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Antitrust Review
May - June 2011

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European Union

- **Commission publishes draft best practices for cooperation among EU national competition authorities.** The European Commission has published a set of draft "best practices" for cooperation among national competition authorities within the EU for mergers that are not subject to EU merger control but require clearance in several Member States.

- **Commission imposes fines in detergents cartel settlement cases.** The European Commission has imposed reduced fines on Procter & Gamble and Unilever for price-fixing under its settlement procedure.

- **General Court upholds Visa fine for refusing to admit Morgan Stanley to its network.** The General Court of the EU has issued a judgment upholding a fine of EUR 10.2 million imposed by the European Commission on Visa International and Visa Europe for Visa's refusal to admit Morgan Stanley as a member of its network.

- **Suez Environnement and Lyonnaise des Eaux fined for breach of seal.** The European Commission has fined Suez Environnement and its subsidiary, Lyonnaise des Eaux, for breaching a Commission seal during an inspection.

- **Commission opens investigations into hard disk drive mergers.** The European Commission has opened two separate in-depth investigations into the proposed acquisitions in the hard disk drive sector of Samsung's HDD business by Seagate Technology, and of Hitachi's storage business by Western Digital Corporation.

China

- **MOFCOM grants conditional clearance in Russian potash merger case.** The Ministry of Commerce of the People's Republic of China has granted conditional approval of the USD 24 billion merger between Uralkali and Silvinit, two Russian producers of potash fertilizer.

- **NDRC fines Unilever following price rises.** China's National Development and Reform Commission has fined Unilever RMB 2 million (around EUR 215,000) for allegedly infringing China's Price Law.

Czech Republic

- **Czech Competition Office re-imposes cartel fine.** The Chairman of the Czech Competition Office has re-imposed a cartel fine on seven poultry producers after its original decision was quashed by the Regional Court in Brno.

France

- **French Competition Authority issues antitrust fining notice.** The French Competition Authority has issued the final version of its notice on antitrust fines.

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Germany

- **Fuel sector inquiry in the German petrol station sector.** The German Federal Cartel Office has stated that the five large petrol station operators in Germany (BP (Aral), ConocoPhilipps (Jet), ExxonMobile (Esso), Shell and Total) form an oligopoly. However, the FCO found that there are no anti-competitive agreements between the oligopoly members.

Poland

- **Resale price maintenance commitments accepted.** The Office of Competition and Consumer Protection has accepted commitments offered by Scotts Poland, a subsidiary of an American producer of fertilisers and pesticides, in a matter concerning alleged resale price maintenance.

Romania

- **Romanian Competition Council accepts commitments.** The Romanian Competition Council has accepted commitments offered by the Romanian Football Federation and the Romanian Professional Football League in its investigation into the sale of commercial broadcasting rights of football matches.

Spain

- **CNC opens proceedings against Telecinco.** The Spanish Competition Authority has opened formal proceedings against Gestevisión Telecinco, S.A. for allegedly breaching the resolution authorising the Telecinco/Cuatro merger.

United Kingdom

- **OFT issues abuse of dominance decision in Reckitt Benckiser case.** The Office of Fair Trading has formally issued a decision that Reckitt Benckiser has abused its dominant position in the market for the NHS supply of alginate and antacid heartburn medicines.

- **OFT announces next steps in audit market.** The Office of Fair Trading will discuss with selected interested parties whether a referral to the Competition Commission would be appropriate to address competition problems provisionally identified by the OFT in the audit market.

- **OFT decides not to appeal CAT judgments in construction cases.** The Office of Fair Trading has decided not to appeal the judgments of the Competition Appeal Tribunal in the construction and construction recruitment forum cases.

European Union: Commission publishes draft best practices for cooperation among EU national competition authorities

Summary. The European Commission (the Commission) has published a set of draft "best practices" for cooperation among national competition authorities within the EU (NCAs) for mergers that are not subject to EU merger control but require clearance in several Member States (best practices).

Background. The Commission has exclusive competence to assess the competitive impact of transactions with an EU dimension. EU member states cannot apply their national competition laws to such transactions, and they cannot adopt measures which could prohibit, make conditional or in any way prejudice such transactions, unless such measures serve to protect certain defined legitimate interests which are compatible with EC law and which comply with the principle of proportionality (*Article 21, EC Merger Regulation (139/2004/EC)*) (Article 21).

If the EU merger control thresholds are not met, the transaction will require clearance by the NCA in those Member States in which the jurisdictional thresholds are triggered.

Facts. The best practices are intended to foster and facilitate information sharing between NCAs during their review of the same transaction that does not qualify for review by the Commission, but requires approval in several Member States. In 2010, at least 240 transactions fell outside the Commission's exclusive competence and required notification with two or more NCAs, according to the Commission.

The best practices aim to increase the efficiency, transparency and effectiveness of the merger review process, for example in relation to the timing of the review process, the exchange of confidential information between NCAs, the substantive assessment of the transaction and, where applicable, remedies.

The best practices have been prepared by the Merger Working Group (composed of the Commission and NCAs), which will review comments from interested third parties (requested by 27 May 2011) with a view to publishing a final version in autumn 2011.

Comment. The best practices are in part an acknowledgement of the call by merging parties for more cooperation among NCAs and more convergence in their approach to merger control. The success of the best practices and enhanced cooperation will depend on both the NCAs and the merging parties, particularly in relation to sensitive issues such as the exchange of confidential information.

Source: Commission press release, 28 April 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/507&format=HTML&aged=0&language=EN&guiLanguage=en; Public consultation: Best practices for cooperation query EU national competition authorities, 28 April 2011, http://ec.europa.eu/competition/consultations/2011_merger_best_practices/index_en.html.

European Union: Commission imposes fines in detergents cartel settlement cases

Summary. The European Commission (Commission) has imposed reduced fines on Procter & Gamble and Unilever for price-fixing under its settlement procedure.

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

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

In June 2008, the Commission introduced a settlement procedure for cartels under which companies may benefit from shortened proceedings and a 10% reduction in fines under the terms its settlements notice (*2008/C 167/1*).

In 2008, Henkel applied to the Commission for leniency in respect of an alleged cartel. In June 2008, the Commission carried out unannounced inspections at several companies' premises.

Facts. The Commission has announced its decision to fine Procter & Gamble and Unilever a total of EUR 315.2 million for operating an alleged cartel with Henkel, aimed at stabilising market positions and at coordinating prices for household laundry powder detergents in eight EU countries.

Procter & Gamble and Unilever discussed in the second half of 2010 their willingness to settle the case, and in January 2011 acknowledged their respective liability. In February 2011, the Commission issued a Statement of Objections reflecting the parties' submissions, which the parties subsequently confirmed. Two months later, the Commission adopted and announced its streamlined settlement decision, reducing the fines of Procter & Gamble and Unilever by 10% on account of their cooperation with the investigation.

Procter & Gamble and Unilever also benefit from fine reductions of 50% and 25% respectively under the Commission's leniency notice.

Comment. This is only the third Commission decision to impose reduced fines under the settlement procedure. It seems likely that in future cases, more companies will apply for reduced fines under the settlement procedure. Competition Commissioner Almunia has previously said (commenting on the DRAM case) that he intends to make the procedure, which aims to simplify and speed up cartel investigations, as successful as the Commission's leniency policy.

Source: Commission press release, 13 April 2011, *http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/473&format=HTML&aged=0&language=EN&guiLanguage=en*.

European Union: General Court upholds Visa fine for refusing to admit Morgan Stanley to its network

Summary. The General Court of the EU has issued a judgment upholding a fine of EUR 10.2 million imposed by the European Commission (the Commission) on Visa International and Visa Europe (Visa) for Visa's refusal to admit Morgan Stanley as a member of its network.

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. On 3 October 2007, further to a complaint by Morgan Stanley, the Commission adopted a decision which found that from March 2000 to September 2006, Visa refused to admit Morgan Stanley as a member of its payment card network. The Commission considered that this led to the exclusion of Morgan Stanley from the UK market for the provision, to merchants, of services enabling them to accept credit card and deferred debit charge card transactions (the acquiring market). Morgan Stanley withdrew its complaint after reaching an agreement with Visa in September 2006. However, the Commission fined Visa EUR 10.2 million for the alleged anti-competitive conduct over six and a half years in breach of Article 101.

On 19 October 2007, Visa brought an action before the court for the annulment of the Commission's decision and, alternatively, cancellation or reduction of the fine. First, Visa argued that its refusal to admit Morgan Stanley did not have the effect of excluding Morgan Stanley from the acquiring market because Morgan Stanley could have entered via a "fronting arrangement" with a Visa member financial institution. Second, Visa argued that the Commission had underestimated the degree of competition actually existing in the market.

Decision. The court rejected Visa's arguments and upheld the fine imposed by the Commission. The court did not agree that a "fronting arrangement" would have provided a real concrete opportunity for Morgan Stanley to enter the market given, in particular, the difficulty that Morgan Stanley would have had in finding a fronting partner.

The court also noted that the assessment of competition should be based on not only existing but also potential competition in the market, and that the entry of Morgan Stanley as a new player in the acquiring market would have created scope for increased competition. The court also considered that the assessment of a potential competitor must be based on their ability to enter the market which, in the case of Morgan Stanley, had not been challenged and was not merely theoretical. As a result, the court was of the view that the Commission had not erred in law by considering Morgan Stanley as a potential competitor.

Comment. The Commission has stated that the judgment supports its determination to tackle market foreclosure, particularly in relation to new players who would otherwise have improved competition. It also confirms that terminating such behaviour and admitting a player to the market does not absolve the offending company from liability.

Case: Visa Europe Limited and Visa International Service v European Commission, Case T-461/07; General Court of the European Union Press Release No 38/11, 14 April 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=CJE/11/38&format=HTML&aged=0&language=EN&guiLanguage=en; Commission press release, 14 April 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/245&format=HTML&aged=0&language=EN&guiLanguage=en.

European Union: Suez Environnement and Lyonnaise des Eaux fined for breach of seal

Summary. The European Commission (the Commission) has fined Suez Environnement (Suez) and its subsidiary, Lyonnaise des Eaux (LDE), for breaching a Commission seal during an inspection.

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

Commission inspectors have the power to seal any business premises and books or records for the period and to the extent necessary for the Commission's inspection (*Article 20(2)(d), Modernisation Regulation*). The Commission may fine a company up to 1% of its total turnover in the preceding business year where it, intentionally or negligently, breaks a Commission seal (*Article 23(1)(e), Modernisation Regulation*).

Facts. The Commission has fined Suez and LDE a total of EUR 8 million for breach of the Commission's seal during an inspection at LDE's premises.

In April 2010, the Commission conducted a dawn raid at the premises of various water management companies in France, including those of LDE. The Commission has stated that, when it returned to the premises on the second day of the inspection, the seal affixed by the Commission officials had been broken. On 4 June 2010, the Commission announced that it had launched a formal investigation into the breach of the seal.

The Commission noted that, in calculating the fine, it took account of "the immediate and constructive" cooperation of Suez and LDE in its investigation, with both Suez and LDE providing more information than was required.

The Commission's investigation into alleged anti-competitive conduct in the water and waste water markets is still ongoing.

Comment. This is only the second time that the Commission has decided to impose fines for breach of a seal and reaffirms the Commission's hard line on any attempt by companies to obstruct investigations. In January 2008, the Commission fined E.ON EUR 38 million for breaching a Commission seal during an inspection, with the General Court upholding the fine in December 2010.

Source: Commission press release, 24 May 2011, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/632&format=HTML&aged=0&language=EN&guiLanguage=en.

European Union: Commission opens investigations into hard disk drive mergers

Summary. The European Commission (the Commission) has opened two separate in-depth investigations into the proposed acquisitions in the hard disk drive (HDD) sector of Samsung's HDD business by Seagate Technology, and of Hitachi's storage business by Western Digital Corporation.

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). The decision to open an in-depth investigation does not prejudge the final results of the Commission's investigation.

Facts. The Commission has opened two separate in-depth investigations into proposed acquisitions in the hard disk drive (HDD) sector.

At present, there are five HDD manufacturers worldwide: Seagate, Western Digital, Hitachi (recently renamed Viviti Technologies), Toshiba and Samsung.

The Seagate / Samsung transaction was notified to the Commission first and is being assessed without regard to the Western Digital / Hitachi transaction. A Seagate / Samsung merger would, according to the Commission, consolidate Seagate's position in HDDs in general and more particularly in the manufacture of 3.5" desktop HDDs, a sector in which only Western Digital and Hitachi are also active.

The Western Digital / Hitachi transaction is being assessed taking into account the Seagate / Samsung deal, which was notified a day earlier. The Commission has stated that the transaction would create a global market leader in HDDs, that for 3.5" desktop HDDs the merged entity would face only one competitor (the Seagate / Samsung merged entity), and for 2.5" mobile HDDs, the only remaining competitors would be the Seagate / Samsung merged entity and Toshiba.

The Commission considers that the transactions may each impact the demand for heads (a vital component for HDDs) from TDK, an independent supplier. The Commission considers that this may negatively affect TDK's ability to innovate and, in turn, the competitiveness of Toshiba (which depends on TDK for heads). The Commission is also of the view that both transactions may negatively affect non-integrated external storage devices manufacturers, as they source HDDs from the transaction parties.

Comment. The Commission's Phase II investigations underline the importance, where several transaction are anticipated in a given sector, of seeking to formally notify a transaction to the Commission as soon as possible and before the other transaction is formally notified. The Commission now has until 26 October 2011 to decide whether to approve a consolidation from five to four, or four to three, global market players. The US Federal Trade Commission is also looking closely at the transactions and is likely to be cooperating with the Commission.

Source: Commission press release, 30 May 2011,
http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/660&format=HTML&aged=0&language=EN&guiLanguage=en.

China: MOFCOM grants conditional clearance in Russian potash merger case

Summary. The Ministry of Commerce of the People's Republic of China (MOFCOM) has granted conditional approval of the USD 24 billion merger between Uralkali and Silvinit, two Russian producers of potash fertilizer.

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). The AML and MOFCOM's Interim Provisions on the Effects of Concentrations of Undertakings on Competition, intended to give guidance on the factors that MOFCOM may take into account when reviewing mergers and recently published for consultation, allow non-competition factors to be considered during review.

Facts. On 2 June 2011, MOFCOM granted conditional approval of the USD 24 billion merger between Uralkali and Silvinit, two Russian producers of potash fertilizer.

MOFCOM found that the contemplated merger would create the second-largest potassium chloride export supplier in the world, with a market share exceeding one third of the global market, and have an adverse impact on global trade. It also found that the merger would likely eliminate or restrict the market for imports of potassium chloride into China.

MOFCOM's analysis focused on the impact of the merger on China as a significant importer of potassium chloride. MOFCOM noted that "*China relied heavily on the international market of potassium chloride*" and considered that "*due to China's dependency on imported potassium chloride and the existing market structure of potassium chloride, the proposed concentration will have a certain level of adverse effects on China's relevant sectors including agriculture*".

The conditions imposed by MOFCOM in clearing the merger require the merged entity to maintain current practices and procedures in relation to the sale, and to use best efforts to maintain stable supply, of potassium chloride.

The entity must also consider in its price negotiations the history of transactions with Chinese customers and the nature of the Chinese market, and maintain certain customary consultation procedures, including price negotiations for spot sales and contract sales.

Comment. The decision is MOFCOM's seventh conditional clearance decision since the AML came into effect on 1 August 2008. It also serves as an example of MOFCOM's approach to the assessment of the effects of the transaction on national economic development under the AML – a non-competition factor that the AML allows MOFCOM to consider in the context of a merger review.

Indeed, the decision contained various references to the security of supply to China of potassium chloride and the reliance of the agricultural sector on such imports, which suggests that MOFCOM included non-competition issues in its merger review analysis.

Sources: Announcement of Anti-Monopoly Review Decision on the Approval of the Acquisition of OAO Silvinit by OAO Uralkali with Conditions, 2 June 2011, http://fldj.mofcom.gov.cn/aarticle/zcfb/201106/20110607583288.html;
Notice on Soliciting Comments on the Interim Provisions on the Assessment of the effects of Concentrations of Undertakings on Competition, 3 June 2011, http://fldj.mofcom.gov.cn/aarticle/zcfb/201106/20110607585023.html (available in Chinese).

China: NDRC fines Unilever following price rises

Summary. China's National Development and Reform Commission (NDRC) has fined Unilever RMB 2 million (around EUR 215,000) for allegedly infringing China's Price Law.

Background. The Price Law prohibits activities including "fraudulent pricing", which includes the provision by businesses of false discounts, fake special rates and promotions, and misleading information on pricing. Article 14 of the Price Law prohibits the falsification or dissemination of information regarding price rises, and behaviour which excessively drives up product prices.

Facts. On 6 May 2011, the NDRC fined Unilever RMB 2 million allegedly infringing China's Price Law.

In March 2011, Unilever was reported to have notified various Chinese supermarkets and news organisations that it intended to raise prices of certain products in order to pass on a rise in costs of raw materials. This allegedly sparked panic-buying by consumers in some Chinese cities.

The NDRC criticised Unilever for allowing its spokesperson to tell Chinese media about the anticipated price increases, and suggesting that competitors would follow suit. Unilever initially bowed to pressure from the NDRC and abandoned the planned price increases but this was not enough to avoid the fine. The NDRC imposed the fine stating that Unilever had "*abused its dominant market position to sell goods at unfairly high prices*" and had "*seriously distorted market order*".

The NDRC added that the fine should be a reminder in particular to those entities with a large market share that they should respect the Price Law, consider the responsibilities they owe society, and neither collude with their competitors to raise prices nor abuse their dominant positions.

The NDRC subsequently clarified that the fine was levied not for raising prices *per se*, but due to the manner in which Unilever had disclosed to the market its intention to raise prices. The NDRC stated that it would not interfere in normal market behaviour.

Chinese media reported that, by the end of May, the planned price rises had gone ahead, albeit this time on a more low key basis.

Comment. The NDRC has levied a number of other high profile fines under the Price Law this year, including fines on several outlets of Carrefour and Wal-Mart for fraudulent pricing. This decision indicates that consumer goods and retail remain an area of keen focus for the Chinese competition authorities as China battles price inflation. It also highlights the fact that announcements on changes to pricing levels and structure – even where in response to genuine market or inflationary pressures – must be handled carefully.

Source: 'Responses of the National Development and Reform Commission on journalists' questions with regard to the investigation into Unilever's dissemination of information on price rises and disturbance of the market' (Chinese), 6 May 2011, *http://www.ndrc.gov.cn/xwfb/t20110506_410543.htm (available in Chinese).*

Czech Republic: Czech Competition Office re-imposes cartel fine

Summary. The Chairman of the Czech Competition Office (CCO) has re-imposed a cartel fine on seven poultry producers (the producers) after the CCO's original decision was quashed by the Regional Court in Brno.

Background. The CCO has the power to issue new decisions and re-impose fines when its decisions are quashed by a Regional Court during judicial review (*Section 101(d) of Administrative Code in combination with Section 78(4) of the Code of Administrative Justice*).

Facts. On 1 June 2011, the CCO re-imposed a cartel fine on the producers after the CCO's original decision was quashed by the Regional Court in Brno. On 13 December 2006, the producers allegedly agreed on a common strategy for setting the minimum price of poultry meat. The agreement was implemented by some of the producers during negotiations with a customer on 14 December 2006. In 2007, the CCO fined all producers an aggregate amount of CZK 14 million (approximately EUR 600,000). The CCO stressed that even where the production of poultry was not profitable over the long term, a cartel of poultry producers could not be justified. The Regional Court in Brno subsequently quashed the decision, pointing out that the CCO had disregarded the fact that one of the producers had not participated in the negotiations with the customer.

In its latest decision, however, the CCO re-imposed the fine. It emphasised that although one of the producers had not participated in the negotiations with the customer on 14 December 2006, this does not relieve the individual producer from liability for its subsequent involvement in the cartel.

Comment. The CCO's reissued decision shows the CCO's zero tolerance approach towards justifications for concerted practices based on the market difficulties of cartel participants. Since the CCO's original decision predates the financial crisis, the re-imposition of the fine demonstrates that the CCO has not changed its stance on such justifications in the aftermath of the financial crisis.

Source: CCO press release, 1 June 2011,
http://www.compet.cz/hospodarska-soutez/aktuality-z-hospodarske-souteze/uohs-opetovne-ulozil-drubezarum-pokutu-za-kartel/ (available in Czech).

France: French Competition Authority issues antitrust fining notice

Summary. The French Competition Authority (FCA) has issued the final version of its notice on antitrust fines.

Background. The FCA may impose fines on undertakings or associations of undertakings when they infringe competition law *(Article L 464-2 I 2 of the French Commercial Code (the Commercial Code))*. Fines are proportional to the gravity of and economic harm caused by the infringement as well as to the individual situation of each undertaking. They are subject to a limit of 10% of the global turnover of the group to which each undertaking belongs *(Article L 464-2 I of the Commercial Code)*.

Facts. On 16 May 2011, the FCA issued the final version of its notice on antitrust fines. The notice provides guidance on the method applied by the FCA when determining the level of fines. It is binding upon the FCA and thus enforceable by undertakings subject to an antitrust procedure.

The FCA will use a two-step methodology when determining the level of fines. First, it will determine a basic amount for each company involved, depending on the gravity of the infringement and the economic harm caused. As a general rule, the basic amount may vary between 0% and 30% of the value of the sales which were affected by the infringement (and between 15% and 30% in case of horizontal cartels). Moreover, the duration of participation in the infringement will be considered to be a multiplying coefficient.

This basic amount may then be adjusted upwards or downwards depending on various factors. For this purpose, mitigating and aggravating circumstances may be taken into account as well as the size of the firm and repeated infringements.

The final notice does not substantially differ from the draft and remains close to the European Commission's notice on fines. However, some changes have been made following the consultation process. For instance, the FCA has taken certain measures to stimulate an upfront debate between the parties on how to set the penalty. The notice also gives guidance on the conditions under which economic studies may be taken into account when assessing the importance of the damage to the economy. Lastly, it stresses that any fine reduction for leniency or non-contestation of objections will be applied after the maximum legal threshold of 10% of the undertaking's turnover has been respected. This is to ensure that companies can fully benefit from these reductions.

Comment. This new framework will help companies under investigation to better anticipate the amount of fines. However, it seems likely that in general the FCA will impose higher fines on companies, given that the FCA will now explicitly take into account the duration of the participation in the infringement. Confirmation that the basic amount will be at least 15% of the value of sales in case of horizontal cartels suggests that, unless there are mitigating circumstances, companies selling only one type of product would be fined 10% of their annual turnover. Finally, in the absence of any transitory measures, the FCA will be able to apply this new method to infringements having occurred prior to its entry into force.

Source: FCA notice on antitrust fines, 16 May 2011,
http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=388&id_article=1598.

Germany: Fuel sector inquiry in the German petrol station sector

Summary. The German Federal Cartel Office (FCO) has stated that the five large petrol station operators in Germany (BP (Aral), ConocoPhilipps (Jet), ExxonMobile (Esso), Shell and Total) form an oligopoly. However, the FCO found that there are no anti-competitive agreements between the oligopoly members.

Background. Under Section 32 lit. e) of the German Act against Restraints of Competition, the FCO may conduct an investigation into a specific sector of the economy if the rigidity of prices or other circumstances suggest that domestic competition may be restricted or distorted.

Facts. On 26 May 2011, the FCO stated in its final report on the fuel sector that the five large petrol station operators in Germany (Aral, Jet, Esso, Shell and Total) form an oligopoly.

In May 2008, the FCO launched a fuel sector inquiry (the inquiry) following antitrust concerns about high price levels at German petrol stations. During the course of the inquiry, the FCO representatively collected and analysed data on all price changes from 1 January 2007 to 30 June 2010 at more than 400 petrol stations in Hamburg, Cologne, Leipzig and Munich.

In its final report, the FCO considered that Aral, Jet, Esso, Shell and Total jointly dominate the German petrol station market, accounting for approximately 65% of fuel sales. According to the FCO's findings, the transparency of the fuel market and, in particular, the use of monitoring systems enabled the oligopoly members to quickly react to any price changes initiated by other market players. Additionally, the FCO considered that the oligopoly members followed certain price-setting patterns enabling them to set the fuel prices more or less uniformly. For example, the prices usually increased at the beginning of a holiday period and were on the highest level on Fridays. Furthermore, the inquiry revealed numerous links between the oil companies making it difficult for members to break away from the oligopoly. In sum, the report suggests a market structure which leads to higher prices without necessarily requiring anti-competitive agreements between the large market players.

Comment. As a conclusion from the inquiry, the FCO intends to maintain its strict policy with regards to mergers involving one of the five oligopoly members. However, it should be borne in mind that in one of its recent rulings relating to the fuel sector the Higher Regional Court in Düsseldorf did not follow the FCO's conclusions based on the preliminary results of the inquiry, and overruled the FCO's prohibition decision with regard to the acquisition of 59 gas stations by Total from OMV in Eastern Germany.

Source: FCO's report on the fuel sector inquiry, 26 May 2011, http://www.bundeskartellamt.de/wDeutsch/publikationen/SektoruntersuchungW3DnavidW26117.php. (available in German).

Poland: Resale price maintenance commitments accepted

Summary. The Office of Competition and Consumer Protection (OCCP) has accepted commitments offered by Scotts Poland (Scotts), a subsidiary of an American producer of fertilisers and pesticides, in a matter concerning alleged resale price maintenance (RPM).

Background. Under the Polish Act on Protection of Competition and Consumer Protection (the Act), price fixing, including RPM, is prohibited. The OCCP may impose on an undertaking a fine of up to 10% of its turnover earned in the preceding year for breaching this prohibition. However, according to Article 12 of the Act, an undertaking may offer commitments to the OCCP to address concerns related to a suspected infringement. In such cases the OCCP is not required to carry out a full investigation to prove that a provision of the Act was breached and may instead accept commitments.

Facts. On 26 April 2011, the OCCP issued a decision accepting commitments from Scotts. In November 2010, the OCCP commenced proceedings against Scotts following the allegation that Scotts and its distributors were fixing resale prices. At an early stage, Scotts offered commitments to remedy the suspected infringement.

The OCCP had discovered that Scotts used template distribution agreements which included a provision according to which distributors were obliged to apply prices agreed with Scotts. According to the OCCP, this provision was likely to be anti-competitive. However, the OCCP admitted that there was no proof that Scotts enforced compliance with the offending provision. The company did not induce the distributors to apply fixed prices, nor would it threaten them with sanctions for non-compliance.

The OCCP accepted commitments from Scotts to delete the above mentioned provision from the template distribution agreements and from already concluded agreements, and not to use provisions which oblige distributors to apply fixed prices in the future.

Comment. The commitments procedure is applied by the OCCP in order to bring antitrust investigations to an end and eliminate anti-competitive practices more quickly. In 2010, the OCCP issued 70 commitment decisions in both antitrust cases and cases concerning breaches of consumer rights. Such decisions were mostly issued in cases in which the template contract provisions in question appear to infringe antitrust law or consumer rights regulations. Generally, commitments offer to delete such provisions in a template contract.

Source: OCCP press release, 11 May 2011, http://www.uokik.gov.pl/aktualnosci.php?news_id=2608 (available in Polish).

Romania: Romanian Competition Council accepts commitments

Summary. The Romanian Competition Council (RCC) has accepted commitments offered by the Romanian Football Federation (FRF) and the Romanian Professional Football League (LPF) in its investigation into the sale of commercial broadcasting rights of football matches.

Background. During an investigation by the RCC, an entity can submit commitments in order to remedy the situation that led to the initiation of the investigation. If the RCC considers the commitments to be sufficient, the investigation can be closed and the company being investigated will avoid being sanctioned *(RCC Guidelines of 28 December 2010)*.

Facts. On 19 April 2011, the RCC accepted commitments offered by FRF and LPF.

The RCC had investigated FRF and LPF for the collective sale of commercial broadcasting (e.g. broadcasting rights for TV, radio, internet) of football matches in domestic competitions, which the RCC considered to represent an alleged breach of the competition regulations.

On 15 November 2010, while under investigation, FRF and LPF submitted the first draft of the commitments. The RCC published the commitments on its website and separately requested a written opinion from several TV and radio stations and mobile communication services providers. A public debate was also organised in March 2011 by the RCC which was attended by interested parties. FRF and LPF consequently submitted their final commitments at the request of the RCC.

FRF and LPF undertook to sell the commercial broadcasting rights in different packages, and to remove from the contracts to be executed the automatic extension clause and the first option clause. On 19 April 2011, the RCC concluded that there were no outstanding reasons to continue the investigation and decided to close it. The decision of the RCC brought the commitments into force.

Comment. This is the first time the RCC has accepted commitments from parties subject to an antitrust investigation.

Source: RCC Decision no. 13 of 19 April 2011, http://www.consiliulconcurentei.ro/documente/Decizie_19527ro.pdf (available in Romanian).

Spain: CNC opens proceedings against Telecinco

Summary. The Spanish Competition Authority (CNC) has opened formal proceedings against Gestevisión Telecinco, S.A. (Telecinco) for allegedly breaching the resolution authorising the Telecinco/Cuatro merger (the resolution).

Background. Article 62(4)(c) of the Spanish Competition Act 15/2007 of 3 July 2007 (LDC) states that "*not complying with or contravening a resolution, decision or commitment adopted in application of this Act, regarding both restrictive conduct and merger control"* will constitute a *"very serious infringement*". Article 41 of the LDC provides the CNC with the power to monitor the fulfilment of obligations, resolutions and decisions.

Facts. On 29 April 2011, the CNC opened formal proceedings against Telecinco for allegedly breaching the resolution.

On 28 October 2010, the CNC issued the resolution authorising the Telecinco/Cuatro merger subject to certain voluntary commitments. In order to monitor Telecinco's compliance with the commitments, Telecinco was required to present an action plan within one month from when the resolution became enforceable. The action plan should have detailed the measures Telecinco was to adopt as well as a timetable for their implementation. However, Telecinco failed to present the action plan within the required timeframe.

Therefore, the CNC has opened a formal investigation in order to determine whether the failure to comply with the commitments, specifically the failure to present the action plan, constitutes a breach of Article 62(4)(c) LDC 15/2007.

Comment. This is the first time the CNC has formally decided to investigate the fulfilment of commitments submitted by the parties as a prerequisite to the authorisation of a merger. However, the CNC has previously investigated fulfilment of commitments in the context of settlement agreements reached in restrictive practices proceedings.

Source: CNC Press Release, 29 April 2011, http://www.cncompetencia.es/Inicio/Noticias/tabid/105/Default.aspx?Contentid=330041&Pag=3.

UK: OFT issues abuse of dominance decision in Reckitt Benckiser case

Summary. The Office of Fair Trading (OFT) has formally issued a decision that Reckitt Benckiser (RB) has abused its dominant position in the market for the NHS supply of alginate and antacid heartburn medicines.

Background. Companies are prohibited from engaging in any conduct that amounts to the abuse of a dominant position in a market insofar as it may affect trade in the UK (*section 18 Competition Act 1998, Chapter II*) (1998 Act). Companies which breach this rule can be fined up to 10% of their worldwide turnover and third parties can claim damages against them in the national courts (*section 36, 1998 Act*).

On 15 October 2010, the OFT announced that it had reached an early resolution agreement with RB, in which RB admitted infringing UK and EU competition law (admission) and agreed to pay a penalty of £10.2 million.

Facts. The OFT has formally issued its decision that RB abused its dominant position by withdrawing its NHS packs of its Gaviscon Original Liquid medicine from the NHS prescription channel after the product's patent had expired but before the publication of the generic name for it so that more prescriptions would be issued for RB's alternative branded product, Gaviscon Advance Liquid, which remains a patent protected product until 2016 and for which there are no generic equivalents. The OFT was of the view that RB withdrew Gaviscon Original Liquid as a way of limiting pharmacy choice and hindering competition from suppliers of generic medicines.

The OFT imposed a fine of £10.2 million with RB benefiting from a reduction in the penalty from £12 million as a result of RB's admission and cooperation with the OFT by entering into an early resolution agreement. The OFT expect to publish the final decision in summer 2011.

Comment. This is the first time that the OFT has imposed fines for abuse of dominance since its Genzyme decision in 2003 and it is the highest level of fines for such an infringement ever imposed by the OFT.

Source: OFT press release, 13 April 2011,
http://www.oft.gov.uk/news-and-updates/press/2011/53-11.

UK: OFT announces next steps in audit market

Summary. The Office of Fair Trading (OFT) will discuss with selected interested parties whether a referral to the Competition Commission (CC) would be appropriate to address competition problems provisionally identified by the OFT in the audit market.

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*).

Facts. The OFT has provisionally decided that there are competition problems in the audit market that pass the statutory test for a referral to the CC. The OFT said that it would discuss with interested parties whether, in practice, potential remedies exist that could allow the CC to resolve the identified issues.

Following the discussions with interested parties, the OFT will make a provisional decision on whether to make a market investigation reference to the CC, which will then be subject to statutory consultation later this year.

On 3 June 2011, the OFT released a statement summarising its concerns, in particular considering provisionally that the audit market is highly concentrated (the level of concentration having increased in the last 10 years), with substantial barriers to entry and switching.

Comment. Given that the OFT has kept the audit market under ongoing review for the past decade and the existence of in-depth reviews of the audit market at both UK and EU level, the OFT has decided to move straight to a provisional decision on whether to make a reference to the CC rather than conducting a full market study itself. The OFT will now use the discussions with interested parties to determine the suitability of CC remedies to address its concerns. However, the OFT has already indicated that "*there may be difficulties around potential remedies to audit market concentration.*"

This is particularly so given that the CC's jurisdiction is limited to the UK and "many of the potential solutions will require action on an international level if they are to be wholly effective."

Sources: OFT press release, OFT announces next steps in audit market, 17 May 2011, http://www.oft.gov.uk/news-and-updates/press/2011/59-11; OFT press release, Audit market - questions and answers, 17 May 2011, http://www.oft.gov.uk/OFTwork/markets-work/othermarketswork/accountancy-audit/qandas; OFT press release, Competition in the audit market: Features of the market that prevent, restrict or distort competition, 3 June 2011, http://www.oft.gov.uk/shared_oft/markets-work/audit-features.pdf.

UK: OFT decides not to appeal CAT judgments in construction cases

Summary. The Office of Fair Trading (OFT) has decided not to appeal the judgments of the Competition Appeal Tribunal (CAT) in the construction and construction recruitment forum cases.

Background. An appeal from a decision of the CAT as to the amount of a penalty imposed, or on a point of law arising from the CAT's judgment in relation to any other type of appealable decision, may be brought by a party to the proceedings before the CAT, or a person who has sufficient interest in the matter *(section 49, Competition Act 1998)*.

On 21 September 2009, the OFT imposed fines totalling GBP 129.2 million on 103 construction companies, finding that the parties had infringed competition law through their involvement in anti-competitive bid-rigging activities from 2000 to 2006. Twenty five parties appealed on matters related to the penalties imposed (penalty appeals), six of which also related to liability. In a series of judgments from the CAT earlier this year, all of the penalty appeals were successful and the CAT overturned liability findings in relation to four parties.

On 30 September 2009, the OFT imposed fines totalling GBP 39.27 million on six recruitment agencies for price-fixing and the collective boycott of another company in the supply of candidates to the construction industry. In April 2011, the CAT cut the fines by around 80 per cent, finding that the OFT had chosen an inappropriate starting point in calculating the fines.

Facts. On 27 May 2011, the OFT announced that it would not appeal the judgments of the CAT in the construction and construction recruitment forum cases.

The OFT stated that its decisions not to appeal were influenced by the fact that that substantial deterrence and behavioural change have already been achieved by the two cases, with increased awareness of competition law in the sector and the launch of initiatives by industry bodies to encourage compliance. The OFT stated that while it was still concerned by aspects of the judgments, in particular the substantial fine reductions made by the CAT, it did not believe that its ability to impose substantial fines with a deterrent effect had been undermined. As a result, the OFT considered that appeals to the Court of Appeal would not represent the best use of public funds.

Comment. The OFT has stated that it recognises that the judgments raise issues about how it carries out its enforcement work, and in particular how it sets penalties. The OFT said that it will review its penalty policy and internal penalty-setting processes, but added that it will continue to focus on high-impact enforcement action, with substantial financial penalties and the use of individual sanctions where appropriate.

Source: OFT press release, 27 May 2011,
http://www.oft.gov.uk/news-and-updates/press/2011/61-11.

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