

## EU & UK COMPETITION LAW

### BULLETIN

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### British Airways seeks to avoid potential group litigation

British Airways has attended a High Court hearing with the aim of preventing around 180 new claimants from joining an existing action brought against the airline in relation to its involvement in an alleged air cargo cartel. If allowed, a representative action such as this is likely to have important repercussions both for other airlines and for representative actions in the UK and beyond.

#### Background

The initial claim was lodged last autumn by Emerald Supplies Ltd and Southern Glass House Produce Ltd, both cut-flower wholesalers based in the south of England. The claimants imported flowers from Colombia and Kenya and allege that they suffered loss between 1999 and 2006 as a result of the cartel due to inflated prices, a decrease in sales volume, and ultimately damage to their brands. The claimants are seeking damages and interest.

The potential 180 new claimants are thought to include companies in the same sector, as well as direct and indirect purchasers from sectors such as the engineering industry. British Airways has stated that 150 of those seeking to join the proceedings are subsidiaries of the same group, Dana Holding, a supplier of engineering parts.

#### Representative actions in the UK

In the US, class actions allow a named claimant to bring a claim on behalf of a class of unnamed claimants, where individuals must opt-out in order not to be bound by the outcome of the class action. An equivalent system does not exist in the UK. Nevertheless, in the UK there are certain procedural mechanisms which can be used to allow a group of claimants to bring a group action, although in contrast to the US, these generally operate on an "opt-in" rather than an "opt-out" basis.

- A representative action may be brought by, or against, parties that have the "same interest" in every part of a claim. A judgment given in a representative action is binding on all the parties represented in the claim (and may, with permission, apply to non-parties). The legal basis for this is set out in part 19.6 of the Civil Procedure Rules (CPR). Traditionally, this has been a relatively uncommon way of bringing a group action, as the "same interest" test is difficult to satisfy.
- Group Litigation Orders (GLO's) were introduced to deal with problems encountered in bringing representative actions and the test for inclusion is broader. A GLO is an order by the court allowing for the case management of multiple claims which involve common issues of law and fact. The legal basis for this is part 19.11 of the CPR.
- In addition, the Enterprise Act 2003 makes it possible for "specified bodies" to bring proceedings before

the Competition Appeal Tribunal on behalf of two or more consumers for damages. Which? (formerly the Consumer Association) was granted specified body status in 2005 enabling it to bring representative actions and is currently is the only recognised “specified body” capable of bringing representative actions.

### **The arguments**

The claimants are seeking to rely on part 19.6 CPR and have put forward arguments supporting the view that there are “elements common to the claims” of the potential new claimants, which are sufficient to satisfy the “same interest” requirement. They argue that the new claimants will include purchasers of airfreight services either directly from British Airways (or other airlines involved in the cartel) or indirectly through a freight-forwarder.

Conversely, British Airways is seeking to demonstrate that the additional parties do not have the “same interest” as the two lead claimants and are arguing that the term “same interest” should be narrowly interpreted. In support of their argument, British Airways have sought to highlight potential difficulties in clarifying the scope of the extended claim and have questioned where the line should be drawn in admitting new claimants who could potentially extend all along the distribution chain and across an almost limitless range of products.

In seeking to undermine the idea that the claimants all pursue the “same interest”, British Airways has pointed to an inherent conflict of interests among the extended group of claimants. This conflict allegedly arises from the fact that the claimants derive from different levels of the distribution chain, therefore some will have passed on the suspected cartel overcharge, while others will have absorbed it.

The judge raised the issue of a scenario where a party, unaware that he falls within the class of claimants, later discovers the fact and wishes to lodge a claim at some point in the future, unaware that the case has already been litigated. The claimants pointed out that there were still unresolved policy issues throughout Europe and the US but which do not in themselves prevent group litigation.

### **The outcome**

If British Airways are found to have participated in the cartel, they will be held jointly and severally liable for all those suspected of being active in the price-fixing ring which includes, amongst others, Lufthansa, Qantas, Air France-KLM of SAS Cargo. If the judge allows this application, it could potentially make it easier for claimants to join proceedings in the future and reduce the costs associated with lodging a separate action. It has also been argued that purchasers outside of the UK would also have grounds for a claim.

If, on the other hand, the application is refused, British Airways will have avoided potentially huge costs. Perhaps more significantly, the “same interest” test will remain a significant hurdle to overcome for those seeking redress through the courts.

### **A changing legal landscape?**

A move towards the increased use of group actions in the UK would be indicative, not only of the increased trend of private damages actions for breaches of UK or EU competition rules but also of a shift towards a more claimant-friendly forum. Indeed, the Office of Fair Trading has signalled its support for representative actions, and the Civil Justice Council and the European Commission have also been considering the merits of a universal opt-out approach towards group actions.

However, there are still hurdles to be overcome before representative actions can be said to be part of the UK culture. Which? launched the first-ever representative action against JJB Sports bringing a claim for damages before the Competition Appeal Tribunal on behalf of – only - 130 consumers following the price fixing of replica football shirts. At the time many commentators thought such action would be the first of many involving damages for cartel activity for consumer goods, but Which? struggled to find consumers willing to join the action, despite the case being relatively high profile. Which? eventually agreed to settle out of court with JJB Sports, after the retailer agreed to pay up to £20 each for the affected England and Manchester United shirts bought between 2000 and 2001.

## EU

### Decisions

#### 1 Commission approves acquisition of tour operator Gold Medal by Thomas Cook

The European Commission has cleared under the EU Merger Regulation the proposed acquisition of sole control over the UK company Gold Medal International, an independent leisure travel group, by Thomas Cook Group of the UK. The Commission found that the activities of Thomas Cook and Gold Medal are largely complementary and that the proposed transaction would lead to overlaps solely on the markets for short-haul and long-haul foreign package holidays. In these markets, the increment brought about by the acquisition of Gold Medal is very limited. The Commission's investigation found that the parties would continue to face several effective competitors with significant market shares and that the proposed concentration would thus not raise competition concerns.

IP/09/507 - 31 March 2009

#### 2 Commission approves proposed acquisition of Azucarera by Associated British Foods

The European Commission has cleared under the EU Merger Regulation the proposed acquisition of the Spanish company Azucarera Ebro S.L. by the UK company Associated British Food Plc (ABF), the owner of British Sugar. The proposed transaction will lead to a small overlap in the sale of sugar, where both Azucarera and ABF are active in essentially complementary geographic regions. However, the Commission's investigation confirmed that the merger would not lead to any significant change in the market structure and that the merged entity would continue to face several competitors.

IP/09/508 - 31 March 2009

#### 3 Commission approves proposed acquisition of Corinthos Power by Mytilineos and Motor Oil

The European Commission has cleared under the EU Merger Regulation the proposed acquisition of joint control of Corinthos Power S.A of Greece (an electricity generator) by two Greek companies, Mytilineos Holdings S.A. and Motor Oil (Hellas) Corinth Refineries S.A (MOH). The Commission's examination of the proposed transaction showed that the horizontal and vertical relationships between the parties' activities are limited. The Commission also analysed the potential risks of the joint venture's parent companies closing off supplies of fuel or access to construction services to competing existing or potential electricity suppliers but found that this was not a risk as there are sufficient alternative competing sources of supply on the relevant upstream markets.

IP/09/509 - 31 March 2009

### Invitations to Comment

#### 4 General Motors/Delphi Steering Business

Interested parties are invited to comment by 10 April 2009 on the proposed acquisition by General Motors Corporation of the global steering business ('Delphi Steering Business') by way of purchase of shares and assets.

COMP/M.5500 - 31 March 2009

## UK

### Decisions

#### 5 Competition Commission finds that Capita/IBS acquisition could damage competition

The CC has concluded that the completed acquisition by Capita Group plc of IBS OPENSsystems could damage competition in the market for the supply of revenues and benefits software to local authorities in the

UK. The acquisition combined two competing suppliers leaving only one other supplier to compete for business. The CC will now begin a consultation process in which it will identify the most appropriate way to address this loss of competition; it is possible that they may order either partial or full divestments of the acquired business.

15/09 - 1 April 2009

## **6 OFT accepts divestment of medical waste plant in SRCL/Cliniserve merger**

The OFT has accepted a divestment package from SRCL and Cliniserve Limited to address competition concerns arising from SRCL's acquisition of Cliniserve. SRCL provides waste management services to medical and other sectors throughout England and Wales. Cliniserve provides the same service, mainly for the healthcare and pharmaceutical sectors. Cliniserve has agreed to sell its medical waste treatment plant in Littlehampton to Ethos Recycling Limited. The divestment package includes an agreement, approved by the OFT, in which SRCL will continue to provide waste for disposal at the newly-acquired Littlehampton site for a specified period of time while Ethos establishes its new business. As a result of this agreement, the merger will not be referred to the Competition Commission.

37/09 - 2 April 2009

### **Invitations to Comment**

## **7 Anticipated acquisition by Osem U.K. Limited of the business of Yarden G.B. Limited**

Affected sector: Kosher food. Case officer: Tim Geer 020 7211 8339 (tim.geer@oft.gsi.gov.uk)

Deadline for comment: 16 April 2009

## **8 Anticipated merger between Ticketmaster Entertainment, Inc. and Live Nation, Inc.**

Affected sector: Live music venues; live music promotions; ticket agency services. Case officer: Dimitrios Sinaniotis 020 7211 8911 (Dimitrios.Sinaniotis@oft.gsi.gov.uk)

Deadline for comment: 17 April 2009

### **Other**

## **9 Consultation over revised merger fees**

In April 2009, the second stage of a process to increase merger filing fees was due to be implemented. This dates back to an announcement by the then Department of Trade & Industry (DTI) on 6 January 2006 that merger fees would increase in a two stage process designed to recover the costs incurred by the competition authorities in undertaking their statutory merger control functions.

Last month, it was announced that the second stage of fee increases was to be delayed as the planned increase would not generate sufficient funds to recover the full cost of operating the merger control regime. The Department for Business Enterprise and Regulatory Reform is now consulting on a revised fee structure and should soon release details of the revised merger fees.

## EU

**10 Commission takes note of MasterCard's decision to cut cross-border Multilateral Interchange Fees (MIFs) and to repeal recent scheme fee increases**

The European Commission have indicated that they see no need to pursue MasterCard for non-compliance with a 2007 Commission decision that MasterCard's cross-border multilateral interchange fees (MIF) were in breach of EC Treaty rules on restrictive business practices. MasterCard is now using a different method to calculate MIF's and has agreed to make further alterations to its systems to increase transparency and competition in the payment cards market. Given these proposals and a series of undertakings offered by MasterCard the Commission do not intend to pursue MasterCard either for non-compliance with the Commission's 2007 decision, or for infringing the antitrust rules by increasing its scheme fees or by reintroducing a cross-border MIF.

IP/09/515 - 01 April 2009

**11 Commission sends Statement of Objections to Visa**

The European Commission has confirmed that it has sent a Statement of Objections to Visa. The Statement of Objections outlines the Commission's preliminary view that Visa's multilateral interchange fees (MIFs) harm competition between acquiring banks, inflate the cost of payment card acceptance for merchants and ultimately increase consumer prices. The MIFs are an important part of the total cost that retailers must pay for accepting Visa's consumer payment cards, and in effect establish a minimum price for retailers. The Commission's preliminary view is that this behaviour infringes European antitrust rules (Article 81 EC Treaty and Article 53 EEA Treaty).

MEMO/09/151 – 6 April 2009

**12 Commission temporarily authorises illiquid asset facility for ING**

The European Commission has granted temporary clearance to the illiquid asset back-up facility provided by the Dutch State to the financial group ING, with final approval dependent on the result of an in-depth investigation. Following an initial assessment of the complex measure for ING, the Commission decided for reasons of financial stability, similar to those governing the assessment of rescue aid, not to raise objections for a period of six months. However, as some conditions required by the Impaired Asset Communication need further in-depth analysis, in particular regarding valuation, the Commission has decided to open an in-depth investigation on this and corresponding elements like burden sharing.

IP/09/514 - 31 March 2009

**13 Commission authorises Dutch temporary scheme to grant aid of up to €500 000**

The European Commission has authorised, under EC Treaty State aid rules, a Dutch measure to help businesses to deal with the current economic crisis. Authorities at national, regional and local level may grant aid of up to €500 000 per firm in 2009 and 2010 to businesses facing funding problems because of the current credit crunch. The scheme is intended to increase possibilities to give timely and well targeted aid to SMEs and large companies and will therefore significantly contribute to remedying the current financial and economic crisis.

IP/09/527 - 2 April 2009

**UK****14 OFT publishes report on Essilor International**

The OFT has published the results of its investigation into the acquisition of Signet Armorlite by Essilor International. Both companies are involved in the supply of ophthalmic substrate and finished plastic ophthalmic lenses in the UK. The OFT does not believe that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

ME/3992/09

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.

**CONTACTS****Diarmuid Ryan****T: +44(0)161 830 5331****E: [diarmuid.ryan@hammonds.com](mailto:diarmuid.ryan@hammonds.com)****F: +44 (0)870 460 2884****Tom S. Pick****T: +32 2 627 7692****E: [tom.pick@hammonds.com](mailto:tom.pick@hammonds.com)****F: +32 2 627 7686**