

COMPETITION LAW BULLETIN

JANUARY 2011

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EU

1 [European Commission blocks merger between Olympic Air and Aegean Airlines](#)

The European Commission (the “Commission”) has prohibited the proposed merger between the Greek airline carriers, Olympic Air and Aegean Airlines. The Commission concluded that together the carriers would have had control of over 90 per cent of the Greek domestic air-transport market, and the proposed merger would have resulted in a quasi-monopoly on nine domestic routes from Athens.

The parties had offered to release take-off and landing slots at Greek airports in an attempt to resolve the Commission’s concerns. However, the Commission’s investigation found that Greek airports do not suffer from the congestion observed at other European airports in previous mergers or alliances, meaning this remedy was therefore unlikely to encourage a new airline of a sufficient size to enter the routes and constrain the merged entity’s pricing.

IP/11/68 26 January 2011

UK

2 [Secretary of State considers possible undertakings in lieu of referring News Corporation/ BSkyB merger to UK Competition Commission \(the “CC”\)](#)

The Secretary of State for Culture, Olympics, Media and Sport (the “Culture Secretary”) (Jeremy Hunt) has announced that the government will be considering undertakings in lieu offered by News Corporation (“News Corp”), following Ofcom and the Office of Fair Trading (the “OFT”) review of the media plurality issues that may be expected to arise from News Corp’s proposed merger with BSkyB.

Ofcom advised the Culture Secretary that it reasonably believed that the proposed merger may be expected to operate against the public interest on the grounds that there may not be a sufficient plurality of persons with control of media businesses providing news and current affairs to UK-wide audiences. Therefore, Ofcom advised that the transaction should be referred to the Competition Commission for further investigation. The OFT confirmed that the Culture Secretary has jurisdiction to make such a reference.

As part of the process Mr Hunt will invite the OFT, in its capacity as a public body with experience in examining and negotiating undertakings in lieu, to be involved with the investigation.

Following correspondence with News Corp and BSkyB, the government will investigate whether the undertakings in lieu mitigate the risk posed to media plurality. If the Culture Secretary concludes it may be appropriate to accept the undertakings in lieu, a 15 day consultation process will follow during which time all interested parties will be able to express their views.

25 January 2011

EU

3 [European Commission review of Greek lignite commitments decision](#)

The Commission has invited comments from interested parties on commitments offered by the Greek Government regarding the Greek electricity market. These commitments have been offered to address the Commission's decision, in 2008, that Greece had infringed Article 106(1) of the Treaty on the Functioning of the European Union ("TFEU"), which prevents a Member State from enacting or maintaining in force measures contrary to the TFEU, in conjunction with Article 102 TFEU, prohibiting abuse by an undertaking of a dominant position. The Greek Government had given privileged access to the State-owned electricity incumbent Public Power Corporation ("PPC"). Lignite is mainly used as fuel for electricity generation in Greece and is the cheapest source of electricity generation in Greece.

In the Commission's 2008 decision it called upon Greece to propose measures to address the infringement. In 2009 Greece offered measures to tender four new lignite mines to competitors of PPC (representing around 40% of the total exploitable Greek lignite reserves). These measures were made legally binding in August 2009. Subsequently, the Greek Government requested a review of these measures due to the introduction of a new energy policy. In the latest commitments, upon which the Commission has invited comments, Greece proposes to address the competition concerns by giving PPC's competitors access to 40% of lignite-fired generation through drawing rights in existing lignite-fired power plants of PPC and by offering participation in future power plant projects using currently available lignite.

IP/11/34 14 January 2011

4 [European Commission conducts inspections in the truck sector](#)

On 18 January 2011 the Commission commenced unannounced inspections in several Member States at the sites of businesses operating in the truck sector. Operating alongside their Member State national competition authority counterparts, the Commission entered the sites with reason to believe that the companies concerned may have violated EU antitrust rules.

MEMO/11/29 18 January 2011

5 [European Commission opens antitrust investigation into Telefonica and Portugal Telecom](#)

The Commission has opened a formal investigation into whether the Spanish and Portuguese telecoms incumbents - Telefónica S.A. and Portugal Telecom SGPS S.A. - have agreed not to compete with each other in their respective home markets, in breach of the competition rules. The agreement (and specifically, a non-compete clause that runs from September 2010 to the end of 2011) being investigated was concluded last year when Telefónica acquired sole control over Vivo, the Brazilian mobile operator.

In 1997, the Telefónica S.A. and Portugal Telecom SGPS S.A notified a co-operation agreement to the Commission, which affected markets outside the EU. As part of the current investigation the Commission will also investigate whether that co-operation may have included a non-compete strategy affecting EU markets, even before the Vivo deal.

IP/11/58 24 January 2011

UK

6 Modification of Northern Ireland Bar Council rules following OFT concerns

Following discussions with the OFT, the Bar Council of Northern Ireland (“BCNI”) has agreed to voluntarily amend its code of conduct to ensure that it is clear that its members are free to compete on the level of fees charged to their clients. The BCNI has also agreed to make the market more accessible to barristers from outside Northern Ireland by publicising a flexible procedure designed to allow barristers to obtain temporary practising certificates.

The OFT welcomed the changes while stating that it still had some concerns regarding the level of independence and accountability of the regulation of legal services in Northern Ireland.

The OFT had opened discussions with the BCNI following a number of complaints, prompting the OFT to conduct its own research into the market. The changes to the code of conduct have been highlighted on the BCNI’s website and copies of the new Code of Conduct have been sent to all BCNI members.

02/11 5 January 2011

7 OFT consults on formal commitments to limit data exchange

The OFT is consulting on draft formal commitments offered by insurers Ageas Insurance Limited (formally Fortis Insurance Limited), Aviva plc, AXA Insurance UK plc, Liverpool Victoria Friendly Society, RBS Insurance Group Limited, Royal Sun Alliance and Zurich Insurance plc, and the IT software and service providers Experian Limited and SSP Limited. Following an investigation the OFT considered that a specialist, and widely used, market analysis tool used by motor insurers increased the risk of price coordination and allowed the insurers to access not only the pricing information they themselves provided to brokers but also pricing information supplied by other competing insurers.

Under the commitments, the insurers will no longer be able to access each other’s individual premium information through the market analysis tool. Instead, the commitments propose that the exchange of premium information through the analysis tool will only be carried out if the information meets certain principles agreed with the OFT. These principles would require the premium information to be anonymised, aggregated across at least five insurers and already ‘live’ in broker-sold policies.

Squire Sanders Hammonds advised SSP Limited throughout the OFT’s investigation.

04/11 13 January 2011

8 OFT decision in loan pricing case

The OFT investigation into breaches of competition law by Barclays and Royal Bank of Scotland (“RBS”) concluded on 20 January 2011 as the OFT issued its decision to fine RBS £28.59 million following anti-competitive practices between Barclays and RBS relating to the pricing of loan products to large professional firms. The level of the fine was the subject of an earlier agreement between RBS and the OFT as a result of which RBS admitted to certain breaches and agreed to cooperate throughout the investigation. As Barclays brought the matter to the attention of the OFT it avoided, under the OFT’s immunity policy, any financial penalty.

The OFT decision concludes that employees in RBS’s Professional Practices Coverage Team infringed the competition rules by making generic as well as specific confidential and commercially sensitive future pricing information disclosures to their counterparts at Barclays through informal contacts at social and networking

MARKET INVESTIGATIONS

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EU

9 [European Commission launches second monitoring exercise of patent settlements in pharmaceutical sector](#)

The Commission has sent information requests to a number of pharmaceutical companies, requesting copies of patent settlement agreements concluded in 2010 between originator and generic companies. This follows the Commission's sector enquiry in 2009, which identified significant risks and consumer harm that may result from patent settlements, such as the risk that patent settlements may serve to delay the market entry of cheaper generic medicines.

The Commission undertook a first monitoring exercise in 2010 as a result of which the Commission identified a significant decrease in the number of patent settlements during the period following the Commission sector enquiry, which the Commission suggested indicated an increased awareness in the industry of the types of settlement agreements that may attract competition law scrutiny.

The Commission will publish a report providing a statistical overview of its findings in the first half of 2011 and has stated that if a specific settlement raises additional questions, a more targeted request for information could follow.

IP/11/40 17 January 2011

UK

10 [OFT market study into organic waste](#)

The OFT has announced it will be working with Ofwat on a market study into the treatment of organic waste. The study will combine the experience of the OFT in conducting market studies, generally, and of the commercial, industrial and municipal waste sectors with Ofwat's expertise of sewerage sectors. The OFT stated that, given the potential for organic waste to produce low carbon energy, the investigation will examine whether the appropriate technologies are in place in the UK for efficient use of the technologies.

Three key areas for the study will be: an examination of the current price-regulation in sewage-sludge treatment, recycling and disposal services and an assessment of whether there is scope to encourage greater competition; whether there exist any specific barriers to efficient investment in and the use of "co-treatment" of waste (waste from a variety of different sources treated at a single facility); and how best to attract efficient investment in advanced treatment techniques.

The OFT aims to conclude the study in July 2011, allowing Ofwat to include the findings in a wider Ofwat study in relation to how it regulates the sector, with the aim of achieving an improved, more sustainable method of regulation. The OFT has invited key parties to submit comments or make submissions on the

study.

06/11 21 January 2011

11 [OFT announces market study into the supply of energy to off-grid customers](#)

The OFT has announced a market study into the supply of energy to consumers who are not connected to the main gas grid. The OFT estimates there are approximately two and a half million “off-grid” consumers using a range of alternative energy sources such as heating oil, LPG and renewable energy sources. The OFT has decided to undertake the study now in light of a dramatic increase in complaints during the recent period of cold weather relating to high prices and delays in deliveries. Further, the Department of Energy and Climate Change (“DECC”) asked the OFT to undertake the study now to allow it time to consider any recommendations before next winter and in light of increasing public concern about aspects of the market.

The OFT is consulting on the scope of the study, which it proposes should cover the whole of the UK. There are three proposed key themes: the success of competition in this sector at providing choice for consumers at local and regional level; whether the terms and conditions of supply provide consumers with clear information, competitive prices and fair terms and conditions; and consumer experience through the use of UK wide surveys. The OFT has invited comments from interested parties by 28 February 2011, and intends to confirm the scope of the study in March, with a planned completion in Autumn 2011.

07/11 25 January 2011

12 [OFT publishes equity underwriting market study](#)

Following a market study into equity underwriting, the OFT has found that the market lacks effective competition on price. While the OFT does not consider it appropriate at this stage to make a referral to the Competition Commission, it has encouraged companies and institutional shareholders to apply greater pressure when negotiating equity underwriting fees.

The OFT found that average fees in the market had risen to more than 3% from around 2 – 2.5% between 2003 – 2007. The OFT accepted this increase is partly attributable to volatile stock markets during 2008 and 2009, but found that fees have been slow to fall in line with risk. The OFT considers that consumers are best placed to challenge the level of fees by focusing more on the cost of these services when compared with the speed and quality of service on offer. The OFT has published a list of recommendations to companies, including an attempt to encourage those less experienced in the market to employ independent advice to encourage more informed decisions when purchasing these services.

08/11 27 January 2011

LITIGATION

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EU

13 [ECJ dismisses appeal against refusal of interim measures in calcium carbide cartel appeal](#)

The European Court of Justice (the “ECJ”) has dismissed an appeal by Almamet against the refusal by the General Court to grant interim measures to suspend the effect of the Commission's decision on the calcium carbide cartel. Under the Commission's decision, in 2009, Almamet was fined €3,040,000 for participating in

a price-fixing and market-sharing cartel for calcium carbide powder, calcium carbide granulates and magnesium granulates.

Following the Commission's decision, Almamet asked the Commission to suspend, pending appeal, the requirement to pay the fine and without imposing the usual bank guarantee on the grounds that Almamet was unable to pay the fine. The Commission rejected Almamet's request and Almamet paid €650,000 on account. Almamet then lodged an interim measures application with the General Court requesting that the payment of the remainder of the fine be suspended, again without the requirement that Almamet provide a bank guarantee. The General Court dismissed this application on 11 May 2010 on the grounds that Almamet had not provided sufficient evidence to demonstrate that it was objectively impossible for it to provide a bank guarantee or that the provision of a bank guarantee would threaten the company's viability. Almamet subsequently lodged an appeal against the General Court's decision. That appeal has now been dismissed, with the ECJ finding that the General Court had examined the financial capacity of Almamet and its shareholders and that Almamet had not provided any evidence that financial support could be offered by its shareholders.

C-373/10 16 December 2010

14 European Court of Justice ruling in General Quimica's appeal in relation to attribution of liability for cartel

The ECJ has handed down its judgment on an appeal by General Quimica and its parent companies in relation to the attribution of liability for the rubber chemicals cartel. In 2005, the Commission announced that it had fined four companies a total of €75.86 million in relation to their participation in a price-fixing and information sharing cartel in the rubber chemicals market. Repsol YPF SA, its 100% subsidiary Repsol Quimica SA and General Quimica SA (Repsol Quimica's 100% subsidiary) were held jointly and severally liable for the infringement and together fined €3.38 million. Following an appeal by three companies regarding the attribution of liability in the Commission's decision the General Court confirmed, in 2008, that the Commission was correct to find that Repsol YPF SA and Repsol Quimica SA were jointly liable with General Quimica SA.

Before the ECJ the appellants claimed that the General Court erred by attributing responsibility to the parent company on the basis solely of finding that the parent company had the possibility or capacity to exercise decisive influence over its subsidiary. The ECJ rejected this argument. It concluded that where a holding company has a 100 per cent shareholding in a subsidiary, and that subsidiary holds the entire capital of another company which infringes the competition rules there is a rebuttable presumption that the holding company exercises decisive influence over its direct subsidiary and also, via that company, control of the infringing company. However, the ECJ held that the appellants had succeeded in demonstrating an error by the General Court in its assessment of evidence adduced to rebut the presumption that the parent companies had decisive influence over General Quimica's cartel conduct. As such, the ECJ set aside the General Court's decision and substituted its own final judgment, in which it found that the Commission did not commit any error of assessment. Accordingly, the ECJ dismissed the appeal.

C-90/09 20 January 2011

UK

15 Ryanair appeals to the CAT following a decision by the OFT that it is not time barred from investigation

Ryanair has appealed to the Competition Appeal Tribunal (the "CAT") following a decision by the OFT that it is not time barred from investigating Ryanair's acquisition of a minority stake in Aer Lingus. Ryanair claim

that the proposal by the OFT to investigate the acquisition of the shareholding falls outside of the statutory four month period in which the OFT has jurisdiction to review a transaction (and is capable of making a reference to the Competition Commission).

In October 2010 (following the conclusion of appeals before the European Courts relating to the Commission's decision on Ryanair's full bid for Aer Lingus and its retained minority shareholding), the OFT announced that it was examining whether it had jurisdiction to review the acquisition by Ryanair and, if so, whether the acquisition gave rise to a substantial lessening of competition. The OFT had been due to make a decision on 17 January 2011 as to how it would respond to the acquisition and, on 4 January 2011, announced that it believes it is 'in-time' to conduct the review.

The OFT has confirmed that it will extend the 17 January 2011 deadline, without providing a new deadline for its decision and, accordingly, the appeal before the CAT will focus – until further order by the CAT - on whether the OFT is out of time to launch an investigation.

14 January 2011

16 CAT publishes notices of damages claims against Cardiff City Transport Services

The CAT has announced that four separate claims have been brought against council owned Cardiff City Transport Services ("Cardiff Bus"). The OFT found, in 2008, that Cardiff Bus had abused its dominant position in relation to urban commercial bus services in Cardiff by introducing and running at a loss a "no frills" bus service designed to force rival company, 2 Travel Group Plc ("2 Travel"), out of the market.

Cardiff Bus argued before the OFT that it had introduced the service as a reaction to 2 Travel's entry into the market, but had been forced to withdraw from offering the service shortly after 2 Travel's exit, citing a lack of customer interest and driver shortage. The OFT did not impose a fine, finding that as the Cardiff Bus turnover was below £50 million the infringement was of minor significance within the meaning of section 40 of the Competition Act 1998.

2 Travel has filed a claim against Cardiff Bus for lost profits, the loss of the 2 Travel business, the loss of the commercial opportunity to develop 2 Travel's business at an alternative site, and loss suffered as a result of being driven out of the market. Three former 2 Travel employees have also filed claims relating to loss of capital value of shares, sums paid out to 2 Travel creditors, sums paid into the 2 Travel business and costs incurred during the liquidation of 2 Travel.

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REGULATORY

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EU

17 European Commission to strengthen the European dimension of sport

Under the Lisbon Treaty the EU has the role of supporting and coordinating sport policy in Member States, particularly in areas where challenges cannot be sufficiently dealt with at national level.

In its latest Communication, "Developing the European Dimension in Sport", the Commission has focused on the societal role of sport, its economic dimension, and the organisation of sport. The Commission proposes

actions to be carried out by the Commission and the Member States for each of these areas. In relation to the 'economic dimension of sport', the Commission recognises that the exploitation of intellectual property rights in the area of sport, such as licensing of retransmission of sport events or merchandising, represents an important source of income for professional sports. In the Communication, the Commission states that it considers that, subject to full compliance with EU competition law and Internal Market rules, the effective protection of these sources of revenue is important in guaranteeing independent financing of sport activities in Europe. The Commission cites the collective selling of media rights as an example of a practice that responds to the demands of the sports market whilst respecting the competition rules (for example, collective selling of media rights threatens to limit competition between broadcasters but may bring about advantages that outweigh the negative effects such that it can be exempted under the competition rules).

The Communication will be sent to the Council and the European Parliament for discussion and a response is expected during 2011.

IP/11/43 18 January 2011

18 European Parliament welcomes Commission's 2009 Competition Policy Report

The European Parliament has adopted a resolution welcoming the Commission's report on Competition Policy 2009 (which the Commission published in June 2010). The Report provides an overview of the main competition policy developments and enforcement actions taken by the Commission during 2009 in relation to Articles 101 and 102 of the Treaty on the Functioning of the European Union, merger control and state aid.

The European Parliament's resolution praises the Commission for its quick reaction to the financial and economic crisis, and its effective use of competition policy measures in exceptional circumstances. The resolution also identifies a number of areas for action by the Commission. The Commission should take forward its work on damages actions for breach of the competition rules and come forward with proposals to facilitate individual and class action claims, whilst taking care not to go as far as the relevant US law, which according to the European Parliament has led to excesses. The European Parliament also suggested that the use of even higher fines may be too blunt an instrument and therefore called upon the Commission to develop a wider range of more sophisticated instruments covering such issues as individual responsibility, transparency and accountability of firms, shorter procedures, the rights of defence and due process, mechanisms to ensure effective operation of leniency applications and corporate compliance programmes. In relation to merger control, the European Parliament emphasised that the current economic crisis did not justify a relaxation of EU merger control policies and underlined that the application of competition rules to mergers must be evaluated from the perspective of the entire internal market.

20 January 2011

If you require further information or advice on any of the items covered, contact details of the Squire Sanders Antitrust and Competition partners are available at: http://www.ssd.com/antitrust_competition/