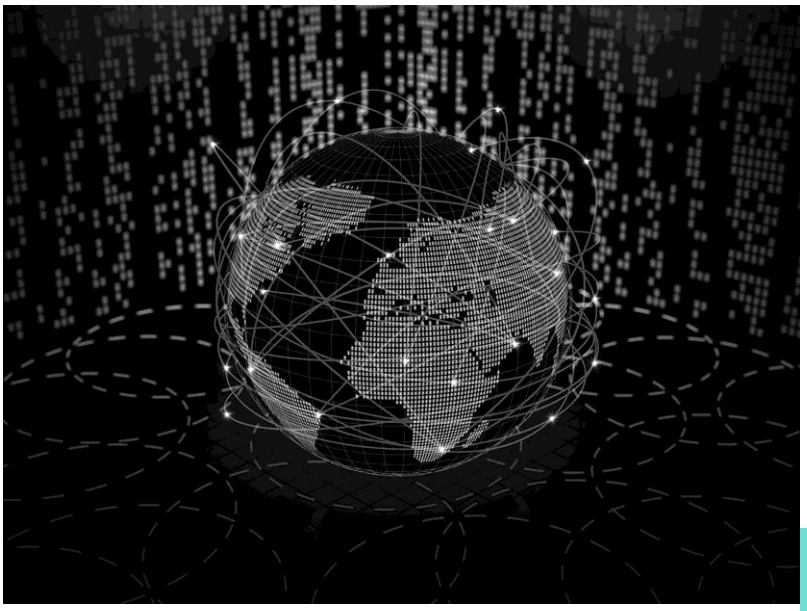


ashurst

Competition Law Newsletter

MAY 2022

From the editors

The May 2022 issue of Ashurst's competition law newsletter features some of the key recent competition law developments, including: an important ruling by the ECJ on what constitutes an "interested party" under Regulation 2015/1589; key reforms to the UK competition law and consumer law regimes; a decision by the UK Competition Appeal Tribunal in relation to anti-competitive manipulation of foreign exchange markets; and updates on recent antitrust fines in Australia, France and China.

Donald Slater
Partner

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

Laura Carter
Senior Associate

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

Emile Abdul-Wahab
Associate

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

Adelle Elhosni
Associate, Admitted in Australia

T +971 2 406 5689
M +61 439 522 519
adelle.elhosni@ashurst.com

Michael Utama
Trainee Solicitor

T +44 20 7859 2518
M +44 7823 341 140
michael.utama@ashurst.com

Edward McNeill
Counsel

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

Fiona Garside
Senior Expertise Lawyer

T +44 20 7859 3269
M +44 7900 894 101
fiona.garside@ashurst.com

Zac Davies
Avocat

T +32 2 641 9940
M +32 473 132 179
zac.davies@ashurst.com

Letty Morris
Trainee Solicitor

T +44 20 7859 2502
M +44 7824 747 673
letty.morris@ashurst.com

Content

ECJ holds Greek green electricity producer is not an "interested party" in State aid challenge

EU – STATE AID

On 7 April 2022, the ECJ upheld the General Court's ruling that Renewable Electricity Producer, Solar Ileias Bompaina, did not qualify as an "interested party" in its challenge against the new aid scheme introduced by Greece.

KEY TAKEAWAYS

- an 'interested party' within the meaning of Article 1(h) of Regulation 2015/1589 refers to any person, undertaking or association of undertakings whose interests might be affected by the granting of the aid, including competitors of the beneficiary
- a company which is not a direct competitor of the beneficiary of the aid scheme can qualify as an 'interested party', if its interests could be affected by the grant of the challenged aid
- where the adverse effect of the grant of aid on a company's interests may only be potential, a risk of a specific effect on such interest must be demonstrated

BACKGROUND

In December 2014, Greece notified to the European Commission its new operating aid scheme in favour of producers of electricity using renewable energy sources (RES Producers). Notably it reduced previously applied feed-in tariffs payable to RES Producers in order to balance the scheme, which was in deficit.

Solar Ileias Bompaina (Solar), a Greek RES Producer, submitted a complaint to the European Commission about the changes. It argued that they involved illegal aid to downstream energy suppliers (Suppliers). The RES Producers (including Solar) would bear the costs of reducing the deficit of the account, whereas the Suppliers (who contributed to the same deficit) did not.

The complaint was dismissed by the Commission. Solar's appeal against that decision before the General Court was rejected as inadmissible by judgment of 3 July 2020 (Case T-143/19). The General Court held that Solar had not established its status as an 'interested party' within the meaning of Article 1(h) of the State aid Procedural Regulation 2015/1589 (Procedural Regulation).

Solar challenged that finding before the ECJ.

JUDGMENT OF THE ECJ

The ECJ rejected Solar's appeal (Case C-429/20 P).

It recalled that that the notion of 'interested party' within the meaning of Article 1(h) of the Procedural Regulation refers to any person, undertaking or association of undertakings whose interests might be affected by the granting of the aid, including competing undertakings of the beneficiary of such aid. That did not preclude that a company which is not a direct competitor of the beneficiary of the aid scheme being qualified as an 'interested party'. However, it must establish that its interests could be affected by the grant of the aid.

To do so the undertaking must establish that the aid is likely to have a specific effect on its situation. That specific effect can also be potential, but must be demonstrated to the requisite legal standard.

The ECJ firstly confirmed that the RES Producers and Suppliers were not competitors as they operated at different levels of the Greek electricity market.

As to whether the aid scheme could have had a practical impact on Solar's situation, the ECJ agreed with the General Court that Solar had failed to demonstrate that there is a correlation between the reduced feed-in tariffs and the non-payment of a contribution account by the Suppliers. Moreover, it failed to establish that the challenged scheme could have affected its market position or interests.

In addition, the ECJ found that Solar had not explained how the exemption of Suppliers from the aid scheme could have influenced the setting of the new feed-in tariffs given that they were designed primarily to counterbalance the overcompensation previously granted to the RES Producers. More generally, the question whether another category of economic operators may have contributed to the occurrence of the deficit at the level of aid scheme was considered irrelevant, as was the possibility that RES Producers and Suppliers would be in a comparable situation for the purposes of assessing the status of 'interested party'.

COMMENT

The ECJ judgment brings valued guidance on the concept of 'interested party' within the meaning of Article 1(h) of the Procedural Regulation, and builds upon its past precedents (see in particular *Commission/ Kronopoly and Kronotex*, C-83/09 P).

The possibilities to be considered an 'interested party' may arguably been theoretically widened, to explicitly include non-competitors. However, what is required to establish 'risk of a specific effect' and the practical possibilities of meeting that test remain unclear.

With thanks to Maëlle Vannet--Deprugney and Eloise Robson for their contribution.

Reform Of UK Competition Law And Consumer Law Regimes

UK – NEW LAW/POLICY

On 20 April 2022, the Department for Business, Energy & Industrial Strategy ("BEIS") published a response to its July 2021 consultation "*Reforming competition and consumer policy – Driving growth and delivering competitive markets that work for consumers*" setting out its plan to introduce significant reforms to competition law and consumer law in the UK. Reforms are proposed in all areas of competition law from mergers to anticompetitive conduct and market investigations. In relation to consumer law, the government plans to fundamentally change the enforcement of consumer law by introducing an administrative enforcement model which will enable the Competition and Markets Authority ("CMA") to directly impose fines of up to 10% of global turnover on companies that break the law.

KEY TAKEAWAYS

- ***Competition law***
  - Updated merger control thresholds: (i) an increased turnover threshold for the acquired business of £100 million (up from £70 million); and (ii) a new jurisdictional threshold to target "killer acquisitions" which applies where at least one of the merging businesses has an existing share of supply in the UK of 33% and UK turnover of £350 million.
  - The CMA will be granted enhanced powers to gather evidence and sanction companies for failing to comply with investigations (with fines of up to 1% of global turnover) and remedies (with fines of up to 5% of global turnover), including daily penalties for continued non-compliance.

- The CMA will have the power to revise, including by supplementing, remedies imposed following a market investigation, for a period of up to 10 years without having to re-open the investigation.
- The courts and the Competition Appeal Tribunal ("CAT") will be able to order exemplary damages in private competition law claims.

- ***Consumer protection and enforcement***
  - Businesses should expect increased consumer law enforcement once the CMA has the power to enforce consumer law and to impose fines of up to 10% of global turnover for breaches.
  - New laws will be introduced to tackle posting fake reviews and "subscription traps" to ensure customers can exit contracts in a straightforward, cost-effective and timely way.

COMPETITION LAW

Following Brexit, the government has greater power to adopt a UK specific competition policy and law, and states that it is taking the "*opportunity to implement regulations that work better for the UK*" and "*moving in a more agile way than the EU*".

MERGER CONTROL – JURISDICTION

As proposed in the July 2021 consultation, the government plans to amend the jurisdictional thresholds for merger control. To ensure that the merger control regime remains proportionate:

- the target turnover threshold will be increased from £70 million to £100 million (in line with inflation); and
- a safe harbour will be introduced to exempt mergers from review where each party's UK turnover is less than £10 million.

Significantly, the government intends to introduce a new jurisdictional threshold designed to capture so-called "killer acquisitions" and vertical mergers. This new threshold will grant the CMA jurisdiction where *at least one of the parties*:

- has an existing share of supply of goods or services in the UK of 33%; and
- UK turnover of £350 million.

The share of supply and turnover thresholds for this new head of jurisdiction have been increased from 25% and £100 million (as initially proposed in the consultation) following feedback from stakeholders that the proposal could place a disproportionate burden on businesses and would capture a significant number of transactions that are unlikely to raise competition concerns.

Notably, this new threshold can be satisfied by *any* party to the transaction and respondents to the consultation raised concerns that it will allow the CMA to review mergers where there is no UK nexus as the target does not need to have turnover or even activities in the UK. In its response, the government has indicated that there will also be a UK nexus criterion to ensure that only mergers with an appropriate link with the UK will fall within the CMA's jurisdiction. This will still result in a significant expansion of the CMA's jurisdiction and is consistent with recent case law where the CMA has taken a broad approach to jurisdiction to enable it to review mergers which, in its view, may give rise to competition concerns, such as *Sabre/Farelogix* (see our June 2021 newsletter).

The introduction of a third jurisdictional threshold will add to the already increased administrative burden on merging parties in the UK following the removal of the UK from the EU one-stop shop post-Brexit and the new mandatory filing requirements under the National Security and Investment Act 2021 (see our Quickguide on the National Security and Investment Act).

For completeness, there are no current proposals to amend the jurisdictional threshold granting the CMA power to review transactions where a share of supply of 25% or more is created or enhanced.

However, the government notes that it will continue to monitor how this is applied and may propose reforms in the future.

MERGER CONTROL – PROCEDURE

The government continues to be of the view that the voluntary and non-suspensory regime is working well and reduces the burden on both companies and the CMA. A number of reforms have been proposed to improve the efficiency of the merger review process, including:

- allowing the CMA to accept binding commitments earlier in a Phase 2 investigation;
- enhancing and streamlining the merger "fast-track" procedure by allowing parties to request a fast track referral at any stage during pre-notification discussions and Phase 1, and removing the requirement that parties accept that the merger may create a substantial lessening of competition; and
- updating how the CMA is required to publish its merger notice so that the CMA is only required to publish a notice on its website (rather than in the Gazettes).

In the July 2021 consultation, the government proposed limiting Phase 2 investigations to the issues identified at Phase 1. Following mixed feedback from stakeholders that it could result in a more efficient process for some mergers while having unintended consequences for others, the government is not pursuing this reform.

ANTI-COMPETITIVE CONDUCT – SCOPE

The government plans to expand the territorial scope of the Competition Act 1998 Chapter I prohibition on anticompetitive agreements to include agreements, concerted practices and decisions which are implemented *outside the UK*, depending on the effect within the UK. This is consistent with the scope of Article 101 Treaty on the Functioning of the European Union. Currently, the government does not intend to alter the territorial scope of the Chapter II prohibition on abuse of a dominant position as, in its view, it is "*less clear that a significant enforcement gap arises from the requirement that the business in question have a position of dominance within the UK*".

The turnover threshold for immunity from financial penalties under Chapter II of the Competition Act for conduct of minor significance has been reduced from £50 million to £20 million. As a result, the immunity thresholds for Chapter I and Chapter II will be aligned and, in the government's view, this will deter companies in smaller and local markets from abusing their dominant position.

ANTI-COMPETITIVE CONDUCT – PROCESS

In Competition Act investigations, the CMA will be granted new evidence-gathering powers, including:

- the ability to interview any relevant person (e.g., beyond those employed by the company under investigation).
- powers to "seize and sift" evidence during inspections at domestic premises;
- introducing a duty to preserve evidence in all Competition Act investigations, analogous to the existing duty in the context of cartel investigations; and
- strengthening the CMA's powers to obtain information stored remotely when executing a warrant.

The government also plans to introduce a new statutory framework for confidentiality rings, which will include civil penalties for breaches. In the government's view, this will reduce the burden of access to the file for the CMA and the parties, as well as improving efficiency by establishing a more standardised approach to the use of confidentiality rings.

To further incentivise compliance with investigations and remedies, the CMA will be granted additional powers to sanction companies for refusing to cooperate. Specifically, the CMA will be able to impose penalties of up to 1% of a company's global turnover for non-compliance with investigative measures (e.g., failing to comply with an information request) and up to 5% of global turnover for non-

compliance with remedies, including commitments and undertakings. In addition, the CMA will have the power to impose daily penalties of up to 5% of daily global turnover for continued non-compliance.

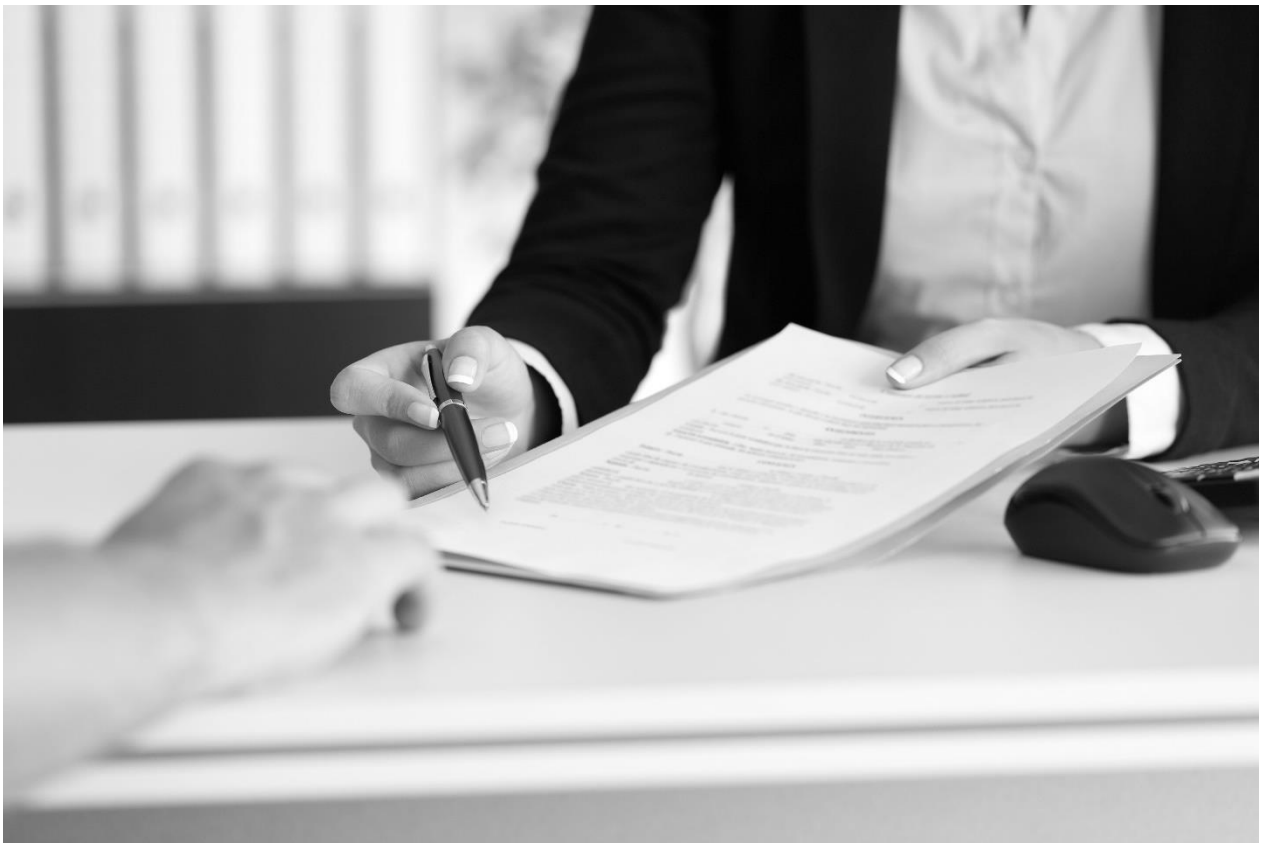
ANTI-COMPETITIVE CONDUCT – JURISDICTION OF THE COURTS

Appeals against interim measures decisions in Competition Act investigations will no longer involve a full merits review: instead, they will be determined by reference to the principles of judicial review. Interim measures have been rarely used and the government considers that the current approach focuses too much on preventing interim measures being imposed erroneously to the detriment of ensuring that interim measures are applied when they are warranted. The rules governing access to file will also be amended to provide that the CMA only has to provide reasons for its decision and does not need to provide full access to underlying evidence. The combination of these two measures will make it much more difficult for companies to challenge the imposition of interim measures.

PRIVATE COMPETITION LAW CLAIMS

Following support from stakeholders, the government will extend the jurisdiction of the CAT to enable it to grant declaratory relief. As a result, claimants will not need to bring their competition law claims as damages actions or applications for an injunction when the most helpful outcome would be a declaration as to how the law applies to the facts of the case.

The courts and the CAT will also be granted the power to make exemplary damages awards in private competition law claims. Exemplary damages are prohibited by the EU Damages Directive (Directive 2014/104/EU) which requires that damages should provide full compensation but not overcompensation. Following Brexit, the government has decided to restore the courts' power to award exemplary damages in appropriate cases: exemplary damages will not be available in collective proceedings.



MARKET INQUIRY REGIME

The government intends to pursue a number of reforms which it considers will make the market inquiry regime a more efficient and effective tool. Specifically, the reforms will:

- provide the CMA with greater flexibility to define the scope of market investigations and remove the requirement to consult on a market investigation reference within the first six months of a market study;
- introduce greater flexibility for the CMA to accept binding commitments at any stage of a market study or market investigation;
- enable the CMA to require businesses to trial remedies to determine the final format of certain remedies. This power will be limited to remedies concerning what, when and how information is presented to consumers; and
- enhance the CMA's ability to amend remedies in a ten year period following the finding of an adverse effect on competition in a market investigation. Importantly, this is not limited to removing obsolete remedies and will enable the CMA to supplement remedies "*to achieve better outcomes*". A mandatory two year "cooling off" period will apply from the end of a remedy review, which will prevent the CMA from conducting a further review of the same remedy on its own volition.

ENHANCED CONSUMER PROTECTION LAWS

In its consultation, the government noted that the rise in online shopping (further accelerated by the Covid-19 pandemic) and the increase in subscription contracts prompted a review of consumer protection laws. For further information on the current consumer law protections, see the UK chapter of ICLG.

Key changes relate to:

- **Subscription traps:** The government will introduce new rules to tackle subscription traps (in which companies make it difficult for consumers to exit a contract). These will include a requirement on companies to provide clear information to consumers, send consumers reminders before roll-overs and ensure that consumers have a straightforward, cost-effective and timely mechanisms for exiting a subscription contract.
- **Fake reviews:** A new law will be enacted to address fake reviews by adding to the current "blacklist" of automatically unfair practices in Schedule 1 of the Consumer Protection from Unfair Trading Regulations 2008. This will prohibit companies from commissioning fake reviews or hosting consumer reviews without making reasonable and proportionate checks that they are genuine. The CMA is continuing to take enforcement action against Amazon and Google following concerns that they have not been doing enough to tackle fake reviews on their sites.
- **Saving schemes:** The government also plans to strengthen protections for consumers using "saving schemes" (such as Christmas Savings Clubs) by requiring such schemes to fully safeguard customers money, and to update and simplify the regulations and protections relating to package travel.

ENHANCED CONSUMER LAW ENFORCEMENT

In a long-awaited but significant change, the CMA will be given the power to directly enforce consumer law, including new powers to fine companies up to 10% of their global annual turnover and individuals up to £300,000 for breaches of consumer law. This administrative enforcement model will enable the CMA to impose directions and/or fines on companies found to have infringed core consumer law (including unfair commercial practices and unfair contract terms), rather than being limited to obtaining undertakings from companies to change their behaviour or having to go through the courts. which can be a lengthy process. The CMA will also be able to directly enforce undertakings given by enforcement subjects, with the possibility of fines for breaches of undertakings or directions imposed by the CMA.

In addition, the government has indicated that:

- the CMA will be required to consult on its rules of procedure and guidance for these administrative investigations.

- parties will be able to seek a full merits review to the High Court in England and Wales and Court of Session in Scotland against any decisions of the CMA.
- it intends to improve Alternative Dispute Resolution (ADR) services in consumer markets, in order to encourage consumers and traders to resolve more disputes without court action.

COMMENT

Many of these reforms will require legislation and the timing of implementation is therefore uncertain. Legislation and further guidance will also provide more detail on the precise scope of some of the proposed reforms, in particular in relation to consumer law enforcement. Companies will need to monitor the progress of these changes and consider how best to adapt their internal compliance policies and procedures. Further reforms are also possible as the government has identified a number of areas (in particular, the operation of the share of supply test in merger control and the impact of private damages claims on leniency programmes) where it is not currently proposing to make changes but where it intends to monitor future developments and may enact reforms.

Once in force, the strengthened consumer law enforcement powers will have a significant impact on the consumer law landscape in the UK. The measures will bring consumer enforcement alongside competition law in the CMA's toolkit and will likely lead to a substantial increase in the number of CMA investigations into consumer law breaches. For the first time, the CMA will be able to impose fines, while the prospect of the CMA taking administrative decisions is likely to open up the risk of follow-on damages actions from consumer groups. As noted, the precise procedures for these investigations are still to be determined and will be the subject of further consultation. However, the existing administrative competition regime is likely to provide the reference point to develop a consumer law enforcement framework which provides for robust decision making whilst protecting the rights of defence.

In addition to these reforms, the government consulted on "A new pro-competition regime for digital markets" in July 2021 (see our September newsletter) which set out proposals for an enforceable code of conduct and a bespoke merger control process (including a requirement to report all mergers to the CMA and a mandatory merger control regime for the largest transactions) for firms designated as holding Strategic Market Status. The Government published its response to this consultation on 6 May 2022, which we will cover in a separate briefing.

Competition Appeal Tribunal rules on first ever 'carriage dispute' in UK FX cartel class action

UK – PRIVATE DAMAGES ACTIONS

On 31 March 2022, the Competition Appeal Tribunal ("CAT") refused to certify two claims advanced against a number of UK banks for their participation in a foreign exchange spot rate manipulation cartel as opt-out collective proceedings. The novel issue before the CAT at the certification hearing was a 'carriage dispute', whereby it was invited to consider which of the two rival applicants looking to bring an opt-out claim would be most suitable to represent the interests of the class members. By declining to certify either claim on an opt-out basis, the CAT effectively side-stepped the issue.

KEY TAKEAWAYS

- The CAT has jurisdiction both to certify collective proceedings on a basis other than that which is applied for by a class representative and to strike out any claim on its own initiative even where a strike-out or summary judgment application has not been brought.
- Pleading cases of "market-wide" harm will be particularly difficult for claimants.
- The "strength and practicability" of the claim will be significant factors in determining whether a claim should proceed on an opt-in or opt-out basis.
- The choice of proposed class representative ("PCR") should be considered carefully when bringing collective actions.

In summary, the CAT found in this case that:

- both claims were liable to be struck-out under rule 41(1)(b) of the CAT Rules (an issue that it unusually raised of its own initiative). However, given that the claims raised novel issues for further judicial consideration (in particular, in relation to the issues of "market-wide harm" and the carriage dispute), it was not appropriate to exercise its strike-out discretion at this stage in the case;
- both actions met the general test for certification, namely that the collective claims raised the same, similar or related issues and were suitable to be brought in collective proceedings;
- nevertheless, the merits and impracticability of the claims pointed strongly away from certification on an opt-out basis. The claims were stayed and the applicants given permission to make a revised application for certification on an opt-in basis, which the CAT indicated would be likely to succeed; and
- while it was not strictly necessary to consider the carriage issue given the decision not to certify at this stage, were the CAT minded to grant certification on an opt-out basis, it held that it would marginally favour the Evans PCR.

THE CAT HAS THE POWER: THE INITIAL JURISDICTIONAL QUESTIONS

Opt-in v opt-out

Both Mr O'Higgins and Mr Evans applied for certification on an opt-out basis only. Counsel for each of the applicants contended that it was therefore not open to the CAT to grant a collective proceedings order on an opt-in basis. The CAT disagreed; it did have jurisdiction to decide between opt-in and opt-out proceedings, and cited three principles upon which the discretion is based: (i) the interests of the due administration of justice; (ii) the interests of the proposed class (which are not necessarily the same as those of the applicant); and (iii) the interests of the proposed defendants to the action.

Strike-out

The CAT also made the unusual move to consider striking the claims out of its own initiative, which it has the power to do under CAT Rule 41(1)(b). While noting that no strike-out application had been made, the CAT considered it appropriate to consider strike-out given the concerns it had as to the merits of the claims, particularly given that they were based on economic theory alone.

PLEADING "MARKET-WIDE HARM" CASES OF THIS KIND WILL BE PARTICULARLY DIFFICULT

The lack of a clearly pleaded position in relation to issues of causation led the CAT to conclude that neither claim could plausibly proceed to trial. This was driven by the fact that both claims sought to advance cases of "market wide" damage based on pure economic theory pointing to potential inefficiencies in the market. In the CAT's view, neither applicant successfully articulated a sufficiently pleaded and factually evidenced causal link between these alleged inefficiencies and any consequent losses for consumers, stating that *"economic theory does not, in and of itself, constitute an arguable legal claim".*

In this case, strike-out was not ordered due to the need for further judicial consideration in this area and the fact that the applicants had not had an opportunity to address the CAT's thinking on the adequacy of their pleadings. Nevertheless, it is clear that the CAT will not

shy away from striking out collective proceedings claims itself where appropriate

FURTHER CLARIFICATION ON CERTIFICATION AND THE OPT-IN/OPT-OUT ISSUE

Merits assessment

Following certification of the *Merricks* (see our October 2021 newsletter), *Gutmann,* and *Le Patourel* collective actions as opt-out proceedings, the *Evans/O'Higgins* judgment provides further guidance on key issues surrounding the bases for certification.

In particular, questions surrounding the relevance of the "'merits" of the claim to its suitability to be brought as collective proceedings are addressed and the common law position clarified. The CAT confirmed that it considers itself bound by the Supreme Court's majority judgment in *Merricks* and, more specifically, Lord Briggs' contention that merits are distinct from issues of suitability. As such, there is *"no separate, freestanding 'merits' condition"* contained within the legislation as it relates to certification (see our February 2021 newsletter).

The strength and practicability of the claims

The CAT may, however, conduct something akin to a merits assessment when determining whether a claim should be certified on an opt-in or opt-out basis (but only in that context). It confirmed the general principle that the stronger a claim is, the more suitable it will be for opt-out proceedings.

The strength of the claim comprises the first of two factors which must be taken into account when considering the opt-in/opt-out issue in addition to those considered in respect of certification; the second being whether it is practicable to bring the claims on an opt-in basis. Given that these additional factors are specifically identified in the legislation, the CAT asserted that they are to be regarded as *"intrinsically likely"* to be significant in determining the nature of the claim.

Introducing a general test for "practicability", the judgment confirms that claims should be considered in light of *"that which is practicable from the standpoint of the members of the class concerned"* (CAT's emphasis) and not what is "*theoretically*" possible. Consequently, the CAT must have regard to the practical bars to opting in, and the likely attitudes of the class member *"on the Clapham omnibus"*.

Further, buy-in (or lack of it) from the class members will therefore go some way to determining the opt-in/opt-out issue; as the CAT sees it, "*the choice between opt-in and opt-out proceedings turns on this difference".* In circumstances such as this case where the claimant law firms were unable to recruit willing participants to the claims despite sizeable efforts and the relatively significant pay-outs each potential claimant stood to gain, the CAT considered it impractical for either claim to proceed as opt-out proceedings. Simply put, *"proceedings should not go ahead where members of the class do not want it to go ahead".*

THE CHOICE OF CLASS REPRESENTATIVE IS KEY: THE CARRIAGE DISPUTE

While this was the CAT's first ever judgment on a carriage dispute, it did not in fact rule on the carriage dispute, as its refusal to certify the claims as currently formulated rendered the issue moot. However, the CAT provided guidance to assist future litigants in selecting appropriate class representatives.

The general test

Where there are competing applications, the CAT will consider whether one proposed class representative represents the class better, given the specific nature of that class. It will focus on any concerns surrounding, rather than the relative advantages of, a prospective representative. The judgment introduces a general test in this respect, formulated as follows:

"Would an interested and well-informed member of the proposed class have a concern or concerns about the proposed PCR and – if so – what is the nature of that concern or those concerns? To what extent do those concerns enable a differentiation between PCRs?"

The choice of PCR will clearly have a significant effect on the viability of the proceedings, and the suitability of the proposed representative is considered an absolute requirement for certification. Indeed, the CAT remarked that *"it is better for the class action not to proceed at all than for it to be progressed by an*

inappropriate representative" (CAT's emphasis).

Funding concerns

The CAT also examined the respective funding proposals for each application in considerable detail in order to assess the PCRs' plans for the litigation and their ability to cover the respondents' costs, underlining the significance of ensuring suitable and sufficient funding mechanisms are in place at the outset.

Relatedly, it expressed some misgivings about the PCRs' ability to "*adequately and fairly*" represent the proposed class members, questioning the extent to which the PCRs were *"truly independent of the funders and the law firms supporting the applications"* (CAT's emphasis). This was primarily because both PCRs were approached by the lawyers and funders behind the claims for the purposes of advancing the litigation, and did not bring the claims themselves. As a result, the CAT was concerned that the PCRs would be potentially vulnerable to having to agree a settlement that covered contingent fees and funders' profits at the possible expense of the class. Conversely, it noted that were the PCRs instead heads of trade bodies whose established purpose was to represent the interests of consumers, for example, this would turn the tide in favour of opt-out certification.

While this was not a reason ultimately to disqualify either PCR, this was a factor of significant weight in the CAT's assessment.

"Frivolous" disputes

Commenting on the very fact of the rival applications, the CAT reprimanded the applicants' failure to reach a resolution amongst themselves in circumstances where the claims were insufficiently distinct to warrant a lengthy and expensive carriage dispute. These remarks suggest that "frivolous" carriage disputes will not be looked on favourably by the CAT in the future, and that rival applicants should endeavour to find common ground wherever possible. These comments from the CAT are noteworthy, particularly since courts in other jurisdictions (notably Australia – where competing class actions are common) have, in contrast, taken a much more pragmatic approach to dealing with similar carriage disputes.

Timing

The judgment provides helpful guidance regarding the timing of competing filings, including confirming the CAT's expectation that, where an applicant wishes to make a related or duplicative application to one which has already been made, it should seek permission to attend the initial case management conference for the original claim in order that the CAT can manage the carriage dispute. Any non-attendance would need to be justified by the later applicant. Nonetheless, due consideration will always be given to whether the first application has 'jumped the gun' on its application, with poorly formulated pleadings noted as an indicator of a premature filing.

Legal teams

The CAT saw no material differences between the firms bringing the applications, but emphasised the importance of the solicitors instructed being familiar with claimant collective actions involving competition and financial markets law.

NEXT STEPS

The O'Higgins and Evans applications have been stayed, and the applicants have three months to submit revised applications on an opt-in basis. Both applicants have stated their intentions to appeal in circumstances where they say the proceedings are not viable to be brought other than as opt-out proceedings.

Peters Ice Cream receives chilling $12 million penalty for exclusive dealing

AUSTRALIA – ANTICOMPETITIVE AGREEMENTS

The Federal Court has ordered Australasian Food Group, trading as Peters ("Peters"), to pay a $12 million penalty after the ACCC alleged, and Peters admitted, that its exclusive distribution agreement with PFD Food Services ("PFD") had the likely effect of substantially lessening competition.

KEY TAKEAWAYS

- Exclusive dealing is prohibited in Australia where it has the purpose, effect or likely effect of substantially lessening competition, and is subject to significant financial penalties.
- The ACCC has listed exclusive arrangements that impact competition by firms with market power as one of its enforcement and compliance priorities for 2022-23.
- Care must be taken to assess competition law risk when entering into commercial arrangements which limit the ability of parties to continue to supply or acquire goods or services freely.

PETERS' EXCLUSIVE DEALING CONDUCT

Peters is an Australian manufacturer and wholesale supplier of single serve ice cream products ("SSIC products") including those sold under the Connoisseur, Drumstick and Maxibon brands.

PFD was Australia's largest distributor of SSIC products at the time of the conduct. PFD distributed SSIC products nationally to petrol and convenience retailers such as BP and Caltex, and reached more than 90 per cent of Australian post codes.

From November 2014 to December 2019, Peters and PFD had an agreement under which Peters acquired distribution services from PFD on the condition that PFD would not, without Peters' consent, market, promote, sell or distribute SSIC products that compete with Peters' SSIC products in designated geographic areas within Australia (the "Exclusive Dealing Conduct").

PROHIBITION ON EXCLUSIVE DEALING

Section 47 of the *Competition and Consumer Act 2010* (Cth) ("CCA") prohibits corporations from engaging in exclusive dealing where it has the purpose, effect or likely effect of substantially lessening competition in a market in Australia.

In broad terms, exclusive dealing arises where an agreement for the supply, re-supply or acquisition of goods or services imposes restrictions on one party's ability to choose with whom, in what or where to deal. For example, exclusive dealing arises where a supplier refuses to supply goods or services unless the purchaser agrees not to buy goods of a particular kind from a competitor of the supplier. This conduct would contravene section 47 of the CCA if it has the purpose, effect or likely effect of substantially lessening competition in a market in Australia.

LIKELY EFFECT OF PETERS' EXCLUSIVE DEALING CONDUCT

The ACCC alleged, and Peters admitted, that the Exclusive Dealing Conduct had the likely effect of substantially lessening competition in the market for the supply by manufacturers for SSIC products in Australia ("the SSIC product market").

The ACCC and Peters jointly submitted that the SSIC product market experienced significant barriers to entry and economies of scale due to substantial fixed costs associated with manufacturing and supplying SSIC products, including the cost of distributing SSIC products.

This was evidenced by PFD refusing to distribute SSIC products made by manufacturers such as Bulla and Pure Pops –

both of whom are competitors of Peters – as a consequence of PFD's agreement with Peters. Bulla had also investigated alternative distribution methods to distributing through PFD, including establishing its own distribution network, but was unable to find viable alternative distribution options.

As a result, it was found that Peters' Exclusive Dealing Conduct likely heightened barriers to entry by preventing PFD from distributing competitors' SSIC products. The ACCC and Peters agreed that one or more potential competitors were likely to have entered or expanded into the SSIC product market if Peters had not engaged in the Exclusive Dealing Conduct.

On 25 March 2022, the Federal Court ordered, by consent, that Peters:

- pay a pecuniary penalty of AUD 12 million;
- pay the ACCC's legal costs; and
- establish and maintain a compliance program for three years focused on the competition law prohibitions in the CCA, particularly section 47.

ACCC'S ONGOING INTEREST IN EXCLUSIVE DEALING

Anti-competitive agreements and practices remain an enduring priority for the ACCC. The ACCC will always prioritise pursuing exclusive dealing enforcement cases that it considers would likely result in a substantial lessening of competition in a market in Australia.

In particular, the ACCC lists exclusive dealing in its enforcement and compliance priorities for the year. The Chair of the ACCC, Ms Gina Cass-Gottlieb, has confirmed that "[t]*he ACCC is targeting exclusive arrangements by firms with market power that impact competition as one of our compliance and enforcement priorities for 2022/23*".

It is particularly important for businesses to take care in assessing the competition law risks associated with exclusive arrangements. Businesses should seek advice on risk arising from existing exclusive arrangements, where appropriate, and on proposed entry into new exclusive arrangements.

First French Competition Authority fine covering both a failure to notify and a breach of the standstill obligation

FRANCE – MERGER CONTROL

On 12 April 2022, the French Competition Authority ("FCA") issued a 7 million euro fine to Cofepp for the acquisition of control over Marie Brizard Wine & Spirits ("MBWS") before notifying the concentration to the FCA (failure to notify) and *a fortiori* without waiting for the FCA's clearance decision (breach of the standstill obligation or "gun jumping").

KEY TAKEAWAYS

- This case is a stark reminder that parties to a concentration which meets the French notification thresholds must comply with both the obligation to notify the proposed transaction to the FCA and wait for the FCA's clearance before implementing the transaction.
- Failure to notify and subsequent implementation of a transaction before the FCA's clearance decision may each lead to a fine of up to 5% of the notifying undertaking's French turnover. The fine can be increased by taking the target's revenues into account where appropriate.
- The decision issued by the FCA on 12 April 2022 is the first application of the *Marine Harvest* caselaw (see our March/April 2020 newsletter) in France.

On 28 February 2019, the FCA issued a conditional clearance decision regarding the proposed acquisition by Cofepp, a company producing and distributing spirits (in particular Poliakov, Label 5, Cruz, Saint James, Old Nick) of sole control of MBWS, one of its competitors which also owns several brands of spirits such as Marie Brizard, San José and William Peel. The contemplated transaction was notified on 3 January 2019 following the execution of a memorandum of understanding under which Cofepp undertook to subscribe to a capital increase as a result of which it would hold 47.08% of the capital and 47.51% of the voting rights of MBWS.

Shortly after clearing the concentration, in April 2019, the FCA's investigations team raided several companies active in the French spirits sector, including Cofepp and MBWS. The FCA then opened an ex-officio investigation for suspected non-compliance with merger control rules in connection with Cofepp's acquisition of sole control of MBWS.

Following its investigation, the FCA found that Cofepp was already exercising decisive influence and thus *de facto* control over MBWS several months before the related notification. As a consequence, the FCA fined Cofepp EUR 7 million on 12 April 2022.

In its decision, the FCA observed that Cofepp had undertaken a gradual takeover of MBWS starting in June 2015. Cofepp's position in MBWS' general meeting and on its board of directors therefore progressively increased until Cofepp became the main shareholder of MBWS in 2017. Cofepp's position on MBWS' board of directors gave it access to sensitive information on the commercial and budgetary policy of its competitor, allowing it to "*closely monitor MBWS' activities and to interfere in certain decision-making*".

Among the evidence demonstrating the existence of decisive influence over MBWS prior to the notification, the FCA also considered the intensification of their commercial and financial relationship from 2016, the direct intervention by Cofepp in MBWS' strategic and operational decisions, including in particular the key role it played in the nomination of MBWS' new CEO appointed from 13 April 2018.

Further, the FCA found that beyond a failure to notify the acquisition of *de facto* sole control over MBWS, Cofepp completed the merger before having obtained authorisation.

On the basis of two distinct provisions of the French commercial code, and in line with the European Commission's decision-making practice, the FCA sanctioned Cofepp for both a failure to notify and a breach of the standstill obligation. Although it imposed a single fine for both infringements in the present case, the FCA pointed out that the obligation to notify a transaction and the standstill obligation constitute two distinct obligations, which pursue separate objectives, and which can each lead to a fine of up to 5% of the notifying party's turnover in France, which can potentially be increased to take the target's revenue into account.

When determining the quantum of the fine imposed on Cofepp, the FCA took into consideration elements demonstrating the gravity of the infringements committed by the latter. This included the fact that the transaction could only be cleared subject to structural remedies as well as evidence showing Cofepp's awareness of merger control rules and obligations. The FCA also took into account the fact that Cofepp had requested and obtained a settlement procedure, and had thereby accepted not to challenge the FCA's findings.

This decision is a further illustration of the great vigilance exercised for several years by the FCA services regarding breaches of merger control rules. Companies are advised to be particularly attentive in this area, particularly in case of progressive takeovers.

China's top court deems patent settlement agreement anti-competitive

CHINA – ANTICOMPETITIVE AGREEMENTS

The Supreme People's Court of China ("SPC") issued a judgment on 21 March 2022 which found that a patent settlement between Shanghai Huaming Power Equipment Manufacturing ("Huaming") and Wuhan Taipu Transformer Switch ("Taipu") constituted a horizontal monopoly agreement in violation of China's Anti-Monopoly Law ("AML").

KEY TAKEAWAYS

- This case is a stark reminder that parties to a concentration which meets the French notification thresholds must comply with both the obligation to notify the proposed transaction to the FCA and wait for the FCA's clearance before implementing the transaction.
- Failure to notify and subsequent implementation of a transaction before the FCA's clearance decision may each lead to a fine of up to 5% of the notifying undertaking's French turnover. The fine can be increased by taking the target's revenues into account where appropriate.
- The decision issued by the FCA on 12 April 2022 is the first application of the *Marine Harvest* caselaw (see our March/April 2020 newsletter) in France.

The Supreme People's Court of China ("SPC") issued a judgment on 21 March 2022 which found that a patent settlement between Shanghai Huaming Power Equipment Manufacturing ("Huaming") and Wuhan Taipu Transformer Switch ("Taipu") constituted a horizontal monopoly agreement in violation of China's AML.

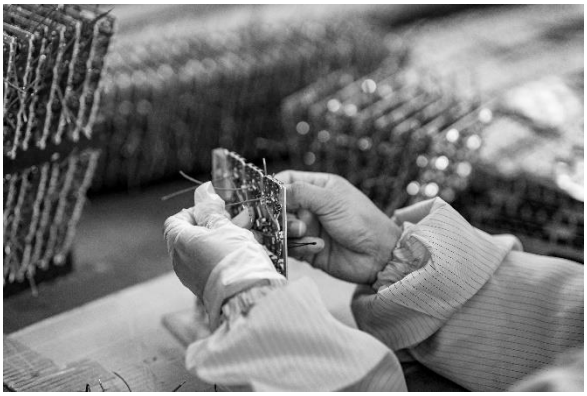
TIMELINE OF KEY EVENTS

Set out below is timeline of key events in the lead up to the hearing before the SPC.

- 2008 - Taipu obtained a patent in relation to a certain type of off-load tap changer with shielding apparatus (a component used in electric transformers).
- December 2013 - Taipu discovered that Huaming was producing and selling off-load tap changers with cylindrical shielding apparatus which it believed had the technical features that fell within the scope of its patent.
- October 2015 - Taipu filed a lawsuit against Huaming for alleged patent infringement.
- November 2015 - Huaming successfully lodged an application with the National Intellectual Property Administration to invalidate the patent in question.
- December 2015 - Huaming applied for the suspension of the suit brought by Taipu.
- January 2016 - the parties entered into a settlement agreement. Following this, Taipu applied for the withdrawal of the patent infringement litigation, while Huaming applied for withdrawal of the patent invalidation request.
- January 2017 - following an alleged violation of the settlement agreement by Huaming, Taipu filed a fresh law suit with the Jiangxia District People's Court of Wuhan City for breach of contract. The Jiangxia Court found in Taipu's favour.
- July 2017 - the Jiangxia Court's decision in favour of Taipu was upheld by the Wuhan Intermediate Court.
- June 2019 - the Wuhan Intermediate People's Court in the province of Hubei

agrees to hear Huaming's claim that the settlement agreement constituted a monopoly agreement contrary to Article 13 of AML. Huaming sought orders that the mediation agreement be declared invalid and that Taipu compensate it CNY 798,626 (~USD 121,800) for economic losses and CNY 100,000 (~USD 15,250) for reasonable expenses incurred in defending its rights and for the litigation fee.

- December 2020 – the Wuhan Court dismissed Huaming's claim.



Set out below is timeline of key events in the lead up to the hearing before the SPC.

- 2008 - Taipu obtained a patent in relation to a certain type of off-load tap changer with shielding apparatus (a component used in electric transformers).
- December 2013 - Taipu discovered that Huaming was producing and selling off-load tap changers with cylindrical shielding apparatus which it believed had the technical features that fell within the scope of its patent.
- October 2015 - Taipu filed a lawsuit against Huaming for alleged patent infringement.
- November 2015 - Huaming successfully lodged an application with the National Intellectual Property Administration to invalidate the patent in question.
- December 2015 - Huaming applied for the suspension of the suit brought by Taipu.
- January 2016 - the parties entered into a settlement agreement. Following this, Taipu applied for the withdrawal of the patent infringement litigation, while Huaming applied for withdrawal of the patent invalidation request.
- January 2017 - following an alleged violation of the settlement agreement by Huaming, Taipu filed a fresh law suit with the Jiangxia District People's Court of Wuhan City for breach of contract. The Jiangxia Court found in Taipu's favour.
- July 2017 - the Jiangxia Court's decision in favour of Taipu was upheld by the Wuhan Intermediate Court.
- June 2019 - the Wuhan Intermediate People's Court in the province of Hubei agrees to hear Huaming's claim that the settlement agreement constituted a monopoly agreement contrary to Article 13 of AML. Huaming sought orders that the mediation agreement be declared invalid and that Taipu compensate it CNY 798,626 (~USD 121,800) for economic losses and CNY 100,000 (~USD 15,250) for reasonable expenses incurred in defending its rights and for the litigation fee.
- December 2020 – the Wuhan Court dismissed Huaming's claim.

WUHAN COURT'S DECISION

The Wuhan Intermediate People's Court held that the parties were competitors, as they both manufactured and distributed tap changer products to transformer manufacturers. However, the court concluded that the settlement agreement was not a "monopoly agreement" because:

- the purpose of the agreement was settlement of the parties' patent infringement dispute and was intended to restrain competition and cooperation between the parties, rather than constrain competition in a competitive market; and
- the agreement did not contain price-fixing or adjustment terms, limits on production and sales, or market division terms, which are the constituent features of a "monopoly agreement" under Article 13(1) of the AML.

Finally, the court found that Huaming had failed to prove that the settlement agreement would result in anti-competitive effects.

Huaming sought to challenge the decision before the SPC. The SPC accepted the case on 13 July 2021 and held a hearing on 26 November 2021.

SPC'S DECISION

Consistent with the Wuhan Court's decision, the SPC held that there was a competitive relationship between the parties. However, contrary to the decision at first instance, the SPC considered the settlement agreement to constitute a horizontal monopoly agreement. The SPC pointed to three key clauses in the agreement which:

- placed restrictions on the sale of certain products by Huaming, including within China and in overseas markets with the effect of dividing sales markets between the parties;
- placed restrictions on the quantity of goods produced and sold by Huaming including by requesting Huaming discontinue production and limit the sale of certain off-load tap changer products; and
- had the likely effect of fixing commodity prices, including as a result of the restrictions placed on Huaming on the production of a certain type of off-load tap changer in China and restrictions placed on overseas sales. In addition, alignment on pricing was likely in the context of a clause whereby the parties agreed to share price information in respect of imported substitutes.

According to the SPC, the mediation agreement had the effect of excluding or restricting competition. The SPC acknowledged that once a monopoly agreement is formed it will generally be accepted as having a potential or actual effect of harming market competition, unless it can be established that the agreement has a pro-competitive effect that offsets any negative effect. As the defendant, Taipu was required to, but had failed to, adduce sufficient evidence to prove that the settlement agreement had the effect of promoting competition. Among other facts, the SPC referred to WeChat evidence between the legal representatives which demonstrated Taipu repeated requests of Huaming to keep unit prices at rates much higher than previously sold by Huaming. Based on this evidence, the implementation of the agreement would result in an increase in product prices with the clear effect of harming the interests of users in downstream markets.

As a party to the mediation agreement, Huaming participated in reaching the horizontal monopoly agreement and accordingly its own behaviour was illegal. The SPC therefore held that the claim for economic loss did not have a legal basis. On the reasonable expenses claim, however, the SPC decided to entertain this request on the basis that horizontal monopoly agreements can be hard to detect. The SPC considered that supporting a claim for reasonable expenses would encourage participants in such agreements to proactively report monopolistic conduct.

CONCLUDING REMARKS

The SPC's decision demonstrates the top court's sophistication in applying the AML in the context of IP-related disputes. The decision serves as a strong warning to IP advisors and parties caught up in IP litigation to be mindful of the overlay of competition law in their dealings. When engaging with a competitor, regardless of the context, it is advisable to be vigilant in all aspects of dealings and agreements reached, or else parties risk falling foul of competition law.

Key EMEA contacts

Gabriele Accardo
Counsel

T +39 02 85423430
M +39 338 7305376
gabriele.accardo@ashurst.com

Rafael Baena
Partner

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

Neil Cuninghame
Partner

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

Denis Fosselard
Partner

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

Michael Holzhäuser
Partner

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

Duncan Liddell
Partner

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

Donald Slater
Partner

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

Steven Vaz
Partner

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

Denis Waelbroeck
Partner

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

Irene Antypas
Counsel

T +32 2 641 9966
M +32 471 129 991
irene.antypas@ashurst.com

Euan Burrows
Practice Group Head, Competition

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

Gil Even-Shoshan
Counsel

T +32 2 626 1907
M +32 471 129 973
ges@ashurst.com

Maria Held
Counsel, Rechtsanwältin

T +49 89 24 44 21 176
M +49 172 67 02 553
maria.held@ashurst.com

Christophe Lemaire
Avocat à la Cour

T +33 1 53 53 54 62
M +33 6 81 98 96 44
christophe.lemaire@ashurst.com

Nigel Parr
Partner

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

Javier Torrecilla
Counsel

T +34 91 364 9839
M +34 676 623 036
javier.torrecilla@ashurst.com

Annick Vroninks
Partner

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

Key Asia Pacific contacts

Peter Armitage
Partner

T +61 2 9258 6119
M +61 418 973 700
peter.armitage@ashurst.com

Melissa Fraser
Partner

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

Justin Jones
Partner

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

Angie Ng
Partner

T +65 6416 9525
M +65 9728 5630
angie.ng@ashurst.com

Alyssa Phillips
Partner

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

Ross Zaurrini
Partner

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

Tihana Zuk
Partner

T +61 2 9258 6343
M +61 409 654 876
tihana.zuk@ashurst.com

ashurst

www.ashurst.com