



This update provides an overview of the key legal and policy developments in UK & EU Competition law in December 2010 and January 2011. For further information, please contact your usual Burges Salmon contact or a member of our competition team.

### **Court of Appeal rules that OFT fines cannot be recovered from directors or employees**

#### **Key points**

- A company that infringes provisions of the Competition Act 1998 relating to anti-competitive activity cannot recover any penalty imposed on it from its directors or employees.
- The public policy objectives of the Competition Act are to punish companies (not individuals) for breaches of the Act, and to deter other companies from infringing.
- However, individuals should be aware of the serious personal consequences which may follow from involvement in anti-competitive activity, including the criminal cartel offence.

On 21 December 2010, the Court of Appeal handed down its judgment in *Safeway v. Twigger*.<sup>1</sup> The judges were unanimous in holding that the case brought by Safeway against 11 of its former directors and employees to recover

a £10.7 million fine imposed on it by the Office of the Fair Trading (“OFT”) for breaches of competition law should be struck out.

#### **Background**

The case arose out of the OFT’s investigation into exchanges of pricing information among supermarkets and dairies regarding the prices of milk, butter and cheese in 2002-2003.

Several parties to the investigation, including Safeway, entered into early resolution agreements (“ERA”)<sup>2</sup> with the OFT. The ERA entered into between Safeway and the OFT in 2007 provided for Safeway to pay a reduced fine of £10.7 million, the reduction being conditional on Safeway continuing to co-operate with the OFT’s investigation.

In September 2008, Safeway brought the claim against 11 of its former directors and employees (“the Defendants”) to recover the amount of the fine and the costs Safeway had incurred during the course of the OFT’s investigation. Safeway alleged that the Defendants, in causing Safeway to breach the Competition Act, acted in breach of their employment contracts, and/or fiduciary duties, and/or had been negligent. In fact, Safeway’s motivation was to recoup the fine and costs from its directors and officers (D&O) insurance policy.

The Defendants applied for the claim to be struck out on the basis of the legal maxim *ex turpi causa non oritur actio* which prevents a claimant from recovering damages arising from his own illegal act. In addition, the Defendants argued that, as a matter of public policy, a company fined for breaches of the Competition Act should not be allowed to pass on the amount of the fine (by effectively claiming under a D&O insurance policy).

#### **Judgment**

Although unsuccessful at first instance, the Court of Appeal found in favour of the Defendants and, in a unanimous judgment, struck out Safeway’s claim.

<sup>1</sup> [2010] EWCA Civ 1472.

<sup>2</sup> i.e. a form of settlement, under which a party admits liability and agrees to pay a reduced penalty.

### *Application of the ex turpi causa maxim*

The Court considered that Safeway's liability for the breach of competition law was personal in the sense that Safeway was liable for intentionally or negligently breaching Chapter I of the Competition Act. Safeway was not being made vicariously liable for the acts of its employees. No-one is liable for the penalty imposed by the Competition Act except the relevant undertaking.<sup>3</sup> It was sufficient for the OFT to show companies intentionally or negligently infringed the provisions of the Competition Act.

Accordingly, the *ex turpi causa* rule applies to prevent the company from recovering from the employees that it claims were responsible for the breach of the law.<sup>4</sup>

The Court held that if it were the law that the *ex turpi causa* maxim could only be used against a company if the act were specifically authorised by the whole Board of Directors or shareholders in a general meeting, there would be little scope for the maxim to be used at all in a corporate context.

### *Public policy considerations*

The Court held that the policy of the Competition Act is to penalise undertakings for breaches of the Act, and to deter others from similar infringements in future. This policy would be undermined if companies were able to pass on their liability for infringements to their employees or, more particularly, the employees' D&O insurers.

It was noted that individuals may be punished separately for their involvement in anti-competitive activity, particularly under the criminal cartel provisions of the Enterprise Act 2002.

### **Conclusion**

This is an important judgment for companies found to have infringed competition law who were considering bringing a claim against their directors and employees in an effort to pass on to D&O insurers the costs of the OFT investigation and the penalty imposed. The Court of Appeal firmly rejected such an approach, ruling that the financial consequences of breaching the competition rules fall squarely on the company found to be in breach - and no-one else.

For employees and directors, the judgment removes the risk of damages actions by employers or former employers. However, individuals must still be wary of the potentially grave consequences of personal involvement in anti-competitive activity, including criminal liability and disqualification as a director.

## **European Commission opens investigation into alleged abuse of dominance by Google**

On 30 November 2010, the European Commission announced that it has opened a formal investigation into an alleged breach of Article 102 of the Treaty on the Functioning of the EU ("TFEU") by Google connected to its conduct in relation to on-line searches. Article 102 of the TFEU prohibits companies with a dominant position in a market in the EU from abusing this dominance.

The investigation follows complaints by competing on-line search service providers<sup>5</sup> about alleged unfavourable treatment of their services in Google's search results and alleged preferential placement of Google's own services.

In response to the announcement, Google published a statement which stressed that it will '*continue to work closely with the Commission to answer their questions*' but rejected any suggestion of wrongdoing on its part.

In relation to the specific allegations of abusive behaviour, Google contends that it provides more information about how its ranking of results works than any other major search engine, while protecting against compromising the integrity of its results.

More fundamentally, and perhaps surprisingly, Google also denies that it holds a dominant position in the on-line search market, despite most analysts regarding its European market share as being in excess of 90%.

## **European Commission publishes new rules applicable to co-operation agreements between competitors**

On 14 December 2010, the European Commission adopted revised regulations and guidelines for the assessment of horizontal co-operation agreements (i.e. agreements between competitors or other companies active at the same level of the supply chain).

### **New block exemption regulations**

If an agreement complies with the conditions of a block exemption, it is regarded as being within a "safe harbour" and is presumed to be compliant with EU competition law.

The new research and development ("R&D") and specialisation block exemption regulations replace previous regulations on these matters<sup>6</sup> from 1 January 2011, with a transitional period

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<sup>3</sup> Section 36 of the Competition Act 1998.

<sup>4</sup> The Court of Appeal did note that the situation may be different in cases of strict liability, where there has been no intentional or negligent behaviour on the part of the company, but that situation did not arise in this case.

<sup>5</sup> Complaints were made by Foundem (a UK price comparison site), ejustice.fr (a French legal search engine) and Ciao (a shopping comparison site owned by Microsoft).

<sup>6</sup> Regulations 2659/2000 (R&D) and 2658/2000 (specialisation).

of two years for pre-existing agreements that meet the conditions of the previous regulations.

Of particular note, the new R&D block exemption regulation extends the scope of the R&D block exemption so as to also cover "paid for research" (where one party merely finances the R&D activities of the other party).

The new specialisation block exemption clarifies that the exemption will continue to apply even where one of the parties to the agreement only partly ceases production. This will enable a company that has two production plants for a certain product to close down one of its plants, outsource the output of the closed plant, and still benefit from the block exemption.

### Revised guidelines on horizontal co-operation

The European Commission has also published new guidelines for the assessment of co-operation agreements between competitors, so-called horizontal co-operation agreements.

The main changes, as compared with the previous guidelines published in 2001, that have been introduced are:

- a substantial review of the **standardisation** chapter, introducing more transparency into the process of standard-setting; and
- a new chapter on **information exchange** which attempts to explain exactly when an exchange of information is good or bad for competition. In particular, this new chapter provides clarity on the treatment of information exchanges depending on whether the information is strategic, public or private, aggregated or individualised and future, current or historic.

For a more detailed assessment of the key implications of the new block exemptions and guidelines, please refer to our briefing which will be available via the commercial section of our website: <http://www.burges-salmon.com/Practices/commercial/Publications/default.aspx>

### OFT announces market study into private healthcare

On 14 December 2010, the OFT announced that it is seeking views prior to launching a market study into private healthcare. It is consulting on the proposed scope of the market study to make sure that the correct issues are being considered.

The OFT plans to launch the market study in Spring 2011.

Currently, the OFT proposes that the study should cover the following issues:

- the level of concentration amongst providers of private

healthcare at the national, regional and local levels, and whether this limits the extent of competition in the market;

- the existence of barriers preventing private healthcare providers from entering or expanding in the market;
- the existence of any restrictions on the ability of consultants and other medical professionals to practice;
- how consumers access and assess information, and how they exercise choice in the provision of private healthcare; and
- how the NHS impacts on competition, both as a potential supplier and a funding source for private healthcare.

Reports suggest that the focus of the market study will be on the so-called "Big Five" private hospital groups (General Healthcare, Spire, HCA, Nuffield Health and Ramsay) which have gained market share due to consolidation by way of acquisition in recent years. In particular, concerns have been expressed that HCA has a dominant position in the London area.

For further information on the general implications and potential outcomes of a market study, please refer to the September 2010 issue (issue 3) of this update: [http://www.burges-salmon.com/Practices/commercial/competition/Publications/UK\\_EU\\_Competition\\_Update\\_September\\_2010.pdf](http://www.burges-salmon.com/Practices/commercial/competition/Publications/UK_EU_Competition_Update_September_2010.pdf)

### Vince Cable relieved of competition law responsibility after Murdoch controversy

On 21 December 2010, the Prime Minister's spokesman announced that the Secretary of State for Business, Vince Cable, will take no further part in the decision over News Corporation's proposed takeover of BSkyB.<sup>7</sup> In addition, all responsibility for competition and policy issues relating to media, broadcasting, digital and telecoms sectors will be transferred immediately to the Secretary of State for Culture, Media and Sport.

This decision follows critical comments made by Vince Cable about Rupert Murdoch and the proposed News Corp/BSkyB merger, which reportedly indicated his intention to block the deal.

### Competition Commission clears Zipcar/Streetcar merger

On 22 December 2010, the Competition Commission published its final report on the completed acquisition of Zipcar of Streetcar, the two largest car clubs operating in London.

As expected, the Competition Commission confirmed its

<sup>7</sup> We reported in the November 2010 issue (issue 5) of this update that the Secretary of State had issued an intervention notice in relation to the proposed merger - see page 3 of issue 5.

provisional conclusion that the acquisition may not be expected to result in a substantial lessening of competition in the car club market in London. The decision was based principally on strong evidence that other companies (such as Hertz) were likely to enter or expand into the car club market in the near future, and that this new market entry would constrain the merged entity from raising prices or reducing service quality.

### **Ryanair appeals against OFT decision to review its stake in Aer Lingus**

In the November 2010 issue (issue 5) of this update, we reported on the OFT's intention to investigate Ryanair's 29.82% shareholding in Aer Lingus under UK competition law.<sup>8</sup> This followed a ruling by the EU General Court that Ryanair could not be required to divest its stake in Aer Lingus under EU competition law, thereby upholding the European Commission's decision on the minority shareholding published in June 2007.

On 10 January 2011, the Competition Appeal Tribunal ("CAT") published a notice of an application by Ryanair for review of the decision by the OFT to investigate its stake in Aer Lingus.

In particular, Ryanair is challenging the legality of the OFT's decision that it is "in time" to review the acquisition. The crux of this issue is whether the OFT is entitled on the facts to rely on an exception to the general rule that the OFT is only able to refer to the Competition Commission completed relevant mergers within four months of the merger's completion or from the time material facts about the merger were made public. The exception in question applies when, because of the applicability of EU merger control rules, the OFT could not act at a UK level until the matter was first resolved at an EU level.

Accordingly, this application by Ryanair raises important and novel issues relating to the OFT's jurisdiction to review a transaction that has been the subject of previous examination both by the European Commission and the EU courts.

### **Communication on developing the European dimension in sport**

On 18 January 2011, the European Commission published a Communication on developing the European dimension in sport. In particular, the Communication considered the concept of the "specific nature of sport" in relation to the application of EU law to sporting rules.

Article 165 of the TFEU provides that the EU shall contribute to the promotion of European sporting issues, while taking into account the specific nature of sport, its structures based on voluntary activity and its social and educational function.

The Communication makes clear that sporting rules developed by sports organisations relating to the organisation and proper conduct of competitive sport must be compatible with EU law. In order to assess the compatibility of sporting rules with EU law, the Commission will consider:

- the legitimacy of the objectives pursued by the rules, such as the fairness of competitions, the protection of athletes' health, the financial stability of sports clubs and the training of young athletes; and
- whether any restrictive effects of those rules are inherent in the pursuit of the objectives and whether they are proportionate to them.

### **Secretary of State to consider possible undertakings in lieu of referring News Corp/BSkyB merger to Competition Commission**

On 25 January 2011, the Secretary of State for Culture, Olympics, Media and Sport, Jeremy Hunt (who took over responsibility for this matter from Vince Cable – see above), stated that on the basis of the advice and submissions received from OFCOM and from the OFT, he considers that it may be the case that the proposed merger between News Corporation and BSkyB may operate against the public interest in media plurality. Accordingly, he intends to refer the merger to the Competition Commission for further investigation.

However, before doing so, the Secretary of State will consider whether undertakings in lieu proposed by News Corporation will prevent or otherwise mitigate the merger from having effects adverse to the public interest.

At this stage it is unclear what the nature of any undertakings offered by News Corporation might be, although the press speculation is that they are likely to relate to ensuring the editorial independence of Sky News.

### **OFT announces market study into off-grid energy**

On 25 January 2011, the OFT announced that it is consulting on the scope of a market study into the supply of energy to consumers who are not connected to the main gas grid.

Off-grid energy supply includes any product that can be used by consumers who are not connected to the gas mains network to supply energy to heat their homes. Examples include heating oil, LPG, coal or renewable sources that generate heat and electricity, such as heat pumps or solar panels. The OFT

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<sup>8</sup> Page 2 of the November 2010 issue (issue 5).

estimate that two and a half million people rely on off-grid energy.

Complaints have been received by the OFT about the supply of energy to off-grid consumers including concerns about high prices, delayed deliveries, difficulties in switching and a lack of transparency in the market.

The OFT is consulting on the scope of the market study until 28

February and intends to formally launch the study in March 2011.

For further information on the general implications and potential outcomes of a market study, please refer to the September 2010 issue (issue 3) of this update: [http://www.burges-salmon.com/Practices/commercial/competition/Publications/UK\\_EU\\_Competition\\_Update\\_September\\_2010.pdf](http://www.burges-salmon.com/Practices/commercial/competition/Publications/UK_EU_Competition_Update_September_2010.pdf)

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