K&L GATES

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TALKINGPOINT April 2020

Antitrust litigation – defence and damages

FW discusses defence and damages in antitrust litigation with Max Strasberg at Ashurst LLP, Jorge Padilla at Compass Lexecon and Mélanie Bruneau at K&L Gates LLP.

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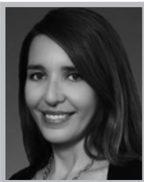

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FW: Could you provide an overview of antitrust trends in the US, Europe and elsewhere? To what extent have regulators increased their monitoring and enforcement efforts to target perceived antitrust violations?

Strasberg: There is widespread regulatory interest in the financial services, pharmaceutical, automotive and big tech sectors in particular. More sophisticated monitoring techniques and greater cooperation between regulators can be observed across several jurisdictions. Regulators are coming up with innovative ways of detecting anticompetitive activity, including greater reliance on anonymous whistleblowing hotlines and technology. For example, the UK Competition and Markets Authority (CMA) launched a tool in late 2017 which aims to help procurement professionals identify bid-rigging behaviour. The software is free to download and relies on algorithms to detect unusual bidding and pricing patterns. With regulatory scrutiny growing in breadth and intensity, the risk of widespread follow-on litigation may discourage infringing companies from seeking leniency. The auto parts cartels are a prime example of a growing 'domino effect' in regulatory activity. The first infringement was announced in early 2012 in the US. Since then, dozens of separate investigations have been opened in most of the world's industrialised economies, including the US, the European Union (EU), Japan, Korea and China, resulting in an estimated $20bn in total fines to date. This has given rise to numerous follow-on damages actions.

Bruneau: Globally, there has been a significant shift in policy toward new enforcement priorities and practices to address potential antitrust violations over the past few years. The US Department of Justice (DOJ) has announced its intention to provide more incentives on corporate antitrust compliance, whereas the US Federal Trade Commission (FTC) plans to frame the ways antitrust rules can be shaped to monitor the conduct of dominant technology platform companies. In Europe, cartel enforcement actions continue to expand. The European Commission (EC) has also intensified its efforts to enhance the set of guidelines governing private damages actions within the EU since the adoption of the 2014 Damages Directive. The past year can also be perceived as the starting point for updating China's antitrust and competition laws, as its State Administration for Market Regulation (SAMR) has released three antitrust regulations to reform its anti-monopoly regime.

Padilla: The main regulatory changes are taking place in the US, where both the DOJ and the FTC have decided to devote additional resources to investigating the conduct of big tech companies. These

companies are also subject to increased scrutiny in Australia, the EU, the UK and elsewhere. Competition agencies seem particularly worried about issues such as 'self-preferencing', whereby a dominant multi-sided platform which also operates on one of the sides of the market as a seller discriminates in favour of its subsidiary. In sharp contrast, there seems to have been a fall in the number of cartel investigations in the EU due to the negative impact on leniency programmes of the proliferation of damages cases.

FW: How would you describe general activity levels for antitrust litigation? What types of cases are you seeing?

Bruneau: In Europe, antitrust litigation has become the norm in most national jurisdictions. The implementation of the Damages Directive has boosted the number of private damages actions filed before national courts in the EU. Moreover, the enactment of collective redress mechanisms in the jurisdictions of several Member States has contributed to a significant increase in the level of antitrust litigation proceedings. The EC sees collective actions as a key component to ensuring the effective application of the full compensation principle. The emergence of such schemes can be illustrated by the recent 2019 landmark judgement in the *Walter Merricks v. Mastercard* case in the UK. It can also be illustrated by the regime on collective actions in the Netherlands, which was revised in 2019 to provide the option for foundations or associations to seek declaratory relief and claim monetary damages on behalf of the injured parties.

Padilla: Antitrust litigation has been growing steadily and significantly over the last few years. There have been many damages claims connected with EU cartel cases involving power cables, financial indices such as Libor, trucks, and smart chip cards.

Strasberg: Activity levels are high and appear to be increasing. At the UK Competition Appeal Tribunal (CAT), for example, the number of cases registered in 2019 was almost double the 2018 figure. This is largely driven by follow-on damages claims concerning interchange fees or arising from the trucks cartel. A similar trend can be seen in continental Europe. The German, Spanish and Dutch courts in particular are busy handling trucks litigation. It has been reported that there are many hundreds of claims in trucks litigation across Europe, with new claims being brought very regularly. Aside from trucks and interchange fee litigation, damages actions both for and against automotive manufacturers continue to be brought. A recent example is the litigation arising from the 'roll-on, roll-off' (RoRo) maritime shipping cartel. Regulatory appeals in the pharmaceutical industry continue – such as 'pay-for-delay' and excessive pricing in respect of generic drugs – and could lead to follow-on damages actions if unsuccessful. Finally, the UK's nascent 'class-action' type regime continues to be tested since it came into existence in late 2015. The UK Supreme Court hearing in *Merricks v Mastercard* later this year is eagerly awaited by those seeking guidance on the proper interpretation of the rules on certification. If it is certified, the Merricks damages claim for £14bn would be the largest ever issued in the UK.

FW: Have any recent, high-profile antitrust cases caught your attention? What key issues did these cases raise and what can we learn from their outcome?

Strasberg: The *BritNed v ABB* case – the first English follow-on cartel damages action to reach judgment following trial. The claim arose from the power cables cartel and has attracted much attention since the High Court's ruling in late 2018, which was upheld by the Court of Appeal a year later. Approximately €10m in damages were awarded to BritNed, from a claim of over €200m. The facts were unusual in that just one transaction was in issue. It will be interesting to see the approach taken in other cases which might concern numerous, possibly many thousands, of transactions of the cartelised product. The trucks litigation is testing many courts' case management powers in the context of a caseload that is far heavier than usual. In order to make progress, courts may have recourse to active and potentially creative case management techniques.

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Padilla: The three cases the EC ran against Google were particularly interesting. They were all concerned with what could be termed 'platform envelopment strategies', whereby a dominant platform – the enveloper – operating in a multi-sided market enters a second multi-sided market by leveraging the data obtained from its shared user relationships. These are cases where the enveloper, Google in this instance, could fund the services offered to all sides of the target market by monetising data in the origin market. The *Qualcomm v. FTC* case in the US is also worth investigating, as it involves a novel theory of harm and there seems to be considerable disagreement between the US agencies.

Bruneau: There were several high-profile antitrust cases during the previous EC mandate. This includes, notably, the European Court of Judgement (ECJ) *Intel* judgement, which set aside the €1.06bn fine imposed on Intel for abuse of a dominant position. More recently, another high-profile case in antitrust enforcement has been the

EC's €1.49bn fine on Google for abuse of its market dominance. This case is a strong indicator that online platforms are likely to face increased scrutiny and that competition rules need to be further developed to address the specificities of the digital sector. The EC's decision to impose a €242m fine on Qualcomm for abusing its market dominance and forcing its competitor out of the market, is one of the most significant predatory pricing decisions in many years.

FW: In the event of an antitrust investigation or accusation, what immediate steps should companies take in response? How important is it to prepare, plan and manage a robust defence?

Padilla: Companies must handle an antitrust investigation as they would any investment project. In fact, one might argue that an investigation is an investment project. The company invests in a team, including executives and external advisers, as well as in data collection and analysis to minimise the impact of the investigation on its business model and, hence, its future cash flows. As with any other investment, the company must consider all possible strategic options, assess and balance the costs and benefits, and choose the option that has a greater associated net present value (NPV). Once that option is chosen, the company needs to execute the plan, which may be far from simple because many at the company will consider this the least attractive and appealing of all its projects, even when its potential impact on value is the greatest. And, finally, the company needs to reassess the plan continuously because this is a project where the actions of third parties may be hard to predict.

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Bruneau: Although there is no 'one size fits all' approach, a proactive approach and the implementation of a credible antitrust compliance programme is expected to mitigate the risks for antitrust infringements and subsequent enforcement by competition authorities. Ahead of an antitrust investigation, companies must ensure that their organisational structure will facilitate effective communication among the various internal departments in order to efficiently support the company's management. Against the backdrop of reputational damage, companies should allocate adequate resources in order to implement risk management strategies and to monitor compliance on a continuous basis, notably using internal audits. Especially when it comes to a multijurisdictional investigation, companies must ensure that they have reliable ways of identifying risks in place in each jurisdiction. Moreover, companies should be able to count on a robust team that will maintain good contact with the competition authorities on a global scale.

Strasberg: A company facing a possible antitrust violation should promptly investigate the issue internally to assess the merit of any allegations and determine the scope of any potential infringement. This will allow for decisions to be made early, which in turn maximises the available options for next steps, including any leniency applications the company may decide to make. It is increasingly important for companies to have response plans in the event of a 'dawn-raid' or short notice inspection. It is advisable to complement these with specific and efficient internal processes for making key strategic decisions at pace. Companies should seek to maintain legal privilege over any investigation as far as possible. In the EU, this will mean having recourse to external legal advisers, because EU law does not recognise legal privilege over in-house legal advice.

FW: What benefits may be derived from involving economists in antitrust litigation cases?

Bruneau: The complexity of competition law disputes has rendered the application of economic concepts pivotal in the interpretation of facts, not only to prove the existence of a competition law infringement, but also to calculate the potential damages. For this reason, the involvement of economists in antitrust litigation cases has acquired greater significance over time, as the assessment of antitrust violations appears to have shifted from the formal notion of dominance toward the concept of effective competition. Economic elements and statistical data, including sales volumes, consumer preferences and costs, have an increasing role to play in determining the anti-competitive behaviour in antitrust investigations. The application of economic methods is considered an essential step in finding the existence of a competition law infringement. Likewise, economists can resolve uncertainties in terms of the quantification of damages by applying sound economic principles when investigating patterns related to competition law infringements.

Padilla: Economists are an indispensable partner in many cases, as they are uniquely qualified to, first, investigate whether a company enjoys a dominant position in a properly designed antitrust market, second, assess the implications of the economic context within which certain conduct takes place on the likelihood of anticompetitive effects and, third, in follow-on damages cases, calculate the overcharge and the share of that overcharge that is passed on downstream. Economists can also help plaintiffs and defendants to formulate

alternative theories of harm and assess their pros and cons.

FW: At what point in the process should economists be engaged, in what capacity, and to perform which types of analyses?

Padilla: Economists should be engaged as early as possible since the legal and business strategy of any company involved in an antitrust dispute, irrespective of its role as a plaintiff or defendant, must be informed by the facts and some facts cannot be established without rigorous economic analysis. We would like to see some economists involved as 'strategic advisers' and others as 'experts'. We do not believe the same persons can play the two roles. Experts need to preserve their independence and, therefore, should not be involved in the formulation of the defence strategy. However, such a strategy may not be formulated correctly if the economics of the case, for example the relevant theories of harm, are analysed incorrectly.

Bruneau: Economic expertise can provide useful input throughout antitrust litigation proceedings. As competition cases become more complex, economists could significantly contribute by articulating quantitative analyses and delineating variables, such as the definition of the relevant market, the level of market share and market power, or the intensity of competition. Depending on the specificities of the various legal frameworks which allow for a different degree of expert testimony in the process of proof, economists could be engaged, as early in the process as possible, in the capacity of expert witnesses or court-appointed experts with the task of providing advice on technical matters. Furthermore, economists remain crucial to the theory and quantification of harm in competition damages claims. The use of empirical tools is often considered critical in assessing the exact quantum of competition damages, although such analyses may be granted a varying degree of importance depending on the jurisdiction concerned.

FW: Could you explain the process of calculating and evaluating potential damages arising from an antitrust claim? What aspects and methodologies need to be considered?

Strasberg: Calculating potential damages arising from an antitrust claim involves comparing what happened as a result of the infringement with the situation that would have existed absent the infringement, also known as the counterfactual scenario. The counterfactual scenario cannot be observed directly and therefore needs to be estimated. The precise methodology for estimating the counterfactual will depend on the specific claim, but comparator-based methods are most commonly used. These methods involve comparing the infringement scenario with a non-infringement scenario. For example, this could involve comparing prices during the infringement with prices in the same market before and after the infringement, a different but similar geographic market, such as a different country, or a different but similar product market. When considering comparator-based methods, it is important to control for other 'external' factors that may have influenced prices during the infringement period. As a result, it is often necessary to use econometric techniques to analyse data.

Bruneau: The central question in the evaluation of antitrust damages is to determine what is likely to have happened absent the antitrust infringement. In recent years, the implementation of the Damages Directive has shaped the landscape of damages litigation in Europe. The European Commission has offered guidance to national courts by publishing a practical guide on the quantification of harm and complementing it with guidelines on how to estimate the passing-on of overcharges. In this context, national courts retain the possibility of going beyond the scope of the framework put forward at the European level. Indeed, while various methods are described as suitable for calculating damages, national courts have often opted for the application of certain methods, the most prominent among them consisting of

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comparing prices over time. Meanwhile, other calculation methods, such as comparisons with unaffected markets or regression analyses, have been applied in a smaller number of cases.

Padilla: The key is to define the appropriate 'counterfactual' – the scenario which would have prevailed in the absence of the alleged anticompetitive violation. The difficulty is that such a scenario is not observable; we can only approximate it using information about other products or markets, or from periods that were not affected by the alleged infringement. This is a very difficult exercise since those 'proxies' are, by definition, bound to be imperfect. Suppose, for example, that one uses the market outcomes observed in a non-infringement period to proxy the outcomes that the same market would have produced in the infringement period. That exercise is problematic because the infringement and non-infringement periods may differ along many dimensions and not just as a result of the infringement. Taking into account such confounding factors is essential to avoiding attributing to the infringement the impact on market outcomes caused by those other factors. Unfortunately, the identification of the effects of the infringement, when there

are confounding factors, requires the use of sophisticated economic and statistical tools. Such tools are not only difficult to understand for non-specialists but can also be misused, and detecting those manipulations is extremely complex.

FW: What considerations need to be made when managing the interaction between lawyers, economists and businesspeople throughout the litigation process?

Bruneau: Since competition proceedings are generally evidence-based, one must consider the complexities in ascertaining evidence and establishing the burden of proof throughout the litigation process. The amount and quality of evidence in an antitrust matter will depend on its source and the use of economic constructs or legal concepts, or, in some cases, both. Such models may give rise to discrepancies in respect of the quantification of damages, especially when qualitative and quantitative analyses are carried out in parallel. This being said, one of the main issues, already at an early stage of the process, is to reconcile the respective work of all parties concerned where lawyers need the support of economists and businesspeople. Despite the absence of a harmonised framework across Europe, and the differences in the importance given to economic concepts, a substantial interaction between lawyers and economists in the course of antitrust proceedings could improve the quality of arguments provided in defence.

Padilla: Importantly, the three sides of the equation need to be coordinated and work as one team. Economic analyses are meaningless unless they reflect the business reality. They need to be consistent with the documentary evidence and cannot contradict the logic of the business decisions made in *tempore non suspecto.* Likewise, economic analyses are useless unless they address those issues that are relevant from a legal perspective. The case law identifies legal tests, which often require economic assessments. For example, whether prices are excessive or predatory, or they effect a margin squeeze, can only be determined by implementing an appropriate price-cost test. Economists must know and understand such tests and the relevant case law to calculate the right cost measures and to perform the appropriate price-cost calculations.

FW: What essential piece of advice would you offer to companies in terms of developing sound case management strategies to address antitrust litigation?

Strasberg: Be prepared that you may need to go to trial – early settlements may no longer be as forthcoming. Recent cartel decisions have given rise to very significant follow-on litigation – the volume of claims in the interchange fee and trucks litigations is unprecedented. Defendants involved in mass-litigation of this nature face very material risks, potentially of a business-critical scale. As new claims multiply, businesses may face greater challenges in assessing risk and making adequate provision for their legal defence or claim – as the case may be. Defendants facing litigation in multiple jurisdictions with diverging limitation rules may face greater difficulties in formulating a sound settlement strategy for many years after the first claims surface. If those dynamics continue, the tendency for cartel cases to settle early may be less prevalent in the coming years. Many practitioners are awaiting the UK Supreme Court's judgment in the interchange fee litigation later this year, which may address the legal test for establishing pass-on. The current test is practically difficult for defendants to satisfy, but any relaxation could provide another incentive for defendants to fight for longer.

Padilla: Companies must nominate a businessperson or group of persons who own the project and ensure that lawyers and economists are coordinated with the relevant members of the organisation and can easily access the relevant pools of information. Companies must focus on the strategy of the case, rather than the tactical issues of the day-to-day. The firm's executives cannot and should not micromanage the work of their advisers but should provide them with all the relevant information needed to do their work and direct them strategically so that the firm can navigate the litigation successfully. Interfering with the work of experts is particularly problematic. Their duty is to the courts. They are ineffective when their credibility is undermined by their clients. Company managers often favour experts that tell them what they want to hear and then, after the case is lost, blame the court or competition agency for the outcome. A good expert is the one that helps the company to understand the pros and cons of their case and can do their job rigorously and professionally.

Bruneau: As more sophisticated techniques are applied to demonstrate antitrust infringements, companies need to anticipate likely problematic issues from an antitrust perspective and implement a comprehensive compliance programme that would facilitate regular assessment of the strategies in place. Employing an efficient management strategy will ensure that the companies have a good understanding of their rights and obligations toward the competition authorities and will allow for better anticipation and planning in terms of procedure and disclosure of documents. To effectively address antitrust litigation, the adequate training of the company's managers and employees is vitally important. Companies should convey to their employees detailed information on how to behave in the event of an investigation and ongoing antitrust litigation procedures. Furthermore, the increasing number of documents requested by authorities requires careful coordination. To that end, management and legal departments should familiarise themselves with the company's operations, data, storage and document retention policies in order to efficiently contribute to litigation proceedings.

FW: Although comparatively few disputes ever see the inside of a courtroom, how do you foresee antitrust litigation activity, as well as the types of dispute that are likely to emerge, in the months and years ahead?

Padilla: Antitrust litigation will go on for years to come but we may see a shift from cartel enforcement to abuse of dominance cases. Whether that is the case or not will depend on the competition authorities' ability to strengthen their leniency programmes, which could require an investment in whistleblowers and significant fines handed down on to the individuals directly involved in the cartel. Litigation against dominant companies found to have infringed competition laws will become more common. These cases are orders of magnitude more complex than the standard cartel damages cases we have seen thus far – among other reasons, because there can be no presumption of actual effects other than in cartel cases and a significant proportion of the damages caused by an abuse of dominance take the form of lost future profits.

Bruneau: The number of antitrust litigation cases is expected to increase in the coming years. In the context of digital transformation, competition regulators have switched their focus to the application of competition rules to big tech companies, with digital markets facing a series of regulatory interventions. At the European level, Margrethe Vestager, the EU's competition commissioner, will run the extended portfolio under the title 'A Europe fit for the digital age'. As the EC's executive vice president, she has been assigned with the mandate to lead on digital policy and competition issues. Competition enforcement is likely to give rise to numerous antitrust proceedings in the technological and data sectors as companies in these fields are expected to be in the centre of scrutiny from the EC. Furthermore, the amount of abuse of dominance claims appears to be growing. In the future, we can also expect more decisions regarding follow-on antitrust private damages claims at national levels.

Strasberg: As matters currently stand, a sustained increase in litigation activity can be expected, with more cases reaching trial. Regulatory activity in sectors ripe for follow-on litigation shows no signs of abating. Appeals in the pharmaceutical cases, if unsuccessful, are likely to give rise to follow-on actions from health authorities. The big tech sector is attracting increasing regulatory scrutiny and has an extremely broad consumer base. The first cases in the interchange fee litigation are still being heard, with many to follow, including the Merricks claim, if it is certified. And litigation in the financial services sector remains active, with numerous follow-on claims afoot. ■

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A tax professional since 2006, Romain Tiffon has experience in structuring pan-European alternative investment funds across all asset classes, as well as coordinating tax structuring advice and implementation for a wide range of institutional investors. He also has extensive experience in structured finance, M&A transactions and sovereign wealth funds, and is currently responsible for ATOZ's DAC6 initiatives, working closely with Taxand and ATOZ Digital Solutions.

FW: Could you provide an overview of the key aims of DAC6? What type of cross-border tax arrangements fall within the Directive's scope?

Tiffon: DAC6 is a European Directive which, as of 25 June 2018, requires tax intermediaries to report, on a mandatory basis, specific cross-border arrangements that contain defined characteristics or features, and that were implemented after 25 June 2018. In order for an arrangement to fall within the scope of the Directive, it has to be cross-border, understood as being an arrangement that involves at least two different states, of which one has to be an EU Member State – although some countries have implemented rules for domestic arrangements. An arrangement also has to satisfy at least one of the hallmarks of the Directive – some of which are subject to a main benefit test, notwithstanding the presence of the hallmark – with reporting only required to the extent it is reasonable to assume that the main or one of the main benefits of the arrangement was to obtain a tax advantage.

FW: How important is it that businesses, individuals and intermediaries understand the importance and implications of the Directive? What might a failure to comply with DAC6 entail?

Tiffon: First of all, failure to report may lead to fines and penalties ranging from a few thousand euros to up to €5m, with potential criminal charges in some countries. Beyond the monetary aspect, there is also a reputational dimension. One critical angle for businesses is the centralisation of information. A non-coordinated approach will likely result in all intermediaries acting, and therefore reporting, on a standalone basis. This will potentially lead to disclosure of more information than that which is legally required, or even inconsistent information given the various degrees of the involved intermediaries' information access. Finally, it is important for taxpayers to understand that adopting an approach where all transactions are automatically disclosed without having a thorough analysis of the hallmarks may lead to substantial collateral damage. It may be perceived by tax authorities as an invitation to launch an audit. It may change the nature of a product that an investor was historically comfortable investing into from, say, a private equity asset to a tax product, assuming it is concluded that the main benefit test is satisfied.

FW: What steps should businesses be taking to ensure they achieve compliance by the Directive's full implementation deadline of 1 July 2020? How would you characterise general preparedness to date?

Tiffon: First reporting is due on 31 August 2020 and will cover all the reportable cross-border arrangements that were implemented or amended since 25 June 2018. Immediate actions that must be carried out to ensure intermediaries and taxpayers are compliant with their DAC6 obligations on time include screening all transactions that will have taken place over this two-year period, liaising with all tax intermediaries that have been involved, assessing which transactions may be reportable, then allocating the reporting responsibility. In terms of preparedness, most taxpayers are starting to really look into the practicalities of reporting, especially as legal professional privilege, and its broader application, may cause the reporting obligation to be shifted onto taxpayers, although intermediaries protected by legal professional privilege will nonetheless have to assess the reportability nature of the arrangement.

FW: What are the consequences of the Directive for a business's reporting function? To what extent can new technologies help a business fulfil multiple reporting requirements?

Tiffon: A business's reporting function will need to have more control over who is involved in any of its transactions, with the aim of ensuring appropriate disclosure when required, but only to the extent of what is legally required. The spirit of the Directive is that there be only one report filed within the EU for any reportable cross-border arrangement. Where intermediaries are not properly coordinated, there is a genuine risk that this will result in over-

reporting, overlapping reporting or even failure to report. To address these risks, besides having internal processes in place, I am convinced that technology will play a significant role. An IT solution can allow stakeholders, for any given transaction, to perform a DAC6-country specific analysis and then, thanks to a collaborative feature, have all the involved intermediaries sit around a virtual roundtable where the reporting responsibility will be allocated. Seamless coordination and communication among taxpayers and intermediaries is the key to managing DAC6 obligations successfully.

FW: Given that DAC (unlike the Foreign Account Tax Compliance Act (FATCA)) is not governed by rules so much as principles with broad hallmarks, to what extent is there potential for confusion and a lack of clarity?

Tiffon: While most EU countries have so far transposed DAC6, including the hallmarks *ad verbum*, actual local interpretation is likely to diverge across countries. Besides, the difficulty will also reside in the interconnection between various EU Member States. For example, under the Directive as implemented in most EU countries, the very fact that a reportable cross-border arrangement has been duly reported by one EU intermediary suffices to discharge the other EU intermediaries from their reporting obligations. Nevertheless, we cannot exclude that another tax authority may consider that the reporting in another jurisdiction is not sufficient on the ground that, for example, it does not contain the same information that should have been disclosed had the reporting been done in this first jurisdiction. Another interesting question is how the main benefit test will be construed in each jurisdiction. As of today, there is no guidance on how to measure the economic impact of an arrangement. How do we factor the duration of the arrangement? How do we price the non-monetary impacts that may be important to the structure?

FW: What essential advice would you offer to businesses, individuals and intermediaries in terms of meeting their DAC6 compliance obligations?

Tiffon: Complying with DAC6 obligations going forward will rely heavily on well-oiled internal processes and project management, which will result in the genuine requirement of clear and transparent coordination and communication among taxpayers and intermediaries. To that end, we recommend including DAC6 language in engagement letter terms. From a transactional perspective, a DAC6 analysis will become a compulsory part of the approval process, in the same way as we have witnessed with environmental, social and governance (ESG) standards. There needs to be a good understanding of who the intermediaries are, given the varying scope of the definition across different EU jurisdictions. It should also be understood which of these intermediaries may rely on legal professional privilege, possibly waiving it should clients want to designate them as reporting intermediaries. Finally, I would recommend a DAC6 analysis when intermediaries issue a structuring note.

FW: How smooth, or otherwise, do you anticipate the DAC6 implementation process will be? What transitional measures are available to aid compliance?

Tiffon: Given the current lack of guidance by most, if not all, jurisdictions, I suspect the initial implementation will be far from perfect, but will likely perfect itself overtime. In order to aid compliance, I cannot stress enough that beyond the technical legal analysis, a lot of what DAC6 implies is process and organisation. It is therefore key for taxpayers and intermediaries to set up processes to be adhered to so that DAC6 obligations are properly dealt with. To that point, I believe that having a collaborative-enabled IT solution will be fundamental to achieving the desired result, as all intermediaries will be able to share their reporting conclusions on a transaction and decide, if it is reportable, who among them should make the report so that only one reporting is filed. ■

> COMPLYING WITH DAC6 OBLIGATIONS GOING FORWARD WILL RELY HEAVILY ON WELL-OILED INTERNAL PROCESSES AND PROJECT MANAGEMENT.
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