American Airlines/US Airways Merger: Back to Square One?

On 13th August 2013, the US Department of Justice (DOJ) and attorneys general from six US states and the District of Columbia filed suit in the US District Court for the District of Columbia to block the merger between US Airways and American Airlines. Days before, a group of American Airlines customers filed a claim that the merger would violate Section 7 of the Clayton Act.

These actions took place within little more than a week after the European Commission cleared the proposed merger with commitments, in a Phase 1 decision on 5 August 2013. The European Commission concluded that the merger would lead to a monopoly on the London-Philadelphia route, where US Airways and American Airlines (through its joint venture with British Airways and Iberia) are the only carriers offering non-stop flights. However, the Commission was willing to accept commitments that it felt would alleviate the competition concerns. These included an agreement to release one daily slot at each of London Heathrow and Philadelphia airports. In addition, the parties were willing to provide incentives for a possible new entrant to acquire certain rights and to entering into special feed traffic agreements with any likely new entrant airline.

The US actions have thrown American Airlines emergence from Chapter 11 bankruptcy into disarray. American has been in Chapter 11 since November 2011. In March 2013, the bankruptcy judge had preliminarily approved American’s reorganization plan, which contemplates the merger with US Airways. However, the plan confirmation has been postponed in light of the DOJ action.

The Department of Justice has sought to see American emerge from bankruptcy as an independent company. Suggestions that American could remain as an independent carrier and emerge from bankruptcy alone have been viewed by some commentators as unrealistic in light the increased strength of Delta and United Airlines following their recent mergers. Although American has asked the bankruptcy judge to confirm its reorganization plan notwithstanding the DOJ action, the suing customers have asked the judge to send their antitrust
lawsuit to the US. District Court for the Southern District of New York, claiming that that the bankruptcy court is not the appropriate forum to decide this matter.

In the meantime, although DOJ had requested a trial date in March 2014, claiming the need for time to ensure the court will have an appropriate record on which to base a decision in what would be one of the largest merger challenges ever tried. The airlines had opposed this, pointing to the DOJ’s already 16 month investigation of the matter. The trial judge has now set an expedited 25th November 2013 trial date.

Just one day after the DOJ’s request for a March trial date, the parties have expressed an interest in settling the case, although the DOJ says it awaits a proposal from the defendants that addresses the competitive harms it has addressed in its complaint. In spite of the fact that prior policy allowed six unprofitable airlines to merge over the last five years, the current competitive landscape was viewed as not “functioning as competitively as it ought to be,” according to the Justice Department, and the merger would result in four airlines controlling some 80% of the US market.

We will watch this space with interest.

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**Italian Competition Authority Opens Investigation on Former State-owned Railway Incumbent**

On 28th May 2013, the Italian Competition Authority (“ICA”) published its decision to open an in-depth investigation on Ferrovie dello Stato Italiane S.p.A. (“FS”), the Italian railway incumbent operator, for abuse of dominance.

After the privatization in 2000, FS has become the holding company of the FS Group, which fully controls Trenitalia S.p.A. (“Trenitalia”), the incumbent passenger services operator, and Rete Ferroviaria Italiana S.p.A. (“RFI”), which manages the Italian railway network (“Network”) and consequently the access to passenger stations and maintenance facilities.

In April 2012, the Italian company Nuovo Trasporto Viaggiatori S.p.A. (“NTV”) entered the market for high-speed passenger services, so that putting an end to Trenitalia monopoly on the passenger services market.

NTV filed a complaint with ICA against Trenitalia for anti-competitive practices.

After examining the complaint ICA decided to start proceedings alleging that FS had committed the following infringements of Article 102 TFEU:

(a) Charged high prices to allow NTV to access the Network and, at the same time, low-prices to consumers for high-speed passenger services

(b) Denied NTV access to the Network during peak hours, granting them to Trenitalia

(c) Denied NTV access to maintenance facilities and spaces for advertising and promoting commercial services in passenger stations

(d) Refused to grant NTV suitable ticket office locations
In particular, ICA found that the conduct referred at (a) above could constitute a margin squeeze. FS charged low-prices in the downstream market (high-speed services) combined with a high price policy in the upstream market (network access), so that to impede NTV from offering the same price in the downstream market because of the insufficient margins due to the costs suffered in the upstream market.

In relation to the conduct referred in letter (b), (c) and (d) above ICA alleged that their implementation was designed to impede NTV entering into the high-speed passenger services market. In addition to that, ICA found that a dominant undertaking, like FS, is under an obligation to deal with other competitors (NTV) in a non-discriminatory way in relation to the access to the infrastructure that it owns.

In our view, the ICA’s decision highlights two important issues for competition authorities: first, the growing scrutiny of the ICA on margin squeeze issues and secondly, the extent to which FS’s subsidiaries are commercially as well as legally independent of the holding company. This lack of commercial independence has led to FS being subject to investigation although it is an holding company, legally separated from Trenitalia and RFI, which have materially carried out the alleged anti-competitive conduct.

Liberty Global’s USD 4.1 bn acquisition of Kabel BW in the limbo

On August 14, 2013 the Higher Regional Court of Düsseldorf (“OLG Düsseldorf”) overturned the merger clearance decision issued by the German Federal Cartel Office (“Bundeskartellamt”) on December 15, 2011 for Liberty Global’s USD 4.1 bn acquisition of the cable network operator Kabel BW. Kabel BW is Germany’s third-largest cable company. Liberty Global already owned Unity Media, the country’s second largest cable company.

The Bundeskartellamt had only cleared the transaction after Liberty Global had made extensive concessions in order to preserve competition in the cable market. Nonetheless, the clearance was appealed by two competitors (Deutsche Telekom and Netcologne). The competitors asserted that the obligations (“Auflagen”) imposed on Liberty Global were insufficient to protect unhindered competition and to compensate for the increase of the market-dominating position resulting from the transaction. The concessions included, e.g.: removing encryption of digital free TV programs; renouncing the use of certain exclusivity clauses; granting special termination rights for large contracts and enabling competitors to bid on contracts with housing associations that make up for a considerable part of the sales.

The OLG Düsseldorf has now ruled that the obligations imposed by the Bundeskartellamt were not sufficient to compensate for the increase of the market-dominating position. The court expected that, without the concentration, Kabel BW might have extended its operations to the regions served by Unity Media and acted as a competitor of Unity Media. The Court further came to the conclusion that the geographic market was not to be defined as national market (as assumed by the Bundeskartellamt), but that it was mainly regional.
Leave to appeal the judgment of the OLG Düsseldorf to the Federal Court of Justice was refused. However, the judgment is not yet effective and the parties can appeal against denial of leave to appeal before the Federal Court of Justice itself within a period of one month.

If the judgment becomes binding, the case will be remitted back to the Bundeskartellamt for re-examination as to whether the merger should be cleared subject to stricter obligations. If the merger cannot be cleared, the concentration between Liberty Global and Kabel BW would have to be dissolved.

**Competition Enforcement Action over Ban on Online Sales Follows OFT Market Study**

On 5th August 2013, the OFT issued a decision finding that Roma Medical Aids Limited, a manufacturer of mobility scooters, and a number of its online retailers, some of which operated physical retail shops, had infringed Chapter I of the Competition Act 1998.

This decision is significant in that it demonstrates the OFT’s willingness to take competition law enforcement following a market study commenced under the Enterprise Act 2002 in one of the first cases of its kind. It also highlights the increasing importance the OFT attaches to its market study work. The increased market study powers contained in the Enterprise and Regulatory Reform Act 2013 only serve re-emphasise this.

The OFT held in its decision that the parties had entered into a series of agreements or engaged in concerted practices over several periods between 2011 and 2012 which prevent UK-wide online retailers from selling Roma branded mobility scooters online or from advertising their prices online.

These agreements and practices targeted the more vulnerable consumers in society. They limited consumer choice and obstructed consumers’ ability to compare prices and get value for money. In earlier investigations the OFT found that restrictions could increase the price of mobility scooters between £1,000-£3,000.

Although found guilty of competition law infringement, no fines were imposed on the parties as their turnover fell within the threshold for immunity from fines for small agreements under Section 39 of the Competition Act 1998. However, the OFT directed that the parties should bring the infringements to an end (if they had not already been terminated) and to refrain from entering into the same or similar arrangements in future.

This decision follows an earlier market study under Section 5 of the Enterprise Act 2002 into the mobility scooter sector and in particular into suspected online restrictions.

The OFT’s decision is significant because it:-

- exhibits the OFT’s willingness to take competition law enforcement action following a market study
- emphasises the importance the OFT attaches to preventing vertical restrictions in the online world
• highlights that no company, however small, is immune from competition law enforcement in the UK and that all companies need to ensure that they have suitable competition law compliance programmes in place to ensure observance with the law.

French Competition Authority Issues New Merger Guidelines

On July 10, 2013, the French Competition Authority (Autorité de la Concurrence) published an updated version of its Control of Concentrations Guidelines, first issued in 2009.

The main changes are as follows:-:

(a) the Authority stressed the importance of the informal pre-notification procedure, which enables the parties to anticipate possible antitrust issues;

Although the Guidelines stress the importance of the pre-notification procedure while stating that such procedure remains optional and can be initiated at any stage of the concentration project, they do not precisely regulate this phase (cf. paragraphs 136 to 142 of the guidelines). Many practitioners deplore this fact and suggest implementation of concrete processes and procedures within the pre-notification phase to rationalize it (notably to save time).

(b) the Authority has specified the conditions to benefit from its simplified accelerated examination procedure (15 days where no competition issues are likely to arise);

A significant number of practitioners welcome the clarifications of the conditions to benefit from the simplified examination procedure (which entered into force in January 2011) but some regret that such procedure is not applicable to concentrations where the parties act on the same market or where the parties have vertical links but where their cumulated market shares are low (cf. paragraphs 636 et seq. of the Guidelines).

(c) the Authority has issued standard forms of asset transfer agreements which may be used by parties contemplating structural remedies.

The Guidelines distinguish between structural and behavioral remedies to be used (when an operation is likely to significantly harm competition and where its beneficial effects in terms of economic efficiency are not sufficient to compensate such harm). They notably indicate that when there is a horizontal overlap of the activities of the parties, structural remedies in the form of asset transfer agreements are the most efficient remedies; whereas when there is a risk of foreclosure in upstream or downstream markets then, subject to certain conditions, behavioural remedies may be sufficient (cf. paragraph 576 of the Guidelines).

UK Groceries Code Adjudicator: Consultation on Investigation and Enforcement of Groceries Supply Code of Practice

On 25th June 2013, an Act creating the Groceries Code Adjudicator came into force. The Adjudicator is charged with encouraging, monitoring and enforcing compliance with the Groceries Supply Code of Practice by the UK’s largest supermarkets (some 10 supermarkets with UK groceries turnover of more than £1 billion). The Groceries Supply Code of Practice was introduced in 2010 following a Competition Commission investigation.
The Code requires large retailers to deal fairly and lawfully with their suppliers, including among other things:

- Not to vary supply agreements unilaterally
- Not to charge listing fees except in limited circumstances
- Not to charge position payments except for promotions
- Not to require suppliers predominantly to fund promotions
- Not to over-order at promotion prices
- Not to seek contributions to marketing costs unless provided for in supply agreements
- To de-list suppliers only for genuine commercial reasons and to give reasonable notice and opportunity to discuss

The need for the Adjudicator arose from the inability of the industry to agree on a means of self-regulation, as well as a perception that suppliers were often reluctant to come forward with complaints for a variety of reasons, including the risk that a challenge could result in adverse action against the complainant. The Adjudicator has a legal duty to protect supplier confidentiality.

The Adjudicator’s statutory functions are to provide advice both to suppliers and retailers, arbitrate disputes, investigate complaints, impose sanctions and other remedies for breaches of the Code and to publish an annual report.

The Act provides for tough powers and a range of enforcement actions available to the Adjudicator to ensure suppliers are treated fairly. However, before the Adjudicator may launch a formal investigation and take enforcement action, she must publish guidance on the criteria she intends to adopt in deciding whether to carry out investigations, the practices and procedures for such investigations, the criteria for choosing among enforcement powers and the criteria for deciding the amount of any financial penalties.

To that end, the Adjudicator on 31 July 2013 launched a consultation seeking feedback on the proposed guidance:


The proposed guidance sets out four criteria for initiating a formal investigation: impact, strategic importance, risks and benefits and resources. Once a formal investigation is opened, the guidance sets out proposed procedures for obtaining documents and information, including imposing time limits. If an investigation results in a finding of a breach of the Code, the guidance proposes that the Adjudicator may make recommendations, require information to be published and/or impose financial penalties. The proposed guidance sets out the criteria for deciding which enforcement power to use, considering sanctions that are proportionate to the nature and seriousness of the breach. The Adjudicator proposes a maximum financial penalty of 1% of UK turnover.
Responses to the consultation are due by 22 October 2013 and the final guidance must be published by 25th December 2013.

**Italian Competition Authority opens antitrust proceedings against Italian Bar Association for two alleged anti-competitive agreements**

On 16th July 2013, Italian Competition Authority (“ICA”) decided to open an investigation on Consiglio Nazionale Forense (“CNF”), the Italian Bar Association, for infringement of Article 101 TFEU.

ICA’s investigation is aimed at verifying whether two separate practices by CNF limited the ability of Italian lawyers to fix their own fees and to advertise their own law-firm on the internet.

The alleged anti-competitive behaviour can be summarized as follows:

(a) CNF published on its website the table of fees, that was repealed by the Italian Government in 2006, along with a letter (“Letter”) pointing out that a lawyer asking for a fee below the minimum value set forth in the Table may be sanctioned for breaching the professional Code of Conduct;

(b) CNF issued a memorandum (“Memorandum”) according to which lawyers cannot use the internet to advertise their own businesses as it would breach Article 19 of the Code of Conduct.

In relation to the first practice, ICA believes that the Letter appears to be aimed at fixing a minimum level of fees, so impeding competition on fees between all Italian lawyers. Such behavior would be detrimental to the consumer who could not benefit from a reduction in prices of legal professional services.

As far as the second practice is concerned, ICA found that the Memorandum would impede Italian lawyers properly accessing the market. Nowadays, the internet is one of the most used means of communications and restrictions on its use would prevent either Italian lawyers from taking the opportunities offered by an important distribution channel or the consumer from being informed on professional services and comparing the different offers.

In our view, the above decision highlights the contrast between the business of running a modern law firm and the traditional stance of the Italian Bar Association which is struggling to come to terms with modern commercial practices.