Hammonds

COMPETITION LAW MONTHLY BULLETIN

SEPTEMBER 2009

Please click on the following links to go directly to your area of interest:

CIBA Vision fined €11.5 million by German Competition Authority

CIBA Vision, the leading German contact lens producer, has been fined €11.5 million by the German Competition Authority ("**BKartA**") for breaching competition law by restricting online trade and pressurising online retailers to follow recommended resale prices.

The BKartA found that CIBA Vision had implemented a series of agreements with its direct customers, prohibiting online trading and, in particular, preventing sales of certain types of lenses via the online auction platform E-bay. In addition, CIBA Vision had operated a sophisticated "control and intervention" system, used to monitor the resale prices set by online retailers. If the resale prices offered by online retailers were found to undercut CIBA Vision's recommended resale prices by a particular amount, CIBA Vision would contact the reseller concerned and request that they increase their prices. The BKartA concluded that in many cases, CIBA Vision's attempts to increase resale prices this way had been successful.

The BKartA further confirmed that, although the practice of unilaterally recommending resale prices is not prohibited under German competition law, making contact beyond the mere communication of recommended resale prices by exerting pressure on resellers to increase resale prices constitutes an anti-competitive agreement or concerted practice in violation of the competition rules. In its press release the BKartA stated that agreements will consequently be found to fall foul of the competition prohibition contained in Paragraph 1 of the German Act Against Restraints of Competition where it can be established that the supplier has intervened with a view to coordinate the pricing of the reseller, and both parties agree on the reseller's future pricing conduct.

The BKartA also noted that vertical resale price coordination by a supplier may eventually result in a horizontal agreement or concerted practice between resellers. This could be established even where no direct contact between resellers takes place provided all the resellers follow the resale price recommendations of the supplier and rely on their competitors to do the same.

CIBA Vision contests the factual and legal findings of the BKartA but has expressed its intention not to appeal the decision of the BKartA.

MERGERS

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EU

Decisions

1 Lufthansa's Austrian Airlines acquisition gets Commission approval subject to conditions

The European Commission has approved, under the EC Merger Regulation, the proposed acquisition by Lufthansa of Austrian Airlines, provided the merged entity complies with certain conditions. The acquisition is part of the restructuring and privatisation of Austrian Airlines, made possible following the Commission's approval of a State aid grant of €500 million to Austrian Airlines by the Austrian Government.

The Commission's initial investigation found that the proposed merger transaction would lead to competition concerns on certain routes, potentially resulting in reduced consumer choice and the likelihood of increased prices. Lufthansa proposed a remedies package, intended to prevent further investigation, but this offer was declined by the Commission for failing to resolve all of the issues it identified. The Commission, therefore, commenced a Phase II investigation and subsequently received another package of proposed commitments from Lufthansa on 31 July 2009.

Following a thorough investigation, the Commission reduced the number of routes about which it had concerns to just five: Vienna to Frankfurt, Munich, Stuttgart, Cologne and Brussels. Lufthansa's revised remedies package resolved all of the Commission's outstanding concerns. It included a commitment to offer landing/take-off slots according to an efficient and timely slot allotment system, thereby allowing new entrants to operate flights or existing competitors to expand services on these routes. In addition, new entrants are to be given grandfathering rights over relevant slots if a route has been operated by them for a certain period of time. Other ancillary measures were also provided including participation in Lufthansa's Frequent Flyer Programme.

The Commission was satisfied that these commitments would resolve issues associated with slot congestion, which would otherwise act as a barrier to entry on the five routes, and considers that the remedies should work to encourage the expansion of existing operators and the entry of new operators and, therefore, maintain effective competition.

IP/09/1255 – 28 August 2009

2 Commission launches Phase II investigation into planned acquisition of Sun Microsystems by Oracle

The European Commission has announced its decision to open an in depth Phase II investigation, under the EC Merger Regulation, into the proposed takeover of Sun Microsystems, a US software and hardware provider, by software company Oracle.

In its initial investigation, the Commission identified serious competition concerns because the proposed transaction would merge two major competitors in the already highly concentrated market for databases. Oracle's databases and Sun's MySQL database compete in many of the same sectors of this market and the competitive constraint provided by MySQL is likely to increase as its functionality improves. The Commission also commented that anti-competitive effects might still exist despite the "open source" nature (which allows users access to the source code and certain other rights normally reserved for copyright holders) of Sun's MySQL database and it was, therefore, concerned about the

impact of the proposed transaction.

The Commission now has until 19 January 2010 to decide whether the merger is compatible with the common market.

IP/09/1271 - 3 September 2009

3 Commission approves joint venture between Bertelsmann and Kohlberg Kravis Roberts

The European Commission has approved, under the EC Merger Regulation, the proposed acquisition of joint control by Bertelsmann AG and Kohlberg Kravis Roberts & Co LLP ("KKR") over a newly created music publishing and rights management venture. International media company, Bertelsmann and private equity firm KKR, will first establish a joint venture into which Bertelsmann will contribute its activities in music publishing and recorded music. The new joint venture will then acquire music from Crosstown Songs America LLC.

The Commission has decided that the proposed concentration would not be anti-competitive, as it would only have a very small share of the music publishing and recorded music market. On analysing the vertical links between the joint venture's activities in music and publishing and Bertelsmann's and KKR's activities in TV and radio, the Commission found that the limited size of the joint venture would also prevent them from foreclosing their competitors.

IP/09/1291 – 9 September 2009

UK

Decisions

4 Competition Commission approves acquisition of Julian Graves by Holland and Barrett

The CC has approved the acquisition of Julian Graves Limited by NBTY Europe, the owner of Holland and Barrett. In its final report, the CC confirmed its provisional findings that the merger will not reduce the level of competition in the retail market for nuts, seeds and dried fruits in the UK or any local market in the UK.

Although both Holland and Barrett and Julian Graves competed in the market for nuts, seeds and dried fruit, the relevant product market also included supermarkets and other health food shops providing a range of these products at comparable prices. Following a thorough analysis of the market, the CC concluded that there was sufficient competition within the market to constrain the merged entity and prevent it from profitably implementing price increases.

The CC also considered, but rejected, the application of the failing firm defence. The failing firm defence allows a merger, that would otherwise be blocked due to its harmful effect on competition, to proceed, provided certain conditions are met. Although Julian Graves was in severe financial difficulty, less anti-competitive alternatives to the merger were conceivable, such as the acquisition by a financial buyer and, therefore, this argument was not accepted.

20 August 2009

5 Competition Commission publishes provisional findings in Stagecoach/Preston Bus merger

Following a referral from the OFT in May 2009, the CC has published its initial findings following the

acquisition of Preston Bus Limited by Stagecoach Group Plc.

The CC has concluded that the merger is likely to lead to a substantial lessening of competition in the market for the provision of commercial bus services. In particular, the CC noted that the loss of competition resulting from the merger would decrease potential new entrants in the market and would result in a worsening of price and non-price factors in relation to which the parties previously constrained each other. They considered, therefore, that the merger would lead to higher prices than would otherwise be the case and a decline in service levels.

In order to address the lessening of competition, the CC is considering suitable remedies which include the possible sale of Preston Bus in whole or in part and a series of behavioural remedies such as restricting Stagecoach's responses to new entries in the market and controlling aspects of Stagecoach's behaviour.

The CC invited comments on the possible remedies and comments from third parties throughout September and intends to publish its final report by 12 November 2009.

42/09 – 3 September 2009

6 Competition Commission consults on review of CRR undertakings

Following the OFT request in May this year, the CC has published for consultation its provisional decision on a review of ITV's Contracts Rights Renewal (CRR) undertakings. The undertakings were given in 2003 as a condition of the merger between Carlton Communications Plc and Granada Plc. The OFT had requested a review of the undertakings to establish whether or not circumstances had changed sufficiently to warrant their variation or removal. In its provisional decision, the CC considered that the situation had not changed substantially enough to justify ITV's release from the undertakings, however, it highlighted that there may be scope for alteration.

The CC is, therefore, seeking views on possible variations to the undertakings, including widening the definition of ITV1 to include any ITV+1, or ITV1 High Definition channel that ITV decides to launch, and appropriate ways to deal with the decline of the market position of ITV1. It is also seeking views on alternative ways of dealing with any unintended competition concerns which may have arisen as a result of the CRR undertakings in practice. The CC is due to publish its final decision at the end of the year.

45/09 – 15 September 2009

7 Competition Commission extends inquiry period for Sports Direct/JJB merger

On the 16 September 2009, the CC decided to extend the period of reference in the Sports Direct/JJB merger. This decision was made to enable Sports Direct to provide the information and documents required under the Notice under section 109 of the Enterprise Act 2002 requiring the provision of certain information, which was issued on 14 September 2009. In making the decision, the CC stated that it had regard to the press release by JJB on 10 September 2009 which indicated that JJB was assisting the OFT in an investigation into anti-competitive conduct in the sports retail market. In particular, JJB and Sports Direct are under investigation by the OFT and the Serious Fraud Office following alleged cartel activity in the sector.

The Commission further concluded that in light of these circumstances, Sports Direct may have a legitimate excuse for failing to comply with the requirements of the Notice and that an extension to the inquiry period is therefore necessary.

16 September 2009

8 OFT consults on request for consent under FirstGroup/SB Holdings undertakings

The OFT has invited comments on bus company FirstGroup's request for a variation to its north-east fare zone boundary. As a result of FirstGroup's acquisition of SB Holdings in 2002, numerous undertakings were agreed with the Secretary of State and subsequently amended by the CC in 2008. In particular, these undertakings prevent FirstGroup from changing the terms and conditions of bus services and also from altering the fares or fare boundaries without the prior written consent of the OFT.

FirstGroup has sought the consent of the OFT to re-align the north east boundary of its FirstCard multi ticket in order to provide consistency in the zones FirstGroup intends to introduce for its FirstDay and FirstWeek tickets. FirstGroup is also seeking to ensure consistent pricing of the FirstCard in relation to the services provided.

16 September 2009

Developments

9 Increase in UK merger fees

Following publication of the Enterprise Act 2002 (Merger Fees) (Amendment) Order 2009, the Department for Business, Innovation and Skills announced on 7 September 2009 that merger fees are set to double.

The new fees payable by notifying parties to the OFT apply from 1 October 2009 to all mergers where the parties cease to be distinct entities after this date. For mergers where the UK turnover of the business being acquired is £20 million or less, the fee will increase from £15,000 to £30,000; between £20 million but not more than £70 million, from £30,000 to £60,000; in excess of £70 million, the fee will increase from £45,000 to £90,000.

7 September 2009

OTHER

10 Chinese merger control

Only a few months after the conditional clearance of Mitsubishi Rayon's acquisition of Lucite (Note: Hammonds' represented Lucite), on 28 September 2009 the Chinese Ministry of Commerce (MOFCOM) cleared two foreign-to-foreign transactions, subject to conditions.

Pfizer/Wyeth

This transaction was notified to MOFCOM in June 2009 and MOFCOM decided to initiate a Phase II investigation before the Phase I deadline on the 15 July had expired.

In its decision, MOFCOM cited the significant increase in market share post-merger, the high level of concentration in the relevant market and barriers to entry, as reasons to impose remedies. To clear the deal, the parties agreed to divest Pfizer's swine mycoplasma pneumonia vaccine business in China within the next 6 months. The divestment will include all assets, both tangible and intangible, including intellectual property, and the independent buyer must meet criteria set by MOFCOM. Pfizer also committed to provide necessary technical and supply support for three years after the divestment. MOFCOM has reserved the right to appoint another trustee if a suitable buyer cannot be found within 6 months.

General Motors/Delphi

MOFCOM also cleared General Motor's (GM) acquisition of parts supplier Delphi at Phase I subject to certain behavioural remedies.

In its decision, MOFCOM voiced concerns about the likely effects of this transaction on China's car and car parts market. After negotiation, MOFCOM accepted behavioural remedies, such as a ban on GM and Delphi exchanging trade secrets regarding Delphi's other Chinese customers and requiring Delphi to commit to a non-discriminatory pricing policy, as conditions to clear the deal.

For parties seeking merger clearance in China, these two decisions underline the need for parties to anticipate and address the China-specific competition concerns of global transactions.

ANTITRUST

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EU

11 European Commission carries out raids on Spanish cement producers

The European Commission, along with the Spanish Competition Authority (Comisión Nacional de la Competencia or "CNC"), carried out surprise inspections at the headquarters of various cement, mortar and concrete producers and suppliers. In its press release, the Commission stated that it had reason to believe that the companies concerned may have been involved in prohibited cartel activity and/or abuses of a dominant position in breach of Articles 81 and 82 of the EC Treaty, including direct or indirect price fixing and market sharing.

The Commission stressed that the inspections were not an indication of guilt but a necessary part of the preliminary stages of an investigation into suspected anti-competitive practices.

MEMO/09/409 - 23 September 2009

12 Commission adopts new Block Exemption Regulation for liner shipping consortia

The European Commission has adopted a new Block Exemption Regulation which revises the current exemption for liner shipping consortia from the ban on restrictive business practices under Article 81 of the EC Treaty. The review of the current Block Exemption began in 2007 with a thorough market investigation, and the draft Regulation was circulated in 2008. The new Regulation will come into effect on 25 April 2010, once the current Block Exemption Regulation expires, and extends the current exemption for a further five years.

Both the new and current Block Exemption exempt liner shipping consortia which meet the conditions of the Regulation. In particular, all consortia agreements whose objective is the joint cooperation of liner shipping services in transporting cargo, will be deemed not to infringe the ban on restrictive business practices under the EC Treaty. It is worth noting, however, that consortia agreements which relate to price fixing will not be exempted under the Regulation and the Commission may still withdraw the benefit of the block exemption at any time.

The new Regulation aims to better reflect current market practices and to be more consistent with other block exemptions in relation to horizontal cooperation between companies. Key changes in the new Regulation include extending its scope to all liner shipping cargo services, prolonging the exit clauses

and lock in periods and revising the list of exempted activities. More significant, however, is the reduction of the market share threshold from 35% to 30%, above which companies do not qualify for automatic exemption.

If a consortium does not fulfil the conditions of the Regulation this does not mean that such cooperation is automatically unlawful, but that the parties have to assess its compatibility with the competition rules on an individual basis.

IP/09/1367 – 28 September 2009

UK

13 Bid-rigging construction firms fined £129.5 million

Following one of its biggest Competition Act investigations, the OFT has fined 103 construction firms in England £129.5 million for their involvement in the bid-rigging of 199 construction contracts. The OFT concluded that the parties had engaged in illegal anti-competitive conduct by making artificially high bids which were not intended to win the contract (known as "cover pricing"). Cover pricing gives the contracting party a distorted impression of the level of competition in the market. In some cases, the unsuccessful tenderer was subsequently paid a "compensation payment" by the winning bidder of up to £60,000. The infringements affected 200 construction projects to the value of £200 million, including building works to schools and hospitals and housing refurbishments across England.

The OFT reduced the fines applied to 86 of the firms by a total of £64.9 million under its leniency programme, fast track policy and following admissions of illegal conduct made by 12 firms after receipt of the OFT's Statement of Objections. Interestingly, the OFT has also decided to allow all of the undertakings to make payments in instalments to avoid dealing with large numbers of requests to do so as a result of the current economic climate. The full decision will be published later this year but in the meantime, the OFT has issued a note in conjunction with the Office of Government Commerce recommending how to deal with tenders submitted by firms who have been found by the OFT to have been involved in bid rigging activities (in particular recommending that these firms be allowed to participate in future tenders).

114/09 – 22 September 2009

14 OFT fines recruitment agencies in the construction industry

The OFT has fined six recruitment agencies a total of £39.27 million for their involvement in price fixing and the collective boycott of another company. Those agencies fined include, A Warwick Associates Ltd, CDI AndersElite Ltd, Eden Brown Ltd, Fusion People Ltd, Hays Specialist Recruitment Ltd and Henry Recruitment Ltd. Two other recruitment agencies, namely Beresford Blake Thomas Ltd and Hill McGlynn & Associates Ltd, were granted immunity from fines for originally exposing the cartel.

The agencies were found to have engaged in anticompetitive practices, in breach of the Competition Act 1998, following the entry of Parc UK Ltd into the market for the supply of candidates to the construction industry. Parc implemented an innovative strategy, liaising between recruitment agencies and the construction companies. This put pressure on its competitors to improve their offering but instead, the eight companies investigated chose to boycott Parc, agreeing between themselves not to enter into contracts with it. The agencies also agreed to fix the fee rates they would charge to construction companies and other intermediary companies.

The agencies' actions constituted a serious breach of competition law, distorting competition and raising prices. The OFT felt that the severity of the infringement, therefore, justified hefty fines.

119/09 – 30 September 2009

Other

15 Google under investigation in Italy

Following a complaint filed by the Italian Federation of Newspapers Editors (FIEG), the Italian Antitrust Authority decided on 26 August 2009 to launch an antitrust investigation against Google Italy, which was subsequently dawn raided on 27 August. The proceedings relate to the website service Google News Italia, through which Google compiles partially shows news published by other online journalists. According to FIEG, by publishing news from other online journalists, Google News Italia undermines the possibility of those journalists attracting users to their own websites and selling online advertising space. Moreover, the journalists receive no compensation for the use of their news on Google News Italia and have no way of choosing whether or not a piece of news is included on Google News Italia. In fact, were the journalists to choose not to be included on the Google News page, they would also be prevented from appearing in Google's search engine. The investigation was extended to Google Italy's parent company Google, Inc. at the beginning of September.

The antitrust investigation will now look at whether, taking into consideration its dominance in the search engines sector, Google's behaviour has a negative impact on competition in the online advertising market, with the further effect of consolidating Google's position as an online advertising intermediary.

A first reaction by the press office of Google Italy is that Google News Italia takes users to external websites, rather than away from them. However, the Italian Antitrust Authority does not appear to accept this argument, as the Authority's President, Mr Antonio Catricalà, has recently declared that the investigation might lead to heavy fines and he has urged Google to begin talks with publishers. Google has already adopted this approach in the US and in other countries where it is considering the option of compensating the publishers for the use of their news on Google News website.

26 August 2009

16 CNC opens formal proceedings against Mediapro in relation to resale of football broadcasting rights

The Investigations Division of the Spanish National Competition Commission (Comisión Nacional de la Competencia or "CNC") has initiated proceedings against Mediaproducción, S.L. (Mediapro) and its wholly owned subsidiary Gol Televisión, S.L. for possible anti-competitive practices. The investigation relates to the resale of broadcasting rights for the Spanish football league and Copa del Rey (King's Cup) tournament matches to other TV operators for the 2009/2010 and subsequent seasons.

The initiation of proceedings is the result of a "reserved information procedure" in which the Investigations Division examined the offers submitted by Mediapro to other pay-TV and open-broadcast operators for the rights to broadcast matches and highlights of the football league and Copa del Rey tournament in Spain, as well as the agreements eventually reached by Mediapro.

The preliminary reserved investigation was in conjunction with a complaint filed by Canal Satélite Digital, S.L. (a member of the Sogecable group) claiming that Mediapro had refused to provide it with the broadcast signal for the league and Copa del Rey football matches broadcast under pay per view (PPV) in Spain. Mediapro had tied provision of the signal to the contracting and marketing of "Gol Bar", the Mediapro service for hotels, restaurants, bars and cafeterias. In connection with the complaint, Sogecable petitioned the CNC to adopt interim measures to require Mediapro to provide it with the PPV signal for the matches, without having to contract the "Gol Bar" service. The request for interim relief is currently being studied by the CNC Council.

The information obtained during the investigation indicates that the configuration of broadcasting rights packages offered, the terms of the agreements with Mediapro, and the conditions under which Mediapro offer to supply the signal for the league and Copa del Rey football matches broadcast under PPV, may be contrary to the Spanish Competition Act. They may, therefore, be detrimental to competition in the market and in particular to the pay-TV market.

The CNC has a maximum term of 18 months to investigate and resolve this case.

7 September 2009

17 Greece introduces new competition act

On 7 September 2009, a new competition act came into force in Greece, designed to restructure the Hellenic Competition Authority (HCC) and help it to clear a growing backlog of cases by simplifying notification requirements.

The introduction of the act brings tougher penalties for individuals who infringe the competition rules. Individuals involved in anti-competitive agreements may now be sentenced to a minimum of six months in prison and incur hefty fines. Fines for individuals who breach Article 82 (or the provisions relating to the abuse of a dominant position under Greek law) or who fail to file a qualifying merger under the merger control rules, have also been increased, and may be up to €150,000.

The new act retains the obligation on parties to notify the HCC of restrictive behaviour within the scope of Article 81, or the equivalent Greek legal provisions, and the Authority is still able to formally exempt the agreement or confirm that the agreement is not anti-competitive. The Act also introduces a provision allowing self certification of restrictive agreements, although it is unclear how this will operate in practice.

The act sees the removal of the Greek Directorate General of Competition, which had previously acted in an investigatory capacity. Investigations will now be undertaken by the Hellenic Competition Authority itself. The Authority has also seen changes in its key officials, some of whom have been brought over from Brussels to re-establish the Authority's integrity following the previous Director General's conviction for corruption. The Authority will be governed by nine key individuals (instead of eleven), and will be presided over by Dimitrious Kyritsakis, a former vice president of the Greek Supreme Court.

7 September 2009

18 Belgian Competition Authority conducts dawn raids at the Belgian premises of Electrabel and SPE-Luminus

On 22 September 2009, the Belgian Competition Authority launched its biggest ever inquiry by conducting dawn raids at several companies on suspicion of anti-competitive practices in the wholesale electricity market. The companies included Electrabel and SPE Luminus, who are Belgium's leading electricity wholesalers, with market shares of 75% and 12% respectively. Electrabel is owned by GDF Suez. SPE's majority shareholder is currently Centrica, however, the proposed sale by Centrica of its 51% share to EDF was notified to the European Commission in July and clearance is expected in October.

Earlier this year, the Belgian energy regulator (CREG) had raised a number of concerns regarding the pricing strategy adopted by SPE and Electrabel, which appeared contrary to standard industry practice. CREG stated that between 2005 and 2007, Electrabel and SPE had unlawfully invoiced their professional clients EUR 1.217 million. Electrabel then released a statement defending its pricing policy and arguing that it had been given an unfair CO2 allocation, which directly impacted the prices it charged. Electrabel argued that its comments were supported by previous findings of the Dutch

Regulator and asked the pricing investigation to be referred to the Belgian Competition Authority for closer examination.

The Belgian Competition Authority has announced that the possible infringements it is investigating include restrictive practices and/or abuse of a dominant position, in particular, concerning capacity withdrawal and price formation. Electrabel and SPE are said to be co-operating with the ongoing investigations.

22 September 2009

STATE AID

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19 Commission approves German export credit scheme

The financial crisis has caused many banks to experience severe difficulties in finding long term funding. This, in turn, has made banks reluctant to grant new export loans, which are loans given to foreign customers to enable them to purchase products sold by a national producer. To limit the adverse impact on the supply of export credit, the European Commission has authorised a scheme in Germany under EC Treaty State aid rules.

The scheme proposes to introduce a mechanism by which the German public credit institution Kreditanstalt für Wiederaufbau (KfW), would be allowed to purchase existing credit export loans from banks. The refinancing of existing export credits will then provide banks with appropriate funding to grant new export loans to purchasers outside the European Union. Only loans that are covered by 100% export credit insurance from the Federal Government will be eligible for purchase by KfW and any new export credit granted must be the same in value as the financing received from KfW.

The Commission has found this measure to be consistent with its guidance on State support for financial institutions in the current economic crisis and has held the scheme to be appropriate and necessary to address major market disruption. The scheme has been authorised for six months, and in addition to other safeguards, will minimise any potential distortions of competition.

IP/09/1319 – 15 September 2009

20 Commission proposes further measures to help the dairy sector

Following its report in July, the European Commission has proposed a package of measures as part of its campaign to help dairy farmers in the European Union during the current market crisis. The measures aim to secure the short and long term future of the dairy sector and build on actions already taken by the Commission, such as an expected increase in annual spending of €600 million on market measures.

Short term measures include changes to State aid rules to allow Member States to temporarily offer aid to farmers under the Temporary Framework. In the coming weeks, Member States will be able offer up to €15,000 in aid to farmers as part of the initiative. Further changes to legislation will also be made to bring the dairy sector within an emergency framework that already exists for other farm sectors. Bringing the dairy sector within Article 186 of the Single Common Market Organisation will allow the Commission to take temporary action quickly and respond to future market disturbances more efficiently.

In the medium and long term, the Commission proposes to establish a working group of experts from Member States and the Commission to deal with matters ranging from the contractual relations between

farmers and the dairy industry, good practice in terms of production costs throughout the European dairy sector and the possibility of a dairy futures market. The working group would also have input into the conclusions of the Commission report on the workings of the dairy sector supply chain, which is expected to be published before the end of the year.

IP/09/1333 – 17 September 2009

21 Commission approves new Guidelines for broadband networks

Following extensive consultation with stakeholders and Member States, the Commission has adopted new Guidelines on the application of State aid rules in relation to the deployment of broadband networks, largely based on its original draft and existing jurisprudence. The Guidelines are designed to provide a clear and transparent framework for Member States and public authorities to ensure that they remain compliant with the EU's State aid provisions and to encourage the deployment of broadband networks in underserved, often rural, areas.

The Guidelines are divided into two main sections; firstly the Commission's policy on the development of traditional broadband networks, and secondly, public financing of very high speed "next generation access networks" or "NGAs". The Guidelines distinguish between competitive "Black" areas, where no State aid can be justified, and underserved "White" and "Grey" areas where State aid may be justified provided certain safeguards are met. State intervention should only be implemented as a last resort and Member States are required to carefully consider whether State aid is the most appropriate solution in each case. Other safeguards have also been implemented, including a clawback mechanism for State aid if competition grows beyond anticipated levels in a certain area and requirements to use an open tender procedure, provide a detailed geographic analysis of the area, use existing infrastructure and allow third party access.

The Guidelines provide welcome clarity for commercial operators whose support is needed to invest substantial funds into the development of broadband networks. Where notification is required, the Guidelines will assist the Commission in its assessment, speed up the approval process, facilitate broadband roll-out and, in turn, help the EU to meet its economic targets.

IP/09/1332 – 17 September 2009

22 Commission issues statement on aid for Opel Europe

The Commission has issued a statement regarding the granting of State aid in the restructuring plan for the new Opel Europe, emphasising that the plan must make the company viable in the future. This follows the German Government's decision to grant €4.5 billion of public funds to support the sale of General Motor's majority share in Opel/Vauxhall to Magna International and Sberbank.

The German Government is relying on aid already approved under the Temporary Framework, which are a series of measures introduced to support access to finance in the current economic climate, but which does not remove its obligation to comply with internal market and State aid rules. State aid granted under the Temporary Framework is conditional upon the implementation of a specific business plan that is discussed and negotiated with Member States. The Commission will, therefore, carefully scrutinize whether the German authorities have tried to include any non-commercial conditions in the aid granted to Opel regarding the geographic distribution of restructuring measures or the location of investments. It is also monitoring negotiations with European governments regarding financial support linked to retaining Opel employees in each Member State.

IP/09/1332 – 23 September 2009

EU

23 Court of First Instance dismisses Clearstream appeal

On 9 September 2009, the Court of First Instance (CFI) dismissed an action by Clearstream Banking AG (Clearstream) and its parent, Clearstream International SA, against a Commission decision that they had breached Article 82 of the EC Treaty. The CFI upheld the Commission's decision in its entirety, both in finding that Clearstream was in a dominant position and that it had abused this position by applying discriminatory prices and refusing to supply clearing and settlement services for registered shares to Euroclear Bank SA, one of its customers.

Clearstream acts as the German Central Securities Depository and is responsible for carrying out all clearing and settlement, both essential requirements for a securities trade to be completed in Germany. The relevant market was, therefore, the provision of clearing and settlement for securities issued under German law. The Commission found that Clearstream had a de facto monopoly and its behaviour towards Euroclear resulted in Euroclear being put at a competitive disadvantage.

Although Clearstream's parent company, Clearstream International SA, was not found to be in a dominant position and could not, therefore, have abused its position, it did hold 100% of the capital in its subsidiary, Clearstream. In accordance with established case law, the burden fell on Clearstream's parent company to provide evidence that its subsidiary acted independently, which it failed to do. The Commission was, therefore, entitled to find Clearstream International SA, and Clearstream, jointly and severally liable for the infringements committed by Clearstream alone.

The Commission has welcomed this judgement as it confirms the special duty of dominant service providers not to impair the provision of efficient and cheaper services in a market where the costs of cross-border securities transactions are higher than for national transactions within the common market.

MEMO/09/381 – 9 September 2009

24 ECJ Judgement in Akzo Nobel Case

The European Court of Justice (ECJ) has confirmed that a parent company may be held liable for the anti-competitive behaviour of its subsidiaries, despite the absence of any involvement by the parent company itself directly in the infringement. This judgement follows an appeal brought by five companies belonging to the Akzo Nobel Group, against a decision made by the European Court of First Instance, itself upholding a previous Commission decision. The Commission had jointly and severally fined Akzo Nobel NV, along with four of its subsidiaries, €20.99 million after discovering that the subsidiaries had been involved in cartel activity constituting serious and continuous breaches of Article 81 EC.

The main consequence of the ruling is that, in order for the Commission to be able to target the parent company of cartel participants in its statement of objections, it is sufficient for the Commission to show that the parent company has a 100% shareholding in its subsidiary. The parent will then have to prove that it did not have decisive influence over its subsidiaries' conduct by demonstrating the group companies' separate legal and economic structure. In reality, this means that although the presumption of liability of the parent company for breach of competition law by its subsidiaries based on capital links is rebuttable, it is now becoming extremely difficult to disprove.

MEMO/09/385 – 10 September 2009

25 CFI President calls for help to clear backlog of cases

Marc Jaeger, President of the CFI, has called for help from the political bodies of the EU to clear the growing backlog of cases brought before the CFI. Many of the cases are highly technical in nature and, therefore, require significant judicial consideration, particularly as each CFI judgement may have a far-reaching impact on the sector concerned.

Jaeger has proposed increasing the number of staff and/or judges engaged in order to alleviate the current strain on the CFI. He has also suggested that EU decision makers consider creating a separate specialist court, for example in the field of intellectual property litigation, to help free-up valuable resources.

The CFI's growing caseload has concerned Jaeger from the outset of his presidential appointment when he instigated a number of reforms, including holding more hearings each week. Unfortunately, these measures have proved insufficient in the long run and Jaeger is anxious that unless more resources are made available, the CFI will be forced to reconsider its approach and condense the detailed judgements it currently provides.

23 September 2009

UK

26 Appeal of Ofcom decision on carrier pre-selection charges

The Competition Appeal Tribunal (CAT) has registered an appeal by Cable & Wireless, Carphone Warehouse and Gamma Telecom against an Ofcom decision in July concerning the rates BT can charge for notifying and redirecting calls to operators of carrier pre-selection services. The applicants argue that Ofcom acted against a previous determination in January where it was decided that BT could not cover such costs through the wholesale fees for carrier pre-selection (CPS).

The applicants are seeking that the July decision be set aside and that Ofcom should order repayment of the overpayments made by them to BT since 28 November 2003, as a result of the erroneous inclusion by BT of the retail costs in the CPS set-up charge. The applicants submit that the determination by Ofcom contained serious errors in law by failing to apply the statutory regime for dispute resolution and by misdirecting itself as to the legal basis for the exercise of its powers.

10 September 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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