

COMPETITION LAW BULLETIN

FEBRUARY/MARCH 2010

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MERGERS

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EU

Decisions

- 1 [Acquisition of Shell's Greek fuel and bitumen business by Motor Oil is referred to Greek competition authority for review](#)

On 27 January 2010, the European Commission (the "Commission") received a notification whereby Motor Oil would acquire sole control over Shell Gas Commercial and Industrial and over Shell Hellas from the Royal Dutch Shell Group. At the same time, Shell Overseas Holdings Limited ("SOHL", UK) a subsidiary of Royal Dutch Shell and Motor Oil would create a joint venture which would be active in the supply of aviation fuel at Greek airports.

On 18 February 2010, the Hellenic Competition Commission ("HCC") asked the Commission to refer the case to it for review as they argued that the planned operation would threaten to significantly affect competition because it would result in high market shares in various retail markets for fuels in Greece as well as in various non retail markets for fuels and bitumen.

The Commission concluded that as the proposed concentration would affect only the Greek markets for fuels and bitumen, the Greek competition authority would be best placed to examine it. Consequently, on the 15 March 2010, the Commission referred the case to Greece so that it can be assessed under the Greek merger control law.

IP/10/281 - 15 March 2010

- 2 [Commission approves proposed merger between UK subsidiaries of France Telecom and Deutsche Telekom, subject to conditions](#)

On 1 March 2010, the Commission decided to clear the proposed merger of Orange UK and T-Mobile UK, respectively France Telecom's and Deutsche Telekom's UK subsidiaries. The Commission's decision is conditional upon the amendment of an existing network sharing agreement with Hutchison 3G UK ("3UK"), to ensure that there remain sufficient competitors in the market, and the divestiture of a quarter of the combined

spectrum of the merging parties in the 1800 MHz band, which is one of three frequency bands currently used for mobile communications in the UK.

On 2 February 2010, the Office of Fair Trading (“OFT”) submitted a request to the Commission to refer to it the examination of the proposed transaction pursuant to Article 9(2)(a) of the EU Merger Regulation. However, as a result of these commitments offered by the parties, the OFT withdrew its request on 1 March 2010.

IP/10/208 – 1 March 2010

3 Commission gives Microsoft the all clear for the proposed acquisition of the Yahoo search business

On 18 February 2010, the Commission approved the proposed acquisition of the internet search and search advertising businesses of Yahoo! Inc (“Yahoo”) by Microsoft.

Microsoft is active in the design, development and supply of computer software. The Yahoo search business encompasses the internet search and the online search advertising businesses of Yahoo, including its online search advertising platform Panama.

Pursuant to the agreements concluded by the parties, Microsoft has acquired a 10 year exclusive license to Yahoo's search technologies, becoming the exclusive internet search and search advertising provider used by Yahoo. In exchange, Microsoft will retain 12% of the search revenues generated on Yahoo's and its partners' websites during the first 5 years of the agreement, paying 88% to Yahoo as a traffic acquisition cost.

The Commission expects the merger to increase competition in internet search and search advertising by allowing Microsoft to become a stronger competitor to Google.

IP/10/167 – 18 February 2010

UK

Decisions

4 Brightsolid/Friends Reunited merger is formally approved by the CC

On 18 March 2010, the CC formally cleared the acquisition of Friends Reunited from ITV by Brightsolid. The CC concluded that the acquisition would not pose any threat to customers of online genealogy services, confirming their provisional findings.

Friends Reunited and Brightsolid are two of the three largest suppliers of online genealogy services in the UK, the market leader being Ancestry.co.uk. The CC stated that as Ancestry.co.uk will remain the largest supplier, its presence will ensure that the merged company faces strong competition, preventing it from raising prices or reducing the quality of the service it provides.

15/10 – 18 March 2010

5 OFT asks Commission to investigate Procter & Gamble air freshener acquisition

On 17 March 2010, the OFT announced that it has decided to request under Article 22 of the EU Merger Regulation, that the UK aspects of the acquisition by Procter & Gamble of the air care business of Sara Lee Corporation be referred to the Commission for consideration. Even though the proposed merger does not have a Community dimension, within the meaning of Article 1 of the EU Merger Regulation, it qualifies for

investigation by a significant number of EU member states, potentially including the UK. The OFT, therefore, considers that it is appropriate for the Commission to undertake a single investigation under the EU Merger Regulation into the competitive impact of the merger.

The OFT believes that the merger may affect trade between member states and may threaten significantly to affect competition within the territory of the UK, as Proctor & Gamble and Sara Lee both supply a range of air fresheners in the UK.

On 31 March, the Commission accepted the request by the OFT and similar requests by the merger control authorities of Belgium, Germany, Spain and Portugal

IP/10/395 – 31 March 2010

6 CC reconsiders Ticketmaster/Live Nation merger

In its December 2009 report, the CC cleared the Ticketmaster/Live Nation merger, concluding that it would not result in a substantial lessening of competition in the market for live music ticket retailing or in any other market in the UK.

However, following a challenge to the decision made by CTS Eventim AG (“Eventim”), the CC agreed during a hearing at the Competition Appeal Tribunal (“CAT”) on 10 February 2010 to the decision in its report being quashed and the matter being referred back to it to reconsider and make a new decision.

The CC now has until 11 May 2010 to reach a new decision.

10/10 – 12 February 2010

ANTITRUST

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EU

7 Commission closes investigation into "Baltic Max Feeder" scheme

The Commission has closed an investigation into a potential breach of EU competition rules in the planned "Baltic Max Feeder" scheme for "feeder" vessel owners since the scheme was abandoned.

The Commission opened a formal antitrust investigation in January 2010 concerning the "Baltic Max Feeder" scheme aiming to establish whether there was a potential breach of EU rules on restrictive business practices (Article 101 of the Treaty on the Functioning of the European Union ("TFEU")). The Commission was concerned that the scheme, whereby European ship owners collectively agree to cover the costs of removing feeder vessels from service, may be aimed at reducing capacity and therefore pushing up charter rates for such vessels. Typically, feeder vessels collect shipping containers from different ports and transport them to central container terminals where they are loaded onto bigger vessels.

In response to the Commission's investigation, Anchor Steuerberatungsgesellschaft mbH, the company at the origin of the scheme, informed the Commission in February 2010 that the planned scheme had been abandoned. As a result, the Commission concluded that there was no reason to investigate further and closed its case.

8 Commission adopts new Block Exemption Regulation for insurance sector

The Commission has adopted a new Regulation that block exempts certain types of agreements in the insurance sector from the EU's general prohibition of practices restrictive of competition. The new Block Exemption Regulation ("BER") comes into force on 1 April 2010 and renews two of the four categories of agreements currently exempted, namely joint compilations, tables and studies, and co(re)insurance pools.

The Commission justifies the continuation of the block exemption for certain types of information exchange in order for the industry to be able to carry out its business and allowing insurers to accurately assess risks in the interest of consumers. Equally, the Commission also justifies the importance of pooling as it ensures that all risks are covered.

The Commission intends to cooperate with national competition authorities to ensure that insurance companies, in particular pools, are correctly assessing whether their agreements meet the exemption conditions. The new BER will be valid until 31 March 2017.

IP/10/359 - 24 March 2010

9 Commission market tests commitments proposed by British Airways, American Airlines and Iberia concerning transatlantic co-operation

In April 2009, the Commission opened proceedings in relation to its concerns about agreements between British Airways, American Airlines and Iberia in which the parties intended to jointly manage schedules, capacity and pricing, as well as sharing revenues on transatlantic routes between North America and Europe. The Commission's concerns were that these agreements would lead to restrictions of competition on certain transatlantic routes. Consequently, the parties involved offered commitments in order to alleviate the Commission's concerns. On 1 February 2010, the Commission confirmed that it was assessing the effectiveness of the proposed commitments received from the parties.

Subsequently, on 10 March 2010, the Commission invited comments from interested parties on the commitments proposed by British Airways, American Airlines and Iberia as part of their assessment process before deciding whether they will be suitable to remedy any competition concerns. Interested parties can submit their comments to the Commission by 10 April 2010.

IP/10/256 – 10 March 2010

10 Statement of Objections sent to Telekomunikacja Polska S.A by the Commission

On 1 March 2010, the Commission sent a Statement of Objections ("SO") to the Polish telecoms operator - Telekomunikacja Polska S.A. ("TP") outlining their preliminary view that TP has abused its dominant position by refusing to supply remunerated access to its wholesale broadband services.

Access to TP's wholesale broadband services is crucial for alternative operators wishing to provide retail services to end-users in Poland. As a result of TP's conduct, the alternative operators have had to undergo a lengthy and burdensome process to access TP's network. The Commission was therefore of the view that TP's conduct hindered the development of the broadband retail market in Poland.

TP has 8 weeks to reply to the SO, and will then have the right to be heard in an Oral Hearing. If the Commission confirms its preliminary views, it has the right to require TP to cease the abuse and impose a

fine.

IP/10/213 – 1 March 2010

11 Commission investigates suspected cartel in the automotive electrical sector

On 24 February 2010, Commission officials carried out unannounced inspections in several Member States at the premises of companies active in the sector of automotive electrical distribution systems (also known as “wiring harnesses” – which is considered as the “central nervous system” of a car, linking the car’s computers to the various relevant functions in the vehicle) and of other components for automotive electronic and electrical distribution systems.

The Commission carried out the unannounced inspections as it believes that the companies concerned may have violated Article 101 of the TFEU and Article 53 of the Agreement on the European Economic Area (“EEA”) which prohibits cartels and restrictive business practices.

MEMO/10/49 – 25 February 2010

12 Commission sends Statement of Objections to alleged participants in freight forwarding cartel

In February 2010, the Commission sent a Statement of Objections to a number of companies concerning their alleged participation in price-fixing cartels in the air freight forwarding business in violation of Article 101 of the TFEU and Article 53 of the Agreement on the EEA.

Unannounced inspections were carried out by the Commission at the premises of various providers of international freight forwarding services in October 2007. Freight forwarding consists of organising the transport of goods along with related activities such as customs clearance, warehousing and ground services.

The Commission is investigating allegations that these companies fixed prices by colluding on the imposition, level, timing and application of various surcharges. The allegations concern four separate infringements involving the provision of freight forwarding services from the UK to outside the EEA, from the EEA to the US, from China to the EEA and from Southern China/Hong Kong to the EEA.

IP/10/149 – 10 February 2010

UK

13 RBS to pay £28.59 million fine for disclosing pricing information to competitor

The Royal Bank of Scotland (“RBS”) has agreed to pay a fine of £28.59 million after admitting breaches of competition law which took place between October 2007 and February/March 2008. The fine which was initially £33.6 million was reduced to reflect RBS’s admission and cooperation.

The OFT’s investigation had found that individuals in RBS’s Professional Practices Coverage Team had disclosed confidential future pricing information to their counterparts at Barclays Bank. The disclosures by RBS took place in the course of a number of contacts on the fringes of social, client or industry events or through telephone conversations. The information concerned the pricing of loan products to large professional services firms, such as solicitors, accountancy and real estate firms, in respect of which RBS and Barclays are the main providers. According to the OFT, this information was then taken into account by Barclays in determining its own pricing.

However, Barclays is immune from paying a fine as it blew the whistle to the OFT about the infringement.

14 Regulation of Investigatory Powers Orders published

On 2 March 2010, the [Regulation of Investigatory Powers \(Covert Human Intelligence Sources: Code of Practice\) Order 2010](#) (“CHIS”) was published on the Office of Public Sector Information (“OPSI”) website. The OFT has the power to authorise covert human intelligence sources in its cartel investigations under the Enterprise Act 2002 (“EA 2002”), and the Competition Act 1998. The code of practice has been revised to assist public authorities who have the power to authorise the use of informants in applying the test for the necessity and proportionality in making an application for the use and conduct of covert human intelligence sources.

Similarly, on 3 March 2010, the [Regulation of Investigatory Powers \(Covert Surveillance and Property Interference: Code of Practice\) Order 2010](#) (“CSPI”) was published on the OPSI website. The OFT has the power of intrusive surveillance and related property interference in its cartel investigations under the EA 2002. This code of practice has been revised to help authorities to understand the necessity and proportionality tests in applications to use directed and intrusive surveillance, or interference with property.

Both the CHIS and the CSPI require public authorities to consider the seriousness of the offence under investigation in addition to the requirement that they weigh up the benefits to the investigation in authorising the use of covert human intelligence sources/covert techniques.

The OFT has also published its own code of practice relating to the use of [covert human intelligence sources](#) in cartel investigations and in relation to the use of [covert surveillance in cartel investigations](#).

2 March 2010

15 OFT issues Reckitt Benckiser with Statement of Objections

On 23 February 2010, the OFT issued a Statement of Objections alleging that Reckitt Benckiser abused its dominant position in the market for the NHS supply of alginate and antacid heartburn medicines. It is alleged by the OFT that Reckitt Benckiser sought to restrict competition to its Gaviscon brand by withdrawing and de-listing its NHS packs of Gaviscon Original Liquid from the NHS prescription channel.

Where a patent has expired and a “generic name” has been assigned, GPs can search using their prescribing software for a well-known branded product and then provide patients with an “open” prescription that lists its generic name. Once pharmacies receive these prescriptions they can choose whether to dispense the relevant brand or equivalent generic medicines, which are cheaper.

According to the OFT, this withdrawal was deliberately timed to occur before the publication of the generic name for this product so that when GPs search for 'Gaviscon' prescription packs they will identify Gaviscon Advance Liquid, which is patent protected, and not Gaviscon Original Liquid, for which an “open” prescription could otherwise be provided.

20/10 - 23 February 2010

OTHER

16 eQuestionnaire – The Commission's electronic investigative platform

The Commission has recently publicised its eQuestionnaire, a new electronic investigative platform. The Commission introduced the web-based application “eQuestionnaire” in its merger market investigations in December 2009 and its application will be progressively introduced in certain antitrust investigations in the

future.

The eQuestionnaire provides respondents with a modern, secure and efficient web-based workspace to submit their replies to the Commission during an investigation. It is designed to accommodate the input of both large corporations and smaller companies, while improving and streamlining the Commission's market investigations.

26 March 2010

17 Regulation and competition in the 2010 Budget Report

On 24 March 2010, the Chancellor of the Exchequer announced the 2010 Budget Report. In relation to competition and regulatory matters, the Budget Report included discussion of measures to improve competition in the financial services. In particular, the Government notes the progress made by the OFT and the banks in addressing concerns about unauthorised overdraft charges. It stated that any new entrants to the market are expected to stimulate further competition in products, services and charging structures. However, the Government is expected to continue to monitor developments and will take action if a voluntary approach does not deliver the changes required.

The Government also welcomed the announcement by the OFT of a short review of barriers to entry in retail banking. This work will consider whether there are any obstacles to entrants providing a competitive stimulus, focusing on personal current accounts but also considering banking for Small and Medium Enterprises ("SME").

In addition, the Government has confirmed that the landline duty (which will be levied on local loops used to supply voice, data or other communications sector other than television and radio services) will be implemented on 1 October 2010. The Government also notes that it has worked with Ofcom to ensure that conditions relating to price controls do not prevent network owners from passing the duty through to retailers.

24 March 2010

18 Joaquin Almunia speech on the future of EU Antitrust policy

The European Competition Commissioner, Joaquin Almunia, gave a speech to the International Forum on EU Competition Law concerning EU Antitrust policy and the road ahead.

Almunia stressed that competition policy is a tool that can help overcome the financial and economic crisis and that competition policy, and in particular State aid policy, are key to helping achieve an exit from state support, and a return to normal market functioning. Competition policy is also fundamental to the Commission's new EU2020 strategy, which is based on the principles of innovation, competitiveness, protection of the environment and social cohesion, and aims to achieve a new period of growth and dynamism in Europe.

With regard to the EU Antitrust policy, Almunia commented that "what we can see is a modern approach to antitrust enforcement, which focuses on preventing or putting an end to consumer harm, rather than protecting "competitors" as such." Following this approach, it will be an important priority to maintain enforcement against cartels and for other antitrust infringements (e.g. abuses) and for mergers, investigations must be based on sophisticated economic analysis, as well as on a qualitative knowledge of the market realities and on a good understanding of customer demands.

Alongside competition enforcement, Almunia's first step will be to push through necessary updates to the legal framework – notably to support enforcement at Commission and national level, and provide clarity and

legal certainty for business. He also wishes to finalise the legislative projects on vertical agreements, cars and insurance, as well as starting an important process on "horizontal agreements".

Finally, Almunia also stressed that he was keen to examine ways of deepening and extending cooperation with national competition authorities, and to pursue bilateral and multilateral cooperation with international competition enforcement agencies.

9 March 2010

19 [OFT publishes speech by Philip Collins on the importance of compliance and the role of trade associations](#)

The OFT have published a speech by Philip Collins (Chairman of the OFT) which focuses on the importance of compliance with competition and consumer law, and the role of trade associations in helping businesses to understand and meet their legal obligations.

The speech highlighted the work that the OFT had been doing to encourage compliance. This included a project entitled "Drivers of Compliance with Competition and Consumer Law" to examine what actions are most likely to assist business to achieve compliance, current best practice and what further steps the OFT could take to encourage it.

In his speech, Philip Collins also noted that the OFT was aware of concerns that uncertainty about the application of competition law has led to some forms of potentially beneficial collaborative work between businesses not going ahead. As a result, the OFT is proposing to trial a "short-form" opinion procedure. This would allow the OFT, in a limited number of cases, to provide prompt guidance where there is a novel or unresolved issue of wider interest arising in the context of a specific prospective collaborative initiative.

4 March 2010

MARKET INVESTIGATIONS

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UK

20 [CC releases BAA from interim undertakings](#)

On 11 March 2010, the CC announced that it has released BAA from provisions of the interim undertakings which were given in May 2009. The main purpose of the undertakings was to prevent action being taken which might impede the CC from taking remedial action to implement the decisions in its final report on the BAA airports market investigation.

However, on 25 February 2010, the CAT quashed parts of the final report following BAA's successful appeal. In addition, as BAA have now sold Gatwick airport, they (and the other parties to the interim undertakings) have been released from those parts of the interim undertakings which relate to the preservation of airport assets (pending sale), the appointment of a monitoring trustee relating to the sale of Gatwick airport, the development of Stansted airport and the submission of compliance reports.

11 March 2010

21 CC publishes review of market investigation remedies

On 24 February 2010, the CC published recommendations arising from a review of its approach to remedies in market investigations. This review follows the successful appeals against remedies in the payment protection insurance and groceries market investigations. The review found, in particular, that too significant a proportion of the total investigation timetable was spent identifying the adverse effects on competition. As a result, there was insufficient time and resources for full consideration of remedies.

To help provide a solution to the problems, the review group has recommended allowing more time for the remedies phase within market investigations timetables. It will now aim for completion in 18 months which will give greater scope for detailed consideration by placing stricter time limits on the earlier stages of the investigation, allowing more time for design and evaluation of remedies.

The review also recommended greater focus on the mechanisms and impacts of remedies and a more structured framework for developing, expressing and scrutinising remedies decisions.

12/10 – 24 February 2010

22 GSCOP comes into force

The Groceries Supply Code of Practice (“GSCOP”) came into force on 4 February 2010 and replaces the current Supermarket Code of Practice. The main purpose of the GSCOP is to remedy the CC concerns that grocery retailers are adopting certain practices which transfer excessive risks and unexpected costs to suppliers. Groceries include food, alcoholic and non-alcoholic drinks, cleaning products, toiletries and household goods.

Some of the new provisions that the GSCOP covers include a ‘fair dealing’ principle which requires a retailer to deal with its suppliers in good faith; a provision prohibiting retailers from making retrospective adjustments to any supply agreements; and prohibiting retailers from holding suppliers liable for losses due to shrinkage (losses that occur after groceries are delivered to a retailer’s premises and arise due to theft, the groceries being lost or an accounting error).

4 February 2010

LITIGATION

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UK

23 CAT refers wholesale line rental appeal to CC

The CAT has referred part of an appeal by Carphone Warehouse to the CC. The reference is about prices that Ofcom permits Openreach to charge for wholesale line rental (“WLR”).

WLR is a product Openreach supplies to communications providers, allowing them to rent access lines on wholesale terms, and resell the lines to retail customers, to deliver a voice service. The charges which Ofcom announced in October 2009, cover the period to March 2011.

Carphone Warehouse is challenging these charges on a number of grounds, in particular, that the price controls imposed on Openreach in respect of WLR are set at an inappropriate level and that Ofcom should

have disclosed the modelling relied upon to set the WLR price control to Carphone Warehouse and other interested stakeholders during the consultation process.

On 24 March 2010, the parties settled the non-price control matters arising in this appeal.

13/10 – 25 February 2010

24 Court of Appeal (“CoA”) reduces National Grid fine in domestic gas meter case

In February 2008, the Gas and Electricity Market Authority (“GEMA”) fined National Grid £41.6 million for abusing its dominant position in the market for the supply of domestic sized gas meters in Great Britain. The abuse consisted of market foreclosure caused by long term contracts (Meter Service Agreements (“MSAs”)) that restricted the ability of efficient meter operators to enter the market and/or to expand their businesses.

In April 2009, National Grid had failed in their appeal to the CAT against GEMA’s decision. However, the CAT did reduce the fine from £41.6 million to £30 million because GEMA had been closely involved in discussions of the agreements with National Grid before they were entered into. National Grid then appealed the CAT’s decision to the CoA.

On 23 February 2010, the CoA upheld the CAT’s decision in relation to its findings on National Grid’s abuse of dominance. It did, however, further reduce the fine to £15 million because it considered that the CAT did not give sufficient weight to the mitigating factor of GEMA’s involvement.

23 February 2010

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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