CLIFFORD CHANCE

Consumer Goods and Retail Industry Competition Bulletin | Winter 2011/12

Hot Topic

- **European Union**: The European Commission has set up an internal "task force" to oversee scrutiny of the food sector over the next two years.
- **France**: The French Competition Authority has opined that the food retail market in Paris is extremely concentrated and has called for new structural injunction powers.

Supermarkets/Groceries Retailing

- **United Kingdom**: A response to a report on the draft Groceries Code Adjudicator Bill has been published by the UK Government.
- **United Kingdom**: The Office of Fair Trading has decided to release Asda from an obligation to divest one of the stores which it recently acquired from Netto.

Beverages, Breweries and Tobacco

- **United Kingdom**: Appeals brought by a number of tobacco industry players have been allowed by the Competition Appeals Tribunal against the Office of Fair Trading's 2010 decision which had found that a number of tobacco manufacturers and retailers had infringed UK competition law.
- **United Kingdom**: The UK government has announced a range of substantive, self-regulatory reforms which the pub industry has committed to implement.
- **United Kingdom**: The Scottish Government and the UK Government have recently given further indications of a shared desire to introduce minimum unit prices for alcoholic drinks – despite claims that such laws may be subject to challenge under EU law.

Dairy and Food Products

- **European Union**: Arla Food's acquisition of Allgäuland-Kaserein has been unconditionally approved, notwithstanding that the transaction parties had offered commitments as part of the merger review process.
- **United Kingdom**: The Competition Commission has unconditionally approved the completed acquisition by Kerry Foods Ltd of the frozen ready meals business of Headland Foods Ltd.

Non-food Goods/Retailing

- **European Union**: Distribution agreements imposing a *de facto* ban on internet sales constitute a restriction by object, and therefore breaches EU competition law.
- **European Union**: The European Commission has published its decision clearing the *Unilever / Sara Lee* merger.
- **France**: Three laundry detergent manufacturers have been fined for having coordinated commercial strategies on the French laundry detergent market.
- **The Netherlands**: Jumbo acquires C1000 to become the second largest retail chain in the Netherlands after committing to divest 18 stores.

- **The Netherlands**: The Dutch Competition Authority has accepted commitments from two trade associations to ensure that their common digital platform for distributing e-books will not impede competition in the market for e-books.
- **United Kingdom**: The proposed acquisition by Amazon.com Inc. of The Book Depository International Limited has been cleared unconditionally by the office of Fair Trading.
- **United Kingdom**: The Office of Fair Trading's investigation into potentially anticompetitive conduct within the sports goods retail industry by Sports Direct International PLC and JJB Sports PLC has been closed.

Other News – In Brief

- **China**: Rules enacted by China's Ministry of Commerce on the assessment of effects on competition entered into force in September 2011.
- **European Union**: A fine of EUR 8.9 million has been imposed on a member of the second bananas cartel.
- **European Union**: New guidance on antitrust compliance for small and medium sized companies has been published by the European Commission.
- **European Union**: The European Commission has adopted a package of reforms to its antitrust proceedings and expanded the role of the hearing officer.
- **European Union**: Best practices for cooperation among EU national competition authorities has been published.
- **Germany**: A draft bill to amend the Act on Restraints of Competition has been published by the German Federal Ministry of Economics and Technology.
- **Germany**: The German Federal Cartel Office has launched a sector inquiry into food retail sector.
- **Slovak Republic**: The Slovak Parliament has approved revised Slovakian merger control rules.

HOT TOPIC

European Union: Commission sets up task force to monitor the food sector

Summary. The Directorate-General of Competition of the European Commission (the Commission) has established a task force to monitor the food sector over the next two years (Task Force Food).

Background. In response to rising food prices and the proposals put forward as part of the Single Market Review published in November 2007, the Commission established a High Level Group on the Competitiveness of the Agro-Food Industry (HLG) in April 2008. In December 2008, the Commission published an interim report identifying key policy suggestions which was followed by the HLG issuing 30 recommendations and a roadmap of key initiatives aimed at reining in prices, focusing on structural agricultural, environmental and internal market policy remedies in March 2009. In October 2009, the Commission issued a Communication *(COM(2009) 591)* (Communication) and an accompanying Staff Working Paper, which contained an analysis of numerous anti-competitive practices in the food supply chain, such as abuse of buyer power, joint selling and exclusive supply agreements.

To address the concerns identified in the Communication, the Commission - whilst pragmatically proposing cooperation with Member States' national competition authorities (NCAs) - hinted at broader regulatory initiatives to be pursued in tandem with the HLG's recommendations. In 2010, the Commission transformed the HLG into a High Level Forum for a Better Functioning Food Supply Chain (HLF) tasked with developing industrial policy in the agro-food sector by following both the recommendations of the HLG, and the initiatives proposed in the Communication.

Facts. In January 2012, it was reported that the Commission has now established Task Force Food. This task force is scheduled to operate for two years, and has been established within the Commission unit responsible for antitrust and merger control in basic industries, manufacturing and agriculture.

Comment. The establishment of the Task Force may be a response to pressure from the European Parliament to take EU-wide action against the potentially anti-competitive practices in the food sector which were identified previously. To date, the HLF has focused more on agricultural and industrial policy than on competition law enforcement - and the Commission has been content with only a coordination role, leaving the NCAs to enforce competition law. NCA enforcement activity in relation to the food retail sector has been particularly pronounced in the last few years, as demonstrated by the UK Office of Fair Trading imposing total fines of over £49 million following recent conclusion of its dairy products retail pricing investigation and the German Federal Cartel Office's launch of a recent market study (see article below).

The Commission has continually stated that NCAs are better placed to investigate and punish illegal conduct in the food industry. Whilst Task Force Food will give structure to the Commission's increasingly active role as the coordinator of (and consultative body for) NCAs, its establishment may be aimed more at entrenching the Commission's role of coordinating NCA enforcement than at allowing the Commission to launch its own antitrust investigations.

France: The French Competition Authority considers Casino to be dominant in the food retail market in Paris

Summary: Responding to a request from the municipality of Paris, the French Competition Authority (FCA) has issued an opinion stating that the food retail market in Paris is extremely concentrated, with Casino holding a dominant position. Despite the absence of any abuse, the FCA suggests the creation of a new instrument, the structural injunction, in order to be able to modify the structure of the market.

Background: The French commercial Code grants the FCA the power to issue, at its own initiative or upon request of public bodies or companies, opinions concerning the competitive functioning of markets, without inflicting any fine. Acting as an "advocate of competition", it has therefore the possibility, for example, to contribute to drawing up of legal texts or, furthermore, to recommending measures or actions in order to improve the competitive functioning of markets.

Facts: On 8 February 2011, the Paris municipality asked the FCA to look into the competitive environment in the food retail sector in Paris, noting that this market seemed to be particularly concentrated.

On 11 January 2012, the FCA issued an opinion confirming that, according to the FCA, the Casino group holds a market share of more than 60% in terms of sales area and between 50% and 70% in value terms, i.e. more than three times the market share of its main competitor, Carrefour. The fast rate at which new outlets have been opening in recent years has not affected market concentration, since most of these outlets are operated by Casino itself.

The FCA noted that, when new competitors have opened outlets close to Casino outlets, the new arrival has had a negative impact on the net profits of the Casino outlets. However, the impact has not been sufficient enough to oblige Casino to lower its prices significantly.

The FCA made clear that the position of Casino in the market is the result of its own merits and not of anticompetitive behaviour, but regretted the low level of competition from a consumer's perspective. It therefore proposed some structural remedies to address these competition concerns. These proposed remedies are as follows:

- first, the FCA wants to lower the barriers to entry on the market, by asking the legislator to abolish the administrative authorization procedure for new outlets with floorspace over 1,000 sq. m and by asking retailers to introduce more flexible terms in the franchise agreements, in order to favour the mobility of franchised outlets; and
- secondly, the FCA notes that it has no effective power to act when competition-related concerns arise as a result of market structures rather than stemming from operators' behaviour. Therefore, the FCA would like the legislator to adopt legislation enabling the FCA to force companies to sell assets to their competitors where the competitive environment so requires. According to the FCA, this power of structural injunction would be the most effective means of modifying the structure of the market for the benefit of the consumer.

Comments: If the FCA's proposed remedies were enacted into legislation (which is far from being evident), this would constitute a true revolution in French competition law, enabling a competition authority, outside the scope of any anticompetitive practice or merger, to order a market participant to sell assets in order to reduce a market position built on its own merits. Such proposals are open to challenge and call into question market conditions that have been founded on existing competition principles. Overall, this shows that the FCA intends to strengthen its power as a regulator of the markets.

SUPERMARKETS/GROCERIES RETAILING

United Kingdom: UK Government publishes its response to report on the draft Groceries Code Adjudicator Bill

Summary. The UK Government has stated that it will incorporate some of the comments of the House of Commons Business, Innovation and Skills Committee (BISC) on the draft Groceries Code Adjudicator Bill (Bill) and will look to introduce the Bill as soon as Parliamentary time allows.

Background. On 15 October 2011, the Government published its response to BISC's Ninth Report on Session 2010-2011 (published on 28 July 2011). BISC had been asked to consider the Bill, which will introduce an Adjudicator to referee the Groceries Supply Code of Practice (Code).

The Code, established by the Groceries (Supply Chain Practices) Market Investigation Order 2009 (Order), was designed to improve the relationship between big retailers and their suppliers by preventing certain practices from occurring. The Order requires retailers with sales of groceries exceeding £1bn a year in the UK to incorporate the Code into their contracts with suppliers. Under the Bill, the Adjudicator will be able to act as an arbitrator in disputes between retailers and suppliers and will be able to investigate potential breaches of the Code based on complaints.

Facts. The Government has decided to incorporate a number of BISC's recommendations into the Bill, in particular that:

- the Adjudicator should have some power to escalate remedies;
- the Government should review the legislation after two, rather than three, years; and
- the Bill should extend the source of secondments to the Adjudicator from the current provision of the Department for Business, Innovation and Skills and the Office of Fair Trading, to the entire public sector.

There are a number of other recommendations that the Government will not be taking forward, in particular, the ability to add additional categories of informant in the future and the introduction of financial penalties from the outset. The Government is still considering whether to allow information from trade associations, and possibly whistleblowers, to act as a trigger for the Adjudicator to open an investigation.

Comment. BISC has urged the Government not to let further consideration delay the introduction of the proposed Bill, which has been under consideration since 2008. In its response, the Government stated that it intends to introduce the legislation as soon as Parliamentary time allows. Implementation of the Bill will strengthen the effectiveness of the Code by providing arbitration, investigation, enforcement and guidance capacity and will ensure that there is an avenue for suppliers to seek redress in the event of non-compliance by retailers.

United Kingdom: OFT releases Asda from its obligation to divest Netto store

Summary. On 25 October 2011, the Office of Fair Trading (OFT) decided to release Asda Stores Limited (Asda) from an obligation, previously imposed by the OFT, to divest a store acquired from Netto Foodstores Limited (Netto).

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).

The OFT may, in lieu of a reference to the CC, accept undertakings that the OFT considers are appropriate for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effect which has resulted, or may be expected to result, from it (*section 73, 2002 Act*).

On 27 May 2010, Asda announced its intended acquisition of Netto, which operated 194 groceries stores in the UK. On 9 March 2011, the OFT decided, to accept certain undertakings in lieu (UILs) from Asda instead of referring the transaction to the CC. To address the OFT's concerns, Asda agreed to divest 47 Netto stores in areas in which the OFT had identified that the transaction could give rise to a SLC. The OFT also required Asda to find identified "up-front" buyers for 25 of these stores.

Facts. During the divestment process, Asda proved unsuccessful in its attempts to sell the Netto store in Keighley, West Yorkshire, due to a lack of interest from suitable potential purchasers. Pursuant to the UILs given by Asda, the OFT then approved the appointment of a divestiture trustee, who subsequently advised the OFT that it was extremely unlikely that a suitable purchaser would be found for the Keighley store. Between 28 September 2011 and 13 October 2011, the OFT consulted publicly on its proposal to release Asda from its divestment obligation. Having received no comments, on 25 October 2011, the OFT decided to release Asda from its obligation to divest the Keighley store.

Comment. To ensure that any SLC is remedied, the OFT will require up-front buyers in cases where the risk profile of the remedy requires it. This may be, for example, where the OFT has reasonable doubts over the attractiveness of a divested business, or where there are very few suitable potential purchasers. Whilst the OFT appears to have recently become keener on avoiding "remedy failure" – and thus more likely to require upfront buyers in relation to UILs including a divestment – the above case, following on from the OFT's decision in April 2011 to release the General Healthcare Group from its undertaking to sell Abbey Carrick Glen hospital in Ayrshire, also shows that there may be some flexibility where it is impossible to fulfil an upfront buyer condition.

BEVERAGES, BREWERIES AND TOBACCO

United Kingdom: CAT allows Tobacco appeals

Summary. The Competition Appeals Tribunal (CAT) has allowed the appeals brought by Imperial Tobacco Group (Imperial) and five retailers against the decision of the Office of Fair Trading (OFT) which had stated that a number of tobacco manufacturers and retailers had infringed UK competition law.

Background. Chapter I of the Competition Act 1998 prohibits agreements or concerted practices which have the object or effect of preventing, restricting or distorting competition in the UK (Chapter I prohibition).

The CAT has jurisdiction to hear appeals against OFT decisions brought by a party to an agreement found to have been in breach of the Chapter I or Chapter II prohibitions (*section 46, Competition Act 1998*).

On 16 April 2010, the OFT concluded that two UK manufacturers of tobacco products (Imperial and Gallaher) and 10 retailers (Asda, Co-operative Group, First Quench, One Stop Stores, Morrisons, Safeway, Shell, Somerfield and TM Retail) breached the Chapter I prohibition by entering into a series of bilateral arrangements relating to the pricing of tobacco products in those retailers' stores. In particular, the OFT found that each retailer had agreed to set its shelf prices for the relevant manufacturer's products in accordance with a set of parity and differential requirements, which were communicated to them by the manufacturers, relating to named competing brands of cigarettes and other tobacco products. As a result, the OFT imposed the largest total fine in a Competition Act 1998 case to date, namely £225 million. Sainsbury received full immunity under the OFT's leniency programme, whilst Gallaher, together with Asda, First Quench, One Stop Stores, Somerfield and TM Retail, each entered into early settlement arrangements with the OFT.

In June 2010, Imperial, Asda, Co-operative Group, Morrisons, Safeway and Shell appealed the OFT's decision to the CAT on the grounds of both liability and quantum. The main hearing at the CAT on liability began on 21 September 2011.

Facts. During the course of the CAT hearing, counsel for the appellants objected to the OFT's cross-examination of the appellants' witnesses, and argued that the line of questioning no longer fitted with the OFT's case as set out in the OFT's decision or skeleton argument. On 31 October, the CAT asked the OFT to confirm (i) whether the OFT continued to maintain that each of the agreements, which were the subject of the appeal, operated in the same way; and (ii) how the OFT now asserted that the agreements operated.

On 3 November 2011, the OFT acknowledged that "*each and every one of the specific circumstances relied on in the decision to support the finding of an infringement by object 'may or may not be established to the appropriate legal standard'" and that, looking at the evidence in the round, the decision had been "cast too narrowly*". As a result the CAT adjourned the appeals and directed the OFT to provide a written statement setting out whether the OFT continued to contest the appeals (and, if so, the legal and factual basis on which it did so in relation to each of the relevant bilateral agreements). On 9 November 2011, the OFT submitted a statement setting out its refined case which the OFT claimed "*reflected part but not the whole of the decision*". The appellants argued that the OFT's refined case introduced new arguments not set out in the OFT's decision, and that the CAT must allow the appeals.

On 12 December 2011, the CAT handed down its judgment in which it allowed each of the appeals, and quashed the OFT's decision in respect of each of the appellants. The judgment, however, stated that it had not addressed any of the substantive issues raised in any of the appeals.

Comment. The CAT's judgment is another disappointment for the OFT following on from the CAT's judgments earlier in 2011 that significantly reduced (and, in some cases, set aside) the fines for many appellants in respect of the construction bid-rigging case and a recruitment cartel. However, the OFT has issued a statement defending its track record on appeals claiming that only 9 of its previous 52 decisions have been overturned on appeal on the grounds of liability. The OFT has also noted that it will consider any broader implications for the way in which it conducts investigations and possible appeals in the future.

United Kingdom: Government announces reform to pub companies regulation

Summary. The UK Government has announced a range of substantive, self-regulatory reforms which the pub industry has committed to implement.

Background. The distribution of beer in the UK has been subject to intense regulatory scrutiny for over 20 years.

In 1986, the supply of beer for UK retail sale was referred to the Monopolies and Mergers Commission due to concerns that widespread tying of retail outlets to six large brewers was restricting competition. Some subsequent recommendations were made by means of the "Beer Orders" in 1989, precipitating a trend of brewers divesting retail interests and large pubcos emerging as a counterweight to the brewers.

The Beer Orders were revoked in 2002, following an Office of Fair Trading (OFT) review. The OFT has since found in favour of a number of beer-tie agreements, and has consistently rejected past invitations – from, for example, the Campaign for Real Ale (CAMRA) and various House of Commons Committees – for a more comprehensive investigation into the distribution of beer. Most recently, in October 2010 the OFT decided, following a super-complaint lodged by CAMRA, that no further action nor a reference to the CC was warranted.

In June 2008, the House of Commons Business and Enterprise Committee (BEC) began investigating whether the conclusions of a 2004 report into relations between pubcos and their tenants were still valid, and how its recommendations had been applied. In May 2009, BEC published a report concluding that a number of issues persisted, and that the Government should look urgently at the bargaining power inequalities identified as well as refer pub ties (which oblige licensees to purchase drinks through a specific company rather than on the open market) to the CC. In March 2010, the House of Commons Business, Innovation and Skills Committee (BISC) published a follow-up report, warning pubcos that if self-regulated reform by June 2011 proved inadequate, legislative intervention would be recommended.

Facts. In July 2010, the UK Government confirmed that it would take action if pubcos were found to not be acting properly within the applicable Industry Framework Code (Code). Following what the Government found to be insufficient progress by the pub industry, on 24 November 2011 the Department for Business, Innovation and Skills (BIS) published its response to BISC's Report on Pub Companies.

The UK Government has declined to legislate, in favour of a self-regulatory approach whose key elements are:

- making the Code legally binding, by incorporation into new agreements and via a collateral contract for existing lessees;
- strengthening the Code, including a focus on full repairing and insuring leases;
- the establishment of a Pub Independent Conciliation and Arbitration Service (PICAS), to provide binding mediation and arbitration – and a new Pubs Advisory Service (PAS), to provide initial free advice to tenants and lessees; and
- the introduction of a three-yearly reaccreditation process for pub company codes.

The Government found little evidence that pub ties are harmful, and stated that pub ties may indeed play a crucial role in safeguarding small breweries and local beer.

Comment. Despite the Government's preference for a non-legislative solution, doubts inevitably remain amongst some interested parties as to whether self-regulation, which has thus far failed to remedy the issues raised in recent years by CAMRA and BEC, will be effective.

United Kingdom: Minimum pricing laws for alcohol discussed further

Summary. The Scottish Government and the UK Government have recently given further indications of a shared desire to introduce minimum unit prices for alcoholic drinks – despite claims that such laws may be subject to challenge under EU law.

Background. The Scottish Government launched a consultation in June 2008 on a new strategy for tackling alcohol misuse, which included a proposal for minimum retail prices. Notwithstanding some mixed stakeholder reactions to minimum pricing proposals, these were progressed by the Scottish Government, which in March 2009 published a framework for action which included proposed minimum prices at licensed premises. The measures were included in a bill published in November 2009, and are now incorporated in the Alcohol (Minimum Pricing) (Scotland) Bill introduced on 31 October 2011.

In England, the Chief Medical Officer's 2008 annual report recommended setting minimum retail prices for the sale of alcohol, based on a minimum per-unit price of 50 pence. The UK Government gave those recommendations a lukewarm initial response. However, a House of Commons Health Committee report published in January 2010 agreed with the recommendations, and proposed the introduction of minimum retail prices for alcohol rather than an increase in alcohol duty because, amongst other reasons, minimum prices would have the greatest impact on cheap alcohol and would benefit traditional pubs. The UK Government has not, to date, made any formal minimum per-unit pricing proposals, but has introduced measures, effective from April 2012, to prevent the sale of alcohol "below-cost" (i.e. for less than the tax payable).

Facts. Since the Scottish National Party (SNP) won a majority in the Scottish elections in May 2011, it has refocused its energies on plans for pricing regulation. Scotland's draft Bill authorises the Scottish Government to set a minimum unit price for alcohol by using secondary legislation. The Bill itself contains no minimum prices; the minimum price currently proposed is 45 pence per unit of alcohol, although that may change based on information available from time to time, after modelling of the potential effects has been concluded. If the SNP majority votes in favour of the Bill, it could be enacted in summer 2012.

In December 2011, it was reported that UK Prime Minister David Cameron has asked for minimum pricing measures similar to those proposed in Scotland to be introduced across the UK as part of the UK Government's alcohol strategy, due to be published in early 2012. However, it has also been reported that prominent members of the UK Government favour alternative approaches, such as increased taxation and/or a voluntary pricing scheme.

Comment. Critics of Scotland's Bill have complained that it risks infringing laws on the free movement of goods contained in the Treaty on the Functioning of the European Union (TFEU), insofar as the Bill will effectively restrict imports by negating the benefits of any lower costs which foreign producers could pass on to Scottish consumers. Articles 34 and 35 TFEU prohibit quantitative restrictions on imports and exports between EU Member States, and all measures having equivalent effect. However, those provisions do not preclude import or export restrictions which are justified on grounds of, *inter alia*, public policy and/or the protection of health and life of humans, animals or plants, and which do not constitute a means of arbitrary discrimination or a disguised restriction on trade between EU Member States (*Article 36, TFEU*).

In 2010, the European Court of Justice (ECJ) issued decisions finding that French, Austrian and Irish laws imposing minimum prices for certain tobacco products infringed EU law; though those cases focused on whether minimum prices were contrary to a specific law, i.e. Directive 95/59/EC, the ECJ's judgments follow a line of EU cases in which health objectives have been considered not to justify the imposition by Member States of minimum pricing (e.g. Case 82/77 *Openbaar Ministerie v Van Tiggele*).

The European Commission has since stated that Directive 92/83/EEC – which deals with the structures of excise duties on alcohol and alcoholic beverages, defines the categories of alcoholic substances which are subject to excise duty, and the basis on which these excise duties are calculated – would not prohibit Member States from setting minimum retail prices for alcoholic beverages in the same manner as for tobacco under Directive 95/59. However, any such national measure and its effects must still be compatible with other provisions of EU law, including the TFEU rules on the free movement of goods. National minimum retail prices for alcohol may be contrary to Article 34 TFEU if, for example, such prices placed imported products at a disadvantage to identical domestic goods because the competitive advantage conferred by lower cost prices was cancelled out. Any minimum pricing law would, therefore, still have to fall within one of the exemptions set out in Article 36 TFEU.

Whilst no interested party has yet indicated clearly that they would challenge Scotland's Bill, UK Government public health minister Anne Milton has confirmed receipt of advice that a minimum price per unit was "*probably illegal*" under European trade laws and would be challenged in the courts. The explanatory notes to the Alcohol (Minimum Pricing) (Scotland) Bill introduced in October 2011 make no reference to such potential legal challenges; however, the SNP's current position is that the new law "*is capable of complying with European law*", as a result of the minimum unit price itself being "*proportionate*" and "*fair*". In February 2012, a spokesman for Scottish Health Secretary Nicola Sturgeon claimed that the European Commission had confirmed that "*minimum pricing for alcohol is entirely compatible in principle with EU law*", however the Commission later denied this, stating the Commission "*will have to check if Scotland's proposals are compatible with EU law. At this stage we don't know*."

DAIRY AND FOOD PRODUCTS

European Union: Arla / Allgäuland merger cleared unconditionally

Summary. The European Commission (the Commission) has approved the acquisition by Arla Food amba (Arla) of Allgäuland-Kaserein together with certain affiliates (Allgäuland) without imposing any conditions, notwithstanding that the transaction parties had offered commitments to the Commission during the merger review process. The merger gives Arla a major foothold in the southern part of Germany, part of its publicly stated strategy to becoming Germany's leading dairy company.

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*).

Facts. On 15 September 2011, Arla notified the Commission of its intended acquisition of Allgäuland. Both Arla and Allgäuland supply a number of dairy products; Allgäuland also owns 30.1% of Milei GmbH (Milei), a producer of whey-based products.

The Commission identified horizontal overlaps in national/regional markets for the procurement of raw milk and certain fresh dairy products, and the EU-wide market for certain longlife dairy products. However, the Commission was satisfied that the parties' shares in these markets were low and did not give rise to any competition concerns.

The Commission also identified potential co-ordination issues in the whey protein concentrate (WPC), lactose and permeate markets (and related sub-markets) in which Arla and Milei competed, all of which the Commission suggested were likely to be at least EU-wide in geographic scope. Concerns arose that the 30.1% interest in Milei owned by Arla/Allgäuland – and a major supply agreement between the merged entity and Milei - could remove the combined Arla/Allgäuland entity's incentive to properly compete with Milei. Ultimately, although Arla and Milei have a combined 40-50% share of the EU-wide WPC market, after a further market investigation customers indicated to the Commission that there would remain sufficient alternative suppliers available. In addition, the parties' combined shares of the EU-wide lactose and permeate markets (10-20% and 30-40% respectively) were not considered problematic, due to established competitive constraints on the parties. The Commission also noted that "*most concerns raised during the market investigation were not merger specific and that those that were, related to minimal amounts and there are alternative suppliers*". Entry into the WPC market was also considered to be "*relatively quick and can be substantial*".

Accordingly, on 7 November 2011 the Commission unconditionally cleared the transaction.

Comment. This case demonstrates the potential impact of positive market testing in the merger review process. The Commission had initially indicated that the parties would need to submit commitments in order to obtain merger clearance, but after further market investigation it recognised that commitments were not required.

United Kingdom: CC unconditionally clears frozen foods merger

Summary. The Competition Commission (CC) has unconditionally approved the completed acquisition by Kerry Foods Ltd (Kerry) of the frozen ready meals (FRM) business of Headland Foods Ltd (Headland).

Background. The Office of Fair Trading (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*).

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. On 10 February 2011, the OFT launched an own-initiative merger investigation. After concluding that Headland was neither a failing nor a "flailing" firm, finding no compelling evidence to broaden the relevant markets beyond FRM so as to include chilled ready meals (CRM) as well as FRM, and identifying a number of potential competition concerns, on 12 July 2011 the OFT referred the merger to the CC for further investigation.

Facts. Similar to the OFT, the CC considered the relevant geographic market to be the UK, but assessed the effects of the merger with reference to the supply of FRM manufactured in and imported into the UK. The CC also considered that:

- Headland was not a "failing firm";
- the parties were the two largest suppliers of FRM to UK customers, and each other's closest competitors;
- the merger reduced the number of significant suppliers of FRM in the UK; and
- post-merger, Kerry successfully implemented – at least initially – significant price increases, many of which significantly exceeded any relevant input cost increases.

However, the CC also observed how many of the merged entity's customers were, over time, able to find alternative suppliers for the range of FRM products – at prices either comparable to pre-merger prices or higher only to an extent which reflected subsequent increases in raw materials costs. The CC found that UK customers had sufficient alternative providers to be able to switch away from Kerry (or at least threaten to do so), constraining Kerry's ability to charge higher prices beyond the short term. Ultimately, the CC concluded that the merger did not and was not expected to result in any SLC in any UK market for goods or services and cleared the transaction on 2 December 2011.

Comment. The CC's final decision confirms its provisional finding, published on 25 October 2011. The major factor behind the CC's decision to clear the deal appears to be the CC's observation of how customers actually reacted post-merger, underlining how real-life examples of switching are considered to be important evidence in a merger review context.

The decision marks the tenth consecutive unconditional clearance which the CC has given following the referral of a merger by the OFT. Such a run of unconditional clearances by the CC, stretching back to November 2009, is unprecedented since the Enterprise Act 2002 came into force.

NON-FOOD GOODS / RETAILING

European Union: ECJ opposes *de facto* online sales bans

Summary. The European Court of Justice (ECJ) has held that a distribution agreement imposing a *de facto* ban on internet sales constitutes a restriction by object, and therefore violates the Treaty on the Functioning of the European Union (TFEU) as it is not objectively justified.

Background. Article 101(1) TFEU (Article 101) 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*); various regulations provide that certain categories of agreements may qualify for a block exemption.

In 2006, France's Competition Authority (FCA) began investigating whether certain distribution agreements breached Article 101 and/or corresponding French competition law. One company under investigation was Pierre Fabre Dermo-Cosmetique SAS (PFDC), which manufactures and sells cosmetic and personal care products. In 2008, the FCA ruled that distribution agreements under which PFDC required its distributors to sell PFDC products only from physical premises at which a qualified pharmacist was present, effectively imposed a *de facto* ban on internet sales, in breach of Article 101 and corresponding French competition law.

PFDC appealed to the Cour d'appel de Paris, which in turn made a reference to the ECJ for a preliminary ruling on whether the *de facto* ban on internet sales breached Article 101, and if so whether PFDC could benefit from either the Vertical Agreements Block Exemption (*Regulation 2790/1999*) (VBER) and/or an individual exemption under Article 101(3) TFEU.

Facts. On 13 October 2011, the ECJ handed down a judgement in Case C-439/09, ruling that: (i) PFDC's distribution agreement was not objectively justified, and amounted to a restriction by object in breach of Article 101; (ii) the VBER does not apply to a distribution agreement which contains a *de facto* prohibition on internet sales; and (iii) it was for the Cour d'appel de Paris to examine whether the conditions of Article 101(3) TFEU are met.

Comment. The ECJ's decision confirms the European Commission's 2010 Vertical Guidelines, which explain that distribution agreements should not prohibit a dealer from selling over the internet, and that any conditions attached to online sales must be equivalent to those applied to physical outlets (except to the extent any dissimilarities are objectively justified). Maintenance of a prestigious image is insufficient justification to prevent internet sales.

European Union: Commission publishes Unilever / Sara Lee decision

Summary. The European Commission (Commission) has published its conditional clearance decision in respect of the acquisition of the body and laundry care businesses of Sara Lee Corp (Sara Lee) by the Anglo-Dutch consumer conglomerate Unilever, which was originally announced in November 2010.

Background. Under the EU Merger Regulation (*139/2004/EC*) (EUMR), the Commission must, at the end of its Phase I investigation, clear a transaction unless it finds that the merger would significantly impede effective competition in the relevant market(s). If serious doubts are raised and the Commission has not received an offer of appropriate remedies, then it must open an in-depth Phase II investigation (*Article 6(1), EUMR*). A decision to open an in-depth investigation does not prejudge the final results of the Commission's investigation. The Commission can accept binding commitments from the merging parties as a condition of Phase II clearance (*Article 8(2), EUMR*).

Facts. The transaction was announced on 29 September 2009, and notified to the Commission on 21 April 2010. After an initial review revealed potential competition concerns owing to the combination of very important brands with high market shares in several Member States in deodorants, bath & shower and fabric care markets, on 31 May 2010 the Commission opened a Phase II investigation into the transaction.

The Commission's in-depth investigation confirmed concerns in several deodorants markets in Belgium, The Netherlands, Denmark, UK, Ireland, Spain and Portugal, as Sara Lee's Sanex deodorants competed with Unilever's Axe/Lynx, Rexona/Sure and Dove brands. The merging parties offered to address concerns by divesting Sara Lee's Sanex brand and related business. In light of this offer, the Commission cleared the transaction on 17 November 2010, albeit subject to full compliance with the commitments offered. The divestment obligation was fulfilled in June 2011 when Sanex was sold to Colgate-Palmolive, following clearance of the transaction by the Commission.

On 27 January 2012 the Commission published the public version of its decision. The decision, which runs to over 400 pages, includes a detailed Technical Annex providing the details and results of the "merger simulation" model utilised by the Commission to predict the likely impact of the transaction on deodorant markets. In drawing the relevant product markets in the deodorant sector, the Commission drew a distinction between male and "non-male" (i.e. female and unisex) deodorants, but concluded that deodorants of all formats (spray, roll-on etc.) fell within the same market. Arguments put forward by the parties that male and non-male deodorants should be considered part of the same product market – based on the ease of supply-side switching between male/non-male deodorants – were rejected by the Commission on the basis that the extension of a well known deodorant brand into a different gender category would require significant time to prepare and launch the product, even if existing production lines could be used to produce the products.

Comment. In analysing the likely effects of the merger, the Commission appeared to place significant weight on the results of its merger simulations, which are set out in considerable detail in the decision. Notably, the Commission was prepared to identify competition concerns in markets (e.g. the non-male deodorant market in Spain) on which the model indicated overall price increases of only 2 per cent as a result of the merger, with the highest brand-specific rise being 5.3 per cent. In the past, predicted price increases of up to 5 per cent have tended to be disregarded as falling within a "margin of error" required to take account of the uncertainty inherent in economic modelling. However, the Commission rebutted criticism of its model by Unilever, indicating that to the extent the model may have needed refinement, this would have led to the predicted price increases being higher.

The decision also reveals that prior to accepting the parties' commitment to divest the Sanex brand, the Commission considered, and rejected, an alternative remedy package proposed by the parties which would have consisted of national licensing and rebranding of the Sanex brand in the Member States in which the Commission had identified competition concerns. Respondents to the Commission's market test indicated that the complexity of the rebranding process and the requirement for significant sunk investments by the licensee(s) would made such a remedy commercially unviable. By contrast, the divestment of the whole Sanex business in Europe was considered a more "clear-cut" solution, indicating that to obtain merger clearance in certain circumstances companies may have to offer a remedy that goes further than the areas of direct overlap.

France: French Competition Authority fines detergent cartel

Summary. The French Competition Authority (FCA) has fined three manufacturers for having coordinated commercial strategies on price and promotions on the French laundry detergent market.

Background. Article L. 420-1 of the French Commercial Code prohibits agreements between undertakings and decisions by associations of undertakings which have as their object or effect the prevention, restriction or distortion of competition (similar to Article 101 of the Treaty on the Functioning of the European Union).

Facts. On 8 December 2011, the FCA issued a decision stating that Henkel, Proctor & Gamble, Unilever and Colgate-Palmolive had, contrary to Article L. 420-1 of the French Commercial Code, engaged in secret meetings involving the use of code names to discuss and agree on laundry detergent prices and promotions offered to French supermarkets.

The FCA, applying the new fining guidelines which it issued in May 2011, took into account, amongst other things, the seriousness of the facts, the importance of the harm done to the economy and each cartel participant's situation (or that of its group). The FCA fined three manufacturers (Henkel, Proctor & Gamble and Colgate-Palmolive); each of those fines included reductions under the FCA's leniency programme to reflect the manufacturers' cooperation with the FCA. The FCA's initial press release on 8 December 2011 described the fines as totalling EUR 361 million, with Procter & Gamble receiving the largest fine (EUR 233.6 million). However, after the FCA identified an error it issued a revised statement on 20 December 2011 according to which fines in the case totalled EUR 367.9 million, with Procter & Gamble's fine being EUR 240.2 million. As Unilever was the first company to apply successfully for leniency in respect of the case, it was exempted from a EUR 248.5 million fine that would have otherwise been payable.

Comment. The FCA has described this as the most important leniency case it has investigated to date, noting in particular that this was the first leniency case concerning a "mass-market product", and the first cartel case in which all parties involved cooperated with the FCA. This was also the first case in which the FCA has made extensive use of the new fining guidelines which it issued in May 2011, and involved the highest fine ever imposed by the FCA in a leniency cartel.

The European Commission (the Commission) has also recently concluded an investigation into the detergents sector. On 13 April 2011, the Commission fined three detergent manufacturers (Henkel, Proctor & Gamble and Unilever) a total of EUR 315 million, with Henkel granted total immunity from fines as "whistleblower". However, the FCA's decision did not take into account Henkel's leniency application to the Commission, resulting in the FCA issuing Henkel with a fine (of EUR 92.3 million). Henkel has launched proceedings against the Commission's refusal to pass leniency documents to the FCA, and has also indicated that it intends to appeal the FCA's decision (as it believes that it is linked to the decision of the Commission). In a memo published at the same time as its decision in the case, the FCA stated that, apart from the fact that they both began with leniency applications, the EU and French detergents cartel cases were otherwise very different from each other.

Apart from the FCA and the Commission, other competition regulators – in the Czech Republic and Slovakia – have recently issued fines in relation to cartel conduct in the detergents sector.

The Netherlands: NMa clears the acquisition by Jumbo of C1000 to become second largest retail chain in the Netherlands

Summary. The Dutch Competition Authority (NMa) has cleared the acquisition by Jumbo, the third-largest retail chain the Netherlands, of C1000, the Netherlands' second largest retail chain, after Jumbo committed to divest 18 stores.

Background. The NMa must clear a transaction at the end of its Phase I investigation period of four weeks, unless it finds that the merger may significantly impede effective competition in the relevant markets (*Article 37(1), Dutch Competition Act* (DCA)). If the latter is the case, then the NMa must open an in-depth Phase II investigation (*Article 37(2)*, DCA). The NMa can accept binding commitments from the merging parties as a condition of the Phase I clearance (*Article 37(4)*, DCA) or agree that the parties amend the proposed transaction to take away any competition concerns that the NMa may have. The NMa can ask additional questions to the parties which can "stop the clock" on the NMa's Phase I review period (*Article 38*, DCA).

Facts. The transaction follows an earlier consolidation of Dutch retailers in 2008, when Jumbo acquired another large retail chain - Super de Boer - and consequently sold approximately 80 Super de Boer stores to C1000 (formerly known as Schuitema). Those transactions were cleared by the NMa.

Jumbo and C1000 are active in the retailing of daily consumer goods to end consumers. In its clearance decision, the NMa re-confirms that there is a separate product market for the retail of daily consumer goods carried out by retail outlets such as supermarkets, hypermarkets and discount chains.

As in earlier cases, the NMa has left the geographic market definition open. The geographic market could either be national (in which case, further consolidation would not raise concerns) or be limited to the boundaries of a territory where consumers can reach the outlets easily. In practice, the NMa reviews competitive effects on a city-by-city basis and, for cities with less than 50,000 inhabitants, also in the area 15 minutes drive-time around each of the parties' supermarkets (as opposed to the 20-30 minutes drive-time areas generally applied by the European Commission).

Comment. The transaction confirms the combined Jumbo/C1000 entity as the second-largest retail chain in the Netherlands, behind market leader Albert Heijn. The NMa concluded that the transaction does not lead to any competition concerns on a national level. In line with the NMa's practice in earlier cases, the NMa reviewed closely all relevant local/regional markets and found that the transaction could lead to competition concerns in 18 local/regional geographic areas. In response to this finding, Jumbo committed to divest supermarkets in each of the 18 geographic areas identified by the NMa, thereby removing all possible competition concerns and avoiding a Phase II investigation.

Clifford Chance Amsterdam acted for C1000 and the seller (CVC) in this case

The Netherlands: Dutch Competition Authority accepts commitments regarding e-books distribution platform

Summary. The Dutch Competition Authority (NMa) has accepted commitments from two trade associations to ensure that their common digital platform for the distribution of e-books will not impede competition.

Background. Article 6 of the Dutch Competition Act (DCA) prohibits cartels and other agreements or concerted practices which restrict competition, and is equivalent to Article 101 of the Treaty on the Functioning of the European Union.

In November 2011, the Dutch Secretary of Culture announced that the Dutch government had decided not to set fixed prices for e-books by law and that, consequently, e-book retailers would remain free to compete on the prices they offer to consumers.

Facts. On 1 December 2011, the NMa published a press release indicating that two trade associations representing e-book publishers and retailers in The Netherlands – namely Koninklijke Boekverkoperbond and General Publishers Group (the Trade Associations) – had committed to ensure that both existing and new market players would be allowed to access the digital e-book distribution platform exploited by the Trade Associations, on the basis of objective, transparent and non-discriminatory conditions.

Furthermore, the Trade Associations agreed not to impose exclusivity as a condition for the purchase and/or sale of e-books on the platform and that distribution agreements and prices would be negotiated directly between the relevant publisher and retailer, outside of the platform. The NMa will ensure that the commitments are complied with.

Comment. The NMa's publication came only a week after the Dutch Culture Secretary's announcement that e-book prices would not be regulated. The NMa considers that competition in the e-books market is currently limited due to the limited supply of e-books in The Netherlands and the fact that retailers usually simply apply the recommended prices set by the publishers. It is expected that competition on the market for e-books will increase following the commitments given by the Trade Associations and the Dutch Government's earlier announcement.

The week after the NMa e-books press release, the European Commission (the Commission) initiated formal investigations into whether certain publishers of e-books have engaged in anti-competitive practices affecting the sale of e-books in the EEA, possibly with the help of Apple. The Commission is investigating the publishers Hachette Livre, Harper Collins, Simon & Schuster, Penguin and Verlagsgruppe Georg von Holzbrinck (Macmillan) – and, in particular, the agency agreements under which these publishers set the prices at which retailers must re-sell the relevant publisher's e-book products. The EU investigation follows from dawn raids carried out by the Commission in March 2011 at the premises of the companies involved, and effectively continues an investigation previously begun by the UK's Office of Fair Trading.

United Kingdom: Amazon/Book Depository clearance

Summary. The Office of Fair Trading (OFT) has, after thorough investigation, cleared the proposed acquisition by Amazon.com Inc. (Amazon) of The Book Depository International Limited (The Book Depository).

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*).

Amazon is a US-based online retailer of consumer goods including books; Amazon also offers third party sellers the opportunity to sell products on Amazon's c-commerce platform, Amazon Marketplace. The Book Depository is an online retailer of books registered in Cyprus, with a number of UK subsidiaries. In June 2011, Amazon agreed to acquire The Book Depository, and on 4 July 2011 the parties notified the merger to the OFT.

Facts. The OFT received a number of complaints, which questioned the parties' proposed market definition. Ultimately the OFT adopted a cautious approach, examining the case by reference to the online retail supply of books as distinct from bricks and mortar retail but, where evidence permitted, also taking account of constraints imposed by high street retailers and supermarkets. The OFT left open whether the relevant market should be further segmented between (i) books and e-books (given The Book Depository's limited sales of e-books); and (ii) different categorisations as to the range of titles (but the OFT acknowledged that, when considering the merger's potential effects, it examined separately the conditions of competition in relation to the supply of long-tail books and best sellers).

On 26 October 2011, following an extended review period, the OFT unconditionally cleared the proposed transaction on the basis that it would not bring about a SLC in the UK. The OFT found that Amazon had a relatively strong position in the online retailing of books, but concluded that the resulting increment in Amazon's share would be below 5 per cent. The OFT also found that there was limited pre-merger competition between Amazon and The Book Depository's own website, and was satisfied that - while there was competition between Amazon and a number of other retailers using Amazon Marketplace, including The Book Depository - the combined entity would continue to face competition from a significant number of online retailers, for a wide range of book titles, post-transaction. The OFT also found that the merger was unlikely to result in price increases for the wide range of book titles available, or for delivery charges.

Comment. The OFT took approximately three and a half months to reach its final decision in this case illustrating the extent to which the OFT can extend its review period in some Phase I cases.

Clifford Chance London and Brussels acted on this transaction on behalf of Amazon.

United Kingdom: OFT closes investigation into conduct in sports goods retail industry

Summary. The Office of Fair Trading (OFT) has closed an investigation into potentially anticompetitive conduct within the sports goods retail industry by Sports Direct International PLC (Sports Direct) and JJB Sports PLC (JJB).

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).

Article 101(1) of the Treaty on the Functioning of the European Union (Article 101) 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 OFT began investigating the sports goods retail sector in September 2009 after JJB applied to the OFT for leniency, effectively "blowing the whistle" on Sports Direct. The OFT's investigation concerned suspected breaches of Article 101 and the Chapter I prohibition in relation to sports goods retailing, including allegations of price-fixing and market-sharing (through co-ordination of the location of the parties' respective stores).

Facts. On 17 October 2011, the OFT announced that it had closed its investigation into the conduct of Sports Direct and

JJB on the retail market for sports products, in accordance with the OFT's prioritisation principles and available resources. In particular, the OFT had uncovered only limited evidence of potential price-fixing, much of which was contradicted by other material. The likelihood of the OFT being able to determine whether there had been any competition law infringements was therefore deemed too low to merit prioritisation.

Comment. Though the OFT's case is now closed, and the Serious Fraud Office (SFO) completed investigations into suspected related offences by JJB and Sports Direct in October 2010, the SFO continues its investigations into suspected offences, contrary to the Fraud Act 2006 and the Enterprise Act 2002, by individuals.

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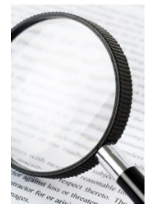

China: Merger control rules on assessment of competitive effects enacted

Summary. Rules enacted by China's Ministry of Commerce (MOFCOM) governing 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; and 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 ten 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.

European Union: Commission imposes fine on member of second bananas cartel

Summary. The European Commission (the Commission) has imposed a fine of EUR 8.9 million on a member of a cartel relating to the sale of bananas in Italy, Portugal and Greece.

Facts. On 12 October 2011, the Commission announced that it had imposed a fine of EUR 8.9 million on Pacific Fruit for its involvement in a banana cartel affecting consumers in Italy, Portugal and Greece between 2004-2005, in violation of Article 101 of the Treaty on the Functioning of the European Union (Article 101). Chiquita was also found to have participated in the cartel, but received immunity under the Commission's leniency regime.

This is the Commission's second Article 101 decision in the banana sector, following its decision to impose fines totalling EUR 60 million on Dole and Weichert for operating a price fixing cartel in eight northern EU Member States from 2000 to 2002. Chiquita also participated in the first cartel but then too was the first to inform the Commission. The Commission has explained that difference in the size of the fines between the first and second cartels is due to the much bigger size of the markets concerned, longer duration and the fact that three companies were also involved in the first cartel.

European Union: Commission publishes guidance on antitrust compliance

Summary. The European Commission (the Commission) has published new guidance on compliance with competition law.

Facts. On 23 November 2011, the Commission published guidance on how companies can do more to achieve compliance with the EU competition rules. The guidance brochure, titled *Compliance Matters,* is aimed in particular at small and medium-sized companies and provides a summary of the key rules and the benefits of ensuring compliance. However, the Commission reiterates its stance that if an infringement of competition law is found, the mere existence of a compliance strategy will not be taken into consideration when setting the fine.

European Union: Commission adopts reforms to antitrust proceedings and expands role of hearing officer

Summary. The European Commission (the Commission) has adopted reforms to its antitrust proceedings and expanded the role of the hearing officer.

Facts. On 17 October 2011, the Commission announced that it was adopting a package of measures aimed at increasing interaction with parties in antitrust proceedings and strengthening the mechanisms for safeguarding parties' procedural rights. The package also includes a revised hearing officer's mandate which strengthens and expands the role of the hearing officer. The Commission's best practice procedural notice incorporates a number of additions to the previous draft, which was published for consultation in 2010, including:

- informing parties in the Statement of Objections of the main relevant parameters for the possible imposition of fines;
- extending state of play meetings to cartel cases and complainants in certain circumstances; and
- publishing rejection of complaints, either in full or in summary.

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

Summary. The European Commission (the Commission) has published a set of "best practices" for cooperation among national competition authorities (NCAs).

Facts. The Commission has published a set of "best practices" for cooperation among NCAs within the EU for mergers that are not subject to EU merger control but require clearance in several Member States (Best Practices). The Best Practices were prepared by a working group, composed of the Commission and NCAs, and were the result of a stakeholder consultation following the publication of draft Best Practices in April 2011. Following the consultation, the draft Best Practices Guidelines were amended to clarify for instance the use and scope of the case information system, the voluntary nature of confidentiality waivers and the timing for providing up-front information about mergers. The Best Practices

Guidelines also now include a section making it clear that confidential information provided to NCAs is protected under the national legislation in all Member States.

Germany: Ministerial draft of ARC reform proposals

Summary. On 10 November 2011, the German Federal Ministry of Economics and Technology (FMET) published a ministerial draft of the so-called "8th ARC Novel".

Background. The basis for the ministerial draft is the key issues paper published by the FMET in August 2011. According to the FMET, it does not intend to completely overhaul the Act against Restraints of Competition (ARC). However, one of the main purposes of the reform proposals is to further diminish the existing differences between European and German competition law provisions which, in particular, apply to merger control.

Facts. The 8th ARC Novel, expected to come into force on 1 January 2013, contains, amongst others, the following reform proposals:

- The market dominance test would be modified by the significant impediment of effective competition (SIEC) test used by the European Commission in merger control proceedings.
- The statutory market share threshold for the presumption of a monopoly would be increased from one third to 40%.
- Behavioural commitments in the context of Phase II merger control proceedings would be possible.
- A provision similar to Article 5(2) of the EU Merger Regulation, according to which two or more transactions within a two-year period between the same persons or undertakings are treated as one and the same transaction, would be adopted.
- The implementation of public bids will be admissible under certain conditions prior to receiving a respective clearance decision from the FCO.
- The FCO will have structural unbundling powers in case of antitrust law violations similar to the European Commission's power to impose structural remedies under Article 7(1) of Regulation 1/2003/EC.
- Claimants seeking damages in private cartel claims will not have access to leniency applications and other related documents submitted by leniency applicants.

In addition, the ministerial draft contains various other provisions relating to specific industries, such as energy, water, food and press sectors.

Comment. The ministerial draft is only a first step towards the final bill expected to come into force on 1 January 2013. Until then, it can be assumed that the reform proposals will be subject to intense political and legal discussions which may result in further amendments to the ARC.

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 were 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.

The inquiry is part of an increasing focus on the consumer goods and retail sector by the FCO. In January 2012, the FCO published its final report in the milk sector inquiry, which has been running since 2008, focusing in particular on the relationships between undertakings operating at different market levels.

Slovak Republic: Revised merger control rules approved by the Slovak Parliament

Summary. The Slovak Parliament (NCSR) has approved revised rules for the Slovakian merger control regime.

Background. The Slovak Competition Act (SCA) contains provisions relating to various areas of competition law, including merger control. Amendments to the SCA, particularly rules which had been regarded as being overly stringent, were recently proposed.

Facts. On 19 October 2011, the NCSR approved revisions to the merger control provisions of the SCA in order to ensure the efficiency and flexibility of the merger control system. The amendments:

- introduce a turnover threshold which requires, in cases of acquisitions of sole control, the target company to have local sales of at least EUR 14 million (whereas 'foreign-to-foreign' transactions could previously be caught even where the target company generates no sales within Slovakia);
- reduce the merger review period of 60 working days to 25 working days in simple cases; and
- allow, in simple cases, decisions to contain shorter simplified reasoning and to be adopted without the need for a consultation process with the notifying parties.

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 amendments entered 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.

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