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Competition Law Newsletter

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From the editors

The October 2021 issue of Ashurst's competition law newsletter features some of the key competition law developments over the last month, including: the first collective proceedings order granted by the Competition Appeal Tribunal in the UK; briefings from the European Commission and the Competition and Markets Authority on environmental and sustainability policies; recent competition and consumer law rulings by the Australian and German courts; and key decisions by the Indonesian and Spanish competition authorities, as well as other news.

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Content

ECJ rules that Belgian excess profit rulings qualify as a scheme

EU – STATE AID

On 16 September 2021, the ECJ handed down its much awaited judgment on whether Belgian tax rulings concerning excess profits could be classified as an aid scheme (as opposed to individual aid measures). The ECJ set aside the General Court's judgment and backed the European Commission's finding that the rulings at issue qualify as a scheme.

KEY TAKEAWAYS

- State aid in the form of a scheme is to be distinguished from State aid in the form of an individual aid. With respect to the former, the Commission can confine itself to examining its general features in an abstract manner to assess whether it grants State aid.
- ECJ clarified that the systematic *contra legem* application by tax authorities of a tax provision can form the basis of an aid scheme. In this context, a tax ruling issued by tax authority does not constitute a further implementing measure (and therefore an individual aid).
- The General Court now has to examine whether the Belgian excess profit scheme conferred upon multinational businesses a selective advantage.

BACKGROUND

From 2005 to 2014, Belgian tax law provided for the possibility for Belgian companies belonging to multinational groups to make downward adjustments to their taxable base for 'excess profits' (i.e. profits that exceed the profit that would have been made from a transaction carried out at arm's length). The exemptions – which were granted on the basis of tax rulings - were intended to avoid or undo potential double taxation.

In 2016, the European Commission (the "**Commission**") found that excess profit rulings issued by the Belgian tax authorities constituted an unlawful State aid scheme (the "**Decision**") and ordered the recovery of the alleged aid from 55 multinational businesses.

The Decision was challenged by Belgium and 28 alleged beneficiaries (including companies such as Magnetrol, AB InBev and BASF).

On 14 January 2019, the General Court ("**GC**") ruled that the Commission did not demonstrate that the rulings constituted an 'aid scheme', as opposed to 'individual aid' measures. For this reason, it annulled the Decision (but did not conclude on whether the 'excess profit' tax exemptions gave rise to illegal State aid).

The Commission appealed the judgment arguing that the GC misinterpreted the concept of 'aid scheme'. In parallel, it decided to open 39 separate formal investigations into individual excess profit rulings.

ECJ JUDGMENT

The ECJ first recalled that for a State measure to qualify as an aid scheme, three cumulative conditions must be met:

- aid has to be granted individually on the basis of an "*act*";
- "*no further implementing measure*" is required for that aid to be granted; and
- beneficiaries must be defined in a "*general and abstract manner*".

As regards the **first condition**: the ECJ confirmed that the term *'act'* may also refer to a consistent administrative practice by tax authorities where that practice reveals a *"systematic approach"*. The GC was therefore wrong to limit its analysis to the normative acts allowing for the exemption and should also have taken account of the *"systematic approach"* followed in the tax rulings.

As regards the **second condition**: the GC ignored that one of the essential characteristics of the scheme at issue lay in the fact that the tax authorities *systematically* granted the exemption when certain conditions (identified in the Decision) were met. The tax authorities

therefore had no discretion and no '*further implementing measure*' was necessary.

As regards the **third condition**: the ECJ noted that the errors concerning the first two conditions necessarily led to a wrong assessment of the third one.

Finally, unlike the GC, the ECJ considered that the sample of rulings examined by the Commission (22 rulings selected in a weighted manner from a total of 66) is, "*by its nature, capable of representing a systematic approach taken by the Belgian tax authorities*".

Accordingly, in line with the opinion of Advocate General Kokott, the ECJ set aside the first instance judgment and referred the case back to the GC.

COMMENT

The GC now has to rule on the pending aspects of the case and in particular on whether the excess profit scheme conferred upon its beneficiaries a selective tax advantage. In its Amazon and Apple judgments (which are under appeal) – which concerned individual tax rulings – the GC found that the Commission failed to prove the existence of an advantage.

With respect to the selectivity condition, the qualification of the rulings as a scheme is not without consequences. While the Commission is in principle allowed to presume the selectivity of an individual aid, it has to show with respect to a tax scheme that it discriminates between companies which are in a similar situation in the light of the tax reference system.

EU General Court upholds "double punishment" for gun-jumping (Altice)

EU – MERGER CONTROL

On 22 September 2021, the EU General Court upheld the European Commission's decision to impose two separate fines for breaching gun-jumping rules contrary to the EU Merger Regulation (the "EUMR") by: (i) failing to notify a transaction to the European Commission; and (ii) implementing a transaction prior to obtaining a clearance decision.

KEY TAKEAWAYS

- The notification obligation under Article 4(1) of the EUMR and the standstill obligation under Article 7(1) of the EUMR pursue different objectives and can lead to distinct fines.
- Provisions in share purchase agreements should be carefully reviewed to ensure that they do not confer decisive influence beyond what is necessary to preserve the value of the target business.
- Parties to an M&A transaction must continue to conduct themselves separately and independently pending a clearance decision by the European Commission.

BACKGROUND

On 24 April 2018, Altice Europe NV ("Altice"), a multinational cable and telecommunications company, was fined a total of EUR 124.5 million by the European Commission for breaching the EUMR by implementing its 2015 acquisition of PT Portugal, a telecommunications and multimedia operator, prior to its notification to the European Commission and prior to obtaining a clearance decision (the "Decision").

The Decision imposed fines of EUR 62.25 million for failing to notify the transaction to the European Commission under Article 4(1) of the EUMR (the "notification obligation"), and an additional fine of EUR 62.25 million for implementing the transaction prior to obtaining a clearance decision contrary to Article 7(1) of the EUMR (the "standstill obligation")

Altice challenged the Decision before the General Court on the basis of, among other pleas, the following arguments:

- the notification obligation is "*redundant*" in light of the standstill obligation. Accordingly, imposing fines for infringements of both provisions of the EUMR is contrary to the prohibition of "*double punishment*" rooted in the general principle common to the legal systems of EU Member States; and
- the 'preparatory clauses' in the share purchase agreement relating to the acquisition of PT Portugal played a key role in ensuring the integrity of the commercial activities of the acquired business between signing and closing, and did not result in early implementation of the transaction.

The General Court upheld the Decision and rejected Altice's arguments.

JUDGMENT OF THE GENERAL COURT

The notification and standstill obligations

The General Court found that the notification obligation and the standstill obligation pursue autonomous objectives within the context of the "*one stop shop*" system under the EUMR, as an infringement of the notification obligation automatically results in an infringement of the standstill obligation, whereas the converse is not true.

In addition, according to the General Court, whilst the notification obligation is an obligation to act (i.e. to notify a transaction to the European Commission) and can result in an instantaneous infringement, the standstill obligation is an obligation not to act (i.e. not to implement the transaction prior to a clearance decision), and can lead to a continuous infringement.

The General Court concluded on this basis that the imposition of two fines, under both Article 4(1) and under Article 7(1) of the EUMR, does

not give rise to a situation of "*double punishment*".

The preparatory provisions

The General Court concluded that the preparatory clauses in the Share Purchase Agreement gave Altice the *possibility* of exercising decisive influence over PT Portugal, in so far as, among other things, Altice was able to:

- appoint and terminate the employment of the senior management of PT Portugal or to amend their contracts;
- influence PT Portugal's pricing policy, by requiring PT Portugal to obtain written consent from Altice to change its prices and to amend its terms and conditions; and
- enter into, terminate or amend a wide range of contracts of PT Portugal, which was obliged in turn to request Altice's prior consent to all material contracts, whether or not they were in the ordinary course of business and irrespective of their economic value.

In addition, the General Court found that, in practice, Altice exercised decisive influence over PT Portugal under the provisions of the Share Purchase Agreement, intervened in the day-to-day running of PT Portugal, and received commercially sensitive information from PT Portugal.

Finally, whilst confirming that, in principle, the European Commission may impose two simultaneous fines for breaching the notification obligation and the standstill obligation, the Court nonetheless reduced the amount imposed in relation to the notification obligation by 10%, on account of the fact that Altice had informed the Commission of the transaction it was contemplating by sending the European Commission a case team allocation request.

COMMENT

The Decision is the highest gun-jumping fine ever imposed by the European Commission (notwithstanding the 10% fine reduction by the General Court in relation to the notification obligation). The General Court's ruling confirms that the European Commission may apply separate fines for breaching the notification and standstill obligations, and that a subsequent clearance decision of a transaction does not exclude the possibility of fines for gun-jumping.

It is also important that merging parties not only properly identify the jurisdictions in which to file merger notifications, but also to comply with the standstill obligation between signing and closing, which includes ensuring that:

- preparatory clauses do not confer decisive influence over the target business; and
- merging parties continue to conduct themselves separately and independently pending a clearance decision by the European Commission.

Sustainability agreements and competition rules: will EU and national guidance converge?

EU – ANTICOMPETITIVE AGREEMENTS / CARTELS / NEW LAW / POLICY

On 10 September 2021, the European Commission published a Competition Policy Brief ("Policy Brief") on how EU competition rules can complement environmental and climate policies more effectively. The Policy Brief recognises that further guidance is needed on the application of competition law to sustainability initiatives. Similarly, national competition authorities (most notably in the Netherlands, Greece and Austria) have taken steps to clarify the application of competition rules to sustainability agreements.

KEY TAKEAWAYS

- The European Commission is expected to provide further guidance on the application of Article 101 TFEU to sustainability agreements in the future - both in the revised guidelines and on individual cases.
- National initiatives in Austria, the Netherlands and Greece have paved the way for more flexibility in the assessment of sustainability initiatives and, in particular, for the consideration of environmental benefits for the society as a whole. The European Commission does not appear to be ready to go as far in its assessment of efficiencies under Article 101(3) TFEU.
- Both the European Commission and national authorities have made clear that sustainability agreements must not be a cover for a cartel.

BACKGROUND

In December 2019, the European Commission presented the European Green Deal which commits to climate neutrality by 2050.

Acknowledging the need for a "green" competition policy, the European Commission published a call for contributions in October 2020 and held a conference in February 2021 which focused on how EU competition rules can support environmental and climate policies.

In September 2021, the European Commission published a Policy Brief which provides examples of policy reform across State aid, antitrust and merger control. One theme which emerged from the responses to the call for contributions is a need for greater clarity on how the pursuit of sustainability objectives affects antitrust assessment. The European Commission has confirmed that it will provide this guidance in its updated guidelines on horizontal cooperation and vertical agreements. In particular, it has identified a number of areas for clarification with respect to assessments under Articles 101(1) and 101(3) TFEU.

In providing this guidance, the European Commission is likely to consider national initiatives designed to offer more flexibility in relation to sustainability agreements. Most notably:

- the Dutch Competition Authority ("ACM") published its draft Guidelines on sustainability agreements in January 2021;
- the Hellenic Competition Commission ("HCC") published a draft staff discussion paper on sustainability issues and competition law in 2020 and launched a public consultation on a sandbox for sustainable development in the Greek market in July 2021; and
- the Austrian legislator introduced an express exemption from the prohibition of restrictive agreements where they substantially contribute to an ecologically sustainable or climate-neutral economy in September 2021.

THE NEED FOR CLARITY ON SUSTAINABILITY AGREEMENTS FALLING OUTSIDE ARTICLE 101(1) TFEU

In its Policy Brief, the European Commission acknowledges that it is important to provide concrete examples of how companies can

engage in sustainability initiatives without restricting competition.

When revising its guidelines, the European Commission may draw inspiration from the ACM draft guidelines in particular, which propose creating a safe harbour for the following categories of agreements:

- non-binding sustainability targets (e.g. regarding the reduction of CO2 emissions), provided individual undertakings can set their own contributions to these targets and the means to reach them;
- open and voluntary green standards, provided the participation criteria are transparent and access is granted based on reasonable and non-discriminatory terms;
- agreements aimed at improving product quality or replacing products which are produced in a less sustainable manner, provided they do not appreciably affect price and/or product diversity;
- joint initiatives to create new products where required in order to acquire sufficient production resources (including know-how) or to achieve sufficient scale; and
- agreements whose sole purpose is to comply with national or international standards (e.g. relating to the protection of natural resources).

HOW CAN GREEN EFFICIENCIES BE TAKEN INTO ACCOUNT UNDER ARTICLE 101(3) TFEU?

The Policy Brief acknowledges that it will be useful to clarify how sustainability benefits can be taken into account in the assessment of Article 101(3) TFEU and in particular:

- that sustainability benefits can be assessed as qualitative efficiencies (e.g. replacing plastic with wood in toys or using recycled materials for clothing may result in increased quality or longevity), as well as potentially offering cost efficiencies (e.g. reducing plastic packaging may reduce the cost for materials, transport and storage);
- that sustainability benefits do not need to be direct or immediately noticeable product quality improvements or cost savings, provided the users appreciate them and are willing to pay a higher price for this reason alone;
- to what extent "*out-of-market*" efficiencies (e.g. the societal benefits accrued by carbon emission reduction) can be taken into account;
- when and how market failures prevent the free market from generating benefits and thus necessitate a joint-initiative (e.g. to remove a first mover disadvantage and nudge consumers towards more expensive sustainable products); and
- when existing environmental regulation sufficiently incentivises companies to produce products sustainably, obviating the need for cooperation.

As regards "*out-of-market*" efficiencies, the Policy Brief states that the assessment of the anti-competitive effects and benefits of a practice should, in principle, be made within the confines of the same relevant market. This reflects the anchored "*consumer welfare standard*" according to which restricting competition for a product can only be justified if the users of that product are not, on balance, worse off. However, the Policy Brief acknowledges that "*benefits achieved on separate markets can possibly be taken into account*" provided that:

- *"the group of consumers affected by the restriction and the group of benefiting consumers are substantially the same";* and
- the benefits "*fully compensate*" the harmed consumers (the latter being part of society).

The approach taken by the European Commission to "out of market" efficiencies noticeably diverges from positions taken at national level.

Most notably, the Austrian legislator recently amended Austrian competition rules to explicitly provide that the harm to consumers will be considered as offset where the benefit "contributes significantly to an environmentally sustainable or climate-neutral economy". This includes climate protection measures, the sustainable use of natural resources or measures directed at saving or restoring ecosystems and biodiversity. Although the Austrian Competition Authority has not yet issued its guidelines, the preparatory works for the legislative amendment interestingly provide that:

- environmental benefits for society as a whole are sufficient (and therefore do not need to

be granted to consumers on the relevant market);

- future environmental benefits can be taken into account; and
- a "*significant contribution*" to an environmental, sustainable and climate neutral economy can be evidenced based on models that calculate the costs of environmental impacts on society. A precise calculation of the environmental benefits may, however, not be required where the harm to competition is minimal compared to the material contribution to environmental objectives.

In its draft guidelines, the ACM adopts a similar position with respect to environmental-damage agreements (i.e. agreements which aim to improve production processes that cause harm to humans, the environment and nature). It provides that these agreements should be allowed where (i) the benefits to society as a whole are equal to or greater than the disadvantages to users and (ii) these benefits support an international or national standard binding upon the government (e.g. the Paris climate agreement).

The ACM and HCC also jointly commissioned a Technical Report on Sustainability and Competition on the quantification of sustainability benefits. The Technical Report "*spotlights the forms of quantitative analysis that can be used in competition assessments to account for broader social benefits, including benefits for future generations*". This leading expert report is likely to be taken into account by both the European Commission and other national competition authorities.

FUTURE GUIDANCE

In addition to the new guidelines on horizontal cooperation and vertical restraints (due to be published by the end of 2022), the Policy Brief states that the European Commission will consider:

- requests for individual guidance letters in relation to sustainability initiatives raising novel issues; and
- adopting decisions - pursuant to Article 10 of Regulation 1/2003 - finding that competition rules are not applicable to certain sustainability initiatives.

The HCC has also proposed the creation of a "*sandbox*" for sustainability and competition in the Greek market. The "*sandbox*" would take the form of a digital platform and provide a supervised environment for businesses active in certain sectors to liaise with the authority about proposed sustainability initiatives.

CONCLUSION

The draft revised guidelines on horizontal cooperation are expected to provide more concrete guidance on how companies can cooperate to achieve environmental goals without breaching EU competition rules. While the European Commission may draw inspiration from national initiatives, the Policy Brief suggests that the institution may take a different approach to some national authorities in relation to key aspects of the antitrust assessment (in particular, the concept of "green" efficiencies).

Both the European Commission and national competition authorities have made clear that sustainability initiatives cannot be used as a cover for cartels. This was very recently stated by the Commission when issuing its decision fining car manufacturers for agreeing to limit the development of the full potential of clean emission technology (see our September 2021 newsletter).

With thanks to Jessica Bracker and Uliana Kovaleva of Ashurst for their contribution.

Commitments accepted in long-running Greek Lignite abuse case

EU – ABUSE OF DOMINANCE

The European Commission accepted commitments from Greece requiring Public Power Corporation (PPC), the state-owned electricity incumbent, to maintain a fixed net seller position for electricity baseload futures on certain energy exchanges in order to address competition concerns raised by exclusive access to lignite-fired electricity generation.

KEY TAKEAWAYS

- In some circumstances, EU Member States can breach competition law when they grant special or exclusive rights to public undertakings.
- The commitments accepted by the European Commission require PPC to supply a minimum volume of electricity on to the wholesale market on a quarterly basis, corresponding to between 40-50% of the volume of energy produced from Lignite by PPC in the same quarter of the preceding year.
- PPC is required to supply these quarterly volumes through electricity baseload futures contracts traded on the Hellenic Energy Exchange or the European Energy Exchange.

On 10 September 2021, the European Commission approved commitments (**"Commitments"**) submitted by Greece to address the competition concerns set out in its decision (**"Decision"**) of 5 March 2008 in case AT.38700 – Greek lignite and electricity markets.

THE DECISION

In the Decision, the European Commission found that PPC held a dominant position both on the market for the supply of lignite (also known as 'brown coal') in Greece and the downstream market for the wholesale supply of electricity in Greece.

PPC had been granted exclusive exploitation rights to practically all reserves of lignite in Greece through a series of legislative measures enacted by the Greek state. PPC had also obtained exploration rights, in the absence of any competitive tender process, for the remaining exploitable deposits in Greece as well as special rights to request exploitation rights with respect to those deposits.

Lignite-fuelled plants were the cheapest and most extensively used plants in Greece at the time of the Decision, representing around 60% of energy generation used to supply Greece's interconnected electricity network.

At the time of the Decision, PPC generated electricity that was considered to represent 85% of total electricity traded on the wholesale electricity market.

Article 106(1) TFEU prohibits Member States from enacting or maintaining in force measures contrary to Article 102 TFEU where these measures benefit 'public undertakings' or 'undertakings to which Member States grant special or exclusive rights'.

The European Commission found that Greece had breached Article 106(1), read in conjunction with Article 102 TFEU, by granting and maintaining quasi-monopolistic rights for lignite exploration and exploitation in favour of PPC. In particular, this distorted competition in PPC's favour and reinforced PPC's dominance on the wholesale electricity market.

PPC was initially successful in obtaining the annulment of the European Commission's Decision before the General Court following an appeal in 2008 (T-169/08). However, the General Court's judgment was set aside by the Court of Justice on appeal in 2014 (C-553/12 P) and the case was referred back to the General Court. PPC's action was ultimately dismissed by the General Court in 2016 (T-169/08 RENV).

THE COMMITMENTS

The Commitments mark the end of a procedure initiated by the European Commission in 2004.

Greece has agreed to ensure that PPC will sell certain minimum volumes of electricity onto the wholesale market via electricity baseload futures contracts traded on either the Hellenic Energy Exchange ("HEnHx") or the European Energy Exchange ("EEX").

PPC will also be required to maintain a net seller position with respect to its transactions on both the HEnHx and EEX (taken together). The extent of this net seller position is determined by reference to a percentage of the volume of lignite energy produced by PPC in the same quarter of the preceding year:

- from Q4 of 2021 to end of Q3 2022, PPC is required to maintain a net seller position in each quarter corresponding to 50% of the lignite energy produced in the same quarter of the preceding year; and
- from Q4 of 2022 until, at the latest, Q4 of 2023, PPC's net seller position will be reduced to 40% of its lignite energy production in the same quarter of the preceding year.

COMMENTS

This case is a rare example of a finding of a breach of competition law by a Member State, on the basis of Article 106(1) read in conjunction with 102 TFEU.

The remedies package submitted by Greece provides an interesting insight into the types of remedies the European Commission is willing to accept to address a situation in which an undertaking enjoys entrenched privileged access to a resource which is a primary input in a downstream market.

With thanks to Zac Davies of Ashurst for his contribution.

Funeral industry remains in the ACCC spotlight: Alex Gow Funerals pays infringement notice for misleading price representations

AUSTRALIA – CONSUMER PROTECTION

On 2 September 2021, the Australian Competition and Consumer Commission ("ACCC") announced funeral services provider Alex Gow Proprietary Limited (Alex Gow Funerals) paid a penalty of AUD $13,320 for allegedly making false and misleading representations about the price of its funeral services and fees consumers were required to pay.

KEY TAKEAWAYS

- The ACCC made clear that competition and consumer issues in the funeral sector were a 2021 compliance and enforcement priority. Its action against Alex Gow Funerals is the latest example of the ACCC giving effect to this enforcement priority and we expect more enforcement activity in this sector.
- Pricing representations continue to be scrutinised by the ACCC and this action is a reminder to all businesses to provide accurate information about the price of services and fees consumers are required to pay. Consideration may need to be given to the circumstances in which customers acquire the relevant services (here, consumers using funeral services are experiencing a difficult and emotional period).
- In addition to misleading conduct involving pricing representations, the ACCC continues to look closely at the use of unfair contract terms in this sector and more broadly. Have you reviewed your standard form (consumer and small business) contracts for this purpose?

Alex Gow Funerals is an Australian funeral services provider which operates funeral homes across four locations in Brisbane, Queensland. The ACCC issued Alex Gow Funerals with an infringement notice for falsely representing in an invoice that a $400 'Estate Fee' was payable for its funeral and/or cremation services, when in fact, the fee was a late payment fee payable if the customer did not pay the bill on time.

The alleged conduct occurred between at least July 2020 and May 2021.

Deputy Chair of the ACCC, Delia Rickard stated clearly:

"*Funeral businesses must clearly describe the purpose of all fees included in their invoices, as well as the total price and due date for the invoice. If a fee applies for late payment of an invoice, the late payment fee must be clearly stated and should not be included in the total amount due on invoices*".

The ACCC can issue infringement notices where it has reasonable grounds to believe that a person or business has contravened certain provisions of the Australian Consumer Law. The payment of a penalty under an infringement notice is not an admission of contravention.

To resolve this action, in addition to paying the penalty under the infringement notice, Alex Gow Funerals:

- refunded 40 customers during the period which had paid the "Estate Fee"; and
- amended its invoices replacing "Estate Fee" with the accurate description "Late Payment Fee".

Further, Alex Gow Funerals agreed to amend its consumer contracts to address the ACCC's

concerns that certain terms should be regarded as unfair, including excessive interest fees for late payment and broad indemnity clauses, each of which the ACCC considered were not reasonably necessary to protect Alex Gow Funerals' legitimate interest in recovering costs.

There should be no doubt about the ACCC's continued focus in the funeral services sector. The ACCC has stated that the issues raised in this action are widespread industry issues of concern.

This case is an important reminder that (i) pricing representations (in the funeral industry and more broadly) are closely scrutinised – they must be accurate and provide sufficient information so as not to mislead a customer; and (ii) the ACCC continues to devote resources to examining potentially unfair contract terms – businesses should review their standard form small business and consumer contracts for compliance with the unfair contract terms regime.

With thanks to Isabella Hunt of Ashurst for her contribution.

ACCC accepts court enforceable undertaking after supplier admits to likely resale price maintenance

AUSTRALIA – ANTICOMPETITIVE AGREEMENTS

Nero Bathrooms International Pty Ltd (trading as Nero Tapware) ("Nero"), a national supplier of bathroom-ware products admitted it likely engaged in resale price maintenance by withholding supply of its products from a retailer when that retailer refused to raise its advertised prices.

KEY TAKEAWAYS

- In Australia, resale price maintenance is prohibited outright regardless of whether it has the purpose or likely effect of substantially lessening competition.
- Serious breaches of the prohibition on RPM expose companies to a range of court ordered penalties including substantial financial penalties.
- Businesses should ensure resale price maintenance obligations remain top of mind in their day-to-day business practices, including ensuring that retailers are aware that recommended retail prices are a guide only.

RESALE PRICE MAINTENANCE

Resale price maintenance ("RPM") occurs when a supplier of goods or services specifies a minimum price below which a reseller must not resell or advertise those goods or services for sale. RPM may prevent retailers from competing on price, resulting in consumers paying more for goods and services. RPM is prohibited outright regardless of whether it has the purpose, effect or likely effect of substantially lessening competition.

RPM conduct arises where it is a condition of supply that the retailer must (or the supplier threatens to withdraw supply if the retailer does not):

- sell at a certain price;
- not sell below a certain price;
- only discount to an agreed extent or not discount at all; and
- comply with a recommended retail price ("RRP") or not price a certain percentage below it.

RPM may only be permitted where the Australian Competition and Consumer Commission ("ACCC") is satisfied that the likely benefits from the RPM conduct outweigh the likely public detriments. ACCC approval may be obtained by lodging a notification or applying for authorisation, before engaging in the conduct.

NERO'S CONDUCT

Nero admitted that it made the following statements to a retailer in March 2020 about the Nero bathroom products being re-sold by that retailer:

- the retailer's prices were too low;

- the retailer should not advertise Nero products at a price lower than 15% below the RRP; and
- the retailer should amend its online advertised prices so those prices were not lower than 15% below the RRP.

As a result of the retailer's failure to raise its prices, Nero significantly reduced the retailer's discount on the wholesale price of Nero products, and then ceased supplying the retailer altogether.

The ACCC considered that this conduct contravened the prohibition on RPM by:

- informing the retailer that Nero would cease supply if it did not raise its prices;
- inducing or attempting to induce the retailer to not sell Nero products at a price lower than a price specified by Nero;
- withholding supply to the retailer for not raising its prices; and
- stating a price to the retailer that was likely to be understood as the price below which products must not be sold.

PENALTIES

Serious breaches of the prohibition on RPM expose companies to a range of court ordered penalties including financial penalties of up to $10,000,000, three times the benefit obtained from the conduct, or 10% of annual turnover. Most recently, in March 2021, the Federal Court ordered FE Sports to pay a $350,000 penalty after finding it had engaged in RPM in relation to cycling and sporting products.

In appropriate cases, the ACCC may instead use other enforcement powers to remedy breaches, including issuing infringement notices and accepting court enforceable undertakings. The ACCC said about Nero's conduct that "[i]*n this case, the conduct was limited to a single retailer, and there was no direct consumer harm because that retailer did not comply with Nero's pricing directions*".

The ACCC accepted a court enforceable undertaking from Nero that it will:

- not engage in resale price maintenance for three years;
- implement and maintain a compliance program for sales staff to minimise risk of future breaches of RPM; and
- communicate to its retail customers that the RRPs are a guide, and resellers are free to set prices above or below the RRP.

COMMENT

RPM continues to be an enduring priority for the ACCC as it is considered significantly detrimental to consumer welfare and the competitive process. While the ACCC accepted a court enforceable undertaking in this case due to the limited consumer harm arising, the potential exposure for breaches of the prohibition on RPM can be substantial. Businesses should ensure resale price maintenance obligations remain top of mind in their day-to-day business practices, including ensuring that retailers are aware that recommended retail prices are a guide only.

With thanks to Alicia Gormly of Ashurst for her contribution.

ACCC authorises amalgamation of payment service providers BPAY, eftpos and NPPA

AUSTRALIA – MERGER CONTROL

On 9 September 2021, the Australian Competition and Consumer Commission ("ACCC") authorised the proposed amalgamation of three payment service providers, BPAY Group Holding Pty Ltd ("BPAY"), eftpos Payments Australia Limited ("EPAL") and NPP Australia Limited ("NPPA"), subject to a court enforceable undertaking ("The Undertaking"), provided by the amalgamated entity's holding company, Australian Payments Plus Ltd ("AP+").

KEY TAKEAWAYS

- The ACCC authorised the amalgamation of payment service providers BPAY, eftpos and NPPA. This is only the ACCC's third merger authorisation determination, despite the process being available since 2017.
- The merger authorisation process enables parties to seek authorisation of proposed transactions that may substantially lessen competition, on the basis that they result in net public benefits. Nonetheless, in this authorisation process, a court-enforceable undertaking was offered to address competition concerns (a common feature of informal clearance applications for transactions that raise concerns).
- Unlike the informal clearance process, the merger authorisation process is time bound – the ACCC must make a determination within 90 days, unless the applicant agrees to an extension. In this case, the ACCC issued its determination following a 6-month public review.
- The ACCC's review of the proposed amalgamation of BPAY, EPAL and NPPA illustrates the burdensome and unpredictable nature of the authorisation process.

THE PROPOSED AMALGAMATION

In March 2021, Industry Committee Administration Pty Ltd (the "applicant") sought merger authorisation from the ACCC to amalgamate ownership of BPAY, EPAL and NPPA under AP+, a new entity. The three companies provide various payment services to Australian businesses and consumers: an electronic bill payment service by BPAY, an electronic platform for point-of-sale payments between customers and merchants known as "eftpos" by EPAL, and open access real-time payments infrastructure by NPPA.

Importantly, there is a degree of common ownership across the payment schemes; the four major Australian banks - Australia and New Zealand Banking Group Limited, Commonwealth Bank of Australia, National Australia Bank Limited and Westpac Banking Corporation (together, the "major banks") - each possess a significant interest in the payment services provided, and will continue to do so after the amalgamation. This interest in, and influence over, the payment services was a key consideration in the ACCC's competition analysis.

THE AUTHORISATION PROCESS

In this case, the lengthy authorisation process involved the following steps:

- 18 March 2021: the applicant submitted an almost 200 page application, accompanied by 97 annexures, seeking authorisation for the proposed amalgamation. The application claimed that the amalgamation would not substantially lessen competition in any market, and was expected to deliver a number of public benefits, without any discernible public detriments;
- 30 March 2021: the ACCC commenced its market inquiries;
- 4 June 2021: the ACCC issued its statement of preliminary views, stating that it was not satisfied the amalgamation would not result in a substantial lessening of competition, and while the amalgamation was likely to result

in some public benefits, the extent and significance of those benefits was unclear;

- from June to August 2021: the ACCC sought, and the applicant provided, further information in relation to the proposed amalgamation;
- 5 August 2021: the applicant offered a draft court-enforceable undertaking under s 87B of the *Competition and Consumer Act 2010* (Cth) that included behavioural commitments relating to the availability of eftpos and least cost routing ("LCR"), to the address the ACCC's concerns on this issue;
- 9 September 2021: the ACCC issued its determination granting authorisation for the proposed amalgamation and accepting the Undertaking from AP+; and
- 1 October 2021: the authorisation came into effect, as no application for review was made to the Australian Competition Tribunal.

Throughout the authorisation process the ACCC took into account over 70 submissions received from interested parties, including competitors, relevant industry associations, academics and the Reserve Bank of Australia ("RBA").

While financial institutions tended to be supportive of the amalgamation on the basis that it would be pro-competitive and the claimed public benefits would be realised, stakeholders such as Mastercard and the Council of Small Business Organisations believed the amalgamation would have long-term anti-competitive effects on the Australian payments market.

THE ACCC'S ANALYSIS

The authorisation test

In order to grant an authorisation, the ACCC must be satisfied, in all circumstances, that:

(a) the proposed acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition ("competition limb"); or

(b) the proposed acquisition would result, or be likely to result, in a benefit to the public and that benefit would outweigh the detriment to the public that would result, or be likely to result, from the proposed acquisition ("net public benefit limb").

COMPETITION LIMB

The ACCC was satisfied in all the circumstances, including its acceptance of the Undertaking from AP+, that the amalgamation would not, or would not be likely to, substantially lessen competition, in any market.

The key aspects of the ACCC's competition analysis included:

Likely effect of the amalgamation on the future availability of eftpos and LCR

In the absence of the Undertaking, the ACCC identified a risk that the proposed amalgamation may substantially lessen competition in the market for routing of debit card payments. EPAL's independent eftpos service (the only domestic debit card scheme) plays an important role in maintaining competition in the routing of debit card payments by providing LCR, a viable low-cost alternative to similar debit schemes offered by Visa and Mastercard. The ACCC was concerned that the mixed incentives of the major banks to support eftpos and make LCR available to their customers, and the ability of the major banks to materially affect AP+'s investment decisions, may diminish the role of eftpos in Australia with the amalgamation. To address these concerns, AP+ offered the Undertaking which imposes obligations on AP+ to support eftpos through a variety of behavioural measures, including a commitment to do all things in its control to make available and promote LCR for at least four years. The ACCC concluded that, with the Undertaking, the amalgamation was unlikely to result in a substantial lessening of competition in relation to the routing of debit card payments.

Softening of competition between certain payment services

The ACCC considered that the amalgamation would likely soften but not substantially lessen competition between the payment services. While several areas of "potential overlap" between BPAY, EPAL and NPPA were identified in the analysis (e.g. point of sale payments), the parties' core offerings were not in direct competition and were not key competitors of each other. Rather, the payment services were mostly "complementary", and their overlap typically involved fringe components of each business.

Loss of potential competition between BPAY, EPAL and NPPA to supply new services

The ACCC considered that the amalgamation would reduce incentives for BPAY, EPAL and NPPA to compete to bring new innovations to the market, and this would likely result in some lessening of competition, but concluded that this risk was mitigated by the following factors:

(a) in the context of the relevant markets, competition will continue to be provided by Mastercard and Visa and the threat of entry by international tech companies like Apple or Google; and

(b) with or without the amalgamation, the major banks (who are highly influential in determining whether a domestic payment service offering successfully achieves scale) would be reluctant to support multiple payment service initiatives with overlapping use cases.

Likely effect of the amalgamation on third party access to the New Payments Platform ("NPP")

The ACCC considered that the amalgamation was unlikely to materially change third party access to the NPP (open access infrastructure used to facilitate real-time payments between bank accounts within Australia). While the ACCC acknowledged that post-amalgamation AP+ would control multiple payments infrastructure and have some ability to foreclose third party access to the NPP, it was satisfied that there remained significant regulatory constraints (including RBA intervention) to limit AP+'s ability and incentive to deny access.

NET PUBLIC BENEFIT LIMB

While it was not necessary for the ACCC to apply the net public benefit limb of the authorisation test, the ACCC considered that the amalgamation was likely to result in some public benefits, and that the public benefits would likely outweigh any likely detriment arising from the amalgamation, including from any lessening of competition.

IMPLICATIONS FOR FUTURE MERGER AUTHORISATION APPLICATIONS

This is only the third merger authorisation granted by the ACCC since the process became available in November 2017. Interestingly, although the ability to take into account public benefits is one of the key advantages of the merger authorisation process, all three merger authorisations so far have been granted under the competition limb of the authorisation test. The ACCC was satisfied that AP Eagers' acquisition of Automotive Holdings Group (subject to a s87B divestment undertaking) in July 2019, and Gumtree's acquisition of Cox Australia Media Solutions in April 2020, were not likely to substantially lessen competition in any relevant market.

Unlike the previous authorisations, however, the 6 month process for the AP+ amalgamation significantly exceeded the statutory time limit of 90 days (subject to the applicant agreeing an extension). This recent authorisation decision illustrates the burdensome and unpredictable nature of the authorisation process. Parties should expect close scrutiny of public benefit arguments, and be prepared to offer behavioural or divestment undertakings to obtain a favourable determination.

For a comprehensive comparison of the benefits of the informal merger clearance and authorisation processes in Australia, see our Merger Control Review 2020 chapter.

With thanks to Jessica Apel and Veronica Murdoch of Ashurst for their contribution.

Porsche-Tuning II: Top German court rules car manufacturer cannot restrict sales of Porsche cars and spare parts to car tuners

GERMANY – ANTICOMPETITIVE AGREEMENTS

In a decision of 6 July 2021, published in September 2021, the German Federal Court of Justice ("FCJ") ruled that restrictive clauses in retail and service agreements between Porsche and its authorised distributors were in breach of competition law. Porsche could not prohibit its authorised distributors from selling Porsche cars and spare parts to companies operating in the tuning industry.

KEY TAKEAWAYS

- Car manufacturers, such as Porsche, may not prohibit their authorised distributors from selling cars and spare parts to companies that want to modify (tune) them and/or use them for presentation purposes. Such a ban constitutes a restriction of competition. The tuning companies here were not to be classified as "subsequent retailers" competing with Porsche – on which such a prohibition generally could be imposed – but rather as end customers.
- The term "subsequent retailer" is to be interpreted objectively. The manufacturer cannot arbitrarily exclude undesirable buyers from the purchase by arbitrarily declaring them to be subsequent retailers.
- The burden of proof for establishing that the market share threshold for the block exemptions for vertical agreements ("VBER") has not been met is on the party relying on the exemption. Porsche failed to persuade the court that it was below the market share threshold of 30% and therefore VBER was not applicable.

BACKGROUND: PORSCHE PROHIBITS AUTHORISED DISTRIBUTORS FROM SELLING TO RESELLERS

Within its authorised distribution network, Porsche obliged its distributors to sell their cars exclusively to end consumers or to other authorised distributors. Sales to so-called "subsequent retailers" were expressly prohibited.

In doing so, Porsche considered companies that used Porsche cars either as presentation models for their tuning equipment or in order to tune (i.e. modify) them and sell them to the end consumer as "subsequent retailers". Similarly, distributors were prohibited from selling spare parts when these were to be used as components for tuning products.

The plaintiff, an association of around 130 companies that manufacture and distribute tuning parts, requested a cease and desist order in relation to these clauses. The appeal court, the Stuttgart Higher Regional Court, mostly upheld the action and the FCJ confirmed this decision.

FCJ'S DECISION: PROHIBITION OF SUPPLY TO TUNING PRODUCT MANUFACTURERS IS INADMISSIBLE RESTRICTION OF COMPETITION

The FCJ ruled that the clauses at issue represented unlawful customer sales restrictions that restricted both the ability of the "subsequent retailers" to enter the tuning market as suppliers and the ability of the tuning companies to purchase the parts needed for their products. By virtue of Porsche manufacturing its own range of tuning products, it was not only a competitor with the tuning companies but could also not rely on the supply of components exemption as the clauses represented a blanket restriction on the sale of all spare parts and not just Porsche's tuning products.

NO EXCEPTION TO THE PROHIBITION

Members of a selective distribution system cannot be prevented from selling to end users. According to the FCJ, the organiser of a selective distribution system cannot arbitrarily

exclude sales by members of that system to groups of "undesirable" buyers by arbitrarily declaring them to be "subsequent retailers" and not "end users".

The term "subsequent retailer" has to be interpreted objectively. It only applies to retailers reselling the vehicle in an as-new condition without substantial modifications. The purpose of use in question here - presentation of the vehicle with one's own tuning products - did not fall under that definition. Companies that buy Porsche cars solely as presentation models for their own tuning products are to be considered end users rather than "subsequent retailers".

NON-APPLICABILITY OF THE VBER

The restrictive clauses could not be exempt based on VBER. While the burden of proof was held to be on the party trying to rely on the exemption, Porsche could not establish that its market share did not exceed 30%, a requirement for the applicability of the VBER.

COMMENT

This is the second case in which the FCJ held that Porsche could not restrict the sale of Porsche cars and equipment to tuning companies. In the decision in *Porsche-Tuning I* of 6 October 2015 the FCJ found that the claimant, a tuning company, under specific circumstances had a right to be supplied with Porsche vehicles and parts, otherwise Porsche would infringe the prohibition against abuse of economic dependence and abuse of dominance under German law.

The FCJ in both cases clarified that Porsche could only rely on the supply of components exemption under VBER with regard to parts from their own Porsche tuning programmes which are intended for value-added reuse and not for unchanged use and resale to Porsche centres.

With thanks to Jan Schwarzfischer of Ashurst for his contribution.

Indonesian Competition Authority imposes fines for bid rigging conduct in three cases and wins on appeal in a fourth case

INDONESIA – CARTELS

The Indonesia Competition Commission ("ICC") has imposed significant penalties on several Indonesian entities for bid rigging conduct in relation to three separate government tenders related to port and school facility construction. In a fourth case, the Commercial Court upheld the ICC's decision against a party that had engaged in bid rigging conduct in the context of hospital construction tender.

KEY TAKEAWAYS

- Article 22 of the Indonesian Competition Law prohibits business actors from conspiring with other parties to arrange or determine the winner of a tender where this may result in unfair business practices.
- Alongside delayed notifications for merger control filings, enforcement actions against bid-rigging conduct have historically accounted for a significant proportion of the ICC's enforcement activities.
- Pursuant to the Penalty Guidelines, parties found to be in violation of the Indonesian Competition Law must pay fines imposed by the ICC no later than 30 days after the ICC's decision is handed down. In addition, parties are obliged to pay 20% of the total penalty in the form of bank guarantee before filing an appeal against an ICC decision.

The ICC has imposed penalties on several Indonesian entities for bid rigging conduct in relation to three separate tenders. The ICC imposed penalties on the colluding parties as follows:

Bid rigging in port construction tender	• PT Kurniadjaja Wirabhakti – IDR 1.4 billion (approx. USD 102,000) • PT Dian Sentosa – IDR 200 million (approx. USD 14,000) • PT Mahakarya Tunggal Abadi – IDR 150 million (approx. USD 11,000)
	Total – IDR 1,820 million (approx. USD 127,000)
Bid rigging in school facilities and infrastructure tender	• PT Adhikarya Teknik Perkasa – IDR 2.05 billion (approx. USD 143,000) • PT Kalber Reksa Abadi – IDR 1.98 billion (approx. USD 138,000)
	Total – IDR 4,030 million (approx. USD 281,000)
Bid rigging in port construction tender	• PT Perkasa Jaya Inti Persada – IDR 1.25 billion (approx. USD 87,000) • PT Kurniadjaja Wirabhakti – IDR 1 billion (approx. USD 70,000) • PT Duta Ekonomi - IDR 1 billion (approx. USD 70,000)
	Total – IDR 3,250 million (approx. USD 227,000)

In a fourth case, the Commercial Court at the Medan District upheld the ICC's decision against PT Mina Fajar Abadi for conduct in violation of Article 22 of the Competition Law in the context of a hospital construction tender.

Pursuant to the *Regulation on Guidelines for the Imposition of Penalties for Violations of the Law on the Prohibition of Monopolies and Unfair Business Practices* ("Penalty Guidelines") parties must pay the fines imposed by the ICC no later than 30 days after the ICC's decision is handed down. Any delayed payment may be subject to a fine for delay of 2% per month of the value of the fine. In addition, under the Penalty Guidelines parties are obliged to pay 20% of the total penalty in the form of bank guarantee before filing an appeal against an ICC decision. An appeal will not be filed if the bank guarantee letter is not submitted within 14 days after the ICC announces its decision.

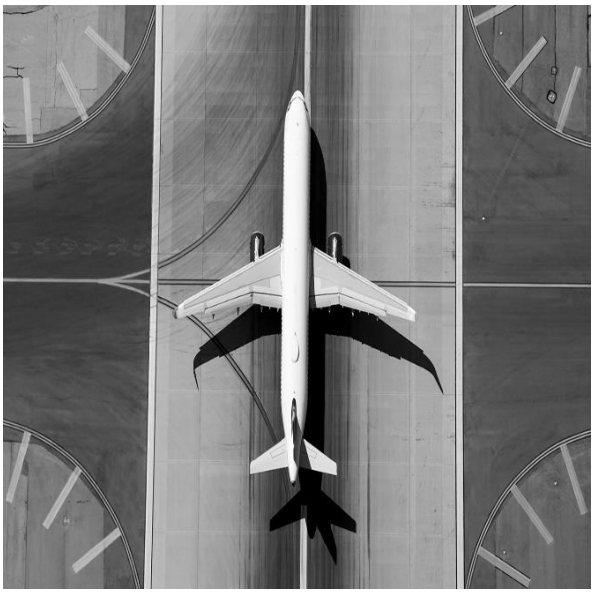
CONCLUDING REMARKS

The ICC's ongoing commitment to crack down on collusive conduct, particularly in the context of government tenders, continues. With decisions of the ICC being upheld by the Commercial Court, this will instil a great degree of confidence in the ICC as it continues to investigate entities for breach of the Indonesian Competition Law.

ICC fines Garuda Airlines IDR 1 billion for discriminatory conduct

INDONESIA – ABUSE OF DOMINANCE

The Indonesia Competition Commission ("ICC") has imposed a penalty of IDR 1 billion (approx. USD 70,000) on Garuda Indonesia Airlines ("Garuda") for engaging in conduct in violation of Article 19 of the Indonesian Competition Law. The ICC held that Garuda engaged in discriminatory conduct for giving preferential treatment to certain travel agencies for the sale of its airline tickets to the Middle East.



KEY TAKEAWAYS

- Article 19 of the Indonesian Competition Law prohibits business actors from engaging in one or more activities (either individually or jointly with other business actors), which may result in monopolistic practices or unfair business competition, including discriminatory practices towards certain business actors.
- This penalty comes after a long-standing investigation which commenced in 2019 by the ICC regarding Garuda's discriminatory practices towards certain travel agencies. While six travel agencies benefitted from the preferential treatment, there were some 300 other travel agencies who were not presented with the same treatment.
- ICC regulation Number 1/2019 offered the airline the opportunity to self-report and change their conduct following an initial hearing through the use of an "Integrity Pact". In principle, the pact was a signed document that stated the behaviour that Garuda was alleged to have committed and that it would not continue to violate competition law in the future.

The ICC has imposed a penalty of IDR 1 billion (approx. USD 70,000) on Garuda Indonesia Airlines ("Garuda") for engaging in conduct in violation of Article 19 of the Indonesian Competition Law. The ICC held that Garuda engaged in discriminatory conduct in the selection of a limited number of travel agent partners for the sale of its airline tickets to and from Jeddah and Medina in the Kingdom of Saudi Arabia.

BACKGROUND

In March 2019, a local travel agent association filed a complaint after it was unable to purchase tickets from Garuda's branches for pilgrims looking to travel to Jeddah and Medina. The association could only purchase tickets from six major travel agencies in Jakarta at the time, and as a consequence, ticket prices increased by 15%.

In September 2020, the ICC held hearings in the case and found that the arrangements between Garuda and the six agencies hindered business for some 300 other travel agencies nationwide and the conduct led to increased airfares to the Middle East for Indonesians travelling for pilgrimage. The ICC proposed behavioural remedies for the airline, which Garuda agreed it would comply with ("Integrity Pact").

CONTINUATION OF DISCRIMINATORY CONDUCT

In July 2021, the ICC held that Garuda had continued to engage in the discriminatory conduct, in violation of the Integrity Pact.

The ICC noted that the airline's policy harmed the ability of other providers to compete and Garuda's process for appointing the travel agencies was not open or transparent, nor was it based on any objective requirements and considerations. The ICC further noted that inconsistencies in the rationale for appointing wholesalers proved the existence of discriminatory conduct. Accordingly, the ICC imposed a penalty against Garuda for engaging in conduct in breach of Article 19 of the Indonesian Competition Law.

PENALTY

In determining the penalty, the ICC noted that it took into account the airline's ability to pay and had regard to Garuda's financial statements from 2018, 2019 and 2020. The ICC said that had it imposed a large fine, this would potentially threaten Garuda's ability to continue to operate.

CONCLUDING REMARKS

This case highlights the importance of compliance with the ICC's regulations, including its reliance to remedy violations through its Integrity Pact process. However, the more lenient approach of an Integrity Pact should not be underestimated, as the ICC will continue to monitor conduct and proceed to penalise parties who do not correct their behaviour.

With thanks to Isabella Hunt for her contribution.

Italian court annuls Vodafone Italia margin squeeze fine

ITALY – ABUSE OF DOMINANCE

On 15 September 2021, the Italian administrative court of first instance ("TAR Lazio") upheld the appeal brought by Vodafone Italia S.p.A. ("Vodafone") against the decision of the Italian Competition Authority ("ICA") of 13 December 2017 in case A500(A).

The TAR Lazio found that the ICA had incorrectly applied the "as-efficient competitor test". As a result of that error, the ICA erroneously established the existence of a margin squeeze in the bulk SMS market. Therefore, the TAR Lazio annulled the ICA's €5.7m fine.

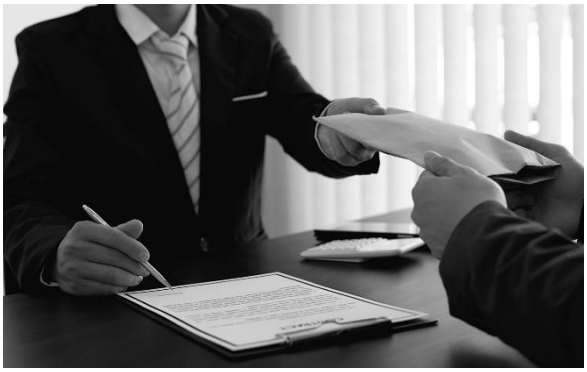
KEY TAKEAWAYS

- In margin squeeze cases, the ICA is required to apply the "as-efficient competitor test".
- When applying the "as-efficient competitor" test, the ICA is required:
  - to identify the competitors of the dominant company; and
  - to calculate the price that would allow an as-efficient competitor to recoup its costs and generate a profit margin.

THE ICA'S INVESTIGATION

On 13 December 2017, the ICA found that Vodafone had abused its dominant position in the wholesale market for SMS termination on its own network, by charging the so called "D43 Operators" (i.e., undertakings active in the downstream bulk SMS retail market) prices that were higher than those Vodafone charged to its own divisions active in the bulk SMS retail market.

According to the ICA, Vodafone's conduct resulted in a margin squeeze to the detriment of as-efficient competitors active in the provision of bulk SMS services, which are "packages" of SMS services purchased by large companies, such as banks, insurance companies, supermarkets, etc., for marketing communications to their customers, to be sent via mobile network operators ("MNOs").



THE TAR LAZIO'S RULING

On 15 September 2021, the TAR Lazio *annulled* the ICA's decision on various grounds.

First, the court found that the ICA had incorrectly applied the "as-efficient competitor" test. In particular, the court ruled that the ICA was required to assess whether Vodafone's retail divisions could profitably compete if they had to pay the same wholesale price Vodafone charged third parties for the purchase of a specific input which, in this case, was the right to deliver an SMS on Vodafone's network. When calculating the price of that input, the TAR considered that the ICA incorrectly took into account only the wholesale price charged by Vodafone to the D43 operators, which excludes the price paid to Vodafone for that input by other types of purchasers, such as aggregators, which purchase SMS termination services from MNOs and the D43 Operators for resale. In fact, the ICA had wrongly considered that aggregators were final customers, similar to banks and other large corporate clients. However, the ICA should have treated aggregators as competitors.

Second, the ICA did not demonstrate that the final product (bulk SMS) was only affected by the input provided by Vodafone. This was a necessary element of the test to determine

whether the price charged by Vodafone was capable of excluding the D43 operators from the downstream market. In fact, each bulk SMS is generally made up not only of messages to be dispatched on the Vodafone network, but also of messages to be dispatched on the networks operated by the other two MNOs active in Italy (TIM and Wind Tre). The price of the right to terminate an SMS on Vodafone's network therefore represented only a portion of the cost incurred by Vodafone's competitors active on the bulk SMS retail market. Therefore, according to the TAR Lazio, there was no evidence that the prices charged by Vodafone alone were capable of squeezing its competitors' margins on the retail market.

Finally, the ICA did not carry out any assessment of the anticompetitive effects of the conduct. In order to establish whether a margin squeeze is abusive, it is necessary to provide evidence of:

- the anticompetitive intent of the dominant vertically integrated operator; and
- the reasons why, based on a market analysis, as-efficient competitors run the risk of being excluded from the market as a result of the margin squeeze.

COMMENTS

This ruling clarifies the approach that the ICA should follow when assessing whether conduct amounts to a margin squeeze and how to apply the "as-efficient competitor test".

In particular, the TAR Lazio has confirmed that the correct application of the "as-efficient competitor" test requires clear identification of the competitors that risk being excluded from the market, and an assessment of the anticompetitive effects of the margin squeeze.

With thanks to Cecilia Borelli of Ashurst for her contribution.

The CNMC clears Santa Lucía/Funespaña merger with commitments and conditions

SPAIN – MERGER CONTROL

On 7 September 2021, the Spanish Competition Authority ("CNMC") cleared, subject to commitments and conditions, the acquisition by Santa Lucía of exclusive control of almost all assets of Mapfre Group subsidiary Funespaña. The transaction affects the funeral services and funeral planning sectors.

KEY TAKEAWAYS

- The conditions and commitments adopted are aimed at mitigating customer foreclosure and coordinated effects risks arising from the presence of two competing insurance companies in the shareholding of a downstream supplier.
- The CNMC has conditioned clearance on the divestment of Mapfre Group non-controlling share in the Santa Lucía owned entity to which Funespaña assets were transferred ("NNC").
- Non-controlling shareholdings may give rise to competition concerns even if acquired in a downstream supplier.

After an in-depth phase II investigation, the CNMC cleared the acquisition by Santa Lucía of exclusive control over almost all Funespaña assets, contingent on compliance with several conditions imposed by the CNMC and commitments offered by Santa Lucía.

Funespaña, a Mapfre Group subsidiary, is a company active in the funeral services market, along with Albia, a Santa Lucía Group subsidiary. Both Mapfre Group and Santa Lucía are insurance companies active in the vertically related market of funeral planning, a type of insurance guaranteeing coverage of funeral costs and related expenses, such as the costs of the wake, burial fees, cremation costs, and grave-digging charges. Around 60% of the funerals in Spain are covered by funeral plans.

Although after the transaction NNC, the entity to which Albia and Funespaña assets are to be transferred, would manage 278 mortuaries, 61 crematoria and 43 cemeteries in 275 different municipalities, given the highly localised nature of funeral markets, the transaction only gave rise to two horizontal overlaps between Albia and Funespaña.

Rather, the CNMC's main concerns related to the vertical effects of the transaction, given that Santa Lucía is the leading company in the vertically related market of funeral planning and that Mapfre Group, also present in the funeral planning market, would hold a 25% stake in NNC post-transaction.

According to the CNMC, this interest would provide Mapfre Group with an incentive to channel funeral services covered by their funeral plan policies through NNC, thereby preventing third party funeral service providers from accessing customers.

In addition, the CNMC considered that the interest would also give NNC the ability to degrade trading conditions or foreclose other insurers, especially in the municipalities where it would become the only funeral service provider as a result of the transaction.

The CNMC also raised concerns about potential coordinated effects between Santa Lucía and Mapfre Group in the other branches of insurance in which they are both active.

To mitigate the identified competition risks, the CNMC cleared the transaction on the condition that Mapfre relinquished its 25% stake in NNC and subject to certain commitments from Santa Lucía, such as to allow the entry of a competitor in one of the municipalities where there was a horizontal overlap.

With this decision, the CNMC highlights the importance of assessing competition law issues arising from non-controlling shareholdings, even if acquired in a downstream supplier.

With thanks to Teresa Prado of Ashurst for her contribution.

"Green Claims Code" – CMA warns businesses that environmental claims must comply with consumer law

UK – CONSUMER PROTECTION / NEW LAW / POLICY

On 20 September 2021, the CMA published its Green Claims Code (the "Code"), which contains principles and guidance to help businesses ensure that their environmental claims are compliant with consumer protection law.

KEY TAKEAWAYS

- Businesses should review the Code and ensure that any environmental claims made as part of their products or services are compliant with consumer protection law.
- The CMA has warned that it will carry out a full review of misleading green claims, both online and offline, at the start of 2022, and "*any business that fails to comply with the law risks damaging its reputation with customers and could face action from the CMA*".

BACKGROUND

The CMA's publication of the Code follows a recent international analysis of websites which found that 40% of green claims made online could be misleading. The CMA has also warned businesses that it will begin a review of compliance in this area under consumer law in January 2022 and that, if there is evidence of non-compliance, the CMA will consider whether further enforcement action is necessary.

THE GREEN CLAIMS CODE

The Code notes that consumers are increasingly demanding products and services which minimise harm to, or have a positive effect on, the environment. This has led to a significant increase in the number of businesses, products, and services claiming to meet this demand. Such

Such environmental claims can be explicit, or implicit, and all aspects of a claim can be relevant, such as: the meaning of any terms used; explanations of what is said; the evidence that supports those claims; the information that is not included or is hidden; the colours, pictures and logos used, and the overall presentation.

It is important that these claims do not mislead consumers. The Code therefore sets out a framework for businesses to make environmental claims that help consumers make informed choices. In particular, the Code sets out the following principles, and provides examples and case studies on their application:

- claims must be truthful and accurate;
- claims must be clear and unambiguous;
- claims must not omit or hide important relevant information;
- comparisons must be fair and meaningful;
- claims must consider the full life cycle of the product or service; and
- claims must be substantiated.

As noted in the Code, this guidance is for all businesses which make environmental claims, and it will apply to claims that are ultimately aimed at consumers and also (to a more limited extent) to businesses marketing to other businesses. It will also be of relevance to organisations that produce codes of practice and to third parties that develop certification schemes.

If a business fails to comply with consumer protection law, the CMA (and other bodies, e.g. the Trading Standards Agency) can initiate court proceedings. In addition, in some cases, the business may be required to compensate consumers harmed by the breach, and could also face legal action from consumers.

The Code therefore explains that any business making, or considering making, environmental claims needs to:

- comply with any sector- or product-specific laws that apply to them or their products and services;
- read the Code and ensure they are complying with their consumer protection law obligations;
- consider carefully whether they need to make changes to their practices; and
- make any changes necessary to comply with the law, such as:
    - stopping making false or deceptive statements;
    - amending claims to ensure they are compliant;
    - ensuring they have the evidence to substantiate claims; and
    - ensuring they give consumers the information they need to make informed choices.

Comment

The publication of the Code is part of a wider awareness campaign by the CMA, as well as a continued focus by the CMA on sustainability-related initiatives, both from a consumer protection and competition law perspective.

This includes the CMA's recent consultation on environmental sustainability advice, which seeks views on how competition and consumer regimes can support the UK's Net Zero and sustainability goals; and the CMA's information sheet published on 27 January 2021 which aims to help business and trade associations better understand how competition law applies to sustainability agreements.

Competition Appeal Tribunal certifies first UK competition class action in Merricks

UK – PRIVATE DAMAGES ACTIONS

On 18 August 2021, the UK's Competition Appeal Tribunal ("CAT") certified the application by Mr Walter Merricks CBE to bring an opt-out class action on behalf of 46 million UK consumers who suffered loss as a result of anticompetitive interchange fees imposed by Mastercard between 1992 and 2008. While the CAT's ruling was expected following the Supreme Court's judgment in December 2020, this is a significant decision as it is the first time a class action has been certified following the amendments introduced by the Consumer Rights Act 2015.

KEY TAKEAWAYS

- The first opt-out collective proceeding in the UK has been certified which will pave the way for future collective actions.
- A class can include the representatives of the estates of deceased persons but it cannot simply include deceased persons.
- It will be difficult to claim for compound interest as part of a collective action.

BACKGROUND

In September 2016, Mr Merricks applied to the CAT to bring a follow-on damages claim, on an opt out basis, on behalf of all individuals over 16 who purchased goods or services from a UK business that accepted Mastercard between 1992 and 2008. The application is based on a decision by the European Commission in 2007 that interchange fees, charged to retailers for card use which are often passed through to consumers in the form of higher prices, for Mastercard debit and credit cards breached EU competition law.

Mr Merricks brought his claim under Section 47B of the Competition Act 1998 amended by the Consumer Rights Act 2015) which introduced a framework allowing collective actions to be brought on an opt-out basis in the English courts for breaches of competition law.

Opt-out claims presumptively include all UK domiciled members of the class as claimants unless individuals actively "opt-out". Before an opt-out claim may proceed, the CAT must certify it by granting a collective proceedings order ("CPO").

After the CAT declined to grant a CPO for Mr Merricks' application in 2017, he appealed to the Court of Appeal which held that the CAT had failed to properly apply the eligibility condition. Mastercard then appealed to the UK Supreme Court.

SUPREME COURT JUDGMENT

On 11 December 2020, the Supreme Court handed down its judgment which broadly upheld the Court of Appeal's judgment and confirmed that the CAT had not applied the correct meaning of "suitability" when considering the appropriateness of Mr Merricks' claim for collective proceedings. On that basis, Mr Merricks' application was remitted to the CAT for it to reconsider certification. For a more detailed analysis of the Supreme Court's judgment, please refer to our February 2021 publication.

CAT JUDGMENT

Following the Supreme Court's decision, Mastercard no longer opposed certification of Mr Merricks' application. In its judgment, the CAT considered issues relating to three areas:

- Authorisation of Mr Merricks as the class representative;
- Whether Mr Merricks could amend the application to extend the class to include individuals who died before the claim form was issued; and
- Whether the collective proceedings could include a claim for compound interest.

Authorisation of the class representative

In 2017, the CAT held that Mr Merricks satisfied the authorisation condition to be the representative of the proposed class. In its recent judgment, the CAT considered two

developments since the 2017 hearing: (i) an objection raised by a member of the proposed class which was dismissed and (ii) the replacement of Mr Merricks' third party litigation funder with Innsworth Capital.

The CAT focused on whether the proposed class representative would be able to pay the defendant's recoverable costs if ordered to do so. The new litigation funding agreement ("LFA") provides for a significant amount more funding than the previous LFA which had satisfied the CAT. Under the LFA, Mastercard had no right to enforce the LFA and would therefore need to apply for a third party costs order against Innsworth Capital, which is a Jersey company and accordingly outside the jurisdiction. Mastercard therefore sought an undertaking by Innsworth Capital to the CAT that it would discharge a liability for costs ordered against Mr Merricks, which Innsworth Capital agreed to provide.

Deceased persons issue

The CAT found that Mr Merricks clearly intended to exclude deceased persons in his original claim, however, the experts did not allow for the exclusion of deceased persons when calculating aggregate damages. On remittal, Mr Merricks sought to amend the claim form to include deceased persons in the class. This would have significantly increased the size of the class from 46 million to almost 60 million.

Proceedings brought under Section 47B of the Competition Act 1998 are a subset of proceedings which could be brought under section 47A and are a "bundle" of claims which are brought collectively but retain their identity as distinct claims. As the claims of deceased persons vest in their estate on their death, the CAT held that it is not possible to simply include deceased persons in the class. However, it would be possible to have a class definition which included the estates of deceased persons and the right to opt-in or opt-out could then be exercised by their representative. As this was not the amendment proposed by Mr Merricks, his application to amend the claim form was denied.

For completeness, the CAT also noted that the application to amend the claim form was made over four years after the limitation period expired and did not fall within the exceptions in the CAT rules which allow for additional parties to be added after the expiry of the limitation period.

The CAT expressly noted that nothing in its judgment affects the claims of class members who died after the claim form was issued.

Compound interest

Mr Merricks' original claim form included a claim for compound interest on the basis that all class members will have either incurred costs to finance the overcharge (for example, through borrowing) or will have lost interest that they would have otherwise earned by holding the amount of the overcharge. Compound interest is a distinct head of loss which needs to be established separately and cannot be presumed: it is awarded as part of the damages unlike simple interest which is awarded *on* damages.. In this case, a claim for compound interest, as opposed to simple interest, would make a substantial difference to the total claimed given the period over which the alleged loss was incurred.

Mastercard opposed the inclusion of the claim for compound interest on the basis that no plausible or credible method had been proposed for calculating the loss suffered and that it was not a common issue across the class.

The CAT held that it was necessary to show on the balance of probabilities how members of the class funded the additional expense or how they would have used the additional money if there had been no overcharge. The CAT observed that the principal claim amount per class member is small and was incurred incrementally as a result of very small overcharges on day-to-day purchases. In this case, class members may have been able to pay the additional amount from their earnings and/or may have used the additional money, absent any overcharge, to spend more.

Mr Merricks submitted two alternative methodologies for estimating the compound interest claim: (i) calculating a blended interest

rate to reflect the saving and borrowing rates during the relevant period, proportionate to the members of the class who saved or borrowed money or (ii) given the data limitations with the first approach, limiting compound interest to a subset of borrowers and excluding members of the class who have no borrowings from the claim for compound interest. The CAT rejected both approaches and commented that each approach assumes how the class members would have used the money, absent an overcharge, and do not address the probability that the money would have been used for additional spending. Applying the Supreme Court's judgment, the CAT found that the claim for compound interest was not suitable for an aggregate award in the absence of any "*credible or plausible method of estimating what loss by way of compound interest was suffered on an aggregate basis*". The CAT emphasised that that the claim was not being rejected on the basis of any data limitations but because no viable methodology had been put forward.

Having excluded the claim for compound interest on the above basis, the CAT did not consider in detail whether the recovery of compound interest is a "common issue" raised by the claims of all class members. The CAT did, however, comment that it would be difficult to see how a claim for compound interest could raise a common issue where only a minority of class members suffered loss by way of compound interest.

COMMENT

This is a significant milestone for the UK's nascent collective actions regime. Mastercard now faces the largest damages claim in the history of the English civil courts, as well as claims brought by merchants. A date has not been set for the case to be heard.

Additional collective claims have been filed following the Supreme Court's judgment in December 2020 and more are likely to follow now that the first application has been certified. Collective actions have been filed against BT, Qualcomm, Apple and Google, as well as in relation to the Trucks and FX cartels. Based on the CAT's judgment, it may be challenging for applicants to claim compound interest in future collective proceedings. However, there is potential for the estates of deceased individuals to be included as eligible class members in future claims.

The full judgment can be found here.

With thanks to *Fiona Garside* of Ashurst for her contribution.

CMA proposes changes to guidance on settlements in antitrust investigations

UK – NEW LAW / POLICY

On 31 August 2021, the CMA launched a public consultation on the settlement chapter of its 'Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (the "Guidance"). The amendments would require that, as a condition of settlement, businesses under investigation will not challenge or appeal the CMA's infringement decision.

KEY TAKEAWAYS

- Under the proposed amendments, the CMA would make settlements conditional on businesses under investigation agreeing not to appeal the CMA's infringement decision, including the financial penalty imposed.
- The changes aim to bring finality to settlement cases by ensuring that they cannot easily be re-opened and to achieve procedural efficiencies and resource savings for the CMA.

BACKGROUND TO THE PROPOSALS

The CMA has powers to enter into settlements with parties that are being investigated under the Competition Act 1998. The CMA will typically consider the settlement procedure where the evidential standard for giving notice of its proposed infringement is met and settlement is likely to achieve procedural and resource efficiencies. These efficiency savings, in part, include the CMA not being required to defend an appeal against its decision before the UK Competition Appeal Tribunal (the "**CAT**").

The proposals partly stem from a recent judgment by the CAT in April 2021, which rejected an appeal brought by Roland against a penalty imposed by the CMA in a recent settlement case. The CAT found that Roland breached its agreement not to challenge the CMA's decision and revoked the 20% settlement discount that Roland had received (see our May 2021 newsletter).

The CMA welcomed the CAT's judgment, but did not consider removing the settlement discount alone to be, in and of itself, sufficient to ensure a settlement is in the public interest.

OVERVIEW OF THE AMENDMENTS

The outcome of the *Roland* case has informed the CMA's proposed amendments to the Guidance, under which settling parties must confirm, as part of their settlement agreement, that they will not challenge or appeal the CMA's infringement decision to the CAT and that a successful appeal to the CAT is no longer an exception to the settlement decision remaining final and binding.

The changes are likely to limit the ability of parties to appeal settled cases, which corresponds with the CMA's stated objective of ensuring that settlement brings finality to an investigation and that settled cases cannot easily be re-opened by settling parties. The CMA considers these proposed changes to be in line with the law on waiving a right to a fair and public hearing, which is valid when it is voluntary, informed and unequivocal, due to the voluntary nature of the settlement process and the parties' ability to withdraw from settlement discussions at any time.

As the proposals relate to the CMA's Guidance, they can be made without the need to change primary or secondary legislation, and therefore have the potential to be published once the responses to the consultation, which closed on 28 September, have been reviewed.

COMMENT

At the time of the CAT's ruling in *Roland*, CMA officials commented that the judgment reinforces the CMA's view that settlements should be final. The proposed changes to the Guidance is further confirmation that the CMA intends for the settlement process to be final and, assuming the proposals are taken up, businesses under investigation by the CMA should have this expectation in mind when considering whether to settle a case.

With thanks to Olivia Spong of Ashurst for her contribution.

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