

COMPETITION AND REGULATORY BULLETIN

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[OFT seeks views on purchase of minority stake in Aer Lingus by Ryanair](#)

The Office of Fair Trading (**OFT**) has invited third parties to submit written representations in relation to the OFT's merger investigation under the Enterprise Act 2002 into the completed acquisition by Ryanair Holdings Plc of a minority interest in Aer Lingus Group.

Following the conclusion of appeals before the EU General Court, the OFT had previously announced in October 2010 that it had begun a merger investigation into the transaction and, in January 2011, the OFT announced it considered it was "in time" to undertake that investigation. Ryanair appealed this decision by the OFT and the Competition Appeal Tribunal (**CAT**), in July 2011, decided against Ryanair and concluded the OFT was "in time".

Written representations in relation to this transaction must be submitted to the OFT by 14 September 2011.

[1 September 2011](#)

[OFT refers Anglo/Lafarge joint venture to Competition Commission](#)

The OFT has referred the proposed UK joint venture between Anglo American PLC and Lafarge S.A to the Competition Commission.

The parties, both active in the supply of construction materials in the UK (Anglo American through its UK subsidiary Tarmac Limited), propose to establish a 50:50 joint venture to which each would contribute the bulk of their construction businesses in the UK.

The transaction triggered the merger control thresholds of the EU Merger Regulation but the parties made a pre-notification request for the European Commission (**Commission**) to refer the merger to the OFT, on the basis that the transaction may significantly affect competition in a market(s) within the UK. The OFT found that the proposed joint venture involved overlaps between the parties' activities in a number of product markets and at a local, regional and national level. In addition, the OFT found that competition concerns may arise due to vertical supply relationships between the parties' activities which could foreclose independent suppliers.

The initial 24-week statutory deadline for the Competition Commission to publish its final report is 16 February 2012.

[OFT 95-11, 2 September 2011](#)

[GB Oils undertakings accepted by the OFT](#)

The undertakings offered by GB Oils Limited which address concerns relating to the anticipated acquisition of Pace Fuelcare Limited (**Pace**) have been accepted by the OFT and, accordingly, the OFT has confirmed that the merger will not be referred to the Competition Commission.

The undertakings include provisions that GB Oils will not acquire either Pace's oil distribution business on the Isle of Wight or its Cowes Terminal.

The OFT considered concerns raised by third parties that Pace may withdraw from the Isle of Wight (or not be committed to the operations there) and concluded that Pace are unlikely to close their Isle of Wight operations given the value of the Cowes terminal and because the company has the resources, expertise and incentive to continue their business on the island

[OFT 104/11, 27 September 2011](#)

EU

[Commission market tests IBM's commitments on mainframe maintenance](#)

International Business Machines Corp. (**IBM**) have offered commitments to resolve a Commission investigation into claims the company blocked competition from rival providers of maintenance services for mainframe computers by imposing unreasonable conditions for the supply of certain spare parts and technical information, and thereby abused a dominant position contrary to Article 102 of the Treaty on the Functioning of the European Union (**TFEU**). The Commission opened the investigations into IBM in 2010.

The commitments offered by IBM involve measures that seek to ensure third-party providers of mainframe maintenance services receive certain spare parts and technical information under reasonable and non-discriminatory terms.

Interested parties have been invited to comment on the commitments within one month.

[IP/11/1044, 20 September 2011](#)

[Commission launches antitrust 'dawn raids' on 10 gas companies](#)

The Commission has carried out a series of 'dawn raids' of companies active in the supply, transmission and storage of natural gas in several Member States to investigate suspected anti-competitive practices in the supply of natural gas in Central and Eastern Europe. The Commission has indicated that the focus of the investigation is on the upstream supply level.

[MEMO/11/641, 27 September 2011](#)

[Commission opens investigation into standardisation process for e-payments](#)

The Commission has announced that it has opened formal proceedings to investigate whether the standardisation process for payments over the internet (e-payments) undertaken by the European Payments Council infringes the prohibition against anti-competitive agreements under Article 101 TFEU. The European Payments Council is the decision-making body for, and co-ordinates, the European banking industry for payments.

Whilst the Commission has stated that the standardisation process is important in terms of promoting economic integration, which can result in greater efficiencies and better prices for the customer, the Commission has indicated that, following receipt of a complaint, it intends to investigate in detail whether the e-payments standardisation process unduly restricts competition, for example through excluding new entrants and payment providers who are not linked to a bank.

[IP/11/1076, 26 September 2011](#)

UK

[OFT issues call for evidence in UK motor insurance industry](#)

The OFT has requested evidence that relates to the UK private motor insurance industry to assess in more detail recent reports of rising UK private motor insurance premiums, the reasons behind any increase (reported to be up to 40 per cent for annual comprehensive insurance) and consider whether further work may be necessary to improve the way the market works.

The OFT is asking insurers and other interested parties for comments on a number of aspects of the private motor insurance market that may raise competition or consumer issues, including: price comparison websites, credit hire replacement vehicles, insurance companies' use of panels of approved repairers, and ancillary products that are sold by insurance companies in addition to standard motor insurance cover.

The OFT will accept written submissions from consumers and interested third parties up to 12 October 2011 and currently intends to publish a summary of findings and any proposed next steps in December 2011.

[97/11, 8 September 2011](#)

[OFT launches dentistry market study](#)

The OFT has launched a market study to examine whether the private and NHS dentistry markets, which were worth £7.2 billion in 2010, are working well for patients. The OFT wants to examine concerns that many patients are confused over dental treatments and prices.

The study will focus on issues such as how dentistry services are sold, whether patients are given appropriate information to inform their choices between dental practices, the different types of treatments on offer, different payment methods in both NHS and private dentistry, how easy it is to switch dentists, whether the current system for customer redress works, and whether there are any unnecessary barriers to new practices seeking to enter either the private or NHS market.

The OFT plans to complete the study by March 2012 and is inviting contributions from interested parties.

[99/11, 15 September 2011](#)

[OFT receives super-complaint about travel money](#)

The OFT has received a super-complaint from Consumer Focus in relation to the cost of obtaining foreign currency and overseas use of credit and debit cards. The Enterprise Act 2002 provides that "designated consumer bodies" can make super-complaints and Consumer Focus is a designated consumer body. The OFT will now determine whether or not any feature, or combination of features in the relevant market is, or appears to be, significantly harming the interests of consumers.

In particular, Consumer Focus identified three features in its super-complaint which it wants the OFT to investigate: the unfair charges applied by some banks and credit card providers for purchases of foreign currency, the confusing nature of charges applied when using cards abroad and the use of potentially misleading phrases such as '0% commission' and 'competitive exchange rates'.

The OFT has 90 days to consider the super-complaint and will publish its response by 20 December 2011.

[101/11, 21 September 2011](#)

Change needed to encourage competition in organic waste treatment, OFT finds

The OFT has issued recommendations aimed at encouraging increased competition and greater efficiency in the treatment of organic waste, following a market study requested by Ofwat. The OFT identified several barriers to competition relating to aspects of economic, environmental and planning regulation.

The recommendations propose changes to the economic regulation of water and sewerage companies and recommend greater harmonisation of the environmental regimes applicable to sewage sludge and other organic waste.

The OFT has provisionally decided that a market investigation reference to the Competition Commission would not be appropriate at this time because it considers action by Ofwat and other government agencies would be better and more proportionate to address the regulatory barriers and competition concerns identified in the market study and is now consulting on this provisional decision.

103/11, 22 September 2011

OFT announces a package of measures for mobility aids sector

The OFT has published the results of its market study, which was launched on 16 February 2011 and reported in our [February 2011 bulletin](#). Within the three areas focussed on in the study, the OFT found that: consumers are not being treated fairly and although the problem is not endemic, it is widespread and those targeted are particularly vulnerable; over half of consumers are not comparing prices of mobility aid adequately and so are not getting a fair price; and the effective lack of competition in the sector means it can be hard to obtain the best value wheelchairs.

The actions and recommendations which follow the market study include: the OFT launching consumer protection investigations into two mobility aids traders and investigating several other cases, launching a campaign designed to raise awareness of doorstep selling and planning to produce enforcement guidance for Trading Standards Services in March 2012.

The OFT is also working with the British Healthcare Trades Association, which will be amending its Code of Practice to require members to display prices and price ranges. In terms of competition in the wheelchair sector, the OFT has indicated it will make recommendations to NHS Supply Chain and to the individual public sector purchasing bodies across the UK, with the aim of increasing their ability to drive competition into the sector.

The OFT has not yet reached a provisional view as to whether the statutory test for reference to the Competition Commission has been met, but at this stage the OFT does not feel this is a case where the OFT would exercise its discretion to make a reference and has invited interested parties to submit their views on this proposed decision by 20 October 2011.

105/11, 29 September 2011

OFT raises concerns over consumer policy reform

The OFT has published its response to the BIS consultation: "Empowering and Protecting Consumers: Consultation on institutional changes for provision of consumer information, advice, education, advocacy and enforcement". In the response the OFT welcomes and supports the three objectives set out by the Government for these reforms (reducing complexity in the landscape, strengthening the effectiveness of consumer enforcement and achieving more cost-efficient delivery) but raises concerns that the proposed reforms will lead to lower standards of protection, poor value for money, and would fragment the capacity of consumer enforcement to tackle market-wide problems and to pursue nationally significant enforcement cases.

OFT1367, September 2011

[The General Court annuls the 31.66 EUR million fine imposed on Koninklijke Grolsch NV for its participation in a cartel on the Dutch beer market](#)

The General Court has handed down its judgment in the appeal by Koninklijke Grolsch NV against a Commission decision finding that it had infringed Article 101(1) TFEU by operating an illegal price-fixing cartel in the beer market in the Netherlands. In annulling the Commission's decision the General Court found that the Commission had failed to prove Grolsch's direct participation in the cartel.

Koninklijke Grolsch had argued that it did not participate directly in the infringement of Article 101 TFEU - there was only one instance of a director of Koninklijke Grolsch attending a relevant meeting and other alleged attendees were actually employees of a subsidiary of Koninklijke Grolsch. The General Court noted that the Commission had not disputed the proposition that the attendees at the cartel meetings (except for the one director of Koninklijke Grolsch) were not employees of Koninklijke Grolsch, but of its subsidiary and concluded that it did not consider the evidence from the director of Koninklijke Grolsch, and attendance at one meeting by that director, was sufficient proof of Koninklijke Grolsch's participation in the ongoing continuous multilateral co-operation between the breweries.

In terms of the liability of a parent company (i.e. Koninklijke Grolsch) for the acts of a subsidiary, the General Court held that a decision attributing liability on a parent company must contain a detailed statement of reasons for attributing the infringement to the parent company, and it is not sufficient to treat the corporate group as one without assessing the economic, organisational and legal links between the parent company and its subsidiary. In this respect, the Commission failed to provide details in the decision as to the reasons for attributing to Koninklijke Grolsch liability on the basis the conduct of a subsidiary (attendance by the subsidiary's employees in the meetings in question).

93/11, 15 September 2011

[Elf Aquitaine wins appeal on parental liability in cartel decision](#)

The Court of Justice of the European Union (**ECJ**) have annulled Elf Aquitaine's liability for an illegal cartel in the market for monochloroacetic acid. Elf Aquitaine was challenging, in particular, the General Court's ruling that the Commission had been correct to attribute liability to Elf Aquitaine for the actions of its subsidiary Arkema France (formerly Atofina SA) (**Arkema**). The Commission had attributed joint and several liability to Elf Aquitaine on the basis that Elf Aquitaine held 98% of the shares in Arkema which was sufficient for the actions of its subsidiary to be imputed to it.

The ECJ made it clear in the judgment that the Commission must justify in full the basis upon which it rejects arguments presented by firms to counter the presumption that parent companies should be held liable for the acts of their subsidiaries. In other words, the presumption that a parent company exercises direct influence over the conduct of its subsidiary is only a presumption and can be rebutted by evidence showing the subsidiary did act independently. In this case, the ECJ did not consider the Commission had provided a sufficiently reasoned decision that responded to certain arguments submitted by Elf Aquitaine to prove Arkema had determined its conduct on the market independently and noted that the Commission had previously considered Elf Aquitaine and Arkema were not part of the same 'undertaking'.

C-521/09P, 23 September 2011

UK

[BAA seeks judicial review of the Competition Commission's decision requiring it to sell airports](#)

BAA has sought judicial review from the CAT after the Competition Commission ruled that the company had to sell Stansted and either Glasgow or Edinburgh airports. A BAA company statement sets out that this latest challenge relates to the Competition Commission's final decision in July 2011 (reported on in our [July 2011](#)

[bulletin](#)) that there were no material changes of circumstances or special reasons that would justify the Competition Commission amending its original decision (in 2009 following the market investigation into BAA airports) to require BAA to divest either of Glasgow or Edinburgh airport and Stansted airport.

The application sets out the four grounds on which BAA submits the conclusions in the final decision of the Competition Commission are flawed:

1. The Competition Commission failed in its duty to gather and assess the information necessary to perform its function and / or acted irrationally (and in particular as regards its adherence to its assessment of the competition benefits connected with the expansion of runway capacity).
2. The Competition Commission's assessment of the whether common ownership of Heathrow and Stansted airports gave rise to adverse effects on competition was flawed.
3. The Competition Commission's analysis of Stansted airport's profitability, which led to the conclusion that the divestiture remedy was proportionate, was irrational.
4. The Competition Commission failed to take into account the damage to BAA and its shareholders that followed the requirement to divest Stansted airport in a short timescale.

1185/6/8/11, 22 September 2011

REGULATORY

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EU

[BEREC presents analysis on Roaming Regulation to European Parliament](#)

The Body of European Regulators for Electronic Communications (**BEREC**) presented its analysis to the European Parliament on the Commission's proposals for a revised roaming regulation.

The current roaming regulation, which governs the tariffs on international roaming within the EU, expires in June 2012. The Commission published a consultation on the functioning of the current roaming regulation and sought views on issues such as the need for further regulatory intervention in relation to roaming charges (post-June 2012) and, if further intervention was deemed necessary, the most appropriate approach to such intervention. Following that consultation the Commission recently published a draft revised roaming regulation.

BEREC sets out the analysis that it shares with the Commission's proposal, highlights points where its analysis differs, and suggests a high level strategy for reducing roaming prices (along with proposed drafting changes in relation to the same).

30 August 2011

UK

[Ofcom bans rollover contracts](#)

Ofcom has confirmed that the sale of new rollover contracts, also known as Automatically Renewable Contracts (**ARCs**), which tie landline and broadband customers into repeated minimum contract periods unless they opt out, will be banned from 31 December 2011. The ban will apply to ARCs for landline and broadband services sold to residential and small business customers.

Ofcom has also indicated that it will require communications providers to move all residential and small business customers currently on rollover contracts to alternative deals, and to completely remove rollover contracts from the market by 31 December 2012.

Ofcom's evidence shows that ARCs raise barriers to competition by locking customers into long term deals with little additional benefit.

13 September 2011

Department of Energy & Climate Change considers giving Ofgem greater powers and more rights for energy consumers

The Department of Energy & Climate Change (**DECC**) has published a statement announcing measures proposed by the Energy Secretary to give the Office of Gas and Electricity Markets (**Ofgem**) greater powers and to enhance the rights of energy consumers. The aspects being considered by the Energy Secretary include whether competition is being hindered by the offering of cheaper deals online (and the Energy Secretary has asked Ofgem to look into this) and giving Ofgem new powers to require companies to provide potentially unlimited consumer redress for losses arising from a company breaching a licence condition, in addition to the current power of Ofgem to fine companies up to 10% of their annual turnover.

Under the proposed measures, companies will no longer be able to block action by forcing Ofgem to seek a second opinion from the Competition Commission and Ofgem will instead be permitted to take a decision which may then be appealed (which will also be open to small energy companies and Consumer Focus). This change is due to come into force by the end of the year, subject to Parliamentary approval. Another proposed measure includes a right to switch energy suppliers within three weeks once the cooling off period has expired for all customers who wish to change energy supplier and energy suppliers will be under a new obligation to speed up their switching processes (overseen by Ofgem).

A working group will also be established to examine the potential for collective purchasing and switching in the energy market and to review any barriers to helping consumers collaborating and getting a better deal.

11/076, 20 September 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/
