September 2019

Competition Law Newsletter

Welcome to the September 2019 (first edition) of our Competition Law Newsletter. This will be a quarterly update covering key developments in EU and UK competition law.

Merger control

High fines imposed on companies for "gun jumping"[1]

On 27 June 2019, the European Commission ("**EC**") fined Canon, the Japanese manufacturer of imaging and optical products, €28 million for implementing its acquisition of Toshiba Medical Systems Corporation ("**TMSC**") before notifying and obtaining the approval of the EC. This was a breach by Canon of the "stand-still" obligation under the EU Merger Control Regulation ("**EUMR**").

When a merger, or an acquisition, or the creation of a joint venture amounts to a "concentration" (i.e. as a result of the change of control in one, or more undertakings, etc.) under the EUMR, the parties to the transaction need to consider whether a formal notification of their transaction to the EC is required (i.e. if the relevant EUMR turnover thresholds are met). If a notification is required, the parties should hold off (i.e. "stand-still") from completing their transaction, until the EC's approval is granted.

If the parties do not comply with the "stand-still" obligation, the EC has the power to fine the parties for "jumping the gun". In addition, if the EC cannot approve the transaction because it is likely to cause a significant impediment to effective competition, the EC can also order the unwinding of the transaction.

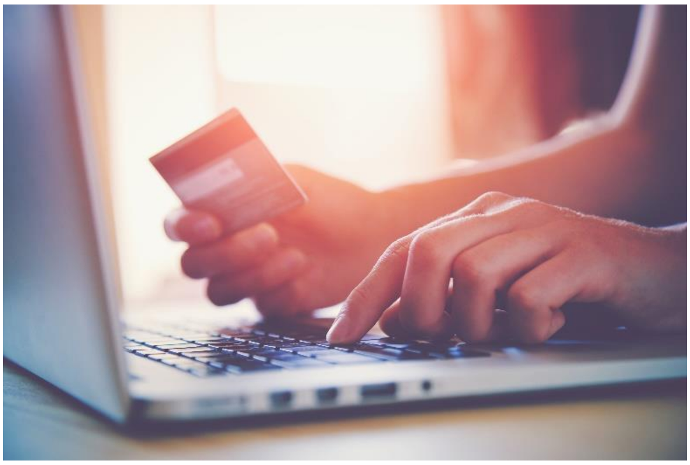
On 12 August 2016, Canon notified the EC of its plan to acquire TMSC. The EC cleared the transaction unconditionally on 19 September 2016.

Canon had used a warehousing two-step structure to complete the acquisition, using an interim buyer as follows:

- Step 1: the interim buyer acquired 95% in the share capital of TMSC for €800, whereas Canon paid €5.28 billion for the remaining 5% and share options over the interim buyer's stake; and
- Step 2: following approval of the merger by the EC, Canon exercised the share options, acquiring 100% of the shares of TMSC.

The EC concluded that:

- Step 1 and Step 2 in the transaction together formed a single notifiable acquisition;
- Step 1 was necessary for the acquisition of final control over TMSC, which was completed with Step 2; and



[1] A number of fines for gun-jumping/failure to notify an acquisition/joint venture arrangement have been announced by competition authorities around the world, including:
• China – in two decisions, (1) Harbin Electric and GE China have each been fined RMB 300,000 for failure to notify the establishment of a joint venture, and (2) Tianneng Battery Group was fined RMB 300,000 for failing to notify its acquisition of Anhui Hongda Power Supply;
• Kenya - Moringa School Limited was fined KES 503,656 for failure to notify the acquisition of an additional 50% shareholding (amounting to a change from joint to sole control);
• Philippines – Wingtech Technology was fined PHP 716,150 for failing to notify its proposed acquisition of Nexperia within the required time limit (the transaction was notified 194 days after being announced, in violation of the 30 days filing deadline); the transaction was ultimately cleared by the PCC; and
• United States - Third Point and three funds managed by it have agreed to pay a penalty of US$609,810 for failure to notify the acquisition of shares in DowDupont.

- By carrying out Step 1, Canon partially implemented its acquisition of TMSC before both the notification and the EC's approval. In doing so, Canon breached both the notification requirement and "stand-still" obligation. Canon was aware of its obligations under the EUMR and, as such, the breach was, at least, negligent.

The EC can impose fines of up to 10% of the aggregated turnover of companies that, intentionally or negligently, breach the "stand-still" obligation. In setting the amount of a fine, the EC takes into account the nature, the gravity and duration of the infringement, as well as any mitigating and aggravating circumstances.

Provision of misleading information can be expensive

In April 2019, the EC imposed a fine of €52 million on General Electric ("**GE**") for providing incorrect information in the notification of its planned acquisition of LM Wind.

When GE first notified its proposed acquisition of LM Wind to the EC in January 2017, it stated that it did not have any higher power-output wind turbine for offshore applications in development, beyond its existing 6MW turbine. However, through information submitted by a third party, the EC established that GE was simultaneously offering a 12MW offshore wind turbine to potential customers. As a result, on 2 February 2017, GE withdrew its notification of the acquisition of LM Wind and on 13 February 2017, GE re-notified the same transaction, this time submitting complete information on its future project. On 20 March 2017, the EC approved the proposed acquisition.

On 6 July 2017, the EC issued a Statement of Objections ("**SO**") to GE alleging that it had breached its procedural obligations under the EUMR. The EC's investigation confirmed that, contrary to GE's statements in its first notification, GE had indeed been offering a higher power-output offshore wind turbine to potential customers. Consequently, GE's statement in the notification form asserting that it had no higher power output wind turbines for offshore in development was incorrect.

The EC may impose fines not exceeding 1% of the aggregate turnover of the undertaking concerned where, intentionally or negligently, they supply incorrect or misleading information in a notification or supplement to that. Despite the withdrawal and re-notification of the acquisition with complete information, the EC took the decision to fine GE. Parties have an obligation to ensure the accuracy of all information submitted at all times – and this obligation arises even where the information does not affect the EC's final approval of the transaction.

This fine is not an isolated case, with the EC having previously fined *Facebook* €110 million for providing misleading information on its acquisition of *WhatsApp* in 2017.

Antitrust

European Commission reinvigorates use of interim measurers in antitrust investigations

On 26 June 2019 the EC issued a SO to Broadcom, stating its intention to impose an interim measures ("**IMs**") order on Broadcom to discontinue its suspected anti-competitive conduct. The EC had reached the preliminary conclusion that Broadcom: (a) was likely to hold a dominant position in various markets for the supply of components for TV set-top boxes and modems; and (b) may have abused that dominant position by entering into agreements with customers that require them to purchase exclusively (or almost exclusively) from Broadcom. The EC was concerned that Broadcom's conduct could lead to the elimination or marginalisation of its rivals before the end of the EC's full investigation into its various anti-competitive practices.

The EC can impose IMs under Article 8 of Council Regulation 1/2003 on companies, if there is urgency due to the risk of serious and irreparable harm to competition before a final decision on substance has been reached and where the companies are suspected of having infringed the competition rules. The EC concluded in the SO that there was such a risk and that Broadcom should cease enforcing these provisions, to safeguard the effectiveness of the EC's final decision to be issued in due course.

The EC's SO is just the beginning of a process setting out the evidence and the legal basis for IMs. Broadcom will now have the opportunity to respond to the SO, following which the EC will decide whether to proceed with the adoption of the IMs.

Any such EC decision can ultimately be appealed to the General Court of the EU ("**GC**"). Pending any such appeal, however, Broadcom will be required to comply with it, as failure to do so may lead to the imposition of periodic penalty payments.

Competitors should not share supplies to a customer or exchange commercially sensitive information

On 18 June 2019, the UK Competition and Markets Authority ("**CMA**") sent a SO to several competing pharmaceutical companies on the suspicion that these competitors had shared the supply of nortriptyline to a large pharmaceutical wholesaler, exchanged commercially sensitive information and agreed to fix the quantities and prices of supply. If ultimately confirmed, these infringements of UK competition law are likely to give rise to significant fines. In addition, affected customers will be able to bring third party damages claims for any loss suffered as a result of such breaches of competition law.

The CMA alleged that competitors, King and Auden McKenzie, agreed that one would supply only 10mg nortriptyline tablets and the other would supply only 25mg nortriptyline tablets to the wholesaler. In addition, these two suppliers allegedly agreed to fix the quantities and the prices of supply. The CMA also considered that King, Alissa and Lexon exchanged commercially sensitive information — including information about prices, volumes and entry plans — to try to keep nortriptyline prices high.

Interestingly, the range of addressees of the SO demonstrates that competition law risk can extend to companies that take over an infringing business. The addressees of the SO included Accord-UK Limited (formerly known as Actavis UK Limited) because the CMA provisionally considered Accord to be the economic successor of Auden McKenzie (Pharma Division) Limited and so it should be held liable for Auden McKenzie's direct involvement in the alleged infringement.

The addressees also included Praze Consultants Limited, a consultancy that conducted King's corporate and commercial services. The CMA provisionally considered that Praze directly participated in both infringements of competition law alleged against King.

On 20 September 2019, the CMA announced that King and Alissa had admitted infringing competition law; and will now enter into a settlement agreement with the CMA. The CMA will continue to investigate Lexon, as Lexon denies involvement in the suspected information exchange infringement.

This is one of several cases that the CMA has ongoing currently into suspected anti-competitive practices in the pharmaceutical sector.

Resale price maintenance is still very much illegal

On 1 August 2019, the CMA fined Casio £3.7 million for imposing minimum resale prices on retailers that sold its musical instruments online. This is the largest fine ever imposed by the CMA in relation to resale price maintenance ("**RPM**"). This decision arises out of four other ongoing antitrust investigations in the musical instruments and equipment sector being carried out by the CMA.

The CMA stated that Casio admitted to using an advanced monitoring software to ensure retailers

were complying with its pricing policy, which established minimum prices for online sales of its digital pianos and keyboards from 2013 to 2018. Casio then pressured those retailers who deviated from the RPM policy to raise their prices. According to the CMA, the use of the monitoring software made it easier for Casio to enforce its RPM policy in "real time" and thereby dissuaded retailers from offering discounts on Casio products for fear of being caught and potentially sanctioned. The CMA also found that Casio's retailers had to disclose to Casio when their rivals offered discounts on pianos and keyboards.

The CMA decided to reduce the fine imposed on Casio by 20% under the CMA's settlement regime reflecting Casio's admission of the breach and cooperation with the CMA's investigations, which allowed the CMA to speed up its investigation significantly.

The CMA so far has only fined three companies for online RPMs. In two probes concluded in May 2016, the CMA fined a manufacturer of bathroom fittings £786,668 and a supplier of catering equipment £2.3 million. In 2017, the CMA fined a lighting supplier £2.7 million for online RPM as well as for disregarding a prior CMA warning about its sales restrictions.

Last year, the CMA increased its monitoring of vertical restrictions and during 2018 issued 19 warning letters and three advisory letters about RPM to alert companies to the illegal nature of this practice and the need to ensure compliance.

Other jurisdictions, including the EU, have demonstrated an increasing appetite over the years to investigate and fine companies engaged in RPM. In 2018, the EC imposed a total fine of €111 million on four consumer electronic groups for restricting their online retailers' ability to set their own retail prices for electronic products (including hair dryers, headphones, kitchen appliances, etc.).

Similar considerations apply to the imposition by the manufacturer or the wholesaler of minimum advertised price ("**MAP**") online restrictions in their distribution arrangements. Although MAP policies are common in the US and permitted (i.e. where resellers are contractually prohibited from advertising a product's price online below a set level, even though they may sell the product at a lower level in-store and failure to abide by such MAP policy can result in sanctions for the non-compliant reseller); in the UK/EU such practice is generally considered a breach of the competition rules. MAP restrictions have been held illegal and fines imposed on the relevant parties by the CMA in *Commercial Catering Equipment* and *Mobility Scooters.*

Director disqualifications in the UK are on the rise

In May 2019, the CMA secured legally binding competition disqualification undertakings ("**CDUs**") from three directors of companies within the Fourfront Group for their participation in the illegal cover bid rigging office-fit-out cartel. Robb Simms-Davis, Trevor Hall and Oliver Hammond were disqualified for five years, two years and six months, and two years, respectively. By giving an undertaking, a director agrees to be disqualified from fulfilling such role at a company that has infringed competition law, or otherwise being involved in the management of any UK company, unless the permission of the court is obtained.[2]

On 31 July 2019, the CMA announced that it had secured another three CDUs from three more directors in the same cartel. This sends a clear message that the risk of director disqualifications is on the rise. Specifically, the three individuals were the founder and CEO of the Fourfront Group (disqualified for a period of 4 years and 9 months), the Chair of the Fourfront Group (disqualified for 2 years and 9 months) and the Managing Director of Area Sq. Ltd, which is part of the Fourfront Group (disqualified for 1 year and 6 months).

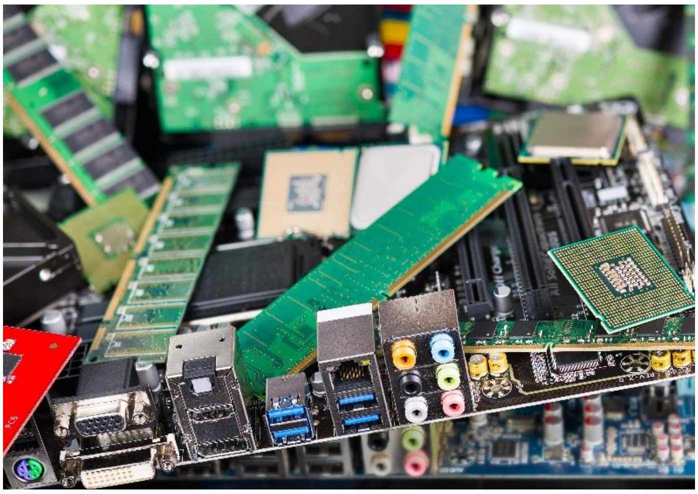
Importantly, the founder of the Fourfront Group was disqualified for personal contribution to 10 breaches of UK competition law, which affected contracts with a total value exceeding £11.9 million. The Chair of the Fourfront Group contributed to one of these breaches and took no steps to avoid the other 9 breaches, even though he had reason to suspect, or should have known about them.

It is therefore clear that a director of a company not only has a special obligation to ensure compliance with competition law, but is further expected to monitor and identify breaches as well as take active steps to bring such breaches to an end.

The three directors initially declined to give CDUs but later decided to do so after being put on formal notice by the CMA of its intention to apply to the Court for director disqualification orders (i.e. CDOs) against the individuals. Had these undertakings been given before the regulator issued the formal notice, the CMA stated that the periods of disqualification would have been much shorter.

The CDUs will take effect on 7 October 2019 to allow the Fourfront directors sufficient time to apply to the Court for permission to carry out specified director duties. Whether or not the Court may grant such application will be based on the directors' and the CMA's representations. At Court, the CMA will be concerned to ensure that any permission is subject to appropriate public protection safeguards and that Fourfront and its directors are constructively engaging with the CMA to that end. An application "for permission to act" is a routine feature of disqualification cases and the CMA will remain involved in this process to ensure that the public is protected.

To date, the CMA has disqualified a total of 12 directors since 2016, when it started to ramp up its use of director disqualification powers. Other cases where director disqualifications have been ordered include: *Online Sales of Posters and Frames cartel; Residential Estate Agency Services in the Burnham-on-Sea area cartel* and *Supply of Precast Concrete Drainage Products cartel.*



[2] The CMA can also apply to the Court to make a competition disqualification order ("**CDO**") against an individual under Section 204 of the Enterprise Act. The CDU has the same effect as a CDO, but has the advantage of avoiding court proceedings and relevant costs. Currently, the majority if not all director disqualifications have been achieved by CDU.

Abuse of dominance

Predatory pricing activities fined again more than 15 years later

On 18 July 2019, the EC fined Qualcomm €242 million for engaging in predatory pricing. This fine comes after the lodging of a complaint in May 2010 by Icera – Qualcomm's main rival at the time.

In the course of its investigation, the EC determined that Qualcomm had held a dominant position in the global market for 3G baseband chipsets between 2009 and 2011 on the basis of its high market shares of approximately 60% and the high barriers to entry to the market.[3]

The EC found that during its period of dominance, Qualcomm had sold certain quantities of three of its chipsets below cost to two of its strategically important clients, Huawei and ZTE, with the intention of eliminating Icera from the market. During the time in question, Icera was a new entrant in 3G baseband chipsets and one of the few companies able to challenge Qualcomm. The EC was able to establish that Qualcomm's behaviour had a significant detrimental impact on competition, preventing Icera from competing in the market, stifling innovation and ultimately reducing choice for consumers.

The EC relied heavily on Qualcomm's internal documents to establish that Qualcomm had identified Icera as a critical threat for Qualcomm's 3G baseband chipset business and that it needed to take preventative action. This case is a reminder to companies that they need to be careful when producing internal documents given the EC now has significant capabilities to analyse large amounts of internal documents and is issuing large requests to companies for documents in these types of investigation.

This is the first time the EC has imposed a fine on a company for engaging in predatory pricing since finding that *Wanadoo* had engaged in predatory pricing over 16 years ago. Predatory pricing cases are complex and hard to prove. This decision shows that the EC will not hesitate to pursue such difficult cases.

This decision also follows a fine imposed on Qualcomm last year by the EC for giving Apple exclusivity rebates and illegally shutting out rivals from the market for 4G baseband chipsets.

Qualcomm has decided to appeal the EC's decision, describing it as "unsupported by the law, economic principles or market facts".

State aid

Multinational tax advantages EC State aid decision challenged by the UK

The UK government appealed the EC's State aid decision requiring it to recover taxes from multinational companies that benefited from certain tax exemptions on cross-border lending to the GC.

In April 2019, the EC found that a tax break, introduced as part of a wider tax scheme, the so-called Controlled Foreign Company ("**CFC**") rules, breached State aid law. Specifically, the CFC rules are aimed at preventing multinational companies' subsidiaries based in low-tax jurisdictions from siphoning off profits generated in the UK, using intragroup lending for that purpose and thus avoiding their profits being taxed in the UK.

While the exemptions from the CFC rules were "partially justified," the Group Financing Exemption ("**GFE**") allowed for certain derogations from these rules and that, according to the EC, broke EU State aid law. This is because the measure in question gave certain multinational companies a selective advantage over other undertakings by granting them an unjustified exemption from tax avoidance rules. The UK authorities have since removed the GFE exemption from the CFC scheme.

In its appeal against the EC State aid decision, the UK government emphasises its claim to power of discretion over its own tax system and considers that it is "uniquely well placed to determine which kinds of arrangements present a high risk of abuse."

By relying on the concept of "margin of appreciation," the UK underlines the interplay between EU powers and national sovereignty, alleging that the EC is overstepping its mandate by interfering in the internal tax legislation of an EU Member State. The UK further claims that the EC made a number of errors in its analysis of the tax exemptions.

The EC's decision has reignited the debate about whether the EC should be using State aid law as a tool to tackle international tax avoidance. Therefore, the UK appeal comes as no surprise. Most importantly, however, the substance of the appeal demonstrates that the UK is gearing up for a major court fight with the EU over its tax regime just as it is ramping up its forces for the anticipated departure from the EU at the end of October 2019. If the UK leaves the EU on the terms of the Withdrawal Agreement concluded last year, then all State aid

[3] While holding a dominant position is not in itself illegal under EU and/or UK competition laws, companies in such a position have a special responsibility to ensure that they are not abusing their market position by restricting competition in any market.

investigations started by the EC will continue after Brexit. However, if the country crashes out of the EU without a deal, then the EU's State aid rules will no longer apply to the UK. The GC's judgment will therefore surely be very closely monitored.

Regulatory

Digital platforms and competition

The EC is taking very seriously the application of its competition rules to digital markets, and in particular, to digital platforms. It has so far completed an E-Commerce Market Study and commissioned a report on *Competition Policy in the Digital Era,* which was completed in April 2019. The proposed re-appointment of Margrethe Vestager as a Commissioner for Competition with an enhanced responsibility for digital markets confirms the plans and the intentions of the EU in this area.

At the end of August 2019, Commissioner Vestager delivered an important speech on the digital economy and digital platforms.[4]

After praising the successes and the resilience of the EU, Commissioner Vestager acknowledged the benefits of digital platforms to the economy as they often provide the infrastructure that allows the digital world to work. She noted, however, that at the same time this gives them enormous power to affect the lives of EU citizens.

Taking Google as an example, Commissioner Vestager set out the three main functions of Google which give the company significant market power:

- *The search engine*: the engine dominates the market for web searches in every country in the EU single market.
- *The android technology*: some 80% of the world's smartphones and tablets use Google's Android operating system, which dominates the market for operating systems that other phone makers can use.
- *Advertising brokerage services for online search advertising*: any company with a search box on its website can turn to Google to find ads that are linked to the items those users search for. Google dominated this market with more than 70% between 2006 and 2016.

Commissioner Vestager accepted that all these markets are vital to the digital economy and that, in all of these markets, Google used its power to undermine competition and keep out innovation.

Commissioner Vestager also made a special reference to the so-called "self-preferencing" - namely the fact that many digital platforms act as both a player and referee – they run ads and at the same time compete with the users of the platform. Such practice presents a clear conflict of interests and Commissioner Vestager noted that digital platforms face an obvious temptation to adjust the way they work to favour their own services. In particular, Commissioner Vestager referred to Google using its power under its search engine to favour its own comparison shopping services thereby harming competition and consumers. However, this is about more than the competition rules.

Commissioner Vestager appears very concerned from a moral point of view whether it is right for companies like Google and other platforms to have such control over the success, or failure of other companies, and to be free to use that power in any way they like. Commissioner Vestager suggested that, to ensure that these platforms use their power in a way that is fair and non-discriminatory, regulation might be the answer to tackle this issue. However, she appears to favour a combination of competition policy and regulation.

Commissioner Vestager expressed further concerns about digital platforms collecting data from individual consumers as well as from their business customers, and not only from the likes of Facebook or Google. In fact, the Commissioner for Competition noted that there are much more unexpected types of data that can be collected, such as through the Onavo VPN application, which users downloaded to hide their browsing from prying eyes – but which also sent information to Facebook about the applications such users used, and the websites they visited. Commissioner Vestager is thus very concerned as digital platforms appear to act like *'robot vacuum cleaners, working their way into every corner of the digital world, and sucking up data with the aim to*

[4] https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/digital-future-works-europeans_en

outdo their rivals'. Commissioner Vestager stressed that the way these platforms collect and use data can undermine competition.

Finally, Commissioner Vestager emphasized the need for international cooperation in the area of digital markets to build an international environment that helps all reach their goals, which could even include fair international tax rules, so that digitisation does not allow companies to avoid paying their fair share of tax and praised the OECD work in this area.

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