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## ANTITRUST & COMPETITION LAW DIGEST

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## EUROPEAN UNION

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# The Court rules on the burden of proof in a case involving technological collusion

➦ Case C-74/14 of the Court of Justice, *Eturas UAB e.a.*, January 22, 2016

On January 21, 2016, the Court of Justice of the European Union (the “Court”) issued a preliminary ruling in *Eturas UAB e.a.*, C-74/14, that answered questions raised by the Supreme Administrative Court of Lithuania. The Court shed light on the level of evidence required to presume the existence of a concerted practice in the context of the unilateral announcement of rebates on an online booking system.

In this case, the administrator of the system sent a notice to travel agents via the internal E-TURAS messaging system informing them that they should apply a maximum 3% discount to their bookings. In addition, a

technical restriction was set in the E-TURAS system to cap the discounts that could be entered in the booking system at 3%. Some of the online agents argued that they had not read the message or not even sold the relevant product. As a consequence, the Lithuanian court sought clarification as to the correct interpretation of Article 101 (1) TFEU and, in particular, as to the allocation of the burden of proof.

The Court held that economic operators may, if they were aware of that message, be presumed to have participated in a concerted practice since they did not publicly distance themselves from that practice, or

report it to the administrative authorities or adduce other evidence to rebut that presumption, such as evidence of the systematic application of a discount exceeding the cap in question. The Court of Justice ruled that although the law of evidence is a matter for national law, it would be contrary to the presumption of innocence to infer the awareness of the travel agents on the sole basis of the message being sent to them.

In other words, if the mere sending of the message in question may, in the light of other objective and consistent

indicia, suffice to presume that the message recipients were aware of its content, they should nevertheless still have the opportunity to rebut such presumption. In this regard, the Court merely stated that ‘*excessive or unrealistic*’ steps cannot be imposed on the message recipients.

Also, in light of the *Eturas* judgment, it is necessary for undertakings, if they become aware of a concerted practice, to publicly distance themselves as quickly as possible or report it to the competent competition authorities without delay.

## Commission's green light to consolidation in the Belgian telecom sector

🔗 [Case M.7637 - Liberty Global / BASE Belgium, February 4, 2016](#)

On February 4, 2016, the European Commission (the "Commission") approved, subject to conditions, the acquisition of mobile operator BASE, the leading mobile operator in Belgium, by Liberty Global, parent of Telenet, a mobile virtual network operator ("MVNO") active in Belgium.

The clearance decision, adopted after an in-depth investigation, is the first in the Telecom sector after the failure of the joint venture project between TeliaSonera and Telenor in Denmark and takes part in the consolidation wave in the Telecom sector, where "multi-play" offers are at the heart of the market dynamics.

In its analysis, the Commission first noted that Telenet and BASE were two particularly dynamic players in the Belgian retail mobile market and that they had both contributed to reducing market prices by offering attractive tariffs. Thus, the Commission concluded that the transaction would lead to the elimination of an important competitive force and that the new entity would have limited incentive to exert significant competitive pressure on Proximus and Mobistar – the only two remaining competitors post-transaction in this market. In these circumstances, the Commission considered that the transaction could generate higher prices, reduced supply, and less service innovation for customers in the Belgian retail mobile market.

The Commission also assessed the possibility for Liberty Global to exclude competitors from the market by offering bundles of fixed and mobile telephony services to BASE customers. This hypothesis was eventually excluded, as Telenet had already proposed – before the transaction – bundled offers with fixed and mobile telephony services and thus the transaction would not change its incentives or the market structure.

To meet the Commission's concerns regarding competition in the Belgian retail mobile market, Liberty Global offered a number of commitments in order to ensure that a new MVNO will be able to enter the retail mobile market.

- Firstly, Liberty Global has agreed to sell, prior to completion of the transaction, BASE's share in VikingCo SA and VikingCo International SA (Mobile Vikings) to Medialaan, a Belgian media company ("up-front buyer" remedy).
- Secondly, Liberty Global has committed to transfer, prior to completion of the transaction, BASE's customer base under its JIM Mobile brand to Medialaan ("up-front buyer" remedy). This sale was approved by the Belgian Competition Authority on January 28, 2016.

- Finally, Liberty Global has reached an agreement with Medialaan, giving the latter access to BASE's mobile network under conditions that allow Medialaan to compete as an independent virtual operator ("full MVNO").

Liberty Global's commitment to sell part of BASE's customer base (under the brand JIM Mobile) is not common in the Telecom sector. It stems from past decisions that the Commission has a strong interest in commitments relating to the assignment of frequency packages,<sup>1</sup> mobile sites,<sup>2</sup>

strengthening of RAN-sharing and/or roaming agreements<sup>3</sup> or entering into wholesale agreements with MVNOs.<sup>4</sup> However, this type of commitment is not entirely new in the sector given that, in the context of the *H3G/ Orange Austria* transaction,<sup>5</sup> Orange sold a part of its customer base under the "Yesss!" brand.

<sup>1</sup> Decision of the Commission COMP/3916, *T-MOBILE AUSTRIA/TELERING*, April 26, 2006; COMP/5650, *T-MOBILE/ORANGE*, March 1; COMP/M.6497 - *HUTCHISON 3G AUSTRIA/ORANGE AUSTRIA*, December 12, 2012; COMP/M.7018 - *TELEFONICA/E-PLUS*, July 2, 2014.

<sup>2</sup> Decision of the Commission COMP/M.3916 - *T-MOBILE AUSTRIA/TELERING*, April 26, 2006.

<sup>3</sup> Decisions of the Commission COMP/M.5650 - *T-MOBILE/ORANGE*, March 1, 2010; COMP/M.6992 - *HUTCHISON 3G UK/02 IRELAND*, May 28, 2014.

<sup>4</sup> Decisions of the Commission COMP/M.6497 - *HUTCHISON 3G AUSTRIA/ORANGE AUSTRIA*, December 12, 2012; COMP/M.6992 - *HUTCHISON 3G UK/02 IRELAND*, May 28, 2014; COMP/M.7018 - *TELEFONICA/E-PLUS*, July 2, 2014.

<sup>5</sup> Decision of the Commission COMP/M.6497 - *HUTCHISON 3G AUSTRIA/ORANGE AUSTRIA*, December 12, 2012.



## Annulment of the Commission decision in the airfreight cartel case

⑦ Cases T-9/11, T-28/11, T-36/11, T-38/11, T-39/11, T-40/11, T-43/11, T-46/11, T-48/11, T-56/11, T-62/11, T-63/11, T-67/11 of the General Court, *Airfreight*, December 16, 2015

On December 18, 2015, the General Court annulled the Commission's decision in the airfreight cartel case.

As a matter of background, on December 9, 2010, the Commission fined 21 airlines for price fixing on freight services. It argued that the airlines had agreed on fuel surcharge and security charges on routes between the EU/EEA and third-country airports over various periods. The Commission imposed fines of €799 million on the airlines, except for Lufthansa and Swiss, which had obtained full immunity under the Commission's leniency program.

In the decision's grounds, the Commission found the existence of a single, complex and continuous infringement for all the unlawful conducts. This concept allows the Commission to conclude that several individual but related infringements constitute a single infringement when they are part of a "global plan". To the extent the Commission shows that each company is aware of and intends to participate in this global plan, it can hold each company accountable for the entire infringement, even if it has not directly participated in all its components. The Commission may use this power without prejudice of its obligation to adapt the level of the fine to the personal involvement of each company.

The Commission's decision showed some inconsistencies between the operative part and its grounds. Indeed, on the one hand, the Commission retained the existence of four different infringements, incriminating for each of them different air carriers depending on the routes and periods concerned, and on the other hand, imposed a single fine on each carrier for all four offenses.

Therefore, the General Court found that the operative part and the grounds were contradictory and annulled the decision.

It is interesting to note that the successful plea pointing out the decision's internal inconsistencies was raised by the air carriers only at the hearing before the General Court, at a very advanced stage of the proceedings. The General Court admitted this plea and ruled that the inconsistencies prevented it from exercising control over the decision's legality and infringed the plaintiffs' rights of defense.

This judgment underlines the importance of the operative part of the Commission decisions, which is the only part that formally establishes the nature and extent of the infringements as well as the identity of the authors. The

crucial nature of the operative part is particularly significant in the context of the development of actions for damages following competition law infringements. Under Directive 2014/104/EU, which must be transposed in Member States' national laws in 2016, it is indeed the operative part of a decision that plays a central role for damages actions.

Following the judgment, the Commission confirmed officially its intention not to appeal the judgment to the

Court of Justice. This should avoid extending the suspension of the ongoing actions for damages against the airlines. Two options thus remain open: either the Commission adopts a new fining decision taking into account the judgment or it decides to simply drop the case.



## EUROPEAN UNION

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# State aid: the Commission aims the stevedoring sector

⑦ Decision SA.25338 of the European Commission, Netherlands, January 21, 2016

⑦ Decision SA.38393 of the European Commission, Belgium, January 21, 2016

⑦ Decision SA.38398 of the European Commission, France, January 21, 2016

⑦ Decision SA.35905 of the European Commission, Port of Antwerp, January 15, 2016

On January 21, 2016, the Commission adopted three decisions concerning exemptions on corporate tax applying to certain ports in the Netherlands, France and Belgium.

The Commission found that those tax exemptions are likely to infringe EU state aid rules: the Commission considered that ports conduct economic activities different from those related to infrastructure operations involving the exercise of the essential responsibilities of the State that are essential government functions (e.g. safety, surveillance, traffic control), i.e. public service obligations, which are

beyond the control of state aid. Conversely, the profits generated in the context of these activities must be subject to the general corporate tax system in order to avoid any distortion of competition.

The exemptions targeted by the Commission constitute “existing aid”—in other words, aid granted prior to the entry into force of the Treaty of Rome. This type of aid is subject to a special regime of cooperation under which the concerned Member States must align their legislation to the EU state aid rules.

Each Member State has two months to comply with the Commission's requirements or the Commission will be allowed to open formal in-depth investigations.

In another decision relating to container terminals, the Commission opened an in-depth probe into alleged aid given by the public port of Antwerp (Belgium) to container-terminal operators. The investigations focus on reductions of compensation granted to SA Antwerp NV and Antwerp Gateway NV that might constitute an undue advantage over competitors, infringing the EU State aid rules.

In the present case, the public authority responsible for the management of the port of Antwerp had signed two concession agreements with two operators concerning the provision of land for carrying out their activities within the port of Antwerp.

These agreements contain minimum tonnage requirements pursuant to which the two operators committed to handle

a minimum number of containers in the port each year. If the operators failed to comply with this condition, they were required to pay compensation to the port authority. However, during the period between 2009 and 2012, the tonnage requirements were not met and the port authority did not collect the compensation fee due by both operators and retroactively reduced the minimum tonnage requirements for March 2013 (by approx. 80%).

Following a complaint from a competitor, the Commission opened an in-depth investigation to assess whether the fact that the port authority reduced the compensation fee constitutes a State aid, and if so, whether this aid complies with EU State aid rules. The Commission officially published its formal letter on March 18, 2016, thereby giving a month to interested third parties to comment on its preliminary findings.



## FRANCE

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# Administrative courts are competent to examine follow-on actions in the context of public tenders

🕒 *Tribunal des Conflits, Paris area, November 16, 2015*

On November 16, 2015, the French *Tribunal des conflits* ruled that actions for damages resulting from anti-competitive practices relating to public tenders fall within administrative tribunals' jurisdiction.

This judgment was made in the Ile-de-France High Schools case whose facts are well known: companies colluded in the process of bidding on public contracts for the renovation and the reconstruction of schools for which the Ile-de-France region was responsible for providing management, maintenance and construction.

The French Competition Authority (the "FCA") fined the undertakings in question on the basis of Article L. 420-1 of the French Commercial Code concerning cartels. Furthermore, the Paris Criminal Court fined several individuals for

non-material damages. The decision of the FCA and the judgment of the Paris Criminal Court were both upheld on appeal on July 3, 2008, and on February 27, 2007, respectively.

The Ile-de-France region then brought a claim before the Court of First Instance of Paris for the conviction of several individuals in compensation for material damages that resulted from the cartel's actions.

However, the action was deemed statute-barred by a ruling handed down on December 17, 2013. The region then lodged an appeal before the Paris Court of Appeal. The administrative authorities challenged the jurisdiction of civil courts in favor of the administrative judge. After the chamber proved them wrong, the administrative

authorities asked that the case be referred to the French *Tribunal des conflits*.

The French *Tribunal des conflits* reversed the Paris Court of Appeal's judgment, ruling that the dispute was related to the liability of companies and their employees because of actions that led the Ile-de-France region to award contracts on unfavorable price conditions and was intended to compensate for damages resulting from the difference between the terms of the public contracts actually entered into and those that would have been approved under normal competitive conditions.

The French *Tribunal des conflits*' solution is the straight continuation of another judgment handed down on May 23, 2005, *Savoy-SPTV c/ Apalats Company*. The *Tribunal des conflits* held that a dispute between a contracting authority and an applicant based on the award

of a procurement contract fell within administrative tribunals' jurisdiction, even if it did not relate to compliance with public procurement rules or the implementation of the contract.

Similar solutions have also been reached by the French Highest Administrative Court, in a dispute regarding the liability of companies because of fraudulent actions that may have led a public person to enter into a contract with unfavorable terms (Council of State, 19 December 2007, *Campenon Bernard Company and others*)<sup>1</sup> and by the French Civil Highest Court (Cass. Civ., 18 June 2014, No. 13-19 408 ).<sup>2</sup>

<sup>1</sup> <https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000018007825&fastReqId=43985983&fastPos=12>

<sup>2</sup> <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000029116055&fastReqId=560891533&fastPos=1>

## Implementation of commitments: the divestiture of Completel approved

[↗](#) Press release of the French Competition Authority, December 22, 2015

On December 22, 2015, the French Competition Authority approved the Kosc consortium as purchaser of the DSL network of Numericable's former subsidiary, Completel, which Numericable had committed to divest as a remedy for its acquisition of SFR.

In its decision of October 2014, the FCA had indicated that the disappearance of Completel, a maverick that constituted the main driver of price competition on the market for fixed telephony and business communications, raised competition concerns. Numericable had therefore committed to divest Completel's DSL network to one or more players, independent from Numericable and the Altice group, one that would have sufficient financial resources and competence to exploit and develop the network.

The FCA found that the Kosc Consortium's members, namely Cofip, Kapix, Styx and OVH, fulfilled the above

conditions in light of their significant expertise in the telecom sector. The FCA mentioned, in particular, that OVH is a major player in the web-hosting market and had recently entered into the telecom market, and that Kapix and Styx are the holding companies of telecom entrepreneurs Yann de Pince and Boris Clause.

This approval falls into the ongoing supervision by the FCA of the implementation of the commitments offered by Numericable in the context of its acquisition of SFR. In this respect, the FCA is still monitoring the way that Numericable is implementing its commitments toward Bouygues Telecom for the deployment of an optical fiber network, and is looking into whether SFR and Numericable jumped the gun and started working together before obtaining clearance from the FCA.

## The FCA hits Orange with a record fine in a settlement procedure

➤ Decision n°15-D-20 of the French Competition Authority on practices implemented in the electronic communications sector, December 17, 2015

The FCA fined Orange €350 million for abusing its dominant position in the market for electronic communication services provided to non-residential clients (business customers). The FCA raised various objections against Orange on both fixed and mobile telecommunications services segments.

Regarding fixed telecommunications services, the FCA held that discriminatory practices took place in relation to the wholesale access to the local loop. The FCA found that Orange, as the incumbent operator and manager of the cooper local loop, had access to technical information essential to other operators' abilities to compete. The FCA noted that Orange did not provide access to this information under the same conditions that apply to its own services.

Regarding the mobile telecommunications services, the FCA held that Orange set up various cumulative loyalty rebates that led to market foreclosure and contributed to the artificial protection of Orange's position.

In more detail, Orange granted to its clients loyalty points calculated each month based on their seniority, the number of phone lines they owned as well as the amount of their monthly bill. Those loyalty points could only be used if the clients re-subscribed to a monthly phone plan,

thus, according to the FCA, discouraging consumers to move to another provider. A rebate was also granted to some of Orange's clients in exchange for an extension of their contract period, thus artificially raising the operator switching costs. Finally, a rebate was offered to Orange's clients as part of its virtual private network (VPN) services under the condition that the client would not buy similar services from competing operators.

Besides the record amount of the fine, €350 million, which is the highest fine ever imposed on a single company by the FCA, this decision is also important because it made an anticipated application of the new settlement procedure introduced by *Loi Macron*. This stems from two elements in particular.

First, the *Rapporteur Général's* fine proposal, based on negotiations with Orange, took the form of a nominal value set on the basis of the maximum fine rather than a reduction of the basic amount of the fine. Second, Orange waived its right to challenge not only the substance of the decision, but also the outcome of the case. It seems therefore that the company has committed not to appeal the decision, which is a main requirement for the use of the new settlement procedure.

## Paris Court of Appeal overturns the automatic increase of the fine of subsidiaries forming part of a group

🔗 Judgment of the Paris Court of Appeal, January 21, 2016

On January 21, 2016, the Paris Court of Appeal, ruling on referral, reduced the fines that had been issued by the FCA to subsidiaries of two major groups, Inéo Réseaux Sud-Ouest and Spie Sud-Ouest, for their participation in a concerted practice on private and public tender markets. The Court of Appeal ruled that where an infringing company belongs to a group, this circumstance does not justify an automatic increase in the fine to be paid by the infringing company when it has acted on an autonomous basis from its parent company. In its decision, the FCA took into account the fact that the subsidiaries belonged to “*a major corporate group (...) whose turnover was particularly significant*” to increase the fine imposed upon the subsidiaries, whose complete autonomy from their parent companies had been recognized. Both subsidiaries appealed the FCA’s decision.

According to European precedents, parent companies are liable for the illegal behaviour of their subsidiaries where they exercise decisive influence over them. Such influence is presumed where the subsidiaries in question are wholly owned or controlled by their parent companies. In a decision dated January 6, 2011, the FCA applied this European presumption for the first time. However, in the present case, as the FCA issued the statement of objections before January 6, 2011, it did not apply the presumption and conducted an *in concreto* analysis of the evidence relating to the economic, legal and organizational links between both subsidiaries and their respective parent companies. The FCA concluded that both infringing subsidiaries had

complete commercial autonomy from their respective parents.

To calculate the amount of the fine, the European Commission takes into account the fact that the subsidiary forms a single economic entity with the corporate group to which it belongs. It relies on the size of the corporate group involved to apply a multiplying factor to the basic amount of the fine to be imposed upon the subsidiary where its parent is presumed to exercise a decisive influence.

Until now, to justify an increase in the fine, the FCA systematically took into account the size of the corporate group to which the infringing subsidiary belonged, regardless of its commercial autonomy *vis-à-vis* its parent company. On several occasions, the Court of Appeal confirmed the FCA’s position in order for the fine to be as deterrent and proportional as possible pursuant to Article L. 464-2 I, 3 of the French Commercial Code.

However, in its judgment of January 21, 2016, the Paris Court of Appeal overturned this precedent by considering that “*the fact that a company belongs to a corporate group cannot justify, in itself, the automatic increase of the amount of the fine*”.

It therefore stems from this judgment that the FCA may no longer automatically increase the fine of an infringing subsidiary that is acting completely autonomously from its parent company.



## BELGIUM

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# The Belgian Competition Authority imposed modest fine for gun-jumping

🔗 [Decision n°15-CC-79 of the Belgian Competition Authority, Cordeel-Imtech, December 23, 2015](#)

On December 23, 2015, the Belgian Competition Authority (the “BCA”) symbolically fined the Cordeel Group, a general contractor company, €5,000 for having implemented the acquisition of the Belgian activities of the Dutch Imtech Group prior to notifying it and obtaining clearance from the BCA.

Similar to EU law, Belgian law contains a standstill obligation forbidding companies from implementing a notifiable transaction until approval has been received from the BCA. The violation of this obligation (“*gun-jumping*”) constitutes an infringement for which the BCA may impose a fine even if the transaction is cleared later. The present case shows that the risk is not purely hypothetical.

In August 2015, Cordeel acquired Imtech, a company on the verge of bankruptcy active in the installation of electronic and sanitary appliances. The operation was not notified to the BCA, disregarding the fact that it qualified as a notifiable concentration according to Belgian law.

After the implementation of the concentration, the BCA contacted Cordeel on its own initiative and informed it of the applicability of the merger control rules to the transaction and the infringement of the standstill obligation stemming from its early implementation.

Following the BCA’s information, Cordeel requested a retroactive exemption from the standstill obligation. The BCA agreed to grant this exemption and lifted retroactively the suspensive effect of the notification in order to safeguard the legal certainty of the acts undertaken by the merged entity since the acquisition. This exemption prevents these acts from being challenged on the basis that they were adopted by the merged entity prior to the clearance of the transaction.

On November 10, 2015, the concentration was formally notified to the BCA under the standard procedure, allowing the BCA to adopt a single decision on both the concentration and the infringement of the standstill obligation.

On December 23, 2015, the transaction was unconditionally cleared as it did not raise any competition concerns. However, regarding the infringement of the standstill obligation, the BCA imposed a symbolic fine of €5,000 on the Cordeel Group. The moderate amount of the fine was due to the exceptional mitigating circumstances relating, *inter alia*, to the non-intentional nature of the infringement, the severe financial difficulties of Imtech, which was in a situation of imminent bankruptcy, the limited value of the transaction, its absence of harmful effects on competition as well as the limited duration of the infringement.

## No one-stop-shop in the EU for leniency applicants

⑦ Case C-428/14 of the European Court of Justice, *DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA v. Autorità Garante della Concorrenza e del Mercato*, January 20, 2016

On January 20, 2016, the European Court of Justice handed down a preliminary ruling concerning the relationship between the EU and Member State leniency programs.

The ruling followed a request by the Italian Supreme Court in a case concerning a cartel in the international road freight forwarding sector in Italy. In particular, the Italian watchdog sanctioned DHL for its participation in the cartel without taking into account the leniency application filed at the EU level. It argued that it was under no obligation to consider any leniency application other than the one filed at the national level.

The European Court confirmed the *Autorità Garante della Concorrenza e del Mercato's* reasoning by excluding the existence of any legal connection between European and national leniency programs. According to the Court,

leniency or immunity granted to a company in an EU cartel investigation does not guarantee the same benefit in a similar national investigation. In this case, the Commission sanctioned a cartel in the air freight forwarding services sector, whereas the Italian competition authority focused on a cartel in the road freight forwarding sector.

The recent decision has clearly brought out the difficulties linked to the absence of a centralized EU leniency program. Applicants should thus be very prudent in filing leniency applications. They should ensure that their applications cover the entire scope of conduct concerned and all relevant jurisdictions, bearing in mind that it would be impossible to rely on the scope of EU applications before national authorities.



## UNITED STATES

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# Liability of individuals in the wake of the Yates memo: the oil and gas probe

Recent developments demonstrate the DOJ's renewed focus on prosecuting individuals when the DOJ suspects corporate wrongdoing. On March, 1, 2016, the DOJ announced an indictment against former CEO of Chesapeake Energy Corporation, Mr. Aubrey K. McClendon. The indictment, styled as part of an ongoing probe into the oil and gas industry, accused Mr. McClendon, who denied the charge, of conspiring with another company to predetermine the winner of leasehold bidding contests.<sup>1</sup> The indictment, which the DOJ moved to dismiss following Mr. McClendon's death,<sup>2</sup> confirmed the DOJ's commitment to increase deterrence by holding individuals accountable for antitrust violations.

On February 18, 2016, Brent Snyder, Deputy Assistant Attorney General for Criminal Enforcement, announced that the Antitrust Division, which he claimed already had a track record of pursuing individual charges, would increase its efforts following the Yates Memo.<sup>3</sup> The memorandum, issued by Deputy Attorney General Sally Yates on September 9, 2015, announced a renewed focus on "*combat[ing] corporate misconduct*" by pursuing charges against individuals.<sup>4</sup> The memorandum outlined steps it would take to achieve its goals, directing the DOJ, in

particular, to withhold credit for cooperation unless the corporation provides "*all relevant facts*" on the individuals involved in the alleged misconduct, to focus on individuals in its investigations, and to avoid corporate resolutions featuring agreements to "*dismiss charges against, or provide immunity for, individual officers or employees.*"<sup>5</sup>

Importantly, however, that directive does not apply to the Antitrust Division's Corporate Leniency Program.<sup>6</sup> That exception may encourage corporations that learn of possible wrongdoing to seek leniency from the DOJ. The Leniency Program, notably, protects current directors, officers, and employees from prosecution, but corporations that wish to participate in the Program may also negotiate to extend that umbrella to cover *former* executives.<sup>7</sup> In that regard, however, Chesapeake Energy, which received conditional leniency,<sup>8</sup> apparently did not apply for, or did not obtain, that protection for its former CEO.

Corporations may increasingly face a reality in which antitrust charges mean not only fines for the corporation, but criminal charges and possible prison terms for executives. This development should underscore the importance of enhanced compliance programs. If some wrongdoing is suspected, serious consideration should be given to using the leniency program to protect not only the corporation, but also its current and, to the extent possible, former directors and employees.

<sup>1</sup> Erien Ailworth and Bradely Olson, *McClendon's Death Casts Cloud Over Probe*, WALL ST. J., Mar. 3, 2016, <http://www.wsj.com/articles/mcclendons-death-casts-cloud-over-probe-1457055700>

<sup>2</sup> Ailworth and Olson, *supra* note 2.

<sup>3</sup> Jeff Zalesin, *DOJ Official Says Antitrust Division Upping Exec Scrutiny*, LAW360.COM, Feb 19, 2016, <http://www.law360.com/articles/761245/doj-official-says-antitrust-division-upping-exec-scrutiny>

<sup>4</sup> Memorandum from Deputy Attorney General Salley Quillian Yates to All United States Attorneys 1 (Sept. 9, 2015) (on file with author) [hereinafter Yates Memo].

<sup>5</sup> *Id.*

<sup>6</sup> Yates Memo at 5.

<sup>7</sup> U.S. Dep't of Justice Antitrust Division Model Corporate Conditional Leniency Letter at 2 n. 2 (on file with author).

<sup>8</sup> Ailworth and Olson, *supra* note 4.

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