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Ashurst Competition Newsletter May & June 2020

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Welcome to the May/June 2020 issue of Ashurst's competition law newsletter, which features the European Commission's proposal to introduce a new competition tool, the landmark German Facebook judgment on competition law and data protection, new merger control rules in the UK, bid rigging in Singapore, interchange fees held as anticompetitive by the UK Supreme Court, the UK's first RPM fine imposed on a retailer, as well as other news.

Content

A click or two short of the best: the Federal Court finds Trivago misled consumers

AUSTRALIA – CONSUMER PROTECTION

Australian Competition and Consumer Commission v Trivago N.V. [2020] FCA 16

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Federal Court has ruled that Trivago misled consumers and breached Australian consumer law as a result of claims made during television advertisements and on its website with respect to offering the cheapest or best hotel deals.
- The algorithm used by Trivago to display what Trivago purported to consumers to be the cheapest or best hotel deals gave too much consideration to the amount that Trivago would be paid by the advertiser each time a consumer clicked on the offer.
- The Federal Court also found Trivago breached Australian consumer law through making representations that two offers in relation to the same hotel room were 'like for like' when in fact they were not.

WHAT YOU NEED TO DO

- Businesses should carefully consider whether the representations they make about goods and services, and comparisons between goods or services, are accurate.
- Where software is used to determine an offer or make a representation about goods or services, businesses should ensure that the offer or representation made based on the results of the software accurately reflects the underlying representations that the software has analysed.

TRIVAGO'S HOTEL SEARCH AND COMPARISON SERVICE

Trivago carries on a business in Australia offering an online search and price comparison platform for travel accommodation offers. Trivago displays offers from online booking sites, online travel agencies or the hotel itself ("Online Booking Sites"). Trivago generates revenue when a user clicks on a specific deal being advertised by Trivago, which then triggers a requirement for the relevant Online Booking Site to pay Trivago a fee referred to as a 'Cost Per Click' (**CPC**).

Trivago invites the Online Booking Sites to submit bids for the CPC they will pay. An Online Booking Site's offer will only be displayed if it meets a minimum CPC amount.

ALLEGATIONS MADE BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION ("ACCC")

The ACCC alleged that between 1 December 2016 and 13 September 2019 ("Relevant Period"), Trivago made the following four representations that, for the reasons set out below, resulted in breaches of the Australian Consumer Law ("ACL"):

- The Trivago website would identify the cheapest rates available for a hotel room ("Cheapest Price Representation");
- Offers displayed on the website with the most prominence ("Top Position Recommendation or Top Position Offer"), were the cheapest available offer for the hotel identified or had some other characteristic that made them more attractive than other offers;
- Prices displayed directly above the Top Position Recommendation in red strike-through text ("Strike Through Representation or Strike Through Price") were a comparison between prices offered for the same room category in the hotel identified; and
- Prices displayed directly above the Top Position Recommendation, in red strike-through text ("Red Price Representation or Red Price") were a comparison between prices offered for the same room category in the hotel identified.

TOP POSITION ALGORITHM AND THE CPC

While the experts that provided evidence to the Court disagreed on a number points, they agreed that the CPC was a major factor when Trivago's algorithm determined the Top Position Offer.

CONDUCT FOUND TO BE IN BREACH OF THE ACL

The Cheapest Price Recommendation

The Court referred to three television advertisements aired by Trivago, and statements that appeared beneath Google search results, all of which made representations that Trivago would find the consumer the hotel with the "best price". The Court held that a representation to provide the "best price" in this context was referring to the cheapest price.

Referring to expert evidence, the Court found that the Trivago website often did not provide the cheapest price for a hotel room. This was in part a result of the algorithm used by Trivago not displaying an Online Booking Site's offer unless the CPC exceeded a minimum threshold.

In making the Cheapest Price Representation, Trivago was found to have breached s 18 of the ACL through engaging in conduct that was misleading or deceptive or likely to mislead or deceive.

It was also held that, in making the Cheapest Price Representation, Trivago breached s 34 of the ACL through engaging in conduct that misled the public as to the nature, characteristics and suitability for purpose of the accommodation search service provided by the Trivago website.

Top Position Recommendation

As outlined above, the Court found that the Trivago website often did not provide the cheapest price for a hotel room.

It was observed that the Top Position Offer was presented in large green font with lots of white space around the amount. The Court held that this helped give the impression that the Top Position Offer was the best offer for the hotel.

Given the Top Position Offer was in many cases not the cheapest offer, in addition to this conduct also breaching s 18 of the ACL, Trivago was also found to have breached s 29(1)(i) of the ACL through, in connection with the supply or possible supply of accommodation services, making misleading representations with respect to the price of those hotel accommodation services.

Strike-Through Representation and Red Price Representation

The Court focused on the Strike Through Price, and later in the Relevant Period the Red Price Representation, being positioned above the offer given most prominence on the website. At [207], Moshinsky J explained that:

"The implicit representation that was conveyed was that the two offers that were juxtaposed, namely the Strike-Through Price and the Top Position Offer, were comparable offers apart from price; in other words, that the offers were, apart from price, 'like for like'."

The Court found that, given the prices offered were not a comparison between prices offered for the same room category at the same hotel, through making the Strike-Through Price and Red Price Representations Trivago had breached s 18 and s 29(1)(i) of the ACL.

The case of the disappearing tape recording: Federal court dismisses ACCC's allegations that Ramsay Health Care misused its market power

AUSTRALIA – ANTITRUST - ABUSE OF DOMINANCE

ACCC case falls over on weak factual evidence after surprise revelation of a covert tape recording

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- In a rare Federal Court proceeding involving alleged misuse of market power, the Federal Court held that the Australian Competition and Consumer Commission ("ACCC") failed to establish that Ramsay Health Care ("Ramsay") had in fact engaged in the anti-competitive conduct pleaded by the ACCC to prevent a group of surgeons from opening a rival day surgery in competition with Ramsay.
- Even if the alleged conduct had occurred, Ramsay did not take advantage of its substantial market power as a private hospital operator for an anti-competitive purpose, in contravention of the former misuse of market power prohibition (former section 46 of the Competition and Consumer Act 2010), as it had legitimate business reasons for engaging in the alleged conduct.
- The case against Ramsay was brought under the former misuse of market power prohibition, which prohibited firms from taking advantage of market power for a proscribed purpose. In 2017, the "old" section 46 was repealed and replaced with a "new" prohibition which included an "effects" test. The "new" prohibition would have been unlikely to produce a different outcome because, in addition to the deficient evidence, the Court found that Ramsay's alleged conduct did not have the likely effect of substantially lessening competition in a market as its conduct was not the ultimate cause of the relevant surgeons' decision not to open their proposed facility.
- The ACCC has not appealed the judgment and the time for lodging an appeal under the Federal Court Rules has passed.

WHAT YOU NEED TO DO

- Businesses with substantial market power, including those that have gained substantial market power as a result of the COVID-19 crisis, risk contravening the current section 46 prohibition if they engage in conduct that has the purpose or likely effect of substantially lessening competition, even if there is a legitimate or pro-competitive commercial rationale for engaging in that conduct.
- Such businesses must tread carefully in dealings with current and "potential" competitors – ie, businesses that may enter a market but have not done so yet. Current customers of a business can, in some instances, be potential competitors.
- The decision highlights that the distinction between a purpose of substantially lessening competition and an "economically rational" purpose of efficiently maximising the utilisation of assets can be fine.
- The facts of this case meant that the Court was not required to consider the difficult question of whether conduct of a firm with substantial market power, which is economically rational, can nonetheless have the effect of substantially lessening competition in a market.
- While the ACCC's case failed in this instance, the case illustrates that a mere "threat" by a business with substantial market power, conveyed orally or otherwise (for example, to refuse to supply a potential competitor) could potentially contravene section 46, even if the person making the threat does not follow through, if the threat has the intended deterrent purpose or effect. Businesses with a strong market position should obtain legal advice before seeking to utilise their market

position to advantage their operations over competitors through conduct such as limiting supply or refusing to deal with competitors.

- The ACCC's case against Ramsay was highly reliant on evidence of conversations that took place between Ramsay and the surgeons. Businesses can help shield themselves from allegations of misuse of market power by: (i) keeping accurate records documenting the business' commercial rationale for decisions: (ii) keeping contemporaneous notes of interactions with competitors and potential competitors to ensure an accurate record is available to draw on if needed; (iii) in high risk situations, having experienced competition counsel attend meetings or calls with competitors and potential competitors, to monitor competition law compliance; and (iv) avoiding creating documents which incorrectly suggest the business is dominant or subject to limited competition.

BACKGROUND

In Federal Court proceedings brought by the ACCC (*Australian Competition and Consumer Commission v Ramsay Health Care Australia Pty Limited [2020]* FCA 308), the ACCC alleged that Ramsay had misused its market power and engaged in anticompetitive exclusive dealing in its dealings with a group of surgeons that proposed to establish a competing day surgery in Coffs Harbour, NSW.

The ACCC alleged that senior officers at Ramsay told a group of surgeons, in a series of oral conversations, that their access to operating theatre time at Ramsay's Baringa Private Hospital ("Baringa") in Coffs Harbour "would be substantially reduced or entirely withdrawn" if they proceeded with their plans to establish a competing facility in Coffs Harbour. It was pleaded that these conversations were part of a crafted "strategy" to dissuade the surgeons from implementing their plans so that Ramsay would not face competition from the surgeons in the relevant market.

ACCC'S CLAIMS FAILED DUE TO DEFICIENT EVIDENCE

Justice Griffiths noted that the ACCC faced significant evidentiary difficulties from the beginning due to the fact that its claim was substantially dependent upon evidence of four separate conversations that occurred four years prior to the hearing, where witnesses had given their best recollections of the words which were used some time after the conversations took place.

After a careful examination of the evidence, Justice Griffiths ruled that the ACCC had failed to establish to the requisite standard that the conversations that it contended constituted contravening conduct occurred in the way pleaded by the ACCC, including because:

- there was an absence of "strong corroborating material" and limited relevant and contemporaneous documents to support the content of the conversations as pleaded by the ACCC;
- His Honour preferred the evidence given by Ramsay's witnesses in relation to each of the conversations, describing the evidence given by Baringa's CEO as "truthful and honest"; and
- the ACCC's witnesses (the group of surgeons) were, at times, prone to overstate the evidence if they believed it was in their self-interest to do so.

Two of the surgeons who had conversations with Ramsay’s representatives, during which alleged threats were made along the lines of the pleaded conversations, had surreptitiously made sound recordings of the conversations in which each was involved. One of the recordings was not available during the proceeding because it had been inadvertently deleted and the other was recovered from the surgeon's phone, after the existence of the recording was only revealed during cross-examination of the witness. Ramsay sought to have the evidence of the relevant surgeon excluded or restricted, claiming that its case had been severely prejudiced because it had cross-examined three surgeons without knowing that the sound recording existed, nor what is contained.

The Court chastised the ACCC for failing to act as a model litigant, but concluded that Ramsay was

not unfairly prejudiced because it was able to recall the relevant surgeons for further cross-examination. Nevertheless, the discrepancies between one of the recordings and a file note the surgeon had prepared damaged the ACCC's case and contributed to the Court preferring the evidence of Ramsay's witnesses.

Although Justice Griffiths concluded that the case should be dismissed based on deficiencies in the ACCC's evidence, His Honour did consider the remaining elements of the ACCC's case notwithstanding it being unnecessary to do so.

RAMSAY HAD SUBSTANTIAL MARKET POWER BUT DID NOT MISUSE IT

In relation to the misuse of market power allegation, Justice Griffiths considered the relevant market to be the market for the supply to surgeons of private in-patient surgery services at private hospitals in Coffs Harbour, as pleaded by the ACCC.

Justice Griffiths held that Ramsay had substantial market power in this market for the following reasons:

- Ramsay had no close competitors (it was the only private hospital in the Coffs Harbour region);
- the barriers to entry to the in-patient market were substantial (the average cost to construct a new private hospital is AUD 750,000 per bed in addition to the cost of land, approvals, recruitment and training);
- there was no indication of any potential entrants to the in-patient Coffs Harbour market during the relevant period;
- Ramsay was not constrained by surgeons as Baringa was the only real choice for surgeons to operate on private patients in the region; and
- Ramsay's internal documents confirmed that Ramsay viewed itself as having substantial market power in the Coffs Harbour region.

Justice Griffiths then addressed whether Ramsay took advantage of its substantial market power for the purpose of preventing a new day surgery from entering the market or deterring or preventing a new day surgery from engaging in competitive conduct, by considering, in particular, whether or not Ramsay had a legitimate business rationale for the pleaded contravening conduct.

His Honour held that the ACCC had failed to establish that Ramsay did not have a legitimate reason for seeking to balance its anticipated loss of day work from the group of surgeons in question by seeking surgeons from elsewhere. Justice Griffiths accepted that in any counterfactual, a hospital which lost the day work of three or four incumbent surgeons would be expected to seek the balance from other surgeons who were prepared to provide the requisite balance of day and night work. The ACCC therefore failed to prove that it was economically irrational for Ramsay to behave in the way that it did.

RAMSAY DID NOT ENGAGE IN PROHIBITED EXCLUSIVE DEALING

Justice Griffiths held that the ACCC failed in its exclusive dealing case including because the pleaded contravening conduct:

- was incapable of constituting supply or offer on condition because Ramsay's alleged threat to withdraw a surgeon's operating list allegedly occurred when the competing day surgery did not yet exist; and
- did not have the purpose or likely effect of substantially lessening competition because the surgeons' decision not to proceed with the rival day surgery was not because of Ramsay's conduct but rather because the surgeons came to the view that it would not be viable.

WOULD AN "EFFECTS TEST" HAVE MADE A DIFFERENCE?

The current misuse of market power provision (in force since November 2017) prohibits firms with substantial market power from engaging in conduct having the purpose or likely effect of substantially lessening competition.

Under the current regime, a corporation with substantial market power that is alleged to have misused its market power will no longer be able to defend that claim on the basis that it did not "take advantage" of its market power because it would have and/or could have engaged in the same conduct without the market power. In addition, having a legitimate or pro-competitive commercial rationale would not protect a firm from breaching the prohibition if that conduct nevertheless had the **likely effect** of substantially lessening competition.

It is unlikely that the current misuse of market power provision would have made a difference in this case because:

- the ACCC's claims failed because it was unable to prove the essential element of its case – its version of four conversations between surgeons and Ramsay management – and not the application of the former misuse of market power provision; and
- Justice Griffiths' conclusion that the pleaded contravening conduct was not the cause of the surgeons' decision not to proceed with the rival day surgery meant that the conduct could not have had the likely effect of substantially lessening competition.

NO APPEAL

The ACCC has not appealed the judgment and the time for lodging an appeal under the Federal Court Rules has passed.

Major reforms to Australia's foreign investment review framework

AUSTRALIA – MERGER CONTROL

The Australian government has announced a sweeping set of changes to its foreign investment framework, representing the most comprehensive reform of the Foreign Acquisitions and Takeovers Act 1975 (Cth) since its introduction. The reforms aim to address inherent risks to Australia's national interest, particularly national security, arising from existing and emerging matters such as technological change and international security developments and strengthen compliance measures.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- On 5 June 2020, the Treasurer announced sweeping changes to Australia's foreign investment framework, representing the most comprehensive reform of the Foreign Acquisitions and Takeovers Act 1975 (Cth) ("FIRB Act") since its introduction.
- The reforms are intended to strengthen the Government's ability to safeguard Australia's national interest from existing and emerging national security risks and global developments and aim to strike a balance between encouraging foreign investment and ensuring it is not contrary to the national interest.
- The changes are proposed to take effect from 1 January 2021.
- The Treasurer's announcement **does not** affect the temporary reduction to monetary screening thresholds for all foreign investments to AUD 0 introduced on 29 March 2020, which will remain in place for the duration of the coronavirus crisis. It is expected that there will be a transition from those temporary measures to the reformed framework once it has been legislated.

THE KEY ELEMENTS OF THE REFORMS ARE:

- A new **national security test** for foreign investors, who will need approval to start or acquire a direct interest in a "sensitive national security business", regardless of the value of the investment.
- A **"call in" power** for the Treasurer to review foreign investment in a "sensitive national security business" that raises national security risks but would otherwise fall outside of review requirements.
- A national security **"last resort" power** for the Treasurer to impose or vary conditions or, as a last resort, order disposal on national security grounds in very limited circumstances.
- **Enhanced compliance measures and enforcement powers** available to the Government, including increased penalties.
- **Reduced FIRB approval requirements** for foreign private equity, institutional fund and similar investors with passive foreign

government investors, for investment into non-sensitive businesses.

- The changes are to be made through amendments to the FIRB Act - the exposure draft legislation is expected to be released for consultation in July 2020, with the reforms scheduled to commence on 1 January 2021.

NEW NATIONAL SECURITY TEST

The reforms introduce a new "national security test" regime applicable to foreign investments that give rise to national security concerns.

Under the reforms, foreign investment in a "sensitive national security business" will require notification to and approval from the Treasurer, regardless of value.

While the Government continues to assess what will constitute a "sensitive national security business" for these purposes and will consult on this alongside the release of the exposure draft legislation, it is expected that this will include businesses operating in sensitive sectors such as energy, utilities and critical infrastructure, defence, national security-related supply chain, and businesses owning, storing, collecting or maintaining sensitive data relating to Australia's defence and national security.

Other key aspects of the new "national security test" regime include:

- The Treasurer will be granted new, time-limited **"call in" powers** to enable them to require the assessment of any foreign investment which would not otherwise be subject to assessment under the foreign investment review framework, whether before, during or after that investment, if the Treasurer considers it raises national security concerns.
- Foreign investors will be able to make **voluntary notifications** for assessment, and also obtain specific **exemption certificates** for eligible acquisitions once they are assessed as not posing a national security risk.
- The Treasurer will have a broad national security **"last resort" power** to reassess foreign investments where subsequent national security risks emerge. This will enable the Treasurer to impose new conditions or vary existing conditions or, as a last resort, require compulsory divestment in very limited circumstances, such where there has been a substantial change in a foreign investor's activities posing unforeseen national security risks. The power will only be available if the foreign investment was already subject to FIRB review, and, for reasons of certainty, will not be retrospective but only applicable to future foreign investment.

STREAMLINING LESS SENSITIVE INVESTMENTS – GOOD NEWS FOR PRIVATE EQUITY AND INVESTMENT FUNDS WITH PASSIVE FOREIGN GOVERNMENT INVESTORS

Under the reforms, certain privately controlled and managed institutional investors (such as private equity and investment fund investors) in which foreign government enterprises have invested will no longer be treated as "foreign government investors" for the purposes of the FIRB Act, if those foreign government enterprises have no influence or control over the investor's investment or operational decisions.

This will be welcome news and, if delivered, will significantly streamline the investment process for foreign private equity and investment fund investors with passive foreign government investment, which are currently subject to more

rigorous assessment requirements applicable to "foreign government investors" as a result only of that passive investment.

ENHANCED COMPLIANCE MEASURES AND ENFORCEMENT POWERS

The Government has proposed a raft of reforms intended to improve foreign investors' compliance with the foreign investment review framework, primarily through the introduction of stronger penalties and compliance measures for non-compliance and increased powers of enforcement available to the Government.

The measures proposed to be introduced through these reforms include:

- standard monitoring and investigative powers;
- powers to give directions to investors in order to prevent or address suspected breaches of conditions or of the FIRB Act;
- increased civil and criminal penalties under the FIRB Act to ensure they act as effective deterrents to non-compliance;
- an expanded infringement notices regime to cover all types of foreign investments;
- remedy powers where a FIRB approval or an exemption certificate is granted based on incorrect statements or omission of material information;
- powers to impose conditions or require disposal for foreign investment originally made in breach of the FIRB Act where the interest has transferred to another foreign person by will or devolution by operation of law;
- powers to accept enforceable undertakings from foreign investors to manage non compliance or ensure compliance with commitments given by them; and
- powers to require foreign investors given FIRB approval to notify the Government of certain events relating to the approved action.

CHANGES TO THE FOREIGN INVESTMENT REVIEW PROCESS

The Government has also put forward in the proposed reforms a series of changes which it says are aimed at improving the integrity of the existing foreign investment review framework, including to:

- require further approval for increases in actual or proportionate holdings of foreign investors above those that have been previously approved;
- remove the ability for foreign money lenders to apply the moneylending exemption in obtaining interests in a sensitive national security business;
- require FIRB approval for acquisitions of interests in Federal, State or local government entities through privatisations that raise national security risks;
- extend existing tracing rules to apply to unincorporated limited partnerships in the way they currently apply to corporations and trusts;
- establish a Register of Foreign Ownership to provide greater visibility of foreign investment in Australia;
- introduce measures to prevent the use of family and other associated structures in order to avoid the requirement to obtain FIRB approval;
- facilitate better, more co-ordinated and broader information gathering and sharing among government agencies in relation to foreign investments; and
- introduce various other improvements to improve efficiency and take better account of commercial deadlines and investor operations.

REVISED FEES FOR FOREIGN INVESTMENT REVIEW

The Government is proposing to revise the fees applicable to its foreign investment review framework in order to make the fee structure "fairer and simpler" for investors, and it says it will reduce complexity to minimise the compliance and administrative costs for foreign investors in establishing and paying the applicable fee. Inevitably, there will be winners and losers in different scenarios from these adjustments as we do not expect the Government is targeting any material reduction in overall fees.

OTHER TECHNICAL AMENDMENTS

The proposed reforms also include various other amendments to the FIRB Act and the existing foreign investment review framework which are of a more technical nature, to improve its usability and address identified inconsistencies.

Power cables saga continues: ECJ annuls parts of NKT decision

EU – ANTITRUST - CARTELS

On 14 May 2020, the European Court of Justice (the "ECJ") partially quashed the General Court's (the "GC") judgment upholding the European Commission's ("Commission") power cables cartel decision with respect to NKT and its wholly owned subsidiary NKT Verwaltungs (together "NKT" or the "appellants"). I doing so, the ECJ reduced NKT's fine by EUR 200 000.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Commission must base its decisions 'only on objections on which the parties concerned have been able to comment'. Therefore, the Commission cannot hold liable a company for conduct which was not covered in the Statement of Objections ("SO").
- The Commission must show awareness as regards the various elements of an infringement to hold a company liable for the conduct of another company. In this respect, there is no distinction between essential and non-essential practices of the cartel.
- There is no right to full and automatic access to SO replies by other cartel participants. Refusal to disclose such documents can only amount to a breach of the rights of defence if the applicants show that the documents would have been useful to their defence.

BACKGROUND

In April 2014, the Commission imposed fines totalling EUR 302 million on eleven producers of high voltage underground and submarine power cables (and their parent companies) for their participation in a global market-sharing cartel. It found that German cable maker, NKT, had directly participated in the cartel as a 'fringe player' between 2002 and 2006 and imposed on them a EUR 3.9 million fine. The GC dismissed NKT's appeal against the Commission's decision in 2018 (Case T-447/14), together with 14 other appeals (see our August 2018 newsletter).

RIGHTS OF DEFENCE

The ECJ recalled that:

- the Commission is required to base its decisions "only on objections on which the parties concerned have been able to comment"; and
- where a party was not able to defend itself properly with regard to a particular objection, "an infringement of the rights of the defence capable of leading to the judgment under appeal being set aside must be found". In this case, the party is not required to show that without such irregularity, the outcome of the procedure might have been different.

On this basis, it found that the GC was wrong to have upheld the Commission's final conclusion that the infringement covered conduct related to sales in countries outside of the EEA while the Commission did not include this in the SO sent to NKT or inform NKT of this objection later on. In so doing, the Commission breached the appellants' rights of defence.

In contrast, the ECJ ruled that there is no right to full and automatic access to SO replies by other cartel participants. These are not comparable to replies to requests for information, the content of which has been taken into account in the SO. Here, a breach of the rights of defence by the Commission could not be established as the applicants did not "adduce prima facie evidence that the undisclosed [SO replies] would be useful to their defence".

PARTICIPATION AND AWARENESS

The ECJ dismissed most of NKT's arguments that the GC erred in finding that it had participated in various aspects of the cartel and in a single and continuous infringement ("SCI") or that it had the requisite level of awareness. Notably, the GC was right to uphold the finding that NKT engaged in a SCI covering both underground and submarine power cable projects.

However, the ECJ upheld two of NKT's claims.

- First, the GC was wrong to find that the Commission was not obliged to prove that NKT had been aware of the collective refusal to supply accessories and technical assistance to competitors not participating in the cartel or could reasonably have foreseen it, on the ground that the practice was only a non-essential characteristic of the cartel. In this respect, the ECJ:
  - recalled the strict requirement for the Commission to show awareness as regards the various elements of the infringement to hold a company liable for the conduct of another company; and
  - clarified that the "case-law does not distinguish between practices which are 'essential' and those which are not". In any event, the practice in question was among the "principal activities" of the cartel.
- Second, the GC could not conclude that NKT had participated in one aspect of the cartel (i.e. the allocation of projects in the EEA) prior to November 2002 "without breaching the presumption of innocence" and the correlative principle that the "benefit of the doubt must be given to the undertaking to which the decision finding an infringement is addressed". The only piece of evidence in this regard related to the allocation of projects outside the EEA and the GC did not rule out that the two aspects of the cartel could exist independently from each other.

Accordingly, the ECJ annulled parts of the Commission's decision and in the exercise of its unlimited jurisdiction, reduced the fine imposed on NKT by EUR 200 000. NKT is the second appeal (after ABB's appeal) against the power cables GC judgments which has not been fully dismissed by the ECJ (see our December 2019 newsletter articles here and here). The outcomes in Cases C-595/18, C-601/18, C-611/18, C-606/18 are still awaited.

New Competition Tool and ex ante regulation of digital platforms – EU to widen its regulatory net

EU - MARKET INVESTIGATIONS & SECTOR INQUIRIES / NEW LAW/POLICY

On 2 June 2020, the European Commission ("Commission") launched a public consultation seeking views on a proposal to develop a "new competition tool" ("NCT") to address "structural competition problems" and on the EU Digital Services Act package (a collection of proposed initiatives regarding the digital sector). The proposed NCT would allow the Commission to launch detailed market investigations and to impose behavioural and/or structural remedies if it finds a structural competition problem, similar to the UK market investigations regime, while the Digital Services Act package includes a proposal for ex ante regulation of digital platforms.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The NCT would enable the Commission to impose behavioural and structural remedies, as well as recommend legislative action to improve the functioning of the market investigated.
- The proposed regime is similar to that of the UK market investigations regime, which

can lead to behemoth investigations and require huge resource investments, both for the regulator concerned and those subject to investigation.

WHY A NEW COMPETITION TOOL?

The Commission can currently enforce competition law in a number of ways, including: investigations where it suspects a breach competition law (e.g. Articles 101, 102, 106 TFEU); through the State aid prohibition and notification regime; through the EU merger control regime; and by launching a sector inquiry (however, such inquiries do not allow the Commission to impose remedies to address any concerns found my such an inquiry).

Following the Commission's recent experience of enforcing the EU competition rules in digital and other markets, as well as the reflection process on the fitness of the existing competition rules by the Commission and national competition authorities, the Commission has identified certain structural competition problems that the current rules cannot tackle or cannot address in the most timely or effective manner. These structural concerns are categorised by the Commission as follows:

- Structural risks for competition: Certain market characteristics (e.g. network and scale effects, lack of multi-homing and lock-in effects) coupled with the conduct of the companies operating in those markets can create a threat to competition. This is particularly the case for markets at risk of "tipping". The risks to competition arise through the creation of powerful market players with an entrenched market and/or gatekeeper position which could be prevented by early intervention. Other scenarios falling under this category include unilateral strategies by non-dominant companies to monopolise a market through anti-competitive means.
- A structural lack of competition: Certain market structures do not deliver competitive outcomes (i.e. a structural market failure), even without companies acting anti-competitively. For example, markets may display systemic failures due to certain structural features, such as high concentration and entry barriers, consumer lock-in, lack of access to data or data accumulation. Similarly, oligopolistic market structures increase the risk of tacit collusion, including markets featuring increased transparency due to algorithm-based technological solutions, which are becoming increasingly prevalent across sectors.

THE "OPTIONS" - WHAT MIGHT THE NCT LOOK LIKE?

The Commission has proposed four broad possible forms of the NCT - a regime applicable to:

- dominant companies only, in any sector ("dominance-based with horizontal scope");
- dominant companies only, but only in the digital and other limited sectors ("dominance-based with limited scope");
- all companies, in any sector ("market structure-based with horizontal scope");
- all companies, but only in the digital and other limited sectors ("market structure-based with limited scope").

In relation to remedial powers, the Commission has proposed that the NCT would:

- enable the Commission to impose behavioural and structural remedies, as well as recommend legislative action to improve the functioning of the market concerned;
- not result in a finding of infringement, fines or a basis for damages claims.

COMPETITION ASPECTS OF THE DIGITAL SERVICES ACT PACKAGE

The new competition tool is closely linked to the wider Digital Services Act packages and its additional proposed regulatory powers. The Digital Services Act package has two main pillars:

- first, rules framing the responsibilities of digital services to address the risks faced by their users and to protect their rights; and

- second, ex ante rules covering large online platforms acting as "gatekeepers", which "set the rules of the game" for their users and their competitors. The initiative is aimed at ensuring that those platforms behave fairly and can be challenged by new entrants and existing competitors, so that consumers have the widest choice and the Single Market remains competitive and open to innovations. Options include additional general rules for all platforms of a certain scale, such as rules on self-preferencing, and/or through tailored regulatory obligations for specific gatekeepers, such as non-personal data access obligations, specific requirements regarding personal data portability, or interoperability requirements.

INSIGHTS FROM THE UK MARKET INVESTIGATIONS REGIME

The NCT appears similar to the market investigations undertaken in the UK (see the Ashurst Quickguide for more details on the UK regime), which can be behemoth undertakings both for the regulator concerned and those subject to the investigation. There are certainly plenty of insights that can be gleaned from the UK regime, and from the steps to introduce the Open Banking regime following the UK Retail Banking Market Investigation, for example ensuring:

- an appropriate test for intervention, identifying a market failure and an appropriate remedy;
- that EU-wide remedies can be implemented swiftly and with suitable flexibility built-in, to reflect the dynamic nature of many markets;
- an effective intuitional set up. For example, in the UK the key decisions in market investigations are taken by an independent panel of experts;
- a swift and efficient appeals process; and
- appropriate rights of defence. For example, hearings, regular consultation and access to working papers and data rooms are all key features of the UK model.

NEXT STEPS AND COMMENT

Feedback on the NCT and Digital Services Act Inception Impact Assessments was due by 30 June 2020 and, in relation to the wider proposals (via online questionnaires) by 8 September 2020. A legislative proposal is scheduled for Q4 of 2020. Ashurst will be engaging with this consultation process.

EU Commission proposals to regulate foreign subsidies

EU – NEW LAW/POLICY

On 17 June 2020, the European Commission ("Commission") published a White Paper on "levelling the playing field as regards foreign subsidies". The White Paper sets out the Commission's initial proposals aimed at reducing distortions to the EU internal market as a result of subsidies from non-EU governments.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The consultation on the proposals runs until 23 September. The Commission says it intends to introduce legislation in 2021.
- There are three main strands to the Commission proposals:
  - a compulsory prior approval mechanism for subsidised acquisitions;
  - a compulsory notification mechanism for bidders participating in public procurement processes that are backed by foreign subsidies; and
  - a general instrument to control the distortive effect of foreign subsidies.
- Each could result in remedies aimed at limiting or removing the distortive effect of subsidies.

The Commission was tasked by the European Council in 2019 to identify new tools to address the distortive effects of foreign subsidies. The proposals stem from a belief that EU businesses are being put at a disadvantage compared to certain non-EU investors who are backed by state

subsidies in a way EU businesses are not. The Commission states that foreign subsidies appear to have increasingly facilitated acquisitions of EU businesses, influenced other investment decisions or distorted the market behaviour of their beneficiaries. The Commission notes that, unlike foreign subsidies, subsidies from EU countries are controlled by the State aid rules, which seek to ensure that EU markets are not unduly distorted by such aid.

Regarding acquisitions, the Commission explains that subsidies may allow an acquirer to pay a higher price for an asset than it otherwise would have done, potentially leading to excessive purchase prices, lower efficiency gains and an inefficient allocation of resources. The Commission states that subsidies may be driven by a desire to get a foothold in strategically important markets or privileged access to critical infrastructure. Similar issues arise in public procurement processes.

The Commission accepts it has some existing tools to tackle subsidies, including the WTO Agreement on Subsidies and Countervailing Measures. For example, additional import duties may be imposed on goods produced by entities backed by state subsidies. However, these rules only apply to goods; not services, investment or other financial flows. Whilst the EU Regulation on screening foreign direct investments, which will come into force in October 2020, is of some relevance, its scope is much narrower: it only applies to foreign investment which may impact security or public order, for example, due to effects on critical infrastructure and technologies.

The Commission therefore concludes that additional tools are needed.

THE WHITE PAPER PROPOSALS

The Commission proposes for discussion three main new mechanisms:

Compulsory notification mechanism for subsidised acquisitions of EU targets with the following features:

- The proposals would apply to subsidies explicitly linked to acquisitions, and measures which distort the market indirectly by increasing the financial strength of acquirers.
- A mandatory approval process similar to (but separate from) merger control. Like merger control, the Commission suggests that it be prohibited to implement a relevant acquisition pre-approval, and that the Commission itself should be the decision-maker.
- If the Commission found that an acquisition was facilitated by distortive foreign subsidies, it could either accept remedies, or prohibit the acquisition. Remedies might include divestments, capacity reductions, third party access obligations or mandatory licences.
- The proposed measure would potentially be wider than EU merger control in that it might capture not only acquisitions of control, but also acquisitions of "material influence".
- The regime would only capture subsidised acquisitions. Subsidies for this purpose would include (amongst others) capital injections, grants, loans, guarantees, fiscal incentives or other preferential tax treatment and debt forgiveness. If the subsidy was granted by a government acting as a market investor might, it appears that, like EU State aid law, no relevant benefit would be considered granted. The Commission suggests that subsidies below EUR 200,000 would not be captured (this is the threshold for de minimis aid in the EU). Note that subsidies granted up to one year post-closing would also be covered.
- The Commission indicates there would be a threshold for mandatory notification. This may relate to the turnover of the EU target (the Commission suggests EUR 100 million), but it could be a looser qualitative threshold.
- Subsidies would only be problematic if they distort the EU market. However, subsidies directly facilitating acquisitions would normally be considered distortive. The distortive effect of other subsidies would need to be assessed. Amongst other things, regard would be had to whether the acquirer has privileged access to its domestic market that it could use to leverage its EU position. The Commission also envisages a balancing test based on comparing the distortive effect with any positive impacts the investment might have in the EU (the EU interest test).

Compulsory notification of foreign subsidies by bidders for government contracts*.* To avoid public procurement processes being similarly distorted, the White Paper proposes the following:

- That EU public buyers be required to exclude from procurement procedures operators that have received distortive foreign subsides. This

could also lead to exclusion from subsequent procedures.

- This would be achieved by bidders having to notify the awarding authority when submitting their bid whether they (or related entities) have received, or are expecting to receive, foreign subsidies over a certain threshold.
- It would then be assessed whether the subsidy facilitates participation in the procurement procedure, either directly or indirectly. Where the subsidy enables submission of an offer that would otherwise be economically less sustainable (e.g. bidding significantly below market price), a distortion would be presumed. In other cases, the distortive effect would need to be assessed.
- In terms of procedure, a designated national authority would in principle decide whether there was a relevant subsidy. However, if a detailed investigation is commenced, the authority would have to consult with the Commission on its proposed decision.
- Investigations would be subject to time limits so as not to unduly delay award procedures. The Commission suggests 15 working days for a preliminary review and three months for an in-depth investigation. The contract could not be awarded to the relevant operator during the investigation, but it could be awarded to another bidder. Note that if the designated authority decides a subsidy had been granted, the issue would revert to the awarding authority to decide whether the subsidy distorted the procurement process.

General instrument to control distortive effects of subsidies. This is arguably the most controversial proposal due to its breadth. The White Paper proposes the following:

- It would be a general measure addressing subsidies provided to beneficiaries established or active in the EU that cause distortions in the EU market in all market situations (including, it seems, acquisitions and procurement processes).
- The Commission and national authorities could take action against distorting foreign subsidies. The Commission suggests that if, following an in-depth investigation, it is concluded that the proper functioning of the internal market may have been or may be distorted (note the use of "may"), measures could be imposed to redress that distortion. As in the context of acquisitions, an EU interest test would be applied to balance possible distortions against positive impacts that the relevant activity or investment might have.
- Certain categories of subsidy would be considered most likely to cause distortions. These include export financing not in line with OECD officially supported export credits, subsidies to ailing undertakings, unlimited guarantees, tax reliefs and subsidies facilitating an acquisition. Other measures would need to be assessed in more detail.
- In terms of remedies, as in State aid cases, a requirement to repay monies to the relevant country could be imposed. However, the Commission notes that it may be difficult to determine whether a subsidy has actually and irreversibly been paid back to a third country. Similar remedies to those in the context of acquisitions may therefore also be appropriate.

CONCLUSIONS

The Commission proposals are ambitious in scope and could have far-reaching implications, including on the ability of EU investors to invest in other countries. As the Commission recognises, there may be difficulties in determining whether subsidies have been granted, as well as whether they are distortive. Given that the process of establishing whether State aid has been provided by EU countries is often not straightforward, determining whether distorting contributions have been given by foreign governments can be expected to be even more fraught.

It remains to be seen whether the EU Member States will support such a wide-ranging set of proposals. There is likely to be some opposition to giving the Commission further exclusive powers in relation to acquisitions. Some Member States may also think it sends the wrong message at a time when foreign investment is still very much needed. In any event, it is unlikely to be clear until next year what form any proposed regime will actually take.

French public consultation on Fintechs

FRANCE – MARKET INVESTIGATIONS AND SECTOR INQUIRIES

On 20 May 2020, the French Competition Authority ("FCA") launched a public consultation intended to better understand the competitive impact of the development of new technologies in the financial sector, especially with regard to payment services.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The FCA is conducting a sector inquiry on new technologies applied to financial services and, in particular, to payment services.
- Recent developments in the sector justify the need for more guidance, particularly on how relevant markets should be defined and what kind of practices are at risk.
- The outcome of the public consultation and the sector inquiry may affect the FCA's enforcement priorities.

On 13 January 2020, the FCA launched a sector inquiry intended to better understand the impact on competition of the growing use of new technologies in the financial sector with a focus on payment services. A 20 May public consultation has been published to gather comments from stakeholders. The deadline is 19 June 2020.

According to the FCA, a number of factors are liable to impact market dynamics and the competitive behaviour of undertakings:

- The first one relates to innovation and the development of new types of services (e.g. e-wallets, new exchange instruments, crypto-assets).
- The second is the emergence of new market players, e.g. start-ups bringing about innovative services or leading digital players extending their business in the financial sector.

These coexist with financial institutions which are adapting their model through the purchase of FinTech companies, co-operations or partnerships and/or by investing in research and development.

The public consultation takes the form of a list of questions on three topics:

- The evolution of the financial sector in recent years.
- Issues related to market definition and the position held by existing market players.
- Business practices likely to be implemented by the different players and their impact on competition.

This sector inquiry is part of efforts made by the FCA in the past few years to provide stakeholders with more guidance in relation to digital markets. The FCA recently published a number of insightful papers on digital economy, including a study on "Algorithms and Competition" (6 November 2019) and another one on "Competition and E-commerce" (5 June 2020).

First French fine for obstructing raid confirmed

FRANCE – PROCEDURE

On 26 May 2020, the Paris Court of appeal ("Court") confirmed the fine imposed by the French Competition Authority ("FCA") on an undertaking for having obstructed a competition investigation.

On 22 May 2019, the FCA adopted its first decision sanctioning a company for having obstructed a competition law investigation. It imposed a fine of EUR 0.9 million on Akka, an engineering and technology consultancy group, in relation to two practices that occurred during dawn raids in November 2018:

- the breach of a seal (which was broken by pure negligence by an employee); and
- the suppression of e-mails received during the investigations by employees.

In its ruling dated 26 May 2020, the Paris Court of appeal confirmed this decision:

- First, it stated that the concept of obstruction should not be construed narrowly. According to the Court, this concept covers any conduct tending to obstruct any act of investigation, whether or not it is intentional or the result of a mere negligence.
- Second, the Court held that a company's liability for an act of obstruction committed by one of its employees was established under the same conditions as its liability for anticompetitive practices committed by its employees, since both relevant provisions of the French commercial code refer to the same concept of "undertaking". This means, according to the Court, that the undertaking's liability may be triggered by the actions of any employee authorised to act on its behalf.

As a consequence, the Court – noting that the wrongful conducts were of particular gravity – confirmed the financial penalty imposed by the FCA.

Round 3 to FCO: Landmark German Facebook data collection ban reinstated

GERMANY – ANTITRUST – ABUSE OF DOMINANCE

On 23 June 2020, the German Federal Court of Justice ("Federal Court") handed down a decision in preliminary proceedings in favour of the German Federal Cartel Office ("FCO") which, in 2019, objected to the business model of Facebook. Specifically, the Federal Court upheld the FCO's assessment that Facebook's processing of user data amounted to an abuse of its dominant position in the German social networking market.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- While the Federal Court adopted a slightly different route to the FCO, it confirmed the assessment of the FCO's finding of an abuse of dominance.
- Facebook has a dominant position on the German social networking market which it has been held to have been abusing by requiring its users to consent to Facebook collecting and assigning non-Facebook data to their Facebook user accounts.
- The FCO has prohibited this conduct, only for a lower court to lift that suspension. The Federal Court's interim decision has now reinstated the same restrictions.

In February 2019, FCO alleged Facebook was abusing its market dominance and objected in particular to how Facebook pools data from third-party apps (including WhatsApp and Instagram) with Facebook data and how it tracks people online through Facebook's 'like' or 'share' buttons (see our previous summary). The FCO's decision was subsequently overturned by the Higher Regional Court Düsseldorf (the "OLG Düsseldorf"), which raised "serious doubts about the legality" of the FCO's decision, in particular reading the lack of harm to competition and the lack of causality (see our previous summary). The OLG Düsseldorf's decision is now subject of review by the Federal Court.

The Federal Court's overturning of the OLG Düsseldorf will have come as a surprise to many, as it needed only determine if the OLG Düsseldorf's judgment was legal plausibility:

- The Federal Court found that there are neither "serious doubts" about Facebook's dominant position in the German social networking market, nor any such doubts that Facebook is abusing its dominant position with the terms of use.
- Quite remarkably, the Federal Court reached this conclusion for different reasons to those relied on by the FCO:
  - Whereas most critical voices from a competition law perspective doubted that Facebook's data collection practices could be regarded as damaging competition, the FCO had focused on the alleged infringement of data protection rules (i.e. not competition rules) as the basis on which it concluded that Facebooks conduct constituted an exploitative abuse.
  - The Federal Court, on the other hand, bypassed data protection issues entirely, and considered Facebook's terms of use to restrict the freedom of choice and decision-making sovereignty of its users (absent a dominant position, Facebook's customers would have the chance to switch to a competitor who might have given the user more choice over how their data was used).

According to the Federal Court, Facebook terms of use force its users to consent to the "practically unrestricted collection and assigning" of non-Facebook data to Facebook user accounts which suppresses its users' freedom to choose and thus violate the principle of independence in decision-making of market participants. Hence, by qualifying this as an exploitative abuse of market power the Federal Court, for the first time, seems to be applying the principle of decision-making sovereignty in an abuse of dominance case, thereby emphasizing the importance of autonomy in digital markets.

As a result of the decision, Facebook is required to implement the FCO's decision within 14 months. The main proceedings will continue to be heard before the OLG Düsseldorf. It may well be the case that the OLG Düsseldorf will stick to its former reasoning in favour of Facebook, even though the Federal Court will have the final say over the main proceedings should the final decision of the OLG Düsseldorf be appealed.

However, in the main proceedings the case could also be submitted to the European Court of Justice, which could lead to helpful clarifications of the fundamental legal questions in this case of global importance.

German banking industry attempts to stifle FinTech rivals thwarted

GERMANY – ANTITRUST - ANTICOMPETITIVE AGREEMENTS

In April 2020, the German Federal Court of Justice ("Court") confirmed that certain market participants in the financial sector violated competition law by jointly agreeing on provisions restricting the use of their customers' PIN and TAN codes for purposes of arranging payments via third-party payment operators (case no. KVR 13/19).

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Competition watchdogs in Germany continue to focus on the financial services industry.
- Companies in all fields of business should carefully consider antitrust compliance when consulting with professional associations, and participating in events and initiatives organised by those associations.

In 2016, the German Federal Cartel Office ("FCO") found that certain contractual clauses negotiated by a number of companies active in the financial services sector violated German and European competition law. The relevant clauses were agreed via a professional association, which the relevant companies participated in. These provisions restricted online banking customers' use of their personalised security features. In particular, under the applicable Terms and Conditions, customers were prohibited from using their PIN and TAN codes to access their accounts when using independent online payment service operators' platforms, such as "Klarna". According to the FCO, these restrictions undermined the business models of these third party platforms. The FCO did not consider these restrictions indispensable to ensuring security in online banking. Instead, the FCO concluded that the main purpose of the specific provisions was to hinder the disruptive impact of non-banking payment service operators.

In its recent judgment, the Court has confirmed that the FCO applied the correct approach in its assessment of the restrictions, and that the FCO reached the correct conclusion.

The case clearly points out that the German competition watchdog remains keen to foster vigorous competition in financial services markets, which is good news for the evolving FinTech industry. The decision is also a reminder that anti-competitive practices involving professional associations are still very much an enforcement priority in Germany.

Hong Kong Competition Tribunal adopts a four-step approach for pecuniary penalties

HONG KONG – ANTITRUST – CARTELS / PROCEDURE

On 29 April 2020, The Hong Kong Competition Tribunal ("Tribunal") has handed down its first judgment concerning pecuniary penalties, which provides guidance on how fines are to be calculated for breaches of the Competition Ordinance (Cap 619) ("Ordinance").

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Tribunal applied a four-step approach to the determine the relevant pecuniary penalties, in order to deter anti-competitive conduct and provide certainty and transparency for the calculation of penalties in the future.
- In determining the appropriate penalty, the Tribunal will have regard to the Competition Commission's (Commission) recommendations as to fines, including any suggested reductions for the offender's cooperation with the Commission. Regardless, the Tribunal will impose the pecuniary penalty that it determines appropriate in each case.
- The Tribunal's approach provides an analytical framework for determining pecuniary penalties in a fast-developing area of Hong Kong law. Market participants should be aware that serious anti-competitive conduct will likely lead to the imposition of substantial penalties.

On 17 May 2019, the Tribunal found ten renovation contractors had contravened the First Conduct Rule of the Ordinance by engaging in market sharing and price fixing in providing renovation services to tenants at On Tat Estate in Kwun Tong (see our earlier newsletter summary).

Nearly a year later, on 29 April 2020, the Tribunal handed down a further judgment which determines:

- the pecuniary penalties imposed on the ten contractors; and
- whether and to what extent the contractors should be ordered to pay the Commission's costs. This is the first judgment on pecuniary penalties under Hong Kong's competition law regime.

Ultimately, the Tribunal ordered the contractors to pay pecuniary penalties ranging from HKD132,000 (c.USD 17,000) to HKD 740,000 (c.USD 95,000), and the majority of the Commission's costs (the Tribunal allowed a 20% reduction on the Commission's given that this was the first case before the Tribunal and likely incurred additional costs).

LEGAL FRAMEWORK

The Tribunal has discretion to determine pecuniary penalties, subject to two limitations (Ordinance, s93). First, the Tribunal must take into account:

- the nature and extent of the illegal conduct;
- the loss or damage caused by the conduct;
- the circumstances in which the conduct took place; and
- whether the offender has previously contravened the Ordinance.

Second, the maximum penalty which can be imposed is 10% of the turnover of the offender for each year in which the contravention occurred or, if the contravention occurred in more than three years, 10% of the turnover for the three years with the highest turnover.

The Tribunal held that pecuniary penalties serve the principal purpose of deterring anti-competitive conduct, and that the object of deterrence is best served in Hong Kong by a structured and methodological approach. The Tribunal also focused on the emerging nature of competition law in Hong Kong, adding that a structured approach results in certainty, clarity and transparency.

THE FOUR-STEP APPROACH

The Tribunal approached the determination of pecuniary penalties under the Ordinance in the following four steps:

- **Step 1: Determining the "Base Amount":** The starting point is to identify the value of sales directly or indirectly related to the contravention in the relevant geographic area within Hong Kong in the financial year in which the contravention took place. This value is then multiplied by: (a) a gravity percentage to reflect the gravity and blameworthiness of the conduct (the range accepted by the Tribunal to be applied in Hong Kong is between 15 to 30%); and (b) a duration multiplier to reflect the number of years in which the respondent participated in the contravention. This determines the "Base Amount" of the pecuniary penalty.

  In this case, the gravity percentage recommended by the Commission and accepted by the Tribunal was 24%. Although the respondents were relatively small enterprises, the breaches were "not technical or trivial", and the conduct engaged in was "serious anti-competitive conduct" as defined in the Ordinance. The duration multiplier was one (despite the fact that the conduct in question only lasted for 5 months).

- **Step 2: Making adjustments for aggravating, mitigating and other factors**

  This involves consideration of the surrounding circumstances which may impact the proper penalty, including any aggravating and mitigating circumstances to increase or decrease the Base Amount.

  The Tribunal found no aggravating factors, despite the fact that the Commission submitted that there were aggravating factors, namely, that there were directors/senior management involved and evidence that the anticompetitive arrangements reflected long-running and widespread industry practice.

  As for mitigating circumstances, the Tribunal took into account the limited role of respondents (some of them became liable only as a result of issuing licences to sub-contractors who were engaged in the infringing conduct). A one-third reduction was applied to the Base Amounts for four of the respondents for this reason.

- **Step 3: Applying the statutory cap:** A pecuniary penalty may not exceed 10% of the turnover of the undertaking concerned for each year in which the contravention occurred (the "statutory cap"). The Tribunal reiterated that the statutory cap applies to all sales made by the offender in the relevant financial year, rather than only to the category of goods affected by the conduct.

  The statutory cap limited the pecuniary penalties imposed on seven of the ten respondents. This is because these respondents were small companies and the statutory cap is calculated by reference to overall sales.

- **Step 4: Applying cooperation reduction and considering pleas of inability to pay, if any:** This final step involves applying a reduction, where relevant, to reflect the respondent's cooperation with the Commission. The Tribunal may also consider a firm's financial inability to pay the penalty to justify a reduction of the amount assessed.

  None of the respondents made a claim for reduction on the basis of cooperation. Although one of the respondents argued that its penalty should be reduced by reason of its inability to pay, the Tribunal refused in the absence of clear and compelling evidence that the respondent's viability would be undermined by the penalty.

The pecuniary penalties ultimately imposed by the Tribunal ranged between HKD 132,000 (USD17,000) and HKD 740,000 (USD 95,000) for each of the ten respondents. These penalties can be contrasted against the value of the sales directly or indirectly related to the anti-competitive conduct, which for the ten respondents were between HKD 1.32 million (USD 170,000) at the lowest end and HKD 4.94 million (USD 638,000) at the highest.

COMMISSION'S LEGAL COSTS AND COSTS OF INVESTIGATION

In addition to the pecuniary penalties imposed, the Tribunal required the respondents to pay the Commission's legal costs on a party and party basis, in ten equal shares, applying the civil approach to costs. However, given that this was one of the first cases dealing with this area of law, and that more costs would have been incurred because of the novelty of it, the Tribunal reduced the costs payable by 20%.

In relation to costs of investigation, section 96 of the Ordinance provides that any person who has contravened a competition rule must pay the amount of the costs of, and incidental to, any investigation into the conduct or affairs of that person reasonably incurred by the Commission. The Tribunal held that it is for the Commission to justify why an order under section 96 should be made and, in the absence of evidence, declined to make such an award in favour of the Commission.

ANALYSIS

As this is the first decision of the Tribunal in determining pecuniary penalties under the Ordinance since it came into full force in December 2015, it is likely that Hong Kong's jurisprudence on this topic will continue to develop as the Tribunal deals with different types of anti-competitive conduct. In time, appellate courts will also invariably play an active role in developing the approach to pecuniary penalties in Hong Kong.

In the meantime, however, the Tribunal's four step approach to determining pecuniary penalties provides a useful framework through which market participants can assess the potential consequences of contraventions of the Ordinance. In setting this approach it is notable that the Tribunal considered a structured and methodological approach was the best means of achieving a deterrence effect in Hong Kong and that *"[c]ontraventions of competition law 'do not occur as a result of passion or accident'"* and are instead the outcome of conscious attempts to achieve financial gain.

The decision also demonstrates that the Tribunal will apply an independent mind when setting penalties and not simply follow the recommendations of the Commission. While the Commission must establish an evidential basis upon which pecuniary penalties are to be imposed, the Ordinance provides the Tribunal with a broad discretion to determine the penalties appropriate to the respondents' actions in each case.

First Italian approval decisions under temporary COVID-19 cooperation rules

ITALY – ANTITRUST – COVID 19

On 27 May 2020, the Italian Competition Authority ("ICA") approved a joint purchasing agreement of surgical masks via pharmacies/drugstores and a moratorium scheme on loan repayments agreed within ASSOFIN (the Italian Association of Consumer Credit and Mortgage Lending) pursuant to its temporary rules on cooperation among companies during the COVID-19 outbreak.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Companies are encouraged to seek guidance from the ICA in advance if they are considering coo COVID-19 outbreak;
- Exemptions from the general prohibition on cooperation between competitors will only be approved where cooperation is necessary, temporary and proportionate;
- The ICA has approved agreements between competitors concerning the supply of surgical masks and loan repayments, in each case after consulting the European Commission.

On 24 April 2020, the ICA adopted a communication on cooperation between competitors during the COVID-19 emergency situation (the "Communication"). The Communication mirrors to a large extent the guidance set out in the European Commission's communication establishing a temporary framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak (see our summary).

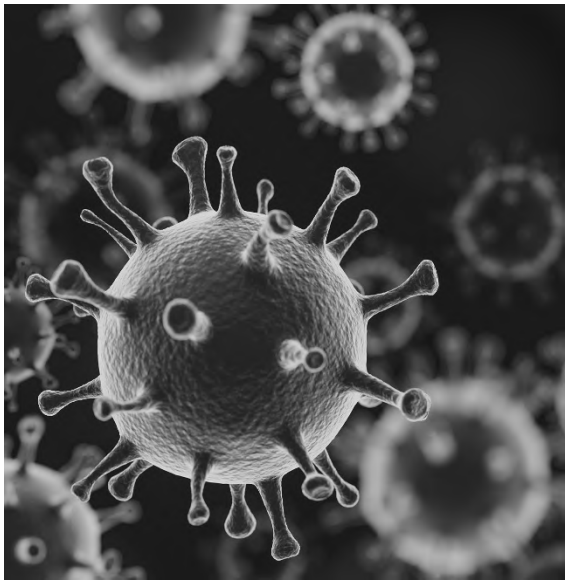
In essence, in some sectors cooperation in the supply of goods and services may be necessary during the COVID-19 emergency situation to overcome or mitigate the effects of the crisis. The Communication recognises, therefore, that certain forms of cooperation may be exempted from the general prohibition on anticompetitive agreements between competitors provided that the cooperation is temporary and does not go beyond what is strictly required to facilitate the supply of essential goods and services during the COVID-19 emergency situation.

There are four points to highlight:

- exchange of commercially sensitive information between competitors remains forbidden;
- the ICA has indicated that it will consider all queries it receives from companies about potential cooperation with competitors;
- the ICA may provide further specific guidance in relation to the application of national competition law in comfort letters; and
- the Communication stresses that it remains important to comply with the antitrust rules during the COVID-19 emergency situation, which the ICA will continue to enforce.

On 27 June, after consulting the European Commission, the ICA took its first two decisions applying the Communication. The first case concerned cooperation between competitors in connection with the distribution of surgical masks via pharmacies and drugstores. The second case concerned a common moratorium scheme for consumer credit reached by ASSOFIN.

The first cooperation scheme concerns the joint purchasing of surgical masks by the two main Italian associations of pharmaceutical distributors and their subsequent distribution among distributors at the unit purchase price negotiated with suppliers. Due to the exceptional health emergency and the limited duration of the agreement (until 30 June 2020), the ICA did not intervene, after concluding that the agreement was designed to manage an effective and homogeneous supply of essential personal protection devices throughout Italy.



In parallel, the ICA approved the common moratorium scheme agreed within ASSOFIN to delay the repayment of loans by consumers and companies that have been impacted by COVID 19 between 21 February and 30 June. The ICA also took into consideration the extraordinary emergency situation and the limited duration of the agreement, while stressing that companies adhering to the moratorium scheme must not directly or indirectly exchange commercially sensitive information. The ICA requested ASSOFIN to keep track of any exchanges of information that are deemed objectively necessary and proportionate to the achievement of the aims of the agreement, in case the ICA should request such information in the future.

As the ICA has made clear, companies should come forward if they are considering cooperating with a view to overcoming or mitigating the effects of the crisis on the supply of products or the provision of services to customers impacted by the pandemic. These first decision demonstrated the ICA's willingness to approve solutions that are necessary, temporary and proportionate.

Legitimacy of ex-post remedies in Sky Italia and R2 (MP) merger reconfirmed

ITALY – MERGER CONTROL

On 28 May 2020, the Italian Administrative Supreme Court ("CoS") reinstated remedies imposed by the Italian Competition Authority ("ICA" or "Authority") to mitigate the effects of the acquisition by Sky Italia Holding S.p.A. ("Sky") of certain assets of the digital terrestrial Pay-TV owned by Mediaset Premium S.p.A. ("MP"). The ICA decision had been quashed by the Regional Administrative Tribunal of Lazio.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- **The ICA can impose remedies in relation to a concentration that has been partially implemented before the end of its investigation:** Italian competition law allows parties to close a transaction prior to receiving clearance. However, completing a transaction may have effects that cannot be easily unwound and the ICA may impose far reaching remedies to restore the pre-merger level of competition.
- **Even a limited degree of control over part of the assets of a company, for a short period, may bring about lasting and irreversible anticompetitive effects in the market:** returning the assets to their original owner will not necessarily restore the level of competition that existed before the deal took place.

The CoS ruled that the Regional Administrative Tribunal of Lazio wrongly quashed the ICA decision imposing remedies on Sky's purchase of R2 S.r.l. ("R2"), which runs MP's pay digital terrestrial television (DTT) platform and is the main pay-TV competitor of Sky in Italy, despite suggestions that Sky had abandoned the transaction. Further background information on the case may be found in our previous newsletter.

In its judgment, the CoS concurred with the ICA's finding that the purchase of the DTT sub-licence eliminated Sky's only significant competitor in the pay-TV space (DTT and satellite). Therefore, the ICA was right to prohibit Sky from entering into exclusive rights for audio-visual content and linear channels for internet platforms in Italy for three years, so that content would be available for other operators that provide their services through Internet services.

The CoS further held that the abandonment of the transaction did not restore competition to the level that existed prior to the transaction. In particular, despite the fact Sky only held "temporary" control over R2, the transaction produced irreversible anticompetitive effects. Indeed, during that limited period, Sky had the possibility of making technological changes to the CAM modules (where the SIM cards are plugged in) used by the R2 platform, thus facilitating its acquisition of new customers and hampering rivals' ability to acquire those customers. The CoS therefore reinstated the measure the ICA imposed to mitigate such "irreversible" effects, thereby ordering Sky to grant FRAND access to competitors to any new platform it may develop.

The CoS also rejected Sky's claims on procedural grounds notably concerning Sky's right of defence (allegedly violated in so far as the ICA did not issue a new statement of objections in relation to the "residual" part of the transaction) and the violation of the principles concerning the assessment of inter-related transactions as a single concentration.

Italian competition law allows parties to close a transaction prior to receiving clearance. However, this case illustrates the difficulty in some cases of unwinding the effects of a completed transaction giving rise to competition concerns and the fact that, in such cases, the ICA is prepared to impose far-reaching remedies to restore competition.

Fines for Singapore Zoo and Bird Park building and maintenance bid rigging

SINGAPORE – ANTITRUST - CARTELS

The Competition & Consumer Commission of Singapore ("CCCS") has imposed fines totalling SGD 32,098 for the rigging of bids for the building and maintenance of the Singapore Zoo and Bird Park among other iconic Singapore park attractions. The CCCS concluded that three construction companies had exchanged sensitive bid information and co-ordinated responses to eight invitations to tender by the Wildlife Reserves Singapore ("WRS") during the period 1 July 2015 to 6 October 2016. The CCCS held that the conduct distorted competition as the parties agreed on bid prices which prevented WRS from obtaining best prices through independent competitive bids.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Bid-rigging arrangements are *per se* illegal in Singapore. They are, by their very nature, regarded as restricting competition appreciably.
- The standard of proof to be applied in deciding whether an infringement of the prohibition against anticompetitive agreements has been breached is the civil standard: proof on the balance of probabilities. In this case, it was sufficient that on the balance of probabilities there was evidence of bid-rigging based on direct evidence, circumstantial evidence and inferences from established facts.
- The CCCS may only impose financial penalties where it is satisfied that the infringement was committed intentionally or negligently. In this case, the CCCS considered that bid-rigging is, by its very nature, committed intentionally.
- While the parties were all leniency applicants, the CCCS varied the applicable leniency discounts depending on the co-operation and usefulness of the information provided by the parties.

On 4 June 2020, the CCCS published an infringement decision against three construction companies, Shin Yong Construction Pte Ltd ("Shin Yong"), Geoscapes Pte Ltd ("Geoscapes") and Hong Power Engineering Pte Ltd ("Hong Power") for participating in the rigging of bids for building, construction and maintenance works for WRS' attractions (Jurong Bird Park, Night Safari, Singapore Zoo and River Safari).

The investigation was commenced when the CCCS received a complaint from WRS on the matter. WRS in turn had received emails from an anonymous complainant alleging that bid-rigging had taken place. The CCCS conducted dawn raids at the premises of several WRS vendors, including Shin Yong, Geoscapes and Hong Power, and conducted simultaneous interviews with personnel. During the course of the investigations, the CCCS also requested documents, information and further interviews with all three companies.

Following the dawn raids, Shin Yong applied for leniency, followed by Geoscapes and Hong Power. While each party admitted to participating in bid-rigging, they were unable to identify specifically which invitations to tender they had rigged. WRS was also unable to provide records of bids by the parties due to limitations of its procurement system. From the evidence gathered, the CCCS considered that, at a minimum, Shin Yong had rigged bids in at least eight tenders; Geoscapes had rigged

six bids, and Hong Power had rigged five bids. Importantly, the CCCS considered that each of the relevant invitations to tender amounted to a separate infringement and none of the discrete incidents of bid-rigging spanned more than a year.

As bid-rigging is per se illegal pursuant to the Competition Act (Cap. 50B), the CCCS did not have to prove that the bid-rigging conduct resulted in anticompetitive effects.

A number of factors were taken into account in terms of the calculation of penalties, including:

- the extent to which each party cooperated with the CCCS;
- whether the parties provided useful information to the CCCS;
- whether there were any aggravating or mitigating factors (e.g. the CCCS considered the multiple infringements committed by each party to be an aggravating factor); and
- adjustments to prevent the maximum penalty from being exceeded.

The maximum penalty is 10% of the turnover of the business of a party in Singapore for each year of infringement, up to a maximum of 3 years. In the end, financial penalties totalling SGD 32,098 were imposed on the parties. Shin Yong was fined SGD 7,148; Geoscapes was fined SGD 19,739 and Hong Power was fined SGD 5,211.

This infringement decision showcases, *inter alia*, the CCCS' extremely broad investigative powers (including the ability to raid premises and to compel the provision of information, documents and interviews), as well as its willingness and ability to progress investigations and reach enforcement decisions quickly and efficiently.

Spanish cartel diverging damages claims developments

SPAIN – PRIVATE DAMAGES ACTIONS

Spanish Courts continue to have diverging approaches to damages in cartel cases, in particular towards the damages arising from the Trucks Cartel. Such differences have been mitigated by appeal courts in Barcelona, Valencia and Galicia. Recently, these disparities amongst lower courts have been also displayed in damages claims arising from the car dealers cartel sanctioned by the Spanish Competition Authority ("CNMC") in 2015.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Spanish courts continue to debate the extent to which it is necessary to prove a damage and its precise quantification under the pre-Damages Directive regime.
- Whereas some lower courts deem that a reliable economic expert report provided by the claimant is necessary in order to establish a damage, the courts of appeal of Barcelona, Valencia and Pontevedra have considered that it is a surmountable requirement.
- The percentage of damages granted against the same cartel continues to differ amongst lower courts.

Since the implementation of the Damages Directive in Spain in 2017, the country has witnessed an explosion of damages actions arising from different cartels, mainly, from the European Commission's trucks cartel decision. However, a diverging landscape of first instance rulings in the Spanish antitrust damages arena has been created. This is because, damages actions are decided by lower courts on a case-by-case basis, as the Spanish judicial system does not encourage class claims and the Supreme Court has not provided a clear cut ruling establishing the criteria for establishing damage arising from a cartel and its quantification.

Two lower courts in Asturias have recently decided on the first claims relating to the car-

dealer cartel sanctioned by the CNMC in 2015, reaching opposite outcomes:

- One court has rejected the award of damages, as it has deemed insufficient the expert report provided by the claimants in order to establish the existence of a damage arising from the cartel.
- The other court has granted damages to another claimant regarding an identical case, as it has admitted the existence of the damage by relying on the same economic evidence and expert report.

Similar discrepancies are found in the damages trucks cartel judgements, where lower courts have granted different damages quantifications, ranging from 5% to 20%.

The court of appeal of Barcelona has recently reviewed a first instance ruling concerning the award of truck cartel damages and has dropped the compensation from 10% to 5% of the truck purchase price. In this regard, the lower court deemed that, even if the expert economic report provided by the claimant was insufficient to establish the existence of a damage, under the pre-Directive regime, a presumption of harm arising from cartels existed and hence estimated the damage to a 10%. The court of appeal in Barcelona upheld this ruling but lowered dropped the compensation to a 5%, as the absence of a reliable economic report provided by the claimant forces the court to adopt a cautious approach to this matter.

The former ruling follows the judgments granted by the courts of appeal in Valencia and Galicia, deeming that under the pre-Directive regime exists a presumption of harm arising from cartels and that judges have the duty to autonomously establish the quantification of the compensation absent a reliable economic expert report provided by the claimant. Similarly to Barcelona's court of appeal, in such cases, Valencia and Galicia's courts of appeal have granted compensation of 5% of the truck purchase price. It is on note that this jurisprudence has not been unanimous amongst lower courts in the territory of Spain and, for example, the first ruling of the Asturian courts presented does not follow it, as it rejects the claim.

These cases show how the landscape of damages actions in Spain is evolving from a divergent approach from lower courts towards a more unanimous approach in courts of appeal. Nevertheless, we are still in early stages of the process to the development of a consistent jurisprudence on the matter and it is still an on-going issue as there are many courts of appeal that still have to make a decision regarding this matter, such as the Madrid's court of appeal, in order to be able to establish a consistent pattern of interpretation of the Spanish law regarding antitrust damages actions.

Shoppers would be "worse off" - CMA prohibits JD Sports/Footasylum merger at Phase 2

UK – MERGER CONTROL

On 6 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. The CMA has concluded that in order to remedy competition concerns, JD Sports must sell Footasylum in its entirety, but it will allow an extended timeframe to do so in light of the current COVID-19 pandemic.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Although mergers can be completed without seeking UK merger clearance, this places risk on the purchaser. This case provides another example of the CMA blocking a completed merger at Phase 2, requiring the divestment of the entirety of an acquired business to address competition concerns.
- The investigation places limited emphasis on market shares given the differentiated nature of the markets involved, relying on other evidence including internal documents and customer surveys to assess the closeness of competition between the merging parties.
- Whilst the CMA continues to consider the impact of COVID-19 on merger decisions, it is clear that the global pandemic will not necessarily result in more lenient merger assessments even in heavily impacted industries.

JD Sports acquired Footasylum in April 2019. The CMA launched a Phase 1 investigation into the merger in July 2019 and the case was referred to Phase 2 in October. The CMA published its Phase 2 decision (CMA summary of decision here) prohibiting the merger between JD Sports and Footasylum on 6 May 2020. The CMA found that the merger gives rise to a substantial lessening of competition in the UK market for sports-inspired footwear and apparel. In particular, the CMA is concerned that the merger will mean customers (predominantly male and aged 16-24) will miss out on beneficial discounts and a high quality range of products, as well as experience a lower standard of customer service.

The CMA identified both in-store and online sales channels as part of a single, combined market, after considering that many shoppers exercise these two options "interchangeably". However, the CMA placed limited weight on market shares in this case given the differentiated nature of the products/services offered by the merging parties. Instead the CMA focussed on a range of other evidence that pointed to the merging parties being "close competitors", including:

- analysis of over 2,500 internal documents showing that the merging parties regularly monitor each other more closely than other competitors;
- surveys indicated that the parties' customers considered them to be strong alternatives to each other;
- the 'gross upward pricing pressure index' (GUPPI), based on the survey results, was high for both parties and particularly for Footasylum. GUPPI provides a measure of a firm's post-merger incentive to raise prices;
- analysis of the impact of store openings and closures indicated that Footasylum is a competitive constraint on JD Sports; and
- the aggregate competitive constraint imposed by other competing retailers was deemed to be moderate at best.

The CMA also considered the effects of the COVID-19 pandemic on the merger, but ultimately concluded that the uncertainty in the retail sector caused by the virus will not, in the medium to long term, increase constraints on either party so as to address the fundamental competition concerns. Although we have seen the CMA provisionally accept the "failing firm" argument due to the pandemic in its Amazon-Deliveroo merger investigation, this case makes clear that COVID-19 will not necessarily result in more lenient merger assessments even in heavily impacted industries.

The CMA therefore considers it a proportionate and necessary next step for JD Sports to sell Footasylum, in order to preserve competition in the market, with an extended divestment period due to COVID-19 uncertainty. JD Sports has expressed its "fundamental disagreement" with the decision and plans to appeal, having recently been granted an extension of time by the CAT to file its notice of appeal against the CMA.

This case provides another example of the CMA blocking mergers at Phase 2, including the Sainsbury's/Asda merger, demonstrating a marked increase in prohibition decision compared to the last five years. It will be interesting to see if this increasingly interventionist approach continues, particularly in the context of a rising case load post-Brexit.

Court of Appeal judgment on costs in Pfizer/Flynn excessive pricing case

UK – ANTITRUST – ABUSE OF DOMINANCE / PROCEDURE

On 12 May 2020, the Court of Appeal ("CA") gave its judgment on an appeal against the ruling of the Competition Appeal Tribunal ("CAT") on costs relating to the appeals by Pfizer and Flynn against the 2016 CMA decision which fined Pfizer and Flynn for abusing their dominant positions by charging unfair and excessive prices for phenytoin sodium capsules. The CA held that, even though the CMA had been unsuccessful on the main issues in the appeal, no order for costs should be made against the CMA which had been acting in its capacity as a regulatory body.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Court of Appeal has confirmed the default position is that the CMA should not be subject to adverse costs orders, even where the CMA is unsuccessful on the main issues in the appeal.
- The ruling rejected the CAT's position that the CMA should be singled out from other regulatory bodies because of its discretion to bring cases and freedom to impose financial penalties.
- The CAT has discretion to depart from the default position for good reason, but such approach must take into account the fact that the CMA is a public body carrying out a public interest function.
- The Court of Appeal's ruling will shape how the CAT approaches costs in future regulatory appeals involving the CMA.

BACKGROUND

The present costs ruling comes against a backdrop of litigation between Pfizer, Flynn and the CMA following the CMA's 2016 decision which found that both Pfizer and Flynn were dominant in the relevant markets and had infringed competition law by charging excessive and unfair prices in the UK for phenytoin sodium capsules. The background to the substantive appeal and the CA's March 2020 ruling remitting the case back to the CMA is set out in a previous article.

Following its 2018 decision on the substantive appeal, the Competition Appeal Tribunal ("CAT") ruled on costs in March 2019 ([2019] CAT 9). The CAT referred to the CA decision in British Telecommunications plc v Office of Communications [2018] EWCA Civ 2542 ("BT v Ofcom"), in which the CA had found that Ofcom should not be subject to adverse costs orders in

situations where it was acting purely in its regulatory capacity in prosecuting or resisting a claim before the CAT, even if it was unsuccessful, provided that its actions were reasonable and in the public interest.

The CAT, however, held that the CA's reasoning in *BT v Ofcom* did not apply as the CMA as a competition authority was not merely performing its regulatory function; rather, it had discretion to bring an infringement case and extensive powers to impose financial penalties. Rule 104 of the Competition Appeal Tribunal Rules 2015 ("CAT Rules") provides that the CAT may "*at its discretion…make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings*".

Accordingly, the CAT held that its established practice was that the starting point for its exercise of discretion was that the unsuccessful party should pay the successful party's costs. From this starting point the CAT considered who had won and who had lost on the various main issues in the substantive appeal; ultimately ruling that the CMA should pay a proportion of the costs of both Flynn and Pfizer.

THE COURT OF APPEAL RULING

In the present judgment, the CA concluded that the starting point is, as set out in BT v Ofcom, that no order for costs should be made against a regulator who has brought or defended proceedings in the CAT acting purely in its regulatory capacity. In this case the CMA was performing its statutory duty under the Enterprise and Regulatory Reform Act 2013; namely, that the CMA must promote competition for the benefit of consumers.

The CA found that this starting point may be departed from for good reason, but the mere fact that the regulator has been unsuccessful, as was the case here, is not enough.

The CA was unconvinced by the CAT's reasons for distinguishing competition infringement cases from other regulatory cases. It was not of great significance that the CMA has discretion as to whether or not to pursue an investigation and a power to impose financial penalties. Additionally, since an appeal of a CMA decision to the CAT is a merits appeal, it is entirely appropriate to consider the CMA's role in such appeal as defending a regulatory decision.

While the CA recognised the CAT does have discretion under rule 104 of the CAT Rules and its approach to costs can, under that rule, explicitly consider the degree of success of failure of a party, the CA ultimately ruled that the CAT must still consider the fact that the CMA is a public body carrying out a public interest function.

COMMENT

The CA's choice not to depart from its ruling in *BT v Ofcom* provides some additional certainty for the CMA, and places the CMA's capacity as competition authority on the same level as other regulatory bodies for the purposes of costs. With no costs order having been made, the CMA will now reconsider the substantive issue as to whether Pfizer and Flynn had abused their dominant positions and, if so, what fine should be imposed. A remittal case timetable was published on 8 June 2020, and the initial investigation will take place from June to October 2020.

Continued rise of UK consumer law: Fake online reviews and COVID-19 pricing and cancelations

UK – CONSUMER LAW

On 22 May 2020, the CMA launched a consumer enforcement investigation into several major websites that display online reviews, to see if they are taking sufficient action to protect shoppers from fake and misleading reviews. The CMA also announced that it had secured commitments from Instagram to tackle the trading of fake and misleading reviews on its platform. The CMA is separately continuing a wide-ranging programme work looking at consumer protection issues arising from the COVID-19 pandemic, focussing in particular on cancellations and refunds and pricing practices.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This action by the CMA evidences that its focus on the online review space is continuing, and has become increasingly important during lockdown when consumers are particularly dependent on online shopping. This action has now seen Facebook, eBay and Instagram offer commitments to tackle misleading online reviews.
- Companies should consider reviewing any of their own online review-related activities, including procedures for managing the detection and take down of suspect material (as well as their online terms and conditions more generally) to ensure compliance with relevant consumer protection provisions.
- The CMA is separately continuing a wide-ranging programme work looking at consumer protection issues arising from the COVID-19 pandemic, focussing in particular on cancellations and refunds. Companies should carefully consider their approach to refunds and alternatives (including how the available options are presented to consumers).

FAKE AND MISLEADING ONLINE REVIEWS

The CMA's online review investigation will look into how the websites under consideration currently detect, investigate, and respond to fake and misleading reviews. In particular, the CMA will consider issues such as:

- suspicious reviews, e.g. where a single user has reviewed an unlikely range of products or services;
- whether businesses are manipulating the presentation of reviews about their products and services (e.g. by combining positive reviews for one product with the reviews for another); and
- how these websites handle reviews about products or services that the reviewer has received a payment or other incentive to review.

Such false and misleading statements are prohibited under consumer legislation, in particular, the Consumer Protection from Unfair Trading Regulation Regulations 2008. This forms part of the CMA's wider programme of work into this area; in 2015, the CMA estimated that online reviews influence GBP 23 billion of UK customer spending each year.

The launch of this investigation ties into the CMA's announcement, also on 22 May 2020, that it has secured commitments from Instagram to tackle the risk that people can buy and sell fake and misleading reviews through its platform (which is operated by Facebook). In particular, Instagram has:

- committed to updating and revising its policy guidelines to clarify that it prohibits fake and misleading review content across its website;
- taken down the content that the CMA had identified, and removed similar content that it identified itself (in particular, Instagram has removed 76 profiles that were being used to trade, or facilitate the trade, of fake and misleading online reviews); and
- agreed to put in place robust systems to detect and remove this kind of harmful material from its website in the future.

This follows similar action taken by Facebook and eBay in January 2020 in response to the CMA's concerns regarding the trade of fake and misleading reviews on their websites, which were raised in June 2019 as part of the CMA's programme of work on this issue.

The CMA has acknowledged that concerns regarding online reviews are particularly relevant during lockdown, when consumers are more dependent than ever on online shopping. Although the CMA is not alleging that any of the websites have acted illegally at this stage, it has been clear that it will take enforcement action to secure any necessary changes, pursuing action through the courts if needed.

CMA'S INCREASING FOCUS ON CONSUMER ENFORCEMENT

This is further evidence of the CMA's increasing focus on consumer enforcement. This has been evident, in particular, in its work in response to COVID-19, with the CMA's COVID-19 taskforce focusing in particular on issues relating to unjustifiable price increases and cancellations and refunds.

Price increases

In respect of its concerns relating to price increases, the CMA sent an open letter to the pharmaceutical and food and drink industries raising concerns about firms seeking to capitalise on COVID-19 by charging unjustifiably high prices for essential goods or making misleading claims around their efficacy. The CMA warned that it has recourse to a range of competition and consumer powers to tackle such behaviour. Subsequently, on 18 June, the CMA launched investigations under Chapter II of the Competition Act 1998 into whether four pharmacies and convenience stores may have abused a dominant position by charging excessive and unfair prices for hand sanitiser products. Although limited details are available, it seems likely that the CMA is investigating whether the four stores may have abused a dominant position in their local area.

Cancellations and refunds

To address concerns relating to cancellations and refunds, the CMA has turned to its consumer law powers. In April 2020, it published a general overview on the legal position pertaining to refunds, in which it reinforced that, subject to a number of limited exceptions, consumers can expect a full refund where:

- a business has cancelled a contract, without providing the goods or services or where no service has been provided (for example due to prevention of the service by Government public health measures) or
- the consumer cancels, or is prevented from receiving services, as a result of Government public health measures (meaning the consumer is not allowed to use the service).

The CMA also confirmed that whilst credits, vouchers, rebooking or rescheduling could be offered as alternatives to refunds, consumers should not be misled or pressured into accepting an alternative to a refund.

The CMA announced at the end of April 2020 that, in response to a large number of complaints, it had opened an investigation into cancellations and refunds. Initially, this investigation focused on three sectors: weddings and private events, holiday accommodation, and nurseries and childcare providers, and it has since been extended to package travel. On 9 June 2020, the CMA announced that Vacation Rentals, an operator of online accommodation websites, has offered undertakings to provide full refunds to customers who were unable to fulfil bookings due to lockdown restrictions. The CMA noted that inquiries continued into other companies, which might lead to court action is similar undertakings are not agreed.

For a summary of the UK consumer law regime, as well regimes in other jurisdictions around the word, see the International Comparative Legal Guide to Consumer Protection Laws and Regulations 2020.

CMA accepts unusual behavioural undertakings in relation to Bauer Media radio acquisitions

UK – MERGER CONTROL

On the 1 June 2020, following a detailed Phase 2 investigation, the Competition and Markets Authority ("CMA") published a notice of acceptance of final undertakings in relation to the completed acquisitions by Bauer Media Group ("Bauer") of four different radio businesses from Celador Entertainment, Lincs FM Group, Wireless Group, and UKRD Group.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The CMA has concluded that the acquisitions resulted, or may be expected to result, in a substantial lessening of competition ("SLC") in the market for the supply of representation for national advertising to independent radio stations in the UK.
- When the CMA reaches such a conclusion, it typically opts for divestment remedies rather than behavioural remedies. Occasionally, it opts for outright prohibition. Divestment remedies would have required Bauer to sell off all or some of the businesses it had acquired (or potentially pre-existing Bauer businesses) with the aim of restoring a sufficient level of competition.
- Behavioural remedies, which are designed to exclude or reduce the ability of the merged entity to exploit increased market power, are generally viewed as sub-optimal, because they rely on ongoing regulation to restore competition, rather than allowing the market to take its natural course.
- However, in the specifics of this case, the CMA felt that requiring a divestment would have involved certain risks and therefore preferred to go down a route of requiring Bauer to provide sales representation services to independent radio stations on the same terms as they received previously, for 10 years.

On 7 August 2019, the CMA referred the following four completed acquisitions by Heinrich Bauer Verlag KG, trading as Bauer, for a detailed Phase 2 investigation:

- the acquisition of 16 local radio stations and associated local FM radio licences from Celador Entertainment;
- the acquisition of 9 local radio stations and associated local FM radio licences, an interest in an additional local radio station and associated licences, and interests in the Lincolnshire and Suffolk digital multiplexes from Lincs FM Group;
- the acquisition of 12 local radio stations and associated local FM radio licences, as well as digital multiplexes in Stoke, Swansea and Bradford from The Wireless Group ("Wireless"); and
- the acquisition of the entire issued share capital of UKRD Group ("UKRD") and all of UKRD's assets, namely ten local radio stations and the associated local FM radio licences, interests in local multiplexes, and importantly, UKRD's 50% interest in First Radio Sales Limited ("FRS"). FRS is a sales house that sells national advertising, sponsorship and promotion and digital campaigns on behalf of independent local radio stations. As at 19 September 2019, it represented 118 local radio stations across the UK. The remaining 50% of FRS is owned by Wireless.

The four acquisitions were concluded separately and with different sellers in early 2019, but the Phase 2 reference related to the cumulative effect of the acquisitions.

The CMA published its Phase 2 final report on 12 March 2020. In the report, the CMA panel noted that the radio stations that Bauer had acquired through the four acquisitions accounted for the majority of FRS' business. It considered that FRS would be significantly loss-

making without the commission revenue it receives from those stations. Therefore, it expected that FRS would be closed by Bauer and Wireless in due course.

Without FRS, independent local radio stations would only have two options for sales representation- one of these being Bauer, and the other being a third party which might impose unwelcome conditions to act in this capacity. This would leave stations with insufficient choice when trying to sell radio advertising airtime. This could lead to higher commission rates or the quality of service offered to those stations deteriorating.

When considering appropriate remedies, in the specific circumstances of this case, the CMA concluded that imposing a full divestment remedy would have raised significant risks. These principally related to uncertainty regarding the incentives, likely appetite and strategic focus of any purchaser to maintain FRS as an active competitor to represent independent stations, and the diverse set of radio stations which would make up the divestiture package. The CMA also did not consider that a partial divestment would work as divestment of Bauer's 50% share in FRS as well as all four of the acquired businesses was thought necessary in order to provide a sufficient scale of customer base to ensure FRS's long-term viability.

The CMA therefore concluded that a behavioural remedy would be more effective in this case. As a result, amongst other things, for a 10-year period, Bauer will be required to provide sales representation services to independent radio stations on the same terms as the stations are currently receiving those services from FRS.

The final form of the undertaking can be found here.

UK Supreme Court: Interchange fees restricted competition

UK – ANTITRUST - ANTICOMPETITIVE AGREEMENTS / PRIVATE DAMAGES ACTIONS

On 17 June 2020, the UK Supreme Court handed down a unanimous judgment in Sainsbury's [2020] UKSC 24 relating to the default multi-lateral interchange fees ("MIFs") set by Visa and Mastercard. The Supreme Court upheld the Court of Appeal's determination that the MIFs had the effect of restricting competition under Article 101(1) of Treaty on the Functioning of the European Union ("TFEU") and handed down important guidance on the application of Article 101(3) TFEU and the pass-on 'defence'.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The UK Supreme Court has unanimously ruled that Mastercard and Visa's multi-lateral interchange fees infringed Article 101(1) TFEU.
- For consumers in a two-sided market to receive a "fair share" under Article 101(3) TFEU of benefits resulting from an agreement, it is necessary that the benefits fully compensate the consumers in the same market within which the restriction adversely affects competition.
- In competition damages cases, defendants and indirect claimants are not required to demonstrate "unreasonable precision" when asserting the "pass-on" of any overcharge.

BACKGROUND

Visa and Mastercard operate a four-party card payment scheme in the UK. Under a four-party scheme, MIFs are charged by the issuing bank (which issues the debit or credit card to the cardholder) and are paid by the acquiring bank (which provides card payment services to the merchant). Visa and Mastercard are responsible for establishing the rules of the scheme and, in absence of any negotiated interchange fees, setting the default MIFs that apply to card transactions.

The European Commission ("Commission") concluded an investigation into Mastercard's MIFs that applied to intra-EEA cross-border card payments in 2007. The Commission found that Mastercard's MIFs restricted competition between acquiring banks and inflated the cost of card acceptance by merchants without leading to proven efficiencies under Article 101(3) TFEU. The Commission's decision was upheld on appeal to the General Court in 2012 and, subsequently, the European Court of Justice ("ECJ") in 2014 (see our September 2014 newsletter).

The Supreme Court's *Sainsbury's* judgment stems from three sets of standalone actions – claiming damages in relation to MIFs – in the English courts, which resulted in one award of damages in the Competition Appeal Tribunal (the "CAT") in 2016 and two judgments dismissing claims in the Commercial Court in 2017. The cases were appealed and jointly heard before the Court of Appeal in 2018. In a landmark ruling, the Court of Appeal overturned all three lower courts decisions and remitted the cases to the CAT for a reassessment. Mastercard and Visa were granted permission to appeal in November 2018 and a hearing was held by the Supreme Court in January 2020.

THE RESTRICTION OF COMPETITION

The first ground of appeal sought to contest whether the MIFs at issue amounted to a prima facie restriction of competition contrary to Article 101(1) TFEU. Mastercard and Visa submitted that the Court of Appeal was wrong to conclude that it was bound by the ECJ's Mastercard judgment (which upheld the Commission's decision finding that Mastercard's cross-border MIFs had breached Article 101(1) TFEU). They argued that the decision of the ECJ depended on a different factual basis.

The Supreme Court dismissed the appeal, finding that whether the ECJ's Mastercard judgment is binding *"depends upon whether the findings upon which that decision is based are materially distinguishable from those made or accepted in the present appeals"*. The Court did not consider this to be the case. On the contrary, the Supreme Court found that *"the essential factual basis upon which the [ECJ] held that there was a restriction on competition is mirrored in these appeals"*. Visa and Mastercard were therefore found to have breached Article 101(1) TFEU.

However, the Supreme Court continued to find that, even if the Supreme Court were not bound by ECJ's Mastercard judgment, it would have still followed it and reached the same conclusion. Here the Court drew upon the *"clear contrast in terms of competition"* between the default MIFs established by Mastercard and Visa resulting in a *"minimum price floor"* and the counterfactual world in which the fees paid by merchants are *"open to competitive bargaining"*.

THE STANDARD OF PROOF UNDER ARTICLE 101(3)

The second ground of appeal considered the exemption criteria under Article 101(3) TFEU, in respect of which Visa and Mastercard complained that the Court of Appeal had wrongly adopted an unduly onerous standard of proof.

Dismissing the appeal, the Supreme Court considered that the complaint by Visa and Mastercard did not concern the standard of proof, but rather the *nature* of the evidence required to meet the standard of proof. Indeed, the Court of Appeal had expressly accepted that the applicable standard of proof

was the usual civil standard of the balance of probabilities under English law.

The Supreme Court explained that Regulation 1/2003, which recognises the autonomy of Member States to determine the legal test for the standard of proof under Article 101(3) TFEU, does not recognise the same autonomy of Member States on the nature of the evidence required to satisfy that standard. Those evidentiary requirements – which are imposed by Article 101(3) TFEU – cannot vary depending on whether EU competition law is being applied by EU courts or authorities or the courts or authorities of Member States.

The Court of Appeal's two-step approach for establishing the requisite causal link between the anti-competitive conduct and the efficiencies claimed under Article 101(3) TFEU was also endorsed by the Supreme Court. In order to satisfy that requirement, Mastercard and Visa must:

- first demonstrate that the default MIFs in each case incentivised issuers to take steps they would not otherwise have taken; and
- second, the steps taken must be shown to have increased card usage or increase the effectiveness of transactions which would have been card transactions anyway.

Finally, the Supreme Court gave guidance on the relevance of the Merchant Indifference Test – which was heavily debated before the lower courts – to the application of Article 101(3) TFEU. The Supreme Court agreed with the Court of Appeal's conclusion that such a test provides a "useful starting point" for the application of Article 101(3) TFEU, but was not a *"silver bullet"* or substitute for the facts the case. As such, in order to obtain exemption, any reliance on the Merchant Indifference Test as a benchmark must be supported with robust analysis and cogent empirical evidence.

THE CONDITIONS THAT CONSUMERS RECEIVE A "FAIR SHARE"

To satisfy the requirements for exemption under Article 101(3), it is necessary to show, inter alia, that the restriction of competition produced benefits (the "first condition") and that consumers received a *"fair share"* of the resulting benefits (the "second condition").

By its third ground of appeal, Visa argued that the that the Court of Appeal had incorrectly interpreted the application of the second condition in the context of a two-sided market. In the Court of Appeal's view, consumers in the relevant market (here the merchants in the acquiring market), would only receive a fair share of the benefits if the advantages to them caused by the restriction of competition outweighed the disadvantages, so that they were no worse off. However, at first instance before the CAT, Visa had argued (successfully) that the second condition could be satisfied even if merchants were worse off as a result of MIFs, provided they received some objective advantages, and the benefits to cardholders and merchants, considered in aggregate, outweighed the disadvantages.

In dismissing the appeal, the Supreme Court emphasised the second condition's *"distinct requirement of "fairness""*, which adds to the considerations of economic efficiency with which the first condition is primarily concerned. As such, the Supreme Court held that aggregate efficiency gains may be relevant to the first condition where restrictive measures have effects in more than one market. However, they cannot be determinative of the question of *"fairness"* under the second condition; if merchants are not fully compensated for the harm inflicted on them by the restrictive measure, they cannot be said to receive a *"fair"* share of the resultant benefits.

PASS-ON

The Supreme Court's ruling on the fourth ground of appeal, in relation to pass-on, is the aspect of the judgment which could least be described as a victory for the retailers.

The Court of Appeal had held that the burden of proof was on the defendant seeking to show pass-on to establish *"a sufficiently close causal connection between an overcharge and an increase in the direct purchaser's price"*. Importantly, the Court had also rejected the application of the *"broad axe"* principle used to quantify overcharge, stating that there was *"no scope for the application of any such principle where the burden lies on the defendant to establish a pass-on of the unlawful overcharge in order to reduce the amount recoverable by the claimant".*

The Supreme Court confirmed that the burden of alleging and proving pass-on remains on the defendant and did not reject the requirement of a close causal connection. However, it clarified

that once a defendant has raised the issue of pass-on, there is a *"heavy evidential burden"* on a claimant to provide evidence as to how they have dealt with cost recovery.

As to how pass-on is to be quantified, the Supreme Court overturned the Court of Appeal's rejection of the broad axe principle, stating that *"in so far as the Court of Appeal has required a greater degree of precision in the quantification of pass-on from the defendant than from a claimant, the Court erred".* In reaching this view, the Court recalled that the application of the compensatory principle must do justice by avoiding under or over-compensation, but must do so at proportionate cost (in accordance with English Civil Procedure Rules). In line with this, the Court reasoned that *"the law does not require unreasonable precision in the proof of the amount of the prima facie loss which the merchants have passed on to suppliers and customers"* and, accordingly, that the extent to which any overcharge was passed on by retailers *"can only be a matter of estimation".*

This aspect of the ruling is likely to have important practical consequences on the approach to quantifying pass-on in the future. It is likely to be more straightforward both to establish and rebut pass-on, possibly with less recourse to extensive and complex econometric modelling. This may streamline litigation between direct purchaser claimants and defendants – the extent to which this occurs will become clear once these principles are applied in practice.

COMMENT

The Supreme Court's ruling that Mastercard and Visa's MIFs were in breach of Article 101(1) will be welcomed from the side lines by merchants pursuing similar claims relating to MIFs in the English courts. However, two of the three actions before the Supreme Court – brought by Sainsbury's – must now be remitted to the Competition Appeal Tribunal for the assessment of quantum and a reconsideration of the application of Article 101(3) TFEU.

This means that Sainsbury's must now demonstrate the losses it claims to have suffered as a consequence of the restriction of competition. The scheme operators will also argue, as they have maintained consistently throughout these proceedings, that the MIFs were exempted under Article 101(3) TFEU. Theses assessments will be far from straightforward and involve complex economic assessments.

Finally, the impact of the Supreme Court's judgment will have repercussions beyond direct merchants. Further down the supply chain, a simpler approach to quantification and the expectation of disclosure by a direct purchaser will have immediate relevance to consumer actions and, in particular, the *Merricks* opt-out collective claim currently awaiting certification, on which the Supreme Court is due to rule later this year. The Court's approach to pass-on in that case, particularly following the *Sainsbury's* judgment, will be keenly awaited by consumer groups.

UK Public Contracts: Recovery and Transition from COVID-19

UK

On 9 June 2020, the Cabinet Office published Procurement Policy Note 04/20: Recovery and Transition from COVID-19 ("PPN 04/20"). PPN 04/20 is intended to update and build on the guidance set out in Procurement Policy Note 02/20: Supplier relief due to COVID-19 ("PPN 02/20"). PPN 02/20 was published on 20 March 2020 and was intended to have effect until 30 June 2020. PPN 04/20 will have effect from 1 July 2020 until 31 October 2020.

PPN 02/20 and its accompanying guidance set out the actions contracting authorities should take to provide relief to suppliers at risk of not meeting their obligations under existing public contracts due to the impact of the COVID-19 pandemic ("at risk suppliers"). In particular, PPN 02/20 was intended to encourage contracting authorities to take action to support at risk suppliers so they would be better able to cope with the pandemic, and to resume normal service delivery and fulfil their contractual obligations when the pandemic is over. The measures contemplated by PPN 02/20 included:

- establishing alternative payment scheduling to support supplier cash flow, such as advanced payment; and
- various forms of contractual relief, such as agreeing extensions of time for contract performance or a waiver of the ability of the contracting authority to exercise a right and/or remedy.

PPN 04/20 acknowledges that the COVID-19 pandemic is not a short term crisis. However, now that the Government is beginning to implement its COVID-19 recovery strategy, the Cabinet Office is providing guidance to contracting authorities on how they should work with their suppliers during the recovery stage of the pandemic.

EMERGING FROM COVID-19

Given the possibility of future outbreaks of COVID-19, the delivery of public contracts may be impacted in the medium to longer term by social distancing measures. Therefore, the supplier relief guidance set out in PPN 02/20 may continue to be appropriate in a number of cases for some time. However, PPN 04/20 seeks to encourage contracting authorities to work in partnership with their suppliers with a view to a gradual exit from any relief measures that have been agreed. In particular, PPN 04/20 recognises that in many cases it will not be commercially viable to revert to the terms of contracts that were agreed prior to the pandemic on account of changes to the basic assumptions underpinning those contracts.

WHAT DOES THIS MEAN FOR CONTRACTING AUTHORITIES AND SUPPLIERS?

PPN 04/20 applies to all UK contracting authorities, excluding the Devolved Administrations. It covers all types of public contracts being delivered in the UK (including PFI and PF2 contracts).

PPN 04/20 advises contracting authorities to do the following:

- Review their contract portfolio, including where they are providing any contractual relief due to COVID-19 and, if appropriate to maintain delivery of critical services, continue or commence measures in line with PPN 02/20;
- Work with their suppliers to develop transition plans to exit from any relief as soon as reasonably possible (e.g. by agreeing necessary contract variations);
- Work with their suppliers to ensure contracts are still relevant and sustainable and deliver value for money over the medium to long term; and
- Continue to pay suppliers as quickly as possible to maintain cash flow and protect jobs.

As regards the final point, HM Treasury guidance on Managing Public Money prohibits payment in advance of need without Treasury

consent. However, PPN 04/20 confirms that Treasury consent is granted until 31 October 2020 for payments in advance of need, subject to a cap of 25% of the total value of the contract, where the Accounting Officer is satisfied that a value for money case is made by virtue of securing continuity of supply of critical services in the medium and long term. Consent for payment in advance of need in excess of this amount should be sought from Treasury in the usual way.

As regards contracts that have been interrupted during the pandemic, PPN 04/20 sets out guidance on the content of transition plans to be agreed by both parties to those contracts.

COMMENTARY

There are four key considerations that need to be borne in mind PPN 04/20 by contracting authorities and suppliers when considering the application of PPN 04/20.

First, PPN 04/20 is guidance, not law. Suppliers to the public sector are not automatically entitled to payment or other relief contemplated by PPN 04/20.

Second, PPN 04/20 does not expressly acknowledge that the ability of contracting authorities to grant supplier relief is constrained by public procurement legislation. In particular, the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016, and the Concession Contracts Regulations 2016 each contain provisions regulating the grounds that may be relied upon by contracting authorities and utilities when negotiating modifications to public contracts during their term. Therefore, if supplier relief is granted inconsistently with those provisions, the award of any modified contract would be susceptible to the risk of a successful challenge. This would appear to explain why PPN 04/20 states that that "It may be necessary for the parties to discuss contract termination" in situations where contracts are no longer viable.

Third, before granting supplier relief, contracting authorities are required to take account of other sources of government support that are available to suppliers. For example, suppliers must not be in receipt of multiple, duplicative relief under PPN 02/20 and PPN 04/20, and under the Coronavirus Job Retention Scheme.

Fourth, suppliers in receipt of public funds must operate on an 'open book' basis. This means suppliers must make available to the contracting authority providing relied any data required and requested to demonstrate the payments made to them under their public contracts have been used in the manner intended.

UK merger control expanded: public health intervention and technology mergers

UK – MERGER CONTROL . NEW LAW/POLICY

With effect from 23 June 2020, the UK Government can intervene in UK merger control assessments in order to maintain the UK's capability to combat, and mitigate the effects of, public health emergencies. In simple terms, this means that the UK Government can now block a deal or (more likely) impose remedies if it has concerns that an acquisition of a relevant UK entity may make it more difficult to combat public health emergencies, such as the current COVID-19 pandemic.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The UK Government can now intervene in UK merger control assessments in order to protect the UK's ability to combat, and mitigate the effects of, public health emergencies.
- The Government also proposes to lower the applicable thresholds in order to bring a greater number of acquisitions relating to artificial intelligence, cryptographic authentication technology and advanced

materials within the scope of UK merger control.

- These measures are a precursor to a planned National Security and Investment Act, which will introduce more comprehensive controls on M&A deals which may impact the UK's national security.

PUBLIC INTEREST INTERVENTION

Under UK merger control, the Competition and Markets Authority ("CMA") is generally the decision-maker. However, the Government can intervene on public interest grounds, in which case, the public interest consideration may trump the competition analysis conducted by the CMA. For example, the Government may block a deal or impose remedies on public interest grounds despite the CMA concluding there are no competition concerns. (As yet, no deals have actually been blocked on public interest grounds: typically, any concerns are dealt with by way of undertakings from the acquirer.)

Until 23 June, there were three public interest intervention grounds: national security, media plurality and stability of the financial system. The public health emergency ground has now been added as a fourth intervention ground. This change is a response to the current COVID-19 pandemic and a concern that critical businesses in such a pandemic (e.g. ones producing vaccines or personal protective equipment) may be more susceptible to takeovers by foreign buyers. This could potentially prejudice the UK's ability to combat the current pandemic, and future ones.

If businesses or investors consider it possible that a transaction could raise such concerns, government guidance encourages them to speak to the department as early as possible.

The changes do not require any business or investor to take any direct action. They do not affect, for example: the fact that the UK retains a voluntary notification mergers system; the other procedural provisions under UK merger control; the European Commission's powers under the EU Merger Regulation.

REDUCED THRESHOLDS FOR MORE TECHNOLOGY MERGERS

In addition, the Government will introduce (once approved by the UK Parliament) reduced thresholds for three additional sectors which are perceived as important for national security:

- artificial intelligence;
- cryptographic authentication technology; and
- advanced materials.

In those sectors, acquisition of the following targets will be caught by UK merger control:

- targets with a UK turnover of GBP 1 million, instead of the usual GBP 70 million; and
- targets which have a 25% share of supply in the UK in one of those sectors, even if the UK turnover of the target business is below GBP 1 million.

These lower thresholds have been in place for targets active in the defence, computing hardware and quantum technology sectors since 2018.

A draft statutory instrument to bring about the expanded scope of the lower thresholds has been published. This indicates that:

- advanced materials relate, amongst other things, to materials capable of modifying the appearance, detectability, traceability or identification of any object to humans or sensors, and alloys formed by chemical or electrochemical reduction of feedstocks in the solid state; and
- cryptographic authentication is defined as the method of verifying a person, user, process or device, or the origin or content of a message, data or information, by means of electronic communication, where the method of verification has been encrypted.

NATIONAL SECURITY AND INVESTMENT BILL

Finally, the Government plans to introduce a National Security and Investment Bill to Parliament soon. This will introduce a more typical system of control on foreign investments as exists in many other jurisdictions (e.g. CFIUS in the US and FIRB in Australia). It remains to be seen whether the Bill will be largely modelled on the previous Government's 2018 White Paper (see our summary update).

For more on the UK merger control regime, see our Quickguide.

Online RPM strikes again – further fines for online restrictions

UK – ANTITRUST - ANTICOMPETITIVE AGREEMENTS

On 29 June 2020, the UK Competition and Markets Authority ("CMA") announced that it had fined two musical instrument makers a total of GBP 5.5 million, in two separate cases, for restricting online discounting of musical instruments. On the same day, it also announced that it had, for the first time, taken enforcement action against a retailer in a resale price maintenance ("RPM") case.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- RPM covers behaviour which restricts retailers' or resellers' freedom to set their own prices, meaning price discounts cannot be offered, for example. This can lead to customers missing out on the best deals because, even when they shop around, they find all retailers are selling at similar prices.
- Whereas RPM cases where relatively scarce a few years ago, this is one of a number of recent infringement cases in this area, demonstrating the CMA's focus on this type of behaviour. This action brings the total fines imposed by the CMA for this illegal conduct in the musical instrument sector to GBP 13.7 million.
- Guidance on avoiding RPM can be found on the CMA's website.

Roland and Korg, which make electronic drum kits and hi-tech music equipment and synthesizers, have been fined for implementing RPM designed to restrict retailer freedom to set prices online by requiring their musical instruments to be sold at or above a minimum price. This follow fines recently imposed on two other leading suppliers in the same sector, Casio and Fender.

The CMA also announced that separately, GAK, a retailer of musical instruments, has also admitted to engaging in RPM with Yamaha and agreed to pay a maximum fine of more than a GBP 250,000 to settle the case. This marks the first time the CMA has taken enforcement action against a retailer in a RPM case. The CMA has issued a provisional decision finding that GAK and Yamaha agreed that GAK would not discount the online price of certain Yamaha instruments below a minimum price. The fine was increased by 15% after it emerged the activity appeared to have continued after GAK received an advisory letter from the CMA, making it aware that there was evidence suggesting it might be engaging in RPM. In contrast, Yamaha was granted total immunity from fines for being the first to bring the conduct to the attention of the CMA.

The CMA has launched its own price monitoring tool aimed at deterring companies from entering into agreements restricting online discounting. The new software allows the CMA to automatically monitor price levels amongst musical instrument retailers. The CMA intends to use this tool to monitor suspicious pricing activity in other sectors in the future to help protect more customers purchasing online.

As a result of these investigations, the CMA has:

- issued an open letter to the industry highlighting the illegal activity it has uncovered and urging compliance with the law; and
- written to almost 70 manufacturers and retailers across the sector, warning them about their conduct and that they need to take swift action to ensure they are complying with the law or potentially risk an investigation and fines.

Ashurst contributes to the International Comparative Legal Guide to: Consumer Protection 2020

GLOBAL – CONSUMER PROTECTION

Ashurst has collaborated with Global Legal Group to produce one of the first international comparative legal guides (ICLG) to Consumer Protection Laws and Regulations. This topic has recently become increasingly more important across the world, especially during the COVID-19 outbreak.

The International Comparative Legal Guide to: Consumer Protection 2020 covers common issues across 23 jurisdictions, with a focus on substantive provisions, enforcement actions, remedies and anticipated reforms. Ashurst has contributed the guides to the United Kingdom, Germany, France and Italy, as well as a chapter on the proposed reforms to toughen the UK regime and what they mean for businesses.

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The guide is free to read online here.

Click on the links below to access the ICLG chapters in association with Ashurst:

- United Kingdom: Consumer Protection 2020
- Tougher UK Consumer Protection Law powers and what they mean for businesses: Consumer Protection 2020
- France: Consumer Protection 2020
- Germany: Consumer Protection 2020
- Italy: Consumer Protection 2020

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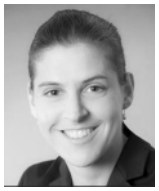

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