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CMA imposes record fine for breaches of IEO

The UK Competition and Markets Authority (CMA) has imposed a record penalty of £325,000 on ION Investment Group Limited and ION Trading Technologies Limited for breaching an initial enforcement order (IEO) imposed in the context of ION's completed acquisition of a controlling interest in Broadway Technology Holdings LLC.

BACKGROUND

ION acquired a controlling interest in Broadway on 6 February 2020 and made an announcement to this effect on 14 February 2020. The CMA imposed an IEO on ION, which came into force on 2 April 2020.

ION and Broadway nevertheless continued to collaborate closely on a draft response to a request for proposal (RFP) from a potential client after the IEO came into force. Broadway submitted a draft response to the RFP on 3 April 2020 which included both Broadway and ION services and products and the names of key senior individuals at both companies. It also sought to use the merger to gain a competitive advantage, noting that Broadway, as part of the ION Group, offered certain advantages over rival bids. Moreover, email communications made later in April 2020 and in May 2020 indicated that the bid was made on behalf of both ION and Broadway.

On 7 August 2021 the CMA therefore found that ION had breached the IEO and imposed a fine.

CMA'S FINING DECISION

The CMA found that ION had breached the IEO in two respects. First, the CMA found that ION had failed to comply with the IEO by presenting a joint response to the RFP - conduct which might impair the ability of the Broadway business or the ION business to compete independently. ION also failed to maintain a distinction between Broadway's business and ION's business after the IEO came into force, or to ensure that the Broadway business's separate sales and brand identity was maintained. The CMA also commented on the manner in which ION chose to communicate the IEO within the ION and Broadway businesses. ION disseminated the information to staff verbally over the course of the week after the IEO came into force, which in the CMA's view entailed avoidable delays and made breach of the IEO more likely as staff were not aware of the need to comply with the IEO as soon as it came into force.

Second, the CMA found that ION failed to provide the CMA with the requisite information for compliance-monitoring purposes. In the course of its investigation, the CMA made a number of requests for information and documents for the purposes of monitoring compliance with the IEO. It found that there were material inaccuracies in the information provided by ION. For instance, ION stated that no joint interactions had

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taken place since the IEO came into force and made no reference to the RFP, even though a joint bid had been submitted by Broadway during this time.

The CMA found that these breaches risked prejudicing a reference for a phase 2 merger investigation or impeding potential remedial action, and imposed a penalty of £300,000 for the first breach and £25,000 for the second breach.

ASSESSMENT OF PENALTIES

When imposing penalties for breach of an IEO, the CMA emphasises that penalties should have a deterrent effect such that interim decisions are complied with.

Here, the CMA considered that the breaches were particularly "*serious and flagrant*". It considered that ION was aware of the need to keep the ION and Broadway businesses separate, and highlighted the involvement of senior management in both breaches. It also noted that ION had continued to fail to comply with the IEO even after the CMA had made its concerns known. Finally, the CMA noted that it had considered the financial position of ION when setting the level of the penalty and that the penalty was well below the statutory maximum of 5 per cent of global turnover.

This decision is the latest of a number of recent fines imposed by the CMA for breach of an IEO, as reported in previous editions of this newsletter. The previous highest fine imposed and upheld for a single breach was a penalty of £250,000 imposed on PayPal in September 2019 for breaching an IEO in relation to its acquisition of iZettle. Other penalties previously imposed have included a penalty of £100,000 imposed on Electro Rent Corporation in June 2018 which was upheld by the Competition Appeal Tribunal (CAT) (with an additional £200,000 penalty imposed on 12 February 2019); penalties of £150,000 each for two breaches of an IEO by Ausurus Group Ltd, imposed in December 2018; and a £120,000 penalty imposed in March 2019 on Vanilla Group Ltd. In July 2020 the CMA imposed a fine of £300,000 on JD Sports Fashion plc for breach of an IEO in relation to its acquisition of Footasylum plc - the penalty was however later withdrawn in October 2020, "*in light of issues raised on appeal*".

OUTLOOK

The CMA consulted on updates to its Interim Measures Guidance earlier this year. The proposed amendments reflect experience gained since 2019 and are primarily intended to clarify to whom interim measures will typically apply and the CMA's expectations as to the steps merging parties should take to ensure compliance. It remains to be seen if the consultation will lead to substantial changes to the enforcement of IEOs and the imposition of penalties for breaches.

OTHER DEVELOPMENTS

ANTITRUST

CMA PROPOSES REVISIONS TO GUIDANCE ON COMPETITION ACT SETTLEMENT PROCEDURES, ENSURING FINALITY

On 31 August 2021 the CMA issued an open consultation to revise Chapter 14 of its guidance on investigation procedures under the Competition Act 1998 (CA 1998), which sets out the CMA's rules on settlement. Under the current guidance a settling party that appeals against the settlement decision will lose the benefit of the settlement discount. The CMA now proposes to amend the settlement process so that any settlement entered into between the CMA and a party is considered a final and binding agreement, so a settling party will no longer be able to challenge or appeal the infringement decision to the CAT.

The impetus for change comes from a recent appeal brought by Roland against a CMA decision following a settlement procedure (for details, see our previous edition of this newsletter). In its judgment, the CAT found in favour of the CMA, stating that "*if a settling party could retain the benefit of a settlement discount despite appealing the infringement decision, the settlement process would be undermined*". However, the CMA does not consider that removing the discount is sufficient to ensure that a settlement is in the public interest as the current regime would still require the CMA to devote resources to an appeal for a case that it had considered as being settled.

If the proposed revisions are implemented, the CMA will not enter into any settlement agreements unless the settling businesses confirm that they will not challenge or appeal the infringement decision. The CMA's consultation closes on 28 September 2021.

AG BOBEK PROPOSES A UNIFIED TEST FOR THE PROTECTION AGAINST DOUBLE JEOPARDY UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS

On 2 September 2021 the Court of Justice announced that in two Opinions[1] requesting clarification of the principle of double jeopardy or *ne bis in idem* under Article 50 of the Charter of Fundamental Rights of the EU in antitrust cases, Advocate General (AG) Bobek proposed harmonising the EU test for the principle *ne bis in idem*. The cases concern two German sugar producers (Nordzucker and Südzucker) and a Belgian postal operator (Bpost), respectively. Nordzucker was fined in 2014 by the German Competition Authority for its role in a sugar market sharing cartel but prior to that decision the Austrian Competition Authority applied to Vienna's Higher Regional Court to fine Nordzucker and others for entering into regional market sharing agreements to distribute industrial sugar in Austria. Bpost was fined by the Belgian sector regulator for postal services and the Belgian Competition Authority for abusing its dominant position in the relevant market.

The AG suggested a single unified test across all areas of EU law, save where a specific EU law provision expressly guarantees a higher level of protection. The AG also emphasised that the very purpose of the principle is to protect the party from the second set of proceedings. Both Nordzucker and Bpost argued that they could not be fined again for the same offence by invoking the *ne bis in idem* principle. In the case of Nordzucker, it argued that its cartel conduct in Austria had already been taken into account by the German Authority when it issued its fine and therefore the temporal and geographical scope of the cases are the same. Bpost argued that the postal regulator and the Competition Authority's fines both covered the same conduct and therefore it should not have been fined twice.

AG Bobek considered that it is now well-established case law that the application of the principle *ne bis in idem* in the EU competition law context relies on the three criteria of the identity of the offender, facts and the protected legal interest. However, the AG observed that the criterion of legal interest is only well established in the abstract as it has never been applied in practice and the Court has never actually explained in any great depth how the protected legal interest should be assessed.

The AG further referred to other approaches taken in cases outside EU competition law[2] and described the position as "*untenable*". Other areas of EU law adopt their own test for the *ne bis in idem* rule, with some revolving around only the identity of the offender and the facts of the case. The AG did not feel that competition, or other areas of EU law, warrant their own test, which serves only to fragment the law. Subsequently, AG Bobek proposed a single unified test of *ne bis in idem* under Article 50 of the Charter to replace what he referred to as "*a mosaic of parallel regimes*". He suggested that the assessment should assess three aspects: the identity of the offender; the relevant facts; and the protected legal interest.

Although not binding, the AG considered Nordzucker to have satisfied the criteria for the *ne bis in idem* principle. However, for Bpost, the AG thought that the legal interests between the Competition Authority and the sectoral regulation by the sectoral regulator were different and therefore did not fall within the principle. It is expected that the Court will issue its judgment in the coming months.

CHINA LAUNCHES PUBLIC CONSULTATION ON DRAFT RULES FOR ONLINE RECOMMENDATION ALGORITHMS

On 27 August 2021 the Cyberspace Administration of China (CAC) opened a public consultation on a draft set of rules (in Chinese), issued under the Cybersecurity Law of the People's Republic of China, the Data Security Law of the People's Republic of China, the Personal Information Protection Law of the People's Republic of China, and the Internet Information

[1] Cases C-117/20 *bpost* and C-151/20 *Nordzucker*, relating to national references for a preliminary ruling from Belgium and Austria, respectively.

[2] For instance, the AG referred to the case-law of the Schengen rules, the rules of the European arrest warrant, and the recent Menci case-law.

Service Management Rules. The rules aim to regulate the algorithms tech companies use to make recommendations to users and would prohibit algorithms which are anticompetitive or might cause social harm.

In particular, providers will be prohibited from using algorithms to engage in unfair competition, including through manipulating search rankings, or to favour their own products or services through self-preferencing. Providers must also allow users to opt out of services being customised according to their personal characteristics or to disable the algorithm recommendation service altogether, as well as avoid algorithms that cause various social harms such as disrupting economic and social order or causing addiction or high-value spending. It is interesting that there is a presumption that self-preferencing is problematic, without there having been an infringement decision in China on this under the Anti-Monopoly Law.

Given the regulatory climate in China and the recent crackdown by Chinese authorities on the tech industry, it is expected that the CAC will continue to implement tighter restrictions on other areas of the digital economy going forward. The consultation closes on 26 September 2021.

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