

# COMPETITION LAW BULLETIN

DECEMBER 2010

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## MERGERS

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### UK

#### Decisions

- 1 [OFT makes Article 9 request in relation to Thomas Cook/ CGL Group/ Midlands Co-operative Society joint venture](#)

The Office of Fair Trading (OFT) asked the European Commission (Commission) to refer the proposed joint venture between Thomas Cook Group plc (Thomas Cook), the Co-operative Group plc (Co-operative) and Midlands Co-operative Society Limited (Midlands Co-operative) to it for review under the UK competition rules. The proposal would see Thomas Cook, a UK leisure tour operator, own 30% of the joint venture, and the Co-operative and the Midlands Co-operative, both of which have travel businesses operating retail travel outlets, business travel operations and call centres, own 66.5% and 3.5% respectively.

The proposed joint venture was notified to the Commission in November but the OFT is concerned that bringing together two of the largest UK high street travel agents would raise concerns in relation to competition for the supply of travel services such as package holidays through UK retail travel agencies. As such, the OFT believes it is the more appropriate authority to review the case due, primarily, to the fact that any adverse effects will be exclusively felt by consumers in the UK. Other factors supporting the OFT's request include its experience in reviewing retail markets and travel services, its understanding of regional competition issues and it being better placed (geographically) than the Commission to obtain any necessary remedies.

In the latest development, the Commission notified Thomas Cook on 6 January that it has granted jurisdiction to the OFT to review the proposed joint venture.

128/10 - 3 December 2010

- 2 [OFT accepts undertakings in lieu from Travis Perkins in relation to its acquisition of the BSS Group](#)

The OFT has published the full text of its decision to accept undertakings offered by Travis Perkins plc (Travis Perkins), a UK builders' merchant, in its acquisition of the BSS Group plc (BSS), a leading distributor

to specialist trades .

Following its investigation, the OFT raised concerns about the impact the acquisition would have on competition in 20 local areas where Travis Perkins and BSS overlapped in the supply of heating and plumbing products. City Plumbing Supplies, part of the Travis Perkins Group, supplies heating and plumbing products through a network of over 180 branches nationwide. Plumbing Trade Supplies, part of the BSS Group, supplies domestic heating, plumbing and sanitaryware products in 300 branches nationwide.

Travis Perkins offered to sell Plumbing Trade Supplies or City Plumbing Supplies stores in each of the 20 local areas identified in order to alleviate competition concerns. Following a public consultation, the OFT concluded that the undertaking could be accepted as, once fully implemented, it would address the concerns raised by the OFT and should result in competition being retained at the pre-merger level. Hammonds (now Squire Sanders Hammonds) advised BSS on the UK merger control review.

135/10 - 10 December 2010

### 3 [Competition Commission announces cancellation of Dorf Ketal Chemicals/ Johnson Matthey merger inquiry](#)

The Competition Commission has announced that it has cancelled its investigation into the proposed acquisition by Dorf Ketal Chemicals AG of the titanate and zirconate business of Johnson Matthey plc after receiving statements from both parties that the acquisition has been abandoned and the sale and purchase agreement terminated.

The OFT had referred this case to the Competition Commission in November 2010. It was only the third case to be referred by the OFT in 2010, the detail of which can be found in our November bulletin. The OFT was concerned that the merger would result in a substantial lessening of competition with the merger creating the single largest titanate and zirconate supplier with little or no constraints on the merged entity's activities.

10 December 2010

## ANTITRUST

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### EU

#### 4 [Commission carries out dawn raids in the pharmaceutical sector](#)

The Commission has confirmed that its officials have carried out dawn raids at the premises of a number of pharmaceutical companies in several Member States. The Commission believes that the targeted companies may have acted individually or jointly, in particular to delay generic entry for a particular medicine.

An earlier Commission sector enquiry into the pharmaceutical sector was concluded in July 2009 and identified a number of concerns relating to the entry of generic drugs onto the market. Since the sector enquiry the Commission has conducted dawn raids at a number of pharmaceutical companies and initiated two formal investigations.

MEMO/10/647 – 3 December 2010

## 5 Commission makes Visa Europe's commitments to cut interbank fees for debit cards legally binding

In April 2009, the Commission sent a Statement of Objections to Visa Europe stating that Visa Europe's multilateral interchange fees (MIF) harmed competition between merchants' banks, inflated costs for accepting payment cards and ultimately increased consumer prices. Various other restrictions operated by Visa Europe were also deemed to be in violation of EU antitrust rules.

In response, Visa Europe committed to reduce the maximum weighted average MIF for consumer debit cards for cross-border transactions and national transactions in a number of EEA countries (although this maximum weighted average MIF can still be modified if reliable new information comparing the costs of cards to the costs of cash becomes available). Visa's commitments also provide for other measures, such as registration and publication of all MIF rates, full visibility and the electronic identification of commercial cards, and the possibility for merchants to freely accept VISA, VISA Electron, or VPAY debit cards.

These commitments are now legally binding on Visa Europe for four years. Whilst the Commission may review the market after the commitments have expired, the formalising of the commitments brings the Commission's investigation to a close.

IP/10/1684 - 8 December 2010

## 6 Commission rules against the Ordre National des Pharmaciens for anti-competitive practices in the French clinical analysis market

The Commission has fined the Ordre national des Pharmaciens (ONP) €5 million for setting minimum prices on the French market for clinical laboratory tests and for actively hindering the development of laboratory groups in this market. The ONP is a professional body that oversees pharmacists in France and ensures that they comply with their professional duties.

After an investigation that was commenced following a complaint from the LABCO group in October 2007, the Commission concluded that the ONP's behaviour had restricted competition in the French clinical testing market. The Commission noted that, since 2003, ONP decisions had been frequently targeted at groups of laboratories with the aim of impeding their development on the French market and preventing significant, structural changes to these groups. In addition, between September 2004 and September 2007 the ONP imposed minimum prices by seeking to prohibit discounts of over 10% on the public prices granted by private undertakings. During its investigation the Commission found that the cost of clinical laboratory testing services was often up to two or three times higher in France than in other Member States.

IP/10/1683 – 8 December 2010

## 7 Commission fines LCD panel producers €648 million for participation in price fixing cartel

The Commission has fined six LCD panel producers a total of €648 million for participating in a cartel between October 2001 and February 2006 which harmed the European market for equipment using Liquid Crystal Display components. The six companies are Samsung Electronics (which received a 100% reduction in fine under the Commission's whistleblower program), LG Display (fined €215 million) and Taiwanese firms AU Optronics (fined €116.8 million), Chimei InnoLux Corporation (fined €300 million), Chunghwa Picture Tubes (fined €9.025 million) and HannStar Display Corporation (fined €8.1 million).

IP/10/1685 – 8 December 2010

## 8 Commission commences antitrust proceedings against cement manufacturers

The Commission has opened an investigation into suspected anti-competitive practices by several cement manufacturers in a number of Member States including France, Germany, Italy, Spain, and the UK. According to the Commission, its preliminary investigations have shown that it should pursue this investigation as a matter of priority.

In addition to cement, cement-based products such as ready mix concrete and other materials used to produce cement-based products are under investigation.

The Commission will now further investigate whether or not the companies acted to restrict trade in the EEA, including import restrictions, market sharing and price coordination in the markets for cement and related products.

IP/10/1686 – 10 December 2010

## 9 Commission adopts two new block exemption regulations and guidelines on horizontal co-operation agreements

The Commission has adopted a new set of block exemption regulations (BERs) that cover certain types of horizontal agreements; a research & development (R&D) BER and specialisation BER. The Commission also adopted its new Horizontal Guidelines covering all forms of horizontal co-operation agreements (not just those related to R&D and specialisation). The BERs are in force as of 1 January 2011 with a two year transition period during which the old BERs will apply to agreements that fulfil its conditions but do not fall under the new BER. In terms of the Horizontal Guidelines, two key features of the reform are a new chapter on information exchange and a substantial revision of the chapter on standardisation agreements.

IP/10/1702 – 14 December 2010

## 10 Commission opens investigation against Deutsche Telekom concerning behaviour of its subsidiary Slovak Telekom

On 8 April 2009, the Commission began an investigation into whether Slovak Telekom's behaviour could prevent or hinder competition in broadband internet access and other electronic communications markets in Slovakia. The latest development - extending the proceedings to Deutsche Telekom - is to establish whether Deutsche Telekom may have been involved in one or more of the suspected infringements or may be held liable for one or more of them. During the investigation, the Commission has been investigating a possible refusal to allow access to infrastructure and a possible margin squeeze with respect to the unbundled local loop in Slovakia. The Commission is also looking into possible margin squeeze and other abusive behaviour with respect to broadband access services in Slovakia.

The Commission has gathered evidence about the relationship between Slovak Telekom and its parent company, Deutsche Telekom and on this basis will assess the degree of involvement of Deutsche Telekom in the activities of its Slovak subsidiary.

IP/10/1741 - 17 December 2010

## 11 Commission sends statement of objections to Czech energy companies

The Commission has sent a Statement of Objections to Energetický a průmyslový holding and J&T Investment Advisors, both active in the electricity sector in the Czech Republic. The Commission states that, in its view, the companies obstructed an inspection carried out by Commission officials from 24 to 26 November 2009. In May 2010, the Commission opened official proceedings against the two companies in respect of the

obstruction.

During the inspection at Energetický a průmyslový holding and J&T Investment Advisors, the companies are said to have failed to block an e-mail account, failed to open encrypted e-mails and diverted incoming e-mails. If the Commission concludes that the companies did obstruct its investigation, it can impose a fine of up to 1% of a companies' annual worldwide turnover.

IP/10/1748 - 20 December 2010

## UK

### 12 OFT recommends extension of the public transport ticketing schemes Block Exemption

The OFT has made a recommendation to the Secretary of State for Business, Innovation and Skills that the public transport ticketing schemes Block Exemption (the PTTSBE) be extended without significant change for a further five year period until 29 February 2016. This follows support from an overwhelming majority of respondents to the OFT's consultation on its proposal to extend the PTTSBE earlier this year.

Under the PTTSBE certain types of integrated ticketing arrangements between public transport providers, such as multi-operator travelcards, multi-operator individual tickets, through-tickets and short/long distance add-on tickets for local bus/train/tram/ferry travel, are automatically exempt from the prohibition against anti-competitive behaviour under the Competition Act 1998. To ensure ticketing arrangements do not substantially eliminate competition and only impose restrictions that are necessary to achieve consumer benefits and efficiencies the PTTSBE contains certain conditions which ticketing arrangements must comply with in order to benefit from the exemption.

141/10 - 16 December 2010

### 13 OFT publishes report on events leading to collapse of BA executives price-fixing trial

The OFT has published the findings and recommendations of an OFT Board review into the collapse of a criminal trial against four BA executives in relation to their involvement in alleged fuel surcharge price-fixing. The report concluded that the OFT had not been negligent but that the complexities of this particular case meant that this was not ideal as the OFT's first contested criminal case. The report recognised that several problems arose relating to the OFT's procedures and identified areas for improvement in the OFT's risk assessment and internal oversight of the case, including greater involvement by senior management.

17 December 2010

### 14 Ofcom issues statement of objections to BT in wholesale pricing investigation

The Office of Communications (Ofcom) has issued a statement of objections to BT Group (BT) for an alleged margin squeeze in the market for wholesale end-to-end voice calls between July 2008 and April 2009 in breach of Chapter II of the Competition Act 1998 and Article 102 of the TFEU. Other communications providers use BT's 'Wholesale Calls' product to offer calls at a retail level and Ofcom considers that the prices charged by BT to other providers for its 'Wholesale Calls' product were set at such a level that equally efficient operators would not have been able to cover their costs. This represents the latest step by Ofcom following the complaint from THUS plc (now part of Cable and Wireless Worldwide plc) and Gamma Telecom into BT's practices in the wholesale calls market.

BT now has the opportunity to respond before Ofcom makes its final decision as to BT's infringement.

## MARKET INVESTIGATIONS

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### UK

#### 15 [OFT announces market study into private healthcare](#)

The OFT is to launch a market study into the market for private healthcare in Spring this year following questions over whether the market is working well for private healthcare patients. The study is to focus on the nature of competition within the market and whether the market is fully competitive.

The proposal is to address four possible areas of concern: the level of concentration amongst providers of private healthcare at national, regional and local levels, and whether this limits the extent of competition in the market; any barriers preventing private healthcare providers from entering or expanding in the market; any restrictions on the ability of consultants and other medical professionals to practice; and how consumers access and assess information, and how they exercise choice in the provision of private healthcare.

The OFT is seeking the views of interested parties in order to refine and confirm the scope of the study and the proposed scope may change. Interested parties are to submit their comments in writing to the OFT by 1 February 2011.

137/10 – 14 December 2010

#### 16 [OFT Consultation into scope of market study into mobility aids](#)

The OFT wishes to consult interested parties on the proposed scope of a market study into mobility aids. The purpose of the study is to consider whether the market(s) in the sector are working well.

The proposal is to address four key areas: the level of access to information consumers have to make informed choices when purchasing complex products from the market; the power of consumers to drive competition within the market; the treatment of consumers and a consideration of whether this treatment is fair; any other sources of market problems, for example distortions of competition due to market structure.

The OFT intends to launch the investigation in February 2011.

19 November 2010

## LITIGATION

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### EU

## 17 National competition authority's rights in appeal proceedings examined by the Court of Justice of the European Union

The Court of Justice of the European Union (CJEU) has ruled on a reference from the Belgian courts in relation to the rights of the Belgian Competition Council before the Belgian national court in proceedings involving appeals against the Competition Council's decisions. The Belgian Competition Council had been prevented from participating in any judicial proceedings brought against its own decisions in the national courts because it was classified under Belgian law as a judicial body.

The CJEU ruled that national laws which prevent national competition authorities from participating in judicial proceedings brought against its decisions run contrary to the objectives of Regulation 1/2003 and the effective implementation of Article 101 and 102 TFEU. The CJEU held that if national competition authorities are not afforded rights to participate in proceedings and defend their own decisions, this might harm the effective administration of EU competition rules.

C-439/08 - 7 December 2010

## 18 General Court annuls decision of Commission to reject a complaint against watch manufacturers

On 15 December 2010, the General Court annulled a decision of the European Commission to reject a complaint alleging a breach of Articles 101 and 102 of the TFEU by several watch manufacturers. The Court held that the Commission was wrong to have concluded that there was insufficient community interest in examining the complaint further.

The Court also held that the Commission had not given sufficient reasons for its conclusion that the market involved was of limited size and importance. Further, the Commission was found to have committed manifest errors of assessment by deciding that the respective markets for spare parts and repair/maintenance services formed part of the primary market for luxury or prestige watches, instead of forming separate markets. The Court held that because the Commission had made manifest errors when determining the relevant market, this also vitiated the Commission's conclusion (in rejecting the complaint), that there was a low probability of establishing infringements of Articles 101 and/or Article 102.

T-427/08 -15 December 2010

## 19 General Court rules on E.ON breach of seal case

The General Court has upheld a fine of €38 million that the Commission imposed on E.ON Energy because a seal securing documents, put in place by Commission inspectors during a dawn raid, was broken during the inspection (carried out at the premises of E.ON in May 2006). E.ON denied breaking the seal, however it was unable to explain why or how the seal was broken.

The Court stated that the Commission had been correct to assume that there had been, at least, a negligent breach of the seal and that it was not necessary for the Commission to show how the seal was actually broken or that evidence had actually been tampered with in order to impose a fine.

MEMO/10/686 – 15 December 2010

## UK

### 20 Court of Appeal rules that OFT fines cannot be recovered from directors or employees

The Court of Appeal has handed down a judgment on the question of whether an undertaking fined for breaching the Competition Act 1998 could recover the fine from directors or employees responsible for the

infringing conduct.

The decision follows an investigation by the OFT into collusion between supermarkets and dairy processors in relation to retail prices of dairy products. Following an early resolution agreement with the OFT, Safeway agreed to pay a financial penalty but later brought an action for damages or equitable compensation against former employees and directors of the company, seeking an indemnity against liability and to recover the cost of the penalty from the directors and employees. The claim alleged the directors and employees had breached their employment contracts, breached their fiduciary duties and were negligent. Further, the claim alleged the directors and employees had conspired to initiate Safeway's involvement in the infringement. The Court of Appeal, upholding the Defendants claim, held that Safeway's liability for the breach of the Competition Act was personal, and that Safeway had not been made vicariously liable (by the OFT's infringement decision) for the acts of its employees and directors. The Court of Appeal also applied the legal principle that a claimant is barred from pursuing an action if it arises from his own illegal conduct because the court cannot assist a claimant to recover a benefit from such conduct. The Court of Appeal also considered the policy of the Competition Act, and deterrence, would be undermined if infringing undertakings were able to pass on the liability for infringements to their employees.

21 December 2010

## 21 Second damages action in relation to carbon and graphite products cartel

The Competition Appeal Tribunal (CAT) has published details of an action brought by 30 companies claiming damages against Morgan Crucible PLC, Schunk GmbH, Schunk Kohlenstofftechnik GmbH, SGL Carbon AG, Mersen SA (formerly Le Carbone-Lorraine SA) and Hoffman & Co. Elektrokohle AG. In 2003, the Commission issued a decision that the above named defendants had been members of a cartel for electrical and mechanical carbon and graphite products between October 1998 and December 1999, and imposed total fines of €101.44 million.

The claimants before the CAT, mainly train and other transport operators and train/rolling stock manufacturers, include companies from Germany, UK, Italy, Norway, Sweden, Portugal, Spain and the Netherlands. They are all companies which either purchased products which were subject to the cartel or goods/services incorporating such products, and are seeking damages for loss or damage caused by the defendants' breaches of statutory duty. The claimants allege that each of the defendants is jointly and severally liable, for the period of its participation in the cartel, for all the loss and damage caused to the claimants and as a result of the breaches of statutory duties.

21 December 2010

## REGULATORY

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### UK

## 22 OFT to examine competition in public services procurement

The OFT has launched a study into commissioning and competition in the provision of public services which is designed to help policymakers and commissioners of public services promote competition and consider potential competition issues in the procurement of public services.

The study is based on a key theme of the OFT (as set out in the OFT's Annual Plan) to look into the



government's role as a buyer, seller and market maker. The aim of the study is to provide practical guidance and best practice examples for the competitive procurement of public services in areas such as health, education, welfare and justice. It will also consider payment by results, delivery through a mutual model and the role of small and medium sized businesses and the third sector, and will look to draw international comparisons and parallels with the commissioning of private services. The OFT will be contacting relevant bodies to seek information and is open to relevant submissions on the subject of the study.

133/10 – 10 December 2010

### 23 Department of Health confirms establishment of Monitor as economic regulator with concurrent competition powers

As part of a wider review of the framework for regulation of healthcare provision, the Department of Health has confirmed its proposals to establish Monitor, the independent regulator of NHS foundation trusts, as an economic regulator for health and adult social care services.

Under the forthcoming Health and Social Care Bill, Monitor will be given concurrent competition enforcement powers under the Competition Act 1998 and the Enterprise Act 2002. In exercising its concurrent powers, Monitor will have, broadly, three main functions: to promote competition; to set or regulate prices; and to support the continuity of services.

The Government also intends to legislate to the effect that the Enterprise Act 2002 merger regime will apply to foundation trusts from April 2012 (before that date Monitor will have concurrent powers under the Enterprise Act 2002 only in relation to market studies/investigations).

14 December 2010

If you require further information or advice on any of the items covered, then please contact either Diarmuid Ryan in Manchester/London, or Riccardo Croce or Brian Hartnett in Brussels who are all partners in our EU, Competition, Trade & Regulatory practice

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