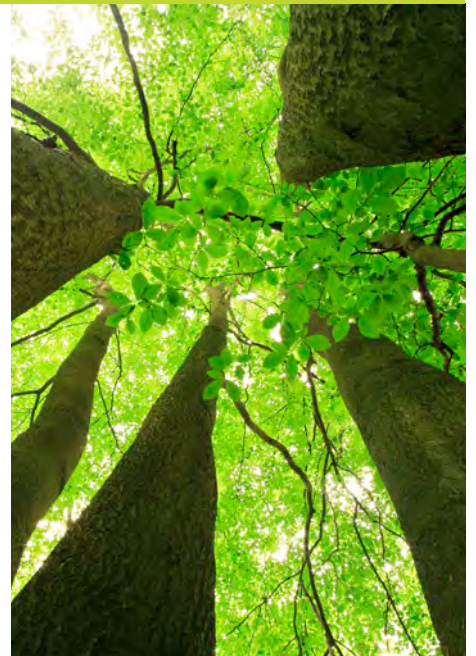


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CEO fined \$500,000 for HSR Act violation upon acquisition of stock-based compensation

A public company CEO recently consented to a federal district court order requiring him to pay a \$500,000 civil penalty for violating the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”). The Antitrust Division of the Department of Justice (“DOJ”) charged the executive for failing to satisfy the notification and waiting period requirements of the HSR Act before acquiring common stock under his company’s stock-based compensation programs. The CEO exceeded an HSR Act notification filing threshold through his acquisition of common stock upon the vesting of outstanding restricted stock unit awards and the reinvestment of dividends and short-term interest through his 401(k) account. The DOJ’s enforcement action illustrates the potentially costly consequences of a failure to consider HSR Act compliance in the investment planning process for corporate executives who hold or will acquire company stock with a total value greater than the statute’s transaction filing thresholds.

HSR ACT OBLIGATIONS OF EXECUTIVES ACQUIRING COMPANY STOCK

The HSR Act and rules impose obligations on parties to certain transactions involving acquisitions of assets, interests in unincorporated entities, or voting securities of corporations. The parties must file notification reports with the Federal Trade Commission (“FTC”) and the DOJ’s Antitrust Division and observe a waiting period before closing their acquisition transactions if the transactions satisfy HSR Act reporting threshold tests and are not otherwise exempt. The purpose of the HSR Act is to permit an antitrust agency to review, and possibly challenge, reportable acquisitions before they are consummated if the agency determines that the transactions may have an anticompetitive impact.

Application to personal investments

Although HSR Act compliance is most frequently considered in the context of business mergers and acquisitions, the statute also can apply to personal investments by executives in their company’s common stock and other voting securities. Executives may incur an HSR Act reporting obligation when they buy voting securities in capital-raising transactions from the company or in the open market, when they convert non-voting securities into voting securities, when they receive equity awards under company-sponsored compensation programs, when they exercise stock options, or when they acquire voting securities in other transactions. The statute’s requirements apply only if the total value of voting securities to be acquired and held by the executive exceeds the HSR Act’s size-of-transaction threshold, which is \$66 million until the threshold is next adjusted in 2012.

The HSR Act applies in the same manner to acquisitions of common stock by a company’s directors and employees generally. Acquisitions by senior members of a company’s management, however, may be more likely to meet the statute’s transaction value threshold. Executives holding substantial equity positions in public companies which they obtained as founders or in merger transactions, or which they have accumulated from compensation payments, may be particularly

at risk of crossing the size-of-transaction threshold when they acquire additional shares.

Acquisition of “voting securities”

An executive’s acquisition of employer securities will be reportable if the transaction 1) involves the acquisition of “voting securities” within the meaning of the HSR Act, 2) satisfies the HSR Act size-of-transaction and size-of-person threshold tests, and 3) does not qualify for an exemption. The HSR Act rules define “voting securities” as securities that presently or upon conversion entitle the owner or holder to vote for the election of company directors. Accordingly, an executive will not incur an HSR Act obligation if the securities to be acquired confer no voting rights, or if the securities confer the right to vote on corporate matters other than those involving director elections. Shares of a corporation’s common stock having customary voting rights qualify as voting securities under this test.

The definition of voting securities includes instruments that do not confer the present right to vote for the election of directors, but which are convertible into securities having such voting rights. The acquisition of such a convertible security, however, is exempt from HSR Act requirements. As a result, no HSR Act filing is required at the time an executive acquires a stock warrant, a security convertible into common stock, or a stock option or other award under a company stock-based compensation plan if the instrument does not provide its holder with the present right to vote for the election of company directors. The HSR Act, however, could apply to the executive’s later acquisition of common stock (or another security having the present right to vote for the election of directors) upon the conversion, exercise, or exchange of the stock warrant or convertible security, or upon the vesting of some types of compensatory equity awards, if the statute’s threshold tests are satisfied and the transaction is not exempt.

No “passive investor exemption”

An executive’s acquisition of company voting securities may qualify for an exemption from the HSR Act requirements. Under current FTC staff positions, however, an executive may not rely on the so-called “passive investor exemption”. Under this exemption, a person generally is permitted to acquire up to ten percent of the issuer’s voting securities so long as the person acquires and holds the securities “solely for the purpose of investment”. The HSR rules define investment purpose to mean that “the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer”. The FTC staff has indicated that the passive investor exemption is not available to officers or directors of a company (or of any entity under common control with the company) who acquire the company’s shares. In the staff’s view, officers and directors, by reason of their positions, intend to participate in the company’s basic business decisions and to exercise control or influence over the company’s actions, and accordingly cannot satisfy the exemption’s investment purpose condition.

Reporting obligation

If the HSR Act applies to an acquisition of voting securities, both the acquiring executive and the company must satisfy the statute's notification and waiting period requirements before the acquisition is consummated. A failure to comply will expose the executive and the company to potential civil penalties of up to \$16,000 a day for each day of non-compliance.

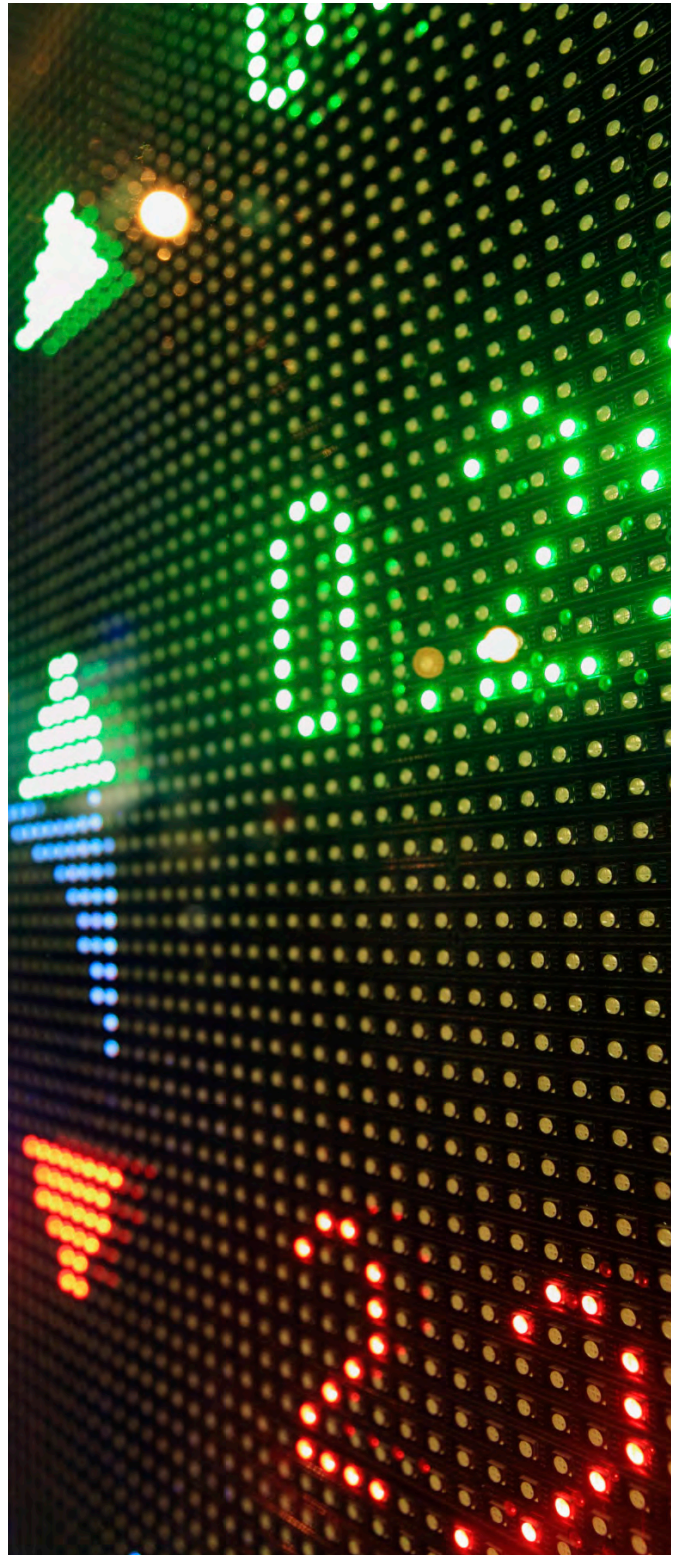
ENFORCEMENT ACTION AGAINST COMCAST CEO

Allegations in DOJ complaint

The Antitrust Division of the DOJ brought a civil antitrust action in federal district court against Brian L. Roberts, chief executive officer of Comcast Corporation ("Comcast"). The DOJ charged that Mr Roberts violated HSR notification and waiting period requirements in connection with his acquisition of Comcast common stock during a period of almost two years beginning in October 2007. According to the complaint, Mr Roberts had filed under the HSR Act in 2002 to acquire Comcast voting securities in connection with a merger agreement between Comcast and AT&T Corp. Under the HSR Act rules, Mr Roberts was permitted to acquire additional shares of Comcast common stock up to the next notification threshold for five years after the expiration of the waiting period for his 2002 filing, without having to file again under the HSR Act. Mr Roberts acquired approximately 3,700 shares of Comcast class A common stock through his 401(k) account from October 2007 through April 2009 and a total of approximately 334,560 shares of class A common stock upon the vesting of restricted stock units from March 2008 through April 2009. The DOJ alleged that, because the five-year period for acquisitions under his 2002 HSR Act filing had expired in September 2007, Mr Roberts violated the statute by failing to file under the HSR Act and observe the waiting period before any of such subsequent acquisitions. As a result of the subsequent acquisitions, Mr Roberts held Comcast voting securities with a value greater than the applicable HSR Act size-of-transaction threshold.

Corrective filing process

The antitrust agencies became aware of the reporting violations when Mr Roberts made a corrective filing under the HSR Act in August 2009 for the Comcast shares he had acquired over the preceding two years. In making this filing, Mr Roberts took appropriate action to correct his reporting delinquency. A failure to file an HSR Act notification report when required for a transaction may only be corrected by a filing, even though delinquent, for the transaction. If an executive has acquired company shares in violation of the HSR Act, the executive and the company should notify the FTC Premerger Notification Office of the missed filing as soon as they discover the violation, and file the appropriate HSR Act notification reports with the antitrust agencies as soon thereafter as practicable. The FTC and the DOJ will process the late filing in accordance with their normal procedures. If the agencies determine that the executive's acquisition of shares will not have an anticompetitive effect, which is almost always the case, the post-notification waiting period will expire or terminate in the usual course.



Continued...

Voluntary corrective action usually will limit the maximum amount of penalties that may be assessed by the antitrust agencies and (at least in the case of the first inadvertent violation) may persuade the agencies not to impose any penalties. The agencies may have decided to seek civil penalties against Mr Roberts in the current action because, as the DOJ highlighted in its complaint, Mr Roberts in previous years had submitted two corrective filings for other acquisitions which he had acknowledged as being reportable under the HSR Act. In each of the prior filings, Mr Roberts had asserted that his failure to file and observe the waiting period was inadvertent. In the absence of the earlier reporting delinquencies, the antitrust agencies might have been willing to forbear from imposing penalties. The agencies typically do not seek penalties where the failure to file resulted from an executive's unfamiliarity with the HSR Act's application to acquisitions of employer voting securities, the company and the executive self-report the non-compliance and make corrective filings as soon as they discover their mistake, and the executive and the company have undertaken measures to prevent a recurrence.

SHARE ACQUISITIONS UNDER EQUITY COMPENSATION PROGRAMS

As the DOJ's enforcement action against Mr Roberts illustrates, the HSR Act reporting analysis must be applied to acquisitions of company shares resulting from the receipt, exercise, or vesting of equity awards granted to the executive under stock incentive plans and other employer-sponsored compensation programs, such as 401(k) plans. In some circumstances, such as where an executive exercises a stock option after the award has vested, the acquisition of shares requires action by the executive. In other circumstances, the executive may acquire shares through a grant by the company's compensation committee, which is outside the executive's control. Under the HSR Act rules as currently administered, the lack of voluntary action by the executive in the latter case will not exempt the acquisition from HSR Act filing requirements that otherwise would apply. As a result, because the rules do not accord any special status to equity awards, HSR Act compliance for compensation arrangements must focus on the date on which an executive may be considered to make a reportable acquisition of voting securities.

Restricted and unrestricted stock

Compensatory awards of restricted stock and unrestricted stock must be evaluated for HSR Act filing purposes by reference to the award grant date. Because the shares represented by these awards are issued on the grant date, the awards result in the executive's acquisition on that date of shares having the present right to vote for the election of company directors. Restricted stock awards are not excludible from HSR Act reporting simply because the executive may forfeit the shares at a later date upon failure to satisfy the award's vesting conditions. If the acquisition of a restricted or unrestricted stock award is reportable, the executive and the company must satisfy the HSR Act's notification and waiting period requirements before the executive receives delivery of the shares.

Stock options and SARs

The award of a stock option or a stock-settled stock appreciation right ("SAR") will not result in the executive's acquisition on the grant date of the shares subject to the award. The acquisition will occur on a later date when the executive exercises the option or SAR and receives the underlying shares. If the applicable HSR Act threshold tests will be met in connection with (and at the time of) an exercise, and no exemption applies, the HSR Act requirements must be satisfied before the option or SAR is exercised.

Restricted stock units

Potential HSR Act reporting similarly may be deferred in the case of equity awards, such as restricted stock units, that provide for the delivery of the underlying shares on or after specified future vesting dates. The executive's acquisition of the shares subject to such awards will occur when the company issues the shares. The company and the executive must evaluate the executive's acquisition of shares at each delivery date in light of the applicable HSR Act threshold tests and, if any scheduled share issuance is reportable, satisfy the statute's requirements before the executive receives delivery of the shares.

HSR ACT COMPLIANCE MEASURES FOR EXECUTIVES

Public companies and their executives should exercise the same vigilance in complying with the HSR Act they display in complying with other federal laws that apply to executive acquisitions of company shares. An effective HSR Act compliance program should involve the executive and the executive's advisers, since much of the information needed to evaluate the statute's applicability to a particular transaction will be in the executive's possession. There are a number of compliance measures companies may wish to consider to reduce the possibility of missteps by their executives who may become subject to HSR Act reporting obligations.

Communicate HSR Act requirements

As a first step, companies should get out the word internally that some of their executives could incur an HSR Act reporting obligation if they acquire additional company shares. HSR Act requirements should be communicated to the executives who might engage in reportable transactions, as well as to employees who have responsibility for approving, documenting, or processing executive stock transactions. Recipients of the briefing typically should include members of the company's legal, compliance, and human resources departments.

Identify potentially affected executives

Companies should identify executives whose existing holdings of company shares either exceed the HSR Act size-of-transaction threshold or, together with reasonably expected future share acquisitions, might exceed the threshold. The company should then refine the list of potential candidates for HSR Act filings by asking the executives in this group to evaluate their potential status under the size-of-person test (if applicable). Depending on the nature and scope of an executive's assets and shareholdings (including assets of entities controlled by the executive under HSR Act control tests), such an evaluation might take some time

to develop and require the assistance of the executive's personal advisers, particularly if the executive (or an entity under the executive's HSR Act control) does not have a regularly prepared balance sheet or annual income statement. The assessment under the two threshold tests for each likely candidate will have to be updated from time to time in anticipation of future share acquisitions (whether scheduled or unscheduled) to reflect changes in the market price of company shares and in the executive's personal financial situation.

Consider an advance HSR Act filing

The affected executive should consider whether to complete the HSR Act notification process in advance of any particular acquisition of company shares. An executive who can certify to the antitrust agencies that the executive expects to cross an HSR Act transaction reporting threshold within one year may file an HSR Act notification report months before the first such acquisition. Agency clearance related to the filing will be effective for one year following expiration or termination of the executive's HSR Act waiting period, and will apply only if the executive crosses an HSR Act reporting threshold within that period. If the specified reporting threshold or any lower threshold is crossed within the one-year period, the executive would be able to acquire additional company shares for a five-year period without another filing unless the executive were to cross a higher reporting threshold. (As discussed above, this is the exemption on which Mr Roberts initially relied following his HSR Act filing in 2002.) Although an advance filing would afford an executive flexibility to complete future share acquisitions without HSR Act compliance concerns, this advantage might not outweigh any reluctance by the executive to pay the significant HSR Act filing fee until a filing is required. This reluctance might be reinforced by the possibility that volatility in the company's stock price could drive the market price of company shares below an applicable HSR Act threshold amount by the time of any new share acquisition.

Integrate compliance measures into stock compensation programs

The administration of stock compensation programs should include provision for monitoring potentially reportable transactions in connection with compensation committee grants, stock option and SAR exercises, and the vesting of outstanding equity awards. To minimize the possibility of a missed HSR Act filing, the company officials supporting the activities of the compensation committee should consult with each affected executive about a potential filing obligation well in advance of any scheduled grant, exercise, or vesting date.

Consult with HSR Act counsel

Company officials should consult with HSR Act counsel to confirm current HSR Act filing thresholds and to evaluate the potential availability of an exemption from HSR Act reporting. The same measures should be effective in bolstering compliance with the HSR Act by directors who acquire shares of the companies on whose boards they serve.

Application of the HSR Act threshold tests and exemptions is complex and requires careful attention to changes in the executive's personal circumstances and annual changes in the HSR Act filing thresholds. Failure to design and implement effective compliance measures could prove costly both to executives who acquire shares in violation of the HSR Act and to their employers.



Peter J. Romeo
T +1 202 637 5805
peter.romeo@hoganlovells.com



Richard J. Parrino
T +1 202 637 5530
richard.parrino@hoganlovells.com



Michele S. Harrington
T +1 703 610 6173
michele.harrington@hoganlovells.com

EU antitrust regulator turns to food sector

The European Commission has established a special internal task force within the Competition Directorate General (“**DG Competition**”) to look at the food sector. The task force is not expected to announce specific goals, but recent (and ongoing) actions of EU national regulators may point to the areas which the new task force may investigate.

CHANGE TO THE COMMISSION APPROACH

“Task Force Food” will sit within the DG Competition unit responsible for antitrust and merger review in the primary industries, manufacturing and agriculture. Reports suggest that it will have around six dedicated staff, though it will of course be able to call on DG Competition resources more generally.

This represents a significant move by the antitrust arm of the Commission, bowing to pressure to look into the food supply chain. The sector has been under intense scrutiny in recent years from other elements of the EU institutions and from the national competition authorities of the EU Member States. However, DG Competition has thus far resisted being drawn into such reviews, confining itself to investigation of classic cartels in this sector – for example a recent finding of price fixing amongst banana importers.

CLOUDS GATHERING IN BRUSSELS

As long ago as 2008 the European Parliament passed a resolution calling on DG Competition to investigate the impact of supermarkets and to take appropriate action, including legislation. The reaction then of a DG Competition official was that it would “resist that request,” seeing these as national issues to be dealt with at national level.

Also in 2008, the European Council asked the Commission to report on food prices in Europe. The Commission identified then factors which might merit closer review. These included ongoing consolidation throughout the supply chain, buying alliances, private label products and certification schemes, as well as traditional competition issues like cartels, exclusive arrangements and resale price maintenance.

More recently, the Commission has established the High Level Forum for a Better Functioning Food Supply Chain, a body of food industry regulators, companies and associations, chaired by the Commission and looking at the food supply chain. It has a mission to report by the end of this year.

ONGOING NATIONAL SCRUTINY

Meanwhile, national investigations have been spurred by concern about the direct nature of consumer harm from any increase in food pricing – attracting public and political interest. These concerns have increased in line with very substantial rises in food pricing.

A recent publication of the European Competition Network of competition authorities disclosed at least 40 different actions in the sector taken over the course of 2011 by competition authorities of 18 countries. The actions included investigations of cartels and abuses of dominance, sector investigations and

introduction of special rules. They focused on all levels of the supply chain, from primary producers to supermarkets. For example:

- in the UK the supermarket industry has been under near-constant investigation for 13 years: this has included two full scale reviews of the market, special legislation, detailed merger reviews and a number of cartel cases successfully and unsuccessfully pursued against supermarkets and food suppliers; and
- the French competition authorities have long focused on retail prices for groceries, have introduced specific lower thresholds for retail trade transactions allowing the review of most of the mergers between supermarkets which may ultimately increase retail prices and have issued detailed legal opinions on arrangements in the supply of various food and drink types.

COMING INVESTIGATIONS

There is no reason to think that national investigations will decline with the launch of the DG Competition taskforce. Indeed, the information generated by these investigations is likely to be a key factor in informing antitrust investigations at a European level. Combined with the political will reflected in the new task force, it seems only a matter of time before DG Competition takes action.



Angus Coulter

T +44 20 7296 2965

angus.coulter@hoganlovells.com

Final EU best practices guidelines

On 17 October 2011, the European Commission issued the final version of its “best practices” antitrust guidelines (Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU). The principal purpose of the guidelines is to provide a guide to the day-to-day conduct of antitrust proceedings before the European Commission. The guidelines also provide for an expanded role for the EU’s Hearing Officer, whose role has been set out in a new decision that revises the functions and terms of reference of this office.

BACKGROUND

On 6 January 2010, the European Commission published draft “best practices” antitrust guidelines, as well as guidance in the procedures of the EU hearing officer which aimed to make its role more transparent. Despite the fact that both documents were not intended to create new law, the European Commission received a large number of comments, which it has tried to address in its final guidelines and in the new role it has set out for the EU hearing officer.

THE BEST PRACTICES GUIDELINES

The guidelines touch on most aspects of EU antitrust proceedings, from the initial assessment of a case to the publication of a decision, including the opening of proceedings, information requests, state-of-play meetings, confidentiality, legal privilege, statements of objections and the role of the hearing officer.

The guidelines contain a number of changes/innovations since the draft in 2010, which include:

- the Commission states that it will indicate in the statement of objections the main relevant parameters for the possible imposition of fines. These will include “the essential facts and matters of law which may result in the imposition of a fine, such as the duration and gravity of the infringement and that the infringement was committed intentionally or by negligence”; the facts which may give rise to aggravating or attenuating circumstances; and matters which are relevant to the calculation of fines including relevant sales figures to be taken into account and the year that will be considered for the value of such sales
- the guidelines include more information about the procedure for requests to take into account an inability to pay fines
- the Commission commits to offering a State of Play meeting in cartel cases after the oral hearing. In addition, the Commission will offer a State of Play meeting where the Commission has opened formal proceedings (pursuant to Article 11(6) of Regulation 1/2003) and intends to inform the complainant that it will reject its complaint by formal letter
- access to key submissions has been enhanced. The Commission states that it will provide the parties who are subject to proceedings shortly after the opening of proceedings with the opportunity to review non-confidential versions of other “key submissions” in addition to the complaint itself. This would include “significant submissions of the complainant or interested third parties, but not, for example, replies to requests for information”
- instead of just committing to publishing on its website decisions rejecting complaints “which are of general interest”, the Commission now states that it will publish on its website all decisions rejecting complaints or a summary thereof.

NEW ROLE FOR THE EU HEARING OFFICER

The Commission has issued a decision “on the function and terms of reference of the hearing officer in certain competition proceedings”. The post of the Hearing Officer was first established in 1982 in order to enhance impartiality and objectivity in competition proceedings before the Commission. There are currently two EU hearing officers, who are independent of DG Competition, and report directly to the Competition Commissioner.

The role of the hearing officer has been expanded in the following areas:

- **Legal professional privilege claims.** The hearing officer has been given a role to resolve claims that a document is privileged in the context of an antitrust investigation. The undertakings concerned must consent to the hearing officer viewing the relevant information. The hearing officer shall, without revealing the information, inform the Commission of their preliminary view and take steps to promote a mutually acceptable resolution. Where no resolution is reached, the hearing officer may formulate a reasoned recommendation to the competent member of the Commission. The party making the claim shall receive a copy of this recommendation
- **Procedural status.** If a company which is subject to an investigative measure considers that it has not been properly informed by DG Competition of its procedural status, it may refer the matter to the hearing officer for resolution. The hearing officer shall have authority to take a decision that DG Competition will inform the undertaking of their procedural status
- **Self-incrimination.** Where the addressee of a request for information refuses to reply to a question invoking the privilege against self-incrimination, it may refer the matter, in due time following the receipt of the request, to the hearing officer. In appropriate cases, and having regard to the need to avoid undue delay in proceedings, the hearing officer may make a reasoned recommendation as to whether the privilege against self-incrimination applies
- **Deadlines for reply to information requests.** The hearing officer will decide whether an extension of the time limit for responding to an information request should be granted. The hearing officer will take into account “the length and complexity of the request for information and the requirements of the investigation”.

Continued...

COMMENT

The new guidelines and the role for the hearing officer provide a useful tool for promoting certainty and transparency in European Commission antitrust proceedings. Whilst they represent a positive step in the right direction, businesses should be aware that there still remain a number of important deficiencies in the EU system:

- the European Commission system involves an administrative process in which the Commission still remains capable of starting an investigation on its own initiative or based on a complaint from a third party; to investigate the case; to “prosecute” the parties; and to make the final decision, subject to later judicial review. This is in sharp contrast to the U.S. system, where the Federal Trade Commission and the Department of Justice cannot block conduct without a court order
- the guidelines do not provide parties with any concrete information about the likely length of the proceedings in which they are involved. Lack of clarity about the likely length of proceedings can create considerable uncertainty especially because non-merger cases often take many years to resolve
- the best practices reserve considerable discretion to the European Commission. The Commission notes early in their guidelines that the specific features of an individual case may require an adaptation of, or deviation from the best practices “depending on the case at issue”.



Peter Citron
T +32 2 505 0905
peter.citron@hoganlovells.com



EU ruling on the prohibition of online sales

On 13 October 2011, the Court of Justice of the European Union (the “**Court of Justice**”) ruled that the restriction of online sales in a selective distribution agreement constitutes a restriction of competition “by object” under EU law (Case C-439/09 *Pierre Fabre Dermo-Cosmétique v Président de l’Autorité de la Concurrence, Others*). This judgment further supports the general EU rule set out in the recently revised EU vertical restraints guidelines that a supplier must allow its goods to be sold online.

BACKGROUND

In 2008, Pierre Fabre was fined by the French competition authority for infringing both EU and French competition law by prohibiting online sales as a result of requiring its distributors to sell its products only in brick and mortar stores with a trained pharmacist present. Pierre Fabre appealed the fine before the Cour d’appel de Paris, which, before ruling, requested the Court of Justice to clarify whether Pierre Fabre’s prohibition of internet sales could be regarded as anti-competitive by “object”.

Categorisation of a restriction as anti-competitive by “object” is significant under EU law. It means that the restriction is almost inevitably viewed as a “per se” infringement. In this context, a supplier faces the very significant challenge of showing that the restriction is either objectively justified (for example, on grounds of health and safety), or produces offsetting benefits which satisfy the conditions of Article 101 (3) (which is often very difficult to prove). This is the case even for a supplier with a very small market share. The EU Vertical Agreements Block Exemption Regulation can normally apply where market shares are below 30%, but it cannot apply where a distribution agreement includes a restriction “by object”.

THE JUDGMENT

The Court of Justice held that “a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in the ban on the use of the internet for those sales, amounts to a restriction by object... where... it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified”. The Court of Justice noted that it has already not accepted the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products to be an acceptable justification for the prohibition of online sales in the context of non-prescription medicines and contact lenses. The Court also noted that the mere need to maintain a prestigious image could not be sufficient justification for a prohibition of online sales. The Court of Justice stated that it was for the Cour d’appel de Paris to examine whether the prohibition of online sales in this case could be justified by a legitimate aim. It also stated that it did not have sufficient evidence before it to assess whether the prohibition satisfied the conditions in Article 101 (3) TFEU, and that it was for the Cour d’appel de Paris to examine this question.

IMPLICATIONS

Whilst this judgment confirms that the prohibition of online sales in a selective distribution agreement will be regarded under EU law as a restriction by “object”, and therefore very difficult for

brand owners to justify, it is disappointing that the judgment does not cover in more detail the circumstances when such a prohibition could be objectively justified or be exempted under Article 101 (3). This is particularly disappointing considering that Pierre Fabre had a relatively small market share in the markets in question of 20%, and in view of the fact that there are different approaches to the issue in other jurisdictions. U.S. federal law, for example, has a more relaxed approach to the restriction of online sales, although certain U.S. states are more strict.

Brand owners will need to continue to rely on the recently revised EU Verticals Block Exemption Regulation which allows for the restriction of online sales in certain limited circumstances by permitting a requirement that only brick and mortar dealers may sell online, minimum sales targets for in-store sales, a fixed fee to support the sales effort in in-store sales, and standards for use of websites.

Brand owners should also watch closely the sector inquiry launched on 1 July 2011 by the French Competition Authority into the e-commerce sector where the issue of internet sales is being specifically investigated. The French Competition Authority has specifically stated that it will examine as part of this inquiry restrictions on online sales imposed by manufacturers or by distributors. It has stated, however, that the conclusion of its sector inquiry will in no circumstances put into question the rules relating to internet sales set out in the EU Vertical Agreements Block Exemption Regulation with which it is in full agreement.



Omblin Ancelin

T +33 1 53 67 16 01

omblin.ancelin@hoganlovells.com

Revised best practices for U.S.-EU co-operation

On 14 October 2011, the Federal Trade Commission (“FTC”), the Department of Justice’s Antitrust Division, and the European Commission (“DG Competition”) published revised best practices for cases where the Commission and a U.S. agency are reviewing the same merger.

The best practices document updates a previous 2002 version to reflect the current co-operation and experiences of co-operation. Although the document is a reflection of the steps that the U.S. agencies and the European Commission have been taking to achieve lower costs, faster merger reviews, and greater consistency for merging parties, co-operation between the EU and U.S. raises potential strategic issues that companies should consider very carefully when executing deals with both U.S. and EU dimensions.

KEY ELEMENTS

The best practices establish a key objective that “when the U.S. agencies and the European Commission are reviewing the same merger, both have an interest in reaching, insofar as possible, consistent, or at least non-conflicting, outcomes”.

The best practices set out procedures in four distinct areas as follows:

1. Communications between reviewing agencies

The reviewing agencies should contact one another “promptly upon learning of a merger that appears to require review in both the U.S. and EU”. Where it appears that substantial cooperation may be beneficial, a tentative timetable for regular inter-agency consultations should be set up. This should provide for consultations at key stages (for example, before the issue of second request in the U.S., no later than three weeks after the European Commission initiates a Phase I investigation etc). Each agency should designate a contact person for communication between the agencies.

2. Co-ordination on timing

Merging parties are encouraged to discuss timing with the reviewing agencies as soon as feasible, and to provide the anticipated dates for filing in each jurisdiction. “The reviewing agencies and the merging parties should be prepared to discuss ways to coordinate the timing of the U.S. and EU investigations, to the extent possible under U.S. and EU law respectively.”

The best practices also:

- encourage parallel filings in the U.S. and EU, but note that if filings in the EU and U.S. are not made in parallel,



meaningful cooperation can still be achieved if the timing of the filings allows for cooperation of the agencies at key decision-making stages of their respective investigations.

- note that facilitation by the parties of the coordination of investigations is particularly important “in cases in which the merging parties anticipate that the U.S. agency will issue a second request and will seek remedies, and the merging parties are seeking a Phase I clearance decision with commitments from the European Commission”
- state that “after the issuance of a second request in the U.S. and the opening of a Phase II investigation in the EU, the parties can further facilitate coordination of the investigation by using the timing flexibility provided for in the respective procedures, for example, negotiating a timing agreement with the reviewing U.S. agency, or in the EU requesting to extend the review period by up to 20 working days”
- actively warn against filing and gaining a decision in one jurisdiction before the other. “If the timing of the filings in the U.S. and the EU is such that a final decision in one jurisdiction is reached before filing has taken place in the other, any possibility for meaningful cooperation between the agencies will have been excluded.”

3. Collection and evaluation of evidence

Coordination may start in DG Competition’s pre-notification phase, and includes sharing publicly available information, discussing the respective analyses at various stages of an investigation (market definitions, assessment of competitive effects and efficiencies, theories of competitive harm, and empirical evidence to test those theories), and views on remedial measures and relevant past investigations and cases. In addition, the reviewing agencies may discuss and coordinate information or discovery requests to the merging parties and third parties, including exchanging draft questionnaires to the extent permitted by local law.



As soon as feasible after the parties inform the reviewing agencies of a merger that requires review by both the U.S. agencies and the European Commission, the staff of the reviewing agencies should enter into discussion with the merging parties with a view to receiving confidentiality waivers from the merging parties normally at DG Competition’s pre-notification stage. Reviewing agencies may also request that third parties waive confidentiality.

4. Remedies/settlements

The reviewing agencies should strive to ensure that remedies do not impose inconsistent or conflicting obligations on the parties. Reviewing agencies should share draft remedy proposals and participate in joint discussions with the merging parties, prospective buyers, and trustees.

COMMENT

Merging parties must carefully consider their interests in facilitating coordination between the EU and U.S. agencies, and not leap forward reflexively in the interest of perceived expediency. It is critical that U.S. and EU counsel work together closely to formulate strategies dealing with multiple reviews that are in the interests of merging companies on a case-by-case basis.

Whilst the best practices state that the U.S. and EU authorities will seek to cooperate with other authorities around the world (pursuant to relevant OECD recommendations, bilateral cooperation agreements, and principles developed by the International Competition Network for interagency cooperation), the practical reality is that merging parties can face a bewildering number of merger regimes with very different procedures, substantive assessments, and timetables. It is therefore imperative that merging parties in global transactions take early strategic advice on how to navigate the different regimes as expeditiously and as cost effectively as possible.



Janet L. McDavid

T +1 202 637 8780

janet.mc david@hoganlovells.com

Continued role for market definition in U.S. merger cases

Despite the antitrust agencies' recent attempt to create an alternative framework, most complaints still define markets.

Market definition continues to be a central issue in merger litigation despite the 2010 Merger Guidelines' attempt to create an alternative, less market definition-reliant framework. Indeed, each complaint filed by the Federal Trade Commission ("FTC") and U.S. Department of Justice ("DOJ") since those guidelines were issued in August 2010 has alleged product and geographic markets, as agency officials indicated was likely when the revised guidelines were adopted. Given this focus on market definition at the litigation phase, it is not surprising that both agencies also continue to focus attention on market definition during the merger-review process. As a result, practitioners should do the same.

However, the recently filed complaint in *In re Graco Inc., Illinois Tool Works Inc. and ITW Finishing LLC*, FTC Docket No. 9350, Compl. ¶¶ 25-31 (15 December 2011), arguably implies that the focus on traditional concepts of market definition analysis is eroding because that complaint does not include any specific market share or concentration calculations. Whether the Graco complaint is a sign of things to come or merely an exception to the rule might ultimately depend on the outcome. What is clear is that in 2011 neither the DOJ nor the FTC abandoned traditional merger analysis in litigation in favor of the alternative approach suggested by the 2010 Merger Guidelines.

Market definition historically has been an essential element in merger cases brought under § 7 of the Clayton Act as well as in claims based on § 5 of the FTC Act. In fact, the 1992 Merger Guidelines issued by the agencies provided that the first step in their merger analysis was to "assess... whether the merger would significantly increase concentration and result in a concentrated market, properly defined and measured". DOJ and FTC, Horizontal Merger Guidelines, at 3 (revised 8 April 1997).

The 1992 Guidelines were consistent with prevailing case law at the time, in part because § 7 requires effects in "any line of commerce... in any section of the country". For instance, in *Brown Shoe Co. v U.S.*, 370 U.S. 294 (1962), the U.S. Supreme Court noted that "[m]erger analysis begins with defining the relevant product market". *Id.* at 324. Since then, lower courts have generally started their antitrust analysis by defining the relevant product and geographic markets. In *U.S. v Oracle*, 331 F. Supp. 2d 1098, 1110 (N.D. Calif. 2004), the court stated that "[i]n determining whether a transaction will create or enhance market power, courts historically have first defined the relevant product... a 'necessary predicate' to finding anticompetitive effects". In 2008, when the FTC challenged a district court's treatment of market definition as "a threshold issue", the U.S. Court of Appeals for the D.C. Circuit effectively declined the FTC's invitation to abandon traditional market definition analysis by noting that "[t]he district court acted reasonably in focusing on the market definition". *FTC v Whole Foods Mkt. Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008).

The revised 2010 Merger Guidelines departed from the accepted paradigm by de-emphasizing market definition and emphasizing competitive effects. See Thomas Leary & Janet McDavid, "New Merger Guidelines Emphasize Flexibility," *NLJ*, 26 April 2010 (Web-only). The guidelines asserted that "[t]he Agencies' analysis need not start with market definition," and "[s]ome of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition". DOJ and FTC, Horizontal Merger Guidelines, at 7 (revised 19 August 2010). Indeed, the Merger Guidelines asserted that evidence of a likely price increase may "directly predict the competitive effects of a merger, reducing the role of inferences from market definition and market shares". *Id.*

While most recent challenges by the agencies and ensuing court decisions suggest that the 2010 Guidelines' approach to market definition has not gained traction in litigation, the FTC's challenge of Graco's proposed acquisition of ITW Finishing, which does not include any allegations of specific market shares or concentration levels in the five identified product markets, suggests that the FTC is not averse to departing from traditional analysis. Indeed, in Graco, the FTC sought to establish a presumption of illegality based on evidence of anti-competitive effects, which purportedly created an inference that the defendants' products would satisfy a hypothetical monopolist test. Graco ¶ 25. This step toward devaluing traditional market definition analysis in favor of a pure competitive effects analysis should be watched closely, especially because other recent DOJ and FTC challenges (and decisions) show no sign of movement away from the traditional market approach.

On the DOJ side, the 10 November 2011, decision by the U.S. District Court for the District of Columbia enjoining the merger of H&R Block and 2SS Holdings Inc. provides an illustration of the continued importance of market definition. The court started its analysis by noting that "[m]erger analysis begins with defining the relevant product market". *U.S. v H&R Block*, No. 11-00948, 2011 WL 5438955, at *8 (D.D.C. 10 November 2011) (internal citations omitted). Indeed, in H&R Block, product market was clearly the most important factor. The DOJ argued that the product market consisted solely of digital do-it-yourself tax-preparation products. Defendants contended that assisted-tax-preparation firms and manual tax preparation ("pencil and paper" filing) were sufficiently close substitutes to be considered part of the same antitrust market (an "all tax preparation" market). The court ultimately accepted DOJ's digital do-it-yourself market definition as well as its allegation of high market concentration, thereby establishing a presumption of illegality that ultimately proved insurmountable for the defendants. The H&R Block court declined to abandon precedents focusing on market definition, noting that the statute itself appears to mandate traditional market-centered analysis. The court also observed that it was "not aware of any modern Section 7 case in which the court dispensed with the requirement to define a relevant product market". *Id.*

Likewise, in the DOJ's 31 August 2011, complaint seeking an injunction blocking the now-abandoned AT&T Inc. acquisition of T-Mobile USA Inc., DOJ alleged highly concentrated product markets consisting of "mobile wireless telecommunications services provided to enterprise and government customers" nationally and in 97 local geographic markets (the local geographic markets were based on cellular market areas used by the FCC in licensing spectrum). *U.S. v AT&T Inc.*, No. 1-11-cv-01560 (D.D.C. 31 August 2011). The DOJ also contended that in many markets, the number of competitors would shift from three to two; and in some markets, the merged company would be the only competitive firm. *Id.* ¶¶ 35-36.

Three recently filed FTC cases also emphasized market definition and traditional market analysis. In *FTC v ProMedica Health System Inc.*, No. 3:11-cv-47, 2011 WL 1219281 (N.D. Ohio 29 March 2011), the merging parties accepted the FTC's proposed market definition, from which Judge David Katz concluded that the merging parties had high market shares in a highly concentrated market. *Id.* at *10-*12. This finding was central to the court's decision to enjoin the proposed merger. In *FTC v Laboratory Corp. of America*, No. SACV 10:1873 AG, Dkt. No. 128 ¶ 157 (C.D. Calif. 22 February 2011), the merging parties did not concede the relevant market, and the court devoted much of its decision to assessing the proposed geographic and product markets – ultimately ruling against the FTC on both market-definition issues. *Id.* ¶¶ 157, 167.

Similarly, in the FTC's 17 November 2011, administrative complaint seeking an injunction blocking the merger of OSF Healthcare System and Rockford Health System, the FTC alleged a product market consisting of "general acute-care inpatient services sold to commercial health plans" in a geographic market no larger than several counties. *In the Matter of OSF Healthcare System*, FTC Dkt. No. 9349 ¶ 23 (17 November 2011). The product and geographic markets were identical to a 1989 case blocking the merger of Rockford Memorial and Swedish American. The FTC asserted, among other things, that the current merger would create a duopoly between OSF and Swedish American that is "presumptively unlawful by a wide margin". *Id.* ¶¶ 33, 34. Thus, the complaint provides another example of a traditional, market-based structural argument.

These recent cases suggest that market definition continues to be a critical and often determinative issue in merger litigation. The recent FTC complaint in Graco could reflect the FTC's desire to create a more flexible framework consistent with the 2010 Guidelines. The success of this approach remains to be seen.



Janet L. McDavid

T +1 202 637 8780

janet.mcdavid@hoganlovells.com



Corey W. Roush

T +1 202 637 5731

corey.roush@hoganlovells.com



Christian M. Rowan

T +1 202 637 3207

christian.rowan@hoganlovells.com

New Greek leniency regime

On 29 November 2011, Greece published a new cartel leniency programme. The new programme contains a number of improvements which makes applying for leniency in Greece much more attractive, and should allow the Hellenic Competition Commission (“HCC”) to improve its detection rate. It replaces the 2006 programme, which did not lead to any successful cases for the authority. Business should now be prepared for a more aggressive cartel enforcement regime in Greece.

INNOVATIONS

Key innovations of the new regime include:

- individuals (and not just companies) who cooperate with the HCC can now apply for leniency. This is important, as since April of this year the HCC has the power to fine individuals who take part in cartels up to €2 million
- reductions of fines can reach 70% for individuals and 50% for companies
- applicants may request a “marker”. The marker protects the applicant’s place in the queue for a given period of time, and allows it to collect within this period the information and evidence necessary to meet the minimum conditions and requirements for immunity. Previously, applicants had to give immediately all the necessary evidence to apply for immunity
- the HCC will now allow leniency applications in oral form. This avoids the problem of discoverability in follow-up damages proceedings before the courts, which may have put off leniency applicants in the past
- it is now possible for an applicant to apply for leniency, even where the applicant has been found in the past to have infringed competition law by the European or national competition authorities. Under the previous law, companies that had been found to have entered into cartels before could not apply for leniency. Recidivism remains, however, an aggravating circumstance under the HCC fining guidelines
- applications submitted by companies which have carried out actions in order to coerce other companies to participate in the cartel are excluded from immunity. This is a narrower exception than in the 2006 Programme which excluded companies having merely encouraged other companies to participate in the infringement. However, this exception does not apply to individuals who have acted on behalf of the same undertaking
- institutional roles have been adjusted. The role of the Director General of the HCC has been reduced, and that of the President of the HCC strengthened by empowering this position to be the first point of contact for the immunity/leniency applicant
- there can only be one immunity recipient, which will be either a company or an individual. The granting of immunity/leniency is automatically extended to individuals within that

company that are liable for administrative fines. However, immunity/leniency granted to an individual is not extended to the company or to any other individuals. This may lead to a “race” between individuals and the company for immunity.



Paris Anestis

T +32 2 505 0973

paris.anestis@hoganlovells.com



Dimitris Vallindas

T +32 2 505 0974

dimitris.vallindas@hoganlovells.com

Three “firsts” – China’s merger control process is moving on

On 10 November 2011, the Chinese Ministry of Commerce (“**MOFCOM**”) granted conditional approval for the proposed establishment of a joint venture (“**JV Company**”) between two subsidiaries of the U.S. multinational General Electric (“**GE**”) and Shenhua Group Corporation Ltd. (“**Shenhua**”), the Chinese state-owned energy giant. The approval decision breaks new ground for Chinese merger control in several respects.

BACKGROUND

As part of the transaction, GE intends to grant the JV Company a license of its coal-water slurry gasification (“**CWSG**”) technology. Post-transaction, the JV Company will engage in CWSG technology licensing and engineering services in China. The CWSG technology converts solid coal into coal gas, which is then used to generate power and manufacture chemical products, among other applications.

MOFCOM’S ANALYSIS

CWSG technology licensing in China was identified as the relevant market in this transaction. To carry out CWSG projects, downstream customers need both a license for CWSG technology and coal with specific properties. The decision states that the transaction brings together the market leaders in both CWSG technology licensing and the special property coal, but without specifying the parties’ market shares or discussing whether they have significant market power. MOFCOM was concerned that the JV Company could take advantage of Shenhua’s strong market position for special-property coal, and thus restrict competition in the CWSG technology licensing market. Although the decision fails to go into great depth on the issue, MOFCOM seems to have been concerned in particular about whether Shenhua would engage in tying sales of its special-property coal to the JV Company’s CWSG technology, thereby excluding competitors in that technology licensing market. To address these concerns, MOFCOM imposed conditions to its clearance of the transaction, namely a prohibition upon Shenhua on either “forcing” coal buyers to purchase the JV Company’s technology or raising costs for rival technologies.

OBSERVATIONS – THE THREE “FIRSTS”

The GE/Shenhua decision moves beyond prior MOFCOM decisions in three respects. First, up to now, all decisions issued by MOFCOM in the merger control arena that were not unconditional clearances (that is, conditional clearance or prohibition decisions) were directed against foreign companies. The GE/Shenhua decision is therefore a significant development since it may be the first step in creating a more level playing field for foreign and domestic companies. This decision is not only addressed to a domestic company but, in fact, a major state-owned enterprise. In addition, the reasoning underlying the imposition of remedies in this case mainly focused on the strong market position of Shenhua.

Second, the GE/Shenhua decision is the first public decision to apply to the establishment of a joint venture in China. Admittedly, MOFCOM’s position with regard to joint ventures was clear even prior to GE/Shenhua: JVs are subject to merger control rules,

at least under certain circumstances. However, joint ventures were neither explicitly mentioned in the Anti-Monopoly Law and its implementing rules, nor had they been the subject of a published MOFCOM decision. Hence, with this decision, MOFCOM sends a clear signal that joint ventures can and do fall under Chinese merger control rules.

Third, prior to this transaction, the relevant markets in all of MOFCOM’s published decisions concerned tangible products. The GE/Shenhua decision is the first where MOFCOM has made a determination that the licensing of technology may also constitute the relevant market.



Adrian Emch

T +86 10 6582 9510

adrian.emch@hoganlovells.com

MOFCOM imposes divestiture obligation in its approval of private equity transaction

On 31 October 2011, the Anti-Monopoly Bureau of China's Ministry of Commerce ("MOFCOM") cleared the acquisition of Savio Macchine Tessili S.p.A. ("Savio") by Alpha Private Equity Fund V ("Alpha V") subject to certain conditions. This is the eighth occasion on which MOFCOM has attached conditions to its decision approving a transaction under the Anti-Monopoly Law of the People's Republic of China ("AML"), but it is the first conditional decision relating to a private equity ("PE") investor. The decision also sheds some light on how MOFCOM deals with minority interests under the merger control rules contained in the AML.

1. FACTS

Alpha V agreed to acquire Savio, a textile machinery producer based in Italy, through Penelope S.r.l., a company specifically established for this transaction. Alpha V is a PE fund that generally invests in mid-size companies in Europe. According to MOFCOM, Alpha V's main areas of investment concern non-ferrous metal recycling, home textiles and textile machinery. One of Alpha V's other portfolio companies (with 27.9% of the issued shares) is Ulster Technologies AG ("Ulster"), a Swiss company. Savio is a provider of winder and yarn quality control systems. It also holds all of the shares in a Swiss subsidiary company, Gebrüder Loepfe AG ("Loepfe").

2. PROCEDURE

After receiving the initial notification of the transaction on 14 July 2011, MOFCOM (as is its customary manner of proceeding) requested further information from Alpha V. Upon receipt and examination of the additional materials, the regulator accepted the case and officially started running the clock roughly one-and-a-half months after the date of the initial notification. Only 10 days into phase 1 of the clearance process (phase 1 is 30 days, phase 2 is 90 days and phase 3 is 60 days under the AML), MOFCOM informed the acquirer that it had substantive concerns. Less than two weeks later, Alpha V tabled its proposal to address and remedy these concerns. Although MOFCOM ultimately accepted the remedy proposed, its decision ran over into phase 2 of the process. The regulator issued the clearance decision roughly one month into phase 2.

3. MOFCOM'S REVIEW

At the beginning of its substantive assessment, MOFCOM defined the relevant market, but did not dwell much on this aspect. It found electronic yarn clearers for automatic winders to be the relevant market. According to the MOFCOM decision, Ulster and Loepfe are the only two players in that relevant market (with worldwide market shares of 52.3% and 47.7%, respectively).

The key question for the regulator thus became whether Alpha V, one way or another, had control over Ulster. If so, the transaction would mean a move from a duopoly to a monopoly. The difficulty with this question was, however, that Alpha V only held 27.9% of the shares in Ulster.

Against this background, MOFCOM phrased the scope of its analysis in the following terms: does Alpha V participate in, or influence, the business activities of Ulster? During this analysis,

MOFCOM examined Ulster's shareholding structure, voting system at its general assembly, historical attendance records at the general assembly, and the composition and voting system at the board of directors. The stated result of the analysis was somewhat weak and inconclusive; MOFCOM simply found that it "could not exclude the possibility" that Alpha V participated in, or influenced, Ulster's business activities.

Perhaps tacitly acknowledging the fact that its analysis was not fully convincing, MOFCOM provided two arguments to support its position that the transaction was anti-competitive. It found that not only could Alpha V engage in anti-competitive conduct through its control or influence over Ulster and Loepfe post-transaction, but it also highlighted the possibility that the two Swiss companies could – by way of coordinating their conduct "through" Alpha V – restrict competition.

In addition to the above analysis, MOFCOM also examined the barriers to entry into the relevant market, and found them to be very high.

As a result, MOFCOM found the transaction to have anti-competitive effects. However, the remedy offered by Alpha V allowed the regulator to clear the transaction subject to conditions. In essence, the remedy consisted of Alpha V selling its shareholding in Ulster to an unrelated third party, subject to MOFCOM's approval and supervision of the divestiture process by a monitoring trustee.

4. COMMENTS

The Alpha V/Savio transaction provides a number of interesting insights into the workings of MOFCOM's merger control procedure and, perhaps, the regulator's strategies and priorities.

Guidance for PE investors

In the first place, the MOFCOM decision is noteworthy because it is the first decision under the AML that grants conditional approval to a PE related transaction. In the past, some PE players and shareholders had taken the position that PE transactions were rarely, if ever, subject to Chinese merger control. The Alpha V/Savio decision clearly shows that this position does not reflect that of the regulator, and may herald similar decisions in the future. The decision illustrates that MOFCOM regards PE funds or firms in much the same way as it does corporate industrial groups. For example, for the question of whether the merger filing thresholds are exceeded, MOFCOM may take the view that the sales revenues of all entities "under the control" of the same PE fund or firm need to be taken into account.

Missed opportunity to give guidance on "control" concept

Related to the previous point, MOFCOM however missed a good opportunity to provide more specific guidance on the concept of "control" in Chinese merger control. It should be recalled that the AML requires notification of transactions only where the filing thresholds are met and a company acquires "a controlling right" or the ability "to exercise decisive influence" over another company.

The Alpha V/Savio transaction appeared to concern the acquisition by Alpha V of the entire issued share capital of Savio. Therefore, the “acquisition of a controlling right” issue did not directly arise. However, the regulator did examine whether Alpha V had “control or influence” over Ulster, thereby using very similar terminology and (it would appear) similar logic. In that regard, the MOFCOM decision is instructive to some degree, as it sheds light on the factors MOFCOM deliberated – namely, the shareholding structure, voting system and attendance records at the general assembly, and the composition and voting system at the board of directors. Regrettably, however, the decision did not indicate specific thresholds. For example, it is not clear whether control over a de facto majority of votes is required in the general assembly and/or board of directors, or what other level indicates “control” or “influence”. Hence, MOFCOM may continue to enjoy flexibility in subsequent cases.

Coordination and minority shareholdings

As described above, MOFCOM put forward the argument that, post-transaction, Ulster and Loepfe might restrict competition by coordinating their conduct “through” their joint shareholder Alpha V. The regulator might have resorted to this argument thinking that it provided an elegant way out of the difficulty of determining whether or not Alpha V had effective control or could exercise decisive influence over Ulster: even if it had not (so the implicit argument runs), the two Swiss companies would still have had Alpha V as a common shareholder and would have been able to somehow use this fact to coordinate their market behaviour.

MOFCOM’s concern about coordination between the two Swiss subsidiaries may be legitimate, to a certain degree. Indeed, the antitrust laws of both the United States (“U.S.”) and the European Union (“EU”), for example, acknowledge that minority investments in competitors can, under certain circumstances, have anti-competitive effects.

However, in the U.S. and the EU, the availability of public decisions by courts and authorities give market players some specific guidance on the legal benchmarks for this type of investments. In China, in contrast, while the Alpha V/Savio decision repeats the principle that minority shareholdings in competitors can be problematic (as, more implicitly, MOFCOM’s decisions in Inbev/Anheuser-Busch and Panasonic/Sanyo did), it does not provide any details of how exactly coordination between Ulster and Loepfe would work in practice. As a result, market players do not have clear benchmarks for the assessment of their minority investments under the AML’s merger control rules.

Timing

The timing of MOFCOM’s procedural steps, as well as Alpha V’s conduct in that regard, may be one of the most notable aspects of the Alpha V/Savio decision. For example, the regulator informed Alpha V of its concerns about the competitive effects of the transaction a mere 10 days into phase 1. This very short time scale suggests that Alpha V may have started discussing substantive issues in the preacceptance phase. The fact that Alpha V was able to table its “final remedy proposal” only eight

days after receipt of MOFCOM’s concerns would seem to support this interpretation. To a certain extent, this development shows that MOFCOM has made progress to address concerns voiced by the legal and business community in the past, and now ensures continuity in merger review investigation across the pre and post acceptance phases (even though these are still led by different teams within MOFCOM).

Remedies

The remedy proposed by Alpha V and accepted by MOFCOM was relatively straightforward: the divestiture of Alpha V’s stake in Ulster to an unrelated third party. Still, it should be noted that while structural remedies are the preferred solution in other jurisdictions such as the U.S. and the EU, MOFCOM’s past practice shows much more of a mix between structural and behavioural remedies, with a penchant for the latter.

Another noteworthy point is that the decision is the first that explicitly relies on MOFCOM’s provisional regulation on divestiture remedies adopted in 2010. In a way, this shows the growing maturity of the regulator.

To conclude, the Alpha V/Savio decision covers new ground in various respects. As a result, not only PE firms will have a better understanding of their obligations under the Chinese merger control rules, but other companies may also have gained important insights into how MOFCOM carries out its substantive assessments and procedures. A particularly noteworthy aspect is how MOFCOM dealt with minority investments in its substantive assessment. In the EU, the issue of minority investments is under review – a notice by the European Commission to gather information about minority investments was released just last week. A few months ago, the European Commissioner for Competition, Joaquín Almunia, stated that he had instructed his services to examine potential anticompetitive effects of minority shareholdings. Similarly, in the U.S., it is well established that minority investments can create risks of both unilateral effects and coordinated effects. Hence, to a certain extent, MOFCOM’s conclusion on the acquisition of Savio by Alpha V – with the latter’s minority investment in Savio’s only competitor – brings Chinese merger control regulation in line with other major jurisdictions.



Adrian Emch

T +86 10 6582 9510

adrian.emch@hoganlovells.com

Strong medicine for law breakers – NDRC’s first antitrust action in the pharmaceutical sector under the Anti-Monopoly Law

On 14 November 2011, China’s National Development and Reform Commission (“**NDRC**”) announced its decision to sanction the anti-competitive conduct of Shandong Weifang Shuntong Pharmaceutical Co. Ltd. (“**Shuntong**”) and Weifang Huaxin Medicine Trading Co. Ltd. (“**Huaxin**”). The fines imposed on the two companies are the highest for antitrust violations under the Anti-Monopoly Law of the People’s Republic of China which took effect on 1 August 2008 (“**AML**”) so far. This case is also NDRC’s first antitrust action in the pharmaceutical sector under the AML.

BACKGROUND

Shuntong and Huaxin were found to have unlawfully controlled the supply of promethazine hydrochloride, the raw material of the compound reserpine used for high blood pressure treatments, and to have driven up prices. Reserpine is used by more than 10 million patients throughout China, and is on China’s essential drug list.

According to NDRC’s announcement, Shuntong and Huaxin gained control over the supply of promethazine hydrochloride by signing two exclusive distribution agreements with the only two domestic producers. These agreements require the two producers to seek approval from Shuntong and Huaxin prior to

supplying the products to any third party. In practice, Shuntong and Huaxin therefore obtained a right to veto sales to competing distributors of promethazine hydrochloride. Press reports (but not NDRC’s announcement itself) indicated that the two promethazine hydrochloride producers agreed to grant exclusivity to Shuntong and Huaxin because the latter offered to buy the products at 40% above the market price. After gaining control over the supply of promethazine hydrochloride, Shuntong and Huaxin increased sales prices from below RMB 200 per kilogram to prices ranging from RMB 300 to RMB 1,350 per kilogram. As a result of the price increase, many manufacturers of reserpine tablets halted production due to the high price for the input raw material.

LEGAL REASONING

The announcement published by NDRC did not identify which AML provision was infringed. The announcement merely held that Shuntong and Huaxin had “unlawfully” gained control over the supply of promethazine hydrochloride, and stated that the AML and Price Law of the People’s Republic of China (“**Price Law**”) prohibited such actions constituting “abuse of a monopoly position and the implementation of price monopoly conduct in order to eliminate or restrict competition, hike prices, and reap excessive profits to the detriment of consumer interests”.



The lack of detail in NDRC's announcement is disappointing, as it would have been interesting for market players to know more about NDRC's legal reasoning. Indeed, on the basis of the information available from the announcement and the press reports alone, it is not easy to understand NDRC's legal analysis behind the decision. One explanation of the case would have been that NDRC objected to the concertation between Shuntong and Huaxin. A concertation between competitors (Shuntong and Huaxin both operate at the distribution level for promethazine hydrochloride) to determine a joint strategy to enter into exclusive agreements with the two producers could be deemed as cartel-like conduct – for example, market partitioning (by allocating suppliers between them).

However, the press reports also suggested that Shuntong and Huaxin are affiliated companies. Internationally, concertation or other agreements between companies of the same group do not fall under antitrust law; in many instances, the group is considered as a single economic entity on the market and antitrust law applies to it alone. Against this background, there are indications that NDRC did not rely on the concertation argument but instead held that Shuntong/Huaxin abused their dominant market position. The reference to "hiking prices" and "reaping excessive profits" would seem to support this conclusion. These two prohibitions (contained in the Price Law) apply to single companies, no prior concertation with other companies being required.

SANCTIONS

NDRC ordered Shuntong and Huaxin to cease the illegal conduct and to terminate their exclusive distribution agreements with the producers. It also imposed fines of close to RMB 7 million (approximately \$1.1 million; €800,000) on Shuntong and around RMB 150,000 (approximately \$24,000; €18,000) on Huaxin. The NDRC announcement stated that the sanctions were made in accordance with the AML, implying that it was this law that was applied in this case rather than the Price Law. It is not clear how NDRC arrived at this number – under the AML entering into an anti-competitive agreement or an abuse of dominant market position are both subject to a fine of between 1% and 10% of turnover of the business operator for the previous year.

IMPACT OF DECISION

Despite the lack of detail on NDRC's legal reasoning, the decision is remarkable in various respects. First, it is another step in what seems to be a trend by NDRC to increase the level of fines for antitrust violations. The fine imposed on Shuntong by far exceeds the previously highest fine for an antitrust related infringement, imposed on Unilever – around RMB 2 million (roughly \$300,000; €230,000) – a few months ago. Second and related to the previous point, the fact that the two companies fined by NDRC are domestic capital firms indicates that the nationality of the capital firms under investigation is not a decisive factor for NDRC; now the highest fine recorded for an antitrust infringement has been directed at a Chinese firm and exceeds the fines imposed in the Unilever decision. This second point is important as it challenges the notion that the AML has been used in a lop-sided fashion against foreign interests.

Third, and perhaps most importantly, NDRC's action against Shuntong and Huaxin is remarkable as the pharmaceutical sector is itself heavily regulated. Indeed, NDRC itself plays a major role in setting the prices of many essential drugs. To the extent that some market observers expected NDRC to stay away from a sector in which it regulates prices, this decision against Shuntong and Huaxin will be a disappointment. On the contrary, this decision seems to suggest that far from "letting go" of antitrust enforcement in the pharmaceutical sector, NDRC might view the pharmaceutical sector as being too important to be left to industry-focused regulation alone.



Adrian Emch
T +86 10 6582 9510
adrian.emch@hoganlovells.com



Andy Huang
T +86 10 6582 9533
andy.huang@hoganlovells.com

Round-up of key developments

EU

Cartel fines

The European Commission issued three cartel fines in the last quarter of 2011. On 12 October 2011, the European Commission fined Pacific Fruit €8.9 million for coordinating reference prices on a weekly basis from July 2004 to April 2005 for bananas imported into Italy, Greece and Portugal. Chiquita, received full immunity from fines under the Commission's Leniency Policy. On 19 October 2011, the Commission imposed fines on three producers of special glass used to make cathode ray tubes (Asahi Glass – €45.1 million, Nippon Electric – €43.2 million and Schott AG – €40.4 million) for participation in an illegal cartel. Samsung Corning Precision Materials, received full immunity from fines under the Commission's Leniency Notice. The decision was reached using the settlement procedure. On 7 December 2011, the Commission imposed fines on four producers of refrigeration compressors used in refrigerators, freezers, vending machines and ice-cream coolers (ACC – €9 million, Danfoss – €90 million, Embraco – €54.5 million and Panasonic – €7.6 million) for participation in an illegal cartel. Tecumseh, received full immunity from fines under the Commission's Leniency Notice. The decision was also reached using the settlement procedure.

The EU judicial review system and human rights

On 8 December 2011, the Court of Justice of the European Union (the "CJEU") dismissed KME's appeals against the General Court's judgments, which rejected its applications for annulment or for a reduction in fines for a cartel in industrial tubes. One of KME's arguments was that the General Court had infringed its fundamental right to full and effective judicial review contrary to the requirements of the principle of effective judicial protection enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and in Article 47 of the Charter of Fundamental Rights of the European Union. The CJEU noted that the review provided for by the Treaties involves a review by the Courts of the European Union of both the law and the facts, and that the Courts have the power to assess the evidence, to annul a contested decision, and to alter the amount of a fine. It held that this review of legality, supplemented by the unlimited jurisdiction in respect of the amount of fine, was not contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter.

Technology transfer agreements

On 6 December 2011, the European Commission issued a questionnaire to seek views to inform its review of the EU technology transfer block exemption ("TTBER") and its accompanying guidelines. The questionnaire aims to gather feedback on stakeholders' experience of applying the current rules in practice, so that the Commission can consider whether these rules should be modified when they expire on 30 April 2014. The Commission has also published a report prepared for it by external consultants on the assessment of potential anti-competitive conduct in the field of intellectual property rights and the assessment of the interplay between competition policy and IPR protection.

Notification date priority rule

In the last quarter of 2011 there were two merger decisions that confirm the Commission's practice of taking the date of notification as determinative for its substantive assessment in situations where it is reviewing two transactions concerning the same markets simultaneously. In M.6214 Seagate Technology/HDD Business of Samsung Electronics, Seagate filed its notification one day before Western Digital in M.6203 Western Digital/Viviti Technologie (although Western Digital started its pre-notification discussions with DG Competition before Seagate). Seagate's acquisition was assessed without reference to Western Digital's transaction, while Western Digital's transaction was judged as if the consolidation brought about by the Seagate transaction had already occurred. Whilst both cases entered into a Phase 2 investigation, the Western Digital transaction had a more difficult clearance path, not receiving clearance until 23 November and subject to divestments. The Seagate transaction in contrast was cleared on 19 October unconditionally. These cases underline the importance of not delaying notifications, especially in consolidated markets where other transactions are on the horizon.

Multi-jurisdictional mergers – best practices on cooperation

On 9 November 2011, the European Commission announced that it and the heads of EU national competition authorities had agreed a set of best practices on co-operation in merger review. The best practices' stated aim is to enhance cooperation in merger cases where the EU Merger Regulation does not apply and where the merger needs to be notified in more than one EU Member State. The document discusses a number of areas for the facilitation of the merger review process, including the exchange of certain basic non-confidential information, the alignment of timetables, regular contacts with regard to timing and decisions to open in-depth investigations, and discussions on substantive analysis such as market definition or possible anti-competitive effects. Merging parties and third parties are encouraged to provide waivers of confidentiality to all authorities where the merger is reviewable, and the documents attach a model confidentiality waiver form.

Third party rights

The *test-achats* judgment in October emphasised how critical it is for third parties to provide their comments to the Commission on a merger within the formal review period if they want to challenge subsequently the Commission's merger decision.

On 12 October 2011, the General Court ("GC") found that an application by a Belgian consumer group, ABCTA, for the annulment of the European Commission's decision approving conditionally the EDF/Segebel merger was inadmissible. The GC considered that the locus standi of third parties concerned by a merger must be assessed differently depending on whether they rely on defects affecting the substance of a decision (the "first category"), or submit that the Commission infringed procedural rights which are granted to them by the acts of EU law governing the monitoring of mergers (the "second category").

With respect to the first category, the GC found that ABCTA was not individually concerned by the Commission's clearance decision. ABCTA was affected only by reason of their "objective and abstract status as energy consumers". The clearance decision did not affect ABCTA by reason of certain attributes which are peculiar to it or by reason of a factual situation which differentiated ABCTA from all other persons.

With respect to the second category, the GC ruled that the right to be heard is subject to two conditions: first, the merger must relate to goods or services used by final consumers, and, second, an application to be heard by the Commission during the investigation procedure must actually have been made in writing by the association. Although ABCTA satisfied the first condition, it did not satisfy the second condition. ABCTA wrote to the Commission two months prior to the notification expressing its concerns about the merger, but had not applied for its right to be heard following the notification of the merger. The GC noted that to rule otherwise would place an unnecessarily heavy burden on the Commission, as otherwise it would be under an obligation to consider comments outside the strict timetable established by the EU Merger Regulation.

ABCTA also challenged the Commission's decision to reject a request from the Belgian competition authorities for partial referral of the merger. The GC recalled that a third party is entitled to challenge a Commission decision to uphold a national competition authority's referral request. However, it held that third parties are not entitled to challenge a non-referral request. This is because the procedural rights and judicial protection that EU law confers are not in any way jeopardised by a non-referral

decision. This contrasts with a referral decision, where third parties are deprived of the opportunity of review by the Commission of the lawfulness of a transaction.

Proposals for modernising public procurement rules

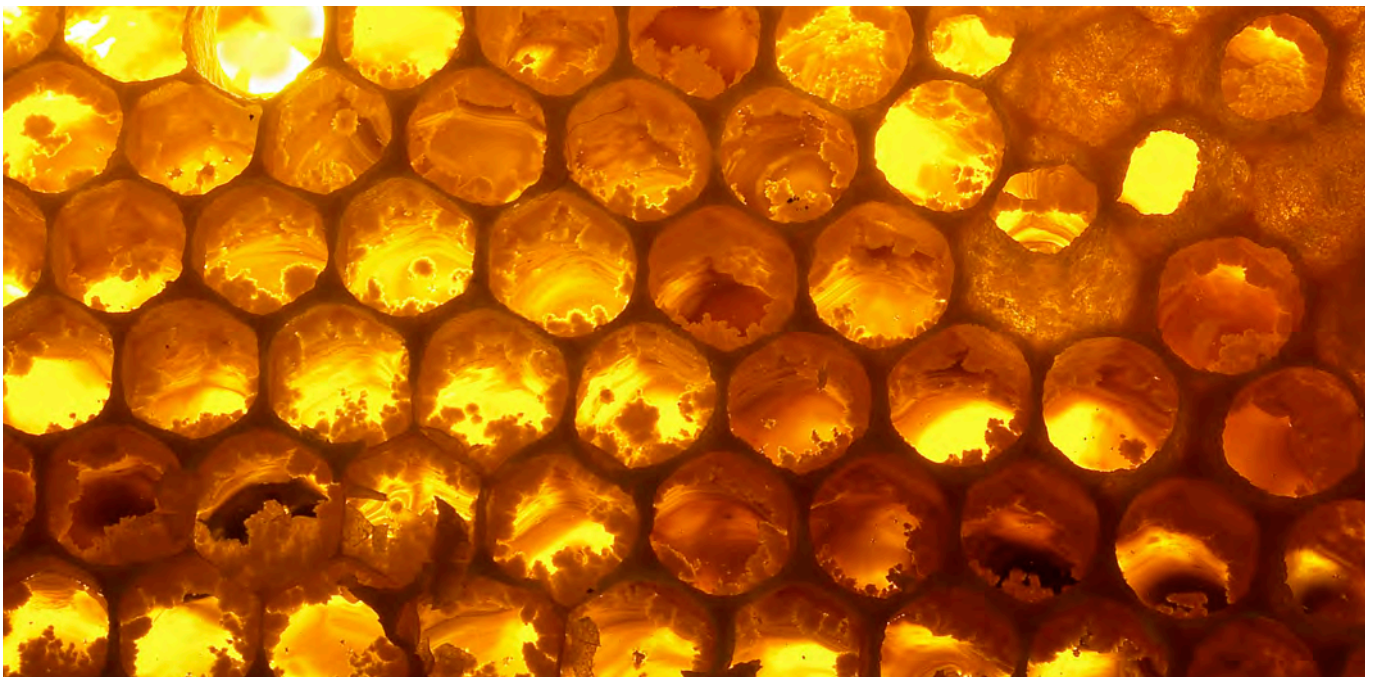
On 20 December 2011, the European Commission published its proposals for modernising the EU public procurement rules. The Commission has published two proposed directives to replace respectively Directive 2004/17 (the Utilities Directive) and Directive 2004/18 (the Public Sector Directive). The Commission has also published a separate proposed directive on the award of concession contracts.

The Commission's proposals will now be passed to the Council and the European Parliament for negotiation and adoption.

FRANCE

Fines imposed on laundry detergent manufacturers

On 8 December 2011, the French Competition Authority imposed a €367.9 million fine on Unilever, Procter & Gamble, Henkel and Colgate Palmolive for creating and maintaining a cartel on laundry detergents products between 1997 and 2004. During almost six years, the four major manufacturers allegedly met secretly several times a year to determine together their sale prices and the reductions offered to hypermarkets and supermarkets. The undertakings checked the leaflets of the others to verify their compliance with the agreed prices. This decision constitutes the most important leniency case investigated by the FCA in which all undertakings concerned obtained either a fine exemption or reduction.



Continued...

Validity of electronic data seizures

On 14 December 2011, the Supreme Court quashed an order of the Paris Court of Appeal regarding seizures carried out in the premises of SNCF (national rail operator) by French inspectors. The Supreme Court recalled some essential rules relating to the validity of electronic data seizures, in particular as regards the possibility for inspectors (i) to affix provisional seals, (ii) to seize any computer or file found in the premises which is likely to relate to the investigation and is not covered by the attorney-client privilege, (iii) to seize any file which only partly relates to the relevant facts provided that it cannot be divided.

GERMANY

Cable operator merger cleared with remedies

On 15 December 2011, the Bundeskartellamt cleared the €3.16 billion merger of cable operators Unitymedia, a subsidiary of Liberty Global, and Kabel BW. Clearance was given subject to far reaching commitments. Amongst others, Liberty will have to grant special termination rights for large contracts for retail TV services, and end its encryption of digital free-TV programs.

Water prices

On 5 December 2011, the Bundeskartellamt issued a statement of objections against water supplier Berliner Wasserbetriebe alleging that the supplier has abused its market dominance on the Berlin water market by charging excessive prices for tap water. Berliner Wasserbetriebe was instructed to lower its prices for the period 2012-2014 by nearly 20%. The water company must now respond to the preliminary findings of the Bundeskartellamt.

Fines for instant cappuccino producers

On 18 October 2011, the Bundeskartellamt fined cappuccino producers Kraft Foods Deutschland and Krüger, as well as two individuals, a total of €9 million for price fixing. Melitta Kaffee had successfully applied for leniency and avoided a fine.

ITALY

Cross-directorships in Italian financial institutions

The Italian budget law, approved on 22 December 2011, has introduced limits to cross-directorships in the insurance and financial sectors. According to article 36, individuals are forbidden from taking directorships in competing undertakings. Directors must choose one directorship only within 90 days. Failure to do so will trigger automatic resignation from all directorships.

Postal fines

On 15 December 2011, Poste Italiane was fined €39,377,489 for abuse of a dominant position by obstructing the development of liberalized markets for the services of 'guaranteed date and time' delivery and messenger notification. The inquiry identified a series of practices that were designed to exclude competitors and weaken their competitive capacity. Poste Italiane was found to have exploited its market power, which is based on the possession of an established network of traditional postal services, in order to enter the markets for 'guaranteed time and date' services

and messenger notification services. It was held to have applied predatory pricing by taking advantage of free access to its pre-existing universal services network and making offers that its competitors could never match.

Insurance fines

On 28 October 2011, the Italian competition authority imposed a fine of over €13 million on three insurance companies and one multi-firm agency in the sector of healthcare liability coverage in Campania. Gerling, Faro, Navale and Primogest (a multi-firm agency) were fined for setting up a unique and complex agreement, lasting from 2003 to 2008, to divide up various insurance tenders for the coverage of third party liability (responsabilità civile terzi (rct)) and operator liability (responsabilità civile operatori (rco)) as determined by local healthcare and hospital companies in Campania.

POLAND

Fines for Polish mobile telephone operators

On 23 November 2011, the President of the Office of Competition and Consumer Protection ("the OCCP") fined four telecom operators (Polkomtel, PTK Centertel, PTC, and P4) a total of PLN 113 million (approximately €25 million) for infringing Polish and EU competition law. In the OCCP's view, the operators entered into an anti-competitive agreement which caused a delay in the market entry of Info-TV-FM, the mobile television (Digital Video Broadcast – Handheld) operator. The companies were found to have (i) exchanged commercial information on the assessment of the offer submitted by Info-TV-FM; (ii) agreed a common policy towards Info-TV-FM; and (iii) adopted a common PR strategy which aimed to discredit Info-TV-FM. The companies were also fined a few months earlier for obstructing the dawn raids in the investigation, which led to even higher fines than those for the substantive infringement.

Fine for dawn raid obstruction

On 28 November 2011, the OCCP fined Inco-Veritas about PLN 2 million (€0.5 million) for the obstruction of an inspection. An employee had deleted a file from a personal computer. The OCCP did not accept the excuse that the concerned employee on the day of the inspection had participated in an external conference and did not know about the inspection. The OCCP held that it is the obligation of investigated company to inform its employees about their duties in the course of the inspection.

SPAIN

Fines on sherry producers

On 10 October 2011, the Council of the Spanish Competition Commission ("SCC") imposed a total fine of €544,000 on several associations of sherry producers in the region of Andalusia, specialized in producing grape must, for negotiating and agreeing the price of grapes and grape must from April 1991 to March 2009. Interestingly, the SCC considered that the Andalusian regional government was jointly responsible for the anticompetitive infringement given its active role sponsoring the negotiations. Given the fact that it is the first time that the SCC finds a public body responsible for an antitrust infraction, it considered that a fine should not be imposed.

Bid-rigging

On 24 October 2011, the SCC imposed a fine of more than €47 million on 47 construction companies for coordinating their bids in 13 national public tenders and one regional in the period 2008-2009 for roadway maintenance works. This is the first fine imposed by the SCC in this sector after showing certain concerns in its Guide on Public Procurement, published in February 2011. This Guide provides an overview of the construction sector, highlighting potential anticompetitive concerns and giving recommendations in order to avoid future infringements.

Transport link between Algeciras and Ceuta

On 11 November 2011, the SCC imposed a fine of €15.2 million on six ferry operators for entering into agreements aimed at fixing the prices and commercial conditions in the transport of passengers and vehicles from Algeciras to Ceuta. The SCC confirmed that from February 2008 to April 2010, the companies involved in the cartel established contacts (through meetings, telephone calls and emails) to fix ticket prices and commercial conditions with travel agencies selling those tickets. Moreover, they also coordinated bids and created mechanisms for compensation, as well as a system to monitor adherence to the agreements. Three companies from the Balearia Group benefited from a 50% reduction in the fine due to the application of the Leniency Programme after producing significant evidence and cooperating with the SCC during the investigation.

Abuse of dominance in Spanish broadcasting

On 20 December 2011, the Spanish Collective Rights Management Association, AISGE (Artistas e Intérpretes Sociedad de Gestión) was fined €628,000 for abuse of dominance. The Spanish Cinema Federation, FECE (Federación Española de Cines de España), lodged a complaint in 2009, accusing AISGE of increasing unilaterally and disproportionately the intellectual property rights paid to the association. Following the complaint, the SCC opened an investigation and concluded that AISGE had abused its dominant position from 2005 to date, almost doubling the tariffs payable by cinemas and charging them different tariffs, even retroactively. The SCC took into account when imposing the fine that it was a recidivist infringement, after a previous fine for a similar conduct in July 2000.

UK

Tobacco retail pricing decision

On 12 December 2011, the CAT handed down a judgment by which it allowed appeals brought by Imperial Tobacco and five retailers against the decision of the OFT finding that they had infringed the Chapter I prohibition of the Competition Act 1998, and which imposed fines of £225 million. The CAT annulled the OFT's decision on the basis that the theory of harm set out in its decision was not supported by sufficient evidence and that any subsequent attempts by the OFT to redefine its case were not part of the original decision and could therefore not be reviewed by the tribunal.

Compliance and deterrence

On 7 December 2011, the OFT published a report setting out the results of research on the impact of competition interventions on compliance and deterrence. This builds on a report on deterrence published in 2007. The new report analyses the drivers of compliance, businesses' knowledge and awareness of competition issues and specific competition investigations, the deterrent impact of sanctions and enforcement (in general and in specific cases), and the compliance measures taken voluntarily by businesses.

Information exchange

On 2 December 2011, the OFT announced that it has accepted commitments from six insurance companies and two IT software and service providers in relation to the data exchange tool *WhatIf? Private Motor*. The tool allowed insurers to access current and future pricing information on their competitors. The commitments provide that if information is less than six months old, it must be anonymous, aggregated across at least five insurers and already "live" in broker-sold policies. On the basis of the commitments, the OFT has closed its investigation without reaching a decision as to whether there has been an infringement of the Chapter I prohibition and or Article 101 of the TFEU.

OFT consults on new guidance on penalties and leniency

On 26 October 2011, the OFT published for consultation proposals to revise its guidance as to the appropriate amount of a penalty under the Competition Act 1998. The key proposal is to increase the maximum starting point for penalties to 30% of relevant turnover (rather than 10% at present). The OFT has also published a consultation on a revised version of its guidance on applications for leniency and no-action in cartel cases. The OFT invites comments on both consultations by 26 January 2012.

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- 21 Jan 2011 - 21 Jan 2011
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- 21 Jan 2011 - 18 Mar 2011
▶ UCL CPD Course: Competition Law and Intellectual Property Law, The Regulation of Innovation
- 02 Feb 2011 - 02 Feb 2011
▶ Centre of European Law 35th Annual Lecture: Who has the last word? National and Transnational Courts - Conflict and Cooperation
- 11 Feb 2011 - 11 Feb 2011
▶ Clive Maxwell, Executive Director of OFT - Competition and Financial Regulation
- 11 Feb 2011 - 11 Feb 2011
▶ New Frontiers of Antitrust, with J Almunia

A guide to key Competition and EU law events

Welcome to the new on-line Competition and EU law Planner with a search facility so you can now search by title, topic, organiser and date.

All competition and EU law practitioners will know that the development of competition and EU law in recent years has brought with it an increase in the number of competition and EU law related events across the world. Such events provide the professional community with invaluable opportunities for education, debate and networking. Increasingly, however, the plethora of events and the wide range of organisations staging them mean that it is all too easy to lose track of upcoming opportunities.

The aim of the Competition and EU law Planner is to provide a one-stop source of information on forthcoming major competition and EU law conferences, seminars and symposia around the world. We hope that the Planner will become a valuable notice board for the competition and EU law community, providing information on what is taking place, when and where. Diary conflicts and missed opportunities should become a thing of the past!

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To find out more contact:

Susan Bright
T +44 20 7296 2263
susan.bright@hoganlovells.com

Janet McDavid
T +1 202 637 8780
janet.mcdavid@hoganlovells.com

Peter Citron
T +32 2 62 69 236
peter.citron@hoganlovells.com

Maureen Nieber
T +44 20 7296 2790
maureen.nieber@hoganlovells.com



A spotlight on France

Our competition team in Paris assists clients on all aspects of competition law including merger control, investigations, compliance advice, restrictive trade practices, pricing, state aid, as well as distribution and consumer law.

We advise clients on avoiding the risks of contravening competition law relating to their commercial strategies and we assist them in relation to investigations conducted by the EU, the French Competition Authority and the DGCCRF (competition and consumer department of the Ministry of the Economy).

Our lawyers represent clients before the French and EU competition authorities and courts in proceedings over infringement of competition law, or in disputes against competitors, suppliers, retailers or customers.

We provide merger control advice to our clients, helping them to integrate this aspect of a transaction into their overall deal strategy, filing the transaction to the French Competition Authority or the European Commission and structuring arguments to obtain clearance. We also assist in multi-jurisdictional merger control filings in EU member states as well as in other parts of the world.

Our team members have in-depth experience on subjects specific to EU law, particularly with regard to the free movement of goods and services, the freedom of establishment of companies, including related litigation.

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- General EU law
- Mergers
- State aid.

OUR PRINCIPAL CONTACTS FOR ANTITRUST IN FRANCE



Pierre de Montalembert

T +33 1 53 67 18 00

pierre.demontalembert@hoganlovells.com



Michel Debroux

T +33 1 53 67 47 89

michel.debroux@hoganlovells.com



Omblin Ancelin

T +33 1 53 67 16 01

omblin.ancelin@hoganlovells.com



Notes

www.hoganlovells.com

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