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Competition Law Newsletter
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The February 2021 issue of Ashurst's competition law newsletter features some of the key competition law developments in December and January, including important judgments by the European Courts on antitrust cases, amendments to the German legislation on merger control and antitrust, landmark rulings by the highest courts in the UK and Germany on private claims for follow-on damages, and final reports market inquiries in Australia and the UK, as well as other news.

Content

Kilpailu- ja kuluttajavirasto: stop all the clocks, cut off the cartel

EU – CARTELS/ANTITRUST - ANTICOMPETITIVE AGREEMENTS

On 14 January 2021, the European Court of Justice delivered a preliminary ruling (case C-450/19) setting out guidance on when an anticompetitive agreement on submitting prices in the context of a call for tenders is considered to come to an end. This ruling has important implications for the application of limitation periods for fines imposed by competition authorities.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Participation in a bid-rigging cartel is deemed to end on the date the terms of the agreement that was the subject of the call for tenders has been definitively determined, which will generally be the contract signature date.
- The fact that performance of obligations under the contract continues long after signing is not material in determining the end of an undertaking's participation in a bid-rigging cartel.
- Wider economic effects on third parties flowing from the contract may be relevant for damages actions, but are not relevant to the application of limitation periods for imposing fines.

The request for a preliminary ruling was submitted to the Court in the context of proceedings brought by the Finnish Competition and Consumer Authority ("KKV"), challenging the lawfulness of a decision issued by the Finnish Market Court, in which the court rejected the KKV's application of 31 October 2014 imposing a fine on the Eltel group. The Market Court denied the KKV's application as the conduct at issue was deemed to have occurred outside the five-year limitation period applicable under EU and Finnish competition rules.

According to the KKV, Eltel had secured a contract for the construction of a high-voltage transmission line in Finland as a result of an agreement with its competitor, Empower, on the terms of tenders submitted to Fingrid, the contracting authority responsible for the development of the Finnish high-voltage electricity transmission network.

The Finnish Supreme Administrative Court, hearing the case on appeal, sought clarification from the Court of Justice on the date Eltel's participation in the bid-rigging cartel should be considered to have come to an end. Four potentially relevant dates were considered by the court:

- the date Eltel submitted its tender - 4 June 2007;
- the date the contract was concluded - 19 June 2007;
- the date the works were completed - 12 November 2009; and
- the date the last instalment under the contract was paid to Eltel - 7 January 2010.

According to the Court's case law, an undertaking's participation in an anticompetitive agreement is deemed to last for as long that agreement produces its effects, regardless of the date on which that agreement formally came to an end.

The KKV argued that the harmful effects of the cartel lasted until the final instalment was paid to Eltel, and that the cartel could have had harmful economic repercussions downstream, in particular in the form of higher electricity distribution tariffs paid by Fingrid's customers.

In its ruling, the Court of Justice drew a distinction between the restrictive effects of the cartel on competition - which deprived the contracting authority of the opportunity to obtain the agreed goods, works or services under competitive conditions - and the wider adverse economic effects on other market players flowing from the contract. Only the first category of effects are relevant in determining the duration of an undertaking's participation in an anticompetitive agreement.

As Fingrid had been definitively deprived of the opportunity to obtain the goods, works or services under normal market conditions on the date the terms of the contract with Eltel had been definitively determined, Eltel's participation in the bid-rigging cartel was deemed to have come to an end on 19 June 2007, the date on which the contract was signed.

This case provides valuable guidance on the duration of an infringement in circumstances in which a cartel participant has entered into a contract with a third party producing obligations long after the date of signing.

In its guidance, the Court has sought to maintain a clear distinction between effects relevant for the purposes of calculating penalties for infringing competition law and downstream effects relevant to actions for damages before national courts.

This is the second preliminary ruling delivered in January 2021 by the Court of Justice's second chamber in relation to the implementation of limitation periods by Member States in EU competition cases. In *Whiteland Import/Export* the Court of Justice held that an overly narrow approach to the interruption of limitation periods may block the application of EU competition rules in a way that is potentially contrary to the EU principle of effectiveness.

Another episode in pay-TV saga as ECJ annuls Paramount's binding commitments

EU – CARTELS/ANTITRUST - ANTICOMPETITIVE AGREEMENTS /PROCEDURE

On 9 December 2020, the European Court of Justice ("ECJ") set aside a judgment of the General Court upholding a 2016 decision by the European Commission ("Commission") to make binding commitments offered by Paramount on cross-border pay-TV services. This is the first time that a commitment decision adopted under Article 9 of Regulation 1/2003 has been successfully annulled.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Commitment decisions can be adopted by the Commission to address competition concerns without concluding whether or not an infringement has taken place.
- When assessing the proportionality of commitments offered by parties under investigation, the Commission must ensure that the rights of third parties are "not deprived of their substance". It is therefore important to be mindful of the possible effects on third parties when offering commitments to the Commission.
- National courts cannot require an undertaking to breach commitments made binding by the Commission.

BACKGROUND

The case relates to the Commission's investigation into pay-TV licensing agreements between Sky UK and six movie studios (including Paramount). The Commission announced in 2016 its preliminary conclusion that certain clauses under these agreements restricted broadcasters' ability to accept unsolicited requests (so-called 'passive sales') for their pay-TV services from consumers located outside their licensed territory.

To address these concerns, Paramount offered commitments to the Commission that it will neither act upon nor enforce these clauses in existing film licensing contracts for pay-TV with any broadcaster in the European Economic Area. In July 2016, the Commission made those commitments legally binding on Paramount ("Decision").

Canal+, a French television broadcaster, was the counterparty to a pay-TV licensing agreement with Paramount and challenged the Decision before the General Court ("GC"), notably arguing that the Decision encroached upon its contractual rights.

In December 2018, the GC dismissed Canal+'s action. In particular, the GC ruled that the Decision did not have an "*irremediable effect as against a third party that neither offered nor subscribed to the commitment made binding*". According to the GC, nothing prevented Canal+ from referring the matter to a national court for a declaration that the relevant clauses are compatible with competition law. Canal+ appealed to the ECJ.

THE ECJ'S JUDGMENT

The ECJ rejected a number of Canal+'s arguments on appeal, notably confirming that:

- the GC was correct to rely on *Murphy* to find that terms granting absolute territorial protection give rise to competition concerns; and
- the Commission can entirely disregard efficiencies under Article 101(3) TFEU when negotiating commitments.

However, in line with the Advocate General's opinion, the ECJ held that the GC breached the principle of proportionality when assessing the adverse effects of the Decision on third parties' interests.

The ECJ recalled its *Alrosa* judgment and noted that in the context of commitment decisions:

- the Commission is confined to verifying (1) that the commitments address the competition concerns and (2) that the undertakings concerned have not offered less onerous commitments that also address those concerns adequately; and
- when doing so, it must take into consideration the interests of third parties.

Distinguishing between these two aspects of the proportionality test, the ECJ clarified that when assessing the proportionality of commitments by reference to their impact on third parties' interests (as opposed to their impact on the competition concerns), the Commission must ensure that the rights of third parties are "*not deprived of their substance*".

While acknowledging that commitment decisions do not preclude national courts from examining whether agreements that are the subject of those decisions comply with competition rules (as made clear in *Gasorba* – see our December 2017 newsletter article), the ECJ disagreed with the GC's conclusion that this would ensure an adequate and effective protection of third parties' contractual rights.

This is because, pursuant to *Masterfoods*, which is now codified in Article 16(1) of Regulation 1/2003, national courts cannot take decisions that would run counter to Commission decisions (and, in this case, require Paramount to contravene its commitments and honour its obligations towards Canal+). In other words, it is now clear that whilst national courts can adopt a stricter approach and may, during the period of a commitment decision's validity, conclude that the arrangements that are the subject of the decision amount to an infringement, they cannot adopt a finding of non-infringement that runs counter to legally binding commitments.

The ECJ therefore set aside the General Court's judgment and annulled the Commission's Decision.

COMMENT

The ECJ's judgment in *Canal+* is likely to have an impact on the Commission's future approach to commitment decisions, and constrain its discretion to accept commitments that would otherwise nullify the pre-existing contractual rights of third parties. It may also have more direct implications for existing commitment decisions: press reports have recently suggested that the Commission is considering whether to withdraw a similar commitment decision relating to other movie studios adopted in 2019 (see our April 2019 newsletter article; there is also a legal challenge currently pending). The pay-TV saga may be far from being over.

EU General Court issues judgment in International Skating Union case

EU – CARTELS/ANTITRUST - ANTICOMPETITIVE AGREEMENTS

On 16 December 2020 the General Court of the European Union (the "Court") issued an important ruling in the International Skating Union ("ISU") case. While accepting that sports governing bodies may apply a prior authorisation system for third party events to ensure that all sports competitions meet common standards, the Court stressed that the applicable rules and procedures have to be fair, transparent and proportionate. However, the Court upheld the role of the Court of Arbitration for Sport ("CAS") as the primary body for the adjudication of sports-related disputes.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Sports associations organising their own competitions may legitimately have a pre-authorisation system in place for third party events, to ensure that all sports competitions comply with common standards (e.g. related to the safety of athletes or the fairness of competitions).
- The applicable rules and procedures must be fair, transparent, non-discriminatory and proportionate.
- A compulsory arbitration system, giving the Court of Arbitration for Sport exclusive jurisdiction over sports-related disputes, is not anti-competitive in itself and may not be characterised as an aggravating circumstance in a decision establishing a competition law infringement.

BACKGROUND

The ISU is the sports federation that regulates figure and speed skating at worldwide level and organises the main speed and figure skating international competitions. All professional skaters are subject to the rules of the ISU which include, in particular, pre-authorisation rules for third-party events as well as eligibility rules defining the conditions under which athletes may participate in the ISU competitions. Until recently, these rules prohibited athletes from participating in unauthorised skating events under pain of a lifetime ban from the ISU competitions.

Following a complaint by two Dutch athletes, the European Commission issued a decision in

2017, finding that the rules of the ISU infringed Article 101 TFEU and ordering the ISU to amend these rules. The Commission also took issue with the compulsory arbitration system of the ISU which gave exclusive jurisdiction to the CAS over actions against ineligibility decisions. The Commission found that the CAS failed to ensure effective judicial protection for athletes and reinforced the restrictions of competition arising from the ISU rules, especially insofar as the CAS, as well as its appeal body, the Swiss Federal Tribunal, have no obligation to apply EU competition rules. The ISU appealed the Commission decision before the Court.

JUDGMENT OF COURT

In its judgment of 16 December 2020, the Court emphasised that the ISU, on account of its dual role as market regulator and operator, had a special responsibility to ensure undistorted competition on the market. While the ISU could legitimately enforce a pre-authorisation system to ensure that all skating events comply with common standards (e.g. related to the safety of athletes or the fairness of competitions), the applicable rules and procedures had to be "*clearly defined, transparent, non-discriminatory, verifiable and capable of guaranteeing effective access to the market for competing event organisers*". While the ISU rules did pursue certain legitimate objectives, the Court found that they were disproportionate to the extent that they:

- left the ISU "*absolute discretion*" to refuse to approve competing skating events;
- provided for manifestly disproportionate penalties (with athletes facing a lifetime ban from the ISU competitions), the application of which was, moreover, unpredictable; and
- imposed excessive and discriminatory requirements on third-party organisers, and also failed to set out specific time-limits for decisions on requests for authorisation.

Under these conditions, the Court concluded that the Commission did not err in finding that the ISU rules restricted competition "by object".

However, the Court disagreed with the Commission with regard to the compulsory arbitration by the CAS. The Court observed that arbitration clauses are not anti-competitive in themselves, and do not render the infringement more harmful. On the contrary, there are clear benefits in having all sports-related disputes referred to a specialised court that is able to decide quickly and economically on such matters and ensures legal certainty and procedural uniformity for all athletes. Moreover, the Court found that the arbitration of the CAS did not violate the athletes' right to a fair hearing and did not compromise the effectiveness of EU competition law as athletes have the possibility to seize national courts and/or one of the competition authorities in the EU. Accordingly, the Court annulled the Commission decision insofar as it referred to the arbitration of the CAS as an aggravating circumstance.

COMMENT

This judgment provides important insights into the application of EU competition law to sports associations having both regulatory and commercial activities. The judgment firstly confirms that sports associations may lawfully enforce a pre-authorisation system for third-party events, provided that the latter pursues legitimate objectives and the applicable rules and procedures are fair, transparent, non-discriminatory and proportionate. In this regard, the new authorisation rules of the ISU, which were developed in close consultation with the Commission, will probably serve as an important point of reference for other sports associations in the future. The Court also endorsed the role of the CAS as the primary body for the adjudication of sports-related disputes, thus preserving the established arbitration mechanism of many sports associations.

European Court of Justice confirms default interest must be awarded on fines reimbursed

EU – ANTITRUST - CARTELS / PROCEDURE / RECOVERY OF FINES

On 20 January 2021 the European Court of Justice ("ECJ") upheld the General Court's ruling on the European Commission's duty to pay default interest on reimbursed fines as a form of *restitutio in integrum*, clarifying the rate to be applied and that late payment of interest will itself incur interest.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Upon reimbursement of a fine provisionally paid in compliance with an antitrust decision, which is subsequently annulled, the company is also entitled to default interest.
- The default interest rate to be applied is currently that set by the European Central Bank for its principal refinancing operations, plus 3.5 percentage points.
- If the European Commission fails to fully comply with this obligation, the company can bring an action seeking payment of the shortfall.
- The company can also seek default interest on the shortfall itself, from the date of partial repayment of the fine until the date of payment in full.

In the ruling under appeal in this case (T-201/17 of 12 February 2019), the General Court had recalled that, pursuant to Article 266(1) TFEU, the institution whose act has been declared void must take the necessary measures to comply with that judgment i.e. restore the situation which existed before that decision was adopted. In the event of the annulment of a European Commission decision imposing a fine which the company has provisionally paid - as in Printeos' case – that requires reimbursement of the principal amount of the fine and, in addition, payment of default interest from the date of the provisional payment. If the European Commission fails to comply with that obligation, that constitutes a sufficiently serious breach of Article 266(1) TFEU, entitling the applicant to bring an action for damages.

On appeal (C-301/19 P) the ECJ confirmed the General Court's ruling on those basic points. However, it provided some important additional clarifications and also reformed the ruling in relation to one key issue.

Firstly, the ECJ clarified that default interest is aimed at compensating at a standard rate for the loss of enjoyment of the monies owed and to encourage the debtor to pay the due amount as soon as possible. Since the annulment of an antitrust decision shows that the European Commission erred in imposing the payment of a fine, default interest must be paid according to the *restitutio in integrum* principle.

Secondly, the ECJ confirmed that the applicable rate of interest should normally be the rate set by the European Central Bank ("ECB") for its principal refinancing operations, plus 3.5 percentage points, pursuant to Article 83 of Delegated Regulation 1268/2012 (now Article 99 of Delegated Regulation 2018/1046). However, where the European Commission has invested the provisionally paid fine and that investment has yielded a higher rate of interest, then it is that higher rate that should apply. Ironically, in this specific case, Printeos had explicitly asked the General Court for a significantly lower rate – i.e. ECB plus 2 percentage points – and the court therefore did not have the power to grant any more than that in its judgment ('*ne ultra petita*' or '*not beyond request*' principle).

Finally, in its application before the General Court, Printeos, in view of the fact that the European Commission had failed to pay the full amount of default interest due to it immediately after the annulment of its decision, had asked to receive "*compound*" default interest on the amount (of interest) that the Commission had failed to pay. The General Court had rejected this request for "*compound*" interest, except for the period following its own judgment.

That finding was overturned on appeal. The ECJ confirmed that, if the European Commission failed to reimburse all interest due, default interest thereon should be recognized on the amount which had not been paid by the Commission. The rate to apply would again be the ECB refinancing rate plus 3.5 percentage points and it would apply from the date of the partial reimbursement of the fine. Again, somewhat ironically, in this specific case Printeos requested "*compound*" default interest from a later date (the date on which it introduced its action for damages before the General Court). As a result, it could not be awarded any "compound' interest before that date in accordance with the *ne ultra petita* principle.

With this ruling the ECJ solved (once and for all?) important doubts surrounding the recovery of antitrust fines unduly paid, namely (i) the European Commission's duty to pay default interest on the fine to be reimbursed, (ii) the applicable interest rate and (iii) the possibility to compound interest

Top EU court confirms scope of liability for investors in companies involved in cartels

EU –ANTITRUST - CARTELS – PARENTAL LIABILITY

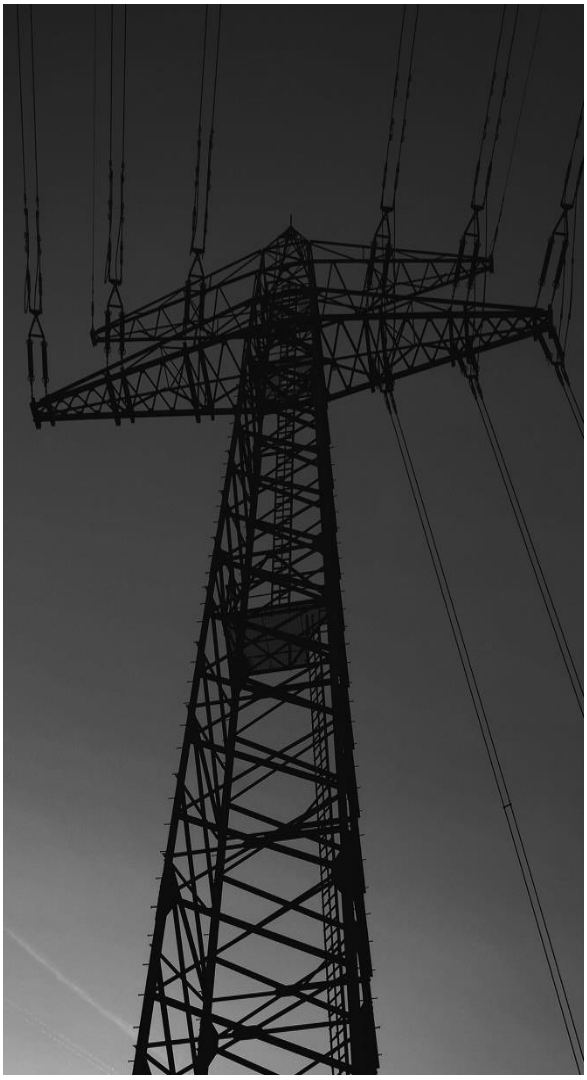
On 27 January 2021, the Court of Justice of the European Union ("the Court") upheld the €37.3 million fine imposed on Goldman Sachs as a result of the involvement of portfolio company Prysmian in the power cables cartel. The ruling has held that in the circumstances of this case, Goldman Sachs, the manager of the investing fund, could incur parental liability for the competition law infringement of Prysmian.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Private equity and other "financial" investor entities can in certain circumstances be held jointly and severally liable for anti-competitive conduct of their controlled portfolio companies.
- Liability can continue long after the investment has been exited.

In 2014 the Commission fined Prysmian €104.6 million for its involvement in the power-cables cartel. The Goldman Sachs Group Inc. (**"Goldman Sachs"**) was held to be jointly and severally liable for €37.3 million of that fine, covering the period (2005-2009) of the cartel when Prysmian was an investee company of the bank.

By its appeal, Goldman Sachs sought to have set aside the General Court's 2018 judgment, upholding the Commission decision imposing joint and several liability.



Goldman Sachs argued before the Court that its relationship with Prysmian was not that of a parent company, but of a "*pure financial investor*" and that its stake in Prysmian during the vast majority of the time of the infringement was less than 100%. As a result, it argued that it should not be held liable for the anti-competitive behaviour of its investee company.

Those arguments were rejected by the Court.

In its judgment the Court held that an entity holding 100% of the voting rights associated with a company's shares is able to exercise decisive influence over the conduct of that company. In this respect, it did not matter that Goldman Sachs only held 33% of the financial interests in the relevant fund which held the shares in Prysmian; nor did it matter that the fund's shareholding in Prysmian initially reduced from 100% to 84%. Goldman Sachs' control of 100% of the voting rights for the period through to a 2007 IPO meant that the Commission was entitled to rely on the legal presumption that Goldman Sachs had exercised decisive influence over Prysmian's conduct on the market in that period.

Nor did the Court find fault with the General Court's separate conclusion that Goldman Sachs had in fact actually exercised decisive influence over Prysmian throughout the infringement period, including following the 2007 IPO, which reduced the Goldman Sachs fund's holding in Prysmian, initially to 46% and subsequently to 26%, and in which period Goldman Sachs no longer exercised 100% of the voting rights. Such actual exercise of decisive influence was based on various factors such as Goldman Sachs' ability to appoint the members of various Prysmian boards, its power to call Prysmian shareholders to meetings and to propose the revocation of directors, and the delegated powers of directors of part of Goldman Sachs' Merchant Banking Division on Prysmian boards and their participation in Prysmian's Strategic Committee.

Although it is well established case-law that a parent company can be found liable for the cartel activity of its subsidiary, this is the first time that the EU's highest court has explicitly confirmed application of very similar rules to an investment held through an investment fund structure.

ECJ confirms validity of information request in Qualcomm predation investigation

EU – ABUSE OF DOMINANCE / PROCEDURE

On 28 January 2021, the European Court of Justice ("ECJ") upheld a ruling of the General Court finding that an information request issued by the EU Commission, as part of its investigation into Qualcomm's predatory pricing practices, did not breach the principles of necessity and proportionality.

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WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The EU Commission has broad powers of investigation under Regulation 1/2003 where it suspects there has been an infringement of competition law, including the power to issue legally binding information requests.
- The EU Commission may issue information requests after a statement of objections has been issued, for example, in order to adjust its assessment following responses received to the statement of objections from parties under investigation.
- Failure to comply with information requests may result in fines of up to 1% of an undertaking's global turnover and/or periodic penalty payments.

BACKGROUND

In July 2019, the EU Commission fined Qualcomm EUR 242 million for predatory pricing in the global market for 3G (UMTS) baseband chipsets, with the aim of eliminating rival chipmaker Icera by selling chipsets at a loss (see our July 2019 newsletter).

As part of its investigation, the EU Commission issued an information request using its powers under Article 18 of Regulation 1/2003. In absence of a reply to that information request, the EU Commission adopted a decision ("Decision") requiring Qualcomm to disclose the required information within a prescribed time period or be subjected to a periodic fine of EUR 580,000 per day until the information request was complied with.

Qualcomm ultimately complied with the information request. However, Qualcomm also appealed the Decision to the General Court challenging, amongst other things, the necessity and proportionality of the request, including the fact that the request had been sent after the statement of objections was issued and covered periods outside the scope of the allegations as set out in the statement of objections. The General Court dismissed Qualcomm's appeal and Qualcomm appealed to the ECJ.

THE ECJ'S RULING

In dismissing the appeal, the ECJ emphasised that the statement of objections is provisional in nature and liable to change, with the ultimate decision regarding any infringement of competition law to be assessed based on the whole of the EU Commission's investigation. Furthermore, the EU Commission is entitled to request further information arising from observations submitted by parties in response to the statement of objections.

The ECJ also upheld the General Court's findings that the Decision was necessary and proportionate. In this regard, the ECJ observed that:

- the information request sought to take into account observations, submitted by Qualcomm in response to the statement of objections, that the EU Commission's methodology for establishing predatory pricing did not reflect prices actually paid by Qualcomm's customers. The information request sought to obtain data to address that issue; and

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- the General Court correctly took into account the burden imposed by the Decision on Qualcomm, which required a large quantity of information to be provided in a specific format. The General Court accepted that complying with the Decision entailed a "*significant workload*", but was correct to conclude that the information request was not disproportionate, having regard to the needs of the investigation relating to the alleged infringement.

COMMENT

The ECJ's judgment in *Qualcomm* confirms the EU Commission's wide discretion in deciding what information is "*necessary*" to determine whether an alleged infringement has taken place. This can sometimes extend to onerous information requests in cases where the information is deemed necessary in light of the purpose of that investigation.

Qualcomm is continuing with its appeal of the EUR 242 million fine that was ultimately imposed as a result of the EU Commission's investigation (see our July 2019 newsletter), and has also appealed a separate EU Commission decision imposing a EUR 1 billion fine following an investigation into exclusionary practices for LTE baseband chipsets (see our February 2018 newsletter). Both cases are currently pending before the General Court.

The ACCC publishes its final report in the home loan price inquiry

AUSTRALIA – MARKET INVESTIGATIONS & SECTOR INQUIRIES

In its Final Report in the Home Loan Price Inquiry ("Final Report"), the Australian Competition and Consumer Commission ("ACCC") found that many Australians with older home loans continue to pay significantly higher interest rates than those with newer loans. The Final Report focused on perceived impediments to borrowers switching to alternative lenders, and identified recommendations to address specific impediments. The ACCC also recommended that the Government direct it to embark on a further 5-year monitoring inquiry into competition and pricing in the home loan market. The Government's decision on the ACCC's recommendations is pending.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The ACCC's Final Report sheds light on a range of practices by lenders which the ACCC considers detract from price competition in the home loan market and adversely affect consumers. Notably, however, the ACCC's Final Report does not indicate that any of the lenders breached any Australian competition or consumer laws.
- The ACCC has made a range of recommendations directed to addressing perceived impediments to home loan switching and has recommended that the Government direct it to continue to monitor competition and pricing in the home loan market.
- It remains to be seen whether the Australian Government will adopt the ACCC's recommendations, and if it does so, when and how any adopted recommendations would be implemented.
- Australian lenders should carefully consider any future home loan pricing decisions and strategies as any such conduct is likely to be closely examined by the ACCC.

On 14 October 2019, the Australian Government directed the ACCC to conduct an inquiry into home loan pricing, focussing on two issues:

- prices charged for home loans since 1 January 2019 by Australia's major banks; and
- impediments to consumers switching to alternative home loan suppliers.

Building on an earlier Interim Report issued by the ACCC, focussing on the first of the two issues, the Commonwealth Government released the ACCC's Final Report, examining the second issue, on 5 December 2020.

The central findings of the Final Report were that many Australians with older home loans continue to pay significantly higher interest rates than borrowers with newer home loans, and that borrowers could save significant amounts of money by seeking a lower rate from their existing lender or switching to a new lender.

The ACCC found that borrowers with home loans between three and five years old paid on average about 58 basis points more than the average interest rate paid for new loans, whilst borrowers with loans more than 10 years old were, on average, paying about 104 basis points more. The ACCC calculated that a borrower with a home loan of A$ 250,000, paying 58 basis points more than the average interest rate, could save more than A$ 17,000 in interest over the term of the loan.

Having regard to these findings, the ACCC made four recommendations:

- **Recommendation 1**: all lenders should be required to provide an annual prompt to borrowers with older variable rate loans (originated three or more years ago) to encourage such borrowers to engage in the home loan market and potentially switch lenders or home loan products.
- **Recommendations 2 and 3**: all lenders should provide borrowers with a standardised form to discharge the borrower's home loan from their existing lender, which should be easy to access, fill out and submit. To complement this, the ACCC also recommended that a time limit of 10 days be placed on lenders to complete the discharge process.
- **Recommendation 4:** the ACCC should "*continue to inquire into and monitor competition and pricing in the home loan market, under government direction*". Specifically, the ACCC recommended a 5-year monitoring directive, initially focussing on the 10 largest lenders in the home loan market.

The timeline for the Australian Government's decision on the ACCC's recommendations is as yet unclear, particularly given the other pressing issues on the Government's agenda. It is also uncertain whether market participants will be invited to make submissions to the Government in advance of its decision.

The ACCC has been examining this area since 2017 and, given its ongoing importance to the Australian economy, it is unlikely that this most recent inquiry will conclude the ACCC's fascination with mortgage loan pricing, regardless of whether it is directed to undertake a further 5-year monitoring inquiry.

Although the relevance of an ongoing examination has arguably diminished in the short term, given Australia's current low interest rate environment, Australian lenders should carefully consider any future home loan pricing decisions and strategies as any such conduct is likely to be closely examined by the ACCC.

ACCC achieves obstruction conviction in connection with cartel probe

AUSTRALIA – ANTITRUST - CARTELS

In December 2020, Jason Ellis, a former general manager of sales and marketing at BlueScope Steel Limited ("BlueScope"), was sentenced to eight months' imprisonment (suspended) and ordered to pay a A$10,000 fine, for inciting the obstruction of an investigation by the Australian Competition and Consumer Commission ("ACCC") into alleged price fixing by BlueScope and Mr Ellis.

This was the first time an individual had been charged with, and convicted of, inciting the obstruction of an ACCC investigation.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Inciting the obstruction of a Commonwealth official in the performance of their functions is a criminal offence under the Commonwealth Criminal Code, and carries a maximum jail sentence of two years. On a guilty plea in the Local Court, the maximum jail sentence is one year.
- The ACCC takes attempts to prevent it from obtaining full and truthful accounts of conduct under investigation extremely seriously, and can refer conduct (including failure to comply with compulsory notices and providing false information) to the Commonwealth Director of Public Prosecutions ("CDPP") to consider prosecution.
- The ACCC's civil proceedings against BlueScope and Mr Ellis for alleged price fixing continue, with the trial scheduled to commence in August 2021.

BACKGROUND AND SUMMARY

In October 2019, Mr Ellis was charged by the CDPP with two counts of inciting the obstruction of a Commonwealth official in the performance of their functions. The charges related to actions Mr Ellis took during an ACCC investigation into alleged cartel conduct by BlueScope and Mr Ellis.

The ACCC was investigating allegations that, between September 2013 and June 2014, BlueScope and Mr Ellis attempted to induce various steel distributors in Australia and overseas manufacturers to enter arrangements containing a price-fixing provision. The ACCC commenced civil proceedings against BlueScope and Mr Ellis in respect of those allegations in August 2019.

In September 2020, Mr Ellis entered a guilty plea to one "*rolled-up*" charge, for inciting two fellow BlueScope employees to give false evidence to the ACCC during its investigation, regarding discussions he and those employees had in meetings with certain steel companies.

In handing down the sentence, Magistrate Atkinson considered the conduct to be objectively serious, and said: *"in all dealings* [with the ACCC] *a person needs to allow investigations to run properly, without any attempt to hinder investigations by officials"*.

The ACCC's investigative powers, including its information-gathering powers under section 155 of the Competition and Consumer Act 2010 (Cth), are central to its ability to detect and gather evidence of cartels. Refusing or failing to comply with a section 155 notice by the due date is also a criminal offence, as is providing false or misleading information or evidence in response to a notice. These offences can also attract financial penalties and/or imprisonment.

COMMENT

The case demonstrates the seriousness with which the ACCC takes attempts to obstruct it from obtaining a full and truthful account of matters under investigation.

It also illustrates that such conduct may increase the potential legal liability of parties under investigation, exposing them not only to potential liability for the conduct under investigation but also prosecution for the subsequent obstructive conduct.

The ACCC's Chairman, Rod Sims, has indicated that the ACCC will not hesitate to make similar referrals to the CDPP in the future, where the ACCC considers parties have improperly sought to impede its investigations.

The proceedings against BlueScope and Mr Ellis for alleged cartel conduct remain ongoing, with a trial scheduled to commence in the Federal Court in August 2021.

Paris Court of Appeal preserves presumption of innocence, but upholds fines imposed on chemical distributor Brenntag

FRENCH – ANTITRUST - CARTELS

On 3 December 2020, the Paris Court of Appeal ("Court") confirmed the fines imposed by the French Competition Authority ("FCA") in 2013 on the German chemical distributor Brenntag, and its former parent company Deutsche Bahn, of EUR 47 million and EUR 5.2 million respectively for participating in an anti-competitive agreement relating to the distribution of chemical commodities in France. However, it modified its case-law in a way that will limit the FCA's ability in "hybrid" settlement cases to use facts not contested by settling parties against non-settling parties.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- According to the Paris Court of Appeal, the FCA cannot solely rely on facts established during settlement negotiations against undertakings that have decided not to contest a statement of objections in order to establish the liability of an undertaking which chooses not to settle.
- Under the presumption of innocence, which is a general principle of EU law, undertakings that choose not to settle must be able to exercise their rights of defence by contesting the factual allegations made against them.

In 2013, the FCA fined several chemical distributors for participating in a single, complex and continuous anti-competitive agreement with a view to stabilising their market shares and increasing their margins through customer allocation and tariff coordination. The FCA's decision, which originated from a leniency application filed in 2006, was followed by lengthy legal proceedings during which Brenntag challenged in particular the FCA's use of its investigative powers and the regularity of the documents brought by the whistle-blower, Solvadis, which contained defamatory statements about Brenntag's lawyer.

However, the significance of the Court's decision of 3 December 2020 is found in its departure from the so-called "*Manpower*" case law, a ruling of the French Supreme Court dated 29 March 2011, which had been applied by the FCA for approximately 10 years. According to *Manpower*, in cases where some undertakings decide not to contest the FCA's statement of objections in order to reach a settlement agreement, whilst other undertakings contest the statement of objections, the FCA is only required to demonstrate with respect to the latter undertakings that they participated in the infringement in question (i.e. the FCA does not have to demonstrate facts relating to the infringement that can be considered as established through the settlement procedure).

The FCA argued before the Court that – in accordance with the *Manpower* case law – the classification of the infringement as a single, complex and continuous cartel could not be contested by Brenntag. However, the Court's decision confirms that the presumption of innocence is a general principle of EU law, which precludes the FCA from adopting an approach that would deny the undertaking concerned the opportunity to exercise its rights of defence outside of the settlement procedure.

Despite the Court's important clarification on the application of the *Manpower* case law, the examination of the substantive merits of the FCA's decision led the Court to conclude that, first, the factual findings were sufficient to establish the existence of a single, complex and continuous infringement and, second, Brenntag in fact did participate in such an infringement.

The FCA is likely to appeal this decision before the French Supreme Court given the implications of the Court's judgment to future cases. However, the Supreme Court may be persuaded by the inferior court's ruling and adopt a decision that serves to protect the rights of defence of parties under investigation in future cases.

The German Competition Digitisation Act: Good news for M&A activity, challenges ahead for big tech companies and digital platforms

GERMANY – NEW LAW/POLICY

On 19 January 2021, a major amendment to the German Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, "GWB"*) – the so-called "GWB Digitisation Act – entered into force. The amendment pursues two major objectives: to create a regulatory framework for competition in the digital economy and to implement the ECN+ Directive into national law. The key changes concern various areas of competition law, i.e. merger control, abuse of dominance – in particular in the context of the digital economy, cartel prosecution and horizontal cooperation.

Overall, the amendment will result in fewer transactions being notifiable to the German Federal Cartel Office ("FCO"), implements far-reaching powers for the FCO against big tech companies and digital platforms by modernising the abuse of dominance provisions, introduces a formal procedure for companies to obtain a decision from the FCO on the legality of envisaged cooperation with competitors within six months (and thus more legal certainty) and extends the FCO's investigative powers in the area of cartel prosecution. However, whether and to what extent compliance efforts may now be considered as a mitigating factor, even though explicitly addressed in the amendment, remains unclear.

MERGER CONTROL – DECREASED JURISDICTION OF THE FCO THROUGH A SIGNIFICANT INCREASE IN DOMESTIC TURNOVER THRESHOLDS?

The amendment includes far-reaching changes to the German merger control regime. As a consequence of a significant increase in the domestic turnover thresholds, far fewer transactions will be subject to German merger control in the future. Although the original draft bill had proposed an increase in domestic turnover thresholds, the competent parliamentary committee made last-minute changes by further increasing those thresholds. The increased domestic turnover thresholds aim to reduce the workload of the FCO in mergers cases by up to a third in order to free up resources to address the market power of leading companies in the digital markets, or other critical cases.

As a result, transactions will only be subject to German merger control and require a merger control notification to the FCO if they meet the following three cumulative thresholds:

- the combined worldwide turnover of all participating companies exceeds EUR 500 million;
- at least one participating company has a German turnover exceeding EUR 50 million; and
- (a) at least one further participating company has a German turnover exceeding EUR 17.5 million; or

  (b) the transaction value amounts to more than EUR 400 million and the target has significant activities in Germany, but achieves a German turnover below EUR 17.5 million and – as an unwritten requirement – the turnover of the target does not reflect adequately its market position and competitive potential (for further information on the transaction value test, see Ashurst's Newsletter of August 2018).

Having reviewed approximately 1,200-1,400 notifications per year in recent years, the majority of which raise little or no competition concern and/or have limited impact on competition in Germany, the FCO sees the new thresholds as a means to focus on the cases that are most relevant to competition.

We expect the amendment to reduce the number of German merger control filings by a third. Acquisitions of small German companies and acquisitions of foreign companies with limited exports to Germany will benefit most. In contrast, establishments of joint ventures and co-investments that are reportable today will typically continue to be notifiable. This is because a typical parent company or co-investor (together with its company group) is larger than a typical target company.

Apart from the increase in the domestic thresholds, the German merger control regime remains widely unchanged. Only the threshold for the so-called "***de-minimis exemption***", according to which the FCO may not prohibit mergers if they affect "***de-minimis markets***" that have existed for at least five years, is increased from a market size of EUR 15 million to EUR 20 million. However, the law clarifies that in order to benefit from the de-minimis exemption, the combined size of all relevant ***de-minimis markets*** concerned by the concentration must be below that threshold.

In addition, as a reaction to a merger in the German waste management sector involving a number of acquisitions of very small competitors that did not meet the turnover thresholds, the amendment introduces a new filing requirement. A filing may be ordered by the FCO, even if an acquisition meets neither the turnover thresholds nor the transaction value threshold, if there are indications that competition will be significantly impeded by future transactions in the industry sector concerned. However, the FCO may use this new merger control tool only: (i) after conducting a sector investigation; (ii) if it concerns an acquisition of companies that achieved a turnover of more than EUR 2 million in the last business year; (iii) of which more than two thirds was in Germany; and (iv) if the parties have a 15% share of domestic supply (or demand on the buyer side). It remains to be seen if the FCO will be in time to intervene when large companies start buying smaller rivals and market structures change, if it must first conduct a sector enquiry.

As regards special rules for specific sectors, certain hospital mergers will be exempted from merger control requirements until at least 2027 and the turnover multiplier applicable to the print media sector will be reduced from eight to four.

From a procedural point of view, the duration of the Phase II merger control review period is extended by one month to a total of five months (one month for Phase I, plus four months for Phase II).

ABUSE OF DOMINANCE - IMPORTANT CHANGES FOR THE PROTECTION OF COMPETITION IN THE DIGITAL ECONOMY

Another central focus of the amendment concerns the modernisation of the abuse of dominance rules.

The "classical" abuse of dominance rules enforced by competition authorities are primarily aimed at stopping or sanctioning abusive behaviour by companies with market power after the abuse has already taken place. However, it is widely considered that the rate of development of the digital economy and the rapid growth of the large platforms make it necessary for the FCO to be able to intervene more quickly and more effectively. The amendment therefore enables the FCO to intervene pre-emptively to prohibit certain conduct by "big tech" and digital platforms at an earlier stage. In this regard, the German legislature is an international pioneer and hopes to curb the market power of the big tech companies and digital platforms with such tools. Similar instruments are also being discussed at European level.

The most significant change to the rules on abuse of dominance is perhaps the newly introduced section 19a of the GWB. For the first time, it enables the FCO to intervene at an early stage when competition is threatened by certain large digital groups. The FCO can pre-emptively prohibit certain conduct by companies which, due to their strategic position and resources, are of overwhelming importance for competition across markets (so-called "super-dominant companies"). Examples of the types of conduct in which the FCO can intervene include, *inter alia*:

- granting preference to a company's own offerings over its competitors ("self-preferencing");
- hindering third parties in their business activities on procurement or sales markets if the company's activities are important for access to these markets;
- using competitively sensitive data collected by the company to create or appreciably raise barriers to market entry;
- impeding the interoperability of products or services or the portability of data

The effectiveness of these new tools is underpinned by a newly introduced, and hotly debated, shortened judicial review procedure. Disputes and appeals arising out of the FCO's use of its new tools will be directly decided by the German Federal Court of Justice, which is thus the first and last instance court in those matters. The purpose of this shortened judicial review, thereby skipping the previous first instance of the Higher Regional Court of Düsseldorf, is to avoid lengthy court proceedings and to save time, given that the markets concerned are quickly developing and changing. It remains to be seen whether this new judicial review procedure will be challenged, as some observers argue that it may infringe constitutional law.

The amendment also expands some of the "classical" abuse of dominance provisions to include internet-specific criteria. When measuring market power, the law provides that access to competition-relevant data and the question of whether a platform has so-called intermediation power are to be taken into account. A strong position in the intermediation of services can establish a relationship of dependency that is relevant under competition law.

In addition, protections against companies with relative or superior market power have been broadened. The amendment provides that any company (and not just small and medium-sized enterprises, as previously) is protected against a market participant on which it depends. Another important innovation is that the FCO can, under certain conditions, order that data access be granted for an appropriate fee in favour of dependent companies. Finally, the amendment introduces a right of intervention for the FCO against the so-called "tipping" of markets (i.e. the transformation of a market with several suppliers into a monopolistic or highly concentrated market). This new intervention right applies to companies with superior market power, i.e. it is not necessary to establish that the company concerned holds a dominant position in that market.

COOPERATION BETWEEN COMPETITORS – GUIDANCE FOR COMPANIES

Cooperation between competitors is becoming increasingly important in many sectors, in part, due to the digital transformation. The FCO is generally open for discussion and has already handled a number of requests for immediate guidance on the legality of cooperation between companies in the context of the COVID-19 crisis. However, going forward, the amendment enables companies to formally ask the FCO for a decision within six months on the legality of envisaged cooperation with a competitor, if the companies have a substantial legal and economic interest in such a decision. This should provide greater legal certainty to companies planning to cooperate with competitors, compared with having to rely on self-assessment only.

CARTEL PROSECUTION, IMPLEMENTATION OF THE ECN+ DIRECTIVE AND

The amendment also implements the ECN+ Directive into German law and hereby strengthen the effectiveness of cartel prosecution. Through the implementation of the ECN+ Directive, the investigative powers of the competition authorities are extended.

In particular, in alignment with the system that exists at EU level, companies and their employees will in future be obliged to cooperate with competition law investigations, in particular, by providing information or evidence (in response to requests for information). As under European law, searches of premises are now subject to a duty to cooperate, with fines in case of non-compliance. In certain cases, natural persons may be obliged to provide incriminating information, but that information may not be used against them in criminal or administrative offence proceedings.

In determining the amount of the fine, the amendment specifies – as has been partly established by existing case law – that, in addition to the gravity of the infringement and its duration, the following circumstances must be taken into account: (i) the nature and extent of the infringement, in particular the proportion of turnover directly or indirectly related to the infringement;

(ii) the importance of the products and services affected by the infringement; (iii) the manner in which the infringement was carried out; (iv) previous infringements by the undertaking, as well as adequate and effective precautions taken prior to the infringement to prevent and detect infringements; and (v) the company's efforts to detect the infringement and to compensate the damage, as well as precautions taken after the infringement to prevent and detect infringements.

The two latter aspects under (iv) and (v) constitute, at least at a first glance, a change in the assessment of companies' compliance efforts. While previously the FCO has strictly refused to recognise compliance efforts as a mitigating factor for the calculation of a cartel fine, Section 81d (1) sentence 2 no. 4 GWB, explicitly states that *"reasonable and effective precautions taken in advance to avoid and detect infringements"* can be considered as mitigating circumstances in the future assessment of fines. While this clarification is a welcome recognition of companies' compliance efforts and an overdue alignment with the legal approach to corporate crimes in Germany, it remains to be seen the extent to which the FCO's enforcement practice will change. As the FCO has previously declined to give credit for compliance measures based on the argument that the cartel infringement proves their lack of effectiveness, it is now likely to consider measures to be effective only if they lead to the detection and reporting of the infringement. However in circumstances where the infringement has been detected and reported to the FCO by a company, this new mitigating factor is unlikely to be relevant because the reporting company would already benefit from a reduction of the fine to zero as the first applicant for leniency under Section 81k GWB. It remains to be seen whether and the extent to which there may be room for companies to "fight" for the recognition of their compliance efforts.

Finally, the leniency programme has now been enshrined and codified in law.

German Federal Court of Justice delivers first ruling on the Trucks cartel

GERMANY – PRIVATE DAMAGES ACTIONS

In a decision of 23 September 2020, published early January 2021, the German Federal Court of Justice ("BGH") rejected a follow-on damages claim filed against Daimler in relation to the European Commission's ("Commission") Trucks decision. This is the first time that the highest German civil court has ruled on a damages claim arising from the Trucks proceedings and it is not expected to be the last.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- German courts are bound by the factual findings of Commission infringement decisions, including settlement decisions imposing fines.
- The *Trucks* cartel was not – as previously found by some lower instance German courts – a mere information exchange, but a price fixing cartel.
- Claimants affected by the *Trucks* cartel are generally entitled to claim damages if they purchased trucks from the cartelists falling within the product, geographic and temporal scope of the cartel. This includes all trucks based on the basic models whose list prices were the subject of collusive practices.
- There is no prima facie evidence of damage suffered by a claimant. However, claimants can rely on an actual presumption that cartels lead, on average, to higher prices. The fact that the cartelists in *Trucks* agreed "only" on list prices (and not transaction prices) is not in conflict with this presumption.
- Courts must assess and weigh all the facts and circumstances of each individual case. The burden of proof to demonstrate damages remains with the claimant.

BACKGROUND

In 2016, the Commission fined truck manufacturers Volvo/Renault, Daimler, Iveco, and DAF a total of approximately EUR 3 billion, whilst MAN received immunity from fines following a leniency application. There are now hundreds of damages claims following the *Trucks* decision pending before German courts. The decision of the BGH of 23 September 2020 is the first decision of the highest German civil court in respect of these claims.

In the case at hand, a construction company claimed damages against Daimler for overcharges paid for 11 specially and individually configured trucks. While the lower first and appeal instance courts generally granted damages for these claims (without deciding on the amount), the BGH rejected the reasoning of the lower courts and referred the case back for a re-assessment.

THE BGH'S JUDGMENT

In its ruling, the BGH confirmed and clarified various aspects that will be important for future damage claims, especially in the context of claims arising from the *Trucks* decision:

- As to the nature of the cartel, the BGH found that the courts are bound by the factual findings of the Commission establishing the competition law infringement, including facts established in settlement decisions imposing fines. As the Commission had established the conduct at question as price coordination, the BGH found that German courts are
- bound by this finding. Therefore, it was incorrect for some lower courts to classify the behaviour as a mere information exchange and to ignore the extensive coordination between the cartelists.
- As to the product scope of the cartel, the BGH confirmed that there were no indications why the individually configured vehicles in question should be classified as "*special vehicles*" that were not subject to the impact of the cartel. Rather, generally speaking, as long as the vehicles – as in the case at hand – are based on the basic models whose list prices were the subject of collusion, they are generally impacted by the cartel.
- The BGH also confirmed that claimants were affected by the cartel if they purchased trucks from a cartelist that falls within the product, geographic and temporal scope of the cartel. It is not necessary to establish whether, and to what extent, transaction prices for specific, individualised vehicles were influenced by the collusive practices.

As regards the question of whether or not to award damages, the BGH emphasised the importance of correctly and comprehensively assessing and weighing all of the facts of the case and confirmed the burden of proof to demonstrate damages remains with the claimant, and may not be reversed onto the defendant:

- As a preliminary observation, the BGH affirmed its ruling in the context of the rail track cartel that there is no *prima facie* evidence of damages suffered by a claimant as a result of a cartel (file no. KZR 26/17; see our March 2019 newsletter). Rather, the courts must comprehensively assess all of the facts and circumstances of the case, including the representations made by the parties concerned.
- However, and in line with the rail track cartel ruling, the claimant can rely on an actual presumption that, as a result of the cartel, the price level was on average higher than in absence of the cartel. The fact that the cartelists in *Trucks* had agreed "*only*" on list prices (and not transaction prices) does not jeopardize the actual presumption of a price increase.
- Nevertheless, the courts shall grant damages only if they are convinced that damages have occurred, having considering all of the facts and circumstances of the individual case. If doubts remain, damages shall not be awarded. In this context, the BGH held

that it is not necessary for the defendant to demonstrate that there are no damages; it is sufficient for the defendant to present and, if necessary, prove the facts that are capable of calling into question the existence of damages and, for that purpose, weak indications shall suffice.

- The BGH concluded that the burden of proof to show damages remains with the claimant and it would be incorrect to allocate that burden onto the defendant.

In the case at hand the BGH found that the appeal court did not sufficiently assess the arguments presented by Daimler on the cartel's impact on prices and on the degree of competition between the cartelists. The wording of the appeal court's judgment also suggested that Daimler could only succeed with its arguments if it provided clear evidence against the existence of an overcharge. In light of this, the BGH held that the appeal court had incorrectly reversed the burden of proof and required Daimler to demonstrate that there were no damages.

On account of this error in law, the BGH rejected the decision of the appeal court and referred the case back for re-assessment.

COMMENT

The BGH's judgment confirms that the burden of proof for the establishing damages rests with the claimant and courts need to comprehensively assess all of the facts and circumstances on a case-by-case basis. It still remains to be seen how the lower courts and claimants will interpret the ruling of the BGH in future cases, particularly against a background where – for claims that have arisen after 26 December 2016 – the legislator has introduced a legal presumption that a cartel gives rise to damages.

The "*captive banks*" case: The Italian Administrative Court of First Instance annuls Italian Competition Authority's highest fine ever

ITALY – ANTITRUST - CARTELS

On 21 October 2020 the Italian Administrative Court of First Instance ("TAR Lazio") annulled the decision issued by the Italian Competition Authority ("ICA") on 20 December 2018 sanctioning a number of car manufacturers and their "*captive banks*" in relation to an alleged cartel concerning car financing products. The fines totalling €678 million in this case were previously the highest fines ever imposed by the ICA.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The ICA must comply with the principle of reasonable duration of proceedings and therefore promptly open the investigation once it has gathered all the supporting information and documentation.
- The characterization of an infringement as a "by object" restriction requires the precise assessment of the economic and legal context of the market concerned as well as the objectives underlying the conduct at issue.

The ICA's decision, which followed a leniency application, had sanctioned Daimler, Volkswagen, Toyota, Renault, General Motors, Ford and BMW jointly with their respective "*captive banks*" (i.e. the subsidiaries of each of those car manufacturers providing banking services) for having fixed the conditions for the financing and leasing of new cars in Italy between 2003 and 2017 in breach of Article 101 TFEU (see our comment on the ICA's decision here). The TAR Lazio annulled the ICA's decision on both procedural and substantive grounds (the *FCE Bank* judgment can be found here).

In line with recent national case-law, the TAR Lazio held that the ICA breached the parties' right to a reasonable duration of the proceedings. This was insofar as the ICA unreasonably delayed the launching of the proceedings for three years, despite all relevant information already being provided in the context of the leniency applications received in this case.

On the merits of the case, the TAR Lazio criticized the ICA for having failed to demonstrate how the exchange of information which formed the object of the ICA's investigation could affect the competitive dynamics on the relevant market, as defined by the ICA in the decision.

In this regard, the TAR Lazio noted that the ICA had identified the market concerned by the exchange of information as the market for the "*sale/leasing of cars through financial products, namely car financing (in the strict sense) and leasing*".

However, in the market so defined, it was not clear, according to the TAR Lazio, that the conditions of the financing offered to customers was the main or even an important driver of competition, as the price and/or characteristics of the car could also influence customers' choice significantly. The ICA had failed to investigate this issue and thus had failed to demonstrate that the captive banks' conduct was capable of distorting competition in the relevant market.

The TAR Lazio also indicated that even if one were to consider only the market for car financing (which was not the relevant market considered by the ICA in its decision), it was still unclear that the exchange of information at stake could affect competition. Indeed, on such a market, the captive banks faced competition from universal banks, which were strong competitors.

Thus, the ICA had not provided sufficient evidence that the conduct concerned was inherently capable of significantly affecting competition and thus could not be viewed as a restriction "by object" (as the ICA had done). The ICA should have assessed the economic and legal context of the market in which the alleged infringement occurred in order to establish evidence of the potential negative effects of the conduct on competition.

The TAR Lazio's ruling adds to the current (welcome) trend of the Italian courts requiring the ICA to provide convincing grounds before concluding that conduct constitutes a restriction by "object". In this regard, the courts are aligned with similar recent developments at the EU level (see, for example, our summary of the ECJ's judgment in *Budapest Bank*).

Italian Council of State confirms annulment of football TV rights bid-rigging decision

ITALY – ANTITRUST - CARTELS

On 12 December 2020, Italy's highest administrative court, the Council of State, upheld the annulment of the Italian Competition Authority's ("ICA") decision to fine broadcasters Mediaset and Sky Italia, the Italian Football League, and marketing agency Infront a total of €66m for an alleged anti-competitive agreement to rig an auction for pay-TV broadcasting rights for Serie A matches.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The notion of a "by object" restriction of competition must be interpreted restrictively.
- When assessing an anti-competitive agreement the ICA is required to have a clear understanding of the relevant market, and to take due account of its peculiarities, including the regulatory framework.
- The ICA must demonstrate a common interest among the parties to carry out the alleged anticompetitive conduct, and the consequences of this conduct on the market.

The Council of State fully upheld the ruling of the court of first instance ("**TAR Lazio**"), which annulled the ICA's decision concerning the tender for the allocation of pay-TV rights relating to the Serie A matches for the 2015-2018 seasons (the judgments can be found here and here).

At the end of that tender, despite Sky having submitted the best offer, the Italian Football League (and its marketing agency, Infront) awarded the main packages of TV rights to both Sky and Mediaset, pursuant to art. 9 of Legislative Decree no 9/2008 which prevents the assignment of all the packages relating to live matches to a single operator. Mediaset subsequently agreed to sub-licence a package to Sky, following authorization granted by the Italian Communications Authority and the request of the Italian Football League.

According to the ICA, this "agreement" between the broadcasters and the Italian Football League affected the outcome of the tender and the allocation of TV rights in breach of Article 101 TFEU.

The Council of State found that the TAR Lazio correctly annulled the ICA's decision, having properly held that the ICA did not provide evidence of anti-competitive collusion between the parties, either in terms of an agreement entered into between the parties prior to, or after, the submission of bids, or a common interest among the parties that would have caused them to enter into the alleged anticompetitive agreement.

The ICA also wrongly assessed the agreement as having the object of determining the outcome of a tender in advance. In particular, the ICA failed to take into account:

- the specific market characteristics (a clearly defined market where a certain number of competitors compete to acquire specific products);
- the sector regulation which prevented allocation of all of the TV rights tendered to a single operator (Legislative Decree no 9/2008); and
- the position of the other competitor (Eurosport) which, according to the administrative courts, would gain no advantage from the re-organisation of the tender, as it was not able to make a competitive offer.

The Council of State recalled that even in case of "by object" restrictions the ICA is always required to assess whether there are specific facts that might cast doubt on the presumed unlawful nature of the alleged agreement. In this case, the allocation of the TV rights packages was affected by the peculiarities of the relevant market, and in particular the specific regulatory framework, rather than by the alleged agreement as found by the ICA.

Once again the administrative courts have thus stressed that, when assessing an anti-competitive agreement, the ICA is required to have a clear understanding of the relevant market, as this is key to identifying the economic and legal context in which the alleged anticompetitive conduct takes place.

The CNMC fines three solid fuel cartels and five individuals €3.7 million

SPAIN – ANTITRUST - CARTELS

The Spanish competition authority ("CNMC") has fined six companies and five directors participating in three cartels, breaching EU and Spanish antitrust rules by fixing prices and other commercial conditions, sharing customers and exchanging commercially sensitive information for almost 20 years.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This case provides a good illustration of collaboration between regional competition authorities and the CNMC
- Investigations by regional authorities can lead to national investigations when evidence suggests that the conduct investigated affects several regions
- This case also shows that the CNMC is committed to using fines on company directors as a deterrent against participation in cartel activity

This case originated with dawn-raids conducted by the Basque competition authority at the premises of two companies in June 2016, in relation to suspected anticompetitive agreements regarding the commercialisation of metallurgical coke. When analysing the information seized, the regional authority determined that the suspected conduct could involve other Spanish regions and cover several other products. Therefore the regional authority alerted the CNMC, which subsequently raided the premises of four other companies in October 2018 and in January 2019. This led to the opening of a formal investigation into seven companies (although the authority eventually closed proceedings against one of these companies, Cementos Tudela Veguín, due to a lack of evidence).

The first cartel was made up of three companies: Toro, FISL and Grafitos. According to the CNMC, these companies supplied various customers on the basis of agreed prices and conditions for a period of 17 years. To this end, the companies coordinated the bids and prices that each offered to their customers, and exchanged information on customer negotiations. The directors of the participating companies monitored compliance with their anticompetitive agreements through meetings, telephone calls, and emails, providing compensation for any deviation from their agreement.

The second cartel was made up of two companies: Candel and García Munté Energía. These companies shared customers, each establishing exclusive customer relationships, as well as agreeing on sales quotas, sales prices and exchanging commercially sensitive information between August and December 2015 and between December 2017 and September 2018. The directors of these companies also held meetings and shared communications coordinating their client sharing activities (establishing vetoes, priorities rules, etc.), as well as explicitly agreeing to keep their activities secret.

Finally, the third cartel was made up of two companies: Candel and Capex CGC. These companies had agreed to fix prices and share customers, through the exchange of information on prices and quantities, between July 2015 and February 2016. In this case, only the director of Candel was sanctioned.

The CNMC imposed fines of a total of €3.5 million on the companies participating in the cartels as well as fines of €0.16 million on the company directors.

This case illustrates both the CNMC's commitment to identifying and dismantling cartels in Spain as well as its commitment to imposing fines on company directors as a deterrent against participation in cartel activity.

Spanish court reduces overcharge in trucks cartel from 20% to 8% on appeal

SPAIN – PRIVATE DAMAGES ACTION

On 18 December 2020, a Spanish second-instance court (Audiencia Provincial de Asturias, "APA") issued a ruling partially endorsing an appeal brought by IVECO S.a.P. ("IVECO") against a judgment awarding damages to one of its customers in the context of a follow-on action deriving from the EU Commission's decision in the Trucks case. The court held that the criteria used for quantification of damages were not supported by solid economic evidence and reduced the overcharge from a 20% to 8%.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

According to the APA:

- The limitation period for filing a follow-on action runs from the date of publication of the EU Commission decision (not the corresponding press release) and can be interrupted by means of an out-of-court complaint to the defendant.
- The existence of damages can be presumed.
- there needs to be a solid evidential basis upon which quantification of damages are made.

In 2016 the EU Commission issued a decision finding that IVECO, together with other truck manufacturers, had participated in a 14 year cartel relating to prices and emissions technology (see our newsletter article here). A significant number of follow-on damages actions have been brought by customers before national courts; for example, see our newsletter articles on the recent German Supreme Court ruling and follow-on damages actions in the UK.

In one such case brought against IVECO by one of its customers, a Spanish commercial court held at first instance that the EU Commission decision created a presumption that the infringement had given rise to damages. The claimant was awarded €78,887.23 based on an economic report establishing that the price overcharge resulting from the infringement was above 20%.

In its appeal judgement on 18 December 2020, the APA confirmed that the limitation period for filing a follow-on action runs from the date of publication of the EU Commission decision (not the corresponding press release) and could be interrupted by means of an out-of-court complaint to the defendant. In its appeal judgement on 18 December 2020, the APA confirmed that the limitation period for filing a follow-on action runs from the date of publication of the EU Commission decision (not the corresponding press release) and could be interrupted by means of an out-of-court complaint to the defendant.

The APA also confirmed that the existence of damages could be presumed. Whilst the EU Damages Directive (which requires Member States to introduce such a presumption into their national law) did not apply to the case, the presumption flowed directly from Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), Regulation 1/2003 and basic principles of EU law.

Nonetheless, the APA disagreed with the quantification of damages on the basis that the economic report (which established the level of the overcharge resulting from the infringement was above 20%) lacked a solid evidential basis. As IVECO did not propose an alternative, the APA set the percentage at the 8%, on the basis of:

- The nature of the infringement, which consisted of a long-lasting cartel having as its object the exchange of information on gross prices, involving companies with high turnovers and affecting the whole EEA.
- The fact that the infringement resulted in a distortion of the market could be inferred from the EU Commission decision.
- Market factors such as demand elasticity or the application of different discounts and margins by distributors should lead to cautious estimates.
- The fact that other Spanish courts and national courts of other Member States (for example, Germany) have considered similar percentages, below 10%.

Finally, the APA also endorsed the granting of interest being an essential element of damage reparation.

This case provides valuable guidance on the estimation of price overcharges and damages deriving from EU competition law infringements in cases where the claimant has failed to provide adequate economic evidence of the extent of the overcharge.

CMA Orders Unwinding of Completed Trucks Parts Merger

UK – MERGER CONTROL

On 12 January 2021, the CMA ordered TVS Europe Distribution Limited ("TVS") to divest its ownership of 3G Truck and Trailer Parts Limited ("3G"). After conducting a Phase 2 merger inquiry, the Competition and Markets Authority ("CMA") ruled that only full divestiture would address its competition concerns.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This case is a reminder that the CMA is willing to intervene in relatively small markets - 3G had a UK turnover of just over £10 million.
- The case highlights how important internal documents can be to the CMA's case, especially those which set out the rationale for a transaction.
- Of the ten transactions assessed by the CMA at Phase 2 since April 2020, only two have been cleared (one unconditionally,

the other subject to a partial divestiture requirement).

On 3 February 2020, TVS completed its acquisition of 3G. Completion of the transaction was not conditional on obtaining merger control clearance from the CMA. 3G, the target business, had UK turnover of just over £10 million per annum, significantly under the CMA's £70 million turnover based jurisdictional threshold. However, the transaction fell within the jurisdiction of the CMA as the parties' combined market shares were above 25 per cent; therefore the CMA considered that the "share of supply test" had been satisfied.

On 1 April 2020, the CMA launched a Phase 1 merger inquiry. On 2 June 2020, the CMA decided to refer the acquisition for an in-depth Phase 2 investigation, on the basis of concerns that that the transaction has resulted or may be expected to result in a substantial lessening of competition ("**SLC**") within a market or markets in the United Kingdom. Following that Phase 2 investigation, the CMA has concluded that the acquisition would likely result in an SLC.

The CMA's competitive assessment relied heavily on internal documents from both parties. In particular, the CMA appears to have placed considerable evidential weight on a number of documents prepared for TVS's board, which set out the rationale for the merger. One of those documents explained how the transaction would "*strengthen UC's dominant market position*", while another described how acquiring 3G would remove the constraint imposed by 3G, who offered lower prices pre-transaction. TVS did not realise at the time that these documents could become subject to external scrutiny. Interestingly and perhaps not surprisingly, the CMA considered that this enhanced (rather than diminished) the evidential weight that should be placed upon these documents.

Other evidence considered by the CMA in its decision included market share data and a closeness of competition analysis (in particular customer win/loss data).

The CMA assessed three different remedy options: (i) full divestiture; (ii) partial divestiture; and (iii) behavioural remedies. The CMA concluded that partial divestiture would be unlikely to create a viable standalone business able to compete with the merged entity. Consistent with previous decisions, the CMA was also reluctant to accept any behavioural remedies and showed a strong preference for structural remedies (i.e. divestment).

This case is the latest example of the CMA prohibiting a transaction following an in-depth Phase 2 investigation. Of the ten transactions assessed by the CMA at Phase 2 since April 2020, only two have been cleared (one unconditionally, the other subject to a partial divestiture requirement).

CMA publishes its final report on funerals and crematoria market investigation

UK – MARKET INVESTIGATIONS & SECTOR INQUIRIES

Following an in-depth market investigation into the funeral services sector, the Competition and Markets Authority ("CMA") published its final report in December 2020. The report identifies a number of competition issues and confirms a package of "sunlight remedies", including obligations on funeral directors and crematoria operators to disclose prices to customers, and a prohibition on solicitation.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- A market investigation is an in-depth investigation led by a group drawn from the CMA's panel, undertaken independently of the CMA Board. If the investigation finds there are features of a market that have an adverse effect on competition, the CMA has the power to impose remedies and make recommendations to other bodies.
- As a result of the CMA's investigation, funeral directors will now be obliged to improve the transparency of price and commercial information provided to customers.
- The CMA will continue to monitor the sector and will require some larger funeral directors and all crematoria operators to provide the CMA with information on volume and revenues to assist with this.
- Given the significant impact of COVID-19 on the funerals sector, the CMA has recommended consulting on a new market investigation reference once the impact of the pandemic is better understood.

BACKGROUND

The CMA launched a market study in relation to the supply of funerals in the UK in June 2018 and, in March 2019, made a market investigation reference (under s. 131 of the Enterprise Act 2002) in relation to the supply of services by funeral directors at the point of need and the supply of crematoria services in the UK. Following a six-month extension to the market investigation due to the COVID-19 pandemic, the CMA published its provisional findings decision for consultation in August 2020, followed by its final report, confirming those findings, on 18 December 2020.

COMPETITION CONCERNS IDENTIFIED

The central concern arising from the market study was that consumers pay higher prices for funerals because they are not in a position to make the best choices and are vulnerable to exploitation.

The funeral director industry is fragmented consisting of three large players and a long tail of small firms, many of which have only one branch. Contrary to the belief of many customers, the activities of funeral directors are not regulated in England, Wales and Northern Ireland (though a regime is being introduced in Scotland). In addition, there are 303 crematoria in the UK operated by 184 separate entities, primarily local authorities.

In the market investigation, the CMA found that most people are unlikely to exercise good commercial judgment when purchasing a funeral as they would in relation to other high-cost purchases. Grief and bereavement naturally have an impact on decision-making, and consumers do not generally compare offers between different funeral directors or crematoria. They also tend to make choices of provider based on proximity or familiarity rather than price.

The CMA found that funeral directors play a very important role in shaping customer decision-making, but noted concerns about the lack of pricing information available online and the reluctance of funeral directors to provide prices in a complete and transparent way over the phone. There were also concerns about the way in which funeral directors may seek to gain additional customers through partnerships with care providers, and about the lack of competitive incentives over back-of-house quality (how the deceased is cared for by the funeral director), a significant feature of the service which is unobservable by customers.

The CMA found that crematoria operators do not generally have geographically close rivals, as barriers to entry are high. Whilst customers do consider overall quality of the cremation service, they are unlikely to compare quality between crematoria, as proximity is equally as important.

Ultimately, the CMA concluded that there were a number of features of the funeral directors and crematoria markets which restrict or distort competition, and that high prices in the supply of funeral director and crematoria services are likely to reflect the exercise of market power arising from limited competitive constraints.

REMEDIES

The CMA's "sunlight" remedies seek to ensure that the pricing and commercial activities of funeral directors and crematoria operators, as well as the quality of service provided by funeral directors, are exposed to greater public scrutiny, including:

- requirements that funeral directors and crematoria improve the transparency of price and commercial information provided to customers, and a prohibition on funeral directors from entering into certain customer referral and solicitation arrangements;
- a recommendation to UK Government to establish an inspection and registration regime to monitor the quality of funeral director services in England, Wales and Northern Ireland;
- recommendations that the CMA actively monitors the funerals sector, publishes an annual report on consumer outcomes and considers consulting on a new market investigation reference once the impact of COVID-19, which has materially changed the circumstances in which funerals can be conducted, is better understood; and
- requirements that some larger funeral directors and all crematoria operators provide the CMA with information on volume and revenues to assist with monitoring the sector.

These remedies must be implemented by 17 June 2021.

The CMA noted that as a result of the pandemic, it has not been able to design the remedy package that it might otherwise have wished to implement, including a price control. However, given its plan for ongoing monitoring of the sector, the CMA may yet take further action once the dust of the pandemic has eventually settled.

CMA fines suppliers of groundworks products to the UK construction industry over £15 million

UK – ANTITRUST - CARTELS

On 17 December 2020, the CMA issued a decision finding that three UK-based suppliers of groundworks products to the UK construction industry had illegally

colluded in order to reduce competition and maintain or increase prices, in breach of Chapter 1 of the Competition Act 1998 and Article 101 TFEU.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Two companies were fined over £15 million in total, while a third participant was granted immunity from fines under the CMA's leniency programme, for sharing confidential information and coordinating their commercial activities.
- The construction industry remains an area of focus for the CMA: this is the fourth time in the last two years that the CMA has fined a cartel in this sector.

According to the CMA's press release, the three suppliers of groundworks products (which are used to protect excavations from collapse during construction projects) shared confidential information on future pricing and commercial strategy, and coordinated their commercial activities to reduce uncertainty, including monitoring each other's prices and challenging quotes considered too low.

Two of the companies, Vp plc and M.G.F. (Trench Construction Systems) Ltd, were found to have participated in the illegal conduct for periods of nearly two years in total, and were fined over £11.2 million and £3.7 million respectively. The third company, Mabey Hire Ltd, was found to have taken part in the conduct for a single period of five months. However, Mabey Hire informed the CMA about the conduct pursuant to the CMA's leniency programme and therefore was not fined.

As noted by Michael Grenfell, Executive Director of Enforcement at the CMA, "*this is the fourth time in the last 2 years that the CMA has fined a cartel in the construction sector*", with previous fines being imposed on office fit out companies for 'cover bidding'; suppliers of concrete drainage products for infringements including price fixing and market sharing; and firms in the UK roofing materials sector for price collusion, market sharing and a collective boycott. Mr Grenfell stated that it "*is essential that the* [construction] *sector, which is crucial to the success of our country's economy, can benefit from a competitive marketplace to deliver value, innovation and quality*". It seems clear that the construction industry will remain an area of focus for the CMA as it moves forward post-Brexit.

Supreme Court lowers the bar on certification for collective actions

UK – ANTITRUST - ABUSE OF DOMINANCE / PROCEDURE

In a highly anticipated ruling, the UK Supreme Court has dismissed Mastercard's appeal against the principles established by the Court of Appeal (on appeal from the UK's Competition Appeal Tribunal ("CAT")) in relation to the approval of class actions by the CAT. The case will now be remitted to the CAT for reconsideration. The ruling potentially opens the door to a wave of large-scale opt-out actions under the UK's fledgling collective proceedings regime.

Opt-out proceedings can be pursued on behalf of a class of unnamed, and even unidentified, claimants who are deemed to be included in the action unless they specifically opt out. This is in contrast to opt-in actions, which require claimants to

elect to join the action in order to be considered a member of the class.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- In what is a largely untested UK collective action scheme (since its introduction in 2015), the Supreme Court judgment clarifies the principles to be applied when determining whether a claim is suitable for collective proceedings.
- In favouring a more permissive approach, the Supreme Court has effectively lowered the standard for certification of collective claims. This is likely to lead to an increase in large-scale opt-out collective actions in the English courts as claimants and litigation funders are emboldened by lower barriers to certifying a claim.

BACKGROUND

In September 2016, Mr Walter Merricks CBE applied to the CAT to bring a follow-on damages claim, on an opt-out basis, on behalf of 46 million UK consumers who suffered an estimated £14 billion in losses as a result of anticompetitive interchange fees imposed by Mastercard between 1992 and 2007.

Mr Merricks brought his claim under Section 47B of the Competition Act 1998 (as amended by the Consumer Rights Act 2015), which introduced a framework allowing, for the first time, collective actions to be brought on an opt-out basis in the English courts for breaches of competition law. The opt-out scheme will automatically include all UK-domiciled members of the class as claimants unless they actively "*opt-out*". Before an opt-out claim may progress, the CAT must certify it by granting a collective proceedings order ("CPO"). In Mr Merricks' case, the CAT declined to grant a CPO, finding that the claim was not "*suitable*" to be brought in collective proceedings for two main reasons:

- first, the CAT was unconvinced that there was "*sufficient data available*" to enable Mr Merricks to apply his proposed methodology for calculating aggregate damages; and
- secondly, the CAT considered that Mr Merricks' proposed method for distribution of any aggregate damages award could not be sufficiently linked back to losses suffered by individuals in the class, so that such an award would offend against the compensatory principle.

Mr Merricks' appealed the CAT's ruling to the Court of Appeal.

COURT OF APPEAL JUDGMENT

The Court of Appeal disagreed with the CAT's decision not to certify the claim, holding that the CAT had made multiple errors of law. In particular, it took the view that the CAT had adopted an incorrect approach in its assessment of the strengths of Mr Merricks' case on the extent of pass-on of the overcharge to consumers; and that it had applied the wrong test in relation to distribution of damages.

On the pass-on issue, the Court of Appeal held that the CAT's approach of effectively carrying out a "*mini-trial*" of the merits at the certification stage was inappropriate. At the certification stage, a class representative need only show that a claim has a "*real prospect of success*". For Merricks, that meant that the proposed methodology for pass-on was capable of assessing the level of pass-on to the represented class, and that there was (or was likely to be) data available to operate that methodology.

As regards the distribution of damages, the Court of Appeal held that aggregate damages do not need to be distributed on a compensatory basis and that, in any event, this was not a matter to be dealt with at the certification stage. Rather, distribution is a matter for the trial judge, and the question to be determined at the certification stage is "*whether the claims are suitable for an aggregate award*". An assessment of individual loss is not necessary.

Mastercard appealed the Court of Appeal's judgment before the Supreme Court.

SUPREME COURT JUDGMENT

The relevant provisions of the CAT rules require the CAT, when considering whether to certify a claim, to be satisfied that: i) the claims are brought on behalf of a definable class of claimants; ii) the claims raise common issues; and iii) the claims are suitable to be included in collective proceedings. Mastercard's appeal to the Supreme Court concerned the "*suitability*" requirement.

When assessing the suitability of claims for collective proceedings, the CAT is required to consider "*all matters it thinks fit*". This includes the following factors:

- whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
- the costs and benefits of continuing the collective proceedings;
- whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
- the size and nature of the class;
- whether it is possible to determine in respect of any person whether that person is or is not a member of the class;
- whether the claims are suitable for an aggregate award of damages; and
- the availability of alternative dispute resolution and any other means of resolving the dispute.

The Supreme Court judgment, handed down on 11 December 2020, broadly upheld the Court of Appeal's judgment. It held that the CAT did not apply the correct meaning of "suitability" when considering the appropriateness of Mr Merricks' claim for collective proceedings. The Supreme Court held that whether a claim is "*suitable*" is a question of whether it is suitable to be brought in collective proceedings *as opposed to* individual proceedings. The certification process is not about, and does not involve, a merits test. In particular, difficulties insufficient to prevent an individual claimant from bringing a claim are also insufficient to deny certification of collective proceedings.

The Supreme Court held that the CAT had failed to properly weigh the relevant factors in its consideration of "*suitability*". In particular, it held that the CAT had been wrong to find that pass-on to end customers was not a common issue in the claims. In so-doing, the CAT had failed to consider that both of the main issues in the case — overcharge and merchant pass-on — were common issues, which, the Supreme Court held, "*would, or should, have been a powerful factor in favour of certification*".

The Supreme Court also provided guidance on the compensatory principle, confirming that actions for aggregate damages are not required to take into account the individual loss suffered by each class member. Indeed, the Supreme Court noted that "*a central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss*".

Finally, the Supreme Court held that the CAT's "*most serious*" error of law was its failure to take into account the "broad axe" principle, whereby a claimant who has suffered loss should not be denied a chance to recover that loss because of difficulties with quantification. The court has a duty to do the best that it can for a claimant with the evidence that it has available; this may involve making broad assumptions and estimations where it is not practically possible to arrive at a precise figure for damages. The Supreme Court agreed with the Court of Appeal in this regard, which had observed that in denying a CPO on grounds of perceived deficiencies in Mr Merricks' data, the CAT had allowed potential difficulties with interpreting incomplete or complex data to lead it to a conclusion that fell on the wrong side of that principle.

COMMENTARY

Merricks will now return to the CAT to be reconsidered in the light of the guidance provided by the UK's highest court. The hearing is listed for 25 March 2021. Should the case now be certified, Mastercard will find itself defending a £14 billion claim, the largest damages claim in the history of the English civil courts, alongside numerous claims brought by merchants.

In dissenting opinions, Lord Sales and Lord Leggatt expressed concerns over the potential for abuse that may arise from a lower bar to certification, noting that collective proceedings often "*confer substantial legal advantages on claimants and burdens on defendants which are capable of being exploited opportunistically*". Whether such abuse occurs remains to be seen, but defendants will need to be on the lookout. In any event, lowering the threshold for certification is likely to see defendants seeking to exploit any non-compliance with the certification criteria, as well as exploring other ways of "*stemming the flow*" (e.g. through early summary judgment or strike-out applications) in order to avoid the significant costs associated with defending collective proceedings.

The UK's class action regime remains in its infancy: no class action has yet been certified since the framework was introduced in 2015. The Supreme Court's judgment provides greater certainty as to the requirements that a claimant must meet in order for their claim to proceed, which is likely to result in an increase in the number of collective claims being brought. Indeed, just a few weeks after the judgment was handed down, a new £600 million collective claim against British Telecom for overcharges paid by landline customers was announced.

Seven other collective proceedings filed after Mr Merricks' application also await certification. The year ahead will therefore be critical in determining the landscape for collective actions in the UK.

The Supreme Court's judgment can be found here.

CAT rejects FP McCann's appeal of cartel fine

UK – ANTITRUST - CARTELS

In October 2019, the Competition and Markets Authority ("CMA") imposed fines totalling £36 million on three Northern Irish concrete producers, including FP McCann ("FPM"), for participating in a cartel in relation to the supply of concrete drainage products between July 2006 and March 2013 (see our summary). On 22 December 2020, the Competition Appeal Tribunal ("CAT") gave judgment dismissing FPM's appeal against its £25.4 million fine.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The CMA has considerable discretion over the way it manages antitrust investigations, and is not required to run criminal and civil cases in parallel. It will be difficult to demonstrate that an investigation was subject to inordinate or inexcusable delay as would warrant a reduction in fines.
- In the UK, cartel conduct such as price fixing and market sharing can result in heavy fines for the companies involved, as well as director disqualification and criminal penalties for individuals.

In particular, the CAT held that FPM's fine had not been inflated by unreasonable delays in the CMA's criminal and civil investigations, which took a total of 79 months between the first arrests in March 2013, and the civil infringement decision in October 2019. This meant that the cap applied to FPM's fine (10% of its turnover in the year preceding the decision) was higher than it might have been had the decision been taken earlier.

In relation to the criminal case, the CAT considered that four years and three months was not excessive for an investigation, to criminal standards, into a secret seven-year cartel involving nine suspects, over a hundred possible witnesses and a substantial volume of evidence. The CAT accepted that there are good reasons not to run criminal and civil cases in parallel, including the risk of contaminating evidence in the criminal case and the potential for important evidence for the civil case to emerge at trial. The CAT also found that the civil case, which took 28 months, was not unreasonably long.

The CAT agreed with FPM that the CMA should have applied a discount for FPM's compliance activities: although FPM denied the infringement, this was not evidence that FPM's senior personnel did not understand the compliance training they had received or did not intend to comply with competition law in the future. However, the size of the fine upheld by the CAT was ultimately unchanged from that imposed by the CMA because it was subject to the 10% cap.

RELATED PROCEEDINGS AGAINST COMPANY DIRECTORS

The CMA has ongoing director disqualification proceedings against two current directors of FPM in the Northern Ireland High Court, in which the directors challenged the CMA's finding that FPM had committed a breach of competition law, the "First Condition" for their disqualification. This aspect of the case was transferred to the CAT and stayed, pending determination of FPM's appeal, in which the directors were granted permission to intervene. However, in the course of the appeal it became clear that FPM did not dispute the CMA's finding of infringement, just the size of the fine. The CAT has therefore determined that the First Condition is satisfied and the disqualification case will now continue in the Northern Ireland High Court, which will determine whether the directors' conduct has made them unfit to be concerned in the management of a company, and the duration of any disqualification.

Other consequences of the precast concrete drainage products cartel include:

- in September 2017, conviction of Barry Cooper, CEO of Stanton Bonna Concrete, under the criminal cartel offence. Mr Cooper received a sentence of two years' imprisonment suspended for two years, a 6pm-6am curfew for six months and disqualification as a director for seven years (see our summary); and
- in April 2019, competition disqualification undertakings obtained from two former directors of CPM Group, for periods of seven and a half years and six and a half years respectively (see our summary).

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