SLAUGHTER AND MAY

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CMA provisionally clears SSE/Npower merger

On 30 August 2018 the Competition and Markets Authority (CMA) **announced** its provisional findings that the proposed merger between SSE's domestic retail energy supply, telecoms and energy-related services business (SSE Retail) and Npower does not raise competition concerns.

Background of the merger

SSE and Npower are involved in the supply of gas and electricity to domestic customers in Great Britain (GB). SSE and Npower are the second and sixth largest players, respectively, in GB's domestic energy supply.

The proposed transaction anticipates that Npower's German parent company, Innogy SE, will merge Npower with SSE Retail to form a new premium-listed retail energy company. Innogy will hold a minority stake of 34.4 per cent and the remaining 65.6 per cent will be distributed among SSE's shareholders immediately following the listing of the new entity.

The CMA's investigation and provisional findings

On 26 April 2018 the CMA **announced** that it would refer the acquisition for a more in-depth, Phase 2 investigation, unless undertakings in lieu were offered by the parties, having found that the proposed merger could reduce competition for default tariffs, potentially leading to higher prices for some bill payers.

The parties did not offer undertakings to address the CMA's concerns and, accordingly, the CMA **referred** the acquisition for a Phase 2 investigation on 8 May 2018.

As part of the investigation, the CMA was required to determine whether the merger would be expected to result in a substantial lessening of competition within the market of supply of gas and electricity to domestic consumers.

In its provisional findings **report**, the CMA provisionally decided to clear the deal after determining that SSE and Npower do not compete closely on either:

- acquisition tariffs, usually fixed-term tariffs, which are offered to compete for new customers, including those who switch from other suppliers; or

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- default tariffs, which apply when a customer has not chosen a specific tariff and are typically standard variable tariffs (SVTs), with no end date or 'exit fees'. The number of customers on SVTs has declined in recent years.

Acquisition tariffs

The CMA found that there is a relatively low level of customer switching between SSE and Npower and that, when their customers switch, over half switch to small and mid-tier suppliers, of which there are currently 66 in GB.

Anna Lambert, Chair of the Inquiry Group, an independent panel established to examine the merger as part of the Phase 2 investigation, said that "*it is vital that householders have a range of energy suppliers to choose from so they can find the best deal for them. With more than 70 energy companies out there, we have found that there is plenty of choice when people shop around*".

In light of the limited switching between SSE and Npower, and the range of alternative suppliers and tariffs available, the CMA concluded that it was unlikely that they could profitability increase their acquisition tariffs as a result of merging.

Default tariffs

Having ruled out any competition concerns in relation to acquisition tariffs, the CMA's main consideration was whether the merger would affect how the large energy suppliers set SVT prices. It was therefore key to the investigation whether those SVT customers would be affected by the merger, by way of changes to the way in which decisions are taken on SVT pricing.

The CMA examined the factors that prompt changes to SVT prices and found that the main driver for change for all the larger energy companies is changes in their costs. The effect an SVT price change has on customer retention was also important. As the providers all face similar cost drivers, they are likely to experience cost pressures at around the same time and will often monitor and take into account the SVT price changes of their competitors when setting their own price changes.

While evidence indicated that the larger energy companies look at how their proposed SVT price changes will be perceived in the wider market context, and that this inevitably includes the other larger energy firms, the CMA determined that neither SSE nor Npower placed more importance on price changes of the other party over any of the other large energy firms. Further, there were "*no indications that either of the parties is seen as a particular price leader*". The change from six to five larger energy firms would therefore not alter the way in which SVT price changes are determined.

The CMA also examined the factors that affect the decision on timing of an SVT price change and found that suppliers are likely to see an increase in the number of customer losses if it is the first to increase its SVT, so there may be some incentive to reduce the chances of being a 'first mover' by delaying its price change announcement.

The CMA concluded that the costs of delaying a price increase are high while the benefits of avoiding the additional customer losses are relatively small (which is reflected in the fact that the potential to avoid being the first to announce played a limited role in the parties' decision making). Furthermore, the effect

of the merger on any such incentives to delay announcement was likely to be small, since there would remain four other large suppliers who could announce following a delay.

The CMA's provisional conclusion

As the merger was not expected to have a significant impact on acquisition or default tariffs, the CMA's provisional findings concluded that the merger is not expected to result in a substantial lessening of competition in the supply of gas and electricity to domestic customers in GB.

Next steps

The CMA invites responses to these provisional findings by 20 September 2018, before coming to a final view. The statutory deadline for the CMA to issue its final report is 22 October 2018.

SSE's Chief Executive announced the company is "*confident that the formation and listing of the new company is on track for completion by the end of SSE's financial year*", which is at the end of March 2019.

Other developments

Merger control

European Commission conditionally clears acquisition of sole control of Wind Tre by Hutchison

On 31 August 2018 the European Commission **cleared** the proposed acquisition of sole control of Wind Tre S.p.A. by CK Hutchison Holdings Limited. The clearance is subject to the continuing fulfilment of conditions that the Commission imposed when it cleared the creation of Wind Tre in 2016. In clearing the proposed transaction, the Commission indicated that absent fulfilment of the 2016 conditions, the proposed transaction would raise the same concerns as those identified by the Commission in its 2016 investigation.

Wind Tre was created in 2016 when the activities of WIND (a subsidiary of VimpelCom (now VEON)) and H3G (a subsidiary of Hutchison) were combined. Wind Tre remains jointly owned by Hutchison and VEON until the proposed acquisition completes, but following completion Hutchison will be solely responsible for fulfilling the Commission's conditions. The 2016 conditions are still being implemented and include the completion of site divestments and spectrum transfer.

In 2016 the Commission was concerned that the creation of Wind Tre would lead to reduced competition in the Italian retail mobile market and make it harder for mobile virtual network operators to compete. In response to the Commission's concerns, Hutchison and VimpelCom proposed structural remedies that the Commission agreed would address its competition concerns. According to Commissioner Margrethe Vestager the Commission's 31 August 2018 clearance demonstrates that the conditions imposed by the

Commission in 2016 have been effective and have "*not only preserved but also incentivised competition in the mobile telecommunications market in Italy*".

Antitrust

Guangzhou Toyota Motor sales executives fined for failure to cooperate in antitrust probe

On 22 August 2018 China's Guangdong provincial Development and Reform Commission (Guangdong DRC) handed down two decisions imposing penalties of **RMB 12,000** (approximately £1,350) and **RMB 8,000** (approximately £900) respectively on two executives for refusing to cooperate with an antitrust investigation conducted by the Guangdong DRC. This is the first published decision in which individuals have been fined by antitrust agencies in China for refusing to cooperate under the Anti-Monopoly Law (AML).[1]

On 9 January 2017 the Guangdong DRC carried out an investigation into Guangzhou Qingfeng Toyota Motor Sales Service Company Limited (Guangzhou Toyota). During the investigation, the Legal Representative and General Manager of Guangzhou Toyota took certain unhelpful steps, including: (i) removing a USB stick, with which the officials were extracting data, from a computer; (ii) ordering workers to unplug and disconnect their computers; (iii) refusing to comply with an order to provide documents, claiming they contained "trade secrets"; and (iv) challenging the authority of the officials. The officials made a contemporaneous note of these actions, which the executives refused to sign. However, the executives subsequently apologised to the Guangdong DRC and delivered the requested documents in March 2017.

The Guangdong DRC took the view that the executives violated Article 42 of the AML, which stipulates that individuals under investigation should cooperate with the antitrust agencies. Accordingly, the executives were fined pursuant to Article 52 of the AML which entitles agencies to impose fines of up to RMB 100,000 (approximately £11,277) on individuals who refuse to cooperate with their investigations in serious cases. A higher fine of RMB 12,000 was imposed on the more senior individual (the Legal Representative), who issued the instructions to obstruct the investigation.

Two interesting observations arise from this case. First, the Guangdong DRC has not issued a decision against Guangzhou Toyota to date, but chose to issue the penalty decisions against the individuals first. Second, despite the announcement of the consolidation of the three antitrust agencies in March 2018 (as covered in this previous **edition** of the newsletter), it appears that the State Administration for Market Regulation has not replaced the three agencies at the local level, as illustrated by the fact that the Guangdong DRC was responsible for enforcement in these two decisions.

[1] In a similar case in 2016, an employee of a company threw away a USB stick during an antitrust investigation. However, only the company, not the employee, was fined RMB 120,000 (approximately £13,500) in that case.

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Commissioner Vestager delivers speech on "A responsibility to be fair"

On 3 September 2018 EU Competition Commissioner Vestager delivered a **speech** at Copenhagen Business School in which she discussed the responsibility of companies to act fairly.

Vestager raised the digital sector and the energy and resource sector as two business sectors that owe significant responsibilities towards society. Given the power of social media and the ability of businesses in the digital sector to influence society, the Commissioner said that businesses operating in that sphere should raise their level of responsibility towards society to that of their influence.

Summarising the basic premise of Corporate Social Responsibility as the need for companies to "*take responsibility for the well-being of our societies and of the world we live in, beyond their own, narrowly defined interests*", the Commissioner turned to discuss fairness in business. She noted that more than 60 years ago EU competition policy was founded on the concepts of fairness, openness and competitive markets. Elaborating on fairness, a concept that arises in numerous areas of competition law, Vestager explained that those running businesses need to be fair to their competitors and their business partners, as well as to their consumers.

The Commissioner finished her speech by noting that failure by companies to comply with the law has social and political implications that cannot be ignored, and that it is the responsibility of companies and people running them to foster trust in the markets "*by playing by the rules when they do business in the EU*".

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