Hammonds

EU & UK COMPETITION LAW

BULLETIN

23 March 2009

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Mergers Antitrust State Aid Market Investigations Litigation

BAA ordered to sell three airports by the Competition Commission

The Competition Commission (CC) has published its final report on BAA's ownership of seven UK airports. BAA will be required to sell three of its airports: Gatwick and Stansted, as well as either Edinburgh or Glasgow. The report follows a referral by the OFT in relation to their market investigation of 2007. The CC hopes that the sale of these airports will kick-start a much needed process of competitive rivalry and bring substantial benefits to passengers and airlines.

The report indicates that the three airports must be sold within two years and in accordance with a predetermined sequence: firstly Gatwick, then Stansted, followed by either Edinburgh or Glasgow, although the precise dates have not been published to avoid impeding the sale process. The sale of Gatwick, which was initiated by BAA in September 2008, is already under way. In addition to the three divestitures, the CC is also requiring BAA at Aberdeen to improve consultation with airlines, and to publish certain financial and other information.

At Heathrow, the UK's only hub airport, BAA will continue to have substantial market power, even after it no longer owns either Gatwick or Stansted. The CC has therefore made a series of recommendations to the Civil Aviation Authority (CAA). The CAA must improve the consultation process at Heathrow between BAA and competing airlines. They must also introduce an annual independent audit of the existing service quality regime. The CC has also made recommendations to the UK Government on aspects of the Government airports' policy, as well as on matters arising from the inquiry on the shortcomings of the current airports' regulatory system, to be taken into account in the Government's current review of the need for, and design of, a more effective and flexible regulatory system.

The CC's enquiry found that there are competition problems that adversely effect passengers and airlines at all seven of BAA's UK airports (Heathrow, Gatwick, Stansted and Southampton in the South of England, and Edinburgh, Glasgow and Aberdeen in Scotland). The CC found the key problem at BAA's airports in the Southeast and in lowland Scotland to be common ownership as this precludes any competition between the airports. According to the report, there are also additional problems at the London airports arising from the current system of regulation, planning and aspects of Government policy. The problems at Aberdeen derive from its isolated geographical position giving it the characteristics of a local monopoly.

Although the CC has recognised that the divestitures will have a significant impact on BAA's business, the CC did not believe alternative measures, such as the sale of only one of the London airports or greater regulation, would be adequate, given the nature and scale of the competition problems uncovered by the investigation. According to the report, the CC anticipates that the sale of the three airports to different purchasers will bring substantial benefits to passengers and airlines, partly because the new airport owners will have a much greater incentive than BAA to be more responsive to their customers, but also because BAA will need to respond to whatever action is taken by its new competitors, such as lowering prices, improving levels of service and more efficient investment in response to customers' needs.

Market Investigations

Under the Enterprise Act, the OFT has the power to refer markets to the CC for further investigation. They will do this when they have reasonable grounds for suspecting that any feature, or combination of features, of a market is preventing, restricting or distorting competition. Following a reference, as was the case here, the CC will decide whether competition is indeed restricted and what, if any, action should be taken to remedy the adverse effect on competition.

MERGERS

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EU

Invitations to Comment

1 Enel/Endesa

Interested parties are invited to comment by 27 March 2009 on the proposed acquisition by Enel S.p.A. of Endesa S.A. by way of purchase of shares.

COMP/M.5494 – 17 March 2009

2 Mapfre/Salvador Caetano/JVS

Interested parties are invited to comment by 29 March 2009 on the proposed acquisition by Mapfre S.A. and Grupo Salvador Caetano SGPS, S.A. of the undertakings Choice Car-Comércio de Automóveis, S.A., Finlog-Aluguere Comércio de Automóveis, S.A., Guerin-Rent-A-Car (Dois), Lda, and Luso Assistência—Gestâo de Acidentes, S.A. by way of purchase of shares.

COMP/M.5347 – 19 March 2009

3 Votorantim/Aracruz

Interested parties are invited to comment by 29 March 2009 on the proposed acquisition by Votorantim Group of Aracruz Celulose S.A. by way of purchase of shares.

COMP/M.5477 – 19 March 2009

OTHER

4 China's rejection of Coca-Cola bid is not protectionist

Last Wednesday, China's Ministry of Commerce (MOFCOM) announced its decision to prohibit the merger between Coca-Cola and Huiyuan. MOFCOM has since denied that its decision is protectionist. Coca-Cola offered to buy Huiyuan, the nation's largest juice maker, for 17.92 billion Kong Kong dollars (2.3 billion U.S. dollars) in cash. MOFCOM said that the bid failed to meet requirements set out in anti-monopoly laws and that if it went ahead, the transaction would disturb market competition.

MOFCOM said that the decision would have no effect on China's policy in accepting foreign investment and that the decision was based "on sufficient investigation and research, on the basis of facts, and strictly in line with the country's anti-monopoly law."

ANTITRUST

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EU

5 Commission welcomes European Court of Justice (ECJ) judgment in sodium gluconate cartel case

The European Commission has welcomed a judgment from the ECJ dismissing an action by Archer Daniels Midland Company (ADM) against a judgment of the Court of First Instance. The ECJ upheld the Commission's October 2001 decision to fine a worldwide Sodium Gluconate cartel (case T-329/01). In particular the ECJ confirmed the fine imposed on ADM. The judgment confirmed that the Commission and the Court of First Instance correctly assessed the gravity of the cartel.

MEMO/09/119 - 19/03/2009

6 Commission confirms sending Statement of Objections to ENI concerning the Italian gas market

The European Commission has confirmed that it has sent a Statement of Objections under EU antitrust rules to the Italian ENI group. The Statement of Objections sets out the Commission's preliminary view that the management and operation of natural gas transmission pipelines by ENI may be in breach of EC Treaty rules on abuse of a dominant market position (Article 82). Their behaviour concerns an alleged refusal to grant access to capacity available on the transport network (capacity hoarding), the granting of access in an allegedly less useful manner (capacity degradation) and an alleged strategic limitation of investment (strategic underinvestment) in ENI's international transmission pipeline system. These practices allegedly took place despite very significant short- and long-term demand from third party shippers. The Statement of Objections indicates that these practices may have weakened competitors on the market, and harmed customers in Italy.

MEMO/09/120 - 19/03/2009

7 Commission opens German gas market to competition by accepting commitments from RWE to divest transmission network

The European Commission has adopted a decision that renders legally binding the commitments offered by RWE to address concerns raised in the course of an investigation under EC antitrust rules. The Commission had concerns that RWE may have abused a dominant position on its gas transmission network in restricting its competitors' access to the network, thereby violating Article 82 of the EC Treaty. RWE will divest its entire Western German high-pressure gas transmission network. The sale will be carried out under the supervision of a trustee and all buyers will have to be approved by the Commission.

IP/09/410 - 18/03/2009

STATE AID

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EU

Decisions

8 Commission approves modification of French risk capital scheme to boost real economy

The European Commission has approved, under EC Treaty State aid rules, a temporary increase in investment tranches of a French risk-capital scheme, approved by the Commission in March 2008. The proposed modifications are in line with the Commission's Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis. In particular, the increase in investment tranches will be possible only until the end of 2010.

IP/09/406 -16/03/2009

9 Overview of measures adopted by Member States

The European Commission has released an overview of the measures which have been adopted by Member States in response to the financial and economic crisis.

MEMO/09/111 - 17/03/2009

If you require further information or advice on any of the items covered, then please contact either Diarmuid Ryan in London or Tom Pick in Brussels who are both partners in our EU Competition team.

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