

CAMELOT GROUP LIMITED

NOTICE OF PROVISIONAL DECISION OF THE NATIONAL LOTTERY COMMISSION IN RELATION TO THE APPLICATION BY THE HOLDER OF THE NATIONAL LOTTERY LICENCE TO PROVIDE ANCILLARY SERVICES

PROPOSED REMEDIES

Camelot Group Limited (“Camelot”) is pleased to offer the following remedies to the Commission to address the concerns expressed in relation to Article 106 Treaty on the Functioning of the European Union (“TFEU”) in the Commission’s provisional decision of 15 July 2010 (“Decision”) in connection with Camelot’s application for consent to offer commercial services by way of Ancillary Activities.

They are offered by way of further assurance. The Commission will understand that Camelot certainly does not intend to, and would not, act anti-competitively and also does not believe that consent would be contrary to EU or UK law. Camelot would be pleased to consider any comments the Commission may have on these proposed remedies, and this proposal is not intended to limit the fuller submissions and any additional proposals Camelot may make in relation to the consultation process in due course.

Camelot notes that the case law of the European Courts on Articles 101, 102 and 106 TFEU distinguishes between state-lead distortions of competition and those that result from a company’s individual commercial choices. The Decision expresses the concern that the Commission’s consent may fall into the former category. Consent is said potentially to “lead to” anti-competitive conduct by Camelot and is thus a state measure contrary to Article 106. Camelot considers that the alleged advantages assumed by the Decision, if they exist at all, would neither be state conferred (the infrastructure purchased by Camelot was acquired at arms length on market rates from commercial vendors) nor would they of themselves lead Camelot to act anti-competitively. Although hypothetically Camelot could choose to engage in unlawfully predatory conduct (using the alleged advantage of its lottery cost base) or unlawful tying (using its alleged advantage of operating commercial services and the National Lottery *via* a single terminal),¹ this

¹ As Camelot will submit in due course as part of the consultation, the factual position is rather different. Camelot proposes to install at participating retailers additional equipment alongside the National Lottery terminal, namely an Ingenico ICT 250 contactless, swipe card and chip and pin reader, plus a high specification hand held bar card reader/scanner and a key reader for talexus and quantum payments. This equipment is the same as (or in some cases the more recent version of) the terminals used by other commercial services operators. Hence there is no space saving for retailers in choosing Camelot’s services. National Lottery retailers would not be required to offer Camelot’s commercial services, nor would there be any price or contractual bundling. Retailers are free to offer one or more commercial services operators’ service(s) alongside the Camelot’s. Camelot will have the option of offering a user interface on National Lottery terminal for participating retailers which they can use in connection with the sale of commercial services. While retailers may find such a user interface convenient, it is only one facet of competition in relation to commercial services. Commercial services operators compete on price (the retailer will know which service offers the best commission for a particular product line), content and service levels. Operators commonly seek to use exclusive contracts with service providers (such as a regional energy

would be Camelot's independent commercial choice, not a matter which was a consequence of consent. Consequently Article 106 would not be engaged. Only Articles 101 or 102, and/or domestic equivalents, would be applicable.

Camelot submits that the following remedies would provide the Commission with further assurance that its consent to Ancillary Activities would not "lead to" a violation of Article 101/102 TFEU in the manner identified in the Decision. Rather, the Commission would make consent expressly conditional on Camelot's compliance with competition law and require Camelot to put in place appropriate and proportionate systems to facilitate detection and to deter breaches.

1. Financial Transparency Directive/Financial Transparency (EC Directive) Regulations 2009

a. Proposed remedy

Camelot proposes that, either by way of separate undertaking or by condition to the consent, that Camelot would be subject to and comply with the relevant provisions of *Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings*² (the "Directive"). This has been implemented in the UK by the Financial Transparency (EC Directive) Regulations 2009 (the "Implementing Regulations").

Camelot would undertake such compliance notwithstanding the absence of any effect on trade between EU member states.

b. Reasoning

The Directive deals with situations in which a state entity or an undertaking with exclusive rights in one market also provides services in other markets. The obligation in the Directive would require Camelot to maintain separate accounts, so that (a) the costs and revenues associated with different activities; and (b) full details of the methods by which costs and revenues are assigned or allocated to different activities emerge clearly.³ The aim is to enable illegitimate cross subsidies to be detected.

Recitals 9 and 14 to the Directive note that the Directive is intended to address Article 106 concerns:

(9) *Article [106 TFEU] imposes obligations on Member States in the case of public undertakings and undertakings to which Member States grant special or exclusive rights.*

supplier, TV licence, Oyster cards or congestion charge) to persuade retailers that they offer the most attractive range of services. Speed of transaction times will also be an important factor, to maximise retailer turnover and minimise queuing time. Competition would play out between Camelot and its competitors across a range of variables on price, range and quality of service.

² http://eurlex.europa.eu/LexUriServ/site/en/oj/2006/l_318/l_31820061117en00170025.pdf

³ Article 1(2) of the Directive

Article [106(2) TFEU] applies to undertakings entrusted with the operation of services of general economic interest. Article [106(3) TFEU] requires the Commission to ensure the application of the provisions of that Article and provides it with the requisite means to this end. In order to ensure the application of the provisions of Article [106 TFEU] the Commission must have the necessary information. This entails defining the conditions for ensuring such transparency.

- (14) *Complex situations linked to the diverse forms of public and private undertakings granted special or exclusive rights or entrusted with the operation of services of general economic interest as well as the range of activities that might be carried on by a single undertaking and the different degrees of market liberalisation in the various Member States could complicate application of the competition rules, and particularly Article [106 TFEU]. It is therefore necessary for Member States and the Commission to have detailed data about the internal and financial and organisational structure of such undertakings, in particular separate and reliable accounts relating to different activities carried on by the same undertaking.*

The Directive would require Camelot to retain records to these separate accounts for five years, and to provide them to the Department for Business, Innovation and Skills on request.⁴ The EU Commission can also request this data,⁵ thus ensuring that Camelot would be subject to on-going scrutiny at both a UK and European level.

Should the Commission so require, Camelot would be prepared to submit this data to the Commission, to the Office of Fair Trading (“OFT”) and, subject to appropriate non-disclosure arrangements and use restrictions being agreed, to such other persons, for example the advisers of complainant third parties, as the Commission may direct.

The Decision states that the Commission is concerned that the Commission’s consent will lead Camelot to abuse its dominant position in relation to alleged unmatched advantages derived from its lottery cost base. The Directive requires that there be account separation between Camelot’s lottery and non-lottery businesses and that costs and revenues for the new services be available for inspection. The intention is to detect and deter illegal cross subsidy and/or predatory conduct.

Were this remedy to be adopted, Camelot submits that the Commission would have further assurance that its consent would not be a state measure that “leads to” anti-competitive conduct. To the contrary, this remedy would provide appropriate and proportionate controls by which potentially anticompetitive conduct by Camelot could be monitored and detected, and therefore deterred.

⁴ Regulation 8 of the Implementing Regulations

⁵ Article 6(2) of the Directive.

2. Fair Trading Condition

a. Proposed remedy

Camelot proposes that the Commission make any final consent subject to a “fair trading condition” (by way of condition to the consent or separate undertaking). Such condition would apply without prejudice to whether Article 106 TFEU is applicable.

“Fair and effective competition

(1) *The Licensee shall:*

(a) not enter into or maintain any arrangement, or engage in any practice, which is prejudicial to fair and effective competition in the provision of commercial services; and

(b) comply with any code or guidance for the time being approved by the Commission or by such persons as the Commission may direct for the purpose of ensuring fair and effective competition in the provision of commercial services; and

(c) comply with any direction given by the Commission, or such persons as the Commission may specify, to the Licensee for that purpose.”

b. Reasoning

Fair trading conditions are commonly used by other regulators in order to safeguard the competitive process. The Office of Communications (“OFCOM”) (then the Director General of Telecommunications) first used fair trading conditions to impose upon the dominant incumbent telecoms operators obligations to comply with competition law before such time as OFCOM had domestic powers under the Competition Act 1998 to apply competition law.⁶

Camelot suggests that period of time is particularly apposite as a model for the Commission’s approach in this matter. At the time, OFCOM’s guidelines state that BT was the dominant incumbent. The telecommunications market was liberalizing rapidly and both dominant incumbent and new entrants were diversifying into new markets away from their core fixed line telephony business. This raised exactly the same issues of diversification by dominant companies into new markets, economies of scope and cost recovery with which the Commission states it is concerned in this case.⁷ In this market context, and without formal competition powers, OFCOM wished to impose a condition that would deter dominant incumbents from engaging in cross-subsidy, predation and/or tying.⁸

⁶ OFTEL, Guidelines on the Operation of the Fair Trading Condition , March 1997 (available at: www.ofcom.org.uk/static/archive/oftel/publications/1995_98/fair_trading/guidelin.htm)

⁷ OFTEL, Guidelines on the Operation of the Fair Trading Condition , March 1997, paragraphs 38-39

⁸ OFTEL, Guidelines on the Operation of the Fair Trading Condition, March 1997, paragraphs 38 to 54 (Analysis of the risks of predation, cross-subsidy and tying that might be engaged in by incumbents and which OFCOM was trying to safeguard against by means of the condition)

A similar approach was adopted by the Postal Services Commission (“PostComm”) in relation to the licensing of the Royal Mail (then Consignia plc) in 2001, at the time when the postal services market(s) had not opened up to competition (this occurred fully in 2006). The Royal Mail’s then licence permitted the Royal Mail to undertake a wide range of licensed services, in addition to those which were historically the subject of the postal monopoly. Again, this was a liberalizing market where new entrants were seeking to offer related services. In order to detect and deter competition law violations, the licence incorporated monitoring provisions, a fair trading condition and a compliance officer function responsible for ensuring internal compliance and investigation of third party competition law complaints.⁹ PostComm also required separation of accounts (as discussed above in relation to the first proposed remedy) and entered into a memorandum of understanding with the OFT on PostComm’s and the OFT’s respective enforcement responsibilities.¹⁰

The text of the fair trading condition proposed above is modeled on the text currently used by OFCOM in television broadcasting licences.

The Decision states that the Commission is concerned that consent will lead Camelot to breach Articles 101 or 102 TFEU by virtue of its alleged unmatched advantages. This proposed remedy would provide the Commission with further assurance that rather than leading Camelot to breach competition law, it has made consent conditional upon Camelot observing competition law.

The Commission may use the additional powers of direction and/or guidance under this arrangement to require that Camelot submit information, such as proposed pricing strategies, agreements or other information to an appropriate competition regulator or such other person (subject to appropriate arrangements as to confidentiality and non-disclosure) as it may direct. This might include the advisers of third party complainants.

The Commission might further use the powers of direction under this arrangement to require that Camelot draw up and adhere to a competition law compliance code of conduct in relation to commercial services. It could require Camelot to appoint an individual within the company to have specific responsibility for monitoring adherence to the code, investigating third party complaints and reporting upon compliance with the code to the Commission, or such body as the Commission may specify, on a periodic basis.

Camelot submits that this condition of consent would provide the Commission with further assurance that consent did not “lead to” Camelot acting anti-competitively. The Commission would have put in place proper and proportionate safeguards to ensure that Camelot conducted itself in compliance with competition law and that such compliance would be appropriately monitored.

⁹ Licence to Consignia plc of 23 March 2001, Schedule 2, Conditions 10-11 and 14

¹⁰ Memorandum of Understanding between Postcomm and the Office of Fair Trading (at www.psc.gov.uk/postcomm/live/competition/anti-competitive-behaviour/2007_08_Updated_MoU_OFT_v1.0.pdf)

