Antitrust Review | July - December 2012

European Union

- **Commission fines producers of TV and computer monitor tubes €1.47 billion.** The European Commission has imposed total fines of approximately €1.47 billion on seven international groups of companies producing cathode ray tubes.
- **Microsoft receives SO for non-compliance with commitments.** The European Commission has issued a statement of objections to Microsoft on non-compliance with commitments to offer users a choice screen enabling them to easily choose their preferred web browser.
- **Universal/EMI receives conditional clearance.** The European Commission has, subject to a number of divestments, conditionally approved the proposed acquisition of EMI's recorded music business by Universal Music Group after its Phase II investigation.
- **General Court upholds Commission's bitumen decision.** The General Court of the EU has ruled on appeals brought by bitumen producers and construction companies against a decision of the European Commission, which found that the undertakings had participated in an illegal price-fixing cartel in the road bitumen sector in the Netherlands.
- **Commission opens wire harnesses investigation.** The European Commission has opened an investigation into suspected cartels for the supply of automotive electrical distribution systems, also known as wire harnesses, in the EEA**.**
- **Commission sends SO to computer CD and DVD drives suppliers.** The European Commission has informed thirteen suppliers of optical disk drives in the EEA of its preliminary view that they may have infringed EU antitrust rules by participating in a worldwide cartel.

China

- **Wal-Mart's acquisition of Chinese online retail platform receives conditional clearance.** China's Ministry of Commerce has imposed behavioural conditions on Wal-Mart Stores Inc.'s acquisition of a controlling stake in Newheight Holdings Limited.
- **ARM / Giesecke & Devrient / Gemalto JV receives conditional clearance.** China's Ministry of Commerce has imposed behavioural conditions in connection with the proposed creation of a joint venture between semiconductor intellectual property supplier ARM, and two providers of security solutions – Giesecke & Devrient of Germany and Gemalto of the Netherlands.
- **Second hand car dealers fined for cartel conduct.** The Henan Administration of Industry & Commerce, a local branch of the State Administration for Industry and Commerce, has fined 11 used car dealers RMB 1.73 million for price fixing.

Czech Republic

- **Amendments to the CCA.** A bill amending the Czech Competition Act came into effect on 1 December 2012.

Germany

- **FCO fines Haribo for information exchange.** On 1 August 2012, the German Federal Cartel Office fined confectionery manufacturer Haribo €2.4 million for unlawful information exchange.

Japan

- **FTC warns alcohol wholesalers against suspected beer sales below cost.** The Fair Trade Commission issued a warning to three alcohol wholesalers regarding the sale of beer to Aeon, a large chain store operator, at an excessively low price which could result in sales below cost.

Romania

- **RCC closes mobile telecommunication prepay cards investigation.** The Romanian Competition Council has closed a 3-year investigation into possible concerted practices between mobile telecommunication operators Orange, Vodafone and Cosmote, and distributors of their prepaid SIM cards subject to certain commitments.

Slovak Republic

- **Council of the Antimonopoly Office confirms fine against ZSE-D.** The Council of the Slovak Antimonopoly Office has dismissed the appeal of ZSE Distribúcia, a.s., a regional electricity distribution system operator, against the AMO's decision of December 2011 which found that ZSE-D had abused a dominant position.

United Kingdom

- **Cross channel transport merger referred to CC.** The Office of Fair Trading has referred the completed acquisition by Groupe Eurotunnel S.A. of certain assets of former ferry operator, SeaFrance S.A. to the Competition Commission for further investigation.
- **OFT recommends release from Yellow Pages undertakings.** The Office of Fair Trading has recommended that the Competition Commission consider releasing hibu plc (formerly Yell Group plc) from the undertakings given to the Competition Commission in 2007 relating to its Yellow Pages business.
- **OFT launches revised Competition Act procedures guidance.** The Office of Fair Trading has issued its revised guidance on Competition Act 1998 procedures.
- **OFT launches review of personal current account market.** The Office of Fair Trading has launched a review of the personal current account market to establish how the market has evolved since the OFT's market study in 2008.
- **Voluntary assurances to the OFT by NHS hospital trusts.** Eight NHS Hospital Trusts have given voluntary assurances to the Office of Fair Trading that they will no longer exchange commercially sensitive information about their private patient unit prices, to ensure their compliance with competition law and thereby avoid a formal investigation by the OFT.

United States

- **FTC addresses standard essential patent conduct in merger review.** The US Federal Trade Commission has approved the acquisition by Robert Bosch GmbH of SPX Service Solutions US LLC subject to certain behavioural commitments relating to SPX's pre-transaction standard essential patent conduct.
- **Biglari settles alleged violation of US premerger notification requirements.** Biglari Holdings, Inc. has agreed to pay $850,000 to settle an allegation by the US Federal Trade Commission that Biglari violated premerger notification laws when it failed to report an acquisition of shares in restaurant operator Cracker Barrel Old Country Store, Inc.
- **Pharmaceutical cooperative and FTC reach consent order on collective bargaining.** The US Federal Trade Commission has accepted a proposed consent order from the pharmaceutical cooperative Cooperativa de Farmacias Puertorriqueñas prohibiting itself from collectively negotiating with payers (such as pharmacy services providers)**.**
- **FTC seeks comments on proposed changes to reporting requirements under the HSR Act for exclusive patent licenses in the pharmaceutical industry.** The US Federal Trade Commission has requested public comments on proposed amendments to the premerger notification rules promulgated under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 that will apply to proposed acquisitions of exclusive patent rights by companies in the pharmaceutical industry.

European Union: Commission fines producers of TV and computer monitor tubes €1.47 billion

Summary. The European Commission (the Commission) has imposed total fines of approximately €1.47 billion on seven international groups of companies producing cathode ray tubes (CRT) (the CRT manufacturers).

Background. Article 101(1) (Article 101) of the Treaty on the Functioning of the European Union (TFEU) prohibits cartels and other agreements or concerted practices that restrict competition. Companies can apply to the Commission under the terms of its leniency notice to obtain total immunity or leniency from fines (*2006/C 298/11)*.

Following unannounced inspections in November 2007, the Commission issued a statement of objections (SO) in November 2009. A supplementary SO concerning corporate liability was issued in June 2012 against two companies.

Facts. The Commission has imposed total fines of approximately €1.47 billion on the CRT manufacturers for alleged participation in cartels relating to (i) colour display tubes used in computer monitors and (ii) colour picture tubes used for colour televisions. The Commission considered that the CRT manufacturers participated in anti-competitive practices including price fixing, market sharing, customer allocation, capacity and output coordination and exchanges of commercial sensitive information for almost ten years between 1996 and 2006. The Commission also considered that the CRT manufacturers monitored the implementation, including auditing compliance with the capacity restrictions by plant visits in the case of the alleged computer monitor tubes cartel.

According to the Commission, the alleged cartels operated worldwide and meetings between the CRT manufacturers took place in various locations in Asia and Europe. It also considered that the CRT manufacturers were aware that they were breaking the law and were taking precautions to avoid being in possession of anti-competitive documents.

In setting the level of fines, the Commission took into account the companies' sales of the products concerned in the EEA, the very serious nature of the alleged infringement, its geographic scope, its implementation and its duration. Chungwa, one of the CRT manufacturers, received full immunity from fines as it was the first to reveal the existence of the alleged cartels. Others received reductions ranging from 10% to 40% for their cooperation under the Commission's leniency programme.

Comment. The combined total fine is the largest fine imposed by the Commission to date in a single decision. One of the companies was granted a reduction of the fine due to its inability to pay. The CRT sector has been a focus of investigation in recent years and, in 2011, the Commission settled an investigation into alleged price coordination between producers of CRT glass used in television and computer screens.

Source: Commission press release, 5 December 2012, http://europa.eu/rapid/press-release_IP-12-1317_en.htm.

European Union: Microsoft receives SO for non-compliance with commitments

Summary. The European Commission (the Commission) has issued a statement of objections (SO) to Microsoft on non-compliance with commitments to offer users a choice screen enabling them to easily choose their preferred web browser (the browser commitments).

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

The Commission may terminate Article 102 proceedings by adopting a commitments decision where the companies under investigation are willing to offer commitments which remove the Commission's initial competition concerns (*Article 9, Modernisation Regulation (1/2003/EC)*) (Article 9). The commitments can be behavioural or structural and may be limited in time.

The issuing of an SO is a formal step in competition investigations by the Commission and provides notice of a proposed infringement decision to the parties involved. The parties can make written submissions in response and may request an oral hearing. The Commission considers any submissions made before it makes its decision (*Article 10, Conduct of*

Commission Proceedings Regulation (773/2004/EC)).

In 2009 to address the Commission's concern that it may have tied its web browser Internet Explorer to Windows, in breach of Article 102, Microsoft offered commitments to the Commission. These included the browser commitments whereby Microsoft would make available for five years (i.e. until 2014) a "choice screen" in Windows from which EU consumers could choose which web browser(s) they wanted to install in addition to, or instead of, Microsoft's Internet Explorer. The Commission approved the browser commitments and made them legally binding on Microsoft in December 2009.

On 16 July 2012 the Commission opened proceedings to investigate concerns that Microsoft may have failed to incorporate the choice screen in its Windows 7 Service Pack 1, issued in February 2011.

Facts. The Commission has issued an SO to Microsoft informing it of the Commission's preliminary view that Microsoft has failed to comply with the browser commitments. The Commission has taken the preliminary view that Microsoft has failed to roll out the browser choice screen with its Windows 7 Service Pack 1 and that from February 2011 until July 2012, millions of Windows users in the EU may not have seen the choice screen.

Comment. The sending of an SO does not prejudge the final outcome of the investigation. Microsoft has acknowledged that the choice screen was not displayed during the relevant period and has stated that it had moved quickly to address the problem as soon as it became aware of it. In June 2012, the General Court of the EU upheld a fine imposed on Microsoft by the Commission in 2008 for failure to comply with a 2004 Commission decision.

Source: Commission press release, 24 October 2012, http://europa.eu/rapid/press-release_IP-12-1149_en.htm..

European Union: Universal/EMI receives conditional clearance

Summary. The European Commission (the Commission) has, subject to a number of divestments, conditionally approved the proposed acquisition of EMI's recorded music business (EMI Recording) by Universal Music Group (Universal) (the proposed transaction) after its Phase II investigation.

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.

Universal notified its proposed acquisition of EMI's recorded music business to the Commission on 17 February 2012 and the Commission then opened an in-depth investigation on 23 March 2012. A statement of objections setting out the Commission's competition concerns was adopted on 19 June 2012.

Facts. The proposed transaction would bring together two of the four so-called global "major" record companies, leaving only three majors. The Commission had concerns that following the merger, Universal would enjoy excessive market power vis-à-vis its direct customers, who sell physical and digital recorded music at retail level. The Commission focused its investigation on the markets for digital music where record companies license their music to digital retailers such as Apple and Spotify. It had concerns that the proposed transaction, as initially notified, might have allowed Universal to impose higher prices and more onerous licensing terms on digital music providers. The Commission considered that this could have negatively impacted on the possibilities for innovative providers to expand or launch new music offerings and would ultimately have reduced consumers' choice for digital music, as well as cultural diversity, in the European Economic Area (EEA).

Universal committed to divest significant assets including EMI Recording Limited (Parlophone label), EMI France, EMI's classical music labels and various other labels and a number of local EMI entities. The divestment package also includes Coop, a label licensing business. In addition, Universal committed to selling EMI's 50% stake in the popular *Now! That's What I Call Music* compilation joint venture and to continue licensing its repertoire for that compilation in the next ten years.

Universal also committed not to include most favoured nation clauses in its favour (which oblige digital customers to extend any favourable term granted to Universal's competitors to Universal) in any new or renegotiated contract with digital customers in the EEA for ten years. The rights to be divested are worldwide and cover both digital and physical music

Comment. There are currently four other on-going Commission phase II investigations: the proposed acquisition of TNT Express by UPS; the proposed acquisition of Aer Lingus by Ryanair; the proposed merger between the paper products manufacturer Munksjö and the European label and processing business of Ahlstrom; and the proposed acquisition of technology services provider Mach by Syniverse.

Source: Commission press release, 21 September 2012, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/999&format=HTML&aged=0&language=EN&guiLanguage=en.

European Union: General Court upholds Commission's bitumen decision

Summary. The General Court of the EU has ruled on appeals brought by bitumen producers and construction companies (the appeals) against a decision of the European Commission (the Commission), which found that the undertakings had participated in an illegal price-fixing cartel in the road bitumen sector in the Netherlands.

Background. Article 101(1) (*Article 101*) of the Treaty on the Functioning of the European Union (TFEU) prohibits cartels and other agreements or concerted practices that restrict competition.

Those found to have infringed Article 101 can appeal to the General Court (*Article 256, TFEU*). Appellants can also apply to the General Court for a reduction of the fines imposed by the Commission (*Article 256, TFEU*).

Facts. In September 2006, the Commission imposed total fines €266.7 million on eight bitumen suppliers and six construction company purchasers for infringing Article 101(1). The Commission found that between, at least, 1994 and 2002 the undertakings had allegedly participated in a single and continuous infringement by fixing collectively the gross price of road pavement bitumen in the Netherlands, a uniform rebate on the gross price for participating road builders and a smaller maximum rebate on the gross price for other road builders.

Decision. The General Court has handed down 16 separate judgments in the appeals. Fourteen of the appeals were rejected in their entirety, whilst Shell and Ballast Nedam were granted a reduction in their fines. The General Court reduced the fine imposed on Shell from €108 million to €81 million; concluding that the Commission failed to establish to the requisite legal standard that Shell played the role of instigator and leader in the infringement. The General Court also reduced the fine imposed on Ballast Nedam Infra BV to €3.45 million from €4.65 million as the Commission had failed to indicate the capacity in which the appellant was held responsible for the alleged involvement in the cartel between June 1996 and September 2000 (i.e. for its own conduct or for that of a wholly-owned subsidiary). However, the fine against its parent company Ballast Nedam was upheld.

Comment. A number of the undertakings, including both Shell and Ballast Nedam, challenged the Commission's decision to attribute liability to parent companies for the alleged anti-competitive behaviour of their subsidiaries. In rejecting the appeals against parental liability, the court followed the principle of the 2009 decision in *Akzo Nobel NV v Commission* that there is a rebuttable presumption that a parent company is liable for the antitrust infringements of a subsidiary if the parent exerts "decisive influence" over it.

Source: Case T-343/06 – Shell Petroleum NV v Commission; Case T-344/06 – Total SA v Commission; Case T-347/06 – Nynas Petroleum and Nynas Belgium; Case T-348/06 – Total Nederland v Commission; Case T-351/06 – Dura Vermeer Groep v Commission; Case T-352/06 – Dura Vermeer Infra v Commission; Case T-353/06 – Vermeer Infrastructuur v Commission; Case T-354/06 – BAM NBM Wegenbouw and HBG Civiel v Commission; Case T-355/06 – Koninkliijke BAM Groep v Commission; Case T-356/06 – Koninkliijke Volker Wessels Stevin (KVWS) v Commission; Case T-357/06 – Koninkliijke Wegenbouw Stevin (KWS) v Commission; Case T-359/06 – Heijmans Infrastructuur (HI) v Commission; Case T-360/06 – Heijmans NV v Commission; Case T-361/06 – Ballast Nedam v Commission; Case T-362/06 – Ballast Nedam Infra v Commission; and Case T-370/06 – Kuwait Petroleum v Commission.

European Union: Commission opens wire harnesses investigation

Summary. The European Commission (the Commission) has opened an investigation into suspected cartels for the supply of automotive electrical distribution systems, also known as wire harnesses, in the EEA.

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

In February 2010, the Commission carried out unannounced inspections at the premises of a number of wire harness producers.

Facts. The Commission has concerns that certain suppliers of automotive distribution systems (used to link a car's computer systems to its various functions) may have been involved in bid-rigging.

Investigations have been ongoing, including unannounced inspections at companies suspected of being involved. However, the opening of proceedings means the Commission will treat this case as a matter of priority, without prejudging the outcome of the investigation. The Commission has informed the companies involved and the competition authorities of the Member States that it has opened formal proceedings in this case.

Comment. The Commission's investigation is part of a wider effort to investigate possible cartels in the automotive sector. The Commission has recently carried out unannounced inspections in other areas of the car parts sector, including in the occupant safety systems sector in June 2011, bearings sector in November 2011 and in the thermal systems sector in May 2012. In October 2011, the UK's Office of Fair Trading (OFT) closed its criminal investigation into the alleged cartel conduct involving suppliers in the automotive sector.

Source: Commission press release, 9 August 2010, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/894&format=HTML&aged=0&language=EN&guiLanguage=en.

European Commission: Commission sends SO to computer CD and DVD drives suppliers

Summary. The European Commission (the Commission) has informed thirteen suppliers of optical disk drives in the EEA of its preliminary view that they may have infringed EU antitrust rules by participating in a worldwide cartel.

Background. Article 101(1) (Article 101) of the Treaty on the Functioning of the European Union (TFEU) prohibits cartels and other agreements or concerted practices that restrict competition.

A statement of objections (SO) is a formal step in competition investigations by the European Commission and provides notice of a proposed infringement decision to the parties involved. The parties can make written submissions in response and may request an oral hearing. The Commission considers any submissions made before it makes its decision (*Article 10, Conduct of Commission Proceedings Regulation (773/2004/EC)*).

Facts. The Commission has concerns that certain suppliers of optical disk drives (used to read or write data on CDs and DVDs) may have co-ordinated their behaviour in bidding events organised by two major original equipment manufacturers for optical disk drives used in personal computers (desktops and notebooks) and in servers.

The Commission's preliminary view is that the companies concerned were involved for at least five years in bid rigging. The Commission considers bid rigging to be one of the most serious breaches of EU antitrust rules which, if established in this case, may have ultimately affected customers that bought optical disk drives manufactured by the companies concerned.

Comment. The Commission has stated that the sending of an SO does not prejudge the final outcome of the investigation. The Commission has recently opened proceedings in several other cases, demonstrating its commitment to anti-cartel enforcement. For example, earlier in July, the Commission sent an SO to four traders of North Sea shrimps following concerns that they may have colluded to fix prices, and allocate markets and customers in at least the Netherlands, Germany, France and Belgium; and in September, it sent an SO to suspected participants of a retail food packaging cartel.

Source: Commission press release, 24 July 2012, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/830&format=HTML&aged=0&language=EN&guiLanguage=en.

China: Wal-Mart's acquisition of Chinese online retail platform receives conditional clearance

Summary. China's Ministry of Commerce (MOFCOM) has imposed behavioural conditions on Wal-Mart Stores Inc.'s (Wal-Mart) acquisition of a controlling stake in Newheight Holdings Limited (Newheight).

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 and national economic development.

Facts. Wal-Mart is a major competitor in the supermarkets sector in China and globally. Newheight owns Yihaodian, currently the largest online supermarket in China. Yihaodian's business can be split into its online direct sales business and its value-added telecoms services (VATS) business. Post-acquisition, Wal-Mart would increase its stake in Newheight from 17.7% to 51.3% and would become the controlling shareholder in Newheight and, indirectly, in Yihaodian.

MOFCOM considered that the merged entity would have the ability to "leverage" its combined competitive strength in both physical and online retail segments to expand rapidly and enhance its bargaining power in the VATS market. MOFCOM had concerns that this could eliminate or restrict competition in the VATS market. MOFCOM therefore imposed behavioural conditions largely aimed to ensure that Yihaodian operates and manages its VATS business on an independent basis without Wal-Mart's involvement.

Comments. This is MOFCOM's 15th conditional clearance since the enactment of the AML. Retail is a sector closely scrutinized by the Chinese government. In its decision, MOFCOM made a distinction between the physical retail sector (i.e. brick and mortar retail outlets) and the online retail sector. MOFCOM used the entire review period of 180 calendar days to review this transaction.

Source: MOFCOM press release, 14 August 2012, http://fldj.mofcom.gov.cn/aarticle/ztxx/201208/20120808284410.html (in Chinese).

China: ARM / Giesecke & Devrient / Gemalto JV receives conditional clearance

Summary. China's Ministry of Commerce (MOFCOM) has imposed behavioural conditions in connection with the proposed creation of a joint venture (JV) between semiconductor intellectual property supplier ARM, and two providers of security solutions – Giesecke & Devrient (G&D) of Germany and Gemalto of the Netherlands.

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 and national economic development.

Facts. The purpose of the proposed JV was to research, develop and market trusted execution environments (TEE), a security product, for consumer electronics devices. Given that ARM licenses intellectual property rights (IPRs) to consumer electronics devices, MOFCOM considered that the JV's TEE products would rely on ARM's technology and are vertically related. MOFCOM considered that ARM had a substantial market position in the licensing of the relevant IPRs, as a result of which the proposed transaction could enable ARM to exclude competitors of the JV from the TEE market.

To address MOFCOM's concerns, ARM committed to release the security monitoring code and other information necessary for the development of alternative TEE products based on ARM's technology on a non-discriminatory basis. ARM further committed not to degrade the performance of any third party's TEE products through any special design of its own intellectual property. Both commitments will be valid for 8 years.

Comments. This is MOFCOM's 16th conditional clearance since the enactment of the AML and the 6th conditional clearance in 2012 which appears to have been MOFCOM's most active year to date. The duration of the commitments offered in this case is also the longest in MOFCOM's conditional clearances to date.

Source: MOFCOM press release, 6 December 2012, http://fldj.mofcom.gov.cn/aarticle/ztxx/201212/20121208469841.html (in Chinese).

China: Second hand car dealers fined for cartel conduct

Summary. The Henan Administration of Industry & Commerce (Henan AIC), a local branch of the State Administration for Industry and Commerce (SAIC), has fined 11 used car dealers (the dealers) RMB 1.73 million for price fixing.

Background. Article 13 of the Anti-Monopoly Law (AML) prohibits competitors from entering into anti-competitive agreements, including price fixing agreements. The SAIC is one of two authorities responsible for enforcing the conduct provisions under the AML – the other authority being the National Development Reform Commission.

Facts. The Henan AIC commenced its investigation in August 2011. According to the Henan AIC, the dealers fixed servicing charges for four years from October 2007, resulting in illegal gains of approximately RMB 7 million. The dealers allegedly fixed standard servicing charges and agreed that deviators would be penalised by up to RMB 15,000. The dealers also allegedly agreed not to reduce servicing charges except in special circumstances, and even then not by more than 10% of the agreed rate. The Henan AIC proceeded to fine the dealers after authorisation from the SAIC.

Comment. This is the second published enforcement decision by a local branch of the SAIC since the enactment of the AML in 2008. The first enforcement decision was published in February 2011 by the Jiangsu Administration for Industry and Commerce in relation to alleged cartel conduct by concrete manufacturers. The SAIC has stated that cartels such as this, and a number of other similar investigations, are amongst its enforcement priorities. The increase in enforcement activity coincides with the fourth anniversary of the AML's entry into force in August 2008.

Source: Anyang City Government press release, 3 August 2012, http://www.anyang.gov.cn/sitegroup/root/html/000000003611423601363858 55fe2882/20120803105191585.html (in Chinese).

Czech Republic: Amendments to the CCA

Summary. A bill amending the Czech Competition Act (CCA) (the Bill) came into effect on 1 December 2012.

Background. According to Section 21 of the CCA, proceedings regarding cartel cases and abuse of dominant positions are initiated by the Czech Competition Office (CCO). Sections 22 and 22a of the CCA provide sanctions for breaches of competition law. The CCO already uses leniency and settlement procedures as part of its investigative and decision-making powers, and has issued a notice on its leniency procedure. However, there has been no express statutory basis for leniency and settlement procedures in the CCA.

On 29 February 2012, the Czech Government proposed the Bill to the Czech Chamber of Representatives (the Chamber of Representatives). Following the approval by the Chamber of Representatives, the Bill was submitted to the Czech Senate (the Senate) on 23 July 2012. On 21 August 2012, the Senate returned the Bill to the Chamber of Representatives.

Facts. The Chamber of Representatives overruled the Senate by approving the Bill with an absolute majority on 19 September 2012. On 9 October 2012, the Czech President signed the Bill, which then came into effect on 1 December 2012.

The Bill includes provisions introducing (i) a legal basis for leniency, (ii) a settlement procedure, (iii) the possibility of

excluding companies guilty of bid rigging from participating in public tenders for three years, and (iv) the discretion of the CCO not to pursue cases if there is no public interest in initiating such proceedings in view of the low negative impact of the anti-competitive behaviour in question.

Comment. The Bill is expected to enhance legal certainty for companies as well as the enforcement of competition law. While the proposed discretion of the CCO not to commence proceedings in certain cases might not result in legal certainty for companies on the Czech market, the reasons given by the Senate for returning the Bill were primarily related to technical and drafting issues.

Source: Transcript of Senate proceedings, http://www.senat.cz/xqw/xervlet/pssenat/historie?O=8&action=detail&value=3180 (available in Czech only); Act amending the CCA, 19 September 2012, http://aplikace.mvcr.cz/sbirka-zakonu/ViewFile.aspx?type=z&id=24921 (in Czech).

Germany: FCO fines Haribo for information exchange

Summary. The German Federal Cartel Office (FCO) has fined confectionery manufacturer Haribo €2.4 million for unlawful information exchange.

Background. According to Section 1 para 1 of the German Act against Restraints of Competition (ARC), agreements between undertakings, decisions by associations of undertakings and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition, shall be prohibited. Information exchange can lead to a concerted practice under section 1 para 1 ARC if it reduces strategic uncertainty in the market.

Facts. According to the FCO, senior sales representatives of four confectionery manufacturing undertakings (the manufacturers) met regularly in the years 2006 and 2007 in so-called "four party talks". During these meetings competitively sensitive information on the state of negotiations with various major retailers was exchanged. The manufacturers informed each other about retailers' demands regarding rebates and discounts, and discussed how they had dealt or intended to deal with such demands. The FCO considered that this type of information is usually treated as strictly confidential, and its availability had allegedly influenced the manufacturers' market conduct in negotiations with the retailers.

The FCO's investigation began following a leniency application filed by Mars, one of the manufacturers. As a consequence, Mars received full immunity from fines. Proceedings against the two other manufacturers are still ongoing.

The FCO noted that it reduced the fine imposed on Haribo due to its cooperation during the investigation proceedings. Furthermore, it took into account termination of the proceedings by way of settlement and the alleged infringement not constituting a hard core infringement.

Comment. The FCO's investigation is the latest in a number of investigations relating to the broader food retail sector. In 2010, coffee roasters were fined €159.5m for price fixing, which is one of the largest fines ever imposed by the FCO. Given the pending sector inquiry by the FCO into the food retail sector, it can be assumed that the food industry will continue to be under intensive scrutiny of the FCO.

Source: German FCO press release, 1 August 2012, http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2012_08_01.php.

Japan: FTC warns alcohol wholesalers against suspected beer sales below cost

Summary. The Fair Trade Commission (FTC) issued a warning to three alcohol wholesalers (the wholesalers) regarding the sale of beer to Aeon, a large chain store operator, at an excessively low price which could result in sales below cost.

Background. The Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (AML) prohibits the continuous supply of goods or services for a price which is excessively below cost without a justifiable reason.

Facts. According to the FTC's press release, the wholesalers had been selling beer to Aeon at a price excessively below

cost since at least January 2009. The FTC believes that the alleged illegal practice may be a result of the National Tax Agency's 2006 guidelines which led beer manufacturers to reduce their rebates while the wholesale price was not increased to reflect the reduction of rebates. The FTC suspects that the wholesalers were unable to raise the wholesale price as Aeon refused to agree to price increase due to a superior bargaining position. In addition, the FTC could not prove that the sales below cost had in fact an adverse effect on competition from the retailers in Aeon's neighbourhoods. The FTC therefore issued a warning to the wholesalers, rather than a prohibition order, but added a note requesting that Aeon and the wholesalers hold discussions to ascertain when wholesalers propose to increase wholesale prices.

Comment. In the current economic climate, consumers are increasingly price sensitive and competition amongst retailers is intense. Aeon, in its press release, admitted that it had been investigated by the FTC but stressed that the FTC could not find any anti-competitive conduct and that it has always been willing to discuss prices with the wholesalers.

Source: FTC warning to the liquor wholesalers, 1 August 2012, http://www.jftc.go.jp/pressrelease/12.august/120801.pdf (in Japanese).

Romania: RCC closes mobile telecommunication prepay cards investigation

Summary. The Romanian Competition Council (RCC) has closed a 3-year investigation into possible concerted practices between mobile telecommunication operators Orange, Vodafone and Cosmote (the operators), and distributors of their prepaid SIM cards (the distributors) subject to certain commitments.

Background. Article 5(1) of Law no. 21/1996 (Competition Law) (*Article 5*) and Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (*Article 101*) prohibit 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 Romanian market and the common market, respectively. The prohibition contained in Article 5 and Article 101 may be declared inapplicable in respect of certain agreements (*Article 5(2) Competition Law and Article 101(3) TFEU*).

Article 46 of the Competition Law provides the possibility for entities investigated by the RCC to submit proposed commitments designed to remedy the alleged breach of antitrust law. If the RCC considers the commitments to be sufficient, the investigation may be closed without imposing sanctions on the company being investigated. The RCC can decide to reject such proposed commitments.

In November 2009, the RCC opened an investigation on its own initiative into the mobile telecommunication prepaid cards market, in connection with the possible existence of contractual clauses in breach of antitrust law regarding (i) imposition of a resale price, (ii) territorial restrictions and customer sharing and (iii) non-competition in distribution agreements. Horizontal relations between the operators were not the object of the investigation. In November 2010, Orange and Vodafone approached the RCC with proposed commitments and the RCC requested that all three operators submit proposed commitments to address the potential competition issues.

Facts. The operators and the distributors committed to sign addendums to the distribution agreements with the distributors to amend or eliminate certain clauses. The RCC accepted the proposed commitments and ruled in three separate decisions (one for each operator and its distributors) to close the investigation. The RCC imposed time limits for the implementation of the commitments - three months in respect of the agreements with the direct distributors and nine months time in respect of the rest of the distribution arrangement. The implementation of the commitments will be monitored for a three year period. The RCC can shorten the term by one year if it is satisfied that the commitments have been sufficient to remedy the alleged infringement of competition law.

Comment. The RCC also closed another investigation in relation to prepaid cards on the same day subject to commitments. This investigation concerned Orange and six of its direct distributors and had also been opened in November 2009.

Source: RCC decisions no.21, 22, 23 and 24, 6 June 2012,
http://www.consiliulconcurentei.ro/uploads/docs/items/id7631/decizie_21_2012_prepay_public.pdf,
http://www.consiliulconcurentei.ro/uploads/docs/items/id7632/decizie_22_2012_vodafone_prepay.pdf,
http://www.consiliulconcurentei.ro/uploads/docs/items/id7633/decizie_cosmote_23_2012_prepay_publicare.pdf,

http://www.consiliulconcurentei.ro/uploads/docs/items/id7634/decizie_24_2012_publicare.pdf *(in Romanian).*

Slovak Republic: Council of the Antimonopoly Office confirms fine against ZSE-D.

Summary. The Council of the Slovak Antimonopoly Office (AMO) (AMO Council) has dismissed the appeal of ZSE Distribúcia, a.s. (ZSE-D), a regional electricity distribution system operator, against the AMO's decision of December 2011 which found that ZSE-D had abused a dominant position (the infringement decision).

Background. According to Section 8(2)(a) of the Slovak Competition Act (Act), the direct or indirect enforcement of excessive prices or other unfair trade conditions may amount to the abuse of a dominant position in the relevant market. Any abuse of a dominant position in a market is prohibited under Section 8(6) of the Act.

Facts. The AMO Council's decision has confirmed a fine of €150,000 imposed on ZSE-D by the AMO. ZSE-D charged alternative suppliers of electricity a fee of around €27 (excl. VAT) whenever consumers wanted to change supplier on the newly liberalised market. The fees were levied for taking readings of electricity consumption meters on dates outside of regular meter reading dates. The AMO compared the fees charged by ZSE-D with those charged by other regional distribution system operators and considered that ZSE-D had exploited a dominant position on the market between 1 April 2008 and 31 March 2010. The AMO believed that the fees charged by ZSE-D were excessive and would not be possible in a competitive environment. The AMO also noted that, following legislative changes which prohibited excessive charges for changing suppliers, the fee for an additional reading of electricity meters dropped to around €10 which, according to the AMO, corresponded to the actual costs incurred by ZSE-D in this regard.

Comment. The fine is equivalent to 0.032% of ZSE-D's total 2010 turnover and actually equals the total excessive amount of fees charged for the extra readings. Despite the relatively low fine, the threat of private damages claims from alternative electricity suppliers may serve to deter any future anti-competitive conduct in such cases.

Source: AMO press release, 31 July 2012 http://www.antimon.gov.sk/135/4748/the-council-of-the-office-confirmed-the-fine-for-zse-d.axd (in Slovak).

United Kingdom: Cross channel transport merger referred to CC

Summary. The Office of Fair Trading (OFT) has referred the completed acquisition by Groupe Eurotunnel S.A. (Eurotunnel) of certain assets of former ferry operator, SeaFrance S.A. (SeaFrance) to the Competition Commission (CC) for further investigation.

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 United Kingdom (*section 22(1), Enterprise Act 2002*) (2002 Act).

Eurotunnel provides rail transport services to passengers and freight customers across the English Channel via the Channel Tunnel. SeaFrance previously provided ferry services from Dover to Calais (the route) to passengers and freight customers across the same section of the English Channel. After SeaFrance went into liquidation in January 2012 (the liquidation), Eurotunnel acquired some of its assets (the acquisition) and, in August 2012, recommenced operations of some former SeaFrance vessels, operated primarily by ex-employees of SeaFrance, on the route under a new brand called 'MyFerryLink'.

Facts. The OFT recognised that the new service benefits passengers by replacing the capacity on the route that was lost due to the liquidation. However, the OFT considered that there is some evidence that an alternative buyer would have acquired the business had Eurotunnel not done so. The OFT was concerned about the loss of competition as compared with the alternative buyer scenario.

The OFT considered that SeaFrance was a close competitor to Eurotunnel prior to the liquidation and that, although some competitors remain after the acquisition, only P&O will provide a strong competitive constraint to Eurotunnel for some

customers. The OFT was concerned that, for both passenger and freight customers, competition in the provision of cross channel transport services may reduce and prices may increase as a result of the acquisition. According to the OFT, the acquisition has a realistic prospect of resulting in a SLC and has therefore been referred to the CC for an in-depth review.

Comment. OFT Chief Economist and Decision Maker, Amelia Fletcher commented that efficient and cost-effective transport links between the UK and Continental Europe for passengers and business customers are important and it is appropriate for the CC to review the merger in detail to ensure that the interests of consumers and industry are protected. However, the French competition authority approved the merger on 8 November 2012. The CC published its issues statement on 17 December 2012 and is expected to publish its final report is 14 April 2013.

Source: OFT press release, 29 October 2012, http://www.oft.gov.uk/news-and-updates/press/2012/100-12.

United Kingdom: OFT recommends release from Yellow Pages undertakings

Summary. The Office of Fair Trading (OFT) has recommended that the Competition Commission (CC) consider releasing hibu plc (formerly Yell Group plc) (hibu) from the undertakings given to the CC in 2007 relating to its Yellow Pages business (the Yell undertakings).

Background. The OFT has the power to make a market investigation 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, Enterprise Act 2002*) (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 action or recommend action to remedy, mitigate or prevent such effects, including by accepting undertakings from appropriate persons (*sections 138 and 159, 2002 Act*).

The OFT has a duty to keep undertakings given under the 2002 Act under review and to consider whether, by reason of any change of circumstances, an undertaking is no longer appropriate and needs to be varied or to be superseded, or the party to the undertaking needs to be released from it (section 162, 2002 Act).

In April 2007, the Yell undertakings were provided following the CC's 2006 market investigation and report into the supply of classified directory advertising services in the UK. The Yell undertakings include (i) a price cap on Yellow Pages' advertisement rates; (ii) restrictions on hibu's ability to publish second tier directories and guides on particular topics (themed guides); and (iii) requirements for hibu to provide the OFT with a comprehensive advertising rate card, as well as accounts relating to its printed regulated directory business.

Facts. Following a review of the Yell undertakings and a consultation on its provisional findings between August and September 2012, the OFT has advised the CC that the Yell undertakings may no longer be appropriate and that the CC should consider releasing hibu from all elements of the Yell undertakings. The OFT considered that the growth in internet access and usage by both consumers and advertisers was a relevant change of circumstances that justified a review of the Yell undertakings, as it had led to a likely broader range of competitive constraints on suppliers of printed classified directories. The OFT also noted that the size of the printed classified directory business has decreased significantly since 2006, and as such it appeared to be a declining business.

Comment. In its final report of 2006, the CC had recommended that the Yell undertakings should be reviewed by the OFT after three years. The CC will now consider the OFT's advice and decide whether to take any action, based on the OFT's advice as well as any additional analysis that the CC considers necessary to inform its decision. The CC is expected to publish its final report in April 2013.

Source: OFT press release, 26 October 2012, http://www.oft.gov.uk/news-and-updates/press/2012/98-12; CC press release, 27 November 2012, http://www.competition-commission.org.uk/media-centre/latest-news/2012/Nov/issues-statement-yell-hibu-review-of-undertakings.

United Kingdom: OFT launches revised Competition Act procedures guidance

Summary. The Office of Fair Trading (OFT) has issued its revised guidance on Competition Act 1998 (1998 Act) procedures (the revised guidance).

Background. The 1998 Act gives the OFT a number of powers to investigate and fine companies suspected of taking part in anti-competitive agreements or concerted practices or abusing their dominant position in a market, as well as the power to conduct studies of markets as a whole and refer them for more detailed investigation by the Competition Commission if the OFT has reasonable grounds to suspect that the markets may contain anti-competitive features.

In March 2011, the OFT published guidance on its investigation procedures and announced a one-year trial of a procedural adjudicator who would resolve disputes between parties and OFT case teams in investigations under the 1998 Act. In March 2012, the OFT published a revised draft of the guidance for consultation (the consultation).

Facts. Many of the main procedural changes considered during the consultation have been incorporated into the revised guidance, including:

- final decisions on infringement and penalty are to be taken by a three person "case decision group" (rather than a single senior responsible officer (SRO), as is current practice);
- in order to reflect the views received during the consultation, the SRO will continue to take decisions relating to the imposition of interim measures, acceptance of commitments and possible settlement (consulting with other senior officials as appropriate);
- the procedural adjudicator role has been extended until the OFT's enforcement powers under the 1998 Act are transferred to the Competition and Markets Authority in April 2014;
- parties in relation to whom the OFT is considering finding an infringement and imposing a financial penalty will be able to make representations on key elements of the OFT's proposed penalty calculation ahead of the final decision;
- more interactive oral hearings, additional 'state of play' meetings have been introduced to provide greater opportunity for direct dialogue between the parties and the decision makers; and
- case opening notices and case-specific administrative timetables are to be published on the OFT's website to increase the transparency of the investigations.

Comment. The OFT has recently faced criticism in relation to its investigation and fining procedures following successful appeals against OFT decisions before the Competition Appeal Tribunal (for example, the construction and construction recruitment cases, and the tobacco case). The OFT believes the changes introduced in the revised guidance will enhance the robustness and efficiency of its 1998 Act cases, as well as resulting in better interaction with parties to investigations and improving the transparency of its work.

Source: OFT press release, 16 October 2012, http://www.oft.gov.uk/news-and-updates/press/2012/91-12.

United Kingdom: OFT launches review of personal current account market

Summary. The Office of Fair Trading (OFT) has launched a review of the personal current account (PCA) market (the review) to establish how the market has evolved since the OFT's market study in 2008 (the 2008 study).

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 (MIR) 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*).

Facts. The review will consider whether previous initiatives agreed by the OFT with banks have been successful at improving the process of switching PCAs, increasing the transparency of PCA charges and allowing people to manage their accounts more effectively.

The review will also inform the OFT's wider programme of work aimed at achieving a more competitive and customer

focused retail banking sector. As part of the wider programme, the OFT will also consider the operation of payments systems and the banking market for small and medium-sized enterprises, and examine the way in which consumers make decisions and engage with retail banking services, including through applying behavioural economics.

The OFT aimed to publish the outcome of the review by the end of 2012.

Comment. The 2008 study identified the key problems in the PCA market to be low switching levels and real and perceived difficulties in switching between PCA providers, low levels of transparency of PCA charges and other costs, and complexity combined with a lack of control over the use of unarranged overdrafts. In September 2011, the Independent Commission on Banking recommended that the OFT consider making an MIR to the CC by 2015 if it had not already done so and if sufficient improvements in the market have not been made by that time. The OFT has stated that its PCA review and wider programme of work are aimed at informing its response to this recommendation.

Source: OFT press release, 13 July 2012, http://oft.gov.uk/news-and-updates/press/2012/62-12.

United Kingdom: Voluntary assurances to the OFT by NHS hospital trusts

Summary. Eight NHS Hospital Trusts (the trusts) have given voluntary assurances to the Office of Fair Trading (OFT) that they will no longer exchange commercially sensitive information about their private patient unit (PPU) prices, to ensure their compliance with competition law and thereby avoid a formal investigation by the OFT.

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

All public bodies, including NHS Hospital Trusts, are subject to the Competition Act 1998 when engaged in the commercial supply of goods or services, such as paid treatments for private patients. The OFT published revised guidance in December 2011 on how competition law applies to public bodies engaged in economic activity.

Facts. Following information received from a whistleblower earlier in the year, the OFT approached members of the Southern Region Private Healthcare Association (SPHA) regarding possible competition concerns about the exchange of pricing data. To address the OFT's concerns, the trusts, who are members of SPHA, have provided voluntary assurances that they will not exchange confidential pricing information and will provide further training to their staff on the importance of complying with competition law where applicable.

The OFT has welcomed the voluntary assurances, which have enabled the OFT to close its preliminary investigation. However, the OFT has noted that this does not preclude the OFT from investigating any aspect of NHS Hospital Trusts' economic activities if it receives further evidence of potential infringements of competition law.

Comment. The OFT's work in healthcare is part of its wider public markets work and forms part of the priorities identified in its Annual Plan 2012-13. In April 2012, the OFT referred the market for privately funded healthcare services in the UK to the CC for further investigation and in October 2012, it commenced its review of a proposed merger between two NHS Foundation Trust hospitals. Recent changes to the regulation of the health sector, where Monitor will become the concurrent regulator for health services in England from April 2013, have resulted in the OFT working closely with the Department of Health and Monitor to provide advice on competition and consumer issues. The OFT has also written to NHS Hospital Trusts and Foundation Trusts which operate PPUs, enclosing guidance on competition law compliance.

Source: OFT press release, 16 August 2012, http://oft.gov.uk/news-and-updates/press/2012/71-12.

United States: FTC addresses standard essential patent conduct in merger review

Summary: The US Federal Trade Commission (FTC) approved the acquisition by Robert Bosch GmbH (Bosch) of SPX Service Solutions US LLC (SPX) subject to certain behavioural commitments relating to SPX's pre-transaction standard

essential patent conduct.

Background: Section 7 of the Clayton Act (15 U.S.C. § 18) prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." Section 5 of the Federal Trade Commission Act (FTC Act) (15 U.S.C. §45) prohibits ‘‘unfair or deceptive acts or practices in or affecting commerce.’’

Facts: In 2010, Bosch acquired RTI Technologies, a business providing air conditioning recycling, recovery and recharge ("**ACRRR**") services for the repair of motor vehicle air conditioning systems. On 23 January 2012, Bosch entered into an agreement to acquire SPX. According to the FTC, the market for ACRRR services is highly concentrated, with Bosch (via RTI) and SPX being the two most significant participants with 10% and 80% market share respectively. The FTC alleged that the acquisition of SPX would give Bosch essentially a monopoly in the market for ACRRR services.

The FTC further alleged that, prior to Bosch's acquisition, SPX reneged on a commitment to license key, standard-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms by seeking injunctions against willing licensees of those patents in violation of Section 5 of the FTC Act. As part of its review of the merger, the FTC incorporated into the proposed settlement behavioural commitments to address SPX's conduct regarding SEPs.

The proposed settlement requires Bosch to (1) sell its RTI business; (2) grant manufacturers licenses to key patents that they need in order to compete in the market for this equipment, and (3) end agreements that restrict third parties from advertising, servicing, distributing, or selling competitive products in the United States. The proposed settlement is open to comment until December 26, 2012.

Comment: This is an example where the US antitrust authorities examined anti-competitive conduct in the context of a merger review, and emphasises the importance due diligence for companies engaging in transactions as conduct, such as a target's patent licensing practices, could be subject to antitrust scrutiny.

Source: FTC press release, 26 November 2012, http://www.ftc.gov/opa/2012/11/bosch.shtm.

United States: Biglari settles alleged violation of US premerger notification requirements

Summary. Biglari Holdings, Inc. (Biglari) has agreed to pay $850,000 to settle an allegation by the US Federal Trade Commission (FTC) that Biglari violated premerger notification laws when it failed to report an acquisition of shares in restaurant operator Cracker Barrel Old Country Store, Inc. (Cracker Barrel).

Background. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act) requires companies proposing to acquire voting securities, non-corporate interests or assets above certain thresholds to notify the US Department of Justice (DOJ) and the FTC and wait a specified period of time before closing. The HSR Act permits the FTC and DOJ to review such transactions to determine whether they may violate the antitrust laws if consummated. Parties failing to make required notifications are subject to fines of $16,000 per day and other penalties.

The passive investor exemption permits the acquisition of up to 10 percent of a company's voting securities provided that the investor has no intention to participate in management of the company. The US antitrust authorities have historically interpreted this exemption strictly, and any attempt to influence the company's business decisions has been viewed as inconsistent with the exemption.

Facts. Between May and June 2011, Biglari acquired approximately 8.7 percent of Cracker Barrel's voting securities valued in excess of the then-applicable monetary threshold of $66 million without making a premerger filing. At the request of the FTC, the DOJ filed a complaint in the US District Court seeking civil penalties for the violation.

According to the complaint, Sardar Biglari, the Chairman and CEO of Biglari, met with Cracker Barrel officers to discuss ideas for the company and to request that he and another Biglari officer be appointed to the board of directors. The FTC alleged that such actions were inconsistent with the passive investor exemption from filing requirements. In September 2011, Biglari agreed to pay $850,000 to settle the charges.

Comment. While the FTC claims that Biglari improperly relied on the passive investor exemption, Biglari's own press

release states that it did not rely on the passive investor exemption but inadvertently failed to make the required filing. Despite Biglari's assertion, the enforcement action is a reminder that FTC and DOJ interpret the passive investor exemption strictly, and will seek penalties for an improperly broad interpretation of this exemption. In addition, intent to influence business decisions can be inferred from actions taken by the investor after the acquisition has occurred.

Source: FTC press release, 25 September 2012, http://www.ftc.gov/opa/2012/09/biglari.shtm.

United States: Pharmaceutical cooperative and FTC reach consent order on collective bargaining

Summary. The US Federal Trade Commission (FTC) has accepted a proposed consent order from the pharmaceutical cooperative Cooperativa de Farmacias Puertorriqueñas (Coopharma) prohibiting itself from collectively negotiating with payers (such as pharmacy services providers).

Background. Section 5 of the FTC Act bans unfair methods of competition and unfair or deceptive acts or practices. This includes conduct that violates the Sherman Act as well as other practices that harm competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act.

Facts. In its complaint, the FTC alleged that competing pharmacies, through their participation in Coopharma, agreed to fix prices. The pharmacies, through Coopharma, collectively negotiated contracts with payers and organised boycotts against payers that would not abide by their collective terms. Coopharma encouraged its members to refuse to deal with third-party payers except through the cooperative and threatened to terminate and terminated contracts with payers who refused to deal with Coopharma on the terms it demanded. The pharmacies lacked any efficiency-enhancing integration that would otherwise justify the challenged conduct. According to the FTC, the conduct unreasonably restrained prices for pharmacy services and other competition among Coopharma members and, as a result, prices for pharmacy services increased.

Comment. This case serves as a reminder that cooperative agreements among competitors can be problematic under the antitrust laws, especially where such agreements lack any pro-competitive justification.

Source: Complaint, 21 August 2012, http://www.ftc.gov/os/caselist/1010079/ 120821coopharmacmpt.pdf; Analysis Of Agreement Containing Consent Order To Aid Public Comment, http://www.ftc.gov/os/caselist/1010079/120821coopharmaanal.pdf.

United States: FTC seeks comments on proposed changes to reporting requirements under the HSR Act for exclusive patent licenses in the pharmaceutical industry

Summary. The US Federal Trade Commission (FTC) has requested public comments on proposed amendments to the premerger notification rules (Rules) promulgated under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) that will apply to proposed acquisitions of exclusive patent rights by companies in the pharmaceutical industry.

Background. The HSR Act and Rules require companies proposing to acquire voting securities, non-corporate interests or assets above certain thresholds to notify the US Department of Justice (DOJ) and the FTC and wait a specified period of time before closing. The HSR Act permits the FTC and DOJ to review such transactions to determine whether they may violate the antitrust laws if consummated**.**

Facts. The FTC and DOJ jointly developed the proposed changes to the Rules which apply to the transfer of patent rights in the pharmaceutical and biologics industries. Under current regulations, the acquisition of a patent license is potentially reportable only if the license is exclusive in some respect even as against the grantor – for a specified geographic area, field of use, or period of time. Under the proposed Rules, whether the acquisition of a patent license is potentially reportable would no longer be based on exclusivity but on a newly-defined concept of "all commercially significant rights."

A grantor will have been deemed to have transferred "all commercially significant rights" to a licensee in the pharmaceutical or biologics industry even where the patent holder retains the right to manufacture the product for the licensee, provided that

other exclusive rights to the patent within a specific therapeutic area or indication have been transferred to the licensee. All commercially significant rights will also be deemed to be transferred where the grantor retains "co-rights" to assist the licensee in developing and commercializing the product covered by the patent. Previously, where the grantor retained rights to manufacture the product, the license was not deemed to be "exclusive" and no potentially reportable transfer of an asset occurred.

The FTC deadline for comments on the proposed amendments was 25 October 2012.

Comment. While certain classes of assets benefit from specific exemptions, this is the first time that a specific class of assets has been singled out for special inclusion under the HSR Act and regulations. The FTC believes the proposed changes will enhance the effectiveness of the premerger notification program.

Source: FTC press release, 13 August 2012, http://ftc.gov/opa/2012/08/hsr.shtm; Federal Register Notice, http://ftc.gov/os/2012/08/120813hsr-ipnprm.pdf.

Editors

Alex Nourry
Alex.Nourry@cliffordchance.com

Chris Worrall
Chris.Worrall@cliffordchance.com

Christopher Duff
Christopher.Duff@cliffordchance.com

Chandralekha Ghosh
Chandralekha.Ghosh@cliffordchance.com

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Antitrust Contacts

Thomas Vinje
Chair

Oliver Bretz
Managing Partner

Tony Reeves
Belgium

Emma Davies
China

Alex Cook
Czech Republic

Patrick Hubert
France

Joachim Schutze
Germany

Stephen Crosswell
Hong Kong

Aristide Police
Italy

Miho Mizuguchi
Japan

Steven Verschuur
Netherlands

Iwona Terlecka
Poland

Nadia Badea
Romania

Torsten Syrbe
Russia

Miroslava Obdrzalkova
Slovak Republic

Miguel Odriozola
Spain

Andrew Matthews
Thailand

Ulyana Khromyak
Ukraine

Alex Nourry
United Kingdom

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