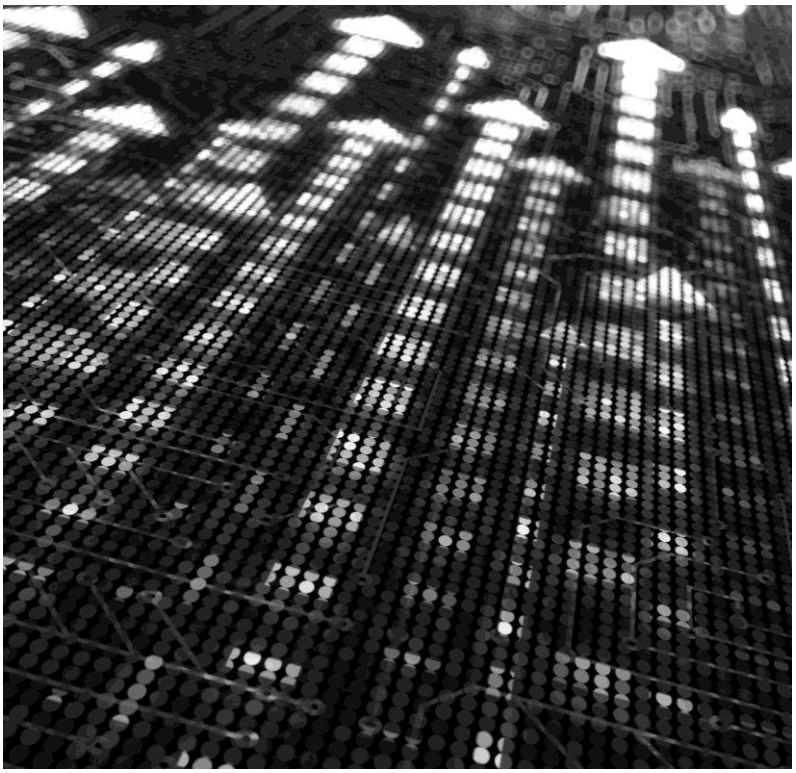


ashurst

Ashurst competition law newsletter – December 2019

From the Editors

This issue of the Ashurst competition law newsletter features a round-up of some key recent developments from November and December to mark the end of 2019. This edition covers a feature article on the first public enforcement outcome in Australia related to concerted practices, a surge of power cable cartel judgments from the ECJ, the joint Franco-German algorithms study, the Australian customer loyalty schemes report, further developments in both the European and UK courts relating to damages claims, as well as other news.

Season's Greetings and a Happy New Year from the Editorial Team.

Alexi Dimitriou
Counsel
London

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

Donald Slater
Counsel
Brussels

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

Ross Mackenzie
Partner
London

T +44 20 7859 1776
M +44 7946 707 890
ross.mackenzie@ashurst.com

Edward McNeill
Senior Associate
London

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

Content

No crossed wires – first ECJ judgment in power cables saga upholds General Court

EU – ANTITRUST – CARTELS

On 14 November 2019, the European Court of Justice ("ECJ") dismissed the appeal in case C-599/18 P brought by Silec Cable ("Silec"), which sought to set aside an earlier judgment by the General Court upholding the European Commission's ("Commission") power cables decision.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- It is well-established that competition authorities may fine parent companies for the conduct of their subsidiaries during the period in which they formed part of the same undertaking.
- Public distancing can prove that an undertaking had no anticompetitive intention when participating in collusive meetings.
- However, in cases where collusion operates over several years, rather than during individual meetings, the absence of public distancing is but one factor amongst others which can be used to establish participation in an anticompetitive agreement.

In April 2014 the Commission imposed fines of €302 million on 11 producers of underground and submarine power cables. The Commission found that Silec had directly participated in the cartel as a "moderate player" between 30 November 2005 and 16 November 2006, and found that General Cable (which acquired Silec on 21 December 2005) and Safran (the vendor) were each jointly and severally liable as parent companies of Silec.

The General Court rejected Silec's appeal against the Commission's decision in 2018, together with 14 other appeals that were also dismissed (see our August 2018 newsletter).

PARTICIPATION AND PUBLIC DISTANCING

The ECJ rejected Silec's first ground of appeal, which claimed that the General Court had distorted the evidence in its assessment of Silec's participation in the infringement. In particular the ECJ, which has no jurisdiction to establish the facts in an appeal, found no evidence to support the contention that General Court's approach was "manifestly incorrect", and therefore held Silec's arguments to be unsubstantiated.

The ECJ also found that, contrary to Silec's arguments, the General Court had not relied solely on Silec's absence of public distancing during the cartel as evidence of Silec's participation, nor did the General Court incorrectly reverse the burden of proof by requiring Silec to provide an explanation or justification for the subjective perceptions of the other participants in the cartel.

PERSONAL RESPONSIBILITY

The second ground of appeal alleged that the General Court had incorrectly refused to grant Silec the same reduction in the fine, granted to other "fringe players" in the cartel, by attributing the past conduct of Safran and Silec to the period that followed General Cable's acquisition of Silec.

However, the ECJ dismissed the appeal, holding that the General Court had found Silec could not be a classified as a fringe player on the basis of its own conduct. The ECJ also noted that that the appellants put forward no evidence before the General Court to demonstrate that Silec's conduct had radically changed afters it acquisition by General Cable.

The ECJ's Silec judgment is the first of multiple appeals to the Court of Justice in the power cables saga. On 28 November 2019, the Court of Justice handed down its decisions in the ABB and LS Cable cases (see our December 2019 newsletter article). The outcomes in cases C-582/18 P, C-589/18 P, C-590/18 P, C-595/18 P (which is the appeal brought by Goldman Sachs) and C-611/18 P are currently awaited.

ECJ rules on three power cables cartel appeals

EU – ANTITRUST - CARTELS

On 28 November 2019, the European Court of Justice ("ECJ") handed down judgments in three appeals against General Court judgments that had dismissed actions challenging the European Commission's ("Commission") power cables cartel decision. Leniency applicant ABB's appeal was partially upheld, while Brugg and LS Cable & System's appeals were dismissed in their entirety.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The presumption of innocence will not be breached where an undertaking's participation in a cartel is found to be very slightly earlier than the date of the first piece of precise evidence.
- Participation in one meeting can be sufficient to presume participation in the cartel and that presumption can, at least in certain cases, be reversed only by demonstrating public distancing from the cartel.
- Undertakings cannot seek to have the Commission's evidence and the General Court's assessment thereof re-examined before the ECJ, unless they establish actual distortion of the evidence on the part of the General Court.

BRUGG KABEL AND KABELWERKE BRUGG ("BRUGG"): APPEAL DISMISSED ON ALL GROUNDS

All six grounds of appeal raised by Brugg were dismissed by the ECJ. The ECJ found that there had been no infringement of Brugg's rights of defence in relation to either:

- notifications and information requests having been made in English rather than German; or
- the Commission's refusal to grant access to replies of other addressees of the statement of objections.

Alleging breach of the presumption of innocence, Brugg also argued that the General Court had applied too low a standard of proof to:

- the determination of the start date of Brugg's participation in the cartel;
- the duration of continued cartel participation by Brugg; and
- in relation to Brugg's liability with regard to certain agreements.

The ECJ found that Brugg was seeking to question the General Court's assessment of the facts and accordingly rejected these three pleas.

Finally, the ECJ found the General Court had not breached the principles of legality and proportionality by upholding 2004 as the reference year for calculation of Brugg's fine and by increasing the fine for undertakings that participated in both geographical configurations of the cartel.

LS CABLE & SYSTEM ("LSCS"): APPEAL DISMISSED ON ALL GROUNDS

The ECJ also dismissed LSCS's three grounds of appeal. Notably, the General Court had been correct in finding that:

- LSCS's participation in one meeting was sufficient to presume its participation in the cartel; and
- that presumption could be reversed only by LSCS demonstrating that it had publicly distanced itself.

ABB: APPEAL PARTIALLY UPHELD

ABB raised three grounds of appeal:

- **Start date:** The ECJ rejected the alleged failure by the General Court to state reasons for the start date of ABB's participation in the infringement. The ECJ also dismissed ABB's plea of breach of the presumption of innocence, finding that the General Court had justifiably upheld the Commission's determination of the start date of ABB's infringement as very slightly before the date of its first piece of evidence, particularly because it was clear that, on the date of those first pieces of evidence, ABB had been aware of and participating in the cartel for some time.
- **Equal treatment:** ABB had also alleged a breach of the principle of equal treatment, pointing to the fact that another cartelist, Nexans France, was found to have started participation in the cartel later than ABB. Such plea was equally dismissed - the ECJ held that ABB could not rely on an unlawful act of a third party in support of its claim.
- **Scope of conduct:** However, ABB's first ground of appeal was upheld. ABB alleged a failure to establish that the infringement had extended to all underground power cable projects. The ECJ dismissed ABB's arguments that the General Court had erred in law by finding the Commission had discharged its burden of proof on this point. However, it did find that the General Court had relied on an "unsubstantiated presumption" in finding that the collective refusal to supply power cable accessories included accessories for power cables with voltages between 110 and 220 kV. The Commission decision was annulled in so far as it found ABB liable for an infringement in respect of collective refusal to supply accessories for underground power cables with voltages between 110 and 220 kV.

These three judgments came just two weeks after a similar appeal by Silec and General Cable was dismissed on 14 November 2019. ABB's appeal is currently the only appeal to not have been fully dismissed by the ECJ. In circumstances where there remain a number of similar appeal decisions pending before the ECJ, the approach taken by the ECJ in these judgments is of high significance.

Campine's car battery recycling cartel fine halved

EU – ANTITRUST - CARTELS

On 7 November 2019, the General Court ("GC") partially annulled with respect to Campine the Commission's decision in the car battery recycling cartel case. While the Commission was correct to establish that Campine had participated in an unlawful cartel, the GC concluded that the Commission erred in its findings on the duration of the infringement and on the fine reduction for mitigating circumstances. Accordingly, it reduced the company's original fine from €8.1 million to €4.3 million.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- In cartel cases, the burden of proving the existence of an infringement lies with the Commission. Given the secretive nature of cartels, the Commission is entitled to infer the existence of an anti-competitive practice from coincidences and indicia.
- To find that an undertaking participated in a 'single and continuous' infringement, the Commission must adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that an infringement continued uninterruptedly between two specific dates. It cannot solely rely on the absence of public distancing to show that a conduct continued in circumstances where, over a significant period of time, several collusive meetings occurred without the participation of the undertaking concerned.
- In purchasing cartel cases, the Commission may depart from the general fining methodology and increase the fine.

FACTUAL BACKGROUND

In February 2017, the Commission concluded that Campine, together with three other recycling companies, participated in a cartel aimed at fixing the purchase prices of scrap lead-acid automotive batteries in Belgium, France, Germany, and the Netherlands. The companies exchanged information and agreed on target prices, maximum prices and volumes to buy from suppliers. They also exchanged information on the prices offered by/ agreed with suppliers in order to limit their bargaining power.

The Commission found that Campine participated in the infringement without interruption for 3 years and 4 days despite the lack of direct evidence of Campine's participation in anticompetitive contacts during two periods of 11 months. Campine was fined €8.3 million.

Campine, which was the only company not applying for leniency, challenged the decision before the GC.

GC'S JUDGMENT

The GC first recalled the standard of proof required to establish an infringement of EU competition rules. While the Commission must show the existence of an infringement by reference to precise and consistent evidence, it is sufficient if the body of evidence relied on, viewed as a whole, meets that requirement. Moreover, given the secretive nature of cartels, the Commission is entitled to infer the existence of an anti-competitive practice from coincidences and indicia.

In this case, the Commission proved to the requisite legal standard the anti-competitive nature of each of the six collusive contacts in which Campine allegedly participated. In particular, the GC noted that mere receipt by an undertaking of price information, including pricing intentions, from a competitor is enough. Therefore, the Commission did not need to prove that Campine had replied to texts from its competitors or had taken any concrete follow-up action.

However, the GC found that the Commission erred in qualifying the infringement as 'single and continuous' insofar as it lacked evidence of Campine's participation in two long periods of 11 months. Notably, the Commission could not solely rely on the absence of public distancing to show that the conduct continued in circumstances where, over a significant period of time, several collusive meetings took place without Campine's participation.

In the context of the functioning of the cartel at issue, the two 11-month intervals were long enough to constitute interruptions and for the infringement to be reclassified as 'single and repeated'. The GC observed in particular that these periods:

- significantly exceed the intervals separating the usual intervals between the tens of other collusive contacts involving the three other carter members; and
- add up to 22 months in total, which is significant when compared with the overall duration of the cartel (36 months).

Accordingly, the GC reduced Campine's fine to the extent that the Commission did not correctly assess the duration of the infringement factor when calculating the basic amount of the fine. It also applied a higher fine reduction for mitigating circumstances (8% instead of 5%) to reflect Campine's ancillary role and limited presence on the market.

By contrast, the GC upheld the Commission's decision to depart from the fining guidelines and increase the fine by 10%. That departure was justified because using the value of purchases would have led to an underestimation of the economic importance of the infringement.

The judgment confirms that the Commission cannot presume that a conduct continued over time while there have been significant gaps between collusive contacts. That is an important principle limiting the duration of 'single and repeated' infringements and resulting fines.

Cartel damages also available to State lenders

EU – PRIVATE DAMAGES ACTIONS

On 12 December 2019, the European Court of Justice ("ECJ") provided important clarification, holding that Article 101 TFEU must be interpreted as meaning that a public body which granted promotional loans to purchasers of products covered by a cartel are entitled to claim damages for loss caused by the cartel.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- A person who has suffered loss caused by a breach of competition law can claim for damages where a causal connection between the loss and the infringement of the competition rules exists.
- This right is not limited to just suppliers or customers on the market affected by a cartel, but can include others such as, in this case, a state lender which incurred losses resulting from the impact of increased prices of products on the amount of loans granted.

The ECJ judgment was on a reference for a preliminary ruling from the Austrian Supreme Court. The case before the Austrian Supreme Court concerned a damage claim brought inter alia by the Land of Upper Austria against five lift and escalator manufacturers which the Austrian competition authorities had already established had engaged in a long running cartel (from the 1980s to 2004).

The Land of Upper Austria had not suffered loss as a purchaser of the cartelised products. However, the Land of Upper Austria has claimed that the cartel caused construction costs to which led it to grant larger subsidies, in the form of promotional loans for the purpose of financing construction projects affected by the cartel, than would have been the case absent the cartel. In turn, this deprived the Land of Upper Austria from using those additional funds more profitably. The Supreme Court of Austria asked the ECJ to rule on whether a state lender, such as the Land, was able to make a claim for damages in these circumstances.

The ECJ confirmed that:

- the direct effect of Article 101 TFEU means that any person who has suffered loss caused by a breach of competition law can claim for damages where a causal connection between the loss and the infringement of the competition rules exists;
- the national rules relating to procedures for exercising that right to compensation must not undermine the effective application of Article 101 TFEU (i.e. national rules cannot exclude compensation for losses suffered by persons who do not operate as suppliers or as customers on the market affected by the cartel);
- Article 101 TFEU therefore allows any person who does not operate as a supplier or as a customer on the market affected by a cartel, but who granted subsidies in the form of promotional loans, to request compensation for loss it suffered as a result of the fact that it was unable to use increased levels of subsidies caused by the cartel more profitably; and
- that it is for the national court to determine whether the applicant had the possibility to make more profitable investments and whether the applicant had established the existence of a causal connection between that loss and the cartel at issue.

Benelux competition authorities joint paper on challenges of digitisation

BELGIUM - UPDATE

On 2 October 2019, the Belgian, Dutch and Luxembourg competition authorities published a joint memorandum on "challenges faced by competition authorities in a digital world". The Benelux competition authorities chose to focus on three issues identified for further consideration in the European Commission's ("Commission") report on Competition in the digital era: merger control, ex ante guidance and ex ante intervention mechanisms.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

The Benelux competition authorities have contributed to the discussion around the challenges of digitisation with three key proposals:

- Further evaluation of the need for changes to merger control in technology markets through a comprehensive study of large platform acquisitions in the past decade.
- Greater ex ante guidance, through more pro-active guidance papers as well as individualised guidance, potentially used in tandem with a commitments procedure.
- Developing an ex ante intervention mechanism, giving power to impose behavioural remedies on dominant companies in the absence of any finding of an infringement of Article 102 TFEU.

MERGER CONTROL

The Benelux competition authorities propose that the Commission take steps to commission a study covering all acquisitions by the main technology platforms in the past decade; whether reviewed by a competition authority or not. The study would consider which types of merger were caught under non-based-turnover thresholds (e.g. value of transaction thresholds) and whether, in all cases, the competition authorities had sufficient information to investigate the relevant theories of harm and other efficiencies.

For acquisitions that were subject to review, the study would assess whether theories of harm, including those identified in the Commission's report, actually materialised, or whether efficiencies developed.

The study would feed into a policy discussion evaluating themes such as:

- how best to assess the competitive potential of start-ups;
- changes to the jurisdictional thresholds (e.g. based on acquiror market power and/or transaction value);
- whether a 'balance of harms' approach (assessing the scale as well as the likelihood of potential harm) would improve merger review;
- the scope and merits of reversing the burden of proof in technology markets, requiring the acquiror to prove the pro-competitiveness of an acquisition;
- the scope for a 'wait and see' approach, keeping acquisitions of young targets on-hold (by maintaining separate assets and teams) until the target has had time to develop; and
- how to broaden the information-gathering power of competition authorities in reviews of start-up acquisitions by digital platforms.

EX ANTE GUIDANCE

Two forms of ex ante guidance are discussed in the memorandum: guidance papers; and 'case-by-case guidance letters'. In relation to the former, the Benelux authorities advocate for greater proactivity - competition authorities taking the lead in issuing guidance in the absence of case law.

The Benelux competition authorities also advocate the use of individual guidance, using powers similar to those under Article 10 of Regulation 1/2003 or under the Notice on informal guidance relating to novel questions

concerning Articles 101 and 102, in conjunction with a form of commitment procedure, which could be used in the early stages of engagement. Key areas identified for further consideration are, among others, the level of transparency and publication of guidance letters as well as the potential for judicial review.

EX ANTE INSTRUMENTS

The new ex ante 'intervention mechanism' envisaged would allow competition authorities to impose binding behavioural remedies on dominant companies in digital and other 'fast moving' markets, including 'platform access, data portability, data-sharing and non-discriminatory ranking'.

The key distinguishing factor from the powers already available to the Commission under Article 8 of Regulation 1/2003, or similar powers granted to national competition authorities under Directive 2019/1, is the fact that the authority would not be required to establish even a prima facie finding of infringement before imposing remedies. Companies would face a 'punitive mechanism' of some kind in case they do not abide by the remedies imposed.

COMMENT

The joint memorandum appears to offer closer empirical scrutiny of certain proposals in the Commission's report on Competition in the digital era as well as the welcome prospect of more proactive and individualised guidance from competition authorities. The option of using an early commitments procedure may also offer an avenue for earlier resolution and greater certainty in some cases.

The proposed ex ante intervention mechanism, on the other hand, would need to be based on well-defined and verifiable criteria justifying such intervention. Technology markets are often complex and careful consideration of the factual and economic context is required, which may render the actual application of any ex ante rules difficult and open to challenge. Behavioural remedies are also, by their very nature, invasive and capable of having a significant impact on the undertaking. Hence, necessary safeguards would need to be built in to avoid ex ante intervention leading to a loss of innovation in the markets concerned. In this context, it may be a difficult task for the authorities to design rules that achieve the desired result.

For an earlier summary of how some other key jurisdictions around the world are tackling the interface between an increasingly digitised economy and competition law, see our Comparative guide to competition policy in the digital era.

Astre transport group fined for anticompetitive practices

FRANCE – ANTITRUST – CARTELS

On 28 October 2019, the French Competition Authority ("FCA") fined a group of road transport companies for having organised customer allocation practices among its members. Astre did not challenge the FCA's objections and applied for settlement.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- On 27 December 2018, the FCA published its procedural notice providing guidance on the application of the settlement procedure ("Notice") (see our previous newsletter article for more details).
- French settlement procedure has a wider scope than the European Commission process. For example, it also allows undertakings to negotiate the fine – not just a reduction – with the investigation services.
- However, there are specific conditions that need to be met before settlement can be agreed.

In October 2017, following an investigation report from the Directorate General for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF), the FCA decided to start ex officio proceedings regarding practices implemented in the road freight transport sector. Two years later, on 28 October 2019, it imposed on Astre, an association of small and medium-sized road hauliers, a €3.8 million fine for having implemented, for more than 20 years, a system of customer allocation by means of a non-compete clause introduced into several of its internal documents (namely its rules of procedure, bylaws and accession convention), as well as monitoring and sanction mechanisms. According to the non-compete clause, Astre's members undertook not to solicit referenced customers of other members nor to answer these clients' requests.

The FCA found that such practices had the object of preventing competition in the market in particular by restricting the commercial autonomy of Astre's members and reducing alternatives available to customers.

Astre did not challenge the FCA's objections and applied for settlement.

The case raises a few particularly interesting points related to the FCA settlement procedure:

- First, the FCA indicated that an undertaking applying for settlement must provide sufficient guarantees related to compliance with competition law, particularly by fixing a time-limit for the termination of anticompetitive practices identified by the FCA.
- Second, the FCA specified that by signing the settlement arrangement, which includes a range of the fines incurred, an undertaking cannot afterwards challenge the level of the fine on the basis that it is unable to pay it, unless it is able to demonstrate that its financial position has deteriorated since the settlement arrangement.

French court upholds €20 million fine for breach of merger commitments

FRANCE – MERGER CONTROL

In a decision of 7 November 2019, the French State Council ("Conseil d'Etat") dismissed the appeal brought by Fnac Darty, a retailer specialising in cultural and electronic products, against a fine imposed by the French Competition Authority (the "FCA") for failure to comply with its obligation to divest three stores, which were conditions to the clearance of the merger between Fnac and Darty.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Unlike in sanction decisions for anti-competitive practices, the FCA is not required to explain the level of fine imposed in the field of merger control.
- The proportionality of the fine must be assessed in the light of the gravity of the infringement, e.g. the significance of the non-fulfilled remedies in relation to the full range of remedies imposed, the behaviour of the undertaking in the implementation of the remedies and its specific situation.
- The consequences of the infringement on the market is not a relevant factor in this regard, and so the FCA is not required to carry out any such analysis.

In 2018, the FCA fined Fnac Darty for non-compliance with the remedies accepted in relation to the FNAC/Darty merger because:

- for one of the stores to be divested, neither a sale contract or a buyer was presented to the FCA; and
- for the two other stores, the proposed buyer was found to be unlikely to compete effectively with Fnac Darty by the FCA.

The FCA had also refused to extend the deadline for implementing the remedies because Fnac Darty did not make this request in time and could have considered alternative commitments in view of the difficulties encountered.

The State Council, which is competent to deal with action brought against FCA decisions in the field of merger control, confirmed the decision of the FCA and raised several interesting points:

- First, it indicated that, unlike sanctions for anti-competitive practices, the FCA is not required to explain the level of fine imposed when adopting a sanction in relation to merger control.
- Second, it stated that the proportionality of the sanction must be assessed in the light of the gravity of the infringement, i.e. the significance of the non-fulfilled remedies in relation to the full range of remedies imposed, the behaviour of the undertaking in the implementation of the remedies and its specific situation – including its financial situation.
- Third, the State Council stressed that the FCA is not required, however, to assess the proportionality of the fine in relation to the consequences of the infringement on the market. As a result, the FCA is not required to carry out a new analysis at the time of the decision to determine the impact on the market, as Fnac Darty claimed.

The State Council therefore confirmed the proportionality of the FCA's sanction, stating that the remedies in question represented half of the remedies imposed, that Fnac Darty could have anticipated the difficulties in finding a buyer well before the deadline and that it did not report any financial difficulties during the investigation.

BMW, Daimler and Volkswagen fined for anti-competitive purchasing practices

GERMANY – ANTITRUST – CARTELS / ANTITRUST – ANTICOMPETITIVE AGREEMENTS

On 21 November 2019, the German Federal Cartel Office ("FCO") issued fines totalling approximately €100 million on BMW, Daimler and Volkswagen for joint anti-competitive practices concerning the purchase of long-steel products.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- In 2018, the FCO imposed fines on several producers and sellers of special steel (a type of long steel) for price fixing.
- This decision, however, reflects the fact that coordination between purchasers can also infringe competition law.
- Material fines can be imposed for such conduct, even if the input concerned accounts for a small percentage of the total cost of the end product for which it is purchased.

According to the FCO, between 2004 and the end of 2013, the car manufacturers met twice a year with steel makers, forging companies and large systems suppliers. In those meetings the car manufacturers agreed among themselves to accept the practice of uniformly calculated scrap and alloy surcharges as established by the steel makers instead of individually negotiating such surcharges. Prices resulting from this concerted anti-competitive practice were in place until at least 2016.

Long steel is necessary to produce specific car parts, e.g. transmission parts, crankshafts and steering rods. Car manufacturers either buy such car parts from forging companies or produce them themselves in their own forges for which they purchase long steel as a raw material.

Long steel is usually sold based on a price calculation model comprising essentially: a base price and scrap and alloy surcharges. Such surcharges account for a significant portion of the end price, for example for one third in case of engineering steel (the main type of long steel concerned here).

In relation to such surcharges:

- After the expiry of the Treaty establishing European Coal and Steel Community which provided for some special rules concerning pricing in the steel industry, several steel makers had jointly agreed on and implemented an uniform method of calculation of the scrap and alloy surcharges for special steel products from at least 2004 to November 2015.
- There was also a basic agreement between the steel producers that the surcharges be passed on to the customers on a 1:1 basis. For this price-fixing practice several steel makers were fined €205 million by the FCO in 2018 (see our previous newsletter article).

This decision, however, concerns the purchasing side of the market, i.e. BMW, Daimler and Volkswagen as customers buying long steel from steel producers. The purchase

costs of long steel account for less than 1% of the total costs of a car.

When the steel makers made unilateral adjustments to the surcharge calculation over the course of 2003 and 2004, in some cases under the threat of stopping delivery, the car manufacturers started discussions with the steel makers under the guise of the German association for steel and metal processing (*Wirtschaftsverband Stahl- und Metallverarbeitung*). In those discussions the car manufacturers agreed amongst themselves to accept and adhere to the surcharges as uniformly calculated by the steel makers. According to the FCO: "[…] *Insofar as the surcharges were no longer negotiated* [by the car manufacturers] *individually with the suppliers* [steel makers] *as a consequence of these talks, price competition between the companies on these price components was eliminated*".

The car manufacturers cooperated and settled the case with the FCO. This was taken into account in the calculation of the fine which, according to press releases, amounts to €48.7 million for Volkswagen, €28 million for BMW and €23.5 million for Daimler. Due to the settlement, an appeal to the Düsseldorf Higher Regional Court is unlikely.

This decision shows that the steel and car manufacturing sectors are very much on the radar of competition authorities. Other cases include:

- the special steel cartel in which the FCO imposed fines for price fixing in July 2018 and may impose further fines;
- the conclusion of the FCO's investigation, on 12 December 2019, of several producers of flat steel (quarto plates) for alleged price fixing, where fines were imposed on Grobblech GmbH, Thyssenkrupp Steel Europe AG and Voestalpine Grobblech GmbH as well as three individuals responsible for exchanging information on and agreeing certain prices; and
- the European Commission's ongoing investigation of several car manufacturers over suspected anticompetitive agreements on emission control technologies.

Algorithms and competition law: Franco-German joint study published

FRANCE AND GERMANY – UPDATE

On 6 November, the French and German competition authorities published their long-awaited joint Algorithms and Competition study (and executive summary). It follows their 2016 joint study into Big Data.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The growth of pricing software used by businesses, particularly in online markets, comes at a risk that such tools increase the risks of firms colluding in way which breaches competition law.
- As the application of competition law to algorithmic pricing develops, businesses should ensure that automated and machine-learning pricing technologies are compliant with competition law.
- Compliance training for those adopting and programming such technology is just as important as training the rest of the business.
- Businesses which adopt algorithms to assist in commercial decision-making should also monitor the effect of that automated decision-making to ensure that it is competition law compliant.

The study focuses on algorithms which, in the authorities' view, may potentially impact competition. In particular, it focuses on the risks of collusion flowing from the use of such tools. In doing so it considers: economic theory; practical scenarios where algorithms could result in collusion; and practical

challenges that antitrust regulators face when investigating algorithms.

THE THEORY: HOW ALGORITHMS MIGHT RESULT IN STABLE COLLUSION

The study finds that the actual impact of the use of algorithms on the stability of collusion in markets is a priori uncertain and depends on the specific characteristics of the relevant market. For example, whilst certain algorithms might have the potential ability to coordinate prices, stable coordination is likely to be undermined in markets where algorithms are used to engage in personalised pricing (thus reducing transparency - a key factor of stability for a collusion). A similar view was reached by a study by the UK Competition and Market Authority in October 2018.

As regards the role of algorithms in the emergence of collusion, the study concludes that economy theory provides few insights into which kinds of algorithms are more prone to facilitate the emergence of tacit collusion.

PRACTICAL SCENARIOS: WHERE COLLUSION MIGHT ARISE

The study goes on to examine three practical scenarios in which algorithms may enhance collusion:

- **Explicit direct collusion:** Where algorithms are used to facilitate the implementation, monitoring or enforcement of collusion which has been expressly agreed between competitors. Examples include, the UK Posters and frames cartel, and the European Commission Asus, Denon and Marantz RPM case. The use of algorithms in these scenarios is likely to reinforce the negative effects of anticompetitive collusive conduct (which may lead to a larger fine).
- **Algorithm-driven collusion involving a third party:** Where competitors have no direct contact with each other, but coordinate through a third party (e.g. where the third party provides similar pricing software solutions or advises on the design and use of pricing algorithms). In such cases the competitors' liability may depend on the extent to which they are aware of the illegal coordination being facilitated by the third party. A similar scenario was considered by the ECJ in the E-TURAS case in 2016 (see the EU section of our Ashurst publication Competition policy in the digital era: a comparative guide).
- **Collusion induced by the parallel use of individual algorithms:** The report considers whether algorithms could result in illegal coordination in circumstances where multiple competitors use distinct pricing algorithms which result in convergence towards the same price, but without the competitors having coordinated on such use. Instead, the algorithms may interact between themselves. The study concludes that there is still much uncertainty as to how algorithms would actually "communicate" in real market conditions, blurring the distinction between illegal coordination and legitimate parallel behaviour. However, the study stresses that it is a company's responsibility to consider how to ensure their tools are compliant.

PRACTICAL CHALLENGES FACED BY REGULATORS

The study concludes that classical investigation tools (e.g. requests for information, inspections, interviews) will remain the primary tools used by the competition authorities to understand the aim and functioning of any price-setting algorithms. However, more in-depth analysis of an algorithm itself may also be conducted (e.g. analysis of the source code or simulation of the algorithmic behaviours).

CONCLUSION

Overall, the study does not provide any brand new insights regarding competition law risks associated with the use of algorithms. However, it is helpful that both regulators have outlined some factual scenarios where concerns might arise, providing some guidance as to

where businesses might focus their compliance efforts.

As the use and power algorithms and linked technology develops, so will the regulatory focus and reassessment of the associated risk. For example, the study does not conduct a detailed assessment of when personalised pricing might risk infringing competition law (e.g. on grounds of discriminatory conduct).

However, the authorities have expressed a need for "careful analysis" in that regard.

For an earlier summary of how these, and some other key jurisdictions around the world, are tackling the interface between an increasingly digitised economy and competition law, see our Comparative guide to competition policy in the digital era.

CNMC fines two major Spanish audiovisual communication groups

SPAIN – ANTITRUST – ANTICOMPETITIVE AGREEMENTS

On 13 November 2019, the Spanish Competition Authority ("CNMC") announced that it had fined Mediaset and Atresmedia €77.1 million in total for antitrust practices in the marketing of television advertising. Both companies have been required to cease their behaviour and adapt their commercial and contractual policies within three months.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The case reflects the CNMC's focus on this sector.
- The case is another sign of CNMC's interest on investigating vertical agreements.
- The decision may mark the start of a long judicial process, as both companies are expected to appeal the decision.

The CNMC decision states that both groups have developed commercial policies for the sale of television advertising with the aim of consolidating their position in the market (which amounted to a combined market share that exceeds 85% of the entire market) that were addressed to two market players: advertisers and media agencies.

- Regarding advertisers, Atresmedia and Mediaset generally charged their advertisers a high *minimum investment* fee, which accounted for a significant percentage of their general campaign. Moreover, failure to comply with the aforementioned investment commitment could be penalised, which reinforced the foreclosure effect of the conduct.
- In relation to media agencies, both media groups paid agencies incentives by way of additional premiums ("*extraprimas*"), conditioned upon each agency reaching a certain investment volume or share of all the advertising billed in Mediaset and Atresmedia.

In both cases, both media groups regularly bundled advertising into channel packages modules. Each of the modules included one of the channels which is appealing and very difficult for advertisers to replace, with other channels with lower viewership. That way, both media groups were able to ascertain a minimum level of advertising even regarding their less popular channels. The abovementioned practice was reinforced by the use of "simulcast" (the broadcasting of a same advertisement simultaneously on many channels of the media group), obliging the

advertiser to pay the same price regardless of the channel where the advertisement is broadcasted.

The CNMC considered that such practices could have a foreclosure effect on other competitor media groups as their intended effect was to make more difficult for competitors to capture advertising revenues and, consequently, to acquire appealing audio-visual content that could allow them to improve their ratings.

The case shows the increasing interest of the CNMC on pursuing vertical agreements. In fact, on October 2019, it also fined a corporate group that operates in the sector of products and technology for heating, ventilation and air conditioning for imposing restrictions on its independent repairers network and, last year, started an investigation into Adidas España.

CAT upholds Ofcom's Royal Mail fine

UK – ANTITRUST – ABUSE OF DOMINANCE

On 12 November 2019, the UK Competition Appeal Tribunal ("CAT") upheld Ofcom's decision to fine Royal Mail £50 million for abusing a dominant position by announcing price changes. Royal Mail has announced that it is seeking permission to appeal to the Court of Appeal.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The CAT upheld the £50 million fine on Royal Mail - the second largest single fine ever imposed in the UK for a competition law infringement.
- Royal Mail was found to have infringed competition law by announcing pricing changes, even though those prices changes were never implemented, as the changes would have had a material impact on Royal Mail's only downstream competitor.
- The CAT's findings on Royal Mail's intentions, derived from contemporaneous documents, were central to its conclusions.

BACKGROUND

In January 2014, Royal Mail announced changes to the prices which wholesale customers pay to access its delivery network, including a price differential between two of Royal Mail's access price plans. Whistl, a user of Royal Mail's network who was also in the process of rolling out its own delivery network to certain parts of the country, complained to Ofcom that the new prices would put them at a competitive disadvantage. In February 2014, Ofcom announced a decision to investigate Royal Mail which immediately suspended the price announcements, as a consequence of pre-existing contractual provisions. In August 2018, Ofcom imposed a fine of £50m on Royal Mail for abusing its dominant position by discriminating against delivery competitors. See further the November 2018 edition of our competition newsletter.

THE APPEAL

Royal Mail appealed Ofcom's decision to the CAT and a hearing was held in June & July 2019. On 12 November 2019, the CAT upheld Ofcom's decision and dismissed Royal Mail's appeal on all grounds. In particular:

- The CAT rejected Royal Mail's argument that the prices set out in the contracts could not be discriminatory because they were never charged or paid;
- Royal Mail had argued that Ofcom should have applied the "as-efficient competitor test" ("AEC test") to determine whether the announced prices, if paid, were capable of excluding a competitor as efficient as the appellant. The CAT held that the test was not necessary or informative in this case.
- Royal Mail argued that its announced price changes were objectively justified by the need to protect its universal service obligation from 'cherry-picking' direct delivery. However, the CAT did not accept that Whistl posed a threat to the universal service and concluded that the price changes

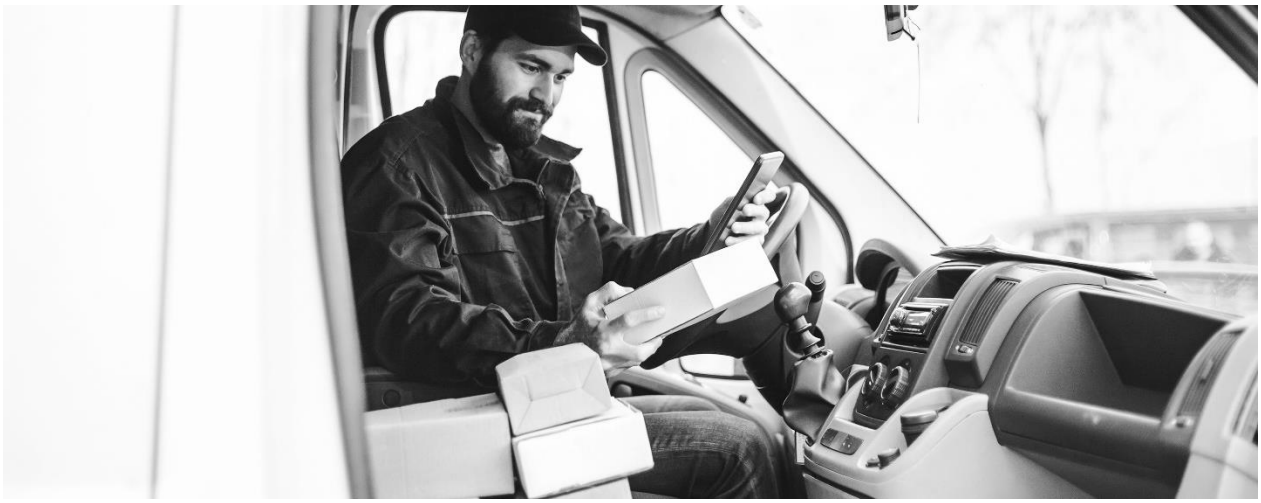
were not proportionate to achieve that objective.

COMMENT

The CAT's judgment raises a number of interesting points of wider application, in particular in relation to when pricing announcements can themselves be considered anti-competitive and the extent to which dominant companies can rely on the AEC test in order to self-assess their conduct.

While the concept of abusive price announcements is novel, the question of the appropriate test for establishing anti-competitive foreclosure is the subject of a long-running debate, in particular following the Court of Justice of the European Union's judgment in *Intel*. In this case, the CAT found that Ofcom was correct in its view that an AEC test was neither necessary nor informative. The CAT upheld Ofcom's finding that the price differential announced by Royal Mail was capable of restricting competition as it would have had a material impact on Royal Mail's only competitor. The CAT also relied heavily in its judgment on its finding, based in large part on its assessment of the contemporaneous documents, that Royal Mail had a strategic intent to restrict competitive entry by Whistl.

On 4 December 2019 Royal Mail announced that it is seeking permission to appeal the CAT's decision to the Court of Appeal.



Ofcom focuses on parcels

UK – ANTITRUST – ANTICOMPETITIVE AGREEMENTS

On 14 November 2019, Ofcom issued an infringement decision under Article 101 TFEU and Chapter 1 Competition Act 1998 against Royal Mail and The SaleGroup Limited ("TSG") finding that a parcel delivery services agreement was anticompetitive. This was swiftly followed by a decision to open a separate investigation under Article 101/Chapter 1 in the parcels sector.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Royal Mail and TSG admitted entering in to an illegal market-sharing agreement; Royal Mail received immunity following a leniency application.
- Leniency applications can only be made to the CMA. The CMA then passed the investigation on to Ofcom to exercise its concurrent competition law powers as a sectoral regulator.

THE INVESTIGATION

In May 2018, Royal Mail reported to the CMA that it had entered into an agreement with an online reseller of parcel delivery services, Despatch Bay (the trading name of TSG). Under the agreement, neither company would offer parcel delivery services to the other company's business customers. These

customers were mainly small and medium businesses and the agreement was in place between August 2013 and May 2018. The Competition and Markets Authority ("CMA") passed the case on to Ofcom (the UK regulator for the communications services, including postal services).

Ofcom found that the parties were in regular email correspondence and that the agreement operated by one party asking the other to withdraw a quote provided to particular customers. It found that TSG also shared its customer list with Royal Mail to ensure that each company could avoid offering services to customers belonging to other party.

Ofcom found that the agreement was designed to restrict competition through the sharing of customers and prevented some customers from being able to purchase parcel delivery services from their chosen provider, which in some cases led to them paying higher prices.

Royal Mail was granted immunity from fines for revealing the agreement to the CMA under its leniency policy. TSG also admitted to breaking competition law and agreed to a settlement of £40,000 with Ofcom.

Its decision in this case was swiftly followed by an announcement, on 22 November 2019, that it had opened another investigation under Article 101/Chapter 1 into the parcel and pick-up delivery sector. Ofcom stated that the probe will examine whether there are agreements between providers which establish minimum prices and impose online sales restrictions.

COMMENT

This case provides a reminder that market sharing agreements are regarded as among the most serious forms of competition infringement. At a procedural level, it also provides an illustration of the operation of the case allocation mechanisms between the CMA and sectoral regulators. In the UK, sectoral regulators such as Ofcom have concurrent powers with the CMA to investigate suspected breaches of competition of law. However, only the CMA can grant leniency. Ofcom's parcel delivery investigation (and Ofcom's further investigation announced in November) are further examples of sectoral regulators increasingly exercising those concurrent powers, and of their close cooperation with the CMA.

BritNed's damages reduced by Court of Appeal

UK – PRIVATE DAMAGES ACTIONS

BritNed Development Limited ("BritNed") brought a claim against ABB arising from the European Commission's 2014 power cables cartel decision. In October 2018, the High Court found that there had been no overcharge but awarded damages for "baked-in inefficiencies" and "cartel savings" plus simple interest, which were reduced in a subsequent judgment by 10% to account for the relevant regulatory cap on profits. BritNed appealed, seeking an increase in damages, and ABB brought a cross-appeal in relation to the "cartel savings". BritNed's appeal was dismissed in full, while ABB's was allowed.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Only compensatory damages are available in the English courts; restitutionary awards will not be permitted. A saving by a cartelist cannot form the basis for a loss to the victim of the cartel, and so cannot give rise to a remedy of damages.
- The burden of proof lies with the claimant to establish that it has suffered loss and the quantum of that loss, although it may benefit from the application of the "broad axe" principle if there are difficulties in proving quantum.

- In assessing and quantifying the overcharge, the court must examine in detail all the specific facts. The mere existence of the cartel is only the starting point; the actual circumstances of the transactions must be considered.

The Court of Appeal judgment set out some clear approaches in relation to the correct approach to assessing "cartel damages" generally, and the assessment of overcharge.

ASSESSMENT OF "CARTEL DAMAGES"

The Court of Appeal confirmed that the correct measure of damages in respect of losses caused by a cartel is in principle the difference between the price actually paid and the price which would have been agreed had the cartel not operated. It also emphasised that only a compensatory award of damages is available in the English courts, and a restitutionary remedy is not required to give effect to the EU principle of effectiveness.

The Court of Appeal also rejected BritNed's argument that the European Court of Justice's recent judgment in *Skanska* meant that cartel damages should have a punitive as well as a compensatory/deterrent purpose.

Recognising the difficulties of proving loss, the Court of Appeal reaffirmed that the "broad axe" principle developed by the English courts was the correct approach to follow when assessing damages in cartel cases. The Court of Appeal also emphasised that there is no general principle that courts should err on the side of under-compensation, but noted that caution should generally be had when using estimates.

CARTEL SAVINGS

ABB cross-appealed the High Court's award of damages to BritNed for cartel savings made by ABB. It argued that such savings did not translate into a loss to BritNed and, accordingly, that the High Court's award of damages was based on an error of law that, if upheld, would upset the principles of compensatory damages. The Court of Appeal accepted this argument and overturned the award of cartel savings damages.

ASSESSMENT OF OVERCHARGE

Although the operation of the cartel was a serious breach of competition law, the Court of Appeal endorsed the High Court's conclusion that it represented the starting and not the end point of the quantification process in this case, which concerned a single transaction. Citing Marcus Smith J, the Court of Appeal confirmed that the narrower issue of loss to BritNed in the one transaction in issue was more relevant.

The Court of Appeal found the High Court had been correct to construct a counterfactual based on the price that would have been agreed with ABB had the cartel not operated; a lack of third party evidence would have rendered it impossible to construct a counterfactual using another bidder. It further recognised that, in this case the High Court could not have reliably made any factual findings enabling it to assess the impact of ABB's pricing on its appetite to win projects during and after the cartel period.

BritNed is subject to a regulatory cap on its profits. Initially, BritNed argued that the reduction of damages awarded based on this cap allowed ABB to be "refunded" the overcharge. The Court of Appeal expressed some reservation as to the High Court's exact approach on this point, noting it was strange that the High Court (and not the regulator) to deal with it. Ultimately, however, the Court of Appeal upheld the reduction, on the basis that it would not remit the case back on this point alone, and, in any event, it would be generally

inconsistent with the regulatory regime to allow BritNed to retain excess profits.

LOST PROFITS

The High Court had rejected BritNed's claim for loss of profit arising from the fact that it used a lower capacity interconnector as a result of the cartelised bid price. This was also rejected by the Court of Appeal. The Court of Appeal held that the High Court's dismissal of this claim stemmed from an assessment of the counterfactual which it had been entitled to adopt.

COMMENT

The BritNed case was the first cartel follow-on damages action in England & Wales to go to full trial and produce a judgment (see our previous article). The appeal was also the first of its kind in the jurisdiction. The case was closely watched as it unfolded and the approach of the Court of Appeal will be instructive.

On the one hand, both judgments serve as a reminder to claimants of the difficulties they could face in proving loss, particularly in the context of an object infringement. On the other, the High Court's willingness to engage with lengthy and detailed economic evidence is likely to encourage parties on both sides to focus their efforts on producing a cogent economic case supporting their respective positions.

However, the outcome should not be overstated. The facts were very specific – the case involved just a single transaction. It remains to be seen whether or not English Courts will adopt a similar approach to follow-on damages claims engaging a considerable number of affected transactions.

ACCC customer loyalty schemes report: data practices, disclosures and emerging trends

AUSTRALIA – MARKET INVESTIGATIONS & SECTOR INQUIRIES / UPDATE / CONSUMER LAW

On 3 December 2019, the Australian Competition and Consumer Commission ("ACCC") released its Final Report on Customer Loyalty Schemes ("Report"), following a review of the major schemes operating in Australia, in the airline, supermarket, credit card, travel, telecommunication and retail industries. The ACCC found that improvements to customer loyalty schemes are needed to better protect consumers, particularly in respect of data practices and disclosures. The ACCC made five recommendations, some with broader implications for businesses operating in Australia.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Traditionally the domain of privacy law and privacy regulators, data practices and associated disclosures are increasingly being examined through a competition and consumer law lens.
- Operators of loyalty schemes in Australia should review their practices and terms and conditions closely against the Report's findings and detailed recommendations. This is one of the ACCC's current priority areas, and close scrutiny is likely.
- Australian businesses who collect data from consumers, not just customer loyalty schemes, should review their privacy policies and clickwrap agreements for any unfair terms, having regard to the guidance in Recommendation 4 of the Report.
- If the Australian Government decides to adopt the ACCC's recommendations regarding introducing an unfair practices prohibition, reforming Australia's privacy laws and making unfair contract terms subject to penalties, further changes to data collection practices and associated disclosure documents may be required. An announcement on these issues is now expected in early 2020.

CONSUMER LAW ISSUES

The ACCC found that particular aspects of customer loyalty schemes could potentially be unfair or misleading, and detrimental to consumers. The Report raised issue with the lack of transparency surrounding critical components of loyalty schemes, such as expiry periods, restrictions on redemption opportunities and the imposition of taxes and charges on redeeming points. Similarly, the ACCC expressed concern with unilateral reductions to earn rates and the redemptive value of points, particularly where a customer has acquired a significant number of points at the time the reduction is implemented.

To address these issues the ACCC made the following recommendations:

- **Recommendation 1**: Loyalty scheme operators should improve their approach to presenting T&Cs, and ensure changes are fair and adequately notified.
- **Recommendation 2**: Consistent with the recommendations in the ACCC's Digital Platforms Inquiry Final Report, the Australian Consumer Law should be amended so that unfair contract terms are prohibited (not merely voidable) and attract significant penalties, and a new prohibition against unfair trading practices is introduced.

DATA PRACTICES

A key benefit of loyalty schemes for operators is the ability to derive value from the collection of customer data, including personal information, habits and preferences. The ACCC expressed concerns about the collection, use and disclosure by loyalty schemes of consumer data in ways that do not meet consumers' expectations. Specifically, the ACCC raised concerns with the following practices:

- Seeking broad consents from and making vague disclosures to consumers about the collection, use and disclosure of their data. In particular, the ACCC regards clickwrap agreements and take-it-or-leave-it terms as suboptimal.
- Providing consumers with limited insight and control over the sharing of their data with unknown third parties.
- Providing a limited ability for consumers to opt out of targeted advertising delivered by third parties on behalf of loyalty schemes.
- The automatic linking of consumers' payment cards to their loyalty scheme profiles, such that retailers can continue to collect the consumer's data even when the consumer does not scan their loyalty card.

These practices, says the ACCC, can impact market efficiency and cause consumer harm in the form of decreased consumer welfare from decreased privacy and risks to consumers from increased profiling, discrimination and exclusion.

To provide customers with greater control over their data and improve data practices, the ACCC has made the following recommendations:

- **Recommendation 3**: Loyalty schemes should end the practice of automatically linking members' payment cards to their loyalty scheme profile.
- **Recommendation 4**: Loyalty schemes should improve their data practices, give consumers meaningful control over their data (such as through pre-selected opt-outs for targeted advertising) and provide better transparency in their privacy policies and T&Cs (particularly about limitations to control over data collection and use), being mindful that standard form contracts are subject to the unfair contract terms regime.
- **Recommendation 5**: Consistent with the recommendations in the ACCC's Digital Platforms Inquiry Final Report, privacy protections for consumers should be strengthened through amendments to the Privacy Act to more closely align it with the EU GDPR, and broader privacy law reform.

COMPETITION LAW ISSUES

The ACCC expressed concerns about the potential for customer loyalty schemes to raise competition law issues, such as:

- anticompetitive foreclosure effects resulting from a dominant firm operating a loyalty scheme in a saturated market with strong customer lock-in; and
- the ability for firms with large loyalty scheme memberships to use collected data to entrench their market position and raise barriers to entry.

The ACCC did not make any recommendations in this regard, but indicated that it will continue to consider the anticompetitive effects of loyalty schemes on a case-by-case basis.

EMERGING ISSUES

One of the emerging issues raised by the ACCC in the Report was the potential for increasingly sophisticated data analytics and personalisation to enable highly targeted price discrimination, based on businesses' perception of an individual's ability or willingness to pay. The ACCC is concerned that many consumers are likely to pay more, particularly where they have limited choice of who to buy form or limited inclination to shop around. The ACCC has not expressed views on whether competition and consumer laws could or should be used to tackle such price discrimination. We expect the ACCC to closely monitor these developments.

A floor on roof prices? ACCC achieves first public enforcement outcome for alleged concerted practices

AUSTRALIA – ANTITRUST – ANTICOMPETITIVE AGREEMENTS

The Australian Competition and Consumer Commission ("ACCC") has achieved its first enforcement outcome for alleged anticompetitive concerted practices since the prohibition was introduced in November 2017. In this case two Sydney roofing companies acknowledged in Court-enforceable undertakings that posts on social media about setting minimum rates for the repair of homes damaged by hail in Sydney were likely to constitute an attempt to fix prices, and "in some circumstances" could raise concerns under the concerted practices prohibition.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This enforcement action evidences the ACCC's view that sharing competitively sensitive information or coordinating competitive behaviour in a public forum can give rise to a concerted practice; communications need not be private or covert to amount to a prohibited concerted practice.
- It also demonstrates the risk that directors or employees who "like", "share" or "repost" a comment on social media may be arming the ACCC with good evidence that the conduct in question gave rise to an "understanding" between competitors for the purposes of the cartel laws even if it falls short of an explicit agreement.
- Companies should review their competition law compliance policies and ensure that their staff are being given appropriate competition law training, including in relation to social media usage.

BACKGROUND

The ACCC has achieved its first enforcement outcome for an alleged breach of the concerted practices prohibition against two Sydney roofing companies.

The Competition and Consumer Act 2010 ("CCA") prohibits companies from engaging in a "concerted practice" that has the purpose or likely effect of substantially lessening competition. The term "concerted practice" is not defined in the CCA but is generally understood to capture any form of cooperation between two or more firms (or people) or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition.

The CCA also prohibits competitors from engaging in cartel conduct by entering into or giving effect to a contract, arrangement or understanding to fix prices, divide markets, rig bids or restrict output.

ANZ Roofing Pty Ltd and Ivy Contractors Pty Ltd, and directors of those companies, have acknowledged that discussions in Facebook groups in December 2018 regarding minimum rates for roofing services were likely to constitute an attempt to fix prices in contravention of the cartel prohibition, and "in some circumstances" could raise concerns under the concerted practices prohibition.

COMMUNICATIONS VIA FACEBOOK

The roofers were both in Facebook groups used by roofing providers in Sydney to advertise jobs and discuss industry issues. Following a damaging hailstorm in Sydney, the two directors made comments about increasing pricing of roofing services across the board:

- In one post, a director of ANZ Roofing Pty Ltd shared an image of the hail damage and wrote, "I think this latest storm is the perfect opportunity for the roofers of Sydney to increase pricing across the board as a standard that doesn't decrease!".
- In another, he replied to a post with the comment, "if there is ever a time to increase an [sic] set the standard it's times like this … nothing like a natural disaster the day we shut down! It's like a United strike! Haha".
- In a further post, a director for Ivy Contractors Pty Ltd wrote "Let's agree that we start from $65 and go up" – an apparent reference to the price per linear metre to install new quad guttering. The director of ANZ Roofing Pty Ltd "liked" that post.

The companies and their directors accepted the ACCC's concerns that the Facebook posts:

- were likely an attempt to contravene, or induce a contravention of, the cartel provisions of the CCA by fixing, maintaining or controlling the prices for certain roofing services; and
- in some circumstances, could raise concerns under the concerted practices prohibition.

THE UNDERTAKINGS

In the undertakings provided to the ACCC, the companies and directors undertook:

- not to make any communication or engage in any conduct that would amount to a contravention, attempted contravention or attempt to induce a contravention of the CCA for a period of three years; and
- to complete practical competition and consumer law training from a suitably qualified legal practitioner within three months of the commencement date.

ANZ Roofing Pty Ltd was also required to publish a post on one of the Facebook groups about prohibited anticompetitive conduct, but was not required to pay a penalty.

OBSERVATIONS - WHAT THIS ENFORCEMENT ACTION HIGHLIGHTS ABOUT THE ACCC'S ROLE AND PRIORITIES

Cartel conduct remains an enduring enforcement priority area for the ACCC and there are many high profile instances in recent times of the ACCC bringing enforcement action for alleged cartels, usually by way of Court proceedings. In addition to risking contravening the civil prohibition, alleged cartelists also face potential criminal prosecution, with the current prosecution of various banks and their senior executives for an alleged cartel relating to share trading a case in point.

The ACCC is willing to take action for alleged anticompetitive concerted practices

Up until this point the ACCC had not publicly taken enforcement action for alleged anticompetitive concerted practices. This was likely in part due to the fact that the prohibition is relatively new (having been introduced into law at the end of 2017) and that it takes some time for the ACCC to complete an investigation. It may also have been due to the fact that it is typically more difficult for the ACCC to prove a violation of a competition law that is subject to a "substantial lessening of competition" (SLC) test as compared to one subject to a per se prohibition (such as cartel conduct). The ACCC now has a dedicated "SLC" unit focused on investigating conduct that may have substantially lessened competition.

This enforcement action demonstrates that the ACCC is willing to enforce this relatively new provision and that the same course of conduct could contravene the prohibitions on cartel conduct and concerted practices.

One interesting aspect of the Court-enforceable undertakings given by the companies and their directors is that the admissions on whether the conduct violated the concerted practices prohibition were general and somewhat vague. Indeed, it was merely an acknowledgment that "in some circumstances, conduct of the kind set out [above] could raise concerns under [the concerted practices provision]". This may reflect that the case against the companies for a contravention of the concerted practices prohibition was not clear cut.

It may also reflect the position of the companies – being small businesses – wishing to shut down the enforcement action quickly.

Beware of sharing competitively sensitive information with competitors

The enforcement action also evidences the ACCC's view that sharing competitively sensitive information in a public forum can give rise to a concerted practice; communications need not be private or covert to amount to a prohibited concerted practice. However, this also raises difficult questions about when public announcements of business plans or prices could breach competition laws and whether such announcements by their nature change the confidential and competitively sensitive character of the underlying information.

In this enforcement action, the conduct in question involved a fairly transparent attempt by some roofers to induce consistency on the base price to be charged across the industry. However, there are many other instances in which companies make public announcements about future business intentions for entirely legitimate reasons but which are nevertheless likely to induce a competitive response – for example, a business's intention to close a retail outlet by the end of the year or a company outlining its newly revised business strategy in its annual report. Determining whether particular public announcements could risk contravening the concerted practices laws can require a careful assessment of the relevant facts and circumstances and the application of considered judgements.

Beware of social media usage – evidence for the ACCC

Finally, the enforcement action demonstrates the risk that employees that "like", "share" or "repost" a comment on social media may be arming the ACCC with good evidence that the conduct in question gave rise to an "understanding" between competitors for the purposes of the cartel laws. Historically, establishing an "understanding" to the requisite standard in Court was difficult – the archetypical example being someone's recollection of a subtle nod or wink in a dark, smoke-filled room. However, the ubiquitousness of social media and the enduring nature of social media posts, as well as tools like the "like" button designed to give people the ability to reinforce or validate each other's views, could make the ACCC's task of establishing compelling evidence of an understanding in certain cases much easier than it may have been in the past.

WHAT SHOULD COMPANIES DO TO AVOID A SIMILAR FATE?

Companies should ensure that they have up-to-date competition compliance policies which include policies designed to minimise the risk of improper sharing of competitively sensitive information

between competitors or coordination of competitive activities. Such policies should address social media activities.

Companies should also ensure that their employees receive appropriate periodic competition law compliance training and that such training covers topics on cartel conduct and concerted practices.

Whilst this action demonstrates the ACCC's determination to enforce the concerted practices prohibition, it does little by way of concrete guidance on the scope of conduct that the ACCC regards as being prohibited by the provision. In this context, any sharing of information about future price intentions between competitors is particularly high risk and should be avoided without considered legal advice.

While there are perfectly legitimate reasons for competitors to communicate with each other privately or in public from time to time, companies and their employees should always seek legal advice before sharing confidential or competitively sensitive information with a competitor, or otherwise seeking to induce competitors to coordinate their competitive behaviour, as this may risk breaching the cartel conduct and concerted practices prohibitions.

Key EMEA Contacts

Rafael Baena
Partner
Madrid

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

Michaël Cousin
Avocat à la Cour
Paris

T +33 1 53 53 56 92
M +33 6 03 48 48 19
michael.cousin@ashurst.com

Denis Fosselard
Partner
Brussels

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

Christophe Lemaire
Avocat à la Cour
Paris

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

Ross Mackenzie
Partner
London

T +44 20 7859 1776
M +44 7946 707 890
ross.mackenzie@ashurst.com

Alexandre Vandencasteele
Partner
Brussels

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

Annick Vroninks
Partner
Brussels

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

Ute Zinsmeister
Partner
Munich

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

Euan Burrows
Partner
London

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

Neil Cuninghame
Partner
London

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

Michael Holzhaeuser
Partner
Frankfurt

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

Duncan Liddell
Partner
London

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

Nigel Parr
Partner
London

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

Steven Vaz
Partner
London

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

Denis Waelbroeck
Partner
Brussles

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

Key Asia-Pac Contacts

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

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

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

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

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

ashurst

www.ashurst.com