

# Competition Disputes in the UK

## Spring 2020

We ended 2019 wondering whether Brexit would remain as all-consuming as it had been the previous three years. Cue the COVID-19 pandemic. We hope this newsletter finds you, your family and your colleagues in good health and adjusted to the new '*normal*'. We look back at the first three months of 2020, unforgettable in more ways than one, and how current developments may impact our future.

Our personal and professional lives will never be the same as the effects of the coronavirus will exist far beyond the pandemic itself. Unsurprisingly perhaps, a large part of this newsletter is taken up by COVID-19.

We highlight a couple of topical developments on competition and data privacy in light of the coronavirus, followed by key updates from the English Courts and the competition authorities and regulators.

We end the newsletter with a team update and how we adjusted to remote working while continuing to advise and represent our clients.

### COVID-19

#### Competition rule book

The COVID-19 pandemic has caused governments and competition regulators to take unprecedented steps to protect consumers during these extraordinary times. We reflect on the major responses and highlight some issues that may arise moving forward, including state aid and price gouging. We also consider what the competition landscape may look like once the COVID-19 pandemic comes to an end.

#### EC emphasises that privacy is key to the effectiveness of contact tracing Apps

As initiatives to adopt smartphone apps in the fight against COVID-19 gain increase in momentum across the globe, the European Commission has published Guidance on data protection standards for Apps fighting the pandemic. To be effective, it is estimated that they need to be used by as many as 80 % of smartphone owners, who will need to be assured that their fundamental rights, including privacy, are protected and that their data is not used for non-COVID-19 related activity, such as tracking movements and advertising. Our team investigates what needs to be done.

## **Contractual and supply chain issues**

The unprecedented situation caused by the pandemic places severe strain on business relationships and supply chains. Our commercial disputes team prepared [an easy-to-use checklist](#) on how COVID-19 may impact supply chain and what can be done, which may be useful to all.

## **£1 Million COVID-19 Commitment**

On 15 April, Hausfeld London announced that it will commit up to £1 million of its lawyers' time to enable businesses impacted by the COVID-19 outbreak to investigate significant commercial claims they may have arising out of COVID-19. This means eligible organisations will be able to seek advice in relation to situations caused by the impact of COVID-19 on their business. The investigation will be done on a non-recourse basis, i.e. the claimant will not have to pay for that time spent in almost all circumstances.

Hausfeld acknowledges COVID-19's devastating impact and offering up lawyer time and expertise is the firm's way to play its part in that recovery.

Competition claims include a) breaches of Articles 101 and 102 of the TFEU/ Competition Act 1998, b) breaches of State Aid rules; and c) breaches of Public Procurement rules. By way of example, a dominant player uses the COVID-19 situation to unreasonably increase its prices. This potentially unlawful abuse of its position may have an adverse effect on a business operating in that sector and/or reliant on its products.

Contact your usual Hausfeld contact or specific Commitment telephone number 020 7936 0949 or email us on [covid19commitment@hausfeld.com](mailto:covid19commitment@hausfeld.com). A member of our team will respond to you as quickly as possible.

## **Court Updates**

### **CAT judgment on funding and insurance in collective actions**

A recent judgment by the UK Competition Appeal Tribunal (CAT) in the *Trucks collective actions* regarding funding and adverse costs arrangements is welcome news for class claimants and undoubtedly positive for the development of the UK's young collective actions regime. The team [reviews the judgment](#), highlighting the associated costs, after the event insurance and level of cover included. Our competition experts also share their observations and consider how the Tribunal may interpret the relevant requirements for authorisation in future proceedings.

### **CAT's judgment on binding recitals and abuse of process in trucks litigation**

On 3 March 2020, the CAT ruled that findings from the European Commission's €2.93 billion cartel settlement with multiple truck manufacturers in 2016, are binding on several damages claims that have been brought against them in the UK. In its preliminary ruling, the CAT states that if the truck manufacturers were allowed to deny admissions made in the commission decision, this would result in an abuse of process, and thus be unfair for claimants in follow-on damages claims. On 26 March, the truck manufacturers were granted permission to appeal the ruling, and a timetable is awaited for that appeal. Hausfeld acts for three groups of claimants in these proceedings. Our team provides [an in-depth review](#) of the CAT's judgment.

### **English limitation rules in competition damages claims**

The High Court's judgment in *Granville v Infineon* is a forceful reminder for claimants to monitor the time for bringing a competition damages claim from the date they are put on notice of potential

infringements. Our team reviews the four [key points arising from the judgment](#), including the apparent divergence between European and English law and assess the practical implications this judgment will have on bringing competition damages claims going forward.

### **EU elevators and escalators cartel decision**

The Elevators and Escalators Cartel decision has given rise to extensive litigation across Europe, despite the decision dating back to 2007, shaping the follow-on litigation landscape, including a recent CJEU decision. The CJEU's findings are only a first step towards effective compensation and national courts are the gatekeepers, setting out the required thresholds to assess the existence, extent, and causal link of cartel losses. Our team explains the [EU lessons learned](#) so far.

### **The CJEU and competition in pharmaceutical market**

In January 2020, AG Kokott delivered her opinion following the CAT's request for a preliminary ruling related to the appeal by GSK, Generics (UK) Ltd, Xellia Pharmaceuticals, Alpharma, Actavis and Merck of the CMA's infringement decision adopted on 12 February 2016. The CAT sought guidance on the application and interpretation of both Articles 101 and 102 where the regulatory findings of anti-competitive conduct concern patent litigation and settlements of the type commonplace in the pharmaceutical industry. The team focuses only on the questions concerning [the interpretation of Article 101](#). Specifically, it considers the concepts of: (i) potential competition and (ii) restriction of competition by object in the pharmaceutical market – the same issues as are currently under consideration by the Court of Justice (CJEU) in the *Lundbeck* and *Servier* appeals.

### **The CJEU in Visa Mastercard**

The CJEU's judgment follows the Hungarian Supreme Court's preliminary reference on the interpretation of Article 101(1) in the context of an infringement finding by the Hungarian Competition Authority against Visa, Mastercard and a number of Hungarian banks in relation to interchange fees. [The team reviews](#) what is an unsurprising judgment in a well-established line of cases concerning the distinction between object and effect restrictions under Article 101(1). Nevertheless, it provides useful clarity on the precise construct of an object restriction and the importance of conducting a counterfactual analysis to determine whether conduct had anti-competitive effects on the market in question.

### **Hausfeld Case Updates**

Our team has remained busy, especially on abuse of dominance cases and collective actions, with hearings taking place at the General Court in Luxembourg and the CAT.

### **EC Google shopping decision hearing**

On 12-14 February 2020, the General Court in Luxembourg heard [Google's appeal against the European Commission's Google Shopping Decision of 2017](#), finding that Google breached European competition rules. The General Court heard submissions from Google, the European Commission (EC) and the interveners supporting the EC on these issues. Hausfeld London's client Foundem and Hausfeld Berlin's clients Visual Meta, BDZV, and VDZ intervened in support of the European Commission and the hearing was attended by lawyers across both offices. The hearing was reported widely amongst leading legal publications and newspapers in Europe.

## **Foreign exchange - collective action**

Following a case management hearing on 13 February 2020, the CAT [recently issued](#) its first ruling in the claim, holding that it should determine whether Phillip Evans or Michael O'Higgins FX Class Representative Ltd is more suitable to act as class representative in the collective action in respect of unlawful forex cartels during the main substantive hearing in March 2021. Hausfeld advises Mr Evans in his UK forex cartel collective action.

The ongoing [FX Claim UK opt-out collective action](#) was featured in *The Lawyer's* Top 20 Cases 2020. The renowned annual list showcases some of the most significant disputes to watch across the globe.

## **High Court allows Foundem's expert access to Google's confidential information**

On 18 March 2020, Mr Justice Roth granted Foundem's application ordering that Google must allow Foundem's independent technical expert to access to confidential evidence and documents, including Google's proprietary search algorithms or cease to rely upon such evidence. Foundem made its application after Google filed a strike-out application in respect of parts of Foundem's claim and relied upon technical evidence which Foundem itself was not permitted to see. Our team represented Foundem and [reviews the judgment](#) (which was handed down remotely).

## **Competition Authorities**

### **The CMA's Interim Report on online platforms and digital advertising**

Stakeholders have weighed in on the Competition Market Authority's (CMA) Interim Report on its market study into online platforms and digital advertising and criticised its decision not to launch an investigation despite clear suggestions of

serious competition concerns. Our team [review](#) on the responses received, including those of Facebook and Google. The final report in the CMA's market study, which will include a more comprehensive assessment of the issues and confirm the CMA's next steps, is due to be published by early July 2020, although we suspect the timing may be affected by the ongoing coronavirus pandemic.

## **Autorité de la Concurrence - Gibmedia/Google Ads decision**

Another infringement decision against Google – this time by the French Competition Authority (Autorité de la Concurrence) - found that Google abused its dominant position in the French market for search advertising through the operating rules applied by Google Ads, its auction-based advertising system. Our team [discusses the Gibmedia decision](#) and provides comprehensive background on the findings of abuse, the fines and additional measures.

## **The Competition Disputes Team Q1 2020 Developments**

On 1 March 2019, Hausfeld opened [Hausfeld Advocaten](#) in Amsterdam, its 7<sup>th</sup> office in Europe and 12<sup>th</sup> worldwide, consisting of the entire team of lawyers from Zipro Meijer Advocaten.

Tom Bolster was promoted to partner and Lucy Rigby promoted to counsel. We continue to grow the London team with Eleanor Powell, Samantha Hewitt, Hugh Tait, Rachael Baillie and Sara Berger joining the firm. The competition team now comprises 9 partners and 27 counsel/senior associates/associates.

Legal 500 UK recently awarded partner Lianne Craig "*Individual of the Year – Dispute Resolution London*".

## Remote working

Some of our lawyers shared how they cope with the challenges of remote working while trying to find the positive in their situation through their individual LinkedIn postings.

Anthony Maton [shared his journey](#) as managing partner leading a law firm remotely; Duran Ross wrote on how he has adapted to [remote working during the pandemic](#) with a small child; Ginevra Bicciolo shared about [remote working while on secondment](#); Vincent Poylo writes [about working across borders](#); Phoebe Toyne-Bridges [shares her remote working top tips](#); Eliza Buchanan on working remotely while sharing with housemates and Lucy Pert's personal account on how [personal and professional](#) life as a partner in a law firm can bring its challenges.

## #RemoteSilverLinings

Daily headlines paint a stark picture of life during and after the pandemic. We remain mindful of the impact COVID-19 has on all of us, but in an attempt to focus on the positive, the London team shared some of their unexpected silver linings of remote working on the Hausfeld social media accounts. Let us know how you bring positivity to your day using #RemoteSilverLinings.

*Scott Campbell, Partner, and Stella Gartagani, Senior Associate - Hausfeld London*

By following us on LinkedIn, you will gain access to the Hausfeld blog, Perspectives, as and when they are published. Team contact details of the team are on the next page.

**To discuss any of the topics or case highlights in this newsletter or how we can be of assistance, please contact:**



Anthony Maton  
Managing Partner, Vice Chair  
[amaton@hausfeld.com](mailto:amaton@hausfeld.com)  
+44 20 7665 5000



Laurent Geelhand  
Partner  
[lgeelhand@hausfeld.com](mailto:lgeelhand@hausfeld.com)  
+44 20 7665 5000



Scott Campbell  
Head of Competition Disputes  
[scampbell@hausfeld.com](mailto:scampbell@hausfeld.com)  
+44 20 7665 5000



Andrew Bullion  
Partner  
[abullion@hausfeld.com](mailto:abullion@hausfeld.com)  
+44 20 7665 5000



Nicola Boyle  
Partner  
[nboyle@hausfeld.com](mailto:nboyle@hausfeld.com)  
+44 20 7665 5000



Anna Morfey  
Partner  
[amorfey@hausfeld.com](mailto:amorfey@hausfeld.com)  
+44 20 7665 5000



Lesley Hannah  
Partner  
[lhannah@hausfeld.com](mailto:lhannah@hausfeld.com)  
+44 20 7665 5000



Wessen Jazrawi  
Partner  
[wjazrawi@hausfeld.com](mailto:wjazrawi@hausfeld.com)  
+44 20 7665 5000



Tom Bolster  
Partner  
[tbolster@hausfeld.com](mailto:tbolster@hausfeld.com)  
+44 20 7665 5000