COMPETITION AND REGULATORY BULLETIN

JULY 2011

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Commission clears Myllykoski acquisition

The European Commission (**Commission**) has approved the acquisition of Myllykoski Corporation, a Finnish company active in manufacturing paper products and pulp, by UPM-Kymmene Corporation, a worldwide company based in Finland and active in making paper products, pulp, electricity, label-stock, sawn timber and panel products.

The Commission had initial concerns about the high market shares that would result in relation to magazine paper and, in particular, supercalendered paper (**SC**). A Phase II in-depth investigation was opened in March 2011.

Following its analysis, the Commission concluded that the transaction did not raise competition concerns: generally, the parties' competitors were found to have significant spare capacity which would enable them to react to any attempt by the merged firm to raise prices and the demand for magazine paper was forecast to remain stable if not slightly decline, meaning sufficient future capacity in the market. The Commission also found that recent market entrants already impose significant competitive pressure on the parties (new SC-B paper already competes directly with one type of SC paper) and this pressure is expected to increase in the future.

IP/11/865, 13 July 2011

UK

Ready meals merger referred to Competition Commission

The Office of Fair Trading (**OFT**) has referred the completed acquisition of a frozen food manufacturing business to the Competition Commission (**CC**).

Kerry Foods Limited acquired the frozen ready meals business of Headland Foods Limited in January 2011. Before the acquisition, according to the OFT, the parties were the two largest suppliers of frozen ready meals to UK retail customers. During the OFT's investigation, almost all of the parties' main customers told the OFT that they had been concerned about a price rise that followed the merger (which the OFT attributed partially, but not totally, to an increase in raw material costs) and that there was no alternative large-scale manufacturer that supplied to supermarkets.

The CC expects to report by late December 2011.

37/11, 13 July 2011

Thomas Cook/Co-op joint venture provisionally approved by Competition Commission

The CC has provisionally approved the proposed travel agency joint venture between Thomas Cook, the Co-operative Group and the Midlands Co-operative Society. The proposed joint venture would combine two of the three largest travel agents on the UK high street.

The CC investigated the potential impact of the joint venture on the package and independent holiday sectors, and in relation to bricks-and-mortar travel agents on the high street. In particular, the CC found that there is relatively limited competitive interaction between rival travel agencies on the high street and, further, the incentives for the proposed joint venture to increase prices or worsen its retail offer at a wider regional or national level are even weaker than at local level.

The CC also looked at the potential foreclosure effect caused by Co-op and Midlands outlets favouring Thomas Cook package holidays over those from other providers and the potential for the proposed joint venture to stop or otherwise hinder other travel agents from selling Thomas Cook holidays. The CC concluded that the additional promotion of Thomas Cook holidays through the proposed joint venture would

make little difference and that a strategy of preventing other travel agents from selling Thomas Cook holidays would be not be (strategically or financially) rational.

The CC has invited comments on its provisional findings by 11 August 2011.

40/11, 15 July 2011

Competition Commission provisionally clears treasury management services merger

A completed merger between two businesses that provide treasury management advisory services (i.e. assistance to public and private sector bodies in managing cashflow and associated financial risks) has been provisionally cleared by the CC.

Sector Treasury Services Limited (**STS**) has bought Butlers, the trading division of ICAP plc, both of which provide treasury management advisory services.

During the CC investigation, ICAP submitted that it would have closed down Butlers if the merger had not gone ahead. The CC has concluded that the evidence supports ICAP's submission, with the result that the merger does not reduce the number of competitors in the market. The CC also decided that despite plans to transfer Butlers' contracts to STS at the time of the merger, which would give STS a competitive advantage when the transferred contracts were subsequently retendered, the effect on competition would be small.

38/11, 15 July 2011

OFT applies de minimis exception to medical gas business acquisition

The OFT has used its de minimis discretion not to refer to the CC the acquisition by Atlas Copco of the medical gas division of Penlon Limited.

The OFT found that the parties overlapped in the manufacture of gas equipment and components for hospitals and the provision of installation and maintenance services. The OFT concluded that it is or may be the case that the transaction may be expected to result in a substantial lessening of competition in the manufacture and supply of terminal units (connection points for the user into the medical gas system) in the UK.

The OFT concluded that it believed the annual cumulative size of the market concerned in the UK to be less than £10 million, and it therefore assessed whether it should apply the 'de minimis' exception to the duty to refer. As part of that assessment the OFT found that it did not consider, based on its objective evaluation of the transaction, that undertakings in lieu were 'in principle' available since doubts existed that a clear-cut effective structural remedy was possible. Further, the OFT's inquiry did not identify any exceptional circumstances which justified a reference to the CC. As such, the OFT considered it appropriate to exercise its 'de minimis' discretion.

Squire Sanders Hammonds advised Atlas Copco on the acquisition, including its submissions to the OFT.

18 July 2011

News Corp/BSkyB inquiry formally closed

The CC has formally cancelled its investigation into the planned takeover of BSkyB by News Corporation.

News Corporation already owns a 39.1 percent share of the satellite broadcaster. The Secretary of State for Culture, Olympics, Media and Sport, Jeremy Hunt, referred the acquisition of the remaining shares to the CC on 11 July 2011. The CC says that it has now received satisfactory assurances that the planned acquisition has been dropped and it has therefore closed its inquiry.

44/11, 25 July 2011

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EU

Commission issues Statement of Objections in alleged power cables cartel

The Commission has sent a Statement of Objections to 12 companies detailing its concerns over a suspected cartel in which producers of underground and submarine power cables may have colluded to allocate markets and consumers, and to fix prices within the EEA.

Power cables are used in the transmission and distribution of electrical power by connecting generation capacity to electricity grids, or interconnecting grids in other countries. The Commission therefore believes the price of these cables is directly relevant for electricity consumers.

The Commission carried out inspections at the premises of a number of producers of power cables in January 2009 following concerns of anti-competitive behaviour.

IP/11/839, 6 July 2011

Commission closes investigation into Boehringer Ingelheim

The Commission has closed its investigation into an alleged misuse of the patent system after German pharmaceutical company Boehringer Ingelheim (**Boehringer**) and Spanish pharmaceutical company Almirall reached a voluntary settlement agreement.

Almirall had accused Boehringer of filing unmeritorious patent applications which would block or delay the entry to market of its own combination medicines and having a negative effect on its ability to market products based on the "mono-product", a new active substance discovered by Almirall but covered by Boehringer's patent applications in combination with other active substances.

The settlement agreement will remove the alleged blocking positions for Europe, grant a licence for two countries outside of Europe, and end all pending litigation between the parties.

IP/11/842, 6 July 2011

Commission investigates abuse of dominance in the Czech electricity market

The Commission has opened formal proceedings in its investigation into whether CEZ a. s. (**CEZ**), the incumbent electricity producer in the Czech Republic, abused its dominant position by hindering or preventing competitors' entry to the Czech wholesale electricity market, in particular through the hoarding of capacity in the transmission network.

The Commission carried out inspections at the premises of CEZ and other companies active in the Czech electricity market in November 2009.

The Commission is also investigating alleged obstructions during these inspections by Energetický a průmyslový holding and J&T Investment Advisors, for which Statements of Objections were sent in December of last year.

IP/11/891, 15 July 2011

Commission investigates abuse of dominance by Austrian waste management company

The Commission has opened formal proceedings in its investigation into whether Austrian waste management company ARA has abused its dominant position by foreclosing access to the market for the management of household and commercial packaging waste.

The investigation will focus on whether ARA has hindered or prevented entry or expansion into these markets by obstructing access to its collection infrastructure and pressurising both customers and collection service providers not to contract with its competitors.

The Commission has indicated that, if established, it believes ARA's practices may result in increased waste management costs with a resulting higher price for packaged goods.

IP/11/893, 15 July 2011

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UK

BAA airports sell-off order confirmed

The CC has confirmed its provisional view (published in March 2011) that BAA will be required to sell Stansted followed by either Edinburgh or Glasgow airports.

The CC had been considering whether any material change in circumstance had occurred since it published its final report on BAA in March 2009 that should cause it to revise the findings in the final report. That report set out the requirement to divest three airports including Gatwick, which was sold in December 2009. The CC's final report had been under review after a legal challenge that ended with the Court of Appeal reinstating the findings, and the Supreme Court refusing BAA's application for permission to appeal further.

In confirming its provisional view, the CC stated that it remains of the belief that divesting two further airports will benefit passengers and airlines, and that the divestments are still justified despite the Government's decision not to build extra runway capacity at any of London's airports.

39/11, 19 July 2011

OFT provisionally refers audit market to Competition Commission

The OFT has provisionally decided to refer the market for statutory audit services to large companies to the CC.

The OFT says that it has been concerned about the market for some time, and in May 2011 it decided that the statutory test for a reference to the CC had been met. Since then, and before making a reference to the CC, the OFT has been trying to establish whether there was a reasonable chance that appropriate remedies would be available to the CC.

There are only four large players in the market, and the OFT says that there are substantial barriers to entry and switching.

Interested parties can respond to the provisional decision by sending written representations to the OFT before 9 September 2011.

85/11, 29 July 2011

LITIGATION

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EU

Judgments from the General Court in synthetic rubber cartel appeals

In 2006, the Commission found that five groups of companies had been involved in an illegal price-fixing and market-sharing cartel in the synthetic rubbers market between May 1996 and November 2002, and imposed a fine of more than EUR 519 million. On 13 July 2011, the General Court handed down several judgments in

relation to certain appeals against the Commission's decision and the financial penalty imposed.

The General Court rejected in their entirety the arguments brought by the Shell group companies, and upheld the initial fine imposed on Dow Deutschland despite finding that the period of infringement was shorter than that determined by the Commission.

The fines imposed on Eni and its subsidiary Polimeri Europa were reduced from EUR 272.25 million to EUR 181.5 million as the Commission failed to provide sufficient evidence of recidivism after a complex corporate restructuring changed the structure and control of the companies involved.

In relation to Unipetrol, its subsidiary Kaučuk, and Trade-Stomil, the General Court stated that any doubt over their involvement must operate to their advantage. Consequently, the General Court annulled the Commission's decision in relation to each of these companies finding that the Commission had failed to adduce to the requisite standard sufficient evidence of their participation in the meetings at which the infringement occurred.

71/11, 13 July 2011

Judgments from the General Court in the elevators and escalators cartel appeals

In 2007, the Commission imposed fines of EUR 992 million on KONE, Otis, Schindler and ThyssenKrupp for their participation in four separate single and continuous infringements in the market for elevators and escalators. Between 1995 and 2004, the undertakings had agreed to allocate public tenders and other contracts among themselves, not to compete with each other, and to exchange commercially sensitive information in Belgium, Germany, Luxembourg and the Netherlands.

The Otis, KONE, Schindler and ThyssenKrupp groups subsequently brought actions to reduce the financial penalties imposed and/or annul the Commission's decision.

In its decisions, handed down on 13 July 2011, the General Court dismissed the appeals by Otis, KONE and Schindler, which included pleas relating to, amongst others, the approach adopted by the Commission in the case to the calculation of fines, reductions for leniency cooperation and non-contestation of the facts, the liability of a parent company and the application of EU competition laws to cartels functioning at national level.

The fines imposed on the ThyssenKrupp Group were reduced by approximately EUR 160 million following a finding by the General Court that the Commission had erred in increasing the fine for recidivism (it was not clear that the subsidiary companies in the elevators and escalators infringement were the same addressees as in a previous cartel).

72/11, 13 July 2011

UK

CAT clears OFT to review Ryanair stake in Aer Lingus

The Competition Appeal Tribunal (the **CAT**) has held that the OFT is "in time" to review the 2006 acquisition by Ryanair of a minority shareholding in rival Aer Lingus.

Ryanair initially acquired a minority shareholding in Aer Lingus and then mounted a public bid for the entire shareholding in October 2006. The Commission investigated the public bid at the time and decided, in June 2007, to prohibit the transaction. Aer Lingus appealed against the Commission's decision not to order Ryanair to divest its existing minority stake in Aer Lingus and separately, Ryanair also appealed on the grounds that the Commission should not have prohibited its public bid for the entire shareholding in Aer Lingus. In July 2010, the General Court ruled that the Commission did not have the ability to examine or require divestment of minority shareholdings that do not confer 'decisive influence' for the purposes of the EU Merger Regulation.

Subsequent to the General Court's ruling, the OFT announced in September 2010 that it would carry out an investigation into the acquisition, and Ryanair argued that the investigation was time-barred. Following its review of Ryanair's complaint as to the OFT's jurisdiction, the CAT has held that the OFT had a duty, pending the ongoing EU appeal process, to wait before opening any investigation. Otherwise, the OFT would create a risk of inconsistent outcomes with ongoing EU cases and potential conflicts with the co-operation principles in the Treaty on the Functioning of the European Union. Ryanair says it will appeal against the decision of the CAT.

[2011] CAT 23, 28 July 2011

REGULATORY

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EU

BEREC calls for contributions on legal and administrative barriers to the provision of communications services for the business segment

Following analysis undertaken first by the ERG (European Regulators Group) and then by the Body of European Regulators for Electronic Communications (**BEREC**), BEREC has raised concerns that the current inconsistent implementation of regulation across Europe is leading to inefficiencies for providers of electronic communications services to business, which is potentially hindering competitive dynamics and the completion of the internal market.

To complement its previous analysis, BEREC has now launched a call for contributions in order to examine legal and administrative barriers in relation to the provision of electronic communications services for the business segment. Further, BEREC have outlined their intention to carry out a survey and analysis of existing restrictions. The contributions from stakeholders on any inefficiencies experienced under the current national administrative regimes will form part of that analysis. Responses have been requested by 5 August 2011.

4 July 2011

BEREC publishes report on infrastructure and spectrum sharing in mobile/wireless networks

In response to a questionnaire circulated amongst national regulatory authorities (**NRA**s), BEREC and the Radio Spectrum Policy Group (**RSPG**) published a report on 5 July 2011 relating to infrastructure and spectrum sharing in mobile/wireless networks. The report focuses on the extent to which sharing exists between providers; on what scale this sharing is agreed; and what competition issues arise as a result.

The report, based on research and the answers to a survey from participating RSPG/BEREC members, shows that in all 27 EU member states both active infrastructure sharing and passive infrastructure sharing agreements exist between leading service providers. Additionally, there is a trend throughout the EU to an increase in these types of sharing agreements. The intensity of the sharing arrangement is, however, likely to vary in each case. The report notes that, in the UK, the current trend is towards large-scale network sharing rather than ad hoc arrangements and cites the creation of Everything/Everywhere by the Orange and T-Mobile merger in 2010 as a recent UK example.

The report highlights that infrastructure sharing agreements may raise potential issues regarding their compatibility with Article 101 TFEU. However, when these arrangements are compatible with competition law, companies can benefit from greater efficiency due to large reductions in costs, allowing them to diversify their product range.

5 July 2011

Commission sends letters of formal notice to 20 EU Member States

Only seven EU Member States (Denmark, Estonia, Finland, Ireland, Malta, Sweden and the UK) notified the Commission of measures to fully implement the new EU telecoms rules into domestic legislation by 25 May 2011, the deadline set by the EU Parliament and the Council of the European Union.

These new rules give rights to businesses and consumers in relation to phones, mobile services and internet access, and include: the right to better protection of online personal data; the right to more clarity about services offered; and the right to switch telecoms operators in just one day without changing phone number.

The Commission has sent letters of formal notice to the remaining twenty Member States, to which they have two months to reply with notification of full implementation measures. If the Member States fail to reply or if the Commission is not satisfied with the response from the Member States, the Commission can send the Member States concerned a formal request to implement the legislation (a 'reasoned opinion' under EU infringement procedures) and in the event of continued default, refer the Member State to the Court of Justice of the European Union.

IP/11/905, 19 July 2011

UK

Ofcom publishes final determination in sub-loop unbundling charges dispute

The Office of Communications (**Ofcom**) has published its final determination in resolution of a dispute brought by Digital Region Limited (**DRL**) and Thales UK Limited (**Thales**) against BT Telecommunications plc (**BT**) in relation to charges for three of BT's wholesale connection and rental sub-loop unbundling (**SLU**) products.

Ofcom concluded that certain costs incorporated into BT's SLU charges were not costs related to provision of the products and as such BT had not complied with its regulatory obligations. BT must now adjust these charges as of the date of the determination so as to reflect only those costs which can reasonably be derived from the costs of provision, and is to reimburse DRL and Thales for any overpayments made.

15 July 2011

Ofcom issues statement on charge control for wholesale broadband access

On 20 July 2011, Ofcom published its statement with regard to the wholesale broadband access charge control.

In the geographic areas where BT is the sole provider of wholesale broadband services, Ofcom has reduced, by 12% below RPI, the price that BT Wholesale is allowed to charge Internet Service Providers.

For a more detailed discussion on the wholesale broadband access market, please see Ofcom's statement on its review of that market, which was published on 3 December 2010 and can be found here.

20 July 2011

Electronic Communications Code set for review

As part of the government's review of the Communications Act 2003, the Law Commission has outlined, in its Eleventh Programme of Law Reform, its plans to review the Electronic Communications Code (**Code**). The Code is a statutory regime governing the rights of electronic communications network providers, in relation to their rights regarding installation and maintenance of infrastructure on public and private land.

The Law Commission will undertake a general review and will determine whether the Code remains fit for purpose. The Law Commission aims to make the Code more transparent and accessible, while also considering a timely and efficient dispute resolution process.

According to the Law Commission, a consultation paper can be expected around September 2012 and the Law Commission will then publish a report of its recommendations to the Department for Culture, Media and Sport in spring 2013.

20 July 2011

Ofcom final determination on dispute between Openreach and Opal and Sky about local loop unbundling charges

Ofcom published its final determination regarding the dispute between Opal Telecom, BSkyB and Openreach about charges for local loop unbundling (**LLU**) services between June 2009 and October 2010.

Further to Ofcom's consultation on its draft determination on 15 June 2011, Ofcom have declared that, while there are arguments for making Openreach repay an amount to reflect the adjustments to Ofcom's LLU price control (following the Carphone Warehouse's appeal against Ofcom's 2009 decision on the LLU charge control), Openreach did charge an amount that complied with the regulatory obligations of the time. It would, therefore, be unjust to make them repay these sums.

In arriving at its final determination, Ofcom emphasised that a party's claim for fairness (i.e. that it should be able to pass price increases through to customers) must be tempered with a stakeholder's need to rely on regulatory obligations that apply.

21 July 2011

Average UK broadband speed up 10 percent since December

The average broadband speed in the UK has risen to 6.8Mbit/s in the six months to May 2011, according to research by Ofcom. The research was released on the same day (27 July 2011) that a revised broadband speed Code of Practice comes into force. The broadband speed Code of Practice encourages broadband providers to advertise a speed range rather than a single 'up to' speed and to allow customers to leave their supplier without penalty if the customer receives a speed that is significantly lower than the bottom of the estimated range.

However, Ofcom also notes that the gap between actual and advertised ('up to') speeds has grown over the same period, with Ofcom finding the average advertised speed was 15Mbit/s - 8.2Mbit/s higher than the average actual speeds of 6.8Mbit/s.

Ofcom found that while "superfast" broadband is available to some customers, more than 75 percent of UK home connections are currently delivered by copper ADSL telephone lines, in respect of which speeds depend on the length and quality of the line running from the customers home to the local exchange (typically, the closer a customer lives to the exchange, the better the performance).

27 July 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/