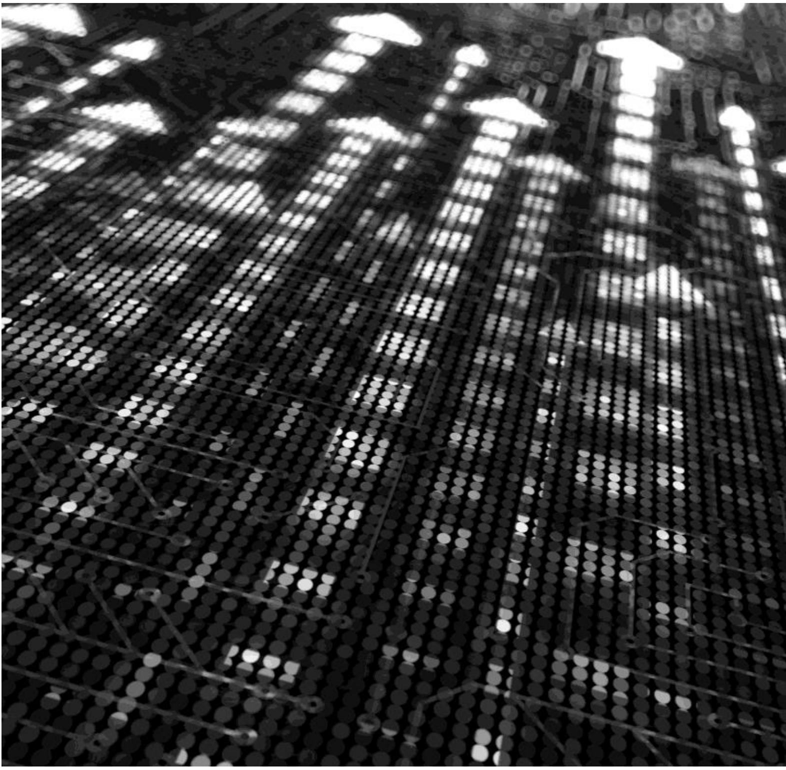

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Ashurst competition law newsletter – October 2019

From the Editors

The October issue of Ashurst's competition law newsletter features a round-up of some key recent developments (with not a single mention of Brexit!). This edition covers the first imposition of interim measures by the European Commission in 18 years, a key European Court ruling on legal privilege in competition investigations, further developments in selective distribution in France, a huge bid-rigging case in Spain, the conclusion of the marathon UK concrete products cartel case as well as other news.

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Broadcom imposed first Commission interim measures in 18 years

EU – ANTITRUST – ABUSE OF DOMINANCE, PROCEDURE

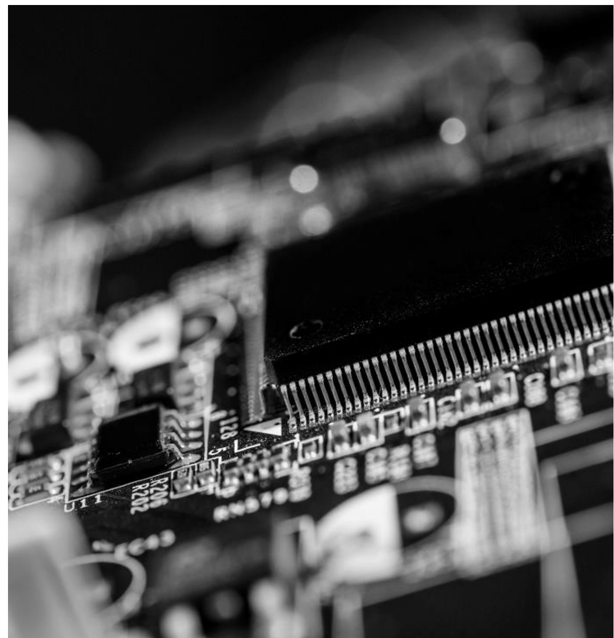
On 16 October 2019, for the first time in 18 years, the European Commission ("Commission") imposed interim measures on Broadcom - a major supplier of integrated circuits for communications devices - in order to prevent "serious and irreparable damage" to competition from occurring in certain markets for systems-on-a-chip for TV set-top boxes and modems.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Commission had not adopted interim measures in 18 years.
- Interim measures are subject to strict legal conditions under Article 8 of Regulation 1/2003: there must be a prima facie finding of infringement; and the Commission must demonstrate urgency caused by the risk of serious and irreparable damage to competition.
- Despite a finding of prima facie abuse of dominance, the Commission may take another three years to adopt a final decision.
- The Commission adopts a broad approach to the concept of "urgency", considering in this case that the likelihood that the conduct affects a "number of tenders that would be launched in the future" is sufficient to characterize the risk of serious and irreparable damage to competition.

As explained in our previous article on the Broadcom case, interim measures are exceptionally rare in the Commission's decisional practice. Since its power to do so was recognised by the Court of Justice in the *Camera Care* case almost 30 years ago, the Commission has only done so 8 times. The last time was 18 years ago in the IMS case and the measures were withdrawn following suspension by the EU Courts. Broadcom is the first use of interim measures since the entry into force of Regulation 1/2003 whose Article 8 formalises the Commission's powers in this respect.

In the decision adopted on 16 October 2019, the Commission reached the conclusion that Broadcom is, at first sight, dominant in three different markets, for systems-on-a-chip for TV set-top boxes, fibre modems and xDSL modems.



The Commission's analysis of abuse focuses on exclusivity. Broadcom prima facie abused its dominant position by entering into agreements with six manufacturers of TV set-top boxes and modems:

- containing exclusive or quasi-exclusive purchasing obligations; and,
- granting commercial advantages (including rebates) made conditional on the customer buying these products exclusively or quasi-exclusively from Broadcom.

In what appears to be a quite broad approach to the notion of "urgency", the Commission found that these provisions would have resulted into "serious and irreparable" harm to competition as they would have been likely to affect a number of future tenders concerning notably the upcoming introduction of the Wi-Fi 6 standard for modems and TV set-top boxes. On this basis, Broadcom

was ordered to drop these clauses and to refrain from agreeing provisions with equivalent object or effect in other agreements with customers.

The interim measures will remain in force for a period of three years or, alternatively, up to the date of the final Commission decision (if adopted earlier). The Commission thus put a longstop date on its probe. That could be read as an attempt to counter criticism that its investigations are too slow, notably in cases involving new technologies. While the aim of reducing the duration of investigations is certainly laudable, a three-year period is still considerable in a case in which the Commission found a prima facie infringement of competition rules.

Broadcom has now a 30-day deadline to implement the measures. In a statement released on the same day, the chipset supplier announced its intention to appeal the decision.

Canned vegetable cartelists fined

EU – ANTITRUST - CARTELS

On 27 September 2019, the European Commission ("Commission") fined Coroos and Groupe CECAB €31.65 million for participating in a canned vegetables cartel for over 13 years, with a third participant, Bonduelle, receiving full immunity for blowing the whistle.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Commission will grant full immunity to a member of a cartel where it is the first to come forward with information, which in the Commission's view will enable it either to carry out a "targeted inspection" (i.e. a "dawn raid"), where this has not already taken place, or to find an infringement of Article 101 TFEU (where there has previously been insufficient evidence).
- Where full immunity is no longer available, businesses may still be able to qualify for a leniency reduction in exchange for volunteering evidence about the infringement which provides "significant added value" to the Commission's investigation.
- Parties which are prepared to admit liability and waive their full rights of defence can also enter into a "settlement" agreement with the Commission. If agreed, the investigation will be streamlined, and the party concerned will be rewarded by a 10% reduction in its fine (separate and additional to any reduction for leniency).

On 27 September 2019, the Commission fined Coroos and Groupe CECAB €13.65 million and €18 million respectively for breaching the Article 101 TFEU prohibition on cartels. A third participant in the cartel, Bonduelle, received full immunity for revealing the existence of the cartel to the Commission, avoiding a fine in the region of €250 million. All three companies admitted their involvement and settled the case.

THE CARTEL

The cartel involved a single infringement comprising three separate agreements relating to:

- private label sales of canned vegetables such as green beans, peas, peas-and-carrots mix to retailers in the EEA;
- private label sales of canned sweetcorn to retailers in the EEA; and
- both own-brand and private label sales (sold under retailer's brands) of canned vegetables to retailers and food service industry specifically in France.

Coroos participated in only the first agreement, while Bonduelle and Group CECAB participated in all three.

The cartel lasted over 13 years, from 2000 to 2013, and covered the entire EEA. As part of this cartel, the companies engaged in conduct such as setting prices, agreeing market shares

and volume quotas, allocating customers and markets, coordinating replies to tenders and exchanging commercially sensitive information.

The Commission had also opened proceedings against a fourth company, Conserve Italia in relation to this investigation. Conserve Italia is not covered by the settlement decision and the investigation against it will continue under the standard (non-settlement) cartel procedure.

THE FINES

Applying its 2006 Leniency Notice, the Commission granted Bondeulle full immunity for revealing the existence of the cartel, allowing it to avoid fine of approximately €250 million. Coroos and Group CECAB received a 15% and 30% discount respectively. In addition, both Coroos and Group CECAB received a further 10% discount each for settlement, under the Commission's 2008 Settlement Notice, resulting in a €13,647,000 and €18,000,000 fine for Coroos and Groupe CECAB respectively.

The Commission's press release states that one of the companies also received a further discount after invoking its inability to pay the fine under point 35 of the 2006 Guidelines on fines. In deciding to grant this discount, the Commission thoroughly assessed the company's financial statements for recent years, projections for the current and coming years, ratios measuring the financial strength, profitability, solvency, liquidity, and relations with outside financial partners and with shareholders.

This is the Commission's second cartel case relating to canned foodstuffs in recent years. In June 2014, the Commission fined Bonduelle, Lutèce and Prochamp a total of around €32 million, in a settlement decision relating to a canned mushrooms cartel. In April 2016, it fined Riberebro (which did not settle) €5.2 million in relation to the same cartel.

Protection of whistle-blowers: new EU-wide rules to come into force in 2021

EU – NEW LAW, UPDATE

On 7 October 2019, the European Council formally adopted a Directive aimed at improving protection of whistle-blowers in the EU (the "Directive"). The Directive will now be published in the Official Journal of the European Union ("OJEU") and will enter into force 20 days after publication. Member states will then have two years to transpose these rules into their national law.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Member States have two years from the entry into force of this Directive to transpose these rules into their national laws. By 2021, companies with more than 250 employees will have to be compliant

and two years later, companies with 50 to 250 employees.

- Obligations include setting up an effective, GDPR-compliant, internal reporting channel available 24/7 in relevant languages.
- They also include implementing a number of safeguard and support measures intended to protect the whistle-blower and the individuals who assisted him. These consist notably in the provision of information on the rights of these individuals, on the procedures and remedies available to them. Companies should also ensure the protection of the anonymity of these individuals and protect them against retaliation in the organisation.

Whistle-blowers are individuals who in the context of their work become aware and expose behaviours that may threaten or harm public interest. These may be anticompetitive conduct or more generally breaches of rules and regulations (notably in the environmental or public health sectors).

However, potential whistle-blowers are often discouraged from reporting their concerns or suspicions for fear of retaliation. Currently, Member States' national laws relating to the protection of whistle-blowers are still very fragmented, some affording little to no protection to the latter[1]. Prompted by scandals such as the Dieselgate or the ongoing Cambridge Analytica revelations, the European Council and Parliament adopted – upon a proposal of the European Commission – a Directive on the protection of persons who report breaches of EU law.

The new rules are intended to have a broad scope of application. Individuals protected include employees, civil servants at national/local level, volunteers and trainees, non-executive members and shareholders. Areas covered include public procurement, financial services, prevention of money laundering and public health. A list of all EU legislative instruments covered is annexed to the Directive but Member States may go beyond the latter when implementing the new rules.

The main protective measures provided for by the Directive include:

- the obligation to create effective and efficient reporting channels in companies of over 50 employees and municipalities of more than 10 000 inhabitants. Whistle-blowers are encouraged to use internal channels within their organisation first, before turning to external channels which public authorities are obliged to set up;
- safeguards to protect whistle-blowers from retaliation, such as being suspended, demoted and intimidated. Those assisting whistle-blowers, such as colleagues and relatives are also protected. The Directive contains a list of support measures which will be put in place for whistle-blowers. These include easily accessible information and advice on procedures and remedies available and on the rights of the person concerned, effective assistance by competent authorities and legal aid in criminal and in cross-border civil proceedings; and
- the obligation for employers/public authorities to respond and follow-up on whistle-blowers' reports within 3 months, with the possibility of extending this to 6 months for external channels in duly justified cases.

Member States have two years from the entry into force of this Directive to transpose these rules into their national laws. This means that by 2021 companies with more than 250 employees must fulfil their obligations and two years later this will also apply to companies with 50 to 250 employees. Companies who have yet to implement internal reporting processes/channels may already do so in order to manage risks within their organisations.

[1] At the moment, only 10 EU countries have a comprehensive law protecting whistle-blowers. At EU level, there is legislation in only a limited number of sectors (mostly in the areas of financial services) which include measures to protect whistle-blowers.

ECJ upholds Commission inspections following privilege issue

EU – ANTITRUST – CARTELS, PROCEDURE

On 17 October 2019, the Court of Justice of the European Union ("ECJ") dismissed an appeal by ethanol company Alcogroup and its subsidiary Alcodis (collectively "Alcogroup") against a ruling of the General Court ("GC") which had dismissed the company's request for the suspension of the European Commission's ("Commission") investigation and the annulment of an inspection decision after the inspectors examined documents marked as legally privileged.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- It is important to watch out for privileged documents during inspections and ensure (without obstructing the inspection) that these are protected as quickly as possible.
- Procedural issues during an inspection do not invalidate the decision to initiate the inspection.
- Procedural steps during an investigation are not amenable to appeal.

BACKGROUND

In October 2014, Commission officials carried out an inspection at Alcogroup in relation to an ongoing investigation into possible collusion between companies in the oil and biofuel sectors (the "first inspection"). A second inspection took place in March 2015 in connection with a separate investigation into price fixing and market sharing in the bioethanol market (the "second inspection").

Prior to the second inspection, Alcogroup had agreed with the Commission that documents labelled as privileged would be set aside for review with Alcogroup's lawyers following the inspection. These documents included privileged communications prepared following the first inspection. However, during the electronic searches carried out as part of the second inspection, among the documents 'tagged' by the Commission for export were several communications marked as legally privileged. The Commission explained this as being due to the fact that those legally privileged documents had effectively been swept up with other, non-privileged documents, to which they were related. All documents marked as legally privileged were subsequently separated into a different file following complaints from Alcogroup's lawyers (with the exception of one document, which was returned later).

In April 2015, Alcogroup sent a letter to the Commission requesting that both investigations be suspended. Alcogroup argued that it could not defend itself effectively once the Commission had reviewed privileged documents that had been prepared as part of their defence following the first inspection. In May 2015, the Commission sent a letter to Alcogroup rejecting this request ("Commission's Letter").

On 29 May 2015, Alcogroup appealed: (a) the second inspection decision; and (b) the Commission's Letter. At the same time, Alcogroup also sought interim measures from the GC requiring the Commission to suspend its investigations. This application was rejected.

THE APPEALS

In April 2018, the GC dismissed the appeal as inadmissible. The GC had previously ordered Alcogroup to provide unredacted versions of the relevant communications to the Court (although they were not provided to the Commission).

In its judgment, the GC:

- held that the legality of the decision to inspect Alcogroup in 2015 could not be impacted by any arguments that the subsequent procedure was unlawful; and
- as regards the Commission's Letter, the GC also rejected Alcogroup's challenge on the basis that the Commission's Letter amounted only to a refusal to discontinue the

- investigative steps at that stage and was not a final determination as regards the privileged nature of the relevant documents.

Alcogroup filed an appeal with the ECJ, which upheld the GC's ruling in full. In its appeal, Alcogroup's arguments included that the GC should have examined whether the inspection decision was adequately reasoned. In Alcogroup's view, that decision should have included 'precautionary measures' to prevent the inspectors from examining documents marked 'legally privileged'. The ECJ upheld the GC's rejection of this argument and held that:

- the inspectors could not have inferred from the absence of such precautionary measures in the decision that they were allowed to review privileged materials; and
- the Commission had not confirmed in its Letter whether its officials had actually read the documents or not, only that tagging could not be equated with reading.

The ECJ's judgment is available here.

COMMENT

Since Alcogroup's action was dismissed as inadmissible, the ECJ did not rule on the substance of the dispute. The case does, however, highlight the difficulties posed by privileged documents in the context of dawn raids where an authority uses software to trawl through thousands of electronic documents, sort them into families and tag them. In particular it raises some key questions, including:

- if a document has been 'tagged' by the Commission during an inspection, can it be inferred that it has been read by it? On the face of it, the judgment seems to imply that it cannot. However, that is ultimately a question of proof and evidence and, since the action was rejected as inadmissible, it has not been addressed. That will need to be done in the context of an appeal against the final Commission decision (assuming there is one); and
- if privileged communications were read, does that affect the legality of the final decision? In practice this will very likely depend on the extent to which these documents have been relied upon by the Commission and affected the content of the decision.

Belgian authority fines pharmacist body for limiting advertising and rebates

BELGIUM – ANTITRUST – ANTICOMPETITIVE AGREEMENTS

On 16 October 2019, the Belgian Competition Authority ("BCA") fined the national Order of Pharmacists €225,000 for taking disciplinary measures limiting the ability of pharmacists to advertise and apply rebates to parapharmaceutical products.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The BCA's decision was prompted by various complaints from pharmacies and has to be read in light of a parallel decision taken earlier this year by which the BCA imposed a fine on the Order of Pharmacists for having obstructed MediCare-Market's commercial activity.
- In this case, the settlement procedure was followed and led the Order of Pharmacists to commit to adapt its Code of Ethics in a way to no longer restrict advertising with regard to parapharmaceuticals and make sure that disciplinary measures are not taken with regard to pro-competitive behaviour.

Between 2010 and 2017, the Investigation and Prosecution Service of the BCA received various complaints from pharmacies, some of which have an online presence, concerning both the rules of the Code of Ethics in relation to the advertising and the granting of rebates and the

application of these rules by the Order of Pharmacists.

The complainants argued that both the rules of the Code of Ethics and the disciplinary measures adopted on the basis of these rules were preventing them from pursuing their commercial activity in a normal way.

In its decision of 15 October 2019, the BCA found that the Order of Pharmacists breached Article IV.1 of the Belgian Code of Economic Law and Article 101 TFEU by adopting, maintaining and implementing provisions of the Code of Ethics prohibiting certain types of advertising practices, in particular online advertisement practices, for parapharmaceutical products.

The BCA concluded that such provisions limited the pharmacists' ability to advertise and to apply rebates for parapharmaceutical products.

The BCA followed the settlement procedure, which implies an admission of guilt by the Order of Pharmacists. In addition, the Order of Pharmacists committed to adopt, by the end of 2019:

- a revised Code of Ethics which provides for the approval in principle of advertising and commercial practices allowing for paid referencing and advertising via social media; and
- an explanatory code on advertising and commercial practices to complete and facilitate the interpretation of the provisions of the revised Code of Ethics.

This case confirms once again that competition law fully applies to liberal professions such as pharmacists and that ethical rules cannot be used to restrict competition to the detriment of consumers.

Procter & Gamble, Coty, Chanel and two wholesalers fined for exclusive overseas import agreements

FRANCE – ANTITRUST – ANTICOMPETITIVE AGREEMENTS

On 8 October 2019, the French Competition Authority ("FCA") sanctioned Procter & Gamble ("P&G"), Coty and Chanel, as well as their wholesalers, €176,000 for having implemented exclusive import agreements in overseas territories.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Since March 2013, the Luren law has prohibited exclusive import agreements in French overseas territories.
- These agreements remain an active area of enforcement for the FCA, with the present case being the seventh such decision.

In November 2017, the FCA received a complaint regarding exclusive import agreements in the perfumes and cosmetics distribution sector in French Antilles, French Guiana and on the Reunion Island having been implemented after the entry into force of the Law on Economic Regulation in French overseas territories (known as the "Lurel Law") of 20 November 2012. The Lurel law, whose purpose is to address the specific competition law issues of those territories (i.e. insularity, concentration of markets, entry barriers, etc.), prohibits exclusive import agreements as of 22 March 2013.

In French Antilles and Guiana, P&G and its wholesaler (Parfumerie d'Outremer) maintained exclusive import rights regarding products of certain P&G brands after this date and until February 2014. Then, Coty acquired these brands and granted Parfumerie d'Outremer similar rights. Therefore, each of these companies has been sanctioned by the FCA for having maintained or established exclusive import rights.

On the Reunion Island, the wholesaler of Bourjois' products (Sodibel) benefited from exclusive import rights until January 2014 – being specified that although at the time of implementation of the practices, Bourjois was owned by Chanel, its activity has then been transferred to Coty. In this context, the FCA sanctioned Chanel as Bourjois' former parent company and Coty as the buyer of Bourjois. Sodibel was also fined for these practices.

Fines were imposed by the FCA in accordance with the terms of the settlement procedure for which each company concerned applied and amounted to a total of €176,000.

This is the seventh decision sanctioning exclusive import agreements regarding French overseas territories issued by the FCA since the entry into force of the Lurel law, other sectors concerned being the distribution of consumer goods, medical biology products, and termite traps.

Finally, it should be noted that Sodibel had already been sanctioned by the FCA for the implementation of practices of similar nature regarding the distribution of dessert products in July 2017.

FCA Stihl sanction for online sales ban confirmed on appeal

FRANCE – ANTITRUST – ANTICOMPETITIVE AGREEMENTS

The Court of appeal of Paris has confirmed the decision of the French Competition Authority ("FCA") sanctioning Stihl, a manufacturer of mechanical garden equipment, for prohibiting, between 2006 and 2017, the sale of certain dangerous products on its distributors' websites. The Court of appeal, however, reduced the fine by €1 million to €6 million.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The sale of high quality and technical products that also present a safety risk for end users legitimates the creation of a selective distribution network.
- This does not allow the supplier to impose on its authorized distributors a requirement to deliver products by hand and thus to de facto exclude online sales.

As a reminder, Stihl, a manufacturer of mechanical garden equipment such as chainsaws, brush cutters, pole-saws, imposed two restrictions on online sales on its authorised dealers (see our previous newsletter article).

First, Stihl prohibited the resale of its products (dangerous or not) on third party platforms. The FCA had considered that this prohibition was justified in light of the EU Court of Justice's Coty precedent.

Second, Stihl obliged its resellers to hand deliver those of its products that were deemed to be "dangerous". These products had to be either collected by the client at the dealer's premises or delivered by the dealer himself and not by a third party such as a transporter. This resulted in Stihl de facto preventing online sale of these products according to the FCA.

Stihl appealed that second aspect of the FCA's decision before the Court of appeal of Paris.

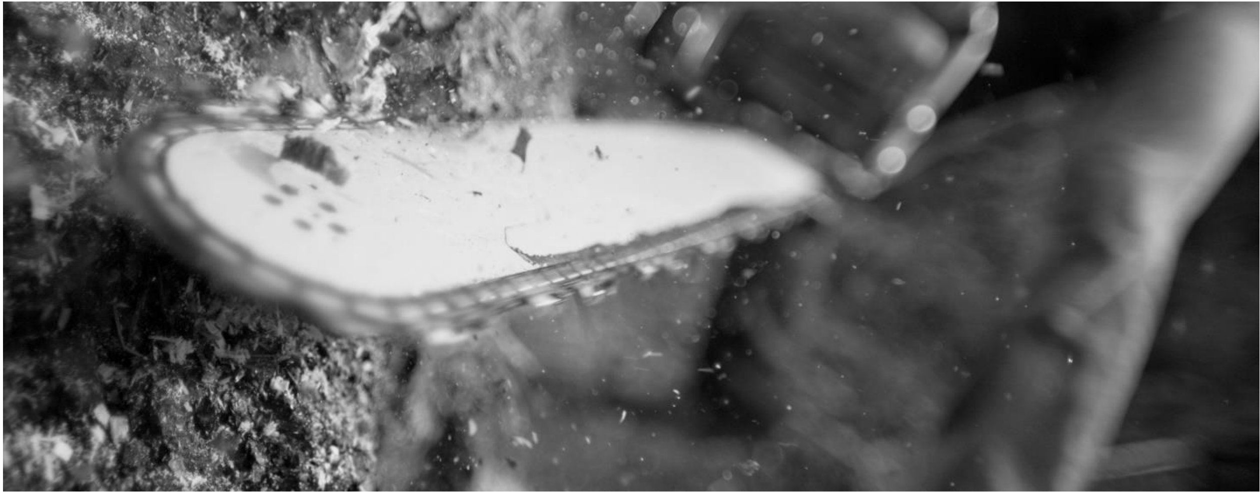
Whilst the Court of appeal concluded that this de facto restriction on online sales was a restriction of competition 'by object', it conducted an in-depth analysis to assess the object and effects of this practice.

First, it observed that the restriction was justified and likely to guarantee a proper use of the products and the users' safety. However, it

considered that it went beyond what was necessary to achieve that purpose. The Court noted that the restriction applied to professional and non-professional users without distinction. It also pointed out that online assistance (i.e. not necessarily a hand delivery) could be an appropriate instrument to guarantee a proper use and users' safety.

Second, the Court of appeal considered that the object infringement was not liable to be exempted considering that direct advice by authorized dealers, whilst useful, was not necessary. It stressed that the only advantage of this practice consisted in the assurance that the end user would hear the safety instructions. Yet, other online tools could be implemented to achieve the same safety objective without restricting competition.

The Court of appeal concluded that the restriction deprived end users without justification of all the benefits of online sales.



K-Line receives $34.5m fine for criminal cartel conduct

AUSTRALIA – ANTITRUST - CARTELS

On 2 August 2019, Kawasaki Kisen Kaisha Ltd ("K-Line") was ordered by the Federal Court of Australia to pay a AUD34.5 million fine for criminal cartel conduct occurring between July 2009 and September 2012. K-Line's fine is the largest ever criminal penalty to be handed down for contraventions of the Australian Competition and Consumer Act 2010 (Cth).

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Companies should ensure that they do not enter agreements that may have an effect in distorting or limiting competition in the relevant market. Internal whistle-blower arrangements are likely to mitigate this risk.
- The ACCC has extensive powers to investigate possible cartel conduct and can and will refer serious cases to the CDPP to consider criminal prosecution.
- Courts view cartel conduct as requiring firm condemnation and condign punishment. They will impose harsh penalties on companies found guilty of cartel conduct, regardless of the relevant conduct occurring overseas or part of a global cartel where prosecution may have already occurred in other jurisdictions.
- Companies that have been involved in potentially suspicious activities should seek advice immediately, because cartel immunity is only available to the first party to report the conduct/arrangement to the Australian Competition and Consumer Commission ("ACCC").

K-Line is a global Japanese transportation company that, relevantly, supplies shipping services for the transportation to Australia of cargo such as motor vehicles, buses, trucks and other "roll-on, roll-off" commercial vehicles.

In February 1997, K-Line entered a "Respect Agreement" with a number of other global shipping companies which established an understanding that the parties would not attempt to take current business from one another or seek to alter their market shares. The cartel provisions of particular interest involved fixing freight rates for vehicle transport services to ports in Australia supplied to eleven key motor vehicle manufacturers including Honda Motor Company Ltd, Nissan Motor Co Ltd, Suzuki Motor Corporation and Toyota Motor Corporation.

The ACCC commenced investigations into the matter in 2012 after action was taken by the Japan Fair Trade Commission and the United States Department of Justice in overseas jurisdictions. Shortly after, K-Line sought immunity from the ACCC but this was not available as K-Line was not the first shipping company to approach the ACCC doing so.

In August 2017, Nippon Yusen Kabushiki Kaisha, another party to the arrangement, was convicted of knowingly giving effect to cartel provisions in breach of the Competition and Consumer Act and was fined AUD25 million.

Criminal charges for cartel conduct were laid by the Commonwealth Director of Public Prosecutions against K-Line in November 2016. In April 2018, K-Line pleaded guilty to a charge of intentionally giving effect to cartel provisions.

In his sentencing, Justice Wigney found the factors which weighed towards a more severe punishment included:

- the maximum penalty in respect of the offence by K-Line being AUD 100 million;
- the systematic, deliberate and covert nature of the conduct over a long period of time and by members in senior management;
- the potential damage to the Australian market's integrity from such conduct; and
- the need for general and specific deterrence.

Mitigating factors included:

- the contrition and rehabilitation demonstrated by K-Line, including changes made to the corporate structure to prevent recidivism;
- the plea of guilty and co-operation provided to the ACCC during investigations;
- the penalties imposed by courts and authorities in other jurisdictions; and
- K-Line's otherwise clear history from conviction of offences worldwide.

Justice Wigney concluded that, in all the circumstances, a AUD34.5 million fine was appropriate. He incorporated a 28% discount, noting that but for the guilty plea and corporation and contrition displayed throughout, K-Line's fine would have been AUD48 million.

ACCC Chair Rod Sims said "This decision is a serious warning to businesses and will deter others seeking to join or start a cartel. Businesses should know that engaging in cartel conduct will result in ACCC scrutiny and result in potentially very serious consequences.

CNMC fines 19 assembly and maintenance companies for bid-rigging

SPAIN – ANTITRUST - CARTELS

The Spanish Competition Authority ("CNMC") has fined 19 assembly and maintenance companies operating in the energy and petrochemical sectors €54.2 million, and fined 8 directors €0.28 million, for big-rigging practices following a leniency application submitted by one of the companies.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The case reflects the CNMC's continued focus on stamping out bid-rigging (both in the public and private sector).
- The case also shows the CNMC's willingness to use new legal tools to deter anticompetitive conducts such fining directors of infringing companies and banning companies from participating in future public tenders.
- It is the third time that the authority has used its power to ban public tendering, again leaving the National Consultancy Board for Administrative Contracting to determine the scope and duration of the ban.

The CNMC concluded that the companies engaged in a cartel between 2001 and 2017 to share, at least, 746 bidding contracts (all private sector with the exception of one public contract) among themselves, which would have affected around 20 clients in the energy and petrochemical sectors. According to the authority, this is a sector in which contracting usually takes place through private tenders, as assembly and maintenance requires complex and specific safety, industrial quality and environmental standards.

The CNMC considered proven at least 18 meetings among the infringing companies in which they agreed to allocate customers, tenders, exchange commercially sensitive information, propose "cover offers" in tenders, as well as set prices and compensation. In addition, the coordination methods among the companies evolved over time due to the long duration:

- At a first stage, the designated awarding company sent its offer to the others so they could increase theirs by a certain percentage; and
- At a second stage, an Excel file was circulated among the companies in which they indicated the prices, offers, companies submitting bids and the designated awarding companies.

The investigation follows a leniency application submitted by one of the companies, which was exempted from paying a fine (although one of its directors was fined €42,400 since he refused to cooperate with the CNMC). In addition, another company that cooperated with the authority was granted a 50% reduction in its fine.

In addition to the fines imposed on the companies and directors, the CNMC has used the procedure previewed in the Public Procurement Law (Law 9/2017) to ban the infringers (with the exception of the companies that participated in the leniency programme) from submitting public tenders, for the third time (see here and here). As in previous cases, the CNMC did not determine the scope and duration of the prohibition, which will have to be determined by the National Consultancy Board for Administrative Contracting.

This case shows the interest of the authority in using new legal tools to deter anticompetitive practices such as the possibility to fine directors of the infringing companies, or to impose a ban from submitting public tenders (even though the large majority of the cartel concerned the private sector).

CMA fines three construction firms £36m for cartel conduct

UK – ANTITRUST - CARTELS

FP McCann Ltd, Stanton Bonna Concrete Ltd ("SBC") and CPM Group Ltd ("CPM") have collectively been fined more than £36 million by the Competition and Markets Authority ("CMA") for participating in an illegal cartel in relation to the supply of concrete drainage products.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Companies can be fined up to 10% of their group turnover for engaging in conduct which breaches competition rules.
- It is also a criminal offence in the UK to engage in the most serious and damaging forms of anti-competitive agreements, known as "hard core cartels". These include agreements relating to price-fixing, the sharing of markets or customers, limiting production or supply, or bid-rigging. Significant sanctions, including a prison sentence of up to five years, exist for individuals found guilty of the offence.
- Director disqualification has 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.

THE CARTEL AND FINES

The three firms were found to have fixed and co-ordinated prices of concrete drainage products, shared the market among themselves by allocating customers, and exchanged commercially sensitive information at regular meetings attended by senior executives of all three firms. In particular, the meetings were used as evidence by the CMA when making its final decision, after it secretly recorded a number of them during the life of the cartel.

At the time of the alleged cartel, which spanned seven years, the three firms were the largest players in the market, holding a combined share of more than 50%. From 2010 onwards, they collectively held more than 90% of the market. The concrete drainage pipes they manufacture are used in large infrastructure projects and are usually supplied to engineering and construction firms, as well as utility providers and local and national government bodies.

Regarding the level of the fine, the CMA said that issuing large fines in this and other sectors are key to cracking down on cartels and deterring others from participating in this sort of behaviour in the future.

SBC and CPM previously admitted their involvement in the cartel, so received reductions to their fines as part of the CMA's leniency and settlement guidelines. In contrast, FP McCann has not accepted responsibility and has said it will be "robustly" appealing the decision.

The criminal investigation and director disqualifications

The CMA also conducted a related criminal cartel investigation into whether individuals had committed an offence under section 188 of the Enterprise Act 2002 (the "criminal cartel offence"). The criminal investigation concluded in June 2017 and in September 2017, the CMA announced that Barry Cooper, the CEO of SBC, had been sentenced to two years' imprisonment suspended for two years, a 6pm-6am curfew for six months and disqualification as a director for seven years, for participating in a price fixing and market sharing cartel in the supply of precast concrete drainage products.

In addition, on 26 April 2019 the CMA announced the disqualification of two former directors of CPM resulting from CPM's involvement in the cartel. 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.

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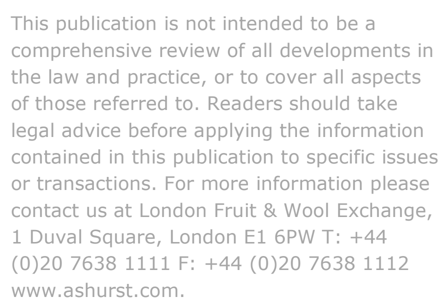

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