Hammonds

COMPETITION LAW BULLETIN

MAY 2010

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MERGERS

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EU

Decisions

1 European Commission initiates Phase II review of Unilever/Sara Lee Body Care

On 31 May 2010, the European Commission ("Commission") opened an in-depth investigation under the EU Merger Regulation of the planned acquisition by Unilever of Sara Lee's body and laundry care business. The Commission's concerns focus on the fact that the merger would bring together a number of leading and competing brands in product categories such as bath and shower products, deodorants, fabric cleaning and conditioning products, creating a clear market leader with high market shares in several EU countries. The current deadline for the Commission's final decision is 5 October 2010.

IP/10/640 – 31 May 2010

UK

Decisions

2 Competition Commission clears Live Nation / Ticketmaster merger for the second time

The Competition Commission ("CC") has for the second time concluded that the merger between Live Nation and Ticketmaster would not result in a substantial lessening of competition in the markets for live music retailing or any other market in the UK. The CC initially cleared this merger in December 2009 but agreed to reconsider its decision following a challenge by CTS Eventim ("Eventim"), the largest global competitor of Ticketmaster, before the Competition Appeal Tribunal ("CAT"). The basis of Eventim's challenge was that it had been denied the right to a fair hearing and the CC had erred in its assessment of, inter alia, the effects of the merger on the market and the "substantial lessening of competition" test.

Eventim is a small-scale ticket retailer in the UK (having only entered the UK for the first time, via its Live Nation agreements, before the Ticketmaster merger was proposed) and the CC decided that its prospects of competing effectively with the larger incumbents in the UK market, most notably Ticketmaster, would not be

affected by the merger, its ability to compete being dependent on Eventim's own efforts and abilities. Further, Eventim had entered into an agreement with Live Nation prior to the merger whereby Live Nation sold tickets through Eventim. The terms of this agreement prevented Live Nation from reducing the number of tickets allocated to Eventim.

While the CC acknowledged that there was theoretical potential for the merged entity to use its position (as a ticket retailer, promoter and venue operator) to harm competitors in different parts of the supply chain the CC was of the view that there was no financial incentive to do this: the merged entity would likely thereby suffer significant short-term losses in pursuit of very uncertain long-term gains.

18/10 – 7 May 2010

3 Project Canvas falls outside UK merger control jurisdiction

Project Canvas is a proposed joint venture between the BBC, ITV, Channel 4, Five, Talk Talk and Arqiva to build an open internet-connected platform, with common technical standards, in relation to internet connected television. The OFT has confirmed that this joint venture falls outside the merger provisions of the Enterprise Act 2002 ("EA02") and so it does not have jurisdiction to investigate further.

Under EA02, a relevant merger situation arises when two or more enterprises cease to be distinct. The BBC is contributing to the Canvas JV existing research and development whilst contributions from the other joint venture partners are primarily financial. The OFT has decided that none of the joint venture partners are contributing pre-existing businesses and so there are no "enterprises" being transferred to the joint venture that will cease to be distinct. This transaction therefore differs fundamentally from the "Project Kangaroo" joint venture which involved the contribution of video-on-demand content and other pre-existing businesses to a JV and which was blocked by the CC in February 2009. The joint venture partners will also not have any material influence over the joint venture, an additional reason why the OFT found it had no merger review jurisdiction.

51/10 – 19 May 2010

4 CAT upholds Stagecoach challenge to CC prohibition of Preston Bus acquisition

Stagegroup lodged an application to the CAT under section 120 EA02 for a judicial review of the CC decision that Stagecoach's acquisition of Preston Bus Limited may be expected to result in a substantial lessening of competition ("SLC") in the market for the supply of commercial bus services in the Preston area.

Stagecoach relied on four grounds of challenge: (i) that the CC had misdirected itself as to the correct legal approach; (ii) that the CC made a number of highly material findings of fact which were unsupported by the evidence; (iii) that the CC acted in a procedurally unfair manner; and (iv) that the CC imposed a disproportionate remedy.

In relation to the first ground, the CAT concluded that the CC had applied the correct legal test when considering whether the merger led to an SLC. However, with regard to the second ground the CAT concluded that the CC had not acted rationally in its choice of counterfactual, particularly as it had not clearly explained why it had based the counterfactual on an assumption that Stagecoach had not launched services on the Preston intra-urban routes in June 2007, thereby disregarding what actually happened in the relevant market prior to the merger. The CAT held there was an inconsistency in this regard with the CC's analysis of the failing firm defence in which it did consider the actual position in the market as at September 2008. The CAT upheld Stagecoach's submissions that there was no factual support for the CC's findings that Stagecoach's conduct was pursued with little regard for profit and normal commercial considerations. In

doing so, the CAT concluded that the second ground of Stagecoach's application succeeded.

The CAT did not find it necessary to come to a conclusion on the third ground and indicated that it would hear further submissions from the parties on the form of an appropriate order.

21 May 2010

Other EU NCA's

5 Dutch cartel authority imposes fines on the British insurer Amlin Limited and the Dutch state, for failing to notify their merger in time

On 3 May 2010, the NMA (Dutch cartel authority) imposed a fine of €1,366,000 on the British insurer Amlin (Overseas Holdings) Limited, part of Amlin Plc, and a fine of €782,000 on the Dutch state, for not having made the required notification of a merger in time.

The Dutch State transferred its shares in Fortis Corporate Insurance NV (FCI) to Amlin in July 2009. The transaction gave Amlin controlling powers over FCI. This amounted to a notifiable merger under Article 27 (1) (b) of the Dutch Competition Act. The NMA discovered this merger in the summer of 2009 through information disclosed by the media. Amlin finally notified the merger to the NMA in December 2009, after it had been completed. The merger was approved by the Dutch cartel authority in January 2010.

The Dutch cartel authority nevertheless imposed a fine on both Amlin and the Dutch state. It declared that it had imposed the fines because the failure to notify had undermined its supervision role over mergers.

3 May 2010

Developments

6 Ofgem announces network company merger policy

On 25 May 2010 Ofgem published its policy on mergers between energy network companies. Ofgem is of the view that mergers have the potential to impact adversely on its ability to regulate energy networks efficiently, protect the interest of consumers, push for further efficiencies and improve quality of service. Ofgem acknowledges that mergers can have some benefits, and its policy is not to prevent all energy network mergers. It is asking that the merger authorities take regulatory considerations into account when assessing mergers and consider all relevant factors affecting the interests of consumers. In particular, Ofgem has called for legislative change so that the UK merger control authorities (OFT and CC) are obliged, when reviewing energy network mergers, to take account of any resulting impact on Ofgem's ability to regulate.

Further, Ofgem's policy is that customers should automatically be allowed to receive a share of efficiencies and other benefits that arise from mergers in the same way that efficiencies from other initiatives are shared as part of the price control framework. However, Ofgem will no longer seek to reduce allowed revenues following a merger by a predefined amount.

Going forward, Ofgem intends to advise the OFT/CC on any relevant energy mergers, so ending its case-by-case approach announced in February 2010.

25 May 2010

7 Joint consultation on good practice in merger surveys

The OFT and CC have launched a joint consultation on good practice for parties presenting evidence in merger inquiries intended to assist parties and their advisers who wish to provide consumer survey evidence.

The OFT recognise that evidence from, for example, law firms, management consultancies, economic consultancies and market research agencies often form an important part of the evidence in merger investigations. The draft consultation sets out principals of good practice in merger investigations focussing on transparency, representativeness, soundness of method and full disclosure of results.

Interested parties are invited to comment on the draft guide by 3 September 2010.

54/10 – 25 May 2010

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EU

8 Consultation on Horizontal Agreements

On 4 May the Commission published for consultation draft regulations and guidelines for the assessment of co-operation agreements between competitors ("Horizontal Agreements"). The current regulations and guidelines expire on 31 December 2010. The published drafts update and clarify the application of competition rules to Horizontal Agreements.

The rules applicable to Horizontal Agreements are made up of two block exemption regulations (research and development ("R&D") agreements and specialisation agreements) and guidelines providing a framework for the assessment of the most common types of Horizontal Co-operation Agreements. After consultation with member states and national competition authorities, the Commission is of the view that the current regime in this area works well; however, the draft regulations and guidelines do contain some changes.

The draft R&D block exemption regulation has been reworked and restructured. One of the key changes is a disclosure obligation on the parties to the agreement. Prior to starting any R&D the parties must disclose all existing and pending intellectual property rights, so far as they are relevant to the exploitation of the results of the research by the parties. All parties must also be granted equal access to the results of the joint R&D for the purposes of further research or exploitation.

The draft specialisation block exemption is largely unchanged. A key change is the introduction of an additional market share threshold. Where intermediary products within a specialisation or joint production agreement are also used by one or more of the parties for the production of certain downstream products which they also sell, for the block exemption to apply, there is a market share threshold of 20% on this downstream market.

The draft guidelines have been substantially reworked. In particular, they include a new section on information exchange which can range from the direct sharing of data between competitors, through a trade association or by means of publishing. The guidelines provide details of how such information exchanges will be assessed. The Commission recognises that information exchange can increase efficiency, but such exchanges can also be restrictive and lead to competitors being aware of, inter alia, market strategies, intended future prices and quantities. When assessing the effects of an information exchange, and whether it will be exempt from the prohibition against anti-competitive agreements, the Commission will look at the characteristics of the information, for example, frequency, commercial sensitivity and age of the data. There will also be an examination of any efficiency gains and whether this will be passed onto consumers.

The draft guidelines also clarify the position with regards to agreements between joint ventures and their

parents. Agreeing capacity and production volume of the joint venture or the agreed amount of outsourced products will not be an infringement of the competition rules. However, if the output of the joint venture is limited compared to what the parties to the joint venture could have produced on their own this will be restrictive on competition.

The draft Guidelines also provide a number of examples of the Commission's thinking in the application of Article 101 to standardisation agreements.

The draft regulations and guidelines are open for consultation until 25 June 2010. The new regulations and guidelines will apply from 31 December 2010. It is proposed that there will be a one year transitional period until 31 December 2011 to ensure that Horizontal Agreements already in force satisfy the criteria of the new regulations.

IP/10/489 – 4 May 2010

9 Commission decision makes legally binding E.ON access commitments

The Commission has adopted a decision that renders legally binding commitments offered by E.ON to effectively open up access to the German gas market thereby addressing concerns that it may have unfairly shut out competitors in a possible abuse of its dominant market position.

Following the Commission's antitrust investigation, E.ON undertook to release large capacity volumes at the entry points to its gas network by October 2010. The commitments are expected to have a major structural impact on the possibility for other companies to compete on the German market, benefitting both domestic and industrial gas consumers.

Access to gas pipelines is vital for new market entrants as insufficient access limits the ability to acquire customers, no matter how competitive the offer might be. The Commission's investigation showed that E.ON had booked on a long-term basis the largest part of the available transport capacity at the entry points into its gas transmission networks. Such bookings may have prevented other gas suppliers from accessing the German gas market, preventing them from competing with E.ON. Therefore, the Commission came to the preliminary view that the long-term reservations might have infringed EU rules on the abuse of a dominant market position.

IP/10/494 – 5 May 2010

10 Commission reaches first settlement in a cartel case

The Commission has imposed fines on 10 producers of memory chips or DRAMS used in computers and servers. The total fine amount was over €331 million and signifies the first time in which the Commission has adopted a settlement decision in a cartel case. The settlement procedure was introduced in 2008 with the objective of reducing in appropriate cases the administrative procedure and investigative costs, with a view to freeing up resources to tackle other cases. The procedure rewards parties making early admissions with a fine reduction of 10%.

Settlement discussions on the DRAM case began in 2009 when all parties to the cartel indicated that they were prepared to engage in such discussions. All entered formal settlement submissions and acknowledged their liability. The Commission hopes that, following this decision, similar cases will begin to go through this settlement procedure, and have indicated their aspiration that settlement cases should take no more than six months to resolve.

IP/10/586 – 19 May 2010

11 Commission adopts revised competition rules for motor vehicle distribution and repair

A new block exemption regulation for the car sector came into force on 1 June. Guidelines have also been adopted to provide guidance as to the application of the competition rules in the car sector. Several changes have been made to the previous block exemption in this sector, which it is hoped will increase competition in the market for repair and maintenance.

The new rules introduce a 30% market share threshold. Agreements between car manufacturers and authorised repairers will no longer be covered by the block exemption if their respective market shares exceed this threshold. This is expected to have benefits for consumers and smaller repairers. Car manufacturers will no longer be able to make a car warranty conditional on services being carried out only in specific garages and the refusal to grant independent repairers access to technical information may be deemed to be anti-competitive. Increasing competition between authorised and independent repairers will be beneficial for consumers considering repair bills are thought to account for 40% of the total cost of owning a car.

The Commission is also aware that the previous rules relating to downstream activities, namely in relation to the distribution of cars, were complicated and restrictive with the effect of indirectly driving up distribution costs. The new rules will give car manufacturers more flexibility when distributing their cars, for example, organising a distribution network in which dealers that promote a number of car manufacturers exist alongside dealers who promote only one car manufacturer.

IP/10/619 – 27 May 2010

12 Commission market tests Visa MIF commitments

On 28 May 2010, the Commission published a "market test notice" inviting comments from stakeholders on Visa Europe's proposed commitments regarding multilateral interchange fees ("MIFs") for cross border point of sale transactions within the EEA using Visa-branded consumer payment cards and other rules applied to transactions with debit cards for example, the "Honour All Cards" rule, which requires merchants to accept all valid Visa-branded cards, the "no surcharge" rule and the blending of merchants' fees. The MIF is a bank-to-bank fee for card payments, determined by Visa Europe's member banks and is therefore reviewable as an agreement under Article 101 TFEU.

The Commission has concerns that Visa's MIFs may restrict competition between acquiring banks and alleges that this has the effect of inflating the cost of payment card acceptance for merchants, and so ultimately increases consumer price. In response to these concerns, Visa Europe has proposed to reduce to 0.20% the maximum weighted average MIF for all cross border transactions within consumer debit cards and for national transactions in a number of member states. In addition, it will maintain, implement and improve certain transparency measures. If the outcome of the market test indicates that these commitments are suitable to remedy the competition concerns, the Commission may make the commitments legally binding on Visa Europe. The Commission's investigation into past MIFs for consumer credit and deferred debit remains ongoing.

Memo/10/224 – 28 May 2010

13 Commission opens proceedings against Czech J&T Group for obstruction during inspection

In November 2009 the Commission carried out inspections ("dawn raids") at the premises of Czech companies active in the electricity and ignite sectors. The inspections were in connection with Commission

investigations into a potential infringement of EU competition rules. During the inspection a number of issues arose relating to the handling of e-mail accounts and access to electronic records. The Commission will now consider whether these companies produced the required records in incomplete form and whether their behaviour constituted an unlawful refusal to submit to the Commission's investigation.

If the Czech companies are found to have refused to produce required records or produced records in incomplete form, whether intentionally or negligently, the Commission may impose a fine of up to 1% of the company's turnover. Previous proceedings in this respect highlight how serious the Commission now takes such violations of the rules governing competition investigations. In January 2008 E.ON was fined €38 million after the Commission found that it had broken a seal placed by the Commission on a room to prevent the removal of documents.

IP/10/627 – 28 May 2010

MARKET INVESTIGATIONS

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UK

14 CC confirms the case for a prohibition on point-of-sale personal protection insurance ("PPI")

The CC has provisionally decided that consumers will benefit from a prohibition on all forms of point-of-sale PPI, except for retail. PPI most commonly covers repayments on credit products in the event a consumer is unable to pay due to an accident, sickness, unemployment or death. Over 90% of PPI sold in the UK is either unsecured personal loan PPI, credit card PPI, mortgage PPI or secured loan PPI.

The vast majority of PPI is taken out at the time of purchase of the credit product. The majority of customers are unaware that they can buy PPI from other providers and the customers rarely shop around to compare or switch providers. In their investigation into this market the CC found that businesses offering PPI alongside credit products face little or no competition. Other providers, without the point-of-sale advantage, struggle to reach the majority of customers and point-of-sale providers often charge high prices.

In its final report on its market investigation, published in January 2009, the CC adopted a package of remedies which included a prohibition on point-of-sale PPI. Barclays Bank Plc applied to the Competition Appeal Tribunal ("CAT") for judicial review of this decision, stating that a prohibition would be a potential inconvenience to consumers. In its judgement of 16 October 2009, CAT quashed this aspect of the final report. On remittal, the CC reconsidered the prohibition remedy and has provisionally decided that the benefits of a prohibition, namely greater competition, increased choice and lower prices, outweigh the potential inconvenience.

This provisional decision is now open to comments from interested parties with the CC expected to make a final decision in July.

19/10 – 14 May 2010

15 OFT announces stock take of infrastructure ownership and control

The OFT has announced that it intends to conduct a stock take across economic infrastructure sectors in the UK which will include energy, water, communications and transport sectors. The purpose of this stock take is to clarify public understanding of the ownership of these sectors and the control of their assets, map such

ownership and control across the sectors and assess how ownership of infrastructure affects consumers in these markets. The OFT also envisages that this will lead to further work in the event that specific competition or consumer issues are identified.

This stock take is to be carried out as there have been significant changes to ownership and control across these sectors over the past decade and the OFT is keen to assess how this may impact on competition and consumers.

The stock take is expected to be completed by Autumn 2010. The OFT will be approaching some firms and industry representatives directly in order to clarify its understanding of the issues and differences between the sectors. Interested parties are invited to make submissions to InfrastructureOwnership@oft.gsi.gov.uk.

49/10 – 14 May 2010

16 OFT launches review of barriers to entry, expansion and exit in retail banking

The global financial crisis has led to a substantial change in the banking industry. Some of the major high street banks have been nationalised, have received financial support from the Government or have merged resulting in the sector becoming more consolidated and concentrated around a handful of major providers. The OFT anticipates that the extent of barriers to entry, expansion and exit in retail banking will affect how the retail banking market will develop. With new and potential new entrants in other sectors, for example Tesco Bank and Virgin Money, it is hoped that the threat of losing business will spur innovation and create lower prices and higher service levels for customers. The review will look specifically at the extent of barriers affecting personal banking and banking for small and medium enterprises.

The OFT's review will focus on four key areas. Firstly it will consider how the regulatory requirements impact on new entrants entering the market, in particular, how new and potential entrants meet the requirements to obtain a banking licence and also the necessary capital and liquidity requirements. Secondly the review will consider how access to essential inputs prevents or inhibits new entrants. New entrants often have to rely on existing banks to share credit data and rely on centralised networks for access to payment systems required to provide the necessary services to their customers. Next the review will focus on barriers to achieving scale. Previous reports have highlighted how it is important to banks to establish a successful reputation and develop a branch network, each of which take time and involve high costs. The review will consider how barriers to expansion affect new and potential entrants, especially in the light of increased internet and mobile banking. Finally, the review will look at barriers to exit and, amongst other things, will consider how protection and support for failing institutions can have detrimental effects on the market: the rescue of inefficient institutions preventing their replacement with efficient institutions.

The OFT has invited interested parties to make submissions on this review to b2ebanking@oft.gsi.gov.uk by 8 July 2010.

55/10 – 26 May 2010

UK

17 OFT abandons criminal proceedings against current and former BA executives

The OFT has abandoned its criminal prosecution of 3 former and 1 current BA executive under section 188 Enterprise Act 2002 (the cartel offence) for their part in a fuel surcharge cartel. The proceedings were withdrawn by the OFT, after the trial had already begun, following the discovery of a substantial volume of electronic material of which the OFT was not previously aware and which the defendants had not been given the opportunity to review. This material had been omitted from the material that Virgin had provided to the OFT under its obligation, in accordance with its application for immunity from penalties, to provide continuous and complete cooperation.

Although the OFT stated that almost all of the new material was of no relevance to any of the issues in the case, the OFT nevertheless withdrew these proceedings as it was of the view, given the volume of material, that to continue with the trial would potentially be unfair to the defendants. However, the OFT in a press release, stood by its decision to bring the proceedings, its decision to withdraw being based solely on procedural and disclosure grounds and not on an assessment of the evidence or prospect of success. The OFT has acknowledged some responsibility, stating that it occurred at a time when the UK criminal cartel regime was relatively new and the OFT's approach to handling leniency applications in the context of parallel criminal and civil investigations was still evolving. The OFT has stated that it has improved this process going forwards by providing detailed internal guidance on criminal procedures and making a number of appointments to strengthen its criminal investigation and prosecution functions.

Although no formal decisions have been made yet, the OFT has hinted that it may review the role played by Virgin and its advisers in the omission of the relevant material. Virgin blew the whistle on the fuel charge cartel and was granted full immunity from penalties. In respect of this leniency, Virgin was obliged to provide full cooperation. The apparent failure to provide full information may impact on Virgin's immunity from penalties. The OFT has confirmed that no adverse decision affecting Virgin's immunity status will be made without first providing Virgin with an opportunity to make representations.

47/10 – 10 May 2010

EU

18 General Court refuses interim measures for cartel participant

Reagens SpA, a company involved in the production of tin stabilisers for polyvinyl chloride, was fined €10,791,000 by the Commission for its involvement in a cartel relating to additives used as heat stabilisers. The Commission gave Reagens three months to pay the fine and, in the event Reagens lodged an appeal, it was to provide a bank guarantee to cover the debt and interest.

Reagens lodged an appeal and also applied for interim measures to suspend the decision and the obligation to pay the fine citing that to pay would put the company in severe debt, funding would be withdrawn from its main bank and it would be difficult to continue with production.

Interim measures can be granted if the order is urgent in order to avoid serious and irreparable harm to the applicant's interest; they may be justified in particular if, without them, the applicant's existence is threatened and no other solution exists. There is therefore an obligation on the applicant to explore all other possibilities.

The General Court took a strict approach and dismissed the application as Reagens had not explored the option of obtaining a bank guarantee or provided a sufficient picture of the company's financial position demonstrating the required urgency. Two weeks later Reagens lodged with the General Court evidence showing that it would be difficult to obtain a bank guarantee. This was not accepted by the General Court as new applications for interim measures can only be made on new facts and supplementing an application at a later date is not compatible with the expeditious nature of interim proceedings.

This strict approach follows the line of reasoning taken previously by the General Court in November 2009 when an application by a Slovakian company involved in a price-fixing and market sharing cartel for calcium and magnesium products was rejected on the grounds of lack of urgency. In this case the company was already in national insolvency proceedings and so harm had already been caused, interim measures would serve no purpose, and it had not been shown that it was impossible for the company, or another group company to provide a bank guarantee or prove that to provide such a guarantee would jeopardise the company or the group.

T-30/10 R – 12 May 2010

REGULATORY

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UK

19 Ofgem publishes its preliminary views on gas storage third party access

From 3 March 2011 storage system operators ("SSO") will be obliged to comply with the provisions of the Gas Regulation and relevant provisions of the Gas Directive in relation to gas storage facilities. This will be known as the "Third Package" and will replace the current regime known as the "Second Package". The Second Package is the current default regime for the operation of gas storage facilities and provides that such facilities must be operated under agreements that comply with the framework for negotiated access to the facilities, as set out in the Second Package.

The Third Package provides for additional requirements for access to gas storage. This includes increasing information provisions and transparency requirements, unbundling SSOs from vertically integrated companies, strengthening provisions to prevent discrimination in relation to third party access to storage facilities and enhancing the monitoring duties and enforcement powers of national regulatory authorities (Ofgem).

Ofgem has published its preliminary views on the Third Package. It is acknowledged by Ofgem that undertakings with significant market power are more likely to discriminate and restrict access to storage to the detriment of consumers. Ofgem's view is that market power should be assessed based on how pivotal the undertaking is to the market, i.e. significant market power can be demonstrated if market demand for flexibility cannot be met without deploying the undertaking's supply sources, including storage. Ofgem also expects SSOs to use auction processes to allocate capacity and services, this being a more transparent method of allocation than, for example, first come first served, and so has a lower risk of being discriminatory.

Under the Gas Regulation, SSOs must offer services to the market. Ofgem expects the SSOs to use an appropriate and transparent process when testing market demand for the services being provided. Ofgem further expects the SSOs to test market demand when offering a new service or new/additional capacity.

Ofgem is also of the view that undertakings with significant market power may have the potential to

manipulate wholesale gas prices by withholding capacity by selling to a related undertaking. Ofgem's view in this regard is that such players should limit the proportion of storage services retained by related undertakings.

Following publication of its preliminary views, Ofgem intends to develop these further and consult with the market.

18 May 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 & Trade practice.

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