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Competition Law Newsletter
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The April 2021 issue of Ashurst's competition law newsletter features some of the key competition law developments over the last month, including important rulings by the European Court of Justice on State aid and antitrust appeals, such as the Court's first ruling on hybrid settlements, commitments accepted by national competition regulators following abuse of dominance investigations in Australia, Germany and Italy, and further updates relating to cartel cases in France and the UK, as well as other news.

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ECJ rules FC Barcelona received illegal State aid

EU – STATE AID

On 4 March 2021, the European Court of Justice ("ECJ") handed down its much awaited judgment in the *Fùtbol Club Barcelona* ("FCB") case. It set aside the judgment of the General Court. As a result, the European Commission's decision classifying as State aid a tax scheme that was available to four Spanish professional football clubs has been reinstated.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Aid schemes must be assessed by reference to circumstances at the time they are adopted even if they are examined by the European Commission after they have been put into effect.
- Where a "*tax aid scheme applies on an annual or periodic basis*", the European Commission is only required to demonstrate that, at the time of its adoption, the scheme was capable of conferring an advantage on its beneficiaries.

BACKGROUND

The case concerns Spanish legislation introduced in 1990 requiring professional sports clubs to be reincorporated as so-called sports limited liability companies ("SLLCs") instead of non-profit entities. Clubs with positive financial balances (namely FCB and three other professional football clubs) were exempt from this obligation and could continue to enjoy a lower rate of income tax.

In 2016, the European Commission concluded that by introducing a preferential tax rate, Spain had granted incompatible State aid to four football clubs and ordered Spain to recover the illegal aid.

In 2019, the General Court upheld an appeal brought by FCB and ruled that the European Commission had failed to demonstrate that the exemption from the requirement to be incorporated as an SLLC conferred an "*advantage*" on the beneficiaries of that exemption. According to the General Court, the European Commission had not sufficiently considered whether the advantage resulting from the reduced tax rate could have been offset by a less favourable deduction rate for certain expenses. It noted, in particular, that Real Madrid had paid more tax as a non-profit entity than it would have done as an SLLC.

ECJ JUDGMENT

The ECJ first emphasised that the measure at stake constituted an "*aid scheme*" (as opposed to an "*individual aid*"). As regards "*aid schemes*", the examination of the existence of aid relates exclusively to the scheme itself and not to aid subsequently granted on the basis of the scheme. It follows that this necessitates an ex ante analysis at the time that the scheme is adopted.

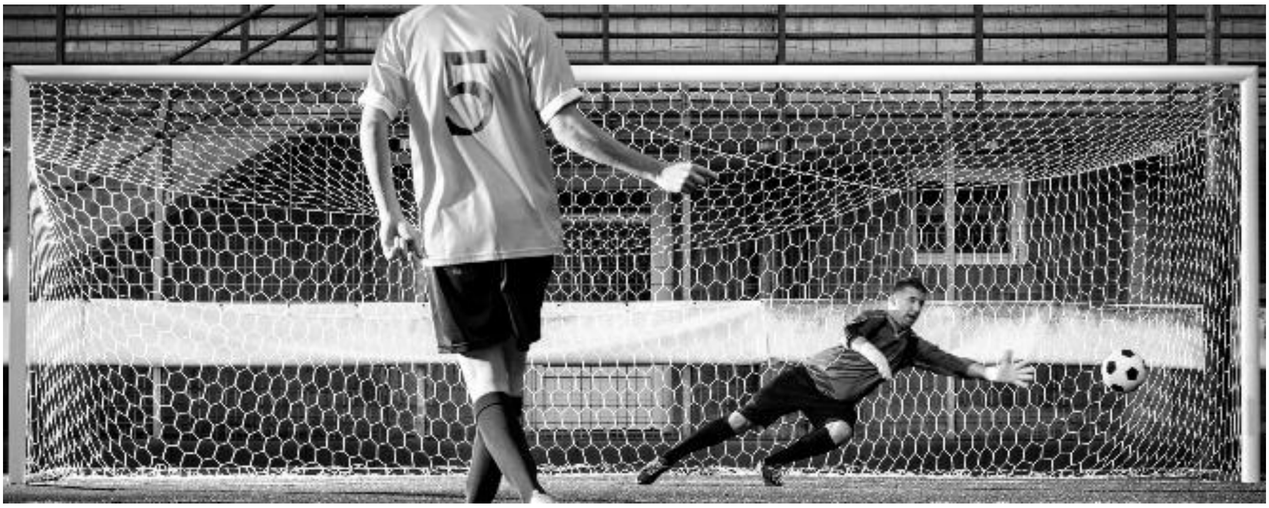
The ECJ then accepted that, when assessing the "*advantage*" condition, the European Commission is required to take into account all the components of a national scheme (both favourable and unfavourable from the perspective of the beneficiaries).

However, where a "*tax aid scheme applies on an annual or periodic basis*", the ECJ held that the European Commission is only required to demonstrate that, at the time of its adoption, the scheme was *capable* of conferring an advantage on its beneficiaries. As a result, potentially unfavourable features whose actual impact depends on "*random and variable circumstances*" can be disregarded. Rather, these features are relevant when the European Commission is assessing the amount of aid that needs to be recovered from individual beneficiaries of the scheme. This is on the basis that the European Commission is required to determine whether that scheme has *actually* conferred an advantage on any of its beneficiaries.

In the present case, the ECJ found that the European Commission was right to consider that the lower tax rate for non-profit entities was *capable* of conferring an advantage. The European Commission was not obliged to examine the actual impact of the possibility of making tax deductions and whether it neutralised the advantage received from the reduced tax rate.

COMMENT

In its judgment, the ECJ carefully singled out the situation of "*aid schemes*" and its reasoning cannot be extended as such to individual aid measures. It is worth noting in this respect that in its recent Apple and Starbucks judgments – which concerned individual tax rulings - the General Court ruled that the European Commission must show that there is an *actual* reduction of the tax burden in order to establish the existence of an advantage.



ECJ confirms support measures adopted by Italian bank consortium did not constitute State aid

EU – STATE AID

On 2 March 2021, the European Court of Justice ("ECJ") dismissed in its entirety the European Commission's appeal against the General Court's judgment regarding financial support adopted by an Italian consortium of banks for the benefit of one of its members. The General Court found correctly that those measures, which were approved by the Bank of Italy, were not imputable to the Italian State and thus did not constitute State aid.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The appropriate evidence for the purpose of demonstrating that a measure adopted by a private entity is imputable to the State differs from that required in a situation where the entity providing the aid is a public undertaking.
- Where a measure is adopted by a private entity, the European Commission cannot rely on the unlikelihood of an absence of actual influence and control by the public authorities over the private entity providing the aid.
- On the contrary, in such circumstances, there is an even more stringent requirement for the European Commission to set out and substantiate sufficient evidence capable of establishing that the measure had been adopted under the actual influence or control of the public authorities

In 2014, the Fondo Interbancario di Tutela dei Depositi ("FITD"), a banking consortium established for the purpose of pursuing the common interests of its members, granted Banca Tercas, a private equity bank placed under special administration, with approximately EUR 300 million in support (through capital injections and guarantees) with the approval of the Bank of Italy.

In its 2015 decision in case SA.39451, the European Commission considered that this support constituted unlawful aid imputed to the Italian State. This decision was, however, annulled by the General Court in March 2019, on the ground that the conditions for the intervention to be classified as State aid were not satisfied, in particular as regards the requirement for the measure to be imputable to the State.

On appeal, the European Commission sought to argue that, when seeking to establish that measures adopted by an entity distinct from the State are imputable to it, the standard of proof required did not vary depending on whether the entity providing aid is owned publicly or privately. Accordingly, the European Commission argued that it was only required to demonstrate either the likelihood of the involvement by the public authorities or, at least, the unlikelihood of them not being involved in the measures adopted by the FITD.

In its judgment, the ECJ held that the appropriate evidence for the purpose of demonstrating the imputability of an aid measure to the State arises from the circumstances of the case and the context in which that measure was taken. The absence of links of capital nature between the FITD and the Italian State was clearly relevant in that regard.

As the FITD is a private entity, the appropriate evidence for the purpose of demonstrating that the measure is imputable to the State differs from that required in a situation where the entity providing the aid is a public undertaking. In such circumstances, the European Commission could not rely on the unlikelihood of an absence of actual influence and control by the public authorities over the private entity providing the aid.

On the contrary, where the measure was adopted by a private entity, there was an even more stringent requirement for the European Commission to set out and substantiate sufficient evidence capable of establishing that this measure had been adopted under the actual influence or control of the public authorities and was, accordingly, imputable to the State. The European Commission had therefore failed to establish that the measure at issue could be imputed to the Italian State.

This judgment provides valuable guidance on the application of the rules on imputability in less conventional cases of aid measures granted by a private entity, confirming that the European Commission bears a greater evidential burden in these cases.

ECJ rules on hybrid settlements for the first time in Pometon

EU – CARTELS

In its ruling in *Pometon* (C-440/19 P), the European Court of Justice ("ECJ") issued its first ruling on the use of so-called 'hybrid settlement' procedures in cases in which settlement decisions do not cover all parties to an infringement.

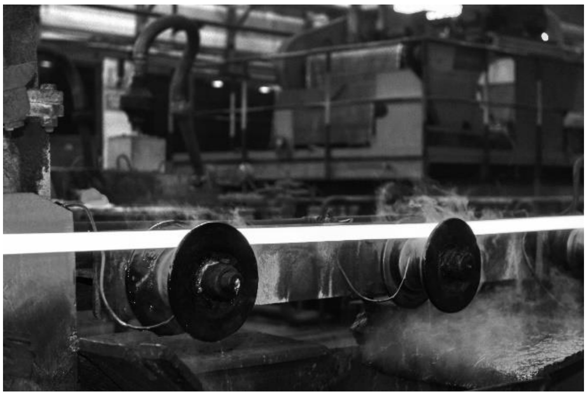
WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The ECJ has validated the European Commission's use of 'hybrid settlement' procedures in cases in which settlement decisions do not cover all parties to an infringement.
- However, to the extent that facts relating to the involvement of non-settling parties must be introduced in a settlement decision, the European Commission must:
  - take sufficient drafting precautions in order to avoid a premature judgment as to their participation in the infringement; and
  - not disclose more information in relation to the non-settling parties than is necessary for the classification of liability of the addressees of that decision.

On 18 March 2021, the ECJ issued its first judgment in a so-called 'hybrid settlement' case, i.e. cases in which the settlement decision does not include all of the participants in an infringement. In these cases, the European Commission's practice is to adopt two separate decisions: first, a settlement decision using a simplified procedure; and, second, an adverse decision using the 'normal', lengthier procedure.

The chronology of these cases gives rise to procedural hazards, as the European Commission must provide a sufficient description of the infringement in the settlement decision without prejudicing the non-settling parties' procedural rights in the context of an ongoing investigation, particularly with respect to the presumption of innocence.

In *Pometon*, the ECJ provided its first endorsement of the European Commission's hybrid settlement practice and set out the legal framework applicable to textual references to non-settling parties in settlement decisions.



Drawing on the European Court of Human Right's case law on the presumption of innocence in complex criminal proceedings, the ECJ confirmed that, to the extent that facts relating to the involvement of non-settling parties had to be introduced in a settlement decision:

- the European Commission must take sufficient drafting precautions in the settlement decision in order to avoid a premature judgment as to the non-settling parties' participation in the infringement; and
- the European Commission must not disclose more information than is necessary for the classification of liability of the addressees of that decision.

On the facts of the case, the ECJ confirmed the General Court's ruling that the European Commission had not breached the presumption of innocence with respect to Pometon - the non-settling party in the European Commission's steel abrasives cartel (case AT.39792). In particular, the ECJ agreed with the General Court's assessment that references to Pometon "*intended solely to clarify the development over time of the cartel*" met the requisite legal standard.

The ECJ also further reduced the fine imposed on Pometon due to the General Court's failure to explain how the fine reduction it awarded to the undertaking was consistent with the principle of equality, in light of the reductions applied to other parties in comparable positions to Pometon.

The European Commission's use of hybrid settlement procedures had been in doubt after the General Court found in *ICAP* that the settlement decision in the Yen Interest Rate Derivatives case breached the presumption of innocence. The *Pometon* ruling marks an important validation of the European Commission's use of hybrid settlement procedures by the EU's highest court.

No call for annulment in Deutsche Telekom appeal

EU – ABUSE OF DOMINANCE

In its ruling in *Deutsche Telekom v Commission* (C-152/19 P), the European Court of Justice ("ECJ") provided guidance on the application of the *Bronner* case law to refusal to supply cases, as well as on the relevant facts, and on the circumstances in which an infringement of competition law can be imputed to a parent company.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The *Bronner* conditions remain the appropriate test to determine whether a refusal to provide access to infrastructure constitutes an abuse of Article 102 TFEU.
- However, where a dominant undertaking provides access to its infrastructure, but makes that access subject to unfair conditions, competition authorities are not required to establish that such access is indispensable to find an abuse.
- The ECJ also held that, for the purposes of imputing liability for an infringement, competition authorities can rely, in part, on facts demonstrating that a parent company was *able* to exercise decisive influence in order to establish that such influence was *exercised*.

BACKGROUND

In its decision in 2014, the European Commission found that Slovak Telekom ("ST"), along with its parent company Deutsche Telekom ("DT"), had abused its dominant position on the Slovak market for broadband internet services.

In 2005, ST was found to be an operator with significant market power on the wholesale market for unbundled access to the local loop. Consequently, ST was obliged to grant access to this infrastructure to other operators. In its 2014 decision, the European Commission found that ST had set unfair terms and conditions in its reference offer for unbundled access to its local loop, withheld information necessary for the unbundling of the local loop and imposed tariffs on competitor undertakings which were deemed to be unfair.

The European Commission's decision was partially annulled on appeal to the General Court, reducing the level of the fine imposed on ST and DT. On appeal to the ECJ, DT challenged, among others, the General Court's application of Article 102 TFEU, as well as its assessment of the facts on which the decision to impute an infringement to parent company can be based.

APPLICATION OF THE INDISPENSABILITY CONDITION IN *BRONNER*

On appeal, the ECJ drew a distinction between an outright refusal to supply and an implied or constructive refusal to supply.

At first instance, the remedy required to eliminate the effects of the abuse is to force the dominant undertaking to give access to its infrastructure, which is particularly detrimental to both its freedom of contract and its right to property. Interventions of this kind can also disincentivise infrastructure investment in the first place.

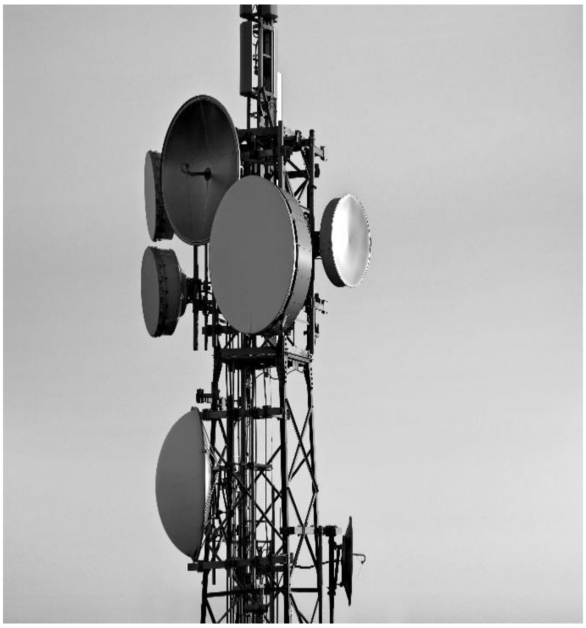
In light of these considerations, the ECJ reasoned such a remedy can only be justified where the dominant undertaking has a "*genuinely tight grip on the market*". Therefore, the ECJ confirmed that a competition authority should be required to establish that there is no *actual or potential substitute for the infrastructure in relation to which access was sought*, as per the ruling in *Bronner*, in order to establish that an outright refusal to supply is an abuse under Article 102 TFEU.

Conversely, where the dominant undertaking has granted access to its infrastructure to competitor undertakings, even where such access is subject to unfair conditions, the remedial action required is much less detrimental to the undertaking's rights and freedoms as it does not require a competition authority to impose access to the undertaking's infrastructure. Accordingly, there is no requirement to satisfy the indispensability condition laid down in *Bronner* in order to establish a constructive or implied refusal to supply.

As ST was subject to a regulatory obligation to provide access to its infrastructure, and the European Commission's allegations related to the terms on which that access was provided, the European Commission was not required to show that the *Bronner* conditions were met.

IMPUTATION OF LIABILITY TO A PARENT COMPANY

In order to impute liability for an infringement to a parent company, a competition authority is required to establish that the parent had the *ability* to exert decisive influence over its subsidiary and that it actually *exercised* that influence.



Siding with the General Court, the ECJ considered that the European Commission was entitled to take into consideration facts demonstrating that the appellant was in a position to exercise decisive influence as indications contributing to a finding of an actual exercise of influence.

The ECJ therefore agreed that considerations such as the presence of DT senior management on ST's board of directors, the provision of DT staff to ST and regular reporting to DT could serve as indications of the actual exercise of influence.

CONCLUSION

The ECJ's ruling has confirmed the continued validity of the conditions laid down in *Bronner* and provides a useful framework to determine the circumstances in which these will be relevant to establish a breach of Article 102 TFEU.

The ECJ's ruling has also lightened the evidential burden on competition authorities to establish the actual exercise of decisive influence. Its findings are likely to reduce the scope for arguing that the conduct of a subsidiary should not be imputed to the parent.

Visa provides ACCC undertaking to address anti-competitive conduct concerns regarding debit card payments

AUSTRALIA – ABUSE OF DOMINANCE/ANTICOMPETITIVE AGREEMENTS

On 10 March 2021, Visa AP (Australia) Pty Ltd and Visa Worldwide Pte Limited (together, "Visa") entered into a court enforceable undertaking with the Australian Competition Consumer Commission ("ACCC"), seeking to address the ACCC's concerns that Visa was leveraging its substantial market power in credit cards to limit competition in debit card acceptance.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The ACCC has recently announced that its 2021 priorities include promoting competition and investigating allegations of anti-competitive conduct in the financial services sector.
- Visa's undertaking is designed to ensure that merchants can make informed decisions about which network to process payments on Visa branded debit cards, without suffering adverse consequences (including increased costs) from Visa.
- The ACCC is very likely to continue to carefully scrutinise circumstances where large players may be leveraging their market power into adjacent markets to gain significant advantages over their competition.

HOW DO DEBIT AND CREDIT CARD PAYMENTS WORK IN AUSTRALIA?

There are three debit card scheme networks through which debit card payments may be processed in Australia: Visa Debit, Debit Mastercard or eftpos. In contrast, most (if not all) credit cards will be routed through the card issuer's network (Visa or Mastercard only). eftpos is a privately-run Australian debit card payment system owned and administered by eftpos Payments Australia Limited.

The cost a merchant incurs when it processes a payment from a customer via a debit or credit card varies depending on the 'interchange rate' that is set by the network that processes the payment.

Most debit cards in Australia are 'dual network' which enables payment to be processed either via eftpos or one of Visa or Mastercard (depending on the card issuer).

In 2017, the Reserve Bank of Australia supported an initiative known as 'merchant choice routing' or 'least cost routing' which introduced technology to allow Australian merchants to choose to send contactless ('tap and go') payments for dual network debit cards via the debit network that charges the least to the merchant. The purpose of this initiative was to (1) provide merchants the ability to make routing choices based on the lowest cost, and (2) increase the competitive pressure between debit card payment schemes to incentivise providers to lower fees.

WHAT WERE THE ACCC'S CONCERNS REGARDING VISA?

Visa has agreements with certain merchants to provide them with strategic debit rates and/or strategic credit rates, on the condition that payments are routed through the Visa network. The ACCC investigated whether the tying of Visa's strategic credit rates to a merchant's commitment to route Visa branded debit transactions via the Visa network was anti-competitive.

The ACCC considers that there are separate markets for the supply of credit card acceptance services and the supply of debit card acceptance services in Australia, and that Visa has a substantial degree of market power in the supply of credit card acceptance services because merchants do not have an alternative choice of network to Visa when processing Visa credit card transactions.

The ACCC was concerned that, through its tying conduct, Visa was leveraging its substantial market power in the credit market to lessen competition in the debit card acceptance market. The ACCC alleged that this conduct may substantially lessen competition in the market for debit card acceptance services in Australia, in contravention of the misuse or market power and/or exclusive dealing provisions of the *Competition and Consumer Act 2010* (Cth).

HOW DID THE UNDERTAKING ADDRESS THE ACCC'S CONCERNS?

In the undertaking accepted by the ACCC, Visa acknowledged, but made no admissions, in respect of the ACCC's concerns. However, to address the ACCC's concerns, Visa has undertaken that for three years it will:

- not terminate, withdraw or change a merchant's strategic credit rate, or otherwise raise a merchant's costs, following a merchant's decision to process Visa debit payments through a network other than the Visa network;
- not offer a strategic credit rate to a merchant on condition that the merchant processes Visa debit payments through the Visa network;
- not consider a merchant's Visa debit payments volume or processing decisions in assessing that merchant's eligibility for a strategic credit rate;
- provide written reasons to a merchant for any withdrawal or change to that merchant's strategic credit rate, if that merchant has indicated an intent to process (or has already commenced processing) Visa debit payments through a network other than Visa;
- publicise the ability of merchants to process Visa debit payments through a network other than the Visa network without affecting their strategic credit rate;
- prior to commencing negotiations, provide merchants with eligibility criteria for debit and strategic credit rates and allow merchants to choose how negotiations proceed;
- include an appropriate dispute resolution framework in Visa's agreements with merchants;
- provide annual training to Visa staff that engage with merchants in respect of obligations contained in the undertaking and compliance obligations under the *Competition and Consumer Act 2010* (Cth); and
- appoint and fund an independent auditor to conduct an annual audit of Visa's compliance with the undertaking.

Visa's undertaking applies only in respect of Visa's arrangements with Australian merchants and does not affect Visa's arrangements with global merchants.

By entering into the undertaking, Visa avoided any litigation the ACCC may have pursued over misuse of market power or exclusive dealing concerns.

The ACCC is very likely to continue to carefully scrutinise any circumstances where large players may be leveraging their market power into adjacent markets to gain significant advantages over their competition. The ACCC may seek alternative remedies to litigation if it is satisfied that those remedies can sufficiently address its competition concerns and its need to achieve public enforcement outcomes.

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Empty promises, empty pockets – Megasave declared to have misled potential franchisees

AUSTRALIA – CONSUMER PROTECTION

On 1 March 2021, the Federal Court declared that Megasave Couriers Australia Pty Ltd ("Megasave") breached the Australian Consumer Law ("ACL") by making false or misleading representations to potential franchisees as to the benefits of its franchises. Megasave admitted to misleading prospective franchisees by indicating that they would receive minimum weekly payments and a guaranteed annual income, in circumstances where Megasave did not have reasonable grounds for making the representations.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Megasave and its sole director, Mr Gary Bourne, admitted to making false or misleading representations to prospective franchisees that they would receive minimum weekly payments and guaranteed annual income if they purchased a Megasave courier franchise.
- The proceedings were instituted by the Australian Competition and Consumer Commission ("ACCC") and reflect the regulator's heightened concern with compliance in the franchising sector. Last month, the ACCC announced franchising as a key enforcement and priority area for 2021.
- Franchisors should carefully consider whether they have a reasonable basis for making any representations about franchises, especially in relation to the earnings, profitability or risks of operating a franchise.

BACKGROUND

Megasave is a franchised courier delivery business in Australia. Since April 2019, Megasave has advertised its courier franchises for sale via its own website and the Seek Business website.

Between September 2019 and July 2020, Megasave indicated to potential franchisees that they would receive guaranteed minimum weekly payments for an initial period of operating the franchise ("weekly payments representations"). In most cases, Megasave guaranteed AUD 2000 per week for the first six months.

Furthermore, between September 2019 and April 2020, Megasave also guaranteed a specified annual income to potential franchisees, which in most cases was AUD 91,000 per annum ("annual income representations").

These representations were made to potential franchisees on the Megasave and Seek Business websites, as well as to interested parties who enquired about franchising and received a "Franchisee earnings" document from Megasave.

FEDERAL COURT PROCEEDINGS

On 6 July 2020, the ACCC commenced proceedings against Megasave in the Federal Court alleging that Megasave breached the ACL by making false or misleading representations to prospective franchisees. In particular, the

ACCC alleged Megasave had contravened: section 18: the general prohibition on misleading or deceptive conduct;

- section 29(1)(g): false or misleading representations as to benefits; and
- section 37(2): false or misleading representations about certain business activities.

The ACCC also alleged that Mr Bourne, as the sole director of Megasave, was knowingly concerned in this conduct.

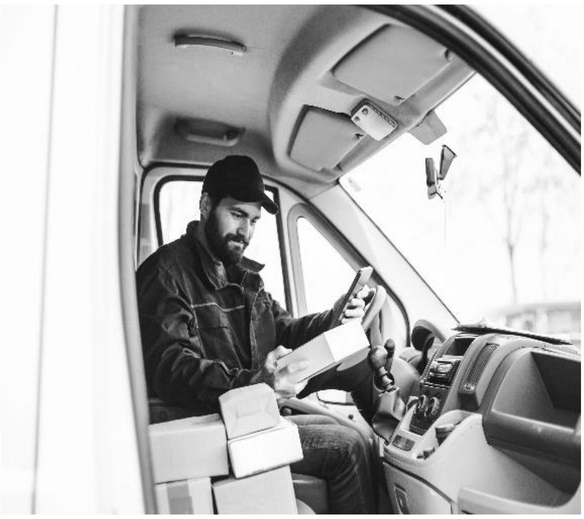
The ACCC argued, and Megasave admitted, that Megasave did not pay all its franchisees in accordance with its weekly payments representations or its annual income representations. Megasave also did not have a reasonable basis for making these representations because:

- Megasave was not paying existing franchisees the promised minimum weekly payment and the weekly payments which were made were insufficient to cover the guaranteed annual income;
- Megasave did not have sufficient revenue to pay existing or potential franchisees in accordance with the weekly payments representations or the annual income representations; and
- Megasave did not have a reasonable basis to expect to receive a substantial increase in either its customers or the volume of parcels for delivery, such that it would have sufficient revenue to act in accordance with its representations.

The Court declared that Megasave made false or misleading representations in contravention of the ACL and Mr Bourne was knowingly concerned in, and party to, the contraventions.

By consent, the Court ordered injunctions to restrain Megasave and Mr Bourne from entering into further franchise agreements unless certain conditions were met. The Court also disqualified Mr Bourne from managing corporations for a period of five years.

A hearing is listed for 29 April 2021 to determine penalties and compensation for affected franchisees.



COMMENT

This case reflects the ACCC's increased focus on the franchising sector as an enforcement and priority area for 2021. With over 30 franchisees complaining to the ACCC about Megasave's conduct, the ACCC has indicated that it will continue to take enforcement action in the sector where franchisees are being treated unfairly.

Franchisors should carefully draft their advertising materials to ensure that all representations are accurate. In particular, representations as to the earnings, profitability or risk of operating a franchise should only be made where the franchisee has a sound and reasonable basis for making such claims.

French Administrative Supreme Court confirms the scope of the FCA's investigative powers in the context of cross-border investigations

FRANCE – ANTICOMPETITIVE AGREEMENTS

On 17 February 2021, the French Supreme Court confirmed an order authorising the French Competition Authority ("FCA") to carry out dawn raids at Caudalie's premises on its own account following a request for assistance received from its Belgian counterpart.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- When the FCA receives a request to carry out an inspection on behalf of another EU competition authority, it may also seek investigative measures on its own account in case of suspected anticompetitive practices implemented in France.
- In such circumstances, the FCA may seek an authorisation to conduct dawn raids without being bound by the material and geographic scope of the request for assistance received from the other competition authority.

Following a request for assistance received on 26 January 2018 from the Belgian Competition Authority ("BCA") pursuant to Article 22 of Regulation 1/2003 - which permits a national competition authority to carry out inspections and other fact-finding measures on behalf of another EU competition authority - the FCA initiated an investigation into alleged anticompetitive agreements implemented by French skincare company, Caudalie.

Caudalie is alleged to have compelled its selective distributors, including those active online, to limit customer discounts to a maximum of 10% of the pre-tax purchase prices. On the basis of evidence provided by the BCA, the FCA also requested an authorisation to conduct an inspection at Caudalie's premises in relation to potential agreements implemented in France.

On 20 February 2018, the FCA was granted an order authorising it to conduct a dawn raid at Caudalie's premises, which it did on 28 February 2018.

Caudalie subsequently challenged the order before the Paris Court of Appeal, claiming that the FCA's investigation went beyond the terms of the request for assistance received from its Belgian counterpart.

After the Court of Appeal rejected its claim and confirmed the order granted to the FCA on 19 June 2019, Caudalie lodged an appeal before the French Supreme Court (Cour de Cassation).

Rejecting Caudalie's appeal in its ruling of 17 February 2021, the French Supreme Court found that the FCA was entitled to investigate practices implemented in France, and therefore request authorisation to carry out dawn raids, on the basis of evidence received from an EU competition authority in the context of a request under Article 22 indicating that the practices investigated may have had effects in several EU Member States, including France.

This ruling provides a welcome clarification on the scope of the FCA's powers to conduct dawn raids in the context of cross-border investigations initiated by another EU competition authority.

French Administrative Supreme Court rejects appeal by an employee representative body in relation to a merger approval

FRANCE – MERGER CONTROL

On 9 March 2021, the French Administrative Supreme Court (Conseil d'Etat) rejected an appeal by Mondadori's social and economic committee ("SEC") in relation to the French Competition Authority's ("FCA") decision to approve Reworld Media's takeover of Mondadori France. The French Administrative Supreme Court found that the FCA is not bound to ensure, prior to issuing its decision, that the undertakings concerned complied with requirements under the Labour Code in respect of consultation with the target's SEC.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- A company's SEC is entitled to seek the annulment of a merger clearance decision having regard to its responsibility for ensuring the interests of employees are taken into account in decisions relating to the development of the company.
- However, the FCA is not required, as part of its merger investigation, to ensure that the undertakings concerned have complied with labour law obligations, such as requirements with respect to consultation with the target's SEC.
- A merger clearance decision cannot constitute, by itself, a violation of labour law obligations.

The French Administrative Supreme Court issued a judgment on 9 March 2021 rejecting an appeal by Mondadori's SEC seeking the annulment of the FCA's decision approving Reworld Media's takeover of Mondadori France.

Reworld and Mondadori are both active in print magazine publication, editorial website operation and the selling of advertising space. In May 2019, the FCA approved this merger subject to the condition that Reworld sells one of its automotive magazine titles, otherwise the new entity would own three of the four main titles in this market.

SECs are bodies of elected employees, which are intended to act on behalf of employees so that their interests are taken into account, in particular, in decisions relating to the management and economic and financial development of companies.

Mondadori's SEC filed a request to annul the FCA's merger clearance decision before the French Administrative Supreme Court.

By way of a preliminary point, the French Administrative Supreme Court accepted that the SEC is entitled to bring an action to annul a decision by the FCA in connection with a merger in view of the SEC's missions under labour law and the effects of a merger clearance decision.

Mondadori's SEC alleged that the FCA prevented the undertakings concerned from submitting comments on the decision and thereby violated their rights of defence. This claim was rejected by the French Administrative Supreme Court since the FCA published its decision on its website and organised market tests.

Mondadori's SEC also claimed that the FCA was not allowed to clear the merger until the target company had complied with its duty to consult its SEC. This claim was also rejected. The French Administrative Supreme Court held that the FCA was not bound to ensure that the target had complied with any obligations in respect of consultation with its SEC as the obligation to notify the transaction is on the purchaser, not the target. The French

Administrative Supreme Court clarified that neither labour law nor business law required the FCA to ensure that the undertakings concerned consulted their SECs, and affirmed that a merger control decision cannot, by itself, infringe the obligation to consult with the SEC.

While the judgment focuses on the extent of the obligation to consult with the SEC in connection with a planned merger, this ruling suggests that the analysis conducted by the FCA in the context of merger control is independent from any assessment of compliance with other areas of law, such as labour law.

German competition authority secures Deutsche Post commitments to change T&Cs

GERMANY – ABUSE OF DOMINANCE

On 26 February 2021, the German Federal Cartel Office ("FCO") closed its six-year investigation into Deutsche Post AG ("DPAG") after securing commitments in connection with practices relating to the dispatch of newspapers and magazines. The FCO suspected that DPAG had abused its dominant position by entering into contracts with customers (such as publishing houses) containing exclusivity clauses and fidelity rebates. During the investigation, DPAG maintained that it was not dominant, but agreed to change its terms and conditions; abandoning its rebate system and using unit prices for the delivery of newspapers and magazines instead.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- A company's SEC is entitled to seek the annulment of a merger clearance decision having regard to its responsibility for ensuring the interests of employees are taken into account in decisions relating to the development of the company.
- However, the FCA is not required, as part of its merger investigation, to ensure that the undertakings concerned have complied with labour law obligations, such as requirements with respect to consultation with the target's SEC.
- A merger clearance decision cannot constitute, by itself, a violation of labour law obligations.

The FCO found that DPAG's contracts contained the following clauses:

- *"Hard entire circulation clauses",* which made the grant of rebates dependent on the entire customer's newspaper or magazine circulation being dispatched by DPAG; and
- *"Soft entire circulation clauses"*, where a large discount is granted under the condition that the customer's whole newspaper or magazine circulation is delivered by DPAG, combined with the possibility that no discount may be granted on future consignments if the services of competitors are used.

During the investigation, DPAG initially revised its discount system; however, those amendments were not accepted by the FCO because customers were still offered discounts depending on customers' total volumes dispatched, and customers risked losing discounts retroactively if they used DPAG's competitors to dispatch newspapers and magazines instead. In addition, the FCO found that DPAG's rebate system may be discriminatory because DPAG offered different conditions and rebates to its customers without any objective justification.

Even though throughout the investigation DPAG maintained that it did not hold a dominant position, DPAG cooperated with the FCO by abandoning its rebate system and replacing it with unit prices that are negotiated with customers for the delivery of newspapers and magazines.

Additional safeguards were also put into place, namely to: (i) protect customers against being sanctioned by DPAG for using the services of competitors (for example through minimum contract terms, termination rights and negotiation options); (ii) protect competitors against being driven out of the market through predatory pricing; and (iii) prevent price discrimination by ensuring that price reductions are transparent.

ICA accepts Italgas' commitments in abuse of dominance probe in the market for natural gas distribution

ITALY – ABUSE OF DOMINANCE

The Italian Competition Authority ("ICA") has recently closed with commitments an investigation against Italgas for an alleged abuse of dominance consisting of the refusal to supply essential information to the Venice municipality, which was launching a tender concerning gas distribution services in Venice and eight other municipalities.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The refusal to provide data and information – even to a public authority – by a dominant undertaking can be seen as abusive if it can limit or hinder competition.
- Undertakings holding legal or de facto monopolies must refrain from implementing behaviours aimed at hindering competition, especially in light of the interest of the ICA in enhancing competition in regulated sectors.
- The content of the far-reaching commitments by Italgas may become standard practice in Italy if the ICA's recent proposal to the government is passed into law.

Natural gas in Italy is distributed under a legal monopoly regime (concession) granted for a given local area by an ATEM (i.e. a defined geographical area encompassing several municipalities for the awarding of natural gas distribution concessions) for a period no longer than 12 years.

Italgas operated under a legal monopoly for over 40 years pursuant to an agreement with the Venice ATEM which expired in 2012. Following expiration, Italgas and the City of Venice entered into a long dispute before the courts concerning the ownership of the distribution network. The Venice ATEM then complained to the ICA that it was prevented from launching new bidding procedures, since Italgas refused to provide it with all the information necessary to organise the tender.

That information, exclusively held by Italgas, was essential for the preparation of the new call for tenders, as well as to allow potential competitors to make an assessment about the profitability of the contract.

According to the ICA, the refusal could result in the impossibility for the ATEM to establish competitive gas distribution bidding procedures.

In order to overcome the competition concerns raised by the ICA, Italgas committed to assist the Venice ATEM (and, in future, any other awarding authority) in establishing natural gas distribution tenders by providing detailed technical and financial information, such as the relevant costs related to the distribution networks, the relevant maps and description of the distribution system in an open and interoperable format, and other information necessary to launch competitive biddings.

The ICA has welcomed the commitments since they will allow all contracting authorities (not only the specific Venice ATEM) to rapidly launch calls for tenders, assuring the participation of several competitors, according to the arm's length principle, and increasing competition.

The ICA has thus confirmed that information and data (relating to the natural gas distribution services) are "*valuable*" inputs from an antitrust perspective, and the refusal by a dominant undertaking to provide them can be considered as abusive.

Another similar investigation in the Genoa area, also involving Italgas, was closed with commitments in 2020.

In light of this recent decisional practice, in its opinion on possible competition reforms in view of the adoption of the Annual Law on Markets and Competition submitted to the Italian Government on 23 March 2021, the ICA proposed:

- to make binding on the outgoing operator the provision of the maps and other documents describing the distribution system in an open and interoperable format, as well as to avoid leaving any discretionary margin to the outgoing operator, or any uncertainty, as regards the information to be provided; and
- to envisage a fining system in case of failure to provide the relevant information.

Directors disqualified over construction cartels

UK – CARTELS

The Competition and Markets Authority ("CMA") has disqualified five directors in relation to two separate construction cartels. Three of the directors were disqualified following an investigation by the CMA into two of the UK's largest suppliers of rolled lead roofing materials, Associated Lead Mills Ltd ("ALM") and H.J. Enthoven Ltd (trading as BLM British Lead). Two of the director disqualifications relate to the CMA's 2019 decision finding that three suppliers of pre-cast concrete drainage products formed a cartel. This brings the total number of director disqualifications, as a result of CMA investigations, to 25.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The CMA's message to directors is clear: "*you are personally responsible for ensuring that your company complies with competition law, and if it doesn't you risk disqualification*."
- Directors may be held accountable for anti-competitive behaviour, even if not directly involved in the breach.
- In order to avoid personal liability for breaches of competition law, directors should take active steps to prevent further breaches.
- Directors who do not take active steps to prevent further breaches of competition law will be seen as having contributed to the breach and therefore risk disqualification.

ROLLED LEAD ROOFING MATERIALS CARTEL

On 4 November 2020, the CMA found that two of the UK's largest suppliers of rolled lead roofing materials, ALM and BLM British Lead, had formed an illegal cartel. The scope of the cartel included price collusion, market-sharing, refusal to supply, and information exchange. Both ALM and BLM British Lead concluded a settlement with the CMA and agreed to pay fines of around GBP 1.5 million and GBP 8.1 million respectively.

The cartel took place between October 2015 and March 2017, during which Mr Campbell was a director of BLM British Lead, and Mr Hudson and Mr Sherling were directors of ALM. Reflecting on the serious nature of the breaches and the extent of the directors' involvement in the cartel, the CMA has secured the disqualification of all three directors.

Mr Campbell, who sought to conceal his cartel activity by using a different mobile phone from his main number, has been disqualified for six and a half years. Mr Hudson has been disqualified for four years and Mr Sherling, who admitted to suspecting that ALM was involved in anti-competitive behaviour but not doing anything to stop it, has been disqualified for three years.

PRE-CAST CONCRETE CARTEL

Following the CMA's 2019 decision that FPM, Stanton Bonna Concrete Ltd and CPM Group Ltd had infringed competition law from July 2006 to March 2013 through fixing prices, market-sharing and exchanging competitively sensitive information, the CMA secured the disqualification of two former directors of FPM for their roles in the illegal construction cartel. The two directors had attended regular cartel meetings on behalf of FPM.

These disqualifications bring the total number of disqualifications resulting from CMA investigations to 25. These latest disqualifications serve as a reminder of the CMA's ability to take strong action against individuals to protect the public from illegal anticompetitive practices. In particular, the CMA's message is that directors are personally responsible for ensuring that their companies comply with competition law.

UK Court of Appeal confirms Trucks collective proceedings' funding arrangements are not damages-based agreements

UK – CARTELS/PRIVATE DAMAGES ACTIONS

On 5 March 2021, the Court of Appeal upheld a decision of the Competition Appeal Tribunal ("CAT") that the funding arrangements in place in two collective proceedings arising from the *Trucks* cartel are not damages-based agreements ("DBAs").

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The decision confirms that litigation funders who only provide funding to claimants are not providing "*claims management services*" and such arrangements do not constitute DBAs.
- Applicants proposing to bring collective proceedings are able to amend their funding arrangements following a hearing in order address any concerns the CAT has in respect of those arrangements.
- The Court of Appeal has confirmed that interim decisions made by the CAT can be appealed by way of judicial review. This is in contrast to CAT decisions which result in the "*end of the road*" for the claim, which can be appealed in the usual way.

BACKGROUND

In 2018, two applications were made to the CAT by UK Trucks Claim Limited ("UKTC"), a special purpose vehicle, and Road Haulage Association Limited ("RHA") seeking permission to bring collective proceedings on behalf of purchasers of trucks to recover damages following on from the European Commission's decision in *Trucks* (case AT.39824) (see our August 2016 newsletter).

Both applications had been awaiting the outcome of separate proceedings on the correct approach to the certification process for collective claims, which was recently heard by the UK Supreme Court in *Merricks v Mastercard* (see our February 2021 newsletter). During the interim period the CAT determined, as a preliminary issue, the adequacy of UKTC and RHA's funding agreements.

The CAT confirmed that both applicants' funding agreements (in the form of Litigation Funding Agreements ("LFAs")) were not DBAs and therefore not subject to the UK's DBA Regulations 2013. The CAT also concluded that, subject to certain conditions, the proposed claimants' funding arrangements and after the event insurance coverage were not reasons to refuse authorisation of either applicants' application for a collective proceedings order. Authorisation is a key gateway in being able to bring collective proceedings.

The DAF respondents sought, but were refused, permission from the CAT to appeal the decision that the parties' funding arrangements were not DBAs.

THE PROCEDURAL ISSUE

The DAF respondents then sought permission from the Court of Appeal to appeal the CAT's decision, or alternatively for permission to bring proceedings for judicial review against that decision in the High Court. Both approaches were pursued due to the uncertain scope of section 49 of the Competition Act 1998, which provides that an appeal in collective proceedings can be made on a point of law arising from a decision "… *as to the award of damages or other sum*…".

In determining the procedural issue, the Court of Appeal held that the words "*as to the award of damages*" is only descriptive of the type of *decision* from which an appeal may be brought, rather than the type of *proceedings* in which the decision is made.

The Court of Appeal noted the CAT's decision regarding funding is only one matter that the CAT will ultimately consider when making a final certification decision. Additionally, the Court of Appeal noted that a decision by the CAT objecting to the claimants' funding arrangements would not have been the "*end of* *the road*" for the claimants, due to the flexible approach taken by the CAT in allowing amendments to be made to their funding arrangements.

The Court of Appeal therefore ruled that the CAT's decision was an interim ruling on an important issue of principle that can only be challenged by way of judicial review.

THE FUNDING ARRANGEMENTS WERE NOT DBAS

The issue before the Court of Appeal was one of statutory construction. DBAs are defined in section 58AA(3)(a) of the Courts and Legal Services Act 1990 as an agreement between a person providing either: (i) advocacy; (ii) litigation; or (iii) claims management services, and that the recipient of those services provides payment "*determined by reference to the amount of financial benefit obtained*".

The Court of Appeal was required to consider, in particular, whether the funding arrangements entered into by UKTC and RHA resulted in the funder providing "*claims management services*", which is defined as, *inter alia*, "*the provision of financial services or assistance*".

The Court of Appeal confirmed that the funders were not providing such claims management services, holding that the "*provision of financial services*" must be provided in the context of the management of the claim (thus financial services must be provided in the context of providing claims management services). Accordingly, the provision of funding under an LFA does not, in and of itself, amount to claims management services. Consequently, UKTC and RHA's LFAs did not constitute DBAs, because the funders in each case were not providing claims management services.

CONCLUDING THOUGHTS

LFAs are becoming increasingly common in litigation proceedings across the UK. The Court of Appeal has now confirmed that arrangements which only provide funding to claimants will not constitute a DBA. In the context of competition law proceedings, it is important to note that DBAs are prohibited for opt-out collective proceedings; however, the Court of Appeal's ruling also suggests that it would be open for the CAT to allow claimants to amend their funding arrangements if they constitute a DBA.

The Court of Appeal has also provided important clarification on the appeal routes available for CAT decisions in the context of competition damages claims. In particular, judicial review is available in respect of interim decisions which do not amount to the claim reaching the "*end of the road*". This is in contrast to decisions resulting in "*an award of damages or other sum*", which can be appealed in accordance with the Competition Act 1998.

UK regulators announce first workplan for digital markets

UK – NEW LAW/POLICY

On 10 March 2021, the Digital Regulation Cooperation Forum ("DRCF") published its first annual plan of work for 2021/22. The plan of work establishes a road map for how the Competition and Markets Authority ("CMA"), the Office of Communications ("Ofcom") and the Information Commissioner's Office ("ICO") will work together to ensure coordination on regulatory matters across digital markets and online services.

BACKGROUND

The CMA, ICO and Ofcom have a wide range of regulatory responsibilities across digital markets, which include promoting competition, protecting consumers, protecting people's data rights, regulating communication services and broadcasting and regulating harmful content.

On 1 July 2020, the DRCF published its launch document setting out that the overarching ambition of the DRCF is to support cooperation and coordination between the CMA, ICO and Ofcom in relation to online regulatory matters, and to enable coherent, informed and responsive regulation of UK digital markets. The Financial Conduct Authority will also join as a full member of the DRCF as of April 2021.

The 2021/22 plan of work has been published following several major developments since the DRCF was formed, including the UK Government confirming that it would establish and resource the Digital Markets Unit ("DMU") within the CMA from April 2021, and naming Ofcom as the regulator for online safety in the Online Harms White Paper, with powers to impose fines of up to £18 million or 10% of global annual turnover (whichever is the higher).

A JOINED-UP APPROACH TO DIGITAL REGULATION

The DRCF has identified the following three priorities to support its strategic ambitions as part of its 2021/22 plan of work:

- ***Priority 1: Responding strategically to industry and technological developments*** through horizon scanning, and cooperating on joint strategic projects to provide regulatory coherence and clarity for business and digital service users. This includes service design, algorithmic processing, digital advertising technologies and end-to-end encryption.
- ***Priority 2: Developing joined-up regulatory approaches*** to ensure coherent regulatory outcomes, which will include a focus on the interrelation between data protection and competition regulation. This work will also consider how new regimes for online regulation may interact with wider existing regulation such as financial regulation, intellectual property rights, and content regulation.
- ***Priority 3: Building skills and capabilities*** by working together to build collective technical, expertise and analytical capabilities (for example, in artificial intelligence and data analysis), and engaging closely with other regulatory authorities responsible for digital markets.

The DCRF also plans to improve clarity for stakeholders through collective engagement, including through public documents and international engagement, as well as more operational proposals to build the capabilities of the DRCF so that it is fit for purpose.

COMMENT

The DRCF represents a shift towards a more holistic regulatory approach to digital markets. However, as a non-statutory network, the 2021/22 plan recognises that "*future challenges have the potential to test the limits of our collaboration under our current frameworks*". The DCRF intends to review its existing bilateral memoranda of understanding between regulators, and the work plan indicates that the DCRF is engaging with the UK Government to identify whether further measures may be needed to support cooperation between its members, including the possibility of statutory measures to enable greater information sharing arrangements.

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