

EU & UK COMPETITION LAW BULLETIN

7 May 2009

Please click on the following links to go directly to your area of interest:

[Mergers](#)

[State Aid](#)

[Anti-trust](#)

[Market Investigations](#)

[Litigation](#)

OFT clears proposed acquisition of 15 former Zavvi stores by HMV plc on basis of 'failing firm defence'

The Office of Fair Trading (OFT) has cleared the proposed acquisition of fifteen former Zavvi stores by HMV plc on the basis of the 'failing firm defence'. Zavvi, formerly a leading national retailer of entertainment products, was formed after a management buy out of the Virgin Megastore division of the Virgin Group in September 2007, but went into administration at the end of last year.

This case is particularly interesting because, prior to Zavvi going into administration, both it and HMV were leading national retailers of entertainment products, with overlapping stores in a large number of local areas across the UK. However, the application of the failing firm defence means that the Zavvi acquisition is cleared without the OFT needing to conduct a detailed market analysis under its normal merger control procedure.

What is the failing firm defence?

The 'failing firm defence' in the UK is a defence under the Enterprise Act 2002 which parties to a merger may seek to rely on to persuade the OFT that a merger raising substantive competition concerns should be cleared and not, therefore, referred to the Competition Commission (CC) on the basis that the target business will exit the market if the merger does not go ahead. The rationale for accepting such claims is therefore that any harm to competition would result even without the merger, and so should not be attributed to it.

OFT restatement of its position on 'failing firms'

The challenges of the current economic climate, particularly the lack of financing and the sharp increase in the number of UK companies facing insolvency, have brought this defence to the fore, with an increased number of 'failing firm' candidate cases in the UK. To address this, in December 2008, the OFT issued a restatement of its position on 'failing firms', codifying its standpoint, and confirming that there is no intention for the criteria of the 'failing firm' defence to be relaxed in any way. The restatement has the expressed aim of promoting consistency and transparency and providing businesses with the necessary means to assess regulatory risks.

The restatement also confirms the OFT's willingness to provide informal advice, upon application by the parties, on how the 'failing firm' criteria may apply in appropriate cases, specifically in relation to the issue of whether a target business can be regarded as a 'failing firm'. The advice that the OFT may offer, however, is limited insofar as it is non-binding on the OFT and its accuracy is wholly dependent on the information provided by the merging parties. In addition, as the restatement makes clear, certain issues, such as whether there is a realistic and substantially less anti-competitive purchaser for the target business, are not amenable to informal advice

and cannot be assessed outside the context of a market test involving third parties. The Zavvi acquisition is the first time the defence has been successfully argued since the OFT clarified its policy in this area.

The requirements for the defence

Winning on 'failing firm' grounds involves satisfying a notoriously demanding test, which explains why there have been relatively few successful 'failing firm' claims in the UK – this is only the fifth time the OFT has applied the defence to date. The OFT will only clear a transaction on a 'failing firm' basis where it has sufficient compelling evidence that the following two conditions are met:

1. Inevitable exit of the target business absent the merger

The parties must, first of all, prove that without the merger the target business would inevitably exit the market in the near future. In the majority of cases, this will be because of the parlous financial situation of the target business: firms that are in liquidation will usually pass this test; but even firms that are not yet in liquidation or administration may also qualify, and there could equally be other valid grounds, such as a change in the seller's corporate strategy. Key to this condition is demonstrating that there is no serious prospect of the target business being reorganised, and that all options for re-financing have been explored and exhausted. In the present case, which was investigated by the OFT on its own initiative, the parties satisfied the regulator that without the merger the fifteen stores in question would inevitably have exited the entertainment retail market as a result of Zavvi's collapse.

2. No realistic and substantially less anti-competitive alternative

The second condition is that there must be no realistic and substantially less anti-competitive alternative to the merger. To clear this hurdle, the parties are required to show that there are no other realistic purchasers whose acquisition of the target business would produce a substantially better outcome for competition. Demonstrating this necessitates proof that all possible alternative bidder options have been explored. In the case of Zavvi, the parties were able to provide compelling evidence that there was no other realistic entertainment retail purchaser for the fifteen stores. However, this may not always be the case, and there is always the possibility that in certain circumstances it may be better for competition if the failing firm fails and the various rivals compete for its market share and assets (as opposed to their wholesale transfer to the purchaser).

Conclusion

The HMV/Zavvi case is an interesting contrast to a case earlier this year, where the OFT decided, in accordance with its restated policy, not to accept the failing firm defence in deciding to refer the Holland & Barrett/ Julian Graves merger to the CC. The OFT believed that the acquisition of Julian Graves resulted or could be expected to result in a substantial lessening of competition within the UK specialist health food products market. In addition, the OFT found that the parties are each other's closest competitor and that the merged entity would not face sufficient constraint from any other retailers. There was also good evidence of other viable purchasers.

The OFT adopts a cautious, stringent approach in assessing 'failing firm' claims and the 'sufficient compelling evidence' standard required to demonstrate that the 'failing firm' criteria are satisfied is a tough test to meet. The OFT only accepts independently verifiable evidence for its assessment and will not rely on self-serving speculation from the parties.

Despite the current economic climate, it seems unlikely that the OFT will show greater leniency in the application of the 'failing firm' defence. As the OFT stated in its restatement "the OFT will not, regardless of prevailing economic and market conditions, relax the 'sufficient compelling evidence' standard required to demonstrate that a merger between close competitors is not itself the cause of any SLC (substantial lessening

of competition”).

Nonetheless, as this case shows, the standard applied by the OFT is attainable in practice if the necessary facts and evidence are produced and meritorious cases may proceed through clearance by the OFT relatively swiftly, without requiring a detailed market analysis by the regulator, as was the case in the Zavvi merger.

MERGERS

[Back to Top](#)

EU

Decisions

1 Commission approves acquisition of Delphi Steering Business by General Motors

The European Commission has cleared under the EU Merger Regulation the proposed acquisition of Delphi Steering Business, a US manufacturer of steering products for motor vehicles, by the US car manufacturer General Motors (GM), for whom Delphi Steering Business is a major supplier of vehicle manufacturing activities. The Commission's examination of the transaction showed that for all vehicle components that GM gets from Delphi Steering Business, the merged entity would continue to face several strong, effective competitors with significant market shares. The Commission's investigation also found that the merged entity would not have an incentive to close off competing car manufacturers' access to Delphi Steering Business products, given that, *inter alia*, these vehicle components represent a modest fraction of the cost of a car. The Commission therefore concluded that the transaction would not significantly impede effective competition within the European Economic Area or a substantial part of it.

IP/09/689 - 30 April 2009

Invitations to comment

2 Grupa Polsat/Thomson Technicolor Polska/PRN

Interested parties are invited to comment by 8 May 2009 on the proposed acquisition by Bithell Holdings Limited (belonging to the Polsat Group) and Thomson Technicolor Polska Sp. z o.o. (belonging to Thomson Group) of joint control of the undertaking PRN Polska Sp. z o.o. by way of purchase of shares.

COMP/M.5392- 28 April 2009

3 SD/JTIA/MIBRAG

Interested parties are invited to comment by 9 May 2009 on the proposed acquisition by Severocèskè doly a.s. controlled by Čez a.s. and J&T Investment Advisors s.r.o., through the special purpose investment vehicle, Blitz F09-acht GmbH of joint control of MIBRAG B.V. and its wholly owned subsidiary Mitteldeutsche Braunkohlengesellschaft mbH, collectively 'MIBRAG Group', which are at present jointly controlled by NRG Energy Inc. (US) and URS Corporation (US), by way of purchase of shares.

COMP/M.5498- 29 April 2009

4 Air France-KLM/Royal Air Maroc/JV

Interested parties are invited to comment by 15 May 2009 on the proposed acquisition by Air France KLM Group and the Groupe Royal Air Maroc of joint control of Aerotechnic Industries S.A., hitherto controlled by the Compagnie Royal Air Maroc, by way of a purchase of shares in an existing company which is to become a joint venture.

COMP/M.5380- 5 May 2009

5 Q-Cells/Good Energies/Norsun/Sunfilm

Interested parties are invited to comment by 16 May 2009 on the proposed acquisition by Q-Cells SE, Good Energies Investments 2 B.V. and NorSun AS of joint control of Sunfilm AG by way of purchase of shares and assets.

COMP/M.5507- 6 May 2009

6 Vattenfall/Nuon

Interested parties are invited to comment by 16 May 2009 on the proposed acquisition by Vattenfall AB wholly owned by the Swedish State of control of the whole of N.V. Nuon Energy currently controlled by local and regional authorities in the Netherlands by way of purchase of shares.

COMP/M.5496- 6 May 2009

UK

Decisions

7 OFT considers divestments in Sports Direct's acquisition of JJB stores

The OFT is considering an offer by Sports Direct International plc to divest stores in five local areas following its acquisition of 31 stores from JJB Sports plc. Sports Direct and JJB are the two largest specialist retailers of sports-related clothing, footwear and equipment in the UK. Sports Direct purchased the stores from JJB in a series of separate transactions over a two year period, but under the Enterprise Act 2002, the OFT was able to review these acquisitions as one individual transaction. The OFT investigation, which was carried out on its own initiative, found that although the purchase of these stores had not reduced competition at a national level, the transactions raised competition concerns in five local areas, which needed to be addressed. If the divestments are not accepted, the transaction will be referred to the (CC) .

50/09 – 1 May 2009

Other developments

8 OFT and CC publish joint merger guidelines

The OFT and CC have issued draft joint guidelines on how they assess the competitive impact of mergers, and have called for comments on the document from interested parties. For the draft guidelines, please click [here](#). The publication revises and expands guidance material currently contained in several publications issued separately by the two authorities after the introduction of the Enterprise Act 2002. This is the first time the OFT and the CC have worked together to produce a single set of guidelines.

The joint guidelines feature sections on the operation of the UK merger regime; the questions the CC and OFT must consider when reviewing mergers; how they define a 'relevant merger situation'; the criteria and methodology used by the authorities when assessing mergers; guidance on public interest cases; and information on related matters such as interim measures and remedies, directing where appropriate to other guidance already published by the two authorities. Comments are invited from interested parties and should be sent by email to tony.gooch@cc.gsi.gov.uk by 7 August 2009. A joint presentation on the new guidelines is also planned in the near future.

49/09 - 30 April 2009

9 Notice of undertakings for completed acquisition by Nufarm crop products UK limited of AH Marks Holdings Limited

The CC has published its proposed undertakings in relation to the completed acquisition of of AH Marks Holdings Limited (AH Marks) by Nufarm Crop Products UK Limited. In its report of 10 February 2009, the CC concluded that the merger could be expected to result in a SLC within the markets for MCPA at the technical acid, manufacturing concentrate and formulated product levels of the supply chain; and for MCPPP-p at the manufacturing concentrate and formulated product levels of the supply chain. To remedy the SLC and any adverse effects flowing from it, the CC has proposed undertakings from Nufarm. The CC has invited written

representations from any persons who wish to comment on the proposed undertakings to reach the CC by 13 May 2009.

CC – 28 April 2009

10 Notice of extension of inquiry period relating to completed acquisition by Capita Group plc of IBS OPENSsystems plc

Following a reference from the OFT, on 1 April 2009 the CC published its Notice of Provisional Findings relating to its investigation into the completed acquisition by Capita Group plc of IBS OPENSsystems plc. The period within which the CC's report on this reference was to be prepared and published (the reference period) was due to expire on 5 May 2009. However the CC considers that the completion of its investigation, including the remedies process, and the publication of its final report, will not be possible within the original reference period and has therefore concluded that an extension is necessary, until 30 June 2009, because of delays in the provision of information necessary to carry out the inquiry and the need to consider the effectiveness of both a full and a partial divestiture of the IBS business.

CC – 30 April 2009

Invitations to comment

11 Completed acquisition by Nationwide Building Society of parts of Dunfermline Building Society

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

Deadline for comment: 13 May 2009

12 Anticipated acquisition of a former Somerfield store in Headingley by J Sainsbury plc

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

Deadline for comment: 14 May 2009

ANTI-TRUST

[Back to Top](#)

EU

13 Commission adopts report on functioning of key anti-trust Regulation

The European Commission has published a report on the first five years of the application of Council Regulation 1/2003. The Regulation put an end to the previous notification system, under which companies notified agreements to the Commission for approval under the anti-trust rules. This has eliminated unnecessary bureaucracy and has allowed the Commission to focus its resources on serious competition problems. The Regulation also created the European Network of Competition Authorities (ECN), within which the Commission and national competition authorities coordinate the application of EC Treaty anti-trust rules. The main conclusion of the report is that Council Regulation 1/2003 has contributed to stronger enforcement of anti-trust rules within the EU since it came into force on 1 May 2004. In addition, according to the report, it has proved to be a successful model of cooperation, with the Commission being informed about more than 300 decisions planned across the EU based on EC Treaty anti-trust rules. The report highlights a limited number of areas which merit further evaluation, such as the impact of divergences in national procedures and fining powers on the effective enforcement of the EC antitrust rules and the divergence of national laws in the area of unilateral conduct.

IP/09/683 - 30 April 2009

Decisions

14 Commission authorises temporary Hungarian scheme for subsidised State guarantees to boost real economy

The European Commission has authorised under EC Treaty State aid rules a Hungarian scheme aimed at providing relief to companies encountering financing difficulties as a result of the credit squeeze in the current economic crisis. The scheme allows authorities to grant aid in the form of subsidised guarantees for investment and working capital loans concluded by 31 December 2010. The scheme meets the conditions of the Commission's Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis, as amended on 25 February 2009, because it is limited in time, respects the relevant thresholds and applies only to companies that were not in difficulty on 1 July 2008. The Commission concluded that the scheme is therefore compatible with Article 87(3)(b) of the EC Treaty, which permits aid to remedy a serious disturbance in the economy of a Member State.

IP/09/647 - 27 April 2009

15 Commission approves amendments to Swedish bank guarantee

The European Commission has approved under EC Treaty State aid rules a package of amendments to the Swedish state guarantee scheme for financial institutions, initially approved on 30 October 2008 and 29 January 2009. The changes concern the prolongation of the scheme's validity until 31 October 2009 and the extension of its scope. The Commission found that the amendments were in line with its guidance on State aid to banks during the crisis. In particular, they are well targeted, proportionate and limited in time and scope. The amended Swedish guarantee scheme is therefore compatible with Article 87(3)(b) of the EC Treaty, which permits aid to remedy a serious disturbance in the economy of a Member State.

IP/09/652 - 28 April 2009

16 Commission approves €46 million regional aid to Fiat for investment project in Sicily

The European Commission has authorised, under EC Treaty State aid rules, €46 million of regional investment aid, which the Italian authorities intend to grant to Fiat for an investment project for the production of a new car model in Sicily. The project involves investments to extend the existing Fiat plant in Termini Imerese in order to change the production process and to diversify its production. The investment is expected to maintain existing jobs in the region. The Commission found the measure to be compatible with the requirements of the Regional Aid Guidelines 2007-2013 and in particular with the rules on large investment projects (because Fiat would not increase significantly its production capacity). Therefore the positive impact of this investment on regional development can be considered to outweigh potential distortions of competition.

IP/09/660 - 29 April 2009

17 Commission approves three UK fiscal venture capital schemes

The European Commission has approved, under EC Treaty State aid rules, three UK fiscal venture capital schemes: Enterprise Investment Scheme (EIS), Venture Capital Trusts (VCTs) and Corporate Venturing Scheme (CVS). The schemes form part of the UK's measures to support access to finance to SMEs and provide tax incentives to individual and corporate investors to encourage their investments in unquoted SMEs. As all the requirements of the Community Risk Capital Guidelines have been met, after the UK modified the schemes, the Commission considers that the aid is therefore compatible with Article 87(3)(c) of the EC Treaty, which allows aid to facilitate the development of certain economic activities.

IP/09/661 - 29 April 2009

18 Commission opens in-depth inquiry into rescue measures for Hungarian fertiliser producer Péti Nitrogénművek

The European Commission has opened an in-depth investigation to establish whether measures in favour of Hungarian fertiliser producer Péti Nitrogénművek infringe EC Treaty State aid rules. The measures include loans granted by the Hungarian Development Bank amounting to approximately €85 million, covered by State guarantees. Hungary did not notify these measures. The Commission has opened an in-depth inquiry due to concerns as regards the compatibility of the measures with EC State aid rules. The in-depth investigation will allow interested parties to comment on the measure under scrutiny. It does not prejudice the Commission's final decision.

IP/09/662 - 29 April 2009

19 Commission adopts Simplification Package to accelerate State aid decisions

The European Commission has adopted a Simplification Package for State aid with a Best Practice Code and a Simplified Procedure Notice. Both aim at improving the effectiveness, transparency and predictability of State aid procedures at each step of an investigation, thereby fostering voluntary co-operation between the Commission and Member States. In particular, both texts propose that Member States increase their contacts prior to notification of aid measures, so as to eliminate potential difficulties early in the process, and include a set of improved planning tools to tackle both difficult and straightforward cases. Adoption of the Simplification Package constitutes an important step of the reform programme announced by the Commission in its 2005 State Aid Action Plan (click [here](#)).

IP/09/659 - 29 April 2009

20 Commission authorises Slovak temporary aid scheme to grant compatible aid of up to €500,000

The European Commission has authorised, under EC Treaty State aid rules, a Slovak measure to help businesses to deal with the current economic crisis. Aid of up to €500 000 per firm may be granted in 2009 and 2010 to businesses facing funding problems because of the current credit squeeze. The scheme meets the conditions of the Commission's Temporary Framework for State aid measures, which gives Member States additional scope to facilitate access to financing in the present economic and financial crisis. It is therefore compatible with Article 87(3)(b) of the EC Treaty, which permits aid 'to remedy a serious disturbance in the economy of a Member State'.

IP/09/680 - 30 April 2009

21 Commission approves prolongation of Finnish support scheme for financial institutions

The European Commission has approved under EC Treaty State aid rules a prolongation of the Finnish support scheme to stabilise financial markets by providing guarantees to eligible financial institutions. The Commission found the measure, initially approved on 13 November 2008, to be in line with its Guidance Communication on State aid to overcome the financial crisis. In particular, the measure as amended is limited in time and scope. The Commission therefore concluded that the measure is an adequate means to remedy a serious disturbance of the Finnish economy and as such in line with Article 87(3)(b) of the EC Treaty.

IP/09/681 - 30 April 2009

UK

22 Competition Commission consults on Ombudsman plan

On 30 April 2008, the CC published its final report on its UK groceries market investigation. In this report, the CC set out its intention to seek undertakings from grocery retailers to establish a Groceries Supply Code of Practice (GSCOP) Ombudsman to monitor and enforce compliance with the GSCOP. The CC is now consulting publicly on draft undertakings to establish this Ombudsman, which would have the following duties: to arbitrate on disputes between retailers and suppliers arising from the new GSCOP; to investigate complaints under the GSCOP; to publish guidance on the provisions of the GSCOP; to make recommendations to retailers on how to improve compliance with the GSCOP; and to advise and report to the OFT on the operation of the GSCOP. The CC does not have the power to establish an Ombudsman itself, so this will require the agreement of retailers. If retailers do not sign up to the Undertakings, then the CC will recommend to the Department for Business Enterprise and Regulatory Reform that it takes steps to establish the Ombudsman instead.

R/20 28 April 2009

UK

23 CAT upholds OFGEM's decision against National Grid in metering competition case

Ofgem has welcomed the Competition Appeal Tribunal's (CAT) decision to uphold OFGEM's finding that National Grid was in breach of competition law by restricting the development of competition in the domestic gas meter market. In its decision, the CAT ruled that National Grid should face a £30 million financial penalty, which, although lower than the £41.6 million fine imposed by Ofgem, is the highest penalty for abuse of dominance imposed to date in the UK. The CAT also upheld Ofgem's directions which require National Grid to bring its multi-million pound contracts into compliance with competition law.

Shortly after the domestic gas metering market was opened to competition, National Grid struck long-term contracts with five of the six major energy suppliers to supply and maintain gas meters. These contracts included financial penalties that apply if suppliers replaced more than the small number of meters allowed under contract by National Grid. These contracts severely restrict the rate at which suppliers may replace even National Grid's older meters with cheaper or more advanced, smarter meters from rival competing meter operators. The CAT upheld Ofgem's finding that, by restricting competition, National Grid has deprived gas suppliers and gas customers of access to lower prices and improved service.

R/20 30 April 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 European Competition team.

CONTACTS



Diarmuid Ryan

T: +44(0)161 830 5331

E: diarmuid.ryan@hammonds.com

F: +44 (0)870 460 2884

Tom S. Pick

T: +32 2 627 7676

E: tom.pick@hammonds.com

F: +32 2 627 7686

