Hogan Lovells

# Antitrust, Competition and Economic Regulation Quarterly Newsletter

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# The European Commission's consultation on increased cooperation between NCAs in multijurisdictional mergers

The European Commission is currently considering responses received to its consultation on draft Best Practices for Cooperation Among EU National Competition Authorities in merger cases ("**draft Best Practices**"). The consultation period was launched on the back of publication in April 2011 of the Commission's draft Best Practices document which set out guidance as to how NCAs could better cooperate on their review of mergers which fall short of the EU Merger Regulation ("**EUMR**") thresholds, but which are notifiable in multiple EU jurisdictions at the national level.

One of the most notable aspects of the Commission's draft Best Practices is that they appear to place the onus not only on NCAs, but also on merging parties for ensuring that multijurisdictional merger reviews are coordinated and that there is a consistent result in all relevant jurisdictions. While companies engaged in notifiable transactions falling short of the EUMR thresholds will undoubtedly welcome moves towards a more cooperative process among NCAs, some have already highlighted the barriers to more effective cooperation that arise from the complex patchwork of filing thresholds, waiting periods and notification requirements that are in place across different Member States. Consequently, there have been some calls not only for better cooperation but for increased convergence of diverse national merger review procedures and we consider whether truly effective cooperation between NCAs in merger cases can be achieved in the absence of an initiative in favour of greater convergence of the merger review procedures followed at Member State level.

## THE COMMISSION'S PROPOSALS

The Commission's best practices guidelines were prepared by the Merger Working Group and are intended to facilitate information sharing between NCAs, particularly when it comes to information related to timing of the review process, substantive assessment and, if applicable, remedies. In the press release accompanying the draft Best Practices, the Commission notes that cooperation is most likely to be beneficial in those cases which have the potential to affect competition in more than one Member State. The Commission acknowledges that cooperation is not inevitable or desirable in all multijurisdictional mergers, and it suggests that NCAs should cooperate with each other in respect of multijurisdictional mergers which raise similar or comparable issues in relation to jurisdictional or substantive questions. The Commission draft envisages three instances in particular when cooperation between NCAs could be particularly useful:

i) assisting NCAs to reach a view as to whether a transaction qualifies for notification in a particular Member State;

ii) helping NCAs to assess mergers which may have an impact on competition in more than one Member State (especially where affected markets may cover more than a single Member State); and

iii) in mergers where remedies need to be designed or examined in more than one Member State, or where a remedy adopted in one Member State may have cross-border effects.

The draft Best Practices set out some relatively concrete suggestions as to how cooperation between NCAs may be improved, including informing each other on timing issues, including for example any decision to commence second-phase proceedings. The draft Best Practices also go so far as to suggest that NCAs could discuss issues such as market definition, efficiencies, empirical evidence requirements and remedial measures. The guidance is relatively vague, however, when it comes to how exactly more effective cooperation can be achieved in the context of the array of procedural differences which exist between different NCAs.

## THE ROLE OF MERGING PARTIES AND CONVERGENCE ISSUES

One element of the draft Best Practices which has been subject to more comment than others is the section that is devoted to the role that merging parties should play in facilitating better cooperation among NCAs. The Commission notes in its draft that effective cooperation at the NCA level requires the 'active assistance' of merging parties. Examples of ways in which merging parties can assist include providing details of a proposed merger to NCAs 'as soon as practicable', ensuring that any remedy proposals are consistent across different Member States and being proactive in the use of confidentiality waivers. However, the ability of merging parties to assist inter-NCA cooperation could be limited in practice by the divergent procedures in place in different Member States. These potential limitations are not addressed directly in the draft Best Practices. Indeed, the Commission appears to be signalling in this consultation that it expects that more effective cooperation between Member States on multijurisdictional mergers can come about chiefly as a result of efforts by NCAs and merging parties.

Beyond the action of actually publishing the draft Best Practices, it is less clear what role the Commission envisages for itself in fostering greater cooperation at Member State level. In a speech to delegates in Brussels at a celebration of the 20th anniversary of EU merger control, Competition Commissioner Joaquin Almunia tried to strike a balance between trumpeting what he sees as the success story of EU competition policy, while emphasising the continuing importance of the role played by NCAs. Commissioner Almunia specifically acknowledged that many companies have been calling not only for enhanced cooperation between authorities in different Member States, but also for more convergence between the different procedures maintained in each jurisdiction.

The Commission's draft Best Practices consultation appears to be responsive to the call for increased cooperation, but not the appeal for greater convergence. It is surely not a coincidence that many of those who have called for enhanced cooperation have also spoken in favour of increased convergence, given the extent to which the success of moves towards better cooperation between NCAs is linked to the issue of convergence. Where a cross-border transaction is subject to review by three or four NCAs, the reviewing authorities can only cooperate with each other insofar as their different merger control rules will allow. There would seem to be little advantage, for example, in Authority A, which has a two-month waiting period and no provision for a pre-notification procedure, coordinating the timing of its review with Authority B, which has a one-month waiting period and which supports pre-notification talks. In such a situation, notifying parties may have already engaged in pre-notification discussions with Authority B, setting out substantive proposals on approach to market definition and perhaps even identifying potential remedies, before Authority A has even begun its review of the transaction. The parties could therefore find themselves in a position where they have prepared a possible remedy that they understand would satisfy the concerns of one NCA, but without the option of trying to coordinate the design of that remedy with another NCA, even though the remedy may affect the market in the jurisdiction covered by that other NCA.

**CANDIDATES FOR CONVERGENCE**

There are some aspects of Member States' filing procedures that appear to be natural candidates for some element of harmonization. These tend to be those elements where differences between Member States' procedures can have a real, potentially negative impact on transaction certainty and on merging parties more generally in terms of financial, taxation and human resources planning.

Obvious targets would include differing information requirements: the amount and type of information that needs to be submitted as part of a merger notification varies greatly by Member State, with some notification forms setting out relatively onerous requirements in terms of describing competitive dynamics in markets which, on the face of it, bear little relation to the issues raised (if any) by the notified transaction, while other notification forms ask for much less detail. Some respondents to the Commission's draft Best Practices consultation suggest the introduction of a uniform notification form for use in every Member State. This was a proposal that also surfaced during the Commission's Merger Regulation review in 2008.

The differences between review periods can also have a considerable impact on companies, given that notifying parties must suspend closing of their transaction until the NCA with the longest review period has concluded its examination of the deal. The length of review periods ranges from around four weeks or one month, as in Germany and Ireland, up to around three months for a first phase clearance, as in Slovakia. Although the length of time needed to consider the potential impact of a single transaction in different Member States can vary depending on the impact of the transaction on the market in that particular jurisdiction, the automatic application of a three-month waiting period in one jurisdiction and a one-month waiting period in another, for a substantively uncontroversial transaction, can mean something of a transaction planning headache for merging parties.

There are a number of other aspects of the merger review process which differ greatly between the Member States, including the existence of market share thresholds in a few countries, as opposed to the purely revenues-based thresholds in the majority of jurisdictions. Even the concept of a "concentration" for merger control purposes is subject to differing interpretations between Member States, with Austria, Germany and Lithuania maintaining rules which mean that the acquisition of pure minority interests without any element of control may still be notifiable to the relevant authorities, although the vast majority of Member States have a concept of concentration that is closely aligned with the EU approach.

Concern as to a lack of convergence between national review procedures is not a novel phenomenon: at the time of the Commission's consultation on the functioning of the Merger Regulation in 2008, several consultation respondents called for the Commission to take into consideration the challenges posed for businesses by the patchwork of procedural requirements at Member State level, and to consider how increased convergence might be achieved. The Commission declined at the time to engage in any overt moves towards increased convergence at NCA level: one possible reason for this reticence could be that, given the extent of procedural differences between some Member States' merger control requirements, any attempt to move towards greater convergence could be a formidable logistical challenge. Aside from questions as to the degree of convergence that NCAs and Member State governments would be willing to countenance, any concerted effort to introduce more convergence could be technically challenging, particularly given the lack of formal powers on the part of the Commission to require changes to national merger review procedures, as well as a general need to respect the principle of subsidiarity.

**CONCLUSION**

The Commission is currently considering the submissions that it received in response to its consultation, with a final version of the guidance expected to be issued in Autumn 2011. While it is possible that some of the concerns expressed in relation to a lack of details in the draft Best Practices may be addressed, it is unlikely that the Commission will use the final version of the Best Practices to address calls for increased convergence between Member States' merger review procedures. While some would argue that such a move is a necessary accompaniment to any initiatives designed to improve coordination among NCAs, it is more likely that if any moves are made towards encouraging convergence in the immediate term, they will manifest themselves in a more low-key approach, perhaps via initiatives of the European Competition Network. In any event, merging parties can expect to wait, at least until the impact of the new Best Practices can be assessed, before the idea of pursuing not only cooperation but convergence makes its way on to the priorities lists of NCAs and the Commission alike.

David Cardwell
**T** +32 2 505 09 20
david.cardwell@hoganlovells.com

# Directors' responsibilities for competition law infringement – new UK guidance

At the end of June, the UK's Office of Fair Trading ("OFT") published its final guidance on how it will assess the extent of an individual director's responsibility for infringements of competition law.

The guidance makes clear that there is no room for complacency in competition law compliance programmes. All directors must understand the principles of competition law, demonstrate a commitment to competition law compliance, ensure their organisation is taking steps to identify and to assess the exposure to competition law risks, and put in place appropriate steps to mitigate those risks. Senior directors of large companies should take particular note as the guidelines set out the standards expected of them so that they may limit the risk of their own disqualification as a director for infringements that they are unaware of but ought to have known about.

**BACKGROUND TO THE GUIDANCE**

In 2003, the OFT was given the power to seek a competition disqualification order ("CDO") allowing for disqualification of a director for up to 15 years if a company has breached competition law. On 29 June 2010, the OFT published new guidance on the use of CDOs, signalling a more aggressive enforcement stance. Whilst the law itself did not change, the main change to the OFT's position related to the "knowledge standard" for directors. The guidance made clear that the OFT would assess a director's responsibility on a case-by-case basis, and that a director who had reasonable grounds to suspect a breach, but took no steps to prevent it, or was unaware of it but ought to have known that the conduct constituted a breach, could now be susceptible to disqualification. In light of this stricter approach, the OFT agreed that it would be helpful to issue additional guidance aimed at directors in order to minimise the risk of CDOs being awarded against them.

**THE GUIDANCE**

The guidance sets out high level guidance on the standards that the OFT expects of all directors. It provides information on the principles, types of behaviour and extent of knowledge that will be relevant to directors when considering their responsibility under competition law. Key points to note are:

- The OFT expects **all directors**:
  - to understand that compliance with competition law is important and that infringing competition law could lead to serious legal consequences for the company and for them as individuals.
  - to understand that cartel activity (such as price fixing, bid-rigging, limiting production, market sharing, sharing commercially sensitive information) will constitute a very serious infringement of competition law.
  - to have sufficient understanding of the principles of competition law to be able to recognise risks, and to realise when to make further enquiries or seek legal advice.
  - to demonstrate a commitment to competition law compliance, and to ensure that their organisation is taking steps to identify and to assess the company's exposure to competition law risks and put in place appropriate steps to mitigate those risks, reviewing these activities on a regular basis.
- The OFT suggests that **all directors** should ask the following questions regarding competition law compliance:
  - What are our competition law risks at present?
  - Which are the high, medium and low risks?
  - What measures are we taking to mitigate these risks?
  - When are we next reviewing the risks to check they have not changed?
  - When are we next reviewing the effectiveness of our risk mitigation activities?
- The OFT has **different expectations of directors depending on their role**, in particular whether the director has an executive or non-executive role, the director's specific responsibilities within the company, and the size of the company and wider corporate group.
- The OFT expects **executive directors** with a higher exposure to competition law risk to have both greater knowledge of competition law concepts and also to take greater steps to prevent, detect, and terminate the infringement. For example the OFT states that *"a sales director would be expected to be able to recognise whether the risk of cartel activity within a company is high due to its sales staff having frequent contact with competitors at trade association meetings or through involvement in other industry bodies and ensure that appropriate mitigating activities (such as training, policies and procedures) are in place to bring about any behaviour change that is necessary to achieve compliance"*.
- **Non-executive directors** are not expected to have an intimate knowledge of the company's day-to-day transactions, but are expected to challenge the decisions and actions of the executive directors. In particular the OFT expects non-executive directors to *"ask appropriate questions of the company's executives, in order to ensure that appropriate compliance measures have been put in place within the company to prevent, detect and bring to an end infringements of competition law"*.
- The OFT recognises that a company may decide to designate a director with specific responsibility for competition law compliance, but this appointment does not absolve any other directors of their responsibilities under competition law. A **compliance director** is not expected to have any greater awareness of specific infringements by the company than any other director.

- Whilst directors in **larger organisations** are not expected to have an intimate knowledge of all day-to-day activities, the OFT expects them to take steps to ensure that there are appropriate systems in place to prevent, detect and bring to an end infringements of competition law.

- In relation to **abuse of dominance or other potentially anti-competitive agreements** (not involving cartels), the OFT states that where a director is committed to competition law compliance and has taken steps to mitigate competition law risks in a manner that is appropriate to the level of any identified risk, for example through taking legal advice prior to the conduct being undertaken that constituted the breach, the OFT is unlikely to apply for a CDO.

- In assessing whether a director **ought to have known** of a competition law infringement, the OFT states that it will take into account a number of elements, including whether

  - a director has direct management responsibility for the individuals concerned in the anti-competitive conduct

  - a director is personally involved in the day-to-day activities of the company

  - the extent of the risk mitigations introduced by the director and what evidence the director ought to have seen, had he or she put the appropriate compliance measures in place.

- Where a director has overall responsibility for a business area, but **no direct management responsibility** over the individual directly involved in the infringement, the OFT will consider what evidence that director actually saw, or was presented with, and what evidence that director ought to have seen, having made reasonable enquiries.

**GUIDANCE ON HOW BUSINESSES CAN ACHIEVE COMPLIANCE**

At the same time as issuing this final guidance on directors' responsibilities, the OFT also published its final guidance on how businesses can achieve compliance with competition law. This sets out the OFT's recommended risk-based four-step approach for creating a culture of compliance within a business, and the practical compliance measures that businesses might be able to take. The OFT notes that while no automatic discount can be expected from any fine for companies that have undertaken compliance activities, it does state that the amount of the fine may be reduced by up to 10% if "adequate steps" have been taken with a view to ensuring compliance.

**Peter Citron**
**T** +32 2 626 92 36
peter.citron@hoganlovells.com

# The French Competition Authority publishes its notice on the method for calculating fines

On 16 May 2011, the French Competition Authority published its notice on the method relating to the setting of financial penalties for undertakings or organisations guilty of infringing competition rules. The final version of the notice includes significant changes to the initial draft published on 17 January this year in response to the the public consultation which closed on 30 March 2011.

The Competition Authority recognises that the notice is binding on it with regard to undertakings under prosecution and is thus enforceable against it. The notice equates to a directive, in the meaning of administrative case law, even if the Authority reserves the right to depart from the calculation method in certain circumstances and on adequate grounds.

A major change is the introduction of a two-way process regarding the setting of fines. The Authority's investigatory services must now inform the undertaking or organisation concerned of the main legal and factual elements liable to impact on calculation of the fine, to enable them to respond. This information will be provided in the report or, if no report is made, at the latest in a note accompanying the statement of objections.

The Authority recalls the importance it attaches to compliance programmes as part of the effort to prevent breaches of competition rules. It announces the publication of a framework document in which it will set out the general principles applying to compliance programmes and of a procedural document on the question of commitments given in settlement procedures.

**THE BASIC AMOUNT OF THE FINE**

- Turnover in France

  To determine the basic amount of the fine, the initial draft took into account the value of sales by the undertaking relating directly or indirectly to the breach and excluding value added tax ("VAT") as well as other taxes.

  The value of sales is now defined as the value of all categories of products or services relating to the breach, that is, the turnover in France on the sale of the products or services in question. When the breach results from an agreement to limit sales on French territory, the Authority may also take into account sales made in the European Economic Area.

- Economic studies

  The Authority specifies the value it ascribes to the economic studies produced by the parties. It thus commits to take them into account in measuring some aspects of the damage that may have been caused to the economy, provided they comply with certain conditions, and to include the results of its analysis of the studies in its decision.

**THE CLARIFICATION OF THE FACTORS TAKEN INTO ACCOUNT IN INDIVIDUALISING FINES**
The notice list examples of factors liable to be taken into account for individualising fines. It allows the Authority to increase or reduce the fine in order to take into account factors such as the "single-product" or "multi-product" nature of the undertaking, or its belonging to a large or economically powerful group.

**THE REDUCTION OF THE TIME PERIOD FOR REITERATION**
In order to identify a reiteration of practices, the Authority examines whether there is a final decision identifying an identical or similar breach before the end of the new practice. It also takes into account the time that elapsed between the previous breach and the beginning of the new practice. If more than 15 years (not 20 years, as provided for in the initial draft) have gone by, the Authority will not oppose the reiteration. It has therefore not retained the 10-year prescription period suggested by several contributions to the public consultation. In return for this reduction in the period, the fine may now be increased for repetition by between 15 and 50%, rather than 5 to 50% as per the initial draft.

**THE ADJUSTMENTS**
The Competition Authority will only take account of any reductions granted for leniency or settlement reasons after checking the statutory ceiling, so as to ensure the affected parties enjoy the effective benefit of the reductions.

**CALLING ON ASSOCIATION MEMBERS**
In relation to trade associations, the Authority examines whether or not the association has, beyond its immediately available resources, the possibility of calling on its members for the funds necessary to pay the fine.

**CALLS FOR TENDER**
In the initial draft notice, the basic amount of the fine for practices implemented during calls for tender was supposed to be calculated by applying a coefficient determined according to the gravity of the facts and the importance of the damage to the economy to the calculation basis chosen by the Authority as relevant to the case in hand. The Authority will now use as its calculation basis the total turnover realised in France by the organisation or undertaking concerned or by the group it belongs to.

**Pierre de Montalembert**
**T** +33 1 53 67 18 00
pierre.demontalembert@hoganlovells.com

**Michel Debroux**
**T** +33 1 53 67 47 89
michel.debroux@hoganlovells.com

# U.S. antitrust agencies announce significant changes to the HSR form

On 7 July 2011 the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") announced revisions to the Hart-Scott-Rodino ("HSR") premerger notification rules and the HSR form. The new rules and form changes will take effect 30 days after publication in the Federal Register. The purpose of some of the changes is to make the HSR filing less burdensome by elimination of requests for information that the agencies have not found useful in their antitrust assessment of transactions. Other changes, however, particularly those involving the new concept of "associate" and those requiring production of a new category of documents (new Item 4(d)), will add to the burden of completing the form. However, according to the agencies, these changes are justified because they will result in the production of information and documents useful to their antitrust assessment of reportable transactions. Some of the most significant changes are as follows.

**PRODUCTION OF ADDITIONAL DOCUMENTS (ITEM 4)**
Filing parties often find that collection and review of documents responsive to Item 4(c) of the HSR form are the most time-consuming and costly part of the HSR filing process. Item 4(c) requires the production of all documents (including emails and handwritten notes) prepared by or for an officer or director "for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets." This Item, which is intended to provide the antitrust agencies with information useful to its assessment of the competitive effects of the reported transaction, remains unchanged. However, the FTC has added three additional categories of documents that must be included in addition to the Item 4(c) documents.

Item 4(d)(i): This new Item will require the production of confidential information memoranda that were prepared by or for officers or directors of the ultimate parent entity of the acquiring or acquired person or of the acquiring or acquired entity and that specifically relate to the sale of the entity or assets to be acquired. If no such documents exist, parties must produce any documents given to any officers or directors of the buyer that served the same function as a confidential information memoranda. This item is limited to documents produced within one year of the filing.

Item 4(d)(ii): This new Item will require the production of all documents prepared by investment bankers, consultants, or other third party advisors (engaged by or seeking an engagement with the filing party) for any officers or directors of the ultimate parent entity of the acquiring or acquired person or of the acquiring or acquired entity if such documents contain "4(c) content" and specifically relate to the sale of the entity or assets to be acquired. This item is also limited to documents produced within one year of the HSR filing.

Item 4(d)(iii): This new Item will require the production of all documents evaluating or analyzing synergies and/or efficiencies if they were prepared by or for an officer or director for purposes of evaluating or analyzing the reportable transaction. Financial models without stated assumptions do not need to be provided.

Filing parties should anticipate an increase in the time and cost associated with searching for and identifying documents responsive to new Item 4(d). In addition, parties will also need to be mindful that the officers and directors covered by the requests in Items 4(c) and 4(d) now differ depending on the specific item. Items 4(c) and 4(d)(iii), for example, apply to officers and directors of the ultimate parent entities of the acquiring and acquired persons and of all entities within their HSR control.[1] Items 4(d)(i) and 4(d)(ii), on the other hand, apply only to officers and directors of the ultimate parent entities of the acquiring and acquired persons and of the acquiring and acquired entities, and not any other entities they control. Finally, there is likely to be uncertainty in complying with new Item 4(d)(i) to the extent that parties do not have confidential information memoranda. In such cases, the new instructions require the production of "ordinary course documents and/or financial data shared in the course of due diligence" if such served the purpose of confidential information memoranda.

**INCLUSION OF INFORMATION RELATING TO "ASSOCIATES" (ITEM 6(C) AND ITEM 7)**
The current HSR rules require that the ultimate parent entity of the acquiring person provide information in its HSR form with respect to all entities under its HSR control. As a result, information about entities that are under common management with an acquiring person, but not under common HSR control, is not included in the present form. The agencies believe information about competitive overlaps between the acquiring person (including entities under common investment or operational management with the acquiring person) and the acquired entity/assets is important to provide a full picture of the competitive effects of the proposed transaction. The agencies have therefore introduced a new concept – associate – and will now require the acquiring person to provide information about its associates and certain of their holdings.

An "associate" is defined in the new HSR rules as an entity that is not under common control with the acquiring person but:

a) has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity (a "managing entity"); or

b) has its operations or investment decisions, directly or indirectly, managed by the acquiring person; or

c) directly or indirectly, controls, is controlled by, or is under common control with a managing entity; or

d) directly or indirectly manages, is managed by, or is under common operational or investment management with a managing entity.[2]

Both Items 6(c) and 7 are affected by these changes.

Item 6(c): The form will have a new Item – 6(c)(ii) – that only the acquiring person will complete. Specifically, the acquiring person must provide information about each of its associates

*Continued...*

that holds either at least 5% but less than 50% of the voting securities or non-corporate interests of the acquired entity, or at least 5% but less than 50% of a corporation or the non-corporate interests of an unincorporated entity which derived U.S. revenues in the most recent year in any 6-digit North American Industry Classification System ("**NAICS**") Code in which the acquired entity/assets also derived U.S. revenues. If the NAICS Codes of the entities in which associates hold minority interests are not known, the acquiring person should answer this new item based on whether its associates hold minority interests in entities that operate in the same industries as the acquired entity/assets. In addition, the acquiring person may rely on regularly prepared financials if they are no more than three months old to identify its and its associates' minority investments.

**Item 7:** Item 7 currently requires identification of NAICS Code overlaps between the acquiring person (including all entities under common HSR control with such person) and the acquired entity/assets. In addition to this information, new Item 7 will also require the acquiring person to identify the names of any of its associates that also derived revenues in the 6-digit NAICS Code(s) used by the acquired entity/assets and certain information about the geographic areas in which its associates derived revenues in such overlapping codes.

These revisions will primarily affect certain types of acquiring persons – such as master limited partnerships and private equity funds. However, they will certainly increase, in many cases quite substantially, the burden of completing HSR forms by such acquiring persons.

### MODIFICATIONS TO REVENUE REPORTING REQUIREMENTS (ITEM 5)

Item 5 of the HSR form currently requires the parties to a transaction to report certain U.S. revenues classified by NAICS Codes for the most recent year and for a "base" year – currently 2002.[3] The most significant change to Item 5 is the elimination of the requirement to report historical (currently 2002) U.S. revenues. In addition, parties will no longer be required to provide information on "added or deleted" manufactured products. Instead, the parties will be required only to provide revenues for the most recent year, broken down by 6-digit NAICS Codes for non-manufacturing activities (as is currently required) and by 10-digit NAICS Codes for manufacturing activities (instead of the 7-digit NAICS Codes currently required).

Another change to Item 5 relates to the proper NAICS Codes to use in connection with a party's manufacturing outside of the U.S. of products that are sold into the U.S. The new form will require that parties provide revenues related to manufacturing operations conducted outside of the U.S. to the extent that such operations result in sales in or into the U.S. whether at the wholesale or retail level or directly to customers. Such revenues would be reported under a 10-digit manufacturing NAICS Code.

The revisions to Item 5 will decrease the burden of responding to Item 5 significantly.

### REVISIONS TO THE REQUIREMENT THAT PARTIES IDENTIFY ALL ENTITIES UNDER THEIR HSR CONTROL (ITEM 6(A))

Item 6(a) currently requires that filing parties list and provide the full addresses for entities under their (or in the case of the acquired person, under the acquired entity's) HSR control, regardless of whether the entity is located in the United States, with total assets of at least US$10 million. This requirement can be particularly burdensome for large corporations with numerous foreign subsidiaries. The new form decreases the burden by requiring that filing parties list (i) responsive U.S. entities under common HSR control and (ii) responsive foreign entities under common HSR control that have sales into the U.S. In addition, filing parties will only be required to provide a city, state, and country (not a street address) for all entities listed in Item 6(a).

### REVISIONS TO INFORMATION REQUIRED ABOUT THIRD PARTIES WHO HOLD AT LEAST 5% BUT LESS THAN 50%, OF CERTAIN ENTITIES (ITEM 6(B))

Item 6(b) currently requires information about the third parties who hold at least 5%, but less than 50%, of the voting securities of corporations under common HSR control with the acquiring person or of the voting securities of corporations under common HSR control with the acquired entity. New Item 6(b) would require information about the third parties who hold at least 5% of the voting securities or non-corporate interests of corporations or unincorporated entities only for the acquired entity and only for the acquiring entity and its ultimate parent entity. For natural persons, third party holders of at least 5% of corporations or unincorporated entities would only need to be identified for the top level corporate or unincorporated entities under the HSR control of such natural persons. In addition, this Item would be extended to request identification of the general partners of limited partnerships, regardless of what percentage they hold in such partnerships.

### REVISIONS TO INFORMATION REQUIRED ABOUT MINORITY HOLDINGS OF FILING PARTIES (ITEM 6(C))

New Item 6(c) requires, in addition to the above noted changes with respect to associates, that both filing parties list their minority holdings – of at least 5% but less than 50% – of the voting securities or non-corporate interests of an issuer or unincorporated entity with total assets of at least US$10 million. (Current Item 6(c) requests information only on five percent stockholders of corporations.) In addition, under the new form, the acquiring person would list only its responsive minority holdings of entities that derived dollar revenues in the most year in the same 6-digit NAICS Code(s) as the acquired entity/assets. Likewise the acquired entity would list only its minority holdings in entities that derived revenues in overlapping 6-digit NAICS Code(s) with the acquiring person.

### ELIMINATION OF NEED TO PROVIDE CERTAIN FINANCIAL OR SEC DOCUMENTS (ITEMS 4(A) AND 4(B))

Item 4(a) currently requires that filing parties provide documents or Internet links to certain documents submitted to the U.S. Securities and Exchange Commission ("**SEC**"), such as their most recent 10-K filing. The changes to the HSR form would simplify this requirement. Under new Item 4(a) parties will only provide the names and Central Index Key (CIK) number for all entities under common HSR control with them that file annual reports with the SEC.

Item 4(b) currently requires that filing parties provide the most recent annual report, annual audit report, and regularly prepared balance sheet of the person filing notification and each unconsolidated U.S. issuer included within that person. New Item 4(b) would require parties to provide only the most recent annual report and/or annual audit reports (and not the most recent balance sheet) of the person filing notification and each unconsolidated U.S. entity included within such person.

Significantly natural persons who are filers would only need to provide annual reports and/or annual audit reports for the highest level entities under their control. Personal balance sheets would no longer be required.

**ADDITION OF NON-COMPETE AGREEMENTS**
Currently, and with some exceptions, parties are now required to file copies of their executed agreement. This request (re-numbered new Item 3(b)), will be extended to require as well that parties file executed agreements not to compete. If at the time of the HSR filing, the parties' most recent version of a non-compete is still in draft and not yet executed, they would be required to produce the most recent draft.

**CONCLUSION**
There are other changes to the HSR form intended to streamline the notification process. We encourage companies to review all changes, particularly those related to the production of additional documents (Item 4(d)) and those related to the new "associate" concept, and consult counsel in advance to evaluate the impact of these changes on the HSR notification and review process. In addition, parties should assume that the time to prepare the new filing, and the costs of doing so, will increase at least in the short run. Private equity funds and other entities should also consider identifying their "associates" as part of the ordinary course of their business to decrease the time it will take them to prepare HSR filings when needed.

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

**Leigh L. Oliver**
**T** +1 202 637 3648
leigh.oliver@hoganlovells.com

**Michaelynn R. Ware**
**T** +1 202 637 8857
michaelynn.ware@hoganlovells.com

1 HSR regulations define "control" as holding 50% or more of the voting securities of a corporation or having the contractual power to designate 50% or more of its directors. Control of a partnership or limited liability company (LLC) is defined as having the right to 50% or more of the profits of the partnership or LLC or the right, in the event of dissolution, to 50% or more of the assets of the partnership or LLC, taking preferential distributions into account.

2 16 CFR § 801.1(d)(2).

3 The acquiring person provides U.S. revenues for its ultimate parent entity and all entities under the HSR control of the ultimate parent entity. The acquired person provides U.S. revenues only for the entity or assets being acquired. This will not change.

# New U.S. merger remedies guidance

**THE U.S. DEPARTMENT OF JUSTICE HAS AMENDED ITS POLICY GUIDE TO MERGER REMEDIES TO SHOW THE ANTITRUST DIVISION'S ACTUAL PRACTICE**

Following in the wake of several high-profile vertical mergers, the antitrust division of the U.S. Department of Justice ("the Division") updated its policy guide to merger remedies on 17 June 2011. The new policy guide, which replaces the Division's 2004 guide, is intended to serve as a tool for Division staff and merging parties, and the bar providing greater transparency into the Division's current approach to merger remedies. While conduct remedies in vertical mergers have captured media attention of late, the new policy guide reinforces that remedies are always fact-specific: they are designed to fit the alleged violation and flow from the theory of competitive harm.

**DIVESTITURE IN HORIZONTAL MERGERS**

Structural remedies, which generally involve the divestiture of certain assets (physical and intangible) or the divestiture/licensing of intellectual property rights, remain the Division's preferred solution to competition concerns in horizontal merger matters. In fact, divestiture is the typical remedy in the vast majority of horizontal mergers where the combination of assets would result in enhanced market power. The goal of divestiture is for the purchaser to be an effective competitor, so it is necessary that any divestiture includes all the assets necessary for the purchaser to compete effectively with the merged entity. The Division therefore prefers the divestiture of an existing business entity that has a demonstrated ability to compete in the relevant market. However, the Division may also approve divestiture of less than an existing business (for example, certain assets within a business) or insist on divestiture of more than an existing business, depending on the characteristics of the market and the purchaser.

**REMEDIES IN VERTICAL TRANSACTIONS**

In vertical transactions, the updated policy guide better reflects the Division's recent willingness to craft innovative and comprehensive remedies, including conduct remedies in appropriate cases. Under the Bush administration, the Division rarely challenged vertical mergers, so few mergers involved conduct remedies. But an evolved merger landscape has forced the Division to alter its approach to remedies. Now, recognising the potential efficiencies that can result from vertical mergers, the Division seeks a wider variety of remedies when necessary to rebalance the competitive landscape. The press release accompanying the new policy guide notes that the goal of any merger remedy is still to provide an effective remedy to eliminate the anticompetitive effects of a proposed transaction.

When a vertical merger creates changed incentives or enhances the ability of the merged entity to impair the competition, the Division will consider tailored behavioural remedies designed to prevent conduct that might harm consumers. As with all remedies, conduct relief is tailored to the particular competitive concern. To rebut the common critique that conduct remedies are easily evaded because the provisions are often vague or subject to multiple interpretations, the new policy guide stresses that clear and careful drafting will be especially important in creating effective conduct relief and has put the Division's new general counsel in charge of enforcement.

With an increasing number of mergers posing complex vertical issues, crafting effective and enforceable remedies is ever more challenging. However, the new policy guide underscores that the Division will not treat vertical mergers as too difficult to challenge or too dangerous to block outright when structural relief is not feasible, as is often the case in mergers between firms that do not operate in the same markets. In some situations, there is a middle road. Assistant Attorney General Christine Varney made clear that the Division is "prepared to clear a merger, block a merger or accept a remedy that maintains efficiencies as long as the result eliminates any competitive harm".

**TAKING A CREATIVE APPROACH**

Like the updated horizontal merger guidelines, released in August 2010, the new policy guide to merger remedies is intended to reflect better the actual practice of the Division. Since Christine Varney took over as assistant attorney general in April 2009, the Division has imposed a variety of conduct remedies in several important mergers. While vertical merger challenges and behavioural relief were exceedingly rare in the prior administration, the current Division has not hesitated to employ any form of relief to address competition concerns, even in some of its most high-profile cases.

In the 2010 merger of concert venue operator Live Nation Inc and ticket seller Ticketmaster Entertainment Inc, the Division expressed concern about Live Nation's ability to impose conditions on access to its venues and artists on the purchase of Ticketmaster's ticketing services. In the end, the Division chose not to block the merger despite the lack of a clear structural remedy that could maintain the efficiencies of the vertical integration. Instead, the parties negotiated a creative remedies package that included a prohibition on retaliation against concert venues that use competing ticket sellers and a requirement that the merged entity provide its biggest rival, Anschutz Entertainment Group ("AEG"), with the right to use Ticketmaster's ticketing platform to sell tickets.

The creativity did not end with the Ticketmaster/Live Nation deal. Comcast Corp's joint venture with NBC Universal Inc raised the prospect of Comcast refusing to provide access to NBC's television programming to its cable and satellite competitors. Comcast would also be in a position to handicap the online-video-distribution industry, an emerging competitor to cable providers like Comcast, by withholding popular NBC programmes. The consent decree includes non-discrimination and mandatory licensing provisions, prohibitions on restrictive licensing practices, and the divestiture of governance and voting rights in Hulu, the online media distributor in which NBC held an ownership stake.

Most recently, when Google Inc announced its plans to acquire travel technology company ITA Software Inc, the Division concluded that, as a leading player in the internet search industry, Google had the incentive and ability to impair its rivals by removing access to a critical input in travel search software. In taking the middle road and deciding not to block the merger, the Division chose to harness the expected efficiencies from Google's search expertise applied in the travel search industry, while simultaneously eliminating its ability to disadvantage competitors. The resulting consent decree requires Google to continue to improve ITA's proprietary software; license it to rivals; and implement firewalls to prevent the sharing of competitively sensitive information between the ITA business and a new Google travel site that would compete with ITA's customers.

**A PANOPLY OF POTENTIAL CONDUCT REMEDIES**

As if recent practice was not enough to show the Division's newfound confidence in the ability of conduct remedies to preserve competition effectively, the new policy guide outlines a panoply of remedies available to address the unique competition concerns raised in vertical mergers.

The most common conduct remedies include the following:

- Firewalls are designed to prevent the sharing of sensitive information within a vertically integrated firm when, for example, the downstream firm possesses confidential information about the upstream firm's rivals, or vice versa. Firewalls may require separating the sensitive information and monitoring to ensure compliance with the policy.

- Non-discrimination provisions prohibit an upstream firm from denying equal access and terms to its downstream competitors. The Division may insist on including an arbitration provision, so controversies can be resolved without the Division's involvement.

- Mandatory licensing prevents the merged firm from withholding a key input necessary to preserve competition. The remedy may require parties to license certain technology on fair and reasonable terms, including mandatory arbitration clauses.

- Transparency provisions seek to deter anticompetitive behaviour and enable better monitoring by requiring the merged entity to provide the Division regularly with information, such as prices.

- Anti-retaliation provisions prevent the merged entity from discriminating against customers for actions that the merged entity does not like – for example, contracting with its competitor or providing information to the Division.

- Prohibitions on certain contracting practices prevent the merged entity from entering into restrictive contracts if it controls a vital input.

Other conduct remedies include requiring notice of non-reportable mergers, supply contracts, restriction on reacquisition of scarce personnel assets, and arbitration provisions. Of course, many cases will require some combination of structural and behavioural relief.

**COMPLIANCE ENFORCEMENT**

Equally noteworthy is the Division's new plan to monitor and enforce merger remedies. According to the new policy guide, no remedy is effective unless it can be enforced. To help ensure that parties comply with all remedies as they are designed, the Division has placed evaluation and oversight responsibility in the newly created General Counsel's Office, directed by J Robert Kramer II, the Division's former director of operations. By concentrating enforcement in the General Counsel's Office, the Division hopes to ensure that remedies are strictly enforced. It also hopes to foster greater consistency in remedies. Previously, this key task was left to the individual enforcement sections that negotiated the remedy.

Finally, the General Counsel's Office will develop and disseminate remedy best practices and conduct ex post reviews of remedy effectiveness, such as provisions that allow the Division to monitor compliance. For example, they may require that the parties agree to provide reports or allow the Division to inspect documents or interview employees. The General Counsel's Office will now be charged with ensuring that consent decrees in the new merger landscape effectively eliminate the anticompetitive aspects of the transactions.

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

**Charlie Dickinson**
**T** +1 202 637 3208
charles.dickinson@hoganlovells.com

# U.S. Federal Trade Commission recommends changes to U.S. Patent System

The U.S. Federal Trade Commission ("**FTC**") has issued a report analyzing the U.S. patent system from a competition policy perspective. The FTC recognizes that, like the competitive process fostered by competition law, the right to exclude provided by the intellectual property laws is intended to promote innovation and thereby benefit consumers. The FTC believes, however, that several aspects of the U.S. patent system could be improved to better achieve these goals. In particular, the FTC focuses on several situations where the patent system may provide certain patentees – especially what the FTC refers to as "patent assertion entities" (that is, "patent trolls") – legal remedies that are far out of proportion to the importance of their inventions. The FTC believes that this "patent hold-up" problem overcompensates these patentees, which in turn distorts the competitive process and reduces overall innovation.

Ideally, a market participant developing a product can determine which patents might cover its product, and then decide whether to seek a license or design around each patent. If the party seeks a license at this stage (called "ex-ante licensing"), the negotiation should result in a royalty rate that fairly reflects the value of the patent as compared to the available alternatives. A central insight of the FTC Report, however, is that there are a variety of circumstances where market participants will not be able to identify in a timely and reliable manner which patents their products may infringe. If such a party invests significant sunk costs in its product, and a patentee subsequently contends that the product infringes, then the patentee may be able to take advantage of these high sunk costs when threatening a patent lawsuit and injunction. These "ex-post licensing" negotiations can therefore result in what the FTC calls "patent hold-up," where a patentee can coerce a potential infringer into a significant licensing payment even though the patented invention (i) may not have been copied by the alleged infringer when designing its product, and (ii) may not cover important technology (that is, could easily have been designed around).

The potential inefficiencies generated by this situation are significant and will have a negative impact on innovation. To begin with, market participants must make product development decisions without full information as to the potential costs associated with different technology choices. Additionally, the extra costs incurred by a manufacturer in an "ex-post" licensing transaction will ultimately be passed on to consumers. This means that consumers must pay more for a product than they would have paid if the manufacturer in question had notice of the patent claims and could have made more efficient design choices. These higher prices will result in less demand and thus less reward for the innovative manufacturer.

The FTC Report makes recommendations to address these concerns in two principal areas: notice and remedies. With respect to notice, the FTC recommends several changes in an effort to improve the ability of market participants to identify and assess the scope of relevant patents. The FTC's recommendations would impose stricter rules against claims that are indefinite or overly broad, and include suggestions for procedures that the FTC believes would provide outside parties with additional (and earlier) guidance in interpreting existing patent claims.

The second -- and potentially more far-reaching -- set of FTC recommendations relates to remedies. The FTC makes several suggestions in an effort to make sure that the damages awarded to a patentee are proportional to the value of the invention (that is, that they replicate what would have been awarded in a competitive marketplace). Just as damages that are too low will encourage infringement and inhibit innovation, damages that are too high will impose costs on competition that are unnecessary to protect the patent system's incentives to innovate. One key element of the FTC Report is that infringement damages should reflect the value that the patent provides as compared to non-infringing alternative products. Thus, for example, if one were to calculate a reasonable royalty based on a hypothetical ex-ante licensing negotiation, the licensor would only be willing to pay an amount that reflected the value of the invention as compared to non-infringing alternatives. The FTC recommends that courts set this "hypothetical" negotiation at an early stage of product development, before the infringer has sunk costs into using the technology.

The FTC also made several recommendations about when a patentee should not be entitled to an injunction. The agency agreed with the standards set forth in the U.S. Supreme Court decision in *eBay Inc v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), which will have the effect of reducing the ability of "patent assertion entities" to obtain injunctions in certain circumstances. The ability of such entities to obtain an injunction can, in some situations, lead to a serious patent hold-up problem. Although it believes that injunctions should ordinarily be awarded, the FTC suggests a few factors that might weigh against equitable relief. These include (i) where the alleged infringer did not actually copy the invention subject to the patent, and (ii) where the patented invention is a minor element of the product subject to the injunction, and has numerous alternatives that the infringer could have chosen instead had it been aware of the patent claim.

The FTC's recommendations are tailor-made for certain more obvious "patent hold up" situations, such as where an industry standard is set by a standard setting body without notice of a relevant patent, or where a "patent assertion entity" takes advantage of sunk costs incurred by a manufacturer to coerce it into paying exorbitant fees to license unimportant patents that the manufacturer did not rely upon or copy when developing its products (and which it could have designed around had it been aware of the risk). Whether these recommendations can be implemented into a patent system that must balance numerous other considerations, including a majority of cases that do not involve the "patent hold up" problem, remains to be seen.

**Eric Stock**
**T** +1 212 918 8277
eric.stock@hoganlovells.com

# MOFCOM issues conditional clearance of Russian potash merger and circulates two draft regulations for public comment

On 2 June 2011, the Ministry of Commerce ("**MOFCOM**"), China's merger control authority, approved the proposed merger between two Russian potash producers, Uralkali and Silvinit, subject to conditions. The decision is MOFCOM's first conditional clearance in 2011 and only the seventh since the Anti-Monopoly Law ("**AML**") came into force on 1 August 2008.

**BACKGROUND**

Announced in December 2010, the Uralkali/Silvinit transaction is to be implemented in two stages (Uralkali first acquires 20% of Silvinit's shares, followed by a full-blown merger), with Uralkali being the surviving post-transaction entity.

Uralkali and Silvinit are both producers of potash, which mainly serves as a fertilizer for agricultural use but is also used, to a much lesser extent, in industrial and other "special" applications. More specifically, the MOFCOM decision defined potassium chloride – the most common potash-based product – as the relevant product market.

**COMPETITION CONCERNS IDENTIFIED BY MOFCOM**

Having defined potassium chloride as the relevant product market, MOFCOM was less specific about the geographic market definition, simply noting that it had "considered" both the worldwide market and the Chinese market. The decision went further in highlighting the importance of imports into China and made a distinction between imports into China through "seaborne trade" and "cross-border trade".

The MOFCOM decision was short, too, on detail as to the competition law theories underlying the negative impact of the merger. It seems that MOFCOM found both anti-competitive 'unilateral effects' – that is, the elimination or reduction of competition between the merging parties – and 'coordinated effects' – that is, the reduction of competition between the merged entity and third parties.

As to unilateral effects, the merging parties had a combined share of 33% of the worldwide market, and a 25% market share in China. However, if the market were defined in a narrower way, focusing on potassium chloride imports into China or, even narrower still, cross-border trade imports into China, then the parties' combined market share would increase to over 50% and 100%, respectively. At the same time, MOFCOM found the transaction to be anti-competitive because it would increase the likelihood that potassium chloride suppliers coordinate production and sales. The decision states that the aggregate market share of the two leading suppliers worldwide (Canada's Potash Corp and the merged entity) would be around 70%. Finally, MOFCOM pointed out that new entrants into the potash market faced high entry barriers in that they needed to make a substantial investment in money and time, hence contributing to its finding that the merger would have anti-competitive effects.

**THE REMEDIES IMPOSED**

After several rounds of negotiations, MOFCOM accepted the remedies proposed by the merging parties. The remedies are basically a standstill commitment by the merging parties.

Indeed, the parties promise to maintain the existing "sales practices and procedures," to continue imports into China by railway and sea, and to continue offering various types of potassium chloride products in sufficient quantities to supply the Chinese market. In addition, the merged entity commits to preserve "customary negotiation procedures" and, in price negotiations, to take into account the historic and current relationship with Chinese customers, as well as the particularities of the Chinese market. The decision points out that "customary negotiation includes price negotiations based on spot sales (per transaction or per month) or contract sales (annual or bi-annual)."

In order to ensure compliance with the commitments, the merging parties agree to appoint a monitoring trustee that reports to MOFCOM.

**THE DECISION'S IMPLICATIONS**

It is not immediately apparent what lessons can be drawn from the *Uralkali/Silvinit* decision because MOFCOM relied on a variety of arguments to conclude that the transaction was anti-competitive.

If one looks at the unilateral effects theory in isolation (for example, without taking into the account MOFCOM's explanations on the importance of imports into China), then the decision appears to be quite far-reaching. In *Uralkali/Silvinit*, the merging parties had a relatively low combined share in the potassium chloride market: 33% worldwide and 25% in China. These figures are considerably below the level of the previous lowest market share objected to by MOFCOM when imposing conditions (46.3% in *Panasonic/Sanyo*). The merger would, according to MOFCOM, only create the world's No 2 potash supplier.

A careful reading of the decision, however, suggests that coordinated effects may have played a role as well: indeed, the two major potash suppliers (including the merged entity) would control 70% of the worldwide market post-transaction. This is MOFCOM's second public decision where it has taken issue with the coordinated effects of a transaction. However, unlike in *Novartis/Alcon* where MOFCOM found that the exclusive distribution agreement between the merged entity and a third party would lead to coordination of their conduct, the *Uralkali/Silvinit* decision does not explain how Potash Corp and the merged entity would coordinate their behavior. In that regard, it is surprising that MOFCOM neither provided additional details on the concentrated nature of the potash market, nor mentioned the export cooperation mechanisms that exist between the various potash suppliers in Canada and Belarus.

MOFCOM's explanations about China's high level of dependence on potash imports and the distinction between seaborne and cross-border trade suggest that a further interpretation is possible, namely that the decision was (at least in part) motivated by industrial policy concerns. This would reportedly not be the first time that such concerns have come up in a MOFCOM merger control ruling, and would not be particularly surprising in this specific context. Indeed, some would argue that industrial policy issues will inevitably surface when dealing with the potash industry. As the MOFCOM

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decision points out, over 80% of global potash reserves are located in three countries (Canada, Belarus and Russia), and the supply side is, to a certain extent, influenced by industrial policy. For example, the Canadian government is reported to have blocked BHP Billiton's attempted takeover of Potash Corp and to have encouraged export cooperation among Canadian potash suppliers. However, the reference to China having to buy from a single entity instead of two companies post-transaction (which would "likely have the effect of eliminating or restricting competition") for cross-border imports into China suggests that the emphasis here is really on the impact on China trade, which points to a policy-based interpretation.

This background may help to better understand MOFCOM's concerns about the Russian potash merger. A question mark remains, however, behind the specific remedies imposed by MOFCOM to address these concerns. Given the various concerns identified, the remedies appear to be rather tame and unintrusive with respect to the business activities of the merged entity. With the *Novartis/Alcon* decision as a 'precedent,' for instance, one could have expected MOFCOM to have challenged the agreements underlying the coordinated effects theory which, in this case, arguably, would mean the export cooperation agreements between foreign potash suppliers. Similarly, no asset divestitures or supply obligations were included in the package of remedies.

Perhaps MOFCOM may have achieved its primary purpose by obtaining the commitment from the merged entity to respect "customary negotiation procedures" including price negotiations. At present, it appears that potash imports into China are mainly made by state-owned companies, which jointly negotiate with foreign potash suppliers under MOFCOM's guidance. Overall the importers' interest is likely to be to enter into long-term contracts (bi-annually or annually) which lock-in supply at a fixed price, rather than following the vagaries of spot prices. To that extent, although drafted in vague terms, the commitments in the *Uralkali/Silvinit* decision may provide a useful tool for MOFCOM and/or Chinese importers to improve their bargaining position in future negotiations with the merged entity.

**DRAFT REGULATIONS CIRCULATED FOR COMMENT**

In a separate but related development, on 3 and 13 June, MOFCOM issued two draft regulations on the substantive assessment process in merger control cases and on the procedures that apply if a company fails to notify a reportable transaction, respectively.

The language in the draft regulation on the substantive assessment process is disappointingly vague; in some respects, the draft seems to be a step backwards as compared to a similar draft that was circulated informally in 2009. Although the current draft regulation makes reference to many factors commonly used in merger control procedures around the globe – including in relation to some of the issues that arose in the *Uralkali/Silvinit* transaction, such as entry barriers or, more vaguely, coordinated effects – it consistently lacks detail. For example, although the draft mentions that MOFCOM will use the Herfindahl-Hirschman Index ("**HHI**") for measuring market concentration, it does not specify which HHI levels or increments are problematic. Similarly, the draft makes a vague reference to the 'failing firm' doctrine used in other jurisdictions, by pointing out that an examination of whether a merging party "is about to go bankrupt" should be conducted, but does not contain any operational criteria to put the doctrine into practice. In sum, it is not clear to what extent the draft regulation on the substantive assessment process, if enacted, would actually provide additional guidance to merging parties in future cases.

The second draft regulation circulated for public comment on 13 June provides a few details on the procedures applicable to cases where the parties, in violation of the law, fail to file a notifiable transaction. According to the draft regulation, MOFCOM will initiate an investigation to confirm whether a violation of the law has occurred, based upon complaints filed by "any unit (单位) or individual" or, presumably, launched upon its own initiative. If the violation is confirmed, the merging parties are essentially under an obligation to file a standard notification, and the standard merger control procedure applies. A key question that the draft regulation leaves open is whether the most stringent sanction foreseen under the AML – that is, the unwinding of the transaction – is possible only if the transaction has anti-competitive effects, or whether the ultimate sanction can also be imposed in the absence of such effects but where other elements – for example willful action – are present. The draft is also unclear about the consequences if the merging parties refuse to cooperate in the MOFCOM investigation, which would make it very difficult, if not impossible for MOFCOM to conduct a proper substantive merger assessment. Although the draft provides for specific sanctions against the parties and/or individuals in that scenario, it is not clear how the review process would end, if at all.

What seems more clear, in contrast, is that the enactment of the regulation on failure to file may well mark the beginning of a new phase in MOFCOM's enforcement history. Many observers on the ground view the current lack of procedural rules as the main reason why MOFCOM has so far refrained from taking action with respect to transactions that were not notified in violation of the law, and hence would expect investigations to start shortly after enactment of the regulation. The fact that the scope for whistle-blowing in the draft regulation is broadened further enhances this impression; MOFCOM may even be going so far as to encourage reporting by individuals within the company breaching the law. In addition, the draft regulation gives MOFCOM's antitrust officials in Beijing the possibility of working with their provincial-level offices throughout the country. If this arsenal of enforcement measures and personnel were fully deployed, it would mean considerably more manpower and resources being devoted to detecting notifiable transactions that have not been filed. Companies doing business in China, particularly those who might otherwise be having second thoughts about filing, should take note.

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

# Round-up of key developments

## EU

### Fine for obstruction of a dawn raid

On 24 May 2011, the European Commission imposed a fine of €8 million on Suez Environnement and its subsidiary Lyonnaise des Eaux for breaching a seal that had been placed by Commission officials during a dawn raid. The companies did not deny that the seal had been breached, but claimed that this was unintentional.

### Draft guidance on quantifying harm in Article 101/102 damages actions

On 17 June 2011, the European Commission published for consultation a draft guidance paper on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU. The aim of this draft guidance paper is to offer non-binding assistance to courts and parties involved in antitrust damages actions. It provides insights into the harm caused by the infringement of the competition rules (in particular in the form of price increases and market exclusion) and provides guidance on the main methods and techniques that are available to quantify such harm. The deadline for comments is 30 September 2011.

### Third party access to leniency documents

On 14 June 2011, the Court of Justice in the Pfleiderer case handed down a judgment on a reference from a German court regarding third party access to documents submitted under a national leniency programme. The Court held that the relevant provisions of Regulation 1/2003 must not be interpreted as precluding a person who has been adversely affected by a breach of EU competition law from being granted access to documents relating to a leniency application by the perpetrator of the breach. According to the judgment, it is for the courts and tribunals of member states to determine, on the basis of their national law, the conditions under which third party access to documents provided as part of a leniency application should be allowed or refused.

## FRANCE

### Commitments in the multi-brand gift cards sector

On 27 April 2011, the French Competition Authority accepted commitments proposed by Accentiv'Kadéos, a leading operator in the multi-brand gift card sector, in relation to exclusivity agreements in the multi-brand gift cards sector. The Authority considered that the exclusive affiliation of brands was likely to create entry barriers, notably as a result of the scope of the exclusivity agreements and of their duration. The commitments aimed at enabling new players to enter the market quickly in a business sector which is expanding rapidly. The total value of the gift vouchers and cards issued in France was around €2.2 billion in 2009.

## GERMANY

### Cartel members liable for damages to indirect purchasers

On 28 June 2011, the Federal Supreme Court (BGH, KZR 75/10 – Selbstdurchschreibepapier) ruled that not only direct customers of members of a cartel but also their respective customers further down the distribution chain can claim damages as victims of the cartel. The court emphasized that the detrimental effects of illegal agreements do not always hit the direct customers of the cartel members but often - since those customers can pass on any price increases - their customers on a downstream market. The purpose of private compensation for antitrust violation would justify that those customers are also entitled to compensation. However, the court also ruled that defendants can argue that the party seeking damages actually passed on the price increases to its own customers and therefore does not have any damage anymore (passing-on defence).

### Oligopoly in the petrol station markets

On 26 May 2011, the Bundeskartellamt published its "Final Report on the Fuel Sector Inquiry" presenting the view that the five largest petrol station operators in Germany, BP, ConcoPhilips, ExxonMobil, Shell and Total have formed a dominant oligopoly. The analysis based on objective data shows that the oligopolistic market structure enables the large oil companies to set prices more or less uniformly at their petrol stations. After finding evidence of precise price-setting patterns and monitoring systems, the Bundeskartellamt has said it is committed to prevent further concentration on the market and recommended regulatory interventions.

## ITALY

### Fines in international freight shipping sector

On 16 June 2011, the Italian Competition Authority ("ICA") fined nineteen companies and one trade association a total of €76 million for fixing the price of international freight shipping rates. The ICA held that the companies had met frequently through the industry association, Fedespedi to discuss price increases and exchange commercially sensitive information. This is the third case in which the ICA has used its leniency procedure, which came into force in 2007.

### Commitments accepted from the national gambling operator

On 13 April 2011, the ICA issued a decision terminating an investigation into SISAL, an Italian gambling operator, concerning an alleged abuse of its dominant position on the market for national games. The ICA accepted and made binding the commitments offered by SISAL (which include an obligation to provide links on its website to the websites of other operators authorised to sell tickets and collect bets for SISAL's lotteries) in order to solve the competition concerns raised during the investigation. SISAL, which manages several popular national lotteries in Italy on an exclusive basis, had been accused by one of its competitors, Giochi 24, of abusive conduct in the downstream market for the on-line collection of bets for lottery games. In particular, the competitor claimed that SISAL had exploited its dominant position in the market for operating the lotteries in order to attract potential players and to induce them to purchase lottery tickets online through the website of its subsidiary, Match Point.

## POLAND

### Record fine imposed on Polish entity for infringement of competition rules

On 22 June 2011, the European Commission imposed a fine of €127 million on Telekomunikacja Polska S.A ("TP") for abuse of

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dominant position. This fine represented 3.24% of TP's turnover in 2010), and is the highest fine ever imposed on a Polish company for an infringement of the competition rules. It is also the first fine imposed by the European Commission on a Polish company for abuse of dominance. According to the European Commission's findings, TP which in Poland is the exclusive supplier of wholesale broadband access products (wholesale broadband access and local loop unbundling) deliberately abused its dominant position by raising numerous difficulties for alterative operators who wanted to acquire TP's broadband wholesale services. For instance, TP proposed unreasonable conditions, delayed the negotiation processes, rejected orders on unreasonable grounds, and refused to provide reliable and accurate information on TP's network which was indispensable to allow alternative operators to make business decisions. The European Commission emphasized that TP's practices led to the limitation of consumer access to broadband and therefore to the Internet, which is a core element for digital economy.

**SPAIN**

SCC fines the National Canned Food Association ("**NCFA**")

On 31 March 2011, the Council of the Spanish Competition Commission ("**SCC**") imposed a fine of €100,000 on NCFA for implementing a collective recommendation which had as its object the coordination of the canned food producers' behaviour in the market, and in particular the passing on to consumers of the increase of the price of tinplate.

Early resolution agreement with Galp

On 6 April 2011, the SCC accepted an agreement for the early resolution of the proceedings against Galp initiated in July 2009 as a consequence of a claim from the Spanish Confederation of Service Stations concerning alleged restrictions in Galp's petrol distribution contracts.

The SCC considered that the contracts could raise competition concerns due to their excessive duration, the inclusion of sales objectives linked to penalisation clauses in their contracts (extending the duration of the agreement or paying an agreed amount) in case the objectives were not met, as well as the inclusion of exclusive supply clauses exceeding 5 years. The commitments offered by Galp to its distributors regarding the possibility of an early termination of the contracts and the establishment of economic compensation for the petrol station when the sales objectives are not met (commitments in line with other precedent decisions in the sector) have been considered appropriate to solve the initial SCC' concerns.

SCC fines five major electricity companies

On 13 May 2011, the SCC imposed a fine of €61 million on five major electricity companies for hindering the switching of supply by consumers to independent providers as well as for fixing the prices charged to industrial clients in the context of the liberalisation of the electricity sector in Spain. The companies fined were Endesa (ENEL Group), E.On, Gas Natural Fenosa, Hidroeléctrica del Cantábrico, Iberdrola and the trade association UNESA (Spanish Association for the Electricity Industry).

**UK**

First decision of Procedural Adjudicator

On 19 May 2011, the OFT published the Procedural Adjudicator's first decision. Jackie Holland, the Procedural Adjudicator, rejected an application by Sports Direct International plc (SDI) in relation to procedural issues (involving an application for early access to a formal information request issued to a third party) raised during an ongoing investigation undertaken by the OFT in relation to cartel activity in the sports retail market.

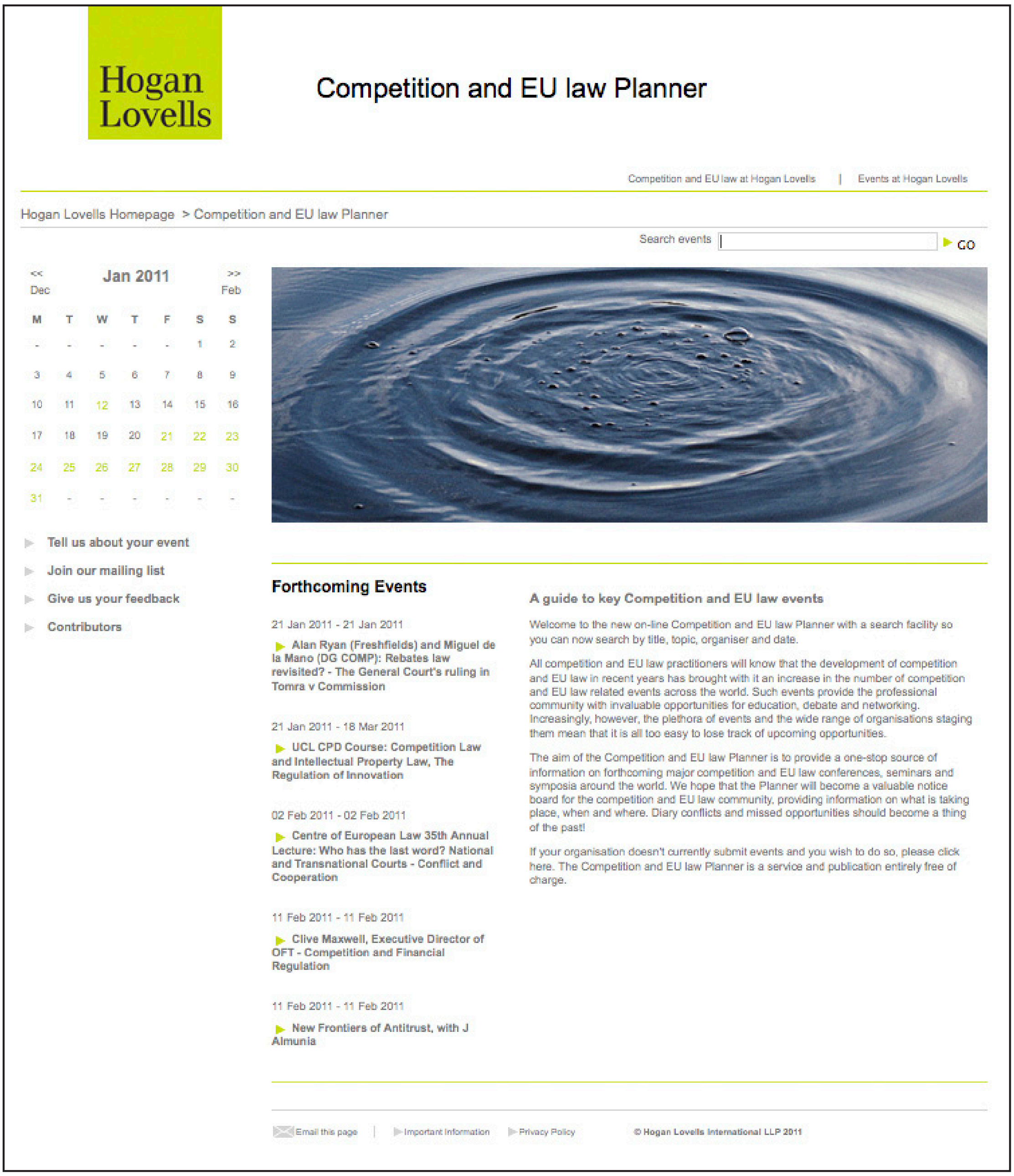
Equity underwriting market to Competition Commission

On 17 May 2011, the OFT published its decision not to refer the equity underwriting and associated services market to the Competition Commission under section 131 of the Enterprise Act 2002. The OFT considers that, although it has found that there are features in the market that provide reasonable grounds for suspecting that competition for equity underwriting services is prevented, restricted or distorted in the UK, those features can be most effectively tackled by companies and institutional shareholders taking action themselves. The OFT also concluded that, although the features it identified apply across the whole of the market, it was questionable whether such features will persist as the market comes through an exceptional period and adjusts to more typical conditions.

Abuse of dominance

On 13 April 2011, the OFT issued a decision finding that Reckitt Benckiser has infringed Article 102 TFEU and the Chapter II prohibition of the Competition Act 1998, and imposed a fine of £10.2 million. The OFT found that Reckitt Benckiser abused its dominant position by withdrawing and de-listing Gaviscon Original Liquid from the NHS prescription channel in 2005, following expiry of its patent but before the publication of the generic name for it. This meant that NHS prescriptions were issued for the patent protected Gaviscon Advance Liquid rather than for generic alternatives. The company's actions had the object of limiting pharmacy choice and hindering competition from generic medicines. Reckitt Benckiser admitted the infringement and agreed to pay the fine (reduced from £12 million) as part of an early resolution agreement with the OFT.

# Competition and EU law planner

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For further details please contact us at: www.eucompetitionevents.com

# COMPETE – competition law compliance e-learning

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

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

The programme can be customized to reflect the identity of the company, including branding, sector and company specific case studies and content. The programme is available in a variety of languages, including French, German, Spanish, Italian, Polish and Portuguese.


**Key features of COMPETE**

- Easily navigable
- Opening teaser 'story' brings the program to life
- 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.

To find out more contact:

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

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

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

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

# A spotlight on China

Hogan Lovells is one of the first legal practices in China to have a dedicated competition law capability including competition law practitioners on the ground in China. We have been assisting our clients with understanding the implications of the Chinese competition law regime (including the Anti Monopoly law "**AML**") for some time, and have assisted them on a wide number of matters involving Chinese competition law, including successfully carrying out merger filings in cooperation with local Chinese firms, as well as advising on the application of AML to exercise their intellectual property rights.

We are the only international legal practice able to provide competition law advice in most major cities throughout China through the SGLA firms (a ground-breaking legal alliance between Hogan Lovells and 13 leading Chinese law firms located in China's key cities and regions).

In addition, we are experiencing an increasing demand from clients in relation to competition law in Asia more generally, in particular, concerning the proposals for a competition law in Hong Kong. We have also established antitrust/competition capabilities in our other Asian offices in Tokyo, Singapore, Hanoi and Ho Chi Minh City.

Our principal contacts for antitrust in China are:

**Jun Wei**
**T** +86 10 6582 9501
jun.wei@hoganlovells.com

**Andrew McGinty**
**T** +86 21 6122 3800
andrew.mcginty@hoganlovells.com

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

**www.hoganlovells.com**

Hogan Lovells has offices in:

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| Abu Dhabi | Colorado Springs | Houston | New York | Silicon Valley |
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