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Globally Aligning Collective Bargaining Strategy

By Donald C. Dowling, Jr. (White & Case LLP)

As multinationals continue to globalize worldwide operations, they roll out various kinds of international initiatives that affect workers internationally.

Examples of international workforce initiatives include: ..multi-country restructurings/integrations/reductions-in-force; global mergers/acquisitions/divestitures; international human resources policies/work rules/codes of conduct; global Human Resources Information Systems; international "shared services" centers; and outsourcing/"offshoring" of specific business functions.

Looking from the top (headquarters) down, international workforce initiatives make good business sense. But looking up — from each affected local country — too many of these projects hit an obvious roadblock: information/consultation and bargaining obligations with the multinational's various local employee representative bodies around the world.

Examples of local employee representative bodies include: ..trade unions; local works councils; European Works Councils; labor/management councils; staff consultation committees; working-environment committees; health and safety committees; and ombudsmen.

In many countries, almost all employees are constituents of one... — or more — of these representative bodies. So many various worker-advocate voices can sound like a cacophony. At least, that is often the reaction of employers based in the United States, a country where only seven percent of non-government employees participate in organized labor and where law in effect allows just one kind of "employee representative," the labor union. (Outside the US, the various worker representative bodies other than independent trade unions tend to be employer organized/ sponsored, and as such, in the US, would be illegal "employer-dominated labor organizations." See U.S. Nat'l Lab. ReI. Act Section 8(a)(2); Electromation line of cases, cf. 35 F. 3d 1148 (7th Cir. 1994).)

The problem, in short, is that multinationals' globalization initiatives keep running into an old, rigid doctrine cobbled together back in the era of parochial, shop-level labor relations: the concept of "mandatory subject of bargaining" or required "information and consultation" with employee representatives in each local workplace. Fast-moving multinationals find themselves powerless to implement — even to make a final decision to implement — a new global initiative until they exhaust varied local processes. These processes can take months to complete: first, pitching a proposal to foreign affiliates' inevitably skeptical labor representatives; then, considering in good faith the representatives' counterproposals; finally, reaching agreement with certain local bargaining agents, or reaching impasse and exhausting deadlock resolution procedures.

Fast-moving multinationals find themselves powerless to implement — even to make a final decision to implement — a new global initiative until they exhaust varied local processes.

This hurdle will not go away. But surmounting it gets easier after a multinational globally aligns an approach to local collective bargaining. Indeed, undertaking a proactive alignment project offers several tangible benefits: advancing corporate goals and enhancing operational flexibility internationally harmonizing local collective agreement provisions/procedures across borders (to the extent possible) engaging a multinational's own foreign local labor negotiators, motivating them to bargain harder for headquarters initiatives defending against internationally focused trade unions teaming ..up across borders to wage "international corporate campaigns" against targeted multinationals

To any multinational with complex industrial relations, these benefits are huge. But in practice, to build a top-down global labor relations reporting model/bargaining strategy requires three phases:

Phase 1: Project Scope

Project Team

Assemble an in-house global labor-alignment project team. Project management should be top-down, under the global human resources function or any Global Vice President of Industrial Relations. Identify, enlist and empower foreign local internal labor liaisons — the company's own human resources people who negotiate with local labor

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representatives in each jurisdiction. Also identify outside local labor lawyers and consultants.

Global Philosophy and Goals

Articulate an organization-wide labor relations philosophy. Separately, list international collective bargaining goals, including any possible restructuring, divestiture, or other change out on the horizon. (If any big change is imminent, now is too late to align global bargaining structures.)

Global Labor Relations Philosophies Lie Across a Spectrum

At one end are multinationals that champion robust employee involvement, such as Europe-based conglomerates that sign international "framework"/union-neutrality agreements and that voluntarily host "global works councils. " At the other end of this spectrum are US-based multinationals with a "union free" mindset that see no business case for empowering labor representatives. Any such labor philosophy should account for the company's own supplier ("sweatshop") code of conduct: Many multinationals impose, on suppliers worldwide, codes with "free association" (union-neutrality) provisions. Can an organization impose a free association restriction on its outside suppliers without granting free association rights to its own staff?

Information-gathering

Put together a list of the bodies currently representing employees, by jurisdiction. Include special-topic representatives like health and safety committees. Collect these groups' existing agreements, formal and informal, including "sectoral" union agreements that apply by force of law rather than contract. For each jurisdiction, collect data about the local bargaining agenda, local grievances/disputes and the tenor of local bargaining relationships (friendly or contentious? proactive or moribund?). Get timetables: When are meetings? How long does it take to implement a new management proposal?

Phase 2: Analysis

Problem Spotting

Isolate the cumbersome provisions and procedures in local collective arrangements and other hurdles hindering headquarters.

Benchmarking

Benchmark best practices outside: Do peer employers' collective agreements offer innovative flexibility-enhancing provisions/procedures?

Phase 3: Implementation

Agenda

Develop a jurisdiction-by-jurisdiction agenda for modifying local collective agreements/procedures, to the extent possible, so as to: advance the philosophy/goals developed in phase 1; resolve the problems identified in phase 2; and speed up and align consultation timelines across jurisdictions.

Inflexible foreign labor agreements and cumbersome consultation procedures impede globalization — and, ultimately, profits. No one can eliminate these barriers, but a proactive multinational can lower them by aligning collective bargaining from headquarters down to the overseas local office/ "shop floor."

Execution

Design a communications/involvement strategy to engage and empower the company's in-country labor negotiators, keeping them focused on implementing headquarters agendas. To facilitate future change initiatives, maintain the project team "pyramid" structure using intranet tools and regular conference calls.

Inflexible Foreign Labor Agreements and Cumbersome Consultation Procedures Impede Globalization — and, Ultimately, Profits

No one can eliminate these barriers, but a proactive multinational can lower them by aligning collective bargaining from headquarters down to the overseas local office/ "shop floor." Doing this is a big project. But doing nothing perpetuates rigidity and delays in global restructurings, divestitures, and other international initiatives. ❑

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European Commission Unveils Plans to Restrict EU's General System of Preferences

By Paulette Vander Schueren and Madelein Perrick (Mayer Brown LLP)

On May 10, 2011, the European Commission unveiled a proposed Regulation on the EU's new General System of Preferences ("GSP") that should enter into force at the latest on January 1, 2014. This proposal must now be examined by the Council and the European Parliament.

The product scope of the GSP remains unchanged. As well, products remain categorized into:

- non-sensitive products which can be imported into the EU duty-free except for agricultural components;
- sensitive products for which the EU customs duty rate is decreased by 3.5 percentage points for most products.

While currently 176 countries and territories benefit from the EU's GSP, the European Commission proposes to exclude from GSP benefits countries that have been classified by the World Bank as high-income or upper-middle income economies for the past three years, based on Gross National Income (GNI) per capita. That would significantly limit the number of beneficiaries to possibly 80 countries only whereby countries such as Kuwait, Russia, Saudi Arabia and Qatar as well as a lot of the Latin-American countries such as Brazil, Argentina or Venezuela would cease to benefit from the EU's GSP.

Countries that already benefit from preferential access to the EU that is at least as good as the EU's GSP (such as countries that concluded an FTA with the EU or countries that benefit from an autonomous arrangement such as Balkan countries or the countries with an Economic Partnership arrangement with the EU) would also cease benefiting from the GSP.

Note that both categories of countries can resume benefiting from the GSP if they cease being high or upper-middle income economies or their FTA expires.

The exact list of beneficiary GSP countries will be known only at the time of the adoption of the new GSP Regulation based on the 3-year data available at that time.

While currently 176 countries and territories benefit from the EU's GSP, the European Commission proposes to exclude from GSP benefits countries that have been classified by the World Bank as high-income or upper-middle income economies for the past three years, based on Gross National Income (GNI) per capita.

The EU's current GSP also has a GSP+ regime that offers improved tariff preferences of which 15 countries benefit based on:

- vulnerability whereby the five largest sections of their GSP-covered imports to the EU represent over 75% of their total GSP-covered imports and GSP-covered imports from each of those countries represent less than 1% of total EU imports under GSP;
- ratification of 27 specific international conventions in the fields of human rights, core labor standards, sustainable development and good governance; Under the European Commission's proposal, the vulnerability thresholds are relaxed so that more countries will be eligible for GSP+, i.e.:
- the import-share threshold would increase from 1% to 2%;
- the share of the seven rather than five largest sections of GSP-covered imports should represent 75% of the total GSP-covered imports.

These countries will still be required to respect core international standards but the burden of proof for the implementation of the international conventions concerned will rest on the countries concerned. They will be compelled to commit to full cooperation with international organizations regarding the respect of the conventions concerned.

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Applications for GSP+ will be accepted at any time rather than every 1.5 years as is currently the case.

For the Least Developed Countries (49 among the poorest countries), the EU will continue to exempt their originating products from customs duties in its Everything But Arms regime. It trusts that with the reduction of its normal GSP regime to fewer beneficiaries, competitive pressures will decrease and the LDCs will be able to reap a greater benefit from the EU's GSP.

The current EU GSP regime is subject to revisions every 3 years. It is now proposed for the new GSP to be adopted for an indefinite period of time with changes being made if and when necessary.

Pursuant to the provisions on graduation in the current EU GSP system, groups of products originating in GSP beneficiary countries may lose GSP and GSP+ benefits when the average imports of products in a Section of the tariff nomenclature exceed 15% (12.5% for textiles and clothing) of GSP imports into the EU of the same products from all GSP beneficiaries during 3 years.

Under the European Commission's proposal:

- product sections used for graduation are expanded from 21 to 32 so that products in the categories susceptible of graduation are more homogenous;
- the thresholds are increased from 15% to 17.5% and from 12.5% to 14.5%;
- graduation will not apply to GSP+ countries.

The Commission's proposal provides that the GSP preferential arrangements can be withdrawn inter alia in the case of:

- failure to comply with international conventions on anti-terrorism and money laundering;
- serious and systemic unfair trading practices including those affecting the supply of raw materials which have an adverse effect on the EU industry and are not addressed by the beneficiary country (possibly after a WTO determination).

The reaction to the Commission's proposal is likely to divide EU Member States. Spain might find the exclusion of Latin-American countries problematic; other countries might welcome the exclusion as they wish to protect domestic production. BusinessEurope, which is the federation of EU industry associations, has already issued a mitigated reaction in which it welcomes the restriction of the number of beneficiary countries to concentrate the benefits of the system on

The reaction to the Commission's proposal is likely to divide EU Member States. Spain might find the exclusion of Latin-American countries problematic; other countries might welcome the exclusion as they wish to protect domestic production.

LDCs and lower-middle income countries. At the same time, it has expressed reservations regarding the relaxation of the conditions to grant GSP+, because it can undermine the competitive position of poorer countries to the benefit of stronger economies. Also, the politicizing of the GSP regime by linking it to fair trading or anti-terrorism will be prone to criticism. As a result, the Commission's proposal may undergo significant amendments before finalization. ❑

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Good Faith Disclosure and FRAND Commitment in the Context of Standardization Agreements

By Yves Botteman and Agapi Patsa (Steptoe & Johnson LLP)

The European Commission recently revisited its Guidelines on Horizontal Cooperation Agreements and has significantly changed the chapter on standardization agreements. The changes include specific provisions on standardization agreements that involve the use of intellectual property rights. In order for such agreements to fall within a safe-harbor, where there is a presumption that competition is not restricted, several conditions must be fulfilled. These conditions include granting effective access to the standard on the basis of (i) good faith disclosure and (ii) FRAND commitment obligations. This article examines these two core obligations in order to understand how they should be applied in practice.

Introduction

In December 2010, the European Commission (the EC) published revised guidelines on the assessment of horizontal cooperation agreements.

The new Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union (TFEU) to horizontal cooperation agreements[1] (the new Guidelines) bring about a number of noteworthy modifications, including a significant revision of the chapter on standardization agreements.

The core change in the chapter is the elaboration of more detailed guidance with regard to the conditions that a standardization agreement should fulfill in order to avoid the application of Article 101 (1) and (3) TFEU. While the Guidelines previously in force required unrestricted participation and non-discriminatory, open and transparent procedures in the setting of a standard, the new Guidelines shed more light on the concepts of: "unrestricted participation", "transparent procedure" and "access to the standard on fair, reasonable and non-discriminatory terms".

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According to the new Guidelines, standardization agreements will normally not fall within the scope of Article 101 (1) TFEU if:

- They do not risk creating market power through a dominant standard;[2] or
- Despite risking the creation of market power, they cumulatively satisfy the following conditions:

The new Guidelines address a matter that was not covered in the old Guidelines; that is, standardization agreements involving intellectual property rights (IPR).

- all of the competitors in the market(s) affected by the standard enjoy unrestricted participation in the setting of the standard;
- a transparent procedure is followed for the standard's adoption, so that stakeholders are effectively informed at every stage of the standard's development;
- there is no obligation to comply with the standard; and
- access to the standard is provided on fair, reasonable and nondiscriminatory terms.[3]

In addition, the new Guidelines address a matter that was not covered in the old Guidelines; that is, standardization agreements involving intellectual property rights (IPR). The new Guidelines state that, in cases of standards involving IPR, "a clear and balanced IPR policy, adapted to the particular industry and the needs of the standard-setting organization in question, increases the likelihood that the implementers of the standard will be granted effective access to the standards elaborated by that standard-setting organization".[4] Such IPR policy imposes on participants two obligations: (i) a "good faith disclosure"; and (ii) a "fair, reasonable and non-discriminatory commitment" (FRAND commitment).

Both obligations are further discussed below in order to understand how they should be applied in practice and avoid falling foul of the prohibition in Article 101 (1) TFEU.

The Good Faith Disclosure Obligation

According to the new Guidelines, the adoption by a

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standard-setting organization (SSO) of a clear and balanced IPR policy is a guarantee of effective access to the resulting standard. One necessary component of such IPR policy is the obligation imposed on participants to disclose ex ante and in good faith any IPR that might be essential for the implementation of the standard under development.[5]

This *ex ante* obligation is, according to the EC, intended to prevent patent "ambush" strategies and, hence, justified in order to allow participants to identify in advance technologies which are covered by IPR.[6] This in turn enables them to make an informed judgment when adopting the standard— both in terms of the IPR holder's willingness to actually license its IPR and the fees that it intends to charge.

Interestingly, the new Guidelines do not simply refer to a "disclosure" obligation, but rather qualify it with a "good faith" Endeavour to disclose IPR. However, the use of the good faith concept, largely inspired from continental civil law, is rather vague, as the new Guidelines do not elaborate further on it. This creates queries such as how far would someone have to go for the obligation to be deemed fulfilled. It appears that the good faith qualification has been used in recognition of the fact that a full disclosure requirement is quite burdensome and impractical in itself, in view of the fact that technological innovation is an endless and always perfectible exercise in many industries. Accordingly, the new Guidelines state that "[s]uch a disclosure obligation could be based on ongoing disclosure as the standard develops and on reasonable endeavors to identify IPR reading on the potential standard".[7] Still without further explanation, the use of the good faith concept—which has traditionally been used in the context of matters pertaining to civil law— in the field of EU competition law may be a source of uncertainty.[8] Such uncertainty is aggravated by the absence of any criteria according to which the EC will assess whether a participant has acted in good faith.

Having said that, the good faith disclosure requirement raises a number of issues:

- From a practical standpoint, it will inevitably result in increased administrative costs for both the participants to the SSO and the SSO itself. First, each time, the participants will need to identify and assess the importance of the IPR in question and whether such IPR are relevant to the specific standardization programme. Second, the SSO will need to establish and enforce procedures to regulate matters such as, for example, the precise scope of the disclosure obligation, in order to avoid instances of under- or over-disclosure. This obligation could become burdensome and the SSO will inevitably need guidance, which the new Guidelines regrettably do not offer.
- It may discourage R&D efforts. By disclosing the IPR, even only partly, the IPR holder may see the right's economic value decreased. This effect might induce major IPR holders to remain outside standardization efforts. The new Guidelines seem to acknowledge this possibility and, in an effort to avoid it, recognize that it is sufficient for participants in standardization undertakings to indicate the likely existence of IPR claims over a technology, without identifying them with any degree of precision.[9] This arrangement, however, raises the question of whether the participants are at all in a position to make any meaningful and informed judgment on the indispensability and value of the IPR in question.

This ex ante obligation is, according to the EC, intended to prevent patent "ambush" strategies and, hence, justified in order to allow participants to identify in advance technologies which are covered by IPR.

- Finally, another intriguing point is the way in which such obligation will in practice co-exist with the obligations imposed on competitors under the chapter of the new Guidelines on information exchange. A combined reading of the sections on information exchange and standardization agreements suggests that, in a number of respects, the two chapters contain provisions that may conflict with, rather than complement, each other.

Specifically, the new Guidelines list technologies and R&D programmes and their results as strategic information, of which exchange between competitors is likely to be caught by Article 101 TFEU. They expressly state that "if companies compete with regard to R&D it is the technology data that may be the most strategic for competition".[10] From this perspective, the disclosure of an IPR within an SSO could be considered as reducing both the strategic uncertainty and incentives to compete in the relevant market. It remains to be seen how this issue will be treated in practice, especially in instances of unnecessary over-disclosure of IPR.

In recognition of the admittedly rare and over-emphasized "ambush" problem identified and examined in the Rambus case[11], the EC should, in our view, adopt an approach on the good faith disclosure that would be respectful not only of the need to protect valuable IPR efforts, but also of the potentially negative effects that open-ended information sharing may have on competition.

Where a SSO chooses to apply a different disclosure model from the one described in the new Guidelines (e.g., a model that allows for disclosure, without however requiring it), a case-by-case assessment is called for. While the scope of this assessment is not clear, it appears that it will boil down to whether the disclosure model opted for actually allows the participants in the SSO to make a fully informed choice as to the standard finally adopted.[12]

The FRAND Commitment Obligation

Besides a good faith disclosure obligation, a clear and balanced IPR policy is also expected to include an ex ante, irrevocable FRAND commitment obligation, so as to ensure effective access to the standard.[13]

Under a FRAND commitment, participants undertake that their IPR, if incorporated into the standard, will be accessible on fair, reasonable and nondiscriminatory terms and conditions. In essence, the FRAND commitment constitutes a restriction on the IPR holder's ability to freely set royalties for the use of its IPR by third parties.

The economic justification for the use of a FRAND commitment lies in the need to ensure that the IPR holder does not abuse the market power that it might gain as a result of its IPR's inclusion in the standard adopted. In the absence of such commitment, patent "hold-up" problems might arise and limit the dissemination of the standard.

While the logic underlying the use of a FRAND commitment appears quite clear, its precise content remains obscure, as the new Guidelines do not sufficiently specify what would be considered as fair, reasonable and nondiscriminatory terms. It is merely implied that "fair" refers to the precise licensing terms imposed; "reasonable" concerns the fees charged for the IPR's use; and "non-discriminatory" relates to the treatment of the licensees.

The new Guidelines furthermore state that the SSO is not obliged to determine whether the terms provided by the IPR holder are indeed fair, reasonable and non-discriminatory.[14] This determination is to be made by the IPR holder itself and, in case of a dispute, examined on the basis of whether the fees bear a reasonable relationship to the economic value of the IPR.

The new Guidelines do not stipulate a particular method, but only suggest a number of (rather impracticable) ways for carrying out such assessment (e.g., comparing the licensing fees charged by the company concerned before and after the inclusion of its IPR in the standard).[15] In doing so, they give the impression that the exercise is objective, while in reality the terms of access are decided on a case-by-case basis and are usually driven by purely commercial considerations.

The absence of an explicit definition of FRAND terms may not be harmful, since parties should be free to negotiate license conditions. Nevertheless, it does raise a number of questions:

- A first troubling issue is how exactly the IPR holder can ensure that the protected IPR is accessible to all third parties in a non-discriminatory way. Discrimination not only arises from treating similar situations in a different manner, but also from treating different situations in a similar manner. Does it follow from this that, in formulating the licensing terms and fees, the IPR holder will have to take into account the individual circumstances of the various parties across the negotiating table (e.g., market share or other meaningful parameters)? Moreover, on a more general note, the imposition of an obligation of non-discriminatory treatment without any further qualifications appears to disregard the fact that foreclosure is not illegitimate per se; rather, anti-competitive foreclosure of a competitor should be in the EC's spotlight.
- Another question relates to who is to decide on the fairness, reasonableness and non-discriminatory nature of the terms provided by the IPR holder.

Interestingly, the new Guidelines do not simply refer to a "disclosure" obligation, but rather qualify it with a "good faith" endeavor to disclose IPR.

While the new Guidelines explicitly state that the SSO has no obligation to do so, they do not stipulate who does. Because the fees paid by each licensee to the IPR holder could be characterized as strategic information under the section of the new Guidelines on information exchange, it does not appear feasible that the other licensees could collectively assess the terms. On the other hand, if the SSO did choose to assume that task, it could end up endangering its neutrality and objectivity—both important elements for the completion of any standardization effort undertaken by it. One scenario would be for arbitrators to assess the terms, but both the IPR holder and the licensee would have to agree to this solution.

- Furthermore, similar to the good faith disclosure obligation, a FRAND commitment might have a negative impact on the industry's R&D efforts. Fearing a potential breach of the FRAND requirement, IPR holders might end up charging inadequate fees for use of their right by third parties. Low fees, while re-assuring the IPR holder that it is not in violation of its obligations, might act as a disincentive for industry participants to change the IPR incorporated into the standard, thereby slowing down further technological development.

It should be noted that the employment of the FRAND commitment obligation in the field of standardization

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agreements is somewhat awkward, as it appears to transpose principles applied in the context of Article 102 TFEU to Article 101 TFEU. The new Guidelines seem to reduce the risk of abuses of dominance by urging SSOs to adopt proper rules[16] and introducing some sort of blanket mandatory licensing through the back door. It is questionable whether guidelines on co-operation among competitors (rather than on unilateral conduct) are an appropriate basis for this sort of approach to licensing.

Conclusion

Undeniably, under the new Guidelines, the EC has opted for a stricter stance vis-à-vis standardization agreements involving the use of IPR.

The introduction of the good faith disclosure and FRAND commitment obligations could well result in a significant number of instances where SSO processes and agreements may not benefit from the safe-harbor from the application of EU competition rules that the new Guidelines seek to set in place. This is because both obligations are not clearly delineated in the new Guidelines. Crucial issues such as what is good faith disclosure, as opposed to 16 Damien Geradin 'Observations on Draft Horizontal Cooperation Guidelines and 'Patent Hold-Up'', speech in the context of the ABA Lunch 'The Draft EU Guidelines on Standard-Setting', 13 October 2010. disclosure, what are considered to be fair, reasonable and non-discriminatory terms and how disclosure of IPR will interact in practice with the rules contained in the section of the new Guidelines on information exchanges between competitors are either overlooked or insufficiently explained.

Another issue relates to the EC's contention that standardization agreements will normally fall within the safe-harbor if they do not risk creating market power through a dominant standard. In such instances, the new Guidelines seem to indicate that there is not even a need for adherence to the good faith disclosure and FRAND commitment obligations.[17] However, it could well be that a standard gains sufficient market power in order to become dominant ex post. Would the standardization agreement or process risk then being found to be anticompetitive?

It appears therefore that it will be quite difficult for industry to exploit the safe-harbor offered by the new Guidelines; not only due to its narrow scope, but also because of the unclear conditions for its application.

Even though the new Guidelines explicitly recognize that a standardization agreement that does not fall within the safe-harbor may avoid the prohibition under Article 101 (1) TFEU, standardization undertakings may nonetheless suffer from legal uncertainty. Rather than helping, the section on Article 101 (3) TFEU in the new Guidelines is so vague that it only adds to the ambiguity. Both SSOs and their participants appear to be forced into conducting ex ante compliance reviews.

The EC itself may provide answers to the above questions as it applies the new Guidelines in practice. The policy choice made in the new Guidelines has proven to be quite controversial in that the EC appears to have used an extreme measure to pre-empt patent ambush and hold-up problems. In any case, what is crucial at this point is that participants in standardization undertakings take the antitrust dimension into account when devising rules on membership and adoption of processes. ❑

By disclosing the IPR, even only partly, the IPR holder may see the right's economic value decreased. This effect might induce major IPR holders to remain outside standardization efforts.

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1 OJ C 11/1, 14.1.2011, see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF.

2 Ibid., paragraph 277. As commented in the concluding part of this article, the way in which the EC has structured the new Guidelines appears to assume that standardization efforts will lead to the creation of dominant standards. While this, in our view erroneous, approach is not the subject-matter of this article, it is necessary to highlight it, as it contributes to the legal uncertainty surrounding any future standardization efforts.

3 Ibid., paragraphs 278 and 280.

4 Ibid., paragraph 284.

5 Ibid., paragraph 286.

6 Ibid., paragraph 268.

7 Ibid., paragraph 286.

8 Paul Hughes, "Directors' Personal Liability for Cartel Activity under UK and EC Law–A Tangled Web" (2008) E.C.L.R. 11 p. 632.

9 Supra, note 5.

10 Ibid., paragraph 86.

11 See Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/C-3/38636–Rambus, OJ C 133/16, 12 June 2009.

12 Supra, note 1, paragraph 298.

13 Ibid., paragraph 285.

14 Ibid., paragraph 288.

15 Ibid., paragraph 289-290.

16 Damien Geradin 'Observations on Draft Horizontal Cooperation Guidelines and 'Patent Hold-Up'', speech

17 Supra, note 1, paragraphs 277-278.

Roundup

By Reuters

UK to Probe Big Four Auditing Stranglehold

UK competition authorities are to probe the stranglehold of the world's biggest accountancy firms on British blue-chip company audits after finding evidence of anti-competitive behavior. The Office of Fair Trading (OFT) said dominance of the sector by the so-called "Big Four" threw up barriers for rivals and made it hard for firms to switch auditors. It said there were reasonable grounds for suspecting features of the market "restrict, distort or prevent competition" in Britain.

The OFT's move comes on top of criticism from some policymakers who blame accountancy firms for giving banks a clean bill of health just before they had to be shored up during the financial crisis. But policymakers also worry markets could be destabilized if one of the four went under -- repeating the collapse of Arthur Andersen in 2002, which reduced the number of big auditing firms from five to four.

The European Union's executive European Commission is set to publish draft legislation later in 2011 to boost competition in the sector.

The OFT said it would meet with the Big Four in May and June 2011 to explore what reforms can be made before deciding on whether to pass the issue to Britain's Competition Commission. Otherwise, action at the international level could be more beneficial, the OFT said.

KPMG, one of the Big Four, said it was important to bring to a head the long-running debate on competition and choice and that it supported market-based and not regulatory intervention.

EU Ministers Back Plans to Curb Short-selling

European Union finance ministers backed a draft law to ban uncovered selling of shares and government debt, in a move to tighten controls on speculation. The short-selling rules, which would allow a European markets watchdog to block trades, will now be negotiated with the European Parliament and could be in place by the end of the year.

The new regime will require investors to inform regulators of their big short-selling positions and will give new powers to a markets watchdog to demand sensitive information as well as stop trades. France's finance minister Christine Lagarde told a meeting of European Union finance ministers in Brussels that the legislation could help identify large market movements which would previously have gone unidentified.

ECB's Trichet Says Financial Reforms Halfway

European Central Bank Governor Jean-Claude Trichet said regulators were around halfway through reforms to reinforce the financial system and ensure it makes a sustainable contribution to growth. Trichet told a conference in Madrid on financial system reform that regulators had achieved a blueprint of stringent bank regulations that include more loss-absorbing capital, better risk coverage and limitations for undue leverage. He said it was an "absolute obligation" for everyone to reinforce the resilience of the financial system and eliminate an "excessive fragility" revealed in the financial crisis.

UK competition authorities are to probe the stranglehold of the world's biggest accountancy firms on British blue-chip company audits after finding evidence of anti-competitive behavior.

Trichet said there had been a strengthening of oversight of financial systems and markets and market infrastructure, and an overhaul of financial supervision was in progress. But he said implementing the reforms must still be implemented, and the issue of systemically important financial institutions required more thought.

Trichet said things were not yet back to normal in the financial sector, and he did not share the view that ambitious reforms were unnecessary and counterproductive. Another bailout of the banks using taxpayers' money would not be acceptable in Europe or the United States, Trichet said. He also said the implementation of Basel III would help spare taxpayers the bill for future crises.

Rating Agencies Blast EU Three-day Warning Plan

Forcing credit rating agencies to let countries know about rating changes three days in advance could encourage insider trading, top officials from the sector said. Paul Taylor, president of Fitch Ratings, told a panel of lawmakers from Britain's upper parliamentary chamber that sovereign ratings was "one of the leakiest areas in our business".

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Roundup *(from page 11)*

The lawmakers were kicking off hearings into the sector's role in the financial crisis and its perceived lack of competition as the "Big Three" -- Fitch, Moody's, and Standard & Poor's -- dominate the international market.

Rating agencies give all issuers 12 hours' notice to challenge any factual errors but the European Union's executive European Commission has floated the idea of a three-day notice period on sovereign debt changes in Europe. At the same time, politicians have criticized agencies for causing big swings in government bond prices in the euro zone at a time when bailout packages were being negotiated for countries like Greece.

Frederic Drevon, managing director and head of Europe at Moody's, said three days would increase the risk of insider trading by increasing the number of people involved. Taylor said the rating agencies were less influential than people thought and blamed some of the big market moves on the power of the press.

Bribery Rife Across Europe's Top Companies

More than one third of employees at large European companies are prepared to offer cash or lavish gifts and entertainment to win business as the economic downturn prompts firms to cut corners, a survey said. In its 2011 European fraud survey, consultants Ernst & Young said that Greek and Russian staff were most likely to offer cash bribes, and Greek staffers were called the most likely to offer personal gifts.

France and Norway had the cleanest slates, although two thirds of the 2,365 people quizzed across 25 European countries agreed that bribery and corruption was widespread on their turf -- and nearly half were unaware of any company anti-bribery policy. David Stulb, who leads Ernst & Young's global fraud investigation & disputes services, said complacency about fraud, bribery and corruption, combined with cost cutting initiatives at many companies, created additional risk for companies.

Britain's Bribery Act, which comes into force from July 2011, unsettled business leaders in part because of an onerous new offence of failure to prevent bribery, which can make businesses with any UK interest criminally liable if staff, subsidiaries or "associated persons" offer bribes anywhere in the world.

After polling employees from the factory floor to top executives, Ernst & Young said over 40 percent acknowledged that bribery and corruption had worsened over the last two years of the economic crisis. Around one quarter did not trust management to behave ethically and nearly 60 percent expected top executives to cut corners to hit targets. Half of management respondents agreed. Ernst & Young said only 26 percent of UK staff and less than 20 percent in France and Germany had received anti-corruption training. Only one third of those polled thought their anti-bribery policy contained clear guidance.

BoE's Kohn Says Watchdogs Must Eye Offshore risks

Britain's financial watchdogs must guard against imposing tight rules that might push firms to offshore locations where they could still pose a threat to the UK, a new Bank of England adviser said. Donald Kohn, a former Federal Reserve vice-chairman who is taking up a seat on the BoE's new interim Financial Policy Committee, told a parliamentary committee that the FPC would face a tricky balancing act.

Banks have at least six months to continue using U.S. credit ratings for calculating mandatory capital cushions, European Union regulators said.

Kohn expressed concern that Britain's financial system could still be vulnerable if financial institutions with links to large banks moved outside of British jurisdiction. The FPC will have the power to set its own benchmarks for gauging risky behavior in the financial sector, and Kohn said it would be hard to strike the right balance between securing financial stability without stifling growth and innovation.

Kohn said there had not been any discussion yet of what tools the FPC would have at its disposal. However, he said there was a case for developing a "countercyclical capital tool" to monitor the level and quality of capital, as well as one for monitoring loan-to-value ratios for households and securities markets.

Kohn also said there was a case for banks to alter their loan-to-value ratios to respond to changing conditions on the housing market -- an issue being consulted on in a current review of the mortgage market.

EU Banks Get Breather Over U.S. Credit Ratings

Banks have at least six months to continue using U.S. credit ratings for calculating mandatory capital cushions, European Union regulators said.

Lenders faced a deadline of June 6 after which they could not use ratings compiled from a non-EU country whose credit rating standards have not been deemed by Europe to be "as stringent" as the bloc's own new rules.

Banks using U.S. ratings would have been left without an independent, external credit opinion on some activities like structured finance. They would have been forced to top up regulatory capital with billions of euros to reassure local supervisors, industry officials have said.

Brussels has so far held off from endorsing U.S. standards, leaving transatlantic banks in the lurch.

But this week the European Securities and Markets Authority (ESMA) issued guidelines to allow the continued use of third-country ratings until the agency has been formally registered in the EU.

The watchdog also signaled flexibility when it comes to assessing whether a non-EU country's rules are good enough, saying it will take a "global and holistic view".

The EU has already endorsed Japan's rules and ESMA said it was studying improvements anticipated to the U.S. reform of Wall Street known as Dodd-Frank.

EU to Publish Draft Bank Capital Rules in July

European Union states will be left with no "wriggle room" under plans by the bloc's executive to turn globally agreed tougher bank rules for more than 8,000 lenders into law. The accord, known as Basel III, was endorsed by world leaders in November 2010 and will phase in tougher bank capital and liquidity requirements over six years from 2013. EU financial services chief Michel Barnier will publish a draft EU law in July 2011 based on the global agreement.

A source involved in the process said that the law will contain "the core of Basel III." The European Commission wanted to take advantage of the current situation to push to further integration, the source said.

The draft law is set to allow so-called "silent participations" to be included in regulatory capital, but only if they meet 14 conditions. Some Austrian and German banks use this form of non-voting capital, with both debt and equity characteristics, which has been criticized by international regulators who fear it may not be readily at hand to absorb losses when needed. The European Banking Authority will be responsible for checking if the criteria are met.

Barnier is set to follow Basel's lead on liquidity during the lead up to 2015, when a fixed global ratio will become mandatory. The fixed ratio introduced in the EU from 2015 will be in line with what is agreed globally.

EU, UK Officials Back Choice in Securities Clearing

Investors should not be forced to clear trades on a particular platform, European Union and British officials said.

EU Competition Commissioner Joaquin Almunia said regulation and competition must go hand in hand to make sure market structures did not harm users. In particular, he told a seminar at Cass Business School, any entity that controls essential infrastructure such as a trading platform, clearing platform or pre-trading service, cannot be allowed to benefit "a restricted few."

Almunia is set to rule on a planned merger of Deutsche Boerse and NYSE Euronext, which would have a combined market share of over 90 percent of listed derivatives and a large chunk of share trading and clearing in Europe.

Banks fear being forced to clear trades within the combined Boerse/NYSE group and want the EU to forestall this, such as by allowing links between clearers, known as interoperability.

Almunia gave users some hope, and disputed arguments that increased competition made possible by interoperability would undermine stability.

Britain's financial services minister, Mark Hoban, said a draft EU law on clearing should be extended to all derivatives and not just those traded off exchanges.

Spain, the euro zone's fourth biggest economy, is desperate to avoid taking on more debt as it seeks to distance itself from fellow euro zone members like Greece and Ireland.

Spain Shies Away from Irish-style Bad Bank

Spain is reluctant to create a state-backed bank to hold toxic real estate assets from a burst housing bubble while it fights to bring down its deficit, preferring individual institutions to shoulder the risk. But the government will come under increasing pressure to underwrite a capital shortfall in its financial system, in a country struggling to emerge from recession and with little sign of private investor interest in its sell-off of regional banks.

Spain, the euro zone's fourth biggest economy, is desperate to avoid taking on more debt as it seeks to distance itself from fellow euro zone members like Greece and Ireland.

Ireland's bad bank, NAMA, was set up in 2009 and bought real estate assets from banks at a discount in exchange for bonds. In May 2011, NAMA took a one billion euros charge to cover potential losses from the loans it has acquired, sending its fourth-quarter loss up to 678 million euros.

Luis Arenzana, managing partner of Shelter Island Capital Management in Madrid, said the case of Ireland proved a bad bank was "a terrible idea."

Spain's Socialist government may also be unwilling to close down non-performing regional banks one year ahead of general elections, as any sign of attacking the 'cajas' may cost it votes in Spain's powerful, autonomous regions, noted Pedro Schwartz, economist at San Pablo University in Madrid. He said the worst performing cajas should be allowed to fail.

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Roundup *(from page 13)*

Spain has already poured around 10 billion euros ($14 billion) into a forced consolidation of the fragmented unlisted savings banks which account for around half the banking system. The central bank has estimated the banking system has a 15 billion euros capital shortfall, not taking future losses on real estate into account.

EU Slaps First Anti-subsidy Duties on China

The European Union imposed a five-year hike in duties on imports of glossy paper from China, the first EU challenge to Chinese state subsidies and a sign of more to come. In a double swipe likely to anger China, the bloc said it would charge duties worth a maximum of 12 percent to combat what it says is illegal Chinese state aid that is hurting EU producers, as well as duties of up to 35.1 percent to counteract what it says is illegal pricing by Chinese exporters. Both levels were approved by EU capitals in March 2011.

Although the sector is small -- Europe imported only about 130 million euros' worth of Chinese coated fine paper in 2009 for brochures and coffee-table books -- this challenge has been seen as the start of a trend, particularly since the EU has vowed to take on Chinese state subsidies that put European producers at an unfair disadvantage.

EU Commission spokesman John Clancy said this was the first time ever the EU had put in place measures against the "strategic and targeted subsidization of a specific industry by the Chinese government." He added that China was flouting its obligations under international trade rules.

Apple and Google smartphones may come under tighter regulation in Europe after a data protection panel ruled that data on the location of their users should be classed as private.

Apple, Android Phones Face Strict Laws in Europe

Apple and Google smartphones may come under tighter regulation in Europe after a data protection panel ruled that data on the location of their users should be classed as private, the Financial Times said.

The proposals by the panel, which advises the European Commission, are a first step to formulating a law on mobile phone location data, and could be written into Europe's revised Data Protection Directive this year, the report said.

The panel said companies should get permission from smartphone users before collecting user-location data and should specify what purpose the data are being used for. ❑

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UK Jurisdiction Issues in Cross-Border Employment

By Jonathan C. Maude (McGuirewoods LLP)

An area of serious concern for companies employing UK national employees to work outside of the UK relates to the jurisdictional reach of UK courts in relation to the employment of those individuals. Generally, the jurisdictional tests developed by the courts focus on the degree of practical connection between the job or work in question and the UK. The following is a brief overview.

UK Employment Laws

The UK laws that are most likely to be relevant in the context of extended jurisdictional claims are:

- unfair dismissal law;
- discrimination law; and
- contract law.

The cross-border effect of each legal area is very different and; therefore, it is helpful to consider each in turn.

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Unfair Dismissal Law

This right is alien to a number of countries outside of the UK and provides "protected employees" with the right for a procedure to be followed in the event of termination of the employment contract. Failure to do so can result in compensation claims limited in value to £80,400. However, the Employment Act generally provides that this protection will not apply to employees "ordinarily working" outside of Great Britain.

In order for a UK court to take jurisdiction in relation to an unfair dismissal claim, the employee will need to show, inter alia, that his or her employment has a sufficiently strong connection with the UK such that jurisdiction should properly be taken.

The meaning of "ordinarily working" outside of

Cross-Border Employment, continued on page 16

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Cross-Border Employment *(from page 15)*

Great Britain has occupied many hours of Employment Tribunal and Court time. The main focus is to determine from a factual perspective where the employee is based and what happens in connection with his or her employment in practice. Matters to be considered include:

- where the employee has his or her headquarters;
- where the employee has his or her home;
- what currency is paid to the employee; and
- whether the employee is subject to, or the employer pays, UK taxes or national insurance.

In order for a UK court to take jurisdiction in relation to an unfair dismissal claim, the employee will need to show these factors exist or that his or her employment has a sufficiently strong connection with the UK such that jurisdiction should properly be taken.

Discrimination Law

The Equality Act that has recently come into force in the UK consolidates a huge raft of equal opportunities legislation. Unfortunately, parliament has not clarified the position in relation to the jurisdictional issues that arise when an employee wishes to litigate regarding alleged breaches of the legislation. Consequently, existing case law on the point is the only guide available until case law under the new Act has been decided.

However, as a general rule, an employee would be able to rely on UK discrimination law if he or she works "wholly or partly in Great Britain" or "wholly outside of Great Britain," and the following conditions apply:

- The employer had a place of business in Great Britain; and
- The work was for the purposes of that business and the employee was ordinarily resident in Great Britain (a) at any time during the course of the employment, or (b) when he or she offered the employment.

Again, this is a form of the "closest connection" test being applied.

It is clear that attempting to devise a "one size fits all" test for cross-border employment jurisdiction is not possible. Each employee will have different factual circumstances that will need to be considered.

Contractual Rights

In this context, the first consideration should be the terms of the contact in order to ascertain whether the parties themselves have agreed to a jurisdiction that should apply to contract interpretation. Most contracts will have a jurisdiction clause providing significant guidance on the matter. However, this is not conclusive.

For example, the UK Court of Appeal (in Samengo-Turner v. J&H Marsh & McLennan (Services) Limited) disregarded the exclusive New York jurisdiction clause in a bonus agreement, which was agreed before the dispute arose. In so ruling, the court opined that a "multinational business must be expected to be subject to the employment laws applicable to those they employ in different jurisdictions." However, again, it can be expected that the employee concerned would need to show a "close connection" to the UK in order to utilize the UK jurisdiction.

In conclusion, it is clear that attempting to devise a "one size fits all" test for cross-border employment jurisdiction is not possible. Each employee will have different factual circumstances that will need to be considered. However, the closer the connection, in practical terms, with the UK, the more likely it is that UK Employment Tribunals and Courts will take jurisdiction in relation to such issues. ❑

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