Antitrust Review | March – April 2012

European Union

- **Commission fines freight forwarders EUR 169 million.** The European Commission has fined 14 groups of companies a total of EUR 169 million for price fixing in the international air freight forwarding sector.
- **Commission fines Czech energy companies for obstruction during inspection.** The European Commission has imposed fines totalling EUR 2.5 million on Energetický a průmyslový holding and EP Investment Advisors for obstructing an inspection carried out at their premises in Prague by Commission officials.
- **Toshiba/Western Digital: EU clearance.** The European Commission has cleared the proposed acquisition by Toshiba of certain hard disk drive assets from Western Digital.
- **AstraZeneca and Nycomed: Commission closes investigation.** The European Commission has closed an investigation into the pharmaceutical companies AstraZeneca and Nycomed which focused on alleged individual or joint action to delay the market entry of generic medicines.
- **General Court reduces industrial bags cartel fines on appeal.** The General Court has reduced the fines imposed on UPM-Kymmene Oyj, FLS Plast A/S and FLSmidth & Co A/S in relation to the plastic industrial bags cartel.

Czech Republic

- **Health insurance companies are not competitors within the meaning of the Czech Competition Act**. The Czech Competition Office has found that health insurance companies are not competitors within the meaning of the Czech Competition Act and that the applicability of competition rules in the public health care sector is limited.

France

- **FCA announces public consultation on sector inquiry regarding car repair and maintenance**. The French Competition Authority has published its initial findings of its sector inquiry into car repair and maintenance identifying several potential obstacles to competition, and is consulting on its initial findings.

Germany

- **New guidance on substantive merger control.** The German Federal Cartel Office has published its new guidance on substantive merger control.

Slovak Republic

- **Slovak Telekom obliged to disclose pre-EU information.** The EU General Court has ruled that Slovak Telekom is obliged to disclose to the European Commission information about its activities undertaken prior to the Slovak Republic's accession to the EU.

United Kingdom

- **Competition Commission clears in-flight catering merger.** The Competition Commission has cleared the anticipated joint venture between Alpha Flight Group Limited and LSG Lufthansa Service Holding AG, combining the parties' in-flight catering services in the UK.
- **Office of Fair Trading launches consultation on Competition Act procedures guidance.** The UK's Office of Fair Trading is consulting on a revised draft of its Competition Act 1998 procedures guidance.

United States

- **US DOJ claim regarding prices of electronic books.** The US Department of Justice has filed a complaint claiming that that publishers conspired to fix prices of electronic books.
- **FTC reverse payment patent settlement dismissed.** The Court of Appeals for the Eleventh Circuit has dismissed the US Federal Trade Commission's reverse payment patent settlement.

European Union: Commission fines freight forwarders EUR 169 million

Summary. The European Commission (the Commission) has fined 14 groups of companies a total of EUR 169 million for price fixing in the international air freight forwarding sector.

Background. Article 101 (*Article 101*) of the Treaty on the Functioning of the European Union prohibits cartels and other agreements or concerted practices that restrict competition. Companies can apply to the Commission under the terms of its leniency notice to obtain total immunity or leniency from fines (*2006/C 298/11*).

Facts. On 28 March 2012, the Commission imposed fines totalling EUR 169 million on 14 groups of companies for their alleged participation in four distinct cartels in the international air freight forwarding sector during the period 2002 to 2007.

The Commission's investigation began with dawn raids on 10 October 2007. The Commission's statement of objections was issued in February 2010.

The Commission considered that the freight forwarders colluded on surcharges and charging mechanisms relating to important trade lanes, in particular the Europe-USA and China/Hong-Kong-Europe lanes. The Commission found that in most cases the freight forwarders took steps to conceal their conduct, such as the use of codes names based on vegetable names and setting up a private email account to facilitate exchanges.

Comment. The decision highlights the value of the leniency notice to companies, with Deutsche Post (and its subsidiaries, DHL and Exel) having received total immunity from fines for being the first to inform the Commission of the conduct. Four other groups received fine reductions ranging from 5 – 50% under the leniency notice.

Source: Commission press release, 28 March 2012, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/314&format=HTML&aged=0&language=EN&guiLanguage=en.

European Union: Commission fines Czech energy companies for obstruction during inspection

Summary. The European Commission (the Commission) has imposed fines totalling EUR 2.5 million on Energetický a průmyslový holding (Energetický) and EP Investment Advisors (EP) for obstructing an inspection carried out at their premises in Prague by Commission officials.

Background. Article 101 (*Article 101*) of the Treaty on the Functioning of the European Union prohibits cartels and other agreements or concerted practices that restrict competition. Article 102 of the Treaty on the Functioning of the European Union prohibits the abuse of a dominant position by companies of their market position in the EU, or a substantial part of the EU (Article 102).

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

Facts. On 28 March 2012, the Commission announced that it had imposed fines totalling EUR 2.5 million on Energetický and EP for obstructing an inspection carried out at their premises in Prague by Commission officials as part of an antitrust investigation.

From 24 to 26 November 2009, the Commission carried out inspections at the premises of Czech companies active in the electricity and lignite sectors. The Commission opened proceedings in May 2010 and sent the companies a statement of objections in December 2010, setting out its concerns.

On 24 November 2009, the Commission requested that e-mail accounts of key persons at the companies be blocked until further notice. However, the Commission inspectors subsequently discovered that the password for one account had been modified in order to allow the account holder to access the account.

The Commission inspectors also discovered that one of the employees had requested all e-mails arriving in certain blocked accounts to be diverted from these accounts to a computer server. According to the Commission, the company admitted that this procedure had been implemented for at least one e-mail account. Consequently, the incoming e-mails did not become visible in the inboxes concerned, they could not be searched by inspectors and their integrity could be compromised.

Comment. Companies under inspection are required to co-operate with Commission officials, and to give correct information and access to relevant documents. This latest decision serves as a reminder that the Commission takes these obligations upon inspected companies seriously and will pursue any breaches of the rules against obstructions during dawn raids.

Source: Commission press release, 28 March 2012, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/319&format=HTML&aged=0&language=EN&guiLanguage=en.

European Union: Toshiba/Western Digital: EU clearance

Summary. The European Commission (the Commission) has cleared the proposed acquisition by Toshiba of certain hard disk drive (HDD) assets from Western Digital (the proposed transaction).

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*).

Facts. The proposed transaction was notified to the Commission on 28 February 2012.

This followed the Commission's decision in November 2011 to conditionally approve Western Digital's acquisition of Viviti Technologies, Hitachi's storage business, subject to compliance with a divestment remedy.

The Western Digital / Viviti Technologies merger was notified to the Commission one day after the notification of a merger between two HDD competitors Seagate and Samsung. The Commission's assessment of the transaction therefore took into account the impact of the Seagate / Samsung merger, based on a priority rule according to the date of formal notification. The Commission found that following the merger there would be only two suppliers of 3.5-inch HDDs. Consequently, Western Digital agreed to divest its production assets for the manufacture of these products to an up-front purchaser.

The Commission cleared the proposed transaction unconditionally on 26 March 2012. The transaction was considered under the simplified merger review procedure.

Comment. Western Digital has lodged two appeals against the Commission's review of its acquisition of Viviti Technologies and its application of the priority rule. Details were published on 31 March 2012 of its latest appeal, which includes requests for disclosure of the third party questionnaires relating to the Seagate / Samsung merger sent by the Commission, and internal correspondence concerning the prioritisation of the two transactions.

Sources: Commission unconditional clearance decision, 26 March 2012, http://ec.europa.eu/competition/mergers/cases/decisions/m6531_20120326_20310_2312952_EN.pdf.

European Union: AstraZeneca and Nycomed: Commission closes investigation

Summary. The European Commission (the Commission) has closed an investigation into the pharmaceutical companies AstraZeneca and Nycomed that focused on alleged individual or joint action to delay the market entry of generic medicines.

Background. Article 101(1) of the Treaty on the Functioning of the EU (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).

Article 102, TFEU prohibits the abuse of a dominant position by companies of their market position in the EU, or a substantial part of the EU.

Facts. On 30 November 2010, the Commission launched unannounced inspections at the premises of AstraZeneca and Nycomed in several EU Member States, as part of the investigation into the alleged joint or individual practices aimed at delaying the entry into the market of a particular generic medicine. The Commission has now closed this investigation.

Comment. The investigation followed an extensive competition inquiry between 2008 and 2009 by the Commission into the pharmaceutical sector to examine the reasons why fewer new medicines were brought to market, with a primary focus on the delayed market entry of generic medicines. The Commission continues to monitor potentially problematic patent settlements and has since opened investigations against Servier, Lundbeck, Cephalon and Johnson & Johnson for possible violations of EU competition rules.

Source: Commission press release, 1 March 2012, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/210&format=HTML&aged=0&language=EN&guiLanguage=en.

European Union: General Court reduces industrial bags cartel fines on appeal

Summary. The General Court of the European Union (the General Court) has reduced the fines imposed on UPM-Kymmene Oyj (UPM), FLS Plast A/S (FLSP) and FLSmidth & Co A/S (FLS) in relation to the plastic industrial bags cartel.

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

Facts. On 30 November 2005, the European Commission (the Commission) imposed fines of EUR 290.71 million on 16 firms for operating a cartel in which participants allegedly fixed prices, exchanged information, collectively rigged bids and allocated customers in the plastic industrial bags market over a period of 20 years in Germany, Belgium, the Netherlands, Luxembourg, France and Spain. All participants appealed the Commission's decision to the General Court.

The General Court has issued judgments in relation to three of the appeals relating to UPM, FLSP and FLS.

Decision. In relation to UPM, the General Court considered among other factors that the Commission had erred in calculating how long UPM's subsidiary, Rosenlew Saint-Freres Emballage SA (RSFE), had participated in a single and continuous infringement. The General Court found that the initial contact that RSFE had with the cartel in 1994 was merely exploratory in nature and did not amount to joining the cartel. In addition, the General Court held that the Commission had not produced "precise and consistent" evidence to support the argument that RSFE had participated in a particular sub-group relating to "block-bags". Whilst the General Court accepted that the Commission had erred in its calculation of the duration factor for the fine, the General Court rejected all of UPM's arguments regarding mitigating circumstances, including claims that (i) RSFE was not an active participant in the cartel, (ii) it had co-operated during the administrative process to the extent that it could, (iii) market conditions in the industry during the 1980's were depressed, and (iv) UPM had a compliance programme in place. As a result, the General Court reduced the level of fine from EUR 56.55 million to EUR 50.7 million.

In relation to FLSP and FLS, the General Court considered that the Commission had failed to establish, to the requisite legal standard, that FLSP and FLS had exercised decisive influence over the conduct of Trioplast Wittenheim SA (TW) during 1991. The General Court concluded that decisive influence by FLSP and FLS could not be presumed on the basis that, during 1991, the former owner of TW retained a 40% shareholding and continued to conduct the day-to-day management of TW, thereby still retaining the ability to exercise decisive influence. Whilst the General Court agreed that the Commission had taken an inconsistent approach by naming FLSP (an intermediate holding company of TW with no market-facing activity of its own) as an addressee of the decision when it had not similarly held other intermediate companies liable, the General Court denied that this rendered the decision unlawful. The General Court rejected all other arguments put forward by FLSP

and FLS relating to the level of the fine imposed. The General Court therefore reduced the fine for which FLSP and FLS were jointly and severally liable from EUR 15.3 million to EUR 14.45 million to reflect the fact that the Commission had miscalculated the duration of FLSP and FLS's participation in the cartel.

Comment. This is not the first time that the General Court has reduced the fines imposed by the Commission in relation to this cartel. In 2011, the General Court reduced and annulled the fines imposed on Low & Bonar PLC and Koninklijke Verpakkingsindustrie Stempher CV/Stempher BV respectively based on similar grounds as upheld by the General Court in relation to UPM, FLSP and FLS.

Case T - 53/06 - UPM-Kymmene Oyj v Commission, 6 March 2012 http://curia.europa.eu/juris/document/document.jsf?text=&docid=120043&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=89753;

Case T - 64/06 - FLS Plast A/S v Commission, 6 March 2012 http://curia.europa.eu/juris/document/document.jsf?text=&docid=120042&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=37107;

Case T - 65/06 - FLSmidth & Co. A/S v Commission, 6 March 2012 http://curia.europa.eu/juris/document/document.jsf?text=&docid=120045&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=89689

Czech Republic: Health insurance companies are not competitors within the meaning of the Czech Competition Act

Summary. The Czech Competition Office (CCO) has found that health insurance companies are not competitors within the meaning of the Czech Competition Act (CCA) and that the applicability of competition rules in the public health care sector is limited.

Background. Section 11, CCA prohibits the abuse of a dominant position by one or more companies to the detriment of other companies or consumers. Section 2, CCA defines "competitor" as an individual, a legal entity or an association thereof, who participates in economic competition or can influence economic competition, regardless of whether or not it conducts any commercial activities.

Facts. In March 2012, the CCO issued a decision on a complaint of the Association of Czech and Moravian Hospitals. The complaint asserted that eight health insurance companies restricted market competition by acting in concert and abusing dominant positions when they signed a certain document (the Memorandum of Health Insurance Companies on Restructuring and Reduction of the Number of Hospital Beds from 31 October 2011). The CCO dismissed the complaint on the grounds that health insurance companies, while providing their services within the public health insurance system, are not competitors within the meaning of the CCA. According to the decision, the activities of health insurance companies are aimed primarily at meeting social objectives based on non-profit and solidarity principles.

Comment. The decision excludes health insurance companies from the application of Czech competition law. The CCO noted however that state interference and regulation of this sector might decrease in the future in connection with the ongoing public health care reform, resulting in the application of competition principles.

Source: Decision of the CCO on the position of health insurance companies within competition law, 2 March 2012*,* http://www.compet.cz/hospodarska-soutez/aktuality-z-hospodarske-souteze/zdravotni-pojistovny-nejsou-souteziteli/ *(in Czech).*

France: FCA announces public consultation on sector inquiry regarding car repair and maintenance

Summary. The French Competition Authority (FCA) has published and is consulting on the initial findings of its sector inquiry into car repair and maintenance, which identify several potential obstacles to competition.

Background. Pursuant to Article L. 462-4 of the French Commercial Code, the FCA is authorised to give an opinion on any competition issue and it also can recommend that the French Government takes legislative action in sectors where it considers that competition can be improved.

In July 2011, after noting a significant increase in the prices of spare parts and of vehicle servicing costs since the late 1990s, the FCA launched an inquiry to examine how competition operates in the sector.

Facts. In April 2012, the FCA published its initial findings of its sector inquiry into car repair and maintenance. The FCA has found that between the years 2000 and 2010, prices for maintenance and repair services and spare parts in France increased in real terms by 28% and 13% respectively. Although this increase could be explained, in part, by increases in raw material and labour costs, the FCA noted that many manufacturers in France had enjoyed an increase in their margins, while in other countries there had been a decline in the price of spare parts.

According to the FCA, manufacturers' authorised repairers currently hold a 53% market share by value against independent repairers and also have an 80% share for cars of less than two years of age and 70% for cars less than four years of age. Consequently, the FCA considers that increasing competition between the manufacturers' authorised network of repairers and the independent network of repairers would benefit consumers and would encourage them to use independent repairers.

The FCA has identified five factors which may be allegedly restricting competition in the sector:

- industrial design right protection of visible car spare parts giving the manufacturers' repairers a legal monopoly over 70% of visible spare car parts;
- lack of availability of non-visible spare car parts to independent repairers, which for newer models can be as low as 56% of products required;
- independent repairers only have access to 80% of the necessary technical information that is available to manufacturers' repairers;
- conditions on manufacturers' warranty contracts encouraging customers to use manufacturers' repairers; and
- the uniform use by manufacturers' repairers of recommended retail pricing, despite potentially large discounts being available.

The FCA plans to publish its final decision in the summer and may make recommendations to the government with suggested changes to relevant legislation and guidance for participants in the sector. Moreover, if the FCA considers there have been any breaches of competition law, it may open a further investigation.

Comment. This inquiry comes at a time when the motor vehicle sector is under scrutiny worldwide. For example, in June 2011, the European Commission carried out inspections at the premises of companies that supply car seatbelts, airbags and steering wheels to investigate alleged anti-competitive behaviour, and investigations in the sector have also been carried out by the US Department of Justice and Japan's Fair Trade Commission.

Source: Autorité de la Concurrence press release 11 April 2012, http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=418&id_article=1851.

Germany: New guidance on substantive merger control

Summary. The German Federal Cartel Office (FCO) has published its new guidance (the New Guidance) on substantive merger control.

Background. Germany operates a mandatory system of merger control notifications. Under section 36 of the German Act Against Restraints of Competition (ARC), a transaction which is expected to create or strengthen a dominant position will be prohibited by the FCO unless the undertakings can prove that the transaction will also lead to improvements of competitive conditions which will outweigh the disadvantages of dominance (the market dominance test).

Facts. On 29 March 2012, the German Federal Cartel Office published its New Guidance on substantive merger control, replacing previous guidelines which were published in 2000 under the title "Principles of Interpretation of Market Dominance" (the 2000 Guidelines).

The New Guidance reflects continued development of the FCO's recent merger control practice, as well as the case law of the competent courts. In particular, the New Guidance increases the emphasis placed on economic findings and concepts in the decision-making process. Furthermore, in contrast to the 2000 Guidelines, the New Guidance places greater emphasis on the necessary appraisal of all relevant conditions in the market without employing a checklist approach. The New Guidance also explains the economic concepts underlying the theories of competitive harm.

Comment. The New Guidance is based on the market dominance test which will be replaced by the significant impediment to effective competition (SIEC) test (as part of the 8th Amendment of the ARC which is expected to come into force on 1 January 2013). However, whether a merger creates or strengthens a dominant position will still remain the key indicator of a significant impediment to effective competition. Therefore, the principles laid out in the New Guidance will remain applicable after the introduction of the SIEC test into the German merger control regime.

Source: Guidance on Substantive Merger Control of the German Federal Cartel Office, 29 March 2012*,* http://www.bundeskartellamt.de/wDeutsch/merkblaetter/Fusionskontrolle/Leitfaden_zur_Marktbeherrschung_in_der_Fusionskontrolle.php.

Slovak Republic: Slovak Telecom obliged to disclose pre-EU information

Summary. The General Court of the European Union (the General Court) has ruled that Slovak Telekom is obliged to disclose to the European Commission (the Commission) information about its activities undertaken prior to the Slovak Republic's accession to the EU.

Background. According to Article 18(1) of Council Regulation (EC) No 1/2003, in order to carry out the duties assigned to it by the regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.

Facts. After an inspection at Slovak Telekom in January 2009, the Commission decided to initiate proceedings investigating whether Slovak Telekom had possibly abused a dominant position in the Slovak telecommunications sector through various practices, including an alleged refusal to enter into agreements with its competitors on wholesale access to its broadband network and an alleged margin squeeze.

In the course of the proceedings, Slovak Telekom was ordered in two Commission decisions to provide documents and disclose information about its activities undertaken before the Slovak Republic's accession to the EU. Slovak Telekom brought actions against both of the decisions before the General Court, arguing that the Commission did not have the authority to request such information and alleging that pre-accession information was irrelevant to the investigation of its post-accession activities.

Decision. On 22 March 2012, the General Court dismissed the actions, stating that the Commission was entitled to request such information, as it provided a context to the subsequent activities of Slovak Telekom and, while taking place before the Slovak Republic's accession to the EU, the requested information concerned the planning, launch, investment and development of services provided post-accession and subject to the Commission's investigation.

Comment. The decision is not surprising in the context of the case law of the EU courts regarding the scope of "necessary information" which may be requested by the Commission (e.g. the judgment of European Court of Justice of 29 June 2006, the Commission v. SGL Carbon, C-301/04). However, it may be seen as a confirmation of the Commission's broad powers in this respect.

Source: Slovak Telekom a.s. v. Commission, Joined cases T-458/09 and T-171/10, http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=1&part=1&mode=lst&docid=120721&occ=first&dir=&cid=253733.

United Kingdom: Competition Commission clears in-flight catering merger

Summary. The Competition Commission (CC) has cleared the anticipated joint venture between Alpha Flight Group Limited (Alpha) and LSG Lufthansa Service Holding AG (LSG), combining the parties' in-flight catering services in the UK.

Background. The Office of Fair Trading (OFT) must refer an anticipated merger to the CC if it believes that there is, or may be, a relevant merger situation that may be expected to result in a substantial lessening of competition (SLC) (*section 33, Enterprise Act 2002*).

The OFT referred the transaction to the CC on 10 October 2011 on the grounds that there was a realistic prospect of unilateral effects at several UK individual airports (including Heathrow) and more widely for bidding for national contracts to supply airlines that operate from many UK airports. The OFT also considered that the joint venture might result in a significant reduction in competition to supply full service catering for long-haul customers.

On 7 February 2012, the CC published its provisional findings which concluded that the anticipated joint venture was not expected to result in an SLC in the market of in-flight catering services in the UK.

Facts. On 14 March 2012, the CC published its final report which confirmed its provisional findings and cleared the anticipated joint venture between Alpha and LSG.

The CC found that some airlines have a degree of buyer power with the ability to switch between different providers and an

ability to leverage their catering requirements across a network of regional airports. In addition, the CC held that, because of the value of their business to in-flight caterers, large long-haul airlines and major low-cost carriers and charter/leisure airlines may have a significant degree of pre-merger buyer power.

The CC held that the supply of in-flight catering services in the UK was an appropriate market definition but also considered separate segments of customer demand (a) at Heathrow and regional airports; and (b) taking into account the distinction between short-haul and long-haul catering.

- At Heathrow, the CC also considered the supply of in-flight catering services to British Airways (BA) to be a distinct segment due to the sheer size of its operations in the UK and its willingness to enter into long-term contractual arrangements. The CC concluded that BA's existing supply arrangements at Heathrow would be unaffected by the merger and there would remain a large number of credible and competitive bidders in any future contract rounds.
- The CC's primary concern was the effect the joint venture might have on the larger long-haul airlines out of Heathrow and described its decision to find in favour of the merger to be a "*finely balanced judgment*". The CC considered that the joint venture would reduce the number of '*traditional suppliers*' to two (i.e. the merged entity and Gate Gourmet). However, on balance the CC found that the presence of DHL, a relatively new entrant in the market, was a sufficiently credible constraint on the two traditional suppliers and when coupled with the degree of buyer power retained by customers, the proposed joint venture was unlikely to give rise to an SLC in relation to this segment.
- In relation to both the other demand segments identified at Heathrow and other regional airports, the CC found that customers would have an ability to switch between a number of alternative providers. Regional network airlines were held to be large and sophisticated customers that may be able to sponsor or encourage new entry. Furthermore, the CC identified that regional network airlines' contracts tended to be aggregated together and were therefore considered to be valuable, such that in-flight caterers may be expected to compete actively to secure and retain them.

Comment. This is the first merger decision by the CC in 2012 and demonstrates the CC's ability to conduct a thorough investigation and balance the different competing interests in the market so as to clear complex mergers.

Source: CC press release, 14 March 2012, http://www.competition-commission.org.uk/media-centre/latest-news/2012/Mar/cc-clears-in-flight-catering-joint-venture; CC final report, 14 March 2012, http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/alpha-flight-group-lsg-lufthansa/final_report_excised.pdf.

United Kingdom: Office of Fair Trading launches consultation on Competition Act procedures guidance

Summary. The UK's Office of Fair Trading (OFT) is consulting on a revised draft of its Competition Act 1998 (the 1998 Act) procedures guidance (the consultation).

Background. The 1998 Act gives the OFT a number of powers to investigate companies that are suspected of taking part in anticompetitive agreements or concerted practices or abusing a dominant position in a market, as well as to conduct studies of markets as a whole and refer them for more detailed investigation by the Competition Commission if it has reasonable grounds to suspect the markets may contain anticompetitive features.

Over the last few years, the OFT has introduced various streamlining initiatives designed to increase the speed and improve the quality and efficiency of its CA98 investigations. In March 2011, the OFT published guidance on its investigation procedures and announced the creation, for a one-year trial, of a "Procedural Adjudicator" who would resolve disputes between parties and OFT case teams in investigations under the 1998 Act.

Facts. The main procedural changes proposed in the consultation are:

- moving to a collective judgment procedure in which three individuals who are unconnected with the investigation procedure (rather than one, as is current practice) will, in consultation with a senior-level Decisions Committee be responsible for making infringement decisions;

- the Procedural Adjudicator role has been extended for an additional year and will have additional powers, including the chairing of oral hearings in CA98 investigations, following which it will have to report to the decision makers on whether the investigated parties' right to be heard has been respected; and
- additional transparency through the publication of additional information on investigations and procedural timetables when they are opened, the routine offering of state-of-play meetings, more interactive oral hearings, and giving parties the ability to make representations on draft penalty calculations.

The consultation will run until 19 June 2012. After the consultation, the OFT will decide whether any changes are necessary to the draft guidance, and intends to publish the final version of the revised guidance before Autumn 2012.

Comment. The OFT has recognised the importance of being open and clear about the procedures that it follows when undertaking investigations into anticompetitive practices. The OFT has stated that it is important to keep its CA98 procedures under review, and change them as appropriate, in light of lessons learnt from cases, international best practice and feedback from external stakeholders. Transparency and separation of decision-making powers is of particular concern as, following the recently announced changes to the UK antitrust regime, the functions of the OFT and Competition Commission will soon be combined.

Sources: OFT press release, 28 March 2012, http://www.oft.gov.uk/news-and-updates/press/2012/23-12.

United States: US DOJ claim regarding prices of electronic books

Summary. The US Department of Justice (DOJ) has filed a complaint claiming that that publishers conspired to fix prices of electronic books.

Background. Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits conspiracies that unreasonably restrain trade (*Section 1*, *Sherman Act*).

Facts. On 11 April 2012, the DOJ filed a civil antitrust complaint alleging that Apple, Inc. and five of the six largest publishers in the United States restrained competition in the sale of electronic books, in violation of Section 1, Sherman Act. According to the DOJ, electronic books constitute 10% of general interest fiction and non-fiction books sold in the U.S. and are predicted to constitute 25% of U.S. general interest fiction and non-fiction book sales within two to three years.

The DOJ alleged that publishers and Apple agreed to develop an agency model whereby publishers established the price at which electronic books could be sold through retailers (agency model). The DOJ claims that this reversed the existing pricing model, through which retailers set the price of electronic books. According to the DOJ, as a result of the agency model, consumers pay more for electronic books.

Shortly after filing the complaint, the United States filed a proposed final judgment with respect to Hachette Book Group, HarperCollins Publishers, and Simon & Schuster, Inc., settling the matter as to those defendants (Final Judgment). The Final Judgment requires the settling defendants to, among other obligations, terminate their agreements with Apple.

Comment. Apple has publicly stated that it will not settle the suit. The facts which come to light during the ensuing litigation will determine whether the DOJ's claims are substantiated.

Source: Complaint, U.S. v. Apple, Inc., Civil Action No. 1:12-CV-2 (S.D.N.Y.) at http://www.justice.gov/atr/cases/f282100/282135.pdf; Competitive Impact Statement, U.S. v. Apple, Inc., Civil Action No. 1:12-CV-2 (S.D.N.Y.) at *http://www.justice.gov/atr/cases/f282100/282143.pdf*.

United States: FTC reverse payment patent settlement dismissed

Summary. The Court of Appeals for the Eleventh Circuit has dismissed the US Federal Trade Commission's (FTC) reverse payment patent settlement.

Background. Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), prohibits unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce (*Section 5, FTCA*).

"Pay-for-delay settlements" are those where a patent holder pays an allegedly infringing generic drug company to delay entering the market until a specified date thereby protecting the patent monopoly against a judgment that the patent is invalid or would not be infringed by the generic competitor. For more than a decade, the FTC has publicly stated that "pay-for-delay settlements" violate the antitrust laws, including Section 5, FTCA.

Facts. The US District Court for the Northern District of Georgia (Georgia District Court) had dismissed allegations by the FTC that patent settlements between branded pharmaceutical manufacturer, Solvay Pharmaceuticals, Inc. (Solvay), and certain generic drug companies were illegal under the antitrust laws. The FTC claimed that the settlements relating to the prescription drug AndroGel delayed generic competition. The court held that the settlements were not an unreasonable restraint of trade and that the FTC had failed to make a successful antitrust claim.

The FTC appealed the decision of the Georgia District Court and argued that Solvay was not likely to be able to uphold its patent in infringement litigation which it brought and then settled with the allegedly infringing generic manufacturers.

Decision. The Eleventh Circuit affirmed the decision of the Georgia District Court.

Comment. This case follows a consistent chain of losses for the FTC on this topic. However, FTC Chairman Jon Leibowitz stated after the decision that the FTC continues to believe that this conduct violates the antitrust laws.

Source: Federal Trade Commission v. Watson Pharmaceuticals, Inc., No. 10-12729 (11th Cir. April 25, 2012), *http://www.ca11.uscourts.gov/opinions/ops/201012729.pdf*.

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