



N A B A R R O  
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# Brussels Update

## EU & Competition newsletter

13 July 2007

We enclose the latest edition of *Brussels Update*, a regular update on significant developments in EU law and policy and UK competition law prepared by the EU & Competition group. We hope that you will find it useful and informative. If you think this publication may be of interest to any of your colleagues or acquaintances, please feel free to forward it to them and we will be happy to add them to our mailing list. New subscribers should click [here](#).

**Rachel Bickler, editor**

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### HEADLINES

#### UK COMPETITION

OFT publishes results of its market study into internet shopping  
OFT announces market study into house building  
Goldshield settles cartel claim with the Department of Health  
OFT responds to credit card Supercomplaint  
BSkyB's pay TV service under review

#### EU COMPETITION

Competition to be dropped as a Treaty objective  
Appeals brought against decision in gas switchgear cartel case  
EU's international rail passenger services open to competition by 2010  
Commission prohibits proposed takeover of Aer Lingus by Ryanair

#### PUBLIC PROCUREMENT

Litigation over German group pension service contracts  
Prison construction outside the security exception  
Are local authority association services "public service contracts"?  
Public broadcasting organisations subject to procurement rules  
Bus route licences are not subject to the procurement rules  
ECJ rules on Greek medical equipment case  
MEP's own report on procurement implementation problems



N A B A R R O  
CLARITY MATTERS

## **STATE AID**

CFI dismisses appeal over aid to Italian ferries

DHL training aid may lack "incentive effect"

Tax reductions for free zone in Madeira endorsed by Commission

Conditional authorisation of state guarantee for Austrian bank

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## **UK COMPETITION**

### **OFT PUBLISHES RESULTS OF ITS MARKET STUDY INTO INTERNET SHOPPING**

On 19 June 2007, the Office of Fair Trading (OFT) published the results of its market study into internet shopping. The study confirmed that the market, worth over £21.4bn, was operating competitively but outlined some concerns. These included the level of information supplied to consumers, the application of the distance selling regulations, and on-line security. The OFT will now work with consumer groups and businesses to implement better practices to resolve the concerns that the study had raised. The OFT has recently announced a policy shift towards performing more market studies (using its powers under the Enterprise Act 2002) to investigate rather than carrying out a number of investigations under the Competition Act 1998 into the same market.

### **OFT ANNOUNCES MARKET STUDY INTO HOUSE BUILDING**

The Office of Fair Trading (OFT) launched a market study into the house building market on 22 June 2007 using its powers under the Enterprise Act 2002. The decision to initiate the market study follows the March 2004 Barker Review of Housing Supply, which highlighted the need for better customer satisfaction and the development of a code of conduct for new house sales. The Review stipulated that the OFT should assess the market if there was insufficient progress in the areas of concern.

### **GOLDSHIELD SETTLES CARTEL CLAIM WITH THE DEPARTMENT OF HEALTH**

On 22 June 2007, the Department of Health announced a settlement with Goldshield Group Plc (Goldshield) in relation to anti-competitive cartel conduct regarding the supply of generic pharmaceutical drugs to the National Health Service. Goldshield, along with a number of other generic drugs companies, was investigated by the Serious Fraud Office in relation to a cartel between 1996 and 2000 that is alleged to have fixed the price of a number of drugs including antibiotics, Warfarin and Ranitidine. Goldshield has now settled the civil claim for £4m (without admitting liability) with regard to Warfarin (the blood anticoagulant) sales. Other alleged cartel participants have also entered into settlement agreements, e.g. Norton settled for £13.5m in April 2006, and Generics UK settled for £12m. The on-going criminal investigation was conducted under the common law "conspiracy to defraud" offence, as it predates the introduction of the "cartel offence" under the Enterprise Act 2002.



N A B A R R O  
CLARITY MATTERS

### **OFT RESPONDS TO CREDIT CARD SUPERCOMPLAINT**

Following a Supercomplaint made under the Enterprise Act 2002 by the consumer organisation, Which? on the method of credit card interest rate calculations, the Office of Fair Trading (OFT) published a response on 26 June 2007. In its response, the OFT has identified concerns over whether consumers understand how costs were calculated when making decisions about which credit card products to purchase. When dealing with these issues, the OFT plans to take a negotiated approach, working with the industry to ensure that better information is made available and consumers are fully informed of the issues.

### **BSKYB'S PAY TV SERVICE UNDER REVIEW**

The Office of Communications (Ofcom) opened a consultation, on 26 June 2007, into the decision by BSkyB and National Grid Wireless Limited (NGW) to replace their free-to-air channels with a pay TV service on their Digital Terrestrial Television (DTT) platform. Ofcom plans to publish a consultation document on the issues later this year. In the interim, NGW is obliged to maintain the free-to-air channels on the DTT platform. The consultation coincides with the Competition Commission's investigation into BSkyB's acquisition of shares in ITV.

## **EU COMPETITION**

### **COMPETITION TO BE DROPPED AS A TREATY OBJECTIVE**

On 21-22 June 2007, the European Council reached agreement on the mandate for drafting a revised Treaty of European Union. One of the political concessions that broke the deadlock was accession to French President Sarkozy's demand that the reference to "free and undistorted competition" be removed from the Article in the Treaty listing its principal objectives. As a sop to those opposing the change, it has been proposed that a Protocol on Internal Market and Competition be annexed to the Treaty which will refer to inclusion of "a system ensuring that competition is not distorted". The legal implications of the changes are unlikely to become clear until there is a ruling from the European Court of Justice, assuming that the draft Treaty is finalised and ratified. In the meantime, there is much speculation over the political implications for the direction of EU competition policy, in particular in the areas of state aid, liberalisation of network industries and mergers.

### **APPEALS BROUGHT AGAINST DECISION IN GAS SWITCHGEAR CARTEL CASE**

Appeals have been lodged by all but one of eleven companies found guilty by the European Commission (Commission) in January 2007 of cartel offences in respect of the market for gas insulated switchgear. The companies were found to have engaged in a range of illegal practices and agreements concerning market-sharing, quota allocation, bid-rigging, price-fixing and the exchange of sensitive information between 1988 and 2004. Hitachi, Siemens, Toshiba, Areva, Alstom, VA Tech, Siemens Transmission & Distribution, Nuova Magrini Galileo, Fuji and Mitsubishi Electric are now appealing various aspects of the Commission decision.

### **EU'S INTERNATIONAL RAIL PASSENGER SERVICES OPEN TO COMPETITION BY 2010**

The EU's political institutions have reached broad political agreement on a package of legislation intended to open up the market for international rail passenger services within the



N A B A R R O  
CLARITY MATTERS

European Union by 2010. The deal however does not give automatic rights to foreign rail companies to have access to the domestic rail market though nothing prevents Member States (as is the case in the UK) from operating such a system. The draft package of legislation also deals with other related issues such as a directive dealing with common procedures for certification of train drivers and regulation harmonising minimum rights for rail passengers including compensation for delay and assistance to disabled passengers or those with reduced mobility.

### **COMMISSION PROHIBITS PROPOSED TAKEOVER OF AER LINGUS BY RYANAIR**

The European Commission (Commission) recently prohibited the proposed acquisition of Aer Lingus by Ryanair, which would have resulted in the merger of the principal airlines offering short-haul flights between Ireland and the continent. Following an in-depth investigation, the Commission concluded that the merger would create a monopoly on 35 routes leading to higher prices, poorer services and reduced choice for consumers. The Commission believes that the market tests it carried out demonstrated that remedies put forward by Ryanair were insufficient to remove competition concerns. Michael O'Leary, chief executive of Ryanair, criticised the decision and confirmed his company's intention to appeal to the European Court of First Instance. Mr O'Leary also confirmed to the press that the company had filed a formal complaint to the EU ombudsman over alleged leaks of confidential information in relation to the investigation and decision-making process.

## **PUBLIC PROCUREMENT**

### **LITIGATION OVER GERMAN GROUP PENSION SERVICE CONTRACTS**

The European Commission is taking an action against Germany to the European Court of Justice, concerning the practice of local and municipal authorities to award contracts for group pension services without going out to tender under the public procurement rules. Under a collective agreement concluded in 2003 by an association of German local and municipal authorities and the trade union, the pension services are reserved to three particular groups of service providers. Insurance companies offering similar services consider that this agreement unfairly prevents them from offering alternative pension services. Germany does not consider the agreements to be covered by the procurement rules and the matter will now have to be resolved before the Court.

### **PRISON CONSTRUCTION CONTRACTS OUTSIDE THE SECURITY EXCEPTION**

Italy has been formally requested to provide information to the European Commission (Commission) concerning a decree by its Minister of Justice in 2003 which authorised the building of several prisons without the requirement that the public works contracts go out to tender under the procurement rules. Italy considers that the contracts concerned were exempted from public tender under the exception applicable to contracts subject to tight security requirements and for reasons of urgency. The Commission however disputes the valid application of either of these exclusions to the facts in this case.



N A B A R R O  
CLARITY MATTERS

### **ARE LOCAL AUTHORITY ASSOCIATION SERVICES "PUBLIC SERVICE CONTRACTS"?**

Under the French Local Authority Code, a municipality, which is part of a joint local authority association, may make its services available to the association. The European Commission has sent a reasoned opinion to France alleging that these arrangements effectively amount to the award of public service contracts and should be subject to the procurement rules.

### **PUBLIC BROADCASTING ORGANISATIONS SUBJECT TO PROCUREMENT RULES**

A long-standing debate between Germany and the European Commission (Commission) over whether the public procurement rules apply to the award of contracts by public broadcasting companies is to go before the European Court of Justice. Germany takes the view that the contracts are not governed by the rules because they are not financed through state funds but through licensing fees levied on citizens. The Commission considers that the fee system is based on the exercise of public powers conferred by the state and therefore amounts to public financing.

### **BUS ROUTE LICENCES ARE NOT SUBJECT TO THE PROCUREMENT RULES**

Following a complaint, the European Commission (Commission) carried out an investigation into whether the granting of bus route licences by a German regional transport authority amounted to the award of a contract under the public procurement rules. The complainant in the case alleged that the practice of the regional authority in question led to the award of bus route licences exclusively to a selected group of providers and that there was no opportunity for access to the market for other parties. The Commission rejected this view on the basis that the licences amounted to a service concession and therefore were not subject to the procurement rules. However, while carrying out the investigation, the Commission negotiated changes to the licensing system of the regional administration concerned to improve the level of transparency of the system including the publication of information on a dedicated website.

### **ECJ RULES ON GREEK MEDICAL EQUIPMENT CASE**

The European Court of Justice (ECJ) has ruled on a reference from a Greek Court asking whether a tender for medical devices, duly certified as meeting EC standards and appropriately labelled with the "CE" marking, can be rejected from a procurement procedure at the technical assessment stage. The ECJ found that the principle of equal treatment and the obligation of transparency preclude such unilateral action unless justified by the outcome of a special safeguard procedure. In order to comply, the relevant Member State may, having notified the European Commission (Commission), take interim measures to withdraw a certified medical device from the market. It is the Commission's role to decide whether the device complies with necessary standards. The contracting authority must wait for the outcome before proceeding with the procurement process.

### **MEP'S OWN REPORT ON PROCUREMENT IMPLEMENTATION PROBLEMS**

A Member of the European Parliament has published a report on the transposition and implementation of two new public procurement and utilities directives adopted in March 2004. Member States were obliged to transpose the directives into national law by 31 January 2006. The report notes that only 20 out of the 27 Member States have so far achieved this citing lack



N A B A R R O  
CLARITY MATTERS

of national legal expertise, lack of human resources and insufficient political will as the most common barriers to effective transposition. The report recommends negotiation between Member States and the European Commission to avoid breaches and ensure best practice. The report also calls for the development of 'national advisory agencies' to help Member States improve standards and consistency in the application of the procurement rules generally and recommends that the Commission assist by adopting an action plan focusing on illegal direct contract awards and incorrect transposition.

## STATE AID

### CFI DISMISSES APPEAL OVER AID TO ITALIAN FERRIES

On 20 June 2007, the Court of First Instance (CFI) dismissed the appeal (in case T-246/99) by the Gruppo Tirrenia di Navigazione (Tirrenia) against an earlier European Commission (Commission) decision in respect of alleged aid granted by Italy. In August 1999, the Commission opened an in-depth investigation into alleged aid to domestic ferry services operated by Tirrenia. The Commission considered that the aid was new aid that might not be compatible with the common market and requested that Italy suspend further grants beyond the net additional cost of providing services of general economic interest. Tirrenia appealed the decision to open in-depth proceedings. The CFI dismissed the appeal, finding that the Commission had competence to examine the content of public services obligations and to open proceedings where it has serious doubts over whether aid is compatible with the EC Treaty.

### DHL TRAINING AID MAY LACK "INCENTIVE EFFECT"

The European Commission (Commission) has opened formal investigations into proposed German training aid to DHL, the worldwide service provider in the parcel delivery and airfreight sector. Following recent relocation, DHL is building a new delivery and airfreight centre and envisages a training project for its employees in jobs such as ground handling of airfreight, security, and pre-flight and ramp techniques. Under plans put forward by Germany, around 60 per cent of the training costs would be covered by subsidies totalling €7.7m. The Commission has concerns that this may not be compatible with the EU state aid rules. As DHL would need to employ new workers in order to start operating in the new location and the training would have to be carried out whether or not aid was granted, the aid may lack the necessary 'incentive' condition, which requires that aid may only be granted in circumstances where it encourages activities that would not otherwise be carried out.

### TAX REDUCTIONS FOR FREE ZONE IN MADEIRA ENDORSED BY COMMISSION

The European Commission (Commission) has approved a scheme of tax reductions worth €300m to companies establishing themselves in Madeira between 2007 and 2013. Madeira is among the outermost regions of the EU. The regional guidelines used by the Commission in its decision-making process take into account certain difficulties faced by such regions, including size, remoteness, difficult topography and climate and limited scope of economic dependence. The Commission was satisfied that the aid was intended to promote regional development and was proportionate to the additional costs resulting from the region's handicaps.



N A B A R R O  
CLARITY MATTERS

### **CONDITIONAL AUTHORISATION OF STATE GUARANTEE FOR AUSTRIAN BANK**

A €900m guarantee granted by Austria to the country's fourth largest bank BAWAG-PSK in 2006, has been conditionally authorised by the European Commission (Commission). Following a period of speculative financial investments between 1995 and 2004, BAWAG-PSK faced a liquidation crisis in Spring 2006 which was only averted through the adoption of a tailor-made law allowing the Government to provide a guarantee to rescue the bank. In November 2006, the Commission opened in-depth investigations into the aid. It is now satisfied that a restructuring plan endorsed by new owners of the bank was likely to be successful and that compensatory measures would limit any potential distortion of competition.

### **CONTACT**

Cyrus Mehta, Partner **T** +44 (0)20 7524 6497 [c.mehta@nabarro.com](mailto:c.mehta@nabarro.com)

Rachel Bickler, Associate **T** +32 2 626 0740 [r.bickler@nabarro.com](mailto:r.bickler@nabarro.com)

### **Our EU & Competition group**

The Nabarro EU & Competition group advises on all aspects of UK and EU competition and regulatory law and on related areas, including merger control, anti-dumping, customs and origin legislation, state aid, public procurement and EU rules on the free movement of goods and services.

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#### **London**

Lacon House, 84 Theobald's Road,  
London WC1X 8RW  
**T** +44 (0)20 7524 6000  
**F** +44 (0)20 7524 6524

#### **Sheffield**

1 South Quay, Victoria Quays,  
Sheffield S2 5SY  
**T** +44 (0)114 279 4000  
**F** +44 (0)114 278 6123

#### **Brussels**

209A Avenue Louise,  
1050 Brussels, Belgium  
**T** +32 2 626 0740  
**F** +32 2 626 0749

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