

IN THE MATTER OF

CAMELOT UK LOTTERIES LIMITED

OPINION

Introduction

1. We have been asked to provide a legal opinion to Camelot UK Lotteries Limited (“Camelot”), in connection with its application to the National Lottery Commission (“the Commission”) for permission to offer ancillary services using its lottery-related infrastructure.
2. In particular, we have been asked to consider whether the grant of such permission would cause the Commission to be in breach of Article 106(1) of the Treaty on the Functioning of the European Union (“TFEU”).
3. The salient factual background to this matter is as follows:
 - (1) Camelot is the holder of the National Lottery licence under section 5 of the National Lottery etc. Act 1993. The licence was awarded by the Commission for a period of ten years from 1 February 2009 to 31 January 2019.
 - (2) The Invitation to Apply, which was issued by the Commission on 29 June 2006, included the following paragraph:

6.4 Ancillary Activities

The Commission is keen to encourage innovative ideas and methods to increase revenues through Ancillary Activities, and to share those increases as appropriate between the good causes and the Licensee. Once the Successful Bidder has been appointed, the Commission will consider the Bidder's proposals to implement such activities accordingly.

[...]

The ability of the Licensee to undertake such activities will require Commission approval. This is because the Commission needs to ensure that:

- *The activities being undertaken are consistent with the Commission's statutory duties.*
- *Sufficient safeguards are put in place to protect the core Lottery business and brand; and*
- *Any exercise of the Commission's discretion to give consent would be lawful, including having regard to competition law considerations.*

Subject to these constraints, the Commission would expect to give consent where it was satisfied that a fair return can be achieved for the good causes in making such use of the Lottery infrastructure.

- (3) On 9 February 2007 Camelot submitted its bid for the Licence which included a proposal to offer "Commercial Services" as an Ancillary Activity. The Commercial Services were to include mobile phone top-ups, international calling cards, bill payments, electronic funds transfers and "tap & wave" payments using contactless technology. Then in July 2009, after it had been awarded the Licence, Camelot submitted an application, in accordance with Condition 6.3 of the Licence, for permission to offer the Commercial Services via retailers' premises using the spare capacity in its lottery network.
- (4) On 18 November 2009 the Commission sought views from interested parties on whether there should be a consultation on "the legal principles and approach that should be applied in deciding whether or not there are competition law concerns in the granting or rejection of Camelot's proposal to provide the Commercial Services". As part of this consultation, on 15 February 2010 the Commission

sought the views of interested parties in relation to this question. A variety of responses were received, including one notably negative one from Paypoint plc, which would compete with Camelot in the market for some of the proposed Commercial Services if Camelot's application were to succeed.

(5) On 15 July 2010 the Commission issued a Provisional Decision in which it indicated that it was "minded to refuse to grant consent to Camelot's application to undertake Ancillary Activities on the basis of the EU/competition law concerns it raises." Since that date Baker & McKenzie, on behalf of Camelot, have debated some of these concerns in correspondence with the Commission and its solicitors, Herbert Smith. The Commission has agreed to allow a further period until 17 September 2010 in which to make written representations before taking a final decision on the matter.

4. In these circumstances, we have been requested to examine the reasons given by the Commission for provisionally refusing its consent, and to express an opinion as to their validity.

Summary of conclusions

5. We can summarise our conclusions as follows:

(1) The Commission has adopted an incorrect legal test in considering whether to authorise Camelot to offer commercial services. The Commission should have framed the issue in terms of whether a grant of permission would in fact result in an infringement of Article 106(1), and not merely in terms of whether there is a "significant risk" of such an infringement occurring. It would only be appropriate to issue a negative decision if it were satisfied on reasonable grounds that granting permission would actually place it in breach of Article 106(1).

(2) On the basis of the evidence presently available, having regard both to the supposed "unmatchable advantages" which it is suggested that Camelot might enjoy and to the possibility that Camelot might commit a "stand-alone" abuse of

its dominant position, there is no realistic prospect that the grant of permission to offer commercial services would be held to infringe Article 106(1).

- (3) Such minor risks as might nevertheless exist could be effectively eliminated through the imposition of appropriate conditions and/or ex-post regulation. To prohibit Camelot from offering any commercial services at all because of the possibility of an infringement of Article 106(1) would be manifestly disproportionate and, as such, indefensible.

The applicable legal test

6. The legal test applied by the Commission is set out in paragraph 13 of the Provisional Decision where the Commission states that it has been advised that “if there is a significant risk of a breach of EU/competition law it ought to exercise its discretion by way of a refusal to permit ancillary services”. Later, in paragraph 21(viii), the Commission refers to more specific advice to the effect that there would indeed be “significant EU/competition law risks” if it were to grant consent to Camelot’s application.
7. The Commission does not explain what is meant by “significant” in this context, but it appears to mean something less than “likely”. If that is right then in our view a test which considers only whether there would be a significant risk of an infringement of Article 106(1) is not the correct test to apply in these circumstances, for two essential reasons.
8. The first reason is that, in addition to the specific rule contained in Article 106(1), the UK (and therefore the Commission) is also subject to a general duty, arising out of Article 4(3) of the Treaty on European Union (“TEU”), to facilitate the achievement of the Union’s tasks and to refrain from any measure which could jeopardise the attainment of its objectives. Prominent among those objectives is the development of a highly competitive social market economy (Article 3(3) TEU). The Commission’s discretion to grant or refuse permission to conduct Ancillary Activities must therefore be exercised reasonably and must give due weight to these considerations.

9. In effect, therefore, the Commission's duty to act pro-competitively, derived from the TEU, requires it (all other things being equal) to grant permission to Camelot unless doing so *would in fact* infringe the competition rules. Since the entry of a new undertaking into a market can ordinarily be expected to result in increased, rather than reduced, competition, it would be wrong in principle for the Commission to prevent this from happening simply because of a mere unquantified risk that the competitive process might turn out to be harmed in the longer term.
10. The second reason for applying a presumption that the granting of permission would be lawful is that the freedom to carry on a business is a fundamental economic right, enshrined in Article 16 of the EU's Charter of Fundamental Rights, which has a status equal to that of the Treaties.¹ Where EU law is in issue, as it is here, Member States may not curtail this right except insofar as it is necessary and proportionate to do so.² Only if granting permission to offer commercial services would actually be unlawful, contrary to Article 106(1), could a prohibition could be said to be necessary. Otherwise there would be no justification for restricting Camelot's freedom to provide services in this way.
11. This is consistent with the test that the Commission appears to set itself in the Invitation to Apply, where it acknowledges a need to ensure that "Any exercise of the Commission's discretion to give consent would be lawful". No mention is made of any need to assess the *risk* of acting unlawfully.
12. A further striking feature of the Provisional Decision is that it contains no analysis at all of (for example) the relevant markets which would be affected by a decision to grant or refuse consent, the competitive structure of those markets or how they would be altered in the event of a favourable or unfavourable decision by the Commission. Nor are these matters addressed in the Memorandum prepared by NERA at the request of the Commission dated 2 July 2010. Without evidence of these matters it is

¹ Article 6(1) TEU

² Charter of Fundamental Rights, Article 52(1). Chapter 3 of the Provision of Services Regulations 2009, which implement the EU Services Directive 2006/123, effectively lays down a presumption in favour of approval of services where the Regulations apply, by limiting the circumstances in which approval may be required and minimising conditions which may be attached to any approval.

impossible, as it seems to us, even to conclude that there is a significant risk of an infringement of Article 106(1), let alone that an infringement would be established on the balance of probabilities. Since there is no evidence that granting permission would be unlawful, for the reasons explained above the only lawful course in our view is to grant permission to operate the commercial services.

13. That is particularly the case given that the one fact which can be predicted with some confidence on the presently available material is that granting Camelot permission to offer commercial services would be beneficial to competition at least in the short term. This is confirmed by the NERA Memorandum, which states that:

*“In the short run, entry will have occurred on a substantial scale. This will intensify competition (all else equal), with some impact expected in terms of reducing prices and increasing consumer welfare”.*³

14. Predicting the longer-term competitive consequences is, by contrast, an exercise in speculation. The NERA Memorandum expresses no view on this question at all, confining itself to the self-evident statement that “The long run effect could be that competition is either intensified or reduced (or left largely unchanged).”⁴ Consequently, the interests of competition would appear to favour granting permission, to enable these short-term benefits to be realised.

15. Insofar as the Commission had concerns that its decision would end up infringing Article 106(1) by distorting competition in the longer term, such concerns would seem to be capable of being adequately addressed by attaching appropriate qualifications or conditions to the licence and/or by ex-post regulation. If it were thought desirable, it would even be possible for the Commission to grant permission for a limited period in the first instance, to give it and its advisers the opportunity to obtain and study some empirical data showing the actual impact on competition of Camelot’s activities. At that stage, if Camelot’s presence was shown to have a harmful effect, the Commission could no doubt amend or even revoke the licence.

³ NERA Memorandum, p.12

⁴ *ibid*

16. However, what the Commission cannot legitimately do, in our opinion, is refuse to grant consent simply because of a risk – even a significant risk – that its consent may subsequently be held to be unlawful. Whilst the Commission is understandably concerned to protect its own legal position, by adopting this approach it appears in effect to prioritise its wish to eliminate the risk of a challenge from one or more of Camelot’s competitors under Article 106(1) (an irrelevant, or at best relatively unimportant, consideration), at the expense of its overriding duty to further the aims of the EU Treaties by acting so far as possible pro-competitively. In our view this failure amounts to an error of law which, if perpetuated in the Commission’s final decision, would render that decision liable to be quashed on review.

Would granting permission to Camelot to offer commercial services infringe Article 106(1) in conjunction with Article 102?

17. Having made those preliminary observations, we will now proceed to examine, insofar as it is possible to do so on the limited material presently available, the question which the Commission should have posed for itself, namely whether granting permission to offer commercial services would in fact lead to a breach of Article 106(1). That provision is in the following terms:

In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

18. It must be recalled that Article 106(1) cannot be infringed by a state in isolation, but only in conjunction with one or more of the other rules in the Treaties. The basis of the Provisional Decision appears to be that granting permission to Camelot to offer commercial services would infringe Article 106(1) in conjunction with Article 102.⁵

⁵ At paragraph 21(v) the Commission notes that there is a risk that the proposed agreement between Camelot and the Post Office might be found to have the effect of restricting competition, contrary to Article 101(1). However, it goes on to say that even if it were satisfied that this were not the case, its “risk assessment” in relation to Article 106 would not change.

19. The Provisional Decision draws a distinction between two possible ways in which this could occur. Firstly, it suggests that “the grant of consent for Camelot to undertake Ancillary Activities could lead to an inequality of opportunity arising from Camelot having one or more “unmatchable advantages” deriving from the Licence” (paragraph 21(i)). Secondly, it states that, whether or not such an inequality of opportunity arises, “there is also a risk of Camelot committing certain “stand-alone” abuses of dominance, such as pricing below relevant costs, cross-subsidisation, imposing exclusivity in relation to commercial services, and/or tying the provision of the National Lottery to commercial services” (paragraph 21(iii)). We will consider these possibilities in turn.

Inequality of opportunity

20. Without considering the case law, it might be thought that the logical approach to an Article 106(1) case would be to consider whether there is evidence of an infringement of Article 102 (or whatever other substantive provision may be in issue) and then to consider whether any such infringement resulted from a state measure. However, whilst that approach will be valid in many cases (and is the correct one in relation to the suggestion of “stand-alone” abuses by Camelot, addressed below), there is a line of authorities in which the European Courts have effectively conflated these two stages and asked simply whether a state measure has led to an “inequality of opportunity” as between rival economic operators. Where this is so, the state will be held to have infringed Article 106(1) in conjunction with Article 102. It is this case law which the Commission has in mind in paragraph 21(i) of the Provisional Decision where it refers to the risk of a breach of Article 106 deriving from Camelot’s so-called “unmatchable advantages”. It is therefore necessary to examine these authorities and to consider what implications they have for the present case.

21. Before doing so, however, we would make two preliminary observations. The first is that the concept of an “unmatchable advantage” has never, to our knowledge, formed part of the Courts’ or the EU Commission’s analysis of an Article 102 or an Article 106 problem. The source of this phrase appears to be an OFTEL decision of 11 July

2003 which is referred to in Paypoint plc's response to the Commission's consultation.⁶ relating to BT's broadband services.⁷ That case was concerned with allegations by Freeserve that BT's ability to use its billing and customer support functions as marketing channels for its broadband product to bill customers for telephone and broadband services jointly amounted to unmatchable advantages which distorted competition so as to place BT in breach of Article 102. On the facts, the Director General rejected Freeserve's complaints because the suggested advantages were not unmatchable by BT's competitors or because there was insufficient evidence of anticompetitive harm. However, we would question whether the "unmatchability" of a competitive advantage is actually a relevant consideration in an Article 102 or Article 106 analysis. As the NERA Memorandum indicates, the term has no precise meaning in conventional economics, and it would be difficult to determine whether any suggested advantage was "unmatchable" in practice.⁸ We will therefore not use the term "unmatchable advantages" any further in this Opinion.

22. The second observation is that it is not at all clear, on the evidence currently available, that Camelot would in fact have *any* significant advantages (unmatchable or otherwise) over its competitors in the relevant commercial services markets. The only advantage discussed in any detail in the NERA Memorandum is the potential ability to achieve economies of scope by dividing some of its costs between its lottery-related and commercial businesses and by making use of its existing network and infrastructure to deliver the commercial services. The extent to which this is capable of giving rise to an "inequality of opportunity" within the meaning of the Article 106 case law is considered below. A more fundamental issue however is whether Camelot would actually enjoy any advantage capable of giving rise to such an inequality of opportunity at all. It should be noted that NERA, whilst concluding that Camelot would be able to achieve economies of scale, nevertheless comments that "it has not been demonstrated that Camelot's cost advantage is likely to be very large".⁹

⁶ Paragraph 4.20

⁷ Ref 42/03

⁸ NERA Memorandum, p.4: "It is unclear to us what precisely are the criteria for determining whether an unmatchable advantage exists". See also p.5: "whether this cost advantages is 'unmatchable' is in our view a legal consideration given the lack of clarity as to what, in economic terms, an 'unmatchable advantage' is held to be."

⁹ NERA Memorandum, p.6

23. For the purposes of this Opinion, we will assume that Camelot would be able to achieve significant economies of scope of this kind. However, it should be emphasised that this is something that the Commission would effectively have to prove in the event of a challenge by Camelot to any negative decision, and that the evidence presently available does not come close to enabling the Commission to discharge this burden.

24. Turning to the European case law, the first relevant case in the group of cases seemingly relied on by the Commission is *GB-Inno-BM*,¹⁰ where an undertaking known as RTT had an exclusive right both to operate telephone services and also to grant type-approval to telephone equipment with a view to the connection of such equipment to the Belgian network. RTT was also itself a supplier of telephones. The defendant company sold telephones in Belgium which had not been approved by RTT. In its defence to an action by RTT for an order preventing it from selling unapproved telephones, GB-Inno-BM claimed that RTT's power to decide which telephone equipment could be connected to the network was contrary to Article 106(1). RTT defended itself on the basis that there would only be an infringement of Article 106(1) if it had actually committed an abuse, and not merely where there was a risk of abuse. The European Court of Justice ("ECJ") rejected that argument, holding as follows:

24. *...It is sufficient to point out in this regard that it is the extension of the monopoly in the establishment and operation of the telephone network to the market in telephone equipment, without any objective justification, which is prohibited as such by Article 86 [now Article 102 TFEU], or by Article 90(1) [now Article 106(1) TFEU] in conjunction with Article 86, where that extension results from a measure adopted by a State. As competition may not be eliminated in that manner, it may not be distorted either.*

25. *A system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal*

¹⁰ Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941

equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors...

26. *In those circumstances, the maintenance of effective competition and the guaranteeing of transparency require that the drawing up of technical specifications, the monitoring of their application, and the granting of type-approval must be carried out by a body which is independent of public or private undertakings offering competing goods or services in the telecommunications sector...*

28. *Accordingly, it must first be stated, in reply to the national court's questions, that Articles 3(f), 90 and 86 of the EEC Treaty preclude a Member State from granting to the undertaking which operates the public telecommunications network the power to lay down standards for telephone equipment and to check that economic operators meet those standards when it is itself competing with those operators on the market for that equipment.*

25. Another relevant case is *Connect Austria*,¹¹ in which a state-owned undertaking, Mobilkom Austria, held a licence to provide digital mobile telephone services according to the GSM 900 standard. The Austrian authorities subsequently granted it a licence to provide services in the frequency band reserved for the DCS 1800 standard without paying an additional fee. This was challenged by Connect Austria, which also held a DCS 1800 licence for which it had had to pay a fee of ATS 2.3 billion. The ECJ held that this might amount to a breach of Article 106(1), stating as follows:

84. *If inequality of opportunity between economic operators, and therefore distorted competition, results from a State measure, such a measure constitutes an infringement of Article [106(1) TFEU] in conjunction with Article [102 TFEU].*

85. *In that regard, the fact that, in the main case, a new entrant on the market at issue...must pay a fee for its DCS 1800 licence whereas the first national operator, a public undertaking which has a dominant position, is allocated additional frequencies in the DCS 1800 band without having to pay a separate fee is liable to amount to a competitive advantage, allowing the latter either to extend its dominant position in the digital mobile telecommunications services market according to the DCS 1800 standard or to reinforce its dominant position in the digital mobile telecommunications services*

¹¹ Case C-462/99 *Connect Austria Gesellschaft für Telekommunikation v. Telekom-Control-Kommission* [2003] ECR I-5197

market or in the mobile telecommunications services market, depending on how the market at issue is defined, by distorting competition, and therefore to infringe Article [102].

86. *As a result of the financial charge imposed on its competitor which obtained a DCS 1800 licence (Connect Austria), Mobilkom, a public undertaking in a dominant position...could find itself in a situation which would lead it, inter alia, to offer reduced rates, in particular to potential subscribers to the DCS 1800 system, and to carry out intensive publicity campaigns in conditions with which Connect Austria would find it difficult to compete.*

87. *Therefore, national legislation such as that at issue in the main proceedings...is likely to lead the public undertaking in a dominant position to breach Article [102] by extending or strengthening its dominant position, depending on how the market at issue is defined, by distorting competition. Given that the distorted competition would therefore result from a State measure which creates a situation where equality of opportunity for the various economic operators concerned cannot be ensured, it may amount to a breach of Article [106(1)] in conjunction with Article [102].*

26. However, the Court went on to hold (in paragraphs 88-95) that there would not be a breach of Article 106(1) if the fee of ATS 4 billion imposed on Mobilkom for its GSM 900 licence, subsequently extended to include its DCS 1800 licence, was equivalent in economic terms to the fee imposed on Connect Austria for its DCS 1800 licence. It was for the national court to determine whether or not that was the case.

27. Finally, in the case known as *Greek Lignite*,¹² Greece had granted to a dominant electricity supplier, PPC, an exclusive right to research and exploit lignite, a cheap source of electricity. The Commission found that this was a clear violation of Article 106(1). Having referred to the *GB-Inno-BM* and *Connect Austria* decisions, it concluded at paragraph 238 as follows:

By granting and maintaining in force quasi-monopolistic rights giving the public undertaking PPC privileged access to lignite exploitation, and accordingly to lignite-based electricity, the Hellenic Republic assured PPC a privileged access to the cheapest available fuel for electricity production, which gave this company the possibility to maintain a dominant position in the wholesale electricity market at a level close to monopoly by excluding or hindering market entry by

¹² Case COMP/38.700, decision of 5 March 2008. [2009] 4 CMLR 580. The decision is currently on appeal: Case T-169/08 *DEI v. Commission*, not yet decided.

new-comers. The Hellenic Republic thus enabled PPC to protect its quasi-monopolistic market position despite liberalisation of the wholesale electricity market, thereby maintaining and reinforcing its dominant position in that market.

28. In our view, none of these authorities provides any real support for an argument that authorising Camelot to offer commercial services would infringe Article 106(1) in conjunction with Article 102. There are, as it seems to us, four main points of distinction.¹³
29. The nature of the inequality of opportunity. The first obvious difference between the present case and each of the three precedents quoted above is that in none of those decisions did the inequality of opportunity consist merely of an ability to benefit from economies of scale as a result of having an existing network or infrastructure. In *GB-Inno-BM* the inequality arose from the fact that the dominant undertaking had the power directly to exclude its rivals from the marketplace for telephone equipment; in *Connect Austria* it (arguably) took the form of an exemption from a substantial licence fee; while in *Greek Lignite* (the most extreme case) the dominant undertaking was actually granted a monopoly over the related market. All these inequalities are self-evident and readily susceptible to correction under the competition rules.
30. By contrast, as the NERA Memorandum recognises, “differences in competitive positions and the creation of competitive advantages by diversifying assets into ancillary activities can be observed in many markets and are not unique to Camelot’s Commercial Services.”¹⁴ Indeed, we understand that most or all of the existing market players in the relevant commercial services markets offer a variety of services using a shared platform. It has never been the function of competition law to eliminate competitive advantages such as these and in our view the existence of such an advantage cannot in itself give rise to a breach of Article 102 or, therefore, Article 106(1).

¹³ There are other European authorities which discuss the concept of an inequality of opportunity in the context of Article 106: the three referred to in this section are merely a representative selection. Two other examples are considered in the section on stand-alone abuses below: Case C-202/88 *France v. Commission* [1991] ECR I-1223, paragraph 51 and Case C-49/07 *MOTOE v. Elliniko Dimosio* [2008] ECR I-4863, paragraph 51, both of which (like *GB-Inno-BM*) were concerned with dominant undertakings entrusted with regulatory powers over competitors.

¹⁴ NERA Memorandum, p.5

31. This is clear from a number of EU Commission decisions in the telecommunications and postal sectors (of which *Connect Austria* was an example), where monopolists in the national markets for fixed-line telephony and postal services have diversified into related markets. Whilst invariably noting that the incumbent operators enjoy significant advantages such as a large subscriber base, an existing network and economies of scale for infrastructure, the Commission has never found a violation of Article 102 or 106(1) by reason of such advantages alone.¹⁵ It has only intervened where it has found a likelihood that the economies of scale will be exploited in an abusive manner contrary to Article 102. However, abusive conduct of that kind falls under the category of “stand-alone” abuse discussed below: it would not be an abuse deriving from an “inequality of opportunity” as that concept is used in the Article 106 cases.
32. The nature of the state measure. It is also significant that in none of the cases considered above did the relevant state measure take the form of the mere grant of permission for a dominant undertaking to diversify into a new market. Indeed, we are not aware of any case in which the entry into a new market has been held to be contrary to Article 102 or in which the grant of permission to enter a new market has been held to infringe Article 106(1).
33. In *UPS*,¹⁶ the Court of First Instance considered an allegation by UPS that Deutsche Post, which had a privileged position in the market for delivery of letters, had abused that position by purchasing a stake in DHL, which competed with UPS in the market for delivery of parcels. UPS argued that since Deutsche Post was a dominant undertaking vested with exclusive rights in one market, it was abusive for it to enter into the parcel market in circumstances where that entry was financed by profits

¹⁵ See e.g. Decision 97/181/EC of 18 December 1996 concerning the conditions imposed on the second operator of GSM radiotelephony services in Spain: OJ L 076 , 18.3.1997 p.19, paragraph 20; Decision 95/489/EC of 4 October 1995 concerning the conditions imposed on the second operator of GSM radiotelephony services in Italy: OJ L 280 , 23.11.1995 p. 49, paragraph 16; Decision 90/456/EEC of 1 August 1990 concerning the provision in Spain of international express courier services: OJ L 233 , 28.8.1990, p.19, paragraph 13; Decision 90/16/EEC of 20 December 1989 concerning the provision in the Netherlands of express delivery services: OJ L 10, 12.1.1990, paragraph 17.

¹⁶ Case T-175/99 *UPS Europe SA v. Commission* [2002] ECR II-1915, paragraph 51

deriving from the reserved letter market. The Court rejected that argument, however, holding that:

“[T]he mere fact that an exclusive right is granted to an undertaking in order to guarantee that it provides a service of general economic interest does not preclude that undertaking from earning profits from the activities reserved to it or from extending its activities into non-reserved areas”.

34. The Court went on to state that the expansion of a dominant company into another, liberalised and competitive market, would only infringe Article 102 if the funds used for such expansion were derived from abusive conduct in the reserved market.¹⁷
35. Accordingly, it seems to us wholly unreal that Camelot simply by diversifying into commercial services would be held to be abusing a dominant position or that the Commission, by permitting such diversification, would be found to have infringed Article 106(1).
36. The causal link between the state measure and the advantage. Next, and critically as far as the Commission’s liability under Article 106(1) is concerned, in each of the above cases the advantage enjoyed by the dominant undertaking which threatened to distort competition in the related market had been conferred directly on it by the state. In *GB-Inno-BM* it was the conferral of a regulatory function on RTT, which created an obvious conflict of interest; in *Connect Austria* it was the possible discrimination between two competing undertakings entering the DCS 1800 market; and in *Greek Lignite* it was the direct extension of PPC’s monopoly in the electricity market into the market for lignite.
37. In contrast to the position in *GB-Inno-BM*, *Connect Austria* and *Greek Lignite*, and numerous other cases where a dominant undertaking has extended its monopoly into a new market, the potential economies of scope available to Camelot, if they are capable of giving rise to an “inequality of opportunity” at all, would not have been gifted to Camelot by the state. The only advantage that has been conferred on Camelot by the state is the right to operate the National Lottery. The infrastructure which it uses to operate the Lottery and which would be used to provide the

¹⁷ *ibid*, paragraph 61

commercial services has all been purchased from third parties on arm's-length commercial terms. Any economies of scope which arose would therefore be an advantage of a kind which could equally well be enjoyed by any other actual or hypothetical provider of commercial services which was already active in another related market. For this reason also, a finding of an infringement of Article 106(1) by reason of Camelot's supposed economies of scope would involve a fairly radical and, in our view, unprincipled extension of the existing case law.

38. The effect on competition. Finally, it is important to recall that there can be no question of any breach of Article 102 unless it is shown that the allegedly abusive conduct has the actual or potential effect of restricting competition. In each of the three cases considered above, it was apparent that the dominant undertaking had either already extended its monopoly into a related market (as in *Greek Lignite*) or was likely to do so as a result of the state measures in question (as in *Connect Austria* and *GB-Inno-BM*). Competitive harm was therefore either already self-evident or capable of being inferred from the circumstances. By contrast in the present case, as noted above, there has been almost no analysis at all of what markets might potentially be affected if Camelot were to begin providing commercial services or the structure of those markets, let alone any evidence that Camelot would succeed in extending its monopoly into them.

39. The EU Commission has indicated in its Guidance Paper on Article 102¹⁸ that it will normally intervene where, “on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure” It is immediately apparent from that language that the test is one of *likelihood*: in other words, a mere risk of harm to competition will not normally lead to action being taken under Article 102. The Commission and NERA by their own admission have not conducted a sufficiently thorough analysis to enable them to form a view as to the likelihood of Camelot causing a distortion of competition if it were to begin offering commercial services. Indeed, NERA's preliminary opinion is entirely equivocal as to whether this development would lead to an increase or a reduction in competition, or to no change at all. In those circumstances, the Commission plainly cannot conclude

¹⁸ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p.7

that granting permission would lead to a violation of Article 102 or, therefore, Article 106(1).¹⁹

40. For all these reasons, therefore, we can see no real prospect that a UK or EU court would find that Article 102 and/or Article 106(1) had been infringed merely by reason of any inequality of opportunity arising out of the alleged competitive advantages which Camelot might enjoy were it to enter one or more markets for commercial services.

41. As a final point, it should also be noted that in none of the cases considered above was there any suggestion that the dominant undertaking should not be permitted to participate in the related market at all. Clearly, the most appropriate and pro-competitive remedy in such circumstances would be one which enabled the dominant firm to compete in the related market but neutralised the inequality of opportunity created by the state. If, therefore, there were any prospect of an infringement of Article 106(1) if permission were granted, which we do not consider to be the case for the reasons given above, in the absence of compelling evidence to the contrary it would appear to be capable of being more appropriately and proportionately addressed by the imposition of suitable conditions than by a complete prohibition on providing the commercial services.

“Stand-alone” breaches

42. It remains to consider whether an infringement on the part of the UK might nevertheless be established on the basis of a “stand-alone” breach of Article 102 by Camelot such as unfair pricing or tying.

¹⁹ It is notable in this connection that an Italian court recently dismissed a complaint that the Italian lottery operator, Lottomatica, had infringed Article 102 by refusing to allow its competitors to use its network on the same terms as those granted to Lottomatica’s own subsidiary for the provision of ancillary services (in that case, selling ticketing to entertainment events). The court held that it had not been established that access to the network was necessary to ensure effective competition (Case 08590/2003 *Ticket One SpA v. Ministry of Economy and Finance*, Regional Administrative Court of Lazio).

43. In the first place, it must be noted that the Commission has not referred to any specific evidence indicating that there is any objective likelihood of Camelot engaging in any abusive practices of this kind.
44. Nonetheless, even assuming that Camelot did commit a pricing or tying abuse (the suggestion of a “cross-subsidisation” abuse appears misconceived in light of the *UPS* case discussed above), there would still in our view be a formidable difficulty in finding an infringement of Article 106(1) in such circumstances. This is because it is well established that, in order for liability under Article 106(1) to arise there must be a sufficient causal connection between the abuse and the relevant state measure.²⁰ If that were not the case, virtually every state measure which conferred special or exclusive rights on an undertaking would *prima facie* infringe Article 106(1), as such measures invariably provide an opportunity for the undertaking concerned to abuse its privileged position. However, it is clear that the creation of a dominant position by the grant of exclusive rights cannot in itself infringe Article 106(1).²¹
45. The precise nature of the causal connection which must exist between a state measure and an infringement of Article 102 before the state will be liable under Article 106(1) is, admittedly, uncertain. The case law is not consistent. In some cases the Courts have adopted a strict test which requires that the measure must necessarily lead to an abuse of the privileged undertaking’s dominant position,²² while in others it has been sufficient that the public or privileged undertaking, “merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses.”²³ In at least one case the European Court of Justice has even held that “a Member State breaches the prohibitions laid down by Article [106] in conjunction with Article [102] if it adopts any law, regulation or administrative provision which

²⁰ See the Opinion of Sir Francis Jacobs (then Advocate General Jacobs) in Joined Cases C-67/96 etc *Albany International BV v. SBT* [1999] ECR I-5751, paragraph 388.

²¹ See e.g. Case C-155/73 *Sacchi* [1974] ECR 409, paragraph 14

²² See e.g. Case C-323/93 *Centre d’Insémination de la Crespelle v. Coopérative de la Mayenne* [1994] ECR I-5077, paragraphs 18-22.

²³ Joined Cases C-180-184/98 *Pavlov* [2000] ECR I-6451, paragraph 127; Case C-209/98 *Sydhavnens Sten & Grus ApS v. Københavns Kommune* [2000] ECR 3743, paragraph 66.

enables an undertaking on which it has conferred exclusive rights to abuse its dominant position” (emphasis added).²⁴

46. There is therefore no single test of causation which is applicable in all cases.²⁵

Professor Whish has suggested, in our view plausibly, that the case law shows that “the causal link must be stronger in some kinds of cases than others, depending on how likely it is that abusive behaviour will follow from the measure in question.”²⁶

47. This analysis is borne out by the recent case of *MOTOE*²⁷ to which the Commission refers in paragraph 21(iii) of the Provisional Decision in support of its statement that the risk that Camelot might choose not to operate the commercial services in the manner described in its application “could lead the Commission to breach Article 106”. It is true that in that case the ECJ said that Articles 102 and 106 would be infringed “where a measure imputable to a Member State, and in particular a measure by which a Member State confers special or exclusive rights within the meaning of Article [106(1)] EC, gives rise to a risk of an abuse of a dominant position.” However, *MOTOE* was another case like *GB-Inno-BM*, where the state had created a conflict of interest (in this case, by entrusting the organisation of motorcycling events to an undertaking which was itself an organiser of such events). Whilst the Court referred to a “risk of an abuse”, therefore, it clearly took the view that the risk was a serious one which would in fact almost inevitably materialise.²⁸

48. In the present case, the state measure consists of nothing more than the grant of permission to carry on a certain type of business, and there is no inherent reason why the grant of such permission should be likely to lead Camelot to abuse its dominant

²⁴ Case C-203/96 *Dusseldorp BV v. Minister van Volkshuisvesting* [1998] ECR I-4075, paragraph 61

²⁵ See the comments of Advocate General Fennelly in Case C-163/96 *Silvano Raso*, paragraphs 57-66 and 71.

²⁶ R. Whish, *Competition Law* (6th ed., 2008), p. 228

²⁷ Case C-49/07 *MOTOE v. Elliniko Dimosio* [2008] ECR I-4863

²⁸ See also *Dusseldorp* (cited above) which concerned a measure adopted by the Dutch government requiring undertakings to deliver certain types of waste to a privileged national undertaking (AV Chemie) for processing, unless the waste could be processed more efficiently in another Member State. The Court found this to be unlawful, in the absence of any objective justification, because it imposed an obligation on firms such as *Dusseldorp* to deliver their waste to AV Chemie even though it could be processed equally well in another Member State. Despite the Court’s somewhat loose reference to conduct which “enables” an undertaking to abuse its dominant position, the Dutch legislation clearly went further than simply providing an opportunity for an abuse; rather, it led directly and inevitably to an abuse by reinforcing the national undertaking’s dominant position without the dominant undertaking having to take any independent decisions of its own.

position in the market for lottery services. Indeed, this is implicitly acknowledged by the Commission in paragraph 21(iii) of the Provisional Decision where it suggests that Article 102 is only likely to be infringed in the event that Camelot operates the commercial services in what would effectively amount to an unauthorised manner.

49. In this respect, the case is more comparable to *France v. Commission*,²⁹ where dominant providers of telecommunications terminals were alleged to have committed an abuse by requiring their customers to enter into unreasonably long contracts. The EU Commission had sought to prohibit this practice on the basis of Articles 102 and 106(1). The ECJ held that, as the French state had not “compelled or encouraged” the providers to conclude long-term contracts, the EU Commission had not been entitled to take action under Article 106(1). Instead, the abuse should have been dealt with as an independent abuse under Article 102 only.³⁰

50. Similarly in *Centre d’Insémination* (cited above), where a number of bovine insemination centres which had the exclusive right to operate in a defined area were accused of charging excessive prices for their services, the ECJ said as follows:

19. *The alleged abuse in the present case consists in the charging of exorbitant prices by the insemination centres.*

20. *The question to be examined is therefore whether such a practice constituting the alleged abuse is the direct consequence of the national Law. It should be noted in this regard that the Law merely allows insemination centres to require breeders who request the centres to provide them with semen from other production centres to pay the additional costs entailed by that choice.*

21. *Although it leaves to the insemination centres the task of calculating those costs, such a provision does not lead the centres to charge disproportionate costs and thereby abuse their dominant position. (Emphasis added.)*

51. The Court therefore held that there was no breach of Article 106(1), although there might still have been a breach of Article 102 if the insemination centres had independently abused their dominant position by charging disproportionate fees.

²⁹ Case C-202/88 *France v. Commission* [1991] ECR I-1223

³⁰ *ibid*, paragraphs 55-57

52. The fact that there is no inherent reason why the grant of permission to offer commercial services should be likely to lead to abusive conduct by Camelot implies that the causal requirement should be relatively strict in this case. In view of that, and the fact that any “stand-alone” abuse committed by Camelot in relation to any relevant markets for commercial services would not result directly from the Commission’s grant of permission to undertake Ancillary Activities, the requirement is most unlikely to be satisfied in our opinion. Any “stand-alone” abuse would in all probability be regarded as the result of an independent commercial decision by Camelot which would be liable to be policed and, if appropriate, penalised under Article 102 alone.
53. For these reasons, we are of the opinion that authorising Camelot to provide commercial services would not place the Commission in breach of Article 106(1) in the event that Camelot were subsequently to engage in any kind of “stand-alone” anticompetitive conduct.
54. However, insofar as there is any room for doubt on this question, then once again there seems to be no reason why the Commission could not protect itself against any residual risk of an inadvertent infringement due to a stand-alone abuse by Camelot by imposing suitable conditions on the licence. It could, for example, specifically prohibit Camelot from tying the commercial services to lottery-related services or engaging in improper cross-subsidisation. That would make it almost impossible for a competitor of Camelot or a competition authority to conclude that the Commission had caused Camelot to abuse its dominant position in any relevant legal sense. Even in *MOTOE* where, as noted above, there was an obvious likelihood of abuse by the privileged undertaking, the Court acknowledged that the state could have avoided acting unlawfully by making the rights which it had granted to the dominant undertaking “subject to restrictions, obligations and review”.³¹

³¹ *MOTOE v. Elliniko Dimosio*, paragraph 53

Conclusion

55. For the reasons set out in this Opinion, it is our view that the Commission would not infringe Article 106(1) in conjunction with Article 102 if it were to grant permission to Camelot to offer commercial services. Indeed, we are unable even to agree with the Commission's conclusion that there is a "significant risk" of such an infringement taking place, at least if "significant risk" is understood to mean something more than a mere theoretical possibility. It seems to us much more probable, on the basis of the materials presently available, that *refusing* Camelot permission to offer any commercial services would be held to represent an unjustified and (insofar as it pursues any legitimate aim at all) disproportionate restriction of Camelot's fundamental rights, as well as of competition generally, and that such a refusal would accordingly be unlikely to withstand a challenge to its lawfulness.

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