

Antitrust Review | November-December 2011

European Union

- **ECJ dismisses copper tubes cartels appeals.** The Court of Justice of the European Union has upheld the judgments of the General Court and the decisions of the European Commission relating to two cartels in the copper industrial and copper plumbing tubes sectors.
- **Commission settles cartel with refrigeration compressor producers.** The European Commission has settled a cartel with producers of household and commercial refrigeration compressors.
- **Commission opens formal proceedings to investigate sales of e-books.** The European Commission has opened formal antitrust proceedings to investigate whether certain publishing groups have engaged in anti-competitive practices affecting the sale of e-books in the European Economic Area.
- **Commission accepts IBM's mainframe maintenance commitments.** The European Commission has made commitments offered by International Business Machines Corporation (IBM) legally binding, bringing to an end the Commission's investigation as to whether or not IBM abused a dominant position on the mainframe maintenance market.
- **Cathode ray tube producers - Commission imposes reduced fines.** The European Commission has imposed reduced fines on certain cathode ray tube glass producers under its cartel settlement procedure.
- **Commission imposes EUR 8.9 million fine on banana importer.** The European Commission has imposed a fine on Pacific Fruit, while Chiquita received immunity from fines, for alleged price fixing in Southern Europe between July 2004 and April 2005.
- **Antitrust investigation procedures - best practices published.** The European Commission (the Commission) has adopted a series of measures aimed at increasing the Commission's interaction with parties in antitrust proceedings and strengthening the mechanisms for safeguarding parties' procedural rights.

Czech Republic

- **Final appeal in bus operator abuse case thrown out for missing deadline.** The Supreme Administrative Court of the Czech Republic has rejected a final appeal against a decision of the Czech Competition Office because it was lodged too late.

France

- **French Competition Authority fines detergent cartel a total of EUR 367.9 million.** The French Competition Authority has fined three laundry detergent manufacturers for coordinating commercial strategies on price and promotions on the French market.

Germany

- **Reform proposals to the Act Against Restraints of Competition – ministerial draft.** On 10 November 2011, the German Federal Ministry of Economics and Technology has published a ministerial draft of the so-called "8th ARC Novel".

The Antitrust Review does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Slovak Republic

- **Draft guidelines on settlement procedure published.** The Slovak Antimonopoly Office is consulting on draft guidelines introducing a settlement procedure applicable to violations of the Slovak Competition Act.

United Kingdom

- **CAT allows Tobacco appeals.** The Competition Appeal Tribunal has allowed the appeals brought by Imperial Tobacco Group (Imperial) and five retailers against the decision of the Office of Fair Trading (OFT) which found that a number of tobacco manufacturers and retailers had infringed the Competition Act 1998 and quashed the OFT's decision as it related to each of the appellants.
- **OFT announces agreed measures for travel money charges.** The Office of Fair Trading has published its response to the travel money super-complaint, which includes a set of industry-agreed measures to improve the information available for consumers purchasing foreign currency in the UK or using credit and debit cards abroad.
- **OFT refers audit market to CC.** The Office of Fair Trading has referred the market for statutory audit services to large companies in the UK to the Competition Commission for a market investigation.
- **OFT consults on new guidance on penalties and leniency.** The Office of Fair Trading is consulting on two revised guidance documents, setting out proposals to update its approach to financial penalties and to awarding leniency in competition cases.

United States

- **Cartel members receive rare corporate probation.** Four freight forwarding companies involved in an international cargo shipment cartel receive fines and an uncommon two-year probation.
- **US challenges H&R Block acquisition of TaxACT.** The Antitrust Division of the US Department of Justice successfully challenged H&R Block's acquisition of TaxACT.

European Union: ECJ dismisses copper tubes cartels appeals

Summary. The Court of Justice of the European Union (ECJ) has upheld the judgments of the General Court and the decisions of the European Commission (the Commission) relating to two cartels in the copper industrial and copper plumbing tubes sectors.

Background. Article 101 of the Treaty on the Functioning of the European Union prohibits cartels and other agreements or concerted practices that restrict competition. Those found to have infringed Article 101 can appeal to the General Court (*Article 250, TFEU*). General Court judgments are subject to appeal to the ECJ on points of law only (*Article 250, TFEU*).

Facts. In December 2003, the Commission imposed fines on a number of companies for their participation in a cartel in the copper industrial tubes sector. Companies belonging to the KME group were fined a total of EUR 39.81 million. In September 2004, the Commission fined the KME group EUR 67.08 million and Chalkor EUR 9.16 million for their participation in a second cartel, this time in the market for copper plumbing tubes.

KME and Chalkor appealed their fines to the General Court. In relation to the first cartel, in May 2009 the General Court rejected all of KME's arguments relating to the determination of the size of the fine. In relation to the second cartel, in two judgments issued in May 2010 the Court (i) rejected KME's arguments relating to the determination of the size of the fine, and (ii) decided that the extent of Chalkor's participation in the cartel merited a 10% reduction in its fine from EUR 9.16 million to EUR 8.25 million.

KME and Chalkor appealed further to the ECJ, seeking to have the General Court's judgments set aside and the Commission's decisions annulled.

Decision. On 8 December 2011, the ECJ issued three judgments upholding the General Court judgments and Commission decisions relating to the two cartels in the copper industrial and copper plumbing tubes sectors.

The ECJ judgments included the following findings.

- The General Court's review of the Commission's decisions imposing fines was not contrary to the principle of effective judicial protection laid down by the Charter of Fundamental Rights of the European Union.
- The ECJ agreed with Chalkor that the General Court was required to carry out a review as regards both matters of fact and law, and concluded that in this instance the General Court indeed carried out such a full and unrestricted review. The ECJ noted that the General Court has the power to assess the evidence, to annul the Commission's decision and to alter the amount of a fine.
- Jurisdiction empowers the General Court, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the pecuniary penalty imposed. However, the exercise of unlimited jurisdiction does mean that the Courts are obliged to carry out a review of the *whole* of the contested decision.

Accordingly, the ECJ preserved the fines at the current level.

Comment. This is the latest in a series of cases that have fuelled the debate over the compliance of the EU's cartel fining system with fundamental rights, which has gained momentum since the Lisbon Treaty came into force in December 2009. The European Court of Human Rights (ECtHR) ruled in September 2011 (Case no. 43509/08 – *A Menarini Diagnostics S.r.l v. Italy*) that the Italian system of antitrust sanctions was legal, on the basis that fines issued in decisions of the antitrust authority were subject to full review by the administrative courts. Thus, if a decision of the European Courts were ever to reach the ECtHR, there would likely be close scrutiny of whether in fact the EU judges actually conducted an in-depth review of complex economic assessments.

Accordingly, the ECJ judgment in the present case stressed that while the Commission has a margin of discretion in areas giving rise to complex economic assessments, the General Court must not refrain from reviewing the Commission's interpretation of information of an economic nature. In other words, the General Court must not defer to the Commission's work and dispense with its own in-depth review of the law and facts.

Source: *ECJ Judgments (C-272/09, C-386/10 and C-389/10)*, 8 December 2011; ECJ press release, 8 December 2011, <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-12/cp110134en.pdf>.

European Union: Commission settles cartel with refrigeration compressor producers

Summary. The European Commission (the Commission) has settled a cartel with producers of household and commercial refrigeration compressors.

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

Companies can apply to the Commission under the terms of its leniency notice to obtain total immunity or leniency from fines (2006/C 298/11) (the leniency notice).

In June 2008, the Commission introduced a settlement procedure to simplify and speed up cartel investigations. Under the settlement procedure, companies may benefit from shortened proceedings and a 10% reduction in fines under the terms of the Commission's settlements notice (2008/C 167/1).

Facts. On 7 December 2011, the Commission fined Appliances Components Companies S.p.A. (ACC), Danfoss A/S (Danfoss), Embraco Europe S.r.l. (Embraco) and Panasonic Corporation (Panasonic) a total of approximately €161 million for allegedly co-ordinating European pricing policies for household and commercial refrigeration compressors, used in fridges, freezers, vending machines and ice-cream coolers, and keeping market shares stable in an attempt to recover cost increases. While the Commission considered that Tecumseh Products Company Inc. (TPC) had also participated in the alleged cartel, TPC was granted full immunity under the leniency notice.

The Commission reduced the fines on Panasonic, ACC, Embraco and Danfoss by 10% for participation in the settlement procedure. The Commission also granted reductions to Panasonic (40%), ACC (25%), Embraco (20%) and Danfoss (15%) for cooperation under the leniency notice, and Embraco's fine was further reduced for co-operation outside the leniency notice. The fine imposed on Panasonic reflected the Commission's recognition that it was not involved in all aspects of the alleged cartel. One of the companies was also granted a reduction in its fine on the grounds of inability to pay.

Comment. This decision marks the fifth time overall and third time in 2011 that the Commission has used the settlement procedure. The settlement procedure is likely to become increasingly prevalent as the Commission seeks to reduce its administrative burden by reducing the time it takes to reach decisions.

Source: Commission press release, 7 December 2011, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1511&format=HTML&aged=0&language=EN&guiLanguage=en>.

European Union: Commission opens formal proceedings to investigate sales of e-books

Summary. The European Commission (the Commission) has opened formal antitrust proceedings to investigate whether certain publishing groups have engaged in anti-competitive practices affecting the sale of e-books in the European Economic Area (EEA).

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).

The Commission has powers to enter and inspect premises, land and vehicles of undertakings (Article 20, Regulation 1/2003/EC) (Regulation 1/2003) as well as other premises (Article 21, Regulation 1/2003). 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), Regulation 1/2003).

In March 2011, the Commission carried out unannounced inspections at the premises of several companies active in the e-

book publishing sector in various Member States.

Facts. On 6 December 2011, the Commission announced that it had opened formal proceedings to investigate whether international publishers Hachette Livre, Harper Collins, Simon & Schuster, Penguin and Verlagsgruppe Georg von Holtzbrinck have engaged in anti-competitive practices affecting the sale of e-books in the EEA, possibly with the help of Apple.

The Commission will focus its investigation on whether the publishers and Apple have engaged in agreements or practices that would have the object or effect of restricting competition in the EU or EEA. The Commission has stated that an additional concern it is investigating may be the character and terms of the agency agreements entered into by these publishers with retailers for the sale of e-books.

Comment. The UK Office of Fair Trading (OFT) had carried out an investigation in parallel and in close cooperation with the Commission but closed its investigation prior to the Commission opening formal proceedings on grounds of administrative priority. The OFT has stated it will continue to co-operate with the Commission in its investigation going forward.

Source: Commission press release, 6 December 2011, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1509&format=HTML&aged=0&language=EN&guiLanguage=en>; OFT update, 6 December 2011, <http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/e-books/>.

European Union: Commission accepts IBM's mainframe maintenance commitments

Summary. The European Commission has made commitments offered by International Business Machines Corporation (IBM) legally binding, bringing to an end the Commission's investigation as to whether or not IBM abused a dominant position on the mainframe maintenance market.

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

The European Commission may terminate Article 102 proceedings by adopting a commitments decision where the companies under investigation are willing to offer commitments which remove the Commission's initial competition concerns (Article 9, *Modernisation Regulation (1/2003/EC)*) (Article 9). The commitments can be behavioural or structural and may be limited in time. The Commission can impose a fine on the company of up to 10% of worldwide turnover for failure to respect the commitments imposed (Article 23, *Modernisation Regulation (1/2003/EC)*).

Facts. On 14 December 2011, the Commission announced that it had made commitments offered by IBM legally binding. The Commission's acceptance of the IBM commitments brings to an end its investigation as to whether IBM abused a dominant position on the mainframe maintenance market.

In July 2010, the Commission opened an investigation into whether IBM was abusing a dominant position on the market for the maintenance of mainframe computers by hindering the access of independent maintenance service providers to critical spare parts. Given the critical role of mainframe computers to vital business processes and the consequent need for timely and effective maintenance to avoid the disruption of day-to-day business, such behaviour would potentially place those providers at a competitive disadvantage and breach Article 102.

Under the commitments, which were revised in light of third party observations received as part of a Commission consultation begun in September 2011, IBM will ensure that spare parts and technical information are made swiftly available to independent mainframe maintenance companies on commercially reasonable and non-discriminatory terms.

Comment. The Commission has made the commitments legally binding on IBM without concluding whether or not IBM infringed Article 102. The Commission is satisfied that the commitments are sufficient to resolve its competition concerns, and noted that dealing with such matters swiftly is particularly important in fast moving technology markets.

Source: Commission press release, 14 December 2011, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1539&format=HTML&aged=0&language=EN&guiLanguage=en>.

European Union: Cathode ray tube producers - Commission imposes reduced fines

Summary. The European Commission (the Commission) has imposed reduced fines on certain cathode ray tube (CRT) glass producers under its cartel settlement procedure.

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

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 leniency notice).

In June 2008, the Commission introduced a settlement procedure to simplify and speed up cartel investigations (the settlement procedure). Under the procedure, companies may benefit from shortened proceedings and a 10% reduction in fines under the terms of the Commission's settlements notice (2008/C 167/1).

Facts. The Commission has fined Asahi Glass (AGC), Nippon Electric Glass (NEG) and Schott AG (Schott) a total of approximately EUR 128.7 million for allegedly coordinating the prices for CRT glass used in televisions and computer screens which ultimately affected consumers in the EEA. While the Commission considered that Samsung Corning Precision Materials (SCP) had also participated in the alleged cartel, SCP was granted full immunity under the leniency notice.

The Commission reduced the fines on all participants by 10% for participation in the settlement procedure. NEG also benefitted from a 50% reduction in its fine for co-operation under the leniency notice, whilst the Commission announced that it had reduced Schott's fine by 18% for co-operation outside the leniency notice. The fines on Schott and AGC also reflected the Commission's recognition that they were not involved in all aspects of the alleged cartel.

Comment. This is the fourth time the Commission has imposed fines under the settlement procedure (the last time being in the washing powder cartel). This is a clear demonstration of the Commission's desire to apply the settlement procedure in order to reduce the time taken to reach its decisions, although Competition Commissioner Joaquín Almunia has warned companies that they should be "*under no illusion about the Commission's resolve to fight cartels and impose fines that should deter them from breaching competition rules in the EU*".

Source: Commission press release, 19 October 2011, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1214&format=HTML&aged=0&language=EN&guiLanguage=en>.

European Union: Commission imposes EUR 8.9 million fine on banana importer

Summary. The European Commission (the Commission) has imposed a fine on Pacific Fruit, while Chiquita received immunity from fines, for alleged price fixing in Southern Europe between July 2004 and April 2005.

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

Companies can apply to the Commission under the terms of its leniency notice to obtain total immunity or leniency from fines (2006/C 298/11). Before the adoption of its new leniency guidance in 2006, the Commission applied the terms of its 2002 leniency notice (OJ 2002 (45/03)) (2002 leniency notice).

In November 2007, the Commission carried out unannounced inspections at the premises of various producers and importers of fresh exotic fruits.

Facts. The Commission considered that the alleged cartel operated in Southern Europe, affecting consumers in Italy, Greece and Portugal for nearly one year. During this period, the Commission considered that weekly sales prices were fixed and price information was exchanged to the detriment of consumers. The duration of the alleged infringement was reduced by around nine months following the parties' replies to the Commission's statement of objections in December 2009.

A fine of EUR 8,919,000 was imposed on Pacific Fruit while Chiquita received full immunity from fines, under the 2002 leniency notice, for providing information to the Commission. At the time of the infringement, annual sales of bananas in Italy, Greece and Portugal together amounted to approximately EUR 525 million.

Comment. This is not the first time the Commission has imposed fines in the banana sector. In 2008, the Commission imposed a fine of EUR 60 million on Dole and Weichert for alleged price fixing. Chiquita also received full immunity from fines in the previous case by alerting the Commission to the activity. Decisions of the Commission may be appealed to the General Court of the European Union. It is understood that Pacific Fruit is appealing the decision.

Source: Commission press release, 12 October 2011, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1186&format=HTML&aged=0&language=EN&guiLanguage=en>.

European Union: Antitrust investigation procedures - best practices published

Summary. The European Commission (the Commission) has adopted a series of measures aimed at increasing the Commission's interaction with parties in antitrust proceedings and strengthening the mechanisms for safeguarding parties' procedural rights.

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. Article 102 TFEU (Article 102) prohibits the abuse of a dominant market position by companies in the EU.

In January 2010, the Commission consulted on earlier versions of a notice on best practices for the conduct of Article 101 and 102 proceedings (Notice), a working paper on best practices for the submission of economic evidence in such proceedings (Working Paper) and a decision on the function and terms of reference of the Hearing Officer in such proceedings (Decision) (collectively the Antitrust Procedures Documents) which introduced certain reforms, such as "state of play" meetings at key points of Article 102 proceedings to provide opportunities for parties to communicate directly with the Commission.

Facts. Following consultation, the adopted Antitrust Procedures Documents introduce additional improvements to Article 101 and 102 investigative proceedings aimed at increasing the Commission's interaction with parties in antitrust proceedings and strengthening the mechanisms for safeguarding parties' procedural rights, including:

- the provision to parties, by the Commission, of key submissions from complainants and third parties, including economic studies, prior to the issuing of the statement of objections (SO);
- the explanation by the Commission, in the SO, of the parameters by which possible fines will be calculated, to give parties a better idea of what damages they may face;
- the introduction of "state of play" meetings to Article 101 proceedings;
- publishing rejections of complaints, in full or in summary; and
- specific guidance on the minimum standards for consumer survey evidence

The role of the Hearing Officer (formerly an adjudicator of disputes following issuance of the SO) in the investigative portion of proceedings has been enhanced and now includes the power to intervene where (a) parties feel that they have not been informed of their procedural status, (b) deadlines to reply to information requests are disputed, (c) legal professional privilege issues arise and (d) parties feel that they should not be compelled to reply to questions which might force them to admit to an infringement.

Comment. The Antitrust Procedures Documents have been introduced following increasing concerns about the fairness of the Commission's antitrust procedures arising from its combined roles as investigator, prosecutor and adjudicator. Commission Vice-President Joaquín Almunia stated, "The procedural package demonstrates that we are willing to listen to stakeholders, learn from experience and make improvements, while maintaining efficient procedures."

Source: Commission press release, 17 October 2011,

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1201&format=HTML&aged=0&language=EN&guiLanguage=en>;
 Commission Frequently Asked Questions,
<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/703&format=HTML&aged=0&language=EN&guiLanguage=en>.

Czech Republic: Final appeal in bus operator abuse case thrown out for missing deadline

Summary. The Supreme Administrative Court of the Czech Republic (SAC) has rejected a final appeal against a decision of the Czech Competition Office (CCO) because it was lodged too late.

Background. Section 11 of the Czech Competition Act prohibits the abuse of a dominant position by one or more undertakings to the detriment of other undertakings or consumers. The CCO can impose fines for abuse of dominance. Undertakings found to have breached the prohibition can apply for judicial review to the regional court in Brno. Appeals against the decision of the regional court to the SAC are allowed on certain grounds.

Facts. On 22 November 2011, the SAC dismissed a final appeal against a decision of the regional court in Brno, which had rejected a request for judicial review against a decision of the CCO to fine Dopravní podnik Ústeckého kraje, a.s. (DPUK), a local bus operator, for abuse of dominance.

In August 2006, the CCO found that DPUK had abused a dominant position in the market for the provision of transport services and imposed a fine on DPUK of approximately EUR 28,000.

The SAC rejected the final appeal on the basis of it being lodged too late. The SAC confirmed that the two-week appeal period in relation to the regional court decision delivered on Friday 23 September started to run on Saturday 24 September and therefore expired on Friday 7 October. The appeal was lodged on Monday 10 October. The SAC confirmed that an appeal lodged after expiration of the statutory time period cannot be accepted.

Comment. The case confirms the strict interpretation of the statutory periods for lodging an appeal to the Supreme Administrative Court in competition cases and underlines how important it is to exercise extreme care with the time limits for lodging an appeal.

Source: decision of the Supreme Administrative court of the Czech republic no 1 Afs 72/2011-154, http://www.nssoud.cz/files/SOUDNI_VYKON/2011/0072_1Afs_11_20111129021500_prevedeno.pdf, 22 November 2011; and original decision of the CCO no. S227/06-19569/06-SOHS II, <http://www.compet.cz/hospodarska-soutez/sbirky-rozhodnuti/7595/>, 6 November 2006 (in Czech only).

France: French Competition Authority fines detergent cartel a total of EUR 367.9 million

Summary. The French Competition Authority (FCA) has fined three laundry detergent manufacturers for coordinating commercial strategies on price and promotions on the French market.

Background. Article L. 420-1 of the French Commercial Code prohibits agreements between undertakings and decisions by associations of undertakings which have as their object or effect the prevention, restriction or distortion of competition (it is similar to Article 101 of the Treaty on the Functioning of the European Union).

Facts. On 8 December 2011, the FCA issued a cartel decision fining three laundry detergent manufacturers a total of EUR 361 million. The fine was increased by EUR 6.9 million after the FCA found an error in its initial calculation.

The FCA considered that Henkel, Proctor & Gamble, Unilever and Colgate-Palmolive had engaged in secret meetings involving the use of code names to discuss and agree on prices and promotions which they would offer to supermarkets. In March 2008, Unilever submitted a leniency application to the FCA, and the other three cartelists followed suit with their own applications.

The FCA applied its new fining guidelines, taking into consideration the seriousness of the facts, the importance of the harm done to the economy (and in this case the seriousness of the acts themselves) and the situation of the company or the group to which it belongs. The FCA imposed reduced fines on Henkel, Proctor & Gamble and Colgate-Palmolive, in accordance with the French leniency programme. As Unilever was the whistleblower, it received immunity from a potential EUR 248.5 million fine.

Comment. On 13 April 2011, the European Commission (the Commission) concluded an investigation into the detergents sector and fined two of the companies concerned (Proctor & Gamble and Unilever) a total of EUR 315 million, whilst Henkel was granted immunity from fines as the whistleblower. However, the FCA did not take Henkel's leniency application to the Commission into account in its decision and fined Henkel EUR 92.3 million. Henkel has indicated that it intends to appeal the FCA's decision as it believes that it is linked to the decision of the Commission, but the FCA has stated that apart from the fact that both cases began with leniency applications, the nature, field, geographic area, duration of the practices and participants to the agreement were different in the two cases.

The FCA has described this as the most important leniency case which it has investigated. It is also the first case in which the FCA has made extensive use of the new fining guidelines which it issued in May 2011.

Source: *Autorité de la Concurrence* press release, 8 December 2011, http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=389&id_article=1735; *Autorité de la Concurrence* press release, as amended on 20 December 2011, http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=389&id_article=1735; and Commission press release, 13 April 2011, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/473>.

Germany: Reform proposals to the Act Against Restraints of Competition (ARC) – ministerial draft

Summary. On 10 November 2011, the German Federal Ministry of Economics and Technology (FMET) has published a ministerial draft of the so-called "8th ARC Novel".

Background. The basis for the ministerial draft is the key issues paper published by the FMET in August 2011. According to the FMET, it does not intend to completely overhaul the ARC. However, one of the main purposes of the reform proposals is to further diminish the existing differences between European and German competition law provisions which, in particular, apply to merger control.

Facts. The 8th ARC Novel, expected to come into force on 1 January 2013, contains, amongst others, the following reform proposals:

- The market dominance test would be modified by the significant impediment of effective competition (SIEC) test used by the European Commission in merger control proceedings.
- The statutory market share threshold for the presumption of a monopoly would be increased from one third to 40%.
- Behavioural commitments in the context of Phase II merger control proceedings would be possible.

- A provision similar to Article 5(2) of the EU Merger Regulation, according to which two or more transactions within a two-year period between the same persons or undertakings are treated as one and the same transaction, would be adopted.
- The implementation of public bids will be admissible under certain conditions prior to receiving a respective clearance decision from the FCO.
- The FCO will have structural unbundling powers in case of antitrust law violations similar to the European Commission's power to impose structural remedies under Article 7(1) of Regulation 1/2003/EC.
- Claimants seeking damages in private cartel claims will not have access to leniency applications and other related documents submitted by leniency applicants.

In addition, the ministerial draft contains various other provisions relating to specific industries, such as energy, water, food and press sectors.

Comment. The ministerial draft is only a first step towards the final bill expected to come into force on 1 January 2013. Until then, it can be assumed that the reform proposals will be subject to intense political and legal discussions which may result in further amendments to the ARC.

Source: Draft of the German Federal Ministry of Economics and Technology, 10 November 2011, available at <http://www.bmwi.de/BMWi/Redaktion/PDF/G/qwb-8-aenderung-referentenentwurf,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf>.

Slovak Republic: Draft guidelines on settlement procedure published

Summary. The Slovak Antimonopoly Office (SAO) is consulting on draft guidelines introducing a settlement procedure applicable to violations of the Slovak Competition Act (SCA).

Background. The SCA does not contain any provisions on settlement procedures relating to the prohibitions against cartels or the abuse of a dominant position.

Facts. In November 2011, the SAO launched a public consultation on draft guidelines setting out conditions for settlement proceedings in relation to certain violations of the SCA, including the prohibitions against cartels and the abuse of dominance.

The settlement procedure would be initiated by either the SAO or the company that has breached the SCA. Before the settlement procedure is initiated, the SAO would have to inform the company concerned about the results of an investigation and the amount of fine to be imposed. If the company then agrees with the results of an investigation, it would have to confirm in writing its involvement in the relevant conduct. The SAO would then impose a fine that may be reduced, at its discretion, by up to (i) 20% in the case of horizontal cartels and (ii) 50% in the case of other violations. The fine may also be combined with a leniency application and further reduced.

Comment. The draft guidelines introduce a settlement procedure that could speed up and lower the costs of proceedings. They should also serve as an incentive to cooperate with the SAO. The extent to which the guidelines can operate without an express statutory basis and whether companies will be willing to accept liability even with a reduced fine remains unclear.

Source: Material detailing the conditions of settlement in cases of violation of the Slovak Competition Act, <http://www.antimon.gov.sk/files/38/2011/Podmienky%20urovnania.rtf> (available in Slovak only).

United Kingdom: CAT allows Tobacco appeals

Summary. The Competition Appeal Tribunal (CAT) has allowed the appeals brought by Imperial Tobacco Group (Imperial) and five retailers against the decision of the Office of Fair Trading (OFT) which found that a number of tobacco manufacturers and retailers had infringed the Competition Act 1998 and quashed the OFT's decision as it related to each of the appellants.

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

On 15 April 2010, the OFT decided that two UK manufacturers of tobacco products (Imperial and Gallaher) and 10 retailers had breached the Chapter I prohibition by entering into a series of bilateral arrangements relating to the pricing of tobacco products in those retailers' stores. In particular, the OFT considered that each retailer had agreed to set its shelf prices for the relevant manufacturer's products in accordance with a set of requirements communicated to them by the manufacturers which related to named competing brands of cigarettes and other tobacco products. As a result, the OFT imposed fines totalling £225 million. Sainsbury received full immunity under the OFT's leniency programme, whilst Gallaher, together with Asda, First Quench, One Stop Stores, Somerfield and TM Retail, each entered into early settlement arrangements with the OFT.

In June 2011, Imperial, Asda, Co-operative Group, Morrisons, Safeway and Shell (the appellants) appealed the OFT's decision to the CAT on the grounds of both liability and quantum.

Facts. On 12 December 2011, the CAT handed down a judgment in which it allowed the appeals brought by the appellants against the decision of the OFT and quashed the OFT's decision in respect of each of the appellants.

During the course of the CAT hearing, the appellants' counsel argued that the OFT's line of questioning no longer fitted with the OFT's case. On 31 October 2011, the CAT asked the OFT to confirm (i) whether the OFT continued to maintain that each of the agreements, which were the subject of the appeal, operated in the same way; and (ii) how the OFT now asserted the agreements operated.

On 3 November 2011, the OFT acknowledged that *"each and every one of the specific circumstances relied on in the decision to support the finding of an infringement by object 'may or may not be established to the appropriate legal standard'"* and that, looking at the evidence in the round, the decision had been *"cast too narrowly"*. As a result the CAT stayed the appeals and directed the OFT to provide a written statement setting out whether it continued to contest the appeals and, if so, the legal and factual basis on which it did so in relation to each of the relevant bilateral agreements. On 9 November 2011, the OFT submitted a statement setting out its refined case which the OFT claimed *"reflected part but not the whole of the decision"*. The appellants contested that the OFT's refined case introduced new arguments not set out in the OFT's decision and argued that the CAT must allow the appeals.

Decision. The CAT's judgment quashed the OFT's decision in respect of each of the appellants.

Comment. The CAT's judgment is another setback for the OFT, following the recent construction bid-rigging case in which the CAT significantly reduced the level of fines for many of the companies concerned. However, the OFT has issued a statement defending its track record on appeals, noting that only 9 of the 52 competition decisions it has made against 504 parties have been overturned on appeal on the grounds of liability. The OFT noted that it would consider the CAT's judgment in detail and any broader implications for the way in which it conducts investigations and possible appeals.

Source: CAT judgment, 12 December 2011, <http://www.catribunal.org.uk/238-7403/Judgment.html>; OFT press release, 12 December 2011, <http://www.of.gov.uk/news-and-updates/press/2011/134-11>.

United Kingdom: OFT announces agreed measures for travel money charges

Summary. The Office of Fair Trading (OFT) has published its response to the travel money super-complaint, which includes a set of industry-agreed measures to improve the information available for consumers purchasing foreign currency in the UK or using credit and debit cards abroad.

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. Within 90 days after the day on which a super-complaint is received, the OFT must say publicly how it proposes to deal with it (section 11, Enterprise Act 2002). Consumer Focus is a designated consumer body.

In September 2011, the OFT received a super-complaint from Consumer Focus about the cost of obtaining foreign currency and overseas use of credit and debit cards. The OFT investigated the sector and engaged closely with the industry to tackle problems it identified.

Facts. The OFT has agreed a set of voluntary measures in its response, including the following:

to deter companies from engaging in anti-competitive activity, but are also fair and proportionate. Key proposals include:

- certain banks agreed to scrap charges for consumers using their debit cards to purchase foreign currency in the UK (certain other banks do not charge such fees);
- certain banks agreed to display the actual charges incurred by customers for using cards abroad far more clearly on their monthly and annual statements (certain other banks already provide such information);
- the UK Cards Association and the British Bankers Association agreed on behalf of their members to give clearer, more accessible information about their charges for using cards abroad, on websites, statements and through call centres; and
- many foreign currency businesses have agreed to review their marketing to make costs and conditions clearer.

The debit card fees will stop during 2012 and the provision of the charges information will be implemented by the end of 2013.

Comment. The OFT's investigation was carried out quickly and was marked by close cooperation between the OFT and the travel money industry. The package of agreed measures was offered voluntarily by the relevant businesses and associations and suggests that the OFT's industry engagement was particularly productive in this case.

Source: OFT press release, 20 December 2011, <http://www.oft.gov.uk/news-and-updates/press/2011/138-11>.

United Kingdom: OFT refers audit market to CC

Summary. The Office of Fair Trading (OFT) has referred the market for statutory audit services to large companies in the UK (the audit market) to the Competition Commission (CC) for a market investigation.

Background. The OFT keeps markets under review as part of its general function (section 5, Enterprise Act 2002) (2002 Act). The OFT has the power to make a reference to the CC if it has reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services (section 131, 2002 Act).

The CC has two years from the date of a market investigation reference to conduct inquiries and publish its report (sections 136 and 137, 2002 Act). If the CC concludes that adverse effects on competition or detrimental effects on customers are occurring, it can take or recommend action to remedy, mitigate or prevent such effects (section 138, 2002 Act).

The OFT announced its provisional decision to refer the audit market to the CC for a market investigation on 29 July 2011.

Facts. Following a public consultation which closed in September, the OFT has made a reference to the CC for a market investigation into the audit market.

The OFT is concerned that the audit market is highly concentrated, with substantial barriers to entry and low levels of switching. The OFT engaged with a wide range of industry participants where it examined, among other things, the potential for overlap with parallel work that is ongoing at the EU level. However, the OFT believed that the nature, content and timing of EU legislation are not settled and that there are a number of important inputs that the CC might make during the legislative process. The OFT considered that the CC's inquiry has the potential to address UK-specific competition concerns that may not be within the scope of the work at the EU level.

Comment. The OFT emphasised that it made its decision to make a market investigation reference following extensive public consultation. The CC now has a maximum of two years to conduct its inquiries and publish its report.

Source: OFT press release, 21 October 2011, <http://www.oft.gov.uk/news-and-updates/press/2011/115-11>.

United Kingdom: OFT consults on new guidance on penalties and leniency

Summary. The Office of Fair Trading (OFT) is consulting on two revised guidance documents, setting out proposals to update its approach to financial penalties and to awarding leniency in competition cases.

Background. The OFT's guidance as to the appropriate amount of financial penalties sets out the basis on which the OFT will calculate penalties for infringements of the Chapter I or the Chapter II prohibitions or Article 101 or 102 of the Treaty on the Functioning of the European Union (*OFT's Guidance as to the appropriate amount of a Penalty (OFT 423)*) (the penalty guidance).

The OFT's guidance on the awarding of leniency in competition cases sets out the circumstances in which the OFT can reduce financial penalties if a party to an illegal agreement or concerted practice assists the OFT with its investigation (*Leniency and No Action (OFT 803)*) (the leniency guidance).

Facts. The OFT's proposed changes to its penalty guidance are designed to ensure that the OFT sets fines that are sufficient to deter companies from engaging in anti-competitive activity, but are also fair and proportionate. Key proposals include:

- increasing the maximum starting point for the calculation of fines to 30% of relevant turnover.
- introducing a specific step at which the OFT will consider whether the overall penalty proposed is appropriate. At this step the OFT would be able to decrease the penalty to ensure that it is not disproportionate or excessive.

The OFT states that many of the proposed changes to its leniency guidance reflect the OFT's existing policies and practices, rather than representing substantive changes. This includes additional detail on the procedure for applying for leniency, the scope of leniency protection and the expected level of cooperation required from leniency recipients.

Comment. The OFT's aim is to enhance the transparency and predictability of its approach. The proposed increase in the maximum starting point for the calculation of fines would make the OFT's approach consistent with that of the European Commission and several other competition authorities. This approach was also recently suggested to the OFT for consideration by the Competition Appeal Tribunal (*Kier v OFT* ([2011] CAT 3)). The deadline for submitting responses in relation to both consultations is 26 January 2012.

Source: OFT press release, 26 October 2011, <http://www.oft.gov.uk/news-and-updates/press/2011/116-11>.

United States: Cartel members receive rare corporate probation

Summary. Four freight forwarding companies involved in an international cargo shipment cartel receive fines and an uncommon two-year probation.

Background. The Antitrust Division of the US Department of Justice (DOJ) is charged with prosecuting criminal violations of Section 1 of the Sherman Act which prohibits price-fixing. Criminal price-fixing penalties can include, for companies, fines of up to USD 100 million or "twice the gain or loss" and, for individuals, fines of up to USD 1 million and imprisonment of up to 10 years. Probation is available at the option of the sentencing court.

Facts. The DOJ investigated multiple conspiracies to fix prices in air transportation. The conspiracies involved both personnel and cargo transportation. As a result of the investigation and subsequent indictments, the courts have levied criminal fines of more than USD 1.8 billion against 21 companies and 19 individuals.

Part of the investigation included a price-fixing conspiracy among freight forwarders. 12 freight forwarding companies were charged with price fixing. On 4 November 2011, four of the 12 pleaded guilty to conspiring to fix prices for international cargo shipments. As part of their respective settlements with the DOJ, each agreed to pay a fine: Panalpina agreed to pay approximately USD 12 million, Kühne+Nagel agreed to pay approximately USD 9.9 million, EGL agreed to pay approximately USD 4.5 million, and Geologists International Management (Bermuda) Ltd. agreed to pay approximately USD 688,000.

When presenting the settlements to the Court, the DOJ did not seek probation. Nonetheless the Court imposed on the corporations a two-year probation in addition to the settled fines. As part of those probations, the companies were ordered to report annually to the DOJ and the Court describing their efforts to comply with the antitrust laws, as well as to notify the DOJ and the Court of any antitrust investigations by any government agency.

Comment. Corporate probation in price-fixing cases is rare. The DOJ has argued against the imposition of probation, which imposes a monitoring burden upon the DOJ, because the incidence of repeat price-fixing by a particular offender is minimal. It remains to be seen whether other courts will adopt corporate probation as an additional penalty.

Source: 15 USC § 1 *et seq.*; 18 USC §3571; 18 USC § 3561; *Judgment, US v. Geologists International Management (Bermuda) Ltd.*, No. 10-268-RJL (D.D.C.); *Judgment, US v. Kühne+Nagel International AG*, No. 10-272-RJL (D.D.C.); *Judgment, US v. Panalpina World Transport (Holding) Ltd.*, No. 10-270-RJL (D.D.C.); and *Judgment, US v. EGL, Inc.*, No. 10-269-RJL (D.D.C.).

United States: US challenges H&R Block acquisition of TaxACT

Summary. The Antitrust Division of the US Department of Justice (DOJ) successfully challenged H&R Block's acquisition of TaxACT.

Background. Section 7 of the Clayton Act prohibits transactions the effect of which is to substantially lessen competition. The DOJ challenges transactions likely to have an anticompetitive effect.

Facts. H&R Block and TaxACT provide do-it-yourself tax preparation products. H&R Block proposed to acquire TaxAct for USD 287.5 million. The DOJ challenged the transaction in federal district court.

The DOJ alleged a digital do-it-yourself tax preparation product market, in which the three largest firms service approximately 90% of all consumers. The DOJ further alleged that the transaction combined the second and third largest players in that market — creating a duopoly that eliminated head-to-head competition between the transacting parties and increasing the likelihood that the remaining providers would collude to reduce competition.

After a trial, the Court accepted the DOJ's proposed market definition, held that the transaction violated Section 7 of the Clayton Act, and permanently enjoined the transaction. The parties subsequently abandoned the transaction.

Comment. The case is one of the few merger challenges by the US antitrust authorities that proceeded to trial.

Source: *Complaint, U.S. v. H&R Block, Inc.*, No. 1:11-CV-00948 (D.D.C.).

Editors



[Alex Nourry](#)

Alex.Nourry@cliffordchance.com



[Chris Worrall](#)

Chris.Worrall@cliffordchance.com



[Christopher Duff](#)

Christopher.Duff@cliffordchance.com



[Chandralekha Ghosh](#)

Chandralekha.Ghosh@cliffordchance.com

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If you would like to receive copies of our other publications on this topic, please email: [**lisa.bunker@cliffordchance.com**](mailto:lisa.bunker@cliffordchance.com)

Antitrust Contacts

[Thomas Vinje](#)

Chair

[Oliver Bretz](#)

Managing Partner

[Tony Reeves](#)

Belgium

[Emma Davies](#)

China

[Alex Cook](#)

Czech Republic

[Patrick Hubert](#)

France

[Joachim Schutze](#)

Italy

[Miho Mizuguchi](#)

Japan

[Steven Verschuur](#)

Netherlands

[Iwona Terlecka](#)

Poland

[Nadia Badea](#)

Romania

[Torsten Syrbe](#)

Russia

[Miroslava Obdrzalkova](#)

Slovak Republic

[Miguel Odriozola](#)

Spain

[Andrew Matthews](#)

Thailand

[Alex Nourry](#)

United Kingdom

[William Blumenthal](#)

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