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Ashurst competition law newsletter

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From the Editor

The October issue of Ashurst's competition law newsletter is now out, featuring a round-up of a number of developments that have caught our eye. This edition includes the CMA's first ever land agreement infringement decision, an insight into what UK competition law might look like in a "no deal" Brexit scenario, the English courts' first ever follow-on cartel damages judgment, the European Commission's McDonald's State aid decision, German's first reported case of an external adviser being fined for involvement in a cartel, and the landmark Damages Directive trucks disclosure judgment in the English Court, as well as other topics.

Chips are down for General Court: ECJ orders reassessment of smart card chips fine

EU (PROCEDURE)

On 26 September 2018, the European Court of Justice ("ECJ") handed down judgments in Infineon (Case C-99/17 P) and Philips (Case C-98/17 P) relating to the European Commission's (the "Commission's") decision on the smart card chips cartel in 2014 (see our September 2014 newsletter). The ECJ set aside the General Court's judgment in Infineon, inasmuch as it relates to the assessment of the Commission's fine, and referred the case back to the General Court. All other claims brought by Infineon, and the entirety of Philips' appeal, were dismissed.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Direct exchanges between competitors of commercially sensitive information such as pricing intentions constitute restrictions by "object", dispensing with competition authorities' requirement to establish the existence of any actual anti-competitive effects.
- In principle, the ECJ will only intervene in the assessment of the level of the Commission's fines in cases where fines are excessive, to the point of being disproportionate.
- However, at first instance, the General Court must take into account all of the relevant circumstances, including the limited involvement in the cartel behaviour, when asked to assess the proportionality of the Commission's fine.

THE GENERAL COURT'S REVIEW OF THE EVIDENCE

Both parties alleged errors in the General Court's review of the evidence. In this regard, Infineon alleged that the General Court examined only five of the 11 unlawful contacts identified by the Commission, and made four further allegations relating to the authenticity and probative value of evidence adduced by Samsung (a party to the smart card chips cartel).

The ECJ, however, held that the General Court was justified in limiting its review of unlawful

contacts on the basis that prices were principally negotiated on an annual basis. Moreover, it was for Infineon to establish before the General Court that evidence relied upon by the Commission was inauthentic (and that the outcome of the Commission's decision would have been different absent that evidence). Further allegations by Infineon and Philips that the General Court had distorted evidence were also rejected.

THE APPLICATION OF ARTICLE 101 TFEU TO DIRECT EXCHANGES OF COMMERCIALLY SENSITIVE INFORMATION BETWEEN COMPETITORS

Infineon and Philips were similarly unsuccessful when alleging that the General Court applied Article 101 TFEU incorrectly. Contrary to pleas made by both parties, the ECJ held that the General Court applied the correct legal standard when finding that the Commission was not required to demonstrate the existence of anticompetitive effects in relation to direct exchanges between competitors of pricing intentions and other commercially sensitive information such as production capacities. It was sufficient to show that, having regard to economic factors characterising the market, the information at issue was capable of influencing directly the competitive behaviour on the market. The ECJ also confirmed that there was no basis for Philips' allegation that its intentions were insufficiently taken into account, as intention is not necessary to establish whether coordination is restrictive under Article 101 TFEU.

The ECJ rejected further allegations brought by Infineon and Philips concerning the General Court's assessment of the existence of a single and continuous infringement:

- It was held that there was no requirement to show Infineon's awareness of the collusive conduct of other members to the infringement in circumstances where Infineon itself was only liable to the extent of its own involvement (and not the infringement as a whole).
- Secondly, Philips could not challenge the General Court's assessment of a single and continuous infringement in circumstances where it had failed to establish that the General Court had effectively distorted the evidence.

THE ASSESSMENT OF FINES

Philips' claim that the Commission applied a disproportionate fine under the Commission's 2006 Fining Guidelines was dismissed. The ECJ confirmed that it is only in cases where the fine is "*excessive to the point of being disproportionate*", rather than merely inappropriate, that the ECJ will find that the General Court erred in law.

Infineon was, however, successful in its allegation that the General Court erred by taking into account, when assessing the amount of Infineon's fine, only five of the 11 unlawful contacts with Samsung or Renesas (another party to the smart card chips cartel). Following the Opinion of Advocate General Wathelet, the ECJ held that the General Court is required to consider all complaints based on issues of law and fact which seek to show that the amount of the fine is not commensurate with the gravity or duration of the infringement, in order to satisfy Infineon's fundamental rights to a fair trial. In this regard, the General Court must consider whether the relatively small number of Infineon's unlawful contacts warranted a reduction in the fine, beyond a 20% reduction it had already received on account of other mitigating circumstances.

CONCLUSION

For the most part, the *Infineon* and *Philips* judgments confirm established practice that the ECJ will adopt a strict legal standard to cartel-like exchanges of information cases and uphold the discretion of the Commission to assess the gravity of fines imposed on the parties. However, and importantly, when asked to review the proportionality of the Commission's fine, the General Court must take account of "*all the relevant circumstances*". In *Infineon*, this required the General Court to have regard to whether the fine applied was commensurate with the number of unlawful contacts between Infineon and rival undertakings.

Landmark Damages Directive trucks disclosure judgment in English courts

UK (PRIVATE DAMAGES ACTIONS)

On 15 August 2018, the Court of Appeal (of England and Wales) refused DAF and Iveco (truck manufacturers) permission to appeal an order requiring DAF to disclose a substantial part of the European Commission's ("Commission") case file in the Trucks Cartel. It is the first decision in the English courts to apply the new procedural rules implementing the Damages Directive which govern access to the case file. Ashurst is advising Ryder.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Prior to the implementation of the Damages Directive into English law, there were no specific rules governing disclosure of a competition regulator's case file to a claimant in a related follow-on damages claim.
- Since 9 March 2017, claimants seeking such disclosure must make an application to the Court and must satisfy certain conditions relating to plausibility, specificity and proportionality (central concepts in the Damages Directive).
- The Court was willing to adopt a purposive interpretation of the provisions of the Damages Directive. In particular, the Court did not view those provisions as inconsistent with the continued operation of the disclosure rules that exist in English litigation.
- The decision is to be viewed with care – the High Court and Court of Appeal were faced with balancing the need to apply the Damages Directive correctly with the need to maintain internal consistency between parallel follow-on damages claims arising from the same facts but subject to different procedural rules.

Claimants in competition follow-on damages cases frequently seek disclosure of the competition regulator's case file. The case file often contains important evidence, previously unknown to claimants, which can assist in pleading and proving their case. Until recently, there were no specific procedural rules governing access to the case file. It was open to claimants to seek to agree production of the file in correspondence or, where this was resisted by the defendant(s), to apply to the Court for the same. New English procedural rules implementing Directive 2014/104/EU (the "Damages Directive") now require an application to be made.

On 15 August 2018, the Court of Appeal refused DAF and Iveco (truck manufacturers) permission to appeal an order requiring DAF to disclose a substantial part of the Commission's case file in the Trucks Cartel. The disclosure order was made by Mr Justice Roth in the High Court on 31 July 2018 in favour of Ryder Limited. It is the first decision to apply the new rules in the English courts.

The order was made in four parallel follow-on damages claims in the High Court arising from the Commission's decision of 19 July 2016 relating to the Trucks Cartel (the "Decision"). The Decision fined five groups of truck manufacturers (MAN, Volvo/Renault, Daimler, Iveco and DAF) for participating in a pan-EEA cartel concerning medium and heavy trucks from 1997 to 2011. The Commission also fined Scania (another manufacturer) for the same conduct in a separate decision which is on appeal in the EU courts.

The Commission's findings have given rise to considerable follow-on litigation across Europe. In the UK, the first claimant to issue a claim was Royal Mail in December 2016. Ashurst is advising Ryder, a global leader in the truck leasing and rental sectors, in respect of its claim against MAN, Volvo/Renault, Daimler, Iveco and DAF. The claim was issued on 20 December 2017.

Since 9 March 2017, new procedural rules in Practice Direction 31C of the Civil Procedure Rules implementing provisions of the Damages Directive have introduced a requirement for claimants to make an application in order to obtain disclosure of the case file. Such an application must:

- contain a statement of the reasonably available facts and evidence sufficient to support the plausibility of the claim for damages;
- include a description of the evidence sought that is precise and narrow as possible on the basis of that statement; and
- be proportionate (with specific regard to the criteria in Article 5(3) of the Damages Directive).

Ryder's claim fell within Practice Direction 31C, whereas Royal Mail's claim (because it was issued prior to 9 March 2017) did not. Royal Mail sought and obtained disclosure of the Commission's case file (subject to specific exclusions) at a case management conference before Mrs Justice Rose in December 2017.

In June 2018, Ryder (alongside other claimants in parallel proceedings) applied to the High Court for disclosure from DAF of the same version of the Commission case file that had been disclosed to Royal Mail. Unlike Royal Mail, the applicants were obliged to satisfy the Court that the applications complied with Practice Direction 31C.

The applications were heavily contested by DAF and Iveco (which intervened to seek an adjournment). This was compounded by written submissions from the Commission suggesting that the applications may not be compliant with the Damages Directive.

Roth J ruled in favour of Ryder and its co-applicants. He held that the applications were compliant with the Damages Directive. Roth J had specific regard to the fact that the applicants sought no more than that which had already been disclosed to Royal Mail previously, albeit under a different procedural framework.

DAF unsuccessfully sought permission from the Court of Appeal to appeal Roth J's order.

Medical waste disposal supplier fined for excessive pricing

FRANCE (ANTI-TRUST – ABUSE OF DOMINANCE)

The French Competition Authority, the Autorité de la concurrence ("AdlC"), has imposed a fine of €199 000 on Sanicorse for abusing its dominant position between 2011 and 2015. The company used its monopoly to abruptly, and significantly increase the price of its waste disposal services for infectious medical waste generated by healthcare establishments in Corsica.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Unlike Article 102 of the TFEU, the imposition of unfair prices is not expressly cited as an example of an abuse of dominance in the French equivalent prohibition.
- However, the AdlC set out a number of contributing factors why Sanicorse's price increases qualified as abusive conduct. In particular, because the price rises where significant, permanent and not objective justified.

Healthcare establishments are under a number of strict duties when they dispose of infectious medical waste. A number of them outsource this task to specialist companies. Sanicorse is one of these specialists and the only one active in Corsica. It therefore enjoys a *de facto* monopoly in the island which, according to the AdlC, constitutes a separate market.

From 2011, Sanicorse applied price increases to its customers reaching an average of 88% between 2010 and 2012 (individual increases of up to 135% or 194% were sometimes applied).

- Unlike Article 102 of the TFEU, the imposition of unfair prices is not cited as an example of an abuse of a dominant position in the French equivalent prohibition. However, the AdlC considers that it may, in certain circumstances, the dominant undertaking enjoys a monopoly that may not be contested by potential competitors; and

- there is evidence that the dominant undertaking has implemented a strategy to exploit its customers. Such a strategy may be evidenced, in the case of a price increase, by the fact that it is sudden, significant, permanent and not objectively justified.

The AdlC considered that these circumstances were met in this case for the following reasons:

- It observed that the price increases were applied without any prior notice and under an implicit threat to terminate or not to renew the agreements if the price increases were refused.
- The AdlC considered that the price increases were significant as they exceeded 60% and were imposed on captive customers.
- The AdlC observed that Sanicorse applied the prices increases for a period of more than four years. Thus, the price increases could not constitute a transitory business strategy.
- The AdlC also concluded that the price increases were not justified by Sanicorse's costs or investments. Rather, they were used as a threat of retaliation in case its clients developed alternative solutions for the disposal of medical waste.

On 20 September 2018, the AdlC therefore held that Sanicorse abused its dominant position and imposed a fine of €199,000.

It is interesting to note that Sanicorse could have paid a much lower fine had it not refused a settlement offer proposed by the Minister of the Economy, under its competition law enforcement powers in relation to local anti-competitive practices applied by small undertakings.

External adviser fined for first time as part of publishing cartel

GERMANY (ANTI-TRUST – CARTELS)

On 3 September 2018, the German Federal Cartel Office ("FCO") imposed fines amounting to in total €16 million on DuMont Mediengruppe GmbH & Co. KG ("DuMont"), an individual responsible within DuMont and DuMont's external lawyer for having concluded from 2000 - 2016 an illegal territorial agreement with its competitor, the Bonner General-Anzeiger media group ("Bonner General-Anzeiger"), to carve up the newspaper publishing market in the Bonn region. Bonner General-Anzeiger escaped a fine as it blew the whistle.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Two newspaper publishers, DuMont and Bonner General-Anzeiger, have been found to have infringed competition law in Germany by engaging in a market sharing cartel in the Bonn region.
- In July 2017, German competition law introduced an antitrust exemption provision for the press sector aimed to help ensure press diversity, facilitate cooperation between publishers and strengthen intermedia competition. The exemption, however, does not apply to price-fixing or market sharing agreements.
- Whilst it is common for the FCO to impose fines on individuals who were involved in a cartel (as it has done in this case), this is the first time that the FCO has published the fact that it has fined an external legal adviser for its role in advising the cartel participants.

Newspaper publishers DuMont and Bonner General-Anzeiger had previously agreed, in December 2000, that they would allocate geographic areas in the Bonn region by withdrawing distribution of their newspapers from areas allocated to the other publisher.

In addition, the companies safeguarded the territorial agreements, which were to run until 2016 by awarding DuMont a pre-emption right over shares in Bonner General-Anzeiger.

In March 2004, DuMont notified its envisaged acquisition of an 18% shareholding (plus the pre-emption right) in Bonner General-Anzeiger to the FCO. Even though DuMont decreased the envisaged shareholding to 9% and gave up the pre-emption right, the FCO prohibited the transaction. DuMont appealed the prohibition to the Higher Regional Court of Düsseldorf ("Düsseldorf Court") which, in July 2005, rejected the prohibition. The Düsseldorf Court held that the acquisition of 9% did not constitute a "concentration", since it did not amount to the acquisition of a "competitively significant influence".

Under German law, the acquisition of a competitively significant influence constitutes a concentration if a minority shareholding, i.e. below 25%,[1] and certain "plus factors" are acquired, i.e. factors that make the situation comparable to an acquisition of 25%. In general terms, the "plus factors" can include anything that may give the acquirer the possibility of influencing the (competitive) conduct of the target, such as representation of the acquirer on the Board or in any other committee of the target, *de facto* personal links between the acquirer and the target, information rights of the acquirer as a shareholder, for example, and also pre-emption rights. Since DuMont gave up its pre-emption right, the Düsseldorf Court concluded that there were no such "plus factors".

However, in December 2005, Bonner General-Anzeiger again agreed to grant a pre-emption right in favour of DuMont. In September 2006, DuMont and Bonner General-Anzeiger increased their mutual shares from 9% to 18% which they notified to the FCO. However, they deliberately did not disclose DuMont's pre-emption right to the FCO although, as the companies knew from the Düsseldorf Court's decision, it was of key relevance for the examination of the question of mutual participation under German merger control. In December 2016, DuMont and Bonner General-Anzeiger concluded an agreement to terminate their mutual participation as of December 2016.

The FCO found that the territorial agreements between DuMont and Bonner General-Anzeiger were aimed at phasing out competition between the publishers and therefore were in breach of competition law and did not benefit from the press sector antitrust exemption introduced in July 2017. In order to ensure press diversity, the new press antitrust exemption provision allows certain cooperations between publishers to strengthen their economic basis for intermedia competition. However, this provision does not exempt price-fixing, territorial and customer agreements from the cartel prohibition.

For the first time the FCO has fined an external lawyer as part of its decision. The lawyer advised DuMont during the entire period from 2000 to 2016 and was actively involved in all communications with the FCO and in the operations.

This case therefore illustrates the FCO's common practice to impose fines not only on the companies involved in a cartel, but also on individuals responsible, including external advisers.

[1] An acquisition of 25% automatically constitutes a relevant concentration.

Commission unconditionally clears Apple's acquisition of Shazam

EU (MERGER CONTROL)

On 6 September 2018, the European Commission ("Commission") unconditionally cleared Apple's acquisition of Shazam after a Phase 2 review, concluding that the transaction would not adversely affect competition in the European Economic Area.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The transaction did not trigger the turnover thresholds under the EU Merger Regulation ("EUMR"), but it was notified in Austria.
- The Commission's jurisdiction to review the transaction was triggered by a case referral request made by seven Member States pursuant to Article 22(1) of the EUMR, even though the transaction only met the national merger control thresholds of one of them (Austria).
- This case is a reminder that transactions that do not trigger the EUMR thresholds are capable of raising prima facie competition concerns justifying a decision to open an in-depth Phase 2 investigation.

The proposed acquisition was initially notified to the Austrian competition authority as the transaction did not meet the turnover thresholds prescribed by the EUMR. Following a referral request by Austria, France, Iceland, Italy, Norway, Spain and Sweden, the transaction was notified to the Commission in March 2018.

Following a preliminary investigation, the Commission concluded that Apple and Shazam offer complementary services and are not direct competitors. In particular, the Commission identified that Apple Music is the second largest music streaming service in Europe after Spotify, while Shazam is the market leader in the supply of music recognition apps.

On 23 April 2018, the Commission decided to open a Phase 2 investigation due to the risk that the transaction could result in a reduction of choice for users of music streaming services. The main concern was that, as a result of the transaction, Apple would obtain access to commercially sensitive data held by Shazam relating to its competitors' customers, which it could use to encourage those customers to switch to Apple Music.

After considering further evidence obtained from stakeholders during its Phase 2 investigation, the Commission concluded that the transaction would not raise competition concerns. In particular, the Commission found that:

- the acquisition would not enable Apple to foreclose competing providers of digital music streaming services either (a) as a result of having access to commercially sensitive information about Shazam's customers or (b) by restricting access to the Shazam app. These findings hinge on the fact that the transaction will not materially increase Apple's ability to target music enthusiasts and any attempt to make customers switch would not have a significant impact on the market;
- there was lack of evidence that the Shazam app functions as an entry point to music streaming services; and
- Shazam's data is not unique and Apple's competitors would still have the opportunity to access and use a similar database. Therefore, the Commission concluded that Apple's access to Shazam's data would not provide a unique advantage to the merged entity in the markets in which it operates

This decision raises a couple of interesting issues:

- Firstly, it is an example of the Commission grappling with the impact on competition of a company obtaining access to data relating to potential customers. This has been a recurring issue in recent cases, including the recent decision by the Commission to open an antitrust investigation concerning Amazon's use of digital information. In the *Apple/Shazam* case, the Commission appears to have got sufficiently comfortable that access to data would not give rise to competition concerns. However, interestingly, the Commission's press release includes an express reminder that "a merger decision does not release companies from respecting all relevant data protection laws".
- Secondly, the case (once again) raises the question as to whether or not the jurisdictional thresholds under the EUMR remain fit for purpose, particularly in the context of acquisitions of tech companies with significant commercial value but limited turnover. In particular, this case demonstrates that such transactions are, at least in principle, capable of having a significant impact on EU-wide competition. Whilst the referral mechanisms under the EUMR meant that the *Apple/Shazam* transaction could be reviewed by the Commission, this will not necessarily be the case in all similar cases. In this regard, the Commission is reliant on (a) national merger control thresholds being engaged and (b) Member States or, as was the case in *Facebook/Whatsapp*, the notifying parties seeking the referral of such cases to the Commission.

For further comment on some of the key issues and themes which are commonly encountered when dealing with data-related transactions, and whether competition authorities are changing the way they assess data mergers, see the Ashurst March 2018 article "*If data has become the "new oil", what are the key issues that are arising in M&A transactions?*".

CMA "scraps" Phase 1 recycling merger decision

UK (MERGER CONTROL)

On 14 August 2018 the CMA published its Phase 2 decision in relation to the merger of Ausurus Group Ltd and Metal and Waste Recycling. The final decision is very unusual in that of the four markets in which competition concerns were identified, three were not previously identified as areas of concern in the Phase 1 decision.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This case represents an unusual example of where the CMA's Phase 2 concerns were wider in scope than their Phase 1 decision.
- This is unusual as the CMA is under a duty to refer mergers for a Phase 2 investigation where there is a realistic prospect of a substantial lessening of competition, which is a materially lower threshold than the standard of proof at Phase 2.
- This case is a cautionary reminder that issues which may have appeared to have fallen outside the CMA's focus at the end of Phase 1, may be re-examined at Phase 2.

In August 2017, Ausurus Group Ltd (through its subsidiary European Metal Recycling ("EMR")) completed the acquisition of Metal and Waste Recycling ("MWR"). EMR is the

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largest metal recycler in the UK with 65 metal recycling sites across England, Scotland and Wales. MWR was the fourth largest metal recycler in the UK with eight sites in England. The transaction was not notified to the CMA and was investigated by the CMA on its own initiative.

Metal recycling involves purchasing scrap metal from suppliers, processing it, and either selling the metal to other metal recyclers, exporting it, or selling it to UK customers. Scrap metal can be split into different categories:

- new production steel (NPS) – ferrous scrap metal that has a low proportion of other metallic elements and is usually sourced directly from factories;
- other ferrous metal which is often generated from recycling obsolete consumer products (e.g. scrapped automobiles); and
- non-ferrous metals including aluminium, copper and lead.

In its Phase 1 decision the CMA identified competition concerns in relation to: (a) the purchase of ferrous and non-ferrous scrap metal in the London area; and (b) the shredding of scrap metal in the South East. The merger was referred to a Phase 2 investigation in February 2018 after the merging parties failed to offer remedies to address the CMA's concerns.

The CMA published its Phase 2 provisional findings on 4 June 2018. The provisional findings identified competition concerns in relation to the following markets:

- purchasing of shredder feed (scrap metal that needs to be shredded) in the South East;
- purchasing of ferrous and non-ferrous scrap metals in the London region;
- purchasing of ferrous and non-ferrous scrap metals through tendered contracts in the West Midlands;
- purchasing of ferrous and non-ferrous scrap metals through tendered contracts in the North East; and
- sales of new production steel to UK customers.

The latter three markets were not identified as raising concerns at Phase 1. Following the publication of supplementary provisional findings in July 2018 (after an extension to the Phase 2 timetable) the CMA published its final decision on 14 August 2018, requiring EMR to divest five of the sites it bought from MWR (three sites in the West Midlands, one site in the North East and one site in the South East). The decision reversed the provisional competition concerns identified in relation to the purchasing of ferrous and non-ferrous scrap metals in the London region but identified continuing competition concerns in the four remaining areas identified in the original provisional findings (three of which were not raised as concerns at Phase 1).

This case therefore represents a rare example of where the CMA's Phase 2 concerns were wider in scope than their Phase 1 decision, partly as a result of third party concerns raised at Phase 2. This is unusual as the CMA is under a duty to refer mergers for a Phase 2 investigation where there is a realistic prospect of a substantial lessening of competition. This is a materially lower threshold than the standard of proof at Phase 2, where a merger will be assessed on the basis of the balance of probabilities, i.e. whether it is "more likely than not" that the merger will give rise to a substantial lessening of competition.

This case is a cautionary reminder to merging parties that going through a Phase 2 process will not always result in a better outcome compared to the Phase 1 decision. In particular, issues which may have appeared to have fallen outside the CMA's focus at the end of Phase 1, may reappear at Phase 2. In this case, the acquirer had to divest two more sites than would have been required to address the competition issues at Phase 1.

Ashurst acted for a third party which raised concerns at Phase 2 in relation to the markets which were not identified as raising competition issues at Phase 1.

Luxembourg McDonald's tax rulings State aid

EU (STATE AID)

On 19 September 2018, the European Commission ("Commission") found, following an in-depth investigation, that the non-taxation of McDonald's profits in Luxembourg was in line with national tax laws and the Luxembourg-US double taxation Treaty, and therefore did not constitute illegal State aid. Ashurst acted for the Luxembourg authorities on this case.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The McDonald's decision is the first amongst recent State aid decisions where the Commission reached a finding of no aid.
- The decision confirms that where tax rulings granted by a national authority do not deviate from national law, and the national law itself is not selective, there is no State aid.
- In this case, the Commission assessed the extent of any deviation in relation to the Luxembourg-US double taxation Treaty – rather than deviation from general national tax rules (as in the Fiat, Starbucks or Amazon cases) or the alleged "objective" of these rules (Engie).

In 2009, McDonald's Luxembourg-based entity, McD Europe, set up a branch in the US assuming various economic risks and costs associated with the development of McDonald's franchise rights. Revenues of this branch were included in the consolidated financial statements of McD Europe in Luxembourg.

It follows from the tax ruling concerned that:

- McD Europe was a tax resident in Luxembourg pursuant to national legislation, and was accordingly fully liable for corporate income tax in Luxembourg but also benefitted from all provisions of the Luxembourg-US double taxation Treaty.
- Under this Treaty, activities of the US branch were to be considered as being performed in the US. Consequently, the profits generated by the US branch could only be subject to possible taxation in the US and exempted from corporate income tax in Luxembourg.
- Under US domestic law, the US branch did not constitute a permanent establishment for tax purposes. As a result, under US law, the US branch was also exempted from corporate taxation.

The Commission's formal investigation, which was opened on 3 December 2015, concluded on 19 September 2018, that the Luxembourg authorities did not misapply the Luxembourg-US double taxation Treaty and that therefore McD Europe's tax treatment in Luxembourg could not be considered State aid. The business carried on by the US branch fulfilled all of the conditions of a permanent establishment under the Luxembourg tax code. Therefore, the Luxembourg authorities correctly applied this Treaty by considering that profits generated by the US branch could only be subject to possible taxation in the US and that they were exempt from corporate income tax in Luxembourg. This is so, regardless of the fact that, under the US tax code, the US branch did not fulfil the relevant provisions to be considered a permanent establishment there and that it was consequently effectively exempt from corporate taxation in the US.

The McDonald's decision is the first amongst the recent fiscal State aid cases in which the Commission had reached a finding of no aid. Commissioner Vestager explained that "*the reason for double non-taxation in this case is a mismatch between Luxembourg and US tax laws, and not a special treatment by Luxembourg. Therefore, Luxembourg did not break EU State aid rules*".

Denis Waelbroeck and Scheherazade Oozeerally of Ashurst acted for the Luxembourg authorities on this case.

CMA issues first ever land agreement infringement

UK (ANTITRUST – ANTICOMPETITIVE AGREEMENTS)

The UK Competition and Markets Authority ("CMA") has taken competition law enforcement action in a case involving a land agreement for the first time. Heathrow Airport ("Heathrow") and the Arora Group hotels operator ("Arora") have admitted to breach of Chapter 1 of the Competition Act in relation to an anti-competitive car park agreement. Arora was granted full immunity, while Heathrow has been fined £1.6 million as part of a settlement with the CMA.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This is the first time that the CMA has used its competition enforcement powers in relation to a land agreement restriction, in this case a covenant restricting how parking prices should be set.
- The CMA has sent letters to other airports and hotel operators warning against similar agreements.
- Businesses engaged in the car parking sector should review their land agreements in light of this enforcement action, in particular if they have received a warning letter from the CMA.

THE CMA'S ANNOUNCEMENT

On 7 December 2017, the CMA launched an investigation into a suspected breach of the Chapter I prohibition in relation to airport facilities.

On 18 September 2018, the CMA announced that it has found that Heathrow and Arora both breached competition law. In particular:

- It has been investigating Heathrow's agreement with Arora regarding the lease of Arora's Sofitel hotel at Terminal 5.
- This agreement included a clause restricting how parking prices should be set by Arora for non-hotel guests.
- The CMA looked into whether the pricing restriction prevented the Arora from charging non-hotel guests cheaper prices than those offered at other car parks at Heathrow in breach of the Chapter 1 prohibition.

Both parties have formally accepted that the agreement was a breach of competition law and have removed the pricing restriction. Arora had brought the restrictive covenant to the attention of the CMA and was therefore awarded full immunity. Heathrow's fine was reduced by 20 per cent from £2 million to £1.6 million following a voluntary settlement with the CMA.

PRACTICAL POINTS OF NOTE

Some important considerations flow from this decision:

- Since 6 April 2011, restrictions in land agreements[2], which had previously been excluded from the UK prohibition on anti-competitive agreements, must comply in full with competition law. However, this is the first time that the CMA has used its competition enforcement powers to impose a

[2] Land agreements include those which create, alter, transfer or terminate an interest in land, such as transfers of freehold interests, leases, assignments of leasehold interests and agreements relating to easements, licences and in Scotland, interests under a lease and other heritable rights in or over land.

fine in relation to a land agreement restriction.

- This investigation has continued a trend of competition investigations into airport facilities. In December 2016, the Civil Aviation Authority announced it had issued an infringement decision finding that East Midlands International Airport and Prestige Parking had engaged in price fixing of car park services.
- The CMA has sent letters to other airports and hotel operators warning against similar agreements. The CMA is likely to have sent these those letters to airports and hotel operators where it believes there to be reasonable grounds to suspect that similar infringing agreements might be in operation. (See Ashurst's Newsletter of March 2017 for an article on the CMA's use of advisory and warning letters).
- Car parks have clearly become a focus of the CMA. In this regard, Ann Pope, the CMA's Senior Director for Antitrust, said: "Airport car parking charges are paid by millions of people and any agreements to restrict price competition are not acceptable." She continues: "Competition law applies to land agreements at airport car parks in the same way as any other type of business arrangement"; and "This fine should act as a strong warning to all companies that the CMA will take action to make sure businesses are free to compete on price."
- Businesses engaged in the car parking sector should review their land agreements in light of this enforcement action, in particular if they have received a warning letter from the CMA.

CMA publishes pricing algorithms study

UK (ANTITRUST – ANTICOMPETITIVE AGREEMENTS)

On 8 October 2018, the UK's Competition & Markets Authority ("CMA") published an economic research paper on the conditions under which algorithmic pricing could cause harm to consumers. The CMA's analysis draws on existing literature, as well as primary research involving discussions with algorithm providers, other competition authorities and the CMA's own pilot tests.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The growth of pricing software used by businesses, particularly in online markets, comes at a risk that such tools increase the risks of firms colluding in way which breaches competition law.
- On the other hand, the CMA's report suggests that extensive use of software to generate personalised pricing would make it significantly less likely that algorithms are able to achieve coordinated outcomes.
- As the application of competition law to algorithmic pricing emerges, businesses should ensure that automated and machine-learning pricing technologies are compliant with competition law.

THE RELEVANCE OF ALGORITHMS TO COMPETITION IN MARKETS

The focus of the CMA's research paper is on algorithms that use price as an input and/or determine price as an output. This includes price monitoring algorithms, price

recommendation algorithms and price setting algorithms.

The CMA acknowledges many of the potential positive benefits of algorithms. For example, algorithms can reduce transaction costs for firms, reduce frictions in markets, and give consumers greater information on which to base their decisions. However, algorithms can also be used to facilitate explicit anti-competitive agreements.

The CMA closed its first case involving a price-fixing cartel using automated re-pricing software in 2016, which related to the sale of posters using an online market place (December 2016 newsletter). In this regard, algorithms may make explicit collusion more stable as it:

- is easier to detect and respond to deviations;
- reduces the chance of errors or accidental deviations; and
- reduces "agency slack", i.e. reduces the risks of individuals in a firm undermining the cartel.

A more contentious area concerns the potential of algorithms to engage in tacit coordination (sometimes known as "conscious price parallelism").

ALGORITHMS AND TACIT COORDINATION

Competition literature identifies three main methods by which algorithms could result in tacit coordination:

- **hub-and-spoke** – whereby multiple competitors use the same algorithm;
- **predictable agent** – algorithms designed to give predictable results to external factors which may help sustain tacit coordination; and
- **autonomous machines** – self-learning algorithms that experiment to achieve the optimal pricing strategies to increase profits, including through tacit coordination.

The CMA identifies hub-and-spoke coordination as the most "immediate risk" presented by algorithms to competition. Tacit coordination in these circumstances may be achieved by competing undertakings using common third party algorithm suppliers, particularly where those third parties have access to competitor data, and, in turn, are incentivised to increase prices above the competitive level to maximise collective profits.

The CMA found that the predictable agent and autonomous machine models of coordination present a less immediate threat to consumers, but may materialise in markets that are already susceptible to coordination if such algorithms become sufficiently advanced and widespread.

The CMA gives a timely reminder of the traditional risk factors associated with tacit coordination, and how the algorithmic pricing and online markets could exacerbate these factors and result in *more risk* of harm to consumers. In particular, the CMA notes that:

- algorithms can immediately collect information about competitors, meaning that coordination can occur in **less concentrated markets**, and deviation and punishment strategies can be detected and implemented faster;
- increased availability of data, especially online, results in **increased market transparency** and enables algorithms to scrape data from websites to detect price deviations and adopt simpler pricing behaviours;
- the capability of implementing price changes automatically **increases frequency of interaction and price setting**, thereby enabling immediate market feedback and

discouraging the short-term benefits of price wars; and

- the availability of online markets creates opportunities for customers with low buyer power to form buying groups, **increasing their buying power**.

PERSONALISED PRICING

A further part of the research paper is concerned with the role of algorithms in personalised pricing. The CMA conducted its own testing on the use of algorithms to personalise pricing using an "internet lab". Although the CMA found evidence of algorithms used to personalise search results, advertising and discounts, in practice limited evidence was found of algorithms used to personalise pricing.

However, the CMA noted that use of such tools can be expected in the future, and are most likely to harm consumers in circumstances where:

- markets have limited competitive constraints;
- consumers can be divided into small groups (based on their willingness to pay);
- the cost to implementing personalisation is significant (and must be recouped through higher retail prices); and
- consumers decide to withdraw demand due to mistrust in the market.

An interesting discussion in the research paper concerns interaction between personalised pricing and tacit coordination. In particular, the CMA's preliminary view is that extensive use of personalised pricing would make it significantly less likely that algorithms are able to achieve coordinated outcomes (because competitors would be unable to observe and detect deviations from the collusive price, which is individualised). Conversely, factors such as transparency, which facilitate tacit coordination, make it harder to engage in personalised pricing (because consumers are able to compare prices and find a better deal). In other words, the two concepts are compatible in theory, but unlikely to co-exist in practice.

CONCLUSION

Competition authorities are monitoring the use of pricing algorithms and their effect on competition and consumers. The CMA's research paper suggests the need for further research in this area, including whether there are some types of algorithms that should be presumed to be anti-competitive; a likely area of contentious debate in competition policy.

For the time being, existing competition tools provide regulators with sufficient tools to address the potential competitive harm brought by pricing algorithms, as the CMA's *Posters* case in 2016 demonstrates. Moreover, the use of third party pricing software should also receive careful attention by businesses as regards how competitor data is used to avoid risks of hub-and-spoke price coordination.

Complainants cannot force investigation - ECJ dismisses plant protection appeal

EU (PROCEDURE)

On 20 September 2018, the EU Court of Justice ("ECJ") dismissed an appeal brought by several parallel importers of plant protection products (the "Applicants") against the 2017 General Court judgment upholding the European Commission's ("Commission") rejection of their anti-trust complaint alleging coordinated action by producers and distributors of plant protection products.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- A complainant does not have the right to insist that the Commission investigate and reach a final decision as to the existence of an infringement.
- The Commission enjoys a certain discretion in deciding whether or not to pursue a

complaint for alleged infringement of competition law, and in particular may decide not to pursue the complaint for lack of EU interest.

BACKGROUND

The proceedings began in 2010 with the lodging of a complaint with the Polish competition authority alleging that several producers and distributors of plant protection products had infringed competition rules by carrying out a concerted plan of filing allegedly false notices with the Polish and Austrian authorities, calling into question the lawfulness of its parallel trade business.

The Polish competition authority, however, found that it was barred from acting on the complaint because of a one-year statutory limitation period under Polish law that had expired. That decision could not be appealed before the Polish courts on account of the case-law of the Polish Supreme Administrative Court.

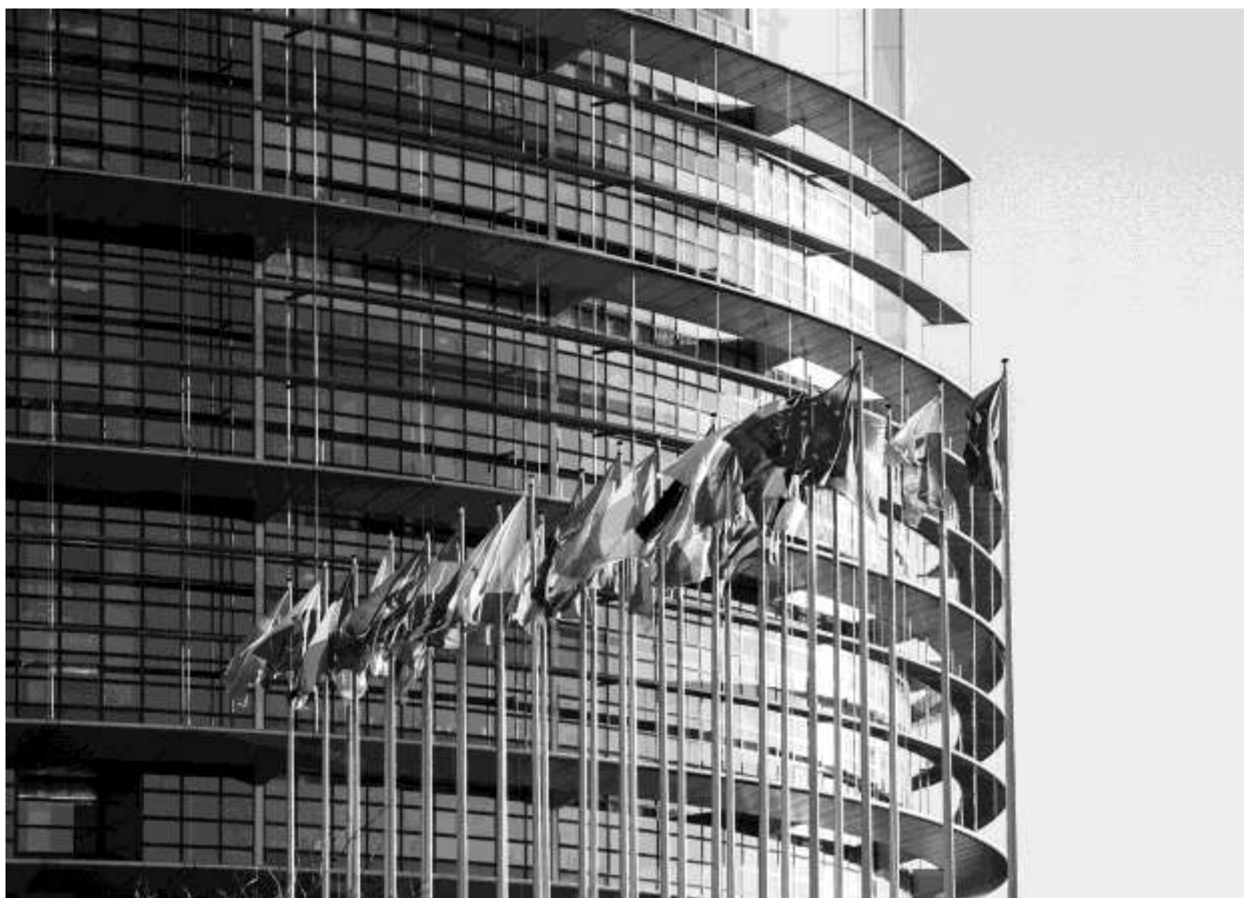
The Applicants subsequently took their complaint to the Commission. In December 2014, the Commission, however, dismissed their complaint for lack of EU interest. The Applicants sought the annulment of the Commission decision before the General Court, which dismissed their action. The Applicants appealed the General Court judgment, claiming an erroneous assessment by the General Court of the merits of the Commission's evaluation of EU interest and a breach of their right to effective judicial protection.

THE ECJ JUDGMENT

The ECJ dismissed the appeal in its entirety, as partly inadmissible and partly unfounded:

- The ECJ first found that the GC had not committed an error of law in its review of the Commission decision. The Commission could reasonably dismiss the complaint for lack of EU interest. In this context, the ECJ underlined the Commission's discretion in deciding which criteria to use in its assessment of EU interest, which in the present case included the low likelihood of finding a competition law infringement and the considerable resources required for a cross-border investigation.

- Second, the ECJ held that the Applicants failed to show that it was impossible for them to obtain effective protection at a national level. The ECJ reiterated that the EU Treaty requires Member States to provide effective legal protection, and that it is not for the Commission to make up for any shortcomings in judicial protection at national level.



Court of Appeal supports principle of legal privilege for internal investigations

UK (PROCEDURE)

Eurasian Natural Resources Corporation Limited ("ENRC") has successfully overturned, in part, a High Court judgment in which the UK's Serious Fraud Office ("SFO") had challenged its claims to legal professional privilege over documents produced during an internal investigation into criminal allegations of fraud, bribery and corruption.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This judgment may well have implications for companies subject to competition law investigations.
- The Court of Appeal recognised the clear public interest in enabling and encouraging companies to investigate possible wrongdoing under the protection of legal professional privilege.
- Legal advice given to address, avoid or even settle reasonably contemplated legal proceedings may benefit from litigation privilege in the same way as advice on defending such proceedings. However, companies will still need to demonstrate, on the facts of the case, that civil litigation or criminal prosecution is reasonably in contemplation.
- The fact that a formal investigation has not been commenced is not determinative in deciding whether proceedings are reasonably in contemplation.
- Whilst the judgment provides greater clarity on the principles of when litigation privilege may apply, the difficulties raised by *Three Rivers* in relation to the identity of the "client" for the purposes of legal advice privilege remain for now.

BACKGROUND

ENRC became aware of allegations of wrongdoing in December 2010, and instructed lawyers to conduct an internal investigation. It also instructed forensic accountants to investigate following reports that the SFO had become involved.

The SFO contacted ENRC in August 2011 indicating it had become aware of recent intelligence and media reports concerning the allegations. The SFO urged ENRC to consider carefully the SFO's self-reporting guidelines. There followed a lengthy dialogue over many months between ENRC and the SFO.

The SFO began a criminal investigation into ENRC in 2013, and sought to compel ENRC to produce:

- the lawyers' notes of the evidence given to them by ENRC's employees, former employees, subsidiaries and others; and
- materials generated by the forensic accountants.

ENRC refused to produce the documents on the grounds of legal privilege.

In 2016, the SFO challenged the privilege claims in Court. At first instance, the High Court controversially ruled that the documents did not benefit from litigation privilege.

COURT OF APPEAL JUDGMENT

Litigation privilege

The Court of Appeal unanimously disagreed with the conclusions of the judge at first instance. The Court of Appeal found (amongst other points) that:

- It was clear that criminal prosecution was reasonably in contemplation when ENRC began its investigation in April 2011. The contemporaneous documents supported ENRC's claim that they believed prosecution was a serious risk and the subtext of the communications between ENRC and the SFO was the possibility of prosecution if the self-reporting process did not result in a civil settlement.
- The judge at first instance had wrongly concluded that ENRC's objective was to address compliance and governance issues.

The dominant purpose was preparing for a contemplated prosecution: the need to investigate was a "*subset*" of the defence of criminal proceedings. The judge had also wrongly concluded that ENRC had always intended to share the information from the initial investigation with the SFO. This was not the case, and it would not have deprived the preparatory work of litigation privilege, even if that had been ENRC's intention.

- There is a clear public interest in encouraging companies to investigate suspected wrongdoing: it is "*obviously in the public interest that companies should be prepared to investigate allegations from whistle blowers or investigative journalists, prior to going to a prosecutor such as the SFO*". If such information were not to benefit from legal privilege, the temptation might be not to investigate at all.

Legal advice privilege

The Court of Appeal also considered legal advice privilege, which attaches to confidential communications between a client and its lawyers. The Court found it was unable to depart from its own previous narrow interpretation of the "client" in *Three Rivers (No. 5)*. However, it suggested that it would have done so if it had been able, noting the inequality created by the test: "*large corporations need, as much as small corporations and individuals, to seek and obtain legal advice without fear of intrusion*", and that English law is out of step with other common law jurisdictions on this question.

The judgment made clear that this point must be decided by the Supreme Court. The SFO has announced that it will not be appealing to the Supreme Court, so the issue remains unresolved for now.

CONCLUSION

The case raised significant questions about how companies might conduct investigations into their own suspected wrongdoing without creating potentially prejudicial or incriminating material. The judgment makes it clear that companies do not need to have established whether claims of wrongdoing are true, and a regulatory investigation need not have started, to show that proceedings are reasonably in contemplation in order to benefit from litigation privilege.

This may well have implications for companies subject to competition law investigations. The Court of Appeal's judgment supports the principle of, and recognises the public interest in, enabling companies properly to investigate claims or allegations of infringement through relying on litigation privilege for the results of those investigations. However, companies will still need to demonstrate, on the facts of the case, that civil litigation or criminal prosecution is reasonably in contemplation. Further, the challenges presented by the Court's narrow interpretation of the "client" for the purposes of legal advice privilege remain for now.

First follow-on cartel damages judgment by English courts

UK (PRIVATE DAMAGES ACTIONS)

On 9 October 2018, the English High Court handed down judgment in a €180+ million damages claim brought by BritNed Development Limited ("BritNed") against ABB, a high voltage power cable supplier, arising from the European Commission's decision dated 2 April 2014 in respect of the Power Cables Cartel (the "Decision").

The judgment, delivered by Mr Justice Marcus Smith, is the first to be produced by an English court in a follow-on cartel damages claim. Smith J held that ABB did not deliberately overcharge BritNed, but awarded BritNed damages of approximately €13 million.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Court was unwilling to apply a presumption of harm prematurely: the Court declined to apply the presumption of harm that was brought into existence by Directive 2014/104/EU (the "Damages Directive"). The Court noted that the English regulations implementing the Damages Directive had not entered into force when the case was issued and therefore did not apply to it.
- Not all of the Commission decision is binding: the Court provided a useful reminder of the extent to which it was bound by the findings contained in a European Commission decision. In line with EU law principles, the Court held that it was bound only by the Decision itself (i.e. the 'operative part' that follows the recitals) and those recitals which form part of the 'essential basis' for the Decision.
- Complex and theoretical economic evidence carries a danger of being disregarded in favour of simpler and more fact-based alternatives: the Court preferred ABB's approach of undertaking a comparative analysis of its own reported data during and after the cartel to BritNed's approach of using economic proxies. The Court considered that actual data (when it existed) should be used rather than proxies for actual data, unless there was a good reason for disregarding actual data.
- Damages for losses resulting from an inferior product: the Court's approach confirms that the evidential burden for proving an overcharge is a high one. However, Smith J's willingness to award damages for losses suffered as a result of ABB supplying a less efficient product than it would have had to provide in order to win the BritNed contract absent the cartel may open new doors for claimants in the future.

BritNed is a joint venture between Tennet (a Dutch power transmission operator) and the National Grid set up to operate the submarine electricity link between Great Britain and the Netherlands, commissioned in 2011. ABB was appointed by BritNed to supply the cable for that link.

On 2 April 2014, the European Commission found that ABB (specifically ABB AB and ABB Limited) and 10 other power cable suppliers were involved in a 10 year cartel from 1999 to 2009 in the market for underground and submarine high voltage power cables.

BritNed issued a claim for damages against ABB arising from the Decision, alleging that it had suffered losses of over €180 million (including lost profits and compound interest) as a result of an alleged overcharge applied to the cable supplied by ABB.

The Court awarded approximately €13 million of the damages claimed by BritNed on the basis that:

- the cartel facilitated ABB's appointment to supply BritNed with an inferior product to that which it would have had to offer absent the cartel. Because ABB was not challenged by any of the cartelists, it was able to win the contract with a less efficient cable design. The inefficiency was passed-on to BritNed;
- ABB's participation in the cartel allowed it to save costs more generally.

Smith J awarded BritNed around €7.5 million in respect of the inefficient cable design and around €5.5 million in respect of the broader savings ABB was able to make by participating in the cartel. BritNed's lost profits and compound interest claims were dismissed.

PRESUMPTION OF HARM

The Court declined to apply the presumption of harm introduced by the Damages Directive on the basis that the UK regulations implementing it into English law had not entered into force at the time BritNed issued its claim.

BritNed sought to persuade the Court that the presumption should nonetheless be applied in line with the EU law principle of effectiveness (i.e. national law should ensure the full effectiveness of EU law). Smith J rejected this analysis, reasoning that implementing legislation would not have been required if courts were nonetheless bound to apply it through other means. Further, Smith J considered that BritNed would either be able to prove its case on the facts and evidence (in which case a presumption would not be needed) or fail to do so (in which case he saw no basis to support a weak claim with a presumption).

BINDING PARTS OF THE DECISION

Smith J considered the extent to which the Court was bound by the Decision. In particular, he held that the Commission instrument contained three broad types of provisions:

- the Decision itself (i.e. the operative part) which was binding on its addressees and the court;
- recitals which form a constitutive part of the essential basis for the Decision, which are also binding; and
- other recitals, which are not binding.

Smith J made clear that non-binding recitals to the Decision were open to assessment by the Court and need only be accepted where they constitute findings that the Court can itself properly make based on the evidence before it as a whole.

ECONOMIC EVIDENCE

When assessing damages, the Court relied extensively on ABB's economic evidence to quantify damage. ABB's approach comprised a during-and-after price comparison analysis based on its own reported data. In contrast, BritNed's approach involved a more complex regression analysis using economic proxies.

BritNed's economic experts justified the use of proxies on the basis that the market would have been very different absent the cartel, and this rendered ABB's data unreliable. Smith J did not agree. He stated that actual data should be used where this existed, unless there was a particular reason not to use it.

"No deal" Brexit: What UK competition law might look like

UK (BREXIT)

Wondering what competition law in the UK might look like in a post-Brexit "no deal" scenario? On 13 September 2018, the UK government tried to shine some light on this area by publishing a technical notice on the provisions for merger control and competition enforcement if there is no Brexit deal in March 2019, having published a similar notice in relation to State Aid on 23 August.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- A "no deal" Brexit scenario is the outcome where the UK leaves the EU on 29 March without any withdrawal agreement or transitional arrangements in place (see our *previous article* for a description of each of these).
- Whilst there will be a few tweaks to the UK merger review and antitrust rules, they should remain largely familiar in a "no deal" scenario. The biggest impact of a "no deal" scenario might be on a business part way through a European Commission ("Commission") merger control or antitrust investigation on Brexit Day.
- The "no deal" plans for State aid involve transposing an EU State aid model into UK law and introducing a UK State aid regime, regulated by the CMA. This reflects what is largely expected to take place even if a deal was ultimately agreed with the EU.

On 12 July 2018, the UK government published a white paper on the future UK-EU relationship which set out the government's view of what the post-Brexit relationship should look like (the "White Paper"). In relation to competition law, and consistent with the government's response of 19 April 2018 to the House of Lords EU Internal Market Sub-Committee's report on the impact of Brexit on UK competition and State aid, the White Paper proposed:

- committing to a common rulebook on State aid, to be enforced and supervised in the UK by the Competition and Markets Authority ("CMA"); and
- maintaining the current UK antitrust prohibitions and merger control system with enforcement by the CMA (or concurrent sectoral regulator where relevant) being coupled with effective cooperation with EU authorities.

As part of its preparations for Brexit, and in particular for a "no deal", the UK government has publishes a series of technical notices. These technical notices are aimed at providing UK citizens and businesses with guidance on how they can prepare for a "no deal" scenario.

The government published technical notices on State aid on 23 August 2018, and on merger control and antitrust on 13 September 2018. Set out below is a summary of these technical notices and how a "no deal" scenario would affect the State aid, merger control and antitrust rules in the UK, together with some observations and issues that are not covered by the notices.

STATE AID UNDER A "NO DEAL" SCENARIO

Proposed changes

The UK is currently subject to the EU State aid rules, which apply with direct effect without any UK implementing legislation, and which are enforced by the Commission. The technical notice of 23 August states that the UK "strongly supports a rigorous State aid system", and so in a "no deal" scenario the UK would create a "UK-wide subsidy control framework to ensure the continuing control of anticompetitive subsidies" (i.e. a UK State aid regime).

In particular, the technical notice proposes the following:

- Transposing EU State aid rules into UK domestic legislation: The EU State aid rules will be transposed into UK domestic legislation under the European Union (Withdrawal) Act 2018. This will apply to all sectors and would mirror the existing block exemptions.

- Enforcement: The CMA would take on the role of supervision and enforcement for the UK in place of the Commission.

- Devolved administrations: The government will continue to work with the devolved administrations to ensure the new State aid regime works for all the UK.

Practical implications

- Transition: In relation to transition, the 23 August notice proposes that:

  - existing approvals of State aid, including block exemption approvals, will remain valid and will be carried over into UK law under the European Union Withdrawal Act; and

  - any full notifications not yet approved by the Commission should be submitted to the CMA.

- Notifications and complaints: Public authorities will need to notify aid to any undertaking to the CMA from 30 March 2019. From 30 March 2019, all complaints about unlawful aid or the misuse of aid would also have to be made to the CMA.

These proposals reflect what is largely expected to take place even if a deal is ultimately agreed with the EU. This is unsurprising as the adoption of State aid rules will be a prerequisite of any wide ranging future trade deal with the EU the UK hopes to agree. But the 23 August notice should at least give UK business expecting to receive State aid within the UK some welcome certainty as how a "no deal" outcome would impact such aid.

MERGER CONTROL UNDER A "NO DEAL" SCENARIO

Proposed changes

The technical notice of 13 September includes the following proposed changes to the merger control rules in the event of a "no deal" scenario:

- Jurisdiction: The current parallel EU/UK merger control system is described as a "one-stop shop", whereby larger transactions will fall for review under the EU regime, and smaller transactions would typically fall for review under the UK regime. The UK regime does not currently apply where EU jurisdiction is triggered. Brexit will remove the "one-stop shop" from merger control so far as the UK is concerned.

- No substantial changes to UK regime: Whilst the UK will cease to be a part of the EU "one-stop shop" regime, the UK government does not propose to make any changes to UK merger control in the event of a "no deal" outcome, except those necessary to implement Brexit and to keep the regime running largely as it is (e.g. removing certain references in UK merger guidance to applications for mergers to be referred to or from the Commission under the EU Merger Regulation).

Practical implications

The practical implications of a "no deal" outcome for merger control include the following:

- The end of the EU "one-stop shop" and parallel filings: After Brexit, as the EU's "one-stop shop" for mergers will no longer apply in the UK, businesses considering a merger that has an impact in EU and UK markets will need to comply with both the EU and UK merger rules. A post-Brexit merger may therefore potentially trigger parallel filings in both jurisdictions.

- Deal timing: One of the key implications of parallel filings is that the CMA and EU merger control regime review periods differ significantly.[3] There is no indication in the

[3] (a) at Phase 1: 40 working days for the CMA, compared to 25 working days under EU rules; and (b) at Phase 2: 24 weeks for the CMA, compared to 90 working days (c.18 weeks) under EU rules, (all excluding extensions).

13 September notice that the UK government will harmonise the UK merger timetable with the EU process. Accordingly, the different timescales will need to be considered by deal teams in the context of post-Brexit transactions.

- Live cases: In a "no deal" scenario there may be no agreement on jurisdiction in relation to live EU merger cases to the extent that the Commission is examining effects on UK markets. The technical notice recommends that if businesses are considering a merger transaction or have made a merger notification but have not received clearance prior to March 2019, they should approach the Commission and the CMA, who will be able to advise if any further action is necessary.

ANTITRUST ENFORCEMENT UNDER A "NO DEAL" SCENARIO

Proposed changes

The technical notice of 13 September sets out the following approach to the UK antitrust system in a "no deal" scenario:

- No substantial changes to UK regime: As with merger control, the UK government is not proposing to make any changes to the UK antitrust regime following a "no deal" outcome.

- Supremacy of EU law will end: The CMA and UK courts will no longer be bound to follow future decisions of the Commission or European Courts. Neither will there be a requirement for UK law to remain consistent with EU law. In this regard, section 60 of the Competition Act 1998, which requires that UK competition law be "dealt with in a manner which is consistent with" EU competition law, will be revoked.

- Jurisdiction: The Commission will no longer be able to commence investigations into cases involving anticompetitive conduct in the UK, and the CMA and concurrent regulators will only investigate anticompetitive conduct that affects UK markets. However, the Commission will continue to have the power under EU law to investigate UK firms if they engage in conduct that has effects on competition within the EU, and EU businesses operating in the UK must comply with UK competition law as they do now.

- Block exemption regulations: The EU Withdrawal Act will preserve the EU block exemption regulations as parallel exemptions to the UK competition prohibitions. These block exemption regulations exempt certain types of agreements from the Chapter I prohibition where certain conditions are satisfied and there are benefits for consumers.

Practical implications

- Dawn raids: As the Commission's jurisdiction over investigating anticompetitive conduct in the UK ends, so will its ability to undertake investigations of business premises in the UK.

- Divergence: Because the CMA, UK courts and UK legislators will no longer be bound to follow EU law, over time UK competition law might diverge from EU law both in terms of case law and statute.

- Parallel exemptions: Where existing agreements between companies have benefited from the parallel application of an EU exemption, these exemptions will continue to apply, and companies will be able to benefit from them when they enter into new agreements that meet the relevant criteria after EU exit. Businesses benefiting from EU block exemption regulations will wish to familiarise themselves with the modifications to the preserved block exemptions. The technical notice, however, notes that there will not be significant changes.

- Live cases: The technical notice recommends that businesses subject to an ongoing antitrust investigation should take legal advice on how to comply with any ongoing investigation of the Commission and/or the CMA (or the relevant UK sectoral regulator).

- Parallel cases: Because the Commission will not be able to conduct new investigations in relation to UK conduct, it is likely that in many circumstances (such as a pan-European-wide cartel) both the Commission and the CMA (or the relevant UK sectoral regulator) will undertake parallel investigations into the same conduct. In such cases, leniency applications and settlement considerations would need to be assessed in relation to both jurisdictions at the same time.

ANTITRUST LITIGATION UNDER A "NO DEAL" SCENARIO

In relation to court proceedings, the 13 September notice states that, in a "no deal" scenario:

- Status of pre-Brexit Commission decisions: Competition infringement decisions of the Commission that are made before Brexit will continue to have the same legal status as they have now, so that claimants may bring follow-on claims based on those decisions in the UK courts. But the CMA and UK courts will no longer be bound to follow future case law of the European Court, and claimants who wish to pursue private damages claims in UK courts for infringements of EU competition law will no longer be able to rely on those future decisions as a binding finding of an infringement.

- Claims for post-Brexit breaches: Claimants who wish to pursue claims in UK courts based on alleged breaches of EU competition law that took place after Brexit will be able to do so on a standalone basis, as a foreign tort claim (a legal claim in the UK relating to a violation of foreign law).

- Parallel claims: If companies or consumers wish to claim damages based on infringement decisions issued by both the Commission and the UK authorities after Brexit, it may be necessary to make parallel claims before the UK courts and the courts of an EU member state.

- Claims following-on from pre-Brexit decisions: Claimants pursuing claims for damages in UK courts, based on decisions of the Commission or member state competition authorities that are made before Brexit, may bring those claims in UK courts. Claimants should consider the applicability of damages claims in EU member states in light of the government's technical notice on Civil Judicial Cooperation.

In summary, whilst there will be a few changes to the UK merger review and antitrust rules, they should remain largely familiar in a "no deal" scenario. The biggest immediate impact of a "no deal" outcome is likely to be on a business part way through a Commission merger control or antitrust investigation on Brexit Day. In such cases there would be no agreement as to the jurisdiction of the UK aspects of those live investigations. In practice, however, it is likely the long established cooperative relationship between the CMA and the Commission would secure a pragmatic outcome.

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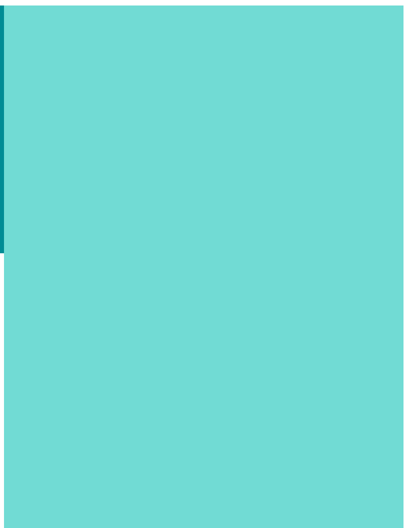

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