Hogan Lovells

Antitrust, Competition and Economic Regulation Quarterly Newsletter

October – December 2010

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New rules for horizontal co-operation agreements in the EU

In December 2010, the European Commission published a number of documents dealing with the assessment of co-operation between competitors (horizontal co-operation) under the EU competition rules. This includes revised Guidelines on the assessment of horizontal co-operation in general and two revised "Block Exemption" regulations in the areas of research and development ("**R&D**") and specialisation in production respectively.

The new Guidelines provide a useful analytical framework for businesses to self-assess horizontal co-operation under the EU competition rules. They include a new chapter on information exchange and a substantial revision to the chapter on standardisation. The enhanced level of guidance in relation to information exchange will prove helpful to business, including trade associations, who until now have had limited guidance on how the EU competition rules apply in this area. Companies which are party to R&D or specialisation agreements in the EU will also want to consider the effects of the new Block Exemptions on their existing agreements.

INFORMATION EXCHANGE

The Guidelines set out the methodology that should be used when assessing the compatibility of information exchanges with EU competition law and provide examples of the Commission's thinking on a number of sample agreements. They provide for an assessment on the basis of market characteristics, the nature of the information exchanged and the risk of the exchange leading to the coordination of companies' competitive behaviour. Of particular note is the following:

- the Guidelines emphasise that information exchanges between competitors of individualised data regarding intended future prices or quantities should be considered a restriction of competition by **object**. This means that the Commission does not in these cases have to show an anti-competitive **effect** in order to prove an infringement. However, the Commission notes that "in specific situations where companies are fully committed to sell in the future at the prices that they have previously announced to the public (that is to say, they can not revise them), such public announcements of future individualised prices or quantities would not be considered as intentions, and hence would not normally be found to restrict competition by object"

- exchange of "strategic data" is most likely to be caught by the EU competition rules. Information related to prices and quantities is the most strategic, followed by information about costs and demand. However, if companies compete with regard to R&D, the technology data may be the most strategic for competition

- the Guidelines do not give a specific time period in which data becomes historic and old enough not to pose risks to competition. The Commission states that "whether data is genuinely historic depends on the specific characteristics of the relevant market and in particular the frequency of price re-negotiations in the industry"

- the Guidelines note that unilateral price announcements that are genuinely public (for example, through a newspaper) are unlikely to infringe the competition rules. However the Commission warns that in certain limited circumstances even a unilateral announcement may infringe Article 101, for example "where an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each other's public announcements (which, to take one instance, might involve readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination."

STANDARD SETTING

The Guidelines include a substantial revision of the standardisation chapter, which aims to give guidance on how to ensure that the process of selecting industry standards is competitive and that, once the standard is adopted, access is given on fair, reasonable and non-discriminatory ("**FRAND**") terms to interested users. The guidance sets out the criteria under which the Commission will not take issue with a standard-setting agreement (the safe harbour). These criteria include:

- the procedure for adopting the standard is unrestricted with participation open to all relevant competitors on the market;

- the procedure is transparent, ensuring that stakeholders are able to inform themselves of upcoming, ongoing and finalised standardisation work;

- participants are free to develop competing standards, and to sell products that do not comply with the standard; and

- the procedure involves a balanced IP rights policy with good faith disclosure of those IP rights that are essential for the implementation of a standard, and a requirement for all IP rights holders that wish to have their technology included in the standard to provide an irrevocable commitment to license their IPR on FRAND terms.

Of particular note in the chapter is the following:

- the Commission has clarified that the requirement of good faith disclosure of IP rights in the safe harbour does not include an obligation to carry out a patent search and positively declare that the participant has no IPRs reading on the standard

- there is more guidance for standard-setting organisations falling outside the safe harbour, and it is made clear that the only effect of falling outside the safe harbour is that self-assessment in accordance with the effects based part of the chapter is needed. This is aimed to address the specific feedback that the Commission received during the consultation period that the safe harbour should not lead to any "straight jacket effect"

- the Commission confirms that ex ante disclosures of the maximum royalties that a company would charge if its technology were incorporated in a standard would not normally give rise to competition concerns. This is not necessary in order to fall within the safe harbour. But in appropriate circumstances the ex ante disclosure of licensing terms will be relevant when determining ex post whether those terms are FRAND.

- the Guidelines clarify that there are various methods to assess whether royalties and other terms are FRAND in the context of standard-setting. In appropriate circumstances, particular attention will be given to royalties charged prior to the adoption of the standard.

BLOCK EXEMPTIONS

Both Block Exemptions have been reworked. Most of the changes aim to provide more clarity, but there are a few extensions in scope, particularly in the case of the R&D Block Exemption.

The R&D and Specialisation Block Exemptions entered into force on 1 January 2011, with a transitional period of two years, during which the previous Exemptions will remain in force for such agreements that fulfil the conditions of those Regulations but do not fall under the new Regulations.

R&D Block Exemption

The scope of the R&D Block Exemption has been expanded to cover "paid for research" (where one party merely finances the R&D activities of the other party). The Block Exemption will cover:

- paid-for R&D of contract products or contract technologies and joint exploitation of the results of that R&D

- joint exploitation of the results of paid-for R&D of contract products or contract technologies pursuant to a prior agreement between the same parties

- paid-for R&D of contract products or contract technologies excluding joint exploitation of the results.

Parties to an R&D agreement can now also avail themselves of the R&D Block Exemption where only one party sells the contract products in the EU on the basis of an exclusive license by the other party (which will often have the right to sell the contract products in areas outside the EU).

The Commission has dropped a requirement that appeared in the draft of the Block Exemption issued in May for consultation, which specified that an exemption should only be available if prior to starting the research and development, all parties agree that they will disclose in an open and transparent manner their existing and pending intellectual property rights relevant for the exploitation of the results by the other parties. The Commission considered that there was no need for this requirement as potential patent ambushes in the context of R&D agreements can be adequately addressed by the parties through private contractual arrangements.

Specialisation Block Exemption

The Specialisation Block Exemption clarifies that it will continue to apply even where one of the parties to the agreement only partly ceases production. This will enable a company that has two production plants for a certain product to close down one of its plants, outsource the output of the closed plant, and still benefit from the Block Exemption.

The recitals to the Exemption introduce a second market share threshold for specialisation or joint production agreements on intermediary products which one or more of the companies use captively for the production of certain downstream products. In case the company sells these downstream products on the merchant market, an exemption is only granted if the share of the parties on this downstream market does not exceed 20%.

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Are golden shares just fool's gold?

Judgment of the CJEU in *European Commission v Portuguese Republic*

On 11 November 2010, the Court of Justice of the European Union (the "CJEU") handed down its judgment in the case of *European Commission v Portuguese Republic* (Case C-543/08).

In that case, the European Commission (the "**Commission**") argued that by retaining special rights for the Portuguese State through its "golden" shares in Energias de Portugal ("**EDP**"), Portugal had failed to fulfil its obligations under Article 56 of the EC Treaty ("**EC**") (which prohibits restrictions on the free movement of capital, and is now Article 63 of the Treaty on the Functioning on the European Union ("**TFEU**")), and Article 43 EC (which prohibits restrictions on the freedom of establishment, and is now Article 49 TFEU).

The CJEU held that the golden shares held by the Portuguese State conferred on it special rights that constitute a restriction on the free movement of capital and that, as a result, Portugal has failed to fulfil its obligations under the treaty. The CJEU made no ruling in relation to the alleged restriction on the freedom of establishment, stating that because the measures at issue had been found to infringe the rules concerning the free movement of capital, there was no need for a separate examination of the measures at issue in the light of the rules concerning freedom of establishment.

The CJEU's judgment seems to be another nail in the coffin of golden shares.

BACKGROUND TO THE CASE

Since the early 1990s, the Portuguese electricity sector has undergone extensive restructuring. As part of that restructuring, EDP was re-privatised in a multi-phase process. However, under a number of provisions of Portuguese law and EDP's articles of association, the Portuguese State was allocated certain special rights in connection with its golden shares in EDP.

On 18 October 2006, the Commission sent a letter of formal notice to Portugal accusing it of having failed to fulfil its obligations under Articles 56 EC and 43 EC on the ground that the Portuguese State and other public sector shareholders held golden shares with special rights in the share capital of EDP, in particular:

- veto rights in respect of certain resolutions of the general meeting of EDP's shareholders (including resolutions relating to amendments to EDP's articles of association (including increases of share capital, mergers, divisions and winding up), and the conclusion of certain contracts);
- the right to appoint a director to replace an otherwise successfully elected director if the Portuguese State voted against that other director; and
- the exemption of the Portuguese State from five percent ceiling on voting rights.

On 29 July 2007, the Commission issued a reasoned opinion in which it restated the content of the formal notice and invited Portugal to comply with that opinion within two months. On 30 October 2007, Portugal replied to the reasoned opinion. However, the Commission remained dissatisfied, so on 4 December 2008, it brought an action under Article 226 EC (now Article 258 TFEU) for failure by Portugal to fulfil its obligations under the treaty, specifically the obligations of free movement of capital (under Article 56 EC) and freedom of establishment (under Article 43 EC).

DID THE PROVISIONS OF PORTUGUESE NATIONAL LAW AND EDP'S ARTICLES OF ASSOCIATION RESTRICT THE FREE MOVEMENT OF CAPITAL AND/OR THE FREEDOM OF ESTABLISHMENT?

The CJEU noted that the treaty provisions on the free movement of capital generally prohibit restrictions on movements of capital between Member States. Movements of capital for these purposes includes in particular: "direct" investments (those being shareholdings that confer the possibility of effectively participating in the management and control of a company), and "portfolio" investments (those being investments solely for the purposes of financial investment without any intention of influencing the management and control of the undertaking). Therefore, national measures must be regarded as restrictions within the meaning of treaty provisions on the free movement of capital if they are liable to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors of other Member States from investing in their capital.

The CJEU went on to consider whether the veto rights, the right to appoint a director, and the exemption from the five percent voting ceiling enjoyed by the Portuguese State constituted restrictions on the free movement of capital.

The CJEU stated that it is clear that a large number of significant resolutions relating to EDP are subject to the approval of the Portuguese State. The CJEU specifically noted that any resolution involving an amendment of EDP's articles of association requires the Portuguese State to vote in favour, meaning that the influence of the Portuguese State on EDP cannot be reduced except with the consent of the State itself. As a result, the right of veto, in so far as it confers on the Portuguese State an influence on the management and control of EDP which is not justified by the size of its shareholding, is liable to discourage operators from other Member States from making direct investments in EDP since they could not be involved in the management and control of that company in proportion to the value of their shareholdings. Similarly, the veto rights may have a deterrent effect on portfolio investments in EDP because the possibility of the Portuguese State vetoing an important decision that is in EDP's interests, is liable to depress the value of the shares of EDP and thus reduce the attractiveness of an investment in those shares.

In relation to the exemption from the five percent ceiling on voting rights, the CJEU stated that it is clear that the voting rights attaching to shares constitute one of the principal ways by which the shareholder can actively participate in the management of an undertaking or in its control. Consequently, any measure that is designed to prevent those rights being exercised or to subject

them to qualifications may deter investors in other Member States from acquiring stakes in the undertakings concerned and constitute a restriction on the free movement of capital. Furthermore, a voting ceiling is an instrument which is liable to limit the ability of direct investors to participate in a company.

In relation to the Portuguese State's right to appoint a director (when it has voted against an otherwise successfully elected director), the CJEU stated that it is clear that that right constitutes a restriction on the free movement of capital because it constitutes a derogation from general company law and is laid down by a national legislative measure for the sole benefit of the public authorities. The CJEU noted that while it is true that that facility can be conferred by legislation as a right of a qualified minority, it is clear that it must, in such a case, be accessible to all shareholders and must not be reserved exclusively to the state. In the instant case, it was not.

The CJEU concluded that the veto rights over certain resolutions, the exemption enjoyed by the Portuguese State from the five percent voting ceiling, and the right of the Portuguese State to appoint a director to replace an otherwise successfully elected director, constitute restrictions on the free movement of capital.

In reaching this conclusion, the CJEU rejected the argument advanced by Portugal that national measures which apply without distinction to domestic investors and to investors from other Member States could constitute restrictive measures under the treaty provisions on freedom of establishment and the free movement of capital only if those national measures impose direct and substantial conditions on the access of investors to the market. In so arguing, Portugal invited the CJEU to interpret the concept of a 'restriction' on freedom of establishment and on the free movement of capital in the light of the judgment of the CJEU in Joined Cases *Keck and Mithouard* on selling arrangements in relation to the free movement of goods. However, the CJEU rejected that analogy and stated that while it was true that the restrictions at issue applied without distinction to both residents and non-residents, they did affect the position of a person acquiring a shareholding and therefore were liable to deter investors from other Member States from making such investments and, consequently, affect access to the market.

The CJEU made no specific ruling in relation to the alleged restriction on the freedom of establishment. However, the CJEU noted that in so far as the national measures at issue entail restrictions on the freedom of establishment, such restrictions are a direct consequence of the obstacles to the free movement of capital, to which they are inextricably linked. As a result, the CJEU stated that because an infringement of Article 56 EC had been established, there was no need for a separate examination in the light of the rules concerning freedom of establishment.

WERE THE RESTRICTIONS JUSTIFIED?

The CJEU went on to consider whether the restrictions on the free movement of capital were justified on any of the grounds set out in Article 58 EC (now Article 65 TFEU) or by overriding reasons in the public interest, and whether the restrictions were appropriate to secure the attainment of that objective and did not go beyond what is necessary in order to attain it.

Portugal argued that the provisions at issue were justified on the ground of public security. The CJEU stated that the objective to ensure a secure energy supply in a Member State in case of crisis, war or terrorism may constitute a ground of public security and possibly justify an obstacle to the free movement of capital. However, the CJEU also noted that it is undisputed that requirements of public security must, in particular as a derogation from the fundamental principle of the free movement of capital, be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State. Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.

Portugal argued that the crucial importance of energy in the form of electricity and natural gas to all contemporary economies and societies means that such a threat does not have to be immediate; that it could legitimately equip itself with the means required to guarantee the fundamental interest of security of supply even if there is no imminent threat. Portugal argued that since the risk of serious threats to the security of energy supply cannot be excluded and since such threats are by definition sudden and, in the majority of cases, unforeseeable, it is the duty of the Member State concerned to ensure that adequate mechanisms are put in place to enable it to guarantee that the security of that supply is not interrupted.

Although the CJEU described Portugal's argument as "not entirely without merit", the CJEU stated that a justification based on public security could not be upheld on the facts because Portugal had done no more than raise that ground, without stating clearly the exact reasons why it considered that the special rights at issue would make it possible to prevent such an interference with a fundamental interest of society.

The CJEU also stated that Portugal's argument that EU law does not adequately guarantee the security of energy supply in Member States, and therefore Portugal is compelled to adopt adequate national measures, is of no relevance. The CJEU stated that even if it is accepted that a Member State has an obligation to guarantee the supply of energy within its territory, compliance with such an obligation cannot be relied on to justify any measure which is contrary in principle to a fundamental freedom.

Furthermore, the CJEU stated that because the exercise of the special rights which the holding of golden shares in the share capital of EDP confers on the Portuguese State is not subject to any specific and objective condition or circumstance, it means that the provisions of national law confer on the Portuguese State a latitude so discretionary in nature that the serious interference with the free movement of capital cannot be regarded as proportionate to the objectives pursued.

Portugal also argued that the national law provisions at issue are required to enable EDP to carry out its task, of providing services of general economic interest, conferred on it by the Portuguese

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State pursuant to Article 86(2) EC (now Article 106(2) TFEU). However, the CJEU rejected that argument. In so doing, the CJEU stated that in the proceedings were not concerned with the granting of special or exclusive rights to EDP nor with the classification of EDP's activities as services of general economic interest, but with the lawfulness of attributing to the Portuguese State, as a shareholder of that company, special rights in connection with golden shares. Therefore, Article 86(2) EC is not applicable and therefore cannot be relied on by Portugal as justification of the national provisions.

Having dismissed all the justifications advanced by Portugal, the CJEU held that by maintaining for the Portuguese State and other public sector bodies special rights in EDP such as those provided for by provisions of Portuguese law and EDP's articles of association, allocated in connection with the Portuguese State's golden shares in the share capital of EDP, Portugal has failed to fulfil its obligations under the treaty relating to the free movement of capital.

WHAT DOES THIS MEAN FOR GOLDEN SHARES?
The judgment in *European Commission v Portuguese Republic* provides yet another example of the Commission successfully bringing proceedings against a Member State for breaching its treaty obligations by conferring on itself special rights over undertakings through golden shares.

Indeed, this judgment follows hot on the heels of a CJEU judgment earlier this year in relation to other golden shares held by the Portuguese State. In that case, the CJEU held that Portugal had failed to fulfil its obligations relating to the free movement of capital by retaining special rights for the Portuguese State and other public sector bodies through its golden shares in Portugal Telecom. On 24 November 2010, the Commission announced that it has asked Portugal to provide it with information about the measures that Portugal is taking to comply with the CJEU's judgment in the Portugal Telecom case. The Commission stated that if Portugal does not comply with the CJEU's judgment, the Commission may refer the case for the second time to the CJEU and ask the CJEU to impose a lump sum and/or penalty payment on Portugal.

It is clear from the case law of the CJEU that the threshold for finding that a golden share provision is a restriction of the free movement of capital is relatively low. Where a Member State is able to exercise power over a company, particularly where this is not commensurate with its level of shareholding, and in so doing deters investment then it appears to be highly likely that the CJEU would find a restriction on the free movement of capital. Furthermore, the CJEU has approved a Member State's justification of a golden share arrangement on only one occasion – that being the Belgian State's golden share in Belgium's natural gas transport companies – although it should be noted that the Commission will not necessarily take action against golden share arrangements that it does not consider to be problematic. As a result, Member States would be well advised to review their golden shares arrangements and consider whether those golden shares result in the Member State breaching its obligations under the TFEU.

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Results of DG Competition stakeholder survey

On 18 October 2010, DG Competition published the results of the first comprehensive survey of stakeholders about their views on DG Competition's activities. The survey was carried out by two independent market research organisations across professional stakeholders and citizens of all EU Member States. It revealed an overall endorsement for the authority with some specific criticisms and suggestions for improvement.

The comprehensive survey was split into two parts:

- the "Qualitative professional stakeholder study" presents the views of professional stakeholders on the performance of DG Competition; and
- the "Quantitative citizen survey" reveals the perceptions of EU competition policy held by citizens across the EU.

QUALITATIVE PROFESSIONAL STAKEHOLDER STUDY

The qualitative stakeholder survey sought views on DG Competition's enforcement, policy and advocacy activities from professional stakeholders (lawyers, economists, business and consumer associations, national competition authorities and companies). The market researchers conducted 113 in-depth interviews lasting 75 or 90 minutes with individuals from these stakeholder groups between December 2009 and March 2010.

The study considers issues such as the legal and economic soundness of DG Competition's activities, its integrity, the economic effectiveness of its actions on the markets and the quality of its external communications.

Key positive feedback on DG Competition included the following comments:

- decisions are clear and understandable and there has been an improvement in clarity in recent years and an improvement in economic analysis since the appointment of the Chief Economist in 2003
- decisions are predictable due to praiseworthy application of legislation, rules and published guidelines
- national competition authorities found fines predictable and most stakeholders found fines to be an effective deterrent
- the enforcement activity is correctly focussed on sectors with an important impact on consumers
- there was a broadly held view that DG Competition is a professional organisation with competent and committed staff
- the majority of company representatives were positive about the integrity of DG Competition in observing procedural rules
- the detection policy is effective as a result of the leniency programme
- State aid cases were dealt with quickly and efficiently during the financial crisis
- most stakeholders consider that DG Competition's external communications (the website, press releases and speeches) are clear and comprehensible.

However, some negative comments and/or suggested improvements were expressed:

- the quality of decisions is seen to differ depending on the subject area, with legal analysis in cartel cases being seen as least thorough
- some respondents mentioned that DG Competition has shifted its opinion about a transaction at a late stage during the review process in merger cases
- all stakeholders asked for increased transparency throughout the lifetime of cases including earlier communications and more frequent follow-up
- stakeholders were divided on the issue of fines but a significant proportion of lawyers and company representatives found fines less predictable under the 2006 guidelines and some felt that this was intentional
- some lawyers thought that economists should be involved at an earlier stage and direct communication with economists should be possible
- business associations and companies felt DG Competition's market understanding could be improved
- some stakeholders complained of perceived breaches of confidentiality in the form of leaks or off-the-record briefings to journalists
- information requests sometimes present a disproportionate burden on companies
- the delay in decision-making may mean that decisions become irrelevant; set time frames could be introduced in antitrust proceedings
- the role of the hearing officer was criticised for a lack of substance
- the role of DG Competition as "judge, jury and executioner" was criticised by some respondents.

QUANTITATIVE CITIZEN SURVEY

The objective of the quantitative citizen survey was to measure EU citizens' perceptions about EU competition policy and their views about a possible lack of competition in certain important sectors. Over 25,000 randomly selected citizens aged 15 years and over across the 27 EU Member States were interviewed by telephone between 16 and

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20 November 2009 reaching around 1,000 citizens in each country.

There was considerable variation in EU citizens' perceptions about competition policy across Member States. The proportion of respondents who answered that they were sufficiently informed about each of the areas of competition policy was below 5% in almost all Member States. For almost all statements, the proportion of respondents who gave a "don't know" response or who did not consider themselves qualified to answer was highest in Belgium.

Citizens in all Member States were in agreement that competition between companies could lead to better prices and/or more choices for consumers. A majority of citizens in almost all Member States agreed that competition policy should prohibit agreements on prices between companies. The energy sector was cited by 44% of EU citizens as the sector with a lack of competition which causes the most problems for consumers. The pharmaceutical sector was cited by 25% of respondents as suffering from a lack of competition, whereas 21% mentioned telecommunications and the internet, 19% referred to transport services, 18% named financial services and 16% cited food distribution.

The findings of these studies are expected to help DG Competition achieve more targeted and dynamic communication with stakeholders and citizens. They will also be fed into the ongoing review of DG Competition's best practices for antitrust proceedings.

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UK Court of Appeal confirms "fatal flaw" in representative element of air cargo cartel claim

On 18 November 2010, the UK's Court of Appeal upheld the High Court's decision in *Emerald Supplies and another v British Airways PLC* to strike out the representative element of the action for failing to conform to the requirements of the Civil Procedure Rules.

BACKGROUND – THE HIGH COURT PROCEEDINGS
The claimants, Emerald Supplies Ltd and Southern Glass House Produce Limited, used the services of the defendant British Airways ("BA") and other international airlines to import cut flowers from Colombia and Kenya respectively. In September 2008 the claimants alleged that BA had acted in breach of European competition law by fixing the prices at which air freight services were supplied and that such infringement resulted in inflated prices which caused loss to "direct or indirect purchasers or both of air freight services", of which they were two such representative purchasers. The claimants argued that BA is liable to pay damages to those purchasers in light of these breaches.

CPR RULE 19.6
CPR Part 19 sets out the procedure for parties involved in representative actions and group litigation. Under CPR Rule 19.6 a claimant may commence a claim on behalf of himself and others, or the court may order that such a claim be continued, where, "more than one person has the same interest in a claim." The Rule also provides the court with a discretion to direct that a claimant may not act as a representative. On 31 October 2008, BA applied to the court for an order to strike out the representative element of the claim. BA submitted firstly, that the other persons described did not have "the same interest" as the claimants; and secondly, that even if those other persons did have the same interest, the court ought to direct that the claimants may not act as their representative.

BA argued that the claim was not limited to direct or indirect purchasers of air freight services from BA, and that it extended to the direct or indirect purchasers of air freight services from any other airline which was party to the alleged agreements or concerted practices. Further, the claim was also not limited to direct or indirect purchasers of air freight services within the Common Market, EEA Member States, or the UK. In summary, BA argued that the class of purchasers delineated by the claimants was said to be, "on the face of the pleadings… not only unidentified, but unknowable, potentially comprising every conceivable so-called direct and indirect purchaser worldwide who at one stage or another were arguably affected – directly or indirectly – by the cost of air transport shipping services during the relevant period." In reply, the claimants argued that the size of the class of the represented claimants was the unavoidable consequence of the alleged infringements, and irrelevant to the proper construction and application of CPR Rule 19.6.

THE CHANCELLOR'S JUDGMENT
The Chancellor of the High Court granted BA's application to strike out the representative element of the claim. He observed that there is no upper limit on the number of persons who may be represented under Rule 19.6. However, as the class in this case was both numerous and geographically widespread, the other pre-conditions of a representative action would have to be satisfied more clearly. The Chancellor held that the class of represented claimants should have had the same interest at the time the claim was brought. In deciding whether this was the case, the Chancellor compared the class of represented claimants in a number of earlier cases, with the class argued for by the claimants in the present case. In the earlier cases, the composition of the class was not dependent on the outcome of the claim because it was determined for example, by statute, or by reference to a register of members. In contrast, the class outlined by the claimants was defined in relation to allegations made by the claimants against BA, which they needed to prove in the action. In addition, the Chancellor found that while the relief sought in the earlier cases would be equally beneficial to all members of the relevant class, in the present proceedings this could not be true because defences to the claim could be available against some members of the class, but not others, depending on the member's position in the distribution chain and whether the member had passed on the cartelised prices to others in that chain.

In conclusion, the Chancellor stated that the authorities indicate that CPR Rule 19.6 is intended to provide a convenient means to avoid a large number of substantially similar actions, but he did not think that it was convenient or conducive to justice that a representative action should be "pursued on behalf of persons who cannot be identified before judgment in the action and perhaps not even then." The Chancellor noted the difficulties involved in bringing multiple actions on the same or similar facts, but stated that the consolidation of multiple actions based on the same or similar facts can equally well be achieved by obtaining a Group Litigation Order under CPR Rule 19.11.

The claimants appealed the Chancellor's judgment.

COURT OF APPEAL JUDGMENT
In the opening lines of his judgment, Lord Justice Mummery made clear the Court of Appeal's views on this appeal; describing it as "a bold attempt at keeping a procedural novelty alive." The Court of Appeal unanimously agreed to dismiss the claimants' appeal. The Court agreed with the Chancellor that for the requirements of CPR Rule 19.6 to be met, the represented parties must have "the same interest" in the action at all stages of the proceedings. Lord Justice Mummery stated that the fundamental requirement for a representative action is that at all stages of the proceedings it must be possible to say of any particular person whether or not they qualify for membership of the represented class by virtue of having the same interest as the claimant. He noted that this did not mean, however, that the class must remain constant throughout this period. It simply meant that the criteria for inclusion must be satisfied at the time the action is brought, rather than at the time of judgment. In this case, the claimants would have to succeed in their action for a declaration before it could be said that any party would qualify as being entitled to damages against BA, and therefore form part of the class. Lord Justice Mummery did not think that the proceedings could be accurately described or regarded as a representative action until the question of liability had been tried and a judgment on liability given.

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The Court of Appeal also agreed with the Chancellor's view that the representative element was problematic because defences were available to the claims of some claimants but not others, as a result of their position within the supply chain. The Court of Appeal noted that there is a potential conflict between those in the class who "pass-on" to their customers the inflated element of the illegally fixed prices and those who did not "pass-on" such loss.

COMMENT

This judgment illustrates how difficult it is for claimants to bring representative actions in this type of case. In particular, where different defences may be raised against different groups of claimants, the claimants will have to overcome a significant hurdle to demonstrate that they all share the "same interest" in the outcome of the claim. This case highlights some of the difficulties facing claimants who want to bring representative actions and it suggests that there will be significant interest in the public consultation which was announced on 15 October 2010 by the European Commission inviting comments from stakeholders on his proposals for a more coherent approach within Europe to collective redress in relation to competition infringements.

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Newly enacted NDRC and SAIC rules may usher in new anti-monopoly enforcement phase

On 4 and 7 January 2011, the National Development and Reform Commission ("NDRC") and the State Administration for Industry and Commerce ("SAIC") published a total of five newly enacted departmental regulations implementing the Anti-Monopoly Law of the People's Republic of China ("AML") within the areas for which they are responsible.

The new regulations contain the first substantive legal rules to be issued by both authorities in the AML field. The regulations may set the stage for a new phase in the enforcement of the AML, with SAIC and NDRC beginning to take a higher profile and more active role. NDRC's and SAIC's anticipated activities are to complement the enforcement work already being carried out by the Ministry of Commerce ("MOFCOM") – the third member of the triumvirate of Chinese authorities with AML enforcement powers – in merger control cases. All five regulations will become effective from 1 February 2011.

THE NDRC REGULATIONS

NDRC has jurisdiction over three types of anti-competitive conduct: (1) anti-competitive agreements (so-called "monopolistic agreements"), (2) abuses of a dominant market position, and (3) abuses of administrative power (so-called "administrative monopolies") but only to the extent that the conduct relates to pricing.

Substance

The regulation which sets out new principles of substantive law – the Anti-Price Monopoly Regulation (the "**Anti-Price Monopoly Regulation**") – covers all three types of anti-competitive conduct. The provisions on anti-competitive agreements are relatively straight-forward. For horizontal agreements (that is, agreements between competitors), the Anti-Price Monopoly Regulation focuses on price-fixing and, for vertical agreements (that is, between entities in different parts of the supply chain such as between a company and its distributor), they merely confirm that a company – even if not occupying a dominant market position – is prohibited from setting the resale prices charged by its distributors (so-called "resale price maintenance"). Furthermore, the broader language (relative to the AML) on anti-competitive agreements organized through industry associations may possibly point to an area of future focus for NDRC enforcement actions. NDRC's recent decision to impose the maximum available fine for associations on a paper manufacturers' association in Zhejiang (which was made public also on 4 January 2010) seems to strongly support this view.

The provisions on abuse of dominance in the Anti-Price Monopoly Regulation add some substance vis-à-vis the "bare bones" framework of the AML. The Anti-Price Monopoly Regulation expands and provides further guidance on the types of abuses that are listed in the AML which fall within NDRC's regulatory jurisdiction (that is, excessive pricing, predatory pricing and discriminatory pricing). In addition, the Anti-Price Monopoly Regulation adds new types of conduct that can be deemed abusive if engaged in by companies with a dominant market position – namely, "margin squeeze," "loyalty rebates" and "unreasonable expenses." On the other hand, businesses will welcome the additional guidance on when potentially abusive conduct can be justified for "valid reasons", an expression that was not further explained in the AML, leaving businesses in the dark as to what forms of "reasons" would potentially justify otherwise abusive acts.

The provisions on abuse of administrative power in the Anti-Price Monopoly Regulation largely reiterate those in the AML. As with the AML, it remains unclear whether businesses have a right to seek redress against anti-competitive government conduct.

Procedure

The Regulation on Anti-Price Monopoly Administrative Enforcement Procedures ("NDRC Procedural Regulation") shows that central-level NDRC is keen to (partially) delegate its enforcement powers to NDRC's provincial or even local offices, while at the same time the national headquarters wishes to retain certain supervisory powers. This is understandable in the light of NDRC's limited manpower dedicated to AML enforcement based in Beijing (its AML unit has only three members of staff).

The NDRC Procedural Regulation also includes some guidance on the leniency program, whereby participants in cartels and other anti-competitive agreements can come forward to self-report to the authority in exchange for immunity from fines or a fine reduction (see below).

Interestingly, one of the requirements for accepting complaints (against other companies) under the NDRC Procedural Regulation is that the complainant must state whether or not it has filed a complaint with another administrative authority (in practice, likely to be SAIC) or brought suit in a Chinese court in relation to the same matter. This indicates that NDRC and (based on unofficial statements also) SAIC may be reluctant to initiate a procedure that might "step on the toes" of the other authority or which will run in parallel with existing court proceedings. Presumably the concern here is one of consistency: it would be embarrassing if NDRC were to reach an entirely different conclusion from SAIC or, more likely, a court on the same matter.

THE SAIC REGULATIONS

The three SAIC regulations cover the same types of anti-competitive conduct as NDRC's, the only difference being that the SAIC regulations cover non-price-related conduct (pricing conduct falls under NDRC's remit). SAIC decided to take a slightly different approach in terms of how it structured its regulations by issuing a single regulation covering each of the three types of conduct separately – that is, the Regulation on the Prohibition of Acts involving Monopolistic Agreements (the "SAIC Monopolistic Agreements Regulation"), the Regulation on the Prohibition of Conduct constituting an Abuse of a Dominant Market Position (the "SAIC Abuse of Dominance Regulation") and the Regulation on the Prevention of Conduct constituting an Abuse of Administrative Powers to Eliminate or Restrict Competition (the "SAIC Abuse of Administrative Powers Regulation"). It should be noted that SAIC adopted procedural rules addressing these forms of anti-competitive conduct in 2009.

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Monopolistic agreements

Similar to the NDRC approach, the SAIC Monopolistic Agreements Regulation provides more detail on the categories of anti-competitive agreements listed in the AML, but does not significantly alter the scope of the obligations they impose upon businesses. Perhaps most importantly, there is no reference to vertical agreements, indicating that SAIC's focus may lie on cartel conduct and the like (such as coordinated capacity reduction, market partitioning, collective boycotts, etc.).

The SAIC Monopolistic Agreements Regulation also contains certain procedural rules, including a few provisions on leniency applications, but which are different from NDRC's approach. As for sanctions, the SAIC Monopolistic Agreements Regulation predictably repeats the extraordinarily high fine of between 1% and 10% of the infringing company's annual sales revenues which can be imposed for anti-competitive agreements (and abuses of a dominant market position), but states that monopolistic agreements which have not (yet) been implemented should trigger fines below RMB 500,000 (approximately US$75,000; €58,000). The hopes that the SAIC Monopolistic Agreements Regulation would provide greater clarity on the calculation of the fine – that is, whether the fine would be based on sales revenues in China or worldwide, and be based on the revenues generated by the products to which the cartel or abusive conduct relates or all products of the company in question – were not fulfilled, as the regulation is silent on this point. In addition, the regulation does not seem to give SAIC flexibility to impose fines below the 1% minimum threshold.

Abuse of dominance

As with the NDRC Anti-Price Monopoly Regulation, the most interesting and – for companies – likely most challenging part of SAIC's legislative output lies in the field of abuses of a dominant market position. The SAIC Abuse of Dominance Regulation targets four types of abusive conduct by dominant companies – that is, (1) refusal to deal, (2) exclusive/restrictive dealing, (3) imposition of unreasonable conditions and (4) discriminatory treatment. The exact scope of these prohibitions is unclear but potentially far-reaching (in the absence of further implementing rules). The regulation also provides some guidance on when conduct can be justified for "valid reasons," although in a more limited and abstract way as compared to the NDRC Anti-Price Monopoly Regulation.

Abuse of administrative power

The SAIC Abuse of Administrative Powers Regulation largely follows the corresponding provisions of the AML. Perhaps its most interesting feature is that the addressees of the obligations imposed by the rules extend beyond government bodies and officials to also encompass business operators: the latter are prohibited from implementing monopolistic agreements and abusing their dominant position "by means of" administrative decisions, delegation or regulation, but it is not clear what these concepts exactly mean.

INCONSISTENCIES AND UNCERTAINTIES

While the entry into force of these five new regulations may pave the way for a new era of AML enforcement, businesses in China will face a number of challenges when trying to comply with these regulations.

For example, both the NDRC Anti-Price Monopoly Regulation and the SAIC Monopolistic Agreements Regulation attempt to provide guidance on the concept of an "agreement," which was broadly defined in the AML as an "agreement, decision or concerted practice." But – quite apart from the fact that the drafting of the NDRC and SAIC regulations is not exactly the same – the new regulations at times appear to raise more questions than they answer – for example, how is the "meeting of minds," a factor supposedly indicating the existence of a concerted practice, to be interpreted, and to what extent can SAIC order companies engaging "in collusion without yet having entered into an agreement" to cease and desist from engaging in such conduct?

Another important source of uncertainty for businesses lies in the authorities' leniency programs. At the very basic level, NDRC's and SAIC's programs are similar: those participants in cartels and other monopoly agreements which voluntarily come forward to disclose the illegal conduct and provide "important evidence" may receive immunity or a reduction in the fine. However, there are also notable differences between the two programs. Not only is "important evidence" defined differently by the two authorities, but even the extent of leniency which an applicant can hope for varies according to the authority concerned: both NDRC and SAIC seem willing to grant full immunity to the first whistle-blower. But while NDRC intends to grant a reduction in the amount of the fine of no less than 50% for the second one to turn himself in and up to 50% for all other leniency applicants, SAIC's regulation is silent on the exact percentage by which the fine will be reduced for all but the first whistle-blower. Even for the first one to turn himself in, whilst the SAIC Monopolistic Agreement Regulation clearly states that it will obtain immunity, under the NDRC Anti-Price Monopoly Regulation, it does not necessarily follow that immunity will be granted. More generally, the leniency programs of both NDRC and SAIC lack detail and thus create uncertainty for businesses. Experience in other antitrust jurisdictions shows that uncertainty in the leniency system can work as a major deterrent for whistle-blowers to come forward.

COMPLIANCE BURDEN

For companies doing business in or with China, the main focus for additional compliance triggered by the new regulations may be the abuse of dominance rules. The NDRC Anti-Price Monopoly Regulation prohibits exclusive dealing arrangements imposed by dominant companies "by means of granting rebates" and the imposition of "unreasonable expenses", while the SAIC Abuse of Dominance Regulation appears to prohibit the imposition of certain territorial and customer restrictions as well as unreasonable contractual provisions. Hence, both regulations clearly appear to be extending the original scope of the AML's provisions. In addition, the SAIC regulation contains a very broad interpretation of the AML's refusal to deal provision.

For companies that have a dominant position in a relevant market (whether big or small), the new regulations are likely to create additional obligations and provide substantial uncertainty. On the one hand, granting rebates for meeting purchase targets is a widespread business practice in some sectors. Likewise, contracts with territorial restrictions or, say, customer-group restrictions can be seen in many industries. With the new regulations, these kinds of practices will now need careful screening and analysis. On the other hand, the new regulations refer to the concept of "unreasonable conditions," in relation to expenses (NDRC) or other contractual terms (SAIC). In jurisdictions with a longer legal tradition, such issues would normally be addressed under consumer protection or unfair contract term legislation, rather than antitrust laws. The inherent risk for dominant players is that such vague concepts may engender a high degree of uncertainty and encourage speculative lawsuits, particularly by publicity-seeking companies and individuals targeting high profile multinationals in China.

The new regulations clearly demonstrate that cartels may be one of the major areas of focus for both NDRC and SAIC. Companies with operations in China will need to step up training and monitoring of staff behaviour to mitigate the risk of becoming subject to a NDRC or SAIC investigation. Past business practices and policies will need to be reviewed and updated in the light of the new rules. Whilst far from perfect, the very existence of defined leniency programs is likely to increase the risk of companies ending up being investigated due to the actions of a whistle-blower.

Whilst NDRC and SAIC may have been relatively slow out of the gate as compared to MOFCOM in terms of AML enforcement, this may be attributable to the fact that in the absence of implementing regulations such as those just enacted, NDRC and SAIC felt their hands were somewhat tied. MOFCOM may have dealt with many more cases, but it should not be forgotten that it is the breaches of the rules on monopolistic agreements and abuse of dominance that carry by far the heaviest penalties under the AML; for that reason alone, these rules – however imperfect – have to be considered carefully by companies doing business in or with China.

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Round-up of key developments

EU

Air cargo fines

On 9 November 2010, the European Commission imposed fines totalling €799 million on 11 cargo airlines who were found to have coordinated on fuel and security surcharges between December 1999 and February 2006. Due to a lack of evidence, the Commission dropped allegations against certain other airlines that had received the Statement of Objections and also dropped allegations relating to other surcharges and freight rates against all airlines.

All carriers received a reduction of 15% due to a "general regulatory environment in the sector which can be seen as encouraging price coordination", some received a reduction because of their limited involvement in the cartel and all but one carrier received reductions to reflect either their cooperation with the Commission's investigation or (in the case of Lufthansa and its subsidiary Swiss who received full immunity) their role in bringing the cartel to the attention of the Commission. Two airlines had their fines capped at 10% of their turnover for 2009 as the calculations would otherwise have led to a figure exceeding this amount which is the legal limit. The fine on SAS was increased by 50% due to its recidivism; it had previously been fined for its involvement in another cartel in the airline sector. Five carriers also claimed inability to pay the fines imposed although none met the relevant conditions.

Google investigation

On 30 November 2010, the European Commission announced that it had opened an investigation into an alleged breach of Article 102 TFEU by Google, in relation to its conduct in the online search market.

The Commission's investigation will examine:

- whether Google has abused a dominant position in the online search market by lowering the ranking in its unpaid search results of competing services that specialise in providing users with specific online content such as price comparisons (vertical search services);
- whether Google gives its own vertical search services preferential placement in search results so as to shut out competing services; and
- whether Google has lowered the "Quality Score" for sponsored links of competing vertical search services (the Quality Score influences the likelihood that an advertisement will be displayed by Google and its ranking. If two advertisers use the same key words, the site with a lower Quality Score will have to offer a higher price to be ranked at the same place as the other advertiser).

In its press release the Commission states that its investigation will also focus on allegations that Google imposes exclusivity obligations on advertising partners, which prevent them from placing certain types of competing adverts on their websites, for the purpose of shutting out competing search tools. It will also consider suspected restrictions on the portability of advertising campaign data to competing online advertising platforms.

Commission fines professional association

On 8 December 2010, the European Commission announced that it has fined the Ordre National des Pharmaciens ("**ONP**") and its governing bodies €5 million for breach of Article 101 of the TFEU. The Commission found that ONP, a professional body, is an association of undertakings for the purposes of Article 101. It had taken decisions aimed at imposing minimum prices on the French market for clinical laboratory tests and hindering the development of certain groups of laboratories.

FRANCE

On-line advertising market

On 14 December 2010, following a request by the French Minister for Economy, Finance and Employment to investigate the on-line advertising market, the French Competition Authority issued an opinion where it considered that many elements converge to indicate that Google holds a dominant position on the on-line advertising market linked to search engines. The Authority also presented an analysis grid of several types of practices on this market that may infringe competition law. The Authority stated that press publishers must be able to request and obtain exclusion from Google News, without necessarily being delisted by Google search engine.

GERMANY

Chemical wholesale fines

On 7 December 2010, the Bundeskartellamt announced that it has imposed fines totalling €15.11 million on 12 companies in the chemical wholesale sector. These companies had been found to have agreed prices and supply quotas for standardised industrial chemicals. The cartels only covered the chemical wholesalers' distribution business, and direct supplies from chemical producers were not affected. Investigations continue against 16 further companies.

Best practices for economists

On 20 October 2010, the Bundeskartellamt published a notice on binding quality standards for expert economic opinions. The aim of these standards is to ensure that these opinions satisfy minimum quality requirements. The notice also aims to standardise the process of submission and evaluation of expert economic opinions.

ITALY

Fines in cosmetics sector

On 15 December 2010, the Italian Competition Authority ("**ICA**") fined 15 companies more than €81 million for an alleged long-running scheme to coordinate list prices sent to large retailers for cosmetic and health care products. The ICA's investigation determined that the companies conducted a complex and continuous scheme to coordinate and boost the suggested list prices provided to supermarkets and other large retail chains for the companies' cosmetics and personal care products. Moreover, Italy's brand association allegedly helped to organize the scheme by offering support, logistics

and information to the involved companies. The collusion ran from at least 2000 to 2007 and covered a number of personal care products, including soap, detergent, perfume, creams and toothpaste. The cartel in the regulator's view led to the steady increase in list prices for
the products above the rate of inflation.

Abuse of dominant position in preventing access to national railway infrastructure
In December 2010, the ICA initiated an antitrust investigation into allegations that Ferrovie dello Stato, through its subsidiary Rete Ferroviaria Italiana ("RFI" – the national rail network operator), is abusing its dominant position in the market for access to railway infrastructure by preventing entry to new competitors. Complaints were brought by new market entrant, Arenaways, and the national consumer associations Altroconsumo and Codacons. In the regulator's view, RFI would not give feedback to the repeated requests of the Ministry of Infrastructure and Transportation to complete the process of assigning tracks despite the consultations that the company had initiated in 2008 with the Regions concerned and Arenaways' requests. The investigation must be completed by 31 December 2011.

POLAND

Severe fine for dawn raid obstruction
On 4 November 2010, the Polish Office of Competition and Consumer Protection (the "OCCP") fined mobile telephone operator, Polska Telefonia Cyfrowa Era, 123,246,000 PLN (equivalent to €30 million) for obstruction of a dawn raid. The company delayed the start of an inspection for more than an hour, preventing inspectors from accessing the business premises and from having an immediate meeting with representatives of the company. Although the behavior could have potentially hindered the gathering of evidence, the OCCP could nevertheless not establish direct negative effects on the results of the investigation.

Conditional merger clearance
On 18 October 2010, the OCCP approved the acquisition of control by Kompania Węglowa ("KW") over Huta Łabędy ("Labedy Steelmill"). The OCCP held that the concentration could restrict competition as the target is a leading producer of mining equipment whereas the KW is its main purchaser. The OCCP issued clearance under the conditions that KW will sell the controlling stake within two years to an independent investor and KW will not exercise its rights from shares in a way that could restrict production capacity.

SPAIN

Withdrawal of merger notification Prisa/Telefónica/Telecinco/ Digital+
On 10 November 2010, the Council of the National Competition Commission ("the NCC") decided to shelve the merger file relating to the acquisition of joint control of Digital+ (the only TV digital platform currently operating in Spain) by Prisa (56% of the shareholding), Telefónica (22%) and Telecinco (22%). Prisa currently exercises sole control over Digital+, but further to the partial sale of its shareholding and, in particular, to the granting of veto rights to Telefónica and Telecinco, the control would be jointly exercised with these two companies.

The transaction, initially notified on 29 April 2010, was subject to a second phase investigation, which started on 30 June 2010. The merging parties offered far reaching commitments to overcome the concerns raised by the transaction but the transaction faced significant opposition from competitors.

In the end, Telefónica and Telecinco decided to waive their veto rights, leaving Digital+'s control to Prisa, hence eliminating the need to notify the transaction (since there would be no change in the structure of control).

Conditional approval of merger file Telecinco/Cuatro
On 29 November 2010, the NCC authorised the takeover of TV Channel Cuatro by its competitor Telecinco subject to the fulfilment of certain commitments offered by the merging parties.

The transaction was notified on 28 April 2010, and entered into a second phase investigation on 30 June 2010, since the NCC considered that the merger would give rise to certain competition concerns, namely (1) the merger could create a dominant player in the TV advertising market, and (2) the buyer power of the merged entity would be significantly reinforced.

To solve these problems, the parties submitted commitments on 19 October 2010 which had to be later extended. These commitments will apply for three years, potentially extended to two additional years if the conditions of the market recommend it.

The agreed commitments are, inter alia, that the merged entity (Telecinco and Cuatro) (1) may not jointly market their advertising space; (2) will not extend its current offer of Digital TV channels by renting them from third parties and it will not block any quality improvements in the digital space that it shares with other competitors (Cuatro with La Sexta and Telecinco with Net, respectively); and (3) will limit any agreement to exclusively distribute TV content to three years.

UK

Reckitt Benckiser admits abuse and agrees to pay fine
On 15 October 2010, the OFT announced that Reckitt Benckiser has agreed to pay a fine of £10.2 million for abuse of its dominant position. Reckitt Benckiser has admitted to a breach of Article 102 of the TFEU and the Chapter II prohibition of the Competition Act 1998 by withdrawing and de-listing Gaviscon Original Liquid from the NHS prescription channel in 2005. The fine to be imposed was reduced from £12 million as a result of Reckitt Benckiser's admission and its decision to co-operate with the OFT as part of an early resolution agreement.

OFT consultations on compliance
On 19 October 2010, the OFT published for consultation:

- draft guidance on how businesses can achieve competition compliance. The draft guidance contains a four-step process for creating a culture of compliance within a business,

Continued…

and sets out practical measures that a business can take to ensure compliance with competition law.

- guidance for company directors on compliance with competition law. The draft guidance is intended to explain the legal framework that applies to directors and provide practical guidance. Following on from the OFT's revised guidance on director disqualification orders, this draft guidance provides information on the principles, types of behaviour, and extent of knowledge that might be relevant to directors when considering their responsibilities under competition law.

Recovery of fines from directors or employees

On 21 December 2010, the Court of Appeal handed down its judgment on an appeal from the High Court in relation to the question of whether an undertaking that has been fined for a breach of the Competition Act 1998 can recover the penalty from the directors or employees who were responsible for the infringing conduct. The Court of Appeal has overturned the ruling of the High Court and decided that fines imposed on an undertaking under the Competition Act 1998 are "personal" to that undertaking, and that it cannot recover the fines or the costs of the OFT's investigation from employees or directors who carried out the infringing behaviour. The maxim that a claimant cannot recover damages for the consequences of its own wrongful acts applied in this case (*Safeway Stores Limited & Others v Twigger & Others*).

Final guidance on exceptions to the duty to refer and undertakings in lieu of reference

On 14 December 2010, the OFT published the final version of its new guidance on exceptions to the duty to refer mergers and undertakings in lieu of reference. The guidance updates and amends the OFT's earlier guidance on the three statutory exceptions to its duty to refer: where the market is not of sufficient importance to justify a merger (de minimis), where arrangements are insufficiently advanced and where there are relevant customer benefits. It also expands the OFT's guidance on the situations in which it will consider accepting undertakings in lieu of reference to the Competition Commission (particularly in relation to approval of purchasers and up-front buyer obligations).

UNITED STATES

Bank of America agreement to pay restitution

On 7 December 2010, as a condition of its participation in the US Department of Justice's ("**DOJ**") Antitrust Corporate Leniency Programme, Bank of America agreed to pay US$137.3 million in restitution to federal and state agencies for its employees' participation in a conspiracy to rig bids in the municipal derivatives market. Bank of America was the first and only entity to self-report that its employees had engaged in anti-competitive conduct in the municipal bond derivatives industry. As a condition to its participation in the DOJ's Antitrust Corporate Leniency Programme, Bank of America was required to acknowledge its wrongdoing, provide continuous cooperation in the investigation, and pay full restitution to victims of the conspiracy. As part of this agreement, Bank of America will not by required to pay any penalties for the reported conduct. Further, Bank of America and its current employees who have cooperated with the investigation will not be prosecuted by DOJ provided that the other requirements of the leniency program have been satisfied.

FTC orders divestiture of completed transaction

On 5 November 2010, the Federal Trade Commission ("**FTC**") ruled that the completed acquisition of Microporous Products L.P. by Polypore International, Inc. was anticompetitive, and ordered Polypore to divest the company to an FTC-approved buyer within six months. The FTC's decision largely upheld the Administrative Law Judge's decision, which found that the acquisition reduced competition in four North American markets for flooded lead-acid battery separators – membranes that are placed between the positive and negative plates of flooded lead-acid batteries. The FTC reversed the Administrative Law Judge and ruled in favour of Polypore with regard to one market. The Commission found that the FTC staff who prosecuted the complaint did not prove that Microporous participated sufficiently in that market for the transaction to have reduced competition. Nevertheless the FTC agreed with the Administrative Law Judge that the appropriate remedy was the complete divestiture of the acquired assets.

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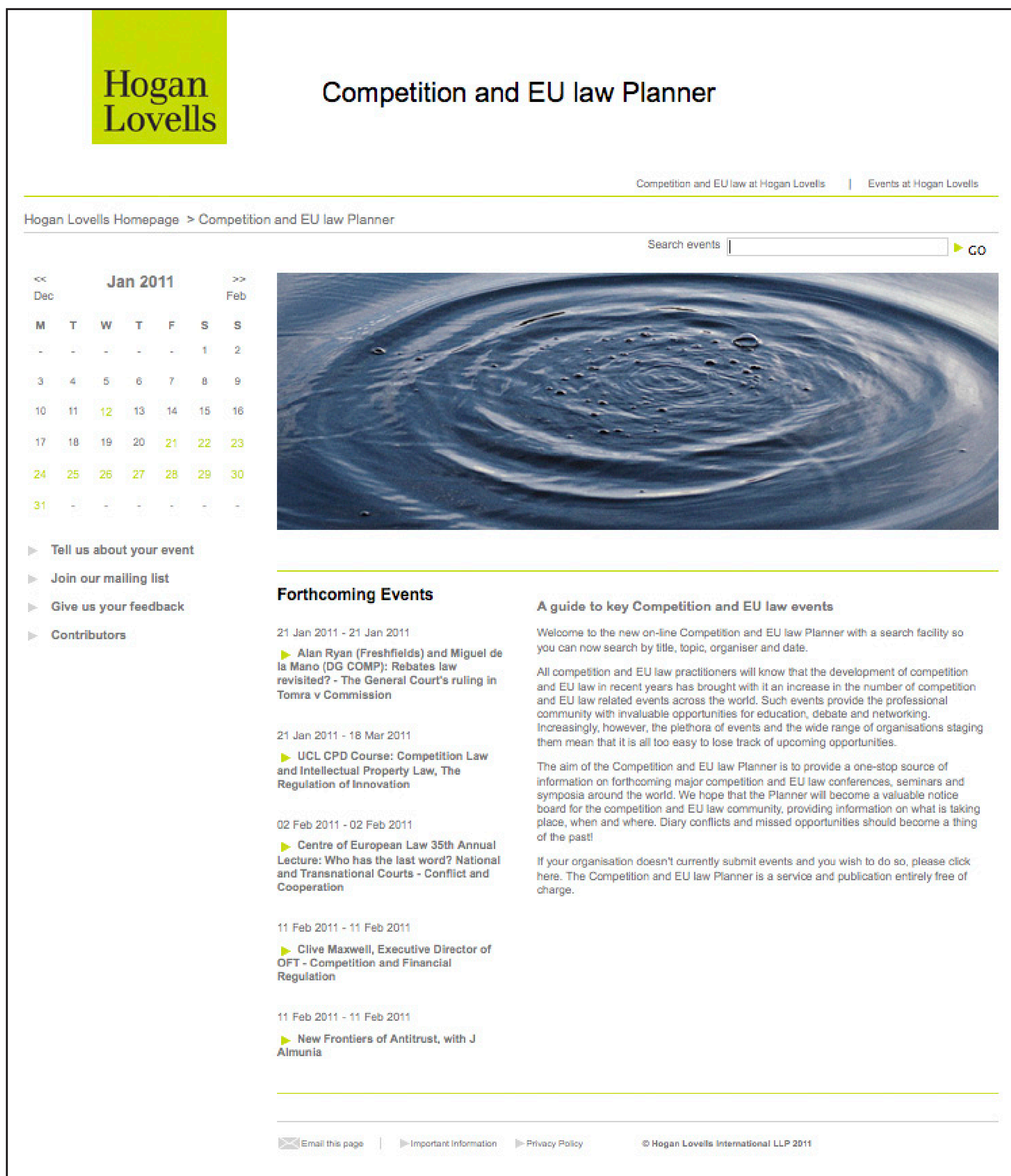

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