Hammonds

COMPETITION LAW BULLETIN

APRIL 2010

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EU

Decisions

1 Acquisition of Rohm and Haas powder coating business by AkzoNobel approved by the Commission

On 21 April 2010, the European Commission ("the Commission") cleared the proposed acquisition of Rohm and Haas' powder coating business by AkzoNobel. Powder coatings are applied to a wide range of metal objects such as motor vehicle components (engine parts, wheels etc) and domestic appliances such as washing machines.

AkzoNobel produces and markets a wide range of paints, performance coatings and specialty chemicals worldwide. The coating products of AkzoNobel include both liquid and powder coatings. The powder coatings business of Rohm and Haas focuses on the research, development, production, marketing and sale of powder coatings. The merging parties' activities overlapped with respect to powder coatings only.

Even though the proposed transaction would strengthen AkzoNobel's market-leading position in powder coatings, the Commission's investigation confirmed that a large number of alternative suppliers would remain in the market and that these alternative suppliers would not be constrained either in terms of capacity or access to key raw materials. As a result, the Commission concluded that the proposed concentration would not raise competition concerns.

IP/10/457 - 21 April 2010

EU

2 European Commission adopts new vertical restraints framework

On 20 April 2010, the European Commission (Ethe Commission") adopted a new Vertical Agreements Block Exemption Regulation ("the Regulation") and accompanying revised Vertical Restraints Guidelines ("Guidelines"). The Regulation will replace Regulation 2790/1999 from 1 June 2010, with a transitional period of one year for pre-existing agreements that meet the conditions of Regulation 2790/1999.

The basic principle remains that companies are free to decide how their products are distributed, provided their agreements do not contain price-fixing or other hardcore restrictions, on condition that the market share cap is not exceeded. Under Regulation 2790/1999, the applicable market share cap was that the supplier's share of the relevant supply market does not exceed 30%. However, the new rules introduce a 30% market share cap for the buyer (on the market on which it purchases the contract goods or services) to take into account the fact that some buyers may also have market power with potentially negative effects on competition. Therefore, from 1 June 2010, in order for an agreement to benefit from the safe harbour of the Regulation, the market shares of both supplier and the buyer should not exceed 30% (and of course the agreement must not contain "hardcore" restrictions).

The Regulation and accompanying Guidelines also take into account the development, in the last 10 years, of the Internet as a force for online sales and for cross-border commerce, something that the Commission wants to promote as it increases consumer choice and price competition. The new rules specifically address the question of online sales. Once authorised, distributors must be free to sell on their websites as they do in their traditional shops and physical points of sale, i.e. without limitation on quantities, customers' location and restrictions on prices. However, suppliers may be able to impose quality standards on distributors for Internet selling and distributors may also be required to have one or more 'brick and mortar' shops.

Finally, the guidelines indicate a slightly increased tolerance on the part of the Commission for the notion that a hardcore restriction (e.g. resale price maintenance) may nevertheless qualify for individual exemption (the parties bearing the burden of rebutting a presumption to the contrary).

IP/10/445 – 20 April 2010

UK

3 OFT drops allegations against Tesco in Dairy investigation

As part of its Dairy investigation, the OFT decided to drop certain allegations against Tesco and at the same time agreed a penalty discount after Tesco notified the OFT that it does not intend to contest the OFT's provisional findings that it had breached competition law.

After considering detailed representations and new evidence from Tesco following the issue of the Statement of Objections in September 2007, and a supplementary Statement of Objections, the OFT had concluded that the evidence it now has on file is insufficient to support an infringement finding against Tesco with regard to three alleged dairy initiatives. These relate to liquid milk in 2002 and 2003 and value butter in 2003. The OFT did not receive any representations from Tesco relating to UK produced cheese in accordance with Tesco's non-contest stance.

On being notified by Tesco that it does not intend to contest the provisional OFT findings of a breach of

competition law relating to the exchange of commercially sensitive information on certain cheese lines with two of its cheese suppliers in 2002 and one of its cheese suppliers in 2003, the OFT agreed a 10% discretionary penalty discount. The agreed discount is consistent with previous cases.

46/10 – 30 April 2010

4 ORR statement on ATOC Code of Practice

On 17 November 2009, the Office of Rail Regulation ("ORR") concluded that Association of Train Operating Companies (“ATOC”) and its subsidiary National Rail Enquiries (“NRE”) had not abused its dominant position in refusing to provide access to its database consisting of real time train information.

The ORR accepted that the real time train information is advantageous to third parties who would want to develop real time train information software applications and services. However, the ORR concluded that there was insufficient evidence that ATOC's refusal to supply the information had prevented a new product from coming into the market or prevented the emergence of new technology. Instead, the ORR recommended that ATOC develop and publish a Code of Practice relating to its procedures for granting access to its database.

On 23 April 2010, ATOC published the NRE Code of Practice for data licensing. However, during the development of the Code of Practice, the ORR stated that it had received a number of third party concerns about whether the Code “went far enough and how it would work in practice”. Subsequently, NRE made a number of changes to the Code which the ORR still does not believe would provide all the assurances which potential users of the Code would want to see.

NRE has therefore agreed to keep the Code under review and the ORR will also monitor its application in one year’s time to examine whether there is any case for action under the relevant regulatory licences or the Competition Act 1998.

26 April 2010

5 OFT issues competition advice under new "Short-form Opinion" process

On 27 April 2010, the OFT issued its first advice under a new process which allows it to give firms clarity on certain competition law issues.

Under the Short-form Opinion process, the OFT aims to provide guidance to businesses seeking clarity on how the law applies to prospective collaboration agreements between competitors which raise “novel or unresolved” competition issues. The process involves parties submitting a statement of facts which is agreed between them and which the OFT does not verify for accuracy or completeness. The OFT does not carry out any market testing and instead bases its opinion on the submitted “assumed facts”.

In the first trial use of the process, grocery wholesalers Makro-Self Service and Palmer & Harvey requested clarification on the competition implications of a proposed joint purchasing agreement. The OFT identified that certain exchanges of information between the firms could potentially lead to a reduction in competition. However following the OFT’s advice, the parties have agreed to ensure the data they supply to each other is general and aggregated, preventing either company from extrapolating specific or sensitive information.

Even though the OFT aims to provide wider guidance to a range of businesses or sectors, the Short-form Opinion process will only likely be available for a limited number of cases per year and the OFT will choose these cases by applying its usual prioritisation principles.

44/10 - 27 April 2010

6 Statement of objections issued against Cathay Pacific Airways and Virgin Atlantic

On 22 April 2010, the OFT issued a statement of objections alleging that Cathay Pacific Airways ("Cathay") and Virgin Atlantic infringed competition law in relation to passenger services on the London to Hong Kong route.

It is alleged that a number of contacts between employees of the two airlines over a number of years had led to the exchange of commercially sensitive information on pricing and other commercial matters with the aim of coordinating the parties' respective pricing strategies regarding passenger fares.

Under the leniency policy, Cathay is immune from paying a fine as it blew the whistle to the OFT about the infringement, provided it continues to cooperate.

41/10 - 22 April 2010

7 Tobacco manufacturers and retailers fined £225 million over retail pricing practices

The OFT has imposed fines totalling £225 million on two tobacco manufacturers and ten retailers in their involvement in unlawful practices in relation to retail prices for tobacco products in the UK. The two manufacturers are Imperial Tobacco and Gallaher and the 10 retailers are Asda, The Co-operative Group, First Quench, Morrisons, One Stop Stores (formerly T&S Stores), Safeway, Sainsbury, Shell, Somerfield and TM Retail.

The infringements were committed between 2001 and 2003 and involved the markets for UK duty paid cigarettes, hand rolling tobacco, pipe tobacco, cigars and cigarillos. The OFT found that each manufacturer had a series of individual arrangements with each retailer whereby the retail price of a tobacco brand was linked to that of a competing manufacturer's brand. These arrangements restricted the ability of these retailers to determine their selling prices independently breaching the CA 1998.

Under the leniency policy, Sainsbury is immune from paying a fine as it blew the whistle to the OFT about the infringement. Asda, One Stop Stores, Gallaher, First Quench, TM Retail and Somerfield have also benefitted from the leniency policy and have had their fines reduced for cooperating with the OFT in its investigation.

39/10 - 16 April 2010

8 OFT publishes its Annual Plan

On 29 March 2010, the OFT published its Annual Plan outlining its priorities for 2010 - 2011. The OFT proposes to fulfil its mission through high impact enforcement and other measures that maximise its influence on markets and on changing the behaviour of business, consumers and government to make markets work well for consumers.

In its Annual Plan the OFT states that it will work with business to increase compliance and good practice, with consumers to enable them to engage better with businesses and with the government to inform them about policy. The OFT believes that through its market studies it can examine the way a market is working and make proposals as to how it might be made to work better. The OFT emphasised that the preferred approach will be to achieve change voluntarily - avoiding formal intervention or regulation wherever possible.

The OFT also recognises the need to remove unnecessary burdens on business, since these will be passed

on to consumers in the form of higher prices, lower quality or reduced choice. The OFT also emphasises that it has already taken steps to increase transparency and improve its external engagement, and has commissioned independent evaluation work to understand the impact of its work on business and markets.

The OFT's Annual Plan for 2010-2011 can be found here.

33/10 - 29 March 2010

OTHER

9 Swiss regulator rejects proposed merger between France Telecom and TDC

France Telecom's plan to merge its Swiss operations with those of TDC was rejected by Swiss regulators where they concluded that the combination of the companies' local Orange and Sunrise units would create a "dominant position" in the Swiss market.

If the Swiss regulators had approved France Telecom's merger with TDC, it would have created Switzerland's second-largest mobile operator, the market leader being Swisscom AG. Earlier this year, France Telecom's Orange merged its UK operations with Deutsche Telekom's T-Mobile, creating the UK's largest mobile operator.

23 April 2010

10 BWB fines cartel of wholesalers dealing in printing chemicals

Four wholesalers dealing in printing chemicals have been fined approximately €1.5 million in total by the Austrian Cartel Court (on the request by the Austrian Federal Competition Authority ("BWB")) for being involved in a price-fixing cartel.

The four wholesalers involved were: Donau Chemie AG ("Donau") and Donauchem GmbH (fined €675,000); DC Druck Chemie Sud GmbH & Co KG ("DC Druck" - fined €397,000); Brenntag Austria Holding GmbH and Brenntag CEE GmbH (fined €381,000); Ashland Sudchemie Kernfest GmbH and Ashland Südchemie Hantos GmbH (fined €66,000).

The BWB claimed that the cartel involved collusion relating to price increases, price cuts with the aim to force competitors out of the market, customer allocation and the exchange of information relating to the conditions and payment arrangements (discounts and bonuses).

Donau and DC Druck both applied for leniency. Although DC Druck obtained a reduction to its fine, Donau, which was the first applicant under the Austrian leniency programme, had to pay the highest fine as it did not provide the BWB with all the available information in relation to the cartel, which was one of the conditions necessary for a successful leniency application.

14 April 2010

11 Energy Bill receives Royal Assent

On 8 April 2010, the Energy Bill received Royal Assent and is published as the Energy Act 2010 ("the Act"). The Act contains provisions which enable the Secretary of State ("SoS") to provide financial assistance to Carbon Capture and Storage ("CCS") projects, including the power to impose an electricity supply levy for these purposes - an electricity supply levy is one which is charged in respect of supplies of electricity and

paid by the person who make, or are expected to make, such supplies.

The Act also gives the SoS the power to create schemes that will require energy suppliers to give benefits to defined groups of customers for the purpose of reducing fuel poverty. For example, a support scheme may provide for scheme customers to be identified through membership of a fuel poverty risk group, by the scheme suppliers or by the SoS directly.

The Act will allow the SoS to modify electricity generation licences in order to prevent an electricity generator from obtaining an excessive benefit (resulting from its market power). The Act will also allow the SoS to give additional powers to modify electricity/gas supply licences to prevent suppliers from unilaterally modifying domestic supply contracts.

These powers respond to concerns initially expressed by Ofgem in its Energy Supply Probe about the operation of Great Britain's gas and electricity retail supply markets for domestic and small business consumers. Ofgem's main concern was that many consumers were not benefiting fully from the competitive market and that vulnerable consumer groups are disproportionately affected.

9 April 2010

12 Revised requirements for End-User Undertakings for SIELs

The Export Control Organisation ("ECO") has issued a new Notice to Exporters stating that as of 1 July 2010 the ECO will require all end-user undertakings ("EUUs") supplied in support of applications for Standard Individual Export Licences ("SIELs") for the export of dual-use and military goods to contain a declaration by the end-user that they will not re-export the goods to a destination subject to an embargo imposed by the UN, EU or OSCE where to do so would be a breach of that embargo. The change to the EUU follows a recommendation by The House of Commons Select Committees on Arms Export Controls.

The ECO will continue to accept EUUs without the re-export declaration until 30 June 2010. Exporters should, however, amend their current standard forms and inform their customers of the change, as soon as possible.

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13 Competition Commission publishes Groceries Market Investigation (Controlled Land) Order 2010

On 30 April 2010, the Competition Commission ("CC") published the Groceries Market Investigation (Controlled Land) Order 2010 ("the Order"). The aim of the Order is to address the adverse effects on competition which resulted from the control of land by large grocery retailers in highly concentrated areas. This particular concern was identified by the CC in its market investigation into the supply of groceries.

Under the Order, Asda, Co-op, Marks & Spencer, Morrison, Sainsbury, Tesco and Waitrose are all designated as Large Grocery Retailers and as a result must not (subject to certain specified exceptions) enter into any new restrictive covenants that may restrict grocery retailing.

30 April 2010

LITIGATION

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EU

14 Advocate General says that legal professional privilege should not apply to in-house lawyers

On 29 April 2010, the Advocate General ("AG" - Juliane Kokott) published an opinion in which she stated that legal professional privilege should not apply to in-house lawyers. The issue of whether the protection of communications between lawyers and their clients also extends to internal exchanges of opinions and information between the management of an undertaking and an in-house lawyer employed by that undertaking is the main focus of the appeal case against the Commission brought by AkzoNobel Chemicals Ltd ("Akzo") and Akcros Chemicals Ltd ("Akcros").

The case involves an email between the general manager of Akcros and an employee of Akzo's in-house legal department who was also a member of the Netherlands Bar. Akzo claimed that its in-house lawyer was covered by rules governing independence set out in conditions for Bar membership in the Netherlands. However, the Court of First Instance, now General Court, following the existing case law on the matter, concluded that legal professional privilege did not cover in-house lawyers.

Agreeing with the CFI decision, the AG emphasised the risks to the internal market and the enforcement of competition if differing interpretations of legal professional privilege were allowed to prevail. In particular, the AG regarded the Bar membership as "exemplary" but argued that they are not capable of guaranteeing that enrolled in-house lawyers enjoy a degree of independence equal to that of external lawyers. As a result, the AG recommended that the appeal be dismissed.

29 April 2010

UK

15 The Court of Appeal rules against Competition Appeal Tribunal's retroactive MTR fee setting

The Court of Appeal ("CoA") has ruled that the Competition Appeal Tribunal ("CAT") could not order The Office of Communications ("Ofcom") to backdate a reduction in the termination rates mobile companies can charge.

The CoA concluded that Ofcom could only set "prospective" conditions on remedies such as mobile termination rates ("MTR") and that any subsequent order to modify them can not be applied retroactively.

In March 2007, Ofcom had set mobile call termination price controls on the mobile network operators ("MNO") which was to be in force from 1 April 2007 to 31 March 2011. British Telecom ("BT") appealed the decision to the CAT, successfully arguing that the caps were too high. In an April 2009 judgment, the CAT agreed with BT, and directed Ofcom to adopt new price controls for the whole period in question. As a result, four of the five MNOs challenged the decision before the CoA.

If BT decides to challenge the CoA decision on the grounds of substance, it would need to ask the Supreme Court for leave to appeal.

20 April 2010

16 BT appeals against Ofcom in relation to charges for 080 calls

On 5 February 2010, Ofcom issued a determination to resolve disputes between BT and each of T-Mobile, O2, Vodafone and Orange ("the MNOs"). The dispute involved the introduction (from 1 July 2009) of termination charges by BT for calls to 0800 and 0808 numbers ("080 numbers") hosted on its network and originating on the MNOs' networks.

Ofcom had found that it was fair and reasonable for BT to impose a termination charge for calls to 080 numbers and it could be fair and reasonable for 2G/3G MNOs to receive an origination payment. However, as the MNOs had not been able to confirm to BT their average retail prices for calls to 080 numbers, Ofcom were not in a position to identify sufficiently clear benefits to consumers. They concluded that it had not been demonstrated that either BT's termination charges or a payment to cover the costs of origination of any of the MNOs were fair and reasonable.

Ofcom determined that BT and each of T-Mobile, O2, Vodafone and Orange revert to the terms on which they were trading prior to the introduction of BT's termination charges. In addition, BT should reimburse termination payments it had received since 1 July 2009 from any of the MNOs, by way of an adjustment for overpayments made, with interest.

Subsequently, on 16 April 2010, the CAT published a notice of an appeal lodged by BT against Ofcom's determination claiming that Ofcom had erred in finding that BT was not entitled to introduce such charges and that the determination is unlawful and unfair to BT.

16 April 2010

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 & Trade practice.

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