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### LEGISLATIVE DEVELOPMENTS

On April 25, 2013, the UK Enterprise and Regulatory Reform Act 2013 passed into law.<sup>1</sup> The Act makes changes to a number of areas of UK law, including the competition enforcement regime. The most high profile competition law change is the establishment of the new Competition and Markets Authority (the “CMA”). The CMA will bring together the competition functions of the Office of Fair Trading (the “OFT”) and the Competition Commission (the “CC”), which will both be abolished. The Act also makes various procedural changes to the enforcement of competition law concerning mergers, market investigations and the “cartel offence” (under which there is personal criminal liability in the UK for involvement in certain types of anti-competitive behavior, particularly cartels).

In April 2013, the Financial Conduct Authority (the “FCA”) started operations. The FCA regulates the financial services industry, its aim being to protect consumers, ensure the industry remains stable and promote healthy competition between financial services providers. The Financial Services (Banking Reform) Act 2013, enacted in December 2013, gave the FCA competition powers, which it will operate concurrently with the CMA, probably from 2015.<sup>2</sup>

On June 12, 2013, the UK Government published its proposed legislative reforms which are aimed at encouraging private competition law actions.<sup>3</sup> The main proposals include allowing the Competition Appeal Tribunal (the “CAT”) to hear stand-alone as well as follow-on cases, giving the CAT the power to grant injunctions, and creating a fast track for simpler cases in the CAT (this latter being aimed at empowering SMEs to challenge anti-competitive behavior that is restricting their ability to grow). The proposed reforms are subject to Parliamentary timing and approval.

On July 8, 2013, the OFT published revised leniency guidance.<sup>4</sup> To qualify for leniency, applicants must admit their involvement in unlawful cartel activity, cooperate fully with the OFT investigation and stop their involvement in the cartel from the time they come forward.

### MERGERS

In 2013, the OFT took 73 merger decisions, including one in which the transaction was cleared subject to remedies. It referred nine cases to the CC for a detailed second stage review. The CC itself completed 11 merger inquiries during 2013.

1 Enterprise and Regulatory Reform Act 2013, available at <http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted>.

2 See the FCA’s website <http://www.fca.org.uk/>.

3 Draft Consumer Rights Bill, available at <https://www.gov.uk/government/publications/draft-consumer-rights-bill>.

4 OFT document OFT1495, July 2013, “Applications for leniency and no-action in cartel cases; OFT’s detailed guidance on the principles and process”, available at [http://www.of.gov.uk/shared\\_of/reports/comp\\_policy/OFT1495.pdf](http://www.of.gov.uk/shared_of/reports/comp_policy/OFT1495.pdf).

In the most high profile case, on August 28, 2013, the CC required airline Ryanair to reduce its 29.8 per cent stake in competitor Aer Lingus down to 5 per cent.<sup>5</sup> This was accompanied by obligations on Ryanair not to seek or accept board representation or acquire further shares. The rationale for this decision was that Aer Lingus' commercial policy and strategy was likely to be affected by Ryanair's minority shareholding. Ryanair has appealed the CC's decision.

The CC announced that it had decided to prohibit the anticipated merger of two hospitals, finding that the proposed merger would give rise to a substantial lessening of competition in relation to the provision of a range of hospital services.<sup>6</sup>

## CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

On March 27, 2013, the OFT issued a decision finding that Mercedes-Benz and five of its independent commercial vehicle dealers in the UK had infringed competition law and fined them a total of GBP 2.8 million (approximately USD 4.6 million).<sup>7</sup> The dealers involved were mainly active in areas within the North of England and parts of Wales and Scotland. The nature of the infringements varied but all contained at least some element of market sharing, price coordination or exchange of commercially sensitive information. One of the dealers avoided a fine, having been the first company to come forward after the investigation commenced to provide evidence of collusion in return for immunity from penalty under the OFT's leniency policy. Three of the other dealers and Mercedes-Benz settled with the OFT by admitting the

infringement in return for a reduced fine. The remaining dealer did not settle.

On August 5, 2013, the OFT issued a decision finding that Roma Medical Aids Limited, a manufacturer of mobility scooters, and some of its retailers, breached UK competition law.<sup>8</sup> The OFT found that Roma had entered into arrangements with seven UK-wide retailers which prevented them from selling Roma-branded mobility scooters online and from advertising their prices online. The OFT found that these practices limited consumers' choice and obstructed their ability to compare prices and get value for money. No fines were imposed due to the small size of each of the companies involved.

On August 29, 2013, the OFT announced that Amazon had decided to end its price parity policy, which restricted its Amazon UK Marketplace sellers from offering lower prices on other online sales channels.<sup>9</sup> This applies across the EU since August 30, 2013. The OFT was concerned that the policy was potentially anti-competitive, since it may raise online platform fees, curtail the entry of potential entrants, and directly affect the prices which sellers set on platforms (including their own websites), resulting in higher prices to consumers. The OFT formally closed the case in November 2013 and specifically stated that it had not reached a decision as to whether there had been an infringement of EU or UK competition law.<sup>10</sup>

On December 6, 2013, the OFT issued a decision fining three companies for engaging in collusive tendering concerning the supply and installation of access control and alarm systems to retirement properties in

5 Competition Commission press release, August 28, 2013, "CC requires Ryanair to sell shareholding in Aer Lingus down to 5 per cent", available at <http://www.competition-commission.org.uk/media-centre/latest-news/2013/Aug/cc-requires-ryanair-to-sell-shareholding>.

6 Competition Commission press release, October 17, 2013, "CC makes final decision on hospitals merger", available at <http://www.competition-commission.org.uk/media-centre/latest-news/2013/Oct/cc-makes-final-decision-on-hospitals-merger>.

7 Office of Fair Trading press release 30/13, March 27, 2013, "OFT issues five infringement decisions in the distribution of Mercedes-Benz commercial vehicles investigation", available at <http://www.of.gov.uk/news-and-updates/press/2013/30-13>.

8 OFT press release 57/13, August 5, 2013, "OFT issues decision in mobility scooters case", available at <http://www.of.gov.uk/news-and-updates/press/2013/57-13>.

9 Office of Fair Trading press release 60/13, August 29, 2013, "OFT welcomes Amazon's decision to end price parity policy", available at <http://www.of.gov.uk/news-and-updates/press/2013/60-13>.

10 Office of Fair Trading case summary, "Investigation into suspected anti-competitive arrangements by Amazon relating to online retail", available at <http://www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98/closure/online-retail/>.



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the UK.<sup>11</sup> A fourth party escaped fines since it had applied for leniency. The combined value of the at least 65 tenders involved amounted to only around GBP 1.4 million (approximately USD 2.3 million). The total fines amounted to only around GBP 50,000 (approximately USD 82,000). The OFT found that when bidding for the contracts, the leniency applicant had shared its proposal with one of the other three with the aim that they would submit higher bids, thereby enabling the leniency applicant to win the contracts.

On December 12, 2013, the OFT announced that a prescription medicine supplier, Hamsard, had agreed to pay a fine of GBP 388,000 (approximately USD 640,000) for entering into a market sharing agreement.<sup>12</sup> The cartel only ran between May and November 2011. The other party, Celesio, escaped a fine entirely since it was the whistleblower (first in). Hamsard's fine was reduced since it also used the OFT's leniency program (second in) and cooperated with the OFT under its settlement procedure, including by agreeing to pay the fine. This was a bald market sharing agreement; the companies agreed that Tomms Pharmacy (owned by Hamsard) would not supply prescription medicines to existing Lloyds Pharmacy (owned by Celesio) care home customers in the UK. In return, for at least some of the time, Lloyds also agreed not to supply prescription medicines to existing Tomms care home customers.

On December 20, 2013, the OFT consulted on commitments put forward by two online travel agents

(“OTA”s) and InterContinental Hotels Group, which were designed to address the OFT's competition concerns in relation to the online offering of room-only hotel accommodation bookings by OTAs.<sup>13</sup>

There were developments in the area of market investigations, which concern entire business sectors as opposed to the behavior of individual companies. The most significant development was the CC's publication of its final report on statutory audit services to large companies in the UK.<sup>14</sup> The CC confirmed that competition is restricted in the audit market due to factors which inhibit companies from switching auditors and by the incentives that auditors have to focus on satisfying management rather than shareholder needs. The CC set out a package of remedies in response to these findings.

## ABUSES OF A DOMINANT POSITION

On January 17, 2013, the UK water regulator Ofwat confirmed that it had accepted binding commitments from Severn Trent plc.<sup>15</sup> Severn Trent plc agreed to divest Severn Trent Laboratories Limited, which provided water analysis services to Severn Trent Water Limited and other companies, so as to address concerns raised by Ofwat following a complaint. The complainant, ALcontrol UK Ltd, had alleged that Severn Trent Laboratories had been able to win contracts by pricing below cost, which was enabled by the structural links between Severn Trent Water Limited and Severn Trent Laboratories Limited.

11 OFT press release 81/13, December 6, 2013, “Retirement home security suppliers breached competition law, OFT decides”, available at <http://www.ofwat.gov.uk/news-and-updates/press/2013/81-13>.

12 Office of Fair Trading press release 82/13, December 12, 2013, “Pharmaceutical group agrees to pay over £380k in care home medicine cartel”, available at <http://www.ofwat.gov.uk/news-and-updates/press/2013/82-13>.

13 Office of Fair Trading press release 86/13, December 20, 2013, “OFT consults on amendments to proposed hotel online booking commitments”, available at <http://www.ofwat.gov.uk/news-and-updates/press/2013/86-13>.

14 Competition Commission press release, October 15, 2013, “CC finalises measures to open up audit market”, available at <http://www.competition-commission.org.uk/media-centre/latest-news/2013/Oct/cc-finalises-measures-to-open-up-audit-market>.

15 Ofwat press release IB 02/13, January 17, 2013, “Ofwat accepts commitments from Severn Trent plc”, available at [http://www.ofwat.gov.uk/mediacentre/ibulletins/prs\\_ib0213alcontrol](http://www.ofwat.gov.uk/mediacentre/ibulletins/prs_ib0213alcontrol).

## COURT DECISIONS

On March 28, 2013, the CAT awarded damages in a private claim relating to an abuse of dominance.<sup>16</sup> The claim was based on the finding, also made by the CAT, that water company Dŵr Cymru had infringed the UK prohibition on abuse of dominance (it was therefore a “follow-on” claim).<sup>17</sup> This earlier finding of the CAT was that the price at which Dŵr Cymru was prepared to offer Albion Water a common carriage service to carry water through its pipes (the “First Access Price”) amounted to an abuse by Dŵr Cymru of its dominant position in that it imposed on Albion a margin squeeze and was both excessive and unfair in itself. Albion’s claim comprised three heads: if Dŵr Cymru had offered a lawful price for common carriage, rather than the abusive First Access Price, Albion would have been able to supply its custom-

er, Shotton Paper, on the basis of common carriage, which would have been more profitable than the existing arrangements; as a result of the abuses, Albion lost the chance to win a potentially lucrative contract to supply another business, Corus Shotton, and it was, therefore, deprived of further profits; and a claim for exemplary damages. The CAT awarded Albion damages in the amount of GBP 1,694,343.50 (approximately USD 2.8 million) in respect of the first claim and GBP 160,149.66 (approximately USD 260,000) in respect of the second claim, together with interest. The claim for exemplary damages was dismissed.

In November 2013, the English High Court granted interim injunctions in two cases concerning an alleged refusal to supply by Barclays Bank plc.<sup>18</sup>



<sup>16</sup> Competition Appeal Tribunal, *Albion Water Limited v Dŵr Cymru Cyfyngedig* (March 28, 2013), available at <http://www.catribunal.org.uk/238-7977/Judgment.html>.

<sup>17</sup> Competition Appeal Tribunal, *Albion Water Limited & Albion Water Group Limited v Water Services Regulation Authority (Dŵr Cymru/Shotton Paper)* (April 9, 2009), available at <http://www.catribunal.org.uk/237-610/1046-2-4-04-Albion-Water-Limited-Albion-Water-Group-Limited.html>.

<sup>18</sup> *Dahabshil Transfer Services Ltd v Barclays Bank plc and Harada Ltd and another v Barclays Bank plc* [2013] EWHC 3379 (Ch), available at <http://www.bailii.org/ew/cases/EWHC/Ch/2013/3379.html>.