K&L Gates Global Government Solutions® 2012: Annual Outlook

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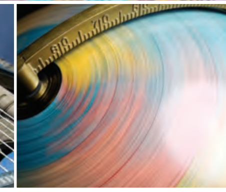

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For businesses to remain competitive in this global economy, they must appreciate and stay ahead of the quickly changing relationship between business and government.

2012 Annual Outlook

This past year has seen extraordinary global political and economic challenges, including volatility in the financial markets, the Euro zone crisis, revolution across the Middle East, nuclear disaster in Japan, inflation in a number of emerging markets, and the debt ceiling debacle in the United States. Governments have struggled to manage the impact of these ordeals and have become both more interventionist and more unpredictable. This has created an environment with a high degree of economic and regulatory uncertainty. Complicating matters, there will be a series of elections in 2012 and transfers of power in some of the largest countries [see timeline on p. 87].

For businesses to remain competitive in this global economy, they must appreciate and stay ahead of the quickly changing relationship between business and government.

The K&L Gates Global Government Solutions® initiative brings together our firm's diverse government-related practices around the world. With a global platform comprising more than 30 policy and regulatory disciplines and more than 400 alumni of government agencies on four continents, K&L Gates is strategically positioned to effectively assist clients in dealing with virtually any government-related issues within the broad legal spectrum.

The 2012 Annual Outlook provides a valuable collection of articles that address important industry and regulatory trends and their correlation with government and political developments. This edition covers such diverse topics as systemic financial risk regulation, anti-corruption and white-collar enforcement initiatives, tax policies, competition and antitrust law matters, intellectual property changes, international trade developments, energy and climate change, and health care and food safety laws. In recognition of our expanding regulatory practices in Europe, highlighted by the opening of our Brussels office in 2011, there are a number of articles on regulatory issues in European Union countries. I hope you will find the 2012 Annual Outlook to be a useful resource for your business.

If you have any questions about any of the articles, or wish to obtain further information, you may contact the authors directly or send an e-mail to governmentsolutions@klgates.com.

Best wishes for a successful 2012!

Peter J. Kalis

Chairman and Global Managing Partner

Keeping Up with Dodd-Frank Implementation

In the eighteen months since the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), U.S. financial regulators have engaged in an unprecedented amount of rulemaking activity. The implications of Dodd-Frank, the most comprehensive reform of the U.S. financial regulatory system since the Great Depression, are far-reaching and difficult to follow.

Dodd-Frank contains over 315 rulemaking requirements and 145 study and reporting provisions. Many of the rulemaking and study requirements have ambitious deadlines for finalization. In light of the monumental amount of work and the limited timeframe, regulators have been working at a frenetic pace. However, missed deadlines are becoming a relatively common occurrence, creating significant legal uncertainty. More than 130 deadlines have been missed and approximately 190 rules have yet to be proposed.

Indeed, the financial regulators still have a long road ahead. The rulemakings and studies that are yet to be finalized, in many cases, are on the most contentious and complex aspects of Dodd-Frank, such as rules relating to OTC derivatives, broker-dealer fiduciary standards, systemic risk regulation and resolution authority, replacement of references to credit ratings, and proprietary trading of commercial banks and their affiliates (the so-called Volcker Rule). Due to the complexity and controversy surrounding many of these rule proposals, there have been and continue to be numerous opportunities to favorably influence rulemakings through notice-and-comment, public hearings, congressional input and oversight hearings, and a variety of other channels.

In such an environment, it is critical to stay abreast of the multitude of Dodd-Frank-initiated regulatory activities in order to identify impacts on business operations, to address issues with regulators before rules are finalized, and to ensure the adequacy of internal compliance systems. The level of regulatory activity requires monitoring of a broad range of agencies (sometimes agencies with which industry participants have not worked previously) and constant vigilance, which is quite labor- and cost-intensive. Many aspects of rulemaking are crystallized long before a rule is finalized, and affected parties that come late to the game may find that it is too late to affect the outcome. By contrast, businesses that consistently and actively engage with the congressional and regulatory process are more likely to have an impact on the ultimate regulatory framework.

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DOL Continues to Press for Regulatory Changes Regarding 401(k) and Pension Plans and Steps Up Enforcement Efforts

One might imagine that the last half of 2011 did not go as the U.S. Department of Labor (DOL) had hoped in regulating 401(k) and pension plans. The DOL had long insisted that it would finalize a number of regulations that would affect employee benefit plans, employers, and service providers, particularly the financial services industry. Most prominently, the DOL had said that it expected to finalize the proposed rule that would redefine what constitutes "investment advice" and thus who is regulated as a "fiduciary" for purposes of the Employee Retirement Income Security Act of 1974 (ERISA). In addition, the DOL had said it would issue a final regulation that would expand the scope and manner of disclosures that service providers must make to ERISA-covered plans.

But despite its best efforts, the DOL was unable to finalize these regulations. The DOL did issue two significant regulations, one of which is procedural (relating to the content and form of applications for prohibited transaction exemptions) and one of which is more substantive [see below]. However, key parts of the DOL's regulatory agenda for the first half of 2012 look a lot like its agenda for the last half of 2011.

On the enforcement side, the DOL announced the successes of a relatively new criminal enforcement initiative, the Contributory Plans Criminal Project (CPCP). Additionally, although the DOL has made no announcement, many observers have noticed that the DOL's civil enforcement staff is focusing increasing attention on the financial services industry.

Redefining ERISA's Definition of "Investment Advice"—and "Fiduciary"

In October 2010, the DOL proposed one of the most significant regulatory changes in decades—revising the long-standing regulatory definition of "investment advice" for purposes of ERISA. In September 2011, the DOL announced it would "re-propose" the regulation. According to the DOL, "the re-proposal is designed to inform judgments, ensure an open exchange of views and protect consumers while avoiding unjustified costs and burdens."

The DOL's action is highly unusual and has been the subject of a great deal of comment. The October 2010 proposed rule would have significantly modified a regulation adopted in 1975 on what constitutes "investment advice" for purposes of ERISA. Under ERISA, a person is a fiduciary to the extent that the person "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property" of a plan or has any responsibility to do so.

Although many in the financial services industry believe the current regulation is effective and that any changes should be minimal, the DOL views the current regulation as too narrow. According to DOL Assistant Secretary Phyllis C. Borzi, "[t]he narrowness of the existing regulation opened the door to serious problems, and changes in the market since the regulation was issued in 1975 have allowed these problems to proliferate and intensify." Borzi and the DOL believe that the regulation needs to be significantly overhauled in order to "safeguard workers who are saving for retirement as well as the businesses that provide retirement plans to America's working men and women."

Although some observers may have wondered if the "re-proposal" was intended to allow the DOL to fundamentally change the proposed

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regulation or to abandon it altogether, the DOL is adamant that the re-proposed regulation will be substantially similar to the October 2010 proposal, with certain clarifications. The DOL has announced that the clarifications are expected to include "clarifying that fiduciary advice is limited to individualized advice directed to specific parties, responding to concerns about the application of the regulation to routine appraisals, and clarifying the limits of the rule's application to arm's length commercial transactions, such as swap transactions." The DOL also announced that it anticipates revising existing exemptions or possibly granting new exemptions in order to address concerns about the impact of the re-proposed regulation and, as appropriate, "clarifying the continued applicability of exemptions that have long been in existence that allow brokers to receive commissions in connection with mutual funds, stocks and insurance products." In amending exemptions or proposing new ones, the DOL's announced goal will be to "preserve beneficial fee practices, while at the same time protecting plan participants and individual retirement account owners from abusive practices and conflicted advice."

Although many observers had hoped that the re-proposal process would result in a proposed regulation that was significantly different from and less radical than the DOL's October 2010 proposal, the DOL appears committed to the framework of its October 2010 proposal. The DOL has stated that it expects to issue the re-proposed regulation in early 2012.

Expanding the Scope and Manner of ERISA Disclosures

The DOL is continuing to press on finalizing regulations that will change ERISA's disclosure rules. Key areas of focus are disclosures by service providers, and disclosures regarding target funds.

Disclosure by Service Providers to Plans—The Interim Final 408(b)(2) Regulation

The DOL is poised to provide guidance on "point of sale"-type disclosures that service providers must make to plans. Although the Office of Management and Budget (OMB) completed its review in October of the final regulation submitted by the DOL, OMB has not issued the final clearance required to allow the DOL to issue this regulation.

The revised regulation requires service providers to disclose the services to be performed, the specific role of the service provider (particularly whether the service provider will be an ERISA fiduciary or not), and the service provider's expected compensation, both direct (*i.e.*, from the plan or employer) and indirect (*e.g.*, from third parties, such as 12b-1 fees or commissions). Although the new provisions were to be effective July 16, 2011, which was later extended to April 1, 2012, many observers expect that the DOL may need to delay the effective date yet again to allow service providers sufficient time to comply with the regulations.

Disclosures about Target Date Funds

Target date (or "lifecycle") funds are mutual funds or collective trusts that automatically adjust their investment mix and risk allocation to become more conservative over time, and these have become an increasingly common option in participant-directed 401(k) plans. Target date funds are often used as an automatic, default investment option in such plans, since they are "qualified default investment alternatives" or QDIAs under DOL rules. Existing DOL regulations mandate certain disclosures to participants in 401(k) plans and disclosures regarding QDIAs.

After a number of target date funds declined in value in the 2008-2009 market downturn, such funds became the subject of criticisms that they had assumed more investment risk than had been understood by plan participants. In an effort to address these criticisms, the DOL in December 2010 proposed to require additional disclosures for target date funds. The proposed regulation would require, in addition to the types of disclosure required of other mutual funds and common investment options, disclosure about the right of the participant to direct investment out of the target date fund. This regulation is expected to be finalized in the first half of 2012.

DOL Enforcement Initiatives

The DOL's latest enforcement effort—the Contributory Plans Criminal Project (CPCP)—focuses on fraud and embezzlement affecting 401(k) plans. Most commonly, these offenses result from an employer's failure to remit participant contributions to the plan's trust account, and instead using the assets to pay personal expenses or corporate expenses unrelated to the plan. For many years, the DOL has been active in bringing civil enforcement actions against employers that fail to promptly and systematically make contributions to plan trust accounts and, where appropriate, the DOL has encouraged the Department of Justice and state authorities to bring criminal prosecutions. The CPCP represents a more formal coordination of those efforts.

Although the DOL has announced no new civil enforcement initiatives, many observers have noted that the DOL is conducting an increasing number of investigations of financial service providers, including registered advisers, banks and trust companies (both as trustees or custodians but also as asset managers), and consultants. These investigations are consistent with the DOL's publicly stated concerns that plans may be poorly served as consumers of investment advice, discretionary asset management, and other financial services. Although the DOL has not announced a sweep or other initiative (other than the DOL's long-standing Consultant/Adviser Project), it appears that the DOL will be looking at how investment advisers, banks, and other financial services firms provide services to ERISA plans for the foreseeable future.

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U.S. Regulation of Hedge Funds Cresting

In 2012, we will see a wave of regulation begin to crest over the U.S. hedge fund industry. While the U.S. Securities and Exchange Commission (SEC) gave the industry an initial reprieve by delaying the implementation of Title IV of the Dodd-Frank Act from July 21, 2011, the final implementing rules will go into effect on March 30, 2012. By that date, all hedge fund managers with more than $150 million in assets under management (and all of those with more than $100 million that also manage non-fund separate accounts) will have to be registered with the SEC under the Investment Advisers Act of 1940 (the Advisers Act). Advisers Act regulation is primarily oriented toward fiduciary principles and full disclosure (rather than prescriptive or prudential regulation), and many registered hedge fund managers have flourished under the Advisers Act. Nonetheless, regulation will represent significant new compliance burdens and a cultural shift for much of the hedge fund industry.

In particular, regulation will bring much closer scrutiny through SEC examinations and enforcement investigations and actions. The SEC has been stung by criticisms that it did not stop the Madoff fraud and did not prevent the failures of Bear Stearns and Lehman Brothers. As a result, the SEC has been trying to re-establish its reputation as a tough regulator, and relatedly, it is concerned that it will lose support if another Madoff were to go uncaught or another major investment firm were to fail. Thus, it has focused its examination program on emerging risks that it tries to identify from its analysis of managers' filings and disclosures and of publicly available data, as well as from a more sophisticated system for sifting through the myriad of tips, complaints and referrals that come to the agency. In addition, the SEC has organized within its Division of Enforcement a number of specialized units focused on what it deems to be high-risk groups, including an Asset Management Unit, which as its name suggests is focused on investment advisers and particularly fund managers. Both the examiners and the enforcement lawyers are focused on hedge fund managers, and they are working together more closely than they have in the past, meaning that examinations now have a greater chance of ending in an enforcement action.

In the past two years, the SEC has taken a series of enforcement actions against fund managers with several themes in common. The SEC, often in conjunction with the criminal authorities, has brought dozens of insider trading actions against fund managers in the past two years, including a series of actions against hedge fund managers, most prominently in the *Galleon* case. The agency also has brought a series of actions against fund managers on charges that they made investments that were inconsistent with the investment strategies and/or risk factors that they described to their investors or clients. The SEC has also taken action against hedge fund managers on charges that they abused side pockets to conceal losses or misappropriations, indicating that the SEC will continue to probe side pockets, gates and other mechanisms for addressing illiquid assets. The SEC will certainly continue to take actions along these lines.

Moreover, the Asset Management Unit and the examination staff have organized a number of joint initiatives designed to scrutinize, and if violations are found, to prosecute, high-risk managers. For instance, under the Aberrational Performance Inquiry, the SEC staff uses risk analytics to evaluate hedge fund returns; performance that appears inconsistent with a fund's investment strategy or other benchmarks leads to further scrutiny. This initiative recently culminated in a number of enforcement actions against fund managers based on allegations of fraudulent valuations and other misrepresentations. Similarly, there are initiatives focused on potential violations by hedge fund promoters and placement agents, as well as on managers with weak compliance programs.

In addition, Dodd-Frank tasked the SEC with the collection of data from hedge fund managers to assist the U.S. Financial Stability Oversight Council in monitoring for systemic risk. To implement these provisions, the SEC recently adopted Form PF, which becomes effective in phases in 2012. All hedge fund managers with more than $150 million in fund assets will have to complete and file Form PF annually, disclosing to the SEC a variety of information regarding size, leverage, investor types and concentration, liquidity, and fund performance, as well as information about fund strategy, counterparty credit risk, and use of trading and clearing mechanisms. Managers with more than $1.5 billion in hedge fund assets will have to file quarterly and disclose a host of additional information, including information aggregated across fund regarding exposures by asset class, geographical concentration, and turnover by asset class, and for each fund with at least $500 million in assets, information relating to that fund's exposures, leverage, risk profile, and liquidity.

These filings will be extremely burdensome, and for an industry where managers have long closely guarded their investment strategies and positions, they will represent a new degree of openness and a leap of faith: while the SEC is required by law to keep this information confidential, Congress is not. In a notorious incident in 2011, a U.S. Senator released similar data obtained by the U.S. Commodity Futures Trading Commission (CFTC) in order to publicly identify traders that he believed were manipulating energy prices—an accusation that, needless to say, the traders contested vigorously.

As if this were not enough, early in 2011, the CFTC proposed rescinding two exemptive rules upon which the large majority of private fund managers that trade in futures have long relied to avoid registration with and regulation by the CFTC as commodity pool operators. While not required to do so by Dodd-Frank, the CFTC stated that it was motivated by the spirit of that law to bring managed futures funds into the regulatory spotlight, and it seems likely to follow through on this proposal in early 2012. More cynical observers see a regulatory turf battle, as the CFTC does not want to lose jurisdiction over the entire hedge fund industry to the SEC. Whatever the agency's motivation, hedge fund managers that use futures (and swaps, which become subject to CFTC jurisdiction after the CFTC completes applicable Dodd-Frank rulemaking) face the prospect of dual registration and duplicative regulation.

While it is impossible to predict precisely how high this regulatory wave will be or where it will crash, there is no doubt that it is building in force. The next several years will see the SEC, and quite possibly the CFTC, develop a regulatory regime that will change the shape of the hedge fund industry.

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New Payment Technologies Present Challenges for FinCEN

Over the past year, the Financial Crimes Enforcement Network (FinCEN) has taken several actions designed to combat the use of newer payment technologies in financial crimes. FinCEN's rulemaking activities highlight the challenges that emerging payment systems can pose to law enforcement officials. It also exposes some problems with trying to fit new payment systems into existing regulatory regimes.

Prepaid Access Rule

Before this year, FinCEN rules imposed various requirements on issuers, sellers, and redeemers of "stored value." The rules also generally did not apply to "closed loop stored value"—*i.e.*, stored value that could be redeemed only at one store or a limited number of stores. By FinCEN's own admission, these rules did not always capture the complexity of stored value systems. In particular, it was frequently difficult to identify the "issuer" of a stored value product, because usually a number of different parties are involved in any stored value system, and the relationships and roles of these parties did not always fit into any predefined mould.

To remedy this situation, FinCEN issued rules in July 2011. These rules replaced the term "stored value" with "prepaid access." The rules defined the term "prepaid access" expansively as access "to funds or the value of funds that have been paid in advance and can be retrieved or transferred at some point in the future through an electronic device or vehicle, such as a card, code, electronic serial number, mobile identification number, or personal identification number." To solve the problem of identifying the "issuer" of stored value, FinCEN created the concept of the "provider of prepaid access." The various parties to a prepaid arrangement may decide among themselves which is the "provider." This party is required to register with FinCEN as a money service business and develop an anti-money laundering program (AML). Most sellers of prepaid access also are required to adopt AML programs, although they are not required to register with FinCEN.

These closed-loop prepaid access provisions subject many retailers and other nonfinancial companies for the first time to regulations relating to money laundering and other financial crimes.

The prepaid access rule broke new ground by applying Bank Secrecy Act (BSA) requirements to some parties that deal in closed-loop stored value. Providers of closed-loop stored value might be required to register and develop AML programs, unless the product being provided limits daily access to funds, per device, to $2,000. Sellers of closed-loop prepaid access may also need to develop AML programs unless they adopt policies and procedures reasonably adapted to prevent sales of more than $10,000 in prepaid access to any one person in any one day.

These closed-loop prepaid access provisions bring under the BSA many retailers and other nonfinancial companies who have no prior experience with regulations related to money laundering and other financial crimes.

Treating Prepaid Access Devices as Monetary Instruments

FinCEN also proposed to expand the definition of "monetary instrument" in FinCEN's rules to encompass most devices that provide access to prepaid funds, including mobile phones that can be used as access devices for prepaid funds. This expansion is important because anyone transporting more than $10,000 worth of monetary instruments into or out of the United States must file a report with FinCEN.

FinCEN is likely to discover quickly, however, that tracking the transportation of access devices for prepaid funds will not be as easy as tracking paper monetary instruments. A paper monetary instrument, in the words of an official comment to UCC Article 3, is a "reified" payment obligation—meaning, essentially, that the payment obligation is inextricably bound up with the paper on which the obligation is memorialized. This means that pieces of paper representing $10,000 in value are immutably pieces of paper representing $10,000 in value. The only way to get $10,000 in paper instruments across the border is to physically move them across the border.

But not so with access devices for prepaid funds. The funds associated with any particular device generally can be changed. A device might not provide access to $10,000 worth of funds when it crosses the border—but then provide access to such funds shortly thereafter, simply by loading funds into the associated account. And some prepaid access devices are not even immutably prepaid access devices. A mobile phone is a prepaid access device when the proper applications and account information are installed. Uninstall the application, and the phone ceases to be an access device. Put the application back on the device and—*voilà*—it is once again an access device. You do not need to be a money laundering mastermind to figure out how to work around this reporting requirement.

This proposed rule is a commendable attempt to prevent the illicit use of emerging payment technologies. But its weaknesses also illustrate the complex challenges that FinCEN will face as it tries to adapt its regulatory regime to the evolving face of payment systems.

For more news and developments related to consumer financial products and services, please visit our Consumer Financial Services Watch blog at www.consumerfinancialserviceswatch.com

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CFTC Proposes Expanded Duties and Liability for Chief Compliance Officers

The Dodd-Frank Act's amendments to the Commodity Exchange Act (CEA) require each of the new types of regulated entities dealing with swaps, *i.e.*, swap dealers (SDs), major swap participants (MSPs), swap execution facilities (SEFs), and swap data repositories (SDRs), as well as traditional futures commission merchants (FCMs), to designate a chief compliance officer (CCO) to assume responsibility for the entity's regulatory compliance. Under the statute, CCOs will have significantly increased responsibilities including, among other matters, annually self-reporting instances of noncompliance. They will also bear potential personal liability for an entity's regulatory compliance.

In seeking to implement this legislation, the Commodity Futures Trading Commission (CFTC) has proposed rules that would aggressively define this expanded CCO liability. The CFTC proposals also raise a question about the scope of a CCO's right to assert attorney-client privilege in the context of regulatory inquiries, which by implication could call into question whether legal advice received by a CCO is ever privileged. The privilege issue is raised expressly in the proposed rules to govern CCOs of SEFs and the final rules governing CCOs of SDRs, but the treatment of the issue there implies a policy view that might extend to all CCOs.

Action Items for CCOs

Under the proposed rules, the many responsibilities of a CCO will include developing and implementing a compliance manual, code of ethics, employee training program, a monitoring and surveillance regime, and systems for (a) documentation of transactions and compliance oversight; (b) recordkeeping; and (c) discipline and sanctions for noncompliance. The extensive recordkeeping requirements under Dodd-Frank will likely require the maintenance of records of transactions at every stage of their existence, periodic position reports, daily values used for margin and marking positions to market, and information reported to SDRs and trade publications. In addition, a CCO must prepare and certify an annual report that discloses:

- the entity's compliance efforts with applicable laws and regulations, and the entity's own compliance policies;
- the effectiveness of the entity's policies and areas for improvement;
- the resources dedicated to compliance; and
- any instances of noncompliance that were identified and how they were addressed, including any disciplinary action that may have been taken.

The CCO's Role in an Organization

Pursuant to the CFTC's proposed rules, the CCO must report directly to the board of directors or a senior officer. The CCO must meet with the board or a senior officer at least annually to discuss the effectiveness of compliance policies, and a SEF's CEO also must meet at least quarterly with the regulatory oversight committee. The CCO will

be considered to be a "principal" of a registrant, which will require the CCO to complete the registration forms and pass the background checks for principals. The CCO will be subject to the statutory disqualification standards applicable to registrants under the CEA.

The requirement for the CCO to ensure compliance with the CEA and CFTC regulations raises an issue whether the CFTC intends for the CCO to be deemed a line supervisor rather than, as has been customary, merely an adviser to the entity on compliance matters, and, if so, what the extent of a CCO's supervisory responsibilities is. The proposed implementing regulations for CCOs of SDs and MSPs state that a CCO could be charged with a failure to supervise in connection with false, incomplete, or misleading statements or representations in the annual report, and that the CCO or the registrant, or both, either directly or vicariously, could be subject to criminal penalties for such false statements.

The proposed SEF CCO regulations would specify that the CCO cannot act as the SEF's general counsel or be a member of the SEF's legal department. The CFTC stated that one basis for this separation of roles is the CFTC's determination that the CCO should not be able to assert attorney-client privilege in responding to CFTC information requests. The CFTC further stated that while there may be circumstances where a SEF could assert the privilege, such circumstances do not include the areas of responsibility assigned to CCOs by the CEA or CFTC regulations. The CFTC's final rules for SDRs require separation of the CCO and general counsel roles in the organization. It remains to be seen whether this principle also will be incorporated in the final regulations governing CCOs for the other swap entities and FCMs.

The regulator's interest in disallowing privilege for advice given by a CCO is perhaps understandable, but preventing a CCO from receiving privileged advice from the entity's general counsel or outside counsel is another matter. The latter could effectively result in CCOs acting without legal counsel, which would seem contrary to the well-recognized public interest supporting attorney-client privilege. Moreover, as a practical matter, it potentially could leave CCOs uninformed or less informed about sensitive firm matters in circumstances where risking the loss of confidentiality for the information by disclosure to the CCO might be harmful to the entity's or its shareholders' interests.

Conclusion

The CFTC's proposed regulations for swap entity CCOs, if adopted as proposed, would significantly increase the responsibilities, legal obligations and exposure to liability for CCOs beyond that historically assumed by CCOs of CFTC and Securities and Exchange Commission registrants, while at the same time potentially effectively constraining their ability to assert privilege with respect to legal advice. The adoption of such regulatory requirements would likely require, as Dodd-Frank and the CFTC would intend, deploying greater resources to the compliance function, but its draconian features may also significantly limit the pool of qualified persons willing to assume the role of the chief compliance officer.

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Changing Dynamics In U.S. Regulation of Investment Products

Regulatory risk, always a high priority in the heavily regulated investment management industry, is shifting in focus as U.S. regulators respond to increasing congressional and judicial demands. The industry's primary regulator, the Securities and Exchange Commission (SEC), is working hard to rebuild its reputation as a tough defender of consumer interests after suffering heavy criticism for failing to identify the Madoff Ponzi scheme and to regain ground from a long period of deregulation. The SEC is fighting an uphill battle on various fronts that affects how it approaches regulation going forward, including facing other players that now have a hand in affecting how the fund industry is regulated. Some of the dynamics in play are as follows:

The Impact of Dodd-Frank on Regulatory Initiatives

As the wide-ranging regulatory reform initiatives contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) begin to take shape, its potential to influence the regulatory process in less obvious ways is becoming more evident. To a far greater extent than when they were originally enacted in the 1930's, the federal securities laws now under the Dodd-Frank Act impose highly detailed regulatory requirements—details that previous legislators would have delegated to the agency with substantive knowledge of the industry being regulated. Rather than setting basic policy standards and a framework to be interpreted and enforced by a sophisticated regulatory agency, Congress, under Dodd-Frank, set much of the SEC's regulatory agenda for a number of years and kept the agency on a short leash to report back regarding its progress in many areas.

Dodd-Frank's ambitious rulemaking agenda that Congress established for the SEC has strained already scarce SEC resources and impacted SEC priorities for its other rulemaking initiatives. By tightly scheduling several years of rulemaking deadlines, Dodd-Frank may have inadvertently forced the SEC into the enforcement arena for carrying out its own agenda. Indeed, following its enactment, the director of the SEC's Division of Enforcement outlined a series of new initiatives including, among other things, the formation of a dedicated Asset Management Unit. This unit now consists of approximately 65 lawyers and other professionals, and has been aggressive in bringing enforcement cases against advisers, funds and their personnel.

The Division has aggressively focused on mutual fund fees, despite recent U.S. Supreme Court decisions that could scale back potential liability claims against investment advisers and fund boards regarding the level of fees charged. The Division recently fired its first shot across the bow of the industry as part of this initiative when the SEC issued a cease-and-desist order against an adviser for authorizing $1.8 million of payments for more than ten years to a sub-adviser who allegedly did not provide the advice, research and assistance services as represented by the adviser to the fund and its board. All indications are that the Division intends to continue bringing additional fee cases, which the industry is carefully monitoring in an effort to identify the "metrics" the Division has said it is applying to identify industry outliers.

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Court Oversight of SEC Settlements

The U.S. District Court for the Southern District of New York (SDNY) has recently criticized the SEC's long-standing practice of resolving enforcement actions through negotiated settlements in which defendants neither admit nor deny the allegations. In November 2011,

Judge Rakoff of the SDNY refused to accept a $285 million proposed SEC settlement with a bank over the sale of toxic mortgage securities on the grounds that the SEC's policy, "hallowed by history, but not by reason," deprives a reviewing court "of even the most minimal assurance that the substantial injunctive relief it is being asked to impose has any basis in fact." In his decision, Judge Rakoff particularly challenged the settlement for letting the bank off the hook on negligence charges only and without admitting anything, and what he characterized as a penalty that was nothing more than a "modest cost of doing business."

Clearly irritated by the decision, the director of the SEC's Division of Enforcement promptly issued a retort stating that "[w]e . . . believe that the complaint fully and accurately sets forth the facts that support our claims in this case as well as the basis for the proposed settlement. These are not 'mere' allegations, but the reasoned conclusions of the federal agency responsible for the enforcement of the securities laws after a thorough and careful investigation of the facts." He also noted that the court's criticism, among other things, "ignores decades of established practice throughout federal agencies and decisions of the federal courts." Judge Rakoff had previously criticized another proposed SEC settlement related to bundling of toxic mortgages on similar grounds. It is possible that the SEC's ability to enter into such settlements will continue to be stymied in the SDNY and elsewhere, which could further tax the SEC's limited resources and frustrate its enforcement efforts.

Court Oversight of SEC Rulemakings

The U.S. Court of Appeals for the District of Columbia Circuit (DC Circuit) has also dealt the SEC a series of blows in its rulemaking efforts, most recently this past July when it struck down the SEC's recently adopted proxy access rule that required public companies, including mutual funds, to provide proxy disclosure and require shareholder vote related to shareholder-nominated candidates for the company's board of directors. The case was the third instance in recent memory that the DC Circuit criticized the SEC for "fail[ing] adequately to consider [a] rule's effect upon efficiency, competition, and capital formation." The DC Circuit, in a unanimous opinion, harshly chastised the SEC for having "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain [sic] costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters." The DC Circuit also noted that the SEC's "decision to apply the rule to investment companies was also arbitrary" and its rationale in that context was "utterly mindless."

To the extent the DC Circuit continues to override SEC judgments, …many of the rulemaking initiatives on the SEC's agenda could be at risk.

The case reinforces the DC Circuit's increasing reluctance to defer to SEC process and fact-finding and represents a continuing shift in the balance of powers and allocation of authority to the SEC. Under classic New Deal principles of administrative agency autonomy and judicial deference, broad powers were delegated to agencies along with room for flexibility and expertise to deal with issues within their jurisdiction. Courts have been generally deferential to this approach under established legal concepts. To the extent the DC Circuit continues to override SEC judgments, however, many of the rulemaking initiatives on the SEC's agenda could be at risk. Particularly to the extent that new SEC rules threaten an established industry practice or result in increased costs, industry members may be encouraged to challenge them in court. Given the SEC's recent track record before the DC Circuit, proposed rules may well be sent back to the drawing board, and their implementation significantly delayed or indefinitely stalled.

Financial Stability Oversight Council (FSOC) Oversight

The FSOC, created by Dodd-Frank, is not a government agency as such, but a framework for agency coordination and financial stability oversight. It includes among its 15 members, the chairs of the major banking agencies, the SEC, the Commodity Futures Trading Commission, and representatives from state securities, banking and insurance regulators. Notably, a significant majority of the ten FSOC voting members consists of banking regulators. The historic dichotomy in the United States between banking regulation (which depends on secrecy to protect its primary concern for the safety and soundness of banking institutions) and securities regulation (which is primarily concerned with investor protection and capital formation through full and fair disclosure) suggests that the autonomy of the SEC, which represents only one vote on FSOC, and the principles it represents, might suffer over time.

One area in which SEC authority may be in the balance currently relates to money market fund regulation, clearly an SEC prerogative. FSOC's authority over so-called systemically important non-bank financial institutions (SIFIs) has caused FSOC to focus on money market funds' potential to impact the financial stability of the U.S. economy, and FSOC has been following carefully the SEC's progress on reform of the industry. In November 2011, the SEC chair gave a speech in which she referred to a statement in a recent FSOC Annual Report and noted that "the SEC—working with FSOC—is evaluating options to address the structural vulnerabilities posed by money market funds." She further noted that "[t]hroughout the process of considering reform options, we have benefitted greatly from meaningful comment, critical thinking, and in-depth analysis from both regulators and public commenters," presumably referring to the regulators represented on FSOC. She concluded by stating that she "look[ed] forward to making substantial progress on our money market fund reform initiative in the coming months so that we can issue a proposal in very short order. We cannot let this issue linger." Some have suggested this indicates that the SEC is under pressure from within FSOC to effect reform of the money market fund industry; presumably the reform ultimately proposed by the SEC also will bear the imprint of FSOC influence.

Conclusion

Shifts away from traditional New Deal deference to regulatory agencies are changing the balance of power between the SEC and Congress, and between the SEC and the courts. Also, the newly created FSOC has taken an active role in asserting its authority in certain areas previously uniquely within the SEC's jurisdiction. These and other dynamics will have an impact on the ability of the SEC to effectively protect consumer interests and will influence the relationship between the SEC and the investment management industry it regulates, all in ways that are yet to be seen.

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The Safety of Customer Assets after MF Global

A silver lining could emerge at the beginning of 2012, following the collapse of former derivatives market leader MF Global—in which hundreds of millions of dollars in customer collateral supporting derivatives somehow vanished into thin air.

The silver lining would be a revitalized regulatory rethinking of the safety of customer assets by the principal futures and derivatives regulator in the United States, the Commodity Futures Trading Commission (CFTC). Near the end of 2011, CFTC Chairman Gary Gensler, Commissioner Bart Chilton, Commissioner Scott O'Malia and others at the CFTC indicated that the agency fully intends to use all regulatory means at its disposal to protect customer assets.

This rethinking includes the reconsideration of segregated fund arrangements. From comments made by CFTC commissioners, it appears that no option is off of the regulatory table: for example, Commissioner Chilton, among others, clearly is willing to support new legislation and regulatory adjustment on the subject of customer segregation and customer asset investment, including changes to CFTC Regulation 1.25, which addresses the investment of customer funds. New ideas also include the development of an insurance fund to backstop customer losses.

MF Global Resurrected Full Segregation

Full segregation, a process by which customers keep their collateral in accounts established by independent third party custodians—as opposed to entrusting them with clearing brokers or futures commission merchants (FCMs) such as MF Global—was for all intents and purposes dead at the CFTC before MF Global, but now is alive and well at the CFTC at least in concept prior to CFTC meetings in 2012. Full segregation is very much alive and in practice in the U.S. listed options industry, as well as in European markets. The futures industry has long pointed out that full segregation is more expensive to FCMs and clearing brokers and that much of these costs are passed on to customers. These considerations have carried the day before MF Global. There are, however, many customers who, given MF Global, would willingly pay the cost for more protective arrangements.

The CFTC Commissioners are analyzing details of how full segregation was approved by the commission and actively

As 2011 drew to a close in the United States, trade associations urged the CFTC to retain flexibility in segregation regulations so that market participants may have the option to pursue different arrangements.

used by mutual funds in the United States for more than twenty years. In addition, they are studying the U.S.-listed options market: full segregation in fact exists today in listed security option trades, which are cleared nearly every day by the largest equity options clearing house in the world, the Options Clearing Corporation.

The CFTC also is considering the use of, and regulatory interest in, full segregation in Europe. With the abuses of customer collateral within MF Global, the idea of a custodian—completely independent of both a customer and its FCM—holding collateral has once again managed to attract attention at both the market and regulatory levels in the United States.

Segregation in Europe

Overseas, full segregation protective measures are already deeply rooted in European trading and current reform efforts. Compared with the U.S. market today, European market participants as a whole more keenly support full segregation, and the European Parliament has already aggressively supported initiatives calling for more protective customer collateral arrangements to protect buyside interests and assets.

The current debate among policymakers in Europe has been between, on the one hand, full physical segregation, and on the other, omnibus segregation, in which all customer assets are aggregated with each other and segregated from FCM assets in a single, customer account. European regulators are considering today a regulatory regime that will impose on market participants full physical segregation of collateral unless parties opt out to an omnibus account-based system of segregation. In Europe, when market participants are given the choice between full physical segregation and other collateral arrangements, many participants choose full segregation.

In both the EU and United States, market participants realize that there are cost implications for full physical segregation, but the cost-benefit analysis may be shifting: those who are keen on full segregation are also willing to pay additional expenses for full segregation.

As 2011 drew to a close in the United States, trade associations have urged the CFTC to retain flexibility in segregation regulations so that market participants may have the option to pursue different arrangements. For example, the Managed Funds Association wrote that, given the nature of the MF Global failure and the way in which that failure exposes collateral protection shortcomings today, the commission should fully explore the merits of various segregation models, including full segregation. As derivative and collateral rules are put into final form by the CFTC, the entire market continues to wait with great anticipation so that problems associated with failures like what was just witnessed with MF Global will result in less damage to market participants.

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Investment Protection at Risk

Article 207 (1) of the Treaty on the Functioning of the European Union (TFEU) created a new competence for the EU for foreign direct investment. The scope of this new competence is highly disputed between the member states, the Commission and the European Parliament.

How Does the New EU Competence Affect European Investors?

Over the last 50 years, European member states have developed a wide-ranging network of approximately 1,200 bilateral investment treaties (BITs) that provide important protections for investors abroad and help to mitigate political risk. For example, Germany, the worldwide BIT champion, has 130 treaties in force, including BITs with 13 EU member states. The treaties protect foreign investors against interference by host state governments with an investment. Most importantly, such treaties provide for direct access to international justice: investors have the right to commence international arbitration before an independent international tribunal directly against the host state to seek redress and obtain compensation. BITs are important safeguards for cross-border investments and have contributed to the economic welfare of the member states and their investors.

The future of this success story is uncertain after the entry into force of the Lisbon Treaty. Certain members of the Committee of International Trade of the European Parliament and also members of the European Commission advocate a future EU policy on investment protection, the result of which may be a decrease in investor protection. At the same time, the European Commission is actively seeking to abolish the nearly 190 BITs that currently exist between EU member states (Intra-EU BITs). Another hot topic is the transition regime for existing member state BITs with states outside the EU (Extra-EU BITs). This is now the subject of a three-way discussion among the EU Council, the European Commission, and the European Parliament.

These issues are relevant to many cross-border investors, but in particular, European investors investing outside the EU, and to investments from one EU State to another. Investors will need to remain alert to the level of protection they currently enjoy and to the potential need for precautionary measures to make sure that they will remain protected in the future.

European businesses should also get in touch with their representative organizations and make their concerns clearly known to the European institutions, so that their concerns are taken into account.

Existing Member State BITs with Non-EU States—Grandfathering Regulation

On July 7, 2010 the commission proposed a draft regulation for the "grandfathering" of Extra-EU BITs (COM (2010)344 final). Under this proposal, existing BITs would be "authorized" (and would not have to be terminated) for a limited period of time and under certain conditions. The commission wants to be able to withdraw authorization for a BIT which "constitute(s) an obstacle to the development and the implementation of the Union's policies relating to investment" (Article 6 (1) (c)), for example if a third state refuses to enter into negotiations with the EU for a new treaty because it already has such treaties with the most important EU member states. Another even more striking, new power for the commission would be that it can force the council to grant it a negotiation mandate: if the council does not authorize the commission to open negotiations within one year, the Commission can withdraw authorization for the existing BITs (Article 6 (1) (d)). This provision has been dubbed the "blackmail clause" or "hostage clause," because European investors, who would lose their treaty protections, are being taken hostage by the commission in order to force the council to adopt a mandate. This interferes with the powers of the council and raises serious concerns as to the compatibility of the proposed regulation with the TFEU.

The council advocates a replacement system under which existing member state BITs will remain in force until they are replaced by a new EU investment treaty that contains the same or better level of investor protection.

The report by Carl Schlyter as rapporteur of the Parliament's Committee on International Trade (2010/0197(COD)) largely supported the Commission's position. However, recently we have seen some positive movement on the part of Parliament. There seems to be a growing awareness of the needs of European investors for legal certainty and a robust level of investor protection.

Discussions among the commission, council, and Parliament to reach a compromise are ongoing, with the most recent meeting having taken place on December 5, 2011. The European Parliament has signaled that it is willing to accept the replacement system suggested by the Council. This would be an important step towards reaching a compromise, making it possible that a grandfathering regulation may be adopted in the first half of 2012.

The Future of Intra-EU Investment Protection

The commission formally requested the member states to terminate all Intra-EU BITs. The commission takes the position that those BITs have become "superfluous" with the accession of states to the EU and that they purportedly violate EU law. Beyond this, the commission has participated as *amicus* in several investor-state arbitrations, arguing against the application of Intra-EU BITs. To date, all of these Investor-State Tribunals, as well as courts of the EU member states (for example, the Czech Republic), have rejected the commission's position and held that Intra-EU BITs remain in force.

Key EU member states are opposing the commission's view, refusing to do away with Intra-EU BITs unless a replacement system is agreed that would give European investors the same protections they enjoy under existing treaties. European business organizations also support this position. In a joint letter of July 1, 2011, the national committees of the International Chamber of Commerce for Belgium, France, Germany, the Netherlands and the UK expressed their concern about the future in a letter to Commissioner Barnier and explained why maintaining Intra-EU BITs is essential for the future of European businesses. In response to their request, Commissioner Barnier assured them that he "recognize(s) the importance of strong investor protection and the need for effective instruments at the service of investors. Therefore, my services are currently examining options which would not just address the phasing out of existing BITs, but also provide the opportunity for all EU investors to obtain quick solutions to investment-related problems, whilst at the same time respecting the primacy of EU law."

However, despite these assurances, it is rumored that the commission is still considering infringement proceedings against several member states with a view to destroying all Intra-EU BITs.

Investment Chapters in Free-Trade Agreements (FTAs)

Negotiations for investment chapters in FTAs with Canada, India and Singapore are under way. The mandates for these negotiations have recently been leaked on an NGO website (www.s2bnetwork.org).

The council's mandate provides for strong protections in line with the best practices of the member states. There are concerns, however, that Canada will push for a lower standard of protection modeled after NAFTA and its own Model BIT. Also, it remains to be seen what level of investor protection India is willing to accept.

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Despite "Super-Committee's" Failure, Tax Reform Continues to Move through Congress

Efforts to reform the federal income tax code are showing no signs of slowing as the U.S. Congress turns to its agenda for 2012. While the Joint Select Committee on Deficit Reduction (Committee) represented a missed opportunity to put tax reform on a fast track, it is also true that the factors driving interest in tax reform remain despite the committee's failure to reach a deal. Certainly, the congressional tax-writing committees and supporters of tax reform are diligently continuing their work.

There has been a growing interest in the last year in reforming the U.S. Internal Revenue Code (Code). Reasons to reform the code include increased simplicity, certainty, and fairness. There also is a hope that a reformed code will increase economic efficiency by decreasing its interference in investment and business decisions and, as a result, increase the competitiveness of U.S. businesses. There appears to be consensus around the idea of reducing or eliminating a number of tax preferences, incentives, credits and deductions to offset the cost of a general reduction in marginal tax rates for both individuals and businesses. More than two dozen hearings addressing tax reform's potential effect on everything from energy policy to homeownership were held by the House and Senate tax-writing committees in 2011, and more are planned.

For those currently benefiting from relatively few tax preferences, *i.e.*, for those paying a high effective tax rate, tax reform represents an opportunity to reduce their tax burden. Conversely, those tending to benefit from such items and, as a result paying a lower effective tax rate, are at real risk of paying higher taxes.

The committee's failure appears to mitigate these risks and opportunities in the very near term. However, over the longer term—and in key respects still in the short term—those risks and opportunities remain.

First, there remains an interest in simplifying the code to reduce economic inefficiencies and to lower rates to reduce such inefficiencies and increase global competitiveness for U.S. business. For example, U.S. Senate Finance Committee Chairman Max Baucus continues his work on tax reform, including inquiries into modifying federal energy tax incentives to become more "technology neutral." Meanwhile, business leaders at various hearings this year have said they would willingly give up tax breaks of direct benefit to their companies if the U.S. marginal corporate tax rate were lowered to roughly 25 percent.

Second, in the next 12 months Congress must decide the fate of expiring tax provisions worth $4.7 trillion over the next 10 years, or roughly 12 percent of all federal revenues during the period. The bulk of these provisions stem from the 2001 and 2003 tax acts, which are set to expire at the end of 2012. But dozens of other temporary tax provisions of benefit to businesses and individuals, colloquially known as "extenders," expired at the end of 2011. These include 15-year depreciation for leasehold and restaurant improvements, the research and development tax credit, the active financing exception for subpart F income and others. Pressure to more permanently decide the fate of these expiring provisions could provide the impetus for a broader reform of the code.

Finally, it is true that enacting a comprehensive tax reform will be an extraordinarily difficult task because of the political power of the interests behind tax provisions that would be reformed or eliminated: if reforming the code were easy, it would have been done long ago. As a result, it appears more likely than not that tax reform will not be signed into law until after the upcoming presidential election.

However, one should not focus on when exactly tax reform will be enacted, because the shape of the legislation will be decided long before then. For example, House Ways and Means Committee Chairman David Camp (R-MI) released on October 26, 2011 a discussion draft plan for international tax reform [see next article], and Senator Rob Portman (R-OH) plans soon to release a tax reform plan based on a proposal offered while he was a member of the Committee. These and similar drafts likely will be used in whole, or in part, as the baseline for future negotiations.

Almost daily, lawmakers and congressional staff are meeting with constituents and interest groups, holding hearings, and negotiating among themselves about how to craft tax reform. And once policymakers set pen to paper, every decision made will be hard to "unmake." As a result, those with an interest in tax reform should be actively engaged in the debate.

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House Ways and Means Committee Offers Alternative International Tax System

With the continuing integration of the global economy, the U.S. tax code has come under increasing criticism for stifling the ability of U.S. businesses to compete with non-U.S. competitors. The United States is the only major industrialized nation that continues to tax its businesses on worldwide income. Non-U.S. counterparts generally tax their businesses only on income earned in-country (although some exceptions exist for certain passive income such as interest, which may be taxed currently but at a substantially lower marginal tax rate than corporate profits). In addition, the U.S. corporate tax rate is the second highest among major industrialized nations; only Japan's is higher.

On October 26, 2011, House Ways & Means Committee Chairman David Camp unveiled a plan to overhaul the U.S. system of corporate international taxation. The committee proposal would replace the current method that taxes worldwide corporate income with a territorial system that exempts most foreign-source corporate income from taxation in the United States. In addition, the U.S. marginal corporate tax rate would be reduced from 35 to 25 percent.

The Ways and Means proposal is a discussion draft intended to stimulate debate and generate feedback from the corporate community as the debate over tax reform evolves. Because it arises out of the House tax-writing committee and was released with statutory language as well as a general description, tax insiders are treating the proposal as a serious effort. It is the first in a series of reform proposals that the committee has signaled it plans to release; individual and domestic corporate reforms are slated for a later time.

Highlights of the Ways and Means Proposal

The proposal would reduce the U.S. marginal corporate tax rate to 25 percent The proposal is intended to be revenue-neutral; specific base-broadening policies to replace the revenues lost by reducing the corporate rate are not addressed in the draft and are expected to be included in future releases from the committee.

The proposal also would exempt 95 percent of non-U.S. corporate earnings from U.S. taxation when profits are brought back, or repatriated, as dividends to the United States from a foreign subsidiary. In addition, the proposal would eliminate foreign tax credits on exempted income. Foreign tax credits would continue to be available for use with non-exempt foreign income, including passive and highly mobile income. In general, the proposal would impose no limits on deductions for business expenses. Five percent of repatriated profits would be taxed in lieu of allocating expenses between U.S.-source and foreign-source income.

The proposal includes a series of anti-abuse options designed to prevent erosion of the U.S. tax base, including "thin capitalization" rules that would limit certain interest expense deductions, and income-shifting rules to prevent U.S. companies from avoiding U.S. tax by transferring intangible property to foreign companies that pay little or no tax. The proposal also would keep the existing Subpart F rules in place. Passive and highly mobile foreign income, including interest and royalties, would continue to be currently taxed.

The proposal includes a transition rule that would impose a "deemed-repatriation" tax of 5.25 percent on all accumulated foreign earnings currently held offshore. Unlike several recent proposals in Congress aimed at reducing the tax cost of actually bringing earnings of controlled foreign corporations (CFCs) into the United States, the proposal would tax the earnings of CFCs even if the funds were not physically repatriated. This tax could be spread over a period of eight years.

The proposal largely leaves open the question of how companies would transition from a worldwide system to a territorial system. The draft does not resolve whether and how U.S. multinationals would be able to benefit from unused foreign tax credits. It also does not consider whether temporary international tax provisions, including the active financing exception and the controlled foreign corporation look-through rules, would be allowed to expire or be made permanent as part of the overall reform package. It will be difficult for U.S. businesses to assess how they will be affected by the committee's territorial proposal with these important issues unanswered.

Moreover, rather than simplifying the tax code, the draft could create complexities of its own. For example, the base erosion options would impose significant recordkeeping burdens on businesses in order to appropriately allocate income and costs to specific intangible property.

The Ways and Means Committee is actively seeking feedback on the proposals in the territorial draft. The draft is expected to serve as an important marker in discussions about tax reform throughout 2012 that may lead to comprehensive reform, possibly in 2013. Thus, businesses that engage early in the reform process will likely have a meaningful impact on the shape of any ultimate legislation.

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The Securities Transaction Tax: A Global Pandemic?

In November 2011, U.S. Senator Tom Harkin (D-IA) and Representative Peter DeFazio (D-OR) introduced companion bills, S. 1787 and H.R. 3313, which would impose a 3-basis-point tax on securities transactions. Reaction by U.S. policymakers to the legislation, the "Wall Street Trading and Speculators Tax Act," has been lukewarm at best—even among Democrats. Such a financial services transaction tax (STT) would have broad and significant consequences, not only for the financial services industry, but the economy more generally. A STT would drive financial transactions to less-regulated and less-capitalized markets, decreasing the investor protections and increasing the risks associated with such transactions. Additionally, the cost of a STT would be borne in large part by investors. However, such proposals should not be quickly dismissed as having limited prospects for enactment. Such a dismissal ignores the risk of policy contagion in the United States if the STT gains traction in Europe.

Since the unprecedented financial events of 2008, there have been increased systematic efforts to harmonize financial regulation across the globe. In particular, the financial regulatory efforts have been mirrored across the Atlantic between the United States and European Union, resulting in a "ratcheting up" phenomenon. At the November G20 meeting in Cannes, France, French President Nicholas Sarkozy and German Chancellor Angela Merkel met with President Obama to urge his support for the financial securities transaction tax. The European Commission, under the leadership of President José Manuel Barroso, has proposed a European Union-wide financial securities transaction tax, under which stock and bond transactions would be taxed at 10 basis points and derivatives would be taxed at one basis point. Given the recent level of global harmonization with respect to financial regulation, if the European Union does adopt a financial transaction tax, there will be increased momentum to enact a parallel policy in the United States.

Often overlooked is the fact that the U.S. government already imposes "Section 31 fees" on securities trades. These fees are collected from investors by the exchanges and forwarded to the U.S. Treasury in order to recover the cost of running the Securities and Exchange Commission. Given the magnitude of the budget deficit, this model could easily be expanded upon to collect additional sums.

Additionally, the Harkin/DeFazio legislation has been cleverly drafted. The proposed STT of three basis points on stock and bond transactions would be less than one-third of the amount of the European Union proposal of 10 basis points, addressing concerns about the global competitiveness of U.S. financial markets. The proposed transaction tax would exempt trading of short-term indebtedness, addressing concerns about short-term market liquidity. Moreover, bills introduced by Representative DeFazio in previous sessions of Congress included exceptions for retirement accounts and a tax credit for up to the first $100,000 of securities transactions per year; inclusion of such provisions could address concerns about the burden on individual investors.

In today's economic climate, ignoring possible policy contagion of a financial securities transaction tax and related ideas, such as the bank tax, could result in significant risk. Consequently, in the new era of global harmonization of financial regulation, it is necessary for the financial industry to simultaneously engage with policymakers in Washington, D.C., London, Paris, Frankfurt, and Brussels to contain the epidemic.

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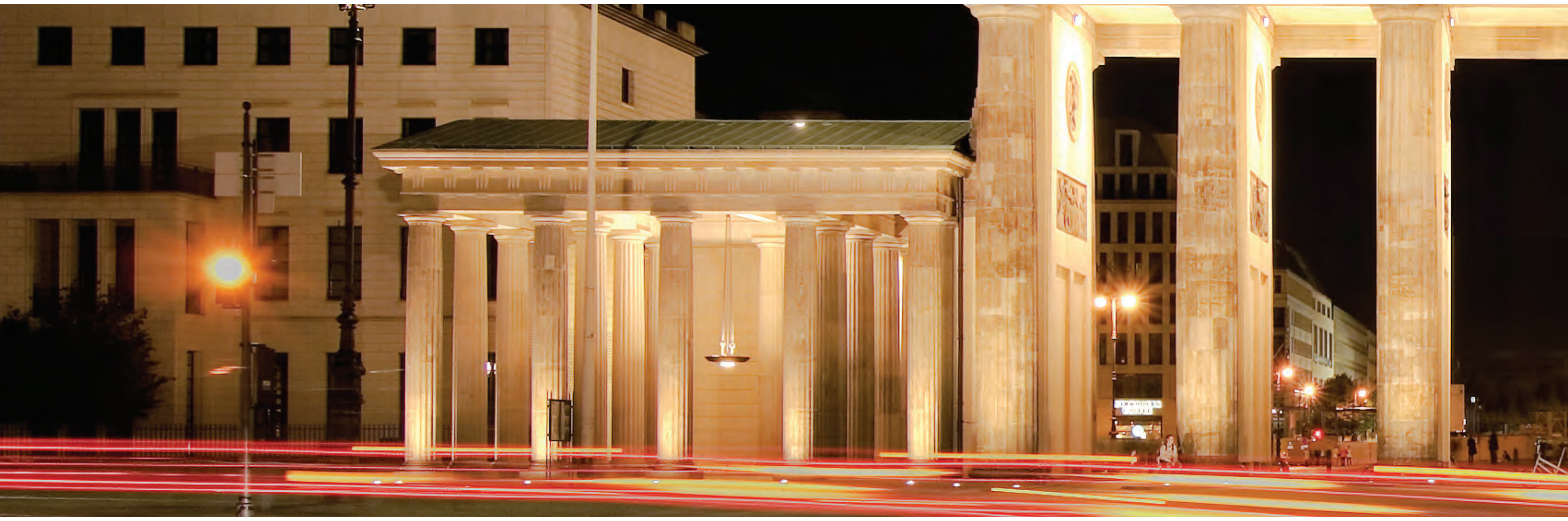
ECJ Tax Decision May Have Far-Reaching Consequences



The European Court of Justice (ECJ) has held in its judgment C284/09 dated October 20, 2011, that the German law governing withholding tax levied on dividends violates the free movement of capital provisions of the Treaty on the Functioning of the European Union (TFEU) and the European Economic Area (EEA) Agreement.

Current German Statutory Law

Under current statutory law in Germany, dividends paid by a corporation that is tax resident in Germany are generally subject to withholding tax, irrespective of whether the recipient shareholder actually resides in Germany. The applicable overall withholding tax rate is generally 26.375 percent.

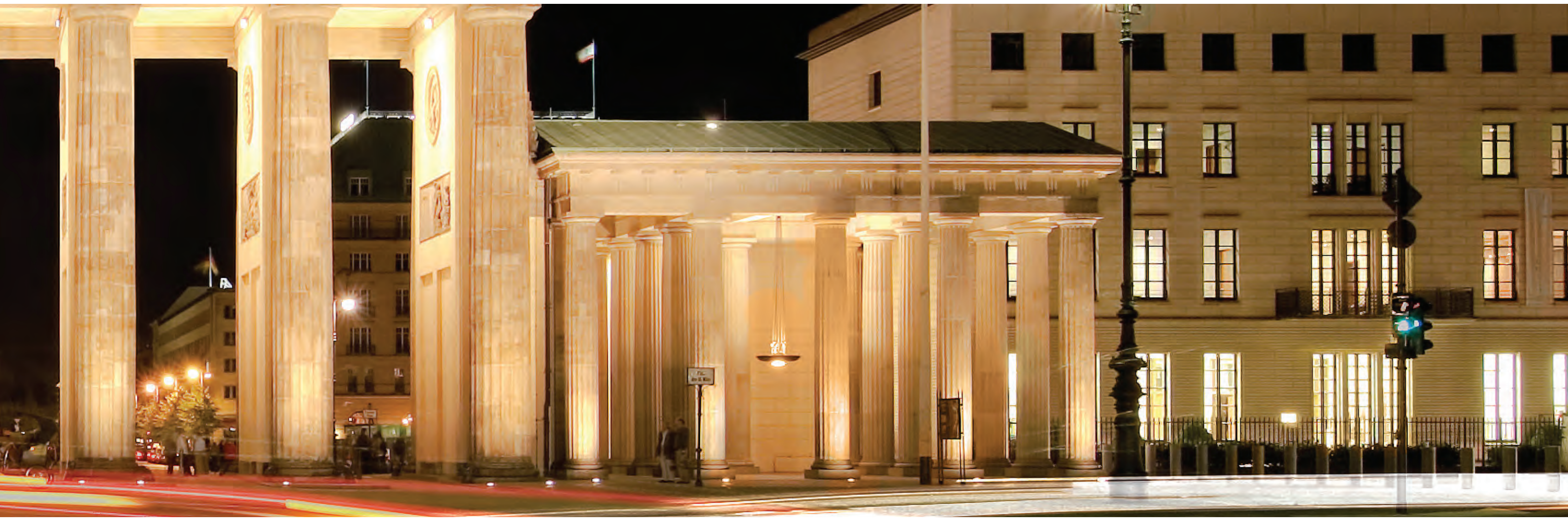
As a result of a tax assessment procedure, dividends received by German tax-resident corporate shareholders are effectively 95 percent tax-exempt. This means (assuming no other income items are generated) that the dividends are subject to an effective corporate income tax rate including solidarity surcharge of approximately 0.8 percent in Germany. This tax exemption can be obtained only through a respective corporate income tax assessment procedure in which any amount of withholding tax paid on the dividend is credited against the corporate income tax (and solidarity surcharge) liability of the assessed corporate shareholder, with any excess amount being refunded to the corporate shareholder.

By contrast, non-German corporate shareholders are not generally eligible for this assessment procedure or any withholding tax credit or refund. Only for cases subject to the EU Parent-Subsidiary Directive, or in matters subject to a double taxation agreement with Germany, may the German withholding tax be totally or partially excluded or refunded. This usually requires a minimum shareholding, under the EU Parent-Subsidiary Directive; for example, an interest of at least 10 percent, and other requirements also have to be met.

ECJ Ruling

The ECJ held that this disparate treatment of dividends, which resulted in a higher effective tax burden on dividends received (in particular) by non-German corporate minority shareholders, constitutes a violation of the free movement of capital provisions [Article 56 TFEU and Article 40 EEA Agreement].

Decisive for the ECJ was the fact that domestic corporate shareholders do not suffer an effective tax burden due to the withholding tax on dividends, while non-domestic corporate shareholders generally do. In its decision, the court rejected arguments by the Federal Republic of Germany seeking to justify the dissimilar treatment. The court found that the disparity of treatment could not be justified by the fact that dividends paid to domestic corporate shareholders may in certain circumstances be subject to German trade tax, nor the fact that non-German shareholders might be eligible for tax credits in their respective countries of residence.



Impact

As a result of the ECJ decision, any non-German corporation that was or is subject to German withholding tax on dividends without a full exemption or refund being available (whether under current German statutory law, the EU Parent-Subsidiary Directive or any applicable double taxation agreement) should seek guidance on whether to apply for a refund of the full amount of German dividend withholding tax.

The impact of the ECJ ruling might indeed be broad:

- The ECJ ruling should, in principle, apply to future as well as past dividends. It may also cover income items not covered by the EU Parent-Subsidiary Directive, such as income from liquidations, certain restructurings and certain equity-type instruments.
- While the ECJ did not address whether its ruling applies to non-European corporations as well, the TFEU provisions on the free movement of capital generally also apply to non-EU/EEA corporate residents holding portfolio investments.
- Since certain German corporate shareholders may not be eligible for a credit or refund of the German withholding tax on dividends, it is possible that comparable non-domestic corporate shareholders may also not be covered by the ECJ ruling. Furthermore, the German substance provisions, currently also suspected of infringing EU law, may still be applicable—such that the German tax authorities may scrutinize the "substance" of non-German corporations applying for a withholding tax credit or refund.
- It remains to be seen whether the significance of the ECJ ruling is limited to German tax law, or whether other jurisdictions may also be affected. Moreover, the reasoning of the decision may also be applicable to other German tax provisions.

The ECJ decision did not address what German authority would be responsible for dealing with potential refund claims or applicable procedures or time limits. Thus, interested parties should remain alert to further developments in this respect. In any case, it can be expected that the ECJ ruling will have a significant impact on future tax structuring and tax planning, and may even result in major tax law changes in affected jurisdictions.

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Recent U.S. Enforcement Activity Underscores the Danger of Firms with Monopoly Power Refusing to Deal with Non-Exclusive Customers

Moving into 2012, U.S. antitrust enforcement agencies can be expected to continue their increasing focus on efforts by companies with large market shares to force customers or suppliers into exclusive dealing arrangements that foreclose rivals, or potential rivals, from the market. Several recent and pending agency cases have centered on allegations that a dominant firm has violated Section 2 of the Sherman Act by imposing onerous restrictions on the ability of its vertical partners to deal with rivals.

These cases are not unprecedented, but the renewed efforts to challenge this type of conduct highlight the fact that, although there is no such thing as conduct that is "per se" unlawful under Section 2, which prohibits illegal efforts to preserve or acquire a monopoly, these situations come as close as anything to the heart of the U.S. antitrust enforcement agenda in terms of unilateral-conduct cases.

Over the years, the enforcement agencies have pursued all kinds of conduct under Section 2, from below-cost pricing in the American Airlines case, to the old AT&T's refusals to interconnect with rival long-distance companies like MCI, to the myriad of behaviors challenged in the IBM and Microsoft cases. But in recent years, it has become clear that the behavior most likely to draw fire from the agencies is the refusal to deal with a customer (or supplier) unless that customer (or supplier) agrees to stop dealing with rivals of the monopolist.

Challenges to restrictions on dealing date back at least to the government's successful challenge under Section 2 of the Sherman Act to a monopoly newspaper's refusal to accept advertising from companies that also advertised on the local radio station [see *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951)]. The government's recent initiatives can be traced to the Justice Department's challenge to a "loyalty" policy enforced by Dentsply, the dominant firm in the artificial tooth market [*see United States v. Dentsply Int'l, Inc.*, 399 F.3d 131, 189-90 (3d Cir. 2005)]. Dentsply had a policy of refusing to sell to distributors that also dealt with Dentsply's competitors. Because Dentsply had such a large share of the market, the policy had real bite: distributors needed to stock at least some of Dentsply's teeth, because they were demanded by dental labs.

In the last two years, the government has brought several cases fitting into this mold. In *In re Intel Corporation* (FTC December 16, 2009), the U.S. Federal Trade Commission (FTC) challenged Intel's arrangements that required computer manufacturers not to adopt or purchase non-Intel CPUs. The FTC alleged that this conduct raised barriers in a market already characterized by a number of legitimate barriers to entry. Similarly, in *In re Transitions Optical, Inc.* (FTC April 22, 2010), the FTC challenged the leading U.S. photochromic lens treatment developer's practice of requiring its manufacturer customers to exclusively use its lenses. The FTC also took issue with the company's agreements with retail chains and wholesale labs to restrict their ability to sell competing lenses. The FTC alleged that such tactics foreclosed rivals from the relevant markets, harming competition and consumers.

The FTC's most recent effort in this regard, *In re Pool Corporation* (FTC November 21, 2011), involved a challenge to the allegedly exclusionary tactics of PoolCorp, the largest U.S. pool product distributor. The FTC's complaint alleged that PoolCorp refused to purchase supplies from manufacturers that also sold to new distributors competing with PoolCorp. In a statement addressing the PoolCorp Complaint, the FTC Commissioners stated that "[c]onduct by a monopolist that raises rivals' costs can harm competition by creating an artificial price floor or deterring investments in quality, service, and innovation." The Commissioners also warned that new rivals are often the targets of anti-competitive exclusion because they are most likely to create competition in the market by competing aggressively on price and introducing innovative business strategies, indicating that the FTC will be keeping a close eye on market leaders that target new entrants with exclusionary conduct.

The Department of Justice's Antitrust Division has also come down hard on this same type of conduct. In *United States v. United Regional Health Care System* (N.D. Tex. February 25, 2011), the Antitrust Division alleged that United Regional unlawfully maintained its monopoly for hospital services in the Wichita Falls area by offering contracts with steep discounts to health insurers in exchange for exclusivity. Since United Regional—a dominant hospital in the area—was a "must have" service provider for insurers selling health insurance in that market, and since the penalty for contracting with United Regional's rivals was so significant, the Antitrust Division alleged that this practice was exclusionary and effectively prevented insurers from contracting with United Regional's competitors.

Given the resurgence of government enforcement in single-firm, exclusionary conduct scenarios, companies that have market power should seek the advice of antitrust counsel if considering entering into exclusive, or *de facto* exclusive, agreements that could foreclose rivals from customers or sources of supply.

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Pleading Poverty in the Wake of the Economic Crisis: "Inability to Pay" Defense in EU Cartel Cases

Recent cases confirm the European Commission's willingness to take account, in setting cartel fines, of companies' financial difficulties, particularly in the ongoing economic crisis. Businesses facing either the imposition of fines or of recovery measures, where fines are imposed but yet unpaid, are eligible for an 'inability to pay' (ITP) reduction if they can show that the full fine would put them at a serious risk of bankruptcy.

The high level of fines imposed in EU cartel cases in recent years has become all too familiar. Small and medium enterprises (SMEs) and single product companies find it increasingly difficult to pay these heavy fines, especially in the on-going economic crisis. The number of businesses claiming their ITP and requesting a fine reduction on that basis has, as a result, risen significantly. ITP claims are based on point 35 of the EU Fining Guidelines. These rules entitle the European Commission to take account, at its discretion, of the critical financial situation of individual businesses. Following a strict case-by-case analysis, the agency may grant, in exceptional cases and upon request, fine reductions to companies unable to pay the full fine. In practice, a company has essentially to show that the fine would "irretrievably jeopardize [its] economic viability," thus likely forcing it into liquidation. A mere adverse or loss-making financial situation would not be enough.

Interestingly, despite these rules being in place for several years, it was only in the wake of the economic crisis that, in November 2009, the Commission accepted ITP claims for the first time. Since then, the Commission has granted significant fine reductions—between 25 and 75 percent—in a number of cases, including two cases in the last year. In March 2011, the Commission accepted a post-decision ITP claim and lowered fines imposed in 2007 in *Fasteners* (payment had been deferred pending court proceedings). In December 2011, the Commission reduced fines in *Refrigeration Compressors*, showing its increased receptiveness to take account of companies' financial difficulties in the economic crisis. As Competition Commissioner Almunia recently remarked, it is the Commission's concern "not to provoke a company's bankruptcy" as "competition policy is about promoting competition, not eliminating firms from the market place."

The favorable stance towards ITP claims is expected to continue at least as long as the economic downturn persists. The creation of a fully dedicated ITP team within the Commission's Cartels Directorate confirms the agency's long term commitment to screen ITP claims and grant relief where bankruptcy concerns are substantiated. Since they are financially more vulnerable than larger groups, SMEs and single product businesses are best placed to get relief, in particular where active in sectors especially affected by the recession (*e.g.*, construction, metal products, and other manufacturing industries, as found in recent decisions). First, they face significantly higher fines, in proportional terms, than larger companies or diversified groups, often reaching the legal upper limit of 10 percent of total worldwide turnover. Second, they normally do not hold sufficient cash to pay the full fine, nor can they rely on cash flow from conglomerate businesses or controlling shareholders. Third, if active in sectors in economic crisis, SMEs and single product companies face the additional hurdle that finding access to capital or credit is extremely difficult due to the declining demand. For example, in granting fine reductions in *Bathroom Fittings* and *Prestressing Steel* in 2010, the Commission took account of the severe financial difficulties experienced in the sectors ("dysfunctional credit markets at the height of the crisis," as described in Commission's articles).

Companies which may face the imposition of fines as a result of an on-going cartel investigation, or have unpaid fines outstanding, and feel especially hit by the economic crisis, might consider bringing an ITP claim if the fine would likely cause their bankruptcy. As clarified in a Commission Notice of June 2010, the criteria for benefiting from an ITP reduction vary depending on whether claims are made before or after adoption of the final decision imposing the fines. While the related information gathering is not insignificant, a company's efforts in claiming ITP may be worth its own continued existence.

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European Commission Addresses Due Process Concerns over EU Antitrust Proceedings

The issuance by the European Commission of a new set of best practices in antitrust proceedings, as well as its attempt to reinforce the role of the hearing officer, have sparked up the debate about the European antitrust procedure.

Even though criticism of EU antitrust procedure has always been present in EU competition law discussions, it is a subject that remains key from a due process standpoint because of the commission's need to use extensive investigative powers in antitrust cases paired with the heavy sanctions imposed on infringers.

Unlike U.S. practice, EU competition law enforcement occurs in an administrative, not criminal, system. In this system, the Commission combines the roles of prosecutor, judge, and jury. Under current procedures, companies accused of violating EU competition law cannot cross-examine witnesses, even when they might have been involved in incriminating them, nor can they have the matter heard by a third party (other than the commission's case team). The final decision is taken by politically appointed commissioners, most of whom only first hear of the case when they are summoned to vote. EU competition law practitioners complain that, as a practical matter, if the commission forms a strong view about a case early in the procedure, it is an uphill battle to change the likely outcome during the following stages leading to a decision.

The European Commission has long defended these procedures as fair and transparent and built on sound legal and economic analysis, but it has now taken steps to address the criticisms by issuing new best practices in antitrust proceedings. These best practices seek to achieve effective procedural improvements by increasing transparency and certainty. They set out, for the first time, a description of the different stages of a proceeding, and they oblige the commission to keep the parties informed at all times of the state of proceedings and to offer advance clarity on the possible outcome of the case. The commission's new best practices also reinforce the role of the hearing officer, an independent commission official that guarantees procedural rights. Most notably, the role has been expanded in order to allow escalation of procedural rights at any stage of the process, rather than only after the Statement of Objections is issued. All these measures increase the commission's interaction with relevant parties during the procedure.

The EU's projected accession to the European Convention of Human Rights might present a new opportunity to challenge the EU competition procedure as it stands today. Even though, at present, the commission's administrative decisions can be subject to review by European courts, it might be that commission decisions are not compliant with the kind of judicial scrutiny that is established in the European Court of Human Rights. The court has already declared itself competent to rule on fines imposed in competition law proceedings by National Competition Authorities of the European member states.

This new angle to a much discussed debate will be a topic sure to dominate the EU competition stage in 2012.

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Russia's Accession to the WTO

Until recently, Russia was the largest economy not included within the World Trade Organization (WTO). On November 10, 2011, after 18 years of discussion, the terms of Russia's accession were approved by the WTO's 62-member Working Party on the Accession of the Russian Federation. At the December 15-17, 2011, Ministerial Conference the documents were approved, and Russia became a WTO member. The chief Russian negotiator with the WTO, Maxim Medvedkov, expects that the Russian Parliament will ratify the accession package by mid-summer 2012.

The accession package includes the report of the Working Party, which outlines Russia's trade regime and commitments on legislative harmonization and enforcement, and assesses their compliance with the WTO rules. The package also includes a list of commitments to be made by Russia for opening its markets in goods and services. The documents summarize and reflect the bilateral agreements that already exist between Russia and individual WTO member states on market access for services (with 30 WTO members) and on market access for goods (with 57 WTO members). As part of the accession process, Russia has also committed to enact new laws and amend existing legislation to bring all of its trade-related laws into conformity with WTO rules, including, for example, federal laws "On the Fundamental Principles of State Regulation of Foreign Trade Activity," "On Special Protective, Antidumping, and Compensatory Measures Related to the Import of Goods," "On the Circulation of Medicines," and, of particular note, Part IV of the Civil Code of the Russian Federation, which regulates intellectual property rights.

Russia's WTO Commitments

Russia has committed to fully apply all WTO rules and provisions from the date of its accession, although there are transitional periods with respect to certain specified provisions. These commitments include the following.

Import Tariffs and Tariff Rate Quotas

From the date of accession, Russia has agreed to reduce more than one-third of its national tariffs, with another quarter of tariffs to be reduced three years later. For some "essential" products, however, Russia has insisted on a longer transitional period of 5-7 years. Average maximum import tariffs will be reduced from 10 to 7.8 percent, with average tariffs on agricultural products to be reduced from 13.2 to 10.8 percent, and average tariffs on manufactured products are set to fall from 9.5 to 7.3 percent. Tariff-rate quotas (TRQs) will remain for beef, pork, and poultry as the Russian government intends to protect domestic agricultural companies. According to the Ministry of Economic Development, the term of TRQs for beef and poultry products has not been set, but the TRQs for pork will be replaced by a flat top rate of 25 percent as of January 1, 2020.

Services Markets

In accordance with WTO rules, Russia has agreed to remove certain barriers for foreign investments in 116 service sectors (out of 155 sectors under the

Russia has committed to enact new laws and amend existing legislation to bring all of its trade-related laws into conformity with WTO rules.

WTO classification). The bulk of these commitments will result in no changes to the existing regulations, except with regard to the insurance sector, where the total quota for foreign participation in the sector will be increased from 25 to 50 percent, and the 49 percent restriction on foreign ownership of companies engaged in life insurance and mandatory insurance (which includes mandatory medical insurance and minimum liability coverage for owners of automobiles) will be raised to 51 percent from the date of accession, and canceled altogether after five years.

Subsidies

Russia has agreed to limit agricultural subsidies to no more than $9 billion in 2012 and will subsequently reduce these to an annual limit of $4.4 billion by 2018. Russia has also agreed that annual agricultural subsidies for certain specified products should total no more than 30 percent of total agricultural support to avoid excessive concentration of government support for particular products. With regard to the industrial sector, Russia agreed to reduce or modify subsidies so that they are not contingent upon either export or the use of domestic goods in favor of imports.

Customs Union

The 2010 Customs Union created among Russia, Kazakhstan, and Belarus will be unaffected by Russia's accession to the WTO, as it was created in compliance with the WTO rules. It is expected the WTO will officially recognize the Customs Union when Kazakhstan and Belarus ultimately join the WTO. Certain other CIS countries have indicated their intention to join the union.

Transparency

Russia has agreed to provide transparency with regard to its regulation of foreign trade. All legislation regulating trade will be published in official sources and will not take effect prior to that time. In addition, when drafting new regulations, Russia will provide all interested parties a reasonable opportunity to submit comments on newly proposed regulations before they are adopted. These rules will also apply to legislation of the Customs Union, providing the opportunity for WTO members to comment to the competent Customs Union Body.

WTO Plurilateral Trade Agreements

It is expected that, as part of the integration process, Russia will indicate its intention to join the WTO Government Procurement Agreement. This agreement regulates all rules and procedures associated with tendering for public procurement. Implementation of this agreement will require the Russian government to award public contracts for procurement of goods and services, according to commercial considerations, without distinguishing between foreign and domestic suppliers.

The WTO currently unites 154 member states, which together account for 95 percent of world trade turnover. It is estimated that Russia's accession to the WTO will result in GDP growth of 1.2 percent and $20 billion in absolute figures. Russia's accession will thus not only result in tremendous benefits for the Russian people, but will also present enhanced opportunities for foreign investment in Russia.

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An Update on the U.S. Iran Embargo: A Proliferation of Anti-proliferation Measures

The past two years have brought about a sea change for the U.S. Iran embargo, not only in terms of its scope and reach but also embargo mechanisms.

Viewed as a whole, two things stand out about these developments. First, the most recent changes have resulted in an incredible proliferation of measures potentially impacting transactions by non-U.S. persons involving Iran. Indeed, the assessment of whether a proposed transaction may run afoul of, be impeded by, or give rise to sanctions under such measures may now, for certain transactions, necessitate considering more than a dozen separate U.S. regulations and sanction regimes.

Second, even with the addition of a multitude of new restrictions and possible sanctions, the most obvious route for applying economic pressure on Iran appears to remain outside the scope of the U.S. embargo. It appears that non-U.S. persons still may purchase Iranian petroleum without threat of U.S. sanctions, although, as discussed below, their ability to do so could be impeded by newly passed U.S. legislation.

The Iranian Transactions Regulations and the Iran Sanctions Act

After a hiatus following the resolution of the embassy hostage crisis in 1981, the current U.S. embargo on trade with Iran began in 1995 with the issuance of Executive Orders 12957 (March 15, 1995) and 12959 (May 6, 1995), which, respectively, barred U.S. persons from engaging in certain activities relating to the development of petroleum resources in Iran and imposed a virtual embargo on trade by U.S. persons or from the United States with Iran. The executive orders were implemented through the Iranian Transactions Regulations (ITR), which are administered by the U.S. Department of the Treasury, Office of Foreign Assets Control (OFAC). There also are provisions of the Export Administration Regulations, not covered in this article, which impose certain restrictions on exports/reexports of U.S.-origin products to Iran that operate in combination with the ITR.

The following year, Congress passed the Iran and Libya Sanctions Act of 1996 (ILSA), which authorized the President to impose a variety of sanctions on any person, including a non-U.S. person, who invested $40 million or more for the development of petroleum resources in Iran (or, at that time, Libya). The ILSA subsequently was amended to remove Libya (after which it became the Iran Sanctions Act (ISA) and to reduce the threshold for sanctions to investments of $20 million or more.

The ITR and ILSA formed the framework for the U.S. embargo for the next 14 years—regulatory restrictions to bar U.S. trade and the threat of sanctions to discourage certain non-U.S. trade. The ITR were rarely amended but vigorously enforced. However, in the face of objections by Western European trading partners and allies, sanctions under the ILSA were never imposed. And, neither embargo measure specifically targeted the supply by Iran of petroleum or petroleum products to the world market (except for certain restrictions applicable to U.S. persons).

Expansion of the ISA

The Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010

In 2010, Congress adopted a substantial amendment to the ISA, in the form of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA). Signed into law on July 1, 2010, the legislation broadened the scope of activities subject to sanction under the ISA. Most significantly, the CISADA mandated the imposition of sanctions against any person engaged in the (i) sale, lease, or provision of goods or services that could directly and significantly facilitate the maintenance or expansion of Iran's domestic production of refined petroleum products; (ii) sale or provision of certain refined petroleum products to Iran; or (iii) provision of goods or services that could directly and significantly contribute to the enhancement of Iran's ability to import refined petroleum products. The CISADA also added three categories of sanctions to the original menu of six and required the imposition of at least three.

More significantly, unlike the ISA prior to July 2010, which spurred much discussion but no actions, the U.S. Government already has sanctioned at least 10 entities in accordance with the CISADA amendments.

Executive Order 13590

On November 21, 2011, President Obama signed Executive Order 13590, which extends the CISADA energy-related sanctions to persons that knowingly provide goods, services, technology, or support to Iran that could directly and significantly contribute to the maintenance or enhancement of Iran's ability to

develop its petroleum resources or the maintenance or expansion of Iran's domestic production of petrochemical products. The Executive Order also lowers the monetary thresholds that will give rise to sanctions. Under the executive order, transactions with a value as low as $250,000 may create an issue. However, as noted in the U.S. Department of State fact sheet, dated November 21, 2011, released in conjunction with the Executive Order, "[t]he Executive Order would not cover the purchase of petroleum resources or petroleum products from Iran, or the shipping of those products from Iran, absent other sanctionable conduct."

Additional Regulations

In addition to the ITR, which, as described above, impose general restrictions on trade involving Iran, two new regulations adopted by OFAC in 2010 and 2011 impose other more specialized restrictions relating to Iran.

- The Iranian Financial Sanctions Regulations (IFSR), adopted on August 16, 2010, which were mandated by CISADA, generally prohibit, or impose strict conditions on, the opening or maintaining of a correspondent or a payable through account in the United States for a non-U.S. financial institution that knowingly facilitates or provides support for certain activities of the government of Iran, including specifically for Iran's Revolutionary Guard Corps and the Central Bank of Iran, and certain other persons, including activities relating to the acquisition or development of weapons of mass destruction or terrorism.
- The Iranian Human Rights Abuses Sanctions Regulations, adopted February 11, 2011, generally block the property of and prohibit U.S. persons from engaging in any dealings with persons designated for engaging in human rights abuses in Iran. As with other OFAC embargo regulations, the designated individuals or entities are included on OFAC's list of Specially Designated Nationals and Blocked Persons (SDN List) and identified with an acronym associated with the OFAC regulations involved (in this case, "IRAN-HR").

Enforcement of Other Embargo Regulations Against Iran

In addition to the restrictions under the Iran-specific OFAC regulations, individuals and entities in Iran also may be designated on the SDN List under sanctions regulations administered by OFAC targeting other countries or certain types of activities, such as relating to terrorism, proliferation, or drug trafficking. As a result, certain persons in Iran, in addition to being within the scope of the restrictions of the Iran-specific regulations described above, also are designated on the SDN List under one or more of the following embargo regulations:

- *Non-Proliferation Sanctions.* The Weapons of Mass Destruction Trade Control Regulations, the Highly Enriched Uranium Assets Control Regulations, and the Weapons of Mass Destruction Proliferators Sanctions Regulations—persons designated under these regulations ordinarily are identified by the acronym "NPWMD" on the SDN List.
- *Counter-Terrorism Sanctions.* The Global Terrorism Sanctions Regulations, the Terrorism Sanctions Regulations, the Terrorism List Governments Sanctions

Regulations, and the Foreign Terrorist Organizations Sanctions Regulations—persons designated under these regulations ordinarily are identified by the acronym "SDGT" and/or "FTO" on the SDN List.

- *Counter-Narcotics Trafficking Sanctions*. The Narcotics Trafficking Sanctions Regulations and the Foreign Narcotics Kingpin Sanctions Regulations—persons designated under these regulations ordinarily are identified by the acronym "SDNTK" on the SDN List.
- *Iraq-Related Sanctions*. The Iraq Stabilization and Insurgency Sanctions Regulations—we understand that persons designated under these regulations ordinarily are identified by the acronym "IRAQ3" on the SDN List.
- *Syrian Sanctions*. The Syrian Sanctions Regulations—persons designated under these regulations ordinarily are identified by the acronym "SYRIA" on the SDN List.

Anti-money Laundering

In addition to the banking-related measures implemented through the IFSR, the U.S. Department of the Treasury also has implemented measures targeting Iranian banks through the money laundering provisions of the USA PATRIOT Act. Most recently, on November 28, 2011, the Treasury Department imposed a special measure against the Islamic Republic of Iran as a jurisdiction of primary money laundering concern in accordance with Section 311 of the USA PATRIOT Act. This measure will make it more problematic for even non-U.S. banks to engage in dealings with Iranian banks.

Proliferation Sanctions

In addition to the proliferation-related OFAC regulations and sanctions administered under the ISA described above, the U.S. Department of State Bureau of International Security and Nonproliferation (ISN), also administers an anti-proliferation sanctions program under a number of executive orders and statutes, including the Iran and Syria Nonproliferation Act; the Iran-Iraq Arms Nonproliferation Act of 1992; the Iran, North Korea, and Syria Nonproliferation Act; and the Iran Nonproliferation Act of 2000. Many of the sanctions are similar to those authorized under the ISA. A number of Iranian persons are subject to ISN sanctions.

Conclusion

The most recent U.S. efforts to bring a comprehensive embargo to Iran clearly have been motivated by the necessity to prevent Iran from developing a nuclear weapons capability. However, even efforts born of a clear motivation and objective are impacted by the context in which they occur. The context in this case is a highly politicized Washington and an extended global economic slowdown. The U.S. presidential election is on the horizon, and Iran is a "hot button" foreign policy issue. As a result, the implementation of the Iran embargo in the U.S. has become at least a bit like the proverbial "battle of the bands," with the administration issuing successive new Iran sanction regulations and Congress passing successive new sanctions legislation. That being said, given the frailty of the U.S. and global economy, neither seems inclined to pursue the most aggressive course of seeking to cut off the world from the supply of Iranian petroleum and Iran from the revenue derived from that supply.

As noted above, however, the ability to purchase Iranian petroleum could be severely hindered by the National Defense Authorization Act for Fiscal Year 2012, which President Obama signed on December 31, 2011. The legislation authorizes the imposition of sanctions on the Central Bank of Iran (CBI) and directs the imposition of sanctions on non-U.S. financial institutions engaged in "significant financial transactions" on or after February 29, 2012, with the CBI or other Iranian financial institutions designated by the Secretary of the Treasury for the imposition of sanctions. In addition, the legislation mandates the imposition of sanctions on non-U.S. financial institutions, including central banks, in connection with any transaction for the purchase of petroleum or petroleum products from Iran "conducted or facilitated" on or after June 28, 2012; central banks and other non-U.S. government owned or controlled financial institutions also can be targeted for transactions involving sales of petroleum or petroleum products to Iran. Specifically, the legislation, which incorporates a national security waiver applicable to all affected transactions, as well as exceptions for certain petroleum transactions designed to avoid antagonizing countries allied with the United States that continue to purchase Iranian crude and to mitigate against price shocks, directs the president to prohibit the opening, or prohibit or strictly condition the maintaining, of correspondent or payable-through accounts in the United States by non-U.S. financial institutions. Although it is unclear how the legislation will be implemented, it has the potential to severely limit the ability of non-U.S. financial institutions to continue doing business with the United States.

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Recent Developments in EU International Trade Sanctions

The EU recently strengthened its trade sanctions against Iran and Syria in light of concerns about political developments in those countries, and this trend is set to continue.

EU trade sanctions normally follow a familiar pattern. They are usually, although not invariably, based on a resolution of the U.N. Security Council. For reasons to do with the limits of the EU's legislative competence in the foreign and security policy area, there are always two legislative instruments: a decision of the Council of the EU (the Council), which defines the approach of the EU and with which member states must ensure that their national policies conform; and a regulation of the Council, which is directly and immediately applicable in all the member states.

The decision will typically include an embargo on arms and related equipment and, where appropriate, restrictions on the supply of dual-use items (items which can be used for both civil and military purposes); a prohibition on technical or financial assistance relating to such equipment; a ban on the export of equipment that can be used for internal repression purposes; a visa/travel ban with regard to designated individuals; a requirement to freeze funds owned or controlled by such persons; and a prohibition on making funds or economic resources available to designated individuals and entities. The regulation will generally duplicate some of these provisions, in particular the financial sanctions.

EU sanctions against Iran have been in place since 2007. They were strengthened in July 2010 to include additional measures in the areas of trade, the financial sector, the Iranian transport sector, key sectors of the oil and gas industry, and additional designations specific to the Islamic Revolutionary Guards Corps (IRGC). The lists of designated persons and entities were further expanded in October 2010 and May 2011. More recently, on December 1, 2011, the Council designated a further 180 entities and individuals to be subject to the existing sanctions, including entities and individuals directly involved in Iran's nuclear activities; entities and individuals owned, controlled, or acting on behalf of the Islamic Republic of Iran Shipping Line; and members of, as well as entities controlled by, the IRGC. The Council also agreed to consider a broader set of measures aimed at severely affecting the Iranian financial system, the transport sector, the energy sector, and the IRGC. It is anticipated that these measures, including a crude oil embargo, will be adopted early in 2012.

With regard to Syria, basic sanctions were adopted in May 2011. On December 1, 2011, the Council decided to impose new measures related to the energy, financial, banking, and trade sectors, including the listing of additional individuals and entities that are involved in the violence or directly supporting the regime. In particular, it is now prohibited to supply or assist in the installation, operation, or updating of equipment or software intended primarily for use in the monitoring or interception of telephone or Internet communications by or on behalf of the Syrian regime. It is also prohibited to purchase, import, or transport crude oil or petroleum products from Syria; to provide financing or financial assistance (including financial derivatives) and insurance/reinsurance; to supply equipment and technology for key sectors of the oil and natural gas industry in Syria; to grant any loan or credit to undertakings in Syria engaged in the construction of new electrical power plants; to sell, purchase, broker, or assist in the issue of Syrian public or public-guaranteed bonds to or from the government of Syria, public bodies, or banks domiciled in or controlled from Syria; to open new branches, subsidiaries, or representative offices of Syrian banks in the EU; or to provide insurance or reinsurance to the Syrian government or public bodies.

It can be expected that EU sanctions on both Iran and Syria will continue to evolve in 2012 in line with the developing situation in each country.

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Government Litigation 2012: Sovereign Immunity Implications Involving Foreign Banks

Recent federal court decisions highlight the importance of anticipating sovereign immunity issues at the onset of any proceeding in the United States involving the instrumentality of a foreign state, as well as being aware of possible sovereign immunity repercussions related to ongoing efforts to stabilize banking institutions by foreign governments.

Nationalized Foreign Banks and Sovereign Immunity

The situation has been crystallized for the courts under the following scenario: investment funds bring a suit against a foreign bank that has been nationalized by its government during an effort to stabilize the banking industry, alleging that the bank breached various provisions of an agreement after it had been nationalized. Such suits typically include a claim that the bank was not entitled to sovereign immunity under the Foreign Sovereign Immunities Act of 1976 (FSIA). FSIA is the sole basis for obtaining jurisdiction over a foreign state in U.S. courts. FSIA immunizes foreign states from the jurisdiction of U.S. courts, subject to certain exceptions, and that immunity extends to the "agency or instrumentality" of such states. Exceptions to FSIA immunity include when the legal action is based on commercial activity carried on in the United States by the foreign state or actions outside the United States which cause a "direct effect" in the United States. The immunity may also be waived either explicitly or "by implication."

In addressing the issue of whether the nationalized bank enjoys sovereign immunity as an agency or instrumentality of a foreign government, U.S. courts commonly find commercial banks wholly owned by a foreign state to be such an agency or instrumentality [see, *e.g.*, *Commercial Bank of Kuwait v. Rafidain Bank*]. Although there may be arguments that the bank has waived sovereign immunity by agreeing to choice of forum or law provisions in the relevant contracts, that assertion can be challenged on the grounds that the bank entered into the agreement while still a private entity, and the subsequent nationalization does not mean the foreign government itself had also agreed to such jurisdiction. Claims that the FSIA commercial activities exception has been met may similarly be rejected on the grounds that prior to nationalization the activities of the bank were those of a private entity and not acts of a foreign state or instrumentality, and that post-nationalization the fact that debt instruments were payable in the United States is not sufficient

commercial activity in the United States to trigger the exception to immunity under the FSIA. Alternately, arguments that the bank's actions outside the United States nonetheless had a "direct effect" in the United States must also show that the effects followed as an immediate consequence of those actions, and in some instances courts have found that the failure to remit funds payable in the United States meets the "direct effect" requirement [see, *e.g.*, *Republic of Argentina v. Weltover, Inc.*]. It does not necessarily follow, however, that an increased risk of nonpayment, rather than an actual failure to pay funds, is sufficient to support a "direct effect" finding.

These arguments and issues highlight key risks involved when engaging in financial transactions with foreign banking institutions that may become or already are instrumentalities of a foreign government. Continued financial upheaval in Europe and elsewhere may also lead to similar situations where the nationalization of banks injects sovereign immunity issues into commercial disputes. This will likely impact the analysis of risks and strategies involved in commercial transactions with at-risk financial institutions abroad, as well as impact any subsequent litigation strategies, risk analysis, and legal pleadings.

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Foreign Corrupt Practices Act/Anti-corruption: What to Expect in 2012

Over the past decade, and particularly in the last five years, law enforcement actions against international corruption have become commonplace. What is noteworthy as we enter 2012 is precisely how routine the activity in this area has become. The U.S. Department of Justice (DOJ) suffered a couple of embarrassing setbacks in its enforcement efforts, although these are unlikely to have any long-term impact on the program. Efforts to amend and scale back the Foreign Corrupt Practices Act (FCPA or the Act) have gained support both in Congress and some sectors of the business community, but even if adopted these will do little to alter the fundamental features of the enforcement landscape. The fact is that anti-corruption law enforcement achieved a certain level of stability, and we can expect, for 2012 and beyond, essentially more of the same—a regular flow of cases against both companies and individuals, primarily but not exclusively by U.S. authorities, many with penalties in the tens or hundreds of millions of dollars and, at least for an unlucky few, prison terms of multiple years.

Among the key things to watch for 2012 will be the following:

Vigorous FCPA prosecutions will continue by both the DOJ and the Securities and Exchange Commission.

Both agencies have specialized units working these cases, staffed with personnel who continue to gain experience and industry knowledge, which they will then bring to bear on other potential defendants. Even though fewer FCPA cases were brought in 2011 than in the prior year, this reflects no slackening of effort or any reduction of priority for these matters.

Concerned that the anti-corruption message is still not adequately appreciated by the private sector, authorities are emphasizing prosecution of individuals as well as corporate entities, and pursuing criminal charges rather than civil ones where they believe they can obtain convictions. This strategy carries risks, as criminal defendants are more likely to fight these cases, and some prosecutions failed in 2011. The DOJ obtained its first FCPA criminal conviction of a company in May 2011, only to see it thrown out due to prosecutorial misconduct, including the false testimony of a federal law enforcement agent. The trial of the first group of "shot show" defendants, who faced charges arising out of an FBI "sting" operation, ended with a hung jury and the declaration of a mistrial, as jurors apparently struggled with concerns about entrapment. But these were aberrations that do not alter the larger enforcement picture, which continues to reflect a long record of successful efforts. The DOJ settled many corporate cases and won convictions at trial in a significant number of cases against individuals, with some defendants sentenced to terms of more than five years. Other convicted defendants exhausted their appeals and prepared to report to prison. The DOJ also successfully faced down challenges to its interpretations of key legal provisions, such as whether employees of government-owned enterprises should be considered "government officials" under the FCPA.

Authorities reaffirmed their commitment to aggressive enforcement tactics such as wiretaps and confidential informants, and lucrative bounties are now available to whistleblowers under provisions of the Dodd-Frank Act. Both the DOJ and SEC made clear efforts through their settlements of various cases to demonstrate the benefits obtained by those who had self-reported violations and cooperated with enforcement authorities, although some observers remain skeptical, and such benefits do not lend themselves to precise quantification.

Efforts at FCPA reform are gaining some traction, but even if adopted, these changes will do little to alter the most central requirements of the Act.

Key proposals under consideration are a redefinition of who is a "government official" to exclude personnel of state-owned enterprises engaged in ordinary commercial activities, the creation of an affirmative defense to liability for companies with effective compliance programs, and the elimination of criminal successor liability. As welcome as these changes would be to the business community, it is difficult for Washington to enact any kind of legislation, much less provisions that could be characterized as easing up on improper corporate payments. And, it is unlikely that many of the FCPA cases being brought would come out differently under these revised standards. Perhaps most importantly, the FCPA enforcement program is a real money maker for the federal government. DOJ officials have been completely candid about the fact that the program brings in significantly more revenue than it costs, and that these proceeds help to

fund a large portion of the Department's criminal enforcement program. They have been clear about having "no intention whatsoever" of supporting what they see as efforts to "weaken the FCPA and make it a less effective tool for fighting foreign bribery."

UK authorities will be keen to find the right opportunity to bring a major Bribery Act case.

Britain's Serious Fraud Office (SFO) may look with envy on the large settlements routinely obtained by U.S. authorities, but for now at least the UK's budget woes are likely to force that office to choose its fights carefully. The SFO's head has indicated that the office will be cautious in selecting the right enforcement opportunities, and that the office is not looking for "easy quick wins." The SFO is expressly interested in cases against non-UK companies with a UK presence who are involved in foreign bribery, but are in particular seeking cases in which a UK company can be said to have lost out to an unscrupulous competitor. The office disclaims any intention of wasting its scarce resources on mere technical violations.

International anti-corruption enforcement efforts beyond the U.S. and the UK remain uneven and to a large extent non-existent, but there is steady, albeit very slow, improvement on this score.

Signatories to the OECD Convention on Bribery, which include virtually all of the most developed economies, have committed to enact legislation much like the FCPA, criminalizing bribery of foreign officials in connection with commercial transactions, and most have had such laws in place since 2002. According to Transparency International, however, only seven of these countries "actively" enforced these laws: the United States, the UK, Germany, Italy, Norway, Denmark, and Switzerland. Nine others engaged in "moderate" enforcement, while the remaining 21 countries evaluated had "little or no" enforcement. The prospects for improvement on this score remain uncertain. At the same time, during 2011 there were highly publicized initiatives in Russia and China to upgrade their laws against bribery of foreign officials, and while enforcement of these laws remains uneven, when enforcement does occur it may be exceptionally severe. Law enforcement authorities are increasingly cooperating and sharing information on an international basis, and to the extent non-US authorities become active in anticorruption enforcement, these issues will increasingly involve cross-border issues and pose complex challenges to resolve.

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United Kingdom: FSA Enforcement—Record Fines, Original Thinking, and Imminent Reform

In recent years, the UK's Financial Services Authority (FSA) has sought to achieve "credible deterrence" in order to "change behavior" and promote better "outcomes" for financial services customers, the market and its integrity, and the fight against financial crime. These efforts reflect a conclusion by the FSA that such deterrence requires the imposition of harsher sanctions—meaning, among other things, larger fines; the bringing of criminal charges, especially for insider trading;, and enforcement action against not only firms, but also individuals, particularly senior managers who can be held responsible for a firm's behavior.

The FSA is delivering on these initiatives. A new regime of increased penalties was adopted in May 2010, and the FSA has brought a multitude of criminal charges for insider trading, achieving several convictions and prison sentences.

All of this is taking place amidst a reconstruction of the UK's landscape for the regulation of financial services. The FSA is set to be abolished by 2013 and replaced by three separate entities—an independent Financial Policy Committee within the Bank of England; a prudential regulator for systemically important firms, the Prudential Regulation Authority; and a conduct of business regulator, the Financial Conduct Authority (FCA). The FCA will be acutely aware, as is the FSA, of dissatisfaction with the FSA's former "light touch regulation" following the financial crisis and will be similarly committed to credible deterrence. The FCA will also have new powers not available to the FSA, in particular the power to intervene in product development and promotion. Current FSA activity suggests that the FCA will not be shy to use such early intervention tools.

The FSA has a number of weapons in its enforcement armory, the most powerful of which are fines and criminal sanctions. The criminal offenses which the FSA may prosecute include insider dealing and market misconduct under the Criminal Justice Act 1993 and breaches of the Money Laundering Regulations 2007. The imposition of fines has developed as the most common, high profile sanction, and the FSA's increasingly aggressive approach (evidenced from the level of recent fines and the escalation in total annual fines levied in recent years) is expressly intended to warn and deter as much as to punish. "Credible deterrence" is now written into the formula for setting financial penalties.

Penalty Setting

Since May 2010, the FSA has been following a specified formula for setting penalties in enforcement cases:

Step 1: The FSA looks to order the wrongdoer to disgorge a benefit, which is directly derived from the breach. The penalty is in addition to that disgorgement (and any restitution to customers or counterparties who have lost money).

Step 2: In assessing the starting point for the penalty, the FSA examines the general seriousness, nature, and impact of the breach. The penalty element is based on a percentage of the firm's or a regulated individual's "relevant income." The maximum for a firm is 20 percent and for individuals 40 percent in non-market abuse cases. In market abuse cases, individuals can be fined the greater of a multiple of up to four times the profit made/loss avoided or £100,000 if the abuse took place outside employment or if either figure would exceed the relevant percentage of relevant income.

Step 3: The FSA has the discretion to vary the amount determined under Step 2 depending on whether there are any mitigating or aggravating circumstances.

Step 4: The FSA then has further discretion to increase the penalty if it believes that the penalty so far determined would be inadequate as a deterrent.

Step 5: As was already the case, the penalty is discounted where the party is cooperative and settles at early stages of the process (by 30 percent 20 percent or 10 percent depending on the timing).

Four substantial fines, ranging from £5.95 million to £10.5 million, were imposed in 2011 for failing to ensure the suitability of investments sold to customers. The latter is the highest fine imposed in respect of retail activity, overtaking a £7.7 million penalty set in January. These fines were assessed without reference to the new penalty regime since they related principally to events occurring before its introduction in May 2010.

The FSA also imposed in 2011 its highest ever financial penalties on individuals, one of £2 million and another of approximately £4 million, the larger of the two having been assessed under the new penalty regime and reflecting a significant punitive element, consonant with the FSA's recent declaration that the "degree of deterrence increases with the level of the penalty."

The FSA has also on several occasions obtained injunctive relief against parties accused of market abuse. The FSA has always had such power under Section 381 of the Financial Services and Markets Act 2000, but it had not done so before this year. One of these cases also reflects a further new FSA tactic—that of publicizing allegations of wrongdoing where the disciplinary process has not yet run its full course. It has been proposed that restrictions on early publication of disciplinary action should be relaxed further for the new FCA.

A final illustration of the expansion of the range of the FSA's activity is provided by its approach to traded life policy investments (TLPIs), which are funds that invest in life assurance policies, often of U.S. citizens. The FSA has decided that it does not approve of these products being sold to retail investors. It first raised its concerns with the industry in February 2010. On November 28, 2011, it issued draft guidance on TLPI sales for consultation, announcing that it proposed to issue such guidance as an interim measure because the consultation process for changing the rules to introduce a ban on marketing TLPIs to retail investors would take longer. The FSA's "key issues" addressed by the draft guidance are headed "TLPIs should not reach retail investors in the UK." On the same day, it issued a press release entitled "FSA warns against 'toxic' traded life policy investments," announcing that these "toxic" products pose significant risks to retail investors, that they aim to ban their marketing to retail investor, and that the industry now had a strong warning that it should not do so from now on.

The FCA will have explicit product intervention powers to take this type of regulatory action, which can be expected to continue in other contexts.

The message from the regulator is clear: It has an impressive set of weapons and it is not afraid to deploy them, and with increased flexibility and creativity.

The FSA has recently announced that it has budgeted for an increase in litigation since the inauguration of its new penalty structure. The FSA recognizes that more firms may be willing to fight over higher, more punitive penalties. Total fines levied by the FSA through December 2011—about £50 million—are in fact significantly less than 2010's total of nearly £90 million (which included the highest single fine of £33.32 million). Both figures, though, represent an extraordinary increase on the total figure of just over £5.34 million for 2007, and the sharp upward trend can be expected to continue.

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Anti-bribery Enforcement with Chinese Characteristics: Not All Official

In 2012, expect to see the global trend of increasing anti-corruption enforcement persist as regulators around the world continue to show zeal in enforcing anti-corruption laws. This is not to say, however, that anti-corruption enforcement will pose the same types of risk in different jurisdictions across the globe. In fact, understanding the differences in the kinds of bribery and corruption subject to stricter enforcement vigilance will be critical to formulating effective compliance strategies to mitigate risks on the ground in key markets.

Considerable Western media attention has focused on the 2011 amendment to China's Criminal Law, which outlaws bribery of foreign (*i.e.*, non-PRC) officials in connection with commercial transactions. The amendment of this offense, known as the ["Crime of Offering Bribes to Officials of Foreign Countries and International Public Organizations"] (often referred to as "China's FCPA"), brings China towards compliance with the OECD Anti-bribery Convention. The seriousness with which the Chinese Communist Party (CCP), the ruling party of China, considers this matter is highlighted by significant coverage by Xinhua News, China's official news agency, of recent remarks by He Guoqiang, a member of the Standing Committee of the CCP's Political Bureau and the head of the CCP's Central Commission for Discipline Inspection. Mr. He noted that China's long-term development depends on systemic, grass-roots anti-corruption reform and improvements to the current corruption prevention and enforcement regime. Mr. He's comments are not remarkable in themselves, but it is worth noting that Mr. He speaks as a senior party member, not as a government official. Thus, his voice in articulating the importance of improving anti-corruption enforcement underscores the extent to which the CCP views this issue as fundamental.

Given the CCP's interest in protecting its status and reputation as the ruling party, investigation and prosecution of official bribery cases tend to focus on the recipients—that is to say the government officials and CCP members—rather than on the donors of the bribes. The recent suspended death sentences meted out by Chinese courts against two former China Mobile executives, who were senior party members, for accepting bribes (with relatively little attention given to the investigation of the person(s) giving the bribes) suggest that the CCP has not swayed in its enforcement focus on officials. However, while the amendment of China's Criminal Law and continued efforts against official bribery are notable developments, they are by no means the sole focus of China's anti-corruption enforcement efforts.

Arguably, in terms of PRC anti-corruption enforcement risk, the primary hazard for foreign-invested enterprises operating in China comes instead from commercial bribery. Unlike the U.S. FCPA, but more similar to the UK Bribery Act, China's anti-bribery laws extend beyond offenses involving official bribery and cover commercial bribery as well. Under PRC law, commercial bribery involves the provision of improper benefits in a purely commercial setting, thereby extending legal risks beyond improper payments to government and party officials. Violations can result in administrative sanctions and also criminal prosecution. But, unlike official bribery enforcement, which tends to focus on the recipient official, commercial bribery enforcement generally targets both the donor and the recipient (both of which can be foreign-invested enterprises or their employees). Hence, foreign-invested enterprises may be exposed to the risk of both making and receiving improper payments in a commercial bribery context.

Compounding this enforcement risk is the fact that the continued prevalence of state-ownership in the PRC economy can cause a commercial bribery case to escalate beyond legal consequences arising solely under PRC law. Today's interconnected and global enforcement landscape poses a new and multifaceted kind of risk—that a *commercial* bribery investigation in one location could implicate *official* bribery enforcement risks in another. This is particularly true because many goods and service providers that are typically private enterprises in Western economies are, in China, state-owned enterprises. Thus, for example, a PRC commercial bribery investigation of potentially improper payments by personnel of the China branch of a U.S.-headquartered airline services provider to a Chinese airline (which are predominantly state-owned in China) could draw the attention of U.S. law enforcement officials and spark an FCPA investigation of the same set of circumstances.

Despite various well-publicized prosecutions of officials, some of China's most active anti-corruption enforcement efforts have actually focused on commercial bribery, and this seems likely to continue in 2012. Nearly 31,000 commercial bribery cases were investigated by the Administration of Industry and Commerce (the administrative commercial bribery enforcement agency) during the previous five years, with approximately another 6,500 cases investigated over the same period by the Ministry of Public Security (the national law enforcement agency in China). These cases frequently implicate foreign-invested companies: the Anbound Group, a Beijing-based consultancy firm, estimated that over 60 percent of the total corruption investigations in the 10 years prior to 2009 involved foreign companies.

Sales and distribution are areas where the problems of commercial bribery are particularly prevalent, and cases reported in the Chinese media often involve distributors or suppliers paying kickbacks to sellers or purchasers to favorably influence distribution of their products or the use of their products and services in projects. For example, in 2009, two employees of Shenmei Beverage and Food Co., Ltd., a partially-owned subsidiary of Coca-Cola, were arrested by police for allegedly receiving over $1.5 million in kickbacks from suppliers. In that same year, an employee of Ying Zhi Jian, a Chinese company, was convicted of giving benefits to Amway (China) Co., Ltd., a subsidiary of Amway, to secure its position as a supplier. The employee was sentenced to three years imprisonment and criminally fined. The case did not reveal that Amway (China) was investigated for receiving benefits.

From a policy perspective, commercial bribery is considered to have a negative impact on social welfare by driving up the cost of goods to consumers and end users, as well as potentially compromising product safety. Thus, the CCP and government are attuned to the potential threat that these negative effects pose to social stability—a concern at the forefront of the CCP's policy considerations. Next year, a transition in the CCP's leadership will occur, which is likely only to heighten concerns about demonstrating the CCP's continued ability to shepherd Chinese society through a period of growth and development. A strong stand in terms of stepping up law enforcement aimed at punishing commercial bribery can be anticipated.

Thus, if your company is operating in China, the chief enforcement risk you face *vis-à-vis* PRC regulators in 2012 will be that of commercial bribery, with the unwelcome possibility of FCPA enforcement as an exacerbating consequence.

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Environmental Policy Outlook for 2012: Kicking the Can Down the Road

Two years ago, President Obama's environmental team was running on all cylinders to pursue climate change legislation. Following the 2010 election, with any prospect for the enactment of such legislation gone, the administration shifted gears to instead focus on an ambitious regulatory agenda, with the Environmental Protection Agency (EPA) issuing tighter emissions limits for conventional and hazardous air pollutants, proposing new water and waste rules, and requiring new greenhouse gas permits.

Hindsight is twenty-twenty, so it is unclear whether the administration overestimated the support for many of these rules or underestimated the extent of the backlash that they provoked. In either case, last year, EPA administrator Lisa Jackson and her lieutenants were called to testify before Congress nearly 60 times, averaging more than once a week, to defend the EPA's environmental agenda against fierce Congressional opposition, particularly from the House of Representatives.

With the economy in a slow recovery and unemployment remaining high, House Republicans have labeled many of the regulatory proposals "job killers." Now, less than a year before the presidential election, the administration is reconsidering many of its positions and is in partial environmental retreat.

The most prominent examples are the decisions to postpone EPA's long-anticipated ozone regulation, reconsider the boiler Maximum Available Control Technology (MACT) and incinerator rules, and delay the Keystone XL oil pipeline until further studies are complete, although Congress is pushing the president to make a quicker decision. Also, EPA has delayed the long-awaited New Source Performance Standards for refineries and utilities, coal ash regulations, and financial responsibility rules for the hard rock mining, oil and gas, and chemical industries.

At the same time, there are still plenty of environmental issues in play where engaging the administration and Congress can make a difference. Among the most significant are:

- CAFE Standards: In late 2012, EPA and the National Highway and Traffic Safety Administration proposed corporate average fuel economy rules that set new mileage standards and greenhouse gas limits for auto manufacturers. The rules are expected to be issued in early 2012.
- Hydraulic Fracturing: A number of actions on hydraulic fracturing are expected in 2012.
  - In April, EPA will propose new air emissions limits for oil and gas processing plants;
  - Before the election, EPA will issue a study on hydraulic fracturing, which could be a regulatory "game changer;"
  - Throughout the year, the agency will continue efforts to develop effluent guidelines for hydraulic fracturing, continue its review of a petition from the environmental community on whether to regulate oil and gas wastes as hazardous, and initiate chemical disclosure requirements under the Toxic Substances Control Act.

- Controlling Air Emissions: Just before the holidays, EPA published the long-anticipated, so-called utility MACT rule to control mercury emissions from power plants. On the heels of this action, 2012 will be another busy year for regulating air emissions from utilities and manufacturers. EPA's Cross State Air Transport rule, which regulates pollutants from upwind sources, became effective on January 1, 2012. EPA also expects to issue final boiler MACT and incinerator rules that set emissions limits for hazardous air pollutants in April 2012.
- Regulating Water and Waste: In July 2012, EPA will issue its long-awaited cooling water rule to regulate cooling water intake structures at power plants. Also before the election, EPA expects to issue a decision on whether to regulate coal ash as a hazardous waste, or to do so under less stringent solid waste standards.

With the election approaching, 2012 will be a year of significant uncertainty. Congressional hearings and controversy over EPA rules will continue. Some regulations will be delayed until after the election, while others are likely to become the subject of eventual legislative or regulatory compromise. The EPA budget will be cut, and many legislative "riders" relating to EPA regulations will pass the House, but the riders will find less support in the Senate.

Although 2012 will be a year of political posturing and provide a temptation to kick the can down the road, it will also be a year where legislative compromise and new regulatory proposals can happen rather quickly. This makes it even more important for interested parties to monitor the regulatory and legislative situation closely, and to watch for opportunities both in Congress and by working with the administration to help shape environmental policy and regulations.

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Resolution of Chemical Industry Disputes under the EU's "REACH" Regime

European Union (EU) companies manufacturing or importing one ton or more of certain chemical substances must register these activities with the newly established European Chemicals Agency (ECHA). The new system, which is set out in Regulation (EC) No 1907/2006, known as REACH (Registration, Evaluation, Authorization, and Restriction of Chemicals), requires the industry to collect and share the data on substances in order to register them with ECHA. The ECHA is to evaluate this data and is authorized to impose stringent regulation of dangerous substances or ban them altogether. Under REACH, the term "chemical substances" is broadly defined to include not only a wide range of substances, but also products such as paints and cosmetics that contain them.

Unlike other EU regulatory legislation, REACH foresees a variety of mechanisms for resolving disputes arising out of this framework. REACH provides for the right to challenge certain decisions of ECHA and the European Commission before the EU General Court, a lower, independent court attached to the EU Court of Justice (ECJ). REACH also provides for the appeal of other ECHA decisions to the Board of Appeal—a dispute resolution body which is part of ECHA. REACH also recognizes a contractual right to arbitrate certain disputes and acknowledges that certain rights conferred by REACH may be pursued before national courts.

Increasingly, ECHA's and the commission's decisions with regard to REACH obligations are being challenged, either in court or before the Board of Appeal. To date, very few of these challenges have been successful; however, and companies considering such a challenge need to carefully consider how, where, and when it is most appropriate to do so.

ECHA's Board of Appeal

The ECHA Board of Appeal is set up within the agency to guarantee the processing of appeals for persons affected by certain decisions taken by ECHA. The Board of Appeal—whose members are required by REACH to be independent—is responsible for deciding on appeals relating to, among other matters, rejections of registrations, decisions on sharing data in the case of substances, examinations of testing proposals, and evaluations of registration dossiers. To have standing to pursue an appeal, the decision at issue must be addressed to, or be of direct and individual concern to, the appellant. Appeals will be decided (by majority vote) by three members of the Board of Appeal; this procedure is similar to that for appeals to the EU General Court or ECJ.

To date, eight appeals have been lodged with the Board of Appeal, and of these, seven have led to a published decision. Of those seven appeals, two were withdrawn and one has been satisfied. REACH provides that ECHA's Executive Director may rectify the contested decision within 30 days of the appeal being filed. On that basis, three appeals were discontinued after ECHA rectified the decision in question.

Actions before the General Court

Under REACH, decisions of the Board of Appeal may be brought before the General Court. The General Court may also hear challenges to decisions of the ECHA as to which there is no right of appeal to the board, and with regard to European Commission decisions on REACH obligations. In cases where ECHA has an obligation to take a decision but fails to do so, the party concerned may bring proceedings for failure to act before the General Court.

A number of challenges against ECHA and commission decisions concerning the early stages of the authorization process have already been brought before the General Court. Several of these have recently been held to be inadmissible on the grounds that (i) the decision was not of "direct concern" to the applicant; (ii) the decision challenged did not produce legal effects and thus was not a challengeable act; or (iii) the challenge was out of time. Moreover, the European Court of Justice has already given its first two judgments on questions of interpretation of REACH that had been referred by the UK High Court. In addition, a number of appeals have been logged against General Court decisions.

The Role of National Courts

National courts also have a role under REACH. Specifically, in the event of data sharing between companies—either for existing data or for new data being developed via testing—REACH provides that one party is entitled to have a claim on the other party for an equal share of the cost incurred, or to prohibit the other party from manufacturing, importing, or selling the substance, provided that certain conditions are satisfied. In both cases, REACH provides that the entitled party may bring a claim before the national courts. More generally, where a question on the interpretation of REACH arises in proceedings before a national court, that court may—and in certain circumstances must—refer the question to the ECJ for judgment.

Arbitration under REACH

Last, but not least, REACH recognizes circumstances whereby parties in disagreement may choose to arbitrate. Specifically, when companies or individuals cannot agree on sharing certain information where this is mandatory under REACH, or cannot agree on cost sharing for tests to develop data, they can submit the matter to an arbitration tribunal whose decision the parties agree to accept.

The Future

To date, the REACH dispute resolution regime remains barely tested for most parties subject to REACH. However, given the scope of REACH and its applicability and potentially significant impact on industry, there is likely to be a significant escalation of REACH-related disputes in the near future. There have been recent reports of concerns in the General Court, in particular over the likely number of technically complex REACH-related appeals that the court will be called upon to deal with in the next few years and beyond. Companies subject to REACH should therefore be vigilant in producing the best argument before ECHA's Board of Appeal or the General Court and ensuring that proceedings are lodged in a timely fashion.

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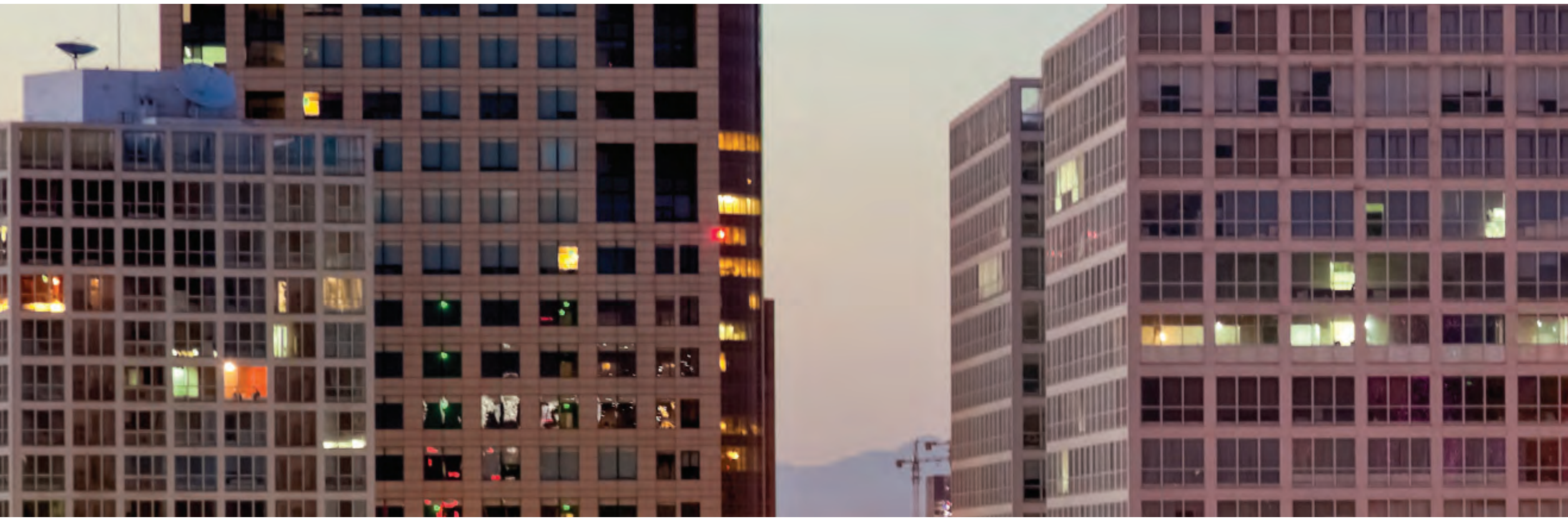
Newly Introduced PRC National Security Review Scheme



Foreign investors seeking to acquire Chinese domestic companies may encounter a number of different regulatory review processes. As a general matter, all foreign investments into China are subject to review and approval by the Ministry of Commerce (MOFCOM) or its provincial counterparts. In cases that raise concerns regarding the competitive impact of a transaction, a separate review will be conducted by the antitrust division of MOFCOM, pursuant to the Chinese Anti-Monopoly Law (AML), promulgated in 2008.

In addition to a competition review, the AML also provides for a state security review in appropriate cases, but until recently, no specific rules had been adopted to implement these provisions of the AML. That gap was filled when, on February 3, 2011, the State Council of China issued the *Circular on the Establishment of Security Review System in Respect of Acquisition of Domestic Enterprises by Foreign Investors* (Circular), which serves as a legal basis for China's first national security review system. MOFCOM subsequently issued procedural rules to implement the Circular on August 25, 2011, the *Provisions on the Implementation of the System for Security Review of Acquisition of Domestic Enterprises by Foreign Investors*.

Two Triggering Industrial Categories

The new framework provides that a national security review will be conducted if foreign investors seek to acquire a target within the following two industrial categories:

- *Defense industry*. Any investment in Chinese domestic military industrial enterprises, military industry supporting enterprises, and enterprises located in the vicinity of pivotal and sensitive military facilities, or other entities associated with the safety of national defense.
- *Other key industries*. A controlling interest in any Chinese domestic enterprise involved in important agricultural products, energy and resources, basic infrastructure, transportation services, key technologies, and equipment manufacturing. This would include not only holding a majority of voting shares, but also cases in which the foreign investor obtains material influence over shareholder or board meetings, or any other situation causing transfer of actual control to foreign investors in areas such as operational decisions, financial affairs, or human resources and technologies. It also includes situations in which a controlling interest is obtained through nominee holdings, trusts, multi-reinvestments, contractual control arrangements, etc.

Reviewing Agency and Focuses

The Circular provides for national security reviews to be conducted by a cross-ministerial national security review joint committee (Joint Committee), led by representatives of the State Council, the National Development and Reform Commission, and MOFCOM, with the involvement of representatives of the industrial ministries relevant to the business sector involved.

Foreign investors who believe that a proposed transaction may fall within the scope of national security may initiate the review process themselves by filing a review application with MOFCOM. In addition, other parties, including relevant Chinese governmental departments, industry associations, enterprises in the same industry, and upstream or downstream enterprises, can also propose that the Joint Committee undertake a security review.

Although the Circular does not provide a precise definition of "national security," it describes its mandate in terms that appear to be substantially broader in scope than the national security reviews conducted by the Committee on Foreign Investment in the United States (CFIUS). Specifically, a CFIUS review will not consider the potential economic consequences of a transaction, unless the transaction might threaten U.S. national security. By contrast, the Chinese Joint Committee has indicated that in every national security review it will consider the impact of the transaction on (i) the stable operation of the national economy; (ii) the basic living circumstances in society; (iii) national defense security, including the capacity for domestic product manufacture and for provision of domestic services, and relevant equipment and facilities needed for national defense; and (iv) the capacity for research and development of key technologies related to national security.

The national security review system represents an additional layer of government review of foreign investment activities in China. The national security review may occur in parallel with MOFCOM's competition review in cases where there is a concern about the market impact of a transaction. As these reviews are conducted by separate divisions of MOFCOM, parties can expect to expend additional time and money in connection with these processes.

Conclusion

As with other areas of regulation in the PRC, foreign investors will need to pay close attention to their strategies for communicating and interacting with the relevant regulatory bodies. We are not yet aware of any national security reviews having been conducted to date. Given that these are new and relatively concise regulations, many issues remain unclear, such as precisely what information will be required in the various application documents and which industry sectors fall within the "important" sectors as to which a controlling interest requires approval. In addition, it remains to be seen how transparent the review process will prove to be.

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Significant Legal Developments in Taiwan in 2011

In 2011, Taiwan rolled out several new laws and amendments to cope with increasing concerns in the areas of personal data protection, anti-corruption efforts, and antitrust issues.

Anti-corruption Law

Under Taiwan law, government officials are subject to criminal liability for receiving or attempting to receive a bribe, without regard to whether the bribe was offered in exchange for the violation of an official duty. Until recently, however, a person paying or offering a bribe has been subject to liability only when an improper benefit was offered to induce the official to violate his or her duties. Thus, while it was a crime for an official to accept a facilitating payment to perform an act that the official was already obligated to do, persons offering such payments were not in violation of the law.

Facilitating payments are now prohibited as a result of a 2011 amendment to Article 11 of the Statute for Punishment of Corruption, reflecting the Taiwan government's determination to crack down on corrupt activities. Now, any person who offers, promises, or delivers a bribe or other illegitimate benefit to a governmental official—regardless of whether the actions of the official would violate their duties—will be subject to imprisonment for up to three years and/or a fine of no more than NT $500,000 (approximately US$170,000).

While it is now a crime to offer a facilitating payment to a Taiwan official, the amended Article 11 provides that any person who makes or offers such a payment will be exempted from punishment if he or she voluntarily surrenders before the matter is investigated by the authorities. Surrender once an investigation or related trial has been initiated will mitigate but not eliminate any penalty. By encouraging the flow of information from bribe payers, Article 11 seeks to overcome difficulties that prosecutors have often encountered in seeking to proceed against government officials who have taken bribes.

Personal Data Protection Law

In 1995, Taiwan first promulgated its Computer-Processed Personal Data Protection Law (CPDPL) regulating the collection, processing, and use of "personal data" by companies in certain designated industries, including hospitals, schools, and companies involved in telecommunications, finance, security, insurance, mass media, and credit investigation. These industries were required to register with the competent authorities before they could collect, process, and use personal data. The majority of companies in Taiwan were not subject to this CPDPL when collecting, processing, and using personal data, and most multinational companies were able to move without restriction the personal data of employees, retail customers, and suppliers out of Taiwan for processing in other countries.

In light of the increasing concerns about the manipulation of personal data, the government in 2010 determined to extend the CPDPL's restrictions to all industries and to all personal data regardless of whether or not such data is processed by computer. The title of the CPDPL was amended to become the "Personal Data Protection Law," to abolish the industry designation and registration systems, and to extend application of its restrictions to all industries.

Among other provisions, the new Personal Data Protection Law imposes an obligation on the collector of personal data to disclose to the data subject the name of the collector, the type of personal data being collected, the purpose of its collection, the type of personal data collected, the period and the geographic area of use, the names of users of the data, and the method of use. These disclosure obligations are likely to be a substantial burden on both Taiwanese and multinational companies and effectively limit their ability to collect, use, and transmit personal data, even those of their own employees, outside of Taiwan to their overseas affiliates.

Due to the controversy caused by the new Personal Data Protection Law, the effective date of the Personal Data Protection Law has yet to be decided by the executive branch of the Taiwan government.

Antitrust Laws

In the past few years, several Taiwan companies with international operations have been charged with violations of the antitrust laws in other jurisdictions. In order to educate Taiwan-based entities and reduce the risk that they may violate the antitrust laws of other jurisdictions, the Taiwan Fair Trade Commission (FTC) promulgated in 2011 a *Code of Conduct for Compliance with Antitrust Laws by Enterprises* (Code of Conduct). The Code of Conduct sets out certain preventive measures enterprises may take, and certain types of behavior that they should avoid, in order to minimize the risk of violating antitrust laws in other jurisdictions.

Although the purpose of the Code of Conduct is to provide guidance to Taiwan enterprises, it also offers insight into the FTC's view of business practices that violate the Taiwan Fair Trade Law. Therefore, it is advisable for foreign entities that have business operations in Taiwan to take note of those actions that the FTC has advised

against under the Code of Conduct. Among the examples identified by the Code of Conduct are the following:

- **Concerted actions:** The Code of Conduct notes that companies should adhere to certain practices to avoid potential concerted actions in violation of antitrust laws:
    - Consult with antitrust law professionals before making contact with or entering into any agreement with a competitor.
    - Refuse to discuss certain sensitive information, such as price, quantity, or capacity utilization rate, with a competitor.
    - Be cautious about communications or telephone messages between companies, and make written records of the meetings, telephone conversations, or times and places of meetings with competitors.
    - Avoid making any announcement or press release or convening any meeting under the name of an industry association to allow competitors to jointly adjust prices or capacity, or to create opportunities to discuss sensitive competition information.
- **Restrictions on resale price:** The Code of Conduct advises against any of the following actions that would have the effect of restricting resale prices:
    - Imposing any restriction on resale prices or setting a minimum sales price.
    - Imposing any link between the price quoted by its distributors and the resale price quoted by a competitor's distributors.
    - Forcing distributors to maintain resale prices by means of coercion, inducement with interest, or delaying or cancelling the supply of products.
- **Abuse of a monopoly position or favorable market power:** The Code of Conduct advises against any of the following actions by a company which has strong market power:
    - Exclusive distribution is only allowed when there is a reasonable justification. But when the enterprise has a strong market power, the period of exclusivity must be reasonably limited.
    - Absent reasonable justification, no territorial restriction will be permitted.
    - Pricing cannot be lower than the cost in order to eliminate competition.

Conclusion

The foregoing amendments and guidelines suggest the need for multinational companies to revisit their internal guidelines regarding anti-corruption, personal data collection and transmission, and antitrust issues. It is expected that the Taiwan government will be more and more active in regulating the manner of enterprises in doing business in Taiwan, especially in the areas of unfair competition and privacy.

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Developments and Issues in Asia Climate Policy and Law

In many ways, it is business as usual around Asia in relation to national and international efforts to advance climate change policy and law.

Following the international climate negotiations held in Durban from November 28 to December 11, 2011, and fortified by an international agreement that included the establishment of a second commitment period to the Kyoto Protocol (legally binding emissions reductions for the period 2013 to 2017 or 2020) and the launch of the Green Climate Fund, governments in Asia are pressing ahead with domestic climate mitigation and adaptation action. Nevertheless, difficult global economic conditions have affected the ability and will of governments to take bold action, and there has been a wide disparity in the level and type of commitments and action put forward by countries in Asia.

Also weighing on the minds of developing country, non-Annex I Parties of the Kyoto Protocol in Asia is the position of the European Commission on the status and eligibility of Clean Development Mechanism (CDM) projects and Certified Emissions Reductions (CERs) generated by those projects hosted in their countries. A key concern of Asian non-Annex I Parties (and indeed of those in other parts of the world) is the apparent restriction in the use of CERs from CDM projects registered after January 1, 2013 for compliance in the European Union Emissions Trading Scheme (EU ETS) under the amended Directive 2003/87/EC (Amended Directive), except for CDM projects registered after that date hosted in least developed countries (LDCs). While the Amended Directive provides for the possibility of using CERs from CDM projects hosted in non-LDC countries registered after January 1, 2013 where the host country has concluded bilateral or multilateral agreements with the EU, no such agreements have been concluded to date.

Another controversial issue in Asia relates to the extension of the EU ETS to the aviation sector, which has provoked heated protests from non-EU carriers, including Asian airlines that fly into and out of the EU. Asian governments, many of whom wholly or partly own their national carriers, have started to take more vocal positions on the implementation of the EU ETS to aviation. In a decision dated December 21, 2011, the European Court of Justice rejected the challenge of the Air Transport Association of America and a number of U.S. airlines on the basis that the inclusion of international aviation in the EU ETS is contrary to international law and to the Chicago Convention, the Kyoto Protocol, and the Open Skies Agreement. This decision effectively limits if not ends further EU legal challenges, increasing the prospect of retaliatory trade measures by disaffected countries and WTO legal challenges.

Beyond international climate negotiations, Asian countries have been working at different paces in establishing and advancing their domestic climate change strategies, plans, and agendas. Comments on selected Asian countries are set out below.

Cambodia

Climate vulnerability threatens Cambodia, as it does many LDCs. Cambodia is implementing a pilot project within the framework of reducing emissions from deforestation and forest degradation as its Nationally Appropriate Mitigation Action (NAMA). The country is one of the Asian LDCs most likely to benefit from the implementation of new CDM projects after 2012 by virtue of the Amended Directive.

China and Hong Kong

The main driver of climate policy and action in China and the Hong Kong Special Administrative Region is the 12th National Five Year Plan (12th FYP). The 12th FYP aims to shift China to a low carbon economy and sets a 17 percent carbon intensity reduction target for the period 2011 to 2015. This is consistent with China's national carbon intensity reduction target of 40 to 45 percent by the year 2020 (base year 2005), but effectively leaves more aggressive action for the next five-year plan.

The Hong Kong government has proposed an even more aggressive carbon intensity reduction target of 60 to 65 percent by 2020 (adopting a 2005 base year) but has yet to implement specific actions following the closing of a public consultation on climate change policy in December 2010.

The Guangdong provincial and Hong Kong governments recently indicated that they are cooperating in the establishment of a greenhouse gas pilot emissions trading scheme (an earlier sulfur oxides, nitrogen oxides, and particulates pilot emissions trading scheme was unsuccessful), which is one of six pilot emissions trading schemes under development in China pursuant to the 12th FYP. (The others are the cities of Beijing, Chongqing, Shanghai, Tianjin, and Hubei Province.) Guangdong government officials have suggested that the Guangdong-Hong Kong pilot scheme would accept international carbon credits for compliance. A climate change law is also under development and is expected to be promulgated during the 12th FYP period. While a national carbon tax is under consideration, it is not expected to be implemented in the near future.

India

The National Action Plan on Climate Change of 2008 (Plan) remains the blueprint of India's policy and action on addressing climate change mitigation and adaptation. The Plan outlines eight core national missions up to 2017, targeting energy use, energy efficiency, renewable energy, and building research capacity on climate change issues. India has committed to a voluntary emissions intensity reduction target of 20 to 25 percent (2005 base year), exclusive of agricultural emissions, by 2020. India's 12th Five Year Plan, expected to be launched on April 1, 2012 will outline India's low-carbon growth strategy. India is not developing a domestic emissions trading scheme or considering the implementation of a carbon tax.

Indonesia

On September 26, 2011, the president of Indonesia signed Presidential Decree No.#61 of 2011 (Decree) on a National Action Plan to reduce greenhouse gas emissions. The Decree confirmed Indonesia's voluntary emissions reduction target of 26 percent or up to 41 percent with international support by 2020. The National Action Plan is intended to provide guidance to Indonesian government ministries and local governments. Local governments are required to develop regional action plans. Activities under the National Action Plan are grouped under agriculture, forestry and peat lands, energy and transport, industry, and waste management. Indonesia is not developing a domestic emissions trading scheme or considering the implementation of a carbon tax.

Japan

As the sole Asian Annex I Party, Japan has pledged a target of 25 percent emissions reduction by 2020 (1990 base year), contingent on a fair and effective international agreement. Efforts to enact this 25 percent emissions reduction target into law, along with legislation to implement a carbon tax and a cap and trade scheme have not been successful to date. On a brighter note, the Tokyo Metropolitan Government continues to implement a mandatory urban cap and trade scheme (launched in 2010) to cover emissions from 1,400 building installations. This scheme targets greenhouse gas emissions reductions of 25 percent by 2020 (2000 base year). Two compliance periods run from 2010 to 2014 and 2015 to 2019. Japan is not considering the implementation of a carbon tax.

Taiwan

The legal status of Taiwan as an independent state is controversial and has made it difficult for Taiwan to participate fully in international climate change negotiations and action. Taiwan is not a party to the United Nations Climate Change Conference (UNFCCC) or the Kyoto Protocol. However, Taiwan is newly industrialized and has taken significant steps domestically to reduce greenhouse gas emissions. The country continues to seek observer status in international climate negotiations. Domestically, the Greenhouse Gas Reduction Act is under review by the Taiwanese legislature and on April 18, 2011, the Environmental Protection Administration issued the Greenhouse Gas Reduction Credit Accounting Management Guidelines to facilitate domestic carbon offset projects.

Singapore

Singapore has pledged that the implementation of its NAMAs will lead to a reduction in greenhouse gas emissions of by 7 to 11 or 16 percent below business as usual by 2020. The latter target is contingent on a legally binding global agreement in which all countries implement their commitments in good faith. The Singapore government is currently working on the National Climate Change Strategy 2012, which will provide a framework and overall strategy to tackle climate change related issues. It is intended to outline policies and measures to reduce emissions, and to cope with the impacts of climate change and build on the country's capabilities to tap opportunities arising from climate change. Singapore is considering the feasibility of a domestic emissions trading scheme or the implementation of a carbon tax but nothing concrete has emerged to date.

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Telecommunications, Media and Technology in the U.S.: Availability of Additional Spectrum for Wireless Broadband, Net Neutrality, and Pending Legislation

Recent events suggest that 2012 will see increased regulatory and legislative activity in the telecom, media and technology (TMT) sector.

Spectrum Shortage for Mobile Wireless Services

One of the flagship policy initiatives of the Federal Communications Commission (FCC) during the first year of the Obama administration was the adoption, pursuant to the American Recovery and Reinvestment Act of 2009, of the National Broadband Plan in order to identify new sources of radio spectrum to meet the seemingly insatiable demand for wireless broadband services. In addition, since the terrorist attacks of September 11, 2001, the public safety community, the FCC, Congress, and the mobile wireless industry have tried to adopt a consensus plan for a nationwide public safety network that could improve the critical operational communications of first responders and law enforcement. Both of these initiatives have proven to be challenging to implement for a variety of reasons.

In the absence of new FCC spectrum auctions to match increasing demand for wireless broadband network capacity, the wireless industry has taken its own steps to obtain spectrum, such as the recent effort of AT&T to acquire T-Mobile USA and Verizon Wireless effort to acquire advance wireless service licenses from several cable companies. AT&T, however, abandoned its effort to acquire T-Mobile USA after it failed to persuade the FCC and the U.S. Department of Justice that the acquisition would serve the public interest and promote competition. The Verizon Wireless acquisition, as of this writing, is currently under review by the FCC and the Department of Justice. The government's more aggressive approach to reviewing the AT&T transaction suggests that private sector efforts to obtain additional spectrum by way of consolidation will undergo significant scrutiny in 2012. As a result, the issue of whether and how mobile wireless operators could obtain new spectrum will likely be an important issue for the industry in 2012 and beyond.

Meanwhile, recent efforts to find an acceptable compromise that would lead to the creation of a nationwide public safety network continue to get derailed in Congress amidst an increasingly partisan political environment. In June 2011, the Senate Commerce Committee approved a bill, S. 911, which would authorize the FCC to hold "incentive" auctions for broadcast spectrum, with a portion of the

The issue of whether and how mobile wireless operators could obtain new spectrum will likely be an important issue for the industry in 2012 and beyond.

proceeds going to fund the public safety broadband network and to compensate broadcasters willing to vacate their channels. An analogous spectrum bill introduced by the Republican chairman of the House Energy and Commerce Subcommittee on Communications and Technology passed the full House as part of a year-end package to extend the expiring payroll tax cut. The spectrum provisions, however, were dropped from the Senate version of the same short-term extension of the payroll tax cut passed at year end. As of this writing, the payroll tax cut extension is the subject of a partisan impasse between the House and Senate, which makes the inclusion and passage of spectrum provisions in any final legislation uncertain at best.

Universal Service Fund/Intercarrier Compensation Reform

In an effort to assure that both fixed and mobile voice and broadband services are available to all Americans, on November 18, 2011, the FCC released a report and order that it said "comprehensively reforms and modernizes the universal service and intercarrier compensation systems." The new rules require all eligible telecommunications carriers that receive funding from the Universal Service Fund to offer broadband services to their customers. The proposed reforms are intended to expand broadband coverage to 7 million customers in underserved areas. The FCC described the development of nationwide broadband services as the "universal service challenge of our time" and indicated it would continue to remain one of the FCC's top priorities. Various parties have appealed the FCC's new rules, however, and those appeals were recently consolidated in the United States Court of Appeals for the Tenth Circuit.

FCC Net Neutrality Regulations Become Effective Subject to Court Challenges

The FCC's "net neutrality" regulations, which require broadband service providers to handle lawful online content in a nondiscriminatory manner and to increase network management transparency, took effect on November 20, 2011. The new rules survived months of Congressional challenges and debate, including House passage and Senate rejection of a resolution intended to overturn them. Although the regulations are now in effect, other parties continue to pursue legal challenges, including proponents of net neutrality who have asserted that the rules did not go far enough with respect to wireless broadband access services. Those various appeals were consolidated into an action before the U.S. Court of Appeals for the District of Columbia Circuit. There appears to be a significant possibility that the FCC's regulations will be overturned in whole or in part, given the D.C. Circuit's recent decision in *Comcast Corp. v. FCC*, (2010), which rejected the FCC's claim of ancillary jurisdiction over Comcast's Internet network management practices, including Comcast's decision to interfere with consumers' use of certain peer-to-peer applications. The D.C. Circuit's decision on the net neutrality regulations, expected in 2012, will be closely scrutinized by the entire TMT industry.

These and other issues germane to the TMT space can be followed on the K&L Gates TMT blog, www.tmtlawwatch.com.

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Further Steps Towards the Harmonization of Copyright Law in the European Union: An Overview on the European Commission's Regulatory Approaches

Despite some substantial progress in its harmonization during the last decades, copyright law in the member states of the European Union is still heterogeneous in many respects. In order to accelerate the process of harmonization, the European Commission is preparing some significant regulatory developments, some of them planned to be adopted in 2012. One of the main objectives in this process is the development of a digital single market in Europe.

Legislative Initiative on Collective Rights Management

As a contribution to the development of a digital single market, the Commission plans to adopt a legislative initiative on the facilitation of collective rights management in March 2012. Collective rights management refers to the practice whereby individual right-holders entrust their rights to an organization such as a collecting society to manage rights on their behalf. The initiative was announced in the Digital Agenda for Europe and in the Commission's Intellectual Property Rights Strategy.

The Commission sees an increasing need for harmonization in order to facilitate the provision of services by collecting societies, above all the cross-border licensing of online services. Considering the main policy objectives, the initiative will have a double focus. On the one hand, it aims at a general level of governance and transparency applicable to all collecting societies. On the other hand, it is planned to set specific rules for the licensing of online music.

Green Paper on the Online Distribution of Audiovisual Works

Beyond the facilitation of collective rights management, the Commission will report on the need for additional measures to contribute to a digital single market in Europe. The report will be the result of a debate initiated by the Green Paper on the online distribution of audiovisual works published in July 2011 and the reactions of stakeholders that have been contributed by November 2011. A Green Paper released by the European Commission is a discussion document intended to stimulate debate and launch a process of consultation on a particular topic.

As a part of the debate, the Commission is assessing legislative options specifically addressing the clearing of copyright and related rights for cross-border online media services. The Green Paper has a focus on the right clearance for audiovisual works (*e.g.*, online video and music transmission), but is not necessarily limited to these types.

One of the options being discussed in the Green Paper is to extend the "country of origin" principle as set out in the Satellite and Cable Directive to the delivery of programming online. Following this principle, the applicable law would be solely that of the country where the online transmission originates. As of now, the online distribution generally has to be in accordance with the law of any state in which the programming has an audience.

In the context of the Intellectual Property Rights Strategy, the Commission also examines the more far-reaching approach of the creation of a comprehensive unitary European Copyright Code. Such a code could be based on a consolidation of the existing EU copyright directives and harmonize all the essential aspects of copyright law in the European Union. It has to be noted, however, that such an ambitious project is not expected to be realized in the near future. In addition to such a code, the feasibility of creating an optional unitary copyright title on a voluntary basis and co-existing with national titles is being assessed.

As to the question of licensing, the Commission also discusses the options for developing data management systems for the ownership of rights in audiovisual works. This includes exploring the ways in which sources of rights ownership information could be shared across sectors, considering the need for rights clearance for pre-existing works and subject matters incorporated in the audiovisual work.

Beyond the discussion of the copyright licensing framework, the Green Paper covers the question of the remuneration of authors and performers for the online use of their works and assesses whether additional measures are to be taken to ensure that the remuneration is adequate. One of the measures being discussed is to ensure the remuneration of authors on a per-use basis.

Finally, the Green Paper deals with certain special uses of audiovisual works and beneficiaries of exceptions. It asks whether legislative changes are required to increase legal certainty for film heritage institutions and poses questions in relation to access by persons with disabilities to cultural materials.

Permitted Uses of Orphan Works

The Commission has also published a proposal for a directive on certain permitted uses of orphan works that is expected to be adopted in 2012.

Its aim is to establish common rules on the digitization and online display of orphan works, *e.g.*, books, newspaper and magazine articles, and films that are still protected by copyright but whose authors are not known or cannot be located or contacted to obtain copyright permissions. The Commission fears that orphan works that are part of the collections held by European libraries might remain untouched if no common rules are developed to make their digitization and online display legally possible.

Members Reactions on the "Murphy Judgment"

In October 2011, the "Murphy Judgment" of the Court of Justice of the European Union has drawn the attention of almost anyone involved in the distribution of audiovisual content. While its impact on current business models is still being discussed, members of the Commission have joined the debate in order to clarify certain aspects. Michel Barnier, Commissioner for Internal Market and Services, made clear that licenses still do not generally have to be offered or acquired for the whole of Europe. And Neelie Kroes, European Digital Agenda Commissioner, has also underlined that the voluntary decisions of right-holders are to remain at the center of the licensing system. For a comprehensive analysis of this case, please refer to the article "(Sports) Right-Holders at the Crossroads?".

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EU Data Protection: Poised for Reform in 2012

Since 1995, the EU has operated under a comprehensive system of regulation to protect personal data and privacy. This regime includes such principles as the fair collection of data, a right to object or consent to the disclosure of personal data to a third party, limited retention periods, and the creation of independent data protection authorities in each EU member state. Implementation of this EU legislation across the 27 EU member states, however, has been less than perfect, and despite the existence of a purportedly unified EU framework, companies spend more than €2 billion per year adapting to the disparate requirements of each specific national legislation, according the EU's Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding.

In late 2011, Commissioner Reding made public her proposals for reform of these rules, and it is anticipated that in 2012 this framework will be broadly reorganized in an effort to minimize national deviations.

At about the same time that Commissioner Reding's proposals were announced, the Court of Justice of the European Union (CJEU) rendered a decision that illustrates the need for full harmonization of European regulation in this area. In a decision dated November 24, 2011, the CJEU held that in implementing the provisions of Directive 95/46 on personal data protection (Directive), Spain had gone beyond the scope of the Directive by imposing additional requirements on the collection and processing of personal data by organizations without the consent of the data subject.

EU privacy regulations apply primarily to entities known as "data controllers" (*i.e.*, the entity in charge of the purpose and means of the data use or "processing"). Article 7(f) of the Directive provides that, as a general matter, prior consent of the subject of the data (a data "subject") is not required when the processing of the subject's data is "*necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject.*" Implicit in this formula is a balancing of interests between the users of data and the subjects of it.

In implementing the EU privacy legislation, Spain had included in its organic law no. 15/1999 on data protection (Spanish Act), a provision that only data contained in material accessible to the public could be collected without the prior explicit consent of the data subjects. In its November 2011 decision, the CJEU found that such restriction did not comply with the Directive.

The Spanish Act effectively prohibited the use of data not derived from public sources without the consent of the data subject. A balancing of the legitimate interest of the data controller and the fundamental rights and freedoms of the data subjects was required under the Spanish Act only in cases where the data originated from public sources. As a result, the Spanish data protection authority has invariably required the prior explicit

consent of the data subject for data from any other source.

The Spanish Act's variance from the requirements of the Directive broadly affected the Spanish market for direct marketing and commercial information. Beyond this, the Spanish Act sometimes served as a guidepost for those interpreting the Directive, leading them to state as a general principle that all collection of personal data was subject to the prior express consent, regardless of the source material. Yet this was neither the wording of this article, nor the intent of the EU Directive. Though Article 7 starts off with "*Member States shall provide that personal data may be processed only if (…) the data subject has unambiguously given his consent*", this is quickly followed by an "or" and a list of five other possibilities for data collection that may occur without the data subject's consent.

These five other possibilities were not meant to be subsidiary to the consent requirement. Consent of the data subject was intended as one of several alternatives for the proper collection and processing of personal data—and this is just what has been affirmed by the CJEU decision. Under EU law, the consent solution is the least preferable option for both companies and data subjects; indeed, consent must be freely given, explicit, and discretionary. It may not allow the adoption by a company of a long lasting and global commercial policy, as each data subject's will could potentially put an end to it. In addition, the withdrawal of consent may never allow a data subject to rewrite the past and "reclaim" the personal data which may have been transferred throughout the world.

In its decision, the CJEU also declared that Article 7(f) was unconditional and sufficiently clear. Therefore, it is of direct effect and may be raised by anyone, and must be enforced under the national jurisdiction of all member states.

This decision comes as a strong support to Viviane Reding's efforts to truly harmonize the European legislation, which should move forward in 2012. European and U.S. companies that are affected by EU privacy regulations will need to be alert to developments in 2012 and protect their interests. Indeed the benefits of the upcoming harmonization are likely to facilitate compliance by multinational data controllers. At the same time, companies must be alert to new efforts that might focus on data subject consent as the sole means of enabling data use.

Finally, the 2012 reform could threaten both North American and European economies if, further to Commissioner Reding's project, the applicable law criteria was to be amended. Since 1995, the establishment of the "data controller" is a secure and stable applicable law criterion.

However, the latest drafts published in December 2011 by the services of the EU Commission provided that EU privacy laws would apply to any company which targets its service to EU residents. If this criterion was finally adopted, the processing of personal data would become a giant puzzle for online service providers all over the world. If this option is confirmed in late January 2012, the remaining choice for multinational companies or Internet players will be between wishful thinking and lobbying initiatives.

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U.S. Patent Solutions: Big Changes in 2012

On September 16, 2011, the president signed into law the Leahy-Smith America Invents Act (AIA), which will substantially affect the way that patents are procured and enforced in the United States for all industries.

Many New Patent Rules in 2012

The AIA is the first major patent reform since 1983, with 150 pages in 37 sections. Consequently, the next 12 months will bring a flood of new regulations to implement the act. These new rules should be monitored closely to identify required changes in practice. While a few provisions were effective upon enactment of the AIA, most of the major provisions will become effective on or after September 16, 2012.

The Same Strategies; Faster Patents

Overall, the AIA may increase the value of patents over time and increase the speed and quality of action at the U.S. Patent and Trademark Office (PTO). However, it remains unchanged that any time new patentable inventions (including, for example, software, computer systems, non-human life forms, molecules, pharmaceuticals, devices, methods, business methods, processes, manufactured articles, computer enabled services, or computer enabled financial products) are developed, purchased, or used, then both offensive and defensive patent issues will be raised for the developer, seller, buyer, or user.

Some Highlights

The reforms in the AIA are primarily procedural and administrative. Major points about the act include:

1. The major patent strategies for business to increase shareholder value, remain in place. The AIA reforms are tactical and administrative and should increase the value of patents over time. As always, file early and file often. Patent what you sell, and how you sell. Enforce, monetize, and explain your patent portfolio. Out-patent your competition.
2. The major patent case law from the Supreme Court and federal circuit remains in place and is not overruled. Software, computer, and business method patents continue (except for tax strategy patents). Bio-tech and genetic engineering patents continue (except for human organisms).
3. Most financial patents will continue to be for software and computer systems that support operations, and not for financial products. However, financial product patents will continue. Tax strategies are now not patentable (although there never were many of them).
4. Prioritized (Expedited) Patents. The PTO has interpreted the AIA to permit it to accept requests, as of September 26, 2011, for prioritized (expedited) patent applications when a special fee is paid. The PTO targets final disposition of these prioritized applications within 12 months of granting priority. For software and computer-related and business method applications (where it is common to wait three years for a first office action), this acceleration should be a welcome option at the PTO. The optional procedure to expedite patent applications applies to both new application filings and certain pending applications. Also, there will be another option for priority (expedited) examination for inventions that are "important to the national economy or national competitiveness." However, there are no definitions or standards for these terms in the act.
5. Conversion to a first-to-file patent system from a first-to-invent system. There is a race to the patent office.
6. A new Inter Partes Review (IPR) proceeding to challenge patents.
7. A new Post Grant Review (PGR) proceeding to challenge patents. The director of the PTO has predicted that the IPRs and PGRs will move faster than federal district court patent cases. Therefore, he expects that there will be more reliance in federal patent litigation on PTO determinations in IPRs and PGRs, which in many cases will be disposed of prior to discovery or *Markman* rulings in parallel federal litigation. The director expects to see IPR or PGR results used in most future patent litigation.
8. A new Transitional Post Grant Review to challenge business method patents. This is effective for an eight-year transitional period. There are special standards to consider any request for a stay of any pending infringement actions.
9. A new supplemental examination.
10. There is a new defense to patent infringement based on prior commercial use for any patent, if the defendant shows that for the invention, (i) the defendant had internal commercial use, or sale of a useful end result, (ii) the use was more than a year before the patent filing date, (iii) the patent is for a

process or is used in a commercial process, and (iv) the defendant was acting in good faith.

11. A faster patent office; more fees, examiners, judges, and branch offices. The AIA increased PTO fees and gave fee-setting authority to the PTO. The PTO is proceeding to hire between 1,000 and 2,000 new examiners, within the next 12 months, to cut down the unprecedented delay in processing patent applications. (The PTO currently has about 5,000 examiners, so that would represent an increase of up to 40 percent.) Furthermore, the PTO is advertising for 100 new judges for the PTAB (Patent Trial and Appeal Board), to deal with the anticipated new load of IPRs and PGRs. Also, the PTO is proceeding with plans to set up its first three branch offices outside of Washington, DC. The new "mini-bus" appropriations bill recently passed by Congress allows the PTO to access all the fees it collects for FY2012, which should finance these expansion efforts, at least in part.
12. Prohibition of human organism patents;
13. Virtual patent marking is facilitated and some false marking cases are inhibited;
14. Best mode is eliminated as a grounds for invalidating a patent; although, oddly, best mode is not otherwise eliminated as a patent requirement.

The Devil in the Details: Stay Tuned for New Rules

The next 12 months will provide further insight into how the AIA will affect patent practices as the PTO adopts new rules to implement the various sections of the AIA. The devil is in the details and, to be sure, there will be plenty of details.

We can provide upon request a complete copy of the AIA, or a more detailed executive summary of the act's provisions.

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Labor Unions Gain Support Through Administrative Actions

During the 2008 presidential campaign, then-candidate Barack Obama pledged his continued support for the Employee Free Choice Act (EFCA), a bill he had co-sponsored in the Senate. The EFCA would have made it easier for labor unions to organize private sector workforces in the United States by, among other things, allowing unions to be certified as the exclusive bargaining representative of a workforce based on authorization cards presented by the union and without the need for a secret ballot election. The EFCA was controversial and met with stiff resistance in Congress. In a question-and-answer session on September 13, 2010, President Obama stated that while his administration continued to support the EFCA, its likelihood of passage that term was "not real high," since, "[f]rankly, we don't have 60 votes in the Senate" to pass it. Instead, President Obama told the group that his administration was trying to do "as much as we can administratively to make sure that it's easier for unions to operate and that they're not being placed at an unfair disadvantage." In other words, what the Obama administration was unable to accomplish through the legislative process it was attempting to accomplish administratively.

Since the president gave those remarks in September 2010, the National Labor Relations Board (NLRB or Board), the agency that administers federal law governing private sector employer-union relations in the United States, has taken a number of unprecedented steps in apparent fulfillment of this directive to make it easier for unions to organize employees.

Proposed Rulemaking to Speed Up Elections

One way the Board has attempted to promote private sector unionization is through a proposed rule designed to speed up the secret-ballot election process. The NLRB allows a union to become the exclusive representative of a group of employees only upon a showing that a majority of the employees in an appropriate unit wish to be represented by that union. The process by which the NLRB determines majority support normally begins when a union files a petition with the NLRB. After an investigation, the Board's regional office conducts a secret ballot election to determine if a majority of employees in the unit wish to be represented by the union. In cases where parties do not agree on terms of the election, the Board's regional office will conduct a pre-election hearing and, if necessary, conduct a post-election hearing to resolve challenges to voters or objections to the conduct of the election.

On June 21, 2011, the NLRB proposed a rule that would dramatically shorten the time between the filing of a union's election petition and the election by curtailing the ability of employers to be heard on pre-election and post-election disputes. Current Board procedures provide for no strict time periods in which hearings on such disputes must be conducted, because the scope and complexity of the issues involved will vary from case to case. However, the proposed rule would require the Board's regional directors to set a pre-election hearing to begin seven days after the hearing notice is served, and a post-election hearing to begin 14 days after the tally of ballots. The proposed rule also would limit the ability of employers to obtain administrative review of disputed pre-election and post-election rulings by the regional director.

The Board's only Republican member, Brian Hayes, sharply dissented from the proposed rule. He cited the Board's expeditious performance in most representation cases and noted that delays were the exception rather than the norm. In fact, for fiscal year 2010, the median time to proceed from the filing of the petition to the election was 38 days (below the Board's target of 42 days), and more than 95 percent of all initial representation elections had been conducted within 56 days of the filing of the election petition (surpassing the Board's target of 90 percent). However, Hayes argued that "by administrative fiat in lieu of Congressional action, the Board will impose organized labor's much sought-after 'quickie election' option, a procedure under which elections will be held in 10 to 21 days from the filing of the petition." He expressed the concern that the change would effectively deprive employers of a legitimate opportunity to express their views to employees about unionization prior to an election.

The NLRB's proposed rule also met with opposition in Congress. On November 30, 2011, the U.S. House of Representatives passed a bill that would effectively block the proposal. Among other things, the bill would require that no union election take place in fewer than 35 calendar days after the filing of an election petition. The bill would also provide that the first election hearing not take place until at least 14 calendar days after the filing of the petition.

The NLRB has not given up on its proposed rule. On November 30, 2011, the same day that the House bill was passed, the NLRB voted 2-1 (with Hayes again dissenting) to approve a resolution adopting a scaled-back version of its original proposal. The scaled-back version, scheduled to take effect on April 30, 2012, will limit the ability of employers to file pre- and post-election challenges to disputed rulings by the regional director but will not incorporate those portions of the original proposal that would shorten the election process. Nonetheless, the scaled-back version is the subject of a lawsuit filed by the U.S. Chamber of Commerce seeking to block its implementation.

Aggressive Pursuit of Injunctive Relief

The Board is also promoting private sector unionization through its aggressive pursuit of injunctive relief in organizing campaigns. Section 10(j) of the National Labor Relations Act authorizes the Board to petition a United States District Court for injunctive relief upon issuance of an administrative complaint alleging that an unfair labor practice has occurred. Historically, the NLRB has exercised its discretion to seek Section 10(j) relief sparingly, generally reserving petitions for such injunctions only for extraordinary cases. However, on September 30, 2010, the acting general counsel of the NLRB announced a new initiative to pursue Section 10(j) injunctive relief in all cases in which the NLRB contends that an employee was unlawfully discharged during a union organizing campaign. This change in enforcement policy has been accompanied by a marked increase in Section 10(j) actions. Whereas the NLRB filed a total of 86 Section 10(j) petitions for injunctive relief for the four-year period covering fiscal years 2007 to 2010 (an average of 21.5 per year), it filed a total of 45 such petitions in fiscal year 2011 alone. With this change in enforcement policy, the Board is now wielding its considerable power to seek Section 10(j) injunctive relief in further support of union organizing campaigns.

New Posting Requirements

The Board is also advancing union activity through a new posting requirement. Now scheduled to be effective on April 30, 2012, this rule is facing several legal challenges, including a suit by the U.S. Chamber of Commerce. If it survives, most private employers will be required to post a notice advising employees of their rights under the National Labor Relations Act. Among other things, the notice advises employees of their right to (1) organize a union; (2) form, join, or assist a union; (3) bargain collectively through representatives of their own choosing for a contract setting wages, benefits, hours, and other working conditions; (4) discuss union organizing, wages, and other terms and conditions of employment with co-workers or a union; (5) take action with co-workers to improve working conditions by raising complaints with the employer or a government agency and seeking assistance from a union; (6) strike or picket, depending upon the purpose or means of the strike or picket; and (7) choose not to do any of the above. The notice also advises employees that it is illegal for the employer to prohibit them from talking about a union during non-work time or distributing literature during non-work time in non-work areas. Similarly, it states that it is illegal for a union to threaten or coerce them to gain support.

The notice must be posted in a conspicuous place where other notices are displayed. It must also be linked to any internal or external website where other notices are posted.

Conclusion

The Democratic-controlled NLRB has taken a number of steps in apparent fulfillment of the president's directive to make it easier for labor unions to organize workers. It has proposed rules that would dramatically speed up the secret-ballot election process; it is aggressively pursuing federal court injunctions where unfair labor practices have been alleged in union organizing campaigns; and it has imposed a new posting requirement. These and other actions by the NLRB pose significant challenges for private sector employers in the United States seeking to resist union organizing in their workplaces. The transformation of the NLRB from an impartial enforcer of national labor law into an advocate for unionization will likely continue, and perhaps intensify, until after the 2012 election.

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Proposed Reform of UK Employment Law

As part of its continuing efforts to kick-start the economy, the British government has turned its attention to employment law reform. Some of its proposed changes have been promised for some time, but others are new. The aim is to provide employers with more protection and more flexibility in their dealings with employees, to redress the perceived imbalance between the rights of employers and employees, and to instill businesses with a new level of confidence. The proposals have met with predictable levels of support from employer bodies and criticism from unions.

The government's proposals were announced by Business Secretary Vince Cable in a speech to the Engineering Employers' Federation on November 23, 2011. On the same day, in a three-pronged approach to the reform of employment law, the government announced its written response to the *Resolving Workplace Disputes* consultation on the reform of the employment tribunal system, and two "calls for evidence," in which the government invites comments on how legislation is operating in practice, relating to the possible reform of collective redundancy consultation and the UK's legislation which protects employment rights on the transfer of a business (TUPE).

The government's proposals include the following:

- A requirement for all employment litigation claims to be submitted to ACAS, the independent conciliation service, before the claim can begin. This is to allow the parties to undertake a pre-claim conciliation process, if both agree to do so. The parties will have a one-month period in which to attempt to settle the claim, failing which the employee will then be free to commence legal proceedings;
- The introduction of the concept of "protected conversations," to allow employers to raise workplace issues "in an open way, free from the worry it will be used as evidence";
- A thorough review of the employment tribunals' rules of procedure to be carried out by the current president of the Employment Appeal Tribunal, Mr. Justice Underhill. In addition, the government has already announced an increase on the limit applicable to orders imposing court costs (which can be made against either party) from £10,000 to £20,000. The government has also announced that employers who are unsuccessful in their defense of claims may, at the discretion of the employment tribunal, be required to pay a financial penalty to the government of 50 percent of the amount of damages awarded to the employee, subject to a maximum ceiling of £5,000. The penalty will be reduced by 50 percent if paid within 21 days;

- For the first time, a requirement for employees to pay a fee in order to commence an employment tribunal claim, possibly with higher fees for higher value claims;
- A limitation on the scope of the UK's whistleblowing legislation by overturning case law that has established that employees are entitled to whistleblower protection for complaining about a breach of their own contracts of employment;
- Doubling the service period required before employees can claim unfair dismissal, from one year to two years;
- Simplifying recruitment by reviewing the extensive legislation that governs employment agencies, including a commitment to review in early 2013 the Agency Workers Regulations 2010, which give agency workers the right to be paid at the same level as comparable employees after 12 weeks' employment, and which only came into force on October 1, 2011; and
- Extending to all workers the right to request flexible working schedules (thereby removing the current six-month service requirement) and implementing a more modern system of parental leave which reflects the greater involvement of modern fathers in childcare.

In terms of timing, the government has committed to increase the unfair dismissal qualifying period by April 2012 and has invited Mr. Justice Underhill to recommend a revised procedural code for employment tribunals by that date. Implementation of the government's remaining proposals will be the subject of further consultation.

Critics of the proposals point to the fact that the most concrete of them, the increase in the unfair dismissal qualifying period, will not elevate business confidence as is suggested—especially in times of deep uncertainty created by the Eurozone crisis. The government's own estimates tend to support that view. These estimates state that increasing the qualifying service period will only reduce the number of unfair dismissal claims by between 1,600 and 2,400 each year. Since 47,900 such claims were heard by employment tribunals last year, it is indeed questionable whether a 4 percent reduction will have any practical impact. What is clear is that British businesses will have to come to grips with yet another raft of employment-related legislation, just as they have in previous years under previous governments.

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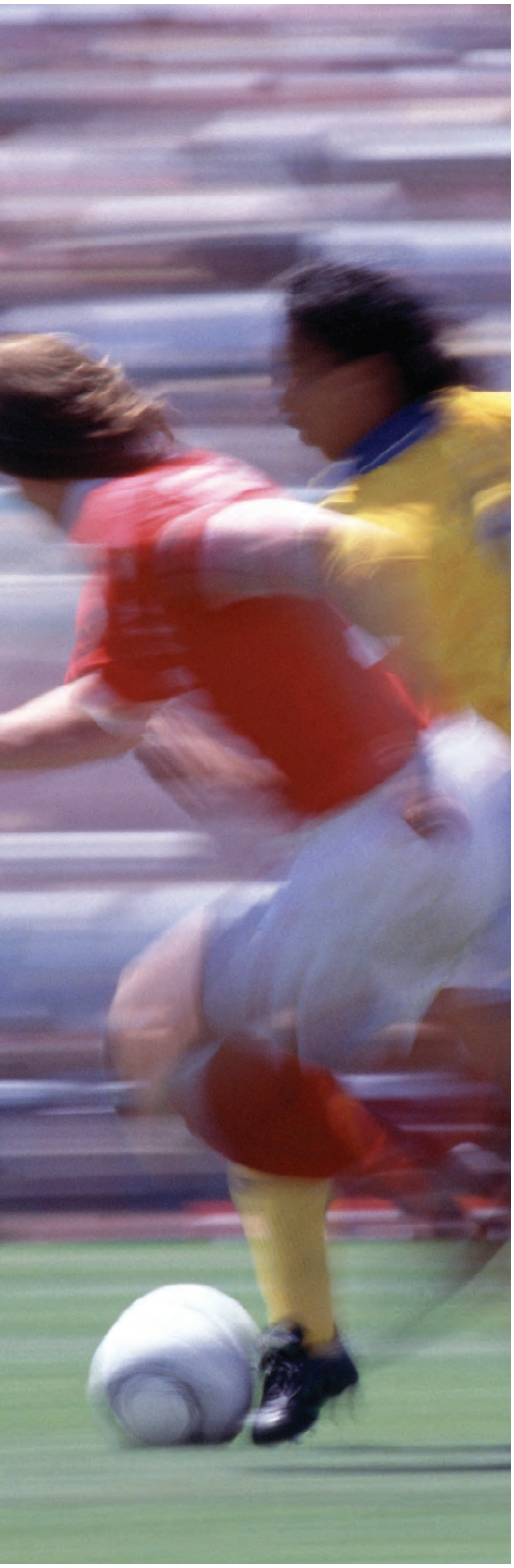
(Sports) Right-Holders At The Crossroads?



The current European sports broadcasting model, which is largely based on separate exclusive licenses for the territory of different EU member states, has been put to the test before the Court of Justice of the European Union (CJEU)—and the enforcement of absolute territorial exclusivity has been found contrary to EU law. In the light of the Murphy/QC Leisure judgment of October 2011, sports right-holders around the world and sports broadcasters in the European Union are currently re-assessing their business models.

The Murphy Case

The case concerned the licensing practice of the English Football Association Premier League (Premier League) for satellite TV broadcasting rights. The Premier League granted exclusive licenses to broadcast live football matches on a territorial basis. Licensees were obliged to prevent their broadcasts from being viewed outside their respective broadcasting areas in order to protect this territorial exclusivity. Satellite signals were therefore encrypted and transmitted only to subscribers within assigned territories: subscribers could decrypt the signal using a decoder card. The license agreements obliged licensees to prevent the circulation of authorized decoder cards outside the respective licensee's territory, with the intention of preventing EU consumers from watching matches via satellite services originating elsewhere in the European Union.

The CJEU dealt with these issues under copyright, competition, and primary EU law. On the copyright aspect, the CJEU stated that sporting events as such were not protected under the Copyright Directive, although they might potentially be worthy of comparable protection under national laws. The CJEU did state that the Premier League would have copyright in at least part of the broadcast of matches (*e.g.*, the Premier League anthem). However, the CJEU did not address the issue of the copyright in the broadcast itself (rather than in the match), which would typically vest in the broadcaster and be assigned back to the Premier League under the license agreement.

The decisive question for the CJEU was on the relationship between copyright law (allowing for territorial or personal restrictions on licensing) and the goal of competition and free movement of services within the internal market. For the satellite broadcasting sector, the CJEU came to the conclusion that the restrictions of competition and of free movement of services in the case at hand could not be justified by copyright law. The *additional* obligations on the broadcasters not to supply decoding devices for use outside "their" territory created an *absolute* territorial exclusivity which was contrary to EU law.

It is important to note, however, that according to the CJEU, the mere fact that a right-holder grants an exclusive right to broadcast protected content in a member state to a sole licensee, and consequently prohibits its transmission by others during a specified period, does not *per se* infringe EU (competition) law. What was considered contrary to EU law (as not necessary for the protection of the intellectual property rights) were the additional obligations aiming at absolute partitioning of national markets along member states' borders.

The CJEU concluded that the restrictions of competition and of free movement of services not be justified by copyright law.

Conclusion

The CJEU did not outlaw exclusive territorial licenses as such. The negative assessment was mainly founded on the additional protection granted through the restrictions on import and export of decoders, which led to an absolute territorial protection designed to prevent any cross-border provision of services. As Michel Barnier, EU commissioner for the internal market, commented on the decision: "*It does not mean that right-holders are obliged to grant licenses for the whole of Europe, nor that broadcasters are obliged to buy a pan-European license.*" But, in the satellite broadcast sector, which is harmonized at the European level and in which licenses are not *per se* limited to a certain destination territory, the absolute territorial restrictions and their protection went beyond what was necessary for the protection of the content protected by intellectual property rights.

For other means of transmission, the judgment is only of limited relevance, as the CJEU's findings are narrowly based on the facts of the case, in particular on the harmonized rules of the Satellite Broadcasting Directive. For cable, IPTV, or internet transmission, no such harmonized rules exist—yet. However, the European Commission has in its communication "A Single Market for Intellectual Property Rights" (May 2011), made it clear that a true single market for intellectual property is the goal. In addition, the commission is currently studying the "economic potential" of the cross-border market in pay TV and is expected to launch a consultation on the audiovisual sector "soon." Thus, irrespective of the *Murphy* judgment, sports right-holders as well as other industries dependant on copyright protection (music, TV, etc.) should remain ready to rethink their business models in the future.

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Online Gambling in the European Union: Was 2011 a Landmark Year?

2011 may prove to have been a turning point in the regulation of online gambling in Europe.

Until now, the European Union's institutions (with the exception of the Court of Justice of the European Union (CJEU)) have been reluctant to intervene in an online gambling market which has become increasingly divided along national boundaries. The 27 EU member states have differing cultural, legal, and fiscal approaches to the online gambling industry—some support a state-sponsored gambling monopoly operator, while others have opened their markets to licensed operators within a regulated framework. However, even these national regulated frameworks vary enormously, and the principle of mutual recognition of licensed operators from other member states is rarely applied.

As a result, online gambling operators providing cross-border services in Europe must navigate an inconsistent patchwork of regulated, gray, and restricted markets. Further, the CJEU has had to deal with a stream of cases concerning the conflict between the restrictive online gambling laws of many member states on the one hand, and the freedom to provide services enshrined in the Treaty on the Functioning of the European Union (EU Treaty) on the other.

However, 2011 has seen the European Commission publish a green paper on online gambling, and the European Parliament issue an own-initiative report on the topic.

European Commission Green Paper

In 2011, the European Commission's green paper on online gambling launched a public consultation covering the regulation of gambling and related services (including advertising and sponsorship) in Europe, enforcement, and public policy issues.

That consultation closed in July 2011, and the commission is now considering the responses. It is unclear what the next steps will be: it may be that the consultation is followed by a white paper setting out policy options influenced by the information gathered, and, perhaps, a legislative proposal thereafter. However, it seems extremely unlikely that the market will be harmonized, or even that member states will be prepared to adopt a policy of mutual recognition toward gambling operators established in other member states. Any such developments would require the support of member states who, until now, have rarely reached agreement on the topic. However, as described below, the commission has now been given some clear guidance by the European Parliament.

European Parliament Report

On November 15, 2011, the European Parliament adopted its own report on online gambling in the internal market (the Creutzmann Report).

Given that the member States differ greatly on this issue, it is no surprise that the Creutzmann Report rejected legislative uniformity within the internal market and supported the discretion of individual member states to make their own gambling policy, so long as it is proportionate and non-discriminatory.

Nevertheless, the report still represents a change of direction from the European Parliament in favor of the regulated online gambling industry and demonstrates a new emphasis on cooperation between member states and upholding EU Treaty principles in the sector. Importantly, the report urges the commission to take a more active role to pursue infringement proceedings, to uphold EU Treaty principles in favor of EU-licensed operators, and to consider introducing common standards and a framework directive.

The report represents a change of direction in favor of the regulated online gambling industry.

It is also particularly interesting that the Creutzmann Report recommends that a controversial property right for sports event organizers, along the lines of the "fair return" mentioned in the commission's green paper, should be recognized. While that is merely a recommendation, if implemented it could mean that sports organizations would be able to charge gambling operators for the privilege of taking bets on their events.

Conclusions

It is welcome that both the European Parliament and the European Commission have decided that this issue could benefit from some central policy guidance. What happens next is less certain: the Creutzmann Report is non-legislative, and the timing and the nature of the next steps from both the European Parliament and the commission are unclear. With such divergent attitudes towards the regulation of gambling among member states, it will be difficult to forge any real progress in the short to medium term.

At the same time, the tide may be turning against the state-sponsored gambling monopoly model in the European Union—at least where member states' gambling policies can be shown to be inconsistent, discriminatory, or disproportionate. We may also see a greater degree of legal certainty for the industry in the future, and increased cooperation between regulators in different member states.

The events of the next few years promise to be just as significant as the one just past.

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Filtering Policies and Gambling Regulation in Europe: The CJEU Applies Net Neutrality Principles

After almost a decade of vigorous debate among interested parties, the Court of Justice of the European Union (CJEU) has finally issued a decision that moves toward unifying the European perspective on internet filtering. While the CJEU decision itself is specific to the gambling industry, the core principles of the decision may be extended to other fields.

Several recent decisions by the CJEU put into a strict perspective the validity of the position held by certain European member states with regard to gambling, namely state-sponsored monopolies [see for instance CJEU case C-42/07]. At the same time, the opening of the online gambling field to authorized operators in European countries, such as France, went hand-in-hand with the creation of administrative agencies. Those agencies, such as France's Autorité de Régulation des Jeux en Ligne (ARJEL) possess, among other things, the prerogatives and powers to demand the take-down of cross-border gambling and gaming websites deemed illegal under national law and accessible by individuals connecting from the same country.

On the other hand, on the copyright and peer-to-peer front, collective rights management agencies have been heavily involved in regulating the contents made available on the Internet. Indeed, for the past decade since the appearance of Napster, right-holders have been trying relentlessly to limit the impact of online copyright infringement, by pursuing action against individual downloaders in the first place, and then against the website publishers making illegal content accessible.

On both fronts, though, the temptation for grasping control over Internet content can be seen lingering around.

In the *SABAM vs. Scarlet* decision (CJEU case C-70/10), published on November 24, 2011, the CJEU applied a five-prong approach on Internet control ordered by third parties on Internet Service Providers (ISPs) that may be extended to the gaming and gambling industry. In SABAM, the Belgian collective rights management entity had requested ISPs to cut access to several websites that allowed the illegal download of copyrighted material.

Although the national laws of EU member states specify the requirements for obtaining an injunction against the operator of an online service deemed illegal, such as national law must be compliant with the mandatory limitations set forth by European law, notably in the e-Commerce Directive 2000/31/EC. The e-Commerce Directive provides in Article 15.1 that "*Member states shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13, and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity*." This has been understood by many commentators as the founding European net neutrality principle.

As a consequence of this European net neutrality principle, national authorities may not adopt measures which would require an ISP to carry out general monitoring of the information that it transmits on its network.

In the SABAM decision, the Belgian courts requested that the CJEU clarify whether European law would permit an injunction that would require an ISP to implement a filtering system for all electronic communication transiting through its services where such filtering would:

- Apply impartially to all of the ISP clients;
- In a preventive manner, as opposed to a reactive manner where infringing content, once identified and notified by the right-holders, would be dealt with;
    - In a permanent manner, as opposed to a temporary measure; and
    - At the sole costs of the ISP.

Following its advocate-general, who had concluded in the preceding legal opinion that this scheme was obviously disproportionate with regard to the rights to be protected, the court held that the implemented measures have to be "*fair and proportionate and must not be excessively costly*."

Additionally, the court foresaw the practical consequences of such general filtering and blocking—the ISPs need to appreciate the legality of the online services, which would thus "*require active observation of all electronic communications conducted on the network of the ISP concerned and, consequently, would encompass all information to be transmitted and all customers using that network*." In other words, instead of relying on an evidenced take-down request from the right-holders, such right-holders were requesting that the ISPs themselves perform all the necessary checks on all the material they make available to ensure no infringing content would be available. At the same time, such a measure would have been in complete contradiction with the founding principle of Article 15 of the e-commerce directive and the net neutrality principle.

Moreover, the court drew attention to the fact that to permit the ISP to be the judge of what internet content was to be deemed illegal would likely adversely affect freedom of expression by blocking, albeit in a collateral manner, legal services and information. According to the court, the ISP bears a technical role in the individual's access to the Internet. Therefore, its involvement should be limited to such a technical role, except in cases where the obviousness of the illegality of the targeted content prevails.

Finally, to the great satisfaction of many privacy advocates, the court seized the opportunity to state incidentally that the IP addresses used for ISP subscribers' identification purposes were personal data. Indeed, in spite of the strict regulation of personal data processing in Europe, many national laws of agencies, in order to implement fast proceedings against illegal online file-sharing, were quick to dismiss the need for compliance with data protection law. This latest observation also calls for moderation in the processing of online data and information, be it by right-holders, collective rights management organizations, or administrative agencies all over Europe.

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U.S. Supreme Court to Decide Future of Health Care Reform Act

In November 2011, the United States Supreme Court announced that it will hear three petitions arising from a decision of the Eleventh Circuit Court of Appeals regarding the Patient Protection and Affordable Care Act (the Act). The Act is the comprehensive federal health reform law, which was signed into law by President Obama in March 2010. The three petitions were filed by: (1) the State of Florida and 25 other states, (2) the National Federation of Independent Business, and (3) the federal Department of Health and Human Services, the Department of the Treasury, and the Department of Labor and their respective Secretaries.

The Supreme Court will address the following issues:

- Whether parties are prevented from challenging the Act's mandate that virtually all individuals obtain minimum health insurance coverage (the "individual insurance mandate") because of the Anti-Injunction Act (AIA). *The Eleventh Circuit did not address this issue but other courts have, resulting in conflicting opinions, so the federal government requested that the Supreme Court consider the issue.*
- If parties are not barred by the AIA, whether the individual insurance mandate is unconstitutional as exceeding Congress's powers under Article I, Section 8 of the U.S. Constitution (the Commerce Clause). *A majority of the Eleventh Circuit held that the individual insurance mandate exceeded Congress's Commerce Clause power, and that Congress did not pass the legislation under its taxing authority.*
- If the individual insurance mandate is unconstitutional, whether the provision is severable from the remainder of the Act. *The Eleventh Circuit reasoned that precedent favors severing the unconstitutional provision and allowing the remainder of the Act to remain in place.*
- Whether the provisions in the Act to expand the Medicaid program are unconstitutional. *The Eleventh Circuit upheld the expansion provisions.*

The Individual Insurance Mandate and the AIA

The AIA bars lawsuits seeking to enjoin the assessment or collection of a *tax*. Under the Act, individual taxpayers who for three consecutive months fail to purchase the required minimum insurance coverage must pay a "penalty." This penalty provision is contained in the tax code and is payable through the individual's tax return. However, the provision is labeled a "penalty" rather than a "tax." The Supreme Court will determine whether the individual insurance mandate is in fact a tax. If so, the AIA would apply and the Supreme Court would lack jurisdiction to consider the challenges to the individual insurance mandate.

The Constitutionality of the Individual Insurance Mandate

The Commerce Clause empowers Congress to regulate commerce among the states and within the states when such activity has a "substantial effect on interstate commerce." Courts examine challenges to Commerce Clause-based legislation using a rational basis test. The focus of the review is whether there is an appropriate and reasonable connection between the means (*i.e.*, the regulatory scheme) and the ends (*i.e.*, the goals to be accomplished by the legislation).

The Supreme Court will examine whether the individuals who choose not to purchase insurance nevertheless are participants in the health insurance and health services market that is regulated by the Act, and therefore, are engaging in interstate commerce. The parties will ask the court to decide also whether the individual insurance mandate is a necessary means to obtain the goals of availability and affordability of health insurance and health care for most Americans.

The federal government is also asking the court to evaluate the legality of the individual mandate under Congress's power to tax, raising issues that are similar to the AIA issue described above.

The Severability of the Individual Insurance Mandate

The individual insurance mandate appears at section 1501 of the Act, and is codified in the Internal Revenue Code. It is one of hundreds of sections in a complex act that for the most part is structured toward achieving the goal of health care coverage for most Americans at an affordable price. The Supreme Court will reach the severability issue only if it determines that the individual insurance mandate is unconstitutional. If it makes that determination, it will need to decide whether any other provisions are so entwined with the mandate that they cannot be severed from the Act and thus also must be struck down.

The Constitutionality of Medicaid Expansion

The Supreme Court also will consider whether the expansion of the Medicaid program that is required of states participating in the program is within Congress's authority under the Spending Clause of the U.S. Constitution. Congress uses the Spending Clause to authorize payment of federal funds to states, with strings attached. The statute establishing the Medicaid program is Spending Clause legislation, meaning that the program is voluntary, but once a state elects to participate and draw down federal funds, it must comply with the rules attached to the funding. The court will decide whether the federal requirements to expand coverage of the program render it coercive rather than voluntary, since the "amount of funding at stake is unprecedented" and Congress is attaching new conditions to existing funds, not just to the new funds.

Possible Outcomes

The case raises multiple constitutional and legal questions with a range of potential outcomes. If the court holds that the individual insurance mandate is a tax, the AIA would bar the court from considering the constitutionality of the mandate.

If the court determines that the AIA does not bar it from considering the individual insurance mandate, the court could find that Congress exceeded its enumerated powers and strike down the individual mandate.

If the court strikes down the individual insurance mandate, the court could:

(1) decide that the mandate section is wholly severable and strike only that provision;

(2) find the mandate is partially severable but so entwined with certain other provisions that also must fall with the mandate, the intricacies of which could be decided by the Supreme Court or by remand to a lower court; or

(3) strike the entire Act because the mandate cannot be severed from the Act.

On the other end of the spectrum, the court could find that the individual insurance mandate is constitutional. The Medicaid expansion would be considered separately, and if also found constitutional, the entire Act would remain in effect.

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New EU Food Labeling Law Requires Clarity of Consumer Information

The EU's new Food Information Regulation (FIR) came into effect on December 12, 2011. The FIR sets out labeling requirements for nutritional and country of origin information on foods intended for retail consumers. The FIR represents a considerable change from prior requirements for food labeling. It combines and updates Directive 2000/13, on labeling, presentation, and advertising of foodstuffs, and Directive 90/496, on nutrition labeling for foodstuffs, and adding new requirements on food labeling.

For most of the new provisions, there is a three-year transitional period for importers and producers to comply, and a five-year period for the application of mandatory nutrition declaration requirements.

Food Information

Among other things, the FIR introduces mandatory nutrition labeling for most processed foods, including information on the energy value, amounts of fat, saturates, carbohydrates, protein, sugars, and salt. Information must be presented in a single, clearly legible table on the packaging, and expressed as amounts per 100ml or 100g. Provisionally exempted from this requirement are alcoholic beverages containing more than 1.2 percent by volume of alcohol, and unprocessed foods contained in packaging too small to accommodate mandatory labeling requirements (less than 25cc). A product, irrespective of its size, must also display information about its name, whether certain allergens are contained in the product, its net quantity, and the date by which it must be consumed. Regarding the exemption for alcoholic beverages, the commission must revisit the new regulation within three years and address whether mandatory nutrition information should apply for alcoholic beverages in the future. Producers of pre-packaged food will have to adjust contents and layout of labels to the additional information required. If pre-packaged food is sold by internet or mail order, sellers will also have to make available all mandatory information in advance of the sale, *e.g.*, on the related webpage or catalog entry.

Requirements for country of origin labeling have been extended. Previously, origin marking was obligatory only for certain foods such as beef, honey, and olive oil. The FIR now requires country of origin labeling for most meats, including fresh meat from pigs, sheep, poultry, and goats, as well as additional food categories, *e.g.*, dairy products. The commission is obliged to develop specific rules for mandatory labeling of meat within two years, and is even authorized to extend the country of origin labeling further on other types of meat, milk, single-ingredient products and ingredients that represent more than 50 percent of a food.

The FIR strengthens previous provisions on the identification of potentially allergenic substances, requiring that this information be provided not only on prepackaged foods, but with regard to all foods. EU member states are authorized to decide the means by which this information should be provided to consumers. Food providers selling non-prepackaged foods, in particular supermarkets, caterers, and restaurants, will need to adapt and train employees in order to ensure compliance with the new requirements.

Fair Information Practices

Complementary to the general prohibition of misleading commercial practices set out in Directive 2005/29 (Unfair Commercial Practices Directive), the FIR generally requires food labeling not to be misleading. This requirement also applies to advertising and the presentation of foods, including the appearance or packaging, the way in which food products shall be arranged, and the setting in which they shall be displayed. Therefore, any pictorial presentations and marketing claims on packaging or advertisements must comply with fair information practices. These practices become particularly important in connection with so-called "imitation foods," which look like natural foods, but substitute different components or ingredients for the natural ingredient. A prominent example is "cheese" made from vegetable oils.

Liability of Food Operators

The FIR contains specific provisions as to responsibility along the food chain regarding the presence and accuracy of food information. Legal responsibility for the food information lies with the food business operator, *i.e.*, the operator under whose name the food is marketed. As the FIR requires the food operator to be listed on the packaging, importers and retailers will have to make sure that the original supplier of a food product is named on the product in order to avoid liability for the accuracy of the presented food information.

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Traditional Herbal Medicines in the European Union: Is the Herbal Directive a Benefit or Obstacle?

Since May 1, 2011 new rules on marketing authorization apply to certain herbal medicinal products. These rules may have important effects for manufacturers and importers of such products.

EU Directive 2004/24 (the Herbal Directive) amends EU Directive 2001/83 on the Community Code relating to medicinal products for human use as regards traditional medicinal products. Under that directive, herbal medicinal products required an authorization before they could be marketed as such in the EU. Application for a marketing authorization required the submission of an extensive dossier and demonstration of a well-established medicinal use with recognized efficacy. Many traditional herbal medicinal products could not satisfy these requirements and could not therefore be marketed as medicinal products in the EU. Instead, Member States often took the view that they were not "medicinal products" within the meaning of the EU legislation and permitted them to be marketed as food supplements, which are subject to EU legislation on food and can be marketed without registration.

The Herbal Directive introduces a uniform regime for the new category of "traditional herbal medicinal products." This regime is less onerous than that applicable under EU Directive 2001/83 to conventional medicinal products.

What are Traditional Herbal Medicinal Products?

Herbal medicinal products are defined as products which contain exclusively herbal substances or preparations (although vitamins and minerals having an ancillary action may be added). Traditional herbal medicinal products are defined as those that have been in medicinal use for at least 30 years, including at least 15 years in the EU, provided that data demonstrate that use is harmless and efficacy is plausible, are intended and designed to be used without the supervision of a medical practitioner, are exclusively for administration in accordance with a specified strength and dosage, and are prepared for administration orally, externally or by inhalation (rather than by injection).

The Herbal Directive

The Herbal Directive establishes a simplified registration procedure for traditional herbal medicinal products. In contrast to other medicinal products for which a marketing authorization is sought, the application for registration does not need to include pre-clinical tests, clinical trials, a pharmacovigilance summary, or a risk management plan. The applicant must, however, demonstrate that its product satisfies the definition of a traditional herbal medicinal product [see above] and submit:

- bibliographical or expert evidence that the product (or a corresponding product) has been in medicinal use for the requisite period
- a bibliographic review of safety data
- an expert report

The Herbal Directive introduces a uniform regime for the new category of "traditional herbal medicinal products" that is less onerous than that previously applicable to conventional medicinal products.

- evidence that the product was manufactured in compliance with the principles and guidelines of good manufacturing practice as laid down by the commission in EU Directive 2003/94.

The simplified registration procedure is a national procedure. This means that an application must be submitted in each EU member state where the applicant intends to market the product. However, the relevant national authorities will recognize registrations granted by other member states in certain circumstances.

The Herbal Directive also requires that any labeling of a registered traditional herbal medicinal product must state that the product is a traditional herbal medicine and that the user should seek medical advice if the symptoms persist.

Benefits or Obstacles?

Now that traditional herbal medicinal products are tightly defined and regulated in the Herbal Directive, it will be more difficult for Member States to take the view that products falling within that definition can continue to be marketed as food supplements (although herbal products making no medical claims may still be marketed as such). Compared to the formalities for obtaining a marketing authorization for "normal" medicinal products, the new registration procedure for traditional herbal medicinal products will be simpler, quicker and, therefore, less expensive. It is nonetheless expected that some manufacturers and importers will take their traditional herbal medicinal products off the EU market rather than incur the costs of registration. This is likely to be the case in particular for multiple herbal products and for herbal medicinal products that are not based on European traditions, such as Chinese and Ayurvedic medicinal products. Such products often do not have the long history of use within the EU which is necessary for simplified registration under the Herbal Directive. They will therefore require a standard marketing authorization as for all other medicines, including costly and time-consuming tests and clinical trials. Manufacturers will have to calculate from potential sales figures in the EU market whether this is worth the investment and effort.

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Will UK Lobbyists be Required to Register?

It was in October 2011 that the UK Coalition Government faced its second major Cabinet resignation, after less than 18 months in office. (The first Cabinet resignation occurred within two weeks of the Coalition government being formed.) On this occasion, Secretary of State for Defense Liam Fox resigned over his links with his friend and advisor Adam Werritty. Questions were raised about Mr. Werritty's having accompanied Dr. Fox on a number of overseas visits and issuing business cards erroneously suggesting that he had an official advisory position. Those who had funded research bodies set up by Dr. Fox were purportedly unaware that many of their contributions were used to fund Mr. Werritty's own expenses.

Following Dr. Fox's resignation, David Cameron, the British Prime Minister, took the opportunity to repeat his pledge to introduce a mandatory statutory register for lobbyists. Mr. Werritty actually never acted as a lobbyist in this role, so whilst this was a great opportunity to knock lobbyists in general, it actually had no real relevance to the scandal that led to Dr. Fox's resignation.

Lobbyists are easy "knocking fodder" in opposition. All political parties (especially those in opposition) believe in complete transparency. When he was Leader of the Opposition, Mr. Cameron several times pledged to tackle lobbying, stating that it was "*the next big scandal waiting to happen*" and had "*tainted our politics for too long…*" and he wanted politics to "*… come clean about who is buying power and influence.*"

Greater regulation of lobbyists was a manifesto commitment by both governing

Greater regulation of lobbyists was a manifesto commitment by both governing parties and features in the Coalition Agreement.

parties and features in the Coalition Agreement (that was the agreement between the Conservatives and the Liberal Democrats which led to the formation of the Coalition government). The Coalition government planned to introduce a consultation paper on lobbying by the end of November 2011. Latest indications from the Cabinet office are that a consultation paper may materialize in early 2012. Even so, there are many different views about the operation of a mandatory registration scheme, and the prospects are that any legislation is unlikely to come into force until the 2013/14 Parliamentary session.

Lobbyists in the UK have tried to head off statutory-based regulation by setting up their own self-regulating body called the UK Public Affairs Council, an umbrella body consisting of three key industry trade associations. On December 9, 2011 one of those three trade associations withdrew from this body. The UK PAC was intending to establish a voluntary register of interests, but their failure to agree amongst themselves is not at all promising and makes the prospect of statutory regulation all the more likely.

On December 6, 2011 "The Independent" reported a claim by senior officials at a leading UK public affairs agency that they could secure direct access to senior members of the government. Their managing director was recorded as saying "*we've got all sorts of dark arts…he couldn't put them in the written presentation because it's embarrassing if it gets out.*"

It is therefore not terribly surprising that the good intentions behind the establishment of the UK PAC appear to have failed.

What will the new register require? Will it be lobbying firms or individual lobbyists that have to be registered? How do you define a "lobbyist" for these purposes? Will they have to record every single meeting and proposal or will the register be more generic? Will the register have to include law firms? The European Commission and the European Parliament have recently jointly launched their own voluntary register, which might provide the UK government with an interesting model. Whether or not an organization should register depends on whether or not they or their members are involved in "*directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU Institution*." Registration does bring advantages, such as access to the European Parliament's premises. However, the downside of registration is a requirement to disclose details of annual turnover, resources devoted to lobbying activities, and potentially the names of clients.

In the UK, the terms "lobbyist" and "lobbying" are deeply unattractive and somewhat derogatory of a valued industry that has an important and effective democratic function. As is always the case, it is the actions or statements of a few that cause so much damage to the whole. The government's determination to regulate becomes stronger every time that a consultant claims (with or without any justification) that he can influence those in government (whether national or local). Whether there is actually an appetite within the Coalition government to carry through the statutory register remains to be seen. So much has happened in the last few months, and the UK government seems to have far greater priorities at the moment. Maybe a statutory register will still only be a promise when the political parties are campaigning again at election time in 2015.

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Towards a European Market in the Defense Sector?

The EU has been working on the integration of the defense sector into the European internal market for years, the ultimate goal being a level playing field for the defense and security industry in the EU in order to secure a strong defense technological and industrial base. Efforts to reach this aim were intensified since 2003 with the European Commission's communication "*Towards an EU Defense Equipment Policy*." This summer, finally, the so-called "Defense Package" came into force, containing a Procurement Directive and a Transfer Directive.

The Procurement Directive

The Procurement Directive (Directive 2009/81/EC) addresses the coordination of procedures for certain works contracts, supply contracts, and service contracts awarded by contracting authorities or entities in the fields of defense and security. With the Procurement Directive, the EU aims at the gradual establishment of a European defense equipment market. The directive creates a formal framework specifically designed for (generally sensitive) defense procurements, which under the prior framework were often awarded without formal tender procedures. It applies to contracts exceeding an estimated value of over €400,000 for supply and service contracts and over €5,000,000 for works contracts. The Procurement Directive sets up enforceable common rules for the procurement of military equipment and sensitive equipment and is designed to foster, develop, and sustain a European defense technological and industrial base that is capability driven, competent, and competitive.

Additionally, the directive provides for specific exemptions from its scope, *e.g.*, for contracts for intelligence activities or cooperation programs on research and development. It also provides rules concerning subcontracting, the use of electronic auctions, transparency, and most importantly on review procedures allowing bidders to challenge procurement decisions.

Although the EU is aiming at a European market in the fields of both defense and security, the Procurement Directive stresses that the directive's scope ends where national security interests in a member state are at stake: their protection remains the exclusive right and responsibility of each member state in accordance with Article 346 of the Treaty on the Functioning of the European Union (TFEU). As a consequence, the Procurement Directive does not apply when the tender

The Defense Package should make life easier for the very diverse and international defense industry by reducing companies' efforts to deal with different national regulations.

process in itself would be contrary to the protection of certain national interests concerning the core of national security and defense.

The Transfer Directive

The Transfer Directive simplifies the terms and conditions of transfers of defense-related products within the Community. With the Transfer Directive, the EU seeks to harmonize each of the Member State's rules concerning the transfer of defense-related products within the EU. The ultimate goal is to ensure the proper functioning of the internal market in the defense sector. The directive applies to defense-related products as set out in an annex. Under the directive, the intra-community transfer of defense-related products will continue to be subject to prior authorization through general, global, or individual transfer licenses granted or published by the "departure" member state, *i.e.*, the state from which the respective supplier wants to transfer defense-related products. However, the Directive now sets up common European rules for licensing procedures and contains incentives for member states to replace their existing individual licenses with general licenses for intra-community transfers as far as possible. As a result, in the future global licenses, grouping multiple transfers by one supplier to several recipients, is supposed to become the rule and individual licenses the exception. Member states will remain free, though, to determine the products eligible for the different types of license and to fix the terms and conditions of such licenses.

Conclusions

The Defense Package should make life easier for the very diverse and international defense industry by reducing companies' efforts to deal with different national regulations. The Procurement Directive's rules will open up markets to which companies had no access before. Once a contract is put out for tender, every company can at least apply for it, and will win the award if it hands in the best offer. Therefore, the most interesting question will be whether a contract falls under the Procurement Directive's scope and its tender requirement. That will mainly depend on how the awarding authorities will interpret the TFEU exception clause in Art. 346. However, the European Court of Justice, as well as several national courts, have made it clear in the past that this clause has to be interpreted restrictively. As a consequence, the EU's latest steps towards an internal market have a good chance to be successful in creating more competition and transparency in the defense market.

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The United Kingdom's Localism Act 2011

The Localism Act 2011 was enacted in November 2011 and was much vaunted as one of the key pieces of legislation in the UK Government's "Big Society" agenda. "Big Society" is a vaguely described concept bringing together a number of attempts to bring greater liberalism and empowerment to governance and administration in the UK.

When the UK government first announced the publication of the Localism Bill, it said it would "put an end to the hoarding of power within central government and top-down control of communities, allowing local people the freedom to run their lives and neighborhoods in their own way" and "herald a ground-breaking shift in power to councils and communities overturning decades of central government control and starting a new era of people power."

That would be to overstate what the act does achieve, but it does bring change to local government in the areas of local governance, land use planning, and social housing, and has some novel ideas.

There is much speculation as to how significant the impact of these changes will be in practice, as the secondary legislation which will contain much of the detail is yet to be drafted, and the majority of the act is not yet in force.

Governance

One of the provisions that has been heralded as a paradigm shift in local governance is a new general power of competence for local authorities. This is to give local authorities the power "to do anything that individuals generally may do." This would be a huge shift (as it would even allow local authorities to act irrationally and unreasonably), but this headline power is constrained by subsequent limiting provisions in the act that restrict the general power by any current limitations on their power, and hence the headline objective may not be achieved in practice.

Neighborhood Plans

The act grants to local communities a new power to make neighborhood plans. The UK land use system is plan-led, meaning that the policies in those plans are fundamental to whether a development is granted permission or not. Previously plans were written by local authorities at borough, district or unitary level, or by the London mayor. This new plan-making power would be a significant shift of authority down to local communities which could set their own agenda and priorities. Developers fear this power would be used to oppose development.

However, the power is restricted so that only a parish council (or similar designated neighborhood forum where no parish council exists) can make the plan, and that the neighborhood plan must be in accordance with the strategic policies in the development plan (called the Local Plan) made by the local authority. In other words, the neighborhood plan cannot be more restrictive than the Local Plan and national guidance, but it is not known how any conflict in practice will be resolved. Also, the procedure to create a neighborhood plan is convoluted, expensive, and if published, it will add another level of bureaucracy, which is likely to cause confusion.

Community Right to Buy

The act imposes a moratorium period on the private sale of land and buildings that are listed as "assets of community value." These are to be defined by regulations to follow but are considered likely to be leisure uses, buildings and land in community use, cinemas, public houses, open land currently used for recreational and leisure purposes, theatres, car parking, community facilities, and sports facilities. Any owners of an interest in land (irrespective of whether or not they are in the public or private sectors) whose land or property is listed as an asset of community value must notify the local authority of their intention and not enter into a relevant disposal of the land for six weeks, or six months if a bid to purchase is made. The act does not provide a right to buy or provide to whom the asset should be sold, but does give the community an opportunity to make a bid to save a community asset. However, it may impact values, cause delay, and create problems for those seeking to dispose of such assets, including private and local authority-owned assets.

Local Authority Services

The act provides a community right for charities, voluntary bodies, and even employees of the local authority to express an interest in taking over a local authority service. The type of local service is likely to be limited by later regulations. The act does not require the local authority to automatically give over the service, but seeks to limit upon what grounds it can reject an expression of interest. The objective of this provision is to allow local people the opportunity to run services like libraries, but it remains to be seen whether other services will be impacted.

Social (Low Income) Housing

The act makes large changes to social (low income) housing, which traditionally has been more centrally administered than the other aspects of the act. Social housing is intended to move away from a "house for life" to a more limited tenure, allocated according to provisions set by the local authorities. The act will ensure that more financial decisions will be set at the local level to respond to local need. The public sector has undertaken little social housing development in the last few decades, and there may be an opportunity for local authorities to undertake or facilitate such development. The current social housing regulator is being disbanded, and the regulation function changed to a more "reactive" approach. Tenants will be encouraged to form tenant panels to hold landlords to account for failure to provide services. These changes are untested and have received both criticism and praise.

New Development Tax

The provision likely to have the greatest immediate impact is a new development tax called the Community Infrastructure Levy (CIL). The genesis of this tax was from the previous government, which created the framework for CIL in the Planning Act 2008, and which the current act amends. Larger developments currently make financial and other contributions to local authorities in planning obligations that are flexible and able to be negotiated on a case-by-case basis. In the new provisions, each local authority will set a tariff for all new development to pay. The levy must be paid if the proposed development is to go ahead, and there are limited exemptions and little flexibility. The local authorities are just starting to publish their tariffs, and it may mean many developments will become unviable (if the rate of the levy is set locally at too high a level), just when the UK government says it is seeking to encourage development. The tax was conceived to be used on the future development of community infrastructure (transport, education, energy, libraries, open space, etc.). The act allows local authorities to use CIL on the maintenance of current infrastructure, thereby incentivising local authorities to use CIL as a revenue source, rather than as a fund for needed new infrastructure.

Balancing Empowerment and Economic Growth

The UK government is trying to strike a difficult balance between encouraging growth and empowering local communities, and until further regulations are released it is too early to be definitive on the efficacy of the changes. Communications from the UK government herald the act as making ground-breaking changes to end the hoarding of power by central government. The reality of the current situation is not as centralized as made out, and the act and its regulations cannot live up to this level of hyperbole, but it is clear that it will have both positive and negative impacts for the foreseeable future.

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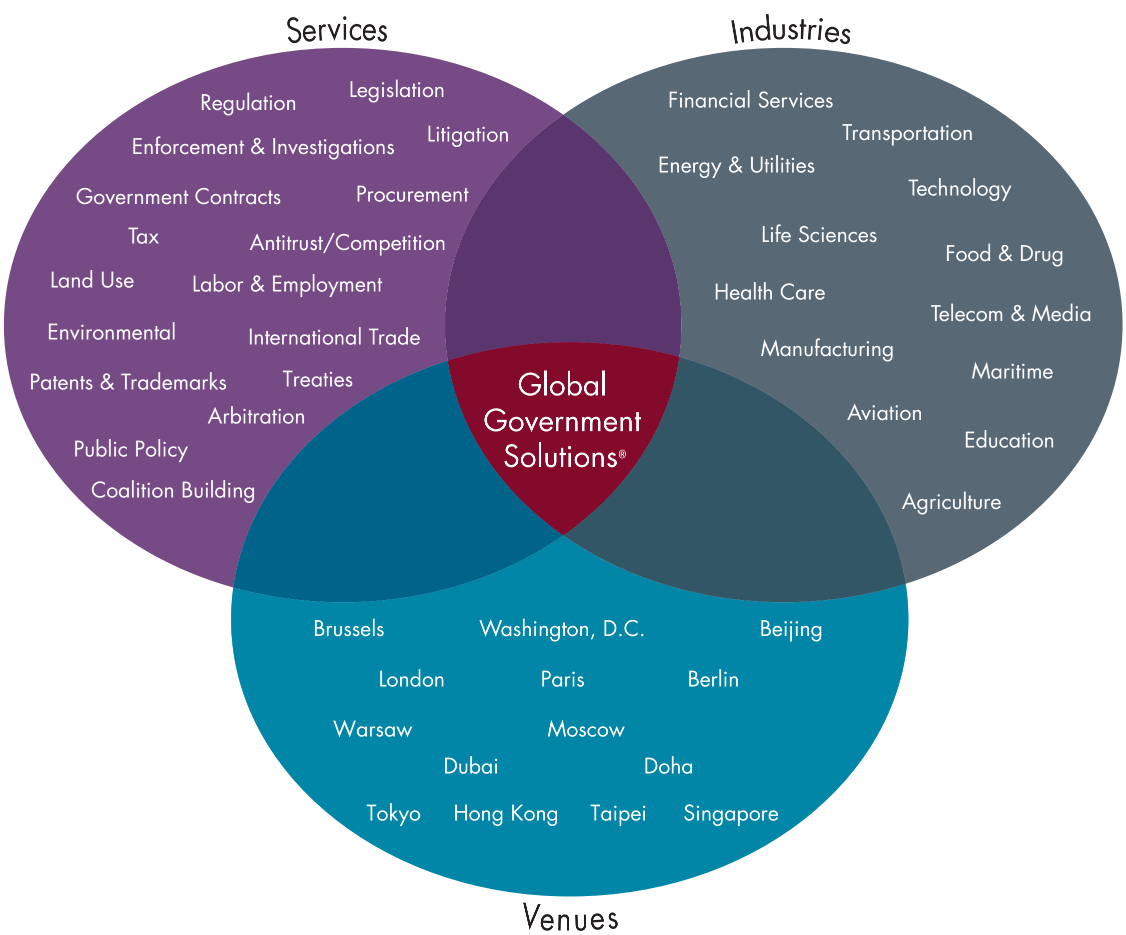

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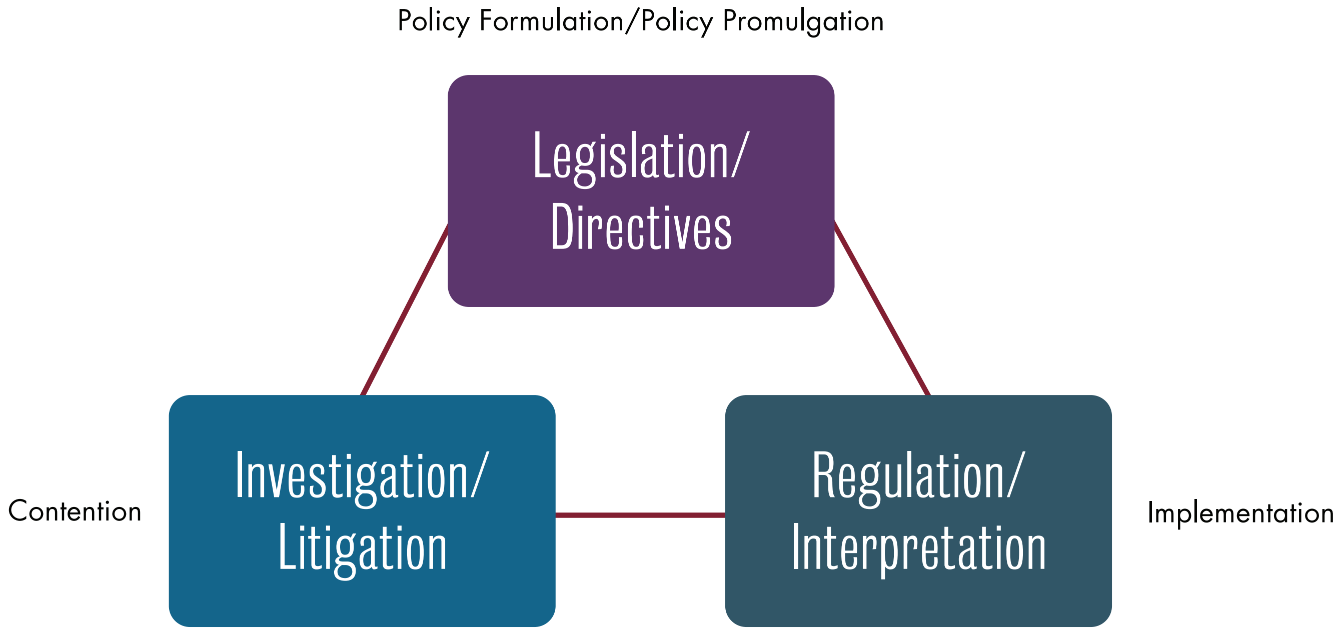

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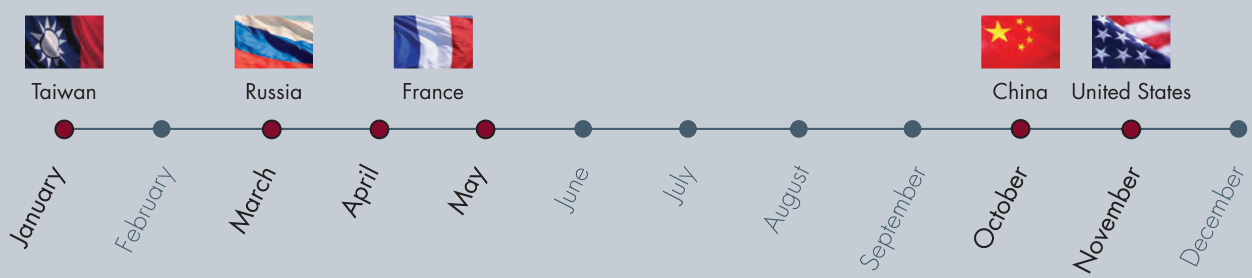

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