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COMPETITION AND TRADE LAW REPORT AND UPDATE

1 CARTELS AND HORIZONTAL AGREEEMENTS

EU UPDATES

A consultancy firm not active on a relevant market which has contributed to the implementation of a cartel may be fined according to Article 81 EC (case T-99/04)

In December 2003, the European Commission (the "Commission") found that a consultancy firm, AC-Treuhand AG, had provided some producers of organic peroxides held liable of a cartel infringement with various services relating to the organisation of illegal meetings and the covering up of evidence of the violation. Notwithstanding the fact that the company was not involved in the market in which the other companies were active and which was affected by the cartel, the Commission found that the consultancy company played an essential role in the violation. Therefore, the Commission concluded that also the consultancy firm had infringed competition rules and imposed a fine on it of €1,000.

AC-Treuhand AG brought an action for annulment of the Commission's decision before the Court of First Instance (the "CFI") claiming, *inter alia*, that it could not be held liable since it was not a contracting party of the cartel. Moreover, since it was not active on the market on which the restriction of competition had materialised, it could not be considered to be a perpetrator of the violation.

The reasoning of the CFI in the judgment rendered on July 8, 2008, is based on a literal, contextual and teleological interpretation of Article 81 EC.

As per the literal interpretation of article 81(1) EC, the judges focussed on the full implications of the term "agreements between undertakings". The CFI held that, according to the jurisprudence, proof of the existence of an agreement must be founded in a "*concurrence of wills*" between the undertakings involved. In the light of the European case law, the CFI stated that such "joint intention of conducting themselves on the market in a specific way" (see for all *Bayer* v *Commission*, case T-41/96) do not require the market on which the undertaking which is the "perpetrator" of the restriction of competition is active to be the same as the one on which that restriction is deemed to materialise. It follows that any restriction of competition within the common market may be classed as an "agreement between undertakings" within the meaning of Article 81(1) EC. That criterion implies that an undertaking may infringe the prohibition laid down in Article 81(1) EC where the purpose of its conduct, as coordinated with that of other undertakings, is to restrict competition on a specific relevant market within the common market, and that does not mean that the undertaking has to be active on that relevant market itself.

As per the contextual and teleological interpretation of Article 81(1) EC, the CFI, in replying to one of the applicant's plea, stressed that it is not to be ruled out that an undertaking may participate in the implementation of a competition restriction even if it does not restrict its own freedom of action on the market on which it is primarily active. Any other interpretation, according to the judges, might restrict the scope of the prohibition laid down in Article 81(1) EC to an extent incompatible with its useful effect and its main objective, since proceedings against an undertaking for contributing to a restriction of competition could be blocked simply on the ground that that contribution does not come from an economic activity forming part of the relevant market on which that restriction materialises or on which it is intended to materialise. Therefore, also in the light of a "teleological approach", the CFI concludes that in European competition law the notions of a cartel and of an undertaking perpetrator of an infringement are conceptually independent of any distinction based on the sector or the market on which the undertakings concerned are active.

Moreover, the CFI finds that the fact that an undertaking has participated in a cartel only in a subsidiary, accessory or passive way is not sufficient to rule out its liability for the entire infringement. The possibly limited importance of that contribution may none the less be taken into account for the purposes of determining the level of the penalty.

On such grounds the Court upheld the Commission decision since, in organising meetings and covering up traces of the infringement, AC-Treuhand AG actively contributed to the implementation of the cartel and there was a sufficiently definite and decisive causal link between its activity and the restriction of competition on the organic peroxides market.

Commission fines wax producers €676 million for price fixing and market sharing cartel

On October 1, 2008, the Commission imposed a total €676 million fine on 9 groups (ENI, ExxonMobil, Hansen & Rosenthal, Tudapetrol, MOL, Repsol, Sasol, RWE and Total) for participating in a cartel for paraffin wax in the EEA in violation of Article 81 EC. The companies fixed prices for the products concerned and ran the cartel between 1992 and 2005. Some of the participants also allocated markets and customers. According to the Commission the overall market of paraffin waxes is worth almost €500 million. Sasol's fine was increased by 50% because it was considered to be the leader of the cartel. The Commission increased the fines for ENI and Shell by 60% because they had already been fined for cartel activities in previous Commission decisions. Shell was the first company to provide relevant information under the Commission's 2002 Leniency Notice and received full immunity from fines.

Banana producers fined €60 million for setting of quotation prices

On October 15, 2008, the Commission fined around €60 million the main banana importers for running a price cartel between 2000 and 2002. The cartel affected eight member States (Austria, Belgium, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden). In 2002, the combined retail value of bananas sold in those Member States totaled around €2.5 billion. The companies involved are Dole (US), Weichert (US-Germany) and Chiquita (US). In April 2005, before the starting of the investigation, Chiquita applied for immunity as a whistle-blower under the Commmission's 2002 Leniency Notice, provided crucial information on the cartel and therefore was granted full immunity from fines.

The violation or Article 81 EC consisted of concerted practices carried out by the undertakings in order to coordinate the price of bananas. The banana business is organised in weekly cycles. During the relevant period the importers of leading brands of bananas set and then announced every Thursday morning their reference price (their "quotation price") for the following week. Over the three year period the Commission found that there were calls among the companies, usually the day before they set their price. According to the Commission, during these calls the companies discussed or disclosed their pricing intentions.

Highest cartel fines ever imposed by the Commission for cartel violations (car glass producers)

On November 12, 2008, the European Commission (the "Commission") imposed the highest fines for cartel violations, both for an individual company (€896 million) and for a cartel as a whole (€1.38 billion). The companies deemed responsible by the Commission of infringing competition law are the major European producers of car glass. Namely, the French company Saint-Gobain, which was considered a repeated offender and fined €896 million, the Japanese company Asahi (€113 million), the English company Pilkington (€370 million) and the Belgian Soliver (€4 million). During the period of the infringement (between 1998 and 2003) these undertakings controlled about 90% of the glass used in the EEA in new cars and for original branded replacement glass. Only taking into account the last year of the infringement, this market was worth about €2 billion. The Commission investigation started following to information provided by an anonymous informant. After surprise inspections in 2005, the Japanese company Asahi and its European subsidiary filed an application under the 2002 Leniency Notice. This was the reason why its fine was reduced by 50%. Conversely, the fine imposed to Saint Gobain was increased by 60% due to the fact that the latter was involved in two previous cartels, in 1984 (Flat Glass Italy) and in 1988 (Flat Glass Benelux). The Commission found a system of market sharing and exchanging information, through which the producers discussed the allocation of car glass to be supplied to customers (mainly car manufactures), the renegotiations of on-going contracts and other sensitive and confidential issues with the aim of keeping the market shares of each car producers as stable as possible at the European level.

US UPDATES

Non-Compete Agreement Between Competitors As Illegal Market Allocation (*In the Matter of Dick's Sporting Goods* - FTC File No. 071 0196).

On October 9, 2008, the Federal Trade Commission ("FTC") charged that Golf Galaxy's non-compete agreement with a competitor was overbroad and thus constituted illegal market allocation.

In 1998, Golf Galaxy, a subsidiary of Dick's Sporting Goods, and Golf Canada entered into a consulting agreement, under which Golf Galaxy would provide consulting, employee training and other services to Golf Canada to help it develop it initial stores in Canada in return for Golf Galaxy's receiving shares of Golf Canada , a seat on its board of directors and cash payments. The agreement also contained non-compete provisions that would prohibit Golf Canada from entering the United States market for a period of five years after the consulting agreement ended. With the help of Golf Galaxy, in fact Golf Canada was able to open 13 retail stores in Canada between 1998 and 2004. The FTC viewed the 1998 restraints were arguably reasonably necessary to the formation and/or efficient operation of their legitimate and pro-competitive competitor collaboration.

Then the parties ended the legitimate consulting arrangement in 2004, but yet entered into a revised non-compete agreement, extending the duration of the non-compete provisions. Specifically, the 2004 agreement (1) barred Golf Canada from entering the U.S. market until 2013; (2) barred Golf Canada from engaging in any businesses outside Canada that competes with, or similar to, the business of Golf Galaxy until 2010; and (3) for the first time, barred Golf Galaxy from opening a store in Canada until June 2008. The FTC alleged that these revised non-compete provisions went well beyond the term contemplated in the initial 1998 agreement without offering any offsetting pro-competitive justifications, and thus constituted an unlawful market allocation agreement. According to the FTC, the non-compete provision should have been extended at most until through 2009, five years after the termination of the legitimate consulting agreement, as contemplated in the initial consulting agreement of 1998.

To settle the charges, Golf Galaxy agreed not to divide or allocate the market for the retail sale of golf merchandise. Golf Galaxy also agreed not to enforce any non-compete provision beyond 2009, the end of five-year non-compete term as contained in the initial 1998 consulting agreement and as determined to be reasonably necessary by the FTC. Finally, Golf Galaxy agreed not to enforce the 2004 revised non-compete provision that would have barred Golf Canada from engaging in any business outside Canada that competes with, or is similar to, the business of Golf Galaxy until 2010.

2 ABUSE OF MARKET POWER

EU UPDATES

Commission publishes guidance on its enforcement of Article 82

In December 2008 the Commission published its long-awaited Communication on the prohibition in Article 82 EC of abuse of a dominant market position. This follows the publication in December 2005 of a Staff Discussion Paper on the application of Article 82 to exclusionary abuses.
The Communication applies to abusive exclusionary conduct by dominant businesses, that is conduct which aims to exclude actual competitors from expanding or would-be competitors from entering a market, thereby potentially depriving customers of more choice, more innovative goods or services and/or lower prices, with further guidance to be published in the future on exploitative abuses such as excessive pricing.

The guidance is only one third of the size of the Staff Discussion Paper and the Communication is clear that it does not purport to be a definitive statement of the law on Article 82 - rather, it provides guidance for businesses to assess what cases the Commission is likely to consider worthy of investigation i.e. its enforcement priorities. It therefore remains open to businesses to argue for a different interpretation in a specific case brought directly before national courts, albeit that the Commission's view will also be influential.

The Communication consists of two main sections: first, a general discussion of the Commission's approach to dominance; and, secondly, guidance on individual types of abuses. The Commission makes clear that it will focus on conduct that is liable to bring about harm to consumers in the form of reduced quality, choice or innovation, or increased prices by adopting an effects and economics-based approach, rather than a formulaic approach, to tackling conduct of dominant undertakings. The Commission indirectly addresses past criticisms by confirming that the focus of its enforcement policy should be the maintenance of an effective competitive process in order to protect consumers as opposed to individual competitors. The Commission will also examine possible defences put forward by dominant undertakings that their conduct is objectively justified or creates efficiencies. The criteria for efficiencies are similar to the exemption criteria for anti-competitive agreements under Article 81(3) EC and are likely to be equally contentious to apply in practice.

The contentious area of collective dominance (where two or more unconnected undertakings are together deemed to be dominant) is absent from the Communication, despite its inclusion in the earlier Staff Discussion Paper.

The Communication then goes on to provide specific guidance on the most common types of exclusionary conduct, namely exclusive dealing and rebates; tying and bundling; predatory pricing; refusal to supply; and margin squeeze. One important development on refusal to supply is the Commission's inclination to subject all refusal to supply cases to similar high standards as the classic "new product" or "essential facilities" cases, requiring evidence in particular that continued supply is indispensable even where a customer has historically been supplied by the dominant undertaking.

By way of comment, protection of the consumer (in its broadest sense) is the underlying concern behind the guidance contained in the Communication, and - no doubt to avoid suggesting that its previous practices were less than perfect - the Commission emphasises that it has already applied this effects-based approach to Article 82 in high-profile cases such as *Wanadoo*, *Telefonica* and *Microsoft*.

However, although it provides useful guidance on what the Commission's priorities are likely to be when looking at Article 82 cases, as noted above, the Communication makes clear that it is not intended to constitute a statement of the law, and is without prejudice to the interpretation of Article 82 by the EC courts. It is perhaps best to see the Communication as just the first of a series of versions of the guidance that will no doubt evolve with the case law.

ECJ ruling on the application of Article 82 to the refusal to supply pharmaceuticals intended for parallel export (Joined Cases C-468/06 – C-478/06)

In September 2008 the European Court of Justice (the "ECJ") issued a ruling following a reference by the Athens Court of Appeal. The question posed was whether a refusal by a dominant company to meet orders from pharmaceuticals wholesalers, in order to limit parallel trade, constituted an abuse of that dominant position under Article 82 EC. The ECJ confirmed that the competition rules do apply to such practices in the pharmaceuticals sector. However, dominant manufacturers may protect their commercial interests by refusing orders from parallel exporters which are "out of the ordinary" in terms of quantity. "Out of the ordinary" should be determined by reference to previous dealings with the exporters in question and the requirements of the Member State from which the exports are made.

Proceedings were brought by a group of pharmaceuticals wholesalers against a Greek subsidiary of GlaxoSmithKline ("GSK"). The dispute arose because GSK stopped meeting the orders of the wholesalers for certain products then resumed supply, but in limited quantities. These proceedings culminated in a reference by the Athens Court of Appeal for an ECJ ruling.

GSK argued that special features of the pharmaceuticals sector meant that either the usual rules should not apply or that there was an objective justification for a refusal to meet orders in full, namely:

- the regulation by Member States of the distribution and prices of medicines;
- the negative impact of unlimited parallel trade on the R&D investments of pharmaceuticals companies; and
- the minimal benefit of parallel trade of medicines for final consumers.

The ECJ rejected the notion that refusal to meet orders at all or in full could not constitute an abuse of a dominant position because of the special features of the pharmaceuticals sector. The ECJ noted the importance of parallel trade for undistorted competition and the integration of national markets through the establishment of a single market. The ECJ noted that where a medicine is protected by a patent, the price competition which may exist between a producer and its distributors, or between parallel traders and national distributors, is the only form of competition until the expiry of that patent. The ECJ rejected the argument about minimal benefit for consumers. The ECJ did not examine the argument that R&D would be negatively impacted, although Advocate General Colomer in his opinion on the case was sceptical about any casual link.

Nevertheless, the ECJ ruled that a dominant pharmaceuticals manufacturer would be objectively justified in taking steps that are reasonable and proportionate to counter the threat to its own legitimate commercial interests that may be posed by a parallel exporter. The ECJ's concern was that otherwise, a dominant pharmaceuticals manufacturer might be left with no alternative but simply not to place its products in a Member State where the prices of those products were set at a relatively low level.

Based on earlier case law on refusal to supply, the ECJ held that to assess whether the refusal by a dominant pharmaceuticals manufacturer to supply parallel traders is a reasonable and proportionate measure, it must be ascertained whether the orders of the wholesalers are "out of the ordinary". The ECJ held that it was for the referring national court to ascertain whether these quantities were ordinary in light of both the previous business relations between GSK and the wholesalers concerned and the size of the orders in relation to the requirements of the market in the Member State concerned (Greece, in this case). The ECJ indicated that wholesalers orders could be out of the ordinary if they were out of all proportion to those quantities previously sold by the same wholesalers to meet the needs of the market in the first Member State.

In this ruling, the ECJ has for the first time confirmed that dominant pharmaceuticals manufacturers may legitimately limit supplies to wholesalers purely on the basis that products are destined for parallel export. However, there is still uncertainty as to the level at which supply may be capped - the ECJ has left this for the national courts to determine.

3 MERGERS

EU UPDATES

Commission publishes new Merger Remedies Notice

The Commission has revised its guidelines on remedies in merger control in order to deal more effectively with competition concerns and make it clear to parties involved in merger activity exactly what information will be required for the Commission to accept the remedies offered. The revised guidelines reflect changes in legislation and case law and take account of the Commissions evolving experience in this area.

The Commission's revised notice on remedies (the "Remedies Notice"), which came into force in October 2008 and replaces the previous remedies notice, confirms that remedies, which should be proposed by the merger parties, are only acceptable if they are viable, can be implemented within a short space of time and effectively eliminate the competition concerns raised by the Commission. Merger parties will now be required to provide the Commission with specified pieces of information relating to the remedies on offer by completing a new form, to be called Form RM.

Structural remedies as opposed to commitments on future behaviour are preferred as they are considered to be the most effective as they create the conditions for the emergence of a new competitor or the strengthening of an existing competitor. Divestiture will, however, only be considered an effective remedy where (1) the remedies package sets out the selection criteria in accordance with which a purchaser will be found, and the Commission is satisfied that such criteria will ensure that such a purchaser will become an active competitor in the market, and (2) all assets and personnel which are necessary in order to guarantee the viability of the business to be divested are included.

In some circumstances, if there is a risk that the divestiture may fall through, parties will be required to propose an alternative divestiture (the "crown jewel") which would maintain competition as effectively as the first option but does not have any uncertainty as to its implementation. An alternative open to the Commission would be to require divestiture to an "up-front buyer" to be completed prior to the proposed merger itself completing.

Non-structural remedies such as giving access to infrastructure or networks or licensing arrangements may be satisfactory where such remedies would be as effective as structural remedies. However, other remedies, such as undertakings as to future conduct, will only be acceptable in exceptional circumstances.

The time limits for satisfying a divestment undertaking should be as brief as possible and not normally in excess of one year. The Commission must approve the purchaser of the divested entity. The parties must also propose the appointment of a monitoring trustee to oversee their compliance with the commitments they have given. If no suitable purchaser is found by the parties a divestiture trustee will be appointed to complete the process, though any sale by a divestiture trustee is likely to be for significantly less money than if the parties retained control of the process.

Potential merger partners will therefore need to adopt a coordinated, thorough and timely approach to proposing remedies to the Commission, if the EU's anti-trust regulator adheres rigidly to the Remedies Notice. Moreover, it appears that parties will have to work increasingly hard to convince the Commission that non-divestiture remedies are sufficient to allay competition concerns.

CFI rejects damages claim by MyTravel (Case T-212/03)

In September 2008 the Court of First Instance (the "CFI") rejected a claim brought by MyTravel (formerly known as Airtours) against the Commission seeking damages for the losses suffered as a result of the flawed Commission decision to prohibit the merger of Airtours and First Choice.

In 1999, the Commission blocked Airtours'proposed takeover of First Choice on the grounds that the merger would create a collective dominant position amongst the three largest travel companies in the UK, who together would hold 80% of the UK short-haul foreign package holiday market. Airtours (which has since merged with Thomas Cook) appealed this decision and in 2002 the CFI comprehensively overturned the Commission's prohibition, severely criticising the Commission's economic reasoning. The Court held that it was clear that the Commission had committed a series of errors of assessment as to factors fundamental to determining whether a collective dominant position might be created.

Airtours brought a damages action in June 2003 seeking an order for the Commission to pay damages (initially estimated at £517 million) as compensation for the lost profits, potential efficiency gains and the costs associated with the prohibited bid. The right to claim damages from EU institutions is set out in Article 288(2) EC. The Commission is liable in relation to its decisions if a number of conditions are satisfied:

- the Commission's conduct must be unlawful - in this case, the CFI had already annulled the Commission's decision to prohibit the Airtours/First Choice merger, so there was no question of the decision being lawful;
- the Commission must have manifestly and gravely disregarded the limits on its discretion;
- the claimant must have suffered actual damage; and
- there must be a causal link between the conduct and the damage pleaded.

In this case, the CFI decided on the second of these factors that the errors in the Commission's analysis of the Airtours/First Choice merger did not amount to a sufficiently serious infringement of a rule of law to result in the Commission incurring liability under the provisions of the Treaty.

In particular, MyTravel had failed to show that the Commission had relied, in part, on an unsubstantiated theory of "unilateral effects" (i.e. anti-competitive effects arising from the enlarged Airtours/First Choice group, as distinct from the effects of increased concentration in the market as a result of the market shares of Airtours/First Choice and the limited number of other competitors).

Also, the Commission's errors of assessment as to the market situation in the absence of the merger and the likelihood of "tacit collusion" between Airtours/First Choice and its competitors were not sufficiently serious to give rise to liability in damages. The CFI heavily criticised the Commission's reasoning on these issues in its decision to annul the prohibition decision. In this damages case, the CFI indicated that effectively all the Commission needed to do was to produce a coherently argued case with evidence to back it up; the fact that the CFI considers the Commission's argument to be fundamentally flawed and/or not backed up by its evidence is not sufficient to found a damages claim.

This conclusion underlines the very high standard of proof which must be met if a claimant is to bring a successful damages action in these circumstances and raises the question of whether a defective merger analysis could ever constitute a breach which is sufficiently serious to give rise to such a claim. Although this was not ruled out by the CFI, it held that the complexity of merger control situations (especially in a collective dominance case such as this one), the margin of discretion available to the Commission, and the time constraints as a result of the fixed timetable in merger cases must all be taken into account in the Court's analysis.

There was more comfort for the Commission in a separate case on which judgment was handed down on the same day. MyTravel had sought access to various documents in connection with the Commission's internal review of the CFI's original annulment of the prohibition decision. However, the CFI ruled that the Commission was entitled to refuse to disclose almost all of the documents requested in the interest of ensuring that Commission officials can frankly express views internally - the risk was that disclosure could undermine effective decision-making. This disclosure decision has broader application than appeals in merger cases.

US UPDATES

I. FTC MERGER ENFORCEMENT

Contest Merger Challenges

FTC Seeks to Undo Consummated Non-HSR Reportable Drug Acquisition and Also Seeks Disgorgement of Profits

On December 16, 2008, the FTC filed a complaint in the U.S. District Court for the District of Minnesota against Ovation Pharmaceuticals, Inc. ("Ovation"), alleging that its 2006 acquisition of the U.S. rights to the drug NeoProfen from Abbott Laboratories substantially lessened competition in violation of Section 7 of the Clayton Act and unlawfully maintained monopoly in violation of Section 5 of the FTC Act. The FTC alleged that as a result of the acquisition Ovation now controls both NeoProfen and Indocin I.V., the only drugs to treat a serious and potentially deadly congenital heart defect affecting more than 30,000 babies born prematurely each year in the United States. The FTC is seeking equitable relief, including both divestiture of the acquired assets and disgorgement of ill-gotten profits.

Ovation first purchased the rights to Indocin from Merck in August 2005. At that time, NeoProfen was awaiting regulatory approval from the U.S. FDA. The FTC alleged that to prevent independent NeoProfen from posing a competitive threat to Indocin, Ovation acquired the U.S. rights to NeoProfen from Abbott in January 2006. This acquisition was not an HSR-reportable transaction because it fell before the premerger notification threshold. The FTC further alleged that after it acquired Indocin, Ovation raised the price of Indocin almost 1,300 percent, from $36 to $500 a vial. Then, when it began selling NeoProfen in July 2006, Ovation also set the price of NeoProfen at a similarly high inflated level.

This case serves as an important reminder that the substantive antitrust merger law, *i.e.*, Section 7 of the Clayton Act, is separate and independent of the premerger notification requirements of the Hart-Scott-Rodino Act, which is Section 7A of the Clayton Act. Therefore, regardless of whether a particular merger transaction is an HSR-reportable transaction, the FTC (and DOJ) retains and does exercise in appropriate cases its separate substantive merger enforcement jurisdiction under Section 7 of the Clayton Act. This also highlights that the acquiring party's post-consummation conduct, *e.g.*, a significant and successful price increase as alleged in the Ovation Pharmaceuticals case, will not only attract the FTC's attention but also will serve as direct evidence that the acquisition substantially lessened competition. Also note that, while still rare, the FTC has in the past and will continue to seek disgorgement of unlawfully obtained profits.

FTC v. Whole Foods – The War on "Premium, Natural and Organic Supermarkets" Goes On

As reported previously, in July 2007 the FTC first unsuccessfully sought to block Whole Foods' acquisition of Wild Oats. In August 2007, promptly after both the district court and the appeals court denied the FTC's request to stay the district court's dismissal of a preliminary injunction motion pending appeal, the merging parties consummated the transaction. On July 29, 2008, more than a year after the district court's initial decision, the United States Court of Appeals for the District of Columbia, by a 2-to-1 vote, reversed the district court decision and remanded the matter to the district court. At the same time, the FTC is also forging ahead with the administrative proceedings on the merits.

The Court of Appeals held that the District Court below misapplied the preliminary injunction standard. After noting that the standard is a sliding scale to balance the FTC's likelihood of success on the merits against the equities in favor of allowing the merger, the Court of Appeals held that the FTC made a sufficient showing of its likelihood of success. The Court also observed that at this early stage the FTC was not required to settle on a product or geographic market definition or to show detailed evidence of antitcompetitive effect. In particular, the Court noted that the district court erred in its product market analysis by focusing only on "marginal" customers and ignoring the FTC's evidence of a "premium, natural and organic supermarkets" market that catered to a group of "core" customers who would not switch to conventional supermarkets in the face of a hypothetical small but significant non-transitory price increase in the hypothetical "premium, natural and organic supermarkets" market. Interestingly, in his dissent, Judge Kavanaugh admonished the majority's opinion for focusing on the difference between marginal and core customers—a distinction that was "never once referred to, much less relied on" by the FTC in its briefing or at oral argument. Furthermore, Judge Kavanaugh also observed that the key question is whether that core group is large enough to make a small but significant price increase profitable on the whole for the merged entity.

On November 21, 2008, the Court of Appeals denied Whole Foods' motion for rehearing en banc. Then, in a rather unusual move, on December 8, 2008, Whole Foods filed a complaint in the district court, accusing the FTC of bias and due process violations and requesting the district court to block the FTC's administrative proceedings on the merits while the dispute is still pending in the federal courts. The FTC moved to dismiss the complaint. Furthermore, as its own offensive move, the FTC petitioned the court to order Whole Foods to change the name of the former Wild Oats stores that had been rebranded as Whole Foods stores back to Wild Oats.

Merger Consent Agreements and Abandoned Deals

During the second half of 2008, the FTC secured the following merger consent agreements or abandonment of proposed transactions:

(1) Pernod Ricard's $9 billion acquisition of V&S Vin & Sprit (July 17, 2008; acquisition would combine the two most popular brands of "super-premium" vodka sold nationwide, Absolute and Stolichnaya; Pernod agreed to end its distribution agreement with the owners of Stolichnaya; Pernod also agreed to establish firewalls in its participation in the existing joint venture between V&S and Fortune Brands regarding the markets for cognac, domestic cordials, coffee liqueur and popular gin);

(2) McCormick's $605 million acquisition of the Lawry's and Adolph's brands of seasoned salt products from Unilever N.V. (July 30, 2008; McCormick agreed to divest its Season-All seasoned salt business to Morton International);

(3) Sun Pharmaceutical's acquisition of Taro Pharmaceutical (August 13, 2008; Sun agreed to divest all rights and assets to three distinct generic formulations (immediate-release tablets; chewable tablets; and extended-release tablets) of the anticonvulsant drug carbamazepine for the treatment of seizures to Torrent Pharmaceutical); and

Fresenius Medical Care Ag & Co.'s acquisition of an exclusive sublicense from Luitpold Pharmaceuticals, Inc., a wholly-owned subsidiary of Daiichi Sankyo Company, Ltd. (September 15, 2008; under the sublicense, Fresenius, the largest provider of end-stage renal disease dialysis services in the United States, would manufacture and supply the intravenous iron drug Venofer to dialysis clinics in the United States; to address the concern that this vertical agreement will give Fresenius the ability to increase Medicare reimbursement payments for Venofer, the consent agreement prevents Fresenius from reporting intra-company transfer prices higher than certain price levels derived from current market prices).

II. DOJ MERGER ENFORCEMENT

The DOJ Files Lawsuit to Stop Pending Merger (*JBS S.A./National Beef Packing Company LLC*)

On October 20, 2008, the Department of Justice ("DOJ") and Attorneys General of 17 states[1] filed a lawsuit in the U.S. District Court for the Northern District of Illinois to block the proposed acquisition by JBS S.A. of National Beef Packing Company LLC. Out of the four top U.S. beef packers, JBS and National Beef are the third and fourth largest, respectively. The Complaint alleges that post acquisition, JBS' market share would increase from 20% to approximately 35%, and that over 80% of the nation's beef packing capacity would be controlled by a "three-firm oligopoly." In particular, the government alleged that the proposed transaction would "diminish the vigor with which JBS and the two other significant packers each will compete to purchase fed cattle and produce and sell USDA-graded boxed beef, making interdependent or coordinated conduct among [them] more likely." The government went on to allege that such coordinated conduct would lead to lower prices for cattle producers and ranchers and higher prices for consumers.

The DOJ's focus on coordinated effects is noteworthy. In a recent merger enforcement speech given by former Assistant Attorney General Thomas Barnett, he noted that of the 58 merger complaints filed by the DOJ between 2001 and June 2008, just 10% included only a coordinated effects claim.

[1] Arizona, Colorado, Connecticut, Iowa, Kansas, Minnesota, Mississippi, Missouri, Montana, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas and Wyoming.

The DOJ Fines Investment Companies for Failure to Make HSR Filings

On December 15, 2008, two investment funds agreed to pay $525,000 and $275,000, respectively, to settle charges that they failed to make filings under the Hart-Scott-Rodino ("HSR") Act for the purchase of voting securities of AutoZone, Inc. in 2004.

Both of the funds (ESL Partners L.P. and ZAM Holdings L.P.) already held voting securities of AutoZone before making subsequent acquisitions in 2004. ZAM, through a controlled entity, had purchased $270 million of AutoZone voting securities before September 1, 2004. Because of certain HSR rules in effect at the time, ZAM was not required to make HSR filings for the previous acquisitions. On October 12 and 14, 2004, ZAM, again through a controlled entity, purchased additional AutoZone voting securities. The combination of the AutoZone voting securities purchased before September 1, 2004, and those ZAM later agreed to purchase made an HSR filing necessary.

Similarly, ESL held approximately $775 million of AutoZone voting securities prior to acquiring additional shares of AutoZone. However, unlike ZAM, ESL had made an HSR filing for the acquisition of its AutoZone voting securities. Under HSR rules, that filing permitted additional acquisitions of AutoZone securities to be made without another HSR filing for the next five years. That five-year period ended on September 1, 2004. ESL subsequently made additional purchases of AutoZone voting stock on September 28 and 30 and October 12 and 14, 2004, without making an HSR filing.

In early 2005, upon an inquiry from the Federal Trade Commission, ESL and ZAM made belated post-consummation HSR filings for the additional acquisitions they made in 2004. Thus, ESL and ZAM were in violation of the HSR Act from the time they consummated the additional purchases of AutoZone stock until the waiting periods expired as to their 2005 filings - approximately five months. Under the terms of the proposed settlement, which is subject to the district court's approval, the civil penalties imposed on ESL and ZAM were $525,000 and $275,000, respectively.

4 STATE AIDS

EU UPDATES

Commission consults on draft guidance for state aid enforcement by national courts

On September 22, 2008 the Commission launched a public consultation on a set of guidelines to assist Member States' courts in applying the EU state aid rules. The guidelines are aimed at supporting national courts and potential claimants in relation to domestic state aid challenges. Interested parties were invited to comment on the draft by October 23, 2008.

The draft new notice, which replaces the 1995 Cooperation Notice, provides more detailed guidance to national courts and potential claimants based on the EU Courts' jurisprudence on the role of national courts in the state aid field.

The notice recalls that remedies available before national courts include: (i) preventing the payment of unlawful aid; (ii) recovery of unlawful aid (regardless of compatibility); (iii) recovery of illegality interest; (iv) damages for competitors and other third parties from the State aid granting authority and, in some cases, directly from the beneficiary, and (v) interim measures against unlawful aid. National courts can also face State aid issues in cases where the Commission has already ordered recovery. Although most cases will be actions for the annulment of a national recovery order, third parties can also claim damages from national authorities for failure to implement a Commission recovery decision.

The draft notice aims also at giving national courts more practical and user friendly support in their daily work through support mechanisms based on existing practice in the antitrust area. National judges would thus be able to ask the Commission for information (Section 3.1 of the notice) and/or for its opinion on the application of the state aid rules (Section 3.2 of the notice).

Finally, the draft notice draws on the conclusions of a detailed study on the enforcement of state aid law at national level of 2006 (the "Enforcement Study"), finding that, although the overall number of state aid cases before national courts had increased, actions aimed at challenging the granting of illegal aid (the so-called "genuine" State aid private enforcement) were still relatively rare. According to the Enforcement Study, actions by competitors against a Member State authority for damages, recovery and/or injunctive measures based on Article 88(3) EC accounted for only 19% of the judgments analysed, whilst actions by competitors directly against beneficiaries accounted for only 6% of the judgments.

Commission adopts guidance on bank recapitalisation in financial crisis

On December 8, 2008, the Commission published a Communication providing a detailed guidance on how Member States can recapitalise banks in the current financial crisis. The guidance takes account of the fact that the financial crisis started to affect the real economy and that banks may need state capital to ensure an adequate level loans to citizens and companies, whilst avoiding excessive distortions of competition.

This Communication complements and refines a broader guidance document adopted on October 13, 2008 and further addresses the necessity of appropriate safeguards to ensure that the public capital is used to sustain lending to the real economy and not to finance aggressive commercial conduct to the detriment of competitors who manage without state aid.

The Communication is based on the fundamental principle that state support for banks must not result in recipient banks enjoying an artificially advantageous competitive position compared to banks not receiving aid. The document distinguishes between, on the one hand, banks that are fundamentally sound and receive temporary support to enhance the stability of financial markets, and, on the other hand, distressed banks whose business model has brought about a risk of insolvency. State support for distressed banks implies a greater risk of competition distortions, therefore safeguards must be stricter and a thorough restructuring is necessary.

In particular, the Communication established principles for the pricing of state capital injections into fundamentally sound banks based on base rates set by central banks to which a risk premium is added that has to reflect the risk profile of each beneficiary, the type of capital used and the level of safeguards accompanying the recapitalisation. Riskier banks will have to pay a higher rate of remuneration. Moreover, the pricing mechanism needs to carry a sufficient incentive to keep the duration of state involvement to a minimum, for example through a remuneration rate that increases over time.

In addition, the use of state capital for banks in distress can be accepted only on the condition of an implementation of severe restructuring measures.

Commission consults on draft Best Practices Code on state aid proceedings

On December 11, 2008, the Commission launched a public consultation on a draft Best Practice Code (the "Code") on the conduct of state aid control proceedings. The Code will provide, after consultation with Member States in January 2009, guidance on the day-to-day conduct of state aid proceedings. It aims to improve the effectiveness, transparency and predictability of the procedures at each step of the investigation, thereby fostering co-operation between the Commission and Member States. This is in line with the objective announced in the State Aid Action Plan (2005) which called for more effective, simple and predictable procedures in the field of State aid. Interested parties are invited to submit their comments on the draft by January 28, 2009.

The Code proposes increased pre-notification contacts, mutually agreed planning for the most difficult cases and a stricter enforcement of existing procedural rules. In particular:

- a summary of notifications would be published on the Commission's website: third parties' comments would be considered if their submission reaches the Commission within 10 working days;
- the Commission would try to group its requests for information;
- in particularly complex cases, the Commission might send a copy of its decision to open the formal investigation procedure to identified third parties and invite them to comment on specific aspects of the case;
- the Commission would endeavour to adopt the final decision no later than 4 months after the submission of the last information by the Member State concerned;

there would be a predictable procedure with defined steps and timetables for dealing with complaints, including indicative deadlines and better information of complainants on the treatment of their complaints.

Commission adopts temporary framework for Member States to tackle effects of credit squeeze on real economy

On December 17, 2008 the Commission adopted a temporary framework providing Member States with additional possibilities to tackle the effects of the credit squeeze on the real economy. The Framework forms part of the measures announced by the Commission in its European Economic Recovery Plan and was approved in record time following consultation with Member States.

The new framework introduces a number of temporary measures to allow Member States to address the exceptional difficulties of companies to obtain finance. In particular, Member States will be able to grant without notification of individual cases subsidised loans, loan guarantees at a reduced premium, risk capital for SMEs and direct aids of up to €500,000. All measures are limited until the end of 2010 and subject to conditions. Based on Member States' reports, the Commission will evaluate whether the measures should be maintained beyond 2010, depending on whether the crisis continues.

Member States may grant, under certain conditions and until the end of 2010 e.g.:

1. a lump sum of aid up to €500,000 per company for the next two years, to relieve them from current difficulties;
2. state guarantees for loans at a reduced premium;
3. subsidised loans, in particular for the production of green products (meeting environmental protection standards early or going beyond such standards);
4. risk capital aid up to €2.5 million per SME per year (instead of the current €1.5 million) in cases where at least 30% (instead of the current 50%) of the investment cost comes from private investors.

The Commission expects the financial markets, and hence the provision of lending to businesses, to get back to normal in the foreseeable future. Therefore, the new measures addressing the exceptional circumstances in the financial markets are limited in time and expire at the end of 2010.

Member States will have to notify schemes to the Commission that fully comply with the above-mentioned types of aid. Once schemes are approved, aid given to individual companies will not have to be notified.

Geographical selectivity of a State aid: the ECJ specifies the criteria to be used in order to determine whether a regional body is autonomous in relation to central government (Cases from C-428 to C-434/06)

This decision, issued on September 11, 2008, originated from a preliminary reference submitted to the ECJ by the *Tribunal Superior de Justicia* of the Autonomous Community of the Basque Country (the "ACB"). The Basque court asked the ECJ whether certain tax measures ("foral taxes") are considered to be selective measures conferring advantage on certain undertakings or productions and, accordingly, to be State aid incompatible with the common market *on the sole ground* that they do not apply to the whole territory of Spain. Namely, in 2005 each of the three "Historical Territories" Álava, Vizcaya and Guipúzcoa, constituting regional administrative bodies, with limited competence ("foral authorities"), of the ACB, adopted a tax measure setting the rate of corporation tax at 32.5% and provided for a series of fiscal deductions in connection with such tax. Common legislation to the Spanish State in this respect sets the basic rate of corporation tax at 35% and does not provide for such deductions.

Since in the Basque Country there are two different "institutional" levels, the one common to the whole territory and that of foral bodies, the ECJ indicated that it is both to the Historical Territories and to the ACB that reference must be made for the purpose of assessing whether such infra-State bodies enjoy sufficient autonomy to constitute the reference framework for assessing the selectivity of the tax measures mentioned above. On such grounds, the ECJ pointed out, in line with the *Azores* decision (*Portugal* v *Commission*, C-88/03), that the conditions which must be satisfied in order for the territory falling within the competence of an infra-State body to be the relevant framework are the ones regarding i) institutional autonomy, ii) procedural autonomy and iii) economic and financial autonomy.

The ECJ found that as per the first criterion, such entities have a political and administrative status distinct from that one of central government.

With regard to procedural autonomy, the European judges pointed out that this criterion is fulfilled provided that the decision taken by the infra-State body is adopted without the central government being able directly to intervene as regards its content.

Lastly, the economic and financial autonomy criterion requires that the financial consequences of a reduction of the national tax rate for undertakings in the region is not to be offset by aid or subsidies from other region or central government. In this respect, the ECJ underlined that the ACB pays a quota to the State in respect of the area of competence not assumed by the regional body. The ECJ essential element for the calculation of such quota is the so-called "attribution rate", which, according to the judges, is set following to essentially political negotiations. It follows that a decision to reduce the corporate tax rate in object does not necessarily have an impact on the level of the attribution rate.

The Commission called into question that the current attribution rate is undervalued and that, consequently, the Historical Territories contribute less than they should to State burdens. However, in this respect, the ECJ pointed out that an undervaluation of that rate may be merely an indicator of lacking of economic autonomy. In order for that lack of autonomy to be confirmed, there must be compensation, in other words, a causal relationship between a tax measure adopted by the foral authorities and the amounts assumed by the Spanish State.

In any event, the ECJ did not exclude an "hidden compensation", namely that the tax reduction may result in larger financial transfers in favour of the infra-State body, deriving from other sectors, such as, for example, social security. It is for the national courts to make such assessments.

More on regional selectivity: the ECJ annuls the Commission decision on the reform of corporate tax in Gibraltar (Joined Cases T-211/04 and T-215/04)

In August 2002, the UK notified the Commission the reform of corporate tax proposed by the Government of Gibraltar. The Commission held that such reform constituted a scheme of State aid incompatible with the common market. In particular, the measure was considered to be regionally selective, since it provided for a system under which companies would be taxed, in general, at a lower rate than those in the UK. The government of Gibraltar and the UK challenged the decision before the CFI, which annulled it in its entirety.

As far as *regional selectivity* is concerned, the CFI examined whether, in accordance with the conditions laid down in the *Azores* judgment, it is the territory of the United Kingdom or the territory of Gibraltar that constitutes the appropriate reference framework for assessing whether the tax reform is regionally selective.

The different evaluations carried out, respectively, by the Commission and the CFI relate in particular to the second and third criterion set forth in the *Azores* decision (i.e. procedural and economic/financial autonomy).

The procedural autonomy of Gibraltar derives from the fact that the UK's residual power to legislate for Gibraltar and the various powers granted to such government must be interpreted as means enabling the UK to assume its responsibilities towards the population of Gibraltar and to perform its obligations under international law, *and not as granting an ability to intervene directly* as regards the content of a tax measure adopted by Gibraltar authorities, in particular since those residual powers have never been exercise in matters of taxation.

With regard to the third condition, requiring the financial consequences of the tax measures not to be offset by aid or subsidies from other region or from the UK central government, the CFI deemed that none of the financing referred to by the Commission serves to offset any financial consequences that the tax reform would entail for Gibraltar.

Therefore, the CFI considered the three conditions to be met, and consequently concluded that the reference framework for assessing whether the reform is selective corresponds to the geographical limits of the territory of Gibraltar.

Moreover, the CFI pointed out that the Commission had also failed to assess the *material selectivity* of the measures at issue. The Court held that the analysis on material selectivity must be carried out in three stages. Namely: i) the identification and exam of the common or "normal" tax regime; ii) the demonstration that the measure derogates from the common regime and differentiates between economic operators who are in a comparable factual and legal situation; iii) the assessment that such differentiations are not justified by the nature of the general scheme of the notified tax system.

According to the judges, the Commission had neither identified nor examined the first stage of analysis *sub* i) and therefore failed to carry out its analysis.

The CFI annuls the Commission decision on advantages granted by the Walloon Region and by Charleroi Airport to Ryanair (Case T-196/04)

On December 17, 2008 the CFI annulled the Commission decision regarding alleged state aid incompatible with the common market in favour of Ryanair. The measures were included in two agreements entered into by Ryanair: the first one with the Walloon Region, the owner of Charleroi Airport, the other with Brussel South Charleroi Airport ("BSCA"), a public sector company, controlled by the Walloon Region, which manages the airport as a concession holder.

The Commission examined the two agreements separately and found that they constituted illegal aid. The Commission specified that the Walloon Region had entered into the first agreement with Ryanair in its capacity as a public authority ("regulatory role"), and therefore excluded in its analysis the so-called "private investor test".

The CFI held that the Commission erred in examining the two agreements separately, since the Walloon Region and BSCA ought to have been regarded as one single entity. In addition, the Commission should have not refused to apply the private investor principle to the measures adopted by the Walloon Region on the basis of its alleged regulatory role. The CFI held that the actions of the Walloon Region, namely the fixing of the amount of landing charges and the accompanying indemnity, were *economic activities*.

Consequently, the CFI concluded that the Commission's refusal to examine together the advantages granted by the Walloon Region and by BSCA and to apply the private investor principle to the measures adopted by the Walloon Region was vitiated by an error in law.

5 PROCEDURAL MATTERS

EU UPDATES

A Commission information letter can be considered an act challengeable by the State aid complainant (Case C-521/06)

By a judgment rendered on July 17, 2008, the ECJ held that the letter, in accordance with Article 20(2) of Regulation No 659/1999, by which the Commission informs the State aid complainant that there are insufficient grounds for taking a view on the case constitute an act open to challenge for the purposes of Article 230 EC.

In the case at issue, the appellant Athinaïki Techniki was seeking to have quashed the order of September 26, 2006 (Case T-94/05), by which the CFI dismissed as inadmissible Athinaïki Techniki's action seeking annulment of the Commission decision of June 2, 2004 to take no further action on its complaint concerning alleged State aid granted by the Hellenic Republic to the Hyatt Regency consortium.

According to the ECJ, the contested act cannot be classified as preliminary or preparatory since it cannot be followed, in the context of the administrative procedure which has been initiated, by any other decision amenable to annulment proceedings. Contrary to what the CFI held, it is not relevant, in that regard, that the interested party may still provide the Commission with additional information which might oblige the Commission to review its position on the State measure at issue.

It follows that the Commission did adopt a *definite position* on Athinaïki Techniki's request seeking a finding of infringement of Articles 87 EC and 88 EC.

The fact that the Commission did not notify the Member State concerned, that it did not describe the contested act as a "decision", and that it did not refer to Article 4 of Regulation No 659/1999, has no bearing on the classification of the contested act. As that act prevented Athinaïki Techniki from submitting its comments, in the context of a formal investigation procedure referred to in Article 88(2) EC, it produced legal effects which were capable of affecting that company's interests.

Commission launches public consultation on Regulation 1/2003

On July 24, 2008 the Commission launched a public consultation on the functioning of Council Regulation 1/2003 that sets out the rules for the Commission's enforcement of EC antitrust rules. Interested parties were invited to submit their comments by September 30, 2008. Article 44 of Regulation 1/2003 foresees that the Commission shall report on its functioning five years after its entry into application - by May 1, 2009. Receiving feedback from the business community and from other stakeholders (including courts, industry associations and consumer associations) is a key element of the Report.

The questionnaire, divided into eight parts, focuses in particular on the following issues: 1. Direct applicability of Article 81(3) EC; 2. Relationship between EC competition law and national competition law; 3. Enforcement by the Commission; 4. Enforcement by National Competition Authorities; 5. Cooperation in the European Competition Network; 6. Cooperation between Competition Authorities and judicial authorities; 7. International cooperation; 8. Other questions.

The Commission will analyze the outcome of this consultation as part of the factual basis for the preparation of this report, alongside its own experience of applying Regulation 1/2003.

6 IP & LICENSING

US UPDATES

DOJ Clears Proposed Patent Licensing Arrangement

Through its business review letter procedures, the DOJ announced that it would not challenge a proposal by a consortium of companies to jointly license patents necessary to comply with standards for ultra high frequency radio frequency identification (UHF RFID) technology. UHF RFID technology is used in, among other things, ID cards, baggage tracking for airlines, medical equipment and specimen tracking.

Because compliance with the UHF RFID standard could infringe a number of existing patents, a group of seven entities formed a consortium to facilitate access to necessary patents. Each of the entities holds at least one patent that has been independently determined to be essential for compliance with the UHF RFID standard. Additionally, each entity has granted the consortium a nonexclusive right to license its patent(s).

The DOJ applied the rule of reason and determined that the consortium's patent pool was more likely to be pro-competitive than anti-competitive. In part this decision was based on the fact that the consortium would limit the ability of its members to hold up the sale of products conforming to the UHF RFID standard and that the consortium members agreed to license their portfolio of patents on reasonable and nondiscriminatory (RAND) terms. Additionally, the consortium has the potential to lower transaction costs to the extent that licensees can do "one-stop shopping" for patents rather than negotiating separate agreements with each of the patent holders.

The DOJ also focused on a number of safeguards in place to minimize the risk of harm to competition, including a self-policing mechanism. Because the patent royalties are allocated, in part, on the number of patents in the pool, the consortium members have a monetary incentive for weeding out those members who hold invalid patents or whose patents are no longer "essential" due to the existence of viable alternatives.

7 TELECOMMUNICATIONS

US UPDATES

DOJ Issues a Report on Competitive Development in Telecommunications Services

The DOJ issued a report from its symposium on competitive developments in the telecommunications industry which was held in November 2007 that focused specifically on video, telephony, and broadband. One of the stated goals of the symposium was to determine whether the past conclusions of the DOJ as to product market (*e.g.*, wireless v. wireline) and geographic markets needed to be fine-tuned based on the advent of new telecommunications technologies and services. The report's conclusions include the following:

- **Multichannel Video Programming Distribution ("MVPD")**: Satellite-based services continue to provide the best competition to incumbent cable television companies. Wireline MVPD providers such as telephone companies and broadband service providers offer competition as well, but this alternative is available to only a small minority of consumers.
- **Voice Telephone**: Primary competition for residential consumers is between the ILECs and cable companies. Additionally, the available evidence did not show that mobile wireless services acted as a price constraint on landline telephony.
- **Broadband**: Primary competition for residential customers is between the cable and telephone companies. Additionally, alternative providers who offer broadband services over hybrid fiber/coaxial cable or fiber-based terrestrial networks are beginning to develop in limited geographic areas. While satellite broadband service providers remain an alternative in rural areas where residential customers do not have access to terrestrial broadband services, satellite service providers are not effective competitors to landline broadband providers in areas where both services are offered. This is because prices for the satellite services are substantially higher. It is unclear whether companies who are investing in wireless broadband service will have a substantial impact on the marketplace because of restraints on available spectrum, limitations of the technology, and the difficulty of competing against better-positioned incumbents.
- **Bundling**: Some companies offer attractive pricing of telephony, broadband, video and wireless bundled services, and many consumers have taken advantage of these options. While it is not yet clear how bundling of services will impact competition, there is some evidence that bundled services may act as a price restraint on certain telecommunication services.

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