

COMPETITION LAW MONTHLY BULLETIN

AUGUST 2009

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Commission Issues latest draft of new block exemption for supply and distribution agreements

The European Commission is calling for comments on its proposal for a revised Block Exemption Regulation and Guidelines on supply and distribution agreements (vertical agreements). The current Regulation is due to expire in May 2010. Based on its experience in their application and on stakeholders' comments, the Commission considers that the rules are working well overall and should not be fundamentally modified. The main suggestions for amendments intend to take account of recent market developments, in particular the increased buyer power of big retailers and the evolution of on-line sales on the Internet.

Specifically, the Commission proposes the following:

Market share cap

Vertical agreements will benefit from the new Block Exemption on the condition that the market share held by each of the undertakings party to the agreement (i.e. the supplier and the distributor) does not exceed 30% on any of the relevant markets affected by the agreement (the VABE currently generally only refers to the supplier's market share). This change is considered necessary as the Commission's experience to date has demonstrated that vertical agreements can give rise to competition concerns where either supplier or distributor already has market power.

Online sales

In order to address the changes that have arisen as a result of the evolution of sales on the internet, the Commission proposes updating the Guidance to reflect the realities of e-commerce. The prohibition on passive sales to other territories remains unchanged and the starting point is that general advertising or promotion in media or on the internet that reaches customers in other distributors' (exclusive) territories or customer groups will usually be considered as passive sales and must therefore not be restricted.

However, the supplier can require that the distributor sells at least a certain absolute amount of the products off-line to ensure an efficient operation of its brick and mortar outlet(s) and that the distributor's online activity remains consistent with the supplier's distribution model.

Upfront access payments (i.e. fees that suppliers pay to distributors in order to get access to their distribution network)

Upfront access payments will be block exempted when both the supplier's and buyer's market share on their respective downstream markets does not exceed 30%. Above the market share threshold, guidance is provided for the assessment of upfront access payments in individual cases.

Category management agreements (i.e. the distributor entrusts the supplier with the marketing of a category of products)

These will be block exempted when both the supplier's and buyer's market share on their respective downstream markets does not exceed 30%. Above the market share threshold guidance is provided for the assessment of category management agreements in individual cases.

Resale price restrictions ("RPM")

Whilst this is generally considered as a hardcore restriction, it will be open to parties to argue that the benefits of the practice in particular circumstances outweigh the anti-competitive effects. For example, RPM may lead to efficiencies where a manufacturer introduces a new brand or enters a new market (as RPM may be helpful to induce distributors to develop demand for the product). Fixed resale prices may also be necessary in a franchise system for a short term low price campaign.

Next Steps

The Commission invites interested third parties to comment by 28 September 2009. This consultation covers all issues dealt with by the draft Regulation and Guidelines. The Commission is seeking comments not only on the overall functioning of the current rules, but also on the extent to which recent market developments should impact on the new Regulation and especially regarding its suggested approach concerning buyers' market power and restrictions on online sale.

MERGERS

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EU

1 [Lufthansa offers enhanced commitments in bid to see Austrian Airlines takeover approved](#)

Lufthansa has submitted a revised package of proposed commitments to the Commission in connection with the planned acquisition of Austrian Airlines. This follows the Commission's earlier statement that the commitments originally offered were insufficient to overcome competition concerns on a number of routes out of Vienna that could lead to a lack of choice and increased fares for passengers.

Competition Commissioner Neelie Kroes is reported to have instructed her services to draft a conditional clearance decision for the planned merger between Lufthansa and Australian Airlines.

Besides the merger clearance aspects, there are elements of state aid control to be looked at, as the merger goes together with a public takeover offer. This offer is subject to approval by the Commission of €500 million in restructuring aid to be granted to Austrian Airlines by the Austrian government. Nevertheless, there are clear signals that a positive decision is also forthcoming in the financial aid proceedings.

Lufthansa had originally set a deadline of 31 July for the completion of the merger, failing which it threatened to pull out of the deal, but has now asked the Austrian competition authorities for an extension of time up to 31 August in order to complete the transaction.

The Commission's initial investigation found that the proposed merger transaction would lead to competition concerns with respect to, among others, the routes from Vienna to Frankfurt, Munich, Stuttgart, Cologne, Zurich, Geneva and Brussels. Some third parties remain dissatisfied with Lufthansa's suggestions for remedying these concerns, the opponents of the deal stressing the existence of the aforementioned regional dominance, which would be further enhanced with the takeover of Austrian Airlines. Lufthansa argues that the merger with Austrian airlines will have positive effects on consumer welfare, revenues, costs, employment

2 Decision in Oracle/Sun merger expected by provisional deadline of 3 September

The proposed takeover of Sun Microsystems by software company Oracle has been notified to the Commission, which has set a provisional deadline of 3 September for a decision to be made on the transaction's impact on competition in the relevant markets. The US Department of Justice's antitrust investigation into the merger remains ongoing, and the deadline was extended in June after concerns about the licensing of Sun's Java technology were raised. The respective competition investigations are likely to push the completion of the transaction back from the planned deadline of late August until at least September.

30 July 2009

3 Commission approves acquisition of Chrysler by Fiat

On 24 July 2009, the Commission approved the acquisition of Chrysler Group LLC by Fiat. On 30 April 2009 Chrysler filed for protection from its creditors under Chapter 11 of the US Bankruptcy Code and announced plans for a global strategic alliance with Fiat. On 10 June 2009, after a judicial procedure, the company formerly known as Chrysler LLC sold substantially all of its assets, without certain debts and liabilities, to a new company that will operate as Chrysler Group LLC. Fiat has acquired an initial 20% equity interest in Chrysler and entered into a number of agreements with the company to provide it with access to certain Fiat technology, platforms and power trains. Despite only owning 20% in Chrysler, which it may increase in future, Fiat holds rights in the decision-making process of Chrysler that will enable it to exercise sole control over Chrysler.

The Commission found that there are only limited horizontal overlaps between the activities of Chrysler and Fiat. The merger would therefore not significantly change the competitive structure of the markets for the manufacture and supply of passenger cars. Fiat is present on a number of markets such as automotive lighting and transmission systems that are purchased by manufacturers of passenger cars. The Commission found that these vertical links would not lead to competition concerns.

24 July 2009

4 Pfizer's Wyeth acquisition gets Commission approval subject to divestments

The Commission has approved under the EU Merger Regulation the proposed acquisition by Pfizer of fellow US pharmaceutical and health products company Wyeth, provided that the merged entity makes certain divestments. The Commission's investigation found that, while the companies' human healthcare activities were largely complementary, the transaction as originally proposed would have led to competition issues in several national markets for the supply of animal health products, potentially leading to restricted choice and higher prices for consumers. Accordingly, Pfizer offered commitments to make a number of divestments, including the sale of businesses supplying feline and equine vaccines, sedatives, antibiotics, paracitocides and rehydration salts, as well as the disposal of an Irish manufacturing facility. The Commission's view was that these divestments were sufficient to assuage any concerns about the transaction's impact on competition.

IP/09/1161 – 17 July 2009

UK

5 OFT refers Sports Direct / JJB Sports to Competition Commission

The Office of Fair Trading (OFT) has referred Sports Direct International plc's acquisition of 31 stores from JJB Sports plc to the Competition Commission (CC). The CC has been asked to decide whether the acquisition may be expected to result in a substantial lessening of competition within any market or markets in the UK.

Sports Direct and JJB are the two largest specialist retailers of sports-related clothing, footwear and equipment in the UK. The OFT's investigation earlier this year found that the acquisitions raised competition concerns in five local areas where Sports Direct already had stores. Sports Direct offered to divest stores in these areas to upfront buyers approved by the OFT, in lieu of a reference to the CC, but has been unable to

do so in the required timescale. The CC is expected to report by 21 January 2010.

7 August 2009

OTHER

6 Norwegian clearance for Live Nation/Ticketmaster merger

The Norwegian competition authority (NCA) unconditionally cleared Live Nation's planned purchase of ticketing and marketing company Ticketmaster. The potential competition concerns investigated by the NCA were similar to those currently being considered by the UK competition authorities. Live Nation was asked to submit a 'complete' notification to the authority in May, but the regulator decided not to further intervene by issuing an intervention notice. The NCA found that "based on the facts gathered in the case, and given the vertical nature of the merger, the authority has concluded that there is not sufficient evidence to start a phase 2 investigation." The deal is still under review in the US and UK.

16 July 2009

ANTITRUST

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EU

7 EDF and GDF Suez each hit with €553 million fines for gas market sharing

On 8 July 2009, the Commission announced that E.ON and GDF Suez were each fined € 553m for market sharing. The anticompetitive agreement in question dated back to 1975, when Ruhrgas A.G. (now part of the E.ON group) and Gaz de France (now part of the GDF Suez group) jointly built a pipeline transporting Russian Gas from the South Eastern part of Germany to its South Western borders. Both companies had agreed in a written document that they would not compete against each other on their respective market. While this agreement was acceptable when drafted in 1975, it became illegal under European law from 2000 when the 1998 Gas Market Liberalisation Directive came into force. Both companies have continuously denied continuation of the enforcement of the said agreement after 2000 but the Commission found that the arrangement was only abandoned in 2005.

The hefty fines imposed by the Commission are identical because it was considered that both companies were equally liable for the illicit scheme. It has been noted that it is one of the highest fines in total for a horizontal price-fixing / market-sharing case. GDF Suez announced in a press release dated 8 July that it would file an appeal against the Commission decision with the Court of First Instance.

IP/09/1099 – 8 July 2009

8 Commission consults on replacement of motor vehicles block exemption

On 22 July 2009, the Commission published for consultation a Communication setting out its views on the future competition law framework for the motor vehicle sector, following the expiry of the current motor vehicles block exemption regulation in May 2010. It is proposing that the general rules for vertical agreements (as contained in any new regulation that would replace the current vertical agreements block exemption from May 2010) should apply to agreements for the sale of new motor vehicles. However, this would be accompanied by sector specific guidelines on certain issues and there would be a transitional period of three years until May 2013. In relation to the aftermarket for servicing and repairs, the Commission considers that, from 31 May 2010, the general rules for vertical agreements should apply, in conjunction with sector specific guidelines and/or an additional, more focused sectoral block exemption regulation. This approach reflects the fact that there is less intense competition in the aftermarket than there is in the primary market for the sale of new cars, where the Commission has found no evidence of significant competition shortcomings.

22 July 2009

9 Calcium carbide cartel participants fined a total of €61 million

The Commission has imposed a total of € 61,120,000 fines on nine companies – Almamet, Donau Chemie, Ecka Granulate, Holding Slovenske elektrarne (for its former subsidiary TDR Metalurgija), Novácke chemické závody and its former parent 1.garantovaná, SKW Stahl-Metallurgie and its former parent companies Evonik Degussa and Arques industries – for violating the EC Treaty's ban on cartels and restrictive business practices. Akzo Nobel also participated but was not fined because it revealed the existence of the cartel to the Commission. Between 2004 and 2007 the companies fixed prices and shared markets for calcium carbide powder, calcium carbide granulates and magnesium granulates in a substantial part of the European Economic Area. Calcium carbide powder and magnesium granulates are used in the steel industry for desulphurisation or deoxidation purposes. Calcium carbide granulates are used for the production of acetylene, a welding gas. The fine for Evonik Degussa was increased by 50% because it had previously taken part in similar infringements.

22 July 2009

UK

10 CAMRA issues super-complaint over beer supply ties

The OFT received, on 24 July 2009, a super-complaint from the Campaign for Real Ale (CAMRA) relating to the supply of beer in pubs.

The super-complaint submitted by CAMRA (called 'A Fair Share for the Consumer') states that high pub rents and 'tied' beer prices are driving many pub landlords out of business. CAMRA alleges that these practices are contributing to the destruction of Britain's pubs through pub closures and under-investment in pub facilities. CAMRA states that more than seven pubs close every day. In the super-complaint CAMRA has asked the OFT to look at concerns regarding the beer-supply and pub-landlord industry, including the impact of the operation of supply ties within the UK pub industry.

The OFT is currently considering the issues raised in the super-complaint, in order to establish whether any feature, or combination of features, in a relevant market is or appears to be significantly harming the interests of consumers. The OFT will publish a response to the complaint within 90 days.

24 July 2009

11 OFT issues supplementary Statement of Objections in dairy sector investigation

The OFT has issued a Supplementary Statement of Objections (SSO) arising from its long-running investigation into the alleged fixing of prices for dairy products between 2002 and 2003. The OFT investigation looked into the conduct of a number of large supermarkets and dairy processors and an initial Statement of Objections was issued in 2007. The majority of the parties, including Asda and Sainsbury's, admitted price-fixing and agreed to pay fines or applied for leniency. However, Morrisons and Tesco have continued to deny participating in the cartel and the SSO sets out additional evidence to support the OFT's 2007 investigative findings. Morrisons and Tesco will now have the opportunity to make written and oral representations to the OFT before a final decision is reached.

23 July 2009

OTHER

12 Microsoft/Yahoo search agreement unlikely to raise competition concerns

On 29 July 2009 Yahoo! and Microsoft announced an agreement that will, generally, result in Microsoft powering the Yahoo! search function and Yahoo! obtaining exclusive worldwide advertising sales rights.

Under the terms of the agreement, which is to last for ten years, Microsoft will acquire an exclusive ten year licence to Yahoo!'s core search technologies, and will have the ability to integrate Yahoo! search technologies into its existing Web search platforms. Yahoo! will become the "exclusive worldwide relationship sales force" for both companies' premium search advertisers. Under the agreement, it is proposed that Microsoft will compensate Yahoo! through a revenue sharing agreement on traffic generated on Yahoo!'s network. It is expected that the proposed deal will be notified, to antitrust regulators in both the US and

Europe, as a deal which is pro-competitive and a challenge to Google in a market where the Google search engine has become increasingly powerful in recent years.

It is understood that Microsoft and Yahoo!, as a result of the proposed agreement, will have a combined market share of between 25 to 30 % in the US, providing a viable alternative to Google. In Europe, however, the companies would have a much greater distance to make up, with Google having approximately 90 % share of the paid search market. From an antitrust perspective, this may be beneficial to enhancing the apparent pro-competitive nature of the deal and reinforcing its credentials as assisting the emergence of a rival to Google.

29 July 2009

13 Italian football governing body to be investigated for suspected abuse of dominance

The Italian Competition Authority (the AGCM), on 22 July 2009, indicated that it will open an investigation into whether Lega Calcio (the Italian Football League), abused its dominant position in the centralised marketing of its rights relating to the preparation of “packets” of Serie A TV rights for the 2010-2011 and 2011-2012 seasons, respectively.

In the view of the AGCM, Lega Calcio's chosen method for making up the ‘packets’ could be in conflict with competition principles. For instance, the AGCM believe that the “packets”, as they are currently proposed, would seem to be tailor-made for the main pay-TV operators and do not, therefore, ensure a truly competitive procedure. This, in turn, hinders the entry and growth of other businesses in the sector.

Moreover, the AGCM believes that Lega Calcio seems to have preferred to limit competition among pay-TV operators with a view to ensuring its own expected revenues and avoiding the uncertainty that is linked to the results of open tendering. The implications of this lower level of competition among pay-TV operators may result, according to the AGCM, in a negative effect for consumers, who may be forced to pay higher prices for a product offering inferior levels of variety and quality.

On a different note, in relation to the procurement and competitive procedures that apply to the “packets” the AGCM also expressed concern. In the AGCM's view, the “packets” (as currently defined by Lega Calcio) do not ensure absolutely fair, transparent and non-discriminatory conditions for those taking part in the competitive procedures and do not allow for participation by multiple operators within the different platforms.

22 July 2009

14 New Spanish laws and regulations will now require competition impact assessment

At its meeting on 3 July 2009, the Spanish Council of Ministers approved the Royal Decree regarding Regulatory Impact Assessment Reports. The Royal Decree, for the first time, makes analysis of potential impact on competition mandatory when evaluating draft laws and regulations. The wording of the Royal Decree has paid special attention to assessing the economic impact of regulatory proposals, with a comprehensive approach that goes beyond just estimating the budgetary cost and with emphasis on the implications for competition. The future Regulatory Impact Assessment Reports, which will accompany all legislative bills and regulatory proposals, must include an examination of the proposed policy's effects on free competition in the markets.

Making inclusion of competition assessment mandatory in future Reports is in line with two of the most important documents made public by the National Competition Commission (*Comisión Nacional de la Competencia*) (CNC) since its creation. These are the 2008 report Recommendations to Public Authorities for More Efficient and Pro-competitive Market Regulation and the 2009 Guide for Preparing Competition Assessment Reports on Regulatory Proposals, which will no doubt prove very valuable to regulators, law and policy makers at all levels when carrying out the competition analysis now required by the Royal Decree.

The CNC will going forward pay special attention to this obligation in all regulatory drafts, making sure that the content of the Reports contains an in-depth analysis of the potential impact on competition.

3 July 2009

15 [Commission issues latest guidelines on restructuring aid to banks](#)

The Commission announced, on 23 July 2009, a Communication explaining its approach to assessing restructuring aid given by Member States to banks. This approach is based on the following three fundamental principles: i) aided banks must be made viable in the long term without further state support, ii) aided banks and their owners must carry a fair burden of the restructuring costs and iii) measures must be taken to limit distortions of competition in the Single Market.

The Communication, which is temporary and is in force until 31 December 2010, explains how the Commission intends to apply these principles in the current financial crisis, with a view to contributing to a return to viability of the European banking sector. It emphasises that in order to devise strategies for a sustainable future, banks will have to stress test their business. This will involve, amongst other things, reviewing the Restructuring Plan and business model of the bank and highlighting the banks strengths and weaknesses.

The Communication also makes it clear that aided banks and their capital holders/investors must bear adequate and appropriate responsibility and contribute to the restructuring of the bank as much as possible with their own resources. This is recognised as providing an incentive to both the aided bank and the capital holders/investors to avoid excessively risky strategies and to contribute towards a level playing field in the banking sector (and prevent aided banks gaining an unfair advantage).

IP/09/1180 – 23 July 2009

16 [Recapitalisation of HypoSteiermark gets Commission green light](#)

The European Commission has concluded, under EC Treaty State Aid rules, that a recapitalization of Hypo Steiermark, a regional Austrian bank, which was carried out by the public and the private owners pro rata to the pre-existing ownership structure does not constitute state aid.

The capital increase was carried out by the public owner Land Steiermark and the private owner Raiffeisen Steiermark on a pro rata basis, thus preserving existing share-ownership stakes. The share purchase was subject to identical conditions for both investors.

The private – and majority – owner's participation in the capital increase demonstrates that the conditions are acceptable to a market economy investor. The Commission therefore concluded that the measure did not constitute state aid.

IP/09/1183 – 23 July 2009

EU

17 [Intel to launch appeal against record €1.06 bn fine](#)

Intel has lodged a legal challenge at the Court of First Instance against the Commission's decision to fine the firm €1.06 billion for abusing its dominance and excluding rivals. The fine was the highest ever levied by the Commission on a single company and represented 4.15% of Intel's turnover in 2008. Intel's application asserts that the Commission misinterpreted and ignored certain evidence when constructing its case. The Commission's decision, adopted in May this year, found that Intel "gave wholly or partially hidden rebates to computer manufacturers on condition that they bought all, or almost all, their x86 CPUs from Intel". It also unearthed evidence of "direct payments to a major retailer on condition it stock only computers with Intel x86 CPUs." Intel declared its intention to appeal on the day of the Commission's announcement stating that it

took "strong exception" to the decision, believing it to "[ignore] the reality of a highly competitive microprocessor marketplace - characterised by constant innovation, improved product performance and lower prices."

22 July 2009

18 German game distributor signals intention to appeal CFI cartel decision

A German video-game distributor (Activision Blizzard Germany, formerly known as CD-Contact) has brought a challenge against a judgment of the Court of First Instance (the "CFI") to uphold a ruling by the Commission that imposed a fine against the company for colluding with Nintendo to restrict parallel trade in video games.

Whilst the CFI, in its decision of April 2009, agreed with the Commission's decision to fine CD-Contact for attempting to restrict parallel trade in video games across member states for a period of seven years, it did reduce the fine that CD-Contact and Nintendo had to pay. Of note is that another company, Itochu, involved in the same proceedings who appealed the decision of the Commission had its fine maintained. Despite the reduction in its fine (CD-Contact is now subject to a fine of €500,000 reduced from €1 million) the company is now seeking annulment of the decision altogether.

27 July 2009

UK

19 Shell and Exxon-Mobil to face compensation claims from paraffin wax cartel victims

Following the Commission's decision to levy a €676 million fine on the participants of a paraffin wax cartel, plaintiff firm Hausfeld LLP has launched legal proceedings in the High Court against Shell and ExxonMobil, two of the cartel's participants. The claimants that Hausfeld is representing are a number of candle manufacturers based in Europe who argue that they suffered losses as a result of agreements between the cartel participants to fix the price of paraffin wax between 1992 and 2005.

Hausfeld's claim alleges that the defendants are jointly and severally liable for the actions of the cartel members. In the meantime, an appeal is ongoing at the Court of First Instance against the Commission's decision, which imposed a fine of €84 million on ExxonMobil (Shell, having blown the whistle on the cartel, escaped a fine). The claim marks a further example of a claimant looking to take the first steps of a cartel damages claim before regulatory proceedings are completed in order to ensure that the claim is not time-barred.

29 July 2009

20 Crest Nicholson scores success against OFT over refusal to re-open fast-track offer

The High Court has ruled in favour of construction company Crest Nicholson in its judicial review of a decision by the OFT to refuse to re-open an offer of co-operation in an investigation into bid-rigging in the building sector. The OFT had made a fast track offer to Crest Nicholson regarding co-operation in the investigation into collusive tendering in November 2007, an offer that Crest Nicholson rejected in December 2007.

The High Court held that the OFT's refusal to re-open the offer in May 2008 constituted a breach of the principle of equal treatment (on the grounds that the company did not have the same opportunity to make an "informed decision" as the other parties involved in the investigation), as well as the principle of procedural fairness (since the company had insufficient time to understand the essence of the case against it). Nevertheless, the OFT has indicated that the court's decision does not require it to re-open the offer and should not impact on the time frame for the publication of the enquiry, expected to be in the autumn.

24 July 2009

If you require further information or advice on any of the items covered, then please contact either Diarmuid Ryan in London or Tom Pick in Brussels who are both partners in our EU Competition team.

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