COMPETITION LAW BULLETIN

MAY 2011

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Commission opens investigation into acquisition by Caterpillar of MWM

The European Commission (the **Commission**) has begun a Phase II investigation into the acquisition of German engine maker MWM Holdings GmbH by Caterpillar Inc., a US manufacturer of machinery, engines and related parts.

The proposed transaction did not initially qualify for review by the Commission under the European Merger Regulation (**ECMR**) but rather was subject to the jurisdiction of certain national competition authorities. The Commission examined the merger in response to a request under Article 22 of the ECMR from the German competition authority for the Commission to take jurisdiction over the case, based on the effect it would have on trade between Member States and the significant threat of an effect on competition within Germany. The competition authorities of Austria and Slovakia then joined in the request. The Commission's initial investigation showed that the proposed transaction would combine two leading suppliers of generator sets in Europe, in particular, for generator sets which run on gas.

Due to concerns that remaining rival firms would exert insufficient competitive restraint over the merged firm and concerns regarding a potentially negative effect on innovation, the Commission initiated its Phase II investigation on 5 May with a provisional deadline of 16 September 2011.

IP/11/543, 5 May 2011

UK

Competition Commission provisionally clears Irish Sea ferries merger

The Competition Commission (the **CC**) has provisionally cleared the acquisition by Stena AB of two Irish Sea ferry routes from DFDS A/S.

As we reported in our February bulletin, the Office of Fair Trading (the **OFT**) referred the merger to the CC amid concerns that it would substantially lessen competition for the supply of freight and passenger ferry services between the North West of England and Northern Ireland. The investigation centred on Stena's routes between Liverpool and Belfast and Heysham and Belfast.

Stena and DFDS both operated ferry services on the Irish Sea on a variety of routes. In December 2010 – the same month in which the merger was completed – Stena closed a route it operated between Fleetwood and Larne. The OFT believed that this withdrawal may have been linked to the merger, and may have caused a lessening of competition in the market as a whole. The CC found that, in fact, Stena would have been forced to close the Fleetwood to Larne route in any case for commercial reasons.

The CC also concluded that Stena would face a direct competitor in each of the route corridors (i.e. Liverpool and Belfast and Heysham and Belfast) after the merger, and therefore the merger was unlikely to result in a substantial lessening of competition.

28/11, 25 May 2011

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EU

Commission probes credit default swaps market

The Commission has opened two investigations relating to possible breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union (the **TFEU**) in the credit default swaps (**CDS**) market. CDS are financial instruments intended to protect investors if a company/State they have invested in defaults on their payments, and can also be used as speculative tools.

The first investigation relates to whether, through agreements, concerted practices or the abuse of a collective dominant position, the 16 investment banks that deal in the CDS market and Markit (the leading provider of financial information on CDS), have conspired to control the access to financial information on CDS, thereby restricting access to the valuable raw data by other information service providers.

In the second investigation, the Commission will assess agreements between 9 of the 16 CDS dealers involved in the first investigation and ICE Clear Europe (**ICE**). These agreements were concluded at the time of the sale by the dealers of a company called The Clearing Corporation to ICE and contain clauses such as preferential fees and profit sharing, and create an incentive for CDS dealers to use ICE as a clearing house, rather than any other entity. If this is the case, other clearing houses are likely to have difficulties successfully entering the market and other CDS players have no real choice where to clear their transactions. Similarly, the Commission will analyse ICE's fee structure to determine whether ICE is giving an unfair advantage to the 9 CDS dealers discriminating against the other CDS dealers, which could potentially constitute an abuse of a dominant position by ICE under Article 102 TFEU.

11/509, May 2011

Commission carries out dawn raids in container liner shipping sector

The Commission has confirmed that it has carried out dawn raids on companies in the container liner shipping industry.

The inspections are part of an investigation into alleged breaches of Articles 101 and 102 of the TFEU, which prohibit cartels, restrictive business practices and the abuse of a dominant market position.

11/307, 17 May 2011

Commission market tests Standard & Poor's commitments on international securities identification numbers

In November 2009, the Commission sent a Statement of Objections to Standard & Poor's (**S&P**) alleging S&P were charging abusive prices for International Security Identification Numbers (**ISIN**) that had been issued in the USA and were being distributed in the European Economic Area. The Commission took the view that the prices were potentially abusive because they did not comply with certain principles set by the International Organisation for Standardisation (**ISO**), which the Commission regarded as a benchmark for fair prices.

S&P has proposed to offer commitments (under Article 9 of Council Regulation 1/2003, also known as the Modernisation Regulation) to resolve the investigation, by amending its pricing policy for the use of US ISINs in Europe, which should decrease the cost of utilising ISINs from the USA. S&P also commits to distribute ISIN records separately from other "added value information" (S&P had submitted the "added value information" was the reason for higher prices despite the fact that users only needed the ISIN number and minimum descriptive data - together referred to as an ISIN Record - to identify a security).

The Commission will publish a summary of the case and S&P's commitments. It is inviting interested parties to comment before it decides whether to make the commitments legally binding: the Commission is never obliged to terminate its proceedings by adopting an "Article 9" commitment decision, but it can consider such a decision if and when: the companies under investigation are willing to offer commitments which remove the Commission's initial competition concerns as expressed in a preliminary assessment, the case is not one where a fine would be appropriate (this therefore excludes commitment decisions in hardcore cartel cases), and efficiency reasons justify that the Commission limits itself to making the commitments binding and does not issue a formal prohibition decision.

11/571, 17 May 2011

Breach of seal during an inspection - Suez Environnement and Lyonnaise des Eaux

The Commission has imposed a fine of EUR 8 million on Suez Environnement and its subsidiary Lyonnaise des Eaux (**LDE**) (together the **Companies**) for breaching an official seal placed by Commission officials at the premises of LDE during a 'dawn raid' relating to an investigation into collusive tendering in the water and waste water markets (the investigation is ongoing). An LDE employee indicated that they had unintentionally breached the seal.

The Commission regards the breaching of a seal to be a serious competition law infringement which undermines the effectiveness of inspections, but when setting the level of the fine in this case, it took into account the immediate constructive cooperation of the companies (which included the provision of more information to the Commission than the companies were obliged to give).

E.ON

In 2008, and relating to a different case, the Commission fined E.ON Energie AG (**E.ON**) EUR 38 million for breaking a seal affixed at E.ON's premises during an unannounced inspection. In dismissing an appeal by E.ON against the fine, the General Court (**GC**) stated that the Commission is not required to prove how the seal was broken, whether anyone entered the sealed room, or if any information was removed. On 6 May 2011, details were published of an appeal by E.ON to the European Court of Justice (**ECJ**) challenging the GC's judgment.

IP 11/632, 24 May 2011

Commission confirms dawn raids in the engines sector

The Commission has confirmed that it has carried out dawn raids on companies active in the manufacturing, supply and distribution of piston engines which are mainly used for industrial applications.

The inspections are part of an investigation into alleged anti-competitive practices in breach of Article 101 of the TFEU.

11/355, 27 May 2011

UK

OFT publishes first decision of Procedural Adjudicator

The OFT has published the first decision of its Procedural Adjudicator – the OFT official who hears disputes that arise between case teams and parties in relation to procedural matters.

As we reported in our March bulletin, the Procedural Adjudicator has the power to review decisions made by case teams about submission deadlines, disclosure requests, applications for redactions of confidential information from files/documents and other significant procedural issues that may arise during the course of a Competition Act investigation.

In this case, the Adjudicator rejected an application by Sports Direct International for early access to an information request sent to a third party. The Procedural Adjudicator concluded that the OFT was under no positive duty to provide such access and that the case team's decision was reasonable.

The OFT began a year-long trial of the Procedural Adjudicator in March 2011 to provide a swift, efficient and cost-effective mechanism for resolving disputes on procedural matters.

19 May 2011

UK rail regulator consults on access to freight sites

The Office of Rail Regulation (the **ORR**) has begun a consultation into whether the control of freight sites by rail operators acts as a barrier to competition.

The ORR consultation sets out the ORR's belief that mechanisms that were put in place when the rail industry was privatised may not be working effectively. However, the ORR also states that it would not be "proportionate" to refer the matter to the CC at present, and notes that during the course of a public study carried out into access to rail freight sites in Great Britain (between September 2010 and February 2011), the ORR observed more examples of positive transactions than negative and found no material evidence of harm by way of business lost.

The ORR has invited all parties to participate in the consultation and the deadline for responding is Friday 29 July 2011.

9 May 2011

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UK

Competition Commission finds anti-competitive features in UK local bus market

The CC has provisionally found that some features of the local bus market have an adverse effect on competition.

The CC has found that there is little overlap between the services offered by different operators (i.e. on different routes) and limited potential competition in the wider local area. In addition, the CC found there is a range of barriers to entry, including unpredictable and substantial costs.

The CC also investigated the markets for the tendering of contracts for supported local bus services, and provisionally found competition concerns in local markets because the number of operators bidding for Local Transport Authority (**LTA**) contracts and the intensity with which operators compete for these tenders can be limited by the way LTAs design tenders and/or the limited number of potential bidders in local areas.

The CC has consulted on possible remedies, including measures to increase the number of multi-operator ticketing schemes, reductions in fares, fair access to bus stations and recommendations in relation to tendering guidelines. The CC will publish its final report by January 2012.

10 May 2011

OFT considers referring auditing market to the Competition Commission

The OFT is considering whether to refer the external auditing market to the CC after finding that there may be competition concerns in the market.

The OFT has stated that it has been concerned for some time that there are only four large players in the market, with substantial barriers to entry and switching. Having decided that there are reasonable grounds for suspecting that some features of the market restrict, distort or prevent competition (the statutory test for referral to the CC) the OFT will now discuss with interested bodies whether, in practice, potential remedies exist before making a final decision on referral to the CC later this year.

59/11, 17 May 2011

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EU

General Court dismisses appeals against sodium chlorate cartel decision

The General Court has dismissed appeals by Elf Aquitaine SA (and its subsidiary, Arkema France) against a Commission decision that imposed a fine for price-fixing and market-sharing in relation to sodium chlorate paper bleach. The Commission fined eight producers a total of EUR79 million in June 2008 for their involvement in a price-fixing cartel that lasted over six years. The companies, which were part of four corporate groups, swapped sales and price information and held meetings between 1994 and 2000.

In its appeal, Elf Aquitaine complained that it was not in control of its subsidiary Arkema for the purposes of attributing liability under Article 101(1) of the TFEU, and, even if it was, the fine was calculated incorrectly and unfairly. During the time of the infringement Elf Aquitaine owned 97% of the shares in Arkema. The General Court held that there was insufficient evidence to support Elf Aquitaine's complaint that Arkema was *not* under the decisive influence of its parent company. The Court also dismissed Elf Aquitaine's pleas that, by imposing a separate fine of EUR15,890,000 on Elf Aquitaine as a deterrent, the Commission had breached the Article 23(2) of Regulation 1/2003 and the Commission's 2006 Fining Guidelines and that the Commission had erred, or breached legal principles, in increasing the basic fine by 90% to punish Arkema for recidivism.

Cases T-299-08 and T-343/08, 17 May 2011

UK

UK High Court rejects use of competition law defence in contract dispute

Bach Flower Remedies Ltd made a claim against its Italian distributor, Guna SPA, in a dispute about the transfer of product registrations. Guna (the defendant) argued as part of its defence, amongst other things, that the contract contained a restriction on parallel trade between Member States, thereby infringing Article 101 of the TFEU, and rendering the contract void and unenforceable. The High Court held that a party that wishes to rely on a competition law defence against a contract claim must plead the case in detail and not make assertions without reliance on primary facts.

Judge Mackie found that the evidence to support the competition defence was "general" and "sketchy" and required the Court to make important decisions based on "off the cuff" witness evidence. In particular, Mackie J noted that, in complex exercises such as identifying the relevant market, it was helpful (though not a requirement) to receive expert evidence from economists (no such evidence had been provided). It was also held that competition issues needed to be evaluated by the Court early in proceedings, and therefore that statements of case must clearly communicate each party's position.

[2011] EWHC 1202, 16 May 2011

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EU

EU Parliament votes to adopt Radio Spectrum Policy Programme

The EU Parliament has voted in favour of a Commission proposal for a decision to establish the first Radio Spectrum Policy Programme (**RSPP**). The RSPP provides a framework for spectrum allocation within the EU and aims to increase access to radio spectrum throughout Europe.

The policy objectives of the RSPP includes ensuring Member States are able to offer faster broadband to all regions, including remote areas. Additionally, the RSPP proposed that Member States should be able to offer internet connections at a speed of at least 30 Mbps by 2020 and they should free up the 800MHz frequency band so that it is available for harmonised use of wireless broadband services by 1 January 2013. However, the EU Parliament has adopted an amendment in the RSPP that would allow Member States to seek a postponement of this obligation until the end of 2015 (or beyond if they have problems in cross-border frequency co-ordination with neighbouring non-EU countries).

The EU Parliament also wants the spectrum allocated for mobile traffic data to increase to a minimum of 1200MHz by 2015 and for the 1.5GHz and 2.3GHz spectrum bands to be opened up for mobile broadband.

11 May 2011

UK

New electronic communications regulations come into force

The Electronic Communications and Wireless Telegraphy Regulations 2011 (**the Regulations**), which implement the amendments that are contained in the Framework Directive, Access Directive, Authorisation Directive and Universal Services Directive (the **Revised EU Electronic Communications Framework**) have been published.

The Regulations include amendments to the Communications Act 2003 and the Wireless Telegraphy Act 2006. In relation to the former, notable amendments include changes to Ofcom's duties and its power to impose penalties; a new market review procedure; and the addition of a new remedy - functional separation. In relation to the latter, certain amendments are made in order to implement new provisions relating to technology and service neutrality and liberalisation of spectrum usage rights.

The regulations also provide for a review of the implementation the Revised EU Electronic Communications Framework (which took effect on 26 May 2011) by the Secretary of State within five years.

4 May 2011

Information Commissioner publishes guidance on new EU cookies law

The new law which applies to how cookies and similar technologies for storing information are used on equipment such as computer or mobile devices came into force on 26 May 2011 (2009/136/EC) and amends the EU Privacy and Electronic Communications Directive. The UK Information Commissioner's Office has published a guidance document setting out the changes brought into effect and explaining what steps are needed to ensure compliance.

Of particular note is that businesses and organisations that have their own websites must now gain the visitors' consent prior to storing cookies on the appliance the visitor is using to access the site. The only exception to this new rule is where storing the cookie is "strictly necessary" for a service requested by the user. This is in direct contrast to the previous rules on cookies where the user had to "opt out".

Whilst there will be a phased approach to the implementation of these new rules, the Information Commissioner's Office will have the power to impose monetary penalties for serious breaches.

9 May 2011

Government publishes draft bill on GSCOP Adjudicator

The role of the GSCOP Adjudicator in monitoring and enforcing the Groceries Supply Code of Practice (**GSCOP**) has been set out in a draft Bill.

GSCOP was introduced after a CC market investigation into the supply of groceries in the UK. In that investigation the CC concluded, in 2008, that certain groups of retailers were able to exercise purchasing power and as a result, unnecessary risks and additional costs were being passed on to the supplier, thereby affecting competition. Following a number of consultations, the Department for Business Innovation and Skills decided that the body to monitor and enforce the GSCOP should be known as the GSCOP Adjudicator (which should be established within the OFT, but would have decisional autonomy).

Under the draft Bill the GSCOP Adjudicator's role will include: resolving disputes between large retailers and their direct suppliers; investigating possible breaches of the GSCOP; publishing guidance on investigations and its enforcement powers; giving advice to retailers and suppliers; reporting annually on its work; and recommending any changes to GSCOP that may be necessary.

The draft Bill is currently awaiting pre-legislative scrutiny by Parliament.

24 May 2011

If you require further information or advice on any of the items covered, contact details of the Squire Sanders Antitrust and Competition partners are available at: http://www.ssd.com/antitrust_competition/