Antitrust Review | September - October 2011

European Union

- **In-depth investigation - Deutsche Börse / NYSE Euronext.** The European Commission has decided to open an in-depth Phase II investigation into the proposed merger between Deutsche Börse and NYSE Euronext.
- **European Commission opens investigation into e-payments market.** The European Commission has opened an antitrust investigation into the standardisation process undertaken by the European Payments Council for payments made over the internet.
- **Commission confirms natural gas sector dawn raids.** The European Commission has conducted unannounced inspections at the premises of companies active in the supply, transmission and storage of natural gas in several EU Member States.
- **General Court finds Commission failure to act.** The General Court has ruled that the European Commission failed to fulfil its obligations to act on a complaint by Ryanair against the Italian government for alleged state aid to Alitalia and Volare.

China

- **MOFCOM enacts merger control rules governing the assessment of effects on competition.** Rules enacted by China's Ministry of Commerce that govern the assessment of effects on competition entered into force on 5 September 2011.
- **MOFCOM adopts procedural regulations in relation to the national security review regime.** China's Ministry of Commerce has adopted procedural regulations in relation to the national security review regime.

France

- **French Competition Authority withdraws approval for CPG / Vivendi acquisition of TPS / CanalSatellite.** The French Competition Authority has withdrawn the approval given in 2006 for the acquisition by Canal Plus Group and Vivendi Universal of TPS and CanalSatellite due to the parties' alleged failure to fulfil the original commitments.
- **Commercial Court orders French Competition Authority to disclose documents.** The Commercial Court in Paris has ordered the French Competition Authority to disclose documents in relation to a settled antitrust investigation against HighCo and Sogec, which manage e-coupons and reduction coupons in France.

Germany

- **Sector inquiry into the food retail sector.** The Federal Cartel Office has initiated a sector inquiry into the food retail sector to obtain an accurate picture of market conditions.

The Netherlands

- **Fines by NMa and European Commission not tax deductible.** The Dutch Supreme Court has ruled that fines imposed by the Dutch Competition Authority and fines imposed by the European Commission are not tax deductible.

Poland

- **Cable TV providers granted conditional merger clearance.** After a review lasting almost nine months, the President of the Office of Competition and Consumer Protection has issued a conditional clearance decision relating to the proposed merger between the two cable pay TV providers Aster and UPC Polska.

Romania

- **Baxter and Belupo fined by Romanian Competition Council.** The Romanian Competition Council has fined Baxter, Belupo and their distributors for prohibiting the export of pharmaceutical products.

Slovak Republic

- **Bill on revised merger control rules approved by the Slovak Parliament.** The Slovak Parliament has approved revised merger control rules under the Slovak Competition Act.

Spain

- **CNC investigates Microsoft for alleged restrictive practices.** The Spanish Competition Authority has opened formal proceedings against Microsoft Ibérica, S.R.L. Unipersonal and Microsoft Ireland Operations Limited for alleged restrictive practices.

United Kingdom

- **OFT to consult on referral of aggregates market to the Competition Commission.** The Office of Fair Trading has made a preliminary decision to refer the UK markets for aggregates, cement and ready-mix concrete to the Competition Commission for a market investigation.
- **OFT refers construction materials JV to CC.** The Office of Fair Trading has referred the proposed UK construction materials joint venture between Anglo American PLC and Lafarge S.A. to the Competition Commission for further investigation.
- **Competition Commission clears Thomas Cook / Co-op travel agency joint venture.** The Competition Commission has unconditionally cleared the joint venture between Thomas Cook Group plc, the Co-operative Group Limited and the Midlands Co-operative Society Limited.
- **OFT receives super-complaint about travel money.** The Office of Fair Trading has received a super-complaint from Consumer Focus about the cost of obtaining foreign currency and overseas use of credit and debit cards.
- **OFT launches dentistry market study.** The Office of Fair Trading has launched a market study to examine whether the private and NHS dentistry markets are working well for patients.

United States

- **Third Circuit decides that Foreign Trade Antitrust Improvements Act claims do not serve as jurisdictional limit.** The Third Circuit held that the "U.S. effects" requirement under the Foreign Trade Antitrust Improvements Act was a substantive element of an antitrust claim, rather than a jurisdictional limit, therefore overturning its own precedent.

European Union: In-depth investigation - Deutsche Börse / NYSE Euronext

Summary. The European Commission (the Commission) has decided to open an in-depth Phase II investigation into the proposed merger between Deutsche Börse (DB) and NYSE Euronext (NYSE) (the proposed transaction).

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*). The decision to open an in-depth investigation does not prejudge the final results of the Commission's investigation.

The proposed transaction was notified to the Commission on 29 June 2011.

Facts. The Commission's initial Phase I investigation led to concerns that the combination of the two largest derivatives exchanges in Europe may remove an important competitor and have a negative impact on innovation in derivatives products and technology solutions. The Commission is concerned that the possibilities for fee competition may be reduced which could affect customers such as pension funds, mutual funds, professional brokers and banks. The Commission is also concerned that without access to the merged entity's enlarged post-trade clearing facilities, entry by competitors could be made more difficult. There were also concerns in a number of other areas including equities trading and settlement and index licensing. The Commission has until 22 December 2011 to make its final decision.

Comment. The Commission's investigation comes at a time of an ongoing EU policy debate over the regulation of derivatives trading and proposed changes to the regulation of clearing facilities. Commission Vice-President Joaquín Almunia said that the analysis of the proposed transaction will require sophisticated economic analysis and that within this crucial sector, the Commission will "*continue to look at the implications that mergers in financial markets have for market data, indices, trading technology, access to collateral, clearing and settlement as they are all vital to keep them competitive and fair*".

Sources: Commission press release, 4 August 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/948&format=HTML&aged=0&language=EN&guiLanguage=en; and Speech by Joaquín Almunia, 8 September 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/561&format=HTML&aged=0&language=EN&guiLanguage=en.

European Union: European Commission opens investigation into e-payments market

Summary. The European Commission (the Commission) has opened an antitrust investigation into the standardisation process undertaken by the European Payments Council (EPC) for payments made over the internet (e-payments).

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*).

The EPC is the coordination and decision-making body of the European banking industry for payments. The Single Euro Payments Area (SEPA) is an initiative to integrate payment schemes across the EU, to complete the borderless nature of the euro. The SEPA project is supported and promoted by the EPC (made up of 74 banks, payment institutions and banking associations throughout the EU), which has developed the necessary payment schemes and frameworks.

Facts. The Commission will examine the e-payments standardisation process to ensure that competition is not unduly restricted, for example through the exclusion of new entrants and payment providers who are not controlled by a bank. The

Commission considers that excluding competitors in the online payments market may result in higher prices for web merchants and ultimately consumers. The Commission has received a complaint which will form part of its investigation.

At the same time, the Commission has confirmed that it endorses the SEPA project as crucial for consumers, retailers and companies to enjoy the full benefits of the Single Market and in principle welcomes the development of standards for e-payments. The Commission also recognises the importance of standardisation in terms of promoting economic integration, which results in greater efficiencies and better prices and services for the consumer.

Comment. The Commission's recently revised EU Guidelines on horizontal agreements provide useful guidance on the way the Commission analyses standardisation procedures and agreements. Joaquín Almunia, Vice President in charge of Competition Policy, commented that "*in principle, standards promote inter-operability and competition, but we need to ensure that the standardisation process does not unnecessarily restrict opportunities for non-participants*".

The Commission has stated that the opening of proceedings in this case does not prejudge the outcome of the investigation.

Sources: Commission press release, 26 September 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1076&format=HTML&aged=0&language=EN&guiLanguage=en.

European Union: Commission confirms natural gas sector dawn raids

Summary. The European Commission (the Commission) has conducted unannounced inspections (inspections) at the premises of companies active in the supply, transmission and storage of natural gas (the companies) in several EU Member States.

Background. The Commission has powers to enter and inspect premises, land and vehicles of undertakings (*Article 20, Regulation 1/2003/EC*) (Regulation 1/2003) as well as other premises (*Article 21, Regulation 1/2003*). 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), Regulation 1/2003*).

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.

Facts. The Commission is investigating the supply of natural gas in Central and Eastern European Member States (the relevant Member States) focusing on the upstream supply level. The Commission has concerns that there may be exclusionary behaviour such as market partitioning, obstacles to network access and barriers to supply diversification, as well as possible exploitative behaviour such as excessive pricing which could potentially infringe Article 101 and Article 102. The Commission is also investigating alleged anticompetitive behaviour that could harm the upstream suppliers themselves.

The Commission officials were accompanied by staff from the relevant national competition authorities. The inspections represent a preliminary step in the Commission's investigation of suspected anticompetitive practices, and do not prejudge the outcome of the investigation or imply that the companies are guilty of any anticompetitive conduct.

Comment. The Commission's energy sector competition inquiry, which concluded in 2007, was followed by a series of antitrust investigations between 2007 and 2010 against a number of Western European gas incumbents. However, the current investigations relate to upstream suppliers as well as incumbents. These inspections also represent the Commission's first competition inspection relating to the energy sector in some of the relevant Member States (and in some, the Commission's first ever competition inspection in that country).

Source: Commission press release, 27 September 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/641&format=HTML&aged=0&language=EN&guiLanguage=en.

European Union: General Court finds Commission failure to act

Summary. The General Court has ruled that the European Commission (the Commission) failed to fulfil its obligations to act on a complaint by Ryanair Ltd. (Ryanair) against the Italian government for alleged state aid to Alitalia and Volare (Italian airlines).

Background. The EC state aid rules prohibit any aid granted by an EU member state (or granted through state resources) that distorts or threatens to distort competition by favouring certain undertakings or goods and that affects trade between member states (*Article 107, Treaty on the Functioning of the European Union*) (Article 107). Such state aid is prohibited unless it falls into one of the exempted categories listed in Article 107 or is covered by one of the block exemptions allowing state funding of certain sectors of the economy under strict guidelines. The European Commission can require that aid granted by member states which is incompatible with the common market be repaid by recipients to the public authorities that granted it.

Facts. In 2005 and 2006, Ryanair sent various letters to the Commission alleging, amongst other things, that unlawful state aid was granted to the Italian airlines through the transfer of 100 Alitalia employees to other airlines, compensation for loss following the attacks of 11 September 2001 (9/11 compensation) and reductions in airport charges from which Alitalia had allegedly benefited. The Commission acknowledged receipt of Ryanair's first complaint albeit only in relation to Volare.

In August 2007, having not received a response to its complaint, Ryanair sent a letter of formal notice to the Commission calling on it to act under Article 232 of the EC Treaty (now Article 265 of the TFEU). Ryanair brought an action before the General Court seeking a declaration that the Commission had unlawfully failed to define its position on Ryanair's complaints.

Decision. The General Court held that the Commission had failed to act in relation to the aid allegedly granted by the Italian Republic to the Italian airlines in respect of the transfer of the 100 Alitalia employees, the 9/11 compensation and the reductions in airport charges at hub airports from which Alitalia, in particular, was claimed to have benefited.

The General Court noted that a complaint need not be on the Commission's standard form in order to be admissible as a complaint concerning state aid. Once the Commission is in possession of the information but considers that there are insufficient grounds for taking a view on the case, it must inform the interested party. The General Court confirmed that, having begun preliminary examination, even if the Commission took the view that the relevant Italian legislation did not constitute a state aid measure, the Commission was nevertheless required to adopt a decision in order to close the preliminary examination stage.

The General Court found that certain other allegations made by Ryanair did not constitute complaints in relation to which the Commission had a duty to act.

Comment. The decision clarifies procedural issues in relation to complaints of alleged state aid and the Commission's obligations in that regard. In January 2010, Ryanair itself was cleared by the Commission of having received unlawful state aid from Slovakia in relation to an agreement with Bratislava Airport setting service charges.

Case: Case T 442/07 Ryanair Ltd. v European Commission.

China: MOFCOM enacts merger control rules governing the assessment of effects on competition

Summary. Rules enacted by China's Ministry of Commerce (MOFCOM) that govern the assessment of effects on competition entered into force on 5 September 2011.

Background. Transactions which meet specified turnover thresholds must be notified to MOFCOM and clearance obtained before the transaction can be completed (Article 21, Anti-Monopoly Law (AML)). Article 27 of the AML sets out a list of factors that MOFCOM will consider when reviewing a transaction. These include market shares of the transaction parties; market concentration levels; the impact of the transaction on market entry, third parties including consumers, and national economic development (Article 27 factors).

Facts. The Interim Provisions on the Assessment of the Effects of Concentrations of Undertakings on Competition (the Rules) entered into force on 5 September 2011. The Rules provide further guidance on the Article 27 factors. In line with international practice, the Rules note that MOFCOM will consider unilateral or coordinated effects when assessing horizontal mergers, and evaluate foreclosure effects in the case of vertical or conglomerate mergers. According to the Rules, factors that MOFCOM may focus on include:

- market shares, including the transaction parties' market position vis-a-vis competitors;
- market concentration levels based on the Herfindahl-Hirschman Index (HHI) or the combined market shares of the top enterprises in the industry (CRn Index);
- potential competition;
- barriers to entry; and
- buyer power.

MOFCOM will also consider whether the transaction will generate efficiencies (such as economies of scale and scope or cost reduction) and, where applicable, the "failing firm defence". The Rules indicate that MOFCOM may take into account non-competition factors such as social and public interest considerations.

Comment. According to the latest figures released by MOFCOM, the number of notified transactions is increasing. To date, MOFCOM has reviewed more than 350 transactions, including nine conditional approvals and one prohibited transaction. This is the first time that MOFCOM has issued substantive rules which provide guidance on how it will assess the competitive effects of a transaction. However, certain aspects of the Rules (e.g. the notion of "neighbouring markets" the "failing firm" defence, and the non-competition factors that MOFCOM may consider during its review) may need further clarification. The Rules also do not provide safe harbour thresholds based on market shares, or the HHI or CRN Index.

Source: Ministry of Commerce press release, The Interim Provisions on the Assessment of the Effects of Concentrations of Undertakings on Competition, 29 August 2011, http://fldj.mofcom.gov.cn/aarticle/c/201109/20110907723357.html (in Chinese).

China: MOFCOM adopts procedural regulations in relation to the national security review regime

Summary. China's Ministry of Commerce (MOFCOM) has adopted procedural regulations (the Regulations) in relation to the national security review regime.

Background. A notice setting out a national security review (NSR) regime for foreign acquisitions of domestic companies in particular sectors in China came into effect on 5 March 2011 (the Notice). The Regulations accompany the Notice and set out procedural rules for the NSR regime. The Regulations replace interim procedural regulations that were in place from 5 March 2011 to 31 August 2011 (the Interim Regulations).

Facts. MOFCOM has enacted the Regulations (fully titled the Provisions of MOFCOM on Issues Regarding the Implementation of the Security Review Regime on Mergers and Acquisitions of Chinese Enterprises by Foreign Investors). The main change from the Interim Regulations is Article 9, which provides that the authorities will focus on the substance and actual impact of foreign acquisitions of Chinese businesses and assets in particular sectors when determining whether the transaction requires NSR. This means that a foreign investor may not avoid NSR by utilising deal structures such as offshore investment vehicles (e.g. foreign acquisitions of offshore holding companies of Chinese subsidiaries), beneficial/nominee holding structures, trusts, or contractual arrangements (such as "variable interest entity" structures).

MOFCOM will notify the applicant when an NSR application is accepted. Once accepted, MOFCOM will confirm in writing within 15 working days if the transaction falls within the scope of the NSR regime. If the applicant does not receive a notice from MOFCOM within 15 working days, the transaction may be implemented. However, if MOFCOM determines that the transaction falls within NSR then it will file a request within five days with a Ministerial Joint Conference (a committee led by the National Development Reform Commission (NDRC) and MOFCOM) (Joint Conference), requesting that the Joint Conference review the transaction. The transaction cannot be implemented during the NSR review period. Transactions may go through a "general review" stage lasting a maximum of 30 working days from when the Joint Conference receives MOFCOM's request. If more time is needed to assess the transaction, a "special review" process of an additional 60 working days may apply. MOFCOM will have five working days from the date of the Joint Conference's decision to inform the applicant of the decision.

There are three possible outcomes arising from an NSR process:

- The Joint Conference may decide that the transaction in question does not pose any national security concerns. The applicant may then implement the transaction (subject to receiving other necessary approvals in China).
- The Joint Conference may decide that the transaction in question has an impact on national security issues. In this case, the Joint Conference may require that the applicant make relevant amendments or revisions to the transaction to mitigate any such national security issues. The applicant may be required to submit a revised application for consideration before approval.
- The Joint Conference may decide to prohibit the transaction in question because the transaction either has or will have a severe negative impact on national security. The Joint Conference may also adopt any necessary "measures" to eliminate any impact on national security (e.g. ordering undertakings to unwind an already implemented transaction).

Comment. Overall, the timeline for clearing an NSR application could range from 15 to 115 working days (and possibly more, depending on when MOFCOM decides to accept the application). Therefore an NSR process may have an impact on transaction timetables. The concept of scrutinising deals for "national security" concerns was first formally introduced in China by regulations entitled "Provisions in relation to Guiding Foreign Investment 2002". In addition, Article 31 of the Anti-Monopoly Law states that all foreign mergers and acquisitions of domestic businesses may be subject to national security review.

Source: Ministry of Commerce press release, Provisions of MOFCOM on the Implementation of a Security Review System on Mergers and Acquisitions of Chinese Enterprises by Foreign Investors, 25 August 2011, http://wzs.mofcom.gov.cn/aarticle/n/201108/20110807713480.html (in Chinese).

France: French Competition Authority withdraws approval for CPG / Vivendi acquisition of TPS / CanalSatellite

Summary. The French Competition Authority (FCA) has withdrawn the approval given in 2006 for the acquisition by Canal Plus Group (CPG) and Vivendi Universal (Vivendi) of TPS and CanalSatellite (the transaction) due to the parties' alleged failure to fulfil the original commitments.

Background. Pursuant to Article L. 430-8 IV of the French Commercial Code, the FCA may either (i) withdraw the original clearance decision and, unless the parties agree to return to the pre-transaction market situation, require the parties to re-notify within one month, or (ii) force the parties to carry out the breached commitments with a fine for every day of delay. In addition, the FCA may impose fines of up to 10% of the turnover achieved by the parties in France.

The transaction, cleared in 2006 by the French Minister for the Economy, led to the merger of the two main operators on the pay-TV market, TPS and CanalSatellite. Given concerns raised about the potential anti-competitive effects in the distribution of premium pay-TV programmes, the merger clearance decision was subject to the implementation of 59 commitments provided by CPG. CPG was ordered to unbundle seven premium TV channels (the divestment channels), including a premium channel called TPS Star, and to maintain the quality of the divestment channels in the interim.

Facts. On 20 September 2011, the FCA found CPG to be in breach of ten of its commitments and that CPG's delay in allowing distributors access to the seven TV channels provided an advantage to its own new offer of a collection of satellite channels. The FCA also alleged that CPG had undermined the quality of the divestment channels (in particular TPS Star). Moreover, CPG allegedly failed to fulfil commitments governing its relations with independent TV channels which were put into a situation of economic dependence by entry into potentially discriminatory contracts.

As a result, the FCA decided to withdraw the 2006 decision authorising the transaction. Unless the parties agree to revert to the pre-transaction market situation, the parties are required to re-notify the transaction within one month from the date of the FCA's decision. In light of the seriousness of the continuous alleged breaches and their potential impact on competition in the pay-TV market, the FCA also imposed a fine of EUR 30 million on CPG.

Comment. It is the first time that a previously authorised transaction has been ordered to "demerge" or re-notify the transaction in France due to an alleged breach of commitments. The decision highlights the difficulty of monitoring complex commitments and, in particular, behavioural commitments as opposed to structural commitments.

Source: Autorité de la Concurrence press release, 21 September 2011, http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=389&id_article=1697.

France: Commercial Court orders French Competition Authority to disclose documents

Summary. The Commercial Court in Paris has ordered the French Competition Authority (FCA) to disclose documents in relation to a settled antitrust investigation against HighCo and Sogec (the companies), which manage e-coupons and reduction coupons in France.

Background. In its decision of *Pfleider AG v Bundeskartellamt* of June 2011, the ECJ gave guidance to national courts in relation to the disclosure of documents which have been part of leniency requests for the purpose of private actions. According to the ECJ, the question of disclosure would be left up to national courts to decide on a case by case basis.

In August 2011, the Commercial Court in Paris (the Court) considered a disclosure request from the company Ma Liste De Courses (MLDC) in a private action for damages against the companies. The FCA had already settled its investigation into the companies on the basis of commitments offered by the parties.

Facts. MLDC complained to the FCA alleging that the companies had unilaterally decided to impose a standard form for e-coupons in France. The FCA accepted commitments from the companies to reach a settlement. However, MLDC brought a private action before the Court to claim damages for the loss it has alleged it suffered. MLDC requested that the Court should order the disclosure of the relevant written and oral non-confidential evidence from the FCA.

Decision. The Court has ordered the FCA to disclose non-confidential versions of written and oral evidence in relation to the investigation against the companies. The Court accepted MLDC's arguments on the basis of several factors including the following:

- the information requested by MLDC was limited to non-confidential versions;
- the FCA had collected information during its investigation which MLDC would not be able to obtain in support of its arguments; and
- documents from third parties would not constitute a "legitimate hindrance" in the sense of Article 141 of the Code du Procédure Civile, which relates to the obtaining of evidence retained by third parties.

Comment. The potential risk of disclosing such information is that it may discourage "whistle-blowing" whereby parties are granted immunity from fines or given a reduced fine if they provide information useful to an antitrust investigation. European

Commission Vice President Almunia stated in a speech of 16 September 2011 that he has "*no doubt that [the Commission] will find the right balance between protecting the effectiveness of our cartel enforcement and allowing the victims of a cartel to pursue their legitimate quest for damages*".

Source: Commercial Court of Paris, 15th Chamber judgment, 24 August 2011, https://listes.cru.fr/sympa/d_read/creda-concurrence/TCparis/24aout2011/MLDC.pdf.

Germany: Sector inquiry into the food retail sector

Summary. The Federal Cartel Office (FCO) has initiated a sector inquiry into the food retail sector to obtain an accurate picture of market conditions (the inquiry).

Background. Under section 32e paragraph 1 of the German Act against Restraints of Competition, the FCO may conduct an investigation into a specific sector if the rigidity of prices or other circumstances suggest that domestic competition may be restricted or distorted. Sector inquiries are not directed against specific companies.

Facts. On 16 September 2011, the FCO initiated the inquiry focusing on the competitive conditions for the procurement of food and beverages by large food retailers. For the purposes of the inquiry, the FCO has sent comprehensive questionnaires to 21 food retailers and approximately 200 producers of food and beverages.

According to previous decisions of the FCO, the four major food retail companies in Germany (Edeka, Rewe, Schwarz-Group and Aldi) account for approximately 85% of the sales market. The FCO considers strong concentration to be the main reason for launching the inquiry, in particular with regard to the relations between retailers and manufacturers.

The inquiry will have two phases. In the first phase, the FCO will investigate procurement in the food sector. The procurement shares of the individual companies will be determined both for major product categories and in a sample survey for nine products (milk, butter, roasted coffee etc.). The sample survey will be complemented by the FCO's findings from various merger control proceedings in the food retail sector. In the second phase, the FCO intends to investigate whether and to what extent the leading retail companies have purchasing advantages in comparison to their competitors, and what effects these advantages may have on competition in the sales markets. The questionnaires concerning the second phase are due to be sent out in January 2012.

The FCO will publish a report for public consultation following the inquiry.

Comment. The inquiry will not have any direct consequences for food retail sector participants since it is not intended to tackle and terminate any alleged anticompetitive behaviour in specific cases. However, the FCO may potentially use its findings in future merger control and/or cartel proceedings relating to the food retail sector.

Source: Federal Cartel Office press release, 16 September 2011, http://www.bundeskartellamt.de/wEnglisch/News/press/2011_09_16.php.

The Netherlands: Fines by NMa and European Commission not tax deductible

Summary. The Dutch Supreme Court (Hoge Raad) (Supreme Court) has ruled that fines imposed by the Dutch Competition Authority (Nederlandse Mededingingsautoriteit (NMa)) and fines imposed by the European Commission (Commission) are not tax deductible.

Background. Article 3.14 of the Dutch Income Tax Act 2001 excludes administrative fines from corporate income tax deductibility.

Facts. On 12 August 2011, the Supreme Court ruled that fines imposed by either the NMa or the Commission are not tax deductible.

In 2006, the District Court of Haarlem (District Court) ruled that a fine imposed by the Commission could partially give rise to tax deductibility. Fines aimed at deprivation of benefits achieved could be tax deductible, whereas punitive fines could not.

In 2008 the District Court ruled in a different case that a fine imposed by the NMa is not tax deductible as the fine is exclusively punitive under Dutch law. Tax deductibility of the fine would impair the effectiveness of the punishment. It could also give rise to legal inequality between the (legal) persons on which a fine is imposed.

The Commission had, on its own initiative, submitted written observations to the Court of Appeal in Amsterdam. The Commission concluded that unequal treatment of Commission and NMa fines without objective justification is contrary to EU law. In this case the NMa was competent and obliged to apply European competition law. The NMa imposed a fine for conduct which infringed both the Dutch Competition Act and the European competition rules without distinguishing between a national or European basis for the fine. In any event, it would be contrary to the principle of equal treatment, according to the Commission, to treat fines imposed on the basis of European or national competition rules differently when applying Article 3.14 of the Dutch Income Tax Act 2001.

Decision. The Supreme Court considered that, in order to guarantee the effectiveness of fines imposed by the Commission, Dutch courts regard the fine as not tax deductible. The Supreme Court considered that a fine imposed by the Commission has a solely punitive character. Imposing a fine based on the turnover of the infringer does not alter the character of the fine. The Supreme Court ruled that, similar to fines imposed by the NMa, fines imposed by the Commission are not tax deductible.

Comment. The case brings to an end a series of rulings by Dutch courts on tax deductibility of fines. Going forward, fines imposed by the Commission and fines imposed by the NMa shall be treated similarly by Dutch courts and will not be considered tax deductible.

Source: Dutch Supreme Court (in Dutch), 12 August 2011, LJN: BO6770 [AWB 08/493], www.rechtspraak.nl/ljn.asp?ljn=BO6770.

Poland: Cable TV providers granted conditional merger clearance

Summary. After a review lasting almost nine months, the President of the Office of Competition and Consumer Protection (OCCP) has issued a conditional clearance decision relating to the proposed merger between the two cable pay TV providers Aster and UPC Polska (UPC).

Background. Under the Act on Competition and Consumer Protection, if a proposed transaction threatens to significantly impede effective competition, the President of OCCP may, in order to enable clearance, impose obligations on an undertaking concerned or accept commitments, in particular to: (i) divest all, or part of, the assets of one or more of the undertakings; (ii) divest control over one or more undertakings by, in particular, selling shares or removing a member of managing or supervisory board from another undertaking; and/or (iii) grant an exclusive license to a competitor.

Facts. On 5 September 2011, the President of the OCCP issued a conditional clearance decision relating to the proposed merger between Aster and UPC.

On 7 December 2010, UPC applied to the OCCP for approval to take control of Aster. During its review, the OCCP conducted a market survey in which it examined opinions of competitors and housing associations. The OCCP found that Aster and UPC were the two principal companies providing cable pay TV services in both Krakow and Warsaw. The OCCP considered that their combined market share might be between 50% to 60% in each city.

According to the OCCP, the proposed transaction could potentially result in a significant restriction of competition for pay TV and access to broadband internet in the two cities. The OCCP considered that the proposed transaction may result in a situation where the acquirer may gain an allegedly dominant position and thus could provide potentially less favourable offers to subscribers, as compared to situation prior to the proposed concentration.

The OCCP has permitted UPC to take control of Aster on the condition that UPC will divest part of its network currently belonging to Aster where, until now, services were provided by both companies. The condition must be performed within 18 months from the date of its issuance and relates to specific buildings in Krakow and Warsaw, as identified in the decision.

Comment. The President of the OCCP has issued 13 clearance decisions in which conditions were imposed on the acquirer. This decision is the second conditional clearance this year of 101 issued decisions in merger proceedings. The President of the Office of Electronic Communications (OEC) had also formed a view on the proposed transaction stating that the President of the OCCP may have issued a conditional clearance including only behavioural conditions. However, the President of the OCCP did not take the same position.

Source: OCCP decision, 5 September 2011, http://www.uokik.gov.pl/news.php?news_id=2885&news_page=1.

Romania: Baxter and Belupo fined by Romanian Competition Council

Summary. The Romanian Competition Council (RCC) has fined Baxter, Belupo and their distributors for prohibiting the export of pharmaceutical products.

Background. Agreements aimed at restraining competition are prohibited pursuant to the provisions of Article 101 of the TFEU and Article 5 of Law no. 21/1996 (the Romanian Competition Law).

Such agreements are considered to be invalid under Romanian Competition Law and can trigger the application of fines ranging from 0.5% to 10% of the total turnover of the company in breach.

In September 2009, the RCC began an investigation into pharmaceutical producers Baxter and Belupo.

Facts. On 12 October 2011, the RCC fined Baxter and Belupo a total of EUR 1.8 million for prohibiting the export of pharmaceutical products. During the investigation, the RCC found that Baxter and Belupo, as well as several others which acted as distributors of the two companies' products (i.e. Actavis SRL, Farmaceudica Remedia SA, Sofmedica SRL, A&G med Trading SRL), had agreed not to export certain products outside Romania. The RCC held that the result was not only that Baxter and Belupo products could not be traded on other markets, including the EU market, but also that the Romanian market was "isolated" (although the relevant RCC press release does not clarify what the RCC means by this expression).

The RCC's decisions are not published, but the relevant RCC press release states that the RCC has decided to fine the two manufacturers and their distributors a total of approximately EUR 1.8 million. Baxter and Farmaceudica Remedia SA, one of Baxter's distributors, acknowledged their conduct and benefited from a 20% reduction in their fines. Baxter was fined approximately EUR 315,000 and Belupo was fined EUR 1,350. The largest individual fine, amounting to approximately EUR 700,000, was imposed on Actavis SRL.

The companies can challenge the decision of the RCC at the Bucharest Court of Appeal within 30 days from its communication. They can also ask this court for a suspension of payment of the fine, after depositing a bail in accordance with the provisions of the Romanian Fiscal Procedure Code.

Comment. These investigations were initiated by the RCC following a pharmaceutical sector inquiry that was opened in 2009. Further decisions relating to other pharmaceutical producers and distributors are expected.

Source: RCC press release, 12 October 2011, http://www.consiliulconcurentei.ro/uploads/docs/items/id7138/amenda_baxter_si_belupo.pdf (available only in Romanian).

Slovak Republic: Bill on revised merger control rules approved by the Slovak Parliament

Summary. The Slovak Parliament (NCSR) has approved revised merger control rules under the Slovak Competition Act (SCA).

Background. The Slovak Competition Act (SCA) contains provisions relating to various areas of competition law, including merger control. The rules currently in force have been regarded as being particularly stringent, and so amendments to the SCA were proposed.

Facts. On 19 October 2011, the NCSR approved revisions to the merger control provisions of the SCA. The purpose of the amendment is to ensure the efficiency and flexibility of the merger control system.

The amendments introduce a turnover threshold which requires the local sales of the target company to be at least EUR 14 million in cases of acquisitions of sole control. Currently, 'foreign-to-foreign' transactions may be caught even where the target company does not have any sales in Slovakia.

Moreover, the current clearance review period of 60 working days in simple cases will be reduced to 25 working days. A decision issued in simple cases may now contain shorter simplified reasoning and will not need to be subject to a consultation process with the notifying parties before being adopted. More complicated cases will be reviewed within 90 working days. Finally, where a merger notification is considered incomplete in relation to information other than in respect of affected markets, the Slovak Antimonopoly Office (SAO) will no longer have the power to restart the clock.

The amendment is proposed to enter into force on 1 January 2012.

Comment. The revised merger control rules should lead to a reduction in the case load of the SAO and allow the SAO to speed up the clearance process. However, question marks remain over the extent to which the SAO will become less formalistic and whether it will relax its practice of restarting the clock.

Source: Amendment to Slovak Competition Act, 19 October 2011, http://www.nrsr.sk/web/Dynamic/Download.aspx?DocID=360708 (available in Slovak only).

Spain: CNC investigates Microsoft for alleged restrictive practices

Summary. The Spanish Competition Authority (CNC) has opened formal proceedings against Microsoft Ibérica, S.R.L. Unipersonal and Microsoft Ireland Operations Limited (Microsoft) for alleged restrictive practices.

Background. Article 1 of the Spanish Competition Act (LDC) prohibits cartels and other agreements or concerted practices which restrict competition (similar to Article 101 of the Treaty on the Functioning of the European Union (TFEU)). Article 2 of the LDC prohibits the abuse of a dominant position on the market (similar to Article 102 of the TFEU).

Facts. On 20 September 2011, the CNC's Investigations Division opened formal joint proceedings against Microsoft in relation to alleged restrictive practices. The CNC claims to have access to information that indicates Microsoft may have unjustifiably prevented or limited the resale of used software licences in the sphere of PC operating systems, in which Microsoft holds a dominant position. The investigation was triggered by a complaint filed by Elegant Business, S.C.

Comment. While the CNC has not yet sanctioned IT companies for the abuse of a dominant position, on 29 July 2011 it opened formal proceedings against Oracle for an alleged abuse of a dominant position in the area of relational database management systems, following a complaint by Hewlett Packard. The CNC has previously imposed high fines in abuse of dominance cases in the electricity sector (e.g. fining four distributors EUR 35.8 million in 2009).

Source: CNC press release, 20 September 2011, http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=104013&Command=Core_Download&Method=attachment.

United Kingdom: OFT to consult on referral of aggregates market to the Competition Commission

Summary. The Office of Fair Trading (OFT) has made a preliminary decision to refer the UK markets for aggregates, cement and ready-mix concrete 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*).

In September 2010, the OFT launched a market study into the aggregates, cement and ready-mix concrete markets (the sectors).

Facts. The OFT identified in its study a number of features of the sectors that could allegedly prevent, restrict or distort competition, relating to both the structure of the markets and the behaviour of major firms towards smaller operators. The OFT considered a number of issues including:

- high barriers to entry in aggregates and cement due to planning permission constraints and the high level of initial investment required, and high and increasing concentration of major players;
- complaints of evidence of vertically integrated firms refusing to supply or discriminating against non-integrated competitors through their pricing;
- multiple contacts and information exchanges across the markets; and
- an apparent squeeze between rising cement prices and stable or falling ready-mix concrete prices affecting independents that both buy cement from vertically-integrated major suppliers and compete against them in the ready-mix concrete market.

The OFT is due to make a final decision on whether or not to make the referral to the CC following a six-week consultation period, which ended on 30 September 2011.

Comment. OFT guidance provides that a market will not normally be referred to the CC when a significant feature of that market is being investigated by the European Commission (the Commission) under Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU). The Commission is currently investigating the markets for cement and related products in a number of EU Member States. However, the OFT considers it appropriate to continue with its market investigation reference on the basis that any infringement action taken by the Commission cannot address the underlying competition problems in these markets and that parallel investigations would not result in undue burdens on business.

Sources: OFT press release, 16 August 2011, http://www.oft.gov.uk/news-and-updates/press/2011/90-11; Commission press release, 10 December 2010, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1696&format=HTML&aged=0&language=EN&guiLanguage=en; OFT report on the aggregates market study, August 2011, http://www.oft.gov.uk/shared_oft/market-studies/oft1358.pdf.

United Kingdom: OFT refers construction materials JV to CC

Summary. The Office of Fair Trading (OFT) has referred the proposed UK construction materials joint venture (JV) between Anglo American PLC (Anglo American) and Lafarge S.A. (Lafarge) to the Competition Commission (CC) for further investigation.

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).

Facts. During its review of the JV, the OFT reviewed a significant quantity of information and analysis provided by both the parties and around 300 of their customers and competitors. The OFT identified the following competition concerns:

- overlaps in the supply of aggregates, asphalt and ready-mixed concrete in many local areas (and particular types of aggregates in regional and national markets);
- an overlap in the supply of bulk grey cement at regional and/or national level;
- an increased prospect of coordination in the supply of bulk grey cement; and
- a concern that the JV could make it substantially more difficult for independent ready-mix concrete suppliers to source bulk grey cement at competitive prices.

The parties offered to divest a variety of assets to try to address these concerns. However, the OFT was not confident that the proposals would clearly remove the OFT's concerns in all areas, and has referred the JV to the CC for a detailed investigation. The CC's report on the JV is expected by 16 February 2012.

Comment. The OFT's decision to refer comes soon after the publication of the OFT's market study report relating to the markets for aggregates, cement and ready-mix concrete which raised a number of issues including high barriers to entry and high levels of concentration among the major players. Following the market study, the OFT has proposed to refer the relevant sectors to the CC for further investigation.

Sources: OFT press release, 2 September 2011, http://www.oft.gov.uk/news-and-updates/press/2011/95-11; CC press release, 2 September 2011, http://www.competition-commission.gov.uk/press_rel/2011/september/pdf/48_11_anglo_lafarge_ref.pdf.

United Kingdom: Competition Commission clears Thomas Cook / Co-op travel agency joint venture

Summary. The Competition Commission (CC) has unconditionally cleared the joint venture between Thomas Cook Group plc (Thomas Cook), the Co-operative Group Limited (the Co-op) and the Midlands Co-operative Society Limited (Midlands) (the proposed JV).

Background. The Office of Fair Trading (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).

On 2 March 2011, the OFT announced that, following a request from the parties to use the fast track reference procedure, it had decided to refer the proposed joint venture to the CC. On 21 July 2011, the CC provisionally cleared the proposed joint venture.

Facts. The CC has published its final report unconditionally clearing the proposed JV. The CC's investigation focused on the sale of overseas package holidays, including both pre-packaged holidays and packages assembled at the time of booking (dynamic packages) via high street travel agents on a local, regional and national basis. The CC noted that package holidays (including dynamic packages) are distinct from independent holiday components mainly due to the convenience of a bundled product offered to customers and the assurance and protection afforded to consumers by certain package tour regulations. Whilst the CC recognised the increasing nature of online sales and took account of them in its competitive assessment it considered that high street agents have traditionally offered an element of service and advice as a feature that distinguishes the channel from other forms of distribution and that the majority of package holidays are still sold via the high street channel.

The CC considered that although it could not rule out the possibility of some price rises (via reductions in discounts given) in certain local areas for certain customer groups, the proposed JV would not be likely to result in an SLC. Any isolated price effects that might occur would most likely be small, sporadic and eroded over time. On a regional and national level, the CC concluded that there would be no SLC as there was no particular regional variation in pricing and the incentives to raise prices or otherwise worsen the retail offer are likely to be weaker at the national level than at the local level.

The CC noted that if there was any customer foreclosure (in other words, whether the proposed JV's stores would favour Thomas Cook's package holidays above those of other tour operators in a way that would significantly reduce competition among tour operators) by the proposed JV favouring Thomas Cook's package holidays, the number of firms involved would be small and any effects on competition were likely to be negligible. In relation to input foreclosure (in other words, whether third party retailers would be disadvantaged in the sale of Thomas Cook's own package holidays in a way that would significantly reduce competition at the retail level), the CC found no evidence to suggest that Thomas Cook's tour operator business would have an incentive to disadvantage third party resellers. The CC also briefly considered non-package holidays activities on a national basis including accommodation-only sales through retail travel agent outlets, holidays sold via online travel agents, foreign exchange (retail and corporate) and business travel but concluded that there was no SLC.

Comment. This is the first case to make use of the OFT's fast track reference procedure which was introduced in the OFT's revised Jurisdictional and Procedural Guidance in June 2009. Despite extending the review period until 11 October 2011, the CC managed to keep to its original timescale due to receipt of third party comments in a timely manner.

Sources: CC press release, 16 August 2011, http://www.competition-commission.org.uk/press_rel/2011/august/pdf/44_11_thomas_cook_co_op_final.pdf ; CC final report, 16 August 2011, http://www.competition-commission.org.uk/inquiries/ref2011/thomas_cook_co_op_travel_agency_joint_venture/pdf/tc_final_report_excised.pdf.

United Kingdom: OFT receives super-complaint about travel money

Summary. The Office of Fair Trading (OFT) has received a super-complaint from Consumer Focus about the cost of obtaining foreign currency and overseas use of credit and debit cards.

Background. Designated consumer bodies can make a super-complaint to the OFT that any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interest of consumers (*section 11, Enterprise Act 2002*) (2002 Act). Consumer Focus is a designated consumer body.

Facts. Consumer Focus has called on the OFT to investigate certain issues it believes it has identified, including:

- the charges applied by some banks and credit card providers for purchases of foreign currency within the UK which it alleges may be unfair and may restrict competition and consumer choice;
- the concerns about complex and unclear charges applied when using credit or debit cards abroad which it believes may prevent consumers from making well informed choices; and
- the use by some UK foreign currency retailers of phrases promising '0% commission' and 'competitive exchange rates' which it considers may mislead consumers and prevent them from shopping around.

The OFT will consider the issues raised in the super-complaint in order to establish whether or not any feature, or combination of features, in the relevant market is, or appears to be, significantly harming the interests of consumers. The OFT has 90 days to consider the super-complaint and will publish its reasoned response on or before 20 December 2011.

Comment. Consumer Focus' only previous super-complaint, made in March 2010, resulted in cash ISA providers adopting new industry guidelines on the time taken to transfer accounts between providers, and agreeing to provide additional information to consumers to increase transparency. The travel money super-complaint comes shortly after the publication of a consultation by the Department for Business Innovation and Skills (BIS) in which BIS has proposed the abolition of Consumer Focus, with some of its functions to be transferred to the Citizens Advice service.

Source: OFT press release, 21 September 2011, http://www.oft.gov.uk/news-and-updates/press/2011/101-11.

United Kingdom: OFT launches dentistry market study

Summary. The Office of Fair Trading (OFT) has launched a market study to examine whether the private and NHS dentistry markets are working well for patients.

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 Competition Commission (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 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 wishes to examine concerns raised by consumer bodies such as Which? that many patients are confused over dental treatments and prices. The study will focus on how dentistry services are sold, whether patients are given access to appropriate information and to assist with their choice of practice, the types of treatments on offer and different payment methods in the context of both NHS and private dentistry. The study will also review how easy it is to change dentists, and whether the current system for customer redress works.

In addition, the study will examine whether there are any unnecessary barriers to new practices entering either private or NHS funded markets, and consider the issue of professional restrictions on direct access to specialists or providers of auxiliary services, such as hygienists.

The OFT plans to complete its market study by March 2012.

Comment. Following a super-complaint raised by the Consumers' Association, the OFT carried out a market study in 2003 into the private dental market which made a number of recommendations to improve consumer information and complaints procedures, and reduce professional restrictions. Sonya Branch, OFT Senior Director for Services, Infrastructure and Public Markets, has stated that the costs of private dental treatment in England are among the highest in Europe and given the current strains on people's finances, the OFT considers that now is a good time to examine whether competition is working effectively to drive up the quality of private and NHS dental services and deliver better value for money for consumers.

Source: OFT press release, 15 September 2011, http://www.oft.gov.uk/news-and-updates/press/2011/99-11.

United States: Third Circuit decides that Foreign Trade Antitrust Improvements Act claims do not serve as jurisdictional limit

Summary. The Third Circuit held that the "U.S. effects" requirement under the Foreign Trade Antitrust Improvements Act (FTAIA) was a substantive element of an antitrust claim, rather than a jurisdictional limit, therefore overturning its own precedent.

Background. Congress enacted the FTAIA in 1982 in order to limit the extraterritorial reach of the Sherman Antitrust Act to foreign anticompetitive conduct that either involves U.S. import commerce or has a "direct, substantial, and reasonably foreseeable effect" on U.S. import or domestic commerce (15 U.S.C. § 6a). Since its enactment, U.S. courts struggled with whether the FTAIA's "effects" test is (i) a jurisdictional limit barring antitrust claims regarding overseas conduct, or (ii) a substantive element of an antitrust claim. Whether the FTAIA's "effects" test is a jurisdictional limit or a substantive element in a cause of action has a significant impact on a U.S. court's ability to hear a case regarding alleged anticompetitive conduct occurring overseas.

Facts. In *Animal Science Prod. v. China Minmetals*, the Third Circuit examined a claim by domestic purchasers of Chinese magnesite compound, alleging that various Chinese firm defendants had fixed the prices of the magnesite compound exported to the United States. The district court dismissed the case because it construed the FTAIA as a jurisdictional restriction on U.S. antitrust suits regarding overseas anticompetitive conduct. Relying on the U.S. Supreme Court decision in *Arbaugh*, which held that courts should regard statutory limitations as substantive unless Congress specifically stated that they are jurisdictional, the Third Circuit reversed the district court holding and concluded that the FTAIA should be viewed as a substantive limitation on the merits.

The Third Circuit held that the U.S. effects requirement was a substantive element of an antitrust claim, rather than a jurisdictional requirement. In deciding that the FTAIA does not serve as a jurisdictional limit, the Third Circuit noted that it "disagree[d] with . . . the Seventh Circuit's decision in *United Phosphorus*" which held that the FTAIA's limitations were jurisdictional in nature. Before the Third Circuit decision, courts largely treated the FTAIA as a jurisdictional limit rather than as a substantive element. The Seventh Circuit has viewed the FTAIA as a jurisdictional limit (see, for example, *United Phosphorus v. Angus Chem*., 322 F.3d 942 (7th Cir. 2003) in which it was held that the FTAIA serves as jurisdictional limit). The Eighth and Ninth Circuits have also recognised the FTAIA as a jurisdictional limit (see, for example, *In re Monosodium Glutamate*, 477 F.3d 535 (8th Cir. 2007) in which dismissed FTAIA claim for lack of subject matter jurisdiction but avoided bright line jurisdictional rule in *United Phosphorus* and *Arbaugh*; and *In re Dynamic Random Access Memory*, 546 F.3d 981 (9th Cir. 2008) which dismissed FTAIA claim for lack of subject matter jurisdiction but avoided bright line jurisdictional rule in *United Phosphorus* and *Arbaugh*).

Thus, the Third Circuit's decision creates a circuit split in treating the FTAIA as a substantive element.

Comment. The Third Circuit decision rejects the majority view that the FTAIA enhances the burden on plaintiffs to establish federal court jurisdiction in cases involving overseas conduct. Previous Seventh Circuit decisions run up against the Third Circuit decision.

In a similar case decided a month after *China Minmetals*, the Seventh Circuit in *Minn-Chem Inc v. Agrium* had the opportunity to address whether the FTAIA serves as a jurisdictional limit, but dismissed the case on other grounds. Nonetheless, the Seventh Circuit recognized the conflicting approaches taken by courts in determining the pleading standard poised by the FTAIA and suggested that the *United Phosphorus* case (holding that the FTAIA serves as a jurisdictional limit) was perhaps ripe for reconsideration.

Construing the FTAIA as a jurisdictional limit provides many advantages to defendants in terms of costs and timing associated with litigation, including the benefit of an earlier dismissal on jurisdictional grounds prior to any litigation of the merits of the case. Foreign clients should be wary of the different burdens that they may face in different federal courts depending on the circuit in which a lawsuit is brought.

Source: Minn-Chem, Inc. v. Agrium Inc., 2011 WL 4424789 (7th Cir. 23 September 2011); Animal Science Prod. v. China Minmetals, 2011 WL 3606995 (3d Cir. 17 August 2011).

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