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January – June 2008

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COMPETITION AND TRADE LAW REPORT AND UPDATE

1 CARTELS AND HORIZONTAL AGREEEMENTS

EU UPDATES

Commission increases by 90% a fine on a repeat offender

For the first time, under the 2006 Guidelines on Fines, the European Commission (the "Commission") has increased the fine on a "repeated offender" involved in three previous cartels.

On June 11, 2008, the Commission has imposed fines, totalling over €79 million, on four groups of companies for allocating sales volumes and fixing prices for sodium chlorate, an agent used mainly for bleaching in the pulp and paper industry, in violation of Article 81 EC and Article 53 EEA. The companies involved in the infringement are: Akzo Nobel, EKA Chemicals, Finnish Chemicals, Erikem Luxembourg, Arkema France, Elf Aquitaine, Aragonesas Industrias y Energia and Uralita. Between 1994 and 2000, these companies fixed prices and allocated markets through various meetings and other illicit means. Akzo Nobel and its subsidiary EKA Chemicals received full immunity from fines according to the Commission's 2002 Leniency Programme, as they were first to provide information about the cartel. Finnish Chemicals' fine was reduced by 50% because of its cooperation during the investigation. Conversely, the fine imposed on Arkema France, amounting to over €59 million, was increased by 90%, due to the fact that the company had been already condemned in the past for three illicit cartels in the plastics sector.

Commission fines providers of international removal services running a cartel for almost nineteen years.

On its own initiative, the Commission discovered a cartel operated for almost nineteen years, from October 1984 to September 2003. On March 11, 2008, the Commission has imposed fines, amounting to around €32.7 million, on companies operating in the market of international removal services. Namely, the companies Allied Arthur Pierre, Compas, Coppens, Gosselin, Interdean, Mozer, Putters, Team Relocations, Transworld and Ziegler were fined for fixing prices, sharing the market and compensating each other for lost bids by a system of financial compensation they called "commissions", in clear violation of Article 81 EC. The lost bid commissions were invoiced between the members of the cartel by way of bills.

The Commission reduced the fine by 70% to the company Interdean, taking into account its inability to pay and the particular circumstances of its individual situation.

The Commission infringed the principles of sound administration and equal treatment and erred in attributing the role of leader of the cartel to Hoechst

On October 1, 2003, the Commission imposed fines totalling €138.4 million to one European company (Hoechst) and three Japanese companies (Daicel, Nippon Synthetic and Ueno) for having infringed competition law by participating in a cartel on the sorbates market between 1978 and 1996. Another Japanese company, Chisso, was given complete immunity due to the circumstance that it was the first undertaking to provide the Commission with decisive evidence of the existence of the competition violation. The German company Hoechst was fined €99 million: an amount reflecting, amongst other things, its role as leader of the cartel (jointly with Daicel) and the fact that it was a repeat offender.

Hoechst brought an action before the Court of First Instance (the "CFI") requesting annulment of the decision or, alternatively, a reduction of its fine.

On 18 June, 2008, the Court has rejected the application for annulment of the decision, but has held that the Commission committed two errors which justify a reduction in the amount of the fine (Case T-410/03).

First, the Court held that the Commission failed to have regard to the principles of sound administration and equal treatment. Although the Commission clearly displayed its intention not to disclose to the cooperating undertakings, in particular to Hoechst, the fact that other companies had taken steps to obtain immunity from a fine, it simultaneously assured Chisso that "fair warning" would be given to it if another company looked like overtaking it in relation to cooperation.

Therefore, in light of the importance of the compliance by the Commission with the principles of sound administration and equal treatment in administrative procedures, the Court decided to reduce the amount of the fine imposed on Hoechst by 10%, due to the breach of those principles.

Secondly, the CFI held that the Commission erred in taking Hoechst's role as a leader of the cartel into account as an aggravating circumstance, without, however, stating that circumstance sufficiently clearly and precisely in the statement of objections. Moreover, according to the CFI, certain facts taken into account by the Commission did not make it possible to conclude sufficiently precisely that the role of leader would be attributed to Hoechst. It followed from that lack of precision that Hoechst was not in a position to defend itself properly.

Considering those two errors, the CFI therefore recalculated the fine imposed on Hoechst and the final amount was reduced from €99 million to €74.2 million.

2 ABUSE OF MARKET POWER

EU UPDATES

Microsoft – the battle continues…

The Commission has imposed additional fines on Microsoft for its failure to comply with a 2004 infringement decision (confirmed on appeal by the CFI in 2007) in Microsoft v Commission (Case T-201/04).

In 2004 the Commission found Microsoft had abused its dominant position by firstly, refusing competitors access to interoperability information which would allow them to interface with Windows operating system servers, and by secondly, foreclosing the market for streaming media players by bundling its Windows Media Player with its dominant Windows operating system.

The Commission imposed a fine of €497 million and remedies which Microsoft unsuccessfully appealed to the CFI in 2007. The remedies imposed included requiring Microsoft to provide interoperability information. On February 27, 2008, the Commission found Microsoft failed to comply with this remedy until October 2007 (on the basis that the information was provided but only at a disproportionately high price). As a result, the Commission has now imposed a penalty fine on Microsoft of €899 million.

The latest fine is the single largest fine ever imposed by the Commission, which stated that it "is a reasonable response to a series of quite unreasonable actions" by Microsoft. Microsoft had indicated that it would not appeal the CFI's 2007 decision, and indeed it withdrew other pending appeals against the Commission and released a statement announcing changes to its business practices in order to facilitate greater interoperability. However, on May 9, 2008, Microsoft lodged an appeal to the CFI, challenging the Commission's imposition of the €899 million

fine in February 2008 in what it states is "a constructive effort to seek clarity from the court".

The fractious relationship between the Commission and Microsoft was further entrenched when in January 2008 the Commission commenced further abuse of dominance proceedings against Microsoft in two separate cases.

The first case relates to a complaint lodged by ECIS, the European Committee for Interoperable Systems, which alleges that Microsoft has illegally refused to disclose interoperability information in relation to certain products. The second relates to a complaint lodged by Opera, a competing browser company, alleging that by tying sales of Internet Explorer with Windows operating systems Microsoft is abusing its dominance on the operating systems market such as to hinder competition from other browser suppliers. This second claim is shored up by a number of other complaints of tying with other Microsoft software products, such as Windows Live.

There are clear parallels between the new allegations and the decision of the Commission and the Court in the previous Microsoft case, where principles were expounded which the Commission is bound to follow. The battle continues…

Deutsche Telekom Margin-Squeeze Decision Upheld by CFI (Case T-271/03)

On April 10, 2008, the CFI decided to uphold the Commission's decision that the German incumbent telecoms operator Deutsche Telekom ("DT") had abused its dominant position (contrary to Article 82 of the EC Treaty), in the market for direct access to its fixed-line network in Germany. The CFI endorsed the Commission's finding that DT had imposed an unlawful margin squeeze. This decision confirms the Commission's approach to the application of Article 82 on pricing abuses under EC competition law and is the first case in which the European Courts had the opportunity of dealing with a so-called price squeeze case.

Put simply, a margin squeeze (or price squeeze) is where a dominant operator sets its wholesale and/or retail prices at levels that do not allow its downstream competitors to make a reasonable margin, thus squeezing out the downstream competitor. Previously, in May 2003, after receiving complaints from fifteen of DT's competitors, the Commission decided that DT had been abusing its dominant position in charging its competitors prices for wholesale access to its network that were higher than its own retail prices or that did not allow the competitors to provide the relevant downstream services, that require the wholesale input, in a profitable manner. This forced competitors to charge their end-users more than DT charged its own retail customers for the same or similar services, as competitors had no option but to use DT's network and also had to take into account other costs such as marketing, billing, debt collection etc. This amounted to a margin squeeze and was considered to constitute an infringement of Article 82 EC. The Commission imposed a fine of €12.6 million on DT.

DT applied to the CFI for annulment of the Commission's decision, or for a reduction of the fine it had imposed. These pleas were wholly rejected by the CFI, which fully upheld the Commission's decision, also upholding the fine of €12.6 million with no reduction.

DT argued that as prices were regulated by the German telecoms regulator (RegTP) this could not give rise to an unlawful margin squeeze. However the CFI found that DT's lowering of its retail prices made the service unprofitable for its competitors and it considered that DT enjoyed sufficient room for manoeuvre, under the regulatory framework, to set its prices in such a manner for the squeeze situation to be avoided. DT's pricing strategy was therefore unlawful. The CFI agreed with the Commission's finding that from 1998 to the end of 2001, and from 2002 until the adoption of the Commission's decision, DT could have ended or at least reduced the margin squeeze by raising its retail prices to its customers, as these were not capped by RegTP. DT could have done this while still remaining under the price ceiling imposed by the regulator on its wholesale prices. Given those circumstances, the CFI found that following regulatory provisions does not absolve DT from its responsibility to comply with competition law as DT had flexibility in setting retail prices.

The CFI disagreed with DT's argument that the Commission was obliged to show that its retail prices were abusive in and by themselves, because the issue of the margin squeeze was concerned with the spread between DT's

wholesale access and retail prices.

DT also argued that access charges (subscription charges for the fixed line) should not be considered separately from call charges and that the Commission had wrongly inflated wholesale charges by including access discontinuance charges in wholesale charges. DT argued that it should not be assumed that competitors would necessarily follow DT's customer pattern. The CFI also rejected all these arguments, emphasising that the abusive nature of pricing practices must be determined on the basis of the dominant company's situation and not on that of its competitors. The CFI thus considered that competitors should be in a position to duplicate the product portfolio of the incumbent operator.

As far as effect on the market is concerned, the CFI found that, given that access to DT's network is indispensable to a competitor wanting to compete with DT in providing retail access (there was no other fixed network in Germany that competitors could have used to make a viable entry into the market), a margin squeeze between wholesale and retail charges would necessarily hinder the growth of downstream competition in the market.

Finally the CFI held that, even if it were the case that RegTP's failure to act against the margin squeeze was a breach of Community law, DT was able itself to reduce or eliminate the margin squeeze and therefore Article 82 EC could apply to its conduct without the Commission trespassing on the regulator's area of competence.

The decision raises a number of important questions on the relationship between regulatory bodies in the telecoms sector and competition law. It is also important for its endorsement of the Commission's approach to determining a margin squeeze, on which there was no previous EC case law. It serves as a reminder that EU competition rules can be an important tool even in markets subject to sector-specific state regulation. Dominant network operators can fall foul of competition law even when in full compliance with their regulatory obligations. Where the operator has discretion over its prices in regulated areas, it should be possible for competitors to duplicate the product portfolio of the dominant undertaking in a profitable manner on the relevant retail (downstream) market. Although this first EC judgment on margin squeeze sheds light on a number of important issues of controversy, numerous technical questions remain unanswered for the time being and further case law would be welcomed to provide more guidance on the precise scope of application of the EC competition rules to margin squeeze matters.

US UPDATES

A new price squeeze case (linkLINE v. SBC California, Inc.)

In *linkLINE v. SBC California, Inc.* F.3d 486 (9th Cir. 2007), the Ninth Circuit determined that SBC, a competitor of linkLINE could claim a violation of Section 2 of the Sherman Act as a result of a "price squeeze" by a competitor who is also the plaintiff's wholesale supplier. The case, which is now on appeal to the U.S. Supreme Court, attempts to create an exception to the Supreme Court's decision in *Verizon v. Trinko* 540 U.S. 340 (2004) which held that a competitor has no duty to deal with another competitor absence statutory compulsion.

In this case, linkLINE, an internet service provider (ISP), alleges that the plaintiff manipulated its dual role as a competitor and supplier. It alleges that SBC charged independent ISP's wholesale prices that were too high in relation to the price that defendants were providing for retail DSL service including charging wholesale prices that were in excess of the prices at which the defendant's retail affiliate was charging retail end user customers, thereby making it impossible for independent ISP competitors to compete.

A "price squeeze" occurs when a vertically integrated company sets its prices or rates at an upstream level so high that its competitors cannot compete with it and in the downstream market. The Ninth Circuit determined that claims of "price squeeze" are viable against monopolists in regulated industries. Recalling a prior holding in the electric utility industry, *City of Anaheim v. Southern California Edison* 955 F.2d 1373 (1992), the Ninth Circuit determined that because Trinko said that claims that satisfy established antitrust standards are preserved, since "price squeeze" had an established antitrust standard prior to Trinko, therefore the *City of Anaheim* precedent was preserved as not entirely inconsistent with *Trinko*. Given the Supreme Court's decision in *Trinko* that there was no

obligation to sell at any price to a competitor, this reasoning is questionable. While the Ninth Court cited various other courts that approved the "price squeeze" theory, observers should carefully watch Justice Breyer's questioning at Supreme Court oral argument. In *Town of Concord v. Boston Edison,* 915 F.2d 17 (D.C. Cir. 1991), the then appellate Judge Breyer rejected the claim that a "price squeeze" can violate Section 2 where the alleged monopolist is fully regulated at both a wholesale and local distribution level. That court left open the possibility a violation could occur where the monopolist is not fully regulated at both levels. That is the case in *linkLINE*.

3 MERGERS

EU UPDATES

Reuters/Thomson merger cleared with conditions

In February 2008 the Commission announced that it has decided to clear the proposed acquisition by Thomson Corporation ("Thomson") of Reuters Group ("Reuters") (both financial data reporting companies). An in-depth Phase 2 investigation was opened in October 2007, because the Commission had concerns over the parties' overlaps in various markets in the financial services sector and the impact which the transaction may have had on competitors, financial institutions and consumers.

Both Thomson and Reuters are leading financial information providers. The companies service, aggregate and disseminate market data content (such as stock prices, exchange rates and financial markets news) needed by financial professionals such as banks, fund managers, corporates, wealth managers and traders.

Following the second phase investigation, the Commission decided that the transaction would eliminate rivalry, on a worldwide scale, between the two main providers of financial data reporting services. This would enable the merged entity to foreclose parts of the market and increase prices and reduce consumer choice. The Commission's concerns related to the off-trading floor space (i.e. research and asset management) given Thomson's marginal presence in the on-trading floor area. In particular the Commission was concerned about overlaps in aftermarket broker reports, earnings estimates, fundamentals (company financial data) and time series economic data. Customers and competitors both raised serious objections to the proposed transaction. In addition the Commission was concerned with vertical aspects as competitors often relied on Thomson and Reuters for data.

One issue which arose in the case was the market share data provided by Thomson and Reuters which conflicted both with data provided by third parties and with Thomson and Reuters own internal documents. As a result the Commission was reluctant to rely on the data provided and said it would use it with great care. Similarly, Thomson and Reuters internal documents were not always helpful to their arguments, one stating that the merged entity would be able to raise prices.

In spite of these problems and the substantial overlaps however, on February 19, 2008 the Commission announced that the transaction was cleared, subject to agreed conditions. The parties agreed to divest copies of certain databases together with the relevant parts of their business including key staff, licences and know-how and customer contracts. Thomson and Reuters can also continue to use these databases in the future to commercialize the data to their own customers. In this way the Commission hopes to restore the pre-merger rivalry which existed and allow customers access to alternative information providers.

The case was examined in parallel with the DoJ in the US where the issues were similar and the DoJ's settlement agreement contains divestitures which are consistent with the Commission's remedies. The Commission may have been influenced to clear the merger by the DoJ which has traditionally been very reluctant to interfere in mergers.

ECJ overturns CFI's annulment of Commission's decision in Sony/BMG merger

Events in the Sony/BMG merger saga have moved on since our update in July-December 2007's issue of this newsletter (see Competition and Trade Law Report No. 2).

We last reported that the Commission had unconditionally approved the merger for a second time (in October 2007), the first approval (given in July 2004) having been annulled by the CFI for not being supported by adequate reasoning or examination (in July 2006). Sony/BMG had appealed the CFI's annulment to the European Court of Justice (the "ECJ"), and the Advocate-General (the "AG") had given her opinion (in December 2007), usually indicative of the ECJ's final decision, stating that the CFI's judgment should be upheld.

However, despite the AG's opinion, the ECJ ruled on July 10, 2008, that the CFI's decision should be set aside and that the case should be referred back to the CFI to reconsider. The ECJ stated that the CFI had erred in law in:

- imposing too high an investigatory standard on the Commission, particularly in light of its limitations in time and resources;
- placing too much reliance on the Commission's statement of objections (which is a provisional statement only and therefore the Commission can deviate from it) and on confidential documents to which the Commission had not had access;
- failing to properly apply the legal test for collective dominance, in neglecting to analyse market transparency in the context of a plausible theory of tacit coordination; and in
- concluding that the Commission had failed to provide an adequate statement of reasons, given that the statement had been sufficient to enable an appeal to be launched.

The ECJ emphasised however that the CFI was correct to hold that there is no presumption that a notified merger is compatible with the common market, and that a Commission approval is open to annulment where there has been inadequate reasoning.

In a further twist, the trade association which appealed the first Commission approval has also lodged an appeal against the second Commission approval. This leaves the parties in a peculiar position whereby two appeals of two Commission approvals of the same transaction are currently pending with the CFI

Mergers approved in the navigable digital maps market

The Commission has this year approved two mergers in the market for navigable digital maps: the acquisition by TomTom, a Dutch Sat Nav company, of TeleAtlas (May 2008); and the acquisition by Nokia, a Finnish mobile phone company providing mobile navigation services, of Navteq (July 2008). Manufacturers of satellite navigation equipment require navigable digital maps for their finished product. TeleAtlas and Navteq hold a duopoly as the only two providers of comprehensive navigable digital maps of Europe and the US.

The Commission was primarily concerned, in both cases, that the vertical mergers would result in foreclosure of the market such that competing Sat Nav manufacturers would find their access to the digital mapping databases may be limited, or that the price for such products increases.

Following Phase II investigations however, the Commission concluded that the mergers were unlikely to significantly impede effective competition in the EEA or in any substantial part of it. The Commission reasoned that TeleAtlas and Navteq provide strong competition against each other, and that this would limit both companies ability to frustrate competitors and consumers. Furthermore, any limitation of access to the maps would result in a substantial loss of revenue to that arm of the merged companies'businesses, which would be unlikely to be adequately compensated by a corresponding increase in sales of the satellite navigation or mobile devices. The

Commission also took into account the efficiencies which would result from the mergers, and in the case of Nokia/Navteq, the fact that Nokia faced competition from other mobile phone operators in many other aspects of mobile technology provision, such that their advantage in the satellite navigation market would not be material.

The Commission has stressed that in line with its policy it examined the Tom Tom/TeleAtlas case independently of the Nokia/Navteq acquisition. However, given the similarities between the products and the outcomes it is likely that they have in effect been examined in parallel.

Both acquisitions were cleared without conditions. This may have been influenced by the fact that the Tom Tom/TeleAtlas transaction was previously cleared in the US and by the difficulty of crafting suitable remedies in a merger situation raising solely vertical competition concerns. In any event the Commission has been keen to express its support for developing technologies, which also may have contributed to its decision not to require remedies in this case.

US UPDATES

The DOJ Clears Two Proposed Acquisitions: XM/Sirius and SABMiller/Molson Coors

A. XM/Sirius

After a highly-publicized investigation into the proposed merger of XM Satellite Radio Holdings Inc. ("XM") with Sirius Satellite Radio, Inc. ("Sirius"), the DOJ announced on March 24, 2008 (just short of a year after issuing a Second Request) that it was closing its investigation and not taking enforcement action against the parties. The DOJ determined that the merger of the satellite radio companies was not likely to substantially lessen competition or harm consumers. The DOJ's investigation revealed that as to *existing* customers, there was little competition between the parties. Additionally, there were limited concerns as to new subscribers who purchased satellite radio through two main channels: car manufactures and mass retailers.

B. SABMiller/Molson Coors

In June 2008, the DOJ explained its decision to close its investigation of the proposed joint venture between SABMiller Plc and Molson Coors Brewing Company for the production and distribution of beer. The DOJ's statement focused on the "substantial and credible savings" the joint venture will have on the companies' business. Ultimately, the DOJ stated that the savings, which are of the kind to be passed on to consumers, will make the joint venture a stronger competitor in the market.

Assistant Attorney General Barnett Discusses Issues in Merger Enforcement

In June 2008, Assistant Attorney General Thomas Barnett spoke about current issues in merger enforcement including the increased focus on unilateral effects in merger reviews, the DOJ's success in obtaining appropriate relief for potentially anticompetitive mergers, and merger process reform.

Importance of Unilateral Effects. The DOJ's focus on unilateral effects in merger challenges has increased over time. Barnett noted that of the 58 merger complaints filed by the DOJ between 2001 and June 2008, 41 included only a unilateral effects claim, 6 included only a coordinated effects claim, and 11 contained both.

High Success Rate of Obtaining Merger Relief. Out of the 112 transactions investigated by the DOJ since fiscal year 2001, only one is in active litigation (*see supra*, MediaNews/Gazette Co.). In 109 actions, the DOJ obtained appropriate relief, either through filing a complaint or through the parties restructuring or abandoning the transaction prior to a complaint being filed. The DOJ was unsuccessful in obtaining relief in the remaining two transactions.

Barnett attributed the DOJ's success rate to improved transparency of merger decisions, including, but not limited

to, issuing 15 merger closing statements since fiscal year 2003, issuing the Merger Remedies Guide in 2004, and improved communication throughout the investigative process.

Merger Process Reforms.

Information Overload. Barnett noted that the information technology revolution has greatly increased the information that businesses create and store, and that the government must review. The DOJ has devoted large resources to accommodate the onslaught of information that its attorneys and staff must sift through, and Barnett recognized the correlated costs incurred by the merging parties and their counsel.

Barnett stated that the DOJ is doing its part to reduce the burden of information gathering and review, including (i) working to better understand what information is most useful to the DOJ's merger review and (ii) making its second requests "more targeted," by "narrowing requests, allowing parties to employ keyword-targeted searches where appropriate, ensuring that file formats are compatible, and conducting discovery in stages [to] minimize the production of information that [the DOJ] may not need." Additionally, Barnett stated that the parties could expedite the merger review process by taking the time to cull out non-responsive documents. Barnett concluded that, "The goal of both the Division and the parties should be to identify the relevant information as quickly as possible so that we can engage in a meaningful discussion on the merits."

Process and Timing Agreement. Barnett remarked that only one company has taken advantage of the Process & Timing Agreement that was part of the DOJ's 2006 revision to the Merger Review Process Initiative. Under the Process & Timing Agreement, parties can limit second request document searches to certain central files and a targeted list of 30 employees. To take advantage of the Agreement, the party must: "provide certain critical information to the [DOJ] early in the investigation, agree to an investigation schedule, and agree to a sufficient period for the [DOJ] to conduct post-complaint discovery should the investigation… result in contested litigation."

4 STATE AIDS

EU UPDATES

The ECJ clarifies the standstill obligation (Case C-199/06, CELF v SIDE)

In this preliminary reference the referring court asked essentially whether, pursuant to Article 88(3) EC, a Member State, which has granted unlawful aid in breach of the notification and standstill obligations, *must* recover that aid from the beneficiary where the Commission *subsequently* adopts a decision declaring the aid in question *compatible* with the common market.

In its judgement delivered on February 12, 2008, the ECJ did not follow the Opinion of AG Mazák (see Competition and Trade Law Report No. 1). According to the ECJ, on the one hand, the national court is *not* bound to order the recovery of an unlawful aid, where the Commission has adopted a final decision declaring that aid to be compatible with the common market. On the other hand, the national judge must order the aid recipient to pay *interest* in respect of the period of unlawfulness.

Basically, the Court adhered to the reasonable position taken by the Commission during the written procedure (see Competition and Trade Law Report No. 1).

The starting point of the Court's reasoning is that the last sentence of Article 88(3) EC is based on the preservative purpose of ensuring that an incompatible aid will never be implemented. In order to achieve that purpose, the implementation of planned aid is to be deferred until the doubt as to its compatibility is resolved by the

Commission's final decision. When the Commission adopts a positive decision, it is then apparent that that purpose has not been frustrated by the premature payment of the aid.

Commission requests information about preferential tax regimes for retail distribution and banking cooperatives in Italy

The Commission has asked Italy under EC state aid rules for information concerning preferential tax regimes for cooperatives operating in the retail, distribution and banking sectors in Italy. Since those measures were in force before the existence of the EC Treaty, they could be qualified by the Commission as existing aid.

In its analysis, the Commission is assessing the equity and efficiency objectives pursued by the cooperatives against any possible distortions of competition that might derive from such measures.

The aim of the Commission, according to the words of its Commissioner Neelie Kroes, is to try to safeguard tax reductions justified by serving social objectives in the common interest, while ruling out unjustified advantages for large cooperatives in direct competition with traditional commercial companies.

The main measures concerned by the analysis relates to: *i*) the deduction from the taxable income of the profits allocated to indivisible reserves; *ii*) the deduction from the taxable income of the cooperative bonuses ("*ristorni*") distributed to members and *iii*) the tax reduction on interest paid to members for short-term deposits.

The preliminary evaluation of the Commission has reached the conclusions that, in general, due to the specific feature of its corporate model, cooperatives can be easily distinguished from profit-making companies, especially when they are purely mutual and generate revenues exclusively with members. However, the Commission points out that cooperatives, despite their specificity, may also make profits from dealings with non-members and behave in the market in the same way as profit-making companies.

The Commission considers that under these circumstances, a preferential treatment for cooperatives may entail state aid. Aid may nevertheless be considered compatible if its positive effects linked with the contribution of cooperatives to social objectives outweigh its negative effects on competition and trade. This is considered to be the case for Small and Medium Enterprises (SMEs), which form the vast majority of cooperatives.

Investigation on the loan granted to Alitalia by the Italian State

The Commission has decided to launch an in-depth investigation to ascertain whether the loan granted to Alitalia by the Italian Government is compatible with the state aid rules. At this stage, the Commission believes that the loan - which the company has the option of incorporating into its equity capital - could constitute aid incompatible with the common market.

The €300 million loan was granted by the Italian State to Alitalia, according to Decree-Law of 22 April 2008, in order to enable the company to cope with its current predicament. A second Decree-Law, dated 27 May 2008, allowed Alitalia to incorporate that sum into its equity capital. This option is intended to enable the company to maintain the value of its capital so as to avoid bankruptcy proceedings and allow its possible privatisation.

At this stage, the Commission considers that such measure could constitute a state aid incompatible with the EC rules.

As Alitalia has already benefited from rescue and restructuring aid, Italy cannot, in principle, grant it any more aid.

The crucial assessment that the Commission has to carry out is whether a private investor would have acted in the same way as the Italian Government.

Commission updates rules on guarantees and provides simplified possibilities for SMEs

The Commission has adopted a new Notice on state aid in the form of guarantees. The text sets out new methodologies to calculate the aid element in a guarantee and provides simplified rules for SMEs, including predefined safe-harbour premiums and single premium rates for low-amount guarantees. The new Notice is part of the State Aid Action Plan.

The main purpose of revising the Commission's current Notice on Guarantees is to provide additional guidance and legal certainty to Member States and stakeholders when assessing whether a guarantee contains an element of state aid or not, since State guarantees are considered to be an important mean to support the growth of companies and to facilitate their access to finance, in particular for SMEs.

The new Notice will allow these companies to evaluate the aid element of a guarantee in a simple way, by a i) predefined safe-harbour premiums based on rating classes; and ii) the application of a premium of 3.8% per year, even in the absence of rating, for example for start-up companies;

Moreover, a single premium can be applied across the board for schemes, when the guaranteed amount remains below €2.5 million per company, so as to allow for a risk-pooling effect in favour of low-amount guarantees for SMEs.

Commission launches an investigation into UK restructuring aid package for Northern Rock

On April 2, 2008, the Commission has declared to have launched an in-depth investigation into the UK authorities' package of measures to support the restructuring of Northern Rock, the UK mortgage bank. The Commission received the notification of these measures on March 17, 2008.

The core activity of Northern Rock is residential mortgage lending, which represents more than 90% of all outstanding loans made by the bank.

As known, the ongoing turbulence in the world's financial markets caused a significant rationing of funds in the sterling money markets in August and September 2007, and the mortgage securitisation market virtually closed. This created serious liquidity difficulties for Northern Rock.

On December 5, 2007, the Commission authorised state aid measures the UK had taken in favour of Northern Rock, finding that they complied with the rescue aid provisions of the Community Guidelines on state aid for rescuing and restructuring firms in difficulty.

The notification of the Northern Rock restructuring plan on March 17, 2008 means that the rescue aid measures for Northern Rock may remain in place while the Commission examines the restructuring plan. The notified aid measures may be declared compatible with EC law if they are in line with the Guidelines on rescue and restructuring aid. Namely, three conditions are to be met: i) restoration of long-term viability without further state support ii) aid limited to the minimum necessary to implement the restructuring and iii) avoidance of undue distortions of competition.

Not all details of the plan have been communicated to the Commission and today's decision requests further information. The decision also invites third parties to comment on whether the plan's proposals for avoiding undue distortions of competition are adequate.

New online form for complaints against alleged unlawful State aid

On April 14, 2008, the Commission has published a new online form for complaints against alleged unlawful state aid. Everybody, any natural or legal person may submit a complaint to the Commission. The procedure is free of charge. The form is available on the Commission website at http://ec.europa.eu/comm/competition/forms/rtf_sa_complaint/en.rtf

The form shall be sent to the relevant Commission department, either by email or by post.

The complainant will receive an acknowledgment of receipt of the information within 15 working days, and will be informed whether there are sufficient grounds to investigate.

A Member State cannot justify failure to implement a Commission decision requiring it to recover State aid on the basis of that decision's alleged illegality

The company Olympic Airways has been subject, over the years and starting from 1992, to various State aid Commission decisions.

The new company Olympic Airlines, which was set up in 2003, benefited from receiving the assets of the "flights" division of Olympic Airways, while the latter retained substantial liabilities.

By a decision dated September 14, 2005, the Commission considered to be State aid the restructuring of Olympic Airways as such, as well as the granting of financial assistance and the receipt by the two companies of various forms of subsidies.

Therefore, Greece was under an obligation to recover the various aids without delay, to immediately suspend the granting of any additional aid to Olympic Airways and Olympic Airlines and to inform the Commission of measures taken.

In the action for failure to fulfil obligations according to Article 88, paragraph 2, CE, brought by the Commission, Greece held, first of all, that the Commission had failed to provide a reliable method of calculation to make determination possible of the aid amount to be recovered. Secondly, Greece challenged the validity of the decision.

The ECJ found that various provisions of the decision indicate amounts that are sufficiently precise and that there is no Community provision that requires the Commission to determine the exact amount of aid to be repaid.

In addition, the Court pointed out that, in the context of an action for failure to fulfil obligations according to Article 88, paragraph 2, CE, a Member State to which a State aid decision has been addressed cannot validly justify failure to implement that decision on the basis of its alleged illegality. In fact, the validity of such decision may be challenged only in the context of action for annulment under Article 230 CE.

Consequently, the Court declared that Greece had failed to fulfil its obligations under the decision of September 14, 2005.

A case referring to an action for annulment of the Commission's decision is presently pending before the CFI.

5 IP/LICENSING

EU UPDATES

Neelie Kroes' Speech on Open Standards – Brussels, 10 June 2008

Speaking at a seminar hosted by OpenForum Europe in Brussels, EU Competition Commissioner, Neelie Kroes backed the use of open software for eGovernment and called on public authorities not to impose proprietary standards on citizens, warning against customers becoming locked in to using technology provided by one vendor.

Ms Kroes advocated interoperability of technologies, which encourages competition between different companies and helps prevent users becoming locked in. She suggested that reliance on proprietary software could generate anti-competitive practices and harm citizens:

"*No citizen or company should be forced or encouraged to choose a closed technology over an open one, through a government having made that choice first*."

Ms Kroes said the Commission needed to work harder to carry out an internal policy to choose open, well-documented standards when it bought technology. She did not mention Microsoft by name but encouraged computer users to avoid formats that, like many Microsoft products, are based on proprietary standards. She also referred to the only company in EU antitrust enforcement history that has been fined for refusing to comply with European Commission orders – this company being Microsoft.

The Commissioner stated that standards were the foundation of interoperability and went on to say there were serious security concerns for governments and businesses associated with using a single software supplier. The Commission must not rely on one vendor and should refuse to become locked into a particular technology. When an open source alternative is available, citizens should not be forced to access government information through one supplier's software.

US UPDATES

A Divided FTC Challenges Patent Holder's Refusal to Honor Predecessor Patent Holder's Licensing Terms

On January 23, 2008, by a 3 to 2 vote, the FTC announced a complaint and settlement with Negotiated Data Solutions LLC ("N-Data") regarding N-Data's alleged refusal to honor licensing commitments made by its predecessor holder of the patents at issue.

In 1994 National Semiconductor Corporation ("National") was developing certain technologies that would enable two devices at opposites ends of a local area network link to exchange information and automatically configure themselves for optimal communication. National also made a commitment to the IEEE, an electronics industry standard setting organization, that it would offer to license the technologies to manufacturers and sellers of products for a one-time, paid-up royalty of $1,000 per licensee if these technologies were adopted as IEEE standards. After they had become the IEEE standards, N-Data acquired these patent technologies from National knowing about National's licensing commitment. Subsequently, however, N-Data allegedly began demanding different licensing terms and higher royalty payments.

The FTC majority first found that N-Data's alleged conduct was an unfair method of competition in violation of Section 5 of the FTC Act. It also found the conduct an unfair act or practice in the meaning of Section 5 of the FTC Act, the concept usually viewed as applicable to the FTC's consumer protection matters as opposed to competition matters. While noting that some may criticize the FTC for broadly applying its "unfairness" authority to stop the conduct at issue, the majority concluded that "the cost of ignoring this particularly pernicious problem is too high" and that "[u]tilizing our statutory authority to its fullest extent is not only consistent with the Commission's obligations, but also essential to preserving a free and dynamic marketplace."

FTC Challenges Cephalon for Blocking Entry of Generic Version of its Branded Drug Until 2012

On February 13, 2008, the FTC, by a unanimous vote, challenged in the U.S. District Court for the District of Columbia Cephalon's patent settlement reverse payments to four first-filer generic firms in excess of $200 million as an anticompetitive means to prevent competition to its branded drug Provigil until 2012.

According to the FTC's complaint, by late 2005, generic competition to Provigil, a branded product for excessive sleepiness disorder, appeared imminent. The only remaining patent infringement issue was a narrow drug formulation patent related to the size of the particles used in the drug. After filing patent infringement lawsuits against the generic companies, Cephalon allegedly induced each of the four generic drug companies to settle the patent litigation and agree to forgo generic entry until April 2012. All four generic companies were so-called "first filers" to file FDA applications to market generic versions of Provigil, and thus no other generic company could enter the relevant market unless and until all of these first filers either relinquished their marketing exclusivity or 180 days after one of them entered the market.

The FTC, by a 5 to 0 vote, sought a permanent injunction against Cephalon to allow generic Provigil entry before 2012. The FTC also sought a final judgment against Cephalon that its course of conduct violated Section 5 of the FTC Act. In a separate concurring statement, Commissioner Leibowitz stated that he "also would have named as a defendant any generic company that took these pay-offs and now refuses to relinquish their 180-day exclusivity, thus blocking generic entry into the Provigil market that otherwise could occur in 2008."

6 PROCEDURAL MATTERS

EU UPDATES

Commission presents the White paper on damages actions for breach of the EC antitrust rules

The Commission has presented a White Paper suggesting a new model for achieving compensation for consumers and businesses victims of antitrust violations, namely restrictive business practices and abuses of a dominant market position (Articles 81 and 82 EC). Damage actions for breach of competition law are underdeveloped in Europe. Up to now, in fact, only few private antitrust damages actions were brought before national courts against competition infringers by consumers and businesses. According to the Commission, whilst avoiding the potential excesses of the US system, it is important that *any* victim of antitrust violation receive full compensation, in alignment with the case law of the ECJ, and in particular with the decisions *Courage* and *Manfredi.*

The White Paper provides suggestions to make damages claims by victims more efficient, proposing a model of compensation through single damages for the harm suffered. This means full compensation, including compensation of the actual loss due to, for example, to an anti-competitive price increase, and should also imply a right to interest.

The White Paper presents a set of recommendations covering, in particular, collective redress, disclosure of evidence and the effect of final decisions of competition authorities in subsequent damages actions.

As per the mechanism of collective redress, the Commission points out that consumers with small value claims need better access to justice and should have the possibility to regroup their claims and bring actions through suitable representatives. In any case, the Commission doesn't want to implement in the legal system of the Member States a type of US class action. In order to avoid the abusive use of collective redress and the excessive litigation, the Commission suggests a combination of two complementary mechanisms of collective redress:

- opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action and
- representative actions, which are brought on behalf of the victims by qualified entities, such as consumer associations, state bodies or trade associations. Member State authorities could either designate those qualified entities in advance or certify them on an *ad hoc* basis, in connection with a particular antitrust infringement.

With regard to evidence, the Commission deems essential to overcome the information asymmetry typical in competition

cases, and to improve victims' access to relevant evidence. The disclosure of relevant evidence, under the control of the judge, should help to ensure a fair case, where both parties have equivalent access to evidence. However, the Commission does not recommend more far-reaching options, such as an automatic right to discovery.

Moreover, the Commission recommends, as is already the case for Commission decisions, that *final* infringement *decisions* of Member States' competition authorities should be considered sufficient proof of an infringement in subsequent actions for damages. Namely, the Commission would like to confer binding effect on final decisions only with reference to the same practices and same undertakings for which the national competition authority or the review court found an infringement.

As known, direct customers of the infringer may pass on an illegal overcharge imposed on them to their own customers, who may do the same, right down the distribution chain to the final consumer. The Commission proposed two different rules relating to the burden of the proof in passing on overcharges. In particular: i) defendants should be entitled to invoke the passing-on defence against a claim for compensation of the overcharge and ii) indirect purchasers, which are usually consumers at the end of the chain and who may find difficult to produce sufficient proof of the existence and extent of the passing-on of an illegal overcharge, should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety.

The White Paper does not deal with the issue of damages calculation. The Commission intends to draw up a framework with pragmatic, non-binding guidance, concerning, for example, approximate methods of calculating or simplified rules of estimating losses.

Interested parties have commented the recommendations provided by for the White paper until July 15, 2008.

Commission imposes a €38 million fine on E.ON for breach of a seal during an inspection

The Commission imposed a fine on E.ON - a German company of the energy sector - for breaching a seal that had been affixed by the Commission officials during an announced inspection in the premises of the company in May 2006. According to the Commission, the seal was removed at the end of the first day of the inspection relating to the suspicion of anticompetitive practices on the German electricity market. The broken seal was intended to secure the room in which all the documents collected by the Commission's officials were stored. As these sensitive documents were not yet listed, the Commission was unable to ascertain whether and which documents were taken by the room.

The company denied breaking the seal but the Commission, after having carried out an investigation, came to the conclusion that the defensive arguments of the company were groundless. According to Article 23(1) e) of Regulation 1/2003, breaches of seals are considered to be an infringement of competition law. As per the amount of the fine, the same provision provides that the Commission can impose a fine of up to 1% of the company's total turnover.

It was the first time that a fine has been imposed to a company for breaching of a seal under the provisions of Regulation n. 1/2003.

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