Hammonds

# COMPETITION LAW BULLETIN

JUNE 2010

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## MERGERS

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### EU

#### Decisions

1 Commission approves part of the acquisition of Tarmac and refers remainder to national competition authorities

The European Commission ("Commission") has approved part of the acquisition of the aggregate activities of Tarmac, part of the UK based Anglo American group, by Eurovia, part of the French Vinci group. On 12 February 2010, Eurovia, Anglo American and Tarmac concluded an agreement whereby Eurovia would acquire Tarmac's aggregate activities in Germany, Poland, France and the Czech Republic. The Commission decided that the acquisition would not significantly impede competition in Germany and Poland. However, the Commission found that there would be significant overlaps in France and the Czech Republic in the aggregates, asphalt mix and civil engineering (including road works) markets.

The overlap would not only have a horizontal impact in the aggregates market but also a vertical impact due to the threat that the merged entity would be able to exercise its market power on the downstream market for asphalt mix and civil engineering. This concern was raised by a majority of stakeholders. The national competition authorities ("NCAs") in France and the Czech Republic have requested to investigate this merger. The Commission has agreed to refer this aspect of the transaction to the NCAs as it is of the view that they are best placed to investigate the effect of the transaction on their respective national markets.

IP/10/720 – 10 June 2010

2 Commission clears "New Eurostar" joint venture, subject to conditions

The Commission has approved, under the Merger Regulation, the creation of a "New Eurostar" joint venture. The joint venture is between SNCF, the French provider of passenger rail and freight transport services, and London Continental Railways, the state owned UK railway company in control of the high speed railway infrastructure between the Channel Tunnel and London. The joint venture is subject to commitments from the parties that would facilitate the entry of new rail operators on the London-Brussels and London-Paris routes. Subject to these commitments, the Commission is of the view that the joint venture would not significantly

impede competition.

Eurostar is currently the sole provider on the London-Paris and London-Brussels routes. It is run by a co-operation of SNCF, a subsidiary company of London Continental Railways and the Belgian company SNCB. The New Eurostar will be a stand-alone joint venture.

The joint venture as notified raised competition concerns as market entry for new operators would be more difficult with the joint venture perpetuating Eurostar's dominant position. It is considered important that incumbents and new operators alike should have access to existing infrastructure.

The commitments offered by the parties ensure effective access for new operators to international station services, for example, ticket counter and passenger information, at certain stations. The parties gave a further commitment to release a certain number of Eurostar pathways for the benefit of new operators if they cannot be obtained in the normal allocation procedure.

The Commission considered that these proposed remedies would lower the barriers to entry for new operators and so the joint venture, as modified, would not raise any competition concerns.

IP/10/755 – 17 June 2010

## UK

### Decisions

3 OFT publishes decision finding acquisition by Sports Direct of minority interest in Blacks does not qualify for investigation

As a result of Kaupthing Singer and Freidlander Limited ("KSF") entering into administration, the beneficial ownership of certain shares in Blacks, a UK leading retailer of outdoor apparel and equipment, was in dispute. Legal title to these shares had been previously transferred from Sports Direct to a nominee company as a result of a financing arrangement with KSF.

Whilst KSF was in administration Sports Direct re-acquired these shares. A subsidiary of Sports Direct is a direct competitor of Blacks and the OFT considered whether Sports Direct had regained the ability to exert a material influence over Blacks.

Following the commencement of the OFT's investigation Sports Direct's shareholding in Blacks dropped from 30% to below 15%. Only in exceptional circumstances will the OFT consider that a shareholding of less than 15% gives rise to material influence, if there are additional factors to indicate an ability to exercise material influence, for example, voting patterns and attendance of shareholders at meetings and board representation.

In this case the OFT decided that a shareholding of 14.5% was not sufficient and so does not engage the OFT 's jurisdiction. In practice Sports Direct are not able to block any shareholder resolutions, there was no board representation on Blacks and no additional factors supporting a finding of material influence.

23 June 2010

## EU

### 4 EC refines approach to firms unable to pay antitrust fines

The Competition Commissioner Joaquin Almunia and the Budget Commissioner Janusz Lewandowski have circulated a note throughout the Commission outlining how it is considering modifying fining guidelines to clarify how companies in financial difficulties can obtain relief when faced with antitrust fines. The Commission has however stressed that it is eager to avoid diluting the deterrent effect of its fines policy and letting antitrust infringers off the hook.

Claims of inability to pay fines has become more prevalent in the light of higher fines and the ongoing economic crisis. The Commission has been facing an increasing number of claims that the imposition of sanctions will result in firms becoming insolvent. The current fining guidelines do refer to an inability to pay but the Commission is keen to clarify the criteria for companies to argue this.

When assessing whether a company is unable to pay any fines the Commission will be placing more emphasis on solvency and liquidity relative to capitalisation and profitability. The Commission will also be assessing whether a fine would have a negative impact on capitalisation and profitability and will also look beyond historical data and take into account cash flow predictions for the following two years.

The Commission is alive to possible claims of unequal treatment between members of the same cartel and also the risk that badly managed companies may benefit or may engineer corporate structures to play the system.

If a company is successful in arguing that it is unable to pay fines, two options will be available. Firstly, a reduction in the fine or secondly, the fine will be deferred and payable in instalments with no requirement to provide security by way of a bank guarantee.

It is expected that the approach to be taken by the Commission in assessing if a company satisfies the relevant criteria will be developed in the Commission's future decisions. There is the potential for further clarity in this area, possibly through a public statement and possibly a revision to the fining guidelines. The Commission has already provided initial guidance in this area in its subsequent decision in the taps cartel, detailed below.

16 June 2010

### 5 EC's taps cartel sets bar for firms with payment problems

The Commission's decision in the taps cartel confirms its willingness to listen to companies that may be struggling to pay fines.

Between 1992 and 2004 17 manufacturers of bathroom equipment were involved in a cartel stretching across six countries and harming a number of builders, plumbers and families. The 17 undertakings were fined a total of €622 million for fixing prices for taps, shower fittings and sanitary equipment. Of the 17 undertakings, ten argued that they would struggle to pay the fines. The Commission agreed to reduce the fines imposed on three of the undertakings by 50% and a reduction of 25% was granted to two further undertakings. The

remaining five undertakings had their requests rejected.

In making this decision the Commission looked at a number of sources of information including recent financial statements, future projections and several financial ratios. The social and economic context of each undertaking was also assessed and consideration given as to whether the undertakings' assets would be likely to lose significant value if forced into liquidation as a result of the fine.

The Commission was keen to stress that such reduction in fines would be the exception rather than the rule and the Commission would continue to be tough on cartels. It was also noted that undertakings may want to avoid claiming an inability to pay as a means solely of avoiding antitrust fines as it could trigger adverse reactions from an undertaking's investors and creditors.

IP/10/790 – 23 June 2010

## UK

### 6 OFT short form opinion on joint purchasing arrangement

The OFT has introduced a new procedure whereby it provides non-binding guidance to parties seeking clarification on how the law applies to their prospective collaboration agreements, which may raise novel or unresolved competition issues.

The first short form opinion given is in relation to a prospective joint purchasing agreement between Makro Self-Service Wholesales Limited ("Makro"), a membership-only cash and carry supplier, and Palmer and Harvey McLane Limited, ("P&H"), the largest independent wholesaler in the UK.

The parties wanted guidance on three specific points, (i) the identification of a downstream safe harbour for purchasing co-operations, (ii) opinion on the degree of transparency of input costs which may give rise to adverse effects on downstream competition and (iii) opinion on whether, in principle, joint negotiation of promotional contributions may give rise to competition issues. The OFT based their assessment only on the market definition and market shares provided by the parties.

The OFT made several general points when giving its opinion. It was stated that increased bargaining powers in a purchasing co-operation can be pro-competitive by intensifying supplier rivalry upstream and passing on lower wholesale prices to the benefit of consumers. It was also acknowledged that purchasing groups can be harmful to competition by, for example, withholding demand.

Considering the specific issues raised by the parties, the OFT stated that - in the absence of downstream market power - the joint purchasing agreement would be unlikely to raise competition concerns. Next, the OFT stated that it would only generally be concerned with cost commonality to the extent that full co-ordination of the members of the purchasing agreement would significantly reduce competition downstream. The proposed co-operation would account for 45-55% of the total variable costs incurred by both parties. With there being no downstream market power, this degree of commonality and transparency would not likely raise any competition concerns.

In addition, the OFT noted that the proposed joint purchasing agreement would involve the exchange of commercially sensitive information to enable the calculation of the payments to be made between the parties under the agreement. This would potentially enable member of the agreement to monitor the level of purchasing activity and so would support an agreement to limit output. In light of this the parties agreed to modify the agreement by providing that the relevant payments would be calculated by an independent consultant, and so remove the need for the exchange of the commercially sensitive information between the

parties.

16 June 2010

### 7 OFT sets out revised approach to director disqualifications

The OFT has published its new policy on director disqualification cases on 29 June 2010 (http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft510.pdf). We will be circulating to subscribers a client alert on this topic.

68/10 29 June 2010

## MARKET INVESTIGATIONS

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### UK

### 8 OFT seeks views ahead of equity underwriting market study

The OFT has announced that it will be undertaking a market study into equity underwriting and associated services. This comes as a number of corporate users have expressed dissatisfaction with the services and there has been public debate as to the functioning of the market. The OFT has said that economic growth and productivity rely on companies being able to raise capital effectively for investment. In 2009 companies raised approximately £70 billion in equity capital in the UK and paid approximately £2 billion in fees for equity underwriting and associated services. The OFT's market study will focus on rights issues and other types of equity raising by the FTSE 350 companies. Before undertaking this market study the OFT is seeking views from interested parties as to whether the proposed scope of the market study is correct, including whether to limit the study to FTSE 350 companies or include AIM listed companies and initial public offerings.

The market study will focus on three key areas. Firstly it will look at how equity underwriting and associated services are provided; such services would include the provision of advice to the companies, arranging the issue and the actual underwriting. The study would also look at the level of competition for these services and how the services are sold. Secondly, the study would consider how the underwriting and associated services are purchased, including the information and advice available to companies, alternative options to equity capital raising and methods used by providers of services to incentivise the companies. Finally the market study will consider the effect of the regulatory environment on the provision of services, for example, whether rules governing professional advisers facilitate or hinder competition.

Prior to the commencement of the market study, the OFT will be discussing the proposed scope with investment banks, other providers of equity underwriting services, large corporate businesses, Government and trade bodies. Interested parties are invited to submit their views on the proposed scope of the market study by 9 July 2010. It is anticipated that the market study will be completed before the end of 2010.

61/10 – 10 June 2010

### 9 OFT publishes initial scoping report for study on rail value for money

In December 2009 a study was announced into value for money of the British railway. The aim of the study is to make recommendations to improve value for money in order to build a financially and organisationally sustainable platform for growth in the future. The study will also consider obstacles and barriers to making

efficiency improvements and incentives across the sector to generating more efficiency.

A "scoping study report" has been published in which it is noted that the railway network is now carrying significantly higher passenger and freight volume than before privatisation. It was also noted that tax payer funding of the sector has risen from £2.3 billion in 1993/94 to £5.2 billion in 2008/09. Costs across the network are also still high when compared against historical standards and other European railways. The report highlights the urgent need to address affordability and efficiency but also stresses that it is undesirable to make service cuts. The study will be a full review and will consider all available options. It will not just be about cutting costs but about how the industry can work more innovatively.

The key areas covered in the study will be industry objectives, industry leadership, planning and decision making, structures, interfaces and incentives (e.g. best practices and international benchmarking), revenue ( e.g. fare levels), asset management, innovation standards and safety and people (e.g. staff costs and future need for workforce skills).

The findings of the study will be presented to the Secretary of State for Transport in March 2011, however, preliminary findings will be ready in time for Government decisions on public spending in Autumn 2010.

14 June 2010

### 10 OFT publishes new guidance for car dealers on legal obligations

In March the OFT published its market study into the second-hand car market. This study highlighted a number of problems in this market and found that customers lose approximately £85 million every year on issues relating to, inter alia, illegal clocking, fixing faults that are the dealer's obligation to correct, the use of illegal disclaimers and failing to disclose sufficient information. Following the market study, the OFT has published guidance for second-hand car dealers setting out their legal obligations to customers. The guidance aims to ensure compliance with consumer protection legislation which ban unfair commercial practices towads consumers and govern obligations regarding quality, fitness and the description of the item being sold. The OFT is hoping that the guidance will improve business practices in this market and it has also stressed that tackling unfair practices in the second-hand car market is an enforcement priority of the OFT.

71/10 – 30 June 2010

## LITIGATION

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### EU

### 11 Damages claim following Commission approval of Blackstone / Acetex merger

A French regional authority, the Community of communes of Lacq ("Lacq") has brought a claim against the Commission claiming €10,000,000 for the alleged failure by the Commission to sanction a company for breach of an undertaking pledging to keep a factory open for a period of five years.

In 2004 Blackstone, a merchant bank, acquired Celanese, a global chemicals company active in the market for chemical and acetate products. In July 2005 the Commission approved the acquisition by Blackstone of Acetex, a company active in the production of acetyls and plastics. Acetex was to become part of the Celanese business.

On 22 March 2010 Lacq lodged an appeal against the Commission seeking damages for failure by the Commission to acknowledge the legal value of an alleged undertaking given by Celanese to continue the operation of the Acetex factory for five years. Lacq is alleging that the Commission has infringed the principles of legal certainty and legitimate expectations.

The Acetex factory was closed and Lacq is alleging that the Commission has deprived third parties of protection in that, following the undertaking given by Celanese, employees were certain that they would be protected against cessation of activity at the factory for five years. Lacq also states that it has suffered significant damage as local authorities have been deprived of important fiscal resources and have had to pay out a number of social benefits due to the closure of the site.

Lacq is claiming €10,000,000 and costs for the alleged unlawfulness and deficiency of the Commission's behaviour in the light of the breach of the undertaking.

5 June 2010

## 12 ECJ Judgment on validity of Roaming Regulation

Regulation 717/2007 (the "Roaming Regulation") was adopted in June 2007 and sets down maximum wholesale and retail prices that mobile network operators can charge for voice calls received by users outside their own network. The Roaming Regulation was adopted pursuant to Article 95 of the EC Treaty (now Article 114 TFEU), which allows measures to be adopted at a Community level in order to approximate the laws of the Member States in cases of actual or potential disparity capable of obstructing the establishment and functioning of the internal market.

Following the adoption of the Roaming Regulation, four UK mobile network operators (O2, Vodafone, Orange and T-Mobile) brought judicial review actions in the UK High Court on the grounds of the legal basis on which the Regulation was adopted and on issues of proportionality. The High Court referred the issues to the ECJ for a preliminary ruling.

On 8 June 2010 the ECJ handed down its decision and concluded that the Roaming Regulation was valid. The cost of roaming services should not be substantially different when providing domestic mobile services and so there is no justification for charging considerably higher prices for roaming.

The ECJ considered that the object of Article 95 was to improve conditions for the functioning of the internal market. High charges for roaming calls were a persistent problem and attempts to remedy this under the previous existing framework had not worked. The Roaming Regulation could therefore be justifiably adopted on the basis of Article 95; it contributed to a smooth running of the internal market in order to achieve a high level of consumer protection and maintain competition between the mobile network operators.

The ECJ also found that the Roaming Regulation was proportionate. Maximum retail and wholesale prices were considered to be appropriate and necessary to protect consumers against high prices. The ECJ also considered the principle of subsidiarity; the EC must not act unless Member States are not in a position to achieve the same goal adequately. When adopting the Roaming Regulation the ECJ found that the Parliament and Council had not infringed the principle of subsidiarity. They had legitimately taken the view that a common approach at Community level was necessary to ensure the smooth functioning of the internal market, allowing operators to act within a single coherent regulatory framework.

MEMO/10/242 – 8 June 2010

## 13 General Court ruling on Commission decision refusing access to its file on a merger case

As a general rule, citizens and residents, natural or legal, of member states have a right of access to documents of the EU institutions (Council, Parliament and Commission). This is subject to a number of exceptions, (i) if disclosure would undermine the protection of privacy and integrity of an individual, (ii) if disclosure would undermine the protection of commercial interests, court proceedings, legal advice or the purpose of inspections/ investigations/ audits and (iii) if the document has been drawn up for internal use in relation to a decision not yet taken.

In 2004 the Commission gave conditional approval for the acquisition by Lagardère of part of the publishing business of Editis. Editions Odile Jacob SAS ("EOJ") brought an action challenging this conditional approval and, in 2005, also asked the Commission to grant it access to certain documents regarding the Lagardère/ Editis merger investigation. The Commission refused and, with the exception of one document, decided that all documents requested were subject to one of the exceptions to the general rule outlined above. EOJ brought an action in the General Court for annulment of the Commission's decision. The General Court took a restrictive approach and decided that the Commission's decision to refuse access to the documents must be annulled. The general rule allowing access was preserved with the exceptions applying only in narrow circumstances.

There is an obligation on the EU institutions to examine and reply to a request for documents. This involves a specific and individual examination of each document. The General Court concluded that a detailed inventory or a division of the documents between the different exceptions did not constitute proof of an individual examination of each document. The General Court accepted that disclosure of the documents was relevant to the purpose of an investigation but this was not sufficient to prevent disclosure. If disclosure would endanger completion of an investigation then refusing access may be permitted. However, the General Court was not prepared to refuse disclosure until any potential appeals may have been decided stating that to do so would make access to documents dependent on uncertain distant events and contrary to the objective of guaranteeing public access.

The General Court also held that the exception to the general rule protecting commercial interests was not applicable, stating that where third parties' interests are concerned, the Commission must consult such third parties, where appropriate, and it had failed to do this.

The exception preventing disclosure of documents prepared for internal use relating to a decision not yet taken was also found to not apply. This exception would only apply if there would be a substantial impact on the decision making process.

The only document which the General Court found could be prevented from disclosure was an opinion given by the Commission's legal service. This document was protected by the exception aimed at protecting the institutions' interest in seeking legal advice.

It was also noted by the General Court that documents are severable. If a particular part of the document falls within an exception, the rest of the document can nevertheless be disclosed. Ascertaining whether there can be partial disclosure is undertaken when the institutions carry out the specific and individual examination of each document.

The Commission claimed that to carry out an assessment of each individual document would be a disproportionate administrative burden. The General Court held that only in exceptional cases will the burden be particularly heavy and exceed the limits of what may reasonably be required.

9 June 2010

## 14 Lafarge SA v Commission judgment

In November 2002 the Commission fined Lafarge, Gyproc, BPB and Knauf a total of €478 million for participation in a cartel on the plasterboard market in Germany, France, the UK and Benelux between 1992 to 1998. Of this total sum, Lafarge was fined €249.6 million which represented a 50% increase for repeated antitrust infringements.

This decision was confirmed by the General Court in July 2008 but Lafarge appealed this decision to the ECJ and asked for the judgment to be set aside or the fines to be reduced. Lafarge argued that its previous infringement should not be taken into account as, although committed in 1994, it had not been confirmed by the General Court until 2000, after the current infringement had been committed. The ECJ rejected this argument and held that the Commission was right to increase fines due to a previous infringement, despite the previous infringement still being subject to judicial review at the time. Commission decisions are presumed lawful and continue to have full effect despite any actions before a court.

17 June 2010

## 15 Appeal brought against Lufthansa / Austrian Airlines decision

In August 2009 the Commission granted conditional approval of the acquisition by Lufthansa of Austrian Airlines. The Commission did have serious concerns regarding flight routes from Vienna to Stuttgart, Cologne, Munich, Frankfurt and Brussels. To allay these concerns, Lufthansa offered commitments to the Commission agreeing to allocate slots at each of the airports on these five routes.

On 19 June the Official Journal published details of an action brought against the Commission's decision on 13 April. The appeal has been brought before the General Court by Niki Luftfahrt GmbH, an operator of a privately financed airline. Niki Luftfahrt has appealed alleging that the market definition used by the Commission hampered the assessment of all the negative effects on the market, that the Commission incorrectly assessed the impact of the merger on flight routes in Eastern Europe and that the Commission did not follow its guidelines on horizontal mergers by failing to consider that competitiveness of remaining competitors would be significantly impeded. Further Niki Lufthart is appealing against the commitments given by Lufthansa, claiming that they are not sufficient to prevent a significant impediment to effective competition arising and also that the Commission has misused its power.

19 June 2010

## 16 Commission v Bavarian Lager judgment

Bavarian Lager have previously lodged a complaint with the Commission claiming that the UK's "Guest Beer Provision", allowing managers of public houses to buy cask-conditioned beers from alternative breweries, was in fact a quantitative restriction on imports of bottled beers.

Following investigation of that complaint the Commission decided to institute proceedings against the UK under article 169 (now article 258 TFEU) and a meeting was held between Community representatives, British administrations and the Confederation des Brasseurs du March Commun. Bavarian Lager sought leave to attend this meeting but was refused.

The Commission suspended the action against the UK and took no further action following the British authorities agreeing to amend the Guest Beer Provision to include bottled beers.

Bavarian Lager requested disclosure of certain documents and details of the participants at the meeting. The Commission disclosed some documents but blanked out the names of five individuals as two objected and

three could not be contacted for their consent. Bavarian Lager submitted a fresh application for full disclosure but this was rejected on the grounds of the protection of private life under the Data Protection Regulation. Bavarian Lager brought an action before the Court of First Instance ("CFI") (now the General Court) for annulment of this decision of the Commission.

The CFI did annul the Commission's decision stating that the mere entry of a name did not undermine that individual's private life. The Commission, supported by the European Council and the UK, appealed this decision to the ECJ.

The ECJ noted that the Access to Documents Regulation provides, as a general rule, that the public may have access to documents of the institutions, subject to exceptions on grounds of public and private interests. Where a request for documents includes personal data, the provisions of the Data Protection Regulation become applicable and the recipient of the personal data must establish a need for this data.

The ECJ decided that the Commission was right to prevent disclosure of the names of the individuals in the absence of their consent. The Commission had sufficiently complied with its duty of openness by releasing the information but with the names blanked out. Bavarian Lager had not provided any express or legitimate justification, or indeed any convincing argument, as to the necessity of the disclosure of the personal data and as such the Commission had been unable to weigh up the interests of the various parties. The ECJ therefore annulled the decision of the CFI.

29 June 2010

## 17 EC's Italianer stresses safeguards in private enforcement actions

Following the Commission's Green Paper in 2005 and White Paper in 2008 on private actions for damages in antitrust cases, a draft directive in this area was prepared.

However, it was withdrawn in October 2009 before publication. Under the new Competition Commissioner, Joaquin Almunia, the initiative has gained new momentum and the Commission is set to launch a consultation in this area in autumn 2010. Only after this consultation will the Commission decide what measures are necessary. Speaking on 10 June, Almunia stressed that the current fines imposed by the Commission for infringement of antitrust rules are designed to prevent harm to customers and that there should be a system to enable customers to also effectively claim compensation when they have suffered harm.

Speaking at a conference in Vienna on the same day, Director-General of the Commission's antitrust department, Alexander Italianer, outlined safeguards that would protect any EU legislative action promoting damages actions from potential abuses.

Italianer first outlined the Commission's preferred choice throughout the EU for future policy; protecting the immunity programme, making competition authority decisions binding throughout the EU and introducing safeguards to stop abusive litigation. He reiterated Almunia's views in ensuring a right balance between public and private enforcement, the latter being focused on compensation rather than direct deterrence.

Safeguards that were considered to prevent abusive litigation being commenced included avoiding treble damages, contingency fees and costs rules encouraging litigation. He also acknowledged the concerns of business groups who are suggesting that private actions for damages may create a culture of US style class actions. In this regard Italianer has advocated a strongly controlled opt-out system. Private damages actions to be brought by representative entities, for example, accredited consumer organisations, must define the groups they are representing and undertake to endeavour to inform all parties represented and offer them the

option to opt out.

10 June 2010

## UK

### 18 Tobacco price fixing fines to be appealed

On 16 April 2010 the OFT found that two tobacco manufacturers and ten retailers had engaged in unlawful practices regarding the retail prices of tobacco products. The undertakings were fined a total of £225 million. Appeals against these fines have been lodged at the Competition Appeal Tribunal by Imperial Tobacco Limited, the Co-op, Morrisons, Safeway, Asda and Shell.

The appellant tobacco manufacturer and retailers have lodged individual appeals on a number of different grounds. The grounds of appeal include, inter alia, that the OFT was wrong to characterise the infringement as an "object" (rather than an "effect") infringement, that the OFT erred in finding that the exclusion order relating to land agreements did not apply, that the OFT had mischaracterised or failed to adduce evidence to the required standard and that the fines imposed were discriminatory, excessive and disproportionate.

24 June 2010

# REGULATORY

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## UK

### 19 Ofgem consults on long term development statements for electricity distribution networks

In August 2002 the Gas and Electricity Markets Authority issued a formal direction to distribution network operators ("DNOs") requiring them to each prepare long term development statements ("LTDS") on an annual basis. The LTDS include technical information to assist existing and future users of distribution networks to assess any opportunities for making new or additional use of networks. The LTDS provide data for the five year period commencing 1 April of the year of publication and must be published in accordance with a form of statement ("FoS") published by Ofgem.

In 2005 Ofgem consulted on how well the LTDS were meeting the needs of existing and potential network users. The conclusion was that the LTDS were broadly satisfactory. The LTDS were assessed again as part of Ofgem's price control review. In the final proposals to this review Ofgem committed to consulting stakeholders on a potential improvement to the consistency, clarity and availability of the current LTDS FoS.

This consultation has now been launched and Ofgem are seeking views and suggestions as to how to change the FoS in order to deliver LTDS that are more useful to those they are intended to help; those who may enter arrangements with DNOs in relation to the distribution of electricity. The issues that will be considered in the consultation are (i) the data required by the FoS and the scope and level of detail to be included, (ii) the format and usability of the FoS, (iii) the consistency of approach between DNOs in meeting the requirements of the FoS and (iv) the structure of LTDS required by the FoS.

Ofgem would also welcome views on whether LTDS network data should be available in a common electronic format and also whether the current approach, which does not impose any obligation for the LTDS to be published on a common format, should be changed. Ofgem is also seeking views on whether all or part

of the LTDS should be updated more frequently than on the current annual basis.

Interested parties have until 20 July 2010 to submit suggestions to Ofgem. It is expected that conclusions will be published soon after with any changes to the FoS being effective and applying to the 2010 LTDS.

8 June 2010

## 20 Ofgem publishes summary of discussions on the length of price control periods

On 17 May Ofgem held discussions with stakeholders, including representatives of consumers, energy network companies and energy network suppliers, to discuss the content of a working paper setting out Ofgem's proposals with regards to extending the length of price control periods.

In the working paper Ofgem proposed to increase the length of price control periods to between eight and ten years. During the discussions the stakeholders considered a number of ways that an extension to price controls could bring additional benefits. For example, exposing network companies to financial risks around their long term costs could improve network planning decisions. It was also considered that five year price controls can deter companies from taking options that would reduce long-term costs. Longer price controls may make it easier to implement a new procurement strategy that delivers long-term cost reductions. Further benefits were that specific incentive schemes would be fixed for longer periods and price control reviews would be less frequent and so would reduce the administrative burden.

As well as considering the benefits, drawbacks to longer price control periods were also considered. A key drawback was that a longer price control period could increase consumers' exposure to the risks of a network company receiving an overly generous price control settlement. The discussions also drew out concerns from the stakeholders regarding the implementation of longer price control periods. There would be a need to limit the scope of any mid-period review. There were concerns that this would be turned into a full scale review and defeat the purpose. It was also considered whether, at the mid-review, there should be the option to re-open the price control if actual costs are above or below specific thresholds. It was also noted that there would be a need for network companies to understand and be able to reflect in their business plans the outputs needs to deliver over a long timeframe.

10 June 2010

## 21 Ofcom publishes draft determination to resolve dispute about BT's termination charges for 0845 and 0870 calls

Traditionally, originating communications providers ("OCPs"), for example mobile network operators offering customers the ability to call 0845 and 0870 numbers, subject calls to such numbers to retail charges. The OCPs in turn face termination charges to contribute to the cost of terminating calls and hosting the numbers.

From November 2009, BT sought to impose an additional charge on OCPs. As well as the existing charge for terminating calls to these numbers BT added a further variable charge based on the average retail price that the OCP levies for such calls.

Vodafone did not accept this additional charge and asked Ofcom to determine whether the imposition of this charge was fair and reasonable. Ofcom decided that it was appropriate for it to determine this dispute and in April 2010 T-Mobile, H3G, O2 and Orange were also added as parties to the dispute.

In deciding the dispute Ofcom followed an analytical framework used in previous cases consisting of three principles. The first principle is that mobile network operators should not be denied the opportunity to recover efficient costs of originating calls to 0845 and 0870 numbers. Ofcom provisionally concluded that this

principle has been met as the new charges do allow sufficient retention relative to geographic calls.

The second principle is that new charges should provide a benefit to customers and avoid a material distortion of competition. Ofcom considered that there is an adverse effect on consumers. Further, competition in retail services between mobile network operators and mobile virtual network operators would be affected in that there is the potential for retail packages to be reduced.

The third principle requires the new charges to be reasonably practicable to implement. Ofcom required further investigation in this area and was unable to reach a conclusion, although it did consider that the new charges potentially give rise to considerable complications and a number of practical issues.

As the new charges failed to satisfy the second principle, Ofcom provisionally concluded that the new charges are not fair and reasonable and have recommended that BT reverts to the previous terms. It was also considered by Ofcom to be appropriate and proportionate for BT to repay additional amounts paid by the OCPs in respect of the new charges, together with interest.

The draft determination was open to comments until 24 June.

11 June 2010

## 22 ORR consults on changes to operator licences

The ORR has published a consultation on modifications to certain operator licences. The changes include minimum harmonised standards for train companies' liability, rights of disabled people and people with reduced mobility, personal security of passengers, passenger information, companies' obligations to passengers in the event of delay, missed connection or cancellation and the handling of complaints. Changes to these licence conditions are being made as the ORR expects to become the enforcement body for the EU Passenger Rights and Obligations Directive. Further changes are also being made to reflect changes made to Network Rail's network licence in 2009. The modifications will ensure that the timetabling conditions in passenger licences properly cross refer to Network Rail's obligations.

Following this initial consultation the ORR will seek licence holders' consent through a formal statutory consultation. Marked up versions of the relevant licences have been published and the ORR is inviting comments on these by 9 July 2010.

14 June 2010

## 23 Ofwat to consider issue of financeability

Ofwat is under a duty to secure that water companies are able to finance the proper carrying out of their functions, this involves securing reasonable returns on their capital. To do this price limits must be set so that efficient companies can be financeable in that their revenues, profits and cash flow are sufficient to allow finance to be raised on reasonable terms.

The companies must be able to raise finance from debt and equity investment if they are to finance their activities and the financial markets must be assured that the companies are able to maintain a good quality credit rating. In addition to this, there must also be transparency and regulatory certainty in relation to price setting in order to reduce the perception of risk.

Ofwat will be undertaking a review of issues relating to financeability when setting price limits. This review will include, inter alia, the cause of any constraints on financeability, the long term capital investment requirements of the water sector and whether there are adequate incentives for investment of equity in

regulated companies. A report discussing these issues is expected to be published in September 2010.

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## EU

### 24 Roaming Regulation measures come into force on 1 July 2010

The Commission has issued a statement on measures of the Roaming Regulation that will come into force on 1 July 2010. From this date travellers will no longer have to worry about incurring huge bills when making or receiving calls abroad or when they connect to the internet via mobile networks. Examples of this problem involve a German traveller who faced a bill of €46,000 when downloading a TV programme in France and a UK student who faced a bill of €9,000 for data roaming whilst studying abroad.

From 1 July 2010 the data roaming limit per month will automatically be set at €50 for all customers, unless they have chosen a different cut off level. Operators must send a warning message to customers when they reach 80% of their data roaming bill limit. Operators must also send a message informing users of data roaming tariffs every time they enter another EU country. The maximum wholesale price for roaming will be cut from €1 to €0.80 per megabyte of information uploaded or downloaded. The maximum retail price for voice roaming calls will also be cut. Outgoing calls will be reduced to €0.39 per minute (from €0.43) and incoming calls reduced to €0.15 (from €0.19). It will also be free of charge to receive a message indicating a new voicemail.

From 1 July 2010 the costs of making and receiving a call when abroad will be 73% less than in 2005.

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## Other EU NCA's

### 25 French Competition Authority opinion on database cross-selling

The French Competition Authority (“FCA”) has issued an opinion on the question of the crossed usage of client databases (“cross-selling”) and the possible effects of such practices within the telecommunications sector.

In recent years, telecoms operators have focused on “convergence strategies”, in particular between the fixed-line and mobile markets. This convergence movement is leading to the appearance of a universal operator business model and new commercial practices. In this context, operators are interested in making crossed usage of their client databases, in order to offer all-in-one bundled offers (fixed-line, mobile, Internet, television) (“Quad Play Services”). Network operators essentially seek to use the commercial data already obtained in one market, in order to enter or develop in another market.

In May 2009 one of the operators in the French telecoms market, Bouygues Télécom, launched a Quad Paly Service (“Idéo”), while SFR, another important player in the market, recently announced the launch of a their own similar Quad Play Service. These operators are using their client files and agency networks relative to their mobile telephony activity in order to promote their high speed Internet access offers. In view of the success of this commercial practice, France Telecom – Orange (“Orange”), the principal player in the telecoms market in France, very recently announced its intention to counterattack its competitors by launching its own Quad Play Service.

In its opinion, the FCA took the view that crossed usage of client databases is possible, including by Orange. However, despite the fact that the adoption of this "cross-selling" model by Orange would not appear to cause in and of itself any foreclosure effect, Orange's marketing of Quad Play Services does entail competition risks, especially in view of the entry barriers in the mobile market, and therefore requires case-by-case analysis.

The FCA noted the increased need to adopt measures, in order to improve market fluidity and to prevent foreclosure risks. In this respect, consumer safeguards, such as measures facilitating the ability of end-users to switch from one operator to another, are particularly important.

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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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