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Competition Law Newsletter
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The November 2020 issue of Ashurst's competition law newsletter features some of the key competition law developments over the last month, including the coming into force of the EU FDI screening rules, the European Commission accepting Broadcom's exclusivity commitments, important European Court judgments, gun-jumping in the Italian energy sector, further consumer law enforcement in Australia and the UK, as well as other news.

Content

General Court partially annuls inspection orders

EU - ANTITRUST - CARTELS / PROCEDURE

On 5 October 2020, the EU General Court ("GC") partially annulled European Commission ("Commission") decisions ordering inspections at ITM and Casino's premises in 2017 following suspicions of illegal anticompetitive exchanges of competitively sensitive information.

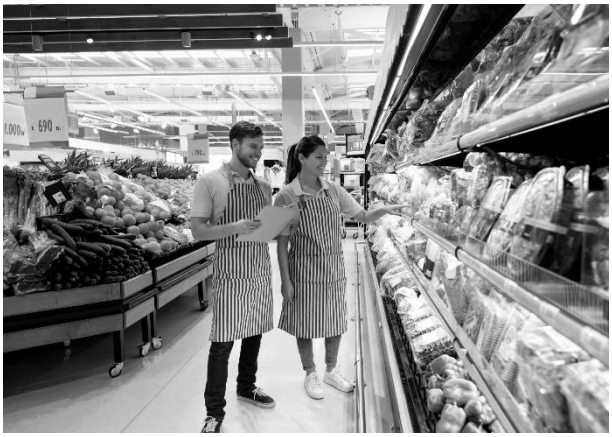
WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Commission may justify dawn raids based on third party testimonies, even though they are not recorded.
- Dawn raids conducted on the basis of evidence which is not serious enough to suspect an infringement must be annulled.

In February 2017, the Commission issued several decisions ordering French retailers ITM and Casino to submit to inspections. The Commission suspected three different anticompetitive information exchanges relating to: discounts obtained from suppliers; the price of commercial services sold to suppliers; and future commercial strategies. A few days later, the companies' premises were raided with the support of the French Competition Authority.

Following these inspections, ITM and Casino brought an action before the GC seeking the annulment of the decisions authorising the inspection.

The GC found that the inspections relating to exchanges of information on rebates and prices were supported by sufficient evidence. In particular, the Commission was entitled, according to the GC, to rely on testimonies made by suppliers of ITM and Casino, the content of which were simply written down in the Commission officials' notebooks. According to the GC, at this stage of the investigations, these testimonies did not have to be formally recorded or minuted. The GC pointed out that formal interviews could make witnesses reluctant to testify.



By contrast, the GC found that the inspections were not supported by sufficient evidence in relation to the suspected information exchange on future commercial strategies. The Commission was relying on the mere presence of a Casino representative at a meeting held with the main suppliers at ITM's headquarters, during which general information had been disclosed on ITM's future plans regarding target customers, the opening of new shops and drive-throughs, digital transformation and the development of e-commerce, innovations aimed at accelerating the shelving of new products, and new promotional efforts. According to the GC, this evidence alone was not sufficient to justify a raid on the applicants' premises since the meeting had been held in public in the presence of journalists and the information disclosed had been very general and merely aimed at promoting ITM.

As a result, the inspections are partially annulled in respect of the suspected exchanges of information on future commercial strategy. The Commission is therefore prohibited from using the corresponding evidence against the companies, and subsequent inspections carried out in 2019 and grounded on that evidence should also be annulled. It is now for the Commission to determine which evidence, among all documents and other information seized during the dawn raid, must be set aside as a result of the partial annulment. This might give rise to further legal controversy.

HeidelbergCement and Schwenk fail to overturn Commission cement merger prohibition

EU - MERGER CONTROL

On 5 October 2020, the EU's General Court ("GC") upheld the European Commission's ("Commission") decision to block the takeover of Cemex Croatia by DDC thereby dismissing the case brought by DDC's parent companies, HeidelbergCement and Schwenk Zement ("Schwenk") claiming, inter alia, that the Commission had no jurisdiction over the case.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- In case of an acquisition by a full-function joint venture, the regulator will look at the real players behind the deal to determine the undertakings concerned and thus whether it has jurisdiction over a case.
- If a deal results in very high combined market shares, non-structural commitments are likely to be insufficient to remedy competition concerns.

BACKGROUND

In 2017, the Commission prohibited the takeover of Cemex Croatia's business by DDC because it considered that the deal would have given the new entity control over more than 70% of parts of the Croatian cement market, which the offered remedies could not overcome (see our previous summary here).

In their appeal against the Commission's decision, the parties argued that the Commission had no jurisdiction to review the acquisition as it failed to meet the EU's merger control thresholds. In particular, they put forward that their full-function joint venture, DDC, was acquiring the target and that thus no account had to be taken of the turnover of DDC's parent companies. As a result, the EU Merger Regulations ("EUMR") thresholds would not have been met as Cemex Croatia's' turnover was too low to trigger jurisdiction. The Commission, however, considered that HeidelbergCement and Schwenk were both relevant "undertakings concerned" for the purposes of deciding whether the EUMR thresholds were met.

GC JUDGMENT

In its judgment, the GC decided that the Commission was correct to take into account "*the economic reality of the real players behind a concentration in accordance with the circumstances of fact and law specific to each case*". Thus the GC confirmed that parent companies can be "*undertakings concerned*", even if the acquirer is not a mere "*shell company*" set up for the purpose of the acquisition.

Having looked at "*the way in which the acquisition process was initiated, organised and financed*", the GC considered that the Commission rightly concluded that the parent companies were the "*real players behind the transaction*", and upheld its jurisdiction over the case.

According to the GC, such case-by-case analysis does not breach the principle of legal certainty, but is in line with the principles set out in the consolidated jurisdictional notice, which was adopted with the "*aim in particular of ensuring legal certainty*", i.e. ensuring that the action of the Commission is "*transparent*" and "*foreseeable*".

The GC also dismissed all the other points of appeal raised by the HeidelbergCement and Schwenk. In particular, it sided with the Commission's analysis that the deal would result in non-coordinated horizontal effects that

could not be remedied by offering access to a cement terminal, as this would not have allowed a supplier to compete effectively and on a lasting basis with the merged entity, thereby requiring the need for structural remedies (divestments) to be considered.

Commission accepts Broadcom's offer to stop exclusivity on chipset markets

EU - ANTITRUST - ABUSE OF DOMINANCE / PROCEDURE

On 7 October 2020, the European Commission (the "Commission") made legally binding commitments offered by Broadcom to ensure competition in chipset markets for modems and TV set-top boxes.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Commitments decisions are adopted in lieu of finding an infringement and/or imposing a fine.
- The Commission is likely to make greater use of interim measures in the future to speed-up proceedings and prompt the offering of commitments in cases where the finding of an infringement is high. This would allow the Commission to counter criticisms that its investigations are too slow, notably in cases involving fast-evolving markets.

BACKGROUND

In June 2019, the European Commission ("Commission") opened a formal investigation into Broadcom, a major supplier of integrated circuits for communications devices, in relation to alleged exclusionary practices on the markets for the supply of TV and modem chipsets (see our July 2019 newsletter) in breach of Article 102 of the TFEU.

On 16 October 2019, for the first time in 18 years, the Commission imposed interim measures on Broadcom in order to prevent "*serious and irreparable damage*" to competition from occurring in certain markets for systems-on-a-chip ("SoCs") for TV set-top boxes and modems (see our October 2019 newsletter). It *prima facie* found that Broadcom had abused its dominant position on these markets by engaging in exclusivity and leveraging arrangements (e.g. discounts) with original equipment manufacturers ("OEM"). The decision ordered Broadcom to cease to apply these clauses contained in agreements with six of its main customers for three years. This decision was challenged before the EU General Court by Broadcom.

COMMITMENTS

Following the imposition of interim measures, Broadcom offered commitments to address the Commission's concerns and slightly amended them in July 2020, in light of the outcome of the market test. On 7 October 2020 (i.e. less than a year after the interim measure decision), the Commission made them legally binding vis-à-vis all OEM, at both EU and worldwide levels.

During seven years, Broadcom will not:

- offer "*price or non-price advantages*" to get OEM to buy "*any minimum percentage*" of their needs of SoCs for TV boxes and modems from Broadcom. At the worldwide level (excluding China), it will not oblige or incentivise customers to purchase more than half of their needs for these chipsets from Broadcom; and
- link the supply of, or the granting of advantages for, SoCS for TV boxes and modems to the purchase of any minimum quantity of other chipsets. At the worldwide

level (excluding China), it will not link the supply of these chipsets to the customers purchasing more than half of their total needs for other chipsets.

Commissioner Vestager stressed that these commitments "*will ensure that existing chipset makers competing with Broadcom and potential new entrants will be able to compete on the merits*". She also praised the use of interim measures, which allows for "*commitment discussions to take place in a more efficient manner and without the risk of the market deteriorating in the meantime*".

COMMENT

The Commission is likely to use this tool more in the future to speed-up proceedings and prompt commitments in cases where the likelihood of finding an infringement is high. This would mark a turn in the Commission's stated policy regarding commitments, which are described in recital 13 of Regulation 1/2003 as being "*not appropriate in cases where the Commission intends to impose a fine*".

Finally, it remains to be seen whether Broadcom will maintain its challenge against the Commission's interim measures, which have become void following the decision on commitments.

EU FDI Screening Regulation goes live

EU - FOREIGN DIRECT INVESTMENT

On 11 October 2020, Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union (the "FDI Regulation") became fully applicable. In the 18 months since the FDI Regulation was enacted, the Regulation and the European Commission's ("Commission") guidance have influenced FDI screening regimes across the EU.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- As of 14 October 2020, 15 EU Member States (plus the UK) have implemented FDI screening mechanisms.
- From 11 October 2020, Member States that have implemented screening mechanisms are bound by the minimum standards set out in the FDI Regulation and are required to participate in an EU cooperation mechanism. The FDI Regulation also sets out certain non-exhaustive criteria Member States can take into account when assessing an investment.
- However, there is relatively low regulatory convergence at this stage of development of the EU FDI screening system and some regimes remain opaque to international investors. Investors should nevertheless be mindful of the potentially severe consequences of failing to notify an investment in a Member State.

BACKGROUND AND THE FDI REGULATION

Under the FDI Regulation, from 19 March 2019, Member States were required to notify FDI screening mechanisms, or any modifications thereto, to the Commission. The Commission maintains a directory of these regimes. As at 27 October 2020, 16 jurisdictions (including the UK) had notified some form of FDI screening mechanism. A number of these have undergone amendments in recent months, typically to enhance scrutiny of transactions potentially posing a risk to critical health infrastructure, the supply of critical inputs and other critical sectors as a result of the COVID-19 pandemic.

From 11 October 2020, national FDI screening mechanisms in EU Member States must comply with certain minimum standards, relating to transparency, non-discriminatory rules and procedures, explicit timeframes and review procedures (see our previous summary here). The FDI Regulation also sets out a non-exhaustive list of criteria the Commission and Member States may take into account in determining whether FDI is likely to affect security or public order.

Member States that have implemented FDI screening mechanisms must also participate in an EU cooperation mechanism. Member States retain the final say on whether to approve an investment, but are required to provide the Commission and other Member States with information on ongoing screening. The Commission and other Member States are able to provide opinions and comments on the relevant investment, to which the host Member State must give due consideration.

EARLY STAGES

However, the decentralised EU screening system is still in its early stages and presents a low degree of regulatory convergence. Certain national regimes remain opaque to international investors and there is often scarce precedent to rely on to interpret their provisions.

Nevertheless, investors have an incentive to dedicate time and attention to this issue as, although the FDI Regulation itself does not give the Commission or Member States the power to block (or permit) foreign acquisitions:

- the potential consequences of overlooking screening rules can be severe under local laws, extending as far as prohibition, and in some jurisdictions, criminal sanctions; and
- the EU FDI screening process may have an impact on transaction timing as Member States will in most cases need to wait for the outcome of the EU screening process before issuing their final decision.

iSelect penalised $8.5m for misleading consumers comparing energy plans

AUSTRALIA - CONSUMER PROTECTION

On 8 October 2020, the Federal Court of Australia ordered iSelect Limited ("iSelect") to pay a pecuniary penalty of AUD 8.5 million for making false or misleading representations on its website when comparing and selling electricity plans, in contravention of the Australian Consumer Law ("ACL").

iSelect represented that it would compare all electricity plans offered by its commercial partners and recommend the most suitable or competitive plan to consumers, when this was not the case. iSelect also made false or misleading price representations on its website where, due to coding errors, prices were misquoted to almost 5,000 customers between March 2017 and November 2019.

iSelect admitted liability and consented to the orders sought by the ACCC, including the AUD 8.5 million penalty and an order to publish corrective advertising.

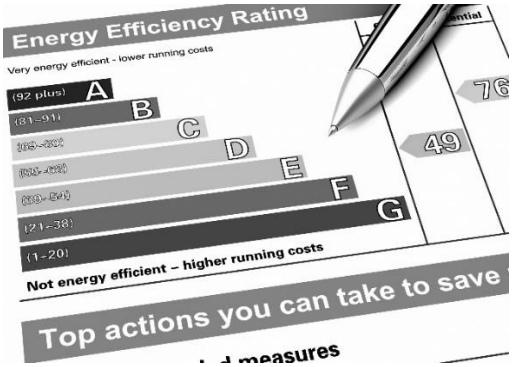
WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Comparison websites must take care if representing themselves as a neutral comparison tool, when in fact, recommendations may be influenced or limited by commercial partnerships.
- Companies should ensure that any algorithms that provide inputs into generating price representations are correct, and implement measures to prevent incorrect calculations (and misrepresentations as to price) being made as a result of coding errors.
- Merely having a compliance program in place and running compliance training is insufficient. Relevant personnel must actively turn their minds to the question of whether representations are accurate.

iSelect is a commercial price comparator which compares utilities, insurance and finance products. It does not charge consumers for using its comparison service, but is paid fees and commission by its partner retailers when a consumer purchases an energy plan through iSelect.

Between November 2016 and December 2018, iSelect represented on its website that it would compare all electricity plans offered by its partners and recommend the most suitable or competitive plan.

In reality, iSelect's commercial partner arrangements restricted the number of plans that its partners uploaded onto its website, so the recommended plans were not necessarily the most competitive, nor did it include all available plans in the consumer's requested area. In addition, iSelect also failed to adequately disclose that cheaper plans from its partners were only available via its call centre and not through the online comparison website.



For these contraventions, the Court considered the AUD 7.3 million penalty jointly proposed by the parties to be appropriate, as the representations had a high degree of visibility and disclosures were not prominent or proximate to the misleading statements. The Court considered the statement "Find the most competitive rates… [on iSelect]" to be "particularly troubling" as it appeared prominently on iSelect's homepage and senior management had approved it, despite being aware of the terms of iSelect's commercial partner arrangements.

iSelect also admitted that between March 2017 and November 2017, the prices of some recommended plans were misrepresented to almost 5,000 consumers due to coding errors in its website. Some quotes underestimated

the total cost of plans by up to AUD 140 per quarter. The Court noted that although there was no evidence that the error was deliberate, iSelect is a publicly listed company with significant resources and its core business is the provision of a comparator dependent on accurate underlying coding. The Court considered its failure to prevent such coding errors to be a significant compliance failure, and it approved the penalty of AUD 1.2 million proposed by the parties.

iSelect admitted liability and consented to the orders sought by the ACCC, including the total penalty of AUD 8.5 million, an order to publish corrective advertising and for iSelect to pay part of the ACCC's legal costs.

In approving the penalties, the Court noted that energy services are a household essential which consumers find complex and confusing to compare, and that iSelect's plan and price misrepresentations would have diminished consumer choice. This case is also a reminder that merely running compliance training is insufficient; iSelect had a compliance program in place but the Court noted that relevant personnel must actively turn their minds to the question of whether representations are potentially false or misleading.

Event ticket reseller viagogo fined $7m for misleading consumers

AUSTRALIA - CONSUMER PROTECTION

On 2 October 2020, the Federal Court of Australia ordered viagogo AG ("viagogo"), a Swiss-based company, to pay a pecuniary penalty of AUD 7 million for making false or misleading representations when reselling event tickets, in contravention of the Australian Consumer Law ("ACL").

The Court found that viagogo made a number of misrepresentations in contravention of the ACL:

- viagogo marketing itself as an "official" seller when it was in fact a platform for second-hand sales;
- viagogo representing that tickets were selling fast or that quantities were limited, without adequately disclosing that this referred only to quantities available on its website, not to the event itself; and
- viagogo advertising low prices to draw in consumers when the true price included additional fees, and not prominently specifying the total fee payable alongside the low price.

The Court also ordered an injunction, restraining viagogo for five years from making similar representations, and that viagogo implement and maintain an ACL compliance program.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Companies must ensure that the use of the term "official" does not misrepresent an affiliation, endorsement or relationship with another party that is not accurate.
- Representations as to the price of products and services should refer to the total price for which the product or service can be purchased by consumers, including applicable fees, to avoid falsely inducing customers to believe that a lower price may be available when that is not the case.
- Beware of using pop-ups, banners, and notifications during the purchasing process which are designed to create, or might otherwise have the effect of creating, a sense of urgency. Even if these messages are not in themselves misleading, they lessen the likelihood of an ordinary consumer paying attention to the 'fine print' during the purchasing process.
- Companies not based in Australia, but conducting business over the internet with Australian consumers, are nevertheless subject to the Australian Consumer Law and the significant penalties available for breaching those laws.

OFFICIAL SITE REPRESENTATION

Viagogo's use of the phrase "Buy Now, viagogo Official Site" was found to be misleading because an ordinary consumer would understand this phrase to mean that official original event tickets could be purchased from viagogo, or that viagogo was affiliated with the event host, when the tickets available were actually being resold.

The Court characterised this as a "very serious" misrepresentation as it "fundamentally misled consumers as to the nature of viagogo's business". A penalty of AUD 2.5 million was imposed for this conduct.

QUANTITY REPRESENTATION

viagogo's website repeatedly displayed statements such as "Only five tickets remaining!", "Tickets are likely to sell out soon" and "Last chance!". The Court found that an ordinary consumer would understand this as referring to the scarcity of tickets available for the event overall, when such representations were actually referring to the tickets being sold only on viagogo.

The Court considered that the effect of this conduct was to distract consumers from the inadequate disclaimers on viagogo's website and hurry customers along. The Court described the misrepresentations as being on "an industrial scale", noting that they would not have escaped the attention of any consumers due to the frequency and the manner in which they appeared. A penalty of AUD 2.5 million was imposed for this conduct.

TOTAL PRICE REPRESENTATION

The Court found that viagogo had misrepresented that consumers could purchase a ticket for a stated price when in fact additional fees needed to be paid to viagogo.

By making the misrepresentation at the start of the purchasing process, the Court considered that viagogo "seduced" customers with a misleading impression. The Court acknowledged that the customer eventually learned the true price on the final page but by then, the customer had invested significant time navigating the booking process. A penalty of AUD 1.5 million was imposed for this conduct.

PART PRICE REPRESENTATION

The Court found that viagogo made a part-price representation in contravention of the ACL by stating on its 'Delivery Page' a price for tickets that excluded further fees payable, without also prominently specifying as a single figure, the price for each ticket that included the additional fees.

The Court noted that consumers were drawn further into the transaction as a result. However, the ACCC's case was based on only three transactions and the conduct was of a limited duration. A penalty of AUD 500,000 was imposed for this conduct.

Paris Court of Appeal upholds interim measures order on Google

FRANCE - ANTITRUST - ABUSE OF DOMINANCE

On 8 October 2020, the Paris Court of Appeal rejected Google's challenge to the French Competition Authority's ("FCA") decision compelling Google to negotiate "neighbouring rights" with news agencies and press publishers. "Neighbouring rights" include the right to receive payment when a publisher's content is reused online.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Paris Court of Appeal considers that Google is dominant on the market for general search services.
- Imposing unfair trading conditions on press publishers and news agencies may constitute an exploitative abuse of a dominant position.
- The FCA can impose interim measures ordering an undertaking to negotiate in good faith provided that there is a risk of serious, urgent and immediate harm to the economy and that the measures are necessary and proportionate.

In the context of the implementation of directive n°2019/790 on copyright and neighbouring rights into French law, Google unilaterally decided to stop displaying short abstracts, or "snippets", of press articles unless press publishers and news agencies allow it to display these snippets for free.

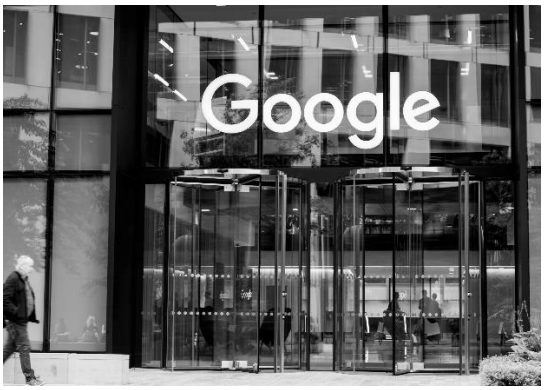
Following several complaints, on 9 April 2020 (decision n°20-MC-01), the FCA imposed interim measures on Google, alleging that its refusal to enter into negotiations in relation to payment for the use of the publishers' editorial content may amount to an abuse of a dominant position as well as an abuse of economic dependence. In its decision, the FCA notably compelled Google to negotiate in good faith such payment with press publishers and news agencies who seek it.

On 8 October 2020 (judgment n°20/08071), the Paris Court of Appeal upheld the FCA's decision. First, the Court held that Google is dominant on the market for online general search (with a market share around 90%) and may *prima facie* have imposed unfair trading conditions which would constitute an exploitative abuse of a dominant position. Google's arguments, relating to the absence of a causal link between Google's actions and a reduction of online traffic on press publishers' websites, and the absence of anticompetitive effects, were rejected.

Second, the Court found that the alleged infringement caused serious, urgent and immediate harm to the press sector. In that context, the Court considered that most of the interim measures imposed by the FCA were both necessary and proportionate. However, the Court modified one of the interim measures, which was intended to ensure that the indexation, classification and presentation of protected content by Google is not affected by the negotiations. The Court reduced the scope of this measure to ensure that Google is able to keep improving its services.

Following the Court's decision:

- Google is required to negotiate and make an offer, but such an offer may be zero-priced, for instance when the reuse of the article by Google does not generate value or if the creation of the article did not involve any particular investment;
- Google may remove a publisher's snippets after Google has made an objective, transparent and non-discriminatory offer for remuneration, but negotiations fail; and
- a publisher may grant Google a free licence without this being considered an abuse. The potential abuse was in Google's general refusal to negotiate, not the zero price in itself.



The Court held that Google derives a direct and indirect economic interest from the display of snippets and acknowledged that publishers get value out of the display of snippets, but that value may not be sufficient compared to publishers' investments. The Court noted that the FCA could take the value of the referral traffic into account in its investigation on the merits.

In parallel to these proceedings, discussions between Google and press publishers continue. In September 2020, a complaint was brought by news agencies and press publishers before the FCA alleging that Google had infringed the FCA's decision by not negotiating in good faith. On 1 October 2020, Google announced that it would unveil a USD 1 billion package in the next three years to support press publishers around the world.

Energy companies fined for gun-jumping in Italy

ITALY - MERGER CONTROL

On 15 September 2020 the Italian Competition Authority ("AGCM") fined three companies active in the production and distribution of energy for failure to notify a concentration before its closing, rejecting the parties' claim that the concentration was interdependent on a second transaction that had been notified on time.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The AGCM can impose fines of up to 1% of a company's consolidated turnover for failure to notify a concentration which meets the Italian thresholds.
- The assessment of whether two or more transactions constitute a single concentration is an objective one.
- Two transactions will be distinct concentrations where, at the time of the first transaction, the second one is considered to be only a future possibility.
- Even a single concentration consisting of two distinct transactions, each of which would meet the applicable turnover thresholds, must be notified before the closing of the first transaction.

On 15 September 2020 the AGCM levied over EUR 150,000 in fines on three utilities companies, Acea S.p.A., Mediterranea Energia Soc. Cons. a r.l. and Alma C.I.S. S.r.l., for failure to notify a concentration prior to its closing.

In particular, on 18 May 2020 the parties had notified two transactions to the AGCM, claiming that they constituted a single concentration. The first transaction, which concerned the acquisition of joint control of Pescara Distribuzione Gas S.r.l. by the parties, had been closed on 19 March 2019 (prior to its notification to the AGCM), while the second transaction concerning the acquisition of joint control of Alto Sangro Distribuzione Gas S.r.l. by the same parties was duly notified prior to its closing.

According to the parties, the two transactions should be considered part of a single concentration, because they were both part of Acea's plan to enter the gas dispatching market

in central Italy and had been carried out by the same parties within a two-year period.

However, the AGCM found that, in the circumstances, the two transactions had to be considered as two distinct concentrations, each of which required prior notification to the AGCM, insofar as:

- they were not simultaneous;
- they were not linked by *de jure* mutual conditionality;
- they were not even *de facto* interdependent since, at the time of the first transaction, future transactions between the same parties were considered only as a mere possibility; and
- both met the merger notification thresholds.

In addition, the AGCM noted that, contrary to the parties' claim, a single concentration consisting of several distinct transactions, each of which meets the applicable turnover thresholds, should in any case be notified to the AGCM before the closing of the first transaction. In this case, the parties only notified the alleged "single concentration" after the closing of the first transaction, thereby breaching the obligation of prior notification.

As a consequence, the AGCM simultaneously:

- found that neither of the two transactions created or strengthened a dominant position on the relevant markets and thus cleared them; but
- opened an investigation into the three parties for failure to notify the first acquisition. It then fined the three parties for gun-jumping, due to their failure to notify the first transaction before its closing.

When quantifying the fine, the AGCM considered as an aggravating circumstance the fact that, if the second transaction had not occurred, the AGCM would not have been made aware of the first one.

This case represented a good opportunity for the AGCM to demonstrate its strict approach to the assessment of the interdependence of two or more transactions. Moreover, the level of the fine and the aggravating circumstance demonstrate the AGCM's strong approach to enforcement of merger control rules and serve as a reminder of the importance of notifying concentrations that meet the national thresholds before their closing and implementation.

Singapore e-commerce platforms market study recommends update to competition guidelines

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

On 10 September 2020, the Competition and Consumer Commission of Singapore ("CCCS") published its findings and recommendations from its market study on e-commerce platforms. While the market study did not identify any significant competition concerns in the sector, the CCCS has concurrently proposed amendments to six of its guidelines to provide greater clarity and guidance to businesses and competition practitioners. These amendments take into consideration the recommendations from the market study.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Digital platforms continue to face increased scrutiny from competition regulators around the globe. The CCCS market study is the latest example of efforts by governments and regulators to determine whether existing competition frameworks are able to address issues arising from the growth of digital companies.
- The market study concluded that Singapore's competition regime was sufficiently robust to address competition issues that may arise from the proliferation of e-commerce platforms.

However, the CCCS noted that it would continue to actively monitor developments in the fast evolving e-commerce market.

- Following recommendations by the market study to provide greater clarity on the application of the Competition Act (Cap. 50B), the CCCS has published proposed changes to its guidelines. These amendments provide further guidance on the CCCS' approach to e-commerce platform operators and other digital companies in the contexts of merger assessments and abuse of dominance investigations.

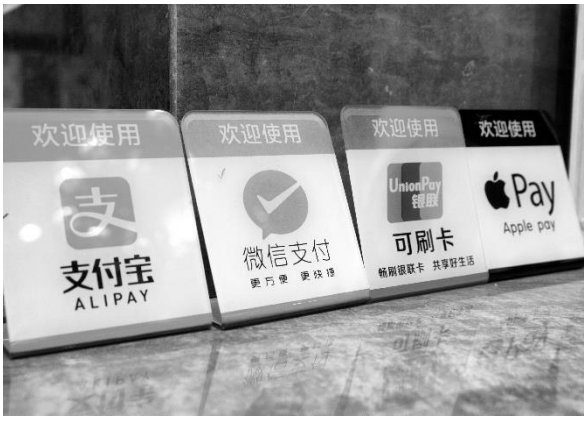
CCCS MARKET STUDY

The CCCS market study investigated the business models of e-commerce platforms in Singapore and analysed the potential competition and consumer issues that may arise from the proliferation of these platforms in the market. In particular, the CCCS examined the growth of e-commerce platforms that competed in multiple market segments offering distinct products and/or services. For example, the market study noted the rise of Grab as a regional "super app" which bundled services such as e-payment, marketplaces, ride-hailing and food delivery in a single mobile app.

The CCCS concluded that it did not identify any major competition concerns in the sector and its existing competition framework was sufficiently robust to address any competition issues that may arise. Key findings of the market study include:

- consumers checked multiple platforms and were sensitive to both price and non-price factors, such as platform loyalty, in deciding which platform to use;
- e-payment services by e-commerce platforms were unlikely to be a prerequisite for a platform's success in Singapore;
- lack of data was presently not a significant barrier to entry for e-commerce platforms; and
- data protection was currently not a key parameter of competition amongst e-commerce platforms.

Further, the CCCS also concluded that there was scope to provide further clarity in its guidelines, particularly in relation to how market definition and market power in cases involving digital platforms would be assessed.



PROPOSED CHANGES TO COMPETITION GUIDELINES

Following the publication of the e-commerce platforms market study, the CCCS announced its public consultation on proposed changes to six of its competition guidelines. These amendments are intended to provide greater clarity on the conceptual, analytical and procedural frameworks applied by the CCCS under the Competition Act (Cap. 50B).

Taking into consideration the findings from the market study, key proposed changes include:

- explanation of the CCCS' approach to market definition in relation to multi-sided platforms. The CCCS will first identify appropriate theories of harm before considering whether the relevant market should be treated as a single multi-sided market or multiple interrelated single-sided markets;
- clarification that market shares, by themselves, may not necessarily be a reliable guide to assessing market power where the market is characterised by innovation and rapidly changing competition dynamics. Other determinants of market power include the strength of network effects and the control or ownership of key inputs;
- inclusion of innovation as a feature of a competitive market and a factor that the CCCS will assess in the context of the substantial lessening of competition test;
- clarification that difficulties in accessing proprietary rights or data can be barriers to entry and expansion; and

- updated processes and timelines for offering commitments in the context of merger notifications.

Businesses active in the e-platforms industry and/or who contract with such businesses may wish to take note of the proposed changes above and consider the implications of these changes on their respective businesses.

Spanish High Court rejects appeal against Land Rover dealer cartel

SPAIN - ANTITRUST - CARTELS

In 2015, the Spanish Competition Authority ("CNMC") sanctioned a cartel of Land Rover dealers, and found that a consultancy firm, ANT Servicalidad, was also liable for the conduct as it acted as a facilitator of the cartel. In a recent judgment, the Spanish High Court rejected the appeal brought by this consultancy firm and confirmed the fine imposed by the CNMC.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Spanish High Court established that the principle of non-bis in idem (legal doctrine that no legal action can be instituted twice for the same cause of action) does not apply if an undertaking performed the same anticompetitive behaviour in respect of different cartels.
- The Court reinforced the powers of the Spanish Competition Authority in its dawn raids orders and reinforced the doctrine on 'incidental findings' which are deemed lawful.

The High Court has recently rejected the appeal brought by ANT, a consultancy firm fined for acting as a facilitator of the cartel, against the Land Rover dealer cartel sanctioned by the CNMC in 2015.

The CNMC found that the cartel consisted in an anticompetitive agreement of maximum discounts to be applied to prices entered by the Land Rover dealers of Madrid and ANT consulting provided services in order to monitor the compliance of the anticompetitive agreements in the market. Alongside with this cartel, during the same period the CNMC also sanctioned similar dealers cartels of Volkswagen, Audi and Seat brands, amongst others, in which ANT Servicalidad also offered similar services.

ANT Servicalidad challenged the sanction in several grounds, however none of the challenges set forward have succeeded:

- First, it was argued that the decision was based on unlawful dawn raids as the investigation order did not contain the minimum information justifying the inspections. Further, the investigation order did not include any references to possible practices concerning Land Rover car dealers as it only referred to practices relating other brands such as Audi or Seat. The Court ruled that the inspection orders did follow the criteria settled by the Supreme Court and that there were sufficient indicia in order to

justify the inspections. Further, the Court established that the fact that the order did not referred to the conducts by Land Rover dealers, according the doctrine on 'incidental finding' the findings in this regard were lawful.

- Second, the CNMC decision was challenged on the ground that is was in breach of the '*non bis in idem*' principle, as ANT Servicalidad had been fined for the same conduct in cartel decisions relating to other brands, issued on the same day. Nevertheless, the Court considered that such principle was not breached as the conduct related to different cartels, thus different situations.
- Finally, the sanction was challenged as ANT Servicalidad considered that it was not proportionate. However, the Court considered that the fine, based on the 2.5% of ANT's annual turnover, was proportionate considering its key role as facilitator of the cartel.

This case further develops the jurisprudence on facilitators in Spanish competition law and establishes key insights on how the non-bis in idem principle applies in such cases.

CMA consumer law push continues – Care UK to refund unfair "shortfall" fees

UK - CONSUMER PROTECTION

On 8 October 2020, the UK Competition and Markets Authority ("CMA") announced that Care UK had agreed to refund certain NHS funded residents that had been charged a "shortfall" fee, which the CMA alleged was unfair and breached UK consumer protection laws. This is part of the CMA's broader investigation into the UK care homes sector and continues the CMA's increased use of its consumer protection laws.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The commitments secured from Care UK form part of the CMA's wider review into the care homes sector. Care home providers should carefully consider the application of the CMA's 2018 consumer law guidance for care home providers to ensure that they are complying with consumer law, including ensuring that options are laid out clearly for consumers and that fees are commensurate with services provided.
- This case also provides further evidence of the CMA's broader increased drive to use its existing consumer protection powers, including its ability to secure refunds for consumers.

On 8 October 2020, the CMA announced that Care UK Health and Social Care Holdings Ltd and Care UK Community Partnerships Ltd ("Care UK") had agreed to refund certain residents who were charged a 'shortfall' fee while receiving NHS Continuing Healthcare ("CHC") funding, which is designed to cover the cost of essential care.

Where residents were entitled to funding from the NHS, Care UK required residents to pay a fee if they wished to receive care from a Care UK premium care home (the "Shortfall Amount"). This Shortfall Amount was equal to the difference between the amount of CHC funding and the amount which was represented to the resident as the residential fee. The relevant terms and conditions stated that the Shortfall Amount would be invoiced to the resident as if it were an 'Enhanced Room Fee', even if an enhanced room was not provided, and required the resident to waive any claims that the Shortfall Amount was illegal, void or otherwise not payable (the "Relevant Terms").

The CMA considered that this conduct was unfair and in breach of consumer protection laws (under the Consumer Rights Act 2015 ("CRA") which prohibits unfair contract terms, and the Consumer Protection from Unfair Trading Regulations 2018 ("CPRs") which imposes a general duty not to trade unfairly with consumers), as well as the applicable NHS

rules. In its 2018 consumer law advice to care home providers the CMA stated that asking residents in receipt of CHC funding to make top-up payments is likely to infringe consumer law, including by amount to a misleading commercial practice under the CPRs.[1]

As a result of the CMA's investigation, Care UK has committed to:

- **refund residents** that had been charged the fee since 1 October 2015.[2] It is expected to pay out more than GBP 1 million to around 160 affected residents by the end of November 2020;
- **stop charging** the Shortfall Amount or any fee that is a condition to providing NHS Continuing Healthcare, including payment for an enhanced/better standard of room where Care UK did not offer the resident a "*meaningful choice*" between the enhanced room and a room at the same home which did not require any additional payment; and
- **not use the Relevant Terms**, or enforce or attempt to rely on any of them,

unless such conduct becomes expressly permitted by amendments to relevant NHS rules/guidance.

The CMA's action in this case forms part of its wider probe into the care homes sector, having opening an investigation in June 2017. In January 2019, Care UK (and two other care home providers) made changes to their terms and conditions, and another large care home provider has agreed to pay out more than GBP 2 million in compensation. The CMA is separately seeking a court order against Care UK in relation to a non-refundable and compulsory upfront administration fee it charged on commencement of a care home contract. Although Care UK agreed to stop charging the fees from 1 August 2018, it did not agree to make any refunds. As the CMA does not have the power to impose such remedies on companies found to have infringed consumer protection law, the CMA has issued court proceedings to seek a court order. These proceedings are currently due to be heard in the High Court in May 2021.

The CMA's work in relation to care homes is part of a wider focus on consumer protection enforcement. This has included work in response to COVID-19 (focussing on unjustifiable price increases and cancellations and refunds), as well as ongoing investigations into the leasehold sector and into fake and misleading online reviews. In connection with a further investigation looking at social media endorsements, the CMA announced on 16 October 2020 that Instagram has committed to a package of changes to tackle hidden advertising on its platform.

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.

[1] CMA Guidance (CMA96), *UK care home providers for older people – advice on consumer law*, November 2018, para 4.134.

[2] The CMA was only able to secure refunds for fees paid from 1 October 2015, as this is when its powers to seek financial redress for consumers came into force under the CRA.

£203m in COVID-19 refunds for Virgin Holidays customers

UK - CONSUMER PROTECTION

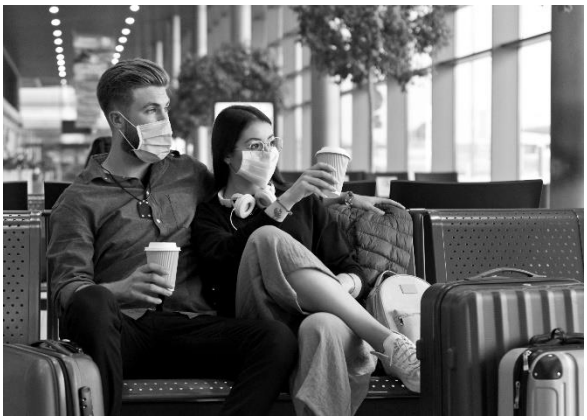
As part of its ongoing work into consumer protection issues arising from the COVID-19 pandemic, the UK Competition and Markets Authority ("CMA") announced on 23 October 2020 that it had secured commitments from Virgin Holidays to refund all customers whose package holidays have been and are to be cancelled due to the pandemic.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The CMA has been pursuing a wide-ranging programme looking at consumer protection issues arising from the COVID-19 pandemic, focussing in particular on cancellations and refunds in a number of sectors including package holidays.
- Following similar commitments secured from Vacation Rentals, Sykes Cottages and TUI, the CMA announced that Virgin Holidays had given commitments to pay refunds expected to total GBP 203 million.
- Given the CMA's recent focus, companies should carefully consider their approach to refunds and alternatives, including how the available options are presented to consumer.

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 was subsequently extended to package travel after the CMA received over 17,500 complaints in just a few months.

In July 2020, the CMA published an open letter to all package holiday businesses setting out its concerns that business may have been engaging in practices contrary to consumer law and explaining what it expects businesses to do in relation to cancellations and refunds due to COVID-19.



The CMA received hundreds of complaints from customers who had not received refunds from Virgin Holidays for holidays cancelled due to the pandemic. Of those customers who were informed by Virgin Holidays that they would receive a refund, many had to wait for an unreasonably long time, with some being told they would have to wait 120 days to receive their money back.

The CMA investigated Virgin Holidays' practices and, on 23 October 2020, the CMA announced that it had secured the following undertakings:

- holidays cancelled before 1 September 2020 will be repaid by 30 October 2020;
- holidays cancelled from 1 September to 31 October 2020 will be repaid by 20 November 2020; and
- people who are entitled to a refund for a holiday cancelled on or after 1 November 2020 will be paid within 14 days.

Virgin Holidays must provide the CMA with regular reports on the progress of its repayments to customers. If it does not repay customers by within the set timeframes, the CMA has stated that is prepared to take the company to court.

CMA's increasing focus on consumer enforcement, particularly in relation to cancellations and refunds

This action is the latest example of the CMA's increasing focus on consumer enforcement, which has been particularly evident in its work

in response to COVID-19. As noted in the May/June 2020 edition of our newsletter, to address concerns relating to cancellations and refunds, the CMA has turned to its consumer law powers, with the practices of package holiday companies coming under particular focus.

As part of this work, the CMA has now secured commitments from a number of travel companies:

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.

On 3 July 2020, the CMA announced undertakings received from Sykes Cottages in relation to bookings prevented from going ahead due to government restrictions related to the COVID-19 pandemic.

On 16 September 2020, the CMA announced that TUI UK had committed that customers awaiting refunds for holidays that were cancelled due to the COVID-19 pandemic would receive them by the end of the month.

Alongside its work in relation to package holidays, the CMA has also recently taken action in relation to wedding services. For further information see the September 2020 edition of our newsletter.

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.

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