CLIFFORD CHANCE

Antitrust Review
March - April 2011

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- **Commission investigation into airline code-sharing.** The European Commission has initiated investigations into certain code-sharing arrangements between Turkish Airlines and Lufthansa and between TAP Portugal and Brussels Airlines.

- **Activision appeal dismissed in Nintendo distribution agreements judgement.** The European Court of Justice has dismissed an appeal by Activision Blizzard Germany GmbH against a judgment of the General Court which upheld the European Commission's decision fining Nintendo and certain distributors for agreements allegedly aimed at restricting parallel trade.

- **ECJ ruling on margin squeeze in relation to TeliaSonera.** The European Court of Justice has provided guidance on assessing whether a pricing practice constitutes an abusive margin squeeze.

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- **Commercial Court of Brussels issues judgment in European Commission elevator cartel damages case.** The Commercial Court of Brussels has issued an interlocutory judgment in the first ever cartel civil damages claim brought by the European Commission on behalf of the EU.

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- **Chinese enforcement agencies and UK OFT sign Memoranda of Understanding.** Two of China's competition authorities, the National Development and Reform Commission and the State Administration for Industry and Commerce have each signed a Memorandum of Understanding with the UK's Office of Fair Trading.

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Czech Republic

- **Czech Competition Office plans to introduce proposal to abolish the Significant Market Power Act.** The Czech Competition Office has begun a public consultation on the proposed abolition of the Significant Market Power Act and related draft amendments to the Czech Competition Act and the Act on Prices.

France

- **French Competition Authority launches market test for proposed inter-bank fee commitments.** The French Competition Authority has published a series of commitments on inter-bank fees proposed by the *Groupement des cartes bancaires*, comprising the main retail banks in France, in order to address competition concerns previously raised by the FCA.

Germany

- **FCO prohibits joint TV on demand internet platform planned by RTL and ProSiebenSat1.** The German Federal Cartel Office has prohibited a proposed joint venture between the private broadcasters RTL and ProSiebenSat1 to create an internet platform for "catch-up" television on demand.

Poland

- **Polish competition authority fines second mobile network operator for obstructing inspection.** The Office of Competition and Consumer Protection has fined Polkomtel, one of the four largest mobile network operators in Poland, EUR 33 million for obstructing an inspection conducted in December 2009.

Slovak Republic

- **Amendments to the Slovak Act on State aid and the Slovak Execution Act.** The National Council of the Slovak Republic has passed an act amending both the Slovak Act on State aid and the Slovak Execution Act.

Spain

- **CNC opens formal proceedings into alleged collective hotel price recommendation.** The Investigations Division of the Spanish competition authority has launched a formal investigation into the Spanish Confederation of Business Organisations and Mr Joan Gaspart Solves, Chairman of the Tourism Board of the CEOE, relating to alleged collective price recommendations.

United Kingdom

- **OFT investigation into e-book sales.** The UK's Office of Fair Trading has launched an investigation into whether arrangements between certain publishers and some retailers for the sale of e-books may breach competition rules.

- **OFT refers Irish Sea ferries merger to the CC.** The Office of Fair Trading has referred the completed acquisition by Stena AB of two Irish Sea ferry services from DFDS A/S to the Competition Commission for further investigation.

- **The OFT decides not to open a formal investigation into Visa's Olympic sponsorship arrangements.** The Office of Fair Trading has decided not to open a formal investigation into Visa's sponsorship arrangements for the London 2012 Olympic Games.

- **CAT reduces fines on a number of companies in the construction sector.** The UK's Competition Appeal Tribunal has reduced the fines imposed by the Office of Fair Trading on a number of companies for alleged bid-rigging in the construction sector.

- **CC publishes final order in Payment Protection Insurance investigation.** The Competition Commission has published a final order detailing measures intended to introduce competition into the Payment Protection Insurance market.

United States

- **Antitrust concerns cast doubt on future of Google's digital library.** A US District Court, citing antitrust concerns, has rejected Google's proposed settlement with a class of authors and publishers.

European Union: General Court cancels fines on 8 companies active in the copper fittings sector

Summary. The General Court has reduced or cancelled fines imposed by the European Commission (the Commission) on 8 companies active in the copper fittings sector for alleged fixing of prices.

Background. Article 101(1) (Article 101) of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between undertakings and decisions by associations of undertakings which have as their object or effect the prevention, restriction or distortion of competition within the common market. Companies can apply to the Commission under the terms of its leniency notice to obtain total immunity or leniency from fines (*2006/C 298/11)*. The prohibition contained in Article 101 may be declared inapplicable in respect of certain agreements (*Article 101(3), TFEU*).

Facts. In September 2006, the Commission imposed fines totalling EUR 314.76 million on 30 companies active in the copper fittings sector (copper fittings companies) for allegedly fixing prices, discounts and rebates, agreeing on mechanisms to co-ordinate price increases, allocating customers and exchanging commercially sensitive information.

A number of the copper fittings companies had applied for leniency under the terms of the Commission's 1996 leniency notice (leniency notice) during the course of the investigation. Mueller Industries Inc. received total immunity from fines under the leniency notice as it was the first to inform the Commission of the existence of the cartel. Fines were also reduced by 50-20% for IMI, Delta and FRA.BO.

Some of the copper fittings companies appealed to the General Court for the annulment of the Commission's decision or for a reduction of the fines. The appeals were addressed by the General Court through its judgments in 10 separate cases.

Decision. The General Court has reduced the fines for Kaimer, Sanha Kaimer, Sanha Italia, Tomkins and Pegler as the it considered that the duration of their alleged infringement was less than that determined by the Commission. The General Court also reduced the fine imposed on Pegler because it considered that the Commission was not entitled to apply a multiplier for deterrence when calculating the fine.

Additionally, the General Court reduced the fine imposed on Tomkins because it considered that Tomkins was held to be liable only in its capacity as parent company for the participation of Pegler, its subsidiary. The General Court considered that the liability of a parent company cannot exceed that of its subsidiary.

The General Court has annulled the Commission's decision imposing a fine on Aalberts, Aquatis and Simplex as it considered that, contrary to the Commission's view, the companies had not participated in the cartel between 25 June 2003 and 1 April 2004. On the other hand, the General Court has dismissed the appeals brought by Viega, Legris Industries, Comap, IMI, FRA.BO and IBP and has maintained the level of their fines.

Comment. The total fines imposed by the Commission in this case were the fifth highest imposed at the time. This case demonstrates the willingness of the General Court to review the basis on which the Commission calculates the fines imposed for alleged price-fixing. The judgment is also noteworthy in rejecting the view that the liability of the parent company could exceed the liability of its subsidiary.

Cases: Case T-375/06 Viega v Commission; Case T-376/06 Legris Industries v Commission; Case T-377/06 Comap v Commission; Case T-378/06 IMI and Others v Commission; Case T-379/06 Kaimer and Others v Commission; Case T-381/06 FRA.BO v Commission; Case T-382/06 Tomkins v Commission; Case T-384/06 IBP and International Building Products France v Commission; Case T-385/06 Aalberts Industries and Others v Commission; Case T-386/06 Pegler v Commission; General Court of the European Union Press Release No 24/11, 24 March 2011, http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-03/cp110024en.pdf.

European Union: Commission investigation into airline code-sharing

Summary. The European Commission (the Commission) has initiated investigations into certain code-sharing arrangements between Turkish Airlines and Lufthansa and between TAP Portugal and Brussels Airlines (the arrangements).

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

Facts. The Commission has launched two separate investigations into the arrangements between Turkish Airlines and Lufthansa on the one hand and TAP Portugal and Brussels Airlines on the other hand.

The Commission has stated that in contrast to another common form of code-sharing (where airlines sell seats on routes they do not operate themselves in order to extend the reach of services and broaden customer choice) the arrangements relate to routes where the airlines already operate their own flights between their own hubs and where they should, in principle, be competing with each other. The Commission has also stated that the arrangements allow one party to sell as many seats as they want on the corresponding partner's flights on routes connecting to their hubs, provided there are seats remaining.

While code-share arrangements are seen to offer significant benefits to consumers, the Commission is investigating whether or not the arrangements may distort competition, leading to higher prices and less service quality for customers on routes between Germany and Turkey and between Belgium and Portugal, respectively.

Comment. The Commission has emphasised that the opening of proceedings does not imply proof of infringement and does not prejudge the outcome of the investigation. It remains to be seen whether the particular kind of code-share agreement under scrutiny will be found to be in breach of competition law.

Source: Commission press release, 11 February 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/147&format=HTML&aged=0&language=EN&guiLanguage=en.

European Union: Activision appeal dismissed in Nintendo distribution agreements judgement

Summary. The European Court of Justice (ECJ) has dismissed an appeal by Activision Blizzard Germany GmbH (Activision) against a judgment of the General Court which upheld the European Commission's (the Commission) decision fining Nintendo and certain distributors for agreements allegedly aimed at restricting parallel trade.

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

Facts. In October 2002, the Commission imposed fines of EUR 167.8 million in total on Nintendo and seven of its official distributors in Europe (the distributors) for agreements that were allegedly designed to prevent exports from low-priced countries to high-priced countries. CD-Contact Data, now Activision, was fined EUR 1 million while Nintendo was fined EUR 149 million.

Activision (along with Nintendo and another distributor) challenged the amount of the fines before the General Court. On 30 April 2009, the General Court refused to annul the Commission's decision but reduced Nintendo's fine as it considered that the Commission had breached the principle of equal treatment by giving a significantly larger reduction in fine for one of the distributors who had started cooperating with the Commission only eight days before Nintendo had done so. The General Court also reduced the basic amount of the fine imposed on Activision by 50%, in view of Activision's exclusively passive role in the infringement, to EUR 500,000.

Activision appealed the General Court's finding that it had infringed Article 101 arguing that:

- the General Court had erred in law by finding there to be an illegal agreement between Activision and Nintendo on an incorrect legal categorisation of the facts. Activision argued that the agreement was perfectly legal under Article 101 as it restricted active sales but did not restrict passive sales, but the General Court did not consider the difference between such restrictions;

- the General Court distorted evidence to show that it intended to pursue an anti-competitive object; and
- the Commission made a manifest error in its assessment of the evidence.

Decision. The ECJ dismissed the appeal.

It held that Activision's first ground of appeal had no factual basis and that based on an analysis of the evidence, the General Court had considered that there was a concurrence of wills between the parties with the object not only of limiting active sales but also parallel trade generally.

The ECJ also held that the General Court had not distorted the evidence or made a manifest error of assessment in its assessment of the evidence.

The ECJ considered that the General Court had provided sufficient reasons for its decision and that the standard of proof required for the purposes of establishing the existence of an anti-competitive vertical agreement is no higher than that required in a horizontal relationship.

Comment. This case confirms that although a distribution agreement may on its face be compliant with Article 101, related correspondence showing a "concurrence of wills" between parties to limit parallel trade may amount to evidence of an anti-competitive distribution agreement. The Commission has recently adopted revised rules and guidance on distribution agreements.

Cases: ECJ judgment, 10 February 2011, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0260:EN:HTML; ECJ press release, 10 February 2011, http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cp110006en.pdf.

European Union: ECJ ruling on margin squeeze in relation to TeliaSonera

Summary. The European Court of Justice (ECJ) has provided guidance on assessing whether a pricing practice constitutes an abusive margin squeeze.

Background. Article 102 of the Treaty on the Functioning of the European Union (TFEU) (Article 102) prohibits the abuse by companies of their dominant market position in the EU, or a substantial part of the EU. Article 267 of the TFEU permits the ECJ to give preliminary rulings concerning the interpretation of the TFEU. An EU member state court may refer such a question to the ECJ if it considers that a ruling is necessary to enable it to give judgment.

Facts. TeliaSonera Sverige AB, (TeliaSonera) is the incumbent operator in the Swedish market for fixed-line telephony. TeliaSonera owns the part of the telephone network that connects the subscriber's telephone to the telephone operator's exchange (known as the local loop). TeliaSonera had a legal obligation to offer unbundled access to the local loop but, without having any obligation to do so, it also offered an ADSL product that allowed other operators to supply their broadband connection services to end users. At the same time, TeliaSonera offered broadband connection services directly to end users itself.

In December 2004, the Swedish Competition Authority brought before the Stockholm District Court an action for TeliaSonera's alleged abuse of a dominant position between April 2000 and January 2003. In April 2009, the court requested that the ECJ clarify the circumstances in which a difference between the price charged by a vertically integrated undertaking to competitors at a wholesale level and to end users at a retail level could be an abusive margin squeeze in the context of Article 102.

Decision. The ECJ has delivered its judgment considering nine points on which guidance in assessing whether a company's pricing practice is an abusive margin squeeze was sought by the referring court.

In considering whose prices should be taken into account, the ECJ considered that it should primarily be the prices and costs of the dominant company in the retail services market. Only where this is not possible should prices and costs of competitors (in the same market) be examined. The ECJ also considered that it was necessary to demonstrate that the pricing practice produces at least a potential anti-competitive effect on the retail market that cannot be economically justified, and in this assessment, account should be taken of whether the product or service being examined is indispensable to competitors.

However, the ECJ considered that the following factors would not generally be relevant in assessing an abusive margin squeeze:

- the absence of any regulatory obligation on the dominant undertaking to supply the wholesale products;
- the degree of dominance held or the absence of a dominant position on the downstream retail market;
- whether the pricing practice is applied to new or existing customers;
- whether losses can be recouped by the dominant undertaking; and
- whether not the relevant markets involve new technology.

Comment. This decision comes after the ECJ's Deutsche Telekom decision of 14 October 2010 and confirms that there need not be a refusal to supply before the conduct of a dominant undertaking in relation to its terms of trade can be deemed to be abusive. Margin squeeze has become an increasingly topical issue in recent years and is considered to be an important compliance issue for undertakings which control access to key infrastructure.

Case: Case C-52/09 Konkurrensverket v. TeliaSonera Sverige AB, 17 February 2011, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=C-52/09&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&docppoag=docppoag&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher.

European Union: The Commission conducts unannounced inspections at the premises of companies active in the e-book publishing sector

Summary. The European Commission (the Commission) has conducted unannounced inspections (inspections) at the premises of companies active in the e-book publishing sector in several EU Member States.

Background. The Commission has powers to enter and inspect premises, land and vehicles of undertakings (Article 20, Modernisation Regulation (1/2003/EC)) (Modernisation Regulation) as well as other premises (*Article 21, Modernisation Regulation*). The Commission may request assistance with such inspections from the national competition authority of the member state on whose territory an inspection is to be conducted (*Article 20(5), Modernisation Regulation*).

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

Facts. The Commission has confirmed that it conducted inspections on 1 March 2011 at the premises of companies active in the e-book (electronic or digital books) publishing sector in several EU Member States. The Commission has stated it has reason to believe that the companies may have infringed Article 101. The Commission officials were accompanied during the inspections by their counterparts from relevant national competition authorities.

The inspections represent a preliminary step into the Commission's investigation into suspected anti-competitive practices, but do not prejudge the outcome of the investigation or imply that the companies are guilty of any anti-competitive conduct.

Comment. The inspections follow the Office of Fair Trading (OFT) investigation in the e-book publishing sector. The OFT announced on 1 February 2011 that it had opened an investigation into whether arrangements between certain publishers and some retailers for the sale of e-books may breach competition rules, following a number of complaints. The OFT has stated that its investigation is at an early stage and that it should not be assumed that there has been a breach of competition law.

Source: Commission press release, 2 March 2011,
http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/126&format=HTML&aged=0&language=EN&guiLanguage=en.

Belgium: Commercial Court of Brussels issues judgment in European Commission elevator cartel damages case

Summary. The Commercial Court of Brussels (CCB) has issued an interlocutory judgment in the first ever cartel civil damages claim brought by the European Commission (the Commission) on behalf of the EU.

Background. Article 101 of the Treaty on the Functioning of the EU (TFEU) prohibits cartels or other agreements or connected practices that restrict competition. Article 254 of the Treaty on the Functioning of the European Union (TFEU) permits the European Court of Justice (ECJ) to give preliminary rulings concerning the interpretation of the TFEU. An EU member state court may refer such a question to the ECJ if it considers that such a ruling is necessary to enable it to give judgment. Article 1382 of the Belgian Civil Code provides that any act which causes damage to another obliges a person by whose fault it occurred to make reparation.

Facts. On 18 April 2011, the CCB issued an interlocutory judgment in the first ever cartel civil damages claim brought by the Commission on behalf of the EU.

In 2008, the Commission brought an action on behalf of the EU before the CCB against the Belgian and Luxembourg subsidiaries of the four major elevator manufacturers (ThyssenKrupp, KONE, Otis and Schindler) whom the Commission in its decision of 17 February 2007 fined for participation in customer allocation cartels in Belgium, Luxembourg, Germany and the Netherlands. The Commission claimed damages of over EUR 7 million in relation to the allegedly inflated prices paid for elevators installed at EU institutions in Belgium and Luxembourg.

The four elevator companies raised a variety of defences, including:

- lack of international competence of the CCB to decide on the liability of claimants based in Luxembourg, and to assess Luxembourg contracts in which a choice for Luxembourg courts has been made;
- lack of admissibility of the claim on the basis that the Commission was not properly authorised to institute the claim or represent other EU institutions;
- absence of proof of causality and damages; and
- infringement of the TFEU and fundamental human rights in relation to a fair trial and impartial judge, in view of the fact that the Commission investigated and fined the elevator cartel that is now the basis for its private damages claim.

The CCB agreed with the defendants that it lacked international jurisdiction to decide the Commission's claim in relation to Luxembourg defendants. However the CCB rejected the argument on diverging choice of forum clauses, holding that the claims were in any event connected.

The CCB referred a number of questions to the Court of Justice of the European Union (CJEU). First, the CCB asked the CJEU to clarify the relationship between the TFEU, which exclusively designates the Commission to represent the EU in law, and the Financial Regulation (of 25 June 2002), which provides that in relation to administrative matters concerning their functioning, the EU institutions can act in law on their own behalf. The CCB also asked the CJEU whether the Commission should have obtained a written mandate from the institutions to represent them. The CCB also asked two further questions relating to the defendants' right to a fair trial in light of the Commission's capacity as prosecutor and civil claimant and the fact that national courts are bound by a Commission cartel decision; and the ability of the Commission and other EU institutions to recover damages in cartel cases if the Commission cannot claim cartel damages without breaching the right to a fair trial. Pending the CJEU's response to these questions, the CCB has postponed its judgment on the other issues.

Comment. The CCB's judgment is interlocutory insofar as it rejected the Commission's claims against the Luxembourg entities, while at the same time postponing judgment on issues of substance while the CJEU considers preliminary questions.

The Commission is widely regarded as having brought the claim as a means to promote cartel civil damages claims. However, the CJEU's response to the CCB's questions on the Commission's role in cartel investigations and civil damages cases could potentially impact on the Commission's future handling of such cases.

Source: Judgment of the Commercial Court of Brussels of April 18, 2011.

China: China's Supreme People's Court adopts draft provisions on private litigation under the Anti-Monopoly Law

Summary. China's Supreme People's Court (SPC) has published for consultation a set of judicial interpretations on private actions based on competition law.

Background. The Anti-Monopoly Law (AML) entered into force in 2008. Article 50 of the AML provides for private litigation. However, there has been uncertainty as to various procedural matters relating to private litigation, and as to the precise relationship between private litigation and competition investigations by China's enforcement authorities. The SPC is the highest court in China and its judicial interpretations are in practice treated by lower courts as binding.

Facts. On 25 April 2011, the SPC published for consultation the "Provisions on Several Issues Applicable to the Trial of Anti-Monopoly Private Litigation Cases" (Draft Provisions), a set of judicial interpretations on private actions based on competition law. Highlights of the Draft Provisions are set out below:

- *Jurisdiction*: an action must be brought before China's competent intermediate courts.

- *Nature of the litigation*: the Draft Provisions make clear that private litigation is in addition to enforcement action by the competition authorities. The action may be brought after the competition authority has taken action, or the individual claimant may also bring an action before the court directly and independently of action by the competition authorities.

- *Time limits*: private actions must be brought within two years of the date on which the injured claimant knew or should have known of the harm arising from the alleged anti-competitive conduct, or from the date on which the injured claimant knew or should have known of the competition authority's decision establishing unlawful conduct.

- *Parties to the action*: the claimant can be a natural or legal person, including an undertaking, consumer or organisation, and can bring an action for damages based on harm arising from alleged anti-competitive conduct. Individual or joint actions may be brought.

- *Burden of proof*: the Draft Provisions specify the allocation of the burden of proof between the claimant and defendant. The claimant is required to demonstrate the existence of the alleged anti-competitive conduct, the harm suffered, and the causal link between conduct and harm. It is for the defendant to establish any legitimate justifications for the alleged anti-competitive conduct.

- *Evidence*: the court procedure requires parties to provide considerable evidence in support of a case. In an effort to lessen the burden, the Draft Provisions provide that parties may ask the court to call expert witnesses, including economists and industry experts, to provide expert testimony during the court trial. The Draft Provisions also specify that information disclosed in the administrative process can be used as evidence. Furthermore, a claimant need not provide evidence to support facts that are substantiated by a prior decision of the competition authorities or court judgment.

- *Independent Judgment*: the court may still entertain the claimant's action even if the competition authority determines following an investigation that a particular conduct is not anti-competitive. In addition to damages, the court may order the cessation of anti-competitive conduct, or other conduct that threatens to cause future harm.

- *Other*: a pass-on defence is available, although the specifics of the defence remain to be clarified.

Comment. The Draft Provisions are the result of work that has been ongoing since 2009 and constitute the first substantive guidance issued by the SPC on the AML. While the Draft Provisions clarify a number of procedural issues on private litigation in China's courts, a number of questions remain, including the standard of proof and the level of damages. The Draft Provisions also allow courts to entertain private actions in cases where the competition authority determines that a particular practice is not anti-competitive, raising the prospect of different outcomes for decisions of the competition authorities and the courts.

Judges are likely to feel more comfortable dealing with private actions after publication of the SPC's final judicial interpretation. Private litigation may also increase. There have already been a number of attempts by private litigants to bring court actions under the AML, but these have thus far generally been unsuccessful.

Source: Draft Provisions, *25 April 2011,* http://www.court.gov.cn/gzhd/zqyj/201104/t20110425_19850.htm (*in Chinese*).

China: Chinese enforcement agencies and UK OFT sign Memoranda of Understanding

Summary. Two of China's competition authorities, the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC) have each signed a Memorandum of Understanding (MOU) with the UK's Office of Fair Trading (OFT).

Background. Enforcement of China's Anti-Monopoly Law (AML) is divided between three competition authorities: the NDRC deals with price-related practices, the SAIC with non-price related practices, and the Ministry of Commerce (MOFCOM) with merger control. From time to time, the OFT concludes MOUs with other competition authorities with a view to facilitating bilateral cooperation in relation to competition enforcement.

Facts. On 21 March 2011, the SAIC signed an MOU with the OFT. This followed the signing of an MOU between the NDRC and OFT on 10 January 2011.

The MOUs, although not legally binding, are part of an ongoing programme of cooperation between the OFT and Chinese competition authorities. They aim broadly to facilitate enforcement of competition policy through the exchange of information and best practice.

The MOU between the OFT and SAIC sets out areas of common interest between the authorities, including: exchange of information on policies, laws, rules and enforcement regarding competition and consumer protection; exchange of information on each country's consumer regimes and their respective "agency effectiveness" experience; sharing best practice, knowledge and expertise in tackling market problems and encouraging compliance; and specific projects for cooperative working to be agreed and regularly updated by the parties. The MOU between the OFT and NDRC addresses similar areas, albeit without the explicit focus on consumer protection contained in the MOU between the OFT and the SAIC. The MOUs will remain valid for an initial period of two years although this can be extended by mutual agreement. Progress under the MOU will be reviewed regularly, and the authorities have appointed liaison departments to facilitate communication.

In a press release, the OFT indicated that cooperation with the SAIC will focus on abuse of dominance, the relationship between intellectual property and competition, and market definition. The OFT also stated that it has engaged the SAIC in discussions on cross-border inter-agency cooperation, and the benefits of transparency in ensuring that the reasoning behind competition decisions are understood.

Comment. The MOUs are the first set of bilateral cooperation agreements between the Chinese competition authorities and those of other countries to have been entered into since the AML became effective. They establish a general framework for bilateral cooperation but leave out several details on the precise nature and scope of the cooperation, such as the kind of information to be exchanged and how the authorities will cooperate on on-site investigations. Nonetheless, the MOUs offer a common set of competition principles that businesses in the UK and China can expect in either jurisdiction. MOFCOM is expected to sign a similar agreement with the OFT in June this year, and other cooperation agreements can be expected in the future as China seeks to align its competition policy and enforcement with international best practice.

Sources: Memorandum of Understanding on Cooperation between the OFT and the SAIC, 21 March 2011, http://www.oft.gov.uk/shared_oft/about_oft/international/MoU_with_China_SAIC.PDF; Memorandum of Understanding on Cooperation between the OFT and NDRC, 10 January 2011, http://www.oft.gov.uk/shared_oft/about_oft/international/China.pdf.

Czech Republic: Czech Competition Office plans to introduce proposal to abolish the Significant Market Power Act

Summary. The Czech Competition Office (CCO) has begun a public consultation on the proposed abolition of the Significant Market Power Act (SMPA) and related draft amendments to the Czech Competition Act and the Act on Prices.

Background. The SMPA regulates relations between buyers and their suppliers by prohibiting certain practices of the former where they exercise "significant market power". The CCO supervises the application of the SMPA.

Facts. On 7 April 2011, the CCO began a public consultation on the proposed abolition of the SMPA and related draft amendments to the Czech Competition Act and the Act on Prices, which may replace the SMPA.

The proposal sets out what would constitute a "significant economic position", i.e. an economic position held by an undertaking that could significantly affect the dealings and behaviour of other companies competing on the relevant market. A company may be deemed to hold a significant economic position even if it does not meet the criteria of a dominant, or monopolistic, position. The abuse of a significant economic position would be prohibited.

The proposal also contains a set of examples of conduct which would constitute an infringement of the statute, and removes the concept of "economic dependence", which has been found to be inefficient.

Comment. The SMPA has been criticised as being unsystematic, discriminatory, unclear, and excessively interventionist. Some may feel that draft amendments to the Czech Competition Act still go too far in regulating contracts and negotiations where one party is in a stronger position than the other, but the proposals certainly seem to address some of the more controversial issues.

Source: CCO press release, 7 April 2011, http://www.compet.cz/hospodarska-soutez/aktuality-z-hospodarske-souteze/verejna-diskuse-k-navrhu-zruseni-zakona-o-vyznamne-trzni-sile/ (available in Czech).

France: French Competition Authority launches market test for proposed inter-bank fee commitments

Summary. The French Competition Authority (FCA) has published a series of commitments on inter-bank fees proposed by the *Groupement des cartes bancaires* (the GCB), comprising the main retail banks in France, in order to address competition concerns previously raised by the FCA.

Background. Pursuant to Article L 464-2 of the French Commercial Code, the FCA may accept commitments proposed by companies or entities that are likely to remedy competition concerns regarding potential prohibited practices (except for "hard core infringements") on the basis of Articles L 420-1, L 420-2 and L 420-5 of the Commercial Code (the French equivalents of Articles 101 and 102 of the TFEU).

Facts. On 5 April 2011, the FCA published a series of commitments on inter-bank fees proposed the GCB, comprising the main retail banks in France, in order to address competition concerns previously raised by the FCA.

Following referrals in 2009 and 2010 from two retail trade organisations, the FCA examined the compatibility of multilateral inter-bank fees related to the use of various means of payment (except cheques) with competition law. The FCA first took the view that by preventing the banks from determining the fees bilaterally and autonomously, the inter-bank fees set by the GCB were likely to be seen as concerted practices that may restrict competition.

According to past decisions of the FCA, such a common approach to the setting of fees is not anti-competitive in itself and may be justifiable, especially if the level of the fees is set on the basis of objective criteria (e.g. security) and is supported by up-to-date data. However, in this case, the FCA considered that there were not sufficient grounds to justify the level of the various fees. As a result, the GCB offered a set of commitments intended to reduce the level of the various inter-bank fees.

For inter-bank *payment* fees, paid by the acquiring bank (the merchant's bank) to the issuing bank (the cardholder's bank) for each card payment resulting in an inter-bank transaction, the GCB proposed setting an average amount less than or equal to 0.32%, thus reducing the fee by around 25%.

Inter-bank *withdrawal* fees, paid by the issuing bank for any withdrawal made from an ATM belonging to another bank, comprise several components. The GCB committed to set the fixed "ATM fee" component at an amount equal to or less than EUR 0.72, and to maintain both of the IWF's variable components at their current levels. The GCB suggested leaving the level of the inter-bank fee for cash withdrawal at the counter (EUR 3.81 + 0.45% of the withdrawal amount) unchanged, but committed to reduce the fee charged when banks withhold payment cards.

These commitments, which would apply for a period of 5 years, are subject to comments from all stakeholders and to the review of the FCA, which may either close the case or open a formal infringement procedure. The commitments will be market tested until 5 May 2011.

Comments. This market test is further evidence of the high level of the FCA's interest in the retail banking sector. In September 2010, the FCA fined 11 French banks for charging unjustified inter-bank fees during the transition towards a new digital system for processing cheques. The retail banking sector remains subject to heightened antitrust scrutiny.

Source: Market test for the proposed inter-bank fee commitments, 5 April 2011, http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=389&id_article=1580.

Germany: FCO prohibits joint TV on demand internet platform planned by RTL and ProSiebenSat1

Summary. The German Federal Cartel Office (FCO) has prohibited a proposed joint venture between the private broadcasters RTL and ProSiebenSat1 to create an internet platform for "catch-up" television on demand.

Background. Under Section 36 of the German Act against Restraints of Competition (ARC), a transaction which is expected to create or strengthen a dominant position will be prohibited by the FCO unless the companies concerned prove that the transaction will also lead to improvements in the conditions of competition and that these improvements will outweigh the disadvantages of dominance.

Facts. On 17 March 2011, the FCO prohibited a proposed joint venture between the private broadcasters RTL and ProSiebenSat1 to create an internet platform for 'catch-up' television on demand. RTL and ProSiebenSat1 planned to form a full-function joint venture to establish and operate a central online platform on which consumers could watch television programmes aired in Germany and Austria up to seven days after their initial broadcast on television.

On 6 August 2010, the parties notified the joint venture to the European Commission (the Commission). The Commission referred the case to the German and Austrian competition authorities upon their requests. The FCO was of the opinion that the joint platform would further strengthen the existing dominant duopoly between the two broadcasting groups on the market for TV advertising. The FCO might have adopted a different view if the parties had opened the platform to third parties and broadcasters and had lifted the restrictions on the time of availability and quality of content. However, RTL and ProbSiebenSat1 refused to make fundamental changes to the original concept of the joint venture. Consequently, the FCO held that despite its technical benefits, the project provided no guarantee that it would outweigh the expected disadvantages for competition, and so prohibited the joint venture.

Comment. While both parties may challenge the FCO's decision before the courts, it is difficult to assess the chances of any such legal action since the project could also potentially raise competition concerns with regard to likely spill-over effects resulting from the joint venture.

Source: FCO decision, 17 March 2011, http://www.bundeskartellamt.de/wEnglisch/News/press/2011_03_18.php.

Poland: Polish competition authority fines second mobile network operator for obstructing inspection

Summary. The Office of Competition and Consumer Protection (OCCP) has fined Polkomtel, one of the four largest mobile network operators in Poland, EUR 33 million for obstructing an inspection conducted in December 2009.

Background. The OCCP has powers to enter premises, land and vehicles of companies (Article 105b of the Act on Competition and Consumers Protection (Competition Act)). Upon approval of the Competition Court, OCCP officials may search premises and objects of companies (Article 105c of the Competition Act).

The OCCP may impose a fine of up to EUR 50 million on a company which has not co-operated during an inspection and a fine of up to the equivalent of fifty times the average remuneration of a person that holds a managerial position, or is a member of the management board of the company (Article 106 item 2, point 3 and 108, item 2 of the Competition Act).

Facts. On 24 February 2011, the OCCP fined Polkomtel, one of the four largest mobile network operators in Poland, EUR 33 million for obstructing an inspection conducted in December 2009.

The inspection of Polkomtel's premises was one of five simultaneous dawn raids following allegations of a horizontal agreement relating to mobile television services. The OCCP officials entered the reception area of Polkomtel and asked the receptionist to contact the chairman of Polkomtel's management board. The inspectors were informed that the chairman was at a meeting which was being held in Polkomtel's premises. The chairman did not meet with the OCCP inspectors until approximately 1 hour and 15 minutes after their arrival. Furthermore, during the raid representatives of Polkomtel obstructed the inspection by failing to submit complete documents required by the OCCP and refusing to allow the seizure by the OCCP of hard disks which contained the email profiles of five Polkomtel employees.

The OCCP imposed a fine of EUR 33 million on Polkomtel, arguing that the infringement was flagrant and resulted in significant harm to the public interest. As the dawn raids were to be conducted simultaneously at the premises of five companies, the OCCP considered it very important that all inspections started at the same time. Further, the fact that Polkomtel refused to hand over the hard disks and provided only partial documentation, undermined the OCCP's authority to determine the scope of documentation to be delivered by companies. The amount of the fine levied was 66% of the maximum possible fine which could be imposed under Polish law.

Comment. This is the second fine which the OCCP has imposed on a mobile network operator for obstructing the inspections conducted in December 2009 (the first fine, imposed on PTC, was EUR 30 million). This illustrates that the OCCP is willing to impose considerable fines on companies that attempt to undermine its right or ability to conduct dawn raids.

Source: OCCP decision, 4 November 2010, http://www.uokik.gov.pl/news.php?news_id=2506.

Slovak Republic: Amendments to the Slovak Act on State aid and the Slovak Execution Act

Summary. The National Council of the Slovak Republic has passed an act (the Act) amending both the Slovak Act on State aid and the Slovak Execution Act. The Act will come into force on 1 June 2011 and reflects the outcome of proceedings against the Slovak Republic in connection with the State aid provided to the drinks manufacturer Frucona Košice, a.s. (Frucona).

Background. In a decision dated 7 June 2006, the European Commission (the Commission) considered that the write-off by the Slovak Republic of a tax debt owed by Frucona of approximately EUR 13.8 million (SKK 416.5 million) constituted unlawful State aid and had to be recovered with interest.

Frucona appealed the Commission's decision before the General Court of the European Union. On 7 December 2010, Frucona's appeal was dismissed. The Commission had also brought a concurrent action before the Court of Justice of the European Union (CJEU) in relation to the failure of the Slovak Republic to recover the unlawful State aid. On 22 December 2010, the CJEU declared that the Slovak Republic had failed to fulfil its obligations under the Commission decision.

Facts. On 23 March 2011, the National Council of the Slovak Republic passed the Act amending both the Slovak Act on State aid and the Slovak Execution Act in response to the judgment of the CJEU on 22 December 2010.

Section 26 of the Slovak Act on State aid, as amended by the Act, now provides for direct enforceability of Commission decisions declaring granted State aid as unlawful against the beneficiary. In addition, pursuant to Section 44(2) of the Slovak Execution Act, as amended by the Act, the decision of the Commission about unlawful State aid may not be reviewed by Slovak courts. Other provisions of the Slovak Execution Act, amended by the Act, set forth a simplified procedure of enforcement of Commission decisions on unlawful State aid whereby an execution order is issued together with notification of execution to the aid beneficiary.

Comment. There are doubts as to the applicability of the Act to the recovery of State aid from Frucona because of the Act's temporal scope. The Act provides that Commission decisions dated prior to 31 May 2011 that are yet to be enforced should be enforced pursuant to the provisions of the Act effective as of 1 June 2011. Moreover, the simplified enforcement procedure may give rise to objections from State aid beneficiaries concerning their right to appeal. The Act can nevertheless be seen as a step in the right direction, bringing Slovak legislation in line with European Union rules and adding greater transparency to issues of State aid.

Source: Collection of Laws No. 102/2011 dated 7 April 2011,
http://www.zbierka.sk/zz/predpisy/default.aspx?PredpisID=210171&FileName=zz2011-00102-0210171&Rocnik=2011
(available in Slovak only).

Spain: CNC opens formal proceedings into alleged collective hotel price recommendation

Summary. The Investigations Division of the Spanish competition authority (CNC) has launched a formal investigation into the Spanish Confederation of Business Organisations (CEOE) and Mr Joan Gaspart Solves, Chairman of the Tourism Board of the CEOE, relating to alleged collective price recommendations.

Background. Article 1 of the Spanish Competition Act 15/2007 (LDC) prohibits "collective recommendations which have as their object, produce or may produce the effect of prevention, restriction or distortion of competition". Article 61(1) of the LDC establishes that participants to infringements may be natural or legal persons. Moreover, if the infringement is committed by a legal person, Article 63(2) of the LDC provides that a fine of up to EUR 60,000 may be imposed on the legal representatives or of the relevant company.

Facts. On 1 April 2011, the CNC launched a formal investigation into the CEOE and Mr Joan Gaspart Solves, Chairman of the Tourism Board of the CEOE. The opening of proceedings came after the CNC found that statements allegedly made by the latter constituted *prima facie* evidence of conduct prohibited by Article 1 of the LDC. Specifically, the investigation centres on the allegation that the statements constituted a collective price recommendation.

Comment. The CNC has been active recently in investigating collective price recommendations within the context of trade associations. On 31 March 2011, the CNC fined the National Association of Canned Fish and Seafood Manufacturers EUR 100,000 for engaging in a collective price recommendation. In September 2009, the CNC fined several food industry associations EUR 322,500 for making collective recommendations to apply price increases.

The CNC has in the past fined individuals based on Article 63(2) of the LDC, but this is the first time that the CNC has included the name of an individual in the press release about the opening of a formal investigation. It is presently unclear whether the proceedings against Mr Gaspart are based on Article 61(1) or 63(2) of the LDC. If the CNC finds that Mr Gaspart has infringed Article 1 himself on the basis of Article 61(1), it would be the first time that the Spanish authority has found a natural person directly guilty of such an infringement.

Source: CNC announcement, 5 April 2011,
http://www.cncompetencia.es/Inicio/Noticias/tabid/105/Default.aspx?Contentid=316731&Pag=2.

United Kingdom: OFT investigation into e-book sales

Summary. The UK's Office of Fair Trading (OFT) has launched an investigation into whether arrangements between certain publishers and some retailers for the sale of e-books may breach competition rules.

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

Facts. The OFT has announced that it has opened an investigation into whether arrangements between certain publishers and some retailers for the sale of e-books may breach competition rules, following a significant number of complaints. The OFT has stressed that the investigation is at an early stage and that it should not be assumed that the parties involved have breached competition law.

Comment. The OFT has not confirmed the precise focus of the investigation. The last major UK enquiry into the wholesale book trade was in February 2007 when the merger of Bertrams, a wholesale supplier of books to retailers, and Entertainment UK Limited was referred to the Competition Commission.

Source: OFT announcement, 1 February 2011,
http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/e-books/.

United Kingdom: OFT refers Irish Sea ferries merger to the CC

Summary. The Office of Fair Trading (OFT) has referred the completed acquisition by Stena AB (Stena) of two Irish Sea ferry services from DFDS A/S (DFDS) (the transaction) to the Competition Commission (CC) for further investigation.

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

The transaction, which included the acquisition of assets and vessels of the Liverpool-Belfast and Heysham-Belfast routes (the acquired routes), was completed on 1 December 2010. On 2 December 2010, Stena announced that it would be closing its Fleetwood-Larne route (the Stena route).

Facts. In assessing the transaction, the OFT considered whether Stena would have exited from supplying the Stena route, which was a competitor of the acquired routes, had the acquisition not taken place. If so, a loss of any competition between Stena and DFDS may have been due to the closure rather than the acquisition. However, the evidence available to the OFT was not sufficient to allay its concern and prove that the Stena route would have closed even in the absence of the acquisition.

As a result, the OFT considers that the transaction has created a realistic prospect of an SLC in the supply of freight ferry services between the north of England and the north of Ireland. The OFT has therefore referred the transaction to the CC for further investigation.

Comment. The OFT's referral follows the Irish Competition Authority's announcement on 14 January 2011 that it would be carrying out a full phase 2 investigation of the transaction. In the meantime, DFDS has announced its intention to close its remaining Irish Sea ferry routes.

In 2004, the CC imposed remedies in relation to Stena's anticipated acquisition of two routes from P&O, which included the Stena route.

The CC is expected to report on the transaction by 25 July 2011.

Sources: OFT press release, 8 February 2011, http://www.oft.gov.uk/news-and-updates/press/2011/13-11;
CC news release, 9 February 2011, http://www.competition-commission.org.uk/press_rel/2011/feb/pdf/0411_stena_dfds_merger_inquiry_cc_invites_evidence.pdf.

United Kingdom: The OFT decides not to open a formal investigation into Visa's Olympic sponsorship arrangements

Summary. The Office of Fair Trading (OFT) has decided not to open a formal investigation into Visa's sponsorship arrangements for the London 2012 Olympic Games.

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

Visa and the London Organising Committee of the Olympic Games and Paralympic Games (LOCOG) entered into sponsorship arrangements which, among other things, confer on Visa payment card exclusivity for the purchase of official Olympic merchandise and for the use of ATM machines at official Olympic Games venues (the sponsorship arrangements).

Facts. The OFT has decided not to open a formal investigation into the sponsorship arrangements.

Following an initial assessment, the OFT has stated that it considers that the aspects of the sponsorship arrangements are unlikely to give rise to material consumer harm. The OFT considered the availability of alternative payment methods for the purchase of Olympic merchandise, including cash and cheques but also the Visa virtual prepaid card, which has been specially created by Visa for the 2012 Olympic Games.

The OFT stated that it does not propose to open a formal investigation or to prioritise this matter at this stage. However, the OFT has reserved its right to investigate the issue in the future should there be any evidence of material consumer harm going forward.

Comment. The availability of alternative payment methods and pre-paid cards appears to have addressed any concerns raised by the OFT in this case. The OFT did not consider as part of its initial assessment Visa's exclusivity arrangements for the purchase of tickets for events at the Olympic Games, however this aspect has been monitored by the European Commission.

Source: OFT case closure summary, March 2011,
http://www.oft.gov.uk/OFTwork/cartels-and-competition/ca98/closure/visa-olympic-sponsorship/.

United Kingdom: CAT reduces fines on a number of companies in the construction sector

Summary. The UK's Competition Appeal Tribunal (CAT) has reduced the fines imposed by the Office of Fair Trading (OFT) on a number of companies for alleged bid-rigging in the construction sector.

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

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

Facts. In 2004, the OFT commenced an investigation of practices in the construction industry and, on 22 September 2009, fined 103 companies a total of £129.2 million. All but six of the offending companies were found to have engaged in a practice by which a company not wishing to win a contract, but needing to put in a bid in order to be considered for future work, arranged to have another company submit a higher bid (simple cover pricing) rather than more serious bid-rigging agreements in which the other company is compensated for submitting a higher bid. 25 appeals lodged against the decision were heard by the CAT in June and July 2010. All of the first 12 appeals challenged how the fines were set.

Decision. The fines of the six appellants in the CAT's first decision of 11 March 2011 (first decision) were reduced from approximately £42 million to approximately £4.2 million. Those of the six appellants in the CAT's second decision of 24 March 2011 (second decision) were reduced from around £15 million to around £4.2 million.

Though the CAT's reasons for reducing the fines vary by appellant, the decisions reveal certain common considerations of the CAT in relation to the manner in which the OFT determined the penalties such as the starting point for calculation of the fine, the relevant year for turnover, the commonality of the practice as a mitigating circumstance and application of the minimum deterrent threshold (an additional turnover-based penalty designed to deter parties from further infringements) on a case-by-case basis.

Comment. The first decision resulted in a reduction of the total fines by about 90% which is a significant amount and likely to represent a set-back for the OFT. However, the CAT has noted in the second decision that the substantial reductions should not be interpreted as indicating that the CAT considers cover pricing to be anything less than a serious infringement of the competition rules. The OFT has stated that it will consider the judgment in detail and will consider whether it should appeal to the Court of Appeal.

Cases: Kier Group plc and others v OFT, [2011] CAT 3, 11 March 2011; GF Tomlinson Group Limited and others v OFT, [2011] CAT 7, 24 March 2011; OFT press release, 11 March 2011, http://www.oft.gov.uk/news-and-updates/press/2011/34-11.

United Kingdom: CC publishes final order in Payment Protection Insurance investigation

Summary. The Competition Commission (CC) has published a final order detailing measures intended to introduce competition into the Payment Protection Insurance (PPI) market.

Background. The Office of Fair Trading (OFT) has the power to make a market investigation reference to the CC if it has reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services (*section 131, Enterprise Act 2002*) (2002 Act).

The CC has two years from the date of a market investigation reference to conduct inquiries and publish a final report (*sections 136 and 137, 2002 Act*). If the CC concludes in its report that that there is one or more than one adverse effect on competition (AEC), it must either accept final undertakings or issue a final order to remedy, mitigate or prevent the AEC (*section 138, 159 and 161 2002 Act*).

Facts. The CC has published its final order detailing measures intended to introduce competition into the PPI market. These measures include:

- a prohibition on selling PPI at the point of sale of the credit until after seven days after the credit sale or, if later, seven days after the supply of a personal PPI quote (point of sale prohibition);
- an obligation to provide a personal PPI quote, setting out the cost of PPI along with details of the cover provided;
- an obligation to provide an annual review setting out the cost of PPI and including a reminder of the consumer's right to cancel;
- an obligation to provide information in marketing material about the cost of PPI and key messages, for example making it clear that PPI is optional and available from other providers; and
- various information, compliance reporting and other requirements, including commission of independent 'mystery shopping' exercises by the largest providers.

The CC had previously outlined its remedies in a final report of January 2009 (and draft Order of July 2009). However, the report and, in particular, the question of whether the point-of-sale prohibition was proportionate and necessary were the subject of a legal challenge to the Competition Appeal Tribunal (CAT). The CAT upheld the CC's conclusions as to the competition problems in the market, but concluded that the CC had failed to take into account the loss of convenience to customers that would occur from point-of-sale prohibition, and found that the methodology used by the CC in quantifying the benefits expected from its remedies package was defective. The CC concluded in October 2010 that the point-of-sale prohibition would benefit customers.

The order takes effect from 6 April 2011. However, the main remedies will be introduced in two phases: some information requirements will come into force on 1 October 2011, and the point-of-sale prohibition and other measures on 6 April 2012. The OFT will take the lead in enforcing and monitoring compliance with the order.

Comment. The publication of the order marks the culmination of the CC's market investigation into PPI, which started in February 2007 and which saw only the second ever successful appeal of CC recommendations at the Competition Appeal Tribunal.

Source: Competition Commission press release, 24 March 2011, http://www.competition-commission.org.uk/press_rel/2011/march/pdf/13_11_PPI_CC_publishes_final_Order.pdf.

United States: Antitrust concerns cast doubt on future of Google's digital library

Summary. A US District Court, citing antitrust concerns, has rejected Google's proposed settlement with a class of authors and publishers.

Background. Class action settlements must be approved by the US courts under Federal Rule of Civil Procedure 23(e). A court will approve the settlement only if it is fair, adequate, and reasonable, and not a product of collusion.

Facts. On 22 March 2011, a US District Court, citing antitrust concerns, rejected Google's proposed settlement with a class of authors and publishers.

Google began scanning books in 2004 after entering into agreements with several major research libraries to digitally copy books and other writings in their collections. Google has scanned into its digital library more than 12 million books to date.

A significant portion of the books scanned by Google were still under copyright, and Google did not obtain copyright permission to scan the books. Certain authors and publishers sued Google in a class action, alleging copyright infringement. The parties eventually settled. The relevant court tentatively approved the settlement, pending public comment. The proposed settlement triggered hundreds of objections.

The parties modified the settlement based upon many of the initial objections. The court again tentatively approved the modified settlement, subject to public comment. Again, hundreds of objections were lodged. The US Department of Justice, as well as several persons not parties to the case but with an interest in the outcome of the case (including Microsoft and Amazon), weighed in against the settlement. The objections spanned numerous subjects, including antitrust. The antitrust objections were: (i) the described pricing mechanisms constituted horizontal agreements in violation of the Sherman Act; (ii) the settlement effectively granted Google a monopoly over digital books; and (iii) the monopoly entrenched Google's dominant position in the online search business. The court agreed with these concerns, among others, and held that they rendered the settlement not fair, adequate, and reasonable.

Comment. The case contrasts two public policy concerns: access to books and monopolisation. The court noted that the benefits of Google's digital library would be multiple: "books would become more accessible"; "libraries, schools, researchers, and disadvantaged populations will gain access to far more books"; "digitisation will facilitate the conversion of books to Braille and audio formats, increasing access for individuals with disabilities"; authors and publishers will benefit from "new audiences will be generated and new sources of income"; and older books "will be preserved and given new life." Yet the court found that these advantages were outweighed by monopolisation and other concerns, leaving open the question of whether a digital library can be created absent government intervention.

Source: The Authors Guild v. Google Inc., 05 Civ. 8136 (DC) (S.D.N.Y. Mar. 22, 2011).

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