

CRA Insights: European Competition

MARCH 2009

CRA's recent events

Energy workshop in Brussels – February 2009

CRA hosted a workshop on Competition Policy in the European Energy Sector on 12 February at the Conrad Hotel in Brussels. The workshop, attended by over 100 delegates, reviewed recent competition developments in the energy industry, focusing on the economic aspects of the current debate on how best to protect and enhance competition in the sector. Speakers consisted of senior regulators, economists and representatives from energy firms: Claes Bengtsson (DG Competition) and Céline Gauer (Head of Energy Antitrust Unit), European Commission; Paul Hallas, Director of Gas Supplies, Centrica Energy; Dennis Hesseling, Head of Network Sectors and Media Unit, Dutch Competition Authority (NMa); Juan José Alba Rios, Director, Regulatory Affairs, Endesa; Prof. Nils-Henrik von der Fehr, University of Oslo; and Ulrich Rust, Head of Merger Control and Antitrust, RWE. The conference was chaired by Giulio Federico and Diana Jackson of CRA.

A conference programme and links to conference presentations are available here:

http://www.crai.com/ecp/events/2009/Workshop_Feb09.htm

6th annual competition conference in Brussels – December 2008

CRA held its 6th annual conference on Economic Developments in European Competition Policy in Brussels on 3 December. Over 400 participants attended the event, which was opened by Philip Lowe, Director General of DG Competition.

The conference covered a range of topics in European competition policy, including on-going state aid procedures in the banking sector, recent non-horizontal mergers, cartel deterrence and a review of the vertical restraints guidelines. Damien Neven, Chief Economist at DG Competition, also gave his views on the Article 82 Guidance Paper that was adopted by the Commission the same morning. Bill Kovacic, Chairman of the Federal Trade Commission in the US, provided his views on the future of US antitrust enforcement under the new administration.

A full list of topics and links to speaker presentations are available here: http://www.crai.com/ecp/news/news_2008/BruConf08.htm

CRA's European news

Sanofi-Aventis/Zentiva – February 2009

The European Commission cleared at Phase I, subject to remedies, the acquisition of Zentiva, a generics company active in Central and Eastern Europe, by the French pharmaceutical company Sanofi-Aventis. The Commission investigated the effects of the transaction in over 100 national pharmaceutical markets where the parties' activities overlapped. Remedies were required to address the Commission's concerns in a number of therapeutic areas in Eastern European markets, Sanofi-Aventis offered to divest 15 products. **Matthias Pflanz**, **Hristina Dantcheva** and **Andrew Parkinson** of CRA advised Sanofi-Aventis.

Gas Natural/Union Fenosa – February 2009

A CRA team including **Giulio Federico**, **Ugur Akgun** and **Clara Ruiz Prada** advised ENI throughout the investigation by the Spanish Competition Authority of the acquisition of Union Fenosa by Gas Natural. The transaction affected the Spanish gas and electricity markets. The merger was cleared subject to several remedies in February 2009.

Laurent Flochel promoted to Vice President in France



Laurent Flochel has been promoted to Vice President. Laurent established CRA's French office in 2007, having previously been professor of economics at the University of Lyon, and scientific advisor at the Council of Economic Analysis of the French Prime Minister. Since joining CRA, Laurent has led successful economic analyses in a number of high-profile cases: the Pernod Ricard/V&S merger before the EU Commission; the international arbitration EADS vs Thales; as well as several mergers, agreements and abuse of dominance cases before the Conseil de la concurrence – in well-known cases concerning press distribution, pay-TV, online travel agencies, distribution of iPhone handsets, employment agencies and other sectors. The French office continues to expand, reflecting the high level of activity and strong economic focus of the Conseil.

Article 81 and 82 investigation of online travel agencies in France – February 2009

The French Conseil de la concurrence issued in early February a decision relating to its Article 81 and Article 82 investigation into alleged anti-competitive practices adopted by SNCF (the state owned French railway operator) to favour its online travel agency joint venture with Expedia to the detriment of rival online travel agencies in France. The decision follows complaints lodged by rival online travel agencies Karavel-Promovacances, Lastminute and Switch. In order to address the Conseil's concerns, SNCF gave a number of behavioural commitments allowing rival online travel agencies to market all of SNCF's promotional offers as well as enabling competitors' customers to print rail tickets online. SNCF also undertook to facilitate access by rival online travel agencies to its electronic rail booking system now and going forward. A CRA team including **Laurent Flochel** and **Adrien Cervera-Jackson** advised SNCF and Expedia.

Exclusive distribution of Apple iPhone by Orange in France – February 2009

On 17 December 2008, the French Conseil de la concurrence adopted interim measures against the exclusive arrangements between Apple Europe and Orange France for the distribution of the iPhone mobile handset in France. The decision follows a complaint lodged by mobile network operator Bouygues Telecom in September 2008 against the exclusive designation of Orange as the wholesaler and mobile network operator for Apple's iPhone. The Conseil considered that the exclusive arrangements restricted competition in the French mobile phone market as a result of their excessive duration and the associated increase in consumer switching costs. In order to address its concerns, the Conseil imposed interim measures suspending all exclusivity provisions and allowing other mobile network operators (notably SFR and Bouygues Telecom) to retail the iPhone to their customers as part of their mobile offers. The Conseil will publish a substantive decision on this matter in due course. Following an appeal by Apple and Orange, the French Cour d'Appel de Paris issued a judgment on 4 February 2009 upholding the Conseil's interim measures decision. Apple Europe was advised by a CRA team including **Laurent Flochel** and **Adrien Cervera-Jackson**.

French Competition Authority fines employment agencies for illegal exchange of information – February 2009

On 2 February 2009, the French Conseil de la concurrence fined three employment agencies a total of €94.4 million for having exchanged information on prices and contract conditions applicable to their largest customers in 2003 and 2004.

A CRA team (including **Laurent Flochel** and **Pascale Dechamps**) advised Manpower on the application of the "impact on the

economy" (*dommage à l'économie*) basis for assessing the level of the fine. The Conseil and two of the defendants produced econometric analyses of the potential overcharge imposed by the agencies on their clients during the infringement period. Manpower and the other defendants are currently appealing the Conseil's decision to the Paris Court of Appeal.

Recent publications by CRA consultants

Economic analysis of the use of selective distribution by luxury goods suppliers

A CRA paper on this issue by **Thomas Buettner**, **Andrea Coscelli**, **Thibaud Vergé** and **Ralph A. Winter** will be published in the March 2009 issue of the European Competition Journal (Vol.5, No. 1). The paper was previously submitted to Commissioner Kroes' working group on "Opportunities in Online Goods and Services". It also contributes to the debate around forthcoming revisions of the European Commission's Vertical Restraints Guidelines more generally.

Competition and regulation in the Spanish gas and electricity markets

CRA Senior Consultant **Giulio Federico** (together with **Xavier Vives** and **Natalia Fabra**) has prepared a comprehensive review of recent developments in **competition and regulation in the Spanish gas and electricity markets** set in the context of the European energy industry. The report is published by the Public-Private Sector Research Center of IESE Business School. The report is available here: <http://www.orkestra.deusto.es/images/pdf/competition%20and%20regulation%20in%20the%20spanish%20gas%20and%20electricity%20markets.pdf>

La concurrence entre biens systèmes

Laurent Flochel (CRA France) has published an article in *Concurrences: Revue des droits de la concurrence* which examines competition between two firms supplying all or part of a "system good" (i.e., the combination of several complementary components). A system good can be open (where all components may be combined together) or closed (where only certain components may be combined together either due to technical incompatibility or exclusive agreements between firms). The article concludes that, from a static perspective, supplying a closed system good is not necessarily anticompetitive and competition between suppliers, each providing a closed system, can even lead to lower prices compared to the provision of open systems. The analysis of consumer welfare is, however, more nuanced. Overall, a case by case assessment is required to evaluate correctly the economic effects of competition between suppliers of system goods. The article (in French) is available here: http://www.crai.com/ecp/assets/esup_203_droit_eco_Flochel.pdf

Incumbent press distributors fined in France for anti competitive rebate scheme – January 2009

Laurent Flochel (CRA France) assisted Messageries Lyonnaises de Presse (MLP) in its complaint to the French Conseil de la concurrence against a rebate scheme operated by incumbent press distributors, Nouvelles Messageries de Presse Parisienne (NMPP) and Société Auxiliaire pour l'Exploitation des Messageries Transports Presse (TP).

NMPP and TP offered loyalty rebates (which were retroactive in nature) to their clients, the newspapers. The Conseil carried out an effects-based analysis of the rebates. In particular, the Conseil assessed whether demand could be contested by a competitor (MLP) and whether the competitor was able to offer a tariff that would neutralise the rebates without incurring losses. The Conseil also investigated whether the rebates offered could have been justified by specific efficiency gains. On 27 January 2009 the Conseil de la concurrence issued a decision to fine the incumbent press distributors.

Selective distribution of luxury goods in the age of e-commerce – January 2009

Cristina Caffarra of CRA and Prof. Kai-Uwe Kühn of the University of Michigan have prepared an economic report for CHANEL on the economics of vertical restraints (selective distribution) for luxury goods, in the context of the forthcoming review ("Selective Distribution of Luxury Goods in the Age of e-commerce"). The report contributes to the discussion surrounding future revisions of the European Commission's Vertical Restraints Guidelines. A non-confidential version of the report is available at http://ec.europa.eu/competition/consultations/2008_online_commerce/chanel_report.pdf

Ryanair/Aer Lingus II – January 2009

In December 2008, Ryanair renewed its efforts to bid for Aer Lingus, notwithstanding a pending CFI review of the Commission's 2007 decision to prohibit its previous attempted merger with Aer Lingus. Ryanair subsequently abandoned the bid during the Phase I review in January 2009. A CRA team including **Cristina Caffarra**, **Giulio Federico** and **Hugh Wills** supported Aer Lingus in the initial stages of their defence against this new unsolicited bid.

UK Competition Commission issues final report on PPI – January 2009

The UK CC has published its final report on its Payment Protection Insurance (PPI) market investigation. The supply of PPI was referred to the CC by the OFT in February 2007, following a super-complaint about PPI by Citizens Advice. The CC found a lack of effective competition in the distribution of PPI and recommended a package of remedies, including a prohibition on selling PPI at the

same time as the sale of the credit product, or within seven days of the conclusion of the credit sale period. Other elements of the remedies package included measures to improve information provided to consumers, to enable them to make price comparisons more easily. **Alan Overd** and **Rameet Sangha** advised Lloyds TSB during the CC and OFT investigations of PPI.

Wholesale broadcasting transmission market review in France – January 2009

In November 2008, ARCEP (the French telecoms regulator) published a consultation document relating to its ongoing review of wholesale broadcasting transmission markets in France. CRA advised an alternative terrestrial broadcasting transmission operator (towerCast) in its response to ARCEP's consultation document dealing with regulatory obligations relating to access to the transmission infrastructure of the incumbent (TDF). ARCEP's consultation period ended in January 2009 and the regulator is expected to issue a decision on market definition, SMP assessment and remedies relating to this market review later in 2009. towerCast was advised by a CRA team including **Laurent Flochel** and **Adrien Cervera-Jackson**.

Paper merger – Sappi/M-Real – November 2008

The acquisition by paper manufacturer Sappi of M-real's graphic paper business was approved without conditions. The parties were respectively no. 1 and no. 3 in Europe in the production of certain categories of paper, used in high-quality commercial printing. The Commission nonetheless recognised that customers would still have a choice between a number of suppliers after the proposed transaction, and cleared the merger unconditionally. A CRA team including **Cristina Caffarra**, **Ian Small**, **Pascale Dechamps** and **Jenny Haydock** advised Sappi and M-real.

CRA's South African news

South African Competition Commission gives go-ahead to two Vodacom acquisitions – December 2008

In reports dated 10 and 11 December 2008, the South African Competition Commission informed Vodacom that it recommended unconditional approval of Vodacom's proposed large merger with Storage Technology Services ("StorTech") and unconditionally approved Vodacom's proposed medium merger with Gateway Communications. Both mergers are part of Vodacom's strategy to expand outside its core mobile phone business into managed network services and various IT services for business customers in South Africa and other countries on the African continent. In each case, there was little if any current overlap between the activities of Vodacom and the acquired firm. The principal issues were the impact of the proposed mergers on potential future competition

and the implications of the 50% ownership interest which Telkom (the incumbent fixed line operator) currently holds in Vodacom (but which it is in the process of divesting). A team including **Bob Stillman** and **Geoff Edwards** from CRA's European Competition Practice advised Vodacom, StorTech and Gateway Communications.

South African retail banking and payments – December 2008

The South African Competition Commission published a report into retail banking and the national payment system in December 2008, following a Commission-appointed investigation of competition in the sector which began in 2006. The report's 28 recommendations included the implementation of a direct charging model for ATMs, measures to facilitate account switching and comparison of fees across accounts, and the establishment of a regulatory process to determine interchange fees on payment cards and other payment mechanisms. **Bob Stillman**, **Kyla Malcolm** and **Rameet Sangha** of CRA advised Absa Bank during the long-running investigation.

CRA's North American news

US and European competition authorities clear reinsurance brokerage merger (Aon/Benfield)

CRA International teams based in Washington, DC and London provided economic analysis and support to reinsurance brokerages Aon and Benfield in connection with their recent merger. Following presentations and submissions by CRA and counsel for the parties, the US and European antitrust authorities respectively concluded that neither a second request in the US nor a Phase II investigation in Europe were necessary. The merger was allowed to proceed without conditions in both jurisdictions.

In reaching these decisions, the antitrust agencies concluded that, while Aon and Benfield have historically been among the largest providers of "reinsurance brokerage services", the primary insurers

to which Aon and Benfield provide their services had access to many alternatives to the merging parties, including other reinsurance brokers, direct purchase (bypassing the need for brokers) and alternative risk transfer mechanisms such as capital market instruments.

Work in the US was led by **Greg Vistnes** with the assistance of **Dipan Ghosh**, while work in Europe was led by **Lorenzo Coppi** with assistance from **Pablo Florian** and **Rosalind Hunter**.

Discover settles with Visa and MasterCard for \$2.75 billion

CRA economists assisted counsel for Discover Financial Services in a lawsuit seeking damages from Visa Inc. and MasterCard Inc. for practices that suppressed third-party issuing on the Discover Network and the acceptance of Discover's cards. Discover's \$2.75 billion settlement agreement with Visa and MasterCard is the third largest reported antitrust settlement in US history. CRA was retained to analyse the anti-competitive effects of Visa and MasterCard rules and to compute damages.

Discover filed its damages suit against Visa and MasterCard in October 2004, following the conclusion of a Department of Justice lawsuit that determined Visa and MasterCard violated antitrust laws by barring banks from issuing cards on the Discover Network. CRA supported Discover's expert economist in this matter, CRA Senior Consultant Professor **Jerry A. Hausman**. The CRA team undertook economic analyses of market definition, market power, and the impacts of Visa's and MasterCard's rules on competition in the provision of credit and debit card network services. CRA also assessed the monetary damages to Discover. CRA's analysis contributed to determining the \$2.75 billion settlement amount. **Craig Romaine** led the project and was assisted by CRA Senior Consultant Professor **Steven C. Salop**, and CRA senior staff **Spencer Graf**, **Stephen Kletter** and **Mary Beth Savio**.

About CRA's European Competition Practice

CRA's European Competition Practice specialises in providing economic advice to businesses on matters of competition policy and regulatory affairs. Our reputation is for rigorous and innovative economic analysis, careful attention to detail, and the ability to work effectively as part of a wider team of advisors.

CRA's European Competition Practice has over forty staff in London, Brussels, Amsterdam and Paris. Our economists have extensive experience working before DG Competition and the national competition and regulatory authorities of the Member States. We also work closely with our network of internationally renowned academic associates and CRA colleagues in North America. We have native speakers of all the major European languages.

Contacts

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