ABA SECTION OF ANTITRUST LAW

Promoting Competition
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Spring 2016 Issue

TRANSPORTATION, ENERGY & ANTITRUST

A publication of the
Transportation and Energy Industries Committee of the Section of Antitrust Law,
American Bar Association

Message from the Chair

Welcome to the Spring 2016 edition of our committee newsletter *Transportation, Energy & Antitrust*.

The theme of this edition of *Transportation, Energy & Antitrust* is the wide ranging issues that our committee covers for the Antitrust Section. The broad range of sectors within the transportation and energy industries is showcased by our six substantive articles covering ground (oilfield services, freight rail transportation, and automobiles), sea (seaports), and sky (airlines). We also address both domestic and international issues, including regulation, merger review, and consumer protection.

We also continue our new feature, Cases to Watch. This feature provides a short summary of recent developments in key energy and transportation cases since our Fall 2015 edition. If you would like to continue to follow one or more of these cases, you do not have to wait until the next edition of the newsletter. Our Young Lawyer Representative, Laura Collins, provides a "Weekly Roundup," of all the news you need to know from the prior week relating to antitrust and consumer protection issues in the energy and transportation industries. You can find this on our Connect page each week: http://connect.abaantitrust.org/communities/community-home?communitykey=992223f0-c028-4dea-a5db-cd48d6eedff9&tab=groupdetails

In addition to our wonderful authors, this issue would not have been possible without the significant contributions of several individuals including Josh Chamberlain, Amanda Norton, Laura Collins, Francesca Pisano, and our editors, Brian Rafkin and David Meyer.

Happy reading!

Amanda Wait
Chair, Transportation and Energy Industries Committee
2015-2016

A Primer on European Union Competition Law Issues Relating to Seaports

By Dr. Vincent JG Power[1]

The European Union's 1,200 commercial seaports (or "ports") occupy an interesting space in competition law. On the one hand, they can be profit-generating publicly- or privately-owned businesses but, on the other hand, they often have a role to play as a public utility. In addition, the costs of building and maintaining some of a port's infrastructure—some of which would never be profit-making but are nonetheless necessary for safety, security, and operational reasons—mean that there is considerable State involvement and investment in ports without any real commercial return. As a result, cases concerning competition in ports involve a delicate balance between competition and regulation as well as market stimulation and market competition. In so far as competition law applies to ports, the European Union ("EU") cases have pushed the outer bounds of competition law, in terms of the application of the "essential facilities" doctrine, novel theories of abuse of dominance, and EU State aid enforcement.

While the case law provides opportunities for enterprising businesses that deal with ports, such as carriers, stevedores and others, to obtain favourable business outcomes (e.g., by invoking competition law principles in negotiations), these businesses must also must be careful to comply with the competition laws themselves so as to avoid the penalties and pitfalls that afflict those in breach of EU competition law.

There are seven parts to this article: (1) an overview of the commercial context in which EU ports operate; (2) a short primer on EU competition law; (3) the application of EU rules on abuse of dominance to ports; (4) the application of EU rules on anti-competitive arrangements to ports; (5) the application of EU State aid rules to ports; (6) the merger control regime as applied to ports; and (7) finally, some advice on competition law compliance.

I. Commercial Overview

Ports are critical to the commercial success of the EU's 28 Member States and its internal market. Around 37% of the intra-EU freight traffic, 74% of extra-EU goods and almost 400 million passengers pass through the EU's ports annually. Ports are to be found in 22 of the Member States and are dotted along the EU's coastline of 41,006 miles – a coastline which is more than three times longer than that of the United States. Annually, there are over 60,000 calls at EU ports by ships from all nations. By tonnage, about 70% of traffic is bulk traffic with about 18%

[1] Dr. Vincent Power BCL (NUI), LL.M. and Ph.D. (Cambridge) is a partner at A&L Goodbody in Dublin, Ireland.

involving Lo-Lo traffic,[2] 7% being Ro-Ro traffic,[3] with the balance being general cargo. The EU port sector is a significant employer with over 110,000 port workers. Most of the EU's ports are publicly-owned (whether directly by the State or local authorities or indirectly through State-owned companies) but some are owned privately. EU law does not distinguish or discriminate between publicly- and privately-owned ports[4] but insists that ports which are publicly-owned or are given special privileges (regardless of who owns the ports) do not abuse the privileges given to them in a way which distorts competition.[5] Traditionally, many ports were characterised by restrictive work practices but, steadily, ports are becoming more competitive and efficient. This increase in competitiveness and efficiency has been due to changing work practices which are, in turn, the result of demands by carriers and shippers as well as legislative intervention.

II. A Primer on EU Competition Law Relating to Ports

EU competition law is broader than U.S. antitrust law. The EU rules cover not only rules on anti-competitive arrangements (*e.g.*, cartels),[6] abuse of dominance (which is broader than U.S. monopolization law)[7] and merger control[8] but also "State aid" provided by EU Member States.[9] The EU rules apply to "undertakings" - these are economic operators such as carriers, stevedores, agents and so on.[10] Ports can be undertakings or not depending on their activities. For example, if ports are engaged in commercial activities then they are undertakings, but when they are involved in activities which are non-commercial in nature (*e.g.*, environmental clean-up) then they are not undertakings and hence EU competition law does not apply in those circumstances.

EU Member States also have their own national competition laws, so businesses typically have to comply with both sets of rules (*e.g.*, EU and German law in regard to activities in a German port). Occasionally, only one set of rules apply (*e.g.*, EU State aid or EU merger control law) but both the EU and Member State sets of rules on anti-competitive arrangements or abuse of dominance could

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[2] Lo-Lo traffic involves the lifting-on and lifting-off (hence "Lo-Lo") of containers on or off ships using a crane with that crane being either on the ship or on shore.

[3] Ro-Ro traffic involves the rolling-on and rolling-off (hence "Ro-Ro") of containers on or off ships using a ramp from the ship to the shore with the containers being pulled by a truck or tractor.

[4] Article 345 of the Treaty on the Functioning of the European Union ("TFEU") provides that the EU "Treaties shall in no way prejudice the rules in Member States governing the system of property ownership."

[5] See Article 106 of the TFEU.

[6] See Article 101 of the TFEU.

[7] See Article 102 of the TFEU.

[8] See Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (published in Official Journal L 24, 29.01.2004, p. 1-22).

[9] The case law of the EU relating to competition is found in two main sources: www.curia.eu and http://ec.europa.eu/competition/index_en.html (by clicking "cases" under the antitrust, cartels, mergers and State aid tabs).

[10] However, employees or regulatory bodies are not undertakings. The term "undertaking" is not defined in EU competition legislation generally but is taken to mean, in general terms, economic/market operators (whether or not acting for profit) rather than regulators or public service entities (e.g., national health systems or air traffic control providers).

potentially apply in the same situation. So, it is wise to comply with both the EU and the national legal regimes.

III. Abuse of Dominance

Abuse of dominance is the key competition law risk facing port operators and port users. Indeed, the rules on abuse of dominance have been used by the EU institutions (particularly, the European Commission and the CJEU) in striking and innovative ways to, for example, mandate that ports provide access to prospective users or to improve the operating conditions at ports under the "essential facilities" doctrine.[11]

Article 102 of the TFEU[12] prohibits all abuses of dominance without the possibility of exemption or exception. Similar to Section 2 of the Sherman Act, an undertaking is in a dominant position when it has the ability to act to an appreciable extent independently of its competitors, customers, and consumers. The dominance must relate to the whole of the EU or to a "substantial part" of the EU and, interestingly, some ports (even smaller ones) have been recognised as representing a "substantial part" of the EU and being in a dominant position.[13]

It is useful to consider the Article 102 cases under the headings of: (a) access to ports; and (b) operating conditions in ports.

A. Access to Ports

The European Commission has shown a willingness to treat ports as "essential facilities"—thereby mandating access to prospective users—even where the allegedly dominant port is small in size.

For example, the operator of a small port of Roscoff in France was held[14] to have abused its dominant position in the market for services between Ireland and Brittany (a region in Northwest France)[15] by refusing access to an Irish ferry

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[11] The terminology of, and thinking behind, the Doctrine of Essential Facilities was not used initially by the Commission or the CJEU but it has been used with increasing frequency by the Commission and the CJEU (the latter has referred to the Doctrine in both Advocate General opinions and Court judgments – e.g., C-67/13 P CB v Commission ECLI:EU:C:2014:1958 and C-138/11 Compass-Datenbank ECLI:EU:C:2012:449 respectively).

[12] For the text of Art.102 of the TFEU, see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E102:EN:HTML.

[13] For example, where the port is linking one Member State to another or where it provides ferry services to the capital city of another Member State. For example, Commission Decision 94/19/EC of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.689 - Sea Containers v. Stena Sealink - Interim measures) Official Journal L 15, 18.1.1994, p. 8–19 (note: Art.86 of the EC Treaty is the predecessor provision of Art.102 of the TFEU).

[14] See Irish Continental Group v CCI de Morlaix [1995] 5 CMLR 177. Available also at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_35388.

[15] The European Commission defined the relevant market as being the supply of port facilities in Brittany to operators of ferry services for passengers and vehicles which wish to offer services between Brittany and Ireland. According to the European Commission, it was possible to distinguish this market from other markets for the supply of port services, notably Normandy ports, because there existed a specific demand from ferry operators for port services in Brittany in order to satisfy

company that wanted to operate a service between Roscoff and Ireland.[16] It was not entirely clear why the operators of the port of Roscoff refused access to the Irish ferry company, but it was a notable fact that the port operator had a small shareholding in a ferry company, Brittany Ferries, which already operated between Roscoff and Ireland and would have been faced with the new competition from the Irish company but it is unclear as to why it refused supply. The European Commission found that the port operator (*i.e.*, CCI de Morlaix) occupied a dominant position in the provision of what could be described as an essential facility (*i.e.*, a facility or infrastructure, without access to which competitors cannot provide services to their customers) (the European Commission stated at para.18 of its Decision: "the port of Roscoff presently possesses the essential facilities in the market, while the other ports do not appear, prima facie, to be directly substitutable"). The European Commission continued by explaining that the port operator's refusal—without objective justification—to grant access to a prospective port user constituted an abuse of its dominant position. Thus, the European Commission was satisfied that a company, in these circumstances, in a dominant position which sells services must have an objectively valid reason for refusing to sell them to a willing buyer, in particular where the company in a dominant position controls access to an essential facility. The European Commission concluded by ordering CCI de Morlaix to grant the Irish ferry company to access to the Roscoff port. The decision was interesting because on the basis of the European Commission's decision, CCI de Morlaix was obliged by the European Commission to take the necessary steps to allow the Irish operator access to the port of Roscoff from a specified date but the European Commission expressed its hope that both parties would negotiate an agreement for agreed access; as it happens, the parties did reach agreement and the ferry operation remains in place.

In another case, the small port of Holyhead in Wales was at the centre of a claim that it was abusing its dominance by refusing access to a ferry company that wanted to operate a "rapid ferry service" to Dublin, Ireland.[17] As in the *Roscoff* case, the port owner also operated a "conventional ferry service" from Holyhead that would have been protected from competition from the complainant's "rapid ferry service" between Holyhead and Dublin. Following the European Commission's intervention, it brokered a settlement between the parties whereby the port owner agreed to provide the ferry company with access to the port of Holyhead on terms which the European Commission considers reasonable and non-discriminatory.

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customer demand for transport services between Ireland and Brittany. The European Commission also concluded that the port of Roscoff was the only one providing port facilities for transport services between Brittany and Ireland under acceptable conditions to the Irish ferry company involved because other ports in Brittany were not suitable (either too far away or not providing the necessary technical facilities for large ferries). Consequently, the port had a dominant position in the market for the provision of port facilities for passenger and car ferry services between Brittany and Ireland. It also is notable that the European Commission used a subjective rather than objective test, that is to say, that instead of looking at what an average ferry company might need, the European Commission saw the test as relating to what the particular putative applicant sought by way of facilities.

[16] See Irish Continental Group v CCI de Morlaix [1995] 5 CMLR 177. Available also at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_35388.

[17] Commission Decision 94/19/EC of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.689 - Sea Containers v. Stena Sealink - Interim measures) Official Journal L 15, 18.1.1994, p. 8–19.

These cases make clear that ports, particularly where the port operator also competes in a downstream market against the prospective entrant, can be seen as essential facilities in a dominant position and be required to provide access to new entrants.

B. Operating Conditions at Ports

The very same Holyhead port discussed above was also at the centre of another case[18] where the owner of the port was held to have altered the timetable of its ferry operations in a way which prejudiced a competing ferry operator. Following a complaint from the ferry operator, the European Commission determined that the owner of the port held a dominant position and that it had abused its dominance by virtue of changing its timetable to prejudice the competing ferry service. Ultimately, the European Commission required Holyhead to return to its published ship schedules for the previous year to avoid prejudicing the competing ferry service. This is an interesting example of what would appear to be micro-management of a ferry port's operations, but the European Commission justified the intervention because of the competitive harm caused to the victim company (and its passengers) by the abuse of dominance of a dominant operator who had altered its schedules.

Other port operations have also been subjects of case law. For example, the port of Genoa in Italy was at the centre of fascinating case where the CJEU opined, in effect, that the port could not compel a ship to use the port's exclusive but less efficient service provider when the ship could have used its own cranes and crew to discharge its cargo. The case is notable because it demonstrates that EU competition law can be invoked to challenge inefficiencies in the marketplace. This line of case law seems to push the boundaries of traditional abuse of dominance law and it can prove useful for port users who want to reduce costs (*e.g.*, to self-handle cargo instead of using dockworkers).

It is quite likely that the full effects of this case law have not yet been identified, and more developments should be anticipated. So far, the European Commission has been more enthusiastic about applying the essential facilities doctrine than the CJEU[19] and the law still needs further development, but it would be short-sighted for ports and port users alike to ignore the rules on abuse of dominance.

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[18] Commission Decision IV/34.174 Sealink/B&I – Holyhead: Interim Measures of 11 June 1992 relating to a proceeding under Article 86 of the EEC Treaty, [1992] 5 CMLR 255. See also http://ec.europa.eu/competition/antitrust/cases/dec_docs/34174/34174_2_2.pdf.

[19] The "Doctrine of Essential Facilities" cases in regard to ports have come before the European Commission rather than the CJEU. By contrast, the inefficiency cases have mainly come before the CJEU. For the hesitancy of the CJEU, see Case C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG 1998 I-07791, ECLI:EU:C:1998:569.

IV. Anti-Competitive Arrangements

Under Article 101 of the TFEU,[20] an arrangement between undertakings which has the object or effect of preventing, restricting, or distorting competition in the EU or in any part of the EU is generally prohibited and void. Examples would be hard-core Sherman Act Section 1-type conduct such as price-fixing, bid rigging, market sharing, or customer allocation, as well as anti-competitive exchanges of competitively sensitive information. While this area is yet to be explored fully in the context of ports, examples could include: (a) two ports exchanging competitively sensitive information or setting charges (often known as "dues") collectively; or (b) two stevedores in fixing port charges.[21]

While there has been little private litigation or government enforcement under Article 101 relating to ports (at least on the public record), antitrust compliance remains critical because competitors operate in such close physical proximity. Ports and their trading partners should ensure that, for example, they do not themselves (or require others) to exchange competitively sensitive information or to engage in any form of price-fixing or anti-competitive collaboration. Equally, port users must ensure that, despite their often close physical proximity to competitors, they maintain active compliance programmes and avoid entering into anti-competitive agreements.

V. State Aid

The EU prohibits its Member States from providing discriminatory State aid to businesses where the State aid would distort competition.[22] The aid could be, for example, a cash grant but could also be, for example, a remission of charges or the provision of free facilities where a market economy operator would not have provided free facilities. The State aid rules are enforced mainly by the European Commission, though, more unusually, cases can be brought by plaintiffs in Member State courts. If the European Commission finds that a business has been provided with unlawful State aid then the recipient must repay the aid to the Member State which provided it. This is different from fines imposed by the European Commission for breaches of competition law under Articles 101 and 102 where the fine is paid to the European Commission. In some ways, the Member State providing the State aid is on an "even bet" because it gets the benefit of the undertaking's business or contribution and, if there is State aid, gets back the money that it provided. Companies do not fare as well, though as Member States. For example, if a shipping company benefits from unlawful State aid, then the company

[20] For the text of Art.101 of the TFEU, see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML.

[21] Before 1 May 2004, it was possible to notify an individual arrangement or practice to the European Commission to obtain an exemption (comparable to the Business Review Letter mechanism in the U.S.) but this was abolished under the European Commission's so-called "Modernisation Programme" (embodied primarily in Regulation 1/2003 OJ L1/1-25 – available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001). Thus, because exemptions can only be granted by courts and competition agencies following litigation, companies are well-advised to seek advice before concluding an arrangement and make their own "self-assessment" as to whether the arrangement is compatible with EU competition law.

[22] See http://ec.europa.eu/competition/state_aid/overview/index_en.html.

can be faced not only with the cost of repaying the State aid (with interest) but also with honouring the business arrangements that it agreed to with the assistance of the State aid. Thus, a business that concludes agreements with ports or obtains privileges from ports should ensure that the arrangements and privileges are compatible with State aid law otherwise the benefits could prove illusionary in the long run.

There are several cases pending across the EU on State aid in relation to ports, and the indications are that this area is likely to develop over time. The European Commission's press release of 15 January 2016 regarding its inquiry into the Port of Antwerp in Belgium summarises that case neatly:

> The Commission opened an in-depth inquiry into whether reductions in compensation payments granted by the Port of Antwerp to two container terminal operators gave them an undue advantage over competitors, in breach of EU state aid rules . . .
>
> The concession agreements for PSA Antwerp NV and Antwerp Gateway NV, two container terminal operators in the Port of Antwerp, contained a requirement that a minimum amount of containers must be handled in the port every year (minimum tonnage requirements). Between 2009 and 2012 PSA Antwerp NV and Antwerp Gateway NV did not reach these minimum tonnage requirements. Under the agreements, they were obliged to pay compensation to the Authority. However, instead of collecting the compensation due from the two companies, in March 2013 the Antwerp Port Authority retroactively revised the minimum tonnage requirements downwards. This significantly reduced the amount of compensation to be paid by PSA Antwerp and Antwerp Gateway (by around 80%).
>
> Following a complaint from a competitor, the Commission has opened an in-depth investigation to examine whether a private investor would have accepted to reduce its compensation in a similar manner. If the operation was not carried out on market terms it could constitute state aid as defined by EU rules. The Commission would then verify whether such aid could be authorised under State aid rules that allow Member States to grant state aid for certain public interest goals.[23]

The case is still pending, but it demonstrates that State aid can involve much more than grants or concessions but could also involve amendments to contracts or debt forgiveness favouring port users. It is worth noting that while many of the cases involve publicly-owned ports, the State aid rules can also apply to privately-owned ports where an EU Member State is providing some State aid.

Businesses dealing with ports need to be particularly careful where the port is not acting as a market economy operator (*i.e.*, like a private profit-driven operator) would do but is instead, for example, providing facilities at less than full value,

[23] IP/16/81. See http://europa.eu/rapid/press-release_IP-16-81_en.htm?locale=FR.

renegotiating rates in a way which leads to overly generous deals, waiving charges, or providing assistance selectively. Businesses cannot "notify" their agreements in advance to the European Commission to confirm whether there is State aid – under the current rules, only a Member State may notify arrangements or practices to determine whether there is State aid and to seek authorization. While businesses should seek legal and economic advice as to whether the proposed arrangements are comparable to those which would be entered into by a market economy operator in comparable circumstances, this is often a difficult task because there may not be an actual market comparable and hence a hypothetical private sector operator has to be imagined for the purposes of the analysis. Unfortunately, businesses simply may need to forego some of the benefits on offer because they may be unlawful – a simple rule of thumb is for business executives to recall the old maxim that if a deal looks too good to be true then it may well be so.

VI. Merger Control

Anyone wishing to buy, sell, or conclude a joint venture with an EU port must ensure that the transaction complies with the relevant European Commission or Member State rules on merger control. Notification is often complex but, to date at least, the cases involving ports have been relatively straightforward. Difficult cases could potentially involve scenarios where a number of ports in a region or country combine in a way which would be likely to lead to an increase in charges because the merged entity would not, post-transaction, face effective competition.

VII. Advice on Compliance

Irrespective of its nationality, domicile, or place of incorporation, every undertaking (whether, for example, a port or a port user) must comply with EU competition law whenever an arrangement or practice has an effect on trade between EU Member States, if there is State aid, or where there is a merger within the meaning of the EU rules. The requisite "effect" on inter-State trade to trigger the application of EU competition law is easily established and given the international nature of port activities, it is not surprising that EU competition law almost invariably applies to cases on ports.

Businesses should have a compliance programme and greements and practices should be reviewed to ensure compliance with EU competition law. Such a programme should be both defensive and offensive: first, it should ensure that executives know the rules well enough to avoid any breach, and secondly, it should train executives to be able to spot scenarios where they can invoke the EU competition rules to challenge the anti-competitive behaviour of ports or other port users. Indeed, as discussed above, the EU case law on ports provides sufficient opportunities for enterprising port users to obtain favourable business outcomes. A failure to comply with the competition laws—whether by ports or port users—may mean choppy waters ahead.[24] It should be plain sailing but a lack of planning can mean that deals and reputations founder on the rocks of EU competition law.

[24] To date, there have not been many significant port cases at the EU level but the risk is real.







Transportation and Energy Industries
COMMITTEE OFFICERS

Chair:
Amanda L. Wait
Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037-1701
(202) 955-1502
await@hunton.com

Paul Brown
Greenberg Traurig LLP
1000 Louisiana Street, Suite 1700
Houston, TX 77002-5001
(713) 374-3500
brownpa@gtlaw.com

Karen Kazmerzak
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005-1401
(202) 736-8068
kkazmerzak@sidley.com

Council Representative:
Alysa Zeltzer Hutnik
Kelley, Drye & Warren LLP
3050 K Street, NW, Suite 400
Washington, DC 20007-5100
(202) 342-8603
ahutkik@kelleydrye.com

David L. Meyer
Morrison & Foerster LLP
Suite 6000
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1831
(202) 887-1519
dmeyer@mofo.com

Leigh L. Oliver
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-3648
Leigh.oliver@hoganlovells.com

Young Lawyer Representative:
Laura Collins
Freshfields Bruckhaus Deringer LLP
700 13th Street, NW, Floor 9
Washington, DC 20005
(202) 777-4579
laura.collins@freshfields.com

Brian Rafkin
Dechert LLP
1900 K Street, NW
Washington, DC 20006
(202) 261-3318
brian.rafkin@dechert.com

William H. Stallings
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006-1101
(202) 263-3807
wstallings@mayerbrown.com

Please send all submissions for future issues to:

Editors
David L. Meyer
Morrison & Foerster LLP
Suite 6000
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1831
Phone: (202) 887-1519
Fax: (202) 785-7599

Brian Rafkin
Dechert LLP
1900 K Street, NW
Washington, DC 20006
Phone: (202) 261-3318
brian.rafkin@dechert.com