



# UK & EU Competition Update

Issue 3

September 2010

**This update provides a brief overview of significant legal and policy developments in UK & EU Competition law in September 2010. For further information, please contact your usual Burges Salmon contact or a member of our competition team using the details on page 3 of this briefing.**

## OFT market studies: implications for your business

In the past two years, the number of market studies conducted by the Office of Fair Trading ("OFT") has doubled. There are currently five on-going market studies.<sup>1</sup>

This briefing shines a light on market studies by describing in general terms how they work and the key implications for businesses in the market under scrutiny.

### What are market studies?

Market studies are one of a number of tools at the OFT's disposal to address competition or consumer protection problems, alongside its enforcement activities.

Typically, market studies are examinations into the causes of why particular markets are not working well for consumers, leading to proposals as to how they might be made to work better. They take an overview of regulatory and other economic drivers in a market and patterns of consumer and business behaviour.

The OFT guidance on market studies states that *'[w]here there is a clear case of a breach of competition or consumer protection law by an individual business, taking enforcement action will usually be preferred over starting a market study.'*<sup>2</sup> Market studies, on the other hand, are intended to be used where enforcement action would not remedy the perceived problem, such as where competition problems are caused by behaviour which is endemic across a whole market. In such a case, the 'holistic perspective' of the market study is preferred to focussed enforcement against one or a small number of businesses.<sup>3</sup>

As well as looking at particular markets, market studies can relate to practices across a range of goods and services, for example doorstep selling.

### Launch and information gathering

A market study may be commenced either on the OFT's initiative or following complaints from individual businesses, trade associations, consumer groups and/or other interested parties.

The OFT conducts a market study by gathering information through questionnaires, focus groups, meetings with stakeholders and visits to businesses where appropriate. Comparative information is then obtained about similar markets in other sectors or countries to build up a picture of how competitively the market in question is performing.

If the OFT has reasonable grounds for suspecting that any feature of a market is anti-competitive, the OFT has the power to:

- require parties to give evidence; and,
- require the production of specified documents and information.

The average length of OFT market studies from launch to publication of the final report is 12 months.

### Outcomes

A market study will lead to one or more of the following outcomes, listed in order of the potential severity of their consequences for your business:

- a market investigation reference to the Competition Commission ("CC"). The CC would then review the market in question and could impose either, wide-ranging measures, including the divestment of assets or, alternative enforcement action against particular businesses found to be responsible for harm to competition in the market studied;<sup>4</sup>
- recommendations to government;
- formal recommendations to businesses by the OFT or trade bodies such as reviews of terms and conditions or codes of conduct;

1 Studies into: aggregates (please see our study specific briefing) [http://www.burges-salmon.com/Practices/real\\_estate/minerals/Publications/OFT\\_Aggregates\\_Study.pdf](http://www.burges-salmon.com/Practices/real_estate/minerals/Publications/OFT_Aggregates_Study.pdf); outdoor advertising; advertising of prices; equity underwriting; and consumer contracts.

2 Guidance on the OFT's approach to market studies, paragraph 2.14 (September 2010).

3 Ibid, paragraph 2.15.

4 For example, following a market study into BAA airports, BAA was required to divest Stanstead, Gatwick and Edinburgh or Glasgow airport. Burges Salmon advised the Competition Commission on the corporate aspects of the sale of Gatwick Airport for £1.5bn but did not provide competition law advice.

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- consumer-focused action such as the OFT-led awareness campaign to enable consumers to make better purchasing decisions which followed the market study into second hand car sales; and
- a clean bill of health for the market.

### Looking ahead

Rumours have been circulating, not least since Robert Peston's blog on the BBC website on 16 September<sup>5</sup>, that the OFT and the CC may soon be merged.

Set against this backdrop, it remains to be seen whether this trend to conduct more market studies will continue or whether the OFT (in its current or future guise) will refocus its resources on enforcement action.

### Practical points

- A market study does not mean you are alleged to have infringed competition law.
- Engage with the OFT and respond to any questionnaires or reasonable information requests.

## The ECJ limits the scope of legal professional privilege for in-house lawyers

The European Court of Justice ("ECJ") has recently upheld a decision that legal professional privilege does not extend to communications between in-house lawyers and their employers. This runs contrary to English law where all communications from in-house lawyers are protected.

For more information on this important case, please see our earlier briefing ([http://www.burges-salmon.com/Practices/commercial/competition/Publications/Are\\_your\\_documents\\_safe.pdf](http://www.burges-salmon.com/Practices/commercial/competition/Publications/Are_your_documents_safe.pdf)).

## CAT dismisses Asda's application to amend Notice of Appeal in Tobacco appeals

The Competition Appeal Tribunal (the "CAT") has refused Asda permission to amend its Notice of Appeal in order to pre-empt the OFT enforcing provisions of the early resolution agreement ("the ERA") entered into between the parties on 11 July 2008, which would have allowed the OFT to increase Asda's fine.

On 16 April 2010, the OFT issued a decision fining ten retailers (including Asda) and two manufacturers a total of £225 million for alleged price fixing agreements concerning the sale of tobacco (the Decision). During the course of the investigation, Asda entered into an ERA with the OFT whereby its eventual fine was reduced following an admission of liability and an agreement not to contest the Decision. The ERA granted the OFT the following rights in the event that Asda decided to appeal:

- 1 to apply to the CAT to increase the fine (clause 7(a));
- 2 to require Asda to pay the OFT's full costs of any appeal (clause 7 (b)); and
- 3 to terminate the agreement and impose a further fine for the infringement (clause 11).

Following Asda's submission of an appeal to the Decision on 15 June 2010, the OFT wrote to Asda to inform them of their intention to exercise the rights under clause 7(a) but that it did not intend to pursue clauses 7(b) or 11 at this time. Asda responded by applying to the CAT to amend its Notice of Appeal contesting the ability of the OFT to require Asda to pay costs and impose a further fine.

However, the CAT rejected Asda's application stating firstly, that until the OFT sought costs there was no need to make a judgment and secondly, that any separate fine would require a new infringement procedure to be brought by the OFT and separate appeal.

### Comment

This is the first instance of an ERA party appealing a decision so it will be interesting to see how the validity of the early resolution procedure is effected. This hearing also demonstrates the CAT's unwillingness to hear such issues pre-emptively.

Burges Salmon act for the Co-operative Group Limited in this investigation and subsequent appeal.

## OFT and Competition Commission publish first joint merger guidelines

On 16 September, the OFT and Competition Commission published the final version of their joint merger assessment guidelines. The guidelines are designed to assist companies and their advisers by providing greater clarity on how the competitive impact of mergers is assessed.

The publication revises and expands guidance previously contained in several publications issued separately by the two Authorities.

The guidelines set out the questions the Authorities will consider when reviewing mergers, how they define a 'relevant merger situation', what is meant by a 'substantial lessening of competition' and the criteria and methodology used when assessing mergers. The guidelines also deal with public interest cases, an issue which has become somewhat emotive following high profile takeovers of British companies such as the acquisition of Cadbury by Kraft.

Key revisions to the existing guidance include:

- a shift in emphasis towards direct assessment of effects on competition and away from a detailed assessment of market definition; and,

<sup>5</sup> [http://www.bbc.co.uk/blogs/thereporters/robertpeston/2010/09/oft\\_and\\_competition\\_commission.html](http://www.bbc.co.uk/blogs/thereporters/robertpeston/2010/09/oft_and_competition_commission.html)

- more detail in the sections on barriers to entry, mergers between non-competitors and on the exiting firm scenario (more commonly known as the 'failing firm defence').

## Update on Zipcar/Streetcar merger

Following the referral of Streetcar Limited's proposed acquisition by Zipcar inc in our previous issue ([http://www.burges-salmon.com/Practices/commercial/competition/Publications/UK\\_EU\\_Competition\\_Update\\_August\\_2010.pdf](http://www.burges-salmon.com/Practices/commercial/competition/Publications/UK_EU_Competition_Update_August_2010.pdf)) the OFT has released its referral decision and the Competition Commission has also released its issues statement.

### Referral Decision

The acquisition's referral attracted attention as it is unusual for corporate activity in nascent markets to be scrutinised. While both companies are relatively small, as their combined UK share of supply in UK car clubs exceeded 25% the OFT decided a relevant merger situation had been created and considered the merger further.

The OFT established the market as the provision of car club services in London. It decided that, based on the combined market share of 80% to 90%, the competitive restraint on Streetcar by Zipcar, the comparatively weak position of other car clubs in London and the barriers to new entrants, the acquisition created a realistic prospect of a substantial lessening of competition.

## OFT approves acquisition of four hospitals by General Healthcare Group subject to divestment undertakings

The OFT has assessed the completed acquisition by General Healthcare Group ("GHG") of four Abbey hospitals which were previously part of the Covenant Healthcare Group. The OFT found that the acquisition gives rise to a substantial lessening of competition in respect of the local market around the Abbey Carrick Glen hospital in Ayrshire. The acquisition has reduced the number of private medical service providers from three to two.

The turnover of the affected market is below £10 million, therefore the OFT considered whether the *de minimis* exception should apply. However, the OFT applied its policy that **it will not exercise its discretion to apply the *de minimis* exception where the harm to competition could, in principle, be remedied by clear-cut undertakings.**

To resolve the OFT's concerns, GHG offered to divest the Abbey Carrick Glen hospital. The OFT considers that this divestment would ensure that users of private medical services in the area would continue to have sufficient choice. The OFT decided not to impose an up-front buyer requirement, recognising that this could prove to be a disproportionate burden on GHG given the small size of the affected market.

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