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Antitrust & Competition Insight In association with Hogan & Hartson LLP

In association with **Hogan & Hartson LLP**

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Contents

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www.mergermarket.com

80 Strand
London, WC2R 0RL
United Kingdom

t: +44 (0)20 7059 6100
f: +44 (0)20 7059 6101
sales@mergermarket.com

895 Broadway #4
New York
NY 10003, USA

t: +1 212 686-5606
f: +1 212 686-2664
sales.us@mergermarket.com

Suite 2001
Grand Millennium Plaza
181 Queen's Road, Central
Hong Kong

t: +852 2158 9700
f: +852 2158 9701
sales.asia@mergermarket.com

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 Joseph Krauss and Michaelynn Ware give a comprehensive overview of US antitrust enforcement and policy actions in 2008. Next, on page 11, Catriona Hatton and Mariabruna Fimognari provide an overview of European Commission antitrust rulings in 2008, particularly with respect to judgments on non-horizontal mergers and acquisitions.

On page 19, Ben Bschor, dealReporter's regulatory correspondent, looks at BHP Billiton's decision to call off its bid for Rio Tinto. Also in this edition of the newsletter, Jun Wei examines China's enforcement authority and current legal framework for pre-merger antitrust review, this can be found on page 21.

The usual mergermarket round-up of the most significant antitrust situations across the globe can be found on page 25. Finally on page 29, Bruno Ciuffetelli and Jose A. Cobeña examine antitrust rulings in Venezuela, Brazil and Argentina in 2008.

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

Philip C. Larson
Chair, Antitrust
Practice Group
Washington D.C.

Catriona Hatton
Co-Chair, European
Antitrust Practice
Brussels

John Pheasant
Co-Chair European
Antitrust Practice
London/Brussels

Sharis Arnold Pozen
Practice Group Director
Washington D.C.

North American M&A Antitrust: A Round-up of 2008

Joseph Krauss and Michaelynn Ware, Hogan & Hartson LLP, Washington

The US antitrust agencies have had another moderately active year with respect to merger enforcement and policy, despite a few high-profile investigations that were cleared without any enforcement action. Below is a summary of the principal merger actions by both the Federal Trade Commission ("FTC") and Department of Justice ("DOJ").

Mergers, Acquisitions, and Joint Ventures

DOJ Required Divestiture in Pearson's Acquisition of Harcourt Assessment

The DOJ announced on January 24, 2008 that it would require Pearson plc to divest assets relating to three clinical testing markets in order to proceed with its proposed $950m acquisition of Harcourt Assessment. The products to be divested included clinical tests that are used by psychologists, speech-language pathologists, and clinicians to diagnose persons who have or are at risk of developing certain disorders or disabilities. According to the DOJ, the original transaction would have resulted in higher prices to purchasers of clinical tests, including many school districts, and would likely have impaired the launch of competitive new tests for adult abnormal personality disorders.

Natural Gas Merger Abandoned After FTC Obtains Injunction

The FTC announced on February 4, 2008 that Equitable Resources, Inc. and The Peoples Natural Gas Company, a subsidiary of Dominion Resources, Inc., had decided to abandoned their original merger after the FTC obtained a preliminary injunction to block the deal. The FTC argued in its original administrative complaint (filed on March 14, 2007), that the proposed transaction was anticompetitive because the parties were each other's sole competitors in the distribution of natural gas to nonresidential customers in certain areas of Allegheny County, Pennsylvania (including Pittsburgh). After the district court dismissed the FTC's complaint, the U.S. Court of Appeals for the Third Circuit granted the FTC's emergency motion for an injunction pending appeal. Following this ruling, the parties decided to terminate the proposed transaction on January 15, 2008.

DOJ Required Divestiture in Private Equity Funds' Acquisition of Clear Channel

The DOJ announced on February 13, 2008 that it would require Clear Channel, one of the largest radio station operators in the U.S., to divest radio stations in four cities in order for a group of private equity investors led by Bain Capital and Thomas H. Lee Partners ("THL") to proceed with their acquisition of a controlling interest in Clear Channel. According to the DOJ, the original transaction would have resulted in higher prices to purchasers of radio advertising in Cincinnati, Houston, Las Vegas, and San Francisco because Bain and THL already have substantial ownership interests in two firms (Cumulus Media Partners LLC and Univision Communications Inc., respectively) that compete with Clear Channel in those cities.

DOJ Required Divestiture in Thomson's Acquisition of Reuters

The DOJ announced on February 19, 2008 that it would require The Thomson Corporation to sell financial data and related assets in order to proceed with its $17bn acquisition of Reuters Group plc. The DOJ said that the original transaction likely would have resulted in higher prices to purchasers of three important types of financial data used by investment managers, investment bankers, traders, corporate managers, and other institutional customers in making investment decisions and providing advice to their firms and clients. To preserve competition, the DOJ required that Thomson sell copies of three financial datasets (Thomson's WorldScope, Reuters Estimates, and Reuters Aftermarket (Embargoed) Research Database) and license related intellectual property to a firm or firms that will use the data in order to offer products and services in competition with the combined Thomson/ Reuters.

DOJ Required Divestiture in United's Acquisition of Sierra

The DOJ announced on February 25, 2008 that it would require UnitedHealth Group Inc. and Sierra Health Services Inc. to divest assets relating to United's Medicare Advantage business in the Las Vegas area in order to proceed with United's acquisition of Sierra. According to the DOJ, the original transaction would have resulted in United and Sierra controlling 94 percent of the Medicare Advantage health insurance market in the Las Vegas area, leading to higher prices, fewer choices, and a reduction in the quality of Medicare Advantage plans purchased by senior citizens.

DOJ Required Divestiture in Cookson's Acquisition of Foseco

The DOJ announced on March 4, 2008 that Cookson Group plc and Foseco plc agreed to divest Foseco's U.S. carbon bonded ceramic ("CBC") business to proceed with Cookson's proposed $1bn acquisition of Foseco. The DOJ said that the original transaction would have substantially lessened competition in the United States for two types of CBC's (stopper rods and ladle shrouds) used in the continuous casting steelmaking process. Cookson and Foseco agreed to divest Foseco's entire CBC business in the United States.

DOJ Required Divestiture in Merger of Altivity and Graphic Packaging

The DOJ announced on March 5, 2008 that it would require Altivity Packaging LLC and Graphic Packaging International Inc. to divest two paperboard mills to proceed with their proposed $1.75bn merger. The DOJ stated that the original merger would have substantially lessened competition in the production and sale of a type of coated recycled boxboard used to make folding cartons for consumer and commercial packaging, including cereal boxes. Altivity agreed to divest its mills in Wabash, Indiana and Philadelphia, Pennsylvania.

DOJ Approved the Merger of XM and Sirius without Conditions

On March 24, 2008, the DOJ announced that it was closing its investigation into the proposed merger of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. In a lengthy statement, the DOJ explained that the merger would not result in increased prices because XM and Sirius did not compete in certain important segments and competitive alternative services available to consumers, including radio and other entertainment, are likely to become increasingly attractive over time as a result of technological change. In addition, DOJ stated that it expects efficiencies to flow from the transaction that could benefit consumers.

FTC Challenged a Series of Acquisitions by TALX Corp.

The FTC announced on April 28, 2008 that a series of acquisitions by TALX Corp. between 2002 and 2005 substantially lessened competition in the markets for outsourced unemployment compensation management ("UCM") and verification of income and employment ("VOIE") services. UCM consists of administering, on behalf of large, multi-state employers, unemployment compensation claims filed with a state or territory. VOIE services consist of providing income and employment information on behalf of employers to third parties, such as lending institutions. According to the FTC, TALX engaged in a series of acquisitions resulting in its obtaining market power in the UCM and VOIE businesses. While each transaction individually may not have been problematic, the FTC looked at the cumulative effect. To remedy the FTC's concerns, the FTC and TALX entered into a settlement that would allow long-term TALX customers to terminate their contracts and eliminate non-compete clauses for former and current TALX employees.

FTC Issued Final Opinion and Order in Evanston's Acquisition of Highland Park Hospital

On April 28, 2008, the FTC issued its final opinion and order to restore the competition that was lost when Evanston Northwestern Healthcare Corporation ("ENH") in suburban Chicago, Illinois, acquired its competitor, Highland Park Hospital. The FTC's order required, among other things, that ENH establish separate negotiating teams for both inpatient and outpatient services at Evanston and Highland Park, required ENH to use separate negotiations as its status quo approach to negotiations with payors unless a payor specifically elects to opt out and negotiate for all ENH hospitals jointly, and, prohibited the ENH and Highland Park negotiating teams from engaging in the negotiations when a payor elects to negotiate jointly for all ENH hospitals.

DOJ Required Divestiture in Merger of Regal Cinemas and Consolidated Theatres

The DOJ announced on April 29, 2008 that it would require Regal Cinemas, Inc. and Consolidated Theatres Holdings to divest movie theater assets in the areas of Charlotte, Raleigh, and Asheville, North Carolina in order to proceed with their proposed $210m merger. The DOJ said that the transaction, as originally proposed, would have substantially lessened competition among first-run commercial movie theaters in these three areas, resulting in higher ticket prices and decreased quality viewing experience for consumers.

FTC Required Divestiture in Agrium's Acquisition of UAP

On May 5, 2008, the FTC announced that it would require Agrium, Inc. to divest certain farm stores in order to proceed with its proposed $2.65bn acquisition of UAP Holding Corporation ("UAP"). According to the FTC, the transaction as originally proposed would have reduced competition in the market for the retail sale of bulk fertilizer and farm stores in several areas of the United States. The FTC's consent order required that Agrium sell five UAP farm stores in Michigan and two Agrium stores in Maryland and Virginia.

FTC Challenged Inova Health System Foundation's Acquisition of Prince William Health System

On May 9, 2005, the FTC announced that it would seek a temporary restraining order and preliminary injunction in federal district court to block the acquisition of Prince William Health System ("PWHS") by Inova Health System Foundation (the largest hospital system in Northern Virginia), pending a full administrative trial on the merits. In its complaint, filed on May 12, 2008, the FTC alleged that the acquisition therefore would reduce competition for general acute care inpatient hospital services in Northern Virginia. It also alleged that, as a result, consumers in Northern Virginia would pay higher prices and lose the benefits of non-price competition. The parties ultimately abandoned their proposed transaction on June 6, 2008, and the FTC dismissed its complaint on June 17, 2008.

DOJ Required Divestiture in Cengage's Acquisition of Houghton Mifflin College Division

The DOJ announced on May 28, 2008 that it would require Cengage Learning Inc. to divest assets related to textbooks and educational materials (including finished textbooks, publishing and licensing rights, author contracts and original artwork) used in 14 college level course in order to proceed with its proposed $750m acquisition of Houghton Mifflin Harcourt Publishing Company's College Division ("HM College"). The DOJ said that the original transaction would have eliminated competition between Cengage and HM College and would have likely resulted in lower quality of textbooks and related educational materials or higher textbook prices for college students.

FTC Required Divestiture in Carlyle Partners' Purchase of INEOS's Sodium Silicate Businesses

The FTC announced on June 30, 2008 that it would require that Carlyle Partners IV, L.P. agree to certain divestitures in order to proceed with its proposed acquisition of the world-wide sodium silicate and silicas business of INEOS Group Limited. Carlyle owns PQ Corporation, which is the largest sodium silicate producer and seller in the Midwest region of the United States and a competitor of INEOS. The FTC's consent order required that Carlyle agree to sell PQ's sodium silicate plant and businesses in Utica, Illinois, to an FTC-approved buyer. It also required that the companies license all of the intellectual property related to sodium silicate product at the Utica plant.

DOJ Closed Its Investigation of the Joint Venture Between SABMiller plc and Molson Coors Brewing Company Without Condition

The DOJ announced on June 5, 2008 that it was closing its eight-month investigation into the proposed joint venture between SABMiller plc ("Miller") and Molson Coors Brewing Company ("Coors"). Under the joint venture, Miller and Coors will combine their beer operations in the United States and Puerto Rico. As part of its investigation, the DOJ verified that the joint venture is likely to produce substantial and credible savings that will significantly reduce the companies' costs of producing and distributing beer.

DOJ Required Divestiture in Verizon's Acquisition of Rural Cellular Corp.

The DOJ announced on June 10, 2008 that it would require Verizon Communications Corp. to divest assets in six geographic areas to proceed with its $2.7bn acquisition of Rural Cellular Corp. (doing business as Unicel). Verizon is the second largest mobile wireless telecommunications services provider in the United States as measured by subscribers. The DOJ concluded that its acquisition of Rural Cellular would have substantially lessened competition to the detriment of consumers of mobile wireless telecommunications services in Vermont's two Rural Service Areas ("RSAs"), Burlington Metropolitan Statistical Area, one RSA in New York, and two RSAs in Washington.

DOJ Required Divestiture in Signature's Acquisition of Hawker Beechcraft's Flight Support Services Business

The DOJ announced on July 3, 2008 that it would require Signature Flight Support Corporation to divest assets used to provide flight support services, also referred to as fixed based operations ("FBOs"), at the Indianapolis International Airport in order for Signature to proceed with its proposed acquisition of Hawker Beechcraft's FBO business. FBOs provide fuel and related support services to general aviation customers, which include charter, private, and corporate aircraft operators. The DOJ concluded that the original transaction would have combined the only two providers of FBOs to general aviation customers at Indianapolis International Airport and would have substantially lessened competition, resulting in higher prices and reduced service and innovation.

FTC Required Divestiture in Flow International's Proposed Acquisition of OMAX Corp.

The FTC announced on July 10, 2008 that it would require divestitures in Flow International Corporation's proposed $109m acquisition of rival waterjet manufacturer OMAX Corporation. Waterjet systems use high-pressure water mixed with abrasive garnet particles to cut a wide variety of materials, including steel and stone. According to the FTC, Flow and Omax are the two leading manufacturers of waterjet systems in the United States. Under the terms of the FTC's consent decree, Flow was required to grant to any firm a royalty-free license to two OMAX patents relating to the controllers used in waterjet cutting systems.

FTC Required Divestiture in Pernod Ricard's Proposed Acquisition of V&S Vin & Spirit

The FTC announced on July 17, 2008 that it would require a divestiture in Pernod Ricard's proposed $9bn acquisition of Swedish spirits company V&S Vin & Spirit. The FTC stated that the acquisition as originally proposed would have combined the two most popular brands of "super-premium" vodka sold nationwide, Absolut and Stolichnaya. The FTC required that Pernod end its distribution agreement with the owners of Stolichnaya, Spirits International BV, within six months of acquiring V&S and the Absolut brand.

FTC Required Divestiture in McCormick's Acquisition of Unilever's Lawry's and Adolph's Brands

The FTC announced on July 30, 2008 that it would require that McCormick & Company, Inc. sell its Season-All seasoned salt business in order to proceed with its $605m acquisition of Lawry's and Adolph's brands of seasoned salt products from Unilever N.V. According to the FTC, the U.S. market for branded seasoned salt is highly concentrated, with McCormick's Season-All and Lawry's products comprising most of the $100m in annual sales. Under the terms of the consent decree, McCormick agreed to sell Season-All to Morton International, Inc. within 10 days of completing the deal.

FTC Required Divestiture in Sun Pharmaceutical's Acquisition of Taro Pharmaceutical Industries

The FTC announced on August 13, 2008 that it would require a divestiture for Sun Pharmaceutical Industries Ltd. to proceed with its acquisition of Taro Pharmaceutical Industries Ltd. According to the FTC, the transaction as originally proposed would be anticompetitive and would cause U.S. consumers to pay higher prices for three distinct generic formulations of the anticonvulsant drug carbamazepine. The FTC stated that both Sun and Taro either manufacture and sell each of the three generic drug products in the United States, or are posed to enter with competing products in the near future. Under the terms of the FTC's consent decree, Sun will sell all rights and assets to the three drugs to Torrent Pharmaceutical Limited, a generic drug manufacturer based in India.

DOJ Required Divestiture in Raycom's Acquisition of WWBT-TV

On August 28, 2008, the DOJ announced that it would require that Raycom Media, Inc. divest the local CBS affiliate in Richmond, Virginia (WTVR-TB) following Raycom's acquisition of the Richmond NBC affiliate (WWBT-TV) from Lincoln Financial Media Company on April 1, 2008. The DOJ said that the original transaction would have resulted in Raycom owning two of the four local broadcast stations, which likely would have led to higher prices for those seeking to advertise on local broadcast television.

FTC Challenged Polypore International, Inc.'s Consummated Acquisition of Microporous Products L.P.

On September 10, 2008, the FTC approved an administrative complaint challenging Polypore International, Inc.'s acquisition of Microporous Products L.P. Polypore acquired Microporous in February 2008. Both companies manufacture polyethylene ("PE") battery separators, a key component in flooded lead-acid batteries. According to the FTC, the acquisition led to decreased competition and higher prices in the following markets: (1) deep-cycle separators for golf cart batteries; (2) motive separators for forklift batteries; (3) automotive separators for car batteries; and (4) uninterruptible power supply separators used in batteries that provide backup power in the event of power outages. In addition, the FTC alleged that Polypore entered into an illegal agreement in 2001 with a potential competitor in order to prevent the company from entering the market for PE battery separators. The FTC also alleged that Polypore attempted through various anticompetitive means to maintain monopoly power in multiple battery separator markets. The FTC and Polypore currently are engaged in administrative litigation.

FTC Allowed Vertical Agreement Between Fresenius and Daiichi Sankyo With Restrictions

On September 15, 2008, the FTC announced a complaint challenging Fresenius Medical CareAg & Co. KGaA's ("Fresenius's") proposed acquisition of an exclusive sublicense from Luitpold Pharmaceuticals, Inc., a wholly owned U.S. subsidiary of the Japanese firm Daiichi Sankyo Company, Ltd. Under the sublicense, Fresenius would manufacture and supply the intravenous iron drug Venofer to dialysis clinics in the United States. According to the FTC, the proposed agreement would have provided Fresenius, the largest provider of end-stage renal disease dialysis services in the U.S., with the ability to increase Medicare reimbursement payments for Venofer because the price that Fresenius' clinics would pay for the drug post-transaction would become an internal transfer price reported by Fresenius to the Center for Medicare & Medicaid Services. The FTC consent order would have prevented Fresenius from reporting intra-company transfer prices higher than certain levels specified in the order.

FTC Required Divestitures in Reed Elsevier's Acquisition of ChoicePoint

The FTC announced on September 16, 2008 that it would require Reed Elsevier Inc. to divest certain electronic public records services in order to proceed with its proposed acquisition of ChoicePoint, Inc. According to the FTC, Reed Elsevier (through LexisNexis) and ChoicePoint together account for over 80 percent of the approximately $60m U.S. market for the sale of electronic public records services to law enforcement customers. The FTC's consent order would have required that Reed Elsevier divest assets related to ChoicePoint's AutoTrackXP and Consolidated Lead Evaluation and Reporting electronic public records services to Thomson Reuters Legal Inc.

DOJ Required Divestiture in Manitowoc's Acquisition of Enodis

The DOJ announced on October 6, 2008 that it had reached a settlement that would require Manitowoc Company, Inc. to the divest Enodis plc's U.S. ice machine business to proceed with Manitowoc's proposed $2.7bn acquisition of Enodis. According to the DOJ, Manitowoc and Enodis (owner of the Scotsman and Ice-O-Matic brands) are two of only three significant manufacturers of commercial cube ice machines in the United States. The remedy contained in the DOJ's proposed settlement is consistent with the remedy obtained as a result of an antitrust investigation by the European Commission that was announced on September 19, 2008.

DOJ Sought to Block the Proposed Acquisition of National Beef Packing Company by JBS

On October 20, 2008, the DOJ filed an a civil antitrust lawsuit in U.S. District Court in Chicago to stop JBS SA, the third-largest U.S. beef packer, from acquiring National Beef Packing Company LLC, the fourth-largest U.S. beef packer. The DOJ concluded that the acquisition, as originally proposed, would have resulted in lower prices paid to cattle suppliers in the High Plains, centered in Colorado, western Iowa, Kansas, Nebraska, Oklahoma and Texas, and the Southwest. It also concluded that the acquisition would have resulted in placing more than 80 percent of domestic fed cattle packing capacity in the hands of three firms. The Attorneys General of Colorado, Iowa, Kansas, Minnesota, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas and Wyoming joined the DOJ's lawsuit. The lawsuit is still pending in federal court.

CCS Abandoned Proposed Acquisition of Newpark Environmental Services after FTC Filed Complaint

On October 23, 2008, the FTC announced an administrative complaint challenging the proposed $85m acquisition of Newpark Environmental Services by CCS Corporation. It also announced that it would file a complaint in federal district court to obtain a temporary restraining order and preliminary injunction pending the administrative trial. According to the FTC, the transaction would violate the federal antitrust laws by consolidating two of the most significant providers of waste disposal services to the offshore oil and natural gas exploration and production industry in the Gulf Coast region of the United States. On November 24, 2008, Newpark Resources agreed to cancel its proposed sale.

DOJ Approved the Merger of Delta and Northwest without Condition

After a six-month investigation, the DOJ announced on October 29, 2008 that it was closing its investigation into the proposed merger of Delta Air Lines Inc. and Northwest Airlines Corporation. The DOJ determined that the proposed merger between Delta and Northwest was likely to produce substantial and credible efficiencies that will benefit U.S. consumers and was not likely to substantially lessen competition. Delta, based in Atlanta, Georgia, and Northwest, based in Minneapolis, Minnesota, are the third and fifth largest airlines in the United Sates, respectively.

FTC Required Divestiture in Hexion's Proposed Acquisition of Huntsman

The FTC announced on October 2, 2008 that it would require that Hexion LLC divest its specialty epoxy business and agree to certain conduct provisions in order to proceed with its proposed $10.6bn acquisition of Huntsman Corporation. According to the FTC, the acquisition as originally proposed would have substantially lessened competition in the North

American markets for various end-use markets for specialty epoxy resins and the market for methyl diisocanate (commonly called MDI). Under the FTC's consent order, Hexion's specialty epoxy business was to be divested to Spolek Pro Chemickou A Hunti Vyrobu (Spolek or Spolchemie), or another FTC-approved buyer. In addition, Hexion was required to institute procedures to ensure that the MDI business it acquires did not have access to competitively sensitive non-public information obtained by its formaldehyde division.

Yahoo! and Google Abandoned Their Advertising Agreement After DOJ Threatened Lawsuit

The DOJ announced on November 5, 2008 that Yahoo! Inc. and Google Inc. decided to abandon their proposed advertising agreement rather than fight a threatened DOJ lawsuit to block the implementation of the agreement. According to the DOJ, the proposed agreement would have resulted in Google and Yahoo! becoming collaborators rather than competitors for a significant portion of their search advertising businesses. The DOJ said that, if implemented, the agreement likely would have harmed competition in the markets for Internet search advertising and Internet search syndication. The companies' decision to abandon the transaction eliminated the need for the DOJ to file an enforcement action.

DOJ Required Divestiture in InBev's Acquisition of Anheuser-Busch

The DOJ announced on November 14, 2008 that it would require InBev N.V./S.A. to divest its subsidiary Labatt USA, along with a license to brew, market, promote and sell Labatt brand beer for consumption in the United States, to proceed with InBev's proposed $52bn acquisition of Anheuser-Busch Companies Inc. (the largest brewer in the United States). According to the DOJ's complaint, Anheuser-Busch's Budweiser brands, including Budweiser and Bud Light, and InBev's Labatt brands, including Labatt Blue and Labatt Blue Light, are the two biggest selling beer brand families in Buffalo, Rochester and Syracuse, New York. The FTC stated that the transaction, as originally proposed, would have limited competition and led to higher prices for beer in those metropolitan areas.

FTC Sought to Block Merger of CCC and Mitchell

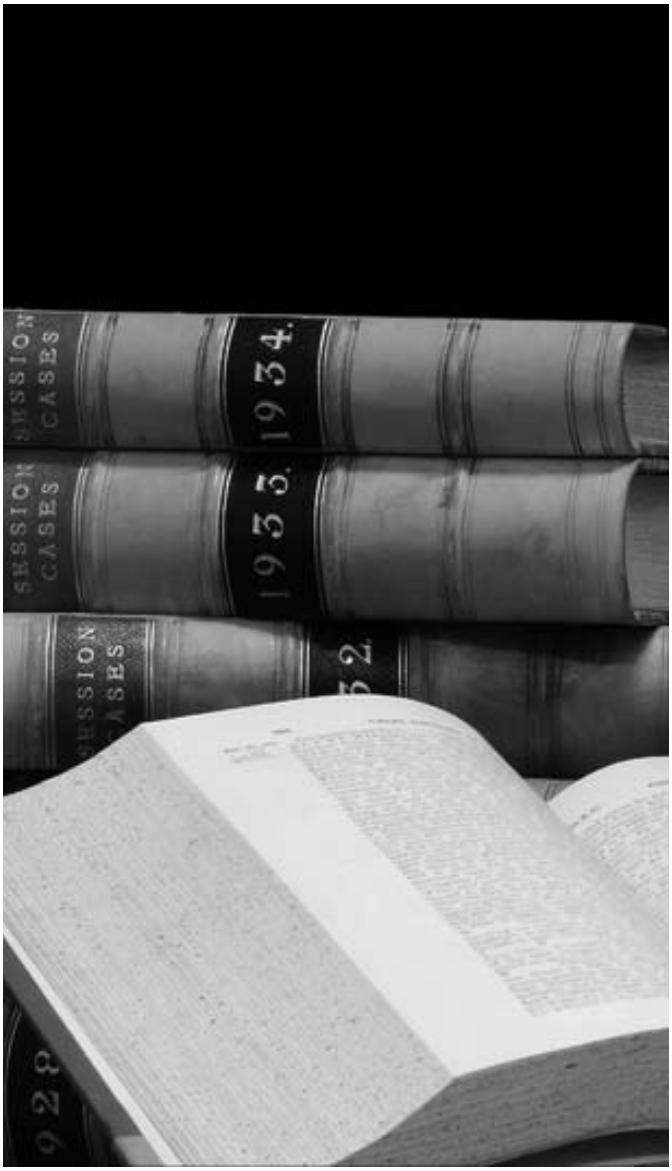
On November 25, 2008, the FTC announced that it would file an administrative complaint challenging the proposed $85m acquisition of Newpark Environmental Services by CCS Corporation. It also announced that it would file a complaint in federal district court to obtain a temporary restraining order and preliminary injunction pending the administrative trial. According to the FTC's complaint, the $1.4bn merger would hinder competition in the market for electronic systems used to estimate the cost of collision repairs, known as "estimatics," and the market for software systems used to value passenger vehicles that have been totaled, known as total loss valuation systems. The FTC alleged that the merger would harm insurers, repair shops and, ultimately, U.S. car owners by reducing from three to two the number of competitors in the two related businesses. The administrative litigation between the FTC and CCS is ongoing.

DOJ Required Divestiture in Republic's Acquisition of Allied Waste

On December 3, 2008, the DOJ announced that it would require Republic Services Inc. and Allied Waste Industries Inc. to divest commercial waste collection and disposal assets, serving 15 metropolitan areas, in order to proceed with Republic's proposed $4.5bn acquisition of Allied. DOJ said that the original transaction would have resulted in higher prices for collection of municipal solid waste from commercial businesses or disposal of waste, or both, in these areas. The required divestiture includes numerous commercial waste collection routes, and certain landfills, transfer stations, ancillary assets, and in a few cases, access to landfill disposal capacity.

Proposed Amendments to FTC Rules

On September 25, 2008, the FTC issued a Notice of Proposed Rulemaking seeking public comment on proposed rule revisions that would amend the FTC's Rules of Practice concerning the process of administrative adjudication at the agency (commonly referred to as "Part 3"). The FTC's Part 3 process has long been criticized for being too protracted. According to the FTC, lengthy Part 3 proceedings may result in parties abandoning transactions before their merits can be adjudicated, and it may also lead to substantially increased litigation costs. The FTC stated that the goal of its proposed amendments is to shorten the Part 3 process, improve the quality of adjudicative decision-making, and clarify the respective roles of the Administrative Law Judge and the Commission in Part 3 proceedings.



European M&A Antitrust: A Round-up of 2008

Catriona Hatton and Mariabruna Fimognari, Hogan & Hartson LLP, Brussels

This year the European Commission ('the Commission') handled a number of new legal and business issues, in particular in the context of the application of the newly adopted guidelines on mergers between companies at different levels of the supply chain ('non-horizontal mergers'). Some of the most interesting decisions include the acquisition by TomTom of Tele Atlas, the acquisition by Nokia of NAVTEK and the acquisition by Google of DoubleClick. The views expressed in these decisions provide an indication of the way the Commission is likely to apply the non-horizontal merger guidelines in the future.

From a legislative perspective, apart from the adoption of the non-horizontal merger guidelines, other developments were less significant or are not yet accomplished. The revision of the notice on remedies does not bring about significant changes and the final outcome of the consultation on the revision of the Merger Regulation is unlikely to be known before the end of next year.

A. Significant mergers

TomTom/Tele Atlas and Nokia/Navtek

Both of these transactions were the first vertical mergers to be considered by the Commission following the adoption of the non-horizontal merger guidelines. Both transactions were subject to an in-depth investigation by the Commission ('second stage investigation') and were assessed almost in parallel with the approval decision for the Nokia Navteq acquisition following shortly (less than two months) after the Commission's approval of TomTom's acquisition of Tele Atlas. The Commission had to evaluate the effects on the relevant markets produced by the almost simultaneous vertical integration of the only two upstream players in the provision of digital maps for portable navigation devices.

On 22 October 2007, TomTom N.V. ('TomTom') notified the Commission of its plan to acquire Tele Atlas N.V. ('Tele Atlas'). On 19 February 2008, Nokia Corporation ('Nokia') notified the Commission of its plan to buy Navteq Corporation ('Navteq'). TeleAtlas and Navteq are the only two effective suppliers of navigable digital map databases (this was the market definition adopted by the Commission) with approximately 50% each of the relevant market. They supply navigable digital map databases to manufacturers of PNDs (Portable Navigation Devices), car manufacturers, navigation software producers, mobile phone manufacturers and location web companies.

TomTom and Nokia operate in the downstream markets. TomTom is a manufacturer of PNDs and a supplier of navigation software for use in navigation devices. It is a leader in the EU in the PND market, while its activities in the segment for the supply of navigation software are limited. Nokia is principally known as a manufacturer of mobile handsets. The Commission concluded that the market for PNDs and the market for mobile handsets were separate markets (mainly due to the fact that mobile handsets providing digital maps also include other features that are not included in PNDs. Consumers tend to use mobile handsets mainly for communication purposes and PNDs for 'geographical orientation' purposes).

In the TomTom transactions, the Commission assessed whether the acquisition would have resulted in TomTom foreclosing its downstream competitors in the PND market and in the market for navigation software by, for example, increasing the prices of the digital maps or through a degradation of the quality of the maps or even by refusal to supply. Such behaviour would have led the other digital map manufacturer (Navdeq) to increase its market power and eventually its prices. Many questioned the need for the Commission to engage in a long drawn out investigation of an acquisition where the parties are not competitors. Such transactions are rarely subjected to anti-trust scrutiny in the US and are generally presumed not to have an anti-competitive effect. However, the Commission in its guidelines on non-horizontal mergers was taking a more conservative approach than the US agencies. In addition, they were faced with a number of complainants who opposed TomTom's acquisition of Tele Atlas.

In the end, the econometric analysis that the Commission carried out led to the conclusion that TomTom would not have had an incentive to foreclose its competitors in the PND market. The merged company's ability to restrict access to digital maps for other PND manufacturers would be limited by the presence of an upstream competitor, Navteq. In addition, the merged company would have no incentive to restrict access to digital maps because the sales of digital maps lost by Tele Atlas would not be compensated by additional sales of PNDs. The Commission finally approved the transaction without conditions after almost seven months of investigation.

In the Nokia/Navteq case, the competition assessment was similar. The Commission's analysis focussed on the merged firm's ability and incentives to raise competitors' costs by increasing the price of navigable digital map databases. In addition, the Commission analysed the merged company's incentives to limit competitors' access to such databases. Finally, the Commission focussed on the possible impact of such a restrictive strategy on competitors and end-consumers.

On the basis of the economic analysis carried out during its investigation, the Commission concluded that the merged company would be unlikely to pursue a foreclosing strategy. The merged firm's ability to refuse to competitors the access to map databases is limited by the presence of the other competitor, Tele Atlas. In addition, the merged company would lack incentives to cease supplying digital map databases to its competitors because a loss in sales of maps would not be compensated by increased sales of mobile telephones. Other mobile phone manufacturers could still compete with Nokia by working together with independent developers of navigation applications or by developing other features of their handsets. The Commission also approved this transaction without conditions after almost five months of investigation.

Google/DoubleClick

This transaction raised significant interest because it involved the most popular search engine, Google, and DoubleClick. Both companies were considered as potential competitors in certain areas while, in other areas, they were operating at different levels of the same markets.

Google is a leading provider of online advertising space and also offers advertisement intermediation services for online advertisement through its ad network AdSense. DoubleClick is a leading provider of 'ad serving' technologies, i.e. once online advertising space is sold by a publisher to an advertiser, either directly or through intermediary services, both parties need to make sure that the advertisement is correctly placed, in the right place and at the right time. This service is performed by 'ad serving' technology providers and also includes monitoring the 'success' of the advertisement.

From a horizontal perspective, the Commission indicated that while Google and DoubleClick could not be considered direct competitors in that DoubleClick does not sell online advertising space and Google does not provide ad serving technology, the parties could be viewed as indirect competitors since each of them was in the process of developing technologies for entering the other's market. However, the marketplace investigation showed that the elimination of DoubleClick as a potential competitor in the online intermediation services market would not have produced detrimental effects on competition for the provision of intermediation services since there is strong competition from other players. Similarly, the elimination of Google as a potential competitor in the market for ad serving tools was not considered to be anti-competitive given the strong competition on that market.

Several third parties expressed concerns that Google could use DoubleClick's position in ad serving to raise costs for competing intermediaries and at the same time could have taken advantage of its leading position in search advertising and/or online ad intermediation services by trying to bundle its services with DoubleClick's ad serving tools.

However, the market investigation showed the presence of viable competitors for ad serving technology. In other words, a price increase in ad serving tools and/or any attempt to bundle products would easily lead customers to switch to suppliers who could provide competitive services both in terms of cost and quality (competitors include vertically integrated big players such as Microsoft, AOL and Yahoo). Therefore, following a six-month investigation, the Commission cleared the transaction unconditionally.

Thomson/Reuters

This transaction is particularly interesting because it is the first second-stage investigation carried out by the Commission in the financial information and market data business.

Thomson and Reuters are significant financial information providers. The identification of the relevant markets and of the parties' position on those markets presented complex issues. On the basis of the parties' arguments and the Commission's further market investigation, the market definition distinguished between the provision of information to on-trading floor activities and off-trading floor activities. On-trading floor players are those who operate in the sale and trading of financial instruments. They are therefore mainly interested in real-time information on market data. Off-trading floor users are those who operate in market research and asset management. These entities are therefore mainly interested in historical and reference data and market analyses.

The main overlapping area in this transaction concerned the off-trading floor segment. Both parties were leading players in that segment with Thomson playing a purely marginal role in the on-trading floor segment. In particular, the market investigation showed concerns in respect of the markets for the distribution of aftermarket broker research reports, of earning estimates, of fundamental financial data of enterprises and of time series of economic data.

The Commission considered that the proposed transaction would have eliminated competition between the principal two suppliers of these databases at both worldwide and EEA-wide level. This would have given rise to a risk of price-increase and might have led to the disappearance of certain overlapping products.

In addition, the Commission considered that the transaction would have produced detrimental effects downstream on the providers of desktop products which purchase and integrate the types of content described above into their own offerings to customers. The merged entity would have had the ability and the incentive to squeeze out such competitors, thus adversely affecting competition at the downstream level.

During the second-stage investigation, the parties proposed remedies to the Commission that consisted in the sale of copies of the databases containing the content sets of such financial information product, together with the assets, staff and customer base necessary to allow the purchaser to be an effective competitor in these markets within a short period of time which the Commission considered would establish the 'pre-merger rivalry' in these markets.. The parties could continue to use those databases in the future to supply their respective data to their own customers. The Commission approved the transaction following a five-month investigation subject to these conditions on the basis that these remedies would ensure that post-merger customers could continue to rely on sufficient competing sources of supply.

Rewe/Adeg

REWE is a German company active on the Austrian retail and wholesale markets for everyday consumer goods which it sells in supermarket chains such as Billa, Penny and Merkur in several countries, including Austria. It is the market leader in this sector of the Austrian market, with SPAR Austria its nearest competitor.

ADEG is an Austrian company that is also active on the retail and wholesale markets in Austria, selling food and household goods through its retail chain. Before this transaction, ADEG had been jointly owned by AÖGen (ADEG independent merchants' organisation), Edeka Chiemgau and REWE which had a minority shareholding of 24.9%.

REWE notified the Commission in April 2008 that it intended to acquire control of ADEG by raising its shareholding in the company to 75%, leaving REWE in sole control and with AÖGen as a minority shareholder.

The Commission found that ADEG was not a strong competitive force on the Austrian market and that the market shares of the parties in Austria would remain reasonably moderate after the transaction. However, it noted during the Phase I investigation that it had serious concerns that the combined strength of REWE and ADEG in the market in certain local districts in Austria might lead to increased prices at a national level.

In order to address the Commission's reservations and avoid the opening of a Phase II investigation, REWE offered to sell all ADEG-owned shops in the districts that had been identified by the Commission as those causing concern. On top of this remedy, REWE offered to encourage all ADEG merchants to leave the ADEG network in the relevant districts and, in the event that too few merchants did so, REWE committed to sell some REWE outlets. The Commission approved the transaction subject to these conditions.

In September 2008, SPAR, REWE's closest competitor in Austria, lodged a challenge at the Court of First Instance against the Commission's decision to approve the deal (having unsuccessfully argued in 2007 that the Commission should step in to investigate REWE's previous acquisition of 24.9% of ADEG). SPAR is expected to oppose the Commission's decision primarily on grounds of procedural failings in relation to the Commission's conduct of its investigation. An initial hearing in this case is pending.

BHP Billiton/Rio Tinto

This transaction was eventually withdrawn but had been the subject of a lengthy investigation by the Commission over a period of 18 months and would have required significant remedies in order to obtain Commission approval. BHP Billiton ('BHP') is the world's largest mining company. It was created in 2001 by the merger of Australia's Broken Hill Proprietary Company and the UK's Billiton and the company is now dual-listed in London and Melbourne. BHP operates across 25 countries and is involved in major commodity areas including aluminium, metallurgical coal, cooper, iron ore and uranium mining.

Rio Tinto is one of the world's largest mining companies and is the second largest iron ore supplier globally. Dual-listed in Australia and the UK, the company has operations across the world, with particularly strong activity in Australia and North America. Rio Tinto's main products include aluminium, copper, gold, industrial minerals and iron ore. Its iron ore operations include interests in several ventures in Australia such as Robe River and Hamersley Iron. It is also involved in further iron ore operations in Brazil, Canada, India and Guinea.

BHP notified the Commission in May 2008 that it intended to acquire ownership and control of Rio Tinto.

The Commission identified several competition law concerns, in particular, the high market shares the combined entity would hold in iron ore and metallurgical coal markets. On 4 July 2008, it announced the opening of an in-depth, Phase II investigation of the proposed transaction.

In a Statement of Objections issued to BHP on 3 November 2008, the Commission reportedly listed concerns as to the potential high degree of concentration in the 'sea-borne' iron ore and coal sectors, as well as issues in relation to the supply of uranium whereby the merger would lead to a significant reduction in choice of alternative uranium suppliers. Aluminium production was marked as a further area for concern. Generally, the Commission reportedly noted its belief that the proposed transaction had the potential to lead to higher prices and reduced choice for customers in the iron ore, coal, uranium and aluminium markets.

There was strong opposition to the proposed deal from steel manufacturers who had serious concerns about the possible damaging effects on the steel industry. Similar opposition was flagged by the Chinese authorities.

In the wake of the Commission's investigation and its Statement of Objections (which ran to over 300 pages) it seemed clear that BHP would have been required to divest significant assets in order to gain regulatory approval of the deal from the Commission. On 26 November 2008, BHP Billiton informed the Commission that it was withdrawing its notification and in abandoning the transaction, it referred to the current adverse economic climate and the Commission's objection which would have required divestments. BHP noted, in relation to the divestments that it would have had to make in order to gain the Commission's approval, that "given the current economic circumstances and uncertainty regarding

our ability to achieve fair divestment values in the required time frames, these remedies would contribute to the cost and risk of the transaction". BHP concluded that it was not in its shareholders best interests to continue with the bid given the global economic downturn and the "lack of any certainty as to the time it will take for conditions to improve".

B. Key legislative developments

Guidelines on the assessment of non-horizontal mergers

At the end of 2007, the Commission adopted the Non-Horizontal Merger Guidelines ('the guidelines'). The guidelines are used by the Commission (and provide very useful guidance to the business community) to evaluate the effects of mergers and acquisitions between firms operating at different levels of the commercial/distribution chain (vertical mergers) as well as conglomerate mergers, i.e. mergers and acquisitions between firms operating in complementary or related markets (i.e. a manufacturer of toothbrushes acquiring a manufacturer of toothpaste).

The Commission is aware that non-horizontal mergers are less likely to have a harmful impact on competition and the Guidelines emphasize this as well as the frequently beneficial effects of vertical mergers (increased efficiency, reduction of costs). The guidelines also make it clear that non-horizontal mergers will not be problematic if the resulting entity does not have a 'significant degree of market power'. Unfortunately, the Commission sets a very low threshold below which it considers that market power is unlikely to arise. Essentially, the Commission considers that market shares below 30% and post-merger HHI levels below 2000 (HHI stands for Herfindahl-Hirschman Index, a commonly accepted measure of market concentration calculated by squaring the market share of each firm competing in a market, and then summing the resulting numbers) are likely to be considered non-problematic, subject to further evaluation of other factors such as the existence of cross-shareholdings and previous situations of coordination.

The guidelines set out various potential anti-competitive effects arising from non-horizontal mergers. The key concern (which was the core element for the assessment of certain mergers, e.g. the TomTom/Tele Atlas transaction) focuses on potential 'foreclosure' of competitors broadly in three main scenarios. :

- Input foreclosure in vertical mergers: the acquisition of a player in the downstream market (e.g. a manufacturer acquiring a retailer) may lead to the rivals of the acquired company losing access to an important upstream player (the acquiring manufacturer);
- Customer foreclosure in vertical mergers: , the competitors of the acquiring manufacturer could suffer from a severe reduction of their customer base if the downstream players being purchased by the acquiring manufacturer was a significant customer;
- Foreclosure in conglomerate mergers: mergers among entities operating in complementary/related markets may lead to leveraging a strong position in one market into the complementary/related market. The Commission will pay special attention to bundling, tying and other exclusionary practices.

In terms of how to assess foreclosure effects, the guidelines indicate a three-step exercise. The Commission will first assess whether the parties – based on current market position and dynamics – are able to foreclose. Second, it will evaluate whether – based on market structure – they will have an incentive to foreclose. Third – based on market conditions – the Commission will determine whether foreclosure of inputs/customers or foreclosure in complementary/related markets will lead to effects such as barriers to entry, elimination of competitors.

Furthermore, the Commission raises a further concern in its guidelines regarding what it sees as the risk that mergers in vertical/complementary/related markets can also lead to companies gaining access to sensitive information concerning upstream or downstream rivals.

All in all, the guidelines are helpful in clarifying the approach the Commission will take to assessing vertical and conglomerate mergers but are more conservative than the business community might have hoped for given that such mergers in practice, rarely raise significant anti-trust issues.

Revised Notice on Remedies

On 22 October 2008, the Commission published a Revised Commission Notice on Remedies ('the 2008 Notice') and amended accordingly the Merger Implementing Regulation (Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings).

The aim of the revision is to ensure that remedies address anti-competitive concerns more effectively. Based on its experience, the Commission felt it was necessary to clarify to companies involved in merger cases how best to address competition concerns.

The main changes include the introduction of a form for submitting information on remedies, details on divestiture and access remedies and clarifications on the role of the Trustee. The revision reflects the changes contained in the revised Merger Regulation (EC) No. 139/2004, the Commission's experience in a significant number of cases, the Commission Mergers Remedies Study and recent European Courts' decisions. The revised text of the Notice also reflects the comments received from the public consultation held in 2007 on a draft Notice.

The Notice emphasizes that remedies are only acceptable if they are viable and effectively eliminate the competition concerns addressed by the Commission. In order for the Commission to be in a position to assess the viability and effectiveness of remedies, the parties will have to provide detailed information in a new remedies form ("Form RM" – this has been introduced through an amendment to the Merger Implementing Regulation).

Divestitures continue to be the Commission's preferred remedy and since this type of remedy is able to address concerns in an adequate manner only if an appropriate purchaser is the Notice 'insists' on this point by further setting out ways to identify such a purchaser. For example it clarifies when an up-front buyer will be appropriate and emphasizes the need to include all the assets and personnel necessary to ensure the viability of the business to be divested.

The Notice also clarifies that the Commission will only accept access remedies (e.g. giving access to infrastructure or networks) if they are in practice equivalent to divestitures. Access remedies produced very limited effects in the past in terms of addressing anti-competitive concerns, therefore, the aim in the revised Notice is to ensure that access remedies are structured in a such a way that they will be used effectively.

Finally, in respect of the implementation of remedies, the revised Notice and the amended Merger Implementing Regulation clarify the role of the Trustee.

Review of Merger Regulation

The EU Merger Regulation requires that the Commission must report to the Council by 1 July 2009 on the functioning of the jurisdictional thresholds and the mechanisms by which Member States can refer transactions for Commission review and vice versa .

In October 2008, the Commission launched a public consultation aimed at collecting stakeholders' feedback on these two aspects of the Merger Regulation and more broadly on the general functioning of the Regulation. There has been much debate about the functioning of the jurisdictional thresholds of the Merger Regulation, in particular, the rule whereby mergers between companies which meet the EU Merger Regulation thresholds but where both parties have at least two-thirds of their turnover in the same Member State, falls outside the Commission's jurisdiction. For example, the Endesa/Gas Natural case shows how the two-thirds rule may 'force' a 'jurisdictional' conclusion that may result in a transaction being assessed by the least appropriate authority. In other words, some mergers (particularly in sectors such as energy and financial services) that have effects that are of Community interest may end up remaining in the hands of a national authority because the parties generate more than two thirds of their EU-wide turnover in one and the same member state. However, politically, it may be difficult at this stage to secure agreement from Member States to give broader jurisdiction to the Commission in merger cases and it seems unlikely that there will be major revisions to the Merger Regulation as a result of this initiative.

An unpopular marriage: BHP Billiton & Rio Tinto

Ben Bschor, dealReporter

On Tuesday, 25 November, before the London Stock Exchange opened, BHP Billiton issued a statement saying that "it no longer believes that completion of the offers for Rio Tinto would be in the best interests of BHP Billiton shareholders." This came 383 days after initial confirmation that BHP had made an unsolicited merger proposal to its rival Rio Tinto and signalled that the takeover battle had finally come to an unsuccessful ending.

Had the deal between the second and the third biggest worldwide iron ore producers been completed, it would have created the biggest market player, larger than the current number one, Brazilian Vale. Furthermore, Vale and a combined BHP/Rio, would have controlled about 70% of the global seaborne iron ore market. No surprise the proposed deal led to serious concerns amongst competitors and customers.

Due to the large worldwide markets and size of the companies involved, antitrust clearance from a number of competition authorities around the world was required. Australian, US, South African, Chinese, Canadian and last but not least the European antitrust body needed to give the green light for the deal to go ahead. From the outset, the European Commission (EC) was earmarked by commentators to be the one authority that would heavily scrutinise the proposed transaction. The other authorities appeared to be either less likely to block the deal and/or to require significant commitments, or their jurisdiction was simply not within a crucial iron ore market.

Hence BHP and Rio itself, their respective shareholders, customers and competitors all followed the EC investigation closely and the rumour mill steadily produced updates on the stages of the investigation which started from the day of initial notification at the end of May 2008.

The European steel industry, represented in Brussels by its interest group Eurofer, lobbied from the very beginning against the proposed deal, arguing it would create a duopoly situation, not only controlling current supply but also future iron ore deposits. Eurofer also opposed proposals by BHP to switch the pricing mechanisms in iron ore from a benchmarking system, which is based on twelve months contracts between supplier and customer, to an index based system, which was seen as more volatile to market conditions from the perspective of large scale clients.

But in the early stages of the EC investigation, the question of market definitions was crucial. Would the Commission follow Eurofer's point of view that the applicable market was a worldwide market for seaborne iron ore? Or was there potentially a different approach? BHP was said to argue for regional market definitions while at the same time always insisting that no remedies would be necessary to ease potential antitrust concerns by the Commission.

The weeks dragged on until early July, when the Commission first revealed its concerns in a public statement when opening an in-depth phase II investigation into the proposed deal. At the time Competition Commissioner Neelie Kroes said, that a "recent surge in commodity prices has had a serious impact on the industries buying these commodities, their customers, and ultimately all the consumers in Europe and elsewhere in the world," thereby indicating that the EC did indeed lean towards a global market definition.

The doubts raised concerns about not only iron ore supply, but other markets such as coal, uranium, aluminium and mineral sands. But as the synergies in iron ore were seen as the main driver for the deal, observers following the situation did not expect other commodities to pose problems. It was expected that BHP would be prepared to offer remedies in all other sectors, but a significant iron ore remedy would have potentially destroyed the rationale of the deal.

After the EC release in July, it seemed increasingly likely that iron ore commitments would be unavoidable, but it was still questionable if this would need to be in the form of divestments. Behavioural remedies, regarding pricing or the development of iron ore reserves could – at least in theory – not be ruled out. And even divestments did not seem to be a straight forward remedy. Who would be a buyer and would the EC insist on upfront buyers?

In early November, the EC issued a Statement of Objections (SO) to BHP. Rumours that iron ore commitments might be imminent came up again, and media reports suggested BHP could improve its offer for Rio Tinto to win over the target's support for the deal. With Rio's support and more data provided from its side, it was believed it would be easier to convince the EC that the deal was not anti-competitive.

Soon after content of the Statement of Objections leaked to the public and even though the SO did not discuss remedies directly, it seemed to suggest that significant divestments in Australian iron ore mines would be unavoidable. In addition, more detailed market definitions became known, when it turned out that the Commission subdivided the seaborne iron ore market into the product categories: lump, fines, and pellets.

This submarket approach drew attention to another remedy problem. Although it was said that the EC's main concern was in iron lumps, it seemed impossible to only offer targeted remedies for lumps without affecting the fines business as well, which was not primarily the focus of the EC. Experts pointed out that lumps and fines are found in the same mines, usually in a ratio of 1:2 or even 1:3. Therefore, whatever lump capacity needed to be divested could not be done without giving away up to three times the capacity in fines. Some commentators concluded that the rationale for the deal would be ruined by such remedies to such an extent that it would not make sense for BHP to proceed further.

Throughout November, there was increased speculation in Brussels that BHP were set to withdraw from the transaction. When this was announced the statement listed a number of reasons for the withdrawal, focussing on changing market conditions which made the deal less attractive to BHP shareholders. The statement noted that the EC would have expected iron ore divestments, which, "[i]n the normal range of economic conditions BHP Billiton would have been prepared to offer […]." It continued: "However, given the current economic circumstances and uncertainty regarding our ability to achieve fair divestment values in the required time frames, these remedies would contribute to the cost and risk of the transaction." Only a day later the EC closed the investigation.

Chinese M&A Antitrust: A Round-up of 2008

Jun Wei, Hogan & Hartson LLP[1], Beijing

China[2] established a merger control regime as part of its implementation of the Anti-monopoly Law (AML), which became effective on August 1, 2008. As of November 19, 2008, the Chinese government had officially accepted 13 pre-merger filings, 8 of which were approved.[3] However, while recent cases and a handful of government Q&As provide market players with guidance on the antitrust review of transactions, it remains difficult to fully understand the procedures and standards the government will use to evaluate transactions due to uncertainties surrounding the AML in its current early stages. This article describes China's enforcement authority and current legal framework for pre-merger antitrust review, and explores challenges in implementing the AML given certain uncertainties.

Enforcement Authority

The AML places responsibility for antitrust enforcement with the Anti-monopoly Commission under China's State Council (AMC) and the anti-monopoly enforcement authorities designated by the State Council (AMEA). The AMC supervises the AMEA. The AMEA's structure involves a three-way split of authority among the Ministry of Commerce (MOFCOM), the National Development and Reform Commission, and the State Administration of Industry and Commerce. MOFCOM, through its Anti-monopoly Bureau (AMB), is solely in charge of pre-merger antitrust review, and hence is also called the "Reviewing Authority."[4]

Highlights of Current Rules for Pre-Merger Antitrust Review

According to the AML, when parties to a proposed M&A transaction meet certain prescribed thresholds, they must file with the Reviewing Authority before proceeding with the transaction. This is known as the pre-merger filing requirement. On August 3, 2008, the State Council issued the Provisions on Pre-Merger Filing Criteria (the "Filing Criteria Provisions"), which define the thresholds triggering the filing requirement. [5]

Transacting parties who fall under the prescribed threshold may be exempted from a filing if their transaction does not involve a change of control.[6] However, even if the parties do not meet the thresholds, the Reviewing Authority may initiate investigations if the transaction has, or may have, the effect of eliminating or restricting competition.[7]

All filings are subject to an initial 30-day review period from the date of official acceptance of the filing and an additional 90-day further review (extendable by a further 60 days in certain circumstances) from the end of the initial review period if not cleared within the first 30 days. Therefore, once the filing is officially accepted, the entire filing review process can extend as long as 180 days (a 30-day initial review plus a 90-day further review plus a 60-day extended review) under extreme circumstances.

[1]Jun Wei is the co-managing partner of Hogan & Hartson LLP's Beijing, Shanghai, and Hong Kong offices. Her practice area includes corporate and foreign direct investment, with a focus on cross-border merger & acquisition where concentration filing has often been a difficult challenge.

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

[3]MOFCOM Interprets Relevant Issues Concerning Antitrust Review of M&A Transactions in a Q&A Session with the Media. Available at: http://www.mofcom.gov.cn/aarticle/zhengcejd/bj/200811/20081105906893.html.

[4]For convenience, this article uses "Reviewing Authority" and "MOFCOM" alternatively to refer to the anti-monopoly enforcement agency under the State Council that reviews M&A transactions.

[5]According to the Filing Criteria Provisions, filing parties must file with the Reviewing Authority if a transaction meets any of the following criteria: (1) During the previous fiscal year, the total global turnover of all the parties to the transaction exceeded RMB 10bn, and at least two of the parties each had a turnover of more than RMB 400m within China; or (2) During the previous fiscal year, the total turnover within China of all the parties to the transaction exceeded RMB 2bn, and at least two of the parties each had a turnover of more than RMB 400m within China.

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

The AML also specifies the factors to be considered in the review: the market shares of the parties to the transaction in the relevant market; the ability of the parties to the transaction to control the market; the degree of market concentration in the relevant market; and the effect of the proposed transaction on consumers, other related parties, market access, technological progress, and the development of the national economy.

MOFCOM may issue three types of written decisions: decisions to approve the transaction, decisions to prohibit the transaction, or decisions to attach restrictive conditions to an approved transaction. Specifically, under the AML, MOFCOM must promptly and publicly announce a decision to prohibit a transaction or a decision to attach restrictive conditions to a transaction. On November 18, 2008, MOFCOM made its first public announcement post implementation of the AML (Announcement No. 95), declaring its approval of the acquisition of Anheuser-Busch Companies Inc. (AB) by InBev N.V./S.A. (InBev) (the "InBev/AB Transaction"), subject to several restrictive conditions.[8]

Challenges in Implementing Current Rules for Pre-Merger Antitrust Review

Clear and unambiguous rules for pre-merger antitrust review are important. However, many notable provisions under China's current antitrust legal framework are rather vague and require further interpretation and definition by PRC authorities.

First, neither the AML nor the Filing Criteria Provisions specify the method for calculating the turnover of the parties to the proposed transaction. The 2006 draft of the AML stated the turnover calculation should apply to affiliated enterprises and enterprises under the control of parties to the transaction, indicating the calculation should apply to all affiliated enterprises, including joint ventures regardless of the shareholding ratio that the parties have in such affiliates. However, this provision was not incorporated into the final law, leaving the scope of the turnover application unclear. 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.

In addition, according to the AML, the timeline of the antitrust review shall commence on the date that all filing materials are duly submitted. However, due to the lack of detailed rules for the documentation requirement, whether the filing materials are "duly submitted" is subject to MOFCOM's sole discretion. For example, Announcement No.95 indicates that InBev submitted its filing report to MOFCOM on September 10, 2008. MOFCOM requested InBev to submit supplementary materials on October 17, 2008 and October 23, 2008, and officially accepted the filing on October 27, 2008. Unfortunately, Announcement No.95 does not explain the standards for deciding whether the filing materials are "duly submitted."

Furthermore, the ambiguity of certain documentation requirements may cause uncertainty in the antitrust review process. The AML lists a limited set of filing materials, but also authorizes MOFCOM to require "other documents and information" at its sole discretion.[9] According to MOFCOM, it is impossible to provide one standardized and unified requirement on filing materials because a transaction may involve different industries and different parties. Consequently, MOFCOM will require specific filing materials on a case-by-case basis.[10]

[7]According to Article 4 of the Filing Criteria Provisions, in the event that the transaction does not reach any of the thresholds provided in Article 3 of these Provisions, the Reviewing Authority should conduct investigations in accordance with the law if facts and evidence duly collected in accordance with relevant procedures indicate that the transaction has, or may have the effects of eliminating or restricting competition.

[8]According to Announcement No.95, the following items should not be implemented without MOFCOM's prior approval: (1) an increase in AB's current 27% shareholding in Tsingtao Brewery; (2) a change in InBev's controlling shareholders or shareholders of the controlling shareholders; (3) an increase in InBev's current 28.56% shareholding in Zhujiang Brewery; and (4) an acquisition of shares in CR Snow Brewery or Yanjing Brewery. MOFCOM Announcement No. 95. available at: http://fldj.mofcom.gov.cn/aarticle/ztxx/200811/20081105899216.html. Interestingly, these are restrictions on the merged parties future conduct as opposed to restrictions related to the transaction.

Also, it is not clear how MOFCOM will hold hearings. Normally, MOFCOM conducts the antitrust review based on the available filing materials. However, MOFCOM may hold hearings to seek the opinions of interested parties in a high-profile transaction. In the InBev/AB Transaction, MOFCOM held a series of hearings and collected opinions and suggestions from other government agencies, trade associations, major domestic beer manufactures, and domestic beer venders, but has not explicitly stated how or under what timetable such hearings were held.

Suggestions and Conclusions

Although the implementation of the AML marks an important move towards a more robust merger control regime, given ambiguities in the AML, much remains to be seen about how the regime will operate in practice. It is advisable that dealmakers interested in the Chinese market include the AML and its related regulations in their deal planning, and closely monitor the future development of the merger control rules.

Meanwhile, to reduce uncertainties currently surrounding the merger control rules, it may be wise for dealmakers to maintain close relations and coordinate with MOFCOM, especially to take advantage of the informal pre-filing consultation mechanism during the filing process. This mechanism allows filing parties to submit a written request to MOFCOM for clarification on certain filing requirements.

If any of the filing parties disagree with the decisions or administrative penalties MOFCOM imposes, they can either apply to MOFCOM for administrative reconsideration[11] or file a lawsuit to challenge such matters in court.[12]

[9]Article 23 of the AML explicitly provides that the filing party must submit the following to the Reviewing Authority: the filing report, an explanation of the impact of the transaction on competition in the relevant market, the concentration agreement, and the audited financial reports of the parties to the transaction for the previous fiscal year. Additionally, the AML provides an open-ended clause authorizing the Reviewing Authority to require "other documents and information" at its sole discretion.

[10]MOFCOM Interprets Relevant Issues Concerning Antitrust Review of M&A Transactions in a Q&A Session with the Media. Available at: http://www.mofcom.gov.cn/aarticle/zhengcejd/bj/200811/20081105906893.html.

[11]On October 6, 2008, Dong Zhengwei, a lawyer, applied to MOFCOM for administrative reconsideration on AMB's failure to act on its antimonopoly enforcement duty with respect to the antitrust review on the on-going restructuring of telecommunications. The case is deemed to be the first case against the antimonopoly enforcement authorities since the implementation of the AML. According to MOFCOM's Implementation Measures for Administrative Reconsideration (effective as of July 1, 2004), the Department of Treaty and Law (DTL) of MOFCOM is responsible for handling applications requesting administrative reconsideration. On October 14, 2008, DTL officially accepted Dong Zhengwei's application and started reviewing AMB's decision. Under China's Administrative Reconsideration Law, an administrative reconsideration authority (such as MOFCOM) must make a decision on a request for an administrative reconsideration within 60 days from the day it accepts the application. If the case is complex, and an administrative reconsideration authority fails to make a decision within the prescribed time limit, the responsible members of the administrative reconsideration authority may extend the time limit by an additional 30 days, and notify the applicant and the respondent of the application of this extension.

[12]The Chinese Supreme People's Court (Supreme Court) recently published in its official newspaper a Q&A session with the media in which the head of the Supreme Court tribunal responsible for trials in administrative litigation (administrative tribunal) set forth crucial guidance applicable to trials of administrative lawsuits relating to the AML. In this Q&A, the Supreme Court explained the applicability of the Administrative Procedure Law in dealing with antitrust administrative cases, and further established several rules applicable to courts at all levels hearing such lawsuits. Full context of the Q&A session with the media available at: http://rmfyb.chinacourt.org (November 3, 2008).

Regional Round-Ups

North America/Europe

DOJ says Manitowoc must divest all Enodis' ice machine business in the US

The Department of Justice (DOJ) confirmed that a settlement has been reached to allow the international industrial equipment manufacturer, Manitowoc, to acquire UK based Enodis in a proposed US$2.3bn deal. The DOJ will allow the deal on the condition that Manitowoc divests all of Enodis' commercial ice machine manufacturing business in the US.

The DOJ filed a civil antitrust lawsuit in US District Court in Washington D.C. to stop the proposed acquisition alongside the settlement proposal, which, if approved would resolve the DOJ's competition concerns allowing the transaction to go ahead. The proposed settlement aims to avoid the detrimental impact on the innovation, quality and price of commercial ice machines in the US that reduced competition would give rise to. Other than Manitowoc and Enodis, there is only one other major commercial ice machine manufacturer in the US.

The settlement outcome is consistent with the result of an antitrust investigation by the European Commission (EC) announced in September 2008. The DOJ co-operated with the EC during the investigation and the two bodies plan to continue working together to ensure the quick divestiture of Enodis' ice machine business in the US.

North America/Asia

Chinese competition regulators begin review of Coca Cola's bid for Huiyuan

On 19 November, the Chinese Anti-monopoly Bureau began a review of Coca Cola's proposed US$2.3bn bid for the Chinese juice-company Huiyuan. This came after the US soft drink giant submitted the final application materials that were needed for the review of the proposed transaction. Initially, there had been a delay in the review after the Chinese competition regulator deemed the application files submitted by Coca Cola in October and September as insufficient to meet the information standards required by law.

Coca Cola has recently stated it will not modify the offer proposal, despite the poor performance of the equities market. Over 60% of Huiyuan's shareholder's have supported the cash offer, which valued their shares at HK$12.2 (three times the closing price on the day before the announcement offer). However, the move by Coca Cola has unnerved some Chinese juice producers and consumers who fear the emergence of a monopoly in the sector and the sell off of a well-known Chinese brand.

In early December, the two companies released a joint statement saying the Anti-monopoly Bureau's review would continue until late March 2009, after which time Coca Cola will release further statements about the deal.

North America/South America

JBS may divest assets to see through the acquisition of NBP

JBS, the Brazilian meat processor, has said that it could gain approval for the recent acquisition of National Beef Packing (NBP) if it divests beef packing operations in other regions of the US. The DOJ is currently challenging JBS' acquisition of the Missouri-based company as it comes under pressure from cattle producers in the US, whose trade organisations, the National Cattlemen's Beef Association and the Ranchers Cattlemen, have joined the lawsuit against the acquisition.

The DOJ believes the deal, valued at US$970m, may grant JBS a disproportionate presence in the US beef packing market. Together with JBS' acquisition of Smithfield Beef Group earlier this year, a successful NBP acquisition would result in JBS becoming one of the largest beef packers in the US alongside Cargill and Tyson Foods. According to one analyst, the three companies would dominate the meatpacking industry with an 80% market share, yet it remains uncertain what assets JBS would divest to increase chances for the deal's approval.

JBS' CEO, Joesley Batista, commented that if his company struggles to complete the NBP deal, it will pursue other acquisitions with money received from a stake sale to the Brazilian Development Bank. He added that after consolidating

recent buys, the company will continue to expand with future acquisitions likely in Mercosur markets such as Argentina and Brazil in the coming two years.

Europe/Asia

BHP steps away from Rio takeover

BHP, the Anglo-Australian mining company, has said it is no longer seeking to go ahead with the acquisition of Rio Tinto. BHP moved away from the deal, citing poor market conditions, which have increased debt risks and made it an unfavourable time for divesting assets at a fair market value.

That said, BHP was facing significant challenges from national antitrust regulators across the world, particularly in Europe and Asia. Analysts believe that antitrust investigations would have required costly BHP commitments for the deal's success. However, these remedies would have called into question the viability of the deal in any event. Several competition regulators have announced they will no longer pursue antitrust investigations into the deal, most notably regulators in the UK, EC and China.

North America

Dow takeover of Rohm and Hass hindered by slow pace of divestments

Dow's planned US$18bn takeover of Rohm and Hass may see completion delayed until Q1 2009 due to the weak market for divestitures. Dow is aiming to avoid extended antitrust concerns from the EC and the Federal Trade Commission (FTC) by moving to sell off its Clear Lake acrylic and esters operations and its UCAR Emulsion Systems latex business. The EC is expected to deliver its phase one review on 15 December and failure to dispose of the abovementioned assets before then could delay deal completion. Furthermore, a lawyer familiar with the deal believes the FTC will require a buyer to be named before it grants a consent order.

Potential bidders for the Clear Lake and UCAR Emulsion Systems began looking at the assets when their books were released in September. Clear Lake has received more interest and insiders believe it will sell first, though this will still depend on the ability to finance any acquisition without recourse to borrowing given the poor credit conditions.

North America/Europe

Getinge's takeover of Datascope moves forward

Datascope has announced it will divest its endoscopic vessel harvesting (EVH) unit to the Italian cardiovascular technology company, Sorin Group. The divestment of EVH was a necessary condition for the acquisition of Datascope by Getinge, the Swedish healthcare and life sciences firm. The sale agreement will soon be put forward to the FTC for its review and approval. Getinge, which has twice re-filed its tender offer, made a bid for Datascope at US$53 per share in October. Getinge's latest tender offer expires in the middle of December.

Europe

Gas Natural's takeover of Union Fenosa subject to second review

The Spanish National Competition Commission (CNC) has said that it will need to undertake a careful analysis of Gas Natural's acquisition of Union Fenosa. Reportedly, the CNC wants to enter a second phase analysis of the proposed acquisition in order to determine structural links between the merged business and European energy groups Cepsa, Eni, Iberdrola, Endesa and HC Energia.

The CNC has already identified the joint ownership of Union Fenosa Gas by Gas Natural and Eni as one structural linkage. The Spanish regulator also cautioned that a structural link with Cepsa would also be created in the form of the combined Nueva Generadora del Sur generator. Gas and electricity market linkages to Iberdrola would also exist as would a combined generator with Aceca. The body will also likely review links between Fenosa and Endesa through the jointly held Eufer.

The CNC stated that any increase in efficiency would not be sufficient to offset the potential negative effects on competition. Moreover, the CNC has said that greater efficiency would not likely be passed on to consumers. The Spanish regulator is due to finalise its second phase analysis by 7 January.

Europe

Ryanair faces challenges in its bid for Aer Lingus

Despite challenges from regulators and shareholders, Ryanair is moving ahead in its bid for its main rival in the Irish market, Aer Lingus. Ryanair, which owns a 29.82% stake in Aer Lingus, suffered an early setback when its offer of €1.40 per share was declined by Aer Lingus shareholders as the rival company advised investors not to accept the deal.

If the merger was completed, a combined entity would control 80% of Ireland's outbound, short-haul passenger market. As such, EC competition regulators and the Irish government, which holds a 25.1% stake in Aer Lingus, may well move to block the deal. The EC antitrust regulators already reached such a conclusion when Ryanair first made an offer for Aer Lingus in 2007.

However, Ryanair believes the changing business environment, poor economic conditions, the risk of Aer Lingus failing and the offer of remedies will all favour clearance this time around. After its most recent offer, Ryanair claimed the competitive environment had changed since the 2007 bid, arguing that there has been widespread consolidation throughout the EU airline industry and that small flag-ship carriers are not sustainable. While Ryanair has said that Aer Lingus needs a strong partner to secure its future, lawyers believe the financial position of the company is too strong for Ryanair to win approval of its bid through a failing company defence, which maintains that a merger is necessary to ensure the continued existence of a troubled company.

Lawyers familiar with the bid said that Ryanair's appeal against the EC's veto in 2007 at the Court of First Instance would have no bearing on the new investigation. The court's decision in 2007 was limited to the circumstances at that time and each new investigation needs to be evaluated independently. Legal experts believe that a second phase investigation may be likely although Ryanair may undertake greater pre-notification co-operation with regulators in order to increase the chances of the transaction receiving antitrust clearance.

Europe

EDF offers early commitments for quick clearance of British Energy acquisition

EDF and British Energy remain optimistic that the EC will clear their £12.4bn deal by the end of 2008 after the French energy company pledged commitments in an attempt to prevent a second phase of antitrust investigations. An EDF spokesperson said that after recent discussions with the EC, it was clear the antitrust regulator still has some competition concerns relating to the acquisition, this prompted the French energy firm to take pre-emptive commitments early to streamline clearance of the deal. Details of EDF's remedies remain confidential, but may be tested by the EC with select competitors and customers of EDF.

It has been speculated that a possible remedy may be the divestment of sites that could be used for nuclear power stations during the next stage of development. Another remedy could be the auction of a set share of future energy supply from the merged company for which there is a precedent in EC recommendations.

Latin America M&A Antitrust: A Round-up of 2008

By Bruno Ciuffetelli and Jose A. Cobeña, Hogan & Hartson LLP, Caracas

Venezuela

In Venezuela, the authority empowered to enforce antitrust laws, including merger control regulations, is the Superintendency for the Promotion and Protection of Free Competition ("Procompetencia". Procompetencia's objective is to enforce the Antitrust Law and to investigate and control harmful anti-competitive practices within Venezuela.

Mergers & Acquisitions

During 2008, Procompetencia investigated and rendered one merger control opinion in the telecommunications sector.

Procompetencia Approved the Change of Control of BT Global (Venezuela), SA and Comsat Venezuela Comsatven, SA (Comsatven), due to the Merger Between Holdings Companies of the BT Group and COMSAT International Holdings

The Venezuelan telecommunications agency, CONATEL, requested a merger control opinion from Procompetencia regarding the antitrust effects that the change of control of Comsatven may cause in the telecommunications market following the purchase of shares by holdings companies of the BT Group and COMSAT International Holdings. Procompetencia considered this merger transaction as a global transaction having indirect effects in 15 different jurisdictions, including Venezuela. Both Comsatven and BT Global (Venezuela) provide telecommunication services in Venezuela, directed toward corporate costumers in the transmission of data and the internet; however, BT Global (Venezuela) had not yet started operations in Venezuela at the time of the investigation.

Procompetencia approved the transaction based on the fact that the merger between the holdings companies of the BT Group and COMSAT International Holdings would not increase the degree of concentration in the Venezuelan telecommunications market and that no possibilities exist for collusive practices and/or the abuse of respective firms' market position given that the dominant position in the market is held by CANTV.

Brazil

Merger control rules are enforced by the Conselho Administrativo de Defesa Econômica – CADE (Administrative Commission for Economic Defense), a federal agency whose main objective is to guide, inspect, analyze and prevent transactions that may be considered anticompetitive.

Mergers & Acquisitions

CADE Approves Acquisition of Koblitz SA by Areva Participações Ltda.

CADE announced on March 5, 2008 that it had approved the acquisition of 70% of Koblitz SA shares by Areva Participações Ltda. The deal was structured around two stock purchase agreements, one for the purchase of 46% of the shares and the other for 24%. Additionally the parties signed an agreement granting Areva the future option of purchasing the remaining 30% of Koblitz stock. Areva Participações Ltda. is part of the multinational Areva Group, which is involved in the energy sector. Koblitz SA is a Brazilian company involved in renewable energy generation, production of automated electric panels and equipment and services in the energy production sector. The parties argued that the acquisition would generate a small concentration in the automated electronic panels sector as Areva retains 5% of the market share and Koblitz 4.9%; however, even after the acquisition of Koblitz, at least six other companies will continue to retain 73% of the market. Additionally, the parties mentioned that the vertical integration between the production of circuit breakers (Koblitz) and their use in the production of automated electronic panels (Areva and Koblitz) would be minimal and further stated that the respective market would not suffer any shortage in circuit breaker supplies. CADE analyzed both arguments and approved the acquisition without restrictions.

JP Morgan Chase Acquisition of Bear Sterns is Approved by CADE

On July 01, 2008, CADE approved JP Morgan Chase & Co.'s acquisition of 100% of Bear Sterns Company Inc. shares by means of a stock swap agreement. Both companies are US banking institutions involved in the general financial sector in Brazil. In their analysis of the transaction, CADE observed a horizontal integration in the investment banking sector in which both companies are engaged. Nevertheless, due to the fact the JP Morgan Chase & Co.'s participation in this specific market is approximately 0.7% and Bear Stern's is 0.001%, the concentration of economic power does not represent a threat to competition in the market. Therefore, CADE approved the transaction without restrictions.

CADE Approved the Acquisition of Two Mining Companies by Usinas Siderúrgicas de Minas Gerais - USIMINAS

CADE announced on October 06, 2008 that it had approved the acquisition of Mineração J. Mendes Ltda. and Global Mineração Ltda., companies involved in iron ore extraction, production and sales, by USIMINAS, a Brazilian mining company engaged in steel production. The transaction involved the purchase of all of the target companies' assets (including land titles and mining rights) and the possibility of an increase in the purchase price in the event new iron ore reserves are discovered. The operation presented a strategic move for USIMINAS as it would become less vulnerable to fluctuations in iron ore prices and thus more competitive in the steel market. In their analysis, CADE examined three relevant markets in order to verify any anticompetitive behavior: (i) lump iron ore in the southeast region of the country; (ii) sinter-feed iron ore in the southeast region; and (iii) sheet metal in the national market. CADE did not verify any horizontal integration. With regards to vertical integration, it observed that the target companies were responsible for 8.9% of the lump iron ore and 11.2% of the sinter-feed ore sold in the southeast region of Brazil; and concluded that these numbers are not sufficient to be considered an anticompetitive transaction. Furthermore, CADE examined the possibility of supply shortages to other steel producers in the region and concluded that the other manufactures can obtain ore form their own integrated sources or Companhia Vale do Rio Doce and CSN (two of the Brazil's largest mining companies). Therefore, CADE approved the acquisition without restrictions.

Argentina

Antitrust laws in Argentina are enforced by the Comisión Nacional de Defensa de la Competencia - CNDC (National Commission for Competition Defense). The CNDC's mission is to protect the free market through the establishment and enforcement of preventive and disciplinary procedures designed to protect the public economic interest and to guarantee the free competition of individuals.

Mergers & Acquisitions

CNDC Authorized the Acquisition of Torneos y Competencias S.A. (T&C) by Directv Latin America, LLC. (Directv LA)

ON 25 September, CNDC Resolution No. 685 announced the authorization of Directv LA's acquisition of T&C shares. In this transaction, Directv LA, DJL Offshore Partners III-1, C.V. (DJL), Mr. Frederick Arnold Vierra and Mr. Alejandro Burzaco entered into an agreement for the purchase of T&C shares, in which Directv LA acquired 33.2% of the capital stock of T&C. Additionally, Directv LA had the right and/or obligation to purchase the 6.8% of the shares from Mr. Frederick Arnold Vierra and Mr. Alejandro Burzaco under some specific circumstances.

In this case, the discussion was centered on the high levels of economic concentration and vertical integration between operators of subscription television services in two different markets, the advertising market in subscription television and the distribution market of subscription television signals with national sports content.

The CNDC decided that the transaction would not be sufficient to affect competition in the respective market and approved the acquisition; however, based on the findings of high levels of economic concentration in the distribution market of subscription television signals with national sports content, the CNDC imposed the following obligations: (i) to guarantee equitable commercial conditions to let other subscription television operators access the television signals of the companies; and (ii) to look over any relevant changes in the process of television signals distribution related to competitors in the market and provide this information to CNCD.

Live deals – Europe

dealREPORTER

Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
Aer Lingus Plc / Ryanair Holding.	1 AERL = EUR1.40	01 Dec 2008	20 Mar 2009	98		Ireland (Republic)	EUR-797m	-6.20%	2.75%	-22.85%
Altana AG / SKion GmbH	1 ALT = EUR13.00	06 Nov 2008	19 Dec 2008	7		Germany	EUR-1,825m	0.00%	0.00%	0.00%
Austrian Airlin. / Lufthansa AG	1 AUA = EUR4.44	05 Dec 2008	31 May 2009	170		Austria	EUR-326m	16.84%	-1.88%	35.95%
Axon Group Plc / HCL Technologie.	1 AXO = GBP6.4775	26 Sep 2008	15 Dec 2008	3	29 Dec 2008	United Kingdom	GBP-439m	0.04%	-0.39%	3.52%
British Energy . / Electricite de .	1 BGY = GBP7.74	24 Sep 2008	05 Jan 2009	24	19 Jan 2009	United Kingdom	GBP-12,376m	0.78%	-0.59%	11.41%
Brostrom AB / AP Moeller - Ma.	1 BROB = EUR6.0939	27 Aug 2008	16 Jan 2009	35	23 Jan 2009	Sweden	EUR-334m	16.03%	-0.13%	162.48%
Ciba Specialty . / BASF SE	1 CIBN = EUR33.3781	15 Sep 2008	06 Mar 2009	84	06 Mar 2009	Switzerland	EUR-2,128m	8.34%	1.57%	35.81%
Continental AG / Schaeffler KG	1 CON = EUR75.00	15 Jul 2008	19 Dec 2008	7		Germany	EUR-6,081m	99.47%	3.39%	4538.23%
Distrigaz SA / ENI SpA	1 DIST = EUR6809.64	04 Nov 2008	23 Jan 2009	42		Belgium	EUR-4,707m	1.64%	0.30%	13.89%
Enia SpA (forme. / Iride SpA (form.	1 EN = 4.20 IRD	16 Oct 2008	01 Mar 2009	79		Italy	EUR-388m	11.30%	-2.59%	51.56%
HBOS Plc / Lloyds TSB Grou.	1 HBOS = 0.605 LLOY	18 Sep 2008	16 Jan 2009	35		United Kingdom	GBP-4,615m	9.12%	-3.34%	92.48%
Imperial Energy. / Oil and Natural.	1 IEC = GBP12.50	26 Aug 2008	30 Dec 2008	18	13 Jan 2009	United Kingdom	GBP-1,085m	17.81%	0.99%	342.20%
Itinere Infraes. / Citigroup Inc	1 ITI = EUR3.96	01 Dec 2008	28 Feb 2009	78		Spain	EUR-2,714m	5.88%	-0.57%	27.18%
Meliorbanca SpA / Banca Popolare .	1 MEL = EUR3.20	24 Jun 2008	30 Jan 2009	49		Italy	EUR-370m	9.12%	-0.47%	66.59%
Metal Industry . / Iberdrola Renov.	1 ROKKA = EUR16.00	01 Jul 2008	17 Dec 2008	5		Greece	EUR-329m	0.00%	0.00%	0.00%
Peab Industri A. / Peab AB	1 PINDB = 1.50 PEABB	10 Nov 2008	17 Dec 2008	5	30 Dec 2008	Sweden	EUR-6,379m	0.00%	-0.33%	0.00%
Protherics Plc / BTG plc	1 PTI = 0.291 BTG	18 Sep 2008	04 Dec 2008	Completed	18 Dec 2008	United Kingdom	GBP-154m	5.73%	1.62%	N/A
Revus Energy AS. / Wintershall AG	1 REVUS = EUR11.977	27 Oct 2008	05 Dec 2008	Completed		Norway	EUR-538m	1.92%	-0.52%	N/A
Tanganyika Oil . / China Petroleum.	1 TYK = USD25.4772	25 Sep 2008	31 Jan 2009	50		Canada	USD-1,358m	16.67%	-3.35%	119.28%
Union Fenosa SA / Gas Natural SDG.	1 UNF = EUR18.33	31 Jul 2008	30 Apr 2009	139		Spain	EUR-15,895m	5.41%	-0.43%	14.09%
Wavefield Insei. / CGGVeritas	1 WAVE = 0.1429 GA	10 Nov 2008	12 Dec 2008	Completed		Norway	EUR-191m	11.17%	-6.12%	N/A

Live deals – Asia

dealREPORTER

Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
Alfresa Holding. / Mediceo Paltac .	1 2784 = 4.15 7459	10 Oct 2008	01 Apr 2009	110		Japan	JPY-189,198m	1.66%	-1.19%	5.51%
Amtek India Lim. / Amtek Auto Limi.	1 AMTEKIN = 0.44 AMTEKAUTO	01 Aug 2008	31 Mar 2009	109		India	INR-2,069m	24.73%	0.00%	82.80%
Australasian Re. / Resource Develo.	1 ARH = AUD2.20	07 Aug 2008	30 Mar 2009	108		Australia	AUD-137m	609.68%	11.26%	2060.48%
Australian Weal. / IOOF Holdings L.	1 AUW = 0.268 IFL	24 Nov 2008	12 Mar 2009	90		Australia	AUD-507m	7.83%	-0.32%	31.77%
Central Finance. / OMC Card, Inc.	1 8588 = 0.85 8258	29 Sep 2008	01 Apr 2009	110		Japan	JPY-22,152m	-8.89%	1.11%	-29.50%
China Huiyuan J. / The Coca-Cola C.	1 1886 = HKD12.20	03 Sep 2008	15 Apr 2009	124		Hong Kong	HKD-14,688m	22.00%	-0.12%	64.76%
Chongqing Titan. / Panzhihua New S.	1 000515 = 1.78 000629	05 Nov 2007	31 Dec 2008	19		China	CNY-2,542m	19.41%	0.22%	372.86%
eTelecare Globa. / EGS Acquisition.	1 ETEL = USD9.00	19 Sep 2008	11 Dec 2008	Completed	26 Dec 2008	Philippines	USD-263m	1.39%	0.25%	N/A
Guangzhou Refri. / Guangzhou Dongl.	1 000893 = CNY7.78	12 Dec 2008	10 Jan 2009	29		China	CNY-2,444m	-29.34%	7.00%	-369.24%
Hyundai Autonet. / Hyundai Mobis L.	1 042100 = 0.0397 012330	03 Nov 2008	31 Jan 2009	50		South Korea	USD-483m	-5.96%	2.37%	-43.48%
Indosat Tbk, PT. / Qatar Telecom Q.	1 ISAT = USD0.5674	30 Jun 2008	15 Feb 2009	65		Indonesia	USD-2,371m	30.05%	0.53%	168.73%
Meiji Seika Kai. / Meiji Dairies C.	1 2202 = 0.855 2261	11 Sep 2008	01 Apr 2009	110		Japan	JPY-160,768m	-2.20%	0.45%	-7.29%
MYOB Limited / Manhattan Softw.	1 MYO = AUD1.04	30 Oct 2008	18 Dec 2008	6	18 Jan 2009	Australia	AUD-409m	-0.95%	3.63%	-57.94%
Natural Beauty . / Global Radiance.	1 157 = HKD1.20	26 Nov 2008	16 Feb 2009	66		Hong Kong	HKD-2,361m	1.69%	0.00%	9.37%
Pangang Group S. / Panzhihua New S.	1 000569 = 0.82 000629	05 Nov 2007	31 Dec 2008	19		China	CNY-4,707m	19.71%	0.18%	378.73%
PCCW Limited / Consortium for .	1 0008 = HKD4.20	03 Nov 2008	14 Jan 2009	33	23 Jan 2009	Hong Kong	HKD-24,719m	15.07%	-0.32%	166.67%
Queensland Gas . / BG Group Plc	1 QGC = AUD5.75	28 Oct 2008	15 Dec 2008	3	18 Dec 2008	Australia	AUD-5,344m	0.00%	0.00%	0.00%
Shriram City Un. / Shriram Retail .	1 532498 = INR364.647	15 Sep 2008	27 Mar 2009	105		India	INR-15,910m	5.09%	-0.61%	17.68%
Spice Communica. / Idea Cellular L.	1 SPCM = INR77.30	25 Jun 2008	15 Mar 2009	93	21 Oct 2008	India	INR-22,561m	136.39%	-1.46%	535.30%
Tata Teleservic. / NTT DoCoMo Inc .	1 TTML = INR23.20	14 Nov 2008	27 Jan 2009	46	11 Feb 2009	India	INR-37,564m	17.17%	-0.30%	136.25%

Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
Tecmo Ltd / Koei Co, Ltd.	1 9650 = 0.90 9654	18 Nov 2008	01 Apr 2009	110	25 May 2009	Japan	JPY-19,205m	9.12%	0.01%	30.25%
United Metals H. / China National .	1 2302 = HKD1.82	24 Jun 2008	03 Dec 2008	Completed	13 Dec 2008	Hong Kong	HKD-648m	6.43%	0.00%	N/A
VADS Berhad / Telekom Malaysi.	1 7150 = USD2.22	22 Sep 2008	31 Mar 2009	109		Malaysia	USD-277m	5.56%	-0.68%	18.63%
Yunnan Malong C. / Yunnan Yuntianh.	1 600792 = 0.35 600096	08 Nov 2008	30 Nov 2009	353		China	CNY-988m	-11.99%	0.26%	-12.39%
Yunnan Salt & C. / Yunnan Yuntianh.	1 002053 = 0.51 600096	08 Nov 2008	30 Nov 2009	353		China	CNY-1,903m	0.06%	-0.97%	0.06%
Zhejiang Xinhu . / Xinhu Zhongbao .	1 600840 = 1.85 600208	10 Dec 2008	30 Sep 2009	292		China	CNY-2,520m	7.60%	0.00%	9.51%

Live deals – America

dealREPORTER

Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
Alpharma, Inc. / King Pharmaceut.	1 ALO = USD37.00	11 Sep 2008	30 Dec 2008	18		USA	USD-1,501m	2.92%	0.14%	56.11%
Arlington Tanke. / General Maritim.	1 ATB = 0.7463 GMR	06 Aug 2008	17 Dec 2008	5		Bermuda	USD-148m	0.26%	1.49%	15.93%
Barr Pharmaceut. / Teva Pharmaceut.	1 BRL = 0.6272 TEVA + USD39.90	18 Jul 2008	19 Dec 2008	7		USA	USD-7,006m	2.33%	0.44%	106.47%
Castlepoint Hol. / Tower Group, In.	1 CPHL = 0.47 TWGP + USD1.83	05 Aug 2008	15 Jan 2009	34		Bermuda	USD-429m	10.44%	0.54%	108.85%
Centennial Comm. / AT&T Inc	1 CYCL = USD8.50	07 Nov 2008	30 Apr 2009	139		USA	USD-856m	7.46%	0.54%	19.45%
Constellation E. / MidAmerican Ene.	1 CEG = USD26.50	18 Sep 2008	30 Jun 2009	200		USA	USD-4,833m	-2.21%	1.07%	-4.02%
Datascope Corpo. / Getinge AB	1 DSCP = USD53.00	16 Sep 2008	09 Jan 2009	28		USA	USD-821m	2.42%	0.14%	30.40%
Embarq Corporat. / CenturyTel, Inc	1 EQ = 1.37 CTL	27 Oct 2008	30 Apr 2009	139		USA	USD-4,386m	12.81%	1.48%	33.39%
Foundry Network. / Brocade Communi.	1 FDRY = USD16.50	21 Jul 2008	19 Dec 2008	7		USA	USD-2,302m	4.56%	-0.07%	208.17%
Grey Wolf, Inc. / Precision Drill.	1 GW = 0.1883 PDS + USD5.00	25 Aug 2008	23 Dec 2008	11	31 Dec 2008	USA	USD-1,016m	8.54%	-0.09%	259.77%
Huntsman Corpor. / Hexion Specialt.	1 HUN = USD28.00	12 Jul 2007	31 Dec 2008	19		USA	USD-1,203m	416.61%	35.51%	7603.04%
Landry's Restau. / Fertitta Holdin.	1 LNY = USD13.50	16 Jun 2008	15 Feb 2009	65		USA	USD-190m	14.80%	3.78%	81.83%
Lundin Mining C. / HudBay Minerals.	1 LMC = 0.3919 HBM	21 Nov 2008	28 Feb 2009	78		Canada	USD-383m	19.03%	-7.88%	87.93%
Mentor Corporat. / Johnson & Johns.	1 MNT = USD31.00	01 Dec 2008	31 Mar 2009	109		USA	USD-1,035m	1.17%	-0.23%	3.90%
Merrill Lynch / Bank of America.	1 MER = 0.8595 BAC	15 Sep 2008	12 Dec 2008	Completed		USA	USD-19,360m	1.15%	-0.59%	N/A
National City C. / PNC Financial S.	1 NCC = 0.0392 PNC	24 Oct 2008	31 Dec 2008	19		USA	USD-3,509m	6.32%	2.01%	115.34%
Nationwide Fina. / Nationwide Mutu.	1 NFS = USD52.25	06 Aug 2008	31 Dec 2008	19		USA	USD-7,118m	1.67%	-0.48%	30.54%
NDS Group Plc / The News Corpor.	1 NNDS = USD63.00	14 Aug 2008	31 Dec 2008	19		United Kingdom	USD-2,961m	23.81%	-8.77%	434.51%

Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
NRG Energy Inc / Exelon Corporat.	1 NRG = 0.485 EXC	11 Nov 2008	11 Nov 2009	334		USA	USD-5,451m	14.51%	3.19%	15.81%
Omrix Biopharma. / Johnson & Johns.	1 OMRI = USD25.00	24 Nov 2008	31 Dec 2008	19		USA	USD-425m	0.60%	0.20%	11.02%
Progress Energy. / ProEx Energy Lt.	1 PGX.UN = 0.8125 PXE	17 Nov 2008	16 Jan 2009	35		Canada	USD-745m	-0.79%	-3.85%	-8.03%
Puget Energy In. / Puget Acquisiti.	1 PSD = USD30.00	26 Oct 2007	15 Jan 2009	34		USA	USD-3,165m	22.90%	-2.10%	238.82%
Rohm And Haas L. / The Dow Chemica.	1 ROH = USD78.00	10 Jul 2008	30 Jan 2009	49		USA	USD-13,233m	15.52%	4.39%	113.31%
SI Internationa. / Serco Inc.	1 SINT = USD32.00	27 Aug 2008	31 Dec 2008	19		USA	USD-410m	3.56%	0.67%	64.97%
Sovereign Banco. / Santander Centr.	1 SOV = 0.3206 STD	13 Oct 2008	28 Feb 2009	78		USA	USD-1,770m	5.91%	0.31%	27.29%
Tanganyika Oil . / China Petroleum.	1 TYK = USD25.4772	25 Sep 2008	31 Jan 2009	50		Canada	USD-1,358m	16.67%	-3.35%	119.28%
UST Inc. / Altria Group In.	1 UST = USD69.50	08 Sep 2008	07 Jan 2009	26		USA	USD-10,109m	1.45%	0.92%	19.53%
Wachovia Corpor. / Wells Fargo & C.	1 WB = 0.1991 WFC	03 Oct 2008	31 Dec 2008	19		USA	USD-10,843m	2.72%	0.40%	49.70%

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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
Artman SA / LPP SA	1 ART = EUR26.7946	10 Sep 2008	05 Jan 2009	24		Poland	EUR-98m	17.06%	0.64%	249.05%
Blue Star Marit. / Attica Group SA	1 BSTAR = 0.6963 ATTICA	03 Dec 2008	19 Jan 2009	38		Greece	EUR-229m	47.56%	-0.68%	445.15%
ECM / ECM Group N.V.	1 ECM = EUR12.1984	21 Oct 2008	05 Dec 2008	Completed	12 Dec 2008	Czech Republic	EUR-46m	19.40%	-0.17%	N/A
Imperial Energy. / Oil and Natural.	1 IEC = GBP12.50	26 Aug 2008	30 Dec 2008	18	13 Jan 2009	United Kingdom	GBP-1,085m	17.81%	0.99%	342.20%
International I. / Al-Deera Holdin.	1 IIPC = 0.3704 ALDEERA	23 Oct 2008	31 Dec 2008	19		Kuwait	USD-107m	111.62%	0.00%	2037.00%
JGC TGK-4 (The . / Onexim Group	1 TGKD = USD0.0011	07 Apr 2008	31 Dec 2008	19		Russia	USD-396m	266.67%	0.00%	4866.67%
Lebedyansky JSC / Bidco for Lebed.	1 LEKZ = USD88.02	20 Mar 2008	11 Dec 2008	Completed		Russia	USD-1,470m	22.25%	0.00%	N/A
Metal Industry . / Iberdrola Renov.	1 ROKKA = EUR16.00	01 Jul 2008	17 Dec 2008	5		Greece	EUR-329m	0.00%	0.00%	0.00%
Spring Bank / Platinum Habib .	1 SPRINGBK = USD0.0588	01 Dec 2008	18 Dec 2008	6		Nigeria	USD-495m	34.55%	0.00%	1801.73%
Terme Catez / Bidco for Terme.	1 TCRG = EUR305.00	04 Nov 2008	29 Dec 2008	17	09 Jan 2009	Slovenia	EUR-82m	84.85%	3.41%	1720.54%
Terna S.A. / GEK S.A. (aka G.	1 TERR = 0.95 GEK	07 Apr 2008	10 Dec 2008	Completed		Greece	EUR-131m	0.00%	0.28%	N/A
Territorial Gen. / Integrated Ener.	1 TGKF = USD0.0011	14 Mar 2008	18 Dec 2009	371		Russia	USD-258m	450.00%	0.00%	441.53%
TGK-14 (Territo. / Energopromsbyt	1 TGKN = USD0.0003	23 Jun 2008	31 Dec 2008	19		Russia	USD-78m	200.00%	0.00%	3650.00%
TGK-2 (The Seco. / Kores Invest	1 TGKB = USD0.0011	14 Mar 2008	31 Dec 2008	19		Russia	USD-110m	1000.00%	0.00%	18250.00%
Volzhskaya TGK . / Berezville Inve.	1 TGKG = USD0.1198	15 May 2008	18 Nov 2009	341		Russia	USD-282m	1174.47%	0.00%	1253.45%
Zentiva NV / Sanofi-Aventis .	1 ZEN = EUR48.1457	18 Jun 2008	20 Feb 2009	70		Czech Republic	EUR-1,611m	13.95%	0.67%	71.69%

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Catriona Hatton
Co-Chair, European Antitrust Practice
Brussels

chatton@hhlaw.com
Tel: +32.2.505.0911
Fax: +32.2.505.0996

Philip C. Larson
Chair, Antitrust & Competition Group
Washington D.C.

pclarson@hhlaw.com
Tel: +1.202.637.5738
Fax: +1.202.637.5910

John Pheasant
Co-Chair European Antitrust Practice
London/Brussels

jpheasant@hhlaw.com
Tel: +44.20.7367.0214
Fax: +44.20.7367.0220

Sharis Arnold Pozen
Practice Group Director
Antitrust & Competition Group
Washington D.C.

sapozen@hhlaw.com
Tel: +1.202.637.6948
Fax: +1.202.637.5910

Abu Dhabi	Baltimore	Beijing	Berlin
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www.hhlaw.com

Notes & Contacts

Simon Anam
Managing Director, Remark
sa@mergermarket.com

Erik Wickman
Remark, North America
erik.wickman@mergermarket.com

Ben Bschor
Regulatory Correspondent, dealReporter
ben.bschor@dealreporter.com

Tom Coughlan
Research Analyst, Remark
tom.coughlan@mergermarket.com

80 Strand
London WC2R ORL

t: +44 (0)20 7059 6100
f: +44 (0)20 7059 6101
sales@mergermarket.com
crm@mergermarket.com

895 Broadway
4th Floor
New York
NY 10003, USA

t: +1 212 686-5606
f: +1 212 686-2664
sales.us@mergermarket.com

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