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Briefing note

June 2013

Consumer Goods and Retail Industry Competition Bulletin

HOT TOPICS

- **UK: Bitter sweet – the OFT's recent approach to food mergers.** A review of recent Office of Fair Trading decisions in the food sector suggests merger participants must continue to expect lengthy and ever more detailed reviews.
- **EU: Food sector sees sustained interest by European competition regulators.** The food sector in the EU has continued to receive interest at the EU and Member State level following last year's ECN report on competition in the food sector.

BEVERAGES, BREWERIES AND TOBACCO

- **EU: Dutch beer fines: Appeals dismissed.** The European Court of Justice has dismissed Dutch beer market cartel appeals.
- **UK: Exceptional developments in the aftermath of the OFT tobacco investigation.** The Competition Appeal Tribunal has granted two companies the right to appeal the Office of Fair Trading's tobacco investigation decision out of time.
- **US: AB InBev and US Department of Justice reach settlement on Modelo transaction.** Anheuser-Busch-InBev has agreed to sell the US business of Grupo Modelo to obtain US merger clearance.
- **China: Record penalties imposed on State-owned liquor producers for resale price maintenance.** Record penalties have been imposed on state-owned liquor producers for resale price maintenance.

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

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DAIRY AND FOOD PRODUCTS

- **EU: General Court hands down judgements in banana cartel.** The General Court has dismissed banana cartel appeals.

- **UK: Booker/Makro: CC unconditionally clears wholesale merger.** The Competition Commission has unconditionally cleared the acquisition by Booker Group plc of Makro Holding Limited.

- **UK: Groceries Code Adjudicator Bill given Royal Assent.** The Groceries Code Adjudicator Act has been given the Royal Assent.

- **The Netherlands: ACM conditionally clears the merger of Buitenfood and Ad van Geloven: transaction abandoned.** The Netherlands Authority for Consumers and Markets has conditionally approved the merger of Buitenfood and Ad van Geloven.

- **Spain: Spanish Competition Authority publishes a report on central wholesale markets for perishable foodstuffs.** The Spanish Competition Authority has published a report on competition in the central wholesale markets for perishable foodstuffs.

- **Spain: Spanish Competition Authority clears Deoleo/Hojiblanca merger with commitments.** The Spanish Competition Authority has cleared Deoleo S.A.'s acquisition of Hojiblanca SCA.

- **Slovak Republic: The Act on Inadequate Conditions in Business Relationships relating to Foodstuffs enters into force.** The Act on Inadequate Conditions in Business Relationships relating to Foodstuffs has entered into force.

NON-FOOD GOODS/RETAILERS

- **EU: European Commission publishes final commitments in e-books investigation.** The European Commission has published its summary decision accepting commitments in relation to the pricing and distribution of e-books in the EEA.

- **UK: Extended warranties on domestic electrical goods: John Lewis appeal rejected.** The Competition Appeal Tribunal has rejected John Lewis' appeal against the Office of Fair Trading's refusal to list them on a warranty price comparison website.

- **Czech Republic: REWE fined for non-compliance with merger clearance commitments.** The Czech Competition Office has fined REWE Zentralfinanz eG for non-compliance with commitments relating to its 2008 acquisition of the Plus retail chain.

- **France: Paris Court of Appeal upholds fine imposed on Pierre Fabre for prohibition of online sales.** The Paris Court of Appeal has upheld the fine on Pierre Fabre for banning online sales of its cosmetics.

SUPERMARKETS/GROCERIES RETAILING

- **UK: OFT and Tesco settle CAT appeal of dairy investigation decision.** The Office of Fair Trading has agreed to reduce the fine imposed on Tesco pursuant to the 2011 Dairy Retail Price Initiatives decision.

- **France: French Competition Authority launches in-depth examination of Casino's acquisition of Monoprix.** The French Competition Authority has opened an in-depth examination into Casino's intended acquisition of Monoprix.

- **Australia: ACCC Investigations into allegations of Misuse of Market Power and Unconscionable Conduct in the Australian Supermarket Sector.** The Australian Competition and Consumer Commission has provisionally concluded that Coles and Woolworths may have contravened prohibitions against misuse of market power and unconscionable conduct.

HOT TOPICS

UK: Bitter sweet – the OFT's recent approach to food mergers

Tempers frayed recently when the OFT referred A.G. Barr plc's acquisition of Britvic plc to the Competition Commission (CC). Britvic's Chairman, Gerald Corbett attacked the OFT decision, saying "We've got two British companies trying to strengthen themselves against a big American corporation. If this is government industrial policy, I'm going to take French lessons".

Fortunately, a review of recent OFT decisions does not suggest a campaign of sustained sabotage against the UK food industry. The two most recent OFT decisions in the food sector are considered below – soft drink manufacturer A.G. Barr plc's acquisition of Britvic plc (*Barrs/Britvic*) and Nakano UK Holding Limited's acquisition of the vinegar and pickles in vinegar businesses of Premier Foods Group Limited (*Nakano/Premier*)

Food frenzy?

The most striking observation when looking at recent OFT decisions is the OFT's continuing focus on local markets and overlaps between competing bricks and mortar businesses. Of the nine cases so far this year (as at 15 May) where the OFT has found competition concerns, six of these have involved local overlaps in diverse sectors comprising leisure (cinemas and concert venues), food retail, electrical wholesale and hospitals. This is consistent with the OFT's recent enforcement record and does not represent any marked change in approach – in 2012 for example, six out of the seven cases where the OFT accepted undertakings in lieu of reference (UIL) involved local markets.

Beyond the OFT's ongoing pre-occupation with local markets, it continues to review transactions in the food industry. However, there is no discernible pattern suggesting a more heavy handed intervention in the food sector. Excluding the recent *Booker/Makro* wholesale merger[1] (on which, see below), *Barrs/Britvic* was the first OFT reference decision in the food sector since the July 2011 *Kerry/Headland* decision. Whilst there have been a number of cases since then where the OFT has found a food merger likely to lead to a substantial lessening of competition (SLC), these have been resolved by UIL without the need for a lengthy CC inquiry – *Solway/Premier* and *Princes/Premier Foods* - and some have been cleared unconditionally – for example, *ABInBev/Grupo Modelo* (although see below in relation to the US) and *ABF Grain Products/Elephant Atta*. Moreover in absolute terms, the food sector has fared considerably better than some other sectors – notably the transport sector, where the OFT referred four transactions[2] to the CC in the period between the *Kerry/Headland* and *Barrs/Britvic* cases.

Food for thought

A brief comparison of the OFT's approach in the *Barrs/Britvic* and *Nakano/Premier* cases is instructive, as despite finding competition concerns in both cases, the nature of the OFT's analysis was quite different. The OFT's approach in the *Nakano/Premier* case was a "traditional" one, based on a detailed consideration of the relevant markets and virtually no economic analysis or evidence. The OFT based its conclusions on the fact that the parties were the only or main UK suppliers of unbranded malt and spirit vinegar to the food ingredient and retail channels, with market shares of up to [90-100%]. In the *Barrs/Britvic* case on the other hand, the OFT defined a market of carbonated soft drinks (CSDs) on which the parties' share was no more than 35-45% (less on some measures) and always less than Coca Cola Enterprises (CCE). In reaching its view that this transaction would reduce competition, the OFT relied on economic evidence regarding the extent to which the parties' key brands were seen by customers as particularly close substitutes, focusing primarily on Irn Bru/Pepsi and Tango/Orangina.

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1 Completed acquisition by Booker Group plc of Makro Holding Limited, referred by the OFT in November 2012 and cleared by the CC in April 2013.

2 *Groupe Eurotunnel/Seafrance*, 29 October 2012; *Stagecoach Devon/First Devon and Cornwall*, 10 July 2012; *Ryanair/Aer Lingus* on 15 June 2012; and *McGills/Arriva Scotland West*, 18 April 2012.

Vinegar, vinegar or vinegar

In conducting its analysis in the Nakano case, the OFT focused in on the narrowest possible market definition:

- distinguishing between malt, spirit, wine and cider vinegars on the basis that customers across all channels would be unlikely to switch vinegar types in the event of a 5-10% price rise and that few suppliers manufactured more than one type of vinegar;
- each of the food ingredient, food service and retail channels, on the basis that it was likely that suppliers could discriminate between customers in different channels; and
- segmented between branded and unbranded supply and also assessed on the basis of treating branded and unbranded supply together.

In terms of geographic market definition, the OFT looked at trade flows between the UK and the rest of the EU to assess the extent to which the parties might be constrained by imports and found that, to a greater or lesser extent across the different vinegar types, imports did not materially constrain the parties. On this basis, the OFT assessed the transaction on the basis of a national market definition.

As Nakano and Premier were the only two UK producers of malt and spirit vinegar, the OFT unsurprisingly had concerns in relation to the supply of these products (through any channel). The OFT also considered whether Nakano's acquisition of Premier's pickling business might incentivise Nakano to withhold or increase the price of vinegar (a key input for the pickling business) from its rivals. However, as the cost of vinegar represents only a small proportion of the overall cost of pickles, the OFT was satisfied that Nakano had no incentive to increase prices to other pickling businesses.

There were a handful of other notable points emerging from this decision:

- Buyer power. Nakano had sought to argue that many of its customers – particularly the larger retailers – had buyer power and could therefore resist any price increases. However, the OFT rejected this argument, partly on the basis that as Nakano supplies a narrower range of products than Premier, it would have more of an incentive to increase prices (and would be less vulnerable to customers retaliating by switching away from its other products).
- Branded v unbranded. As well as accounting for virtually all sales of unbranded malt vinegar, the transaction also saw Nakano purchase the Sarsons brand, accounting for 90-100% of sales of branded malt vinegar to retailers. Although the OFT considered that the acquisition of the Sarson brand would increase Nakano's incentives to increase the prices of both branded and unbranded malt vinegar, it did not reach a conclusion on whether the transaction would give rise to an SLC in the supply of branded and unbranded malt vinegar to retailers. No reason was given, although presumably any concerns would have been mitigated by Nakano's divestment of the unbranded malt vinegar business.
- Wine vinegar. The OFT did not find it necessary to conclude on whether the transaction gave rise to an SLC in relation to unbranded and branded wine vinegar, despite high combined market shares in unbranded wine vinegar (until recently, 90-100%); the acquisition of Dufrais (a major wine vinegar brand); a customer complaint and evidence suggesting that the majority of customers of the target considered Nakano as their second choice. As such, the remedy offered by Nakano did not cover wine vinegar. The OFT's reasoning for not finding an SLC in wine vinegar is not clear, but may be due to the fact that Nakano had recently lost a major contract (accounting for 25-30% of overall UK volumes).

Close, closer, closest

In *Barrs/Britvic* on the other hand, the exercise of defining the market simply revealed the leading position of the parties' main rival, CCE. The OFT defined a market of CSDs on which the parties' share was no more than 35-45% (less on some measures) and always less than CCE. The OFT therefore focused primarily on economic evidence – comprising an "event study" (where it analysed the effects of a customer's decision not to stock one of the party's products) and a survey undertaken on behalf of the parties which asked consumers which brand of CSD they would buy if their preferred brand was unavailable. The use of survey evidence has become increasingly common and the OFT typically attaches great weight to the proportion of customers' spend which would switch from one supplier to another (the diversion ratio). By combining the

diversion ratio with the parties' margins, it is also possible for the OFT to estimate the degree of upward pricing pressure that the merger might give rise to.

The evidence from AG Barr's internal documents suggesting that Coke was its closest competitor was brushed aside. Similarly, the OFT did not find the evidence from a "de-listing event" sufficiently compelling, even though it apparently showed that the removal of Britvic's brands had not resulted in an uplift in sales of AG Barr's products. The evidence from the survey showed more customers would switch from Irn Bru to Coke (and its sister brands) than to the Britvic brands. However, the OFT focused on the fact that the combination of a moderately high customer diversion ratio from Irn Bru to Britvic (15-25% according to the OFT) and from Orangina to Britvic (30-40%), together with high variable margins translated into an incentive on the merged firm to raise prices by 5-10%.

This case therefore turned on the notion, correctly expressed but not always applied, that for a merger to be anti-competitive, it is not necessary for the merging parties to be each other's closest competitors – it is sufficient that they are close.

In the Nakano case, Nakano's main reason for pursuing that transaction seems to have been to acquire a presence in the branded sector and so Nakano could accept a remedy requiring it to divest manufacturing assets. However, in the *Barrs/Britvic* case, the OFT's concerns related directly to the parties' major brands and so no remedy would have been viable.

In their joint initial submission to the CC, Barrs and Britvic echo Gerald Corbett's reference to industrial policy quoted above by emphasising that the merger would have a "strong industrial logic" that would allow the merged entity to compete more effectively. The CC has until the end of July to determine whether this logic is compelling.

Other considerations

These two cases also highlight a couple of noteworthy procedural points.

First on timing, which was an issue in both cases. The *Barrs/Britvic* notification was deemed complete on 14 November 2012 (and no doubt followed a period of pre-notification) and was referred on 13 February 2013 – following a number of announcements from Barrs regarding delays in the expected decision date. The CC is not expected to deliver its verdict until 30 July 2013 – giving a review period of eight and a half months. The *Nakano/Premier* deal on the other hand was notified on 13 July 2012 and although the OFT's initial decision was issued on 26 September 2012, it was not until 26 February 2013 that the OFT confirmed its approval of Baxters as a suitable buyer for the divested business, giving a review period of seven and a half months. In other words, the OFT's requirement in *Nakano/Premier* that Nakano divest its plant to an upfront buyer (meaning that the OFT could refer the *Nakano/Premier* transaction to the CC until a satisfactory buyer had committed to purchase the divestment business) meant that it took almost as long for *Nakano/Premier* to get phase I clearance as it will take *Barrs/Britvic* to get phase II clearance.

Secondly, on the use of monitoring trustees. The *Nakano/Premier* transaction completed shortly after having been notified to the OFT and (in common with many other transactions), Nakano gave hold separate undertakings under which it committed to manage the target business separately. However, the OFT also required Nakano to appoint (and pay for) a monitoring trustee to oversee the hold separate process and a divestment trustee to oversee the divestment process. Although commonly used by the CC, the OFT has only recently started to require the appointment of monitoring trustees and *Nakano/Premier* was one of the first cases of a trustee being appointed. It is expected that the OFT will make much greater use of these powers in the future.

EU: Food sector see sustained interest by European competition regulators

"*It is a fact that a handful of retailers control most of the market and impose their own terms on suppliers. Contractual freedom is a notion that exists only on paper. This is an illegal oligopoly which is causing a distortion of the market, with a widespread abuse of buyer power*." Igor Šarmír (Employers' Group, Slovakia), rapporteur of the EESC opinion on the Large retail sector.

European regulator interest in the food sector, at both the national and supra-national, shows no sign of waning in light of the European Economic and Social Committee's (EESC) recent damning opinion on the state of competition in the European agro-food sector. With the European Competition Network's (ECN) May 2012 finding that the food sector had been a high priority for competition authorities in recent years, the past few months have seen continued scrutiny by competition authorities in the sector, at both the retail level and upstream.

The ECN report

The ECN brings together the European Commission (Commission) and the national competition authorities (NCAs) of the 27 EU Member States. Following the Commission's communication of October 2009 on 'A better functioning food supply chain in Europe' and a resolution by the European Parliament in September 2010 calling for action in this respect, an ECN sub-group was established to examine enforcement activities in the food sector.

The ECN's report of May 2012 provides detailed information on enforcement, advocacy and monitoring actions undertaken by the NCAs and the Commission between 2004 and 2011. Over this period, the European competition authorities:

- investigated more than 180 antitrust cases, covering a wide range of food markets across all levels of the supply chain. The largest number of cases occurred at the processing level (28%), retail (25%) and manufacturing (16%);

- examined nearly 1,300 mergers, of which 83 raised concerns. These were concentrated in the retail sector (which represented 33% of all mergers and 30% of all mergers raising concerns), followed by the dairy and meat sectors (which represented 9% and 10% respectively of all mergers and 17% and 12% of all mergers raising concerns). The vast majority were cleared, subject to commitments from the merging parties. 8 mergers were prohibited;

- undertook more than 100 monitoring actions, aimed at improving knowledge about food markets and identifying potential structural problems that could negatively affect the functioning of the food supply chain. The largest number of monitoring investigations (36 investigations) focused on the retail sector.

According to the report, the number of investigations and actions in this area showed that the food sector has been a high priority for competition authorities. The report noted that, as food prices continue to increase, European competition authorities would continue to be active in monitoring this sector.

NCA enforcement activity

Even in the first few months of this year, the food sector has seen significant enforcement activity at the Member State level, as highlighted in the following decisions:

- **France:** On 13 February 2013, the French Competition Authority (FCA) fined five Breton slaughterers and the French Meat Association a total of €4.6 million for agreeing to fix the quantity of pigs bought from farmers and for exchanging pricing information. Most of the participants settled the case and offered to undertake commitments relating to their future practices, thereby obtaining significant reductions in their fines. The decision by most participants to settle, however, led the FCA to apply its "Manpower" ruling, according to which the only issue to be considered in relation to the participants that did not settle is that of their participation in the cartel (but not the existence of the cartel itself). By preventing the participants that did not settle from contesting the existence of a cartel, this case highlights one of the major criticisms of the French settlement procedure with regard to a party's right of defence.

- **Germany:** In January 2013, the German Federal Cartel Office (FCO) imposed fines of approximately €60 million on several manufacturers of branded confectionery and some of their sales representatives for, inter alia, exchanges of

commercially sensitive information (including pricing and the status of negotiations with major retailers) and price fixing in relation to chocolate bars and other chocolate products. Mars GmbH was granted full immunity from fines as whistle blower under the FCO's leniency programme.

In February 2013, the FCO also imposed fines of approximately €65 million on a number of milling companies, the Association of German Mills and their representatives on account of their involvement in cartel infringements. The cartel participants were found to have agreed on prices, customer allocation and supply volumes in relation to the sale of flour. The FCO also found that the milling companies involved had limited output by shutting down mills or by ensuring that mills which had already been shut down did not re-open. The French and Dutch competition authorities have also imposed hefty fines on German mills for their involvement in other cartel infringements.

At the ABA Antitrust Spring Meeting in Washington in April 2013, the president of the FCO, Andreas Mundt, is reported to have raised concerns over potentially illegal price agreements in German food retail sector and the recent investigations in Germany are indicative of the FCO's continued prioritisation of competition law enforcement in this sector.

- **The Netherlands:** At the end of December 2012, the Netherlands Authority for Consumers and Markets (ACM, previously the NMa) fined seven undertakings that grow, process and trade in first-year onion sets a total of €4.2 million for illegal cartel activities concerning the destruction of sown acreage of onion sets in 2009. The cartel participants (which collectively represent approximately 80 percent of the supply of first-year onion sets grown by Dutch undertakings) were alleged to have exchanged competitively sensitive information and agreed to reduce the supply of onion sets in order to push up prices.

- **UK:** The UK Office of Fair Trading has also taken a cautious approach to mergers in the sector, referring the *Barr/Britvic* merger to the Competition Commission for in-depth review less than six months after its decision to also refer the *Booker/Makro* merger (both of which are reported in this bulletin).

The EESC Report

Whilst NCA activity has focussed on upstream abuses at the production / manufacturing level, the opinion of the EESC, published in January 2013, takes a closer look at alleged abusive and anticompetitive practices by large retailers, particularly in relation to the bargaining power they hold over their suppliers.

The EESC concludes in its report that "large retailers constitute an oligopoly in every country", which enables retailers to impose terms of business on their food suppliers and causing such an imbalance in commercial relations that legislative action at the EU level, as opposed to a 'softer' code of practice, would be justified to redress the balance. The EESC was particularly concerned that a High Level Forum set up following the ECN's 2009 report has yet to reach a consensus on compulsory regulation of unfair business practices in the agri-food supply chain.

The EESC's concerns also accord with those raised by the UK Competition Commission in its 2008 market investigation into the supply of groceries in the UK. In an attempt to address these concerns, the Groceries Code was introduced in the UK to govern the relationship between major grocery retailers and their direct suppliers (see below).

The European Commission is, however, now considering changes to unfair trading laws (as opposed to competition laws) with a view to addressing perceived inequality of bargaining power between large retailers and their suppliers. In January 2013, the Commission adopted a Green Paper on business-to-business unfair trading practices in the food and non-food supply chain, examining the effectiveness of self-regulatory and legislative frameworks at the Member State level and to assess whether divergent approaches in Member States might lead to the fragmentation of the single market. The Commission's consultation with stakeholders ended on 30 April 2013 and the adoption of the Green Paper runs in parallel to the work of the High Level Forum. The Commission is now to launch an Impact Assessment analysing several possible options to address these issues, ranging from self-regulation to legislation, and will announce detailed steps later this year.

BEVERAGES, BREWERIES AND TOBACCO

EU: Dutch beer fines: Appeals dismissed

Summary. The Court of Justice of the EU (ECJ) has dismissed the appeals brought by Dutch brewers Heineken NV (Heineken) and Bavaria NV (Bavaria) against the General Court's judgment of 2011 regarding their alleged participation in a cartel on the Dutch beer market.

Background. Article 101 of the Treaty of the Functioning of the European Union (TFEU) (Article 101) prohibits cartels and other agreements or concerted practices that restrict competition. Companies found by the European Commission (the Commission) to have infringed Article 101 can appeal to the General Court. General Court judgments are subject to appeal to the ECJ on points of law only (Article 256, TFEU).

Facts. On 18 April 2007, the Commission fined Heineken (including its subsidiary Heineken Nederland BV), Bavaria and Grolsch NV (Grolsch) a total of over €273 million for participating in an alleged cartel in the beer market in the Netherlands between February 1996 and November 1999. The alleged breach of Article 101 related to the allocation of customers and the coordination of prices and price increases for beer, in both the Dutch "on-trade" (hotels, cafes and restaurants) and "off-trade" (supermarket/off licences for consumption at home) segments. Grolsch, Heineken and Bavaria appealed to the General Court.

On 16 June 2011, the General Court largely dismissed Heineken's and Bavaria's appeals but reduced their fine by 5% overall in light of the excessive duration of the procedure. The fines imposed on Heineken and Bavaria were reduced to approximately EUR 198 million and EUR 21 million, respectively.

On 15 September 2011, the General Court annulled Grolsch's fine in its entirety, on the basis that the Commission had inaccurately attributed the alleged anticompetitive conduct of a Grolsch subsidiary to Grolsch itself without evidence and without giving the parent company an opportunity to challenge the assumption.

Decision. On 19 December 2012 the ECJ rejected all of Heineken and Bavaria's further appeals, concluding that:

- the General Court had not infringed the principle of equal treatment in ruling that the circumstances of the Dutch beer cartel were not comparable to those of the earlier Belgian beer cartel, so that the fines relating to both cartels need not be directly comparable;
- the right to good administration and Heineken and Bavaria's rights of defence had not been infringed by the refusal to grant them access to third party information in the Commission's statement of objections; and
- Heineken's claim that the General Court ought to have ruled on Grolsch's appeal before handing down judgment on Heineken and Bavaria was irrelevant.

Comment. The judgement marks the end of the lengthy Dutch beer cartel case. Heineken's and Bavaria's fines remain at approximately EUR 198 million and EUR 21 million, respectively. Following this judgement, the Commission may be examining whether it can re-open the procedure against Grolsch, taking into account the General Court's comments.

US: AB InBev and US Department of Justice reach settlement on Modelo transaction

Summary. Anheuser-Busch-InBev (AB InBev) has agreed to sell the US business of Grupo Modelo (Modelo), settling a claim by the United States Department of Justice (DOJ) that AB InBev's acquisition of Modelo violated the antitrust laws.

Background. Section 7 of the Clayton Act prohibits mergers, acquisitions and other transactions that substantially lessen competition.

On June 28 2012 AB InBev agreed to purchase the remaining equity interest in Modelo for approximately $20.1 billion. The DOJ filed a civil antitrust complaint against AB InBev and Modelo challenging the transaction and seeking to prohibit its

consummation. The DOJ alleged that the acquisition would substantially lessen competition for beer and result in higher beer prices and less innovation.

AB InBev brews and markets beer. According to the DOJ, AB InBev's share of the US marketplace is 39%. AB InBev sells more than 200 different beer brands. Grupo Modelo is a Mexican corporation and the third-largest brewer of beer in the US. According to the DOJ, Modelo has 7% share of the US marketplace. Among other beers, Modelo sells Corona Extra, the top selling import beer in the US. Constellation is an importer of wines and spirits that, through a joint venture with Modelo, imports, markets and sells certain Modelo brands into the US. According to the DOJ, other than AB InBev, Modelo and MillerCoors) (the second largest player), the market is comprised of "hundreds of smaller fringe competitors."

Facts. Under the settlement, AB InBev is required to grant various licences to Constellation including a perpetual and exclusive US licence to Corona Extra and nine other Modelo beers, and divest Modelo's "newest, most technologically advanced brewery," located in Mexico near the US border, and the assets and Modelo's interest in its joint venture with Constellation, as well as other assets, rights, and interests necessary to ensure that Constellation is able to compete in the beer market in the United States. Further, because the brewery being sold only produces enough beer to serve approximately 60% of Modelo's US. demand, as part of the settlement, Constellation committed to expand the capacity at that brewery to meet the US demand.

Comment. According to the DOJ, tacit collusion and coordinated activity were commonplace in the US beer marketplace and Modelo was the only constraining player. In rare cases, the US antitrust authorities require the acquiror to divest the entire US piece of the business it is buying. This is one of those cases where the government believes that no other fix will remedy the loss of competition posed by the transaction. Notably, the transaction was cleared without issue by the UK and Mexican competition authorities.

China: Record penalties imposed on State-owned liquor producers for resale price maintenance

Summary. On 22 February 2013, local agencies of the National Development and Reform Commission (NDRC) imposed record penalties of RMB 449 million (USD 72 million) on two State-owned liquor producers Kweichow Maotai Co. Limited (Maotai) and Wuliangye Yibin Group Company Limited (Wuliangye) for resale price maintenance (RPM).

Background. Article 14 of China's Anti-Monopoly Law (AML) prohibits agreements which fix the price for resale. Under Article 46 of the AML, a fine of between 1% and 10% of annual turnover may be imposed for entering into an unlawful agreement.

China has three agencies which are responsible for enforcing the AML – the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM) is responsible for merger control; the Anti-Monopoly and Anti-Unfair Competition Department of the State Administration for Industry and Commerce (SAIC) is responsible for non-price monopoly agreements and NDRC has jurisdiction over price-related anti-competitive conduct. Article 10 of the AML allows the NDRC to delegate enforcement to regional or municipal authorities.

Facts. These fines are the largest ever imposed under the AML and reflect the outcome of two separate investigations – Maotai was investigated by the Guizhou Price Bureau and Wuliangye by the Sichuan Provincial Development and Reform Commission (both of which are local counterparts of NDRC). Very little detail is available regarding the Maotai decision, beyond the fact that Maotai's RMB 247 million fine was imposed for fixing and enforcing minimum resale prices. An official statement confirming Wuliangye's RMB 202 million fine referred to Wuliangye's market power as well as the impact of RPM on intra-brand competition; the fact that other, smaller competitors apparently copied Wuliangye's practice; and the impact on consumers who were not able to buy products at a lower price.

Comment. This case is significant in that it shows the Chinese authorities beginning to step up their enforcement activity and comes shortly after NDRC imposed a fine of RMB 353 million on six Korean and Taiwanese manufacturers of LCD panels. Although there are few details, the Maotai and Wuliangye decisions also give rise to the following points of interest:

- The fact that the Wuliangye decision seems to have been based on an analysis of the effects of the RPM agreement has led some commentators to speculate whether NDRC will adopt a more balanced "rule of reason" type approach to RPM rather than treating RPM as "per se" illegal, as a literal reading of the AML implies.

- Fines for breaching AML are based on turnover, although it is not clear whether this is based on national or global turnover or whether it is limited to turnover of the products affected by the infringement or turnover from sales of all products. Wuliangye were apparently fined 1% (the minimum level stipulated under the AML) of their "relevant turnover", implying that that this may be less than the group-wide turnover.

Finally, as an interesting aside, several days before these decisions were announced, there were reports in the press naming the parties and quoting the level of proposed fine.

UK: Exceptional developments in the aftermath of the OFT tobacco investigation

Summary. Several months after the UK Competition Appeal Tribunal (CAT) quashed the Office of Fair Trading's (OFT) tobacco investigation decision on appeal, the OFT agreed to refund a fine imposed on one of the retailers that had originally admitted infringing competition law and declined to appeal its decision. The CAT has now granted two other companies that originally settled with the OFT (but whose fines were not refunded) the right to appeal the decision over two years after that right expired.

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).

On 16 April 2010, the OFT concluded that two UK manufacturers of tobacco products (Imperial and Gallaher) and ten retailers (Asda, Co-operative Group, First Quench, One Stop Stores, Morrisons, Safeway, Shell, Somerfield and TM Retail) had 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 resulted in the price of the manufacturer's competing brands being pegged against each other), 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 TM Retail, Gallaher, Asda, First Quench, One Stop Stores and Somerfield 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. 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, ruling that the evidence presented by the OFT did not support its allegations.

Facts. In August 2012, the OFT said that, following the successful challenge of its decision at the CAT, it would refund the £2.67 million penalty imposed on TM Retail as part of its 2008 settlement agreement with the retailer, as well as "certain other costs". It is understood that the settlement agreement between the OFT and TM Retail contained certain assurances on the OFT's behalf against the possibility of other companies bringing successful challenges against OFT decision. Although the OFT had also reached settlement agreements with five other companies, the OFT stated that it has not agreed any other repayments and the OFT's decision in relation to the companies that did not appeal, including TM Retail, remained in place.

Following failed attempts to secure similar refunds of their settlement agreements directly from the OFT, Gallaher and Somerfield applied to the CAT to extend the normal two-month window for appealing the OFT's decision. On 27 March 2012, the CAT ruled that the time for appeal should be extended. In explaining these "exceptional circumstances", the CAT said that the companies had entered into the settlement with the OFT based on the legitimate expectation that the OFT's decision was "sufficiently robust" and that that basis had since been "fundamentally undermined" by the collapse of the OFT's case.

Comment. The OFT's decision to pay back a fine and to refund costs to a party which has admitted an infringement and not appealed the OFT's decision is unprecedented. TM Retail's agreement has been described as representing a "unique" way for it to benefit from a successful appeal against the OFT's decision, whilst allowing it to obtain a fine reduction for cooperating with the OFT. This may represent an unhelpful precedent for the OFT when negotiating future settlement agreements, which it will be likely be keen to avoid repeating.

Similarly the CAT's decision to grant Gallaher and Somerfield's appeals over two years out of time is, by its own admission, exceptional. The idea that sophisticated parties would rely on the robustness of a regulatory decision in deciding to admit wrong-doing is far from self-evident, particularly as so many other parties directly challenged the robustness of the decision.

DAIRY AND FOOD PRODUCTS

UK: Booker/Makro: CC unconditionally clears wholesale merger

Summary. On 19 April 2013, the UK Competition Commission (CC) unconditionally cleared the acquisition by Booker Group plc (Booker) of rival cash and carry business Makro Holding Limited (Makro).

Background. The Office of Fair Trading (OFT) must refer completed mergers to the CC if the OFT believes it may be the case that a relevant merger situation has been created and this has resulted, or may be expected to result in a substantial lessening of competition (SLC) within any market or markets for goods or services in the UK (section 22(1), Enterprise Act 2002) (2002 Act). The CC must determine whether a relevant merger situation has been created and if so whether this has resulted or may be expected to result in an SLC (Section 35, 2002 Act).

Booker is one of the UK's largest food wholesalers selling primarily to independent retailers, caterers and small business both through its network of 172 cash and carry outlets and through a delivery service. Makro sold wholesale food and non-food products to small businesses (including retailers and caterers) through its 30 cash and carry stores. The UK wholesale cash and carry segment accounted for approximately £11 billion of sales in 2012. The transaction was announced in May 2012 and notified to the OFT. In November 2012, the OFT referred the transaction to the CC on the basis of its concerns that, at a national level, the transaction might lead to a loss of competition particularly for catering customers, where the OFT considered the parties to be particularly close competitors. In addition, the OFT also found competition concerns in up to 22 of the 29 local areas (defined by reference to a 15 or 30 minute drive time around each store) where the parties overlapped.

Facts. The CC looked carefully at the financial situation of Makro (whose sales had been falling for several years) and determined that the most likely counterfactual was the break up and piecemeal sale of the Makro business, with some assets exiting the wholesale market and others continuing to operate as a food wholesale business under new ownership. Assessed against this counterfactual, the CC found that the transaction would not give rise to any national concerns.

In defining the relevant market, although seemingly adopting a narrow approach to include only cash and carry food wholesale, the CC recognised that sales through other channels posed a significant constraint on cash and carry wholesalers, in particular from the major delivered wholesalers (such as Brakes and Palmer & Harvey), and also from specialist wholesalers and supermarkets.

The CC also looked carefully at 18 local areas (defined by reference to a 30 minute drive from each Makro store) in which both Booker and Makro were present. In each case the CC was satisfied either that the Makro site would not have been sold to another food wholesaler; or that there were sufficient competing national, regional or local cash and carry operators present in the local area; or that delivered food wholesalers were sufficiently active to constrain the parties.

Comment. The difference between the conclusions of the OFT and the CC is stark. This may be largely explained by the willingness of the CC to accept a "failing firm" counterfactual. Given the relatively low threshold at which the OFT is duty-bound to refer a case to the CC, the OFT will only exceptionally accept a failing firm counterfactual. Another important consideration was the CC's recognition of the degree to which competition from other channels particularly delivered wholesalers constrained the cash and carry operators.

Note that Clifford Chance advised Booker during the CC's inquiry.

UK: Groceries Code Adjudicator Bill given Royal Assent

Summary. The Groceries Code Adjudicator Act (the Act) has been given Royal Assent, creating the UK's first independent adjudicator to oversee the relationship between large supermarkets and their direct suppliers.

Background. On 30 April 2008, the Competition Commission (CC) published its final report in its market investigation into the supply of groceries in the UK. To address concerns over the exercise of buyer power by certain grocery retailers, the CC decided to introduce a strengthened Code of Practice governing the relationship between the major grocery retailers and their suppliers. The Groceries Code applies to the 10 retailers with a turnover in the groceries market in excess of £1 billion.

Facts. The Act provides a statutory footing for the Groceries Code Adjudicator (Adjudicator) with the role of enforcing the Groceries Code and encouraging compliance with it, including the ability to impose fines for non-compliance. Earlier this year, Christine Tacon, formerly head of the Co-operative Group's farming unit for 11 years, was named by the Government as the first Groceries Code Adjudicator. The Act will come into force in June, with the Adjudicator to publish guidance setting out how she will operate shortly thereafter.

Comment. The aim of establishing the Adjudicator is to ensure that farmers and other suppliers are protected from the adverse effects identified by the Competition Commission by ensuring that large retailers treat them fairly by lawfully adhering to the Groceries Code.

EU: General Court hands down judgments in banana cartel: cuts Del Monte fine in banana cartel, upholds Dole penalty

Summary. The General Court (GC) has dismissed appeals by Del Monte and Dole against fines imposed for their participation in a banana cartel. The GC has, however, cut Del Monte's fine substantially from EUR 14.7 million to EUR 8.82 million.

Background. Article 101 (Article 101) of the Treaty on the Functioning of the European Union (TFEU) prohibits cartels and other agreements or concerted practices that restrict competition. Those found to have infringed Article 101 can appeal to the GC (Article 250, TFEU). Appellants can also apply to the General Court for a reduction of the fines imposed by the Commission (Article 249, TFEU).

The investigation began in 2005 after the European Commission (Commission) received a leniency application from Chiquita for immunity for its involvement in a cartel in relation to the price of bananas. The Commission found that Chiquita, Dole and Del Monte had coordinated their prices for bananas in eight Member States in the EU. The Commission found that, over a three-year period, numerous phone calls had taken place between the parties shortly before quotation prices for the bananas were set. Chiquita received full immunity from fines, whereas Dole was fined EUR45.6 million. Del Monte was found to be jointly and severally liable for the conduct of Internationale Fruchtimport Gesellscaft Weichert & Co (Weichert),in which Del Monte had an indirect interest as a limited partner. Del Monte was fined EUR 14.7 million and Dole and Del Monte subsequently appealed to the GC.

Facts. On March 14 2013, the GC handed down its judgment on the appeals. The GC rejected the arguments made by the parties, including the allegation that the Commission had erred in its finding that the bilateral exchange of pre-pricing information constituted a concerted practice which had an anti competitive object under Article 101 TFEU. Del Monte additionally asserted that its association with Wiechert (with whom Dole communicated pricing information) was not sufficient to constitute an infringement. The GC, however, said that the nature of the links between the two companies resulted in a single economic unit and, therefore, that the Commission's original finding was correct. The GC held, however, that the Commission should have given greater credit for Del Monte's cooperation in its investigation and for its lesser involvement in the infringement and accordingly reduced the fine imposed on Del Monte to EUR 8.82 million.

Comment. Whilst the GC did not accept any of the allegations made against the Commission, the reduction in the level of fine for Del Monte is significant. Dole and Del Monte have lodged appeals with the European Court of Justice. Unusually, the Commission has also reportedly appealed the GC's judgment, challenging the reduction in Del Monte's fine.

The Netherlands: ACM conditionally clears the merger of Buitenfood and Ad van Geloven

Summary. The Netherlands Authority for Consumers and Markets (ACM, formerly NMa) has conditionally approved the merger of snack producers, Buitenfood and Ad van Geloven, following a Phase II investigation. Buitenfood and Ad van Geloven are the two largest Dutch producers of well-known Dutch frozen snacks, such as croquettes (kroketten), appetiser croquettes (bitterballen) and minced meat hot dogs (frikandellen). The approval was subject to the condition that Buitenfood stopped selling appetiser croquettes under its Van Dobben brand to supermarkets and provided a licence to a third party for these products. The parties, however, subsequently abandoned the transaction.

Background. The ACM must clear a transaction at the end of its four week Phase I investigation period unless it finds that the merger may significantly impede effective competition in the relevant markets (Article 37(1), Dutch Competition Act (DCA)), in which case the ACM must open an in-depth Phase II investigation (vergunningsaanvraag) (Article 37(2), DCA). In a Phase II investigation, the ACM must examine whether the proposed concentration prevents effective competition on the relevant markets, in particular as a result of the creation or strengthening of a dominant position. If the ACM considers this to be the case, it may prohibit the merger (Article 41 (2), DCA) or impose conditions for the approval thereof (Article 41 (4), DCA).

Facts. The merger between Buitenfood and Ad van Geloven was approved by the ACM following a Phase II investigation, subject to the condition that Buitenfood issued a six year licence to a third party for the production and sale to supermarkets of regular, mini and appetiser croquettes sold under its key Van Dobben brand.

Under the terms of the conditional approval, the merged entity could continue to use the Van Dobben brand for sales to wholesale traders and hotels/restaurants (so-called out-of-home channels) but could not sell frozen snack products to supermarkets that were comparable to the products originally sold to supermarkets under the Van Dobben brand.

During the six year period, the licensee was required to re-brand the Van Dobben croquettes that it sold to supermarkets to ensure that the products that were sold under the licence could be significantly distinguished from the Van Dobben brand products that the merged entity continued to sell to out-of-home channels. Once the six year period has expired, neither the merged entity nor the licensee would have been able to use the Van Dobben brand for the sale of frozen snacks to supermarkets in The Netherlands.

Comment. The merger was initially notified to the European Commission and was partly referred to the ACM in accordance with Article 9(3)b of the EU Merger Regulation. The merger of the companies' Belgian businesses was approved by the European Commission back in January 2012 on the basis that market overlaps in Belgium would be limited and the existence of market rivals would prevent any reduction in competition. Croquettes are, however, very popular in the Netherlands and Van Dobben is the most famous brand. According to the ACM, the merger could have led to higher prices, lower quality and reduced choice for customers on the relevant market because neither supermarkets nor competing producers would have been able to counterbalance the market power of the merged entity on the relevant Dutch market. A few weeks after the ACM's conditional clearance decision, the merging parties, however, issued a press release indicating that they had abandoned negotiations because the transaction was no longer commercially viable. The abandonment of the transaction also follows the ACM's decision to prohibit Continental Bakeries' acquisition of A.A. ter Beek, a competing producer of rusks and gingerbreads, following a Phase II investigation.

Spain: Spanish Competition Authority publishes a report on central wholesale markets for perishable foodstuffs.

Summary. The Spanish Competition Authority (CNC) has published a report on competition in the central wholesale markets for perishable foodstuffs (Mercas) analysing potential distortions of competition and making various recommendations to improve competition and efficiency in this sector.

Background. The Mercas, which date back to the 1960s, are essentially trading centres located in large urban areas that receive fresh produce, meat, poultry and seafood products. In the past, the CNC has sanctioned conduct relating to the Mercas and found competition problems arising from their internal regulation. The aim of the CNC's report is therefore to ensure that the functioning of the Mercas is rational and justified in the current market and to analyse their impact on competition.

Facts. The CNC has found two particular issues relating to the Mercas. Firstly, the internal rules that govern the functioning of the Mercas, which are passed by the respective city councils, contain numerous clauses liable to distort competition because they create barriers to entry, reduce competition amongst operators within a particular Mercas, and oblige operators to accept and pay for unnecessary services.

Secondly, the Mercas' organisation and management model should be reviewed and modified to present day requirements. This is because reserving the activity of central markets to municipal entities is no longer necessary and seems to be a barrier to wholesale trade. Indeed, new private channels and business models have emerged that do not compromise quality, security or traceability.

Additionally, the CNC has found that management of the Mercas network, which is centred around Mercasa (public company Mercados Centrales de Abastecimiento S.A.), was created during the prevailing conditions in the 1960s when public regulation in this sector was regarded as necessary. The report, however, indicates that this intervention in the Mercas network discourages competition between Mercas within the network as well as competition between competing operators within a particular Mercas. As a result, this could lead to negative effects for those further down the distribution chain as well as end consumers. The CNC has also found that the direct management of Mercas by city councils and Mercasa protects the status quo rather than incentivising the adoption of management mechanisms that reduce costs, increase innovation and encourage greater efficiency.

The CNC has therefore proposed three recommendations in order to improve competition and efficiency in this sector:

- Revise the internal rules that govern the functioning of the Mercas (and any related municipal codes) to ensure that they do not hinder competition and are necessary, proportionate and non-discriminatory;

- Remove the legislation that reserves central market activity to municipalities as there is no longer sufficient justification for it; and

- Increase individual Mercas' autonomy to manage themselves in order to drive greater competition amongst Mercas.

Comment. The main objective of the CNC's report is to open the wholesale markets for perishable foodstuffs in order to increase competition. The CNC has found that the current system is outdated and should be adapted to suit present day market conditions. As a result, it proposes eliminating rules and regulations that could create barriers to entry or hinder competition.

Spain: Spanish Competition Authority clears Deoleo/Hojiblanca merger with commitments

Summary. The Spanish Competition Authority (CNC) has cleared the acquisition by Deoleo S.A. (Deoleo) of Hojiblanca SCA.'s (Hojiblanca) extra-virgin olive oil bottling and distribution business after Deoleo proposed commitments to resolve potential competition problems.

Background. Mergers are cleared in Phase I unless the CNC identifies competition concerns that may hinder the maintenance of effective competition in the affected markets (Article 57(2)(c), Spanish Competition Act (the SCA)), in which case the CNC will issue a decision to start a Phase II review in order to carry out an in-depth analysis of the notified transaction. If the CNC believes that obstacles to competition may result from the transaction, the parties may propose commitments to resolve them (Article 59(1), SCA).

Facts. Deoleo notified the proposed transaction on 19 November 2012. The CNC found that the transaction in question could hinder the maintenance of effective competition by foreclosing both the upstream market for the bottling of extra virgin olive oil and the downstream distribution market. The CNC therefore decided to open a Phase II review.

On 15 March 2013, Deoleo proposed commitments in order to resolve the potential competition problems identified by the CNC, including:

- The removal of a clause in the parties' investment agreement which initially gives Hojiblanca the right to designate two directors on the Deoleo board, which would be lost once a non-compete clause had been in force for three years,

provided that Hojiblanca exceeds a 2% market share in the Spanish branded olive oil market for the retail channel. The CNC considered that the clearance of the merger and specifically this clause would eliminate a significant source of competition for Deoleo, as the clause constitutes a de facto restriction against Hojiblanca competing in the branded olive oil market. By removing this clause, this de facto restriction would no longer exist.

- Ensuring that the parties' sensitive commercial information is not shared by preventing the board members from Hojiblanca accessing Deoleo's sensitive information on the sale of bottled oil to third parties and the purchase of bulk olive oil. Similarly, Deoleo will refrain from accessing Hojiblanca's sensitive commercial information on sales of bulk olive oil. The commitment also requires that the two designated directors from Hojiblanca refrain from exercising the right to vote on these sensitive issues at Deoleo's board meetings. The goal of this commitment is to ensure that the parties' sensitive commercial information is not shared between them thus preventing the parties from coordinating their activities in the market, specifically by raising prices.

- The third and fourth commitments enable the CNC to monitor and review compliance with the measures. In three years, the CNC will review the market in order to either renew or remove the commitments. The parties may also apply for renewal or removal of the commitments if they consider that the circumstances have changed.

The CNC deemed the commitments sufficient and proportionate and therefore has authorised the transaction .

Comment. Commitments are reviewed closely by the CNC and, if they are not fulfilled, the offending company will be fined. Mediaset was, for example, recently fined EUR 15.6 million for non-compliance with commitments in the context of its acquisition of Cuatro in 2010. The CNC has also recently fined Telefonica de España and Prisa Televisión EUR 188,646 for failing to comply with commitments for joint marketing agreements for pay-TV services and communication services.

Slovak Republic: The Act on Inadequate Conditions in Business Relationships relating to Foodstuffs enters into force

Summary. The Act on Inadequate Conditions in Business Relationships relating to Foodstuffs (the Act) entered into force on 1 January 2013.

Background. The Act replaces the Act on Inadequate Conditions in Business Relationships between Customers and Suppliers, which was effective from 1 May 2010 to 31 July 2011. The aim of the Act is the enforcement of measures to prevent the abuse of buyer power, the introduction of conditions to improve market supervision and the evaluation of the situation on the Slovak market in order to increase the share of Slovak foodstuff products available to end consumers.

Facts. According to the explanatory report to the Act, experience has shown that in relationships between customers and suppliers of foodstuffs, the abuse by customers (i.e. large supermarket chains) of their economic position (i.e. buyer power) is common. This has led to a decrease in the share of foodstuffs from Slovak suppliers available to end consumers. The Act applies to all business relationships between customers and suppliers and includes a list of inappropriate conditions. These conditions are divided into two groups: the first group includes "hard core" conditions which are prohibited at all times (i.e. payments for registration in the customer's register of suppliers, payments for the promotion of goods by the customer, etc.). The second group only constitutes a violation of the Act if it involves payments by the supplier exceeding in total 3% of annual sales of food which the supplier delivered to the individual customer within one calendar year (i.e. payments for the use of the customer's distribution network, payments for the placement of products in a specified place on the customer's sales floor, etc.). Compliance with the provisions of the Act will be supervised by the Ministry of Agriculture of the Slovak Republic.

Comment. Regulation of the sector as re-introduced by the Act might create an imbalance in commercial relationships by favouring suppliers and may lead to a situation where the additional costs arising from this regulation are borne by end consumers.

NON-FOOD GOODS/RETAILERS

UK: Extended warranties on domestic electrical goods: John Lewis appeal rejected

Summary. In June 2012 the Office of Fair Trading (OFT) accepted undertakings offered by Dixons, Comet and Argos in lieu of referring the market for extended warranties on domestic electrical goods to the Competition Commission (CC). An appeal by John Lewis to the Competition Appeal Tribunal (CAT) against the OFT's refusal to list certain John Lewis extended warranties on a price comparison website has subsequently been rejected primarily on the basis that John Lewis' arguments were actually a challenge to the OFT's decision with respect to the undertakings in lieu and were therefore time barred.

Background. The OFT keeps markets under review as part of its general function (section 5, Enterprise Act 2002) (2002 Act). The OFT has the power to make a reference to the CC if it has reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services (section 131, 2002 Act). Under section 154 of the 2002 Act, the OFT may accept binding undertakings in lieu of exercising its discretion to make such a referral. Under section 179 of the 2002 Act, any person aggrieved by a decision of the OFT in connection with a market investigation reference, or possible market investigation reference, may apply to the CAT for review of that decision. An application under section 179 must be made to the CAT within two months of the date upon which the applicant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier.

In February 2012, the OFT published the results of a short market study into extended warranties (EW) for domestic electrical goods. The OFT concluded that consumer choice was restricted in this area and the complexity of the product made it difficult for consumers to make effective comparisons, thereby reducing the incentives of suppliers to compete effectively.

On 27 June 2012, the OFT accepted undertakings from Dixons, Comet and Argos in lieu of referring the market to the CC. The undertakings included: the establishment and maintenance of an EW comparison website, improvement of the prominence and accessibility of key information to consumers, the conducting of regular mystery shopping exercises by an independent organisation to monitor the accuracy of information provided to consumers and report results to the OFT; provision of specified value for money information to the OFT to enable it to monitor the extended warranties; and improvements to the transparency of Pay-As-You-Go pricing.

Facts. In November 2012, the OFT notified John Lewis of its decision refusing to list certain John Lewis extended warranties on the price comparison website. John Lewis lodged an appeal with the CAT, seeking review of the OFT's decision on the basis that it was in breach of the OFT's duties under EU law to not distort trade and competition and was an unreasonable and unlawful exercise of the OFT's discretion under section 154 of the 2002 Act. The CAT was of the view that these arguments were a challenge to the June 2012 decision made with respect to the undertakings in lieu, not the November 2012 decision, and were therefore time-barred as there were no exceptional circumstances justifying an extension of the two month time limit.

Comment. The acceptance by the OFT of the undertakings in lieu of a market investigation reference in relation to extended warranties is of particular significance as this is only the second time since the 2002 Act entered into force that the OFT has accepted undertakings in lieu of referring a market to the CC.

France: Paris Court of Appeal upholds fine imposed on Pierre Fabre for prohibition of online sales

Summary. On 31 January 2013, the Paris Court of Appeal upheld the fine imposed by the French Competition Authority (FCA) on Pierre Fabre for banning online sales of its cosmetics.

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

In 2008, the FCA found that Pierre Fabre had breached Article 101 and the equivalent provision of French law by de facto

prohibiting its distributors in its selective distribution system from selling cosmetics products over the internet. Pierre Fabre appealed to the Paris Court of Appeal, which in turn, made a reference to the Court of Justice of the EU (ECJ) for a preliminary ruling on whether the de facto ban on internet sales breached Article 101, and if so whether Pierre Fabre could benefit from either the 1999 Vertical Agreement block exemption (VBER) and/or individual exemption under Article 101(3) TFEU.

On 13 October 2011, the ECJ handed down a judgement ruling that: (i) Pierre Fabre's distribution agreement was not objectively justifiable, 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 Paris Court of Appeal to examine whether the conditions of Article 101(3) TFEU are met.

Facts. On 31 January 2013, the Paris Court of Appeal upheld the fine imposed by the FCA on Pierre Fabre. The Court first recalled that the prohibition of online sales constitutes a restriction by object, as confirmed by the ECJ in its preliminary reference ruling. Following the same ruling, the Court then held that the prohibition of online sales was not objectively justified noting that personalised advice and information on products could be offered via an interactive video link or a hotline. The Court also confirmed that the agreement could not benefit either from the VBER or from the individual exemption under Article 101(3) TFEU.

Comment. The Paris Court of Appeal's ruling confirms the FCA's uncompromising stance, in line with the ECJ and the European Commission's 2010 vertical guidelines, according to which the prohibition of online sales amounts to a restriction of passive sales to end users which cannot benefit from a block exemption. Following this ruling (which may be subject to further appeal before the French Supreme Court), it is clear that the only means to exempt a ban on online sales is to assess the clause under Article 101(3) TFEU, which remains a difficult task.

EU: European Commission publishes final commitments in e-books investigation

Summary. On 13 March 2013, the European Commission (Commission) published the summary of its decision to accept binding commitments from Apple and four publishers after preliminary findings of a concerted practice in relation to the pricing and distribution of e-books in the EEA.

Background. Article 101 (Article 101) of the Treaty on the Functioning of the European Union prohibits cartels and other agreements or concerted practices that restrict competition. The European Commission may terminate Article 101 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 Commission can impose a fine on the company of up to 10% of worldwide turnover for failure to respect the commitments imposed (Article 23, Modernisation Regulation (1/2003/EC)).

The Commission began proceedings against Apple and five publishing houses (Hachette, Harper Collins, Holtzbrinck/Macmillan, Simon & Schuster and Pearson/Penguin) in December 2011. The Commission found that, prior to 2009, four of the publishers (Hachette, Harper Collins, Holtzbrinck/Macmillan and Simon & Schuster) communicated their concerns to one another over the prices set by Amazon for e-books, which were at or below the wholesale price. As a reaction to this, the publishers intended to enter into agreements with retailers whereby they would switch from a wholesale pricing model, where the retailer determines prices, to an agency model, where the publisher determines the prices at which e-books would be sold. The publishers initially planned to enter into such an agreement with Apple, then subsequently with other online retailers, such as Amazon.

Facts. The key terms of the agreement entered into by the publishers and Apple included a retail price 'most favoured nation' (MFN) clause, maximum retail price grids, and provision for commission to be paid to Apple. The MFN clause meant that each publisher would have to match on Apple's iBookstore any lower prices offered for the same e-book from other online retailers. The Commission took a preliminary view that the clause acted as a 'commitment device' which would force retailers such as Amazon to accept the change to the agency model of pricing or risk being denied access to the four publishers' books. The Commission considered that the conduct of the parties "amounted to concerted practice with the object of either raising retail prices of e-books in the EEA, or preventing the emergence of lower prices of e-books in the EEA."

Between September and December 2012, the four publishers and Apple drafted and finalised commitments to counteract the harm perceived by the Commission's preliminary findings. The Commission accepted commitments by the parties, including termination of the agency agreements in the EEA. The publishers additionally accepted undertakings in relation to the termination of any agency agreements with other retailers which constrained their ability to determine prices and promotions. For five years the publishers and Apple will not be able to enter into any agreement relating to the sale of e-books in the EEA that contains an MFN clause; and for two years publishers cannot restrict the ability of e-book retailers to set prices or offer discounts to customers.

In April 2013, Pearson/Penguin announced that it had also offered to settle the case on "substantially the same terms" as the other publishers.

Comment. The increasing use of digital media has led to a number of antitrust cases on both sides of the Atlantic. In the US, for example, agreements between Amazon and Random House, Penguin, Hachette, Simon & Schuster, Harper Collins, and Macmillan in relation to e-books are also being investigated in the US. A month prior to the publication of the Commission's decision (on 15 February 2013), a class action was filed in New York by three bricks-and-mortar book stores (Book House, Fiction Addiction and Posman Books) alleging that Amazon has entered into contracts with the publishers to establish that Amazon could use digital rights management technology, with the effect that a customer purchasing an e-book would be restricted to reading that book on an Amazon Kindle device or through a Kindle app. This case is also part of a wider interest in price relationship agreements (PRA) (agreements which set prices by reference to other transactions). Last year, for example, the UK Office of Fair Trading published a report on PRA.

Czech Republic: REWE fined for non-compliance with merger clearance commitments

Summary. The Czech Competition Office (CCO) has fined REWE Zentralfinanz eG (REWE) for non-compliance with the commitments in relation to is 2008 acquisition of the Plus retail chain.

Background. Section 17(4) of the Czech Competition Act (the CCA) provides that the CCO may make a merger clearance subject to fulfilment of commitments. Sections 22a(1)(e) and 22a(2) of the CCA provide that failure to fulfil such commitments is an offence, for which the offender may be fined up to CZK 10,000,000 (approx. EUR 400,000) or up to 10% of the net turnover achieved by the undertaking in the last accounting period.

Facts. In February 2013, the CCO fined REWE for non-compliance with the commitments of a merger clearance relating to acquisition of PLUS – DISCOUNT spol. s r.o. (Plus) in 2008, which put the Plus retail chain under the same ownership as Billa and Penny Market. REWE was obliged to sell one outlet from its portfolio in each of four selected regions where its market share on the market for the retail sale of consumer goods would be over 40% post-merger. REWE failed to meet this commitment even after several postponements and an adjustment of the commitment and was fined with CZK 23.89 million (approximately EUR 983,000). The decision is not legally binding yet as REWE has appealed.

Comment. This is the first time a fine has been imposed for non-compliance with the commitments set forth in a merger clearance in the Czech Republic. The amount of the fine proves that commitments set out in a merger clearance decision cannot be taken lightly.

SUPERMARKETS/GROCERIES RETAILING

UK: OFT and Tesco settle CAT appeal of dairy investigation decision

Summary. The Competition Appeal Tribunal (CAT) has issued a consent order ending Tesco's appeal in relation to the Office of Fair Trading's (OFT) 2011 Dairy Retail Price Initiatives decision (Dairy Investigation Decision), following a settlement agreement between Tesco and the OFT that reduced Tesco's fine to £6.5 million (the Settlement).

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)).

The CAT has jurisdiction to hear appeals against OFT decisions brought by a party to the agreement which was subject to the decision as to whether the Chapter I and Chapter II prohibitions have been infringed (section 46, Competition Act 1998).

Facts. On 10 August 2011, the OFT issued a decision fining four supermarkets and five dairy processors a total of £49.51 million for breaching the Chapter I prohibition, including a total fine of £10.43 million on Tesco. The OFT considered that the parties had allegedly co-ordinated price increases for certain dairy products through indirect exchange of retail price pricing intentions in 2002 and/or 2003, and that Tesco had allegedly engaged in a separate infringement relating to the price of cheese in 2002 and 2003. Tesco appealed the decision to the CAT, claiming that the OFT had insufficient evidence to support its conclusions, and that the penalty imposed was excessive and disproportionate.

The CAT ruled on 20 December 2012 that the OFT had insufficient evidence for five of the eight alleged exchanges of information, but upheld the OFT's conclusions on the other three occasions. The CAT stated that it would need to hear further submissions to decide whether finding fault with part of the case would lead to the total annulment of Tesco's role in a 'single' infringement, which it had arranged to hear in April 2013.

Decision. On 19 February 2013 the OFT and Tesco submitted a proposed agreed consent order to the CAT to settle the proceedings. Tesco agreed to pay a fine of £6.5 million – a reduction from the original £10.43 million originally imposed. On 26 February 2013, the CAT issued the consent order, thus bringing the appeal to an end.

Comment. The CAT's order draws a line under the lengthy dairy investigation begun nearly a decade ago.

France: French Competition Authority launches in-depth examination of Casino's acquisition of Monoprix

Summary. The French Competition Authority (FCA) has opened an in-depth examination into Casino's intended acquisition of sole control of Monoprix.

Background. Under the French Commercial Code, the FCA may launch an in-depth examination of an acquisition where it believes that it may have anticompetitive effects. The FCA will consider whether the acquisition will create or reinforce a dominant market position and whether the purchasing power of the new entity will place its suppliers in a position of economic dependence. It will then consider whether the transaction has sufficient economic benefits to outweigh any such anticompetitive effects.

In its opinion dated 11 January 2012, the FCA found that Paris's local food retail market is particularly concentrated, noting that, in Paris, Casino group accounts for more than half of the retail outlets in 54 out of 80 catchment areas, and more than 80% of outlets in 11 of those areas.

The FCA usually defines a relevant market for local food retail (as opposed to hypermarket and supermarket formats) as including all retailers with a sales area of less than 1,000m2 and hard discount retailers. According to the FCA, catchment areas for local food retail may vary from 300 to 500 meters.

Facts. On 6 February 2013, the FCA was notified of Casino's intention to acquire sole control of Monoprix, a group which operates more than 400 local food retail outlets in France.

The FCA believes that Casino's proposed acquisition of Monoprix raises serious concerns that it will harm competition. In particular, the FCA considers that the transaction is liable to bring about a significant strengthening of the Casino group in a number of shopping areas in Paris, bearing in mind the presence in such areas, alongside stores under the Monoprix or Monop' banner, of several stores under the Casino group banner (Casino, Franprix, Leaderprice).

The FCA will now conduct a more extensive consultation with market participants regarding the competitive situation in the areas concerned. It will look in particular at the question of competitive pressure exerted on Paris outlets by other forms of food trading, as well as by hypermarkets in the nearby outer suburbs. If necessary, the FCA will also consult market participants about potential remedies – such as divestment of a number of retail outlets – that may address its competition concerns.

Comments. This recent development confirms that food retailers remain firmly under the FCA's scrutiny. Consequently, and in light of the recent opinion issued on the food retail market in Paris, it is likely that the FCA will force Casino to divest a number of retail outlets to help alleviate any such competition concerns.

Australia: ACCC Investigations into allegations of Misuse of Market Power and Unconscionable Conduct in the Australian Supermarket Sector

Summary. The Australian Competition and Consumer Commission (ACCC) has provisionally concluded that Coles and Woolworths, Australia's two major supermarket chains (MSCs), may have contravened the prohibitions against misuse of market power and unconscionable conduct under the Australian Competition and Consumer Act 2010 (CCA) in dealing with supermarket suppliers.

Background. Section 155 of the CCA confers wide powers on the ACCC to obtain information, documents and evidence when investigating possible contraventions of the CCA. A notice under section 155 may be directed at anyone capable of providing information or documents relating to a possible contravention of the CCA, whether the person has engaged in contravening conduct or not. A recipient of a notice cannot refuse to provide a document on the grounds that it contains confidential or commercially sensitive information. The ACCC's approach has been to issue notices to a broad range of suppliers and businesses of interest to its investigations to ameliorate concerns from suppliers that they will be seen to have reported matters to ACCC.

Facts. Since late 2011, complaints by supermarket suppliers about the difficulties associated with the growth of the MSCs' own private label products and unfair treatment by the MSCs have been widely publicised in the Australian media. The ACCC commenced investigations in 2012 in response to these allegations. It became apparent in the early stages of the ACCC's investigations that suppliers were reluctant to speak to the ACCC on a voluntary basis for fear of the consequences. This prompted the ACCC to (i) invite industry participants to come forward on a confidential or anonymous basis; and (ii) give assurances that it would seek to maintain confidence and would not rely on this material in any action that may arise.

The allegations raised with the ACCC can be broadly grouped into two categories of conduct. Firstly, MSCs requiring extra payments or concessions from suppliers beyond the relevant original contractual terms (including, for example, by discounting products, requiring retrospective payments and returning unsold goods at the supplier's expense). Secondly, MSCs favouring or promoting private labels (including, for example, to access to shelf space).

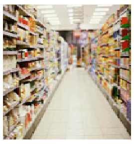
The ACCC considers that the conduct of the MSCs that has been raised in its investigations to date gives rise to the following two distinct issues for the purposes of the CCA:

- Whether the MSCs are engaging in unconscionable conduct (prohibited by s 20 of the Australian Consumer Law, which is schedule 2 to the CCA) in their dealings with suppliers; and

- Whether the MSCs are misusing their market power (prohibited by s 46 of the CCA) by discriminating in favour of their own-brand products to deter or prevent suppliers of proprietary brands from engaging in competitive conduct.

The ACCC has indicated that it has obtained considerable material in its investigations to date, including from the MSCs. However, much of the information provided has been subject to confidentiality assurances from the ACCC. Accordingly, the ACCC has commenced the "resource intensive" process of utilising its compulsory information powers under section 155 of the CCA to enable it to gain further information so that it can decide whether there is sufficient evidence to support any proceedings being instituted.

Comment. The current investigations can be viewed against the background of a number of reports and inquiries initiated by the government and the ACCC in recent years in relation to competition issues in Australia's highly concentrated supermarket sector – including the 2011 Senate Inquiry into milk pricing. The most recent investigations into the conduct of the MSCs also accord with the ACCC's new Compliance and Enforcement Policy, released in February 2013, which identifies misuse of market power (particularly in highly concentrated sectors such as the supermarket sector) as a matter that will always be a priority for the ACCC.



The ACCC will face a number of legal and practical challenges in establishing misuse of market power and/or unconscionable conduct if it commences proceedings against one or both of the MSCs. Any action will necessarily have to relate to specific instances of conduct rather than broader issues arising from the concentration in the supermarket sector. In terms of legal challenges, the ACCC will need to adduce evidence to establish the relevant conduct was carried out with the requisite "anti-competitive purpose" to make out a misuse of market power – which is notoriously difficult to do. The ACCC will similarly face difficulties establishing that particular conduct on the part of the MSCs in relation to suppliers amounts to unconscionable conduct, which must be proved by specific evidence of conduct that surpasses a traditionally high hurdle.