EU Nonmerger Antitrust Enforcement Gets Stricter

Skadden

January 2015

This article is from Skadden's *2015 Insights* and is available at skadden.com/insights.

Contributing Partner

Ingrid Vandenborre
Brussels

Contributing Counsel

Thorsten C. Goetz
Brussels

Contributing Associate

Stephane Dionnet
Brussels

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

Developments in the past year are likely to affect nonmerger antitrust enforcement in the European Union in 2015 and beyond. In addition to merger enforcement, antitrust activity in 2014 provided a number of interesting developments. A new Directive on antitrust damages and the headline-grabbing *Intel* appeal judgment indicate the potential for greater enforcement risks for companies operating in the EU.

Antitrust Damages Actions Directive Set to Expand Civil Damages Framework in Europe

On December 5, 2014, the EU's legislation to harmonize procedural rules in relation to antitrust damages actions (the Directive) was published. Before the rules take full effect, the 28 EU member states will have to implement them into their national laws by December 27, 2016. The Directive sets minimum standards and a uniform framework in relation to a number of key areas, including permissible disclosures, limitation periods, passing-on, joint and several liability, proof of harm and the binding effect of a finding of infringement by the EU Commission and EU member state authorities. For most EU member states, the Directive will introduce more plaintiff-friendly rules compared to the existing national rules. It remains to be seen whether the Directive will enhance private actions across the European Union. The manner in which the Directive is implemented in different member states will play a critical role in companies' assessments of their exposure for damages following a finding of infringement.

The adoption of the Directive is an important step in the creation of a uniform civil damages framework across Europe, which is further aided by the EU courts' case law. For example, in a landmark judgment on June 5, 2014, the EU Court of Justice (in Case C-557/12 *Kone*) held that national laws cannot categorically exclude the possibility of liability of a cartel member in relation to so-called umbrella claims. These claims come from customers of parties that do not belong to a cartelist but independently increased their own prices on the basis of the inflated cartel price.

Numerous EU Member States Tackle MFN Clauses With Enforcement Actions

In 2014, Most Favoured Nation (MFN) clauses were an area of emphasis for antitrust enforcement outside the U.S., with a particular focus on the hotel online booking sector. Under an MFN or price parity clause, a seller, *e.g.*, of hotel rooms, in principle commits not to offer more favorable prices to other customers. Enforcement actions have been taken by EU member state authorities with more than 10 parallel investigations pending on the use of MFN clauses in relation to the pricing of hotel rooms offered on online booking platforms, such as HRS, Expedia and Booking.com, which allow customers to book unused hotel rooms over their respective online platforms. A typical MFN clause in the contracts between the platform providers and their hotel partners requires the hotels to always offer their lowest room price available on the Internet, also via the respective online platform. The European Commission is closely monitoring and coordinating enforcement actions of member states, which have already resulted in infringement or settlement decisions in some member states, such as the U.K. and Germany. In China, the price-related antitrust regulator, the National

Development and Reform Commission, has taken an interest in MFN clauses, opening an investigation in the hotel online booking sector. Enforcement against MFNs, resale price maintenance and online trading restrictions is likely to continue in 2015, at the EU member state and European Commission level, as well as in other non-U.S. jurisdictions.

Intel Appeal Judgment Likely to Encourage Stricter Approach in Enforcement of Dominant Undertakings

On June 12, 2014, the EU General Court issued a judgment upholding the European Commission's 2009 decision imposing a fine of €1.06 billion on Intel for abusing its dominant position in the market for x86 processors by, *inter alia*, granting rebates to computer makers and retailers that were conditioned on customers obtaining either 80 percent or all of their requirements of x86 processors from Intel.

The General Court held that the provision by a dominant supplier of any financial incentive, including, for example, the granting of discounts, that is tied to the customer exclusively or quasi-exclusively purchasing from the dominant supplier is by its very nature capable of restricting competition. The General Court clarified that the illegality of such financial incentive can be determined without the need to demonstrate anti-competitive effects or even a causal link between the discount and the customer's purchasing decision. The General Court did not specify what percentage of committed purchase requirements would be deemed to constitute quasi-exclusivity and held that it is sufficient for the European Commission to demonstrate that the financial incentive makes market access "more difficult" for competitors. Intel has appealed the judgment to the Court of Justice, which is the EU's highest court, and a judgment is expected within the next two years.

The General Court's judgment is likely to encourage the European Commission and EU member state authorities to adopt a strict approach to conditional rebates applied by dominant undertakings, not limited to instances where the supplier benefits from a 100 or even 80 percent exclusive relationship as previously suggested by EU Commission guidance.