

Community Week

A weekly summary of competition law and policy
Issue 460 • 26 February 2010

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Supreme Court dismisses Norris extradition appeal

The Supreme Court has unanimously dismissed an appeal by Mr Ian Norris, the retired chief executive of Morgan Crucible, to avoid extradition to the US on obstruction of justice charges. The Supreme Court considered specifically whether the extradition would be incompatible with Mr Norris' rights to private and family life under Article 8 of the European Convention on Human Rights ("ECHR") - finding in this case that the public interest in his extradition outweighed his human rights.

The United States Government is seeking the extradition of Mr Norris to face obstruction of justice charges. Mr Norris was first arrested in London in 2005 and charged with conspiring to fix prices for carbon components. The US authorities claim that he authorised the destruction of evidence and prepared a script containing false information to mislead investigators from the US Department of Justice.

In March 2008, the House of Lords ruled that the additional price fixing charge was not capable of amounting to an extradition offence - as it was not a crime under English law when it was committed. The case was then sent back to the District Judge to decide whether Mr Norris should be extradited on the remaining obstruction charges. Mr Norris submitted that extradition would cause disproportionate damage to his and his wife's wellbeing (Mr Norris is 67 and both he and his wife are in poor health). These arguments were rejected by both the District Judge and by the High Court on appeal.

Mr Norris subsequently appealed to the Supreme Court arguing that extradition was incompatible with his right to private and family life under Article 8 ECHR.

The Supreme Court stated that extradition is part of the process of ensuring that those reasonably suspected of crime are prosecuted and, if guilty, duly sentenced. As such, the consequences of interference with Article 8 rights must be "exceptionally serious" before this could outweigh the public importance of extradition. It was found in this case that Mr Norris' family ties did not render him immune from extradition and the appeal was dismissed.

Mr Norris may yet seek to appeal the matter before the European Court of Human Rights in Strasbourg, although there is only a limited timeframe in which to do so. If convicted, Mr Norris may face a prison sentence of between 21 and 27 months.

The judgment underlines the high threshold that must be reached in order to defend an extradition request and it remains to be seen whether the Supreme Court's judgment will lead to further extradition applications.

Brightsolid/Friends Reunited merger provisionally cleared by CC

The Competition Commission ("CC") has provisionally cleared the anticipated acquisition, from ITV plc, of Friends Reunited Holdings Ltd ("Friends Reunited") by Brightsolid Group Limited ("Brightsolid"). The CC has found that the tie-up poses no threat to customers of online genealogy services, despite the merger involving two of the three largest suppliers of online genealogy services in the UK.

Brightsolid runs websites Find My Past.com and 1911 Census.com, and Friends Reunited owns Genes Reunited.com. These websites allow users to search and access historical information and documents such as census results, birth, marriage and death records and also supply family tree software.

The CC found that the online genealogy market is growing rapidly - with an estimated 2 million people accessing genealogy websites every month. The internet is now by far the preferred method of tracing family history (for example, the ratio of online to onsite delivery of The National Archives was about 200:1 over the last year).

The CC found several factors in favour of clearing the merger. Firstly there is only a minimal overlap in the activities of the two companies. Further, their business models were found to be different. Importantly, after the merger, Ancestry.co.uk, a competing website, will remain the largest supplier in the UK market and its presence, along with potential entry by new suppliers and the alternatives provided by free sites, will ensure that the merged company faces strong competition - preventing it from raising prices or worsening the service that it provides.

The CC found that the merger could even benefit amateur family historians as the merged company will be better equipped to compete directly with Ancestry.co.uk, leading to more innovation and improvements in the market.

The case was referred to the CC by the Office of Fair Trading back in November last year due to concerns regarding the reduction in the number of players in the market (see [Community Week issue 446](#)).

The CC has asked for comments on the provisional findings by 11 March and is expected to publish its final report by 16 April 2010.

Court of Appeal reduces penalty imposed on National Grid for abusive conduct

On 23 February 2010, the Court of Appeal ("CA") significantly reduced the penalty imposed on National Grid plc by the Office of Gas and Electricity Markets ("Ofgem") to £15 million.

The original fine of £41.6 million, imposed by Ofgem in February 2008, related to an alleged abuse of dominance by National Grid - in particular, market foreclosure resulting from long-term Meter Service Agreements ("MSAs") which incorporated an early termination fee. Ofgem considered that the effect of the MSAs was to reduce entry and expansion in the domestic gas meter market in Great Britain.

In April 2009, National Grid appealed Ofgem's decision to the Competition Appeal Tribunal ("CAT"), which largely agreed with Ofgem's decision but reduced the fine to £30 million, taking into account mitigating factors.

On appeal, the CA substantially agreed with the CAT's legal assessment. The CA rejected National Grid's argument that the early termination charges constituted normal market competition and stated that the critical question was not whether the conduct complained of constituted "normal competition" but whether the dominant company had engaged in practices which had a foreclosing effect. The CA also rejected the contention that when finding an abuse Ofgem and/or the CAT were required to compare the dominant firm's conduct to a benchmark. The CA found that the question of whether an abuse had occurred depended on the particular facts of each case.

However, in spite of finding the MSAs to be abusive, the CA found that National Grid's fine should be halved from £30 million to £15 million. The Court of Appeal recognised the unusual nature of the case, including Ofgem's involvement in the process that led to the making of the MSAs, which was found to be a mitigating factor. National Grid had been transparent with Ofgem in the early stages of the development of metering competition when Ofgem had been closely involved in discussions regarding National Grid's proposals. The relative novelty of the infringement was also taken into account.

The CA however considered that completely annulling the fine was not appropriate in this case since National Grid was aware of the potential competition issues with the MSAs but chose not to seek official Ofgem clearance.

The reduced fine is equivalent to approximately 1.5 per cent of National Grid's relevant turnover, subject to a multiplier of four to take account of the duration of the infringement.

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German developments

Judgment questions lawfulness of cartel fining practice of the German Federal Cartel Office ("BKartA")

The fining practice of the BKartA has come under close scrutiny, following a ruling in the Düsseldorf Higher Regional Court (the "Düsseldorf Court") which purports to call into question the level of the fines which have been imposed by the BKartA. The judgment has not been made public yet.

The debate focuses on an amendment to the Act against Restraints of Competition (ARC) in 2005, in which the level of fines applied to competition law infringements by the BKartA was brought into line with European legal practice. Since then a fine imposed on a company can amount to up to 10% of its turnover (Section 81 (4) ARC). In order to assess the level of the fine, the BKartA starts by looking at the so-called turnover achieved from the infringement and goes on to assess the duration and gravity of the infringement.

In the previous decision practice of the BKartA, it has been understood that the BKartA could theoretically impose fines which could be over and above 10% of a company's turnover (calculated to the criteria referenced above), but that the company would only ever effectively be fined 10%.

The ruling of the Düsseldorf Court seems to suggest that a fine of 10% of a company's turnover should only ever be imposed for the most hard-core infringements of competition law, certain aggravating factors having been met.

In the ruling, this interpretation meant that the fine which had been set by the BKartA against participants in a cement cartel was significantly reduced. Consequently, companies who have been fined by the BKartA are considering whether the fines imposed on them should not be reduced, whereas expectations for lower fines in future are hotly debated.

Whether such high expectations of significantly reduced fines which have been raised in various articles are justified, seems questionable. It is understood that the Düsseldorf Court's main reason for reducing the fines was the extremely long duration of the proceedings and not an excessive fining practice of the BKartA. In addition, the judgment seems to raise more questions than it provides answers for. For example:

- Why did the Düsseldorf Court follow a different approach when calculating the fines but did not declare the current fining practice of the FCO to be unconstitutional?
- If the Düsseldorf Court considered the current fining practice to be unlawful, what would be the consequences, i.e. would the old fining regime be applicable again? (This allowed sanctions up to three times the amount of the additional profit generated by the cartel and had no 10% cap)
- In case of BKartA decisions which have become binding and cannot be appealed anymore, would the fined companies be entitled to demand a revision of the proceedings if the current fining practice has been declared unconstitutional?
- Assuming the current fining practice of the BKartA, which follows the fining practice of the European Commission, is unconstitutional, how could fines imposed by the European Commission be enforced in Germany?

The only fact, of which one can be certain, is that the current debate about the fining practice of the BKartA will continue.

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French developments

French Competition Authority will investigate the online advertising market

On 18 February 2010, the French Minister of Economy invited the French Competition Authority (the "Authority") to issue an opinion concerning online advertising competition in France.

The Minister's request was made after the release of a report called "Creation and Internet" on 6 January 2010. The main purpose of this report was to study the impact of the Internet on different creation industries such as music, book, broadcasting and cinema.

During its investigations, the report's working group realised that many websites' editors were concerned about the continuing decrease of online advertising incomes. They complained about a lack of competition in the French online advertising market.

The Authority is now requested to define the relevant market for online advertising and the position of the key players operating in it (online search engines, site editors and advertisers).

The Authority's opinion is expected around this summer and this will certainly be followed by Community Week.

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