Ashurst competition law newsletter

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Contents

Google hit by new record fine of €4.34 billion

RPM and pricing algorithms: significant fines imposed by the Commission

General Court rejects power cables appeals

European Commission updates Best Practices Code for State aid control

Canal+ commitments allow its subscribers to use third-party decoders

German court rules that Coty may ban the distribution of its luxury perfumes via third-party platforms

Specialty steel companies fined EUR 205 million for price-fixing in Germany

German and Austrian competition authorities publish joint merger control threshold guidelines

Exide and Recobat fined for fixing car-battery purchase prices in Spain

Secretary of State accepts divestiture of Sky News to Disney

From the Editor

The August issue of Ashurst's competition law newsletter is now out, featuring a round-up of a number of developments that have caught our eye. This edition includes articles on the European Commission's Android decision, a decision by the Commission to fine a group of consumer electronics manufacturers in connection with their use of pricing algorithms to fix online prices, and the Higher Regional Court of Frankfurt's ruling in the Coty case, as well as a number of other updates.

Google hit by new record fine of €4.34 billion

EU (ANTI-TRUST – ABUSE OF DOMINANCE)

On 18 July 2018, the European Commission ("Commission") fined Google €4.34 billion for abusing its dominant position contrary to Article 102 of the TFEU. The Commission considered that Google imposed illegal restrictions on Android device manufacturers and mobile network operators in order to consolidate its dominant position in the general internet search market.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The €4.34 billion fine is the largest fine imposed by the Commission in an abuse of dominance case.
- The Commission found that Google engaged in three types of abuse, namely the tying of its search engine and browser apps, making payments to certain manufacturers conditional on the exclusive pre-installation of Google Search on their devices and the obstruction of development and distribution of competing Android operating systems.
- In the Commission's view, these abuses were part of an overall strategy implemented by Google to cement its dominance on the market for general internet search.

The investigation was prompted by a complaint filed in March 2013 by FairSearch, a group of organisations controlled by Oracle and Naspers. Following a five year investigation, the Commission has decided to fine Google €4.34 billion in respect of conduct regarding Android mobile devices. The Commission considers that the relevant conduct was carried out with a view to strengthening the dominance of Google's search engine.

The Commission considered that Google was dominant on the following markets:

- general internet search services;
- licensing smart mobile operating systems; and
- the provision of app stores for the Android mobile operating system.

In light of the above, it is evident that the Commission excluded from the relevant markets mobile operating systems not available for licence such as Apple's iOS mobile operating system.

In substance, the Commission claims that Google imposed restrictions on mobile device manufacturers and network operators by implementing three separate types of practices that are, in the Commission's view, abusive.

The first abuse identified by the Commission was that Google required manufacturers of devices to pre-install the Google Search app and Chrome browser as a pre-condition for obtaining a licence to pre-install Google Play store.

The second abuse identified by the Commission was that, up until 2014, Google had made payments to manufacturers and network operators conditional on the exclusive pre-installation of Google Search. Those payments were found to strengthen Google's dominance in the market for general internet search services. In assessing this abuse, the Commission has indicated that it took into account the recent findings of the Court of Justice of the EU in *Intel* and that it considered the conditions under which the financial incentives were granted as well as their amount, the share of the market covered by the agreements and their duration.

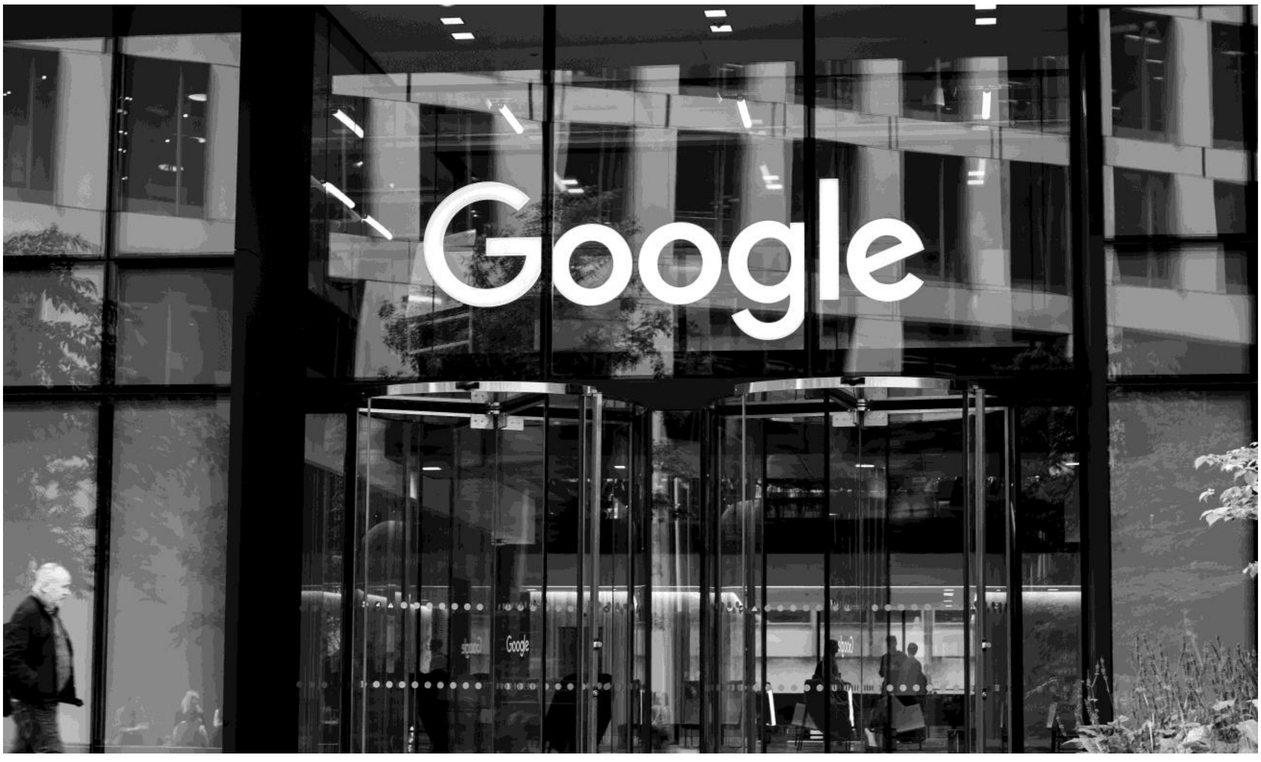
In its investigation of the second abuse, the Commission concluded that Android users consider Google's Play Store as a 'must have' app that they expect to have pre-installed on their devices. In light of these findings, the Commission established that the app bundle and exclusivity payments being offered by Google were creating a *status quo* bias resulting not only in reduced incentives for manufacturers to pre-install Google's competitors' search and browser apps, but also in reduced incentives for Android users to download such apps.

The third abuse identified by the Commission was that Google had obstructed the development and distribution of Android Forks, an alternative version of Android not approved by Google. In this regard, the Commission found that, in principle, Google's competitors have been able to develop alternative versions of Android operating systems for some time with the release of the source code for every new version of Android. However, the openly accessible source code does not include Google's proprietary apps, especially Play Store and Google Search. Therefore, the Commission found that Google was only permitting device manufacturers to pre-install Google's proprietary apps if they committed not to develop or sell any device running an Android fork.

The Commission has cited a case study involving Amazon in its press release to illustrate the effects of this third alleged abuse. In particular, Amazon's unsuccessful attempt to launch its Android fork "Fire OS" in 2012/2013 was attributed to the reluctance of device manufacturers to use the alternative version of Android it had developed as that would have jeopardised their ability to sell Android phones with key Google apps.

The Commission's decision sanctioning one of the biggest technology firms in the Silicon Valley made the world headlines and has been subject to criticism, especially from American politicians. The decision follows Russia's Federal Antimonopoly Service's ("**FAS**") decision in September 2015, which found that Google had abused its dominant position by granting unfair prominence to its own apps on its Android mobile operating system. FAS recently submitted legislative changes to Russia's federal government that would require smartphone and computer manufacturers to pre-install, among other things, the Russian versions of browsers, email and audio players apps.

The US' competition authorities have also stated that they would closely look at the EU's Google Android decision and it will be interesting to see to what extent the US follows suit in initiating enforcement action against Google.



RPM and pricing algorithms: significant fines imposed by the Commission on four consumer electronics manufacturers

EU (ANTI-TRUST – CARTELS)

On 24 July 2018, the European Commission ("Commission") imposed fines on four consumer electronics manufacturers, Asus, Denon & Marantz, Philips and Pioneer, for engaging in fixed or minimum resale price maintenance ("RPM") by restricting the ability of online retailers to set their own retail prices for products such as kitchen appliances, notebooks and hi-fi products.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This is the first infringement finding in respect of RPM by the Commission for around 15 years.
- It is also the first time the Commission has referred to the impact of pricing software/algorithms in relation to a competition infringement decision.
- Cooperating with the Commission led to very significant fine discounts.

According to the Commission's press release, the four manufacturers' conduct was aimed particularly at online retailers who offered their products at low prices, using sophisticated monitoring tools and threats/sanctions (such as blocking of supplies) to deter/prevent non-compliance. In particular, the Commission found that the manufacturers engaged in RPM with respect to the following:

- Asus - certain computer hardware and other electronic products, in Germany and France, from 2011 – 2014;
- Denon & Marantz – audio and video consumer products, in Germany and the Netherlands, from 2011 – 2015;
- Philips – a range of consumer electronics products (such as kitchen appliances), in France, from the end of 2011 – 2013; and
- Pioneer – a range of products including speaker sets and iPod speakers. Pioneer also restricted the ability of its retailers to sell to consumers in other Member States in order to sustain different resale prices, in 12 countries, from 2011 – 2013.

The Commission has found that the manufacturers' interventions limited effective price competition between retailers and led to higher consumer prices.

The Commission has imposed significant fines on all four companies, ranging from c. €7.7 million to c. €63.5 million. Of note, this includes very significant reductions of 40 per cent (in the case of Asus, Denon & Marantz and Philips) and 50 per cent (in respect of Pioneer) for cooperating with the Commission.

In an accompanying statement, Commissioner Vestager explained that all four companies admitted the infringement and provided the Commission with additional evidence, noting that: "*the level of fine reduction depends on the extent and timing of the cooperation in the specific case, and the resulting benefits in terms of efficient procedure and effective enforcement. In the cases decided today, the companies acknowledged the infringement even before the issuing of a statement of objections. They also provided evidence that added significant value to what was already in the Commission's file. This allowed for a number of administrative efficiencies.*"

Such levels of discount are significantly higher than the 10 per cent that can be achieved under the Commission's formal settlement procedure, which only applies to cartel cases. However, more significant discounts (up to 100 per cent immunity) can be obtained in cartel cases under the Commission's leniency regime. The approach in the latest RPM cases follow that taken in 2016, when the Commission granted a significant discount of 30 per cent for cooperation in the Article 102 ARA Foreclosure case.

The press release also notes that many online retailers use pricing algorithms that automatically adapt retail prices to those of competitors, and as a result, the pricing restrictions imposed on low pricing online retailers "*typically had a broader impact on overall online prices for the respective consumer electronics products*".

This is the first time the Commission has referred to this type of software in the context of an actual infringement decision, albeit there has been much recent discussion of the possible impact of such algorithms on competition. While it does not appear that the decision is condemning the algorithms themselves, if this software can increase the impact of RPM measures beyond merely the customers targeted, this may encourage authorities to pursue more RPM-type cases going forward.

General Court rejects power cables appeals

EU (ANTI-TRUST – CARTELS)

On 12 July 2018, the General Court dismissed all appeals against the Commission's decision in connection with the 10-year power cables market sharing cartel. In its April 2014 decision, the Commission imposed fines totalling over €301m on eleven European, Japanese and South Korean manufacturers of underground and submarine high voltage power cables. The manufacturers challenged the Commission's decision on various grounds. The General Court has now dismissed all 15 separate appeals. In particular, the judgments confirm the Commission's position in relation to (i) parental liability and (ii) its powers to take data away from dawn raids.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Investors need to be aware of the risks of anticompetitive conduct by their portfolio companies – parent companies can be liable for the conduct of subsidiaries even with shareholdings well below 50%.
- The Commission can take a copy of data away from dawn raid for later review, but must ensure that undertakings' procedural rights are not compromised in the process.

Parental liability

It is well established under EU and UK competition law that a parent company can be held liable for the anti-competitive conduct of those subsidiaries over which it exercises decisive influence. Parental liability can arise even the parent company was neither involved in nor aware of the anti-competitive conduct.

The judgment in the *Goldman Sachs* appeal (T-410/14) confirms that:

- the rebuttable presumption that a 100% shareholding confers decisive influence over the subsidiary can also apply to a lower shareholding (e.g. between 84% and 91%) where the shareholder, like a sole owner, exercises 100% of the voting rights associated with its subsidiary's shares (as was the case for Goldman Sachs prior to its subsidiary's IPO); and
- rights to decide the composition of the board, call general meetings, participate in strategic committees and receive regular updates on the business are not consistent with those of a pure financial investor and may demonstrate that a parent exercises decisive influence over its subsidiary, even with a shareholding as low as 31.6% (as was the case for Goldman Sachs post-IPO).

Powers to remove data for later inspection

Regulation 1/2003 permits the Commission to examine an undertaking's books and records, irrespective of the medium on which they are stored, and to take or obtain copies or extracts of such books or records in any form.

The *Nexans* and *Prysmian* judgements (T-449/14 and 475/14) confirm that, in the context of a dawn raid:

- these powers permit the Commission to create copy-images of computer drives in their entirety in order to index and search the data; and
- the Commission does not have to complete its review at the undertaking's premises: it can remove copy-images of drives for review at its offices, provided that it offers protections such as keeping the data in a sealed envelope, allowing the undertaking's representatives to attend the review, providing the undertaking with copies of documents to be placed on the case file, and deleting the copy-image at the end of the process.

European Commission updates Best Practices Code for State aid control

EU (STATE AID)

On 16 July 2018, the European Commission issued a new code of best practices for the conduct of State aid control procedure (the "Code"). The Code provides updated guidance on how the Commission's State aid procedures work in practice. It aims to make State aid control as transparent, simple, predictable and timely as possible.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Code sets out the steps that are being taken by the Commission to increase the speed, transparency and predictability of State aid procedures.
- Member States are encouraged to engage in pre-notification contacts with the Commission in particular in novel and complex cases.
- The Code contemplates a "short-form" decision-making process in straightforward cases.
- Complainants in State aid cases should provide all the information requested in the Commission's complaint form and demonstrate that they have been affected by the aid measure in question.

Over recent years, the Commission has implemented its State aid Modernisation reform package to focus enforcement on cases with the biggest impact on the internal market, while at the same time simplifying and streamlining rules and procedures. To make the most of those modernised rules, the Code provides updated guidance on the day-to-day conduct of State aid procedures by the Commission.

The Code clarifies how the Commission and Member States will cooperate to facilitate the handling of State aid cases. For instance, it explains how pre-notification contacts between national authorities and the Commission should take place. Member States are, in particular, recommended to engage in voluntary and confidential informal pre-notification discussions in novel or complex cases. It also indicates that Member States can request the Commission services to deal with priority cases within a pre-defined timeframe. To that end, the Commission will ask Member States twice a year which cases they consider to be of high priority and will then propose a so-called "Mutually Agreed Planning".

Furthermore, the new Code confirms that unproblematic State aid measures corresponding to well-established Commission decision-making practice can be subject to a streamlined procedure. In such cases, the Commission will try to adopt a "short-form" decision within 25 days from notification.

The new Code also seeks to improve the handling of State aid complaints. It recalls that interested parties wanting to submit a formal complaint should fill out the complaint form and demonstrate that the aid measure in question affects their own interests. The Commission endeavours to adopt a decision or send a letter with its preliminary views within 12 months.

Additional guidance is provided, *inter alia*, on how the Commission uses its various market information tools, on the conduct of sector inquiries and on the monitoring of how Member States implement State aid measures and, in particular, exempted aid schemes in practice.

Member States, aid beneficiaries and complainants are strongly encouraged to make the most of the guidance and tips provided by the Commission in order to ensure smooth and transparent procedures.

Canal+ commitments offers commitments so that subscribers' right to use third-part decoders is preserved

FRANCE (ANTI-TRUST – ABUSE OF DOMINANCE)

The French Competition Authority (FCA) has closed the procedure against Canal Plus Group (GCP) after the latter has committed to maintain the ability of pay-TV subscribers to receive its satellite pay TV packages through third-party satellite decoders.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- An abuse can be established when a company which is dominant in a particular market, reserves an activity on a neighbouring market where it is not dominant.
- While dominant firms are free to make changes to their business models, changes which negatively impact on competitors and/or third parties can amount to an abuse and need to be objectively justifiable.
- When the FCA voices competition concerns in a preliminary assessment, the undertaking concerned may offer commitments in order to bring the procedure to an end before any infringement is ascertained (Article L. 464-2 of the French Code de commerce).

In order to receive linear broadcasts of GCP, subscribers must have a decoder. Previously, subscribers were able to rent decoders from GCP or purchase them in a retail outlet from an authorised third-party decoder manufacturer. In order to access content with those decoders labelled "Canal Ready", GCP provided subscribers with a card to be inserted in the decoder ("card only" systems).

However, due to piracy issues affecting third-party decoders, GCP had decided to terminate its partnerships with third-party decoder manufacturers and stop marketing card only systems. Subscribers were thereby deprived of being able to choose alternative decoders, which may be cheaper or may offer different features.

According to the preliminary assessment of the FCA, GCP's decision to terminate its partnerships with third-party decoder manufacturers may amount to an abuse of dominant position. In particular, the FCA noted that an abuse can be established where an undertaking holding a dominant position on a particular market reserves activity on a neighbouring but separate market to itself. While GCP argued its conduct was justified because of content security, the FCA considered the conduct was disproportionate to the objectives pursued.

In response to the competition concerns, GCP has made a commitment to allow its subscribers to access both its linear and non-linear satellite programmes via third-party decoders, provided that they download a "Software Access Module" called "MyCanal" which will be designed, inspected and updated directly by GCP. In addition, GCP has undertaken not to oppose the use of this module by any third-party manufacturer as long as the decoder's operating system is identical to the one used to create the module.

The FCA found that these commitments correctly addressed its competition concerns and therefore decided to make them binding until 31 December 2021.

It is worth noting that, in practice, such commitments not only address the competition concerns but also provide certain improvements to the position of pay-TV subscribers in France. Firstly, the commitments expand the accessibility of non-linear programmes. Secondly, the commitments encourage competition on the downstream market since decoder manufacturers no longer need a partnership with GCP to market a decoder capable of receiving GCP's satellite programmes.

Moreover, the decision is a reminder that dominant firms should consider the potential impact on competition before making any significant changes to their business models and commercial strategies. Where those changes do impact on competition, the firm will need to ensure that there is a legitimate reason for those changes that can be objectively justified.

German court rules that Coty may ban the distribution of its luxury perfumes via third-party platforms

GERMANY (ANTI-TRUST – VERTICAL AGREEMENTS)

On 12 July 2018, the Higher Regional Court of Frankfurt ruled that Coty, a supplier of luxury perfumes, may prohibit its authorised distributors from promoting and distributing its luxury goods via the third-party platform "amazon.de". The Court based its decision on criteria established by the European Court of Justice ("ECJ"), which had been asked to determine whether such restrictions concerning the use of third-party online platforms violate EU competition law.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- In contrast to the Pierre Fabre case in 2011 (C-439/09), where a total ban on internet sales was deemed impermissible, a selective distribution system preventing the use of third-party online platforms may be lawful if its goal is to preserve the quality and proper use of luxury products.
- Such prohibitions do not constitute so-called hardcore restrictions within the meaning of the EU's block exemption regulation on vertical agreements since they do not restrict the types of customers that authorised distributors can supply and they do not prevent passive sales.
- However, mere advertising co-operation between authorised distributors and third party websites, pursuant to which customers are directed to the distributor's own online shop, cannot be prohibited.
- Whether a product is a luxury product can be determined in particular in terms of the consumer's perspective, the manufacturer's marketing activities and the placement of products in a high-value market segment.

Coty is a manufacturer of fragrances, cosmetics and hair care products for brands such as Burberry, Gucci, Hugo Boss and Escada, and specialises in the distribution of luxury perfumes in Germany. Coty operates a selective distribution system, pursuant to which only those retailers that fulfil specific quality requirements are authorised to distribute its products. Parfümerie Akzente is one of those authorised retailers.

At the relevant time, Parfümerie Akzente distributed Coty's goods via bricks and mortar outlets, as well as online via its own website and via amazon.de (a third party platform). In its agreements with its authorised retailers, Coty only permitted retailers to distribute its products online if the exclusive luxury character of those products was maintained, but Coty prohibited the sale of its products via third-party platforms for which authorisation has not been granted. Therefore, by distributing Coty's products via "amazon.de", Coty alleged that Parfümerie Akzente had violated the prohibition set out in its distribution agreement and Coty asked the district court to prohibit the sale of its fragrances on Amazon.

After the complaint was dismissed, Coty appealed the decision. On 19 April 2016, the Higher Regional Court of Frankfurt made a reference to the ECJ seeking guidance on the interpretation of third-party platform bans under EU competition law. The Higher Regional Court's questions were answered by the ECJ in a judgment on 6 December 2017 (see our earlier article). According to the previous case law of the ECJ, qualitative selective distribution systems are permissible and are therefore not subject to the prohibition pursuant to Article 101(1) TFEU:

- if the selection of resellers is based on objective qualitative criteria that are consistently established and applied without discrimination;
- if the characteristics of the products in question require such a distribution network in order to safeguard their quality; and
- provided that the specified criteria do not go beyond what is necessary.

The ECJ has refined the above criteria and found that the establishment of a selective distribution system can be justified not only to ensure the luxury image of products whose quality is based on their physical characteristics, but also for those products whose quality is based on their prestigious character. Since a reseller's poor reputation or damage to the prestigious character of luxury goods is likely to affect the goods' perceived quality, third party platform bans may be justified in order to preserve the quality of luxury goods.

On 12 July 2018, the Higher Regional Court of Frankfurt ruled that the products concerned qualified for selective distribution and the luxury image of those products would be jeopardised if third-party online platforms such as Amazon were given free admission to that distribution system. Moreover, the Court applied the criteria established by the ECJ and decided that the quality objectives of the selective distribution system had been applied consistently and without discrimination since Coty imposed the prohibition on the use of third-party platforms uniformly on all its distribution partners.

The German court did not need to answer the question of whether or not Coty's distribution agreements are prohibited by Article 101(1) as it also found that the third-party platform prohibition did not constitute a so-called hardcore restriction within the meaning of Article 4 b) or c) of the EU's block exemption regulation on vertical agreements. This finding was based on the fact that the prohibition:

- did not restrict the types of customers that authorised dealers could supply; and
- did not prevent authorised dealers from responding to unsolicited requests for products since, in certain circumstances, they were allowed to advertise via the internet and to distribute the goods via their own online shops).

In addition, the market shares of the parties involved did not exceed 30%, therefore the third-party platform ban was block-exempted by the regulation.

Accordingly, Coty may prohibit Parfümerie Akzente from selling its products through "amazon.de" and the related restriction of competition (i.e. the third-party platform ban) is permissible. However, mere advertising cooperation between authorised distributors and third party websites, pursuant to which customers are directed from a third party website to an authorised distributor's own online shop, cannot be prohibited by manufacturers.

Parfümerie Akzente's application to appeal the judgment was denied by the Court, although it may still challenge the denial of permission to appeal before the German Federal Court of Justice.

Consequences

Although total bans on online sales are still generally prohibited, the ruling opens up greater possibilities for manufacturers of luxury branded goods to impose third-party platform bans.

The judgment also provides further guidance on the circumstances in which products actually have a luxury image which is not based solely on their physical characteristics. In particular, the judgment indicates that the following factors are relevant to the assessment of whether certain products have a luxury image:

- consumers' perception of those products;
- the manufacturer's marketing activities in connection with those products; and

- the placement of products in a high-value market segment.

Strictly-speaking, the judgment provides legal clarification only in respect of luxury goods which are sold on Amazon. Therefore, manufacturers of luxury goods should continue to consider sales bans in relation to other third-party platform on a case-by-case basis.

Speciality steel companies fined €205 million for price-fixing in Germany

GERMANY (ANTI-TRUST – CARTELS)

On 12 July 2018, the German Federal Cartel Office ("FCO") issued fines totalling approximately €205 million on a number of parties in respect of a cartel concerning speciality steel products. The cartelists were found to have concluded price-fixing agreements and to have exchanged competitively sensitive information.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The companies that agreed to a settlement will have benefitted from reductions in the amount of any fines.
- The case is a reminder of the fact that trade associations can be fined for facilitating cartels.

The FCO has confirmed that it has imposed fines on producers/processors and traders of specialty steel products, including ArcelorMittal, Zapp Precision Metals, Schmidt + Clemens and Dörrenberg Edelstahl. The FCO's press release also confirms that fines have been imposed on ten individuals, as well as the trade association Edelstahl-Vereinigung. The FCO has reported that trade associations and, in particular, Edelstahl-Vereinigung e.V. "played a decisive role in the agreements."

Austrian steel maker Vestalpine has escaped the fines as it blew the whistle on the cartel. Investigations into four other companies and another trade association are still ongoing, the FCO has reported.

The products covered by the agreements are long steel products, which are used in many industries such as the automotive, construction, manufacturing, household appliances, packaging and aviation industries. The particular products are engineering steel, tool steel and high-speed steel as well as stainless steel (i.e. rust, acid and heat-resistant steel).

The specialty steel products were usually sold based on a price model which essentially consists of the base price and surcharges for certain inputs, especially scrap and alloys. The companies jointly agreed on and implemented a uniform method of calculating scrap and alloy surcharges for steel products across the sector and agreed that the surcharges be passed on to customers on a 1:1 basis.

Customers who bought the products from cartel members during the period of the cartel (2004 to 2015) are likely to seek to claim damages from cartel members. Since the final decisions of the FCO are binding for all courts in the EU, claimants will not have to prove that there was a cartel.

German and Austrian competition authorities publish joint guidelines on new transaction value merger control thresholds

GERMANY (MERGERS)

On 9 July 2018, the German Federal Cartel Office ("FCO") and the Austrian Federal Competition Authority ("AFCA") published joint guidelines on the new transaction value thresholds which were introduced in Germany and Austria in 2017. Even if the traditional turnover-based thresholds are not met, in certain circumstances a transaction may be notifiable if (a) the consideration exceeds €400 million in Germany or €200 million in Austria and (b) the target has significant current activities in Germany or Austria respectively. The guidelines aim, inter alia, to clarify the scope of the new transaction value thresholds. This article mainly focuses on the transaction value test in Germany.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Since 2017, certain mergers have qualified for competition review in Germany and Austria based on the value of the transaction, in circumstances in which the traditional turnover thresholds are not met.
- In Germany, the primary purpose of introducing a transaction value test was to provide the FCO with the ability to investigate mergers concerning target companies with modest turnover, but which may nevertheless have a significant impact on competition. In particular, the focus was on certain digital and innovative sectors, such as the pharmaceutical sector.
- The guidance clarifies that the transaction value test is only applicable in Germany in cases where (a) the target's German turnover is below €5 million and (b) the target has substantial current activities in Germany.
- The target will not be considered to have substantial current activities in Germany in circumstances in which its turnover in Germany to date reflects its market position and competitive potential in Germany.

In view of the interconnectedness of Austria's and Germany's economies and similarities in their merger notification tests, the FCO and AFCA have decided to publish joint guidance on the new transaction value tests applied in their respective jurisdictions since 2017.

In each of Germany and Austria, there are two limbs to the transaction value test. First, the transaction value must exceed a prescribed threshold: €400 million in Germany and €200 million in Austria. Second, the target company must have substantial domestic activities. However, following the introduction of this new test in each of Germany and Austria, there has been a lack of clarity in respect of the application of that test. This article focuses on the application of the test in Germany.

Determination of the transaction value

For the purposes of the tests, relevant consideration comprises all assets and other monetary benefits that the seller will receive from the buyer in connection with the transaction, including all cash payments, voting rights, securities and tangible and intangible assets. It also covers any future payments, such as earn-out-clauses or payments which are conditional upon reaching certain turnover or profit targets (including outside Germany), payments for non-competition obligations by the seller, as well as assumed liabilities of the target or the seller (limited to interest bearing parts thereof).

Current substantial domestic activities

In Germany, not all transactions that exceed the transaction value threshold must be notified. In particular, the notification obligation will only arise where (a) the transaction value threshold is exceeded, (b) the target did not achieve a turnover of more than €5 million in Germany, and (c) the target has substantial current activities in Germany.

The meaning of the concept of "substantial domestic activities" has been a significant source of debate. However, the guidance clarifies that the new transaction value threshold should not be interpreted extensively such that the notification obligation would arise in all cases where the relevant consideration threshold is exceeded and the target's turnover in Germany is below €5 million. The crucial question is whether the turnover generated by the target to date in Germany reflects its economic and competitive potential in Germany.

As a rule of thumb, in the following situations - by way of example - it is likely that the FCO will consider that the turnover does adequately reflect the market position in Germany:

- if the target has generated insignificant domestic turnover (i.e. under €5 million) for a sustained period;
- if the target generates significant turnover abroad but not in Germany, for instance, because the target has not (yet) established a (proper) sales structure in Germany.

The situation is, however, different when the target's turnover is not an adequate indicator, for instance, because the company is active on a market that is not characterised by turnover or because its product has only recently come onto the market such that the low turnover that it has generated to date does not reflect its real economic and competitive potential. In such cases, other indicators of the extent of the target's current domestic activities may be relevant, with the particular indicators depending on the sector in which the target is active (e.g. number of "monthly active users" or the number of "unique visitors" to a website).

The guidelines have been created in light of the FCO's and the AFCA's initial experience of dealing with notifications made pursuant to the new thresholds and have been developed following discussions with practitioners and a public consultation process. The FCO and the AFCA have emphasised that, in the absence of sufficient case practice, it cannot yet model every possible scenario where the obligation to notify a transaction pursuant to the transaction value threshold would arise and that thus the guidelines should be regarded as preliminary.

There are sound reasons for the new transaction value threshold not being interpreted too extensively by the FCO. In particular, we note that the German Act against Restraints of Competition already provides that the transaction value test is not applicable in cases where the target achieved a turnover of more than €5 million in Germany in the last business year.

Exide and Recobat fined for fixing car-battery purchase prices in Spain

SPAIN (ANTI-TRUST CARTELS)

The Spanish National Commission for Markets and Competition (CNMC) has fined Exide Techonologies and Recobat €5.37 million for participating in a cartel which fixed the purchase prices of used batteries for second-hand vehicles. Another company that participated in the cartel, Azor Ambiental, avoided a fine after the CNMC considered that any fine in respect of its conduct would be time-barred.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This is an example of a purchasing (rather than sales) cartel which are uncommon.
- Purchasing cartels can have negative impacts on competition, in particular, in markets characterised by the presence of purchasers with buying power.
- Where a company can prove that it withdrew from a cartel more than 4 years before the start of the CNMC's investigation, enforcement action against that company by the CNMC will be time-barred.

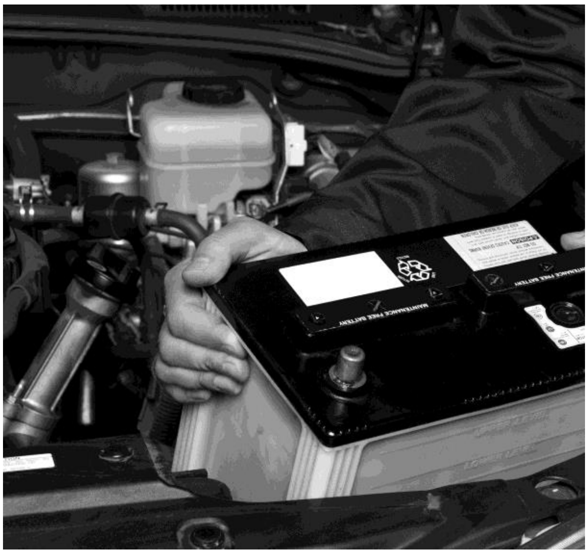
The alleged cartel took place between 2008 and 2012, during which Exide Technologies and Recobat followed a common strategy of fixing their purchase prices. The CNMC considered that:

1. Several companies coordinated to reduce price competition in relation to the purchase of used batteries, which caused damage to the suppliers of used batteries; and
2. There was a continuous practice of exchanging sensitive commercial information regarding the purchasing prices for used batteries between the cartel participants, which enabled those companies to find out the prices that had been and would be offered by their competitors. As a result of these exchanges of information, the cartel participants could align and/or coordinate their purchase prices.

According to the CNMC, in order to achieve their objective, the companies maintained continuous and fluid contact through different channels. They had direct contact through emails, telephone conversations and face-to-face meetings, but also indirect communications through supplier companies, collectors or subsidiaries, which acted as intermediaries in the data flow and provided the necessary strategic information to continue aligning and/or coordinating their prices.

Purchasing cartels can be as harmful to competition as sales cartels (although they are less common), since they can damage innovation and quality of the products sold by affected companies, and the CNMC therefore took a similar approach by deciding to fine the participants.

Exide and Recobat have two months from the date of the decision to lodge and appeal before the Spanish High Court.



Secretary of State accepts divestiture of Sky News to Disney amid media plurality concerns on the acquisition of Sky Plc by 21st Century Fox

UK (MERGERS)

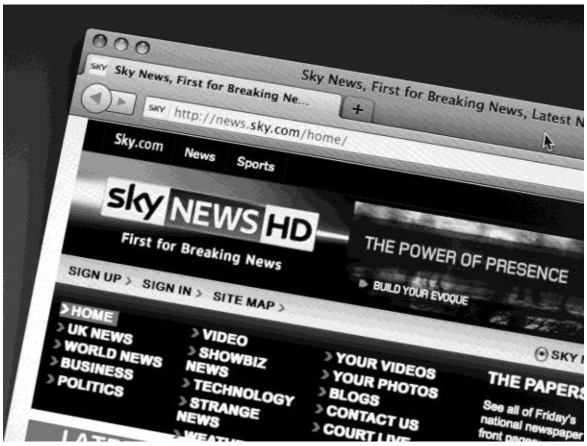
The Secretary of State for the Department for Culture, Media and Sport ("DCMS") announced his decision on the proposed acquisition of Sky Plc by Fox, agreeing with the UK Competition and Markets Authority's ("CMA") finding that the acquisition operates against the public interest on grounds of media plurality. He accepted the final undertakings by Fox and Disney for the divestiture of Sky News to Disney in order to offset the adverse implications of the merger on the public interest, whilst ensuring the continuation and availability of Sky News.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Secretary of State for DCMS has the power to intervene in mergers on specified public interest grounds, including media plurality and broadcasting standards.
- The CMA's finding that the merger would have an adverse impact on media plurality and its recommendation that Fox should divest Sky News to an up-front purchaser (Disney) was endorsed by the Secretary of State.
- The Secretary of State has accepted certain undertakings from Fox and Disney designed to address the media plurality concerns and to ensure the continued independence of Sky News and the Murdoch Family Trust ("MFT").

On 5 June 2018, the Secretary of State published the CMA's final report. The main concern identified by the CMA was that the transaction was not in the public interest in view of the impact on media plurality. In particular, given MFT's ownership of News Corp and Fox, Fox's acquisition of the remaining 61% in Sky plc was likely (a) to reduce the diversity of viewpoints available in the media and (b) to create an excessive concentration of influence by one media owner over public opinion and the political agenda.

While Sky News and News Corp's share of total news consumption is not particularly high (c. 10%), unlike other news providers with higher market shares, the MFT runs a cross-platform service on all four media platforms: TV, radio, newspapers and online media. In addition, in its investigation, the CMA identified limited prospects of market entry and organic growth in the relevant market. Therefore, the CMA found that the transaction would increase the likelihood for editorial alignment across MFT-controlled media enterprises.



Having considered remedies options proposed by the parties, the CMA ultimately recommended the divestiture of Sky News to an up-front purchaser, namely The Walt Disney Company ("Disney"). The CMA considers that the divestiture to Disney provides greater certainty over the continuation and availability of Sky News, whilst maintaining media plurality. In particular, the CMA was satisfied that Disney had the relevant expertise and capability to own and operate a news organisation in the UK.

The Secretary of State accepted the CMA's conclusions, including its finding that the divestiture of Sky News to an upfront purchaser was the most proportionate and effective remedy to address the public interest concerns. He highlighted that the final undertakings provided by Fox would need to ensure that Sky News:

- remains financially viable over the long-term;
- is able to continue to operate as a major UK-based news provider; and
- is able to take editorial decisions independently, free from any potential outside influence.

On 12 July 2018, after DCMS had consulted on the terms of the proposed undertakings to be provided by Fox and Disney, the Secretary of State decided to accept undertakings which:

- prevent Disney from selling Sky News for 15 years without the agreement of the Secretary of State;
- prevent MFT members taking senior roles at Disney in order to maintain Sky News' editorial independence;
- require Disney to protect the independence of Sky News; and
- require amendments to be made to a Brand Licensing Agreement in order to prevent Sky plc interfering with Sky News' editorial independence, with the implication that future changes relating to the presentation of the Sky News Service would require an agreement between Sky and Sky News.

As a result of Disney's acquisition of Sky News and in light of the undertakings provided by Fox and Disney, the CMA and the Secretary of State were satisfied that MFT's share of the UK media market would remain within an acceptable range, diffusing the media plurality concerns.

The CMA was also required to consider whether the proposed merger between Fox and Sky would result in the loss of Sky's fitness and propriety to hold its statutory broadcasting licences. However, the CMA considered that Sky, Fox and the MFT have a genuine commitment to the attainment of the broadcasting standards objectives. Therefore, the CMA found that, on the balance of probabilities, the transaction would not be expected to operate against the public interest taking account of the need for persons carrying on media enterprises, and those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.

On 27 July 2018, the High Court refused an application for judicial review of Ofcom's decision of 29 June 2017 by which Ofcom concluded that various allegations of impropriety made against Fox News and the evidence in support of those allegations did not provide a sufficient basis for it to decide in advance of a proposed merger between Fox and Sky that Sky, an existing holder of statutory broadcast licences, would not remain fit and proper to hold its licences.

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