

## UK & EU Competition update - Issue 16

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

### OFT publishes revised guidance on the application of competition law to farmers

On 9 November, the Office of Fair Trading (OFT) published an updated version of its guidance on how competition law applies to co-operation between farming businesses.

The guidance does not introduce any new law but provides clarity on the sorts of behaviour and agreements in the farming sector that are more or less likely to breach competition law.

The guidance is structured as a question and answer format in three sections:

#### 1. Competition law and policy in the farming sector

This section explains the role of the OFT and outlines the two statutory prohibitions, which farming businesses should be aware of, namely: the prohibition of anti-competitive agreements between companies; and the prohibition of the abuse of market power or dominant positions.

A summary of how the OFT assesses the concepts of relevant markets, market power and dominance is also included. This description is important as market shares are used to assess the application of possible exemptions from the law (the guidance includes a summary table).

#### 2. Collaboration in the farming sector

The OFT is keen to emphasise that beneficial forms of co-operation between farming businesses (such as the formation of co-operatives and collective agreements relating to the sharing of machinery and to R&D) are generally pro-competitive. However, where such agreements are made between otherwise competing businesses, there is the potential for types of co-ordination which may harm consumers.

The guidance addresses how farming businesses can draft, structure and manage specific agreements (such as, agreements to share overheads, create buying groups and set-up co-operatives) in a manner which avoids these pitfalls and complies with competition law.

It is important to note that agreements which are designed to or have the effect of fixing prices, sharing markets / customers or otherwise causing certain negative effects, are highly likely

to breach competition law. Sanctions include fines and, for the most serious cartel offences, potential criminal liability.

The OFT also uses this section of the guidance to respond to the presumption made by many in the farming and agriculture sectors, framed around the question: '*Aren't all forms of agricultural collaboration excluded automatically from EU law and the Competition Act?*'

The OFT explains that the Competition Act does exclude from consideration under UK competition law many agreements between farmers or farmers' associations which concern the production or sale of agricultural products (including livestock, dairy, meat and fish products as well as fruit, vegetables and other crops), or the use of joint facilities for the storage, treatment and processing of agricultural products.<sup>1</sup> However, this exclusion only applies if the agreements meet certain conditions, particularly:

- the agreements are only between farmers or associations of farmers; and
- the agreement must not involve an obligation on the farmers to charge identical prices for their products.

#### 3. Merger control

The final section of the guidance is a reminder that co-operation agreements may amount to a merger if a party transfers some or all of its business to another party in the collaboration. Where such a transaction creates or enhances a share of supply of 25%, or if the target company has a turnover in excess of £70 million, it is advisable to formally apply to the OFT for approval before completing.

However, the OFT stated firmly that there is no presumption that a merger leading to a market share greater than 25% raises competition concerns. Rather, each case will be considered on its own merits.

The OFT concluded by noting that competition law can significantly benefit farming businesses by establishing the conditions under which they can develop sustainable forms of co-operation and by protecting against abuses of competition by others. It is important for farmers to consider competition law when negotiating and implementing agreements and these guidelines aim to provide a user-friendly starting point for compliance.

For a full copy of the OFT's guidance to farming businesses, please click on the following link:

[http://www.offt.gov.uk/shared\\_offt/ca-and-cartels/OFT740rev.pdf](http://www.offt.gov.uk/shared_offt/ca-and-cartels/OFT740rev.pdf)

<sup>1</sup> Schedule 3, paragraph 9 of the Competition Act.

## European Commission publishes set of best practices on co-operation between national competition authorities on multi-jurisdictional mergers

On 9 November, the European Commission announced that it and the head of EU national competition authorities (NCAs) have agreed a set of best practices on co-operation in merger review. These best practices are intended to provide clarity on how co-operation among national competition authorities will operate in multi-jurisdictional merger cases, such as where the merger falls outside the EU Merger Regulation but requires notification in more than one EU Member State.

A large number of mergers are notified each year in two or more EU Member States. These are mergers that do not fall within the exclusive jurisdiction of the European Commission under the EU Merger Regulation, and therefore do not benefit from the “one stop shop” the Commission provides.

Of particular note, the best practices provide that:

- where multi-jurisdictional mergers raise similar or comparable issues in relation to jurisdictional or substantive questions, the NCAs concerned will decide on a case-by-case basis whether co-operation may be necessary or appropriate;
- NCAs receiving notification of a multi-jurisdictional merger will inform all other NCAs of this and provide update information to the NCAs concerned throughout the proceedings; and
- effective co-operation between NCAs requires the active assistance of the merging parties at all stages of the review process. As part of this assistance, the merging parties are encouraged to provide waivers of confidentiality to all NCAs where the merger is reviewable.

## OFT opens investigation into agreements in the pharmaceutical sector

On November 14, the OFT announced that it had opened an investigation into certain patent litigation settlement agreements relating to a medicine used to treat depression and anxiety. The investigation is being conducted under Chapters I and II of the Competition Act 1998 and Articles 101 and 102 of the Treaty of the Functioning of the European Union.

The current investigation comes as a consequence of the European Commission’s monitoring of patent settlements by pharmaceutical companies following its pharmaceutical sector inquiry in 2009.

## European Commission announces new initiatives to be delivered in 2012

On 15 November, the European Commission published its Work Programme 2012. This sets out the key new initiatives that the Commission commits to deliver in 2012.

In relation to EU competition law, the Commission intends to propose a legislative initiative to ensure effective damages actions before national courts for breaches of EU competition law rules and to clarify the inter-relation of such private actions with public enforcement by the Commission and the national competition authorities, notably as regards the protection of leniency programmes, in order to preserve the central role of public enforcement in the EU.

In addition, the Work Programme sets out the Commission’s intention to adopt legislative proposals with a view to further market opening in the rail sector, and in particular of domestic passenger markets.

## European Commission publishes brochure for businesses on competition compliance

On 23 November, the European Commission published a new brochure: *Compliance matters: what companies can do better to respect EU competition rules*. The brochure explains the importance of compliance, summarises the key rules and sets out practical steps that can be taken to ensure compliance with EU competition rules.

In particular, the brochure emphasises that:

- ignorance of EU competition law will not shield businesses from the consequences of breach;
- companies should develop a tailor-made, written compliance strategy, the goals of which are to raise awareness of potential competition law issues and disseminate adequate knowledge of how to avoid issues at all levels of the company; and
- the mere existence of a compliance programme is not enough to counter the finding of an infringement of competition rules. Companies must in fact comply.

For a full copy of the Commission’s compliance brochure, please click on the following link:

[http://ec.europa.eu/competition/antitrust/compliance/compliance\\_matters\\_en.pdf](http://ec.europa.eu/competition/antitrust/compliance/compliance_matters_en.pdf)

## Government accepts package of self-regulatory measures to address concerns about pub sector

On 24 November, the Department for Business, Innovation and Skills (BIS) announced that the government does not intend to take any statutory or other measures to address concerns raised about the pub sector, but it has agreed a package of self-regulatory measures with the industry.

Taking into account, in particular, the OFT’s conclusions in its investigations of the super-complaint by the Campaign for Real Ale (CAMRA) that the pub sector in the UK is competitive overall,<sup>2</sup> the government has decided that a package of self-regulatory measures agreed with the industry is the best way of addressing issues in the market.

<sup>2</sup> The OFT published its final decision on the CAMRA super-complaint on 14 October 2010.

BIS notes that legally binding self-regulation can be introduced far more quickly than any statutory solution and can, if devised correctly, be equally effective. Under the agreed package, a new Industry Framework Code will be made legally binding, by incorporating it by reference into new agreements and via a collateral contract for existing lessees.

In addition, a Pub Independent Conciliation and Arbitration Service and Pub Advisory Service will be set up, and the existing Framework Code will be strengthened.

In relation to the contentious issue of “beer ties” (i.e. obligations imposed by large pub companies under tied lease agreements to sell certain volumes of the pub companies’ own drinks) BIS echoed the OFT’s conclusion that tied lease arrangements are not preventing tied pubs from offering a wide choice of drinks to consumers. Accordingly, the government will not intervene in setting the terms of such commercial, contractual relationships where the OFT has found that they do not raise any competition issues that significantly affect consumers.

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