

December 2019

Competition Law Newsletter

Welcome to the December 2019 issue of our Competition Law Newsletter. Here is a round-up of some of the most interesting EU and UK competition news items in the last quarter (together with some updates on cases we reported on earlier in the year).

Wishing you a very Merry Christmas and a Happy New Year!

HSBC Euribor fine overturned

On 24 September 2019, the EU General Court (“GC”) handed down its judgment in the appeal brought by HSBC against the European Commission’s (“EC”) 2016 decision in Euro Interest Rate Derivatives.¹ Although the GC largely upheld the EC’s finding of infringement, it annulled the fines that had been imposed upon HSBC, for insufficient reasoning.

The appeal arose from the EC’s finding that seven banks were involved, over different periods between 2005 and 2008, in a cartel which aimed to distort a pricing component for euro interest rate derivatives (“EIRD”), the so-called Euribor rate. Barclays, Deutsche Bank, the Royal Bank of Scotland and Société Générale agreed to settle the case with the EC in 2013², and proceedings were opened against Crédit Agricole, HSBC and JPMorgan under the standard (non-settlement) cartel procedure. The EC imposed fines on the remaining three banks amounting to a further €485 million in December 2016.

Since interest rate derivatives do not generate sales in the usual sense, the EC applied a specific proxy for the “value of sales” - the starting point for the determination of the amounts of the fines under the 2006 Fining Guidelines. This was the value of cash flows received by each bank, discounted by an appropriate, uniform factor of 98.849%, to take account of the particularities of the EIRD market, and in particular, the netting inherent in derivatives trading. This basic amount was then adjusted to reflect the gravity and duration of each bank’s



participation. HSBC was found to have participated in the infringement from 12 February to 27 March 2007, for which a fine of €33.6 million was ultimately imposed.

HSBC appealed the decision to the GC, seeking to overturn it in its entirety, or at least the parts relating to the bank and the fine imposed.

The GC concluded that the EC’s fine on HSBC should be annulled in its entirety, agreeing with HSBC that insufficient reasons were given for the 98.849% reduction factor applied by the EC. After recalling the settled case law confirming the requirement for a statement of reasons, and its scope, the GC observed that the requirement to state reasons must be assessed by reference to the circumstances of the case. Further, it held that HSBC’s appeal had two notable features:

- Firstly, the EC had decided to apply the methodology in the 2006 Guidelines (rather than departing from it), in which the determination of the “value of sales” plays a central role, notwithstanding that EIRDs do not generate sales in the usual sense. It was therefore essential that

¹ Judgment of the General Court, 24 September 2019 in Case T-105/17, *HSBC Holdings plc, HSBC Bank plc and HSBC France v Commission* (“**HSBC Judgment**”)

² Case AT.39914 – *Euro Interest Rate Derivatives*, 04/12/2013

the statement of reasons in the EC’s decision should enable the applicants to verify whether the proxy chosen by the EC may be vitiated by an error enabling its validity to be challenged, and the GC to exercise its jurisdiction to review legality.

- Secondly, the reduction factor played an essential role given the size of the cash receipts to which it applied. It followed that the undertakings concerned should be placed in a position to understand how the EC had arrived at a reduction factor set precisely at 98.849% and that the GC be in a position to carry out an in-depth review, in law and in fact, of that factor of the contested decision. However, the EC’s decision contained no explanation as to why the reduction factor was set at that precise level (rather than a higher level). This ground of appeal was therefore upheld.

In terms of HSBC’s other arguments:

- The GC confirmed that the EC had made no error of law or assessment in concluding that the Euribor manipulation in which HSBC was involved, as well as the two relevant exchanges in relation to the mid-point prices of EIRDs, had the object of restricting competition.
- However, the EC was not entitled to reach this conclusion in relation to two discussions relating to trading positions, since they did not reduce or remove the degree of uncertainty on the market to enable the EC to infer that they would have had an impact on the normal course of pricing components in the EIRD sector.
- As regards HSBC’s arguments that it did not participate in a single and continuous infringement, the GC dismissed the first and second parts of the plea, which disputed the “single aim” of the infringement, and the existence of an overall plan, respectively. However, the GC did limit the extent of HSBC’s participation in the single continuous infringement, stating that this could be upheld only in respect, first, of its own conduct in that infringement and, second, of the conduct of other banks forming part of the manipulation of 19 March 2007 and any potential repeat of that manipulation. The EC was, therefore, wrong to hold HSBC liable for conduct beyond this scope (i.e. all of the conduct of the other banks).

Given that the EC’s finding of infringement was substantially upheld by the GC, the EC may be expected to re-impose fines upon HSBC. However, any such decision would need to contain much more detailed reasoning for the level of the reduction factor (or any other method of calculation), as well

as take into account the impact of the other elements of the HSBC Judgment.

The EC appealed against this judgment on 31 October 2019. HSBC filed its own appeal on 3 December 2019.³

The GC’s judgments in the appeals brought by JP Morgan Chase⁴ and Crédit Agricole⁵ are still awaited.

Joint purchasing agreements under the spotlight

Casino Guichard-Perrachon (“**Casino**”) and Les Mousquetaires (“**Intermarché**”) are two of the largest chains of grocery retail shops active in France. In November 2014, they set up a joint venture/alliance for the joint procurement of their branded products, INCA.

In February 2017 and May 2019, the EC carried out dawn raids at the premises of Casino and Intermarché, following which the EC decided to open a formal investigation to investigate whether their alliance went beyond its joint purchasing purpose and amounted to anti-competitive conduct.

The EC generally views joint purchasing agreements between competitors favourably on the basis they can bring lower prices to consumers for food and personal care products, especially if such benefits are passed to consumers.

However, the EC does not tolerate such “purchasing alliances” if they are a disguise for collusive sales practices. According to the EC, there has been a surge of such alliances as well as changes to partners in alliances in the grocery sector; this has enhanced the risks of collusion and anti-competitive conduct.

The EC is concerned that the two grocers agreed to coordinate their operations on: (a) the development of their shop networks, and (b) their pricing policy towards consumers. The EC will now conduct an in-depth investigation.

If proven, Casino and Intermarché may be fined for a violation of the EU cartel prohibition rules.

³ The appeal reference is *C-883/19 P HSBC Holdings and Others v Commission*.

⁴ Action brought on 17 February 2017 — *JPMorgan Chase and Others v Commission* Case T-106/17 (2017/C 112/66)

⁵ Action brought on 20 February 2017 — *Crédit Agricole and Crédit Agricole Corporate and Investment Bank v Commission* Case T-113/17 (2017/C 231/34)

State aid to Bulgaria for construction and operation of a waste to energy plant approved

On 25 November 2019, the EC approved a grant of approximately €94 million to support the construction and operation of a waste-to-energy cogeneration plant in Bulgaria.

On 8 October 2019, Bulgaria notified the EC of its plans to support the construction and operation of a high-efficient cogeneration plant in Sofia, Bulgaria. The plant would make use of fuel derived from 180,000 tonnes of unrecyclable municipal waste to fuel the plant to generate nearly 55MW of heat and 19MW of electricity.

The installation, set up by Toplofikacia EAD, a company fully owned by the Sofia municipality, will be connected to the Sofia district heating network. The construction will be finalised by the end of 2023.

The support will consist of two distinct measures:

1. a direct grant of approximately €90.8 million (around 177.6 million BGN) financed by EU Structural Funds managed by Bulgaria; and
2. a loan granted by the Sofia municipality to Toplofikacia EAD at a preferential rate, amounting to approximately €3 million (around 5.8 million BGN).

The EC assessed these support measures under EU State aid rules, in particular its 2014 Guidelines on State Aid for Environmental Protection (the "**Guidelines**"), which allow Member States to support the production of electricity from renewable energy sources as well as energy-efficiency measures, subject to certain conditions. In particular, the Guidelines provide that, in order to ensure that the State support contributes to a higher level of environmental protection, such support must meet the "high-efficient cogeneration" criteria set out in the 2012 Energy Efficiency Directive.

The EC concluded that the combined production of heat and electricity by the new plant will enable a primary energy saving of 46.5% compared to a scenario in which heat and electricity would be produced separately, thus meeting the criteria set out in the Energy Efficiency Directive. The EC also concluded that: (a) without the public support, the project would not be carried out, and (b) the project will deliver a reasonable rate of return.

Commissioner Vestager said "*The support measure will help Bulgaria achieve its energy-efficiency targets and will contribute to the reduction of CO2 emissions in line with the EU environmental objectives, without unduly distorting competition*".

EU proposes extension to liner shipping block exemption

On 20 November 2019, the EC announced that it was intending to extend the Consortia Block Exemption Regulation (the "**Exemption**") by another four years to 25 April 2024.

The Exemption had been due to expire on 25 April 2020, but in September 2018, the EC launched a consultation on whether the Exemption should be extended beyond this date and, if so, whether its current text should be amended. Interested stakeholders were given until 20 December 2018 to submit their views.

The Exemption provides legal certainty to liner shipping companies that certain cooperation agreements between them to carry out specified activities do not infringe EU competition law, so long as certain conditions are met.

Cooperation agreements benefiting from the Exemption include:

- Joint operation of liner shipping services, including coordination of timetables and ports of call, slot exchanges, pooling of vessels and certain infrastructure, and use of joint operations offices;
- The ability to make capacity adjustments in response to supply/demand fluctuations; and
- Joint operation/use of port terminals and related services e.g. stevedoring services,

so long as the agreements in question do not attempt to: (a) fix prices; (b) limit capacity or sales (save where this occurs in response to supply/demand fluctuations; or (c) allocate customers or markets. In addition, the parties to the agreement must not have a market share of 30% or over on any market in which they operate and must have an unconditional right to exit the agreements on 6 months' notice.



In the event that the above conditions are not met, the parties would need to self-assess the compliance of any such agreement with EU competition law.

The consultation revealed carriers and ship-owners to be strongly in favour of an extension, whilst shippers, customers and some port terminal operators advocated it being allowed to lapse. The consultation was followed by an evaluation by the EC of the Exemption, conducted between Q4 2018 and Q3 2019, in order to assess whether the Exemption was effective, efficient, coherent with other competition policy measures, relevant, and created EU added value. Overall, the EC considered that these evaluation criteria were met and that the market conditions of the liner shipping sector still appeared to necessitate the existence of a sector-specific block exemption, notwithstanding considerable consolidation in the marketplace. It therefore proposed that the Exemption application period be extended.

This proposal, as well as a roadmap for the extension, has now been opened for further consultation. The EC has invited contributions from carriers, their clients (shippers and freight forwarders), terminal/port operators, and their respective associations in particular. Interested parties have until 3 January 2020 to provide comments.

Watch this space for further developments...

CAT dismisses Royal Mail's appeal and upholds Ofcom's £50 million fine

In early 2014, the Office of Communications ("**Ofcom**") acted on a complaint from Whistl (formerly TNT Post – a subsidiary of the Dutch company TNT) which is a provider of, among others, business (bulk) mail delivery services in the UK. Following a detailed investigation, Ofcom decided to impose a £50 million fine on Royal Mail, the dominant player in the bulk mail delivery market. Royal Mail appealed Ofcom's decision to the UK's Competition Appeal Tribunal ("**CAT**"), and the latter ultimately concluded on 13 November 2019 that the £50 million penalty was justified.

By way of background:

- Whistl was/is one of Royal Mail's competitors in the bulk mail delivery market, albeit Whistl did not provide by itself a nationwide service like Royal Mail. Whistl was an "access" customer of Royal Mail in this regard. Whistl would collect and sort bulk mail (such as bank statements, utility bills and statements from councils) from large organisations. Whistl would then deliver the sorted mail itself to addresses in certain metropolitan areas (London, Manchester, etc.) of

the UK; however, where Whistl did not provide "the last mile delivery" it had to contract with Royal Mail to make the delivery of the mail for a price. By 2014, Whistl was the largest active bulk mail operator in the UK, handling nearly four billion letters. The retail market for bulk mail was/is competitive with tight margins. Royal Mail's access charges are the principal input cost for operators using access to compete in the retail market for bulk mail. Access services generate £1.5 billion to Royal Mail each year.

- In January 2014, Royal Mail increased the price for the bulk mail delivery access services to all of its customers. That meant that any of Royal Mail's competitors would find it harder, if not impossible, to compete with Royal Mail in this area of the market. Royal Mail's 2014 price changes involved different price plans for access customers, depending on whether they were able to hit mail volume targets for areas covering the whole of the UK. In practice, if a company wished to start delivering bulk mail in some parts of the country, as Whistl did, it would have to pay Royal Mail around 0.25p (1.2%) more per letter than customers that used Royal Mail as their bulk mail delivery provider. This was very likely to inhibit entry and push any competitor out of the market. Whistl submitted a complaint to Ofcom and Ofcom opened an investigation into Royal Mail's price changes in February 2014 under the Chapter II prohibition of the Competition Act 1998 (and Article 102 of the Treaty on the Functioning of the European Union ("**TFEU**")).
- Whistl had begun delivering bulk mail (business letters) in London in 2012 and had planned to grow its delivery operation to cover around 40% of all UK addresses by 2018. Following notification of Royal Mail's new prices, Whistl suspended its plans to extend delivery services to new parts of the UK. In July 2015, Whistl exited the bulk mail delivery market.

Ofcom concluded that Royal Mail used its position as a near-monopoly provider of "last mile" delivery postal services to penalise, put at a disadvantage, and push out access customers competing in the bulk mail delivery market.

Ofcom analysed Royal Mail's internal documents regarding the price changes. These showed the changes were part of a deliberate strategy to limit competition in delivery as a direct response to the threat of competition from Whistl.

On 14 August 2018, Ofcom decided to fine Royal Mail £50 million for abusing its dominant position in breach of the Chapter II prohibition of the Competition Act 1998 and Article 102 TFEU. Royal

Mail appealed to the CAT against Ofcom's decision and the fine imposed.

Royal Mail did not contest the finding of dominance but did contest the finding of abuse and the amount of the fine. It claimed that the new prices: (a) although announced, were never applied in practice, (b) were not improperly discriminatory, (c) did not cause a competitive disadvantage, and in any case, (d) were objectively justified either in themselves, or to preserve the financing of the universal postal service under its Universal Service Obligation ("USO"). Royal Mail also objected to an aspect of Ofcom's procedure and to the principle and size of the penalty.



The CAT decided that:

- The evidence supported the view that Royal Mail planned and intended to take actions that it either knew would harm Whistl's expansion plans, or was reckless as to whether they would.
- Royal Mail knew about Whistl's intentions in sufficient detail to plan against them and clearly had Whistl in mind when preparing its new pricing plans.
- Royal Mail appeared to have thought that its particular position under the USO and possibly its wider public responsibilities, would justify such actions vis-à-vis its competitors and in some way protect it from the application of competition law.

The CAT rejected all of the Royal Mail's grounds of appeal and upheld the findings of Ofcom including that Royal Mail did not provide convincing evidence to objectively justify the price increase and that it was unable to support the arguments that it had put forward regarding "efficiencies", or the protection of its USO.

The CAT did not find any procedural irregularities committed by Ofcom in the course of its investigation including in their calculation of the fine, the amount of which was fully upheld as appropriate and not disproportionate given the fact that Royal Mail was a large and substantial group, despite the fact that it did not always enjoy a strong financial position.

It remains unclear whether Royal Mail will appeal the CAT's judgment.

More suspected pay for delay agreements

On 3 October 2019, the Competition and Markets Authority ("CMA") issued a Statement of Objections ("SO") to three pharmaceutical companies over pay-for-delay agreements. This is yet another case in a long string of cases over the years where both the CMA and EC have investigated pay-for-delay and excessive pricing cases in the pharmaceutical world.

In its SO, the CMA set out its provisional view that, in 2016, pharmaceutical company Aspen unlawfully agreed to pay two other firms, Amilco and Tiofarma, to stay out of the UK market for fludrocortisone acetate tablets. This medicine is used to treat adrenal insufficiency, commonly known as Addison's disease.

The CMA alleges that Tiofarma and Amilco colluded with Aspen by agreeing to stay out of the market so that Aspen could maintain its position as the sole UK supplier of fludrocortisone, allowing it to raise prices by 1,800%. In exchange, it is alleged that Tiofarma was made the sole manufacturer of fludrocortisone for direct sale in the UK, and that Amilco received a 30% share of the increased prices that Aspen was able to charge.

In August 2019, Aspen admitted that it took part in this allegedly anti-competitive arrangement and agreed to pay a maximum financial penalty of £2.1 million if the CMA ultimately concludes that there has been an infringement. The other companies have not admitted wrongdoing.

The CMA also accepted Aspen's offer to resolve related competition concerns in respect of Aspen's 2016 purchase of a competitor fludrocortisone product from Tiofarma authorised for supply in the UK. This acquisition brought all existing fludrocortisone marketing authorisations in the UK permanently under Aspen's ownership. Aspen has agreed to pay the NHS £8 million and guarantee that there will be at least two fludrocortisone suppliers in the future.

CMA's unwinding order was unreasonable

In August 2018, Tobii AB ("**Tobii**") announced that it had agreed to acquire Smartbox Assistive Technologies Limited and Sensory Software International Limited (together "**Smartbox**") for a total consideration of £11 million. Completion occurred in October 2018.

The CMA commenced an investigation into the transaction on its own initiative and issued an Initial Enforcement Order on 28 September 2018, prohibiting Tobii from taking steps to implement the transaction. However, Tobii and Smartbox had already taken certain steps, including entering into a reseller agreement for Tobii's products in the UK and Ireland, withdrawing certain products from sale in the UK and Ireland, and discontinuing certain R&D projects.

The CMA issued an unwinding order on 28 March 2019 given that it had concerns that these steps might prejudice the CMA's ability to implement effective remedies. This included requiring the parties to terminate the reseller agreement and obliging Smartbox to supply the discontinued products and to reinstate the R&D projects.

Having referred the merger to a Phase 2 investigation in February 2019, the CMA published its findings on 15 August 2019 that the acquisition would give rise to a substantial lessening of competition ("**SLC**") due to horizontal and vertical overlaps between the parties in various markets. The CMA concluded that the only way it could approve the acquisition was the divestiture by Tobii of Smartbox to a suitable purchaser within a timeframe specified by the CMA.

On 13 September 2019, Tobii filed an application to the CAT for the judicial review of the CMA's decision. On 16 October 2019, Tobii filed an application to the CAT seeking specific disclosure from the CMA of a number of documents or classes of documents, on the basis that such disclosure was necessary, relevant and proportionate.

Tobii argued that these documents were necessary for it to determine whether: (a) the CMA's questionnaires suffered from design flaws; and (b) the evidence received by the CMA was inherently unreliable, and on that basis to verify the reliability and lawfulness of the CMA's substantive findings on the relevant market and theories of harm relating to the alleged horizontal unilateral effects and vertical foreclosure effects. According to Tobii, these documents would indicate the insufficiency of the CMA's finding of any SLC as a result of both input foreclosure and customer foreclosure and would allow the CAT to fairly and justly determine whether the CMA's finding of an SLC due to vertical

foreclosure was supported by evidence submitted by competitors.

Tobii also suggested that these documents would further demonstrate: (a) the scale of the CMA's misunderstanding (as it transpired from its decision in relation to market definition and the degree and intensity of competition faced by the merging parties); (b) that the CMA, in its approach to market definition and its substantive analysis, took into account irrelevant considerations; and (c) whether the CMA took relevant considerations properly into account.

The CMA opposed Tobii's disclosure application as unnecessary and disproportionate.

Under Rule 19(1)(p) of the CAT Rules 2015, the CAT may give directions for the disclosure and the production of documents. However, the nature and extent of disclosure depends on the form of the proceedings sought, e.g. disclosure is more likely to be wider in a cartel damages action than in a challenge to a decision applying judicial review principles.

Applying these principles, the CAT considered that in the particular circumstances of this case, some of the documents that Tobii had requested, namely, 30 customer questionnaire responses, might well assist the CAT to justly determine whether the customer evidence received by the CMA in response to its customer questionnaires was reliable.

The CAT emphasised that this decision was not to be taken as a precedent in future judicial review applications to suggest that decision-makers such as the CMA are under a general obligation to disclose underlying evidence and material collected in their investigations so that a party can test for itself whether the evidence is reliable, or that decision makers are required to disclose more than the gist of their case.

In relation to the confidentiality of the documents to be disclosed, the CAT noted that a balance needed to be struck between the protection of the interests of third parties which co-operated with the CMA investigation on the premise that their confidential information would be protected and Tobii's interests in securing the just conduct of CMA proceedings. The CAT therefore ordered that anonymised versions of the 30 customer responses be disclosed within the confidentiality ring to Tobii's external legal and economic advisers.

The CAT denied the other two Tobii disclosure requests, which related to the disclosure of CMA requests for information to the parties' competitors and their responses, and an un-redacted version of a market share table and market data.

Pre-cast concrete drainage cartel fined



On 23 October 2019, the CMA issued fines totalling more than £36 million against three producers of pre-cast concrete drainage products⁶ for breaching UK competition law. Stanton Bonna, CPM and FP McCann agreed to fix or coordinate their prices, shared markets by allocating customers and regularly exchanged commercially sensitive information from July 2006 to March 2013 (nearly seven years). At the time of the infringement, these firms were the leading players in the relevant market accounting for over 90% between them. The intention of the firms was to keep prices artificially high to the detriment of customers.

The infringing behaviour involved meetings attended by senior executives from each of these companies. The CMA secretly recorded a number of these meetings and used them as evidence to arrive at its final decision.

Stanton Bonna was fined nearly £7.5 million and CPM £4 million – both these parties admitted their participation in the cartel and agreed to settle with the CMA. The level of the fines therefore reflects their degree of cooperation. On the other hand, FP McCann did not agree to settle and was issued the largest fine - approximately £25.5 million.

This is one of the five cartel cases in the construction sector that the CMA has spent time investigating in 2019. The other cartels include the ground works cartel, the design and fit out services cartel, and the rolled-lead cartel. In March 2019, the CMA announced a further investigation involving the construction sector and in October 2019 it updated its timetable on this without disclosing the specific construction market it was investigating. This clearly shows that the CMA continues intensively to pursue

⁶ Pre-cast concrete products, such as drainage pipes, are of crucial importance to large infrastructure projects and are often used in roads and railways or water management projects. Customers for these products include engineering and construction firms, utilities providers, local and national government across Great Britain.

infringements of the UK competition rules in the construction sector. Notably, Andrea Coscelli, the CMA's Chief Executive, has stated: "The CMA will not hesitate to issue appropriately large fines in these cases and we will continue to crack down on cartels in the construction sector and in other industries."

Court of Appeal reduces first follow-on cartel damages award

The first judgment from an English Court or Tribunal in a private follow-on damages claim based on an infringement of EU competition law was given by the English High Court on 9 October 2018, in an action brought by BritNed Development Limited ("**BritNed**") against ABB, based on ABB's participation in a cartel relating to power cables.⁷ A supplementary judgment was handed down on 1 November 2018, and BritNed was ultimately awarded €11.7 million in damages - significantly less than the amount originally claimed.⁸ On 31 October 2019, the Court of Appeal dismissed the appeal from BritNed in its entirety and allowed a cross-appeal by ABB, reducing the level of damages payable to BritNed.⁹ The judgment confirmed that damages arising from a breach of competition law will be assessed on a compensatory (rather than punitive) basis, and that claimants will need to demonstrate, on the balance of probabilities, that the price actually paid was too high.

The action was brought by BritNed following the EC's finding that 11 producers of underground and submarine high voltage power cables were involved in a global cartel from 1999 until 2009, for which fines totalling over €301 million were imposed in its decision of 2 April 2014.¹⁰ ABB was found to have been involved from 1 April 2000 to 17 October 2008 but received full immunity from any fines that would otherwise have been imposed on it since it was the first undertaking to have brought the infringement to the EC's attention.

BritNed operates the BritNed Interconnector, an electricity submarine cable system connecting the Dutch and UK electricity grids, whose cable was provided by ABB during the period of ABB's involvement in the cartel. BritNed claimed damages under three heads:

- *Overcharge*: as a result of the cartel it paid more for the cable element of the BritNed

⁷ *BritNed Development Limited v ABB AB and ABB Ltd*, [2018] EWHC 2616 (Ch)

⁸ *BritNed Development Limited v ABB AB and ABB Ltd*, [2018] EWHC 2913 (Ch)

⁹ *BritNed Development Limited v ABB AB and ABB Limited* [2019] EWCA Civ 1840 ("**Court of Appeal Judgment**")

¹⁰ Case AT.39610 - *Power Cables*, 02/04/2014

Interconnector than it would otherwise have done;

- *Lost Profit*: if it were not for the cartel, BritNed would have bought a higher capacity cable, enabling it to generate additional revenues and higher profits; and
- *Compound Interest*: BritNed had incurred higher capital costs as a result of the Overcharge, and claimed interest on this basis.

Mr Justice Marcus Smith undertook a detailed examination of all of the evidence presented over the course of the trial, which lasted over four weeks, holding that BritNed should be awarded damages of €13 million (plus interest) as a result of the Overcharge, and dismissing the Lost Profit and Compound Interest claims. The level of damages was reduced by 10% in the subsequent judgment of the High Court since BritNed had refused to give an undertaking that any damages awarded would be taken into account in calculating BritNed's internal rate of return for the purposes of the "regulatory cap" to which it was subject. The damages awarded were reduced to €11.7 million to reflect the consequent risk of over-compensation.

BritNed and ABB both launched appeals against the High Court judgment, with BritNed seeking an increase in the damages awarded in respect of the Overcharge Claim, to overturn the judge's decision to dismiss the Lost Profit claim, and to challenge the judge's approach to the regulatory cap issue in the supplementary judgment. ABB's cross-appeal sought to challenge an award made by the judge to ABB in relation to "cartel savings": the savings that cartelists may realise as a result of not having to compete. The Court explained that, to a supplier, competition is expensive, because it means incurring the costs of engaging with competing suppliers, with no assurance that a firm order will be placed.

In dismissing BritNed's appeals and upholding ABB's cross-appeal, the Court of Appeal found that:

- As indicated in the High Court, the starting point for damages claims was compensatory, and the High Court judge had not erred in his approach to assessing a competitive price. Although the Court of Appeal confirmed that there is no general principle of under-compensation, it did not consider that the High Court had erred in its approach to the regulatory cap issue.
- It is correct to take a "broad axe" or "broad brush" approach, if difficulties are encountered in quantifying damages. However, notwithstanding that the claimant may benefit from the application of this principle, the burden of proof lies on the

claimant to establish that he has suffered loss and the quantum of that loss.

- There were no grounds for the Court of Appeal to interfere with the judge's approach to the assessment of the overcharge (subject to the question of cartel savings, discussed below), or with his findings of primary fact, or with his evaluation of the totality of the evidence, including the expert evidence. The High Court judge had concluded that, on the unusual facts of this case, there was no demonstrable overcharge, and in the judgment of the Court of Appeal, that conclusion was one which was fairly open to the judge, and was not plainly wrong in the sense that no reasonable judge could have reached it. *"The conclusion is therefore unassailable"*.
- The High Court judge was right to point out that it is not necessarily the case that an allocation (i.e. market-sharing) cartel results in an uncompetitive price being charged to the customer: *"Everything will always depend on a detailed examination of the particular facts, and the need for a claimant in the position of BritNed to demonstrate, on the balance of probabilities, that the price which it actually paid was too high."*
- Finally, although so-called "cartel savings" may result in a saving to the cartelist, this would not necessarily equate to a loss to the customer. Moreover, the judge had expressly found that in this case any cartel savings had, in fact, been competed away (i.e. that the cartel savings had no effect on the price of the BritNed project). ABB's appeal was therefore allowed in respect of the overcharge of €5,492,929 found by the High Court in relation to cartel savings.

The detailed analysis conducted by the High Court of the economic and witness evidence presented to it, and subsequent Court of Appeal judgment confirming the High Court's approach, provides welcome guidance on the way in which follow-on damages will be assessed in future competition law cases. In particular, the judgments confirm that they will be subject to the same principles as other types of civil damages claims: i.e. that damages will be compensatory in nature (with no punitive element), based on a detailed consideration of the particular facts and circumstances of the individual case.

UK class actions brought against members of the forex cartel

In May 2019 Barclays, Citigroup, RBS, JPMorgan Chase and MUFG (formerly Bank of Tokyo-Mitsubishi UFJ) settled the long-running foreign exchange cartel investigation with the EC. The banks admitted that traders were involved in the coordination of trading

operations across 11 currencies (including the US dollar, euro and sterling) and exchange of competitively-sensitive information between 2007 and 2013 through two online chatrooms.

The banks agreed to pay fines of €1.07 billion. UBS, as whistle-blower, did not face a fine and therefore did not settle. A further EC decision is pending against non-settling bank Credit Suisse, which may result in further fines.

On 29 July 2019, Michael O’Higgins, the former Chairman of the UK Pensions Regulator, launched a class action in the CAT against the members of the cartel for damages, alleging potentially billions of pounds in damages from the cartel conduct. The class action appears to be against all participating banks (including UBS) except MUFG. This class action is an “opt-out” action, meaning that all UK-domiciled and potentially affected persons will be included in the claim launched, unless they explicitly “opt-out”. Non-UK domiciled claimants are not included in this class action; however, they have the right to “opt in”.

To proceed to trial, the CAT must certify the claim by way of a collective proceedings order (“CPO”), i.e. it must confirm that the claim is brought on behalf of an identifiable class, raises common issues and is overall suitable to proceed as a class action. So far no CPOs have yet been granted, with the case of *Merricks v Mastercard* on appeal to the Supreme Court after conflicting judgments before the CAT and Court of Appeal. This is the landmark compensation claim against Mastercard over unlawfully inflated card fees. Other CPO applications have either failed, or are yet to be heard.

On 9 August 2019, the CAT gave notice to the parties on the content of, and the issues raised by, the class action application. The CAT stated that, according to the application, the claims raised common issues including whether the CAT had jurisdiction over the claims.

On 6 November 2019, the CAT has ruled that the banks should not wait for the outcome of the *Merricks v Mastercard* Supreme Court ruling to establish jurisdiction. Rather, following a Case Management Conference, the CAT noted that, in order for its jurisdiction to be established (which was contested by all of the banks excluding Barclays) evidence was required. Therefore, the CAT ordered JPMorgan Chase, UBS, Citigroup and Royal Bank of Scotland to disclose to the class representative (within the confines of a confidentiality ring) up to 100 contracts at random in order to enable the class representative to establish the jurisdiction of the CAT for its claim. This disclosure was to be made to the class representative and its lawyers by 4 December

2019 (later extended by mutual agreement to 6 December 2019). Barclays, which did not challenge the jurisdiction of the CAT, was not subject to the Court’s order.

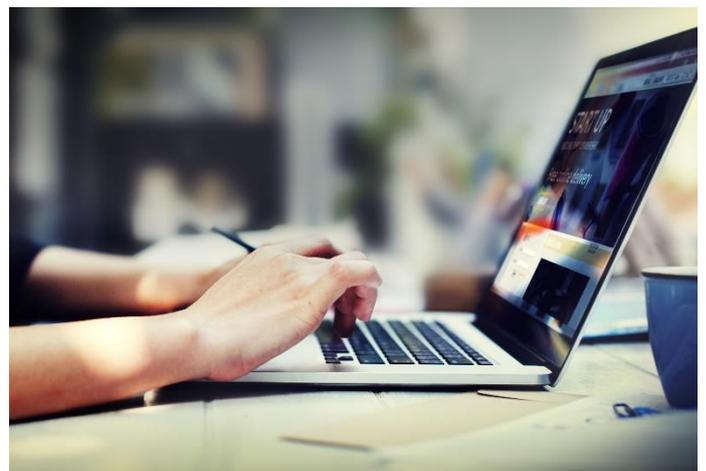
The preliminary issues hearing in this case is set for 13 and 14 February 2020.

Most recently, on 11 December 2019, a separate application to commence an opt-out collective action was filed in the CAT on behalf of an individual called Phil Evans, previously an Inquiry Chair with the CMA, who is seeking to represent the interests of thousands of participants in the forex market, ranging from institutional investors, including asset managers, pension funds, hedge funds, and mutual funds, to multinational companies, public bodies and private individuals. The defendants are those identified in the action brought by Michael O’Higgins, plus MUFG, and the action concerns the same behaviour.

These proceedings highlight the increased litigation risk faced by investment banks in relation to antitrust misconduct. Banks are exposed to investigations by antitrust authorities and financial regulators; but now banks must be aware that they may well face private litigation as a matter of course.

UK scrutinises digital markets

The CMA has been considering its position and strategy on digital markets and digital platforms, including online advertising, for some time now, seeking the optimum ways to tackle new competition law challenges raised in the rapidly developing digital economy. This is not only a UK-wide problem but very much an international one.



In July 2019, the CMA set out to find out more about how major online platforms like Google and Facebook etc. operate. It found, among others, that

in the UK, people spend an average of 3.15 hours online each day on Google, Facebook etc. and their subsidiary platforms, and that the digital advertising sector is now worth around £13 billion. The CMA's interim report, published on 18 December 2019, has found, among others, that last year Google accounted for more than 90% of all revenues earned from search advertising in the UK, with revenues of around £6 billion. Meanwhile, Facebook last year accounted for almost half of all display advertising revenues in the UK, earning more than £2 billion.

These digital platforms have brought very innovative and valuable products and services to the market and to consumers. However, this "gift" is not free of concerns – the CMA is concerned that their positions may have become entrenched with negative consequences for consumers and businesses who use these services daily (e.g. reduction in choice for consumers, higher prices for advertisers, undermining of the ability of newspapers and paper based media to produce valuable content as their share of revenues (primarily through advertising) is squeezed by the large digital platforms).

The CMA used its statutory information-gathering powers for the study in order to build a better understanding of this complex market and the competition issues it presents. The CMA has been able to build a better picture of how these platforms collect and use personal data to assess whether people have the right amount of control over their own information. This understanding is necessary for future regulation plans for this digital sector. The CMA has also found that the default settings people are faced with online have a profound effect on choice and the shape of competition.

Personal data collection is key to these platforms as it allows them to target their advertisements. The CMA's position is that, for both privacy and competition reasons, it is essential that people feel in control of their data. The CMA cites the example of Facebook, which apparently does not allow users to opt out of personalised advertising. Rather, users are presented with a take-it-or-leave-it offer, forcing them to share considerable amounts of personal data as a condition for using the service. It concludes also that it is difficult to access privacy settings on these platforms, as these are often only visible after navigating through multiple menus.

The CMA also refers to the wide-ranging review of digital markets carried out by Professor Furman and his colleagues in early 2019, which concluded that the development of a new regulatory regime for digital markets may be necessary. The CMA is also setting out its proposals to address the issues it has identified. These include: (a) potential measures to open up the search market, such as access to click

and query data and limiting Google's ability to be the default search engine on devices and browsers; (b) requiring Facebook to connect more seamlessly with rival social networking sites; (c) measures to address conflicts of interests and lack of transparency in digital advertising; and (d) requiring platforms to allow people to turn off personalised advertising.

The CMA is now inviting comments on its interim report by 12 February 2020 and proposes to then present its final findings to the UK Government to decide whether and how to regulate what is an increasingly central aspect of people's lives.

Updates

A number of cases were reported in the first edition of our Competition Law Newsletter (September 2019). Set out below are updates to these cases:

Canon gun-jumping

In June 2019, Canon was fined €28 million by the EC for implementing its acquisition of Toshiba Medical Systems Corporation ("**TMSC**") before notifying and obtaining the approval of the EC. The transaction was conducted using a two-step warehousing structure. The EC considered the first and second steps formed together a single notifiable merger, and by carrying out the first step, Canon partially implemented its acquisition of TMSC.

On 9 September 2019, Canon brought an action against the EC before the General Court to annul the EC's decision or, alternatively, to annul or substantially reduce the fines imposed on it. It is alleging that the EC:

- committed a manifest error of law, ignoring existing case-law, by relying on an unprecedented and unsupported concept of 'partial implementation of a single concentration';
- breached Council Regulations and established legal principles such as the principle of legitimate expectations, proportionality, concurrent offences and *nulla poena sine lege*; and
- violated essential procedural requirements by denying Canon the opportunity to comment on new arguments, facts and evidence.

Interim measures against Broadcom

In June 2019, the EC sent a SO to Broadcom stating its intention to impose interim measures on Broadcom to stop certain suspected abusive and anti-competitive conduct, including exclusivity, tying, bundling, interoperability degradation and abusive use of intellectual property rights in relation to the

supply of components for TV set-top boxes and modems.

On 16 October 2019, the EC decided that interim measures were warranted. Broadcom was found to be dominant in several markets and engaging in various abusive practices - in particular, including in agreements with manufacturers of TV set-top boxes and modems that granted customers commercial advantages provided the customer bought certain products exclusively or quasi-exclusively from Broadcom.

To prevent serious and irreparable damage to competition, the EC issued an order to Broadcom to:

- unilaterally cease to apply the anti-competitive provisions identified by the EC and to inform its customers that it would no longer apply such provisions; and
- refrain from agreeing the same provisions or provisions having an equivalent object or effect in other agreements with these customers, and refrain from implementing punishing or retaliatory practices having an equivalent object or effect.

Broadcom must comply with these measures within 30 days. The interim measures apply until the earlier of three years or the date of EC's final decision on Broadcom's conduct.

The substantive investigation on the merits of all parts of the case is still ongoing.

Director disqualifications

In July 2019, the CMA secured disqualification undertakings from three directors of Fourfront Group following its investigation of the design, construction and fit-out services cartel.

On 10 December 2019, the High Court, following the application by two of the disqualified directors Mr Aki Stamatis and Mr Sion Davies, decided to grant them permission to act as directors and take part in the management of certain companies in the Fourfront Group. However, importantly, the underlying director disqualifications remained in place and the two directors could not take on the directorship of any other companies.

The Court considered that, in the particular circumstances of this case, given the needs of the companies concerned, the two directors should be allowed to step into the director roles. However, the Court put in place strict conditions, including a condition that the Fourfront Group retain an independent non-executive director responsible for supervising the group's compliance with competition law.

The Court's decision to allow these directors to continue acting as directors (during their term of disqualification) is not a formality and such decisions will not be given readily. They involve a careful balancing of the need of the applicant to remain a director against a consideration of whether the public is sufficiently protected from a repeat of the conduct in issue.

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