UNITED KINGDOM

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LEGISLATIVE DEVELOPMENTS

On March 16, 2011, the UK Department for Business, Innovation and Skills published its long-awaited consultation paper on options for reforming the UK competition regime.[1] The reform is intended to be evolutionary rather than revolutionary, with the key expressed aims being to (i) improve the robustness of decisions and strengthen the regime, (ii) support the competition authorities in taking forward high impact cases, and (iii) improve speed and predictability for business.

The proposals consider a large number of issues but three are particularly noteworthy in terms of their potential impact on business. First, there is a proposal to merge the competition functions of the Office of Fair Trading (the "OFT") and the Competition Commission (the "CC") to create a single Competition and Markets Authority (the "CMA"). The exact details of how the new CMA would be structured remain open, with the consultation including a number of options.

Secondly, the consultation considers ways to improve the current voluntary merger notification scheme in the UK. The possibilities referred to include the mandatory pre-notification of mergers. Under one pre-notification proposal, very low thresholds would be used, these being requirements that the target has turnover in the UK exceeding £5 million (approximately US$8 million) and that the acquirer has worldwide turnover exceeding £10 million (approximately US$15.9 million).

Thirdly, since there have been no successful prosecutions under the "cartel offence" (which provides for individual criminal liability for certain cartel-type activities), save in a case in which there were guilty pleas, there is a proposal to alter the current requirement that the individual's actions were "dishonest". The preferred option is the removal of the "dishonesty" element from the offence altogether, with a redefinition of the offence so that it does not include agreements made "openly".

There were two other legislative developments worthy of note. The government accepted the OFT's recommendation to extend the duration of the Public Transport Ticketing Schemes Block Exemption in its current form for an additional period of five years until February 29, 2016. An order extending the Block Exemption on these terms came into force on February 28, 2011.[2] This provides for an automatic exemption from competition law for certain ticketing arrangements concerning public transport.

In addition, on April 6, 2011, a special exclusion from competition law for certain types of land-related agreements was removed. Reflecting this change, on March 24, 2011, the OFT published guidance on the application of competition law to such agreements.[3] The guideline sets out that there is no presumption that a land agreement will infringe competition law (and the OFT expects that only a small minority will do so), but that restrictions on the use of land may potentially infringe competition law where this protects a business from competition, or prevents its competitors from entering a market. Generally, the OFT is unlikely to take further action in cases where none of the parties to an agreement has more than a 30% share of the market in which the land is being used.

MERGERS

In 2011, the OFT took 94 merger decisions, which was a material increase on the 2010 figure of 69. It referred 11 cases to the CC for a detailed second stage review, which was also a material increase on the 2010 figure of three. The failing firm defence was used in clearing the completed acquisition by Stena of Irish Sea ferry routes from DFDS, cleared on June 29, 2011[4], and the acquisition by Ratcliff Palfinger of the commercial vehicles tail lifts spare parts

1 Department for Business, Innovation and Skills consultation document, March 2011, "A Competition Regime for Growth: A Consultation on Options for Reform", available at http://www.bis.gov.uk/Consultations/competition-regime-for-growth.

2 Order 2011 No. 277 is available at http://www.legislation.gov.uk/.

3 OFT Press Release, March 24, 2011, "OFT publishes final Land Agreements Guideline", available at http://www.oft.gov.uk/news-and-updates/press/2011/42-11.

4 CC Press Release, June 29, 2011, "CC Clears Ferry Acquisition", available at http://www.competition-commission.org.uk/inquiries/ref2011/stena_dfds_merger_inquiry/.

business of Ross & Bonnyman, cleared on June 10, 2011.[5] The defence was also used in the completed acquisition by Sector Treasury Services Ltd of ICAP plc's treasury management consultancy services business (Butlers). The CC concluded that, if not sold, the target business would have been closed, even though this would not have been for financial reasons.[6]

A travel business joint venture between Thomas Cook, the Co-operative Group and the Midlands Co-operative Society, was cleared on August 16, 2011 by the CC.[7] This case was of particular interest for two reasons. It was the OFT's first fast track referral. For a case to be fast tracked to reference, the OFT must have evidence in its possession at an early stage in an investigation that it believes objectively justifies a belief that the test for reference to the CC is met and the notifying parties must have requested and given consent for use of the procedure. In addition, although the transaction was subject to the EU Merger Regulation (the "EUMR") and not UK merger control, the OFT had requested and obtained its "referral back" to the UK pursuant to Articles 9(2)(a) and 9(2)(b) of the EUMR due to concerns about the impact of the transaction specifically in the UK.

The OFT itself used the failing firm defence in clearing at phase one the acquisition by Kingfisher of 30 Focus "do-it-yourself" (DIY) stores from Cerberus (the private equity owner).[8] The 30 stores formed part of Focus' portfolio of 177 DIY stores across the UK until Focus went into administration (bankruptcy proceedings) in May 2011.

Airline Ryanair's bid for Aer Lingus gave rise to a unique situation concerning the interaction between UK and EU merger control law. Ryanair acquired a stake in Aer Lingus and then in October 2006 mounted a public bid for the entire shareholding in Aer Lingus. The European Commission (the "EC") investigated the public bid and decided to prohibit it in June 2007 under the EUMR. The General Court of the European Union ruled in July 2010 that the EC does not have the ability to examine or require divestment of minority shareholdings that do not confer "decisive influence" for the purposes of the EUMR. The OFT subsequently commenced a UK merger investigation.[9] Ryanair appealed this decision to the Competition Appeal Tribunal (the "CAT"), which on July 28, 2011 concluded that the OFT was "in-time" to review the acquisition.[10]

Under the Enterprise Act 2002, the OFT is able to refer mergers to the CC up to four months after the merger's completion or after the time material facts about the merger were made public, whichever is later. However, the Enterprise Act 2002 also provides that references can be made outside this four month timetable when the reference could not have been made earlier because of anything done under or in accordance with the EUMR. The CAT agreed that the OFT was unable to apply UK national merger control legislation whilst appeals were ongoing in the European courts. Had the OFT opened an investigation under the Enterprise Act 2002 while the EU appeal process was ongoing, it would have created a risk of inconsistent outcomes and conflict of jurisdiction that would have been contrary to the duty of sincere co-operation set out in Article 4 of the Treaty on the Functioning of the European Union (the "TFEU"). The Court of Appeal granted leave to Ryanair to appeal against the CAT's judgment and granted interim measures suspending the OFT's investigation of the merger until the court has ruled.

News Corporation's proposed acquisition of the 60.9% of British Sky Broadcasting that it did not already own gave rise to another extraordinary and high-profile saga.[11] The transaction was notified to the EC under the EUMR and approved from the competition law point of view in December 2010. In November 2010, the UK government issued a European intervention notice in relation to the

5 CC Press Release, June 10, 2011, "R&B Merger Gets Cleared", available at http://www.competition-commission.org.uk/inquiries/ref2011/ratcliff_ross_bonnyman_merger_inquiry/index.htm.

6 CC Press Release, August 31, 2011, "CC Clears STS/Butlers Merger", available at http://www.competition-commission.org.uk/inquiries/ref2011/Sts_Butlers/index.htm.

7 CC Press Release, August 16, 2011, "CC Clears Thomas Cook/Co-op Travel Agency Joint Venture", available at http://www.competition-commission.org.uk/inquiries/ref2011/thomas_cook_co_op_travel_agency_joint_venture/.

8 OFT Press Release, July 7, 2011, "OFT clears Kingfisher acquisition of 30 former Focus stores", available at http://www.oft.gov.uk/news-and-updates/press/2011/78-11.

9 OFT Press Release, October 29, 2010, "OFT statement on its investigation of Ryanair's minority shareholding in Aer Lingus", available at http://www.oft.gov.uk/news-and-updates/press/2010/112-10.

10 OFT Press Release, July 28, 2011, "OFT welcomes Competition Appeal Tribunal judgment in Ryanair/Aer Lingus merger case", available at http://www.oft.gov.uk/news-and-updates/press/2011/86-11.

11 Detailed information is available on the Department for Culture, Media and Sport's website at http://www.culture.gov.uk/what_we_do/media_mergers/7880.aspx.

proposed acquisition. The UK Office of Communications ("Ofcom"), a specialist regulator, was asked to investigate and provide advice and recommendations on the public interest considerations of the transaction. This concerned the sufficiency of plurality of persons with control of media enterprises.

On March 3, 2011, the government announced that, following advice from Ofcom and the OFT, it intended to accept undertakings from News Corporation in lieu of a referral to the CC. The undertakings would involve Sky News, a satellite television news channel, being "spun-off" as an independent public limited company. However, following a "phone hacking" scandal in the UK and the closure of News Corporation's "News of the World" newspaper, the offer of undertakings was withdrawn and the transaction was referred to the CC on July 11, 2011. Very shortly after this, on 13 July, the transaction was abandoned, with News Corporation stating that it would be "too difficult to progress in this climate".

The UK regulators were also active in publishing guidance. On March 17, 2011, the OFT and CC published a joint commentary on retail mergers.[12] The commentary considers the issues raised in the various retail cases examined by the two authorities over the last seven years. It covers a broad range of cases, including mergers of mobile phone outlets, bookshops, DIY stores, opticians and specialist food shops. It shows how the authorities have developed their approaches and techniques. Often these mergers have involved analysis across a large number of local outlets, some owned by large national chains, some by smaller independent companies, as well as companies supplying over the Internet. The commentary focuses on three of the questions that have most often arisen in past cases, namely:

- local catchment areas for retail outlets;
- the extent to which competition takes place at the local and national levels; and
- techniques used to assess how mergers might affect retail prices.

On March 25, 2011, the CC and the OFT jointly published a quick guide to help businesses understand what to expect from the competition authorities when they investigate a merger.[13] The publication complements the detailed joint Merger Assessment Guidelines , which were published by the CC and OFT in September 2010. The quick guide outlines what merging companies can expect, from the earliest stages of the process onwards. It covers issues such as whether to notify the authorities, the different roles of the OFT and CC, which mergers are reviewed, and when they might be referred for a full investigation by the CC.

On April 5, 2011, the CC and the OFT published guidance setting out good practice principles for the design and presentation of consumer survey research in merger inquiries.[14] The guidance is designed to assist companies and their advisors wishing to submit research evidence to the two authorities during merger inquiries.

On April 28, 2011, the CC opened a consultation on its new merger procedural guidelines.[15] These describe the main stages of a merger inquiry and are intended to help parties prepare for their participation when such inquiries are conducted by the CC.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

On August 10, 2011, the OFT fined four UK supermarkets and five UK dairy processors a total of £49.51 million (approximately US$79 million) for a "hub-and-spoke"/A-B-C cartel infringement.[16] The OFT found that the companies infringed the UK Competition Act 1998 (the UK equivalent of Article 101 of the TFEU) by co-ordinating increases in the prices consumers paid for certain dairy products in 2002 and/or 2003. This co-ordination was achieved by supermarkets indirectly exchanging retail pricing intentions with each other via the dairy processors. One of the supermarkets involved, Tesco, has filed an appeal with the CAT.

On January 13, 2011, the OFT announced that seven insurance companies and two IT software and service

12 OFT Press Release, March 17, 2011, "OFT and Competition Commission publish joint commentary on retail mergers", available at http://www.oft.gov.uk/news-and-updates/press/2011/38-11.

13 OFT Press Release, March 25, 2011, "CC and OFT publish quick guide on merger assessment", available at http://www.oft.gov.uk/news-and-updates/press/2011/44-11.

14 OFT Press Release, April 5, 2011, "OFT and Competition Commission jointly publish guidance on good practice in merger surveys", available at http://www.oft.gov.uk/news-and-updates/press/2011/52-11.

15 CC Press Release, April 28, 2011, "CC Consults on Guidelines", available on the CC's website at http://www.competition-commission.org.uk/.

16 OFT Press Release, August 10, 2011, "OFT fines certain supermarkets and processors almost [£]50 million in dairy decision", available at http://www.oft.gov.uk/news-and-updates/press/2011/89-11.

providers had provisionally agreed to limit the data they exchange between them after the OFT raised competition law concerns.[17] This started a formal consultation on these commitments. The proposals followed an OFT investigation which identified an increased risk of price coordination among motor insurers using a specialist market analysis tool by Experian called "Whatif? Private Motor." The tool allowed insurers to access not only the pricing information they themselves provided to brokers, but also pricing information supplied by other competing insurers. The nine companies under investigation proposed to address the OFT's concerns by giving formal commitments that would result in the insurers no longer being able to access each other's individual pricing information through "Whatif? Private Motor." Instead, they proposed to exchange pricing information through the analysis tool only if that information meets certain principles agreed with the OFT. These would require the pricing information to be anonymised, aggregated across at least five insurers, and already "live" in broker-sold policies.

On September 30, 2011, the OFT announced a consultation on an amendment to the original commitments which would reduce, from 36 months to six months, the age of the data that can be exchanged via the analysis tool.[18] The OFT stated that in its view this less restrictive duration, by ensuring that a certain level of information remains available, will avoid undue constraints on market entrants, in particular as concerns entry by new competitors and by smaller competitors to new product areas, and hence will encourage healthy competition in this market. The commitments were formally accepted on December 2, 2011[19], ending the investigation.

The OFT also investigated a different type of information exchange case in the banking sector in the UK. In September 2010, it sent a statement of objections ("SO") (a preliminary statement of its case, to which the parties can reply) to Royal Bank of Scotland and Barclays concerning alleged breaches of competition law through the disclosure of confidential and commercially sensitive future price information in relation to loan products (on the fringes of social, client or industry events or through telephone conversations). Barclays admitted to the practices in exchange for immunity from fines, and RBS agreed to pay a reduced fine of £29 million (approximately US$46 million). The SO was a procedural step required before the formal infringement decision can be taken. The OFT issued its formal decision on January 20, 2011, bringing the investigation to a conclusion.[20]

In March and April 2011, the CAT gave judgment on various appeals arising out of the OFT's construction cartel decision of September 21, 2009 and its September 30, 2009 recruitment agency cartel decision.[21] The former decision found that 103 parties had infringed competition law through their involvement in illegal anti-competitive bid-rigging activities from 2000 to 2006, mostly in the form of cover pricing. Twenty five parties appealed on matters related to penalty, six of which also related to liability. All of the penalty appeals were successful and the CAT overturned liability findings in relation to four parties. The recruitment agency cartel found that six recruitment agencies had engaged in price-fixing and the collective boycott of another company in the supply of candidates to the construction industry. The CAT upheld an appeal by three of the companies concerning the levels of their penalties. The three companies did not pursue a challenge to the OFT's finding that they breached competition law.

These judgments were significant setbacks for the OFT and included criticism of the OFT's use of certain evidence plus significant fine reductions. Nevertheless, the OFT stated on May 24 (recruitment agency cartel) and May 27, 2011 (construction cartel) that it would not appeal against the CAT's findings.[22] It however confirmed that it would review its penalty policy, including considering whether changes should be made to its penalties guidance to reinforce its ability to set substantial fines that ensure deterrence. It

17 OFT Press Release, January 13, 2011, "Motor insurers agree to limit data exchange after OFT investigation", available at http://www.oft.gov.uk/news-and-updates/press/2011/04-11.

18 OFT Press Release, September 30, 2011, "OFT consults on amendment to commitments offered in motor insurance case", available at http://www.oft.gov.uk/news-and-updates/press/2011/108-11.

19 OFT Press Release, December 2, 2011, "OFT accepts formal commitments after motor insurers agree to limit data exchange", available at http://www.oft.gov.uk/news-and-updates/press/2011/129-11.

20 OFT Press Release, January 20, 2011, "OFT issues decision in loan pricing case", available at http://www.oft.gov.uk/news-and-updates/press/2011/05-11.

21 The various documents relating to the appeal are available on the CAT's website at http://www.catribunal.org.uk/.

22 OFT Press Release, May 27, 2011, "OFT decides not to appeal recent Competition Appeal Tribunal judgments", available at http://www.oft.gov.uk/news-and-updates/press/2011/61-11.

further indicated that it would review its internal penalty setting processes and some of its investigative procedures. It followed up on this in October 2011 (see further below).

In 2010, the OFT had announced total fines of £225 million (approximately US$360 million) on two tobacco manufacturers and ten retailers for retail pricing practices concerning tobacco products in the UK. The OFT found that the manufacturers both had a series of individual arrangements with the retailers whereby the retail price of a tobacco brand was linked to that of the competing manufacturer's brand. On December 12, 2011, the OFT lost this case on appeal since the witness evidence it presented did not support its decision. The OFT stated that it would consider the judgment in detail, including any broader implications for the way in which it conducts investigations and possible appeals.[23]

Various guidance documents were published in 2011. On 2 March, the OFT published its final guidance setting out the procedures it follows in Competition Act investigations, from the opening of cases through to their final resolution.[24] This applies to investigations of anti-competitive agreements and of abuses of a dominant position. The guidance included a number of new measures, including:

- offering informal pre-complaint discussions to help potential complainants decide whether to commit the necessary time and effort to prepare a formal, reasoned complaint, based on whether the OFT would be likely to investigate;
- a commitment to reach a decision on whether to formally open a case no later than four months after receiving a substantiated complaint; and
- a commitment to send a case initiation letter on the opening of a formal investigation setting out the details and key contacts of investigators.

The OFT's guidance also further clarified its existing approaches to decision-making, access to decision makers and quality assurance. At the same time, the OFT announced the trial of a new adjudicator role to resolve disputes on procedural issues. This is a similar role to that carried out by the EC's Hearing Officer, albeit more limited. The OFT also announced that it intends to publish a summary of its experience on the use of the settlement procedure. This is similar to that operated by the EC in relation to cartels, but of wider (and to date undefined) scope.

Following a consultation carried out in 2010 by the OFT on competition law compliance guidance for companies and directors, the OFT published on June 27, 2011, the final versions of its guidance material.[25] The principal documents published were:

- "How Your Business Can Achieve Compliance" is aimed at businesses and their advisors, and sets out the OFT's recommended risk-based, four-step approach to creating a culture of competition law compliance; and
- "Company Directors and Competition Law" explains the level of competition law understanding expected from directors. It outlines steps they should take to prevent, detect and stop infringements of competition law.

Although these materials relate specifically to the UK, they represent best practice in the EU in the area of competition law compliance. This guidance follows the publication in 2010 of the OFT's revised guidance on Director Disqualification Orders in competition law cases, which sets out how it intends to use the sanction to deter anti-competitive activity. At the time, the OFT undertook to provide company directors with practical guidance on their duties under competition law.

On December 7, 2011, the OFT published a study considering what drives businesses to comply with competition law and what deters them from trying to infringe it.[26] The study identifies three key pillars which drive competition law compliance (i) knowledge and awareness of the law, (ii) sanctions and enforcement by regulators, and (iii) voluntary compliance measures. Based on a survey of over 800 companies in the UK, the study lists the most common compliance measures used by businesses. For small companies (fewer than 200 employees), the top

23 OFT Press Release, December 12, 2011, "OFT statement on CAT judgment in tobacco case", available at http://www.oft.gov.uk/news-and-updates/press/2011/134-11. The various documents relating to the appeal are available on the CAT's website at http://www.catribunal.org.uk/.

24 OFT Press Release, March 2, 2011, "OFT announces Procedural Adjudicator trial as it publishes new competition act procedures guidance", available at http://www.oft.gov.uk/news-and-updates/press/2011/27-11.

25 These documents and related materials are available on the OFT's website at http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance/.

26 OFT Press Release, December 7, 2011, "Research underlines deterrent effect of UK Competition Regime", available at http://www.oft.gov.uk/news-and-updates/press/2011/131-11.

four measures are, in order (i) taking external legal advice, (ii) carrying out a competition risk assessment, (iii) having a formal competition law code of conduct or compliance programme, and (iv) holding training for employees on competition law issues. For large companies (200 or more employees) the top four measures are the same, but the positions of a code of conduct and training are reversed.

On December 6, 2011, the OFT published a guide on the application of competition law to public bodies.[27] This highlights that competition laws apply to publicly owned bodies whenever they engage in "economic activity". In broad terms, the guide indicates that a public body should ask itself the following questions for each of its activities (i) "am I offering or supplying a good or service, as opposed to, for example, exercising a public power?", and (ii) "if so, is that offer or supply of a 'commercial' - rather than an exclusively 'social' - nature?".

Following the construction and recruitment agency cartel judgments of the CAT, on October 26, 2011, the OFT published for consultation revised guidance documents concerning its fining rules and its leniency programme.[28] The draft penalty guidance proposes a number of changes to the way in which the OFT sets penalties in competition cases. A key aspect of the new proposals is increasing the maximum starting point for penalty calculations to 30% of relevant turnover, in line with the approach of the EC. The OFT also proposes to introduce a new specific step at which it will consider whether the penalty is proportionate in the round. This is designed to ensure that overall fines are not disproportionate or excessive. In parallel, the OFT is consulting on its draft leniency guidance. Many of the revisions are designed to give greater clarity and improved transparency to the OFT's existing policies and practices, rather than representing major changes. For example, additional detail is provided on the procedure for applying for leniency, the scope of leniency protection and the expected level of cooperation required from leniency recipients. Final versions of both guidance documents were at the time of writing scheduled to be produced in spring 2012.

There were developments in the area of market investigations, which concern entire business sectors as opposed to the behaviour of individual companies. On March 24, 2011, the CC published a final order detailing measures to introduce competition into the Payment Protection Insurance ("PPI") market.[29] The full package of measures was initially outlined in January 2009 when the CC published its final report into PPI, concluding that businesses that offer PPI alongside credit face little or no competition when selling PPI to their credit customers. However, the report and in particular the point-of-sale prohibition were the subject of a legal challenge to the CAT. Whilst upholding the CC's conclusions as to the competition problems in this market, the CAT ruled that it must in particular consider further the role and importance of a potential drawback to the prohibition, namely that it might inconvenience customers. The CC reported back in October 2010 that introducing the point-of-sale prohibition for the major forms of PPI would benefit customers.

On July 19, 2011, the CC confirmed its findings in relation to its BAA investigation that BAA should be required to sell Stansted Airport followed by Edinburgh or Glasgow Airport.[30] The CC was considering whether there had been any material changes in circumstances since it published its final report on BAA in March 2009 that should give it cause to reconsider the implementation of the airport sales required by that original decision. The decision was subject to a legal challenge by BAA, which eventually culminated in the Court of Appeal reinstating the CC's findings in October 2010. BAA filed an appeal with the CAT against the CC's decision concerning Stansted Airport.

On December 20, 2011, the CC published its final report into the local bus industry. The CC found that despite there being about 1,245 bus companies in England, Scotland and Wales carrying 2.9 billion passengers a year, the five largest operators (Arriva, FirstGroup, Go-Ahead, National Express and Stagecoach) carried 70% of those passengers. The CC also found that head-to-head competition between operators is uncommon and that, on average, the largest operator in an urban area runs 69% of local bus services. The CC identified a number of factors that restrict entry

27 The guidance is available at http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/guidance-public-bodies/.

28 OFT Press Release, October 26, 2011, "OFT consults on updated penalty and leniency guidance", available at http://www.oft.gov.uk/news-and-updates/press/2011/116-11.

29 CC Press Release, March 24, 2011, "PPI – CC Publishes Final Order", available at http://www.competition-commission.org.uk/inquiries/ref2010/ppi_remittal/index.htm.

30 CC Press Release, July 19, 2011, "CC Confirms BAA Airport Sales", available at http://www.competition-commission.org.uk/inquiries/ref2007/airports/index.htm.

and expansion into local areas by rivals and otherwise stifle competition. It outlined a package of measures intended to tackle these factors and to open markets up in the future.

The OFT also conducted a range of its own market studies. It completed market studies into off grid energy, mobility aids, consumer contracts, outdoor advertising, public services procurement, organic waste, and equity underwriting. It was at the time of writing undertaking market studies into dentistry, extended warranties for domestic electrical goods, and car insurance.

On October 21, 2011, the OFT referred the market for the supply of statutory audit services to large companies in the UK to the CC for investigation.[31] The CC will carry out its own comprehensive investigation, to see if there are any features of this market which prevent, restrict or distort competition and, if so, what action might be taken to remedy them. The CC is required to report by October 20, 2013.

The OFT consulted during 2011 on its intention to make market investigation references to the CC in relation to the markets for aggregates, cement and ready-mix concrete and private healthcare.

ABUSES OF A DOMINANT POSITION

The OFT issued a SO on February 25, 2011, alleging that CH Jones abused a dominant position in the UK market for the provision of bunker fuel card services to direct bunkering customers, typically heavy goods vehicle ("HGV") fleet operators.[32] The OFT also alleges that CH Jones used its dominant position in that market to anticompetitive effect in the UK market for the provision of pay-as-you-go ("PAYG") fuel card services to customers with HGV fleets. The case is interesting because alleged infringements of competition law took place as a result of the use of exclusive agreements, the OFT rarely proceeds in abuse of dominance cases, so the cases are important for precedent reasons when they do, and the case relates to two markets, on only one of which is CH Jones allegedly dominant.

On April 13, 2011, the OFT issued a decision that Reckitt Benckiser had abused its dominant position by withdrawing NHS packs of its Gaviscon Original Liquid medicine, and imposed a fine of £10.2 million (approximately US$16 million). The fine was the subject of an earlier agreement between the company and the OFT under which the company admitted its conduct infringed UK and EU competition law and agreed to co-operate with the OFT. The OFT found that Reckitt Benckiser withdrew withdrew NHS packs of Gaviscon Original Liquid from the NHS prescription channel after the product's patent had expired but before the publication of the generic name for it, so that more prescriptions would be issued for its alternative product, Gaviscon Advance Liquid. Pharmacies that receive prescriptions for Gaviscon Advance Liquid must dispense it, as it is patent protected and there are no generic equivalent medicines.

In an unusual example of a successful competition law action before a court, on April 15, 2011, the English High Court found that Heathrow Airport had abused its dominant position in the provision of access to airport facilities.[33] This was a result of Heathrow's compulsory relocation of two "meet and greet" (or "valet parking") businesses from the forecourts at Terminals 1 and 3 to the short stay car parks, whilst at the same time allowing Heathrow's own meet and greet operations to remain in their existing locations. This was discriminatory treatment which had no objective justification. The court took the view that it was not necessary to establish that Heathrow's actions would lead to the elimination of all (effective) competition in the meet and greet market. It was enough to show that competition would be distorted or hampered to the prejudice of consumers.

COURT DECISIONS

On January 19, 2011, the Court of Appeal held in Enron Coal Services v English Welsh & Scottish Railway that the CAT is bound by all findings of fact made by a competition regulator (not only findings of fact that relate to the actual infringement), unless the CAT specifically directs otherwise.[34] However, these have to be clear statements and not just "stray phrases". This is of significance in the context

31 OFT Press Release, October 21, 2011, "OFT refers audit market to Competition Commission", available at http://www.oft.gov.uk/news-and-updates/press/2011/115-11.

32 OFT Press Release, February 25, 2011, "OFT issues Statement of Objections alleging abuse of dominance by bunker fuel firm CH Jones", available at http://www.oft.gov.uk/news-and-updates/press/2011/25-11.

33 The judgment is available at http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2011/987.html&query=purple+and+Parking&method=boolean.

34 The judgment is available at http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2011/2.html&query=enron+and+coal+and+ews+and+19+and+january+and+2011&method=boolean.

of private damages claims in the UK courts. The Supreme Court subsequently declined to review this judgment.

Case law provided further guidance on the issue of suing a UK defendant company in a damages action arising out of an international cartel case where that company was not named in the regulator's fining decision (the use of a UK "anchor defendant"). On March 21, 2011, the CAT gave judgment in respect of an application by Mersen UK Portslade Ltd (formerly Le Carbone (Great Britain) Ltd) ("Carbone GB") to dismiss certain claims for damages against it on the ground that it was not mentioned in the EC's cartel decision (in the carbon products cartel). The CAT held that there was indeed no infringement decision of the EC on which the claimants could base their claims against Carbone GB. There has to be a decision against the defendant which is actually before the CAT. This was a controversial decision which related to the CAT's special jurisdiction under UK law to hear follow-on damages actions. On October 11, 2011, the plaintiffs in this case were granted leave by the Court of Appeal to appeal against this judgment of the CAT.

By contrast, in the 2010 Cooper Tire case the Court of Appeal had held that a non-addressee UK company could be sued in the "normal" UK courts in such a case provided that the plaintiff was alleging that the subsidiary was aware. The court left open whether there would be a valid claim if this was not the case. A further example of this arose in Toshiba Carrier UK v KME Yorkshire and others[35] in which the High Court refused to strike out claims brought against UK defendant companies where they were not mentioned in the relevant EC decision (in the industrial tubes cartel) but were subsidiaries of the companies to which the decision was addressed.

The European Commission sent an amicus curiae observation dated November 3, 2011 to the High Court in the context of a damages action brought by National Grid, a UK utility company, against a number of companies that were held liable by the Commission in 2007 for their participation in the gas insulated switchgear cartel.[36] The amicus observations were made in response to the High Court's invitation to submit observations in light of the *Pfleiderer* judgment of the Court of Justice of the European Union (the "ECJ")[37] about the possible inter partes disclosure of various documents, some of them containing information specifically prepared for the purpose of an application under the Commission's leniency programme. In its amicus curiae observation the Commission concluded that the weighing of the different interests implied that the information specifically prepared for the purpose of an application under its leniency programme should not be disclosed. The High Court had at the time of writing not given judgment in the matter for which the observations were submitted. In July 2011, the High Court ruled on other disclosure issues in the case.

Issues concerning the time limit for bringing damages actions before the CAT arose in cases following the European Commission's carbon and graphite products cartel decision. On May 25, 2011, the CAT ruled on an application by Morgan Crucible Company plc to strike out the claims against it on the ground that they had not been brought within the relevant time limits. A claim for damages must be made with the CAT within a period of two years beginning with the "relevant date" which, in this case was the date on which Morgan Crucible could have appealed the European Commission's decision at the General Court of the European Union. The CAT held that "decision" must mean the operative part of the decision that finds an infringement in respect of a particular defendant. This gave rise to uncertainty due to inconsistency with a previous judgment, and on July 11, 2011 the claimants were given permission to appeal. On July 26, 2011 the CAT made an order staying the case pending the determination by the Court of Appeal of the claimants' appeal against the CAT's judgment of May 25, 2011.[38]

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35 The judgment is available at http://www.bailii.org/ew/cases/EWHC/Ch/2011/2665.html.

36 The observation is available at http://ec.europa.eu/competition/court/antitrust_requests.html.

37 *Case C-360/09, Pfleiderer AG v Bundeskartellamt.*

38 The various documents relating to this case are available on the CAT's website at http://www.catribunal.org.uk/.