

UK & EU Competition update - Issue 15

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

Competition Commission sets out provisional remedies to address competition problems in local bus markets

On 6 October, the Competition Commission (CC) published for consultation its provisional decision on remedies to address the adverse effects on competition that it has provisionally identified in local bus markets.

Key Points

- The CC intends to make various recommendations for regulatory and legislative changes to increase the number and effectiveness of multi-operator ticketing schemes, impose restrictions on bus operators making changes to service frequency, require the provision of information about deregistered supported services and encourage greater use of partnerships.
- The CC is also minded to recommend that the Office of Fair Trading (OFT) apply a high priority to identifying bus mergers going forward.
- The CC also intends to make an order requiring bus operators who manage bus stations to grant access to other operators on fair, reasonable and non-discriminatory terms.

Background

In January 2010 the OFT referred the market for the supply of local bus services in Great Britain (excluding London) to the CC, having concluded that there were reasonable grounds for suspecting that a number of features of the market prevent, restrict or distort competition.

On 6 May 2011¹, the CC provisionally concluded that supply in local commercial bus services is prevented, restricted or distorted where a combination of the following features are present:

- High levels of concentration, both in terms of limited overlap between operators' services and also the limited presence of operators within the wider local area;
- Barriers to entry and expansion, such as sunk costs on entry and cheap exclusion tactics of competitors; and
- Customer conduct, including the use of single operator multi-journey tickets and a preference to catch the first bus available to minimise waiting time.

The CC estimates that the value of the detriment to customers is likely to be between £58 million to £148 million per year.

Provisional decision on remedies

With a view to addressing the substantive problems identified in its conclusions published in May, the CC is proposing to take forward remedies in the following areas:

Ticketing

In order to reduce barriers to entry and expansion and also increase the number of bidders in tendered contracts, the CC proposes that the number and attractiveness of multiple operator tickets should be significantly increased. Coupled with this, the CC recommends that the Secretary of State for Transport have additional powers to introduce mandatory multi-operator ticketing schemes.

Operator Behaviour

The CC recommends that constraints on certain forms of unilateral operator behaviour be introduced to prevent competition aimed at promoting a rival's exit and the use of "cheap exclusion action" (such as deliberately blocking or delaying a rival's services, intimidating drivers and removing rival timetables). To this end, the CC recommended that the Traffic Commissioners introduce and enforce a local bus operators Code of Conduct, the conditions of which will attach to operator licenses and registrations.

Access to Bus Stations

In order to prevent operators that manage bus stations from restricting access to competitors by imposing high or discriminatory charges or measures, the CC recommended that an order is introduced which requires access to bus stations to be on fair and reasonable terms. Compliance with this order will be monitored by the OFT.

Key aspects of the order will include a requirement to publish Conditions of Use for the bus station, an obligation on the bus station manager to enter into a written contract with each user, a requirement that the manager publish procedures for the timely resolution of disputes, including escalation to an independent expert, the relevant local transport authority (LTA) or the OFT.

Partnership arrangements between LTAs and operators

The CC considers that partnerships between LTAs and bus operators have an important role to play in co-ordinating the actions and investments of operators and LTAs in order to improve the provision of information to bus passengers.

¹As we reported in detail at pages 1 and 2 of the May 2011 issue (Issue 10) of this update.

It is hoped this will increase the usage of bus services and also increase the likelihood that passengers will make an informed choice between rival operators. This in turn could indirectly address the barriers to entry and expansion by increasing the attractiveness of the market to new and/or expanding operators. However, the CC noted that it is also necessary to be aware of the risk of misuse of partnerships, in particular by facilitating co-ordination.

Ensuring effective competition enforcement

The CC believes that the effective enforcement of competition law will have an important role to play in supporting the proposed remedies. In addition, effective merger control will prevent further increases in market concentration.

The CC noted that although the value of routes directly effected by anti-competitive measures may be small on a national scale, such routes may nevertheless have a significant competitive impact in the local market. Furthermore, there is a risk that even small mergers may be removing significant competitors within a local market. In this context, the CC proposes that the OFT continues to apply high priority to identifying bus mergers and that a cautious approach in exercising its discretion not to refer mergers to the Competition Commission on de minimis grounds is taken.

The CC added that it is also important that the OFT remain vigilant to the risk of tacit co-ordination in the bus sector and that any operators who feel they are being subjected to abusive or illegal conduct feel empowered to raise these concerns with the OFT.

Next Steps

Comments are invited on the proposed remedy package by 27 October. The CC is required to report on the reference by 6 January 2012. It therefore aims to publish its final report in late 2011.

ORR consults on the potential for increased on-rail competition

On 4 October, the Office of Rail Regulation (ORR) issued a consultation on the potential for increased on-rail competition (i.e. direct competition between train operators).

Competition within the passenger rail sector currently takes place principally "for the market" by way of franchise competitions. The extent of on-rail competition "in the market" between overlapping franchises or between passenger train operators who operate outside the scope of any franchise (known as open access operators) is very limited.

At present, open access operators² run relatively few services, accounting for less than 1% of all timetabled train kilometres. On-train competition only exists on the East Coast mainline, and in a small number of instances of competition between train operating companies as a result of franchise overlaps.

The ORR considers that competition is a potentially important way to drive value for money improvements. Where operators need to win or retain passengers in the face of rivalry, this puts them under pressure to keep costs down, use resources where they are valued most and respond to passengers' needs and

wants, which may stimulate product or service innovation.

Having said this, the ORR concedes that any increase in on-rail competition will be evolutionary and incremental. The nature of franchises and the ORR's access policy currently restrict the network capacity available to open access operators. In addition, those areas where the market could support competition are in general those areas where network congestion is most acute and capacity is most restricted.

Responses to the consultation are invited by 4 December.

European Court of Justice rules that prohibition on use of foreign TV decoder cards to watch Premier League football breaches EU law

On 4 October, the European Court of Justice (ECJ) handed down a ruling on questions referred from the High Court on the compatibility with EU law of territorial exclusivity agreements relating to football broadcasting rights.

The Football Association Premier League (FAPL) is the governing body of the English football Premier League. FAPL licences broadcasting rights for live transmission of Premier League matches. The licenses are granted on a territorial basis and for three year terms. The rights are awarded to broadcasters following an open competitive tender procedure.

Actions were brought in the High Court in two cases, including that of landlady Karen Murphy, involving pubs that bought cheap foreign (Greek) satellite-decoder equipment and cards for use in screening live football matches in UK pubs, so as to avoid the higher fees charged by the satellite broadcast rights-holder in the UK. In each case, FAPL alleged that the actions of the publicans breached FAPL's copyright and other intellectual property law.

In defence, Karen Murphy and the other publicans argued that the prevention of their use of the decoders would amount to restriction on the EU freedom of foreign broadcasters to provide services. Coupled with this, the defendants contended that FAPL's licences with foreign broadcasters breach EU competition law, on the basis that the prohibition on the foreign broadcasters from supplying decoder cards for use in the UK is based on agreements that limit the markets into which they are permitted to supply their broadcasting services.

The ECJ ruled that national legislation which prohibits the import, sale or use of foreign decoder cards is contrary to EU law on freedom to provide services (Article 56 of the TFEU³).

In addition, provisions of exclusive licence agreements that prohibit the supply of decoder cards to TV viewers who wish to watch the broadcasts outside the Member State for which the licence is granted constitute a breach of EU competition law (Article 101 of the TFEU). The ECJ agreed with the defendants that such provisions in exclusivity agreements between the holder of IP rights (i.e. FAPL) and broadcasters obliging the broadcaster not to supply decoding devices enabling access outside the territory covered by the exclusivity agreement constitute a restriction on competition prohibited by Article 101 of the TFEU.

²The most prominent open access operators in the UK are Hull Trains and Central Trains.

³i.e. Treaty on the Functioning of the European Union.

However, the ECJ also ruled that the transmission in a pub or other public venue of broadcasts containing copyright protected works (such as the opening video sequence of the Premier League anthem) constitutes a “communication to the public” under the Copyright Directive⁴ for which the authorisation of the author of the works is required. This aspect of the ruling would seem to mean that as long as FAPL ensures that its match coverage includes sufficient copyright protected elements, pubs will not be allowed to show foreign broadcasts without FAPL’s express consent. It seems, however, that individual viewers should, in theory, be free to purchase foreign decoder cards and equipment in order to obtain access to any cheaper Premier League sports packages offered in other EU Member States.

Notwithstanding this possible distinction between public and individual viewers because of copyright law, on the basis of this ruling, doubts will be cast about the legality, under competition law, of restrictions in exclusive broadcasting rights licence agreements that provide for absolute territorial protection for broadcasters by preventing viewers in one EU Member State from acquiring equipment allowing them to view broadcasts from another EU Member State.

OFT refers joint venture between in-flight catering suppliers to the Competition Commission for in-depth investigation

On 10 October, the OFT announced that it has decided to refer the anticipated joint venture between Alpha Flight Group Limited and LSG Lufthansa Service Holding AG to the Competition Commission (CC) for an in-depth investigation. The parties are major UK suppliers of in-flight catering to the airline industry, providing both traditional hot meals and light snacks for passenger flights in and out of the UK.

The OFT found that the joint venture would lead to:

- high combined market shares in the supply of in-flight catering at 10 UK airports which would create a risk of increased prices for those customers; and
- a reduction in the number of major national UK suppliers from three to two.

Several airline customers expressed concerns about the impact that the transaction could have on their choice of supplier.

The OFT was not satisfied that existing competitive constraints or new entry would be sufficient to replace the loss in competition which would be likely to arise from the merger, in particular in relation to supply of in-flight meals for long-haul airlines.

This is the tenth merger referred to the CC by the OFT so far in 2011.

Tesco lodges appeal against retail dairy products decision

On 17 October, the Competition Appeal Tribunal (CAT) published a notice of an appeal lodged by Tesco to challenge the decision of the OFT fining Tesco for its involvement in two infringements of the Competition Act in relation to the retail pricing of cheese.

Back in August,⁵ the OFT found that four supermarkets, including Tesco, and five dairy processors had breached the Competition Act by co-ordinating price increases for certain dairy products. The OFT imposed total fines of £49.1 million. Tesco was the only addressee of the OFT’s decision that did not enter into an early resolution agreement, whereby the OFT offered a reduction in the fine in return for an admission of liability.

In its notice of appeal, Tesco claims that:

- the OFT was wrong to conclude from the evidence that Tesco participated in an unlawful concerted practice in relation to both of the infringements; and
- in the alternative, the penalty imposed on Tesco was excessive and disproportionate.

Tesco therefore asks that the CAT quash the OFT’s decision or alternatively reduce the penalty imposed on it.

European Commission confirms dawn raids in the Euro interest rate derivatives sector

The European Commission announced that, on 18 October 2011, it conducted unannounced inspections at the premises of companies active in the sector of financial derivative products linked to the Euro Interbank Offered Rate (EURIBOR) in several EU Member States. The Commission states that it has reason to believe that the companies may have engaged in anti-competitive practices in breach of Article 101 of the Treaty on the Functioning of the European Union (TFEU).

The inspections (conducted under Article 20 of Regulation 1/2003) are a preliminary step in the Commission’s investigation into the suspected anti-competitive practices. Depending on the complexity of the case, and the co-operation of the companies involved, the investigation could take a number of years to complete.

For a summary of the key do’s and don’ts in the event of a dawn raid, please see the Burges Salmon dawn raid survival guide: http://www.burges-salmon.com/Practices/commercial/competition/Publications/Dawn_Raids_a_survival_guide.pdf

European Court of Justice rule on absolute ban on internet sales in selective distribution agreements

In the April 2011 issue of this update, we reported on the opinion of Advocate-General Mazak in the case of Pierre Fabre Dermo-Cosmetique SAS.⁶ On 13 October, the European Court of Justice (ECJ) handed down its ruling, coming to the same conclusion as the Advocate-General.

Pierre Fabre manufactures and markets cosmetics and personal care products. The Court of Appeal in Paris referred a question to the ECJ for a preliminary ruling on whether Pierre Fabre’s ban on selling its goods via the internet within the context of a selective distribution network, constituted a “hard core” restriction of competition and so could not fall within the Vertical Agreements Block Exemption Regulation (“VABER”).

⁴ Directive 2001/29.

⁵ For a detailed review of the OFT’s decision, see pages 1 and 2 of the August 2011 issue (Issue 13) of this update.

⁶ See page 3 of the April 2011 issue (Issue 9) of this update.

The first point made by the ECJ was that neither the EU Treaty nor the VABER referred to the concept of “hard core” restriction of competition and, therefore, the question needed to be understood as seeking to establish whether the ban amounted to a restriction of competition ‘by object’. Where the anti-competitive object of an agreement is established it is not necessary to examine the effects on competition. In order to establish whether the ban involved a restriction of competition ‘by object’, regard has to be had to the content of the clause, the objectives it seeks to attain and the economic and legal context. The ECJ was clear that a ban on internet sales is liable to restrict competition.

The ECJ held that the absolute ban on the internet sales in this case did amount to a restriction by object.

The ECJ pointed out that it had not accepted arguments relating to the purported need to provide individual advice to the customer and to protect against the incorrect use of products (as in the context of prescription medicines). There was no objective justification for such a clause in the context of cosmetics and personal care products.

The ECJ added that the aim of maintaining a prestigious image is not a legitimate one for restricting competition and cannot therefore be used as justification for the absolute ban.

Pierre Fabre also tried to argue that the ban on selling via the internet was equivalent to a prohibition on operating out of an unauthorised establishment but the ECJ did not accept that argument and made it clear that the internet is a method of marketing rather than a place.

The ECJ did, however, hold open the possibility that an individual exemption might be available where the conditions set out in Article 101(3) TFEU were met, but gave no further guidance on the circumstances in which these conditions might be met such that a ban on internet sales would be permissible.

Competition Appeal Tribunal rulings on applications for costs following construction appeals

On 21 October, the Competition Appeal Tribunal (CAT) handed down its rulings on twelve applications for the costs of appeal against the decision of the OFT in the construction bid-rigging/cover pricing case.

The CAT held that, as a matter of principle, the starting point in appeals against a decision under the Competition Act 1998 should be that the successful party recovers its costs. Accordingly, it rejected the OFT’s claim that the starting point should be that costs lie where they fall.

Moreover, the CAT held that the fact that each of the costs applicants had infringed the Competition Act and so were liable to have a fine imposed does not affect the proper starting point for the decision on costs in appeals that were limited to penalty.

The CAT therefore ruled that the OFT should have to contribute up to £200,000 to the costs incurred by any one appellant, this sum representing the maximum that an entirely successful appellant should recover from the OFT in respect of the preparation and conduct of the appeal.

OFT refers market for statutory audit services to large companies to Competition Commission

On 21 October, the OFT published its decision to refer the market for statutory audit services to large companies in the UK to the Competition Commission for a market investigation under the Enterprise Act 2002.

The OFT has identified a number of features of the market that it believes restricts competition, including, high market concentration (the so-called “Big Four” audit firms – PwC, KPMG, Deloitte and Ernst & Young – earned 98.5% of the total audit fees levied for FTSE 250 companies in 2010), high barriers to entry and conditions imposed by banks requiring use of the Big Four as a condition of certain lending agreements.

This is the first market investigation reference made by the OFT since local bus services in January 2010. The OFT notes that in this case it did not need to conduct a formal market study before reaching a decision that the test for reference has been met.

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⁷ For a detailed review of the CAT’s rulings in the construction decision appeals, see pages 1 and 2 of the March 2011 issue (Issue 8) of this update.