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CMA fines CompareTheMarket £17.91m for imposing wide MFN clauses on providers of home insurance selling through its platform

On 19 November 2020 the UK Competition and Markets Authority (CMA) fined CompareTheMarket, a price comparison website which enables consumers to compare the prices of different insurance, utilities and financial products, £17.91 million for imposing wide 'most favoured nation' (MFN) clauses on providers of home insurance selling through the CompareTheMarket platform between 2015 and 2017. The CMA found that the MFN clauses used by CompareTheMarket were likely to have caused home insurance providers to offer less differentiated pricing across price comparison websites, higher commission fees and therefore higher prices, all to the detriment of consumers using price comparison websites to buy home insurance.

BACKGROUND

MFN clauses are contractual parity obligations in which a supplier agrees to treat a particular customer no worse than any of its other customers. 'Wide' MFN clauses generally require a supplier to publish on a price comparison website the same, or better, price and conditions as those published on other sales channels while 'narrow' MFN clauses generally require the same, or better, price and conditions as those published on the supplier's own website.

The CMA's investigation into CompareTheMarket's use of MFN clauses followed its market study into digital comparison tools (price comparison websites and apps) conducted between September 2016 and September 2017. The market study concluded that whilst price comparison websites were generally beneficial in helping consumers compare choices and incentivising businesses to offer competitive products, the CMA should take action where they were not working in people's best interests. Following this, in September 2017 the CMA launched an investigation into how CompareTheMarket structured its contracts with insurers as it suspected that the setup may have resulted in higher home insurance prices.

On 2 November 2018 the CMA provisionally found that wide MFN clauses included in CompareTheMarket's contracts with certain home insurance providers could have led to consumers paying higher premiums.

THE DECISION

On 19 November 2020 the CMA published a summary of its infringement decision against CompareTheMarket (Infringement Decision). Consistent with its provisional findings, the

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CMA confirmed that between 1 December 2015 and 1 December 2017 ComparetheMarket had breached competition law by imposing wide MFN clauses in its agreements with a number of home insurance providers (including underwriters, brokers and retail partners) which contractually prevented ComparetheMarket from being undercut by prices quoted on competitor websites.

The CMA's investigation established that between 2015 and 2017, the use of wide MFN clauses was a core part of ComparetheMarket's competitive strategy and that the company used such clauses to secure the lowest prices whilst also maintaining growth in the commission fees that it received from home insurance providers. ComparetheMarket's internal documents demonstrated that the company believed that, in the absence of wide MFN clauses, there would have been increased competition between price comparison websites that would have put greater pressure on commission fees and reduced its profits. The investigation also revealed that ComparetheMarket monitored and enforced compliance with its wide MFN clauses throughout the period, including by questioning insurers on their pricing and refusing to remove the MFN clauses from its contracts, despite requests from insurers. As a result of this, and due to ComparetheMarket's important role as a trading partner, home insurance providers were strongly incentivised to comply with the wide MFN clauses. Ultimately, the CMA only addressed its Infringement Decision to ComparetheMarket and did not fine any of the home insurance providers that were party to the agreements with ComparetheMarket containing wide MFN clauses.

The Infringement Decision identifies that ComparetheMarket's wide MFN clauses had a number of anti-competitive effects, including:

- contractually preventing insurers from quoting lower prices on rival price comparison websites without having to make an equivalent price reduction on ComparetheMarket, thereby reducing insurers' incentives to lower prices;
- preventing rival price comparison websites from gaining a competitive price advantage over ComparetheMarket by offering cheaper quotes from home insurers, thereby reducing their incentives to lower commission fees;
- restricting the ability of ComparetheMarket's rival price comparison websites to expand, by preventing a price advantage (enabling ComparetheMarket to maintain or strengthen its market power); and
- reducing price competition between home insurance providers competing on price comparison websites.

ComparetheMarket failed to provide evidence of any pro-competitive efficiencies from its wide MFN clauses or that its MFN clauses were objectively necessary and therefore should not be considered to have restricted competition.

WIDE MFNs: THE FUTURE

The Infringement Decision continues a trend across Europe to clamp down on MFN clauses. Most recently, on 3 October 2018 the Commission launched the review of the Vertical Block Exemption Regulation which will expire on 31 May 2022, and the related Vertical Guidelines. The Commission's Staff Working Document published in September 2020 cited the incoherent application of the current rules across Member States regarding MFN clauses as a major trend motivating the Commission's need to revise these documents.

The CMA's significant fine on ComparetheMarket demonstrates the severity of the infringement and serves as a warning to other price comparison websites, and suppliers who use digital comparison websites, to consider very carefully how wide to set the scope of any MFN clause or agreement.

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OTHER DEVELOPMENTS

ANTITRUST

EUROPEAN COMMISSION FINES TEVA AND CEPHALON FOR CONCLUDING UNLAWFUL 'PAY-FOR-DELAY' PHARMACEUTICAL AGREEMENT

On 26 November 2020 the European Commission announced that it had fined the pharmaceutical companies Teva and Cephalon a total amount of €60.5 million for agreeing to delay for several years the market entry of a cheaper generic version of modafinil, Cephalon's drug for sleep disorders. The Commission found that Teva consented to stay out of the market with a cheaper generic version of modafinil in exchange for substantial value which Cephalon transferred to it in the form of cash payments and a package of commercial side-deals. These included a distribution agreement, the acquisition of a licence on certain Teva modafinil patents by Cephalon, purchases of raw materials from Teva, and the granting by Cephalon of access to clinical data that were highly valuable to Teva for a different medicine. Executive Vice-President Margrethe Vestager, in charge of competition policy, stated that pharmaceutical companies buying off competition is illegal, "*even when their agreements are in the form of patent settlements or other seemingly normal commercial transactions*".

In June 2005 Teva introduced its generic modafinil product in the UK, following which Cephalon brought an infringement lawsuit alleging a breach of its patents. The parties concluded a settlement agreement under which Teva undertook not to sell its generic modafinil products in the EEA markets until October 2012. Cephalon's main patents protecting modafinil had expired in Europe by 2005, but it still held secondary patents relating to the pharmaceutical composition of modafinil. In April 2011 the Commission opened formal antitrust proceedings. In October 2011, Cephalon became a subsidiary of Teva.

The Commission has now decided that the patent settlement infringed Article 101 TFEU, which prohibits agreements that prevent, restrict, or distort competition in the EU internal market. It found that the infringement lasted from December 2005 to October 2011, for almost all EU Members States and EEA countries. In accordance with its 2006 Guidelines on Fines, the Commission fined Teva €30 million and Cephalon €30.5 million. In its press release, the Commission clarified that in 'pay-for-delay' cases, the general fines methodology is difficult to apply since generic companies do not make any sales of the affected product. It therefore imposed a fixed amount fine to Teva which is slightly less than the fine for Cephalon. This decision marks the end of a series of 'pay-for-delay' investigations launched by the Commission since its 2009 sector inquiry into the pharmaceutical sector; the Commission has previously fined companies in three other investigations, concerning perindopril, citalopram, and fentanyl.

GENERAL COMPETITION

ECA PUBLISHES REPORT RECOMMENDING THE EUROPEAN COMMISSION TO SCALE UP ANTITRUST AND MERGER CONTROL TO FIT A MORE GLOBALISED WORLD

On 19 November 2020 the European Court of Auditors (ECA) published a special report titled "*The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight*". This was the first audit the ECA has carried out on the European Commission's role as enforcer in the areas of merger and antitrust. The report found that overall the Commission made good use of its enforcement powers, but improvements are necessary in a number of areas.

The report indicated that the Commission, in order to identify infringements of antitrust rules, not only reacted to complaints or market information received, but also acted on its own initiative. However, the amount of resources available for own detection of antitrust cases was relatively limited and the overall number of cases identified by Commission acting on its own initiative has been constantly decreasing since 2015. The report also concluded that the uptake of the leniency programme – the most important tool to enhance reporting of infringements by external parties –

has fallen since 2015. Moreover, the report stated that in order to make effective use of its resources, the Commission should give priority to those cases which have the highest potential impact on the internal market and on consumers; yet the ECA found no clear weighted criteria in place to ensure the selection of cases with the highest risk. The report went on to say that, in the field of merger control, some significant transactions fell outside the Commission's scrutiny as they were not required to be notified according to the current turnover thresholds set out in the EU Merger Regulation. Also, the increasing amounts of data to be processed and the emergence of digital markets have made Commission investigations complex, and not all challenges have been addressed yet.

The report found that the Commission cooperated closely with the National Competition Authorities (NCAs) in various working groups, yet despite the many contacts, the Commission and NCAs did not closely coordinate their market monitoring and sector inquiries. The report further found that the Commission's framework is not fully fit for assessing the performance of its own enforcement activities, and there is no common approach for assessing the NCAs' performance.

The auditors made recommendations aimed at improving the Commission's capacity to proactively detect infringements, render its competition enforcement more effective, help it coordinate better with NCAs through the European Competition Network, and report better on its own performance. Alex Brenninkmeijer, the ECA Member responsible for the report, said that the Commission "*needs to scale up market oversight to be fit for a more global and digital world. It needs to get better at proactively detecting infringements and select its investigations more judiciously*".

HONG KONG COMPETITION COMMISSION PUBLISHES 2019-20 ANNUAL REPORT

On 25 November 2020 the Hong Kong Competition Commission (HKCC) published its 2019-20 annual report. Highlights are set out below.

- **The HKCC's on-going investigations increased significantly**. The HKCC had a total of 83 ongoing cases in 2019-20, which increased by 69 per cent from 49 cases in 2018-19. Most of the HKCC's cases are complaints-driven. A total of 674 complaints/inquiries from the public were received and processed in 2019-20. Around 46 per cent of the complaints concerned anti-competitive agreements and 17 per cent were related to abuse of market power cases. The business sectors involved in antitrust investigations remain unchanged, with the real estate and the logistics sectors remaining as the top two sectors with most cases.
- **The HKCC will broaden its enforcement and litigation to include abuse of dominance cases**. The HKCC has been bringing cases to the Competition Tribunal systematically and strategically to establish legal precedents for Hong Kong's Competition Ordinance. While the current cases so far involved cartel conduct prohibited by the First Conduct Rule, the HKCC has indicated that it will broaden its enforcement and litigation in other areas of the law, including the Second Conduct Rule that targets abuse of substantial market power.
- **The HKCC will enhance engagement with local lawyers in its efforts to help SMEs comply with the Competition Ordinance**. Despite the local lock-down due to the coronavirus, the HKCC conducted a number of seminars, webinars and educational programmes in 2019-20 targeting at small and medium enterprises (SMEs) to raise their awareness of the competition law and encourage compliance. Our firm was also invited by the HKCC to lead one of the sessions for this initiative. Going forward, the HKCC will step up its engagement with local lawyers to strengthen their involvement in competition law, and to better equip them to handle competition cases and compliance matters for SME clients.

The HKCC is rapidly maturing as a law enforcement agency entering its sixth year of full operation. In the coming year, the HKCC is expected to broaden its enforcement actions against the full spectrum of anti-competitive conduct in Hong Kong, while continuing its focus on improving SME compliance with the Competition Ordinance.

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