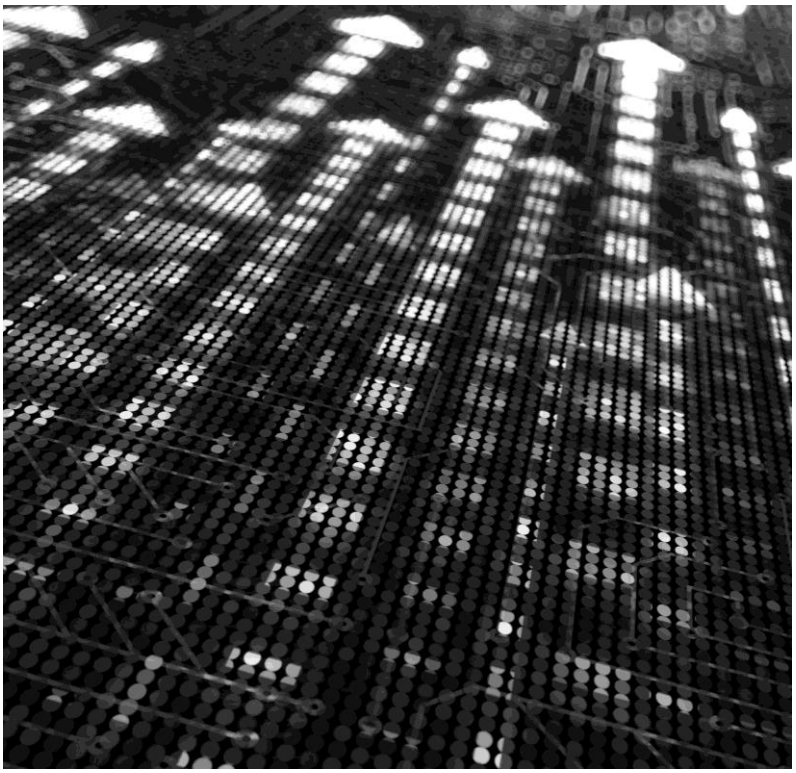

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Ashurst competition law newsletter March & April 2020

30 April 2020

From the Editors

The March/April 2020 issue of Ashurst's competition law newsletter features the European Commission's and UK CMA's response to competition issues related to Covid-19, Apple's EUR 1 billion French fine, the ECJ's landmark Hungarian Banks judgment, the climax of the EU Marine Harvest gun-jumping saga, changes to EU and Australian foreign investment frameworks, cartel decisions in Germany and Spain, the EU's State aid Temporary Framework issued to help respond to Covid-19, and landmark UK abuse of dominance judgments, as well as other news.

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Content

EU guidance on Covid-19 coordination and the return of the "comfort letter"

EU –ANTITRUST - ANTICOMPETITIVE AGREEMENTS / NEW LAW/POLICY

On 8 April 2020, the European Commission ("Commission") published a Temporary Framework Communication ("Communication") to provide antitrust guidance to companies cooperating in response to urgent situations related to the Covid-19 outbreak. The Commission also announced that it issued a "comfort letter" concerning a specific cooperation project aimed at avoiding situations of shortages of critical hospital medicines. In the same announcement, it confirmed that competition laws are still very much in force and that it will continue to closely and actively monitor relevant market developments for breaches of competition law. It follows similar guidance issued by the UK's Competition and Markets Authority (summary here).

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Competition laws remain in force, and are being enforced, during the Covid-19 outbreak.
- The Communication provides guidance to companies in all sectors willing to temporarily coordinate their activities in order to increase production in the most effective way and optimise supply of, in particular, urgently needed products such as hospital medicines, while reducing the antitrust risks.
- Companies remain responsible for assessing themselves the legality of their agreements and practices, but the Commission has been engaging with companies and trade associations to help assess the legality of their cooperation plans and putting in place safeguards. In exceptional cases, the Commission may also provide written comfort (a comfort letter) for projects that need to be swiftly implemented.

TEMPORARY FRAMEWORK COMMUNICATION

Temporary Framework Communication

The Communication states that the exceptional circumstances and challenges brought about by Covid-19 may trigger the need for undertakings to cooperate with each other in order to overcome or at least to mitigate the effects of the crisis to the ultimate benefit of citizens. It covers possible forms of coordination in order to ensure the supply and adequate distribution of **essential scarce products and services** during the Covid-19 outbreak and thus address the shortages of such essential products and services resulting from factors such as rapid growth of demand, stockpiling, factory lockdowns, logistical issues, export bans or import shortages. The Commission has since clarified that it is not aimed at alleviating over capacity issues.

MAIN ANTITRUST ASSESSMENT CRITERIA

Companies remain responsible for assessing themselves the legality of their agreements and practices. To assist with this, using the supply of critical hospital medicines as an example, and based on existing guidance (including the Commission's Guidelines on Article 101(3), and the Horizontal and the Vertical Guidelines), the Communication sets out the following types of coordination which might be adopted to alleviate shortages, namely coordination to:

- significantly and rapidly increase production for certain products in short supply by **reducing production of other products;**
- **reallocate stocks**, requiring business to exchange information on sales and stocks;
- increase production by **switching production lines** for non-essential/non-shortage products to other necessary products;
- increase output, or efficiency, by only producing one product (as opposed to switching production between different products) (i.e. a form of **specialisation**).

- **entrust a trade association** (or an independent advisor, service provider, or public body) to:
  - contribute to **identifying essential products which might suffer from shortage risks;**
  - **aggregate production and capacity information**, without exchanging individual company information;
  - work on a model to **predict demand** on a Member State level, and **identifying supply gaps**;
  - **share aggregate supply gap information**, and request participating undertakings, on an individual basis and without sharing that information with competitors, to indicate whether they can fill the supply gap to meet demand (either through existing stocks or increase of production).

The Communication provides that such conduct would not give rise to an enforcement priority to the extent that such measures would be:

- designed and **objectively necessary** to actually **increase output** in the most efficient way to address or **avoid a shortage** of supply of **essential products or services**;
- **temporary** in nature (i.e. to be applied only as long there is a risk of shortage or in any event during the Covid-19 outbreak); and
- **not exceeding what is strictly necessary** to achieve the objective of addressing or avoiding the shortage of supply.

OTHER GUIDANCE IN THE COMMUNICATION

- Undertakings should document all exchanges, and agreements to record their compatibly with competition law and the criteria set out in the Communication, and make them available to the Commission on request.
- Cooperation encouraged and/or coordinated by a public authority is also a relevant to whether conduct would be an enforcement priority for the Commission.
- "Cooperation would be allowed" if in the context of an "imperative request" (i.e. a mandatory requirement) from public authorities to temporarily cooperate in response to an urgent Covid-19 situation (e.g. to keep up the functioning of health care for Covid-19 patients).

SEEKING GUIDANCE AND THE COMFORT LETTER

The Communication states that the Commission may also provide written comfort (comfort letter) for projects that need to be swiftly implemented and has set up set up a dedicated webpage and mailbox that can be used to seek informal guidance on specific initiatives.

On 8 April, the Commission also used the procedure described in the communication for the first time and provided a comfort letter to "Medicines for Europe" (MfE). The comfort letter addresses a specific voluntary cooperation project among pharmaceutical producers that targets the risk of shortage of critical hospital medicines for the treatment of coronavirus patients. Generic pharmaceutical companies produce the largest part of the critical hospital medicines that are now urgently needed in large scale volumes to avoid shortages.

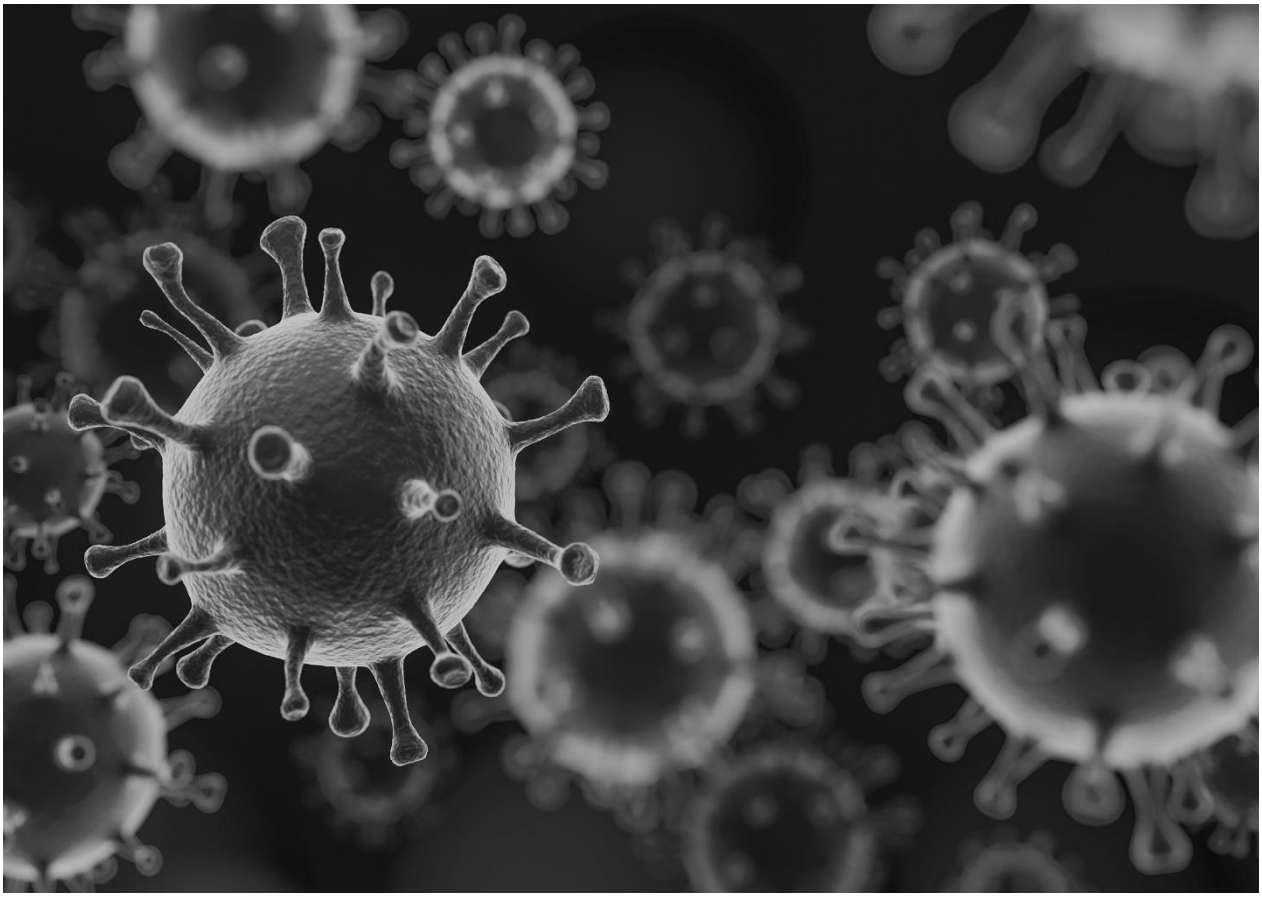
In the comfort letter the Commission states that, in order to increase capacity and alleviate shortages, the following coordination between pharmaceutical producers' would "not raise concerns" under Article 101 TFEU in relation to certain medicines as they achieve this aim in the "most efficient way", i.e. cooperation to:

- model demand for these medicines;
- identify production capacity and existing stocks; and
- adapt or to reallocate, based on projected or actual demand, production and stocks and to potentially also address the distribution of Covid-19 medicines;
- coordinate available industry production capacity throughout Europe and identify means to optimise the use of resources available in the industry, possibly including intermediates, and to jointly identifying where to best switch production of a certain production site to a certain medicine and/or to increase capacity, so that not all firms focus on one or a few medicines, whilst others remain in under-production; and
- where medicines are being under-supplied or where over-supply exists, to rebalance and adapt capacity utilisation, production and

supply (including possibly distribution), on an ongoing basis.

The comfort letter also notes that:

- the Commissioner for Health and Food Safety and the Commission's Directorate General for Health and Food Safety ('DG SANTE') requested pharmaceutical undertakings in relation to shortages of Covid-19 hospital medicines to engage in exchanges about the above-mentioned cooperation. The Commission is providing a forum for these exchanges and will have a steering role in the process;
- the Commission is providing a forum for these exchanges and will have a steering role in the process;
- MfE must put safeguards in place, including:
    - ensuring the cooperation is open to any pharmaceutical manufacturer willing to participate;
    - minutes of all meetings will be created and kept, and copies of any agreements regarding this cooperation shared with the Commission;
    - the exchange of confidential business information among manufacturers will be: limited to what is indispensable for effectively achieving the aims set out above; gathered by MfE or by an external third party; and made available to the participating undertakings in aggregated form only;
    - the cooperation will be limited in time until the risk of shortages, including in a possible second wave of the Covid-19 epidemic, is overcome. The Commission may inform MfE, when this is the case;
- it does not extend to any discussion of prices or any other possible coordination on issues which are not strictly necessary for effectively achieving the aims set out above; and
- is also subject to participating undertakings not unduly increasing prices beyond what is justified by possible increases in costs.



Exceptional derogation from EU competition rules for milk, flowers and potatoes

EU – ANTITRUST - ANTICOMPETITIVE AGREEMENTS

On 22 April 2020, the European Commission ("Commission") announced plans to adopt an exceptional derogation from the EU competition rules for the milk, flowers and potatoes sectors based on Article 222 of Regulation 1308/2013 establishing a common organisation of the markets in agricultural products (the "CMO Regulation"). This forms part of the Commission's response to the Covid-19 outbreak.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The EU competition rules normally apply to conduct relating to the production of, or trade in, agricultural products. The general rule is that EU competition rules cannot be disapplied.
- However, Article 222 of the CMO Regulation enables the Commission to adopt implementing acts to authorise the derogation from certain EU competition rules during periods of severe imbalance in markets.
- This derogation is part of a package of measures that the Commission will be using to support the agri-food sector during the Covid-19 crisis.
- As a principle of EU law, the scope of derogations must be interpreted narrowly.

CMO DEROGATIONS

The EU competition rules found in Articles 101 to 106 TFEU and their implementing provisions normally apply, pursuant to Article 206 of the CMO Regulation, to agreements, decisions and practices in relation to the production of, or trade in, agricultural products.

However, Article 222 of the CMO Regulation enables the Commission to adopt implementing acts to disapply Article 101 TFEU from agreements and decisions of recognised producer organisations, their associations and recognised interbranch organisations in any of the agricultural sectors covered by the CMO Regulation, provided that the following conditions are met:

- there is a severe imbalance in the market;
- any agreements and decisions taken pursuant to that provision must not undermine the proper functioning of the internal market;
- the conduct is strictly aimed at stabilising the sector concerned;
- the conduct falls under one or more of the following categories: market withdrawal or free distribution of products; transformation and processing; storage by private operators; joint promotion measures; agreements on quality requirements; joint purchasing of inputs necessary to combat the spread of pests and diseases in animals and plants or of inputs necessary to address the effects of natural disasters; temporary planning of production taking into account the specific nature of the production cycle; and
- the Commission has already adopted other exceptional measures under Article 219 to 221 of the CMO Regulation or utilised public intervention or private storage aid tools.

The Commission has used Article 222 of the CMO Regulation in the past: in March 2016, to allow producer organisations, inter-branch organisations and cooperatives in the dairy sector to enter into voluntary agreements to limit production.

THE COVID-19 DEROGATION

On 22 April 2020, the Commission announced that it would allow the milk, flowers and potatoes sectors to collectively take measures to stabilize the market in the context of the current sanitary crisis triggered by the Covid-19 outbreak.

The exceptional derogation from EU competition rules will enable the milk producers to collectively plan milk production and flowers and potatoes providers to withdraw products from the market. Private operators will also be authorized to store such commodities.

The agreements and decisions that will result from such derogation measures will only be valid for a maximum period of six months.

The Commission stated that these measures will lead to a decrease of available supply on the market and rebalance the market in the long-term. The Commission also declared that it will closely monitor consumer price movements during that period to determine whether the measures could have adverse effects.

The final adoption of the derogation measures took place on 30 April, following a period of consultation with the Member States, and will come into force in the first week of May

This exceptional derogation from the EU competition rules for the milk, flowers and potatoes sectors is part of a package of exceptional measures to support the agri-food sector during the coronavirus outbreak. The other exceptional measures proposed include granting private storage aid for other dairy products such as skimmed milk powder, butter and cheese as well as meat products. The scheme will also implement measures for the flexibility of the markets for fruit, vegetables, wine, olive oil and other markets.

Foreign takeovers the subject of new EU guidelines

EU – MERGER CONTROL / FDI

On 25 March, the European Commission ("Commission") issued guidelines in relation to foreign direct investment ("FDI") screening and free movement of capital from non-EU countries, prompting the 14 Member States with national screening mechanisms to use such mechanisms as well as the restrictions on capital movement to block transactions that could pose a risk to critical health infrastructures, supply of critical inputs and other critical sectors as a result of the Covid-19 crisis. The Commission is also urging Member States which currently do not have a screening mechanism to set-up a fully-fledged one.

The EU FDI Screening Regulation, adopted in March 2019 (see the previous Ashurst briefing) sets out an EU-level mechanism to coordinate the screening of foreign investments likely to affect the security and public order of its Member States. This mechanism provides for an obligation to exchange information between Member States and the Commission as well as the possibility for the Commission and Member States to issue comments and opinions on specific transactions up to 15 months after the foreign investment has been completed. The implementation of this mechanism will start on 11 October 2020.

In the Commission guidance, the Commission notes that in the context of the Covid-19 emergency, there could be an increased risk of attempts to acquire healthcare capacities or related industries such as research establishments via FDI and that it is necessary to ensure that such FDI does not have a harmful impact on the EU's capacity to cover the health needs of its citizens. The protection of public health has already been recognised as an overriding reason in the general interest and Member States can impose mitigating measures (such as supply commitments to meet national and EU vital needs) or prevent a foreign investor from acquiring or taking control over a company if such acquisition would result in a threat to their security or public order.

As the Covid-19 crisis has put these rules back into the spotlight, the Commission has also said in a (video) conference that the it could coordinate monitoring of "ongoing and planned foreign acquisitions and sharing the relevant information among member states," as a stopgap arrangement until the EU-wide vetting rules fully apply.

EU State aid rules in times of Covid-19 crisis

EU – STATE AID

In the context of the Covid-19, the European Commission (the "Commission") has been very fast in giving guidance and updating EU State aid rules to address the different and rising needs. On 13 March 2020, it published a communication which, together with its annex, provide guidance on the application of existing EU State aid rules to national support measures aimed at tackling the Covid-19 outbreak. To complement existing possibilities, the Commission adopted on 19 March a Temporary Framework, which enables Member States to grant emergency aid measures to ensure that sufficient liquidity remains available to all companies. This crisis Framework has been broadened on 3 April to enable Member States to support companies that develop, test and produce much needed products to fight the coronavirus, but also sectors and regions severely hit by the outbreak.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- To cope with the Covid-19 outbreak, Member States can design ample support measures in accordance with existing State aid rules, some of which do not need to be notified to the Commission, while others need to.
- So far, all the national schemes notified to the Commission in the context of Covid-19 have been declared compatible under: (a) either Article 107(2)(b), which enables Member States to compensate companies for direct damage suffered as a result of the Covid-19 outbreak; or (b) the Temporary Framework, which enables Member State to respond to the liquidity needs of companies and to provide financial support to companies developing, testing or producing Covid-19 relevant products or to sectors and regions severely hit.
- Additional State aid developments to address the rising needs are to be expected in the near future.

FINANCIAL SUPPORT MEASURES WHICH *DO NOT NEED* TO BE NOTIFIED

As recalled by the Commission, a number of measures do not fall under State aid control rules or are exempted and can therefore be put in place by Member States immediately, without prior notification to the Commission. These include:

- public support measures that are available to all companies, e.g. wage subsidies and tax deferrals;
- public financial support granted directly to consumers, e.g. for cancelled services or tickets that are not reimbursed by the operators concerned;
- public aids which fall under the de minimis rules;
- public aids which fall under the General Block Exemption Regulation ("GBER").

FINANCIAL SUPPORT MEASURES WHICH *NEED* TO BE APPROVED

Subject to the Commission's prior approval, Member States can design a number of other measures which will be considered compatible under EU State aid rules. Depending on the type of measure envisaged, Member States can rely mainly on three different legal basis.

First, Member States can adopt measures under Article 107(2)(b) TFEU to compensate notably companies in sectors that are particularly hard hit (e.g. transport, tourism and hospitality) as well as organisers of cancelled events for the damages suffered due to the outbreak. The Commission has recognised that Covid-19 outbreak qualifies as an 'exceptional occurrence' under this article,

as it is an extraordinary, unforeseeable event having a significant economic impact.

To be compatible under this provision, any aid must be (a) directly linked to the damage caused by the Covid-19 outbreak; and (b) proportionate. Under these conditions, the Commission has no discretion but to declare the aid compatible with the internal market. Examples of recent aid authorised under Article 107(2)(b) include:

- EUR 12 million Danish scheme to compensate event organisers for the damage caused by the cancellation and postponement of events.
- EUR 1.3 billion Danish scheme to compensate self-employed through direct grants.
- a French scheme deferring payment by airlines of certain taxes to mitigate economic impact of coronavirus outbreak.
- EUR 5.4 billion Danish scheme that compensates companies particularly affected by the coronavirus outbreak.
- Danish public guarantee of up to EUR 137 million to compensate airline SAS for damage caused by Covid-19.

Second, as it did during the 2008 financial crisis, the Commission adopted on 19 March a Temporary Framework on the basis of Article 107(3)(b). This provision enables the Commission to approve national support measures to remedy a serious disturbance to the economy of a Member State. The Temporary Framework initially provided for four types of aid aimed at ensuring that sufficient liquidity remains available to all companies:

- direct grants, selective tax advantages and repayable advance up to EUR 800,000 to a company;
- State guarantees for loans taken by companies from banks;
- aid in the form of subsidised interest rates for loans; and
- aid in the form short-term export credit insurance, (the Commission amended on 27 March 2020 its Short-term export-credit insurance Communication to further facilitate this type of aid).

After consulting the Member States, the Commission amended on 3 April its Temporary Framework to expand on the existing support mechanisms. Moreover, this revised version provides for additional types of aid that should enable Member States to accelerate research, testing and production of Covid-19 relevant products, to protect jobs and to further support sectors and regions severely hit, namely:

- support for Covid-19 related research and development (R&D);
- support for the construction and upscaling of testing facilities;
- support for the production of products relevant to tackle the Covid-19 outbreak;
- targeted support in the form of deferral of tax payments and/or suspensions of social security contributions;
- targeted support in the form of wage subsidies for employees.

To date, over 50 national schemes have been authorised (all within a few days from notification) by the Commission under the Temporary Framework. Many more are expected in the near future.

Third, Member States can rely on the Rescue Aid and Restructuring Guidelines, which are based on article 107(3)(c) TFEU, to grant urgent and temporary assistance (e.g. in the form of loans or loan guarantees) to companies facing acute liquidity needs or bankruptcy due to the Covid-19 outbreak. Given the unprecedented circumstances, the Commission announced that these rules can be applied with flexibility. In particular, subject to an individual assessment, companies that have already received such support in the past 10 years may be eligible for further aid.

In this crisis context, the Commission proves to be particularly reactive and keen on guiding Member States in the design of their aid measures. It also stands ready to revise and ease its State aid rules to adapt to the rising needs. The Ashurst competition team is closely monitoring the rapid developments in the State aid field. See our more detailed guide on Covid-19 related State aid which is regularly updated to capture the latest developments.

Commission announces new Industrial Strategy for a successful European digital and green transition

EU – NEW POLICIES

On 10 March 2020, the European Commission ("Commission") announced a New Industrial Strategy for a globally competitive, green and digital Europe.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The new Industrial Strategy has set three key priorities: maintaining European industry's global competitiveness and a level playing field at home and globally, making Europe climate-neutral by 2050 and shaping Europe's digital future.
- The Strategy foresees a review of the EU's competition rules but also an Intellectual Property Action Plan, a plan to secure the supply of raw materials and an industrial alliance to encourage the uptake of hydrogen.
- The Commission will evaluate, review and, if necessary, adapt EU competition rules as of 2021.

On 10 March 2020, the Commission presented a new Industrial Strategy that sets out the key drivers of Europe's industrial transformation and proposes future actions to achieve a European industrial policy based on competition, open markets, world-leading research and technologies and a strong single market which brings down barriers and reduces excessive administrative burdens.

The main competition enforcement and policy issues tackled by the Strategy are related to the current application and possible improvements of competition rules, in particular horizontal and vertical agreements and the market definition notice, antitrust case detection, the shortening of investigation procedures, merger control and State aid guidelines.

The Strategy suggests to introduce, by 2021, revised rules for State aid in a number of priority areas including energy and environmental aids as well as new instruments to better tackle the distortive effect of foreign subsidies, also looking at foreign access to public procurement and EU funding. A new Chief Trade Enforcement Officer position will be created to improve the compliance and enforcement of trade agreements involving European Union. In addition, an action plan on the Customs Union will also be implemented to reinforce customs controls and ensure that imported products comply with EU rules.

The Commission has also published a Communication that identifies and addresses barriers to the single market. Such barriers are stemming from restrictive and complex national rules, limited administrative capacities, imperfect transposition of EU rules and their inadequate enforcement. To eliminate these barriers, the Communication insists on the removal of territorial supply restrictions and the importance of competition enforcement action.

The Strategy also discusses the adoption of a new EU pharmaceutical strategy focusing on the availability, affordability, sustainability and security of supply of pharmaceuticals in light of the recent events linked to the Coronavirus disease outbreak. With most of the EU industries having materially slowed down and/or reprioritizing their focus as a result of the Covid-2019 outbreak, it remains to be seen whether it will be possible for the Commission to adopt the reforms promoted within the time prescribed in the Strategy.

ECJ upholds Marine Harvest gun-jumping judgment

EU – MERGER CONTROL

On 4 March 2020, the European Court of Justice ("ECJ") dismissed the appeal made by Norwegian seafood company Marine Harvest against a 2017 ruling of the General Court ("GC") confirming the European Commission ("Commission") 2014 decision fining Norwegian seafood company Marine Harvest for putting into effect its acquisition of salmon producer Morpol before getting the Commission's approval.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Failure to notify the acquisition of control to the Commission can result in two distinct breaches of the EU Merger Regulation: (a) failure to notify; and, (b) completing prior to clearance (gun-jumping).
- Such breaches can lead to significant fines of up to 10% of the total group turnover generated by the companies involved.
- Companies should pay attention to EU merger procedural rules, in particular when carrying out acquisitions in stages.

BACKGROUND

In a previous edition of the Ashurst Newsletter, we explained that Marine Harvest – now called Mowi - acquired its rival Morpol in three stages through the acquisition of:

- a 48.5% shareholding in December 2012;
- a 38.6% of the remaining shares in March 2013; and
- the remaining shares in November 2013.

The acquisitions were, however, not formally notified to the Commission until August 2013.

In July 2014, the Commission decided that the 2012 acquisition had already conferred Marine Harvest *de facto* control of Morpol. It therefore concluded that Marine Harvest had breached the EU Merger Regulation by implementing the acquisition without prior notification and consequently imposed two fines of EUR 10 million each, one for failure to notify and the other for gun-jumping.

In October 2017, the GC confirmed the Commission's decision, in particular that the Commission was right in imposing two distinct fines in its decision as Marine Harvest had breached both its filing and standstill obligations. This judgment was appealed before the ECJ.

THE ECJ'S JUDGMENT

In March 2020, the ECJ upheld the GC's ruling that Marine Harvest was properly fined both for failure to notify and for carrying out the concentration before the Commission had cleared the acquisition.

It thus considered that the GC was right to rule that the Commission could distinguish between situations in which the undertaking complies with the notification obligation but infringes the standstill obligation, and situations in which that undertaking infringes both those obligations. Concluding otherwise would render some of the Commission's enforcement powers under the EU Merger Regulation "redundant".

This ruling was adopted despite the contrary Opinion of AG Evgeni Tanchev which concluded that when a merger is implemented before it is notified and before it is approved, the infringement of one provision should "subsume" the other such that half of Marine Harvest's EUR 20 million fine should be annulled.

TIM/Vodafone/INWIT JV: insight into the future of 5G roll-out

EU – MERGER CONTROL / ANTITRUST - ANTICOMPETITIVE AGREEMENTS

On 6 March 2020, the European Commission ("Commission") cleared the proposed acquisition of joint control over INWIT by Telecom Italia ("TIM") and Vodafone in case M.9674, combining the parties' Italian telecommunications tower holdings as part of their 5G roll-out plan.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Commission decision provides insight on the approach that it may adopt in assessing: (a) mergers between tower companies; and, (b) network sharing co-operation between telecommunication operators in the roll-out of 5G in the EU.
- In relation to the merger, the Commission imposed behavioural remedies to solve vertical integration concerns, confirming that mergers between tower companies will continue to carefully scrutinised.
- As regards active network sharing, the Commission has indicated that, within limits, it will be open to cooperation between large operators in order to accelerate the roll-out of 5G coverage.

In February 2019, TIM and Vodafone announced plans to:

- combine their telecommunications tower interests in Italy; and
- to conclude a passive and active network sharing agreement covering all towns with less than 100,000 inhabitants in Italy.

Passive network sharing involves the sharing of space or physical supporting infrastructure which does not require active operational co-ordination between network operators. Active infrastructure sharing involves the sharing of the electronic infrastructure of the network including radio access network and sometimes core network.

Both parties are active in the retail telecommunications market as the two largest operators in Italy. The transaction was promoted as part of a broader plan to combine forces in order to accelerate the roll-out of 5G in Italy

In its consideration of the combination of the parties towers interests, the Commission identified competition concerns in relation to the market for renting space on towers to telecom operators. Space on towers is particularly important where municipal regulations make it difficult to deploy new towers. The Commission found that the transaction would weaken competition on the rental market for tower space in municipalities with more than 35,000 inhabitants, which could impede competing operator's access to towers.

In order to address these concerns, the Commission imposed behavioural remedies relating to tower access. More specifically, the parties will make free space available on 4,000 towers in municipalities with over 35,000 inhabitants on non-discriminatory terms.

Whilst the active sharing agreement between the parties was not formally subject to review as part of the Commission's merger investigation, the Commission did make a number of observations on those arrangements in its press release clearing the transaction. In particular that:

- network sharing is a widespread practice that can facilitate the roll-out of electronic communications networks by reducing costs. It can be a means to a faster and less costly deployment of mobile infrastructure, and the Commission is generally supportive of such types of cooperation;
- network sharing also entails detailed co-ordination and information exchange between competitors, which in certain circumstances may have a negative impact on competition; and
- where the balance between these two consideration lies must be assessed on a case-by-case basis.

In this context, the Commission welcomed the decision by Telecom Italia and Vodafone (during the Commission's consideration) to scale down their active sharing plans, leaving out the most densely and highly populated cities and centres of economic importance. The effect of this modification was to increase the areas (and the percentage of Italian population) in which Telecom Italia and Vodafone will continue to compete on network quality while retaining the benefits of network sharing in other cities and towns as well as rural areas. Those adjustments were sufficient in the Commission's view to alleviate possible concerns stemming from the network sharing agreements and to remove the need to take further action.

The Commission's press release suggests that the Commission will be supportive of co-operation on active network sharing as a means of facilitating the roll out of 5G in smaller towns and cities and in rural areas, so long as that co-operation does not extend to densely populated areas, where the quality of the network might be a more important vector of competition and the cost of rolling out a 5G network easier to support. However, caution will still be required in relation to such arrangements. In particular, the Commission noted that the Italian market is characterized by the presence of 5 mobile network operators, a feature which is not common to all national markets.

Budapest Bank – ECJ confirms strict approach to "by object" infringements

EU – ANTITRUST - CARTELS / ANTITRUST - ANTICOMPETITIVE AGREEMENTS

On 2 April 2020, the European Court of Justice ("ECJ") delivered its judgment in Budapest Bank on a reference for a preliminary ruling from Hungary's highest court. The judgment confirms the important limitations that apply before competition authorities and courts are able classify anticompetitive agreements as a restriction of competition "by object" under Article 101 TFEU.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Anticompetitive agreements may infringe EU competition law by their "object" and "effect". However, the forms of conduct that harm competition by their object must be interpreted restrictively.
- A finding of an object infringement must be based on sufficient experience that the conduct by its nature is harmful to the proper functioning of competition.

- It is necessary to take into account the context of the agreement, including any serious indications that the agreement was pro-competitive, before concluding that the agreement restricted competition by its object.
- The ruling is especially relevant to allegations of anticompetitive conduct on so-called "multi-sided" markets (e.g. payment systems, digital platforms, etc.) where the interactions between related, but distinct markets, must be taken into account by the competition authority.

The background to the case arises from a 2009 finding by the Hungarian competition authority that 22 banks, as well as Visa and Mastercard, had breached Article 101 TFEU by entering into an anticompetitive agreement to establish a uniform interchange fee for card payments (the "MIF Agreement"). The national competition authority ("NCA") found that the agreement had both the object and effect of restricting competition.

On appeal from the NCA, the Hungarian Supreme Court made a reference to the ECJ for clarification on the application of Article 101 TFEU.

AGREEMENTS MAY RESTRICT COMPETITION BOTH BY OBJECT AND EFFECT

By its first question, the ECJ was asked whether a finding that an agreement has restricted competition "by object" may also, in respect of the same conduct, be classified as a restriction of competition "by effect". The ECJ confirmed that it could, but added an important qualification. Competition authorities and courts making a finding that conduct is anticompetitive by both its object and effect are not relieved from the requirement to adduce the necessary evidence for each determination. Moreover, when making such a finding, it is necessary to specify the extent to which that evidence relates to one or other type of restriction.

CONDUCT THAT HARMS COMPETITION "BY OBJECT" MUST BE INTERPRETED RESTRICTIVELY

The ECJ then turned to the question of whether the MIF Agreement could be classified as a restriction of competition "by object". Although the ECJ did not give a conclusive answer to this question, the application of the court's analytical approach is likely to bear importance to current and future Article 101 TFEU cases.

- The ECJ began by examining the content and objectives of the MIF agreement. On this basis, the ECJ did not consider that the provisions of the MIF Agreement necessarily demonstrated that competition had been harmed, nor did it find that the MIF Agreement pursued an objective to ensure a minimum threshold for merchant fees. Instead, it found that the objectives of the MIF Agreement included ensuring a balance between issuing and acquiring activities within payment systems, which the ECJ considered relevant to the economic and legal context that arises in two-sided markets.
- Moreover, the ECJ emphasised the need for "*sufficient experience*" that the agreement in question is harmful to the proper functioning of competition before the conduct is classified as a restriction of competitive "by object". In order to be sufficient, such experience must be "*solid and reliable*" and "*general and consistent*", which the ECJ noted – in the context of MIF agreements – is contrary to the decisional practice of competition authorities and the case law of the European Courts.
- The ECJ then turned to the context of the agreement and the counterfactual analysis. In particular, the ECJ noted the argument submitted that, in absence of the MIF Agreement, interchange fees would have been higher (i.e. that the MIF Agreement was pro-competitive, rather than anticompetitive). In this respect the ECJ held that, if there are "*serious indications*" that interchange fees would have been higher absent the MIF Agreement, or at least contradictory or ambiguous evidence was submitted in that regard, the MIF Agreement cannot have restricted competition "by object". In such circumstances, it would be necessary to undertake a detailed analysis of whether the MIF Agreement gives rise to anticompetitive effects.

COMMENT

Practitioners have already likened and contrasted *Budapest Bank* with the ECJ's jurisprudence in other recent cases, such as *Cartes Bancaire* and *Paroxetine*. Both cases, for example, also emphasise the importance of a "restrictive" or "strict" approach to the classification of object infringements. But, at least arguably, the ECJ in Budapest Bank has taken a step further, by providing additional clarification on the necessary requirements that a competition authority or court must demonstrate when examining the content, objectives and economic and legal context of an agreement.

It is only upon having sufficiently taken into account these attributes, including past experiences and any evidence submitted to the contrary, that conduct may be classified as restrictive of competition "by object". Whilst it remains to be seen how competition authorities will approach allegations of object infringements in the future, there is still plenty of guidance to be found in the Opinion of Advocate General Bobek, which was delivered in the same case last year. Most particularly: "*if it looks like a fish and it smells like a fish, one can assume that it is fish. Unless, at the first sight, there is something rather odd about this particular fish, such as that it has no fins, it floats in the air, or it smells like a lily, no detailed dissection of that fish is necessary in order to qualify it as such. If, however, there is something out of the ordinary about the fish in question, it may still be classified as a fish, but only after a detailed examination of the creature in question*".

Temporary changes to Australia's foreign investment review framework

AUSTRALIA – MERGER CONTROL / FDI

FIRB has provided some Q&A material which clarifies the earlier announcements.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The monetary screening threshold for all foreign investments under the Foreign Acquisitions and Takeovers Act 1975 (Cth) has been temporarily reduced to AUD 0.
- The amendments **will not apply** to agreements entered into prior to 10.30pm AEDT 29 March 2020 including in relation to acquisitions that have not yet occurred, regardless of whether there are unmet conditions or not (although if an application to FIRB has been made timing may be affected – see below). Accordingly an acquisition which was not required to be notified to FIRB when the relevant agreement was entered into will not need to be notified merely because of this change. Parties will need to take care – amending the existing agreement may change this outcome.
- The statutory timeframe for reviewing applications has been extended from 30 days to 6 months. This will apply to new and existing applications. FIRB will be in touch with applicants to discuss existing applications.
- The changes are effective from 10.30pm AEST on Sunday 29 March 2020 and will remain in place for the duration of the current crisis.
- All foreign persons (irrespective of country of origin) are subject to the new monetary screening thresholds.
- The Government will prioritise urgent applications for investments that directly

protect and support Australian businesses and jobs.

- We expect more detail as to the practical implications of these changes to follow. Further updates will follow as the Government provides additional detail.

KEY CONSIDERATIONS FOR FOREIGN INVESTORS

- The monetary threshold has been reduced to AUD 0. However the other requirements of a significant action or notifiable action still need to be satisfied before foreign investment approval is required.
- For example, investments into companies or trusts will not be notifiable unless they exceed the relevant percentage interest threshold, which will continue to apply.
- Further, subject to limited exceptions, including those applicable in a listed scenario, all acquisitions of an 'interest in land' will be notifiable.
- The Treasurer has not made any announcement as to the applicable fees for applications that would previously not have been notifiable. No mention has been made of refunds for applications which are now not commercially relevant because of delay.

EXISTING AGREEMENTS

The amendments will not apply to agreements entered into prior to 10.30pm AEDT 29 March 2020 including in relation to acquisitions that have not yet occurred, regardless of whether there are unmet conditions.

INVESTMENTS IN AUSTRALIAN PUBLICLY-LISTED COMPANIES

The exemptions available for investment in Australian publicly-listed companies continue to apply. In addition, the lower percentage interest thresholds that apply to some investments in Australian publicly-listed companies will also continue to apply. For instance, acquisition of 5% or more in an 'Australian media business'.

PRIORITISATION

Priority will be given to processing applications for investments that protect and support Australian businesses and jobs.

PROTECTING AND SUPPORTING AUSTRALIAN BUSINESSES AND JOBS

FIRB has noted that the impact on employment and the community is one of the national interest factors which are taken into account when screening applications and the Government will be particularly mindful of these factors.

FEES

The Treasurer has not made any announcement as to the applicable fees for applications that would previously not have been notifiable.

REFUNDS FOR EXISTING APPLICATIONS

FIRB has announced that it will consider refunding an applicant's paid fee where the applicant decides to delay or defer its investment, and therefore withdraw its application, in response to the economic conditions associated with the coronavirus pandemic.

CORPORATE REORGANISATIONS

At this time there is no indication that corporate reorganisations will be treated differently to other investments and as such will be subject to the same AUD 0 monetary screening threshold.

IN PROGRESS TRANSACTIONS

These changes do not necessarily mean that existing transactions for which an agreement has already been entered into (at a time at which notification was not required) now require notification. However, those agreements and the related circumstances should be assessed carefully.

MONEY-LENDING EXEMPTION

At this stage the money lending exemption appears untouched.

Record French €1.24b fine for Apple and two wholesalers

FRANCE – ANTITRUST - ANTICOMPETITIVE AGREEMENTS / ANTITRUST - ABUSE OF DOMINANCE

On 16 March 2020, the French Competition Authority ("FCA") announced that it had fined Apple EUR1.1 billion, the highest fine ever imposed to an undertaking, for having implemented vertical agreements with certain of its distributors and an abuse of economic dependency against its independent premium resellers. It also fined Apple's two wholesalers, Tech Data and Ingram Micro EUR139 million.

In France, Apple sells its products either directly through its Apple Retail Stores and its website, or through a network of independent retailers who buy from two authorised wholesalers, Ingram Micro and Tech Data. Outside its own distribution network, Apple's products are distributed either by food and specialised retailers, or by smaller IT resellers including both "Apple Authorized Resellers" ("AAR"), which have a standard distribution agreement with Apple, and "Apple Premium Resellers" ("APR"), which access the Premium network by joining an optional program designed to provide a premium selling environment and experience.

VERTICAL RESTRICTIONS

In its decision, the FCA sanctioned two vertical agreements. One between Apple and its two wholesalers, the other between Apple and its APR resellers.

- The FCA found that Apple had allocated the distribution of its products between its two wholesalers from March 2005 to March 2013, giving them instructions as regards the customers to which they should resell products and the exact quantities of products to be delivered. This practice had the effect of impeding competition between its two wholesalers, and restricting the commercial activity of the APR resellers by limiting their supplies – a strategy which eventually benefited Apple's own distribution network.
- The FCA also fined Apple for having fixed resale prices by giving APR resellers strong incentives to charge the same prices as those charged by Apple in its own network of Apple Stores. In the FCA's view, the behaviour of Apple led to an alignment of the retail prices covering almost half of the retail market for Apple's products.

ABUSE OF ECONOMIC DEPENDENCE

In its decision, the FCA also fined Apple for certain practices implemented regarding its APR resellers on the basis of a practice that is rarely sanctioned under French competition law - the prohibition for an abuse of economic dependency. The FCA considered that the following practices resulted in Apple weakening or even excluding certain resellers from the market:

- Given that the APRs were economically dependent on Apple because of strict contractual relationships, the FCA considered that Apple was imposing discriminatory delays or refusals to supply APR resellers, while at the same time Apple Stores or Apple's website were still supplied.
- Apple was also maintaining uncertainty regarding the terms of the discounts granted to APR resellers.

With this unprecedented sanction, far ahead the highest ever imposed on a single undertaking in France, there is no doubt that the FCA intended to send a strong message to large digital companies on how they treat smaller companies which form part of their supply chains and ecosystems.

Rail Cartel II: Further landmark cartel damages decision by German Federal Court

GERMANY – PRIVATE DAMAGES ACTIONS

On 28 January 2020, the German Federal Court of Justice ("FCJ"), handed down another highly relevant decision in the field of cartel damages, which has been published on 16 March 2020 (case KZR 24/17). In its decision the FCJ deals with the respective requirements regarding the condition of being affected ("*Kartellbetroffenheit*") by a cartel. In its substance, the decision clarifies the requirements for establishing the necessary causality between anticompetitive behaviour and damages allegedly suffered by claimants.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The decision simplifies the requirements for claimants to show that they have a claim by lowering the requirements concerning the affection of the cartel ("*Kartellbetroffenheit*").
- The FCJ encourages courts of instance to exercise the duty-bound freedom in weighing the parties' factual submissions when assessing the cartel damages.
- The FCJ indicates that the common former practice of many instance courts to issue preliminary decisions on the merits ("*Grundurteile*") is likely to be inadmissible for efficiency reasons. Therefore, more judgments also including the specific damages amount ("*Leistungsurteile*") are to be expected in future.

The Court of Justice of the European Union ("CJEU") established a very broad definition of the group of parties that in principle can be held liable for damages and of those entitled to claim damages based on cartel infringements (e.g., *Skanska* – case C-724/17; and *Otis* – case C-435/18).

In its decision from January, the FCJ adopts this case law and clarifies that if an infringement of Article 101 TFEU is in question, account must be taken of the principles of European law, which determines both the circle of parties entitled to claim compensation, the concept of causality between the anticompetitive behaviour, and the individual damages claimed. In this light, the FCJ has clarified the requirements to be established by the claimant for an alleged effect of the cartel ("*Kartellbefangenheit*"). The FCJ held, for such affection claimants need to establish that the anticompetitive practices are in principle capable of causing damage to the claimant. It is of no relevance whether the cartel has actually had a price-increasing effect on the specific business transactions concerned. This constitutes a substantial simplification for potential claimants, as defendants have typically contested that the transactions were affected by the cartel.

The FCJ has ruled that in case the claimant has established (and proven) to have suffered damages from a specific transaction, this is deemed to be an effect of the respective anticompetitive practice. Thus, the FCJ, in line with the CJEU, equates the effect of a cartel with the question whether causality exists between the anticompetitive practice and the claimed damages.

It is worth noting, that almost one third of the FCJ decision consists of so-called sailing instructions by which means the FCJ provides detailed guidance to the lower courts on how to handle this specific case (and further cases as well). In particular, the FCJ encourages the courts of instance to fully consider the factual submissions of the parties including economic expert opinions, and assessing the respective arguments in each specific case. Accordingly, the FCJ makes it clear that the parties are to submit, to the extent possible, verifiable facts regarding the extent of the alleged damages. It will, according to the FCJ, not suffice for the parties to solely rely on empirical observations or expert opinions.

It follows from these considerations of the FCJ, that the number judgments on the principal merits of a case ("*Grundurteile*"), which today

build a vital part in the German court' practice, might well decrease. Where courts are to scrutinize the case and the parties' arguments comprehensively in detail, it may be more efficient not to initially issue judgments on the principal merits only, but rather on the respective amount ("*Leistungsurteile*") in one go. It will be interesting to see how the Rail Cartel II judgement and in particular the sailing instructions delivered alongside will be implemented into the practice of the lower counts.

Follow-on action developments in Italy

ITALY – ANTITRUST – DAMAGES ACTIONS

In February 2020 the Milan "Tribunale delle imprese" published a judgment which brings good news for the claimants in antitrust follow-on actions. However, a judgment from the Court of Appeal in a parallel case could be viewed as going in the opposite direction.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- **Case-law on antitrust damages actions in Italy is not yet settled:** Recent rulings from the Milan courts on antitrust damages actions appear in part contradictory and leave lawyers wondering whether the Corte di Cassazione (or the European Court of Justice) will be forced to intervene to determine certain issues.
- **There are now more reasons to consider bringing a follow-on action in Italy:** The Tribunale delle Imprese appears more inclined to consider that passing-on should be demonstrated by the defendant and that damages can be awarded on an "equitable basis".

On 27 February 2020, the Milan Tribunale delle Imprese ("TdI") published its judgments in a series of cases involving claims brought by Alitalia (in receivership) ("Alitalia") against certain oil companies active in the supply of jet-fuel. The cases were complex as Alitalia sought reimbursement from the oil companies of part of the airport fees it had paid to them. The airport fees had originally been imposed on the oil companies by the airports themselves. However, Alitalia claimed that the Italian Competition Authority ("ICA") had stated very clearly that such airport fees were excessive, that a certain share of them was paid as a result of an abuse of dominance and therefore had to be reimbursed to Alitalia.

The TdI appointed a judicial expert ("CTU") to provide advice on certain questions including (a) whether Alitalia had "passed-on" the airport fees to its customers and (b) what part of the airport fees could be viewed as excessive. The CTU established that he was unable to reach definitive conclusions on both points, but

indicated that it would have been rational for Alitalia to take into account the airport fees when setting its ticket prices. He nevertheless concluded that passing-on could not be proven.

The judge therefore rejected claim of passing-on raised by the defendants. In this regard, he expressly referred to art. 13 of Directive no. 104/2014 (the "Directive") and art. 11 of Legislative Decree no. 3/2017 (the "Legislative Decree") transposing the Directive - even if such rules were not in force at the time the action was brought - and pointed out that if the burden of demonstrating the absence of passing-on was imposed on the claimants, follow-on actions would become too difficult for the claimants and this was against the objectives of the EU and national legislators.

On the calculation of the overcharge, i.e. the part of the airport fees which was not justified by costs, the TdI opted, in view of the CTU's position, for an equitable determination, based on the ICA's decision. This solution was quite favourable to the claimant.

This ruling has certainly set a positive precedent for those who intend to claim for antitrust damages. However, it should be noted that in a parallel case brought by another airline, Wind Jet, the judge, in the Milan Court of Appeal, has ruled (after the TdI had adopted its judgment in the Alitalia case) that absence of passing-on had to be proved by the claimant in light of the principle of "proximity of the evidence", i.e. the plaintiff is generally the party with access to the evidence demonstrating the existence or absence of pass-on. The Court of Appeal stressed that its decision was dictated in part by the fact that the Directive and the Legislative Decree were not applicable to the case at stake at the time it was brought and in part by the fact that Wind Jet's claim had not been brought against the "antitrust offenders" (i.e. the airports) but against the oil companies which had merely passed-on the excessive fees they had suffered.

Aside from the Court of Appeal judgment, it still appears that Italian courts and especially the Milan TdI may look more favourably to follow-on actions than in the past, making Italy one of the jurisdictions to consider when claiming damages for an antitrust infringement, especially considering the low costs of an action in Italy.

Spanish weather radar cartel sanctioned

SPAIN – ANTITRUST - CARTELS

The Spanish Competition Authority ("CNMC") has fined Schneider Electric Spain ("Schneider"), Adasa Sistemas ("Adasa") and DTN Services and Systems Spain ("DTN") a total of EUR610,000 for organising a bid rigging cartel in the market for the supply and maintenance of weather radars tendered by the National Meteorological Agency ("AEMET"). Furthermore, the CNMC has banned these companies from participating in future public tenders.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This case shows once again the interest of the CNMC and regional authorities in tackling collusion in public tenders.
- It is the fourth time that the CNMC has used its power to ban future public tendering, again leaving the National Consultancy Board for Administrative Contracting to determine the scope and duration of the ban.
- The Catalonian Competition Authority, however, in a similar case, did determine the scope and duration of the ban, showing some divergence with the CNMC in the application of this legal instrument.

The CNMC fined the companies for sharing among themselves two public contracts tendered by the AEMET in 2014 and 2017 for the supply and maintenance of weather radars:

- In the 2014 public tender (for a value of EUR2.211 billion), the CNMC considered that Adasa and Telvent Energia (now Schneider), instead of competing against each other, agreed to form a temporary consortium (named *UTE* in Spanish) that submitted the only bid received by the AEMET that therefore awarded the tender to the consortium.
- In the 2017 public tender (for a value of EUR15,730), the CNMC considered that Adasa and DTN (company belonging to Schneider's group) pretended to compete against each other when bidding on the tender, when in fact they had already decided to share it. However, this time, there were also other companies bidding for the contract that was eventually awarded to one of these competitors.

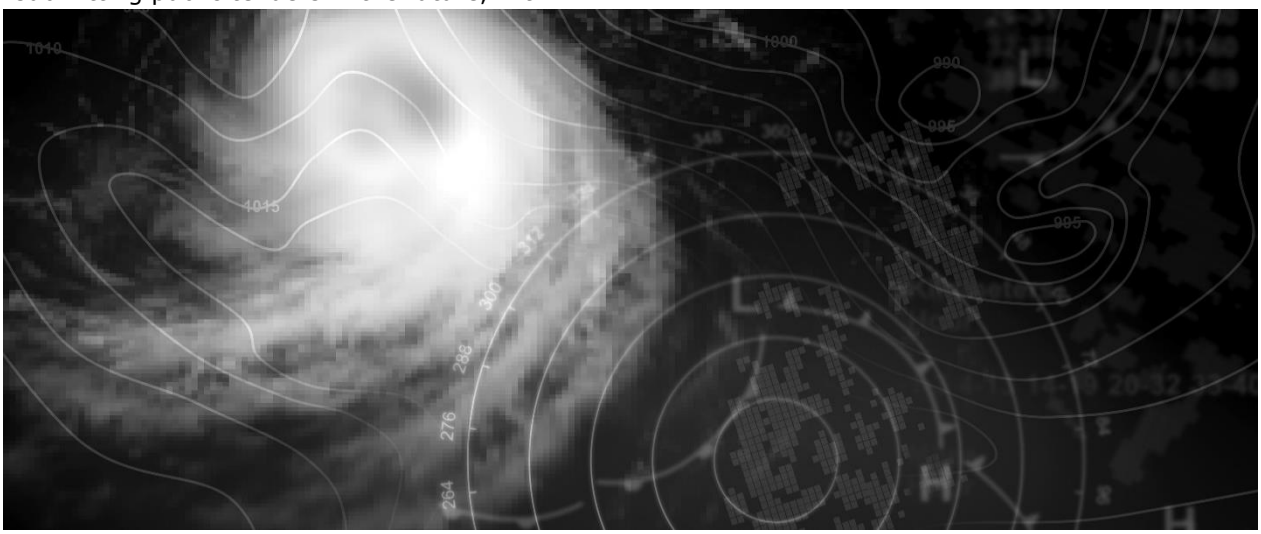
The authority considers that there was no economic rationale nor justification behind these agreements, as demonstrated in internal documents seized during dawn-raids at the infringing companies' premises.

Accordingly, the CNMC fined Adasa, Schneider and DTN EUR450,000, EUR110,000 and EUR50,000, respectively. Furthermore, the CNMC imposed a ban on the infringers from submitting public tenders in the future, with the scope and duration to be determined by the National Consultancy Board for Administrative Contracting (as has been the case in previous decisions in which the CNMC has made use of this legal instrument to prosecute cartels).

The case came to light through the Catalan Competition Authority ("ACCO"), which took a decision in a similar case in Catalonia in January 2020 and informed the CNMC of the possible participation of the companies in other cartels at national level.

It is interesting to note that the ACCO sanctioned Adasa and MCV with fines of EUR764,506.5 and EUR154,199.13, which are significantly higher of the ones imposed by the CNMC. Moreover, it imposed personal fines on the directors of both companies and decided to ban the companies from submitting public tenders in the future, and determined the scope and duration of such ban (which the CNMC has not done to date).

This case shows once again the interest of the CNMC and regional authorities in addressing collusion in public tenders (see examples here and here), while it also evidences some divergence between them in the use of new legal tools to deter anticompetitive conducts in the market, such as the ban from submitting public tenders, and in the amount of the fines.



Supermarkets, hospitals, ferry services and dairy sector receive rare exclusion orders to permit Covid-19 coordination

UK – ANTITRUST - ANTICOMPETITIVE AGREEMENTS

As the Covid-19 emergency escalates, governments and businesses are dealing with a host of unprecedented challenges. The key message from competition regulators around the world, including the UK Competition and Markets Authority ("CMA"), is that whilst competition law is very much still in force, it should not act as a barrier to steps which are necessary to alleviate urgent situations relating to Covid-19. In this connection, on 27 March 2020, the UK government made three temporary exclusion orders under the UK Competition Act 1998 ("CA98"), in relation to cooperation agreements between competing groceries providers, health services providers in England, and the Isle of Wight ferry routes, and a further exclusion order regarding health services on Wales on 20 April, and also announced an exclusion in relation to the dairy sector on 17 April.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Competition laws around the world remain in force, and regulators have stated they will be carefully monitoring conduct to prevent businesses taking advantage of the situation to harm customers.
- However, in some jurisdictions, including the UK, temporary exclusions or authorisations can be granted permitting specific types of conduct that would typically be prohibited.
- These exclusions differ from conduct which could potentially be exempt from the CA98 because it improves production or distribution, or promotes technical or economic progress. The CMA has issued separate guidance on exemptions under the CA98, however the guidance does not bind other regulators (including the European Commission) or protect businesses from third party claims for damages if an incorrect self-assessment is carried out.

As mentioned above, whilst antitrust law is very much still in force, there are some exclusions under UK competition law. In particular, the CA98 provides that the government (specifically, the relevant Secretary of State), can issue an order disapplying prohibitions to specified agreements or conduct if "*there are exceptional and compelling reasons of public policy*" to do so (Schedule 3(7)).

In this connection, the UK government has announced five exclusions to specific sectors, relating to particular types of conduct. These are summarised in the table below:

Exclusion Order	Conduct excluded from Chapter I CA 98 prohibition…	…regarding agreements between.	Aim / consumer benefit
Health Services for Patients in England Exclusion Order (SI 2020/368) Health Services for Patients in Wales Exclusion Order 2020 (SI 2020/435)	✓ Information sharing in relation to capacity ✓ Staff sharing and deployment ✓ Joint purchasing ✓ Sharing facilities ✓ Division of activities within particular geographic areas × But **not** information sharing on prices and costs	Independent healthcare providers and National Health Service bodies	To assist the NHS in addressing the effects or likely effects of Covid-19 on the provision of health services to patients (i.e. to alleviate excess demand/shortages)
Groceries Exclusion Order 2020 (SI 2020/369)	✓ Coordination about quantities of groceries ✓ Staff deployment ✓ Range of groceries ✓ Stock levels ✓ Store opening hours ✓ To supply vulnerable customers × But not information sharing on prices and costs	Groceries suppliers	Part of a package of measures to allow supermarkets to work together to feed the nation during the outbreak (i.e. to alleviate excess demand/shortages)
	✓ Sharing information on staff availability ✓ Storage capacity and vehicles ✓ Coordination of staff deployment × But not information sharing on prices and costs	Logistic service providers	
Solent Maritime Crossings Exclusion Order (SI 2020/370	✓ Co-ordination on timetables ✓ Routes ✓ Deployment of staff and vessels ✓ To supply vulnerable customers × But not information sharing on prices and costs	Ferry companies operating services Isle of Wight and UK mainland	To ensure security of supply to island residents, who are highly dependent on the ferry services (i.e. to alleviate excess supply/capacity)
Dairy Exclusion Order (not yet published at time of writing)	✓ Sharing labour ✓ Sharing facilities ✓ Co-ordination to reduce production ✓ Co-ordination to identify hidden capacity for processing milk into other dairy products such as cheese and butter × But not information sharing on prices and costs (assumed based on other exclusion orders - to be confirmed in the final Order)	Dairy farmers and producers	To enable collaboration between dairy farmers and producers to avoid surplus milk going to waste (i.e. to alleviate excess supply / capacity)

An **exclusion** of this type is different from a potential **exemption** (under section 9 CA98) from the prohibition on agreements restrictive of competition. For example:

- Exclusions are granted by the Secretary of State, whereas businesses are required to self-assess whether their conduct falls within the section 9 exemption. Exemptions will only apply if the section 9 cumulative criteria is met. In particular, if conduct / a restriction under Chapter I:
  - contributes to improving production or distribution, or promotes technical or economic progress;
  - allows consumers a fair share of the resulting benefit;
  - is indispensable to attain the objectives; and
  - does not result in the possibility of eliminating competition in a substantial part of the products / services in question.
- Exemptions are technically only applicable to the Chapter I prohibition against anticompetitive agreements. Exclusion orders, however, can also be applied to the Chapter II prohibition against abuse of dominance (although the March 2020 orders only disapply Chapter I).
- Whilst UK exclusions are capable of disapplying Chapter I and II of the Competition Act 1998, they do not disapply the EU equivalents of Article 101 and 102 TFEU. As a general rule, there are no parallel exclusions for conduct which has an effect on trade between EU Member States (but see our article on the European Commission's exceptional derogation regarding milk, flowers and potatoes). In Article 101 cases, individual self-assessment as to the application of the individual exemption criteria under Article 101(3) TFEU is required.

Businesses are required to self-assess whether their conduct falls within the section 9 exemption. To assist this assessment, the CMA issued guidance on 25 March 2020 setting out its approach to business cooperation in response to Covid-19, and in particular how the CMA intends to apply the legal criteria for exemption in the specific circumstances of this crisis. While this guidance is helpful and should provide businesses with some comfort, it is noted that this does not bind other regulators (including the European Commission), or protect parties from third party damages claims if an incorrect self-assessment is carried out.

For further details on exclusions and exemption under UK competition law, and on the CMA's exemption guidance of 25 March 2020, see our briefing on the Impact of Covid-19: UK Competition law, potential exclusions and exemption.

Court of Appeal dismisses Network Rail's appeal in landmark judgment

UK – ANTITRUST - ANTICOMPETITIVE AGREEMENTS / ANTITRUST - ABUSE OF DOMINANCE / PRIVATE DAMAGES ACTIONS

The Court of Appeal on 5 March 2020 handed down a judgment upholding the ruling of the Competition Appeal Tribunal ("CAT") of July 2019 which found Network Rail had infringed the Chapter I and II prohibitions of the Competition Act 1998 by requiring, in its schemes governing suppliers' access to its infrastructure, that suppliers were vetted by the Rail Industry Supplier Qualification Scheme ("RISQS").

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Court of Appeal's decision to dismiss all of Network Rail's six grounds of appeal and uphold the CAT's findings is significant for all rail industry suppliers in

Great Britain, and procurers more generally.

- The judgment has confirmed that a detailed market share analysis is not always required for the purposes of assessing the anti-competitive effect of an agreement, and the CAT as a specialist tribunal is entitled to engage with expert evidence to determine its approach to assessment.
- In relation to the Chapter II prohibition, the Court confirmed that the anti-competitive effects of an abuse of dominance can arise on a related market to the one in which the undertaking is present, and a dominant company need not benefit commercially from the conduct complained of for its conduct to be found to be abusive.
- Tenders for the market (with one winner) may not be enough to automatically ensure a competitive outcome if no assessment of the benefits of awarding contracts to multiple providers has been undertaken.

As the owner of most of the mainline rail infrastructure in Great Britain, Network Rail Infrastructure Limited ("Network Rail"), operates three schemes which impose terms on individuals or companies working on its managed infrastructure (the "Schemes"). The terms of the Schemes require that service suppliers must be vetted by "supplier assurance"; namely, by RISQS run by the Rail Safety and Standards Board ("RSSB").

Achilles Information Limited ("Achilles") is a supplier assurance service provider with a longstanding history of providing services to Network Rail. Achilles brought a standalone damages action against Network Rail before the CAT in October 2018, claiming that:

- Network Rail's Schemes requirement that supplier assurance should be obtained only through RISQS and not through alternative schemes (the "RISQS-only rule") infringes the Chapter I prohibition on anti-competitive agreements; and
- •Network Rail's strategy of excluding competition in respect of supplier assurance schemes in the rail industry is an abuse of its dominant position, in breach of the Chapter II prohibition.

In an expedited preliminary issue trial, the CAT held in July 2019 that the RISQS-only rule constituted a breach of the Chapter I and/or II prohibitions (assuming that Network Rail holds a dominant position). Network Rail appealed.

BREACH OF THE CHAPTER I PROHIBITION

The Court of Appeal confirmed the following:

- The CAT had been entitled to consider Network Rail's activities as a whole and accordingly find that Network Rail's regulatory operations constituted an economic activity, in concluding that Network Rail is an undertaking for the purposes of the Chapter I and II prohibitions. In this connection, the CAT had held that providing access to its infrastructure is an essential part of Network Rail's operation of the railway infrastructure (which is itself an economic activity)
- The imposition of the Schemes amounted to an "agreement"; the RISQS-only rule is not a unilateral requirement since the Schemes involve ongoing responsibilities on the part of the suppliers. In any event, acquiescence (which the CAT had found on the evidence) is sufficient for an agreement and it was irrelevant that the Schemes do not form part of a contract for the supply of goods or services.
- The Court next rejected Network Rail's challenge to the CAT's market definition and assessment of anti-competitive effects. The Court held that the CAT, in its role as a specialist tribunal, was entitled to prefer a slightly broader market definition that took account of supply-side substitution, based on the expert evidence before it. The CAT had

correctly assessed the appreciable effects on competition, and a detailed market share analysis is not always necessary. The market share thresholds set out in the De Minimis Notice could not be considered determinative in that regard.

- Finally, the Court rejected the argument that the Schemes should have benefitted from an exemption under Section 9 of the Competition Act. The question whether a restriction contributed to improving the provision of services on a relevant market could be answered by weighing up the consequential advantages and disadvantages for competition which flowed from the restriction, which the CAT had done.

BREACH OF THE CHAPTER II PROHIBITION

Network Rail also argued that the CAT had erred in law in finding an abuse of a dominant position. The Court of Appeal held, inter alia, that:

- Consistent with the EU General Court's ruling in Aeroports de Paris (T-238/98), it did not matter that the anti-competitive effects of the abuse arose on a related market to the one in which Network Rail was actually present.
- The CAT had rightly rejected Network Rail's case that there could be no abuse where the dominant company derived no advantage from the alleged abusive conduct.
- The CAT had rightly held that putting the RISQS out to tender periodically (i.e. in an effort to facilitate competition "for the market") was not an automatic substitute for competition "in the market", in particular as there was no evidence that Network Rail or the RSSB had considered the competitive effects of awarding the tender to only one winner as opposed to multiple contractors.

Budget 2020 and CMA Annual Plan: ambitions for UK competition law

UK –NEW LAW/POLICY

On 11 March 2020, the Budget 2020 was published by the UK government, followed by the final version of the Competition and Markets Authority's ("CMA") Annual Plan for 2020/21 on 19 March. The Budget states that the government is committed to making the UK the best place to start and grow a business, and so is investing in the priorities of the business community by improving transport networks and digital connectivity and ensuring that the regulatory regime supports competition and innovation. Whilst the CMA Annual Plan set outs its priorities for 2020/21, its current workload and its assumption of new responsibilities after the end of the Brexit transitional period.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Under government plans, digital companies that have been designated with a 'Strategic Market Status' may have to make the CMA aware of all intended acquisitions.
- Businesses will need to follow digital focused developments in both EU and UK markets in parallel now that the UK has left the EU. Assessing the extent to which the UK's approach will diverge from that of the EU will be a key focus of many digital companies.

BUDGET 2020

As part the 2020 Budget, the UK government announced its plans for the potential shape of UK competition policy in the digital sector, in

particular in relation to platforms (see paragraphs 1.201-202, and 2.266 of the Budget). The government's competition policy plans include:

ACCEPTING FURMAN REVIEW RECOMMENDATIONS

The government will accept all six of the Furman Review's strategic recommendations from March 2019 (see here for our summary of the Furman Review), subject to consultation. These recommendations include:

- Introducing a new digital markets unit focused on digital platforms.
- Reviewing how digital mergers are assessed, including: requiring digital companies that have been designated with a 'Strategic Market Status' to make the CMA aware of all intended acquisitions and updating the CMA's Merger Assessment Guidelines and potentially allowing the CMA to use a 'balance of harms' approach.
- Updating the CMA's enforcement tools, including: greater and quicker use of interim measures, reviewing the appeal standards applied by the Competition Appeal Tribunal, and strengthening information gathering powers.
- Continuing to monitor how the use of machine learning algorithms and AI evolves to ensure it does not lead to anti-competitive activity or consumer detriment, in particular to vulnerable consumers.

DIGITAL MARKETS TASKFORCE

A digital markets taskforce has been established, which will provide the UK government with advice on the design and implementation of pro-competitive measures for digital platform markets. See here for further details. It's key areas of focus include:

- Advice on a potential methodology to designate digital platforms with 'Strategic Market Status' (SMS).
- Whether intervention is justified in relation to platforms or platforms' activities which do not fall within the scope of SMS.
- Considering the form, content and enforcement of a code of conduct for platforms to promote competition, including being mindful of the EU Platform to Business Regulations and other relevant regulations.
- Whether there is a case for remedies relating to data access and interoperability outside of search and social media markets.
- Considering the interaction with existing regulatory regimes and wider regulatory objectives, including economic growth, innovation, privacy, data protection, and intellectual property rights.
- Advice on international cooperation and how this cooperation can be achieved in practice.

DIVERGENCE FROM EU POLICY?

The government's announcement follows recent announcements from the European Commission that it is also considering reforms in similar areas (see our summary here), which means that business will need to follow developments in both markets in parallel now that the UK has left the EU. Assessing the extent to which the UK's approach will diverge from that of the EU will be a key focus of many digital companies.

CMA ANNUAL PLAN 2020/21

On 19 March 2020, the CMA published the final version of its Annual Plan for 2020/21. It was launched prior to the height of the Covid-19 pandemic, and much of its resources and priorities since then have shifted to adjusting to the outbreak and related competition law issues (see our UK competition law Covid-19 guide here).

Foreword

The CMA expects to face a number of challenges in the coming year, most notably those associated with the UK's exit from the EU on 31 January 2020 and the responsibilities

that the CMA will take on from the end of the transition period, including trans-national mergers and cartel cases over which the European Commission has previously had exclusive jurisdiction and enforcement of a new UK national subsidy control regime. The CMA will have to strike a balance between its new responsibilities and its commitment to promoting competition for the benefit of UK consumers in those cases that affect only the UK.

The increasing digitalisation of the economy has exposed consumers to detriment. This poses challenges for the CMA in protecting consumers and they will need to address these challenges effectively.

The CMA also intends to shift its culture to sharpen the focus on what matters to consumers, assess the state of competition in markets across the UK, and consumers' experiences of those markets, become an increasingly viable and robust champion for competition and consumers, improve how they choose which problems to take on and make this selection process more transparent and intervene more actively, decidedly and speedily than in the past.

Priorities

In 2020/21 the CMA will particularly focus on:

- **Protecting consumers, including in particular those in vulnerable circumstances.** Their competition law enforcement caseload is at a record level as they seek to send a clear message that anticompetitive practices are not to be tolerated. In terms of merger control, 2019/20 saw the CMA carry out a high number of major merger investigations that would otherwise result in consumers facing higher prices or lower quality products and services, including carrying into 2020/21 an unprecedented number of Phase 2 merger investigations.
- **Improving trust in markets.**
- **Tackling concerns in digital markets.** In this regard, their market study into online platforms and digital advertising and their investigation into the funerals market are ongoing.
- **Enhancing productivity and economic growth.**
- **Climate change**, supporting the transition to a low carbon economy.
- **Taking on new responsibilities as a result of the UK leaving the EU**. Following the end of the transition period, from January 2021 they expect to incur a 50% increase in the number of merger cases, UK elements of international competition enforcement cases and a role in subsidy control. To be ready, the CMA will need to work on these cases well before January 2021. As a result of this they will have limited opportunities to launch major new projects in the coming year, but are committed to maximising the use of available resources to deliver significant outcomes for consumers, businesses and the economy.

A high price to pay? CMA must reconsider Pfizer/Flynn case

UK – ANTITRUST - ABUSE OF DOMINANCE

On 10 March 2020, the Court of Appeal ("CA") allowed one of the four grounds of appeal of the Competition and Markets Authority ("CMA") in its challenge to the judgment of the Competition Appeal Tribunal ("CAT") allowing the appeal of Pfizer and Flynn Pharma ("Flynn") against the CMA's infringement decision of 2016 finding that Pfizer and Flynn abused a dominant position by charging excessive and unfair prices in the UK for phenytoin sodium capsules (an anti-epilepsy drug). However, the CA upheld the overall judgment of CAT that the case be remitted back to the CMA for reconsideration of whether Pfizer and Flynn had abused their dominant positions by charging excessive

prices for phenytoin sodium capsules and, if so, what fine should be imposed.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- As evidenced by the European Commission's intervention in this case, this judgement provides important clarifications on the legal test for excessive/unfair pricing – cases involving this exploitative type of abuse are rare both on an EU and on a UK level
- The CMA is now required to reconsider its abuse of dominance findings and calculation of fines
- The Court of Appeal's decision may influence the CMA's ongoing investigations under Chapter II/Article 102 TFEU into liothyronine and hydrocortisone (regarding the latter the CMA recently issued a supplementary Statement of Objections in three ongoing investigations)
- Any decision by the CMA may be susceptible to a further appeal

BACKGROUND

Phenytoin sodium capsules are an important anti-epilepsy drug for an estimated 48,000 patients in the UK, which was previously sold under the brand name "Epanutin" by US company Pfizer. In 2012, Pfizer assigned the rights to market phenytoin capsules to Flynn, a UK distributor, whilst Pfizer continued to manufacture and supply the product to Flynn.

Flynn de-branded Epanutin and continued to sell it as a generic, unbranded, drug in the UK, meaning it was no longer subject to the Pharmaceutical Pricing Regulation Scheme ("PPRS").

After de-branding Epanutin, Flynn significantly increased the price of phenytoin virtually overnight. In May 2013, the Office of Fair Trading, the CMA's predecessor, launched an investigation into potential abuse of dominance under Chapter II of the Competition Act 1998 and Article 102 TFEU.

THE CMA'S 2016 DECISION

In 2016, the CMA found that both Pfizer and Flynn were dominant in the relevant markets and had infringed competition law by charging excessive and unfair prices in the UK for phenytoin sodium capsules. Pfizer had abused its position in relation to the manufacture of the drug whilst Flynn had abused its dominance in relation to its distribution.

After the drug was de-branded, significant price increases were applied to both the manufacture (by Pfizer) and distribution (by Flynn) of the drug with the NHS expenditure on the drug rising from GBP 2 million in 2012 to GBP 50 million in 2013.

A record fine of GBP 89.4 million was imposed on the two pharmaceutical companies (GBP 84.2 million on Pfizer and GBP 5.2 million on Flynn respectively). The CMA also issued directions ordering both companies to reduce their prices.

THE CAT'S 2018 DECISION

Following an appeal against the CMA's decision, the CAT upheld the CMA's finding that Pfizer and Flynn were dominant, but rejected the CMA's findings on abuse (see our summary here).

The CAT appeal focussed on whether the CMA correctly applied the two-step legal test originally set out in United Brands for determining excessive/unfair prices:

- **Step 1 – "excessiveness"**: first whether the difference between the costs incurred and the selling price charged by a dominant company is excessive.
- **Step 2 – "unfairness"**: second, whether the price charged is unfair either (a) in and of itself, or (b) in comparison with competing products.

In applying that two-step test, the CAT indicated that the CMA made the following errors:

- **The CMA's "cost plus analysis"**: in considering whether prices were excessive (Step 1), the CMA adopted a "cost plus analysis" under which a return on sales of no more than 6% would be considered reasonable, on the basis that this is the permissible return under the PPRS. The CAT held that the CMA was wrong in law to confine its methodology for determining whether the drug prices were excessive by reference only to its "cost plus" test.

- **Benchmark price:** under Step 2, the CMA failed to ascertain a hypothetical benchmark price in conditions of "normal and sufficiently effective competition".
- **Comparator products**: in determining that benchmark price, the CMA failed to give proper consideration to whether, amongst other things, phenytoin sodium tablets – the prices of which were higher than the prices for capsules – served as a meaningful price comparator. Instead, the CMA found that Pfizer's and Flynn's prices were unfair in themselves, as they bore no reasonable relation to the economic value of the capsules.
- **Economic value of phenytoin**: the CMA also failed to consider patient benefits under Step 2.
- **Fining methodology**: the CAT also expressed concerns about the CMA's decision to impose a 400% uplift on Pfizer's fine for the purposes of deterrence.

GROUNDS OF APPEAL

The CMA appealed the CAT's judgement on four grounds:

- **Ground 1 - United Brands**: the CMA challenged the CAT's interpretation of the United Brands test, in particular arguing that the two limbs under Step 2 are true alternatives (such that if the CMA found one was satisfied, it did not need to address the other) and not, as the CAT found, simply two examples of individual tests that might be used in a particular case. This ground also challenged the findings of the CAT that the CMA is obliged to consider evidence adduced by the parties (i.e. where that evidence related to a limb not relied on by the CMA).
- **Ground 2 - Benchmark price**: this ground challenged the finding of the CAT that the CMA should have ascertained a hypothetical benchmark price in conditions of "normal and sufficiently effective competition" against which to assess whether the actual price charged is excessive.
- **Ground 3 – Relevance of comparator products**: this ground challenges the CAT's finding that the CMA should have carried out a more intense evaluation of comparable products. This ground focused upon the existence of discretion for competition authorities and whether it serves to limit the jurisdiction of the Tribunal to reject findings or conclusions which amount to judgment calls of the authority.
- **Ground 4 - Economic value of phenytoin**: this ground challenged the CAT's findings on the meaning of "economic value" in the *United Brands* test.

Flynn also appealed certain findings of the CAT due, it appears, to concerns about whether those findings would be binding on any remittal of the case to the CMA ("Ground 5").

The European Commission intervened in support of the CMA on the basis that the CAT erred in law in its articulation of the test for abuse of dominance. According to the Commission, if the law is as laid down by the CAT, it would be impracticable and unworkable.

THE CA'S 2020 DECISION

The CA largely upheld the CAT's findings, with three of the CMA's four Grounds (1,3 and 4) being dismissed.

- **United Brands**: the CMA's approach was unduly rigid and literal by interpreting the two limbs under Step 2 (the unfairness test) as strict alternatives. The CA clarified that whilst Step 2 cannot be construed as conferring an obligation on competition authorities to use multiple tests (the CA noted that the CAT's decision was unclear on this point), if evidence is presented by a party under one of the alternative limbs under Step 2, then that evidence must be considered by a competition authority.
- **Benchmark price**: the CA allowed this Ground of Appeal, concluding that whilst "a" benchmark is required, a competition authority can choose a benchmark based upon costs and it is not necessary to establish a hypothetical benchmark price.
- **Relevance of comparator products**: the CAT's finding that the CMA failed to carry out a sufficient deep or intense investigation (i.e. a failure adequately to consider comparator products) is a finding of fact which the CAT is entitled to make and against which there is no appeal.
- **Economic value of phenytoin**: the CA dismissed the CMA's challenge to the CAT's findings on 'economic value' on the basis

that (a) the CAT judgment relied on a finding a fact which it was entitled to reach (and is not subject to appeal) and (b) the CMA's approach erred in law and adopted an artificially limited approach to the evidence.

- **Flynn appeal**: the CA dismissed Flynn's appeal observing that nothing in the CAT's judgment is intended to be binding on remittal and the judgment does not fetter the right of any party to adduce new evidence or argument on the issues remitted.

CONCLUSION

The judgment of the CA provides some clarity on the obligations on a competition authority to evaluate relevant evidence when applying the *United Brands* test for excessive pricing. However, a competition authority retains considerable discretion and is entitled to conclude that prices are excessive by reference to a cost based benchmark (so long as other relevant benchmarks that may have been put forward by the parties have been considered).

There is no requirement for the authority to ascertain a hypothetical benchmark price that would exist in conditions of "normal and sufficiently effective competition" by reference to which it can be determined whether prices are excessive.

Although the CA sided with only one of the CMA's appeal grounds, and upheld the judgment of the CAT that the case be remitted back to the CMA, the CMA's chief executive Andrea Coscelli welcomed the ruling as a whole. He did, however, again emphasise the CMA's "*serious concerns about the very big price increases imposed by certain drugs companies for several other generic drugs, which have cost the NHS hundreds of millions of pounds*".

CMA about to deliver first Covid-19 merger control decision?

UK – MERGER CONTROL

While some businesses may choose to delay transactions in light of Covid-19, many transactions will continue, in particular if the target is in financial distress. In such scenarios, the "failing firm defence" may be an available option for obtaining merger control clearance for transactions which might otherwise raise concerns. Indeed, it seems that the UK Competition and Markets Authority ("CMA") will shortly accept that defence in the context of its ongoing Phase 2 review of Amazon's acquisition of a minority stake in Deliveroo.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Merger control regimes are still in operation during the Covid-19 outbreak.
- In the context of transactions involving distressed targets, there are two key potential arguments which may be used to get clearance for deals which would ordinarily raise concerns, namely: (a) the "failing firm" defence; and (b) a weakened competitor, or "flailing firm" argument.

- Whilst the bar for satisfying either option is high, the failing firm defence is already being considered by the CMA in the context of Covid-19 in its review of the Amazon/Deliveroo transaction, providing some guidance on its application in the context of Covid-19.

Merger control regimes are still in operation during the Covid-19 outbreak, although there have been some changes, in particular to encourage parties to delay notifications, and in some cases, merger control authorities have temporarily closed. For transactions that need urgent clearance, a number of potential options may be available for consideration - these are considered in our more detailed guidance The impact of Covid-19: Merger control in times of crisis.

In the context of transactions involving distressed targets, there are two particular options which merit consideration where the acquirer has significant overlapping businesses with those of the target (and therefore neither a speedy clearance, nor a derogation from applicable suspensory obligations is likely to be available), namely:

- the "failing firm" defence; and
- a weakened competitor, or "flailing firm" argument.

"FAILING FIRM" DEFENCE

The "failing firm" defence is in principle accepted by many competition authorities globally. In broad terms, where one of the parties to a transaction is failing and will exit the market in the absence of the transaction, this reduction in the number of competitors should not be attributed to the transaction. Rather, the assessment of the effect of the transaction on competition should be assessed by reference to a world in which the restructured business did not exist as an independent entity. Key considerations in this regard include:

- Reliance on the failing firm defence will not result in a speedy clearance. The competition authority will still need to decide whether the transaction is otherwise likely to raise competition concerns and if so, whether the conditions for the failing firm defence are met.
- There are strict conditions for the application of the defence, which need to be demonstrated to the regulator with compelling evidence, namely:
  - absent the merger, the target business (and its assets) would inevitably have exited the market in the near future and there is no serious prospect of a successful re-organisation; and
  - there is no less anticompetitive alternative to the transaction, such as the purchase of the failing firm (or its core assets) by an alternative buyer which raises fewer competition concerns or, potentially, the firm exiting and remaining players competing for its market share rather than all of its market share transferring to one competitor.
- Regulators are typically strict in their application of failing firm arguments. In many cases, the application of these arguments is rejected (including where a company enters into administration), often because the regulator concludes that there are alternative, less anticompetitive purchasers. It should also not be assumed that the current situation will make the defence easier to substantiate.

CMA'S FIRST USE OF FAILING FIRM DEFENCE DURING COVID-19?: AMAZON/DELIVEROO

Whilst the failing firm defence has a high bar, it has historically been accepted in some cases and this is also beginning to happen in the context of Covid-19. On 22 April 2020, the CMA published Guidance on the CMA's approach to merger assessment during the Coronavirus pandemic (with an annex summarising the CMA's position on mergers involving "failing firms") in which it confirmed that it will apply the same approach to the failing firm defence in the context of Covid-19 as in normal times and in particular that there will be no relaxation of evidential standards. Nevertheless, on 17 April 2020, the CMA announced in the context of its detailed Phase 2 investigation into the acquisition by Amazon of a minority stake in Deliveroo that it had provisionally found (CMA summary of provisional findings here) that the transaction was not expected to result in a substantial lessening of competition as a result of the failing firm argument. This followed the CMA's

December 2019 Phase 1 decision that the transaction merited a detailed investigation due to the risks it posed to competition, in particular the transaction might have reduced the likelihood of Amazon re-entering the online restaurant delivery market (which it had exited in November 2018). Specifically, the CMA has provisionally concluded that, in light of Covid-19 and the resulting impact on Deliveroo's revenues:

- Deliveroo is likely to exit the market without receiving the additional funding available from Amazon through the acquisition, following significant declines in its revenue as a result of restaurant closures caused by the Covid-19 lockdown, at a time when Deliveroo has an urgent need for additional funding;
- no less anti-competitive investor than Amazon is likely to be available in the timescale needed. In particular, whilst potential alternative investors were available pre-Covid-19, that was no longer likely to be the case in light of the pandemic, and in any event, alternative sources of funding would not likely be available within the required timescale; and
- Deliveroo's exit would be more detrimental to customers and competition than the transaction, reflecting the fact that there are only three significant players in the online restaurant and online convenience grocery markets (of which Deliveroo is one). Deliveroo's exit (even if in due course followed by Amazon's re-entry) would therefore be likely to lead to higher prices and/or a lesser degree of expansion or innovation from the other two leading players (Just East and Uber Eats).

The CMA is aiming to reach its final decision by the end of May 2020.

FLAILING FIRM" ARGUMENT

The "flailing firm" argument is based on the fact that regulators will typically be required to assess future competition in the marketplace by reference to historic data. The flailing firm argument applies where, although not in imminent danger of collapse or market exit absent the transaction, one of the parties has recently been weakened and thus its historic market share may overstate its current and future competitiveness.

Again, the success of this argument is likely to be based on the availability of compelling evidence as to the future competitiveness of the company in question and its prospects for successful rejuvenation. In this regard, the fact that the current crisis is generally seen as likely to be temporary means that liquidity issues caused by Covid-19 are unlikely to be seen as justifying a permanent change to the market structure which may be anticompetitive.

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