COMPETITION LAW BULLETIN
JANUARY 2010

MERGERS

Back to Top

EU

Decisions

1 The proposed acquisition of Super de Boer Assets by Schuitema is referred to the Dutch Competition Authority by the Commission

The European Commission (the "Commission") has decided to refer the assessment of Schuitema's proposed acquisition of assets of Super de Boer to the Dutch Competition Authority (Nederlandse Mededingingsautoriteit – "NMa"), under Article 9 of the EU Merger Regulation. This transaction is closely linked to the acquisition of all the Super de Boer assets by Jumbo, which was cleared by the NMa on 4 December 2009.

The NMa asked the Commission to refer the transaction as they believed it would affect competition in a number of local retail markets within the Netherlands. The Commission decided that the conditions of Article 9 were met and therefore decided to refer the case in its entirety to the NMa.

IP/10/50 – 26 January 2010

2 Proposed acquisition of Ermewa by TLP ("SNCF group") gets approval by the Commission

The Commission cleared under the EU Merger Regulation the proposed acquisition of the Swiss company Financière Ermewa ("Ermewa") by Transport et Logistique Partenaires SA ("TLP") owned by the French SNCF.

It emerged from the Commission's initial market investigation that the planned transaction was likely to raise competition concerns on markets linked to the transportation of cereals by rail, in particular the axial hopper wagon hire market, and on the cereal rail transport commissioning market in France, Benelux, Italy and part of Germany where such wagons are used. The planned transaction would have had the effect of bringing together the two main operators in this field, leading to the creation of an unavoidable partner for cereal shippers in the area in question.

To address the Commission's concerns, TLP offered to divest all commissioning activities for the transportation of cereals by rail plus a fleet of cereal hopper wagons. After market testing the proposed remedies, the Commission concluded that they would address the competition concerns initially identified in its market investigation. The Commission therefore concluded that the planned transaction, as modified by the commitments, would not raise any competition concerns.

IP/10/44 – 22 January 2010

3 The Commission gives the all clear for the proposed acquisition of Varian by Agilent

The Commission has cleared under the EU Merger Regulation the proposed acquisition of Varian Inc by Agilent Technologies Inc, both of the US, by way of purchase of shares.

The Commission identified competition concerns in a number of markets in the European Economic Area ("EEA") and through the proposed transaction the combined entity would have significant market shares in some markets.

To remedy the concerns raised by the Commission in relation to each of these markets, Agilent and Varian have made the commitment to divest Agilent's entire global micro/portable GC instrument business, as well as Varian's entire global Lab GC, triple quad GC-MS and ICP-MS instrument businesses.

In view of the remedies proposed, the Commission has concluded that the operation would not significantly impede effective competition in the EEA or any substantial part of it.

IP/10/39 – 21 January 2010

4 Proposed acquisition of Cadbury by Kraft Foods is cleared by the Commission, subject to conditions

The Commission has cleared the proposed acquisition of Cadbury plc of the UK by Kraft Foods Inc. of the US, by way of public offer.

The Commission found that while the market share of Cadbury is very significant in the UK and Ireland, the penetration of Kraft's brands in these markets remains low. In addition, Kraft's and Cadbury's brands do not compete closely with each other, given the strong preference of UK and Irish customers for traditional British chocolate as opposed to "continental types" of chocolate. Therefore, there were no competition concerns in the UK and Irish markets.

The Commission did however identify competition concerns within the market for chocolate confectionery in Poland and Romania, where the combined market share of Kraft/Cadbury is particularly high and their brands are competing closely. In order to remedy these concerns, Kraft committed to divest Cadbury's Polish confectionery business marketed under the Wedel brand and Cadbury's domestic chocolate confectionery business in Romania. The Commission concluded that the remedies addressed the competition concerns and therefore the operation was cleared under the EU Merger Regulation.

IP/10/3 – 6 January 2010

UK

Decisions

5 OFT accepts hold separate undertakings in acquisition by C&C Group of the Gaymers Cider Business

On 22 January 2010, the Office of Fair Trading ("OFT") accepted hold separate undertakings from C&C Group under section 71 of the Enterprise Act 2002 ("EA 2002") in relation to the completed acquisition by C&C Group of the Gaymers Cider Business.

While the OFT is considering whether to make a reference to the Competition Commission ("CC"), section 71 of the EA 2002 allows them to accept initial and interim undertakings for the purpose of preventing pre-emptive action by the parties' to a completed merger.

22 January 2010

6 OFT publishes clearance decision in acquisition by Yorkshire Building Society of Chelsea Building Society

The OFT has given Yorkshire Building Society the green light in their acquisition of Chelsea Building Society as they identified no competition concerns on a national, regional or local basis.

In relation to each of the overlapping areas of mortgages, savings accounts and insurance, the parties' combined market shares at national level was less than 5%. The OFT was therefore convinced that the merger would not result in a substantial lessening of competition within a market or markets in the UK.

13 January 2010

7 Completed acquisition by PHS Teacrate of GB Nationwide Crate Hire

On 8 January 2010, the OFT cleared the completed acquisition by Teacrate, a wholly owned subsidiary of PHS Group which acquired GB Nationwide Crate Hire ("GBN"). Both companies are active in offering for hire crates and associated products for use in removals.

In their decision, the OFT had taken into account the fact that GBN had lost its largest customer, which accounted for 40-50% of its revenues. It was clear that GBN was in decline and was not offering effective competition to Teacrate immediately prior to the merger. As a result, the merger did not raise any competition concerns at either a national or local level.

8 January 2010

8 OFT publishes decision for granting a consent under FirstGroup/SB Holdings undertakings

On 24 December 2009, the OFT published its decision to approve a request by FirstGroup plc for consent under the undertakings from its acquisition of SB Holdings Limited. In June 1996, FirstGroup acquired the Scottish bus operator SB Holdings Limited.

In January 2002, the Secretary of State had accepted behavioural undertakings from FirstGroup. The undertakings were designed to prevent FirstGroup from exploiting its market power through raising fares above the total permitted increase. As a result, the undertakings capped fares in relation to FirstGroup's operations in Edinburgh and Glasgow.

Subsequently, FirstGroup requested for the OFT's consent to change a fare zone boundary. The OFT allowed the change and the fare increase. In their decision, the OFT concluded that the proposed zone change, which constitutes an indirect price increase, does not represent an exercise of market power by FirstGroup and in the absence of the undertakings, the most likely alternatives for FirstGroup would be to seek to increase bus revenue or reduce its costs (by reducing services). Therefore, the OFT concluded that it was reasonable to allow the change, and the resultant fare increase, given all the evidence provided and taking into account the original purpose of the undertakings.

24 December 2009

ANTITRUST

Back to Top

EU

9 The Commission opens formal proceedings concerning iron ore production joint venture between BHP Billiton and Rio Tinto

The Commission has opened a formal antitrust investigation into Anglo-Australian mining companies Rio Tinto and BHP Billiton under the EU rules on restrictive business practices (Article 101 of the Treaty on the Functioning of the European Union – "TFEU"). Rio Tinto and BHP Billiton are respectively the second and third largest producers of iron ore in the world.

The proceedings concern the agreement signed on 5 December 2009 between BHP Billiton and Rio Tinto to establish a production joint venture covering the entirety of both companies' Western Australian iron ore assets. The Commission will in particular examine whether the joint venture would have a negative effect on competition on the worldwide market for seaborne iron ore.

Opening of proceedings does not imply that the Commission has conclusive evidence of an infringement but merely that the Commission will investigate the case as a matter of priority.

IP/10/45 – 25 January 2010

10 The Commission consults on commitments offered by E.ON to address concerns in German gas market

On 22 January 2010, the Commission published in the Official Journal a notice under Article 27(4) of Regulation 1/2003 to invite comments on commitments offered by E.ON pursuant to Article 9 of Regulation 1/2003. The Commission is concerned that E.ON may have breached Article 102 of the TFEU by virtue of its long-term bookings on its gas transmission systems. In order to address these concerns, E.ON has proposed to commit to a significant, structural reduction of its long-term gas capacity reservations at various entry points. It will release certain entry capacities by October 2010 and then commit to a further reduction of its overall share of bookings by October 2015.

22 January 2010

11 Study for the Commission leads way to quantifying damages from cartels

A new study produced for the Commission by a group of lawyers principally from White & Case and the economic consultancy Oxera has proposed a range of models to help national courts calculate the price tag of antitrust activity in damages actions. While it tacitly states that a typical cartel may lead to a 10-20% overcharge, the study exposes the complexity of the issue and its conclusions will only be one contribution to the Commission's final guidance to judges.

The study looked at how to quantify damages in claims against cartelists and companies who had abused a dominant position. The study sought to produce a general framework for judges and in doing so suggested a number of models to be used which would look at how the market would be in the absence of the cartel or abusive behaviour. These models would therefore demonstrate the affect the transaction had on the markets.

The Commission is taking further submissions from judges, lawyers and other interested parties before giving its guidance.

19 January 2010

12 The Commission opens formal investigation into the "Baltic Max Feeder" scheme for European feeder vessel owners

The Commission has opened a formal antitrust investigation concerning the "Baltic Max Feeder" scheme over a potential breach of EU rules on restrictive business practices (Article 101 of the TFEU). The Commission is concerned that the scheme, whereby European ship owners collectively agree to cover the costs of removing feeder vessels from service, may be aimed at reducing capacity and therefore pushing up charter rates for such vessels. Typically, feeder vessels collect shipping containers from different ports and transport them to central container terminals where they are loaded onto bigger vessels.

Opening antitrust proceedings does not mean that the Commission has conclusive proof of an infringement. It only signifies that the Commission will conduct an in-depth investigation of the case as a matter of priority.

IP/10/21 – 15 January 2010

13 The Commission launches monitoring of patent settlements concluded between pharmaceutical companies

The Commission has confirmed that on 12 January 2010, on the basis of EU antitrust rules, it addressed requests for information to certain pharmaceutical companies asking them to submit copies of their patent settlement agreements. The requests cover patent settlement agreements concluded between originator and generic pharmaceutical companies in the period from 1 July 2008 to 31 December 2009 and relating to the EU/EEA. The Commission is in particular looking at patent settlements where an originator company pays off a generic competitor in return for delayed market entry of a generic drug. This monitoring exercise has been launched in the light of the findings of the competition inquiry into the pharmaceutical sector Inquiry (published in July 2009). The sector inquiry highlighted the risk that certain types of patent settlements may have negative effects on European consumers by depriving them of a broader choice of medicines at lower prices and indicated that the Commission could monitor such patent settlements.

Following receipt of the responses, the Commission will analyse the agreements and publish a short report providing a statistical overview. In case a specific settlement raises additional questions, a more targeted request for information could follow. Depending on the outcome of the exercise, this round of information requests may be repeated annually for as long as the Commission considers that there is a potential problem.

IP/10/12 – 12 January 2010

14 The Commission opens formal proceedings against pharmaceutical company Lundbeck

The Commission has opened a formal antitrust investigation into the international pharmaceutical undertaking Lundbeck to examine potential breaches of EU rules on restrictive business practices and on the abuse of a dominant market position under Articles 101 and 102 of the TFEU. The Commission in particular intends to investigate unilateral behaviour and agreements by Lundbeck which may hinder the entry of generic citalopram into markets in the EEA. Citalopram, originally developed by Lundbeck, is an anti-depressant drug known as a selective serotonin reuptake inhibitor (“SSRI”).

The knowledge acquired during the pharmaceutical sector inquiry, specifically on ways originator companies use to obstruct the entry of generic drugs onto the market, has allowed the Commission to draw conclusions on where Commission action based on competition law could be appropriate and effective. The Commission has decided that the investigation focusing on Lundbeck's conduct should be dealt with as a matter of priority, and as a result has opened proceedings. These proceedings are separate from the sector inquiry.

Opening of proceedings does not mean that the Commission has proof of the infringements but merely means that the Commission will investigate the case as a matter of priority.

IP/10/8 – 7 January 2010

15 The Commission publishes summary of IACS commitments decision

On 6 January 2010, the Commission published in the Official Journal a summary of its October 2009 decision to accept binding commitments from the International Association of Classification Societies (“IACS”) under Article 9 of Regulation 1/2003 (*OJ 2010 C2/5*). The Commission was concerned that IACS might have prevented non-member ship classification societies from joining IACS, from participating in its technical workshops and from accessing technical background documents. This may have resulted in a restriction of competition in ship classification services, contrary to Article 101 of the TFEU, by placing non-members of IACS at a significant competitive disadvantage. To address these concerns, IACS has agreed to establish new qualitative membership criteria and procedures for allowing non-members to access working groups and

technical information. The Commission concluded that the commitments were sufficient to resolve its competition concerns about the membership criteria, procedures and rules of the IACS.

6 January 2010

16 Improved transparency and predictability of proceedings

Detailed explanations concerning how the Commission antitrust procedures work in practice have been published by the Commission's Directorate General for Competition ("DG Competition") and the Hearing Officers on the Europa website in order to further enhance the transparency and the predictability of Commission antitrust proceedings. The explanations are outlined in three documents, namely Best Practices for antitrust proceedings, Best Practices for the submission of economic evidence (both in antitrust and merger proceedings) and Guidance on the role of the Hearing Officers in the context of antitrust proceedings. The documents will make it easier for companies under investigation to understand how the investigation will proceed, what they can expect from the Commission and what the Commission will expect from them. They have been applied by the Commission provisionally from 6 January 2010, but stakeholders have been given 8 weeks in which to submit comments on the documents with a view to the documents being adjusted in the light of comments from interested parties.

Best Practices in antitrust proceedings

The aim of the Best Practices is to further improve procedures by enhancing transparency, while at the same time ensuring the efficiency of the Commission's investigations. Important areas where the Commission will be amending its procedures include:

- earlier opening of formal proceedings, as soon as the initial assessment phase has been concluded,
- offering state of play meetings to the parties at key points of the proceedings,
- disclosing key submissions, including giving early access to the complaint, so that parties can already express their views in the investigative phase,
- publicly announcing the opening and closure of procedures, as well as when Statement of Objections have been sent, and
- providing guidance on how the new instrument of commitment procedures is used in practice.

Hearing Officers' Guidance Paper

Hearing Officers are the independent guardians of the rights of defence and other procedural rights of companies involved in competition proceedings. The aim of the Guidance is to make their role more transparent.

Best Practices on submission of economic evidence

Considering the increasing importance of economics in complex cases, the Commission's competition department often makes requests for information asking for substantial economic data (for example used in econometric analysis) during its investigations. Parties also often submit arguments based on complex economic theories on their own initiative. In order to streamline the submission of such economic evidence, the Best Practices on economic evidence outline the criteria which these submissions should fulfil.

IP/10/2 – 6 January 2010

OTHER

FRANCE

17 Paris Court of Appeal dramatically reduces fines in steel cartel

On 19 January 2010, the Paris Court of Appeal gave its ruling in a cartel appeal, slashing fines imposed by the French Competition Authority (the "Authority") on steel companies by almost €500 million.

By way of background, on 16 December 2008, the Authority condemned 11 undertakings for cartel activities, which took place over nearly 5 years, involving price fixing and market sharing.

The steel companies appealed the amount of the fines imposed by the Authority. In its ruling, the Court responded by reducing the contested amount from €575 million to €75 million.

The decision to reduce the fine was based on three main factors. Firstly, the Court appeared to attempt to temper the position of the Authority on the seriousness of the offence (regardless of the fact that it was an acknowledged price fixing and market sharing cartel). Secondly, the Court considered that the economic harm was not as important as had been made out by the Authority, considering it to be "certain but moderate". Thirdly, the Court found that the Authority had failed to individualise the various fines imposed and had failed to take sufficient account of the various mitigating factors that should have led it to set much lower fines. In particular, the Court considered that the Authority had failed to consider the major effect that the crisis in the steel industry had on the undertakings concerned.

With this decision, the Court seems to have attempted to change the method of calculating fines. The message being sent is that the Authority should have set a more moderate fine, departing as much as possible from the maximum amount set down by law. In addition, the Court appears to have ruled that the Authority ought to look at all possible factors that could lead to a reduction of the fine.

The decision has sparked criticism from the Authority, which has called the judgment "stupefying", claiming that this cartel is "the most important, the most sophisticated and the most serious in the entire history of the Authority". The regulator is worried that if the companies are dealt with so leniently then it will not serve as a deterrent for future malpractice. Indeed, the effect of the decision appears to be to justify crisis cartels, as well as calling into question the overall policy that high fines have a deterrent effect.

19 January 2010

GERMANY

18 Federal Cartel Office conducts dawn raids based on suspicion of resale price maintenance

On 14 January 2010, the German Federal Cartel Office ("FCO") conducted dawn raids on the premises of 11 retailers and 4 manufacturers of branded goods. The nation-wide on site investigations involved a total of 56 FCO officials which were assisted by 62 policemen. The dawn raided companies include grocery stores, drug stores, domestic-animal supplies traders and manufacturers of branded products. Further proceedings against other traders were initiated in writing.

The FCO conducted the dawn raids on suspicion of co-ordinated retail price-fixing for confectionery, coffee and pet food. According to Article 101(1) of the TFEU and the Vertical Block Exemption Regulation, a supplier may not impose on its distributor fixed or minimum prices (or price levels), referred to as Resale Price Maintenance ("RPM"). RPM constitutes a prohibited hard core restriction, rendering agreements null and void. Suppliers may however give non-binding price recommendations and set maximum prices (or price levels), respectively.

The dawn raids were conducted shortly after the FCO had imposed fines totalling approximately €159.5 million on Tchibo GmbH, Melitta Kaffee GmbH, and Alois Dallmayr Kaffee OHG on 18 December 2009. The three coffee producers had formed a price cartel and had fixed coffee prices since 2000. It cannot be excluded that the January dawn raids may have been based on information obtained during this investigation.

The latest dawn raids show that the FCO will continue its hard line approach against companies engaging in RPM practices. In 2009 the FCO had imposed significant fines on Microsoft, the contact lenses producer CIBA Vision and Phonak GmbH, a manufacturer of hearing aids, for RPM and restricting internet sales.

14 January 2010

ITALY

19 Antitrust launches investigation into possible collusion among Guardrail manufacturers

In a meeting on 13 January 2010, the Italian Competition Authority (the "Antitrust Authority") launched an investigation to determine whether the seven main producers of guardrails established an agreement restricting competition in order to alter competitive dynamics in the awarding of contracts and the supply of metal crash barriers to installation services.

According to the information that was provided, the seven companies exchanged information and coordinated their activities during meetings of the Consorzio Manufatti Stradali Metallici (Comast - Consortium for Metal Roadway Products) in the period from 2003 to May 2007, if not longer, dividing up the market for roadway crash barrier sales and securing the best pre-set sales price for consortium members on multiple occasions. In addition, these companies allegedly shared and applied a price list for different types of road barriers in order to fix the prices for individual sales orders, divided up their participation in public calls for tender and adopted practices intended to obstruct their competitors both directly and indirectly.

13 January 2010

20 Soccer league: The Antitrust Authority accepts commitments, one new package for Series A and three new packages for Series B

The proceeding began on 22 July 2009, to investigate possible abuses of dominant position by the League in its centralised marketing of broadcasting rights. The Antitrust Authority established that the League exploited its dominant position by denying authorisations for individual sales, thereby putting up intense resistance when several Series B sports associations requested permission to market the rights for specific Championship games autonomously.

The proceeding was concluded by the proposal of a new package of Series A television rights and a three-part *Platinum Live* package for Series B. These measures have been accepted and made binding by the Antitrust Authority after the Commission and Antitrust Authority returned positive evaluations.

As for Series A, the Soccer League committed to offering a package deal (in addition to those previously identified and already assigned) designated specifically for the satellite platform.

For Series B, the League has committed to subdividing the satellite platform's *Platinum* package into three independent packages to be assigned through competitive bidding. The recipients of Series A and B packages may also re-broadcast recorded versions of *highlights* for the games in their own respective package as well as games from other packages. The League has also decided to eliminate the preferred economic terms and conditions offered to recipients of Series A rights in the past.

In addition, For the 2012-2013 Championship, these updated guidelines will be replaced by new guidelines after receiving pre-approval from the Antitrust Authority with respect to competition-related concerns and package formulation, the League has already committed to incorporating the Antitrust Authority's recommendations. According to the Antitrust Authority, the commitments proposed by the Soccer League are sufficient to encourage competition in the TV rights acquisition phase and to stimulate competition in the pay-

TV market, both between different platforms (satellite and digital) and within individual platforms.

SPAIN

21 Comision Nacional De La Competencia fines Sara Lee, Puig and Colgate Palmolive

Comision Nacional De La Competencia ("CNC") has levied fines totalling €8,000,000 on the companies Sara Lee, Puig and Colgate Palmolive for arranging and maintaining a cartel of bath gel makers. This is the first time penalties have been levied on businesses under the leniency programme.

The CNC issued a resolution on 21 January 2010 declaring that a cartel had been found to exist, since late 2005, between the leading manufacturers of bath and shower gels.

The proceeding was initiated on the same date the leniency programme first came into effect in Spanish antitrust law. On that day, two of the cartel participants Henkel and Sara Lee submitted respective statements to the CNC disclosing the existence of the cartel and their participation, as well as the involvement of Puig, Colgate and Colomer.

Pursuant to the disclosure and to the leniency programme procedure, the CNC conducted inspections in the offices of all companies involved in the cartel, after granting a conditional exemption to Henkel as the first company to provide the CNC with evidence that allowed the Competition Authority to carry out its investigation into the cartel. This also implied denial of the exemption for Sara Lee, although this company has benefitted from a reduction in the amount of the fine in consideration of having provided evidence of significant added value on the cartel to the CNC's probe.

In its resolution of the case, the CNC Council has concluded that Henkel, Sara Lee, Colgate and Puig did indeed form part of the cartel, and that the investigations must continue to fully establish the position of Colomer with respect to the terms on which it has publicly distanced itself from the cartel.

The cartel agreement was adopted after various meetings between the top executives of the aforesaid sector leaders and consisted in a disguised price hike in bath and shower gels (by more than 15%). The arrangement entailed phased implementation of change in the product format, without raising the product price, as a means of masking an increase in the unit price paid by consumers.

The price increase was achieved by selling the gel in a smaller container than the one previously marketed, while maintaining the same price per container. Pursuant to the agreement, from June 2006 to May 2007 Henkel, Sara Lee and Puig reduced the capacity of the containers for their Fa, La Toja, Magno, Sanex, Lactovit, Kinesia, and Heno de Pravia brands by 15%. Colgate did not reduce its containers by the agreed date.

This conduct is considered a very serious violation of Spanish competition law and the companies involved were fully aware of the unlawful nature of their actions, the effects of which can extend beyond this specific infringement. The price increase affected not just the manufacturers who switched to smaller containers, but all the other brands as well, given that a price increase by the sector leaders further widens the price gap between their products and all the rest. Such price increases means that all other brands, including the so-called "white" brands, would find it easier to raise their prices as well, or to discontinue promotional campaigns, without running the risk of losing ground in the market.

In summary, the conduct of the companies that have now been fined generates a direct harm for consumers, as it reduces competitive pressures between the manufacturers, and translates into higher prices or less aggressive sales campaigns, both with the same result, harm to the consumer.

The fine on Henkel was waived 100%, thanks to the leniency programme, whereas Sara Lee saw its penalty reduced by 40%. In the absence of the leniency programme, Sara Lee would have been fined €6,193,124 and Henkel €4,276,979.

21 January 2010

22 CNC fines four companies in the healthcare waste management sector

The CNC has levied aggregate fines of €7,045,000 on four healthcare waste management operators, Consenur, Cespa, Interlun and Sistemas Integrales Sanitarios, for dividing up the market of public sector healthcare providers.

The CNC, acting on the proposal made by the Investigations Division, has ruled that a violation of article 1.1(c) of Competition Act 16/1989 of 17 July 1989 has been proven to exist, with the attendant liability resting with Consenur, S.A., Cespa Gestion De Residuos, S.A., Interlun S.L. and Sistemas Integrales Sanitarios SIS, for having formed a trust to divide up public sector healthcare tenders in a large part of the country for several years. The Council has also declared Cespa responsible for another infringement of competition law involving maintenance and application of an unlawful no-competition agreement.

The Council Resolution, handed down on 18 January 2010, resolves case S/0014/07 brought by the CNC Investigations Division in February of 2008.

The companies now sanctioned, most particularly Consenur and Cespa, the two largest operators in the healthcare waste management sector, have been engaged in this conduct as far back as 1997 at the least. The probe has demonstrated that public sector clients were shared by coordinating the presentation of bids in the various tenders called by healthcare authorities in different regions, either through the creation of temporary joint ventures known as UTEs, when it was technically and economically feasible for the main companies to compete against each other, or through other arrangements, such as abstaining from participating in certain tenders, submitting uncompetitive bids or agreeing the terms of the bids that were to be presented.

18 January 2010

STATE AID

Back to Top

23 The Commission opens in-depth inquiry into preferential electricity tariffs for Aluminium of Greece

The Commission has opened an in-depth investigation to discover whether an electricity tariff granted by the Greek state-owned Public Power Corporation to Aluminium of Greece was illegal under the State aid rules. The Commission had received complaints alleging that Greece had granted incompatible State aid to the aluminium production company, Aluminium of Greece, through several privileges such as tax exemptions, deferral of taxation obligations, loans with privileged terms and lower electricity prices.

The Commission will now examine whether electricity is supplied below the market price and will investigate allegations that the state-owned Public Gas Corporation paid the construction costs of a gas pipeline belonging to Aluminium of Greece.

IP/10/58 – 27 January 2010

24 The Commission approves €576 million Spanish film support scheme

The Commission has approved a €576 million Spanish film support scheme which is directed at Spain's national film support measures including film production and distribution. It is thought that the scheme, which lasts until 31 December 2015, will improve the visibility and popularity of Spanish independent films without distorting competition.

Before approval, the Commission had received submissions raising concerns about the automatic, audience-

based support, including allegations that the aid was not available to films under €600,000. However, they had concluded that films under €600,000 can benefit from the selective support and the scheme is compatible with EU rules.

IP/10/57 – 27 January 2010

25 The Commission completes its investigation into the unlimited guarantee for the French Post Office

The Commission has completed its investigation into the unlimited state guarantee enjoyed by the French Post Office ("La Poste"), following the adoption by the French Parliament of the law on the public enterprise La Poste and on postal activities. The Commission concluded that the conversion of La Poste into a public limited company will have the effect of removing the guarantee.

In 2007, the Commission launched an in-depth investigation into the state guarantee implicitly granted to La Poste which the Commission considers La Poste enjoys because of its status as a public body. The Commission's main concern was that the guarantee was unlimited, provided free of charge and also covers La Poste's commercial activities. As a result, this gave La Poste an economic advantage over its competitors making it incompatible with the common market.

As European competition rules must apply equally to public and private enterprises, the Commission considers that it would be reasonable to ask the French authorities to remove the guarantee by 31 March 2010.

IP/10/51 – 26 January 2010

26 The Commission approves UK Government aid for Dunfermline Building Society

In a step to help tackle the financial crisis, the Commission has approved State aid given by the UK Government to assist in the restructuring of the Dunfermline Building Society ("Dunfermline") of the United Kingdom.

The UK Government split-up Dunfermline into two parts. The first part contained the good quality assets and liabilities which were immediately sold to a competitor. The other contained the impaired commercial loan assets which were put into administration. The UK Government had to provide over £1.5 billion in cash in order to enable the sale to go through as the liabilities of the package sold initially exceeded the assets. The Commission came to the conclusion that the orderly break-up of Dunfermline, followed by the sale of the viable part to a competitor ensured the return of viability of the sold business. Therefore, it was decided that the direct restructuring is compatible with the EU rules on State aid.

IP/10/48 – 25 January 2010

27 The Commission approves liquidation of Bradford & Bingley

In 2008, the UK Government decided to nationalise and wind down Bradford & Bingley while it was still solvent. It sold its retail deposit book and branches and provided the remaining part of the business with a working capital facility and guarantee arrangements. The Commission, on 1 October 2008 authorised these measures as rescue aid. The UK was obliged to submit liquidation or restructuring plan for Bradford & Bingley which the Commission has now approved.

The liquidation plan which the UK had proposed foresees a continuance of the rescue measures previously authorised, which are now extended for the liquidation of the bank, and a potential capital injection. The Commission in approving the measures came to the conclusion that they were necessary for an orderly winding down of the bank as well as helping to preserve the confidence of creditors in the financial system.

IP/10/47 25 January 2010

MARKET INVESTIGATIONS

Back to Top

UK

28 OFT refers local bus services to CC following study

The OFT has referred UK local bus services, excluding London and Northern Ireland, to the CC following the results of an OFT market study into the industry. The OFT is concerned that limited competition between bus operators may result in higher prices and lower quality for bus users, representing poor value for money for taxpayers.

Some of the issues included complaints alleging predatory behaviour of incumbent firms designed to eliminate competition from new entrants and low numbers of bids for supported service contracts in many areas, with just one bidder for a quarter of tenders.

01/10 - 7 January 2010

LITIGATION

Back to Top

EU

29 Arkema and Elf Aquitaine appeal against judgments on MCAA cartel

On 29 January 2010, details were published of appeals lodged with the European Court of Justice ("ECJ") by Arkema France SA and its parent company Elf Aquitaine SA. The companies are appealing against judgments of the General Court that dismissed their appeals against the Commission's decision on an illegal cartel in the market for monochloreacetic acid ("MCAA"). Both companies raise arguments challenging the approach taken by the General Court in assessing the attribution of liability to a parent company for the anti-competitive actions of its subsidiary.

29 January 2010

30 Akzo Nobel withdraws appeal against bleaching agents cartel decision

The General Court has published an order, dated 17 December 2009, removing an appeal by Akzo Nobel NV, Akzo Nobel Chemicals Holdings AB and Eka Chemicals AB (together "Akzo Nobel") from its register (Case T-199/06).

Akzo Nobel were seeking the partial annulment of the Commission's decision that fined Akzo Nobel €25.1 million for participation in cartels in the hydrogen peroxide and perborate markets in breach of Article 101 of TFEU. However, by way of a letter lodged at the Registry of the General Court on 26 November 2009, Akzo Nobel informed the Court that they wished to discontinue proceedings. By a letter lodged at the Registry on 9 December 2009, the Commission informed the Court that it had no objection to the discontinuance and requested that, in accordance with the Rules of Procedure, the applicants be ordered to pay the costs.

17 December 2009

UK

31 CTS Eventim appeals against CC's decision in Ticketmaster/Live Nation merger

CTS Eventim ("Eventim") is seeking to review the CC's decision that the merger between Ticketmaster Entertainment and Live Nation would not result in a substantial lessening of competition in any market in the UK.

It is being claimed that the CC denied Eventim its right to a fair hearing, depriving Eventim of a reasonable opportunity to respond to the main reasons for the Commission's reversal of its view, that the CC erred in its assessments of the relevant counterfactual and of the effect of the merger on the market, and erred in its application of the substantial lessening of competition test.

A case management conference will take place on 10 February 2010 and a hearing date has been scheduled for 17 March 2010.

21 January 2010

32 Court of Appeal dismisses BSkyB's appeal on competition grounds but overturns Competition Appeal Tribunal on media plurality.

On 17 November 2006, British Sky Broadcasting Group plc ("BSkyB") acquired 17.9% of the shareholding of ITV plc. Following reports from the OFT, the Secretary of State referred the acquisition to the CC which concluded in December 2007 that the merger was likely to result in a substantial lessening of competition due to the loss of rivalry between ITV and BSKyB in the market for "all TV". It was recommended that BSkyB reduce its shareholding to less than 7.5%, combined with an undertaking not to be represented on the ITV Board. They also concluded that, having regard only to the relevant media public interest consideration, the merger may not be expected to operate against the public interest.

On 29 January 2008, the Secretary of State confirmed the CC's decision that the transaction is likely to result in a substantial lessening of competition and confirmed that BSkyB divest its shares in ITV to a level below 7.5%. However, the Secretary of State also concluded that the transaction does not have an adverse effect on the relevant specified media public interest consideration (media plurality). Subsequently, BSkyB appealed to the Competition Appeal Tribunal ("CAT") claiming that the CC committed errors of law and material errors and Virgin Media ("Virgin") appealed in relation to media plurality. The CAT had dismissed BSkyB's appeal but upheld Virgin's application and set aside the CC's conclusion that the merger would not adversely affect media plurality. BSkyB then appealed to the Court of Appeal.

On 21 January 2010, the Court of Appeal had dismissed BSkyB's challenges in relation to the CC's competition assessment. They concluded that the CAT had not erred in its intensity of review and that the approach taken by the CC and CAT was correct. However, the Court of Appeal has overturned the CAT's ruling that the CC misdirected itself in relation to the media plurality public interest consideration and concluded that the CC's initial approach was correct.

21 January 2010

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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