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# Roland loses penalty discount in appeal to the CAT

On 19 April 2021 the Competition Appeal Tribunal (CAT) issued its judgment dismissing Roland (U.K.) Limited's and Roland Corporation's (together Roland) appeal against the Competition and Market Authority's (CMA) decision imposing a penalty of £4m on it on 29 June 2020 for engaging in online resale price maintenance (RPM) (see a previous edition of our Newsletter for further details). Roland originally settled with the CMA, admitting both the infringement and the maximum amount of the penalty, but on 1 September 2020 Roland lodged an appeal against the CMA decision. In response the CMA applied to revoke the 20 per cent settlement discount. In dismissing Roland's appeal, the CAT also upheld the CMA's request to revoke the settlement discount.

## ROLAND'S APPEAL

Roland appealed the CMA's decision on two grounds. The first was that the CMA's starting point for the calculation of the penalty (19 per cent of the relevant turnover) was excessive, as it both overstated the seriousness of RPM and did not reflect the very narrow scope of the RPM that it had found it in this case. The CMA in turn argued that RPM is a serious infringement by object, and that starting at a lower percentage of the relevant turnover would not have constituted a sufficient deterrent. The CAT agreed with the CMA's starting point, holding that RPM is an "*inherently serious infringement*"[1] and that the starting point of 19 per cent in this case was appropriate and is "*not out of line with the starting point adopted by the CMA in other decisions*".[2]

The second ground of Roland's appeal was that the 20 per cent discount applied to the fine for leniency was too low and an inadequate reflection of the extent to which it cooperated with the CMA during the investigation. The CMA's argument in rebuttal focused on why the leniency policy exists, emphasising that the material from the leniency applicant must, at the very least, add significant value to the investigation.

The CAT did acknowledge that the CMA's Leniency Guidelines do not offer much helpful guidance of how the relevant discount is calculated or quantified, nor did the CMA explain in its decision how it reached the 20 per cent discount figure. However, the CAT went on to note that the extent to which an applicant cooperates with and supports the CMA in its investigation is not the sole measure of whether such contribution was valuable.

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[1] Para. 96, 1365/1/12/20 *Roland (U.K.) Limited and Another v Competition and Markets Authority* - Judgment [2021].

[2] *Ibid.*

## THE CMA'S APPEAL TO REVOKE THE SETTLEMENT DISCOUNT

Along with Roland's two grounds of appeal, the CMA applied to have the 20 per cent settlement discount that had been applied for a period of the infringement revoked. The CMA reasoned that the purpose of the settlement procedure is to resolve a case and save on administrative costs. By appealing the settlement, Roland ensured that neither of these objectives were achieved. The CMA therefore argued that Roland was no longer entitled to the discount.

The CMA also argued that, should its application to revoke the discount be denied, this would "*damage the integrity of the settlement process*".[3] Allowing Roland to retain the discount while also reopening the case through the appeal would be a contradiction of the purpose of the settlement procedure, and would send the wrong message for future cases. Additionally, the Investigation Guidance expressly states that, if a settling business appeals the decision in the CAT, the settlement discount will no longer apply.

Furthermore, the CMA noted that Roland had been extremely well advised by its legal team and had plenty of opportunity to consider its decision. In fact, Roland had been the party to speed up the process in order to know its maximum liability as soon as possible.

### *ROLAND'S ARGUMENTS AGAINST THE CMA'S APPEAL*

Roland argued that settling a CMA investigation is procedural, the purpose of which, as noted by the CMA, is to save on administrative costs. There is therefore always a right of appeal. Indeed, this is set out expressly in the Investigation Guidelines. Roland stated that the settlement itself had saved time and money for the CMA despite the subsequent appeal. Roland therefore believed it was entitled to retain at least some of the corresponding discount.

Roland further argued this point on the grounds that it was only appealing part of the settlement. It had accepted liability and the CMA's factual analysis on which the penalty was based, and was only challenging elements of the leniency and seriousness calculations. Roland therefore concluded that the CMA could not argue that it had lost all of its administrative savings.

Additionally, Roland argued that automatic revocation of the discount on appeal of the settlement amounts to coercive behaviour from the CMA, and leaves the settling party without a choice. Roland expanded on how this would be a policy issue.

### *THE CAT'S FINDINGS*

The CAT discussed that allowing for discounts through the settlement procedure is a bargain between the two parties, by which the CMA agrees to accept a lower penalty in return for the settling party agreeing to accept the CMA's decision as final. While the CAT did agree with Roland's argument that the settlement of a CMA investigation inherently allows for appeal, it did not think there was any valid reason for the settling party to be able to retain the benefit of the bargain if it did not hold up its end.

The CAT agreed that Roland had sufficient opportunity during the settlement procedure to consider the size of the penalty, and that it signed the Terms of Settlement having received the benefit of legal advice. Therefore it was not unfair to hold Roland to its bargain in this case.

Additionally, the CAT agreed with the CMA's submission that allowing a settling party to retain the discount while also being able to appeal the settlement would undermine the process and contradict its purpose. On the same grounds, the CAT rejected Roland's argument that it should still retain some of the discount.

[3] Para. 125, 1365/1/12/20 *Roland (U.K.) Limited and Another v Competition and Markets Authority* - Judgment [2021].

Also, the CAT rejected Roland's argument that automatically revoking the discount on appeal of the settlement amounts to coercion either to settle and forego an appeal or to pay the full penalty, emphasising that the settlement process is entirely voluntary. The fact that, should it not settle, the party is not guaranteed a better outcome on appeal does not in itself mean that there is no choice. The CAT therefore concluded that the penalty payable by Roland is to be increased in line with removing the 20 per cent settlement discount (this resulted in an increased penalty of £5,004,141).

## SIGNIFICANCE

This was the first ruling of the CAT in relation to the CMA's settlement policy in the context of an appeal. It reinforced the message that, when a company agrees to settle with the CMA in order to conclude an investigation, such settlement is final and any appeal thereof will have as a consequence that the settlement discount no longer applies. In contrast to the UK settlement regime, the EU cartel settlement regime *does* allow the settling party to appeal the settlement fine without the parties losing the benefit on the discount. The European Commission's Notice on the conduct of settlement procedures makes no reference to the discount being automatically forfeited on appeal and, in appeals against settlement penalties brought before the General Court to date, there has not been any consideration of the issue.

The judgment resulted in a £1 million increase in the amount (previously £4 million) to be paid by Roland, and demonstrated the strong stance both the CMA and the CAT will take when faced with companies which attempt to undermine the procedures the CMA has put in place.

# OTHER DEVELOPMENTS

## MERGER CONTROL

### UK, GERMANY AND AUSTRALIA ISSUE JOINT STATEMENT ON MERGER CONTROL

On 20 April 2021 the UK Competition and Markets Authority, the Australian Competition & Consumer Commission and the German regulator Bundeskartellamt published a joint statement on merger control enforcement. The joint statement encourages agencies, courts and tribunals to protect competition despite the uncertainty of a forward-looking assessment, and the challenges in assessing complex markets. The view of the agencies is that firms will generally use gains in market power to increase returns to shareholders at the expense of the consumer, and so high concentrations should be prevented (preferably using structural remedies). The statement recognises several challenges to merger enforcement including uncertainty, complex markets and the COVID-19 pandemic.

In relation to the inherent uncertainty of a forward-looking assessment of a proposed merger, the statement notes that regulators should continue to consider long-term impact and that uncertainty of anti-competitive effects should not be a reason to grant clearance. The agencies state that firms present a view that mergers are presumptively efficiency enhancing which they claim is often overstated and should be challenged by regulators. The statement also advises that the market definition advocated by parties to the deal should be thoroughly tested using documents and data.

The agencies note an increase in the review of mergers in dynamic and fast-paced markets, particularly in technology markets in the last ten years. The technology sector is used as an example of a highly concentrated market featuring high barriers to entry and network effects, which may give rise to entrenched market power. The agencies believe anti-competitive mergers in these markets could cause significant harm due to the importance of the products, services and aggregation of data.

On the impact of COVID-19 the statement suggests a possible increase in acquisitions and stresses the need to protect consumers against loss of competition resulting from anti-competitive concentrations. Although the short-term impact of the pandemic may be a factor in review, the assessment should consider the impact on all firms in the market and be rigorous and evidence based.

## ANTITRUST

### EUROPEAN COMMISSION IMPOSES FINES ON TWO EU RAILWAY COMPANIES IN CARTEL SETTLEMENT

On 20 April 2021 the European Commission fined two railway companies a total of €48.594 million for a cartel offence. The two rail companies fined were the German Deutsche Bahn (DB) and the Belgian Société Nationale des Chemins de fer belges / Nationale Maatschappij der Belgische Spoorwegen (SNCB). The Austrian rail operator Österreichische Bundesbahnen (ÖBB) was also part of the cartel, but avoided a fine as a result of a leniency application.

The cartel was in the market of cross-border rail cargo transport services for conventional cargo (excluding automotive cargo) in the EU using 'blocktrain' and a freight sharing model. Blocktrain refers to the process of shipping goods between sites (for example, from an industrial site in Germany to a harbour in the Netherlands) without splitting the train or stopping en route. Blocktrain is favoured by customers transporting large volumes of a single commodity. The freight sharing model allows the railways providing cross-border transport services to offer customers one overall price under a multilateral contract.

The Commission found that DB, SNCB and ÖBB exchanged information concerning customer requests for competitive offers and provided each other with higher quotes in order to protect their business. This conduct was held to be a customer allocation scheme in breach of EU competition law. The investigation found the conduct lasted from December 2008 to April 2014 (with SNCB only joining in November 2011).

The Commission set the fines in line with their 2006 guidelines, fining DB €48.324 million and SNCB €270,000. DB's fine was increased by 50 per cent as it was considered a repeat offender, having been fined previously in 2015 for another cartel. ÖBB received full immunity as leniency applicant and avoided a fine of €37 million. A reduction of 10 per cent was applied to the fines in light of each company acknowledging its participation and liability in the cartel.

### RECORD-BREAKING FINE FOR ALIBABA AND INTERNET PLATFORMS COME UNDER THE SPOTLIGHT IN CHINA, AGAIN

On 10 April 2021 the State Administration for Market Regulation (SAMR) published its decision to fine Alibaba RMB 18.228 billion (approximately £2 billion) – a record in China – for abusing its market dominance in online retail platform services. SAMR found that Alibaba had breached the Anti-Monopoly Law in China through a business practice called "choose one of two", a form of exclusive dealing where Alibaba prohibited merchants from selling on, or participating in promotional activities of, rival online marketplaces.

Although the fine on Alibaba is enormous in terms of value, it represents 4 per cent of Alibaba's Chinese revenue in 2019, which is lower than the statutory maximum (10 per cent) and the percentages previously applied in the fines levied on Qualcomm (8 per cent), Tetra Pak (7 per cent) and other companies for similar conduct. Alibaba's full cooperation may explain the relatively moderate percentage adopted in this case.

For the first time, SAMR published an administrative guidance letter (Guidance Letter) to accompany the fine. The Guidance Letter requires Alibaba to formulate a plan to rectify the conduct and submit a compliance report for the next three years. However, this was not limited to Alibaba, as the day after publication of Alibaba's fine, SAMR held a meeting

with 34 leading Chinese internet companies, including Tencent, Baidu and Meituan, urging them to rectify any anti-competitive practices, and other issues such as data leakage, within a month and publicly pledge to comply with the law. Notwithstanding this, SAMR also announced on 26 April 2021 that it is now investigating Meituan (China's leading e-commerce platform for various services from food delivery to hotel and travel booking) for similar "choose one of two" conduct.

While these decisions appear to concern China's domestic internet companies, any company operating in China's digital space, domestic or foreign, should brace themselves for increased scrutiny in view of the regulatory focus on this sector. For businesses operating in the digital sector, competition and regulatory issues should continue to stay high on their agenda, both in China and globally.

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