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Ask a question

If you have any questions please contact

Cyrus Mehta, Partner
T +44 (0)20 7524 6497
c.mehta@nabarro.com

Brian Sher, Partner
T +44 (0)20 7524 6453
b.sher@nabarro.com

Rachel Bickler, Managing Associate
T +32 (0) 2 626 07 40
r.bickler@nabarro.com

The EU & Competition team

The team advises on all aspects of UK and EU competition and regulatory law and on related areas, including merger control, anti-dumping, customs and origin legislation, state aid, public procurement and EU rules on the free movement of goods and services.

The EU & Competition team

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On 25 June 2009 the Office of Communications (Ofcom) published its consultation report on the proposed remedies for the pay-TV market. The report signals Ofcom's intention to force BSkyB to offer its premium content to other pay-TV providers. Ofcom's initial investigation was launched in March 2007 after complaints from BT, Top Up TV, Virgin Media and Setanta (who recently entered administration) that the market was operating ineffectively. Although these types of 'must-offer' requirements are rarely imposed, Ofcom was clearly concerned that BSkyB's use of its position as the dominant wholesaler of premium content channels would continue to limit access to content to rivals, in favour of BSkyB's own business in the downstream retail market.

Temporary measures imposed on Stagecoach pending final decision

The Competition Commission (CC) has issued written directions to prevent further action being taken to complete Stagecoach Bus Holdings Limited's

Businesses to be run separately pending final decision

(Stagecoach) acquisition of Eastbourne Buses Limited (Eastbourne) and Cavendish Motor Services (Cavendish) until such time as the CC has made a final decision. The CC is currently investigating whether the acquisitions are likely to result in a substantial lessening of competition on the affected regional bus routes. In the meantime, the CC wants to ensure that the businesses are run separately. In May 2009, the CC required Stagecoach to appoint a monitoring trustee. The new directions issued on 29 June 2009, require Stagecoach to change the current management arrangements of the merged structure of Eastbourne and Cavendish, which will allow the monitoring trustee to

Stagecoach undertakings

To see the CC's press release regarding the direction, [click here](#).

check that the businesses continue to be run independently until a conclusion is reached on whether to allow the mergers.

Ryanair intervenes in BAA appeal

On 6 July 2009, the Competition Appeal Tribunal (CAT) granted Ryanair permission to intervene, on the side of the Competition Commission (CC), against BAA's appeal of the CC's decision in its BAA Airports market investigation. In December 2008, the CC ordered the sale of Gatwick, Stansted and either Glasgow or Edinburgh airports. The CAT was not swayed by arguments by BAA's legal counsel that if Ryanair were allowed to intervene it would effectively be an "officious bystander". The CAT considered Ryanair to have a sufficient legal interest in the matter since it is BAA's main customer at Stansted and a major customer of other BAA airports. A hearing for BAA's appeal has been set for 19 October 2009.

Ryanair demonstrates sufficient interest to intervene

Consultation on Payment Protection Insurance remedies

The Competition Commission (CC) has opened a consultation into its draft order of intended remedies for the Payment Protection Insurance (PPI) market. The draft order features a package of measures to bring competition into the market, such as the prohibition of selling PPI during the sale of a credit product and for seven days afterwards, and the banning of bundling PPI into packages. The draft order is already proving controversial. Barclays has announced it is taking an appeal against certain aspects of the draft order and a hearing before the Competition Appeal Tribunal CAT is set to take place between 7 and 10 September 2009.

Barclays intends to appeal CC's proposed PPI order

Final undertakings for Project Kangaroo

The Competition Commission (CC) has accepted final undertakings which bring an end to Project Kangaroo, a proposed joint venture between Channel 4 Television Corporation, ITV plc and the British Broadcasting Corporation to provide video on demand services to the UK market. The CC published its final report on 4 February 2009 and concluded that the joint venture would have substantially lessened competition in the UK video on demand market.

Project Kangaroo to end

EU COMPETITION

Dawn raids in glass sector

On 2 July 2009 the European Commission (Commission) confirmed that it had conducted unannounced inspections on industrial premises of glassmaker companies in March 2009. The inspection followed evidence leading the Commission to suspect that there has been a breach of Article 81(1) EC Treaty by companies operating in the special glass sector. Special glass is used to make thin flat monitors in products such as: mobile phones; televisions; computers; digital watches; and pocket calculators. The investigation could take a number of years.

Recent decisions in the glass sector

This investigation follows a number of recent decisions in the glass sector for anti-competitive behaviour:

- November 2008 – Commission fined car glass producers €1.38 billion for a market sharing cartel; and
- November 2007 – Commission fined flat glass producers €486.9 million for a price fixing cartel.

First fines in energy sector exceed €1 billion

The European Commission (Commission) has imposed fines each totalling €553 million on E.ON AG (Germany) and GDF Suez AG (France) – the leading suppliers of natural gas in Germany and France. The Commission found that the companies had colluded not to sell gas transported to Russia into each other's home market. The size of the fines reflects the fact that it concerned the "hard-core" offence of market sharing and that the agreement had endured long after the EU gas markets were liberalised. It also takes into account the size of the entities and the volumes of gas affected. The arrangements began in 1975 – subsidiaries of what are now E.ON and GDF Suez constructed the MEGAL gas pipeline between Southern Germany and France. At the time, the companies agreed not to sell any gas into each others' home territory. The Commission held that the market sharing agreement was maintained beyond liberalisation in 2000, and were only terminated in 2005. The parties concerned argue that the arrangement was ineffective from an earlier date, and it seems likely that the decision will be appealed.

Commissions investigations into Energy markets

In the late 1990's the gas and electricity markets were liberalised. The gas markets were, therefore, opened up for cross-border competition in 2000.

Since its 2006 inquiry into the energy sector, the Commission has launched a number of investigations into the gas and electricity markets across the EU.

This is the first fine to be imposed for breach of the antitrust rules in the energy sector since the sector was opened up to cross-border competition.

Large fines reflect the gravity and duration of the breach

Commission to intensify pharmaceutical sector scrutiny

On 8 July 2009, the European Commission (Commission) released its final report into the European pharmaceutical sector. The sector inquiry began in January 2008, having been prompted by the Commission's concerns over the competitive relationship between originators of drugs and producers of generic drugs. The inquiry covers all 27 Member States from 2000 to 2007 and relates exclusively to prescription drugs for humans. The final report confirms some of the findings of the preliminary report, notably a number of specific behaviours which distort competition within the sector, such as 'defensive patenting' strategies, designed to exclude competitors and delaying the approval of competitor drugs in order to slow down their entry into the market. However, unlike the preliminary findings, the Commission has recognised that although company practices may play a role, some of the problems in the market arise from deficiencies in the regulatory regime (notably the patent system). Following the sector inquiry, it is likely that the practices of pharmaceutical companies, both originating and generic drug manufacturers, will come under close scrutiny by the Commission and national competition authorities.

On the same day the report was published, the Commission announced that it had opened formal proceedings against Les Laboratoires Servier and a number of generic pharmaceutical companies (including Lupin Limited, Matrix Laboratories Limited and Teva UK Limited) for suspected breaches of Articles 81 and 82 EC Treaty.

Company conduct and regulatory shortcomings blamed

Pharmaceutical Sector Inquiry Report

To read the Commission's final report on its competition inquiry into the pharmaceutical sector, [click here](#).

Proceedings against Les Laboratoires Servier and others

To read the Commission's press release regarding the investigation, [click here](#).

CFI reduces Peugeot fine by €5 million

The Court of First Instance (CFI) dismissed most of Automobiles Peugeot SA and Peugeot Nederland NV's (Peugeot) appeal at a hearing on 9 July 2009. However, the Court did reduce Peugeot's fine of €49.5 million by 10%, to €44.55 million. The fine was originally imposed by the European Commission in 2005, when Peugeot and its Dutch import subsidiary were found to have devised an anti-competitive strategy to hinder car dealers from selling Peugeot cars in other Member States, in order to maintain prices. In its appeal, Peugeot argued that the Commission had incorrectly assessed the anti-competitive effects of its conduct. It argued that the reduction in Peugeot's exports was a consequence of: abnormally high exports in the preceding years following the launch of particularly attractive new vehicle models; and the reduction of price differences between the Netherlands and other EU countries. The CFI considered that the Commission had been correct in concluding that the breach was serious, even though Peugeot had not introduced an outright ban on exports. However, the CFI supported Peugeot's claim that the Commission had not sufficiently considered the role of diminishing price differentials and reduced the level of Peugeot's fine accordingly.

Court finds actions anti-competitive but effects not as severe as Commission claimed

GlaxoSmithKline appeal should be dismissed

European Advocate Generale Trstenjak (AG) has given her opinion to the European Court of Justice (ECJ) relating to an appeal brought by GlaxoSmithKline (GSK) against a 2001 decision banning GSK from charging different prices for drugs to Spanish distributors. GSK charged lower prices to distributors who sold the products in Spain and higher prices where the eventual destination of the products was elsewhere in the EU. The Court of First Instance (CFI) previously held that GSK's 'dual pricing policy' had the effect of restricting competition, although the CFI considered that the Commission had been wrong in considering that this had been the intention. The AG's Opinion ultimately recommends that the appeal should be dismissed. However, the AG disagreed with the CFI's view that the sale strategy did not have a restrictive object. She was also critical of the CFI's assessment under Article 81(3) EC Treaty of the justifications put forward by GSK of the benefits of their pricing strategy. The AG's Opinion supports the CFI's ultimate findings, if not the reasoning. It remains to be seen whether the ECJ will concur with the reasoning in the AG Opinion.

Advocate-General critical of aspects of CFI reasoning but concurs with the result

CFI confirms Commission's decision on the alloy surcharge cartel

In January 1998, the European Commission (Commission) found six European steel companies had acted in a manner to restrict competition regarding the calculation of an alloy surcharge applying to stainless steel. The infringement was based on Article 65 of the European Coal and Steel Community (ECSC) Treaty. The Commission fined ThyssenKrupp Stainless AG (TKS) of Germany for its contribution to the cartel behaviour. However, the ECSC expired in 2002. In 2006, the Commission re-adopted its 1998 decision, following a series of hearings, imposing a fine of €3,168,000 on TKS. TKS appealed to the Court of First Instance (CFI) on 1 July 2009 (Case T-24/07) who dismissed the appeal in its entirety. Although the ECSC had expired, the actual infringement was committed when it was still in effect. Although there are differences between Article 65 ECSC and Article 81 EC Treaty, to ensure continuity of EU law, the CFI held that the two provisions are entitled to be interpreted in a consistent manner.

Commission entitled to impose a fine despite expiry of the ECSC Treaty

PROCUREMENT

Advocate General Opinion on discriminatory selection criteria

Advocate General Sharpston (AG) issued her Opinion on an infringement action concerning allegations of discrimination in a Greek utilities contract on 9 July 2009. The case concerned a tender for design services for the development of a railway project on the outskirts of Athens. In 2004, a complaint was made by a non-Greek firm to the European Commission (Commission) that one of the selection criterion used by the contracting authority prevented foreign firms from participation. The contested requirement contained a provision which limited participation from foreign firms that had taken part in a competition with the same contracting entity in a tender which had a classification different from the current one. The Commission took an infringement action before the European Court of Justice. The AG took the view that the contested clause was inherently likely to have a dissuasive effect on bidders from other Member States, and that this was a breach of the EU procurement rules governing utilities.

Selection criteria acted as deterrent to foreign bidders

STATE AID

UK carbon dioxide reduction scheme approved

The European Commission (Commission) has given their support to a scheme proposed by the UK to help reduce carbon dioxide (CO₂) emissions. Under the Carbon Reduction Commitment (CRC) scheme, UK companies will be given incentives for changing their polluting behaviour. The CRC will apply only to non-energy intensive sectors that are not covered by the EU Emissions Trading System. Carbon allowances will be sold at 'auctions'; the companies environmental performances will then be ranked in a league table. Auction revenue will be paid back to those companies at the top of the league table, who have produced the least CO₂ emissions. The Commission approved the scheme under Article 87(3) EC Treaty in light of its incentive effect, major environmental benefits and limited distortion of competition.

Scheme involves State aid but meets environmental criteria

Commission supports UK scheme to reduce road freight transport

On 2 July 2009, the European Commission (Commission) made no objections to a new UK scheme aimed at encouraging rail and inland-waterway freight transport. The Mode Shift Revenue Support (MSRS) scheme has a budget of £18 million per year in England, and £9 million in Scotland. It is designed to provide financial incentives to shift freight from road to rail and inland-waterway transport where this provides environmental benefit. The MSRS will last until 2014.

Shifting freight from road to rail and waterways meets "green" objectives

Hungarian mortgage support scheme approved

Due to the current economic crisis, the European Commission (Commission) has approved a Hungarian temporary aid scheme aimed at helping homeowners repay their mortgages. The Hungarian Government will guarantee bridging loans for up to two years for homeowners at risk of being unable to service their payments, due to redundancy or other temporary loss of income. The scheme is only open to mortgages entered into before 30 June 2009, and will close on 30 June 2010. The main beneficiaries of the scheme are homeowners, but the measure would be State aid, as it indirectly supports banks participating in the scheme. The Commission allowed the aid under Article 87(2)(a) EC Treaty, as it has a social nature, and is granted to individuals affected by the economic crisis, on a non-discriminatory basis.

Temporary state guarantee for bridging loans permitted where householders can't make mortgage payments

Newquay Cornwall Airport plans endorsed

Newquay Cornwall Airport is to be granted £24.3 million in UK public funds and £22.5 million from the European Regional Development Fund for redevelopment, following the European Commission's (Commission) decision on 2 July 2009. Newquay Cornwall Airport is currently a military base and will be turned into a fully functional civilian passenger airport. The Commission decided that the aid was necessary, proportionate, would improve the development of the Cornwall region, had medium-term infrastructure prospects and is non-discriminatory towards potential users.

Infrastructure aid approved for Newquay airport

Greece fined for failure to recover illegal aid to Olympic Airways

On 7 July 2009 the European Court of Justice (ECJ) fined the Hellenic Republic of Greece (Greece) a lump sum of €2 million and €16,000 per day, for failure to recover the illegal State aid that it granted to Olympic Airways (Case C415/03). The fines were imposed in accordance with Article 228 EC Treaty. The daily fine will start from one month after the day of the judgment until the infringement ceases, which is a grace period to allow Greece time to demonstrate that it has made recovery. In 2002, the European Commission decided that restructuring aid granted to Olympic Airways was incompatible with the EC State aid rules. Greece should have recovered €41 million of aid which so far it has only partially recovered. The European Commission took a further case to the ECJ to enforce the infringement decision by imposing penalties on Greece.

Penalties imposed for not complying with ECJ Judgment demanding recovery of illegal aid

Fines on Member States

Article 228 of the EC Treaty enables the ECJ to impose fines on Member States for failing to comply with judgements.

London

Lacon House,
84 Theobald's Road,
London WC1X 8RW
T +44 (0)20 7524 6000
F +44 (0)20 7524 6524

Sheffield

1 South Quay,
Victoria Quays,
Sheffield S2 5SY
T +44 (0)114 279 4000
F +44 (0)114 278 6123

Brussels

209A Avenue Louise,
1050 Brussels, Belgium
T +32 2 626 0740
F +32 2 626 0749

Alliance firms

France

August & Debouzy
Gilles August
T +33 (0)1 45 61 51 80
www.august-debouzy.com

Germany

GSK Stockmann + Kollegen
Rainer Stockmann
T +49 (30) 20 39 07 - 0
www.gsk.de

Italy

Nunziante Magrone
Gianmatteo Nunziante
T +39 06 695181
www.nunziantemagrone.it

Nabarro LLP

Registered office: Lacon House, 84 Theobald's Road, London, WC1X 8RW.

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