share. The District Court did state, however, that disclosure could be necessary at a later stage in the procedure.

The EU's parental liability for cartel infringements does not extend to civil damages claims

Litigation vehicle East West Debt (EWD) initiated a damage claim against a number of elevator producers and their parent companies following the 2007 European Commission's elevators cartel decision. In July 2016, the District Court of Midden-Nederland ruled that EWD failed to prove the direct involvement of the parent companies in the cartel and that they could therefore not be held liable for the damage caused by the cartel. EWD had argued that, in line with settled European Union case law, the cartel conduct of wholly owned subsidiaries could be imputed to their parent companies. But the District Court of Midden-Nederland found that civil damages claims are governed by Dutch civil law and not EU law. Under Dutch civil law, a company is generally not liable for the damage caused by an unlawful act by another company, even when both companies are part of the same group. Consequently, the parent companies could not be held liable to pay damages for cartel infringements committed by their subsidiaries.

NEW ZEALAND

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Draft decline for 2:1 print merger; letter of unresolved issues in Sky/Vodafone

Print merger draft determination suggests a decline on 'quality & plurality grounds' – has the NZCC exceeded its jurisdiction or misapplied the 'Public Benefit' test?

On 8 November 2016, the New Zealand Commerce Commission (NZCC) issued a draft (preliminary) determination declining authorisation for the proposed New Zealand Media and Entertainment (NZME)/Fairfax merger. The proposal would essentially be a 'two to one' in newspaper supply (national dailies) and merge the two largest news websites. There would also be overlap in community publications, magazine supply and radio stations.

The NZCC assessed likely impacts in in advertising and reader markets for several media platforms as well as the overall impact on quality and plurality (diversity of voices).

Its preliminary view is that the proposal would to lessen competition in several markets, including the markets for premium digital advertising, advertising in Sunday newspapers and advertising in community newspapers in ten regions throughout New Zealand. The merged entity would likely increase subscription and retail prices for Sunday newspapers and introduce a paywall for at least one of its websites, said the NZCC.

Draft determinations are normally negative, allowing parties to provide further evidence. But unique factors here were the strength of language in the draft (suggesting that, if approved, 'this would be second highest concentration of print media ownership in the world, behind only China') and the advance public signaling (ie, before the draft) by NZCC chair Dr Mark Berry that this would world-leading. He observed:

> 'The NZME/Fairfax authorisation has presented a number of questions the Commission has never been asked to assess before, specifically around how the merger would impact the plurality of voices in the media. There is also limited international evidence for us to draw on, so we expect this decision and our analysis will be of interest not just to New Zealanders but competition organisations around the world.'

Authorisation is available for mergers which the NZCC would not 'clear' due to competition concerns. The NZCC must grant authorisation '… if it is satisfied that

the acquisition will… be likely to result, in such a benefit to the public that it should be permitted, by notice… grant an authorisation for the acquisition'. The only legislative guidance on this test is that the NZCC '… shall have regard to any efficiencies that… will result' from the proposal.

Here the NZCC observed:

'We recognise that the merger would achieve net financial benefits through organisational efficiencies. However, while we cannot quantify the detriments we see with respect to quality and plurality of the media, we consider that detriments resulting from increased concentration of media ownership in New Zealand would outweigh the quantified benefit we have calculated. In particular, the potential loss of plurality has weighed heavily in our draft decision. On this basis, we propose to decline the application.'

So, the NZCC acknowledged the considerable public benefits (though economic efficiencies) as is orthodox. But they decided that those benefits were 'trumped' by its quality and plurality concerns.

This raises several issues:

- Quality should arguably have been considered in its application of the substantial lessening of competition test. So, has there been double-counting?
- Does the NZCC have jurisdiction? New Zealand has clearly decided not to have separate cross media ownership rules, so should the NZCC become the de facto regulator when the legislature has chosen not to have such rules? Should it regulate 'social policy'?
- Even if the NZCC has applied the test correctly, is it right in its conclusion on harm? Has it weighted this correctly against the efficiencies (roughly NZ$14m over five years)?

On the face of it the public benefit test appears broad but there has been relatively limited guidance by the courts or the NZCC on non-economic benefits. Indeed, in *Godfrey Hirst* (2011) the High Court observed:

'Consistent with economic theory, detriments (welfare losses) are quantified (as far as practicable) under three categories of efficiency losses: allocative, productive and dynamic. Efficiency benefits (welfare gains), recognised pursuant to s 3A, are also quantified. Other benefits claimed by a party seeking an authorisation are quantified if possible. The Commission then forms its view on the range, magnitude and likelihood of all the claimed benefits (those quantified and any that are not quantifiable).'

And:

'… the *Commission is not required to overlay some kind of social policy judgment (enabling it to decline an authorisation even if the merger specific efficiencies accepted by the Commission outweigh the efficiencies likely to be lost through the substantial lessening of competition* or conversely to grant an authorisation where losses exceed gains).'

NZCC Letter of Unresolved Issues (LUI) in Vodafone/Sky – first ever published LUI

The NZCC has published a LUI for the proposed Vodafone/Sky merger in New Zealand, citing concerns around vertical and/or conglomerate effects. This is the first known time the NZCC has published a LUI. Many will see this is a step to even greater transparency in the merger review process. The LUI sets out current concerns but is not fatal to the proposed merger. More than half of recent mergers with LUIs were cleared.

We are only aware of the NZCC ever blocking one merger on non-horizontal grounds – in 2005.

The NZCC is considering the impact of the proposed merger on the national retail markets for the provision of:
(1) residential fixed-line broadband services;
(2) mobile services; and (3) pay television (TV) services,
as well as the national wholesale market for the provision of pay TV services. The NZCC does not currently consider that the proposed merger is likely to substantially lessen competition in any wider market for the provision of pay TV and free-to-air TV services.

The LUI notes that the NZCC concerns arise from the following:

- the merged entity would have substantial market power by virtue of its portfolio of content, including premium content such as live rugby;
- the merged entity would have an increased incentive and ability to make buying Sky on a standalone basis relatively less attractive than buying it in a bundle (with mobile and/or broadband) offered by the merged entity, resulting in customers switching to the merged entity;
- the merged entity would have less incentive to enter into reselling arrangements than Sky would in the counterfactual, meaning

rivals would be unable to offer bundles with Sky and mobile/broadband services or offer bundles as attractive as those offered by the merged entity; and
- because of the above, one or more rivals may lose customers to such an extent that they no longer provide an effective constraint in a telecommunications market, allowing the merged entity to profitably raise prices of a telecommunications service above levels that would prevail in the counterfactual.

A challenge for the NZCC is that it cannot accept behavioural undertakings, although we consider that there could be de facto undertakings, enforceable by third parties that could form part of the factual for the merger analysis. The parties could provide the NZCC with rights to enforce those deeds – the NZCC would also likely have rights to enforce them through the courts under NZ's consumer protection laws (the Fair Trading Act).

At the time of writing, it was reported Sky Network Television says the date for a decision on its Commerce Commission application to merge with Vodafone New Zealand has been pushed back to 21 December 2016 to let the regulator process new submissions and cross submissions.

New Zealand merger review process normally follows this process

- *Statement of Preliminary Issues* (SOPI): For most clearance applications, the NZCC publishes a SOPI. This document is generally high level and outlines the NZCC's preliminary view of the competition issues that will be relevant to its consideration of the proposed merger. Interested parties are in invited to submit on the SOPI.
- *Letter of Issues* (LOI): If, following its initial investigation, the NZCC has concerns about potential competition issues that may arise from a proposed merger, it may send a LOI to the *applicant*. A LOI is intended to outline the NZCC's concerns and provide the applicant with an opportunity to provide further information that might address those concerns. Around one-third of recent mergers progressed to the LOI stage (ie two-thirds of recent mergers were cleared without progressing to the LOI stage).
- *Letter of Unresolved Issues*: If, following an applicant's response to a LOI, the NZCC has remaining concerns (ie, some or all the concerns noted in a LOI are unresolved), it will likely send a LUI to the *applicant*. The applicant will then have a final opportunity to provide additional information to allay the NZCC's concerns, such as divestment undertakings. Around two-thirds of recent mergers that reached the Letter of Issues Stage progressed further to the LUI stage.

Neither a LOI nor LUI have previously been published.

POLAND

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Anonymous person denounces price-fixing on the Polish market by the professional association for *in vitro* treatment

Introduction

Professional associations are a common platform for discussions and exchanges of views for undertakings from specific sectors. However, on occasion, these discussions can go too far and cause the competition authorities to intervene.

On 1 September 2016, the President of the Polish Office of Competition and Consumer Protection, the (OCCP), fined the Association of Polish Centres for Infertility Treatment and Reproductive Development (the 'Association') for fixing the prices of its members in the offers submitted to the Polish Ministry of Health (the 'Ministry') in 2013 and 2014.