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## Ashurst competition law newsletter – July 2019

# From the Editors

The July issue of Ashurst's competition law newsletter is now out, featuring a round-up of a number of key recent developments. This edition covers a the most recent EU gun jumping fine, the possibly of the first EU interim measures remedy adopted in 18 years, EU guidance on how to estimate pass on in damages claims, Australia's new electricity retailers' pricing rules, the Spanish textbook cartel, another UK fine for failure to comply with an information request as well other topics.



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# Canon jumps the gun and is fined €28m

## EU – MERGER CONTROL

**On 27 June 2019, the European Commission ("Commission") fined Canon €28 million for the partial implementation of its acquisition of Toshiba Medical Systems ("TMSC") before notification and merger control approval. This was in breach of the EU Merger Regulation's ("EUMR") standstill obligation - the requirement to not implement the merger until notified to and cleared by the Commission.**

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Parties to a transaction should be cautious and seek legal advice when structuring a transactions which include interim steps, such as transactions which include: multiple interdependent steps; rights attached to options that give control on obtaining merger clearance; or where effectively all the commercial risk is assumed prior to clearance.
- The case emphasises that a Commission clearance decision does not mean that parties are clear of all gun jumping risks, as the Commission gun jumping investigation commenced after clearance was granted.
- This is the latest in a string of recent EUMR gun jumping cases, all slightly different and all helping to build understanding of gun-jumping dos and don'ts.
- Gun-jumping can result in a fine up to 10% of aggregate worldwide turnover.

### THE TRANSACTION

In August 2016, Canon notified the Commission of its potential acquisition of TMSC from Toshiba. The transaction was cleared by the Commission in September 2016. Canon used a "warehouse" structure for its acquisition of TMSC, whereby:

- stage one involved Toshiba transferring 95% of TMSC's shares to a holding corporation, with 5% subsequently purchased by Canon, who had the option to acquire the interim buyer's 95% share; and

- stage two involved Canon exercising its share option to acquire the remaining 95% of the shares, thereby completing the acquisition.

### THE COMMISSION'S VIEW

The Commission viewed stages one and two as part of one single notifiable transaction. Stage one was essential and necessary for Canon to gain control of TMSC. Therefore, stage one constituted a "partial implementation" of a transaction.

In the case of [EY](#), the EU Court of Justice ("ECJ") ruled that there must be a *direct functional link* between the action and the implementation of the transaction – it cannot be merely ancillary or preparatory. It appears that the Commission considered that the EY test was satisfied in this case, on the basis that stage one had to occur for stage two to occur, which was the completion of the transaction.

Despite the option structure not allowing Canon to exercise actual control prior to stage two, it appears that the payment of the full purchase price meant that Canon effectively assumed all the commercial risk relating to TMSC.

In coming to the €28 million fine, the Commission considered that Canon:

- had breached both the notification requirement and standstill obligation; and
- was aware of its obligations under the EUMR and that its breaches were therefore negligent

The fact that the transaction was cleared unconditionally was also taken into account in assessing the gravity of the infringements.

Canon has announced that it is appealing the decision to the EU General Court.

### EUMR GUN-JUMPING ENFORCEMENT

This is the latest in a string of recent EUMR gun jumping cases, all slightly different and all helping to provide guidance on gun-jumping dos and don'ts. For example:

- in [May 2018](#) the ECJ ruled that EY did not breach the EUMR's standstill obligation regarding its takeover of KPMG's Danish unit

as a result of the termination of a cooperation agreement between KPMG DK and KPMG's international network;

- a €125 million fine imposed on a Dutch telecom company, Altice in [May 2018](#);
- in [October 2017](#), the EU General Court rejected an appeal by Marine Harvest against its fine for gun-jumping; and
- in [July 2014](#), the ECJ upheld a €20 million fine on Electrabel for failing to notify to the Commission its acquisition of a minority shareholding and completing the deal without prior clearance from the Commission



## Broadcom faces first Commission interim measures for 18 years

**EU – ANTITRUST - ABUSE OF DOMINANCE, PROCEDURE**

**On [26 June 2019](#), the European Commission ("Commission") opened a formal investigation into Broadcom, a major supplier of integrated circuits for communications devices, in relation to alleged exclusionary practices on the market for the supply of chips and chipsets. On the same day - and for the first time in 18 years - the Commission issued a Statement of Objections proposing the imposition of interim measures on Broadcom.**

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Commission had not sought the adoption of interim measures in 18 years, even though Regulation 1/2003 expressly empowered it to do so.
- The revival of this tool is not entirely surprising as one of the challenges faced by the Commission, especially with respect to fast moving markets, is the length of its antitrust investigations. Commentators have notably criticised certain Commission decisions as arriving too late to have any real effect on the market.
- Interim measures are still subject to strict legal conditions under Article 8 of Regulation 1/2003: there must be a *prima*

*facie* finding of infringement; and the Commission must demonstrate urgency caused by the risk of serious and irreparable damage to competition.

The Commission decided to open a formal investigation following concerns that Broadcom might be implementing exclusionary practices in relation to the supply of various types of chips and chipsets used in TV set-top boxes or modems. These practices could comprise:

- exclusive purchasing obligations imposed on its customers;
- rebates or other advantages conditioned on exclusivity or minimum purchase requirements;
- product bundling;
- IP-related strategies; and
- deliberately degrading interoperability between Broadcom products and other products.

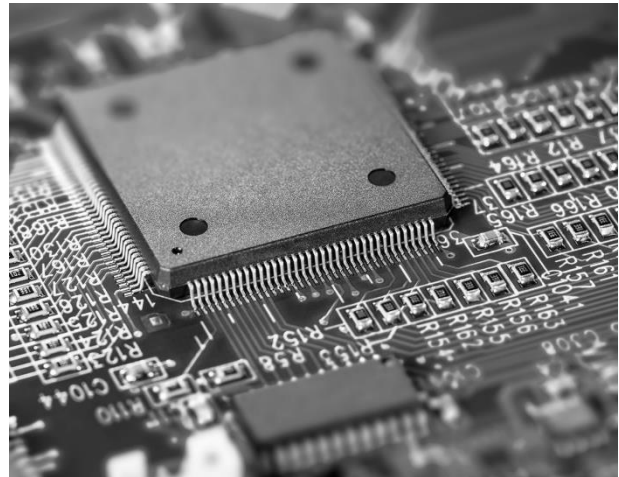
In parallel, the Commission issued a Statement of Objections preliminarily concluding that an interim measures decision may be indispensable in this case. Under Regulation 1/2003, interim measures may be ordered where there is:

- a *prima facie* finding of an infringement; and
- an urgent need for protective measures due to the risk of serious and irreparable damage to competition.

Interim measures are exceptionally rare in the Commission's decisional practice. The last one was adopted 18 years ago in the [IMS](#) case and withdrawn following three EU Court judgments ordering the suspension of the measures. The Broadcom case would be the first use of interim measures since the entry into force of Regulation 1/2003 which formalises the Commission's powers in this respect.

The revival of this tool is not entirely surprising as one of the major challenges faced by the Commission, especially with respect to fast-moving markets, is the time necessary for antitrust decisions to be adopted and implemented. In recent cases involving new technologies, the criticism has often been levied that the Commission's decisions had come too late to have any real effect on the market. Interim measures could help in that regard, although more generally they are not designed to

tackle the excessive duration of investigations. They are powerful and invasive tools which require particular prudence and which are only appropriate in clear-cut cases. Their use should arguably remain exceptional.



## Commission shows its mettle by blocking creation of European steel champion

### EU – MERGER CONTROL

**On 11 June 2019, the European Commission ("Commission") prohibited the creation of a joint venture between ThyssenKrupp ("TK") and Tata Steel ("TS"). The decision sheds light on the need to carefully consider issues such as product and geographic market definition and the scope of potential remedies, the European Commission looking increasingly at whether the divested assets are sufficiently integrated (upstream / downstream) in view of the market functioning.**

#### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The prohibition of the TK/TS joint venture is the tenth merger blocked by the Commission over the past ten years and the third this year.
- Product markets were defined narrowly taking into account requirements of specific customer groups.
- The Commission rejected proposed divestments, which would have needed to

have been 'integrated' vertically i.e. to include upstream (or downstream) assets to ensure effective competition post - merger.

TK is the second largest producer of flat carbon steel in the EEA, while TS is the third largest. Both companies are significant producers of steel for packaging applications and of steel for the automotive industry.

The public version of the decision of the Commission is not yet available at the time of writing. However, it appears clear that the Commission considered in this case that the relevant geographic market was at most Europe-wide and probably regional. The same conclusion was reached by the Commission in relation to certain steel markets in ArcelorMittal/Ilva. The Commission noted at the end of its *TK/TS* press release that "an unprecedented number of trade defence measures have been imposed on imported steel products since 2014".

The Commission also defined narrow relevant product markets, rejecting the existence of strong supply side substitutability i.e. the argument that steel manufacturers not producing the special



products in question could have easily diverted production to supply them. This resulted in high market shares for the parties:

- In the market for **metallic coated and laminated steel products for packaging** the proposed merger would have created a market leader in a highly concentrated industry, particularly in tinplate, which is the most important packaging steel product in the EEA by volume.
- In the market for **automotive hot dip galvanised steel products**, the proposed merger would have eliminated an important competitor in a market where only a few suppliers can offer significant volumes.

The Commission considered that, in the markets in question, competitive pressure from remaining players and from imports from third countries would not have been sufficient to ensure effective competition. The products involved were highly sophisticated and customers had very specific needs in terms of reliability and timing of product deliveries which made it difficult for imports to substitute the competition lost in Europe post-merger.

Remedies were proposed by the merging companies but they failed to fully address the Commission's competition concerns on a lasting basis. For all products, the Commission was concerned by the fact that the remedies proposal included no assets for the production of the steel necessary for manufacture the products in relation to which competitive concerns had been identified. The Commission felt the remedy package needed to be 'integrated upstream' and

so into a market where no competition concerned were in fact identified.

A similar issue arose in relation to automotive steel. In addition, in relation to such products, the Commission was concerned that the remedy package was not integrated downstream. The Commission considered that the parties had to include some finishing lines capable of serving the customers in the geographic areas where the merging companies mostly compete .

The Commission sought the views of market participants about the proposed remedies. The feedback was negative for both areas.

As a result, the Commission prohibited the proposed transaction.



## Commission publishes "Passing-on Guidelines" for national courts

### EU – PRIVATE DAMAGES ACTIONS

On 1 July 2019, the European Commission ("Commission") published guidelines for national courts, outlining how to estimate the extent to which price increases set by a cartel may have been passed down the supply chain. The "Passing-on Guidelines" include an overview of the theory of passing-on, techniques for assessing the

extent of pass-on, as well as examples drawn from cases around Europe.

#### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Passing-on can be used as a 'shield' by cartellists defending a damages claim, but also as a 'sword' by indirect claimants

looking to claim damages further down the supply chain.

- If passing-on is used as a defence, it is important to consider the potential for lost profits arising from a reduction in sales downstream (the volume effect) which could partially offset the passing-on defence.
- Quantifying pass-on and the volume effect can be a complex task that requires significant disclosure from both the defendants and the claimants. It is important that the extent of disclosure is proportionate to the overall damages claim.

Anyone harmed by an infringement of EU competition law has the right to obtain compensation for such harm. In 2013, the European Commission published a Communication on quantifying harm in antitrust damages actions, as well as a Practical Guide on the methods and techniques available to quantify the types of harm normally caused by anticompetitive practices. The Passing-on Guidelines published on 1 July 2019 focus specifically on how to estimate the share of the overcharge resulting from anti-competitive conduct that was passed on to indirect purchasers.

Infringements of Article 101 often result in higher prices for the customers (the direct purchaser) of the infringing undertakings. However, direct purchasers may, as a result of facing higher costs, fully or partially pass-on the price increase to their downstream customers (indirect purchasers). In actions for damages, passing-on can play different roles. First, passing-on may be used as a 'shield' by the infringer to argue that the claimant (either the direct or indirect purchaser) passed-on the overcharge to their customers and that their loss was therefore lower. Second, passing-on may be used as a 'sword' by indirect purchasers to argue that they paid higher prices as a result of the infringement and are therefore entitled to damages.

According to economic theory a range of factors will determine the degree of pass-on by a direct purchaser including:

- the nature of input costs subject to an overcharge;
- the product demand faced by the direct purchaser; and

- the intensity of competition in the market in which the direct purchaser is active.

The Passing-on Guidelines provide an overview of the techniques that can be used to quantify passing-on related price effects:

- **Comparator based models** compare prices set by the purchaser during the infringement period with prices in a comparator market(s). The comparator market could be a different time period (the before-during-after approach), a separate product or geographic market not affected by the infringement (the cross sectional approach), or a combination of both approaches (the difference-in-differences approach).
- **The passing-on rate approach** involves analysing how previous changes in a firm's costs have affected its prices before or after the infringement period. This passing-on rate is then combined with information on the overcharge and sales.
- **The simulation approach** develops an economic model of competition at the stage of the distribution chain where the claimant is active, and simulates the effect of the relevant overcharge on the claimant's profit during the infringement period.

All of the above approaches require significant information from both the defendants and the claimants and also usually involve regression analysis. The Passing-on Guidelines note that it is therefore important that the extent of disclosure required to gather this information is proportionate to the overall damages claim.

When there is a passing-on price effect there is the possibility of a volume effect. The volume effect refers to the loss of profit due to reduced sales that result from passing-on, i.e. less volume sold because of higher prices. The size of the volume effect depends on: (i) the difference between actual sales and sales in the counterfactual (i.e. absent the infringement); and (ii) the price-cost margin that would have been achieved in the absence of the infringement. The volume effect can be estimated using:

- comparator based methods (e.g. comparing volumes and margins in a separate geographic market); or
- by combining the price increase estimated as a result of the passing-on price effect with an estimate of the claimants' price sensitivity (elasticity of demand).



Although the volume effect has only been estimated by national courts in a limited number of cases, it is important that it is not forgotten. As the Passing-on Guidelines note: *"if the price effect is taken into account without the volume effect, this can underestimate the true harm. Hence, in order to avoid over- or under-compensation, the estimation of the volume effect is as essential as the estimation of the passing-on related price effect"*.

## ECJ confirms Commission's breach of its duty to state reasons in setting NEX's fine

**EU – ANTITRUST - CARTELS, PROCEDURE**

On **10 July 2019**, the European Court of Justice ("ECJ") upheld the General Court ("GC") **judgment partially quashing the European Commission ("Commission") decision to fine broker ICAP (now NEX) as a "facilitator" in the cartel of the Yen Interest Rate Derivatives ("YIRD")**. In doing so, it confirmed that the Commission erred in declining to detail its method for calculating NEX's fine.

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Point 37 of the Fining Guidelines allows the Commission to depart from those Guidelines for the determination of the basic amount of the fine. This may be justified notably where an undertaking having allegedly facilitated the cartel does not generate turnover in the markets concerned.
- The Commission's duty to state reasons requires that the decision sets out the factors which enabled it to determine the gravity and duration of the infringement and explains the weighting and assessment of those factors. In circumstances where the Commission applied the same complex method to two facilitators, general references to gravity, duration and nature of the infringement are not sufficient and do not enable proper judicial review.

### BACKGROUND

In a 2013 [settlement decision](#), the Commission fined five banks and the broker R.P. Martin which admitted their involvement in one or more cartels in the YIRD sector. As NEX refused to settle, the Commission issued a separate [infringement decision](#) in February 2015 finding that NEX facilitated the infringements and fining it €14.9 million. The Commission deviated from the standard methodology defined in its 2006 [Fining Guidelines](#) - on the basis of point 37 of those Guidelines - since NEX had no turnover in the markets concerned.

NEX challenged the 2015 decision before the GC. On 10 November 2017, the GC partially annulled the decision. While it confirmed the Commission's finding that NEX had acted as a facilitator in four of the infringements, the GC held that the Commission had committed several errors of law. In particular, it held that the presumption of innocence had not been respected, since the Commission took a position in the 2013 settlement decision (to which NEX was not a party) as to the broker's liability, but that did not justify the annulment of the 2015 decision. The GC did, however, annul certain parts of the Commission's decision on other grounds, including insufficient reasoning in relation to the method used for setting the fine.

The Commission challenged that judgment before the ECJ in so far as it annulled the fines imposed on NEX.



## THE ECJ'S RULING

After recalling that the Commission's broad discretion in calculating fines is limited by the 2006 Fining Guidelines, the ECJ confirmed that the methodology defined therein may be unsuited to certain cases (e.g. where an undertaking which facilitated an agreement does not generate any turnover in the relevant product markets).

It then turned to determining the scope of the Commission's obligation to state reason when it departs from the general methodology in an individual case. It notably recalled that the Commission has to provide a fuller account of its reasoning in novel cases and that any departure from the standard method should comply with the principle of equal treatment.

The Commission fulfils its duty to state reasons if the decision sets out the factors which enabled it to determine the gravity and duration of the infringement. Although it is not required to provide the figures relating to the method of calculation, it must nonetheless explain the weighting and assessment of the factors taken into account. The question of whether a mere reference to those factors suffices depends on the particular circumstances of each case.

In that respect, the ECJ confirmed that the circumstances of this case differ from those in the heat stabilisers cartel case, in which the Commission set the basic amount of the fine imposed on the sole facilitator of the cartel as a lump sum. In the present case, there were two facilitators (NEX and R.P. Martin) and the Commission claimed that it had applied the same five step methodology to calculate their respective fines.

In such circumstances, the ECJ confirmed that general references in the decision to gravity, duration and nature of the infringement as well as to the deterrent effect of fines constituted insufficient reasoning as regards the methodology used. The fact that the methodology applied to NEX was raised with NEX during the administrative procedure and during the proceedings before the GC is irrelevant.

The judgment shows that EU Courts will take a strict approach in cases where there is a risk of unequal treatment. It also comes soon after the [UPS judgment](#) in which the ECJ confirmed that the Commission must respect undertakings' rights of defense when it applies complex methodology in its decisional process.

## Commission re-readopts rebar cartel decision

### EU – ANTITRUST - CARTELS, PROCEDURE

**On 4 July 2019, the European Commission ("Commission") re-adopted, for a second time, a cartel decision against five Italian manufacturers of reinforcing steel bars for concrete, this time with a 50% reduction in fines.**

#### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Commission considers it has the power to readopt cartel decisions more than once following annulment for procedural defects.
- Excessive length of proceedings may lead to very substantial reductions in fines (in this case 50%).

On 4 July, the Commission re-adopted, for a second time, a cartel decision against five Italian manufacturers of reinforcing steel bars for

concrete, namely Alfa Acciai, Feralpi Holding, Ferriere Nord, Partecipazioni Industriali (Riva Fire) and Valsabbia Investimenti / Ferriera Valsabbia.

This second re-adoption decision, something which has never been done before under EU competition law, follows two successive annulments of the Commission's previous decisions by the EU Courts.

In December 2002, the Commission adopted a [decision](#) imposing fines on eight steel manufacturers and the Italian steel manufacturers' association ("2002 Decision"). The EU General Court ("GC") annulled that decision in October 2007 due to the fact that it had been adopted on the basis of Article 65 of the ECSC Treaty, even though that Treaty had lapsed at the time of the adoption of the 2002 Decision.

In [September 2009](#), the Commission re-adopted a decision imposing fines on all eight companies on the basis of Regulation 1/2003 ("2009

Decision"). In December 2014, the GC upheld the 2009 Decision.

Some of the companies appealed that GC judgment before the ECJ arguing *inter alia* that the Commission committed a fundamental procedural error when it had adopted a decision under Regulation 1/2003 without first seeking the opinion of the representatives of the Member States as required by that regulation. The ECJ agreed with the applicants and in [September 2017](#) set aside the GC's judgment and annulled the 2009 Decision.

In its new decision, the Commission asserts that it has addressed this procedural defect, having organized a new hearing with the representatives of the Member States before adopting the decision for a third time. The Commission claimed that the re-adoption was justified by the public interest in deterring cartels.

However, the Commission exceptionally granted a 50% fine reduction for all five companies in recognition of the long duration of proceedings which, the Commission recognised, "*is not attributable to the companies involved*".

It is, however, questionable whether the public interest in pursuing cartellists remains 20 years after the fact and whether the principle according to which fining proceedings must take place within a reasonable period of time (enshrined *inter alia* in Article 6 of the ECHR) should have prevailed. Should the companies appeal, the EU Courts may indeed have to answer that point.

Ashurst represents Ferriera Valsabbia, Valsabbia Investimenti and Alfa Acciai.



## Commission fines Qualcomm €242 million for predation

**EU – ANTITRUST – ABUSE OF DOMINANCE**

**On 18 July 2019, the European Commission ('Commission') fined Qualcomm €242 million for predation in the market for 3G broadband chipsets from 2009 to 2011, aimed at eliminating its rival Icera.**

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- First fine for predatory pricing by the Commission since the Wanadoo case in 2003.
- Case for predation is based on a combination of below cost pricing and exclusionary intent.
- Procedure lasted for almost a decade, with invasive requests for information upheld by the General Court.

On 18 July 2019, the Commission [fined Qualcomm €242 million](#) for predatory pricing in

the global market for 3G (UMTS) baseband chipsets, which allow mobile phones and tablets to connect to cellular networks. The Commission found that the company enjoyed a dominant position on that market, having a market share of around 60%, over three times its closest competitor. According to the Commission, Qualcomm had abused that position by selling the chipsets below cost to ZTE and Huawei between 2009 and 2011, with the aim of preventing its main rival, the UK chipmaker Icera, from further expanding its position.

The Commission has indicated that it based its findings on a combination of a price-cost test and a "*broad range of qualitative evidence demonstrating the anti-competitive rationale behind Qualcomm's conduct*". [Qualcomm has announced](#) that it will be appealing the decision, which it considers to be "*based on a novel theory of alleged below-cost pricing over a very short time period and for a very small volume of chips*".

In January 2018, the Commission already [imposed a fine of almost €1 billion](#) on Qualcomm for exclusionary practices on the market for LTE baseband chipsets.

The procedure in this case has been long even by Commission standards. Icera initially filed its complaint almost a decade ago in 2010. Since then it has been acquired by Nvidia and the chipset business was closed down in 2015. The last decade has also seen a challenge by Qualcomm against the invasiveness of the Commission's investigation come and go, rejected by the EU General Court ('GC') earlier this year

([T-371/17](#)). Qualcomm appealed against that judgment before the Court of Justice last month ([C-466/19 P](#)).

This is the first time the Commission has fined a company for predatory pricing since the [Wanadoo decision](#) in 2003. It will thus give the EU Courts the first opportunity in many years to refine (or not) the legal test for predation, an alchemic blend of cost analysis and exclusionary intent.

## New pricing rules for electricity retailers

### AUSTRALIA – NEW LAW

**On 1 July 2019, the Electricity Retail Code came into force in New South Wales, South-Eastern Queensland and South Australia introducing a new Default Market Offer ("DMO") for electricity customers. At the same time, Victoria introduced its own Victorian Default Offer ("VDO") for electricity customers together with Deemed Best Offer, Clear Advice Entitlement and GST Inclusive Pricing rules for energy retailers.**

#### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The DMO and VDO requires retailers to offer customers a "default offer" that does not exceed a regulated price. The price is set annually by the Australian Energy Regulator ("AER") (outside Victoria) and Essential Services Commission ("ESC") (in Victoria).
- Retailers may continue to offer other "market offers", but must comply with new advertising rules, including obligations to frame prices and discounts by reference to the regulated prices, designed to make it easier to compare prices between retailers.
- The VDO requires Victorian retailers to set a much lower price than the DMO, raising concerns about whether there will still be scope for price competition. The Chair of the Australian Competition and Consumer Commission ("ACCC") commented that "[we] are concerned about what will happen in Victoria. The VDO is at a level so

low that everyone might flock to that and say, 'why bother' [to seek a market offer]".

- Victorian retailers must also comply with a range of other rules which, in effect, require retailers to provide information about the cheapest generally available offer to the customer, provide greater disclosure about costs, and communicate all prices on a GST-inclusive basis.



Since the ACCC published [Restoring electricity affordability and Australia's competitive advantage](#) following its Retail Electricity Pricing Inquiry in June 2018 (see our [summary](#)), there has been significant debate about how to increase retail competition by making energy pricing and

discounts easier to understand. In particular, the ACCC was concerned that price dispersion between the best and worst offers, and confusing discounting practices, were problematic.

Part of the price dispersion was driven by the fact that energy regulations in the National Electricity Market required retailers to make a "standing offer" available to customers. The standing offer is the offer that, in effect, applies when a customer is not engaged with the electricity market. A practice developed over time in which many retailers used the standing offer as, in effect, a benchmark from which to advertise discounts. Consequently, the standing offers of retailers have generally become the most expensive way to buy electricity. While customers can negotiate better details, the ACCC found that some customers, either through choice or, perhaps, due to the complexity in switching or choosing the right offer, did not take that option.

The [Electricity Retail Code](#), which is an industry code under the *Competition and Consumer Act 2010* (Cth), is intended to address this by introducing a new, lower, DMO to replace the standing offer. The DMO is calculated by the AER as an annual total reference price. Electricity retailers must make a default offer available that is equal to, or less than, the DMO reference price for residential customers with flat or controlled load tariffs, and small business customers with flat tariffs, in New South Wales, South-Eastern Queensland and South Australia.

The Electricity Retail Code also introduces rules that apply when advertising or publishing electricity prices, and offering to supply electricity, as well as advertising rules for any conditional discounts (e.g. discounts that only apply when a person pays on time). These rules are intended to facilitate comparisons between retailers, by requiring price claims to be expressed by reference to the DMO reference price.

Victoria has also introduced a series of new rules, including a default offer regime, through a combination of changes to the Victorian Energy Retail Code, and amendments to the *Electricity Industry Act 2000* (Vic) and Orders in Council made under that legislation.

The Victorian regime also features a regulated price, set by the ESC. Unlike the DMO, the VDO

reference price is expressed as a tariff rather than a reference bill. Electricity retailers must offer a Victorian default offer, replacing the standing offer, that is equal to or less than the VDO reference price. When advertising discounts, they must express those discounts against the VDO reference price, and disclose how the discount was calculated.

In addition, energy retailers in Victoria must comply with a significant range of new obligations designed to give small customers an entitlement to clear, timely and reliable information to assist the customer to assess the suitability of, and select, a customer retail contract, and to identify whether they are on their retailer's Deemed Best Offer.

These strict new obligations include:

- providing customers with information, on their bills, regarding the cheapest generally available offer from the retailer;
- informing customers of the terms affecting the potential costs payable by the customer, prior to obtaining a small customer's explicit informed consent to enter a customer retail contract; and
- requiring retailers to express prices as inclusive of GST (where applicable) in communications to customers, including all advertisements and bills.

The Victorian VDO reference price has been set at a lower level than the DMO reference price. This has raised concerns that it is so low that retail competition may be stifled, as customers decide the benefits of having to negotiate a deal are not worth it. In addition, under both regimes, the reduction in price dispersion necessarily means less scope for price competition. It will remain to be seen whether it will result in lower prices overall.

The reforms represent a significant intervention in electricity markets. There is now a live experiment in electricity markets. The pricing outcomes and customer movements under the Electricity Retail Code, and stricter Victorian regime, will be closely analysed and contrasted over the coming year.



# No dirty laundry here: Full Court dismisses cartel allegations against Cussons despite \$27 million penalties paid by other respondents

AUSTRALIA – ANTITRUST - CARTELS

## Cussons cleared of wrongdoing in laundry detergent cartel proceedings

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- On 24 May 2019, the Full Federal Court has unanimously upheld the Federal Court's finding that PZ Cussons (Cussons) did not engage in cartel conduct in the laundry detergent market, despite the other alleged cartel members having admitted wrongdoing.
- The Full Federal Court concluded that Cussons had not reached an arrangement or understanding with the two other largest suppliers of laundry detergent, Colgate-Palmolive (Colgate) and Unilever Australia Limited (Unilever) (together with Cussons, the Suppliers), to launch ultra-concentrate laundry detergents in the market at a specified time and simultaneously stop supplying standard concentrate laundry detergents.
- Cussons was able to distance itself from the ACCC's allegations by pointing to internal strategic brainstorming sessions, its own employee communications protocol, legal advice it had received, as well as a lack of direct communication with the other parties and commitment to their plans.

### WHAT YOU NEED TO DO – KEY TAKEAWAYS

- In discussions with competitors, or discussions with third parties about competitors, businesses should avoid committing, or giving the impression of committing, to any proposal affecting pricing or supply.
- Businesses should seek competition law

advice regarding any proposed dealing with competitors, particularly if competitively sensitive matters such as pricing or the market launch of a product are to be discussed.

- Businesses should establish competition communication protocols prohibiting employees from discussing competitively sensitive information with competitors. Businesses should also carefully review agendas for meetings between competitors and seek legal advice on any topics that may give rise to exchanges of competitively sensitive information.

## BACKGROUND

The ACCC initially commenced proceedings in 2013 against Cussons, Colgate and Woolworths, contending that Unilever, Cussons and Colgate had engaged in cartel conduct by collectively agreeing not to supply ultra-concentrate laundry detergent in the Australian market until a specified date in March 2009 and to cease supplying standard concentrate detergent from then on (**Withhold Supply Arrangement**). Woolworths was alleged to have been knowingly concerned in the Suppliers' cartel conduct. All parties recognised that, if proven, the Withhold Supply Arrangement would constitute an illegal cartel prohibited by the *Competition and Consumer Act 2010* (Cth).

The alleged arrangement was said to have been formed through a series of meetings and communications between May 2008 and January 2009. The ultra-concentrate laundry detergents were subsequently launched in the market by the three suppliers in February and March 2009.

The proceedings followed an immunity application by Unilever in 2013, who consented to being named as the immunity applicant.

Prior to the trial, Colgate and Woolworths admitted liability and agreed to pay penalties of \$18 million and \$9 million respectively.



In 2017, the Federal Court dismissed the ACCC's case against Cussons on the basis that there was insufficient evidence to conclude that Cussons had been part of the cartel. The ACCC appealed the Federal Court's decision.

On 24 May 2019, the Full Court dismissed the appeal and found that the ACCC had failed to identify any errors of fact or law which had led the trial judge to conclude that Cussons had not been a party to an illegal arrangement or understanding.

## HOW DID CUSSONS SUCCESSFULLY DISTANCE ITSELF FROM THE CARTEL?

In summary, the Full Court found that the evidence was inconsistent with the proposition that Cussons had been party to the alleged Withhold Supply Arrangement. In particular:

- the fact that Cussons had acted in parallel with its competitors was explained by the commercial circumstances rather than agreement between the parties;
- there was little direct communication between Cussons and its competitors, and that communication was equivocal;
- there was insufficient evidence that Woolworths had acted as a "hub" for the competitors to communicate with each other;
- Cussons had engaged in a "war gaming" exercise in preparation for the shift to ultra-concentrates (suggesting that it was uncertain about what its competitors would do), which was inconsistent with it having reached an arrangement or understanding with them;
- several incidents suggesting the existence of an arrangement or understanding between Colgate and Unilever did not involve Cussons and never came to Cussons' knowledge;
- contemporaneous evidence suggested that Unilever was concerned that Cussons would be a "rogue player", implying that Unilever at the time did not believe that Cussons was party to an arrangement or understanding;
- Cussons had obtained legal advice that a proposal for the competitors to coordinate the shift to ultra-concentrates would be illegal and had acted in accordance with that advice;
- Cussons had established a communications protocol prohibiting its employees from

discussing the shift to ultra-concentrates with competitors; and

- the ACCC's case did not precisely specify when the Withhold Supply Arrangement was formed, and part of the period suggested by the ACCC was after Cussons was effectively "locked in" to the shift (including its timing) and would not have altered its behaviour.

## MINIMAL DIRECT COMMUNICATION

The ACCC and Cussons accepted that an arrangement generally requires some level of negotiation or communication by the parties. The parties also conceded that both an arrangement and understanding involved a "meeting of the minds". Although not a legal requirement, the court drew attention to the lack of direct contact between Cussons and the other Suppliers when considering this. The court identified only seven instances of direct communication between Cussons and the other Suppliers, including several meetings and telephone calls. The court found that the minimal direct communication, together with its non-committal nature, was a major weakness in the ACCC's case against Cussons.

The treatment of this evidence signals to businesses that merely attending a meeting or engaging in a phone call in which potential cartel conduct is discussed, will not necessarily support a claim that there was a cartel arrangement or understanding.

## STRATEGIC BRAINSTORMING

Cussons adduced evidence of "war-gaming" sessions which assisted in distancing itself from any allegations of cartel conduct. On 21 October 2008, Cussons held an internal war-gaming exercise with its employees involved in the shift to ultra-concentrates. The purpose of the exercise was to workshop how Cussons would compete in different hypothetical scenarios and how its competitors might respond after the launch of ultra-concentrates.

The court accepted that this evidence was inconsistent with the notion that Cussons had arrived at an arrangement or understanding with the other Suppliers. If such an arrangement or understanding had in fact been reached, it would have been unnecessary for Cussons to engage in this kind of strategic brainstorming.

This finding underlines the fact that practical evidence about how a business behaved is directly relevant to testing the case theory put forward by the ACCC.

## **EMPLOYEE COMMUNICATIONS PROTOCOL**

There was evidence that in late September 2018, Cussons had established a strict communication policy for employees working on the transition to ultra-concentrates. Essentially, the policy prohibited Cussons employees from communicating with competitors about the launch of ultra-concentrates. This enabled Cussons to distance itself from allegations of any collusive behaviour with the other Suppliers.

## **CUSSONS' LEGAL ADVICE**

The lack of commitment by Cussons to any arrangement or understanding was further supported by the fact that it received independent legal advice in April and August 2008. The initial advice warned Cussons that any proposal between itself and the other Suppliers could give rise to competition law risks, and that Cussons should not agree or even give the impression of agreeing to any part of such a proposal.

The later legal advice instructed Cussons that whilst it could attend meetings with competitors, it should not engage in discussions of sensitive matters, such as pricing, and should not agree to anything. In fact, the court accepted evidence that during a meeting on 25 August 2008, Cussons strenuously noted its objection to aspects of the proposal being discussed, and indicated that its objection was being driven by legal advice. Cussons instead proposed a counter-arrangement in which the Suppliers would stagger their respective transitions to ultra-concentrates.

## **ECONOMIC EVIDENCE**

The court rejected the ACCC's argument that the parallel conduct of Cussons and the Suppliers – that is, the transitioning to ultra-concentrates at approximately the same time – was substantially consistent with the allegation that there was an arrangement or understanding.

The court agreed with the trial judge that the ACCC's "submissions concerning the circumstantial significance of the parallel conduct... are not supported by its own economic

evidence, and are significantly undermined by the unchallenged evidence adduced by Cussons". On the other hand, Cussons was able to bring its own economic evidence which showed that the parallel conduct would have occurred anyway in the absence of any arrangement or understanding.

Essentially, the economic evidence brought by Cussons demonstrated that the parallel conduct occurred as a legitimate response to market forces at the time (including the timing of Woolworths' major annual review of its range of products), rather than pursuant to an illegal arrangement or understanding.

## **INTERACTION WITH OTHER RESPONDENTS**

The court based part of its reasoning on how Cussons was perceived by the other Suppliers. The evidence demonstrated that the ACCC's allegations of the role played by Cussons were overstated.

For example, there was evidence that in August 2008, Colgate believed Cussons was acting as a "rogue player" for its own commercial purposes. There was additional evidence that in September 2008, Unilever conducted stress-tests in response to the hypothetical situation that Cussons would not also simultaneously transition to ultra-concentrates. The court accepted that Unilever was unsure of Cussons' intentions. Internal emails from December 2008 also showed that Unilever thought that Cussons might be acting on its own, as a rogue player.

Although there was evidence of incidents suggesting that an arrangement or understanding existed between Colgate and Unilever, these incidents did not involve Cussons and in fact, never came to Cussons' knowledge.

In August 2008, although Colgate and Unilever were increasingly sure that the transition date was going to be March 2009, internal Cussons documents demonstrated that they were still unsure about when Woolworths' start date for stocking the new products would be.

There was further evidence which demonstrated that Cussons was not privy to an arrangement or understanding with Colgate and Unilever. The court accepted that Cussons did not know what price the other suppliers were setting their ultra-concentrates at, the size of the powder scoop, what performance or environmental claims might be made on the packaging, or what the concentration level would be.

## KEY PRACTICAL TAKEAWAYS FOR MANAGING CARTEL AND CONCERTED PRACTICES RISKS

With ACCC chairman Rod Sims emphasising that cartel conduct will continue to be an enduring enforcement and compliance priority, businesses should expect the ACCC to take an even tougher stance against cartels.

It is worth noting that the ACCC took action against Cussons prior to the introduction of the prohibition against anti-competitive concerted practices in November 2017. The Cussons judgment highlights the difficulty of proving that an arrangement or understanding existed. Instead of having to prove a "meeting of the minds" between competitors, the ACCC can now institute proceedings against parties who engage in conduct with the purpose or likely effect of substantially lessening competition, even if there is no arrangement or understanding between them.

Although the ACCC is yet to bring proceedings under the new laws, businesses should be aware of the significantly wider scope under which concerted practices allegations may be brought. We expect to see significant ACCC enforcement action regarding exchanges of competitively sensitive information between competitors, both directly with each other and indirectly through third parties, to test the scope of the new concerted practices prohibition.

Cussons was effectively able to point to proactive measures it took to distance itself from the cartel arrangement or understanding.

The relevant practical steps other businesses may consider taking when faced with risks of cartel conduct and concerted practices include:

- minimise direct communications with competitors, whether via meetings, emails or telephone calls, and clearly document all communications to reduce any risk of ambiguity about what was discussed;
- implement and enforce a strict communications protocol for employees at all levels in the business who may have discussions with competitors – in some instances, it may be necessary to prohibit discussions about a particular topic or product entirely;
- consider providing specialised training to senior business representatives on how to

appropriately communicate with competitors in order to mitigate any risks of appearing to agree or commit to plans or strategies;

- seek out competition law advice regarding any proposed agreement with a competitor and be able to demonstrate having acted in accordance with that advice, where appropriate;
- state clearly any objections to an inappropriate proposal or to the receipt of commercially sensitive information – it is important to ensure this stance is reflected in the correspondence between competitors, minutes of any meetings and subsequent internal documents or memoranda;
- ensure any internal papers reflect a genuine commercial purpose and effect that is not anti-competitive; and
- if threatened with competition law proceedings, gather evidence of any actions or discussions that would not have taken place if the alleged wrongdoing had actually occurred – for example, Cussons was able to point to internal workshops which were inconsistent with collectively agreeing to a market approach or strategy.

Although these examples are not exhaustive, they are real and practical commercial processes which can be put in place to lessen the risk of an adverse finding of cartel conduct, as the Cussons decision demonstrates.

In addition, we would recommend establishing protocols governing discussions between competitors, including merger parties pre-completion and participants of trade association meetings. Businesses should be aware of and trained on the new concerted practices prohibitions as well as the cartel prohibitions.



# Bailiffs' bureau fined for antitrust breaches

## FRANCE – ANTITRUST – ANTICOMPETITIVE AGREEMENTS

**On 24 June 2019, the French Competition Authority ("FCA") fined a bureau of bailiffs of a Parisian suburb department (the Hauts-de-Seine) for setting discriminatory membership conditions for new members**

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- While trade associations, and similar groups, are permitted to create their own membership rules and codes of conduct, they should not be used to discriminate against certain competitors in a way which is not objectively justifiable, especially if the object or effect is to exclude competitors from the market.
- BCS settled the case with the FCA. It follows the publication of the FCA's guidance on the application of its settlement procedure in [December 2018](#).

In June 2018, the FCA launched an investigation into practices implemented in the bailiffs sector. A year later, on 24 June 2019, it fined the BCS (Bureau commun de signification des Hauts-de-Seine), a bureau of bailiffs in charge of the service of judicial and extra-judicial documents on behalf of its members, namely all bailiffs of the Hauts-de-Seine department. BCS' purpose is the pooling of various activities, including the centralisation of activities such as the service of

documents, with the aim of reducing the cost price of certain services.

The conduct sanctioned by the FCA related to the BCS' bylaws and internal rules, which stipulated non-objective, non-transparent and discriminatory conditions and procedures for the admission of new members, as well as for the withdrawal and exclusion of members.

In particular, with regard to BCS's admission conditions, the FCA noted that two successive modifications of BCS bylaws in 2015 and 2018 were aimed at deterring new entrants from joining the BCS, notably by establishing a fixed membership entry fee of €300,000. Since all bailiffs active in the Hauts-de-Seine department are members of the BCS, the FCA considered that membership was necessary for a new bailiff to access the market. As a consequence, the FCA found that the BCS' conduct had the object of preventing competition in the market.

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

The FCA decided to impose a fine of €120,000 and accepted two commitments (i.e. an amendment to its bylaws and the publication of a summary of the FCA's decision).

# FCO activity reports published, with clear focus on digital economy

## GERMANY – UPDATE

**The FCO published its activity report for 2017/2018 and its annual report of 2018 on 27 June 2019. The activity report (the "Report") sums up the key activities and goals pursued by the FCO over the last two years. In particular, the highly publicised investigation of Facebook's data collection scheme and the ongoing investigation of Amazon in relation to its business terms for**

**dealers indicate that the FCO is tackling issues posed by the digital age head-on.**

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The focus of the FCO is clearly on the digital economy (e.g. Amazon and Facebook) and on the protection of consumer rights.

- 1,300 planned mergers were reported to the FCO in 2018.
- The number of leniency applications is decreasing slightly (2017 - 37; 2018 - 25), but the FCO stressed the importance of the leniency regime, especially for cartel investigations.
- During 2017/2018 18 dawn raids were conducted (2017 - 11; 2018 - 7).
- In 2017, the FCO issued fines against companies and individuals in the amount of €66.4 million and, in 2018, of €376 million for the use of illegal cartel agreements.
- The FCO is continuing its collaboration with the French competition authority.

**A clear digital agenda:** [On 27 June 2019](#), Andreas Mundt, the President of the FCO, declared: "*We have a clear digital agenda*". This digital agenda pursues two main goals: open markets for competitors and the protection of consumer rights. In 2017, the legislator granted the FCO, as part of the ninth ARC amendment, further powers in the field of consumer protection, albeit the FCO notes that it does not have sufficient competencies to enforce the ARC.

**The Facebook investigation:** Following three years of investigation, on 6 February 2019, the FCO announced its [decision against Facebook](#) in relation to consumer data rights. Facebook appealed against this decision, and a final judgment by the Higher Regional Court in Düsseldorf is expected later this year. More recently, the FCO's enforcement focus has been accompanied by the German Federal Office for Justice issuing a fine against Facebook of €2 million for violating the German Enforcement Act (aiming to prevent hate speech and illegal content in online networks) based on poor reporting by Facebook (published on 2 July 2019). Consumer protection is becoming considerably more important for German authorities.

**Amazon Marketplace:** [The Report](#) notes that the investigation of the Amazon Marketplace terms of business for dealers (initiated by a large number of complaints from these dealers) continues. The special feature of the Amazon investigation results from the hybrid role of Amazon as a platform for dealers on the one

hand and its role as dealer in its own right on the other hand. The investigation is more about opening markets, rather than focusing on consumer protection. The in-depth analysis of the online advertising sector is ongoing.

**German-French collaboration:** The FCO and its French sister authority ("Autorité de la Concurrence") are currently working on a paper concerning the significance of algorithms in competition law. They previously jointly drafted a paper on "[Competition law and Data](#)", which was published in 2016.

**Other enforcement:** [The Report](#) also mentions the following developments in German competition law and various enforcement statistics:

- the decision handed down by the German Federal Court in the EDEKA Hochzeitsrabatte ("wedding discounts") case;
- the efficacy of the ninth ARC amendment in closing the "sausage loophole"/"Wurstlücke";
- that 1,300 mergers were reported to the FCO in 2018. Of these, the FCO opened 13 in-depth investigations (four were cleared, four withdrew their notifications and five are to be concluded at the time of writing); and

that 22 companies were issued fines in 2018, with fines totalling €384 million (€2 million against individuals). The largest of these fines was levied against a cartel of stainless steel manufacturers (€205 million).





# Restrictions imposed on Sky over Mediaset pay-TV deal

## ITALY – MERGER CONTROL

**On 20 May 2019, the Italian Competition Authority ("ICA" or "Authority") issued its decision regarding the acquisition by Sky Italian Holding S.p.A. ("Sky") of certain assets of the digital terrestrial Pay-TV owned by Mediaset Premium S.p.A. ("MP"), imposing significant behavioural remedies to mitigate the effects of the closing of the transaction prior to obtaining clearance despite the parties claims that they had unwound the transaction.**

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- **Even when permitted, completing a complex deal without waiting for merger clearance may be dangerous:**

Italian competition law allows parties to close a transaction prior to receiving clearance. However, completing a transaction may have effects that cannot easily be unwound and authorities may impose far-reaching remedies to restore competition.

Between March and November 2018, Sky and MP entered into a number of preliminary inter-related agreements in preparation for the sale of R2 S.r.l. ("R2") to Sky. R2 runs the terrestrial digital broadcasting technical platform of MP, the main pay-tv competitor of Sky in Italy.

Sky and MP closed the transaction on 30 November 2018, just two days after the filing of the merger to the ICA, without waiting for the ICA's clearance (there is no stand-still obligation under Italian merger control rules). However the parties had included in their agreements a condition which provided for resolution in the event the deal faced opposition from the ICA.

The ICA opened a Phase II investigation, and expressed strong reservations about the effects of the transaction on competition. The ICA claimed in particular that, although the transaction related only to the technology platform owned by MP to distribute its programs, the sale of such assets to Sky necessarily resulted

in an exit of MP from the pay-TV market, which in fact took place in April 2019 (MP's service was to become an Internet-only service). Therefore, the ICA concluded that the transaction would have eliminated the main (and nearly only) competitor of Sky in the pay-tv market.

In view of this opposition, the parties considered that the resolutive condition was fulfilled, and R2 was returned to its previous owner. The ICA found, however, that the effects of closing the transaction had not been eliminated by merely giving R2 back to MP. For example, the ICA found that post-transaction a proportion of MP's customers had already migrated to Sky, and the migration was deemed irreversible.

The ICA thus imposed remedies to mitigate these "irreversible" effects. The ICA:

- prohibited Sky from entering into exclusive rights for audio-visual content and linear channels for internet platforms in Italy for three years, so that content would be available for other operators that provide their services through Internet; and
- ordered Sky to grant the access to competitors to any new platform it may develop and that is compatible with the R2's assets, under fair, reasonable and non-discriminatory conditions.

Interestingly, these remedies are not intended to recreate the now defunct MP, but rather to facilitate the entry by new competitors who may suffer from the lack of access to premium content. Indeed, there were a large number of complaints from telecommunications and providers of online streaming services about the transaction, which focused on these exclusivity clauses which impeded access to important content in Italy.

Sky has appealed the ICA decision, which raises numerous interesting legal issues.

# CNMC throws the (text) book at publishers

## SPAIN – ANTITRUST - ANTICOMPETITIVE AGREEMENTS

**The Spanish Competition Authority ("CNMC") has fined the National Association of Text Books and Teaching Material Publishers ("ANELE"), including the leaders in the sector (Santillana, Anaya and SM), and 34 non-university text book publishers €180,000 and €32.2 million, respectively for two infringements of Article 1 of the Spanish Competition Act and Article 101 of the Treaty for the Functioning of the European Union.**

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This case sends an important message: although the use of codes of conduct is lawful, they should not be used to disguise or mask restrictions of competition.
- If codes of conduct or other forms of trade association rules restrict competition, those restrictions must be objectively justified.

The CNMC concluded that ANELE and 34 publishers infringed the Spanish and EU prohibitions against anticompetitive agreements by agreeing on terms and conditions of trade for merchandising digital textbooks between 2014 and 2017, in particular through:

- the adoption and implementation of ANELE's code of conduct ("CoC"); and
- the coordination of prices and commercial conditions of digital non-university text books.

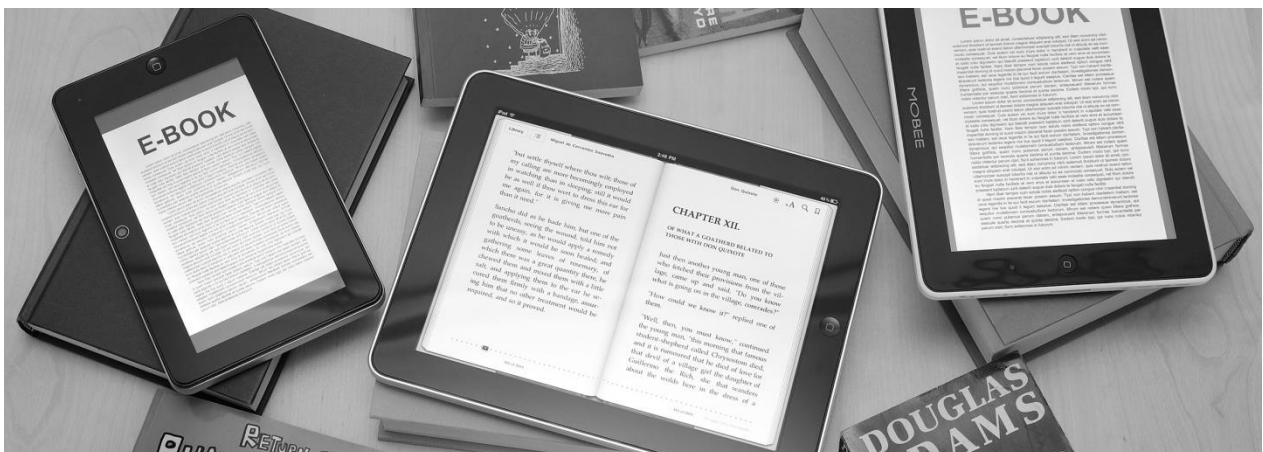
The CNMC found that:

- ANELE and the publishers used the CoC to reduce competition in the market for the commercialisation of non-university text-books; and
- the publishers used the CoC to restrict their supply of free support materials to schools which were provided to their customers (these included materials such as digital boards and projectors, for example).

ANELE and the companies argued that the aim of the CoC was to tackle practices that could lead to situations of bribery and corruption in the selection and prescription of textbooks in schools by ensuring that the selection of text books was based on objective criteria, and not on the quality and quantity of the "gifts" they received. However, this justification was rejected by the CNMC. The authority considered that the only aim of the CoC was to restrict the use of free support materials as a competitive variable between competitors and, thus, to restrict competition in the market.

In addition, the CNMC found that the conduct of the publishers was monitored by an Oversight Committee which policed any deviation from the CoC by means of pressure (inducing letters to schools and public administrations) and/or threats of legal action alleging unfair competitive conduct or bribery. This included threatening publishers who did not sign the CoC.

The CNMC also concluded that ANELE and some of the publishers fixed prices and other commercial conditions of non-university text e-books between 2014 and 2017.



# AL-KO Klobbered with fine for failing to comply with information request

## UK – MERGER CONTROL, PROCEDURE

**AL-KO Kober ("AL-KO") have been fined £15,000 for failing to provide information requested during the CMA's investigation into its acquisition of Bankside Patterson Limited ("BPL"). AL-KO had argued that it did not provide relevant documents due to a non-deliberate human error relating to the inadequacy of the search tool that it used on its databases. In fining the company for non-compliance, the CMA found this to be a serious failure and not a reasonable excuse for failure to provide the information requested.**

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The CMA expects a person on whom a section 109 (of the Enterprise Act 2002) notice (for information) is served to understand the requirements fully and ensure that the notice is complied with, including the tools and methodologies used.
- The pattern of errors from late 2018 was an aggravating factor in setting the level of penalty. However, the CMA noted that although the errors were serious, they were not "flagrant" to justify higher level of penalty.
- Whilst the CMA has not been shy previously to fine companies for failing to comply with information requests, this is the first CMA penalty for non-compliance with a section 109 notice issued during pre-notification discussions.

### BACKGROUND FACTS – THE TWO NOTICES

In August 2018, AL-KO began pre-notification discussions with the CMA in relation to its proposed acquisition of BPL, a producer of galvanised chassis and modular steel frames. In February 2019, the CMA began its Phase 1 investigation, and the CMA issued AL-KO with two section 109 notices under the Enterprise Act 2002:

- **The October 2018 notice**, issued during the pre-notification period, requested the production of internal documents relating to the rationale for the acquisition, in particular the re-entering of the static accommodation chassis market and its setting of prices. AL-KO engaged with the CMA on the search methodology used and the CMA provided comments on this. In November 2018, the CMA sent an informal request for a full copy of a presentation from a potential customer to AL-KO, a document which had not been provided in response to the formal CMA request. When ultimately providing this document, AL-KO explained it had identified that two search terms were omitted in error from the search coding developed by AL-KO's German IT team and that this omission had occurred in respect of one question. At the time, AL-KO set out to the CMA what it intended to do to address this error, and it conducted further searches with the errors rectified, producing over 600 further documents. In relation to the first notice and errors complying with it, the CMA stated that as AL-KO was taking the matter seriously, it was not minded to prioritise further action.
- **The February 2019 notice** asked for documentary evidence backing up AL-KO's indication that if it had been unable to acquire BPL it may instead have looked to acquire another company. Prior to the notice, AL-KO had initially said no such documents existed, but subsequently produced four documents following issuance of the notice. AL-KO also notified the CMA that some further documents may not have been provided in response to the notices and set out the corrective steps it planned to take. Over 500 further documents relating to both notices (although principally in relation to the first notice) were submitted.

The CMA invited AL-KO to provide a compliance statement containing the methodology for the searches in responding to the two notices, which AL-KO provided in March 2019.

The CMA found that AL-KO had failed to adequately comply with both notices.

## NO REASONABLE EXCUSE FOR FAILING TO COMPLY

In coming to its decision to fine AL-KO for non-compliance, the CMA stated that:

- there was no reasonable excuse for failing to comply with the notices. AL-KO ought to have known that the search approach was inadequate to comply with the notices, and this is not a human error that was unforeseeable; and
- the errors were negligent and there was no reasonable excuse for non-compliance.

## PENALTY CALCULATION

In arriving at the level of penalty of £15,000, the CMA took into account:

- the fact that the failure was a serious one that resulted in a delay in the investigation and a waste of public resources;
- that AL-KO had sufficient resources to ensure compliance and whilst it attempted to rectify failures, this was not sufficient to lead the CMA to not penalise the company;
- the pattern of errors in complying with both notices as an aggravating factor; and
- that whilst AL-KO's failures were serious, they were not flagrant.

## A PATTERN OF ENFORCEMENT

This penalty emphasises the need for parties to respond comprehensively and on time to CMA information requests. The CMA has limited time to conduct merger inquiries and prompt responses to its requests are crucial to its investigations. The CMA has not been shy previously to fine companies for failing to comply

with information requests, [fining Hungryhouse £20,000](#) for incomplete disclosure in relation to its merger with Just Eat in 2017.

This issue is not limited to merger inquiries:

- The CMA has similar powers in Competition Act cases and market investigations. In April 2016, [it fined Pfizer](#) for failing to respond to an information request in a Competition Act investigation; and
- The European Commission exercised its own powers in this area for the first time in May 2017, [fining Facebook €110m](#) for providing misleading information during the 2014 Facebook/Whatsapp merger review.

A merger clearance obtained on the basis of incomplete information could also be vulnerable to challenge. In 2014, the Competition Appeal Tribunal quashed the Phase I clearance of the IRI/Aztec merger as the parties had failed to disclose material information to the Office of Fair Trading. The case was reinvestigated and cleared 12 months later.



# CMA clears PayPal/iZettle deal

## UK – MERGER CONTROL

On **12 June 2019**, the UK Competition and Markets Authority ("CMA") unconditionally cleared PayPal's \$2.2bn completed acquisition of iZettle following a Phase 2 merger inquiry (the "Decision"), after previously raising competition concerns relating to the supply of mobile point of sale

("mPOS") devices during its Phase 1 investigation.

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The CMA is increasingly considering



dynamic counterfactuals – according to which the impact of a merger is measured against how the market is likely to develop in the future – when assessing mergers in digital and innovation markets.

- Competition authorities are on the look-out for evidence of "killer acquisitions" of nascent competitors. In cases involving acquisitions of emerging competitors, parties should expect detailed scrutiny of their internal documents and commercial rationales behind the merger.

PayPal and iZettle are providers of technology payments services, including the supply of mPOS services to merchants; typically comprising a card reader that enables merchants to accept offline card payments. Prior to the merger, PayPal and iZettle were two of the UK's largest suppliers of mPOS devices.

## COUNTERFACTUAL ANALYSIS IN DYNAMIC MARKETS

The CMA's found that the payment services industry is a fast-moving and dynamic market. According to the [Decision](#), these types of markets are distinguished by "*rapid growth in a relatively short period of time*" and "*technological and commercial developments that often result in disruption to the current state of competition*".

In light of the pace of change within the payment services industry, the CMA's Decision considered alternative, forward-looking counterfactuals – the competitive landscape against which mergers are assessed. This is unusual as competition authorities typically evaluate mergers against the prevailing conditions of competition. In this respect, the CMA devotes much of its analysis in the Decision to a dynamic assessment of how competitive constraints between providers of mPOS services would likely evolve over time, as well as a static assessment of existing competition.

Although the CMA found that iZettle and PayPal were the largest providers of mPOS services in the UK and close competitors, it concluded that the merging parties would continue to face competition from two key mPOS rivals, Square and SumUp, as well as a material competitive constraint from 'traditional' providers of point of sale devices. Accordingly, the CMA did not identify any competition concerns resulting from the merger in relation to mPOS services.

## THE HUNT FOR "KILLER ACQUISITIONS"

The CMA also considered whether PayPal's acquisition was intended to achieve "*a tactical elimination of a potential significant, nascent competitor*", specifically in relation to the provision on omni-channel services (the provision of integrated payment solutions). The CMA's concern appears to have been driven, at least in part, by the \$2.2 billion acquisition price tag announced by PayPal, only nine days after iZettle's \$1.1 billion pre-IPO valuation. The acquisition, announced on 17 May 2018, also followed iZettle's expansion of its omni-channel services offering with the launch of its e-commerce service in April 2018.

The CMA ultimately identified no competition issues in the provision of omni-channel services, concluding that:

- iZettle's omni-channel services would have only developed at a slow rate; and
- there was sufficient competitive constraint from payment service providers that were actual or potential competitors of PayPal and iZettle.

Whilst no evidence was adduced to support the CMA's original contention that PayPal may have been motivated by the elimination of a future rival, the Decision is an important reminder of the increasing awareness of competition authorities of "killer acquisitions".

## CLOSING REMARKS

The CMA's Decision coincides with a number of important UK and international government developments in recent months, in which innovation and digital markets fall under greater scrutiny by competition regulators (see our publications on the [Furman report](#), the '[Competition Policy for the digital era](#)' report and our [international comparative guide on competitive policy in the digital era](#)). The CMA's Decision is a small, but significant, step towards a system of UK merger control that fosters a more dynamic view towards digital and innovation markets.



# Ofgem turns up the heat: energy firms fined

## UK – ANTITRUST - ANTICOMPETITIVE AGREEMENTS

**Two suppliers, E (Gas and Electricity) Limited and Economy Energy, and a consultancy service, Dyball Associates have been found in breach of Chapter I of the Competition Act 1998. Ofgem considered that the three parties entered into an anticompetitive agreement which prevented the two suppliers actively targeting each other's customers, and which was supported by the exchange of commercially sensitive information. The companies were fined a collective £870,000.**

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Sectoral regulators have similar powers to the CMA to bring enforcement decisions on infringement of the Competition Act 1998. Their industry-specific focus allows for a more vigilant enforcement regime.
- Parties that facilitate anticompetitive conduct can be caught by the enforcement action, to the extent that they contributed to a common objective and were aware that the relevant conduct was to facilitate the infringement.

In September 2016, Ofgem opened an investigation into an alleged infringement of Chapter I of the Competition Act 1998 involving Economy Energy, E (Gas and Electricity) Ltd ("EGEL") and Dyball Associates ("Dyball").

Economy Energy and EGEL were both energy suppliers, catering mainly for pre-payment customers, and Dyball provided software and consultancy services to the UK's energy sector.

Ofgem found that:

- between January and September 2016 Economy Energy and EGEL agreed not to actively target customers already supplied with gas and/or electricity by the other, although each other's existing customers were allowed to switch between the two businesses if they pro-actively sought to do so; and

- Dyball had facilitated this agreement by allowing the companies to share commercially sensitive information (customer lists) through its software and by ensuring that the acquisition of certain of each other's customers was blocked.

Ofgem concluded that the parties involved entered into an agreement and/or a concerted practice to share markets and/or allocate customers between the two energy suppliers in relation to the supply of gas and electricity to domestic customers in Great Britain. The commercially sensitive information shared between the parties involved the customer meter points, which allowed the parties to know whether the customer was already signed up with the other.

Ofgem also found that Dyball:

- was party to the infringement, as it had intended to and did contribute to the common objectives pursued by the two energy suppliers;
- was aware of the actual conduct planned and had allowed Economy Energy and EGEL to share markets and allocate customers by its conduct, and was therefore a facilitator in the infringement.

In imposing fines, Ofgem fined EGEL £650,000, Economy Energy £200,000 and Dyball £20,000. Ofgem has stated that these levels of penalty reflected the seriousness of the infringement, and also that in setting Economy Energy's fine, Ofgem has reflected the fact that Economy Energy had entered administration.

This is the second Competition Act 1998 infringement decision handed down by a sectoral regulator this year using their concurrent competition law powers. [In February 2019](#), the FCA issued its decision against Newton Investment Management Limited, River and Mercantile Asset Management and Hargreave Hale for the sharing of strategic information in the asset management sector.

# Lift Part Suppliers Provide Commitments to CCCS to Facilitate Lift Maintenance in HDB Estates

## SINGAPORE – ANTITRUST - ANTICOMPETITIVE AGREEMENTS

**On 28 May 2019, the Competition and Consumer Commission of Singapore (the "CCCS") concluded its investigation into five lift suppliers, having received voluntary commitments to address concerns that the suppliers had refused third party lift maintenance suppliers access to spare parts.**

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- In Singapore, as in many other competition regimes, although suppliers are generally free to choose with whom to contract, suppliers with market power may be found to breach the competition rules where refusing to provide certain essential inputs harms competition.

## BACKGROUND

In Singapore, town councils are required to carry out regular maintenance of lifts installed in Housing & Development Board ("HDB") estates.<sup>1</sup> They can either:

- (a) appoint the original lift installers of the respective brands installed; or
- (b) call for a tender to invite companies, including third-party lift maintenance contractors, to provide lift maintenance for all the lift brands within the estate.

Following a complaint received on 12 June 2014 alleging restrictive industry practices in the supply of proprietary lift spare parts such as electronic controllers and control boards in HDB estates, the CCCS commenced investigations into five suppliers<sup>2</sup> of these lift spare parts.

<sup>1</sup> Approximately 80% of residents in Singapore live in HDB estates.

<sup>2</sup> The suppliers are E M Services Pte. Ltd., BNF Engineering (S) Pte. Ltd., C&W Services Operations Pte. Ltd., Chevalier Singapore Holdings Pte. Ltd., and Fujitec Singapore Corporation Ltd. The CCCS estimated that these 5 companies installed more than 70% of the lifts in HDB estates in Singapore.

The CCCS was concerned that such practices may have prevented or hindered third-party lift maintenance contractors from effectively competing for contracts to maintain and service lifts of particular brands installed in HDB estates. The CCCS noted that there were potential cost savings in engaging a third-party lift maintenance contractor, and such contractors would require brand-specific spare parts to tender for lift maintenance projects that involve multiple lift brands.

Notwithstanding the general freedom for suppliers to choose with whom to contract, the CCCS can take action against a sole or dominant supplier with substantial market power who seeks to prevent or impede competition by refusing to supply certain products or services that are essential inputs to other businesses, such as lift spare parts.

## VOLUNTARY COMMITMENTS

On 28 May 2019, the CCCS concluded its investigation into the suppliers after receiving voluntary commitments that addressed its competition concerns.

The voluntary commitments provide that the suppliers shall send orders for spare parts to the manufacturer within seven working days of receiving a purchaser's request. The CCCS considered this amount of time reasonable, since purchasers should be expected to bear the cost of maintaining sufficient spare part inventory stock to meet their obligations in servicing the lifts. Further, it would be prudent for town councils to ensure that their appointed lift maintenance contractors maintain sufficient inventories of spare parts to service and maintain the lifts.

The voluntary commitments also provide that the suppliers will undertake to sell lift spare parts (with software if applicable) of the relevant brands to purchasers on a fair, reasonable and non-discriminatory basis, subject to certain terms and conditions.

Following public consultations on the voluntary commitments, the CCCS was of the view that the

voluntary commitments fully address the competition concerns that third-party lift maintenance contractors may be prevented from effectively competing for contracts through refusal to supply essential spare parts of lift brands. Following the acceptance of the voluntary

commitments, the CCCS concluded its investigation.



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