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Briefing note

October 2013

Consumer Goods and Retail Industry Competition Bulletin

BEVERAGES, BREWERIES AND TOBACCO

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- **Spain: Spanish Competition Authority imposes fines for restrictive practices in the tangerine market.** The Spanish Competition Authority has imposed fines totalling more than EUR 5 million on Carpa Dorada, Club de Variedades Vegetales Protegidas and Nador Cott Protection for participating in restrictive practices in the tangerine market.
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- **EU: Spar Austria's appeal dismissed by EU court.** The General Court has dismissed an appeal by Spar Österreichische Warenhandels-AG and upheld a decision by the European Commission to grant conditional approval of a merger between German REWE Group and Austrian Adeg Österreich Handels AG.
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BEVERAGES, BREWERIES AND TOBACCO

UK: CC unconditionally clears Barr/Britvic soft-drinks merger

Summary. The UK Competition Commission (CC) has unconditionally cleared the acquisition by AG BARR plc (Barr) of Britvic plc (Britvic).

Background. The UK Office of Fair Trading (OFT) must refer proposed mergers to the CC if the OFT believes it may be the case that a relevant merger situation has been created and this has resulted, or may be expected to result, in a substantial lessening of competition (SLC) within any market or markets for goods or services in the UK (section 22(1), Enterprise Act 2002)(2002 Act). The CC must determine whether a relevant merger situation has been created and, if so, whether this has resulted, or may be expected to result in, an SLC (Section 35, 2002 Act).

Barr and Britvic are both active in the manufacture and supply of a range of carbonated and non-carbonated soft drinks. Barr brands include IRN-BRU, Orangina, KA and Rubicon and Britvic brands include Robinsons, J2O, Fruit Shoot, Tango and Pepsi. The transaction was announced in November 2012 and was referred by the OFT to the CC for an in-depth review on 13 February 2013 (see CGRB June 2013 edition, **UK: Bitter sweet – the OFT's recent approach to food mergers**). The OFT referred the transaction to the CC on the basis that it might lead to higher prices post-merger. Consumer survey evidence submitted by the merging parties showed that, while Coca-Cola and other brands supplied by Coca-Cola Enterprises were important alternative choices for many drinkers of Barr's IRN BRU and Orangina brands, some of Britvic's brands - in particular Pepsi and Tango - were also sufficiently close alternatives to raise competition concerns.

Facts. The CC assessed three possible competitive effects of the merger: (i) price rises as a result of the merger bringing together brands that are close substitutes for consumers; (ii) effects of the parties' increased bargaining power; and (iii) increased likelihood of coordination.

In relation to possible price rises, the CC considered a customer survey which suggested that, while there was some substitutability between Barr's and Britvic's products, this was limited. IRN-BRU in particular was considered as distinct from other carbonated soft drinks. Furthermore, the CC noted that soft drinks producers and their customers often negotiated on many other aspects in addition to price. The CC therefore concluded that the merger would not have a harmful effect in this manner.

Secondly, the CC considered whether the merged company would be large enough to achieve levels of distribution comparable to those of Coca-Cola Enterprises (CCE) and, if so, whether this would be to the detriment of smaller drinks companies or new entrants. As the merged entity would be less than half the size of CCE, the CC concluded that the merger would make little difference to the parties' bargaining power and distribution.

Finally, the CC considered the possibility of coordinated effects. It concluded that, given that the merged entity would remain significantly smaller than CCE, coordination in the carbonated soft drinks market would continue to be unlikely post-merger.

Comment. The CC was prepared to take a less cautious approach to customer survey evidence than the OFT and acknowledged that even though the proposed transaction represented the merger of the second and third largest players in the carbonated soft drinks market, the main competitive constraint came from CCE. Given the relatively low threshold at which the OFT is duty-bound to refer a case to the CC, it would be unusual for them to clear a 3 to 2 merger where some concerns were raised by survey evidence. The CC is, however, able to take a more pragmatic market view. In the present instance the clearance came too late - the duration of the competition review process was such that shortly after the CC's final report, the parties announced that they had abandoned the transaction.

DAIRY AND FOOD PRODUCTS

China: Record penalties imposed on infant formula companies

Summary. The National Development and Reform Commission (NDRC) has announced fines totalling a record RMB 668.73 million (approximately EUR 82.43 million) against five foreign infant formula manufacturers and one Chinese manufacturer for fixing or setting minimum resale prices (resale price maintenance, or RPM). Three other infant formula manufacturers, although investigated, were exempted from fines.

Background. Article 14 of China's Anti-Monopoly Law (AML) prohibits agreements which fix or set the minimum price for resale. Under Article 15 of the AML, Article 14 does not apply if parties can show that a monopoly agreement satisfies one of the prescribed exemptions, competition is not significantly restricted and consumers benefit. Under Article 46 of the AML, a fine of between 1% and 10% of annual turnover may be imposed for violating Article 14 of the AML. Under Article 50 of the AML, an undertaking bears civil liabilities if it implements a monopoly agreement causing loss to others.

Facts. The NDRC's investigation of the nine infant formula manufacturers reportedly started in March 2013, upon receipt of a complaint. The NDRC concluded that the nine infant formula manufacturers had engaged in RPM, although the specific measures used by the manufacturers to enforce RPM varied and included agreements, penalties, penalties in disguised form, cancellation or deduction of rebates, or restricting or ceasing supply. NDRC noted that the nine manufacturers admitted that their respective RPM activities violated the law and failed to show that their RPM activities satisfied the conditions for exemption under Article 15 of the AML.

The NDRC decided to impose a record fine of RMB 668.73 million (approximately EUR 82.43 million) on six infant formula manufacturers. Specifically, NDRC imposed a fine equivalent to 6% of Biostime's turnover in the preceding financial year, given its severe violation and failure to rectify its conduct; and a fine equivalent to 4% of Mead Johnson's turnover in the preceding financial year, since it failed to cooperate in the investigation. Four manufacturers, namely, Dumex, Abbott, Fonterra and FrieslandCampina, each received a fine equivalent to 3% of their turnover in the preceding financial year, since they were cooperative in the investigation and actively rectified their conduct. The other three manufacturers, namely, Wyeth, Beingmate and Meiji, were exempted from penalty since they took the initiative to report relevant circumstances of the anti-competitive conduct, provided important evidence and rectified their conduct.

In addition to the penalties imposed, all the companies investigated by the NDRC took corrective measures, including ceasing the illegal conduct immediately, amending their distribution agreements, refining their sales policies and providing antitrust compliance trainings to all employees, and taking practical measures to eliminate the impact of the previous violation.

Comment. This case is significant in that it shows the increasingly active enforcement of the AML by the Chinese authorities. It is the third time that the NDRC has imposed significant fines on foreign and Chinese companies – it came shortly after the record fine of RMB 449 million (approximately EUR 55.35 million) on two State-owned liquor manufacturers for RPM in February 2013 (see CGRB June 2013 edition, China: Record penalties imposed on State-owned liquor producers for resale price maintenance) and the fine of RMB 353 million (approximately EUR 43.51 million) on six Korean and Taiwanese manufacturers of LCD panels in January 2013. As usual, the NDRC's decision does not contain any detailed analysis. It also gives rise to several points of interest.

First, the decision indicates that NDRC has substantial discretion in setting fines. The NDRC considered factors such as the severity of the violation, and whether the company was cooperative in the investigation and actively takes corrective measures. It is not entirely clear to what extent each factor was considered during the decision-making process or how the specific percentage was set. Several days before NDRC's decision was announced, there were reports in the press naming the parties and quoting different levels of proposed fine.

Second, it has yet to be determined what the criteria and procedures for exemption are. Under the AML and its implementation rules, NDRC (as well as the State Administration for Industry & Commerce) can, at its discretion, reduce or waive sanctions if the undertaking has voluntarily reported facts and provided important evidence. It is not apparent what types of evidence are regarded as "important". Further, under the leniency programme prescribed under NDRC's implementation rules for the AML, only the "first company" that takes the initiative to report and provides important evidence may get full exemption. It is not clear how three companies in this case were able to get a full exemption at the same time.

Third, it is not evident whether the admission of violation of the AML in the investigation has any impact on potential private litigation. In its decision, NDRC noted that the nine manufacturers admitted that their respective RPM activities violated the AML. To date, all antitrust private litigation involves stand alone action, and the risk of civil damage claims remains untested in China. It is therefore also unclear whether an admission may be used as evidence by plaintiffs in private litigation.

EU: Commission conditionally clears FrieslandCampina acquisitions

Summary. The European Commission (Commission) has conditionally cleared the acquisition by the leading Dutch dairy cooperative, FrieslandCampina, of two Dutch companies, Zijerveld & Veldhuyzen B.V (Zijerveld), a specialist cheese wholesaler, and Den Hollander Food B.V (Den Hollander), a packaging services provider.

Background. Under the EU Merger Regulation (139/2004/EC) (EUMR), the Commission must, at the end of its Phase I investigation, clear a transaction unless it has serious doubts as to the merger's compatibility with the common market. If serious doubts are raised and the Commission has not received an offer of appropriate remedies, then it must open an in-depth Phase II investigation (Article 6(1), EUMR). The Commission can accept binding commitments from the merging parties as a condition of Phase II clearance (Article 8(2), EUMR).

Following the initial Phase I investigation, the Commission concluded that the proposed transaction would only raise competition concerns in the market for semi-hard goat cheese. In order to avoid an in-depth Phase II investigation, FrieslandCampina offered a set of commitments aimed at easing these concerns.

Facts. The Commission raised concerns that the original transaction could have significantly reduced competition in the semi-hard goat cheese market in The Netherlands. Under the terms of the conditional clearance, issued on 12 April 2013, FrieslandCampina committed to amend the exclusive supply arrangement between the target companies and Amalthea, a producer of organic goat cheeses, so that the company's rivals will have access to a significant part of Amalthea's production. It also undertook to stop outsourcing the production of semi-hard goat cheese to Amalthea, in order to ensure that such production capacity will be available to third parties.

Comment. The Commission concluded that the commitments offered by FrieslandCampina would ensure sufficient quantities of semi-hard goat cheese would be available to third parties and, further, that the newly merged entity would continue to face competition from rivals.

EU: Commission conditionally approves McCain's buyout of PinguinLutosa

Summary. The European Commission (Commission) has conditionally approved the acquisition of Belgian potato processor Lutosa by rival McCain.

Background. Please refer to **EU: Commission conditionally clears FrieslandCampina acquisitions**, above, for a summary of the relevant legal background.

Facts. On 29 May 2013 the Commission approved Canada-based McCain's acquisition of Belgium-based Lutosa, subject to commitments. The deal is worth a reported 225 million Euros and means that PinguinLutosa will be able to clear its debts.

The Commission's investigation showed that the transaction, as originally notified, would have led to a reduction in competition on the Belgian retail market for French fries and potato specialties.

Clearance is conditional on divestment of Lutosa's branded retail businesses in the European Economic Area (EEA) and includes an EEA-wide exclusive licence for the "Lutosa" brand in the retail sector, along with relevant know-how and staff. The divestment is designed to remove the overlap between branded potato products in the retail sector in Belgium. It is intended that the purchaser of the licence will be able to operate a business which can compete with McCain and other significant market participants.

The Commission, alongside its investigation into the Belgium retail sector, also investigated the markets for the production and commercialisation of processed potato products in the food service sector, such as restaurants and canteens. The Commission however concluded that competitors such as Aviko and Lambweston will still represent significant competition to McCain in the EEA.

Comment. The Commission analysed the impact of this transaction on the branded segment of the market, where the parties' shares were significant (at least 90% in Belgium). The Commission dismissed arguments regarding competition from own-label (apparently comprising 70% of sales in Belgium), *inter alia*, due to the brand power of the parties' products, and the countervailing buyer power of the three main supermarkets (who together accounted for 90% of purchases).

Italy: Italian Competition Authority concludes agri-food sector inquiry

Summary. The Italian Competition Authority (ICA) has completed its inquiry into large scale distribution in the Italian agri-food sector, finding that large scale distributor buyer power is creating competition concerns in both the upstream and downstream markets, and ultimately for end-consumers.

Background. ICA opened an inquiry into large scale distribution in the Italian agri-food sector in October 2010, focusing in particular on distributor market power. The inquiry came to an end, more than two and a half years later, in August 2013, with the ICA finding that large scale distributors had, over time, acquired significantly enhanced buyer power, partly due to the increasing prevalence in Italy of large-scale alliances between distributors, known as *centrali d'acquisto*. The aim of the *centrali d'acquisto* is to secure better purchasing terms against suppliers in the upstream market through collective negotiations with members of the *centrali d'acquisto*. The ICA also found that separate *centrali d'acquisto* may also form alliances, known as *supercentrale d'acquisto*, and that membership of such alliances accounts for 80% of the large scale distribution sector in Italy.

Facts. Traditionally, Italian competition law has considered *centrali d'acquisto* in general as being pro-competitive. However, the ICA's inquiry has found that the increased distributor buyer power resulting from membership of *centrali d'acquisto* is enabling members to impose unfair terms on their upstream suppliers. The ICA also found that frequent membership-switching between different alliances is facilitating the flow of information in the sector, increasing transparency, and providing distributors with insights into the most favourable terms that may be achieved with suppliers. Competition concerns have also been identified in the downstream market, as more favourable terms achieved at the distributor level are not being passed down to consumers in the form of lower retail prices.

Comment. The ICA is considering monitoring market conditions in accordance with its powers under Article 62 of Law Decree No. 1, which regulates contractual relationships in the agri-food supply chain. Article 62 (which has recently been applied for the first time, see **Italy: Italian court applies new legislation on the agri-food supply chain**), enables the ICA to impose fines for unfair commercial practices in the agri-food supply chain.

Italy: Italian court applies new legislation on the agri-food supply chain

Summary. The Regional Administrative Court for the Lazio Region (TAR) has issued the first judgement interpreting and applying new legislation governing contractual relationships in the agri-food supply chain.

Background. Article 62 of Law Decree No. 1 (Article 62) entered into force on 24 January 2012 and applies to all contracts which have, as their object, the sale of food products, except those entered into with end consumers. Article 62 requires that all such contracts must be made in writing and that certain terms, such as duration, price and payment terms, must be specified. The legislation also imposes statutory deadlines for payment of consideration in relation to such contracts: thirty days for perishable foods; and sixty days for non-perishable. The provisions of Article 62 are mandatory and apply to all relevant commercial relationships in the agri-food chain if delivery takes place in Italy.

Commercial relationships within the scope of Article 62 are also governed by principles of fairness, proportionality and transparency. Whether or not conduct is unfair is assessed in the context of the EU High Level Forum for a Better Functioning Food Supply Chain, as approved on 29 November 2011.

The Italian Competition Authority is responsible for enforcing Article 62 and has the power to impose fines for non-compliance.

Facts. On 17 July 2013, the TAR issued the first judgement interpreting and applying Article 62. The case concerned a food supplements manufacturer and raised specific questions on how food products should be defined under Article 62 and whether general legislation on payment terms takes precedence over the new law.

The TAR found that Article 62 applies to all products in the agricultural cycle, provided that those products are either: listed in Annex 1 to the Treaty on the Functioning of the European Union; or listed in Article 2 of EC Regulation 178/2002; but also to any other food product, even if it not the result of agricultural activity. The TAR therefore concluded that food supplements do fall within the scope of Article 62.

The TAR recognised the supremacy of Article 62 over general national legislation governing payment terms, also noting that the provisions of Article 62 are consistent with EU Directive 2011/07 on combating late payment in commercial transactions, which enable EU Member States to "*maintain or adopt provisions more favourable to the creditor than the provisions necessary to comply with [the] Directive.*"

Comment. It remains to be seen whether the approach adopted by the TAR will be subject to challenge or establishes a reliable precedent for parties to commercial contracts governed by Article 62.

Spain: Spanish Competition Authority imposes fines for restrictive practices in the tangerine market

Summary. The Spanish Competition Authority (CNC) has imposed fines totalling more than EUR 5 million on Carpa Dorada (CD), Club de Variedades Vegetales Protegidas (CVVP) and Nador Cott Protection (NCP) for participating in restrictive practices in the tangerine market.

Background. Nadorcott is a variety of tangerine protected by Council Regulation (EC) 2100/1994 on Community plant variety rights. NCP is the exclusive licensor in Europe to exploit Nadorcott tangerines, and has granted a licence to CD in Spain and Portugal. CVVP is a non-profit association of farmers and sellers dedicated to the development and promotion of the Nadorcott plant variety.

Facts. On 29 November 2010, the Valentian Farmer's Trade Association filed a complaint against CD and CVVP alleging restrictive practices that limited distribution in the tangerine market. The CNC started to collect information about the market from the parties and also contacted the Spanish Plant Variety Office and Community Plant Variety Office to clarify the extension of the rights relating to tangerines since this product is a protected plant variety subject to Council Regulation (EC) 2100/1994. On 21 September 2011, the CNC opened infringement proceedings against CD and CVVP and on 11 September 2012 it extended the investigation to NCP.

The CNC concluded that the three companies had engaged in a number of practices with the purpose of restricting freedom to sell Nadorcott tangerines through: (i) the organisation and implementation of a traceability system mandatorily linked to the signing of exploitation licences and adhesion agreements with sellers, which implied that the latter would assume obligations to supply information, to submit to inspections and make investments that were not necessary in order to secure the rights protected by plant variety legislation; and (ii) the creation of a cross-sector association with the view to ensure the implementation of the anticompetitive measures.

In its resolution, the CNC held that these practices infringed Article 101 TFEU as well as Article 1 of the Spanish Competition Act, and imposed fines of over EUR 5 million on the parties. In addition, the CNC also urged the entities to eliminate the identified restrictions and to refrain from introducing similar restrictions in the future.

Comment. The CNC concluded that the traceability system linked to the licence concession system needed to exploit this tangerine variety is contrary to competition legislation as it imposes a number of restrictions on the licensees and sellers that allow for effective control of the Nadorcott tangerine variety trade. According to the CNC, producers and marketers of the Nadorcott variety were forced to accept certain restrictions in their distribution channels, provide information and make certain investments that were not necessary to ensure the rights protected by the plant variety legislation.

Spain: Spanish Competition Authority imposes fines on eight bakery companies in Navarra

Summary. The Spanish Competition Authority (CNC) has imposed fines totalling EUR 2 million on eight bakery companies for agreeing a 5% increase in the retail price of certain types of bread in Pamplona and the surrounding areas.

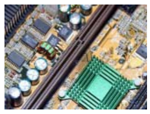
Background. On 2 February 2011, a letter from an individual to the CNC reported an alleged generalised increase in bread prices between 1 and 3 February 2011 in Pamplona and its surrounding administrative district. The CNC opened infringement proceedings and collaborated with regional public institutions to carry out the investigation.

Facts. The CNC found that the accused undertakings agreed to an increase of 5% in the retail price of certain types of bread and that they not only applied the increase in their own establishments, but also imposed it on the establishments they supplied. This resulted in the price of ordinary French sticks (*barra común*), the best-seller, rising from EUR 1.00 to EUR 1.05.

This was considered to be a generalised net increase, as the accused bakeries, who accounted for more than 80% of fresh bread produced for sale, fixed the retail prices for their direct outlets, exclusive sellers, franchisees and resellers.

The CNC found this to be a clear violation of Article 1 of the Spanish Competition Act, and concluded that the effects created in the market concerned a basic item and impacted the consumer in inverse proportion to his or her income. The CNC imposed fines on the parties involved totalling EUR 2 million.

Comment. The CNC considered that the price increase carried out by the parties amounted to parallel price-fixing conduct and not mere adaptive conduct or an example of the 'following the leader doctrine' (as the parties alleged). The CNC held that conduct could not be adaptive where it happened simultaneously. Although the price increase had been publically announced by the main bakery company some months earlier, it actually took place in the same amount, format and moment in time and the CNC therefore found that there could be no other plausible explanation for the conduct.



NON-FOOD GOODS/RETAILERS

UK: OFT issues statement of objections for sports bra retail price maintenance

Summary. The Office of Fair Trading (OFT) has issued a statement of objections (SO) for alleged infringements of competition law by sports bra manufacturer DB Apparel UK Limited (DBA) and three UK department stores. The OFT alleges that the parties entered into resale price maintenance (RPM) agreements for certain DBA branded sports bras.

Background. Chapter I of the Competition Act 1998 prohibits agreements or concerted practices which have the object or effect of preventing, restricting or distorting competition in the UK (Chapter I prohibition). The maximum penalty the OFT can impose is 10% of worldwide turnover of the relevant undertaking in its last business year (Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259)). An SO provides notice of a proposed infringement decision to the parties involved. The parties can make written and oral submissions in response (Competition Act 1998 (OFT Rules) Order 2004 (SI No. 2004/2751)). These representations are considered by the OFT before it adopts a final decision.

Facts. In April 2012, the OFT launched a formal investigation under the Chapter I prohibition (and Article 101 of the Treaty on the Functioning of the European Union (TFEU), the equivalent EU provision) into alleged anticompetitive agreements entered into between DBA and three UK department stores (John Lewis plc, Debenhams Retail plc and House of Fraser (Stores) Limited). On 20 September 2013, the OFT issued an SO alleging that the parties had entered into a number of separate agreements between 2008 and 2011 which had the aim of increasing the prices of DBA's Shock Absorber brand of sports bras sold by each of the three department stores. During the period in question, DBA was one of the UK's leading brands with a market share of approximately 15%. The OFT's provisional view is that the agreements amount to RPM and therefore infringe competition law.

Comment. In accordance with OFT guidance, the SO has not been published by the OFT, but interested third parties may request a non-confidential version up to 4 October 2013. RPM is viewed by the OFT as a serious infringement of competition law, and the present investigation serves to highlight the OFT's apparently increased interest in this kind of behaviour – on 24 September of this year, the OFT also issued an SO for pricing restrictions in the mobility scooter sector (see **UK: OFT issues statement of objections for online sales restrictions in mobility scooter sector**).

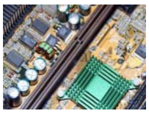
The OFT closed a separate investigation, also being conducted under the Chapter I prohibition and Article 101 of the TFEU, into suspected anti-competitive arrangements in the leisure goods sector in May 2012 on administrative priority grounds. The OFT has not published any further details of the practices which it was investigating, nor further reasons for its decision to close the case, but this may have been as a result of the decision by the OFT to extend the deadline for its present decision on whether to issue an SO from March to September 2013.

UK: OFT issues statement of objections for online sales restrictions in mobility scooter sector

Summary. The Office of Fair Trading (OFT) has issued a statement of objections (SO) for alleged infringements of competition law by Pride Mobility Products Limited (Pride), a manufacturer of mobility scooters, and some of its online retailers. The OFT alleges that the parties entered into agreements which prevented the retailers from advertising online prices below Pride's recommended retail price (RRP) for certain models of mobility scooter between 2010 and 2012.

Background. Please refer to **UK: OFT issues statement of objections for sports bra retail price maintenance**, above, for a summary of the relevant legal background.

The OFT carried out a market study into the mobility aids sector in 2011, identifying several areas of concern and also a package of remedies to help consumers get a better deal. Following the market study, in April 2012 the OFT launched a formal investigation under the Chapter I prohibition (and Article 101 of the Treaty on the Functioning of the European Union, the equivalent EU provision) into alleged anticompetitive online sales restrictions in the mobility aids sector.



Facts. Following an SO issued on 21 March 2013, on 5 August 2013 the OFT issued its first decision in the context of its investigation, finding that Roma Medical Aids Limited (Roma) and some of its online retailers had breached competition law by entering into agreements which prevented the online retailers in question from selling Roma-branded mobility scooters online or from advertising their prices online between 2011 and 2012. The OFT found that such practices can limit consumer choice and impede consumers' ability to compare prices and secure value for money. The OFT therefore directed the parties to bring the arrangements to an end and to refrain from entering into the same or similar arrangements in the future.

On 24 September 2013, the OFT issued a second SO alleging that Pride and a number of its online retailers had entered into agreements between 2010 and 2012 which prevented the retailers from advertising online prices below Pride's RRP for certain models of mobility scooter. In accordance with OFT guidance, the SO has not been published by the OFT, but interested third parties may request a non-confidential version up to 15 October 2013.

Comment. Pricing restrictions are viewed by the OFT as serious infringements of competition law, and the present investigation serves to highlight the OFT's apparently increased interest in this kind of behaviour – on 20 September of this year, the OFT also issued an SO for alleged resale price maintenance by sports bra manufacturer DB Apparel UK Limited (DBA) and three UK department stores in relation to certain DBA-branded sports bra (see **UK: OFT issues statement of objections for sports bra retail price maintenance**). The OFT also continues to investigate competition concerns in the mobility aids sector.

EU: Henkel loses court bid for EU documents on French detergent cartel

Summary. Details have been published in the Official Journal of two appeals lodged by washing-powder manufacturer, Henkel, against orders of the General Court dismissing Henkel's judicial review actions against decisions of the European Commission (Commission) in which it refused to transfer documents produced in relation to the consumer detergents cartel case to the French Competition Authority (FCA).

Background. On 13 April 2011, the Commission announced that it had levied fines totalling EUR 315.2 million against two washing powder producers (Procter & Gamble and Unilever) for participation in an illegal cartel. A third company, Henkel, was granted full immunity from fines pursuant to the Commission's Leniency Notice.

Parallel to the Commission investigation, the FCA conducted an investigation under Article 101 TFEU and the equivalent French provisions into an alleged cartel in the consumer textile detergent sector in France involving Henkel's French subsidiary, Unilever, Procter & Gamble and Colgate Palmolive.

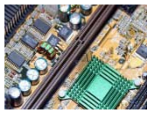
The Commission refused requests by both the FCA and Henkel to disclose certain documents related to its investigation. Henkel brought actions before the General Court to seek annulment of these decisions.

On 17 March 2013, the General Court dismissed Henkel's actions, concluding that both had become devoid of purpose since Henkel had concluded its proceedings. The FCA had decided that the Commission documents were not necessary to guarantee the respect of Henkel's rights of defence and were irrelevant to its analysis of the case. Thus, Henkel had no legal interest in its action for annulment of the Commission decisions.

Facts. On 27 July 2013, details were published of two appeals lodged by Henkel against both General Court orders. Specifically, Henkel claims that the General Court:

- distorted the facts by erroneously holding that there was no other procedural step following the FCA's decision in which documents could be reviewed, misinterpreting the real purpose of the request for the transmission of the documents and holding that the purpose of the request was only to enable the FCA to examine the documents when, in fact, the main purpose was to enable Henkel to exercise its rights of defence;
- committed an error of law by failing to examine whether Henkel retained an interest in bringing proceedings before the General Court so as to avoid a repetition of an illegal act; and
- failed to review any of the arguments put forward by Henkel as to why it had an interest in bringing proceedings, with the result that the General Court's orders are invalid for lack of reasoning.

Comment. Henkel's appeals are likely to provide insights into the Commission's duties to provide documents obtained during a cartel investigation to national competition authorities and national courts.



US: Apple E-books judgement: Implications for the review of vertical agreements

Summary. Apple's agreements with publishers to act as their agents have been held to be per se illegal under US antitrust laws.

Background. Section 1 of the Sherman Act (15 U.S.C. §1) prohibits agreements that unreasonably restrain trade. Courts scrutinise challenged agreements generally either under a per se illegal standard or under the rule of reason. Under the per se standard, courts do not delve into the factual underpinnings of or rationale for the agreement, or the competitive dynamics of the marketplace. A rule of reason analysis weighs the anticompetitive harms posed by the agreement against the pro-competitive benefits, examining market structures and the parties' rationales for entering the agreement. The rule of reason analysis is a much deeper analysis of the effects of the agreement on the marketplace and offers the companies involved greater opportunity to justify their agreement, and perhaps escape antitrust liability. Generally, vertical agreements are judged under the rule of reason standard.

Facts. Prior to the entry of Apple into the electronic books marketplace, publishers and distributors had existed under a wholesale model whereby the publisher established a list price for its content and then sold to the wholesale distributor at a discount to that list price. The distributor in turn sold to the customer at the price of its choosing.

Apple approached each of the publishers with a new business model for electronic book distribution - the agency model. Under the agency model the distributor acted as an agent of the publisher, accepting a commission for the sale of the publisher's content and selling that content at a price determined by the publisher. Apple brought its agency model to each of the major publishers and promised the agreement of each of the other publishers to the agency model. Each of the publishers understood that its competitors would adopt the agency model.

Apple's agency distribution agreement with publishers contained a most-favoured nation clause that permitted Apple to match the lowest retail price offered by its competitors, and imposed a penalty upon any publisher that was unable to force Apple's competitors (and in particular Amazon) to adopt the agency model. The combination essentially forced the marketplace to shift from a wholesale model to an agency model, and permitted publishers to set the price of electronic books without fear that Amazon would undercut that price. In addition to forcing the marketplace to adopt the agency model, the most-favoured nation clause also limited price competition between other distributors and Apple.

The market structure in which Apple and the publishers interacted was a vertical arrangement: Apple was the downstream distributor of the publisher's content. Yet, the Court condemned the agency arrangement as per se illegal. The Court held that per se agreements include those agreements whereby a vertical player "*participates in and facilitates a horizontal conspiracy*" and that "*Apple played a central role in facilitating and executing [the] conspiracy*."

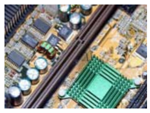
Comment. In terms of how vertical agreements are reviewed by the courts, the Apple decision moves the needle away from a trend of increased application of the rule of reason and back toward per se approach. On the one hand, the comfort that companies have taken with regard to the review of vertical agreements under the rule of reason may be diminished. On the other hand, prudent companies should not become overly anxious. In order for a vertical agreement to fall into per se illegality, a horizontal conspiracy must exist and the vertical player must knowingly participate in the conspiracy and facilitate its existence. The evidence against Apple demonstrated that it was both a knowing and active member of the conspiracy, and "*forcefully facilitated it*". Such circumstances can only exist in an industry conducive to coordinated action with a vertical actor that has significant downstream market power. The alignment of these two factors is likely to be infrequent.

Czech Republic: UNILEVER free to acquire Biolit, SAVO and Diffusil brands

Summary. The Czech Competition Office (UOHS) has approved the acquisition by UNILEVER ČR, spol. s r.o. of HomeBrands, Inc. As a result, Unilever acquires, inter alia, the SAVO, Biolit and Diffusil brands.

Background. The Anglo-Dutch group UNILEVER is a key global manufacturer of consumer goods and foods. It conducts business in nearly 200 countries. Last year, thanks to growth in emerging markets, it increased its net profit by 4.5 percent to EUR 4.25 billion (almost CZK 110 billion). Unilever terminated its production in the Czech Republic in 2010 by closing its factories in Nelahozeves and Mělník.

The company HomeBrands belongs to the Bochemie group which is an important central European manufacturer of disinfectants. HomeBrands is active in the field of all-purpose cleaners, toilet cleaners and drain cleaners (sold under the brand SAVO), insecticides (Biolit brand), repellents (Diffusil brand), household air fresheners (Citresin brand), products for maintenance of surfaces (Lynn brand) and car care products (Coyote brand).



Facts. The transaction was approved by UOHS on 17 July 2013. The principal relevant market was found to be that of multi-purpose cleaners, in which Unilever and HomeBrands are two major competitors. Other relevant markets were the market for toilet cleaners and the market for drain cleaners. UOHS, however, found that Unilever's market power will be offset by the relatively high bargaining power of retail chains which appear on the market in the position of an inevitable customer. In addition, competitors with a global presence, great economic and financial strength and broad product portfolio are active in this market. Given these facts, UOHS came to the conclusion that the concentration will not lead to any competition concerns.

Comment. It is notable that UOHS did not require any remedies from the merging parties despite the fact that the transaction involved the two biggest players merging in the relevant market for multi-purpose cleaners (and number two and three in the market for toilet cleaners and number three and four in the market for drain cleaners). Arguments concerning high bargaining power of retail chains and presence of global manufacturers in the market seem to have satisfied any concerns held by UOHS.

Australia: Roundup of the Parliamentary inquiry into IT Pricing

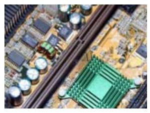
Summary. A Parliamentary inquiry into IT pricing (the Inquiry) has concluded that IT companies and copyright holders discriminate against Australian consumers by setting prices significantly higher without obvious justification. The House of Representatives Standing Committee on Infrastructure and Communications (the Committee) has made recommendations aimed at educating consumers, reforming the law and developing strategic action to address the impact of higher prices on the disabled, students and low-income Australians. As there has been a change of Government after the recent Australian Federal Elections, it is uncertain whether any of these recommendations will be given effect by the Australian Government.

Background. The Inquiry came to an end with the publication of the Committee's final 132-page report, "At what cost? IT pricing and the Australia tax" (the Report). In the course of the Inquiry, over 100 submissions were made by individuals, companies, industry associations and government departments and eight public hearings were held. Notably, the Australian Treasury made the submission that specific pricing discrimination laws should not be reintroduced into Australia's competition law and large multinationals such as Apple, Adobe and Microsoft appeared before the Committee during the Inquiry.

Facts. On the evidence before it, the Committee found that Australians pay on average between 16 and 84 per cent more for IT products. It concluded that these price differentials could not be explained by the cost of doing business in Australia but rather were the result of the regional pricing strategies of vendors and copyright holders.

The Committee's recommendations are that:

- the Australian Bureau of Statistics develops a comprehensive programme to monitor and report expenditure on IT products;
- the Australian Government, in consultation with various university bodies, conducts a comprehensive study of the future IT needs of and costs faced by Australian universities, in order to provide clearer financial parameters for negotiations;
- the Australian Government develops a whole-of-government accessible IT procurement policy, in consultation with relevant stakeholder groups, including consumers with a disability;
- the Australian Government educates Australian consumers and businesses as to the extent to which they may circumvent geoblocking mechanisms, how to do so and how their rights may be affected under consumer laws if they do so;
- consumers' rights to circumvent geographical technological protection measures be secured in the Copyright Act 1968;
- the Australian Government considers banning geoblocking as an option of last resort;
- the Australian Government investigates amending competition legislation so that geoblocking contract terms are considered void;
- parallel importation restrictions in the Copyright Act be lifted and the parallel importation defence in the Trade Marks Act 1995 (Cth) be broadened;
- obsolete exemptions for intellectual property licences from investigation by the Australian Competition and Consumer Commission be removed;
- a right of resale in relation to digitally distributed content be created;
- fair use rights be clarified; and
- vendors' ability to lock digital content into a particular ecosystem be restricted.



Comment. The outgoing Labor Federal Government claims to have already managed to negotiate $100 million in savings as a direct result of the Inquiry. In addition, there is an ongoing inquiry by the Treasury into the taxation of multinational enterprises. Given the change of Government and Treasury's ongoing inquiry, it is unclear whether the Committee's recommendations will be implemented in the near future, if at all. It is notable that the Inquiry did not feature during the new Government's political campaign.

Nevertheless, the Report may have implications for ongoing reviews into the circumvention of technological protection measures by the Attorney-General's Department and copyright exceptions in the digital economy by the Australian Law Reform Commission.

SUPERMARKETS/GROCERCIES RETAILING

EU: Spar Austria's appeal dismissed by EU court

Summary. The General Court has dismissed an appeal by Spar Österreichische Warenhandels-AG (Spar) and upheld a decision by the European Commission (the Commission) to grant conditional approval of a merger between German REWE Group (Rewe) and Austrian Adeg Österreich Handels AG (Adeg).

Background. In April 2008, Rewe notified the Commission of its intention to acquire a majority stake in Adeg. Both Rewe and Adeg were active on the Austrian retail and wholesale markets for everyday consumer goods and the merger would give Rewe a 30-35% share of the national market in Austria. On 23 June 2008, the Commission conditionally approved the proposed merger.

Facts. In its 2008 analysis of the Rewe-Adeg merger, the Commission used a new methodology to review local competition issues on the food-retail market and analysed the market at the district level as opposed to the regional level as it had done when assessing Rewe's purchase of Meinl in 1999. During its preliminary investigation, the Commission raised doubts in relation to the combined strength of Rewe and Adeg at the district level resulting in increased prices on the national retail market. Rewe responded by offering to sell all Adeg-owned shops in the relevant districts and to encourage Adeg merchants to leave the Adeg network, failing which it would sell certain Rewe outlets to reduce the presence of the combined entity in the affected regions.

Following the European Commission's conditional approval of the Rewe-Adeg merger, on 18 September 2008, Spar, which has a 28% share of the same national market in Austria, appealed the Commission's decision to the General Court: (i) challenging the new methodology used by the Commission; and (ii) asserting that the Commission should have collected independent data at the regional, local, district and national levels.

On 7 June 2013, the General Court rejected Spar's appeal. In relation to the latter's argument against the Commission's methodology, the General Court was of the view that Spar had not proved that the Commission had improperly assessed the competitive forces in the food-retail market. The General Court stated that Spar had not been able to establish that the Commission had committed a "manifest error of assessment" in assessing the competitive effects of the merger at the district level. With respect to Spar's second argument in relation to the collection of data, the General Court disagreed and was of the view that Spar could not succeed in arguing that the thresholds set by the Commission in the present case to determine the 'critical' districts led to contradictory and illogical results.

Comment. This judgment highlights the difficulty in challenging Commission decisions on their merits. The Commission's employment of a novel methodology in assessing the Rewe-Adeg merger and the General Court's subsequent rejection of Spar's appeal against it point toward a new avenue of analysis that can be used in relation to local competition issues. Going forward, it will be interesting to examine whether and how the Commission continues to apply methods whereby it studies the effects of a merger at the district level to determine the likelihood of price rises at a national level and also whether this methodology proves more suited to certain markets than others.

Romania: Real-Auchan transaction gets green light from Romanian competition authority

Summary. The Romanian Competition Council (RCC) has approved the acquisition by Auchan of 20 Real hypermarkets in Romania. The decision comes following a referral from the European Commission (the Commission) and includes behavioural commitments.

Background. On 30 November 2012, the Auchan group concluded a sale-purchase agreement with Metro Romania for the purchase of Real hypermarkets in Romania, Poland, Russia and Ukraine. Initially notified to the EC, pursuant to article 4 of the EU Merger Regulation, on 7 March 2013 the analysis of the Romanian and Polish markets was referred to the competition authorities.

Facts. On 29 July 2013, the RCC approved the merger whereby Auchan acquires 20 Real hypermarkets in Romania. The Real-Auchan transaction is one of the largest to take place in Romania in the consumer goods sector. Through this deal, Auchan (which already had 11 hypermarkets operating in Romania) acquires 20 Real stores which were previously operating at a loss. In clearing the transaction subject to behavioural commitments, the RCC found that Auchan will continue to face competition from the Schwarz group (Kaufland and Lidl) and Carrefour in the Romanian market.

Comment. The RCC adopted the same position that the European Commission has taken in its previous case-law regarding the relevant markets. These were deemed local in nature, using the 30-minute drive times used in Commission decisions such as Rewe/Meinl (Case Comp.1221). However, in the largest and most dense area (Bucharest), the size of the local market was reduced to a 20-minute drive time. The RCC deemed that traditional stores should be considered as part of the relevant market alongside modern stores (where the parties to the transaction are active), since in Romania both types of stores still hold approximately equal importance.

The transaction was however authorised subject to behavioural commitments that Auchan would: (i) not open new stores on the two local markets which the RCC deemed would be affected markets in the next 5 years; and (ii) undertake not to increase prices in such markets by more than 5% in the next 3 years.

HOT TOPICS / NEWS IN BRIEF

UK: A new UK competition regime: key reforms and implications for businesses

Summary. Major reforms to the UK's competition regime will be implemented by 1 April 2014, following the adoption of the Enterprise and Regulatory Reform Act 2013 (ERRA) earlier this year. A new, unitary competition authority - the Competition and Markets Authority (CMA) – has been created and will benefit from enhanced statutory powers to monitor and enforce competition law. These include binding deadlines and information gathering powers for Phase 1 merger reviews, the removal of the requirement to prove dishonesty in the criminal cartel offence, greater consideration of public interest issues in market investigations and compulsory interviews during competition investigations.

Background. The ERRA received Royal Assent on 25 April 2013. The biggest impacts on the competition regime are:

- the creation of the CMA, a single competition authority merging the Competition Commission (CC) and the Office of Fair Trading (OFT), which was legally established on 1 October 2013 and will be fully operational from 1 April 2014; and
- reforms to the merger and markets regimes and the criminal cartel offence (pursuant to changes to the competition rules in the Enterprise Act 2002), the antitrust enforcement regime and operation of sector regulators' concurrent competition powers (following amends to the Competition Act 1998).

Facts. The ERRA sets the primary legislative framework of reforms to the competition regime, originally announced by the government in March 2012. However, much of the detail of how that framework will be implemented will be contained in secondary legislation and new CMA guidance, which has recently been consulted upon. Reforms will cut across all areas of competition law (with the exception of competition litigation, which is subject to separate proposals) and include:

- A new single regulator: the new CMA will have jurisdiction to carry out all merger reviews and market investigations, be the primary enforcer of civil and criminal competition laws and retain many of the OFT's key consumer protection enforcement powers.
- Mergers and acquisitions: the merger filing regime will remain voluntary and non-suspensory, but statutory time limits for Phase 1 investigations (40 working days) will be introduced as well as a new procedure for the offer, assessment and acceptance of undertakings in lieu and Phase 2 remedies. New formal information gathering powers and additional powers to agree or impose interim measures will also be introduced.
- Antitrust investigations and enforcement: the ERRA will introduce enhanced powers of investigation, including compulsory interviews, relaxed criteria for the imposition of interim measures, civil fines for non-compliance with the CMA's investigative powers (in place of, as yet unused, criminal penalties that apply at present) and protection for the CMA from defamation claims in respect of public notices of its investigations that identify the parties it is pursuing.
- Market investigations: statutory time limits for completing market studies (12 months) and market investigations (18 months, extendable by 6 months), enhanced powers of investigation and sanctions for non-compliance and the ability to investigate public interest issues alongside competition issues (at the request of the Secretary of State) will be introduced.
- Criminal cartels: the requirement for dishonesty will be removed from the criminal prosecution of individuals for their involvement in cartels.
- Sector regulators / concurrency: sector regulators (such as Ofgem and Ofcom) will retain their concurrent competition powers, but the Secretary of State may revoke these if not used appropriately. The CMA will also have the power to take over competition investigations commenced by sector regulators in certain circumstances.

Comment. Businesses should, at least in theory, benefit from faster and less costly merger reviews and market investigations conducted by the CMA, as the OFT's and CC's resources are merged and streamlined. However, businesses will have to review and, where necessary, bolster their legal and regulatory compliance procedures in light of their greater exposure to corporate risk and personal liability (given, for example, the CMA's enhanced powers of investigation and strengthened powers to impose interim measures). Furthermore, uncertainty over the operation of the new regime will remain for at least another year, as the new system beds down. Final CMA guidance (expected to be published in January 2014) goes some way to setting out the detail of how the CMA will operate in practice, but the CMA readily admits that the review process will continue into 2014.

News in Brief: CGRB June 2013 edition update

UK: Groceries Code Adjudicator Bill given Royal Assent. The Groceries Code Adjudicator (GCA) was formally established by Act of Parliament on 25 June 2013. On 31 July 2013, the GCA published draft guidance for consultation on how investigations into suspected breaches of the Groceries Supply Code of Practice will be carried out. The guidance sets out the GCA's criteria for starting an investigation, the procedure for carrying out investigations and its enforcement powers, which include financial penalties. The consultation closes on 22nd October 2013 and the final guidance will be published by 25 December 2013.

France: French Competition Authority launches in-depth examination of Casino's acquisition of Monoprix. On 31 July 2013, the French Competition Authority cleared Casino's acquisition of sole control of Monoprix, subject to conditions, including the divestment of fifty-five stores in Paris and three in San Tropez and Corsica.