

# COMPETITION AND REGULATORY BULLETIN

## OCTOBER 2011

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### Articles by Squire Sanders Hammonds' team published by Global Competition Review

Global Competition Review has recently published *The European Antitrust Review 2012* which contains a number of articles written by lawyers in the Squire Sanders Hammonds' Competition and Regulatory team. A short summary of each article is printed below; please click on the links to read the full text (available from [www.ssd.com](http://www.ssd.com), and reprinted with permission from the publisher).

[“Countering Competition Risks: Towards a Culture of Compliance”](#) considers the growing importance of compliance, beginning with an overview of the consequences of non-compliance. It advocates a comprehensive approach, beyond a policy or program, to instil a culture of compliance within an organisation. The article provides practical guidance on how companies can most effectively create a compliance culture within their organisations to limit risks and avoid harmful consequences.

[“Defence Procurement”](#) considers the wider legal context surrounding the recent introduction of the EU Defence Procurement Directive, highlights some of the key aspects of the Defence Directive that differ from the ‘traditional’ EU procurement rules (i.e. the rules under the Public Sector Directive and the Utilities Directive) and addresses the specific requirements of the defence sector. It concludes by considering the opportunities that the EU Defence Directive may bring for EU and third country businesses.

[“Market Data Supply Agreements”](#) highlights some of the key considerations for businesses seeking to maintain a competitive edge through up-to-date market data while avoiding infringement of EU competition rules. The authors provide an overview of recent cases finding information exchange violations, with and without the presence of collusive behaviour, and the implications for future application of the competition rules. The article discusses the impact of the European Commission’s (**Commission**) most recent guidelines, which include a new section on information exchange, for the assessment of cooperation agreements between competitors.

[“Telecommunications”](#) reviews the past year in telecommunications, focusing on the implementation of the revised regulatory framework for electronic communications, recent developments in margin-squeeze case law and guidelines on the applicability of State aid to broadband networks. The article also provides an overview of expected forthcoming developments including enforcement actions over implementation of the revised regulatory framework for electronic communications and legislative actions in connection with the Radio Spectrum Policy Programme (**RSPP**).

### EU

#### Commission approves acquisition of Skype by Microsoft

On 7 October 2011, the Commission announced that it has decided to approve the acquisition of Skype by Microsoft. Following a Phase I investigation, the Commission declared that there were only partial horizontal overlaps between the parties. As to potential concerns with regards to possible conglomerate effects of the merger, the Commission concluded (i) in relation to the risk that Microsoft may tie its own products (the Windows operating system) with Skype, as the vast majority of consumers who acquire a computer with Skype pre-installed are already Skype users and will typically subsequently download a different version, the transaction would not change the current situation, and (ii) Microsoft would not have an incentive to degrade Skype's current interoperability.

IP/11/1164, 7 October 2011

### UK

#### OFT refers in-flight catering suppliers joint venture to Competition Commission

The anticipated joint venture between Alpha Group Limited (**Alpha**) and LSG Lufthansa Service Holding AG (**LSG**) has been referred by the Office of Fair Trading (**OFT**) to the Competition Commission (**CC**). LSG and Alpha are both major suppliers of in-flight catering and the OFT stated that the merger would lead to a high combined market share at ten UK airports and reduce the number of national major suppliers from three to two.

The OFT stated that there are competition concerns particularly in relation to long-haul operators (where a traditional full service meal is provided) as, although there is evidence that there is some competitive constraint for short-haul flights, it is not clear that this constraint would be sufficient to replace the loss in competition which would be likely to arise from the creation of the joint venture. The OFT felt there was a particular risk to long-haul operators who fly out of Manchester Airport as the merger would lead to a monopoly in this supply chain.

The CC has invited the submission of evidence from third parties by 26 October 2011 and, with a 24 week statutory deadline for reporting, a decision is expected before 25 March 2012.

110/11, 10 October 2011

#### Kent newspaper merger referred to Competition Commission by OFT

The anticipated acquisition by family-owned media company Kent Messenger Group (**KMG**) of several newspapers from the Daily Mail and General Trust subsidiary, Northcliffe Media Limited (**NML**), has been referred by the OFT to the CC.

The OFT concluded that there was a risk of a monopoly in seven areas of East Kent where KMG and NML are the only publishers of local weekly newspapers. The OFT concluded this monopoly could result in higher advertising costs for businesses and higher newspaper prices for consumers.

A CC decision was expected before 2 April 2012, but the merger has reportedly now been abandoned.

111/11, 18 October 2011

### EU

#### The Commission publishes package of measures on conduct of antitrust procedures

On 17 October 2011 the Commission adopted a package of measures comprising best practice guidelines on the conduct of antitrust proceedings (the **Guidelines**) and a revised Hearing Officer Mandate. The package also includes updated best practices for the submission of economic evidence and data collection.

The Commission has indicated that these measures will provide for greater communication between the Commission and the parties in antitrust investigations, whilst also increasing the transparency and fairness of competition proceedings. The Guidelines cover the procedural approach of the Commission in relation to investigations / proceedings into alleged infringement of Article 101 and 102 of the Treaty on the Functioning of the European Union (**TFEU**). The Guidelines also include detail on the investigation phase up to the issuance of the statement of objectives (**SO**), the procedure after the SO, rejection of complaints and detail on technical issues (such as the implementation, notification and publication of decisions).

As part of the package of measures introduced by the Commission, the Hearing Officer will have an enhanced role during the conduct of antitrust proceedings. The Commission has indicated that the revised mandate will strengthen and expand the role of the Hearing Officer, and includes measures such as the power of the Hearing Officer to intervene during the investigatory phase of antitrust and certain merger proceedings.

IP/11/1201, 17 October 2011

#### Commission confirms dawn raids in the Euro interest rates derivatives sector

The Commission has confirmed that, commencing on 18 October 2011, it conducted unannounced inspections (dawn raids) at the sites of companies involved in the financial derivative products sector linked to the Euro Interbank Offered Rate (**EURIBOR**) in numerous Member States. These inspections (conducted under Article 20 of Regulation 1/2003) are the initial steps of the Commission's investigations.

The inspections were the result of the Commission having grounds to believe that the companies were involved in anti-competitive practices in breach of Article 101 TFEU.

MEMO/11/711, 19 October 2011

#### Commission begins Article 101 TFEU investigation into agreement between Johnson & Johnson and Novartis

The Commission has announced that it has opened an investigation into contractual provisions between the pharmaceutical companies Johnson & Johnson and its Swiss counterpart Novartis. The Commission is examining whether certain contractual agreements have the object or effect of delaying the entry of a generic version of painkiller Fentanyl onto the Dutch market, practices which could be deemed contrary to Article 101 TFEU.

IP/11/1228, 21 October 2011

### UK

#### Sports goods retail sector investigation closed by OFT

The investigation into suspected anti-competitive activities by JJB Sports PLC (**JJB**) and Sports Direct International PLC (**Sports Direct**), reported in our [October 2009](#) bulletin, has been closed by the OFT. The investigation related to claims that JJB and Sports Direct were engaged in price fixing and market sharing (through coordination of store location).

In reaching a decision to close the investigation, the OFT reviewed the case in light of its Prioritisation Principles and concluded that there was only limited evidence of potential price fixing and that the likely consumer impact is low. As the case has been closed on the grounds of the Prioritisation Principles, the OFT has not reached a view on whether the parties have infringed competition law and may decide to reopen the case in the future.

CE/9088/09, 17 October 2011

#### OFT consults on updated penalty and leniency guidance

The OFT has announced that it is consulting on its draft penalty and leniency guidance, with the aim of updating its approach to financial penalties and to awarding leniency.

In relation to its draft penalty guidance, the OFT is proposing changes so that it can set fair and proportionate fines that are at a sufficiently deterrent level, and to improve the transparency of penalty calculations. The proposals include raising the maximum starting point in the fine calculation to 30% of relevant turnover (which reflects comments from the Competition Appeal Tribunal (the **CAT**) in one of the *Construction* appeal decisions and will ensure consistency of approach with that of the Commission and other competition authorities), confirming the policy of compliance discounts, and introducing a new specific step at which the OFT will consider the proportionality of the penalty "in the round". The OFT also plans to make clear which turnover will be deemed to be "relevant turnover" for the purposes of the penalty calculation.

In consulting on its draft leniency guidance, the OFT has indicated that it is primarily planning to improve transparency of its existing policies and practices, and provide further information on the procedures for obtaining leniency protection and the scope of any such protection.

The consultations close on 26 January 2012 and the OFT aims to produce final versions of the guidance documents in spring 2012. The OFT proposes to apply the new penalty guidance in all cases following approval of the guidance by the Secretary of State (provided that an SO has not yet been issued in the case). In relation to the leniency guidance, the OFT will announce the date from which the new guidance will apply when it publishes the final guidance.

116/11, 26 October 2011

## MARKET INVESTIGATIONS

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### UK

#### OFT consults on amendment to commitments offered in motor insurance case

Following on from the market investigation opened in January 2010 into the private motor insurance sector, the OFT has launched a consultation on a proposed amendment to the commitments offered by motor insurance companies to address concerns about the potential exchange of pricing data and the risk of price coordination between competitors, by subscription to an analysis tool.

As a result of its investigation, the OFT announced in January 2011 that it was minded to accept commitments as a means of addressing its concerns, and opened a consultation on draft commitments. The OFT has now indicated that it is inclined to accept an amendment to the draft commitments which would reduce the age of exchangeable data (using the insurers' analysis tool) from 36 months to 6 months. The OFT believes this shorter duration will promote competition by encouraging entry into the market by other competitors, particularly smaller competitors, by ensuring that a certain level of information remains available.

The consultation on the proposed amendment to the commitments closed on 28 October 2011.

108/11, 30 September 2011

## **Competition Commission publishes provisional decision on remedies in local bus services market investigation**

Following a market investigation into local bus services, referred by the OFT on 7 January 2010, the CC has published a provisional decision on the remedies required to resolve the adverse effect on competition and related customer detriment that it has provisionally identified (the remedy package).

The remedies package aims to open the market by reducing barriers to entry and expansion in markets for commercial bus services and providing a sustainable competition environment. The remedies package focuses on ticketing, operator behaviour and access to bus stations, and also deals with supported services. The CC recommends that the Department for Transport updates its best practice guidance on tendering for supported services, and suggests that local transport authorities be given powers to request information about newly deregistered services.

Recommendations have also been made for changes to the regulatory and policy environment, which include action by the OFT.

49/11, 6 October 2011

## **OFT publishes findings of off-grid energy market study**

The OFT has published findings in its study into the supply of off-grid energy (four million households are supplied by off-grid energy). We reported on the opening of the market study in our [January 2011](#) and [March 2011](#) bulletins. The OFT has concluded that the off-grid energy sector does not need price regulation and that consumers have a good choice of suppliers.

The OFT found that although there was a price spike last winter due to demand and bad weather, profit margins were not excessive and overall, competition acted to constrain prices over the year. The OFT also noted that the increasing price trends are largely driven by the internationally traded prices of oil and liquefied petroleum gas (**LPG**).

The OFT does have concerns that consumer law is not being complied with, particularly on pricing practices and the treatment of customers. Areas of particular concern are the difference in prices charged between placing the order and delivery, the locking of customers into LPG contracts that are overly expensive following expiry of special introductory rates, and the potential mis-selling of solar panels.

The OFT recommends that the heating oil industry strengthen its codes of practice in relation to consumer protection. The OFT does not propose to make a market investigation reference to the CC but it is continuing to look into the potentially unfair consumer pricing practices.

112/11, 18 October 2011

## **OFT refers audit market to Competition Commission**

Following the provisional decision to refer the market for statutory audit services to large companies to the CC (reported in our [July 2011](#) bulletin) and the closure of a public consultation on that provisional decision in September, the OFT has now referred this market to the CC.

There are only four large players in the market (Deloitte, Ernst & Young, KPMG and PwC) and these players earned 99% of all the audit fees paid by FTSE 100 companies in 2010. The OFT says that there are substantial barriers to entry and switching (the OFT found the average annual switching rate among FTSE 100 companies was 2.3%).

The CC will analyse the OFT's work and is inviting initial submissions from interested parties, by 11 November 2011, to help it identify the key issues before it releases an issues statement formally setting out the scope of the investigation. The CC has a maximum two year period in which it is required to reach a decision and publish its report.

115-11, 21 October 2011

### EU

ECJ rules that prohibitions on sale and use of foreign TV decoder cards for viewing football matches breach Article 101 TFEU and freedom to provide services

On 4 October 2011, the European Court of Justice (the **ECJ**) gave its ruling on questions referred from the England and Wales High Court, in relation to the use of foreign satellite decoder cards for the broadcast of English Football Association Premier League matches.

The ECJ ruled that national legislation which protects the grant of absolute territorial exclusivity by prohibiting the import, sale or use of foreign decoder cards contravenes the EU law principle of freedom to provide services (Article 56 TFEU). The ECJ ruled that such a grant of absolute territorial exclusivity could not be justified on the respective grounds of protecting intellectual property rights or encouraging the public to attend football matches (rather than watching the football games on television). The ECJ did, however, conclude that broadcasts in a pub containing works protected by copyright (such as opening video sequences) may be a "communication to the public" under the Copyright Directive, and require authorisation from the author of the works.

Furthermore, the ECJ ruled that where a licence agreement is designed to prohibit or limit the cross-border provision of broadcasting services, it may fall within the prohibition against anti-competitive agreements under Article 101(1) TFEU.

4 October 2011

**ECJ preliminary ruling that an absolute ban on internet sales breaches prohibition on anti-competitive agreements**

The ECJ has given a preliminary ruling following a reference from the Paris Court of Appeal, with regards to whether certain selective distribution agreements containing an absolute ban on internet sales of cosmetics and personal care products to consumers breached Article 101 TFEU.

The agreements contained a requirement that all sales be made in a physical space in the presence of a qualified pharmacist. The ECJ considered this amounted to a *de facto* prohibition from any form of internet selling, which was liable to be restrictive of competition (by "object") as it significantly undermined the ability of distributors to sell to consumers outside their contractual territory, unless it could be objectively justified. The enquiry into "objective justification" of a particular clause, said the ECJ, should involve an individual and specific examination of the content and objective of the clause, in its legal and economic context (which includes the properties of the products in question).

Having considered that an absolute ban on internet selling was contrary to Article 101(1) TFEU, the ECJ then commented on the potential application of the automatic exemption granted by the safe harbour under the EU Vertical Agreements Block Exemption Regulation (**VABE**). The ECJ noted that a general and absolute ban on internet sales restricted active and passive sales, with the effect that the VABE could not apply. The ECJ commented that it did not have sufficient information to provide a preliminary ruling or guidance on the potential for individual exemption under Article 101(3) TFEU.

13 October 2011

### UK

**Tesco appeals OFT decision on their involvement in the price fixing of cheese**

Tesco has appealed to the CAT challenging the decision of the OFT to fine Tesco for its involvement in an information exchange on retail pricing intentions for the sale of cheese. The original decision of the OFT announcing that Tesco had breached the Chapter 1 prohibition of the Competition Act 1998 (in relation to anti-competitive agreements) was published in our [August 2011](#) bulletin.

The appeal summary published by the CAT states that Tesco claims that the OFT was wrong to conclude from the evidence that it had participated in the breaches of the Competition Act 1998. Tesco also claims that the penalty imposed on it was excessive and disproportionate. In terms of relief, Tesco has asked that the decision against it be quashed or, in the alternative, that the fine be reduced.

1188/1/1/11, 17 October 2011

## REGULATORY

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### EU

#### [European Commission launches public consultations on access to telecoms networks](#)

The Commission has launched two public consultations related to access for alternative operators to the fixed telephone and broadband networks of established operators. The consultations are part of the efforts of the Commission to ensure consistency in regulating telephone and broadband networks across Member States, and the Commission has indicated that the consultations are important to achieve the Digital Agenda for Europe targets of access to fast and ultra-fast broadband by 2020 via the use of next generation ultra-fast optical fibre-based networks.

The first consultation relates to non-discriminatory access to the infrastructure and services of dominant incumbent operators, and monitoring and enforcement of obligations, while the second focuses on pricing of this wholesale access and incentives to invest in fibre-based networks.

The Commission is inviting responses from interested parties, including telecoms operators and national regulators, until 28 November 2011.

3 October 2011

#### [BEREC holds public consultation on draft guidelines on net neutrality and transparency](#)

The Body of European Regulators for Electronic Communications (**BEREC**) has launched a consultation on its draft “Guidelines on Net Neutrality and Transparency: Best practices and recommended approaches”, which go towards establishing transparency in the market and will assist end-users compare and choose appropriate services. The draft guidelines set out certain aspects that BEREC considers should be provided to end users, which include the scope/availability of the service and general and specific limitations. The draft guidelines also outline which bodies should provide information and discuss the importance of comparability.

Interested parties can submit their comments up to 2 November 2011.

3 October 2011

#### [BEREC report on the implementation of the NGA Recommendation](#)

BEREC has published a report on the implementation of the Commission's Recommendation on Next Generation Access (**NGA**) networks, which was adopted on 20 September 2010. The report is based on data collected by BEREC on how the Commission's NGA Recommendation has been implemented in Member States and examines the situation in relation to different types of access products, considers the availability of these products and identifies issues surrounding implementation in particular Member States.

BoR (11) 43, 6 October 2011

## Neelie Kroes delivers speech on development of the EU e-communications market

The Commission has published a speech by Neelie Kroes, Vice President of the Commission responsible for the Digital Agenda, on the development of the EU e-communications market.

Vice President Kroes highlighted the Commission's proposals to invest almost € 9.2 billion to meet the targets for pan-European projects, fast and ultra-fast broadband and interoperability and noted the funding is part of the Connecting Europe Facility which aims to also generate money from other private and public sources and to attract capital market financing from investors. Vice President Kroes also outlined that the proposed RSPP for wireless infrastructure is at an advanced stage of negotiations with the European Parliament and the European Council, with an agreement in principle on topics including establishing an inventory and review of spectrum use.

Vice President Kroes stated that the Commission is open to examining other technical solutions for roaming, in order to implement the proposed structural measures and noted that there are concerns that prices are not moving from the regulated price caps.

Vice President Kroes closed her speech with reference to the revised EU electronic communications regulatory framework, confirming that the legislation must be implemented by all Member States and that the Commission will take action against those that do not do so correctly.

SPEECH/11/683, 19 October 2011

## Digital Single Market closer to completion with new Radio Spectrum Policy

The European Parliament, Commission and Member States' representatives have agreed on the content of legislation to implement the RSPP, which is due to run from 2012 to 2015. We outlined the major policy objectives of the RSPP in our [May 2011](#) bulletin, but it essentially aims to set European radio policy, harmonising spectrum use throughout Europe and ensuring efficient allocation of wireless spectrum resources.

The draft decision was approved by the Permanent Representatives Committee of the Council on 28 October, but has yet to be approved by the Industry, Research and Energy Committee of the European Parliament.

16072/11 PRESSE 398, 28 October 2011

## UK

### Update on plans for award of 800MHz and 2.6GHz spectrum

As reported in our [March 2011](#) bulletin, Ofcom consulted on its assessment of future competition in mobile markets and proposals for auction of the 800MHz and 2.6GHz spectrum bands. Ofcom has indicated that as a result of a number of strongly argued and substantial responses it received, it plans to publish a further consultation document at the end of the year and will then likely give at least 8 weeks for shareholder comments on the revised proposals. Ofcom hopes to publish a decision statement next summer and then hold the auction towards the end of 2012.

07 October 2011

### Ofcom determination to give effect to CAT Order on termination charges

On 1 August 2011, the CAT upheld an appeal by BT, finding that Ofcom had erred in determining that BT's changes to termination charges for calls to 080, 0845 and 0870 numbers were not fair and reasonable, and held that BT had the right to impose certain specified network charge change notices (**NCCNs**) when it had sought to do so. In light of the decision of the CAT (and a further decision and Order from the CAT), the case was remitted back to Ofcom.

Ofcom has now made a determination which gives effect to those directions made in the Order that are capable of being implemented immediately. This gives effect to paragraphs 5(1) and 5(2) of the Order i.e. that the three NCCNs issued by BT do stand, and that the mobile network operators (Everything Everywhere, Hutchison 3G UK Limited, Vodafone Limited and Telefonica O2 UK Limited) do pay the termination rates due under these NCCNs to BT.

7 October 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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