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August 2019

Bird & Bird Competition & EU

Competitive edge

Keeping you up to date on Competition & EU Law developments in Europe and beyond

Regulation of Digital Platforms in Australia and UK

Thomas Jones
Partner

A look at the latest Australian and UK inquiries and policy reviews, and what the new wave of competition law enforcement and regulation in respect of digital platforms (and, in Australia, media and journalism) might look like in 2019 and beyond.

Richard Eccles
Partner

We are at a critical point in understanding the impact global digital search engines and platforms have on content aggregation, markets and society more generally. Regulators around the globe are grappling with how to ensure regulatory policy effectively addresses consumer harm and remains relevant in this rapidly evolving digital age. We see obvious parallels between the approaches being taken by governments and regulators in Australia and the UK. Read more>

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EU

Commission fines Qualcomm €242 million for predatory pricing

In the first predatory pricing case since 2003, the European Commission ("EC") has fined Qualcomm €242million for abusing its market power by engaging, between 2009 and 2011, in below cost sales of its 3G baseband chipsets, key components of mobile devices (see EC press release here). This fine comes on top of the €997 million fine that Qualcomm received last year for making payments to Apple to exclusively use Qualcomm's 4G baseband chipsets between 2011 and 2016.

In its investigation, the EC found that, considering the high barriers to entry into the 3G baseband chipsets market and the fact that Qualcomm was holding global market shares of approximately 60% in this market, Qualcomm was dominant.

As to the abuse, the Commission held that Qualcomm had engaged in sales of baseband chipsets below cost to two key customers with the intention to eliminate emerging rival Icera. The EC based its finding on both quantitative price-cost calculations and qualitative evidence showing Qualcomm's actions prevented competition and innovation in the market and reduced choice to consumers.

Australia

Federal Court of Australia imposes record fine on Japanese shipping company for criminal cartel conduct

On 2 August 2019, the Federal Court of Australia imposed its largest ever fine on Japanese shipping company, Kawasaki Kisen Kaisha Ltd (K-Line), for engaging in price fixing as part of an illegal criminal cartel with a number of other shipping companies between 2009 and 2012. The fine of AUD$34.5 million is the largest criminal fine that has ever been imposed under Australia's Competition and Consumer Act 2010 (Cth) ("CCA").

More specifically, the Federal Court found that K-Line had intentionally given effect to cartel provisions in its agreements with a number of other shipping companies in relation to the transportation of cars, trucks and buses into Australia under which the cartel participants had agreed to 'not seek to alter their existing market shares [in relation to the supply of ocean shipping services] or otherwise try to win existing business from each other' (at [4]). This provision had the effect of fixing, controlling or maintaining the price of the supply of the ocean shipping services between the cartel participants, which is a criminal contravention of the CCA (s 45AG (1)).

The cartel had operated since February 1997 and had impacted the transportation prices of cars, trucks and buses to Australia from various countries around the world, including the US, Asia and a number of European countries. K-Line and the other cartel participant shipping companies had transported these vehicles on behalf of some of the world's largest car manufacturers including Nissan, Suzuki, Honda, Toyota, Isuzu and others.

The case serves as a timely reminder to companies in Australia, or companies planning to do business in Australia, of the preparedness of Australian courts to take action against those engaging in anti-competitive conduct, particularly cartel conduct.

Denmark

Danish maritime and commercial court finds illegal price coordination agreement on the market of natural gas boiler services

On 12 June 2019, the Danish Maritime and Commercial Court found that a price coordination agreement between HMN Naturgas I/S, its two sub-contractors and a trade organisation had the object of restricting competition.

HMN is a municipally owned natural gas undertaking that offers a maintenance subscription service for natural gas boilers. The services are not provided by HMN themselves, but rather by independent sub-contractors (so-called "service partners"), who also provide services under their own individual contracts. In 2014, HMN and its service partners entered into an agreement, whereby HMN was to (i) lower the profit margin on spare parts and (ii) increase the price of their maintenance subscriptions.

The Court explained that unlike the use of spare parts, the subscription fee is predictable for the customers, making it a significantly competitive parameter, which was weakened by the conclusion of the agreement. Also, the increase in the subscription fee affected all customers on the market, as it aimed to allow for the independent service partners to increase their own prices equally. Consequently, the Court found that the object of the horizontal agreement regarding the price increase of maintenance subscription service was the restriction of competition.

Finally, the Court noted that HMN failed to substantiate that the agreement was objectively necessary for obtaining any efficiency gains, as the agreement only benefitted HMN's own customers. The Court deemed this to be insufficient to justify the agreement. The case is yet to be closed, as HMN has announced its intention to appeal the case.

For more information, please refer to the judgement from the Maritime and Commercial Court available in Danish here.

Finland

Extensions to the Finnish Merger Control Deadlines

The Finnish merger control investigation periods have been extended to 23 working days for phase I investigations (instead of one month previously) and 69 working days for phase II investigations (instead of three months previously).

The previous way of calculating investigation periods in calendar months led to the deadlines varying from 18 to 23 working days depending on the month the transaction was notified to the FCCA and the number of bank holidays in the period in question. If a transaction had been notified according to the old regime on e.g. 29 November 2019, the deadline for a phase I decision would have been 30 December 2019. According to the new regime, the deadline for a phase I decision for a transaction notified on 29 November 2019 would be 8 January 2020.

The purpose of the amendment was to ensure a sufficiently thorough investigation in all cases, irrespective of the time in which they are notified. The amendment entered into force on 17 June 2019.

France

The end of the flour cartels judicial saga?

The flour cartels judicial saga began in 2012 with a decision from the French Competition Authority ("the FCA") under which it imposed a €242.6 million fine on 17 French and German companies for setting up a cross-border cartel between German and French millers between 2002 and 2008, and a national cartel which was supported by two joint-venture companies. The saga then developed with 3 decisions of the Paris Court of Appeal, a decision of the Constitutional Council… and 2 decisions of the French Supreme Court (!).

The latest development in the saga is a decision from the Paris Court of Appeal on 9 July 2019. While the Court mainly confirmed the FCA's findings, it has decided to significantly reduce the fines which were imposed on 6 of the companies involved in the above mentioned cartels: from €150.5 million to €29 million in total - i.e. a reduction of 80%.

The reasons for the reduction in the fines included: (i) a shorter duration retained for the participation of two companies in the cross-border cartel (the length of involvement of two of the companies concerned had not been properly assessed); and (ii) the financial situation of some of the cartel members (at the date by which the court ruled, some of the cartel members were facing serious financial difficulties which did not allow them to pay the fines imposed by the FCA in full and as a result required reductions of the fines).

Will the Court of Appeal's decision be the end of the flour cartel's judicial saga? Only time will tell. The end of the saga is now dependent on whether the FCA decides to appeal the decision or not.

For more information, please refer to the full FCA's decision (in French) here or the FCA's press release (in English) available here. You can also refer to the Paris Court of Appeal's decision (in French) here.

Germany

Vodafone – Liberty Global (Unitymedia): European Commission permits acquisition against commitments

On 18 July 2019, the European Commission ("EC") cleared the acquisition of Liberty Global's cable business by Vodafone in Germany, Czechia, Hungary and Romania subject to remedies.

The concerns of the EC mainly related to the German market. In particular, the EC was worried that the transaction would eliminate the competitive pressure on the end customer market for the fixed broadband services and would strengthen the merging parties' market power in the market for the transmission of TV channels. Today, Unitymedia operates networks in Northrhine-Westfalia, Hessen and Baden-Wuerttemberg, while Vodafone operates networks in the remaining federal states of Germany. Thus, after the acquisition, Vodafone is going to be the only company apart from the Deutsche Telekom that covers all parts of Germany with an own cable network.

The EC found that Vodafone was able to encounter the authority's concerns by means of a package of commitments. Hereinafter, Vodafone undertook to grant a competitor (Telefónica) access to the German joint cable network of the newly merged company. Additionally, Vodafone committed to keep the feed-in prices stable for Free-to-Air TV broadcasters. Furthermore, Vodafone has to continue to transmit the HbbTV signal of Free-to-Air broadcasters and to allow broadcasters whose programs run on the merged entity's TV platform to broadcast their program via an OTT service. The decision of the EC was criticized especially by the Deutsche Telekom. The company announced that it will assess the decision and did not exclude to contest it before a court.

For further details, please see the EC's press release in English here.

German Federal Cartel Office closes proceedings against Amazon subject to conditions

On 17 July 2019, the German Federal Cartel Office ("FCO") announced that it closes its abuse proceedings against Amazon under the condition that Amazon amends its general terms and conditions worldwide prescribed in the Business Solutions Agreement („BSA") as regards the sale on its marketplaces.

After complaints of sellers, the FCO had opened proceedings against Amazon with regard to potentially abusive terms of business and practices towards distributors on the German marketplace in November 2018. The complaints related to e.g. the unforeseeable blocking of sellers accounts, the lack of substantiated termination and blocking of sellers accounts, the lack of transparency of the terms of business, and the sellers' obligation to bear the costs of obviously unjustified customer returns.

Among other things, Amazon now committed to abolish the exclusivity of Luxembourg as the only court of jurisdiction in Europe and to announce any amendments of the conditions in its contracts and programs 15 days ahead. Furthermore, Amazon has to announce the ordinary termination of a seller account 30 days in advance. The current option of immediate termination or blocking of an account without reasoning will be widely abandoned. Moreover, Amazon's exclusion of liability and extensive limitations of liability will be significantly limited. Further amendments relate to the rights of use of product information and partly requirements, to returns and reimbursements, to seller ratings/products reviews and to the confidentiality rules.

Amazon committed to adjust its general terms and conditions not only for the German marketplace but also for the other European, North American and Asian marketplaces.

Please see the press release of the FCO in German and the case report in English for further information.

Italy

The Council of State puts an end to the Hoffman-La Roche (Avastin/Lucentis) saga

On July 17th, the Council of State dismissed the appeals presented by F. Hoffman-La Roche Ltd. ("Roche") and Roche S.p.A. (together, "Roche") and from Novartis Farma S.p.A. and Novartis AG ("Novartis") against the judgement issued by the Regional Administrative Court of First Instance rejecting the appeals against the Decision of the Italian Competition Authority ("AGCM") which fined Roche and Novartis approximately €90 million each.

Background

Avastin was developed by a subsidiary of Roche and marketed by Roche Europe and was brought to market in 2005 for the treatment of tumorous diseases but later began to be prescribed for the treatment of eye diseases. Lucentis was developed by the same Roche subsidiary, but licensed to and marketed by Novartis and was brought to market for the treatment of eye diseases.

Following an in depth investigation, the Italian Competition Authority ("AGCM") found that Roche and Novartis reportedly disseminated information indicating the increased risks and reduced efficiency of Avastin for the purpose of treating eye-diseases despite the lack of scientific evidence supporting such indications to discourage the practice of Avastin being prescribed for eye-disease. Accordingly, the AGCM qualified the practices of Roche and Novartis as a market-sharing agreement constituting an object restriction within the meaning of Art. 101 TFEU and imposed a fine of approximately €180 million on Roche, Novartis, and their Italian subsidiaries.

The appeals of Roche and Novartis were dismissed in first instance and the appeal before the Council of State led to the preliminary reference before the ECJ.

The Council of State asked the ECJ for guidance in relation to three points: (i) how to define the relevant product market, and whether the content of a marketing authorization is decisive in this regard; (ii) the extent to which licensing agreements may infringe EU competition law, even between two companies which are not competitors; and (iii) whether colluding to emphasize the relative safety of one medicine over another can be considered a restriction of competition if there is no unequivocal scientific evidence for this claim.

In the context of the preliminary ruling, as to the point (i), the ECJ first recalled that medicinal products that may be used for the same therapeutic indications belong, in principle, to the same product market and observed that there is a specific relationship of substitutability between (on-label) Avastin and (off-label) Lucentis. As to the point (ii) regarding the nature of the licensing agreement, the ECJ focuses on the interaction between the licensing agreement and the apparent agreement to disseminate jointly information which discouraged the use of Avastin and held that this "arrangement" to disseminate information was not designed to restrict the commercial autonomy of either party to the license agreement, but rather to influence the conduct of third parties such as regulatory authorities and medical practitioners in order to limit the use of Avastin in favor of Lucentis. Finally, as to the point (iii), the ECJ followed the AG's opinion that the joint efforts of Novartis and Roche to communicate that the off-label use of a product was less safe than the on-label use of a product can be considered a restriction of competition "by object".

For more information please see the ruling of the Council of State (in Italian).

Spain

The CNMC "re-imposes" fines on dairy companies for information exchanges in the raw cow's milk supply market

On 11 July 2019, the Spanish Competition Authority ("CNMC") fined eight dairy companies and two industry associations with a total of €60,657,617 for infringing Article 1 of the Spanish Competition Act ("LDC") and Article 101 of the TFEU.

The alleged anticompetitive practices took place in the raw cow's milk supply market, consisting of exchanges of sensitive commercial information from 2000 to 2013. The information shared between dairy companies would have included raw cow's milk purchase prices, purchases volumes, farmers' data and milk surpluses. According to the CNMC, in some occasions, these exchanges of information developed into agreements for fixing prices for the procurement of raw milk and market sharing. Nevertheless, the CNMC has rejected to classify these practices as a buying cartel.

One of the most relevant aspects of this case is that these practices were already examined and fined by the CNMC in 2015. In the previous proceedings, the CNMC elaborated a Statement of Objections (SO) in which the duration of the infringement was mistakenly reduced for certain companies, leading to a rectification on material errors in a second SO. One of the companies appealed this rectification before the Spanish Courts, which partially annulled the CNMC's decision and ordered that the proceedings be resumed at the moment immediately prior to the correction of errors. The CNMC has now imposed the same fines on most of the companies involved in the file for the same conducts sanctioned in 2015, on the basis of the reformatio in peius prohibition.

Some of the sanctioned companies have publicly announced their intention to appeal the CNMC's decision before the National High Court, on the grounds that no anticompetitive conduct has been committed.

For more information, please find the CNMC's final decision here (in Spanish).

The Netherlands

Dutch bill aims to prevent competition law from hindering sustainability initiatives

On 4 July 2019, a legislative proposal ('Wet ruimte voor duurzaamheidsinitiatieven', parliamentary document 2018-2019, 35247, no. 2) was submitted to the Dutch House of Representatives which aims to foster private collaboration towards sustainability goals by preventing sustainability initiatives from being unnecessarily hindered by the cartel prohibition in Article 6 of the Dutch Competition Act (the Dutch equivalent of Article 101 TFEU).

Businesses are increasingly seeking to cooperate in order to accomplish sustainability goals, for example in the fields of public health, animal welfare and the environment. However, competition law and, specifically, the cartel prohibition has often hampered legitimate cooperation between competitors in the area of sustainability. This legislative proposal provides for a procedure enabling private parties to request the relevant Minister to legitimize a sustainability initiative by laying it down in a generally binding regulation.

In the current legislative proposal, the scope of this procedure is limited to initiatives that aim to limit greenhouse gas emissions, stimulate renewable energy production and energy savings and improve animal health and animal welfare, but the proposal allows the minister to further broaden this scope in the future. The proposal stipulates that private parties are required to set out in their request for a binding regulation what goals are served by a particular initiative, the level of support for the initiative and to what extent the benefits of the initiative outweigh the costs. As part of this procedure, the Dutch Competition Authority must be consulted with regard to the effects of the initiative on competition in the market and the general public must be allowed the opportunity to submit their written opinion during a public consultation of the draft binding regulation.

The legislative proposal is available here (in Dutch only). Before the legislative proposal could become law, it would need to first be adopted by both the Dutch House of Representatives and the Senate.

UK

Ofgem publishes customer-sharing competition infringement decision

The GB energy regulator has published its decision, made in May, fining two energy suppliers, Economy and E, for agreeing not to target each other's customers, and a third company, Dyball, for providing software to facilitate the collusion. The two suppliers appear initially to have agreed not to target each other's suppliers, and Dyball then offered to develop a new Customer Relationship Management (CRM) and billing system that would allow the suppliers to reject each other's customers from the new customer registration process. Dyball initially supplied each supplier's customer lists to the other to permit manual withdrawal, and then developed functionality that automatically blocked one supplier's customers from appearing in the other's system. Alerted by anonymous sources and apparently by its own analysis of switching data, Ofgem opened an investigation in August 2016.

One element of the submissions by E and Economy was that the relevant arrangements fell outside the scope of the Chapter I prohibition, because their respective owners were a long-term couple. Ofgem rejected this argument – the two businesses were operated (and viewed themselves as operating) as competitors and there was no authority for the proposition that businesses separately owned by two partners in a long-term relationship constituted a single undertaking.

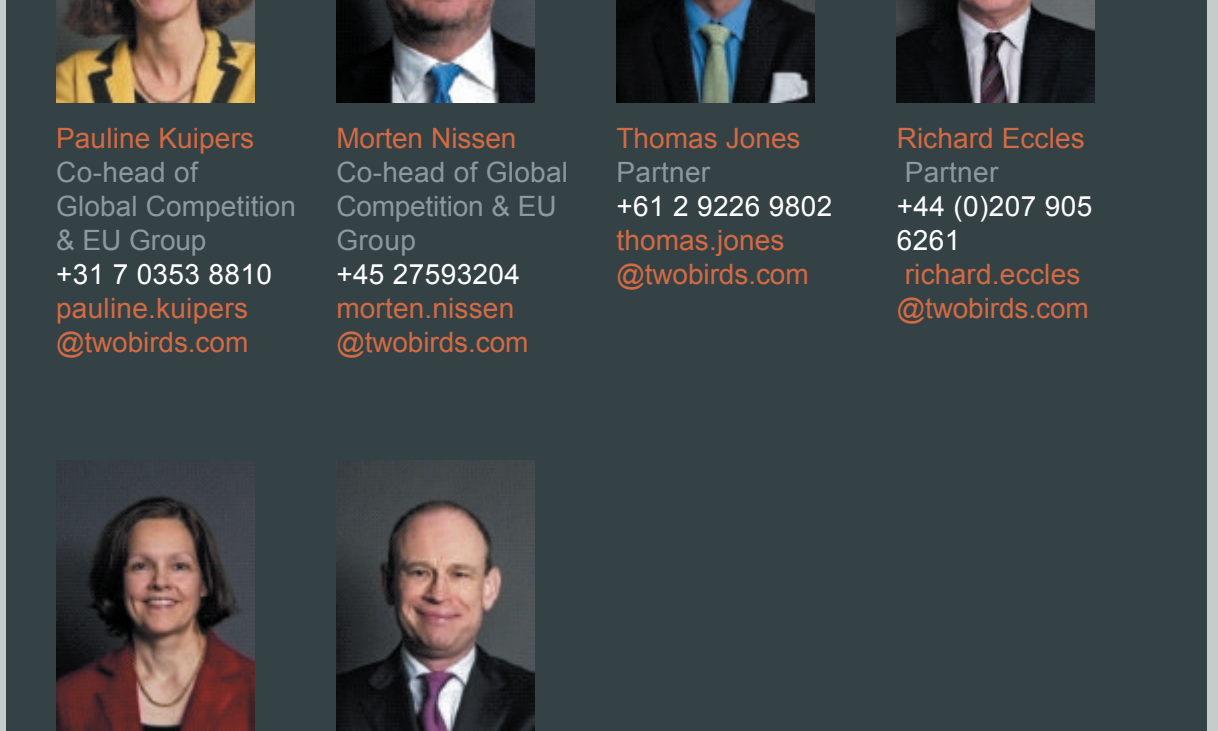
A particularly interesting aspect of the decision, and one that is of much wider relevance, is the involvement of Dyball, and its development of software to facilitate the collusion. Many competition authorities worldwide are currently considering the application of competition rules to the use of various forms of algorithmic collusion. [FN: See, for a useful introduction to this area, the report of the 2017 OECD roundtable here] Much of the interest and debate has been around the extent to which algorithms might be used to replace explicit collusion with tacit collusion, and whether existing competition rules are capable of addressing such practices. In contrast, the use of algorithms to facilitate existing express collusion (as Dyball's software did) is generally accepted to fall squarely within the current rules. Nonetheless, this decision marks one of the first instances of a competition authority imposing penalties for this type of behaviour.

Finally, the decision also provided some useful analysis of the scope of the privilege against self-incrimination. We have written in more detail on this issue (and on the other issues raised in the decision) here.

Upcoming speaking engagements at Competition & EU law conferences

Competition partner Anne Federle will moderate the panel session ***The Future of Cartel Enforcement*** at the **Knect365 Cartels 2019 Conference** in Brussels on Tuesday 17th September.

At the **Fourth Annual Conference of the Florence Competition Programme Hipster Antitrust, the European Way** on October 25th in Fiesole, Florence, competition partner Hein Hobbelen will be a panelist on the topic ***How to tackle concentration in digital markets.***



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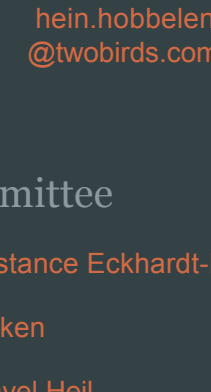

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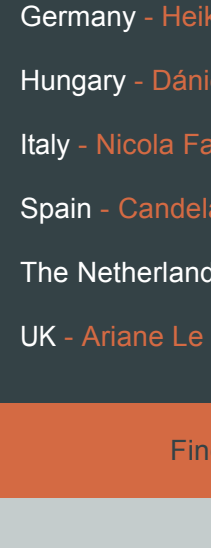

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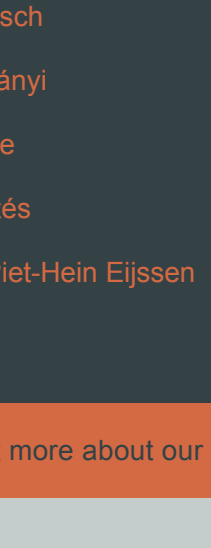

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