

RECENT DEVELOPMENTS IN COMPETITION LAW

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Recent Case-Law Developments in the United Kingdom and the European Union

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Introduction

It is an honour and privilege to be invited to present a paper to this important practitioners conference and I thank the Competition Commission of Singapore and the Singapore Academy of Law for their invitation.

I have been asked to give an overview of recent developments in EU and UK competition law. I have included in this paper general developments of a legislative nature and developments in policy as well as case law. It has been necessary to be selective in presenting the material and it will, I am sure, be understood that not every case can be discussed. I suggest these developments are not without interest in the Singapore context as the issues and concepts under consideration are not greatly different from those applicable here.

In terms of the legal framework, EU and UK law are broadly similar in their treatment of anti-trust and mergers. Both systems operate a prohibition of restrictive agreements and a prohibition of abuse of dominant position. Merger control in the EU applies a test of whether the merger will 'significantly impede effective competition' (SIEC). In the UK the test is whether the merger will 'substantially lessen competition' (SLC). These are substantially the same. The UK regime includes, in addition to EU-type prohibitions, a criminal offence for individuals involved in certain types of cartel behaviour and the market investigation regime.

The institutional structures of the EU and UK differ. The European Commission enforces European competition law (through the Directorate General for Competition (DG Comp)), subject to appeal to the General Court (GC)² and to the Court of Justice (formerly ECJ, now CJEU). In the UK, the Office of Fair Trading (OFT) and various specialist sector regulators apply EU and UK law concurrently; the Competition Commission (CC) handles Phase II mergers and conducts market investigations and appeals on regulatory matters; all are subject to a specialist Competition Appeal Tribunal (CAT) and then to the general courts.

The recent developments I shall discuss suggest three main themes. First, a continued effort to maintain the application of the law against cartels, despite the recessionary economic climate, with a concern to promote a more efficient process and to avoid unnecessary expenditure of resources. This area of law does not require detailed economic analysis on a case by case basis but it does require careful attention to the evidence.

¹Chairman, UK Competition Commission (CC). All views expressed are personal to the author and do not necessarily represent the views of the CC. The assistance of Trudy Feaster-Gee in the preparation of this paper is gratefully acknowledged.

²Formerly the European Court of First Instance.

The second theme is the development of the law concerning market power, where the cases on abuse of dominance and in merger control place great emphasis on sophisticated economic analysis. Although there is the same concern for practical solutions, the development of a more coherent doctrine on monopolisation remains a challenge.

Finally there is the increasing trend towards litigation of competition issues. Not only are efforts continuing to encourage private actions, both originating and 'follow-on', but decisions of authorities are frequently, if not inevitably, the subject of major legal challenge in the courts.

Against this background, let us begin with recent developments in EU competition law.

I. European competition law

(A) Legislative/policy developments

I shall deal first with the founding treaties and then consider regulatory developments.

1. *Lisbon Treaty*

The Lisbon Treaty came into force on 1 December 2009.³ The Lisbon Treaty restyled the Treaty of Rome as the Treaty on the Functioning of the European Union (TFEU) and re-numbered certain of its Articles, including:

- former Art.81 EC (prohibition of restrictive agreements) is renumbered as Art.101 TFEU;
- former Art.82 EC (prohibition of abuse of dominance) becomes Art.102 TFEU; and
- former Art.87 and 88 EC (dealing with state aid) become Art.107 and 108 TFEU, respectively.

I have already noted the new names and acronyms for the EU courts.

2. *Review of block exemption regulations*

The European Commission recently revised two block exemption regulations (which provide automatic exemption from the prohibition of restrictive agreements for certain categories of agreements which fit within their scope). Thus, on 20 April 2010, the Commission adopted a new Vertical Agreements Block Exemption Regulation⁴ and on 27 May 2010, a new Motor Vehicle Block Exemption Regulation for the sale and repair of motor vehicles and for the distribution of spare parts.⁵

These Regulations were amended following extensive consultation with stakeholders and overall represent a freeing up of constraints previously imposed on parties who sought to benefit from block exemption for distribution and other vertical agreements. In particular, the

³It amends, but does not replace, both the Treaty of Rome (EC Treaty, which becomes the Treaty on the Functioning of the European Union (TFEU) and which provides the organizational and functional details, as well as most of the substantive provisions of EU primary law) and the Treaty on European Union (Maastricht Treaty or TEU, which sets out the objectives and principles of the EU and provides for the Common Foreign and Security Policy). Although most of these substantive provisions remain unchanged, the Treaties are restructured.

⁴Commission Regulation 330/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices.

⁵Commission Regulation (EU) 461/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices in the motor vehicle sector.

rules promote Internet trade, reflecting the growing domestic and international importance of this channel of trade.

There are safeguards, however, imposed in light of economic evidence, including limiting the availability of the vertical agreements block exemption to circumstances in which neither party has a market share exceeding 30 per cent and tightening up provisions to deal with the continuing concern for competition in vehicle aftermarkets.⁶

3. Private actions

The European Commission has a strategy to encourage the development of private enforcement of competition law. The Commission is considering introducing a Directive to provide a structure for private damages actions throughout the EU. The draft Directive addresses single damages claims, a passing-on defence and 'opt-in' class actions. This remains a complex area, not least given the differences in substantive and procedural rules among the member states. On the ground, more claimants are coming forward but there remains a dearth of precedent case law, as the threat of litigation is most often used to achieve a settlement. This is seen particularly as a growth area in the UK.

4. Legal professional privilege

A controversial matter revisited by the European system is the issue of legal professional privilege for 'in-house' lawyers. The **Akzo/Akcros** case has just been decided by the CJEU⁷ following a dispute arising from a dawn raid during which Commission officials sought access to advice from in-house lawyers. The Advocate General had earlier handed down an opinion recommending that the CJEU dismiss the appeal by Akzo/Akcros on the grounds that:

- salaried, enrolled in-house lawyers were not sufficiently independent from their employers (as compared with external lawyers) to justify the extension of legal professional privilege to advice which they provided to their employer; and
- there was no basis for saying that the current EU legal position should be extended due to changes in legal practice or the legal framework.

On 14 September 2010, the CJEU followed the Advocate General's opinion and declined to extend legal professional privilege to advice given by in-house counsel. The appeal by Akzo/Akcros had been supported by various EU member states and bodies (including the Council of the Bars and Law Societies of the EU), but the CJEU has effectively maintained the 'status quo'.

(B) European antitrust cases

I will review briefly other recent developments in European enforcement and case law, starting with the prohibition of restrictive agreements.

1. Article 101 Decisions and Cases

The total number of decisions and fines in 2009 (total fines of €1.6 billion from six decisions) was markedly lower than for the record-breaking years of 2007 (total fines of €3.3 billion in eight decisions) and 2008 (total fines of €2.3 billion in seven decisions). However, the

⁶On 4 May 2010 the European Commission also published for consultation draft revised block exemptions for Research and Development and Specialisation Agreements. See: http://ec.europa.eu/competition/consultations/2010_horizontals/index.html.

⁷Case C-550/07P.

Commission continued to investigate suspected cartels, and imposed significant fines in several important cases.

1.1 *Fines imposed in the energy sector*

Of particular note were the first 'cartel law' fines imposed in the energy sector, namely about €1.1 billion imposed on **E.ON and GdF** in July 2009 for market-sharing in relation to the supply of Russian gas in Germany and France. Both companies have appealed the fine.

1.2 *First cartel settlement*

In May 2010 the European Commission adopted its first 'settlement' decision under its 2008 simplified procedure aimed at expediting the resolution of anti-trust cases. This procedure involves an admission by the parties of infringement and a reduced penalty to reflect the saving in administrative costs and resources. In the **DRAMS** decision, the Commission imposed fines totalling €331 million on ten producers of memory chips for sharing information to coordinate prices. Five of the companies also benefited under the Commission's leniency programme, which operates alongside the settlement procedure.

Not every case will be suitable for settlement, which remains subject to the Commission's discretion and is not free from controversy.

1.3 *Fines for cartel leaders*

There have been developments on the issue of the level of fines for the leader of a cartel. In a decision in September 2009 on appeal in the **Austrian Banks (Lombard Club)** case, the CJEU⁸ held (dismissing the appeal) that the market shares of the smaller undertakings within a cartel could lawfully be taken into account and attributed to the cartel leader when setting the latter's fine. This case had been controversial.

Prior to this, in April 2009, the GC had ruled on an appeal by **Nintendo** from the Commission's decision concerning parallel imports within the EU of Nintendo games consoles and related games cartridges. The GC supported the Commission's stance that a manufacturer has a unique position in its distribution system and is thus obliged to pay 'special vigilance'. Although the Commission had not mentioned the possibility of applying, on this count, a deterrence multiplier to Nintendo in its Statement of Objections, the GC held this did not infringe Nintendo's rights of defence.

In similar vein, in the case of **Archer Daniels Midland (ADM)** (9 July 2009),⁹ the CJEU ruled that the European Commission was not required to say in the Statement of Objections that it might classify ADM as a leader of the cartel, which would be premature, provided the Commission set out in the Statement of Objections the evidence which it considered relevant to enable an undertaking which might be classified as 'leader' to respond to such an allegation.

1.4 *Restriction by object*

The Commission has used its cartel powers to prosecute a variety of arrangements and the sharing of information between competitors. The law prohibits agreements which have the 'object or effect' of distorting competition.

⁸Joined Cases C-125/07, C-133/07, C-135/07 and C-137/07 [2009] ECR I-8681.

⁹Case No. C-511/06 *Archer Daniels Midland Co. v Commission of the European Communities* [2009] ECR I-5843.

Following the CJEU's judgment in the **Irish beef** case¹⁰ in November 2008, in June 2009 the CJEU further clarified the law regarding the anti-competitive 'object' of an arrangement, in a case concerning the activities of representatives of **four mobile telecoms operators**.¹¹

The representatives met together once in June 2001 and discussed proposed reductions of standard dealer remunerations for post-paid subscriptions. The CJEU held that:

- (i) An exchange of information between competitors could be a restriction by object on an oligopolistic market, capable of removing uncertainties between those concerned and having anti-competitive object.
- (ii) There was no need for an impact on consumer prices. Art. [101] is designed to protect not only individual competitors or consumers, but also the structure of the market/competition as such.
- (iii) National courts must apply the presumption of a causal connection between the concerted practice and market behaviour, if the companies remain active on the market (though the presumption may be rebutted).
- (iv) A single meeting could be a sufficient basis for concertation of market conduct. The issue was not the number of meetings, but whether the meeting(s) offered the companies the opportunity to take account of competitors' information and coordinate their conduct.

The Commission recently published revised draft horizontal cooperation agreement guidelines seeking to clarify, among other things, when an exchange of commercial information will be seen as having an anti-competitive object.¹²

1.5 Repeat offences

In addition to risking breach of the law by behaviour undertaken on one occasion only, members of cartels face additional risks for repeat behaviour. Involvement in a second cartel can be treated as a repeat infringement of the same type (and thus warrant a heavier penalty) irrespective of significant differences in the nature and circumstances of the two cartels (Judgment of the GC, May 2009, rejecting the appeal by **Outokumpu** in the Copper Industrial Tubes cartel) and irrespective of limitation periods (Judgment of the GC, September 2009 on appeal by **Hoechst** against the Commission's decision of 2005 in the Monochloroacetic acid or MCAA cartel). These rulings are unlikely to be welcomed by larger conglomerate companies, which may have a higher risk exposure with so many acquired businesses within their portfolio.

2. Article 102 Decisions and Cases

Article 102 developments are concerned principally with the substance of competition assessment, in contrast to Article 101 where much of the interest lies in process and penalties.

¹⁰ *Competition Authority v Beef Industry Development Society Ltd (C-209/07) [2008] ECR. I-8637.*

¹¹ *Case No. C-8/08 T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit [2009] ECR I-4529.*

¹² 4 May 2010. See: http://ec.europa.eu/competition/consultations/2010_horizontals/index.html.

2.1 *The Intel case*

In a significant intervention in May 2009, DG Comp imposed a fine of about €1 billion on **Intel** for abuse of dominant position under Article 102 by offering conditional rebates and payments to retailers and customers which were capable of causing anti-competitive foreclosure. Intel has appealed the Commission's decision to the GC.

2.2 *Legitimate response to competition*

It can be difficult to determine whether a dominant company is legitimately responding to competition or engaging in an infringement of competition law. In the **Clearstream** case,¹³ in September 2009, the GC confirmed that a dominant company's right to defend its own commercial interests did not allow it to undertake activities that impaired genuine competition on the relevant market.¹⁴ In April 2009, the CJEU held¹⁵ (following the Commission's finding that **Wanadoo** had charged predatory prices for ADSL services in France) that a dominant company had no absolute right to align its prices on those of its competitors.

In **AstraZeneca**¹⁶ the GC noted that the fact that an undertaking is in a dominant position cannot deprive it of its right to protect its own commercial interests when attacked. However, a dominant undertaking cannot use regulatory procedures in such a way as to prevent or make more difficult the entry of competitors in the market, in the absence of grounds relating to the defence of its legitimate interests or in the absence of objective justification.

2.3 *Predatory pricing*

Regarding the test for predatory pricing, the CJEU held in the **Wanadoo** case¹⁷ that it is not necessary to show that the dominant company could later recoup its losses where an intent to eliminate by the dominant company can be presumed, because it applied prices below average variable costs. The lack of possibility of recoupment of losses did not prevent reinforcement of a dominant position, because the reduction in competition or choice for customers if competitors withdrew might be enough to constitute an abuse.

2.4 *Commitments in Article 102 cases*

As well as these developments on the substance of the law, there are procedural aspects to note also. In particular, the Commission has shown an increasing tendency to request and accept divestments of particular parts of the business and behavioural commitments, in order to settle Art.102 cases:

- **E.ON** offered in Feb/March 2009 significant commitments to divest both generation capacity and its transmission system business in the German electricity case; a voluntary divestment of **RWE**'s gas transmission network was accepted by the Commission in March 2009; and in December 2009 **GdF Suez** committed to a major structural reduction regarding long-term reservations of gas import infrastructure capacity. Behavioural commitments regarding contract terms for customers in France were agreed with **EDF** in May 2010.

¹³Case No. T-301/04 *Clearstream Banking AG v Commission of the European Communities* [2009] 5 CMLR 24.

¹⁴Clearing and settlement are steps for securities trading, which relate to the transfer of title and payment. There are national depositories of shares (called CSDs) and other service providers seeking to organize such services internationally (ICSDs). The core of the dispute and case here was allegations by Euroclear, seeking to operate as an ISCD, that Clearstream, acting as CSD in Germany and with some 90 per cent of German shares deposited with it, was blocking Euroclear from obtaining access to Clearstream's services on the same terms as those offered to Clearstream's own ISCD, Clearstream Banking Luxembourg.

¹⁵Case No. C-202/07 *France Télécom SA v Commission of the European Communities* [2009] ECR I-2369.

¹⁶Case No. T-321/05 *AstraZeneca v Commission of the European Communities*, Judgment of 1 July 2010.

¹⁷See above.

- The technology sector has also seen the use of voluntary commitments to settle abuse of dominance cases. **Microsoft** in July 2009 offered commitments to alleviate the tying of its web browser with Windows; and in December 2009, **Rambus** continued the trend, offering legally binding behavioural commitments to settle an anti-trust investigation regarding issues of patent ambush (by lowering royalty rates worldwide for certain patents for memory chips). Of note is that these cases settled without admission of infringement and without (in Rambus's case) admission of holding a dominant position in any EEA market.
- The Commission is also prepared, in an appropriate case, to 'road test' before accepting commitments. In April 2010, the Commission announced that **Visa Europe** had proposed to reduce to 0.20 per cent its multilateral interchange fees (MIFs) for debit card payments¹⁸ and that the Commission would market test the proposed commitment prior to adopting a decision under Regulation 1/2003 to make the commitments binding.

The use of commitments does not always go unchallenged, however, as shown by the **Alrosa** case in the CJEU.¹⁹ De Beers and Alrosa had notified to the European Commission an agreement under which De Beers agreed to purchase annually, for a period of five years, the equivalent of US\$800 million in rough diamonds from the Russian state-owned company Alrosa, which is the second largest diamond producer in the world. This amounted to approximately half of Alrosa's annual production.

In January 2003, the Commission sent separate statements of objections to De Beers and Alrosa, setting out its preliminary view that the notified agreement appreciably restricted competition on the rough diamonds market by eliminating competition from Alrosa and that it also constituted an abuse of De Beers' monopoly power. De Beers offered undertakings in order to settle the case against it (in essence, to cease purchasing rough diamonds from Alrosa), which undertakings were accepted. Alrosa challenged these undertakings on the grounds (inter alia) that they were disproportionate and the GC agreed. The Commission appealed to the CJEU, which held in June 2010 that the proportionality test only requires the Commission to consider whether the commitments offered address the competition problem identified, not whether the commitments would amount to a proportionate remedy; and a commitment that goes further than a remedy that could be imposed is not, necessarily, disproportionate.

(C) Merger control

There continued to be a decline in merger activity during 2009. Only five Phase II investigations were initiated (compared with 10 in 2008, and 14 in 2007). Of these, only two cases (both involving Lufthansa²⁰) were approved conditional to legally binding, behavioural commitments (the remainder were withdrawn or approved unconditionally).

2010 has been an equally quiet year for merger activity, with only three proposed mergers currently being investigated under Phase II: **Syngenta/Mosano** (sunflower seeds);²¹ **Unilever/Sara Lee** (household and bodycare products);²² and **Olympic/Aegean Airlines**

¹⁸An interchange fee is the fee charged by the bank which issued a payment card to the consumer (the issuing bank) and paid by the retailer's bank (the acquiring bank) for processing a payment card transaction. They are either set bilaterally between individual banks or multilaterally (MIF). A MIF is set by a decision binding all banks participating in a particular payment card scheme relating to a brand of payment card.

¹⁹Case No. C-441/07 *European Commission v Alrosa Company Ltd*, 29 June 2010 (not yet reported).

²⁰See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1255>, and <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/974>.

²¹See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/770>.

²²See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/640>.

(domestic/international flights from Greece).²³ Each has provisional deadlines for later this year.

(D) Nature of General Court's review

There has also been some clarification of the nature of the review conducted by the courts of competition authority decisions.

On 2 September 2010 in **EC v Scott SA**,²⁴ the CJEU upheld an appeal by the European Commission against a judgment of the GC that had annulled part of a state aid decision, holding that the GC exceeded its review jurisdiction as it had not demonstrated any 'manifest errors' of assessment by the Commission. The case has been referred back to the GC for reconsideration.

Interestingly, in **Clearstream**, previously noted, the GC said that it could only carry out a limited review of complex economic assessments undertaken by the Commission and that the court had to check whether the Commission's assessment was based on 'accurate, reliable and coherent' evidence, including 'all relevant data' and was capable of substantiating the Commission's conclusions. The extent of judicial review is not a new issue, but in the more 'modern' economics-based competition world, it is interesting to see how demanding this review standard is. This subject is relevant in the context of developments in the UK also.

(E) State aid

Control of the EU state aid rules is a particular responsibility of the European Commission.

The Commission's workload has continued to be dominated by the impact of the financial crisis,²⁵ with particular emphasis on the acceptability of certain aid to banks. Notable decisions include approval of restructuring packages for Northern Rock, KBC, ING, Lloyds and RBS.²⁶

It remains to be seen whether the Commission will find it necessary to extend beyond 31 December 2010 the Temporary Framework for state aid measures to support access to finance.

Other recent state aid developments include the adoption of the state aid Simplification Package, comprising a Best Practices Code²⁷ and a Simplified Procedure Notice.²⁸

Of course, EU law applies also within the UK and impacts upon our substantive assessment of cases as well as policy. Let us turn now to consider the UK context.

²³See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1017>.

²⁴Case No. C-290/07 *European Commission v Scott SA*, 2 September 2010.

²⁵For example, as at 16 December 2009, the Commission had adopted decisions on no fewer than 81 national measures providing support to the financial sector since the beginning of the financial crisis. The Commission also took 66 decisions under the Temporary Framework for state measures to support access to finance in the current financial and economic crisis.

²⁶See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1600>; <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1728>; <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1729>; <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1730>; and <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1915>, respectively.

²⁷http://ec.europa.eu/competition/state_aid/legislation/best_practices_code_en.pdf.

²⁸http://ec.europa.eu/competition/state_aid/legislation/notice_simplified_procedure_en.pdf.

II. UK Competition law

(A) Legislative/policy developments in antitrust

I deal first with two legislative and policy developments in the UK.

1. *Land agreements*

Following recommendations from the CC in the groceries market investigation,²⁹ to prevent the major supermarkets and other retailers from controlling the use of land to foreclose competition in local grocery supply, the Government announced its decision to repeal the Land Agreements Exclusion Order in its entirety as of 6 April 2011 after a one-year transition period. Revocation will affect all restrictive land agreements, not just in the grocery sector, and the OFT intends to publish revised guidance on the application of competition law to land agreements in October 2010. The exclusion for all land agreements had become increasingly anomalous and has no EU equivalent.

2. *OFT introduces 'short form' opinion*

Secondly, the OFT proposes to provide a short-form, non-binding opinion to companies on certain anti-trust matters. On 27 April 2010, the OFT issued its first short-form opinion, in a case regarding joint purchasing.³⁰ The procedure is intended to be simple, short and flexible, providing guidance to businesses that are seeking to clarify how the law applies to prospective collaboration agreements between competitors, which raise novel or unresolved competition issues.

The OFT is keen to avoid a return to the notification regime that existed prior to May 2004. Rather, the OFT intends to select appropriate cases carefully, where guidance may assist a wider audience who may face similar issues.

(B) UK anti-trust cases

Further developments in the UK include the growing appetite of defendants to appeal anti-trust and other competition decisions and the increasing use by the OFT of early resolution procedures. There are examples of both in the OFT's enforcement of the Chapter I prohibition of the Competition Act 1998.

1. *Anti-competitive agreements*

1.1 *Construction bid-rigging*

In September 2009, the OFT issued a decision under Chapter I of the Competition Act 1998, fining 103 construction companies a total of about £129 million for their involvement in bid-rigging of construction contracts and/or cover pricing. The OFT's procedure during its investigation was the subject of a judicial review action. In July 2009, the High Court ruled that the OFT had acted in breach of the principles of fairness and equal treatment in its treatment of one company in applying its 'fast track offer' procedure, a form of early resolution discount.

Following issue of the OFT's final infringement decision, no fewer than 25 appeals were launched and heard before the CAT in July 2010. Although some of these appeals challenge

²⁹CC report, 30 April 2008.

³⁰OFT press release 44/10.

the finding of infringement or the attribution of liability, most raise issues about the OFT's calculation of the fines imposed. The outcome of these appeals is expected by the end of the year.

1.2 *Construction recruitment*

In a further case related to the construction sector, on 30 September 2009, the OFT fined six recruitment agencies a total of about £39 million for agreeing a collective boycott of a new market entrant and fixing target fee rates for the supply of candidates to construction companies in the UK. Appeals by three companies who received fines were heard by the CAT in July 2010 and judgment is also anticipated by the end of the year.

1.3 *Tobacco*

In the supply of tobacco case, on 16 April 2010, the OFT announced that Imperial Tobacco and Gallaher (both tobacco manufacturers) and ten retailers (including major national chains) operated a series of individual arrangements under which the retail price of a tobacco brand was linked to that of a competing manufacturer's brand.

The OFT considered that these arrangements were by their nature capable of restricting the ability of the retailers to determine their selling prices independently, therefore having an anti-competitive object.

The OFT imposed total fines of £225 million (with Imperial Tobacco being fined about £112 million). Sainsbury's (the supermarket chain) received full immunity from fines under the OFT's leniency programme and 'early resolution discounts' were confirmed for certain other retailers. Appeals are under way in the CAT.³¹

1.4 *Dairy products*

The OFT's use of early resolution discounts has also proved controversial in the groceries sector, for example in the dairy investigation.

Following the OFT's statement of objections in September 2007, a number of supermarkets and dairies reached early resolution agreements with the OFT regarding alleged collusion in the retail prices of certain dairy products (liquid milk, value butter and UK processed cheese) during 2002/03. Morrisons and Tesco contested the OFT's provisional findings that their actions amounted to a breach.

On 23 July 2009, the OFT announced that it had issued a supplementary statement of objections to all the parties involved in its investigation. The OFT then received further detailed representations and evidence from the parties, as a result of which it decided there was insufficient evidence to support a finding of infringement with regard to liquid milk in 2002 and value butter in 2003.

Consequently, on 30 April 2010, the OFT announced that the penalties which a number of the early resolution parties had agreed to pay would be reduced and the investigation against Morrisons would be dropped. As regards Tesco, the OFT announced on the same day that it had dropped a number of allegations against Tesco and agreed a discount of 10 per cent (consistent with previous case precedent) in return for Tesco not contesting the remaining allegations.

³¹See, for example, the summary of the appeal by Imperial Tobacco:
www.catribunal.org.uk/files/1160_Imperial_Summary_Of_Appeal_240610.pdf.

The final decision of the OFT on infringement is expected shortly.³²

Whilst a finding of insufficient evidence does not necessarily indicate that there was no infringement, it may be of concern that several parties felt compelled to settle with the OFT when charges could not lawfully have been brought against them.

There is some tension between the usefulness of early resolution settlements, particularly given the very significant evidential hurdles which must be overcome for a successful prosecution which will withstand judicial scrutiny, and the need for proper administration of justice.

2. Abuse of dominance

Turning now to the Chapter II prohibition of the Competition Act 1998, there remain very few abuse of dominance cases in the UK.

2.1 Ofgem

The Office of the Gas and Electricity Markets (Ofgem), in February 2008, found that **National Grid** had breached Chapter II by imposing abusive contractual restrictions in gas metering contracts. National Grid appealed to the CAT and then to the Court of Appeal (CA), with both courts dismissing the appeal against Ofgem's finding of abuse. On 5 August 2010, the Supreme Court refused leave for National Grid to appeal from the decision of the CA. Detracting slightly from Ofgem's success is the fact that the CA allowed the appeal against penalty and varied the Tribunal's decision to the extent of substituting a fine of £15 million for the Tribunal's figure of £30 million and Ofgem's original figure of £41.6 million, in order to reflect increased mitigation, given the fact that the Authority had been closely involved in discussions leading up to the conclusion of the relevant agreements. To put this £15 million fine in context, National Grid's turnover from its gas metering business is in the region of £250 million.

2.2 OFT

On 23 February 2010, the OFT issued a statement of objections against **Reckitt Benckiser**, alleging abuse of dominant position in the market for the NHS supply of certain heartburn medicines (with no assumption being made at this stage that there is an infringement). Prior to this case, the OFT had taken a decision under Chapter II against **Cardiff Bus** in November 2008 for predatory conduct in local bus markets.

(C) Mergers

1. Decline in activity

The number of OFT merger decisions has continued to decline. During 2009, the OFT reached decisions on only 65 cases, down from the peak of 201 cases in 2005.³³ Seven cases were referred to the CC for Phase II review (the same number as in 2008).³⁴ The

³²A further anti-trust matter in the grocery sector is continuing: Wal-Mart was reported to have sought leniency through its Asda subsidiary from the OFT for involvement in potentially unlawful conduct in respect of price information. (See *The Telegraph*, 4 May 2008.) For the current position at the OFT, see www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/retailers-suppliers/.

³³The OFT decided 141 merger cases in 2006, 113 in 2007 and 81 in 2008.

³⁴Sixteen merger cases were referred to the CC in 2004, 19 in 2005, 13 in 2006 and 10 in 2007.

number of cases where undertakings were accepted in lieu of a reference (four) was slightly lower than in previous years.³⁵

Before discussing some of these cases, let us first consider some legislative and policy developments regarding mergers.

2. Legislative and policy developments

2.1 Increased merger fees

From 1 October 2009, merger fees increased substantially so that they now range from £30,000 for mergers where the business acquired has turnover not exceeding £20 million to £90,000 for larger acquisitions where the business acquired has turnover exceeding £70 million. It is felt that these fee levels more accurately reflect the cost of assessing mergers.³⁶

2.2 Guidance

The OFT and the CC have each produced further guidance on merger control. In June 2009, the OFT published the final version of its new jurisdictional and procedural mergers guidance.³⁷ It also published for consultation draft guidance on the exceptions to its duty to refer merger cases to the CC and its ability to accept undertakings in lieu of a reference.³⁸

The OFT and CC published on 16 September 2010 new joint merger assessment guidelines,³⁹ which revise and expand guidance contained in the substantive merger guidelines previously issued by each authority separately. The new guidelines differ from the old principally in the areas of market definition, counterfactual and coordinated effects.

The CC is also working on mergers procedural guidance and guidance on disclosure and a statement of policy in respect of penalties imposed for failure to comply with a requirement (such as a requirement to produce particular information to the CC). The latter two documents apply to market investigations as well as to mergers.

2.3 Mergers and the public interest

There has been some discussion of introducing a general public interest test for mergers. This arose in part from the high-profile hostile takeover of Cadbury by Kraft Foods. This was cleared at Phase I by the European Commission but created some controversy in the UK because of the particular appeal of Cadbury as a UK 'home-grown' company. Initially, in the run-up to the General Election in the UK, there were calls for the UK merger system to be overhauled to reintroduce a general right of intervention for the Secretary of State to prevent mergers 'against the public interest'. The Government subsequently decided on a review of the Takeover Code⁴⁰ and it is not thought likely that a more general public interest test will be pursued.⁴¹

³⁵The OFT accepted undertakings in lieu of a reference in six merger cases in 2004, four in 2005, seven in 2006, five in 2007 and six in 2008.

³⁶The CC does not charge a fee.

³⁷OFT Press Release 76/09, 30 June 2009; OFT 527.

³⁸OFT Press Release 120/09, 1 October 2009

³⁹CC2 (Revised), OFT 1254.

⁴⁰Review by the Takeover Panel of certain aspects of the regulation of takeover bids (www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP201002.pdf), consultation period closed 27 July 2010.

⁴¹Under the present law the Secretary of State already has power to intervene in mergers on certain defined public interest grounds relating to defence, the media and financial stability.

3. Merger cases

Let us now consider some recent cases:

3.1 Phase I cases

The OFT has made increasing use of the 'de minimis' exception, which allows the OFT not to refer to the CC a market in which a merger may substantially lessen competition where the value of the market is less than £10 million, for example in **Stagecoach/Islewyn Borough Transport**⁴² and in **Arriva/Go Ahead North East**.⁴³ The OFT accepted 'undertakings in lieu' of a reference in **Co-op/Somerfield**⁴⁴ and in **Global/GCAP radio merger**.⁴⁵

3.2 Phase II cases

(1) BSKYB/ITV

Turning now to more complex cases where a reference to the CC was made, the first case I should like to discuss is **BSKYB/ITV**, which concerns a merger reviewed some three years ago but where the subsequent litigation regarding the decision was finally determined earlier this year.⁴⁶

In May 2007, the Secretary of State (SoS) referred the completed acquisition by Sky of 17.9 per cent in ITV to the CC. This was done under powers that enable the SoS to issue an intervention notice in a merger involving broadcasting entities which may give rise to concerns regarding media plurality. The final decision on remedies in such a case rests with the SoS. The CC sent its report to the SoS on 14 December 2007 concluding that the acquisition by Sky of this shareholding in ITV gave rise to an SLC in the all-TV market but did not raise concerns for media plurality. The CC recommended that Sky be required to divest part of its shareholding to below a level at which Sky could materially influence the policy of ITV (in this instance, below 7.5 per cent). The SoS accepted this recommendation.

Sky and Virgin Media appealed this ruling in February 2008. Sky challenged the findings that the acquisition of the shareholding created a relevant merger situation and gave rise to an SLC. Virgin Media challenged the decision on media plurality and the CC's interpretation of the relevant statutory provisions.

By judgment dated 29 September 2008, the CAT dismissed Sky's appeal and endorsed the CC's approach and findings on competition but upheld the appeal of Virgin Media on the question of media plurality.

All parties appealed the CAT's ruling and the CA gave judgment on 21 January 2010. It rejected the appeal by Sky in respect of the competition issues. Importantly the CA confirmed that the CAT had applied the appropriate standard of review and was not required, as put forward by Sky, to engage in a more intensive scrutiny of the CC's decision. As regards media plurality, the CA preferred the CC's interpretation of the Enterprise Act 2002, as it allowed the CC to take into account the actual extent of the control exercised. However, the CA suggested that it might be appropriate for the legislation to be amended, given that it had been open to conflicting interpretations.

⁴²No ME/4290/09.

⁴³No ME/4288/09.

⁴⁴The undertakings were subsequently varied in 2009: See www.of.gov.uk/OFTwork/mergers/Mergers_Cases/2008/coop-somerfield.

⁴⁵OFT press release 77/09.

⁴⁶*British Sky Broadcasting Group Plc v The Competition Commission* [2010] EWCA Civ 2 (Court of Appeal, 21 January 2010).

Following the CA's judgment, in February 2010 the SoS accepted undertakings from Sky to reduce its shareholding in ITV to below 7.5 per cent and that disposal has now occurred.

2009 cases

Of the seven references made to the CC during 2009, cases of particular interest include the following.

(2) *Sports Direct/JJB Sports stores*

In May 2009, the OFT referred the merger of certain sports retail outlets to the CC, having failed to identify suitable up-front purchasers for the outlets required to be divested.

The CC concluded in February 2010 that, although Sports Direct and JJB are each other's closest competitors nationally, there was little evidence to suggest that consumers would face higher prices or reductions in quality and choice in these particular outlets as a result of the acquisition. No divestment was therefore required.

The case was complicated by the OFT's concurrent cartel investigation of Sports Direct and JJB Sports under Chapter I of the Competition Act 1998 and shows the difficulty of running these two procedures in parallel. At an early stage of the case there was a procedural dispute about the disclosure to the merger parties of material relating to the cartel investigation. The CAT took the view that such material should in principle be disclosed but in the result the material in question was not needed for the merger investigation, and the issue was not pursued.⁴⁷

(3) *Stagecoach/Preston Bus Limited*

The next case to mention is **Stagecoach/Preston Bus Limited**. The CC prohibited the merger and required Stagecoach to divest the business it had acquired.⁴⁸ Stagecoach appealed to the CAT and in May 2010 the CAT upheld the CC's decision but disagreed with the CC's counterfactual analysis.⁴⁹ Essentially the CC had considered that the acquirer (Stagecoach—a national operator) had engaged in 'abnormal' competition against the target (Preston Bus) in the months prior to its bid, to threaten the target's viability and make it unattractive to third party bidders. The CAT disagreed with the CC's analysis on this point but upheld the CC's conclusion that the merger was anti-competitive. This somewhat confusing case has now settled without the need for a further appeal by the CC and Stagecoach is disposing of the target business in a slightly modified form to another party.

(D) Market investigations

1. *The regime*

Under the Enterprise Act 2002 the market investigation regime (MIR) empowers the CC to investigate a given market upon referral from (primarily) the OFT, to see if there are features that prevent, restrict or distort competition and which give rise to an adverse effect on competition (known as an AEC). The CC can intervene directly (subject to control by the

⁴⁷ *Sports Direct International Plc v Competition Commission* [2009] CAT 32 (14 December 2009).

⁴⁸ CC report, 11 November 2009.

⁴⁹ *Stagecoach Group PLC v Competition Commission* [2010] CAT 14.

courts) and in extreme cases may force divestments of assets or businesses.⁵⁰ There is a statutory time limit of two years for completion of these investigations.

2. BAA Airports

On 29 March 2007, the OFT made a reference to the CC concerning the **supply of airport services by BAA in the UK**. The CC's report was published on 19 March 2009 and concluded that BAA's ownership of airports in south-east England and lowland Scotland were features giving rise to AECs in connection with the supply of airport services by BAA. The CC also concluded that a number of other features of the relevant markets give rise to AECs, namely: Heathrow Airport's position as a significant hub; Aberdeen Airport's position; aspects of the planning system; aspects of government policy; and the current regulatory system for airports.

The CC ordered: the divestiture of Stansted and Gatwick Airports to different purchasers; the divestiture of either Edinburgh or Glasgow Airports; strengthening of consultation procedures and provisions on quality of service at Heathrow; reporting and consultation in respect of Aberdeen Airport; and recommendations to Government regarding the economic regulation of airports.

Prior to the CC's report, BAA had already set in train the sale of Gatwick Airport, which has since been completed.

On 18 May 2009, BAA applied for review of the report on the grounds of apparent bias and the proportionality of the divestiture remedy. The apparent bias ground concerned certain links between a member of the group deciding the reference and an undertaking which may have been interested in acquiring airports which BAA was required to divest. This, BAA argued, gave rise to apparent bias (rather than actual bias) on the part of the CC member and the group.

In its judgment of 21 December 2009,⁵¹ the CAT found against the CC on the ground of apparent bias but rejected the argument that divestiture was disproportionate. On 25 February 2010, the CAT quashed certain findings of the CC relating to the adverse effects of, and remedies for, BAA's common ownership of airports, and remitted them back to the CC for reconsideration by a fresh group of members.

In view of the seriousness of this case, and the implications of the CAT's rulings for how the CC appoints groups to conduct investigations, it was decided to appeal to the CA. The hearing of the appeal took place in June 2010 and judgment is awaited. In the meantime, apart from the sale of Gatwick Airport, which has already taken place, other aspects of the CC's findings in relation to Aberdeen and London Heathrow are progressing.

3. PPI

From 2007 to 2009 the CC conducted an investigation into the sale of payment protection insurance (PPI). The report⁵² found that the sale of PPI was anti-competitive in that businesses offering PPI alongside credit faced little or no competition when selling PPI to their credit customers. The CC introduced a package of measures including a so-called 'point-of-sale' ban on selling PPI.

⁵⁰Schedule 8, paragraph 13, Enterprise Act 2002. These powers are unique to the UK, although there is a legislative proposal in Germany to give similar powers to the Bundeskartellamt.

⁵¹*BAA Limited v Competition Commission [2009] CAT 35.*

⁵²CC report, 29 January 2009.

Some of the major banks appealed this finding and in October 2009, whilst upholding the CC's conclusions on substance, the CAT remitted the point-of-sale ban back to the CC for further work on potential drawbacks to the prohibition, namely that it might inconvenience customers.

In its provisional decision published in May 2010, the CC confirmed its previous findings and concluded that with the possible exception of retail PPI, the benefits of a package of remedies including the prohibition, by introducing greater competition and choice and lower prices to the market, would indeed outweigh the disadvantages, including the potential inconvenience to some customers.

The CC's final decision is due in October 2010. In the meantime, Lloyds Banking Group recently announced withdrawal of its PPI product.⁵³

4. Banking

Following calls for a thorough investigation of the banking industry in the light of the recent financial crisis, and some uncertainty as to the interplay between the needs of competition and prudential regulation, the UK Government has asked an ad hoc Independent Commission on Banking (ICB) to investigate these issues and make recommendations by October 2011.⁵⁴

5. OFT market studies guidance

In addition, and sometimes as a precursor, to the exercise of the CC's market investigation powers, the OFT may conduct market studies. On 7 September 2010 the OFT published the final version of its revised guidance on market studies.⁵⁵ This guidance has been updated to reflect the OFT's prioritization principles and current practice. In particular, it details the stages in market study projects, including pre-launch consultation, launch, data collection and analysis, and informal consultation on findings and recommendations.

The OFT is intending to consult later this year on revisions to its guidance on market investigation references to the CC.

(E) Private actions

Let us now consider developments in private litigation.

In **Enron Coal Services Ltd**⁵⁶ (ECSL), the CAT rejected ECSL's claim for damages from English Welsh and Scottish Railway Limited (EWS) for losses allegedly caused by EWS's abuse of dominance through the use of exclusionary contracts with industrial coal users, discrimination against ECSL, and other predatory practices. These infringements had been found by a decision of the Office of Rail Regulation. Parts of ECSL's claim were struck out in March and July 2009 and, in December 2009, the CAT handed down its judgment on the remaining parts of ECSL's claim, finding that ECSL had failed to establish that EWS's unlawful conduct had caused the loss that it claimed. This was the first action in the CAT under section 47A of the Competition Act 1998 and shows that proving causation in follow-on damages claims may not be straightforward.

⁵³ *The Daily Telegraph*, 27 July 2010.

⁵⁴ See HM Treasury press release no. 11/10 of 16 June 2010 and www.hm-treasury.gov.uk/d/banking_commission_terms_of_reference.pdf.

⁵⁵ OFT 519.

⁵⁶ *Enron Coal Services (In Liquidation) v English Welsh & Scottish Railway* [2009] CAT 7 (21 December 2009).

(F) Representative actions

Representative actions are a way of combining several potential claimants into a single claim. However, in May 2009 the High Court struck out⁵⁷ the representative element of a claim brought by cut flower importers against BA in the case of **Emerald Suppliers Ltd v British Airways** which arose out of the air freight surcharges cartel.

The Court did, however, consider that it may be appropriate to use the Group Litigation Order process, since there were a number of potential claims giving rise to common issues. The matter is on appeal to the Court of Appeal. Again this case shows that follow-on actions are not straightforward.

(G) Criminal cartels

The main development in the application of the law on individual criminal liability for cartel offences is the recent case involving executives in the airlines sector.

The four-year prosecution of four former executives of **British Airways**, for having dishonestly agreed with others to directly or indirectly fix the price for the supply of passenger air transport services by BA and Virgin in the UK, collapsed in June 2010 following the discovery of a substantial volume of electronic material which had not been reviewed by either the OFT or the defence. The defendants were acquitted.

The case was only the second in which charges have been brought under the UK cartel offence and the first contested hearing (the defendants in the **Marine Hose Cartel** case all pleaded guilty to the charges against them as part of a plea bargain agreement reached with the US authorities).⁵⁸

The BA case has not helped the progress of criminal cartel enforcement in the UK, although how great the setback proves to be remains to be seen. It has also raised questions over the settlement and penalties previously agreed by BA in civil proceedings, and cast doubt on the efficacy of 'whistleblowing' and leniency in a cartel comprising two parties only.⁵⁹

Conclusion

In the light of this brief round-up of EU and UK activity and bearing in mind the themes outlined at the start of this paper, it is possible to offer some more general thoughts:

- (1) Competition enforcement has continued during the recession and its aftermath. The EU's continued emphasis on cartel enforcement is significant in particular as is its continued pursuit of abuse of dominance cases. In the UK, cartel law enforcement has tended to focus on complex arrangements between retailers and suppliers rather than on 'naked' horizontal cartels. Criminal cartel enforcement has clearly received a setback whilst the lessons of the BA case are absorbed.
- (2) Recession has put pressure on the authorities' ability to pursue significant cases. Yet it remains the case that competition law without a steady output of clear, significant cases

⁵⁷The claimants stated that they claimed on their own behalf, and on behalf of all other direct/indirect purchasers of air freight services at inflated prices. However, the High Court concluded that the representative action should not be allowed (under Rule 19.6 CPR) as it was impossible to say of any given person that he was a member of the class purportedly represented by the claimant at the time that the claim form was issued (because the criteria for inclusion in the class depended on the outcome of the action itself).

⁵⁸See OFT press release 72/08 of 11 June 2008.

⁵⁹The BA case had involved various other rulings including an important judgment by the CA in December 2009 on the jurisdiction of the Crown Court in competition matters.

is less effective. Soft enforcement and ‘advocacy’ are important complements but cannot replace enforcement of the law.

- (3) Competition litigation is increasing. In relation to public enforcement, increased activity in the UK, particularly at the CC level, has provoked a rash of appeals and objections. Private follow-on actions to cartel findings at EU and UK level, despite procedural difficulties, are still being pursued, even without the assistance of an EU framework directive.
- (4) Controversial decisions by authorities are likely to be appealed. This, although understandable in principle, is starting to put in question timescales for the conduct of competition cases, with the three-year B SkyB/ITV case as the best UK example. Whether this is an inevitable consequence of outsourcing enforcement to agencies or instead reflects uncertainty on the part of specialist oversight tribunals as to their role remains to be seen.
- (5) Economic analysis is getting more sophisticated. The growth of case-by-case, effects-based analysis largely explains the dearth of Chapter II decisions in the UK. Again, there is a danger that this threatens the efficacy of the law on monopolization. Companies at risk of long drawn out, intricate and expensive cases may adjust their conduct to avoid risk in a way that harms overall economic performance. How to keep assessment and evidence within reasonable bounds is a continuing challenge.
- (6) Recession has also reopened the debate about the objectives of competition law—for example, in relation to the public interest,⁶⁰ and as to whether consumer welfare objectives should prevail over other considerations such as efficiencies. The key dynamic benefits of competition in fostering productivity, growth and innovation are particularly relevant in a recession but the identification of shorter-term consumer benefits from competition can be more problematic.
- (7) Perhaps the main lesson is that competition enforcement is hard work. It is much easier to start a case than to finish it. It took more than three years to make B SkyB sell its stake in ITV. The UK’s Groceries measures, begun in 2006, are still incomplete. The PPI case continues, some ten years after the issue was first raised. These delays arise partly from the need to assess evidence objectively and fairly. Rushing to conclusions is not acceptable. But they also reflect the importance of the subject matter. What is at stake is the exercise of power by an agency acting on behalf of the public in the name of the government. This is no academic exercise but rather one in which major businesses may be required to change their behaviour, or even be divested of assets, against what they see as their economic interests. In the exercise of such an important function, competition authorities must be firm but reasonable; determined but pragmatic; and above all they must have stamina!

Thank you.

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⁶⁰For mergers and other requirements such as the need for prudential regulation in banking. Even within the competition field, the question arises.