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COMPETITION COMMITTEE**

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ROUNDTABLE ON COMPETITION AND SPORTS

Note by the delegation of the United Kingdom

This note is submitted by the delegation of the United Kingdom to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 16 - 17 June 2010

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ROUNDTABLE ON SPORTS AND COMPETITION

-- Note by the United Kingdom --

1. Introduction

1. The purpose of this paper is to provide an overview of the competition enforcement work of the Office of Fair Trading (OFT) in the area of sports and competition.

2. Sports necessarily require agreed rules of the game, which are unlikely to give rise to competition law issues. However, EC and UK law (including Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and the Chapter I and II of the Competition Act 1998)) may apply to sport insofar as the conduct in question constitutes an economic activity rather than a 'purely sporting' activity. This principle is established in EU case law on sports and competition. By way of example, when a sport's governing body imposes rules on its members which go beyond the rules of the game such that this results in it controlling the collective economic exploitation of the sport, for example in the sale of media rights, this would fall within the remit of competition law.

2. The OFT's Treatment of Sports Cases

3. The OFT has stated that agreements, decisions and concerted practices concerning economic activity in the sports sector are subject to the provisions of the Competition Act 1998, to the extent that they may affect competition in the UK.¹

2.1 *British Horseracing Board and Jockey Club*

4. This issue arose following a complaint that the British Horseracing Board (BHB) was abusing a dominant position as a sole provider of race and runner data on UK horse racing.² The OFT considered the governance rules of horse racing in the UK: it accepted that non-commercial sporting rules, such as rules specifying the earliest age at which horses can run, how starting stalls should be operated, or how horses are to be tested for doping, are unlikely to affect competition. Additionally, the OFT accepted that the application of the competition rules in the Competition Act 1998 to a sport should be sensitive to the distinctive characteristics of that sport. Consequently, the OFT considered that, even if the rules may have some negative effects on competition, sporting rules which are essential to enable the sport to operate would not infringe the Chapter I prohibition of the Competition Act 1998, which prohibits anti-competitive agreements, decisions and concerted practices.

5. In addition, the OFT may exempt an agreement from the Chapter I prohibition if it is seen as contributing to the improvement of production or distribution or promotes technical or economic progress while allowing consumers a fair share of the resulting benefit.

¹ http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft654.pdf.

² *Ibid.*

6. However, the OFT considered that certain of the rules of racing were not compatible with the Chapter I prohibition of the Competition Act 1998. First, because they contained restrictions of competition, such as limitations on organising races and market sharing which have significant economic and commercial consequences. Second, because the restrictive aspects of the rules of the BHB and Jockey Club were not essential for achieving the objectives that the BHB and the Jockey Club maintained were being promoted, and were not indispensable to ensure a viable, orderly and trusted British racing industry.

2.2 *Rugby Union Premier League*

7. In addition, the OFT has considered whether the entry criteria of Premier Rugby Limited (which represents clubs within the English rugby union premier league) are compatible with competition law, following a complaint against the English governing bodies for rugby union.³

8. The rules in question prevented teams who are not the main tenants at their home stadium from being promoted to the premier league of first division teams. This rule did not apply to some existing premier league teams. The OFT considered that the rule had effectively prevented one club from being promoted to the Premiership in the 2001/2 season, as it was not the main tenant of its home stadium. Further, the OFT considered that the rules contained restrictions of competition, which had economic and commercial consequences, which were not indispensable to ensure a viable rugby industry. Premier Rugby Limited revised its rules so as to meet the OFT's competition concerns.

3. **Price Fixing- Replica Football Shirts**

9. The OFT investigated the suspicion of a cartel between football replica shirt manufacturers, sports appareled retailers and a number of clubs. In August 2003, the OFT after concluding its investigation levied fines against a number of businesses including JJB Sports (£8.353m), Umbro (£6.642m), Manchester United (£1.1562m) and the FA (£198,000). The fines that were imposed in this were reflected the serious nature of the infringement.

10. The OFT concluded that there had been various agreements or concerted practices which fixed the prices of the top-selling adult and junior short sleeved replica football shirts manufactured by Umbro Holdings Ltd. In particular, the OFT found that there had been indirect exchanges of commercially sensitive information (future pricing intentions) between retailers through their suppliers in order to influence market conditions. These agreements/concerted practices related to replica football shirts of the England team and Manchester United, Chelsea, Glasgow Celtic and Nottingham Forest football clubs. Some of the parties were involved with the shirts of only one or some of the teams and some for longer periods than others. The longest that any of the parties were involved was from April 2000 until August 2001. The agreements or concerted practices took effect during key selling periods after the launch of a new replica football kit and during the Euro 2000 tournament.

11. The subsequent Court of Appeal's decision in *Replica Kit*⁴ sets out the test for proving such indirect information exchanges which are incompatible under competition law: it must be demonstrated that where a retailer (A) discloses to their supplier (B) their future pricing intentions the circumstances of this disclosure are such that A may be taken to have intended that their supplier (B) will/would make use of that information to influence market conditions, or did in fact foresee this, by passing that information on to other retailers (C). B must also be shown to have actually passed that information to C and that they disclosed this in circumstances where C may be taken to have known the circumstances in which the information was disclosed by A to B or that C in fact appreciated that the information was passed to it with

³ For further information, please see: http://www.offt.gov.uk/news-and-updates/press/2003/pn_112-03.

⁴ *Umbro Holdings Ltd v Office of Fair Trading* (Judgement on penalty) and *JJB Sports v Office of Fair Trading* Neutral citation [2006] EWCA Civ 1318. Case No. 2005/1623.

A's concurrence (i.e. to influence market conditions). It must also be demonstrated that C does, in fact, use the information in determining its own future pricing intentions.

4. Sports and media rights

12. The right to broadcast sporting events, and in particular to screen live coverage of major sporting events, is a prime commercial asset: rights to broadcast UK Premier League football for three seasons achieved a total of £1.78 billion in 2009. Competition in broadcasting is no less important than in other sectors of the economy. As elsewhere, it creates opportunities and incentives for suppliers to offer people what they want. Developments in broadcasting technology, which have greatly enhanced the scope for commercialisation of sports, are raising important issues under competition law.

13. The application of competition law to sports broadcasting should take account of distinctive economic features that do not occur in most other parts of the economy in the UK. Some of these features are set out below.

14. First, broadcasting provides a classic case of variable costs being very low in relation to fixed costs. Indeed the costs of broadcasting a programme are largely independent of the number of viewers or listeners.

15. Second, methods of revenue generation differ greatly as between broadcasting technologies. With traditional analogue terrestrial broadcasting, services are necessarily free at the point of delivery. The free-to-air broadcasters in the UK have historically been remunerated either by TV licence fees or advertising revenues. By contrast, the advent of new technologies to support pay-TV has meant that viewers, in common with consumers in other sectors, can face choices with associated prices.

16. Third, broadcasting is a multi-layered industry, in which market power at one level of the supply chain may have far reaching effects at other levels. This is relevant for a competition analysis. The sale of media rights in sport is characterised by the small number of powerful players at each level of the supply chain. Upstream, sports associations sell the rights to broadcast and record sporting events, typically through joint selling: a single organisation (such as a national football league) acts on behalf of its member clubs to negotiate with broadcasters. Downstream, broadcasters bid for the right to screen this content on a variety of platforms, with pay-TV the prevailing medium.

17. The restricted structure of the market has frequently raised issues under EU law. In addition, in the UK the vertical integration coupled with market power of one sports broadcaster, BSkyB, raised potential competition concerns about the broadcaster's conduct. The OFT investigation into this issue is discussed below.

4.1 BSkyB

18. The OFT investigated aspects of BSkyB's conduct under the Competition Act 1998, concluding its investigation in 2002.⁵ Central to this investigation was the question about whether BSkyB has a dominant market position in relation to the wholesale supply of premium sports and film content, and if so whether its pricing policies had abused that position in particular by:

- Exerting an anti-competitive 'margin squeeze' on rival distributors of pay TV;
- Pricing its channels in the form of anti-competitive 'mixed bundling';
- Giving anti-competitive discounts to distributors.

⁵ http://www.of.gov.uk/shared_of/reports/media/oft623.pdf.

19. The OFT concluded that BSkyB was dominant in the relevant markets for the wholesale supply of certain premium sports channels and of certain premium film channels. In particular, the focus was on channels showing content that could only be shown on pay TV. For sports, that content was identified with live Premier League football matches.

20. Other kinds of channel, and other means of viewing (e.g. video hire), were judged not to be sufficiently substitutable with premium pay TV channels to be included in the relevant markets. The OFT considered that one measure of the importance of the key sport content rights is their cost. The Premier League football rights alone cost almost as much as all the sports rights acquired for all free-to-air broadcasting. The OFT considered that BSkyB's ownership of these content rights had been a principal driver of its commercial strategy. Moreover, there were barriers to entry by potential rivals in premium channel supply, not least as a result of BSkyB's exclusive control of prime content rights. The OFT therefore concluded that BSkyB was dominant in the wholesale supply of certain premium sports and film channels.

21. Further, the OFT concluded that there were strong vertical relationships, through exclusive contracts and ownership linkages. These vertical relationships existed both between premium content and channel provision and between channel provision and distribution systems.

22. The OFT's assessment of whether BSkyB had abused its dominant position considered three allegations. First, it was alleged that BSkyB was abusing its dominance over premium pay TV channels, by exercising a margin squeeze in relation to its premium channels, to distort competition against rival distributors and in favour of its own DTH/satellite distribution system. The OFT therefore tested whether BSkyB had set its wholesale prices at a level that would prevent a distributor earning a normal return on the distribution of BSkyB's premium channels, even if it were as efficient in distribution as BSkyB.

23. Second, the OFT also assessed complaints that BSkyB was abusing its dominant position by engaging in mixed bundling with respect to its premium channel pricing. The OFT considered that a degree of mixed bundling is to be expected, and be desirable, in conditions such as those found in pay TV broadcasting. In particular, fixed costs (e.g. of acquiring content rights) are high in relation to the incremental costs of supplying additional subscribers, meaning it is neither unnatural nor undesirable for suppliers to offer discounts to consumers taking additional products as the incremental cost of supplying those extra products to consumers is relatively low.

24. The OFT also received complaints that BSkyB had abused its dominant position by offering anti-competitive discounts. In particular, the complaints related to the pay-to-basic ratio (PBR) discount, the volume discount and the basic penetration discount offered by BSkyB to its distributors.

25. In relation all three allegations of abuse, the OFT had insufficient grounds to find that BSkyB has infringed the Competition Act 1998.

4.2 Ofcom Consultation

26. Finally, the market for premium sports distribution has also been investigated by the UK communications regulator, Ofcom. In January 2009 Ofcom published a consultation as part of its pay TV market investigation in order to improve competition in this sector. The consultation sets out details of a proposed 'wholesale must-offer' obligation. This is designed to address concerns about the restricted distribution of premium sports and movies channels operated by BSkyB. In addition, the consultation notes that there may be a case for specific targeted interventions in relation to the next FA Premier League auction of live broadcast rights. Further information on this consultation can be found on the Ofcom website.⁶

⁶ http://www.ofcom.org.uk/media/news/2009/06/nr_20090626.