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Certain financial hedge arrangements can violate Sherman Act Section 1

On 11 June 2010, the Department of Justice (**DOJ**) responded to critics of its proposed consent agreement in *United States v. KeySpan Corporation, Civ. Action* No. 10cv-1415(WHP) (22 February 2010). Although DOJ received kudos from New York and Pennsylvania state regulators for aggressive enforcement against a financial hedge agreement that diminished price competition, it drew criticism because the proposed remedy – disgorgement of US$12 million in profits – does not fully or directly compensate consumers. In response, DOJ maintained that its unprecedented request for disgorgement vindicates the public interest in antitrust enforcement against anticompetitive agreements because damages in this case likely would not have been available in a civil lawsuit. On 17 June 2010, DOJ requested the Southern District of New York to approve a modified proposed final judgment.

DOJ's enforcement action against the KeySpan financial hedge arrangement described below is an aggressive use of Sherman Act Section 1, 15 U.S.C. § 1, to prohibit an otherwise lawful agreement because it had as its objective a predictably anticompetitive effect. That is, DOJ alleged that KeySpan used a hedging strategy to avoid price competition and thus diminish competition in the relevant market.

The central takeaways for clients from the KeySpan case are that: (1) DOJ is prepared to use Section 1 to outlaw financial arrangements aimed at producing anticompetitive effects; (2) agreements with non-competitors that diminish competition in highly concentrated markets should be reviewed with an eye to antitrust concerns; and (3) compliance with one regulatory regime, in this instance, oversight by the Federal Energy Regulatory Commission (**FERC**), does not shield conduct from the antitrust laws.

BACKGROUND

KeySpan was the largest of three suppliers of electricity generating capacity located in the New York City market. Between 2003 and 2006, the market experienced high demand and tight supply, resulting in KeySpan's ability to sell nearly all of its capacity at a maximum price level established by New York's rate setting agency. Additional generating capacity entered the market in 2006, and prices were projected to fall at least until high demand and tight supply conditions returned. Thus, beginning in 2006, KeySpan expected to face price competition. As a result, KeySpan concluded it could no longer profitably "bid the cap" (i.e. offer to sell all of its generating capacity at the highest allowable regulated rate). Market observers expected KeySpan and other power suppliers to lower their bid prices. When market prices did not fall, both FERC and DOJ initiated investigations.

DOJ's investigation revealed that KeySpan's first response to anticipated price competition was to evaluate outright acquisition of the generating assets of its largest competitor, Astoria. This acquisition would have allowed KeySpan to continue bidding the cap, offsetting the lost revenues with additional revenues from Astoria's capacity. KeySpan ultimately rejected this solution, however, because it believed that a merger between the two companies would not have gained regulatory clearance. According to DOJ, rather than reduce its rates or offer tiered pricing in order to clear all of its capacity and maximize its revenues, KeySpan attempted to do through a financial arrangement with Morgan Stanley what it could not do through the purchase of Astoria's assets. That is, KeySpan sought to acquire an indirect financial interest in Astoria's generating capacity that would have the same effect as purchasing Astoria's assets.

Instead of going directly to Astoria, KeySpan obtained a financial interest in Astoria's capacity by entering into a swap transaction with Morgan Stanley (the KeySpan Swap). Under the KeySpan Swap, if the market price for generating capacity was above US$7.57 per kW-month, Morgan Stanley would pay KeySpan the difference between the market price and US$7.57 times 1800 MW. If the market price was below US$7.57, KeySpan would pay Morgan Stanley the difference times 1800 MW. For the swap to work, Morgan Stanley would need to enter into an agreement at the same time with Astoria that would offset the payments from Morgan Stanley to KeySpan (the Astoria Hedge). Under the Astoria Hedge, if the market price was above US$7.07 per kW-month, Astoria would pay Morgan Stanley the difference times 1800 MW, but if the market was below US$7.07 per kW-month, Morgan Stanley would pay Astoria the difference times 1800 MW. Notably, Astoria was not aware of who the counterparty on the other side of the hedge was. Only KeySpan and Morgan Stanley knew.

According to DOJ, the swap altered KeySpan's pricing behavior by providing certainty that it need not lower its bid prices to compete for business when new capacity entered the market. KeySpan continued to "bid the cap," and although it lost direct sales when alternative supplies increased, it made up the foregone revenues through payments from Morgan Stanley backed by the Astoria Hedge. This strategy effectively insulated KeySpan from competitive forces in the market. Higher energy prices for New York City consumers resulted.

ANALYSIS

Although the Sherman Act applies literally to every contract in restraint of trade, antitrust enforcement of horizontal arrangements traditionally has emphasized contracts or combinations between participants in the same market. DOJ's enforcement against KeySpan reflects an expansion of this principle to cover agreements between parties in separate markets (i.e. energy commodity markets and financial markets) when the agreement has the same anticompetitive consequence as one between direct competitors. In this instance, KeySpan's financial arrangement with Morgan Stanley, a non-participant in the physical market for generating capacity, had an impact on the competitive behaviors of two capacity market competitors, KeySpan and Astoria, that DOJ believes is equivalent in effect to a merger of the two parties. Since KeySpan did not believe that it could lawfully acquire Astoria, the rationale underlying DOJ's enforcement action seems to be that a party may not enter into financial hedging arrangements that achieve the competitive effects of a

merger of two companies if those two companies would not be permitted to merge under existing antitrust standards.

Notably, DOJ emphasized that KeySpan entered the KeySpan Swap with knowledge both that Morgan Stanley would have to hedge its exposure by making an offsetting contract with Astoria and that the offsetting contract with Astoria would necessarily alter Astoria's bidding strategy so that KeySpan could continue bidding the cap as it had when supply was tight and demand was high. Although the FERC regulatory framework was important to KeySpan's strategy in this case, similar anticompetitive results could arise from financial arrangements in thinly traded financial markets where there are very few players in the underlying commodity.

The KeySpan case is unique not only because of the nature of the challenged conduct, but also because of the US$12 million disgorgement remedy. DOJ's unusual pursuit of this remedy is intended to act as a deterrent to participants in other markets with relatively few competitors who might attempt to use third party intermediaries to create non-competitive market conditions. DOJ also rested its request for disgorgement on a belief that private actions attacking the KeySpan Swap might be barred by the filed rate doctrine, which prevents civil plaintiffs from collecting damages for prices in a tariff or other similar document filed with a regulatory agency and determined by the agency to be reasonable or lawful under its statutory authority.

Comments in response to the consent decree and proposed final judgment reflect the frustration of parties who represent the public interest that the US$12 million disgorgement remedy does not account for consumer losses from higher energy prices. They suggest damages to consumers were substantially higher than US$12 million, and accordingly that the disgorgement should have been higher. Some commentators have proposed consumer damages were as high as US$65 million. DOJ replied that although the swap changed KeySpan's competitive incentives, attempting to compute consumer losses was far more difficult because it was uncertain what prices generating capacity would have fetched in the market absent the swap. The relatively low US$12 million disgorgement figure may reflect DOJ's recognition of how difficult proving damages would have been in this instance, as well as some uncertainty about the risk of the viability of its novel liability theory.

An additional lesson from the KeySpan enforcement action is that DOJ might treat otherwise lawful financial hedging agreements, such as the KeySpan Swap and the Astoria Hedge, as deemed unlawful if they lead to higher prices in commodities markets or appear to be a device for circumventing ordinary antitrust review of mergers and acquisitions. In this instance, there were few competitors in the market for electricity generating capacity, and KeySpan appeared to have substantial market power on its own. At least its own internal analysis, and that of Morgan Stanley, suggested that an attempt by KeySpan to acquire Astoria's generating capacity would have likely drawn an antitrust challenge. In this case, the KeySpan Swap and the Astoria Hedge had the effect of giving KeySpan the sort of financial interest in Astoria's generating capacity that it might have obtained had it actually acquired Astoria. By contrast, had KeySpan represented only a small market share, its actions would not have had a substantial effect on competition (i.e. would not have raised prices) and likely would not have attracted antitrust scrutiny.

Finally, the KeySpan case serves as a reminder that compliance with one regulatory regime – in this instance the transactions at issue received FERC approval – does not necessarily shield the conduct from the antitrust laws. Although FERC reviewed the transactions, it focused on compliance with specific agency rules. DOJ's antitrust review, by contrast, involved an assessment of the actual competitive effects of the KeySpan Swap and the Astoria Hedge. Thus, FERC approval of rate caps did not mean that an arrangement designed to insulate market participants from price competition at levels below the bid cap was beyond antitrust scrutiny.

CONCLUSIONS

KeySpan portends more aggressive policing of financial hedging strategies in markets for energy products – as well as other commodity products – where the arrangement is intended to and does have the effect of reducing competitive behavior in the market for the underlying commodity.

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American Needle

The US Supreme Court evaluates antitrust immunity for joint ventures

Breaking a string of victories for antitrust defendants, a unanimous Supreme Court issued its opinion in *American Needle, Inc. v. National Football League* on 24 May, 2010. The decision treats the conduct of joint ventures comprised of independently owned and independently managed businesses that act as "separate economic actors" and are potential "independent centers of decisionmaking" as the collective action of the venturers and thus subject to challenge under Section 1 of the Sherman Act. Justice Stevens delivered this valedictory antitrust opinion with a warning that even the internal decisions of a lawfully-constituted joint venture among competitors may be treated as concerted action subject to Section 1 of the Sherman Act.

American Needle involves activities of the National Football League (**NFL**), an unincorporated association of 32 separately owned professional football teams. In the early 1960s, the NFL formed National Football League Properties (**NFLP**) to develop, license, and market the teams' names, colors, logos, trademarks, and related intellectual property. The teams authorized the NFLP to grant licenses to vendors so that the vendors could use the teams' intellectual property to manufacture and sell various types of consumer products that bear the teams' logos and trademarks. Most of the revenues generated by NFLP have been given to charity or shared equally among the teams. The teams are able to leave the NFLP at any time (and some have chosen to do so in the past).

American Needle, Inc. (American Needle) had been granted a license by NFLP to produce and sell headwear bearing the names and logos of all 32 NFL clubs. In December 2000, however, the NFLP decided not to renew its license agreement with American Needle and, instead, granted an exclusive license to Reebok International Ltd. (Reebok). American Needle sued the NFL, its teams, the NFLP, and Reebok contending that the exclusive license violated Section 1 of the Sherman Act. In response, the defendants argued that they were incapable of conspiring because the NFL and its teams are a single entity with respect to the challenged conduct. The District Court granted summary judgment for the defendants on the grounds that, with respect to the licensing of intellectual property, the NFL and its teams were acting as a single entity rather than a joint venture subject to Section 1. The Court of Appeals for the Seventh Circuit affirmed.

The Supreme Court reversed these decisions. It explained that determining whether a joint venture is a "single entity" and therefore not subject to Section 1 is a question of substance, not form: "[T]he question is not whether the defendant is a legally single entity or has a single name... The relevant inquiry... is whether... [an agreement]... amongst 'separate economic actors pursuing separate economic interests,'...'deprives the marketplace of independent centers of decisionmaking,' and... 'diversity of entrepreneurial interests,'... and thus of actual or potential competition." The Supreme Court concluded that the NFL is not a single entity because the teams do not have a complete unity of interest, lack centralized decision-making, and are not fully economically integrated: "Thirty-two teams operating independently through the vehicle of the NFLP are not like the components of a single firm that act to maximize the firm's profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being... [E]ach team's decision reflects not only an interest in NFLP's profits but also an interest in the team's individual profits."

The Court did not address whether a lawfully integrated joint venture might fall outside of the scope of Section 1 of the Sherman Act. Indeed, *American Needle* does not eliminate the possibility that, under the right circumstances, the participants in a joint venture could be found to be incapable of conspiring under Section 1. The precise characteristics of a joint venture that might fall into this category are unclear. The Federal Trade Commission (**FTC**) and Department of Justice (**DOJ**) set forth the following proposed criteria in their joint Amicus Brief in *American Needle*: (1) the parties to the joint venture must effectively merge the relevant aspect of their operations (thereby eliminating actual and potential competition), and (2) the challenged restraint may not affect actual or potential competition outside of the parties' combined operations (i.e. there can be no "spillover" effect). This is similar to the "integrated joint venture" at issue in the Supreme Court's decision in *Texaco, Inc. v. Dagher*. The FTC and DOJ warned, however, that "[o]nly a limited range of conduct would qualify for single-entity treatment under this standard, since most forms of collaboration are not equivalent to an effective merger, and many restraints have competitive effects on more than one aspect of operations." The Court in *American Needle* did not reject this possibility but instead held that "because the [NFL] teams still own their own trademarks and are free to market those trademarks as they see fit, [the agreements at issue] were agreements amongst potential competitors and would constitute concerted action" under the FTC's and DOJ's own rationale. In addition, the Court noted that it was also "significant" that the NFL teams controlled the NFLP: "[Decisions that might be treated] as independent action, although nominally made by NFLP, are for all functional purposes choices made by the 32 [NFL teams] with potentially competing interests."

The highly-anticipated *American Needle* decision and its "single entity" analysis should be of particular interest to companies who participate in, or are considering participation in, joint ventures. The Court's decision appears to restrict the ability of joint venture participants to escape scrutiny under Section 1 of the Sherman Act. Moreover, it makes clear that venture conduct might still be viewed as concerted action even after a joint venture is formed. Therefore, as the business activities of a joint venture evolve, new competitive restraints will need to be analyzed for compliance with the Sherman Act.

The decision does not resolve the status of fully-integrated joint ventures under Section 1, so further guidance will be needed from lower courts. As this area of the law develops, joint venture participants will need to carefully consider whether their existing activities, as well as any expanded activities, could be construed as concerted action under Section 1 of the Sherman Act and, if so, whether that concerted action will pass muster under the rule of reason.

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Blocking or delaying generic versions of drugs

The General Court ruling in the AstraZeneca appeal

On 1 July 2010, the General Court of the European Union (the General Court) handed down its eagerly awaited judgment in relation to AstraZeneca's appeal against a 2005 decision of the European Commission (the Commission) finding that AstraZeneca had abused its dominant position by blocking or delaying generic versions of its drug Losec.

The General Court reduced the fine imposed on AstraZeneca from €60 million to €52.5 million on the basis that the Commission failed to establish that deregistration of the marketing authorisations for the drug concerned, Losec, in certain Member States was capable of restricting parallel imports. However, the General Court essentially upholds the Commission's decision finding that AstraZeneca had abused its dominant position by preventing market access for generic products.

The case involves features which were described by the Commission at the time of its original decision as "novel" and the General Court's judgment provides some further and much needed clarity on the circumstances in which practices by a dominant pharmaceutical company can infringe EU competition law. The judgment is significant in a number of respects, including its further articulation of the boundaries of EU competition law intervention in relation to conduct before patent and regulatory authorities.

BACKGROUND

The case concerns a decision by the Commission in 2005 concluding that AstraZeneca had abused its dominant position in the market for proton pump inhibitors, contrary to Article 102 Treaty on the Functioning of the European Union (TFEU). AstraZeneca was fined €60 million for two allegedly abusive practices:

- making misleading representations to obtain Supplementary Protection Certificates in respect of Losec (the "misrepresentation abuse"); and

- selective withdrawal of Losec so that generic suppliers did not have a reference product to support their marketing authorisation (the "withdrawal abuse"). However, due to changes in the relevant EU legislation, the specific fact pattern that constituted the subject of this alleged abuse relating to misuse of regulatory procedures could not today form the basis of an allegation of abuse.

As a further indication of the Commission's antitrust interest in commercial practices in the pharmaceutical sector, the Commission has launched a wide-ranging inquiry into the EU pharmaceutical sector with dawn raids in January 2008 and cited the case involving AstraZeneca as one of the only concrete examples of competition law enforcement action in the pharmaceutical sector. Since the Commission's final report in the sector inquiry was issued in July 2009, the Commission has maintained its antitrust scrutiny of the sector, including through the opening of proceedings against Laboratoires Servier in relation to alleged infringements of Article 101 and Article 102 TFEU and further dawn raids on pharmaceutical companies. In January 2010, the Commission requested information from pharmaceutical companies in relation to patent settlements and the results of that inquiry are expected imminently. In the UK, the Office of Trading is investigating whether conduct by Reckitt Benckiser in relation to its Gaviscon product might constitute an abuse of a dominant position.

THE GENERAL COURT'S JUDGMENT

AstraZeneca plc and AstraZeneca AB brought an action before the General Court for annulment of the Commission's decision and/ or a reduction in the fine imposed.

The General Court has rejected most of the grounds of AstraZeneca's appeal and finds that AstraZeneca has committed an abuse of a dominant position.

- With respect to the misrepresentation abuse, the General Court finds that AstraZeneca made misleading representations to national patent offices.

- With regard to the withdrawal abuse, the General Court finds that the fact that pharmaceutical companies may request the deregistration of marketing authorisations for their products does not make them immune from the prohibition on abuse of a dominant position.

However, the General Court has annulled that part of the Commission's decision concerning the deregistration of Losec in Denmark and Norway, insofar as the Commission found that such actions were capable of restricting parallel trade. The General Court considers that the Commission failed to establish that the deregistrations were capable of preventing parallel trade in Losec in those countries and that the reduction in parallel imports of Losec in those countries was as a result of conduct by AstraZeneca. According to AstraZeneca the benefit of the principle that circumstances of doubt or ambivalence must be resolved in favour of the undertaking that is the addressee of an infringement decision, the General Court reduced the fine imposed on the AstraZeneca group companies to a cumulative €52.5 million.

While the General Court's judgment brings closure to the latest round of proceedings it cannot be excluded that AstraZeneca might appeal the General Court's judgment to the highest EU tribunal, the Court of Justice of the EU.

CONCLUSION

This was a controversial case where the facts as well as the legal analysis were in dispute.

The case confirms the Commission's hard line in sanctioning restrictions on parallel trade and on access for generic medicines. However, while the General Court has upheld the Commission's decision on the main findings of abuse, the reduction in the fine to take account of the elements of ambivalence in the case is indicative of the ground breaking nature of the original decision. The amount of the fine originally imposed by the Commission

was significant by any standards but was reduced at the outset given the novelty of the issues raised and that the legal position at the time the alleged practices took place was ambiguous.

The judgment also must be seen against the background of ongoing scrutiny by the Commission which reached a crescendo in its 18 month long sector inquiry and which is continuing in a number of ongoing investigations by the Commission and at national level.

The General Court's judgment is likely to be instructive to competition law authorities in Europe who may well feel emboldened in bringing further cases at the intersection between competition law, IP law and regulation, albeit recognising that such cases are difficult. While the basic allegations of abuse remain intact, it is clear that in areas of doubt a higher tribunal may well defer in favour of the undertaking whose conduct is in issue.

A key issue for competition law purposes raised by the AstraZeneca case and ongoing enforcement activity in the sector is what obligation, if any, a dominant pharmaceutical company may have (i) to take steps to enable its generic rivals to compete, or (ii) alternatively, to refrain from adopting a course of conduct that will or will likely foreclose rivals from the market. Future cases will no doubt be left to articulate such principles further.

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New EU rules for vertical agreements

The European Commission has published a new Block Exemption Regulation and Guidelines on vertical agreements. The new Block Exemption came into force on 1 June 2010 for 12 years, following a public consultation which was launched on 28 July 2009. There is a one year transitional period for agreements which do not satisfy the conditions of the new Block Exemption, but which satisfy those of the old Exemption Regulation.

Whilst the new Exemption and Guidelines broadly follow the current rules, there are some important changes and clarifications. There is a one year period to review whether existing agreements benefit from the new Block Exemption, and if necessary to amend supply and distribution arrangements.

MAIN CHANGES IN THE EXEMPTION REGULATION

The main changes in the Exemption Regulation affect market share thresholds and agreements between competitors.

Market share thresholds

The old Block Exemption only applied if the supplier's market share did not exceed 30%. The new Block Exemption now provides that the market share of the supplier on the market where it sells the contract goods to the buyer, and the market share of the buyer on the market where it purchases the contract products, must each be 30% or less.

This is a change from the initial draft of the revised Regulation which proposed that the buyer must have 30% or less of the market on which it sold the product. This proposal was criticized as unworkable given the difficulty of determining market share in small local markets. Market share on a purchasing market should be more readily accessible.

Where, in a multi-party agreement, an undertaking buys the contract goods or services from one undertaking party to the agreement and sells the contract goods or services to another undertaking party to the agreement, the Block Exemption applies only if its market share does not exceed the 30% threshold both as buyer and a supplier. For example, in an agreement between a manufacturer, a wholesaler, and a retailer, the market shares of the manufacturer and the wholesaler on their respective downstream markets must not exceed 30% and the market share of the wholesaler and the retailer must not exceed 30% on their respective purchasing markets in order to benefit from the Block Exemption.

The change in the rules has been driven by the Commission's concerns regarding the buyer power of large retailers, and the Commission's press release states that this change is "beneficial for small and medium-sized enterprises". The new rules will, however, add further burdens for parties trying to self-assess whether they come within the Block Exemption since they will have to gather additional market share information on the position in purchasing markets.

Exceptions for agreements between competitors

The Commission has retained only two of the three exceptional situations under which the old Block Exemption applied to vertical agreements between competitors. These are for non-reciprocal agreements where (i) the supplier is a manufacturer and distributor of goods, while the buyer is only a distributor and not a competing manufacturer; or (2) the supplier is a provider of services operating at several levels of trade, while the buyer operates at the retail level and does not provide competing services at the level of trade where it purchases the contract services. There is no longer an exception for non-reciprocal agreements where the buyer has a turnover not exceeding €100 million.

CHANGES/INNOVATIONS IN THE GUIDELINES

The new Guidelines contain guidance on resale price maintenance, internet selling, and on territorial protection in new markets.

Resale price maintenance

Resale price maintenance (**RPM**) is a hard core restriction and its inclusion will take an agreement outside the protection of the Block Exemption. However, in a nod to evolving US antitrust case law, the revised Guidelines now recognize that there is a possibility that in some circumstances RPM may lead to efficiencies which will be assessed under Article 101(3), for example for a short time where a manufacturer introduces a new product. The Guidelines state that "RPM may be helpful during the introductory period of expanding demand to induce distributors to better take into account the manufacturer's interest to promote the product. RPM may provide the distributors with the means to increase sales efforts and if the distributors in this market are under competitive pressure this may induce them to expand overall demand for the product and make the launch of the product a success, also for the benefit of consumers".

Similarly the Guidelines recognise that RPM may be necessary to organise "in a franchise system or similar distribution system applying a uniform distribution format a coordinated short term low price campaign (2 to 6 weeks in most cases) which will also benefit the consumers". However, this should not be interpreted as a general blessing for RPM which will remain in most cases a serious breach of Article 101.

Internet selling

The new Guidelines expand on the text in the current Guidelines relating to internet selling. The Commission has been particularly keen to do this as internet sales have increased substantially since 1999 when the current rules were adopted, and because it views online retailing as a welcoming trend supporting further market integration in the EU. The new Guidelines provide a list of restrictions on internet selling which the Commission will regard as a restriction of passive sales and therefore hardcore. Examples include agreeing that:

- the exclusive distributor shall prevent customers in another exclusive territory from viewing its website or placing an automatic re-route of customers to the manufacturers' or other exclusive distributors' websites. However,

the distributor's website can offer a number of links to websites of other distributors and/or the supplier

- the exclusive distributor shall terminate a transaction over the internet once credit card details reveal an address which is not within the distributor's exclusive territory

- the distributor shall limit its proportion of overall sales made over the internet. However, the supplier can require that "the buyer sells at least a certain absolute amount (in value or volume) of the products off-line to ensure an efficient operation of its brick and mortar shop", and can make sure that "the supplier's distribution remains consistent with the supplier's distribution model"

- the distributor shall pay a higher price for products intended to be resold by the distributor online than for the products intended to be resold offline. However, the supplier may agree with the buyer a fixed fee to support the latter's off-line or online sales efforts.

This last point raises questions about the legality of the widespread practice of manufacturers paying additional percentage discounts (rather than a flat fee) to retailers who offer additional marketing services in respect of the manufacturers' product such as operating a bricks and mortar outlet at which potential customers can examine products. This makes it more difficult for manufacturers to encourage retailers to maintain bricks and mortar outlets since paying fixed fees is unlikely to be commercially attractive to either party.

The new Guidelines confirm that in a selective distribution network the supplier may require its distributors to have "one or more brick and mortar shops or showrooms" as a condition for becoming a member of its distribution system. In addition, the Commission notes that "where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform".

Territorial protection in new markets

Although a ban on passive sales is a hardcore restriction which will prevent the Block Exemption from applying, the new Guidelines envisage exceptional situations in which even a restriction on passive selling may fall outside the scope of Article 101(1), namely where substantial investments are required by a distributor to start up and/or develop a new market are necessary (in which case the Guidelines indicate that a restriction on passive sales for up to two years may be acceptable). It is notable that the Commission recognises that passive sales bans may sometimes be lawful, and this relaxation represents an opportunity for those considering the launch of new brands and territories. That said, passive sales bans will remain prima facie hardcore restrictions, so careful consideration will need to be given to the specific justifications for restriction on such sales.

Other additions

The new Guidelines introduce new sections relating to "category management" (agreements where the distributor entrusts the supplier with the marketing of a category of products) and "upfront access payments" (fixed fees paid by suppliers to distributors for access to their distribution network).

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No EU privilege for in-house lawyers

On 29 April 2010, Advocate General Kokott of the Court of Justice of the European Union delivered her opinion in a landmark case on legal professional privilege under EU law in *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* (C-550/07 P).

The case concerns a long-running dispute about whether in-house lawyer work product should be protected by legal professional privilege under EU law. In an opinion that will disappoint in-house legal advisors, the Advocate General ruled that internal communications with in-house lawyers do not enjoy the protection of legal professional privilege under EU law, confirming the judgment of the then European Court of Justice (now the Court of Justice of the European Union) in the leading case of *AM&S v Commission* (Case 155/79), and that of the then European Court of First Instance (now the General Court) in *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* (Joined Cases T-125/03, T-253/03). The opinion emphasised that to enjoy the protection of legal professional privilege a communication must be with an independent lawyer who is "not bound to the client by a relationship of employment". Membership of a Bar or Law Society is not enough in itself to guarantee independence. The Advocate General refused to re-visit the AM&S case law, rejecting arguments that there had been significant developments in the legal landscape which justified a change in approach, namely the status of in-house lawyers in the legal systems of the Member States and the introduction of self-assessment under the modernization of anti-trust proceedings under Regulation 1/2003.

This opinion is a considerable blow to in-house lawyers who have lobbied hard for their work product to be protected by legal professional privilege under EU law. We will need to wait to see if the Court will take a more positive attitude to the role of in-house lawyers, although it seems unlikely. The final judgment of the Court is expected at the end of this summer. Whilst opinions of the Advocate-General are not binding on the Court, they are followed in the majority of cases.

WHAT IS PRIVILEGED?

Following the judgments of the General Court in Akzo and of the Court of Justice of the European Union in AM&S, privilege in EU investigations extends to the following categories of documents:

- written communications exchanged with an external independent lawyer after the initiation of an antitrust investigation
- earlier written communications exchanged with an external independent lawyer which have a relationship to the subject matter of that procedure
- internal notes circulated within an undertaking which are confined to reporting the text or the content of such communications with external independent lawyers containing legal advice
- preparatory documents drawn up exclusively for the purpose of seeking legal advice from an external independent lawyer in exercise of the rights of the defense.

Under the AM&S rules, the external independent lawyer must be EEA qualified.

BACKGROUND TO THE CASE

In February 2003, seeking evidence of possible anti-competitive practice, the European Commission conducted a dawn raid at the office of Dutch-based pharmaceuticals manufacturer Akzo Nobel. A dispute arose concerning the Commission's right to review and seize a number of documents, including email exchanges involving Akzo's in-house lawyer, who was a member of the Dutch bar.

Akzo challenged the seizure of the documents before the General Court. The Court ruled that legal professional privilege does not cover in-house counsel communications, even where in-house counsel is a member of a Member State bar association (in this case, the Dutch Orde van Advocaten). The Court did, however, extend the protection of legal professional privilege to a new fourth category of document, namely preparatory documents drawn up exclusively for the purpose of seeking legal advice from an external independent lawyer in exercise of the rights of defense.

Akzo appealed this judgment before the Court of Justice of the European Union. Advocate-General Kokott rejected a wide range of arguments raised by Akzo and various Bar associations (who intervened in the case) that internal communications with in-house lawyers should be protected by legal professional privilege under EU law.

NO EMPLOYMENT RELATIONSHIP

The key points made in the opinion are:

- there are two cumulative conditions involved in assessing whether a communication is privileged. The first condition must be that the communication "has been made for the purposes and in the interests of the client's right of defense". The second is that the communication must be with an independent lawyer who is "not bound to the client by a relationship of employment"
- even if the lawyer is admitted to a Bar or Law Society and the professional obligations associated with such admission, this is not enough in itself to grant the lawyer independent status. The explicit test in the AM&S judgment is that the lawyer must not be in a relationship of employment. The concept of the independence of lawyers is to be determined not only positively by reference to professional ethical standards, but also negatively by reference to the absence of an employment relationship
- an in-house lawyer is "structurally, hierarchically and functionally" dependent on his employer. This is not the case for the external lawyer in relation to his clients. The Advocate

General noted (in a comment that is unlikely to endear her to the in-house legal profession) that "there is a real danger that, in eagerness to show obedience to their employer, enrolled in-house lawyers will "choose" to give legal advice the substance of which will be acceptable to that employer"

- national schemes which attempt to reinforce the independent nature of in-house lawyers such as those which protect an in-house lawyer from disciplinary proceedings in the case of differences of opinion between employer and employee relating to the nature and substance of legal advice, do not sufficiently guarantee independence. The Advocate General held that whilst such schemes are "exemplary", they could not guarantee independence, as "effective protection given in a document is not necessarily effective in practice"

- whilst it is true that external lawyers are economically dependent to some extent on their clients, it is a different type of dependence than that which an in-house counsel experiences, as an external lawyer usually works for a large number of clients which in the event of a conflict of interest makes it easier for him to withdraw his services of his own accord in order to safeguard his independence. Whilst in-house lawyers do sometimes take on instructions alongside their activities as employees, this work will generally be of minor financial significance.

INSUFFICIENT CHANGE TO THE LEGAL LANDSCAPE
The Advocate General did not accept that the AM&S case law should be re-visited on the grounds of significant changes to the legal landscape. In particular:

- in the national legal systems of the EU Member States there is no identifiable trend toward extending legal professional privilege to in-house lawyers

- in the majority of Members States in-house lawyers do not benefit from the protection of legal professional privilege

- there are no special characteristics exhibited by the tasks and activities of the European Commission which justify any extension. National competition authorities have similar, if not more extensive, dawn raid powers, and Member States do not see a need to deny the authorities access to internal communications with in-house lawyers

- the European Union legislature has also recently signalled its opposition to any extension of privilege to in-house lawyers (e.g. in proposals to modernise Regulation 1/2003).

IN-HOUSE COUNSEL ROLE IN COMPLIANCE
The Advocate General did not accept that post the modernisation of competition law under Regulation 1/2003 and the need to self-assess compliance with competition law, the important role that in-house lawyers played in this process meant that the Akzo rules should be re-visited. She notes that the in-house lawyer's closeness to his employer is a "double-edged sword". Closeness means that the in-house lawyer is close to the facts but also means that he lacks "the necessary distance from the client - his employer - that would characterise genuinely independent advice".

RISK OF ABUSE
The Advocate General had concerns that if privilege was extended to in-house lawyers there might be an abuse of such privilege. Abuse could include "handing over evidence and information to an undertaking's legal department, under cover for legal advice, for the sole or primary purpose, ultimately, of preventing the competition authorities from gaining access that evidence", and "misusing the internal legal department as a place for storing illegal documents."

NO EXTENSION TO NON-EEA LAWYERS
The Advocate General rejected the argument that legal professional privilege should be extended to non-EEA qualified lawyers. She noted that there was no adequate basis for the mutual recognition of legal qualifications and professional ethical obligations, and that it could not be the task of the European Commission or the Courts of the European Union to verify at considerable expense that the third country in question had a system which would enable lawyers to exercise their profession in the independent manner required.

CONCLUSION
Whist many lawyers, both in-house and in private practice, may disagree with some of the reasons given by Advocate General Kokott, it would be surprising if the Court took a different view when it issues its judgment later this year.

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Court of Justice ruling on commitments

On 29 June 2010, the Court of Justice of the European Union (Court of Justice) upheld the European Commission (the Commission) decision to accept commitments offered by De Beers to cease its diamond purchases from Alrosa (*Commission v. Alrosa*, Case C-441/07P).

This overturns the previous General Court judgment which had annulled the Commission's decision.

BACKGROUND
The Commission had investigated concerns that De Beers' long term purchase relationship with its competitor Alrosa could infringe Article 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

In March 2002, De Beers and Alrosa had notified the Commission of an agreement under which De Beers, the largest supplier of rough diamonds in the world, agreed to purchase annually, for a period of five years, the equivalent of US$800 million in rough diamonds from the Russian state-owned company Alrosa, the second largest diamond producer in the world. Both De Beers and Alrosa offered commitments to the Commission in order to avoid an infringement decision and the possibility of a fine. After two failed joint commitments attempts, De Beers offered a third, individual set of commitments. The Commission sent a copy of these proposed commitments to Alrosa, inviting it to submit comments. On 22 February 2006, the Commission adopted a decision under Article 9 of Regulation 1/2003 bringing the proceedings to an end.

Alrosa appealed the decision to the General Court on the following grounds:

- the commitments made binding by the Commission were disproportionate as they effectively prohibited De Beers from purchasing Alrosa's diamonds, and constituted a breach of freedom of contract

- the Commission had breached Alrosa's right to be heard in the procedure leading to the decision; and

- the Commission had breached Article 9 of Regulation 1/2003 as the commitments made binding were only from De Beers, as opposed to both De Beers and Alrosa.

On 11 July 2007 the General Court upheld the appeal annulling the Commission's decision, following which the Commission lodged an appeal with the Court of Justice.

The judgment of the General Court has raised questions regarding the Commission's commitments decisional practice. The Alrosa General Court judgment distinguished commitments decisions from "settlements", aligning them instead with an Article 7 infringement decision. Accordingly, the judgment concluded that the Commission is under a duty to fully investigate the competition issues, including the proportionality of the commitments.

THE JUDGMENT OF THE COURT OF JUSTICE
The judgment of the Court of Justice is of significance in relation to the application of Article 9 where commitments are offered to the Commission to resolve investigations under EU competition law and in relation to the rights of third parties in such proceedings.

- The Court of Justice, in upholding the Commission's decision, states that the Commission's obligation to ensure that proportionality is observed has a different nature depending on whether it is considered in the context of the securing of remedies by the Commission or the acceptance by the Commission of commitments offered by the undertakings concerned. The Court of Justice states that, where commitments are given by undertakings, compliance with the principle of proportionality requires only that the Commission ascertain that the commitments resolve the problems it has identified. This recognises, importantly, that undertakings which offer commitments may accept concessions that go beyond what might have been imposed in a full blown infringement procedure.

- Of equal importance is the guidance from the Court of Justice regarding the Commission's ability to make commitments binding which affect third party rights where those rights would not have been affected under an Article 7 infringement decision. In relation to Alrosa's right to be heard, the Court notes that there were two sets of proceedings under what is now Article 101 and 102 TFEU. Alrosa could have the status of an undertaking concerned only in the context of the Article 101 proceedings. In relation to the Article 102 proceedings, only De Beers as the allegedly dominant undertaking could be the addressee of a statement of objections so that in those proceedings, Alrosa's rights were limited to those of an interested third party. The Court concluded that Alrosa's argument that its right to be heard was not observed did not succeed given its status as an interested third party. The Court concluded that Alrosa had not established that the individual commitments went manifestly beyond what was necessary to address the issues raised by the Commission.

CONCLUSIONS AND IMPLICATIONS IN PRACTICE
The general trend for Article 9 decisions by the Commission over the first five years of experience shows that there is an increasing use of commitments to conclude an investigation and remedy competition concerns. Commitments under Article 9 provide undertakings with an opportunity to conclude an investigation in the most efficient manner possible but case law has shown that it is not always an undemanding route for the undertaking concerned. For example, the Microsoft browser case involved several rounds of commitments negotiations before the Commission was satisfied that the commitments were suitable.

The judgment of the Court of Justice in the Alrosa case provides much needed further clarity on the function of commitments

and the scope for judicial challenge. It also implies a broader discretion for the securing of commitments by the Commission.

The Commission and undertakings concerned will be aware that it is the absence of a detailed formalised procedure under Article 9 which is responsible for the speedier manner with which investigations may be concluded, saving both the Commission and the undertakings concerned time and cost.

Had it been established by the Court of Justice that the Commission is required to undertake a full analysis analogous to Article 7 cases to establish whether the commitments are proportionate to the identified competition concerns, this could risk delays to the concluding of an investigation. This might be expected to compromise the value of the commitments procedure for the Commission and for the undertakings concerned. This should not detract from the need for the possibility of judicial review of commitments decisions in appropriate cases. However, the judgment of the Court of Justice does highlight the need to take account of the special nature of Article 9 cases when establishing whether commitments are sufficient to resolve competition concerns. Looking ahead, it may be that the statement by the highest European Court on the Article 9 procedure serves to encourage undertakings to approach the Commission with reasonable and proportionate commitments, which would ultimately satisfy Article 9.

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OFT report on competition law compliance

On 19 May 2010, the UK's Office of Fair Trading (OFT) published its long awaited report on the key drivers of competition law compliance and the essential elements of creating an effective compliance culture within a business.

Whilst the OFT has decided not to change its fining policy by giving increased discounts to companies that undertake appropriate compliance activities, the report contains helpful guidance for business on how to implement an effective competition law compliance programme, and serves as a timely reminder for business to take a fresh look at compliance activities.

BACKGROUND

The report follows a review by the OFT of competition law compliance best practices and consultation with business and practitioners. The key objectives of the project were to:

- identify the key drivers of compliance and non-compliance with competition law, following on from previous OFT work on deterrence
- identify whether current OFT guidance on an effective competition compliance culture should be updated
- identify and share current best practice in competition law compliance
- identify whether the OFT should be doing more to encourage compliance.

KEY FINDINGS

Among the key findings of the Report are the following:

General approach to compliance

Most of the businesses interviewed adopted a risk-based approach to competition law compliance, focussing on areas of greatest risk. The OFT states that it supports this risk-based approach, and that it also supports a principles-based approach, rather than a rules-based approach that could lead business to apply a "box-ticking" approach which imposes unnecessary burdens.

The OFT explicitly recognises that "one size will not fit all" in competition law compliance. The actions required to achieve a compliance culture will depend on the size of the business and the nature of the risks identified. This may, for example, call for a stricter and more resource-intensive approach in so-called 'hardcore' areas (i.e. cartels) but a more targeted approach in other areas such as abuse of dominance where non-dominant companies have greater freedom of commercial action.

Best practice

The OFT includes in the report examples of compliance activities that business have undertaken "in order to provide ideas to businesses designing or refreshing their competition law compliance strategy and share best practice". This includes practical ways in which business has ensured senior management commitment, encouraged business units to take ownership, and ensured that there are sufficient internal incentives for employees to comply.

Drivers of compliance

The report finds that the key drivers for compliance are the fear of reputational damage and financial penalties. The importance of individual sanctions (criminal proceedings, director disqualification etc), the commitment to compliance from the top of an organization, and opportunity to position as an ethical business are also mentioned as drivers.

It is important that people are properly incentivized to comply. Compliance training can also be incorporated as part of an employee's annual appraisal to focus on the importance of compliance to their career – an appeal to "what does it mean for me?" can be effective.

Financial penalties

The report states that the OFT has decided not to change its penalty policy in relation to compliance activities. A number of respondents had suggested to the OFT that it should allow increased discounts from any fine where the infringing party has undertaken appropriate competition law compliance activities. The OFT states that it will continue its "neutral starting position". In this way, the OFT will consider that the existence or adoption of a compliance programme does not automatically lead to a decrease or increase in the level of fine. The OFT believes that the key reward of an effective compliance programme should be the avoidance of an infringement decision in the first place. However, in practice, it can be very difficult to get buy-in for investment in compliance before there is a 'crisis' event such as a dawn raid or investigation which focuses the business on the need for more rigorous procedures.

The OFT states that it will continue its current policy which recognizes that it might be appropriate to reduce a fine by up to 10% for a business's compliance activities in certain individual cases (as it did in its recent fining decision for bid-rigging in the construction sector). The OFT states that it will not treat the existence of a compliance programme as an aggravating factor in setting fines, apart from in exceptional circumstances, since it recognizes that this might create disincentives for business to engage in compliance activities.

Proposed OFT action

The OFT is keen with its limited resources to do as much as it can to support business in complying with competition law. It proposes to implement the following actions:

- update the OFT's current guidance on competition law compliance. This will include a four step approach, including risk identification, risk assessment, risk mitigation, and review
- issue guidance for directors, following on from the proposed changes to the OFT policy on director disqualification orders

- provide more guidance to business on novel or unresolved questions through a new short form opinion tool. The OFT has recently begun trialling this new tool under which business can seek the OFT's opinion on prospective horizontal collaboration agreements that raise novel or unresolved questions of competition law. In the first trial use of the process announced on 27 April 2010, grocery wholesalers received guidance following a request for clarification on the competition implications of a proposed joint purchasing agreement. The OFT stated that it considers that the arrangement aimed to secure better prices from common suppliers through a collective purchasing agreement was unlikely to restrict competition; and

- consider how the findings of this research might be relevant to smaller businesses.

PRACTICAL IMPLICATIONS FOR BUSINESS

Developing a robust competition compliance solution and ensuring that it is properly implemented is no easy task. The OFT report is a timely reminder for business to take a fresh look at how it can maximise competition law compliance and seek to foster a culture where competition compliance is institutionalised in the way that the business operates.

A variety of techniques may be involved as part of an overall compliance initiative. Appropriate training should be directed at the risk areas involved. Key issues relate to:

- Who to train: in an ideal world, all employees would be trained. The OFT recognises that for businesses with large numbers of staff in low risk areas, it might be appropriate to focus training activities on staff in high risk areas (e.g. sales staff)

- Method of communication: some people just want to read information; others can only get to grips with the subject matter by running through actual scenarios and being forced to make choices in a safe environment (i.e. through practical scenarios). Q&A and feedback can also be helpful to reinforce key principles. The OFT notes that training methods can include online training, face-to-face training or a combination of the two

- Review: competition compliance is not a one-off exercise. The OFT emphasizes the need to sustain and target compliance through ongoing assessment of the risks a business faces (for example in light of the evolving market position) and testing employees at regular intervals to review the success of training activities.

HOW HOGAN LOVELLS CAN HELP

We deliver a wide menu of competition compliance services to our clients across the globe which enable them to implement effective compliance programmes within their organizations. This includes:

- preparing written compliance materials, including compliance manuals and associated materials (such as checklists, "dos and don'ts", FAQs and test questions) which serve as a basic guide for staff

- a suite of e-learning solutions, ranging from an online dawn raid programme to a comprehensive and customizable e-learning training, testing and reporting programme

- the audit of company agreements, arrangements and practices and interviews with employees to assess whether there are any competition law exposures

- compliance "hotlines", allowing clients to contact a dedicated team at Hogan Lovells for matters that they think might give rise to competition law concerns in a quick and cost effective way

- mock dawn raids and investigations in which Hogan Lovells staff simulate a dawn raid or investigation and present in an interactive manner a number of real-life situations that can arise

- compliance training sessions, using novel and innovative formats, such as mini-theatre and mock board rooms to allow employees to explore the consequences of their actions from an antitrust perspective

- audio and video programmes to assist in communicating antitrust issues in a variety of media

- attendance at trade association meetings to address any antitrust concerns that may arise

- review of agendas, minutes, and reports prior to their circulation

- advice on the corporate governance implications of antitrust compliance ranging from securities disclosures to Foreign Corrupt Practices Act compliance

- advice on the employment law issues relating to antitrust compliance, including how to secure antitrust compliance as part of an employee's employment law contract.

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Increased risk for directors – the revised UK approach to director disqualification in competition law cases

On 29 June 2010, the UK's Office of Fair Trading (OFT) published its revised guidance on the circumstances in which the OFT will exercise its power to apply for director disqualification orders in competition law cases.

Under the Company Directors Disqualification Act 1986 (CDDA), a director can be disqualified from acting as a director for up to 15 years if their company is involved in a breach of competition law and the court considers they are unfit to be concerned in the management of the company as a result. In the 2008 marine hose cartel case, for example, three individuals were disqualified from being company directors; one was disqualified for seven years and two others for five years each.

In the past, the OFT has only focused on directors who were personally involved in cartel activity. The OFT's new guidance clarifies a number of aspects of the OFT's policy in this area.

- The OFT does not limit the cases where it believes it appropriate to seek a disqualification to those who were directly involved in a competition law infringement, but also to those directors who ought to have known of the infringement. In this assessment the OFT is likely to consider (i) the director's role in the company including his specific position and responsibilities, (ii) the relationship of the director's role to those responsible for the breach, (iii) the general knowledge, skill and experience actually possessed by the director in question and that which should have been possessed by a person in his or her position, and/or (iv) the information relating to the breach which was available to the director. The OFT states that "the OFT and Regulators expect that every director of every company ought to know that price-fixing, market sharing and bid-rigging agreements are likely to breach competition law".

- The OFT will continue to offer immunity from disqualification orders for any director who cooperates with the OFT's investigation and whose company benefited from leniency. The OFT had consulted on whether to apply for a disqualification order in cases where a company has applied for leniency but a director fails to cooperate with the investigation. The OFT amends its guidance to allow for regulators to apply for a disqualification order against a director of a company which has benefited from leniency where that director fails to cooperate with the regulator's investigation. The OFT does not believe that this approach will undermine incentives to apply for leniency, even though "failure to cooperate" might be interpreted broadly.

- The OFT states that there may be exceptional cases where it is appropriate to apply for a disqualification order where there is no prior decision or judgment on the infringement. However, the fact that the OFT would still need to establish that there had been an infringement of competition law in such cases presents a hurdle.

The general aim is to increase the incentives on company directors to take responsibility for competition law compliance, to keep informed about the company's activities and to take proactive steps to avoid infringements of competition law. The revised guidance maintains the current focus of the OFT to make individuals responsible for competition law compliance. On its face, the revised statement of policy should in theory make disqualification orders more likely. The revised guidance is a clear indication that companies and their directors cannot afford to ignore competition law, even if they could not be considered directly involved in any infringing activity.

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Opening up of the French online gambling market

The law on the opening up to competition and regulation of the online gambling market in France entered into force on 13 May 2010, following its publication in the French Official Journal (Law N°2010-476 of 12 May 2010). The publication of this Law occurs after a long legislative process, at the end of which the French Constitutional Council (*Conseil Constitutionnel*) validated the Law passed by the National Assembly on 6 April 2010.

This Law, followed by several decrees, has a double objective. Firstly, it aims at strictly supervising the betting games according to public policy requirements, in order to ensure the integrity and transparency of gaming operations and to fight against fraudulent or criminal activities such as money laundering. Secondly, it aims at fighting against excessive and pathological gambling, notably regarding minors.

GAMBLING AND BETTING OPENED UP TO COMPETITION
Emphasising that gambling is neither an ordinary business nor an ordinary service, the Law asserts the principle that the use of gambling is placed under an exclusive rights regime granted by the State. By derogation, online gambling and betting that relies on the players' know-how is subject to an accreditation system.

The opening up to competition concerns three sectors: online horse betting, online sports betting and online poker.

- Any operator accredited by the Online Gambling Regulatory Authority (ARJEL) can now collect online horse bets, exclusively in their mutual form. The *Pari Mutuel Urbain* remains solely authorised to collect bets in points of sale.

- Regarding sports bets, any operator accredited by the ARJEL can collect sports bets online. *La Française des Jeux* remains solely authorised to collect sports bets in points of sale. Decree N° 2010-483 of 12 May 2010 relating to sports competitions and to the type of sports results defined by the ARJEL, specifies the sports competitions and results that can be the object of online betting.

- Finally, if online poker is now authorised, other online casino games however (slot machines, blackjack, roulette) remain prohibited. Scratch cards and draw games (Lottery, Euromillion...) remain under the monopoly of *La Française des Jeux*.

CONDITIONS OF ELIGIBILITY FOR OPERATORS
An active operator in the gambling and betting market that is open up to competition must, in order to lawfully operate with French internet users, obtain an accreditation issued by the ARJEL, the terms and conditions of which were established by Decree N° 2010-481 of 12 May 2010. Such accreditation, that differs for online horse betting, sports betting and circle games (poker), is granted for a renewable five year period and is not transferable.

The issuing of an accreditation is subject to the respect of work specifications drafted by the ARJEL and approved by the home, budget, agriculture, and sports secretaries by Order of 17 May 2010 published in the Official Journal of 18 May 2010. These work specifications contain clauses that apply to all types of gambling and betting and that notably relate to the prevention of excessive gambling, transparency and the operators' financial security, or the fight against fraud and crime.

The Law, which was specified by Decree N° 2010-482 of 12 May 2010 that fixes the conditions for issuing the accreditation of online gambling operators, subjects the online gambling operator to different obligations, in order to fight fraud and crime. The operator must particularly:

- set up a dedicated web site, exclusively accessible by using a domain name ending in ".fr"

- be established in a Member State of the European Union or in another State that is a party to the agreement on the European Economic Area having entered into with France an agreement containing an administrative assistance clause aiming at fighting fraud and tax evasion

- be sure of the identity, age and address of the player as well as the identification of the account on which its credits will be deposited. A player's credits with the operator can only be deposited on a single account opened by the player with a service provider established in a Member State of the European Union or of the European Economic Area having entered into with France an agreement containing an administrative assistance clause aiming at fighting fraud and tax evasion

- justify that it holds an account opened with a bank that is established in one of the Member States, on which are only carried out money collection transactions and payments relating to gambling and betting that it legally offers in France

- establish, in its internal accounting records, respectively separated accounts under the gambling and betting offered within the scope of the accreditations issued by the ARJEL and under its other business activities in France and abroad.

The Law also includes several provisions aimed at fighting excessive and pathological gambling, which was specified by Decree N° 2010-518 of 19 May 2010 relating to the offer of online betting and gaming by accredited operators. To this end, the operator must notably:

- prevent from taking part in gambling activities persons who are prohibited from gambling pursuant to rules and regulations in force or who have voluntarily excluded themselves from gambling

- refrain from putting adverts on its web site in favour of a company that is likely to extend loans to players or to allow players to lend each other money. Commercial communication in favour of a legally authorised operator is strictly supervised and credit gambling is prohibited

Continued...

- comply with a strict supervision of return rates to players, which will be fixed by decree. Such rates should be close to 85% of the bets.

RISKS RUN BY OPERATORS

The ARJEL's objective is to take part in the fight against illegal web sites and to control online accredited operators. Under the foregoing, the ARJEL can therefore perform verifications at all times.

Operators proposing online gambling and betting without holding an accreditation issued by the ARJEL incur a three year prison sentence along with a €90,000 fine. When the infraction has been committed by an organised gang, the prison sentence is increased to seven years and the fine to €200,000.

Adverts in favour of an unauthorised gambling web site are punishable by a €100,000 fine. The court can increase the amount of the fine to four times the amount of the advertising expenses dedicated to the illegal business activity.

The ARJEL can also inflict different sanctions upon accredited operators in the event of a breach of legislative and regulatory obligations applicable to their business activities, going from a warning to the withdrawal of the accreditation, eventually coupled with a fine, the amount of which rise up to 5% of the operator's sales, exclusive of tax, for the last closed financial year, corresponding to its business activities that are the object of the accreditation (10% should there be another breach).

Decree N° 2010-495 of 14 May 2010 relating the sanction procedure applicable to accredited online gambling operators specifies what procedure will be implemented by ARJEL.

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Round-up of key developments

EU

Draft EU horizontal guidelines

On 4 May 2010, the European Commission published, for consultation, drafts of a revised research and development block exemption, specialisation block exemption and guidelines on horizontal co-operation agreements. The draft guidelines include a new chapter on the assessment of information exchange between companies and a substantially revised chapter on standardization. They also provide some guidance on the application of the competition rules to agreements between joint ventures and their parents.

DRAMS settlement

The European Commission has fined 10 memory chip (DRAMS) producers a total of €330 million for their involvement in a price-fixing cartel after reaching its first settlement decision in a cartel investigation. The settlement procedure began in 2009 when all of the producers indicated that they wished to negotiate a possible settlement. Subsequently, they all signed formal statements in which they unequivocally admitted liability for the infringement. In return, the fines imposed were reduced by 10%. This has been hailed as "another milestone in the Commission's anti-cartel enforcement" by Competition Commissioner Joaquín Almunia.

Bathroom equipment cartel

On 23 June 2010, the European Commission imposed fines totalling €662 million on 17 bathroom equipment manufacturers for participation in a price-fixing cartel. This includes a fine of €326 million on the US company Ideal Standard. The cartel lasted 12 years, covered six EU countries and involved fixing price increases, minimum prices and rebates, and exchanging sensitive business information in relation to sinks, baths, taps and fittings. Five companies received reductions in their fines due to difficulties in their financial situations.

Prestressing steel fine

On 30 June 2010, the European Commission fined 17 producers of prestressing steel a total of €518.5 million for participation in a price-fixing and market-sharing cartel. The Commission reduced the fines of three companies (by 25%, 50% and 75%) in recognition of their financial difficulties and inability to pay the full fine.

New Motor Vehicle Block Exemption Regulation

The European Commission has adopted a new Block Exemption Regulation and Guidelines on the application of the competition rules in the car sector.

With respect to the sale of new vehicles, the new block exemption for vertical agreements (Regulation No 330/2010) will apply from 1 June 2013 until 31 May 2023. For the three year period until 1 June 2013, the provisions of the previous Motor Vehicle Block Exemption (Regulation No 1400/2002) will continue to apply. This period has been introduced "to allow operators time to adapt to the general regime". With respect to the motor vehicle aftermarket (repair and maintenance), the new rules came into force on 1 June 2010 until 31 May 2023.

The removal of sector specific rules for the car sales market is an acknowledgement of the fact that the market is highly competitive and that the existing rules may now be overly restrictive. However, the Commission still has concerns about conditions in the "aftermarkets" for spare parts, repair and maintenance.

CHINA

New draft rules on anti-competitive agreements and abuse of dominance

On 25 May 2010, the State Administration for Industry and Commerce (SAIC) – one of China's three competition authorities – circulated for public comment three draft regulations that purport to implement the Anti-Monopoly Law (AML) in the particular fields of its jurisdiction. The draft regulations target three types of conduct respectively: anti-competitive agreements, abuses of dominant market positions and abuses of administrative power that eliminate or restrict competition (excluding, however, any price-related behaviour for which a different authority has jurisdiction).

If enacted in unchanged form, the draft regulations could significantly expand the scope of certain of the AML's prohibitions – for example, refusals to deal– and SAIC would in any event have missed a good opportunity to clarify the many existing doubts about its enforcement policies.

FRANCE

Taxi cartel

On 11 May 2010, the French Competition Authority fined a taxi drivers' association active in the region of Amiens for having coordinated the resale price of the taxi licences during ten years and for having applied discriminatory conditions to operators willing to join the association, whereas membership appeared to be necessary to access the market. The association had also impeded its members from canvassing their own clients, notably by forbidding any personal advertising.

The Authority held that these practices distorted competition and imposed a €30,000 fine on the association (2% of the turnover of its members). The parties may still lodge an appeal before the Paris Court of Appeal.

GERMANY

Merger block overturned

On 6 May 2010, the Federal Court of Justice (FCJ) overturned a decision of the Federal Cartel Office (FCO), that had been confirmed by the Higher Regional Court (HRC) of Dusseldorf in the appellate instance, which in 2007 had prohibited Phonak/Sonova from acquiring the hearing aids business (GN ReSound) of Danish competitor GN Store Nord A/S.

The FCO's decision to prohibit the intended acquisition had caused the parties to abandon the transaction. The intended tie-up through the US$ 2.6 billion deal would have created the world's largest hearing-aid manufacturer.

Continued...

The FCO and the HRC expressed the opinion that the merger would promote on the German market the emergence of a dominant oligopoly of the leading three hearing aid manufacturers Phonak/Sonova, Siemens and Oticon. The FCJ has now rejected this decision.

The applicants were able to rebut the statutory presumption of an oligopoly of Phonak/Sonova, Siemens and Oticon. The HRC had put too much emphasis on the negative effect in the alignment of the oligopolists' market shares. A "catch-up merger" can boost competition even when equalizing market forces. Furthermore, the HRC wrongly based its ruling on the assumption that a prognosis on competition between the oligopolists mainly depends on the level of transparency on the market. High transparency only indicates one of the factors which are relevant for the lack of competition among oligopolists but does not prove the lack of competition.

Prohibition of merger of convertible roof manufacturers
The FCO has prohibited the automotive component supplier Magna from acquiring Karmann's European convertible roof systems business.

The Canadian automotive supplier Magna International Inc. planned to acquire the convertible roof systems business of Karmann GmbH, via its German subsidiary Magna Car Top Systems GmbH. On 21 May 2010, following almost four months of examination, the FCO decided to prohibit the acquisition project.

ITALY
Appeal of football league commitments
On 17 May 2010, the Italian Competition Authority (**ICA**) decided to appeal before the *Consiglio di Stato* (the Supreme Administrative Court) the ruling of the TAR Lazio (Regional Administrative Court), which annulled the ICA's acceptance of television commitments from the Football League to end an abuse of dominance proceedings.

The TAR had found two flaws in the decision of the Authority. The first was that the the Authority had not carried out a second market test of the revised commitments presented by the League. The second was that the commitments were insufficient to overcome the antitrust concerns which had been expressed in the ICA's decision.

POLAND
Twentieth anniversary of Polish Office of Competition and Consumer Protection
On 27 May 2010, the twentieth anniversary of the Office of Competition and Consumer Protection was celebrated with a Jubilee Conference on Current Issues in Competition Law which was opened by Director-General for Competition of the European Commission, Mr. Alexander Italianer.

The first part of the conference was dedicated to the goal of competition policy. The second topic of the discussion was the effectiveness of the tools of current competition policy. The final part of the conference concerned the means which may support competition law. Lectures were given by the world's leading figures in competition law and enforcement including William E. Kovacic, Commissioner of the US Federal Trade Commission, Frederic Jenny, Chairman of the OECD Competition Committee, Andreas Mundt, the president of German Federal Cartel Office, Peter Freeman, chairman of UK Competition Commission, Mr. Pieter Kalbfleisch, head of The Netherlands Competition Authority, Eddy de Smijter, DG Competition, as well as other eminent representatives of the NCAs, judges, practitioners and academics. Jacques Derenne, a partner in the Brussels office of Hogan Lovells, gave a speech on State aid issues entitled: "Whether competition policy is still the priority in time of crisis?"

Another cartel detected upon leniency application
On 25 May 2010, the Polish NCA fined companies for vertical collusion in the paint market. Between 2000 and 2006 the paint producer Tikkurila agreed with Castorama and Praktiker the final retail prices of its products. Evidence included emails between the companies. The collusion was detected as a result of a leniency procedure. Castorama which was the first whistle blower escaped a fine and the second applicant's (Tikkurila) fine was reduced by 50% to 9.3 million PLN (approximately €25 million), while Praktiker's fine was close to 39 million PLN (approximately €9.7 million).

SPAIN
Ad-space agreements in media under investigation in Spain
On 31 May 2010, the Spanish Competition Authority (**SCA**) opened two separate formal investigations into agreements signed in the market for advertising space by the major media publishing groups, including the publishers of El País and El Mundo.

The first investigation targets suspected anticompetitive behaviour in the sale of publicity spots in print media and online, while the second one is focused on the market for ads in Sunday newspapers and supplements.

The SCA started investigations following the notification of a joint venture between the groups Zeta and Prisa to sell advertising space. The SCA considered that the transaction was not a merger, but rather an agreement between competitors, but continued to investigate. The preliminary investigation unveiled suspected illegal practices, such as price-fixing, an obligation for joint commercialization and market sharing, which could affect competition on the market.

Football broadcasting rights contracts exceeding three years declared anti-competitive
On 16 April 2010, the SCA published its decision on the controversial file opened against Sogecable, Audiovisual Sports and TV Cataluña (the main football broadcasting rights operators) for anti-competitive practices that would foreclose the market.

In its decision, the SCA declared that contracts between football clubs and operators for the acquisition of their broadcasting rights exceeding three years of duration are per se anti-competitive (as well as any right of extension included in them) due to their foreclosing effects. Notwithstanding this, the SCA declared that those agreements exceeding such duration that are currently in force, would be compatible with Spanish competition law as long as they elapse within the 2011/2012 season (i.e. the coming season). The same three year maximum duration would apply to agreements between operators to jointly resell broadcasting rights through TV, internet and/or mobile phones.

The SCA imposed a symbolic fine upon the operators (€150,000 on Sogecable; €100,000 on Audiovisual Sports and €25,000 on TV Cataluña) due to the fact that these companies did not enforce their joint commercialization agreement.

UK

OFT study on barriers to entry, expansion and exit in retail banking

The OFT has initiated a study into the barriers to entry, expansion and exit within the retail banking sector in the UK. The study will focus on banking services provided to individuals and SMEs and follows on from the report published by the OFT in March concerning unauthorized overdrafts to personal accounts. It will assess how these barriers have evolved in light of the development of telephone and internet banking, the consolidation of the retail banking sector and the economic crisis and how they may influence market development in the future. It will also draw comparisons between any barriers identified in the Scottish and Northern Irish retail banking markets. The first stage of the study is a Call for Evidence. Stakeholders and interested parties should enter their submissions with the OFT by 8 July.

BA executives acquitted of price-fixing allegations

The OFT has withdrawn criminal proceedings against four current and former British Airways executives for fixing the price for the supply in the UK of passenger air transport services by BA and Virgin Atlantic.

The decision followed the late discovery of a substantial volume of electronic material, that neither the OFT nor the defense had previously been able to review. Given the volume of material involved and the fact that the trial had already begun, the OFT accepted that to continue would be potentially unfair to the defendants.

The documents in question were emails sent and received by key members of Virgin Atlantic management, the immunity applicant. The emails had until now been missed by the team of lawyers working for Virgin Atlantic and thus omitted from its submissions to the OFT. The OFT will now review the role played by Virgin Atlantic and its advisers in light of the airline's obligations to provide the OFT with continuous and complete co-operation. The OFT indicated that this might have consequences for Virgin's immunity from penalties.

First UK short form opinion issued

The OFT has issued its first opinion using the new short form procedure. This procedure is designed to allow the OFT to issue an opinion in cases where it encounters a "novel and unresolved question" concerning the application of EU and UK competition law and where it feels that further clarification would benefit a wider audience.

The short form opinion will only be used in cases of prospective horizontal agreements, as it recognizes that these agreements often cause the greatest competition concerns and the initiative is aimed at facilitating the completion of such agreements. It requires the parties involved to provide a full statement of facts for analysis. Only a limited number of these opinions will be issued per year, as the OFT wishes to avoid the development of a de facto notification system.

The first opinion was issued in respect of grocery wholesalers Makro-Self Service and Palmer & Harvey and a proposed joint purchasing agreement. The OFT considered that the exchange of certain information could lead to a reduction in competition, but the parties have agreed only to share general and aggregated data. As such, the OFT considered that the agreement would help both parties secure better prices from common suppliers and would not restrict competition.

OFT imposes fine against tobacco manufacturers and retailers

The OFT has issued a fine of £225 million against several tobacco manufacturers and retailers for infringements committed between 2001 and 2003. The OFT found that each manufacturer had individual agreements in place with retailers whereby the price of a tobacco brand was linked to the price of a competing manufacturer's brand. In this way, the retailers were not free to set their own prices.

The infringements spanned several markets, including UK duty paid cigarettes, hand rolling tobacco and cigars. The current value of these markets is estimated at around £13 billion.

Of the parties found liable, one retailer received full immunity for having alerted the OFT to the infringements, while a further three received discounts for pro-actively co-operating with the investigation. In addition, several parties received discounts for admitting liability to aspects of the allegations and agreeing to a streamlined procedure which allowed the investigation to be concluded over a shorter time period.

This is the largest total fine handed down by the OFT to date.

UNITED STATES

Horizontal merger guidelines

The Department of Justice Antitrust Division and the Federal Trade Commission, the two federal agencies that share antitrust jurisdiction in the US, released draft Horizontal Merger Guidelines for public comment in April. Numerous

Continued...

comments have recommended a variety of language changes, but the final Guidelines are likely to preserve the basic structure and emphasis of the current draft.

Contrary to some expectations, the new draft does not signal a major change in direction. The new Guidelines continue to focus purely on economic factors, but caution that "certainty about anti-competitive effect is seldom possible." There is less emphasis on precise market definitions and measures of concentration, and greater recognition of evidence obtained from the merging parties, customers, other industry participants, and informed observers. This more flexible approach is consistent with advances in economic learning since the predecessor guidelines were issued in 1992, and also more accurately reflects actual agency practice in recent years.

Google/AdMob

On May 21, 2010, the US Federal Trade Commission (**FTC**) approved Google Inc.'s proposed acquisition of AdMob Inc. following a six month in-depth investigation. This high-profile transaction received significant press coverage and attention from various members of Congress. The Commissioners took the fairly unusual step of issuing a closing statement to explain that their primary rationale for clearing the deal was the entry of Apple Inc. into the relevant market via its acquisition of Quattro Wireless, a direct competitor of Google and AdMob. The FTC decided not to challenge the transaction because it recognized that Apple had both the ability and the incentive to ensure that other advertising networks would not raise prices or reduce the percentage of advertising revenue that they share with application developers. Hogan Lovells represented AdMob in the transaction.

COMPETE – competition law compliance e-learning

We have recently developed a customizable competition law compliance e-learning, testing and risk management programme, providing awareness level training for all company employees.

New in 2010, COMPETE is based on state-of-the-art, tried and tested online training solutions with high customer satisfaction. The 75 minute, learner paced, electronic multi-media programme allows a company to deliver awareness level training for all employees, including those whose roles may put them into a position that places the company at a heightened risk of a competition law infringement.

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We would be happy to discuss your needs in more detail and to arrange a demonstration.

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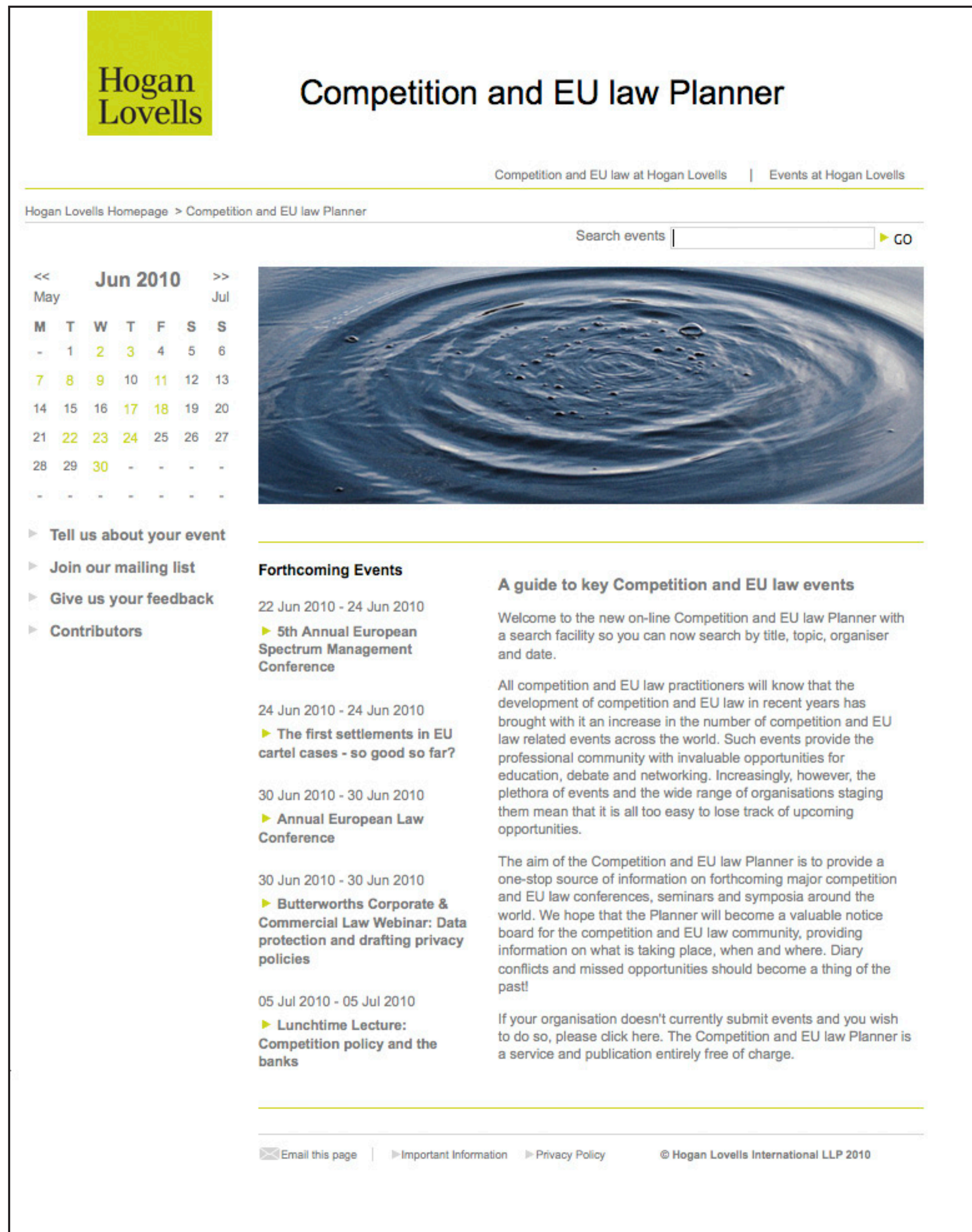

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