

EU & UK COMPETITION LAW

BULLETIN

14 April 2009

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Class action claim struck out by High Court

Sir Andrew Morritt, the Chancellor of the High Court, held on 8 April that the competition damages claim led by Emerald Supplies Ltd and Southern Glass House Produce Ltd (the Claimants) against British Airways (BA) could not proceed as a representative action.

The claim

The Claimants import cut flowers from Columbia and Kenya, for which they use the air freight services of BA and other international airlines. They claim that BA is liable for infringing British and European competition law as it has been party to agreements and concerted practices with other airlines with the overall effect of inflating air freight prices. In September 2008, the Claimants instituted proceedings against BA seeking damages for those infringements as direct or indirect purchasers or both of air freight services for which prices were inflated and representing "all other direct or indirect purchasers of air freight services, the prices for which were so inflated".

The judgment

A representative action may be brought by, or against, parties that have the "same interest" in every part of a claim, the legal basis of which is part 19.6 of the Civil Procedure Rules. The first pre-condition is that there should be more than one person who satisfies the remaining preconditions. The judge held that the mere fact that the relevant class is both numerous and geographically widely spread is not of itself an objection to a representative action. He did however note that, the more extensive the class, the more clearly should the other pre-conditions be satisfied.

The second pre-condition is that those persons have the relevant interest at the time the claim is begun. The essential question was whether the class that the Claimants sought to represent had the same interest in the claim as the Claimants on 18 September 2008 (when the claim was issued). In addition, according to established case law, the Claimants and the class they seek to represent must all have a "common interest and a common grievance" and the "relief sought must in its nature be beneficial to all" of them. The judge found that it was impossible to identify the members of the class unless and until the action was successful and therefore ruled that the representative element of the damages claim should be struck out. The judge also accepted BA's submission that, even if the criteria for inclusion in the class were sufficiently described, the relief sought in the action was not equally beneficial for all members of the class. Given the nature of the cause of action and the market in which the relevant transactions took place, there is an inevitable conflict between the claims of different members of the class. The judge concluded that it is not convenient or conducive to justice that actions should be pursued on behalf of persons who cannot be identified before judgment in the action and perhaps not even then.

However, it was also noted that the avoidance of multiple actions based on the same or similar facts can equally well be achieved by a Group Litigation Order made under CPR Rule 19.11. The European Commission is currently investigating an alleged cartel in this sector, but it is yet to reach a decision. The judge noted that the existing 178 additional claimants and any others who seek to join in after the publication of the European Commission's investigation are more conveniently accommodated under that procedure.

The Claimants have requested leave to appeal against the ruling from Justice Morritt; if he refuses this, the Claimants will have another 21 days to go to the Court of Appeal in pursuit of permission. This case demonstrates the difficulty of establishing a class for a representative standalone action under the current rules.

MERGERS

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EU

Invitations to Comment

1 Bridgepoint Capital Group Ltd/Hermes Private Equity Directs Ltd

Interested parties are invited to comment by 18 April 2009 on the acquisition by Bridgepoint Capital Group Ltd of Hermes Private Equity Directs Ltd by way of purchase of shares.

[COMP/M.5504 – 8 April 2009](#)

2 Toshiba/Fujitsu HDD Business

Interested parties are invited to comment by 17 April 2009 on the acquisition by Toshiba Corporation of Fujitsu Limited's HDD Business by way of purchase of shares and assets.

[COMP/M.5483 – 7 April 2009](#)

3 Magna/Cadence Innovation

Interested parties are invited to comment by 17 April 2009 on the acquisition by Magna Presstec AG, a subsidiary of Magna International INC of Cadence Innovation s.r.o by way of purchase of shares.

[COMP/M.5488 – 7 April 2009](#)

4 IPIC/NOVA

Interested parties are invited to comment by 17 April 2009 on the acquisition by International Petroleum Investment Company (IPIC) of NOVA Chemicals Corporation by way of purchase of shares.

[COMP/M.5499 – 7 April 2009](#)

5 Fincantieri/ABB/JV

Interested parties are invited to comment by 17 April 2009 on the acquisition by Fincantieri - Cantieri Navali Italiani S.p.A. and ABB S.p.A. of joint control of a newly created company constituting a joint venture by way of transfer of shares and assets.

[COMP/M.5473 – 7 April 2009](#)

UK

Invitations to Comment

6 Anticipated acquisition by The Coca-Cola Company of a minority interest in Fresh Trading Limited

Affected sector: non-alcoholic beverages. Case officer: Tim Geer 020 7211 8339 (tim.geer@oft.gsi.gov.uk)
Deadline for comment: 24 April 2009

7 Anticipated acquisition by Cranswick Plc of the pork processing business of Bowes of Norfolk Limited

Affected sector: Pork supply. Case officer: Sophia Stephanou 020 7211 8513 (sophia.stephanou@oft.gsi.gov.uk) Deadline for comment: 24 April 2009

8 Anticipated acquisition by Arqiva Ltd of Digital One Limited and other entities from the Global Radio Group

Affected sector: Radio activities. Case officer: Sophia Stephanou 020 7211 8513 (sophia.stephanou@oft.gsi.gov.uk) Deadline for comment: 23 April 2009

9 The merger of SeniorLink Eldercare and Aid Call resulting from the completed merger between Age Concern and Help the Aged

Affected sector: Personal pendant alarms. Case officer: Androulla Soteriou 020 7211 8244 (androulla.soteriou@oft.gsi.gov.uk) Deadline for comment: 21 April 2009

OTHER

10 BASF secures clearance in the United States and China

On 2 April 2009, the U.S. Federal Trade Commission and the Chinese merger control authority MOFCOM approved the acquisition of Ciba Holding AG by BASF. This appears to be the first structural remedy case cleared by MOFCOM. MOFCOM agreed with the decision by the European Commission of 12 March 2009 and imposed no further conditions. In the European Commission procedure, BASF offered undertakings to divest activities in the relevant sectors, including production assets, know-how, supply contracts, customer lists, inventories and agreed to conclude a contract that would allow third party access to certain technology and an upfront buyer was identified to buy the global divestment. The acquisition was then successfully completed on 10 April 2009.

10 April 2009

11 Live Nation/Ticketmaster notification filed in Norway

On 8 April 2009, the Norwegian competition authority received a 'standardised notification' in relation to the merger of live events producer and promoter Live Nation and live entertainment ticketing and marketing company Ticketmaster Entertainment. The Norwegian regulator has set the deadline of 5 May, up to which date it will consider whether the submission of a 'complete notification' is required. This could result in intervention to remedy any competition concerns.

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ANTITRUST

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EU

12 Registration open for the conference on the Review of the Insurance Block Exemption Regulation (2 June 2009)

As part of its in-depth consultation process regarding the review of Commission Regulation 358/2003 (the Block Exemption Regulation), the Commission is inviting industry and stakeholders from across the Community to a public event to be held in Brussels on 2 June 2009. The purpose of this day-long conference is to hear further representations on the Report and accompanying Working Document presented to the Council and Parliament by the Commission as part of the review process.

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13 Competition Commission publishes Corporate Plan

The Competition Commission (CC) has published its corporate plan for 2009/10, which sets out its objectives over the next 12 months and beyond. The plan (available [here](#)) sets out a number of objectives, including working towards doing some inquiries more quickly, whilst maintaining the quality of the CC's work. In particular, the CC is aiming, where appropriate, to complete future market investigations in 18 months or possibly an even shorter period in the case of smaller markets. Specific work streams will explore ways of making investigations more efficient and effective, as well as ensuring that the CC is taking the right decisions and the right remedial actions when required. The CC has discussed its plan with the Office of Fair Trading (OFT), as the two bodies work together closely to deliver an effective and efficient competition regime, minimising duplication of effort between the two bodies and minimising the burden on business. The OFT has itself committed to a six month target for consulting on decisions whether to refer a market to the CC in cases where this may be the most appropriate and proportionate outcome.

17/09 – 8 April 2009

STATE AID[Back to Top](#)**14 Latest Scoreboard reviews Member States' action to fight economic crisis**

A special edition of the State aid Scoreboard has been published by the European Commission which focuses on measures adopted by Member States and reviewed and coordinated by the Commission in the current financial and economic crisis. In order to safeguard financial stability, Member States have set up guarantee umbrellas, risk shields and recapitalisation measures for the financial sector with an overall volume of up to €3000 billion. Three new Commission Communications provide a clear framework setting out the conditions under which these unprecedented measures can be taken while preserving the integrity of the Single Market and avoiding harmful subsidy races between Member States. In addition, the December 2008 Temporary Framework for State aid measures provides guidance to Member States how companies and jobs in the real economy can be best supported without excessive distortions of competition. The Scoreboard, together with a set of detailed statistical tables and indicators for all Member States, is available [here](#).

IP/09/554 – 8 April 2009

15 Commission approves UK measures in favour of Royal Mail

The European Commission has decided that four state measures granted in favour of the UK postal incumbent Royal Mail between 2001 and 2007 are in line with EU State aid rules. The Commission concluded that three out of the four measures did not contain State aid because they were granted under market conditions. In the case of a fourth measure, which concerned Royal Mail's pension liabilities, the Commission authorised it under EC Treaty rules allowing State aid to facilitate certain economic activities (Article 87(3)(c)) because it covered abnormal costs which had arisen from the previous period when Royal Mail had a monopoly over the letters market. The reasoning followed by the Commission to authorise the pensions measure has some parallels with a decision taken in October 2007 approving aid granted by France to La Poste in respect of its pensions liabilities. None of the measures had been notified to the Commission, but, following complaints, the Commission opened a State aid investigation in 2007. This decision does not cover measures announced by the UK authorities in December 2008, on which the Commission and the UK authorities are now in contact.

IP/09/556 – 8 April 2009

16 Commission approves UK aid for feasibility studies on carbon capture and storage demonstration projects

The European Commission has approved, under EC Treaty State aid rules, aid that the UK intends to grant to conduct two front end engineering and feasibility studies (FEED-studies) on two industrial-scale carbon capture and storage (CCS) demonstration projects. The FEED studies should reduce the technical, environmental and financial risks of the construction of a commercial scale coal-fired power plant equipped with post-combustion CCS technology. The Commission found the measure to be compatible with Article 87(3)(c) EC Treaty that allows, under certain conditions, aid for the development of economic activities or regions, because it is proportionate and contains safeguards minimising potential distortions of competition.

IP/09/555 – 8 April 2009

17 Commission launches new consultation on revised rules for state funding of public service broadcasting

The European Commission has launched a public consultation on a revised draft for a new Communication laying down the rules that it intends to apply to state funding of public service broadcasting. Member States and stakeholders have the opportunity to submit their views on the proposed text (available [here](#)) by 8 May 2009 at the latest. On the basis of the comments received, the Commission intends to adopt a modernised Broadcasting Communication later this year. Main changes compared to the previous draft concern clarifications on the principles of technology neutrality and editorial independence, an increased focus on the key principles with enhanced flexibility for implementation at Member State level and more clarity on holding public service reserves.

IP/09/564 – 8 April 2009

18 Commission opens in-depth investigation into alleged aids to Fortis Bank Nederland and Dutch activities of ABN Amro

The European Commission has opened an in-depth investigation under EC Treaty State aid rules to establish whether state measures in favour of Fortis Bank Nederland (FBN) and the activities of ABN Amro which were acquired by Fortis ("the ABN activities") are in line with EU State aid rules. On 3 October 2008, the Dutch state purchased FBN (previously a subsidiary of Fortis Bank) and provided it with loans amounting to tens of billion of euros allowing it to reimburse its short term debt to Fortis Bank. FBN was therefore effectively separated from Fortis Bank. On 24 December 2008, the Dutch state purchased the ABN activities from FBN. Without considering the ABN activities, FBN was the fourth largest bank on the Dutch retail and merchant market.

At this stage, the Commission has reason to believe that the measures may not be in line with its Communications on State aid to banks during the crisis. In particular, the temporal scope and remuneration of the loan facilities and the purchase price of the ABN activities do not seem to meet the criteria set by the Commission. The Commission is also in close contact with the Dutch authorities on the implementation of its merger decision in the Fortis/ABN AMRO case. The opening of an in-depth investigation gives interested parties an opportunity to comment on the proposed measure. It does not in any way prejudice the outcome of the procedure.

IP/09/565 – 8 April 2009

UK**19 Competition Commission releases final report on Rolling Stock Leasing Market Investigation**

The Competition Commission (CC) has concluded that competition in the market for the leasing of rolling stock for franchised passenger services is restricted by the limited number of alternative fleets available to train operating companies (TOCs) when bidding for rail passenger franchises. In order to address the competition problems that it has found, the CC is making a number of recommendations to the Department for Transport and Transport Scotland aimed at improving competition and choice in the market, as well as introducing other changes itself. The final report is available [here](#).

16/09 – 7 April 2009

20 Administrative timetable published for reconsideration of certain aspects of the groceries market investigation competition test

Following the decision by the Competition Appeal Tribunal (CAT) on 4 March 2009 in *Tesco plc v Competition Commission (CC) (1104/6/8/08)*, judgment on relief was given on 3 April 2009 in which the CAT quashed the CC's recommendation to include a competition test into the consideration of planning applications in respect of large grocery stores. The recommendation was published in the report entitled "The supply of groceries in the United Kingdom: market investigation" on 30 April 2008 (available [here](#)). The CAT also made an Order to refer the competition test back to the CC for reconsideration. The CC has now published an administrative timetable for this reconsideration which states that provisional findings or a provisional decision on remedies will be published in the week beginning 6 July and sets the final deadline for parties' responses or submissions as 27 July. It specifies late August/early September for the publishing of the supplementary report to the report on the supply of groceries in the UK.

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UK**21 Judgment on remedy and costs in *Albion Water Limited v Water Services Regulation Authority (Dŵr Cymru/Shotton Paper)***

The Competition Appeal Tribunal (CAT) has handed down its judgment on the issues raised by the applications of Albion and Dŵr Cymru, both dated 24 November 2008, for final relief in the cases of *Albion Water Limited v Water Services Regulation Authority (Interim Relief)* and *Albion Water Limited & Albion Water Group Limited v Water Services Regulation Authority (Dŵr Cymru/Shotton Paper)*. The initial cases were lodged in 2004, when Albion appealed against a decision of the Water Services Regulation Authority finding that Dŵr Cymru had not infringed the Chapter II prohibition of the Competition Act 1998. On appeal the CAT held otherwise and, having set aside the decision, unanimously decided that there had been a margin squeeze and that the price in question was excessive and unfair in itself.

The issues raised concerned the order the CAT should make to remedy the unfair pricing and margin squeeze abuses as well as the assessment of costs and the amount of any interim payment in respect of costs. As regards the unfair pricing abuse, the CAT ordered that Dŵr Cymru bring the infringement it had

identified to an end and refrain from any conduct having the same or equivalent effect. The CAT could not however modify the price in question as it had made no finding (expressly or by necessary implication) as to whether that price was an abuse of a dominant position. In relation to the margin squeeze abuse, the CAT ruled that setting a minimum retail margin was not an appropriate direction to bring the infringement to an end, due to the specific circumstances of the case. Finally, the CAT ordered that Albion's reasonably incurred legal costs from 8 January 2007 to 30 January 2009 shall be paid by the Authority and Dŵr Cymru. In addition, the CAT directed the Authority and Dŵr Cymru to pay two-thirds of the costs claimed by Albion, by way of an interim payment.

1034/2/4/04 (IR) and 1046/2/4/04 - 9 April 2009

If you require further information or advice on any of the items covered, then please contact either Diarmuid Ryan in London or Tom Pick in Brussels who are both partners in our EU Competition team.

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