UK & EU Competition Update

Issue 7

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

OFT refers two mergers to the Competition Commission for full investigation

Key points

- The OFT has referred two mergers to the Competition Commission (the "CC") in the last month. This compares with three in the whole of 2010.[1]
- A CC investigation typically lasts at least six months, during which time the merging companies will generally be restricted from further integration pending the CC's decision.

Recent merger references to the CC

Tail lift spare parts

On 18 February, the OFT announced that it has decided to refer Ratcliff Palfinger's ("RP") anticipated acquisition of Ross and Bonnyman's ("R&B") tail lift spare parts business to the CC. The parties are two of the three largest suppliers of column tail lifts for commercial vehicles in the UK.

In November 2010, R&B announced its intention to cease manufacturing commercial vehicle tail lifts and RP now intends to acquire its spare parts business. The OFT examined the effect of the proposed acquisition on both the spare parts markets and the primary market for column tail lifts.

The OFT considers that R&B's intention to leave the tail lift market may have been influenced by RP's decision to purchase its spare parts business. The OFT therefore considers that the acquisition would have the effect of removing one of the largest players in the supply of tail lifts for commercial vehicles market which raises a realistic prospect of a substantial lessening of competition.

Irish sea ferries

On 8 February, the OFT announced that it has decided to refer Stena's completed acquisition of two Irish Sea ferry services from DFDS to the CC.

The OFT has concerns that Stena may not have withdrawn from a route that competed with the acquired services in the absence of the merger, and has concluded that the merger created a realistic prospect of a substantial lessening of competition in the supply of ferry services from the North West of England to Northern Ireland.

In December 2010, having acquired assets and vessels on the Liverpool-Belfast and Heysham-Belfast routes from DFDS, Stena immediately announced that it was withdrawing from the competing Fleetwood-Larne route. The OFT did not consider that the evidence was compelling enough for it to rule out concerns that the closure of the route may have been influenced by the acquisition (Stena has submitted that it would have exited from the Fleetwood-Larne route regardless of the acquisition).

The OFT's approach

The above merger references are unusual as the OFT has questioned whether an undertaking's withdrawal from a market was motivated by the merger itself rather than extraneous natural market forces.

When analysing a merger or proposed merger, the OFT will compare the effects on competition of the merger completing with a "counterfactual" – ie what would have happened absent the merger, in particular whether the parties would have been likely to remain independent competitors taking into account their viability and likely expansion plans.

If a company can show that it intended to exit the market regardless of the merger being completed or not, the "counterfactual" analysis will be similar to the analysis of the completed merger, potentially reducing the chance of an adverse finding. However, the OFT will usually only consider market exit due to natural market forces. In these cases, the OFT has suggested that the exit was prompted by the mergers themselves.

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1 Getty Images and Rex Features, Zipcar and Streetcar, Dorf Ketal and Johnson Matthey.

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briefing

Comments

In both cases a reference to the CC might have been avoided if the parties had been able to provide sufficient evidence to the OFT to demonstrate that the market exits were not related to the mergers and would have happened in any event. The OFT will generally require convincing evidence, including detailed financial information, before accepting that any market exit was inevitable. Because the OFT only has a short time in which to decide whether to make a reference to the CC, it is important that parties present sufficient evidence up-front.

In the case of Irish Sea Ferries, the parties went ahead and completed the transaction without first notifying the OFT. The parties will now be required to hold the businesses separate during the six month CC inquiry and may ultimately be required to unwind the merger if the CC prohibits the merger. Whilst UK merger control does not require prior clearance of a transaction, the present case clearly illustrates the risks of doing so.

OFT applies new merger de minimis guidelines for the first time

The Office of Fair Trading has decided not to refer the anticipated merger between Towers Watson Limited and The EMB Group to the Competition Commission. Although its report of 18 February 2011 found that there was a realistic prospect of reduced competition in the market for risk pricing software for UK non-life insurers, no reference was made as the "de minimis" exemption was applied.

The OFT found that the merging companies were effectively the only suppliers in the risk pricing software market and that the acquisition would therefore lead to a monopoly. However as the value of the affected market was less than £1.4 million, the OFT considered it was a market of insufficient importance and chose to apply the "de minimis" exception to the duty to refer.

This is the first occasion where the OFT has exercised its discretion to apply the "de minimis" exception in accordance with its revised December 2010 guidance. This approach contrasts with the recent Zipcar / Streetcar merger, where the OFT chose not to apply its "de-minimis" exception, despite the market falling within the "de-minimis" threshold.[2]

Commission appeals ruling on parent company liability

On 18 February, The European Commission announced that it has launched an appeal against the finding of the General Court that an intermediate parent company should not be liable for the participation of its subsidiary in a Spanish raw tobacco cartel.

The appeal relates to a Commission decision in October 2004 which imposed joint and several liability on World Wide Tobacco Espana's ultimate and intermediate parent companies. This decision was successfully appealed by the parent companies, resulting in the decision being partially annulled. The Commission is also appealing the annulment on procedural grounds.

General Court upholds free to air rights for the Football World Cup and European Championships

On 17 February, the General Court dismissed appeals by FIFA and UEFA against a European Commission Decision allowing the broadcast of the Football World Cup and European Championships on free to air channels in the UK.

FIFA and UEFA had challenged the UK's designation of the events as being of major importance. The designation ensured that the events were broadcast on free to air channels, preventing FIFA and UEFA from auctioning the exclusive rights to the highest bidder. While the designation did not prevent the rights also being sold to pay TV providers, the rights would be less attractive to these operators without exclusivity.

The General Court dismissed arguments regarding the designation procedure and an alleged restriction on pay TV operators' freedom to provide services.

FIFA and UEFA also argued that the designation effectively granted the BBC and ITV a special or exclusive right to broadcast the events, making possible an abuse of a dominant position.

The General Court also dismissed these arguments noting that the designation did not prevent pay TV providers from bidding to broadcast the events alongside the free to air channels. The fact that pay TV providers will only bid for exclusive rights and thus do not bid for the events, is a consequence of the pay TV business model and not of the designation.

NHS to launch damages action against Reckitt Benckiser

The Secretary of State for Health, all 10 Strategic Health Authorities and 144 Primary Care Trusts in England have filed a follow-on damages claim at the high court against Reckitt Benckiser following the OFT's finding of an abuse of dominance in October 2010.

The OFT fine was imposed after Reckitt Benckiser had de-listed and withdrawn Gaviscon Original Liquid from the NHS prescription search engine in 2005 and replaced it with a new Gaviscon product. The de-listing was timed to maintain Gaviscon's position as the default prescription drug at the expense of new and cheaper generic products. Consequently, GPs were denied access to the cheaper product and Gaviscon benefitted from increased sales of its patented alternative.

This is a further example of third parties pursuing follow-on damages claim following an infringement decision by the OFT and the first such claim by the public sector.

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2 See our August update http://www.burges-salmon.com/Practices/commercial/competition/Publications/UK_EU_Competition_Update_August_2010.pdf

European Commission launches further investigations into airline co-operation agreements

On 11 February 2001, the European Commission began an investigation into code sharing arrangements between Lufthansa and Turkish Airlines and between Brussels Airlines and TAP Air Portugal.

These agreements enable the airlines to sell each others' seats on overlapping routes, creating a risk of co-ordination and potentially reducing competition on the routes concerned. This practice should be distinguished from legitimate arrangements whereby airlines sell each others' seats on routes, which do not overlap.

This action is the latest in a series of ongoing investigations into the airline industry.[3]

OFT report on equity underwriting market study

On 27 January, the OFT published its report on its market study into equity underwriting and associated services.

The market study was launched in June 2010, prompted by the OFT becoming aware of company and institutional shareholder dissatisfaction with equity underwriting services and associated services, in particular increases in underwriting fees and discounts on rights issues. There had also been some public debate about the functioning of the market in the wider context of the financial crisis.

The OFT has now found that the equity capital market is not currently working as efficiently as it could as there is little effective competition on underwriting fees. This is due to several features of the market, including:

- asymmetric information: it is difficult for companies to assess whether they are receiving a cost effective outcome when they purchase equity underwriting services because most are not frequently involved in raising equity capital. This prevents them from building up sufficient experience of the market to hold their underwriters fully to account on fees;
- limited price sensitivity by buyers: the main priorities of a company purchasing equity underwriting services tend to be speed, confidentiality and the successful take-up of new shares; and
- limited transparency: negotiations over fees tend to be based on the perceived "going rate" rather than the parties' judgement on the overall value of the service being received.

However, rather than taking any further action itself or making a market investigation reference to the CC, the OFT has concluded that it would be more efficient and effective for the market to resolve the problems itself.

Accordingly, the OFT has identified a number of recommendations for actions by companies and institutional shareholders to drive greater competition, including to be more willing to:

- request a breaking of the underwriter's proposed fees into constituent components;
- hold competitive tenders between investment banks; and
- increase the number of banks with whom they have relationships.

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[3] See our November update http://www.burges-salmon.com/Practices/commercial/competition/Publications/UK_EU_Competition_Update_November_2010.pdf

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