

## Memorandum to airlines

December 2010

### **OFT investigation into the circumstances of Flybe's entry on to the London (Gatwick) – Newquay route in competition with Air South West**

Bird & Bird acted for Flybe throughout this investigation which began in the Spring of 2009 and concluded on 5 November 2010 when the OFT announced that it had no grounds to take action against Flybe.

The OFT's summary of its decision can be found at <http://www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/flybe>.

We believe that all airlines who trade in the United Kingdom, and maybe also in the wider EU, are potentially affected by this decision. The investigation was the first complete investigation by the OFT into alleged predatory (below cost) pricing in the UK airline industry.

We think it is unlikely that, having used significant resources in this ultimately fruitless investigation, the OFT will be inclined to commence another airline predatory pricing case in the near future. Nevertheless, competition law is there to be used as part of the competitive process and it is open to any airline to bring an action in the UK courts to recover damages for, or to prevent, anti-competitive behaviour by another airline.

So all airlines are potentially "in play" whether as defendant or complainant. The OFT's decision betrays a lack of deep knowledge and understanding of how the airline industry works. Some of its theoretical findings will have long-term consequences for the industry, particularly in the UK. With this in mind, there are particular aspects of the Flybe case which airlines would do well to notice:

- dominance and abuse do not have to occur in the same market. It will normally be possible to find a market (however small) in which an airline is dominant (in Flybe's case, it was Exeter-Jersey and Exeter-Guernsey) and this market could be used as a peg on which to hang an allegation of predatory pricing on another route
- the "abuse" of predatory pricing can be committed by an airline entering a route, not just by an incumbent cutting its prices to drive off a market entrant
- so, competition law can come to the aid of either an incumbent or a market entrant.

The Flybe case is bound to increase the likelihood that an airline will be a party to a competition law case involving predation or other exclusionary abuses in the immediate future. Whether such a case proceeds in the High Court or in the OFT, there are extensive powers to require disclosure of corporate documents, such as emails, Board papers, manuscript notes etc. Accordingly, this is a good time for management to remind itself and its staff to think carefully before committing to writing strategic thoughts (which might be susceptible to differing interpretations at a later stage).

Finally, on a wider issue, UK airlines' experience of regulation since 1971 (when the CAA was created) has demonstrated that it pays to know your regulator and it helps if your regulator understands your business. You should be aware that, for understandable reasons, the depth of knowledge within the OFT about the airline business is not comparable with the level which is prevalent in the CAA. This is a topic which you may decide to address in consultations which will shortly take place into, for example, the merger of the OFT and the Competition Commission, and the sharing of regulatory responsibility between the OFT/CC and the CAA.

**If you would like to have a further discussion about this or any other competition law topic, please contact:**

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