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European Antitrust & Competition

Competition Bulletin
26 June 2012

EU Competition

EU – Phase I merger notifications

Companies	Sector	Further Information
Banco Santander/Kredyt Bank/Zagiel	Financial and insurance activities.	Click here
CGI/Logica	Computer programming, consultancy and related activities.	Click here
Lagardère/Bouygues/JV	Advertising and market research.	Click here
Platinum Equity/Caterpillar Logistics Services	Platinum: merger, acquisition and operation of companies providing services and solutions to customers in a broad range of businesses including IT, telecommunications, logistics, metals, manufacturing and distribution. Caterpillar Logistics Services: provision of contract logistics.	Click here
Cisco Systems/NDS Group	Cisco: development and sale of IP-based networking equipment. NDS: supplier of digital technology and services to digital pay-TV service providers and content providers.	Click here
Faurecia/PSA/Plastal SAS/ Plastal Spain SA	Faurecia: engineering and production of automobile equipment, in particular, vehicle seating, interior systems, exterior systems, and exhaust systems. Plastal: engineering and production of automotive equipment, in particular, bumpers and other thermoplastic engineering plastic components.	Click here
KGHM/Tauron Wytwarzanie/JV	Not yet specified.	Click here
Silver Lake/Target	Silver Lake: global investment firm focused on technology, technology-enabled and related growth industries. Global Blue: international provider of sales tax refund and related services.	Click here

Companies	Sector	Further Information
L Capital/Paladin/Cigierre-Compagnia Generale Ristorazione	L Capital: private equity company investing in companies in various sectors. Paladin: holding company with controlling interest in companies in various sectors. CGR: development and management of multiethnic restaurants formats located mainly inside malls.	Click here
Tyco Flow Control International/Pentair	Tyco Flow Control International: manufacture of flow control and thermal management products. Pentair: manufacture of water and fluid processing products and enclosures for electronics and electrical equipment.	Click here
UPS/TNT Express	UPS: provider of logistics and specialised transportation and logistics services. TNT Express: logistics.	Click here
ARM/Giesecke & Devrient/Gemalto	IT solutions.	Click here
Nuvia/Coor/JV	Nuvia: design, build, finance and management of facilities in concessions and construction. Coor: private equity company engaged in provision of investment advice and services to investment funds.	Click here
Tereos/Wilmar/JV	Transformation of wheat into wheat gluten powder, pure native starch, glucose syrup, isoglucose, starch derivative and bio-feed.	Click here

EU – Key merger clearances

Companies	Sector	Further Information
Ericsson/Technicolor Broadcasting Services	Ericsson: manufacture of telecommunications equipment and related services to mobile and fixed network operators; and provision of broadcasting services. Technicolor: technology services and systems and support for media, entertainment and telecommunications companies.	Click here
Tognum/TMH	Tognum: development, design, manufacture, supply and service of diesel engines and complete propulsion systems for various applications. TMH: business of diesel engine manufacturing.	Click here
Samsung Electronics/Samsung Mobile Display	Manufacture of consumer electronics.	Click here
KIB/BDMI/Bidmanagement	Other software publishing.	Click here

Companies	Sector	Further Information
Aegon/Liberbank/Liberbank Vida	Aegon: asset management, and production and distribution of insurance, pension and related products. Liberbank: banking operations and insurance distribution. Liberbank Vida: life insurance.	Click here
The Klesch Group/Arkema's Vinyl Products Business	Klesch: oil refinement and aluminium. Arkema's Vinyl Products Business: production of chlorine, chlorinated derivatives, caustic soda, polyvinyl chloride (PVC), pipes, compounds and profiles.	Click here
Vitol/AtlasInvest/Petroplus Marketing	Vitol: trading of various commodities and financial instruments, particularly in the oil and gas sector; ownership and operation of storage terminals; and exploration and production activities in the oil and gas sector. AtlasInvest: private investment, primarily in exploration, production and operation of oil and gas. PetroPlus Marketing: ownership of a refinery and marketing services.	Click here

EU Developments

Annual Report on Competition Policy: European Commission publishes 2011 Annual Report on Competition Policy and speech by Joaquín Almunia On 19 June 2012, the Commission published the 2011 Annual Report on Competition Policy, and a speech by Almunia, Vice President of the Commission responsible for Competition Policy, on his presentation of the Report to the European Parliament Economic and Monetary Affairs Committee. In his speech, Almunia considered three areas which he believes represent the breadth of the Commission's action in the competition field: (1) financial services – the Commission has been very active in this sector, having: extended the temporary State aid regime for banks into 2012; investigated antitrust cases against Standard & Poor's, Thomson Reuters, MasterCard amongst other; blocked the Deutsche Börse/NYSE Euronext merger; and opened an investigation into the operations of the European Payments Council; (2) food – in this sector, the Commission has had a lot of involvement in reviewing some transnational mergers such as its conditional approval of Südzucker's acquisition of ED&F MAN; and (3) State aid – in 2011, the Commission approved the reform of State aid rules on services of general economic interest and the first case analysed under the new rules was decided in March 2012 concerning the UK Post Office; and has also worked hard on the State aid modernisation package. The Annual Report and accompanying Staff Working Paper consider these three areas and also expand on recent developments in other industry sectors, including the aviation, network industries, R&D, energy, environment, information & communication technologies and pharmaceuticals sectors. Read Almunia's speech. Read the Annual Report. Read the Staff Working Paper.

Restructuring speech: Speech by Joaquín Almunia on competition policy in times of restructuring On 22 June 2012, Almunia, Vice President of the European Commission responsible for Competition Policy gave a speech on competition policy in times of restructuring. He considered the challenges that the EU has been facing over the past weeks and months and how these challenges are shaped by the urgent need for economic restructuring and growth in Europe, the rapid globalisation of economic activity, and the fast evolving technological environment. He began his speech by emphasising the fundamental premise of competition policy: markets produce the best economic outcome in terms of quality, price and innovation by having a customer-driven process of selection. He discussed the State aid modernisation initiative; the main objectives being to help governments spend more wisely to aid recovery, boost growth, keep priorities in order, and mitigate the social effects of the crisis. He stressed the importance of competition policy being enforced to make sure that the fittest companies which serve the economy better are the ones to survive, in particular, the Commission has focused on attempts to distort competition in the energy, telecommunication and transport sectors, and will continue to do so. The Commission is also currently investigating abuses by investment banks, market-information providers and payment systems. He discussed the EU's merger control regime and said that the Commission take productive efficiencies into account but cannot accept efficiencies where benefits are kept as private profits and not transmitted to the economy in terms of pricing or innovation. In terms of innovation, he also considered the importance of looking at IP rights and ensuring standardisation processes are not being used by players to exclude competitors. At the end, he discussed how the Commission must work at a simplification exercise to simplify procedures and shorten certain procedures (such as pre-notification). Read more.

Deustche Börse appeal: Deutsche Börse appeals against European Commission decision to block its merger with NYSE Euronext On 16 June 2012, details were published of an appeal lodged by Deutsche Börse against the Commission's decision to prohibit its proposed merger with NYSE Euronext. The Commission was concerned that the merger would result in the establishment of a quasi-monopoly in the area of European financial derivatives traded globally on exchanges. Deutsche Börse claims that the Commission had failed to properly assess the horizontal competitive restraints which the parties are subject to, that its assessment of efficiencies was vitiated by manifest errors and not supported by consistent evidence, and it had failed to properly assess the remedies offered by the two parties. Read more.

E.ON case for obstructing Commission inspection: Advocate General opinion on E.ON Energie's appeal against fine imposed for breaking a seal On 21 June 2012, Advocate General Bot gave an opinion on E.ON's appeal against a General Court judgment which upheld the European Commission's decision to fine E.ON €38m for breaking a seal during a Commission investigation. On 29 and 30 May 2006, Commission officials carried out unannounced inspections (so-called dawn raids) at the premises of energy companies in Germany, including E.ON. During their inspection at E.ON, officials placed a seal on an office door which they locked to secure documents with the aim of returning to inspect these documents later. On the second day of its inspection, the Commission found the seal had been broken. E.ON denied breaking the seal and came up with a number of explanations for why it had broken (e.g. the seal was outdated or not fixed properly). E.ON put forward six pleas, of which the Advocate General agreed with the General Court's decision to reject five pleas, and recommended the ECJ to reject them. However, the Advocate General disagreed with the General Court on E.ON's final plea where E.ON alleged that the General Court failed to adopt the principle of proportionality in calculating the level of the fine, and had failed to regard mitigating factors. In particular, the Advocate General found that the General Court did not carry out a proper assessment of the level of fine imposed on E.ON, and there was no clear-cut calculation of the fine imposed on E.ON. In addition, the General Court failed to take into consideration the mitigating factor that E.ON's act was one of negligence, not intention. As a result, the Advocate General recommended the ECJ to uphold this final plea, thereby annulling the decision and referring it back to the General Court for a proper calculation of E.ON's fine. Read more.

Telecoms report: European Commission publishes 2011 report on telecommunication markets and regulatory developments On 18 June 2012, the Commission published a report on the current state of the electronic communications markets in the EU and on the implementation of the EU regulatory framework. The report outlines a number of key trends and achievements in this sector and assesses the progress towards achieving a single European electronic communications market. Greater data consumption and a shift to mobile technologies (e.g. smartphones) and mobile services (e.g. 3G internet, webmail) are the most significant trends in the information & communications technologies (ICT) sector which now accounts for 6% of the EU GDP. Positive developments include: broadband being almost fully accessible in Europe, with 95% of Europeans having access to a fixed broadband connection; consumers and businesses moving to mobile, with Mobile Internet take-up growing to 62% last year; 68% of Europeans regularly use the Internet; and eGovernment helping maintain quality public services in cash-strapped economies such as Greece, Portugal, Ireland and Czech Republic. However, the Commission is concerned about the following facts: 50% of European employees do not have sufficient ICT skills to help them find a new job; online shopping is still a national activity; SMEs generally do not shop nor sell online which limits their export and revenue potential; public spending is below the 6% annual growth needed to double public investment by 2020; commercial research investments are falling; and telecoms companies continue to overcharge consumers with mobile roaming prices. Read more.

Telecoms infringement case: European Commission sends Estonia reasoned opinion in telecoms infringement case The Commission has sent Estonia a formal request to comply with EU telecoms rules which require a clear separation between bodies regulating telecoms markets and those providing telecoms services. Under these rules, national authorities which exercise regulatory tasks cannot simultaneously own or control telecoms companies. This separation is necessary to ensure impartiality of national telecoms regulators, to guarantee fair regulation for consumers and businesses, and to maintain competition. In September 2011, the Commission opened infringement proceedings against Estonia for not respecting the principle of separation. In Estonia, the Ministry of Economic Affairs and Communications manages radio frequencies, numbering resources and provision of universal services, while controlling state-owned Levira Ltd, which provides telecoms services including broadcasting and wireless broadband access. The formal request the Commission has made takes the form of a "reasoned opinion" giving Estonia two months to inform the Commission of measures it has taken to comply with EU rules. If it fails to do so, the Commission can refer the case to the ECJ. Read more.

UK Competition

Financial services sector speech: Speech by Clive Maxwell on competition in the financial services sector On 21 June 2012, the OFT published a speech by Maxwell, the new Executive Director of the OFT, on competition in the financial services sector. In his speech, he emphasised the importance of the financial markets in the functioning of our economy, and explained how problems in this sector could lead to less efficient resource allocation, poor management of risk, less economic activity, and significant consumer detriment due to the large size of financial markets. He stated there are a number of problems in this area, in particular, there has been a lack of "customer focus" on the part of providers. Customers are often badly informed about products and services, and in certain instances, banks have been found to exploit customers, e.g. many banks mis-sold payment protection insurance and are now paying out large sums in compensation. As a result, Maxwell calls on a number of ways to tackle these problems including: most importantly change on the part of the banks' behaviours; intervention by regulators such as the OFT and government; and a change in approach by the new Financial Conduct Authority (FCA) shifting away from the Financial Services Authority's (FSA) current approach of talking to management and looking at systems and controls, to a new approach where the FCA will go further to see what customers really experience and with a greater emphasis on firms improving the way they design and sell products. Maxwell believes that banks will feel pressure from the OFT and FCA, as well as new competitors such as Metro Bank and Virgin Money. He went on to discuss what a well-functioning retail banking market would look like and the challenge for banks to change. Finally, the OFT will be: shortly launching a review of the personal current account market; working more closely with the FSA and FCA; and focusing on areas such as SME banking. However, if the OFT finds that the concentrated market structure of UK banking is a problem, it will consider a reference to the Competition Commission. Read more.

Healthcare market: Competition Commission issues statement on private healthcare market On 22 June 2012, the Competition Commission published its issues statement as part of its market investigation into the private healthcare market. It sets out its proposed approach to market definition and how it intends to analyse competition in the relevant market. In particular, the Competition Commission has identified the following seven theories of harm, to present its early thinking on how these issues stand independently and how they might fit together, to help frame its investigation: (1) market power of hospital operators in certain local areas; (2) market power of individual consultants and/or consultant groups in certain local areas; (3) market power of hospital operators during national negotiations with insurers; (4) buyer power of insurers over individuals consultants; (5) barriers to entry at different levels; (6) limited information availability; and (7) vertical effects, e.g. BUPA operates as both an insurer and as the owner of London's Cromwell hospital. The Competition Commission will be looking to identify any detrimental effects on patients such as higher prices; privately-funded healthcare services being less suited to patients' needs; reduced service quality; reduced choices; and reduced innovation. The Competition Commission has provisionally concluded that there is an adverse effect on competition in this sector and will consider customer benefits when considering remedies. The Competition Commission is inviting evidence by 20 July 2012. Read more.

Electricity price regulation: The Office of Gas and Electricity Markets announces UK Power Network's desire to have price regulation lifted on competition connection activities in six market segments On 22 June 2012, Ofgem announced that it has received a Competition Notice from UK Power Network in relation to three licensed distributors – Eastern Power Networks plc, London Power Networks plc and South Eastern Power Networks plc. The Competition Notice serves as an application by UK Power Network to have price regulation lifted on competitive connection activities in six market segments: metered low voltage work; metered high voltage work; metered high voltage and extra high voltage work; distributed generation high voltage and extra high voltage work; unmetered local authority work; and unmetered private finance initiative work. Since 1 October 2010, in order to stimulate competition, distribution network operators ("DNOs") have been permitted to earn a regulated margin of 4% above cost on connection charges in certain market segments where competition is considered viable. DNOs can also serve a Competition Notice if they wish to charge an unregulated margin, and this will be allowed if DNOs can demonstrate that they have passed a Legal Requirements Test and a Competition Test. Under the Competition Test, DNOs must demonstrate that the market for electricity connections in each relevant market segment is working effectively for customers. Ofgem is currently preparing a consultation document on UK Power Network's Competition Notice, which it intends to publish by mid-July 2012. It will only lift price regulation if it considers that effective competition exists and consumers' interests will be protected. Read more.

Groceries market investigation: Office of Fair Trading announces implementation date for its duties under Groceries Market Investigation (Controlled Land) Order On 20 June 2012, the OFT published an announcement declaring that the implementation date of the Groceries Market Investigation (Controlled Land) Order 2010 shall be 1 July 2012. This means that the OFT is now ready to assume its duties under the Order to examine certain restrictive covenants and exclusivity arrangements benefiting the designated seven Large Grocery Retailers (Asda, Co-operative Group, Marks & Spencer, Wm Morrison Supermarket, J Sainsbury, Tesco and Waitrose) and which protect these supermarkets from local competition from rival grocery outlets. The OFT will only examine restrictive covenants which were not investigated by the Competition Commission during its groceries market investigation and where it receives a request for examination by an owner of land burdened by such a restrictive covenant. Under Article 4 of the Order, a Large Grocery Retailer must use its best endeavours to enter into a deed of release with the owner of the land burdened by the restrictive covenant; and to procure the removal of the restrictive covenant from the relevant charges register or land charges register. Read more.

Sainsbury's/Rontec merger approval: Office of Fair Trading clears J Sainsbury plc's acquisition of petrol stations from Rontec Investments LLP On 19 June 2012, the OFT published the full text of its clearance decision on Sainsbury's proposed acquisition of 18 petrol stations from Rontec. It had announced its decision not to refer this merger to the Competition Commission on 7 June 2012. The OFT identified certain areas where the merging parties were close competitors in relation to the fuel and the retail supply of groceries markets. However, it concluded that there are a sufficient number of competitors to constrain the merged entity in the relevant markets, and it did not expect the transaction to result in a substantial lessening of competition within the UK. Read more.

Business connectivity market review: Office of Communications consults on business connectivity market review On 18 June 2012, Ofcom published a consultation document on its 2011-2012 business connectivity market review. The document focuses on measures to address Ofcom's concerns about the extent of competition in the provision of leased lines in the UK. Leased lines, also known as private circuits, provide dedicated transmission capacity between fixed locations. They play a significant role in business communications; support a variety of applications in the public and private sectors; and are used by communication providers to deliver fixed and mobile broadband services to consumers. Through its proposals, Ofcom hopes to improve the availability, choice, price, quality and value for money of data-transfer services throughout the UK. Its market review process will involve three formal steps: (1) defining each relevant market in terms of product and geographic scope; (2) assessing whether any communication provider has significant market power in a relevant market; and (3) assessing which regulatory remedies should be imposed to address competition concerns arising from significant market power. Ofcom is inviting comments by 24 August 2012. Read more.

State aid

Banking sector speech: Speech by Joaquín Almunia on the State aid perspective of restructuring the banking sector in the EU On 21 June 2012, Almunia, Vice President of the European Commission responsible for Competition Policy, gave a speech on the State aid perspective of restructuring the banking sector in the EU. In his speech, he shared his views on Europe's banks based on the experience gathered by the Commission since the introduction of the special State aid rules for the financial sector as a result of the crisis. Since the beginning of the crisis, the Commission has authorised the viability, restructuring or resolution of 46 banks under the special crisis regime, and is still working on over 25 banks. As the Commission tries to implement a more permanent regime, its main aim is to return aided banks to long-term stability. Almunia has found that banks which have been involved in some form of public funding fall under four categories: (1) banks affected by the initial stage of the crisis and now implementing restructuring plans; (2) financial institutions in Greece, Ireland and Portugal where public authorities have more involvement and aim to strengthen macroeconomic and financial stability; (3) cases which are "unfinished business" from the point of view of State aid control, i.e. banks rescued in the early days of crisis but have not yet agreed restructuring plans; and (4) Spanish banks who are ahead of the implementation of the €100bn new capitalisation scheme agreed by the Eurogroup. While work is being done to address issues in the banking sector, Almunia said political breakthroughs are urgently needed in Europe to answer problems affecting the whole of the EU and to lay solid foundations for a truly integrated Economic and Monetary Union in the future. Further bold and far-reaching decisions will have to be made. Read more.

Italian banking tax aid case: European Court of Justice judgment on Italian banking tax aid scheme On 21 June 2012, the ECJ handed down its judgment on an appeal against a General Court ruling which dismissed an action by banks BNP Paribas and BNL against the European Commission's decision that an Italian aid scheme in favour of restructured banks was incompatible with the EU. In 1990, the Italian government took measures to facilitate the reorganisation of previously state-owned banks, in particular, it introduced a derogating tax scheme which facilitated transferring fixed assets and other banking assets held by public entities to existing or newly established private credit institutions. The Commission found that this scheme did not constitute State aid as it was justified by the inherent logic of the tax system. This scheme was then adapted and revised, including releasing hidden gains resulting from privatisations of banks in the 1990s, and authorising the payment of substitute tax in three instalments without interest. These tax advantages were not notified the Commission for approval and it opened an in-depth investigation into the scheme in 2007, concluding in March 2008 that the scheme was incompatible with the internal market. It found that these advantages gave certain credit institutions a selective advantage which had a negative impact on competition, and which could not be justified by the nature of the Italian tax system. Therefore, the scheme was illegally implemented by Italy and had to be recovered from the recipient banks. In 2010, the General Court dismissed BNP Paribas and BNL's (two recipients of the aid) appeals to annul the Commission's decision. BNP Paribas and BNL then appealed the ECJ. The ECJ found that the General Court had erred in law by merely observing the Commission's decision and not carrying out a comprehensive review of whether the tax realignment scheme constituted State aid. Therefore, the ECJ set aside the General Court's judgment but considered itself appropriate to give a final judgment. The ECJ found that Italy's 2004 Finance Law meant that the scheme now only confers a tax advantage to banking entities and other companies could no longer benefit from it. As a result, the ECJ concluded that the tax scheme did not constitute State aid and could not be justified by the inherent logic of the Italian tax system, and therefore dismissed the appeals. Read more.

General Block Exemption Regulation consultation: European Commission consultation on use of General Block Exemption Regulation for State aid On 20 June 2012, the Commission published a questionnaire on the use of the GBER for State aid in the context of the State aid modernisation initiative. The questionnaire is seeking views from interested parties by 12 September 2012 on the functioning of the GBER since it came into force in July 2008. Subject to certain conditions, the GBER exempts aid in favour of small and medium-sized enterprises, research, development, innovation, environmental protection, employment, training and regional investments. The objective of the GBER is to simplify State aid rules and to reduce the administrative burden for certain public support projects. The GBER expires at the end of 2013, and the Commission now wants to hear stakeholders' experiences in order to review the GBER's functioning with a public consultation. It is interested in how the GBER will be able to support the State aid modernisation initiative, which aims to encourage growth and speed up and streamline State aid reviews. The questionnaire is broken down into the following sections: general GBER policy questions; the use of the GBER; the effectiveness of aid provided under the GBER; the common provisions of the GBER; the specific provisions of the GBER; and miscellaneous questions. Read more.

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