THE EUROPEAN ANTITRUST UPDATE

Key developments in competition law *September - December 2005*

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BRUSSELS FLEXES MUSCLES



Sweeping reforms planned

More US style enforcement The European Commission (EC) is considering a raft of proposals due to shake up competition law across Europe. Topping the agenda for Neelie Kroes, the EU's Commissioner for Competition, is the invigoration of enforcement through US style private actions, reform of the way allegedly dominant companies are prosecuted and expanding the EC's merger control powers.

US style damages actions? The EC is expected to publish this month its Green Paper on the promotion of private enforcement of EC competition rules. Last year, national courts gained full powers to enforce these rules themselves. Commissioner Kroes has indicated she favours sweeping away remaining impediments to private actions and to draw from US style enforcement to foster an even better competition culture. The Green Paper will examine appropriate incentives and procedures for pursuing actions for damages before national courts to allow for the expected benefits of direct enforcement of laws and increased deterrence. The new Chair of the UK's Office of Fair Trading (OFT), Philip Collins, has endorsed this move in a December keynote address in London. In addition, the OFT has published a consultation paper on how better to involve third parties in investigations and in the submission of complaints early in proceedings.

> "I like aggressive competition – including by dominant companies – and I don't care it may hurt competitors – as long as it ultimately benefits consumers."
>
> *Commissioner Neelie Kroes*

Focus on consumers? A wide ranging review is also underway on how to improve enforcement of the EC ban on abuse of monopoly power. Current enforcement practices have been widely criticised as inconsistent, unclear, and giving too much room for discretion. Kroes has indicated in a speech at the Fordham Corporate Law Institute in New York that regulators should be cautious about intervening in markets unless there is clear evidence of malfunction. "I like aggressive competition – including by dominant companies – and I don't care it may hurt competitors – as long as it ultimately benefits consumers". A welcome shift of policy would mean the EC examines effects on consumers before pursuing allegedly dominant companies.

National champions targeted? A new plan - contained in an EC report regarding serious competition issues in European energy markets - would further increase Brussels' merger jurisdiction. It would abolish the rule that precludes Brussels' oversight of a merger if all parties concerned earn in excess of two-thirds of their revenue in the same Member State. It follows a ruling in November that this "two-thirds rule" meant the EC could not review the bid by Gas Natural SDG SA, the incumbent national gas company in Spain, for Endesa SA, one of two main electricity operators in Spain. Commissioner Kroes has told the EC the change would help ensure consistent treatment of similar operations across the EU. The move is seen as aimed at national policies that promote "national champions" at the expense of open competition.

EC Telco Approvals

A spate of clearance decisions have facilitated consolidation in Europe's communications sector.

BenQ Corporation/Siemens
Taiwanese BenQ Corporation's acquisition of the mobile device business of Siemens was cleared in September after assessing the impact on branded mobile telephones, design and manufacturing services for mobiles and accessories and spare parts.

Verizon/MCI
The acquisition by the USA's Verizon of MCI was cleared in October after assessing the impact on global internet connectivity services, global telco services and international voice telephony.

France Télécom/Amena
The acquisition by France Télécom of the Spanish mobile operator, Amena was cleared in October partly because the parties do not currently overlap in the same countries. The acquisition creates Europe's number two mobile operator, behind the UK's Vodafone and ahead of Germany's T-Mobile. France Télécom now has 67 million subscribers across the continent, reported sales of €57 billion in 2004 and will be able to offer Spanish clients bundled fixed-line, wireless and internet services.

Belgacom/Telindus
In December, the EC announced it had approved an acquisition of Telindus by Belgacom Group, the incumbant telco operator in Belgium, after assessing the impact on IT services and networking equipment and bundled offerings of network solutions. France Télécom has made a counter offer for Telindus.

WAITING BY THE PHONE… Spain's Telefonica is still in negotiations with the EC regarding it's bid for UK-based O2. Norway's Telenor is waiting to hear if its acquisition of Vodafone Sweden will be cleared, following the successful acquisition of Sweden's Bredbandsbolaget and Denmark's Cybercity earlier this year, and the Carlyle Group and Providence Equity Partners have notified their bid for Swedish cable and internet company Com Hem. In the meantime, the EC has launched a second phase inquiry into the acquisition of Deutsche Telekom's T-Mobile Austria of competitor Tele.Ring.

Member State Approvals

In Estonia, Elion Entreprises acquisition of MicroLink has been approved subject to divesting MicroLink's broadband access network.

In Finland, Elisa's acquisition of Saunalahti Group plc, also got a green light subject to divesting the SaunaVerrko broadband network in areas including Tampere, Jyväskylä and Riihimäki.

> "The acquisition has created Europe's number two mobile operator."

In Ireland, a condition imposed on Liberty Global's takeover of NTL Ireland would mean a special holding company would run the merged entity with limits on who can sit on the board; while the fixed line operator Eircom's acquisition of mobile operator Meteor Mobile Communications, has been approved subject to conditions designed to address cross-subsidisation concerns - but Swisscom's bid for Eircom looks scuppered by the Swiss government's ban on the telco making overseas investments.

In the Netherlands, the Dutch government halved its stake to 8 per cent, in leading telco Koninklijke KPN and has said it would dispose of its "special share" before the end of the year. Earlier this year the competition authority (NMa) cleared KPN's acquisition of competitor Telfort.

In the UK, approval has come through for Cable & Wireless plc's acquisition of the Energis Group's UK-wide fibre-optic network.

MEDIA DECISION SENDS RIPPLES

4% interest can lead to "material influence"

An OFT decision has wide repercussions for many restructuring and merger plans in the UK. The acquisition by Creative Broadcast Services Limited (CBSL) of BBC Broadcast Ltd was cleared on November 2. BBC Broadcast provides broadcast content on different media platforms. CBSL is owned by Australia's Macquarie Capital Alliance Group and Macquarie Bank Limited (MBL). However, merger analysis only arose because the OFT claimed MBL had the ability "materially to influence" the policy of a competitor, Arqiva (formerly ntl Broadcast), as well as CBSL. MBL directly owned only 4.3% of the shares in Arqiva. The OFT said that, a number of cross-share holdings, a management services agreement, common directorships and the joint appointment of one board director was sufficient to give MBL "material influence" over Arqiva.

THE GAMING SECTOR

National News

All bets are off for the Norwegian Government which is being taken to court by the competition regulator for awarding itself a gaming machine monopoly. This follows the rejection by the the Finish Government of an application from Ladbrokes for an operating licence in Finland. In Germany, judgment has been delayed in the much anticipated decision of its Constitutional Court regarding the provision of betting services by private companies, which is not now expected until early 2006.

In the UK, the OFT has accepted divestment undertakings from Hilton Group, acting through its Ladbroke subsidiary, to acquire the licensed betting office (LBO) business of Jack Brown Limited. Earlier this year, the OFT cleared William Hill in order to clear its acquisition of the LBO business of Stanley. In October, the Mikohn Gaming Corporation/EndX Group transaction, concerning casino management software, was cleared and the OFT has called for comments on the acquisition by Gala Group of Coral Eurobet.

A new Gambling Commission was also established in October along with legislation which introduces a new licensing regime regarded by many as encrouraging new entry in casinos and remote gambling businesses.



NOTABLE FINES & INVESTIGATIONS

Across Europe

Luxury hotels
Six Parisian luxury hotels, where suites cost an average of €6000 a night, have been fined by the French Competition Council (CdlC) for collusion. A four year investigation concluded there had been regular exchanges of price information between the Bristol, the Crillon, the George V, the Meurice, the Plaza Athenee and the Ritz.

French telcos
France's three top mobile phone operators – Orange France, SFR and Bouygues Telecom – have been fined a record €534 million for collusion. According to the CdlC the operators struck a secret deal not to compete too aggressively for market share between 2000 and 2002. The investigation was prompted by consumer group UFC Que Choisir. Earlier this year, France Telecom was also hit with an €80 million fine for denying rival operator Neuf Telecom access to its local loop network.

German advertising
The German Federal Cartel Office (FCO) is investigating the intended acquisition of the TV group ProSiebenSat.1 by Axel Springer. The FCO provisionally found existing dominant positions will be strengthened. It regards ProSiebenSat.1 as part of a duopoly in TV advertising and Axel Springer as dominant in street trading newspapers and newspaper advertising.

Scandinavian banks
Local banks are the subject of a joint inquiry by Scandinavia's competition authorities, scheduled to last until mid-2006. The study will investigate why local banks still predominate in Scandinavia to the exclusion of overseas rivals and internet banks. It will consider issues including whether rules on payment systems are creating barriers to new market entry.

Czech and Slovak abuse
The Czech and Slovak Republics have begun implementing EC law by focusing on abuse of dominance cases against their incumbent telcos. The Czech authority imposed its largest fine of CZK 205 million (€7 million) on Cesky Telcom for illegal bundling and Slovak Telcom has been accused of predatory pricing.

Drug price fixed
The UK's increasingly active Competition Appeals Tribunal (CAT) has directed drug manufacturer Genzyme Limited to supply cancer drug Cerezyme to any bona fide provider of homecare services and fixed the maximum price at which it does so. In an earlier judgment, the CAT agreed with the OFT that Genzyme had been engaged in unlawful margin squeeze when supplying homecare providers, although it reduced the fine from £6.8 million to £3 million.

Bid rigging
An investigation into the UK construction industry has led the OFT to uncover bid rigging in contracts worth more than £500 million. This affected more than one thousand contracts in just one region, the East Midlands. The OFT received much of the evidence through it leniency scheme which can provide amnesty for whistleblowers. The OFT has indicated that housing and construction along with healthcare, mass market scams and credit products will be priorities over the coming year and has also promised increasingly to use its new powers to impose criminal sanctions.

CASES TO WATCH

In the Courts

Microsoft v Commission
Details were published in September of an appeal brought by Microsoft Corporation challenging a new EC demand that Microsoft make available certain source code to third parties. Microsoft says this overreaches the EC's already contested 2004 decision imposing interoperability requirements for Windows software and, amongst other violations of its rights, will hand trade secrets to non-licensees and is an unlawful deprivation of property rights.

AstraZeneca v Commission
Details of an action brought by AstraZeneca plc before the CFI have also been published. AstraZeneca is challenging an EC decision in which it was fined €60 million for the alleged abuse of misusing the patent system and the procedures for marketing pharmaceuticals to delay market entry for generic competitors to its ulcer drug Losec.

Endesa v Commission
Endesa has appealed the EC's November ruling confirming Spanish jurisdiction over Gas Natural's hostile bid. The proper calculation of Endesa's turnover has been fiercely disputed. The EC ruling was based on the "two-thirds" rule (see p. 1 story) and confirmed that Endesa's legally audited accounts for 2004 are the proper measure of turnover, even if accounting standards have since changed and although certain other factors may be taken into account to measure financial strength.

Mastercard v OFT
On 10 November 2005, the UK's Competition Appeal Tribunal published notices of appeals lodged by MasterCard UK Members Forum, MasterCard International and MasterCard Europe, and by The Royal Bank of Scotland Group. The appellants are challenging the OFT's finding that the collective fee agreement between members of MasterCard UK Member Forum Limited relating to multilateral interchange fees infringed competition law.

CASE CLOSED

Energias de Portugal v Commission

In September 2005, the European Court of First Instance (CFI) rejected a "fast track" appeal against the EC's decision prohibiting the acquisition of joint control of Gas de Portugal SGPS (GDP), the incumbent Portuguese gas supplier, by Energias de Portugal (EDP), the incumbent Portuguese electricity supplier, and ENI the Italian energy company. The Court held the Commission had erred in finding the transaction was likely to strengthen GDP's dominant position on a number of gas markets in Portugal because its legislated monopoly (protected until 2007) could not be "further strengthened". However, the CFI considered that this mistake did not effect the assessment of the Portuguese electricity sector. It did clarify that the EC has the burden to demonstrate a concentration is illegal, even after commitments are given, and it is not the parties who have to prove that proposed commitments eliminate the competitive concerns identified.



LATEST ON NATIONAL MERGER RULES

FIRSTS IN DAMAGES

The High Court in Denmark has ruled that decisions by the competition authorities are binding proof of liability that will ground a subsequent claim for damages, unless appealed. The case concerned an action for damages by a publisher of free newspapers against one of its competitors. The Court ruled for the claimant stating that the prior finding of abuse of dominance could not be contested.

A law in France permitting class actions has been foreshadowed and a working group will present its preliminary report before the end of the year. The French government will choose between a US-style class action, that automatically covers all potential victims unless they opt out, or a more limited reform by which victims who wish to join a class action will need to opt in.

Permitting class actions would take the French a step further than in Germany, where earlier this year legislation came into force allowing competitors and other market participants to claim for damages for anticompetitive conduct.

Crehan v Inntrepeneur, the landmark UK case awarding damages for a beer tie, is now to be heard in the House of Lords early 2006. The UK's Court of Appeal ruled last May that the tie breached EC competition law. If upheld, the case opens the door to a large number of actions.

European Rule Changes

Austria
Extra-territorial reach questioned: The reach of Austrian merger control over corporate transactions outside Austria is being challenged in the Cartel Court of Appeals in a case involving Erste Bank Group. The transactions (implemented a number of years ago) related to acquisitions of banks located in the Czech and Slovak Republics, Hungary and Croatia. The ruling will affect foreign transactions where one undertaking has no Austrian turnover.

New merger filing thresholds: Concern about extra-territorial reach may have contributed to changes in the law Austrian thresholds that trigger mandatory pre-merger notification. Effective from January 1, 2006, the most significant change is the requirement that the combined turnover of the parties in Austria must exceed €30 million (increased from €15 million).

Belgium
New merger filing thresholds: Belgian merger notification thresholds have been increased so they are not triggered unless the parties' combined turnover in Belgium exceeds €100 million and each of at least two of the parties exceeds €40 million in Belgium.

Estonia
New merger filing thresholds: Significant amendments are planned for the Estonian Competition Act in 2006. Amongst other changes, a new requirement will be that two merging parties each have turnover exceeding EEK50 million (approx.€3.2 million) in Estonia.

Greece
New merger filing thresholds: Greek rules requiring suspension of a deal can now only be triggered when each of at least two participating undertakings has Greek turnover exceeding €15 million, but post-merger filings may be required. The test that required pre-merger filing where the parties exceeded a national market share of 35% has been abolished.

Germany
Fine imposed for giving false information: The FCO has for the first time fined the German subsidiary of a US group for providing false information in a merger notification. As the violation was committed in 2004, the amount of the administrative fine was set on the basis of the law then in force. The Office noted that had they applied the new law, the maximum fine could have been €1 million.

Norway
Fine imposed for failure to notify a merger: For the first time since the new Norwegian Competition Act came into force on 1 May 2004, a fine has been imposed for failure to notify a concentration. In Norway, companies must file no later than when a final merger agreement "has been concluded" or control acquired. As this was the first case, only a moderate fine (€1,250) was imposed.

Sweden
Notification of merger required below the Swedish filing threshold: Danish ferry operator DFDS has been ordered to notify an acquisition although the filing thresholds were not met. Sweden's competition authority said the acquisition of new entrant Cobelfret should have been notified - even though Cobelfret's turnover in Sweden was under the filing threshold of SEK100 million (€10.5 million). The authority said it may require parties to notify a concentration where "special grounds" exist. These include when a new entrant is acquired in a highly concentrated market. The moral in Sweden: check market shares.

Romania
Fines imposed for failure to notify a merger: In September, the Romanian Competition Council fined Procter & Gamble for failure to notify the 2003 takeover of Wella in Romania. Procter & Gamble admitted that the failure to notify was due to an unintentional omission on its part. The parties had mainly been concerned with notifying the European Commission and had failed to assess the Romanian thresholds. The amount of the fine was just €2000 because of co-operation of the parties in establishing the violation.

"The parties had been mainly concerned with notifying the European Commission and had failed to assess the Romanian thresholds."

United Kingdom
Guidance suspended: Until further notice, the OFT has suspended providing confidential guidance in merger cases which had been a hallmark of the UK system's flexibility. It will increase the risks on parties completing transactions without making a formal notification.



MERGER CLEARANCES

EC IN BRIEF

Roaming... An EC website was launched in October listing samples of EU international roaming tariffs of mobile telephone operators, at the same time as it has issued statements of objection to T-Mobile and Vodafone in Germany and to Vodafone and O2 in the UK alleging excessive prices in the provision of wholesale international roaming services.

Football... The prospect of litigation with the FA Premier League has been lessened by an EC draft agreement on bids for live televised football rights. Not all stakeholders believe the agreement goes far enough to open up UK pay-tv.

3G... In September, the EC published conclusions of its inquiry into the provision of sports content over 3G mobile networks. A number of situations were identified that will be reviewed with national competition authorities, with a view to initiating proceedings if necessary.

Car dealers... New rules have come into force that allow car dealers greater freedom to open show rooms outside defined territories, or car makers may face EC fines. The rules apply to passenger cars and light commercial vehicles.

Gambling... An independent report studying on-line and off-line gambling services has been delivered to the EC amidst sensitivity about proposals to reform these sectors. The EC says it is studying the report and will publish it early in 2006.

Waste management... The EC published a paper in September identifying competition issues including lack of choice in the waste management sector. There are four pending decisions before the European Court concerning this sector.

Postal services... A public consultation has been launched by the EC on the future of the EU postal sector. Questionnaires about further reforms are available online.

Merger remedies... An EC study into the effectiveness of its merger remedies has indicated major problems with their design and implementation in a representative sample of cases. The review and consultation on remedies will continue into 2006.



Merger activity in the telco sector has been capped by the bids by NTL Incorporated for Telewest Global Inc., which is being reviewed by the UK regulator, and for Virgin Mobile Holdings (UK) plc

BREAKING NEWS
KEY CASES



Stop Press

General Electric/Honeywell appeal dismissed
In a ruling handed down on December 14, the European Court of First Instance has upheld the controversial decision bt the EC in 2001 to prohibit the merger between General Electric and Honeywell. The Court said that the EC did make errors in its analysis of vertical and so-called conglomerate effects and will be held to a higher standard if it rejects mergers on these grounds rather than on the basis of direct overlaps between competitors. It emphasised that competition law does not impose penalties on account of an undertaking's size and financial resources alone. The EC has the onus to show that theories of harm to competition are supported by documented or empirical evidence. However, even though aspects of the EC's case were rejected, the Court approved the findings that the merger would have created or strengthened dominance because of an aggregated position in certain markets for large jet engines and corporate jet aircraft and for small marine gas turbines. GE and Honeywell may appeal within a two month period.

National Oilwell Varco merger approved
The decision by the Norwegian competition authority (NCA) to block the merger between National Oilwell and Varco, based in Texas, has been overturned by the country's Ministry of Modernisation. The NCA had insisted that National Oilwell divest all its holdings in Norway, despite the fact the merger had been approved in the US, Canada, Mexico, Brazil and Russia. The Ministry has reversed this decision and approved the deal unconditionally, saying that the wrong market analysis had been applied to the oil drilling businesses.

Arriva/Barraqueiro merger blocked
Portugal's Competition Authority (AdaC) has blocked its first merger. It has ruled that combining two transport companies, Arriva and Barraqueiro, would have created a "quasi-monopoly" and the remedies proposed were insufficient and offered late.

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