



# newsletter

Competition - January 2010

## European Commission fines plastic additives producers for cartel

### Summary

On **11 November 2009** the European Commission announced that it had imposed fines of **€173,864,000** on Akzo, Baerlocher, Ciba, Elementis, Elf Aquitaine (Arkema France), GEA, Chemson, Faci, Reagens and AC Treuhand for violating the EC Treaty's ban on **cartels and restrictive business practices (Article 81)**. The Commission considers that between 1987 and 2000 the companies involved fixed prices, shared customers, allocated markets and exchanged sensitive commercial information for tin stabilisers and ESBO/esters.

Chemtura Corporation was a participant but was not fined since it revealed the existence of the cartel to the Commission. Although the fines on Arkema, Baerlocher and Ciba were reduced because they co-operated with Commission investigation, Arkema's fine was increased by **90%** because it had previously taken part in similar cartels.

### Background

Tin stabilisers are used to prevent decomposition caused by heat in the processing of PVC into final products. ESBO/esters are used as plasticisers and heat stabilisers for plasticised PVC products. Both are used in the production of packaging, credit cards, bottles, coatings, flooring and other commonplace plastic products. The **EEA markets** for them were worth **€121 million** at the time of the alleged infringement. The Commission's investigation began with unannounced inspections ('dawn raids') in February 2003, after Chemtura Corporation '**blew the whistle**' on the cartel by lodging an immunity application with the Commission.

### Facts

The Commission has found that Akzo, Baerlocher, Ciba, Elementis, Elf Aquitaine, Chemtura, Reagens and AC Treuhand (for various periods) took part in an EEA-wide tin stabiliser cartel between 1987 and 2000.

It also found that Akzo, Ciba, Elementis, Elf Aquitaine, GEA, Chemson Chemtura, Faci and AC Treuhand (for various periods) took part in an EEA-wide ESBO/ester cartel between 1991 and 2000.

The Commission states that both cartels involved fixing prices, sharing customers, allocating markets and exchanging commercially sensitive information; and that decisions were taken at meetings organised by and held at the Zurich premises of AC Treuhand, and took place monthly for tin stabilisers and quarterly for ESBO/esters.

### Comment

Competition Commissioner **Neelie Kroes** commented: "**These companies must learn the hard way that breaking the law does not pay and that repeat offenders will face stiffer penalties. The companies' elaborate precautions to cover their tracks did not prevent the Commission from revealing the full extent of their determined efforts to rip off consumers**". Tough words, as ever, from Commissioner Kroes.

As always, the case emphasises the importance of an effective competition compliance regime which can bring to light anti-competitive behaviour within a business. Such a system allows management to take timely decisions to protect a business, for example by applying for leniency to the competition regulators.

Separately, it is noteworthy that this is yet another Commission cartel decision involving the supply of products at an industrial '**intermediate**' level (i.e., as an input to a manufacturing process). It follows a string of similar decisions in recent years, such as in 2009 the calcium carbide cartel, and in 2008 the aluminium fluoride cartel, the sodium chlorate cartel, and the nitrile butadiene rubber cartel. Details of all these decisions, and more besides, can be found at:

[http://ec.europa.eu/competition/cartels/overview/faqs\\_en.html](http://ec.europa.eu/competition/cartels/overview/faqs_en.html)



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## UK Groceries – the competition test is back (part 2)

### Summary

In our March, June and July 2009 bulletins we commented on [Tesco plc v. Competition Commission](#) – Tesco's challenge to the Competition Commission's recommendation for a 'competition test' to be introduced to the UK planning system for grocery retail stores.

The Competition Appeal Tribunal asked the Competition Commission to reconsider its recommendation that the competition test should be introduced, after upholding Tesco's challenge. The Competition Commission reconsidered the test over the summer 2009, and has now renewed its formal recommendation to the Government that it should be introduced.

### Background

On 9 May 2006 the [Office of Fair Trading \(OFT\)](#) referred the supply of groceries by retailers in the UK to the [Competition Commission \(CC\)](#) for investigation.

In its report published on 30 April 2008, the CC recommended to the Government that a competition test be applied to grocery retail planning applications, as part of a package of remedies to address the adverse effect on competition that it had found in the grocery retail sector.

Tesco plc (Tesco) challenged the CC's decision to recommend the competition test before the Competition Appeal Tribunal (the CAT). In its judgment of 4 March 2009, the CAT upheld Tesco's appeal. In a later judgment on 3 April 2009 the CAT annulled the CC's decision to recommend the competition test, and referred the matter back to the CC to reconsider.

### What is the competition test?

The competition test, in broad outline, means:

- planning authorities consulting the OFT when considering planning applications for new supermarkets and extensions to existing ones;
- the OFT assessing the impact on competition in the local grocery market of each such development; and
- the planning authorities taking account of the OFT's recommendations when deciding whether to give planning consent.

The CC has said that "the test would block supermarket developments by retailers already powerful in a local area, in order to make room for competing stores from rival retailers."

### What is the latest development?

Following the judgment of the CAT the CC carried out further analysis on "the effectiveness, benefits, costs and proportionality of the competition test". That led to the publication for consultation of a provisional decision in July 2009. The provisional decision clearly indicated that the CC – having reconsidered the competition test – wanted to recommend it to the Government, on the basis that it would "have a positive effect over time for consumers by ensuring that they benefit from greater competition and choice between retailers in their local areas".

The CC has reached its final decision on the competition test. As expected, it has renewed its formal recommendation to the Department of Communities and Local Government and the devolved administrations in Wales, Scotland and Northern Ireland.

The CC has made one change to the competition test, which is "to allow all retailers to make small groceries extensions to stores—one extension per store of up to 300 sq metres of groceries sales area—provided that the store in question has not been extended in the previous five years".

### Comment

[Peter Freeman](#), Chairman of the CC and Chairman of the Groceries Inquiry Group, said:

"We expect that the competition test will have the effect we intend by helping to bring in competition where it is lacking and to stop individual retailers consolidating strong positions in local areas to the detriment of consumers. We were asked to look at the case again by the Tribunal—and we believe we have shown the test will be effective, beneficial to consumers and proportionate."



## Isle of Wight ferry services

### Summary

The Office of Fair Trading (OFT) has decided not to refer the market for ferry services to the Isle of Wight to the Competition Commission (CC) for in-depth review.

Following a market study and a consultation on its findings, the OFT has concluded that although the market has features that restrict competition, there is limited evidence of actual consumer detriment. For that reason, the OFT has decided that a market reference is not appropriate at this time.

The OFT has stated that ferry companies and Isle of Wight residents would benefit from greater transparency about price trends and quality of service. The ferry companies have volunteered to take steps to achieve that.

### Background

Under section 131 Enterprise Act 2002 the OFT can make a reference to the CC if it has reasonable grounds to suspect that any feature or combination of features of a UK market restricts, prevents or distorts competition in the UK. Often, the OFT conducts a preliminary market study to examine whether a market investigation reference should be made to the CC.

In 2008 the ferry services connecting the Isle of Wight to the mainland were the subject of a complaint by [Andrew Turner](#), the island's MP, which was backed by a petition of 8,000 signatures. The complaint alleged that prices were too high and that quality was declining, and asked the OFT to refer the ferry operators to the CC.

### Facts

The OFT found that there were reasonable grounds for suspecting that competition was affected by the high barriers to entry in this market. It found that there were limited port facilities on the island, and that routes might not be sufficiently busy to sustain competition between two or more operators.

It noted that excess capacity on a route would typically result in one operator being driven out of the market, rather than in beneficial competition between operators. Competition on the same ferry route was rare in Europe, and only occurred on the busiest routes (such as cross-Channel services).

Even though the competitive concerns met the threshold for the OFT to make a reference to the CC, it decided to use its discretion not to refer, having looked at various performance indicators to gauge whether the competition concerns gave rise to consumer detriment. The indicators it considered were pricing (and price transparency) service quality (frequency, capacity, speed, reliability and punctuality) and levels of profitability. It found that overall, pricing was not 'far out of line' with what would be expected in a reasonably well functioning market and was broadly in line with Retail Price Index increases, and that there were no significant concerns on service quality.

Despite the fact that no reference will be made to the CC, the OFT's study did highlight concerns relating to customer satisfaction. The operators have stated that they will be bringing in measures to improve the transparency of their services, such as publishing pricing, punctuality and reliability information and customer satisfaction surveys.

### Comment

In October 2008 the OFT published the '[OFT Prioritisation Principles](#)' (OFT953). The first of the prioritisation principles that the OFT considers is: "What would be the likely [direct effect](#) on consumer welfare in the market or sector where the intervention takes place?"

The OFT's decision in the Isle of Wight ferries case is consistent with its prioritisation principles – in essence, if the OFT considers that intervention is not likely to produce an improvement for consumers, then it is not likely to exercise its powers to intervene.

This is emphasised in the following from the Prioritisation Principles:

"Markets usually work well for consumers and the economy without any need for intervention. The OFT only intervenes when it can improve the way in which markets work. [...] We therefore focus our efforts and resources on deterring and influencing behaviour that poses the greatest threat to consumer welfare, and intervene in order to protect consumer welfare and, in the process, drive higher productivity growth. We also recognise the need to avoid imposing unnecessary burdens on business".



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