COMPETITION AND REGULATORY BULLETIN

JUNE 2011

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Styrene joint venture conditionally approved by Commission

The European Commission (the **Commission**) has conditionally approved a joint venture between BASF and INEOS, to combine their existing acrylonitrile–butadiene–styrene (**ABS**), monomer and polystyrene businesses.

The Commission was satisfied that both credible and significant competitors remained in relation to most of the affected products, but had concerns in relation to the market for ABS (a product which is used in a variety of applications and where the market was already highly concentrated). To address the Commission's concerns and avoid a Phase II investigation, the parties offered to divest part of INEOS' ABS business, reducing the overlap in that market and the market strength of the joint venture. The Commission has approved the transaction, conditional upon the completion of this divestment.

IP/11/672, 1 June 2011

UK

UK Government revises undertakings in News Corp/BSkyB merger

The Department for Culture, Media and Sport (the **DCMS**) has amended the proposed undertakings to be offered by News Corporation (**News Corp**) as part of its planned merger with BSkyB.

In January 2011, the Secretary of State for Culture, Media and Sport announced that he considered that the planned merger may operate against the public interest in media plurality and, accordingly, intended to refer the merger to the Competition Commission (the **CC**). However, before making a reference, the Secretary of State indicated he would consider whether undertakings in lieu proposed by News Corp could prevent or mitigate the adverse effects to the public interest.

The changes, announced on 30 June 2011, come after a consultation on News Corp's original proposals, which included the "spinning off" of Sky News into an independent company. The DCMS received more than 40,000 replies to the consultation, but none caused Ofcom or the Office of Fair Trading (the **OFT**) to alter their advice that the undertakings were viable for 10 years and addressed concerns about media plurality.

However, the revised undertakings incorporate suggestions that, the DCMS says, will make them "more robust". They include proposals for an independent director with senior journalism expertise to sit on the board of Sky News, and for a monitoring trustee to be appointed to ensure that News Corporation compiles with the undertakings.

The deadline for responses to the revised undertakings is midday on 8 July 2011.

064/11 DCMS, 30 June 2011

OFT accepts Unilever/Alberto Culver divestment undertakings

The merger of two manufacturers of hair and personal care products will not be referred to the CC after the parties agreed to divest part of the combined firm's soap bars business.

The OFT concluded that the acquisition of the Alberto Culver Company by Unilever may have caused a substantial lessening of competition in the market for bar soaps in the UK because of the strength of Unilever's Dove brand.

The OFT has accepted undertakings to sell off two of Alberto Culver's soap bars strands – Wright's and Cidal – and to offer a perpetual licence of its Simple brand in the UK, Ireland and the Channel Islands. The businesses will be bought upfront by Lornamead.

66/11, 16 June 2011

Ross & Bonnyman acquisition cleared by Competition Commission

The CC has cleared the merger of two businesses that supply tail lifts, which are used to transfer goods in and out of commercial vehicles.

Ratcliff Palfinger Limited has been given the go-ahead to acquire the tail lift spare parts business of Ross & Bonnyman Limited. The companies are the market leader and nearest competitor respectively.

The CC first examined whether Ross & Bonnyman's decision to close its tail lift business was linked to an agreement to sell its spare parts division. Having concluded that there was no link, and that Ross & Bonnyman had decided to exit tail lift manufacturing some time before entering into discussions with Ratcliff Palfinger, the CC focussed on whether the acquisition would affect competition in the spare parts market. The CC concluded that the merger did not have a significant effect because competition between suppliers of spare parts for different makes of tail lifts was already extremely limited.

29/11, 10 June 2011

ANTITRUST

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EU

Commission carries out dawn raids on car safety component manufacturers

The Commission has confirmed that it has carried out dawn raids at the premises of companies that supply car seatbelts, airbags and steering wheels (so called "automotive occupant safety systems").

The inspections are part of an investigation into an alleged breach of Article 101 of the Treaty on the Functioning of the European Union (the **TFEU**) which prohibits cartels and restrictive business practices.

11/395, 9 June 2011

Judgment released in ECJ leniency documents disclosure case

The ECJ has handed down a judgment, following a reference from the German courts, on the interpretation of Council Regulation 1/2003 (**Regulation 1/2003**) concerning the access of third parties to documents supplied under a leniency procedure.

The ECJ received the request for a preliminary ruling from the German court in relation to the proposed grant to a third party (who had purchased it from the infringing companies) of full access to the case file (which contained material voluntarily provided by a leniency applicant to the Bundeskartellamt under the leniency notice).

In its judgment the ECJ states that Regulation 1/2003 must be interpreted as '*not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement*'. The ECJ concluded, however, that it is for national courts to determine the conditions under which such access may be granted or refused under national laws. When national courts make this determination, they must carefully balance disclosure against the interests of the leniency applicant, because they provided such information voluntarily.

C-360/09, 14 June 2011

Polish telecoms firm fined for abuse of dominance

The Commission has imposed a fine of EUR 127.5 million on Polish telecoms operator Telekomunikacja Polska S.A (**TP**) for an abuse of its dominant position on Polish broadband markets over a four year period, contrary to Article 102 TFEU.

As it is not normally economically viable to build alternative access networks in order to provide broadband internet to end users, new alternative operators are typically reliant on being able to use the network of the incumbent operator, in this case TP. In order to use the incumbent's network and therefore compete on the retail market, operators need to acquire wholesale broadband access products (i.e. wholesale broadband access and local loop unbundling) and in Poland these are exclusively provided by TP.

The Commission found that TP deliberately sought to limit competition on the broadband markets in Poland by placing obstacles in the way of alternative operators by, for example, proposing unreasonable conditions, delaying negotiations, rejecting orders without justification and refusing to provide accurate and reliable information to alternative operators.

The Commission's investigation concluded that together, these practices prevented effective competition and constituted an abuse of a dominant position on the Polish broadband market.

IP 11/771, 22 June 2011

UK

OFT publishes new competition law compliance guidance

The OFT has released new competition law compliance materials, which include guidance for businesses and directors on how to comply with competition law.

The materials follow a 2010 OFT report – *Drivers of Compliance and Non-Compliance with Competition Law* – that supported a risk-based approach to competition law compliance, tailored to each business.

Among the publications is an updated *How Your Business Can Achieve Compliance in Competition Law*, which sets out the OFT's suggested "four-step approach" to achieving a compliance culture. This suggests how businesses can identify, assess and mitigate competition law risks, and highlights the need for ongoing review of this process. The OFT also emphasises that importance of a "core" commitment to compliance that runs from senior management downwards.

The OFT has also published a guide for directors - *Company Directors and Competition Law* - which focuses on the key risks that directors should be aware of, and the ways in which they can seek to minimise the risks of their business infringing competition law. Other materials published by the OFT include a new quick guide to competition law and a compliance film which includes footage of a dramatised dawn raid.

74/11, 27 June 2011

OFT revisits morphine market to test effects of 2001 Napp ruling

The OFT has found that competition has increased in the sustained release morphine market, ten years after it imposed restrictions and a landmark fine (the OFT's first under Chapter II of the Competition Act 1998) on Napp Pharmaceuticals (**Napp**).

In the 2001 case, the OFT found that Napp had abused its dominant position by supplying sustained release morphine products to hospitals at discounted rates. In particular Napp targeted the discounts at products that had the most competition; the effect of which was to sustain Napp's high shares and, in one instance, force a competitor to exit the market.

The review, which is the first of its kind, concluded that the OFT's intervention stimulated entry into the market and reduced Napp's market share in the hospital segment from 95 percent to 50 percent, and its share in the community segment from 95 percent to 65 percent. Napp's list price for its sustained release morphine products has also reduced by approximately 25 per cent.

The OFT has committed publicly to evaluate at least two of its previous interventions each year.

63/11, 6 June 2011

Chairman of the OFT gives speech on sanctions, redress and compliance

The Chairman of the OFT, Philip Collins, gave a speech at King's College, London, on 27 June 2011 on a number of interrelated issues at the core of a successful competition regime – sanctions, redress and compliance.

Mr Collins discussed the recent judgments of the Competition Appeals Tribunal (the **CAT**) in *Construction* and *Construction Recruitment Forum*, which (in broad terms) resulted in significant reductions to the fines imposed by the OFT. Mr Collins outlined that, while these cases highlight the different approaches that can arise, the CAT does not seem to rule out higher penalties for infringements in the future and the judgments have not altered the OFT's view on the level of penalties that are required to create a deterrent effect (both general and specific). Mr Collins believes the OFT can therefore address the CAT judgments principally by revising its guidance on fines, rather than by fundamentally changing its current approach.

27 June 2011

MARKET INVESTIGATIONS

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UK

Ofcom launches review of TV advertising trading

Ofcom published, on 10 June 2011, its consultation document in relation to a market investigation to establish whether the manner in which TV advertising is currently traded in the UK prevents, restricts or distorts competition, and whether this has a harmful effect on consumers. If Ofcom concludes that it has sufficient competition concerns it will decide whether to make a market investigation reference to the CC.

The areas identified by Ofcom as being of particular concern are transparency of pricing; the bundling of airtime, which may limit switching; and barriers preventing the development of the trading model (which has not altered significantly in nearly 20 years).

Comments on Ofcom's analysis are to be provided by 22 July 2011. Ofcom then intends to publish a statement in the autumn of 2011, outlining either its decision to make a reference to the CC or the reasons why a reference has not been made.

10 June 2011

LITIGATION

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EU

General Court upholds liability in acrylic glass cartel case

The General Court (the **Court**) has upheld a decision of the Commission which found Arkema France's (**Arkema**) parent companies Total and Elf Aquitaine, jointly and severally liable for Arkema's part in the acrylic glass (methacrylates) cartel.

The Court held that the parties provided insufficient evidence to rebut the presumption that Arkema's parent companies exercised decisive influence over Arkema during the period of the infringement (the presumption was based on the parent companies holding more than 96 percent of the share capital of Arkema at the time of the infringement and controlling the capital of the company). However, the Court did find that the Commission had erred in increasing the fine imposed on Arkema for deterrence by taking into account Total's

turnover. The Court considered that this was disproportionate as Arkema was no longer owned by Total at the date of the decision. The Court reduced the fine accordingly.

T-206 and T-217/06, 7 June 2011

General Court considers fines in removal services cartel appeals

In March 2008, the Commission imposed fines of €32.76 million on 10 undertakings relating to a cartel on the international removals market between 1984 and 2003. The Commission found the infringing companies had fixed prices, provided cover bids and provided financial compensation for lost bids.

Five companies (along with certain parent companies) appealed to the Court to reduce or rescind their fines and the Court handed down its judgments on 16 June 2011. The Court rejected in totality the arguments pleaded by Team Relocations, Amertranseuro International, Putters International and Ziegler and their respective fines therefore remain.

However, Gosselin's fine was reduced by €1.06 million as the Court held that the Commission had only proven that Gosselin had participated in the infringement for seven years and six months (not ten years and seven months as originally assessed by the Commission).

The Court additionally held that Stichting Administratiekantoor Portielje's fine should be rescinded, as it should not be considered an undertaking for the purposes of competition law (the entity was not active on any market and was simply a share holding company, the rights to which were non-negotiable). Moreover, the Court held the Commission made an error in attributing Gosselin's liability to Stichting Administratiekantoor Portielje.

Verhuizingen Coppens pleaded that, as the Commission's decision had stated that it was the only company not to have engaged in "commissions" and as the Commission had not established that the company was aware of that agreement, the Commission was not entitled to find it had participated in a single and continuous infringement covering all of the anti-competitive conduct. The Court agreed and therefore their fine was also rescinded.

63/11, 16 June 2011

General Court refuses interim measures in pre-stressing steel cartel appeal

The Court has rejected an application by a steel producer to suspend the operation of a Commission cartel decision pending its appeal.

Companhia Previdente – Sociedade de Controle de Participacoes Financeiras SA is appealing against a finding that it was jointly and severally liable for infringements committed by Socitrel. The company requested that the Court suspends its obligation to pay its part of a total cartel fine of €458.42 million, or to provide a bank guarantee, until a decision is made in the case.

Companhia Previdente argued that the application was sufficiently urgent (i.e. it could not wait for the outcome of the main proceedings without suffering serious and irreparable damage) because banks had reduced the company's lines of credit and were unwilling to provide it with a guarantee. However, the Court found that there was no specific evidence that the company had sought a guarantee. Furthermore, the Court stated that the condition for urgency in granting interim remedies (under Articles 278 and 279 TFEU in conjunction with Article 256(1) TFEU) will only be met if serious and irreparable damage would be suffered if the remedy were not put in place, and pecuniary damage will rarely be considered to be irreparable. In the circumstances, the requirement for urgency was not met and the Court rejected the application.

T-414/10R, 17 June 2011

Commission publishes draft guidance on harm in damages actions

On 17 June 2011, the Commission published a draft guidance paper for consultation on quantifying harm in actions for damages, based on breaches of Article 101 or 102 of the TFEU.

The Commission has taken a number steps since 2004 to stimulate the debate on damage actions and redress and has sought feedback from stakeholders on a number of possible options, which could facilitate antitrust damages actions. In 2005, the Commission published a Green Paper on damages actions for breach of EU competition rules, which was then followed by a White Paper in 2008. Similarly, in January 2010 the Commission published a study on quantifying antitrust damages. These documents have all been utilised to put together the draft guidance paper and are available here.

The aim of the draft guidance paper is not binding on national courts and is "purely informative". Its aim, nevertheless, is to provide support to courts and parties involved in antitrust damages actions, by offering insight and information in relation to quantification of the damage/harm created by competition law breaches (for example, economic and practical insights that may be of use when national rules and practices are applied). The draft guidance paper also offers direction on the main methods and techniques that exist to quantify harm in a damages action.

Comments on the draft guidance paper are to be received by 30 September 2011.

17 June 2011

UK

Costs claim in construction bid-rigging appeal dismissed

An application requesting that the OFT pay two-thirds of the costs of a company's appeal against a bid-rigging fine has been rejected by the CAT.

Durkan Pudelek Limited and Durkan Limited (together **Durkan**) were fined £6.7 million in September 2009 for infringing Chapter I of the Competition Act 1998 for cover pricing during tenders. The fine was reduced by the CAT, on 22 March 2011, to £2.3 million on appeal.

In the application for its costs, Durkan argued that it had been generally successful in its appeal, and that it should therefore be awarded two-thirds of its costs. However, in the original appeal against the OFT's decision, Durkan had also contested an OFT finding that Durkan Holdings, the parent company, was jointly and severally liable for the infringements. This finding was upheld by the CAT.

The CAT took into account that while both parties had been partly successful, the argument on parent company liability had incurred most of the costs in the appeal. Furthermore, two of Durkan's three arguments on the level of the fine had failed, but they had occupied a large proportion of the Tribunal's time. On balance, therefore, the CAT considered that no order for costs should be made.

[2011] CAT 17, 3 June 2011

REGULATORY

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EU

Neelie Kroes speech on the importance of spectrum management for the Digital Agenda

As noted in last month's bulletin, the EU Parliament recently voted to adopt the proposal to establish the first Radio Spectrum Policy Programme (the **RSPP**). The RSPP provides for a number of actions by the Commission and Member States over the next five years in order to improve efficient radio spectrum management and to ensure, in particular, that sufficient spectrum is made available by 2013 for wireless broadband.

On 14 June 2011, Neelie Kroes (Vice-President of the Commission responsible for the Digital Agenda) gave a speech - "Spectrum must be backbone of internet revolution, not the bottleneck" - at the 6th Annual European Spectrum Management Conference in Brussels. In the speech, Neelie Kroes stresses the importance of

keeping to the current deadlines for harmonising spectrum bands; the need for an inventory of spectrum use and a review of efficiency; and the need to clarify the role the EU is to play in international negotiations and co-ordination. Commissioner Kroes also expressed the vision of spectrum use, which is as efficient as possible and suggested that flexibility and competition are needed to achieve this objective.

SPEECH/11/433, 14 June 2011

Commission raises concerns about Belgian proposals to regulate broadcasting and broadband

The Commission has outlined to the Belgian audiovisual and telecoms regulators that it has concerns about their plans to regulate broadcasting services and broadband access in Belgium.

The regulators consider that each of the Belgian cable operators has significant market power in the broadcasting markets corresponding to their network area. The regulators want to impose on these cable operators an obligation to offer to resell their analogue TV programming, to provide access to their digital TV platform and to resell their broadband internet products to other alternative broadcasting operators.

In relation to broadband, the largest network operator, Belgacom, is found to have significant market power on both the wholesale infrastructure and broadband access markets. As a result of the Commission's proposed regulation, Belgacom would be obliged to grant access to its network and provide a multicast service to alternative operators, which should, for instance, assist these operators to provide IPTV (television over the internet) on Belgacom's broadband network.

The Commission expressed a number of concerns regarding the proposals. These include a suggestion that the Belgian regulators look more closely at the competitive conditions in the relevant markets and the proportionality of the proposed measures, together with considering developing trends and market developments (for example, the need to ensure access to offers over next generation fibre networks is not prevented).

IP/11/761, 21 June 2011

UK

Ofcom consultation on technical licence conditions for 800 MHz and 2.6 GHz spectrum

Ofcom published a consultation document on 2 June 2011, which outlined its proposals for the technical licence conditions for the award of 800 MHz and 2.6 GHz spectrum.

The consultation sets out proposals for technical licence conditions for the 800 MHz and 2.6 GHz spectrum, including information regarding low power shared access in the 2.6 GHz band and additional detail on measures to manage interference to adjacent spectrum bands - including those utilised by radar systems above 2.7 GHz and short range devices and emergency services above 800 MHz. Additionally, the consultation sets out proposals in relation to technical measures which will introduce LTE (Long Term Evolution) and WiMAX (Worldwide Interoperability for Microwave Access) in the 900 MHz and 1800 MHz bands.

Responses to the consultation must be received by 28 July 2011.

2 June 2011

Ofcom publishes guidelines on penalties under the Communications Act 2003 and on dispute resolution

Ofcom has published two guidance documents - new guidelines that it will apply when handling regulatory disputes (the **Dispute Resolution Guidelines**) and updated guidelines for imposing penalties under the Communications Act 2003 (the **Penalty Guidelines**):

- The Dispute Resolution Guidelines

On 7 June 2011, Ofcom published the Dispute Resolution Guidelines which take into account amendments to Ofcom's dispute resolution powers, as a result of the implementation of revisions to the European Framework on Electronic Communications.

For the most part, the guidelines are the same as the version that Ofcom issued for consultation in December 2010. More specifically, they set out, for example, the conditions that need to be in place before Ofcom will consider disputes together, the procedure for seeking opinions of the parties to the relevant dispute, and what happens if Ofcom believes that the criteria for joining an existing dispute have not been met.

The changes that result from the European Framework on Electronic Communications, and upon which guidance has been given, include the introduction of a discretionary power for Ofcom to intervene in network access disputes rather than a duty to intervene, an expansion of the group of persons able to refer certain disputes to Ofcom and a discretionary power to recover the costs of the dispute resolution process (Ofcom is to provide additional direction for the selection of disputes in which it may try to recover the costs of the process - including the method of calculating such costs).

7 June 2011

- The Penalty Guidelines

The Penalty Guidelines, published on 13 June 2011, are applicable to all regulatory penalties that Ofcom may impose on any body that it regulates (other than penalties imposed under Ofcom's Competition Act 1998 concurrent powers).

The Penalty Guidelines outline that Ofcom must consider all the circumstances of the case "in the round" to determine an appropriate and proportionate financial penalty, with the "central objective" of imposing a financial penalty being deterrence. The Penalty Guidelines also indicate that the amount of any financial penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement and that Ofcom may increase the penalty where the regulated body in breach has not co-operated fully with its investigation.

13 June 2011

Ofcom publishes statements on mobile spectrum trading and 3G licence variation

In February 2011, Ofcom consulted on its proposals to establish new regulations and to make tradable the licences for mobile spectrum (900, 1800, and 2100 MHz) and on variations to the third generation (2100 MHz) (3G) licence. On 20 June 2011, Ofcom published two statements in relation to its consultation and the comments it received on these proposals, which Ofcom intends will give effect to the provisions of the The Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010 (the WTA 2006 Order).

The first statement sets out Ofcom's decision to establish the Wireless Telegraphy (Mobile Spectrum Trading) Regulations 2011 and the Wireless Telegraphy (Register) (Amendment) (No.2) Regulations 2011. These regulations sanction the trading of rights to use 900, 1800 and 2100 MHz mobile spectrum, in accordance with the WTA 2006 Order. Additionally, the regulations permit Ofcom to consider whether competition is likely to be distorted when deciding whether to consent to a trade of rights to use mobile spectrum.

The second statement sets out various changes to the 3G licences that are required to execute features of the UK Government's direction to Ofcom, as set out in the WTA 2006 Order. The changes include a new licence duration, a revised coverage obligation, and a provision allowing Ofcom to charge annual licence fees from 31 December 2021.

20 June 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/