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- **Commission approves Johnson & Johnson/Synthes merger.** The European Commission has cleared the proposed acquisition of Synthes Inc. by Johnson & Johnson.
- **Commission sends statement of objections to Slovak Telekom and Deutsche Telekom.** The European Commission has sent a statement of objections to Slovak Telekom a.s. and its parent company Deutsche Telekom AG about its concerns regarding a potential breach of Article 102 of the Treaty on the Functioning of the European Union.
- **European Court of Justice rejects Tomra appeal.** The European Court of Justice has upheld the judgment of the General Court dismissing an appeal by Tomra Systems ASA and a number of additional Tomra group companies against an abuse of dominance finding by the European Commission.
- **General Court dismisses MasterCard appeal.** The General Court of the EU has upheld the decision of the European Commission prohibiting the default multilateral interchange fees applied on EEA cross-border transactions with MasterCard and Maestro branded debit and consumer credit cards.

China

- **MOFCOM issues new merger filing form.** China's Ministry of Commerce has issued a new notification form for merger control filings with effect from 7 July 2012.
- **New rules published for antitrust litigation.** The Supreme People's Court has published the Provisions on Several Issues Regarding the Application of Law to Civil Disputes Involving Monopolistic Acts, which have come into force on 1 June 2012.
- **United Technologies Corporation's acquisition of Goodrich Corporation – conditional clearance.** On 15 June 2012, China's Ministry of Commerce announced its approval of United Technologies Corporation's acquisition of Goodrich Corporation, subject to structural conditions.

Czech Republic

- **Switchgear cartel decision repealed and returned for further hearings.** The Regional Court in Brno has repealed the decision of the Czech Competition Office to fine several electronics companies for alleged bid rigging in relation to gas insulated switchgear.

France

- **Supreme Court confirms Orange's €41 million fine.** The French Supreme Court has rejected Orange's final appeal against a fine imposed on Orange by the French Competition Authority for allegedly exchanging sensitive information with its competitors in the mobile phone services sector.

Germany

- **New anonymous whistleblowing system.** The German Federal Cartel Office has set up an electronic system for anonymous tip-offs of antitrust law infringements.

Hong Kong

- **First cross sector competition law enacted.** Hong Kong's Legislative Council has enacted Hong Kong's first cross-sector competition law, the Competition Ordinance.

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Japan

- **JFTC reverses JASRAC cease and desist order.** Japan's Fair Trade Commission has overturned a cease and desist order issued to the Japanese Society for Rights of Authors, Composers and Publishers.

Romania

- **RCC closes private pension funds investigation.** The Romanian Competition Council has closed a 5-year long investigation into possible concerted practices among private pension funds administrators regarding alleged fixing of administration fees.

Spain

- **CNC opens infringement proceedings against Mediaset (formerly Telecinco) for non-compliance with commitments.** The Spanish Competition Authority has opened infringement proceedings against Mediaset España Comunicación, S.A. (formerly Telecinco) for failing to comply with commitments approved in connection with the Telecinco/Cuatro merger.

United Kingdom

- **OFT reduces British Airways fine for fuel surcharge cartel.** The Office of Fair Trading has reduced the level of fine imposed on British Airways for alleged anti-competitive conduct relating to the pricing of passenger fuel surcharges.
- **Competition Commission requires AA and Lafarge to divest.** The Competition Commission has required Anglo American PLC and Lafarge S.A. to sell a significant portfolio of operations before their proposed construction materials joint venture can go ahead.
- **Metal packaging coatings merger referral.** The UK's Office of Fair Trading has referred the proposed acquisition of Metlac Holding S.r.l. by Akzo Nobel NV to the Competition Commission for further investigation.
- **Competition Commission clears water merger.** The Competition Commission has formally cleared the acquisition of Cambridge Water Plc by South Staffordshire Plc.
- **OFT dentistry market study.** The Office of Fair Trading's market study has identified a number of concerns with the current operation of the UK dentistry market.
- **Bill dealing with establishment of the Competition and Markets Authority and the reform of UK competition law published.** The Enterprise and Regulatory Reform Bill, establishing the Competition and Markets Authority and reforming UK competition law, has been published.

United States

- **Executive faces imprisonment for HSR filing violation.** A Hyosung Corporation executive faces imprisonment for altering documents submitted with an affiliate's filing under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

European Union: Commission approves Johnson & Johnson/Synthes merger

Summary. The European Commission (the Commission) has cleared the proposed acquisition of Synthes Inc. (Synthes) by Johnson & Johnson (J&J).

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 Commission can accept binding commitments from the merging parties as a condition of the Phase I clearance (*Article 6(2), EUMR*). The decision to open an in-depth investigation does not prejudge the final results of the Commission's investigation.

The proposed acquisition was notified on 27 September 2011 and an in-depth investigation launched on 3 November 2011. On 25 January 2012, the parties were advised in a statement of objections that the proposed acquisition raised serious concerns and, in the absence of a sufficient remedy, may be prohibited.

Facts. The Commission's in-depth Phase II investigation considered that there were no competitive concerns for spine, shoulder replacement and cranio-maxillofacial devices, nor for surgical power tools.

The Commission considered, however, that for trauma devices the transaction would impede competition in a number of markets in various EU Member States. The Commission's concerns were based on the merging entities' high combined market shares in these markets, the mature character of the products, and the strong position of the AO Foundation, a Swiss-based surgeon-led organisation with an exclusive relationship with Synthes. As a result, the Commission considered that surgeons are generally reluctant to switch to other suppliers, making entry by competitors difficult or unattractive.

J&J submitted commitments to the Commission, consisting of the divestiture of its entire trauma business in the EEA. The Commission considered that the divestment was sufficient to remove any competition concerns from the overlap in the area of trauma devices and therefore cleared the proposed acquisition subject to the sale of J&J's trauma business in the EEA.

Comment. This is the first time the Commission has examined these product markets. According to Commission Vice President Joaquín Almunia, the Commission obtained remedies to ensure that competition will remain strong in these markets, for the ultimate benefit of patients and social security systems.

Source: Commission press release, 19 April 2012, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/386&format=HTML&aged=0&language=EN&guiLanguage=en.

European Union: Commission sends statement of objections to Slovak Telekom and Deutsche Telekom

Summary. The European Commission (the Commission) has sent a statement of objections to Slovak Telekom a.s. (ST) and its parent company Deutsche Telekom AG (DT) about its concerns regarding a potential breach of Article 102 of the Treaty on the Functioning of the European Union (TFEU).

Background. Article 102 of the Treaty on the Functioning of the European Union (TFEU) 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, TFEU*). A statement of objections (SO) is a formal step in antitrust investigations in which the Commission informs the parties concerned in writing of the objections raised against them. The addressee of an SO can reply in writing and set out all facts relevant to its defence, and may also request an oral hearing to present its comments on the case. The Commission may then decide whether or not the conduct addressed in the SO is compatible with the EU antitrust rules.

The Commission opened formal proceedings against ST on 8 April 2009 and extended the proceedings to include DT (which owns a majority stake of 51% in ST) on 13 December 2010 in order to determine whether or not DT had been involved in the potential infringement or whether as a parent company of ST it is liable for it.

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Facts. On 8 May 2012, the Commission sent ST and DT an SO which expressed concerns about their behaviour on several wholesale broadband markets in Slovakia. The Commission is of the view that ST may have refused to supply unbundled access to its local loops and wholesale services to competitors, and may have imposed a margin squeeze on alternative operators by charging unfair wholesale prices. The Commission also considers on a preliminary basis that DT may be held liable for the alleged conduct of ST, because of the nature and degree of its links with its subsidiary ST. The companies now have three months to reply to the SO. The Commission has noted that sending an SO does not prejudge the outcome of the investigation.

Comment. The General Court confirmed the Commission's methodology for determining the existence of a margin squeeze in broadband markets in the Telefónica case earlier this year. It remains to be seen whether the Commission can follow the same methodology in its assessment of Slovak broadband markets.

Source: Commission press release, 8 May 2012, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/462&type=HTML.

European Union: European Court of Justice rejects Tomra appeal

Summary. The European Court of Justice (ECJ) has upheld the judgment of the General Court dismissing an appeal by Tomra Systems ASA and a number of additional Tomra group companies (Tomra) against an abuse of dominance finding by the European Commission (the Commission).

Background. Article 102 of the Treaty on the Functioning of the European Union (TFEU) 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, TFEU*). Those found to have infringed Article 102 can appeal to the General Court. General Court judgments are subject to appeal to the ECJ on points of law only (*Article 256, TFEU*).

Facts. In 2006, the Commission imposed a fine of EUR 24 million on Tomra for allegedly abusing a dominant position in the market for the supply of reverse vending machines. Tomra appealed the Commission's decision to the General Court on six grounds, each of which were rejected by the General Court in 2010. Tomra subsequently appealed to the ECJ.

Decision. On 19 April 2012, the ECJ delivered its judgement upholding the decision of the General Court, rejecting all of Tomra's grounds of appeal. Tomra argued, *inter alia*, that the General Court (and the Commission) had erred in law in its assessment of retroactive rebates by failing to examine whether prices charged by Tomra were lower than cost prices. Tomra argued this was essential in order to assess the capacity of retroactive rebates to restrict competition, and in particular whether those rebates forced Tomra's competitors to charge negative prices. However, the ECJ found that neither the Commission nor the General Court were obliged to examine whether prices charged by Tomra were below long-run average incremental costs as the Commission had established the existence of an abuse by relying on other considerations, including that Tomra had failed to show that its conduct was objectively justified or that it generated significant efficiency gains which outweighed the anti-competitive effects on consumers.

Comment. In its submissions, Tomra referred to the Commission's 2009 guidance on abusive exclusionary conduct (the Guidance), noting that the Guidance specifically refers to a cost / price comparison when an alleged abuse is the result of prices charged by a dominant undertaking. However, the ECJ found that negative prices are not a pre-requisite to finding that retroactive rebates operated by a dominant undertaking are abusive, concluding that, in any case, the Guidance had no relevance to the legal assessment of the decision given that the Guidance was published in 2009, whereas the Commission's decision was taken in 2006. The ECJ's decision therefore reaffirms the stringent approach currently taken towards rebate schemes.

Case: P-Tomra v Commission Case C-549/10.

European Union: General Court dismisses MasterCard appeal

Summary. The General Court of the EU has upheld the decision of the European Commission (the Commission) prohibiting the default multilateral interchange fees (MIFs) applied on EEA cross-border transactions with MasterCard and Maestro branded debit and consumer credit cards.

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. Those found to have infringed Article 101 can appeal to the General Court. General Court judgments are subject to appeal to the European Court of Justice (ECJ) on points of law only (*Article 256, TFEU*).

Facts. On 19 December 2007, the Commission issued a decision stating that MIFs applied under the MasterCard card payment system were contrary to EU competition law. According to the Commission, the MIFs had the effect of setting a floor under the costs charged by acquiring banks to merchants and thus constituted a restriction of price competition that was to their detriment. The Commission also took the view that it had not been demonstrated that the MIFs satisfied the exemption conditions under Article 101(3) TFEU and could generate efficiencies capable of justifying its restrictive effect on competition.

MasterCard brought an action before the General Court for annulment of the Commission's decision challenging, amongst other things, the Commission's findings that:

- Decisions taken by MasterCard in relation to the MIFs constituted a decision of an association of undertakings;
- The MIFs were not objectively necessary for the operation of MasterCard's four-party payment scheme; and
- The exemption conditions were not satisfied.

MasterCard also claimed that the Commission infringed certain procedural requirements and that its actions were disproportionate.

Decision. The General Court has upheld the Commission's decision and rejected arguments relating to the objective necessity of MIFs to the operation of the MasterCard payment system. The General Court found that it is unlikely that, without a MIF, an appreciable proportion of banks would cease or significantly reduce their MasterCard card-issuing business, or would change the terms of issue to such an extent as to be likely to result in holders of those cards favouring other forms of payment or payment cards. The General Court also held that the Commission was entitled to conclude that, without the MIF, merchants would be able to exert greater competitive pressure on the amount of the costs they are charged for the use of payment cards.

The General Court considered that the MasterCard payment organisation remained an institutionalised form of coordination of the conduct of the participating financial institutions. Consequently, the Commission was entitled to characterise MasterCard's role in determining the MIF as a decision by an association of undertakings.

The General Court also rejected the grant of an exemption on the basis that benefit needed to be attributed to the restriction itself rather than the MasterCard scheme of which it formed part. It was also considered necessary to show that sufficient benefits accrued to merchants. Generally it was considered that the methodology applied in determining the MIF tended to overestimate the costs borne by the financial institutions on issuing payment cards and were inadequate to assess the advantages to merchants.

Comment. The General Court's decision has important implications for the operation of all four-party payment schemes (most notably MasterCard and Visa). Although it is only addressed to MasterCard's EEA cross-border card transactions it is excepted to be directly relevant to domestic MIF arrangements and a number of national enforcement actions have been on hold pending the court's determination. MasterCard has announced its intention to appeal the decision to the Court of Justice. Undertakings that MasterCard unilaterally provided to the Commission in relation to its cross-border MIFs for debit and credit cards have now expired. The decision confirms the Commission's finding that MIFs restrict competition by inflating the cost of card acceptance by merchants without leading to benefits for consumers. In December 2010, the

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Commission accepted Visa Europe's commitments to significantly lower its default MIFs for immediate debit card transactions only. There has been no settlement in relation to Visa's cross-border and deferred debit transactions.

Case: Case T-111/08 MasterCard, Inc and Others v Commission.

China: MOFCOM issues new merger filing form

Summary. China's Ministry of Commerce (MOFCOM) has issued a new notification form for merger control filings with effect from 7 July 2012.

Background. In 2009, MOFCOM published a notification form for use when notifying transactions to MOFCOM for merger control review. The revised notification was published after consultation with a number of third parties and is intended to reflect MOFCOM's experience to date.

Facts. The key changes and the practical implications of the new notification form include the following:

- Notifications can be made based on non-definitive agreements allowing parties to file earlier. The new form makes clear that a notification can be made based on, for instance, a framework agreement, memorandum of understanding or letter of intent. However, parties must explain why the final, binding transaction documents are not available and why the notification is being made on the basis of non-definitive agreement, which allows MOFCOM discretion in accepting the notification as complete.

- MOFCOM will expect parties to explain the impact of their transaction on the future development of the Chinese market and, where available, provide a business plan addressing this. MOFCOM will also require confirmation that the proposed transaction and the parties' Chinese enterprises satisfy applicable laws in China, including in relation to foreign investment approvals.

- The new form requires routine submission of board documents regarding a notified transaction.

Comment. The revised notification form is more data and document intensive and the increased level of detail and information, including board documents relating to notified transactions, will be required even for "no issues" transactions. That said, MOFCOM is currently considering the introduction of a fast track procedure for "no issues" transactions, where MOFCOM will endeavor to complete its review within Phase I (i.e. 30 calendar days) of declaring the notification complete.

Source: *MOFCOM press release, 6 June 2012, http://fldj.mofcom.gov.cn/aarticle/zcfb/201206/20120608166903.html.*

China: New rules published for antitrust litigation

Summary. The Supreme People's Court (SPC) has published the *Provisions on Several Issues Regarding the Application of Law to Civil Disputes Involving Monopolistic Acts* (Rules), which have come into force on 1 June 2012.

Background. The Rules are a judicial guide for civil procedure in cases involving antitrust litigation in China and follow the SPC's publication of a draft judicial guide in 2011 for public comment.

Facts. Key areas where the Rules provide guidance include standing, burden of proof, evidence and limitations for stand alone and follow on rights of action. In particular, the Rules note that:

- The claimant bears the burden of proving that the defendant has engaged in anti-competitive conduct, which resulted in loss. The Rules shift the burden of proof to the defendant to show that the disputed conduct does not have the effect of eliminating or restricting competition in the relevant market if the conduct in question involves a "hard core" violation of the Anti-Monopoly Law (AML) (i.e. price fixing, sales or output restrictions, market sharing, restricting development of new technology and joint boycotts).

- In abuse of dominance cases, the claimant must show that the defendant is dominant, and that the defendant has abused its dominance in the relevant market. It is for the defendant to show that the conduct is justified within the meaning of the AML. In cases where the defendant has statutory monopoly status, dominance is presumed.
- Parties may seek a court's approval for expert evidence to be presented during hearings.
- Cases in relation to the same anti-competitive conduct can be joined by a competent court where two or more claimants bring actions before the same court or before different courts against the same conduct. There is no provision for class actions.
- The courts may order the following remedies: injunctions, damages or other declaratory orders (including orders to declare that provisions in a contract or articles of an industry association are void).
- The limitation period for damages is 2 years, starting from the date when the claimant knew or ought to have known of the infringement of its rights and interests.

Comment. The Rules are expected to spur private actions involving competition disputes in China. They clarify a number of procedural matters, but do not address certain procedural issues that earlier draft interpretations sought to cover such as the use of the decisions of China's antitrust enforcement authorities as evidence of unlawful conduct, calculation of damages and the passing-on defence. To date, most of the private actions have either been dismissed or settled for relatively insignificant sums of money.

Source: Supreme People's Court press release, 9 May 2012, http://www.court.gov.cn/qwfb/sfjs/201205/t20120509_176785.htm.

China: United Technologies Corporation's acquisition of Goodrich Corporation – conditional clearance

Summary. On 15 June 2012, China's Ministry of Commerce (MOFCOM) announced its approval of United Technologies Corporation's (UTC) acquisition of Goodrich Corporation (Goodrich), subject to structural conditions.

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

Facts. UTC is active in the production of a broad range of high-technology products and support services for building systems and aerospace industries worldwide. It is also a supplier of aerospace systems, aircraft engines and helicopters. Goodrich is active in the production and sale of systems and services to the aerospace, defence and security industries.

MOFCOM's chief concern was the horizontal overlap between the two undertakings' aircraft alternating current (AC) generation system businesses. According to MOFCOM, UTC and Goodrich were the top two players in the global aircraft AC generation systems market and their market shares were 72% and 12% respectively. MOFCOM's concern was that the proposed transaction would strengthen UTC's alleged dominance in the alternating AC generation system market resulting in the elimination and restriction of competition. MOFCOM also determined that there were high barriers to entry in this market mainly due to high capital costs and the long life cycles of AC generating systems, as a result of which, once a type of AC generating system was selected for a specific aircraft platform it is unlikely to be replaced by another type of AC generating system for decades.

In order to assess these concerns, MOFCOM required Goodrich to divest its electrical power generating system business, including its AC generating systems business, low voltage direct current generating systems business and power distribution

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systems business.

Comment. This is MOFCOM's 14th conditional clearance since the AML came into force in 2008. MOFCOM adopted its decision ahead of other major competition authorities, including the US and EU. MOFCOM's decision focused on horizontal concerns and structural remedies were imposed to address this. The majority of MOFCOM's decisions to date have involved behavioural remedies, and this case could signal a return to structural remedies.

Source: MOFCOM press release, 15 June 2012, http://fldj.mofcom.gov.cn/aarticle/ztxx/201206/20120608181083.html.

Czech Republic: Switchgear cartel decision repealed and returned for further hearings

Summary. The Regional Court in Brno (Regional Court) has repealed the decision of the Czech Competition Office (CCO) to fine several electronics companies for alleged bid rigging in relation to gas insulated switchgear.

Background. Section 2(1) of the Czech Competition Act (CCA) defines an undertaking as an individual, legal entity or association of these, which participates in competition or can influence competition. Section 3(1) of the CCA prohibits cartels and other agreements or concerted practices which restrict competition. Section 22a(2) of the CCA prescribes fines of up to EUR 400,000 or up to 10% of the net turnover achieved by the undertaking in the last accounting period for entering into prohibited agreements.

In April 2007, the CCO imposed fines on several major electronics companies amounting to approximately EUR 37.5 million in total for alleged bid rigging.

Facts. In June 2012, the Regional Court repealed the 2007 decision of the CCO. The CCO had considered that the alleged bid rigging took the form of agreements regarding price fixing, market sharing and market share fixing and restricting the access of new competitors to the market between 1991 and 2004, which might have affected the relevant market in the Czech Republic. The Regional Court agreed with the CCO in its substantive finding but ruled that the CCO had failed to explain why it fined parent companies of some of the cartel members on one hand and several subsidiaries of other cartel members on the other hand, or even combined both of these approaches in some instances. The Regional Court also held that due to this approach the fines were not imposed fairly, as although the fines were calculated based on the turnover of the whole group, they were imposed on several companies of the same group of some of the cartel members.

Comment. Following decisions of the General Court and the Court of Justice of the European Union, the Regional Court held that although from an economic perspective an economic unit might be comprised of several companies, the liability for cartels under the CCA must be allocated to a specific legal person based on the facts of the specific case. However, this decision does not prevent such liability being allocated to a parent company acting indirectly through its subsidiaries. This is important for multinational companies, since the decision clarifies their risk exposure for cartel activities with effect on the Czech market. The decision clearly confirms that under the CCA it is possible to calculate the fine from the turnover of the parent company and not only the Czech subsidiary.

Source: Decision of the Regional Court no. 62 Ca 22/2007-2067, 14 June 2012, http://www.compet.cz/fileadmin/user_upload/sbirky_rozhodnuti/rozsudky/62Ca22_2007_2067.pdf (Czech).

France: Supreme Court confirms Orange's €41 million fine

Summary. The French Supreme Court (Court) has rejected Orange's final appeal against a fine imposed on Orange by the French Competition Authority (FCA) for allegedly exchanging sensitive information with its competitors in the mobile phone services sector.

Background. Article L. 420-1 of the French Commercial Code (which mirrors Article 101 TFEU) prohibits anti-competitive agreements between undertakings. The French authorities apply this provision to exchanges of commercially sensitive information between competing undertakings. Based on Article L. 464-2 of the French Commercial Code, the French authorities may impose fines of up to 10% of the consolidated turnover of the group of which the company is a subsidiary

during any financial year since the beginning of the infringing practices. The fines imposed are proportional to the gravity and the economic harm caused by the infringement.

Facts. The Court's final ruling comes after many years of divergent decisions given by both the Paris Court of Appeal (CA) and the Supreme Court in relation to alleged information exchanges between key mobile telephone operators, for which record fines have been imposed.

The Court previously confirmed the CA's decision to uphold the record fine of €442 million imposed by the FCA on the three mobile operators for entering into market sharing agreements. However, in this decision it had also partially annulled the fine imposed on Orange for exchanging information. The case was then brought back before the CA to challenge this annulment. On appeal, the CA ruled that Orange's fine would be upheld.

Orange consequently appealed this decision before the Court, on the grounds that the CA had not effectively assessed the gravity and the economic harm caused by the infringement.

Decision. The Court issued its decision on 30 May 2012. In relation to the issue as to gravity of the information exchange, the Court held that the exchanges were sufficient to prove that there had been anti-competitive conduct and that the companies were aware that their actions were in breach of competition law. This was based on the following factors: (i) the strategic and confidential nature of the information exchanged; (ii) the relatively long duration during which the exchanges had taken place (six years); and (iii) the only reason the exchanges ceased appeared to be because the investigation had been commenced by the FCA.

On the assessment of the damage caused to the economy, the Court noted that the mere existence of a harmful effect on the economy is sufficient to prove anti-competitive practice without requiring the authorities provide a precise evaluation of the economic harm. It was held that the Paris Court of Appeal had correctly considered the damage inflicted on the economy as a result of the information exchanges and the damage caused to consumers and market structures. The Court considered that there would be a detrimental impact on consumers as a result of their action through a restriction of competition.

Comment. The decision marks an end to the uncertainty behind this landmark case and confirms the strict approach of the FCA in relation to cases of information exchange.

Source: Cour de cassation, Chambre commercial, 30 May 2012, http://www.autoritedelaconcurrence.fr/doc/cass3_mobiles_mai12.pdf.

Germany: New anonymous whistleblowing system

Summary. The German Federal Cartel Office (FCO) has set up an electronic system for anonymous tip-offs of antitrust law infringements.

Background. In May 2006, the FCO introduced a leniency programme which gives cartel participants the possibility of receiving immunity or reduced fines from the FCO. However, leniency applications necessarily presuppose that the applicants disclose their full identity to the FCO. Therefore, potential informants fearing reprisals, e.g. employees of undertakings participating in a cartel, have so far been reluctant to contact the FCO.

Facts. On 1 June 2012, the FCO implemented an anonymous electronic whistleblowing system under which it will be possible for informants to provide the FCO with information about antitrust law infringements without being obliged to reveal their identity. In addition, the new electronic tool will allow the FCO to contact the informant for follow-up questions while maintaining anonymity throughout the whole process. The new whistleblowing system is based on a similar practice used by some regional criminal police offices in Germany, which has proved to be effective over the past years.

From the FCO's point of view, the new whistleblowing system will provide potential informants who have insider knowledge about antitrust law infringements with the means to anonymously approach the FCO without fearing reprisal for their whistleblowing. In addition, the FCO hopes to increase incentives for cartel members to uncover their cartel as principal witnesses under the FCO's leniency notice. The FCO believes that the introduction of the whistleblowing system marks a

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further stage of improvement in the FCO's cartel prosecution activities.

Comment. It remains to be seen whether the new anonymous whistleblowing system will add considerably to the effectiveness of the FCO's existing tools to fight antitrust law infringements. In particular, potential informants might submit as little information as possible in order to prevent the FCO from drawing conclusions about the informants' identity. This could decrease the quality of the submitted information with regard to the alleged antitrust infringement and reduce the likelihood of the FCO initiating a substantiated antitrust investigation.

Source: FCO press release, 1 June 2012, http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2012_06_01.php.

Hong Kong: First cross sector competition law enacted

Summary. Hong Kong's Legislative Council (LegCo) has enacted Hong Kong's first cross-sector competition law, the Competition Ordinance (CO).

Background. The provisions of the CO are expected to come into effect when the new Competition Commission (Commission) and Competition Tribunal (Tribunal) have been established, which the Hong Kong Administration estimates may take approximately 12 months. The CO contains broadly framed prohibitions against anti-competitive agreements and abuse of market power. It does not introduce a general merger control regime at this stage. However, it does introduce a revised merger regime for telecoms-related mergers to replace the existing regime. The CO provides the Commission and the Communications Authorities (the competition authorities) with extensive powers to investigate suspected breaches with potentially significant penalties and other relief powers.

Facts. The CO sets out the basic framework of the law. It will be supplemented by guidelines from the competition authorities, block exemptions and other regulations relating to exclusions and exemptions. A summary of some of the key provisions of the CO is set out below:

The CO prohibits three categories of conduct:

- the First Conduct Rule prohibits undertakings (a broad term encapsulating any entity engaged in commercial or economic activities) from engaging in agreements, concerted practices or decisions with the object or effect of preventing, restricting or distorting competition in Hong Kong;
- the Second Conduct Rule prohibits undertakings with a substantial degree of market power from abusing that power by engaging in conduct which has the object or effect or preventing, restricting or distorting competition in Hong Kong; and
- the Merger Rule prohibits undertakings from directly or indirectly carrying out a merger that has, or is likely to have, the effect of substantially lessening competition in Hong Kong. Initially, the Merger Rule will only apply to telecommunications related mergers.

Undertakings are exempt from the prohibition in the First Conduct Rule where the combined annual turnover of the undertakings involved does not exceed HK$200 million unless serious anticompetitive conduct, such as price fixing, market sharing, output controls and bid-rigging, has taken place. Undertakings are exempt from the Second Conduct Rule where their turnover does not exceed HK$40 million.

There are various exclusions and exemptions, e.g. based on economic efficiencies or public policy grounds. Clarification may be sought from the competition authorities where is it not clear whether conduct will be in breach.

Contravention of the CO may lead to penalties, including a pecuniary penalty of up to 10% of annual turnover Hong Kong for each year of infringement, up to a maximum of three years and/or disqualification for up to 5 years from acting as a director or being directly or indirectly involved in the management of a company. A broad range of other relief may also be imposed, including orders which (i) force divestiture of business operations, assets or shares, (ii) strike down or declare agreements void in whole or in part, and (iii) require damages to be paid to persons suffering loss as a result of the anticompetitive conduct. Interim injunctions may also be imposed which stop commercial conduct during investigations and pending prosecution.

Comment. The CO introduces competition law prohibitions of a sort not seen before in Hong Kong to many sectors of the economy. Those prohibitions will remain unclear until they are shaped by appropriate guidelines, block exemptions and decisions from the competition authorities, the Tribunal and the courts. It remains to be seen whether this new law will increase Hong Kong's competitiveness or whether it will simply add a layer of regulatory cost and uncertainty. The answer to this will lie in how well the law is interpreted and applied, and whether this is done in a manner consistent with Hong Kong's unique market policy.

Source: The Government of the Hong Kong Special Administrative Region Gazette, Competition Ordinance, Ord No 14, 2012, http://www.gld.gov.hk/cgi-bin/gld/egazette/gazettefiles.cgi?lang=e&extra=&year=2012&month=06&day=22&vol=16&no=25&gn=14&header=1&part=1&df=1&nt=s1&acurrentpage=12&agree=1&newfile=1&gaz_type=ls1.

Japan: JFTC reverses JASRAC cease and desist order

Summary. Japan's Fair Trade Commission (JFTC) has overturned a cease and desist order issued to the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC).

Background. According to the JFTC, JASRAC enjoyed a de facto monopoly over the copyright management business for copyright owners, an activity which used to require a licence from the Government. Since deregulation took place in 2001, several companies have entered the market. JASRAC's business model is known as a "comprehensive collection system", whereby it grants a licence allowing broadcasting companies to use all music under JASRAC's management for their programmes by charging on behalf of copyright owners an amount of royalties calculated as a certain percentage of the revenues of the broadcasting companies, regardless of the volume of music actually used in their programmes.

Facts. In 2009, the JFTC had issued a cease and desist order (the order) to JASRAC, as it considered that the comprehensive collection system was "private monopolisation" prohibited by Article 3 of the Act on the Prohibition of Private Monopolisation and the Maintenance of Fair Trade (Anti Monopoly Law or AML). Article 3 of the AML prohibits "private monopolisation" which is defined as business activities "by which any company, individually or by combination or conspiracy with other company, or by any other manner, excludes or controls the business activities of other companies, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade".

The JFTC considered that a broadcasting company, that had played a piece of music managed by a competitor of JASRAC, had to make a payment of royalties to this competitor for use of the music, while at the same time the company had to pay JASRAC royalties regardless of the actual volume of use of the music. As a result, broadcasting companies were losing interest in using music managed by JASRAC competitors who could be eliminated from the market. JASRAC objected on various grounds, including that the comprehensive collection system did not have the effect of excluding competitors from the market or substantially restraining competition in the market and requested the JFTC to reconsider its decision.

Decision. The JFTC revoked the order mainly on the grounds that there was insufficient proof to show that the broadcasting companies were avoiding using music managed by competitors because of additional royalties to those payable to JASRAC to the detriment of the competitor's business.

Comment. The JFTC's reversal of its own order is very unusual and is the first such reversal since 1994. As a result of this case, JFTC orders are likely to be scrutinised with a more critical eye in the future.

Source: JFTC decision on JASRAC (the private monopolisation regarding music copyright by the copyright management company), 14 June 2012, http://www.jftc.go.jp/pressrelease/12.june/12061401.pdf (in Japanese).

Romania: RCC closes private pension funds investigation

Summary. The Romanian Competition Council (RCC) has closed a 5-year long investigation into possible concerted practices among private pension funds administrators regarding alleged fixing of administration fees.

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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*).

In December 2007, the RCC opened an investigation on its own initiative into privately-managed pension funds, in connection with (i) a possible concerted practice regarding fixing of administration fees between 6 competitors and (ii) possible collusive behaviour regarding the distribution of clients between private pension funds administrators, thereby possibly infringing Article 101 of the TFEU. The RCC issued a decision regarding the latter allegation in September 2010, when it came to a view that 14 private pension funds had infringed Article 101 and imposed total fines amounting to EUR 1.2 million (2010 decision).

Facts. The RCC has decided not to continue the investigation regarding the possible fixing of administration fees for the privately-managed pension funds market.

The RCC ruled that there was not sufficient evidence to support a finding of collusive behaviour in this case. The maximum administration fee which can be charged is set by law, and the RCC concluded that the fact that competitors charge the same level of fees (which is the maximum threshold permitted by law) is not enough, by itself, to prove a concerted practice among competitors.

Comment. This decision was widely anticipated following the successful appeals by a number of private fund administrators of the 2010 decision, which resulted in their fines being reduced or entirely annulled.

Source: RCC Order no. 502, 11 June 2012, http://www.consiliulconcurentei.ro/uploads/docs/items/id7469/ordin_pilon_ii_site.pdf (available in Romanian only).

Spain: CNC opens infringement proceedings against Mediaset (formerly Telecinco) for non-compliance with commitments.

Summary. The Spanish Competition Authority (CNC) has opened infringement proceedings against Mediaset España Comunicación, S.A. (Mediaset) (formerly Telecinco) for failing to comply with commitments approved in connection with the Telecinco/Cuatro merger (the commitments).

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" is a "very serious infringement".

On 28 October 2010, the CNC Council had issued a resolution authorising the Telecinco/Cuatro merger subject to the commitments which were voluntarily offered by Mediaset.

Facts. On 6 June 2012, the CNC Council issued a resolution in which it found that Mediaset had not fulfilled the commitments because it: (i) failed to ensure that its advertising sale houses, Publiespaña and Publimedia, were functionally separate from one another, as the same people were members of the managing boards of both advertising sale houses; (ii) unjustifiably delayed the waiver of its pre-emptive rights to acquire audiovisual content, failed to grant option rights for adjustments to the three-year prescribed term of contracts in force and included prohibited clauses in certain contracts for the acquisition of audiovisual content; and (iii) implemented a strategy to link the sale of advertising on its channels, which was strengthened by the introduction of Mediaset's new advertising sales model.

On 7 June 2012 the Investigations Division of the CNC opened proceedings against Mediaset for the infringement of Article 62(4)(c) LDC.

Comment. The CNC has previously imposed a fine of EUR 3.6 million on Telecinco for failing to comply with its obligation to present an action plan in accordance with the commitments (in a decision of 27 July 2011). Also, on 16 May 2012, the CNC opened infringement proceedings against Mediapro, F.C. Barcelona, Sevilla (a football club) and Racing de Santander for failing to comply with a previous resolution dealing with the acquisition of football broadcasting rights. These cases

demonstrate the CNC's focus on strictly monitoring compliance with its resolutions.

Source: CNC press release, 7 June 2011, http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=143357&Command=Core_Download&Method=attachment.

United Kingdom: OFT reduces British Airways fine for fuel surcharge cartel

Summary. The Office of Fair Trading (OFT) has reduced the level of fine imposed on British Airways (BA) for alleged anti-competitive conduct relating to the pricing of passenger fuel surcharges.

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 that 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)).

Under the terms of an early resolution announced in August 2007 (the early resolution), BA agreed to pay a penalty of £121.5 million for price-fixing, which took into account a reduction under the OFT's leniency policy and an additional reduction for further co-operation with the OFT.

Facts. The OFT has reduced the fine imposed on BA for its infringement of the Chapter I prohibition to £58.5 million (the reduction). The OFT has stated that the reduction reflects legal developments regarding penalty setting for competition law infringements since the early resolution and the fact that the overall value added to the OFT's investigation by BA's co-operation was considered greater than had been originally anticipated.

Comment. The reduction follows the discontinuation in May 2010 of criminal proceedings brought by the OFT against a number of BA executives. The reduction also follows a series of judgments by the Competition Appeal Tribunal (CAT) in 2011 relating to the construction and construction recruitment cartels, in which the CAT significantly reduced the fines imposed by the OFT on appeal. The OFT has since consulted on revising its fining guidelines to bring them in line with the CAT's judgments.

Source: OFT press release, 19 April 2012, http://oft.gov.uk/news-and-updates/press/2012/33-12.

United Kingdom: Competition Commission requires AA and Lafarge to divest

Summary. The Competition Commission (CC) has required Anglo American PLC (AA) and Lafarge S.A. (Lafarge) (the parties) to sell a significant portfolio of operations before their proposed construction materials joint venture (the proposed JV) can go ahead

Background. The Office of Fair Trading (OFT) must refer an anticipated merger to the Competition Commission (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) (s*ection 33, Enterprise Act 2002*) (2002 Act).

Where the CC, on a merger reference from the OFT, decides an anticipated transaction has resulted, or may be expected to result, in an SLC, the CC must take reasonable and practicable action to remedy, mitigate or prevent the SLC and any resulting adverse effects. Such action can include accepting undertakings (*sections 41 and 82(1), 2002 Act*).

The OFT referred the transaction to the CC and, on 21 February 2012, the CC made a provisional finding that the proposed JV which considered that the proposed JV would give rise to a SLC in relation to certain markets for construction materials (provisional report).

Facts. The CC has published the final report of its investigation into the proposed JV (final report) which confirms the provisional report. In particular, the CC considered that it would increase the danger of coordination in the market for bulk cement and would reduce competition in local and national markets for other products including aggregates, asphalt and

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ready-mixed concrete.

Accordingly, the CC has required AA and Lafarge to sell an extensive package of operations before the proposed JV can proceed.

Comment. There are currently only four major UK producers of bulk cement and the CC's remedies are positioned in order to facilitate the entry into the UK cement market of a new player. The Chairman of the Anglo/Lafarge Inquiry Group, Roger Witcomb stated that the extensive sales required by the CC "*will help protect all customers' interests in these key markets, which is particularly important when one considers how much construction work is funded by the public purse.*"

Source: Competition Commission press release, 1 May 2012, http://www.competition-commission.org.uk/media-centre/latest-news/2012/May/joint-venture-must-sell-to-get-go-ahead.

United Kingdom: Metal packaging coatings merger referral

Summary. The UK's Office of Fair Trading (OFT) has referred the proposed acquisition of Metlac Holding S.r.l. (Metlac) by Akzo Nobel NV (Akzo Nobel) to the Competition Commission (CC) for further investigation.

Background. The 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*).

Facts. Akzo Nobel's acquisition of Imperial Chemical Industries plc in 2008 included the acquisition of a minority stake in Metlac and a call option in relation to the remaining shares in Metlac. Akzo Nobel sent a formal notice in writing to Metlac on 23 December 2011 to exercise the call option.

According to the OFT, Akzo Nobel and Metlac are both active in the manufacture and supply of metal packaging coatings and between them supply around 40-50% of the EEA. The OFT received a number of third party concerns relating to the loss of Metlac as a competitor in this product market.

The OFT's investigation found that Metlac exerts a significant competitive restraint on Akzo Nobel and its removal may result in price increases. The OFT therefore concluded that the merger has resulted or may be expected to result in an SLC within a market or markets in the UK and referred the merger to the CC. The CC is expected to report by 6 November 2012.

Comment. The OFT relied significantly on third parties' perception of Metlac as the strongest competitor in the metal packaging coatings market and on bidding and customer switching evidence which showed strong competition between Akzo Nobel and Metlac. This evidence was supported by strong complaints about the impact of the merger from, amongst others, a small number of large customers. This decision demonstrates that significant weight is placed on customers' opinions and perceptions by the OFT.

Source: OFT press release, 23 May 2012, http://oft.gov.uk/news-and-updates/press/2012/42-12.

United Kingdom: Competition Commission clears water merger

Summary. The Competition Commission (CC) has formally cleared the acquisition of Cambridge Water Plc (CW) by South Staffordshire Plc (SS).

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

The statutory questions that the CC has to answer in respect of the merger are (a) whether a water merger has taken place; and (b) if so, whether that merger has prejudiced, or may be expected to prejudice, the ability of the Water Services Regulation Authority (Ofwat) in carrying out its functions by virtue of the 1991 Act to make comparisons between different water enterprises.

SS completed the acquisition on 3 October 2011. The OFT referred the acquisition to the CC on 5 January 2012.

Facts. According to the CC, nearly all water services and sewerage services are provided by 21 companies, including 11 smaller water-only companies of which an SS subsidiary is the fourth largest, while CW is the third smallest. Although there is some scope for competition, the provision of water within an area is usually carried out under monopoly conditions. Ofwat sets price limits for water companies by using the company with the most efficient level of operating expenditure as a benchmark, and compares various water companies' costs to help set efficiency targets for capital expenditure. The CC tested whether the acquisition would have an adverse impact on Ofwat's ability to (i) use comparisons when setting price limits, (ii) monitor and incentivize service quality or (iii) use comparisons to identify and spread best practice by comparing the effects of the merger against the current competitive situation.

The CC found that the merger could be expected to have a negative impact on Ofwat's ability to make comparisons for the purpose of setting price controls and that the loss of CW could be expected to have a detrimental effect on Ofwat's use of league tables to incentivize the delivery of service quality. It was not convinced, however, that CW's contributions to innovation and best practice had had a significant impact on the rest of the water industry, so found that Ofwat's ability to identify and spread best practice and innovation would not be significantly impaired. The CC did not consider that the overall impact of the merger on Ofwat's use of comparisons could be expected to be sufficiently adverse and significant to amount to a prejudice under the 1991 Act.

Comment. This is the first time that a merger between two licensed water companies in England and Wales has been cleared unconditionally under the Enterprise Act 2002 – the CC's last review of a water merger (between South East Water and Mid Kent Water in 2007) resulted in both companies being required to make a one-off price reduction to their customers totalling £4 million.

Sources: Competition Commission press release, 31 May 2012, http://www.competition-commission.org.uk/media-centre/latest-news/2012/May/cc-formally-clears-water-merger.

United Kingdom: OFT dentistry market study

Summary. The Office of Fair Trading's (OFT) market study has identified a number of concerns with the current operation of the UK dentistry 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 Competition Commission (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*).

In September 2011, the OFT launched a market study into the dentistry market (the market study) prompted by a number of complaints reported by consumers, concerns raised by stakeholders in relation to local pockets of concentration in the NHS dentistry sector and OFT concerns regarding high barriers to entry into the market and restrictions on access to dental care professionals.

Facts. The market study identified five areas of concern:

- Patients have insufficient information to make informed decisions about their choice of dentist and treatments they receive. Patients may also be provided with inaccurate information by dentists regarding entitlement to receive particular dental treatments on the NHS, and as a result may pay more to receive private dental treatment;
- Restrictions prevent patients from accessing dental care professionals direct, such as hygienists, without a referral from a dentist. The OFT considers this to be unjustified and likely to reduce patient choice and dampen competition;
- The majority of current NHS dental contracts in England are not time-limited, and only a small volume of new contracts are put out to tender each year. It is therefore difficult for new dental practices to be established, and successful dental practices which offer a higher quality of service to NHS patients are prevented from expanding;

- Complexity of the complaints process for patients; and
- Instances of potential pressure selling by dentists of dental payment plans.

The OFT has identified a wide-ranging package of recommendations to address these concerns which includes the provision of clear, accurate and timely information for patients; direct patient access to dental care professionals; reform of the NHS dental contracts in England; simplification of the complaints process; and the publication of guidance for dentists on the sale of dental plans.

Comment. The OFT has provisionally concluded that it is not appropriate to make a market investigation reference on the UK dentistry market to the CC at this time and is in the process of collecting views from third parties on the proposed decision not to make a reference.

Source: OFT press release, 29 May 2012, http://oft.gov.uk/news-and-updates/press/2012/43-12.

United Kingdom: Bill dealing with establishment of the Competition and Markets Authority and the reform of UK competition law published

Summary. The Enterprise and Regulatory Reform Bill (the Bill), establishing the Competition and Markets Authority (CMA) and reforming UK competition law, has been published.

Background. On 15 March 2012, following a consultation, the government announced its reform of the UK competition regime and the bodies that enforce it. The government announced that it would introduce the Bill in the Queen's Speech 2012.

Facts. Parts 3 and 4 of the Bill establish the CMA and reform UK competition law respectively. The Bill amends various provisions of the Enterprise Act 2002 relating to mergers, markets and the cartel offence and various procedural provisions of the Competition Act 1998. The main provisions of the Bill are:

- The establishment of the CMA (Part 3, Clause 18) which must seek to promote competition, both within and outside the UK, for the benefit of consumers. Schedule 4 of the Bill provides detail on the governance and decision making structure of the CMA;
- The abolition of the Competition Commission (CC) and the Office of Fair Trading (OFT) (Part 3, Clause 19);
- Extension of the OFT's and CC's investigation powers in relation to mergers, so that the CMA will have a single set of powers that can be used consistently (Part 4, Clause 21);
- New statutory time limits relating to merger investigations (Part 4, Clause 24 and Schedule 8);
- The establishment of the power of the CMA to make a market investigation reference in relation to more than one market in the UK for goods or services where the market features concerned relate to any conduct of the suppliers or customers of the goods or services concerned, i.e. a cross-market reference (*Part 4, Clause 35 and Schedule 9*);
- The power of the CMA to require individuals to answer questions as part of an anti-trust investigation under the Competition Act (Part 4, Clause 31);
- The lowering of the threshold for when interim measures may be imposed from "serious, irreparable damage" to "significant damage" (Part 4, Clause 35); and
- The removal of the "dishonesty" requirement in the cartel offence (Part 4, Clause 39).

Comment. While there should be some efficiencies for businesses in the merger of the OFT and the CC, it remains to be

seen whether the checks and balances within the CMA will be sufficient and, in particular, whether the current "fresh pair of eyes" of the CC can be replicated within a single institution.

Source: Enterprise and Regulatory Reform Bill, http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0007/13007.pdf.

United States: Executive faces imprisonment for HSR filing violation

Summary. A Hyosung Corporation (Hyosung) executive faces imprisonment for altering documents submitted with an affiliate's filing under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act).

Background. The HSR Act and implementing regulations require companies engaged in certain transactions to file their transactions with the U.S. Department of Justice (DOJ) and the U.S. Federal Trade Commission (FTC). In addition to delineated financial disclosures, the HSR Act requires filing companies to provide the FTC and DOJ (Antitrust Agencies) with certain documents relating to the transaction.

The federal criminal offense of obstruction of justice carries a maximum fine for a corporation of $500,000 per count and carries a maximum penalty for an individual of 20 years in prison and a fine of $250,000.

Facts. Kyoungwon Pyo, an executive at Hyosung, participated in and directed the identification, review, and collection of documents for inclusion in the HSR filing of Hyosung's affiliate Nautilus Hyosung Holdings, Inc. (Nautilus). In August 2008, Nautilus filed its planned acquisition of Triton Systems of Delaware, Inc. The DOJ reviewed the transaction. Nautilus eventually abandoned the transaction before the DOJ reached a decision on whether or not to challenge the transaction.

The DOJ subsequently filed a complaint alleging that Pyo falsified the subject documents submitted by Nautilus. The DOJ stated in a press release that the alterations misrepresented and minimised the competitive impact of the proposed acquisition.

Nautilus pled guilty to obstruction of justice and agreed to pay a $200,000 fine. Pyo pled guilty to obstruction of justice and agreed to a five-month prison term. The plea bargain is under consideration by the U.S. courts.

Comment. This is the first case in which an individual has been criminally charged with obstruction of justice relating to an HSR Act filing. The charges reflect the willingness of the Antitrust Agencies to prosecute criminally fraudulent filings and are a reminder to future filers of the consequences for failing to properly perfect HSR Act filings.

Sources: DOJ press release, May 3, 2012, http://www.justice.gov/opa/pr/2012/May/12-at-572.html; U.S. v. Kyoungwon Pyo, D.D.C., May 3, 2012, http://www.justice.gov/atr/cases/f282900/282974.pdf.

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