

COMPETITION LAW MONTHLY BULLETIN

OCTOBER 2009

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

[Mergers](#)

[Antitrust](#)

[State aid](#)

[Market investigations](#)

[Litigation](#)

Commission decides to make IACS commitments binding under Article 9(1) of Regulation 1/2003

Following market testing of the commitments offered by the International Association of Classification Societies ("IACS"), the European Commission ("Commission") has decided to accept and make these commitments binding under Article 9(1) of Regulation 1/2003 - the Commission is entitled to accept legally binding commitments offered by companies where it believes that such commitments sufficiently address any competition concerns identified in its preliminary assessment.

Factual Background

In January 2008, the Commission carried out unannounced inspections of the premises of several providers of ship classification services and IACS itself, following its concerns that IACS may have infringed competition law.

Classification societies such as IACS establish, apply and certify compliance with the technical requirements relating to the design, construction and maintenance of ships. The current 10 members and one associate of IACS issue specific classification rules and procedures which cover more than 90% of the world's cargo carrying tonnage.

In May 2009, the Commission commenced formal proceedings and in its preliminary view, identified competition concerns in relation to the criteria and transparency procedures governing membership to IACS and the accessibility of IACS's resolutions and technical background documents. The Commission considered that IACS may have reduced competition in the ship classification market by restricting membership to IACS and participation in IACS's technical working groups for non-members.

Decision

Although IACS did not agree with the Commission's preliminary view, they offered commitments under Article 9(1) to alleviate these competition concerns. In particular, IACS agreed to set up objective and transparent membership criteria; to ensure that classification societies which are not member of IACS are able to participate in technical working groups and access resolutions and technical background documents; and to establish an independent appeals board to settle disputes about membership, participation and access to IACS documents.

The Commission's decision to make the commitments legally binding ended the investigation proceedings without it having to making an infringement decision. The Commission stated that the proposed commitments were an appropriate and proportionate remedy to its competition concerns and that *"this decision opens up the ship classification market to the benefit of both classification societies which are not members of IACS"*

and customers of classification services...which should generate lower prices, more customer choice and improved quality of service.”

The commitments will remain in force for a period of five years, during which IACS must report to the Commission annually to ensure that they are being implemented.

IP/09/1513 – 14 October 2009

MERGERS

[Back to Top](#)

EU

Decisions

1 Commission gives conditional approval to acquisition of Sanyo by Panasonic

On 29 September 2009, the Commission cleared the proposed acquisition of Sanyo Electric Company by the Panasonic Corporation in Japan in accordance with the EC Merger Regulation.

The Commission did, however, have certain competition concerns relating to battery markets, where the new entity would have a considerable market share. To address these concerns, the clearance decision is conditional upon the divestment of a production plant that produces cylindrical lithium batteries and rechargeable coin shaped batteries. In addition, the parties agreed to divest a portable nickel-metal hydride business. The Commission had also examined the markets for consumer electronic products, but found that the merger would not significantly impede effective competition in these markets in the EEA or any substantial part of it.

IP/09/1383 – 29 September 2009

2 Commission refers acquisition of Keolis and Effia by SNCF and CDPQ to the French Competition Authority

On 15 September 2009, the Commission received the notification of a proposed concentration by which the undertaking SNCF-Participations (France) and the Caisse de Dépôt et de Placement du Québec (CDPQ) (Quebec), plan to acquire joint control of the whole of Keolis and Effia. After notification, the French Competition Authority (“FCA”) requested that the Commission refer the case to it for review (in place of the Commission).

The SNCF group operates in the sector of passenger rail transport on France’s rail network. CDPQ is an institutional fund manager, which administers the pension and insurance scheme funds of public and private bodies mainly in Quebec. Keolis is a private operator which provides public transport services and Effia conducts services designed to facilitate passenger mobility and to encourage the intermodality of public transport.

Under Article 9 of the EC Merger Regulation, a Member State may request that the Commission refer a case back to its national competition authority for review. Member States are required to demonstrate that a proposed concentration threatens to significantly affect competition in a given market within the territory of that Member State and that the transaction, therefore, should be considered under its national competition law.

In this case, the FCA sought jurisdiction over the case on the premise that the proposed deal could

significantly affect competition in the French public passenger transport markets through potential anti-competitive effects connected with the presence of the new group throughout the whole transport chain; and therefore, the FCA would be better placed to review the case under its domestic laws.

It is on the basis of Article 9 that the Commission, on 29 October 2009, decided to uphold the FCA's request and refer the matter to the French authorities for consideration. The Commission did so having found that the acquisition may only have anti-competitive effects in French markets.

IP/09/1656 – 30 October 2009

UK

Decisions

3 Competition Commission announces concerns about the proposed merger between Ticketmaster and Live Nation

On 8 October 2009, the UK Competition Commission ("CC") announced its provisional conclusions on the proposed merger between Ticketmaster Entertainment Inc and Live Nation Inc. It found that the merger would be likely to exclude CTS Eventim, a new entrant, from the UK market for the primary retailing of tickets for live music events.

Live Nation had previously agreed that CTS Eventim would provide ticketing services for its live music events and venues in the UK. As a result, CTS Eventim had a starting point for growth in the UK ticketing market. However, the proposed merger would – according to the CC - remove any incentive for Live Nation to encourage CTS Eventim's UK expansion. The CC found that this would have a negative effect on competition, potentially leading to higher prices and a lower quality service. The CC is currently seeking views on whether it ought to (1) prohibit the merger, (2) make its approval conditional on divestment of either all, or part, of Ticketmaster or Live Nation's UK business operation or (3) require Live Nation to use CTS or an alternative (independent) third party ticket agent in the UK.

47-09 – 8 October 2009

Other

Decisions

4 Jersey's Competition Regulatory Authority issues largest ever fine for failure to notify

The Jersey Competition Regulatory Authority ("JCRA") has fined Lufthansa £25,000 for failing to comply with Jersey's competition laws in notifying its acquisition of British Midland Plc ("BMI").

Lufthansa acquired BMI on 1 July 2009 and was obliged to notify the merger to the JCRA prior to its completion owing to the existing business activities in Jersey of BMI's subsidiary airline, bmibaby. However, a notification was not made even though the JCRA were said to have contacted Lufthansa in November 2008 to remind them of Jersey's merger approval requirements.

The JCRA has the power to impose fines of up to 10% of a company's turnover during the period of the infringement and may even order companies to unwind completed mergers and acquisitions. The fine against Lufthansa is the fourth fine the JCRA has issued under its competition laws and was considered to be the most appropriate penalty for the procedural violation.

27 October 2009

EU

5 Reinforcing bar cartel decision re-adopted by Commission

The Commission has announced that it has re-adopted the decision which saw eight cartel participants fined over €83 million. This decision follows the annulment of its previous decision by the Court of First Instance due to procedural irregularities.

The original cartel decision imposed fines on Alfa Acciai, Ferriere Nord, Feralpi, IRO, Leali, Lucchini, Riva Fire and Valsabbia for fixing prices in the reinforcing bars sector in Italy from December 1989 to May 2000. However, this decision was adopted on the basis of the expired European Coal and Steel Community Treaty and could not, therefore, stand as the legal foundation of the Commission's decision. As a consequence the Commission has made a new decision based on the current competition regime.

With one exception, all of the fines imposed are the same as those in the 2002 decision and the Commission was keen to stress that this case sends a clear message to cartel participants that they cannot escape fines for procedural reasons.

IP/09/1389 – 30 September 2009

6 Commission confirms sending Statement of Objections to airlines

The Commission has confirmed that in September 2009, it sent Statement of Objections ("SO") to three members of the oneworld airline alliance. The SO targeted British Airways, American Airlines and Iberia's proposed co-operation on transatlantic routes in relation to passenger services. An SO represents a formal step in the Commission's antitrust investigation in which the Commission informs the parties concerned, in writing, of the competition concerns raised against them.

The Commission believes the airlines' intentions to share revenues and jointly manage capacity, prices and schedules is contrary to Article 81 EC Treaty, which prohibits anti-competitive agreements.

The airlines now have an opportunity to respond to the SO defending their proposals and they are also entitled to request an oral hearing. Receipt of an SO does not prejudge the final outcome of the Commission's investigation but allows the Commission to consider whether the behaviour of the parties complies with competition rules.

MEMO/09/430 – 2 October 2009

7 Commission consults on revised draft Block Exemption Regulation for insurance sector

On 5 October 2009, the Commission announced that it is inviting comments on its revised draft Block Exemption Regulation ("BER") for the insurance sector. The previous insurance BER expires on 31 March 2010.

The purpose of the BER is to exempt certain agreements between insurance companies from the EU prohibition on cartel activity and restrictive business practices under Article 81 of the EC Treaty.

There are currently several categories of agreements exempted by the BER, including: co-operation and information sharing between insurers; the joint establishment of standard policy conditions for direct insurance, and non-binding models on profits; the setting up and operation of certain co-insurance or re-insurance pools; the joint testing and acceptance of agreements relating to security devices, which involves their installation and maintenance, as well as ensuring compliance. The Commission believes that the BER should no longer cover the establishment of non-binding standard policy conditions or agreements on security devices. It plans to retain two of the categories with minor amendments: the co-operation and

information sharing between insurers and the creation and operation of insurance pools.

The Commission is seeking views on three issues in particular: (1) whether the insurance sector is “special” compared to other sectors, with an enhanced need for cooperation; (2) if so, does this enhanced need require a legal instrument to protect or facilitate it; (3) and if so, what is the most appropriate legal instrument?

The consultation ends on 30 November 2009.

IP/09/1413 – 5 October 2009

8 Consultation on commitments offered by Microsoft on the tying of Internet Explorer to Windows

The Commission has announced that it is undertaking a formal consultation with computer software and hardware manufacturers, consumers and interested third parties in relation to the commitments offered by Microsoft to improve web browser choice for consumers.

In January 2009, the Commission sent a Statement of Objections (“SO”) to Microsoft outlining its concerns that Microsoft’s tying of its web browser, Internet Explorer, to its dominant client PC operating system Windows infringes the EC Treaty rules on abuse of a dominant position (Article 82) as it harms competition between web browsers, undermines product innovation and ultimately reduces consumer choice. Microsoft initially offered commitments in July 2009. These included presenting consumers with a “ballot screen” allowing them to make a choice about the web browser they install.

Microsoft has since reconsidered and improved its proposals in order to ensure that consumers have a greater choice of web browsers. These include:

- Browser choice: Introducing a mechanism that allows computer manufacturers to install a competing web browser; and
- Ballot Screen: Distributing ballot screen software updates to users in the EEA, giving consumers the opportunity to decide whether Internet Explorer is the most appropriate choice, providing information about the different options and a simple download mechanism for each browser to ensure ease of use.

A summary of the proposed commitments, known as a “market test notice”, was published in the Official Journal of the EU on 9 October 2009. Interested parties now have one month to present their comments. The Commission has welcomed Microsoft’s proposals and thinks that they have the potential to improve consumer choice in terms of browser provider. After conclusion of the consultation, the Commission may choose to make the commitments legally binding on Microsoft under Article 9(1) of Regulation 1/2003, in order to ensure that its concerns under Article 82 EC are addressed.

MEMO/09/439 – 7 October 2009

9 Commission fines power transformer producers €67.6 million in a market sharing cartel

Following its investigation which began in February 2007, the Commission has imposed fines totalling €67,644,000 on seven companies for breaching Article 81 of the EC Treaty. The Japanese and European power transformer producers, ABB, AREVA T&D, ALSTOM, Fuji Electrics, Hitachi and Toshiba, were found to have participated in cartel activity between June 1999 and May 2003. Siemens also participated in the cartel but received full immunity as it originally brought the existence of the cartel to the attention of the Commission.

The cartel was operated under an oral market sharing agreement, referred to as a “Gentlemen’s Agreement”, where the companies agreed that the Japanese members would not sell power transformers in Europe and

that the European members would not sell them in Japan. In order to avoid detection, the members of the cartel used code names for their companies and only ever concluded their agreements orally.

The Commission determined that their behaviour amounted to a serious breach of Article 81, and in setting the fines it took into account the amount of sales of the companies, the geographic scope of the cartel and the individual behaviour of the companies involved. In doing so, the Commission increased the fine for ABB by 50% because it had already been fined by the Commission for a previous cartel. Fuji, Hitachi and AREVA fully cooperated with the Commission during the investigation and as a result Fuji was granted a reduction of 40% and AREVA and Hitachi's fines were reduced by 18%.

IP/09/1432 – 7 October 2009

UK

10 OFT consults on draft guidance on exceptions to the duty to refer and undertakings in lieu

The Office of Fair Trading ("OFT") has published for consultation revised guidance on the exceptions to its duty to refer merger cases to the CC, and its ability to accept undertakings in lieu of a reference.

Under the Enterprise Act 2002, the OFT has a duty to refer a merger to the CC for investigation if it believes that the relevant merger situation results or may result in a substantial lessening of competition within any market for goods or services in the UK. The draft guidance updates and amends the OFT's existing guidance on the three exceptions to its duty to refer.

In relation to the de minimis exception (which allows the OFT not to make a reference to the CC if the market concerned is not of sufficient importance to justify such a reference), the OFT considers that its primary purpose is to avoid references being made where the costs involved would be disproportionate to the size of the market concerned. The OFT maintains that an affected market will generally be of sufficient importance to refer when its value in the UK exceeds £10 million, but the OFT also indicated that below this threshold, it will consider whether by applying the exception the possible consumer harm might outweigh the cost to the public in referring a merger.

In the case of anticipated mergers, the OFT has the discretion not to refer the merger where the proposed transaction is not sufficiently far advanced, or are not likely to proceed to justify the making of a reference to the CC. The OFT maintains that this exception will only occur if no public announcement of the merger has been made or where neither party has announced a firm intention to make an offer.

Finally, the OFT may not refer a merger where any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition concerned. In this respect the OFT has expanded its guidance to include benefits in the form of efficiencies that can be passed on to customers which can outweigh a substantial lessening of competition.

The OFT invites comments on its draft revised guidance by 15 January 2010, with the final revised guidance expected to be published in early 2010.

120/09 – 1 October 2009

Other

11 The French Competition Authority fined the French Football Federation and Sportfive €6.9 million for collusion

On 1 October 2009, the FCA sanctioned the French Football Federation ("FFF") and Sportfive Company with a fine of €6.9 million for having entered into agreements with the intention to eliminate all competition in the commercialisation of marketing rights of the FFF. The decision was taken by the new Competition Authority

following two investigations on the initiative of the Competition Council.

The FFF and Sportfive entered into long-term exclusive agreements, without open competitive bidding, for the management of the marketing rights of teams in France and the French Cup.

The combination of exclusivity clauses, tacit renewal clauses, clauses of compensation for contract termination and amendments for extension signed several years before the expiry of the contracts, is anticompetitive in so far as the commercialisation of marketing rights was shielded from effective competition for a very long period – extending from 1985 to 2002 for certain contracts.

The organisation of the 2001 tender procedure for the allocation of all marketing rights of the FFF shows that the FFF and Sportfive agreed then to eliminate all competition.

The tender procedure took place in 2001. On this occasion, the Authority established that both parties had acted in agreement, especially by preventing a competitor (Havas Sports) to obtain the information necessary for the cost evaluation of its proposal, and by negotiating, before and after the award of the contract to Sportfive, substantial changes as compared to the original contract.

These practices distorted the competitive bidding organised by the FFF in reinforcing the exclusive rights of the incumbent operator and in closing the market to any external competition. This has resulted in the restriction of competition in the services market of management and commercialisation of marketing sports rights, especially on one of the most prominent sectors of this market: the marketing of football in France, at a time when it was especially attractive because of the success of the French national team. These practices limited access to other market intermediaries and decreased the resources that the FFF could devote to its other activities, especially in relation to the development of amateur football.

The FFF did not contest the claim that an anti-competitive agreement existed and undertook commitments for the future. It committed itself to establishing a competitive procedure for contracts relating to the acquisition of broadcasting rights, to the choice of the sports equipment manufacturer and to intermediary contracts. The duration of these contracts must not exceed four years (or six years in some particular cases). In return, the FFF benefited from a 40% reduction of the fine. The fine imposed on the FFF is €900,000, while the fine to be paid by Sportfive is €6 million.

1 October 2009

12 European Competition Network publishes report on the state of leniency convergence in Member States

Following the introduction of the Model Leniency Programme (“Programme”) in September 2006, the European Competition Network (“ECN”), has published a report on the state of convergence of the leniency programmes of the ECN members as at 1 October 2009.

The Programme was intended to provide the necessary substantive and procedural requirements for leniency programmes and further sought to harmonise these across the members of the ECN. The Programme provides for full immunity for the first company to come forward and reductions in the fines applicable if the applicant adds significant value. The Programme also provides details of the information required in any application, the possibility of an initial submission on an anonymous basis and also the procedure for summary applications, which allow applicants to secure their place in the queue before a NCA.

The report published by the ECN highlights some key points, including the fact that 25 member states and the Commission operate leniency programmes with only Malta and Slovenia being left to implement a leniency programme; and it further reviews the legislative convergence in various areas.

The ECN concluded that the Programme has been a major catalyst in encouraging member states and NCA’s to introduce or develop their leniency programmes, with the report highlighting these achievements. It

also considered that the report should serve as a basis for reflection as to whether further convergence is needed.

MEMO/09/456 – 15 October 2009

13 Spanish competition authority opens inspection into possible anti-competitive practices in the contracting, supply and execution of works for public and/or private sector clients.

On 15 October 2009 inspectors from the Spanish National Competition Commission (Comisión Nacional de la Competencia or “CNC”) carried out inspections at the head offices of companies involved in the public and private works for contracting, supply and execution. The CNC suspected anti-competitive practices including agreements to directly or indirectly fix prices and trading or service conditions, as well as market sharing at a national level.

The inspections mark a preliminary step in the investigation and do not prejudice its results or the culpability of the companies involved. If any evidence of such practices are found, formal proceedings will be initiated. Such conduct would constitute a very serious violation of Article 1 of the Spanish Competition Act 15/2007 of 3 July 2007, and infringing companies could be subject to a fine of up to 10% of their aggregate turnover in the financial year immediately preceding the year the fine is levied.

The inspection powers of the CNC have been strengthened by the new Spanish Competition Act, in line with one of the fundamental objectives of the statute's recent reform: the fight against the most harmful practices, in particular, cartels. The investigation of cartels is a priority area for CNC action, given the severe impact such practices have on consumers.

15 October 2009

14 Spanish competition authority levies fines on nine associations in the food sector for making collective recommendations to apply price increases.

The CNC Council has issued its ruling on the probe carried out by the Investigations Division against several food sector associations, concluding that those organisations are responsible for a strategy based on collective recommendations prohibited by Article 1.1(a) of the Spanish Competition Act (Ley de Defensa de la Competencia or LDC).

The investigation is a result of press releases issued in July, August and September of 2007 by several food industry associations ostensibly for the purpose of alerting public opinion about the increase in the cost of certain commodities. All of the releases quantified those price increments, emphasised that they were of a structural nature and voiced the idea, more or less explicitly, that they would have an impact on the food prices paid by consumers.

Several of those associations were managed by the same entity, BONMACOR GESTION DE ASOCIACIONES. In view of this situation, the Investigations Division conducted an inspection of that entity, as well as in the head offices of the Spanish Confederation of Bakery Organisations (Confederación Española de Organizaciones de Panadería — “CEOPAN”). The information obtained in the inspections led to the opening of formal proceedings against nine sector organisations, including the Spanish Federation of Food and Beverage Industries (Federación Española de Industrias de la Alimentación y Bebidas — “FIAB”) and CEOPAN. The probe conducted by the Investigations Division revealed that the associations carried on a communication and exchange of information strategy that involved the drafting and circulation of press releases.

The Council considered that the associations' actions must be classified as a collective recommendation strategy contrary to the LDC. The content, language and dissemination of the press releases contributed to transmitting the message that passing on the cost increments to the end consumers was inevitable. This served as a signal for the companies to act along the same lines and to predispose consumers toward accepting the price increases. As a result of the communication between associations, some of them were

able to take into account the press releases issued by others, thus contributing to a coordination of messages and making the conduct more likely to distort competition.

The Council's Resolution recalls that the associations and the officers that represent them must be mindful of their public communications and that their messages may be considered unlawful if they unify the behaviour of their members and of other parties in a way that alters the normal functioning of the market.

October 2009

15 The Russian Federal Antimonopoly Service fines Rosneft and initiates antitrust proceedings against Gazprom

The Russian Federal Antimonopoly Service ("FAS") has initiated proceedings against state-controlled natural gas company Gazprom for violating antimonopoly legislation by creating unlawful obstacles for entry to the gas market. Gazprom holds a dominant position in the market of gas transportation services and is, therefore, prohibited from abusing that position in such a way as to prevent or restrict competition.

The FAS investigation follows a complaint made by Rosneft in which it was alleged that Gazprom had restricted Rosneft's access to its gas pipeline system. In particular, Rosneft claimed that between April and August 2009, Gazprom restricted the acceptance of gas from Rosneft's gas fields to its gas transportation system. Rosneft assert that as a result of Gazprom's unlawful restrictions it was deprived of the possibility of selling gas to consumers losing business as a result, and also incurred fines for violating environmental regulations when it was forced to burn the oil/gas not accepted by Gazprom's gas transportation system.

The gas transportation system is the main gas pipeline system in the Russian Federation. It allows for the transportation of produced and processed gas from gas fields to customers in Russia.

The case will be considered by the FAS on 2 December 2009.

This investigation follows the FAS announcement on 27 October 2009 that it had fined Rosneft, the country's biggest oil producer, 5.28 billion roubles (approximately €145 million) for abusing a dominant position in the wholesale market of oil products. In particular, the FAS found that in the first half of 2009, Rosneft had taken oil products off the market which led to increased prices and discriminatory selling conditions. Fines for similar antitrust violations are expected to be imposed on another oil company, Lukoil, in November.

Such intense activity by the FAS against large Russian companies, including the State gas monopoly and oil companies, marks a notable change in Russia in the view of effective competition enforcement. The FAS's activity is to be watched in the future.

28 October 2009

STATE AID

[Back to Top](#)

16 Commission authorizes Northern Rock restructuring package

The Commission has authorised under EC State aid rules, a package of support measures to assist the restructuring of Northern Rock Plc. Northern Rock was the UK's 5th largest mortgage bank whose core activity was residential mortgage lending representing more than 90% of all outstanding loans made by the bank.

Following the authorisation of an aid package in December 2007, the UK notified its restructuring plan for

Northern Rock in March 2008. The Commission opened a formal investigation on 2 April 2008 to assess the package with regard to Northern Rock's prospects for a return to long-term viability. In the same decision, the Commission also authorised another rescue aid measure.

On 30 March 2009, the UK authorities notified substantial amendments to the original support package. The amended plan provided for a division of Northern Rock into two new entities, a relatively small bank, containing all the good quality assets, the mortgage writing platform and the retail deposits and a "bad bank", which would hold the vast majority of the mortgage loans made by Northern Rock in the past. The "bad bank" would be wound down on a solvent basis, and the UK State would support the losses incurred on the risky mortgage loans made by Northern Rock in the past. The Commission extended the scope of its investigation to give interested parties the opportunity to comment on the proposed measures.

The Commission has concluded that the aid is compatible with EU State aid rules and with the Commission's Communications on the application of the State aid rules to banks in times of crisis. The level of aid in the revised restructuring plan has been kept to a minimum and the proposals are capable of restoring the "good" bank's long-term viability.

IP/09/1600 – 28 October 2009

MARKET INVESTIGATIONS

[Back to Top](#)

UK

17 Competition Commission publishes grocery stores competition test recommendation

On 2 October 2009, the CC published its formal recommendation regarding a new "competition test" to be applied in relation to planning decisions for large grocery stores.

The CC had originally issued a report following an investigation into the market for the supply of groceries in the UK in April 2008. The CC concluded that features of the grocery market resulted in the restriction of competition, particularly in relation to the market position of larger grocery stores. The CC proposed the introduction of a competition test in planning decisions by the Department of Communities and Local Government ("CLG") and the devolved administrators in Scotland, Wales and Northern Ireland. In order to pass the test, within a ten minute drive of the area under development: the retailer must be a new entrant; or there must be either four or more different grocery stores, or three or fewer different grocery stores and the retailer would operate less than 60 per cent of groceries sales area (including the new store). The aim was to ensure that local planning authorities withheld planning permission for the construction or expansion of large grocery stores if there was already a high level of concentration in the local market and the retailer had (or would have had) a substantial part of the market.

Tesco applied to the Competition Appeals Tribunal ("CAT") for a review of the report. In March 2009, the CAT unanimously concluded that the CC had failed to properly consider all matters relevant to its recommendation that the competition test be imposed as part of a package of remedies to address the adverse effect on competition identified by the CC.

The CC was required to carry out further analysis on the effectiveness, benefits, costs and proportionality of the test, and its decision was published in July for consultation. The CC has now concluded that the benefits of the competition test outweigh any potential disadvantages and that its implementation is justified. However, to ensure that the competition test is a proportionate remedy to the anti-competitive features of the market,

the CC has also chosen to include a materiality provision to allow retailers to make small extensions to stores unless the store has been extended in the previous five years.

46/09 – 2 October 2009

LITIGATION

[Back to Top](#)

EU

18 Commission defends its decision of Unipetrol's liability for rubber cartel

The Commission has defended its decision before the CFI to fine the Czech firm, Unipetrol €17.5 million for the involvement of its subsidiary, Kaučuk, in a rubber cartel.

Where a company owns 100% of a subsidiary, it is presumed to be liable for the subsidiary's anticompetitive conduct.

Unipetrol argued that it was an unconnected “financial holding” set up by post-communist restructuring, and as such, liability should not be imputed in the same way as with a standard parent company with 100 percent ownership of a subsidiary. Unipetrol was created in 1994 to administer state-run assets from the National Property Fund in order to prepare for privatisation. Unipetrol argued that, due to its specific nature, it had no way to exert control or impose objectives on Kaučuk.

The Commission argued that Unipetrol should be responsible for the involvement of Kaučuk. However, it detailed two situations in which the presumption of influence can be rebutted: firstly, when a contract prevents a parent company from exercising control, and secondly, where the parent company is banned from exercising influence. In addition, the Commission pointed to scenarios of state intervention or regulatory measures to impede intervention, which would make influence less likely. However, the Commission did not consider that any of these scenarios reflected Unipetrol's situation.

20 October 2009

UK

19 High Court refuses stay in synthetic rubber cartel damages action

The High Court has refused to issue a stay against a damages action brought against participants in a synthetic rubber cartel, stating that the risk of contradictory judgements following proceedings in Italy was not a sufficient reason to delay the case.

In November 2006, the Commission imposed fines on six companies (including Shell, Dow, ENI Bayer, Trade-Stomil, Unipetrol and Bayer) totalling €519 million, after discovering that they had been involved in cartel activity in breach of Article 81 EC (now subject to appeal). The High Court claim, brought in December 2007, seeks damages on behalf of tyre manufacturers (including Continental and Michelin) who had allegedly suffered as a result of the rubber companies' anti-competitive actions.

In July 2007, members of the ENI group brought proceedings before the Italian courts seeking a “negative ascertainment”, a declaration that the cartel did not exist (or if it did, that no losses were incurred by other parties). The defendants are seeking to challenge the jurisdiction of the High Court to hear the tyre makers' claim whilst proceedings in Italy are ongoing. The case is effectively trapped between the English and Italian jurisdictions.

Although ENI's proceedings in Italy were dismissed in May 2009, they are now the subject of an appeal and are, therefore, ongoing. The High Court had to decide whether to allow the damages claim to continue or await the final outcome of proceedings in Italy. The High Court held that a stay of the Court's jurisdiction over the claim against the defendants could not be justified as the likelihood of divergent judgements was small and the case's connections with Italy are not sufficient to justify the Italian court acquiring jurisdiction. Dow has been granted leave to appeal against this decision.

27 October 2009

Other

20 Foreign shareholder group authorised to join New York class action suit against Vivendi

A group of French minority shareholders have been admitted to join a class action suit initiated against Vivendi in New York. The group of French shareholders currently represent the majority in the US class action proceedings.

Due to this group taking part to the class action proceedings, Vivendi will encounter significantly greater costs if it loses the procedure in the US. For this reason, Vivendi started legal proceedings in France against two members and the president of a minority shareholders association. Vivendi's aim is to forbid the French group of shareholders from further participation to the US class action proceedings.

In the French proceedings Vivendi argues that the French group of shareholders can address their claim only to the courts of France, as this was where they bought their shares. Besides this, Vivendi also states that the American concept of class actions is incompatible with French law. It is said that Vivendi claims €1 million for damages in France based on allegations of abusive behaviour. The hearing in France is scheduled for 25 November 2009.

The group of French shareholders consider these French procedures as a form of blackmail or unlawful pressure and have asked the US judge to order Vivendi to terminate its legal actions in France. It is not yet clear whether the decision to allow the French group of shareholders to join the US class action will stand. If it will, it is too early to conclude that the US judge's decision to admit a group of foreign shareholders creates a binding precedent. Indeed, US judges have systematically excluded foreign shareholders from class action procedures in the US after assessing the matter on a case by case basis.

15 October 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.

CONTACTS



Diarmuid Ryan

T: +44(0)161 830 5331

E: diarmuid.ryan@hammonds.com

F: +44 (0)870 460 2884

Tom S. Pick

T: +32 2 627 7676

E: tom.pick@hammonds.com

F: +32 2 627 7686

