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Ashurst Competition Law Newsletter July 2020

From the Editors

Alexi Dimitriou
Counsel

T +44 20 7859 1191
M +44 7789 816 477
alexi.dimitriou@ashurst.com

Donald Slater
Counsel

T +32 2 626 1916
M +32 473 132 473
donald.slater@ashurst.com

Edward McNeill
Senior Associate

T +44 20 7859 2843
M +44 7833 681 814
edward.mcneill@ashurst.com

Laura Carter
Senior Associate

T +44 20 7859 2885
M +44 7824 453 158
laura.carter@ashurst.com

Emile Abdul-Wahab
Associate

T +44 20 7859 2262
M +44 7824 484 273
emile.abdul-wahab@ashurst.com

The July 2020 issue of Ashurst's competition law newsletter features the European Commission's recently launched sector inquiry into the Internet of Things, the landmark Apple tax State aid case, the eagerly anticipated UK online platforms and digital advertising final report, further cartel developments in the UK, developments in German damages actions procedure, Spanish regulator guidance on compliance programmes, as well as other news.

It also includes a feature article on the launch of Open Banking in Australia.

Content

Sector inquiry launched into the Internet of Things

EU - MARKET INVESTIGATIONS & SECTOR INQUIRIES

On 16 July 2020 , the European Commission ("Commission") launched an antitrust competition inquiry into the sector of Internet of Things ("IoT") for consumer-related products and services in the EU. The inquiry complements other actions launched within the framework of the Commission's digital strategy, in particular regulatory initiatives related to artificial intelligence (AI), data and digital platforms.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The inquiry will focus on the consumer-related products and services that are connected to a network and can be controlled at a distance (e.g. via a voice assistant or mobile device).
- Knowledge about the market gained through the inquiry will contribute to the Commission's enforcement of competition law in this sector and may lead proposals for specific regulation of the sector.
- Many of the concerns that the Commission has already suggested it will focus on as part of this sector inquiry are concerns that it has raised in relation to other sectors of the digital economy.

SCOPE

The inquiry will focus on consumer-related products and services that are connected to a network and can be controlled at a distance (e.g. via a voice assistant or mobile device). These include:

- smart home appliances (e.g. fridges, washing machines, smart TVs, smart speakers and lighting systems);
- wearable devices (e.g. smart watches or fitness trackers);
- other smart devices (e.g. music and video streaming services and about the voice assistants used to access them).

AREAS OF POTENTIAL CONCERN

Knowledge about the market gained through the inquiry will contribute to the Commission's enforcement of competition law in this sector. The Commission has already raised the following areas of potential concern and focus:

- market players using control over data to distort competition, or otherwise close off these markets for competitors;
- restrictions regarding data access;
- restrictions regarding data interoperability;
- self-preferencing;
- practices linked to the use of proprietary standards; and
- the importance of network effects and economies of scale, which might lead to the fast emergence of dominant digital ecosystems and gatekeepers.

POTENTIAL OUTCOMES

The Commission has no power to adopt measures aimed at remedying a situation under investigation in a sector inquiry. However, the information gathered can be used by the Commission to assess whether it should:

- open specific investigations into practices which may infringe the prohibitions on anti-competitive agreements and abuse of a dominant position (Articles 101 and 102 TFEU). This happened after both the Commission's energy and e-commerce sector inquiries; and

- issue proposals for legislation. In the context of the energy sector inquiry, for example, the Commission took an active role in the subsequent debate on unbundling in the third energy package and created political momentum for increased competition enforcement and efficient remedies.

NEXT STEPS AND COMMENT

Requests for information have already been sent out to a range of players. Recipient companies include smart device manufacturers, software developers and related service providers. A preliminary report on the replies will be published for consultation in spring 2021 and the Commission's final report will follow in the summer of 2022.

Many of the concerns that the Commission has already suggested it will focus on as part of this sector inquiry are concerns that it has raised in relation to other sectors of the digital economy in terms of merger control and antitrust investigations, and in relation to the proposed need for ex-ante platform regulation and new competition tool. The wider digital economy will therefore be watching this space closely.

For more information on EU sector inquires, see our free Quickguide.

€13 billion Apple tax recovery decision quashed

EU - STATE AID

On 15 July 2020, the EU General Court ("GC") handed down its much awaited judgment in the Apple case. It overturned the European Commission's ("Commission") decision ordering Ireland to recover EUR 13 billion (plus interests) in illegal State aid from Apple in its entirety.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Commission may use an 'arms-length principle' as a 'tool' to assess whether profit allocation methods endorsed by individual tax rulings are in line with market conditions even if that principle is formally not incorporated into national law. In so doing, the Commission can refer to OECD guidelines.
- When analysing tax measures, the determination of the reference framework is relevant to assess the existence of an advantage. In its Apple judgment, the GC carried out a detailed analysis of the national legal framework.
- Methodological defects in the adoption of the ruling (such as inconsistencies or cursory assessments) are not, in themselves, sufficient to prove the existence of an advantage. The Commission must prove that these defects have led to an actual reduction in the tax burden on the recipients of the measures.

BACKGROUND

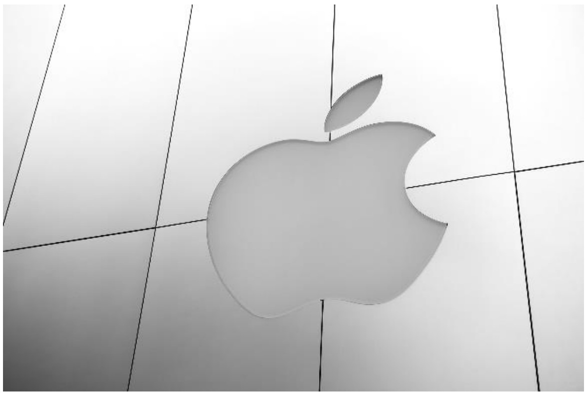
In August 2016, the Commission found that Apple had been granted illegal State aid of up to EUR 13 billion as a consequence of tax rulings issued by the Ireland in 1991 and 2007 (the "Decision"). These involved two Apple Group companies which were incorporated in Ireland, but not tax resident there. As a result of the tax rulings, most of the sales profits of Apple Sales International ("ASI") and Apple Operations Europe ("AOE") were allocated to their respective head offices. However, according to the Commission:

- these head offices, which had no physical presence or employees, were unable to control or manage the Apple Group's IP licences; and
- only the Irish branches of these companies had the capacity to perform functions related to those licenses.

On this basis, the Commission concluded that the sales profits of ASI and AOE should have been recorded with the Irish branches and taxed in Ireland. It considered that the Irish tax rulings had endorsed an artificial internal allocation of profits within ASI and AOE respectively, and therefore conferred a selective advantage upon them. Consequently, the Commission ordered Ireland to recoup up to EUR 13 billion, plus interest, from Apple.

This Decision was the third in a string of decisions concerning tax rulings allegedly granting illegal State aid to multinationals. The Decision and associated record recovery amount attracted criticism notably from the US treasury, for "retroactively applying a sweeping new State aid theory that is contrary to well-established legal principles [and] calls into question the tax rules of individual countries".

Both Ireland and Apple appealed the Decision before the GC. The judgment in the Apple case is the third one delivered concerning this new Commission's policy after the *Fiat* and *Starbucks* judgments back in September 2019 (see our September 2019 newsletter article).[1]



CONFIRMATION OF THE COMMISSION'S COMPETENCE AND CLARIFICATION OF ITS LIMITS

In line with the *Fiat* and *Starbucks* judgments, the GC takes the view that the Commission is competent to verify, under EU State aid rules, whether an individual tax ruling granted an advantage to the concerned tax payer as compared to the *'normal'* taxation system.

The GC confirmed that:

- the Commission may use an '*arm's-length principle*' as a '*tool*' to screen whether the tax rulings at issue were in line with market conditions; and
- the Commission can apply the Authorised OECD Approach which, in the GC's words, reflect the '*international consensus*' and thus have '*real practical significance*' when interpreting questions regarding profit allocation to permanent establishment.[2]

The GC took these views despite the fact that neither the *'arm's-length principle'* nor the Authorised OECD Approach were '*formally incorporated into Irish law*' at the time of the rulings.

However, and arguably in contradiction with the above, the GC draws some limits to the Commission's action by clarifying that:

- there is no *'freestanding obligation*' to apply an *'arm's length principle'* arising from Article 107 TFEU and obliging Member States to apply it horizontally and in all areas of their national tax law;
- the Commission cannot '*disregard the national rules of taxation*' and determine *'independently'* what constitutes the *'normal'* taxation of an integrated company.

As a result, and in contrast with its *Fiat* and *Starbucks* judgements, the GC carried a detailed analysis of the national legal framework, including the relevant legislation and case law.

FAILURE BY THE COMMISSION TO DISCHARGE ITS BURDEN OF PROOF

The GC concluded that the Commission had failed to show to the *'requisite standard of proof that there was a selective advantage*' and annulled the Decision in its entirety. The GC held that the Commission's **primary line of reasoning** was based on erroneous assessments of:

- the *'normal'* taxation under the applicable Irish tax law. The Commission was wrong to allocate *'by default'* the profits derived from the use of the IP licences to the Irish branches, solely on the basis that ASI and AOE had no staff nor physical presence outside their Irish branches (so-called *'exclusion'* approach). The GC accepted that, according to Irish case law, the relevant determining factor when deciding the relevant profits of a branch is the extent to which the branch has *'actual'* control of property at issue; and

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1 The *Fiat* judgment is currently under appeal before the EU Court of Justice.

2 Note that the issue in the *Apple* case (taxation of companies that are not tax resident in Ireland and which trade in that State through their Irish branches) differed from in the *Fiat* and *Starbucks* cases (prices of intra-group transactions within a group of undertakings).

- the activities within the Apple Group. The Commission failed to show that the IP licences should have been allocated to the Irish branches of ASI and AOE in view of: (a) the activities and functions *'actually'* performed by the Irish branches of ASI and AOE; and (b) the strategic decisions taken and implemented outside of those branches (which were centralised in the US).

In addition, the GC considered that the Commission did not demonstrate, in its **subsidiary line of reasoning**, methodological errors in the contested tax rulings (concerning the choice of the tested party, the choice of the profit level indicator and the levels of return accepted) which led to a reduction in ASI and AOE's chargeable profits in Ireland.

While the General Court explicitly *'regrets the incomplete and occasionally inconsistent nature of the contested tax rulings'*,[3] it made clear that these *'defects'* were not, in themselves, sufficient to prove the existence of an advantage.

CONCLUSION AND NEXT STEPS

The *Apple* judgment, shows that the Commission is required to conduct a thorough analysis to meet the requisite standard of proof. In particular, the Commission cannot presume the existence of a selective advantage or a consequence of mere 'methodological defects' in the adoption of the rulings.

Following the judgment, Commissioner Vestager stated that *'the Commission will continue to look at aggressive tax planning measures under EU State aid rules to assess whether they result in illegal State aid. At the same time, State aid enforcement needs to go hand in hand with a change in corporate philosophies and the right legislation to address loopholes and ensure transparency*.'

The *Apple* judgment may still be appealed before the Court of Justice.

On the same day as the *Apple* judgment, the Commission unveiled its new tax package. In this context, the Commission will explore how to make full use of Article 116 TFEU, which allows proposals on taxation to be adopted if the qualified majority is reached. *Ashurst represented Luxembourg, who intervened in support of Ireland in Case T-778/16.*

Fines for ethylene purchasing cartel

EU – ANTITRUST - CARTELS

On 14 July 2020, the European Commission ("Commission") fined ethylene purchasers Orbia, Clariant and Celanese EUR 260 million for having colluded and exchanged information on purchase prices on the ethylene merchant market with a fourth participant Westlake, who received full immunity for blowing the whistle.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This case is the first purchasing horizontal cartel detected in the chemical industry sanctioned under the Commission's 2006 Fines Guidelines.
- Unlike in most cartels, where companies collude to increase their sale prices, the four companies colluded to lower the value of ethylene, to the detriment of ethylene sellers – also known as a purchasing cartel.
- When calculating the penalties, the Commission used the value of purchases in the EU rather than the value of sales to set the level of the fines. As the Commission presumed that those figures were artificially lowered by the cartel conduct, it used its discretion to increase the amount of the fine for all companies by 10%.
- The cartelists settled the investigation with the Commission and benefited from fine reductions in exchange for their cooperation with the Commission and

[3] See the press release of the GC.

acknowledging their participation in the cartel.

THE CARTEL

In May 2016, Commission officials conducted dawn raids on companies active in the market for the purchase of ethylene. The purchase price of ethylene is very volatile and, in order to reduce the risk of price volatility, ethylene supply agreements refer to a pricing formula, which often includes a Monthly Contract Price ("MCP") - an industry price reference resulting from individual negotiations between ethylene buyers and sellers.

During its investigation, the Commission found that the four ethylene purchasers coordinated their price negotiation strategies before and during the bilateral MCP 'settlement' negotiations with ethylene sellers to push the MCP down and therefore colluded to buy ethylene for the lowest possible price to the detriment of ethylene sellers. The Commission also found that the four ethylene purchasers exchanged price-related information.

The purchasing cartel took place during the process of establishing the MCP and lasted from December 2011 to March 2017. The conduct concerned markets in Belgium, France, Germany and the Netherlands.

THE FINES

On 14 July 2020, the Commission fined Orbia, Clariant and Celanese EUR 260 million for breaching the Article 101 TFEU prohibition on anticompetitive agreements. A fourth participant in the purchasing cartel, Westlake, received full immunity for revealing the existence of the cartel to the Commission, avoiding a fine of approximately EUR 190 million. All four companies admitted their involvement and settled the case.

As the cartel concerned a collusion on purchase prices, the Commission used the value of purchases in the European Union, rather than the value of sales, to set the level of the fines. The Commission also used its discretion under the 2006 Guidelines on fines to increase the amount of the fine for all companies by 10% under the assumption that those figures were presumably artificially lowered because of the price coordination. Furthermore, in setting the amount of the fine, the Commission took account of the fact that Clariant had previously been sanctioned for a similar infringement.

Applying its 2006 Leniency Notice, the Commission granted Westlake full immunity for revealing the existence of the cartel. Orbia, Clariant and Celanese benefited from reductions of their fines for their cooperation with the Commission investigation. The reductions reflect the timing of their cooperation and the extent to which the evidence they provided helped the Commission to prove the existence of the cartel in which they were involved. In addition, Orbia, Clariant and Celanese received a further 10% discount each for settlement, under the Commission's 2008 Settlement Notice.

This case is the Commission's first purchasing horizontal cartel relating to the chemical industry sanctioned under the 2006 Guidelines on fines.

Procedural flaws invalidate French dawn raids

FRANCE – PROCEDURES – DAWN RAIDS

On 8 July 2020, the Paris Court of appeal ("the Court") annulled dawn raids conducted by the French Competition Authority ("the FCA") at Whirlpool's premises in 2014.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- When a dawn raid is conducted on the basis of documents seized by the FCA during previous dawn raids, the list of these documents must be attached to the order authorising the subsequent dawn raids in order to ensure effective remedy against the order.
- The FCA may not ground a request to conduct dawn raids on the basis of evidence gathered during a previous dawn raid if this dawn raid has been annulled by a court.

On 27 and 28 May 2014, the FCA raided Whirlpool's premises to find evidence of an alleged price-fixing cartel in the domestic appliance sector. These investigations were conducted by the FCA following the discovery of initial evidence during previous dawn raids conducted on the premises of Samsung and Fagor Brandt. Whirlpool subsequently challenged the validity of these raids before national courts.

After the Court first rejected its claims in 2017, the French Supreme Court overturned the judgment and sent the case back to the Court. In this judgment dated 8 July 2020, the Court reversed its previous judgment and annulled the dawn raids, ruling the following:

- First, that the list of documents seized during the previous raid was not attached to the order authorising the dawn raid, which resulted in Whirlpool being deprived of its right to an effective remedy against the order.
- Second, that the raid on Samsung's premises had already been annulled by the Supreme Court in 2017 because of the violation of its rights to defence (Samsung had been deprived of its right to contact its lawyers until the investigators placed seals in its premises – see our summary here). The FCA was therefore not authorized to use evidence gathered during this previous raid to support its request for an authorization to carry out consecutive dawn raids. According to the Court, the circumstance that the court order was not solely based on this evidence is not relevant, as it still constitutes one of the main grounds of the order.

As a consequence, the Court annulled dawn raids on Whirlpool's premises, preventing the FCA from keeping the seized documents or a copy.

€93 million fine for French double-sided cold meat cartel **FRANCE – ANTITRUST – CARTELS**

The French Competition Authority ("FCA") has fined twelve undertakings involved in a cartel at multiple levels of the ham and cold meats sector.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The fines concerns several cold meat manufacturers who co-ordinated their conduct both on the upstream meat procurement markets and on the downstream markets for the wholesale sale of ham and cold meats.
- For only the second time in its decisional practice, the FCA did not grant impunity from fines to the first leniency applicant.

On 16 July 2020, the FCA issued a decision (n°20-D-09) imposing fines to 12 undertakings which were party to a cartel in the ham and cold meats sector between 2010 and 2013. The investigation was triggered by an initial leniency application, followed by second application, and dawn raids conducted in 2013.

The cartel consisted of three distinct infringements set of practices that took place at different levels of the supply chain, namely:

- co-ordination (including information exchange) on prices on the upstream market for the procurement of ham flank (used to produce cooked hams), purchased by the manufacturers from slaughterhouses; and
- co-ordination on prices on the downstream markets for the sale of private labels and value for money products to retailers (second and third infringements).

Other than the double-sided nature of this conduct, two additional aspects of the decision are worth noting:

- First, the FCA used an unusual method to determine the amount of fines. It calculated the fines on the basis of the downstream sales and upstream purchases made by the cartelists, but did not explicitly mention the proportion of the downstream sales or upstream purchases taken into account to calculate the fine's basic amount.
- Second, for only the second time in its decisional practice (see FCA, decision n°15-D-19 dated 15 December 2015), the FCA did not grant immunity from fines to the first leniency applicant. This was because that applicant did not provide complete information on the cartel, having omitted to report some of the cartel meetings.

Cartel damages: Group liability and evidentiary burden in Germany

GERMANY – PRIVATE DAMAGES ACTIONS

On 8 July 2020, The German Lower Regional Court of Dortmund ("Court") recently handed down its ruling regarding follow-on damages against a specialist wholesale company for sanitary and heating products. Damages were sought following a fine of the German Federal Cartel Office ("FCO") relating to coordinated of price calculations. In its ruling, the Court comments on the general liability of group companies for damages caused by the economic unit they belong

to as well as the necessary evidentiary burden placed on the plaintiff for the assertion of damages in follow-on antitrust proceedings.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- In accordance with the Skanska judgment, the Court considers a (group) company may be liable for damages resulting from a violation of competition law committed by another entity within the same group.
- The claimant needs to establish and prove sufficient facts with respect both being affected and actually harmed by the anti-competitive conduct. It is not sufficient to simply refer to general economic evidence which does not cover the specific dispute at hand.
- In instances where claimant meets such requirements, the court may estimate the damages to be awarded "free-handed". In such cases, the court may also consider the specifics of the respective anti-competitive behaviour.

One of the hot topics in private enforcement of competition law at the moment is the question of to whom liability for damages caused by anticompetitive behaviour extends. This question is particularly important in instances when a claim is brought against a (group) company which was not itself found to have infringed competition law, but which belongs to the same "economic unit" as the group entity that was subject to an infringement decision.

In its ruling, the Court challenges the positions of other German courts of first instance. The Court confirmed, drawing on the principles of the ruling of the European Court of Justice in *Skanska*, that group companies are generally liable to cartel damage claims regarding breaches of competition law by other companies of the same group.

The Court, however, did not need to take its assessment any further as the action was unsubstantiated with respect to other prerequisites for liability under German law.

The action was thus dismissed. Nevertheless, the Court seemed to sympathize with the a "free-handed" estimation of the amount in damages to be awarded by the judge. However, it was stressed that such an estimate requires the claimant to substantiate its claim, i.e. to properly establish the facts to base such estimate on.

In the present case, the Court found the claimant to have not met this requirement, since it only submitted a vast number of documents (much of which did not relate to the concerned products) and had relied on generic references to studies in order to determine the damage suffered. The Court ruled that a "free-handed" approach to calculating damages is only applicable if the facts presented allow the other party to effectively defend itself against such claim; in addition, the specific circumstances of the anti-competitive conduct also needs to be considered.

Spanish authority publishes compliance guidance

SPAIN – NEW LAW/POLICY - PROCEDURE

The Spanish competition authority ("CNMC") has published a "Guide on Regulatory Compliance Programmes in Relation to Competition Law" (the "Compliance Guide") which provides guidance on the circumstances in which internal compliance programmes can lead to more lenient sanctions imposed as a result of a breach of competition law.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- With this publication, the CNMC aims to incorporate compliance considerations into companies' day-to-day decision-making processes.

- A positive evaluation of a compliance programme by the CNMC could entail a reduction of the fines that the company might face in an antitrust investigation, and (in the case of a bid-rigging infringement) potential avoid a ban from participating in future public tenders.
- However, the mere implementation of a compliance programme cannot in itself benefit from the above. It must meet a number of criteria that will be assessed on a case-by-case basis by the CNMC.

The Compliance Guide offers two key messages:

- the mere implementation of a compliance programme (either before or after an investigation is launched) does not constitute in itself a mitigating circumstance. It needs to meet a number of criteria that will be assessed on a case by case basis by the CNMC; and
- a positive evaluation of the compliance programme can result in:
  - a reduction in the level of fine that the company might face, and possibly immunity (in certain circumstances where the infringing conduct is reported to the CNMC but immunity applications are not usually applicable); and
  - avoiding a ban from participating in future public tenders in the case of a bid-rigging infringement.

According to the Compliance Guide, in order to obtain a positive evaluation, a compliance programme must meet the following criteria:

- **Involvement of the company's governing bodies and/or senior management**: This will be the case when, among others, there is an incentive policy in place that rewards compliance (for example, applying bonusses) and punishes non-compliance (for example with salary cuts, limitation of promotion, or even dismissals) and top managers clearly and firmly state that compliance with Competition law is not only a legal obligation, but a core element of the company's culture (for example, in the intranet, compliance emails, etc.).
- **Effective training:** The company must have a training programme to ensure that employees receive training regarding Competition law (the training must be adapted to each different activities and functions).
- **Independence and autonomy of the Compliance Officer:** The company must demonstrate the independence and autonomy of the Compliance Officer responsible for the design and execution of its compliance programmes. This includes granting the Compliance Officer the power to report conduct directly to the governing body.
- **Risk identification and design of control mechanisms:** The company should have:
  - a risk map identifying the business areas and employees that are at the highest risk of infringing competition law, as well as the likelihood and impact of such infringement; and
  - a control matrix stating the procedures the company will follow in case an infringement materialised.
- **Design of the internal procedures for lodging complaints and/or doubts:** There must be an internal reporting channel to report potential infringements of competition law or doubts regarding the lawfulness of certain conduct. The channel must allow the adequate and prompt analysis of the risks and the protection of complainants (for example, ensuring the anonymity of the complainant).
- **Design of a clear and effective disciplinary system:** The compliance programme should include both disciplinary action (e.g. salary cuts or dismissals) and possible incentives for employee compliance (for example, including termination clauses

in case of competition law infringements in the contracts with senior managers) .

The Compliance Guide contains an annex that offers several indicators that could be used by companies to determine whether their compliance programmes comply this criteria. In addition, the CNMC also offers an online tool with a series of questions that the companies can use to self-assess their programmes.

CMA seeks new regulatory regime for digital markets following market study

UK – MARKET INVESTIGATIONS & SECTOR INQUIRIES

On 1 July 2020, the UK Competition & Markets Authority ("CMA") published its final report following a 12-month market study into online platforms and digital advertising in the UK (the "Final Report"). The Final Report concludes that, due to the dynamic nature of digital advertising, existing laws are not suitable to effectively regulate the concerns that the CMA has identified. Therefore, the CMA has recommended that a new "pro-competition regulatory regime" is established to govern major online platforms in the UK.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Online platforms and digital markets are continuing to receive scrutiny from competition regulators around the globe. The CMA's market study has identified specific concerns in relation to digital advertising, where both Google and Facebook are major players in the UK.
- The Final Report recommends that the UK Government establishes a new "Digital Market Unit", which should be responsible for a new enforceable code of conduct that applies to online platforms designated as having strategic market status.
- Based on the CMA's recommendations, the Digital Market Unit should also have extensive powers to introduce "pro-competitive reforms", which range from data-related interventions (such as mandating interoperability or third-party access to data) to measures including the structural separation of online platforms.
- The CMA has simultaneously announced the formal launch of its "Digital Market Taskforce", which will advise the UK Government on the legislative requirements to implement the recommendations in the Final Report and the Furman Review. The Digital Markets Taskforce will report to the UK Government by the end of 2020.

BACKGROUND

The CMA launched its market study in July 2019 amid concerns over how the digital advertising market was functioning in the UK and following calls by the UK House of Lords and the UK Government's Digital Competition Expert Panel (the "Furman Review") to investigate the market (see our April 2019 newsletter).

Market studies are used by UK competition authorities to examine the causes of why particular markets may not be working well. The possible outcomes following a market study are wide-ranging, including giving the market a clean bill of health, regulatory intervention, making recommendations to Government, initiating enforcement action or a market investigation reference (for more information, see our Quickguide on market studies and market investigations in the UK).

COMPETITION CONCERNS IDENTIFIED IN THE FINAL REPORT

With around GBP 14 billion spent on UK digital advertising in 2019, approximately 80% of which was spent on Google and Facebook, the CMA's market study has found that both Google and Facebook have market power in their respective markets for search advertising and display advertising. Although the Final

Report acknowledges that high market shares in digital advertising are not necessarily 'bad', the CMA has found that competitors of Google and Facebook face substantial barriers to entry and expansion, which results in weak competition.

The CMA's analysis raises concerns in relation to the following areas:

- weak competition in the provision of digital advertising has impacted the rate of innovation and the prices paid by advertisers (which are ultimately reflected in the prices of goods and services across the economy);
- the compensation that consumers receive in exchange for their attention and personal data;
- the degree of control that users have over how their personal data is used; and
- wider social, political and cultural concerns arising from the impact of digital advertising on authoritative and reliable news media.

WHAT REMEDIES HAS THE CMA PROPOSED?

The Final Report confirms that the CMA will not be referring the market for an in-depth market investigation, which would typically involve the CMA conducting a further 18-24 month inquiry. Instead, the CMA has recommended to Government the establishment of a "pro-competition ex ante regulatory regime, to oversee the activities of online platforms funded by digital advertising".

The CMA's proposed regulatory regime comprises two broad categories of intervention:

- **an enforceable code of conduct,** which is designed to protect competition by governing the behaviour of platforms that have strategic market status ("SMS"). The objective of the code of conduct would be to address the harmful effects that can arise from the exercise of market power. The CMA has proposed that the code should be based around three high-level objectives of fair trading, open choices and trust and transparency. The code will apply to platforms that are designated as having SMS, as envisaged by the Furman Review, and each platform would have its own tailored code and published guidance on its practical application; and
- **a range of pro-competitive interventions,** which are designed to tackle the sources of market power and promote competition and innovation. This includes data-related remedies such as the provision of third-party access to data and measures to increase interoperability (as suggested by the Furman Review), as well as remedies including consumer control and separation measures.

In order to implement the proposed regulatory regime, the CMA has also recommended that the UK Government legislates to establish a "*Digital Markets Unit*" to undertake SMS designation, although the Final Report does not determine which platforms will be designated as having SMS, the CMA has indicated that Google and Facebook are likely to be included and that this may also be extend to others. The Digital Markets Unit will also be responsible for introducing, maintaining and enforcing the code, as well as introducing any pro-competitive interventions.

WHEN WILL THE NEW REGIME COME INTO FORCE?

There is currently no timetable for establishing the Digital Markets Unit or implementing the CMA's interventions. However, on the same day that the CMA published the Final Report, it also announced the formal launch of a Digital Markets Taskforce (the "Taskforce").

The Taskforce, which was commissioned by the UK Government in March 2020 (see our March 2020 newsletter), will build on the conclusions of the Final Report and advise the Government as to how the new regulatory regime for digital markets should be designed. The Taskforce intends to report to the UK Government by the end of 2020. Therefore, it is unlikely that any draft legislation implementing the CMA's recommendations will be published by the UK Government until early 2021 at the earliest.

Healthcare provider and consultants fined over £1.2 million for price fixing

UK – ANTITRUST - CARTELS

Spire Healthcare, a private healthcare provider, and six consultant ophthalmologists have been fined for their roles in facilitating and arranging to fix the price of initial consultations between different consultants at a Spire hospital in the north of England. Whilst individual consultants were fined in the range of GBP 642 to GBP 3,859 for agreeing to fix initial consultation fees, the private healthcare group was fined GBP 1.2 million for its role as the instigator and facilitator of the arrangement as a result of the UK Competition and Markets Authority ("CMA") applying a significant uplift for specific deterrence and proportionality.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The CMA has found the price-fixing agreement between consultant ophthalmologists to infringe competition law, with the arrangement having been informally agreed during a consultants' dinner and confirmed via email the next day.
- Spire, the private healthcare provider, was fined GBP 1.2 million, after CMA applied a six-fold uplift to the level of the fine for deterrence and proportionality in its penalty calculation, although Spire also benefited from the maximum available 10% reduction for its compliance programme.
- The individual consultants themselves were fined a fraction of this amount, up to GBP 3,859 each after agreeing settlements. Three of the consultants fined operated as sole traders, providing a reminder that individuals may be subject to civil penalties for competition law infringements where they are engaged in economic activity.
- This case continues a long-running focus by the CMA in this sector, following its private healthcare market investigation, as well as its 2015 decision to fine an association of ophthalmologists for exchanging price information.

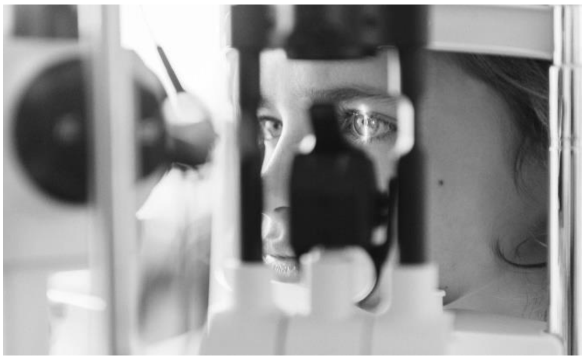
A COSTLY DINER: THE AGREEMENT

The CMA has fined Spire Healthcare Limited and its parent company Spire Healthcare Group plc, together with six consultant ophthalmologists, for an infringement of Chapter I of the Competition Act 1998 by facilitating and agreeing to fix the price of initial consultations at GBP 200 per session for self-pay patients. A seventh consultant was granted immunity after applying for leniency.

According to the CMA's infringement decision issued on 1 July 2020, seven consultant ophthalmologists operating out of Spire's Regency Hospital in Macclesfield had agreed to fix their initial consultation fees for self-pay patients (which are normally set by the individual consultant) following a dinner organised by Spire's management on 24 August 2017. The CMA found that the topic of fees had been raised by a Spire employee during the dinner, with a view to simplifying fee options for self-pay customers. Following a discussion at the dinner, the CMA found that an agreement was reached via an email exchange the next day to fix the level of the fee at GBP 200. The CMA concluded that the resulting agreement, instigated by a Spire employee and facilitated by the hospital's customer service team, lasted until early July 2019.

FINE REDUCTION: SETTLEMENT AND THE IMPORTANCE OF COMPLIANCE PROGRAMMES

In calculating the fines, the CMA applied a starting point of 25% (out of a maximum of 30%) of relevant turnover (the revenue from privately-funded ophthalmology services at the Regency Hospital), reflecting its assessment of the infringement as the "most serious type of cartel behaviour". The six consultants each saw a reduction in their penalties in view of, in particular, their lessor role in the conduct (as compared to Spire), and a further 20% reduction for settlement. While three of the consultants operated through limited companies (with the fine imposed on the company accordingly), fines were imposed on the remaining consultants as sole traders.



A number of adjustments were made to Spire's penalty during the calculation, including a specific 10% increase to reflect Spire's role as the "instigator", although this was offset by an equivalent reduction for Spire's existing competition compliance activities. This represented the maximum available discount for compliance programmes. Spire also agreed to submit a report to the CMA on its compliance activities every year, for the next three years. A further 5% discount was granted on the basis of cooperation as Spire had made an employee (who was a key individual in the investigation) available for interview.

FINE UPLIFT: INSTIGATOR AND FACILITATOR

Spire's penalty following the above adjustments came to GBP 225,824. This was then increased to GBP 1.5 million, a six-fold increase, on the basis of deterrence and proportionality. This uplift in part reflected Spire's overall size and financial position, within the relevant turnover used in calculating the fine representing only a very small part of Spire's overall turnover. However, a key driver was the CMA's findings that Spire had acted as both the instigator and facilitator of a price fixing agreement.

This case follows-on from extensive focus by the UK competition authorities on the private healthcare market. The CMA previously considered the issue of consultant groups (specifically, anaesthetist groups) and the setting of common prices in its private healthcare market investigation carried out over a number of years from 2011 onwards. It is also not the first time that the CMA has investigated the ophthalmology sector in particular; in August 2015, the CMA imposed a fine of GBP 382,500 on an association of ophthalmologists for exchanging price and other commercially sensitive information between members

UK real-estate director banned for seven years after court grants CMA order

UK – ANTITRUST - CARTELS

The first competition disqualification order to come to trial has resulted in a company director, Michael Martin, being disqualified for seven years. In its judgment of 7 July 2020, the UK High Court found that Mr Martin had contributed to Gary Berryman Estate Agents' breach of competition law by failing to prevent its anti-competitive behaviour once he had learnt of it.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The latest director disqualification sends a clear message to company directors that the Competition and Markets Authority (the "CMA") will seek to hold them accountable for breaches of competition law, even if not directly involved.
- In order to avoid personal liability for company breaches of competition law, directors should take steps to prevent or end the company's wrongdoing as soon as they learn of it.
- Directors who do not take steps to prevent or end companies' participation in breaches of competition law will be seen as having contributed to the breach and therefore risk disqualification.

An investigation by the CMA found in 2017 that six estate agents in Somerset had agreed to fix a minimum Commission rate for residential estate agency services in an illegal cartel, which lasted for just over a year beginning in February 2014. The CMA found that the cartel agreement between the six estate agents (who had an estimated market share of 95%) caused local homeowners to miss out on receiving the best possible deal when selling their property.

Following the CMA's findings, three other directors whose companies participated in the cartel provided formal undertakings not to act as a director of a company for between three and five years. Michael Martin abstained from giving formal undertakings, which resulted in the CMA issuing court proceedings against him in February 2019. The trial took place via video conference in June 2020.

The court had regard to the fact that Mr Martin was not concerned with day-to-day sales and did not attend any of the meetings at which the illegal cartel agreement was made, but considered that as a director, on becoming aware of the agreement, he had responsibility to prevent or end his company's involvement in it. By failing to do so, the court determined that he had contributed to the breach of competition law and that this conduct made him unfit to be a director of a company. It therefore disqualified him from acting as a director or being concerned in the management of a company for seven years.

The seven year period reflected the seriousness of the findings of misconduct in the context of the sale of homes when estate agents have to be trusted by vendors. Notably, it was far longer than the 2.5 year period the CMA had proposed if Mr Martin had offered a disqualification undertaking before court proceedings were launched.

The disqualification of Mr Martin is the CMA's 18th director disqualification since the first of its kind in 2016. This case sends a clear message that the CMA will seek to hold company directors accountable for any anti-competitive behaviour, and that, even if a director is not directly involved in a breach, they can still be held accountable for it.

Australian Open Banking live, energy next - Consumer Data Right update

AUSTRALIA – NEW LAW/POLICY

Australia's Consumer Data Right ("CDR") regime in the banking sector ("Open Banking") is live as of 1 July 2020. The Australian Government has also formally extended the CDR to the energy sector, with implementation expected in late 2021. The primary goal of CDR is to allow customers to more easily compare and switch providers if they find a better deal elsewhere, resulting in increased competition and innovation.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Australia is one of a number of jurisdictions around the world developing Open Banking.
- Australia's Open Banking regime has been launched. From 1 July 2020, customers of Australia's four major banks (ANZ, CBA, NAB and Westpac) can direct their bank to disclose their banking data from a range of personal accounts to accredited data recipients.
- In November 2020, the four major banks will be required to make consumer information from other accounts available (such as joint accounts, home loans and personal loans). From mid-2021 onwards, non-major authorised deposit-taking institutions ("ADIs") will be required to begin sharing consumer data.
- The Australian Competition and Consumer Commission ("ACCC") and the Office of the Australian Information Commissioner ("OAIC") will be monitoring compliance with, and enforcing the, CDR

regulatory obligations. Their recently released joint Compliance and Enforcement Policy for the CDR explains the approach they will take to encourage compliance and prevent breaches.

- On 26 June 2020, the CDR was formally extended to the energy sector. Once implemented, energy retailers and certain other data holders will be required to provide access to consumers' electricity data, billing data and additional data sets such as distributed energy resources and plan information for electricity and natural gas.
- The ACCC and Australia's Data Standards Body are working to finalise rules and technical standards for operation of the new CDR regime for the energy sector, and industry stakeholders are encouraged to participate in this process.

WHAT IS THE CDR, AND WHAT DOES IT MEAN FOR ME?

The CDR is a data portability reform that the Australian Government intends to roll out economy-wide, sector-by-sector, starting with banking, followed by energy and telecommunications. The objective of the CDR is to:

- provide consumers with the ability to efficiently and conveniently access their personal data held by businesses ("data holders"); and
- authorise the secure sharing of that data to trusted and accredited third parties ("accredited data recipients").

The CDR also requires businesses to provide public access to information on specified products that they offer.

The CDR aims to give consumers the ability to access and use more information about themselves, and about their use of products in order to improve their ability to make informed comparisons and switch to other providers if they find a better deal elsewhere. This is expected to encourage competition between providers, leading to better prices and more innovative products and services, enhancing consumer welfare.

IMPLEMENTATION, COMPLIANCE AND ENFORCEMENT

The CDR regime is implemented by a framework consisting of legislative provisions in Part IVD of the *Competition and Consumer Act 2010* (Cth) ("CCA"), rules made by the ACCC under the legislation [4] ("CDR Rules") and technical consumer data standards made under the rules by the designated Data Standards Body, CSIRO's Data61 ("Data Standards"). The ACCC is responsible for accrediting data recipients.

The ACCC and the OAIC are jointly responsible for monitoring compliance with, and enforcing the, CDR regulatory obligations, with the ACCC focusing on general compliance, and the OAIC on privacy issues relating to the handling of consumer data by data holders and accredited data recipients. Breaches of the regulatory obligations attract significant civil penalties, among other consequences. [5]

The ACCC's and OAIC's joint Compliance and Enforcement Policy for the Consumer Data Right ("Policy") published in May 2020 explains the approach they will take to encourage compliance and prevent breaches. The ACCC and OAIC will be actively monitoring compliance relying on stakeholder intelligence / complaints, mandatory periodic reports from data holders and accredited data recipients, audits and assessments of data holders and accredited data recipients, and information requests and compulsory notices.

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4 *Competition and Consumer (Consumer Data Right) Rules 2020*, made in February 2020, and amended on 19 June 2020 to clarify their intended operation. The Rules will be regularly updated to expand the scope of the CDR, including to other sectors.

5 For corporations, the greater of AUD 10 million per breach, three times the value of the benefit obtained from the breach, or 10% of annual turnover where the value of the benefit cannot be determined. These penalties can only be imposed if the ACCC brings court proceedings and liability is established. Other enforcement options include administrative resolutions, infringement notices, court enforceable undertakings, suspension or revocation of accreditation by the ACCC, certain determinations and declarations by the OAIC relating to privacy issues.

In determining the appropriate enforcement approach, the ACCC / OAIC will consider factors including:

- the impact of the conduct on consumers;
- whether the conduct was "deliberate, repeated, reckless or inadvertent";
- the extent of potential gain from the conduct;
- whether the conduct indicates systemic issues;
- whether the business has displayed a corporate culture of compliance, including effective compliance programs; and
- whether the conduct was self-reported and the level of cooperation with the ACCC.

Relevantly, the following conduct has been identified as "priority conduct" likely to result in significant detriment to consumers and the integrity of the CDR, "always" giving grounds for the consideration of enforcement action:

- **data holder refusal**: repeated refusal to disclose consumer data (or frustrate the process of disclosure) by intentionally circumventing the Rules or Data Standards;
- **misleading or deceptive conduct**: conduct that misleads a person into believing that another person is a CDR consumer or that a valid request or consent has been made, "holding out" that a person is accredited when they are not, or misleading representations by data recipients regarding the nature or benefits of the CDR service provided;
- **invalid consent**: accredited data recipients collecting data without valid consent;
- **misuse or improper disclosure of consumer data**: intentional misuse or improper disclosure of CDR consumer data by an accredited data recipient, inconsistent with the consent provided by a CDR consumer, particularly where consent has been withdrawn. This would also include circumventing the "data minimisation principle", which requires authorised data recipients to only collect the minimum data they need to provide the products the consumer has consented to; and
- **insufficient security controls.**[6]

Data holders and accredited data recipients, in their dealings with each other, competing providers and consumers, also remain subject to other parts of the CCA, including the Australian Consumer Law.

The ACCC is a very active, well-resourced regulator, and we expect it to closely monitor and vigorously enforce compliance with the CDR. Having regard to the Policy, current and prospective data holders and accredited data recipients should make sure they understand their regulatory obligations and have robust compliance systems in place.

ROLLOUT IN THE BANKING SECTOR

The banking sector was first in line for the implementation of the CDR regime, and will be the test case for the effectiveness of the regime.

Following the commencement of the Rules on 6 February 2020, Australia's big four banks were required to start sharing product reference data in a standardised format, facilitating better product comparisons. From July 2020, the major banks are required to share certain consumer data, such as data relating to credit and debit cards, deposit accounts and transaction accounts, with accredited data recipients where directed by a consumer to do so. A wider range of consumer banking data must be made available from November 2020 (including data relating to mortgage and personal loans, investment loans, joint accounts, closed accounts, direct debits, scheduled payments and payees).

6 ACCC/OAIC Compliance and Enforcement Policy for the Consumer Data Right, May 2020.

Other ADIs are required to share product data from October 2020, and will be required to begin sharing consumer data from 2021.[7]

As at July 2020, two accredited data recipients have completed the necessary steps to securely receive data – Frollo Australia and Regional Australia Bank. A further 39 providers have reportedly begun the process to become accredited data recipients.[8]

EXTENSION TO THE ENERGY SECTOR

On 26 June 2020, the CDR was formally extended to the energy sector.[9] The designation instrument captures consumer data sets relating to the sale or supply of electricity, including where electricity is bundled with gas. Coverage of data sets about products is broader and includes electricity, gas and dual fuel plans.

Information that has been made part of the scope of the CDR in energy includes individual consumer information as well as information about the sale or supply of electricity to a customer (including other products or services offered, such as free energy efficiency assessments or discounts on non-energy products), as well as metering data, NMI (national metering identifier) standing data, DER (distributed energy resource) register data and billing data for that consumer.

Several steps need to occur before the CDR regime becomes effective in the energy sector, including the development of operational and technical rules by the ACCC and the Data Standards Body, and the technical build. The timeframes for implementation are still to be confirmed, but it is expected that implementation may commence in late 2021.[10]

The ACCC is currently consulting on the energy rules framework, including the extent to which additional rules, or amendments to the existing Rules, will be required to accommodate the energy sector.[11] Unlike for Open Banking, where data is provided by data holders directly to accredited data recipients, for the banking sector, the Australian Energy Market Operator ("AEMO**"**) has been selected as the gateway between data holders and accredited data recipients (except in respect of data which AEMO itself holds). This gateway model, and the unique characteristics of energy data and markets, mean that changes to the current Rules are necessary.

During the remainder of this year, we will likely see a number of specific rules proposed for the implementation of the CDR in the energy sector. These will require significant engagement from energy sector participants – particularly retailers. Once the CDR rules and technical standards are settled, it may be necessary to uplift retailer systems to ensure that the capability to provide consumer data is available.

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7 See the rollout timetable on the new CDR website, available here.

8 ACCC, "Consumer Data Right goes live for data sharing", 1 July 2020.

9 See *Consumer Data Right (Energy Sector) Designation 2020* (Cth), and Josh Frydenberg and Angus Taylor and More Power to Compare and Switch Energy Providers, 29 June 2020.

10 Based on indications from the Australian Energy Regulator (AER), Australian Energy Market Operator (AEMO) and Australian Energy Market Commission (AEMC).

11 The ACCC is seeking submissions by 28 August 2020, and looking to publish draft energy rules for consultation in Q4 of 2020.

It will also be useful to keep an eye on the operation of the new CDR rights in the banking sector, including the extent of consumer engagement with the CDR. As this is a very new regime in Australia, lessons may be gained from seeing how it operates in other sectors.

For more details on CDR in the energy sector, see:

- Ashurst "Consumer data right for the energy sector: data sharing and switching is one step closer"
- Ashurst "The new oil - the Australian consumer data right hits the energy sector"

Key EMEA Contacts

Gabriele Accardo
Counsel
Milan
T +39 02 85423430
M +39 338 7305376
gabriele.accardo@ashurst.com

Rafael Baena
Partner
Madrid
T +34 91 364 9895
M +34 676 623 682
rafael.baena@ashurst.com

Euan Burrows
Partner
London
T +44 20 7859 2919
M +44 7917 846 697
euan.burrows@ashurst.com

Michaël Cousin
Avocat à la Cour
Paris
T +33 1 53 53 56 92
M +33 6 03 48 48 19
michael.cousin@ashurst.com

Neil Cuninghame
Partner
London
T +44 20 7859 1147
M +44 7917 064 750
neil.cuninghame@ashurst.com

Alexi Dimitriou
Counsel
London
T +44 20 7859 1191
M +44 7789 816 477
alexi.dimitriou@ashurst.com

Gil Even-Shoshan
Counsel
Brussels
T +32 2 626 1907
M +32 471 129 973
ges@ashurst.com

Denis Fosselard
Partner
Brussels
T +32 2 641 9976
M +32 476 474 564
denis.fosselard@ashurst.com

Maria Held
Counsel, Rechtsanwältin
Munich
T +49 89 24 44 21 176
M +49 172 67 02 553
maria.held@ashurst.com

Michael Holzhaeuser
Partner
Frankfurt
T +49 69 97 11 28 50
M +49 151 14 79 98 17
michael.holzhaeuser@ashurst.com

Christophe Lemaire
Avocat à la Cour
Paris
T + 33 1 53 53 54 62
M +33 6 81 98 96 44
christophe.lemaire@ashurst.com

Duncan Liddell
Partner
London
T +44 20 7859 1648
M +44 7766 113 476
duncan.liddell@ashurst.com

Nigel Parr
Partner
London
T +44 20 7859 1763
M +44 7785 346 577
nigel.parr@ashurst.com

Donald Slater
Counsel
Brussels
T +32 2 626 1916
M +32 473 132 473
donald.slater@ashrst.com

Alexandre Vandencasteele
Partner
Brussels
T +32 2 641 9962
M +32 475 456 944
alexandre.vandencasteele@ashurst.com

Steven Vaz
Partner
London
T +44 20 7859 2350
M +44 7879 497 862
steven.vaz@ashurst.com

Key EMEA Contacts

Annick Vroninks
Partner
Brussels

T +32 2 641 9971
M +32 477 52 37 82
annick.vroninks@ashurst.com

Denis Waelbroeck
Partner
Brussels

T +32 2 641 9963
M +32 475 45 69 43
denis.waelbroeck@ashurst.com

Ute Zinsmeister
Partner
Munich

T +49 89 24 44 21 187
M +49 172 66 15 078
ute.zinsmeister@ashurst.com

Key Asia-Pac Contacts

Peter Armitage
Partner
Sydney

T +61 2 9258 6119
M +61 418 973 700

Melissa Fraser
Partner
Sydney

T +61 2 9258 5949
M +61 400 507 068
melissa.fraser@ashurst.com

Justin Jones
Partner
Melbourne

T +61 3 9679 3640
M +61 412 426 826
justin.jones@ashurst.com

Angie Ng
Counsel
Sydney

T +61 2 9258 6275
M +61 437 447 813
angie.ng@ashurst.com

Alyssa Phillips
Partner
Brisbane

T +61 7 3259 7352
M +61 488 362 225
alyssa.phillips@ashurst.com

Ross Zaurrini
Partner
Sydney

T +61 2 9258 6840
M +61 411 866 953
ross.zaurrini@ashurst.com

Tihana Zuk
Counsel
Sydney

T +61 2 9258 6343
tihana.zuk@ashurst.com

ashurst

www.ashurst.com