

COMPETITION AND REGULATORY BULLETIN

AUGUST 2011

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EU

[In-depth investigation opened in proposed merger between Deutsche Börse and NYSE Euronext](#)

The European Commission (**Commission**) has opened an in-depth Phase II investigation into the proposed merger between Deutsche Börse AG and NYSE Euronext Inc., both worldwide stock exchange groups.

The Commission's initial market investigation showed that the proposed transaction would bring together the two largest derivatives exchanges in Europe, giving rise to significant competition concerns in the market for derivatives trading and clearing. Derivatives are financial contracts which are used for hedging and investment purposes which derive their value from assets and variables such as stock, interest rates or currencies. Concerns were also raised in respect of equities trading and settlement and index licensing.

During the Phase II investigation, the Commission will consider, amongst other things, whether the removal of an important competitor from the market would have a negative impact on innovation in derivatives products and technology solutions. It will also assess whether, in a market characterised by high barriers to entry, the transaction would result in increased difficulties for competitors entering the market without access to the merged entity's enlarged post-trade clearing facilities, thereby reducing the possibilities for fee competition.

The Commission has set a provisional deadline of 13 December 2011 to deliver its final decision on the proposed merger.

IP/11/948, 4 August 2011

UK

[Waste management merger referred to Competition Commission](#)

The Office of Fair Trading (**OFT**) has referred the completed acquisition by Stericycle, Inc (**Stericycle**) of Ecowaste South West Limited (**Ecowaste**) (two waste management businesses) to the Competition Commission (**CC**).

Ecowaste provides waste management services to medical and other sectors in the south west of England and owns a treatment facility at Avonmouth, Bristol. SRCL Limited, the UK subsidiary of Stericycle, provides a similar service throughout England and Wales. Following its investigation, the OFT considered that the merger would give rise to competition concerns in relation to the collection, processing and disposal of healthcare risk waste in the wider Bristol area. The evidence gathered by the OFT indicated that Ecowaste and SRCL Limited had competed closely in the south of England. The OFT concluded that it could not be confident that there was sufficient competition from third parties in the region to prevent SRCL Limited from raising prices or cutting services.

The CC has invited interested parties to submit comments by 16 September 2011 and it is expected to publish its final report by February 2012.

94/11, 25 August 2011

EU

[Commission investigates practices of luxury watch manufacturers](#)

The Commission has opened formal proceedings in its investigation into whether luxury watch manufacturers have breached the competition rules by refusing to supply spare parts to independent watch repairers.

The Commission's move to open proceedings against the luxury watch manufacturers follows a ruling by the General Court in December 2010 which annulled a Commission decision to reject a complaint by the European Confederation of Watch & Clock Repairers' Associations (**CEAHR**). The Commission had rejected the complaint of CEAHR on the basis of a lack of Community interest, but the General Court ruled that the Commission had failed to justify this conclusion.

[IP/11/952, 5 August 2011](#)

UK

[Criminal cartel inquiry into UK agriculture sector dropped](#)

The OFT has ended its cartel investigation into the supply of products used in the agricultural sector. It has decided that there is insufficient evidence to bring criminal charges against any individual.

The investigation had followed the OFT's execution of a search warrant at a business in the West Midlands in April 2010 as part of an inquiry into criminal cartel conduct (under the Enterprise Act 2002, which makes it a criminal offence for individuals dishonestly to engage in cartel conduct).

[3 August 2011](#)

[Supermarkets and dairy producers fined after OFT price-fixing investigation](#)

The OFT has fined four supermarkets and five dairy processors a total of £49.51 million for retail price fixing.

The OFT concluded that the companies had co-ordinated increases in the prices consumers paid for certain dairy products in 2002 and/or 2003. The OFT found that in 2002 Arla, Dairy Crest, McLelland, Safeway, Sainsbury's, Tesco and The Cheese Company co-ordinated price increases for cheese. Four of these firms – Asda, McLelland, Sainsbury's and Tesco – were found to have repeated the practice of co-ordinated price increases for cheese in 2003.

The OFT also found that, in a similar infringement of the competition rules, Arla, Asda, Dairy Crest, Safeway, Sainsbury's and Wiseman had colluded in setting milk prices in 2005.

The price co-ordination found by the OFT relates to the indirect exchange by the supermarkets of retail price intentions through dairy processors in so-called 'A-B-C' information exchanges.

Arla was the first undertaking to alert the OFT to the existence of the possible infringement and received 100% immunity from fines under the OFT's leniency programme. All of the companies except Tesco admitted the infringements, agreed to a streamlined procedure and had their fines reduced. Tesco denied the allegations and was fined a total of £10.43m.

[89/11, 10 August 2011](#)

UK

[OFT publishes market study into aggregates and consults on proposed market investigation reference](#)

On 16 August 2011, the OFT published its market study into aggregates, cement and ready mix concrete. The OFT has concluded that it proposes to refer the sectors to the CC for a more detailed investigation (a reference under s131 of the Enterprise Act 2002).

The OFT has identified that the behaviour of major firms and certain characteristics of the market structure could prevent, restrict or distort competition. More specifically, the OFT concluded that the market has features such as: high barriers to entry; highly-concentrated markets that are increasing in concentration; vertical integration of major firms (i.e. across aggregates, ready-mix concrete and cement); and multi-firm market contacts and information exchanges.

The OFT has requested comments on its proposal to make a market investigation reference by 30 September 2011.

90/11, 16 August 2011

[Sky's market power provisionally found to restrict competition for pay-TV movies](#)

The CC has announced its provisional findings in its market investigation into movies in the pay-TV market.

On 4 August 2010, Ofcom, as part of its broader investigation into the pay-TV market, made a market investigation reference to the CC in relation to premium pay-TV movies. The CC has concluded that, due to Sky's large subscriber base and its exclusive rights to the movies of the major Hollywood studios in the first subscription pay-TV window (the **FSPTW**), competitors are unable to successfully bid against Sky for the rights to show these movies. The CC concluded that due to the importance of offering pay-TV subscribers the option of viewing recent movies, Sky's control over the FSPTW movie rights of the major studios (and over the movie channels incorporating this content) contributes to a lack of effective competition in the overall pay-TV retail market.

The CC proposes limiting the number of studios that Sky can licence exclusive FSPTW rights from, restricting the nature of those rights, and/or imposing a "must sell" obligation (requiring Sky to acquire on a wholesale basis and to offer its subscribers any movie channel containing FSPTW movie content created by a rival).

The deadline for comments on the CC's provisional findings and proposed remedies is 16 September 2011. The CC's final report is expected in February 2012.

45/11, 19 August 2011

UK

[Competition Appeal Tribunal refers phone call termination charge dispute back to Ofcom](#)

The Competition Appeal Tribunal (**CAT**) has allowed an appeal by BT against Ofcom's handling of disputes relating to BT's termination charges for 080 and 0845/0870 phone calls.

In 2009, BT notified mobile network operators of new charging structures for call terminations. A number of network operators challenged the charges, and Ofcom published its final determinations to resolve the disputes in February 2010 (for the 080 disputes) and August 2010 (for the 0845/0870 disputes). Ofcom concluded that the new charges that BT proposed to implement were not fair and reasonable. It directed that the parties should revert to the terms in existence immediately prior to the implementation of the revised termination charges, and that BT should repay any additional amounts paid to it since their coming into force.

In considering BT's appeal against Ofcom's determinations, the CAT held that Ofcom had applied too strict a test when it conducted its assessment of the economic effects of the new charges on consumers (i.e. a welfare assessment). In particular, Ofcom had failed to properly weigh this assessment against the impact on competition and the parties' contractual rights (the CAT found that the evidence was in BT's favour in relation to these two factors).

The CAT has referred the disputes back to Ofcom, and directed it to allow BT's new call termination charges to stand.

[2011] CAT 24, 1 August 2010

REGULATORY

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UK

[Ofcom publishes Communications Market Report 2011](#)

On 4 August 2011, Ofcom published its eighth annual Communications Market Report (**Report**). The Report sets out Ofcom's findings in relation to the communications sector for the last year and supports Ofcom's research into regulatory markets and Ofcom's goal to remain at the forefront of technological understanding.

The Report scrutinises key market trends in certain UK communications markets (UK television, radio and other audio, internet and web based content, and telecoms and networks). Furthermore, due to the rapid technological advancement over the last decade, the Report also focuses on key developments that have taken place during this time - particularly the increased use of smartphones.

The Report is supplemented by reports that set out the key findings for each of England, Scotland, Northern Ireland and Wales.

4 August 2011

[Ofwat issues consultation on HSBC's acquisition of Cambridge Water](#)

On 2 August 2011, HSBC Bank plc (**HSBC**) acquired Cambridge Water plc (**Cambridge**) from CKI UK Water Ltd. Cambridge is an appointed water undertaker that supplies water to south Cambridgeshire and the city of Cambridge. On the basis that HSBC did not have material interests in any other water/water and sewerage company in England and Wales, the procedure for a mandatory water merger reference to the CC (under section 32 of the Water Industry Act 1991) does not apply in this case. Ofwat has, however, opened a consultation on whether any regulatory issues arise from the acquisition and on whether any modifications should be made to Cambridge's licence as a result.

More specifically, Ofwat are consulting on: the capacity of HSBC to be the owner of a regulated water company; whether HSBC is the appropriate entity to provide the Condition P undertaking (Cambridge's conditions of appointment require it to obtain legally enforceable undertakings from its "Ultimate Controller" which are aimed at protecting customers by strengthening the ability of the regulated water company to comply with the conditions of its appointment and maintaining the independence of the regulated water company from the rest of the wider corporate group to which it belongs); and whether any modifications are required to Cambridge's current financial and managerial ring-fencing arrangements.

Responses to the consultation must be received by Ofwat on or before 16 September 2011.

15 August 2011

TalkTalk and Tiscali fined for breach of Ofcom's General Conditions of Entitlement

Ofcom has fined each of TalkTalk Telecom Ltd (**TalkTalk**) and Tiscali UK Ltd (**Tiscali**) £1,524,728 respectively for breach of General Condition 11.1 of Ofcom's General Conditions of Entitlement (**General Condition 11.1**).

General Condition 11.1 states that any bill issued by a communication provider to a customer must represent only the service actually provided to the customer. Ofcom notified both TalkTalk and Tiscali that they were in breach of this condition in November 2010 because they had issued bills to customers for services that had not been provided and for cancelled services. TalkTalk and Tiscali were given until 2 December 2010 to rectify the consequences of their breach and to comply with General Condition 11.1. Ofcom found that, despite attempts to remedy the breach and comply with General Condition 11.1, TalkTalk and Tiscali still incorrectly billed a number of customers after 2 December 2010.

In imposing the fine, Ofcom concluded that the level of the fine reflects the gravity of the breach of General Condition 11.1 but also reflects compliance and remedial steps taken by the parties.

18 August 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/
