IN THE MATTER OF:

VIANET GROUP PLC

PUB COMPANIES AND TENANTS: A GOVERNMENT CONSULTATION (APRIL 2013)

ADVICE

A. INTRODUCTION AND SUMMARY OF ADVICE

1. I am asked to advise Vianet Group plc ("Vianet") about the legality of proposals put forward by the Department for Business Innovation and Skills ("DBIS") in *Pub Companies and Tenants: A government consultation* published in April 2013 ("the Consultation document").

2. Annex A of the Consultation document sets out a draft proposed statutory code[1] to be called the 'Pubs Code of Practice' which it is proposed will apply to all pub companies ("pubcos") with more than 500 pubs, and would apply to those pubcos' non-managed pubs.

3. Vianet is the leading supplier of flow monitoring equipment and services to pub and bar operators in the UK[2], through its Dispense Monitoring system ("DMS") and its more recently developed iDraught system. Vianet also supplies its equipment and services to customers in France, Spain and the Czech Republic.

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[1] Apparently to be imposed by primary legislation, although this issue is not addressed in the Consultation document. The definition of "Pub Company" in the draft code refers in square brackets to a "Pubs Adjudicator Act".

[2] More information on these goods and services is set out in the merger clearance decision of the Office of Fair Trading under section 33(1) of the Enterprise Act 2002 No ME/3365/97 *Anticipated acquisition by Brulines (Holdings) plc of Nucleus Data Holdings Limited* (in which I acted for Brulines). Vianet changed its name from Brulines in April 2012.

4. Vianet's DMS is manufactured in the UK by Titan Enterprises Limited. The iDraught system is manufactured for Vianet by Applied Micro Electronics BV in the Netherlands.[3]

5. Paragraph 30 of the proposed code provides:

> "Information obtained from flow monitoring equipment may not be used for the purpose of determining whether a Tenant is complying with purchasing obligations, nor may it be used or considered as evidence when taking enforcement action on purchasing obligations."

6. This therefore encapsulates two restrictions:

- the use of information obtained from flow monitoring equipment for 'determining'[4] whether a Tenant is complying with purchasing obligations;
- the use of such information as evidence in enforcement proceedings in relation to purchasing obligations.

7. I am asked to advise on the legality of this proposal.

8. In my view, the proposal as set out in the Consultation document if implemented would clearly be unlawful for reasons summarised below.

9. As explained in detail in Part B of this Advice below, the proposal is unlawful under EU law.

(i) The introduction of what would effectively be a ban on the use of flow monitoring information in large pubcos (500 or more pubs) would inhibit the sale in the UK of flow monitoring equipment manufactured in other parts of the EU, and would therefore represent an infringement of the principle of the free movement of goods contrary to Article 34 of the Treaty on the Functioning of the European Union ("TFEU"). EU law is applicable here

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[3] Applied Micro Electronics BV, Esp 100, 5633 AA Eindhoven, P.O. Box 2409, 5600 CK Eindhoven, The Netherlands.

[4] It may be noted that use of the term 'determining' in this context is somewhat confusing and obscure. Flow monitoring equipment is not used to 'determine' whether a tenant is in breach of its contractual obligations. The equipment simply provides information which may be supported by, or contradicted by, other sources of information. Unless the parties agree, it is the court that 'determines' whether the tenant is in breach of its purchasing obligations.

because Vianet's i-Draught flow monitoring equipment is supplied to Vianet by the Dutch company which manufactures the equipment in the Netherlands. Vianet also now exports i-draught flow monitoring equipment to France, Spain and the Czech Republic.

(ii) It would also be an infringement of the principle of free movement of services contrary to Article 56 TFEU as Vianet is currently expanding its flow monitoring information business into other EU Member States.

(iii) There is also a clear restriction of Vianet's right to pursue its trade in these goods and services contrary to the general principles of EU law. Such a restriction could not be justified under Articles 36 and 52 TFEU or the case law of the Court of Justice of the European Union ("CJEU").

(iv) The proposals are clearly disproportionate. The Consultation document has failed to identify any legitimate objective compatible with EU law to be served, and has not considered any alternative less intrusive alternatives.

(v) The proposals are also discriminatory in that they apply to pubcos with at least 500 pubs but not to smaller pubcos or pub operators. No justification compatible with EU law has been advanced for this discrimination.

10. As explained in detail in Part C of this Advice below, the proposals would also be contrary to the European Convention on Human Rights ("ECHR") under the Human Rights Act 1998.

(i) First, the proposal to deprive persons of the right to make use of information from flow monitoring equipment as evidence in court would be an infringement of the right to a fair trial of civil rights and obligations guaranteed by Article 6(1) ECHR.

(ii) Second, the limitation on the use of information from flow monitoring equipment would be contrary to the right to freedom of expression guaranteed by Article 10 of the ECHR.

(iii) Third, the limitation on the use of flow monitoring equipment would be contrary to the right to peaceful enjoyment of property guaranteed by Article 1 of the First Protocol to the ECHR.

(iv) Each of those breaches of the ECHR is disproportionate and discriminatory for the same reasons as apply in relation to the breaches of EU law set out in ¶9 above.

11. Finally, as set out in Part D, the proposal to restrict the use of evidence in court proceedings could not be extended to Scotland or Northern Ireland, as the power to legislate in that regard lies with the devolved administrations.

12. The proposals are therefore liable to challenge by way of judicial review for their incompatibility with EU law and the ECHR, and domestic law in Scotland and Northern Ireland.

B. BREACH OF EU LAW

Free movement of goods

13. Article 34 TFEU legislates for free movement of goods within the EU, providing that:

> "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."

14. While the proposals would not on their face impose a quantitative restriction on Vianet's imports of iDraught equipment from the Netherlands, it is plain that the proposals would fall within the category of a measure having equivalent effect. This is because the prohibition on the use of information from flow monitoring equipment by large pubcos, including as evidence in court, would effectively close down Vianet's market for its equipment and thus in practice operate as an import ban.[5]

[5] A prohibition on sales of cigarettes through vending machines was held to be a measure having equivalent effect under Article 34 TFEU in relation to imports of such machines by both the English and Scottish appeal courts in the *Sinclair Collis* litigation. See *R(Sinclair Collis v Secretary of State for Health* [2011] EWCA Civ 437, [2012] QB 394; *Sinclair Collis v Lord Advocate* [2012] CSIH 80, [2013] SLT 100, see in particular [53].

15. Therefore, the proposals would require justification under Article 36 TFEU or under the case law of the CJEU.

16. Article 36 TFEU provides:

> "The provisions of Article[...] 34 ... shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

17. It is clear that the proposals do not fall within any of the possible grounds for justification listed in Article 36 TFEU.[6]

18. Therefore, it is necessary to consider whether there is a potential justification under the case law of the CJEU. That case law, which has developed since the CJEU's landmark judgment in *Cassis de Dijon*[7], establishes that non-discriminatory measures having equivalent effect may be justified if adopted as a proportionate means of addressing a public interest objective (or "mandatory requirement" in the language of the CJEU in *Cassis de Dijon*) taking precedence over free movement of goods.[8] The CJEU has stated that a mandatory requirement may only be relied upon if it is proportionate:

> "It is also necessary for such rules to be proportionate to the aim in view. If a Member State has a choice between various measures to attain the same objective it should choose the means which least restrict the free movement of goods."[9]

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6 This is in contrast to *Sinclair Collis*, which concerned "the protection of health" by seeking to reduce the availability of cigarettes to children by banning sales through vending machines.

7 Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

8 See Joined Cases C-267 & 268/91 *Keck and Mithouard* [1993] ECR I-6097, [15].

9 Case 261/81 *Rau* [1982] ECR 3961, [12].

19. The burden of proof would be on DBIS (i.e. the Secretary of State) to demonstrate that implementation of the proposals complied with the principles of proportionality.[10]

20. Turning to the application of these principles, it is clear that the Consultation document fails to address what public interest objective (i.e. mandatory requirement) is served by the proposals in relation to flow monitoring equipment.

21. None of the categories of mandatory requirement considered in the CJEU's case law to date (fiscal supervision, public health, fairness of commercial transactions, consumer protection and environmental protection) would appear to be relevant as a justification for the proposals.

22. Moreover, it is impossible to see how an outright ban on the use of information, in particular its use as admissible evidence in court, could be seen as a proportionate response to any legitimate objective that might be served by the proposals.

23. Therefore, the proposals are not justified under the case law of the CJEU and would be in breach of Article 34 TFEU.

Free movement of services

24. Vianet supplies its equipment and services elsewhere in the EU. It currently has customers in France, Spain and the Czech Republic, and is looking to expand elsewhere.

25. If Vianet's domestic market is closed down by the proposals, it is evident that Vianet's continued existence would be seriously prejudiced and it would have to withdraw from offering its goods and services elsewhere in the EU.

26. This would be in breach of Vianet's right to provide services freely throughout the EU. It would moreover be in breach of Vianet's right to trade under EU law.

27. The right to provide services is enshrined in Article 56 TFEU which provides that:

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[10] *R(Sinclair Collis v Secretary of State for Health* [2011] EWCA Civ 437, [2012] QB 394, [164] citing Case C-170/04 *Rosengren* [2007] ECR I-4071, [50].

> "... restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."

28. Article 52 TFEU permits proportionate derogations provided that these are justified on grounds of "public policy, public security or public health".

29. As with free movement of goods, the case law of the CJEU has developed to permit non-discriminatory measures limiting free movement of services if adopted as a proportionate means of addressing a public interest objective.

30. As has already been noted in relation to free movement of goods, the Consultation document omits any reference to or consideration of these issues.

Right to pursue a trade

31. The CJEU has developed a general principle of EU law, that of the right to pursue a trade or profession This has been set out in following terms:

> "According to the case-law of the Court, the freedom to pursue a trade or profession, like the right to property, is one of the general principles of Community law. Those principles are not absolute rights, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of the freedom to pursue a trade or profession, as on the exercise of the right to property, provided that the restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed."[11]

32. Limitations on the right to trade thus fall to be analysed in the same was those on free movement of goods and services. As has already been noted in relation to those freedoms, the Consultation document omits any reference to or consideration of these issues.

C. BREACH OF THE ECHR

33. The ECHR is applicable pursuant to the Human Rights Act 1998.

34. The proposals breach three rights under the ECHR:

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[11] Case C-210/03 *Swedish Match v Secretary of State for Health* [2004] ECR I-11893, [72], in which an EU ban on the sale of oral snuff was held to be justified in the interests of public health.

- the right to a fair trial under Article 6(1);
- the right to freedom of expression under Article 10;
- the right to peaceful enjoyment of property under Article 1 of Protocol 1.

Article 6(1) ECHR

35. Article 6(1) provides that:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

36. This right to a fair trial in civil matters includes the concept of "equality of arms", namely that the parties to a civil dispute should have a fair right to test each other's evidence. Thus:

> "The principle of 'equality of arms' involves striking a 'fair balance' between the parties, in order that each party has a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent."[12]

37. However, the proposals in the Consultation document are specifically designed to prevent there being equality of arms by placing large pubcos at a substantial disadvantage *vis-à-vis* tenants.

38. Part 31 of the Civil Procedure Rules, applicable to any dispute between a pubco and tenant, requires a party to disclose all evidence relevant to the dispute. The flow monitoring information is relevant evidence and therefore will have to be disclosed to the court even if the pubco is not allowed to rely upon it. This would leave pubcos in the anomalous position that while the tenant (and indeed the judge) could consider and rely upon the flow monitoring information, but the pubco could not without breaching the Code. That would be in blatant disregard of the principle of equality of arms.

39. Moreover, flow monitoring information would be admissible evidence in disputes between tenants and pubcos with less than 500 pubs. This then leads to

[12] Simor and Emmerson's *Human Rights Practice* (looseleaf) at ¶6.145.

discrimination against large pubcos, similarly in breach of the principle of equality of arms.

Article 10 ECHR

40. Article 10 ECHR provides:

> "(1) Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

41. Article 10(1) thus guarantees the right "to receive and impart information". It is clear that the proposal to prevent large pubcos from making use of "information obtained from flow monitoring equipment ... for the purpose of determining whether a Tenant is complying with purchasing obligations" is a restriction of this right.

42. Article 10(2) sets out the circumstances in which that right may be restricted. In particular, such restrictions must be "necessary" (i.e. that "the means employed must be proportionate to the aim pursued"[13]) to achieve one of the aims set out in Article 10(2).

43. It is clear that none of the aims set out in Article 10(2) would justify the implementation of the proposals. Further, it is also clear as explained in Part B above that the Consultation document omits any reference to or consideration of the question of the proportionality of what is proposed.

Article 1, Protocol 1 ECHR

44. Article 1 of the First Protocol to the ECHR provides:

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[13] Simor and Emmerson's *Human Rights Practice* (looseleaf) at ¶10.027.

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
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> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

45. The proposals fall within the ambit of the first paragraph of Article 1 Protocol 1 as the limitation on the use of flow monitoring equipment would be contrary to the right to peaceful enjoyment of that property, just as the ban on sales of cigarettes through vending machines was considered to infringe the right to peaceful enjoyment of those machines in the *Sinclair Collis* litigation.[14]

46. The Court of Appeal in England held in that litigation that although Article 1 Protocol 1 was concerned with different issues from Articles 34 and 36 TFEU, the identity and weight of the factors relevant to whether that ban was proportionate so as to be justifiable under the second paragraph of Article 1 Protocol 1 were sufficiently similar to those relevant to the same question under Article 36 TFEU for it to be unnecessary to give separate consideration to the question of proportionality under Article 1 Protocol 1.[15] The Inner House of the Court of Session in Scotland took a similar view.[16]

47. The same principles apply to the factors relevant to the question of proportionality under Article 36 TFEU and the *Cassis de Dijon* mandatory requirements in the present case. As has already been explained above, the Consultation document omits any reference to or consideration of the proportionality issue.

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14 See *R(Sinclair Collis v Secretary of State for Health* [2011] EWCA Civ 437, [2012] QB 394; *Sinclair Collis v Lord Advocate* [2012] CSIH 80, [2013] SLT 100.

15 *R(Sinclair Collis v Secretary of State for Health* [2011] EWCA Civ 437, [2012] QB 394, [54], [147], [192]-[194].

16 *Sinclair Collis v Lord Advocate* [2012] CSIH 80, [2013] SLT 100, [65].

D. THE LIMITS ON THE POWER OF THE UK PARLIAMENT TO IMPLEMENT THE PROPOSALS

48. There a further ground of domestic challenge to the proposals, arising out of the way in which legislative powers are now allocated between the UK government and the devolved administrations.

49. It is clear that the Consultation document has failed to give any consideration as to whether the proposals could be implemented on a UK wide basis as appears to be proposed. The proposal to deprive persons of the right to make use of information from flow monitoring equipment in court would be a rule of evidence in civil proceedings.

50. The UK Parliament does not have the power to legislate on the admissibility of evidence in courts other than those of England and Wales.

51. Since the Scotland Act 1998, the powers under the Civil Evidence (Scotland) Act 1988 are exercisable by the Scottish Government and Parliament, not by UK Ministers and the UK Parliament.

52. In Northern Ireland, civil evidence is dealt with by the Civil Evidence (Northern Ireland) Order 1997. Northern Irish rules on evidence fall within the jurisdiction of the Northern Ireland Government and Assembly.[17]

E. CONCLUSION

53. Should the proposals be implemented as set out in the Consultation Document, the legislation (whether primary or secondary) would be liable to challenge by way of judicial review for incompatibility with EU law and the ECHR.

54. Further, a purported implementation of this proposal would therefore be liable to be struck down on this ground in judicial review proceedings before the Court of Session so far as it purported to apply rules to evidence to Scotland and before the

[17] I add the *caveat* that the advice in ¶¶50-52 also involves consideration of Scots and Northern Irish law, on which appropriate advice should also be sought from lawyers qualified in those jurisdictions.

High Court of Northern Ireland so far as it purported to apply rules of evidence in that jurisdiction.

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6th June 2013

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