

Competition Update  
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**OLSWANG**



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# Introduction



As summer draws to an end and the regulators and courts start to go back to business, we are pleased to bring you our second issue of Competition Update.

Since our last issue the ECJ has handed down its judgment in the *France Telecom/Wanadoo* predatory pricing case. This judgment is not restricted in its applicability to the telecoms industry, and will be of interest to all undertakings which may be dominant in their respective markets (and indeed their competitors). One of the interesting features of the judgment is the extent to which it has departed from the Advocate General's Opinion on the "meeting competition" defence, the scope for which appears to be somewhat narrowed.

The message currently being sent by Europe emphasises the need for scrupulous compliance with all aspects of European competition law. The Commission has exacted a very heavy price on Electrabel (€20 million) for its failure to notify a concentration with a Community dimension – a stark reminder of the importance of compliance with merger control procedures, but also of the increasingly activist attitude of the Commission towards enforcement across the board.

Similarly, the ECJ has also handed down a significant judgment in the Netherlands mobile operator case, in which it has confirmed that a single meeting in which competitors exchange confidential information can result in an infringement of Article 81 EC.

In the UK, the British Airways air freight damages case illustrates the difficulty of establishing the class of claimants in a class action damages claim for competition law infringement, and the Competition Appeal Tribunal has issued a rare costs award against the regulator in respect of an appeal against one of its decisions.

As ever, please do contact me or any of my colleagues listed at the back of this edition if this issue raises any questions which you would like to discuss.

**Howard Cartlidge**



## ECJ upholds the €10.35 million fine on France Télécom/Wanadoo for predatory pricing

**The ECJ dismissed France Télécom's appeal against a CFI judgment upholding the Commission's decision to fine its subsidiary Wanadoo for predatory pricing on the French internet access market. The ECJ confirmed two important legal points: (1) that the Commission did not have to prove the possibility of Wanadoo recouping its losses; and (2) that a dominant firm does not have an absolute right to "meet competition" by aligning its prices to those of its competitors.**

### Background

In 1999, the European Commission launched a sector inquiry on the provision of local loop access services and the use of the residential local loop within the EU. Against this background, it reviewed the prices that Wanadoo Interactive charged its residential customers in France for high-speed internet access. In a decision in 2003 the Commission found that the prices charged by Wanadoo to residential customers for its eXtense and Wanadoo ADSL services were predatory, because they did not enable it to cover its average variable costs ("AVC") between March and August 2001. Between August 2001 and October 2002, these prices were above AVC, but below average total costs ("ATC") and were, according to the Commission, part of a plan to pre-empt the market in high-speed internet access during a key phase in its development.

The Commission concluded that Wanadoo had abused its dominant position in the French market for high-speed internet access for residential customers and imposed a fine of €10.35 million. France Télécom ("FT") (which had in the meantime merged with Wanadoo) challenged this decision before the CFI. In 2007 the CFI dismissed the action for annulment, holding that the Commission correctly concluded that Wanadoo had abused its dominant position and upheld the fine. FT appealed this judgment to the ECJ. In an Opinion of 25 September 2008 Advocate General Mazak proposed to set aside the CFI ruling, but he was not followed by the ECJ which, in a judgment of 2 April 2009, dismissed the appeal in its entirety.

### The ECJ's judgment

Several of the pleas raised by FT were found to be inadmissible, *inter alia* because they were not raised at first instance before the CFI. The remaining pleas were unfounded. The appeal judgment nevertheless provides guidance on a number of interesting legal issues.

#### *Predation test: AKZO case law confirmed*

The ECJ backed the application by the Commission and the CFI of the two-fold *Akzo* and *Tetra Pak II* test, according to which prices below AVC give grounds for assuming that a pricing practice is eliminatory and that, if the prices are below ATC but above AVC, those prices must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. This is in line with the previous case law on predatory pricing.

The ECJ also confirmed that, with regard to the method of calculating the rate of recovery of costs, the CFI had rightly recalled the broad discretion which the Commission has in matters involving complex economic assessment.

#### *A dominant firm's right to align its prices to those of its competitors*

A second interesting legal issue concerned the so-called "meeting competition" defence, i.e. FT's argument that a dominant firm has the right to align its prices with those of its competitors, even if the prices charged are below costs.

The ECJ found that the CFI's judgment rightly held that, although the fact that an undertaking holds a dominant position does not deprive it of the right to protect its own commercial interests if they are attacked and to take such reasonable steps as it deems appropriate to protect those interests, it is not possible to countenance such behaviour if its actual purpose is to strengthen that dominant position and abuse it (*United Brands* case law). The CFI therefore correctly concluded on this basis that Wanadoo could not rely on any absolute right to align its prices with those of its competitors in order to justify its conduct where that conduct constituted an abuse of its dominant position.

#### *Possibility of recouping losses is not a precondition for providing predation*

A third issue concerned the elements of predation, in particular whether proof of the dominant firm's ability to recoup losses once competitors have been driven out of the market is a necessary precondition to a finding of abusive predatory pricing under Article 82 of the EC Treaty.

The ECJ noted dominant firms' "special responsibility" not to allow their behaviour to impair genuine undistorted competition. Article 82 prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than competition on the merits. Accordingly, not all competition by means of price can be regarded as legitimate. Referring to the *AKZO* and *Tetra Pak II* case law, the ECJ concluded that proof of the dominant undertaking's ability to recoup, following a period of below-cost pricing, is not a necessary precondition for such pricing being found to be abusive. In this respect the ECJ rejected the Advocate General's Opinion that "*unless there is possibility of recoupment, the dominant undertaking is probably engaged in normal competition*" and where there is no possibility of recouping losses, consumer interests should, in principle, not be harmed.

However, the ECJ noted that this does not preclude the Commission from finding the ability to recoup losses to be a relevant factor in assessing whether or not the practice concerned is abusive. For example, where prices below AVC are applied, proof of the ability to recoup may assist in excluding economic justifications other than the elimination of a competitor. In addition, where prices are below ATC but above AVC, proof of the ability to recoup may assist in establishing the existence of a plan to eliminate a competitor.

#### **Comment**

Under the traditional *Akzo* case law, prices below AVC are always considered to be abusive *per se*. However, here the ECJ has indicated that proof of the ability to recoup may be relevant in order to demonstrate that there are no economic justifications for the predatory behaviour other than the elimination of a competitor. This could be construed as an indication that in the ECJ's view, prices below AVC are not *per se* abusive, as is generally accepted.

The ECJ appears, in practice, to have closed the door again on a "meeting competition" defence, despite the fact that in the view of Advocate General Mazak it seemed that "*the Court of First Instance was attempting to leave the door open for a 'meeting competition defence' in future cases, where a dominant undertaking prices below costs*". According to the ECJ a dominant firm can take reasonable steps to protect its commercial interests, provided that this does not amount to an abuse, e.g. because its aligned prices are below cost. In practice this means that a "meeting competition" defence will be very difficult.

With regard to ability to recoup losses, the European Commission has welcomed the judgment. The Commission had argued that the analysis of abuse under Article 82 presupposes the existence of a dominant position, which is in itself sufficient to conclude that recoupment is possible. The Commission nevertheless sees the ECJ's ruling as support for its effects-based enforcement approach set out in its "Article 82 Guidance Paper", which states that it is important to look at all of the likely effects of the alleged anti-competitive conduct, in order to show consumer harm.

In its Article 82 Guidance Paper the Commission considers that three conditions must be satisfied for a finding of predation: "*In line with its enforcement priorities, the Commission will generally intervene where there is evidence showing that a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term (referred to hereafter as 'sacrifice'), so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm". With regard to "consumer harm" the Commission explicitly refers to the possibility of recoupment: "*Generally speaking, consumers are likely to be harmed if the dominant undertaking can reasonably expect its market power after the predatory conduct comes to an end to be greater than it would have been had the undertaking not engaged in that conduct in the first place, that is to say, if the undertaking is likely to be in a position to benefit from the sacrifice*".*

As explained above, the ECJ's judgment of 2 April 2009 is generally in line with traditional case law on predatory pricing, it therefore remains to be seen whether the Commission's effects-based enforcement approach will be fully endorsed by the ECJ in future abuse cases. Alternatively, it remains also to be seen how in practice the Commission will apply the case law of the ECJ and whether this will be in any manner different from what it has set out in general terms in its Article 82 Guidance Paper.

## European Commission fines Electrabel €20 million for acquiring control of CNR without prior Commission approval

**The Commission has imposed the largest ever fine for failure to notify a concentration with a Community dimension, even though the concentration itself raised no competition issues. The Commission held that Electrabel acquired *de facto* control of CNR some years before the full acquisition which it notified to the Commission, despite a non-majority shareholding.**

### Background

Under the EC Merger Regulation, a merger or acquisition which is a "*concentration*" with a Community dimension must be notified to the Commission before its implementation so that the Commission can examine whether the concentration would significantly impede effective competition in the EEA or any substantial part of it. The Commission may impose a fine (subject to a cap of 10% of the aggregate turnover of the undertaking concerned) where an undertaking, whether intentionally or negligently, fails to notify a concentration prior to its implementation (without the prior approval of the Commission).

The Commission has used this power in order to impose a fine of €20 million on Electrabel for acquiring control of Compagnie Nationale du Rhone ("CNR") without prior notification. This staggering amount constitutes by far the largest fine to date for failure to notify. This case should serve as a warning to all that the competition implications of a transaction should be duly considered before it is implemented.

In March 2008, Electrabel notified the Commission of its acquisition of CNR. The Commission approved the acquisition on the basis that the parties did not significantly overlap on any relevant market and that there were strong competitors in the relevant market. However, the Commission conducted a further investigation into the issue of the precise date on which Electrabel acquired control of CNR for the purposes of the Merger Regulation.

The Commission found that Electrabel acquired *de facto* sole control of CNR in December 2003 when it purchased 47.88% of CNR's shares, based on the following: (i) Electrabel became by far CNR's largest shareholder; (ii) due to the wide dispersion of the remaining shares and past attendance rates at CNR's shareholders' meetings, Electrabel enjoyed a stable majority at such meetings; and (iii) Electrabel was the sole industrial shareholder of CNR and had taken over the role previously held by EDF in the operational management of the power plants and the marketing of electricity of CNR.

The Commission therefore held that control was acquired more than four years before the notification.

In setting the amount of the fine at €20 million, the Commission took into account four key factors:

- the seriousness of the infringement;
- the long duration of the infringement;
- Electrabel and GDF Suez are large companies which are very familiar with EU merger control proceedings and should have known that the 2003 transaction resulted in an acquisition of control requiring notification to the Commission (at the time of the infringement, Electrabel and GDF Suez together had already filed six notifications under EU rules); and
- CNR is the second largest French electricity supplier.

In its assessment, the Commission did take into account the fact that the transaction had not given rise to any competition concerns and that Electrabel subsequently voluntarily informed the Commission of the acquisition of control. A fine was still imposed because, according to European Commissioner for Competition Neelie Kroes: *"implementing a transaction which has not received the clearance foreseen in EU law constitutes a serious breach of the Merger Regulation ... the Commission will not tolerate breaches of this fundamental rule of the EU merger control system"*. If the transaction had had a negative impact on the market, the Commission advised that the fine could have been considerably higher.

### **Comment**

The factors taken into account in setting Electrabel's fine echo those that underlie earlier decisions on failure to notify (Samsung and A.P. Møller). However, the size of the fines is not comparable (the €20 million fine imposed on Electrabel is in sharp contrast with the earlier fines of €33,000 (Samsung) and €219,000 (A.P. Møller)). The statement of the Commissioner illustrates that the Commission wanted to send out a strong message. Companies can now expect heavy fines for breach of the standstill obligation.

In the light of these developments, any undertaking should pay specific attention to this topic and it may be worth including it in any compliance programme. In particular, it is to be borne in mind that not only structural deals may lead to a change in control but that also factual developments may create a situation of change in control that may be subject to clearance under merger control rules and therefore subject to a standstill obligation.

Electrabel has lodged an appeal at the European Court of First Instance against the decision.

## ECJ rules that a concerted practice arising from a single meeting between competitors can have an anti-competitive object

**The ECJ has ruled that an exchange of information between competitors has an anti-competitive object if it is capable of removing uncertainty concerning the competitors' intended conduct. A causal connection between the exchange and the competitors' market conduct is presumed, and competitors are presumed to take account of the information exchanged, even if it took place on a single occasion.**

### Background

Representatives of the five operators providing mobile telecommunications services on the Netherlands market held a meeting in June 2001 at which they discussed the reduction of remunerations paid to mobile telephone dealers for contract subscriptions. During the course of this discussion, confidential information was shared between the parties. In September 2004, the Dutch competition authority found that the mobile operators had entered into a concerted practice in breach of the Dutch law on competition and Article 81(1) of the EC Treaty. The decision was ultimately appealed to the College van Beroep voor het bedrijfsleven, which referred the following questions to the ECJ for a preliminary ruling:

1. What criteria must be applied when assessing whether a concerted practice has as its object the prevention, restriction or distortion of competition, for the purposes of applying Article 81(1)?
2. In appraising a concerted practice under Article 81(1), must the national court apply the presumption of causation established in European case law?
3. When applying Article 81(1), is there a presumption of causation between the concerted practice and the market conduct of the undertakings involved where the concerted practice resulted from a single meeting?

### Criteria for a finding that a concerted practice has an anti-competitive object

The ECJ held that in order for a concerted practice to be regarded as having an anti-competitive object, it must be capable (i.e. have the *potential*), having regard to the specific legal and economic circumstances, of resulting in the prevention, restriction or distortion of competition within the common market. With regard to an exchange of information between competitors, the court added that while economic operators are entitled to adapt themselves intelligently to the existing or anticipated conduct of their competitors, Article 81(1) strictly precludes any direct or indirect contact between operators by which an undertaking may influence the conduct on the market of its actual or potential competitors, or disclose to them its decisions or intentions concerning its own conduct on the market. On a highly concentrated market such as the Dutch mobile telephone market, the court found that the exchange of information was such as to remove the uncertainty of traders regarding the market positions and strategies of their competitors and thus to impair appreciably the competition which existed between the operators.

The ECJ also considered whether a concerted practice may be regarded as having an anti-competitive object even though there was no direct connection between that practice and the prices charged to consumers; the subject of the agreement was the remuneration to be paid to dealers. The court ruled that Article 81 is designed not only to protect the immediate interests of individual competitors or consumers,

but also competition in the common market more broadly. There does not, on that basis, need to be a direct link between the concerted practice and consumer prices.

As a preliminary point, the ECJ noted that once the anti-competitive *object* of a concerted practice has been established, there is no need to consider whether it has anti-competitive *effects*. Whether anti-competitive effects in fact resulted will only be relevant to the calculation of a fine or assessment of a claim for damages.

### **Causation: presumed, or a matter for national law?**

In order to show the existence of a concerted practice within the meaning of Article 81(1), there must be a causal link between the practice and the market conduct of the participating undertakings. According to ECJ case law, it is presumed that undertakings which have participated in a concerted practice take account of the information exchanged with their competitors where they remain active on the market. The court held that this presumption (although rebuttable) is intrinsic to the concept of a concerted practice under Article 81(1), and that as a result the national court was obliged to apply it.

### **Is causation presumed, even where the concerted practice results from a single meeting?**

The mobile telephone operators had met only once to discuss remuneration of dealers for the contracts they secured, and were of the view that the presumption of causation should only apply where the undertakings involved in a concerted practice meet on a regular basis. The Court found that, whereas regular meetings over a long period might be necessary to show causation if the undertakings concerned had established a complex cartel, in the current proceedings the objective of the exercise was only to concert action on a selective basis in relation to a one-off alteration of their market conduct, and consequently, a single meeting could constitute a sufficient basis for the implementation of the anti-competitive object which the undertakings sought to achieve. The key issue was whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged in order to knowingly coordinate their conduct on the market.

### **Comment**

The ECJ's finding that exchange of information between competitors at a single meeting can constitute a concerted practice under the terms of Article 81(1) should send out a strong message to businesses about the risks of participating in such behaviour, even when the concerted conduct is born out of a single conversation. Where competitors do involve themselves in concerted practices of this nature, they must also be aware that they will be assumed to take account of the information exchanged in determining their market conduct, and that they will bear the burden of proving otherwise.

# UK High Court strikes out part of cartel damages claim against British Airways

**On 8 April 2009 the High Court gave judgment in a damages claim against British Airways for the airline's alleged involvement in an air freight cartel. The case is significant as it deals with the scope of "representative" damages claims on behalf of a class of claimants in alleged cartel cases.**

## Background

The claimant, Emerald Supplies Ltd ("Emerald"), imports cut flowers into the UK using the air freight services of British Airways ("BA") and other international airlines. In September 2008 Emerald commenced proceedings against BA seeking damages to compensate it for losses which it alleged were suffered by the claimant as a result of the airline's role in an air freight cartel. Emerald claimed that BA had been party to agreements and concerted practices in breach of the Chapter I prohibition of the Competition Act 1998, Article 81(1) of the EC Treaty and Article 53 of the EEA Agreement.

Emerald claimed that its case was representative of a class of persons comprising all other direct or indirect purchasers of air freight services the prices for which were inflated as a result of the alleged agreements or concerted practices. By defining the class in such a way, Emerald attempted to expand the claim to include all direct or indirect purchasers of air freight services from BA and any other airline which was party to the alleged agreements or concerted practices. According to Emerald this included at least 178 further potential claimants.

This case has been brought following a European Commission investigation into an alleged cartel in the provision of cargo services and also BA settlements in 2007 and 2008 with the OFT and the US Department of Justice respectively, and a US damages class action with regard to passenger cartel activity.

## High Court judgment

On 1 April 2009 BA applied to the High Court seeking an order striking out the representative element of Emerald's claim. The court delivered its judgment in favour of BA on 8 April 2009. Emerald had sought to rely on Rule 19.6 of the English Civil Procedure Rules ("CPR") which allows a claim to be brought by one party on behalf of itself and representing others who have "*the same interest*" in the claim. BA took issue with Emerald's case in two key respects.

Firstly, BA argued that Emerald's particulars of claim were "*embarrassing*" because they failed to provide a basis on which the other potential claimants could be identified. It is clearly a precondition of Rule 19.6 that there be more than one person who has the same interest. The judge agreed with BA on this point – he held that the essential question was whether the class the claimant was seeking to represent had the same interest as the claimant at the time the claim was commenced. Broadly, the Chancellor of the High Court applied the principles established in a previous case and held that "*the claimants and the class they seek to represent must all have a common interest and a common grievance and the relief sought [must] in its nature [be] beneficial to all of them*". The judge held that it was impossible to say whether any given member of the class satisfied this test because the composition of the class of claimants was dependant on the outcome of the European Commission's decision following the conclusion of its ongoing investigation.

Secondly, BA argued that even if the potential claimants could be identified, they did not constitute one homogenous class but inherently at least two classes with conflicting interests. This was on the basis that the existence and quantum of any potential claimant's claim would depend on whether the alleged inflated costs had been absorbed by the claimant or passed on to its buyers. BA argued that if the costs had been passed on to buyers, then only the buyers could recover from BA. Emerald suggested that the definition of the class could be amended to exclude claimants for damage that had been passed on. However, the judge considered that this would only cause further problems with ascertaining the members of the class and again he agreed with BA's arguments. The judge held that even if the class was identifiable, "*the relief sought in the action [was] not equally beneficial to all members of the class*" and that there was an "*inevitable conflict between the claims of different members of the class*".

### **Comment**

The judge did not accept any of the grounds presented by the claimant to avoid his finding that Rule 19.6 of the CPR did not authorise additional claimants to be represented in this case. The judge noted that in relation to the issue of "passing on" damage, the problems identified by the claimants would be better dealt with by Parliament than by stretching the use of Rule 19.6. The judge also noted that the existing 178 additional claimants and any others seeking to join in after the publication of the European Commission's decision would be more conveniently accommodated by way of a Group Litigation Order under Rule 19.11 of the CPR.

Emerald's damages claim will now continue through the courts without the representative element. In mid-April Emerald sought leave to appeal the High Court judgment on the representative element to the Court of Appeal. It is understood that permission to appeal has now been granted. A hearing in the Court of Appeal may take place as early as this autumn.

Olswang is advising another participant in the European Commission air freight investigation.

# Competition Appeal Tribunal makes a rare costs award against Ofcom

**Following the CAT's finding against Ofcom in last year's appeal against its termination rates dispute determination, the CAT has now also made a costs award against that regulator. It is very rare for the CAT to make such an award, and sheds important light on the circumstances in which it will do so, particularly the relevant standard of the regulator's decision-making.**

## Background

In 2008 the Competition Appeal Tribunal ("the CAT") ruled on an appeal brought by a number of telecommunications operators (including BT) against a determination by the telecommunications regulator, Ofcom, of a dispute under section 190 of the Communications Act 2003 ("the Act"). That dispute concerned the rates for mobile call termination charged by mobile network operators to communications providers connecting calls made to subscribers on those networks.

The facts of the original appeal are highly complex and not particularly material here. The key point is the sheer extent of the flaws which the CAT found in Ofcom's approach to its determination of the dispute (in particular the notorious "gains from trade" test, which examined solely whether the paying party could operate profitably on the basis of the proposed rates, as opposed to examining the effect on all parties to decide a price that was fair as between them). As the CAT noted:

*"There may, in relation to any particular dispute, be a number of different approaches which OFCOM could reasonably adopt in arriving at its determination. There may well be no single "right answer" to the dispute ... But the challenges raised by the Appellants in these appeals are more fundamental ... The grounds of appeal go far beyond alleging errors of appreciation."*

In fact, the CAT found in its 2008 judgment that Ofcom had erred on no less than 13 substantive points in its determination of the dispute, and a significant part of the judgment was therefore assigned specifically to setting out how Ofcom should exercise its dispute resolution function in future.

## The judgment on costs

In the wake of their successful appeal, all of the appellants applied for orders that Ofcom should pay their costs, either in full or in part. As the CAT noted in the costs judgment, rule 55 of the Tribunal Rules allows the CAT at its discretion to make any order it thinks fit in relation to payment of costs, and notably in doing so it may take account of the conduct of the parties to the proceedings.

Notwithstanding the existence of rule 55, the CAT has previously regarded actual awards of costs in appeals against the regulator with extreme reluctance. For example, in *The Number (UK) Limited v OFCOM* the CAT set out a basic rule "*that the starting point will, in effect, be that OFCOM should not in an ordinary case be met with an adverse costs order if it has acted reasonably and in good faith*". This is unlike the situation in relation to costs following proceedings under the Competition Act 1998, where a number of cases suggest that the CAT's starting point for the exercise of its discretion should be that costs follow the event.

However, Ofcom is in a unique position as a regulator, and has statutory duties to perform in the public interest. It is required in the exercise of its functions to judge and to take positions on (often highly

complex) factual and legal issues. The CAT has previously indicated that this puts the regulator in a different position from other parties when it comes to making costs orders. Ofcom exercises a unique, "quasi-judicial" role in determining disputes. It should not be deterred from acting in the way which it considers to be in the public interest – provided that it does so reasonably and in good faith – by a fear that in doing so it may be liable for costs. So, it should ordinarily be entitled to act without fear of an adverse costs order.

However, the CAT conceded here that "*the facts of a particular case may take the matter out of the ordinary so that an adverse costs order would be justified even in the absence of any bad faith or unreasonable conduct; room must always be left for the exercise of the discretion in this way where the facts justify it*". In this case, therefore, the CAT awarded partial costs against Ofcom (notwithstanding unreasonableness and bad faith were not alleged), on the basis that:

- BT's appeal was entirely successful in that the Tribunal accepted virtually all of its arguments (many of which repeated the points which BT had made to Ofcom, and therefore which Ofcom had ignored, during the original dispute process);
- Ofcom had erred very significantly in its exercise of its dispute resolution powers (the CAT referred to "*a compendium of serious errors*", and stated that Ofcom's decision "*was clearly wrong*");
- Ofcom failed to have proper regard to its regulatory objectives, wrongly focused on one particular regulatory obligation to the exclusion of others, failed to consider information that it should have taken into account, and placed too much weight on the need to appear to be consistent with its previous regulatory decisions;
- the "gains from trade" test applied by Ofcom was seriously flawed; and
- the fact that Ofcom was supported by the mobile operators in the appeal was not relevant – those operators had obviously benefited from Ofcom's decision in the form of higher termination rates.

Therefore the CAT stated that this was a case where the interests of justice lay in favour of awarding costs against Ofcom – indeed, the CAT went so far as to say that if it did not make a an order for costs against Ofcom in circumstances like these where its determinations were so seriously flawed, then it was difficult to see when such a costs order would be made at all.

### **Comment**

In some senses the CAT's judgment on costs remains nebulous – it remains that "*how the discretion will be exercised in any case will depend on its particular circumstances*". However, this judgment clearly evidences that the regulator has to get it very wrong indeed to incur a costs order. Even in this case, the appellants were only granted part of their costs (although this also owes to the conflation of various issues and costs in the case with other proceedings in the CAT). The basic decision for parties considering an appeal under the Act remains a weighing of the very generous possibilities for appeal against the reality that recovery of costs remains highly unlikely.

# The CAT upholds Tesco's challenge to the Competition Commission's groceries market investigation

**The CAT has upheld an application for appeal brought by Tesco challenging part of the Competition Commission's final report into the supply of groceries in the UK, specifically the CC's recommendation for a "competition test" to be implemented within the planning system, aimed at preventing the market dominance of large retailers. The CAT quashed the CC's decision to recommend the competition test and directed the CC to retake it.**

## Final report and remedies

On 30 April 2008, the Competition Commission ("CC") published its report entitled "*The supply of groceries in the UK: market investigation*" ("the Report"), a culmination of a wide-ranging market investigation lasting almost two years.

The CC found that, in many important respects, competition in the UK groceries sector is effective. However, the CC also found that certain local markets display one or more of three specific features which prevent, restrict or distort competition, namely: (1) high levels of concentration in a number of local markets which have persisted over several years; (2) barriers to entry or expansion in certain local markets caused by the planning regime which limits the construction of new larger grocery stores and imposes greater costs and risks on some retailers than on others; and (3) barriers to entry caused by the control of land in some highly concentrated markets by incumbent retailers.

The CC proposed a package of remedies to address the adverse affects on competition it had identified. This included the introduction of a competition test into the planning regime whereby a grocery retailer would be refused planning permission for a new store or an extension if it had more than 60% of the grocery floor space and there were fewer than four competing fascias in the relevant local market. The test, which would give the Office of Fair Trading ("the OFT") the role of statutory consultee, was essentially designed to prevent the local planning authorities from granting planning permission to large retailers if there is already a high level of concentration in the local market for large grocery stores.

## The appeal

Tesco's challenge to the Report was a narrow one, focusing only on the competition test and not challenging any of the CC's findings of fact. It sought an order quashing the proposed remedy on the following grounds:

1. the CC failed to take into account the economic costs of the competition test. Tesco argued that the test was a cap on growth which would reduce capacity, artificially limit competition and deprive customers of the benefits of expansion; and
2. the CC failed to take account of considerations which are relevant to the proportionality of the competition test. Tesco had three complaints in this regard: (i) the CC failed to make any assessment of the possible benefit of the competition test; (ii) the CC failed to take account of the economic costs of the test; and (iii) when examining the proportionality of the test the CC failed to take account of the fact that its assessment was not clear cut.

## The CAT's decision

Tesco's challenge was successful on both grounds:

- In relation to the first ground of appeal, the CAT held that there was a significant gap in the CC's analysis in relation to the costs of the competition test. It found that the Report did not fully and properly assess and take account of the risk that the application of the test might have adverse effects for consumers as a result of their being denied the benefit of developments which would enhance their welfare, including by leaving demand "*unmet*".
- The CAT concluded in relation to the second ground of appeal that the CC's proportionality analysis was flawed. The CAT held that the CC has a wide margin of appreciation in terms of how to assess proportionality, but it must perform some sort of assessment.

Importantly, the CAT did not conclude that the competition test would be ineffective, unreasonable or disproportionate. Neither did the CAT's decision preclude the possibility that the competition test may ultimately be lawfully recommended by the CC and implemented. Following a hearing on the appropriate relief, the CAT quashed the CC's decision in relation to the competition test and referred the matter back to the CC, with a direction to reconsider and make a new decision in accordance with the CAT's judgment. The CC has undertaken to reach a decision by 5 October 2009.

## Comment

The large grocery retailers are no strangers to the regulatory microscope, with three CC inquiries into grocery retailing in the eight years prior to the latest market investigation. The supermarkets are also currently subject to a number of investigations under Chapter I of the Competition Act 1998 and a number of mergers in the sector have also been subject to scrutiny. Indeed, Tesco has recently been ordered by the CC to implement divestment remedies following the prohibition of its acquisition of a single Co-op store in Slough. In these circumstances, it is hardly surprising that Tesco should see the CAT's judgment as a victory. However, whether the decision will have any practical effect, other than perhaps delaying the inevitable, remains to be seen. It seems highly likely that the CC will return in October with the same, albeit more considered, competition test.

Perhaps the more significant aspect of the CAT's judgment is the signal it will send to other parties involved in recent or future market investigations, namely the CAT's willingness to question the CC's reports. Indeed, this development does not appear to have gone unnoticed amongst the likes of BAA or Barclays, who have recently brought challenges in respect of other CC market investigations.

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# About Olswang



Olswang is a leading business law firm with a distinctive approach. Our pioneering and problem-solving ethos has established a commanding reputation in a wide range of industries.

Founded in 1981, our Firm has grown to a team of over 650, including over 100 partners, across four European offices. In addition, Olswang has a formal alliance with a major US firm Greenberg Traurig LLP and a long-established best friends network of leading independent law firms throughout the world. For the last four years Olswang has been ranked in The Sunday Times 100 Best Companies to Work For and our strong management team is dedicated to the personal and professional development of our people.

Our Firm continues to be acknowledged as a leading practice in many of our core areas: Olswang was short-listed for EU/Competition Team of the Year at the annual Legal Business Awards and was voted TMT Team of the Year 2009 for the second year running; Olswang's Corporate Group won M&A Law Firm of the Year at the M&A Awards 2008 in conjunction with M&A Magazine, and was named Corporate Team of the Year – Mid markets at The Lawyer Awards 2008.

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At Olswang the passion of our lawyers, the confidence of our approach and the commercial edge to our advice provide a unique and compelling service.

***The information contained in this update is intended as a general review of the subjects featured and detailed specialist advice should always be taken before taking or refraining from taking any action.***

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