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Antitrust Review
July - August 2011

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European Union

- **Commission fines Telekomunikacja Polska S.A. for abuse of dominance.** The European Commission has fined Polish telecoms operator Telekomunikacja Polska S.A. for abuse of a dominant position.

- **General Court reduces fines imposed on Heineken and Bavaria.** The General Court of the European Union has reduced the fines imposed on Heineken NV, its subsidiary Heineken Nederland BV, and Bavaria NV for participating in an alleged cartel on the Dutch beer market.

- **Commission opens proceedings against Czech electricity incumbent.** The European Commission has opened formal antitrust proceedings against the Czech electricity incumbent CEZ a.s. to investigate whether CEZ may have abused a dominant position on the Czech electricity market.

- **Commission investigates luxury watchmakers.** The European Commission has initiated a formal antitrust investigation into several luxury watch manufacturers' alleged refusal to supply spare parts to independent repairers**.**

- **Commission repeals heat stabilisers cartel decision for Ciba/BASF and Elementis.** The European Commission has repealed a cartel decision relating to the market for heat stabilisers insofar as it concerns Ciba/BASF and Elementis.

Czech Republic

- **CCO imposes fine for abuse of significant market power.** The Czech Competition Office has imposed a fine on Kaufland Česká republika, v.o.s., a retailer, for the abuse of significant market power.

Germany

- **Federal Court of Justice considers "passing-on defence" admissible.** The German Federal Court of Justice has held that cartel members can argue the so-called "passing-on defence" in civil damages claims.

Romania

- **Takeovers in the medical field cleared subject to commitments.** The Romanian Competition Council has authorised, subject to commitments, the takeover by entities from the Fresenius group of several companies acting in the medical field previously indirectly controlled by a number of individuals and by Euromedic International Group B.V.

The Antitrust Review does not necessarily deal with every important topic with which it deals. It is not designed to provide legal or other advice.

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Spain

- **CNC fines Telecinco EUR 3.6 million for non-compliance with commitments.** The Spanish Competition Authority has imposed a fine of EUR 3.6 million on Telecinco (now Mediaset España Comunicación, S.A.) for failing to comply the commitments approved in connection with the Telecinco/Cuatro merger.

United Kingdom

- **OFT refers equity trading merger to CC.** The Office of Fair Trading has referred the completed acquisition by BATS Trading Limited of Chi-X Europe Limited to the Competition Commission for further investigation.

- **CC clears Irish Sea ferries merger.** The Competition Commission has cleared the completed acquisition by Stena AB (Stena) of two Irish Sea ferry services from DFDS A/S.

- **OFT launches new guidance on competition law compliance.** The Office of Fair Trading has launched new guidance to help businesses comply with competition law.

- **CAT rules in favour of OFT in Ryanair / Aer Lingus case.** The Competition Appeal Tribunal has ruled that the Office of Fair Trading was 'in time' when it attempted to open an investigation into Ryanair's 2006 acquisition of a minority stake in Aer Lingus.

- **OFT issues decision in dairy products investigation.** The OFT has fined four supermarkets and five dairy processors a total of £49.51 million following its dairy products retail pricing investigation.

- **OFT provisional decision to refer the audit market to CC.** The Office of Fair Trading has provisionally decided to refer the market for statutory audit services to large companies in the UK to the Competition Commission for a market investigation.

United States

- **DoJ issues revised Guide to Remedies in Merger Cases.** The US Department of Justice has updated the Antitrust Division's Policy Guide to Merger Remedies.

- **Changes to US premerger notification requirements come into effect.** Premerger notification requirements in the US have been significantly revised, affecting the information that must be supplied on the Premerger Notification and Report Form used to notify the US Federal Trade Commission and the US Department of Justice of a proposed transaction.

European Union: Commission fines Telekomunikacja Polska S.A. for abuse of dominance

Summary. The European Commission (the Commission) has fined Polish telecoms operator Telekomunikacja Polska S.A. (TP) for abuse of a dominant position.

Background. Article 102 of the Treaty on the Functioning of the European Union prohibits the abuse of a dominant position by companies of their market position in the EU, or a substantial part of the EU (Article 102).

Facts. The Commission has fined Polish incumbent telecoms operator TP approximately EUR 127 million for abuse of a dominant position in the Polish market.

TP is the only supplier of local loop unbundling and wholesale broadband access (wholesale broadband access products) in Poland. To be able to provide broadband internet access to end-users in Poland, other operators must purchase wholesale broadband access products from TP. The Commission considered that, as a dominant company, TP is obliged to allow remunerated access to its network and wholesale broadband access services to allow the effective entry of alternative operators on downstream broadband markets.

In April 2009, following an inspection of TP, the Commission had opened an investigation on its own initiative. According to the Commission, TP's practices from August 2005 until at least October 2009, prevented or at least delayed the entry of competitors onto the Polish broadband market. In particular, TP allegedly offered alternative operators unreasonable conditions, delayed negotiations, unjustifiably rejected orders and refused to provide reliable and accurate information to the alternative operators. The Commission considered that these practices prevented the alternative operators from competing effectively and constituted an abuse of TP's dominant position.

Comment. The Commission's previous decisions regarding alleged abuse of dominance in the telecommunications sector such as against Wanadoo, Deutsche Telekom and Telefonica related to pricing behaviour by the incumbent rather than broader commercial behaviour. The Commission noted that Poland has one of the lowest broadband penetration rates in Europe and higher monthly prices than in other Member States. Commission Vice-President Joaquín Almunia stated that the case shows the Commission's "determination to ensure that dominant telecom operators do not systematically hinder competitors who can make a real difference in the market to the benefit of consumers and businesses". The Commission also emphasised that the existence of national sector specific regulation does not exclude the application of EU competition rules.

Source: Commission press release, 22 June 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/771&format=HTML&aged=0&language=EN&guiLanguage=en; Commission decision against Telekomunikacja Polska - frequently asked questions, 22 June 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/444&format=HTML&aged=0&language=EN&guiLanguage=en.

European Union: General Court reduces fines imposed on Heineken and Bavaria

Summary. The General Court of the European Union (the General Court) has reduced the fines imposed on Heineken NV, its subsidiary Heineken Nederland BV, and Bavaria NV (the appellants) for participating in an alleged cartel on the Dutch beer market.

Background. Article 101 of the Treaty on the Functioning of the European Union prohibits cartels and other agreements or concerted practices that restrict competition (Article 101).

In April 2007, the European Commission (the Commission) issued a decision finding that several Dutch brewers had participated in an alleged cartel on the Dutch beer market between February 1996 and November 1999. The Commission fined the appellants more than EUR 273 million. The appellants applied to the General Court for annulment of the Commission's decision or a reduction in the level of their fines.

Facts. The General Court has reduced by approximately 10% the fines imposed on the appellants for their participation in a cartel on the Dutch beer market. The level of the fines was reduced from EUR 219.28 million to EUR 198 million for Heineken NV and Heineken Nederland BV jointly, and from EUR 22.85 million to EUR 20.71 million for Bavaria NV.

In its judgment, the General Court ruled that the Commission had not proved that the infringement extended beyond price coordination to the occasional coordination of commercial conditions, other than prices, in the "on-trade" segment (i.e. distribution where consumption is on the premises, e.g. hotels, restaurants and cafés). The Commission had sought to rely on some handwritten notes to evidence this, which the General Court considered sporadic and brief, and for which the companies had put forward a plausible alternative explanation. The General Court therefore annulled the Commission's decision on that point and reduced the fines accordingly.

The General Court also ruled that the length of the administrative procedure in the case, which had continued for more than seven years, infringed the principle that proceedings must be completed within a reasonable period. Although the Commission had already reduced the fine on each company by EUR 100,000 for this reason, the General Court found that this reduction was insufficient given the amount of the fines. The General Court therefore ruled that in order to give the companies satisfaction for the excessive duration of the procedure, the reduction should be increased to 5% of the fine. All other arguments of the appellants were rejected.

Comment. The Commission's fining decisions are being closely scrutinised by the General Court. This decision follows the General Court's reduction of the fine imposed on Arkema for the alleged methacrylates (acrylic glass) cartel and the annulment of the fine imposed on Edison for the alleged bleaching agents cartel. Notwithstanding a reduction in their fines, it is understood that Heineken and Bavaria are appealing the General Court's judgment at the Court of Justice of the EU.

Source: General Court press release, dated 16 June, http://europa.eu/rapid/pressReleasesAction.do?reference=CJE/11/62&format=HTML&aged=0&language=EN&guiLanguage=en.

European Union: Commission opens proceedings against Czech electricity incumbent

Summary. The European Commission (the Commission) has opened formal antitrust proceedings against the Czech electricity incumbent CEZ a.s. (CEZ) to investigate whether CEZ may have abused a dominant position on the Czech electricity market.

Background. Article 102 of the Treaty on the Functioning of the European Union (Article 102) prohibits the abuse of a dominant position by companies of their market position in the EU, or a substantial part of the EU.

The European Commission has powers to enter and inspect premises, land and vehicles of undertakings (*Article 20, Modernisation Regulation (1/2003/EC)*) (Modernisation Regulation) as well as other premises (*Article 21, Modernisation Regulation*). The Commission may request assistance with such inspections from the national competition authority of the member state on whose territory an inspection is to be conducted (*Article 20(5), Modernisation Regulation*).

Facts. The Commission will investigate whether or not CEZ may have hindered the entry of competitors, in breach of Article 102. The Commission is concerned that CEZ's alleged conduct, in particular hoarding capacity in the transmission network, may have limited the ability of competitors to enter the Czech wholesale electricity market.

The opening of these proceedings follows an inspection carried out by Commission officials and their counterparts from the Czech competition authority at the premises of CEZ in November 2009. The Commission has stated that the opening of formal proceedings does not imply that the Commission has proof of an infringement.

Comment. This is not the first time that the Commission has to investigate abuse of dominance allegations in the energy sector as well as other sectors. Recently, the Commission fined the incumbent telecommunications operator Poland Telekomunikacja Polska S.A (PTP) for an abuse of a dominant position. The Commission found in particular that PTP had hindered the entry of competitors by impeding their access to the network PTP owns. These cases show the increased willingness of the Commission to intervene to investigate anticompetitive behaviour in sectors which are also subject to national sector-specific regulation.

Source: Commission press release, 15 July 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/891&format=HTML&aged=0&language=EN&guiLanguage=en: Commission press release, 22 June 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/771&format=HTML&aged=0&language=EN&guiLanguage=en.

European Union: Commission investigates luxury watchmakers

Summary. The European Commission (the Commission) has initiated a formal antitrust investigation into several luxury watch manufacturers' alleged refusal to supply spare parts to independent repairers.

Background. Article 101(1) (Article 101) of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between undertakings and decisions by associations of undertakings which have as their object or effect the prevention, restriction or distortion of competition within the common market. The prohibition contained in Article 101 may be declared inapplicable in respect of certain agreements (*Article 101(3), TFEU*).

Article 102 of the TFEU (Article 102) prohibits the abuse by one or more companies of a dominant position in the EU, or a substantial part of the EU.

In 2004, the European Confederation of Watch & Clock Repairers' Associations (CEAHR) complained to the Commission that certain luxury watch manufacturers were in breach of European competition law by not supplying spare parts to repairers who were not members of their selective distribution systems for repair and maintenance.

On 10 July 2008, the Commission formally rejected CEAHR's complaint for lack of Community interest on several grounds, including a limited impact of the alleged infringement on the functioning of the common market. CEAHR appealed to the General Court of the European Union, which on 15 December 2010 annulled the Commission's decision to reject the complaint.

Facts. The Commission's investigation follows the General Court's judgment.

On 5 August 2011, the Commission announced that, to address the General Court ruling, the Commission will now further investigate CEAHR's complaint and initiate formal antitrust proceedings. The Commission's investigation will examine whether the practices in question could contravene Article 101 and/or Article 102, and will cover the whole EEA (and particularly France, Germany, Italy, Spain and the UK).

The Commission has stated that the initiation of proceedings does not imply that the Commission has proof of an infringement.

Comment. It is relatively rare, but not unheard of, for the Commission to re-examine an antitrust complaint which it has previously rejected. The Commission will now investigate allegations which appear to be similar (but not necessarily linked) to those currently being examined by the national competition authorities of Spain and Switzerland.

Source: Commission press release, 5 August 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/952&format=HTML&aged=0&language=EN&guiLanguage=en; Commission memo, 5 August 2011, http://ec.europa.eu/competition/antitrust/cases/dec_docs/39097/39097_652_4.pdf.

European Union: Commission repeals heat stabilisers cartel decision for Ciba/BASF and Elementis

Summary. The European Commission (the Commission) has repealed a cartel decision relating to the market for heat stabilisers insofar as it concerns Ciba/BASF and Elementis.

Background. Article 101(1) (Article 101) of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between undertakings and decisions by associations of undertakings which have as their object or effect the prevention, restriction or distortion of competition within the common market. The prohibition contained in Article 101 may be declared inapplicable in respect of certain agreements (*Article 101(3), TFEU*).

Article 25(5) of Regulation 1/2003 (Antitrust Regulation) sets a maximum 10 year time limit for the imposition of a fine for a breach of Article 101 TFEU. Article 25(6) of the Antitrust Regulation suspends the limitation period for the imposition of fines as long as the decision of the Commission is the subject of proceedings pending before the European Court of Justice (ECJ).

Facts. The Commission has decided to repeal its previous decision finding a cartel in the market for heat stabilisers in relation to Ciba/BASF and Elementis.

In November 2009, the Commission imposed a total of EUR 173,860,400 in fines on 10 different undertakings for price fixing and market sharing. While the Commission considered that the cartel lasted until 2000, Ciba/BASF and Elementis were found to have only participated in the cartel until 1998. Therefore the ten-year limitation period for the imposition of fines had expired in respect of Ciba/BASF and Elementis.

In its 2009 decision, the Commission argued that the ten-year limitation period was suspended under the Antitrust Regulation because some companies had challenged before the EU courts the Commission's investigative measures in the matter. Although Ciba/BASF and Elementis had not challenged the Commission's investigative measures, the Commission took the view that the suspension applied to all the companies involved in the cartel and not only to the ones that brought a court action.

However, in a judgment dated 29 March 2011 in a separate case (ArcelorMittal), the ECJ clarified that actions against final decisions and actions against investigative measures have suspensive effects only for the party that brought the action. Taking note of this judgment, the Commission decided to repeal the heat stabiliser cartel decision insofar as it concerns Ciba/BASF and Elementis. As a result, Ciba/BASF and Elementis will not have to pay a fine.

Comment. The Commission's decision follows the ECJ's judgment in the ArcelorMittal case. The 2009 decision remains valid for the other addressees of the decision.

Source: Commission press release, 4 July 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/820&format=HTML&aged=0&language=EN&guiLanguage=en; Commission press release, 11 November 2009, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1695&format=HTML&aged=1&language=EN&guiLanguage=en.

Czech Republic: CCO imposes fine for abuse of significant market power

Summary. The Czech Competition Office (CCO) has imposed a fine on Kaufland Česká republika, v.o.s. (Kaufland), a retailer, for the abuse of significant market power.

Background. Section 4 of Act No. 395/2009 Coll. on Significant Market Power in the Sale of Agricultural and Food Products and Abuse (Act) prohibits the abuse by companies of significant market power vis-a-vis their suppliers.

Under section 8 of the Act, the CCO may impose a fine of up to CZK 10 million or 10% of the net turnover achieved by the company in its last accounting period for abuse of significant market power.

Facts. On 19 July 2011, the CCO imposed a fine of CZK 13.628 million on Kaufland for the abuse of significant market power.

The CCO considered that Kaufland had infringed the Act by forcing more than half of its suppliers to agree to terms of payment 30 days after delivery of any products. In addition, Kaufland allegedly infringed the Act by requiring more than 95% of its suppliers to pay a special fee of 4% for each receivable from Kaufland that the supplier may have assigned to a third party. Finally, Kaufland also demanded a discount of 0.5% on amounts invoiced by a supplier for each week in which Kaufland settled the invoice with the supplier before the invoiced amount was due.

The CCO ordered Kaufland to remove the relevant clauses from the contracts with its suppliers within 90 days of the decision of the CCO coming into force. The decision has not yet come into force and may still be appealed.

Comment. This is the first time a fine has been imposed under the Act for the abuse of significant market power since the Act became effective. The Act has been largely criticised by retailers for its alleged discriminatory nature and drafting deficiencies. The CCO's decision shows that retailers in the Czech Republic nevertheless need to take the Act seriously. The CCO is assisting in drafting an amendment to (or replacement of) the Act and it will be interesting to see whether the amended legislation affects the rule under which Kaufland was fined.

Source: CCO press release, 19 July 2011, http://www.compet.cz/hospodarska-soutez/aktuality-z-hospodarske-souteze/uohs-poprve-rozhodl-ve-veci-zneuziti-vyznamne-trzni-sily-pokuta-pro-retezec-kaufland/ (available in Czech only).

Germany: Federal Court of Justice considers "passing-on defence" admissible

Summary. The German Federal Court of Justice (FCJ) has held that cartel members can argue the so-called "passing-on defence" in civil damages claims.

Background. Under section 33 paragraph 3 of the German Act against Restraints of Competition (ARC), anyone who intentionally or negligently commits an infringement of section 1 ARC (equivalent to Article 101(1) of the Treaty on the Functioning of the European Union) shall be liable for the damages arising from the infringement. The damage shall not be excluded if the good or service purchased at an excessive price is resold (passed on).

Facts. On 28 June 2011, the FCJ held that cartel members can argue the so-called "passing-on defence" in civil damages claims.

The FCJ's decision relates to a lawsuit in which a manufacturer of carbonless paper was sued for damages suffered by an indirect customer as a result of the manufacturer's participation in the carbonless paper cartel between 1992 and 1995.

In its decision, the FCJ stated that indirect customers are generally entitled to sue for cartel damages as the anticompetitive effects of the cartel were not limited to direct purchasers only. However, the FCJ recognised that cartel members can argue the "passing-on defence" if, for example, their customers, in case of higher prices, passed on their damages further down the supply chain. The FCJ made it clear that such a mechanism would prevent multiple and unjustified claims for cartel damages if the damage was actually suffered only by one market participant.

Comment. The FCJ has overruled previous decisions of the lower courts. As the full text of the judgment has not yet been published, it remains to be seen which standards the FCJ has set for using the "passing-on defence".

Source: Press release of the German Federal Court of Justice, 29 June 2011, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2011&Sort=3&nr=56711&pos=20&anz=138 (available in German only).

Romania: Takeovers in the medical field cleared subject to commitments

Summary. The Romanian Competition Council (RCC) has authorised, subject to commitments, the takeover by entities from the Fresenius group (Fresenius) of several companies active in the medical field (the targets) previously indirectly controlled by a number of individuals and by Euromedic International Group B.V. (Euromedic).

Background. During the review of a merger by the RCC, the acquirer can submit commitments in order to remedy competition concerns. If the RCC considers the commitments to be sufficient, the review can be closed and the merger will be approved, subject to the observance of the commitments (RCC Guidelines for commitments regarding concentrations of 9 December 2010).

Non-observance of the commitments may lead to a fine amounting from 0.5% to 10% of the turnover of the party in breach. In addition, according to Article 54 of the Competition Law, the RCC can impose a fine of up to 5% of the average daily turnover of the company for the last financial year. This additional fine applies daily until the commitments are observed by the company in breach.

Facts. In June 2011, the RCC authorised, subject to conditions, two transactions involving the takeover by Fresenius of the targets indirectly controlled by Euromedic and a number of individuals. The first decision authorised Fresenius Nephrocare Romania SRL to purchase 100% of the shares in Renamed Dialcare SRL, Renamed Medical Service II SRL, Renamed Nefrodial SRL and Renamed Nefrodiamed SRL. The second decision authorised Fresenius Medical Care Beteiligungsgesellschaft to purchase 100% of the shares in Nefromed SRL and Nefromed Dialysis Centers.

While analysing the transactions, the RCC expressed concerns relating to the effects on competition in the local dialysis services markets (calculated using a 50 km radius around each dialysis centre) and the national dialysis products market. On 19 May 2011, the Fresenius group submitted a set of structural and behavioural commitments. Fresenius undertook:

- to sell the dialysis centres owned by the targets in two cities where Fresenius was already operating a dialysis centre;
- not to impose conditions on the third party dialysis centres which would buy medical equipment from Fresenius that would compel them to buy other equipment or consumables from Fresenius either during or after the warranty period;
- to extend the terms of the supply agreements concluded with third party dialysis centres; and
- to report to the RCC the prices charged and the number of patients transferred from third party dialysis centres to Fresenius' dialysis centres.

On 20 June 2011, the RCC concluded that there were no outstanding reasons for concern and issued its decision to clear the transactions and the commitments then entered into force.

Comment. These are the first decisions of the RCC authorising merger transactions subject to commitments submitted by the acquirer, in accordance with the latest amendments to the competition legislation.

Source: RCC decision no. 19 of 20 June 2011, http://www.consiliulconcurentei.ro/documente/Decizie%20Renamed%20pt%20site_19564ro.pdf and RCC decision no. 20 of 20 June 2011, http://www.consiliulconcurentei.ro/documente/Decizie%20Nefromed%20pt%20site_19561ro.pdf (both available in Romanian only).

Spain: CNC fines Telecinco EUR 3.6 million for non-compliance with commitments

Summary. The Spanish Competition Authority (CNC) has imposed a fine of EUR 3.6 million on Telecinco (now Mediaset España Comunicación, S.A.) for failing to comply the commitments approved in connection with the Telecinco/Cuatro merger (the commitments).

Background. Article 62(4)(c) of the Spanish Competition Act 15/2007 of 3 July 2007 (LDC) states that "not complying with or contravening a resolution, decision or commitment adopted in application of this Act, regarding both restrictive conduct and merger control" is a "very serious infringement".

Facts. On 27 July 2011, the CNC imposed a fine of EUR 3.6 million on Telecinco for failing to comply with its obligation to present an action plan in accordance with the commitments.

On 28 October 2010, the CNC issued a resolution authorising the Telecinco/Cuatro merger subject to the commitments. In order to monitor Telecinco's compliance with the commitments, the resolution required Telecinco to present an action plan within one month from when the resolution became enforceable. Specifically, the action plan had to detail the measures Telecinco was to adopt as well as a timetable for their implementation. However, Telecinco failed to present the action plan within the mandatory one-month period.

On 27 April 2011, the Investigations Division of the CNC opened a formal investigation in order to determine whether the failure to comply with the commitments, specifically the presentation of the action plan, constituted a breach of Article 62(4)(c) LDC. Following the investigation, the CNC Council ruled that Telecinco had failed to comply with its obligation and imposed a fine of EUR 3.6 million.

Comment. This is the first time that the CNC has fined a company for failing to fulfil its obligations under commitments submitted by the company as a condition to a merger clearance.

Source: CNC press release, 3 August 2011, http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=91815&Command=Core_Download&Method=attachment.

UK: OFT refers equity trading merger to CC

Summary. The Office of Fair Trading (OFT) has referred the completed acquisition by BATS Trading Limited (BATS) of Chi-X Europe Limited (Chi-X) (the merger) to the Competition Commission (CC) for further investigation.

Background. The OFT must refer completed mergers to the CC if the OFT believes that a relevant merger situation has been created and this has resulted, or may be expected to result in a substantial lessening of competition (SLC) within any market or markets for goods or services in the UK (section 22(1), Enterprise Act 2002) (2002 Act).

Facts. BATS and Chi-X both operate multilateral trading facilities (MTFs) which enable market participants (investment banks, brokers and dealers) to trade pan-European equities through a single platform as an alternative to trading on national exchanges. MTFs are relatively new, having mostly formed following the introduction of the European Markets in Financial Instruments Directive in 2007.

The OFT noted that the evidence was mixed and that it had not "encountered widespread customer complaints". However, the OFT considered that the parties operate the two largest MTFs for the trading of UK-listed equities and have very similar service offerings, and that the merger would reduce the number of significant suppliers of trading services for UK-listed equities from three to two.

The OFT concluded that there is a realistic prospect that, absent the merger, in future the parties would have competed more strongly against each other (as well as against the LSE). The OFT therefore could not exclude competition concerns, and has referred the merger to the CC to investigate in detail whether it may be expected to result in an SLC.

Comment. The merger takes place against a background of increasing consolidation in the exchange industry, which competition authorities are reviewing. The European Commission is currently examining the proposed merger between Deutsche Börse and NYSE Euronext, and a rival bid by Nasdaq for NYSE Euronext was abandoned following the US Department of Justice's intention to file an antitrust lawsuit to block the deal.

The CC's report is expected by 2 December 2011.

Source: OFT press release, 20 June 2011, http://www.oft.gov.uk/news-and-updates/press/2011/67-11; CC press release, 20 June 2011, http://www.competition-commission.org.uk/press_rel/2011/june/pdf/31-11_BATS_Chi-X_merger_inquiry_-_CC_invites_evidence.pdf.

UK: CC clears Irish Sea ferries merger

Summary. The Competition Commission (CC) has cleared the completed acquisition by Stena AB (Stena) of two Irish Sea ferry services from DFDS A/S (DFDS) (the transaction).

Background. The Office of Fair Trading (OFT) must refer completed mergers to the Competition Commission if the OFT believes that a relevant merger situation has been created and this has resulted, or may be expected to result in a substantial lessening of competition (SLC) within any market or markets for goods or services in the UK (section 22(1), Enterprise Act 2002) (2002 Act).

Stena and DFDS both operated ferry services on the Irish Sea on a variety of routes. The transaction, which included the acquisition of assets and vessels of the Liverpool-Belfast and Heysham-Belfast routes (the acquired routes), was completed on 1 December 2010. On 2 December 2010, Stena announced that it would be closing its Fleetwood-Larne route (the Stena route).

Facts. The CC concluded that the acquisition has not resulted in a substantial lessening of competition (SLC) for the supply of freight and passenger ferry services between the North-West of England and Northern Ireland or for Irish Sea ferry services in general.

In assessing the transaction, the CC considered Stena's decision to close the Stena route, reviewing internal documents, examining the route's usage and profitability and taking evidence from a range of market participants. According to the CC, Stena's exit from supplying the route was inevitable, irrespective of the acquisition. Consequently there was no loss of direct competition resulting from the acquisition.

The CC also examined whether the acquisition resulted in a loss of competition between the acquired routes and Stena's other services on the Irish Sea. The CC concluded that Stena will continue to face a direct competitor in each of the corridors in which it operates following the acquisition and will not be able to raise prices and/or worsen services as a result of the acquisition.

Comment. The transaction has also been cleared by the Irish Competition Authority, following a full Phase II investigation, finding that it would not substantially lessen competition in markets for goods or services in Ireland.

Source: CC press release, 29 June 2011, http://www.competition-commission.org.uk/inquiries/ref2011/stena_dfds_merger_inquiry/pdf/Stena_DFDS_Final_Report.pdf, CC final report, 29 June 2011, http://www.competition-commission.org.uk/inquiries/ref2011/stena_dfds_merger_inquiry/pdf/Stena_DFDS_Final_Report.pdf.

UK: OFT launches new guidance on competition law compliance

Summary. The Office of Fair Trading (OFT) has launched new guidance to help businesses comply with competition law.

Background. Chapter I of the Competition Act 1998 prohibits agreements or concerted practices which have the object or effect of preventing, restricting or distorting competition in the UK (Chapter I prohibition). Companies are prohibited from engaging in any conduct that amounts to the abuse of a dominant position in a market insofar as it may affect trade in the UK (section 18 Competition Act 1998) (1998 Act). The OFT may open a formal investigation where it has reasonable grounds to suspect that the Chapter I or Chapter II prohibition may have been infringed (section 25, Competition Act 1998) (1998 Act).

It is also an offence for individuals to dishonestly agree that businesses will engage in certain types of cartel activity, namely price-fixing, limiting supply or production, market-sharing and bid-rigging, known as the cartel offence (section 188, Enterprise Act 2002) (2002 Act). The OFT has the power to enter and search premises under a warrant issued by a judge (section 194, 2002 Act).

Facts. A recent independent survey of over 2,000 businesses commissioned by the OFT has shown that awareness of competition law has grown but has further to go. With this in mind, the OFT has launched new guidance to help businesses comply with competition law. The first document entitled "How Your Business Can Achieve Compliance" is aimed at businesses and their advisors and sets out a risk-based, four step approach to creating a culture of competition law compliance (risk identification, risk assessment, risk mitigation and review).

The second document entitled "Company Directors and Competition Law" is aimed at directors and sets out what they need to know about competition law. The document also outlines the steps they should take to prevent, detect and stop infringements of competition law.

Along with these two documents, the OFT has produced a "Quick Guide" to competition law compliance and a film on how competition law works in practice.

Comment. The independent survey of over 2,000 businesses found that not all businesses were able to identify practices that breach competition law, and in particular smaller businesses. According to OFT Chief Executive John Fingleton, the OFT recognises that most businesses want to comply with the law and the OFT is "keen to help them avoid breaching the law in the first place, supporting this by taking strong enforcement action against those who do not comply".

Source: OFT press release, OFT publishes competition law guidance as survey shows business awareness rising, 27 June 2011, http://www.oft.gov.uk/news-and-updates/press/2011/75-11; OFT compliance page, http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance/#named4.

UK: CAT rules in favour of OFT in Ryanair / Aer Lingus case

Summary. The Competition Appeal Tribunal (CAT) has ruled that the Office of Fair Trading (OFT) was 'in time' when it attempted to open an investigation into Ryanair's 2006 acquisition of a minority stake in Aer Lingus.

Background. A person aggrieved by a decision of the OFT, the Secretary of State or the Competition Commission (CC), in connection with a reference or possible reference of a relevant merger situation, can apply to the CAT for a review of that decision (section 120(1), Enterprise Act 2002 (2002 Act)).

The OFT must refer completed mergers to the CC if the OFT believes that a relevant merger situation has been created and this has resulted, or may be expected to result in a substantial lessening of competition within any market or markets for goods or services in the UK (section 22(1), 2002 Act).

The OFT is able to refer completed relevant mergers within four months of the merger's completion or from the time material facts about the merger were made public (section 24, 2002 Act). The duty to refer applies outside this four month timetable when the reference could not have been made earlier because of anything done under or in accordance with the EU Merger Regulation (section 122(4), 2002 Act).)

Facts. On 28 July 2011, the CAT ruled that the OFT was 'in time' when it attempted to open an investigation into Ryanair's 2006 acquisition of a minority stake in Aer Lingus.

Ryanair acquired a minority stake in Aer Lingus in late 2006, and in October 2006 launched a public bid for Aer Lingus' entire shareholding. The European Commission reviewed the bid and on 27 June 2007 decided to block it.

Aer Lingus subsequently appealed the Commission's decision not to order Ryanair to divest its pre-existing minority stake in Aer Lingus. In July 2010, the General Court of the European Union ruled that the European Commission did not have the ability to require a divestment of minority shareholdings that do not confer 'decisive influence' on the acquiring parties for the purposes of the EU Merger Regulation.

On 29 October 2010, the OFT announced it was opening a UK merger investigation into Ryanair's acquisition of a minority stake in Aer Lingus. Ryanair appealed to the CAT challenging whether the OFT was able to investigate on the basis that its investigation was 'out of time' under the 2002 Act. Ryanair argued that the OFT should have decided whether or not to investigate this acquisition within four months of the Commission's decision of 27 June 2007.

The CAT ruled that the OFT was unable to apply its national merger control legislation whilst appeals were ongoing in the European courts. Ryanair has decided to appeal the CAT's decision.

Comment. In corporate transactions, buyers often acquire minority stakes in the target before launching a full takeover. On the basis of the CAT's ruling, the status of such minority stakes could be subject to the uncertainty that the OFT may investigate only after all possible appeals to the EU Courts have been completed. However, as the CAT noted in deciding not to refer any questions to the Court of Justice of the EU, the sequence of events in this case was somewhat unusual and it is questionable how often similar problems would arise in the UK.

Source: CAT judgment, 28 July 2011, http://www.catribunal.org.uk/files/1174_Ryanair_Judgment_280711.pdf; OFT press release, 28 July 2011, http://www.oft.gov.uk/news-and-updates/press/2011/86-11.

UK: OFT issues decision in dairy products investigation

Summary. The OFT has fined four supermarkets and five dairy processors a total of £49.51 million following its dairy products retail pricing investigation.

Background. Chapter I of the Competition Act 1998 prohibits agreements or concerted practices which have the object or effect of preventing, restricting or distorting competition in the UK (Chapter I prohibition). The maximum penalty that the OFT can impose is 10% of worldwide turnover of the relevant undertaking in its last business year (Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259)).

Under its leniency programme, the OFT can reduce financial penalties if a party to an illegal agreement or concerted practice assists the OFT with its investigation. Full immunity from fines is available for the first member of a cartel to provide relevant information on the infringement to the OFT. Where the undertaking assists the OFT but is not the first to come forward, partial immunity may be available. Immunity that would otherwise be granted may not be available if the undertaking is the instigator or leader of the cartel or otherwise encouraged other members to join or participate (OFT's Guidance as to the appropriate amount of a Penalty (OFT 423) and Leniency and No Action (OFT 803)).

Facts. The OFT has issued its decision in its dairy products retail pricing investigation fining four supermarkets and five dairy processors a total of £49.51 million.

On 20 September 2007, the OFT issued a statement of objections (SO) to each of Asda, Morrisons, Safeway (now owned by Morrisons), Sainsbury's and Tesco; and Arla, Dairy Crest, Lactalis McLelland, The Cheese Company and Wiseman (the dairy processors). The SO alleged that the parties had colluded to increase the retail prices of certain dairy products in 2002 and/or 2003.

The OFT considered that the dairy processors and Asda, Safeway, Sainsbury's and Tesco (the supermarkets) infringed the Chapter I prohibition by co-ordinating increases in the prices consumers paid for certain dairy products in 2002 and/or 2003 with the supermarkets having indirectly exchanged retail pricing intentions with each other via the dairy processors (so-called A-B-C information exchanges). The OFT found that three infringements were committed which related to cheese in 2002 and 2003 and fresh liquid milk in 2003, but not all companies were involved in all three infringements. The 2002 cheese infringement and 2003 fresh liquid milk infringement resulted in the largest total fines of £26.3 million and £20.83 million respectively.

Arla was granted complete immunity under the OFT's leniency programme as it was the first company to alert the OFT to the existence of possible infringements and the first to apply for leniency. The remaining dairy processors and the supermarkets (with the exception of Tesco) received reductions in their fines because they agreed to early resolution, admitting liability for the infringements and agreeing to a streamlined procedure enabling parts of the case to be resolved more quickly.

Comment. John Fingleton, OFT Chief Executive, has stated that the decision sends a strong signal to supermarkets, suppliers and other businesses, that the OFT will take action and impose significant fines where it uncovers anti-competitive behaviour aimed at increasing the prices paid by consumers. Tesco reportedly intends to appeal the OFT's decision.

Source: OFT press release, 10 August 2011, http://www.oft.gov.uk/news-and-updates/press/2011/89-11.

UK: OFT provisional decision to refer the audit market to CC

Summary. The Office of Fair Trading (OFT) has provisionally decided to refer the market for statutory audit services to large companies in the UK (audit market) to the Competition Commission (CC) for a market investigation.

Background. The OFT keeps markets under review as part of its general function (section 5, Enterprise Act 2002) (2002 Act). The OFT has the power to make a reference to the CC if it has reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services (section 131, 2002 Act).

The CC has two years from the date of a market investigation reference to conduct inquiries and publish its report (sections 136 and 137, 2002 Act). If the CC concludes that adverse effects on competition or detrimental effects on customers are occurring, it can take or recommend action to remedy, mitigate or prevent such effects (section 138, 2002 Act).

Facts. The OFT has provisionally decided to refer the audit market to the CC for a market investigation. A final decision will be taken following a six-week consultation period.

The OFT is concerned that the audit market is highly concentrated, with substantial barriers to entry and switching. In September 2010, the OFT set out its concerns in a submission to the House of Lords Select Committee, and on 17 May 2011, announced the provisional decision that the statutory test (under section 131, 2002 Act) for a market investigation reference to the Competition Commission had been met. The OFT also engaged with a wide range of industry participants. The OFT considered that there is a reasonable chance that appropriate remedies would be available to the CC in the event of a reference.

The OFT published a consultation paper in July 2011 on its findings. The OFT anticipates making a final decision before the end of 2011 after consideration of the responses to the consultation.

Comment. The OFT emphasised that it had kept the audit market under ongoing examination for some time, participating in regulatory and policy processes. As a result, information was readily available to the OFT enabling it to reach the view that the test for referral was met without undertaking a market study.

Source: OFT press release, 29 July 2011, http://www.oft.gov.uk/news-and-updates/press/2011/85-11.

United States: US DoJ issues revised Guide to Remedies in Merger Cases

Summary. The US Department of Justice (DoJ) has updated the Antitrust Division's (the Division) Policy Guide to Merger Remedies (the Guide).

Background. In October 2004 the Division first issued the Guide which emphasised that structural remedies involving the divestiture of physical or intangible assets are preferred to behavioural or conduct remedies; conduct remedies are appropriate only in limited circumstances. The divestiture must include all assets necessary for the purchaser to be an effective, long-term competitor, including critical intangible assets. The divestiture of an existing business entity that possesses all of the assets necessary for the efficient production and distribution of the relevant product is preferred to a partial divestiture.

Facts. On 17 June 2011, the US DoJ released an updated version of the Guide. The updated Guide expands on the discussion of conduct remedies that are used to address vertical concerns but does not materially alter policy.

The key principles in the Guide are unchanged. The explanation of the implementation of those principles, however, has been materially rewritten. The changes are predominantly ones of emphasis and tone, rather than substance. The Guide emphasises the Division's willingness to accept conduct remedies in vertical mergers, including mandatory licensing, non-discrimination provisions, restrictions on contracting and sales practices, and other measures designed to prevent the merged firm from exercising market power. The Guide continues to make clear that structural remedies are strongly preferred for horizontal mergers.

The Guide revises and/or clarifies several procedural details in the divestiture process. For example, it indicates that the Division will typically require advance knowledge of the identity of the purchaser of the assets to be divested (the divestiture package). In the most significant change from 2004, the Guide indicates that where a purchaser of the divestiture package is not identified prior to closing of the competitively problematic merger that triggered the remedy, the Division may include a "crown jewel" provision to ensure that the divestiture occurs; such a provision expands the divestiture package into a broader, more marketable package of assets if the original package is not sold within a specified period.

Comment. Since 2004 a greater percentage of the Division's merger interventions have involved vertical concerns, particularly in technology industries. As vertical concerns are more often addressed through conduct remedies, the Guide's earlier emphasis on structural remedies, which are almost invariably used to address horizontal concerns, had the potential to be misleading. The updated Guide is accompanied by an internal reorganisation of the Division. The Office of the General Counsel will now have responsibility for the oversight and implementation of remedies.

Merger enforcement in the US is conducted by both the Division and the Federal Trade Commission (FTC). The Guide continues to reflect the position of only the Division and not the FTC. Over the years, the FTC has advocated the use of structural remedies over behavioural remedies and this is likely to continue.

Source: Antitrust Division Policy Guide to Merger Remedies, June 2011, www.justice.gov/atr/public/guidelines/272350.pdf.

United States: Changes to US premerger notification requirements come into effect

Summary. Premerger notification requirements in the US have been significantly revised, affecting the information that must be supplied on the Premerger Notification and Report Form (Form) used to notify the US Federal Trade Commission (FTC) and the US Department of Justice (DoJ) of a proposed transaction.

Background. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, requires that parties wishing to consummate a merger or acquisition above a certain size notify the FTC and the DoJ and wait a prescribed period of time before closing the transaction.

Facts. On 18 August 2011, the amended Hart-Scott-Rodino Premerger Notification Rules (the Rules) came into effect, changing the information required by the Form.

The most significant change is a new requirement to submit data on entities that are "associated" with the acquirer if their business activities overlap with those of the target. "Associated" entities are entities under common management with the acquirer such as general partners (GP) of a limited partnership, other partnerships with the same GP, investment funds with common management (through a common entity or common management agreement) and investment advisors of a fund. Previously, information was required only for entities "controlled" by the ultimate parent of the acquirer, under a strict definition of control (generally, 50% interest). Information must also be provided regarding the associated entities' minority shareholdings in companies engaged in the same line of business as the target.

Some information about the acquiring party's subsidiaries and minority shareholders is no longer required. However, any GP of a limited partnership must be reported as an interest-holder, regardless of the size of the interest.

The documents that must be submitted with the HSR filing now include:

- offering memoranda, or documents serving that function, that reference the entity or assets to be acquired created within the last year;
- studies, surveys, analyses and reports prepared by third party advisors (whether or not the advisor was retained) that reference the entity or assets to be acquired created within the last year;
- documents prepared for any officer or director analyzing potential synergies or efficiencies of the transaction; and
- any agreements not to compete.

Filing parties are no longer required to provide information about US revenues derived in the so-called "base year," which is currently 2002. However, parties are now required to report on manufacturing revenues not only for products made in the US, but also for products manufactured outside the US and sold within the US.

Comment. With these changes, the agencies are attempting to obtain information that will better enable assessment of the competitive impact of the notified transactions, and to eliminate information previously requested that burdened the filing parties but did not prove to be useful. However, the burden on some filing parties, such as private equity funds, investment funds, master limited partnerships and similar entities, may increase significantly.

Source: New form and instructions, http://www.ftc.gov/bc/hsr/hsrform.shtm; FTC Final Rule, 19 July 2011 http://www.gpo.gov/fdsys/pkg/FR-2011-07-19/pdf/2011-17822.pdf.

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