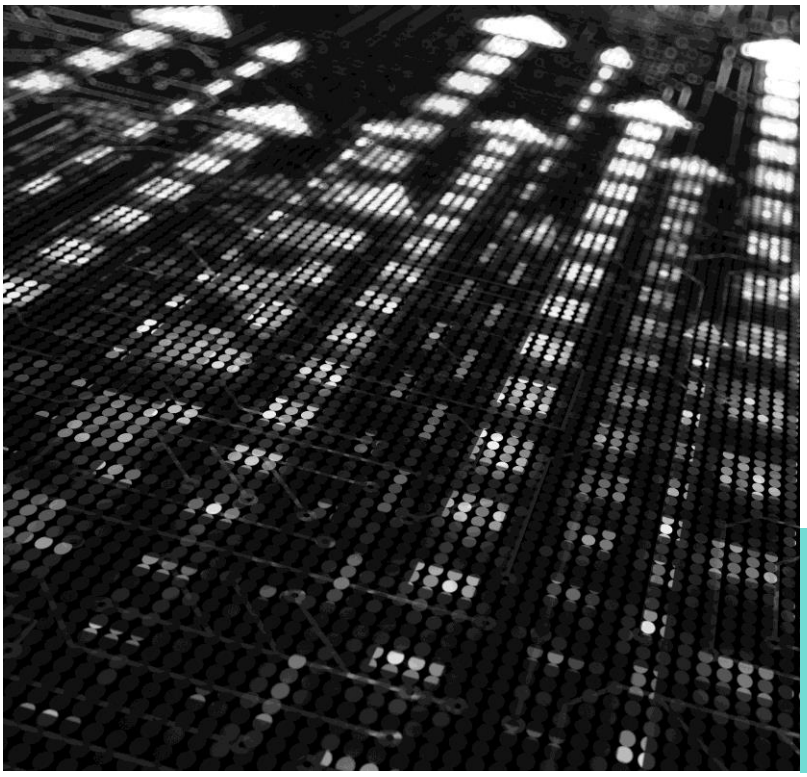

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Ashurst competition law newsletter – June 2019

From the Editors

The June 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 covers a feature article on the Hong Kong Competition Commission's first two victories before the tribunal, the European Commission's fine for restricting beer imports, the Brussels Court of Appeal's UEFA Financial Fair Play rules, further director disqualifications in the UK, new competition law reforms in Belgium, the blocking of the UK Sainsbury's/Asda merger as well other topics.

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Content

World's largest beer company fined €200m for impeding cheaper beer imports

EU - ANTITRUST – ABUSE OF DOMINANCE

On 13 May 2019, the European Commission ("Commission") announced that it had fined AB InBev € 200 million for abuse of its dominant position between 9 February 2009 to 31 October 2016 by hindering cheaper imports of its Jupiler beer from the Netherlands into Belgium.

The Commission considered that AB InBev was dominant on the Belgian beer market, not only because of its consistent high market share (especially with the Jupiler brand which represents 40% of the total Belgian beer market in terms of sales volume) but also because of its ability to increase prices independently from other manufacturers, the existence of significant barriers to entry and to expansion and finally the limited countervailing buyer power enjoyed by retailers given the essential nature of some beers brands sold by AB InBev.

According to the Commission, AB InBev implemented a deliberate strategy to restrict the possibility for supermarkets and wholesalers to buy Jupiler beer in the Netherlands with a view to maintain higher prices in Belgium by limiting imports from the Netherlands where prices were lower.

To that end, AB InBev removed the information in French from its labels and changed the design and size of beer cans. It also limited the volume of Jupiler beer sold to a wholesaler in the Netherlands and put pressure on retailers and wholesalers in the Netherlands to limit their exports to Belgium.

AB InBev was granted a 15% fine reduction in exchange for its express acknowledgement of the infringement and a commitment to affix mandatory food information in French and Dutch on its packaging. This illustrates the new trend of the Commission to reward undertakings' cooperation with its proceedings even where the concerned conduct falls outside the scope of the Commission's Settlement Notice.

This decision is one of the rare cases in which the Commission has acted against unilateral conduct hindering trade between Member States on the basis of Article 102 TFUE. Other precedents include *United Brands* and *Glaxo Greece.*

Commission accepts inter-regional MIF commitments from Visa and MasterCard

EU - ANTITRUST - ANTICOMPETITIVE AGREEMENTS

On 29 April 2019, the European Commission ("Commission") announced that it had accepted legally binding commitments offered by both MasterCard and Visa, capping their multi-lateral interchange fees ("MIFs") in respect of payments made in the EEA with consumer credit or debit cards issued outside the territory (e.g. when an Australian tourist uses a MasterCard of Visa card to pay a bar bill in London) – so-called "inter-regional MIFs". The companies have six months to implement the caps, and the Commitments last for five years and six months.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Commission has accepted Commitments offered by Visa and MasterCard to address the Commission's competition concerns.
- The Commission will now close its investigations without any finding of competition law infringement or penalty against Visa or MasterCard.
- The legally binding Commitments require Visa and MasterCard to cap the level of their MIFs for inter-regional transactions for five years.
- Visa and MasterCard must each appoint a Monitoring Trustee to monitor their compliance with the Commitments.
- If either of Visa or MasterCard were to breach their obligations under the Commitments, they risk the imposition of substantial fines of up to 10 per cent of turnover and the reopening of the investigation.

BACKGROUND

The Commission has previously concluded its investigations into the level of MIFs set by MasterCard and Visa in respect of intra-EEA consumer credit and debit transactions, as a result of which MasterCard and Visa capped the level of their MIFs. Visa settled its investigation via commitments (in 2010 and 2014), but MasterCard battled the Commission all the way to the EU Court of Justice, and lost. The Commission's Decision that MasterCard's intra-EEA MIFs infringed competition law was upheld by the Court in September 2014. Following these investigations, in 2015, the EU Parliament and Council adopted the Interchange Fee Regulation (Regulation 2015/751), which capped the level of MIFs for consumer credit and debit transactions for cards issued and used in the EU. In each case, MIFs were capped at 0.2 per cent for debit card transactions and 0.3 per cent for credit card transactions.

However, the EU Regulation does not apply to cards issued outside the EU, and does not therefore cover inter-regional transactions. Further, the Commission's earlier Decisions (including earlier commitment Decisions) did not address the MIFs applied to transactions using payment cards issued outside the EEA.

COMMISSION INVESTIGATIONS

The Commission opened formal proceedings against MasterCard on 9 April 2013 in respect of the MIFs for payments made in the EEA by cardholders from non-EEA countries. By contrast, the Commission's investigation into Visa's inter-regional MIFs was a continuation of its earlier investigation into Visa MIFs, as Visa had only accepted commitments in respect of its intra-EEA debit MIFs (in 2010) and credit MIFs (in 2014) which were both set by Visa Europe, whereas its inter-regional MIFs are set by Visa Inc.

The Commission sent:

- a Statement of Objections ("SO") to MasterCard on 9 July 2015; and
- a supplementary SO to Visa on 3 August 2017 (following an SO on 6 April 2009 and another supplementary SO on 31 July 2012).

In each case, these SOs identified the Commission's preliminary concerns that the inter-regional MIFs may constitute an anti-

competitive restriction of competition and may increase prices for European retailers when they accept payments from customers using cards issued outside the EEA, and that that may in turn lead to higher prices for consumer goods and services in the EEA.

In order to address the Commission's concerns, and to secure the closure of the Commission's investigations without any finding of infringement, MasterCard and Visa offered the Commitments. Following market-testing of the Commitments by the Commission, the Commission adopted two separate Decisions, under which MasterCard and Visa respectively will be legally bound to cap their MIFs at the following levels within six months:

"Card present" transactions:

- debit cards: 0.2 per cent of the value of the transaction;
- credit cards: 0.3 per cent of the value of the transaction;

"Card not present" transactions (e.g. on-line payments):

- debit cards: 1.15 per cent of the value of the transaction;
- credit cards: 1.5 per cent of the value of the transaction.

Both MasterCard and Visa are also required to publish their MIFs in a clearly visible manner on their websites.

OBSERVATIONS

These Commitment Decisions once again demonstrate that the Commission recognises that MIFs below a certain level are acceptable and do not constitute an unlawful restriction of competition. Further, the levels of the permitted MIFs in respect of "card not present" transactions clearly demonstrate that the Commission also recognises that there are factors associated with such transactions, such as risk, which justify a significantly higher level of MIF.

The Commission has stated that the Commitments will "*significantly reduce the costs for retailers in the EEA*" and that this is "*expected to lead to lower prices to the benefit of all European consumers*". However, the effect is likely to be small, given that expenditure in the EEA using consumer payment cards issued outside the EEA represents a very small proportion of all expenditure on goods and services in the EEA, and the amount of the inter-regional MIF represents a small proportion of the price of goods. Accordingly, the impact of the Commitments on costs for retailers, or on prices for consumers (which would require retailers to pass on any cost savings to consumers in the form of lower prices), is likely in practice to be limited.

Given the significant number of ongoing actions for damages brought by merchants and retailers against Visa and MasterCard, and the ongoing threat of the consumer class action against MasterCard in the UK, both parties will have been keen to avoid any Commission infringement decision which could be used as a possible anchor for new or existing proceedings.

At five years, the duration of the Commitments is relatively short, and it will be interesting to see what further action the Commission decides to take once they have expired if the parties increase the MIFs.

Belgian Parliament adopts law reforming Belgian competition rules

BELGIUM - PROCEDURE

On 25 April 2019, the Belgian Parliament adopted a new law that amends the current Belgian Competition Act that entered into force on 3 June. While the substantive competition rules remain unchanged, the new law will bring about a number of procedural changes to improve the functioning of the Belgian Competition Authority ("BCA"), rationalize procedures, codify existing case-law and BCA's practice and further align Belgian competition rules with EU law.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The new law will make a number of procedural changes to Belgian competition rules.
- The most notable change is the increase in the cap on competition fines to 10% of a company's worldwide turnover (whereas this 10% cap is currently based on the company's turnover in Belgium).
- Substantive Belgian competition rules remain unchanged, although readers will be aware that Belgium recently adopted a law introducing a prohibition on abuses of 'economic dependence', abusive clauses and unfair market practices in relationships between companies (see for further detail our previous article).

On 25 April 2019, the Belgian Parliament adopted a new law replacing the current Belgian Competition Act as embedded in Book IV of the Code of Economic Law. The new law was published in the Belgian Official Gazette on 24 May and entered into force on 3 June. The reform is intended to improve the efficiency of the BCA, codify existing case-law and BCA's practice and further align Belgian competition rules with EU law.

We set out below the most important changes that will be brought about by the new law:

- **Increased cap on competition fines**. The cap on competition fines will be increased to 10% of a company's worldwide turnover, whereas this 10% cap is currently based on the turnover generated in or from Belgium. This is in line with the requirement laid down in Article 15 of the "ECN+" Directive (2019/1). The new cap will only apply to infringements committed after the entry into force of the law.
- **Closure of an investigation based on commitments**. The BCA competition prosecutors ("*auditeurs*") will now have the express power to close an investigation without finding an infringement when the party under investigation offers commitments addressing the concerns raised by the prosecutor. This is in line with the EU Commission's practice based on Article 9 of Regulation 1/2003.
- **Liability of individuals**. Under the new rules, the BCA will no longer have to prove that an individual was acting under an express mandate from his/her company to establish his/her personal liability for a competition law infringement. Instead, evidence demonstrating that the individual was acting "*within the scope of the company's activities*" (regardless of whether he/she exceeded the terms of his/her mandate) will be sufficient for him/her to be held personally liable for the infringement.
- **Leniency**. Companies will no longer be able to obtain immunity from fines by simply acknowledging the existence of a competition law infringement. In line with the practice at EU level, they will also have to adduce evidence of that infringement. Individuals however will continue to be able to obtain immunity from prosecution by simply admitting guilt.
- **Time limits**. The new law modifies some of the time limits applicable in merger control and antitrust proceedings before the BCA (e.g. extending the deadline to respond to a statement of objections from one to two months).

- **Protection of confidential documents**. The Market Court (i.e. the chamber within the Brussels Court of Appeal hearing competition matters) will now be under an explicit obligation and will be given express powers to protect confidential information.

The new law entered into force on 3 June 2019.

Brussels Court of Appeal rejects antitrust challenge on UEFA's Financial Fair Play rules

BELGIUM - PRIVATE DAMAGES ACTIONS

On 11 April 2019, the Brussels Court of Appeal dismissed an action lodged by a number of players' agents and club supporters challenging the validity of UEFA's Financial Fair Play rules, which prohibit clubs participating in UEFA competitions from overspending. In a judgment that echoes an earlier decision of the Paris Court of Appeal in relation to similar actions brought before it, the Brussels Court of Appeal found that it lacked the competence to rule on the merits of the case, as the damage alleged by the claimants was too indirect to establish the jurisdiction of the Belgian courts.

Ashurst acted as co-counsel in this litigation both before the Belgian and the French courts.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Under the rules of jurisdiction set out in the Lugano Convention, it is possible for claimants to bring damages actions in the jurisdiction where the harmful event occurred (e.g. where cartel agreements were concluded) and/or where the damage was suffered.
- Indirect damages (i.e. damages that are not the *direct and immediate consequence* of the alleged competition infringement) are not sufficient to establish the jurisdiction of the courts of the Member State in which the claimants have their registered office/domicile.

BACKGROUND

UEFA's Financial Fair Play ("FFP") rules were introduced in 2010 to improve financial discipline and ensure the long-term viability of European football clubs. FFP's main pillar is the "break-even" rule which requires clubs participating in UEFA competitions to balance their books (broadly meaning that their 'core' expenses cannot exceed their 'core' revenues). Since its entry into force, FFP has been the object of lengthy litigation in various fora, as a number of claimants (players' agents and club supporters) filed complaints with the EU Commission and brought proceedings before the French and Belgian courts claiming that FFP was restrictive of competition and also impeded the free movement of capital and players by constraining clubs' recruitment policies. These claimants also sought damages for the harm allegedly suffered by them as a result of FPP (i.e. a loss of revenues for players' agents, and an increase in ticket prices and/or a decrease in the quality of games for supporters).

In the context of proceedings in Belgium, the Brussels Court of First Instance ("CFI") had rendered a judgment on 29 May 2015. In its judgment, the CFI had concluded that it had no jurisdiction to rule on the case. Notwithstanding that lack of jurisdiction, the CFI granted the interim measures sought by the claimants and also made a preliminary reference to the European Court of Justice ("ECJ") seeking a ruling on the compatibility of FFP with EU law. The CFI's judgment granting interim measures was appealed by UEFA. A cross-appeal on jurisdiction was brought by the claimants. On 16 July 2015, the ECJ dismissed the preliminary reference as "*manifestly inadmissible*" on the ground that it originated in a court with no competence to rule on the merits and also lacked

the necessary precision to allow it to give a preliminary ruling on the questions referred.

BRUSSELS COURT OF APPEAL JUDGMENT

On 11 April 2019, the Brussels Court of Appeal upheld UEFA's appeal finding that the CFI should not have granted interim measures after finding itself incompetent to rule on the case.

On the cross-appeal lodged by the claimants, the Court sided with the CFI in finding that the Belgian courts had no competence to consider the claims against UEFA. In particular, the damages alleged by the claimants, on the assumption they could be established, were not sufficiently direct and immediate to establish the jurisdiction of the Belgian courts on the basis of Article 5(3) of the Lugano Convention (giving competence to the courts of the state in which the harmful event occurred and/or where the damage was suffered). This judgment echoes the position taken by the Paris Court of Appeal in respect of similar actions in 2016. In that instance, the Paris Court of Appeal had also declined jurisdiction on the basis that the damage alleged by the claimants was too "*indirect and uncertain*".

The Brussels Court of Appeal therefore dismissed the action against UEFA without considering the merits.

Finally, the claim had also been brought against the Belgian football union ("URBSFA"). That part of the claim was also dismissed on the grounds that URBSFA was in no way involved in the adoption or enforcement of FFP, so that any possible fault would not be attributable to it.

France simplifies its merger notification procedure

FRANCE - MERGER CONTROL, PROCEDURE

On 20 April 2019, a decree simplifying merger notifications to the French competition Authority ("FCA") has been published.

The decree n° 2019-339 of 20 April 2019 slightly alleviates the information required for a merger notification and the filing process in three respects.

- First, the volume of financial data to be provided by the parties has been considerably reduced.
- Second, as a matter of consistency with the FCA's decisional practice on foreclosure effects, the decree raised to 30% the threshold at which a market is considered to be vertically affected (beyond this threshold additional information on markets must be provided by the notifying parties).
- Third, only one copy will henceforth have to be filed with the FCA.

This decree is a first step towards a broader modernisation and simplification of the French merger control initiated by a public consultation launched by the FCA in Autumn 2017. It will soon be followed by the publication of an updated version of the FCA's merger control guidelines and the introduction of an online notification procedure for certain simplified cases. Even more substantive changes to French merger control may occur in the future with the introduction of an ex post merger control, which is currently being considered by the Government.

Six companies and two consortia fined for bid rigging facilities management tender

ITALY - ANTITRUST - CARTELS

On 17 April 2019, the Italian Competition Authority ("ICA") closed the investigation launched into alleged bid rigging in the facilities management market. The ICA found that the parties entered into a single, complex and continuous agreement aimed at allocating the 18 lots of a tender held in March 2014 by the country's state procurement agency Consip S.p.A. for facilities management services. The fines imposed totalled €235 million.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Importance of leniency applications: The information provided to the ICA was found to be decisive in establishing the infringement. The leniency applicant was granted a 50% reduction on a fine originally amounting to €80 million.
- Relevance of investigations carried out by different authorities: The ICA based its decision also on the evidence gathered by the prosecutor of Rome - which is conducting a criminal investigation into the same tenders – that it would not have been otherwise empowered to gather.
- Strict approach to bid-rigging: The bid rigging in question was considered an infringement by object; the fact that the relevant tender had been suspended, and therefore no contract had been awarded, had no relevance in the assessment of the conduct.

In March 2017 the ICA launched an investigation into possible bid rigging in the Italian market for facilities management services. Particularly, the ICA investigated the conduct of six companies (together with their parent companies) and two consortia that unlawfully participated in the tender held in March 2014 by the country's state procurement agency Consip S.p.A. for the cleaning and management services for all public buildings in Italy. The tender covered 18 lots divided on geographical basis and had a value of €2.7 billion.

The ICA based its assessment, *inter alia*, on the evidence gathered through a leniency application filed after the opening of the proceedings and on the documentation acquired by the prosecutor of Rome - which is conducting a criminal investigation into the same tender (including evidence that it would not have been otherwise empowered to directly gather, e.g. wiretapping). This evidence showed that the parties had regularly met and exchanged sensitive information in order to allocate the 18 tender lots between them. Moreover, the ICA reconstructed the participation pattern of the parties to the tender by simulating the possible outcomes of the tender if one of the parties (namely the temporary grouping of companies led by the leniency applicant) had not withdrawn its offer and if the tender had not been suspended. This simulation showed, according to the ICA, the existence of an allocation strategy based on a perfect "chessboard pattern", that had no alternative and rational explanation than the collusion.

Companies should take note that:

- in light of other recent cases relating to bid rigging, the ICA is increasingly examining the outcomes of tender processes, or the participating patterns, as evidence in order to assess whether there has been an infringement;
- the ICA is taking into account, as evidence of collusion, the use of temporary groupings of companies that appear unnecessary (the companies being theoretically able to submit individual offers) and of sub-contracts (which were used by the parties in order to obtain compensation in cases in which officially a lot was awarded to another party); and
- bid rigging is confirmed to be a very serious infringement, leading to the imposition of a basic amount of the fine corresponding to nearly the maximum percentage set by the ICA (in this case, 22.5% out of the maximum of 30% provided for by the ICA's guidelines).

CMA ramps up use of director disqualification powers

UK - ANTITRUST – CARTELS, PROCEDURE

On 26 April 2019 the UK Competition and Markets Authority ("CMA") announced the disqualification of two directors arising from their company's involvement in a precast concrete drainage products cartel. This was followed on 10 May 2019 by the announcement of the disqualification of a further three directors whose companies had been involved in cover pricing in relation to office fit-outs. These disqualifications mark a change in CMA policy towards greater use of disqualification as a means of enforcement and deterrence.

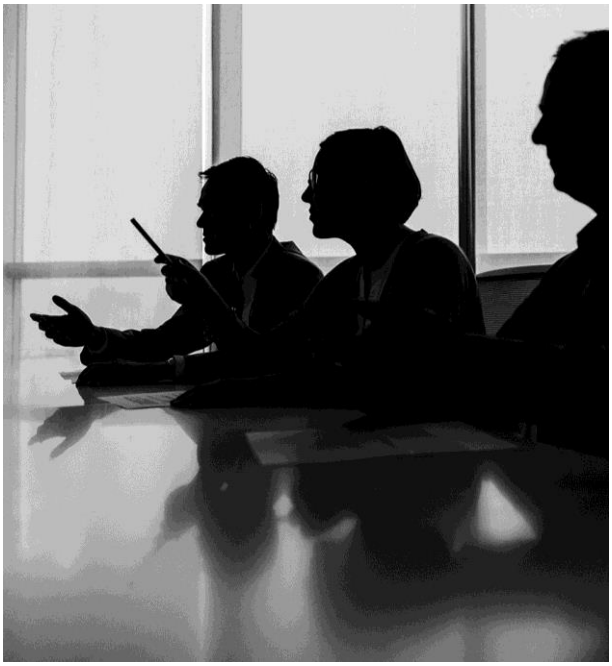
WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Director disqualification looks to become a central tool in the CMA toolkit. Directors should be aware that they have a personal responsibility for ensuring that their companies comply with competition law, and that they may become subject to this sanction even if they have not themselves been directly involved with competition law breaches.
- A Competition Disqualification Order ("CDO") will be made by the court (on the application of the CMA) where there has been a breach of competition law and the court considers that a person's conduct as a director makes him or her unfit to be concerned in the management of a company.
- The CMA also has the power to obtain a competition disqualification undertaking ("CDU") from a director instead of applying for a CDO.

On 26 April 2019 the CMA announced the disqualification of two former directors of CPM Group resulting from CPM's involvement in a cartel concerning the supply of precast concrete drainage products to the construction industry. The CMA secured legally binding CDUs from the former directors, for periods of seven and a half years and six and a half years. The CMA is entitled to accept such CDUs in place of going to court to seek CDOs, with both measures having the same legal effect.

On 10 May 2019 the CMA announced the disqualification of three directors of various companies in the Jones Lang LaSalle and Fourfront groups. The breaches of competition law in this case concerned cover bidding in relation to office fit-outs. Again, the CMA accepted CDUs from the directors in place of seeking CDOs. The disqualifications covered periods of five years, two years and six months, and two years.

The increased use of director disqualification powers comes after a long period during which such powers had been virtually unused. Only three directors had been disqualified by the CMA up to the end of 2018, despite the CMA having the ability to seek disqualification since 2003. However, the CMA has been signalling its intention to make greater use of director disqualifications for some time, and new guidance on this topic was published by the CMA in February 2019.



Sainsbury's and Asda merger fails to check-out

UK - MERGER CONTROL

On 25 April 2019 the UK Competition and Markets Authority ("CMA") published its final decision regarding the anticipated merger between Sainsbury's and Asda, the second and third largest grocery retailers in the UK. The CMA identified extensive competition concerns, including in relation to (a) the retail supply of groceries at both a national and local level; (b) the retail supply of groceries ordered online on a national and local basis; and (c) the retail supply of fuel on a local basis. The CMA was unable to identify suitable remedies that addressed the full range of competition concerns identified, and therefore was left with no option but to prohibit the merger in its entirety.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This case is a reminder that the CMA will prohibit mergers outright where it has significant competition concerns that cannot be adequately addressed through remedies.
- Contrary to the views of the parties, the CMA's economic approach did not represent a fundamental departure from its approach to assessing previous grocery retail mergers.
- It is very difficult to convince the CMA that a merger will give rise to substantial efficiencies, with the Parties' claims that the merger would result in lower prices being rejected.
- Arguments that the market has fundamentally changed since previous CMA analysis need to be supported by the facts.

Sainsbury's and Asda (the "Parties") are the second and third largest grocery retailers in the UK, accounting for around 29% of in-store and online grocery sales. In April 2018, the Parties announced plans to merge, with Sainsbury's acquiring Asda from Walmart and, in return, Walmart would receive shares in Sainsbury's. The CMA started its Phase 1 merger inquiry into the merger in August 2018 (following four months of pre-notification) and referred the case to a detailed Phase 2 investigation in September 2018 following a "fast-track" reference request from the Parties. Details, including the Final Report, are available on the CMA's case page.

The CMA assessed the likely effects of the merger in five areas:

- in-store groceries;
- online delivered groceries;
- general merchandise;
- fuel; and
- buyer power in relation to suppliers.

In relation to general merchandise and buyer power, the CMA concluded that the merger was unlikely to result in a significant lessening of competition ("SLC"). However, in relation to in-store groceries, online groceries and fuel, the CMA's final decision identified SLCs in the following areas:

- the retail supply of groceries in both Sainsbury's and Asda supermarkets on **a national basis**, as the Parties were two of the largest supermarket competitors in the UK and their internal documents recognise the 'Big 4' (Tesco, Sainsbury's, Asda and Morrisons) as a distinct group;
- the retail supply of groceries in supermarkets on a local basis in **537 local areas**, due to insufficient competitive constraints from other competitors in those areas. The CMA's analysis was based on a weighted share of shops model in which Aldi and Lidl received material weights that were nonetheless smaller than the weights for large Tesco, Sainsbury's, Asda and Morrisons stores;
- the retail supply of groceries in Asda convenience stores on a **national basis**, and the retail supply of groceries in convenience stores on a local basis in **18 local areas**. Given that the convenience sector was not a core focus of the merger the CMA did not conduct an in-depth investigation into this segment of the market and instead adopted the methodology used in the recent Tesco/Booker Phase 2 investigation;

- the retail supply of online delivered groceries for Sainsbury's and Asda on a **national basis**, as a result of a national reduction in competition between the Parties' online offerings. In particular, only three online delivered groceries retailers (Tesco, Sainsbury's and Asda) have a near-national presence and many customers would have a restricted choice following the merger: sometimes limited to only the Parties and Tesco. The CMA only found that the merger would give rise to incentives to degrade elements of PQRS (price, quality, range and service) across Asda's online delivered groceries offer as Sainsbury's customers would also consider Ocado and Waitrose as alternatives;
- the retail supply of online delivered groceries for Asda customers on a local basis in **143 delivery areas** served by both Parties. Notably the CMA did not identify any SLCs in local areas around Sainsbury's Supply Points as Sainsbury's was found to act as a competitive constraint on Asda in more local areas than the other way round; and
- the retail supply of fuel on a local basis in **127 of the local areas** in which both Parties operate petrol filling stations. The CMA found that supermarket fuel retailers compete more closely with each other than with non-supermarket fuel retailers.

The Parties argued that there would be substantial cost savings as a result of the merger that would be passed onto consumers. The CMA investigated these claims and concluded that rivalry enhancing efficiencies would equate to around £500 million per annum, but that this effect would not be sufficient to offset the negative impact on competition. The Parties also proposed a divestiture remedy package comprised of around 125-150 stores, potentially a number of convenience stores and a number of petrol filling stations. However, the Parties were unwilling to consider remedies on the scale required to address the CMA's extensive concerns set out in its Provisional Findings. In any case, the CMA considered it unlikely that a suitable package of assets could be found or a suitable purchaser could be identified that would effectively remedy the widespread SLCs.

Accordingly the CMA prohibited the merger in its entirety.

There has been significant commentary as to whether the CMA adopted a new approach in its assessment of the retail supply of groceries on a local basis, with Mike Coupe (Sainsbury's CEO) claiming that the CMA had "*fundamentally moved the goalposts, changed the shape of the ball and chosen a different playing field*". This is not the case. The CMA's approach to assessing local grocery competition in Sainsbury's/Asda was to calculate a GUPPI (Gross Upward Pricing Pressure Index) for each store based on estimated diversion ratios between the Parties' stores and the Parties' margins. Stores with a GUPPI that exceeded 2.75% where identified as areas of concern.

This approach is not as radical a departure from previous decisions as some have suggested. Indeed, it is a very similar approach to the one adopted by the CMA in numerous previous grocery mergers (e.g. *Asda Stores/Co-operative Group*), whereby the CMA surveyed stores to determine a diversion ration and combined this with the parties' margins to calculate an IPR (Illustrative Price Rise – an alternative price pressure test). In past cases, an IPR above 5% was considered likely to give rise to competition concerns.

Whilst the CMA has adopted a lower threshold in this case for identifying competition concerns (2.75% rather than 5%) this reflects differences in the underlying calculations between the IPR and GUPPI tests. In practice, the different tests and thresholds result in similar levels of diversion ratio and gross margins being identified as raising concerns as was applied previously.

Ashurst acted for Morrisons in relation to the CMA's investigation.

Auditing the audit market

UK – MARKET INVESTIGATIONS & SECTOR INQUIRIES

On 18 April 2019, the UK Competition and Markets Authority ("CMA") published a final report in its market study into competition in the statutory audit market. The report found that the UK market was particularly concentrated, with the 'Big 4' accounting firms providing 97% of audits to FTSE350 companies. The report does not propose to make a market investigation reference, but does recommend an operational separation of audit from other consultancy services that the firms provide, mandatory joint audits, a system of peer review, regulation of audit committees and a new regulator to provide oversight, investigation and enforcement of the recommendations.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The CMA concluded that a number of areas need reform in the audit market, including the function of audit committees, barriers to entry (and resultant lack of choice) and the provision of both audit and non-audit services.
- The CMA is not confident that the market will resolve these issues on its own and has recommended the following remedies: audit committee scrutiny, mandatory joint audit/peer review, an operational split between audit and non-audit practices, and a new regulator with powers to perform a five-year review.
- These recommendations would require government legislation and the CMA considered the UK Government to be well placed to enact these reforms.

Following the Competition Commission's market investigation into statutory audit of large companies (in which it identified several areas that needed reform within the market) between 2011 and 2013, the CMA had become increasingly concerned about the audit market. This resulted in the CMA publishing a statutory market study notice in October 2018, with the intention to focus on incentives, choice and switching, and the resilience of the audit market.

In the CMA's update paper in December 2018, the CMA found that improvements had been made since the 2011-13 market investigation but still remained concerned about the quality of audits, lack of choice, barriers to challenger providers, and how non-audit services had affected quality in the audit market.

The CMA's final report states that high-profile failures of certain companies, such as Carillion and BHS have revealed the shortcomings in the UK audit market, and goes on to consider three areas that need reform:

- *The function of audit committees:* whilst audit committees play a key role in the appointment and removal of auditors and the quality of audit, there remains a disconnect between the shareholders and managers of companies. Audit committees should represent the interest of shareholders but in practice shareholders do not engage with audit issues;
- *High barriers to entry and lack of choice*: whilst tendering and switching reforms (set out in the Statutory Audit Services for Large Companies Market Investigation Order 2014) had addressed some concerns, it had also lead to fewer choices of audit provider due to conflict of interest rules and profitability of non-audit activity preventing some firms from bidding for audit services; and
- *Non-audit activities*: the provision of both audit and non-audit services results in limited bidders for audited services and a conflict between the two types of services. The CMA described the auditing (an independent check of the company's financial reporting) of a company to which the same auditor has provided financial advice or services akin to "marking their own homework".

The CMA proposed four remedies to address the outstanding issues, to be enacted through government legislation:

- *Audit committee scrutiny*: the implementation of a new audit regulator with power to mandate minimum standards for the appointment of auditors. The CMA also recommends that the regulator has powers to monitor compliance with these standards and

request information/reports or to place an observer on an audit committee to ensure compliance. The CMA also considered moving audit selection to an independent body; although they did not recommend this course of action, they have not ruled it out as a potential change in the future;

- *Joint audit, peer review*: mandatory joint audit for most large companies, where one of the joint auditors is an operator outside of the 'Big Four'. These joint audits would allow these operators to build capacity, capability and reputation over time, and eventually increase competition in the audit market overall;
- *Operational split between audit and non-audit*: the CMA recommended that the UK Government put in place a full operational split between the audit and non-audit operations of audit firms. This would reduce conflicts of interest and strengthen competition for audit contracts (currently the CMA found that audit services are seen as ancillary or a means to providing more lucrative non-audit services). The CMA noted with this recommendation that if a complete operational split was not something that the UK Government could enact, it would re-examine the merits of such a split; and
- *A new regulator and five-year review*: a new regulator (called the Audit, Reporting and Governance Authority) who can enforce the above, and put in place a five-year review to measure the effectiveness of these remedies in the market.

The CMA stated that it would support the UK Government in implementing the above measures, but it remains to be seen whether the UK Government will act on the recommendations. In February 2019, the government announced the Brydon Review looking at the quality and effectiveness of the UK audit market, to see what can be done to raise the standards of audits to meet public and businesses expectations, although the review is not expected to address any of the issues highlighted in the CMA's final report.

RWE AG/E.ON SE merger – UK material influence test reminder

UK - MERGER CONTROL

On 5 April 2019, the UK Competition and Markets Authority ("CMA") unconditionally cleared the proposed acquisition by RWE of a 16.67% stake in E.ON. The CMA found it had jurisdiction to review the transaction as RWE would have the ability materially to influence the policy of E.ON, as it would be the largest single shareholder by far and had status and expertise in the energy sector that could be used to influence other shareholders.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- UK merger control can apply when a company acquires material influence over another company's policy in the market. This is lower than the threshold of legal or de facto control in most jurisdictions.
- No single factor is used to assess material influence. A case-by-case analysis of the overall relationship between the acquirer and the target is required.
- Shareholdings of over 25% are likely to confer material influence as the shareholder can block a special resolution (which requires the approval of 75% of the shares).
- There is no presumption of material influence for shareholdings below 25%, but the CMA may assess potential material influence of shareholdings of over 15%, and exceptionally shareholdings of less than 15%.

On 25 February 2019, CMA opened a merger inquiry into the proposed acquisition by RWE AG of a 16.67% stake in E.ON, which was part of a share and asset swap transaction between the Parties. The merger was cleared unconditionally at Phase 1 on 5 April 2019.

RWE and E.ON are both DAX-listed German energy companies. The rationale for the wider

transaction was to enable RWE to focus on energy generation and E.ON to focus on energy distribution networks, retail supply of energy and customer solutions.

The turnover test for UK merger control was met, as E.ON had UK turnover exceeding £70m. However, the parties argued that the CMA did not have jurisdiction to examine the acquisition of the 16.67% stake, as it would not give RWE the ability to exercise material influence over E.ON. The Parties explained that:

- the minority shareholding was intended as a purely financial investment;
- the parties had entered a long-term Investor Relationship Agreement, which would limit RWE's ability to exercise material influence; and
- RWE's expertise and status in the sector would not lead to RWE having 'soft' influence over other shareholders to the extent that RWE acquired a blocking stake.

The CMA considered that a minority stake would give RWE the ability to exercise material influence on E.ON, as:

- RWE's stake would be more than twice that of the next largest shareholder;
- RWE could use its respected position and expertise in the energy sector to influence shareholders and/or affect policy formulation. E.ON's other shareholders were institutional investors with investments in utility firms, but lacked expertise and active involvement in the industry. RWE's views would be of particular interest to these other shareholders and could influence policies that required a special resolution, even if RWE could not itself block such a resolution; and
- the undertakings in the Investor Relationship Agreement would not prevent RWE from using its industry knowledge to influence voting of shareholders and affect policy formulation through meetings and discussions with shareholders.

Nevertheless, the transaction was ultimately cleared by the CMA because the swap transactions led to there being little horizontal overlap and the parties also had insufficient market shares in the upstream generation and downstream supply markets to raise vertical competition concerns.

PREVIOUS EXAMPLES OF MATERIAL INFLUENCE AT LOW LEVELS OF SHAREHOLDING

This case is a reminder that material influence can arise at relatively low levels of shareholding. There are a number of previous cases where material influence has been identified at low levels of shareholding, including:

- *First Milk/Robert Wiseman* (April 2005) - a 15% shareholding combined with the right to nominate one non-executive director to the board. The director would be the most experienced of the directors in raw milk procurement and it was concluded that his views would be accorded particular weight by the rest of the board.
- *BSkyB/ITV* (December 2007) – a shareholding of 17.9%. BSkyB would be the largest shareholder by a large margin and would in practice be able to block a special resolution or a scheme of arrangement. BSkyB's industry knowledge and standing could also influence other shareholders and might deter ITV from pursuing certain strategies.
- *Centrica/Lake Acquisitions* (August 2009) – a 20% shareholding combined with the power to veto non-strategic decisions and board representation.
- *Scottish Radio/Kingdom FM* (March 2002) – a 22.5% shareholding with no entitlement to appoint a director to the board or hold any special voting rights. It was found that Scottish Radio's expertise in the sector could enable it to convince other shareholders to follow a certain strategy.
- *JCDecaux Concourse Initiatives and Media Initiatives* (March 2012) – an agreement which provided JCDecaux with certain rights over the running of Concourse, including the right to appoint two out of three directors to the board and the ability to impose restrictions on Concourse's autonomy to carry out its business activities.

Certification hurdle in collective actions may be reduced as Court of Appeal overturns CAT in Merricks v MasterCard

UK - PRIVATE DAMAGES ACTIONS

In April, the Court of Appeal overturned the Competition Appeal Tribunal's ("CAT") decision to refuse to grant a Collective Proceedings Order ("CPO") in proceedings brought by Walter Merricks against three MasterCard companies in relation to multilateral interchange fees ("MIFs"). The case, in which Mr Merricks is seeking an aggregate award for damages and interest of over £14 billion, has been remitted back to the CAT for a re-hearing of the application for a CPO.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- At the certification stage a class representative only has to demonstrate the claim has a real prospect of success, and does not require a "mini trial".
- The power in collective proceedings to make an aggregate award of damages would be largely negated if this also required a calculation of individual loss. Aggregate damages do not have to be distributed on a compensatory basis.
- Distribution of damages is not a matter to be dealt with at the certification stage.
- This judgment appears to reduce the hurdles which potential collective actions need to overcome before being granted a CPO.

BACKGROUND

In 2007, the EU Commission found that the level of the EEA multilateral interchange fee ("MIF") set by MasterCard amounted to a breach of competition law. An interchange fee is charged between banks administering a card payment under the MasterCard scheme. If no fee is agreed between these banks, a MIF is applied as the default. MIFs are generally passed on to the retailer as part of the merchant service charge ("MSC") which merchants are required to pay to their bank as a fee for processing card transactions. The Commission considered that these charges (MSCs and therefore MIFs) were likely to have been passed on to consumers in the form of increased prices.

Accordingly, Mr Merricks applied to the CAT for a CPO as the proposed representative for an opt-out collective proceedings against MasterCard, on behalf of a class representing some 46.2 million individual claims totalling over £14 billion in damages and interest.

THE CAT'S REFUSAL TO GRANT A CPO

In July 2017, the CAT dismissed Mr Merricks' CPO application for two principal reasons: (a) the methodology for calculating pass-on of overcharges to consumers could not be effectively applied due to a perceived lack of data; and (b) the distribution of an aggregate award could not be sufficiently linked back to the losses suffered by individuals and therefore damages could not be awarded in accordance with the compensatory principle. Permission to appeal was initially refused by the CAT, but ultimately granted by the Court of Appeal.

THE COURT OF APPEAL'S JUDGMENT

In its judgment, the Court of Appeal emphasised that a certification hearing does not require a "*mini-trial*" which risks an unnecessarily vigorous examination of a prospective action.

Pass-on

The Court found that the Tribunal at the CPO stage is required to satisfy itself that any proposed methodology offers a realistic prospect of establishing loss to the class as a whole. It was inappropriate at this stage to require the proposed representative to specify in detail what data would be available for each of the relevant retail sectors during the infringement period to establish pass-on to consumers. The Court applied the Canadian case of Pro-Sys Consultants Ltd v Microsoft Corp. [2013] SCC 57, which requires "*some evidence of the availability of*

data to which the methodology [for calculating loss] *is to be applied*".

Commonality

The Court held that, in proceedings where an aggregate award of damages is claimed, there is no need to establish loss on an individual basis. The common issue in Mr Merricks' action is "*[p]ass-on to consumers generally*", not calculating whether each individual has suffered loss.

Distribution

The Court emphasised that the vindication of the rights of individual claimants in collective proceedings can be achieved by the aggregate award itself (if appropriate), and that litigation by way of individual consumer claims against MasterCard would be practically impossible in this case. Indeed, the power in collective proceedings to make an aggregate award of damages would be largely negated if this also required a calculation of individual loss.

Furthermore, the Court considered that distribution is not a matter for a CPO hearing, nor does it need to be on a compensatory basis. The certification stage only requires consideration of "*whether the claims are suitable for an aggregate award" and "does not include the assessment of individual loss*".

FINAL THOUGHTS

With more collective actions proposed, the Court of Appeal's clarifications potentially represent a substantial development for future applicants in due course. However, MasterCard are understood to be seeking permission to appeal the Court of Appeal's decision to the Supreme Court. The CAT is already demonstrating a reluctance to decide further CPOs in the meantime, having effectively stayed two CPOs in the Trucks follow-on damages litigation pending the MasterCard application.

ACCC opposes "potential 4" to 3 merger in telecommunications sector

AUSTRALIA - MERGER CONTROL

Following an 8 month investigation, on 8 May 2019, the Australian Competition and Consumer Commission ("ACCC") announced its decision to oppose the proposed merger between fixed-line provider TPG Telecom ("TPG") and mobile network operator Vodafone Hutchinson Pty Limited ("VHA").

VHA and TPG have announced that they intend to challenge the ACCC's decision, and apply for a declaration from the Federal Court that the proposed merger is not likely to substantially lessen competition.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Announcements about major changes in strategic direction mid-transaction will be met with scepticism from the ACCC, attract scrutiny and may cause significant delays.
- Internal (and external) documents about major changes in strategic direction should be prepared with precision, given the scrutiny to which such documents may be subjected by the ACCC and the Court.

BACKGROUND

TPG provides telecommunications services including retail fixed broadband services, retail mobile services (as a mobile virtual network operator ("MVNO")) and wholesale services, through its key brands TPG, iiNet and Internode. VHA is the third largest telecommunications provider in Australia and owns and operates its own 3G and 4G mobile network. It also supplies wholesale mobile services (including to TPG) and in December 2017 commenced supply of retail fixed broadband services.

Australia's mobile services market has three mobile network operators ("MNOs") Telstra, Optus and VHA, together holding over 87% share. The fixed broadband market is also concentrated with Telstra, TPG and Optus having approximately 85% share.

In a Statement of Issues released in December 2018, the ACCC identified four key markets in which it considered there to be competition concerns.

- **Retail Mobile Market** ("Red light" concerns): The ACCC expressed concerns that the merger would remove TPG as an aggressive competitor in the supply of these services, who would likely (absent the merger) offer cheap plans with large data allowances.
- **Wholesale Mobile Market** ("Amber light" concerns): The ACCC considered the merger would remove TPG as a potential fourth MNO, which may result in higher prices for wholesale services and more restrictive conditions for wholesale customers (ie other MVNOs) that supply retail mobile services and plans to end-user consumers. In 2017, TPG had announced plans to become an MNO and commenced building its own mobile network. It also successfully bid for 2 x 10 MHz of 700 Mhz spectrum (4G), at $1.26 billion.
- **Retail Fixed Broadband Market** ("Amber light" concerns): The ACCC expressed a concern that the merger would remove VHA as a future, potentially significant competitor for supply of retail fixed broadband services. The ACCC considered that VHA would be better placed than others to overcome the high barriers to expansion given its substantial customer base, high level of brand recognition, and established operations.
- **Retail Home Broadband Services (5G)** ("Amber light" concerns): The ACCC considered whether when 5G technology becomes commercially available in the near future, TPG and VHA may, in the absence of the merger, compete in a market for retail broadband services using either mobile or fixed networks. 5G is the next generation of mobile technology (expected to launch globally in 2020), delivering speeds that match or exceed existing fibre broadband services.

On 29 January 2019, TPG announced that it had ceased the planned rollout of its mobile network, as a result of the impact of the Australian Government's ban on the use of Huawei equipment in 5G mobile infrastructure due to national security concerns (announced in August 2018). Huawei was the principal equipment vendor selected for use in TPG's network, primarily because there was a simple upgrade path to 5G using Huawei's equipment.

DECISION

In a media release dated 8 May 2019 (issued one day ahead of the proposed announcement date, due to a computer system glitch), the ACCC announced that it had opposed the proposed merger.

The ACCC found that the proposed merger would be likely to substantially lessen competition in the market for the supply of (retail and wholesale) mobile services because it would preclude TPG entering as a fourth MNO in Australia. The ACCC concluded that, without the proposed merger, "*there is a real chance TPG will roll out a mobile network*". This was despite TPG's public announcement in January 2019 that it would cease the rollout of its mobile network.

We expect the ACCC will have received many submissions from interested parties, and issued compulsory notices to produce information and documents to TPG and others to test its counterfactual – specifically, TPG's plans to continue to roll out its mobile network if the proposed merger did not proceed. Such documents and information would have been produced to the ACCC on a confidential basis, and we would not expect the ACCC to refer to them publicly. Nevertheless, it seems, based on the ACCC's media release, that the ACCC's finding regarding the counterfactual is based on inferences about TPG's capability (based on its past track record as an aggressive disruptor) and commercial incentives, rather than direct evidence.

It's worth noting that, following the *ACCC v Metcash Trading Limited* Federal Court cases in 2010/2011, the standard of proof to be applied in merger analysis remains unsettled – specifically, whether, for the ACCC to successfully block a merger, it must establish that there is a "real chance" or (the higher burden of) "more probable than not" that:

- a counterfactual will come to pass if the proposed acquisition does not proceed; and
- the proposed acquisition would result in a substantial lessening of competition compared to the counterfactual.

REGULATORY ACTIVISM IN A CONCENTRATED SECTOR

While some may not be surprised by the ACCC's decision to oppose a 4 to 3 merger in a concentrated sector, it is unusual for a competition regulator to block a merger on the

basis that it does not accept the acquirer's publicly announced position about its future intentions. The ACCC's decision has been criticised by some as displaying the "nirvana fallacy" – an idealised, unrealistic regulatory counterfactual (by comparison with which the factual will inevitably produce a substantial lessening of competition).

If the parties proceed with their intentions to challenge the ACCC's decision, it will be interesting to see whether the ACCC will be able to satisfy the Court that (whether the "real chance" standard or "balance of probabilities" standard is applied):

- TPG would and could, in the absence of the merger, progress the roll-out of a fourth mobile network in Australia and emerge as a strong competitive force against incumbent players; and
- competition would be substantially lessened by the merger, in circumstances where it seems plausible that the merged entity would be more effective at constraining incumbent players Telstra (which reportedly has 50% of the mobile market) and Optus.

Overall, the decision demonstrates the tougher line that the ACCC has been taking in its assessment of mergers. ACCC Chairman, Rod Sims, has been vocal about his concerns that the hurdle for establishing that a proposed merger is anti-competitive is too high, and should be revisited. The ACCC may yet fail to satisfy that standard in the pending TPG / VHA litigation.

Double Happiness: Hong Kong Competition Commission's first two victories

HONG KONG – ANTITRUST - CARTELS

On 17 May 2019, the Hong Kong Competition Tribunal ("Tribunal") handed down two landmark decisions relating to cartel conduct.[1] These two decisions are the first two successful enforcement actions by the Hong Kong Competition Commission ("Commission") .

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The decisions are vital test cases for the future of competition enforcement in Hong Kong.
- Of note is the fact that the standard of proof applied for the cartel contraventions was the criminal standard of proof ("beyond all reasonable doubt") as opposed to the civil standard of proof ("balance of probabilities"). This sets a high bar to prove for future contraventions.
- The decisions also provide clarity on important issues relating to protections against self-incrimination, when employers are liable for an employee's actions and when contractors are liable for the actions of their sub-contractors.

LEGISLATIVE FRAMEWORK

The First Conduct Rule of the Competition Ordinance ("Ordinance") (which came into full effect in 2015) prohibits anti-competitive agreements between two or more undertakings. Under the Ordinance, an undertaking must not make or give effect to an agreement or engage in a concerted practice if its object or effect is to prevent, restrict or distort competition in Hong Kong. Conduct in breach of the First Conduct Rule can be deemed "serious anticompetitive conduct" if it involves price fixing, market sharing, limiting supply and bid-rigging (or any combination of these activities). This, along with any breach of the First Conduct Rule must be established by the Commission before the Tribunal.

If conduct is deemed as serious anticompetitive conduct, the Commission is not required to afford undertakings with the opportunity to cease or alter the conduct in question within a specified warning period. In addition, the general exclusion for agreements of "lesser significance" does not

[1] *Competition Commission v Nutanix & Ors* [2019] HKCT 2 (CTEA 1/2017) and *Competition Commission v W. Hing Constructions & Ors* [2019] HKCT 3 (CTEA 2/2017)

apply to agreements pertaining to serious anticompetitive conduct. That is, these agreements do not get the benefit of the *de minimis* rule that agreements between undertakings with the combined global turnover of less than HKD 200 million (c.USD 25.5 million) are excluded from the application of the First Conduct Rule.

THE FIRST DECISION – THE "IT COMPANIES CASE"

Facts

In June 2016, BT Hong Kong Limited ("BT") submitted a bid to the Hong Kong Young Women's Christian Association ("YWCA") in response to its invitation to tender for the supply and installation of a Nutanix cloud-based server system (the "IT system"). The tender failed as BT was the only company who submitted a bid and YWCA's procurement policy required a minimum of five bids.

The YWCA therefore decided to release a second invitationto tender for the IT System. To assist BT's bid, Thomas Hung("Hung") (Territory Account Manager, Nutanix) and DenisChan ("Chan") (Technical Pre-Sales Manager, BT) agreed thatNutanix would obtain four "dummy" or "non-genuine" bidsfrom specified channel partners of Nutanix (namely, InnovixDistribution Limited ("Innovix"), Tech-21 Systems Limited("Tech-21"), iCON Business Systems Ltd ("iCON") and SiSInternational Limited ("SIS")).

Chan gave BT's completed bid (including bid prices) to Hung. Hung prepared bids for each of SiS, Innovix, Tech-21 and iCON with substantially higher bid prices than BT's and separately agreed with each of SiS, Innovix, Tech-21 and iCON to sign the bids which he arranged to be submitted to the YWCA. Pursuant to these agreements, SiS, Innovix and Tech-21 (but not iCON) each submitted a dummy bid to YWCA, in addition to the bid submitted by BT.

The Tribunal held that the arrangements between each of Nutanix and BT; Nutanix and Tech-21; and Nutanix, BT and Innovix constituted a breach of the First Conduct Rule. These businesses made or gave effect to agreements or engaged in concerted practices with the object of preventing, restricting or distorting competition. The Tribunal held that the agreements constituted "bid-rigging" and therefore were serious anticompetitive conduct.

Interestingly, the arrangement between Nutanix and iCON was not discussed further as iCON did not submit a bid in the end to the YWCA. In addition, the arrangement between Nutanix and SiS did not constitute an agreement due to the "attribution of conduct and knowledge" issue described in further detail below.

Insights

The key points considered by the Tribunal that should be noted by businesses include:

- **Standard of proof**: Having regard to the Court of Final Appeal's judgment in Koon Wing Yee v Insider Dealing Tribunal [2008] 11 HKCFAR 170, as well as to the doctrine of presumption of innocence in Hong Kong's Bill of Rights, the Tribunal was of the view that the relevant standard of proof when assessing alleged breaches of the First Conduct Rule was the criminal standard, which requires proof "beyond reasonable doubt". In doing so, the Tribunal rejected the Commission's arguments that the civil standard of proof, or proof on the "balance of probabilities", should apply. The Commission reasoned that because of the potentially complex and technical nature of competition proceedings, it was inappropriate to apply the criminal standard. Should the criminal standard of proof be applied uniformly to all future breaches of the Ordinance, this will have far-reaching consequences for the Commission. It will have to prove the anticompetitive foreclosure effects of conduct and/or the presence of a substantial degree of market power beyond reasonable doubt. We expect the Commission to look for opportunities to revisit this issue in future cases, including in respect of any appeals arising from this case or other cases.
- **Evidence**:. The evidence that ultimately resulted in the Tribunal being satisfied, beyond reasonable doubt, that the IT companies had entered into agreements or arrangements in contravention of the First Conduct Rule, included physical documents, emails and WhatsApp messages from the work and personal phones and computers of employees. The Commission also conducted raids in the offices of the relevant undertakings. This reinforces the message that companies should be prepared for investigations and thatpersonal phones and computers are not immune from being seized;

- **Privilege against self-incrimination**: Despite the fact that Hung of Nutanix was the chief architect and implementer of the bid-rigging arrangements, surprisingly, the Commission did not submit any statements by Hung as evidence, nor did it decide to call Hung to testify during the trial. The Commission rejected written statements from Hung on the basis that these were factually inaccurate (as against the statements made during interviews) and was not prepared to grant him immunity. In addition, the Commission did not decide to call Hung to testify during trial, potentially because Hung threatened to invoke a claim for privilege against selfincrimination if he was called as a witness at trial. This suggests that the Commission is willing to take a robust approach and rely on contemporaneous documents instead of "live" witnesses who will not co-operate. This does not mean that the Commission would be adverse towards taking action against individuals in later cases. Provisions in the Ordinance make it possible for the Commission to seek fines and other orders (including director disqualification orders) against individuals. In fact, the Commission hasalready commenced proceedings against two individuals in a third cartel case, lodged in September 2018. The Commission is seeking pecuniary penalties against both individuals and director disqualifications against one of the individuals. This case is discussed in more detail below;
- **Attribution of conduct and knowledge**: The Tribunal attributed the conduct of the relevant employees involved in the YWCA tender to each of Nutanix, BT, Innovix and Tech- 21. However, it did not attribute the conduct of the relevant SiS employee, Keith Shek ("Shek") (Product Manager, SiS) to SiS. As a result, the Tribunal held that SiS was not liable for a breach of the First Conduct Rule because there was no agreement between Nutanix and SiS. This was including because Shek's duties did not include the submission oftender documents, Shek did not have the authority to bind SiS in relation to any commercial commitments and Shek did not inform SiS of the tender (and the Commission did not establish that Shek's supervisors were aware of his actions). Furthermore, SiS did not supply IT products to end-users as a matter of course. Rather, SiS tended to sell products to re-sellers instead. In circumstances where employees have"gone rogue", it is useful to have precedent such as the one described above to allow employers to divorce their conduct from the conduct of an employee acting outside the scope of their authority.

THE SECOND DECISION – THE "RENOVATION CONTRACTORS CASE"

Facts

Ten renovation contractors were licensed to provide decorative works for tenants at On Tat Estate (a subsidized housing estate developed by the Hong Kong Housing Authority ("HKHA")). Instead of competing with each other for the provision of decorative works to tenants on the estate, between June to November 2016, the contractors undertook:

- **A market sharing agreement**: where each of them were allocated four floors in each of three blocks of flats at the estate. The contractors agreed to:
  - refrain from actively seeking business and accept business from tenants on floors allocated to the other nine contractors; and
  - direct tenants on the floors allocated to the other nine contractors to their allocated contractors; and
- **A price fixing arrangement**: where they jointly produced and distributed a promotional flyer to tenants which set out, inter alia, prices for:
  - ten types of commonly requested decorative works (for instance, "repaint living room and bedroom walls with Japanese 5-in-1 paint" and "install new kitchen cabinet using premium fireproof fibreboard"); and
  - service packages and prices for the four types of flats available at the estate (ie, "1 to 2 person flat", "2 to 3 person flat", "1 bedroom flat" and "2 bedroom flat").

  The Tribunal held that each of the market sharing agreement and the price fixing arrangement had the object of preventing, restricting or distorting competition in Hong Kong in breach of the First Conduct Rule and were serious anticompetitive conduct.

Insights

The key points considered by the Tribunal that should be noted include:

- **Standard of proof**: Like in the IT companies case, the standard of proof applied by the Tribunal to establish a breach of the First Conduct Rule was the criminal standard.
- **Evidence**: The evidence that ultimately resulted in the Tribunal being satisfied, beyond reasonable doubt, that the renovation contractors had entered into agreements or arrangements in contravention of the First Conduct Rule, included both direct and circumstantial evidence:
  - witness evidence from tenants that each contractor worked exclusively, or almost exclusively, on four floors;
  - documentary evidence in the form of work orders in which the contractors applied the agreed package prices. This indicated that the flyer was relied on and used to conclude orders with tenants; and
  - evidence from some of the contractors that they agreed to allocate floors and to produce the joint flyer.

  It is important to note that the evidence established not only parallel conduct having occurred between the contractors but also evidence of an actual agreement or understanding between the contractors.
- **Efficiency defence rejected**: Arguments relating to how the impugned arrangements were economically efficient (the "efficiency defence") were put forward by several contractors but these were rejected by the Tribunal. Those contractors claimed that significant efficiencies arose from, inter alia, being able to perform work on multiple number of flats on the same floor on account of the time saved from not having to wait for the lifts to move tools, equipment, supplies or raw materials from floor to floor. The Tribunal held that this argument was not credible for a number of reasons, including because
  - the difficulties caused by having to travel between floors were "rife with exaggeration". For instance, contractors argued that the normal waiting time for a lift for a work crew to go from one floor to another could "easily" be upwards of 20 minutes and could even be 2 hours during peak times; and
  - supporting statements from contractors did not come across as credible (some statements appeared to have been "put into the [contractors'] mouth" by the economic expert).
- **Efficiency defence burden and standard of proof**: The Tribunal held that the burden lay on the contractors to show, on the civil standard of proof (ie, balance of probabilities), that the efficiency defence was made out. It was held that they had failed to do so.
- **Efficiency defence conditions**: The efficiency defence does not only require that the respondents show that the conduct resulted in "overall" efficiencies (e.g., cost savings). It requires that the following four cumulative conditions are fulfilled:
  - the agreement generates efficiencies;
  - it allows consumers a fair share of the resulting benefit;
  - it does not impose restrictions that are not indispensable to the attainment of the efficiencies relied upon; and
  - it does not afford the undertakings concerned the possibility of eliminating competition.

  Notwithstanding the lower standard of proof applied, this defence was not made out.
- **Sub-contractor defence rejected**: Two contractors contended that they were not liable for any contravention of the First Conduct Rule on the ground that it was their sub-contractors, not them that where liable. This defence was rejected on several grounds, including:
  - it was the contractors who contracted with the HKHA. The HKHA is the government body in charge of issuing licences to contractors to provide decorative works to the estate. The contractors were therefore liable under the licence for a number of obligations including to indemnify the HKHA for any loss or damage and to maintain a surety bond and insurance cover; and
  - it was the contractors who contracted with the tenants. The work orders and receipts for payments were issued to the tenants in the names of the contractors. If a tenant defaulted in payment, a claim could only be made against it by the contractors. If a tenant made a contractual claim in relation to the decoration works (e.g., for defective workmanship), it would have to be made against the contractors.

The Tribunal held that there was "unity as between the contractors and sub-contractors conduct on the market" as provision of decoration services required the cooperation of both the contractors and sub-contractors.

Of note is the fact that, in considering whether the subcontractors were part of a "single economic unit" or the same undertaking as the contractors, the Tribunal did not focus on the usual tests applied in the European Union such as whether the contractors controlled or influenced the subcontractors or the extent to which whether the sub-contractors bore financial risk. Rather, what mattered was whether there was "unity" in the conduct as between the contractors and subcontractors and the fact that the contractors could not divorce themselves from liability from the services provided under the renovation contracts. This appears to be a liberal interpretation of what constitutes a "single economic unit". To the extent that businesses contract with distributors or sub-contractors and such "unity" in conduct exists, businesses should be aware that they could be liable under the competition law for their distributors' or sub-contractors' actions.

LOOKING FORWARD

The orders sought by the Commission include pecuniary penalties and costs. The maximum pecuniary penalties that can be imposed is 10% of the Hong Kong turnover of the undertaking concerned for each year in which the contravention occurred. This is a significant cost. In addition, businesses engaged in serious anti-competitive conduct face a number of other potential risks and costs, including:

- reputational damage and adverse publicity;
- legal costs and management time throughout the investigation and proceedings. For instance, from the commencement of initial investigations till the release of the Tribunal judgments, the IT companies case has been running for approximately 3 years and the renovation contractors case approximately 2 years; and
- follow-on rights of actions from persons who have suffered loss or damage as a result of the contravention of the First Conduct Rule (although it is unclear if the YWCA and/or the On Tat Estate tenants are likely to initiate follow on proceedings).

In addition, any appeals in respect of the Tribunal decisions must be lodged by 14 June 2019 (which is 28 days after the judgments were handed down).

Finally, these judgments will be immediately relevant to the third cartel proceeding that was commenced by the Commission in September 2018. In that case, the Commission alleged that three construction and engineering companies and two individuals engaged in conduct amounting to customer allocation and price fixing in relation to the provision of renovation services at King Tai Court, San Po Kong (Kowloon) – also a subsidised housing estate developed by the HKHA.Of note is the fact that the Commission is not only seeking pecuniary penalties from the companies involved but also from two individuals involved. A director disqualification order was also sought against one of the individuals.

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