



This update provides a brief overview of significant legal and policy developments in UK & EU Competition law in August 2010. For further information, please contact your usual Burges Salmon contact or a member of our competition team using the details below.

## Ofcom refers premium pay TV movies market to the Competition Commission

### Key Points

- Following its decision on the pricing of BSkyB's Sports packages,<sup>1</sup> Ofcom takes action to scrutinise BSkyB's market power in the pay TV movies market.
- This is only the second market investigation reference made by a regulatory body under the Enterprise Act.<sup>2</sup>

### Background

On 4 August, Ofcom announced it had referred the supply of wholesale pay TV packages and the acquisition of TV premieres of major films to the Competition Commission.

A market investigation reference to the Competition Commission is a tool used to investigate whether specific features of a particular market are restricting competition and if so, propose appropriate remedies.

Through its range of standard and on-demand movie channels, BSkyB currently has strong market power in the pay to view movie market. In June 2009, as part of its wider investigation into the pay TV market, Ofcom published a consultation seeking views on BSkyB's role in the wholesale supply of core premium sports and movie channels.

BSkyB currently offers 12 premium movie channels including two channels dedicated to broadcasting new releases. In addition to a variety of movie channels, BSkyB also holds the exclusive rights to show films in the "first pay TV subscription windows" (i.e. premieres) for six major Hollywood Studios including Walt Disney, NBC Universal and Time Warner.

### Market definition

Ofcom began by identifying two closely related markets within the wider pay TV movies market:

- 1 the distribution of rights to broadcast major Hollywood premieres in the UK; and
- 2 the wholesale supply of packages containing at least one of BSkyB's core premium channels.

### Market features and effect on competition

On the basis of this market definition, Ofcom identified the following market features, amongst others, as adversely affecting competition:

- BSkyB's market power and exclusivity agreements with Hollywood studios;
- the limited number of major movie releases per year; and
- the staggered TV release of major films including specific "windows" to show premieres.

These features prevent the development of alternatives to BSkyB's products (particularly subscription video on demand) and lead to high wholesale prices restricting the distribution of BSkyB's core premium movie channels to other pay TV providers. As a consequence there is less consumer choice, limited innovation and high retail prices. Ofcom's view is that BSkyB benefits from this status quo so is incentivised to maintain it.

### Reference

In making the reference, Ofcom rejected arguments from BSkyB that any referral should be delayed until their appeal of the Sports Packages Decision (see footnote 1) is resolved.

The Competition Commission has invited initial views from interested parties and are drafting an Issues Statement. As both BSkyB and other pay TV providers appealed the Sports Packages Decision, separately arguing that it was too weak / too strong, this saga is likely to continue for some time.

## The Competition Commission provisionally approves variation of the ScotRail Undertakings

Following its takeover of the Scottish Passenger Rail Franchise in 2004, FirstGroup was required by the Competition Commission to give certain behavioural undertakings (the "Undertakings") to address concerns about competition between First's bus and rail services on overlapping routes.

In particular, the Undertakings required FirstGroup to continue operating certain bus services and adhere to various service standards.

Since the Undertakings came into force, the costs of operating bus services in Scotland have increased significantly, particularly fuel costs. Coupled with this, passenger demand for many services has declined sharply. In light of this change of circumstance FirstGroup submitted a request to vary the Undertakings in respect of 16 services, withdrawing seven and modifying nine.

<sup>1</sup> Ofcom issued a Decision on 31 March 2010 requiring BSkyB to set the wholesale price of its sports packages to a level determined by Ofcom (the "Sports Packages Decision"). BSkyB is currently appealing this decision but separately, has been found to have imposed unfair restrictions on Top Up TV's purchase of the reduced priced sports packages.

<sup>2</sup> The other reference was made by the Office of Rail Regulation in 2007 and led to Rolling Stock Companies accepting undertakings regarding competition in the leasing of rolling stock.

In its provisional decision published on 3 August 2010, the Competition Commission accepted FirstGroup's assessment that the increase in costs and decline in passenger numbers on certain services constitute a change of circumstance which justifies making variations to the Undertakings. Accordingly, the Competition Commission has provisionally decided to allow all withdrawals and all but one of the modifications proposed by FirstGroup.

*Burges Salmon is currently advising FirstGroup in this ongoing matter.*

## The OFT makes second merger reference of the year

The OFT has referred the completed acquisition by Zipcar Inc of Streetcar Limited to the Competition Commission. Both companies are car clubs, which allow members to rent vehicles by the hour.

This referral is interesting as the car club market is a nascent sector and Zipcar and Streetcar are recent entrants. It is unusual for the OFT to refer mergers in these circumstances as consolidation in nascent markets is often considered beneficial to consumers.

The full decision was published by the OFT as we went to print. We will report on the full reasoning in the next update.

In an indication of the current low level of merger activity, this is only the second merger reference this year within 21 total decisions on mergers compared to 8 references and 80 decisions in 2008/9 and 10 references and 111 decisions in 2007/8.

## The Competition Commission introduces amended Groceries Market Investigation (Controlled Land) Order 2010

Following the 2008 market investigation into the supply of groceries in the UK, the Competition Commission found retailers were purchasing land in the vicinity of their existing stores and introducing restrictions to prevent the development of rival stores in the local area.

The Competition Commission identified this practice as a barrier to competition and has subsequently finalised the Groceries Market Investigation (Controlled Land) Order 2010 (the "Order") requiring the named retailers to release these restrictions within six months of the Order entering into force.

This requirement is subject to a local concentration test based on the number of competing stores within a 10 minute drive of the store and the local market share of the relevant store.

## Ofwat consults on change of control of Bournemouth and West Hampshire Water

Ofwat has opened a consultation on the acquisition of a 97.66% shareholding in Cascal N.V. (the parent company of Bournemouth and West Hampshire Water plc ("BWH")) by Sembcorp Utilities Pte Ltd, a subsidiary of Singapore based Sembcorp Industries Limited.

Ofwat is seeking views on:

- the capacity of Sembcorp to be the owner of a regulated water company;
- which entity in the Sembcorp Group should provide the "Ultimate Controller" undertakings; and
- changes to Condition F of BWH's conditions of appointment firstly, to prevent removal of cash or other assets to an associated company, should such a move threaten BWH's credit rating and secondly, a requirement to certify that BWH has sufficient internal control systems to operate for the next 12 months.

The consultation closes on 21 September.

Note: Defra announced on Thursday 26 August that it will be reviewing Ofwat's current remit, responsibilities and statutory duties. It will also examine Ofwat's decision-making and if the regulator is providing value for money.

## The OFT issues Annual Report for 2010

On 27 July, the OFT issued its 2010 Annual Report. The Report focuses on the OFT's work over the previous 12 months and is an indication of future policy and sector priorities.

The next 12 months promises to be busy for the OFT as judgments in the Construction and Construction Recruitment appeals are handed down by the Competition Appeals Tribunal. In addition, the appeals against the OFT's Decision in the Tobacco Price Fixing investigations are anticipated to be heard in early 2011. As the economy continues to recover, the OFT's mergers branch is also likely to be busier.

In addition to its core regulatory functions, the OFT has stated its intention to engage with government on upcoming reform to the competition regime such as stimulating greater competition in banking and the energy sector.

## Upcoming news

In the next issue we will be reporting on the much anticipated Akzo Nobel judgment from the European Court of Justice on the extension of legal privilege to in-house Counsel at EU level.

### Further information



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