COMPETITION LAW BULLETIN

FEBRUARY 2011

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EU

Commission approves acquisition of Arriva Deutschland by Ferrovie dello Stato and Cube

The European Commission (the "Commission") has decided, in accordance with Article 6(1) of the EU Merger Regulation, to approve the acquisition of Arriva Deutschland by Ferrovie dello Stato ("FS") and Cube Transport ("Cube"). FS is an Italian national rail operator and Cube is a subsidiary of Cube Infrastructure Fund, an investment fund controlled by BPCE, the French Banking Group. The combined market share of the parties is below 15 per cent and as such the Commission concluded that the transaction would not significantly impede effective competition in the EEA or any substantial part of it.

On 11 August 2010, the Commission granted conditional approval for the acquisition of Arriva by Deutsche Bahn subject to the divestment of Arriva Deutschland. It is expected that after this transaction, Arriva Deutschland (which has been held separately from the rest of the Arriva group to prevent Deutsche Bahn obtaining any knowledge or influence of the business) will compete against Deutsche Bahn in the German rail and bus markets.

IP/11/193 16/02/2011

Commission approves the acquisition of joint control over Actamax by DSM and DuPont

The Commission has decided to approve the acquisition of joint control by DSM PTG inc. ("DSM") and E.I. du Pont de Nemours and Company ("DuPont"), over the proposed joint venture of Actamax Surgical Materials LLC ("Actamax"), under Article 6(1) of the EU Merger Regulation.

DSM is involved with research and development, production, distribution and sale of nutritional and pharmaceutical products. DuPont is engaged in development, research, production and sale of chemical products, plastics, agro-chemicals, paints, seed and other material. The proposed joint venture, Actamax, will be involved in developing and commercialising advanced biocompatible surgical materials.

The Commission concluded that neither DSM nor DuPont have activities in the same market or in a market that is either upstream or downstream or in neighbouring markets closely related to the market of Actamax. Further, Actamax only forms a small part of the respective portfolios of DSM and DuPont, and as such it is highly unlikely that co-ordination between the parents will restrict competition within the meaning of Article 101(1) of the Treaty for the Functioning of the European Union (TFEU). Accordingly, it has been decided that the transaction would not significantly impede effective competition in the EEA or any substantial part of it.

IP/11/205 21/02/2011

UK

OFT refers Irish Sea ferries merger to Competition Commission

On 8 February 2011 the Office of Fair Trading (the "OFT") referred the completed acquisition by Stena AB of DFDS AS assets and vessels on the Liverpool-Belfast and Heysham-Belfast routes. In its first merger reference to the Competition Commission (the "CC") of 2011, the OFT was not satisfied that a decision by Stena AB to close a competing route between Fleetwood and Larne the day after the merger completed, was made independently of the merger itself. In particular, the OFT has concerns that Stena AB would not have withdrawn from the route in the absence of the merger.

The OFT found that the Fleetwood-Larne service operated by Stena AB was providing an overall benefit to consumers as it competed head to head with the routes that Stena AB acquired from DFDS AS during the acquisition. As the evidence available was not compelling enough to dismiss concerns that the closure had not been influenced by the merger, the OFT examined the merger as if the Fleetwood-Larne service was still in operation. This led to the conclusion that a realistic prospect of a substantial lessening of competition in the supply of freight services between the north west of England and Northern Ireland had been created as a result of the merger, which required reference to the CC for a more detailed investigation.

The CC is expected to report on its findings by 25 July 2011. This will be the second investigation of ferry services in the Irish Sea, following a CC investigation in 2004 into the acquisition by Stena AB of two routes, including the Fleetwood-Larne route, from P&O in 2004.

13/11 8 February 2011

OFT clears national addressing database joint venture

The OFT has decided not to refer to the CC a proposed joint venture to create a national addressing database, despite the fact that a monopoly will be created by the proposed deal. The proposed joint venture will create the National Address Gazetter, a database of geo-referenced addresses in England and Wales, developed through a combination of the spatial address databases of Ordnance Survey and the Local Government Improvement and Development Agency.

The OFT found that in the provision of regularly updated information to accurately locate addresses in industries such as public transport and road maintenance, the two companies did not face competition from less frequently updated databases.

The OFT decided it was not proportionate to refer the joint venture to the CC as:

i) the joint venture's largest customer, the Government, will continue to exercise substantial buyer power and influence over the joint venture;

ii) the size of the market is relatively small and there has been little opportunity in practice for private sector companies to trade one database off against the other; and

iii) virtually all customers supported the joint venture.

18/11 15 February 2011

OFT refers anticipated acquisition by Ratcliff Palfinger Limited of Ross & Bonnyman Limited to the

Competition Commission

The OFT has referred the proposed acquisition by Ratcliff Palfinger Limited of the commercial vehicle tail lifts spare parts business of Ross & Bonnyman Limited to the CC.

The OFT has taken the decision that, on the basis of the evidence provided to it, it may be the case that the decision taken by Ross & Bonnyman Limited to exit the commercial tail lifts market was influenced by the proposed acquisition. The OFT considered the proposed acquisition on this basis, and considered the potential impact on the market as if the Ross & Bonnyman Limited exit had not taken place.

The OFT found that the parties were two of the three largest suppliers in the commercial tail lifts sector. In considering the impact of the proposed acquisition on the supply of commercial tail lift spare parts, and also the impact on the primary market for column tail lifts for commercial vehicles, the OFT found that the deal raises a realistic prospect of a substantial lessening of competition in the supply of column tail lifts in the UK.

The CC is expected to report on the reference by 4 August 2011.

21/11 18 February 2011

OFT accepts variation to undertakings in lieu of reference in Travis Perkins' merger with BSS

In its decision of 26 October 2010 the OFT raised concerns that the proposed acquisition of BSS by Travis Perkins would result in a substantial lessening of competition in 20 local areas. As a result of this decision Travis Perkins offered undertakings in lieu of a reference to the CC to divest a store in each of the local areas affected. As reported in our December 2010 bulletin, the OFT accepted the undertakings on 10 December 2010.

Since that decision, evidence has been presented to the OFT that demonstrates a national heating specialist chain, not previously considered, operates in two of those local areas. The presence of the national store meant that on the basis of the methodology applied by the OFT during the case, the OFT could not reach the conclusion that there would be a substantial lessening of competition in those areas.

The OFT published revised undertakings in lieu in early 2011, in which there would be no requirement for the merged business to divest stores in the two areas. Following a period of consultation, during which no responses were received, the OFT accepted the revised undertakings.

In a further development, the OFT is now considering a revision of the undertakings in lieu in respect of a BSS store in Weston-Super-Mare. The OFT has received evidence of an additional store specialising in heating and plumbing, within 5 miles of a BSS store it had previously requested was divested as part of the merger. The OFT will consider representations by interested parties before maing a decision.

22 February 2011

EU

Commission launches two separate investigations into co-operation agreements between Lufthansa and Turkish Airlines and between Brussels Airlines and TAP Air Portugal

On 11 February 2011, the Commission launched two separate investigations into whether "parallel hub-to-hub code sharing" agreements implemented between Deutsche Lufthansa and Turkish Airlines and between Brussels Airlines and TAP Air Portugal breach Article 101 of the TFEU. The Commission is investigating the Munich-Istanbul and Frankfurt-Istanbul routes in relation to Lufthansa and Turkish Airlines and the Brussels-Lisbon route in relation to Brussels Airways and TAP Air Portugal.

Unlike other code sharing agreements whereby a company sells seats on partners' flights on routes it does not operate, parallel hub-to-hub code sharing agreements allow the partners to sell seats on each other's flights on routes where they both already operate between their own hubs. Whilst the former type of code sharing agreement can actually provide benefits to passengers by widening their choice, the Commission considers parallel hub-to-hub code sharing agreements to be anti-competitive as airlines should be competing with each other for seat sales on routes where they both operate. Parallel hub-to-hub code sharing agreements can result in higher prices and reduced service quality on routes where they are in force, especially in situations where there are only two operators on a route, such as the situation with Brussels Airways and TAP Air Portugal in relation to the Brussels-Lisbon route.

The Commission has informed the parties and the competition authorities of the Member States of the investigations. There are no deadlines for the investigations, the length of which will be determined by a number of factors, including the complexity of each case.

IP/11/147 11/02/2011

Commission launches infringement proceedings against 6 Member States in connection with Russian air service agreements

The Commission has launched infringement proceedings against Cyprus, Ireland, Poland, Portugal, Slovakia and Spain in relation to their bilateral air service agreements with Russia. Formal requests for information have been sent to the Member States concerned and they have 28 days in which to respond. This follows similar requests for information being sent to Belgium, Denmark, Italy, Luxembourg, the Netherlands, Sweden and the UK less than a month ago.

The proceedings come as a result of the 2002 European Court of Justice (the "ECJ") "Open skies" ruling confirming that all bilateral air service agreements between EU member states and non-member states have to include an "EU designation clause" which recognises that the terms of such agreement must apply equally to all EU airlines. Since this ruling, most agreements with non-member states have been adapted; however, Russia refuses to recognise that all EU airlines must be treated equally and imposes different conditions depending on which country the EU airline is based in. The Commission is concerned that this creates distortion of competition between airlines of different member states and would create problems if an EU airline were taken over by an airline based in a different member state. Furthermore, certain EU airlines must pay a charge, directly to Russian airline Aeroflot, for flying over Serbia to reach Asian destinations. The Commission is concerned that this is in breach of EU antitrust law and International law by which airlines should not be forced into concluding a commercial agreement with a

direct competitor.

IP/11/186 16/02/2011

UK

Secretary of State accepts OFT recommendations to extend PTTS Block Exemption

The Secretary of State for Business, Innovation and Skills has accepted a recommendation by the OFT to extend the public transport ticketing schemes Block Exemption ("PTTS") for 5 years, to February 2016. The PTTS automatically exempts agreements between travel operators to offer consumers tickets that can be used on services provided by two or more operators. The effect of these arrangements is usually to provide a benefit to passengers through increased mobility and flexibility with choice on when to travel.

The acceptance follows a consultation period launched by the OFT in July 2010 that considered whether the agreements covered by the PTTS continued to meet the exemptions provided for in the Competition Act 1998, namely that such agreements deliver efficiencies and benefits to consumers without substantially eliminating competition. The recommendation also included that no significant changes should be made to the PTTS at this stage.

The OFT will continue to monitor the PTTS in light of any developments in this sector over the next 5 years.

10 February 2011

OFT Statement of Objections alleges abuse of dominance in the fuel card sector

The OFT has issued a Statement of Objections alleging an abuse of dominance by CH Jones in the market for the provision of bunker fuel card services following a complaint by rival UK Fuels. The allegations relate to services provided under CH Jones' "Keyfuels" bunker fuel card brand, and in the provision of pay as you go fuel card services. The OFT's main concern is that CH Jones has engaged in exclusionary behaviour to the detriment of UK Fuels. In particular, the allegation is that this has involved the use of exclusive agreements with bunker fuel sites.

Heavy goods vehicle ("HGV") fleets typically purchase fuel in bulk from a wholesaler or oil major, and arrange for this fuel to be stored across a network of refuelling sites. The fuel is delivered to the HGV companies' network by the bunker fuel card provider, and fuel cards enable HGV users to draw down the fuel. The card provider is paid a handling charge on the draw down. Pay as you go services allow for smaller customers to access these distribution networks.

Following the issue of the Statement of Objections, the OFT will not be in a position to decide if the law has been breached until it has received and reviewed CH Jones' reponse, and any comments from interested third parties.

25/11 25 February 2011

UK

OFT publishes recommendations in outdoor advertising market study

On 3 February 2011 the OFT published a market study into the outdoor advertising market, and invited comments on its provisional conclusion that no market investigation referral to the CC is necessary. Although the OFT found that there were aspects of the outdoor advertising industry that might restrict, prevent or distort competition, the OFT considers that recommendations made in the study will prevent this from happening.

Outdoor advertising expenditure was £782 million in 2009. It covers advertising targeted at consumers outside of their homes and offices and can be seen at various locations in a range of formats, including bill boards. Typically the advertiser will contract with an advertising agency to develop a campaign, part of which may involve outdoor advertising. The agency will contract with a specialist outdoor buyer, with knowledge of the key advertising spaces available. The rights to advertise at these locations are then purchased from a media owner, who may own or lease the space from a local authority.

In relation to the industry as a whole the OFT identified issues with a system whereby specialist outdoor buyers are incentivised to contract with the same media owners in return for rebates based on total annual spend. The OFT suggested that this would incentivise specialist outdoor buyers to contract with certain media owners to improve this rebate, rather than contract with smaller media owners offering lower prices. The OFT made a number of recommendations regarding the overall transparency of the industry, with the view that increased transparency would reduce any distortion in the market.

The OFT also identified potential competition issues in relation to the contracts between media owners and local authorities. In some cases, it found that these contracts were for long durations and included potentially restrictive terms. This aspect of the study has caused the OFT to open an investigation under the Competition Act 1998 into agreements made between each of JCDecaux and Clear Channel with some local authorities. The OFT has also issued, as part of the report, recommendations to local authorities for best practice for the award of contracts to media owners.

12/11 3 February 2011

OFT confirms scope of mobility aids study

Following a period of consultation, the OFT has announced the scope of its mobility aids study. The study, formally launched 16 February 2011, will cover wheelchairs, scooters, stair lifts, bath aids, hoists and adjustable beds, and specialised seating.

After receiving over 100 reponses to the consultation the OFT has determined that the study will cover three key areas: whether the right information is available and accessible to allow consumers to purchase the correct mobility aid and drive competition; whether consumers are fairly treated by traders and suppliers, and ways to remedy the situation in the event of a finding of unfair treatment; and an assessment of whether competition in the wheelchair sector is working well.

During the consultation the OFT received responses that raised concerns about the consumer's ability to make an informed choice when purchasing a mobility aid, resulting in overcharging, the purchase of

low quality products, and the purchasing of products not suited to the needs of the user. There were also concerns over high pressure sales tactics and the use of unclear terms and conditions.

With regard to the wheelchair sector, the main concerns regarding a lack of competition surround the structure of the market and the decision making of some firms and public bodies as suppliers and purchasers.

The OFT intends to publish its study in September 2011.

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LITIGATION

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EU

ECJ releases Advocate General's opinion on territorial exclusivity agreements relating to the transmission of football matches

Advocate General Kokott has given an opinion on questions referred to the ECJ for a preliminary ruling from the High Court of England and Wales. These questions concerned whether exclusive territorial licences for the broadcast of Premier League football games were compatible with Article 101 of the TFEU, the application of the EU free movement rules and the interpretation of Directives 2001/29 on the harmonisation of certain aspects of copyright, 93/83 on the coordination of rules concerning copyright and rights related to copyright applicable to satellite broadcasting, and 98/84 on the legal protection of services based on, or consisting of, conditional access.

The High Court was dealing with two cases which both involved pubs that were screening live football matches using foreign satellite decoding equipment and cards. The foreign equipment was purchased at a much lower price than equipment available from the UK broadcast rights holder.

The Advocate General concluded that the territorial exclusivity rights have the effect of partitioning the internal market into separate national markets and restricting free movement of services without any justification. In so far as the licences were compatible with Article 101(1) of the TFEU, Kokott concluded that the licences provided absolute territorial protection and had the same effect as agreements to prevent or restrict parallel exports. The licences are therefore liable to prevent, restrict or distort competition and as such are incompatible with Article 101(1) of the TFEU. Advocate General Kokott also noted that it is not necessary to show actual effects of an agreement in order to establish its anti-competitive objective.

It must be noted that the opinions of the Advocate General are not binding; they can, however, be a strong indication of the outcome of the judgment in the case.

CJE/11/3 03/02/2011

ECJ rules on margin squeeze criteria

The ECJ has provided guidance on criteria to be applied by a national court in establishing an abusive margin squeeze following a reference from the Stockholm District Court. TeliaSonera has been found to be dominant in the wholesale asymmetric digital subscriber line ("ADSL") input services market.

TeliaSonera, also supplies its own retail services to end users. The Swedish Competition Authority brought proceedings against TeliaSonera alleging abuse of dominance in setting the price of the wholesale ADSL product and the retail price for ADSL services based on the assessment that the retail price was not sufficient to cover the cost of the wholesale ADSL input. The national court referred a series of questions to the ECJ concerning the interpretation of Article 102 TFEU in relation to the assessment of the margin squeeze allegations.

The ECJ held that as a general rule, the court should examine the prices and costs of the dominant undertaking and only consider the prices and costs of competitors where this is not possible. Contrary to the opinion of the Advocate General, the ECJ concluded that the absence of a regulatory obligation to supply the wholesale product is not relevant to an assessment of margin squeeze. However, it is necessary to demonstrate that the wholesale product is indispensible and accordingly the margin squeeze has an anti-competitive effect on the retail market. The ECJ also notes that the effect need not be concrete and that it is sufficient to demonstrate an anti-competitive effect which may potentially exclude competitors. In relation to market strength, as long as the undertaking in question is dominant for the purpose of Article 102 TFEU, the degree of dominance is not relevant to establishing abusive margin squeeze. It was also held that only dominance in relation to the wholesale market is relevant and that there is no requirement to show that the dominant undertaking has the opportunity to recoup losses suffered as a result of its pricing practice.

17 February 2011

REGULATORY

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EU

European Commission to resurrect collective redress action plan

On 4 February 2011, the Commission published a public consultation document "Towards a Coherent European Approach to Collective Redress". The public consultation document is long awaited and its purpose is to seek views on an EU wide collective redress mechanism in a number of policy areas.

In the public consultation document, the Commission first seeks views on what added value the introduction of a new mechanism of collective redress would have for the enforcement of EU law. It then identifies six general principles that should guide future EU initiatives on collective redress: the need for effectiveness and efficiency of redress; the importance of information and the role of representative bodies; the need to take account of collective consensual dispute resolution; the need for strong safeguards to avoid abusive litigation; the availability of appropriate funding; and the importance of effective enforcement across the EU. In particular, the Commission suggests the "loser pays" principle and reserving the right to bring an action to certain entities such as representative bodies, as ways of safeguarding against abusive litigation.

The consultation also seeks views on cross-border issues and discusses whether the rules should be binding or a non-binding "good practice guide". The Commission identifies that an effective collective redress mechanism available throughout the EU would constitute a strong incentive for parties to settle the case out of court. According to the consultation paper, an initiative on both individual and collective

alternative dispute resolution mechanisms in consumer matters is under preparation.

Finally, the Commission seeks stakeholders' views on whether the collective redress mechanisms should go beyond the competition and consumer protection fields and be available also for other policy areas (or even be of a general scope).

Interested parties will now have until 30 April 2011 to submit their comments in reply to the 34 questions asked by the Commission in the public consultation document.

4 February 2011

If you require further information or advice on any of the items covered, contact details for the Squire Sanders EU, Competition, Trade & Regulatory team are available at: http://www.ssd.com/antitrust_competition/