

# COMPETITION LAW BULLETIN

APRIL 2011

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### EU

#### European Commission launches public consultation on draft best practices for cooperation among EU National Competition Authorities on multi-jurisdictional mergers

The European Commission (the **Commission**) has published a draft best practices consultation document, drafted by the EU Merger Working Group, that is intended to provide a non-binding frame of reference and to facilitate cooperation and information sharing between EU National Competition Authorities (**NCA**s) in relation to cases which fall below the thresholds for the EU Merger Regulation to apply (where the Commission would have jurisdiction to review the merger) but which require notification under national merger control rules in more than one Member State.

The objectives of cooperation amongst NCAs - to increase the efficiency, transparency and effectiveness of the merger review process - are discussed. Further, under the draft best practices document, NCAs keep each other informed of developments during their investigations, including in relation to decisions to commence second phase investigations, remedies or final decisions, and any related timing issues. They may also discuss their substantive analyses and exchange views on remedial measures. The Commission has indicated that mergers where cooperation is likely to be beneficial include those which have the potential to affect competition in more than one Member State, or where remedies need to be designed in more than one Member State.

The deadline for the submission of comments on the draft best practices document is 27 May 2011.

IP11/507 28 April 2011

### UK

#### OFT decision to refer treasury management consultancy acquisition to the Competition Commission

The Office of Fair Trading (**OFT**) has published its decision (which it announced on 31 March 2011) to refer the completed acquisition of ICAP plc's treasury management consultancy services business (**Butlers**) by Sector Treasury Services Ltd (**Sector**) to the Competition Commission (**CC**). The treasury management consultancy market involves the supply of information and advice to local authorities on issues such as risk assessment and investment and debt management.

The parties are the number one and two suppliers of treasury consultancy services and, according to the OFT, are viewed by many customers as each other's closest competitors. The OFT found that the completed acquisition has led to combined market shares in excess of 70% and considers that barriers to entering the market are high, with remaining suppliers of similar services unable to constrain the merged entity.

In particular, the OFT considered that local authorities may receive a reduction in service quality, or be required to pay higher prices, as a result of the transaction.

ME/4739/10 15 April 2011

## EU

### [European Commission imposes fines on members of washing powder cartel using the settlement procedure](#)

The Commission has adopted a decision imposing a total fine of EUR 315.2 million on the participants of a washing powder cartel that existed between January 2002 and March 2005 and was active across eight Member States. The Commission found Henkel, Procter & Gamble and Unilever to be in breach of Article 101(1) of the Treaty on the Functioning of the European Union (**TFEU**) for their participation in the cartel that was aimed at stabilising market positions and coordinating prices. The Commission considered this collusive behaviour was intended to preserve the respective market positions of the parties by way of the implementation of an environmental initiative through their trade association.

The settlement discussions started in the second half of 2010, after the companies indicated that they were prepared to settle, according to a procedure introduced by the Commission in 2008. In January 2011, they all acknowledged their respective liability for the infringement. A Statement of Objections reflecting the parties' submissions was notified to them in February 2011 and they all confirmed that its content reflected their submissions. This led to a strongly streamlined settlement decision that was adopted just two months later.

Henkel received full immunity from a financial penalty under the leniency programme as it was the first participant in the cartel to inform the Commission, whilst Procter & Gamble and Unilever received a reduction of 50% and 25% respectively, for co-operation and an additional 10% reduction for acknowledging the facts of the case and engaging in the settlement procedure.

IP11/473 13 April 2011

## UK

### [OFT issues decision in Reckitt Benckiser abuse of dominance investigation](#)

The OFT has issued its decision that Reckitt Benckiser abused a dominant position by withdrawing NHS packs of Gaviscon Original Liquid medicine.

As reported in the October 2010 edition of this bulletin, the OFT found that Reckitt Benckiser's practice of removing Gaviscon Original Liquid medicine from the NHS prescription market once the patent had expired, but before the generic name had been published, caused more prescription orders for Reckitt Benckiser's alternative product, Gaviscon Advance Liquid which was patent protected and did not have a generic alternative. The OFT found this breached the Chapter II prohibition of the Competition Act 1998, and Article 102 TFEU. Reckitt Benckiser was fined £10.2 million, with the fine the subject of an agreement with the OFT in which Reckitt Benckiser admitted its behaviour breached UK and EU competition law and agreed to cooperate with the OFT's investigation.

The issuance of the decision represents the final formal step in the OFT's investigation and brings the OFT's investigation to a conclusion.

53/11 13 April 2011

### High Court finds that Heathrow Airport Limited has abused a dominant position

The High Court has handed down a judgment finding that Heathrow Airport Limited (**HAL**) (a subsidiary of BAA), has abused a dominant position by excluding competitors from the forecourts at Heathrow Airport Terminals 1, 3 and 5. HAL owns and operates Heathrow Airport, which includes operating a number of car parks on the Heathrow Airport site as an "on-airport" car parking provider. The applicants, Purple Parking Limited (**Purple**) and Meteor Parking Limited (**Meteor**) are both considered to be "off-airport" car park providers, but compete with HAL to provide "meet and greet" and "valet parking services" from the "on-airport" forecourts. HAL sought to introduce a change whereby it would be the only forecourt provider and all the services of Purple and Meteor would be provided at their respective off-site car parks, and also proposed to charge Purple and Meteor. Purple and Meteor claimed HAL's conduct was anti-competitive and unlawful.

The proceedings before the High Court were based on the accepted fact that HAL is dominant in the "Facilities Market"; i.e. the provision of access to Heathrow's facilities, including its roads and forecourts. Accordingly, the High Court had to determine whether HAL had abused that dominant position within the meaning of section 18 of the Competition Act 1998.

The High Court held that the proposed exclusion of Purple and Meteor would amount to HAL applying dissimilar conditions to similar transactions, and as a result Purple and Meteor would be forced to operate out of short stay car parks and would be faced with a charge, while HAL would not. The High Court considered this went beyond the location of the service, and could affect the nature of the service (in real terms and in terms of customer perception). The High Court also concluded that HAL would be the effective monopolist in "meet and greet" services from the airport forecourts, conferring substantial advantages on HAL at the cost of Purple and Meteor and resulting in a serious risk to competition.

On this basis, the High Court found that a decision by HAL to exclude access to the forecourts was an abuse of dominance contrary to section 18 of the Competition Act 1998 and made an order forbidding the proposed exclusion of Purple and Meteor (leaving the parties free to negotiate a competition law-compliant and commercially acceptable solution to the dispute).

15 April 2011

## MARKET INVESTIGATIONS

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### UK

#### OFT launches short market study into extended warranties for domestic electrical appliances

The OFT has launched a "short market study" into extended warranties for domestic electrical appliances such as televisions, washing machines and computers. The OFT has announced the focus of the study will be to ensure consumers are receiving value for money in a market worth over £750 million, and to identify whether action is needed to make the market more competitive.

This short market study follows an OFT review of the aftermarkets for domestic electrical goods launched in November 2010 (the **2010 Review**), which identified that retailers were in a position to limit competition for extended warranties by selling warranties at the same time as the electrical goods. During the 2010 Review, the OFT also received general concerns from consumers that warranties are not good value for money.

The findings in the 2010 Review were consistent with an earlier OFT evaluation in 2008 that identified legislation introduced to improve competition (*Supply of Extended Warranties on Domestic Electrical Goods Order 2005*) was covering only £19 million of an estimated annual consumer detriment of £366 million.

The OFT aims to publish its short market study in Summer 2011, and key stakeholders will be contacted directly by the OFT, while other interested parties are also invited to submit their views to the OFT.

55/11 14 April 2011

## LITIGATION

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### EU

#### [General Court upholds European Commission fine of EUR 10.2 million on Visa for breach of Article 101 TFEU](#)

The General Court has dismissed an appeal by Visa Europe and Visa International Service Association (**Visa**) against the imposition of a EUR 10.2 million fine by the Commission for Visa's refusal to grant Morgan Stanley (**MS**) membership of the Visa network.

In 2007, the Commission found that Visa's refusal to grant MS membership of the Visa network, without objective justification, was contrary to Article 101 TFEU as it prevented MS entering the "merchant acquiring" market for the provision of card services to merchants. The Commission found that this resulted in anti-competitive effects, particularly as it prevented a potential competitor from entering a concentrated market in which there was scope for further competition. The Commission concluded there was no basis for exemption under Article 101(3).

Visa's appeal included a challenge to the Commission's finding that the conduct restricted competition and to the level of fine. In terms of the imposition of liability, Visa's argument that the Commission had applied the wrong test in assessing effects on competition was rejected by the General Court, with the court concluding that Article 101 TFEU is designed to protect the structure of the market and competition itself, not just competitors or consumers. The General Court also rejected Visa's argument that the Commission underestimated the actual and potential degree of competition in the market. In relation to the criteria for assessing whether a company is a potential competitor, the General Court emphasised that while an intention to enter the market may be relevant, the essential factor is the potential competitor's ability to enter the market.

Case T-461/07 14 April 2011

### UK

#### [Competition Appeal Tribunal judgment on construction recruitment agencies appeal](#)

The Competition Appeal Tribunal (**CAT**) has handed down a judgment following appeals against the OFT's 2009 decision in relation to the "Construction Recruitment Forum", which found that a number of firms active in the construction recruitment agency industry had engaged in cartel conduct (collective boycotts and price-fixing) aimed at impacting on intermediaries' ability to compete. The fines imposed by the OFT in 2009 totalled £39.27 million.

The CAT has reduced the fines imposed by the OFT, but nevertheless emphasised that the breaches were considered to be significant infringements of competition law.

As part of the appeals, the CAT accepted certain challenges to the OFT's application of the OFT Penalty Guidelines. The CAT held that the OFT erred in using "gross turnover" rather than "net fees" as the relevant turnover for the calculation of fines, given the nature of the construction recruitment agency industry (i.e. the supply of temporary workers makes net fees rather than gross turnover a more meaningful measure of the scale of activity of the agencies). The CAT also held (following the CAT judgments in the Construction bid-rigging appeals – see the March 2011 edition of this bulletin) that the relevant year for calculating the fine should be the business year prior to the infringement, and not the business year prior to the decision. The CAT also held that the application by the OFT of the Minimum Deterrent Threshold (**MDT**), without consideration of wider issues such as scale or geographic area of infringement, was an inappropriately mechanistic and narrow approach. The CAT agreed with the OFT, however, that a starting point for fines of 9% out of a possible 10% of relevant turnover was appropriate, given the serious nature of the infringements.

1 April 2011

#### UK Supreme Court refuses Safeway permission to appeal on transfer of fines to directors and employees

On 4 April 2011, the Appeal Panel of the UK Supreme Court refused Safeway permission to appeal against a unanimous Court of Appeal decision that prevented Safeway from being indemnified by directors and employees for fines imposed by the OFT for breaches of competition law.

As reported in the December 2010 edition of this bulletin, the fines had been imposed by the OFT following an investigation into collusion on prices for dairy products between supermarkets and dairy processors in respect of which the OFT had imposed a fine. Safeway had sought to shift its liability for the infringement (and the fine) onto its employees (and, more specifically, the employee's insurers) and following a refusal by the Court of Appeal to allow an appeal of a Court of Appeal judgment in December 2010 Safeway had appealed directly to the UK Supreme Court.

4 April 2011

#### Competition Appeal Tribunal judgments on construction bid rigging appeals

The CAT has handed down further judgments following the twenty five appeals in 2010 lodged as a result of the OFT's 2009 decision "Bid rigging in the construction industry in England". Following on from the earlier judgments issued by the CAT last month (reported in the March 2011 edition of this bulletin) the CAT has substantially reduced the fines imposed by the OFT in its 2009 decision. Broadly, in the recent (and final set of) decisions the CAT has dealt with appeals as to penalty and appeals as to liability.

In the latest judgments dealing with the penalty, the CAT adopted a similar decision on the challenges to the OFT's Penalty Guidelines (the **Guidelines**) and to the methodology adopted by the OFT in applying the Guidelines as in the previously handed down judgments in the case.

In the judgments regarding liability, the CAT considered a number of challenges to liability. In two of the cases the CAT upheld the appeal, while in the third the CAT partially upheld and partially rejected the appeal. In each case the CAT adjusted the level of fine accordingly.

15 and 27 April 2011

## EU

### [European Commission launches public consultations on application of State aid rules](#)

The Commission has launched two separate public consultations inviting stakeholders' views on the application of the State aid rules in two sectors; [aviation](#) and [broadband infrastructure](#).

In relation to the aviation sector consultation, there are currently two sets of State aid guidelines – published in 1994 and 2005 – that set out the principles for the application of the State aid rules in the sector. The Commission considers the sector has undergone a wide-ranging evolution in recent years such that the circumstances in which the airlines, airports and the State operate in this sector may well be different from those which prevailed when the 1994 and/or 2005 aviation guidelines were introduced. The aviation consultation takes the form of a detailed questionnaire and seeks stakeholders' views on aspects such as market characteristics, business models of airports and airlines and market definition. The deadline for responding to the aviation sector consultation is 6 June 2011.

[IP/11/445 7 April 2011](#)

On broadband infrastructure, the Commission is obliged to review the State aid rules on public financing of broadband infrastructure in 2012. Accordingly, the aim of this initial broadband infrastructure consultation is to inform the Commission's forthcoming review, particularly relating to important market, technological and regulatory developments in the sector. The broadband infrastructure consultation takes the form of a detailed questionnaire and addresses themes such as next generation access (so called NGA) networks, areas of public intervention and the role of national regulatory authorities. The deadline for responding to the broadband infrastructure consultation is 31 August 2011.

[IP/11/493 19 April 2011](#)

## UK

### [Independent Commission on Banking publishes Interim Report](#)

The Independent Commission on Banking (the **ICB**) has published its Interim Report, following the work it has completed since publishing its Issues Paper in September 2010, with the purpose of focussing the next stage of the debate for banking reform options.

In terms of improving competition, the Interim Report sets out "Reform options for Competition", and notes that challengers to large incumbent banks have largely disappeared. The ICB proposes methods to improve competition between banks through a number of initiatives, such as structural measures (for example, divestures within the Lloyds Banking Group) and dealing with barriers to entry for competitors, as well as the actual and perceived difficulties for consumers wishing to switch bank accounts. The Interim Report also considers the Financial Conduct Authority, as proposed by the Government, will play an important role in the regulation of banks.

The Commission welcomes views and analysis in relation to the Interim Report, and expects to publish its final report in September 2011.

[11 April 2011](#)

### Ofcom call for inputs on Business Connectivity Market Review

Ofcom has invited responses to a new Business Connectivity Market Review examining the market for leased lines and backhaul circuits used by businesses and Communication Providers. This review is part of Ofcom's duties under the European Framework for Electronic Communications, which requires Ofcom to carry out periodic reviews of electronic communications markets in the UK.

Ofcom intends to gather stakeholders' views on the proposed scope of products and services covered by, and the analytical approach to, the market review (including Ofcom's approach to considering appropriate remedies for business connectivity markets). Ofcom will then be in a position to perform a substantive analysis of the competitive conditions in business connectivity markets. The market review is being carried out in the context of Ofcom's aims to implement a new regime for business connectivity services (including any potential remedies and charge controls) by 30 September 2012.

Interested parties should respond to Ofcom's invitation for responses by 1 June 2011.

21 April 2011

### Competition Commission publishes telecoms appeals guidance

The CC has published guidance directed at parties involved in telecoms price appeals under s.193 of the Communications Act 2003. In August 2010, the CC proposed a review of how it undertakes its functions in relation to price control references from the CAT, and whether there was scope to make the process more effective and efficient. Further, the CC decided it was an appropriate time to produce guidance on this issue given its experience (from the reference to the CC of three price control disputes in 2010 and two disputes in 2008/2009) and the prospect of more cases in the future.

Under the Communications Act, an appeal can be made to the CAT against certain specified decisions of Ofcom, including price controls. Section 193 of the Communications Act 2003 requires the CAT to (i) refer a price control matter raised by an appeal to the CC for determination, and (ii) apply the CC's determination when deciding the appeal.

The guidance provides detail on the different stages in the CC's process; key documents used in consideration of the appeal by the CC; conduct of hearings and meetings; written questions and oral enquiries and the approach to transparency and confidentiality.

22/11 27 April 2011

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If you require further information or advice on any of the items covered, contact details of the Squire Sanders Antitrust and Competition partners are available at: [http://www.ssd.com/antitrust\\_competition/](http://www.ssd.com/antitrust_competition/)

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