C L I F F O R D

C H A N C E

Briefing note

July 2014

Consumer Goods and Retail Industry Competition Bulletin

BEVERAGES, BREWERIES AND TOBACCO

- **EU: Commission approves Suntory acquisition of Ribena and Lucozade soft drinks businesses.** The European Commission has unconditionally cleared the proposed acquisition by Suntory Beverage & Food Limited of GlaxoSmithKline's Ribena and Lucozade soft drinks businesses.
- **EU: Deltafina's appeal against ruling on Italian raw tobacco cartel dismissed.** The Court of Justice of the European Union has rejected Deltafina's appeal against a 2011 decision by the General Court and upheld the company's legal responsibility for the Italian raw tobacco cartel.
- **Germany: Competition authority imposes fines in beer price fixing cartel.** The Federal Cartel Office has imposed fines on a number of brewing companies, individuals and a regional trade association for their involvement in a beer price fixing cartel.
- **UK: OFT considers undertakings in completed acquisition by Diageo plc of United Spirits Limited.** The Office of Fair Trading has published the full text of its decision to seek undertakings from Diageo plc in lieu of referring Diageo's completed acquisition of a shareholding in United Spirits Limited to the Competition Commission.
- **UK: Court of Appeal rules that Somerfield and Gallaher cannot file late appeals against OFT tobacco fines.** The Court of Appeal has ruled that the UK Competition Appeal Tribunal failed to correctly apply the law on the circumstances in which parties may be granted an extension of the time to appeal.

Sections

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DAIRY AND FOOD PRODUCTS

- **EU: Commission fines North Sea shrimp traders €28 million in price fixing cartel.** The European Commission has fined four North Sea shrimp traders for operating a price fixing cartel.
- **EU: Commission fines three producers of canned mushrooms €32 million in cartel settlement.** The European Commission has fined three producers of canned mushrooms for their alleged participation in a cartel to coordinate prices and allocate customers.
- **EU: Commission conditionally clears Crown's takeover of Mivisa.** The European Commission has cleared the proposed acquisition of Mivisa by Crown, subject to conditions which require the divestment of metal can production facilities in Spain and the Netherlands.

NON-FOOD GOODS/RETAILERS

- **Australia: Detergent companies find themselves in hot water.** The Australian Competition & Consumer Commission has filed civil proceedings against Colgate, Cussons and Unilever in the Federal Court of Australia in relation to an alleged cartel in the Australian market for laundry detergent.
- **Australia: High Court rejects consumer knowledge as a defence for misleading advertising campaigns in telecommunications sector.** The High Court has allowed an appeal by the Australian Competition & Consumer Commission against a decision of the Full Federal Court, which overturned the ACCC's decision to fine TPG Internet for misleading representations made in an advertising campaign for its ADSL2+ broadband internet service.
- **EU: Consumer goods companies file cartel damages claims against British Airways.** Consumer goods companies have filed claims against British Airways for damages following on from British Airways' role in the air cargo cartel.
- **EU: General Court reduces fines in LCD panels cartel.** The General Court has reduced the fines imposed on InnoLux and LG for their participation in the LCD panels cartel.
- **France: Paris Court of Appeal dismisses laundry detergent manufacturers' appeal.** The Paris Court of Appeal has dismissed appeals by Colgate, Henkel and Procter & Gamble contesting the French competition authority's decision, alleging a violation of the *ne bis in idem* principle, which prohibits a defendant from being penalised twice for the same infringement, and challenging the levels of fines imposed.
- **Germany: Amazon abandons price parity clauses following intervention by competition authority.** The German Federal Cartel Office has terminated its proceedings against Amazon for enforcing price parity clauses on its Marketplace platform.
- **Poland: Competition authority imposes fines on wholesalers for resale price maintenance in relation to branded watches.** The Office of Competition and Consumers Protection has fined Anyro and Jubiler, two exclusive mid-range branded watch wholesalers in Poland for imposing minimum resale prices on their distributors.
- **Poland: Competition authority imposes fines in pet foods sector.** The Office of Competition and Consumers Protection has fined Royal Canin Polska, a producer of compound diet feeds for dogs and cats, and its independent wholesale distributors in Poland, for entering into agreements prohibiting the online retail of Royal Canin's products.
- **Spain: Appeals Court partially annuls fine imposed on L'Oréal for concerted practices in the professional haircare products market.** The Appeals Court has

annulled the fine imposed by the Spanish competition authority on L'Oréal for concerted practices in the market for professional haircare products.

- **UK: OFT finds an infringement of Chapter I in mobility scooters sector.** The Office of Fair Trading has found that Pride Mobility Products Limited, a manufacturer of mobility scooters, and eight of its retailers infringed competition law by agreeing to restrictions on advertising discounts online.
- **UK: CMA closes investigation into sports bra resale price maintenance.** The Competition and Markets Authority has announced the closure, for lack of evidence, of the investigation into suspected anticompetitive resale price maintenance agreements entered into between DB Apparel UK Limited and three UK department stores.
- **Switzerland: Court upholds CHF4.8 million fine against GABA International for blocking toothpaste imports.** Federal Administrative Court has upheld the fine imposed on GABA International, a subsidiary of Colgate Palmolive, for blocking imports of Elmex toothpaste into Switzerland.
- **US: Apple to refund $32.5 million for charges incurred by children in children's mobile apps.** Apple has reached a settlement with the US Federal Trade Commission in which it has agreed to refund iTunes account holders for in-app charges incurred by children without the account holder's consent.

SUPERMARKETS/GROCERIES RETAILING

- **Australia: Competition authority tests unconscionable conduct provisions in supermarket supply contracts.** The Competition & Consumer Commission has instituted proceedings in the Federal Court of Australia against Coles Supermarkets, alleging that Coles engaged in unconscionable conduct in relation to its Active Retail Collaboration programme.

HOT TOPICS AND NEWS IN BRIEF

- **EU: European Commission consults on improving merger control.** The European Commission is consulting on proposals to reform the EU merger control regime. The plans include an eye-catching proposal to extend the European Commission's powers of review to acquisitions of non-controlling stakes where there is a competitive link.
- **News in Brief: CGRB June and October 2013 edition updates.** UK Groceries Code Adjudicator publishes guidelines; European Commission adopts communication on unfair trading practices in food supply chain.

BEVERAGES, BREWERIES AND TOBACCO

EU: Commission approves Suntory acquisition of Ribena and Lucozade soft drinks businesses

Summary. On 27 November 2013, the European Commission (the Commission) unconditionally cleared the proposed acquisition by Suntory Beverage & Food Limited (Suntory) of GlaxoSmithKline's Ribena and Lucozade soft drinks businesses (the Target Businesses).

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. The Commission can accept binding commitments from the merging parties as a condition of the Phase I clearance. The decision to open an in-depth investigation does not prejudge the final results of the Commission's investigation.

Facts. The Target Businesses are principally active in the UK and Ireland, in the production, distribution and sale of energy and sports drinks under the Lucozade brand and a number of soft drinks (non-carbonated juice, still drinks, dilutes and carbonated flavour drinks) under the Ribena brand.

Suntory is a Japanese group active worldwide in a number of sectors, mainly the production and distribution of alcoholic and non-alcoholic beverages. In the European Economic Area, Suntory is active in the soft drinks sector primarily through its subsidiary Orangina Schweppes Group and has a number of brands, for example, Orangina, Oasis, Trina, Sunny Delight, Snapple and V Energy.

Suntory and the Target Businesses, therefore, overlapped in the manufacture and supply of soft drinks which forms part of the wider non-alcoholic beverage sector. More specifically, the parties' activities overlapped in the markets for branded non-cola flavoured carbonated soft drinks and, in particular, branded carbonated energy drinks sold to retailers in the UK and Ireland.

The Commission concluded that: the overlaps were very limited; where overlaps occurred there were small market share increments; and that a number of strong players would remain in the market post-merger. The Commission also noted the frequency of entry and expansion in the market and, therefore, cleared the proposed acquisition without conditions.

Comment. In reaching its decision to clear the acquisition, the Commission considered concepts such as 'must-stock brand' and looked at closeness of competition from a demand-side perspective, concluding that Suntory is far from being the Target Businesses' closest competitor in the UK. It also noted that the parties' combined market shares would not be significantly different if a distinction were made between the branded and private label segments.

The acquisition by Suntory of US spirits company Beam has also been recently cleared by the Commission, with the Commission noting that, although there are some overlaps in the EEA in respect of the spirits produced and sold by Suntory and Beam, 90% of Suntory's spirits sales are in Japan and a number of strong competing players would remain in the EEA post-merger.

Note that Clifford Chance advised Suntory on its acquisition of Ribena and Lucozade.

EU: Deltafina's appeal against ruling on Italian raw tobacco cartel dismissed

Summary. The Court of Justice of the European Union (CJEU) has rejected Deltafina's appeal against a 2011 decision by the General Court and upheld the company's legal responsibility for the Italian raw tobacco cartel.

Background. In October 2005, the European Commission (the Commission) fined four companies for their involvement in the Italian raw tobacco cartel. Although Deltafina was initially granted conditional immunity, it was subsequently fined €30 million for failing to meet its on-going cooperation obligations by revealing to the other companies involved that it had applied for leniency before the Commission had the opportunity to carry out investigations into the cartel. Deltafina's appeal to the General Court was dismissed on 9 September 2011 and Deltafina appealed to the CJEU.

Facts. Deltafina submitted that the General Court failed to rule on its submission that it was entitled to conclude that it had been released from its confidentiality obligation following a meeting with the Commission on 14 March 2002. At this meeting the Commission noted Deltafina's explanation that it would be impossible not to divulge its immunity until the proposed date for inspections due to upcoming meetings with the other cartelists and the need to inform middle management. The Commission therefore requested information from Deltafina within a shorter period of time to enable it to carry out the inspections. Deltafina therefore submitted that it had not failed to fulfil its duty to cooperate. The CJEU upheld the General Court's finding that the Commission had not given prior authorisation for the disclosure by Deltafina.

Deltafina claimed that its right to a fair hearing had been infringed by the General Court, as the General Court obtained oral testimony from Deltafina's lawyer and from the Commission official in charge at the hearing. While the CJEU found that the General Court had arguably infringed Article 68 of the Rules of the Procedure of the General Court, the complex nature of the proceedings meant that overall it did not constitute an infringement of Deltafina's right to a fair hearing.

In addition, Deltafina claimed that the General Court failed to adjudicate within a reasonable time – the proceedings lasted 5 years and 8 months. The CJEU, however, found that Deltafina had provided no evidence that the failure to adjudicate within a reasonable time could have affected the outcome of the dispute, although the CJEU did note that the General Court had failed to adjudicate within a reasonable time, since the duration was not justified by the difficulty of the case.

For their cooperation with the Commission, Deltafina and Mindo (previously Dimon Italia) both received a 50% reduction in the amount of the fines imposed. Deltafina argued that it should have received a greater reduction than Mindo since Deltafina had provided more valuable cooperation and was the first to cooperate with the Commission. The CJEU upheld the General Court's finding that this plea was inadmissible since it was raised for the first time at the hearing before the General Court.

Comment. The CJEU's finding that the General Court failed to adjudicate within a reasonable time gives Deltafina the right to bring a damages action before the General Court. In November 2013, the CJEU found that the General Court had taken too long to adjudicate in a case involving appeals by three companies against fines imposed for their involvement in the industrial bags cartel. In that case the proceedings lasted five years and nine months. Kendrion, a Dutch producer of industrial bags, is the first company to have initiated legal proceedings seeking compensation – Kendrion began its action in June 2014. The fact that such damages claims will need to be raised before the General Court may, however, raise issues of institutional bias.

Germany: Competition authority imposes fines in beer price fixing cartel

Summary. The German Federal Cartel Office (FCO) has imposed fines totalling €337.7 million on a number of brewing companies, individuals and a regional trade association for their involvement in a beer price fixing cartel.

Background. The FCO's investigation into suspected price fixing agreements in the beer sector was triggered by a leniency application by Anheuser-Busch InBev Germany (AB InBev).

Facts. The FCO found that the parties had been involved in price fixing agreements between 2006 and 2008 which resulted in price increases of between €5 and €7 per hectolitre for draught beer and €1 for a 20 bottle crate of bottled beer. The FCO also found that additional price increases had been agreed at a regional level at meetings held by the North Rhine-Westphalia brewery association in 2006 and 2007.

In January 2013, the FCO imposed fines totalling €106.5 million on five of the brewing companies involved and seven individuals. Four of the five breweries that were fined cooperated with the FCO's investigation and agreed to a settlement which was taken into account as a mitigating factor in the calculation of fines. AB InBev received full immunity from fines.

In April 2014, fines totalling €231.2 million were imposed on a further six brewing companies, seven individuals and the brewery association.

Comment. Enforcement action against cartels has been a priority of the FCO for many years and the present case highlights that the FCO is willing to take action, not only against companies involved, but also individuals and trade associations. Carlsberg Deutschland and Radeberger Lasabro have both appealed the FCO's decision.

UK: OFT considers undertakings in completed acquisition by Diageo plc of United Spirits Limited

Summary. On 6 February 2014, the Office of Fair Trading (OFT) published the full text of its decision to seek undertakings from Diageo plc in lieu of referring Diageo's completed acquisition of a shareholding in United Spirits Limited to the Competition Commission (CC).

Background. Under the pre-existing UK merger regime, the OFT was required to refer completed mergers to the CC if the OFT believed that a relevant merger situation had been created and this had resulted, or have may been 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 OFT could, in lieu of a reference to the CC, accept undertakings that the OFT considered were appropriate for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effect which has or may be expected from it (section 73, 2002 Act).

The new UK merger regime came into effect on 1 April 2014 (see April 2014 Client Briefing, **The New UK Competition Regime** for further information).

Facts. On 4 July 2013, Diageo completed its acquisition of a 25.02% interest in United Spirits. A shareholder agreement between Diageo, United Breweries (Holdings) Limited (UBHL) and Kingfisher Finvest India Limited requires UBHL to vote using its shareholding of 11.08% as directed by Diageo, effectively giving Diageo a 36.1% voting right in United Spirits.

In addition to its voting rights, Diageo has the right to appoint several members of the key executive management and the majority of the non-independent directors on the board. The OFT therefore considered that Diageo has acquired at least material influence over United Spirits so that Diageo and United Spirits have ceased to be distinct.

Diageo manufactures and supplies spirits, wine and beer worldwide and owns a number of spirits brands. United Spirits is based in India and manufactures and supplies spirits in the UK and other countries, selling in the UK through its Glasgow based subsidiary Whyte & Mackay Limited. In light of the significant overlaps between the activities of the parties, the parties offered an undertaking to divest all of Whyte & Mackay's blended Scotch whisky brands and private label whisky operations in lieu of reference to the CC.

The OFT (now the Competition and Markets Authority) is considering whether to accept the undertaking in lieu. While considering that the proposed divestment would be sufficient to remedy the competition concerns it had identified, the OFT expressed concern that the number of possible buyers of the divested business could be low and that a number of interested purchasers may have strong competing whisky brands potentially raising competition concerns in their own right. The OFT therefore concluded that any undertaking in lieu should contain an upfront buyer provision.

Comment. In May 2014, United Spirits announced that, subject to regulatory approvals in India and the UK, it had agreed to sell the Whyte & Mackay unit to Philippines based brandy group Emperador for £430 million. This continued the OFT's practice of requiring upfront purchasers for cases involving undertakings in lieu of a referral to the CC. Previous consumer goods mergers where the OFT required an upfront buyer include *Nakano/Premier*, *Boparan Holdings/R F Brookes/Avana Bakeries* and *Princes/Premier Foods*.

UK: Court of Appeal rules that Somerfield and Gallaher cannot file late appeals against OFT tobacco fines

Summary. After the UK Competition Appeal Tribunal (CAT) quashed the Office of Fair Trading's (OFT) tobacco investigation decision on appeal, the CAT granted Somerfield and Gallaher, who had originally settled with the OFT, the right to appeal the decision over two years after its right to appeal had expired. The Court of Appeal has now ruled that the CAT failed to correctly apply the law on the circumstances in which parties may be granted an extension of the time to appeal.

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. 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 agreements with the OFT.

In June 2010, Imperial, Asda, Co-operative Group, Morrisons, Safeway and Shell appealed the OFT 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.

In August 2012, the OFT said that, following the successful challenge of its decision at the CAT, it would refund the £6.7 million penalty imposed on TM Retail as part of its 2008 settlement agreement with the retailer. 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 the OFT decision.

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 decision. On 27 March 2012, the CAT ruled that the time for appeal should be extended on the ground that the circumstances in this case were "exceptional" since 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 (see CGRB June 2013 edition, **UK: Exceptional developments in the aftermath of the OFT tobacco investigation**).

Facts. The OFT appealed the decision of the CAT to the Court of Appeal, stating that the CAT had incorrectly applied rule 8(2) of the Competition Appeal Tribunal Rules 2003, which prohibits the CAT from extending the time limit for appeal unless it is satisfied that the "*circumstances are exceptional*".

The Court of Appeal allowed the appeal, stating that: (i) the doctrine of legitimate expectation was not applicable to the facts of this case; (ii) the basis on which Somerfield and Gallaher had entered into the settlement agreements had not been undermined; (iii) that successful appeals against the OFT decision by other parties was no reason for holding that there were exceptional circumstances for justifying an extension of time in this case; and (iv) in any event, there were no good reasons for Somerfield and Gallaher having failed to appeal the decision in time.

Comment. In its judgment, the Court of Appeal placed emphasis on the fact that Somerfield and Gallaher entered into the settlement agreements with full knowledge of the arguments advanced by the OFT in its investigation against the companies. They also had a proper opportunity to appeal the OFT decision, notwithstanding the fact that they had entered into settlement agreements with the OFT. The terms of the settlement agreements meant that they would have faced adverse financial consequences had they chosen to appeal, but they had assumed those obligations voluntarily.

The Court of Appeal decision underlines the importance of each individual company to a multi-party investigation to carefully evaluate the risks of entering into settlement, and the terms of any such settlement. The Court of Appeal placed great emphasis on the requirement of finality and legal certainty, which may sometimes lead to uncomfortable final outcomes, especially in multi-party investigations. Gallaher and Somerfield have chosen not appeal the Court of Appeal's decision.

DAIRY AND FOOD PRODUCTS

EU: Commission fines **North Sea shrimp traders €28 million in price fixing cartel**

Summary. The European Commission (the Commission) has fined four North Sea shrimp traders a total of €28.7 million for operating a price fixing cartel. The Commission found that Heiploeg, Klaas Puul, Kok Seafood from the Netherlands and Stührk from Germany agreed to fix prices and share sales volumes of North Sea shrimp in Belgium, France, Germany and the Netherlands. Klaas Puul received full immunity from fines under the Commission's 2006 Notice, as it was the first to provide information about the cartel.

Background. Article 101 of the Treaty of the Functioning of the European Union prohibits cartels and other agreements or concerted practices that restrict competition. The Commission's 2006 Guidelines on the method of setting fines (2006 Guidelines) set out the principles which will guide the Commission when it sets fines. The maximum fine is capped at 10% of group turnover. The Commission has discretion to reduce the fines in a way that takes into account the characteristics of the companies and their differences in participation in the infringement.

Facts. The Commission's investigation started with unannounced inspections in March 2009, with a Statement of Objections following in July 2012.

In its press release the Commission states that the cartel took the form of a range of informal bilateral contacts primarily between Heiploeg and Klaas Puul, but also involving Stührk and Kok Seafood. These contacts covered a wide range of business activities, including purchase prices from fishermen, conduct towards other traders on the market, market sharing, and prices charged to specific important customers that often set the benchmark price for other customers.

According to the Commission, the purpose of the cartel was to manage the market by stabilising the suppliers' market shares in order to facilitate price increases and stimulate profitability. The cartel affected the EU market and sales in Belgium, Germany, France and the Netherlands in particular. The companies involved had high combined market shares in the European Economic Area, estimated to be around 80%. The decision of the Commission has not yet been published. It will be published once confidentiality issues have been dealt with.

Comment. It is clear from the Commission's press release that one of the companies invoked its inability to pay the fine under paragraph 35 of the 2006 Guidelines. In the Dutch media it is assumed that this company was Heiploeg, which went bankrupt only a few months after the fine was imposed. The Commission assessed the application on the basis of a financial and qualitative analysis of the ability of the company concerned and its shareholders to pay the final amount of the fine imposed, taking into account the likely effect such payment would have on the economic viability of the company and on whether there would a significant loss in asset value as a result of the fine. As a result of this assessment, the Commission rejected the application. Although parts of the Heiploeg business were subsequently acquired by Parlevliet & Van der Plashas, it seems unlikely that the fine will actually be paid to the Commission. Heiploeg and Stührk have appealed the Commission's decision to the General Court seeking the annulment of the Commission's decision or, in the alternative, a reduction in the fine.

EU: Commission fines three producers of canned mushrooms €32 million in cartel settlement

Summary. The European Commission (the Commission) has fined three producers of canned mushrooms, Lutèce, Prochamp and Bonduelle (the Producers) approximately €32 million for their alleged participation in a cartel to coordinate prices and allocate customers.

Background. Article 101 of the Treaty of the Functioning of the European Union prohibits cartels and other agreements or concerted practices that restrict competition. Companies can apply to the Commission under the terms of its leniency notice (2006/C 298/11) to obtain total immunity or leniency from fines. A settlement procedure was introduced in June 2008 to simplify and speed up cartel investigations. The companies may benefit from shortened proceedings and a 10% reduction in fines under the Commission's settlement notice (2008/C 167/1). The Commission's investigation was initiated with unannounced inspections in February 2012.

Facts. According to the Commission, the Producers aimed to stabilise their market shares and stop the decline of prices by exchanging confidential information on tenders, and agreeing on minimum prices and volume targets. The Commission considered that this covered sales across Europe for over a year and potentially affected a large number of consumers.

The Commission has imposed fines totalling €32.2 million on the Producers. In setting the level of fines, the Commission considered the Producer' sales of the products concerned in the EEA, the serious nature of the infringement, its geographic scope and duration.

Lutèce received full immunity for revealing the cartel's existence and Prochamp received a 30% reduction for co-operating with the investigation under the terms of the leniency notice. The Commission further reduced the fines imposed on all three producers by 10% under the settlement notice, as they acknowledged their participation and liability in respect to the cartel.

Proceedings were also opened against Riberebro, another canned mushrooms producer, however the investigation will continue for Riberebro under the standard investigation procedure.

Comment. This the fourteenth settlement decision since the introduction of the settlement procedure for cartels in 2008. This is also the second alleged cartel to be penalised by the Commission in the food sector recently, following the shrimp cartel decision at the end of 2013, where none of the parties took advantage of the settlement procedure, and only the whistle-blower, Klaas Puul, benefitted from a reduction in its fine under the leniency notice. The Commission has also announced that the results of its study into potential restrictions of competition on food retail markets will be published in autumn 2014.

EU: Commission conditionally clears Crown's takeover of Mivisa

Summary. The European Commission (the Commission) has cleared the proposed acquisition of Mivisa Envases, S.A.U. (Mivisa) by Crown Holdings, Inc. (Crown) subject to conditions which require the divestment of metal can production facilities in Spain and the Netherlands.

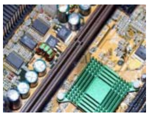
Background. Under the EU Merger Regulation (139/2004/EC) (EUMR), the Commission must clear a transaction at the end of its Phase I investigation unless it finds that the merger would significantly impede effective competition in the relevant markets. If serious doubts are raised, then it must open an in-depth Phase II investigation if it has not received an offer of appropriate remedies (Article 6(1), EUMR). The Commission can accept binding commitments from the merging parties as a condition of the Phase I clearance (Article 6(2), EUMR). The decision to open an in-depth investigation does not prejudge the final results of the Commission's investigation. The transaction was notified to the Commission on 24 January 2014.

Facts. Mivisa of Spain and Crown of the US both manufacture metal food cans used for fruit and vegetables, fish and seafood, pet food and ready-made meals.

The Commission expressed concerns that post-acquisition, the level of competition in the relevant geographic market (Benelux, France, Spain and Portugal) would have been too weak to avoid price increases. The transaction as originally notified, in the Commission's view, would have given the merged entity significant market shares and would have eliminated Mivisa, an important and aggressive competitor, from the market.

The Commission considered that the lack of alternatives would have ultimately resulted in price increases for customers. In each area, only one sizeable competing supplier would have remained and this remaining supplier would have had limited incentives to compete with the merged entity. Other players would also have had limited ability to supply customers with large volumes and product ranges.

Crown offered commitments, including the divestment of certain metal can production facilities (in La Rioja, Murcia, Coruxo-Vigo, Ugao-Miravalles and Montmeló) and the installation of an additional production line in the Coruxo-Vigo facility so that, once divested, it will be in a position to act as a competitive constraint on the merged entity both in Spain and Portugal.



NON-FOOD GOODS/RETAILERS

Australia: Detergent companies find themselves in hot water

Summary. The Australian Competition & Consumer Commission (ACCC) has filed civil proceedings against Colgate Palmolive Pty Ltd (Colgate), PZ Cussons Australia Pty Ltd (Cussons) and Unilever Australia Limited (Unilever) in the Federal Court of Australia in relation to an alleged cartel in the AUD500 million market for laundry detergent.

Background. It is alleged that in 2008 Colgate proposed an industry wide transition in Australia to ultra concentrate detergents. Ultra concentrates are said to be cheaper to produce, store and transport. The ACCC has alleged in its statement of claim that Colgate, Cussons and Unilever simultaneously moved as part of a project (called "Project Mastermind" by Cussons in an email) to supply ultra concentrates to the major supermarkets in Australia and ceased to supply standard concentrated laundry detergents. The ACCC further alleges that Woolworths, one of the two major supermarket chains in Australia played a key role in organising the industry transition to concentrates and was knowingly concerned in the contravention.

Facts. The ACCC alleges Colgate, Cussons and Unilever conspired with Australian supermarket chain, Woolworths, to give effect to cartel and other anticompetitive arrangements, including:

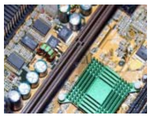
- ceasing to supply standard concentrate laundry detergents in the first quarter of 2009 and supplying only ultra concentrates from that time;
- simultaneously transitioning their laundry detergents to ultra concentrates which met certain requirements, and
- selling ultra concentrates for the same price per wash as the equivalent standard concentrated products and not passing on the cost savings to consumers.

The ACCC alleges that these arrangements denied Australian consumers the benefits of lower prices for laundry detergent products and had a significant detrimental effect on competition. The ACCC alleges that Colgate and Unilever shared market sensitive information, including information about when they would increase the prices of their laundry detergents. In contrast the ACCC noted that in New Zealand, when similar packs were launched, there was significant discounting, and that the collusion in Australia resulted in a loss to consumers of an estimated AUD146 million in value over four years that would have otherwise arisen from competition among the suppliers.

In a mark of the allegation's seriousness, the ACCC is seeking pecuniary penalties against Woolworths, Colgate and Cussons which could run as high as AUD100 million or 10% of each company's annual turnover.

Unilever has obtained conditional immunity from legal proceedings under the ACCC's leniency programme after the company came forward with information about the alleged conduct. The immunity is conditional upon continuing full cooperation from Unilever with the ACCC's investigation.

Comment. The factual circumstances of this case appear to have arisen in 2008 prior to the commencement of Australia's criminal cartel laws and, as such, are based on the civil prohibitions in the Competition and Consumer Act 2010 in relation to contracts, arrangements and understandings which have the purpose, effect or likely effect of substantially lessening competition and those which fix, control or maintain prices. Unilever and relevant executives have gained conditional immunity from legal proceedings by cooperating with the ACCC under its Immunity Policy for Cartel Conduct. The case is, therefore, another which demonstrates the effectiveness of these programmes by antitrust agencies and, as it involves an immunity applicant, underlines the difficulties that Colgate and Cussons may face in defending this case. The case is also interesting in that it highlights the importance of compliance programmes and audits. Newspaper reports suggest that the possible anticompetitive behaviour was first drawn to the attention of management at the suppliers by the New Zealand Commerce Commission. Unilever conducted a compliance audit and was the successful "first in" immunity applicant on discovering the conduct in Australia.



Australia: High Court rejects consumer knowledge as a defence for misleading advertising campaigns in telecommunications sector

Summary. The High Court has allowed an appeal by the Australian Competition & Consumer Commission (ACCC) against a decision of the Full Federal Court, which overturned the ACCC's decision to fine TPG Internet (TPG) AUD2 million for misleading representations made in an advertising campaign for its ADSL2+ broadband internet service. The case is a warning to all companies operating in the retail sector in Australia that fall foul of consumer protection laws.

Background. In recent years, the ACCC has enthusiastically enforced its conduct laws against telecommunications companies that fail to provide transparent pricing.

In September 2010, TPG launched an advertising campaign offering consumers an attractive price of AUD 29.99 per month for its ADSL2+ broadband internet service. However, this offer was subject to customers bundling the broadband with a home telephone service, plus a setup fee and a deposit for telephone charges. Following correspondence with the ACCC, TPG revised the form of its advertisements. Despite these amendments, the ACCC commenced proceedings against TPG, alleging that the advertisements were misleading and deceptive because of the discrepancy between the headline offering the broadband services and the less prominent terms qualifying that offer.

Facts. On 12 December 2013, the High Court allowed an appeal by the ACCC overturning the decision of the Full Federal Court and reinstating the original AUD2 million fine against TPG. The High Court held that the Full Federal Court erred by disregarding the crucial importance of the "*dominant message*" of the advertisements and by failing to appreciate that the misleading nature of the advertisements was not neutralised by the knowledge of consumers that ADSL2+ services may be offered as a "bundle".

The High Court has arguably taken a different approach to its decision in *ACCC v Google*, where Google was found not liable for misleading representations made by advertisers in sponsored links on Google's search results pages. In that case, the High Court found there was no liability because of the knowledge of the "*ordinary and reasonable*" user of search engines meant the consumer understood that the sponsored links were statements made by advertisers and not Google.

Comment. The High Court's decision demonstrates the significant penalties that are now being handed down by courts in Australia for breaches of consumer protection laws. This trend is worth noting by companies operating in retail sectors across Australia, particularly telecommunications, supermarkets and fuel, which have been identified by the ACCC as priority sectors for enforcement. The High Court's interpretation of the law is likely to capture a wider range of misleading and deceptive conduct and means that what counts in determining liability is the dominant message of an advertisement and the overall impression given to the consumer, not the particular knowledge base of the target audience.

EU: Consumer goods companies file cartel damages claims against British Airways

Summary. Consumer goods companies have filed claims in the High Court of England and Wales against British Airways (BA) for damages following on from BA's role in the air cargo cartel.

Background. Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Chapter I of the Competition Act 1998 prohibit cartels and other agreements or concerted practices that restrict competition. EU law requires damages to be available as a remedy for those affected by infringements of Article 101 or 102 of the TFEU and applicants may bring claims before the national courts of Member States and seek damages.

On 9 November 2010 the European Commission (the Commission) fined British Airways and 10 other airlines over €799 million for operating a worldwide price fixing cartel for air cargo services.

British Airways has since been the target of several private damages actions in several countries resulting from its role in the cartel.

Facts. On 12 July 2013, a new damages claim against British Airways was filed in the High Court of England and Wales by ten BA customers: Adidas, Blue Skies Holding, Delphi Automotive Systems, East African Growers, Johnson Controls, Latour, LG Electronics, Michelin, Tetra Pak and Van Zanten. The claimants are understood to be seeking reimbursement of

excessive prices they paid for BA's air cargo services during the operation of the cartel.

Comment. This is the fifth lawsuit filed in the High Court against BA, including two class action suits involving over 750 plaintiffs. BA has also recently been fined by the Swiss competition authority for its participation in the cartel, had its executives jailed in the US and has been the target of further damages actions in the US, France and the Netherlands. This ongoing fallout clearly illustrates that engaging in anticompetitive behaviour can have far more wide-reaching implications that just the initial regulatory fines.

EU: General Court reduces fines in LCD panels cartel

Summary. The General Court has reduced the fines imposed on InnoLux and LG for their participation in the LCD panels cartel to €288 million and €210 million respectively.

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

On 8 December 2010, the Commission announced that it had fined six manufacturers of LCD panels for their participation in a cartel which involved price fixing and exchanging commercially sensitive information. The total fines imposed amounted to over €648 million, including €300 million for InnoLux and €215 million for LG. (see CGRB May 2011 edition, **EU: Commission fines LCD panel cartel €649 million**). InnoLux and LG appealed to the General Court for annulment of the Commission's decision or a reduction in the level of their fines.

Facts. On 27 February 2014, the General Court reduced the fines imposed on InnoLux and LG by €12 million and €5 million respectively. InnoLux's fine was reduced on the basis that it had included sales of categories of LCD panels which were not covered by the infringement decision when submitting its figures to the Commission. Since it was common ground between the parties that these figures should not be included in the calculation of the fine, the fine was reduced accordingly.

InnoLux also submitted that the Commission erred by taking into consideration direct EEA sales of transformed products since there was no finding of an infringement in relation to finished products. The General Court dismissed this argument on the basis that the Commission had not taken into account the full value of the finished products but only the proportion which corresponded to the value of the LCD panels.

LG's fine was reduced by €5 million on the basis that, since LG was granted full immunity for 2006, January 2006 should have been excluded from every stage of the calculation of the fine. LG's submissions seeking immunity for 2005 were dismissed by the Court, which noted that an applicant should provide all relevant information when submitting a leniency application. LG's submission concerning the inclusion of internal sales (which accounted for 81% of the value used by the Commission to calculate the fine) was dismissed by the General Court.

Comment. In early May 2014, LG Display and InnoLux filed appeals to the Court of Justice of the European Union. These grounds for appeal focus on how the Commission calculated the fines, in particular using finished electrical goods as the basis for the fine.

France: Paris Court of Appeal dismisses laundry detergent manufacturers' appeal

Summary. The Paris Court of Appeal has dismissed appeals by Colgate Palmolive (Colgate), Henkel and Procter & Gamble (P&G) contesting the French competition authority's (FCA) decision, alleging a violation of the *ne bis in idem* principle, which prohibits a defendant from being penalised twice for the same infringement, and challenging the levels of fines imposed.

Background. On 8 December 2011, the FCA imposed fines totalling €361 million on the four major laundry detergent manufacturers in France – Colgate, Henkel, P&G, and Unilever – for their participation in anticompetitive agreements on pricing and promotions. All of the companies involved applied for leniency, with Unilever being granted immunity from fines, and a reduction in the fines imposed on Henkel, P&G and Colgate of 25%, 20% and 15%, respectively. In setting the level of

fines, the FCA applied the European Commission's 2011 notice on the setting of fines (the Notice) for the first time.

The FCA's decision was issued several months after the European Commission (the Commission) imposed fines on Unilever, Henkel and P&G for their participation in a powder detergents cartel.

Colgate, Henkel and P&G appealed the FCA's decision, claiming, in particular, a violation of the *ne bis in idem* principle, as well as a violation of the principle of non-retroactivity.

Facts. The Paris Court of Appeal upheld the FCA's decision and the levels of the fines imposed.

The Court firstly dismissed any violation of the *ne bis in idem* principle, which prevents a defendant from being penalised twice for the same infringement. The Court firstly made reference to a letter from the Commission explicitly stating that the two cases were distinct and that the FCA continued to have jurisdiction over the practices which had occurred in France. The Court further clarified that the EU and French practices were distinct by virtue of their object, products and geographical scope.

Consequently, according to the Court, these practices could not be considered as a "single and continuous infringement" within the meaning of European law and they could, therefore, be subject to separate fines without any obligation on the FCA to take into account the fines previously imposed by the Commission.

In light of the above, the Court also confirmed the FCA's view that the undertakings could be subject to different leniency rankings under the different procedures. Indeed, Henkel, which was the first to apply for leniency with respect to the Commission investigation, but second with respect to that conducted by the FCA, claimed that it should have benefited from full immunity in relation to the French practices as well, since it was the first to blow the whistle on the anticompetitive practices at both the European and French level. However, the Court rejected this claim. It took the view that Henkel's immunity application to the European Commission did not contain elements allowing the FCA to open investigations in France.

The Court further considered that the application of the Notice to offences committed prior to its adoption is not contrary to the principle of non-retroactivity, as the approach set out in the Notice is in line with the existing law. Finally, the Court confirmed the FCA's approach to sales valuation and its assessment of the gravity of the infringement and its damage to the economy.

Comment. This case, which is the most important leniency case investigated by the FCA to date, clearly shows the difficulty and lack of legal certainty that might arise for companies involved in parallel leniency regimes (EU and national regimes). Companies, when deciding when and where to apply for leniency, should go simultaneously to all the competition authorities that might investigate the case and make sure that the elements and facts contained in the leniency application will allow such authorities to do so.

Germany: Amazon abandons price parity clauses following intervention by competition authority

Summary. The German Federal Cartel Office (FCO) has terminated its proceedings against Amazon for enforcing price parity clauses on its Marketplace platform after the company fulfilled the requirements set by the FCO.

Background. Under the price parity clauses Amazon used in its contractual conditions with third party sellers trading on its Marketplace platform, the sellers were restricted from selling products they offer on Amazon's Marketplace cheaper through any other sales channel.

Facts. In a case summary, the FCO stated its view that the Amazon Marketplace could be characterised as horizontal cooperation between Amazon and third party suppliers, as it considered Amazon to be a direct competitor with the third party sellers who offer their products on the Amazon Marketplace platform. The relevant price parity clause was deemed to be a particularly serious restriction of competition which did not fulfil the requirements for an exemption on the basis of Article 101(3) Treaty on the Functioning of the European Union.

After Amazon deleted the price parity clauses from its contractual conditions with all sellers on its Marketplace platform and informed them that Amazon has changed its conditions and price parity strategy, the FCO terminated its proceedings in

November 2013.

Comment. The FCO's proceedings against Amazon clearly demonstrate the FCO's (along with other national competition authorities and the European Commission) continued interest in the online retail sector. The FCO has also recently taken enforcement action against HRS, an operator of a hotel booking site, for using price parity clauses in its contracts with hotel partners, and proceedings have also been initiated against Booking and Expedia for using similar price parity clauses.

Poland: Competition authority imposes fines on wholesalers for resale price maintenance in relation to branded watches

Summary. The Office of Competition and Consumers Protection (the OCCP) has fined Anyro and Jubiler, two exclusive mid-range branded watch wholesalers in Poland, PLN332,000 and PLN819,000, respectively, for imposing minimum resale prices on their distributors.

Background. The investigations began in January 2012 after the OCCP received leniency applications from both Anyro and Jubiler. The OCCP found that Anyro (since 2009) and Jubiler (since 2010) had been imposing minimum resale prices on their distributors by setting maximum rebates. The OCCP found that the policies had been introduced in reaction to the growing significance of online sales and had been applied to both traditional and Internet distribution channels. The main objective of the policies was to protect the brands' "luxury" image by preventing distributors from undercutting the prices recommended by the wholesalers across Europe.

Facts. The OCCP found evidence of email and oral communications in which Anyro and Jubiler requested their distributors to observe the price limits set by the recommended prices and maximum rebate levels. The prices were to be rounded up to the nearest zloty to avoid even minor deviations. At a later stage Anyro's distributors were also required to consult with Anyro on their marketing activities so that the restrictions imposed would not be circumvented by the offer of free gifts. The system was enforced by a set of disciplinary measures: the supplies would be stopped or the prices and payment terms would deteriorate if the distributors disobeyed. The wholesalers threatened to do so and in some cases Anyro actually did increase the prices and, required cash payments. The prices, in particular for Internet sales, were closely monitored. Fellow distributors' reports were the most efficient way of price control. Anyro and Jubiler also delegated their employees to check the prices regularly, and sometimes exchanged price reports and information.

The OCCP found that each of the wholesalers had entered into vertical price fixing agreements with their distributors. The practice took place on the Polish market for the wholesale distribution of watches but the effects were felt on the retail market. The OCCP refrained from conducting a detailed market analysis of the effects of the agreements because it is unnecessary in the case of such hardcore restrictions. The agreements clearly restricted competition by object and did not qualify for any exemption. The OCCP found that Anyro and Jubiler, as the initiators and leaders of the arrangement, intentionally violated the core principles of competition law and were, therefore, denied the benefits of leniency. At the same time, the OCCP decided not to fine the distributors because of their secondary, though active, role. In this regard it referred to its decisional practice to date and to that of the European Commission. The OCCP did not consider the case suitable for resolution by commitment decision (in particular because the practice was proved by the evidence that had already been collected at an early stage of the proceedings, led to an actual price increase, involved all distribution channels and lasted for a long period of time). When imposing the fines, the OCCP took into account the fact that the wholesalers were fully aware of the illegal nature of the policy and in fact tried to shield themselves against sanctions by limiting e-mail exchanges concerning the sanctions applied and the underlying policy.

Comment. The decisions confirm the OCCP's traditionally tough stance in relation to vertical agreements and its firm approach to resale price maintenance, although the OCCP did refrain from pursuing charges against the distributors. It did, however, emphasise that exempting the distributors from antitrust liability in such circumstances is not a rule.

Poland: Competition authority imposes fines in pet foods sector

Summary. The Office of Competition and Consumers Protection (the OCCP) has fined Royal Canin Polska (Royal Canin), a producer of compound diet feeds for dogs and cats, PLN2.1 million, and its independent wholesale distributors in Poland

between PLN11,000 and PLN372,000, for entering into agreements prohibiting the online retail of Royal Canin's products.

Background. The OCCP launched an investigation into Royal Canin and its wholesale distributors in August 2010 following complaints by retail distributors that they were refused supply of Royal Canin's products for sale online. The OCCP's investigation found that the refusals to supply coincided with the timing of complaints by vets that did not sell online to Royal Canin that they were being undercut by online retailers.

Facts. The OCCP found that from 2010, following instructions given by Royal Canin, its wholesale distributors had refused to supply pet food for retail online. Royal Canin attempted to justify the refusal to supply on the basis that the product should only be sold under veterinary supervision.

The OCCP found that the refusal to supply was not justified as diet feed is not a medical product. The restrictions could not be exempted. The agreement eliminated the competition for veterinary clinics selling in the conventional way, leading to greater interest among veterinary clinics in Royal Canin's "veterinary diet" product line and to it being recommended more frequently by those clinics.

The OCCP stated that the agreement was entered into intentionally and that this led to a rise in the retail prices of pet food (anticompetitive effects actually occurred). The profit margin on off-line sales by vets was approximately 30-40 %, and for online sales it was 10-15 %. Consumers were additionally forced to pay for the visit to the vet and in smaller localities, the products were also difficult to obtain.

Comment. The OCCP has taken a stand in defence of online sales, in line with the European Commission's approach, although in the case of the OCCP there is less emphasis on protection of the EU internal market, its primary focus being on the effect of the agreement on prices and the products' availability.

Spain: Appeals Court partially annuls fine imposed on L'Oréal for concerted practices in the professional haircare products market

Summary. On 2 April 2014 the Spanish Appeals Court (Audiencia Nacional) annulled the fine imposed by the Spanish competition authority (SCA) on L'Oréal for concerted practices in the market for professional haircare products. The Audiencia Nacional found that the SCA erred in the calculation of the fine by taking into account the total turnover of the undertaking as a reference point in calculating the amount of the fine. The Audiencia Nacional considered that the amount of the fine must be calculated on the basis of the turnover of the undertaking within the economic sector in which the infringement took place.

Background. On 2 March 2011 the SCA found that eight professional haircare product suppliers - among them L'Oréal - and the business association for the perfumery and cosmetics industry in Spain (Stanpa) had engaged in concerted practices between 8 February 1989 and 28 February 2008, infringing Article 1 of Spanish Competition Act (LDC). In particular, the SCA found that that the suppliers had exchanged sensitive commercial information, such as future price increases, in relation to haircare products for professional hairdressers. These products included, among others, shampoos, conditioners, hair tints and lacquers.

The SCA concluded that this conduct constituted a particularly serious (or hardcore) infringement of Article 1, LDC, with the maximum fine available being up to 10% of the total turnover recorded by the liable companies in the year before the year in which the fine is levied. As a result, the SCA imposed fines amounting to €51 million on seven members of the suppliers. L'Oréal's fine amounted to €23 million, while the whistleblower, Henkel Ibérica, was granted immunity.

Facts. L'Oréal appealed the decision before the Audiencia Nacional, which upheld the SCA's views on the illegality of the practices carried out by the suppliers and Stanpa. Nevertheless, the Audiencia Nacional considered that the SCA had erred in the calculation of the fine imposed on L'Oréal.

The SCA calculated the fine based on L'Oréal's total turnover, but the Audiencia Nacional considered that the fine should have been calculated on the basis of L'Oréal's turnover in the economic sector in which the infringement had taken place, that is to say, in the markets directly or indirectly affected by the infringement. Consequently, the Audiencia Nacional annulled the SCA's decision and ordered the SCA to recalculate the amount of the fine.

Comment. The ruling follows the new line of case law established by the Audiencia Nacional since the beginning of 2013 on

the method of setting fines to be imposed for anticompetitive practices. This new line appears to disregard the Communication of the SCA on the quantification of sanctions arising from violations of Articles 1, 2 and 3 of the LDC, which sets out a very specific and detailed methodology for calculating the amount of the fine, along the lines of the European Commission's 2006 Guidelines on the method of setting fines.

UK: OFT finds an infringement of Chapter I in mobility scooters sector

Summary. The Office of Fair Trading (OFT) has found that Pride Mobility Products Limited (Pride), a manufacturer of mobility scooters, and eight of its retailers (the retailers) (together, the parties) infringed competition law by agreeing to restrictions on advertising discounts online.

Background. In April 2012, the OFT opened a formal investigation into online advertising restrictions in the mobility aids sector. In October 2013, the OFT sent a statement of objections to the parties (see CGRB edition October 2013, **UK: OFT issues statement of objections for online sales restrictions in mobility scooter sector**).

Facts. According to the OFT, the parties had entered into agreements or engaged in concerted practices that prevented the retailers from advertising online prices below the manufacturer's recommended retail price for certain models of mobility scooters between 2010 and 2012. The OFT has not imposed fines since the parties' combined turnover did not exceed £20 million in the relevant financial year preceding the infringement and therefore fell within the thresholds for immunity from fines under section 39 of the Competition Act 1998 (small agreements immunity). The OFT has, however, ordered the parties to bring the arrangements to an end (if this has not already happened) and to refrain from entering into the same or similar arrangements in the future.

Comment. This is the second decision following the OFT's 2011 market study into the mobility aids sector. On 5 August 2013, the OFT issued a decision against Roma Medical Aids Limited, another manufacturer of mobility scooters, and seven of its online retailers for restrictions on online sales of motor scooters although no fine was imposed as the parties' turnover fell within the small agreements immunity.

The OFT Enforcement Director, Goods and Consumer Group, Gaucho Rasmussen, commented that the decision sends a clear message to businesses in this and other sectors that, where credible evidence is found or provided, enforcement action would be taken against arrangements that restrict the freedom of retailers to advertise their actual selling prices online.

UK: CMA closes investigation into sports bra retail price maintenance

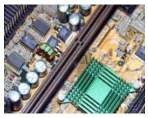
Summary. On 13 June 2014, the Competition and Markets Authority (CMA) announced the closure, for lack of evidence, of the formal investigation initiated by the Office of Fair Trading (OFT) in April 2012 into suspected anticompetitive resale price maintenance (RPM) agreements entered into between DB Apparel UK Limited (DBA) and three UK department stores.

Background. On 20 September 2013 the OFT issued a statement of objections (SO) to DBA and three UK department stores (John Lewis, Debenhams and House of Fraser) alleging that the parties had entered into a number of separate agreements between 2008 and 2011 which had the aim of increasing the prices of DBA's Shock Absorber brand of sports bras sold by each of the three department stores (see CGRB October 2013 edition, **UK: OFT issues statement of objections for sports bra retail price maintenance)**.

Facts. Following the SO, the OFT received written representations from the parties in November and December 2013 and all parties attended oral hearings at the CMA in April 2014, during which the parties submitted that certain correspondence relied on as evidence by the OFT was part of normal commercial dealings between retailers and their supplier.

In accordance with the new CMA procedure (see April 2014 Client Briefing, **The New UK Competition Regime**), a Case Decision Group was appointed to re-examine the evidence relied upon by the OFT in its SO. The CMA concluded that the parties had provided credible alternative explanations for email correspondence between the parties which materially undermined the weight placed on that evidence by the OFT and, therefore, that the CMA had no grounds for action in relation to the allegations set out in the SO.

Comment. Despite the closure of this investigation, the CMA has re-iterated that it *"considers that RPM is a serious*



infringement and it will continue to investigate suspected RPM activity, as appropriate." The investigation also serves as a cautionary tale for all companies engaging in legitimate pricing discussions to take care to avoid careless language from which competition authorities might draw inferences of anticompetitive behaviour.

Switzerland: Court upholds CHF4.8 million fine against GABA International for blocking toothpaste imports

Summary. Switzerland's Federal Administrative Court has upheld the CHF4.8 million fine imposed on GABA International, a subsidiary of Colgate Palmolive, for blocking imports of Elmex toothpaste into Switzerland.

Background. The Swiss Competition Authority's (SCA) investigation into a 1982 agreement between GABA International and its Austrian licensee Gebro Pharma was triggered by a complaint by Denner, a Swiss discount retailer, that it was unable to source cheaper imports of Elmex toothpaste from Austria as a result of the agreement.

During the investigation, the SCA discovered that a clause in the agreement prohibited Gebro from exporting Elmex toothpaste, produced under GABA's licence, to Switzerland. The SCA found that, by banning passive sales from Austria, the agreement restricted parallel imports into Switzerland and imposed a fine of CHF4.8 million (approximately €3.93 million) on GABA and a symbolic fine of CHF10,000 (approximately €8,200) on Gebro Pharma. Both companies appealed the decision to the Federal Administrative Court.

Facts. On 15 January 2014, the Court dismissed the appeals. It held that the SCA correctly assessed the agreement under the Swiss Cartel Act and did not err in applying the fine.

In the Court's opinion, the clause through which the parties restricted parallel imports had to be considered a vertical agreement aimed at restricting competition. While the Cartel Act allows for parties to justify such a restriction for economic efficiency reasons, the Court considered that they had failed to do so in the present case. The SCA's fines on GABA and Gebro Pharma were, therefore, upheld.

Comment. The President of the SCA welcomed the judgement of the Federal Administrative Court which, according to him, sends an important message to other undertakings which have been or currently are preserving territorial restrictions. In the future, it is therefore likely that the Swiss antitrust authorities will further scrutinise the conduct of companies involved in parallel imports. GABA is appealing to the Swiss Supreme Court.

US: Apple to refund $32.5 million for charges incurred by children in children's mobile apps

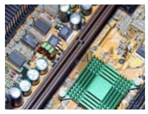
Summary. Apple has reached a settlement with the US Federal Trade Commission (FTC) in which it has agreed to refund $32.5 million to iTunes account holders for in-app charges incurred by children without the account holder's consent. The settlement is further evidence of increased consumer protection enforcement at the FTC.

Background. The settlement relates to the process by which an iTunes account holder installs an app from Apple's App Store. The App Store saves an account holder's password for 15 minutes after it is entered. During this 15 minute window it is possible to purchase apps and incur charges without having to resubmit the account holder's password. In addition, an account holder can approve previously-incurred charges without their knowledge when prompted to enter their password.

Apple offers many children's apps that allow users to incur charges within the apps. Many of these charges are for virtual items or currency used in playing a game. These charges generally range from 99 cents to $99.99. According to the FTC, Apple received tens of thousands of complaints about unauthorised in-app purchases by children. One consumer reported that her daughter spent $2,600 in the app Tap Pet Hotel.

Facts. The FTC alleged that Apple violated Section 5 of the FTC Act, 15 U.S.C. §§ 45(a), (n), because Apple does not inform account holders that children can purchase apps and incur charges during this 15 minute window without the account holder's consent and because Apple had failed to explain to account holders that password entry can finalise previous purchases.

On 15 January 2014, Apple entered into a settlement with the FTC and agreed to modify its billing practices to (i) ensure that



it obtains an account holder's express, informed consent prior to billing them for in-app charges, and ii) allow account holders to withdraw their consent to future charges at any time. Apple was required to make these changes to its billing practices by 31 March 2014. In addition, the settlement requires Apple to provide full refunds, totalling a minimum of $32.5 million, to account holders who were billed for in-app charges incurred by children accidentally or without the account holder's consent. If Apple issues less than $32.5 million in refunds to account holders within 12 months after the settlement becomes final, it must remit the balance to the FTC.

Apple CEO Tim Cook wrote a letter regarding the settlement in which he noted that a federal judge had already found that Apple had attained a "full settlement" of the matter and argued that the FTC's Complaint "smacked of double jeopardy". Apple had e-mailed anyone who had made an in-app purchase in a game designed for children to offer reimbursement. According to Cook, "Apple has led the industry by making the App Store a safe place for customers of all ages" and its parental controls "go far beyond the features of other mobile devices".

The settlement was made final on 27 March 2014.

Comment. This settlement highlights the rapid growth of and complications related to e-commerce, specifically related to how online payment systems should be designed. Companies will need to balance the consumer's desire for efficient online payment systems (e.g., Amazon's 1-Click Ordering), which benefit online retailers by limiting basket abandonment, against the consumer's desire for secure online payment systems that prevent unauthorized charges.

More generally, the FTC's actions emphasise that the mobile arena is a growing focus of the FTC's consumer protection efforts. Last year, the FTC issued staff reports addressing mobile payments and providing recommendations for the mobile industry on how to protect consumers as new payment systems come into use. The FTC's consumer protection enforcement efforts in the mobile arena are likely to continue to increase.

SUPERMARKETS/GROCERCIES RETAILING

Australia: Competition authority tests unconscionable conduct provisions in supermarket supply contracts

Summary. On 5 May 2014, the Australian Competition & Consumer Commission (ACCC) instituted proceedings in the Federal Court of Australia against Coles Supermarkets, alleging that Coles engaged in unconscionable conduct in relation to its Active Retail Collaboration (ARC) programme in contravention of Section 21 of the Australian Consumer Law (ACL). The ACCC has sought pecuniary penalties in relation to the alleged contravention.

Background. The ACCC has been conducting a broad investigation over the past two years into allegations that supermarket suppliers were among other things, being treated unconscionably by the major supermarket chains (see CGRB June 2013 edition, **Australia: ACCC Investigations into allegations of Misuse of Market Power and Unconscionable Conduct in the Australian Supermarket Sector**).

In June 2010 the Competition and Consumer Act 2010 (CCA) was amended to give the ACCC greater powers to take action for breaches of the unconscionable conduct provisions of the ACL, which is a schedule to the CCA.

The changes to the ACL were intended to give greater protection to small businesses and to allow the development of the law relating to unconscionable conduct beyond its traditional basis in Australia concerning conduct involving unequal bargaining power or a special disadvantage, to a broader commercial context between big and small businesses. Under the law, pecuniary penalties of up to AUD1.1 million per infringement can be imposed. At the time of the introduction of the law one of the areas of concern was the creation and operation of a system by larger businesses which might advantage one party to the detriment of another.

It has long been anticipated that section 46 of the CCA (misuse of market power) would be coupled with an unconscionable conduct case in terms of dealing with suppliers and that there would be a test case by the ACCC, as it has publicly indicated its willingness to test the new law in this area as part of its enforcement priorities.

Facts. The ACCC alleges that in 2011 Coles developed a strategy to improve earnings (a target of AUD16 million) by obtaining better trading terms from its suppliers. The allegation by the ACCC is that one of the ways to achieve this increase in earnings was by obtaining rebates in connection with the ARC programme. The ARC programme was based on purported benefits to large and small suppliers that the ACCC states Coles had "*asserted had resulted from changes Coles had made to its supply chain*". In particular it is alleged by the ACCC that Coles required 200 of its small suppliers to agree to a rebate within days and that Coles personnel were instructed to escalate the situation to Coles management with the possibility of the supplier being delisted if they did not agree to the rebates. The ACCC alleges in the proceedings that Coles:

- had no legitimate basis for requiring suppliers to pay the ARC rebate;
- provided misleading information to the suppliers about the ARC rebate;
- exerted undue influence and pressure and used unfair tactics against the suppliers to pay the ARC rebate; and
- took advantage of what was, and what Coles believed to be, a significantly stronger bargaining position than the suppliers.

In its defence Coles has emphasised that the programme was voluntary and had real benefits for the suppliers. Coles has further argued that the negotiations with the big suppliers demonstrate that they also perceived there to be real benefits to participating in the programme.

Comment. The ACCC's case is a significant test of the unconscionable conduct provisions. It may also be quite a difficult case for the ACCC. This is because it may be difficult for the ACCC to say that the conduct regarding each of the 200 suppliers has been "unconscionable" in the manner alleged. It will likely involve some challenges for the ACCC as it has brought the case based on a "system" (the ARC) which while including 200 small suppliers, also included some of the world's largest suppliers including Nestle (which declined to pay the rebate), Red Bull and other household brands in Australia.

It is with some irony that in this publication of CGRB there is another ACCC proceeding against Colgate and Cussons, in relation to illegal cartel conduct. In respect of this case, the Australian Financial Review reported on 12 December 2013 that in 2009 Unilever sought a 5% price increase on its laundry detergent products (alleged to be coordinated with Colgate) from Coles. Unilever is alleged to have threatened to stop supplying Coles after Coles rejected the price increase. Against the background of that type of conduct from one supplier, a key question from Coles in these recent proceedings may be whether its conduct is "unconscionable" conduct or whether it is hard bargaining between large companies to the benefit of consumers, or that it had no detriment to consumers, and, therefore, should be left to commercial parties to regulate.

The case is a reminder to any large business in Australia that regularly deals with small businesses to review its conduct and compliance systems. Having regard to this proceeding, it would be worthwhile to ensure that there are processes in place to ensure that accurate and justified costs are being imposed, there are forums for legitimate concerns and for disputes to be addressed, that staff are trained to manage and address dealing with small businesses that are reliant on the larger business and that staff understand the legal issues that arise in this area.

In the ACCC's media release, the ACCC note that they are conducting broader investigations into inappropriate conduct (thought to be misuse of market power perhaps relating to home brands) by the supermarket chains.

HOT TOPICS / NEWS IN BRIEF

EU: European Commission consults on improving merger control.

The EU Merger Regulation (139/2004/EC) (EUMR) was last overhauled in 2004, but has been reviewed twice since (2009 and 2013).

While the European Commission (the Commission) considers that the current Merger Regulation is still generally fit for purpose and contributes to the smooth running of the internal market, it recognises that there is room for improvement – singling out non-controlling stakes and case referrals as areas ripe for reform.

The Commission has outlined its proposals in a White Paper and accompanying documents, and is seeking views on the plans in a consultation window running until 3 October 2014.

Non-controlling interests

The plans would give the Commission power to review acquisitions of non-controlling stakes – essentially those that allow the exercise of material influence over commercial policy or access to commercially sensitive information – even where the shareholding acquired is as low as 5%.

Although the Commission notes that this is similar to the tests used in the UK, Germany, Austria and several ex-EEA jurisdictions, it is nevertheless a considerable widening of the Commission's remit, and the 5% threshold is actually lower than that typically applied in those other jurisdictions.

The proposed requirement for a "competitively significant link" means that only minority acquisitions that appear to be problematic from a competition perspective need to be notified. This requires a competitive relationship between the buyer and target, i.e. where they are nominally active in the same market or in vertically related markets – a surprisingly broad test that could easily be met by financial buyers with a diverse portfolio of interests, even where there are no conceivable competition concerns.

Parties to such a deal would be required to submit an Information Notice to the Commission. It is not yet clear exactly how much detail this would require, but the Commission has already indicated that it should include transaction structure and some market share information. Parties would also be obliged to wait for a period (e.g. three weeks) for the Commission to decide whether a full notification was required (in which case the parties would of course still need to prepare the Form CO, pre-notify and wait for the Commission's formal review to take place).

Case referrals

The Commission also seeks to limit the number of cases reviewed by multiple EU Member States. The proposals are designed to encourage greater use of the existing case referral provisions, particularly from Member States up to the Commission.

For example, the plans would allow parties who qualify for review in three or more Member States to file in full directly with the Commission, without having to request permission first, reducing the paperwork and time involved under the current system. The proposals also mean that where one Member State asks the Commission to review a deal, the Commission would automatically take jurisdiction for the whole EEA (unless another competent Member State objected), meaning there should be less scope for multiple parallel – and potentially divergent – reviews.

Other proposals

The Commission has also suggested a number of other simplifying and streamlining measures, including exempting entirely from review:

- full function joint ventures located and operating outside the EEA with no effect on EEA markets; and
- deals leading to no "reportable markets", i.e. where there are no horizontal or vertical overlaps (or at least requiring only an Information Notice).

The Commission has also stated that there should be greater coherence and convergence with the merger control rules of EU Member States. Its aim is to enhance cooperation and to avoid divergent decisions where there are parallel reviews. The Commission makes particular reference to some national laws that allow governments to overrule a competition authority's decision on public interest grounds (as seen in the UK with the Lloyds / HBOS merger in 2008).

Comment

The proposed reforms should be welcomed insofar as they alleviate the workload for businesses and streamline existing procedures and requirements, e.g. making case referral mechanisms more efficient. Exemption from review for non-EEA joint ventures and deals with no overlaps would be particularly good news for financial investors such as private equity houses.

However, it is already apparent that the plans could produce a number of undesirable effects or fall short of the intended aims.

Increased burden for businesses

For businesses, any extension of the merger control regime to cover non-controlling acquisitions means adding more delay and cost to those deals. By effectively seeking to lower the test for "control" where there is a competitive link, the Commission will require businesses to notify it of transactions that currently pass unbothered by merger control.

The proposed additional waiting period (while the Commission decides whether a full Form CO is required) may mean in practice that parties to time-sensitive deals feel forced to opt for a full Form CO in the first place, increasing the workload for both businesses and the Commission itself.

Effect on case referrals

It is unclear whether all of the Commission's proposals to make case referrals to and from Member States more effective will hit home. While the changes to make referrals more efficient for parties should be welcomed, the "nudge" style proposal requiring Member States to actively object to the Commission's automatic seizure of sole jurisdiction in some cases may not have a great effect where the Member State remains minded to examine the deal itself.

A European Merger Area

The Commission indicated that its long term aim is to develop a European Merger Area with a single set of rules used by itself and Member States. This would be a step change that would seemingly require unanimous support of national governments and majority support at the European Parliament, and would be a major departure from the current system of national regulation informed by, but not necessarily identical to, the EU regime.

In-depth views to follow

We will be issuing an in-depth briefing focusing on possible consequences of the proposals in due course.

News in Brief: CGRB June and October 2013 edition updates

UK: Groceries Code guidance published. Following the closure of the public consultation on 22 October 2013 (see CGRB October 2013 edition, **UK: Groceries Code Adjudicator Bill given Royal Assent**) on 18 December 2013 the Groceries Code Adjudicator (GCA) published its Guidance on investigation and enforcement functions. The GCA has subsequently published various guidelines, statements and Groceries Code clarifications, including Guidance on its complaints, disputes and escalation process published in April 2014.

EU: Commission Communication on unfair practices in the food supply chain. On 15 July 2014, the European Commission (the Commission) adopted a communication encouraging Member States to improve protection for small food producers and retailers against the unfair practices of stronger trading partners. In January 2013, the Commission published a Green Paper on unfair trading practices in the business to business food and non-food supply chain in Europe (see CGRB June 2013 edition, **EU: Food sector sees sustained interest by European competition regulators**), alongside the European Retail Action Plan, which highlighted the importance of addressing unfair trading practices in order to foster sustainable trading relationships. The Commission is particularly concerned with the differences in bargaining power which can develop due to increased market concentration. The communication suggests a number of priorities for facilitating an effective EU-wide framework against unfair trading practices. Rather than proposing regulatory action at EU level, the communication encourages Member States to ensure that they have appropriate measures in place, taking into account their national circumstances. The suggestions in the communication focus on three elements: (i) support of the voluntary Supply Chain Initiative launched in September 2013; (ii) EU-wide standards for principles of good practice; and (iii) effective enforcement at national level.

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