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Consumer Goods and Retail Industry Competition Bulletin

Over the course of the last few months, there have been a number of interesting developments in the sector. This edition of the Consumer Goods and Retail Industry Competition Bulletin includes details of the European Commission's recent adoption of the revised guidelines for cooperation between competitors. As in previous editions of the Bulletin, we also provide a round-up of the latest developments in the sector that have taken place across a wide range of jurisdictions.

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- **Romania/Bulgaria: Lidl's acquisition of Plus Romania and Plus Bulgaria approved.** The Romanian Competition Council and the Bulgarian Competition Authority have respectively approved Lidl's acquisition of Plus Romania and Plus Bulgaria from Tengelmann.

- **UK: OFT closes investigation into suspected price coordination involving a number of retailers and suppliers in grocery sector.** The Office of Fair Trading decided, on 9 November 2010, to close its investigation into suspected breaches of competition law by a number of retailers and suppliers, across a range of product areas in the UK.

- **UK: OFT considering undertakings in lieu for Asda/Netto UK.** The Office of Fair Trading is considering undertakings offered by Asda relating to its proposed acquisition of Netto's 194 UK groceries stores in lieu of a reference of the transaction to the Competition Commission.

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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BEVERAGES, BREWERIES AND TOBACCO

- **EU: Direct parent held not liable for subsidiary's breach of competition law.** The General Court has held that a company was not liable for its fully-owned subsidiary's involvement in a Spanish raw tobacco cartel, as the case file did not prove that the direct parent had dictated the offending conduct.

- **Spain: CNC fines participants in a cartel limiting sherry output.** Nine Jerez sherry producers, an industry association and a regulatory board have been fined a total of EUR 6.7 million for anti-competitive conduct.

- **UK: OFT publishes final response to CAMRA super-complaint.** On 14 October 2010, the Office of Fair Trading published its final response to a super-complaint from the Campaign for Real Ale relating to the supply of beer in pubs, having concluded that the issues raised warrant no further action.

MILK, DAIRY AND FOOD PRODUCTS

- **EU: European Commission's latest food supply chain investigation.** The next phase of an ongoing investigation into the food supply chain by the European Commission began on 16 November 2010, when a newly-created specialist forum met for the first time.

NON-FOOD RETAILING

- **Czech Republic: Fines imposed for TV component price-fixing.** The Czech Competition Office has confirmed a decision, made at first instance, to impose fines totalling CZK 51,787,000 on certain manufacturers of colour TV picture tubes on account of price-fixing.

- **EU: Commission closes preliminary investigations into Apple's iPhone policies.** The European Commission has ended two preliminary investigations of Apple policies related to its iPhone product, following certain policy changes aimed at addressing initial concerns.

- **EU: Commission conditionally clears Unilever's acquisition of Sara Lee's Household and Body Care business.** The European Commission has conditionally cleared the planned acquisition of the body and laundry care businesses of Sara Lee Corp (Sara Lee) by the Anglo-Dutch consumer conglomerate Unilever.

- **EU: Recent legal developments regarding parallel imports and counterfeit goods.** The European Court of Justice has re-affirmed the legal principles regarding parallel imports principles; at the same time, European law and enforcement practices in respect of counterfeit goods in transit may be evolving.

- **EU: Commission commits to fighting "pay-for-delay" in pharmaceutical sector**. The European Commission intends to clamp down on certain reverse payments or "pay-for-delay" arrangements in pharmaceutical patent settlements that limit the entry of generic companies to the market.

- **Germany: Authority sticks with its finding of a fuel oligopoly.** The Bundeskartellamt has announced that it will uphold its view that certain major players in the retail supply of fuel in Germany form an oligopoly, notwithstanding an appeal court having cast doubt on this analysis in August 2010.

- **Slovak Republic: Antimonopoly Office fines suppliers of cosmetics for RPM.** The Slovak Antimonopoly Office has fined ten suppliers of cosmetics in Slovakia for distorting competition through retail price maintenance.

- **UK: Pharmaceutical company fined for misuse of NHS prescription system.** Reckitt Benckiser has agreed to pay, as part of an early resolution agreement with the Office of Fair Trading, a fine of £10.2 million for effectively misusing the UK's National Health Service prescription system.

- **UK: The Office of Fair Trading has begun investigating a suspected cartel involving commercial vehicle manufacturers.**

- **UK: OFT and CC publish joint merger assessment guidelines.** The new joint merger assessment guidelines do not detail the authorities' current approach to assessing retail sector mergers, but do contain some useful statements of general application.

- **US: Midterm election results may signal end to expansion of US antitrust laws.** The recent midterm election may signal an end to recent legislative efforts aimed at expanding antitrust laws in the US, given the changed balance of power between Republicans and Democrats.

HOT TOPICS

EU: Commission adopts new guidelines for co-operation between competitors.

Summary. The European Commission (Commission) adopted, on 14 December 2010, revised guidelines and block exemptions governing the application of EU competition law to "horizontal" co-operation agreements between actual and potential competitors.

Background. The revised texts come into force on 1 January 2011, and comprise the block exemptions for research and development (R&D) and specialisation agreements and the guidelines on horizontal co-operation agreements (Guidelines). Block exemptions automatically exclude certain types of agreements from the prohibition on anticompetitive agreements contained in Article 101 (Article 101) of the Treaty on the Functioning of the European Union (TFEU), and/or EU Member States' equivalent national competition laws. Agreements that are not covered by a block exemption are not necessarily prohibited, but must be individually assessed for compliance with Article 101. The revised Guidelines provide additional guidance on the Commission's approach to applying the block exemptions, and on how to assess cooperation agreements that fall outside them. The new Guidelines include some substantial changes to the version that had been in force since 2001 – and also compared with the consultation draft published by the Commission earlier in 2010 (comparisons in each case are available on request from your usual Clifford Chance antitrust contacts).

Facts. Set out below are the changes most relevant for companies active in the consumer goods and retail sector.

Information exchange

The new Guidelines now include a section on information exchange between competitors. This covers a wide range of scenarios, including the disclosure of information via published materials, coordinated public announcements, a common third party (e.g., a trade association) and/or direct communication between competitors. The Guidelines seek to clarify the circumstances in which the Commission will consider exchanges effectively illegal even in the absence of an actual effect on competition. In particular, the Guidelines distinguish between the disclosure of an individual company's intended future prices or quantities (including future sales, market shares, territories, and sales to particular groups of consumers), which the Commission will consider as having the "object" of restricting competition, irrespective of the competitive effect, and the exchange of historic information (which the Commission will consider in light of the ensuing competitive effects).

Compared to the consultation draft, the final version contains a more explicit warning that unilateral disclosure of strategic information to a competitor can give rise to a breach, i.e., liability may arise without any "exchange" of information. For example, a company employee who receives unsolicited pricing information from a rival, whether in an email, a single meeting or an otherwise benign conversation during a chance encounter, will be presumed to have accepted and acted on that information, in breach of competition law, unless the employee (or his/her employer) states clearly that they do not wish to receive such information.

Purchasing agreements

The approach to assessing purchasing agreements does not differ greatly from that set out in the previous Guidelines published in 2001, with the Guidelines continuing to take the position that joint purchasing can usually be assumed to be permissible if the parties have a combined share of both the relevant purchasing market and the downstream selling market of less than 15%. However, the new Guidelines now contain illustrative examples which relate to joint purchasing arrangements in the retail sector.

- Example 1: 150 small retailers form a joint purchasing organisation through which they are obliged to purchase a minimum volume which accounts for roughly 50% of each retailer’s total costs, and which allows them to achieve substantial cost savings. The retailers have a combined share of 23% on both the purchasing and the selling markets and have two very large competitors. In the Commission's view, the combination of the modest market position of the retailers, the presence of other substantial competitors and the achievement of economies of scale mean that the joint purchasing organisation is unlikely to breach Article 101, notwithstanding the high degree of commonality of the retailers' costs.

- Example 2: Two supermarket chains with combined shares of between 25% and 40% on the relevant purchasing markets, and 60% on the relevant selling market, jointly purchase products which account for roughly 80% of their variable costs. In the absence of likely market entry, the Commission's view is that this would be likely to breach the competition rules as the parties have market power on the selling market and the purchasing agreement gives rise to a significant commonality of costs. This is the case even if substantial cost savings are likely to arise. The risk would be exacerbated if the parties' cost structures were already similar prior to concluding the agreement, or if they had similar margins.

- Example 3: Six large retailers, which are each based in a different Member State (and are not potential entrants to each other's markets), form a purchasing group to buy several branded products jointly (five of them also offer similar private label products). They have a combined market share of 22% on the relevant purchasing market, which is EU-wide, and in which there are three other large players of similar size. Each of the parties to the purchasing group has a market share of 20%- 30% on their national selling markets. In the Commission's view, this is likely to be permissible, as even if the parties have a combined market share of more than 15% on the purchasing market, they are unlikely to coordinate their conduct and collude on the downstream selling markets since they are neither actual nor potential competitors on those markets.

Standard terms and industry standards

The new Guidelines explain in greater detail how the Commission will assess agreements on industry standards and standard contractual terms. Standard contractual terms will usually not give rise to concerns if they are: (i) established through a transparent and inclusive process; (ii) non-binding and effectively accessible for anyone; (iii) not likely to become a de facto industry standard; and (iv) not related to price-sensitive aspects of competition (e.g., prices, rates, discounts, rebates and interest) or important characteristics of consumer goods / services. If an actual or potential restriction of competition does arise, it might satisfy the exception requirements under Article 101(3) if the standard terms produce sufficient countervailing benefits (e.g. the facilitation of price comparison by (and thus lower switching costs for) consumers, and/or reduced barriers to entry/expansion for competitors).

The guidelines give two pertinent examples of agreements between competitors regarding standardisation of product packaging. In both examples, major manufacturers agree with major packaging suppliers to implement a voluntary standard for packaging, with a view to reducing waste. However, the two examples differ in the openness of the standardisation process employed, with those differences being critical to the compliance of the arrangement with the competition rules:

- In the first example, there is no likelihood of anti-competitive effects, even though the parties represent around 85% of the market, and the standard is therefore likely to become a de facto industry practice. This is because: (i) the manufacturers that are party to the agreement include major importers, so minimising the risk that the standard will act as a barrier to entry for importers from countries with different packaging standards; (ii) the standard was agreed in an open and transparent manner, with importers able to put forward their views before the standard was eventually adopted; (iii) the standard does not specify the type of packaging materials to be used and switching costs are low and the technical details of the standard are accessible to new entrants, importers and all packaging suppliers.
- In contrast, an infringement would, in the Commission's eyes, be likely to arise in a similar scenario in which: (i) the standard is agreed only between manufacturers located within the Member State concerned accounting for around 65% of the market; (ii) there was no open consultation on the specifications adopted; (iii) the standards include detailed standards on the type of packaging material that must be used; and (iv) the specifications of the voluntary standard are not published, resulting in higher switching costs for producers in other Member States than for domestic producers.

Joint ventures

The consultation draft included a useful statement that if a parent company exercises decisive influence over a joint venture, the Commission will consider the parent and joint venture to be part of the same economic entity, such that agreements between the parent and joint venture fall outside the Article 101 prohibition. This guidance has been removed from the final version of the new Guidelines, as the Commission is awaiting the outcome of certain appeals in relation to the "single economic entity" doctrine which are pending before the EU courts.

SUPERMARKETS/GROCERIES RETAILING

France: Competition Authority recommends action to address food retail concentration.

Summary. The French Competition Authority (FCA) has issued a remarkable opinion on France's food retail sector, which concludes that the sector is too concentrated and calls for a number of radical solutions.

Facts. On 7 December 2010, the FCA issued on its own initiative an opinion on France's food retail sector, which concludes – after having examined 208 commercial zones – that the sector is too highly concentrated. The FCA has now called for a number of radical solutions to mitigate the various administrative barriers to entry and the reality that a large proportion of France's main retail operators are networks that aggregate "independent" outlets through various contractual arrangements (e.g., franchise). The FCA wants food retail chains to overhaul significantly the contractual framework traditionally used to access commercial real estate and/or to build up their networks; doing so would force retailers to abandon many traditional contractual arrangements and even to amend retroactively their existing contracts. Thus far, the FCA has threatened to prosecute retail groups if no action is taken, but the potential legal basis for antitrust enforcement is far from clear. Thus, the FCA has invited retail groups to voluntarily implement the FCA's recommendations; should retailers fail to do so, the FCA may lobby the French Parliament and the Government to pass new legislation.

Comment. Clearly, it will be interesting to monitor the extent to which retailers comply voluntarily with the FCA's recommendations, which would amount to "contractual revolution" in the sector. Depending on its perceived success, the FCA's approach may be applied in other, non-food retail contexts – and/or by regulators in other European jurisdictions.

Germany: EDEKA/trinkgut beverage store merger cleared subject to conditions.

Summary. On 28 October 2010, Germany's Bundeskartellamt ("FCO") cleared the proposed acquisition of around 200 trinkgut beverage retail stores by the EDEKA group, a food retailer, subject to the divestment of approximately 30 outlets.

Background. Over the past few years, one focus of the FCO has been the relationships between producers and retailers, as examined through the framework of general competition law. In addition, the FCO has developed its approach towards the industry through some important merger control proceedings; its decision in EDEKA/trinkgut gives a good insight into the FCO's practice in relation to retail mergers.

Facts. The transaction concerned the retailing of beverages to end consumers. The FCO seems to have adopted a product market definition that does not distinguish between different channels of distribution (beverage stores, food retail including discounters) or the type of beverages sold. Geographically the FCO examined around 80 regional markets, and found that the deal in its original form was likely to create or strengthen a dominant position for EDEKA in ten regional markets. The FCO's concerns seem to have included inter alia that EDEKA's purchasing power in respect of beverages would further reinforce EDEKA's position on the downstream retail markets.

The FCO approved the deal, subject to conditions relating to the prior disposal of several retail stores and, under certain circumstances, trinkgut's beverage logistics provider, Maxxum.

Comment. The FCO appears to have exercised a broad discretion in selecting factors relevant to different stages of analysis. For example, the FCO seems to have disregarded different focuses across various sales channels (e.g., different product ranges) when defining the product market, but considered this later when assessing competitive impact.

The FCO also examined national procurement markets for water, non-alcoholic beverages, beer (including beer-mixes), wine, sparkling wine and spirits – and whether EDEKA, REWE and the Schwarz Group form a dominant oligopoly in the procurement of non-alcoholic beverages and branded water. Ultimately, the FCO's investigation did not yield sufficient evidence to justify a prohibition of the merger based on conditions in procurement markets, but the FCO will likely keep an eye on this sector.

Finally, the decision underlines the FCO's apparent tendency to require that commitments be implemented before a transaction completes, rather than post-completion.

Romania/Bulgaria: Lidl's acquisition of Plus Romania and Plus Bulgaria approved.

Summary. The Romanian Competition Council (RCC) and the Bulgarian Competition Authority (BCA) have respectively approved Lidl's acquisition of Plus Romania and Plus Bulgaria from Tengelmann Warenhandelsgesellschaft KG (Tengelmann).

Background. Lidl and Tengelmann signed a single sale and purchase agreement covering the acquisition of the Romanian and Bulgarian retail activities of Plus, a retailer of daily consumer goods. The two acquisitions, which were inter-conditional and between the same parties, were initially notified to the European Commission (Commission) on 5 May 2010. On 28 June 2010, the Commission partly referred the transaction to the national competition authorities of Romania and Bulgaria – under Article 9(2) of the EU Merger Regulation – at the authorities' request, based on concerns that the transaction would affect competition in local daily consumer goods markets in Bulgaria and Romania.

On 30 September 2010, the BCA approved unconditionally the acquisition, by Lidl Bulgaria GmbH, of Plus-Bulgaria Targovia KD, Bulgaria Targovia EOOD, Tengelmann Real Estate International Bulgaria KD and Real Estate International Bulgaria EOOD (together "Plus Bulgaria").

Facts. The RCC examined the acquisition of Pludi Market SRL, Tengelmann Real Estate International SCS and Tengelmann Real Estate International SRL (together "Plus Romania") by Lidl Romania GmbH, WE Beteiligungs GmbH and S.C. Lidl Romania S.R.L. (together "Lidl Romania").

Based on the parties' submissions and market investigation results, the RCC considered that the relevant retail product market was the market for daily consumer goods via supermarkets and hypermarkets – and, contrary to previous Commission practice, also discounters and other similar shops (traditional/proximity shops). However, consistent with the Commission's previous practice, the RCC excluded from the relevant retail product market cash and carry shops, farmers markets, kiosks, sidewalks and petrol service stations, and the relevant geographic market was described as including all areas within a 30 minute drive circle from every Plus outlet. The parties' activities overlapped in 26 local relevant markets, 5 of which involved combined shares exceeding 25%.

The RCC also considered markets for the procurement of daily consumer goods based on different product groups, which were national in geographic scope, but left the exact definition open. The RCC considered factors such as customers' alternatives in the event of price rises, market growth rates and distribution network expansion possibilities and market entry barriers. On 1 November 2010, the RCC concluded that there was no risk of any significant impediment to effective competition on the retail or procurement markets, and approved the acquisition of Plus Romania by Lidl Romania.

Comments. The decision includes detailed analysis of the retail market by the RCC, which may be useful for the preliminary competition assessment of future transactions.

The transaction documents included a non-compete clause prohibiting the seller from holding certain participations, even if only for financial investment purposes, during the following 2 years. The RCC concluded that this provision exceeded what was "directly related and necessary" to the transaction, and required modification or analysis under Articles 5 and 6 of the Romanian Competition Law (similar to Articles 101 and 102 TFEU under EU competition law).

UK: OFT closes investigation into suspected price coordination involving a number of retailers and suppliers in grocery sector.

Summary. The Office of Fair Trading (OFT) decided on 9 November 2010 to close its investigation into suspected breaches of competition law by a number of retailers and suppliers, across a range of product areas in the UK. The investigation commenced in April 2008 and was closed in accordance with the OFT's administrative prioritisation principles.

Background. In April 2008, following receipt of substantial evidence from more than one source, the OFT opened a formal investigation under the Competition Act 1998 into suspected breaches of competition law by a number of retailers and suppliers, across a range of product areas in the UK grocery sector. The investigation examined whether suspected retail price co-ordination involving suppliers and retailers had occurred between 2005 and early 2008 (so-called A-B-C or "hub-and-spoke" information exchanges). According to the OFT, "a significant body of material (including material provided by several leniency applicants) was reviewed by the OFT".

Facts. The OFT decided to close the investigation, based on the following considerations:

- The impact of pursuing the investigation given the apparent positive influence of competition compliance initiatives across the sector;
- The deterrence and strategic significance of pursuing the investigation, given the OFT's previous and ongoing enforcement involving indirect information exchange; and

- The resource implications of pursuing the investigation.

Comment. The case closure comes after a period of significant uncertainty regarding the conduct of the case. In April 2008, a number of press reports indicated that the OFT had inspected the premises and/ or sent information requests to suppliers and retailers regarding the pricing of groceries, health and beauty products and detergents. Since then, there has been virtually no official comment regarding the case.

The OFT has conducted a number of investigations into indirect information exchanges between suppliers and retailers in the last few years. The OFT imposed a record fine of £225 million on tobacco manufacturers and several tobacco retailers for entering into a series of individual arrangements whereby the retail price of a tobacco brand was linked to that of a competing manufacturer's brand, albeit a previous allegation regarding an "A-B-C information exchange" was dropped from the final decision. That case is currently on appeal. An investigation into alleged pricing co-ordination via indirect information exchange in the dairy sector is ongoing, although a number of alleged participants have apparently entered into early resolution agreements with the OFT, and is expected to conclude this year.

The OFT emphasised in its press release that "the decision to close this investigation should not be taken to imply that the OFT would not prioritise suspected A-B-C information exchange in the future".

UK: OFT considering undertakings in lieu for Asda / Netto UK

Summary. The Office of Fair Trading (OFT) is consulting on undertakings offered by Asda relating to its proposed acquisition of Netto's 194 UK groceries stores in lieu of a reference of the transaction to the Competition Commission (CC).

Background. The OFT must refer an anticipated merger to the CC if it believes that there is, or may be, a relevant merger situation that may be expected to result in a substantial lessening of competition (SLC) (*section 33, Enterprise Act 2002) (2002 Act*). The OFT may, in lieu of a reference to the CC, accept undertakings that the OFT considers are appropriate for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effect which has resulted, or may be expected to result, from it (section 73, 2002 Act).

Facts. The OFT considered that the transaction, which was announced on 27 May 2010, would not give rise to competition concerns at a national level due to Netto's low UK-wide market share (below 1%). However, the OFT has raised concerns that, in around a quarter of the local areas in which the parties' stores overlap, competition could be substantially reduced because Asda provides a competitive constraint on Netto. The OFT considered that efficiency savings arising from the merger that would benefit consumers were not in practice sufficient to negate the OFT's concerns.

To address the OFT's concerns regarding certain local areas and avoid a reference to the CC, Asda has offered to sell 47 of Netto's UK stores. On 23 September 2010, the OFT decided to accept, in principle, undertakings in lieu from ASDA of a reference to the CC. The OFT considers that many of the stores are likely to be of interest to multiple suitable purchasers, but will require Asda to identify suitable up-front buyers for any stores where this may not be true. The OFT has since launched a public consultation on the undertakings proposed, including the suitability of proposed buyers in the affected local areas, with comments to be submitted on or by 2 February 2011.

Comment. *Asda / Netto* underlines the OFT's apparent current preference for up-front buyers, in certain circumstances. The OFT will seek an up-front buyer where, for example, the OFT has doubts as regards the ongoing viability of a divested business, and/or the number of eligible buyers is small. Given perceived purchaser divestment risk, the OFT required an up-front buyer for all stores except those for which several potential buyers had submitted indicative bids.

The OFT had not previously examined any acquisition of a limited assortment discounter (LAD) such as Netto, and no precedent suggested that a LAD would be included in the relevant competitor set for a larger grocery retailer. In other respects, the OFT followed its approach in previous grocery retail mergers such as *Co-op / Somerfield*; for example, examining only these areas of local overlap where the transaction resulted in a reduction of 4 to 3 stores, and face-to-face consumer preference surveys were conducted at the parties' stores. Taking into account the Groceries Market Investigation (Controlled Land) Order 2010, the OFT also considered competition issues arising from land banking. The OFT continues to strike a cautious stance on retail mergers; Asda commented that the requirement to divest 47 stores was "*at the high end of its expectations*".

BEVERAGES, BREWERIES AND TOBACCO

EU: Direct parent held not liable for subsidiary's breach of competition law

Summary. The EU's General Court has held that a company was not liable for its fully-owned subsidiary's involvement in a Spanish raw tobacco cartel, as the European Commission did not prove that the direct parent had exercised decisive influence over the offending conduct.

Background. In October 2004, the European Commission (Commission) fined five processors of raw tobacco a total of EUR 20 million for having colluded, *inter alia*, regarding the prices they paid to Spanish tobacco growers, contrary to Article 101 of the Treaty of the Functioning of the European Union (Article 101). The Commission also imposed fines on the tobacco growers for engaging in collective price negotiations.

All of the main processors appealed separately against the Commission's decision. An appeal was also filed by Alliance One International, Inc. (SCC), Standard Commercial Tobacco Co. (SCTC), and Trans-Continental Leaf Tobacco Corp. (TCLT) – the three holding companies that the Commission held jointly and severally liable for fines imposed on their subsidiary, World Wide Tobacco España (WWTE).

Facts. On 27 October 2010 the General Court handed down a decision in Case T-24/05 *Alliance One International Inc., Standard Commercial Tobacco Co. Inc., and Trans-Continental Leaf Tobacco Corp. Ltd v European Commission*. The court began by repeating the orthodox position from case-law that a subsidiary's conduct may be attributed to its parent where that subsidiary, despite its separate legal personality, does not decide its conduct on the market independently but instead carries out, in all material respects, the instructions given by a parent. The General Court upheld findings of liability for WWTE's conduct against SCTC and WWTE's ultimate parent, SCC.

However, the General Court annulled the Commission's attribution to TCLT of liability for WWTE's breach of Article 101, stating that "*none of the material relied on by the Commission […] supports the conclusion that TCLT – […] a company with no activity of its own and whose interest in WWTE is purely financial – in fact exercised decisive influence over WWTE's conduct on the market*". Notwithstanding this, the General Court upheld the total fines imposed on WWTE, for which SCTC and SCC remain jointly and severally liable.

Comment. The decision is a rare example of a parent – albeit an intermediate holding company – successfully refuting liability for a subsidiary's infringement of Article 101. Arguably the Commission may need to establish, in such cases, that a parent could exercise some degree of control or influence over a subsidiary. However, even where the chain of liability in a holding structure is successfully challenged, fines may still be based on the ultimate parent undertaking's turnover.

Clifford Chance Madrid acted for Alliance One (formerly SCC), SCTC and TCLT in this case.

Spain: CNC fines participants in a cartel limiting sherry output

Summary. The Spanish Competition Authority (CNC) has fined nine Jerez sherry producers, an industry association and a regulatory board a total of EUR 6.7 million for anticompetitive conduct aimed at limiting sherry output.

Background. Article 1 of the Act 15/2007 of 3 July 2007 (Spanish Act) prohibits "*the direct or indirect fixing of prices or any other trading or service conditions*"; the maximum penalty the CNC can impose is 10% of the turnover of the relevant undertaking in its last business year. Additionally, the Spanish Act provides for a leniency regime similar to that operated by the European Commission's DG Competition.

Facts. In February 2008, the CNC received a leniency application from two Jerez sherry producers under common control – Complejo Bodeguero Bellavista S.L.U. y Zoilo Ruiz Mateos S.L. – in respect of a sherry cartel. The CNC dawn raided the alleged cartel participants, and found evidence of a cartel, operated between 2001 and 2008, concerning Jerez sherry exported under foreign distributors' private label brands to Germany, the Netherlands and the UK.

Specifically, sherry producers agreed to reduce the supply of sherry in order to increase prices. The cartel was initially a success, insofar as sherry prices rose. When other producers began to enter the markets, attracted by the high prices, new restrictive measures were designed and imposed by the Federation of Jerez wineries (Fedejerez) and the *Consejo Regulador* (a regulatory board responsible for issuing "designation of origin" standards). Smaller and new producers later joined the cartel, which subsequently agreed to additional measures including coordinated price increases, market division, customer allocation, and monitoring mechanisms.

On 29 July 2010, the CNC published its decision in Case S/0091/08 *Vinos Finos De Jerez*, and imposed a total of EUR 6.7 million for what it considered a very serious violation of competition law. The leniency applicant was exempted from paying a fine of EUR 670,000. The other sherry producers' fines ranged from EUR 28,000 (Bodegas Caydsa) to EUR 2,300,000 (Bodegas Williams & Humbert), and Fedejerez and the *Consejo Regulador* were fined EUR 400,000 and EUR 200,000 respectively.

Comment. Some sherry producers claimed that the CNC had already investigated the relevant allegations, given the CNC's previous infringement decision in a similar case in July 2009 (Case S/2779/07 *Consejo Regulador de Denominación de Origen Vinos de Jerez y Manzanilla de Sanlúcar*). However, the CNC considered that the "no double jeopardy" principle was not breached, since in the earlier case only the *Consejo Regulador* was fined – and only in respect of 2006 onwards. The CNC, however, took the earlier case into account when attributing liability to the *Consejo Regulador* in Case S/0091/08 *Vinos Finos De Jerez*.

The CNC also opened, in February 2010, another infringement procedure concerning the sherry sector, in relation to potential price-fixing agreements between sherry grape and must producers. The *Consejo Regulador* is also a party to those proceedings.

UK: OFT publishes final response to CAMRA super-complaint

Summary. The Office of Fair Trading (OFT) has published its final response to a super-complaint from the Campaign for Real Ale (CAMRA) relating to the supply of beer in pubs, having concluded that the issues raised warrant no further action.

Background. Designated consumer bodies can make a super-complaint, to the OFT, that any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interest of consumers (*section 11, Enterprise Act 2002*) (2002 Act). The OFT has the power to make a market investigation reference to the Competition Commission (CC) if it has reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services (*section 131, 2002 Act*).

CAMRA submitted a super-complaint in July 2009, asking the OFT to carry out a market study and make a market investigation reference to the CC, or to take measures in lieu of a reference, in relation to the possible foreclosure of suppliers from tied pubs, the prices paid by tied pubs for wholesale drinks supplies, the level and means of calculating pub rents, barriers to entry at retail level (e.g., restrictive covenants on the sale of pubs) and the provision to pubs of technical services and related equipment.
In October 2009, the OFT initially concluded that no further action need be taken in response to the super-complaint. CAMRA subsequently appealed to the Competition Appeal Tribunal (CAT), seeking to quash the OFT's decision, and to compel the OFT to reconsider the need for further action. Appeal proceedings were then adjourned following the OFT's decision to launch, on 5 February 2010, a public consultation on its October 2009 findings.

Facts. On 14 October 2010, the OFT announced that it saw no grounds to justify any further action in response to CAMRA's super-complaint. In particular, the OFT concluded that consumers benefit from considerable competition and choice between pubs, which prevents "beer ties" leading to pub beer prices being inflated beyond competitive levels. The OFT also found that "beer ties" have not prevented pubs from offering consumers a wide choice of beers, generally from a considerable range of suppliers.

CAMRA has responded publicly to the OFT's final decision, but has thus far stopped short of commenting further on the appeal pending before the CAT.

Comment. The OFT's final response is perhaps not surprising, given its previous UK pub sector reviews (including its initial response on 22 October 2009 to the super-complaint). The distribution of beer has been subject to intense regulatory scrutiny for over 20 years, by both the EU and the UK competition authorities.

In theory, the Secretary of State for Business, Innovation & Skills (Vince Cable) could now refer the matter to the CC, as previously urged by CAMRA (and, in May 2009, by the House of Commons Business and Enterprise Committee). Mr. Cable certainly described the pub industry, in July 2010, as "*on probation… until June 2011*". However, to date no such reference has even been made under the 2002 Act.

MILK, DAIRY AND FOOD PRODUCTS

EU: European Commission's latest food supply chain investigation

Summary. The next phase of an ongoing investigation into the food supply chain by the European Commission (Commission) began on 16 November 2010, when a newly-created specialist forum met for the first time.

Background. The Commission has been studying food supply chain practices and food prices since a monitoring role for it was proposed as part of the November 2007 Single Market Review (*SEC(2007) 1517 and COM(2007) 724*). In April 2008 the Commission established a High Level Group (HLG) on the Competitiveness of the Agro-Food Industry (*2008/359/EC*), which in March 2009 issued 30 recommendations (*HLG.006*.) and a roadmap of key initiatives (*IP/09/1089*) focusing on structural agricultural, environmental and internal market policy remedies; competition law only featured in the recommendation to study the effect of private own-label brands on the food industry's competitiveness. A Commission Communication (the Communication) (*COM(2009) 591*) released in October 2009 analysed a number of anti-competitive practices affecting the supply chain – such as abuse of buyer power, joint selling, tying and bundling and buying alliances, as well as the effect of private label brands. While pragmatically proposing cooperation with member state national competition authorities (NCAs) to address these concerns, it hinted at broader regulatory initiatives to be pursued in tandem with the HLG's recommendations.

Facts. On 16 November 2010, the next phase of the Commission food supply chain investigation began, with the first meeting of the newly-created High Level Forum for a Better Functioning Food Supply Chain (HLF).

This new phase and the HLF seem more focused on agricultural and industrial policy than on competition law enforcement. Documents released in connection with the HLF's first meeting suggest a work plan that is structured largely in the same way as the HLG's roadmap. Numerous work streams have been given to staff in the Commission Directorates General (DG) dealing with the Internal Market (contractual practices, commodity derivatives, developing a code of conduct), Agriculture (agricultural sector consolidation, tariffs and raw material price volatility), Health and Consumer Protection (genetically modified organisms, policy impact assessments) and Trade (access to markets). DG Enterprise, rather than DG Competition has been given the responsibility for enhancing the sustainable competitiveness of the food chain, and has also been put in charge of studying the competition concerns raised by private label brands. DG Competition staff have been given the lead on only one major dossier, and even that – developing a common approach to competition issues with the European Competition Network (ECN) of NCAs – involves a devolution of responsibility. Most telling, the high-level leadership of the new HLF features four Commissioners, but does not include Commissioner for Competition (and Vice President) Joaquín Almunia.

Comment. Whilst the new HLF seem more focused on agricultural and industrial policy than on competition law enforcement, the new HLF may well deal with competition issues mentioned in the Communication, irrespective of what DG Competition has been tasked with.

Many NCAs – which have a greater role in competition law enforcement since Regulation 1/2003/EC, and will be involved in enforcing the Commission's ongoing food chain studies – have commenced their own food supply chain investigations in recent years. The Dutch, Belgian, Italian, Portuguese, Swedish, Czech and Danish authorities are among those that have launched probes, opened consultations and published reports. The recent spike in commodity prices may act as a further catalyst for intervention in this area.

NON-FOOD RETAILING

Czech Republic: Fines imposed for TV component price-fixing

Summary. The Czech Competition Office (CCO) has confirmed a decision, made at first instance, to impose fines totalling CZK 51,787,000 on certain manufacturers of colour TV picture tubes on account of price-fixing.

Background. Section 3(1) of the Czech Competition Act prohibits cartels and other agreements or concerted practices which restrict competition, and is equivalent to Article 101 TFEU.

Facts. The CCO launched an investigation following a leniency application by Samsung, and ultimately found that a number of suppliers had agreed the prices at which cathode ray tubes would be sold to television manufacturers, and exchanged sensitive business information, through meetings in various European and Asian countries between 1998 and 2006 (although some suppliers participated for only some of this time). The CCO limited its investigation to only the period before the Czech Republic's accession to the EU (i.e., 1 May 2004), since conduct after this date has been subject to an investigation by the European Commission.

Samsung SDI Co., Ltd., Chunghwa Picture Tubes, Ltd., Koninklijke Philips Electronics N.V., Technicolor S.A., Panasonic Corporation, MT Picture Display Co., Ltd., Toshiba Corporation and LG Electronics, Inc. were all investigated. Samsung obtained complete exemption from fines, as the successful leniency applicant; Chunghwa's fine was reduced by 50% on account of its assistance with the CCO's investigation. The suppliers fined may yet appeal against the decision to a Regional Court in Brno.

Comment. This appears to be another example of a leniency case before the CCO that was triggered by a company filing leniency applications across multiple jurisdictions, rather than solely in the Czech Republic.

The case also includes a rare example of companies escaping fines – here, Philips and LG Electronics – due to the expiry of the relevant statutory time limit for antitrust investigations.

EU: Commission closes preliminary investigations into Apple's iPhone policies

Summary. The European Commission (the Commission) has ended two preliminary investigations of Apple policies related to its iPhone product, following certain policy changes aimed at addressing initial concerns.

Facts. In Spring 2010, the Commission commenced two preliminary investigations, in parallel, of certain policies in relation to Apple's iPhone. The Commission investigated whether Apple's requirement that iPhones be repaired only in their country of purchase could result in partitioning markets, along national boundaries, dissuading European consumers from buying iPhones outside their country of residence. The Commission also investigated whether Apple stipulating that independent developers of iPhone applications (apps) use only Apple's native programming tools and approved languages could exclude competition from devices running non-Apple platforms.

On 9 September 2010, Apple announced the removal of restrictions on development tools for iPhone apps. A few weeks later, Apple introduced cross-border warranty repair services in the EEA. Subsequently, on Saturday 25 September 2010, the Commission announced that it would end both of its preliminary investigations into Apple's policies.

Comment. The outcome demonstrates that the Commission is willing to accept changes of policy relating to conduct raising competition concerns as sufficient evidence that a lengthy formal investigation need not be opened and that formal commitments are not required. The informal resolution of this is perhaps consistent with Apple's perceived policy of settling regulatory investigations in as low-key a manner as possible. In 2008, the Commission closed a formal investigation of Apple in 2008 after Apple announced plans to equalise, across Europe, prices on Apple's iTunes site.

EU: Commission conditionally clears Unilever's acquisition of Sara Lee's Household and Body Care business.

Summary. The European Commission (Commission) has conditionally cleared the planned acquisition of the body and laundry care businesses of Sara Lee Corp (Sara Lee) by the Anglo-Dutch consumer conglomerate Unilever.

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

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

The Commission's in-depth investigation confirmed concerns in several deodorants markets in Belgium, The Netherlands, Denmark, UK, Ireland, Spain and Portugal, as Sara Lee's Sanex deodorants competed with Unilever's Axe/Lynx, Rexona/Sure and Dove brands. The merging parties offered to address concerns by divesting Sara Lee's Sanex brand and related business. In light of this offer, the Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area or lead to higher prices for consumers. The Commission therefore cleared the transaction on 17 November 2010, albeit subject to full compliance with the commitments offered.

Comment. Unilever's divestment of the whole Sanex business in Europe – which includes shower gel and hand soap products as well as deodorants – demonstrates that, to obtain merger clearance in certain circumstances, companies may have to offer a "clear-cut" divestment that goes further than simply divesting areas of direct overlap.

EU: Recent legal developments regarding parallel imports and counterfeit goods

Summary. The Court of Justice of the European Union (CJEU) has re-affirmed the legal principles regarding parallel imports principles; at the same time, European law and enforcement practices in respect of counterfeit goods in transit may be evolving.

Background. Under harmonised European trademark law (now contained in Directive 2008/95/EC), the holder of a national registered trademark has the exclusive right to prevent third parties from importing or exporting goods under the registered mark without the holder's consent. The "exhaustion of rights" doctrine means that this right does not entitle the owner to prohibit use of the mark in relation to goods put on the market in the EEA under that mark by the proprietor or with its consent.

Facts (1). In April 2008, Bulgarian customs detained a shipment of genuine CANON-branded ink cartridges originating from Hong Kong. Following national court proceedings on related issues, the Bulgarian Supreme Court of Cassation referred to the CJEU a question about importation and the exhaustion of rights (*Case C-449/09 Canon v. IPN Bulgaria*). On 28 October 2010, the CJEU gave a judgment re-affirming that there is no infringement by importation where the goods in transit are not placed into free circulation – and that, on evidence of a sale or offer to sell into the territory the rightholder could invoke its rights, unless these rights were exhausted. In line with previous authorities, if a national court found that the importer was selling or offering for sale the goods in the EEA and that Canon had not consented to the goods being marketed in the EEA, the court should find in favour of Canon.

Facts (2). Nokia confirmed to UK Customs that certain sample goods provided to it were counterfeit; UK Customs then took the legal position that the goods were not, absent any evidence of intention to divert the goods onto the EU market, "counterfeit" within the meaning of Article 2 of the Regulation 1383/2003 (Customs Regulation). In addition, UK Customs had taken a policy decision not to expend resources on such cases. Nokia applied for judicial review. This led to a reference to the CJEU, which was heard on 18 November 2010 as Case C-495/09. Supported by the International Trademark Association (to whom the English courts gave leave to intervene), Nokia argued that the Customs Regulation was intended to apply to infringing goods in transit, even absent evidence of a risk of diversion onto the EU market. A co-pending reference from a Belgian court (Case C-446/09 *Philips v. Lucheng Meijing*) addresses related issues and was heard on the same day. The Advocate General's Opinions are expected on 3 February 2011; rightholders subjected to counterfeiting are closely watching developments.

Comment. A recent German decision has opened up the possibility of a new civil law basis for stopping goods in transit. In a November 2006 decision, the CJEU had confirmed that a rightholder would have a remedy for trademark infringement as regards goods in transit "*only if those goods are subject to the act of a third party while they are placed under the external transit procedure which necessarily entails their being put on the market in that Member State of transit*" (Case 281/05 *Diesel v. Montex*). However, a recent German decision has reportedly developed national law by finding that the inevitable infringement of the rightholder's trademark in the country of destination of transhipped goods

(Russia, on the facts) provided a basis for tortious liability of the transport company under German law. It remains to be seen whether other courts will develop this basis of action for stopping goods in transit.

Meanwhile, on the international plane, as at 3 December 2010 the latest draft of the Anti-Counterfeiting Trade Agreement (ACTA) – which has been vigorously, and often contentiously, progressed over recent months – provides that contracting parties may have procedures allowing for Customs action against suspected goods in transit, but does not require this. This follows the approach in Article 51 of the TRIPs Agreement, where it is noted that the application of customs procedures to goods in transit is not mandatory.

EU: Commission commits to fighting "pay-for-delay" in pharmaceutical sector

Summary. The European Commission (the Commission) intends to clamp down on certain reverse payments or "pay-for-delay" arrangements in pharmaceutical patent settlements that limit the entry of generic companies to the market.

Background. On 8 July 2009, the Commission adopted a final report on its competition inquiry into the pharmaceutical sector, pursuant to Article 17 of Regulation 1/2003. The report noted that certain patent settlements between drug companies may potentially have anti-competitive consequences. "Pay-for-delay" describes the practice whereby a pharmaceuticals manufacturer pays a competitor (usually a generic company) to halt or delay sales of their products(s), as part of a patent settlement.

Since its sector inquiry, the Commission has begun investigating patent settlement agreements by Laboratoires Servier and Laboratoires Lundbeck, and monitored patent settlements more generally.

Facts. A Commission patent settlements study released on 5 July 2010 noted that settlements that might attract competition law scrutiny due to restrictions on generic entry have decreased significantly since its pharmaceuticals sector inquiry was launched. Whereas 22% of settlements between 2000 and 2007 were potentially anti-competitive, potentially anti-competitive patent settlements represented only 10% of settlements between mid-2008 and the end of 2009.

The Commission welcomed this development, but does not consider that its heightened scrutiny of the sector has sufficiently deterred out-of-court litigation settlement. It will therefore continue to monitor the sector to make sure that settlements in the sector do not impede generic drugs' market entry, and will extend its investigation beyond direct payment to net value transfers (for example, insurance), targeting in particular arrangements which extend beyond the duration of the original patent.

Comment. The study released in July 2010, and remarks made in October 2010 by a Commission official at a conference, underline the Commission's clear intention to keep the pharmaceutical industry under scrutiny.

Other competition authorities have had mixed results trying to outlaw such settlements. The US Federal Trade Commission (FTC) has probably been the most active, challenging such settlements in the courts, and advocating before the courts and the legislature to make such settlements illegal. However, despite an aggressive campaign, the FTC has achieved mixed results. In one of the leading pay-for-delay lawsuits — *Schering-Plough* — the Eleventh Circuit came out against the FTC and held that pay-for-delay settlements are to be adjudged under the rule of reason. Subsequent court challenges have yet to yield pendulum shift from that opinion. Attempts to bring the matter before the Supreme Court have been unsuccessful. Moreover, Democrat legislators have twice tried to append legislation prohibiting reverse payment patent settlements onto appropriations bills. With the change in power in the US Congress, such legislation is unlikely to be enacted for at least the next two years. US courts, however, have so far not taken such an extreme approach to such settlements.

Germany: Authority sticks with its finding of a fuel oligopoly

Summary. Germany's Bundeskartellamt (FCO) has announced that it will uphold its view that certain major players in the retail supply of fuel in Germany form an oligopoly, notwithstanding an appeal court having cast doubt on this analysis in August 2010.

Background. As reported in the October 2010 edition of *CGRB*, the Düsseldorf Higher Regional Court (HRC) on 4 August 2010 overruled a FCO decision to block the acquisition of certain gas stations, disagreeing with the view that Shell, BP (Aral), ExxonMobil (Esso), ConocoPhilipps (Jet) and Total form an oligopoly on certain regional fuel station markets.

Facts. On 6 December 2010, the FCO cleared an intended acquisition of certain EDEKA fuel stations by Shell, albeit subject to commitments reducing the number of stations to be acquired. In its decision, the FCO made clear that it will continue to adhere to its view that Shell, Aral, Esso, Jet and Total form an oligopoly on certain regional fuel station markets. This opinion, from the FCO's April 2009 opinion on *Total/OMV*, is apparently confirmed by the FCO's findings in the fuel sector inquiry that it is currently undertaking in parallel.

Comment. The FCO's fuel sector inquiry is expected to complete by the end of January 2011. However, at this stage already the FCO appears to be taking a strict view of the "big five" fuel suppliers in Germany. Any acquisition of further fuel stations by these players faces at least increased risk of being blocked by the FCO – which may lead to further appeals to the HRC, and perhaps judicial consideration of the eventual results of the FCO's sector inquiry.

Slovak Republic: Antimonopoly Office fines suppliers of cosmetics for RPM

Summary. The Slovak Antimonopoly Office (Office) has fined ten suppliers of cosmetics in Slovakia for distorting competition through retail price maintenance (RPM).

Background. The Office prohibits cartels and other agreements or concerted practices which restrict competition, similarly as Article 101 TFEU. Amongst other practices, RPM may infringe this prohibition.

Facts. In a decision dated 18 November 2010, the Office imposed a fine of EUR 543,218 on FAnn-parfumerie, s.r.o. (FAnn) – a cosmetics wholesaler, which also acts as a retail distributor of cosmetics – and nine retailers of cosmetics. The Office found that FAnn and the retailers had agreed the price at which (or price policy under which) the retailers should distribute the relevant products. Indeed, six of the retail suppliers had contractually committed, in distribution agreements with FAnn, to sell products at FAnn's recommended prices. The Office held that this amounted to RPM, also noting that the retail suppliers were independent economic entities coordinating their pricing to end customers.

Comment. This latest decision from the Office, confirms its stance on vertical pricing practices: the Office seems to follow the EU competition law position, to the extent that a producer or wholesaler may permissibly recommend prices at which distributors sell to end customers, but cannot bind distributors to follow such recommendations. The parties in this case may yet appeal against the Office's decision.

UK: Pharmaceuticals company fined for misuse of NHS prescription system

Summary. Reckitt Benckiser (RB) has agreed to pay, as part of an early resolution agreement with the Office of Fair Trading (OFT), a fine of £10.2 million for effectively misusing the UK's National Health Service (NHS) prescription system.

Background. The OFT initially accused RB of abusing its dominant position in the market for the NHS supply of alginate and antacid heartburn medicines, with the issuance of a Statement of Objections (SO) against RB in February 2010. The OFT alleged that RB had sought to restrict competition to its household name Gaviscon brand by withdrawing and de-listing its NHS packs of Gaviscon Original Liquid from the NHS prescription channel, shortly before the publication of the name of a competing, but much cheaper, generic antacid.

Generic products

RB enjoyed a patent over the chemical formulation for its Gaviscon Original Liquid product (a so-called "originator medicinal product") and, during the lifetime of the patent, could prevent other companies from using this to create competing (so-called "generic") products, based on the patented formulation. However, once the patent expired, competitors could produce "generic" medicinal products with the same qualitative and quantative composition in active substances and the same form as the originator, Gaviscon Original Liquid product.

The NHS Prescription Channel

The NHS is fully aware of the price differential between originator and generic drugs. Accordingly, the NHS prescription channel provides that, where a branded medicine's patent has expired (e.g. Gaviscon Original Liquid) and a generic name has been assigned to it (normally the active substance formulation), GPs can use their prescribing software to search for the brand and then provide patients with an 'open' prescription that lists its generic name. When the patient presents the prescription to their local pharmacist, the pharmacy can choose whether to dispense the relevant brand or equivalent, but cheaper, generic medicine.

Early resolution

In certain circumstances, companies under investigation by the OFT may choose to admit to an infringement and to co-operate with the OFT as part of an "early resolution agreement" with the OFT. There is as yet no formal procedure for entering into such agreements with the OFT, but the OFT has indicated that companies may, after receipt of an SO, admit the infringement to, and co-operate with, the OFT, and decline the opportunity to respond to the SO (save to correct material factual inaccuracies).

Facts. RB withdrew and de-listed Gaviscon Original Liquid from the NHS prescription channel in 2005 – shortly before the publication of the generic name of this product. Consequently, when GPs searched for "Gaviscon" prescription packs, they would identify Gaviscon Advance Liquid, which is patent protected until 2016 (and not Gaviscon Original Liquid, for which an 'open' prescription could otherwise be provided). The OFT alleged that this withdrawal and de-listing from the NHS prescription channel was a deliberate move to ensure that more prescriptions would be issued for its patent-protected product, at the expense of its generic competitors.

As a company enjoying a dominant position in a relevant market, RB would be deemed to have a "special responsibility" not to distort competition without objective justification, and so whilst a non-dominant company could have withdrawn supply whenever it so chose (provided this was not in breach of any other regulatory requirements), this option was not open to RB.

RB's fine was reduced by £1.8 million to reflect its admission and decision to co-operate as part of an "early resolution agreement" with the OFT.

Comment. The case is a reminder that dominant companies may be prohibited from taking advantage of aspects of a marketing system or regulatory regime that their non-dominant competitors are free to exploit. In the eyes of the competition regulators, the responsibility lies with the dominant company, notwithstanding any failings of the system.

UK: OFT investigates suspected commercial vehicle manufacturers cartel

Summary. The UK's Office of Fair Trading (OFT) has begun investigating a suspected cartel involving commercial vehicle manufacturers.

Background. The OFT has civil and criminal powers in respect of cartels, under the Competition Act 1998 (CA 1998) and the Enterprise Act 2002 (EA 2002) respectively. Chapter I of the CA 1998 prohibits agreements or concerted practices which have the object or effect of preventing, restricting or distorting competition in the UK; the maximum penalty the OFT can impose is 10% of worldwide turnover of the relevant undertaking in its last business year. It is a criminal offence for individuals to dishonestly agree that businesses will engage in certain types of cartel activity, namely price-fixing, limiting supply or production, market-sharing and bid-rigging, known as the cartel offence (section 188, EA 2002). The OFT has the power to enter and search premises under a warrant issued by a judge (*section 194, EA 2002*).

Facts. On 16 September 2010, the OFT confirmed that it is investigating suspected cartel activity in the UK involving commercial vehicle manufacturers. At least Volvo Trucks, Renault Trucks and Scania have publicly confirmed that their UK subsidiaries are cooperating with the OFT; MAN, Iveco, DAF and Mercedes-Benz are also believed to be under investigation. In addition, reports suggest that the UK offices of Mercedes-Benz were raided, and its managing director arrested but later released on bail. The OFT has indicated that it is pursuing both civil and criminal investigations in parallel, and that it will only be able to conclude whether any undertakings have infringed the law once it completes its investigations and it has assessed the relevant evidence.

STOP PRESS: On 18 January 2011, the European Commission confirmed that it had conducted antitrust inspections "*at the premises of companies active in the truck industry in several Member States*". The relationship between any probe by the European Commission and the OFT's investigation is not yet clear.

Comment. Following the collapse in 2010 of the OFT's criminal case against four British Airways executives, the OFT has yet to complete a successful criminal investigation on its own (the only OFT criminal case completed to date was coordinated with US authorities). However, the OFT now appears to be pursuing at least three criminal investigations, suggesting that it is keen to show that it can use its criminal enforcement powers successfully – especially ahead of the proposed merger of the OFT with the Competition Commission (which was announced on 14 October 2010).

UK: OFT and CC publish joint merger assessment guidelines

Summary. The Office of Fair Trading (OFT) and the Competition Commission (CC) (the Authorities) have published joint merger assessment guidelines (the Guidelines).

Background. Under the Enterprise Act 2002 (2002 Act), the OFT must refer a merger to the CC if the OFT believes that there is, or may be, a relevant merger situation that has resulted or may be expected to result in a significant lessening of competition (SLC) within any goods/services market(s) in the UK. Where the CC decides that a merger has resulted or may be expected to result in an SLC, it must take action to remedy, mitigate or prevent the SLC.

Facts. In 2008, the Authorities commenced a joint review of their respective merger assessment guidance, and launched joint public consultations on respective draft guidelines in April 2009 and April 2010. The Authorities published the final Guidelines on 16 September 2010; these provide guidance on the Authorities' approach in the following areas: (i) analysis of whether a "relevant merger situation" under the 2002 Act arises; (ii) what constitutes an SLC, and the related concepts of theories of harm and counterfactual; (iii) market definition and the manner in which the "hypothetical monopolist test" would be used to check for the relevant product market definition; and (iv) the assessment of potential unilateral price rises, coordination with competitors post-merger, the relevance of efficiencies, and the significance and assessment of entry or expansion and countervailing buyer power. The Guidelines also clarify the circumstances in which the Secretary of State can intervene in mergers on public interest grounds.

Comment. The Guidelines indicate that a merger is unlikely to give rise to concerns in a local retail market if it reduces the number of competing fascia from five to four (or above) – but do not detail the Authorities' current approach to assessing retail sector mergers, so recent decisions remain the best guide for understanding the different filters and screens applied in practice by the Authorities. In addition, the new Guidelines contain some useful statements of general application – for example, "*combined market shares of less than 40% will not often give the OFT cause for concern over unilateral effects*" where horizontal overlaps are concerned, and that "*a market share for the merged firm of less than 30% will not often give the OFT cause for concern over input foreclosure*" in mergers of vertically-related activities.

US: Midterm election results may signal end to expansion of US antitrust laws

Summary. The recent US midterm elections changed the balance of power between Republicans and Democrats and likely mean an end to recent legislative efforts aimed at expanding the US antitrust laws.

Background. Since President Obama took office in 2009, Democrats in Congress have been trying to amend legislatively the antitrust laws on several fronts. Some of the principal initiatives are listed below.

The first initiative is overturning two relatively recent US Supreme Court decisions: (1) *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877 (2007) and *Bell Atlantic Corp. v. Twombly*, 55 US 544 (2007). In *Leegin*, the Court reversed the 96-year-old doctrine that vertical price restraints in the form of resale price maintenance were illegal per se under Section 1 of the Sherman Act, which had replaced the older doctrine with the rule of reason. In *Twombly*, the Supreme Court held that in order to survive a motion to dismiss, a complaint alleging an antitrust conspiracy under Section 1 of the Sherman Act must allege facts that "raise a right to relief beyond the speculative level" and identify a "plausible" conspiracy on its face.

A second initiative is to increase the enforcement capabilities and rulemaking authority of the US Federal Trade Commission (FTC). Legislative efforts have been underway to expand the FTC's enforcement authority by giving the FTC the power to impose civil penalties on companies for unfair or deceptive acts or practices without referral to the Department of Justice (DOJ) and permitting the FTC to impose third-party liability upon companies that substantially assist an unlawful act. Legislative proposals have also sought to effectively eliminate various procedures required for FTC rulemaking.

A third initiative has been to make per se illegal settlements of patent litigation in which the brand-name drug firm pays its potential generic competitor to abandon a patent challenge and delay entering the market.

Facts. Prior to the November 2010 midterm election, Democrats controlled both houses of Congress. The midterm election changed the balance of power between Democrats and Republicans in Congress. After the 2010 midterm elections, in the House of Representatives, Republicans have 239 of the 435 seats. Democrats still maintain a majority of the Senate.

Comment. With control of the House of Representatives, Republicans can block any attempt by the Democrats to change the antitrust laws. Republicans historically have sought to limit the amount of regulation that businesses face, and they opposed the recent expansion proposals. In the current political climate, we do not think that the Democrats' initiatives aimed at amending the antitrust laws will succeed.

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