
International developments

From the UK

The following items come from the Office of Fair Trading's website <<http://www.offt.gov.uk>> and its magazine, *Fairtrading*, unless otherwise specified.

Controversy continues in Safeway takeover battle

From an article that appeared in *The Guardian* at <<http://www.guardian.co.uk>> (16 March 2003)

Amid much speculation, the OFT has referred four of the five bids for the Safeway supermarket group to the Competition Commission for a full inquiry. The bids by Tesco, J.Sainsbury, WalMart's Asda and Morrison will all undergo an investigation, whereas the bid by Phillip Green has been waived through. The OFT has received harsh criticism for its decision, which is a crushing blow just before it assumes greater power bestowed by the Enterprise Act.

An article in the *Financial Times* demonstrates critics' views: 'It (the OFT) has referred to the Competition Commission a bid that would palpably have increased competition. It has given the green light to a bid with a very real risk that it will reduce competition. The regulator's credibility has been weakened just as it is about to take on new powers and greater independence'.

The OFT's decision to refer the bids from the three largest supermarket chains, Tesco, Sainsbury and Walmart's Asda is viewed as largely correct, as they were always going to face a full competition inquiry. If any of these were to win Safeway, the big four would shrink to three large groups with almost 70 per cent of the grocery market. Even though each promised to sell stores in areas where it would end up with excessive domination, the outcome would arguably be less competitive on a national scale.

It is the decision to refer WM Morrison Supermarket's bid to the Competition Commission

which has been condemned by competition lawyers and industry insiders. The OFT has admitted the Morrison/Safeway combination is unlikely to raise national competition concerns, however, the problem comes at the local level. Critics have accused the OFT of 'copping out' of the task of deciding which stores it should sell to avoid problems with local monopolies.

The OFT's approval for Phillip Green's potential bid is also questionable. Mr Green is a clothing retailer with no experience in the grocery business, and it is unlikely that Green can bring Safeway up to scale to compete with its bigger rivals and therefore to improve competition. Arguably, it could even reduce competition if Green later chose to break the business up, reducing the big four to three.

The OFT has further muddied the waters by giving the impression the three big supermarkets are likely to be blocked, while Morrison would eventually get through. For Safeway, the decision is bad, as it now has no firm offers. The question is whether the takeover panel can keep the game alive and keep Safeway shareholders interested while the Competition Commission deliberates.

Drug company hit with second largest fine for abuse of dominance

The UK competition watchdog has again signalled its determination to get tough on antitrust breaches by fining a drug manufacturer £6.8 million (A\$10.6 million) for excluding competition.

The fine is the second largest the Office of Fair Trading (OFT) has levied on a company for breaching the UK Competition Act.

The drug company, Genzyme, supplies Cerezyme—until recently the only treatment for the rare inherited disorder Gaucher disease.

The OFT has accused it of abusing its dominant market position by charging the National Health Service (NHS) a price that includes home delivery instead of allowing them to buy only the drug.

The company also thwarted potential competition for home delivery services to the NHS by charging independent third-party homecare service providers a price that allowed them no possible profit margin.

The OFT has also ordered Genzyme to supply Cerezyme to the NHS at a stand-alone price for the drug only, exclusive of any home delivery. And it has told the company to offer Cerezyme to third parties at the same price it charges the NHS.

Genzyme said it would challenge the OFT's decision as the proposed £6.8 million fine was not realistic.

It has been suggested the OFT's interference in pharmaceutical pricing could damage research into new treatments for rare disorders.

Last month the watchdog levied its highest fine yet when it told retailers Argos and Littlewoods to pay £22.5 million (\$35.9 million) for fixing prices with toy maker Hasbro.

From the US

The following items come from the Federal Trade Commission's press releases on its website <<http://www.ftc.gov>> and from *Antitrust & Trade Regulation*, published by the Bureau of National Affairs, Inc., unless otherwise specified.

FTC continues crack down on pharmaceutical market abuses

From the Legal Media Group website

Bristol Myers Squibb, one of the world's largest drug makers, settled charges with the FTC for obstructing the entry of low price generic drugs. The FTC unveiled details of the settlement reached over the company's abuse of patent and antitrust laws, including a proposal to curb Bristol's patent protection for the next 10 years. This comes in conjunction with possible A\$1.13 billion damages that Bristol faces in its case against the US.

According to the FTC, Bristol's illegal conduct protected nearly A\$4.3 billion in annual sales at a high cost to cancer patients and other consumers, who, being denied access to low-cost alternatives, were forced to overpay by hundreds of millions of dollars for important and often life-saving medication. Bristol used a number of tactics to prevent generic companies from competing against three of its best selling drugs, cancer medicines Taxol and Platinol and the anti-anxiety agent, BuSpar.

'Through Bristol's decade-long pattern of alleged anticompetitive acts, it avoided competition by abusing federal regulations to block generic entry; deceived the US Patent and Trademark Office (PTO) to obtain unwarranted patent protection; paid a would-be generic rival over A\$118 million not to bring any competing products to the market; and filed baseless patent infringement lawsuits to deter entry by generics', said Joe Simons, Director of the FTC's Bureau of Competition.

The FTC claims that Bristol 'late listed' improper patents for the three drugs to prevent generic rivals from entering the market. Late listing is the practise of filing additional patents for a drug with the Food and Drug Administration (FDA)—effectively asking the government for protection—after a generic rival has applied for FDA approval to sell the drug. Late listing delays the approval of the generic application and causes a 30-month stay of entry for any rivals.

Under the proposed settlement, Bristol is barred from late-listing any drugs in its portfolio and is prevented from applying for additional patents on the above three mentioned drugs. The bans were issued in conjunction with other damages facing Bristol.

This is the second case in the past two weeks where the FTC punished a company for patent misuse, (leading to substantial financial gain), and is an area which will be closely watched by competition watchdogs.

Pfizer merger approved

The creation of a 'world super drug maker' has been approved by competition agencies in the US, Canada and New Zealand, giving the green light for Pfizer's A\$92.5 billion acquisition of rival, Pharmacia Corp. The combined company will hold 11 per cent of the world's market for prescription drugs, which is 50 per cent larger than its nearest rival.

All three competition agencies imposed conditions on the deal, to remedy competition concerns. Pfizer, the world's largest drug maker, said they would begin operating on a combined basis almost immediately.

The acquisition was also approved by the EC in late February, where the most significant condition attached to the deal was the sale of an experimental drug for overactive bladders, expected to reach the market later this year and have eventual sales of more than A\$1.6 billion. Pfizer and Pharmacia also agreed to sell two erectile dysfunction drugs in the early stages of experimental testing, as Pfizer already sells the blockbuster Viagra.

The two companies combined revenue was estimated to exceed A\$74.7 billion in 2002 and they had an estimated combined research budget of A\$11.4 billion.

The companies did not name the drugs requiring divestiture in the US or in New Zealand, whereas in Canada it was announced that the agreement provides for the divestiture of two developmental compounds that will treat sexual dysfunction and overactive bladders.

The ACCC has given conditional approval to the transaction in Australia subject to undertakings by the parties, being finalised, and is expected to be finalised within weeks.

First ever foreign class action settlement

From the Legal Media Group website

Christie's and Sotheby's, the world's two largest auction houses, have agreed to pay A\$67.8 million to settle class action claims by overseas customers. Foreign customers claim to have paid higher prices in auction houses outside the US, owned by Christie's and Sotheby's, because of a price-fixing agreement between the two auction houses between 1993 and 2000.

Last year a controversial US court ruling gave the foreign plaintiffs the ability to pursue their claims in the US under the Sherman Act. This is the first settlement of a class action law suit brought by foreign plaintiffs seeking damages in the US for antitrust law breaches abroad. This settlement follows the company's agreement to pay A\$845 million to settle class action claims by US consumers who had bought goods at the US auction houses.

As part of the A\$67.8 million settlement, the plaintiffs have promised not to bring further action in courts outside the US and drop claims already launched in the UK and Canada. The settlement is subject to approval by a US district court and is expected within six months. The auction houses allegedly colluded to end a costly rivalry by eliminating discounts and charging non-negotiable commissions, costing sellers an estimated A\$678 million in commissions from 1993 to 1999.

The two houses control nearly all of the highly lucrative worldwide auction market in everything from furniture to antiques to art. This settlement, although diminutive in comparison to the settlement reached by US consumers, is a step forward as it demonstrates companies are becoming aware they

have a responsibility toward all consumers, whether domestic or international.

From Canada

The following item is from the Competition Bureau's website at <<http://competition.ic.gc.ca>>.

Price maintenance and misleading advertising case (Access Toyota Program)

The Competition Bureau announced that it has settled a price maintenance and misleading advertising case involving Toyota Canada Inc. and its Access Toyota Program. The settlement ensures that consumers will have every opportunity to negotiate prices for Toyota vehicles.

The parties have agreed to a consent prohibition order issued by the Federal Court of Canada requiring Toyota to amend its sales, promotion, training and monitoring practices for the Access Toyota Program. The amended program will be permitted to continue and Toyota may extend it to other parts of Canada. As part of the settlement, Toyota has made voluntary donations totalling \$2.3 million to several charitable organisations across Canada.

The bureau's inquiry addressed allegations of price maintenance, namely that Toyota was prohibiting dealers under the program from selling vehicles below 'Access/Drive-Away Prices.' The inquiry also raised an issue under the misleading representation provisions of the Competition Act because the Access Toyota website indicated that Access Toyota dealers could sell for less than Access/drive-away prices without being penalised by Toyota.

Under the price maintenance provisions of the Competition Act, it is a criminal offence to attempt to influence upward or discourage the reduction of resale price by threat, promise, agreement or other like means or to refuse to supply or otherwise discriminate against a person because of their low pricing policy. Under the Act's misleading representations provisions, it is also a criminal offence to knowingly or recklessly make a representation to the public that is false or misleading in promoting a product or service.

Toyota fully cooperated with the Bureau's investigation and its willingness to address the Competition Bureau's concerns without costly litigation for taxpayers, was an important factor in settling this case.

Montreal man gets US jail time for phone scam

A Montreal man has been sentenced to 10 years in an American jail for running a telemarketing scam that bilked victims out of millions of dollars.

Denis Baribeau pleaded guilty in the US District Court in Boston to two counts of telemarketing fraud and wire fraud. Most of the victims were senior citizens.

Canadian and US investigators cooperated to build the case against Baribeau of Brossard, Quebec.

Baribeau has been in custody in the Boston area since February 2001 when he was arrested while on vacation in Florida.

Baribeau is accused of being the mastermind of a telemarketing ring. Callers allegedly posed as lawyers, police officers and customs agents asking people to provide money for a bogus investigation into a lottery scam.

The ring netted up to \$1 million a week.

Baribeau got the maximum sentence under US law and he won't be eligible for parole. He'll also have to serve three years probation after his sentence.

The ring siphoned an average of \$5000 from each victim. At least one person lost \$50 000.

Another 25 Montreal-area residents have been charged with fraud and conspiracy in connection with the scam. They are awaiting trial.

From New Zealand

The following items came from the NZ Commerce Commission's media releases listed on its website at <<http://www.comcom.govt.nz>>.

Global Pre Paid Communications and In Touch Networks

The Commerce Commission is concerned about the activities of an Australian-based company trading under the names Global Pre Paid Communications Pty Limited and In Touch Networks Pty Limited, following the commencement of legal proceedings against the company by the ACCC.

Director of Fair Trading, Deborah Battell, said the Commerce Commission is alerting people who see any advertising relating to Global Pre Paid Communications or In Touch Networks to be

extremely wary about entering into any agreements with the company until the outcome of the Australian case is known.

The company has been advertising in New Zealand newspapers offering pre-paid telephone card vending machines for sale for use in 'exclusive' territories. Buyers are required to enter into an ongoing agreement with the company to buy the pre-paid telephone cards.

The Commission has received several complaints about the company from New Zealanders relating to misrepresentations about the nature of its business, including the level of potential sales and exclusivity of the territories.

Ms Battell said the Commission has been assisting the ACCC, which has commenced legal proceedings in the Federal Court against the companies and several of their present and former directors, employees and agents, for allegedly breaching the Trade Practices Act.

The company operates from Australia and is not registered in New Zealand.

From Europe

The following items are from the European Commission's website at <<http://europa.eu.int/rapid/start/egi/guesten.ksh?qry.>>

Record A\$1.17 billion fine imposed in Germany against cement cartel

The German Cartel Office slapped a total of A\$1.17 billion worth of fines on six cement producers in its largest ever sanction following a price-fixing probe into the cement industry.

Thirty companies operating in Germany were raided last July by officials seeking evidence of price fixing and regional delivery quotas, with 13 investigations into small and medium-sized companies still in progress. Germany's HeidelbergCement received the largest fine, though the A\$448 million charge was lower than the A\$713 million predicted by some observers.

It admitted taking steps to 'defend itself' against cheap imports, but accused the cartel office of issuing 'preposterously high fines' for moves which, it insisted, had not harmed consumers. It will appeal the fine. Britain's Readymix received the smallest fine of A\$21.4 million after cooperating with authorities.

The German Cartel Office president said the high fines were justified because cement buyers and users were 'massively damaged', though the final punishment reflected the level of cooperation from the companies. The Italian competition watchdog is also targeting the cement industry, as Holcim, the world's second largest cement company, said an investigation had been launched and some of its documents seized.

Philip Morris fined for price fixing

In the second major blow in two weeks, Philip Morris and Italian cigarette maker and distributor ETI, have been fined A\$124.6 million by the Italian antitrust regulator for price fixing.

Last week Philip Morris was fined A\$16.9 billion in damages for deceiving smokers into thinking light cigarettes are safer than normal cigarettes by an Illinois trial judge. US states are poised to intervene in an attempt to reduce the A\$20 billion bond that Philip Morris must post before it can appeal the damages award. The potential move by state attorneys follows warnings from the tobacco maker that it might not be able to make a \$4.3 billion payment due to the states this month under a 1998 legal settlement.

Things for Philip Morris continue to look worse as the Italian regulator last week concluded an in-depth probe into tobacco prices launched in June 2001, and found that the two key players colluded to arrange simultaneous price hikes and to keep competitors and new brands out of the market.

The regulator alleges that between June 1993 and March 2001 state-owned ETI and five Philip Morris units coordinated price increases that helped them maintain control of 90 per cent of the market and at times limited competition. ETI owns distribution rights in Italy for Philip Morris products, including its Marlboro brand cigarettes.

Philip Morris has said it will appeal the fine, arguing that the watchdog's decision ignores the role of the state monopoly in the Italian cigarette company. 'The Antitrust Authority has condemned Philip Morris for implementing price increases that were required by the Italian state as part of its fiscal and budget policies' said a counsel for Philip Morris. Other smaller rival firms investigated were cleared in the investigation.

The investigation showed that the AAMS, the authority which later became ETI, was both cigarette distributor and excise duty regulator, and therefore had a vested interest in seeing prices for

tobacco rise, because it would lead to a higher tax take. The competition authority found that the licensing agreements between Philip and AAMS/ETI meant the commercial strategies of both companies converged, interfering with cigarette price competition and artificially maintaining market stability.

The Italian treasury is in the process of privatising ETI, expected to raise A\$2.2 billion with binding bids to be handed in by the end of April. Potential bidders include British American Tobacco, Japan Tobacco and Spain's Altadis. All eyes will continue to be on Philip Morris to see how it fares this last hit.

From Asia

Article from JoongAng Daily website at <<http://joongangdaily.joins.com>>.

South Korean Fair Trade Commission launches series of competition investigations

Amid escalating tensions between the government and big business, the Korean Fair Trade Commission announced plans to investigate the nation's six major business groups to uncover any illegal inter-group transactions. The probe into Samsung, LG, SK, Hyundai Motor, Hyundai and Hyundai Heavy comes as the government cracks down on 'chaebols' (large conglomerates), and their cross-affiliate transactions.

The announcement comes one week after the inauguration of South Korea's new president, Roh Moo-hyun, who has fuelled tension with his left-of-centre politics. Mr Roh has vowed to stamp out illegal cross-investments within the chaebols and to force the groups' secretive family owners to be more accountable to minority shareholders.

This investigation is the first in a series of FTC probes to eliminate illegal practices, and the director-general of FTC's Investigative Bureau said they have already detected signs of possible illegal transactions.

This probe will be followed by an investigation into seven state-owned companies, including Korea Water Resources Corp. and Korea Land Corp. The FTC will also separately examine the country's top 10 business groups, to ascertain whether these groups have met requirements to disclose major inter-group deals. The targets of these investigations will be announced in April.

Business reaction has been cautious, one business lobby group saying that at least this year the agency 'announced its year's plan of investigation in advance, in contrast to its past practices of conducting a sudden crackdown'. Critics argue the standard of legality for cross-affiliate transactions is not clear, since many of them are judged on the agency's own rules.

The FTC can impose multi-million dollar fines against the chaebol if it finds evidence of wrongdoing.

From Africa

Article from the <<http://allafrica.com/>> website

Nigerian scam proves deadly

The notorious 'Nigerian letters' scam is blamed for the death of a Nigerian diplomat in the Czech Republic. Nigeria's consul in the Czech Republic was shot and killed at the Nigerian embassy in Prague by a 72-year old Czech retiree who claims to have lost his life savings in a get-rich-quick scheme.

The scheme is possibly tied to the Nigerian letters scam, otherwise known as the 'advanced fee fraud' or 419 scam, as 4-1-9 is the Nigerian criminal code for this type of scam. The murder suspect claims to be a victim of the scam, which is a thriving industry around the world.

The scammers use different methods to extort money from thousands of victims around the globe, typically promising them compensation for assistance in moving funds from foreign countries to banks in the US. The fraudsters make their money by extracting ever escalating sums of money for bribes, bank account fees, airfares and the like. Some victims travel to Africa to pick up the money, or are seen waiting at London or New York airports to meet their 'business partners'.

The suspect claims his bank account was drained after giving personal details to someone posing as a senior Nigerian official. He had visited the Nigerian embassy regularly for almost a year in hopes of getting his money back.

In light of the incident, security at Nigeria's foreign offices is to be reviewed. This event demonstrates the broadening reach of email scams, despite efforts by consumer protection agencies to increase public awareness.

South African regulator laments low fines for antitrust breaches

Article from the Competition Commission's website at <<http://www.compcom.co.za>>

The South African competition watchdog has warned the low levels of fines levied on two companies that breached the country's antitrust laws could encourage other companies to weigh up the financial benefits of failing to notify mergers.

Last week the country's Competition Tribunal, which levies penalties for antitrust law breaches, fined retail company Edcon for closing a deal to buy the book debts of Retail Apparel Group (RAG) without notifying the Competition Commission. The deal took place before a full merger between Edcon and the troubled RAG.

The tribunal, however, decided the antitrust breach was a procedural rather than substantive violation of the Competition Act and set the penalty at R250 000 (\$31 418). The tribunal could have fined Edcon up to R85.5 million.

The maximum penalty allowed by the Act is 10 per cent of a firm's turnover.

The tribunal fined component manufacturer Dorbyl just one rand for failing to notify the Competition Commission of a deal. The tribunal said Dorbyl's breach was the result of an honest mistake that the firm had then tried to rectify.

Competition commissioner Menzi Simelane said: 'We hope the guilty verdicts send a message to business that breaches of the Act will not be tolerated. The Competition Commission sought to impose administrative penalties on Edcon and Dorbyl because they proceeded to implement mergers without the prior approval of the Commission as required by the Act.'

But Simelane said the level of fines levied by the tribunal may have the effect of making it difficult for the Commission to fulfill its mandate.

The tribunal's decisions leave the door open for firms to weigh up the financial benefits of implementing transactions prior to notification as it would appear that late filing with the Commission will not attract adequate penalties.

The Commission said it could not appeal the tribunal's decisions but vowed to prosecute parties vigorously if they implemented merger transactions without notifying the authorities.