Hogan Lovells

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Reverse payments – The EU seems to be doing slightly better than the U.S. in tackling this controversial type of pharmaceutical patent settlement

Patent litigation in the pharmaceutical industry is a fierce business. Typically, a brand name drug manufacturer is seeking to stop a competitor from selling a "generic" version of the incumbent's drug that the incumbent believes infringes its hardwon intellectual property. The strength of the relevant patents in these cases is often in dispute, and especially in light of the high costs of patent litigation, there is significant pressure on both parties to settle. In some cases, the parties reach a settlement that provides for a compromise generic entry date as well as some additional consideration flowing from the brand name manufacturer to the generic manufacturer.

Detractors of such settlements refer to them as "reverse payments" because they result in consideration flowing from the patent holder to the alleged infringer (whereas in other IP litigation the settlement payment typically goes in the other direction). Supporters of these types of deals contend, however, that as long as the brand name manufacturer's patents are valid and infringed by the generic drug, then any settlement agreement restricting the entry date for the generic drug could not have had any harmful impact on lawful competition.

On both sides of the Atlantic, antitrust enforcers have acted over the last few years to thwart litigation settlements between pharmaceutical companies that involve such reverse payments because the enforcers believe that these settlements are anticompetitive and improperly raise consumers' costs by keeping out less expensive generic drugs. However, the European Commission recently seems to have had more success than its U.S. counterpart in curtailing this practice. If this trend continues, it could signal a divergence in the types of pharmaceutical patent litigation settlements that can be implemented in the EU and the U.S.

PHARMACEUTICAL PATENTS AND COMPETITION IN THE EU

The European Commission conducted a sector inquiry in 2009 that provided some indication of which patent settlements would invite antitrust scrutiny in the EU. The final report stated that "[agreements] that are designed to keep competitors out of the market may also run afoul of [EU] competition law. Settlement agreements that limit generic entry and include a value transfer from an originator company [or, in U.S. terms, the 'branded company'] to one or more generic companies are an example of such potentially anticompetitive agreements, in particular where the motive of the agreement is the sharing of profits via payments from originator to generic companies to the detriment of patients and public health budgets."

Monitoring of settlements

The Commission began its first monitoring exercise of patent settlements in the European pharmaceutical sector in January 2010 by issuing a request to companies for copies of such settlements. Recently, the Commission published the findings of its second stage of monitoring patent settlements. The study found a decrease in potentially problematic reverse payment settlements in the EU – the total number dropped to 89 agreements from 93 in the preceding 18 months. Furthermore, the number of settlements that limit entry and involve consideration from the branded producer to the generic company decreased significantly more. Such settlements fell from nine out of 93 in the first monitoring exercise to only three out of 89 of the settlements in the most recent exercise.

Commission vice president in charge of competition policy, Joaquin Almunia, stated: "I note with satisfaction that the number of patent settlements potentially problematic under EU antitrust law continues to decrease without calling into account companies' legitimate right to settle disputes amicably." Almunia added that the Commission "will remain vigilant that companies' behaviour respects antitrust law and [does] not delay entry of cheaper pharmaceuticals." The EU intends to continue the review programme in 2012.

Boehringer Ingelheim investigation

The Commission also simultaneously closed a long-running investigation against Boehringer Ingelheim, which had been accused of delaying the launch of a rival drug to its blockbuster treatment for lung disease, Spiriva, which has global sales of about €3 billion per year.

Almirall, a Spanish company, had alleged that the German drugmaker had filed for baseless patents in 2003 regarding new treatments for chronic obstructive pulmonary disease. The Commission investigated Boehringer's alleged misuse of the patent system regarding combinations of three broad categories of active substances treating the disease with a new active substance that had been discovered by Almirall. Almirall complained that Boehringer's patent applications would block or unnecessarily delay the entry of its products that would compete with Spiriva.

Last autumn, the Commission asked Boehringer and Almirall to find a "mutually acceptable solution" to their dispute within the limits of EU competition law. Boehringer ultimately agreed to remove the alleged blocking positions in Europe and granted a licence for two countries outside Europe, which lifts the obstacles to the launch of Almirall's products "and the Commission no longer needs to pursue the case" because Almirall will now be able to launch its medicines without delay (pending market authorisation). This case is indicative of the Commission's ability to extract the concessions it desires from the parties in pharmaceutical patent settlements without resorting to the courts.

PHARMACEUTICAL PATENTS AND COMPETITION IN THE U.S.

The story is slightly different in the U.S. Earlier this summer, the U.S. Federal Trade Commission issued a report finding that the number of pharmaceutical patent settlements involving a reverse payment increased approximately 60% between FTC fiscal years 2009 and 2010.

The FTC has long believed that stopping reverse payment settlements is one of its highest enforcement priorities.

For example, last year the FTC chairman, Jon Leibowitz, testified to Congress that reverse payment cases are "one of the Commission's top competition priorities" because agreements "to eliminate potential competition and share the resulting profits are at the core of what the antitrust laws proscribe." Moreover, a recent FTC study concluded that the practice costs U.S. consumers over $3.5 billion per year.

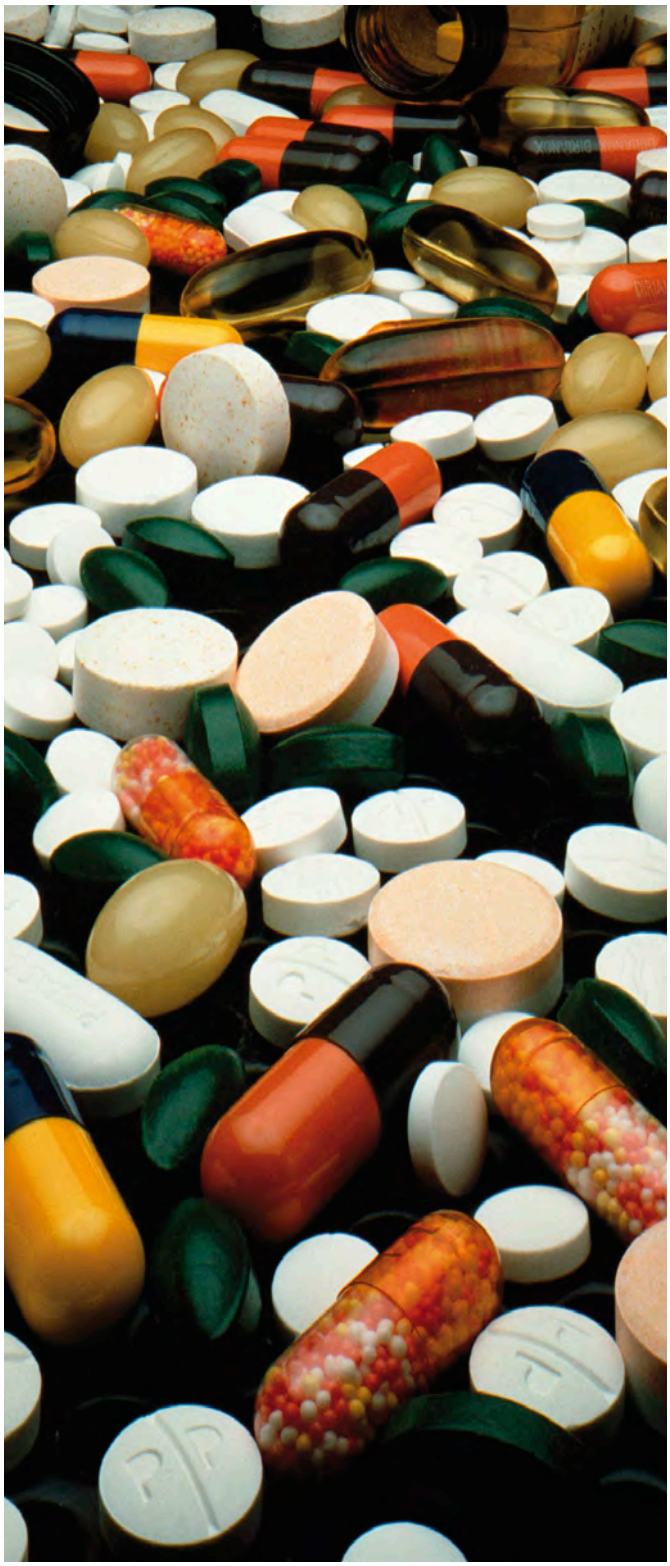
The FTC believes patent settlements that include payments to the generic company are presumptive antitrust violations because they amount to what the FTC calls "pay for delay" – ie the payment is, in the FTC's view, in return for acceptance of a later date for generic entry. Under the FTC's reasoning, such settlements are unlawful regardless of who ultimately would have won the patent litigation because, without the payment, the generic company would have insisted that the settlement had an earlier entry date.

Most U.S. courts, however, have rejected this reasoning. They have found that patent settlements cannot harm competition without proof that the settlement impacted on competition outside the scope of a valid patent. This has been the outcome for the following cases: Schering-Plough Corporation v FTC, In re Tamoxifen Citrate Antitrust Litig and In re Ciprofloxacin Hydrochloride Antitrust Litig. The courts have typically required those challenging such settlements to show that the settlement impacts competition from products not covered by the patents, or that the underlying patent infringement case was "objectively baseless" or based on "fraud."

The AndroGel story

The FTC has fought hard, albeit unsuccessfully, to overturn these decisions. Last year, the U.S. District Court for the Northern District of Georgia dismissed an antitrust challenge brought by the FTC and private plaintiffs to a reverse payment patent settlement relating to Solvay's testosterone gel, AndroGel. In September 2006, Solvay settled patent litigation with generic defendants. The terms of the settlement provided for an agreed-upon date for generic entry and that, in return for a payment, one of the generic companies would act as a backup supplier of AndroGel for Solvay.

In February 2010, the court granted a motion by the defendants to dismiss the FTC's complaint. The court's decision was based on the plaintiffs' failure to plead facts indicating that the patent settlement impacted on competition outside the scope of the branded manufacturer's (Solvay's) patents. The case was yet another setback for efforts by the FTC to reverse the trend of judicial decisions analysing reverse payment patent settlements in a manner that the FTC views as improperly lenient. The decision was not unexpected, given that the court issuing the decision sits within the jurisdiction of the Eleventh Circuit Court of Appeals, which has already ruled adversely to the FTC's position on the antitrust treatment of patent settlements in prior cases (for example, in the Schering-Plough case). The court's decision dismissing the challenge to the patent settlement has been appealed to the Eleventh Circuit.



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The AndroGel story does not end there. Last month, the FTC investigated the merger of Paddock (one of the companies involved in the AndroGel settlement) and Perrigo, another company that has filed with the FDA for a generic version of AndroGel. The FTC concluded that Perrigo's purchase of Paddock's assets would result in harmful concentration in the markets for a number of generic drugs, and therefore it required the parties to agree to a consent order that would protect competition. The consent contains a provision prohibiting the parties from entering into any future reverse payment settlement with any branded producer of a testosterone gel product (ie AndroGel). In short, the FTC used its regulatory power to extract a concession regarding reverse payments that it could not win in the courts.

The legislative option

In addition to the several antitrust lawsuits that it has brought challenging these types of settlements and the filing of amicus briefs in private litigation, the FTC has strongly promoted the idea of legislation that would ban or improve its ability to challenge patent settlements with reverse payments. A bill that would impact on most such settlements advanced to the Senate floor earlier this summer. The proposed legislation would, among other things, and in most cases, put the burden of proof on the parties to demonstrate that a patent settlement with a reverse payment is not anticompetitive. A recent speech by Commissioner Rosch, however, acknowledged that the legislation has an uphill battle to be passed, especially in the U.S. House of Representatives.

Commissioner Rosch also suggested in his speech that if the FTC's efforts in Congress and the courts continue to fail, it is possible that the FTC will seek to exercise its rulemaking authority, for example, by issuing a rule providing that reverse payment patent settlements are "inherently suspect" under the FTC Act, and shifting the burden of proof to the defendants to demonstrate that these deals are not anticompetitive. Such an effort would be sure to face significant legal challenges by industry participants asserting that the FTC has no legal authority to issue such a rule, and it may lead to a legislative battle in Congress.

CONCLUSION

These recent developments illustrate that the competition enforcers on both sides of the Atlantic place a high priority on reining in pharmaceutical litigation settlements that involve payments from the branded company to the generic company, together with an agreed-upon date for generic entry. At first blush, the European Commission may seem to be enjoying more success in its efforts. However, despite the reversals that it has suffered, the Federal Trade Commission continues to investigate alleged anticompetitive conduct in the pharmaceutical industry and to pursue creative ways to challenge it under the antitrust laws. Pharmaceutical companies considering IP settlements in the U.S. should do so with caution and seek to minimise the chances that the FTC will select their settlement for a future enforcement action.

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Lessons from the Ryanair/Aer Lingus decision

On 28 July 2011, the UK Competition Appeal Tribunal ("**CAT**") handed down its judgment in the Ryanair/Aer Lingus case. It decided that the UK Office of Fair Trading ("**OFT**") was not out of time to investigate and refer Ryanair's minority stake in Aer Lingus to the Competition Commission for detailed review, should it decide to do so.

This case has ignited an interesting debate because the result of the CAT's judgment is that the OFT can (and will) investigate Ryanair's minority stake in Aer Lingus three years after the European Commission's decision to block Ryanair's acquisition of Aer Lingus's entire share capital, and four years after Ryanair started to acquire shares in Aer Lingus. At the same time, commentators have questioned whether the circumstances in this case are likely to be repeated. Indeed, the CAT stated that the facts were unusual and questioned how often they would recur in the UK. It added that the time bar problem which gave rise to the CAT hearing was bound up in UK legislation and unlikely to arise in the same form elsewhere in the EU.

While the facts are unusual, there are important lessons which businesses can draw from this case and potentially serious implications for companies acquiring shares in certain contexts.

LEGAL FRAMEWORK

In order for a merger or an acquisition to be reviewable by the Commission under the EU Merger Regulation ("**the EUMR**"), the transaction must constitute a "concentration". A transaction qualifies as a concentration when there is a lasting change in the nature of control of an entity. Control is determined according to the "decisive influence" test. An entity exerts decisive influence over another when it controls its day-to-day commercial decision-making.

The EU one-stop shop principle means that member states cannot review and apply their own rules to a merger once the Commission has claimed or accepted jurisdiction.

There is no harmonisation of member states' merger rules with the EUMR. Consequently, member states have different tests to determine control. The lowest control threshold in the UK is whether one entity has "material influence" over another – a lower threshold than the "decisive influence" required for EUMR purposes.

BACKGROUND FACTS

100% shareholding

On 23 October 2006, Ryanair launched a public bid for the entire share capital of Aer Lingus and notified the proposed acquisition to the Commission under the EUMR. Following a detailed investigation, the Commission announced its decision on 27 June 2007 to block the merger. Ryanair unsuccessfully appealed the Commission's decision to the General Court, which gave judgment on 6 July 2010.

Minority shareholding

In the meantime, between September 2006 and August 2007, Ryanair had gradually increased its shareholding in Aer Lingus to 29%.

In July – and again in August 2007 – Aer Lingus made a submission to the Commission arguing that it should require Ryanair to divest its minority stake. The Commission concluded that it did not have jurisdiction because Ryanair's minority stake did not constitute a concentration: its 29% shareholding did not confer "decisive influence". Therefore, there was no relevant merger situation for review under the EUMR. Aer Lingus unsuccessfully appealed the Commission's decision to the General Court, which again gave judgment on 6 July 2010.

On 29 October last year, the OFT announced that it had commenced an investigation into Ryanair's minority shareholding (which it can do of its own volition where a merger situation exists under the UK rules).

Ryanair argued that the statutory time period for review by the OFT had elapsed and that the OFT should have begun its investigation in 2007 after the Commission's decision to block the 100% share acquisition (when Ryanair's shareholding was 25%). On 4 January 2011, the OFT issued a reasoned decision explaining why this was not the case. On 7 January 2011, Ryanair appealed to the CAT.

THE CAT JUDGMENT

The CAT concluded that the OFT had a duty to avoid potential conflicts with EU law, based on the UK's duty of sincere co-operation and the requirement under the EUMR that no member state shall apply its national competition legislation to a concentration in relation to which the Commission has accepted or claimed jurisdiction. It found that until the final determination of the appeals against the Commission's decisions – ie 17 September 2010 – the OFT would have risked breaching EU legislation if it had commenced an investigation.

ANALYSIS

It is not inconceivable that similar circumstances could arise in the EU and its member states in the future. It is not unusual for shareholders gradually to increase their stakes in companies. Moreover, other member states, including those with mandatory filing regimes (as opposed to the voluntary regime in the UK) have lower control thresholds than decisive influence.

In particular, companies should look out for member states which have both (1) a low control threshold to determine whether there is a reviewable concentration, and (2) a deal/party size thresholds that are easily met.

Germany is an example of such a member state, being known to trigger filing requirements regularly because of its low turnover thresholds. It has two tests (among others) which present a lower threshold than decisive influence. If either is met, the transaction is reviewable (subject to meeting the turnover test).

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The first is the acquisition of 25% of a company's capital or voting rights. The second is the requirement to notify the acquisition of direct or indirect "competitively significant influence" over the target. In the 2008 A-Tec case, the Federal Cartel Office ("**FCO**") ordered the dissolution of a merger that involved the acquisition of a 13.75% share in a company by a direct competitor. Although the acquirer did not have decisive influence over the target, the FCO held that the 13.75% share of a direct competitor was sufficient and provided an incentive to block decisions due to the typically low attendance at the shareholders' meetings.

COMMENT

It is everyday practice to consider the merger filing rules in multiple jurisdictions when a company wishes to acquire all of the assets or shares in another. In the EU, it is less common to have to consider notifying the acquisition of minority stakes than, for example, in the U.S., where merger filing obligations are not always determined by the issue of control. However, perhaps the Ryanair/Aer Lingus case ought to serve as a reminder that the rules of individual member states can differ from those prescribed by the EU (as well as from each other). When a transaction does not qualify as a concentration for review under the EUMR, companies should not rule out the possibility of review under the rules of member states.

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A merger clearance decision withdrawn by the French Competition Authority

One should not trifle with commitments agreed in a merger. On 20 September 2011, the French Competition Authority applied for the first time ever in France Article L.430-8 IV 1° of the French Commercial Code which allows, if the Authority considers that the parties have not complied with a commitment, to "withdraw the decision clearing under conditions the concentration." In this case, it found that Canal Plus had not complied with some key commitments and, therefore, imposed a fine of €30 million on Canal Plus.

The operation in question, authorized in 2006 by the then Minister of Economy at the time in charge of reviewing concentrations, had raised serious competition concerns as it led to the merger of the two major French pay-TV operators, TPS and Canal Satellite. The concentration resulted in a monopoly on markets of premium TV channels and strengthened the dominant position of Canal Plus Groupe on the downstream market of pay-TV distribution, due to the addition of strong market shares, the loss of a potential competitor and the existence of significant vertical effects.

Given the risks for competition, the authorization was subject to the implementation of 59 commitments made by Groupe Canal Plus and its mother company, Vivendi. The purpose of all these commitments was to allow the pay-TV distributors that would remain after the transaction (essentially cable operators and telcos) to have access to channel content which is attractive enough to allow the creation of competitive pay channels packages and thus be able to compete with the merged entity on the downstream market of pay-TV distribution.

In its decision of 20 September 2011, the Competition Authority carefully examined and found, however, that ten commitments, including some which were essential, had not been implemented.

On the intermediate market of TV channels: the aim of the commitments was to make the creation of pay channels packages that can compete with those offered by Canal Plus possible, by making available to all distributors, on a non-discriminatory basis, seven channels necessary for the creation of attractive packages, and by guaranteeing the maintenance of the quality of the unbundled channels. The Authority pointed out however that Canal Plus had neither fulfilled its commitments concerning non-discrimination, nor unbundled the TV channels within the specified period. This delay enabled Canal Plus to promote the migration of TPS subscribers toward its new offer 'The New CanalSat' containing exclusive content, while competitive providers were not able to provide a retail offer including all or part of the seven channels covered by unbundling.

Concerning the commitment to maintain the quality of the unbundled channels: the Competition Authority also noted that, contrary to the commitments, Canal Plus degraded the quality of the channels it had to make available to third party distributors, including the quality of (i) TPS Star – considered as a key channel, (ii) the three movie channels, and (iii) channels made available to one specific distributor, Parabole Réunion, which limited the attractiveness of unbundled channels.

Concerning relations with independent and third party channels: the Competition Authority highlighted that Canal Plus did not comply with certain commitments concerning relations with independent and third party channels. In 2006, it appeared necessary to ensure the sustainability to independent channels and their autonomy vis-à-vis Canal Plus Group, in order to allow third party distributors to expand their packages, by including attractive independent channels. Nonetheless, Canal Plus by keeping some of these channels in a dependency state, did not guarantee their autonomy.

Concerning the acquisition of broadcasting rights: on the upstream market, the commitments aimed to facilitate the acquisition of broadcasting rights by competitors of Canal Plus, by putting an end to all the exclusive broadcasting rights it had under current contracts and by prohibiting future acquisition of such exclusive rights. The Authority has considered that on that point as well, Canal Plus did not meet all its commitments.

A TWO-FOLD PENALTY, HEAVY AND UNPRECEDENTED

The Competition Authority, rejecting the purely mathematical argument that Canal Plus had implemented 80% of its commitments, and considering that the non-performed commitments were essential in the 2006 decision, withdrew the merger clearance decision and imposed a fine of €30 million. Consequently, unless Vivendi and Canal Plus divest TPS (which seems both unlikely and uneasy to implement in practice), they must re-notify the transaction to the Competition Authority within a month, ie before October 20th, 2011.

This decision to withdraw the authorization is the first in France. Before that, the Authority or the Minister of Economy, has only ordered the parties to implement commitments, with a daily penalty payment until full completion (decision of the Minister of Economy, 21 August 2007, Carrefour-ED/Treff). In this case however, such an option would not have been sufficient to restore competition, since the pay-TV market has experienced major changes in the last years. New commitments, relying on the current pay-TV market situation, are likely to be required by the Authority for authorizing the concentration. No doubt they will have to be more substantial, especially as competitive pressure from cable operators and telcos is not as significant as it was expected to be back in 2006.

At European level, most of the competition authorities have the same ability to withdraw the merger clearance decision if the commitments are not timely and fully implemented, but this has not yet been tested in practice (the authorities have only sanctioned failure to fulfill the commitments by ordering the parties to implement the commitments with a periodic penalty payment until full completion).

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The Paris Court of Appeal orders disclosure of documents held by the French Competition Authority

On 24 August 2011, the Paris Commercial Court ordered the French Competition Authority to disclose certain documents gathered in the course of a procedure that ended by way of a settlement with commitments (decision No 10-D-20 of 25 June 2010 relative to practices implemented by Highco and Sogem in the online discount coupons sector). MLDC, a competitor of Highco and Sogem, filed a complaint before the Paris Commercial Court against the two latter companies claiming damages for the alleged harm caused by their anti-competitive practises.

In France, the most difficult part to succeed in such a follow-on action for an applicant is undoubtedly to prove the fault, which implies in this context to prove the existence of anti-competitive practices, without any power of investigation. One could think that this is easier for follow-on actions, but in a case settled by way of commitments, the evidence is not really helped by the decision of the Competition Authority since it does not take a position on the undertakings' guilt but simply states that the commitments respond to the competition concerns the Authority had.

In this context, the Court's reasons to ask for disclosure are easy to understand. Thus, the Court starts by reminding that public and private enforcement do not pursue the same goal. Consequently the action before the Competition Authority does not put an end to the civil action for compensation.

Then, the Court highlights that there is a legal ground to order a third party to disclose documents: article 138 of the French Code of Civil Procedure which allows a judge, at the request of a party to the proceedings, to order the production of a document held by a third party. The only limit to this power lies in a so-called sufficient and legitimate cause ('empêchement légitime'), which includes in particular business secrets and privacy data. According to the Court, there is none here since it only asks for non-confidential versions of the documents in the file of the Competition Authority.

The Court also rules out the arguments based (i) on article L.463 of the French Commercial Code which provides that the documents gathered by the Authority are protected by the confidentiality of investigations, by reminding that this principle can be set aside in the interest of the rights of defence, and (ii) on a Law of 1978 which bans the communication of documents collected by the Competition Authority during its investigation, by considering that this prohibition does not apply to judges.

This decision, whose next step is eagerly awaited, will please plaintiffs in follow-on actions. On the contrary, on the side of the undertakings who are the subject of public enforcement decisions, it will raise concerns since they have no certainty that the information and evidence voluntarily supplied in the context of a leniency application, will be safeguarded by the Competition Authority and won't be disclosed to those seeking to bring cartel damages actions.

It is interesting to note that, at EU level, the Commission does not allow easily the disclosure of documents, all the more when business secrets or evidence collected via leniency are involved. Without sacrificing the private enforcement for the public enforcement (see the current work on the development of private actions), it nevertheless insists on the role of leniency given the difficulties of competition authorities to detect and to fight against cartels.

The Commission has recently reiterated its position following the Pfleiderer judgment of 16 June 2011, in which the European Court of Justice decided that it is incumbent on national courts to decide on a case-by-case basis whether to disclose leniency-related information by weighting 'the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency'. Commenting upon the decision, the European competition commissioner Joaquín Almunia, in a speech of 16 September 2011, has assured that 'the Commission is determined to defend its leniency programme and the programmes of our ECN partners'. Since then, Mr Almunia, in a speech made before the European Parliament on 22 September 2011, expressed 'the need to regulate access to evidence held by competition authorities' as part of broader legislation on antitrust damages actions.

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Round-up of key developments

EU

Parental liability

On 15 September 2011, the General Court annulled a fine of €31.66 million imposed by the European Commission on Koninklijke Grolsch NV ("**Grolsch**") for its alleged participation in a cartel between Dutch beer producers (case T-234/07 Koninklijke Grolsch NV v European Commission). The General Court found that the Commission had failed to identify the commercial, economic and organisational links between Grolsch and its subsidiary thereby denying Grolsch the opportunity to rebut the presumption of liability between parent and wholly-owned subsidiary.

Luxury watch manufacturer investigation

On 5 August 2011, the Commission announced that it had opened formal proceedings in relation to alleged anti-competitive practices by luxury watch manufacturers. This follows a December 2010 judgment of the General Court that annulled the Commission's decision to reject a complaint alleging breach of competition law by several watch manufacturers. In order to take account of the General Court's ruling, the Commission is now investigating further the complainant's allegations that several luxury watch manufacturers have breached competition law by refusing to supply spare parts to independent repairers.

FRANCE

Seizure of electronic documents

On 29 June 2011, the French Supreme Court approved the seizure of 600,000 electronic files during an antitrust investigation in the generic drugs sector, including personal privacy data and legally privileged documents. The inspectors conducted a quick search to identify elements within the scope of the warrant and then proceeded to copy all emails relating to them. According to the Court, there has been no infringement of fundamental rights since (i) the files were unbreakable and their authenticity must be guaranteed, (ii) investigators are bound by professional secrecy, (iii) legally privileged and private documents cannot be used in the proceedings, and (iv) protected data shall be returned to the undertaking.

GERMANY

Proposed amendment of Act against Restraints of Competition

On 1 August 2011 the German Federal Ministry of Economics and Technology (BMWi) proposed amendments of the German Act against Restraints of Competition (GWB). Cornerstones of the legislative proposal are the adjustment of merger control to the EU model (ie alignment with the SIEC-test), a revision of the national abuse provisions (ie introduction of structural remedies), and some changes for summary proceedings and regulatory offences.

Wood-board manufacturers fine

On 20 September 2011 the Bundeskartellamt imposed fines totalling €42 million on four wood-board manufacturers for price-fixing. Ten individuals were also fined. The companies were found to have met regularly between 2002 and 2007 in order to agree price increases, minimum prices, additional fees for certain services. The Bundeskartellamt reached settlement with most of the companies implicated, which led to lower sanctions.

ITALY

UEFA Champions League rights

On 16 August 2011, the Italian Competition Authority ("**ICA**") opened an investigation into Sky's acquisition of exclusive rights to broadcast most UEFA Champions League. The probe will form part of an on-going investigation into Sky's purchase of FIFA World Cup transmission rights. The ICA is examining whether that transaction amounted to an abuse of Sky's market power. The ICA has concerns that Sky's power on the pay-TV market may foreclose rivals from competing. Moreover the regulator highlights that Sky's offer may be particularly attractive and "influence" the choice of a significant number of consumers.

Fines in magnetic resonance equipment sector

On 5 August 2011, the ICA fined Alliance Medical S.r.l, Toshiba Medical Systems Italia S.r.l., Philips S.p.A. and Siemens S.p.A. a total of €5,538,750. The ICA held that the parties had participated in a meeting at which they entered into a joint agreement that defined their participation in a tender for electro-medical equipment.

POLAND

Cable TV merger cleared on conditions

On 5 September 2011, the President of the Office for Competition and Consumers Protection approved the acquisition of Aster by UPC Polska. Both companies are cable television operators. As a result of the merger UPC will achieve a market share of approximately 50 to 60% in the area of Cracow and Warsaw. Clearance has been given subject to conditions under which UPC has to sell parts of its business in the above-mentioned cities and is obliged to maintain services to former Aster clients.

SPAIN

Fine for breach of settlement agreement

On 23 August 2011, the Council of the Spanish Competition Commission ("**SCC**") imposed a fine of €4.8 million on Correos for not complying with the content of a settlement agreement reached on 15 September 2005. Under this agreement, the postal operator agreed to ensure that the final price of its services would cover all real costs, and to terminate those contracts that could result in the application of predatory prices. The SCC found evidence that Correos had applied discounts in 2008 and 2009 to certain large industrial clients that would have resulted in the application of prices below cost.

Fine for not submitting commitments implementation plan

On 27 July 2011, the SCC fined Telecinco €3.6 million for not complying with its obligation to submit a detailed implementation plan for the commitments it agreed as a condition for the clearance of the Telecinco/Cuatro merger. This was required to be completed within a month from the date of publication of the clearance decision.

UNITED KINGDOM

Dairy fines

On 10 August 2011, the OFT announced its decision to impose fines totalling £49.51 million on four supermarkets (Asda, Safeway, Sainsbury's and Tesco) and four dairy processors

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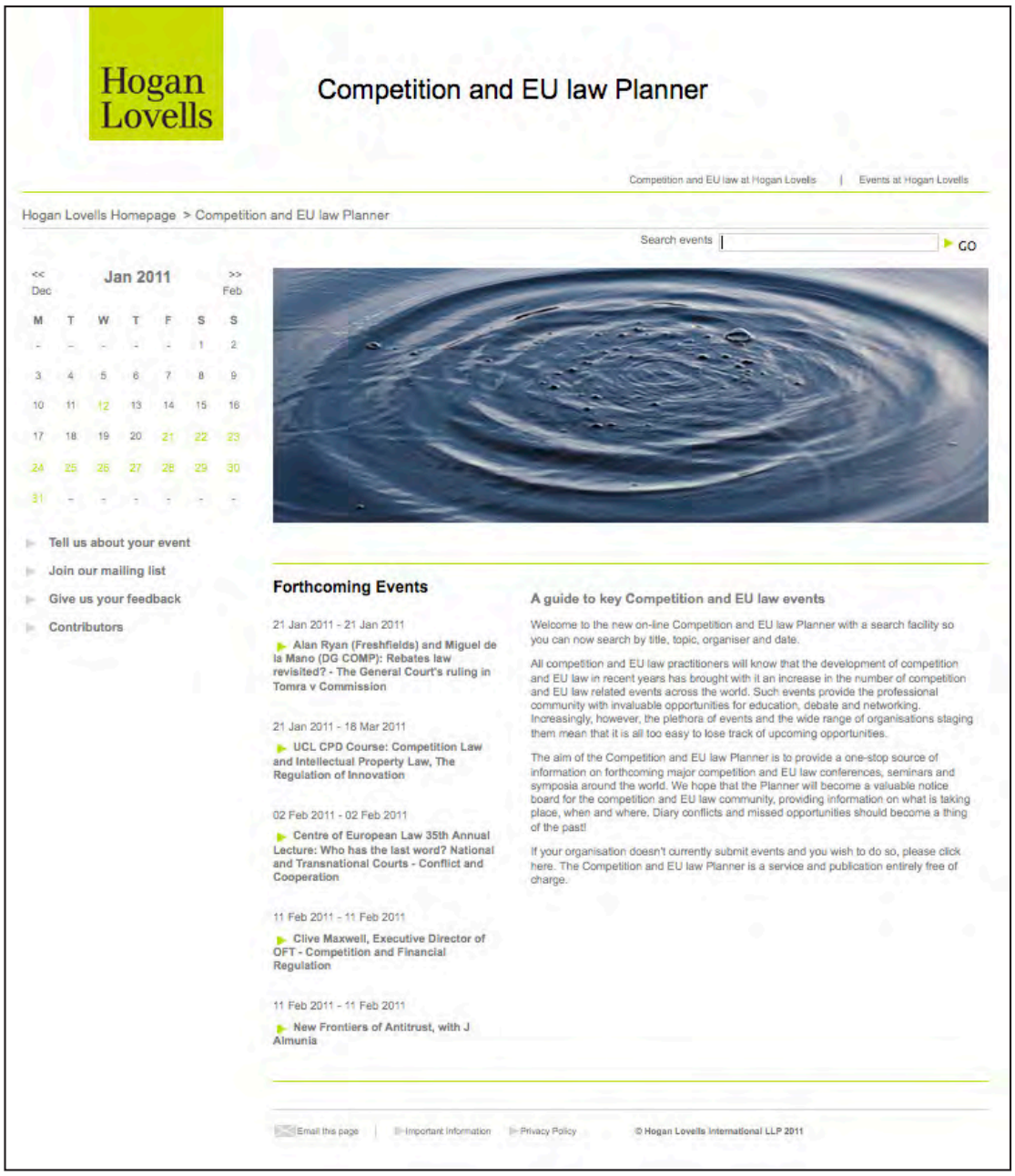
(Dairy Crest, McLelland, The Cheese Company and Wiseman) in relation to its dairy products retail pricing investigation. The OFT's investigation concluded that the supermarkets co-ordinated price increases for certain dairy products in 2002 and/or 2003 by indirectly exchanging their future retail pricing intentions with each other via the dairy processors, thereby infringing the Chapter I prohibition of the Competition Act 1998 (Act).

Market study into aggregates, cement and ready-mix concrete
On 16 August 2011, the OFT published its report on its market study into aggregates, cement and ready-mix concrete. The study began in September 2010 and was initially focused on the aggregates sector. Its scope was extended in February due to concerns expressed regarding vertical integration between the aggregates, cement and concrete sectors.

The OFT has identified a number of features of the market that may adversely affect competition including high barriers to entry, highly concentrated markets, vertical integration, homogenous products, market transparency and supply by major firms to each other to serve local markets (multi-market contacts). The OFT is proposing to make a market investigation reference to the Competition Commission under section 131 of the Enterprise Act 2002. It asked for views on its proposal to be submitted by 30 September 2011. An interesting feature of the case is that the European Commission is currently investigating the markets for cement and related products (including ready-mix concrete and aggregates). The OFT's guidance indicates that it will not normally refer a market to the CC when that market is being investigated by the Commission. However, in this case, the OFT believes that a reference is appropriate because it does not consider that the EU investigation can address the underlying competition problems or that a CC investigation would entail undue burdens.

Competition and EU law planner



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- Interactive training techniques
- Practical scenarios present learners with real life situations
- Focused case law summaries provide real life examples
- Practical guidelines available for learners to print
- Expandable "learn more" sections providing richer content
- Talking heads provide additional narrative excerpts adding to the multi-media experience and authenticity of content
- Q&A test at the end of the course with feedback on the answers
- Options for filtered business reports and tracking systems

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

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A spotlight on Brussels

Hogan Lovells in Brussels focusses on EU Competition, Procurement, Trade and Regulatory Law. Our experience and expertise in these areas enable us to guide clients through the challenging EU and global regulatory environment, with focused and high quality advice.

Our multidisciplinary and multilingual lawyers have broad competition and EU law experience and many have formerly worked in the European Union institutions. Our lawyers enjoy strong professional and personal contacts with European Union regulatory and legislative bodies, offering clients up-to-the-minute knowledge of procedures and policy priorities at the European level. We regularly appear before European Union courts in Luxembourg as well as national courts on European Union-related issues.

Our Brussels team consists of over 30 lawyers, including nine partners and three counsel. We are a truly multinational team, working in 11 languages (English, French, German, Dutch, Italian, Spanish, Greek, Polish, Swedish, Bulgarian, and Mandarin).

AREAS OF FOCUS

- Merger control
- Cartels and other investigations
- State aid
- Competition compliance
- EU litigation
- Public procurement
- International Trade
- Telecommunications, Media, and Technology
- Environmental
- Food
- Life Sciences (Pharma, Biotech and Medical Device)
- Data privacy

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