SLAUGHTER AND MAY

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UK Court of Appeal upholds CAT online sales judgment in Ping

On 21 January 2020 the Court of Appeal dismissed Ping Europe Limited's appeal against a Competition Appeal Tribunal (CAT) judgment upholding the Competition and Market Authority's (CMA) 2017 decision fining Ping for banning online sales.

Background

Ping, a manufacturer of high-end golf clubs and golf accessories, sells its products in the UK via a selective distribution network. In light of Ping's strong focus on "custom fitting" golf clubs, Ping's authorised distributors were prohibited from selling its golf clubs on the internet.

Following a complaint from two of these distributors, in 2017 the CMA found that the prohibition on online sales was a restriction of competition by object and fined Ping £1.45 million. In doing so, the CMA recognised that Ping had been pursuing a legitimate commercial aim (namely, promoting custom fitting of its golf clubs) but this could have been achieved through less restrictive means. As such, the ban was incompatible with competition law.

In September 2018 the CAT agreed with the CMA that Ping's practices amounted to a restriction of competition by object (as reported in a previous edition of our newsletter). Ping appealed to the Court of Appeal.

Court of Appeal judgment

Ping's principle ground of appeal to the Court of Appeal was that the CAT had been wrong to find that Ping's practices amounted to a by object restriction. Ping also argued that in the event the infringement decision was upheld, the fine should be reduced.

Restriction of competition by object

In considering whether the internet sales ban was a restriction by object, the Court of Appeal followed the approach of Advocate General Wahl in *Cartes*

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Bancaires[1], examining the content, objectives and legal and economic context of Ping's internet sales ban.

In terms of the content of the ban, the Court found the restriction to be two-fold – (i) it prevented authorised dealers from selling to customers outside their geographic area; and (ii) this led to a reduction in price competition. Referring, amongst other cases, to *Pierre Fabre*[2] and *Coty*[3], the Court considered that there is a "body of case law and decisional practice" showing that the imposition of an internet sales ban in the context of a selective distribution network is a by object restriction.

Turning to the objectives of the ban, Ping's line of argument was clear: the ban was intended to promote custom fitting, in order to ensure customers purchase the most suitable golf clubs – an objective described by Ping as "the very antithesis" of an object restriction. Nevertheless, the Court referred to established case law in finding that, even if the ban did cause Ping's rate of custom fitting to be higher than that of its rivals (a point which was disputed between the parties), such a legitimate objective did not preclude the ban from amounting to an object restriction.

Turning finally to the legal and economic context of the restriction, the Court found that *"there is nothing about the basic reality here that casts doubt on the conclusion arrived at from looking at the content and objective of the restriction itself"*. In particular, the Court considered *"[t]here is no doubt that some authorised dealers of Ping clubs want to sell the clubs from their internet websites"*. Responding to Ping's claim that the CAT had failed to take account of the context of the selective distribution network, the Court considered there was *"no basis for any such criticism"*. The CAT's judgment did not condemn the ban on the basis of the restriction of intra-brand competition which is inherent in any selective distribution network, but because price competition was prevented *"not merely as between authorised dealers and dealers outside the network but as among authorised dealers themselves"*. In the Court's view, the CAT was right to conclude there was nothing in the economic or legal context in which the internet sales ban operated that negated the conclusion that it was an object restriction.

The amount of the fine

As for the fine, Ping argued that its breach of competition law was neither intentional nor negligent and so it was not appropriate to impose a fine. The Court disagreed, finding that the CAT was right to uphold the imposition of the fine on the basis that the infringement had been committed negligently. In particular, the infringement occurred after the judgment in *Pierre Fabre* and the publication of the Commission's Vertical Guidelines, such that Ping ought to have known that its conduct could be seen as a breach competition law.

Ping also argued that the CAT should have reduced the level of the fine to reflect the fact that it overturned the CMA's finding that the infringement had been intentional, substituting a finding that it had been negligent. The Court dismissed this argument, finding the CAT had been entitled to take a view of the fine "in the round" - while the CAT did not expressly refer back to its finding that the infringement

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[1] Case C-67/13 Groupement des cartes bancaires v European Commission, judgment of 11 September 2014.

[2] Case C-439/09 Pierre Fabe Dermo-Cosmétique SAS v Président de l'Auorité de la concurrence, Ministre de l'Économie, de l'industries et de l'Emploi, judgment of 13 October 2011.

[3] Case C-230/16 – Coty Germany GmbH v Parfumerie Akzente GmbH, judgment of 6 December 2017.

had been negligent rather than intentional, *"there is no basis for saying that its overall decision on the appropriate level of the fine was flawed"*.

The CMA has commented that this judgment sends *"an important signal"* that the imposition of blanket online sales bans are unlawful. Companies operating selective distribution networks should take care to ensure that any restrictions on online sales do not go further than the restrictions which are already permitted with respect to sales from authorised dealers' bricks and mortar shops.

Other developments

Antitrust

CMA issues first market study fine

The CMA has imposed its first ever penalty in a market study. According to a penalty notice published on 17 January 2020, AppNexus Europe Ltd has been fined £20,000 for failing, without reasonable excuse, to provide a response by the set deadline.

AppNexus had been required to produce documents and supply information in relation to the CMA's ongoing online platforms and digital advertising market study, which is part of the CMA's Digital Markets Strategy launched on 3 July 2019.

AppNexus submitted a partial response more than three weeks after the deadline, which the CMA had already extended. Substantial parts of the response came more than ten weeks after the deadline. The CMA found that there was no reasonable excuse for the lack of compliance with the notice, evidencing this with the change in compliance observed once AppNexus' parent, AT&T, took over responsibility for coordinating AppNexus' response. After the involvement of AT&T, the outstanding non-compliance was resolved within four working days.

The CMA found that the delay was serious and was aggravated by a "negligent attitude" with "no real heed" paid to multiple warnings. Further, it had adversely affected the effective running of the market study and its ability to consult on a proposed decision to make a market investigation reference.

EU court opinion suggests GSK pay-for-delay agreements may infringe competition law

In a non-binding opinion delivered on 22 January 2020 in *Generics (UK) Ltd e.a. v Competition and Markets Authority*, Advocate General Kokott has suggested that the European Court of Justice (CJ) should find that a pay-for-delay settlement agreement in a patent dispute may constitute a restriction of competition and that entering into such an agreement may be an abuse of a dominant position.

Questions in the case were referred to the CJ by the CAT in the context of an appeal against a CMA decision which found that GSK and others had infringed EU and UK competition law by entering into a series of agreements that delayed generic entry of the drug paroxetine.

Advocate General Kokott pointed out that an agreement of this type can be a restriction of competition by object, in particular in cases where the agreements undertake not to enter the market and not to challenge the patent. However, she further clarified that the assessment of whether there is an object restriction must include, where appropriate, an assessment of the benefits to consumers afforded by the agreements at issue.

The Advocate General also observed that an agreement of this sort by a company in a dominant position could constitute an abuse of dominance if it is capable of influencing the structure of competition on the market so as to hinder or eliminate competition. She pointed out this can only be justified by consumer benefits offsetting an agreement's adverse effects on competition. This is not likely to be the case if the agreements only afford consumers limited benefits and also eliminate competition by removing all or most sources of potential competition.

The CJ's judgment is expected on Thursday 30 January 2020.

First leniency application leads to new 'hybrid' enforcement in Hong Kong

On 22 January 2020 the Hong Kong Competition Commission (HKCC) issued its fifth enforcement action in the Competition Tribunal against an alleged information sharing cartel in the context of a tender exercise. The case was the result of a successful leniency application. At the same time, the HKCC also issued its first Infringement Notice against a cooperating member of the alleged cartel, which included an admission of liability and the offering of certain commitments. This marks the first instance of the HKCC adopting such a 'hybrid' approach towards enforcement.

The case concerns an IT company, Quantr, allegedly exchanging competitively sensitive information with an unnamed co-bidder (likely to be the leniency applicant) in a tender conducted by an amusement park in Hong Kong. The exchanges were made in an effort to coordinate the winner of the tender and were allegedly instigated by the upstream Australian software supplier, Nintex.

Following the leniency application by the co-bidder, the HKCC offered to resolve the issue by way of an Infringement Notice to the software supplier and Quantr respectively. An Infringement Notice is a summary enforcement mechanism whereby the HKCC offers not to bring enforcement proceedings against the recipient on condition that the recipient makes a commitment to comply with the requirements of the notice. Only Nintex accepted this Infringement Notice route. It admitted to a contravention of the First Conduct Rule and offered a commitment to adopt an enhanced competition compliance programme, details of which are contained in a separate confidential letter between the HKCC and Nintex.

In contrast, Quantr refused to accept the Infringement Notice, thereby leading to the HKCC bringing enforcement proceedings. Pecuniary penalties and a director disqualification order are now being sought against the reseller company and its founding director through the Tribunal proceedings.

The HKCC's new method of enforcement is a welcome one and a demonstration of the HKCC's leniency and cooperation policies at play. The case is an important case as it demonstrates the effectiveness of the HKCC's leniency programme. It also shows that the HKCC may be willing to offer the softer Infringement Notice mechanism to cooperating parties. It is hoped that this alternative enforcement method will lead to more effective antitrust enforcement in Hong Kong.

Hong Kong court mulls over first pecuniary penalties in antitrust enforcement

The Hong Kong Competition Tribunal concluded its first pecuniary penalties hearing on 16 January 2020. Having concluded a three-day hearing, the Tribunal is now deliberating its approach to imposing pecuniary penalties and awarding costs. Its judgment, expected in the first half of 2020, will set the standard for future antitrust enforcement in Hong Kong.

The hearing was a follow-up to the decorators' cartel case, in which 10 decorators were found to have fixed prices and shared customers in a new public housing estate.

The HKCC urged the Tribunal to adopt a methodological framework in arriving at a pecuniary penalty. The HKCC's approach, which is modelled along the lines of the European Commission's 2006 Guidelines on the method of setting fines, starts by determining the base penalty, followed by adjustments for specific aggravating and mitigating factors.

The respondents criticised the HKCC's approach as "mathematical" and generally advocated for an Australian approach towards imposing pecuniary penalties. Instead of starting with a base penalty, the Australian approach looks at a range of matters in setting the appropriate pecuniary penalty, such as the size of the relevant company, the deliberateness of the contravention and whether the contravention arose out of the conduct of senior management or at some lower level.

In terms of costs, the HKCC asked for costs in the Tribunal proceedings, as well as investigation costs. In particular, the HKCC asked for costs on an indemnity basis against respondents that raised an efficiency defence for the market sharing conduct. The respondents argued that it was not unreasonable to raise the efficiency defence, and it would be unfair to impose a costs order on the respondents.

The Tribunal reserved judgment after the three-day hearing. Judgment is expected in the coming months. The Tribunal's decision will likely have an impact on the other IT bid-rigging case that is pending a hearing on pecuniary penalties, and will lay the foundations for setting pecuniary penalties in the future.

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