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Ashurst Competition Law Newsletter September 2020

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The September 2020 issue of Ashurst's competition law newsletter features covers some of the key competition law developments over the last couple of months, including the new Belgian law on abuse of economic dependence, a AUD 2.9m fine for misleading reviews in the Australian healthcare sector, the ECJ's dawn raid power cables judgment, EUR 444m worth of fines in the French pharma sector for abuse of collective dominance, UK merger control and consumer law enforcement, as well as other news.

It also includes a feature article on the European Commission's review of the Vertical Block Exemption and Vertical Guidelines – providing a glimpse into how vertical agreements may be reviewed in the future.

Content

The potential future of EU antitrust rules on vertical agreements – Commission's evaluation

EU - ANTITRUST - ANTICOMPETITIVE AGREEMENTS / NEW LAW / POLICY

On 8 September 2020, the European Commission ("Commission") published a working document (the "Evaluation Report") summarising the findings of the evaluation phase of the review of the Vertical Block Exemption Regulation ("VBER") and the Guidelines on Vertical Restraints ("Vertical Guidelines"). It marks the end of the first phase of the Commission's review of these tools. The evaluation has identified a number of issues with rules covering areas affected by market developments in the last 10 years, particularly the rise of online sales and the emergence of online platforms. This article provides an overview of the Commission's findings, and a potential glimpse into how EU antitrust rules on vertical agreements might change over the next few years.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- A consensus emerged from the public consultation that the VBER and Vertical Guidelines were useful tools to address vertical restraints.
- However, the Evaluation Report brings to light the need to clarify a number of provisions of the VBER and statements contained in the Vertical Guidelines.
- The growth of e-commerce and the development of a so-called "multi-channel consumer experience" has lead the Commission to rethink the framework applying to restrictions on online sales.
- The Evaluation Report highlights the need to address new types of vertical restraints (e.g. vertical information exchanges or territorial supply constraints).

BACKGROUND TO THE EVALUATION PROCESS

The review of the VBER and Vertical Guidelines started on 3 October 2018 and aims to determine whether the Commission should allow the VBER to lapse on 31 May 2022, the end of its period of validity, whether the VBER should be prolonged in its current form or whether an amended version is necessary.

The evaluation phase of the review process aimed at gathering evidence on the functioning of the VBER and Vertical Guidelines, their continued necessity and any modifications that may be required. The evidence gathering process focussed primarily on the views of businesses using the VBER and Vertical Guidelines to self-assess compliance of their vertical agreements as well as the views of national competition authorities ("NCA"s) applying these rules.

FINDINGS OF THE EVALUATION REPORT

The Commission has confirmed that the VBER and Vertical Guidelines continue to be relevant and useful tools for stakeholders. However, the Evaluation Report revealed that the specific objectives of providing legal certainty to stakeholders and providing a common framework of assessment to NCAs and national courts are not fully met.

In particular, a number of stakeholders pointed out that the VBER and the Vertical Guidelines sometimes lacked clarity and needed to be updated to reflect the Commission's decisional practice or market developments, such as the growth of online sales, the emergence of new players such as online platforms and the development by many brands of an 'omni channel experience' to consumers (i.e. online and offline).

Whilst the report does not explain what the Commission intends to do to remedy this and other issues identified, it does provide an insight into the specific problems the Commission will be seeking to solve.

Issues which should be taken into account

The Commission identified a first list of issues which *should be taken into account* in any next steps following the evaluation stage. The issues relate to areas which have been particularly affected by the market developments identified in the report:[1]

- Assessment of online sales restrictions
- Assessment of online advertising restrictions
- Assessment of dual pricing
- Distinction between active and passive sales in the digital space
- Definition of agency agreements
- Assessment of retail parity clauses
- Assessment of selective distribution systems
- Application of the principle of equivalence
- Restrictions on the use of online marketplaces and price comparison websites
- Assessment of dual distribution

Issues that should be paid attention to

The Commission also identified a list of issues, not necessarily linked to market developments, that *should be paid attention to* in any next steps. These issues are primarily related to the drafting of the existing rules and reflect comments from stakeholders on the lack of clarity of certain provisions, their complexity, the lack of detailed examples, as well as the need to update the rules to account for recent jurisprudence of the Court of Justice of the European Union (such as the *Coty* case) and the Commission's decisional practice (such as the *Guess* case). The areas identified in this second list are:[2]

- Hardcore restrictions (e.g. RPM)
- Excluded restrictions (e.g. non-compete clauses)
- Certain distribution models (e.g. franchising)
- Combination of models (e.g. exclusive and selective distribution)

The following sections will drill down into some of the key issues identified in relation to some of these areas of concern.

MARKET SHARE THRESHOLD[3]

Stakeholders and NCAs generally consider that the 30% market share block exemption threshold is appropriate. However, some issues have been raised in relation to online platforms:

- **Turnover-based market shares may be less relevant** than other metrics (like access to data or network effects) to assess the market power of these platforms.
- **The 30% thresholds may be too high** as online platforms sometimes enjoy material market power even below this threshold.
- **The degree of market power of multi-sided online platforms** may differ depending on market circumstances.

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[1] Evaluation Report, p. 92.
[2] Evaluation Report, pp. 92-93.
[3] Evaluation Report, pp. 159–165.

SELECTIVE DISTRIBUTION SYSTEMS[4]

- **Same exemption still appropriate?** As pointed out in the evaluation study commissioned by the Commission to understand how markets have evolved since its 2017 e-commerce sector inquiry, the use of selective distribution systems has increased over the last 10 years. The use of both qualitative and quantitative criteria is also prevalent according to the study. Yet, according to certain NCAs, a growing number of manufacturers use selective distribution criteria unrelated to the actual requirements of the products concerned with a view to reducing intra-brand competition. These NCAs therefore question whether the exemption of selective distribution agreements below the 30% market share threshold remains appropriate.
- **Combined selective and exclusive distribution models:** The Evaluation Report also considers distribution models which combine selective and exclusive distribution features. The Commission notes that combining exclusivity at the wholesale level and selective distribution at the retail level is a common market practice and that the current rules lack clarity on how such a combination may benefit from the block exemption. By way of example, the Vertical Guidelines could provide more guidance on preventing wholesalers from selling products to non-authorised dealers. Stakeholders have also asked the Commission to provide guidance on territorial protection in models which combine selective and exclusive distribution, e.g. whether members of a selective distribution may be prohibited from *actively* selling products or services in a territory covered by an exclusive network.

DISTINCTION BETWEEN ACTIVE AND PASSIVE SALES[5]

- **Lack of clarity:** The Evaluation Report identifies a perceived lack of clarity in the current distinction between active and passive sales, particularly in the context of online sales. Certain NCAs indicated that they considered the distinction between active and passive sales to be one of the biggest challenges faced when applying the VBER to new types of online sales. This lack of clarity was attributed to the fact that the VBER does not contain a definition of these notions and the fact that the Vertical Guidelines provide a limited number of examples of online sales restrictions, which are not sufficiently detailed to provide clear guidance on the distinction.
- **Online sales as passive sales:** Some stakeholders also consider that the presumption that transactions made over the internet are passive sales is not functioning well and does not reflect business reality. In particular, some contributors argued that website operators are always required to implement promotional techniques in order to be found by customers, using social media marketing and keyword bidding for instance. To the extent that the steps leading up to the consumer's visit to a website are active sales techniques, these contributors argue that the presumption that online sales are passive would no longer be relevant.
- **Examples of active online sales:** Some respondents also advocated for an indicative list of online sales practices which might be considered active sales. Suggested examples included the use of country extensions different from the one where the online distributor is located (e.g. a German distributor using ".fr") or providing language options tailored to consumers outside of the Member State in which the distributor is located.

RESALE PRICE MAINTENANCE ("RPM")[6]

- **Different views on RPM:** The Evaluation Report identifies diverging approaches among stakeholders as to how RPM should be treated. Whilst suppliers argue that RPM is a way to make retailers benefit from their knowledge of competitive price levels, retailers generally consider that RPM only results in increasing prices.
- **'Grey areas':** That being said, a number of respondents to the public consultations called for clarity on so-called 'grey areas' of RPM. In particular, more guidance is sought as regards circumstances in which recommended prices may amount to RPM. Concerns have been expressed that by some NCAs

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[4] Evaluation Report, pp. 193–200.
[5] Evaluation Report, pp. 215-218.
[6] Evaluation Report, pp. 168-175.

that the existence of recommended prices coupled with price monitoring would amount to RPM. Other stakeholders submitted that such an approach is too draconian, and that any such conduct should only amount to RPM if the supplier also takes retaliatory action or makes threats as a result of recommended prices not being followed.

- **Justifying RPM:** NCAs have also called for more guidance on scenarios where RPM may be justified by, e.g. for the protection of the goods' characteristics or protection of brand image or non-price efficiencies.

TERRITORIAL SUPPLY CONSTRAINTS ("TSC"S)[7]

TSCs *de facto* limit the territories in which a retailer may resell products (such a limitation being in principle a hardcore restriction). They are used in various sectors, such as fast moving consumer goods. They can take different forms, e.g. refusing to supply or a threat to stop supplies, limiting quantities available, differentiating product ranges and prices between EU Member States or limiting language options for the product packaging. A number of stakeholders expect the revised Vertical Guidelines to address these TSCs, which were also subject to a Commission fact-finding study in 2019.

NON-COMPETE OBLIGATIONS[8]

Some respondents to the public consultation submitted that the maximum duration of five years, above which this type of clause is not block exempted (article 5 of the VBER), is not justified. They also consider that tacitly renewable non-compete clauses should not be excluded from the block exemption.

ASSESSMENT OF AGENCY AGREEMENTS[9]

The Vertical Guidelines explain that all obligations imposed on the agent in relation to the contracts concluded under an agency agreement fall outside the scope of Article 101(1) TFEU. The so-called 'agency exception' is justified by the fact that true agents act as an extension of the principal's activities whereas the principal bears the commercial and financial risks related to the sale and purchase of the contact goods or services. The issue of whether an agent is a 'true agent' turns on the level of risk it is exposed to, for instance where it is required to make market-specific investments. The Evaluation Report identifies issues regarding the application of the agency exception to online platforms, which has led to divergent approaches among NCAs and national courts.

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[7] Evaluation Report, pp. 175-176.
[8] Evaluation Report, pp. 185-188.
[9] Evaluation Report, pp. 147-150.

- **Online platforms as agents:** NCAs were divided on whether online platforms could be treated as agents at all. This was primarily linked to the fact that online platforms typically bear the entire risk of investing in their infrastructure, deal with many different principals and can have stronger bargaining positions than their principals. Other NCAs suggested applying a three-part test to determine, on a case-by-case basis, whether a platform could be considered an agent. This assessment could take into account the following elements:
  - the risks borne by the online platform;
  - the market position of the platform acting as an agent;
  - the level of investment in data-gathering and processing capabilities as well as a determination of whether the data of third-party customers is exclusively retained by the platform.
- **Agent's risks:** More generally, respondents to the public consultation sought clarifications with regard to the concept of risks underlying the qualification as an agent (e.g. level and type of risks incurred by agents as opposed to independent distributors).

PARITY CLAUSES[10]

Parity clauses are often sorted into two categories: (a) 'wide' parity clauses which require the contract party to offer the same or better prices and/or conditions as those offered on any other sales channel; and (b) 'narrow' parity clauses which only apply to the contract party's direct sales channel. These following considerations raised by the Evaluation Report underlined the need for a clear common framework of assessment for parity clauses outside of the safe harbour created by the VBER.

- **Common, but divergent approaches:** The Evaluation Report revealed that these clauses have become quite common in the e-commerce business environment. However, the Evaluation Report also confirmed divergent approaches by NCAs, specifically in relation to narrow parity clauses as applied in the hotel sector. A number of NCAs reported deciding not to take action against narrow party clauses, in contrast with the position adopted by the German competition authority in the *Booking.com* case.
- **Competitive effects:** The Evaluation Report pointed to mixed data on the competitive effects of parity clauses. On the one hand, these clauses were considered by some to be necessary to sustain the business model of platforms and therefore increased consumer welfare to the extent that platforms do. Conversely, the Commission highlighted literature indicating that these clauses could soften competition between retailers and platforms, impede innovation, impede the entry of new suppliers and the expansion of existing suppliers as well as facilitate collusion between retailers or platforms.

DUAL PRICING[11]

- **Relevance of an outright prohibition:** According to paragraph 52(d) of the Vertical Guidelines dual pricing (i.e. higher prices charged for products or services which retailers intend to sell online compared to bricks-and-mortar stores) constitutes a hardcore restriction. NCAs expressed mixed views on this. Some of them questioned the relevance of an outright prohibition, stressing the need for suppliers to compensate hybrid retailers for their investments in bricks-and-mortar shops. By contrast, others consider that e-merchants may nowadays also be subject to free-riding from shops, thus justifying the prohibition.
- **Remuneration:** The need to better specify how specific services provided in shops can be remunerated by suppliers was also considered as something that would need further consideration (paragraph 52(d) only refers to the possibility for suppliers to pay a fixed fee to the retailer).

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[10] Evaluation Report, pp. 180-185.
[11] Evaluation Report, pp. 211-215.

ONLINE SALES RESTRICTIONS[12]

Several types of online sales restrictions have raised comments during the evaluation process.

Online platform bans: Some NCAs submitted that it was still unclear whether the ECJ's *Coty* judgment applied to the distribution of non-luxury goods, which the revised Vertical Guidelines could clarify (note that the French Competition Authority has applied *Coty* to the distribution of non-luxury goods). NCAs also argued that '*per se*' online platform bans, not based on quality criteria, should be subject to a case-by-case assessment rather than benefitting from the VBER's safe harbour. In this regard, a number of respondents to the public consultation submitted that online distributors had made significant investments in the improvement of their services in view of meeting acceptable quality standards.

Bricks-and-mortar requirement: NCAs also expressed a need for more clarity regarding how suppliers may require their distributors to operate bricks-and-mortar shops, as per paragraph 54 of the Vertical Guidelines (the Evaluation Report notes that there is a widespread use of this requirement). It is indeed unclear whether any limit applies to the number of required shops, whether this requirement only applies to selective distribution systems or whether this requirement is in principle acceptable above the 30% market share threshold. More generally, the Evaluation Report makes it clear that distribution has evolved towards an "*omni-channel experience*" where "*free riding can occur in both directions*" (i.e. from online to offline commerce and vice versa). This will give incentive to the Commission to rethink the bricks-and-mortar shop requirement contained in paragraph 54.

Restrictions on the use of price comparison websites: The Evaluation Report further addresses prohibitions on retailers using price comparison websites. The Commission has been asked by a number of NCAs to provide more guidance on how quality criteria may justify such a prohibition. According to these NCAs, an absolute prohibition not linked to such criteria may constitute a hardcore restriction. Indeed, they pointed out that such a prohibition appeared less justified than an online platform ban as the transaction was ultimately carried out on the website of the authorised dealer.

Restrictions on online search advertising: NCAs also stressed that restrictions on online search advertising, which were at stake in the *Guess* case, could *de facto* amount to a ban on online sales for smaller retailers heavily dependent on search engines to generate traffic. According to the Commission, whilst "*all stakeholder groups highlighted the importance of using trademark and brands names in the context of online advertising*", neither the VBER nor the Vertical Guidelines provide guidance on this. A number of respondents to the public consultation asked the Commission to clarify the circumstances in which this kind of restriction could be justified. The need to avoid a 'bidding war' within a distribution network or the protection of the brand were mentioned as possible justifications. Other respondents suggested that alternatives existed to the purchase of only the trademark as a key word (e.g. the purchase of a combination of words including the trademark).

VERTICAL INFORMATION EXCHANGE[13]

A number of stakeholders suggested that the VBER and/or Vertical Guidelines should address information exchanges between retailers and distributors. There is indeed a growing trend for retailers to gather large amounts of data from their distributors, specifically in the online space. That kind of exchange is particularly sensitive in a dual distribution scenario, i.e. where the distributor is also a competitor of the supplier (e.g. when online platforms act as distributors and marketplace operators). The predominant view is that these exchanges may be procompetitive to the extent that they do not result in limiting the distributor's freedom in a manner that would constitute a hardcore restriction under the VBER. However, concerns were expressed that data collection could be used by suppliers to implement behavioural discrimination among their retailers (i.e. adapt prices according to how retailers actually value the products).

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[12] Evaluation Report, pp. 200-207 and 218-223.

[13] Evaluation Report, pp. 226-228.

NEXT STEPS

The findings of this first phase of the review will feed into the 'impact assessment' stage of the process. The impact assessment will seek to verify the problems identified in the evaluation phase, to explore the underlying causes, to assess whether EU action is required as well as to assess the advantages and disadvantages of the available solutions.

The second stage of the process, due to commence in the coming weeks, will also provide stakeholders with an opportunity to make their views known. The Commission is due to launch a public consultation on its proposed amendments to the VEBR and Vertical Guidelines before the end of the year. These comments should feed into an amended draft of these documents, which the Commission is due to publish in the course of 2021.

ECJ rejects power cables appeals on dawn raid powers and successor liability

EU – ANTITRUST - CARTELS / PROCEDURE

On 24 September 2020, the European Court of Justice ("ECJ") fully dismissed an appeal brought by Prysmian, therefore upholding the European Commission's ("Commission") decision to fine Prysmian EUR 104.6 million for taking part in an international power-cable cartel.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Commission has the power to take copy-images of data without first examining the nature of documents during a dawn raid.
- The Commission also has the power to take copy-images away from a premises for later review.
- When two entities constitute one economic entity, the fact that the entity that committed the infringement still exists does not preclude imposing a penalty on the entity to which its economic activity has been transferred.

On 2 April 2014, the Commission fined 11 producers of power cables for their participation in a market-sharing cartel. Appeals against the Commission's decision were dismissed by the General Court in its judgment dated 12 July 2018 (see our summary). Subsequently, one of the cartel's participants, the Prysmian group ("Prysmian") (formerly Pirelli & C. SpA), appealed to the ECJ.

In its judgment, the ECJ dismissed all five of Prysmian's grounds for appeal:

- The ECJ confirmed that, pursuant to Article 20(2)(b) of Regulation No 1/2003, during a dawn raid the Commission is entitled to make copy-images of data without first examining the nature of documents which contain such data, as long as it guarantees the existence of procedural safeguards. It may also continue the inspection at its own premises in order to ensure the effectiveness of the inspection without needlessly increasing the interference with an undertaking's operations.

- The General Court was not wrong to conclude that the Commission could make its subsidiary Prysmian Cavi e Sistemi liable for the entire duration of the infringement under

the principle of economic continuity, even though the company was not established until two years after the cartel began operating.

- The ECJ confirmed the General Court's assessment of the existence of a single and continuous infringement.
- The General Court did not err in determining the starting point of the infringement.
- The ECJ rejected Prysmian's challenge of the calculation of the fines.

This decision is aligned with former case law. Indeed, the ECJ has recently rendered a similar ruling, with regards to Prysmian's first ground for appeal, in another case concerning the power cables cartel (see ECJ, case C-606/18 P, Nexans, 16 July 2020).

Commission fines car parts suppliers €18 million in cartel settlement

EU - ANTITRUST - CARTELS

On 29 September 2020, the European Commission ("Commission") announced that it has fined Brose and Kiekert a total of EUR 18 million for taking part in two cartels concerning supplies of closure systems for cars in the European Economic Area. Magna, a third cartelist, was not fined as it revealed both cartels to the Commission.

According to the Commission's press release:

- Magna, based in Canada and Brose, based in Germany, took part in a bilateral cartel concerning supplies of door modules and window regulators for a certain car model of Daimler group; and
- Magna and Kiekert, based in Germany, took part in a separate bilateral cartel concerning supplies of latches and strikers to BMW group and Daimler group.

All three companies acknowledged their involvement in the cartels and agreed to settle the case.

The three car equipment suppliers coordinated their pricing behaviour and exchanged commercially sensitive information with the aim of preserving each party's existing business and to avoid price competition. The coordination took place through meetings, phone calls or e-mail exchanges.

In terms of fines:

- Magna received full immunity for revealing both cartels, thereby avoiding an aggregate fine of c.EUR 6 million.
- Brose's fine was reduced by 35% and 10% to EUR 3.23 million for its cooperation with the Commission under its leniency and settlement procedure respectively.
- Kiekert's fine was reduced by 40% and 10% to EUR 14.97 million for its cooperation with the Commission under its leniency and settlement procedure respectively. As part of this reduction, Kiekert was granted partial immunity for the second infringement for the period from 15 June 2009 to 4 October 2010, as it was the first company to submit compelling evidence that enabled the Commission to extend the duration of the second alleged infringement until 15 June 2009.

The Commission's decision is part of a series of major investigations into cartels in the automotive parts sector starting back in 2013. The Commission has also fined suppliers of automotive bearings, wire harnesses in cars , flexible foam used (inter alia) in car

seats, parking heaters in cars and trucks, alternators and starters, air conditioning and engine cooling systems, lighting systems, spark plugs braking systems, seat belts, airbags and steering wheels. This decision brings the total amount of Commission fines for cartels in this sector to EUR 2.17 billion.

Belgian law on abuse of economic dependence now in force

BELGUIM - NEW LAW/POLICY

The prohibition of abuses of economic dependence, as recently introduced into Belgian competition law (see Ashurst's April 2019 newsletter article here), is now in force.

BACKGROUND

A Royal Decree amending the Belgian Code of Economic Law with regard to the prohibition of abuses of economic dependence was published in the Official Journal of Belgium on 12 August 2020. This Royal decree confirms the competence of the Belgian Competition Authority ("BCA") to enforce the prohibition and sanction companies abusing the economic dependence of other firms with fines of up to 2% of a company's worldwide turnover.

THE PROHIBITION

The application of the prohibition is subject to three conditions. For the prohibition to apply there must to be evidence of:

- a relationship of economic dependence;
- an abuse; and
- an actual or potential impact on competition in the Belgian market (or a substantial part thereof).

Companies suffering such abuses can submit a complaint to the BCA's investigation service.

With this new law, the Belgian lawmaker intends to protect, in particular, small and medium-sized companies from unfair practices by other companies that are indispensable trading partners for them. Relationships between food producers and supermarket chains, as well as between franchisers and franchisees, were cited as examples of relationships susceptible to such abuses. However, the prohibition has a much wider reach and could potentially apply to a lot of operators across various economic sectors such as, for example, digital platforms, sport associations or infrastructure managers acting as 'gatekeepers' in certain markets.

ECONOMIC DEPENDENCE

According to the law, a company is in a position of economic dependence if it is dependent on one or more other companies to carry out its activities and there is no "reasonably equivalent alternatives available within a reasonable period of time, on reasonable terms and at reasonable costs". Whether or not a company depends on another will likely be assessed, in each case, on the basis of concrete elements pertaining to their business relationship and the broader market context, including such factors as:

- the market share of the company alleged to be an indispensable trading partner;
- whether or not that company accounts for a significant share of the sales or purchases of the its allegedly 'dependent' partner;
- whether the former company holds indispensable knowhow or technology, or an indispensable input or infrastructure of any kind;

- that company's brand reputation; and
- the possibility for suppliers or customers to switch.

ABUSE

The notion of abuse is defined in the same manner as under the prohibition of abuses of dominance, allowing the BCA to rely on existing antitrust case-law. Accordingly, it is likely that all types of conduct which may potentially be regarded as an abuse of dominance will also be capable of giving rise to an abuse of economic dependence. The law broadly clarifies that abusive conduct may consist of imposing "services or conditions that could not be obtained under normal market circumstances".

Divestments overcome strong competition concerns with pharmaceutical merger

AUSTRALIA – MERGER CONTROL

On 10 September 2020, the Australian Competition and Consumer Commission ("ACCC") decided to not oppose Mylan NV's ("Mylan") proposed merger with Pfizer's Upjohn Inc division ("Upjohn"), despite concerns that competition in the supply of pharmaceutical products to treat cardiovascular conditions and glaucoma would significantly reduce. The ACCC's competition concerns were resolved by the parties providing court-enforceable undertakings to divest three off-patent branded pharmaceuticals to an ACCC approved buyer.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- In assessing a proposed pharmaceutical merger, the ACCC will consider the impact on competition in narrowly defined product markets, namely, whether there is any significant reduction in competition in the supply to pharmacies and hospitals of pharmaceutical products with particular active ingredients.
- The ACCC will accept a divestiture undertaking to resolve its competition concerns in a transaction if it considers that the competition that would be lost as a result of a merger will be replaced by competition from an ACCC-approved buyer.

On 29 July 2019, Mylan and Pfizer Inc. proposed to enter into a transaction, which involved the separation of Upjohn from Pfizer Inc and the merger of Mylan's and Upjohn's businesses into a new combined entity known as Viatris. Mylan and Upjohn are both suppliers of cardiovascular, neurology & pain, psychiatry, urology and ophthalmology pharmaceutical products in Australia.

The ACCC was concerned that the merger would have the effect or likely effect of substantially lessening competition in the supply of pharmaceutical products used to treat cardiovascular conditions and certain types of glaucoma, to pharmacies and hospitals in Australia.

In particular, the ACCC considered Viatris would become the only supplier of Amlodipine/Atorvastatin molecules for lipid-regulating cardiovascular treatment in Australia, and that there would be insufficient competitive constraints on Viatris' pricing and service levels in the supply of Latanoprost and Latanoprost/Timolol molecules, used in the treatment of glaucoma.

In order to address the ACCC's competition concerns, Mylan and Upjohn offered a court enforceable undertaking under s.87B of the Competition and Consumer Act to divest three of its off-patent branded pharmaceuticals used to treat cardiovascular conditions and glaucoma, to an approved purchaser. The undertaking will result in the creation of a standalone competitor to supply these pharmaceutical products to pharmacies and hospitals in Australia, in competition with the new combined firm, Viatris.

An undertaking from Pfizer was also required to support the divestment process, allowing Mylan and Upjohn to transfer or license certain intellectual property rights to the approved purchaser.

The ACCC has since approved Aspen Global Incorporated as the buyer of these divested brands, which will be distributed in Australia by Aspen Pharmacare Australia.

HealthEngine fined $2.9m for misleading reviews and patient referrals

AUSTRALIA – CONSUMER PROTECTION

On 20 August 2020, HealthEngine Pty Ltd ("HealthEngine") was ordered by the Federal Court of Australia to pay a AUD 2.9 million civil penalty for contraventions of the Australian Consumer Law ("ACL") between 30 April 2014 and 30 June 2018 related to reviews, ratings, referrals and sharing personal patient information without their consent.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Editing or omitting a customer review, or manipulating review statistics published on a digital platform can constitute misleading or deceptive conduct.
- Companies should ensure that they disclose how they are using customers' data, or they will risk breaching the Australian Consumer Law.
- The Australian competition regulator, the ACCC, has stated that transparency in the collection and use of consumer data is one of their top priorities.

HealthEngine is an Australian health business which allows consumers to search a directory of over 70,000 health practices and book consultations with health practices online. Until June 2018 consumers could also access patient reviews of the services provided by health practices.

The ACCC began investigating HealthEngine's conduct in July 2018 and commenced proceedings against HealthEngine in the Federal Court in August 2019.

The ACCC alleged that HealthEngine engaged in the following conduct in contravention of the Australian Consumer Law:

- editing patient reviews (including removing negative comments) and failing to publish negative reviews on its platforms;
- representing that patient reviews published on its platforms were an accurate reflection of the reviews received by patients;
- where less than 80% of patients responded positively to a survey designed to ascertain whether the patient would recommend a particular health practice to others, representing to consumers that insufficient feedback had been collected to enable HealthEngine to publish a public rating; and
- collecting non-clinical personal patient information and sharing it with private health insurance brokers in exchange for referral fees, without disclosing this to patients.

HealthEngine admitted that it contravened the ACL and made joint submissions with the ACCC to the Federal Court as to the orders the Court should make.

Justice Yates noted that the approach the Court takes in a civil penalty proceeding when the parties present an agreed outcome is as set out in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482: the public policy reason for promoting predictable outcomes in such proceedings is that it encourages corporations to acknowledge contraventions and promotes efficiency in the legal and regulatory system.

Justice Yates concluded it was appropriate that a single pecuniary penalty of AUD 2.9 million be imposed for the three course of conduct relating to the reviews, ratings and referrals, with no reduction to be applied under the totality principle (which requires that the aggregate penalty is just and appropriate). His Honour also ordered HealthEngine to ensure an independent review of its ACL compliance program is undertaken, to contact all customers affected by the misuse of personal information, and to pay a portion of the ACCC's costs.

ACCC Chair Rod Sims note that "[t]he ACCC was particularly concerned about HealthEngine's misleading conduct in connection with reviews it published, because patients may have visited medical practices based on manipulated reviews that did not accurately reflect other patients' experiences".

France issues first ever deal block – E.Leclerc-Géant Casino local hypermarket deal

FRANCE – MERGER CONTROL

The French Competition Authority ("FCA") has concluded that the acquisition of the hypermarket Géant Casino, by two entities operating (directly or indirectly) under the competing retailer E. Leclerc, raised competition concerns at the local level, which could not be addressed through commitments offered by the parties.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Under French merger control, lower turnover thresholds apply to mergers involving parties operating retails stores: these are less than half the normal turnover thresholds.

- The FCA rejected commitments by the parties to reduce the floor space of the acquired retail store, which did not address the competition concerns identified by the FCA relating to price increases and a reduction in product diversity, as the commitments would have reduced the choice of products available to consumers.

BACKGROUND

Retail consumers in the Troyes area (Grand Est Region) have a choice between four hypermarkets operating under three different brands; Carrefour, Géant Casino and E. Leclerc.

Under the proposed acquisition, the hypermarket Géant Casino would have been acquired jointly by Soditroy (which controls a hypermarket operating under the Leclerc brand) and the Association des Centres Distributeurs E. Leclerc (which grants members the right to use the Leclerc brand).

Thus, completion of the merger would have created a duopoly between Carrefour and Leclerc, each of which would have operated two hypermarkets in Troyes under their respective brand names.

THE FCA'S DECISION

Following a "phase 2" examination, the FCA concluded in a decision issued on 28 August 2020 that the acquisition raised competition concerns on the downstream retail distribution markets for (predominantly) food products.

More precisely the FCA found that the transaction raised competition concerns that would have reduced product diversity, increased prices and facilitated coordination between the remaining retail outlets operated by Carrefour and E. Leclerc.

The parties offered commitments to reduce the floor space of the Géant Casino store from 8,210m² to 6,000m², which was rejected by the FCA (as such a commitment would have **reduced** the available product offering for consumers) and, therefore, the merger was prohibited.

COMMENT

It should be noted that, where the FCA raises competition concerns in relation to the acquisition of retail stores, the appropriate remedy in most cases will be remedies that result in the loss of control over the commercial policy of the retail stores in the local area concerned (either through contractual arrangements or divestiture).

It is plainly the case that the FCA will have little room for manoeuvre when the acquisition concerns only one retail store and there are no other equivalent stores nearby that could be divested to offset the loss of competition resulting from the merger.

It is therefore surprising that the proposed acquisition was not abandoned at an earlier stage and in particular before the FCA commenced its in-depth phase 2 examination. As a consequence, the FCA has now issued its first decision to block an acquisition in the field of merger control since it was granted with this power in 2009.

€444m fine for rare collective abuse of a dominance infringement

FRANCE – ANTITRUST - COLLECTIVE ABUSE OF DOMINANCE

The French Competition Authority ("FCA") has issued a rare decision sanctioning three laboratories active in treatment of age-related macular degeneration on the

basis of collective abuse of dominance practices designed to sustain the sale of an expensive drug, Lucentis, to the detriment of a cheaper drug, Avastin.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The FCA found that three pharmaceutical firms held a collective dominant position on the basis of their structural and strategic links (including licence agreements and cross-shareholdings). The General Court has also previously held (T-342/99, Airtours) that collective dominance can be established by the existence of economic links or other factors giving rise to a connection between the undertakings concerned.
- The anti-competitive practices concerned an exploitative abuse – which is rare in the FCA's decisional practice – since the actions taken by the three pharmaceutical companies was aimed at withdrawing one of their own products from the market, in order to maximise profit by promoting a more expensive product.
- This is the first time that the FCA has found anti-competitive practices solely on the basis of a collective abuse of dominance under Article 102 TFEU (in earlier decisions, practices giving rise to a collective abuse of dominance also involved an anti-competitive agreement under Article 101 TFEU).

BACKGROUND

Age-related macular degeneration ("**AMD**") is a disease causing severe impairment of central vision and is the main cause of low vision for people over the age of 50 in industrialised countries. During the relevant period investigated by the FCA, there were two treatments for AMD:

- Lucentis, developed by Genentech, which has a marketing authorisation for AMD treatment. Novartis had been granted a licence for Lucentis.
- Avastin, also developed by Genentech but which, despite being regularly used by doctors for the treatment of AMD, does not have a marketing authorisation for AMD treatment (only for cancer treatment). Roche has been granted a license for Avastin.

Both drugs have been recognised by specialists (primarily ophthalmologists) as effective treatments, but Lucentis is almost 30 times more expensive than Avastin.

THE FCA'S INVESTIGATION

The FCA found that the three laboratories – Genentech, Roche and Novartis – collectively held a dominant position in the AMD market and were tied by significant close structural and strategic links:

- First, the laboratories were found to be connected through licensing agreements, which provided them with a highly-organised system of feedback, discussion forums and joint management committees.
- Second, each of Genentech, Roche and Novartis were found to have significant cross-shareholdings, as Roche was the majority shareholder in Genentech, and Novartis was also a major shareholder in Roche.

The existence of these links was found to have enabled the three laboratories to implement a common strategy based on a strong financial incentive to favour the use of Lucentis. The FCA concluded that the three firms operated as a united entity that held a collective dominant position.

The FCA considered that this collective dominant position enabled the laboratories to implement two types of anti-competitive practices:

- First, Novartis was found to have led a global communication campaign targeting ophthalmologists, doctors, associations and the general public in order to discredit the use of Avastin as a treatment for AMD in comparison to Lucentis. This had the effect

of reducing the use of Avastin and preventing Avastin being used in comparative trials organised by health authorities in charge of setting the price of medical products (which may have otherwise led to a reduction in the price of Lucentis).

- Second, Novartis, Roche and Genentech were found to have initiated a series of blocking tactics and alarmist discourses in order to block initiatives undertaken by public authorities to establish a procedure for the safe use of Avastin. This had the effect of amplifying the concern of health authorities and influencing them to maintain a position of extreme prudence in relation to the use of Avastin. In doing so, the three companies ensured that Avastin would not be recognised by the French health authorities as an appropriate comparator in trials alongside Lucentis, which may have had the effect of substantially reducing its price.

On account of the gravity of the anti-competitive practices, the FCA imposed fines of €444 million on Genentech, Roche and Novartis, for both practices. The fine was calculated using 14% of the value of sales to establish the base amount of the fine, which is relatively high compared to the recent decisional practice of the FCA.

Italian broadcasting and audiovisual acquisitions law contrary to EU freedom of establishment principles

ITALY – EU LAW / MERGER CONTROL

On 3 September 2020, the European Court of Justice ("ECJ") ruled that a restriction imposed by an Italian law on acquisitions in the broadcasting and audiovisual sectors is contrary to the fundamental EU law principle of the freedom of establishment enshrined in Article 49 of the Treaty on the Functioning of the EU ("TFEU").

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- National legislation seeking to prevent the creation of a position that may harm media pluralism in the telecommunications sector must not result in unjustified restrictions on the EU fundamental freedoms;
- Restrictions on the fundamental freedoms may be justified to safeguard the protection of media pluralism, but only where those restrictions are proportionate;
- This ruling comes at a crucial time, as a potential merger between Telecom Italia ("TIM")and OpenFiber is under discussion, which would effectively lead to the recreation of a monopoly broadband network operator in Italy.

The ECJ's preliminary ruling concerns an acquisition by Vivendi of a minority stake (28.8%) in Mediaset Group in December 2016. Vivendi controls TIM, Italy's former state monopoly telecommunications operator.

Vivendi acquired the minority stake after launching a hostile acquisition campaign. This prompted Mediaset to lodge a complaint with the Italian Communications Authority ("AGCOM")– on the basis that Vivendi had infringed a provision of Italian law (Article 43(11) of Testo Unico dei Servizi di Media Audiovisivi e Radiofonici, or "TUSMAR"). That provision provides that companies that generate more than 40% of the total revenues in the electronic communications sector, including through controlled or affiliated undertakings, may not earn revenue exceeding 10% of the total revenues generated in the so-called integrated communications system ("SIC"). The aim of this provision is to protect media pluralism, a principle enshrined in Article

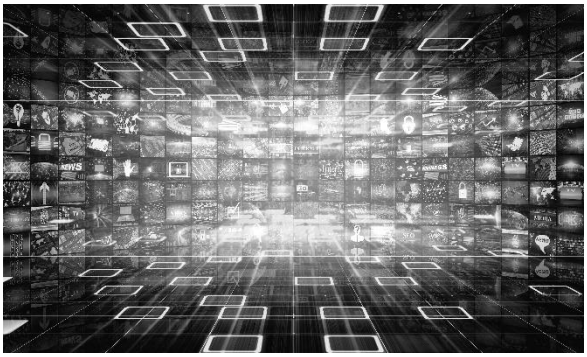
11 of the Charter of fundamental rights of the EU.

On 18 April 2017, AGCOM found that Vivendi had infringed Article 43(11) of the TUSMAR. In reaching that decision, AGCOM had regard to the fact that:

- Vivendi was affiliated with both TIM and Mediaset on account of it holding more than one fifth of the voting rights at the shareholders' meetings of each of those companies;
- Vivendi had secured more than 59% of the revenues generated in the electronic communications sector; and
- Mediaset had received 13.3% of the revenues generated in the SIC.

As a result, AGCOM ordered Vivendi to terminate its shareholdings in Mediaset or in TIM within 12 months.Vivendi challenged AGCOM's decision before the Italian administrative tribunal, which in turn referred three questions to the ECJ, in order to assess whether Article 43(11) of the TUSMAR was compliant with the EU fundamental freedoms.

In its ruling, the ECJ held that Article 49 TFEU must be interpreted as precluding national legislation which has the effect of preventing a company registered in another Member State, whose revenue in the electronic communications sector is in excess of 40% of the total revenues generated in that sector, from earning revenue which exceeds 10% of the revenues in the SIC.



In reaching that ruling, the ECJ acknowledged that restrictions on freedom of establishment may in principle be justified by an overriding reason in the public interest, namely the protection of media pluralism, provided that it is proportionate to the achievement of that objective. The ECJ, however, found that Article 43(11) TUSMAR sets thresholds which bear no relation to the risk to media pluralism, since those thresholds do not make it possible to determine whether and to what extent an undertaking is actually in a position to influence the content of the media.

The ECJ's finding that the restriction on freedom of establishment was not proportionate was influenced primarily by the following factors:

The ECJ considered that the 40% threshold provided for by Article 43(11) is derived from an artificially narrow market definition.

Whether an undertaking meets the 10% threshold concerning the SIC is not, in itself, an indication of the risk of influencing media pluralism, since the SIC includes a wide range of different markets, potentially leading to false positives or negatives.

The method used to calculate revenue earned in the electronic communications sector or in the SIC is not appropriate, in so far as treating a "controlled company" in the same way as an "affiliated company" for such purposes is likely to lead to double-counting.

The ruling is a timely reminder of the importance of the EU fundamental freedoms, in a period when EU Member States and the European Commission itself are increasing their scrutiny on acquisitions of undertakings and assets by companies from third countries.

The ruling also comes at a crucial time, as commercial discussions between OpenFiber and TIM continue about a potential merger of their respective fibre network assets. If that transaction were to go ahead, it would effectively lead to the recreation of a monopoly broadband network operator in Italy.

JD Sports and Amazon fined for breach of UK merger control procedural rules

UK – MERGER CONTROL

In August 2020, the UK Competition and Markets Authority (CMA") imposed a fine of GBP 300,000 on JD Sports/Pentland for failure to comply with its initial enforcement order made in May 2019. Separately, in September 2020, the CMA then imposed two penalties of GBP 25,000 and GBP 30,000 on Amazon for its continuous lack of compliance with the CMA's information requests under Section 109 of the Enterprise Act 2002.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The CMA is increasingly taking a tougher stance and imposing administrative fines on companies for failure to comply with its interim measures and information requests.
- UK merger filings are expected to become more frequent after the end of the Brexit transition period on 31 December 2020, after which an EU merger filing will no longer cover the UK and may mean a parallel filing may need to be met if the UK thresholds are triggered. See our Quickguide for more on the UK merger control regime.

JD SPORTS/FOOTASYLUM

JD Sports Fashion plc ("JD Sports") completed its acquisition of Footasylum Limited ("Footasylum") in April 2019. Shortly afterwards on 17 May 2019, the CMA issued an initial enforcement order ("IEO") to JD Sports and its parent company Pentland Group Limited ("Pentland"), requiring them to manage the two businesses separately pending the CMA's determination. The CMA published its Phase 2 Decision in May 2020 which blocked the acquisition and required JD Sports to sell Footasylum to a suitable buyer (see Ashurst's June 2020 newsletter article here), which JD Sports is appealing.

Separately, on 5 August 2020, the CMA imposed a fixed penalty of GBP 300,000 on JD Sports and Pentland under section 94A of the Enterprise Act 2002 for failure to comply with the May 2019 IEO. The fine related to JD/Pentland's failure in respect of two requirements under the IEO:

- **Break Notice:** The IEO stipulated that the CMA's prior written consent should be sought before assets of the Footasylum business were disposed of. None of the parties had sought such consent when serving a Break Notice to close Footasylum's Wolverhampton store. The parties submitted that the CMA's consent had not been required because closure of this store was part of Footasylum's ordinary course of business and the closure of that particular store had been part of Footasylum's business plan pre-merger. However, the CMA found that closing a retail store was a significant business decision which would have required its prior consent.
- **Subsidiaries compliance:** The IEO stipulated that JD Sports/Pentland should procure that each of their subsidiaries (including Footasylum) comply with the IEO. As a result, the penalty notice was not addressed to Footasylum. The CMA considered that neither JD Sports or Pentland had adequately explained to Footasylum that steps such as the disposal of a lease without the CMA's prior written consent might breach the IEO. Payment of the GBP 300,000 fine has been deferred by nine months in light of the impact of the COVID-19 pandemic.

AMAZON/DELIVEROO

The CMA launched its investigation into the acquisition by Amazon.com NV Investment Holdings LLC ("Amazon") of a 16% stake in Roofoods Ltd ("Deliveroo") in October 2019 but cleared the acquisition on 4 August 2020 following a Phase 2 investigation.

On 7 September 2020, the CMA published its penalty notice imposing two fines on Amazon for failure to comply with Section 109 Notices.

The CMA has information gathering powers under section 109 of the Enterprise Act, and has imposed two penalties of GBP 25,000 and GBP 30,000, in respect of Amazon's responses to three Section 109 notices issued by the CMA during its Phase 2 investigation.

- In total, 189 documents were provided late by Amazon to the CMA.
- The delay ranged from being a few days late to up to more than two months late, and some being provided only after follow-up by the CMA.

According to the CMA, Amazon's approach to compliance with Section 109 Notices had a significant adverse impact on the conduct of its merger inquiry, requiring the CMA to expend significant time and public resources to verify the completeness of Amazon's responses.

The CMA found that Amazon had no reasonable excuse for non-compliance; none of the factors presented by Amazon were unforeseeable issues beyond its control. Whilst the CMA recognised that ultimately Amazon had provided complete responses to the notices, it found that Amazon's behaviour nevertheless risked the CMA taking its decisions on the basis of incomplete evidence. Both fines are payable within 28 days of the notice.

COMMENT

The two fines on JD Sports and Amazon indicate the CMA's increasingly tough stance in merger enforcement, and how seriously it will take breaches of its interim measures. The CMA appears to have increased its use of such fines since the first time it imposed a fine for breach of an IEO in 2018. There may also be scope for the CMA to impose even larger administrative fines than it has to date. The CMA can impose a maximum of 5% of global groupwide turnover for failure to comply with an interim measure. On the other hand, the maximum fine the CMA can impose for non-compliance with a Section 109 Notice is GBP 30,000. The CMA's 2019 reform proposals notably suggested the CMA might seek greater power to impose fines for non-compliance with information requests.

The CMA's approach to merger enforcement will also have an increasing impact on international transactions with a UK element as the UK's Brexit transition period finishes at the end of 2020, possibly leading to an increased number of transactions being notified to the CMA.

CMA open letter to the weddings sector

UK – CONSUMER PROTECTION

The UK Competition and Markets Authority's ("CMA") has published an open letter to businesses in the weddings sector explaining how consumer protection law applies to the wedding contracts which these businesses have with consumers during the COVID-19 pandemic and securing a promise from the Bijou Weddings Group to offer affected customers fairer partial refunds.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The CMA's recent actions as part of its investigation into the weddings sector align with its priority to protect consumers and should therefore be taken as a warning to businesses not to breach consumer protection law.
- This forms part of a wider consumer law enforcement drive by the CMA over the last two years, with the CMA increasingly

cracking down on businesses who act in contravention of consumer protection law.

- Businesses should review their practices to ensure that they are complying with consumer protection law and address any issues with such compliance. See our Ashurst guide on UK consumer law here in association with ICLG.

The huge impact of the COVID-19 pandemic on wedding services has seen the weddings sector become an area of focus for the CMA's COVID-19 Taskforce. Complaints were raised about businesses not respecting the cancellation rights of consumers through failing to provide refunds for the costs of organising weddings which could not take place because of the pandemic. This led to the CMA opening an investigation into the weddings and private events sector (among several other sectors) and issuing its views on consumer protection law in relation to cancellations and refunds during the crisis; namely that where consumers have paid money in advance for services that can no longer take place because of the pandemic, they should be entitled to a refund.

CMA'S OPEN LETTER TO BUSINESSES

On 7 September 2020, the CMA published an open letter to businesses in the weddings sector explaining how consumer protection law applies to the wedding contracts that these businesses have with consumers during the pandemic. This letter encourages businesses to become compliant with consumer protection law, states particular issues and warns of action that may be taken against them if they do not comply with consumer law.

It highlights the following issues:

- refusing to offer or give fair refunds where weddings were/are not able to take place because of lockdown laws;
- where, as lockdowns restrictions are being eased, the Government is issuing guidance for wedding businesses which results in them self-determining how to manage their business in line with consumer protection law; and
- businesses relying on terms in wedding contracts which are unfair in order to deny consumers refunds.

OTHER ACTION

In conjunction with the publication of its open letter, the CMA:

- stated its view on how the law operates in relation to contracts for wedding services affected by the pandemic and has obtained;
- secured a promise from the Bijou Weddings Group to offer affected customers fairer partial refunds that more accurately reflect the services received up until the date of cancellation and to clearly communicate to every affected customer who has not re-scheduled their wedding the refund process that has been agreed; and
- contacted a number of businesses in the weddings sector directly in relation to their obligations under consumer protection law.

LOOKING FORWARD

The CMA appreciates that these are unprecedented times and that businesses are facing enormous challenges. Their actions against businesses in the weddings sector have thus far, therefore, been gentle. This forms part of a wider consumer law enforcement drive in the UK, with the CMA having prioritised protecting consumers in its 2020/2021 Annual Plan and the CMA having already launched and number of consumer law cases recently. For more on the UK consumer law regime, see our Ashurst guide in association with ICL.

Enforcement action against four housing developers and advice on leasehold properties

UK – CONSUMER PROTECTION

As part of its investigation into potential breaches of consumer law in the residential leasehold market, the UK Competition and Markets Authority's ("CMA") is taking enforcement action against four housing developers: Barratt Developments; Countryside Properties; Persimmon Homes; and Taylor Wimpey. The action, which was launched on 4 September 2020, particularly concern potential instances of mis-selling and potential unfairness of certain leasehold contract terms.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The CMA announced in its Annual Plan for 2020/2021 that it will particularly focus on protecting consumers (see Ashurst's April 2020 newsletter here). Its continued investigation into potential breaches of consumer law in the residential leasehold market aligns with this key priority.
- Developers in the residential leasehold market can therefore expect to undergo further scrutinization and should be prepared to receive correspondence from the CMA encouraging them to review their practices to ensure that they are not acting in contravention of consumer protection law.
- Firms who have bought freeholds from these housing developers and have continued to use the same unfair leasehold contract terms will also be investigated by the CMA.
- For more on the UK consumer law regime, see our Ashurst guide in association with ICLG.

The CMA has announced that it is taking enforcement action against four housing developers: Barratt Developments; Countryside Properties; Persimmon Homes; and Taylor Wimpey.

CONCERNS

The CMA has raised several concerns as to their conduct, including the following:

MIS-SELLING

- **Ground rents:** developers failing to explain clearly what ground rent is, whether it increases over time, when increases will occur and by how much.
- **Availability of freehold:** people being misled about the availability of freehold properties; for example, being told properties would only be sold as leasehold homes, when they were in fact later sold as freeholds.
- **Cost of the freehold:** issuing misleading information about the cost of converting a leasehold property to a freehold property.
- **Unfair sales tactics:** developers have been deploying unfair sales tactics - such as unnecessarily short deadlines to complete purchases - in order to secure a deal.
- **Unfair contract terms – ground rents:** the use of unfair contract terms means that homeowners are paying escalating ground rents. This increase is built into contracts, meaning that people can also struggle to sell their homes and find themselves trapped.
- **Escalating ground rents:** the CMA will be looking further into ground rent increases based on the Retail Price Index and may take enforcement action should it find evidence of unfair practices in relation to these.
- **Continued use by freehold purchasers:** certain firms who bought freeholds from these housing developers and have continued to use the same unfair leasehold contract terms will also be investigated by the CMA.

CMA'S INVESTIGATION INTO THE RESIDENTIAL LEASEHOLD MARKET

These case openings follow the launch of the CMA's investigation into potential breaches of consumer law in the residential leasehold market in June 2019. The concerns identified by the CMA largely reflect the potential issues identified in the CMA's February 2020 report into the sector:

- escalating ground rents;
- misleading information about the cost of converting a leasehold property to freehold property;
- misleading information about the difference between freehold and leasehold ownership; and
- unreasonable management fees.

In conjunction with the launch of these cases, the CMA has issued guidance for consumers who own or are buying leasehold properties.

NEXT STEPS

The CMA is seeking further information from these four housing developers, and will look to secure commitments/undertakings from the companies or, if necessary, seek a court order. It is also sending letters to a number of other (unnamed) developers, to encourage them to review their practices. Developers are advised to keep an eye out for any such correspondence.

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