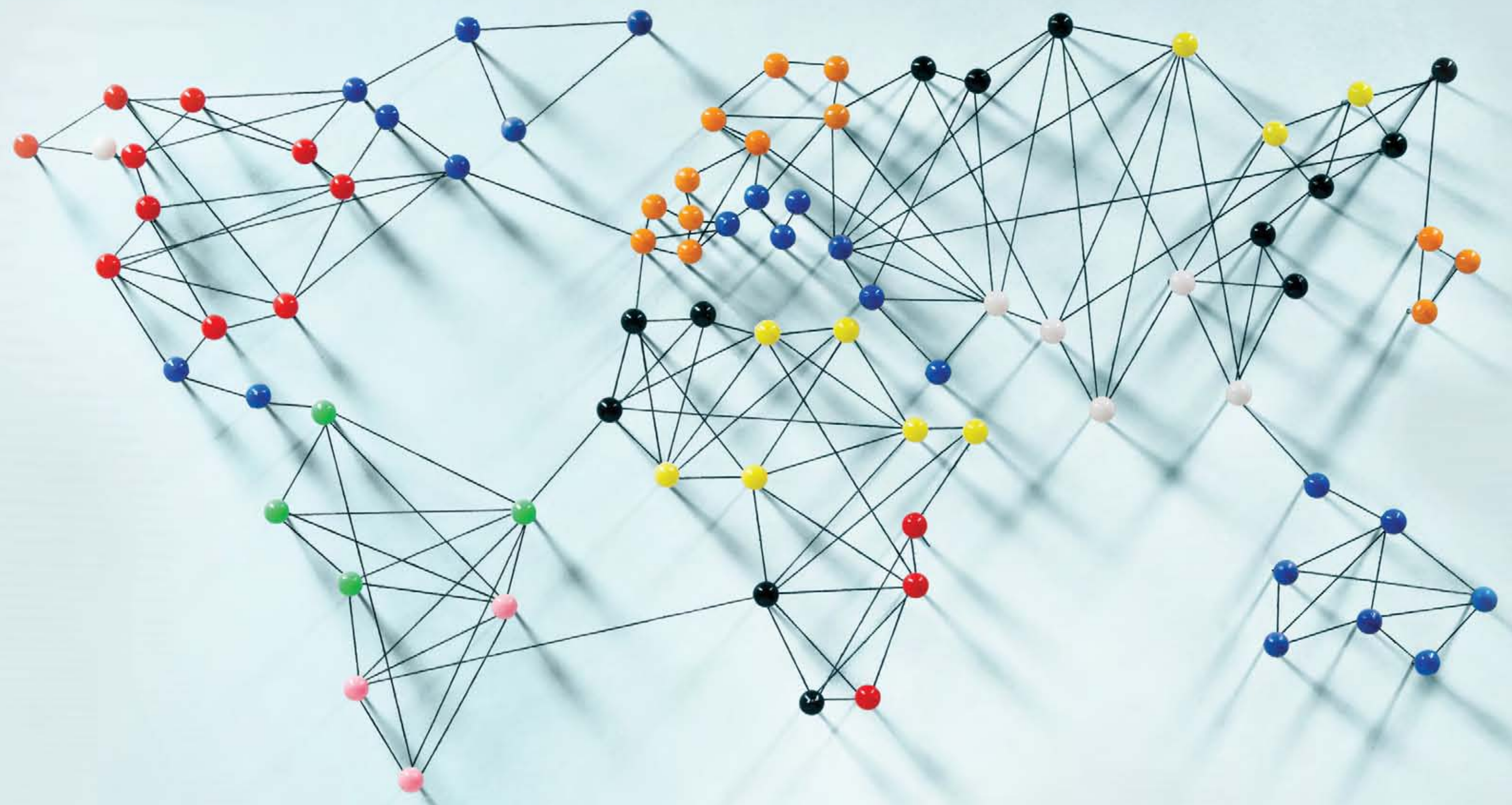

ANTITRUST MATTERS

DLA PIPER'S GLOBAL NEWSLETTER

JULY 2014

DLA PIPER

BACK TO THE FUTURE? BACK TO THE PAST!

By Bertold Bär-Bouyssière

We live again in interesting times. Over the last few weeks, most of us feverishly asked ourselves which soccer team will win the World Cup. During the same period, observers following international business developments around the world were placing their bets on whether or not the French government would allow General Electric to acquire French industrial giant Alstom. Difficult to say which of the two questions was more difficult to answer, but now we know the answer to both. Germany vs. Argentina 1:0; Competition vs. Industrial Policy 0:1.

From a competition law and policy point of view, the proposed link-up between the US and French firms should not raise any conceptually novel issues. Competition law and policy are no longer novel disciplines. The existing tool-box is sufficient to deal with whatever issue there may be to preserve competition. US law now has 125 years of experience in dealing with mergers, the EU roughly 25, if you do not take into account older merger control rules at member state level. Since the Sherman Act was adopted in 1890, and soon followed by the Clayton Act in 1914, much debate has dealt with the question of whether antitrust law and policy should tolerate business combinations and to what extent. Different economic policy schools have emerged over the decades, focussing on the quest for allocative efficiency, or on maintaining a sufficiently competitive market structure. However, under all historically relevant antitrust doctrines that have ever been applied in the US or Europe, the GE-Alstom deal could be properly analysed.

So why not let the regulators do their job? Instead, the French government, rushed to pass a decree that allows the French government to block virtually every acquisition of a French company. Under EU law, which favours the freedom of capital throughout the EU, such “golden shares” are allowed, provided they satisfy the criteria established by the EU Court of Justice: (i) the state’s veto right has to be motivated by overriding requirements of the general interest (which as an exception to the rule have to be interpreted narrowly); (ii) the exercise of the veto right must be proportionate and (iii) procedurally the veto right can only be exercised within a defined window of opportunity following advance notification of the planned investment. Until recently, French law provided for strategic veto rights in the fields of security and defence only. The new decree extends these veto rights to five new sectors: water, health, energy, transport and telecommunications. In fact, the same government member who pushed the new decree only recently threatened an undesired third country investor with a tax audit, should he not abandon its plan to acquire a French telecoms operator.

The French government´s concern over the GE-Alstom deal is, there is no other word for it, protectionist in the most literal sense of the word. And the French government makes no attempt to hide it. After having favoured a link-up with Siemens (that was reportedly rejected because of Siemens’ partnering with Mitsubishi), the French government has also been working on a Plan C, a purely Franco-French solution to the problem: a nationalisation. Now the final outcome appears to be a mix of the GE bid with a large State-owned share giving the French government far-reaching veto rights. The French government even had to persuade current Alstom shareholder Bouygues to cede its shares to it, and secured the voting rights as of now pending the acquisition of the shares over the next two years. It remains to be seen whether the government will succeed in financing this investment by selling other holdings, as it has promised the taxpayers.

It also remains to be seen whether the French legislation to block the planned transaction satisfies the requirements of the Court of Justice´s case law. In the meantime, from a competition law and policy point of view, the French government´s move brings the 19th century back to the front page. For decades, the question as to whether a particular merger control regime leaves room for non-competition and industrial policy considerations has been used by academics, policy makers and organisations such as the OECD, as a benchmark to assess whether emerging markets were ripe for the big game alongside their more developed peers. That it is, out of all governments around this globe, the French government that pulls out the protectionist stick so bluntly, is quite shocking although it does not really come as a surprise. France has always had a strongly developed culture of industrial policy and State interference in business, but normally things were done in a slightly more subtle, more discreet and more elegant way. From a transatlantic viewpoint, this chapter will certainly add to the feud, and become a topic on the TTIP agenda. Supporters of sound merger control policies now ask themselves a third question: is this just a short-term flash in the pan as retaliation for BNP, or a new, longer chapter in the story of tortuous government interference in the freedom of contract in Europe?

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INTERVIEW

AFRICAN MERGER CONTROL

Interview with the COMESA Competition Commission

By Michael Marelus

The Common Market for Eastern and Southern Africa's (COMESA) Competition Commission (CCC) has now been reviewing mergers and acquisitions for almost nineteen months, having commenced operations on 14 January 2013. The CCC is the supranational competition authority of the COMESA free-trade bloc of 19 member states. Growing pains are inevitable, and the newest competition authority of Africa is about to undergo a first round of reform. DLA Piper's Michael Marelus sat down with Mr Willard Mwemba,[1] head of mergers and acquisitions at the CCC, to talk about the CCC and its latest developments.

Michael Marelus: *Let us start with the genesis: the Competition Regulations were published in 2004, and it took nine years for the CCC to enter into operation. What took so long?*

Willard Mwemba: Once the Competition Regulations were adopted in 2004, the institution to administer them needed to be set up. Setting up the CCC required overcoming political and financial hurdles. There were long political discussions between the member states concerning which member state will host the CCC. The second issue was financial: the CCC needs financial support by the member states. This all proved tricky, but ultimately, was successful. The CCC is established in Malawi, and we have been operational for approximately eighteen months. Work is busy, and over the past few months there has been an exponential boom in the number of notifications we are receiving. Between January and December last year we received twelve notifications; between January 2014 and today, we received over eighteen notifications, making it a total of more than thirty notifications submitted to the CCC.

MM: *I understand the CCC is reviewing its current rules and guidelines. You are seeking to improve its merger control regime. You have also recently engaged external advisors to assist you with this. Please tell us more about this review and what to expect.*

WM: We have engaged external advisors to review the current rules and guidelines, and to propose improvements to our merger control regime. We want to bring the CCC merger control regime in line with international best practice. The external advisors' recommendations have now been completed, and we expect to introduce several changes to the Guidelines this summer. The revised Guidelines will remain within the scope of the current Regulations and Rules. The changes to the Regulations and Rules are still being worked on and will enter into force at a later date. The new Rules and Regulations will require amendments, and these can only be approved by the COMESA Council of Ministers.

MM: *The notification thresholds are currently set to zero. Any merger or acquisition where at least one party operates in two or more COMESA member states must be notified to the CCC. This threshold has a very wide reach and catches transactions between parties with minimal activities in the COMESA region.*

WM: The current thresholds for notification are indeed set at zero. We are well aware that this is not ideal, and we intend to amend the Rules on the Determination of Merger Notification Threshold. This is included in our current review, and we intend to propose more suitable thresholds. However, the thresholds are set out in the

[1] Mr Willard Mwemba began his career in competition law at the Competition and Consumer Protection Commission in Zambia. He worked at the Competition Authority in Zambia for close to seven years before he joined the CCC. While at the Competition Authority in Zambia, Mr Mwemba rose to the position of director of the Mergers and Monopolies Department. During his employment at the Competition Authority in Zambia, Mr Mwemba handled some high-profile cases and initiated investigations into prominent cartels. Mr Mwemba joined the CCC in January 2013 and became its first head of the Mergers and Acquisitions Department.

Rules. As explained, the Rules can be amended only by the COMESA Council of Ministers. The Council of Ministers generally meets once a year, and opposition to a proposal by one member state is generally sufficient to postpone a decision on the matter. We will shortly propose to the Council of Ministers an amendment to the Rules, and I very much hope the Council of Ministers will approve it by consensus at one of their next meetings. I can however not put any timing on the adoption of new notification thresholds as it is beyond the mandate of the CCC.

MM: *Until the Rules on the Determination of Merger Notification Threshold are amended by the Council of Ministers, I understand the CCC has found a way to limit the number of transactions falling within the scope of the notification requirement by implementing an "appreciable effects" test and by offering so-called "comfort letters".*

WM: Indeed. Article 3.2 of the Competition Regulations states that the merger control regime applies to transactions having an appreciable effect on trade between COMESA member states and which restrict competition in the COMESA Common Market. We have recently issued comfort letters to notifying parties, confirming that their transaction, while satisfying the current notification thresholds, do not have an appreciable effect on trade.

In determining what amounts to having an appreciable effect, the upcoming revised Guidelines will include a turnover test. Where the turnover test is not met, it is presumed that the transaction will not have an appreciable effect on trade. The CCC is competent to issue Guidelines, and these will come into force with immediate effect this summer.

Similarly, we are reducing the number of notifiable transactions by including guidance on what qualifies as "operating" in two or more COMESA member states. As you pointed out, mergers and acquisitions are currently notifiable where at least one of the parties operates in two or more COMESA member states. We will include in the revised Guidelines a turnover test to determine whether a company is considered as having operations in a member state. This will exclude transactions between parties with limited activities in the COMESA region from needing to be notified. We hope these measures will limit the scope of transactions needing to be notified, at least until the new Rules on the Determination of Merger Notification Threshold are adopted by the Council of Ministers.

MM: *Some have also criticised the high notification fee of up to USD 500.000. What is your view on this?*

WM: Many believe that for each and every notified transaction the filing fee is USD 500.000. That is not the case: the filing fee is a 0,5 percentage of the combined parties' assets or turnover in the COMESA region, capped at USD 500.000. For some transactions, the filing fee will thus be well below USD 500.000. However, when companies and their lawyers complain that the fees are high, we should not be defensive simply because we are a regulator. I think it is important to get feedback from the market, and if the market says the fees are high, we should be looking into it. We are looking into it, and the current fee will most likely be reduced in the near future. I believe we need to come up with a mechanism whereby the filing fee is proportionate to the amount of work the CCC must undertake in reviewing the transaction.

MM: *A lot of transactions that fall within the scope of the Competition Regulations are not notified, particularly with the low thresholds currently in force. What are your enforcement priorities?*

WM: Our focus has so far been on two more important aspects. First of all, we want to make sure we clear notified transactions within the shortest period of time possible. We want to assist the notifying companies as much as possible, and we want to provide clearance – where possible – as swiftly as possible. Secondly, we want to make sure we identify the lacunae in the current legislation and that we develop into a first-class merger control regime. These are our two priorities at the moment.

As you know, I worked for the Zambian competition authority for quite some time. It took the Zambian competition authority a long time before it started using its enforcement powers to fine companies. This was, in fact, also the practice of the other competition authorities in Africa. The Zambian competition authority commenced its operations in 1997, and the first time it imposed a fine was in 2010. At the start of its operations, it was focused on ensuring the law was robust, its decisions were proper, and that it did not frustrate businesses by unnecessarily delaying transactions.

Having said that, should we become aware of someone blatantly disregarding the Competition Regulations, we will act accordingly. We will not hesitate to use our enforcement powers. Fining one erring firm may be needed to ensure the Competition Regulations are respected.

MM: The notification form currently seems to require much information, including on markets on which the parties have no overlap. This might place a significant burden on notifying parties, yet be of limited help to the CCC.

WM: I agree, and we will look at this issue. Once the current review is over, we will most likely look at reforming the notification forms. We want to make the procedure as easy and efficient for companies as possible.

MM: The substantive test of the review is whether the concentration would substantially prevent or lessen competition, in particular through the creation or strengthening of a dominant position. The current Guidelines state that there is a rebuttable presumption that concentrations are anti-competitive. What is the purpose of including this presumption, and is it at all correct?

WM: That reference in the Guidelines will be removed. As a matter of fact, the contrary is true: most mergers and acquisitions are not anti-competitive. This presumption will thus be removed from the Guidelines as part of the upcoming changes this summer.

MM: As part of the CCC's substantive review of a notified concentration, the CCC may take into account public interest factors. These public interest factors are currently listed in a Draft Public Interest Guideline. The list contains only market interests, and thus not interests such as employment issues, nationalist motivations and the like. Could you confirm this?

WM: Definitely. The CCC has no intention to take into account any non-market public interest factors. An interpretation of the rules to imply that the CCC has the right to take into account non-market public interest factors, I think, may be *ultra vires* of the current rules. The substantive test the CCC conducts is whether the proposed concentration substantially prevents or lessens competition, in particular through the creation or strengthening of a dominant position. This by definition already itself includes taking into account the public interest factors listed in the Draft Guideline. Nothing more.

MM: I understand that, in the past, a member state has required concentrations notified to the CCC to be notified also to its national competition authority. Is the CCC a one-stop-shop?

WM: Some issues have arisen in the past, but we are in the process of smoothing the procedural rules between review by the CCC and review by the national competition authorities of COMESA member states. I am glad to state that currently we are working smoothly with almost all COMESA member states. The Competition Regulations make clear that the review of mergers and acquisitions by the CCC is a one-stop-shop, and this has been confirmed by the COMESA Court of Justice. What is important at this stage is that the CCC enjoys the support and the confidence of all COMESA member states.

MM: Mr Mwemba, I thank you for having taken the time to sit with us and talk to us about the recent experiences of the CCC and the upcoming developments in its merger control regime.

WM: It has been my pleasure. We have some issues that need ironing out, such as the notification thresholds, and the like. However, we are in a pretty good place at the moment. We have the luxury of having existing merger control regimes to learn from, and we are developing quickly. I see the recent surge in the number of notifications since January as a sign that people are accepting and recognising the CCC's jurisdiction, and that the CCC is gaining wide acceptance by the corporate world, the legal fraternity and consumers.

COMESA MERGER CONTROL IN A NUTSHELL

COMESA member states: Burundi, Comoros, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

Concentrations: The direct or indirect acquisition or establishing of a controlled interest. Includes full function joint ventures.

Notification thresholds: One or more of the parties have operations in two or more COMESA member states. Revisions to the Guidelines are expected this summer, and include a turnover test for determining whether a party has "operations" in a member state. The size of the parties currently does not matter as the turnover thresholds are set at zero, although a proposal to change these will be submitted to the COMESA Council of Ministers shortly.

Local nexus: Currently not required, as long as the notification thresholds are met. The revised Guidelines expected this summer will set out a turnover test for determining whether a concentration has an appreciable effect on trade in the COMESA region. Obtaining comfort letters from the CC is in the meantime possible.

Notification fee: 0.5% of the merging parties' combined annual turnover or assets in the COMESA region (whichever is higher) and is capped at US$500,000.

Notification period: No later than 30 days from the parties' decision to merge. The revised Guidelines may clarify that these are calendar days.

Review period: Phase I is 60 days, Phase II extends the review to 120 days. The revised Guidelines may clarify that these are calendar days.

Substantive test: The merger would substantially prevent or lessen competition, in particular through the creation or strengthening of a dominant position.

Failure to notify: Transaction is unenforceable in the COMESA region, and fines may be imposed of up to 10% of parties' combined turnover in the COMESA region.

One-stop shop: Notification to the CCC is a one-stop-shop and in theory requires no further notification to the competition authorities of individual member states. However, notably Kenya, seems to currently insist on the transaction being notified also to its national competition authority.

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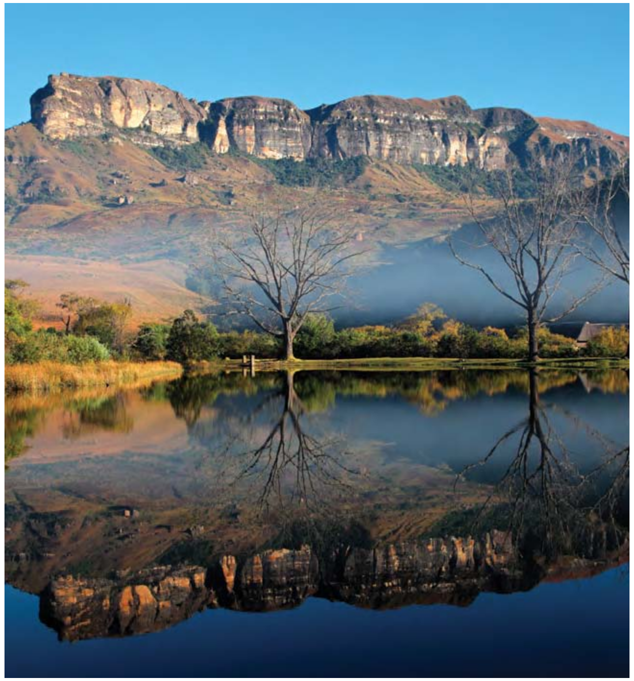

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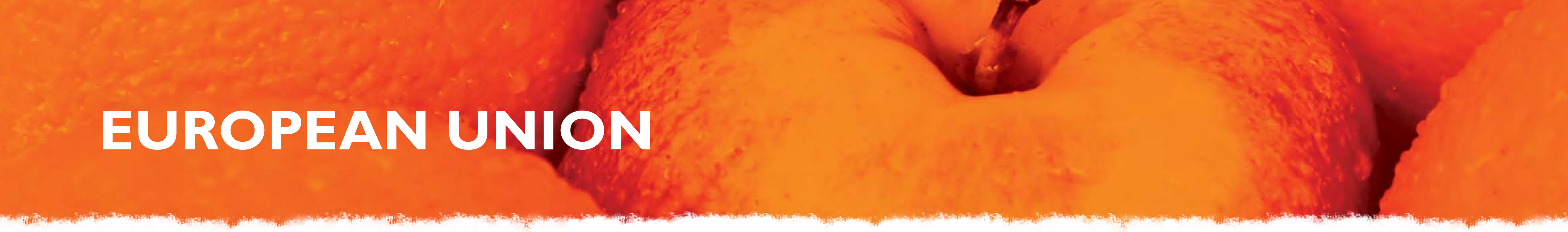

EUROPEAN UNION

Comparing apples and oranges: the concept of state aid and the case of La Poste's unlimited guarantee

By Carole Maczkovics

There is no doubt that undertakings entrusted with the provision of services of general economic interest (SGIEs) are subject to the rules in the Treaty on the Functioning of the European Union (TFEU), including its state aid rules.

However, compensation for providing such public services also benefits from a particular regime in the TFEU. Pursuant to Article 106(2) TFEU, in so far as the application of the treaty rules obstructs the performance, in law or in fact, of particular tasks assigned to such undertakings, derogation may be justified.

This rule has been partially absorbed in the assessment of a measure under Article 107(1) TFEU that determines whether or not a measure constitutes state aid. Indeed, pursuant to the seminal *Altmark* case,[2] compensation for SGIEs is not state aid if a number of conditions are met to show absence of overcompensation. Thus, any advantage may be excluded. In the event that the conditions laid down in *Altmark* are not fulfilled, the European Commission has adopted, on the basis of Article 106(2) TFEU, a package of instruments determining whether the measure is *de minimis* or the aid is nevertheless compatible with the internal market.[3]

In April 2014, the Court of Justice of the European Union (ECJ) rendered its judgment[4] opposing the French Republic and the European Commission. The case was an appeal of a General Court's judgment[5] dismissing France's action against the Commission's decision[6] declaring the unlimited guarantee to La Poste incompatible with the internal market.

Before it became a public limited company in 2010, La Poste was a legal entity governed by public law, an establishment of an industrial and commercial character (*établissement public à caractère industriel et commercial* – EPIC) enjoying a specific status under French law. In particular, ordinary insolvency and bankruptcy procedures do not apply to EPICs. With its decision, the European Commission deemed that such specific status implied for La Poste an unlimited guarantee from the state.

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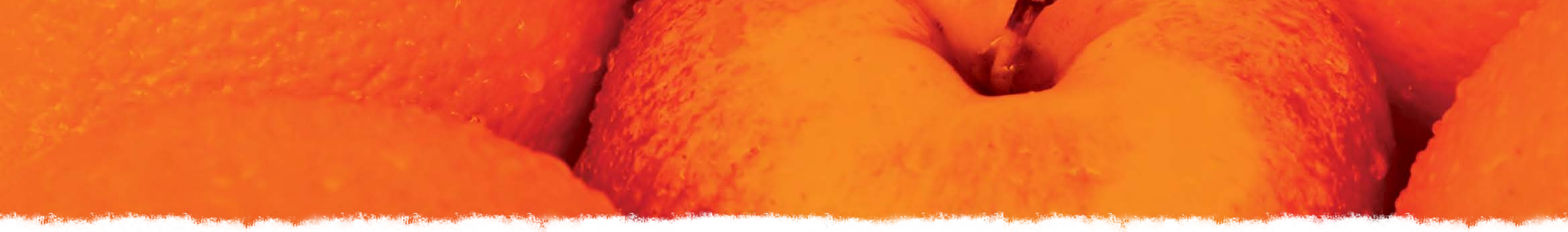
[2] C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, ECR [2003] I-7747.

[3] Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ [2012] C8/4; Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ [2012] L7/3; Communication from the Commission, European Union framework for State aid in the form of public service compensation (2011), OJ [2012] C8/15; Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L [2012] 114/8.

[4] C-559/12 P, not yet reported.

[5] T-154/10 [2012] ECR.

[6] Commission Decision 2010/605/EU of 26 January 2010 on State aid C 56/07 (ex E 15/05) granted by France to La Poste, OJ 2010 L 274/1.



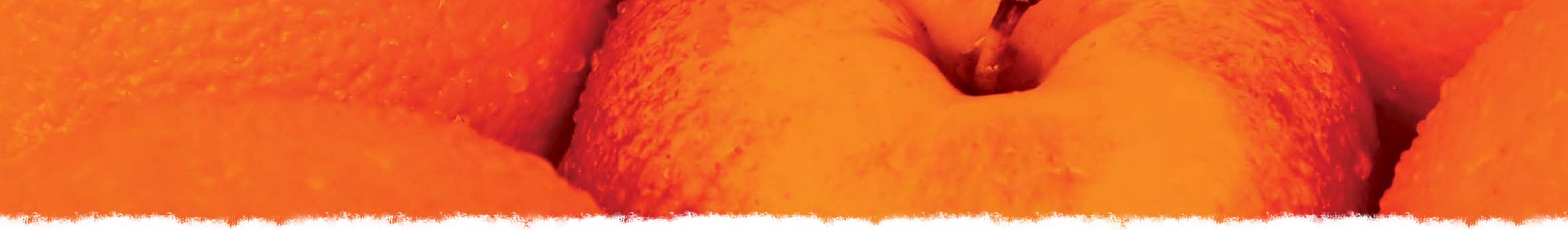
To arrive at that conclusion, the Commission relied on a body of evidence that, in domestic law, a real obligation lies with the state to use its own resources to cover the losses of a defaulting EPIC; this constitutes a sufficiently concrete economic risk of burdens on the state budget. The Commission further observed that La Poste was not subject to the ordinary law on undertakings in difficulty, that creditors could be sure that their claims would be repaid by the state in case La Poste would no longer be able to meet its debts and that, even if they would not be repaid, these creditors would be guaranteed that their unpaid claims would not be cancelled.

The Commission concluded on that basis that La Poste enjoyed an unlimited state guarantee. According to the Commission, as confirmed by the European courts, there is a presumption that the grant of such a guarantee results in an improvement in La Poste's financial position by reducing charges that would normally encumber its budget. Thus, La Poste benefited from more favourable credit terms, constituting a selective advantage. The implied unlimited guarantee constituted state aid which could not be declared compatible with the internal market.

The Commission's decision, and its validation by the General Court, have already been criticised.[7] The criticism holds that the Commission should have (1) abided by higher legal standards towards a merely implied guarantee which is not linked to a financial transaction; (2) identified the failure to pay a market conform premium and calculated actual advantage; (3) considered counterfactual scenarios to evaluate whether the better ratios of La Poste were ever linked to the guarantee, (4) taken into account the fact that La Poste is entrusted with SGEIs and whether the total amount of state resources exceeded the additional costs of providing the SGEIs and (5) not presumed an advantage on the basis of its own interpretation of French law.

Despite these valid points, the ECJ followed the Commission and the General Court. The ECJ accepted reliance on two assumptions. First, state resources were involved because, although there was no explicit provision organising the intervention of the state as a guarantor, a body of evidence allowed the ECJ to conclude so. This assumption was presented as an application of the controversial France Telecom case (C-399/10 P *Bouygues et Bouygues Télécom v Commission and Others* and C-401/10 P *Commission v France and Others*), according to which the first condition to be fulfilled for a measure to amount to state aid – namely, the involvement of state resources – is fulfilled if there is a sufficiently concrete economic risk of future burdens on the state budget. Advocate General

[7] A. Nucara and E. Gambaro, "The La Poste Case: A Guaranteed EPIC Battle", Annotation on the Judgment of the General Court (Sixth Chamber) of 20 September 2012 in Case T-154/10, *French Republic v European Commission*, ESTAL (2013) 3, 568-574.



Niilo Jääskinen stressed that the proof of the contrary can be brought for instance by showing that the debts of a particular EPIC are actually not repaid by the state. Second, a selective advantage was granted to La Poste because such an implied guarantee is, as a rule, liable to confer an advantage. This assumption flowed from the first.

This judgment raises two questions. **First**, although the identified guarantee may function as the guarantee known under civil law, the question is whether it is appropriate to treat it in the same way. Arguably, La Poste is an entity that provides public services; its exclusion from the insolvency procedures may have been motivated by a concern for public service continuity, rather than to improve La Poste's financial situation. If state aid law looks at the effects and not the objectives of a measure, it is striking that there has not been any evaluation (nor any recuperation of the aid ordered) of the amount of advantage, and it is true that it would be a difficult exercise, in the absence of premium paid and of a clear identification of the factors influencing La Poste's "better" position. As earlier criticised, the standard of proof used to determine the existence of state aid seems particularly loose.

Second, one wonders whether the measure would nevertheless not be excluded from the qualification of state aid under the *Altmark* ruling or considered to be *de minimis* or compatible under the SGEI package. Should France have raised the argument that La Poste was entrusted with public service obligations, the outcome of this case might have been different.

Indeed, the *Altmark* ruling and the SGEI package based on Article 106(2) TFEU constitute a specific body of rules compared to the general state aid rules. And, as the Latin expression states: "*Lex specialis derogate generalis*".

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Across the EU, price fixers can be liable for damages outside of cartel

By Jessica Mayhall

When seeking to recover damages arising from a cartel, litigants will often seek "umbrella" damages – that is, damages in relation to sales by suppliers other than the cartelists – on the basis that the price-fixing agreement will cause all prices for the same product throughout the entire market to be raised. On 5 June 2014, the EU Court of Justice ruled that companies involved in price fixing may be liable for damage caused outside of their cartel (umbrella damages), even where national legislation did not allow for such recovery.

In 2007, the European Commission imposed fines on the Kone, Otis, Schindler and ThyssenKrupp groups totalling €992 million for their participation in cartels involving the installation and maintenance of elevators and escalators in Belgium, Germany, Luxembourg and the Netherlands. In 2008, the Austrian authorities also imposed fines on a number of companies (including Kone, Otis and Schindler) for implementing a cartel on the Austrian market in relation to the goods mentioned above.

OBB-Infrastruktur AG (OBB), a subsidiary of Austrian Federal Railways, bought elevators and escalators from businesses that were not party to the cartel but which had raised their prices in order to adapt them to the market price resulting from the cartel. OBB sought compensation of more than €1.8 million from the members of the Austrian cartel in relation both to their purchases from the cartelists and from other suppliers. The Supreme Court of Austria asked the Court of Justice whether the cartel members could be found liable for the loss that OBB claimed to have sustained in relation to its purchases from non-cartelists, even though, under Austrian rules, such loss would not be recoverable.

The Court of Justice in its ruling noted that the effectiveness of the prohibition on anti-competitive cartels would be endangered if applicants could not seek compensation for all loss caused by an infringement of the competition rules. Market price is one of the main factors taken into consideration by an undertaking when determining the price at which it will offer goods and services. Non-cartelist businesses will have therefore raised their prices to reflect the market rate, and the cartel members cannot have been unaware of this.

This decision means that umbrella damages are now in principal available anywhere in the EU irrespective of national rules seeking to prevent them.

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GERMANY

Successful DOJ extradition and conviction: what non-US executives should know

By David Klock and Semin O

The United States Department of Justice has announced "its first-ever successfully litigated extradition of a foreign citizen to the United States in a federal criminal antitrust case" – the extradition to the US from Germany of an Italian citizen, indicted in the so-called marine hose cartel, and his subsequent conviction in federal court.

The accused, who had been indicted in 2010, was arrested in 2013 at a stopover in Frankfurt while he was en route home from Nigeria. In April 2014, he was flown to Miami, where he appeared in court. Two weeks later, on 24 April 2014, he pleaded guilty and was sentenced to pay a fine of US$50,000 and to serve two years in prison (less the "time served" credit for the nine months he was held in German custody during his extradition challenge). His sentence and fine could have been worse: under 15 US Code §1, the maximum penalty is 10 years in prison and the maximum fine is US$1 million.

THE LEGAL ISSUES SURROUNDING EXTRADITION

The DOJ has long made it clear that it would seek the conviction of foreign nationals participating in violations of US antitrust law. But up until this case, it had not been able to extradite any defendants – primarily because it is very difficult to meet the legal requirements around such extraditions. One of the main obstacles is the principle of dual criminality – that the alleged behaviour must also constitute a criminal offence in the country extraditing an accused individual. However, in many jurisdictions, anticompetitive behaviour only constitutes an administrative offence, which is not sufficient grounds for extradition (for Germany see sec. 3 para. 1 and 2 of the Act on International Cooperation in Criminal Matters).

The DOJ's difficulties are aggravated by the prohibition of *ex post facto* laws, which is why an extradition on account of a breach of the Sherman Act was not possible in the case of Mr. Ian Norris in 2008 (although it was subsequently approved by reason of an obstruction of justice in 2010). However, since more and more jurisdictions are adopting criminal laws against hardcore cartel activities, the highest hurdle for the DOJ is the fact that many countries do not extradite their own citizens (in Germany, this is pursuant to Article 16 of the German Constitution).

WHY DID THIS EXTRADITION SUCCEED?

In the current case, the German courts were able to approve the extradition of the defendant because he was accused of participating in bid rigging, which is not only a breach of German competition law but also a criminal offence pursuant to § 298 of the German penal code. There were also no problems arising from the prohibition of *ex post facto* laws, since the provision has been in existence since 1997. Moreover, the former executive is neither a German citizen nor was he able to establish that his extradition constituted discrimination on grounds of nationality (i.e., a breach of Article 18 of the Treaty on the Functioning of the European Union).

WHAT THIS MEANS FOR THOSE POTENTIALLY FACING INDICTMENT

The business world now sees that the US DOJ can succeed in extraditing and convicting a US-indicted foreign national in an antitrust case. This outcome offers several key points to consider.

Most of all, this case shows that the DOJ is taking a more vigorous, and effective, approach to prosecuting criminal offences in antitrust matters. This vigorous approach, and the appetite for its potential outcome, is not going to go away.

A more immediate consequence is already being faced by US-indicted executives, who may find that the most ordinary international business travel has become a minefield. It is no longer enough never to enter US territory. Indicted executives may find themselves plotting ornate routes to avoid being detained.

Next, the DOJ could also use the outcome of this case as leverage against other indicted individuals – for instance, to encourage them to divulge information.

Finally, as it becomes easier – or more thinkable – for prosecutors to extradite those indicted in antitrust cases, defense lawyers may find it more difficult to plea bargain for their clients. Those caught in the net could find themselves not only extradited and convicted, but receiving higher fines and longer sentences.

Thus, although it is still not clear whether the DOJ will be able to, or intends to, litigate extraditions on a regular basis, it would be imprudent to ignore the recent events when considering a defence strategy regarding violations of US antitrust law.

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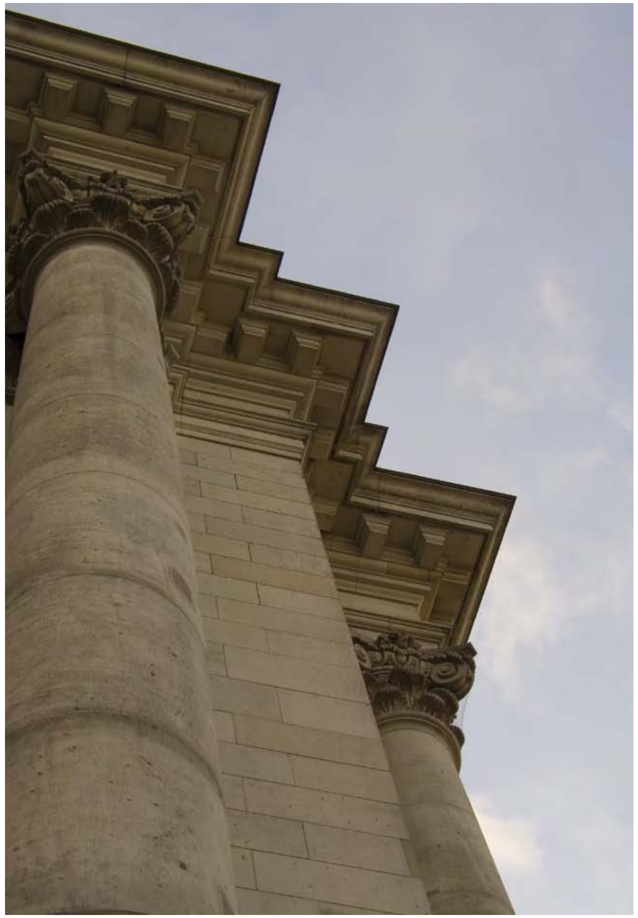

HUNGARY

New settlement procedure in Hungary available from 1 July 2014

By Istvan Szatmary

The latest amendment of the Hungarian Competition Act introduces a new settlement procedure in cartel investigations which will take effect from 1 July 2014. The procedure offers significant time and cost savings to those potentially facing fines for cartel activities.

With this new legislation, the Hungarian Competition Authority's settlement procedure will mirror that of the European Commission, and the policy objectives will also be the same.

From 1 July 2014, following issuance of the Statement of Objections, the Hungarian Competition Authority may, at its discretion, offer the possibility of settlement negotiations to parties under investigation. Although no notice is available for the time being regarding the practical aspects of the new tool, these settlement negotiations will take verbal form and will require intensive cooperation and short response times from the parties involved.

Successful settlements would potentially be a win-win for all sides: while the authority would save time and resources and could keep the costs of the procedure low, and the parties under investigation would benefit from a 10 percent reduction of any fine that could otherwise be imposed on them should the investigation not end in their favor. This 10 percent reduction would be in addition to any other reduction already available in the procedure – effectively meaning that successful leniency applicants (who are not entitled to full exemption from penalties) may further push down their financial penalty exposure by using the new tool.

The Hungarian Competition Authority expects to arrive at the first settlement decisions by 2016 and will most likely issue a notice on the practical aspects of the implementation of the new procedure by that time.

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THE NETHERLANDS

New policy rules look at sustainability initiatives in light of the cartel prohibition

By Martijn van Wanroij and Sophie Gilliam

Issues like climate change and global supply chain responsibility spur a growing number of companies, in the face of public debate, to take voluntary sustainability initiatives. Some sustainability targets cannot be reached, though, without a certain level of coordination between companies.

In the Netherlands, when this results in agreements that may affect parameters of competition (such as higher prices), the question arises whether such joint sustainability initiatives are eligible for an individual exemption of the cartel prohibition (Article 101(1) TFEU and Article 6 Dutch Competition Act (DCA)).

An agreement qualifies for individual exemption if it can be established that the consumer benefits resulting from the agreement outweigh the negative effects on competition. Up until recently, there was little guidance on the economic assessment of consumer benefits resulting from sustainability initiatives. Balancing the positive and negative effects poses specific challenges in these cases, because the benefits may be non-economic in nature or may only occur in the future. In the case of agreements that cover the complete market, the requirement for individual exemption that there is sufficient residual competition may pose additional difficulty.

The Dutch government recently addressed this topic in new policy rules to be applied by the Dutch competition authority (the ACM) when assessing sustainability initiatives under the cartel prohibition. Simultaneously, the ACM has published a corresponding position paper, in which it sets out how it intends to implement the policy rules in practice.

These documents provide interesting guidance on the application of the four criteria of Articles 101(3) TFEU and 6(3) DCA as set out below, on sustainability initiatives. The policy rules and position paper have been discussed with the European Commission.

- With regard to the first criterion, requiring the agreement to "contribute to economic and/or technical progress", the documents adopt a **broad welfare perspective.** This implies that not only direct benefits to consumers in terms of price, quality or product variety are taken into account, but also broader benefits such as environmental effects, public health, animal welfare and fair trade. An interesting (and unprecedented) quantification of the benefits of emission reductions can be found in a recent assessment of the ACM of the "Energy Agreement for promotion of sustainable growth" entered into between Dutch private and (semi-)public organizations.
- The second criterion is that "a fair share of the benefits" goes to consumers. The policy rules require the ACM to take into account the **interests of both current and future consumers** in its assessment. The existing European Commission Guidelines on the application of Article 101(3) clarify that the term "consumer" must be defined as follows: "all direct or indirect users of the products covered by the agreement". This could be read to imply that negative effects on consumers in a specific geographic market or product market cannot be compensated by positive effects that occur in different markets. However, in its position paper the ACM explains that it does see room to take into consideration benefits that cover an extended period of time and that may apply to a larger group than the current users of the relevant product.

- The third criterion of Section 3 concerns the "necessity" of the restrictions. This criterion is generally not applied too strictly in practice. The key factor is if the restriction to competition can be reasonably considered necessary to achieve the planned benefits. When assessing the necessity of agreements implementing a sustainability initiative, the ACM will take into account that due to the "first mover disadvantage" the initiative might not come about without underlying agreement.
- Undertakings involved in a sustainability initiative can comply with the fourth requirement of "residual competition" in various ways. Residual competition can easily be assumed in the case of slight **market coverage**. Where market coverage is high, it can be sufficient if residual competition remains with regard to competition parameters other than those to which the arrangement applies, such as price, quality or service.

These developments in the Netherlands represent welcome steps towards increased clarity on the assessment of sustainability initiatives. In specific cases, the ACM may give informal guidance on the compatibility of an sustainability initiative with the competition rules.

However, it remains up to the parties involved in a sustainability initiative to duly confirm that their arrangements comply with the cartel prohibition.

The ACM will continue to take fierce action against cartels, whether or not they are flying the banner of green.

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NORWAY

Imposition of filing obligation below notification thresholds

By Kjetil Johansen, Line Voldstad and Maria Teresa Espino Fjeld

Under Norway's recently amended Competition Act Section 18, in force from 1 January 2014, concentrations in which the undertakings concerned have a combined annual turnover in Norway exceeding NOK 1 billion shall be notified to the Norwegian Competition Authority (the NCA). However, if only one of the undertakings concerned has an annual turnover in Norway exceeding NOK 100 million, notification is not required.

Nevertheless, the Competition Act provides the NCA with the legal basis to impose undertakings to notify a concentration regardless of the turnover thresholds, provided there are reasonable grounds to assume that competition will be affected or that other special considerations require further investigation.

In March 2014, the NCA , imposed an obligation to submit a notification of a merger , even though the concentration in question did not meet the turnover threshold.

The NCA had, after it became aware of the merger between Cappelen Holding AS and Kongsberg Esco AS, launched an initial investigation into the merger. In the initial investigation, the NCA concluded that the two undertakings had overlapping business.

In its decision the NCA interpreted "reasonable grounds to assume" as meaning that the mere identification of competition issues would be sufficient.

Further, the NCA carried out a material assessment of the overlap in the water pipe/shafts and valves markets and the market share as a result of the concentration. The NCA concludes that, based on its initial investigation and assessment, there are reasonable grounds to assume that the undertakings will, as a consequence of the concentration, gain a substantial share of the shaft valve market.

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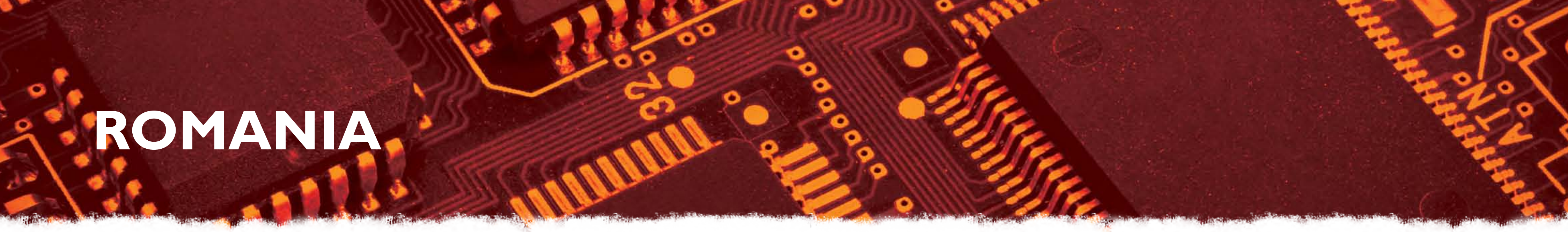


ROMANIA

RCC issues guidelines on co-investment agreements for mobile electronic networks

By Alina Lacatus and Sandra Moga

The Romanian Competition Council (RCC) recently published its Guidelines setting forth the specific conditions in which co-investment agreements for the joint utilisation of mobile electronic networks may be concluded.

The RCC Guidelines arise from a first-time competitive assessment of cooperation agreements in the telecommunication sector. Their issuance shows the RCC's increased interest in scrutinizing the telecommunication sector, especially as regards mobile telecommunications.

THE TRIGGERING FACTOR FOR THE ISSUANCE OF THE RCC GUIDELINES

In 2013, Orange and Vodafone, the two most important players on the mobile telecommunications market in Romania, announced the conclusion of an agreement for the joint utilisation of their network infrastructure which would allow both companies to continue their investments in the development of technologies at the national level.

The RCC decided to publish its Guidelines in order to allow companies active in the telecommunications market to gain a general knowledge of the RCC's approach regarding such cooperation agreements.

GENERAL FRAMEWORK OF THE ASSESSMENT

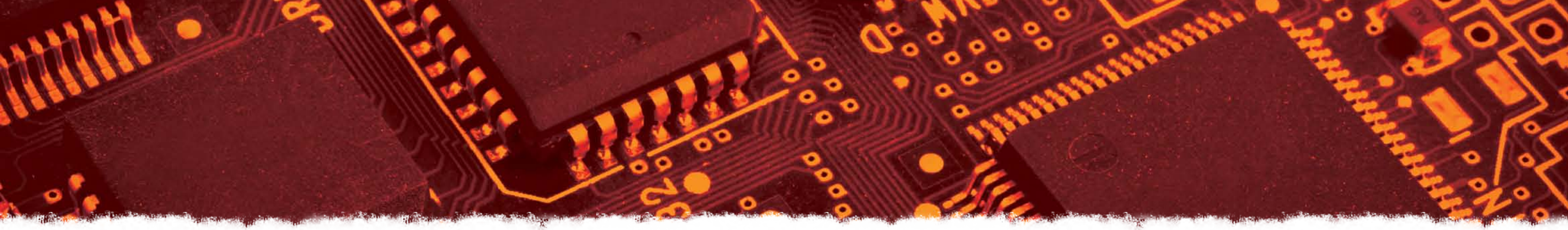
The RCC Guidelines note that horizontal agreements regarding the joint utilisation of mobile electronic networks ("Networks Agreements") may have the following objects:

- The joint utilisation of passive infrastructure (such as utilities and buildings) which, in the RCC's view is unlikely to raise competition concerns given the operators' large degree of independence
- The joint utilisation of active infrastructure, respectively: (i) joint utilisation of radio access network (including joint utilisation of the spectrum); (ii) profound joint utilisation (i.e. joint utilisation of a transportation network); (iii) national roaming

In RCC's view, these Networks Agreements may facilitate collusion and raise competition concerns, given the significant degree of cost commonalities and network sharing between the parties.

The RCC Guidelines indicate that Networks Agreements do not fall under the scope of art. 5 (1) of the Romanian Competition Law (respectively of art. 101 (1) of the Treaty on the Functioning of the European Union), provided that such agreements cumulatively meet the criteria set forth by art. 5 (2) of the Romanian Competition Law(art. 101 (3) TFEU), as follows:

- Efficiency gains: Networks Agreements should lead to (i) avoidance of certain costs, (ii) reduction of entry barriers for limited resources companies; (iii) limitation of the environment impact or (iv) creation of new technologies (e,g, LTE – 4G technology).
- Indispensability: Networks Agreements may generate restrictions regarding the (i) management and utilisation of the shared networks' capacity; (ii) refusal to renew collocation agreements or artificial limitation of the interconnection links' capacity.
- Pass-on to consumers: the RCC will analyse the (i) degree and nature of competition between the parties (the efficiencies will not be presumed only because the agreement does not lead to the elimination of competition on the relevant market); (ii) the nature and degree of efficiency gains; (iii) the elasticity of demand; and (iv) the creation of new or improved goods/services. The RCC mentioned that the arguments regarding non-price efficiency gains (i.e. the increase of network coverage) should be cumulative with the arguments regarding quantitative (price) efficiency gains.



- No elimination of competition: the RCC will assess the creation of the competition at infrastructure level.

The RCC highlighted the fact that the Networks Agreement may raise competition concerns only if the parties intend to change the structure of the market through such agreements (i.e. the agreement is, in fact, a disguised economic concentration).

POTENTIAL ANTICOMPETITIVE CONCERNS RAISED BY THE NETWORKS AGREEMENTS

The RCC Guidelines identify the following anticompetitive concerns regarding the Networks Agreements:

- A significant decrease of competition between the parties as a result of (i) the reduction of competition between the networks triggered by the existence of the same coverage and quality of the service, as well as by the joint utilisation of hardware and software; (ii) the increased costs communalities and the limited level of differentiation between services; and (iii) the potential exchange of confidential information
- Refusal of access to physical infrastructure or unlawful refusal to supply call origination/termination services
- Exchange of confidential information

In RCC's view, the exchange of information regarding the functioning of shared network elements does not raise concerns, given the technical nature and purpose of such information. However, one of the most problematic risks is that related to a potential exchange of information regarding the future capacity of the networks, because this allows the parties to align their services offerings. The RCC indicates that it is necessary to establish measures to restrict the exchange of information between the parties only to the information necessary for the functioning or the management of the shared networks; the measures should be even more efficient as the usage of the shared networks increases.

The RCC will also take into consideration the following factors: (i) the characteristics and competitive structure of the relevant markets and (ii) the parties' ability to differentiate the supplied services; (iii) the economic context; and (iv) the nature of the agreement.

IMPLICATIONS FOR THE TELECOMMUNICATIONS MARKET

Following the issuance of the RCC Guidelines, it is expected that future cooperation agreements on the telecommunications market will be subject to a closer inspection by the RCC.

Moreover, companies intending to conclude a cooperation agreement in the telecommunication market should ensure that their agreement is in harmony with the conditions set forth by the RCC.

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RUSSIA

Russia abolishes merger control subsequent notification procedure

By Elena Kurchuk, Nina Bagdasarova and Andrei Sheetkin

Now in effect is an amendment to the Russian Competition Law abolishing the requirement for business entities to make a subsequent notification to the Federal Antimonopoly Service (FAS) in relation to certain regulated transactions.

The Amendment is the latest attempt by FAS to relax Russia's antimonopoly clearance procedure.

REGULATED TRANSACTIONS IN RUSSIA

Regulated transactions under Russian Competition Law generally include the acquisition by a person (or a group of persons) of (i) voting shares in a Russian target entity, (ii) fixed production/intangible assets of a Russian target entity, (iii) rights which allow the purchaser to determine the business of the Russian target entity, and (iv) more than 50 percent of the voting shares in a foreign target entity, as well as mergers, accessions and, in certain cases, incorporations of Russian business entities.

Historically, intra-group transactions that fell within the above definitions also required clearance from or notification to FAS. However, the applicable notification procedures have evolved over time. In particular, the Competition Law has established an exception for certain intra-group deals as well as a special intra-group subsequent notification procedure (discussed in more detail below).

ANTIMONOPOLY CLEARANCE PROCEDURES IN RUSSIA

Before the amendment, the Competition Law recognised two types of procedures regarding antimonopoly clearance of regulated transactions: prior consent or a subsequent notification. The applicable type of procedure depended on thresholds which were stipulated by the law.

If the Competition Law required the prior consent of FAS for a regulated transaction, then the parties could not proceed with the transaction until such consent was obtained. Generally, FAS issued consent for the regulated transaction within one month from the application date.

For a subsequent notification, the acquirer had to notify FAS within 45 days after the completion of the transaction.

THRESHOLDS FOR REGULATED TRANSACTIONS

Prior consent of FAS was **and is** required if:

- the total aggregate assets of the acquirer's group plus the target entity's group exceeds RUB 7 billion (approximately US$196 million), and the total aggregate assets of the target entity plus the target entity's group exceeds RUB 250 million (approximately US$7 million)
- the total aggregate revenue for the preceding calendar year of such persons exceeds RUB 10 billion (approximately US$280 million), and the total aggregate assets of the target entity plus its group exceeds RUB 250 million (approximately US$7 million) or
- if the target entity or any entity from the target entity's group, or the acquirer or any entity from the acquirer's group, was included on the register of companies with a market share of over 35 percent or had a market dominant position.

A subsequent notification was applicable for transactions in which the assets and revenue of the acquirer and target were significantly lower than the abovementioned thresholds.

EXCEPTION FOR INTRA-GROUP DEALS

A transaction (that would normally require FAS prior consent on the basis of the asset value or revenue of the entities concerned) concluded between a parent company and its subsidiary, in which the parent company holds more than 50 percent of the voting rights, shall not require the prior consent of FAS (“Exception”).

Importantly, FAS further clarified that the Exception should apply to intra-group transactions between indirectly linked entities (provided that the 50 percent voting share link was maintained between all the entities in the chain). Thus, the clarification made the Exception applicable to the transaction between sister companies and the indirect shareholder and the target. However, it should be noted that the Exception may not be applicable to the chain of shareholders that includes partnerships or other forms of business organisation with no shares or participation rights. In such a case, the applicability of the Exception should be investigated on a case-by-case basis.

However, prior to the Amendment, the Competition Law did not stipulate a similar exception for the subsequent notification requirement. As a result, the acquirer could avoid the prior consent procedure, but was still required to notify FAS after the transaction was completed. The Exception gave the acquirer flexibility in terms of time (i.e., to not have to wait one month before FAS issues the consent), but the acquirer still had an obligation to file with FAS a huge volume of documents (almost identical to what is required under the prior consent procedure). This was inefficient.

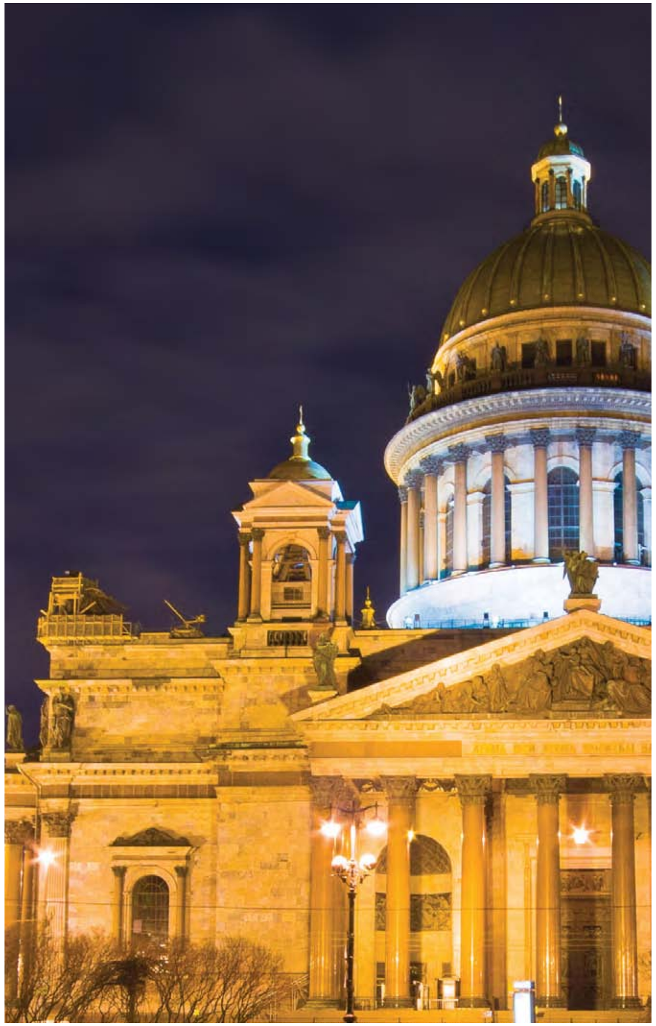
SPECIAL INTRA-GROUP NOTIFICATION PROCEDURE: STILL AVAILABLE

The acquirer can make a subsequent notification to FAS in relation to intra-group transactions provided that the acquirer has disclosed information on its group of persons to FAS one month before the transaction. This option is not frequently used. This procedure was not affected by the Amendment and remains available for the intra-group transactions out of the scope of the Exception.

EFFECT OF THE AMENDMENT

The Amendment will have the following effects on antimonopoly clearance of regulated transactions:

(1) The Competition Law now stipulates a list of thresholds for only those regulated transactions in which the prior consent of FAS is required. An acquirer and target with a relatively low asset value/revenue are no longer required to obtain any antimonopoly clearance in respect of the regulated transaction.



(2) An acquirer that falls within the Exception is no longer required to make any notification to FAS.

(3) There is a special intra-group notification procedure available for certain intra-group transactions that do not fall within the Exception. The acquirer is able to decide whether to seek FAS prior consent or to make the prior group structure disclosure to FAS and after the transaction to file a subsequent notification.

IN SUMMARY WHAT HAS CHANGED?

The assessment of regulated transactions between independent parties has not been changed: the parties are still required to confirm or exclude any requisite merger control filing obligations.

For intra-group restructurings (especially those conducted by large groups of companies), it should be noted that the majority of intra-group transactions should no longer require any notification or clearance. However, this is not a rule. If the prior consent thresholds are exceeded, then review of such intra-group transactions and assessment of filing obligations should still be conducted.

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UNITED KINGDOM

Deutsche Bahn AG and others v Morgan Advanced Materials Plc

By Saiqa Panday

The UK Supreme Court has issued its judgement in relation to Morgan Advanced Materials Plc's appeal against a decision by the UK Court of Appeal. The issue on the appeal was whether claims against the appellant for loss suffered by reason of a cartel infringing Article 81(1) TEC (now Article 101 TFEU) were time barred.

BACKGROUND

The appellant as whistleblower disclosed the existence of an illegal cartel in electrical and mechanical carbon and graphite products to the European Commission and a Commission decision issued in December 2003 found that the appellant and other cartel members had engaged in practices which breached Article 81(1) TEC. As whistleblower, the appellant escaped any Commission fines, while the other cartel members received heavy fines.

The other cartel members appealed the Commission's decision to the General Court. These appeals were dismissed in October 2008 and the time for any further appeal to the Court of Justice against the finding of infringement expired on 18 December 2008.

In December 2010, Deutsche Bahn AG and filed a claim for follow-on damages in the Competition Appeal Tribunal (CAT) against the appellant (and others) regarding the loss it allegedly suffered as a result of the cartel. The respondents' claims were brought under Section 47A of the Competition Act 1998 which provides a statutory basis for a party to bring a follow-on claim. Rule 31 of the CAT Rules 2003 state that the time limit for bringing a follow-on claim is two years from the later of the expiration of the period during which an infringing party can appeal a Commission decision, or the date on which the cause of action accrued. The CAT accepted the appellant's argument that the respondents' claims were out of time, and so struck out the respondents' claim.

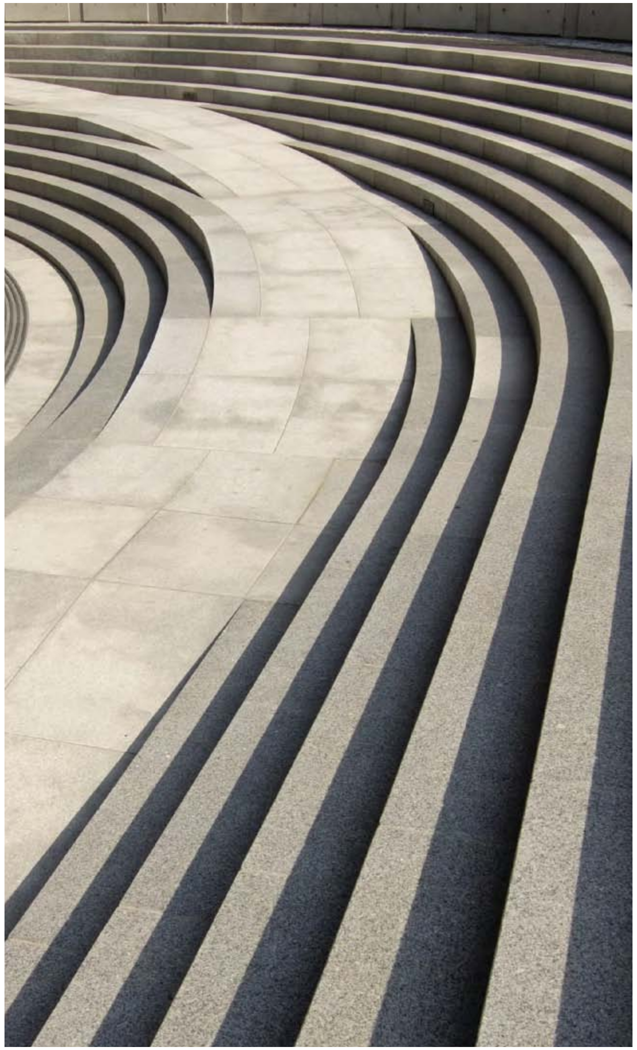
The Court of Appeal by a judgment dated 31 July 2012 accepted the respondents' case and so restored their claim. The appellants then appealed to the UKSC.

ISSUES

The issue to be decided by the UKSC was as follows:

1. Whether the Commission decision was to be viewed as a decision made against individual addresses and not appealed by the appellant or
2. Whether the Commission decision was to be viewed as a decision made against all the cartel members, appealed by most of them and finally upheld as to liability by the General Court.

The split between some cartel members appealing the Commission decision and others meant that the UKSC had to decide when the clock started running for follow on damages claims against those parties that had not appealed the Commission decision. If the UKSC determined that the first alternative was correct, the two-year limitation period for claims against the appellant ended on 13 February 2006 (following the time expiring for the appellant to appeal on 13 February 2004), and the follow-on claims issued on 15 December 2010 were therefore brought too late. But if the second alternative was deemed correct, there was one single timeline for all claims and the two-year limitation period began on 18 December 2008, when time expired for an appeal to the Court of Justice by those who appealed to the General Court; the follow-on claims were therefore on time.



JUDGMENT

The UKSC unanimously allowed the appeal. Mance LJ stated that the decisions of the ECJ relating to a Commission decision establishing the existence of a cartel are a series of decisions addressed to individual addressees rather than all of the addressees of the decision. The only relevant decision which was applicable to the respondents' follow-on damages claim against the appellant was the original Commission decision of 3 December 2003. The appellant had until 13 February 2004 to appeal against the Commission decision. As the appellant had not appealed against the Commission decision, the respondents had a period of two years, beginning on 13 February 2004, to bring a follow-on damages claim against the appellant. As the respondents' follow-on damages claim was brought on 15 December 2010, it was out of time.

In reaching its decision, the UKSC considered that the rules governing the recovery of any loss resulting from the operation of an illegal cartel are a matter of domestic law insofar as they are compatible with the general principles of European law. As section 47A CA98 makes explicit references to decisions issued by the Commission relating to infringement findings, it is necessary to consider the jurisprudence of the European courts in determining this issue. The UKSC considered that Articles 249 and 288 TEC do not specify whether a decision by the Commission operates on a unitary basis against all addressees, or against each addressee separately. However, the ECJ has previously considered this issue in Case C-310/97 *AssiDomän Kraft Products AB v Commission of the European Communities* [1999] All ER (D) 1010, which held that "a decision that has not been challenged by the addressee within the relevant time limit becomes definitive as against him" irrespective of whether an appeal has been brought by another addressee of the same decision. It follows that, even if the appeals by the other cartel members had succeeded, the Commission decision would have remained in full force and effect against the appellant.

The outcome of this case is that a whistleblower may face follow-on damages litigation earlier than other companies participating in a cartel. Because whistleblowers will generally avoid fines and are therefore unlikely to challenge any decision before the EU courts, the two-year limitation period for claims will likely begin once the time has expired for the appeal of a Commission decision.

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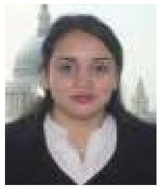

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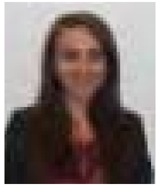
UNITED KINGDOM

Lafarge Tarmac – Appeal of UK Plant Divestment

By Yasmin Bailey

The UK cement market has been under much scrutiny recently. In January 2014, the old UK competition regulator, the Competition Commission (now replaced by the Competition and Markets Authority or CMA) published its final report following its market investigation into the aggregates, cement and ready-mix concrete market. While it did not find any cause for concern in the markets for ready-mix concrete and aggregates, the CMA ruled that a combination of structural and behavioural features in the cement market gave rise to an adverse effect on competition in that market through coordination, particularly between the three largest manufacturers: Lafarge Tarmac, Cemex UK Operations Limited and Hanson and HeidelbergCement AG. This ultimately resulted in higher prices for cement users – about £30 million a year. It was also noted that certain parts of the market are too concentrated, with very few players. As a result, Lafarge Tarmac was ordered to sell off one cement plant in either Cauldon or Tunstead to an independent cement producer from outside the UK with adequate expertise and financial resources which would not itself create more competition or regulatory concerns. In March 2014, the Competition Appeal Tribunal (CAT) published a notice of appeal lodged by Lafarge Tarmac against the findings of the CMA.

Two of Lafarge's grounds of appeal were (1) that the divestment orders were disproportionate and a serious interference to their property rights; and (2) there had been procedural unfairness and Lafarge had not been given the opportunity to disclose critical evidence. As part of the appeal, Lafarge sought to submit a new expert report, but its application to submit this new evidence was dismissed by the CAT, which said it was not satisfied there was a valid basis to admit fresh evidence (generally not permitted in judicial review proceedings). Lafarge's challenge will come before the CAT on 29 September 2014. In addition, Hope Construction Materials has appealed the CMA's decision that the divested Lafarge Tarmac cement plant cannot be bought by a UK cement producer.



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Foundation Trust Hospitals Merger

By Yasmin Bailey

The Competition and Markets Authority (CMA) cleared the proposed takeover of Heatherwood and Wexham Hospitals NHS Foundation Trust by Frimley Park Hospital NHS Foundation Trust in May 2014. Heatherwood and Wexham are two struggling hospitals located near top-performing Frimley Park hospital. The CMA decided to carry out an investigation under the UK merger control rules pursuant to section 79 of the Health and Social Care Act 2012, which applies to mergers involving NHS Foundation Trusts. The CMA's competition analysis around such mergers examines whether there are any overall patient benefits, what impact the merger may have on patient choice and whether such a merger could result in lowering the quality of healthcare services. Notably, the CMA can clear a deal if the overall benefits for patients outweigh competition concerns. In its examination, the CMA considered evidence provided by the NHS Trusts and a number of third parties, including Monitor, the sector regulator for health services in England. The CMA's investigation concluded that the merger would not lead to a material reduction in competition between hospitals in the area nor a loss of choice for patients, as there are a number of other strongly performing NHS hospitals nearby offering similar services. The CMA also concluded that the merger would not reduce the hospitals' incentives to innovate and improve their services. This recent decision contrasts with the decision made by the UK competition regulator late last year in relation to the proposed merger between Poole Hospital NHS Foundation Trust and the Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust. The UK regulator concluded that there was insufficient evidence to suggest the proposed merger would result in overall benefits for local patients and found the merger would damage patients' interests by eliminating competition in 55 services; since the NHS Trusts were each other's closest rivals, such a merger would reduce the Trusts motivation to compete, potentially lessening the quality of patient services.

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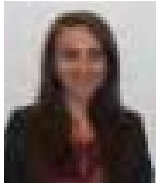

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UNITED STATES

The agencies' eyes are roving: what's inside the FTC and DOJ 2013 Report

By Steven Levitsky

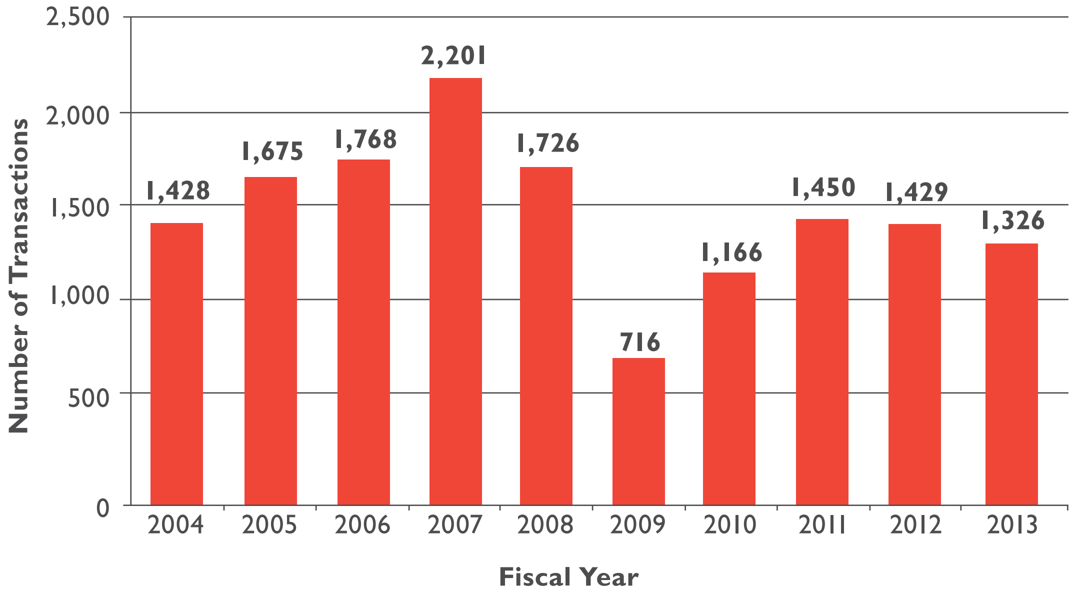
The FTC and DOJ recently issued their annual merger report, reviewing their key merger enforcement actions during 2013 .

The report is a goldmine of useful information for companies seeking to evaluate their business strategies and comply with the regulators.

TRANSACTIONS AND DEAL SIZE WERE DOWN

First, the basic numbers. Last year, there were 1,326 transactions filings, down 7.2 percent from the 1,429 reported in 2012 – a much greater decline than the 1.4 percent decline between 2011 and 2012.

HSR Merger Transactions Reported Fiscal Years 2004-2013



***NOTE:** All charts are from the FTC/DOJ Report.*

November 2013 had more transactions reported (260) than any other single month in the last ten years.

Measured by size, 20.4 percent of the transactions fell into the US$100 million to US$150 million range; 19.5 percent fell into the US$500 million to US$1 billion range; and only 11 percent were over US$1 billion. This represents a very slight decrease in the number of transactions over US$1 billion (142, down from 2012's 156). Of these, 54 percent involved buyers with sales over US$1 billion, and in 19.7 percent of the deals, the targets had sales over US$1 billion.

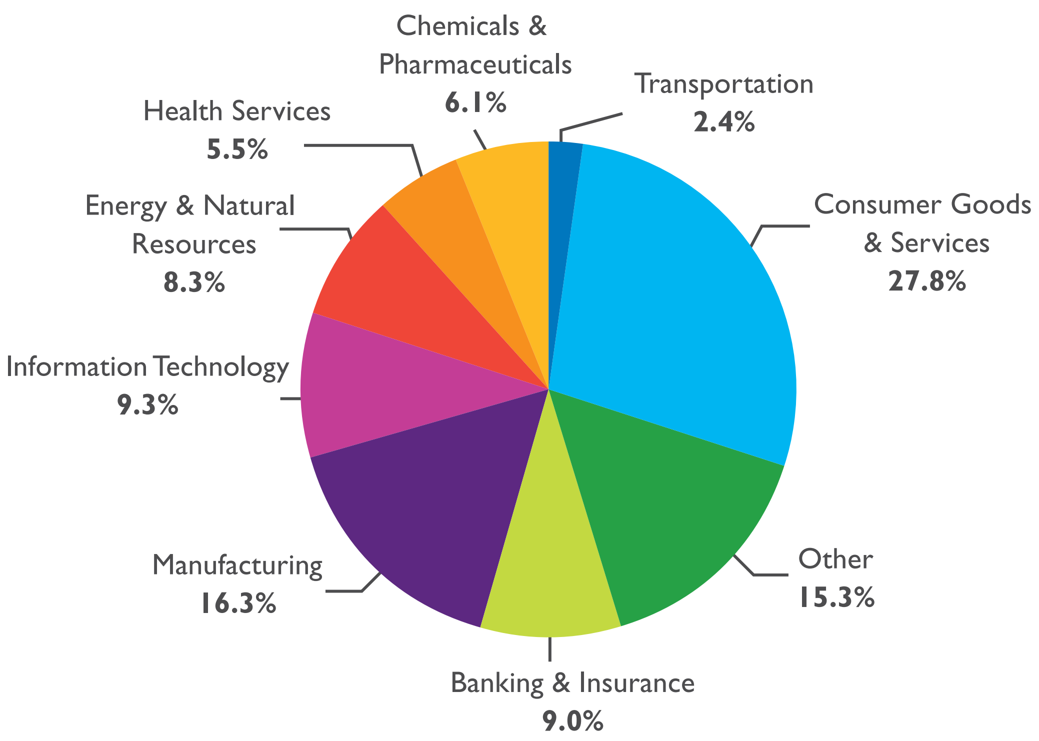
For the second year in a row, the FTC led the DOJ in the number of transactions it reviewed that were sized over US$300 million. (In 2012, the FTC reviewed 68 transactions over US$300 million, compared to the DOJ's 43; in 2013, these were 80 for the FTC and 48 for the DOJ.)

Of the 1,326 filings in 2013, 990 asked for early termination. ("Early termination" means that the agencies cleared the transaction before the end of the waiting period.) Early termination is an option on the HSR form, but if the parties check it, then the clearance is announced publicly on the FTC website. If the parties don't ask for early termination, then the fact of the filing and the clearance remain confidential. Of the 990 requests, slightly less than 80 percent were granted.

INDUSTRIES INVOLVED WERE MIXED – BUT PHARMA AND HEALTH LED IN ENFORCEMENT ACTIONS

A broad range of industries filed with the agencies.

Percentage of Transactions by Industry Group of Acquired Entity Fiscal Year 2013



"Consumer Goods and Services" and "Manufacturing" were the two largest industries represented by the filings. Combined, they made up almost 45 percent of the total. Surprisingly, mergers in the "Chemicals and Pharmaceuticals" and "Health" areas, which received a tremendous amount of attention in the press this year, represented less than 11 percent of total filings.

But in terms of enforcement proceedings, pharma and healthcare each had three, matched by another three in a broadly defined advertising market. The rest of the enforcement proceedings involved widely varied industries, among them waste, scan engines, beverages, chemicals, movie theaters, airlines, electronics, casinos, glass, photoengraving, automobile a/c system recharging equipment, oil pipelines, bleach, cast iron pipes, aviation and recycling yard management systems.

The broad message one can draw from this is that the agencies' eyes are roving. Relying on a combination of internal research and reliable industry gossip, they can clearly find the data on transactions that have the potential to raise competition problems.

Of the 1,326 transactions, the agencies brought 38 enforcement actions. The FTC challenged 23, of which 16 resulted in consent decrees; two resulted in the abandonment or significant change in the transaction; in four, the FTC began an administrative action; and in one, the FTC filed a complaint in court.

The DOJ challenged 15. It won one at trial; has a trial pending in another; obtained five settlements with filed complaints; and, in the other eight cases, the parties either abandoned or restructured the deal to avoid problems.

It is worth noting that, last year, the DOJ filed an aggressive complaint against the U.S. Airways/American Airlines merger. But the two companies responded with an equally aggressive defense, including heavy lobbying with state and federal governments. The DOJ eventually settled. The *Merger Report* described the relief it obtained in this way: "The settlement, which was entered by the court on April 25, 2014, requires the parties to divest key assets at capacity-constrained airports across the county." Yet the DOJ complaint had originally implied that the transaction could not be fixed. Many people felt the agency either overstated its case or miscalculated its support.

"SECOND REQUESTS" WERE UP

Combined, the two antitrust agencies issued 47 "second requests." ("Second requests" are very extensive information requests made when the agencies believe there is a serious question about the competitive impact of a deal. They typically take several months for the parties to answer.)

The raw number of second requests went down 4.1 percent from 2012. But, *measured as a percent* of filings, second requests actually went up to 3.7 percent in 2013 (from 3.5 percent in 2012).

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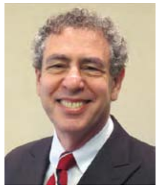

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OTHER NEWS

EUROPEAN UNION

Michael Marelus, Larissa Foulon

EU General Court upholds Commission's billion Euro fine on Intel. In 2009 the Commission imposed a fine of €1.06 billion on Intel for having abused its dominant position. Intel had granted price reductions to four PC and server manufacturers in exchange for purchasing most of their supplies from Intel, and to a computer retailer to encourage the sale of PCs with Intel's equipment. The Commission held that Intel had also granted payments to computer manufacturers to limit the production of computers using Intel's competitors' equipment. On the 12th of June, the EU General Court upheld the Commission's fine. Find out more on this page: http://europa.eu/rapid/press-release_MEMO-14-416_en.htm

ICAP suspected of participation in yen interest rate derivatives cartels by the Commission. The Commission issued a Statement of Objections to ICAP, regarding the possibility of a breach of antitrust rules. The Commission alleges ICAP facilitated several cartel infringements in the market of yen interest rates derivatives. During its investigation of this market, the Commission issued fines amounting to more than €660 million on five banks and a cash broker. The Commission's press release is accessible on this page: http://europa.eu/rapid/press-release_IP-14-656_en.htm

New state aid criteria to support important projects in the European Union. The Commission has issued a new Communication setting out criteria for facilitating the support of important projects of common European interest by member states. The Communication is in line with the Commission's State Aid Modernisation package. It is aimed at achieving the Europe 2020 objectives, and contributing to economic growth, jobs creation and competitiveness in the EU. The new rules could be an opportunity for projects with a transnational dimension which could not be completed with private funds only. The Communication will enter into force on 1 July 2014. More information can be found in the Commission's press release: http://europa.eu/rapid/press-release_IP-14-673_en.htm

State aid: investigation of tax rulings for Apple, Starbucks and Fiat Finance and Trade. The European Commission is investigating the decisions of several tax authorities regarding corporate income tax for Apple in Ireland, Starbucks in the Netherlands and Fiat Finance and Trade in Luxembourg. The inquiry relates to allegations that some member states have, through tax rulings, provided advantages to specific firms. The Commission will assess whether the three transfer pricing agreements validated in the rulings involve state aid beneficiating to the firms. The press release is available here: http://europa.eu/rapid/press-release_IP-14-663_en.htm

State aid: new exemptions from prior notification. The Commission has revised the general Block Exemption Regulation to now include more aid measures and higher amounts that may be provided by member states without prior authorisation. The broadening of the exemption is aimed at facilitating the allocation of aid that could stimulate economic growth and job creation. It saves member states time, and it allows the Commission to focus on the aids that may actually impede effective competition. The revised Block Exemption Regulation will enter into force on 1 July 2014. More information can be found here: http://europa.eu/rapid/press-release_IP-14-587_en.htm

State aid: new rules to support projects in the field of environmental protection and energy. Aiming to help members states reach the EU 2020 climate objectives, the Commission has adopted new rules that facilitate the support of projects in the field of environmental protection and energy. The Commission also provides criteria on how member states can lower the costs incurred by firms exposed to international competition for renewables. More information can be found here: http://europa.eu/rapid/press-release_IP-14-400_en.htm

Commission imposes fines totalling €30,7 million on steel abrasives producers. The Commission has held that four steel abrasives firms (Ervin, Winoa, Metalltechnik Schmidt and Eisenwerk Würth) have participated in a cartel and coordinated prices for more

than six years. The Commission imposed fines totalling €30.7 million. Ervin was not fined as it benefitted from the Commission's 2006 Leniency Notice for revealing the existence of the cartel. The Commission alleges that the price coordination was meant to escape the important fluctuations of the market for steel abrasives, by imposing a surcharge on the products. More information is available here: http://europa.eu/rapid/press-release_IP-14-359_en.htm

Commission imposes fines totalling €302 million on producers of high voltage power cables. The Commission held that eleven producers of high voltage power cables (six European, three Japanese and two Korean) had participated in a cartel and has imposed fines totaling nearly €302 million. The Commission held that producers allocated consumers and projects between themselves on an almost world-wide scale for a decade. According to the Commission, they also agreed on prices to ensure that the allocation of projects would be successful. The Commission's investigation underlines that the producers were aware they were breaching competition rules, and that they concealed compromising documents. The Commission's press release can be found here: http://europa.eu/rapid/press-release_IP-14-358_en.htm

AUSTRIA

Ana Feiler

The Austrian Cartel Court fines three companies for price fixing in the food retail sector. As reported by the Austrian Competition Authority, the Cartel Court has levied fines totalling €336,000 against the Austrian breweries Hirter and Braucommune as well as AFS Franchise-Systeme, part of the Raiffeisen warehouse and trading group, for vertical price fixing in the food retail sector. Hirter and Braucommune agreed with the retailers on list prices and, particularly, promotion prices, while AFS Franchise-Systeme engaged in price fixing with beer and beverage suppliers. At the beginning of this year, four other Austrian brewers (Brauerei Schloss Eggenberg, Vereinigte Kärntner Brauereien, Privatbrauerei Zwettl and Mohrenbrauerei) were fined for vertical price fixing in the food retail sector.

ITALY

Carlo Edoardo Cazzato

Italy launches consultation to adopt its own guidelines on antitrust fines. After many years of setting its fines by applying the guidelines of the European Commission, the Italian Competition Authority (ICA) intends to adopt its own specific guidelines. In mid-May 2014. the ICA launched a public consultation on its draft guidelines on the method of setting antitrust fines. The draft mirrors the structure of the Commission's Guidelines: the first part deals with the basic amount of the fine, while the second addresses with adjustments to the basic amounts. Among the most interesting differences between the draft and the Guidelines of the EU Commission are these: a specific paragraph dedicated to the fines in antitrust cases that concern public tenders, and an express provision on reduction of fines for companies that have adopted an antitrust compliance program. Interested third parties may submit their own observations about the proposed Guidelines by June 29, 2014.

NORWAY

Kjetil Johansen, Line Voldstad

Notification on stay of an acquisition in the waste and recycling market. The NCA has announced that it is considering an intervention against Norsk Gjenvinning's acquisition of Avfall Sør Bedrift. Businesses are required to have a mechanism for the delivery of waste. In the Kristiansand area, there are currently two major competitors in the market for the collection and receipt of industrial waste. In the view of the NCA, the acquisition will, within the market for industrial waste in the Kristiansand area, result in a market share close to monopoly because Norsk Gjennvinning's nearest competitor will be eliminated. The concern of the NCA is that the presumed monopoly situation could undermine

competition in the waste and recycling market and as a consequence enhance the cost for businesses to deliver waste in the Kristiansand area. After receiving such notification of a possible intervention, the companies will have 15 business days to comment on the NCA's preliminary assessments.

Investigations in the banking market. The NCA has initiated an investigation into the banking market and aims to take a close look into the market, including loan to private customers and small to medium sized businesses. The initial focus will be on the mortgage market. The results will be presented some time during the fall. The NCA will in particular look into the new requirements on equity and the actual barriers to switching banks. In relation to the requirement of equity, the NCA has observed that banks` lending margins have significantly increased in recent years. In the NCA's view, this could suggest that the customers are paying a greater share of costs in relation to the raised requirements of equity. In addition, as the Norwegian banks have to compile more equity than foreign branch offices situated in Norway in order to meet the requirements, the NCA will assess how this might affect marketplace competition.

KEY CONTACTS

DLA Piper is a global law firm with 4,200 lawyers located in more than 30 countries throughout the Americas, Asia Pacific, Europe and the Middle East, positioning us to help companies with their legal needs anywhere in the world.

We have a leading global Competition and Antitrust practice across all areas including competition investigations by regulators, compliance, cartel enforcement defence, civil litigation, criminal antitrust defence and merger regulation. Our network of specialists allows us to provide clients with a fully integrated team who work closely together providing consistent quality across multiple jurisdictions. We also work closely with DLA Piper's full service international network to provide clients with a truly integrated service in particular with our trade and global government relations practice which represents clients in the political arena and in the media, giving us a unique perspective on the workings of governments and policy makers, and allows us to provide a broader range of solutions to the problems faced by businesses.

Our lawyers have the experience and insight to find creative and innovative solutions to competition law issues. Members of the team have gained experience not only in law firms but also as in-house counsel within global companies in a number of sectors, with trade associations, and as officials of competition authorities.

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