



This update provides an overview of the key legal and policy developments in UK & EU Competition law in April 2011. For further information, please contact a member of our competition team or your usual Burges Salmon contact.

Heathrow Airport abuses its dominant position by seeking to exclude competitors of its own “meet and greet” parking service

On 15 April, the High Court handed down a judgment upholding a claim by Purple Parking and Meteor Parking that Heathrow Airport Limited had breached the Chapter II prohibition of the Competition Act 1998 by attempting to restrict access to the airport’s forecourts.

Key points

- A dominant company can commit an abuse contrary to competition law not only on the market in which it is dominant, but also where its actions affect a downstream or derivative market (even if it is not dominant in that secondary market).
- This successful action by Purple Parking and Meteor Parking demonstrates how companies affected by anti-competitive behaviour can obtain an appropriate remedy directly from the High Court, rather than relying on the OFT or other competition authorities to act on their behalf.

Background

Heathrow Airport Limited (“HAL”) is a subsidiary of BAA. It is the owner and operator of Heathrow Airport, as part of which it operates a number of car parks on the Heathrow Airport site as an “on-airport” car parking provider.

Purple Parking Limited (“Purple”) and Meteor Parking Limited (“Meteor”) also provide “meet and greet” and “valet parking” activities on the Heathrow Airport site.

In 2010, HAL sought to change its arrangements with Purple and Meteor so that only its own car parking services would be available from the terminal forecourts (directly adjacent to the terminal buildings) with Purple and Meteor being relocated and operating from car parks further away from the terminal buildings. HAL would, therefore, be the only forecourt operator.

The Chapter II prohibition

Chapter II of the Competition Act 1998 aims to control market power. Merely having a dominant position is not illegal. However, companies that hold a dominant position have a ‘special responsibility’ not to allow their conduct to impair genuine and undistorted competition. They are not allowed to ‘abuse’ their positions of dominance.

There are essentially three stages to an analysis of whether the Chapter II prohibition may apply in a particular case. It is necessary:

- (i) to define the relevant market, since this is a pre-condition for deciding whether a company is dominant;
- (ii) to decide whether an undertaking is dominant within that market (as a general rule, a market share in excess of 40% usually suggests dominance); and
- (iii) to determine whether the company has then abused its dominant position.

It is well established that the Chapter II prohibition can apply in situations where the abusive conduct distorts competition in a downstream or derivative market by placing a company in the downstream market at a disadvantage. The dominant company does not have to be dominant or even present in the same market as the affected company. It is sufficient for the Chapter II prohibition to apply that the affected company is in a situation of economic dependence vis-à-vis the dominant company in the sense that the service or facilities offered by the dominant company are necessary to the exercise of the affected company’s business.

High Court Judgment

In the High Court, Mr Justice Mann noted at the outset that the trial took place on the footing that HAL is dominant in the “Facilities Market”, namely the provision of access to Heathrow’s facilities, including its roads and forecourts. Accordingly, it fell to the Court to establish the existence of an abuse of that dominant position contrary to the Chapter II prohibition.

The Court held that HAL had abused its dominance in the upstream Facilities Market by applying dissimilar conditions to equivalent transactions as between its own valet parking service on the one hand and those operated by Purple and Meteor on the other, adversely

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX
Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400

Chancery Exchange, 10 Furnival Street, London EC4A 1AB
Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7685 1266

www.burges-salmon.com

affecting competition in the downstream “meet and greet” parking service market.

In particular, the Court considered that there was a striking dissimilarity between the basis on which HAL and Purple/Meteor would have the benefit of forecourt access for “meet and greet” purposes if the revised arrangements proposed in 2010 were implemented. Purple and Meteor would be forced to operate from car parks significantly further away from the terminal buildings. This would affect the nature of the service they offer, both in real terms and in terms of customer perception.

The Court concluded that the result would have been an effective monopoly on the “meet and greet” service, and a serious risk to competition as far as the consumer is concerned. The customer would have only one product to buy. HAL could charge monopolist prices and potential “meet and greet” customers would have to pay those high prices if they want that distinct product (as opposed to another form of airport parking service).

Accordingly, the Court declared that it would make an order forbidding the proposed anti-competitive conduct, namely the exclusion from the forecourt of Purple and Meteor.

OFT refers treasury management services merger to Competition Commission

On 31 March, the OFT announced that it has decided to refer the completed acquisition by Sector Treasury Services Ltd of ICAP’s treasury management consultancy services business (known as Butlers) to the Competition Commission.

Treasury management consultancy services to local authorities include the supply of information and advice on, for example, investment and debt management, legal and regulatory compliance, risk assessment, and debt and investment accounting.

The merger has brought together the two leading players in the supply of these services to local authorities. The companies are considered by many customers to be each other’s closest competitors. Post-merger, they have a combined market share of more than 70%. Accordingly, the OFT has concerns about the potential impact the acquisition will have on prices, quality and service.

This is the fifth merger to be referred by the OFT to the Competition Commission so far in 2011.¹

Microsoft lodges formal complaint against Google

In the week ending 1 April, details emerged of a formal complaint to the European Commission lodged by Microsoft as part of the Commission’s ongoing investigation into whether Google has abused its dominant position contrary to Article 102 of the TFEU.²

Microsoft is complaining about a *‘pattern of actions that Google has taken to entrench its dominance in the markets for online search and search advertising to the detriment of European consumers.’* In particular, Microsoft complains of the inability of Microsoft’s Bing search engine to return search results with links to YouTube videos (YouTube is owned by Google) and the refusal of Google to allow Microsoft’s new Windows Phones to obtain full access to YouTube. Microsoft also makes allegations about Google’s discrimination against potential competitors in terms of advertisement placement.

It appears that this is the first time that Microsoft has ever formally complained to a competition authority about a rival. Indeed, Microsoft has itself been,

and continues to be, the subject of some of the most high profile antitrust investigations by the Commission founded on the basis of its own dominant position in several information technology markets.

The Commission is currently investigating Microsoft in relation to an alleged breach of Article 102 of the TFEU on the basis of its licence conditions to certain IT equipment manufacturers. Moreover, Microsoft is currently appealing to the EU General Court a fine of €899 million imposed by the Commission in 2008 having found that Microsoft had abused its dominant position in the market for client PC operating systems by refusing to supply interoperability information between Windows software and non-Microsoft operating systems.

Accordingly, there is a strong sentiment that this complaint may be a case of *“the pot calling the kettle black”*, although it also underlines to all companies, even those with large market shares, that competition law can be a sword as well as a shield.

Competition Appeal Tribunal substantially reduces fines imposed by OFT on recruitment agencies

On 1 April, the Competition Appeal Tribunal (“CAT”) handed down its judgment on appeals by three construction recruitment agencies (Eden Brown, CDI and Hays) against the fines imposed by the OFT for breaching Chapter I of the Competition Act 1998. The CAT reduced the total fines imposed from around £39 million to £7.9 million.

The CAT found that the OFT had erred in the following critical manners when calculating the fines it imposed:

- using the gross turnover of the companies, rather than the net fees (e.g. after the deduction of wages paid to temporary workers);
- using the relevant turnover from the year before the decision rather than the year prior to the infringement; and
- applying the Minimum Deterrence Threshold (MDT) in an inappropriately mechanistic manner.

This judgment follows similar recent rulings by the CAT to dramatically reduce the fines imposed by the OFT on several construction companies.³ As we noted in last month’s issue, these judgments raise serious questions of the OFT’s enforcement policy, both historic and for the future. In particular, they are likely to lead to significant reductions in fines for many pending and future appeals.

Land agreements no longer exempt from Chapter I prohibition

On 6 April, the Competition Act 1998 (Land Agreements Exclusion Revocation) Order⁴ entered into force. The Order revokes a 2004 order which excluded land agreements from the prohibition of anti-competitive agreements in Chapter I of the Competition Act 1998.

Accordingly, from 6 April, the Chapter I prohibition will apply uniformly to all agreements without exception, removing any scope for doubt that land agreements must be self-assessed and made compatible with the Chapter I prohibition in the same way as any other type of agreement.

In order to assist companies in the self-assessment of their land agreements, the OFT recently published the final version of its guidance on the application of competition to land agreements. This guidance can be accessed at the following webpage:

³We reported on the 90% reductions in fines imposed on construction companies in our March 2011 issue (Issue 8).

⁴SI 1709/2010.

<http://www.offt.gov.uk/OFTwork/policy/land-agreements>

For a more detailed analysis of the key implications of this change of law, please see our separate briefing on land agreements and competition law:

http://www.burges-salmon.com/Practices/real_estate/Publications/land_agreements_and_competition_law_11_10.pdf

Independent Commission on Banking sets out options to improve competition in the banking sector

On 11 April, the Independent Commission on Banking published its interim report, which consults on options for reforms to improve competition and stability in the UK banking sector.

The Commission was established by the coalition government in June 2010, its role being to examine the structure of the UK banking sector and recommend measures to promote stability and competition in the market for the benefit of consumers and businesses.

In relation to the current state of competition in the UK banking sector, the Commission noted that:

- the sector is highly concentrated: the five largest banks⁵ have a cumulative market share of around 90% of both the personal current account (PCA) sector and the small and medium-sized enterprise (SME) banking services sector;
- there are high barriers to market entry: due to customers' preference for banks with an extensive branch network, strong brand loyalty and low switching rates; and
- there is limited switching between banks: competition between banks is blunted by the actual and perceived difficulties for customers switching accounts and by poor conditions for consumer choice more generally.

In order to improve competition, the Commission recommends that the government seeks to enhance the obligations on Lloyds Banking Group (imposed as a condition of State aid clearance) to divest some of its assets. It is also proposing that measures be taken to improve switching and to address certain barriers to entry. Furthermore, the Commission considers that the new Financial Conduct Authority must have a clear role in promoting competition.

The Commission will publish its final report in September 2011.

European Commission imposes fines on washing powder cartel

On 13 April, the European Commission announced that it has imposed fines totalling €315 million on two producers of washing powder (Procter & Gamble and Unilever) for participation in an illegal cartel between 2002 and 2005 covering eight EU Member States.

The cartel began when the companies implemented an initiative through their trade association (the Association for soaps, detergents and other similar products in Europe) to improve the environmental performance of detergent products by reducing the weight of detergent powders as well as their boxes and bags in order to reduce packaging waste. However, the companies, on their own initiative, engaged in cartel activities, unrelated to these environmental objectives, which aimed at stabilising their market positions and at co-ordinating prices.

The decision was reached using the settlement procedure, whereby the companies acknowledged the infringement in return for a 10% reduction in the fine.

The time saving advantages of the settlement procedure can clearly be seen in this case as the Commission has reached an infringement decision within two years of conducting dawn raids, whereas cartel investigations typically take much longer. The Commission considers that the reduced investigation time is *'good for consumers and for taxpayers as it reduces costs; good for antitrust enforcement as it frees up resources to tackle other suspected cases; and good for the companies themselves that benefit from quicker decisions and a 10% reduction in fines.'*

Opinion on restrictions on internet sales in selective distribution agreements

The opinion of Advocate General Mazak in the pending case before the European Court of Justice of *Pierre Fabre Dermo-Cosmetique SAS* was recently published. The judgment of the Court is not expected for some time. The Pierre Fabre Group manufactures and markets cosmetics and personal care products and for certain of them stipulates that sales must be made in a physical space with a qualified pharmacist present. In practice, that stipulation has the effect of preventing all sales via the internet.

The question in front of the Advocate General was whether such a stipulation was anti-competitive and infringed Article 101 (1) of the TFEU.

In relation to the goods in question, the Advocate General considered that there was no objective justification for the general and absolute ban on internet sales. However, he did say that in, certain exceptional circumstances, limiting the sales of goods or services via the internet might be justifiable. Other than products which are regulated such as medicines where a ban on internet sales can be justified on the basis of the public good, a manufacturer would certainly have to show that it was essential for the customer to meet someone face to face because of the technical characteristics of the products.

Accordingly, a manufacturer using a selective distribution system must be confident that any restrictions included in its agreements with distributors clearly contribute to improving production or distribution, consumers benefit and, most importantly, such restrictions do not go beyond those which are objectively necessary in order to distribute the particular goods in an appropriate manner.

For further information please contact:



Laura Claydon

Partner

+44(0)117 939 2273

laura.claydon@burges-salmon.com



Marc Shrimpling

Solicitor

+44(0)117 939 2221

marc.shrimpling@burges-salmon.com

⁵ Including the so-called "Big Four" of RBS, HSBC, Barclays and Lloyds Banking Group (comprising HBOS since 2009).