HAIRDRYER TREATMENT FROM UK COMPETITION REGULATORS: MORE RED CARDS IN THE BEAUTIFUL GAME

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Policy and Regulatory Alert

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Two decisions this year in the United Kingdom concerning Leicester City Football Club (Leicester City) and Newcastle United Football Club (Newcastle United) show that competition law may be becoming a more prevalent part of the beautiful game. In the Leicester City case the parties involved were found to have breached the Chapter I prohibition of the Competition Act 1998 (Competition Act) by colluding to restrict competition in the sales of Leicester City branded clothing, including replica kits. In the Newcastle United case the club was accused by retailer SportsDirect.com Retail Limited (Sports Direct) of abuse of a dominant position under Chapter II of the Competition Act.

The decisions follow two major EU judgments by the Court of Justice of the European Union (CJEU) in December 2023 concerning the European Super League and UEFA's home grown players' rule. As the money in football continues to reach astronomical levels and the audience for the game continues to expand, failing to comply with competition law now carries far greater risks. Clubs, sporting goods retailers, and governing bodies are just some of the stakeholders that need to be aware of the risks associated with failure to comply with competition law as illustrated by these recent UK decisions.

SPORTS DIRECT V. NEWCASTLE UNITED

On 15 March 2024 Sports Direct brought a claim before the Competition and Appeal Tribunal (CAT)[1] against Newcastle United alleging that the club has abused its dominant market position by unlawfully refusing to supply Sports Direct and was therefore in breach of Chapter II of the Competition Act. Further, or in the alternative, Sports Direct contended that Newcastle United is in breach of the Chapter I prohibition of the Competition Act by engaging in an anti-competitive agreement with JD Sports Fashion Plc (JD Sports) and Adidas.

As set out in Sports Direct's claim, for the 2024-2025 football season Newcastle United will change its kit manufacturer from Castore to Adidas and as part of the move Newcastle United has designated that its kit will be sold via the club's own retail stores, Adidas resale channels, and sportswear retailer JD Sports; but not via Sports Direct. Sports Direct argued that JD Sports would effectively be granted exclusive retail rights to the Newcastle United replica kit, thereby removing Sports Direct from the downstream retail market and reducing effective market competition. Sports Direct contended it had been selling Newcastle United's kit for decades and its absence on the market would remove a key competitive option for consumers. Sports Direct therefore applied for an injunction obliging Newcastle United to supply it with the replica kit until judgment or further order. The CAT

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acknowledged a ruling would be needed imminently, not least due to the impending release of the official kit, which represents a key selling period over the summer in advance of the new season.

The CAT delivered its judgment on 12 April 2024[2] and refused Sports Direct's application for an injunction. The judgment outlined that once the ownership of Newcastle United had changed hands, the new owners were entitled to revisit their commercial relationships. The judgment reaffirmed that the existence of dominance does not give rise to a presumption of abuse and that whilst Newcastle United were dominant in the market for their own replica kits they had not engaged in abusive conduct by entering into new supply and sale arrangements. Newcastle United also argued that the club and Castore had previously entered into similar exclusivity arrangements, and the CAT recognised that such arrangements are reasonable commercial practices that are not in breach of competition law whether via Chapter I or Chapter II.

Whilst the CAT refused Sports Direct's right to appeal the injunction judgment on 19 April 2024,[3] the 12 April 2024 judgment acknowledged that the parties could still proceed to a separate substantive trial to further dispute the issues at hand. We would query whether the CAT may have ruled differently if Newcastle United had not previously entered into similar exclusive commercial agreements under its previous ownership and whether the restriction of the wider availability of the club's replica kits needs to be considered further. It remains to be seen how the parties will proceed including regarding potential further appeal by Sports Direct.

CMA INVESTIGATION OF JD SPORTS AND LEICESTER CITY

The UK Competition and Markets Authority (CMA) first opened the investigation against JD Sports and Leicester City FC on 23 September 2021 and published the full results of its investigation on 9 January 2024. The regulator suspected Chapter I infringements in relation to the sale of Leicester City FC-branded products and merchandise in the UK.

The CMA found that JD Sports and Leicester City infringed competition law by colluding to restrict the sales of Leicester City-branded clothing. In particular, the companies entered into various market sharing and price-fixing agreements across seasons spanning from August 2018 to July 2020. The agreements included the following anti-competitive practices:

Market sharing, whereby on 21 August 2018 JD Sports and Leicester City agreed that JD Sports would immediately cease their online sales, consequentially making Leicester City the only online retailer of 2018/2019 new Leicester City branded clothing for the first part of the 2018/2019 football season.

Price-fixing agreement for the 2019/2020 football season which entailed JD Sports not offering otherwise free delivery for orders of over £70 if they were for Leicester City-branded clothing products, thus ensuring that Leicester City online sales were not undercut.

Finally, for the 2020/2021 season, the parties extended the above price-fixing agreement so that JD Sports continued to charge delivery fees to customers for online orders of Leicester City-branded clothing. However, on 26 January 2021, JD Sports took steps to terminate its compliance with this agreement. As such, the CMA found that anticompetitive conduct between the parties continued between 21 August 2018 and 26 January 2021.

Fines

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In accordance with the settlement agreement, Leicester City and its parent companies have been fined £880,000. This figure is low for a cartel infringement and reflects a substantial settlement discount - intended to take account of the CMA's resources saved through Leicester City's admission of the anti-competitive conduct. JD Sports applied to the CMA for leniency and therefore received full immunity from competition law fines. The CMA's leniency policy affords full immunity from civil and criminal penalties (that would otherwise be imposed by the regulator) for the first cartel participant that blows the whistle, by divulging information on the arrangement to the CMA.

The retailer's previous run-ins with the CMA likely prompted it to seize the first-mover advantage of leniency. In October 2022, the regulator imposed fines totalling over £2 million on Elite Sports, JD Sports, and Rangers FC for fixing the prices of certain Rangers FC merchandise. JD Sports was fined almost £1.5 million of this total.[4]

Analysis

The Leicester City infringement decision epitomises the CMA's continued focus on consumer-facing markets, and in popular sectors such as football kits, especially in light of rising cost of living pressures. They also act as a cautionary tale on the competition law risks that companies face when operating what are known as “dual distribution” models - i.e. selling to both downstream retailers and directly to consumers. The CMA found that JD Sports and Leicester City were parties to a single and continuous infringement that constituted an agreement and concerted practice amongst competitors to limit the scope of competition for Leicester City's own-branded clothing products in the UK. However, the CMA acknowledged the potential for vertical infringement in this decision given JD Sport's role as a reseller. This denotes a stark warning that companies should be aware of when operating within a dual distribution context.

KEEP YOUR EYE ON THE COMPETITION BALL

In the context of the CJEU's two landmark decisions in December 2023 concerning the Super League, the football agents FA tribunal decision[5] and these two new UK decisions, it certainly appears that competition law may become an even more prevalent feature in the football world. It is also interesting to observe that Leicester City has been in financial trouble recently.[6] Companies in financial distress can be tempted to risk engaging in anti-competitive conduct as a “quick fix” and may not put the same level of resources into internal compliance. In an uncertain financial landscape, with Premier League clubs having recorded approximately £3.6 billion worth of debt in their accounts up to 2023,[7] litigious action may also become more prevalent—so football stakeholders should take heed of the ever-growing risk of challenge or investigation. We will continue to monitor this space closely and are happy to answer any questions you may have on these cases or your own business' competition law compliance.

FOOTNOTES

[1] https://www.catribunal.org.uk/sites/cat/files/2024-03/16375724%20-%20Sports%20Direct%20v%20Newcastle%20United%20-%20Summary%20of%20claim%2021%20Mar%202024.pdf

[2] https://www.catribunal.org.uk/sites/cat/files/2024-

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04/16375724%20%20SportsDirect.com%20Retail%20Limited%20v%20%281%29%20Newcastle%20United%20Football%20Company%20Limited%20and%20%282%29%20Newcastle%20United%20Limited%20-%20Judgment%20%28Injunction%29%20%20%2012%20Apr%202024.pdf

[3] https://www.catribunal.org.uk/sites/cat/files/2024-04/16375724%20%20SportsDirect.com%20Retail%20Limited%20v%20%281%29%20Newcastle%20United%20Football%20Company%20Limited%20and%20%282%29%20Newcastle%20United%20Limited%20-%20Reasoned%20Order%20of%20the%20President%20%28Permission%20to%20Appeal%29%20%2019%20Apr%202024.pdf

[4] Please see our previous article on that here: What The UK Competition Authority's Price Fixing Investigation Could Mean For Football Clubs & Kit Suppliers - LawInSport

[5] https://www.lawinsport.com/topics/item/the-end-of-the-fifa-agents-cap-and-the-beginning-of-a-less-restrained-standard-of-competition-review-in-sport

[6] https://www.bbc.co.uk/sport/football/68709502#:~:text=Leicester%20City%20have%20reported%20a,figures%20they%20have%20now%20released.

[7] https://www.bbc.co.uk/sport/football/68713522

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