mergermarket

Antitrust & Competition Insight

In association with Hogan & Hartson LLP

September 2008

In association with:

HOGAN & HARTSON

Contents

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Foreword

Welcome to the latest edition of the Antitrust & Competition Insight – brought to you by mergermarket in association with leading international law firm Hogan & Hartson LLP.

As always this report brings you an update on the key deals and issues affecting M&A activity in North America, Europe and beyond. We hope that this quarterly newsletter will provide corporate, advisory and investor readers with timely, informed and objective intelligence. In addition, the Antitrust & Competition Insight leverages off mergermarket's sister company dealReporter – bringing you a listing of live deals sitting with the regulatory authorities in North America, Europe, Asia and Emerging Europe, Middle East and Africa (EEMEA).

In the first article Lynda K Marshall looks at the shifting sands of merger review following the recent deals involving Whole Foods and Inova Health. On page 6, Christoph Wünschmann examines European state aid law and notes its effect on M&A transactions. Also in this edition of the newsletter Ben Bschor, dealReporter's regulatory correspondent, looks at consolidation in the airline industry in respect of the ongoing situation involving British Airways, Iberia and American Airlines, this can be found on page 9.

The usual mergermarket round-up of the most significant antitrust situations across the globe can be found on page 12. In the penultimate article on page 15, Jun Wei from Hogan & Hartson's Beijing offce gives a comprehensive overview of China's new antitrust law. Finally on page 21, Stefanie von Hoff looks at the European Commission's ongoing efforts to unbundle ownership in the energy sector across Europe.

We hope you find this latest edition of antitrust newsletter useful and informative. Please contact us if you would like any more information.

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The shifting sands of merger review – a look at Whole Foods and Inova Health

Lynda K Marshall, Hogan & Hartson LLP

Two recent cases merger cases brought by the Federal Trade Commission ("FTC") raise important issues for companies that have transactions before the United States federal antitrust agencies. These cases, *FTC v. Whole Foods Market, Inc.*, 533 F.3d 869 (D.C. Cir. 2008) and *FTC v. Inova Health System Foundation,* No. 1:08CV460 (E.D. Va. 2008), available at http://www.ftc.gov/os/caselist/0610166/080513complaint.pdf, are indicative of the FTC's increasing emphasis on administrative litigation, as opposed to a federal court proceeding, as the appropriate forum in which to resolve the substantive issues involved with FTC merger challenges.

Administrative litigation generally is a more time-consuming process than a preliminary injunction hearing in federal court. Consequently, moving consideration of whether the FTC has met its legal standard for blocking the transaction into an administrative forum may add further time to an already lengthy merger review process. Further, the designation of Commissioner Tom Rosch as the administrative law judge in the Inova administrative proceeding is a sign that the parameters under which the administrative proceeding will be conducted are shifting. Combined, these factors make the transaction clearance decision, i.e., the allocation of antitrust review to either the FTC or the Antitrust Division of the Department of Justice ("DOJ"), of much higher interest to the parties – not because the FTC may be the more aggressive enforcer, but because FTC review may be longer and involve a changing forum.

In *Whole Foods,* the FTC challenged Whole Foods Market, Inc.'s proposed acquisition of a key rival, Wild Oats Markets, Inc., alleging that the transaction would injure competition in the market for premium, natural, and organic supermarkets ("PNOS") and seeking relief on two fronts. As an initial matter, the FTC filed a complaint and motion for preliminary injunction in federal court seeking to enjoin the transaction during the pendency of administrative proceedings. Shortly thereafter, the FTC also filed an administrative complaint seeking a ruling that the proposed acquisition would substantially lessen competition in violation of Section 5 of the FTC Act and Section 7 of the Clayton Act. Following an accelerated hearing schedule, the federal district court denied the FTC's motion for a preliminary injunction and administrative proceedings were stayed. The appellate court then denied the FTC's emergency motion for an injunction pending appeal, and the transaction closed a little over two months after the FTC's initial request for an injunction.

Despite these rather daunting setbacks, the FTC appealed and, on July 29, 2008, the Court of Appeals for the District of Columbia overturned the district court, holding that although the lower court had used the correct legal standard for determining whether a preliminary injunction should be granted, it had erred in applying antitrust law to the facts to be evaluated under that standard.

Specifically, the appellate court agreed with the district court that in order to obtain a preliminary injunction under §53(b) of the FTC Act, the FTC need only need show "a likelihood of success sufficient, using the sliding scale, to balance any equities that might weigh against the injunction." *Whole Foods,* 533 F.3d at 881. However, it disagreed with the district court's finding that the FTC had not demonstrated a likelihood of success because it would never be able to prove a PNOS market. "The district court believed the antitrust laws are addressed only to marginal consumers. This was an error of law, because in some situations core consumers, demanding exclusively a particular product, or package of products, distinguish a submarket." *Id.*

As a result, it was impossible to say that the FTC would not be able to prove such a market, and the injunction should have been granted if the equities had weighed in the FTC's favor. *Id.* at 890. The appellate court remanded the case to this district court to consider this issue.

Shortly after the ruling, the stay in the *Whole Foods* administrative proceedings was lifted and the case currently is moving forward in the administrative forum.

The appellate decision in *Whole Foods* was a broad procedural win for the FTC, with implications beyond the case before the court. In rendering its opinion, the appellate court validated a long-held FTC contention that it need not prove the merits of its case to win a preliminary injunction in federal court, "because, in a §53(b) preliminary injunction proceeding, a court 'is not authorized to determine whether the antitrust laws . . . are about to be violated . . . [t]hat responsibility lies with the FTC." *Whole Foods,* 533 F.3d at 876 (quoting *FTC v. Food Town Stores,* Inc. 539 F.2d 1339, 1342 (4th Cir. 1976).

Instead, provided that the FTC has raised serious questions about the merits, it is entitled to a presumption against the merger, and it is up to the merging parties to oppose the preliminary injunction by showing that the equities weigh against it. *Id.*

In all likelihood, this will be an uphill battle for merging parties. As a consequence, FTC merger litigation may move primarily into the administrative arena, with only a brief stop at the federal court house to pick up a preliminary injunction along the way.

Shifting FTC merger litigation primarily to an administrative setting has important implications for parties. One of these implications relates to timing. A preliminary injunction hearing usually proceeds in a matter of weeks, with a decision rendered shortly after the closing of the hearing. For example, in Whole Foods, the FTC filed its motion for preliminary injunction on June 6, 2007. Discovery, expert reports and depositions, and briefing all took place within approximately seven weeks, a hearing was held at the end of July and a decision rendered on August 16, *2007. FTC v. Whole Foods Market, Inc.,* 502 F. Supp. 2d 1, 4 (D.D.C. 2007).[1]

Contrast this to Evanstan Northwestern Healthcare's administrative litigation, which took approximately four years from complaint to decision. (In the Matter of Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc., FTC Docket No. 9315, available at http://www.ftc.gov/os/adjpro/d9315/index.shtm.) With federal courts giving the FTC deference in preliminary injunction hearings, and consequently more FTC merger challenges shifting into administrative proceedings, the time span of FTC merger litigation likely will increase. Few parties will be able to hold transactions pending for the lengthy periods currently required to complete administrative hearings, which may mean as a practical matter that deals end before the merging parties have the opportunity to challenge the FTC's decision on the merits in a litigated proceeding.

The procedural background of DOJ merger challenges is quite different, due both to DOJ's statutory authority and its policy. First, DOJ does not have access to administrative proceedings – its recourse to stop a merger lies in obtaining a preliminary and then permanent injunction in federal court. 15 U.S.C. § 25. Second, DOJ generally consolidates proceedings for preliminary and permanent injunctions. As a consequence, it must establish in one proceeding on a fairly expedited schedule "that the proposed merger would violate Section 7 of the Clayton Act by a preponderance of the evidence." Antitrust Modernatization Commission Report and Recommendations, at 139 (2007) (citations omitted). As a result, the time period until a final litigated decision regarding the merits of a particular transaction is likely to be shorter if a transaction is subject to DOJ review.

[1]This pace is typical for FTC preliminary injunction hearings. See, e.g., FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997) (approximately three months from filing of complaint and request for preliminary injunction to decision); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004) (approximately five months from filing of complaint and request for preliminary injunction to decision

The FTC clearly demonstrated an awareness of the timing issues in its challenge to Inova Health System's proposed acquisition of Prince William Health System earlier this year. In its motion in opposition to a stay of discovery in the administrative proceeding, the FTC asserted that an administrative hearing on the merits could be accomplished quickly and efficiently, while the preliminary injunction hearing was pending, avoiding unnecessary delay in a decision on the merits were the preliminary injunction granted. (Complaint Counsel's Opposition to Respondent's Motion to Stay Discovery and All Other Aspects of This Proceeding, In t*he Matter of Inova Health System Foundation and Prince William Health System, Inc.,* FTC Docket No. 9326, available at http://www.ftc.gov/os/adjpro/d9326/080527ccopprespmostaydiscov.pdf.) Whether such administrative efficiency is possible remains to be seen since the parties aborted the transaction ten days after the administrative law judge denied the request for a stay.

The FTC's position in *Inova* that the administrative proceedings should move forward simultaneously with the preliminary injunction hearing is not surprising. Although moving forward in two proceedings may be burdensome for parties, it ultimately could save parties time assuming they choose to hold the transaction in abeyance and continue the litigation. Designation of a sitting Commissioner as the Administrative Law Judge ("ALJ"); however, was quite surprising, particularly given that the Commissioner is alleged to have participated in the filing of the complaint. (See Respondent's Motion to Recuse Commissioner J. Thomas Rosch as Administrative Law Judge, Inova, FTC Docket No. 9326, *available* at http://www.ftc.gov/os/adjpro/d9326/080523respmorecuseroschasalj.pdf.)

Whilst not prohibited by the regulations, appointment of a Commissioner as ALJ was a clear deviation from standard practice, and one that already has given other litigants pause.[2] It also likely influenced parties with pending matters before the Commission, causing concern that they are on shifting ground in regard to advocating before the Commission.

At the end of the day, it is not clear where FTC merger review will end up, and it is precisely this fuzziness that may make antitrust review by DOJ more appealing for parties. Transactions are a time-sensitive business, and while not all parties choose to fight an agency's request for a preliminary injunction, those that do likely prefer to go into only one battle conducted on a brisk timetable as opposed to two proceedings over a more drawn out period of time. Practically speaking, this may mean that the FTC's push to litigate mergers before consummation in an administrative forum results in fewer merger litigations. Time will tell.

[2]On August 22, 2008, Whole Foods filed a motion to remove the Commissioners as administrative law judge. See Respondent's Motion to Disqualify the Commission as Administrative Law Judge and to Appoint a Presiding Official Other Than a Commissioner, In the Matter of Whole Foods Market, Inc. and Wild Oats Markets, Inc., FTC Docket No. 9324, available at http://www.ftc.gov/os/adjpro/d9324/080822respmodisqualifycomm.pdf.

European state aid law and M&A transactions

By Dr Christoph Wünschmann, Hogan & Hartson LLP, Berlin/Brussels

Introduction

Recently, the German state-owned bank Kreditanstalt für Wiederaufbau (KfW) announced the divestiture of its subsidiary IKB Deutsche Industriebank AG (IKB) to the US-investor Lone Star Funds. IKB had become one of Europe's highest-profile casualties of the international financial crisis after having heavily invested in the US subprime mortgages market. Its financial collapse could only have been prevented through an extensive financial rescue operation by KfW and the German state.

At this point, KfW initiated a bidding procedure to sell its IKB shares in which Lone Star prevailed against other interested parties. Germany's supporting measures in favour of IKB and the divestiture process have subjected the deal to close scrutiny by the European Commission (the "Commission") for compliance with European state aid law. Already on the day of the public announcement of the planned sale of IKB, the Commission stated "it had further questions concerning the transaction." The sale of IKB illustrates possible state aid law issues which could arise in the context of privatisations and M&A transactions in general. This article provides an overview of the main aspects of state aid law that need to be taken into account when participating in M&A transactions.

II. Acquisition of publically subsidised companies

1. State aid risks of target company

During the due diligence process, potential state aid risks of the target company must be thoroughly analysed. There are many different forms of direct or indirect subsidies or aids which are classified as notifiable state aid under EC law and, accordingly, can create considerable risks for the acquirer if they were not notified to or approved by the Commission.

Pursuant to Article 87 of the EC Treaty, any aid granted by a Member State or through state resources in any form whatsoever that distorts competition by favouring certain undertakings or the production of certain goods is, insofar as it affects trade between Member States, incompatible with the common market. This very broad concept of state aid could cover such diverse state measures such as tax benefits or loans, guarantees or capital increases under preferential conditions.

These measures have to be assessed as to whether, among other things, they constitute a commercial advantage to the undertaking concerned which would not be obtainable under regular market conditions. The Commission applies the so-called "Private Market Investor Test" or "Market Economy Investor Test (MEIT)" to examine whether state measures favour the recipient of the aid and distort competition. For instance, if the state is acquiring a shareholding in a company, the Commission assesses whether the terms of this acquisition would be the same for private investors acting under regular market conditions. In the case of discounted loans, the market level of interest has to be taken into account in order to evaluate whether it was also possible to receive the loan in question also from a private investor on the capital market. Likewise, state guarantees have to be checked as to whether a private person or bank would also be willing to provide a guarantee under similar circumstances with comparable interest rates.

Applying the Private Market Investor Test has a considerable valuation risk resulting from the hypothetical transfer of the measure to the private sector. Hence, for the buyer of a publically subsidised company there remain doubts whether state aid formerly granted to the company is compatible with EC state aid rules. State measures are often politically driven and are intended to fulfill local and social requirements which typically would not be in the interest of a private investor. Special legal questions may arise where a public grant is intended to compensate a company that fulfills certain public service obligations, for example in the fields of waste management or local public transport. Therefore, the buyer of such a company would have to evaluate whether the compensation constitutes adequate compensation commercial terms for the service provided.

The Commission has adopted a large number of legislative measures, namely regulations, communications, notices, guidelines and letters to the Member States, in order to improve the transparency and predictability of EC state aid law and thus guarantee more legal certainty. All relevant legislation can be found on the website of the Directorate General for Competition of the Commission (http://ec.europa.eu/comm/competition/state_aid/legislation /..). Despite the substantial body of legislation, companies may still experience difficulties with the assessment of certain state measures, as shown by the significant number of cases concerning the recovery of unlawful aid. The total amount of aid to be recovered on the basis of Commission decisions adopted between 2000 and 2007 is at least €9bn, of which about €7bn including interests of €2.4bn had been effectively recovered by the end of 2007.

2. Buyer's obligation to reimburse unlawful aid

If the target company has received state aid without prior notification to and approval by the Commission, the state aid has to be returned. In order to guarantee the full application of Community Law and to restore a level playing field in the relevant markets, Member States are obliged to recover the aid in question. The recovery also has to be enforced by the Member States against the purchaser of the company that received the unlawful aid.

During the acquisition process of a company that may have received unlawful aid the buyer should therefore carefully assess whether and, if so, how it could eliminate the risk of such recovery in the purchase agreement. The buyer may want to insist that the seller assumes the risk of liability with regard to state aid. In the event that state assistance was identified as a potential state aid risk during the due diligence process it should become classified as unlawful aid, the buyer would then be entitled to reduce the purchase price or to withdraw from the contract. Admittedly, such clauses may raise new questions concerning compliance with EC state aid law. So, under certain conditions the Commission declares the assumption of liability for state aid issues by state-owned sellers to be incompatible with the rules of the EC Treaty, as this may constitute an illegal avoidance of Article 87 of the Treaty or even a state aid issue. These aspects must be taken into consideration when negotiating the liability clauses of the purchase agreement.

III. Privatisations

The privatisation of public entities in particular requires an in-depth assessment of state aid issues. In many cases, the company gets "prepared" for sale by its public owner, who in many case will undertake certain measures before the privatisation takes place, e.g. discharging the company's debts, taking over guarantees, compensating legacy issues or transferring estates to the company. These measures often constitute state aid within the meaning of the EC Treaty and therefore have to be notified to the Commission prior to their implementation. The buyer therefore has to examine carefully whether such measures undertaken prior to the privatisation were executed in accordance with state aid law.

As a matter of principle, the Commission favours privatisation. For instance, the Commission frequently approves so-called restructuring aid granted to companies that are in difficulty only on the condition that the state gives up its equity investment or that the company sells-off certain (non-profitable) divisions. One such example is the Commission's approval of restructuring aid granted by the federal state of Berlin to the *Bankgesellschaft* Berlin in 2004 on condition that the publicly owned bank would be sold. Equally, the French bank *Crédit Lyonnaise* was also privatised according to a conditional approval by the Commission of substantial restructuring aid.

Even though privatisation is favoured in general, the particular privatisation process may attract the Commission's attention. For example, the buyer is not allowed to benefit from a lower purchase price for the target company that does not objectively represent the actual market value and thus creates an advantage over its competitors. In the case of privatisation,

the Commission also applies a test to hypothetically transfer the transaction to the private sector *(private vendor test).* Given that a private vendor is normally interested in a high sale price, if there are several interested parties, it will initiate competitive bidding in order to raise the sale price and ultimately sell the target to the party who offers the highest price. Alternatively, depending on the particular company and market conditions, the seller may initiate a public offering *(dual track process).*

These typical selling processes for *private vendors* are used by the Commission to set the benchmark for the investigation of privatisation procedures of public undertakings to assess whether the process itself or any of the conditions could constitute state aid. The Commission takes the view that state aid risks do not arise if the state initiates a transparent and non-discriminatory competitive bidding process comparable to a public tendering procedure under public procurement law, in which the target firm is ultimately sold to the highest bidding party. If the state chooses to privatise the public company through an offering over the stock market, the Commission will not be concerned about the level of the sale price with regard to state aid rules.

By way of contrast, the Commission is highly skeptical of and will frequently investigate privatisations of public companies where the seller did not initiate a well structured competitive bidding process, but sold the company to a buyer selected without any benchmark that could have revealed the market value of the target. The same applies in a case where the seller, after the completion of a structured bidding procedure, does not enter into a contract with the highest bidding party but with another bidder it prefers, e.g. for reasons of regional politics. In these cases the Commission states that the amount that corresponds to the difference between the purchase price actually paid and the highest offer constitutes state aid and therefore generally has to be notified.

Only recently, the Commission made clear that it doubted whether the privatisation of the Austrian Hypo Bank Burgenland AG in 2006 was compatible with state aid law. In the course of the selling process, the Austrian insurance group GRAWE and a Ukrainian consortium of investors were selected as preferred bidders and submitted two concurring offers. The federal state government of Burgenland concluded the deal with GRAWE even though the purchase offer of the Ukrainian consortium exceeded GRAWE's offer by €50m.

One of the justifications offered by the government for its decision was the fact that the deal with GRAWE would offer a higher degree of transaction security and leave the federal state with a lower liability risk. The Commission did not approve this reasoning as a justification for the advantage granted to GRAWE by accepting a €50m lower sale price. Thus the Commission concluded that the remaining difference constituted unlawful state aid in favour of GRAWE.

This decision, predictably, received significant criticism because the Commission intervened in the sale and decision-making process of the seller and virtually prescribed who the public enterprise had to be sold to from a state aid law perspective. This rigorous approach of the Commission may indicate that a seller is not able to contract with the party of its choice.

IV. Future prospects

It remains to be seen whether the Commission will apply a similarly strict control of state aid law in future privatisations as it did in the *Bank Burgenland* case, or whether the Member States will have more freedom in deciding to whom they sell a public enterprise. However, private investors need to be aware of the fact that in either case, state aid law has to be taken into consideration during competitive bidding and that the public seller might be bound to choose a buyer due to state aid law rules.

However, state aid law also provides opportunities for investors, for example, for a losing bidder if the public enterprise is later sold to one of its competitors who offered a substantially lower purchase price. The losing bidder may lodge a state aid complaint with the Commission which may lead to an in-depth investigation of the selling process as well as the annulment of the contract. In addition, an investor can itself apply the private vendor test during the negotiation process in order to reject certain conditions of the purchase agreement (such as the obligation of the seller to guarantee a certain level of production and employment) that do not correspond to market terms, given that a market-oriented private seller would not impose them.

Now or never? Airline consolidation – a review of the BA/Iberia/ American Airlines situation

By Ben Bschor, Competition & Regulatory Correspondent, dealReporter

Rising fuel prices has increased pressure in recent months on operating companies in the already highly competitive airlines industry to begin a new round of consolidation. The latest deal, announced at the end of August, is Lufthansa's intention to acquire a 45% stake in Brussels Airlines, and the German company is also seen as the front runner for Austrian Airlines, which is due to be privatised. Troubled Alitalia is also looking for investors, after the European Commission launched a state aid investigation in June into the €300m loan given to the company by the Italian government.

Meanwhile, in the no frills segment, notorious Ryanair CEO Michael O'Leary keeps predicting that one or several European carriers will be brought to their knees within the next 12 months. Ryanair itself reportedly remains interested in Aer Lingus. A first takeover attempt of its Irish competitor was blocked by the European Commission last year but Ryanair challenged the case, which is unsettled to date.

The biggest takeover in Europe's airline industry announced this year is the proposed takeover of Spanish Iberia, which has a market cap of around €2bn, by British Airways.

However, things don't stop here. In fact the airline industry is one of the few sectors that still remain highly regulated. A crucial point is that usually the carriers need to be majority owned by nationals of the country where the companies are registered. While things have eased considerably in the past few years in Europe – where now airlines can be majority owned by any EU national if the company is registered in a member state – mergers remain pretty much impossible if one of the merging parties is located outside Europe. This of course is why airlines turn to alliances rather than mergers on the global level.

Shortly after the confirmation of BA/Iberia merger talks, the British airline announced another bold move: to create a transatlantic alliance with American Airlines, which will also include Iberia.

BA and AA had already tried twice in 1997 and 2002 to receive clearance from antitrust authorities for a co-operation agreement on transatlantic flights. In both cases the co-operation failed due to extensive remedies as competition authorities demanded that the airlines give up a significant number of slots at London's Heathrow Airport. During the last investigation in 2002 the US Department of Transportation (DOT) asked the airlines to give up 224 weekly slots at Heathrow. As a consequence the companies withdrew their application to the European authorities and no formal decision by the European Commission and the UK's Office of Fair Trading (OFT) was made.

While the US DOT can still grant antitrust immunity to airlines, procedures in Europe have changed since 2002. In 2004 the possibility of applying for a formal clearance for revenue-sharing co-operations such as airline alliances in Europe was removed. While full mergers still need EC-approval, the compatibility of co-operation with community regulation now needs to be self-assessed by the companies. This includes the implementation of self-inflicted remedies, like divesting certain slots, if the companies conclude such moves necessary to apply with community regulation. However, independently, the Commission can still decide by itself to start a procedure.

Indeed, the Commission has meanwhile confirmed that it is looking at the BA/AA situation, stressing that this was only a preliminary investigation at the moment, launched by initiative of the Commission itself and not by the companies. The investigation was based on article 81 of the Commission treaty, which prohibits companies from agreements and practices which can distort competition.

Similar investigations had been launched by the Commission in the past to examine airline co-operations, such as in the case of Air France's SkyTeam alliance.

Receiving a clear decision from the Commission would certainly be in the airlines' interest, as it gives the companies a better idea of the view taken by the regulators on the case compared to the self-assessment procedure as it was introduced in 2004. "This [the lack of a formal clearance procedure in Europe] poses considerable problems to agreements like airline-alliances," as one observer puts it. "It is in everybody's interest to get some kind of indications from the Commission about what would be acceptable."

Competitors opposing the BA/AA/Iberia alliance will make the most out of it and seek to put their concerns forward to the Commission. Virgin, one of BA's major competitors on routes from London Heathrow to the US, has already made its opposition known. Media reports claim that Virgin Atlantic has put aside €3.8m for a campaign against the proposed BA/AA alliance. While Virigin describes the deal as a "monster monopoly", US airline Delta remained a bit more cautious. Delta CEO Richard Anderson was quoted saying his company

generally supported the deal, but BA and AA would need to make considerable remedies by giving up slots at London Heathrow. At least seven airlines are said to have made formal petitions to the US DOT so far, where the procedure appears to be slightly more advanced already than in Europe.

A problem BA and AA have to face is that it could take a long time for the Commission to make up its mind on the case. Experts believe that a decision could be as far away as a year, if not even longer.

As an illustration it might help to look at the long lasting Commission probe into the SkyTeam alliance. Parts of this investigation go back as far as 2002, and the probe is still not fully concluded. All the Commission says at the moment is that the procedure regarding BA/AA/Iberia will be conducted as quickly as possible, but the Commission also points out there is no specific timetable the Commission is bound to.

Even though the Commission did not take a decision in 2002 when examining the second alliance attempt of BA and AA, an article published in the EC's Competition Policy Newsletter in June 2002 does give some insight in their considerations at the time. The Commission admitted that the alliance would have had advantages for passengers in terms of reduced fares, but it was concerned about a significant loss of competition on routes from London to five US cities. The EC was especially concerned about how this would affect time-sensitive passengers and, to a degree, corporate clients. It was written at the time the most appropriate remedy would have been to give up slots from Heathrow. It was also pointed out in the 2002 article that no decision was made if London airports Heathrow and Gatwick were part of the same market.

Today, it can be argued that conditions have changed in favour for the proposed alliance for a number of reasons since the failed 2002 attempt. A major argument, which has already been put forward by BA, is that the Open Skies agreement between the EU and the US will have a generally positive effect on competition. The agreement, which was launched at the end of March 2008, allows European airlines for the first time to fly without restrictions from any point in the EU to any point in the US. At the time it was launched Jacques Barrot, Vice-President of the Commission who is in charge of Transportation, characterised it as "bringing more competition and cheaper flights to the US."

BA and AA can also refer to other alliances. The Star and SkyTeam alliances have both received US antitrust immunity on transatlantic routes in the more recent past. Also, the proposed merger of Delta and Northwest, which has the Commission's approval already and seems likely to get cleared in the US, would make it easier for BA/AA to argue their case. And at the same time the competing Star Alliance is currently working on adding Continental to their co-operation. However, getting away without giving up a number of slots from Heathrow to US cities, as it was claimed recently by BA CEO Willie Walsh, still seems rather unlikely.

BA claims that at least 20 more daily flights have been launched between Heathrow and US airports since Open Skies was launched in March 2008, among them 13 daily flights operated by competing alliances Star and SkyTeam. And quite a few US airlines which previously only offered connections from Gatwick have moved to Heathrow, increasing competition there. This could indeed make a difference, if Heathrow is not simply seen as another London airport, but rather as the more prestigious one, and especially as being more important as an interconnection for passengers from other European airports changing in Heathrow.

Another interesting point is to compare BA/AA's dominance on transatlantic routes from the UK to other European airlines and their flights from other EU countries to North America.

Now or never? Airline consolidation – a review of the BA/Iberia/American Airlines situation

According to Ascend, a consultancy that focuses on the aviation industry, British Airways currently accounts for 30% of all seats from the UK to North America, and American Airlines accounts for 11%. But for instance Lufthansa and United, which are part of the same alliance, account for 62% of all seats from Germany to North America, KLM accounts for 73% for flights from Holland, and Air France for 46% of all seats from France. "Levels of domination currently enjoyed by Air France in France, Lufthansa in Germany and KLM at Amsterdam are far greater than that of BA in the UK, even taking into account for the addition of AA," Ascend notes.

On the European level, Ascend says BA and AA have a combined share of 17%, compared to Air France, KLM, Delta and Northwest, which are all members of the SkyTeam alliance, accounting for 24%. Ascend notes that, because of network connections, the potential tie-up between BA and AA has to be considered in the context of Europe – North America.

So overall it seems, British Airways and American Airlines, and even though they have Iberia in tow this time, might have an easier ride with antitrust authorities in the US and Europe this time. However, getting away without giving up any Heathow slots still seems unlikely, and therefore, observers believe BA CEO Willie Walsh's recent comments that the company would not surrender any slots are a "negotiating posture" rather than BA's last word.

"The chances are clearly better now than in previous attempts if BA is now prepared to bite the bullet," as one well informed observer concluded.

mergermarket's regional round-ups

Europe: **United Kingdom**

CAT to rule on ITV/BSkyB; Mediaset could target ITV depending on outcome

The UK Competition Appeals Tribunal is likely to rule by the middle of September on whether it should force BSkyB to reduce its 17.9% shareholding in ITV. BSkyB originally acquired the stake in November 2006 and the company may be forced to reduce its holding to below 7.5% depending upon the outcome of the hearing. Meanwhile it is thought that Mediaset, the Italian broadcasting company, is monitoring the situation closely and could launch a takeover bid for ITV depending on the outcome of the hearing.

North America: **United States**

FTC hearing against Whole Foods/Wild Oats deal to start early next year

The Federal Trade Commission's (FTC) hearing against the US$660m acquisition of Wild Oats by Whole Foods is to commence on 16 February 2009. The US Court of Appeals previously overturned a lower court ruling that had allowed the transaction to go through. A former FTC official believes that the body is attempting to set a precedent for a core market definition as well as create a separate entity as a result of divestitures that will arise as a result of the inquiry. This could be difficult as the FTC would have to create a divestiture package that would be attractive to potential buyers and sufficient to reintroduce competition in the market.

The FTC argue that the transaction raises antitrust concerns in 21 geographical areas where the two chains are each other's closest competitor. However, elements of integration between Whole Foods and Wild Oats have already occurred which confuses the situation further. Four Wild Oats stores have already closed and integration of vertical operations and inventory systems in addition to union integration, may well prove difficult to separate. According to sources close to the situation, it is thought that the hearing could move relatively quickly with an estimated timeline of three to six months.

Europe: **North America**

EC to investigate American Airlines, British Airways and Iberia alliance

The European Commission (EC) has confirmed that it will launch a preliminary investigation into the joint business agreement between American Airlines (AA), British Airways (BA) and Iberia on flights between Europe and North America. While the Department of Transportation (DOT) in the United States grants antitrust immunity to airlines, the EC can decide to launch an investigation into any merger or agreement if it believes it will distort competition.

British Airlines and American Airlines have previously attempted to establish a co-operation on transatlantic routes in 1997 and 2002. In both instances the plans were eventually abandoned as authorities demanded that the airlines give up a large number of slots at Heathrow Airport in London. However, in 2002 the EC did concede that an alliance would lead to advantages for passengers in terms of a reduction in fares.

An antitrust lawyer believes that clearance is more likely now than in previous attempts although the airlines are unlikely to get away with divesting no slots from London Heathrow. This is despite the fact that BA and AA have a combined share of 41% of seats from the UK to North America which is lower than the market share of other major airlines in other European countries.

Receiving a clear decision from the EC on this occasion could be in the best interests of all airlines as it would give companies a better idea of the view taken by regulators compared to the self-assessment procedure as it was introduced in 2004. Unsurprisingly, the proposed alliance is facing notable opposition as it is reported that several airlines have petitioned the DOT asking to see confidential submissions, while Virgin Atlantic has been particularly outspoken in its opposition.

North America: **United States**

Verizon/Alltel identify potential divestments; TDS may be interested

Verizon has retained Morgan Stanley to advise on divestitures relating to its US$28.1bn acquisition of Alltel, the voice and data services provider. On 22 July Verizon agreed to divest overlapping assets in 85 predominantly Mid Western markets to allay Department of Justice (DOJ) concerns.

TDS, the diversified telecommunications company, has emerged as a potential buyer of any divestments. Ken Meyers, TDS' CFO, remarked "We're going to look at assets immediately adjacent to ours. I don't know if a deal will get done, but we want to look."

North America/Europe: **United States/Belgium**

Second request issued over InBev/Anheuser-Busch deal

The DOJ have issued a second request for information to Belgian brewer InBev regarding its US$58.9bn acquisition of US competitor Anheuser-Busch. It is thought that regulators are likely to scrutinize the deal purely in terms of market concentration, especially as BUD (which Anheuser-Busch owns) and SAB Miller control 80% of the US market.

InBev and Anheuser-Busch are likely to attempt to limit the scope of the request although an antitrust lawyer conceded that reaching compliance is an arduous task that may take until the end of the year. Rather optimistically, InBev is hoping to complete the antitrust review in the US by the middle of October before Anheuser-Busch vote on the deal.

Furthermore, there is added difficulty as the documents required for submission involves numerous locales. A precedent for market definition may have already been set as a result of the DOJ's recent investigation into the Miller/Coors transaction. In this instance, the regulator settled on a definition of the "overall beer market" rather than taking into account sub sectors such as premium, light, import and popular priced beer. Trade publications suggest that BUD controls approximately 48% of the US beer market while InBev's brands control around 1.5%.

Europe: **The Netherlands/United Kingdom**

AkzoNobel sells off Crown Paints

AkzoNobel, the Netherlands based coatings and chemicals company, has agreed to sell its Crown Paints decorative paints business in the United Kingdom and Ireland to Endless LLP, an independent private equity house. AkzoNobel has also agreed a deal to sell two Belgian brands to Rieu Investissements, a French producer of coatings. These divestments are a consequence of the commitment package which was agreed with the EC in connection with AkzoNobel's €1.4bn acquisition of UK counterpart Imperial Chemical Industries in January 2008.

With regard to the Crown divestment, the transaction includes the UK manufacturing and warehouse sites in Darwen, Hull, Warrington, Dublin and Belfast, as well as the Crown Decorator Centre network and a brand portfolio encompassing several brands. The deal is subject to the approval by the EC and is expected to be completed by the end of October.

Europe/Australasia: **United Kingdom/Australia**

EC stops clock on Rio Tinto/BHP Billiton; regulators in Japan and Australia express concern

On 2 September the European Commission 'stopped the clock' on its antitrust investigation into the Rio Tinto takeover by BHP. The clock-stop in the phase II investigation was described as routine and subject to clearance the deal may still be on course to close by the end of the year. A source at Eurofer, the European steel lobby group who opposes the deal, commented that the move did not come as a surprise. "We all anticipated the EC would stop the clock at one point as it is such a complex deal," a source said.

The EC said it was suspending the investigation because a 13 August request for additional information had not been fulfilled by the parties involved. It is reported that the investigation will only continue when the missing information had been provided by Rio Tinto and BHP. Prior to this, the Phase II investigation had a deadline for 9 December and it is understood that the companies and the EC are not discussing remedies at this stage.

Meanwhile, the Japanese Fair Trade Commission (JFTC) has asked BHP Billiton to submit a plan regarding the takeover by the middle of September. The JFTC will study the information

it obtains to decide whether the deal would have an effect on the ability of Japanese steel companies to procure iron ore. According to reports, the combined entity would become the supplier of around 60% of the imports of iron ore into Japan. The consensus is that there is no definite deadline for the JFTC's decision, but the regulator is hoping to make its decision by the end of this year, around the same time EU competition regulators complete their investigation.

Finally, the Australian Competition and Consumer Commission (ACCC) has raised its concerns about the impact of the deal on Australian steel producers and on iron ore trade. On 1 October, the ACCC will conclude with a final decision on the deal.

Australasia: **Australia/New Zealand**

Woolworths to appeal to NZ authorities over Warehouse rebuff

New Zealand's Supreme Court may rule in November on Woolworths's leave to appeal application in relation to its attempt to acquire The Warehouse Group. However, the hearings will most likely take place in the first quarter of 2009 with a judgement handed down in the second quarter. Woolworths filed for leave to appeal the judgment of the New Zealand Court of Appeal in August, and it follows the decision of the Commerce Commission to decline a clearance to either Woolworths or Foodstuffs to purchase 100% of the shares in Warehouse.

Woolworths and Foodstuffs, supermarket chains listed in Australia and New Zealand respectively, each have a 10% stake in Warehouse and are applying for permission to purchase Warehouse. Foodstuffs earlier today announced it would not appeal the Court of Appeal decision "as the basis of the case to the Court was essentially the same as Woolworths, and Woolworths is lodging an appeal."

North America/Asia: **United States/China**

Coca-Cola buy of China Huiyuan Juice expected to squeeze past authorities

Coca-Cola's US$2.5bn takeover of the Hong Kong-listed China Huiyuan Juice Group is likely to obtain antitrust clearance with the Ministry of Commerce (MOC) although the process could be drawn out, according to industry sources. China's beverage market is competitive and 100% open, and because of this the transaction may well receive antitrust clearance regardless of its high profile. According to a source at Huiyuan, the company accounts for 46% of the high and medium proportional juice market, while in low proportional juice market (juice proportion below 25%), Huiyuan's market share is only 10%.

Following the announcement of the deal, reports have emerged that several domestic juice makers are preparing to file a letter to the MOC against Coca Cola as they believe that the deal will result in the companies having over half of the market share. Additionally, with strong financial support from Coca Cola it is argued that there will be no room for other Chinese juice makers in the market.

Media reports have said that Coca-Cola may seek to take over or buy a stake in another large Chinese beverage company with the aim to become the top beverage brand in mainland China. An industry source went on to comment, "We understand Coca-Cola aims to greatly enhance its presence in healthy drinks via such an acquisition. But if Coca-Cola continues to buy other famous Chinese beverage brands, it will cause broad and serious concerns in the sector."

Africa: **South Africa**

South African regulatory body blocks mergers in steel sector

The South African Competition Commission (SACC) has prohibited three intermediate acquisitions by Aveng, the listed construction company, of Koedoespoort Reinforcing Steel, Witbank Reinforcing & Wire Products and Nelspruit Reinforcing Supplies. The SACC established that collusion in the sector would be affected by the proposed deals and would lead to unacceptable strengthening of cartels in addition to a substantial lessening of competition in the steel industry.

The SACC also prohibited deals that involved Cape Gate acquiring three further firms: Cape Africa, Transvaal Gate & Wire and Fence Products. It was found that the deal would lead to a noteworthy accretion in the market for commercial chain link fencing and would create an entity with a market share of more than 40%. On these deals, the Manger of M&A at the SACC remarked, "collusion in the steel market is a big concern as it artificially keep prices of construction material high. Our country cannot afford to have this type of behaviour continuing, especially in the context of the major construction projects that are currently taking place".

Pre-concentration filing in China: What should dealmakers know?[3]

By Jun Wei[4] , Hogan & Hartson LLP

China established a pre-concentration filing regime as part of its implementation of the Anti-Monopoly Law (the "AML"), which became effective on 1 August 2008. However, the interpretation of some of these rules may raise some practical difficulties in China during the initial implementation period. The aims of this article are to introduce the enforcement authority for the pre-concentration filings and the tribunals that deal with anti-monopoly cases, discuss the highlights of China's current legal framework for pre-concentration filings, and explore challenges in implementing the AML given certain ambiguities and uncertainties.

I. Enforcement authority and litigation

A. Enforcement authority

The AML mandates that both the Anti-Monopoly Commission under China's State Council and the anti-monopoly enforcement authorities designated by the State Council (the "Anti-Monopoly Enforcement Authorities" or "AMEA") will govern monopolistic conduct. The Anti-Monopoly Commission is in charge of general policy, organisation, and regulatory and coordination tasks, while the AMEA will deal with day-to-day enforcement concerning anti-monopoly activities.

The AMEA's structure involves a three-way split of authority functions among the Ministry of Commerce ("MOFCOM"), National Development and Reform Commission ("NDRC"), and State Administration of Industry and Commerce ("SAIC"). MOFCOM is solely in charge of pre-concentration filings, and hence is also called the pre-concentration "Reviewing Authority."[5] In other words, SAIC, which was previously involved in pre-concentration filings, will no longer be involved in this process.

The Anti-Monopoly Commission will supervise the AMEA, and the Commission will operate from a separate working office located within MOFCOM. The Anti-Monopoly Commission will be an ad hoc organisation of the three separate ministries' specific departments, rather than a separate entity.

B. Tribunals dealing with anti-monopoly cases

Different types of cases are to be handled by different tribunals of each court in the PRC. There are three main types of tribunals of each court: Criminal Tribunals, Civil Tribunals, and Administrative Tribunals. Civil Tribunals are further divided into several sub-tribunals, dealing with general civil cases, finance-related cases, Intellectual Property Rights-related cases and foreign-related civil and commercial cases.

According to the Notice on Implementing China's Anti-Monopoly Law issued by the Supreme Court on 28 July 2008, the Civil Tribunal that deals with Intellectual Property Rights-related cases shall deal with anti-monopoly cases involving civil liabilities. If the filing parties disagree with the decisions made, or administrative penalties imposed on, by MOFCOM, they can file a lawsuit to challenge such decisions in the Administrative Tribunal of the court.

[3]For the purpose of this article, "China" refers to Mainland China (the "PRC" or "China"), excluding Hong Kong, Macao, and Taiwan.

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[5]For convenience, this article uses "Reviewing Authority" and "MOFCOM" alternatively to refer to the anti-monopoly enforcement agency under the State Council that reviews undertaking's concentration

II. Highlights of China's current rules for pre-concentration filing

A. Basic legal framework

According to the AML, when a proposed concentration of undertakings reaches any of certain prescribed thresholds, the undertakings must file with the Reviewing Authority before proceeding with the transaction. This is known as the pre-concentration filing requirement. The AML applies not only to concentrations within China, but also beyond China's territory if such concentrations affect market competition within the PRC.[6] Such extraterritorial application effects of the AML will enable the Chinese Reviewing Authority to examine extraterritorial transactions. The State Council recently issued the Provisions on Pre-Concentration Filing Criteria of Undertakings (the "Filing Criteria Provisions"), which define the thresholds triggering the filing requirement.

Before the adoption of the AML, the Rules on Mergers with and Acquisitions of Domestic Enterprises by Foreign Investors (the "M&A Rules") issued on 8 August 2006 constituted the main pre-concentration filing rules enforced in China. The Anti-Monopoly Investigation Office of MOFCOM issued the Guidelines for Anti-Monopoly Filing for Mergers with and Acquisitions of Domestic Enterprises by Foreign Investors (the "Filing Guidelines") on 8 March 2007 to further clarify requirements under the M&A Rules. Certain provisions in the M&A Rules and the Filing Guidelines that contradict the AML's implementation will be replaced by relevant provisions in the AML. Provisions in the M&A Rules and the Filing Guidelines that do not contradict the AML's implementation will remain valid and enforceable before relevant new rules are introduced. Therefore, the AML, Filing Criteria Provisions, M&A Rules, and Filing Guidelines collectively constitute China's basic legal framework for pre-concentration filing rules.

B. Provisions in the M&A Rules and Filing Guidelines superseded by the AML and Filing Criteria Provisions

Several key provisions in the AML and the Filing Criteria Provisions supersede parts of the M&A Rules and Filing Guidelines.

First, the Filing Criteria Provisions make substantial changes to the filing thresholds described in the M&A Rules. The turnover threshold under the M&A Rules could be triggered by only one of the undertakings,[7] and as a result a large number of global M&A transactions could trigger a filing even if the transactions have minimal impact on the Chinese market. In contrast, the Filing Criteria Provisions adopt a turnover criterion that incorporates a "local nexus" requirement by addressing situations where at least two of the involved undertakings each had a minimum turnover in China during the previous fiscal year.[8] Furthermore, the Filing Criteria Provisions eliminate the "market share" criterion, the "assets" criterion, and the "number of foreign invested enterprises" criterion previously contained in the M&A Rules. The large majority of overseas transactions that have little impact on the Chinese market would therefore be exempted from filing.

In addition, the AML states that even if a concentration falls under any of the prescribed criteria, undertakings may be exempted from filing under certain situations.[9] At the same time, however, the Filing Criteria Provisions state that even if a concentration does not fall under any of the prescribed criteria, MOFCOM may conduct investigations if the concentration has, or may have, the effect of eliminating or restricting competition.[10]

[6]Article 2 of the AML.

[7]According to the M&A Rules, in the case of a foreign-domestic M&A transaction, a filing is required if any of the following conditions is met: (1) any party to the M&A transaction had a turnover in the Chinese market during the current year exceeding RMB 1,500,000,000; (2) the foreign investor acquired more than 10 enterprises in related industries in China in one year; (3) any of the parties to the M&A transaction already control no less than 20% of the relevant Chinese market; or (4) the M&A transaction will cause the relevant market share of any of the parties to reach 25%. The corresponding conditions for foreign-foreign transactions are as follows: (1) any of the parties to the M&A transaction has assets in China valued at no less than RMB 3 billion; (2) any of the parties to the M&A transaction had a turnover in the relevant Chinese market during the current year of no less than RMB 1.5 billion; (3) any of the parties to the M&A transaction and its affiliates already control no less than 20% of the relevant market in China; (4) the M&A transaction will cause any of the parties to the M&A transaction and its affiliates to obtain a 25% share of the relevant market in China; or (5) the M&A transaction will cause the number of foreign invested enterprises in related industries in China to exceed 15 where any of the parties to the transaction have a direct or indirect equity interest. (Note that filing thresholds can be triggered even if one of the parties involved in a M&A transaction has no assets or business in China.)

Second, the M&A Rules failed to specify the legal liabilities for failing to file a M&A transaction meeting the required thresholds. Such omissions significantly undermine the effectiveness of anti-monopoly regulation. To address this, the AML stipulates specific provisions related to civil liabilities and administrative liabilities for violations of the AML.[11]

Third, the AML replaces the timeline for review under the Filing Guidelines, creating two main differences between the two regulations. First, the current AML makes the initial review period, which starts from the receipt of the complete filing materials, 30 days, instead of 30 working days under the Filing Guidelines.

Second, the entire review process under the AML can extend as long as 180 days (a 30-day initial review plus a 90-day further review plus a 60-day extended review)[12] under extreme circumstances, a change from the Filing Guidelines where the entire review process can extend as long as 90 working days.[13]

Lastly, a "negative approval" mechanism was implemented under the M&A Rules, under which the review process would be deemed cleared if the filing party had not received any notice for further review within 30 working days after the authorities received all filing materials. Filing parties would not receive any kind of approval in writing certifying that their filing was cleared. This had the potential to create uncertainties and concerns for the filing parties.

To address the abovementioned problem, the AML requires MOFCOM to decide whether to conduct further review within 30 days of receipt of the documents submitted by the undertakings, and MOFCOM must notify the undertakings of this decision in written form. Such written decision may approve or prohibit the concentration, or attach restrictive conditions on an approved concentration.[14] Early clearance of a filing is impossible under the "negative approval" mechanism, but under the "written approval" mechanism, early clearance of a filing is possible since MOFCOM may approve the filing at any time within the specified time limits.

[8]The "local nexus requirement" is adopted by the International Competition Network in its Recommended Practices for Merger Notification Procedures that say filing thresholds should incorporate appropriate material standards regarding the strength of the local nexus requirement for concentration filing, and a transaction's nexus to a jurisdiction should be determined based on activity within that jurisdiction. This "activity" should be measured by considering the activities of at least two parties to the transaction in the local territory or by considering the activities of the acquired business in the local territory. The "local nexus requirement" may sound technical, but its underlying purpose is rather obvious and simple: filing should not be required unless the transaction is likely to have a direct, substantial, and foreseeable effect within the jurisdiction concerned. Filing thresholds should be designed only to capture transactions that are likely to produce real anti-competitive effects in the jurisdiction's territory, and which create detriment to that jurisdiction's consumers. According to the Filing Criteria Provisions, pre-concentration filings must be filed with MOFCOM if a concentration meets any of the following criteria: (1) During the previous fiscal year, the total global turnover of all undertakings participating in the concentration exceeded RMB 10 billion, and at least two of these undertakings each had a turnover of more than RMB 400 million within China; or (2) During the previous fiscal year, the total turnover within China of all the undertakings participating in the concentration was more than RMB 2 billion, and at least two of these undertakings each had a turnover of more than RMB 400 million within China.

[9]According to Article 22 of the AML, undertakings may be exempted from filing a concentration with the anti-monopoly enforcement authority of the State Council in either of the following situations: (1) Among all the undertakings involved in the concentration, one undertaking possesses more than 50% of the voting shares or assets of each of the other undertakings; or (2) an undertaking not involved in the concentration possesses more than 50% of the voting shares or assets of each of the other undertakings involved in the concentration.

[10]Article 4 of the Filing Criteria Provisions. The authority is granted extensive investigative power to conduct on-site examinations; review contracts, correspondence, and financial information; and question relevant parties, a right that includes the power to inquire about the bank accounts of the undertaking in question. At the same time, the AML also provides specific procedural rules for such investigations. It is required that there shall be at least two officials who shall present their identifications when conducting investigations. The officials shall take written minutes of the inquiry and investigation and give the minutes to the investigated parties to sign. The concerned undertakings and interested parties shall have the right to submit statements of their opinions. See Article 39, 40, and 43 of the AML.

[11]In the case an undertaking fails to file for a concentration that meets the threshold requirements, MOFCOM must order the undertakings concerned to cease the concentration, dispose of all or part of their stock or assets within a specific time, transfer part of their business, and adopt other necessary measures to restore the market to its pre-concentration state. MOFCOM may also impose a fine of up to RMB 500,000 on the parties. The undertakings also bear civil liability in the event that they cause damage to others by violating the AML. See Article 48 and 50 of the AML.

C. Provisions in M&A Rules and Filing Guidelines that remain effective

A notable provision in the M&A Rules that remains effective concerns MOFCOM's right to hold hearings on certain transactions under review.[15] In practice, there may be a hearing on the transaction under review if the filing party fails to provide complete and persuasive application materials to define the relevant market, analyse market competition, or if outside parties interested in the concentration file an application requesting such a hearing. The time for holding the hearing is determined on a case-by-case basis and will not be included in the review period. Some of the most controversial high-profile cases, such as the Supor/SEB case and the Carlyle/XCG case[17] resulted in such hearings, causing the review process to be extended. After the implementation of the AML, hearings and extended review process would still be reasonably anticipated based on this provision in the M&A Rules.

The large majority of the rules provided for in the Filing Guidelines, such as the timing for the filing, the filing party, the filing materials, and the confidentiality requirement, will remain valid and enforceable under the AML. Also, of particular importance, the pre-filing consultation mechanism, which allows undertakings to consult with MOFCOM regarding questions about filings prior to the formal filing, will remain effective.

III. Uncertainties surrounding the current pre-concentration filing rules

For the purposes of legal certainty, it is important to have clear and unambiguous pre-concentration filing rules. However, many provisions under the current legal framework are rather vague and require further interpretation and definition by PRC authorities. At this early stage in the development of China's pre-concentration filing rules, dealmakers should pay special attention to the following issues:

A. Definition of "concentration"

Under the AML, the "concentration of undertakings" means: (1) mergers of undertakings, (2) undertakings controlling other undertakings through acquisition of the other's equity or assets, or (3) undertakings controlling other undertakings through contracts or other means, or possessing an ability to decisively influence other undertakings.[18]

Though the AML provides a list of situations that constitute a "concentration," the AML's jurisdiction over certain situations remains unclear. For example, it is uncertain if acquiring minority interests, or the same percentage interests as other shareholding undertakings, of the target undertaking should be considered a concentration. In addition, the AML does not explicitly state that the creation of a joint venture constitutes a concentration.

[12]Specifically under the AML, all filings are subject to an initial 30-day review period from the date of filing and an additional 90-day review (extendable by a further 60 days) from the end of initial review if not cleared within the first 30 days.

[13]Article 4 of the Filing Guidelines.

[14]Article 28 and 29 of the AML.

[15]Article 52 of the M&A Rules.

[16]In August 2006, Supor agreed to sell a 61% stake in its operations to SEB in a three-stage transaction. Given Supor's leading position in China's cookware market (at the time it held a 47% market share), domestic competitors strongly objected to the transaction, concerned that SEB would monopolise the Chinese market after taking control of Supor. MOFCOM carried out the anti-monopoly review in October 2006 and carried out hearings during the review process, but eventually approved the merger on April 11, 2007.

[17]In October 2005, US Carlyle Group (the "Carlyle") intended to purchase an 85% stake in Xuzhou Construction Machinery (the "XCM"), a subsidiary company of Xuzhou Construction Group (the "XCG"). MOFCOM carried out the anti-monopoly review and although it carried out hearings during the review process, it eventually approved the merger in March 2007. When the merger was finally approved by MOFCOM, Carlyle's stake in XCM had fallen to 45%. XCG is a state-owned enterprise, and so the case attracted special attention from the government authorities. On July 23, 2008, Carlyle and XCG jointly made an announcement, stating that both parties decided to cease cooperation under the agreement entered into in October 2005. Therefore, the Carlyle/XCG merger ended up in failure.

Another serious practical difficulty results from the lack of rules for whether multiple transactions would be subject to one filing or several filings. Examples of multiple transactions include the acquisition of an additional percentage of the voting shares or assets of any other undertaking after already acquiring a percentage; acquisition of a certain percentage of the voting shares or assets of any other undertaking as consideration for the sale of its own voting shares or assets; or a series of securities transactions that take place within a reasonably short time period.

The current pre-concentration filing rules are also silent on whether the definition of "concentration" should exclude certain types of transactions, specifically those where the purpose of acquiring control over other undertakings is not directly or indirectly determined to affect the competitive conduct of the acquired undertakings. Examples of such transactions are undertakings that are temporarily holding securities in an undertaking with the intention of reselling them, or the acquisition of bankrupt undertakings.

B. Calculation of "turnover"

Neither the AML nor the Filing Criteria Provisions specify the method for calculating the turnover of participating undertakings, leaving it to be addressed at a later stage. The 2006 draft of the AML stated the turnover calculation should apply to affiliated undertakings and undertakings under the control of undertakings participating in a concentration, indicating the preference for a turnover calculation method for all affiliated undertakings. In practice, however, it is often very difficult or burdensome for the undertakings (especially multinational companies) to calculate the turnover of all their affiliated undertakings and undertakings under their control.

A related ambiguity concerns the composition of "turnover." It is unclear whether sales rebates, value-added taxes, and other taxes that are directly related to turnover should be calculated in "turnover" under the AML.

C. Ambiguous documentation requirements

There are two issues in the pre-concentration filing rules with notable ambiguities. The first concerns the ambiguity of certain documentation requirements. For example, it is unclear what should be included in "the explanation regarding the impact a concentration will have on the competition in the relevant market" required under the AML. Similarly, the Filing Guidelines list certain key terms, such as "company scale," "control," "substantive terms of the M&A agreement," etc., in the filing materials without clearly defining such terms. Herein, the filing parties and MOFCOM might interpret the required filing materials differently, causing uncertainties in the review process.

The second issue is that the flexibility and discretion granted to the filing parties or MOFCOM under the aforementioned rules may cause uncertainty. The AML lists a limited set of filing materials but also authorises MOFCOM to require "other documents and information," which creates the possibility that MOFCOM could require excessive information.

In an effort to reduce the burden of the required filing materials imposed on filing parties, the Filing Guidelines reflect a certain degree of flexibility and provide some discretion for the parties to limit the materials they submit on a case-by-case basis. For example, certain information requirements are only listed as recommendations instead of mandatory obligations.[19] Furthermore, the Filing Guidelines make it clear that if a filing party believes that the submission of certain materials is unnecessary, the party may apply to MOFCOM to fully or partially exempt such filing materials. However, such exemptions are completely subject to the discretion of MOFCOM, making it difficult to predict whether MOFCOM will grant an exemption.

[18]Article 22 of the AML.

D. National Security Review

The recently issued Provisions on Major Responsibilities, Internal Organisations and Personnel for NDRC (the "NDRC Job Responsibilities") nail down that when MOFCOM deems that a specific transaction involves national security concerns, it will submit the transaction to the committee jointly established by MOFCOM, NDRC and other government authorities (the "Committee") for the national security review. However, many things are still unclear about this mechanism, namely what would be the threshold to trigger a review, how such a review would be conducted, the timeline for the review, etc. Such uncertainty will still increase the angst of the dealmakers.

The AML clearly spells out that a national security review of a pre-concentration filing is separate from an anti-monopoly review. However, due to the uncertainties surrounding the national security review, there is still possibility that the national security review will be conducted in certain cases in combination with the anti-monopoly review.

IV. Conclusion

China will implement a full-blooded pre-concentration filing regime, and dealmakers interested in the Chinese market would be wise to accordingly adapt their own business operations. If dealmakers raise concerns in China, they will have to address these concerns with the same seriousness they would give to a similar situation in the US or Europe.

Although the implementation of the AML marks an important move towards a more robust pre-concentration filing regime, it remains to be seen how the regime will operate in practice since many of its facets are currently vague. Therefore, it is advisable that dealmakers interested in Chinese market include the AML and its related regulations in their deal planning, and especially important that they closely monitor the future development of the pre-concentration filing rules. To reduce uncertainties currently surrounding the pre-concentration filing rules, it may be wise for dealmakers to maintain close relations and coordinate with relevant authorities, especially to take advantage of the pre-filing consultation mechanism.

[19]Article III (4), (5), (7), (10), (11), and (12) of the Filing Guidelines.

EU institutions disagree on ownership unbundling

By Dr Stefanie von Hoff, Hogan & Hartson LLP

Almost a year ago, the European Commission (the "Commission") introduced the third legislative package for the EU electricity and gas markets, including new provisions for unbundling, whereby unbundling simply means the separation of energy network activities from production and supply activities. So far, existing legislation requires in this respect only that network operations be legally and functionally separated from supply and generation or production activities. Some Member States have therefore created a totally separate company for network operation. Others have created a legal entity within an integrated company.

The Commission's proposal now foresees a full ownership unbundling for the transmission systems and transmission system operators which shall apply in the same manner to the electricity and gas sector. In practice this means that Member States must ensure that the same person or persons cannot exercise control over a supply undertaking and, at the same time, hold any interest in or exercise any right over a transmission system operator or transmission system. This provision also applies vice versa, that is, control over a transmission system operator precludes the possibility of holding any interest in or exercising any right over a supply undertaking.

The Commission's reasoning for this is the following: vertically integrated companies have an in-built incentive both to under-invest in new networks and to privilege its own sales companies when it comes to network access. The already existing legal and functional unbundling do not solve this fundamental conflict of interest within integrated companies. Therefore, the Commission considers full ownership unbundling to be the best solution. Nevertheless, the proposal also included an alternative to ownership unbundling – the so-called independent system operator (ISO). According to this option, the supply company can still own the physical network assets, but it has to leave the entire operation, maintenance, and investment in the network to an independent company.

The provisions on ownership unbundling have been one of the most disputed aspects of the energy package ever since its publication on September 19, 2007. Great Britain, the Netherlands, Denmark, Sweden, Finland and Spain strongly favoured ownership unbundling. Eight Member States, notably Germany and France, questioned full ownership unbundling and submitted their own proposal in a letter addressed to the EU Parliament in January 2008.

Based on this proposal, the EU Council reached a compromise on ownership unbundling, modeled after a so-called "third way," an alternative which shall coexist with the proposals made by the Commission. The "Effective and Efficient Unbundling" allows European energy companies to retain their network assets, provided they meet the sharpened provisions on legal unbundling. The provisions would address issues such as assets, staff, financial resources, and identity of the TSO, that shall be clearly distinct from the parent company and organised in the legal form of a joint-stock company, professional ethics that apply to its top management in order to ensure their independence from any generation or supply interests and the compliance officer who shall monitor the non-discriminatory behavior of the TSO. A ten year national network development plan shall ensure sufficient and efficient investment into the grid. The regulatory authority shall have the power to oblige the TSO to realise the necessary investment or to organise a tender for third investors.

The dispute went on. The European Parliament challenged the compromise and went even further than the original proposal by the Commission with regard to the electricity market. On June 18, 2008, it rejected the compromise reached by the Council by 378 votes versus 267 in favour, with 22 abstentions and decided in favour of full ownership unbundling as the only option for electricity companies. The Parliament did not accept the exception for the so called ISO. With respect to the internal gas market the Parliament voted on two reports and rejected the ISO option for the gas market, but endorsed the compromise reached by the 6 June Council meeting on July 9th, 2008. However, they did equip it with another safeguard: "an independent trustee" meant to protect the asset value of the transmission system operator.

What's next? The legal dispute must be settled by EU institutions. The EU Council could adopt the opinion of the Parliament which is unlikely. Therefore, it will be necessary for Council and Parliament to reach a consensus on ownership unbundling. Otherwise, the Parliament has the power to veto the EU Council compromise reached on June 6, 2008, by its absolute majority.

Recent developments in the energy market might support an agreement in favour of full ownership unbundling. There are numerous Member States in the EU which have, in recent years, introduced ownership unbundling for their electricity and gas networks. In electricity, about half of the Member States have ownership unbundled grid operators (e.g. Ireland, Italy, Portugal, Czech Republic, Finland); in gas there are seven Member States (e.g. Sweden, Spain, the Netherlands). All Member States report positive effects with regard to price development, grid investment and degree of market concentration. There are also examples of an ISO within the European Union. The best known example is the Scottish ISO for electricity. Since 2005 National Grid operates the networks of the two vertically integrated electricity companies Scottish Power and Scottish & Southern Energy. Very recently Poland has established an organisational structure in the electricity market which is also very similar to the ISO model.

Furthermore, recent developments in Germany as one of the major opponents of full ownership unbundling might help to promote a consensus between Parliament and the Council. Several antitrust investigations which are currently being pursued by the Commission might be settled by German energy companies "voluntarily" selling their grids. Thus, E.ON officially submitted its commitment to divest its Transmission Business consisting of its 380/220 kV-line network, the system operation of the E.ON control area and related activities. The Commission has already announced its intention to declare those commitments to be binding and to not further pursue the antitrust investigation.

As far as the gas sector is concerned, RWE offered to settle ongoing antitrust investigations by committing to sell its gas transmission system network in the west of Germany to an independent operator once all the respective internal company approvals have been obtained. In this case, too, the Commission intends to declare those commitments to be binding once officially submitted to the Commission and market tested. Finally, there is a third energy player, the fourth-biggest German power group Vattenfall Europe which has announced its decision to sell its transmission grid to a serious and financially solid investor at the end of July.

Live deals – Europe

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Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
Acambis Plc / Sanofi-Aventis .	1 ACM = GBP1.90	25 Jul 2008	31 Oct 2008	53		United Kingdom	GBP-274m	0.93%	0.00%	6.40%
Alliance & Leic. / Santander Centr.	1 AL/ = 0.3333 SAN	14 Jul 2008	31 Oct 2008	53		United Kingdom	GBP-1,317m	0.40%	-0.76%	2.75%
Awilco Offshore. / China Oilfield .	1 AWO = EUR10.5861	07 Jul 2008	31 Oct 2008	53		Norway	EUR-1,566m	0.99%	0.55%	6.80%
Axon Group Plc / Infosys Technol.	1 AXO = GBP5.9775	25 Aug 2008	27 Nov 2008	80		United Kingdom	GBP-423m	-3.77%	-1.33%	-17.20%
Benfield Group . / Aon Corporation	1 BFD = GBP3.50	22 Aug 2008	31 Dec 2008	114		United Kingdom	GBP-728m	1.30%	-0.66%	4.17%
Brostrom AB / AP Moeller - Ma.	1 BROB = EUR6.0939	27 Aug 2008	30 Nov 2008	83		Sweden	EUR-379m	2.18%	0.03%	9.57%
Clarins / Financiere FC	1 CLR = EUR55.50	27 Jun 2008	13 Sep 2008	5		France	EUR-742m	0.00%	0.00%	0.00%
Continental AG / Schaeffler KG	1 CON = EUR75.00	15 Jul 2008	16 Sep 2008	8	25 Sep 2008	Germany	EUR-11,983m	1.23%	-0.19%	56.04%
Detica Group Pl. / BAE Systems Plc	1 DCA = GBP4.40	28 Jul 2008	11 Sep 2008	3	25 Sep 2008	United Kingdom	GBP-510m	0.23%	0.00%	27.72%
Enodis Plc / Manitowoc Compa.	1 ENO = GBP3.28	14 Apr 2008	27 Oct 2008	49	10 Nov 2008	United Kingdom	GBP-1,185m	1.71%	0.00%	12.70%
EPCOS AG / TDK Corporation	1 EPC = EUR17.85	31 Jul 2008	07 Oct 2008	29	21 Oct 2008	Germany	EUR-1,157m	0.79%	0.00%	9.95%
GL Trade SA / SunGard Data Sy.	1 GLT = EUR41.70	01 Aug 2008	31 Oct 2008	53		France	EUR-387m	3.01%	-0.26%	20.76%
Guala Closures . / GCL Holding (Ac.	1 GCL = EUR4.30	17 Jun 2008	19 Sep 2008	11		Italy	EUR-289m	0.47%	0.00%	15.51%
Imperial Energy. / Oil and Natural.	1 IEC = GBP12.50	26 Aug 2008	31 Dec 2008	114		United Kingdom	GBP-1,196m	6.84%	-1.39%	21.89%
Jerini AG / Shire plc (fka .	1 JI4 = EUR6.25	03 Jul 2008	10 Sep 2008	2	24 Sep 2008	Germany	EUR-328m	0.00%	0.32%	0.00%
Meliorbanca SpA / Banca Popolare .	1 MEL = EUR3.20	24 Jun 2008	30 Nov 2008	83		Italy	EUR-400m	1.11%	0.00%	4.86%
Metal Industry . / Iberdrola Renov.	1 ROKKA = EUR16.00	01 Jul 2008	10 Nov 2008	63		Greece	EUR-329m	0.00%	0.00%	0.00%
Rio Tinto plc / BHP Billiton pl.	1 RIO = 2.72 BHP + GBP14.51	06 Feb 2008	31 Dec 2008	114		United Kingdom	GBP-44,959m	22.14%	-1.21%	70.88%
Speedel Holding. / Novartis AG	1 SPPN = EUR80.58	10 Jul 2008	05 Sep 2008	Completed	09 Oct 2008	Switzerland	EUR-636m	-1.23%	-0.23%	N/A

Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
SSP Holdings Pl. / Hellman & Fried.	1 SSPH = GBP1.90	23 Jul 2008	24 Sep 2008	16	08 Oct 2008	United Kingdom	GBP-156m	0.80%	0.00%	18.15%
Taylor Nelson S. / WPP Group Plc	1 TNS = 0.1889 WPP + GBP1.73	09 Jul 2008	16 Oct 2008	38	30 Oct 2008	United Kingdom	GBP-1,122m	0.62%	-0.02%	5.93%
TDG Plc (former. / Laxey Partners .	1 TDG = GBP2.50	04 Jul 2008	01 Oct 2008	23		United Kingdom	GBP-202m	0.40%	-0.30%	6.37%
Thus Group Plc / Cable & Wireles.	1 THUS = GBP1.80	30 Jun 2008	09 Sep 2008	1	23 Sep 2008	United Kingdom	GBP-329m	0.28%	-0.42%	101.69%
Union Fenosa SA. / Gas Natural SDG.	1 UNF = EUR18.33	31 Jul 2008	31 Oct 2008	53		Spain	EUR-15,868m	5.59%	-0.12%	38.48%
Utimaco Safewar. / Sophos Inc.	1 USA = EUR14.75	28 Jul 2008	29 Sep 2008	21		Germany	EUR-208m	4.68%	1.61%	81.42%

Live deals – Asia

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Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
Abra Mining Lim. / Hunan Nonferrou.	1 AII = AUD0.808	13 May 2008	22 Sep 2008	14	11 Sep 2008	Australia	AUD-96m	18.82%	6.60%	490.76%
Acom Co., Ltd. / Mitsubishi UFJ .	1 8572 = JPY3565.957	08 Sep 2008	21 Oct 2008	43		Japan	JPY-499,636m	13.93%	-4.15%	118.23%
Amtek India Lim. / Amtek Auto Limi.	1 AMTEKIN = 0.44 AMTEKAUTO	01 Aug 2008	01 Nov 2008	54		India	INR-8,872m	0.99%	2.22%	6.68%
Anzon Australia. / Roc Oil Company.	1 AZA = 0.792 ROC + AUD0.05	16 Jun 2008	06 Oct 2008	28	27 Oct 2008	Australia	AUD-337m	3.85%	5.11%	50.14%
Ausdrill Limite. / Macmahon Holdin.	1 ASL = 1.65 MAH	21 May 2008	29 Sep 2008	21	07 Oct 2008	Australia	AUD-425m	20.91%	2.11%	363.45%
Australasian Re. / Resource Develo.	1 ARH = AUD2.20	07 Aug 2008	31 Dec 2008	114		Australia	AUD-526m	84.87%	-6.43%	271.75%
Bank Internasio. / Malayan Banking.	1 BNII = USD0.0517	26 Mar 2008	30 Nov 2008	83		Indonesia	USD-2,398m	4.66%	-0.64%	20.47%
Bravura Solutio. / Ironbridge Capi.	1 BVA = AUD1.73	05 May 2008	30 Oct 2008	52		Australia	AUD-109m	124.68%	8.43%	875.12%
China Huiyuan J. / The Coca-Cola C.	1 1886 = HKD12.20	03 Sep 2008	11 Feb 2009	156		China	HKD-14,600m	22.74%	-4.35%	53.20%
China Netcom Gr. / China Unicom Lt.	1 906 = 1.508 762	02 Jun 2008	15 Oct 2008	37		Hong Kong	HKD-127,553m	-0.84%	0.22%	-8.28%
Chongqing Titan. / Panzhihua New S.	1 000515 = 1.78 000629	05 Nov 2007	30 Sep 2008	22		China	CNY-2,159m	22.42%	1.02%	372.02%
CITIC Internati. / CITIC Group (Fo.	1 183 = 1.00 CGL + HKD1.46	11 Jun 2008	31 Dec 2008	114		Hong Kong	HKD-35,177m	-5.56%	-0.13%	-17.82%
Core Healthcare. / Hong Kong Healt.	1 8250 = 1.4286 397	05 Jun 2008	26 Aug 2008	Completed	18 Sep 2008	Hong Kong	HKD-679m	-5.33%	0.00%	N/A
Cosmo Securitie. / CSK Holdings Co.	1 8611 = 0.046 9737	23 May 2008	01 Aug 2008	Completed	19 Sep 2008	Japan	JPY-38,124m	10.40%	1.79%	N/A
D&M Holdings In. / Bain Capital LL.	1 6735 = JPY510.00	20 Jun 2008	05 Sep 2008	Completed	18 Sep 2008	Japan	JPY-46,976m	1.39%	-0.61%	N/A
Datacraft Asia . / Dimension Data .	1 D06 = USD1.33	22 Jul 2008	24 Nov 2008	77		Singapore	USD-591m	3.91%	-0.82%	18.52%
Indophil Resour. / Consortium for .	1 IRN = AUD1.3232	20 Jun 2008	22 Sep 2008	14	13 Oct 2008	Australia	AUD-335m	65.40%	-7.57%	1705.07%
Indosat Tbk, PT. / Qatar Telecom Q.	1 ISAT = USD0.6744	30 Jun 2008	15 Oct 2008	37		Indonesia	USD-3,562m	2.87%	-1.59%	28.29%
Industrial Conc. / IJM Corporation.	1 ICP = 0.60 IJM + USD0.0757	05 Sep 2008	31 Dec 2008	114		Malaysia	USD-317m	12.17%	-5.14%	38.96%
Intelligence Lt. / Usen Corporatio.	1 4757 = 238.00 4842	10 Jul 2008	30 Sep 2008	22	30 Nov 2008	Japan	JPY-20,088m	22.47%	-5.85%	372.81%

Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
Kibun Food Chem. / Kikkoman Corpor.	1 4065 = 0.94 2801	19 Mar 2008	01 Aug 2008	Completed	22 Sep 2008	Japan	JPY-31,958m	9.56%	2.99%	N/A
Mineral Securit. / CopperCo Ltd. (.	1 MXX = 2.20 CUO	29 Jan 2008	04 Aug 2008	Completed	15 Sep 2008	Australia	AUD-132m	3.45%	-2.67%	N/A
Mitsubishi UFJ . / Mitsubishi UFJ .	1 8583 = 0.37 8306	28 May 2008	01 Aug 2008	Completed	22 Sep 2008	Japan	JPY-366,207m	-1.61%	-2.27%	N/A
Nippon Sharyo L. / Central Japan R.	1 7102 = JPY352.2149	15 Aug 2008	07 Oct 2008	29	15 Oct 2008	Japan	JPY-49,161m	5.14%	-0.95%	64.68%
Origin Energy L. / BG Group Plc (f.	1 ORG = AUD15.39	24 Jun 2008	26 Sep 2008	18	26 Oct 2008	Australia	AUD-15,453m	-12.80%	-11.14%	-259.65%
Pangang Group S. / Panzhihua New S.	1 000569 = 0.82 000629	05 Nov 2007	30 Sep 2008	22		China	CNY-4,005m	22.46%	1.28%	372.62%
Putrajaya Perda. / UBG Berhad (for.	1 PPB = USD1.4872	18 Jul 2008	12 Aug 2008	Completed	20 Sep 2008	Malaysia	USD-197m	5.48%	0.33%	N/A
Ranbaxy Laborat. / Daiichi Sankyo .	1 ranbaxy = INR546.472	11 Jun 2008	19 Sep 2008	11	19 Sep 2008	India	INR-172,453m	18.25%	-2.26%	605.42%
Ricoh Elemex C. / Ricoh Company, .	1 7765 = 0.50 7752	15 May 2008	01 Aug 2008	Completed	24 Sep 2008	Japan	JPY-21,156m	2.75%	0.23%	N/A
Rio Tinto Limit. / BHP Billiton Lt.	1 RIO = 3.40 BHP	06 Feb 2008	27 Feb 2009	172		Australia	AUD-50,364m	15.95%	1.67%	33.86%
SBI E*Trade Sec. / SBI Holdings In.	1 8701 = 3.55 8473	15 Jan 2008	01 Aug 2008	Completed	30 Sep 2008	Japan	JPY-260,160m	7.68%	0.22%	N/A
Shanghai Power . / Shanghai Electr.	1 600627 = CNY28.05	30 Aug 2007	15 Sep 2008	7		China	CNY-14,736m	-1.41%	1.74%	-73.31%
Spice Communica. / Idea Cellular L.	1 SPCM = INR77.30	25 Jun 2008	15 Mar 2009	188		India	INR-51,986m	2.59%	-1.24%	5.02%
St George Bank . / Westpac Banking.	1 SGB = 1.31 WBC	13 May 2008	21 Nov 2008	74		Australia	AUD-17,882m	4.89%	0.33%	24.13%
Sunshine Gas Li. / Queensland Gas .	1 SHG = 0.2857 QGC + AUD1.65	20 Aug 2008	13 Oct 2008	35		Australia	AUD-931m	0.71%	-0.95%	7.44%
Unisteel Techno. / Kohlberg Kravis.	1 U24 = USD1.4286	07 Jun 2008	12 Sep 2008	4	22 Sep 2008	Singapore	USD-547m	5.18%	-0.57%	472.27%
United Metals H. / China National .	1 2302 = HKD1.77	24 Jun 2008	10 Feb 2009	155		Hong Kong	HKD-1,820m	-63.13%	-2.90%	-148.65%
U-Store Co Ltd / Uny Co., Ltd.	1 9859 = 0.83 8270	10 Apr 2008	21 Aug 2008	Completed	17 Oct 2008	Japan	JPY-35,737m	-29.58%	1.57%	N/A

Live deals – Asia

Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
UTV Software Co. / The Walt Disney.	1 UTVSOF = INR830.785	18 Feb 2008	12 Oct 2008	34	31 Aug 2008	India	INR-18,434m	3.18%	0.77%	34.18%
Victor Company . / Kenwood Corpora.	1 6792 = 2.00 6765	12 May 2008	01 Oct 2008	23	30 Nov 2008	Japan	JPY-57,546m	1.89%	-1.30%	29.94%
Wing Lung Bank . / China Merchants.	1 96 = HKD156.50	02 Jun 2008	31 Dec 2008	114		Hong Kong	HKD-33,668m	7.93%	0.74%	25.39%
Thomas Cook (In. / Thomas Cook Gro.	1 THOMASCOOK = INR100.886	10 Mar 2008	13 Jun 2008	4		India	INR-15,138m	7.15%	0.68%	373.06%
Tokyu Store Cha. / Tokyu Corporati.	1 8197 = 1.00 9005	27 Mar 2008	01 Jul 2008	22	30 Aug 2008	Japan	JPY-40,484m	0.52%	-0.01%	7.59%
Toys R Us Japan / Toys 'R Us	1 7645 = JPY729.00	13 May 2008	10 Jun 2008	1	17 Jun 2008	Japan	JPY-24,871m	0.55%	-0.14%	40.27%
Unisteel Techno. / Kohlberg Kravis.	1 U24 = USD1.4286	07 Jun 2008	29 Aug 2008	81		Singapore	USD-519m	10.74%	4.13%	46.69%
U-Store Co Ltd / Uny Co., Ltd.	1 9859 = 0.83 8270	10 Apr 2008	21 Aug 2008	73	17 Oct 2008	Japan	JPY-36,928m	-31.43%	-0.48%	-150.95%
UTV Software Co. / The Walt Disney.	1 UTVSOF = INR812.638	18 Feb 2008	31 Jul 2008	52	15 Aug 2008	India	INR-17,816m	4.43%	-0.42%	29.41%
Victor Company . / Kenwood Corpora.	1 6792 = 2.00 6765	12 May 2008	01 Oct 2008	114	30 Nov 2008	Japan	JPY-89,395m	2.02%	0.00%	6.32%
Wing Lung Bank . / China Merchants.	1 96 = HKD156.50	02 Jun 2008	21 Jan 2009	226		Hong Kong	HKD-35,688m	2.02%	-0.40%	3.21%

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Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
Allied Waste In. / Republic Servic.	1 AW = 0.45 RSG	23 Jun 2008	31 Dec 2008	114		USA	USD-5,687m	13.85%	-3.86%	44.35%
Alpha Natural R. / Cleveland-Cliff.	1 ANR = 0.95 CLF + USD22.23	16 Jul 2008	31 Dec 2008	114		USA	USD-5,507m	26.44%	2.14%	84.64%
Anheuser-Busch . / InBev SA (forme.	1 BUD = USD70.00	14 Jul 2008	31 Dec 2008	114		USA	USD-48,631m	2.64%	-0.03%	8.45%
APP Pharmaceuti. / Fresenius SE	1 APPX = USD23.00	07 Jul 2008	19 Sep 2008	11		USA	USD-3,807m	-3.16%	-0.25%	-104.78%
Applied Biosyst. / Invitrogen Corp.	1 ABI = 0.4543 IVGN + USD18.1494	12 Jun 2008	30 Dec 2008	113		USA	USD-6,710m	2.23%	-0.16%	7.20%
Apria Healthcar. / Blackstone Grou.	1 AHG = USD21.00	19 Jun 2008	15 Sep 2008	7		USA	USD-855m	7.69%	-1.29%	401.10%
Arlington Tanke. / General Maritim.	1 ATB = 0.7463 GMR	06 Aug 2008	05 Dec 2008	88		Bermuda	USD-280m	-0.76%	-0.11%	-3.13%
Aurelian Resour. / Kinross Gold Co.	1 ARU = 0.317 KGC + USD0.8654	24 Jul 2008	15 Sep 2008	7		Canada	USD-668m	8.84%	-4.67%	460.93%
Barr Pharmaceut. / Teva Pharmaceut.	1 BRL = 0.6272 TEVA + USD39.90	18 Jul 2008	31 Dec 2008	114		USA	USD-7,259m	3.35%	0.23%	10.74%
BCE Inc / BCE Consortium	1 BCE = USD40.2149	30 Jun 2007	11 Dec 2008	94		Canada	USD-30,392m	6.87%	-0.46%	26.67%
Cadence Energy . / Barrick Gold Co.	1 CDS = USD6.3497	21 Jul 2008	15 Sep 2008	7		Canada	USD-371m	-0.10%	-0.10%	-5.01%
Castlepoint Hol. / Tower Group, In.	1 CPHL = 0.47 TWGP + USD1.83	05 Aug 2008	31 Dec 2008	114		Bermuda	USD-442m	4.54%	-0.16%	14.53%
CHC Helicopter . / First Reserve C.	1 FLY.A = USD30.7421	22 Feb 2008	15 Sep 2008	7		Canada	USD-1,334m	5.64%	-1.47%	294.24%
ChoicePoint Inc / Reed Elsevier p.	1 CPS = USD50.00	21 Feb 2008	15 Sep 2008	7		USA	USD-3,548m	0.81%	-0.20%	42.05%
Corn Products I. / Bunge Limited	1 CPO = 0.5142 BG	23 Jun 2008	15 Dec 2008	98		USA	USD-3,095m	0.97%	-0.29%	3.60%
Darwin Professi. / Allied World As.	1 DR = USD32.00	30 Jun 2008	15 Dec 2008	98		USA	USD-538m	1.23%	-0.61%	4.60%
DRS Technologie. / Finmeccanica Sp.	1 DRS = USD81.00	12 May 2008	15 Dec 2008	98		USA	USD-3,289m	2.08%	0.03%	7.74%
Eagle Test Syst. / Teradyne Inc	1 EGLT = USD15.65	02 Sep 2008	31 Dec 2008	114		USA	USD-355m	1.36%	-0.33%	4.35%
Energy East Cor. / Iberdrola SA	1 EAS = USD28.50	25 Jun 2007	12 Sep 2008	4		USA	USD-4,481m	0.67%	-0.04%	61.24%
EnergySouth Inc / Sempra Energy	1 ENSI = USD61.50	28 Jul 2008	31 Dec 2008	114		USA	USD-500m	0.18%	-0.31%	0.57%

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Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
First Calgary P. / ENI SpA	1 FCP = USD3.39	08 Sep 2008				Canada	USD-832m	3.91%	3.91%	
Fording Canadia. / Teck Cominco Li.	1 FDG = 0.245 TCK + USD82.00	29 Jul 2008	31 Oct 2008	53		Canada	USD-13,004m	5.24%	0.27%	36.07%
Foundry Network. / Brocade Communi.	1 FDRY = 0.0907 BRCD + USD18.50	21 Jul 2008	30 Dec 2008	113		USA	USD-2,672m	4.55%	0.05%	14.70%
Gold Eagle Mine. / Goldcorp Inc	1 GEA = 0.146 GG + USD6.3968	31 Jul 2008	19 Sep 2008	11		Canada	USD-1,081m	-0.54%	-0.56%	-17.94%
Greenfield Onli. / Microsoft Corpo.	1 SRVY = USD17.50	29 Aug 2008	30 Nov 2008	83		USA	USD-457m	0.81%	-0.12%	3.55%
Grey Wolf, Inc. / Precision Drill.	1 GW = 0.1883 PDS + USD5.00	25 Aug 2008	31 Dec 2008	114		USA	USD-1,497m	2.95%	-0.20%	9.44%
Hercules Incorp. / Ashland Inc	1 HPC = 0.093 ASH + USD18.60	11 Jul 2008	30 Nov 2008	83		USA	USD-2,449m	2.53%	-0.41%	11.14%
Hilb Rogal & Ho. / Willis Group	1 HRH = 0.6604 WSH + USD23.00	09 Jun 2008	15 Nov 2008	68		USA	USD-1,646m	-1.00%	-0.21%	-5.38%
HLTH Corporatio. / WebMD Corporati.	1 HLTH = 0.1979 WBMD + USD6.89	21 Feb 2008	31 Oct 2008	53		USA	USD-2,219m	6.61%	-0.45%	45.55%
Huntsman Corpor. / Hexion Specialt.	1 HUN = USD28.00	12 Jul 2007	15 Sep 2008	7		USA	USD-2,663m	133.33%	18.28%	6952.38%
i2 Technologies. / JDA Software Gr.	1 ITWO = USD14.86	11 Aug 2008	31 Dec 2008	114		USA	USD-313m	2.48%	-0.21%	7.95%
Ikon Office Sol. / Ricoh Company, .	1 IKN = USD17.25	27 Aug 2008	31 Dec 2008	114		USA	USD-1,626m	-0.52%	-0.99%	-1.66%
Intervoice Inc. / Convergys Corpo.	1 INTV = USD8.25	16 Jul 2008	03 Sep 2008	Completed	10 Sep 2008	USA	USD-322m	0.12%	-0.24%	N/A
Landry's Restau. / Fertitta Holdin.	1 LNY = USD21.00	16 Jun 2008	16 Oct 2008	38		USA	USD-298m	13.88%	-1.31%	133.35%
Longs Drug Stor. / CVS/Caremark Co.	1 LDG = USD71.50	12 Aug 2008	15 Nov 2008	68		USA	USD-2,573m	-0.53%	-0.10%	-2.84%
Nationwide Fina. / Nationwide Mutu.	1 NFS = USD52.25	06 Aug 2008	31 Dec 2008	114		USA	USD-7,169m	0.95%	-0.12%	3.03%
NDS Group Plc / The News Corpor.	1 NNDS = USD63.00	14 Aug 2008	31 Dec 2008	114		United Kingdom	USD-3,526m	3.98%	0.02%	12.74%
Northwest Airli. / Delta Air Lines.	1 NWA = 1.25 DAL	14 Apr 2008	31 Mar 2009	204		USA	USD-2,452m	3.05%	1.46%	5.45%
PeopleSupport I. / Aegis BPO Servi.	1 PSPT = USD12.25	04 Aug 2008	30 Sep 2008	22		USA	USD-256m	1.07%	-0.17%	17.80%
Philadelphia Co. / Tokio Marine Ho.	1 PHLY = USD61.50	23 Jul 2008	31 Dec 2008	114		USA	USD-4,278m	2.69%	-0.16%	8.61%

Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
Puget Energy In. / Puget Acquisiti.	1 PSD = USD30.00	26 Oct 2007	25 Oct 2008	47		USA	USD-3,553m	9.49%	-0.36%	73.69%
Rohm And Haas L. / The Dow Chemica.	1 ROH = USD78.00	10 Jul 2008	30 Jan 2009	144		USA	USD-14,752m	3.63%	0.18%	9.19%
Rothmans Inc / Philip Morris I.	1 ROC = USD28.221	31 Jul 2008	01 Oct 2008	23		Canada	USD-1,906m	0.83%	0.05%	13.11%
SAFECO Corporat. / Liberty Mutual .	1 SAF = USD68.25	23 Apr 2008	30 Sep 2008	22		USA	USD-6,082m	0.71%	0.15%	11.75%
Sciele Pharma, . / Shionogi & Co.,.	1 SCRX = USD31.00	01 Sep 2008	31 Dec 2008	114		USA	USD-973m	0.77%	-0.11%	2.47%
SI Internationa. / Serco Inc.	1 SINT = USD32.00	27 Aug 2008	31 Dec 2008	114		USA	USD-418m	1.65%	-0.23%	5.29%
Solana Resource. / Gran Tierra Ene.	1 SOR = 0.9528 GTE	29 Jul 2008	15 Dec 2008	98		Canada	USD-540m	2.68%	0.24%	9.97%
The Wm. Wrigley. / Mars Incorporat.	1 WWY = USD80.00	28 Apr 2008	01 Nov 2008	54		USA	USD-21,829m	0.57%	-0.06%	3.82%
UnionBanCal Cor. / Mitsubishi UFJ .	1 UB = USD73.50	18 Aug 2008	30 Sep 2008	22		USA	USD-10,115m	0.37%	-0.04%	6.12%
UST Inc. / Altria Group In.	1 UST = USD69.50	08 Sep 2008	31 Jan 2009	145		USA	USD-10,085m	2.60%	-1.22%	6.56%
Vital Signs Inc / General Electri.	1 VITL = USD74.50	24 Jul 2008	30 Nov 2008	83		USA	USD-983m	0.76%	-0.06%	3.33%
Wendy's Interna. / Triarc Companie.	1 WEN = 4.25 TRY	24 Apr 2008	30 Sep 2008	22		USA	USD-2,199m	0.07%	0.42%	1.12%
Xantrex Technol. / Schneider Elect.	1 XTX = USD14.1105	28 Jul 2008	30 Sep 2008	22		Canada	USD-406m	0.72%	0.12%	12.02%

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Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
ABG SA / Asseco Poland S.	1 ABG = 0.099 ACP	29 May 2008	01 Oct 2008	23		Poland	EUR-176m	-2.30%	-1.00%	-36.52%
Ammofos / Fosagro	1 AMMO = USD74.1068	16 Jun 2008	25 Aug 2008	Completed	19 Sep 2008	Russia	USD-993m	-32.69%	0.00%	N/A
Imperial Energy. / Oil and Natural.	1 IEC = GBP12.50	26 Aug 2008	31 Dec 2008	114		United Kingdom	GBP-1,196m	6.84%	-1.39%	21.89%
JGC TGK-4 (The . / Onexim Group	1 TGKD = USD0.0011	07 Apr 2008	20 Oct 2008	42	27 Oct 2007	Russia	USD-1,321m	10.00%	0.00%	86.90%
Lebedyansky JSC / Bidco for Lebed.	1 LEKZ = USD88.02	20 Mar 2008	09 Feb 2009	154		Russia	USD-1,709m	5.10%	0.00%	12.08%
Liberty Group L. / Liberty Holding.	1 LGL = 1.00 LBH	04 Sep 2008	01 Dec 2008	84		South Africa	USD-2,598m	-3.84%	-6.56%	-16.70%
Metal Industry . / Iberdrola Renov.	1 ROKKA = EUR16.00	01 Jul 2008	10 Nov 2008	63		Greece	EUR-329m	0.00%	0.00%	0.00%
Migros Turk Tic. / Bidco for Migro.	1 MIGRS = EUR12.577	14 Feb 2008	10 Oct 2008	32		Turkey	EUR-2,154m	3.96%	0.20%	45.17%
Nampak Ltd / The Bidvest Gro.	1 NPK = 0.1333 BVT	04 Sep 2008	17 Sep 2008	9		South Africa	USD-1,270m	2.84%	1.38%	115.15%
OJSC Power Mach. / Highstat Ltd	1 SILM = USD0.223	28 Nov 2007	30 Dec 2008	113		Russia	USD-1,655m	17.37%	0.00%	56.10%
Terna S.A. / GEK S.A. (aka G.	1 TERR = 0.95 GEK	07 Apr 2008	10 Dec 2008	93		Greece	EUR-268m	4.11%	2.28%	16.13%
Territorial Gen. / Integrated Ener.	1 TGKF = USD0.0011	14 Mar 2008	18 Dec 2009	466		Russia	USD-774m	83.33%	0.00%	65.27%
TGK-10 (Territo. / Fortum Oyj	1 TGKJ = USD4.6319	29 Feb 2008	18 Jul 2008	Completed	23 Sep 2008	Russia	USD-3,360m	0.48%	0.00%	N/A
TGK-14 (Territo. / Energopromsbyt	1 TGKN = USD0.0003	23 Jun 2008	31 Oct 2008	53		Russia	USD-233m	0.00%	0.00%	0.00%
TGK-2 (The Seco. / Kores Invest	1 TGKB = USD0.0011	14 Mar 2008	18 Sep 2008	10		Russia	USD-986m	22.22%	0.00%	811.11%
TGK-8 (Territor. / OAO Lukoil	1 TGKH = USD0.0015	11 Feb 2008	09 Sep 2008	1	03 Oct 2008	Russia	USD-2,064m	0.00%	0.00%	0.00%
Tourism Investm. / Bidco for Touri.	1 TRT = USD0.269	24 Apr 2008	08 Sep 2008	Completed		South Africa	USD-213m	4.83%	0.57%	N/A
Volzhskaya TGK . / Berezville Inve.	1 TGKG = USD0.1198	15 May 2008	18 Nov 2009	436		Russia	USD-1,289m	178.60%	0.00%	149.52%
Zentiva NV / Sanofi-Aventis .	1 ZEN = EUR43.4351	18 Jun 2008	19 Sep 2008	11		Czech Republic	EUR-1,642m	0.90%	0.05%	30.03%

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