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Implications of U.S. Sarbanes-Oxley Act in the Antitrust Field for European Companies

The Sarbanes-Oxley Act of 2002 became law in the United States on 30 July 2002. It makes dramatic changes in the law governing public companies, accounting firms, law firms, investment banks, and securities firms. The Act also contains important provisions that reach into the antitrust and competition realm. Many of these rules are important for non-U.S. companies.

The Sarbanes-Oxley Act is intended to restore investor confidence in the U.S. securities markets by rectifying recent accounting and other corporate abuses which caused public outcry in the United States. The U.S. Congress passed the Act with almost unprecedented speed and many of the provisions were adopted without the benefit of the normal legislative process. Accordingly, the new law is broad in scope and rife with interpretational issues.

It is critical that European in-house and outside counsel as well as businesspeople familiarize themselves with the Sarbanes-Oxley Act in general. Attached is a memorandum from the WCP Corporate and Securities Practice Groups that highlights the Act's main requirements applicable to boards and management of non-U.S. companies. In principle, non-U.S. companies whose securities are traded publicly in the United States are subject to these requirements. Additional information on the Act is available on our website at http://www.wilmer.com/docs/news_items/ACFC8AE.pdf.

Several of the new rules are also relevant in the antitrust and competition context, and others may be made applicable to antitrust situations by the forthcoming implementation rules of the U.S. Securities and Exchange Commission (SEC). European companies should in particular be aware of the following two new criminal law rules applicable in antitrust investigations, because these rules will likely apply to non-U.S. companies *even if their securities are not publicly traded in the United States* (subject to general principles of extra-territorial jurisdiction):

- **Criminal Penalties for Document Destruction and Tampering.** The Act imposes severe criminal penalties, including up to a 20-year prison term, for (a) destroying, altering, or falsifying records with the intent to impede an investigation "of any matter within the jurisdiction of any department or agency of the United States," (b) tampering with a record "with the intent to impair the object's integrity or availability for use in an official proceeding," or (c) obstruction of an official proceeding. These penalties apparently will apply to antitrust investigations by the Department of Justice and Federal Trade Commission, such as investigations of alleged price fixing or other anticompetitive practices, as well as to merger investigations. It is likely that they will apply to non-U.S. as well as to U.S. companies if the underlying antitrust investigation relates to them. These new rules dramatically reinforce the importance of scrupulous attention to document preservation practices in anticipation of and during possible U.S. government antitrust investigations.

- **Criminal Penalties for Retaliation against Whistleblowers.** Sarbanes-Oxley imposes criminal penalties of up to a 10-year prison term for retaliation against a person who provides U.S. law enforcement authorities with information relating to the (possible) "commission of any federal offense." This provision, on its face, criminalizes retaliation against whistleblowers who report suspected antitrust offenses, making it all the more imperative that corporate officials and counsel ensure that employees reporting possible antitrust violations are protected. It is conceivable that U.S. authorities might seek to apply this provision to retaliation against non-U.S. employees of non-U.S. companies, if the whistleblower informed U.S. authorities.

Other provisions of the Act may become relevant in the antitrust field for non-U.S. companies under rules to be issued by the SEC, but probably only if their securities are publicly traded in the United states. Notably among them:

- **CEO/CFO Certifications.** The SEC will promulgate rules under which CEOs and CFOs will be required to certify in writing each annual and quarterly report filed with the SEC. Among other things, these officers will need to certify that they (a) are responsible for designing internal controls to ensure that material information relating to the company is made known to them, (b) have recently evaluated the effectiveness of the internal controls, (c) have presented in the report their conclusions about the effectiveness of the internal controls, and (d) have disclosed to the company's auditors and audit committee all significant deficiencies in the internal controls. It is possible that the SEC will extend these rules to antitrust compliance, in particular by imposing obligations on corporate officers to be familiar with antitrust compliance efforts and any deficiencies relating thereto.

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If you have any questions about the implications of the Sarbanes-Oxley Act for the antitrust field, or any U.S. or European competition law matter, please do not hesitate to contact any of our competition lawyers at Wilmer, Cutler & Pickering:

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