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Ashurst competition law newsletter – September 2019

From the Editors

The September issue of Ashurst's competition law newsletter features a round-up of a number of key recent developments. This edition covers a number of key CJEU rulings, how Germany's landmark Facebook data collection ban has been blocked by a German court, another online resale price maintenance infringement in the UK and a cluster of UK merger control developments.

This edition also includes a feature article on the proposals to toughen UK consumer protection law powers and what they mean for businesses, as well as consumer protection developments in Singapore..



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Starbucks win and Fiat lose: first judgments on legality of tax rulings

EU – STATE AID

On 24 September 2019, the European General Court ("GC") handed down its judgments in the first two individual tax rulings cases involving transfer pricing within multinationals. It overturned the European Commission's ("Commission") decision ordering the Netherlands to recover illegal State aid from Starbucks but rejected the appeal against the decision ordering Luxembourg to obtain reimbursement of unpaid taxes from Fiat.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The GC's judgements, the first in a series of pending appeals, found that the Commission may use an arm's length principle as a 'tool' to assess applications of transfer pricing methods endorsed by individual tax rulings. In doing so, the Commission can refer to OECD guidelines which, according to the GC, reflect 'international consensus'.
- The GC, however, acknowledges the Member States' margin of appreciation as regards the application of transfer pricing methods. It says in this respect that to establish an 'advantage', the Commission must prove that national tax authorities made errors going beyond the 'inaccuracies inherent' to the application of transfer pricing methods.

BACKGROUND

In October 2015, the Commission [found](#) that a 2012 tax ruling issued by Luxembourg granted a selective advantage to Fiat Finance and Trade ("FFT"), a Luxembourg-based holding which was also providing financial services to other companies of the Fiat group. It concluded that, as regards this specific financing activity, the ruling endorsed a transfer pricing method that was inappropriate to establish taxable profits reflecting market conditions. Its criticisms revolved essentially around the capital base used

to that effect, which it regarded as being too low. For these intragroup financing activities, the transfer price was determined, not on the basis of the whole capital of FFT which mainly consisted in shareholdings in the group and which was subject to a different tax regime, but on the basis of required regulatory capital for banks. However, the Commission considered that the entire capital of the company should have been taken into account for the purposes of establishing the profits of the financing activity under the transactional net margin method of transfer pricing ("TNMM").

On the same day, the Commission [found](#) that a 2008 tax ruling issued by the Netherlands selectively favoured a Starbucks coffee roasting company, Starbucks Manufacturing. The decision claimed that the tax ruling artificially lowered taxes paid by this company by endorsing the payment of:

- a substantial royalty to a Starbucks' UK-based company for coffee roasting know-how; and
- an inflated price for green coffee beans to a Starbucks company based in Switzerland.

As a result, the Luxembourg and Dutch government were ordered to recover between €20 million and €30 million from Fiat and Starbucks respectively.¹ Both Member States and tax payers appealed the decisions before the GC.

ENDORSEMENT OF THE COMMISSION'S APPROACH

The GC's judgments find that the Commission is competent to verify, under State aid rules, whether an individual tax ruling granted an advantage to the concerned tax payer as compared to the 'normal' taxation system.

In this respect, the judges found that the Commission may use an '*arms-length principle*', even if undefined in national law, as a '*tool*' to

¹ These cases have been followed by three findings of aid in the [Apple](#), [Amazon](#) and [Engie](#) cases. Annulment actions against all these decisions are pending before the GC. Formal investigations are still ongoing in the [Ikea](#), [Nike](#) and [Huhtamaki](#) cases.

screen whether a given tax measure is in line with market conditions. To this end, the Court accepts that the Commission can apply the OECD Guidelines which, in the Court's words, reflect the '*international consensus*' and thus have '*real practical significance in the interpretation of issues relating to transfer pricing*'. The implications of this is that the Commission may now verify, in light of OECD guidelines and other principles found appropriate by the Commission, whether Member States tax rulings are in line with the '*arms-length principle*' as understood by the Commission. Although the judgments are not entirely clear in this regard, they seem to take the view that the Commission may do so at least if national rules provide that integrated companies are to be taxed on the same terms as stand-alone companies.



The GC also ruled in *Fiat* that an individual tax ruling, involving the application of a transfer pricing method that deviates from the '*arm's length principle*' (as defined by the Commission), is '*presumed*' to be selective. The Commission no longer has to establish that such rulings '*derogate*' from the reference framework (i.e. national law) but only has to prove the existence of an '*advantage*'.

This said, the judgments do draw some limits to the Commission's action. They acknowledge that Member States have a margin of appreciation in the approval of transfer pricing, given the '*approximate nature*' of the arms-length principle. Therefore, the Commission can only make a finding of advantage where the tax authorities made errors going beyond the '*inaccuracies inherent in the application of a method designed to obtain a reliable approximation of a market-based outcome*'.

APPLICATION OF THE 'ARM'S LENGTH PRINCIPLE' IN THE FIAT AND STARBUCKS CASES

In the *Fiat* judgment, the GC, considering that "*capital is fungible*", upheld the Commission's findings that an incorrect application of the TNMM had been approved by the tax ruling as the latter based itself on the required regulatory capital for banks and not the whole capital of FFT. It would have thus lowered FFT's intra-group remuneration for services rendered to other companies of the group. This, in turn, would have lowered FFT's tax burden, thereby resulting in an '*advantage*' for the latter.

In contrast, in the *Starbucks* judgment, the GC considered that the Commission had failed to prove the existence of an '*advantage*'. In particular, the Court found that the '*mere non-compliance with methodological requirements*' does not necessarily lead to a reduction of the tax burden. This entails that the Commission cannot simply criticise the choice of a given transfer pricing method but has to demonstrate why this method results in an incorrect transfer price. Moreover, this judgment finds that the Commission cannot base its analysis on information that was not available or reasonably foreseeable when the tax ruling was issued.

CONCLUSION

These judgments, which may still be appealed before the Court of Justice, endorse an extension of the Commission's approach as regards the '*arms-length principle*'. However, they do not prejudice the outcome of pending appeals in parallel cases, notably where transfer pricing methods are not at issue.

ECJ quashes GC ruling awarding damages to Guardian Europe

EU – ANTITRUST – CARTELS, PROCEDURE

On [5 September 2019](#), the European Court of Justice ("ECJ") quashed the General Court ("GC") ruling awarding glass maker Guardian Europe ("Guardian") damages for the failure to adjudicate, within a reasonable time, its challenge to a glass price-fixing cartel decision.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The damages claim was brought in 2015, following the European Commission ("Commission") decision to fine four glass-product makers a total of €487 million for coordinating price increases for deliveries of flat glass. Guardian's fine was initially set at €148 million and subsequently reduced to €103.6 million on the basis that the Commission had discriminated against the company in calculating the fines.
- In 2017, the GC agreed that it had failed to adjudicate the case in reasonable time and awarded the company €0.65 million to compensate for the material damages resulting from the payment of additional bank guarantee costs.
- The ECJ quashed the GC ruling awarding damages on the basis that the loss resulting from the payment of additional guarantee costs did not result from the infringement of the obligation to adjudicate within a reasonable time in [Case T-82/08](#), but from Guardian's own choice to maintain the bank guarantee according to its financial interest.
- Where a fine is imposed on an alleged cartel, the latter has the choice between paying the fine immediately or providing a bank guarantee. The ECJ reaffirmed that in cases of unreasonable delay in appeal proceedings against a cartel fine, where the fine is annulled, the EU will not be responsible for additional expenses relating to a bank guarantee provided by the claimant.

BACKGROUND

In [November 2007](#), the Commission fined Asahi Glass, Guardian, Pilkington and Saint-Gobain a total of €487 million for coordinating price increases for deliveries of flat glass. Guardian challenged the decision before the GC. In the meantime, Guardian chose not to pay the fine but rather to lodge a bank guarantee for the amount.

By judgment delivered in [2012](#), the GC upheld the fine imposed on Guardian. On appeal before the ECJ, the fine was reduced by 30%, on the grounds of breach of the principle of equal treatment.

DAMAGES CLAIM

In November 2015, Guardian brought a damages claim based on alleged infringements, by the GC, of the principle of equal treatment and of the obligation to adjudicate its initial challenge to the EU fine within a reasonable time. According to Guardian, that delay caused:

- damage to its reputation;
- material damages resulting from the payment of additional bank guarantee fees; and
- loss of profits.

In [June 2017](#), the GC held that the appeal had not been adjudicated within a reasonable time and that there was a causal link between that delay and the fact that Guardian paid excess bank guarantee fees. The GC awarded Guardian €0.65 million in compensation for the material damages resulting from the payment of additional fees. Both Guardian Europe and the Commission appealed the GC ruling. The other grounds were rejected by the GC.

On [5 September 2019](#), the ECJ quashed the GC ruling, finding that the causal link between the delay in proceedings and the damage sustained by Guardian was not established. Thus, the ECJ considered that the alleged damage was the result of Guardian's own decision to provide a bank guarantee instead of paying the fine immediately. At the latest by 12 February 2010 Guardian should have realised there was a delay

in the proceedings and was free at that moment to pay the fine, thus avoiding any extra bank guarantee fees.

COMMENT

The ECJ's judgment confirms that, where an undertaking chooses to provide a bank guarantee, it must bear the *negative financial consequences of any delay in appeal proceedings*.

The judgment must be read in light of parallel case law relating to situations where an undertaking chooses to pay the fine upfront (rather than provide a bank guarantee). Where the fine is paid upfront and then subsequently annulled, the Commission is obliged to pay back the principal with interest. So any delay in appeal proceedings should lead to higher interest payments to the undertaking, effectively to the detriment of the Commission. However, in recent years the Commission has been refusing to pay

any (or very little) interest when it reimburses fines, on the grounds that current interest rates are low or even negative. That would again mean that the undertaking must effectively bear the negative consequences of any delay in appeal proceedings.

The Commission's approach was successfully challenged before the GC ([Case T-201/17, Printeos and Others v Commission](#)) and is now on appeal before the ECJ ([Case C-301/19 P, Commission v Printeos](#)). At least one other appeal is also pending ([Case T-610/19, Deutsche Telekom v Commission](#)). Read together, the Guardian and Printeos lines of case law are key for any undertaking facing a fine and having to decide between paying upfront and providing a bank guarantee.



HSBC's Euribor cartel fine overturned

EU – ANTITRUST – ANTICOMPETITIVE AGREEMENTS

On [24 September 2019](#), the General Court ("GC") annulled a €33.6 million fine imposed on HSBC by the European Commission ("Commission") for its involvement in the Euro Interest Rate Derivatives ("EIRDs") cartel.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Commission must provide sufficient reasoning for its decisions, including on its calculation of the fine.

- Discussions between competitors about factors related to pricing (in this case, mid-point prices) will be classified as "by object" restrictions.
- Discussions that do not have direct relevance to pricing (in this case, trading positions) are less likely to reduce or remove uncertainty on the market - the Commission is therefore required to prove their anti-competitive effects.

Barclays, Deutsche Bank, Société Générale and RBS settled with the Commission in December 2013 in return for €1.71 billion in fines. The

Commission proceeded with its investigation against HSBC, Crédit Agricole and JP Morgan and imposed fines totalling a further €485 million in December 2016. HSBC appealed the infringement decision and fine imposed.

The GC's judgment considers the Commission's obligation to state reasons for its decisions. The GC held that:

- as the Commission decided to apply the methodology in its 2006 Fining Guidelines (in which 'value of sales' play a central role) even though it had noted that EIRDs do not generate sales in the usual sense, it was essential that the statement of reasons should enable HSBC to verify the proxy chosen, in order to challenge its validity and for the GC to review its legality. The decision did not sufficiently explain the Commission's reasons, which led the GC to annul the fine;
- whilst the Commission had shown that HSBC was aware that other banks took part in the manipulation that HSBC itself was involved in, it had not shown that HSBC was aware of the wider "overall plan" between the other banks such that it could not be held liable for all forms of offending conduct as part of a single and continuous infringement; and
- the Commission was not entitled to find that the object of certain discussions about trading positions was to restrict competition, although discussions about mid-point prices were infringements "by object".

Although HSBC was successful in some of its arguments, the GC ultimately upheld the infringement finding. The Commission might be expected to re-impose the fine on HSBC, this time supported by more robust reasoning.



Private damages actions update - indirect purchasers' rights

EU – PRIVATE DAMAGES ACTIONS

In a judgment delivered last week, the Court of Justice ("ECJ") held that indirect purchasers could sue cartelists in the courts of the place where they suffered damage as a result of increased prices.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Actions for damages against cartelists can be brought in the courts of place where the harm occurred.

- That includes the markets on which prices were distorted and the claimant suffered damage.
- That is the case even if the claimant is an indirect purchaser.

On 29 July 2019, the ECJ handed down its judgment in case [C-451/18](#), *Tibor-Trans v. DAF*, a preliminary reference from Hungary on jurisdiction in cartel cases. The main case was a follow on damages claim in the [Trucks cartel](#) saga. The action was brought by freight company Tibor-Trans ("TT") against DAF. TT had purchased a

number of DAF trucks from a dealership in Hungary (i.e. not directly from DAF). The question was whether that was enough to give the Hungarian courts jurisdiction over the claim.



National courts of a Member State can have jurisdiction over a damages claim on the basis that the "harm occurred" there ([Regulation 1215/2012](#), Article 7(2)). That includes only the place of "initial damage" and not of "subsequent adverse effects" or "financial damage following initial damage".

In cartel cases that raises questions about what the nature of the harm is and what adverse effects of cartel price rises can be considered sufficiently direct to found jurisdiction.

In this case, the twist was that the claimant had purchased the trucks indirectly. Could any damage caused to him nonetheless be considered direct?

In its judgment, the ECJ held that it could. The damage resulted "essentially from the additional costs incurred because of artificially high prices" and so constituted an "immediate consequence" of the cartel and "direct damage". The ECJ went on to confirm that the cartel extended to the whole EEA and that, for the purposes of jurisdiction, the place where the harm occurred was "the place where the market prices were distorted and in which the victim claims to them suffered damage" even if the claimant was an indirect purchaser.

Over the past years, the ECJ has in a series of cases extended further and further the scope of the notion of the "place where the harmful event occurred" for the purposes of damages claims in competition cases (C-352/13 [CDC](#); c-27/17 [fly LAL](#)). This judgment is a new high water mark, which effectively allows victims of a cartel to sue in their Member State of domicile, even if they are indirect purchasers, as long as they fall within the cartel's geographic scope.

Belgian Competition Authority publishes 2018 annual report

BELGIUM – UPDATE

On 17 June 2019, the Belgian Competition Authority ("BCA") published its 2018 annual report, highlighting its main areas of activity and future enforcement priorities. The report shows a clear increase in the BCA's merger control activity, which in recent years has tended to take up most of the BCA's limited resources. The BCA also continues to handle a number of antitrust investigations and requests for interim measures.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The BCA's 2018 annual report shows an increase in the authority's merger control activity, including a high proportion of non-

simplified mergers.

- The BCA continues to handle a number of antitrust investigations as well as requests for interim measures.
- The report identifies the following sectors as enforcement priorities in 2019: telecoms, retail distribution, professional services, public contracts, pharmaceuticals and logistics.

MERGER CONTROL

The BCA's 2018 annual report (available in [French](#) and [Dutch](#)) shows a clear increase in the BCA's merger control activity:

- The BCA received 36 merger notifications in 2018, a 20% increase compared to 2017.

- The BCA issued as many clearance decisions. 28 decisions were taken using the simplified procedure, and no less than nine decisions in first phase investigations. Only two decisions were subject to conditions, i.e. *Kinepolis* and *Volvo/Kant*.

The *Kinepolis* case concerns the lifting of some of the conditions imposed in 1997 for the approval of the merger that created the *Kinepolis* cinema group. Following the annulment of an earlier decision for lack of motivation, the BCA adopted a new decision in 2018 that was again successfully appealed by competing cinema chains. The BCA has since then adopted a new decision on 25 March 2019, which is currently again under appeal.

The *Volvo/Kant* merger, on the other hand, concerned the acquisition by Volvo of a number of garages servicing Volvo-branded trucks and busses. The BCA approved the acquisition subject to conditions, including a commitment by Volvo to appoint a new repairer in a specific area to ensure that customers in that area could still choose between a sufficient number of repairers.

ANTITRUST

The BCA did not adopt any antitrust decisions imposing a fine in 2018, although the Prosecution Service submitted one draft decision to the Competition College in the case involving the Belgian pharmacists association, which has been condemned in the meantime for seeking to hinder the development of the innovative (para)pharmacy chain MediCare-Market.

Two antitrust investigations were closed, one on the basis of commitments offered by the investigated party (FEI) and the other on the

basis of a lack of evidence and resources (Floragro).

The FEI case concerned the rules of the international horse riding association on the authorisation of show jumping events. The BCA had reached the preliminary view that the FEI rules infringed EU and Belgian competition law on account of the lack of transparency of the authorisation process, the capacity given to competing event organisers to object to the organisation of new events, and the severe sanctions imposed on athletes participating in unauthorised events. To address the BCA's concerns, the FEI offered to amend its rules and establish a more objective, transparent and non-discriminatory authorisation process. The BCA closed its investigation on this basis. The BCA also decided on four requests for interim measures. Two of those requests related to the FEI investigation but were, ultimately, rejected because there was no sufficient *prima facie* evidence supporting the alleged infringements. In TECO/ABB, however, which concerned ABB's practice of selling products over which it had acquired a manufacturing monopoly at different prices to different parties, the BCA reached the preliminary view that this practice may constitute unlawful price discrimination. It therefore granted interim measures to the claimant. 2019 enforcement priorities

The report also identifies the BCA's enforcement priorities in 2019. In line with last year, the BCA intends to exert particular scrutiny in the following sectors: telecoms, retail distribution including relationships with suppliers, professional services, public contracts, pharmaceuticals and logistics.



Paris Court of Appeal reduces fines in flour cartel

FRANCE – ANTITRUST – CARTELS

By a [decision handed down on 4 July 2019](#), the Paris Court of Appeal has added a new chapter to the judicial saga of the flour cartels, which were sanctioned by the French Competition Authority ("FCA") in [2012](#) (see [here](#) for the English version of the FCA press release). The practices investigated by the FCA consisted of the conclusion of a non-aggression pact between French and German millers, leading to market sharing, as well as agreements between French millers to fix prices, limit production and share customers. Although the Court of Appeal largely confirms the FCA's sanction decision, six of the seventeen companies involved secured a substantial reduction in the fine originally imposed.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- To determine how long an undertaking has participated to a cartel, the Court of Appeal bases itself on the perception that other cartelists had of its participation, not on the requirement for a "public distancing". This perception was reflected, in this case, in the fact that an undertaking was no longer invited to the meetings of the cartel.
- An infringement cannot be said to be particularly harmful and, therefore, a "by object" restriction, without taking into account the economic and legal context which may worsen or mitigate effects on the market.

There are three key areas of interest in the judgment of the Court of Appeal.

DURATION

First, the Court disagreed with the FCA's reasoning as to the duration of the participation of certain undertakings in one aspect of the cartel, the non-aggression pact.

The pact had been put in place during 12 meetings that took place from May 2002 to September 2004. The Court noted that two of the undertakings stopped participating in these

meetings after having attended only one meeting. Whilst there was no evidence that they had publicly distanced themselves from the practices, they had at some point no longer been invited to attend the subsequent meetings.

The Court dismissed the FCA's reasoning, which considered that in these circumstances the undertakings were liable for the entire duration of the cartel. The Court considered instead that the two undertakings were no longer participants in the cartel from the date they stopped receiving invitations to participate in the next meeting (i.e. the date of the invitation sent to all participants except them).

From this date, according to the Court, the other cartelists necessarily considered that these undertakings were no longer part of the cartel. The Court concluded with regard to VK-Mühlen, that the absence of an invitation "*demonstrated with sufficient clarity that it distanced itself from the cartel and that its behavior was interpreted as such by the other participants*".

Thus, the Court does not require undertakings to adduce evidence of actual public distancing from the behaviour to conclude their participation has ended. This could instead be implied by the absence of invitation.

LEGAL AND ECONOMIC CONTEXT

Second, the Court of Appeal sets out that, in order to assess the degree of harmfulness of the infringement and its "by object" nature, it is necessary to take into account the legal and economic context which may aggravate or mitigate its impact on the market.

The FCA's decision did not take into account the existence of a legislation fixing the maximum and minimum prices applicable to flours, which was in force until 1978. This legislation reduced competition on price and thereby impacted the harmful nature of the infringement during this period. However, this legislation did not alter the effect of the market sharing practices and sensitive information exchanges.

ABILITY TO PAY

Finally, the Court of Appeal acknowledged the financial difficulties encountered by the petitioners and significantly reduced certain fines in the light of their ability to pay.

Whilst this decision continues the judicial saga and provides interesting analysis, it is not yet its last chapter, as the FCA has already lodged an appeal before the French Supreme Court.

Amazon fined a record amount for unfair commercial terms

FRANCE – RESTRICTIVE PRACTICES

Following an action brought by the French Ministry of Economic Affairs and Finance before the Commercial Court of Paris (the "Court"), Amazon has been given a record fine of €4 million for imposing unfair commercial terms on third-party sellers. In addition, with a view to balancing the trade relationship with third-party sellers, Amazon has been ordered to amend several clauses of the general terms of use of the "marketplace" within six months.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Jurisdiction clauses are not effective to prevent the application of Article L. 442-6 of the French Commercial Code (now Article L. 442-1) in case of an action brought by the Minister for Economic Affairs and Finance, if the damage occurs in France.
- According to the Court, in the presence of a contract which has not been negotiated, no term is likely to correspond to a request by the seller to rebalance the contract, and the advantages the seller may derive from the contract are unable to offset the unfair terms.
- The prohibition of imbalance between the rights and obligations of the parties aims to protect the "weak" partner and therefore cannot be compensated by the benefits provided to consumers.

The [judgment of 2 September 2019](#) is not based on antitrust law, but on the violation of Article L. 442-6-I of the French commercial code ("FCC"), which prohibits, among other practices, "*to subject or attempt to subject a trading partner to obligations that create a significant imbalance in the rights and obligations of the parties*".

Despite the existence of a jurisdiction clause in favour of Luxembourg law in Amazon's marketplace contracts, the Court found the contracts subject to this Article of the FCC. It stated that the action of the Minister, as a guarantor of economic public order, is a tort law action not constrained by jurisdiction clauses.

The Court therefore followed the jurisdictional rules set out in the European Regulation "*Rome II*" on the law applicable to non-contractual obligations, which indicates that the law of the country in which the damage occurred can be applied. It concluded that the dispute should be heard under French law, considering that an important number of sellers using Amazon's marketplace were located in France, the performance of the service was achieved in France and, more importantly, the impact on competition was felt in France, by French companies competing with *Amazon.fr*.



The Court accepted some of Amazon's arguments in support of the balanced nature of the contract. . For example, the Court accepted that standard form contracts (and hence the absence of negotiation) are inherent to the functioning of online marketplaces. It also accepted that sellers benefit from excellent services provided by Amazon, as do end consumers.

However, the Court found that the majority of terms in question are not justified by the functioning of the Amazon service, nor were they necessary to provide the high level of service. It also considered that Amazon is the main beneficiary of these services, as they increase its popularity, and that the benefits for consumers are in any event not relevant in the analysis of the relevant provisions.

This judgment followed an inquiry launched in 2016 by the DGCCRF ("*Direction générale de la*

concurrence, de la consommation et de la répression des fraudes") into online marketplaces, and illustrates the attention paid to the growing dependence of sellers on online marketplaces. It must be noted that, following an action by the Ministry, previous judgements have already been reached against online travel agencies for similar practices.

Round 2 to Facebook: Landmark German data collection ban blocked by court

GERMANY – ANTITRUST – ABUSE OF DOMINANCE

On 26 August 2019, the Higher Regional Court in Düsseldorf suspended the German Federal Cartel Office's ("FCO" or Bundeskartellamt) decision to prevent Facebook from combining user data from various sources such as Facebook, Instagram, WhatsApp and unrelated sites that use Facebook analytics and software. In its 37-page interim decision the Court raises, in unusually unambiguous terms, serious doubts about the legality of the FCO's decision. This interim decision suggests that the Court is likely to overturn the FCO's restrictions in final judgment on the company's appeal.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This case is one of the most important global precedents regarding the application of competition law in the digital economy.
- It is the first case in which an abuse of dominance is based on an infringement of data protection law.
- The Court confirmed, in clear terms, that an infringement of data protection law (or any other consumer protection law) should not automatically violate competition law simply because it is committed by a dominant company. Rather, a link to competition and a connection between the dominant company's market power and the allegedly infringing conduct needs to be evidenced.

In February this year, having liaised with EU privacy authorities during a three year investigation into Facebook's data collection activities, the FCO objected in particular to how Facebook pools data from third-party apps, including its own WhatsApp and Instagram apps, with Facebook data and how it tracks people online through Facebook's 'like' or 'share' buttons. It held that forcing users to give up their data in this way, without providing customers with the option of opting out, was an abuse of dominance. The FCO subsequently ordered that Facebook be significantly restricted in terms of how it can allocate data between its services, which has been perceived to constitute a structural separation of Facebook's businesses at the data level. For further details, please see also our [Ashurst Competition Newsletter contribution of March 2019](#) on the landmark decision.

It is the first case in which an abuse of dominance decision has been based on an infringement of data protection law and the FCO's approach raised significant international attention. Facebook contested the ruling, taking it to the Court in Düsseldorf. The FCO has not enforced its February decision, because it was waiting for the Court's ruling.

The Court's view is that even if the FCO had shown that Facebook's data processing had violated data-protection rules, that did not automatically constitute an abuse of dominance. The Court has confirmed that a breach of competition law requires harm to competition, but that no such impact was caused by Facebook's conduct. The FCO had tried to establish such a link by alleging that:

- through its dominance, Facebook forced its users to agree to a practically unrestricted collection and assignment of non-Facebook data to their Facebook user account; and
- users are not aware of the scope of Facebook's collection and combination of data from external sources.

The Court rejected the FCO's argument that consumers were harmed by the loss of control over their data by noting that any data collection and processing takes place based on the users' consent. The Court said the fact that 80% of users do not read Facebook's T&Cs when signing up for the service does not constitute abusive behaviour. This line of argument has some merit in this case: if users had opted not to review Facebook's T&Cs, they could not have played a significant part in the users' decision to sign up to the platform.

The Court also did not agree that Facebook's data collection constituted an exploitative abuse of its dominant position to the detriment of consumers because:

- the FCO had failed to investigate which T&Cs would have developed in more competitive market structures; and
- the user data can always be duplicated. Since users can continue to generate and make the same data available to other companies (including competitors of Facebook), providing their data to Facebook did not disadvantage users, nor restrict competition.

From the Court's reasoning it appears that the FCO may have undervalued the positive indirect network effects between the advertising side and the private user side of the platform by not considering either the benefits the data collected had in relation to improving Facebook's targeted advertising functionality, nor the benefit of this advertising to private users.

The Court confirmed, in clear terms, that an infringement of data protection law (or any other consumer protection law) should not automatically violate competition law simply because it is committed by a dominant company. Rather, a link to competition and a connection between the dominant company's market power and the allegedly infringing conduct needs to be evidenced.



The Court's decision presents a significant win for Facebook and a serious blow to competition authorities who seek to use data protection law as a means of enforcing competition law. The FCO's president Andreas Mundt reacted to the Court's ruling by stating: "Data is market power in the digital economy. And that was what we were picking up on with our case. Some basic legal questions need to be clarified. That is why we will be lodging an appeal with the Federal Supreme Court."

While it can be expected that a final decision of the Federal Supreme Court will take several additional years, Germany is awaiting a new amendment of its Competition Act (Gesetz gegen Wettbewerbsbeschränkungen, "GWB") which was drafted by an expert commission ('Competition Law 4.0') and is aimed at assessing more effectively digital competition in sectors with large data businesses. The amendment is expected to cover new ways defining markets (taking into account conglomerate effects and the particularities of digital ecosystems) and examples of what might constitute an abusive conduct in digital markets. It is expected to have a significant impact on the legal framework on which authorities and courts will base their decisions in similar cases in the future.

See our "[Competition policy in the digital era: a comparative guide](#)" for further details on how other competition regulators around the world are approaching the digital economy.

CCCS cracks down on misleading advertisements – second consumer protection enforcement case

SINGAPORE – CONSUMER PROTECTION LAW

On 16 August 2019, the Competition and Consumer Commission of Singapore ("CCCS") found that Charcoal Thai 1 restaurant breached the Consumer Protection (Fair Trading) Act ("CPFTA") by publishing misleading representations with respect to discount periods applying to certain discounted meals on its menu. Charcoal Thai 1 has since agreed to cease this conduct which amounted to an "unfair practice" under the CPFTA. This is the second enforcement case that the CCCS has undertaken since taking on responsibility for enforcing consumer protection law in Singapore in April 2018.²

FACTUAL BACKGROUND

The CCCS commenced investigating Charcoal Thai 1 in 2018, when it found that discounts included in promotional materials published on Charcoal Thai 1's website, social media page, in-store posters and menu did not identify an end date (i.e., they did not state how long the discounts would be available). Those promotional materials also stated that the discounts for meals such as lunch sets and steamboat items were either available for a "limited period only" or would be

"Ending Soon! 50% Discount", when in fact the discounts that had been offered in February 2016 had continued to be available for at least another two years.

LEGISLATIVE BACKGROUND

The CPFTA prohibits unfair trade practices. Pursuant to the CPFTA, it is an unfair practice to represent that goods or services are available at a discounted price for a stated period of time, if the supplier knows or ought to know that the goods or services will continue to be available for a substantially longer period.

On 1 April 2018, the CCCS took over the role of administrator and enforcer of the CPFTA from SPRING Singapore. Under the CPFTA, the Consumer Association of Singapore ("CASE") and the Singapore Tourism Board ("STB") remain the first points of contact for local consumers and tourists respectively to handle complaints. The CCCS, however, has the power to gather evidence against companies that it considers to be persistent or repeat wrong-doers, and to seek injunctive relief against these companies from the courts.

CCCS' VIEW

The CCCS was of the view that:

- The relevant representations may have misled consumers into believing that there was a price benefit arising from the promotional pricing, and a degree of scarcity in relation to such promotional prices; and
- It also provided Charcoal Thai 1 an unfair advantage over businesses which comply with the CPFTA. Businesses which do not publish misleading discount advertisements assist consumers to make accurate price comparisons by offering genuine discounts over a stated period of time.

² The first enforcement case was also an unfair practices case against the SG Vehicles group of companies (SG Vehicles) and its director, Ms Tan Whye Peck. The unfair practices involved, inter alia, misrepresentations over the terms and conditions of motor vehicle sale agreements. Consumers reported being required, amongst other things, to make additional payments due to changes in circumstances beyond their control. Initially, the Consumers Association of Singapore (CASE) requested that SG Vehicles sign a Voluntary Compliance Agreement to cease engaging in unfair trade practices but SG Vehicles declined to do so. The CCCS commenced an investigation into this matter. SG Vehicles did not dispute the CCCS investigation of the complaints against SG Vehicles which revealed evidence of unfair trade practices. By the parties' mutual agreement, a court order was issued prohibiting SG Vehicles (including its directors) from, inter alia: (a) engaging in unfair practices; (b) doing anything if as a result, a consumer might reasonably be deceived or misled into believe that the purchase price is fixed; (c) making any false claims to a consumer as to any guaranteed delivery date of a motor vehicle; and (d) taking advantage of a consumer.

Voluntary remedies

Charcoal Thai 1 has since agreed to:

- Cease the unfair practice and not engage in any other unfair practices under the CPFTA; and
- In particular, it has undertaken not to make any representations with respect to discounts or promotions in its promotional materials or any other forms of publicity without specifying the end date for those discounts or promotions.

Given the above, the CCCS has closed its investigation in relation to Charcoal Thai 1, although it will continue to monitor Charcoal Thai 1's conduct to ensure it complies with the undertaking as well as whether it breaches other unfair practices.

Key messages for businesses

Businesses operating in Singapore should ensure that discounts or promotions offered are genuine and that promotional/marketing materials assist consumers to make accurate price comparisons.

We expect the CCCS to continue to actively investigate alleged breaches of consumer protection law, particularly in industries where consumer complaints are common. These industries include: the motoring industry, the beauty industry, e-commerce and food and beverage.

Casio fined for retail price maintenance

UK – ANTITRUST – ANTICOMPETITIVE AGREEMENTS

On 1 August 2019, the UK Competition and Markets Authority ("CMA") announced that it had fined Casio Electronics Co. Ltd ("Casio") £3.7 million for breaching Article 101 of the TFEU and Chapter I of the Competition Act 1998 by restricting retailer freedom to discount digital pianos and keyboards supplied by Casio online. The fine is a UK record fine for a party found guilty of retail price maintenance ("RPM").

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Whereas RPM cases were relatively scarce a few years ago, this is one of a number of recent infringement cases in this area, demonstrating the CMA's focus on this type of behaviour. The CMA has also issued a selection of simple compliance guidance materials in this regard (see for example its compliance [video](#) and [guidance notes](#))
- This is another example of an infringement decision which concerned the use of software to monitor prices – a recent focus of the UK competition regulator, as well as other many other competition regulators around the world.

In April 2019, the CMA sent a Statement of Objections to Casio and its parent company Casio

Computer Co. Ltd alleging breaches of competition law in relation to restricting retailer freedom to discount digital pianos and digital keyboards supplied by Casio online. Casio supplied digital pianos and keyboards to UK retailers and implemented a policy designed to restrict the retailers' freedom to set their own prices online between 2013 and 2018. The restriction required them to sell at or above a minimum price, thereby stopping them from offering price discounts.



The CMA's provisional findings mentioned how the use of software had made it easier for suppliers and retailers to monitor online prices and therefore find out about lower prices quickly and pressurise retailers to follow their minimum pricing policy. Such software is likely to also reduce incentives for retailers to reduce their prices, with retailers fearing that they will be

caught quickly should they go below the agreed upon minimum price.

The CMA's fine is payable by Casio's parent company, Casio Computer Co. Ltd, as they are jointly and severally liable for the fine. The fine also includes a 20% discount for settlement.

Since 2016, there have been numerous other fines for RPM online, including in [light](#) and [bathroom](#) fittings. The European Commission has also imposed fines on companies for RPM, most recently on [Asus](#), [Denon & Marantz](#), [Philips](#) and [Pioneer](#).

This is also another example of a CMA infringement decision which concerned the use of software to monitor prices - a recent focus of the UK competition regulator, as well as other many other competition regulators around the world. In [2016](#), the CMA fined Trod for using automated re-pricing software to align the prices of its posters and frames sold online through Amazon with those of a competitor.

Rentokil fails to come clean – penalty for inadequate responses to information requests

UK – MERGER CONTROL, PROCEDURE

Rentokil Initial plc ("Rentokil") has been fined £27,000 for failing to comply with a UK Competition and Markets Authority ("CMA") information request imposed on the company in relation to a Phase 1 merger review into its acquisition of MPCL Limited (formerly Mitie Pest Control Limited) ("MPCL").

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The CMA has become increasingly more strict in enforcing procedural requirements as part of its merger and antitrust investigations.
- Parties must ensure that they response to CMA information requests appropriately the first time around. Responding to subsequent notices with documents that are responsive to previous questions will highlight to regulators that you have been non-compliant.
- CMA will take into account the offending parties' behaviour, actions of senior management and their financial resources in coming to an appropriate penalty amount.
- The CMA may consider particular aspects of the transaction as key to their assessment. Parties that avoid providing answers or otherwise frustrate the CMA's may be

subject to more serious penalties.

On [30 September 2018](#), Rentokil acquired MPCL. On 16 October 2018, the CMA issued a notice under section 109 of the Enterprise Act 2002, requiring certain information from Rentokil on the integration steps relating to the merger and details of an agreement to provide of pest control services to certain MPCL clients entered into by the parties (the Preferred Supplier Agreement, "PSA"). The CMA was not satisfied with the response to this notice and stopped the clock (regarding its review period to decide whether to launch a more detailed Phase 2 assessment) on 25 October 2018.

On 30 October 2018, the CMA issued a further notice (with a deadline of 7 November 2018), asking questions in relation to the rationale behind the merger, the overlap between the parties and details of the negotiations. On 5 November 2018, Rentokil informed the CMA that it would be unable to meet that deadline and requested an extension, which was rejected by the CMA. The CMA followed this with a number of additional notices seeking further information on the merger, in particular the link between the share purchase agreement and the PSA.

[The CMA decided to fine Rentokil](#) for failing to comply with the section 109 notices. In particular it noted that Rentokil had provided documents in response to the second and third notices which should have been provided in response to earlier notices. In coming to the decision to sanction Rentokil, the CMA found that there was no

reasonable excuse for failing to comply with the notices. Although Rentokil had engaged with the CMA, the errors that arose due to Rentokil's searches were negligent and not caused by an event outside of Rentokil's control, or the result of a significant and genuinely unforeseeable or unusual event. The CMA also stated that it is ultimately the parties' responsibility to ensure that it provides all relevant material in response to a document request.

Furthermore, the CMA concluded that the penalty was appropriate as the failure to comply with the notices had had an adverse impact on their Phase 1 inquiry, the failure was significant and the penalty had to be an adequate deterrent. The penalty (£27,000) is at the upper limit of the fines that the CMA can impose (it has the power to set a fine of up to £30,000) and the CMA listed

the a number of aggravating factors in setting a high penalty, such as:

- failures to comply with the notices disrupted the Phase 1 inquiry and increased public expense;
- Rentokil had, in particular, failed to respond to questions relating to the PSA, which it considered fundamental to the CMA's assessment; and
- Rentokil's senior management ought to have been aware that the responses omitted highly relevant documents.

On 22 August 2019, the CMA announced that it had accepted final undertakings from Rentokil in lieu of a Phase 2 investigation reference.



CMA flexes its muscles in small-scale technology mergers

UK – MERGER CONTROL, PROCEDURE

In August 2019, the UK Competition and Markets Authority ("CMA") used its statutory merger control powers to: block a technology merger where it had previously issued an Unwinding Order; and impose an Unwinding Order in an investigation into another technology merger. Both transactions were very small (total consideration was £11 million in one and US\$12.5 million in the other), and both had

been completed before clearance was sought or obtained from the CMA.

The CMA's approach demonstrates that it will actively intervene even in very small technology transactions, reflecting its current policy interest in digital markets, and it highlights the risks of proceeding unconditionally in small transactions which raise potential competition concerns.

These cases also show the CMA's readiness to impose an Unwinding Order to reverse action already taken by the parties to implement a completed merger.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The CMA's approach demonstrates that it will actively intervene even in very small technology transactions, reflecting its current policy interest in digital markets, and it highlights the risks of proceeding unconditionally in small transactions which raise potential competition concerns. The CMA will not only investigate, but may also block mergers in very small markets in the technology sector.
- These cases also show the CMA's readiness to impose an Unwinding Order to reverse action already taken by the parties to implement a completed merger, to keep the businesses separate and preserve the CMA's ability to implement effective remedies (e.g. divestment).
- Unwinding Orders are most likely when steps have been taken to integrate the businesses following completion, prior to the CMA issuing an Initial Enforcement Order instructing the parties not to integrate the businesses.
- These two cases show the CMA applying the principles set out in its new [Guidance on the use of interim measures in merger investigations](#), published on 28 June 2019.

TOBII/SMARTBOX

The transaction

In August 2018, Swedish company Tobii AB ("Tobii") announced that it had agreed to acquire Smartbox Assistive Technology Ltd and Sensory Software International Ltd (together "Smartbox") for total consideration of £11 million. Completion occurred on 1 October 2018. Smartbox achieved total net sales of £9.3 million in 2017.

Tobii and Smartbox both supply augmentative and assistive communication ("AAC") solutions globally and in the UK. AAC solutions are communication aids for people who find communication difficult, such as those with a disability. End-users are usually dependant on

AAC technology to communicate, and accordingly the CMA regarded them as vulnerable consumers. It is perhaps also significant, from a policy perspective, that the main customers of AAC solutions in the UK include public bodies such as the NHS, local authorities and schools.

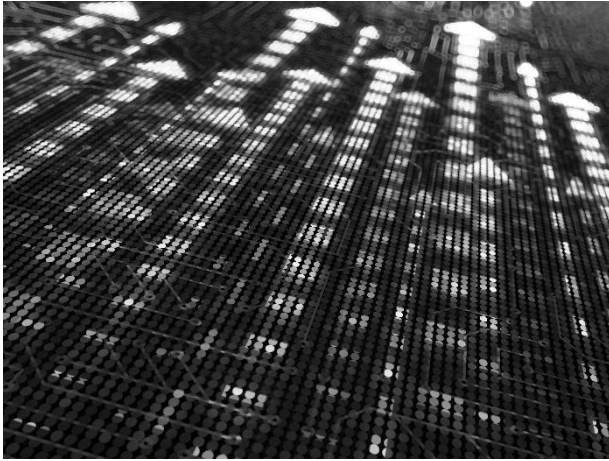
The CMA investigation

The CMA commenced an investigation on its own initiative and issued an Initial Enforcement Order on 28 September 2018, prohibiting Tobii from taking steps to implement the transaction. However, Tobii and Smartbox had already taken certain steps, including entering into a reseller agreement for Tobii's products in the UK and Ireland, withdrawing certain products from sale in the UK and Ireland and discontinuing certain R&D projects. The CMA considered that these steps might prejudice the CMA's ability to implement effective remedies. Accordingly, the CMA issued an Unwinding Order on 28 March 2019, which included the following obligations:

- requiring the parties to terminate the reseller agreement; and
- obliging Smartbox to supply the discontinued products and to reinstate the R&D projects.

Having referred the merger for an in-depth Phase 2 investigation on 8 February 2019, the CMA published its finding on 15 August 2019 that the transaction had resulted, or would be expected to result, in a substantial lessening of competition ("SLC").

In particular, the CMA found that the parties were each other's closest competitors in the supply of dedicated AAC solutions, with a combined market share in the UK of 60-70 per cent. Most of the customers who responded to the CMA's questionnaire raised concerns about the merger. The CMA's investigation also identified that – consistent with customer concerns – the merger strategy expressly involved reducing the range of products available to customers and reducing R&D.



The CMA also identified vertical competition concerns, in terms of the merged entity's ability and incentive:

- to foreclose downstream competitors' access to Smartbox's Grid software, on which competitors' dedicated hardware is reliant; and
- to foreclose upstream competition in the supply of eye gaze cameras (which are used to control certain AAC solutions), through limiting the compatibility of Smartbox's Grid software with the eye gaze cameras of Tobii's rival suppliers.

The CMA also concluded that:

- the partial divestiture and behavioural remedies offered by Tobii would not address the SLC identified;
- there were no relevant customer benefits arising from the merger which could be taken into account; and
- only the full divestiture of Smartbox would comprehensively remedy the SLC and its resulting adverse effects.

Tobii will be required to give undertakings to the CMA to divest Smartbox to an approved purchaser, on terms approved by the CMA. If Tobii does not give suitable undertakings within the statutory timescale (12 weeks from the date of the final report, extendable in exceptional circumstances), the CMA will issue an Order requiring divestment.

BOTTOMLINE/EXPERIAN

On 6 March 2019, Bottomline Technologies (de) Inc. ("Bottomline") acquired certain technology and assets from Experian Ltd (the Experian Payments Gateway, or "EPG") for a cash consideration of approximately US\$12.5 million.

Although the transaction was not notified to the CMA for merger approval, it came to the CMA's

attention. The CMA issued an Initial Enforcement Order on 22 May 2019, prohibiting the parties from integrating the businesses. On 2 August 2019, shortly prior to its announcement that it was commencing an investigation, the CMA issued an Unwinding Order to Bottomline. This stated that the Monitoring Trustee, whom the CMA had directed Bottomline to appoint, had identified material integration between Bottomline and EPG. Under the provisions of the Unwinding Order, Bottomline is:

- prohibited from using confidential information obtained from EPG to solicit any EPG customer; and
- required to segregate the parties' respective confidential information (such as customer lists, pricing, knowhow and IP) between the businesses and to ensure that neither party's confidential information can be accessed by the other party.

OBSERVATIONS

The CMA's voluntary merger notification regime means that businesses may complete their transactions and proceed to implement them without applying to the CMA for approval. However, when the CMA decides to intervene in such completed transactions, it needs to be able to preserve the possibility of restoring effective competition in the event that the transaction raises competition concerns.

Whilst Initial Enforcement Orders are an effective tool in the CMA's armoury to prevent the merging parties taking further steps to implement a merger, they do not remedy the steps which the parties may already have taken. For these purposes the CMA may issue an Unwinding Order to reverse those steps.

These cases demonstrate that the CMA is very willing to use Unwinding Orders to ensure that the independence and integrity of the merger parties, as well as competition in the affected markets, are maintained pending the CMA's final decision. These cases also demonstrate the significant risks that parties run from proceeding unconditionally with mergers which may raise material competition concerns, even when the transactions and the relevant markets are very small.

In this regard, the CMA has singled out technology markets as being a key focus, and has recently initiated a review of its approach to the assessment of digital mergers.

In other recent news, on 24 September 2019, the CMA published its decision to impose a £250,000 penalty on PayPal for failure to comply with the a CMA Initial Enforcement Order issued in the context of [PayPal's completed acquisition of iZettle AB](#). PayPal had engaged in integration projects outside the UK, but which affected the

UK businesses in contravention of the CMA's order. This is a further example of the CMA ramping up its enforcement of procedural merger control restrictions.

Unfit for purpose? Tougher UK consumer protection law powers and what they mean for businesses

UK – CONSUMER PROTECTION LAW

On 18 June 2019, the UK government published a press release announcing "tough new powers for the competition watchdog to fine businesses directly who have broken consumer law". This follows a request from Lord Tyrie, Chair of the UK Competition and Markets Authority ("CMA"), for enhanced powers to investigate and sanction breaches of consumer law by businesses. The government will consult on the specifics in an upcoming Consumer White Paper expected later this year.

This comes alongside proposals to increase the powers of other UK sectoral regulators in this area, in light of recent investigations into issues such as "loyalty penalties" and the government's recent [Smart Data Review](#). It is currently a key area of regulatory focus in the UK, which could significantly increase compliance risk, and therefore it is important that businesses are prepared.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The proposed measures will increase the CMA's powers to investigate and sanction businesses for breaches of consumer protection law, and will concern all businesses, regardless of size and industry sector.
- The precise scope of the measures is currently unknown, however the government has announced that they will enable the CMA to impose penalties on infringing businesses directly, and could potentially also include sanctions on individuals (e.g. director disqualification).
- This may lead to increased numbers of CMA investigations into consumer law breaches, further requests for information from businesses, and additional time/resources required by management of businesses involved. Businesses might also see more complaints made to the CMA from customers and/or consumer groups regarding their consumer protection-related conduct.
- Therefore, businesses should ensure that consumer protection law compliance is sufficiently high on the agenda of their boards, and that they have appropriate compliance policies in place.

This article summarises the CMA's current consumer protection law enforcement regime (including providing some examples of recent CMA cases in this area), a description of the proposed reforms suggested by Lord Tyrie, and some comments on the potential implications of those reforms and next steps.

THE CURRENT POSITION

The CMA's stated aim is to make markets work well for consumers, businesses and the economy, and it has a statutory duty under the Enterprise and Regulatory Reform Act 2013 to seek to promote competition for the benefit of consumers.

The CMA's main consumer enforcement powers derive from a variety of sources:

- civil powers under Part 8 of the Enterprise Act 2002 ("EA02") to stop infringements of certain consumer laws, and the CMA may seek an enforcement order from a civil court against traders which breach specific laws, such as:
 - the Consumer Protection from Unfair Trading Regulations 2008 ("CPRs"), which impose a general duty on businesses not to trade unfairly with consumers; and
 - the Consumer Rights Act 2015 ("CRA"), which protects consumers from traders that use unfair contract terms or notices;
- criminal powers to prosecute traders that engage in certain unfair commercial practices under the CPRs;
- the power under Schedule 3 of the CRA to seek an injunction to stop businesses using unfair terms or notices with consumers; and
- investigatory powers to enable it to investigate breaches of consumer law.



Part 8 of the EA02 provides the principal means by which the CMA enforces consumer protection legislation, although it will use its other civil and criminal powers in appropriate situations. It enables the CMA:

- to apply to the High Court or County Court for an enforcement order; or
- to accept an undertaking,
- to stop a business from breaching any legislation or rule of law listed under the EA02, where the breach harms the collective interests of consumers.

Part 8 also provides that enforcement orders or undertakings may include "enhanced consumer measures" which require businesses to take additional steps for the protection of consumers (i.e. redress, compliance, or choice measures).

However, whilst breach of an undertaking is liable to result in enforcement action and to be drawn to the attention of the court if proceedings ensue, such a breach does not directly lead to financial or administrative penalties. Rather, the CMA must bring court proceedings for breach of the undertakings. In contrast, failure to comply with a court order is liable to be treated as contempt of court and can lead to a fine or imprisonment.

The CMA has investigated a wide range of sectors using its consumer protection law powers, and some recent examples of CMA enforcement in this area are summarised in the table below:

INVESTIGATION	SUMMARY
<u>Gambling Firms (October 2016 – April 2019)</u>	<ul style="list-style-type: none"> • Issue: concerns relating to certain gaming promotions and difficulties gamblers faced withdrawing their money from online gambling firms. • Outcome: various undertakings, e.g. firms committing to being more upfront and clear about promotional terms and conditions, and making it easier and fairer for players to withdraw their cash.
<u>Care Homes (June 2017 - ongoing)</u>	<ul style="list-style-type: none"> • Issue: certain practices, in particular relating to self-funding residents and issues of large upfront fees and fees charged after a resident's death. • Outcome: the CMA published two guidance documents addressing: (a) the charging of fees after a resident's death; and (b) a range of issues including the provision of upfront information, contract terms and business practices, providing services with reasonable care and skill and complaints handling. A number of providers have entered into various undertakings (e.g. agreeing to amend certain of their terms and conditions). In February 2019, the CMA issued court proceedings against Care UK for failing to provide compensation to over 1,600 care home residents who were previously charged (in some cases, as much as £3,000) compulsory administration fees.
<u>Leasehold market (June 2019 - ongoing)</u>	<ul style="list-style-type: none"> • Issue: investigation into concerns regarding the fairness, clarity and presentation of certain leasehold contract terms. The CMA is examining, in particular, areas of potential: • mis-selling, i.e. whether leasehold purchasers fully understand the obligations they are taking on (e.g. ground rent) and their ability to buy the freehold; and • unfair terms, i.e. whether leaseholders are paying excessive fees on administration, service, 'permission' charges and ground rents due to unfair contract terms.
<u>Secondary ticket sales sites (September 2016 - ongoing)</u>	<ul style="list-style-type: none"> • Issues: concerns (a) that online secondary ticket sites were not informing their customers about certain aspects relating to the tickets they are buying; and (b) regarding pressure selling, difficulties in getting money back under a website guarantee, speculative ticket selling, and whether organisers of events are selling as a primary seller directly through secondary ticket websites. • Outcome: undertakings offered by various providers. In November 2018, the CMA secured a court order against viagogo, requiring it to overhaul the way it did business. Since then, the CMA has found that viagogo has not fully complied with the court order, and therefore, on 4 July 2019, the CMA announced it was moving forward with legal proceedings for contempt of

	court.
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Other recent cases include:

CASE	DATE OPENED	STATUS (AS AT 15/07/2019)
Fake and misleading online reviews	21/06/2019	Open
Online console video gaming	05/04/2019	Open
Anti-virus software	27/11/2018	Open
Apple iPhones: consumer protection case	09/08/2018	Closed (22/05/2019)
Social Media Endorsements	08/08/2018	Open
Online dating services	31/10/2017	Closed (06/06/2018)
Online hotel booking	27/10/2017	Open
Car rental intermediaries	19/10/2017	Closed (29/03/2018)

Whilst these examples clearly demonstrate that the CMA has been active in using the consumer enforcement powers it currently has, the Secondary Ticket sales investigation in particular gives some indication of the reasons for the CMA's recent push for reform in this area, as discussed below.

This push also comes in the wake of a [super-complaint](#) made to the CMA by Citizens Advice in September 2018 concerning excessive loyalty payments in certain markets. In its response to this super-complaint, published on [19 December 2018](#), the CMA estimated that longstanding customers who do not shop around pay more than new customers for the same service to the value of around £4 billion in total across the five markets considered (mobile, broadband, cash savings, insurance, and mortgages). The CMA made a number of recommendations in order to address this issue.

A NEED FOR REFORM?

In August 2018, Business Secretary Greg Clark requested advice from the newly appointed Chair of the CMA, Lord Andrew Tyrie, on whether legislative and institutional reforms were necessary to safeguard the interests of consumers and to improve public confidence in markets.

On [21 February 2019](#), Lord Tyrie responded to this request with a letter containing numerous proposals for reform. These proposals are wide-ranging, and reflect the CMA's sentiments in its 2019/2020 Annual Plan, published the week before, in which it stated that *"it is becoming evident that the competition and consumer protection regimes need to evolve further to ensure they stay effective"*.

In terms of the proposals relating specifically to the consumer protection law regime, in summary, Lord Tyrie proposes that this (and the competition law regime) should be re-centred to enable the CMA to focus more directly on protecting the interests of the consumer. The letter advocates that the CMA and the courts (including the specialist competition court, the Competition Appeal Tribunal ("CAT")) should be subject to a new statutory duty to treat the economic interests of consumers, and their protection from detriment, as paramount. This would be supported by strengthening the CMA's powers to enforce consumer protection law, which Lord Tyrie describes as "unfit for its current purpose, and far short of what would be required to enable the CMA effectively to fulfil a consumer interest duty".

In particular, Lord Tyrie highlighted that:

- the CMA currently has no power to order businesses to stop illegal practices, but must go to court in order to obtain a binding remedy;
- even when the CMA wins in court, no civil fines are available;
- although the CMA can obtain undertakings from firms, it has no powers to fine firms for non-compliance with those undertakings; and
- currently, no fines are levied on firms for failing to comply with information notices in consumer protection investigations.

In his letter, Lord Tyrie emphasised the importance of adapting to protect consumer interests, in particular given the growth of digital technology, which is creating new forms of potential consumer detriment, such as data harvesting and personalised pricing. This was also reflected in a subsequent speech he gave in May 2019, in which he made it clear that "competition needs to be promoted not as an end in itself, but rather as a tool to serve the interests of the millions of consumers that are its intended beneficiaries...".

PROPOSED CHANGES

In light of the above, the CMA is seeking greater enforcement powers in the consumer protection context, akin to those it has under the competition law regime. In particular, in his letter, Lord Tyrie proposes that:

- the CMA should be empowered to decide whether consumer protection law has been broken, publish this fact, require businesses to cease the relevant conduct, and impose fines (both for the infringement itself and for subsequent breach of any undertakings provided to the CMA);
- the CMA should be able to order cessation of practices it suspects may be harming consumers on an interim basis pending the outcome of its investigation;
- there could be reforms to improve personal responsibility for breaches of consumer protection law (e.g. director disqualifications) and potentially a requirement on companies to appoint a board director with responsibility for assessing and reporting on risks to competition and consumer law compliance; and
- a turnover-based fines regime for non-compliance with information notices be introduced.

NEXT STEPS AND POTENTIAL IMPLICATIONS

On [18 June 2019](#), the Department for Business, Energy & Industrial Strategy ("BEIS") confirmed in a press release that the government intends to empower the CMA to decide whether consumer protection law has been broken and to impose fines on businesses directly for infringements. This press release includes a statement from the Prime Minister's office stating that "*it is high time [harmful trading practices] came to an end and ... we are confirming our intention to give much stronger powers to the CMA, to strengthen the sanctions available and to give customers the protection they deserve against firms who want to rip them off*".³

The government's intention was also referred to in response to the CMA's loyalty penalty recommendations, published on [17 June 2019](#), in which Mr Greg Clark stated that the government will be consulting on how best to achieve these in an upcoming Consumer White Paper, which will include the route of appeal, and the implications for the wider consumer enforcement landscape. According to a Regulation Update statement made in the House of Lords on 8 July 2019, the Consumer White Paper (which will also address other consumer-related issues), is due to be published later this year.

³ This statement was made under Theresa May's premiership, although there is little indication that plans will change under her successor(s).

The details of the precise enforcement mechanisms, specific sanction levels, and indicative timings are still to be determined pending consultation. However, any implementation of these proposals can be expected to have a significant impact on the enforcement of consumer protection law in the UK. In particular, the direction of the CMA's focus is likely to lead to a greater number of CMA investigations into breaches of consumer protection law, which:

- may include more requests for information;
- will require more input/time from management of the businesses involved; and
- will increase the risk of those businesses ultimately being made subject to cessation orders, undertakings and/or being fined for breaches.

In respect of potential fines, if the approach adopted follows the competition law regime, businesses could face penalties of up to 10% of global turnover for infringing consumer protection law, and so it is important that businesses are prepared.

Similarly, in addition to the powers to impose harsher sanctions on businesses for non-compliance with CMA information requests, query whether the CMA will also seek dawn raid-type powers to assist with its consumer protection law investigations.

In any event, regardless of the precise form of the ultimate proposals, this is a key area of focus for the CMA going forward. As Lord Tyrie stated in his May 2019 speech *"... these proposals will now be further developed and refined. ... The task of rebuilding public trust and confidence requires much more. It requires the CMA to be a more visible and vocal consumer champion, independent of vested interests in the private sector, and of political pressures. ... that will require a cultural shift."*

It is also noteworthy that whilst Lord Tyrie's letter concerns the powers and role of the CMA in relation to consumer protection law, the government has also proposed measures to enhance the powers of the UK sectoral regulators (which also have concurrent competition law powers) in this respect. The BEIS press release, for example, states that the government will legislate to give regulators, such as Ofcom and the FCA, new powers to stop loyal customers being taken advantage of if their existing powers are insufficient - for example, to ensure mobile phone providers end the practice of charging customers the same rate once they have effectively paid off their handsets at the end of the minimum contract period.

Therefore, it is clear that consumer protection is a priority not just for the CMA, but also for the government and other sectoral regulators in the UK, and therefore we are likely to see significant change in this area from a variety of angles in the foreseeable future.



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