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Competition Law Newsletter
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The December 2020 issue of Ashurst's competition law newsletter features some of the key competition law developments over the last month, including national security regime developments in the UK and Spain, the European Commission's latest pay-for-delay pharma fines, the UK investigation into most favoured nation clauses used by comparison sites, further consumer law enforcement in Australia, as well as other news.

Content

Commission fines Teva and Cephalon €60.5 million for pay-for-delay

EU – ANTITRUST - ANTICOMPETITIVE AGREEMENTS

On 26 November 2020, the European Commission ("Commission") announced that it had fined the pharmaceutical companies Teva and Cephalon EUR 60.5 million for agreeing to delay for several years the market entry of a cheaper generic version of Cephalon's drug for sleep disorders, modafinil, after Cephalon's main patents had expired, in breach of Article 101 TFEU (the prohibition of anticompetitive agreements).

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The decision completes the cycle of pay-for-delay pharmaceutical investigations launched with the Commission's 2009 sector inquiry into the pharmaceutical sector.
- To date, the Commission has fined companies in three other investigations – one concerning perindopril, a cardiovascular medicine, one concerning citalopram, an anti-depressant, and one concerning fentanyl, a painkiller.
- Opened in April 2011, this investigation has taken over nine and half years.

BACKGROUND

Modafinil is a medicine used for the treatment of excessive daytime sleepiness associated in particular with narcolepsy. It was Cephalon's best-selling product under the brand name "Provigil" and for years accounted for more than 40% of Cephalon's worldwide turnover. While the main patents protecting modafinil had expired in Europe by 2005, Cephalon still held some secondary patents related to the pharmaceutical composition of modafinil, which aimed at securing additional patent protection. Teva held its own patents relating to modafinil's production process, was ready to enter the modafinil market with its own generic version, and it had even started selling its generic in the UK.

THE COMMISSION DECISION

The decision concerns a patent settlement agreement whereby Cephalon induced Teva not to enter the market for with a cheaper version of modafinil (and not to challenge Cephalon's patents) in exchange for a package of commercial side-deals that were beneficial to Teva and some cash payments. The Commission's view is that generic entry brings price competition to markets that can lead to price drops of up to 90%. In this regard, the Commission has reported the following:

- **Price competition:** without this "pay-for-delay" agreement, Teva could have entered the market earlier and could have, in turn, pushed down prices for modafinil. For several years, this pay-for-delay agreement therefore eliminated Teva as a competitor and allowed Cephalon to continue charging high prices even if the main modafinil patent had long expired. In this connection, the Commission has stated that when Teva entered the UK market for a short period in 2005, it indeed offered a 50% lower price than the price of Cephalon's Provigil.

- **Innovation:** pay-for-delay agreements can also have a detrimental effect on innovation. Competition from generics stimulates pharmaceutical companies to focus their efforts on developing new drugs rather than on maximising income streams from their old drugs by artificially preserving market exclusivity.

The infringement lasted, for almost all EU Member States and EEA countries, from December 2005 to October 2011, when Teva acquired Cephalon and they became part of the same group

FINES

The fines imposed by the Commission on Teva and Cephalon are EUR 30 million and EUR 30.5 million, respectively. As in other pay-for-delay cases, the general fines methodology does not work for generic companies, as they, by virtue of the restrictive agreement, do not realise any sales with the affected product. The Commission, therefore, imposed a fixed amount fine to Teva that is slightly below the fine for Cephalon.

EU State aid rules pass fitness check but will need some adaptations

EU – STATE AID

On 30 October 2020, the European Commission ("Commission") published a Staff Working Document summarising the results of the evaluation of EU State aid rules. While State aid rules are broadly fit for purpose, some individual rules will need to be adapted or updated, notably to reflect the recent European Green Deal and the EU's Industrial and Digital Strategies.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Overall, the Commission has found that the EU State aid control system is fit for purpose.
- However, individual rules will need to be revised and updated. In particular, important changes to the Energy and Environmental Aid Guidelines are to be expected in order to reflect the ambitious objectives laid down in the European Green Deal.
- The impact of the COVID-19 crisis on existing State aid rules has not been assessed. Some specific rules (e.g. the Aviation Guidelines) may need to be reshaped once the long-term impact of the crisis is known.

BACKGROUND

In January 2019, the Commission launched a fitness check of the EU State aid rules. The assessment covered all rules adopted as part of the State Aid Modernisation ("SAM") started in 2012, namely the General Block Exemption Regulation ("GBER"), the *De Minimis* Regulation and the Commission's various guidance documents on horizontal and sector-specific aid.[1]

The fitness check involved internal analyses by the Commission, public consultations and for some specific rules, studies prepared by external consultants or targeted consultations of specific stakeholders.

RESULTS AND NEXT STEPS

The Staff Working document concludes that the current State aid architecture and rules are broadly fit for purposes. Hence, there is no need to reform the system as such. The SAM

[1] Regional Aid Guidelines, Research, Development and Innovation (RDI) Framework, Important Projects of Common European Interest Communication, Risk Finance Guidelines, Aviation Guidelines, Energy and Environmental Aid Guidelines and Rescue and Restructuring Guidelines. In addition, the Short-term export-credit insurance Communication and the Railway Guidelines also form part of the current evaluation exercise.

seems to be largely effective in reaching its triple objective, namely:

- foster "*good aid*";
- focus Commission's *ex ante* scrutiny on cases with the biggest impact on competition; and
- faster access to aid.

However, the individual rules need revisions and/ or updates. This includes clarifying and simplifying certain concepts (such as "relocation" under the Regional Guidelines) or the practical application of certain provisions (such as how to calculate in a simplified manner indirect eligible costs for R&D projects). This also involves adjusting existing rules to reflect recent legislative, market and technology developments.

The Staff Working document highlights that rules should be aligned to future challenges, so that State aid could further contribute to the European Green Deal, as well as to the EU's Digital and Industrial Strategies. This echoes recent statements from Commissioner Vestager stressing that State aid rules "*play a vital part in helping to make sure the green transition is affordable*" and that the Commission will ensure that "*Europe's governments have all the scope they need to make those green investments – without wasting taxpayers' money*".

Given the "*vital*" role of State aid rules in the green transition, the Commission plans to revise the relevant guidelines (in particular the Energy and Environmental Aid Guidelines, RDI Framework, Risk Finance Guidelines and relevant GBER provisions) at the end of 2021. The revised rules are expected to cover new technologies (such as hydrogen, synthetic fuel) but also to include "green bonuses" for projects that make a genuine contribution to the EU green goals.

On 12 November 2020, the Commission launched a public consultation on the revision of the Energy and Environmental Aid Guidelines and will accept views until 7 January 2021. Similar public consultations on other guidelines should follow up shortly.

Finally, it is worth noting that the fitness check did not evaluate the effects of the COVID-19 crisis on the existing State aid rules. While the overall conclusions should remain valid, it cannot be excluded that some specific rules (concerning the aviation industry for example) will need to be reshaped.

Home security provider to refund customers and remove unfair terms

AUSTRALIA – CONSUMER PROTECTION

On 4 November 2020, the Australian Competition and Consumer Commission ("ACCC") accepted a court enforceable undertaking from home security provider Tyco Australia Group Pty Ltd, trading as ADT Security ("ADT"), to refund consumers who were incorrectly invoiced, and to remove or vary certain unfair contract terms from its residential customer service agreement.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Businesses should ensure that by attempting to retain customers, they are not disregarding valid written notices of termination, or falsely invoicing customers for services performed under a terminated agreement.
- Contract terms that allow the party in the stronger bargaining position to unilaterally vary terms and increase fees payable under the contract are likely to be unfair and void under the Australian Consumer Law.
- Costs associated with any fees payable under a contract must be adequately disclosed to customers prior to entering into the agreement, or prominently stated in the terms of the agreement itself.

Since 2016 ADT's standard form 'customer service agreements' with residential consumers for the supply and installation of home security systems ("Agreement") included a provision allowing customers to terminate the Agreement at the conclusion of the initial term of the contract by giving 30 days' written notice. It was ADT's process, however, not to act on this written notice until the company had spoken directly with the customer. If ADT was not able to contact the customer after five days, ADT disregarded the notice and treated the Agreement as if it remained on-foot. After the notice period elapsed ADT continued to supply services and invoice the customer for those services.

MISLEADING REPRESENTATIONS AND CONDUCT

The ACCC considered that by continuing to issue invoices once a customer had terminated their agreement, ADT had:

- made false or misleading representations to consumers that it had a right to payment for services when in fact ADT had no such right in contravention of the ACL's prohibition on false representations concerning the existence or exclusion or effect of any condition, right or remedy (section 29(1)(m) of the Australian Consumer Law ("ACL")); and
- also engaged in misleading or deceptive conduct in contravention of the general prohibition on such conduct (section 18 of the ACL).

UNFAIR CONTRACT TERMS

Additionally, the ACCC alleged that the Agreement contained the following unfair contract terms (which are deemed by the ACL to be void and unenforceable):

- Fee Increase Clause: which allowed ADT to unilaterally increase any fee payable under the contract after the first 12 months of the initial term; and
- Unilateral Variation Clause: which allowed ADT to vary the Agreement after providing one month's written notice to the customer.

The ACCC considered that the Fee Increase and Unilateral Variation Clauses were unfair because they caused a significant imbalance in the parties' rights and obligations, were not reasonably necessary to protect ADT's legitimate interests and caused detriment to customers if ADT relied on them.

EXIT FEE

Further, the Agreement:

- required customers who terminated their Agreement within the initial term to pay an Exit Fee, calculated according to a formula set out in the Agreement; and
- provided, in some instances, that where a customer terminated the Agreement the customer had to pay a decommissioning fee for ADT equipment installed at their home (Decommissioning Fee). The quantum of the Decommissioning Fee was not set out in the Agreement.

The ACCC considered that the costs associated with the Exit Fee and Decommissioning Fee were not adequately disclosed to customers prior to entering into the Agreement, or prominently stated in the terms of the Agreement itself.

UNDERTAKINGS

To resolve the ACCC's concerns, ADT provided a three year court-enforceable undertaking to the ACCC in which it admitted the above contraventions and undertook to, among other things:

- implement and maintain a redress program for affected customers;
- amend the Agreement to rectify the existing unfair terms and improve transparency;
- inform affected customers that ADT will waive the Exit Fee and Decommissioning Fee; and
- implement a compliance program.

COMMENT

Businesses should carefully review their standard form contracts for compliance with the unfair contract term regime and examine their internal processes for managing those contracts with customers entering into standard form contracts with customers, to ensure they are not including or attempting to rely on potentially unfair terms, or employing misleading or deceptive practices to retain customers. The ACCC is very active in this space – it has taken a number of enforcement actions against companies who use standard form contracts with terms it regards as unfair. Further, the Australian Government is actively pursuing reform of the current unfair contract term provisions to make unfair contract terms unlawful and give courts the power to impose a civil penalty, rather than the current regime which merely deems such terms void and unenforceable.

Full Federal Court confirms Trivago misled hotel comparison site consumers

AUSTRALIA – CONSUMER PROTECTION

Trivago N. V. ("Trivago") has been unsuccessful in its appeal against a Federal Court of Australia decision which found that Trivago had made false or misleading representations about hotel room rates, in contravention of the Australian Consumer Law ("ACL"). The question at the heart of the case was whether Trivago had sufficiently disclosed to consumers that it used an algorithm which gave prominence to online booking sites based on their cost per click bids ("CPC", being the amount payable by the site if a consumer clicked on their offer).

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Comparison sites, aggregators and online marketplaces are under close scrutiny by the Australian Competition and Consumer Commission ("ACCC").
- Comparison sites, aggregators and online marketplaces should make sure that they accurately describe their services, who and what is being compared and the factors which influence ranking and prominence, as well as ensuring their comparisons are honest, and like-for-like.
- They should also consider whether their website design may give consumers the impression that they will be shown the cheapest, best or most attractive offer if in fact, ranking and prominence is influenced by other factors, such as payments from partners.
- If payments from partners influence ranking and prominence of offers shown to consumers, this should be clearly disclosed in close proximity to the offers. Descriptions in "Learn How Our Site Works" pages or "hover-over text" may be ineffective.
- Labels such as "Top Deal" or "Best Offer" should be used with care, and only if the

website's algorithm is in fact designed to show the offer that is the most attractive to the consumer.

- Algorithms are typically highly commercially sensitive and complex, and there is a balance to be struck between protecting trade secrets, and adequate and unambiguous disclosure about factors that influence ranking and prominence.
- In-house counsel should ensure they have a solid understanding of their business' algorithms, to enable them to assess whether representations made about the services offered on the business' website are accurate and aligned with the algorithms' inputs and likely output.
- Comparison sites and aggregators should familiarise themselves with the ACCC's Comparator Website Guide.

BACKGROUND

Earlier this year, the Federal Court of Australia found (at first instance) that between 1 December 2016 and 13 September 2019, Trivago had engaged in the following false or misleading representations and conduct:

- **Cheapest Price Representations:** representations in TV ads and statements that appeared in online search results that Trivago's website would quickly and easily identify the best or cheapest rate for a hotel room, when in fact (partly due to Trivago's algorithm) the website often did not provide the cheapest price for a hotel room ("Cheapest Price Representation");
- **Top Position Recommendation and Representations:** implied representations that offers displayed on Trivago's website with the most prominence ("Top Position Recommendation", displayed in large green font) were the cheapest available offer for the hotel identified or had some other characteristic that made them more attractive than other offers ("Top Position Representation"), when the website often did not provide the cheapest price for a hotel room;
- **Strike Through and Red Price Representations:** implied representations that prices displayed directly above the Top Position Recommendation in red strike-through text ("Strike Through Representation") and later in small red font ("Red Price Representation") were a comparison between prices offered for the same room category in the hotel identified, when in fact that price often related to a more expensive, luxury room in the hotel; and
- **Additional Conduct:** conduct that was liable to mislead the public as to the nature of the accommodation search service provided by Trivago by leading consumers to believe that Trivago's website provided an "*impartial, objective and transparent price comparison*" which would enable consumers to quickly and easily identify the cheapest available offer, when the site did not enable consumers to do so, and in fact directed them to more prominently displayed offers made by online booking sites that offered to make higher CPC payments to Trivago ("Additional Conduct").

Trivago's appeal related to the Top Position Representation, the Red Price Representation and the Additional Conduct. The Full Federal Court dismissed each of Trivago's grounds of appeal. The matter will now return to the primary judge to determine the orders to be made. The ACCC is seeking orders for declarations, injunctions, penalties (the amount is yet to be specified) and costs.

In this article, we focus on the Top Position Representation.

THE TOP POSITION REPRESENTATION HAD BEEN MADE: INEFFECTIVE WEBSITE DISCLOSURES AND DESIGN

Trivago submitted that the primary judge erred in finding that Trivago had represented that the

Top Position Offer was the cheapest or most desirable option, in light of the contextual factors in which the representation had been made.

The Full Federal Court rejected Trivago's submissions and upheld the primary judge's finding that the representation was misleading. In doing so, the Full Federal Court rejected Trivago's submissions that the context of the representation, including the following, dispelled the Top Position Representation:

- other elements of the webpage which made qualifying disclosures, including:
    - pop ups that appeared if the consumer hovered over an information button, which stated "in determining the price to display in the leading position of our search results, we consider a variety of factors, including price, the likelihood that you will find your ideal hotel, your ability to complete a booking after you click on a search result and the level of compensation provided by the booking site we offer…"; and
    - the "Learn how Trivago works" page, which stated "…Our Algorithm takes into account a number of relevant factors, such as your search criteria (for example your location and stay dates), the offer's price, and its general attractiveness – for example the experience we think you'll likely have on the displayed booking site. We also take into account the compensation booking sites provide us with when a user clicks on an offer… You may find offers under the 'more deals from' slide-out section with a lower price than the 'top position' offer…"; and
- the occasional listing of cheaper prices in offers near the Top Position Offer.

The Full Court concluded that the qualifications were not effective, and were "opaque and insufficient". The hover-over text was only visible to those consumers who happened to come across it – there was nothing indicating the existence of any hover-over text which might alert consumers to the fact there was some important qualification. Further, the reference to "compensation" was ambiguous and failed to clearly state the character of the CPC, and the significant role the CPC had in the determination of the Top Position Offer.

On appeal, the Full Federal Court also noted that Trivago had exaggerated the frequency with which cheaper prices were displayed below the Top Position Offer, and endorsed the primary judge's acceptance of expert evidence which indicated that most people will accept the first choice that meets their needs when faced with too many options, rather than conducting a more intense search.

THE TOP POSITION REPRESENTATION WAS MISLEADING: THE COURT SHINES A LIGHT ON TRIVAGO'S ALGORITHM

Trivago claimed on appeal that to succeed, the ACCC had to prove that Trivago selected the Top Position Offers *primarily* by reference to the CPC payment that Trivago would receive from the online booking site that submitted the offer if a consumer clicked on the offer. Trivago pointed to expert evidence on the following aspects of Trivago's algorithm:

- the raw inputs into the Trivago algorithm include a number of inputs in addition to the CPC, such as offer price, the minimum offer price of competing offers, the maximum offer price of competing offers, the click-through rate and the priority modifier;
- based on those raw inputs, the algorithm calculated a "composite score" for each offer made by an online booking site with respect to a hotel listing, and the site with the highest score became the Top Position Offer; and
- when Trivago applied its algorithm to determine the composite scope of each offer and award the top position, the primary, most important, or weightiest factor influencing the selection was the offer price, not the CPC.

Trivago had sought to dismiss evidence from the ACCC's expert regarding Trivago's algorithm on the basis that it analysed the *results* of the algorithm's selection in order to measure the relative importance of each input, rather than *how* the algorithm actually made selections (the expert did not use the source code of the algorithm in his model). The Full Court rejected these submissions as a distraction, noting that Trivago "*offered no cogent reason … as to why inferences cannot be drawn as to the operation of the algorithm based on the outcomes produced*". (Expert evidence about Trivago's algorithm was given

in closed court due to commercial sensitivities of some aspects of the algorithm.)

The Court held that the primary judge correctly found the Top Position Representation to be misleading, because evidence showed that:

- the Top Position Offer was determined by Trivago's algorithm which placed a **significant weighting on the CPC**; and
- often the Top Position Offer was not the cheapest price offer (according to the ACCC, in 66.8% of cases), including because Trivago filtered out offers from sites that had bid below a minimum CPC amount, even if they were the cheapest price offers.

ONLINE AGGREGATORS, COMPARISON SITES AND BOOKING SITES UNDER CLOSE SCRUTINY

The Full Federal Court's decision is the latest in a string of successful cases brought by the ACCC against online comparison and booking sites:

- In 2018, the ACCC was successful in proceedings against Meriton regarding misleading online review manipulation on the TripAdvisor website. The Federal Court imposed a AUD 3m penalty.
- In August 2020, the ACCC was successful in proceedings against HealthEngine for misleading conduct involving inadequate data disclosure and manipulation of online reviews. The Federal Court imposed a AUD 2.9 million penalty.
- Last month, the ACCC was successful in proceedings against iSelect for misleading consumers about its comparison of electricity plans and prices. The Federal Court imposed a penalty of AUD 8.5 million.
- Last month, the ACCC was successful in proceedings against Viagogo for misrepresentations about being the official seller of tickets and pricing practices. Viagogo AG was ordered to pay a penalty of AUD 7 million.

Aggregators, online comparison sites, booking sites and other online marketplaces should closely review their website disclosures, design and marketing materials in light of these proceedings, as well as the ACCC's Comparator Website Guide.

French dental surgeons fined for collective boycott

FRANCE – ANTITRUST – ANTICOMPETITIVE AGREEMENTS

On 12 November 2020, the French competition authority (the "FCA") fined the National Council of the College of Dental Surgeons (the "National Council"), five departmental councils of the College and two trade unions for collectively boycotting dental care networks.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Professional associations may be sanctioned by the FCA for practices that, although unilateral in their appearance, are considered agreements that express the collective will of their members.
- The FCA is competent to condemn rules on professional ethics set by professional associations if they breach competition law.
- The FCA defines boycott as "a deliberate action with a view to evicting an operator from the market" and considers collective boycotting a "by object" restriction of competition.
- Professional associations are not considered "undertakings", which means that the maximum level of fine for a breach of competition law is not capped at 10% of the undertaking's turnover. Instead, a maximum fine of EUR 3 million applies (which may, in practice, represent a larger proportion of the association's revenue).

In France, private complementary health insurers reimburse the costs of dental care that is not covered by national health insurance. To limit these costs, private health insurers form dental care networks by entering into agreements with dental surgeons and/or their trade unions. Under these arrangements,

dental surgeons agree to limit their fees in exchange for better reimbursement for their clients by insurers.

Dental care networks have been known to provoke discontent from some parts of the dental profession, which fear the commodification of dental services. Against this background, the FCA has sanctioned two anti-competitive practices that were established with a view to discourage the conclusion of dental care networks:

- First, the FCA sanctioned the National Council, five departmental councils of the College and a trade union for having agreed on actions to boycott dental care networks.

  According to the FCA, these actions mainly consisted of: a campaign designed to encourage dental surgeons to file a complaint against colleagues who were part of dental care networks; and communications suggesting *inter alia* that dental care networks are in breach of rules on professional ethics, sometimes specifying that entering into a dental care network can give rise to disciplinary sanctions.

  The National Council was sentenced to a fine of EUR 3 million (the maximum fine available under French law for an infringer that is not an undertaking).

- Secondly, the FCA sanctioned another trade union for a separate infringement involving calling upon practitioners and patients, through communications and pressure on potential partners, to turn away from dental care networks on the grounds that they endanger the profession. The trade union was fined EUR 680,000.

COMMENT

This is not the first time that the dental profession has been under scrutiny by the FCA. The National Council has been sanctioned for anti-competitive practices in breach of competition law on two separate occasions.

This case yet again raises the question as to where the line should be drawn between, on the one hand, the legitimate actions by associations and trade unions to protect the interests of their profession and, on the other hand, boycott actions that give rise to concerns under competition law.

COREPLA fined preventing new plastic waste management system

ITALY – ANTITRUST – DOMINANCE OF ABUSE

On 27 October 2020 the Italian Competition Authority ("AGCM") issued a EUR 27 million fine to the Italian Consortium for the Collection, Recycling and Recovery of Plastic Packaging (COREPLA) for abusing its dominant position in the Italian market for management of plastic waste services.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Activity related to environmental sustainability has recently become an increasing focus of competition regulators around the world, including in Italy and the EU more widely, often forming part of broader environmental policy.
- The AGCM is increasingly applying interim measures in order to prevent the spread of anticompetitive practices and, ultimately, the exclusion of market operators.

The proceedings, opened on 30 April 2019, concerned the market for plastic waste management services in compliance with the Extended Producer Responsibility ("EPR") principle.

Pursuant to the EPR principle, as established by Article 221 of the Consolidated Act on Environment, manufacturers and users are responsible for the environmental management of waste deriving from the packaging they use/produce. To comply with these responsibilities, manufacturers must set up autonomous collective systems of waste management or adhere to an existing consortium, such as COREPLA. COREPLA, financed by each of its members, pays local authorities and sorting plants for collecting and processing domestic plastic waste and then auctions off the plastic waste to recyclers.

COREPLA has been for many years the sole consortium in charge of treating and disposing of plastic packaging waste, holding a *de facto* monopoly, until certain plastic bottles producers constituted CORIPET in 2016. To operate, CORIPET was granted a temporary license that, after two years, was supposed to lead to a permanent authorisation which, according to the AGCM, was not obtained because of the obstacles imposed by COREPLA.

The AGCM assessed that COREPLA abused its dominant position by:

- not removing, after CORIPET's entrance, the exclusivity clauses included in contracts with local authorities and sorting plants, in order to manage all the plastic packaging waste, including the one falling within CORIPET's quota;
- continuing to manage, even while incurring losses, packaging waste that should have been assigned to CORIPET in light of its temporary licence;

- refusing to enter into a transitional agreement with CORIPET in order to assign quotas for the waste management, which had become necessary due to the impossibility of signing an agreement directly with the local authorities; and
- auctioning off to recyclers waste that should have been assigned to CORIPET, the awards made by the latter having being annulled (since CORIPET could not actually collect those waste because of COREPLA's conduct).

The AGCM concluded that COREPLA implemented a complex strategy which successfully hindered CORIPET's activity and produced anticompetitive "signalling" effects deterring potential new autonomous waste management systems from entering the market.

When assessing the seriousness of the conduct, the AGCM stressed the innovative nature of the project carried out by CORIPET, which involved the management of waste packaging through automatic collectors (the so-called eco-compactors).

AGCM has stated that its intervention not only prevented a serious and irreparable harm to competition, but also contributed to the achievement of certain environmental goals linked to recycling and waste management as established by the Italian and European legislation and in compliance with the EPR principle.

Please also note that, from a procedural standpoint, this investigation provides an example of application of interim measures to antitrust proceedings, a trend that has been recently revived at both Italian and EU levels. In this case, pending the assessment of the anticompetitive nature of the conduct, the AGCM imposed on COREPLA different and very incisive interim measures, including the amendment of its contracts with local authorities and sorting plants and the temporary grant, upon request, to CORIPET of its quota of plastic packaging waste in all sorting plants, as calculated in light of the consumptions its members.

New restrictions on Foreign Direct Investments in Spain

SPAIN – FDI/NATIONAL SECURITY

In March 2020, the Spanish Government introduced a screening mechanism for certain foreign direct investments in Spain (the "Spanish FDI Regime"), which requires prior administrative authorisation from the Council of Ministers of investments made by non-EU/EFTA investors in Spanish companies that meet certain criteria. On 17 November 2020, the Spanish Government enacted new amendments by which, from the 19 November 2020 to the 30 June 2021, investments made by EU/EFTA investors will also be subject to the Spanish FDI Regime when certain conditions are met.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- **The rule:** since March 2020, investments made in Spanish companies by non-EU/EFTA investors that meet certain criteria require prior administrative authorisation from the Council of Ministers.
- **The amendment:** since 19 November 2020 and until 30 June 2021, investments by EU/EFTA investors will also be subject to the Spanish FDI Regime in certain cases. The amendment has also clarified which sectors will be considered "strategic sectors" under the FDI regime.
- **The consequences of not complying:** non-notified transactions will not have any legal effect and the parties face serious sanctions for gun–jumping.

In March 2020, the Spanish FDI Regime was enacted by Royal Decree-law 8/2020 which modified Law 19/2003 of 4 July 2003 on the legal regime of capital movements and economic transactions abroad ("Law 19/2003") by adding a new article 7 bis and modifying articles 8.2 and 12.2, all of which are related to the suspension of the liberalisation regime of certain foreign direct investments ("FDI") in Spain.

INVESTMENTS MADE BY NON-EU/EFTA INVESTORS

Under the new Spanish FDI Regime, an investment in a Spanish company made by one or more non-EU/EFTA investors will require prior administrative authorisation from the Council of Ministers if the investment meets each of the following criteria:

- the investment is EUR 1 million or more;
- it comprises the acquisition of 10% or more of the share capital, or the acquisition of control (which will be interpreted according to the Spanish Competition Law), of a Spanish company; and
- the Spanish target company operates in certain strategic sectors, or the investor(s) met certain subjective criteria.

Regarding this last condition, Law 19/2003 provides:

- a non-exhaustive list of these strategic sectors, which include: critical infrastructure, critical and dual-use technologies, supply of fundamental inputs, sectors with access to sensitive information and the media; and
- the following alternative subjective criteria:
    - the foreign investor is directly or indirectly controlled by the government of a third country (again control will be interpreted according to the Spanish Competition Law);
    - the foreign investor has made investments, or participated, in activities in sectors affecting security, public order and public health in another Member State; or
    - there is a serious risk that the foreign investor may carry out criminal or illegal activities affecting public security, public order or public health in Spain.

Furthermore, investments made by prima facie EU/EFTA investors, but whose ultimate owners (i.e. parents who owns or controls 25% or more of the investor's share capital or voting rights, or who otherwise control, directly or indirectly, the investor) will be classed as non-EU/EFTA investors.

INVESTMENTS MADE BY EU/EFTA INVESTORS

In addition, since 19 November 2020 and until 30 June 2021, investments made by EU/EFTA investors in Spanish companies will also be subject to the Spanish FDI Regime (i.e. will require prior authorisation), when each of the following criteria are met:

- the acquisition relates to a company list in Spain, or the investment is EUR 500 million or more;
- it comprises the acquisition of 10% or more of the share capital, or the acquisition of control (which will be interpreted according to the Spanish Competition Law), of a Spanish company; and
- the Spanish target company operates in certain strategic sectors. (The additional "subjective criteria" does not apply to EU/EFTA investors.)

Moreover, investments made by a Spanish investor when the investor is directly or indirectly controlled by an EU/EFTA investor are also subject to this regime.

NOTIFICATION REGIME

The notification and subsequent authorisation of the transaction must be carried out before the closing of the operation. The Spanish FDI Regime foresees two procedures in this regard:

- the normal procedure, for investments of EUR 5 million or more: notifications are addressed to the Council of Ministers and can last up to six months, although they are usually dealt with more quickly periods (around one or two months). If there is no decision within the six month deadline, the notification is not deemed approved; and
- the simplified procedure, for investments between EUR 1 and 5 million: notifications are addressed to the Directorate and can last up to 30 days.

SANCTIONS FOR NON-COMPLIANCE

Failure to comply with the Spanish FDI Regime will render any concerned transaction void and with no legal effect until they are notified and approved. The investor(s) may also be subject to gun-jumping fine from EUR 30,000 up to the value of the transaction.

ComparetheMarket fined for restricting insurers pricing cheaply elsewhere

UK – ANTITRUST – ANTICOMPETITIVE AGREEMENTS

On 19 November 2020, the UK Competition and Markets Authority ("CMA") announced that it had issued an infringement decision finding that the price comparison website ComparetheMarket infringed Chapter I prohibition of the Competition Act 1998 and Article 101 TFEU as a result of the use of wide most favoured nation ("MFN") clauses in contracts with home insurance providers. The CMA has imposed a penalty of GBP 17.9 million.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The CMA found that the wide MFN clauses had the appreciable effect of preventing, restricting or distorting competition by: (a) reducing price competition between comparison websites; (b) restricting the ability of ComparetheMarket's rival price comparison websites to expand; and (c) reducing price competition between home insurers competing on price comparison websites.
- The CMA's findings follow a trend of interest by competition authorities across Europe and globally in MFN clauses, particularly in the e-commerce sector. Companies which operate or supply services via comparison tools or use MFNs in other ways should take note and review their contracts.
- The case also provides a recent example of the CMA launching an antitrust investigation following the conclusion of a wider market study.

BACKGROUND

In September 2017, the CMA issued the final report of its market study into digital comparison tools (DCTs) which included finding that certain MFNs may in some circumstances have the potential to restrict competition. On the same day, the CMA opened its investigation into ComparetheMarket's use of MFNs and issued a Statement of Objections in the case in November 2018.

On 19 November 2020, the CMA announced that it had issued its infringement decision and imposed a fine on BGL (Holdings) Limited, BGL Group Limited, BISL Limited and Compare The Market Limited (together, "ComparetheMarket").

THE CMA'S FINDINGS

The CMA found that ComparetheMarket had infringed competition law between 1 December 2015 and 1 December 2017 by using wide MFN clauses in its contracts with a number of home insurance providers selling through its price comparison website. 'Wide' MFNs impose restrictions on the offer of better terms on a provider's direct sales channels (in this case, the insurer's own website) as well as rival comparison websites. These can be distinguished from 'narrow' MFNs, which restrict the offer of better terms on direct sales channels only and are considered less problematic.

The network of wide MFNs meant that ComparetheMarket was protected, as a matter of contract, from being undercut by the prices quoted by the relevant insurers on competing price comparison websites.

The CMA considered that the relevant insurers covered by these MFN clauses with ComparetheMarket accounted for approximately 40% of sales made through price comparison websites during the relevant period, and ComparetheMarket itself had a market share of over 50% at the time. As such, there was a significant proportion of consumers who could only be accessed by insurers through listing their offers on ComparetheMarket.

The CMA also noted that internal documents had shown how significant the MFN clauses were to ComparetheMarket's competitive strategy. Further, ComparetheMarket placed a clear emphasis on compliance with its wide MFN clauses, and systematically monitored and enforced them. Accordingly, most insurers complied with the MFNs.

In particular, the CMA found that the use of MFNs across is network of agreement had had the following effects:

- the relevant insurers were contractually unable to quote lower prices on comparison websites than what they quoted on ComparetheMarket, reducing their incentive to lower prices generally;
- competing price comparison websites were prevented from gaining a competitive price advantage over ComparetheMarket;
- ComparetheMarket was able to ensure it had the lowest prices from insurers by relying primarily on its wide MFNs, rather than competing with other price comparison websites e.g. by reducing commission fees;
- competing price comparison websites were restricted in their ability to expand, allowing ComparetheMarket to maintain or strengthen its market power; and
- because the relevant insurers competed less strongly on price, other providers were subject to less competitive pressure, such that competition on retail prices between all insurers competing on price comparison websites was reduced.

Ultimately, the CMA found that the effects of ComparetheMarket's network of wide MFN clauses resulted in less differential pricing across price comparison websites for home insurance, to the detriment of consumers using such sites to purchase their home insurance. The penalty of GBP 17.9 million that was imposed reflected the seriousness of this infringement.

COMMENT

The CMA's findings follow a trend of interest by competition authorities across Europe and globally in MFN clauses, particularly in the e-commerce sector. The CMA noted in its press release that comparison websites have huge consumer benefits (including greater choice and ability to obtain bargains), which is why a restriction of competition in this area was particularly detrimental for consumers. The case also provides a recent example of the CMA launching an antitrust investigation following the conclusion of a wider market study.

CAT dismisses Facebook application and confirms CMA's wide interim order powers

UK – MERGER CONTROL

In a unanimous judgment, the Competition Appeal Tribunal ("CAT") dismissed Facebook's application challenging the CMA's refusal to grant certain derogations from an initial enforcement order ("IEO") imposed in connection with Facebook's completed acquisition of GIPHY, Inc.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The CAT's decision emphasises the CMA's broad power to impose IEOs, and indicates that the exercise of its discretion to impose and administer will not be lightly second-guessed by the courts.

- In requesting derogations, the CAT's judgment illustrates that it is crucial for merging parties to fully cooperate with the CMA, including providing all the reasoning and information needed to assess requests.
- The CMA has the power to impose a fine of up to 5% of global groupwide turnover for breach of an IEO. The CMA has increasingly applied a tough stance on failures to comply with IEOs and the CAT's judgment is likely to strengthen its commitment further. It is therefore vital that businesses engage early and fully with the CMA on any derogations that might be required and in respect of any potential issues or uncertainty in relation to the application of the IEO.

On 13 November 2020, the CAT handed down a unanimous judgment dismissing Facebook's challenge against CMA's refusal to grant derogations from an IEO imposed by the CMA in June 2020 in connection with Facebook's completed acquisition of GIPHY, Inc.

While the UK merger control regime is voluntary, and businesses can complete transactions without receiving merger clearance from the CMA, if the CMA has jurisdiction and decides to intervene it can impose an IEO for the purpose of preventing pre-emptive action which might otherwise restrict the CMA's ability to secure remedies at the conclusion of its merger review. Parties are able to request derogations from the IEO to take actions that would otherwise be prohibited.

The CMA imposed an IEO on Facebook on 9 June 2020. On 10 June 2020, Facebook's legal advisors submitted a request for five urgent derogations from the IEO, including a request that the scope of certain provisions of the IEO be restricted so that they would only apply to the part of the Facebook business relating to the procurement/supply of GIFs and stickers (the "Carve-out Requests"). The CMA considered that it was unable fully to consider the Carve-out Requests on the basis of the information and submissions provided and asked Facebook to provide further information. The CMA maintained its position following further correspondence with Facebook's solicitors and, on 26 August 2020, Facebook lodged an application with the CAT to review the CMA's refusal/delay in granting the derogation on the grounds that it was:

- irrational and disregarded the statutory purpose of preventing pre-emptive action;
- disproportionate; and
- infringed the requirement of legal certainty.

The CAT dismissed the application on all grounds, and was critical of Facebook for, in its view, not engaging effectively with the CMA. Key points which can be drawn from the CAT's judgement are set out below.

SCOPE OF THE CMA'S POWER TO IMPOSE IEOS IS WIDE

- The CAT considered that the statutory purpose of IEOs to avoid pre-emptive action is wide; pre-emptive action is a broad concept, which is not limited exclusively to the efficacy of any remedies which might need to imposed following conclusion of the merger review. In particular, it includes action which 'might' prejudge a Phase 2 reference, including action that has the potential to affect the competitive structure of the market during the CMA's investigation. The CAT noted that the use of the word 'might' implies a relatively low threshold of expectation as the CMA is at an early stage of its investigation.
- As the statutory purpose of an IEO is precautionary, the CAT confirmed the CMA has a considerable margin of appreciation. In order to impose an IEO, the CMA is not required to have formed a view that it is likely that prejudice to the Phase 2 reference will materialise or that there will be an impediment to the CMA's remedial options; a risk or a possibility is enough.

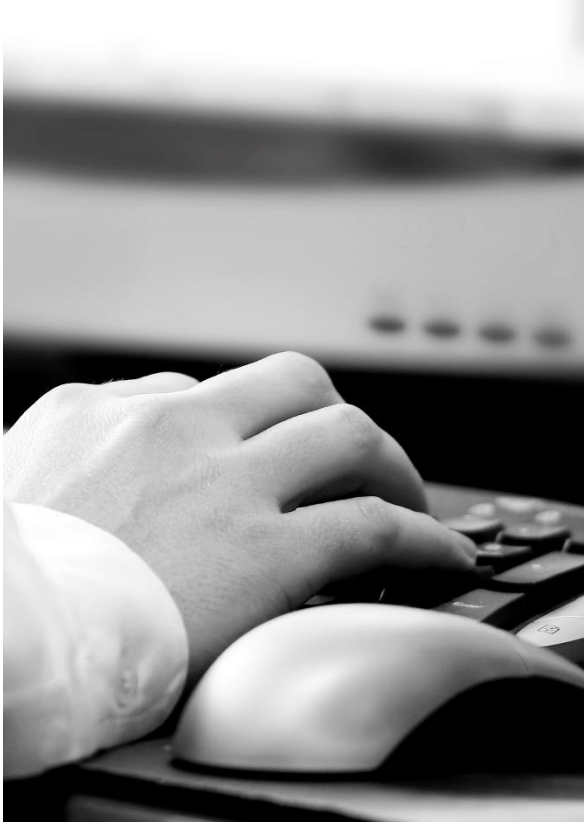
THE CMA IS ENTITLED TO SEEK FURTHER INFORMATION WHEN ASSESSING DEROGATION REQUESTS

- The CAT agreed that, in considering derogation requests, an information asymmetry exists between the merging parties and the CMA. The CMA is therefore under a duty to acquaint itself with relevant information to enable it to assess whether there is a risk of pre-emptive action, and it is not required to accept assertions made by the parties without further verification. Where the CMA decides that it requires

further information, it has a wide margin of appreciation to decide what information is needed.

CO-OPERATION IS VITAL

- A key theme of the CAT's judgment is that merging parties seeking derogations from an IEO should take a constructive and cooperative approach in engaging with the CMA.
- It is incumbent upon the parties to co-operate with the CMA, particularly when making derogation requests. Derogation requests need to be fully specified, reasoned and supported by relevant evidence.



- While the CAT made it clear that it was not expressing any view on whether Facebook had breached the IEO, it did note that it was "*unsatisfactory*" that Facebook effectively proceeded on the basis as though its derogation request had been granted (by submitting its fortnightly compliance statements, as required by the IEO, accompanied by significant qualifications). While the CAT noted that Facebook appeared to have good grounds for submitting that the IEO was unnecessarily wide and burdensome, it considered that the approach Facebook which followed was "*high-risk*" and did not enable the CMA to decide which derogations were appropriate. The CAT was critical of Facebook's lack of engagement with the CMA and failure to provide the CMA with the information requested so far as possible.

CLARIFICATION SHOULD BE SOUGHT FROM THE CMA

- As regards the claim by Facebook that the wording of the IEO was unclear, the CAT held that it is a document that is clear in itself and that the template is familiar to those dealing with IEOs. It recognised that, as with any definitions incorporating terms such as "reasonable steps" or "ordinary course of business", there may be some uncertainty when looking at the margins. However, the CAT noted that in cases where there is such uncertainty, it is open for parties to seek clarification from the CMA.

In conclusion, the CAT found that the CMA acted rationally in deciding that it would not determine the derogation request without further information, and that the CMA's request for information to determine the request was not disproportionate, or in breach of the requirement of legal certainty.

The CAT's decision shows that the exercise of a broad statutory discretion will not be lightly second-guessed by the courts. It also emphasises that it is critical for merging parties to engage early and constructively with the CMA in relation to derogations where an IEO might be imposed. This is particularly important for merger parties given that the CMA has the power to impose fines of up to 5% of global groupwide turnover for breach of an IEO.

As previously noted in our newsletter, the CMA has increasingly taken a tougher stance on compliance with its IEOs. As noted in the September 2020 edition of our newsletter, in August 2020 the CMA imposed a fine of GBP 300,000 on JD Sports and its parent company Pentland Group Limited for failure to comply with its IEO, although this penalty was subsequently withdrawn by the CMA in light of "*issues raised on appeal*" by JD Sports.

CAT puts the boot in CMA merger decision

UK – MERGER CONTROL

On 13 November 2020, the UK Competition Appeal Tribunal ("CAT") published its judgment in relation to the merger of JD Sports and Footasylum. The merger was prohibited by the UK Competition and Markets Authority ("CMA") in May, but JD Sports appealed. The CAT partially upheld the appeal and the decision will now be referred back to the CMA.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Appeals of merger decisions are rare. This case shows that the CAT can reach a decision quickly when such appeals do arise (five months in this case).
- The CAT's judgment provides support for the significant flexibility the CMA has in how it conducts its merger analysis.
- At this time it is unclear whether the appeal will ultimately lead to the CMA changing its decision in light of the developing COVID-19 pandemic.

In May 2020, the CMA prohibited the merger of JD Sports and Footasylum, after finding that shoppers of sports-inspired clothing and footwear would be "worse off" as a result of the merger (see our previous newsletter article here). The CMA concluded that in order to remedy competition concerns, JD Sports must sell Footasylum in its entirety.

In June JD Sports challenged the CMA's decisions on three grounds, alleging that the CMA erred in law and/or acted irrationally in:

- determining whether any lessening of competition caused by the Merger was "substantial", and in assessing the aggregate constraints on the merged entity;
- excluding from the counterfactual the effect of COVID-19 on Footasylum and in its assessment of the effect of COVID-19 on Footasylum; and
- assessing the competitive constraint imposed by: (a) the strategy of a competitor (Frasers Group); (b) suppliers; and (c) Nike's and adidas' own direct to consumer retail offer.

In relation to the first ground, the CAT found that the CMA has a *"wide margin of appreciation"* in how it conducts its merger analysis and also that the CMA had *"substantial reasons for its assessment"* that the merger would lead to a substantial lessening of competition. It also unanimously dismissed JD Sports' arguments in relation to the constraint from Frasers Group and suppliers.

However, the CAT upheld the appeal in relation to the likely effects of COVID-19. The CAT found that the CMA did not go far enough in its information gathering about the impact of COVID-19. In particular the CMA acted irrationally in its failure to follow up inquiries with suppliers on their incentives to increase direct to consumer sales due to COVID-19 and the failure to make direct inquiries of Footasylum's primary lender as to the likely effects of the COVID-19 pandemic.

As a result the CAT has quashed those parts of the CMA's final report relating to the likely effects of the COVID-19 pandemic. At the time of writing the CMA is considering how it will address the CAT's decision, including whether it will appeal. Even if the CMA reassess the impact of COVID-19, it may not necessarily change its overall decision. However, the CMA has access to significantly more information on the impact of the pandemic than was available when it was conducting its review in April.

The CMA is appealing the CAT judgment.

CMA blocks and orders divestment of completed investment platform software merger

UK – MERGER CONTROL

On 6 November 2020, the UK Competition and Markets Authority ("CMA") ordered FNZ to sell GBST, having concluded that the acquisition raised significant competition concerns in the supply of software and services which enable retail investment platforms in the UK.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Although mergers can be completed without seeking UK clearance, this places risk on the purchaser. The CMA can call the case in for investigation and, if competition concerns are found, can ultimately block a completed merger and require the divestment of the entirety of the acquired business.
- In 2020 to date, the CMA has prohibited more mergers at Phase 2 (four, including JD Sports/Footasylum) than it has cleared (three, including Amazon/Deliveroo and Bauer Media), with a further six transactions abandoned by the parties.

In November 2019, FNZ, a UK-based wealth management technology company, completed its acquisition of GBST, an Australian financial technology company. The acquisition was not notified to the CMA, but the CMA opened an own-initiative investigation and imposed a hold separate order preventing integration of the two businesses. On 8 April 2020, following a Phase 1 investigation during which FNZ declined to offer remedies, the CMA referred the acquisition for an in-depth Phase 2 investigation.

At Phase 2, the CMA concluded that the acquisition would result in a significant lessening of competition. Although there are differences in FNZ and GBST's business models (the former providing an integrated software and servicing solution, the latter providing software only), the CMA found that they are two of the four leading suppliers of retail platform solutions to investment platforms in the UK, compete closely with one another and face a significant competitive constraint from just one other supplier. The merged business would be by far the largest UK supplier with a market share of nearly 50%. The CMA was concerned that the merger could cause costs to rise and service quality to decline for millions of UK consumers who hold pensions or other investments.

The CMA considered three remedy options. The partial divestiture of GBST's UK or global wealth management business was discounted as an effective remedy, in particular, because it was closely integrated with other parts of GBST's business. The CMA considered that risks would arise from divesting just the UK business, because FNZ would have retained access to the source code for GBST's wealth management product for use outside the UK. A source code licensing remedy proposed by FNZ was found to be highly unlikely to address the competition concerns. The CMA therefore concluded the only effective remedy would be for FNZ to fully divest GBST.

This case provides a further example of the CMA's power to block mergers at Phase 2, following JD Sports/Footasylum (since partially overturned by the Competition Appeal Tribunal – see our related newsletter article in this edition) and Sainsbury's/Asda, and is a reminder of the risks of completing transactions without UK merger clearance.

Bound by settlement – truck cartelists' appeal on preliminary issue dismissed

UK – PRIVATE DAMAGES ACTIONS

On 11 November 2020, the Court of Appeal emphatically dismissed an appeal brought by five truck manufacturers against a judgment of the Competition Appeal Tribunal ("CAT") handed down in March 2020 relating to the evidential weight to be given to recitals to a European Commission infringement decision issued under the Commission's settlement procedure (Regulation No 622/2008 and Notice OJ 2008 C167/1).

The Court of Appeal upheld the CAT's ruling that it would be an abuse of process for the truck manufacturers, in subsequent follow-on damages proceedings, to deny or not admit facts that they are recorded as having accepted in the European Commission's infringement decision.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Court of Appeal's judgment is likely to have important implications for parties involved in damages claims before the English courts stemming from European Commission settlement decisions.
- In particular, the judgment will be welcome news to current and potential claimants, who will not be burdened with proving at trial facts previously admitted in a European Commission settlement decision.
- The European Commission's settlement procedure will remain an attractive option to companies accused of cartel conduct, in particular a 10% reduction in fines, a much shorter (and uncontested) procedure, and a more streamlined decision. However, the evidential weight likely to be attributed to the content of a settlement decision in follow-on damages claims before the English courts will have to be borne in mind by settling parties.

BACKGROUND TO THE APPEAL

In July 2016, following a settlement procedure, the European Commission issued a decision (the "Settlement Decision") finding various entities within the MAN, Volvo/Renault, Daimler, Iveco and DAF groups guilty of collusion in relation to pricing and gross price increases for medium and heavy trucks, and the timing and passing on of costs for implementing new emission technologies.

By admitting the infringement, as set out in the Settlement Decision, the addressees were offered a 10% reduction in fines and the opportunity to avoid a heavily contested decision and protracted procedure. The Settlement Decision has led to numerous follow-on damages actions, in the UK and across Europe. In the UK, most of the actions are being heard by the CAT.

The first of these claims were brought against some or all of the addressees and their UK subsidiaries between late 2016 and late 2017 by Royal Mail, British Telecom, Dawsongroup, Ryder, Veolia, Suez and Wolseley (and others). These claims have to date been jointly case-managed by the CAT and were the subject of a preliminary issue hearing in December 2019 to determine the legal nature of the recitals to the Settlement Decision.

In its judgment on 4 March 2020, the CAT held that:

(i) in addition to the operative part of the Settlement Decision, a number of the findings in recitals to that Decision were also binding upon the defendants as forming part of the "essential basis" for the operative part, and

(ii) that it would be a breach of the English law doctrine of abuse of process for the defendants to deny (or not admit) non-binding findings that they had previously

admitted as part of the settlement process, in subsequent proceedings for follow-on damages.

The CAT nevertheless enumerated a number of limited exceptions to its ruling on abuse of process, which include, for example, where a defendant relies on new evidence which it could not reasonably have had access to at the time of the proceedings before the Commission. In such cases, it would not be an abuse for a defendant to seek to advance facts inconsistent with a recital.

The defendants appealed the second limb of the judgment, arguing, *inter alia*, that the CAT's judgment breached EU law in making recitals that were not binding at EU level binding in national proceedings. The defendants also sought a preliminary reference to the European Court of Justice.

THE COURT OF APPEAL'S JUDGMENT

The Court of Appeal unanimously dismissed the appeal. It rejected the truck manufacturers' arguments that the application of the English law on abuse of process was incompatible with EU law.

The Court of Appeal ruled that where there is a settlement decision and the addressees of that decision have accepted the facts found by the Commission, there is nothing in EU law that mandates the national court in follow-on proceedings to allow non-essential recitals to be challenged or re-litigated. Agreeing with the CAT, the Court held that it would create great unfairness to the Respondents to have to prove facts that the Appellants had already admitted in the settlement proceedings.

On this basis, the Court of Appeal considered that the matters at issue were *acte clair* and did not require a reference to the European Court of Justice. The Court refused permission to appeal to the Supreme Court and ordered the defendants to pay the claimants' costs of the appeals.

CONCLUDING REMARKS

The issue before the Court of Appeal was straightforward: is it possible for parties to make admissions for the purposes of achieving the benefits of settlement, but then resile from those admissions in subsequent follow-on damages proceedings. The Court's response was clear: it held that it would be "*an affront to most people's ideas of justice*" for the truck manufacturers to be allowed to resile from admissions which the Settlement Decision records them as having made to the European Commission, and to put the claimants to proof of those admitted facts.

The Court of Appeal's judgment, together with the CAT's ruling, provide, for the first time, some clarity on the relevant test for determining which recitals in a cartel infringement are binding in follow-on proceedings before an English court. Perhaps more importantly, however, they curtail a defendant's ability to resile from admissions made to the European Commission in order to benefit from the settlement procedure.

While these judgments only apply to proceedings before the English courts, they are likely to be scrutinised by courts in other EU jurisdictions facing similar issues, and it will be interesting to see how other courts deal with this issue.

The Court of Appeal's judgment can be found here.

CMA publishes first state of UK competition report

UK – UPDATE

On 30 November 2020, the UK Competition and Markets Authority ("CMA") published its first state of competition report, commissioned by the UK government. The purpose of the report was to at the state of competition in the UK economy. It is intended to provide a baseline for future analysis and monitoring, by the CMA and others, to inform the work of the CMA, and to contribute to wider public debate on these important issues.

STATE OF COMPETITION

The CMA has summarised the report's key findings as follows:

- **Decline in competition:** Competition across the economy as a whole may have declined over the last 20 years.
- **Rise in concentration:** Concentration rose as a result of the 2008 recession and, though it has decreased slightly since 2010, it remains 3 percentage points higher today than in 1998.
- **Rising profits:** Among the most profitable companies in the economy, profits and mark-ups appear to be rising. The firms that already had the largest mark-ups saw their mark-ups increase by 9% over the last 20 years.

- **Consumer complaints:** The UK has a relatively high incidence of "consumer problems" compared to EU member states and "poor complaint handling". In 2018, around 1 in 3 UK customers experienced a consumer problem across all markets, the highest in the EU (where the average is 22%). The CMA states that evidence also shows that transport, telecommunications/mobile/internet, utilities and property services perform relatively poorly when it comes to satisfaction and trust.
- **Consumer switching:** The UK scores relatively well in surveys on consumer switching in some service markets, although switching is not as common among low income and financially insecure consumers.

EARLY EFFECTS OF COVID-19

In addition, the CMA placed questions in two ongoing Office for National Statistics surveys and considered "business demographic" data: the number of businesses created and closed. Although the CMA states that it is still early to draw any definitive conclusions about the impact of the pandemic on competition, it states that its initial data shows:

- **Less shopping around:** Around 40% of consumers report shopping around less than usual, particularly among older groups (55+) and those with an illness or condition that limits their ability to perform day-to-day activities.
- **Increased concentration:** The accommodation and food services, as well as the arts, entertainment and recreation sectors are more likely to report that the number of competitors in their areas had decreased.
- **Online sales:** Most businesses did not report experiencing any challenge in selling goods and services online.
- **Postponed/reduced expansion:** 40% of companies have postponed or reduced plans to expand and the new businesses created up to Q3 2020 appear to be smaller in size than in previous years.
- **Reduction in new business:** Construction, accommodation, food, and arts, entertainment and recreation saw the biggest drops in the number of businesses

being created. There are no clear regional differences in business creation, although London is the only area to record positive business growth in both Q1 and Q2 2020.

- **Business closures:** There has so far been no spike in business closures, although the overall business population shrank in Q2 2020 for the first time since Q2 2017

UK Government introduces new National Security and Investment regime

UK – FDI/NATIONAL SECURITY

INTRODUCTION

A NEW NATIONAL SECURITY NOTIFICATION c REGIME

On 11 November 2020, the UK Government introduced its National Security and Investment Bill ("Bill") into Parliament, which will significantly strengthen its powers to investigate and potentially prohibit transactions on national security grounds. The Bill contains a mandatory notification regime, backed up by criminal sanctions, for transactions in sectors thought most likely to raise national security concerns, and a voluntary notification process (underpinned by a "call-in" power) for other transactions that may affect UK national security interests. In its impact assessment of the proposed measures, the Government states that it envisages around 1,000-1,830 mandatory notifications being made each year, with 70-95 detailed national security assessments undertaken under both the compulsory and voluntary regimes. The Bill heralds a fundamental change in approach: there have historically been very few transactions which have been formally assessed under the Government's existing, more limited, national security powers.

The proposals follow an initial consultation launched in October 2017 and a White Paper issued in June 2018.

KEY IMPLICATIONS

The Government has presented the proposals as a measured response to the increased national security risks the UK faces, noting that similar measures have been adopted in many other countries. It is true that many countries, such as the USA, Germany and France, have recently strengthened, or are in the process of strengthening, their national security/foreign investment regimes. There is also a new FDI regime at EU level. However, the new UK regime would involve a sea-change in the UK's approach to national security assessments and will result in:

- a very significant increase both in the number of transactions being assessed for national security concerns and potentially those being the subject of remedies, with serious consequences (criminal and civil penalties) for completing a qualifying acquisition without clearance;
- potentially significant impacts on deal timetables; and
- a potential reduction in deal certainty and an increase in overall execution risk.

KEY FEATURES OF THE NEW REGIME

Notification and enforcement: The proposed Act will establish a new statutory regime for Government scrutiny of, and intervention in, investments and acquisitions for the purpose of protecting national security. The envisaged regime makes provision for:

- **a mandatory notification system** for transactions involving the acquisition of a right or interest (typically at least a 15% holding) in a qualifying legal entity (i.e. excluding "assets deals") in 17 key sectors, where clearance must be obtained before closing;
- **a regime with no thresholds.** The range of transactions that are potentially caught is very extensive, as there will be no minimum turnover level or value in relation to the target business;
- **sanctions**, including imprisonment (of up to 5 years) and fines (up to 5% of worldwide turnover or GBP 10 million – whichever is greater) for non-compliance with the mandatory notification requirement, together with the transaction being void;
- **powers enabling the Secretary of State to amend** by Order the sectors and activities which fall within the mandatory notification system;
- **a power for the Secretary of State to "call in" transactions/investments** (including asset deals) that are not subject to mandatory notification to undertake a national security assessment for up to five years after they have taken place (reduced to six months where the Secretary of State becomes aware of the transaction);
- **voluntary notifications** from parties to transactions not caught by the mandatory regime who consider that their transaction or acquisition may raise national security concerns;
- **a power to adopt interim "hold separate" orders** in relation to completed transactions to prevent or reverse pre-emptive action through integration of the merging businesses;
- **a wide range of remedies** to address risks to national security; and
- **a mechanism for legal challenge**, which will be by way of judicial review rather than a full merits challenge.

What types of transactions are caught?: "National Security" will not be defined in the Act, but the Government has proposed, and is consulting on, a list of 17 sectors (to be defined in regulations) which it considers to be particularly sensitive and will be subject to mandatory notification, including:

- military/dual use and defence products/services;
- essential national infrastructure (including transport, telecommunications, energy networks, data infrastructure and satellites);
- advanced IT, quantum and biosynthesis technologies; and
- critical suppliers to Government or the emergency services.

Retrospective application: transactions that close on or after 12 November 2020 but before the Act is adopted can be retrospectively reviewed using the call-in regime once the Bill becomes law. The merger control provisions of the Enterprise Act 2002 will continue to apply in the interim period (see our Quickguide on UK Merger Control), so it is likely that the Government will only use this provision where transactions fall outside the existing national security provisions of the Enterprise Act. Effectively, therefore, the Government will have the ability to review transactions that complete after the Bill is introduced but before the Act is adopted for up to five years following completion.

Review timetable: A review will take up to 30 working days from notification. If, following that initial review period, the transaction is called in for a detailed national security assessment, the assessment will last an initial 30 working days, extendable by a further 45 working days (with scope for further extensions).

- **To whom does the regime apply?:** The regime will apply equally to UK as well as foreign acquirers/investors from any country, which is consistent with the approach under the existing national security regime. It will also to apply to "foreign-to-foreign" transactions where there is a change of control over a specified business that carries on activity in the UK.

MANDATORY NOTIFICATION REGIME FOR "NOTIFIABLE ACQUISITIONS"

WHAT IS NOTIFIABLE ACQUISITION?

The Bill provides for a mandatory notification requirement for entities involved in specific transactions, referred to as '**notifiable acquisitions**'. A notifiable acquisition takes place, broadly, where a person:

- gains control of a qualifying entity of a specified description; or
- acquires a right or interest equivalent to 15% or more of the shares or voting rights in a qualifying entity.

"Control" is defined as acquiring 25% or more of the relevant shares or voting rights of a qualifying entity, and a fresh acquisition of control (and therefore a further notifiable acquisition) will arise where the investor moves through the 50% and 75% share ownership/voting thresholds.

A qualifying entity is, defined broadly, as any entity that is not an individual (i.e. including companies and partnerships), and regulations will be adopted specifying the "descriptions" of the relevant activities that will be caught by these provisions. Importantly, assets in themselves will not constitute qualifying entities, and therefore "assets deals" will not be subject to mandatory notification.

The Government has identified the following 17 sectors as potentially raising national security concerns and has launched a consultation (to run until 6 January 2021) on the proposed definitions of the precise activities within these sectors which will be covered by the mandatory notification obligation, or be subject to the "call-in" regime (see section below):

- Civil Nuclear
- Communications
- Data Infrastructure
- Defence
- Energy
- Transport
- Artificial Intelligence
- Autonomous Robotics
- Computing Hardware
- Cryptographic Authentication
- Advanced Materials
- Quantum Technologies
- Engineering Biology
- Critical Suppliers to Government
- Critical Suppliers to the Emergency Services
- Military or Dual-Use Technologies
- Satellite and Space Technologies

POWER TO AMEND SCOPE

The Bill provides a power for the Secretary of State, through regulations, to specify and amend the scope of what may be considered a notifiable acquisition - to enable the regime to remain current as the nature of national security threats to the UK evolves. This may include:

- specifying specific sectors of the economy in which enterprises must notify the Secretary of State of notifiable acquisitions;

- exempting acquisitions from the mandatory notification regime on the basis of the characteristics of the acquirer; or
- adding or removing specific types of transaction to/from the mandatory notification regime.

SUSPENSORY REGIME

Relevant parties must notify the Secretary of State of notifiable acquisitions before they take place in order to obtain clearance to close the transaction.

A notifiable acquisition that is completed before being approved by the Secretary of State has no legal effect and will be void. The relevant parties may also be subject to criminal sanctions (imprisonment of up to five years) and civil penalties (of up to 5% of worldwide turnover or GBP 10 million – whichever is greater) for completing the acquisition without clearance. The Secretary of State may retrospectively validate a notifiable acquisition. Regulations will specify how to notify notifiable acquisitions to the Secretary of State.

VOLUNTARY NOTIFICATION AND "CALL-IN" REGIME FOR "TRIGGER EVENTS"

CALL-IN REGIME

The Secretary of State may review specific acquisitions of control of legal entities and assets by issuing "call-in notices". The transactions which are within the scope of this function are collectively known as "trigger events".

A call-in notice may:

- be issued up to **five years after a trigger event** has taken place, so long as that five year period does not extend back before 12 November 2020;
- **not be issued more than six months after the day on which the Secretary of State became aware of the trigger event**, where such trigger event has already occurred (in practice via email or other direct communication from the parties).

A trigger event will occur when a person:

- **gains control (as defined above) of a qualifying entity** or obtains the ability materially to influence the policy of a qualifying entity. The concept of acquiring control of an entity by acquiring material influence over its policy has been drawn from the merger control regime and so it is likely that the concept under the Bill will be interpreted in the same broad way that it is by the CMA under the UK merger control rules (see our Quickguide on UK Merger Control); or
- **gains control of a qualifying asset**. A person is defined as gaining control of a qualifying asset if he/she acquires a right or interest in relation to it and is able to use it, or direct or control its use, to a greater extent than prior to its acquisition. A "qualifying asset" is defined broadly to include land; tangible moveable property; and ideas, information or techniques which have industrial, commercial or other economic value. Examples of assets in the latter category set out in the Bill include trade secrets, databases, source code, algorithms, formulae, designs, specifications and software.

VOLUNTARY NOTIFICATION REGIME

Parties to transactions that do not meet the criteria for mandatory notification may submit a voluntary notification to the Secretary of State if they consider that their acquisition may constitute a trigger event that could raise national security concerns. To help inform this assessment, the Secretary of State has published a draft statement on how he expects to use the call-in power .

NATIONAL SECURITY ASSESSMENT

INTERIM AND INFORMATION GATHERING POWERS

While a notifiable acquisition or trigger event is being assessed, the Secretary of State will:

- **be able to impose interim remedies** in order to ensure that the effectiveness of the national security assessment or subsequent remedies is not prejudiced by action taken by the parties. For example, in the case of a call-in notice where the deal has completed, the Secretary of State might prohibit activities which would result in the integration of two businesses, or act to safeguard assets, until the national security assessment is complete; and
- **will have wide-ranging information gathering powers**, including the ability to require persons to give evidence, to facilitate assessment of the acquisition. There will be safeguards on the use and disclosure of such information.

REMEDIAL POWERS

If, following an assessment, the Secretary of State determines that a risk to national security has arisen or would arise from a notifiable acquisition or trigger event, the Secretary of State has the power to impose remedies in a final order to prevent, remedy or mitigate the risk. Based on experience of the existing national security regime, remedies are likely to include:

- prohibiting or unwinding the transaction;
- access conditions - for example, limiting access to a particular site or dual-use technology to named individuals;
- information/operating conditions, requiring that only persons with appropriate UK security clearance have access to confidential information or may be part of operational management; and
- conditions requiring the retention of UK staff in key roles at particular sensitive sites.

ENFORCEMENT

Breach of any provision in a final order may lead to the imposition of civil or criminal sanctions. Civil and criminal sanctions can also be imposed for non-compliance with interim orders and information requests.

APPEALS

There will be an appeal process in the High Court (or the Court of Session in Scotland) for civil penalties and requirements to pay associated costs under the Bill. All other decisions under the Bill will be subject to judicial review. The Government will be able to apply for a closed material procedure to protect sensitive information in such proceedings.

ROLE OF THE UK MERGER CONTROL FRAMEWORK

The National Security and Investment regime will be separate from the processes and practice of the UK Competition and Market's Authority's mergers framework under the Enterprise Act 2002 (see our Quickguide on UK Merger Control). The mergers framework will continue to exist once the new regime has been implemented, but it will only apply to competition, media plurality, financial stability and public health emergency considerations; national security considerations will be assessed entirely within the new legal framework. The lower thresholds introduced for certain sectors raising national security concerns will be removed.

WHEN IS THE GOVERNMENT LIKELY TO CALL-IN TRANSACTIONS ON NATIONAL SECURITY GROUNDS?

RISK FACTORS

Alongside the Bill, the Government has issued a draft Statement of policy intent (the "**Statement**") which explains that the Secretary of State expects to take into account the following risk factors in exercising his call-in power:

- **the target risk**: whether the entity or asset being acquired is the type of entity/asset which could potentially give rise to risks to the UK's national security; for example, if it were to fall into hostile hands (see further below);
- **the trigger event risk**: the potential of the underlying acquisition of control to undermine national security. The Statement says that the risk of a trigger event will be assessed according to the practical ability of a party to use an acquisition to undermine national security. The Statement suggests that the Government is particularly concerned about trigger events that may involve the potential for:
    - disruptive or destructive actions, including the ability to corrupt processes or systems;
    - espionage activities i.e. through unauthorised access to sensitive information; or
    - exploitation of the acquisition to exercise inappropriate leverage, for example, in geopolitical discussions; and
- **the acquirer risk**: whether the acquirer, including its ultimate controllers, may seek to use the entity or asset to undermine national security. The Government states that most acquirers do not pose such a risk and that such a risk is most likely to arise from hostile states and parties acting on their behalf. The Statement suggests that hostile states are those which seek to undermine UK national security through a range of traditional and non-traditional means. No specific hostile states are named. It notes that the regime does not regard state-owned entities, sovereign wealth funds – or other entities affiliated with foreign states – as being inherently more likely to pose a national security risk.

TARGET RISK/ACTIVITIES THAT ARE MORE LIKELY TO RAISE NATIONAL SECURITY CONCERNS

The Statement identifies certain "core areas" as being more likely to present a risk to national security; these include activities which are analogous closely related to the activities which are subject to mandatory notification, as well as assets used in connection with such activities. These areas are identified as:

- National infrastructure sectors defined by the Centre for the Protection of National Infrastructure;
- Certain advanced technologies;
- Military and dual-use technologies; and
- Critical direct suppliers to the Government and emergency services sector.

The Statement notes that investments in other areas of the economy could potentially also raise national security risks, although this is less likely. Additionally, the Secretary of State expects to intervene very rarely in asset transactions. However, where assets are integral to a "core area" entity's activities or there is an acquisition of land in a sensitive location, their acquisition is more likely to be called in.

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