Hammonds

EU & UK COMPETITION LAW

BULLETIN

10 June 2009

A single meeting between competitors may breach competition law

The European Court of Justice (**ECJ**) has ruled that a single meeting between companies may constitute a concerted practice in breach of competition law. In particular, the ECJ assumes that, if anti-competitive behaviour takes place (in this case illegal information exchange), that behaviour is capable of having an effect on the market even after only one meeting as the participants are assumed to take account of the information they have received.

By way of background, representatives from five mobile telephone network operators in the Netherlands (Ben Nederland BV (now T-Mobile), KPN, Dutchtone NV (now Orange), Libertel-Vodafone NV (now Vodafone) and Telfort Mobile BV (subsequently O2 (Netherlands) BV and now Telfort)) held a meeting on 13 June 2001. At that meeting they are alleged to have discussed, amongst other things, the reduction of remunerations for subscriptions.

The Dutch competition authority found, in 2002, that the five operators had concluded an agreement with each other or had entered into a concerted practice, contrary to competition law: in particular, that they had conspired to reduce their respective payments to mobile phone dealers. The case was appealed and the Administrative Court for Trade and Industry in the Netherlands referred the case to the ECJ, requesting the ECJ to clarify certain legal issues, in particular, whether a single meeting is sufficient to form the basis of a concerted practice in breach of competition law.

The ECJ held that, depending on the structure of the market, it could not be ruled out that a meeting on a single occasion between competitors could constitute a sufficient basis for the parties to coordinate their market conduct. The Court observed that what matters is not the number of meetings (nor indeed whether the meetings involve direct discussion of retail prices) but rather whether the meeting/s which took place provided an opportunity for competitors to take account of information exchanged between them in order to determine their conduct on the market. The ECJ said that there is a presumption that when companies exchange information concerning intended conduct, they will take that information into account in their future conduct (and therefore the burden of proof is on the companies involved to rebut that presumption).

The case will now be referred back to the Dutch courts for a final ruling.

Case reference: **T-Mobile Netherlands BV and Others v Raad van bestuur van der Nederlandse Mededingingsautoriteit C-8/08**

Comment

The judgment is of considerable practical importance, as it illustrates that the threshold for an infringement is low: the ECJ has essentially confirmed that even a one-off exchange of commercially sensitive information between competitors is problematic, as it removes the uncertainty of market conditions and leads to coordination of their competitive behaviour/conduct and alignment of business strategies.

This does not mean that companies should avoid attending all meetings at which competitors will be present. However, the risk is that such meetings give rise to an anti-competitive agreement and the case therefore serves as a useful reminder that a company must ensure that when it does attend meetings with competitors, it does so in full compliance with competition law (in particular, a company should ensure that any employees attending such meetings have received some guidance – ideally in the form of competition law compliance training – to ensure they understand the requirements of competition law (for example, what are the key do's and don'ts, what types of behaviour/discussions at meetings are likely to be unlawful, how to react) and therefore reduce the risk of any breach).

The reason this is important is because breach of the competition rules can have significant implications, for example:

- fines for companies (of up to 10% of a company's (or trade association's) group turnover);
- damages actions for loss suffered by third parties as a result of anti-competitive behaviour;
- individuals dishonestly involved in certain "hardcore" cartel behaviour can be fined and/or go to jail and/or be disqualified from acting as a director;
- (time consuming and costly) investigations (in circumstances where regulators have very broad powers of investigation) and therefore also negative PR and potential loss of shareholder value.

MERGERS

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EU

Invitations to Comment

1 Safran/GEHP

Interested parties are invited to comment by 14 June 2009 on the proposed acquisition of joint control of General Electric Homeland Protection, currently owned by General Electric Company, by SAFRAN USA by way of purchase of shares.

2 Atlantia/SIAS/Acciona/Itinere Chilean Assets

Interested parties are invited to comment by 15 June 2009 on the proposed acquisition of joint control by Servizi SpA and Atlantia SpA, Atlantia and Acciona SA of five Chilean toll motorways (Operación y Logística de Infraestructuras; Litoral Central; Vespucio Sur; Gestión Vial and Autopista Nororiente) by way of a purchase of shares.

UK

Decisions

3 Competition Commission requires Capita to sell part of acquired software business

The Competition Commission has published its report on the completed acquisition of IBS OPEN Systems plc by the Capita Group plc. The report sets out that, as a result of the harmful effect that the merger had on the market, Capita Group plc are required to divest part of the IBS OPEN Systems plc software business.

The merger brought together Capita Group plc and IBS OPEN Systems plc, both of which supplied revenues and benefits and social housing software systems to local authorities and social housing organisations. The Competition Commission did not have competition concerns about the market for social housing software, where there are considerably more suppliers in competition with the merged company. On the other hand, Capita Group plc is required to sell the revenue and benefits business of IBS OPEN Systems plc as soon as possible, and if no suitable sale is achieved, the Competition Commission has stated that it will require Capita Group plc to sell the entire IBS OPEN Systems plc business.

A copy of the Report is available by clicking here.

25/09 – 4 June 2009

STATE AID

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4 Commission endorses Italian reduced interest rate loan scheme to boost real economy

The European Commission has approved under EC Treaty State aid rules an Italian scheme aimed at firms that encounter financial difficulties as a result of the current economic crisis. The scheme is part of a wider set of measures that Italy is putting in place under the Temporary Framework, and in relation to which three other measures have already been authorised by the Commission. The scheme allows national, regional and local authorities to grant aid in the form of reduced interest rates on loans concluded by 31 December 2010. The scheme meets the conditions of the Commission's Temporary Framework for State aid measures, which gives Member States additional scope to facilitate access to financing in the present economic and financial crisis. In particular, it is limited in time and only applies to companies that were not in financial difficulty before 1 July 2008.

The Temporary Framework is available by clicking here.

IP/09/857 – 2 June 2009

5 Commission adopts guidance on training aid and aid to disadvantaged and disabled workers

The European Commission has adopted two guidance papers setting out criteria for the in-depth assessment of large amounts of training aid and of aid to disadvantaged and disabled workers. The guidance outlines the kind of information required by the Commission for its assessment and its assessment methodology which is based on the balancing of the positive and negative effects of the aid. The criteria are based on the principles set out in the State Aid Action Plan, which is a comprehensive programme of reform of State aid policy and has, amongst other things, the aim of clarifying and simplifying State aid procedures.

The Commission Communication provides guidance on the methodology for the detailed compatibility assessment of individually notifiable training aid measures. It is intended to explain the reasoning that

underlies Commission decisions on the compatibility of training aid measures and thereby increase transparency.

The Communication is available by clicking here.

IP/09/863– 3 June 2009

6 Commission authorises temporary Greek scheme for subsidised state guarantees to boost real economy

The European Commission has authorised under EC Treaty State aid rules a Greek scheme aimed at companies encountering financing difficulties as a result of the current credit squeeze. The scheme allows national authorities to grant aid in the form of subsidised guarantees for investment and working capital loans concluded by 31 December 2010. The scheme complies with the conditions of the Commission's Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis because it is limited in time, respects the relevant thresholds and applies only to companies that were not in difficulty on 1 July 2008.

The Greek authorities designed the scheme on the basis of the rules laid down in the Commission's Temporary Framework on State aid to the real economy during the crisis and in particular the conditions for aid in the form of subsidised guarantees.

The reduction of the guarantee fee can be applied during a period of up to two years in relation to loan guarantees contracted no later than 31 December 2010. Where the duration of the underlying loan exceeds two years, the safe-harbour premiums set out in the Annex to the Temporary Framework may be applied for an additional period of up to a maximum of three years. The maximum duration of guarantees granted under the scheme is limited to five years. The scheme does not apply to firms that were already in difficulty on 1 July 2008 (i.e. before the credit squeeze).

The scheme can be applied to companies of all sizes.

IP/09/867– 3 June 2009

7 Commission approves Greek reduced interest rate scheme to boost real economy

The European Commission has authorised under EC Treaty State aid rules a Greek scheme aimed at firms that encounter financial difficulties as a result of the credit squeeze in the current economic crisis. The measure, which is part of a wider set of measures that Greece is putting together under the Temporary Framework (see above), allows national authorities to grant aid in the form of reduced interest rates on loans concluded by 31 December 2010. The scheme meets the conditions of the Commission's Temporary Framework for State aid measures, which gives Member States additional scope to facilitate access to financing in the present economic and financial crisis. In particular, it is limited in time and only applies to companies that were not in difficulties before 1 July 2008.

IP/09/868– 3 June 2009

8 Commission authorises temporary Finnish scheme allowing limited amounts of aid to boost real economy

The European Commission has authorised under EC Treaty State aid rules a Finnish scheme aimed at companies encountering financing difficulties as a result of the current economic crisis. The scheme allows the grant of aid of up to €500,000 per company. The scheme meets the conditions of the Commission's Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis because it is appropriate to remedy a serious disturbance in the entire Finnish economy, is limited in time, respects the relevant thresholds and applies only to companies that were not in difficulties

before 1 July 2008. The measures can be applied until 31 December 2010.

In view of the importance of the scheme for the overall Finnish economy, the Commission considered that the scheme could be approved and that the Finnish authorities demonstrated that the scheme was necessary, proportional and appropriate to remedy a serious disturbance in the entire Finnish economy.

IP/09/869– 3 June 2009

9 UOP lodges an appeal at the Court of First Instance challenging a decision by the European Commission to allow aid to France's Institut Francais du Petrole Group

UOP, a unit of Honeywell dealing with petrol refinery technology, has lodged an appeal at the Court of First Instance challenging a decision by the European Commission to allow aid to France's Institut Francais du Petrole Group – a research body for hydrocarbon technology.

UOP is seeking annulment of the Commission's decision in July 2008 which found that the aid granted to Institut Francais du Petrole and its subsidiaries Axens and Prosernat was legal and complied with State aid rules on research and development.

Institut Francais du Petrole performs research and development for oil, gas and petrochemicals technologies and also for trains engineers and technicians. In 2005 and 2006 it is understood to have received about €150 million per year in aid.

The basis of UOP's case is that it believes the Commission was wrong to allow the aid, having misunderstood the nature of the research and development undertaken by Institut Francais du Petrole. Further it failed, so UOP contends, to take into account the operating aid which had already been granted to Axens and Prosernat (for example, UOP alleges that the Commission did not consider benefits which had been received by Axens through continued use of pilot plants and education grants).

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.

CONTACTS

Diarmuid Ryan

T: +44(0)161 830 5331

E: diarmuid.ryan@hammonds.com

F: +44 (0)870 460 2884

Tom S. Pick

T: +32 2 627 7676

E: tom.pick@hammonds.com

F: +32 2 627 7686