# Antitrust Review | January-February 2012

## European Union

- **Commission probe into transatlantic joint venture**. The European Commission has opened an investigation to establish whether a transatlantic joint venture between certain members of the SkyTeam airline alliance (Air France-KLM SA, Alitalia SpA and Delta Air Lines Inc.) is in breach of EU competition rules.
- **Commission opens proceedings against Samsung.** The European Commission has opened a formal investigation to assess whether Samsung Electronics has abusively used certain of its patent rights to distort competition in European mobile device markets.
- **Commission blocks Deutsche Börse / NYSE Euronext merger**. The European Commission has prohibited the proposed merger between Deutsche Börse and NYSE Euronext following a Phase II investigation.

## China

- **MOFCOM conditionally clears hard disk drive sector acquisition**. China's Ministry of Commerce has cleared Western Digital Corporation's acquisition of the hard disk drive business of Hitachi Global Storage Technology, subject to conditions.

## Czech Republic

- **Chairman of the Czech Competition Office partly annuls decision against Telefónica Czech Republic**. The Chairman of the Czech Competition Office has partly annulled the 2003 decision of the CCO imposing a fine of CZK 81.7 million on Telefónica Czech Republic, a.s. for the abuse of a dominant position, and asked the CCO to adopt a new decision on the level of the fine.

## France

- **French Competition Authority publishes finalised settlement procedures guidelines and compliance programme framework**. The French Competition Authority has issued a final framework for compliance programmes and guidelines for settlement procedures.

## Germany

- **FCO decision on jurisdiction over joint ventures established outside Germany**. The German Federal Cartel Office has published a decision which confirms that joint ventures established outside of Germany may under certain conditions have an effect on the German market and would therefore have to be notified to the FCO if the parent companies meet the relevant turnover thresholds.

## Romania

- **Oil companies fined by the Romanian Competition Council**. The Romanian Competition Council has fined six oil companies for anti-competitive agreements.

# Slovak Republic

- **Guidelines for settlement procedure in force**. The Slovak Antimonopoly Office has introduced guidelines for a settlement procedure applicable to violations of the Slovak Competition Act.

# Spain

- **CNC continues to investigate information exchanges**. The Spanish Competition Authority has imposed a fine of approximately EUR 4 million on Honda and Suzuki for the exchange of commercially sensitive information.

# United Kingdom

- **OFT refers acquisition of Cambridge Water plc to the Competition Commission**. The Office of Fair Trading has referred the completed acquisition of Cambridge Water plc by South Staffordshire plc to the Competition Commission.
- **OFT refers aggregates market to the Competition Commission**. The Office of Fair Trading has referred the UK markets for aggregates, cement and ready-mix concrete to the Competition Commission for a market investigation.

# United States

- **HSR and interlocking directorates thresholds revised**. The Federal Trade Commission has announced its annual revised thresholds to the Hart-Scott-Rodino Antitrust Improvements Act and to Section 8 of the Clayton Act applying to interlocking directorates.

## European Union: Commission probe into transatlantic joint venture

**Summary**. The European Commission (the Commission) has opened an investigation to establish whether a transatlantic joint venture between certain members of the SkyTeam airline alliance (Air France-KLM SA (Air France-KLM), Alitalia SpA (Alitalia) and Delta Air Lines Inc. (Delta)) is in breach of EU competition rules.

**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 opened proceedings to investigate whether a transatlantic joint venture between certain members of the SkyTeam airline alliance breaches rules prohibiting agreements between undertakings that restrict competition.

SkyTeam is one of the three world-wide airline alliances. Member airlines enter into cooperation agreements in relation to passenger and cargo air transport. In 2009 and 2010, Air France-KLM, Alitalia and Delta signed cooperation agreements establishing a transatlantic joint venture focusing on the routes between Europe and North America. Pursuant to these agreements, the parties fully coordinate their transatlantic operations with respect to capacity, schedules, pricing and revenue management, and also share profits and losses of their transatlantic flights.

The Commission's investigation will assess whether or not the arrangements may harm passengers on certain EU-US routes where in the absence of the joint venture the parties would be providing competing services. The Commission has stated that the opening of the proceedings does not prejudge the outcome of the investigation.

**Comment**. The Commission had initially launched an investigation into cooperation agreements in all geographic areas involving eight SkyTeam members (Aeromexico, Air France, Alitalia, Continental Airlines, Czech Airlines, Delta, KLM and Korean Air Lines), but has stated that it has closed this investigation as part of a priority-setting process in light of significant changes in the circumstances on the relevant markets. The Commission noted that its current investigation is in line with its recent enforcement action in relation to the two other airline alliances, Oneworld and Star.

*Source: Commission press release, 27 January 2012, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/79*.

## European Union: Commission opens proceedings against Samsung

**Summary.** The European Commission (Commission) has opened a formal investigation to assess whether Samsung Electronics (Samsung) has abused a dominant position in the EU mobile device markets.

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

**Facts.** The Commission has opened a formal investigation to assess whether Samsung has abusively used certain of its patent rights to distort competition in EU mobile device markets.

In 1998, Samsung gave to the European Telecommunications Standards Institute (ETSI) a commitment to license any standard essential patents relating to EU mobile telephony standards on fair, reasonable and non-discriminatory (FRAND) terms. This was on the basis that some of the patents for third generation mobile and wireless telecommunications devices were essential to the functioning of the standard.

In 2011, Samsung sought injunctions in various EU Member States against competing mobile device makers based on alleged infringements of certain of Samsung's essential patent rights. While seeking injunctions in itself is not unlawful, the Commission will investigate whether the behaviour has breached Samsung's commitment to ETSI and whether this amounts to an abuse of a dominant position. The Commission has stated that the opening of the proceedings does not prejudge the outcome of the investigation.

**Comment.** The Commission's investigation will turn on whether suing rivals for use of certain patents amounts to an abusive practice, particularly where the company has committed to license the technology on FRAND terms. While the investigation currently concerns only Samsung, the industry will be keeping a close eye on proceedings to see whether the Commission widens the scope of its interest to open further investigations into the strategic use of proactive patent litigation in the information technology sector.

*Source: Commission press release, 31 January 2012, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/89.*

## European Union: Commission blocks Deutsche Börse / NYSE Euronext merger

**Summary.** The European Commission (Commission) has prohibited the proposed merger between Deutsche Börse (DB) and NYSE Euronext (NYSE) following a Phase II investigation.

**Background.** Under the EU Merger Regulation (*139/2004/EC*) (EUMR), the Commission must clear a transaction at the end of its Phase I investigation unless it finds that the merger would significantly impede effective competition in the relevant markets. If serious doubts are raised, then it must open an in-depth Phase II investigation if it has not received an offer of appropriate remedies (*Article 6(1), EUMR*). If the Commission concludes, following this procedure, that a proposed merger would significantly impede effective competition in the EU or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, it must issue a decision declaring that the proposed merger is incompatible with the internal market (*Articles 2(3) and 8(3), EUMR*).

On 15 February 2011, DB and NYSE announced their intention to combine to create "*the world's premiere exchange group*". DB filed a formal merger notification with the Commission on 29 June 2011. The parties anticipated the investigation would go into Phase II, and declined the opportunity to propose remedies that could have led to an early settlement in Phase I. The Commission launched the Phase II investigation on 4 August 2011, and extended the deadline twice in order to assess remedies submitted by the parties. The parties were advised in a Statement of Objections sent in October 2011 that the merger as notified raised serious concerns and, in the absence of a sufficient remedy, might be prohibited.

**Facts.** The Commission has prohibited the proposed merger due to concerns with its potential effect on competition in the market for exchange-traded EU financial derivatives.

The Commission was particularly concerned that the combination of Eurex and Liffe, with over 90% of the EU market for exchange-traded EU financial derivatives (interest rate, single stock and equity index) would create a "*quasi-monopoly*". The Commission found that:

- the two exchanges are each other's closest competitors in this market;
- the merged exchange would have more incentive to require companies to trade on its platforms if they wished to use its clearing service;
- the existence of such a significant "vertical silo" could make it difficult for prospective competitors to enter the market and reduce competition on fees, resulting ultimately in higher fees for the customers of the pension funds, mutual funds and banks that are the exchanges' biggest participants; and
- the parties' proposed remedies, including the proposed sale of Liffe's European single stock equity derivatives products and the offer of access to clearing to potential entrants for some categories of new contracts, did not fully address the Commission's competition concerns.

The parties failed to convince the Commission that the market for derivatives was wider than standardised exchange-trade derivatives and that it also included the much larger market for high-value, bespoke over-the-counter (OTC) derivatives. They were also unsuccessful in their attempt to portray the merger as the creation of a sufficiently large source of liquidity to challenge the predominance of OTC trading, to complement the Commission's regulatory efforts to standardise derivatives trading.

**Comment.** This is only the third time since the current EUMR entered into force in 2004 that the Commission has prohibited a proposed merger. It is understood that Deutsche Börse has decided to appeal against the Commission's decision at the EU General Court.

*Source: Commission press release, 1 February 2012, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/94.*

## China: MOFCOM conditionally clears hard disk drive sector acquisition

**Summary.** China's Ministry of Commerce (MOFCOM) has cleared Western Digital Corporation's (WD) acquisition of the hard disk drive (HDD) business of Hitachi Global Storage Technology (HGST) (the proposed transaction), subject to conditions (the decision).

**Background.** Transactions which meet specified turnover thresholds must be notified to MOFCOM and clearance obtained before the transaction can be completed (*Article 21, Anti-Monopoly Law* (AML)). Article 27 of AML sets out a list of factors that MOFCOM will consider during when reviewing a transaction. These include market shares of the transaction parties; market concentration levels; the impact of the transaction on market entry, third parties including consumers and on national economic development (Article 27 factors).

The proposed transaction was initially notified in April 2011 and MOFCOM commenced its review in May 2011. The filing was subsequently withdrawn and re-filed in November 2011, following what MOFCOM considered to be material changes to the deal structure.

**Facts.** On 2 March 2012, MOFCOM approved the proposed transaction, on the condition that WD divest all 3.5 inch HDD assets to an independent third party within six months. In addition, MOFCOM required the acquired business to be held separate from WD's business for a period of at least 2 years, after which WD may apply for the hold-separate commitment to be withdrawn.

The decision followed a market investigation which included on-site visits, consultations with government agencies and other third parties and commissioning of an internal study into the Chinese HDD market. MOFCOM considered that the relevant product market was the HDD market. MOFCOM also determined that the relevant HDD market was global but focused its analysis on China.

MOFCOM considered that the proposed transaction raised significant competition concerns noting that (a) the relevant market was highly concentrated – there were only 5 HDD manufacturers in the global HDD market, namely, Seagate (33%), Western Digital (28%), HGST (18%), Toshiba (10%) and Samsung (10%) (with comparable shares in China); (b) there were substantial barriers to entry in the relevant market – IP rights, non-IP core technologies, process and technical expertise were essential to enter the HDD market – with no new entrants in the last decade; and (c) both WD and HGST were significant innovators in the relevant market. MOFCOM also considered purchasing trends, capacity utilisation rates, buyer power, and the proposed transaction's impact on consumers.

**Comments.** The proposed transaction was also approved with conditions by the European Commission (Commission) on 23 November 2011 and by the US Federal Trade Commission (FTC) on 5 March 2012. The FTC required WD to divest certain HDD assets to Toshiba Corporation.

The decision follows MOFCOM's conditional clearance of Seagate's purchase of Samsung's HDD business (Seagate/Samsung) where MOFCOM had imposed hold separate obligations only. The Commission and FTC had cleared Seagate/Samsung unconditionally.

The decision is MOFCOM's twelfth conditional clearance since China's competition law came into force in 2008. Most of the conditional clearance decisions to date have involved non-structural remedies. MOFCOM has so far prohibited only one transaction.

*Source: MOFCOM press release, 2 March 2012, http://www.mofcom.gov.cn/aarticle/b/c/201203/20120307993792.html (in Chinese)*

## Czech Republic: Chairman of the Czech Competition Office partly annuls decision against Telefónica Czech Republic

**Summary**. The Chairman of the Czech Competition Office (CCO) has partly annulled the 2003 decision of the CCO imposing a fine of CZK 81.7 million on Telefónica Czech Republic, a.s. (Telefónica) for the abuse of a dominant position, and asked the CCO to adopt a new decision on the level of the fine.

**Background.** Section 11 of the Czech Competition Act prohibits the abuse of a dominant position by one or more companies to the detriment of other companies or consumers. The CCO can impose fines for abuse of dominance. Companies found by the CCO (and the Chairman of the CCO at the second instance) to have breached the prohibition can apply to the courts for judicial review. If the court quashes the CCO's decision, the CCO can generally adopt a new one.

In its decision of 30 June 2003 (first instance decision), the CCO considered that Telefónica had abused its dominant position in phone services for business customers (the finding) and imposed a fine of CZK 81.7 million.

**Facts.** On 6 January 2012, after a prolonged series of appeals and counter-appeals before the courts, the Chairman of the CCO partly annulled the CCO's first instance decision insofar as it related to the level of fine. According to the Chairman of the CCO, the fine should have been higher due to the seriousness of the conduct, its duration and the repetitive breach committed by Telefónica. As the courts did not reject the finding, the CCO is only required to determine the level of the fine.

**Comment.** The fine imposed on Telefónica was one of the highest fines in the history of the CCO. The CCO could now further increase the fine. The case could be an example of a challenge to a decision of the CCO which resulted in a higher fine for the appellant.

*Source: Decision of the CCO President no ÚOHS-R 20/2003-16697/2011/320/KPo, 31 January 2012, http://www.compet.cz/hospodarska-soutez/sbirky-rozhodnuti/9312/ (in Czech).*

## France: French Competition Authority publishes finalised settlement procedures guidelines and compliance programme framework

**Summary.** The French Competition Authority (FCA) has issued a final framework for compliance programmes and guidelines for settlement procedures.

**Background.** The FCA has the power to impose fines on companies in breach of competition law, together with the power to reduce these fines totally or partially in the interests of leniency (*Article L.464-2 of the French Commercial Code*). The FCA can also reduce the fine if the company involved waives its right to contest the charges and grant a further reduction in certain cases if the company commits to modify its future behaviour, particularly through the use of a compliance programme.

**Facts.** On 10 February 2012, the FCA published guidelines for settlement procedures which state the objectives of allowing companies to waive their rights to contest charges of anti-competitive behaviour, and indicate that such settlement can reduce any fines imposed by 10%. The company can also undertake to change its future conduct through behavioural (in particular by setting up a compliance programme) or structural remedies, which could lead to an additional reduction of 5%-15% of the fine.

In contrast to the leniency procedure, a settlement procedure may apply to any case dealt with by the FCA, including cases of alleged unilateral conduct. The only condition required is that the company waives its rights to contest the charges, implying that the company may only challenge the elements taken into account to determine the amount of the fine (i.e. the seriousness of the conduct, the harm to the economy, the company or group's individual situation and, if relevant, repeat offences). A settlement procedure may be requested before the company has received the Statement of Objections (SO) or within two months of having received the SO. The waiver allows the FCA to hold the company liable for the charges. The FCA, however, ultimately may decide not to attribute liability to the company for one or two practices irrespective of the waiver. Where such settlement procedure is not entered into by all companies involved in the investigation, the FCA still has to prove the involvement of the companies which have not entered into the settlement procedure.

The guidelines further highlight that the procedural benefits of a leniency application outweigh those of settlement so that where both applications are possible, companies should be encouraged in the first instance to apply for leniency. However, the FCA may accept a cumulative reduction of the fine for leniency as well as a settlement where the FCA believes that the resulting procedural gains are sufficient.

The FCA also published its final framework for compliance programmes, which recommends 5 key criteria, namely: (1) the existence of a clear, firm and public position taken by the management bodies of the company and more generally the company's directors and officers; (2) a commitment to appoint at least one person responsible for the programme; (3) a commitment to put in place effective tools for information, training and awareness raising measures; (4) a commitment to put in place effective mechanisms for control, audit and alert; and (5) a commitment to put in place an effective monitoring system with appropriate sanctions.

If the FCA accepts a commitment to set up a compliance programme or to improve an existing programme in accordance with the above, the FCA reduce the fines by up to 10%.

**Comment.** The FCA's ability to grant reduced fines for leniency and the settlement procedure on a cumulative basis is in line with the FCA's recent decision in relation to a detergent cartel (*Decision no.11-D-17 of 8 December 2011*). This cumulative principle is also in line with the practice of the European Commission. The earlier draft communication had stated that it is unjustified to simultaneously apply reductions for both settlement and leniency, due to the different objectives of these procedures. In the detergent cartel decision, however, the FCA stated that whether the two reductions can be applied in the same case should be considered on a case-by-case basis.

*Source: Autorité de la Concurrence press release, 10 February 2012, http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=418&id_article=1795; Autorité de la Concurrence framework document on compliance programmes http://www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf; and Autorité de la Concurrence guidelines on settlement procedure, http://www.autoritedelaconcurrence.fr/doc/communique_ncg_10fevrier2012.pdf (in French).*

## Germany: FCO decision on jurisdiction over joint ventures established outside Germany

**Summary.** The German Federal Cartel Office (FCO) has published a decision which confirms that joint ventures established outside of Germany may under certain conditions have an effect on the German market and would therefore have to be notified to the FCO if the parent companies meet the relevant turnover thresholds.

**Background.** Germany operates a mandatory system of merger notification. Transactions meeting the notification thresholds are required to be notified and cleared or subject to expiry of the statutory waiting periods before they can be completed. However, the German Act against Restraints of Competition (ARC) is only applicable if the transaction has an effect on the German market pursuant to section 130(2) ARC.

**Facts.** On 25 January 2012, the FCO published its decision in a case relating to the establishment of a joint venture (JV) in the US which initially would not have any activities in Europe. The JV's business activities related to the worldwide market for IT hardware. Despite the fact that the JV's parent companies (parents) clearly triggered the turnover thresholds under section 35(1) ARC, the transaction was not notified to the FCO.

The FCO considered that an effect on the German market was likely even though the JV was initially active only in the US. From the FCO's perspective, a reason for such effect was that both parents had subsidiaries in Germany. In addition, the JV was active on a market whose geographic scope was worldwide. In any event, the parents had to notify the establishment of the JV at the moment when they transferred further assets to the JV and extended the scope of its business activities to Europe.

However, the FCO did not impose fines – which could have amounted to 10% of the parties' worldwide turnover – on the parents for failing to notify the transaction. The FCO stated that its decision not to impose fines was influenced by the history of the transaction and the fact that, according to its turnover, the JV would be of minor importance to the market.

**Comment.** The case confirms the understanding of the effects doctrine under section 130(2) ARC. At least in cases of worldwide markets the establishment of joint ventures should be notified to the FCO provided that the relevant turnover thresholds are met. Given that the FCO has now explicitly stated that such joint ventures might have an effect on the German market, the fact that this decision did not result in fines does not mean that the FCO will generally refrain from imposing fines in similar cases in the future.

*Source: Case report of the German Federal Cartel Office, 25 January 2012, http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion12/Fallberichte_2012/B07-038-11-FINAL.pdf.*

## Romania: Oil companies fined by the Romanian Competition Council

**Summary.** The Romanian Competition Council (RCC) has fined six oil companies for anti-competitive agreements.

**Background.** Agreements aimed at restraining competition are prohibited pursuant to the Article 5 of Law no. 21/1996 (the Romanian Competition Law) (equivalent to Article 101 of the Treaty on the Functioning of the European Union (TFEU)). Such agreements are considered to be invalid under the Romanian Competition Law and can lead to fines ranging from 0.5% to 10% of the total turnover of the company in breach.

In 2005, the RCC initiated an investigation regarding alleged price fixing practices in the oil sector. In 2009, following the withdrawal from the market of the range of Eco Premium petrol, the RCC carried out dawn raids at the premises of the main oil companies in Romania. In 2010, the RCC decided to extend the investigation to analyse the existence of a possible alleged infringement of the Romanian Competition Law and Article 101 TFEU and to separate the new investigation from the initial one regarding price fixing.

**Facts.** On 10 January 2012, the RCC announced fines for six oil companies (OMV Petrom SA, OMV Petrom Marketing SRL, Lukoil România SRL, Rompetrol Downstream SRL, Mol Petroleum Products SRL and ENI Romania) amounting to a total of approximately EUR 200 million (around 3% of 2010 turnover in respect of each oil company) for anti-competitive agreements by which the six companies allegedly agreed to withdraw Eco Premium petrol from the market, thereby infringing both Article 5 of the Romanian Competition Law and Article 101 of the TFEU.

**Comment.** The total fine in this case is the largest ever imposed by the RCC. A decision of the RCC can be challenged at the Bucharest Court of Appeal within 30 days from its communication. The RCC's decision has not yet been published. The companies have already declared their intention to challenge this decision. The remaining investigation, regarding price fixing, is due to be completed by mid-2012.

*Source: RCC press release, 11 January 2012, http://www.consiliulconcurentei.ro/uploads/docs/items/id7302/amenda_carburanti_ian_2012_english.pdf.*

## Slovak Republic: Guidelines for settlement procedure in force

**Summary.** The Slovak Antimonopoly Office (SAO) has introduced guidelines for a settlement procedure (SAO guidelines) applicable to violations of the Slovak Competition Act (SCA).

**Background.** The SCA does not contain any provisions on settlement procedures relating to the prohibitions of cartels or the abuse of a dominant position under the SCA or the Treaty on the Functioning of the European Union (TFEU).

**Facts.** The SAO guidelines came into effect on 1 January 2012.

According to the SAO guidelines, the settlement procedure may be initiated by either the SAO or the company that allegedly breached the SCA. Before the settlement procedure is initiated, the SAO has to inform the company about the results of its investigation (the results) and about the amount of the fine to be imposed.

If the company agrees with the results and confirms in writing its involvement in the relevant conduct, the fine may be reduced, at the discretion of the SAO, by up to (i) 30% in the case of anti-competitive agreements between competitors (cartels) and (ii) 50% in the case of other violations.

If the settlement procedure is combined with a leniency application, the fine may be further reduced. Should the settlement procedure be terminated without reaching a settlement, the company's confirmation of involvement in the conduct cannot be used by the SAO as evidence in further proceedings.

**Comment.** The changes resulting from the public consultation after the draft SAO guidelines were published include a higher possible reduction of fines in the case of cartels, but the exclusion of the abuse of a dominant position from the scope of the SAO guidelines. The settlement procedure could speed up and lower the costs of antitrust proceedings.

*Source: SAO guidelines, 1 January 2012, http://www.antimon.gov.sk/879/podmienky-uplatnenia-institutu-urovnania.axd (in Slovak).*

## Spain: CNC continues to investigate information exchanges

**Summary.** The Spanish Competition Authority (CNC) has imposed a fine of approximately EUR 4 million on Honda and Suzuki (the motorcycle manufacturers) for the exchange of commercially sensitive information.

**Background.** Article 1 of the Spanish Competition Act (SCA) prohibits cartels and other agreements or concerted practices which restrict competition (it is equivalent to Article 101 of the Treaty on the Functioning of the European Union (TFEU)). The maximum fine for such a violation is 10% of the relevant company's turnover in its last business year.

**Facts.** In 2009 and 2010, the CNC conducted dawn raids at the Spanish premises of Honda and Suzuki during which the CNC found two emails exchanged between representatives of these companies containing commercially sensitive information regarding the wholesale price and recommended retail price for each type of motorcycle to be marketed by Honda and Suzuki for the following year. In July 2010, the CNC opened formal proceedings against both Honda and Suzuki alleging that the commercial information exchanged between them reduced the strategic uncertainty in the Spanish market for motorcycles and facilitated the alignment of the companies' competitive behaviour.

On 9 January 2012, the CNC published its decision in Case S/0280/10 *Suzuki-Honda*, and fined the motorcycle manufacturers approximately EUR 2.1 million and EUR 1.8 million respectively for the exchange of commercially sensitive information in breach of Article 1 of the SCA, based on the exchange of a single email between the companies.

**Comment.** The CNC has followed the approach set out in the European Commission's guidelines on the applicability of Article 101 TFEU to horizontal co-operation arrangements, and on assessing the application of the competition rules to exchanges of individualised data on future prices. The CNC has been one of the first national competition authorities within the EU, together with the UK's Office of Fair Trading, to consider exchanges of information as restrictions of competition by object and fining them as cartels. The CNC has recently opened formal proceedings against foam manufacturers Armacell Iberia and L'Isolante K-Flex for an alleged exchange of commercially sensitive information in relation to insulating foam market.

*Source: CNC decision, 9 January 2012, http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?sTipoBusqueda=3&PrPag=1&PagSel=1&Numero=S%2f0280%2f10&Ambito=Conductas*

## United Kingdom: OFT refers acquisition of Cambridge Water plc to the Competition Commission

**Summary.** The Office of Fair Trading (OFT) has referred the completed acquisition of Cambridge Water plc (Cambridge Water) by South Staffordshire plc (South Staffordshire) to the Competition Commission (CC).

**Background.** The Water Industry Act 1991 (WIA 1991), as amended by the Enterprise Act 2002, applies a special merger regime to the water industry under which the OFT is obliged to refer mergers between two or more water enterprises to the CC, provided that the turnover of the water enterprises being taken over, and of those already belonging to the acquirer, is greater than £10 million.

**Facts.** The OFT has referred the completed acquisition of Cambridge Water by South Staffordshire, an indirect wholly-owned subsidiary of investment funds managed by Alinda Capital Partners LLC (Alinda), to the CC for further investigation.

South Staffordshire acquired Cambridge Water from HSBC Bank plc on 3 October 2011. However, South Staffordshire already owns another water company, South Staffordshire Water plc, and the OFT confirmed that it believes the turnover thresholds for a mandatory referral to the CC under the WIA 1991 are met.

As required under the WIA 1991, the CC will now consider whether the water merger has or may be expected to prejudice the ability of the Water Services Regulation Authority (Ofwat) to make comparisons between different water enterprises for the purposes of assessing performance and setting price controls. The CC is expected to report on the merger by 20 June 2012.

Alinda and South Staffordshire have provided hold separate undertakings in relation to the management of the businesses of Cambridge Water and South Staffordshire Water plc until the CC's determination.

**Comment.** The CC last looked at a water merger in 2006-2007 when it investigated the merger between Mid Kent Water and South East Water, concluding that both companies should make a one-off price reduction to their customers to address the adverse effects identified.

The Department for Environment, Food and Rural Affairs (DEFRA) has recently confirmed as part of its water white paper, published on 8 December 2011, that it intends to reform the special merger regime for water companies. This would introduce a two-tier referral system, allowing water companies seeking to take over another water company to make undertakings in lieu of an expensive referral to the CC. DEFRA may also introduce a higher turnover threshold of £70 million in order to exclude more mergers from automatic referral to the CC, and will be consulting further on this proposal.

*Source: OFT press release, 5 January 2012, http://www.oft.gov.uk/news-and-updates/press/2012/01-12*

## United Kingdom: OFT refers aggregates market to the Competition Commission

**Summary.** The Office of Fair Trading (OFT) has referred the UK markets for aggregates, cement and ready-mix concrete 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 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*).

In September 2010, the OFT launched a market study into the aggregates, cement and ready-mix concrete markets, with concerns that the industries were characterised by high barriers to entry and increasing concentration at local level.

**Facts.** The OFT has referred the UK markets for aggregates, cement and ready-mix concrete to the CC for a market investigation.

In August 2011, the OFT published a preliminary report and consulted on its proposal to refer the matter to the CC. The OFT concluded that there were a number of features of the aggregates, cement and ready-mix concrete markets that could prevent, restrict or distort competition, relating to both the structure of the markets and the behaviour of major firms towards smaller operators. In particular, the OFT considered that:

- there may be high barriers to entry in aggregates and cement due to planning permission constraints and the high level of initial investment required;
- there were five major players accounting for over 90% of the cement market, 75% of aggregates sales and 68% of ready-mix production;

- there were complaints about vertically integrated firms refusing to supply or discriminating against non-integrated competitors through their pricing;
- there may be multiple contacts and information exchanges across the markets; and
- and there may be an apparent squeeze between rising cement prices and stable or falling ready-mix concrete prices affecting independents that both buy cement from vertically-integrated major suppliers and compete against them in the ready-mix concrete market.

Following its consultation, the OFT concluded that it had sufficient grounds to refer the markets to the CC for a market investigation and that its conclusions were largely unchanged from those expressed in its earlier preliminary report. However, the OFT concluded that Great Britain and Northern Ireland were distinct geographic markets, with certain features such as market concentration and vertical integration not as prevalent in Northern Ireland, and accordingly decided not to include Northern Ireland within the scope of the reference.

The OFT also noted that its separate consideration for merger control purposes of the proposed Anglo American / Lafarge joint venture had generated a significant amount of additional evidence with regards to the relevant markets, and confirmed that it had taken this evidence into account in its final decision.

The CC now has until January 2014 to publish its report, although it aims to complete its investigation in a shorter timeframe.

**Comment.** This sector continues to face scrutiny across a number of jurisdictions. The European Commission is still conducting its ongoing investigation into suspected anti-competitive practices by several companies active in the cement and related products markets in a number of EU Member States. The CC has also been considering Anglo American's joint venture with Lafarge, following its referral by the OFT in September 2011 due to concerns that the joint venture might result in overlaps in the supply of cement and could force independent concrete suppliers out of the market.

*Sources: Competition Commission press release, 18 January 2012, http://www.competition-commission.org.uk/press_rel/2012/jan/pdf/02_12_aggregates_ref.pdf; OFT press release, 18 January 2012, http://www.oft.gov.uk/news-and-updates/press/2012/02-12; OFT press release, 16 August 2011, http://www.oft.gov.uk/news-and-updates/press/2011/90-11; OFT report on the aggregates market study, August 2011, http://www.oft.gov.uk/shared_oft/market-studies/oft1358.pdf.*

## United States: HSR and interlocking directorates thresholds revised

**Summary.** The Federal Trade Commission has announced its annual revised thresholds to the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) and to Section 8 of the Clayton Act applying to interlocking directorates.

**Background.** The HSR Act (Section 7A of the Clayton Act) requires that parties wishing to consummate a merger or acquisition above a certain size provide prior notification to the federal antitrust agencies and wait a prescribed period of time before closing the transaction. Section 8 of the Clayton Act prohibits interlocking directorates – where an individual is prohibited from serving as an officer or director of two competing companies if the companies meet certain size requirements.

Each year, the Federal Trade Commission revises the thresholds applicable under the HSR Act to reflect changes in US gross national product. The thresholds applying to interlocking directorates under Section 8 of the Clayton Act are also revised annually. The changes are typically announced in January, and become effective in February.

**Facts.** On 24 January 2012, the Federal Trade Commission announced the annual revised thresholds to the HSR Act, which requires premerger notification for mergers and acquisitions meeting certain size criteria. The size of transaction threshold for 2012 will increase from USD 66.0 million to USD 68.2 million. The additional thresholds applicable under HSR law have also been revised upward.

The new thresholds are effective as of 27 February 2012 (the effective date) and apply to all transactions closing on or after the effective date.

The thresholds applying to the prohibition on interlocking directorates under Section 8 of the Clayton Act have also been revised. The new thresholds will prevent a person from serving as an officer or director of competing companies if each company has capital, surplus, and undivided profits aggregating more than USD 27,784,000 unless the competitive sales of either company are less than USD 2,778,400. These revised thresholds also apply from the effective date.

**Comment.** Annual revisions to the thresholds are based on changes in US gross national product. With the exception of 2010, thresholds have been revised upward each year to reflect growth in gross national product. The applicability of the new thresholds is governed by the date the transaction will close, rather than the date the agreement is signed. Thus, where an agreement is signed prior to the effective date of the new thresholds but the transaction is planned to close after the effective date, the new higher thresholds will apply.

*Source: Federal Trade Commission Press Release, 24 January 2012, http://www.ftc.gov/opa/2012/01/hsr.shtm. The entire list of revised thresholds applicable under the HSR Act is available at: http://www.ftc.gov/os/2012/01/120124claytonact7a.pdf*.

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