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Global Antitrust Group
September 2011

Consumer Goods and Retail Industry Competition Bulletin

This edition of the Consumer Goods and Retail Industry Competition Bulletin includes details of China's recent imposition of fines in relation to a price rise announcement, a review of the OFT's practice of requiring an upfront buyer as part of a divestiture remedy, and a summary of the OFT's findings following its 7-year dairy products investigation. As in previous editions of the Bulletin, we also identify the latest developments in the sector that have taken place across a wide range of jurisdictions.

HOT TOPIC

- **China: Unilever fined for offence relating to price rise announcement**. China's National Development and Reform Commission has fined Unilever for allegedly infringing China's Price Law by announcing price rises.

SUPERMARKETS/GROCERIES RETAILING

- **EU: Commission clears REWE / ADEG again.** The European Commission has amended a merger clearance decision previously issued in 2008 in relation to the acquisition of ADEG by REWE, on the basis that the original filing was not complete.

- **Germany: FCO maintains strict line on food retail mergers.** A case study and an activity report issued recently by the German Federal Cartel Office show a continued strict position on mergers between food retailers.

- **UK: Draft bill on Groceries Code Adjudicator published.** The UK Government has published and invited pre-legislative scrutiny by Parliament of a draft Groceries Code Adjudicator Bill.

BEVERAGES, BREWERIES AND TOBACCO

- **Belgium: College ordered to re-examine discriminatory pricing complaint.** The Belgian Competition Council has annulled, on appeal, the rejection of a complaint alleging that a brewer offered discriminatory discounts to "on-trade" customers compared to "off-trade" customers.

- **EU: General Court reduces fines of Heineken and Bavaria, and annuls Grolsch fine.** The General Court of the EU has reduced fines imposed on Heineken NV, one of its subsidiaries and Bavaria NV – and annulled a fine imposed on Koninklijke Grolsch NV – for participating in a cartel on the Dutch beer market.

- **EU: Commission clears proposed orange juice merger.** The European Commission has, after a Phase II investigation, unconditionally cleared the merger of the orange juice businesses of Votorantim and Fischer.

Sections

If you would like to know more about the subjects covered in this publication or our services, please contact any of the Global Antitrust Contacts on the last page of this newsletter.

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DAIRY AND FOOD PRODUCTS

- **Germany: FCO issues guidelines on raw milk information system.** The German Federal Cartel Office has issued preliminary guidelines on the operation of a system for market information concerning raw milk.
- **Italy: Cases cleared by European Commission inspire protectionist moves.** Whilst the European Commission has recently granted unconditional clearance to two high-profile takeovers of Italian companies by French purchasers, most notably the acquisition of Parmalat by Lactalis, the Italian government has moved to make some similar transactions more difficult.
- **UK: OFT fines retailers and processors after 7-year dairy products investigation.** The Office of Fair Trading has fined four supermarkets and five dairy processors a total of £49.5 million following its dairy products retail pricing investigation.
- **UK: Frozen ready meals merger referred to CC.** The Office of Fair Trading has referred the completed acquisition by Kerry Foods Ltd of the frozen ready meals business of Headland Foods Ltd to the Competition Commission for further investigation.

NON-FOOD GOODS/RETAILING

- **EU: Commission publishes draft best practices for cooperation among NCAs in the EU**. The European Commission has published a set of draft "best practices" for cooperation among national competition authorities in the EU for mergers not subject to EU merger control but which require clearance in several Member States.
- **EU: Commission investigates luxury watchmakers**. The European Commission has initiated a formal antitrust inquiry into several luxury watch manufacturers' alleged refusal to supply spare parts to independent repairers.
- **Germany: FCO recognises certain rules on competition in relation to book retail.** The German Federation for Book Retail has issued some new rules on competition, which have largely been accepted by the German Federal Cartel Office.
- **UK: OFT requires upfront buyers in two FMCG cases.** In two recent cases involving fast-moving consumer goods, the Office of Fair Trading requested undertakings in lieu of a reference to the Competition Commission, including commitments to find upfront buyers. One of these cases culminated in the unusual result of a brand being split between different owners.
- **UK: Consumer interest magazines deal cleared by OFT.** The Office of Fair Trading has cleared the proposed acquisition by Hearst Corporation, a US-based media company, of Lagardère's magazine publishing business outside of France.
- **UK: OFT uses failing firm defence to approve acquisition by Kingfisher of 30 former Focus stores.** The Office of Fair Trading has cleared the acquisition of 30 former Focus stores by B&Q's parent company.

OTHER NEWS - IN BRIEF

- **France: FCA finalises antitrust fining notice**. The French Competition Authority has issued the final version of its notice on antitrust fines.
- **UK: Competition law compliance - OFT guidance**. The Office of Fair Trading has launched new guidance to help businesses comply with competition law.
- **US: US 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.
- **US: 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.

HOT TOPIC

China: Unilever fined for offence relating to price rise announcement

Summary. China's National Development and Reform Commission (NDRC) has fined Unilever RMB 2 million (around EUR 215,000) for allegedly infringing China's Price Law by announcing price rises.

Background. China's Price Law prohibits activities including "fraudulent pricing", which includes the provision by businesses of false discounts, fake special rates and promotions, and misleading information on pricing. Article 14 of the Price Law prohibits the falsification or dissemination of information regarding price rises, and behaviour which excessively drives up product prices.

Facts. In March 2011, Unilever reportedly notified various Chinese supermarkets and news organisations that it intended to raise the price of certain products, in order to pass on a rise in costs of raw materials. This allegedly sparked panic-buying by consumers in some Chinese cities.

On 6 May 2011, the NDRC fined Unilever for allegedly infringing China's Price Law through its price rise announcements. The NDRC criticised Unilever for allowing its spokesperson to tell Chinese media about the anticipated price increases, suggesting that competitors would follow suit. Unilever initially bowed to pressure from the NDRC and abandoned the planned price increases; but this was not enough to avoid a fine of RMB 2 million. The NDRC found that Unilever had "*abused its dominant market position to sell goods at unfairly high prices*" and "*seriously distorted market order*". The NDRC added that the fine should be a reminder to companies, in particular to those with a large market share, to respect the Price Law, to consider responsibilities owed to society and to neither collude with competitors to raise prices nor abuse any dominant position. The NDRC has subsequently clarified that it imposed the fine not simply because prices had been raised, but because of the manner in which Unilever had disclosed to the market its intention to increase prices – and that the NDRC would not interfere in normal market behaviour.

Comment. The NDRC has levied a number of other high profile fines under the Price Law this year, including fines on several outlets of Carrefour and Wal-Mart for alleged fraudulent pricing. This decision indicates that consumer goods and retail remain an area of keen focus for the Chinese competition authorities as China battles price inflation. It also highlights that announcements on changes to pricing levels and structure – even where in response to genuine market or inflationary pressures – must be handled very carefully.

SUPERMARKETS/GROCERIES RETAILING

EU: Commission clears *REWE / ADEG* – again

Summary. The European Commission (the Commission) has amended a merger clearance decision previously issued in 2008 in relation to the acquisition of ADEG by REWE on the basis that the original filing was not complete.

Background. Under the EU Merger Regulation (*139/2004/EC*) (EUMR), the Commission must clear a transaction at the end of its Phase I investigation unless it finds that the merger would significantly impede effective competition in the relevant markets. If serious doubts are raised, then it must open an in-depth Phase II investigation if it has not received an offer of appropriate remedies (*Article 6(1), EUMR*). The Commission can accept binding commitments from the merging parties as a condition of the Phase I clearance (*Article 6(2), EUMR*).

On 23 April 2008, REWE - a German-based group focused on food retail – notified the Commission of its intended acquisition of ADEG, an Austrian food retailer. On 23 June 2008, the Commission cleared the transaction subject to certain conditions, including the sale to independent third parties of certain stores located in "critical areas" (i.e., where the combined market shares of REWE and ADEG exceeded 45%).

Facts. Following merger clearance, in Autumn 2009 the Commission requested information from REWE concerning reports that REWE had acquired from ADEG two separate supermarket stores in January 2008 (i.e., after the relevant share purchase agreement was signed but before REWE's merger filing). Neither the stores nor their acquisition by REWE were mentioned in the merger filing, as both stores were closed when the merger was notified. However, REWE then re-opened both stores in November 2008.

The Commission considered the acquisition of the two stores in early 2008 and the wider *REWE / ADEG* merger notified in April 2008 as one transaction for EUMR purposes. On this basis, the Commission re-examined the wider transaction, this time considering the two stores owned by REWE since early 2008. The Commission was concerned that one store, located in *Vienna-Favoriten*, was in a "critical area", resulting in a high combined market share notwithstanding a low level of turnover. The other store was not deemed in a "critical area". After discussions with the Commission, REWE decided to sell both stores acquired in early 2008. REWE sold the second store to Unimarkt in January 2011, but could find no buyer for the store in *Vienna-Favoriten*, where a competing supermarket had recently opened. As a compromise, REWE therefore sold a different, larger store in *Vienna-Favoriten* in September 2010 – and committed not to attempt to influence or re-acquire that store in the next 10 years. On 29 April 2011, the Commission cleared the *REWE / ADEG* merger again, amending its 2008 decision to include REWE's additional undertaking as an supplementary condition.

Comment. It is rare for the Commission to re-open an EUMR investigation. In this case, the Commission clearly considered that its initial review did not include all relevant facts – and that, since both stores belonged to REWE when the merger was notified, they should have been included in the filing even though they were closed at the time. The case is a reminder that merger control filings should describe fully the notifying parties' activities.

Germany: FCO maintains strict line on food retail mergers

Summary. A case study and an activity report issued recently by the German Federal Cartel Office (FCO) suggest that the FCO is maintaining a strict position regarding mergers and acquisitions between food retailers in Germany.

Background. In early 2011, EDEKA – one of Germany's large retail chains – announced its intention to acquire eight Cash & Carry-wholesalers (C&C-markets) and ten hypermarkets from RATIO. After the FCO reviewed the transaction and raised major concerns in a statement of objections, EDEKA withdrew its merger control application, abandoned the transaction as originally planned and then reduced the scope of the transaction to stores in ten local markets in relation to which the FCO had no concerns. In the respective case study (issued on 20 April 2010) as well as in the new activity report (issued on 20 July 2011) the FCO, amongst other things, clarified the FCO's actions in relation to food retail mergers.

Facts. The FCO confirmed, amongst other things, that in its view: (i) the food retail market includes a supermarket's typical product range (i.e., food, and personal hygiene and cleaning products); (ii) no distinction need be made, in principle, between hypermarkets, supermarkets, consumer markets and discounters; (iii) local markets will be examined; and (iv) C&C-markets constitute wholesale-level local (food) markets distinct from food retail and distance wholesale markets. The FCO also confirmed that, in the past, it only assumed dominance on a local food retail market if a very strong position in one local market was supported by a strong position in neighbouring markets – and indicated that fewer issues may arise in relation to acquisition of one or only a few (rather than a network of) retail stores.

The activity report confirmed that in the *EDEKA* case concerns arose on downstream markets – but also suggested that in similar cases in the future upstream markets may be an issue as well, noting the FCO's own ongoing food retail sector inquiry (this inquiry was covered in the May 2011 edition of *Consumer Goods and Retail Industry Competition Bulletin*).

The activity report also noted the FCO's intention to monitor food retail transactions once they are approved and complete. The FCO previously opened an investigation following allegations that EDEKA had, following a merger with another retailer, breached competition law by demanding special rebates based on that merger from its suppliers.

Comment. Food retail will remain a major focus of the FCO over the next few years, across all areas of competition law. Following the FCO's recent activities, the German Federal Government stated on 20 July 2011 that it may take legislative measures in relation to the food retail sector based on the future findings of the FCO's sector inquiry. As part of that inquiry, the FCO has reportedly issued questionnaires to retailers and producers recently – and has announced that it may examine a broader range of products and issue further questionnaires in January 2012.

UK: Government publishes draft bill on Groceries Code Adjudicator

Summary. The UK Government has published and invited pre-legislative scrutiny by Parliament of a draft Groceries Code Adjudicator Bill (the Bill); one committee's report on the draft Bill has already been published.

Background. In April 2008, the Competition Commission (CC) published its final report on the UK supply of groceries. As a result of its investigation, the CC decided to establish the Grocery Supply Code of Practice (GSCOP) which came into force in February 2010. Following concerns raised by suppliers regarding the complaints process, the CC sought but was unable to obtain undertakings from the retailers in relation to the creation of an independent body to enforce compliance with the GSCOP and investigate complaints. On 4 August 2009, the CC formally requested that the Government take the necessary steps to establish an effective ombudsman.

On 13 January 2010, the Department for Business Innovation and Skills (BIS) announced that the Government had accepted the CC's recommendation for the creation of a body to enforce the new GSCOP. In early 2010, BIS consulted on the specific powers for such a monitoring and enforcement body and on whether powers should be given to an existing body or to a newly-established, independent body. On 3 August 2010, BIS published its response to its consultation, confirming amongst other things that the new body will be known as the Groceries Code Adjudicator (GCA) (see the October 2010 edition of the *Consumer Goods and Retail Industry Competition Bulletin*).

Facts. On 24 May 2011, the UK's Consumer Minister published, and invited pre-legislative scrutiny of, a draft Bill. The draft Bill is accompanied by a commentary, explaining its provisions. Agriculture and Food Minister Jim Paice declared that the Bill would "*give teeth*" to the GSCOP.

The draft Bill has generated responses from the public, and on 28 July 2011 the House of Commons Business and Enterprise Committee (HCBEC) published a report on the draft Bill.

Comment. Certain areas of the draft Bill have already attracted comments. For example, under the draft Bill the GCA could address GSCOP breaches by making recommendations, requiring information about the investigation to be published for the benefit of those dealing with the retailer in future and imposing financial penalties – but there is no express sanction for failure to comply with a recommendation. The HCBEC has suggested granting the GCA immediate powers to impose fines for any GSCOP breach (and, in the event of any continuing breach, penalties for non-compliance). The draft Bill envisages the GCA initiating investigations based on information which is publicly available or provided by a supplier; the Environment, Food and Rural Affairs Select Committee and the HCBEC have both recommended also allowing information from trade associations and possibly whistleblowers (e.g., retailers' employees or ex-employees) to serve as a basis for investigations.

BEVERAGES, BREWERIES AND TOBACCO

Belgium: College ordered to re-examine discriminatory pricing complaint

Summary. The Belgian Competition Council (the Council) has annulled, on appeal, the rejection of a complaint alleging that a brewer offered discriminatory discounts to "on-trade" customers compared to "off-trade" customers.

Background. The abuse by one or more undertakings of a dominant position on a relevant Belgian market (or on a substantial part of that market) is prohibited (*Article 3 of the Act on the Protection of Economic Competition, as consolidated by Royal Decree dated 15 September 2006 and amended by the Act dated 6 May 2009*).

In March 2008, Freedom CVBA – a purchasing co-operative of drinks wholesalers – lodged a complaint with Belgium's College of Competition Prosecutors (the College). Freedom alleged that A-B InBev, a brewer, breached laws prohibiting an abuse of dominance by having offered discounts that discriminated between customers in the so-called "on-trade" channel (i.e., wholesale distributors supplying drinks to hotels, restaurants and bars) and customers in the "off-trade" channel (i.e., mainly supermarkets). Freedom argued that there was no longer any need to distinguish between the on-trade and off-trade channels given increasing overlaps between the two channels, and therefore that all distributors were active on the same market and entitled to similar trading conditions.

In September 2010, the College decided that on-trade and off-trade distribution channels still constitute separate relevant markets, and that brewers were therefore under no legal obligation to apply similar price and discount conditions to distributors in the on-trade and off-trade channels. Freedom appealed the College's decision.

Facts. On 29 April 2011, the Council allowed the appeal, finding that the College's decision was insufficiently motivated. The Council stated that the mere fact that the on-trade and off-trade channels constituted separate markets is not a sufficient ground to conclude that different discounts offered to customers in different channels does not constitute an abuse. In addition, the Council considered that the College had failed to determine whether the relevant brewer had a dominant position on any relevant market.

Comment. The above case is a rare example of competition authorities investigating alleged discriminatory pricing as a standalone offence. Typically, discriminatory pricing allegations are ancillary features in cases against companies alleged to have engaged in numerous other abuses – often artificially segregating the single market along national boundaries, and/or specific attempts to exclude direct competitors. It remains to be seen whether any finding of discriminatory pricing is made in the case, which has been referred back to the College for further investigation.

EU: General Court reduces fines of Heineken and Bavaria, and annuls Grolsch fine

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 – and annulled the fine imposed on Koninklijke Grolsch NV – for participating in a cartel on the Dutch beer market.

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

Those found to have infringed Article 101 can appeal to the General Court (*Article 250, TFEU*). Appellants can also apply to the General Court for a reduction of the fines imposed by the Commission (*Article 249, TFEU*).

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 Heineken NV, Heineken Nederland BV, Bavaria NV and Koninklijke Grolsch NV – more than EUR 273 million. Those brewers applied to the General Court for annulment of the Commission's decision or a reduction in the level of their fines.

Facts. On 16 June 2011, the General Court 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 (distribution involving consumption on the same 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 level 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 total fine. All other arguments put forward by the appellants were rejected.

On 15 September 2011, in a linked decision the General Court annulled the EUR 31.7 million fine imposed on Koninklijke Grolsch NV for its participation in the alleged Dutch beer cartel. Koninklijke Grolsch NV denied that it participated directly in the infringement, and that employees of its wholly-owned subsidiary, Grolsche Bierbrouwerij Nederland BV, attended most of the relevant meetings. The General Court found that the contested decision had treated Koninklijke Grolsch NV as one together with the Grolsch group, and made no mention of the economic, organisational and legal links between the parent company and Bierbrouwerij Nederland BV, the subsidiary which directly participated in the alleged cartel. As the decision failed to explain the reasons for attributing to Koninklijke Grolsch NV the conduct of its subsidiary, it denied the parent company any opportunity to reverse the presumption of parental liability.

Comment. The Commission's fining decisions are being closely scrutinised by the General Court. The General Court's decisions on the brewers' appeals follow a similar judicial reduction of a fine imposed on Arkema for participation in the alleged methacrylates cartel and the annulment of a 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 before the EU's Court of Justice.

EU: Commission clears proposed orange juice merger

Summary. The European Commission (the Commission) has, following a Phase II investigation, unconditionally cleared the merger of the orange juice businesses of Votorantim and Fischer.

Background. Under the EU Merger Regulation (*139/2004/EC*) (EUMR), the Commission must clear a transaction at the end of its Phase I investigation unless it finds that the merger would significantly impede effective competition in the relevant markets. If serious doubts are raised, then it must open an in-depth Phase II investigation if it has not received an offer of appropriate remedies (*Article 6(1), EUMR*).

In January 2011, the Commission opened an in-depth investigation into the proposed merger of Votorantim's subsidiary, Citrovita, and Fischer's subsidiary, Citrosuco, in the orange juice sector. During its Phase I investigation, the Commission raised concerns that the proposed transaction would combine "*two of the four main suppliers of orange juice to Europe*" and lead to significant overlaps at the wholesale level to companies active in the beverage sector. The initial investigation also raised concerns regarding the level of market concentration as a result of the transaction in relation to the markets for the supply of a number of by-products such as orange oils and essences.

Facts. On 4 May 2011, the Commission unconditionally cleared the merger, having found that the companies mainly overlap in the wholesale market for frozen concentrated orange juice. The Commission found that the merger would create the world's largest producer and supplier of orange juice to companies that supply consumers with branded or private label products, with important market positions in by-products obtained from the orange juice extraction process. However, the Commission concluded that would remain sufficient competition for orange juice and by-products from companies in Europe and worldwide, and that the merged entity would have no power to increase prices given that other competitive suppliers would not be restricted in their access to fresh oranges.

Comment. This is the first case, which passed to Phase II in 2011, in which the Commission has reached a Phase II decision in 2011 – and seems to mirror a general trend for the Commission increasingly issuing unconditional clearances following a Phase II review.

DAIRY AND FOOD PRODUCTS

Germany: FCO issues guidelines on raw milk information system

Summary. The German Federal Cartel Office (FCO) has issued preliminary guidelines on the operation of a market information system run by a private company, Agrarmarkt Informations-Gesellschaft mbH (AMI).

Background. AMI offers market information for the agriculture and food industries. The FCO, in its preliminary report following its Sector Inquiry in the milk sector in 2009, raised concerns in relation to the high transparency of milk prices. In light of this, AMI requested an assessment from the FCO in relation to its practices.

Facts. The FCO issued a confidential preliminary decision to AMI in May / June 2011, which led AMI to adapt its practices. The FCO then published, on 29 June 2011, a report summarising its preliminary views and the subsequent action taken by AMI in relation to AMI's compliance with Article 101 of the Treaty on the Functioning of the European Union (Article 101, TFEU) (and Section 1 of the German Act against Restraints of Competition, *GWB*).

The FCO considered the raw milk prices paid by dairies to farmers to be an important parameter for competition – and that competition law prohibits the exchange of any pricing data attributable to single dairies, unless the data is historic. The FCO considered data on raw milk prices to be sufficiently "historic" if it was more than six months old (subject to certain exceptions).

The FCO considered that the publication of data that was sufficiently aggregated (i.e., was not attributable to single dairies and/or deals) raised no concerns in principle. The FCO considered there to be sufficient aggregation of the data if such data, roughly speaking, covered five or more dairies, which together represented 33% or less of all dairies in a particular market, of which the top two dairies represented less than 60% of the total relevant market (see "*Fallbericht*" of 29 June 2011 on www.bundeskartellamt.de for details).

The FCO also re-affirmed its view that the relevant market(s) for raw milk were no wider than regional in geographic scope.

Comment. Besides AMI's activities, the FCO looked at other market information systems in both the milk sector and other industries (e.g. cement, drugstore products / cosmetics, insurances, petrol stations). The FCO's position was that each market information system must be assessed on a case-by-case basis, with reference to market structure and concentration as well as the level of detailed information provided. Accordingly, the FCO believed that the principles in relation to raw milk may not, in any event, apply directly to other agri-markets. The FCO is expected to further refine its position on the permissibility of market information systems. The FCO's report in June 2011, however, reminded companies of their "self assessment" responsibilities under the principles of Article 101 TFEU (and Sections 1 and 2 GWB); any entity publishing market data should note that there is a high awareness of the FCO in relation to the issue.

Italy: Cases cleared by European Commission inspire protectionist moves

Summary. Whilst the European Commission (the Commission) has recently granted unconditional clearance to two high-profile takeovers of Italian companies by French purchasers, notably the acquisition of Parmalat by Lactalis and Bulgari by LVMH, the Italian government has moved to make some similar transactions more difficult.

Background. Under the EU Merger Regulation (*139/2004/EC*) (EUMR), the Commission must clear a transaction at the end of its Phase I investigation unless it finds that the merger would significantly impede effective competition in the relevant markets. If serious doubts are raised, then it must open an in-depth Phase II investigation if it has not received an offer of appropriate remedies (*Article 6(1), EUMR*). The decision to open an in-depth investigation does not prejudge the final results of the Commission's investigation.

Facts. On 22 March 2011, Lactalis acquired a 29% shareholding in Parmalat. In April 2011, Lactalis launched a full takeover bid, and on 4 May 2011 notified its proposed acquisition under the EUMR. The Commission investigated potential effects in various different markets for dairy products (e.g., the procurement of raw milk, fresh milk, long life milk, cream and cheeses) but ultimately granted unconditional clearance on 14 June 2011.

In March 2011 Italy's Cabinet granted several decrees aiming to defend companies in "strategic" sectors (including the energy, food processing, defence and telecommunications sectors) from foreign takeovers. The first decree, though applicable to several sectors, allowed Parmalat to postpone its AGM, effectively giving an Italian consortium, led by Intesa Sanpaolo, more time to make a rival bid. The decrees also authorised Cassa Depositi e Prestiti, a state-controlled institution that manages more than €200bn in postal savings, to make investments in "strategic" sector companies. Ultimately, the all-Italian counter-bid failed, as it did not recruit sufficient investors to prevent Lactalis from taking control of Parmalat by securing a majority of seats on the board of directors at Parmalat's delayed AGM, which was held on 28 June 2011.

The Parmalat takeover took place months after a similarly high-profile takeover also cleared unconditionally by the Commission, namely the acquisition of Italian jeweller Bulgari SpA by French luxury-goods maker LVMH Moet Hennessy Louis Vuitton SA.

Comment. The Italian government is not the only EU Member State to consider apparently protectionist measures; in 2005, France faced criticism from the European Commission for adopting anti-takeover provisions similar to those described above. However, it is unclear what effects such moves have on commercial eurozone relations.

It will be important to keep an eye on reactions to future takeovers of Italian companies. French utility Electricité de France is reportedly still considering a bid for the Italian energy company Edison, subject to support from Italy's Treasury, and Pinault-Printemps-Redoute is reported to be considering buying the Italian luxury fashion brand Brioni.

UK: OFT fines retailers and processors after 7-year dairy products investigation

Summary. The Office of Fair Trading (OFT) has fined four supermarkets and five dairy processors a total of £49.5 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 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. On 20 September 2007, the OFT issued a statement of objections (SO) to each of Arla, Dairy Crest, Lactalis McLelland, The Cheese Company and Wiseman (the dairy processors); and Asda, Morrisons, Safeway (now owned by Morrisons), Sainsbury's and Tesco. The SO alleged that these companies colluded to increase the retail prices of certain dairy products in 2002 and/or 2003. In 2007 and 2008, the OFT reached early resolution agreements with seven of the companies, under which the companies admitted liability and agreed to both a streamlined investigative procedure and to pay fines totalling over £116 million. In 2009, the OFT published a supplementary statement of objections setting out further evidence of its allegations against Morrisons and Tesco. In April 2010, the OFT announced that it had insufficient evidence to support an infringement finding regarding liquid milk in 2002 and value butter in 2003, so dropped all allegations against Morrisons (in relation to its own conduct and not that of Safeways) and reduced the provisional fines levied against each of the other companies.

On 10 August 2011, the OFT announced a decision that the dairy processors and Asda, Safeway, Sainsbury's and Tesco (the supermarkets) infringed the Chapter I prohibition by co-ordinating price increases 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. The OFT found that three infringements (relating to cheese in 2002 and 2003 and fresh liquid milk in 2003) but not all dairy processors and supermarkets were involved in all three infringements.

Arla was granted complete immunity under the OFT's leniency programme as Arla 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 Asda, Safeway and Sainsbury's received reductions in their fines because they agreed to early resolution, enabling parts of the case to be resolved more quickly. The OFT decided not to grant Tesco a discretionary 10% penalty reduction for cooperation with the investigation, and fined Tesco £10.43 million.

Comment. This long-running investigation by the OFT, launched in September 2003, generated a number of noteworthy developments, with Morrisons bringing a defamation action against the OFT in 2007, and Safeway attempting to recoup damages from its employees in 2010 (see the May 2011 issue of Consumer Goods and Retail Industry Competition Bulletin). The OFT's decision seems to reaffirm its position in relation to indirect information exchange (so-called A-B-C) infringements, after two previous A-B-C infringements were abandoned on the grounds of insufficient information and administrative policy respectively (in the tobacco and UK grocery products investigations – see, respectively, the April 2010 and January 2011 editions of Consumer Goods and Retail Industry Competition Bulletin). This does not, however, appear to be the end of the line for this investigation, as Tesco has announced that it will appeal the OFT's decision. This follows numerous appeals by other companies against the recent OFT decisions (e.g., in Tobacco and Construction). Given that Asda appealed the OFT's Tobacco decision notwithstanding that Asda had agreed to early resolution, it remains to be seen whether any of the companies which entered into early resolution agreements in this case will also appeal the OFT's decision .

UK: Frozen ready meals merger referred to CC

Summary. The Office of Fair Trading (OFT) has referred the completed acquisition by Kerry Foods Ltd (Kerry) of the frozen ready meals (FRM) business of Headland Foods Ltd (Headland) 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. Kerry and Headland were the two largest suppliers of frozen ready meals to retail sector customers in the UK (e.g., supermarkets). Following completion of their merger in January 2011, the parties reportedly implemented a significant price increase in relation to frozen ready meals. The OFT launched an own-initiative merger investigation on 10 February 2011.

Kerry submitted that Headland was a failing and/or "flailing" firm, but the OFT did not consider that it had received sufficient evidence to conclude that, absent the merger, Headland would have either exited the market or seen its ability to compete with Kerry significantly weakened.

The OFT examined submissions regarding the existence of a single relevant product market comprising both FRM and chilled ready meals (CRMs), and of significant competition between FRMs and CRMs, but on balance did not consider that there was any compelling supply- or demand-side evidence to broaden the relevant market so as to include CRMs as well as FRMs. The OFT examined the production of own-label, contract-packed and own-brand FRMs, found that the parties' market shares high enough to give rise to concerns, and that neither alternative suppliers nor possible increases in imports were sufficient to replace the competition lost by the merger. The OFT also considered that the post-merger price increases could be, at least in part, due to reduction in competition resulting from the merger.

The OFT therefore referred the merger to the CC, whose report is expected by 26 December 2011.

Comment. The case serves to remind merging parties that any significant post-merger price increase may lead to authorities investigating (and/or increasing their scrutiny of) the relevant merger – even if the price increase can be explained, at least in part, by reasons such as raw material cost increases.

Whereas a business whose financial situation means that it would have exited the market if the merger had not taken place could be characterised as a failing firm, a "flailing firm" is a description applied to a business which, absent the merger, would have remained in the market but given its poor financial position would have exerted only a minimal competitive constraint on the other merging party. As the decision in *Kerry / Headland* shows, the OFT is generally typically very sceptical of "flailing firm" arguments; in fact, we are not aware of the OFT having ever accepted such a counterfactual under the 2002 Act. The CC, in comparison, tends to be more willing to consider counterfactuals other those of pre-merger competition. Indeed, the CC has in at least some previous cases (e.g., *Arla / Express Dairies* and *Stagecoach / Cavendish*) analysed and/or cleared mergers based on a "flailing firm"-type counterfactual, even if those specific words were not used.

NON-FOOD GOODS / RETAILING

EU: Commission publishes draft best practices for cooperation among EU national competition authorities

Summary. The European Commission (the Commission) has published a set of draft "best practices" for cooperation among national competition authorities within the EU (NCAs) for mergers that are not subject to EU merger control but require clearance in several Member States (Draft Best Practices).

Background. Under the EU Merger Regulation (*139/2004/EC*) (EUMR), the Commission has exclusive competence to assess the competitive impact of transactions with an EU dimension. EU Member States cannot apply their national competition laws to such transactions, and they cannot adopt measures which could prohibit, make conditional or in any way prejudice such transactions, unless such measures serve to protect certain defined legitimate interests which are compatible with EC law and which comply with the principle of proportionality (*Article 21, EUMR)*). If the EU merger control thresholds are not met, the transaction will require clearance by the NCA in those Member States in which the jurisdictional thresholds are triggered. However, one or more Member States may request that the Commission examines any merger that does not meet the EU thresholds but which affects trade between Member States and threatens to significantly affect competition within the Member States making the request (*Article 22, EUMR*) (Article 22).

Facts. The Draft Best Practices are intended to foster and facilitate information sharing between NCAs during their reviews of any transaction that does not qualify for a "one-stop shop" review by the Commission, but requires approval in several EU Member States. In 2010, at least 240 transactions fell outside the Commission's exclusive competence and required notification with two or more NCAs, according to the Commission.

The Draft Best Practices aim to increase the efficiency, transparency and effectiveness of the merger review process, for example in relation to the timing of the review process, the exchange of confidential information between NCAs, the substantive assessment of the transaction and, where applicable, remedies.

The Draft Best Practices were prepared by a working group, composed of the Commission and NCAs; that group will now review comments received prior to publication of a final version in Autumn 2011. Some comments already published suggest that the draft document is too vague, and places too many responsibilities on merging parties rather than NCAs. Some respondents have called for procedures to be set out to protect the rights of merging parties and third parties as well as information being exchanged by NCAs. Other respondents are concerned about referrals under Article 22, claiming that the referral process is particularly lengthy and burdensome for merging parties. In addition, the Draft Best Practices does not address the issue of NCAs referring mergers under Article 22 where no grounds exist for national investigation – an issue which arose recently in *SC Johnson / Sara Lee Insecticides.* In that case, the referral of a transaction to the Commission under Article 22 was requested by five NCAs, only one of which had jurisdiction to review the transaction under national rules.

Comment. This project is, in part, an acknowledgement of notifying parties' calls for more cooperation among NCAs and more convergence in their approaches to merger control. It regrettable that the Draft Best Practices do not address the issues raised by the referral requests in *SC Johnson / Sara Lee Insecticides*, which were an interesting precedent but have arguably introduced an unwelcome element of unpredictability into merger control in Europe.

EU: 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 EU 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 EU General Court, which annulled the Commission's decision to reject the complaint.

Facts. The Commission has 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 contravene Article 101 or Article 102, and will cover the whole EEA.

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 that it has previously rejected. The Commission will now investigate allegations that appear to be similar (but not necessarily linked) to those currently being examined by the national competition authorities of Spain and Switzerland.

Germany: FCO recognises certain rules on competition in relation to book retail

Summary. The German Federation for Book Retail (BDB) has issued some new rules on competition, which have largely been accepted by the German Federal Cartel Office (FCO).

Background. Under German competition law, economic unions (*Wirtschafts- und Berufsvereinigungen*) are allowed – within strict parameters – to set rules on competition. Economic unions may ask the FCO to "clear" such rules.

German law states that publishers must set retail prices for books. However, in certain circumstances, retail prices can be altered or revoked 18 months after initial publication.

Facts. The BDB has set out some competition rules, which aim to ensure the cooperation of publishers, wholesalers and retailers in the event that book retail prices are altered. The new rules, accepted by the FCO, oblige publishers to give 14 days' notice if they will alter or revoke a retail price.

The FCO has underlined that the rules do not specify the platform on which such an announcement must be made, and considers that each publisher is free to choose to make prices announcements through either the index of available books provided by BDB or any other platform deemed appropriate. The FCO also noted that it has not granted clearance to a BDB rule according to which prices noted in the BDB's index of available books are considered to be the valid price. Accordingly, the FCO considers that each publisher should have the option to publish "valid prices" on platforms other than the BDB's index of available books.

Comment. The German law permitting fixed prices to apply to books reduces, to a certain extent, competition at the retail level – the aim being to maintain a range of both large and small book retailers. However, outside this limitation, the FCO appears to try to maintain competition by providing intense scrutiny to any proposed rules and only granting limited clearance for such competition rules.

UK: OFT requires upfront buyers in two FMCG cases

Summary. In two recent cases involving fast-moving consumer goods (FMCG), the Office of Fair Trading (OFT) required undertakings in lieu of a reference to the Competition Commission (CC), including commitments to find upfront buyers. One of these cases culminated in the unusual result of a brand being split between different owners.

Background. The OFT must refer an anticipated merger to the CC if it believes that there is, or may be, a relevant merger situation that may be expected to result in a substantial lessening of competition (SLC) (*section 33, Enterprise Act 2002*) (2002 Act). Likewise, the OFT must refer a completed merger to the CC if it believes that a relevant merger situation has been created and this has resulted, or may be expected to result in a SLC (*section 22, 2002 Act*).

To remedy, mitigate or prevent any SLC which has resulted or may be expected to result from a merger, under section 73 of the 2002 Act the OFT may, instead of making a reference to the CC, accept undertakings to take such action from such of the parties concerned as the OFT considers appropriate, in particular with the aim of achieving as comprehensive, reasonable and practicable as possible a solution to the relevant SLC.

Facts. In September 2010, Unilever agreed to acquire the Alberto Culver Company (Alberto Culver), a manufacturer of personal care and household products. The acquisition, which completed on 10 May 2011, was notified to competition authorities in Italy, Ireland, the USA and the UK. The deal was cleared unconditionally in Italy and Ireland; with the US Department of Justice reaching a settlement requiring the divestment of Alberto-Culver's Alberto VO5 haircare brand and Unilever's Rave haircare brand in order to proceed with the acquisition. In a decision of 18 March 2011, the OFT considered that the transaction created a realistic prospect of a SLC in the supply of bar soaps in the UK. In order to satisfy the OFT, Unilever was required to divest Alberto Culver's bar soap business, including the Cidal, Wright's and Simple brands. In addition, the OFT required Unilever to find an "upfront buyer" for the divested business. Following a public consultation, on 16 June 2011 the OFT approved Lornamead – a global personal care company with only 'niche' bar soap brands in the UK – as the upfront buyer, and accepted the undertakings in lieu of reference offered by Unilever.

In February 2011, Princes Limited (Princes) agreed to acquire the canned food products business of Premier Foods Group Limited. In a decision of 22 June 2011, the OFT considered that the transaction created a realistic prospect of a SLC in the supply of ambient pies in the UK. In order to avoid a reference to the CC, Princes was required to divest the entire range of Fray Bentos branded canned meat products, to an "upfront buyer".

Comment. The two cases demonstrate that, where undertakings in lieu of reference are required, the OFT is increasingly likely to require the identification an "upfront buyer". The OFT appears especially keen to do so following the "failure" of undertakings in certain previous cases, such as *General Healthcare / Covenant Healthcare*.

Unilever / Alberto Culver is unusual insofar as the Simple brand was divested by means of a perpetual and royalty-free licence, rather than an outright sale. In addition, the case resulted in split ownership of the "Simple" brand (which is also applied to products other than bar soap). It is very rare for a competition authority to accept a remedy which results in a brand being split, given the perceived related commercial risks and practical difficulties. The outcome of *Unilever / Alberto Culver* contrasts with the European Commission's recent decision, in *Unilever / Sara Lee Body Care*, to require the divestment of the entire Sanex brand, throughout the European Economic Area, despite concerns only arising in relation to deodorants. These contrasts show that merger remedies are very much decided on a case-by-case basis.

Clifford Chance London acted for Princes in the above case.

UK: Consumer interest magazines deal cleared by OFT

Summary. The Office of Fair Trading (OFT) has cleared the proposed acquisition by Hearst Corporation (Hearst), a diversified US-based media company, of Lagardère's magazine publishing business outside of France.

Background. The OFT may investigate mergers which meet either the 'turnover test' or the 'share of supply test'. The share of supply test is met if the merging parties will together supply at least 25 per cent of goods or services of a particular description, either in the UK as a whole or in a substantial part of it (*section 23, Enterprise Act 2002*).

In March 2011, Hearst agreed to acquire from Lagardère certain subsidiaries and, in relation to the UK, four magazines (*Red*, *Sugar*, *Inside Soap* and *All about Soap*), the online site digitalspy and a licence to publish *Elle*, *Elle Decoration* and *Psychologies*. The parties overlapped in the UK in the publication and sale of lifestyle, fashion and home interest magazines principally aimed at women – and the supply of advertising space in those magazines. Hearst, for example, offers lifestyle, fashion and home interest titles such as *Good Housekeeping*, *Cosmopolitan*, *Prima*, *Company*, *She*, *Harper's Bazaar*, *Coast*, *Country Living* and *House Beautiful* in the UK.

Facts. Reviewing the transaction, the OFT noted that publishers generally obtain revenue from two sources – the magazine cover price and advertising space sales – and, while the extent of substitution may differ for these two interdependent customer groups (i.e., readers and advertisers), many of the determining factors are the same for both. The OFT investigated the scope of the relevant product market, examining a number of related media with a view to determining whether they formed effective competitive constraints. For example, the OFT believed that monthly and weekly magazines should be considered separately – but did not come to a definitive view, and noted that some weekly titles with similar editorial content may impose a competitive constraint to monthly magazines. The OFT also reached no firm conclusions on whether:

- traditional magazines are constrained by non-traditional magazines (e.g., those provided by retailers, often for free);
- customers switch between, on the one hand, weekly and monthly magazines and, on the other, newspaper supplements positioned closely to magazines; and
- there is a sufficient amount of switching between print media and non-print media (e.g., internet sites offering similar content) to place them in the same market.

The OFT found that, whilst the number of significant publishers of relevant titles would reduce post-merger from four to three, following an analysis of the closeness of competition between the parties' various titles the acquisition was not be expected to result in a substantial lessening of competition on any UK market. The OFT considered, for example: (i) econometric analysis suggesting that certain titles were not especially close competitors; (ii) evidence of certain third parties' titles competing closely with certain of the parties' titles; and (iii) the absence of any evidence indicating that advertisers considered certain of the parties' titles to be 'must have' magazines for any advertising campaign. On 19 July 2011, the OFT announced that it would not refer the transaction to the Competition Commission (CC).

Comment. As the parties notified the proposed acquisition to the OFT on 19 April 2011, the OFT's administrative deadline for a decision on reference to the CC was 24 June 2011. Although the transaction was eventually cleared unconditionally, it is notable that the OFT only issued its decision nearly a month after its administrative deadline. This perhaps indicates that the OFT currently has a heavy workload.

***Clifford Chance London acted for Hearst in the above case*.**

UK: OFT accepts failing firm evidence in approving purchase of 30 former Focus stores

Summary. On 7 July 2011, the Office of Fair Trading (OFT) cleared the acquisition by Kingfisher plc (Kingfisher), the parent company of B&Q, of 30 former Focus stores.

Background. The OFT must refer an anticipated merger to the Competition Commission (CC) if it believes that there is, or may be, a relevant merger situation that may be expected to result in a substantial lessening of competition (SLC) (*section 33, Enterprise Act 2002*) (2002 Act).

On 5 May 2011, the Focus DIY chain went into administration. Kingfisher notified its intention to acquire certain Focus stores to the OFT. As in previous merger cases involving the retail supply of DIY products by national DIY chains, the OFT examined the impact of the merger based on overlaps within local areas within a five and 10 mile radii distance and a 20 minutes driving time.

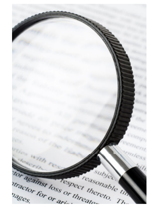
Facts. The OFT found that there were no competition concerns in relation to 20 of the stores as the parties did not overlap at a local level. However, with regards to the remaining 10 stores (Overlap Stores), Kingfisher supplied evidence on diversion ratios between each Overlap Store and the other DIY national sheds present in the area. When combined with evidence on the variable profit margins, the OFT concluded that the diversion ratios in two areas (Huntingdon and Stroud) were not high enough to give the OFT cause for concern over unilateral effects. The OFT therefore excluded these two areas from any further analysis, leaving eight areas where preliminary competition concerns were raised.

In each of the eight remaining areas, the OFT took the position that the failing firm defence was satisfied. In considering the failing firm defence, the OFT assessed the following criteria:
- whether the firm's exit was uninfluenced by the prospect of the merger;
- whether the firm would have exited (through failure or otherwise); and, if so
- whether there would have been a substantially less anticompetitive alternative purchaser for the firm or its assets to the acquirer under consideration; and
- what would have happened to the sales of the firm in the event of its exit.

For each area, the OFT concluded that the store would have exited the market in any event and that there would have been no alternative purchaser for the store that would involve a less anti-competitive outcome compared to the merger.

Comment. Originally, Kingfisher wanted to buy 31 Focus stores, and notified the OFT accordingly. However, after the OFT's initial assessment, Kingfisher decided to not to purchase a store in Dorchester, given evidence suggesting that there was an alternative purchaser for that store involving a substantially less anti-competitive outcome. As a result, the store was released back to the administrator. This approach enabled Kingfisher to effectively remedy the potential competition issue prior to any finding of a SLC. This approach by the OFT is unusual and particularly flexible; it will be interesting to see if and how it is applied in future transactions involving failing firms.

OTHER NEWS – IN BRIEF



France: FCA finalises antitrust fining notice

Summary. The French Competition Authority (FCA) has issued the final version of its notice on antitrust fines.

Background. The FCA may impose fines on undertakings or associations of undertakings when they infringe competition law (*Article L 464-2 I 2 of the French Commercial Code*). Fines are proportional to the gravity of and economic harm caused by the infringement as well as to the individual situation of each undertaking. They are subject to a limit of 10% of the global turnover of the group to which each undertaking belongs (*Article L 464-2 I of the French Commercial Code)*.

Facts. On 16 May 2011, the FCA issued the final version of its notice on antitrust fines, providing guidance on the FCA's two-step methodology for determining the level of fines. The notice is binding upon the FCA, and thus enforceable by companies subject to an antitrust procedure.

First, the FCA will determine a basic amount for each company involved, depending on the gravity of the infringement and the economic harm caused, as multiplied by duration of participation in the infringement. Generally, the basic amount will be between 0% and 30% of the value of sales affected by the infringement (and between 15% and 30% of sales in case of horizontal cartels). The basic amount may then be adjusted upwards or downwards depending on various factors, such as mitigating / aggravating circumstances, a firm's size and whether the firm is a repeat offender.

The final notice does not differ substantially from the draft previously published, and remains close to the European Commission's notice on fines. However, some changes were made following consultation on the draft. For example, the final notice gives guidance on the conditions under which economic studies may be taken into account when assessing damage to the economy. Also, the notice stresses that any reduction in fines for leniency or not contesting objections will be applied after the maximum legal threshold of 10% of the undertaking's turnover has been taken into account, to ensure that companies can fully benefit from the possible reductions.

Comment. The notice will help companies under investigation to better anticipate the level of fines which may be imposed. However, the FCA will likely impose higher fines, in general, as it will now explicitly take duration into account.

Further information on the FCA's final antitrust fines notice can be found in a client briefing available on CC's website, at http://www.cliffordchance.com/publicationviews/publications/2011/05/the_french_competitionauthorityunveilsit.html.

UK: Competition law compliance - OFT guidance

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

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 (that is, 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 that 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.

US: 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.

US: 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.

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.

Further information on the amended Rules can be found in a client briefing available on CC's website, at http://www.cliffordchance.com/publicationviews/publications/2011/07/changes_to_us_premergernotificationrequirement.html.