COMPETITION LAW BULLETIN

NOVEMBER/DECEMBER 2009

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French court refers question to ECJ on absolute ban on Internet sales in selective distribution systems

In 2006 the French Competition Council opened proceedings against eleven cosmetics producers for having imposed an absolute and general ban on members of their respective selective distribution systems from selling their products to end customers via the internet. This was considered to represent a hardcore restriction of competition, contrary to the French Commercial Code and to Article 81(1) of the EC Treaty (now Article 101 TFEU).

In March 2007, proceedings were closed against ten of the producers, who offered commitments to amend their contracts. However, the market leader, Pierre Fabre, refused to do so. As such, the Council opened formal proceedings and adopted a decision finding the practice to be anti-competitive. The Council fined Pierre Fabre 17,000 EUR and ordered it to remove, from its selective distribution contracts, any clause that effectively prohibited internet sales of its cosmetics and personal hygiene products.

Pierre Fabre appealed this decision to the Paris Court of Appeal ("The Court"). The European Commission ("Commission"), of its own initiative, intervened in the proceedings as amicus curiae. In line with the views currently expressed in its draft revised vertical Guidelines, the Commission submitted that a total ban of internet sales constitutes a hardcore restriction of competition by object, which may be objectively justifiable only in limited circumstances, such as for reasons of public order, public safety or public health (e.g. the prohibition of sale of weapons over the internet).

In its ruling of 29 October 2009, the Court decided to stay proceedings and to request a preliminary ruling from the European Court of Justice ("ECJ") on the grounds that, firstly, neither the Guidelines, nor the written submissions of the Commission are binding upon the national Court; and secondly, that although the Commission and the French Competition Council reached the same conclusion, they relied on different arguments to this end. The Court also recognises that the arguments brought forward by Pierre Fabre are not unfounded.

One could indeed agree with Pierre Fabre that it is difficult to understand how the French Competition Authority can, on the one hand, argue that an absolute ban on internet sales is a hardcore restriction, and, on the other hand, accept that procedures against the suspected infringers could be settled using the commitment procedure (not generally suitable for hardcore restrictions, according to the French Authority's own policy).

It is probably an understatement to say that the preliminary ruling of the ECJ will have a tremendous impact on the future of distribution in the EC and that it will be awaited with much interest. Let us just hope that the ECJ will not take too long to issue its ruling.

MERGERS

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EU

Decisions

1 Commission conditionally approves proposed acquisition of Segebel by EDF

On the 12 November 2009, the Commission cleared, under the EC Merger Regulation, the proposed acquisition of Segebel by Electricité de France ("EDF"), both of which are active in the energy sector.

During the course of its investigation, the Commission expressed competition concerns in relation to the Belgian wholesale electricity markets. It was felt that the merger would remove EDF as a potential significant entrant in the market and prevent the development of a new generation capacity in Belgium. In particular, the Commission noted that the merged entity may have less incentive to continue with EDF's development of two sites which contain two Combined Cycle Gas Turbine ("CCGT") units. These are part of EDF's plans to develop a new gas-fired electricity generation capacity.

In order to avoid a Phase II investigation by the Commission, EDF proposed a number of commitments, including: the immediate divestment of one of the two companies in charge of the planned CCGT projects; and the divestment of the remaining assets of the CCGT projects if they have not made a final investment decision by June 2011. The Commission believed that these commitments adequately satisfied their competition concerns with another operator being able to further the development of the new generation capacity in Belgium.

IP/09/1704 – 12 November 2009

2 Acquisition of joint control over Bristol Airport by OTTP and Macquarie Group approved by Commission

The Commission has approved the proposed acquisition of joint control of Bristol International Airport Limited by OTTP and the Macquarie Group under the EU Merger Regulation.

OTTP (the Ontario Teachers' Pension Plan) is a Canadian pension fund which has already invested in Birmingham International Airport and has a non-controlling stake in Bristol Airport. The Macquarie Group is a global provider of banking, financial, advisory, investment and funds management services. It, too, already has a stake in Bristol Airport. Under the proposed merger transaction, OTTP would increase its stake in Bristol Airport, leading to joint control of Bristol Airport between the Macquarie Group and OTTP.

The Commission has decided that the proposed concentration would not be anti-competitive, since the catchment areas for Bristol and Birmingham Airports only overlap slightly and the airports do not, therefore, represent a significant competitive constraint on each other. In addition, there are other alternative airports in the area and airlines do not consider the airports as close substitutes.

IP/09/1910 - 11 December 2009

3 Commission approves proposed acquisition of MCE by Bilfinger Berger, subject to conditions

The European Commission has cleared under the EU Merger Regulation the proposed acquisition of Austrian company MCE AG by German-based Bilfinger Berger AG, both active in industrial services and the installation of high pressure pipes.

The Commission's investigation of the proposed transaction found competition concerns in the German/Austrian market for the installation of high pressure pipes. In order to address the competition concerns identified by the Commission, Bilfinger Berger offered to divest its subsidiary MCE Energietechnik GmbH and also transfer a large MCE high pressure pipe project from another MCE subsidiary to the

Divestment Business.

The Commission concluded that the commitments offered by Bilfinger Berger would remedy its competition concerns and that therefore the proposed transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.

IP/09/1978 - 18 December 2009

UK

Decisions

4 OFT refers Friends Reunited merger to the Competition Commission

On 2 November 2009, the Office of Fair Trading ("OFT") decided to refer the anticipated acquisition of Friends Reunited Holdings Limited ("Friends Reunited") by Brightsolid Group Limited ("Brightsolid") to the Competition Commission ("CC") for further investigation.

Friends Reunited and Brightsolid are two of the three largest suppliers of online genealogy services in the UK, the market leader being Ancestry.co.uk. The OFT, having analysed the extent of direct competition between the parties, the level of competition provided by smaller companies and the possibility of future entry or expansion in the market, felt that current competition in the market was not sufficiently safeguarded if the proposed merger went ahead. The OFT considered that as the acquisition would see three of the main providers for online genealogy services reduced to two, there may be the possibility of the merged entity reducing the quality or range of its services, or possibly raising prices. The OFT, therefore, considered that a referral to the CC was required in order for a fuller investigation to be carried out.

129/09 – 2 November 2009

5 Competition Commission requires Stagecoach to divest Preston Bus

Following a referral by the OFT, the CC has been investigating the completed acquisition of Preston Bus Limited ("Preston Bus") by Stagecoach Group Plc ("Stagecoach") since May 2009. In its provisional decision in September, the CC considered that the acquisition of Preston Bus would substantially lessen competition, and potentially harm the interests of passengers through the raising of prices and worsening of service levels.

In the CC's final report published on 11 November 2009, it decided that Stagecoach must sell Preston Bus, having concluded that divestment is the most appropriate way to restore competition and safeguard passenger interests within Preston. The sale will include a bus depot, other assets and a network of routes formerly operated by Preston Bus. The CC must also approve the successful bidder to ensure that it is capable of being an effective competitor to Stagecoach.

51/09 – 11 November 2009

6 Competition Commission clears Ticketmaster/Live Nation merger

The CC has cleared the proposed merger of Ticketmaster and Live Nation in the UK. The CC concluded in its final report that the merger will not result in a substantial lessening of competition in the market for live music ticket retailing or in any other market in the UK.

The main concern identified in the CC's provisional findings was that prior to the proposed merger, Live Nation had signed an agreement with Ticketmaster's competitor, CTS Eventim ("Eventim") which would provide Live Nation with ticketing software and services. However, the CC has found that the merger will make little difference to the prospects of Eventim's success in the UK and this was noted by the fact that prior to the announcement of the merger, Live Nation had never intended to support Eventim's entry into the UK beyond its obligations under the agreement, which would remain unchanged by the merger.

56/09 – 22 December 2009

Other

7 Chinese Merger Control

On 27 November 2009, the Chinese Ministry of Commerce ("MOFCOM") issued two implementing regulations, the Regulation on the Notification of Concentrations of Undertakings ("Regulation on Notification") and the Regulation on the Review of Concentrations of Undertakings ("Regulation on Review"). The drafts of these two regulations, together with three other regulations, were published by MOFCOM earlier this year for public consultation.

Regulation on Notification

In comparison with the previous consultation draft of the Regulation on Notification, the final version contains three main changes that should be highlighted.

Firstly, Article 3 of the previous draft, which provided a definition of control that is similar to Article 3.2 of the EC Merger Regulation, has been removed from the final text. The previous Article 3 also provided that the creation of a joint venture is to be regarded as a concentration of undertakings as referred to in Article 20 of the Anti-monopoly Law (AML). With the removal of Article 3, arguably MOFCOM has to strictly follow the wording of the AML and consider all transactions that reach the turnover thresholds and cannot be exempted by Article 22 of the AML as reportable

Secondly, Articles 10 and 11 of the final text clarify which information is mandatory in the notifications and which information can be voluntarily submitted by the notifying parties. In the previous consultation draft, supporting documents, such as a feasibility report on the transaction, due diligence reports and reports on the post-merger forecast, were listed as mandatory documents. In the final version, those documents, along with opinions of local governments and relevant regulatory bodies, are explicitly deemed voluntary.

Thirdly, Article 14 of the final text requires MOFCOM to inform notifying parties in writing when it considers the notification to be complete. This starts the clock running for MOFCOM's review. In practice, in recent cases MOFCOM has tended to shorten the period between the date of the initial submission and the date that the clock starts ticking.

Regulation on Review

The final version of the Regulation on Review continues to refine the procedural rules on hearings, Phase II investigations, and remedy proposals. It has removed the provision that hearing sessions are not open to the public. It also clarifies that in Phase II, an Opinion of Objection (the equivalent of the EC's Statement of Objections) will be sent to the notifying parties and the parties can respond to it. Finally, Article 11 provides that the notifying parties should take the initiative to submit remedy proposals for MOFCOM's consideration.

Other potential implementing regulations and/or guidelines

Due to controversy over the other draft implementing regulations on transactions not notified ("gun-jumping") and transactions below the thresholds but potentially raising competition concerns, MOFCOM did not release them this time. It is possible that MOFCOM will substantially revise these three draft regulations and release them at a later stage.

In the past month, MOFCOM has also invited leading academics and practitioners to attend workshops in Beijing on the remedy package and horizontal mergers. It has not been ruled out that MOFCOM will issue guidelines on remedies and horizontal mergers at a later stage to provide more insights on how MOFCOM evaluates these questions.

EU

8 Commission market tests proposed commitments of EDF in the French electricity retail market

The Commission has announced that it is undertaking a formal consultation with market operators and interested parties, on the commitments offered by EDF to improve the level of competition in the French energy market.

The Commission sent a Statement of Objections to EDF in December 2008, outlining its concerns that EDF had infringed the competition rules by entering into contracts which due to their scope, duration and exclusivity restrictions, closed off the market to other potential suppliers. The Commission was also concerned that the relevant contracts may include illegal resale restrictions and that as a result, EDF's actions infringed the competition rules on abuse of a dominant position (Article 82 EC Treaty, now Article 102 TFEU).

EDF has offered a number of commitments in order to address the Commission's concerns. These include:

- ensuring that other providers can compete for 65% of EDF's electricity contracts with large industrial users in France;
- limiting new contracts with large industrial users to a maximum of 5 years duration;
- allowing customers to partly source their electricity requirements from another supplier; and
- from 1 July 2010, removing the resale restrictions from its contracts with large industrial suppliers.

A summary of the proposed commitments was published on 4 November 2009 and interested parties were given one month to present their comments.

IP/09/1669 – 4 November 2009

9 Commission imposes fines of €173 million for cartel involvement of plastic additives producers

On 11 November 2009, the Commission announced that it had fined companies participating in two illegal cartels breaching Article 81 EC (now Article 101 TFEU). The cartels related to price fixing, sharing customers, allocating markets and exchanging sensitive commercial information in the sector of plastic additives which are used as heat stabilisers. The Commission commenced investigations into the cartel activity in February 2003. 24 companies from 10 different corporate groups were fined a total of €173,864,000. This represents the sixth cartel decision which has been made by the Commission in 2009, and takes the total amount of fines imposed during 2009 up to €1,623,388,000.

IP/09/1695 – 11 November 2009

10 Ombudsman releases non-confidential version of Intel complaint decision

On 18 November 2009, the European Ombudsman published a non-confidential version of his decision confirming that the Commission had committed procedural errors in its investigation of Intel's alleged breach of Article 82 EC (now Article 102 TFEU).

Intel, a micro-chip producer, claimed that the Commission had failed to take notes during a meeting with a senior executive at Dell and that this impaired Intel's rights of defence. The Ombudsman concluded that the meeting had been relevant to the subject of the investigation and that the Commission had failed to take a note of the meeting or include a copy of the meeting's agenda in its investigation file. The Ombudsman found the Commission's omission to constitute maladministration, but did not comment on whether this infringed Intel's rights of defence.

Intel also alleged that the Commission had encouraged Dell to enter into an information exchange agreement with AMD (another micro-chip producer), in order to allow AMD access to confidential information in the Commission's investigation file. Although the Ombudsman did not make a finding of maladministration in this respect, he did find that the Commission had failed to make a note of its telephone conversation with Dell regarding the exchange agreement. The Ombudsman advised that the Commission should, in future, take full and proper notes of any meetings and telephone calls where important issues are discussed with third parties.

EO/09/19 – 18 November 2009

11 Commission closes formal proceedings against Qualcomm

The Commission announced on 24 November 2009, that it has closed formal proceedings against Qualcomm, a US chipset manufacturer, for alleged breaches of Article 82 EC (now Article 102 TFEU).

The investigation into potential anti-competitive behaviour began in October 2007, following a series of complaints that Qualcomm had abused its dominant position. In particular, it was alleged that Qualcomm had imposed terms that were not fair or reasonable in relation to the licence terms and conditions for the use of its intellectual property rights for mobile phone technology.

The Commission stated that this case raised important considerations in relation to the pricing of technology once it has become part of an industry standard. The initial investigation centred on whether the royalties that Qualcomm had been charging for its patented technology were unreasonably high; the Commission considered that antitrust authorities have to be careful about overturning commercial agreements.

MEMO/09/516 – 24 November 2009

12 Commission approves commitments offered by GDF Suez to increase competition in French gas market

The Commission has declared the commitments offered by GDF Suez (a French energy company) to increase competition in the French gas market, legally binding under Article 9 of Regulation 1/2003 on the implementation of the EU Treaty's competition rules.

The Commission was concerned that GDF Suez's behaviour may have prevented access to the French gas market and infringed Article 102 of the TFEU (abuse of a dominant position) due to its long term reservations for most of France's gas import capacity, coupled with its investment and capacity allocation strategy at gas import terminals in France. If new competitors are prevented from accessing gas import infrastructures, they are prevented from accessing the market and market development and competition are adversely affected.

GDF Suez has agreed to free-up a large share of its long-term reservations of gas import capacity into

France, ultimately reducing its share to below 50% in order to encourage new competitors to enter the market. The Commission consulted with interested parties in July, who confirmed that they believed the commitments were sufficient to remedy the Commission's competition concerns, and has now agreed their suitability.

The Commission's decision is legally binding and GDF Suez may be fined up to 10% of its total annual turnover by the Commission if it breaches its commitments, regardless of whether EU competition rules have been infringed.

IP/09/1872 – 3 December 2009

13 Commission accepts commitments from Rambus to cap memory chip loyalty rates

On 9 December, the Commission announced its decision to accept an offer made by Rambus Inc, a California based chip maker, to lower royalty rates on certain patents for its dynamic random access memory ("DRAM") chips. DRAM chips are used to temporarily store data, for instance, in PCs.

The investigation dates back to 2007, when the Commission alleged that Rambus had violated the EU antitrust law on abuse of dominant position. The Commission was concerned that Rambus was committing what it described as a "patent ambush" by claiming abusive royalties for the use of its patents. Rambus had failed to notify the Joint Electron Device Engineering Council (JEDEC) that it held some of the patents which were necessary to comply with the new international DRAM standards which were being developed by the Council. Rambus then attempted to enforce the patents against DRAM manufacturers which were complying with the new international standards.

Rambus has now offered to put a worldwide cap on its royalty rates for products that conform to JEDEC standards, during a five year period and to charge zero royalties for certain patents which were adopted when Rambus was a member of JEDEC. The Commission's decision confirms that it considers these commitments to be adequate to address its competition concerns.

IP/09/1897 – 9 December 2009

14 Commission confirms sending statement of objections to alleged participants in bananas cartel in Southern Europe

The Commission has confirmed that in December 2009 it sent a Statement of Objections under the EC antitrust rules to a number of companies active in the import and marketing of bananas, concerning their alleged participation in a cartel in violation of Article 101 TFEU. This statement follows surprise inspections which were carried out by the Commission in Southern Europe in November 2007.

MEMO/09/566 – 17 December 2009

15 Commission welcomes E.ON proposals to increase competition in German gas market

The Commission has welcomed remedies offered by the German energy company E.ON in response to concerns expressed by the Commission that certain E.ON practices may constitute a breach of EC rules on abuse of a dominant market position (Article 102 TFEU).

E.ON proposes to commit to a significant, structural reduction of its long-term gas capacity reservations which prevent access of competitors to infrastructure needed to supply gas to customers within EON's network.

The Commission intends to market test E.ON's proposals, with a view to adopting a decision under Article 9 of Regulation 1/2003. Under such a procedure, the commitments would be made legally binding by a decision of the Commission and the Commission would not pursue the antitrust investigation further.

MEMO/09/567 – 17 December 2009

UK

16 European Commission welcomes the entry into force of the Treaty of Lisbon

On the 1 December 2009, the Treaty of Lisbon entered into force amending the current EU and EC Treaties, and will now be know as the Treaty on the Functioning of the European Union (“TFEU”).

The Commission believes that the new Treaty will provide the Union with the legal framework and tools necessary to meet future challenges and respond to citizens' demands. It will also make the EU better equipped to meet expectations in the fields of energy, climate change, cross-border crime and immigration.

From the 1 December 2009, the numbering of the articles that are relevant for competition law purposes will change as follows:

Rules applying to undertakings:

- Article 81 EC changes to Article 101 TFEU
- Article 82 EC changes to Article 102 TFEU
- Article 83 EC changes to Article 103 TFEU
- Article 84 EC changes to Article 104 TFEU
- Article 85 EC changes to Article 105 TFEU
- Article 86 EC changes to Article 106 TFEU

Aids granted by States:

- Article 87 EC changes to Article 107 TFEU
- Article 88 EC changes to Article 108 TFEU
- Article 89 EC changes to Article 109 TFEU

In addition, the Court of First Instance (CFI) will be called the General Court.

IP/09/1855 - 1 December 2009

17 OFT publishes report on study into its antitrust penalties policy

The OFT has published a report which was commissioned in order to establish the effectiveness of different antitrust sanctions. The report also comments on the efficacy of the penalties imposed in the UK compared with those used by other competition authorities.

The report confirms that deterrence is a key aspect of antitrust policy but that fines alone are not always sufficient. The report, therefore, suggests that the most successful regimes are those that combine fines with non-monetary penalties, such as individual sanctions, leniency, settlements and private actions.

The report states that although the fines imposed by UK competition authorities tend be lower than those of its international comparators, the UK has implemented a robust leniency programme and provides for forceful penalties against individuals; these include imprisonment and competition disqualification orders for anti-competitive practices. The report warns authorities not to pay too much attention to the financial hardship caused by the imposition of fines to deter companies from falsifying their balance sheets. However, the report

also warns that where hefty fines result in bankruptcy, this too can reduce competition within a given market.

30 October 2009

Other

18 Russian Federal Antimonopoly Service fines Lukoil €179 million for abusing its dominant position

The Russian Federal Antimonopoly Services (“FAS”) has fined the oil company Lukoil over 6.5 billion roubles (approximately €179 million), for abusing its dominant position in the wholesale market for oil products. According to the FAS, Lukoil abused its dominant position by withdrawing goods from circulation and by creating discriminatory conditions in selling oil products. This led to increased prices in the wholesale segment of the market for motor petrol, diesel fuel and aviation kerosene in the first half of 2009.

In imposing the fine, FAS also took into account Lukoil’s actions in attempting to obstruct the antitrust investigation. The FAS also noted that most of the companies fined in relation to antitrust breaches attempt to challenge its decisions; but that in more than 80% of cases the Courts confirmed the legitimacy of the decisions made by the FAS.

FAS confirmed that it is currently considering proposals by the largest oil companies relating to the improvement of market competition. FAS plans to discuss these market issues through its Working Group and through a recently formed Expert Council on the Oil and Oil Products Markets.

5 November 2009

19 Comisión Nacional de la Competencia (CNC) fines insurance companies in decennial insurance cartel

The CNC has levied fines totalling €120,728,000 on insurance companies Asefa, Mapfre Empresas/Mapfre RE, Caser, Switzerland/Swiss RE, Scor and Münchener for a cartel agreement to set minimum prices for decennial insurance in Spain.

In 2002 the Spanish Building Regulatory Act (Ley de Ordenación de la Edificación), introduced the obligation on developers of new residential buildings to put in place insurance for latent defects (decennial insurance). In the environment of growing demand and in order to avoid the decline in decennial insurance prices, the leading insurers (Asefa and Mapfre Empresas) and the three top reinsurers (Scor, Switzerland and Münchener) met and exchanged information with the aim of reaching a minimum pricing arrangement to apply to the entire decennial insurance market. The agreement materialised in a document dated 5 December 2001, which fixed the policy for pricing decennial insurance.

The reinsurers undertook to include the agreement into the pricing guidelines they annex to the reinsurance contracts. These guidelines are compulsory for the insurers. This resulted in complete uniformity in the premiums proposed by the different underwriters present in the Spanish decennial insurance market, and the elimination of competition.

This cartel pricing arrangement remained in force between 2002 and 2007. According to the CNC, during that period the companies that formed part of the cartel made sure that the agreement was observed by themselves and by the insurers and reinsurers that operated in the decennial insurance and reinsurance market. Instances of non-compliance with the agreement were reported to the other cartel members and there is evidence that certain members of the cartel would exert concerted pressure and even boycott those companies that had shown a willingness to stray from the cartel's minimum price discipline.

The CNC found the cartel to represent a serious violation of competition law because, apart from its lengthy duration, the arrangement affected the entire market for a product which must, by law, be contracted into by housing developers; who are then able to pass on the increased cost via the final price of the home. The CNC resolved to levy sizeable fines on the companies that participated in the cartel to ensure that the

wrongdoers do not find non-compliance with antitrust laws to be more profitable than compliance.

24 November 2009

STATE AID

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20 Commission endorses restructuring and asset relief package for KBC

On 18 November 2009, the Commission approved a restructuring and asset relief package for KBC under the EC State aid rules. KBC is a Belgian integrated banking and insurance group, based primarily in Belgium and Central and Eastern Europe. KBC has received three aid measures to support it during the economic crisis: in December 2008 a recapitalisation of €3.5 billion; in June 2009, a second recapitalisation of €3.5 billion and an asset relief measure on a portfolio of Collateralised Debt Obligations ("CDO"). Approval of these measures was subject to KBC submitting a restructuring plan.

KBC's proposed restructuring plan provided that KBC would keep its integrated banking and insurance model, but would divest or wind-down several other non-core businesses. The restructuring plans also detail how KBC will reimburse the Belgian authorities for the two cash injections it has received.

The Commission's investigation has verified that the valuation of KBC's CDO portfolio is in accordance with the Commission's Impaired Assets Communication, and that the asset relief measure has adequately addressed its CDO exposure. Potential distortions of competition have been limited by the divestments and business reductions made by KBC and by the commitments provided by the Belgian Authorities.

IP/09/1730 – 18 November 2009

21 Commission endorses restructuring plans and illiquid asset back-up facility for ING

On 13 November 2009, the Commission approved a restructuring plan for ING Groep NV under the EC State aid rules. ING is a Dutch financial institution, offering its services in over 40 countries. In October 2008, the Commission approved the liquidity guarantees of €12 billion offered by the Dutch government to support ING during the economic crisis.

As part of the newly approved restructuring plan, the Commission endorsed a €10 billion recapitalisation of ING under its "Recapitalisation Communication". In addition, it has now given its final approval to the back-up facility granted by the Dutch authorities for illiquid assets. This comes about after the Netherlands has undertaken to fulfil the requirements of the Impaired Assets Communication by carving out Westland Utrecht Hypotheekbank (WUH) under a timetable supervised by a trustee; reducing the risk profile of ING as well as the complexity of its operations; banning ING from acquiring other firms and from exercising price leadership on a temporary basis; and imposing a need for formal approval of the Commission in relation to ING's repayment of hybrid and subordinated debt capital instruments.

IP/09/1729 – 18 November 2009

22 Commission authorises restructuring package for Lloyds Banking Group

The Commission has authorised under EC State aid rules, a package of support measures to assist the restructuring of Lloyds Banking Group ("Lloyds"). The UK government facilitated the acquisition by Lloyds of HBOS (which was facing bankruptcy in January 2009), including the provision of a £17 billion capital injection, giving the government 43.5% ownership of the bank.

In March 2009, it was announced that Lloyds would be included in the UK's Asset Protection Scheme. The State agreed to underwrite and participate in a share offer of £4 billion and to refund losses exceeding a certain level on a pool of assets worth £265 billion. Lloyds' restructuring plan was subsequently submitted to the Commission in July 2009 and contained additional State aid measures.

On 3 November, a capital raising share offer of £20.5 billion was announced as an alternative to Lloyds' participation in the UK Asset Protection Scheme. The Commission concluded that the State's participation in this share offer for an amount of £5.9 billion constituted a State aid element and should, therefore, be assessed alongside the restructuring plan.

The Commission has concluded that the aid is compatible with EU State aid rules and with the Commission's Communications on the application of State aid rules to banks in times of crisis. The measures will help to restore the bank's long-term viability by implementing Lloyds cautious risk management strategy and removing high risk portfolios and non-core business operations. The plan also includes fair allocation of the burden for past losses to the bank, to dissuade the bank from taking excessive risks. The plan includes a divestment package in Lloyds' core business of UK retail banking in order to limit the impact of the aid on competition.

IP/09/1728 – 18 November 2009

23 Commission approves Slovak Aid for Volkswagen

The Commission has approved an aid package of €14.3 million proposed by the Slovak authorities to Volkswagen Slovakia to increase the production capacity at a plant in Bratislava. The project involves total eligible investments of €300 million (most of which is being funded by Volkswagen Slovakia itself) which will be used to enable the production of a new small family model car.

The Commission assessed the aid in accordance with its 2007-2013 Regional Aid Guidelines in order to ensure that Volkswagen Slovakia's market share, and its production capacity created by the investment, would remain below the thresholds provided in the Guidelines. If they do, then the negative effects of the aid on competition are thought to be offset by the positive contribution it provides to regional development. The Commission established that Volkswagen's market share would stay below the threshold of 25% both before and after the investment in the car segments concerned, and that the increased capacity would cause no additional concerns.

IP/09/1865 – 2 December 2009

24 Commission authorises temporary French aid scheme for farmers

On 2 December 2009, the Commission authorised a French aid scheme which is directed at supporting farmers who find themselves in difficulty as a result of the economic crisis. The scheme has a total budget of approximately €700 million and will run until 31 December 2010. Under the scheme, France has been authorised to grant limited amounts of aid of up to €15,000. Farmers facing difficulties will be eligible for aid provided that these difficulties occurred after 1 July 2008, to ensure that they can be attributed to the current economic crisis. The scheme applies the Commission's Temporary Framework for State aid measures which support access to finance in the current financial and economic crisis, as amended in October 2009 to allow grants to primary agricultural producers.

IP/09/1866 – 2 December 2009

25 Overview of national measures adopted as a response to the financial/economic crisis

The European Commission has published an overview of national measures which have been adopted as a response to the financial crisis. The information has been compiled from a range of sources and includes the communications published by the Commission providing guidance to Member States as well as a table

summarising State aid cases as at 16 December 2009.

For more information and to view the table, please follow the link above.

MEMO/09/564 – 17 December 2009

MARKET INVESTIGATIONS

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UK

26 OFT launches market study into corporate insolvency

On the 12 November 2009, the OFT launched a market study into corporate insolvency. The investigation was prompted by concerns raised with the Government and the Insolvency Service, and also following a recent World Bank report which showed that the costs of closing a business in the UK are higher than in other countries.

The OFT's study will look in particular at the structure of the market and the appointment process for insolvency practitioners. It will also identify any features in the market which could result in harm, such as higher fees or lower recovery rates for certain groups of creditors. This appears to support the findings in the report by R3, the trade body for insolvency practitioners, which highlighted the cost of insolvency as a relative weakness of the UK's regime. The OFT stated that the study will enable it to ensure that insolvency firms and practitioners are competing freely and that the market is working well for the end consumer.

132/09 - 12 November 2009

27 OFT publishes research, and consults on guidance to the industry, as part of second-hand cars market study

Following concerns about the large number of consumer complaints relating to second-hand car sales, the OFT has published four research reports as part of its market study into the sale of second-hand cars. The survey covers second-hand car buyers, second-hand car dealers, UK local authority Trading Standards Services and the results of a mystery shopping exercise.

The main survey of second-hand car buyers purchasing from dealers and auctions found that almost a fifth (19%) of those buying a second-hand car had experienced problems with it after the sale. Most problems arose within three months of purchase (86%) and the average cost to resolve the problem was £465.

143/09 - 18 December 2009

LITIGATION

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EU

28 ThyssenKrupp appeals against CFI decision

ThyssenKrupp Stainless AG (TKS) has lodged an appeal against the CFI (now General Court) judgment, dismissing its earlier appeal against the Commission's decision to re-adopt the alloy surcharge cartel

decision.

The Commission had originally fined TKS in 1998 for its own anti-competitive behaviour, and that of Thyssen Stahl GmbH, in breach of the European Coal and Steel Community ("ECSC") Treaty. The Commission concluded that the two companies had acted together with several other steel companies to modify and apply alloy surcharge reference values in a concerted manner. On appeal in 2001, the CFI annulled the Commission's decision relating to TKS' liability for the infringing behaviour of Thyssen Stahl and reduced the fine imposed accordingly.

In December 2006, after sending a new statement of objections, the Commission re-adopted its earlier decision and imposed a fine of €3,168,000 on TKS for the infringements committed by Thyssen Stahl. The Commission applied the provisions of the ECSC Treaty to establish the infringement as, although the Treaty expired in 2002, the breaches had occurred whilst it was still in force. However, it applied the procedural rules in force when the new proceedings were initiated. TKS' appeal against this decision was dismissed by the CFI, as the Commission was correct in applying the provisions of the ECSC Treaty for the past breaches but applying the current procedural framework.

On 6 November, details were published of TKS' appeal to the ECJ. TKS submits that the CFI made numerous procedural errors in its decision to apply an expired Treaty in conjunction with current procedural rules. TKS also argues that the fine imposed was calculated incorrectly and that the legal proceedings have become time barred as a result of the expiry of the relevant limitation period.

6 November 2009

29 Electrabel appeals €20 million fine imposed for implementing its acquisition of CNR without approval

Electrabel has appealed the Commission's decision to fine them €20 million for acquiring Compagnie Nationale du Rhône ("CNR"), prior to receiving approval by the Commission under the EC Merger Regulation.

Electrabel, a French electricity producer and retailer, notified its acquisition of CNR in March 2008 and subsequently received clearance from the Commission in April 2008. The Commission, however, later announced in June 2009 that it had concluded that Electrabel had already acquired de facto sole control over CNR from as early as December 2003.

In its appeal, Electrabel contends that the Commission had incorrectly classified the infringement, that it had erred in finding that there was an acquisition of de facto sole control and that it had breached the principles of proportionality in imposing such a large fine. Electrabel seeks to either have the Commission's decision annulled or to have a reduction in the fine imposed.

7 November 2009

30 ECJ dismisses appeals against CFI judgments in carbon and graphite products cartel case

On 12 November 2009, the ECJ dismissed appeals which had been brought by SGL Carbon AG and Le Carbone Lorraine against a judgment of the CFI (now General Court). The CFI had dismissed their appeal challenging the fines imposed by the Commission for a breach of Article 81(1) (now Article 101 TFEU), by participating in a cartel for electrical and mechanical carbon and graphite products. SGL Carbon was fined €23,640,000 and Le Carbone Lorraine was fined €43,050,000.

The ECJ rejected the pleas of both companies on the grounds that the CFI had not erred in law when calculating the basic amount of the fine; that the fines imposed were non-discriminatory and proportionate; that the fines were specific to the offender; that the Commission had properly taken into account the actual

impact of the cartel on the market in question; and that it had treated all operators equally when granting leniency. Interestingly, Le Carbone Lorraine had sought to argue that the CFI breached the principles of equal treatment and proportionality by finding that it could not benefit from a reduction on account of serious financial difficulties in the same way that SGL Carbon could. The ECJ did not question the CFI's finding that Le Carbone Lorraine had failed to show that it was in an equivalent situation to SGL Carbon in terms of its financial health. The objective differences in the situations of the two companies were found to justify their different treatment by the Commission.

12 November 2009

31 General Court annuls Commission decision declaring measures implemented by France for EDF to be incompatible with the common market

On the 15 December 2009, the General Court of the European Union annulled a Commission decision against EDF which declared aid it had received from the French State as incompatible with the common market.

The case dates back to December 2003, when the Commission found that EDF had enjoyed a tax concession worth approximately €888.89 million as a result of corporation tax it did not pay in 1997. EDF, supported by the French State, sought an annulment of the decision on the basis that the Commission had failed to consider their argument that the French State, as EDF's sole shareholder, had acted like a private investor.

The General Court, in its decision, considered that it is not sufficient justification to regard State actions as attributable to the exercise of State authority by the simple fact that a State has access to resources accrued through the exercise of State authority. The Court considered that an undertaking whose share capital is owned by a public authority, and into which the State injects capital, can be assessed using the prudent private investor test.

Accordingly, the General Court concluded that by refusing to consider the contested measure in the context of the private investor test, the Commission had made an error in law and, therefore, annulled the Commission's decision.

111/09 – 15 December 2009

UK

32 UK Court of Appeal upholds criminal cartel powers

On 9 December 2009, the UK Court of Appeal ruled that the criminal powers used by the OFT for the prosecution of individuals that are involved in cartels are compatible with the EU antitrust framework.

The appeal concerned a case brought by the OFT against "IB", a senior executive of a company, for his involvement in a price fixing arrangement. In the course of the proceedings, IB raised an interlocutory appeal, challenging section 188 of the UK Enterprise Act, which makes it a criminal offence to engage in cartel activity. Under the Enterprise Act, the offence can be tried on indictment and is punishable with up to five years imprisonment.

IB argued that only the designated UK competition authority (the OFT) has any powers of enforcement under the EC Regulation 1/2003 on the implementation of the EU Treaty's competition rules. He claimed that, as a result, the Crown Court has no jurisdiction to try an indictment alleging a cartel offence or to impose a punishment for breach of a cartel offence, where that cartel has an effect on trade between EU countries.

However, the court found that section 188 of the Enterprise Act is not a "national competition law" as set out

in Regulation 1/2003 and that, in any case, there is nothing in that regulation to prevent national courts from applying it.

9 December 2009

33 Competition Appeal Tribunal dismisses ECSL's claim for damages

English Welsh & Scottish Railways Limited ("EWS") was found to have abused its dominant position in the market for haulage of coal by rail in Great Britain. The Office of Rail Regulation found that EWS had entered into exclusionary contracts with industrial coal users. This discriminated against Enron Coal Services Limited ("ECSL"). ECSL claimed that as EWS had overcharged them for coal haulage, this prevented them from obtaining new business.

On 21 December 2009, the Competition Appeal Tribunal ("CAT") dismissed ECSL's claim for damages for the loss of opportunity to win a contract to supply coal to a power station operated by Edison Mission Energy Limited ("EME") for a four year period. The CAT found that ECSL had not established that it had a real or substantial prospect of supplying coal to EME. Therefore, ECSL had failed to establish that EWS's unlawful conduct had caused the loss that it claimed.

1106/5/7/08 – 21 December 2009

34 Competition Appeal Tribunal hands down its judgment into BAA Airports investigation

On 19 March 2009, the CC published the final report ("the Report") in its market investigation into BAA airports. BAA claimed that the findings in the Report were unlawful on the basis of apparent bias as there were links between a member of the CC's Inquiry Panel and an undertaking interested in acquiring those airports that BAA were selling. BAA also claimed that the CC failed to apply the proportionality principles when fixing the timetable for divestiture of three BAA airports.

The CAT handed down its judgment on 21 December 2009 stating that BAA had succeeded in its claim in relation to the apparent bias but failed in relation to their argument on proportionality. The CAT will now hear arguments on the implications of its ruling.

1110/6/8/09 - 21 December 2009

Other

35 China litigation update

Two recent cases relating to the abuse of a dominant position provides insight into the workings of the new AML in judicial proceedings in China.

On 23 October 2009, the Shanghai No. 1 Intermediate Court issued its ruling in the "Shanda-Sursen" case. This represents the first antitrust case that has reached a court verdict since the entry into force of the AML in August 2008. The case involved an action filed by Beijing Sursen Electronic Co. ("Sursen") against Shanda Network Development Co. ("Shanda") and Shanghai Xuanting Entertainment Information and Technology Co. ("Xuanting") relating to the alleged abuse of a dominant position on the on-line literature market. The abuse concerned the sequel to a popular novel which had been commissioned by Sursen. Sursen submitted that Shanda and Xuanting, who had published the original novel on their website, had abused their dominant position on the market by coercing the writer to stop working on the sequel and apologise on their website.

The Court dismissed the claims, and confirmed that Shanda and Xuanting were legitimate in their conduct. Notably, it found that Sursen had not produced sufficient evidence to show that Shanda and Xuanting were dominant on the on-line literature market. Although Shanda's website and third party websites claimed it had over 80% of the market, the court found that it did not satisfy the market share threshold of 50% beyond which dominance will be presumed under the AML.

On 23 October 2009, a case filed against China Mobile by one of its customers was settled privately, following the agreement that China Mobile would pay the customer RMB 1000. Prior to its withdrawal, the Beijing Intermediate People's Court had accepted to hear the claim on abuse of dominant position in the Chinese cellular telephone market. This claim had been transferred from the Dongcheng District Court, indicating that the intermediate level courts will have primary jurisdiction over civil litigation under the AML.

23 October 2009

36 Paris Court of Appeal annuls decision on price fixing in perfumes and cosmetics industry

The Paris Court of Appeal recently annulled a decision of the French Competition Authority ("FCA") on the grounds that the procedure took too long. The original decision was issued by the FCA on March 2006, finding that the main manufacturers and brand owners of perfumes and cosmetics in France were guilty of price fixing.

This is the first time that the Paris Court of Appeal (which has exclusive jurisdiction to hear appeals lodged against the FCA) has accepted arguments put forward by a party as to the impact that the duration of the procedure can have on the exercise of its rights of defence.

The Court ruled that the parties' rights of defence had been breached on the following grounds: the secret nature of the investigation; the 6 year duration of the first administrative part of the investigation; the gross disproportion between the time the investigators allowed themselves (6 years) and the time given to parties to respond to the statement of objections (10 months); and the fact that the infringement decision was essentially based on price information collected from retailers shops for statistical purposes, which was deemed to be incomplete and not objectively collected.

The Court considered that the duration of the preliminary administrative investigation, and the fact that it was run in secret, did not allow the companies involved to anticipate the objections against them and prepare their defence accordingly. The Court concluded that in so doing, the FCA had irreparably breached the companies' rights of defence.

12 November 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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