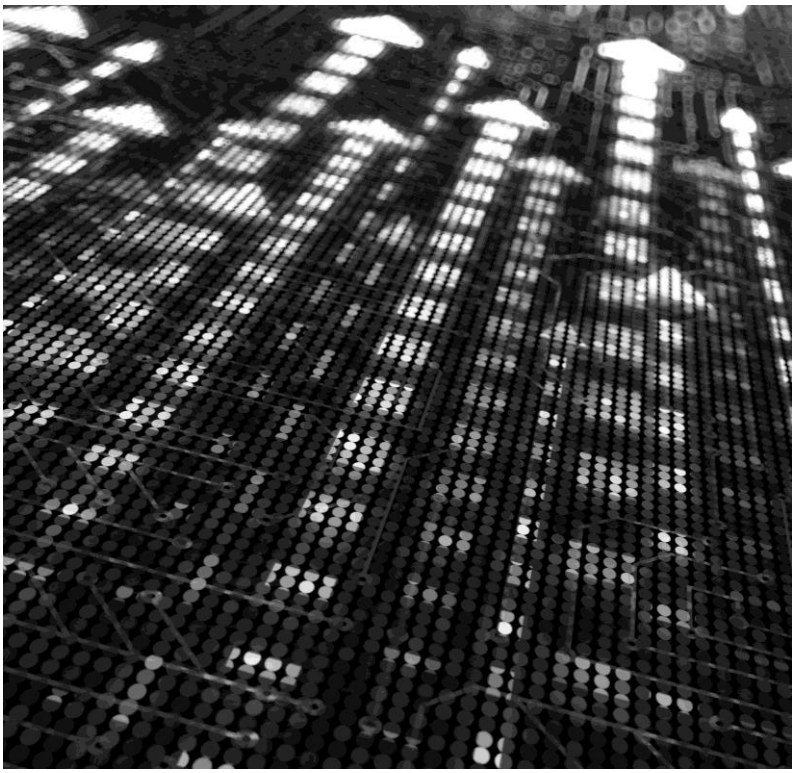

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Ashurst competition law newsletter
January & February 2020

From the Editors

This issue of the Ashurst competition law newsletter features a round-up of some key recent developments from January and February 2020. This edition covers the EU's recently announced plans on how it might regulate the digital economy (including AI and Big Data), proposed changes to German competition law, two UK cases regarding online sales restrictions, the mega Australian TPG/Vodafone merger, a European Commission fine on restricting sales of film merchandise products and other news. It also includes an updated feature article on the practical impact of Brexit on competition law following recent developments.

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Content

Europe Fit for the Digital Age – a preview of how the EU might regulate AI and Big Data

EU – NEW LAW, UPDATE

On 19 February 2020, the European Commission ("Commission") published a Communication on shaping Europe's digital future ("Digital Future Communication") together with a Communication on a European data strategy ("Data Strategy"), which contain a number of statements relating to EU competition policy. It also published a White Paper on Artificial Intelligence ("AI White Paper"), which is open for consultation until 20 May 2020. These initiatives form part of the Commission's work to create a "Europe fit for the digital age".

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The three publications bring together a number of the themes that have been debated by the Commission and other stakeholders in recent years. There is a particular focus on large platforms with market power.
- The Digital Future Communication aims to create a "Europe fit for the digital age", as part of which the Commission will build an open and transparent single market for data; consider ex ante rules for platforms; review if competition rules are fit for purpose, and launch a sector inquiry in 2020,
- The Data Strategy envisages setting up a "European data space" - a single market for data, allowing it to flow freely across the EU and relevant sectors.
- The AI White Paper envisages building a framework for "trustworthy and secure" AI by creating an "ecosystem of excellence and trust". "High-risk" AI systems, such as in health, policing, or transport, should be "transparent, traceable and guarantee human oversight".

DIGITAL FUTURE COMMUNICATION

What: This Communication sets out the Commission's vision for a European digital future, and how it aims to achieve it. The Commission's visions and goals for the digital economy include the following:

- **Society powered by digital solutions**: To create a European society powered by digital solutions that are "strongly rooted in our common values, and that enrich the lives of all of us".
- **Framework to encourage growth and innovation**: Providing businesses with a legal and policy framework that will allow them to "start up, scale up, pool and use data, to innovate and compete or cooperate on fair terms".
- **Independent European infrastructure**: Ensuring the integrity and resilience of European data infrastructure, networks and communications. This requires reducing European dependency on crucial technologies from the rest of the world by "creating the right conditions for Europe to develop and deploy its own key capacities".
- **Empowering citizens through data sharing**: Empowering European citizens to make better decisions based on insights gleaned from nonpersonal data. The Commission states that data should be available to all (public or private, big or small, start-up or "giant").

How: To achieve these aims, the Commission aims to focus on the following key objectives over the next five years:

- **Technology that works for people:** Development, deployment and uptake of technology that makes a real difference to people's daily lives.
- **A fair and competitive economy:** Developing a "frictionless single market" for the digital economy across sectors, respecting consumer rights.

- **An open, democratic and sustainable society:** Building a trustworthy environment in which "citizens are empowered in how they act and interact, and of the data they provide".

The Digital Future Communication also sets out the role of competition policy in achieving some of these aims, in particular, in relation to developing a "fair and competitive economy". For example:

- **A single market for data**: The creation of a European single market for data, ensuring a "level playing field" for businesses of all sizes, and that rules applying offline (such as the competition rules) should also apply online.
- **Platforms and ex ante rules**: In relation to online platforms, ensuring that the systemic role of certain online platforms and the market power they acquire do not negatively impact the "fairness and openness" of European markets. This includes exploration of ex ante rules to ensure markets characterised by large platforms with significant network effects remain "fair and contestable".
- **Rules "fit for purpose":** Continuing the Commission's work on assessing the extent to which the EU competition rules are "fit for purpose" in the digital age. For example, continuing work in relation to assessing the effectiveness of antitrust remedies, conducting a review of the rules themselves, the ongoing review of rules governing horizontal and vertical agreements, the market definition notice, and various state aid guidelines.
- **A 2020 sector inquiry**: The Commission is also planning to launch a sector inquiry during 2020 with a strong focus on these new and emerging markets.
- **Platform economy rules**: Considering additional rules in relation to the platform economy to ensure contestability, fairness and innovation and the possibility of market entry, as well as public interests that go beyond competition or economic considerations.

THE DATA STRATEGY

What: The Data Strategy sets out the Commission's strategy for policy measures and investments over the next five years to enable the data economy– to create a "true European data space" with a single market for data, and to unlock unused data, allowing it to flow freely within the EU and across sectors for the benefit of businesses, researchers and public administrations.

How: To achieve these aims, the Commission proposes to do the following:

- **Regulatory framework**: establish a regulatory framework regarding data governance, access and reuse. This entails creating incentives for data sharing, establishing practical, fair and clear rules on data access and use, which comply with European values and rights such as personal data protection, consumer protection and the competition rules. It also means making public sector data more widely available.
- **Systems and infrastructure**: support the development of technological systems and next generation infrastructures; and
- **Sectoral specific actions**: launch sectoral specific actions to build European data spaces in, for example, industrial manufacturing, environmental sustainability, mobility, and health.

In terms of regulatory and policy framework considerations, the Commission notes the following in relation to competition policy in particular:

- **Guidance**: The Commission will provide more guidance to stakeholders on the compliance of data sharing and pooling arrangements with EU competition law by means of an update to the Horizontal Co-operation Guidelines. If needed, it is also prepared to provide "additional individual project-related guidance" on the compatibility of arrangements with the EU competition rules.
- **Merger control**: When exercising its merger control powers, it will look closely at the possible effects on competition of large-scale data accumulation through acquisitions and at the utility of data-access or data-sharing remedies to resolve any concerns.
- **State aid**: The Commission will examine the relationship between public support for undertakings (for example for digital transformation) and the minimisation of competitive distortions through data-sharing requirements for beneficiaries as part of its ongoing review of a number of state aid guidelines.
- **Ex ante regulation**: The Commission will consider ex ante regulation as part of its review of how best to address systemic issues

relating to platforms and data, to ensure that markets stay open and fair.

AI WHITE PAPER

What: The paper sets out the Commission's vision to build a framework to enable the "trustworthy and secure" development of AI in Europe. The main building blocks involve the creation of:

- **An "Ecosystem of excellence"**, through the adoption of measures to align efforts at European, national and regional level; and
- **An "Ecosystem of trust"**, by ensuring compliance with EU rules, including the rules protecting fundamental rights and consumers' rights, in particular for AI systems operated in the EU that pose a high risk.

In relation to building an "ecosystem of excellence", the AI White Paper sets out the following 6-point Action Plan:

- **Working with Member States**: The Commission, taking into account the results of the public consultation on the White Paper, will propose to Member States a revision of the Coordinated Plan to be adopted by end 2020.
- **Focusing the efforts of the research and innovation community**: The Commission will facilitate the creation of "excellence and testing centres" that can combine European, national and private investments, possibly including a new legal instrument.
- **Skills**: Establish and support networks of leading universities and higher education institutes to attract the best academics and experts and offer world-leading masters programmes in AI.
- **Focus on SMEs**: Working with Member States to ensure that at least one digital innovation hub per Member State has a high degree of specialisation on AI.
- **Partnership with the private sector**: Set up a new public private partnership in AI, data and robotics to combine efforts, ensure coordination of research and innovation in AI, collaborate with other public-private partnerships in Horizon Europe and work together with the testing facilities and the Digital Innovation Hubs mentioned above.
- **Promoting the adoption of AI by the public sector:** Initiate open and transparent sector dialogues giving priority to healthcare, rural administrations and public service operators in order to present an action plan to facilitate development, experimentation and adoption. The sector dialogues will be used to prepare a specific 'Adopt AI programme' that will support public procurement of AI systems, and help to transform public procurement processes themselves.

As part of building an "ecosystem of trust", legislative reforms are being considered, including consideration of the following issues:

- Effective application and enforcement of existing EU and national legislation
- Limitations of scope of existing EU legislation
- The changing functionality of AI systems
- Uncertainty regarding the allocation of responsibilities between different economic operators
- Changes to the concept of safety
- The types of mandatory legal requirements to be imposed on the relevant actors
- The addressees of the legal requirements

For high-risk cases, such as in health, policing, or transport, AI systems should be "transparent, traceable and guarantee human oversight". The Commission states that authorities should be able to test and certify the data used by algorithms.

For lower risk AI applications, the Commission envisages a voluntary labelling scheme if they apply higher standards.

NBCUniversal fined for restricting sales of film merchandise

EU – ANTITRUST – ANTICOMPETITIVE AGREEMENTS

On 30 January 2020 the European Commission ("Commission") fined NBCUniversal EUR 14,327,000 for restricting intellectual property licensees from selling licensed merchandise within the EEA to territories and customers beyond those allocated to them.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Cooperating with Commission investigations can lead to significant reductions in fines. In this instance, NBCUniversal received a reduction of 30% for acknowledging the infringement, providing additional evidence, and waiving certain procedural rights.
- This is the third antitrust decision relating to restrictions in the licensing of merchandise in less than a year, demonstrating the Commission's current focus on removing restrictions undermining the EU Single Market.
- This is also a key example of how issues identified as a result of EU sector inquiries can lead to numerous investigations against specific entities.

NBCUniversal, which operates film and TV production companies worldwide, licenses the intellectual property rights to the characters in its movies (including Jurassic Park, the Minions, Trolls, and Shrek), for use in film merchandise such as toys, mugs, and clothes.

In June 2017 the Commission initiated an investigation into NBCUniversal's licensing and distribution practices, and on 30 January 2020 it found that certain restrictions imposed by NBCUniversal on licensees constituted an infringement of EU competition law. In particular, NBCUniversal implemented a number of direct measures which restricted out-of-territory sales by licensees, sales beyond allocated customers or customer groups, and online sales. NBCUniversal also required licensees to pass these restrictions onto their customers and implemented a series of measures to indirectly encourage compliance with these restrictions.

The Commission considered that these measures, which were in force for over six and a half years, partitioned the Single Market and prevented licensees in Europe from selling products cross-border and across customer groups, to the detriment of European consumers. As put in a statement by Executive Vice-President Vestager, a "*department store in Spain couldn't sell "E.T." pyjamas from a Belgian manufacturer – because that manufacturer was banned from selling into Spain. The extra-terrestrial may have made it all the way to Earth – but he was stopped in Spain because of a contractual restriction.*" However, NBCUniversal received a reduction in fine of 30% for cooperating with the Commission's investigation.

This investigation followed on from the Commission's sector inquiry into e-commerce markets (which completed in May 2017 and concluded that territorial restrictions were becoming increasingly common). It is the third such Commission decision in less than a year, after fines imposed in 2019 on Nike (EUR 12.5 million) and Sanrio (EUR 6.2 million) for similar cross-border restrictions on the sale of licensed merchandise.

ECJ provides further guidance on pay-for-delay cases

EU – ANTITRUST - ANTICOMPETITIVE AGREEMENTS, ANTITRUST - ABUSE OF DOMINANCE

On 30 January 2020 (case C-307/18), the European Court of Justice ("ECJ") issued a preliminary ruling that sheds more light on the circumstances in which an agreement settling a patent dispute between a pharmaceutical patent holder and a company intending to launch a competing generic product may fall foul of EU competition rules.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- A settlement agreement between a pharmaceutical patent holder and a generic company may fall foul of EU competition law if the latter would otherwise have had the ability to enter the market as a competitor to the originator company.
- The existence of a patent in force does not prevent generic companies from being regarded as potential competitors to the patent holder, as the validity of a patent can be contested.
- A settlement agreement between a pharmaceutical patent holder and a potential generic competitor will be regarded as a 'hardcore' restriction of competition if it involves a value transfer to the latter that is so significant that it cannot have any explanation other than the commercial interest of the parties not to engage in competition on the merits.
- The conduct of an originator company that concludes a set of settlement agreements with potential generic competitors may also constitute an abuse of a dominant market position if it has the capacity to have exclusionary effects going beyond the specific anti-competitive effects of each of the settlement agreements.

BACKGROUND

GlaxoSmithKline ("GSK") held a patent for the active ingredient of the anti-depressant medicine paroxetine, as well as secondary patents protecting some processes for the manufacture of that ingredient. When GSK's main patent expired in 1999, several generic companies took steps to launch a generic version of paroxetine in the UK market. GSK brought infringement proceedings against those companies, but eventually entered into settlement agreements with them, whereby the generic companies agreed to refrain, for a specified period, from entering the UK market with their own generic medicines, in return for payments made by GSK in various forms.

The UK Competition and Markets Authority ("CMA") took the view that those settlement agreements infringed the prohibition of anti-competitive agreements and also represented, on the part of GSK, an abuse of its dominant market position. The CMA imposed fines totalling GBP 45 million on the companies involved. The CMA's decision was appealed before the UK Competition Appeal Tribunal ("CAT"), which sought guidance from the ECJ on whether such settlement agreements did fall foul of EU competition rules.

ECJ PRELIMINARY RULING

On the first question, the Court confirmed that, "*notwithstanding the existence of GSK's patents*", the generic companies could be regarded as potential competitors if they had a "*firm intention*" and an "*inherent ability*" to enter the market, and there were no "*insurmountable barriers*" preventing market entry. The Court then confirmed its earlier case-law holding that patent rights cannot constitute, in themselves, such barriers, since their validity can be contested (see e.g. T-691/14, *Servier*, para. 356). The Court noted that the uncertainty regarding the validity of patents is a fundamental characteristic of the pharmaceutical industry, and it is not uncommon for generic medicines to be launched 'at risk' (of violating an existing patent).

On the second question, the Court held that settlement agreements do have a significant impact on competition but are not restrictive *'by object*' unless they serve as a disguise for a market sharing cartel (if the patent dispute is purely fictitious) or involve a value transfer to the generic company that is so significant that it clearly cannot have any explanation other than the commercial interest of the parties not to engage in competition on the merits. This confirms the Court's earlier case-law in which settlement agreements were regarded as restrictive of competition '*by object*' only when they involved an "**unjustified**" value transfer capable of "*inducing*" a generic company to stay out of the market (see T-691/14, *Servier*; T-684/14, *Krka*). In this instance, the Court clarified that a value transfer can be considered unjustified even if it does not exceed the profits that the generic company expected to make by entering the market. The Court also indicated that any competitive assessment must take into account the objective benefits arising from the settlement agreements, if they are such as to call into question the capacity of those agreements to cause a sufficient degree of harm to competition.

On the third question, whether such settlement agreements may be characterised as a restriction of competition *'by effect'*, the Court confirmed the need to assess the counterfactual. However, this not require that it be established either that the generic company would probably have been successful in the patent proceedings, or that the parties would have probably concluded a less restrictive settlement agreement.

Finally, the Court clarified that the conduct of an originator company that enters into a set of settlement agreements with potential generic competitors can be regarded as an abuse of a dominant position under two conditions. First, the originator company must be shown to hold a dominant position in the relevant market, which includes both the originator medicine and its generic version(s), if the latter were sufficiently 'close to market' at the relevant time. Second, the originator company's conduct must have the capacity to have exclusionary effects going beyond the specific anti-competitive effects of each of the settlement agreements. As part of this assessment, the Court restated the need to balance the favourable and unfavourable effects of the originator company's conduct on competition.

End of the line for České dráhy

EU –PROCEDURE

On 30 January 2020, the European Court of Justice dismissed the appeals in joined cases C-538/18 P and C-539/18 P brought by Czech national rail carrier České dráhy, which sought to set aside the judgments of the General Court in cases T-325/16 and T-621/16 upholding the European Commission's inspection decisions in cases AT.40156 – Falcon and AT.40401 – Twins.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Commission's duty to state reasons is not affected by information provided by a national competition authority, gathered

in the context of an investigation for an infringement of national competition rules.

- Where the Commission has sufficiently serious indications of a breach of competition rules, it is not required to weigh these against indications to the contrary when determining the proportionality of an inspection decision.
- Whilst the decision to conduct an inspection must comply with Article 102 TFEU, the Commission is not required to set out elements such as the precise market definition or demonstrate the appreciably of the effect on trade between Member States in its inspection decision.
- In the context of an inspection for alleged predatory pricing, any documents containing information concerning either costs incurred by the undertaking or its suspected exclusionary strategy are within the scope of the Commission's powers to seize documents.

In 2018 the General Court handed down rulings in two cases brought by České dráhy, challenging the legality of two dawn raids conducted by the Commission in 2016. These dawn raids were conducted using the Commission's powers to carry out inspections under Article 20(4) of Regulation 1/2003.

The first inspection decision was based on suspected exclusionary conduct contrary to Article 102 TFEU, through predatory pricing and other similar practices, on routes including, but not limited to, the Prague–Ostrava route (the "Falcon" decision). The second was based on suspected restrictions on sales of rolling stock contrary to Article 101 TFEU (the "Twins" decision). The Twins inspection decision was justified based on documents gathered by the Commission in the context of the Falcon inspection.

České dráhy sought the annulment of both the Falcon and Twins inspection decisions before the General Court in 2016. The General Court upheld part of the appeal against the Falcon decision in case T-325/16 (the "Falcon case"), insofar as it related to routes other than Prague–Ostrava and conduct other than predatory pricing, finding that the Commission did not possess sufficient evidence of these other forms of conduct. The General Court dismissed the appeal against the Twins decision in its entirety in case T-621/16 (the "*Twins case*").

On appeal, České dráhy raised pleas relating, among others, to the duty to state reasons, the requirement for proportionality in inspection decisions, the conditions applicable to inspections under Article 102 TFEU and the limits to the Commission's powers to seize documents.

In relation to the duty to state reasons, the General Court found in the Falcon case that the Commission could meet its obligation simply by setting out the putative infringements that it intended to investigate and the relevant period in which they were alleged to have occurred. On appeal, České dráhy argued that the Commission's duty was set at a higher level in this case, in light of the evidence available to it following an earlier dawn raid by the Czech competition authority for the same alleged practices. The Court of Justice confirmed the position at first instance, adding that information provided by a national competition authority, gathered in the context of an investigation for an infringement of national competition rules, could not affect the Commission's duty to state reasons.

On the proportionality of the inspection decision, the Court of Justice found that, where the Commission has sufficiently serious indications of a breach of competition rules, it cannot be required to weigh these against indications to the contrary at this stage of the procedure. The rights of the defence are preserved by the faculty to present potentially exculpatory evidence during the administrative procedure or during judicial review proceedings. Moreover, the Court of Justice found that the General Court was right to conclude that evidence of high levels of competition on the Prague–Ostrava route at the time of the Falcon inspection did not corroborate a lack of reasonable grounds for that inspection. The fact that a plan to exclude competitors through a predatory pricing strategy was unsuccessful did not make it any less abusive.

At first instance, the General Court also confirmed in the Falcon case that the conditions of Article 102 TFEU – specifically that the undertaking has a dominant position on the internal market or a substantial part thereof, and that the suspected behaviour is capable of affecting trade appreciably between Member

States - apply to both the final decision and any inspection decisions. However, on appeal, the Court of Justice found that this obligation did not require the Commission to precisely define the relevant market nor, a fortiori, to demonstrate the appreciably of the effect on trade between Member States in its inspection decision.

Finally, on the Commission's powers to seize documents, the General Court found in the Twins case that documents taken in the context of the Falcon inspection, and used to justify the Twins inspection, were legally seized. This was despite the fact that they contained no precise or concrete information on the applicant's costs, and did not, on their own, make it possible to establish a plan on the part of the applicant aimed at eliminating competitors. Nor indeed, did these documents show any direct link with the Prague-Ostrava route. Nevertheless, these documents, taken together with other elements contained in other documents seized in the Falcon inspection, may have helped to establish a more or less detailed picture of the applicant's costs or possibly even reveal an anti-competitive strategy. On appeal, the Court of Justice dismissed České dráhy's claim that the aforestated test, applied by the General Court, was excessively broad, finding that it was sufficient that the documents contained information concerning either the costs incurred by the undertaking or its strategy.

In conclusion, the Court of Justice's rulings in the České dráhy appeals set out a robust defence of the Commission's powers in the preliminary investigatory stage of proceedings, resisting arguments to increase the level of information the Commission is required to provide prior to an inspection, preserving the institution's wide discretion to act on the evidence available to it and maintaining a broad interpretation of its evidence gathering powers.

The clear message arising from this case is that the Court is unwilling to increase procedural protections at the expense of the Commission's investigatory powers; the administrative stage and juridical proceedings being the appropriate time for undertakings to exercise its rights.

Belgium adopts new rules on simplified merger control procedures

BELGIUM – MERGER CONTROL, PROCEDURE, NEW LAW

On 8 January 2020, the Belgian Competition Authority ("BCA") adopted new rules allowing the BCA prosecutors to scrutinise and approve mergers under the simplified procedure (without the need for a decision by the Competition College) in additional scenarios.

As a result of these changes, the simplified procedure may henceforth be applied in cases where:

- the combined market share of the parties to the proposed merger is below 50% and the increase in the Herfindahl–Hirschman Index (the HHI is a measure of market concentration defined as the sum of the squares of the market shares of all firms operating in a particular market) is less than 150;
- the combined market share of the parties to the proposed merger is below 50% and the increment in the parties' market share resulting from the proposed merger is less than 2%; and
- in view of all circumstances, the merger does not raise any significant competition concern and:
  - where the parties are active in the same markets, the parties' combined market share does not exceed 40% in any market; or
  - where the parties are active in vertically affected markets, the parties' market share in either the relevant downstream or upstream market is less than 40%.

The latter scenario has been added as the BCA has had to review in the past a relatively high number of mergers under the normal procedure (which is long and cumbersome in Belgium) although they clearly did not raise any competition issues.

No second life for Continental Can before the French Competition Authority

FRANCE – ANTITRUST – ANTICOMPETITIVE AGREEMENTS

Whilst competition authorities are reflecting on ways to control "killer acquisitions", the French Competition Authority ("FCA") has declined to rely on historic case precedent to control a non-notifiable acquisition completed by a dominant company.

On 13 October 2016, TDF, the French incumbent broadcasting company and market leader, acquired one of its two competitors, Itas Tim. This 3-to-2 merger did not meet the merger control thresholds and was consequently not notified to or examined by the FCA.

In November 2017, TDF's only remaining competitor, Towercast, lodged a complaint before the FCA arguing that TDF had abused its dominant position by acquiring Itas Tim, which reinforced TDF's dominant position. TowerCast sought to rely on the 1973 Continental Can case, in which the European Court of Justice ruled that Article 102 of the Treaty on the Functioning of the European Union ("TFEU") prohibiting abuses of dominant position could be applied to mergers when "*an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one*".

Following the complaint, the FCA commenced an investigation, and notified a statement of objections to TDF in relation to Itas Tim's acquisition.

However, the FCA ultimately ruled that the introduction in 1989 of a mandatory ex-ante merger control regime in the EU, intended to be the sole instrument to control concentrations excluded the application of Article 102 TFEU to concentrations even though they do not have an EU dimension. The FCA also made it clear that the French equivalent of Article 102 may not, for similar reasons, be invoked against a concentration.

Unfortunately the FCA's ruling does not provide complete legal certainty in relation to concentrations which do not meet the notification thresholds in France. In its decision, the FCA took the opportunity to clarify that, in its view, a concentration not meeting the French thresholds could nevertheless be subject to a referral from France to the European Commission pursuant to Article 22 of the EU merger regulation. This clarification not only leaves some uncertainty for transactions that do not meet the merger thresholds, but is also inconsistent with the European Commission's position as expressed in its 2014 white paper entitled "Towards more effective EU merger control".

The Paris Court of Appeal confirms CANNA France imposed prices on wholesalers.

FRANCE – ANTITRUST - ANTICOMPETITIVE AGREEMENTS

On 16 January 2020, the Paris Court of Appeal confirmed the 2018 decision of the French Competition Authority ("FCA") to fine several producers and wholesalers active in the sale of liquid fertilizers for domestic cultivation for having imposed vertical restraints.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Court considered that a precise definition of the relevant market is not necessary when establishing the existence of an anticompetitive agreement, as long as the sector can be sufficiently identified.
- When there is enough direct and explicit evidence as to the existence of a price-fixing agreement, it is not necessary to prove that the retailers effectively applied the prices.
- In order to determine whether an undertaking is "single-product" and should be entitled to a discount in its fine, the total turnover of the undertaking composed of the infringer and its parent company, when both are held liable, should be taken into account.

In its decision of 20 December 2018, the FCA fined a number of producers (including Canna France ("Canna")) and wholesalers of liquid fertilizers for domestic cultivation for arrangements amounting to resale price maintenance.

Canna, which was fined EUR 152 000, appealed the FCA's decision, but its arguments were entirely rejected by the Paris Court of Appeal.

Canna argued that the FCA should have defined the relevant market on which the practices occurred. However, the Court noted that such a definition is not crucial for the purposes of sanctioning an anti-competitive practice, especially when the sector in which the conduct took place can be identified with sufficient precision.

Canna also criticised a lack of evidence set out by the FCA to demonstrate the practices concerned. It argued, in particular, that it had not monitored the implementation by wholesalers of its resale prices which, it claimed, were merely recommended prices. However, the Court decided that there was enough evidence in the file that showed that

the parties had actually agreed on the implementation by the wholesalers of the resale prices set out by Canna for its products.

Canna finally criticised the manner in which the FCA had applied its fining guidelines. According to these guidelines, any fine should be mitigated when it is imposed on an undertaking which only produces the product affected by the practice (so-called "mono-product" firms). The rationale for this discount is to prevent too high a proportion of the company's total turnover being taken into account in calculating the fine. The Court agreed with the FCA that, where the company in question is found jointly and severally liable with its parent company, the question of whether the company is mono-product must be assessed across not only the infringing company, but also taking account of its parent company's activities.

10th amendment to Germany's Competition Act

GERMANY – NEW LAW / UPDATE

On 24 January 2020, the draft 10th amendment to the German Competition Act was published (see link to full text in German). The amendment reflects Industry Report 4.0 (in English) and more broadly the ECN+Directive. Key developments are centred around abuse of market power of the German Act against Restraints of Competition - the equivalent of Article 102 TFEU.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- **Assessing market power (dominance)** – new factors to be considered include access to data and an intermediary's "paramount significance" across markets.
- **New theories of abusing market power** – examples include: refusing supply of or access to data, where such supply or access is "objectively necessary"; preferring your own services to those of competitors/discriminating against competitors' offers; preventing data portability; and "free riding" on data collated by another company.
- **New enforcement power**: The German competition authority can intervene to prevent a monopolist "tipping a market" where it has benefited from increased network effects and is deliberating aiming to foreclose rivals

Most remarkably, the proposed analysis of market power has been expanded to include data as a new factor in assessing dominance alongside traditional factors, such as market shares. Additionally, dominance is not confined to only one relevant market, but can span different markets if the undertaking acts as an intermediary.

Not only has the definition of market power been recast, but new proposed theories of abuse of dominance have been injected into the Act. If adopted, the following two theories of harm (among others) could be added - a dominant undertaking:

- refusing access to data which is objectively necessary for a market participant to operate in an upstream or downstream market; or
- preferring its own services to those of other suppliers.

These changes send a very strong signal to data-rich companies, especially to those providing advertising services and operating on multi-sided platforms. These proposed amendments are significant, particularly if the obligation to provide access to data can be stretched so far as to include a positive duty to supply rivals with access to innovations where rivals strongly depend on these. Much will depend on how "objective necessity" will be interpreted as a possible extension of the current "essential facilities" doctrine, particularly as compensation need not be offered in return for access to data. These changes also raise the complicated intersection between competition law and data protection, as consent will be needed for data transfers/access to data.

Beyond new theories of abuse of dominance, the amendment also introduces the following changes:

- **Cartels** - the idea that cartels cause harm has been strengthened.
- **Intermediary powers** have been enhanced.
- **Merger thresholds** - the second domestic merger threshold has been increased from EUR 5m to EUR 10m for all undertakings. Similarly, the de minimis threshold for merger notification in Germany has been increased from EUR 15m to EUR 20m.
- **"Killer acquisitions"** - the latest iteration of the amendment is a first step towards accommodating so-called "killer acquisitions" (acquisitions of an innovative target company/product eliminating future competition in that market). These types of acquisitions cause concern, as they may lead to "tipping" the market by eliminating competitors.
- **According to the January draft**, acquisitions of "small" competitors (achieving a turnover of EUR 2m with two thirds of that turnover being achieved in Germany) by bigger undertakings (turnover of more than EUR 250m worldwide) in the same sector can be notifiable, even where the current merger thresholds are not met. However, the current wording suggests that this will be limited to concerns about harm to competition in certain domestic sectors caused by successive acquisitions in the future. This provision can still therefore be fine-tuned if it were to be used more generally to tackle all types of killer acquisitions including one-off transactions.

The draft emphasises that the list of potential abusive conduct is not closed – although this is not novel and mirrors the European Commission's existing approach to Article 102 TFEU, it emphasises that further amendments may follow.

The 10th amendment is not yet set in stone and we will provide further updates when the final draft is granted legislative approval. In the meantime, global technology giants with market activities in Germany may have to prepare themselves for tighter scrutiny whilst other jurisdictions may adopt similar measures to implement digital reforms.

For further reading, please visit our article on Tightening the Screws on Tech Titans commenting on an earlier draft of the 10th amendment published on 7 October 2019.

ICA fines ENI for "greenwashing" Diesel+ fuel in ad campaign

ITALY – CONSUMER LAW

On 20 December 2019, the Italian Competition Authority ("ICA") fined Eni S.p.a. EUR 5 million for the dissemination of misleading advertising messages used in its sales promotion campaign for Eni Diesel+ fuel.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This is the first fine by the ICA for "greenwashing", that is advertising messages about products' environmental credentials that are not true or that cannot be verified as true.
- The characterisation of a product as "green" can be made in relation to actual features only if the product brings about a positive benefit to the environment which can be demonstrated in absolute terms, and is not generic or relative in scope.
- Green claims must be accurate, clear, specific, unambiguous and scientifically verifiable. Even claims that may be technically true, based on an academic or legislative meaning, can be misleading for the average consumer.

Following complaints by consumers associations and an NGO active in the field of transport and the environment, the ICA applied a EUR5 million fine on ENI who allegedly deceived consumers with so-called green or environmental claims in TV, newspaper, digital media and petrol station advertisements about:

- the positive environmental impact associated with the use of its *Diesel+*; and
- the alleged characteristics of the fuel, in terms of lower consumption and CO2 emissions than competing products.

In particular, the ICA found that ENI's claims were misleading insofar as:

- First, they generated confusion between the Diesel+'s component (Hydrotreated Vegetable Oil or HVO) called "*Green Diesel*" and the *Diesel+* fuel itself, ultimately inducing consumers to believe that the product as a whole (rather than just its HVO component) had a positive environmental impact.
- Second, some of the product's alleged credentials, such as the reduction of gaseous emissions "*up to 40%*" and CO_2 emissions by 5% on average, as well as lower diesel consumption "*up to 4%*", were not confirmed by the ICA's findings.

The ICA held that the "*Green Diesel*" designation, the "green component" and "*renewable component*" qualifications, were used in a suggestive way, suggesting Diesel+ could help protecting the environment, whereas the product concerned was fuel which, by its nature, is highly polluting and cannot be considered "*green*" at all.

The ICA pointed out that green or environmental claims are a key advertising tool which can significantly affect purchase choices by consumers, based on their increased sensibility towards such issues. The characterisation of a product as "green" can be made in relation to actual features only if the product brings about a positive benefit to the environment which can be demonstrated in absolute terms, and is not generic or relative.

Such claims must be supported with the provision of information to consumers about the meaning of the claims aimed at letting them believe, or otherwise suggesting, that the product has a lower impact on the

environment. Even claims that may be technically true, based on an academic or legislative meaning, can be misleading for the average consumer.

In the same vein, the ICA clarified that claims about the characteristics of the Diesel+ were such as to enhance the green claims. In particular, the ICA clarified that ambiguous and broad claims which are difficult to substantiate should be avoided by traders. Indeed, general benefit claims are likely to create confusion about the actual properties or benefits of specific products, as they will likely be perceived by consumers as absolute statements. Claims that are not true or where it cannot be verified that they are true, are described as "*greenwashing*".

The ICA imposed a EUR 5million fine, ultimately rejecting ENI's argument that the "green" qualification is not an absolute statement but a relative indication that entails a comparison with competing products.

Council of State upholds annulment of reinforcing steel bars and electro-welded wire mesh fines

ITALY – ANTITRUST - CARTELS

On 21 January 2020, the Council of State (Italy's Administrative Highest Court) handed down its judgment upholding the annulment of the Italian Competition Authority's ("ICA") decision of 19 July 2017 which had fined eight Italian steel producers for an alleged price-fixing cartel, based on the excessive duration of the ICA's pre-investigation activities, as well as the lack of sufficient evidence of the infringement.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- **The importance of complying with the reasonable duration of proceedings**: The pre-investigation phase was found to be excessively long when account was taken of the extension of the investigation that had to be carried out and the actual usefulness of the documents and information gathered.
- **The competition authority has to show why an exchange of information must be considered illegal**: The Court confirmed that the ICA did not prove the alleged anticompetitive nature of information exchanges between the parties, notably how the resulting transparency would allow the parties to foresee competitors' future prices.
- **Companies can provide alternative plausible explanations of their conduct**: When an alleged infringement is found simply on the basis that the established facts cannot be explained other than by the existence of an anticompetitive behaviour, the parties can provide an alternative plausible explanation of their conduct, which shall prevail.

According to the ICA, eight leading Italian steel manufacturers allegedly put in place a continuous and complex infringement between 2010 and 2016, by coordinating their commercial policies in the national market of reinforcing steel bars and electro-welded wire mesh, imposing total fines amounting to EUR 140 million.

In its judgment, the Council of State upheld the annulment of the ICA decision by the court of first instance, notably:

- confirming the excessive duration of the pre-investigation carried out by the ICA; and
- finding that the decision was manifestly unfounded and unreasonable, insofar as the ICA failed to prove, among other things, the anticompetitive nature of the exchange of information that would have allowed the parties to coordinate their commercial policies.

This judgment undoubtedly establishes an important principle as regards the parties' right

to a reasonable duration of the proceedings. Indeed, according to the Council of State, irrespective of the national provisions regulating the authority's activity and its duration, "a pre-investigation phase carried out for an excessive period of time cannot be justified, since otherwise the general principles… on the certainty and efficiency of the administrative action set in the interest of both the public administration and the party concerned by the proceedings would be violated".

Such an assessment will very likely have an impact on future pre-investigation phases in Italy, namely forcing the ICA to speed up its activity of gathering documents and information before adopting a decision to open proceedings.

Spanish authority accepts Adidas online sales restriction commitments

SPAIN – ANTITRUST - ANTICOMPETITIVE AGREEMENTS

The CNMC has accepted commitments offered by Adidas Spain ("Adidas") and closed the investigation that had been initiated in November 2018, following a complaint lodged by BCINCOPE (an Adidas franchisee), for an alleged infringement of articles 1 SCA and 101 TFEU in the Spanish retail market for clothing and footwear, consisting in the imposition of certain restrictions on Adidas' distribution network.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The CNMC confirms its preference to use commitments to close a case when they are sufficient to address the anticompetitive concerns identified.
- The CNMC maintains its focus on vertical restraints.
- This case offers important insights for companies into how the CNMC will analyse traditional and more recent (such as online) forms of vertical restrictions.

This case offers important insights for companies into how the CNMC will analyse traditional and more recent (such as online) forms of vertical restrictions. Although Adidas changed its contracts with distributors and franchisees over the years to adapt them to current rules and regulations, some of them were not updated, and it was in these ones in which the CNMC identified clauses, which it considered raised anticompetitive concerns, namely:

- Bans on online sales and advertising (e-commerce): some contracts prevented

franchises from selling Adidas' products other than in physical point of sales; others obliged members of the distribution network to request a web URL authorisation to Adidas to sell online; and others prevented distributors from using Adidas' brand as a keyword in the paid results of search engines;

- Post-contractual non-compete obligations: some contracts contained a one year duration non-competition clause, which was considered by the authority to be overly broad as it generally prevented the franchisees from investing in any of Adidas' competitors. The prohibition was not limited to the premises in which the Adidas' franchisee carried out its activities (and so could not benefit from the exemption of article 5.3 b) of Regulation 330/2010);
- Bans on cross selling between franchisees and/or other distributors: some clauses obliged Adidas' distributors and franchisees to only acquire their products from the manufacturer, preventing them from contacting other members of the distribution network for this purpose. As a result, members were only allowed to sell their products to final consumers;

Allegations of resale price maintenance were also investigated, but no supporting evidence was identified by the CNMC.

In order to address the anticompetitive concerns identified by the CNMC in the non-updated contracts, Adidas offered to:

- clarify that Adidas authorises its distributors and franchisees to sell online, both through its own website or through marketplaces; the modification of the URL authorisation process; and to allow the use of Adidas brands as keywords in online advertising;
- remove the post-contractual non-compete clause; and
- clarify that cross-sales within its distribution network (between distributors and franchisees) are allowed (sales to non-authorised distributors being prohibited).

The CNMC considered that the commitments offered by Adidas addressed the concerns identified and that they met the procedural and material criteria established by the CNMC in its Notice on commitments (*Comunicación de la CNC sobre terminación convencional de expedientes sancionadores*).

This case offers important insights for companies into how the CNMC will analyse traditional and more recent (such as online) forms of vertical restrictions and into how the commitment procedure is applied in practice (see also AGIC GNSUR, MEDIAPRO FÚTBOL or SCHWEPPES cases).

Guitar maker fined for illegally preventing price discounts online

UK – ANTITRUST - ANTICOMPETITIVE AGREEMENTS

On 22 January 2020, the Competition and Markets Authority (the "CMA") fined Fender Musical Instruments Europe Limited ("Fender Europe") GBP 4.5 million for engaging in illegal resale price maintenance ("RPM") in relation to the online sale of its guitars.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This is the largest fine imposed by the CMA to date for RPM and follows the CMA's GBP 3.7 million fine against Casio for similar behaviour in August 2019.
- RPM covers behaviour which restricts retailers' or resellers' freedom to set their own prices, meaning price discounts cannot be offered, for example. This can lead to customers missing out on the best deals because, even when they shop around, they find all retailers are selling at similar prices.
- Guidance on avoiding RPM can be found on the CMA's website.

Fender Europe admitted engaging in illegal anticompetitive conduct by pursing a policy aimed at restricting UK retailers from discounting their online prices, and requiring its guitars to be sold at or above a minimum price between 2013 and 2018. This meant that the guitars could not be subject to price discounts.

As Fender Europe admitted to the conduct, a 60% discount was given under the CMA's leniency programme, along with a further 20% discount to reflect settlement.

During the course of its investigation, the CMA found:

- evidence that Fender Europe on occasion pressurised retailers to raise their online prices, after being tipped-off that they were not toeing the line; and
- that certain Fender Europe employees deliberately tried to cover up their actions by recording as little as possible in writing. The investigation nevertheless uncovered emails and texts from Fender Europe's IT servers and mobile phones which helped to prove the illegal behaviour.

Moreover, during the CMA's dawn raid inspection of Fender Europe's premises in April 2018, a senior officer failed to disclose several notebooks. This resulted in the CMA imposing an additional GBP 25,000 penalty on Fender Europe.

This case is an example of the CMA's increasing focus on RPM. For example:

- in 2018, the CMA issued 4 advisory letters and 34 warning letters about RPM, designed to alert companies to the illegal nature of this practice and to ensure compliance; and
- since 2016, there have been numerous other fines for RPM online, including in light and bathroom fittings and the Casio case in August 2019.

First UK fine for failure to respond to market study information request

UK – PROCEDURE, MARKET INVESTIGATIONS & SECTOR INQUIRIES

AppNexus Europe Limited ("AppNexus") has been fined GBP 20,000 for failing to comply with an information request issued by the UK Competition and Markets Authority ("CMA"). The fine relates to an information request imposed by the CMA as part of its ongoing market study into online platforms and digital advertising – the first fine in the UK relating to market study information request.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This is the first time a company has been fined for a failure to comply with an information request issued in the context of a market study. The case follows a pattern of the CMA becoming increasingly more strict in enforcing procedural requirements as part of its merger and competition investigations.
- Parties must ensure that they take all responsible and appropriate steps to respond to information requests. If clarification or an extension of time is required, parties should approach the CMA at the earliest opportunity.
- Responses to information requests can be very time and resource intensive. However, excuses for failure to comply such as a lack of available resource or

holidays may not be accepted by the CMA in all circumstances.

On 3 July 2019, the CMA launched a market study into online platforms and the digital advertising market. Market studies enable the CMA to educate itself about a market in order to inform a decision whether or not to launch a full market investigation (for further information on the UK markets studies regime, see the Ashurst Quickguide). In its interim report of 18 December 2019, the CMA stated that it is not minded to propose a market investigation reference at this stage. The CMA's final report is due in July 2020.

Under the Enterprise Act 2002 ("EA02"), the CMA is able to collect documents and information, or require the attendance of witnesses, as part of a market study. A failure to comply with such a request without reasonable excuse can result in a penalty of up to GBP 30,000.

On 24 July 2019, the CMA sent a draft version of a notice requiring the production of documents and information to AppNexus. The draft notice suggested a deadline for AppNexus' response of 23 August 2019 but, at AppNexus' request, the deadline was subsequently set at 6 September 2019, when the final notice was issued on 22 August (the "Notice"). A further extension was later granted until 11 September 2019.

On 10 January 2020, the CMA published a decision imposing a penalty of GBP 20,000 on AppNexus for failing to comply with the Notice without reasonable excuse.

In its decision, the CMA noted that:

- AppNexus had provided an initial response to parts of the Notice on 7 October 2019, more than three weeks after the extended deadline;
- AppNexus had only provided certain internal documents and data requested by the Notice on 26 and 27 November, over 10 weeks after the extended deadline;
- AppNexus had received multiple warnings from the CMA over its failure to comply with the Notice; and
- AppNexus' non-compliance had an adverse impact on the market study, which is subject to statutory time limit).

S.174(A) EA02 provides that a penalty can be imposed if a failure to comply is "without reasonable excuse". The CMA's guidance on administrative penalties (CMA4, Administrative penalties: Statement of Policy on the CMA's Approach), states that reasons will be considered on a case-by-case basis but, in particular, it will consider whether a "significant and genuinely unforeseeable or unusual event and/or an event beyond [the party's] control" has occurred, absent which the failure would not have occurred.

In its decision, the CMA stated that AppNexus had put forward a number of reasons to explain why it was unable to comply with the Notice, including that:

- there were 250 questions in the Notice requiring expert knowledge;
- it only had two lawyers in the EMEA region and it was the holiday season;
- AppNexus was a global organisation, meaning that the response required several phases of review before submission, and a number of key stakeholders were located in the USA; and
- AppNexus was also responding to similar questionnaires from other authorities.

The CMA concluded that these reasons did not individually or collectively constitute a reasonable excuse. In particular, the CMA noted that:

- AppNexus had been sent a draft Notice and so had ample time to consider the timing requirements and arrange appropriate resource. It had also requested and was granted an extension of the deadline in the draft notice;

- AppNexus only asked for a further extensive extension for the entirety of its response two days before the deadline; and
- once AT&T (AppNexus' parent company) had taken over responsibility for responding to the Notice, the remaining outstanding documents and information were swiftly provided.

This is the first occasion in which an administrative penalty has been imposed for a failure to comply with a request for information in a market study or market investigation since the CMA was given enhanced information gathering and fining powers in 2013. The case shows that, whilst the CMA will respond to reasonable requests for extra time, parties must take information requests and the deadlines for responses seriously. The CMA's decision notes that the AppNexus in-house lawyer who was responsible for co-ordinating the response to the Notice is no longer employed by AppNexus.

The penalty on AppNexus follows a number of recent cases in merger and investigation contexts in which similar administrative penalties have been imposed by the CMA, including a fine of GBP 27,000 imposed on Rentokil in August 2019 (see the Ashurst summary) and a fine of GBP 20,000 for Sabre Corporation in October 2019.

Court of Appeal confirms Ping's online sales ban infringement

UK – ANTITRUST - ANTICOMPETITIVE AGREEMENTS

On 21 January 2020, the Court of Appeal of England and Wales handed down a judgment dismissing the appeal by Ping Europe Limited ("Ping") against a judgment of the Competition Appeal Tribunal ("CAT"), upholding the CMA's 2017 decision that Ping's online sales ban constituted a restriction of competition by object under the Chapter I Competition Act 1998 prohibition and Article 101 TFEU. The Court of Appeal confirmed that case law and decisional practice shows that the imposition by a supplier of a prohibition on internet sales by authorised dealers in a selective distribution network reveals a sufficient degree of harm to competition and is a restriction "by object". The CAT's imposed penalty of GBP 1.25 million was also upheld.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Court of Appeal's judgment confirms that an absolute ban on online sales is highly likely to amount to a serious restriction of competition and will not be permitted under UK and EU competition law.
- The Court found that, although Ping was pursuing a genuine commercial aim of promoting in-store custom fitting of its golf clubs, it could have achieved this through less restrictive means than an absolute online sales ban.
- The judgment confirms that the extent and nature of the conditions that suppliers with selective distribution networks can impose on undertakings further down in their distribution chain is limited, and online restrictions should not go beyond the restrictions permitted on sales from bricks and mortar shops.

BACKGROUND

Ping is a manufacturer of golf clubs, accessories and clothing which operates a selective distribution network of authorised dealers throughout the UK. Ping considers that custom fitting of its golf clubs, which is not possible over the internet, is necessary for their optimisation. Ping accordingly introduced a Custom Fitting Policy including:

- a requirement that Ping clubs should be sold after a dynamic face-to-face custom fitting; and
- a ban on online sales of Ping clubs by Ping's authorised dealers, preventing them from selling these clubs on their websites (the Internet Sales Policy ("ISP")).

In August 2017, the CMA found that the ISP breached the Chapter I prohibition and Article 101, and fined Ping £1.45 million. Ping appealed, but the CAT upheld the CMA decision in September 2018, although it reduced Ping's fine to GBP 1.25 million on the basis that the uplift reflecting the involvement of Ping's managing director was not appropriate on the facts. The present Court of Appeal judgment upholds the CAT's decision and penalty.

RESTRICTION BY OBJECT

The Court of Appeal agreed with the analysis of the CMA and the CAT as to how a prohibition on retailers' online sales restricts competition. This comprises two parts:

- first, the ISP limits the ability of authorised dealers to sell to customers who are outside the geographic range of their premises;
- second, this inability to compete for sales to customers beyond the retailer's geographic range leads to a diminution in price competition.

The Court of Appeal referred to the European Commission's Guidance on Vertical Restraints, which considers online sales as passive sales (where the customer approaches the distributor for a sale); restriction of which amounts to a hardcore restriction under the Vertical Agreements Block Exemption Regulation. This has been confirmed by the ECJ in its *Pierre Fabre* and *Coty* judgments (see our summary of those judgments). The Court also referred to the ECJ judgment in *Cartes Bancaires*, which held that a restriction can amount to an object infringement even if it pursues other legitimate objectives. It was observed that neither the CMA nor the CAT was convinced that the ISP objectively and actually improved competition based on quality. The fact that Ping believes the ISP had a greater impact does not prevent it being an object restriction.

When assessing the legal and economic context of the ISP, the Court held that the fact of Ping's selective distribution network and the legitimacy of that network given the nature of Ping clubs had correctly underlay the CAT's reasoning at every stage. In light of such assessment, the CAT had concluded that the ISP went beyond what was generally regarded as a necessary and legitimate diminution of intra-brand competition to restrict competition.

The Court ultimately held that Ping's essential argument that it should be allowed to decide for itself how best its dealers should market its goods in competition with other manufacturers, has no precedent of success in EU competition cases. Although ECJ case law has recognised the benefits of selective distribution networks for luxury or highly technical goods, Ping's ISP went beyond what is permissible. The judgment also confirmed that there is no need to establish a substantial weakening or elimination of competition in the context of Article 101 TFEU, as Ping sought to argue. Applying such a high threshold would be inconsistent with the application of Article 101, which does not depend on the market power of the parties concerned.

PENALTY

The Court of Appeal dismissed Ping's ground of appeal on the level of the penalty. Ping criticised the CAT for failing to make a specific reduction to reflect that it actually overturned the CMA's finding and held that Ping's infringement had been negligent rather than intentional. However, the Court found that the

CAT had been entitled to take a view of the fine "in the round".

COMMENT

This case marks the first time that a UK court has examined a prohibition of online sales under competition law. In an increasingly digitised economy, the Court of Appeal's judgment is significant and sends a clear message to suppliers to be conscious when arranging their distribution networks and agreements.

The judgment confirmed that the extent and nature of the conditions that suppliers with selective distribution networks can impose on undertakings further down in their distribution chain is limited. The Court emphasised that the decision does not prevent Ping from continuing to insist that its authorised dealers invest in custom fitting apparatus and endeavour to persuade golf club consumers of the benefits of dynamic custom fitting. Outright bans on internet sales which restrict sales to particular groups of end-users will not, however, be permitted.

When three is better than four: Federal Court approves TPG / Vodafone merger

AUSTRALIA – MERGER CONTROL

On 13 February 2020, the Federal Court (per Justice Middleton) decided that the proposed merger of Vodafone Hutchinson Pty Limited (Vodafone) and TPG Telecom (TPG) will not have the likely effect of substantially lessening competition in contravention of section 50 of the Competition and Consumer Act 2010 (Cth) (CCA), reversing the ACCC's decision to oppose the transaction.

Subject to any appeal by the ACCC, and securing clearance from the Foreign Investment Review Board, TPG and Vodafone can proceed to consummate the AUD 15 billion merger they announced 18 months ago. Refer to our timeline diagram below.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The retail mobile market in Australia, is dominated by three Mobile Network Operators (MNOs) – Telstra (41%), Optus (24%) and Vodafone (19%); TPG is one of many Virtual MNOs (retail providers who acquire wholesale services from MNOs) and has a market share of 3%.
- The ACCC's case depended on satisfying the Court that, if the merger between TPG and Vodafone did not proceed, TPG, currently a maverick in fixed broadband (with significant 4G spectrum holdings and a previously announced intention to become an MNO), would roll out a fourth mobile network, which would constrain the incumbent MNOs.
- Vodafone and TGP's case was that, without the merger, TPG would not roll out its own mobile network (no longer commercially viable following the Government's ban on Huawei 5G equipment) and Vodafone and TPG would remain second-class players.

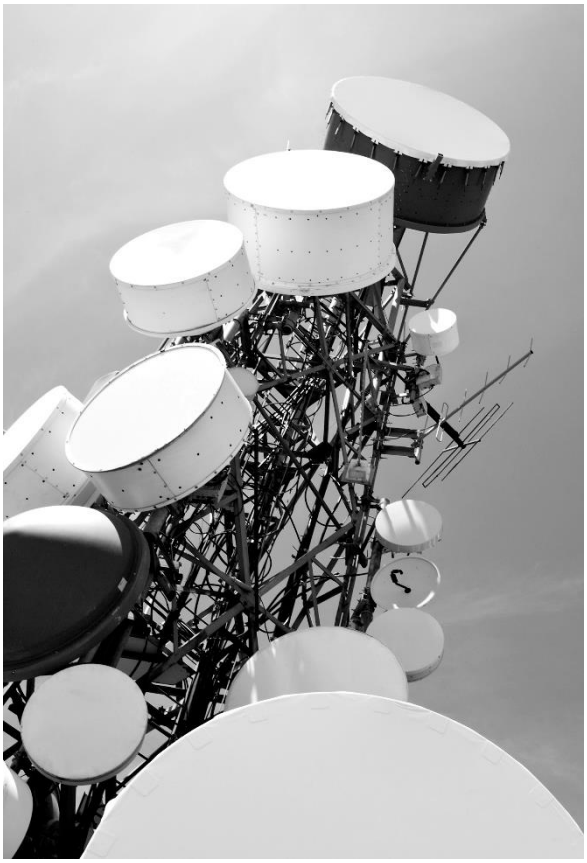
THE FEDERAL COURT HAS RULED IN VODAFONE AND TPG'S FAVOUR, FINDING THE MERGER WILL NOT BE LIKELY TO SUBSTANTIALLY LESSENING COMPETITION IN THE RETAIL MOBILE MARKET

- The Federal Court has granted declaratory relief to the parties, allowing the merger to proceed.
- The reasons are not yet publicly available (due to confidentiality issues), and are expected to be published in the next two weeks.

TPG'S EVIDENCE WAS CREDIBLE – TPG WOULD NOT ROLL OUT A MOBILE NETWORK ABSENT THE MERGER.

The ACCC's counterfactual fails:

- The ACCC was not successful in discrediting TPG's reasons for abandoning its mobile network and failed to show that, absent the merger, TPG could and would be likely to progress the rollout of a fourth mobile network in Australia and emerge as a strong competitive force against incumbent players.
- Justice Middleton was satisfied that it was no longer feasible for TPG to roll out a mobile network, and remarked that TPG's will and incentive to build a mobile network was now gone, and that while he "cannot be sure they won't change their minds" this was "extremely unlikely" and there was "no real chance of it occurring in the next 5 years".



THREE PLAYERS ARE BETTER THAN FOUR

- Justice Middleton commented that "it is not necessarily the number of competitors in the market, but the quality of competition that must be assessed".
- The Court accepted that without the merger, Vodafone's ability to compete successfully in the retail or wholesale mobile market will decrease. Justice Middleton accepted that the merged entity would be more effective at constraining incumbent players Telstra and Optus.

PARALLELS WITH T-MOBILE / SPRINT MERGER DECISION IN THE US

On 10 February, the US District Court rejected the challenge to the merger between the third and fourth largest national mobile carriers in the US, T-Mobile and Sprint. Judge Marrero commented that the case "might well suffice to warrant injunction of mergers in more traditional industries", but that "a presumption of anticompetitive effects would be misleading in this particularly dynamic and rapidly changing industry".

ACCC MAY APPEAL

The ACCC has 28 days to lodge an appeal.

ACCC IS EXPECTED TO RAMP UP ITS LOBBYING EFFORTS FOR CHANGES TO MERGER LAWS

- The decision continues the ACCC's losing record in litigation opposing mergers (which now stands at 0:7). The ACCC's Chairman, Rod Sims, and Commissioners have expressed concerns that the hurdle for establishing that a proposed merger is anti-competitive is too high, and should be revisited.
- We expect the ACCC to continue to advocate for changes to merger laws, including a "rebuttable presumption" that where a merger is likely to result in a significant increase in concentration in a market, the merger should be prevented from proceeding absent evidence to the contrary (similar to the position in the US).

The Government has already committed to undertake further consultation on the ACCC's recommendation (in its Final Report on the Digital Platforms Inquiry) that section 50(3) of the CCA be amended to include two additional merger factors (a) the likelihood that the acquisition would result in a potential competitor being removed from the market; and (b) the nature and significance of assets being acquired, including data and technology.

TIMELINE: *Vodafone v ACCC & TPG*

2017

2017
TPG starts building its own 4G mobile network using Huawei equipment because Huawei is the cheapest equipment provider and offers an "upgrade path to 5G".

2018

23 AUGUST 2018
Australian Government announces ban on Huawei equipment for 5G mobile networks.

30 AUGUST 2018
TPG and Vodafone announce proposed $15 billion merger

24 SEPTEMBER 2018
ACCC commences review of proposed TPG / Vodafone merger.

13 DECEMBER 2018
ACCC publishes a "Statement of Issues", outlining concerns that the proposed TPG / Vodafone merger will substantially lessen competition in the national market for the retail supply of mobile services, by removing TPG as a strong, aggressive competitor.

2019

29 JANUARY 2019
TPG announces its stopping the rollout of its mobile network because it can no longer use Huawei equipment.

8 MAY 2019
ACCC blocks proposed TPG / Vodafone merger.

24 MAY 2019
TPG and Vodafone lodge proceedings in the Federal Court seeking orders that the proposed merger would not have the likely effect of substantially lessening competition.

10 SEPTEMBER – 1 OCTOBER 2019
Federal Court hearing before Justice Middleton.

2020

13 FEBRUARY 2020
Decision handed down by Justice Middleton.

Federal Court of Australia rejects the ACCC's 'dieselgate' settlement and imposes a record $125 million fine on Volkswagen for breaches of the ACL

AUSTRALIA – CONSUMER PROTECTION LAW

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Court imposed a penalty amount AUD 50 million higher than had been agreed between the parties, bucking the recent trend of the Court reducing penalties proposed by the ACCC.
- The AUD 125 million penalty was calculated under the old ACL penalty regime where the maximum penalty was AUD 1.1 million per breach.
- Now that the penalties available under the ACL have increased substantially - the higher of AUD 10 million, three times the benefit obtained or, if this cannot be determined, 10% of the annual turnover of the body corporate – this decision will likely embolden the ACCC to seek considerably higher penalties in contested matters and negotiated settlements moving forward.

BACKGROUND

In Federal Court proceedings brought by the ACCC, Volkswagen Aktiengesellschaft (Volkswagen) admitted it made false representations to Australian regulators about the compliance of its vehicles with Australian diesel emissions standards in breach of the Australian Consumer Law (ACL). The Court ordered Volkswagen to pay a pecuniary penalty of AUD 125 million for the breaches – an amount AUD 50 million higher than had been agreed between the parties, and the highest penalty order ever made by the Court for contraventions of the ACL. Volkswagen was also ordered to pay the ACCC's costs in the agreed amount of AUD 4 million.

At the centrepiece of the global scandal known as "dieselgate" was Volkswagen's "Two Mode" software that operated to deliberately conceal the true nature of nitrogen oxide (NOx) emissions from Volkswagen's diesel vehicles. 'Mode 1' of the software operated under testing conditions to produce NOx emissions that were compliant with the limits prescribed under the relevant Australian emission standards. However, when driven on the road, the vehicles switched to 'Mode 2' which produced substantially higher NOx emissions that exceeded emissions standards.

Volkswagen consented to the Court making declarations that Volkswagen breached section 29(1)(a) of the ACL which relevantly prohibits false or misleading representations that goods are of a particular standard, quality, value, grade or composition. The Court declared that Volkswagen had made false representations to Australian regulators on 473 separate occasions about its compliance with Australian emissions standards in respect of 57,082 Volkswagen-branded diesel vehicles when it sought approval to import the vehicles into Australia, and when it sought to obtain "Green Vehicle" ratings for the vehicles.

JUSTICE FOSTER'S UNCOMPROMISING APPROACH TO PENALTIES

The ACCC and Volkswagen had jointly sought the Court's approval for the imposition of a AUD 75 million pecuniary penalty on Volkswagen. However, the parties' agreed penalty was rejected by Justice Foster as "manifestly inadequate" in the circumstances and was insufficient to meet the overriding objects of specific deterrence and general deterrence. In particular, Justice Foster was critical of the ACCC for "not support[ing] the agreed penalty with any reasoning, let alone reasoning which encapsulated or reflected views within its expertise as the regulator charged with enforcing the consumer protection provisions in the ACL."

At the time of Volkswagen's conduct, the maximum penalty available for each breach of

section 29(1)(a) of the ACL was AUD 1.1 million. Accordingly, Justice Foster found that the maximum penalty which could have been imposed on Volkswagen was AUD 520.3 million (being AUD 1.1 million x 473 contraventions).

Justice Foster applied the "instinctive synthesis" approach to determining the appropriate penalty to be imposed which involved transparently weighing all relevant factors rather than starting from a predetermined figure and making incremental additions or subtractions. Justice Foster made the following pertinent observations regarding the relevant factors:

- at the heart of Volkswagen's conduct was a "dishonest scheme deliberately concocted" that was "designed to deceive" Australian regulators and consumers – this conduct is properly characterised as "an egregious breach of Australian consumer law of the worst kind imaginable" and is "at the most serious end of the spectrum" with respect to admitted contraventions of the ACL;
- the contravening conduct was deliberately perpetrated by senior management personnel of Volkswagen – Justice Foster was sceptical of, but ultimately accepted, Volkswagen's submission that its governing organs were unaware of the scheme, noting that this reflected a "serious governance problem";
- Volkswagen has not shown any contrition with respect to its "outrageous contraventions" and strenuously defended the proceedings for three years before admitting contraventions of the ACL at a very late stage;
- the objective of the emissions standards is to reduce harm to humans and to the environment – Justice Foster considered the harmful nature of excessive NOx emissions and criticised the "temerity" of the parties' joint submission that there was no evidence of actual harm, and in particular, commented that he "cannot fathom why the ACCC joined in such a submission"; and
- Volkswagen is capable of paying a very large penalty given its size and wealth – the company had generated gross worldwide revenue of between EUR 159.3 billion and EUR 213.3 billion during the relevant period from 2011 to 2015.

Ultimately, Justice Foster ordered a penalty of AUD 125 million to be imposed on Volkswagen, noting the application of the course of conduct principle (making allowances for the similarities and possible points of overlap in the contravening conduct) and the totality principle (a "final check" to ensure the penalty is just and appropriate) in reducing the potential penalties from the maximum.

Justice Foster stated that this case was "unique" and that he did not "consider it helpful or relevant" to be told by the parties that the previous highest penalty under the ACL was AUD 26.5 million. Justice Foster also did not consider the substantial fines imposed on Volkswagen overseas to be relevant in circumstances where those penalties did not relate to the conduct perpetrated in Australia.

SUBSTANTIALLY HIGHER PENALTIES EXPECTED MOVING FORWARD

Although the record AUD 125 million penalty ordered against Volkswagen is the highest total penalty order ever imposed by the Court for contraventions of the ACL, and was considerably higher than the previous highest penalty of AUD 26.5 million imposed on Empower Institute for unconscionable conduct, the penalty was determined in accordance with the old ACL penalties regime.

Under the current regime introduced in 2018, maximum penalties for contraventions of the ACL are now considerably higher – the greater of AUD 10 million, three times the benefit obtained or, if this cannot be determined, 10% of the annual turnover of the body corporate. If the current penalty regime had applied in this case, the penalty imposed on Volkswagen would likely have been exponentially higher in circumstances where the lowest maximum penalty that would have been available to the Court would be AUD 4.73 billion (being AUD 10 million x 473 contraventions).

Justice Foster's approach is a reminder that the Court is not merely a "rubber stamp"; the responsibility to determine the appropriate pecuniary penalty remains solely with the Court at all times.

This case also represents a shift in the Court's recent trend of reducing the penalties proposed by the ACCC at a time where the application of the new ACL penalty regime is in its infancy. It is likely that the ACCC will seek to deploy Justice Foster's uncompromising approach to penalties moving forward to seek considerably higher penalties and negotiated settlements for serious corporate misconduct that contravenes the ACL.

The time for Volkswagen to appeal the judgment has not yet expired and Volkswagen is reportedly considering its options.

The transition period and a potential future deal: Brexit's practical impact on competition law

UK AND EU – BREXIT

Are you wondering what UK competition law looks like since the UK left the EU on 31 January 2020 ("Brexit Day"), and what it might look like after the Transition Period has ended? The answer to the first question is relatively straightforward: (almost) nothing has changed. But the shape of UK competition law after the end of the Transition Period will depend on what, if any, trade agreement the UK negotiates with the EU by 31 December 2020 (the current end of the Transition Period).

In this briefing note we consider the practical impact of Brexit on competition law in the UK in the following circumstances:

- **During the Transition Period:** at the time of writing, as of 31 January 2020, the UK remains subject to EU law under the withdrawal agreement entered into between the UK and the European Union on 17 October 2019 (the "Withdrawal Agreement"). Under the Withdrawal Agreement, EU competition rules continue to apply to UK businesses as if the UK was still an EU Member State until 31 December 2020 (the current end of the Transition Period). For the purposes of this note, this period is referred to as the "Transition Period" and includes any extensions to the Transition Period made under the Withdrawal Agreement.
- **Post Transition Period:** the outcome where the Transition Period ends but no future trade agreement has formally been agreed (a "No Deal II" scenario). This scenario assumes that the emergency legislation that was prepared by the UK Government in anticipation of a 'no deal' Brexit will come into effect at the end of the Transition Period.
- **Backstop:** The potential implications of the backstop period set out in the Withdrawal Agreement.
- **Future Relationship:** The impact of a future longer term UK-EU relationship, considering the possibilities following recent Brexit developments.

This note is an updated version of our previous guidance of 11 April 2019.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- As of 23:00 UK time on 31 January 2020 ("Brexit Day") the UK is no longer a Member State of the EU, following ratification by the UK Parliament and the European Parliament of the revised Withdrawal Agreement and Political Declaration on, respectively, 23 January and 29 January 2020. The UK has now entered into a "Transition Period" under the Withdrawal Agreement, which is currently scheduled to end on 31 December 2020, although it is possible that it might be extended.
- The UK Parliament has passed two key pieces of primary legislation which give effect to Brexit and the Withdrawal Agreement under UK law. First, the European Union Withdrawal Act 2018 (the "Withdrawal Act") repeals the European Communities Act 1972 with effect from Brexit Day and transposes into UK domestic law certain existing EU legislation. Second, the European Union (Withdrawal Agreement) Act 2020 postpones the effects of the Withdrawal Act from Brexit Day until the end of the Transition Period, gives effect to the Withdrawal Agreement and amends the Withdrawal Act.
- As a consequence of the Transition Period, competition law in the UK post-Brexit remains largely familiar, subject to any separate non-Brexit related changes the UK Government decides to implement.
- The status of UK competition law post-Transition Period continues to remain uncertain. In principle, the emergency legislation made by the UK Government in preparation for a 'no deal' Brexit scenario will enter into force at the end of the Transition Period. However, those statutory instruments (including the legislation for State aid, which currently remains in draft) are likely to require amendment to reflect the outcome of any future trade deal negotiations between the UK and the EU.
- The biggest immediate impact at the end of the Transition Period from a competition law perspective is likely to be on businesses that are part way through a European Commission ("Commission") merger control or antitrust investigation towards the end of the Transition Period, or are trying to determine whether a new transaction is likely to be caught by the EU or UK merger control rules, or both.
- The draft statutory instruments for State aid involve transposing an EU State aid model into UK law and introducing a UK State aid regime, to be applied by the Competition and Markets Authority ("CMA"). The UK will remain within the EU's State aid regime for the duration of the Transition Period and the Commission will continue to receive and assess notifications from UK aid grantors. However, from the end of the Transition Period, it is currently planned that the CMA will take on its new role.
- At the time of writing, the UK Government and the Commission are negotiating the UK's future relationship with the EU. Those negotiations include, among other things, the degree to which the UK and the EU will remain aligned in respect of State aid and competition law. It is expected that the two systems are likely to remain relatively closely aligned, at least in the short term.
- Currently, UK regulators and courts must continue to interpret UK competition law consistently with EU law by virtue of section 60 of the Competition Act 1998. After the Transition Period, this will change to an obligation to ensure there is no inconsistency with the pre-Brexit EU competition case law, unless there is an appropriate reason in light of specified circumstances to depart from that position. This opens the door for UK and EU competition law to start to diverge in the future.

Background

Set out below are some of the key publications which seek to shed some light on what competition law in the UK might look like post-Brexit:

- On 19 April 2018 the House of Lords EU Internal Market Sub-Committee published a report on the impact of Brexit on UK competition and State aid law.
- On 26 June 2018 the European Union (Withdrawal Act) 2018 (the "Withdrawal Act") received royal ascent, which repeals the European Communities Act 1972 with effect from Brexit Day, transposes into UK domestic law directly-applicable EU legislation (including EU regulations, decisions and Treaty articles) and ensures that EU-derived domestic law continues to have effect in the UK. The Withdrawal Act also gives the UK Government the power to make statutory instruments that modify this body of "retained EU law" under specified circumstances.
- On 12 July 2018, the UK Government published a white paper on the future UK-EU relationship which set out the Government's view of what the post-Brexit relationship should look like.
- As part of its preparations for Brexit, and in particular for a no deal, the UK Government published a series of technical notices aimed at providing UK citizens and businesses with guidance on how they can prepare for a no deal scenario:
  - a technical notice on State aid on 23 August 2018;
  - technical notices on merger control and antitrust on 13 September 2018.

However, the technical notices were subsequently withdrawn by the UK Government on 19 February 2020.

- On 30 October 2018, the CMA published three Brexit-related updates on the role of the CMA in a no deal scenario, shedding some light on what UK competition law might look like should no agreement be reached with the EU by Brexit Day. These updates cover antitrust ("Antitrust Update"), merger control ("Merger Control Update"), together with a general overview. On the same day, the CMA published an update speech by the CMA's newly appointed Director of State aid, Juliette Enser ("State aid update"). The CMA withdrew the Antitrust Update and the Merger Control Update on 19 February 2020. The general overview was withdrawn on 31 January 2020.

- On 14 November 2018 it was announced that the UK Government and the Commission had agreed the draft wording of the Withdrawal Agreement (with a transitional period) (the "Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community") and an outline of the key features of what might form the future relationship between the UK and EU (the "Outline Political Declaration on the Future Relationship"). The UK Parliament was ultimately unable to ratify the Draft Withdrawal Agreement following three successive votes taking place in January and March 2019.
- On 22 November 2018, a fuller version of the Political Declaration on the Future Relationship was published which was agreed at negotiators' level and agreed in principle at political level, and which received the endorsement of the European Council on 25 November 2018.
- On 21 January 2019, a draft version of the State Aid (EU Exit) Regulations 2019 (the "Draft State Aid SI") was laid before UK Parliament. At the time of writing, the statutory instrument remains in draft, and has not been passed by the UK Parliament.
- On 24 January 2019, the Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) (the "Competition SI"), a draft version of which was laid before the UK Parliament on 29 October 2018, were published, having been made on 22 January 2019. On the same day, the final version of the accompanying explanatory memorandum was also published.
- On 28 January 2019, the CMA opened a public consultation on the draft guidance on the effects of the UK's 'no deal' exit from the European Union on the functions of the CMA. The public consultation closed on 25 February 2019. The publication was withdrawn by the CMA on 31 January 2020.
- On 4 March 2019, the CMA opened a public consultation on the draft procedural guidance on state aid notifications and reporting. This public consultation closed on 18 March 2019 and the outcome of the consultation is awaited. Also, on 4 March 2019, the CMA published guidance on the CMA's state aid role if there's no Brexit deal (the "Guidance on the CMA's State Aid Role"), which has now been withdrawn.
- On 18 March 2019, the CMA published its Guidance on the functions of the CMA after a 'no deal' exit from the EU ("CMA 'No Deal' Guidance"). The publication was withdrawn on 31 January 2020.
- On 25 March 2019, the Commission published a Notice to Stakeholders on the Withdrawal of the United Kingdom and EU Competition Law ("Commission Notice") as part of its series of Brexit Preparedness Notices. The notice seeks to provide informal guidance on the Commission's view of the main implications that it foresees of a no deal scenario for the application of EU competition law.
- On 17 October 2019, it was announced that the UK Government and Commission had agreed a revised draft of the Withdrawal Agreement and a revised text to the Political Declaration on the Future Relationship between the UK and the EU. The revised Withdrawal Agreement and Political Declaration replaced the versions that were originally announced on 14 November 2018 and 22 November 2018 respectively.
- On 23 January 2020, the UK Parliament ratified the Withdrawal Agreement and the European Union (Withdrawal Agreement) Act 2020 received royal ascent. The Withdrawal Agreement Act postpones the effects of the Withdrawal Act from Brexit Day until the end of the Transition Period, gives effect to the Withdrawal Agreement and amends the Withdrawal Act.
- On 28 January 2020, the CMA published its Guidance on the functions of the CMA under the Withdrawal Agreement ("CMA Mergers and Antitrust Guidance") and an accompanying Explanatory Note, which explains that the CMA Mergers and Antitrust Guidance has been published as a "live" document and may be subject to change, particularly in light of further political and legal developments.
- On 29 January 2020, the European Parliament gave its consent to conclude the Withdrawal Agreement and, the following day, the Withdrawal Agreement was ratified by the Council of the European Union.
- On 31 January 2020, at 23:00 UK time, the UK exited from the EU and the Transition Period commenced.

- On 25 February 2020, the Commission published its mandate to begin negotiations with the UK on the future UK/EU relationship.
- On 27 February 2020, the UK Government published its own approach to the negotiations ("The Future Relationship with the EU The UK's Approach to Negotiations").

Based on the above background, and the guidance documents published to date, set out below is a summary of the key practical changes to the State aid, merger control and antitrust rules in the UK after Brexit Day, during the Transition Period (as it stands at the time of writing), immediately after the end of the Transition Period, and as part of the proposed future relationship arrangements.

State Aid

Changes to the legal framework

Pursuant to the Withdrawal Agreement and the Withdrawal Act, the EU State aid rules have now been transposed into domestic law. EU State aid rules will continue to apply in the UK for the duration the Transition Period, as if the UK were a Member State of the EU.

Transposing EU State aid rules into UK domestic legislation

- **Transition Period**: The UK will remain within the EU's State aid regime for the duration of the Transition Period as if the UK were a Member State of the EU.
- **Post-Transition Period**: Pursuant to the Withdrawal Act and the Draft State Aid SI, the EU State aid rules will be transposed into domestic law after the end of the Transition Period and the CMA will become the UK State aid enforcement authority, in place of the Commission. The substance of the EU State aid framework is not materially altered under the Draft State Aid SI and would apply to all sectors and include the existing block exemptions.

However, at the time of writing, there remains uncertainty as to the future of the UK's State aid regime after the end of the Transition Period. As noted above, the Draft State Aid SI, which was prepared in the context of the UK's preparatory measures in the event of a no (withdrawal) deal outcome, envisaged no material changes to the substance of the EU State aid framework.

Whilst the UK Government intends to continue with the implementation of a UK State aid regime, the alignment of that regime with EU State aid rules post-Transition Period (which is central to the EU's political demand for a 'level playing field') is an important pivot point in the UK-EU trade negotiations. It is therefore difficult to predict with any certainty what changes to the Draft State Aid SI are likely to be made. Notably, numerous documents including the Guidance on the CMA's State Aid Role have now been withdrawn or removed from the CMA's website, and no updated guidance has been published since March 2019.

Enforcement

- **Transition Period**: The EU State aid rules will continue to apply until the end of the Transition Period. The Commission will continue to have jurisdiction over State aid issues in the UK, including receiving and assessing notifications from UK aid grantors, in relation to aid granted before the end of the Transition Period. For up to four years after the end of the Transition Period, the Commission will be able to bring a State aid case against the UK on facts arising before the end of the Transition Period.
- **Post-Transition Period**: Subject to the terms of any future trade agreement, under the Draft State Aid SI, the CMA would take on the role of supervision and enforcement of the State aid rules in place of the Commission from the end of the Transition Period.

Practical issues

The CMA's State Aid Update and the Guidance on the CMA's State Aid Role were originally prepared in order to provide additional information in relation to a potential no deal outcome, and, potentially, regarding the period after the end of the Transition Period. It is important to note that the CMA has

not published further guidance relating to State Aid since March 2019 and, therefore, the information below may be subject to material change pending the outcome of the UK-EU trade negotiations.

What might the substance of the new regime look like?

The UK Government laid the Draft State Aid SI before Parliament to incorporate the EU State aid rules into UK law, subject to certain technical modifications to ensure that the regime operates effectively in a domestic context. These include adopting the existing block exemptions covering all sectors of the economy and giving effect to existing Commission approvals. At the time the Draft State Aid SI was laid before Parliament, the CMA stated that the expectation was that, from a substantive perspective, the regime under the Draft State Aid SI will look very much like the EU regime. This means that aid grantors and beneficiaries would be able to work on the basis that it is "business as usual".

Will EU case law remain relevant post-Brexit?

Section 6 of the European Union (Withdrawal) Act 2018 provides for the retention of the existing body of EU law, modified as necessary to take account of the new domestic context. It also provides that EU case law, as it exists on or before Brexit day, will continue to be relevant to the interpretation of retained EU law (whether or not in a modified form). Therefore the substantive body of EU case law on the interpretation of the current EU State aid provisions is likely to remain important for interpreting the future UK State aid rules, at least in the short term.

The State aid Update also provided that, as part of any future agreement with the EU, the UK "may agree to remain in step with the EU state aid rules" beyond the Transition Period (the section below provides further insights on the post-Transition Period). The extent to which this will be the case will be determined by the continuing negotiations between the UK Government and the EU, the outcome of which remains uncertain.

What happens to Commission approvals issued before Brexit Day and the end of the Transition Period?

The Guidance on the CMA's State Aid Role confirmed that State aid approved by the Commission in advance of Brexit Day will not need to be approved again by the CMA and this also applies to aid given prior to Brexit Day pursuant to a block exemption. It is therefore expected that State aid approved by the Commission during the Transition Period will receive the same treatment. However, the CMA will have powers under the Draft State Aid SI to act in cases where aid granted prior to the end of the Transition Period that has been approved or was exempted from approval is misused.

What will happen to Commission cases in mid-review at the end of the Transition Period?

The CMA had stated in its Guidance on the CMA's State Aid Role that, in the event of a no deal exit, State aid cases that were notified to the Commission, but on which decisions had not been made by the Commission on or before Brexit Day, would need to be re-notified to the CMA. In advance of this, the CMA clarified that it will engage in informal 'pre-notification' discussions with aid grantors expecting to notify State aid cases to the CMA in the first three months post Brexit Day.

No further guidance has been published on whether the same principles would apply to cases in mid-review at the end of the Transition Period if there is no EU/UK future relationship agreement in place at that point. However, if the UK adopts its own State aid rules after the Transition Period, then it is likely that 'live' EU State aid cases will need to be re-notified to the CMA, which would assume the role of the Commission under the Draft State Aid SI. However, it is expected that the CMA would publish guidance clarifying the approach that aid grantors should follow.

How many State aid cases does the CMA expect to review?

The State Aid Update estimates that the CMA will deal with 20 to 30 cases annually across a wide range of industries. But the CMA notes that this might be a modest estimate as it is based on the UK Government's traditionally conservative approach towards the granting of aid, which might change in the future.

How long will the CMA's State aid reviews take?

The CMA notes that the Commission's review process can be very slow (which it describes as a "source of frustration") and indicates that the CMA aims to reach decisions more quickly, while noting that it has a steep learning curve to overcome.

Guidance and legislation

The CMA is currently consulting on draft procedural guidance on State aid notifications and reporting which, in particular, provides general information on the processes it intends to use when examining and investigating notified aid in the event of a no deal. The consultation closed on 18 March 2019, but as at the time of writing the CMA has not announced the outcome of its consultation.

Further, the CMA is required, under the Draft State Aid SI, to publish a notice on:

- the form and content of notifications;
- the form and content of complaints;
- the form, content and date for the submission of annual reports in relation to existing aid schemes, and aid which is exempt from notification; and
- the form and summary information for aid that is exempt from notification.

The ultimate adoption of a UK State aid regime mirroring that of the EU will depend on the outcome of the Government's negotiations with the Commission in relation to a future trade agreement after the end of the Transition Period (see section below for further insights regarding the post-Transition Period). But the guidance documents published by the CMA to date should at least give UK businesses expecting to receive State aid (or concerned that their competitors' might be) some welcome insight as to what the post-Brexit UK regime might look like in a post-Transition Period world.

Merger control

Changes to the legal framework

The following approach to the merger control rules will be applied during the Transition Period and post-Transition Period:

No substantial changes to UK merger regime

- **Transition Period**: The current EU merger control regime continues to apply until the end of the Transition Period. There are currently no Brexit-related changes anticipated to UK merger control during the Transition Period.
- **Post-Transition Period**: Whilst the UK will cease to be a part of the EU 'one-stop-shop' regime after the Transition Period, the UK Government does not propose to make any immediate changes to UK merger control. The only changes are those necessary to implement Brexit and to keep the regime running largely as it is (e.g. removing certain references in UK merger guidance to applications for mergers to be referred to or from the Commission under the EU Merger Regulation ("EUMR")). However, the CMA has advocated for changes to the UK merger control regime that are not linked to Brexit.

Jurisdiction

- **Transition Period**: The EU merger control rules, including the 'one-stop-shop' principle, will continue to apply during the Transition Period.
- **Post-Transition Period**: The current parallel EU/UK merger control system is described as a "one-stop shop", whereby larger pan-European transactions are reviewed under the EU regime, and smaller transactions are reviewed under the UK regime. The UK regime does not currently apply where EU jurisdiction is triggered. After the Transition Period the "one-stop shop" principle will not apply so far as the UK is concerned, so that an EU merger clearance will no longer cover the UK, and transactions may therefore need to be reviewed concurrently by both the Commission and the CMA.

Practical implications

What will happen to Commission decisions issued during the Transition Period?

- If the Commission has issued a decision before the end of the Transition Period, unless the Commission's decision is annulled in full or in part following an appeal to the EU courts, the UK will have no jurisdiction over the merger under the Withdrawal Agreement. Where a decision is annulled after the end of the Transition Period, the CMA could assert jurisdiction from the date of the European Court decision if the UK jurisdictional requirements are met.

What will happen to Commission cases in mid-review at the end of the Transition Period?

- **Transition Period**: As explained above, post-Brexit, the Commission will continue to have jurisdiction over a merger if it has been formally notified to the Commission before the end of the Transition Period. Unless the Commission's final decision in relation to any such case is annulled after the Transition Period in full or in part following an appeal to the EU courts, the UK will have no jurisdiction over such a merger.
- **Post-Transition Period**: The CMA Mergers and Antitrust Guidance notes that the Withdrawal Agreement makes provision for how 'live' cases are to be dealt with in terms of jurisdiction between the UK and the EU. In particular:
  - where a merger has been formally notified to the Commission before the end of the Transition Period, the Commission will retain jurisdiction over the merger until it reaches a final decision;
  - the Commission will also retain jurisdiction in respect of cases that have been referred to the Commission under Article 4(5) or Article 22 of the EUMR prior to the end of the Transition Period (see 'What happens to cases referred from the CMA to the Commission?' and 'What happens to cases referred to the CMA from the Commission?' below).

Where the Commission retains jurisdiction, the Commission will also continue to be responsible for monitoring and enforcing all aspects of any commitments accepted by the merging parties, unless it agrees with the CMA to transfer responsibility for monitoring and enforcing the UK elements of such commitments to the CMA.

In contrast, if the merger has not been formally notified to the Commission before the end of the Transition Period (including where the parties are in pre-notification discussions with the Commission), then the CMA may have jurisdiction over the UK aspects of the merger, in which case the provisions of UK merger control will apply. Where the merging parties anticipate that such a scenario is possible, the CMA advises parties to consider engaging with the CMA significantly in advance of the end of the Transition Period, particularly where the transaction may raise potential competition concerns in the UK. The CMA will continue to monitor non-notified merger cases during the Transition Period, including cases falling under the jurisdiction of the Commission, but over which the UK may obtain jurisdiction in relation to the UK aspects of the merger after the Transition Period. For example, this may include the CMA taking preparatory steps in relation to a merger during the Transition Period, such as approaching parties (or third parties) to request information about a merger which is at the stage of pre-notification discussions with the Commission.

The CMA's hold separate and unwinding powers will also apply to such mergers post-Transition Period and parties will also remain able to seek derogations from the CMA: for example, to enable the fulfilment of regulatory obligations or to facilitate the integration of the non-UK aspects of the merging parties' business.

What if the parties' UK turnover determines whether the EUMR is triggered? The Commission's view on jurisdiction

- **Transition Period**: As explained above, the Commission's jurisdiction remains unchanged during the Transition Period, and so UK turnover remains relevant in applying the EUMR thresholds during the this period.
- **Post-Transition Period**: The Commission's rules provide that the relevant date for establishing the Commission's jurisdiction over a merger under the EUMR is the date of the conclusion of the binding

legal agreement, the announcement of a public bid or the acquisition of a controlling interest or the date of the first merger notification, whichever date is earlier. This is means that:

- if the relevant date for establishing jurisdiction (e.g. date of signing a binding agreement) takes place after the end of the Transition Period, UK turnover is not relevant for determining if the EUMR thresholds are met (because the UK would not be an EU Member State at that time);
- if the relevant date for establishing jurisdiction takes place before the end of Transition Period, UK turnover is relevant for determining if the EUMR thresholds are met (as though the UK were an EU Member State).

It should be noted that the Commission's approach to determining jurisdiction, as set out in the Commission Notice, is subject to the provisions in the Withdrawal Agreement governing the jurisdiction of 'live' merger cases, which state that the Commission will only have jurisdiction over a merger that has been formally notified or is accepted (or deemed accepted) for a referral to the Commission before the end of the Transition Period.

Substantive assessment

- **Transition Period**: The Commission's approach to substantive assessment and remedies will remain unchanged during the transition period.
- **Post-Transition Period**: The Commission Notice (the Commission Notice to Stakeholders on the Withdrawal of the United Kingdom and EU Competition Law of 25 March 2019) confirms that after the Transition Period the Commission will have to take account of the fact that the UK will no longer be part of the internal market. In particular, the Commission will no longer be competent to find that a planned concentration would (or would not) significantly impede effective competition in UK national or subnational markets. This may impact the Commission's competitive assessment, including the suitability and viability of any remedies. Any such impact will be accessed on a case-by-case basis and the Commission's Notice encourages merging parties to discuss those aspects with the Commission case team at the relevant time.

Commission's information and search powers

- **Transition Period**: The Commission's pre-Brexit powers will continue during the Transition Period.
- **Post-Transition Period**: The Commission will no longer be able to carry out inspections in the UK under the EUMR. However, the Commission will still be able to issue formal requests for information to parties in the UK, as it currently can in relation to undertakings in third-party countries.

What happens to cases referred *from* the CMA to the Commission?

- **Transition Period**: The usual referral mechanisms will continue to apply during the Transition Period, as if the UK were a Member State.
- **Post-Transition Period**: In instances where an Article 4(5) EUMR submission (i.e. a submission by the parties for a case to be referred to the Commission) has been made prior to the end of the Transition Period and where a non-EUMR qualifying merger is capable of being reviewed in three Member States, one of which is the UK for these purposes, the Commission will acquire jurisdiction provided that, prior to the end of the Transition Period, 15 working days has elapsed without any competent Member State (again including the UK for these purposes) expressing its disagreement. The fact that a merger is capable of being reviewed in the UK will no longer be relevant for the application of Article 4(5) for submissions made after the Transition Period.

  If the UK has requested or participated in an Article 22 EUMR referral (i.e. a submission by a Member State for a case to be referred to the Commission), the case will only be considered to be referred with respect to the UK if the Commission has accepted or (or deemed to have accepted under Article 22(3) EUMR) the referral request before the end of the Transition Period.

What happens to cases referred *to* the CMA from the Commission?

- **Transition Period**: If a merger is referred to the CMA under Article 4(4) (i.e. at the request of the parties) or Article 9 (i.e. at the request of the CMA) EUMR, the CMA will continue to apply its usual processes in Phase 1 and 2. The timetable for Phase 1 will remain 40 working days.
- **Post-Transition Period**: The CMA will gain jurisdiction to review the merger under the same terms as during the Transition Period if a referral (under Article 4(4) or 9) is accepted by the Commission prior to the end of the Transition Period. If a request for referral to the CMA is not accepted by the Commission before the end of the Transition Period, then the Commission will retain jurisdiction to review the case.

  Subject to the terms of any future agreement governing the future relationship between the UK and the EU, neither the Commission, the CMA, nor the merging parties will be able to make new referrals under Articles 4(4) or 9 EUMR (i.e. referrals from the Commission to the CMA), or Articles 4(5) or 22 EUMR (i.e. referrals from the CMA to the Commission) post-Transition Period.

Fees

- **Post-Transition Period**: The existing rules for the payment of UK merger fees will apply to mergers notified to the Commission in relation to which the CMA takes a clearance or Phase 2 reference decision after the end of the Transition Period.

Parallel filings

- **Transition Period**: During the Transition Period, the EUMR will continue to apply to the UK and therefore the one-stop shop principle will also continue to apply. This means that parallel notifications will not be a feature of the Transition Period.
- **Post-Transition Period**: As the EU's one-stop shop for mergers will no longer apply in the UK post-Transition Period, businesses considering a merger that has an impact on EU and UK markets will need to comply with both the EU and UK merger rules. A post-Transition Period merger may therefore potentially trigger parallel filings in both jurisdictions, with potentially differing outcomes. In addition, the Commission, CMA and merging parties will no longer be able to request/make a reference under the EUMR between the Commission and the CMA.

Deal timing

- **Transition Period**: As explained above, parallel notifications will not be a feature of the Transition Period. This means that the UK-EU deal timing issue referred to above will not be relevant.
- **Post-Transition Period**: One of the key implications of parallel filings is that the UK and EU merger control regime review periods differ significantly.[1] There is no indication in the guidance documents published by the CMA that the CMA will harmonise the UK merger timetable with the EU process, although (as explained above) the CMA is advocating for reforms separately to Brexit. Accordingly, the different timescales will need to be considered by deal teams in the context of post-Transition Period transactions.

Completed mergers

- **Transition Period**: The rules relating to the four-month statutory deadline remain the same: subject to certain exceptions, the CMA can refer a merger situation for a Phase 2 inquiry at any time up to four months from the date of completion of the transaction, or from the date on which facts about the transaction became public (e.g. when it is announced, or when it receives significant press coverage in the national or trade press), whichever is the later.
- **Post-Transition Period**: As the CMA will obtain jurisdiction over mergers that would otherwise fall under the jurisdiction of the Commission only after the Transition Period, the statutory four-month

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

period will apply from the end of the Transition Period, the date of completion or the point at which the CMA is considered to have been provided with notice of the material facts about the merger (whichever is later).

Antitrust enforcement

Changes to the legal framework

The following proposed changes to the antitrust regime are expected to take place during the Transition Period and post-Transition Period:

Changes to the antitrust regime

- **Transition Period**: EU law continues to apply to the UK as if the UK were a Member State for the duration of the Transition Period. Moreover, no substantive changes to the UK antitrust regime are expected during the Transition Period.
- **Post-Transition Period**: It remains the case that, as with merger control, no substantive changes to the UK antitrust regime are currently proposed immediately following the end of the Transition Period, although (as explained above) reforms are being advocated by the CMA. However, the UK will be treated the same as a third country, like the USA, in relation to EU antitrust law.

Will the obligation to follow EU law end?

- **Transition Period**: The Withdrawal Agreement provides that, during the Transition Period, EU law will be applicable "to and in" the UK and that it must be interpreted in accordance with the same principles as those applicable within the EU. The implications of the Withdrawal Agreement are that the UK will have to continue to interpret UK competition law in accordance with EU law, at least until the end of the Transition Period. In this context, section 60 of the Competition Act 1998, which requires that UK competition law should be "dealt with in a manner which is consistent with" EU competition law, will remain in force during the Transition Period.
- **Post-Transition Period**: Under the Competition SI, after the end of the Transition Period, the CMA will no longer have jurisdiction to apply Article 101 of the Treaty on the Functioning of the European Union ("TFEU") on anti-competitive agreements (including cartels) and Article 102 of the TFEU on abuse of dominance (but equivalent provisions will continue to apply under the Competition Act 1998). The CMA has stated that it will inform all affected parties if the scope of an investigation involving them is affected by this development.

  Similarly, the Competition SI repeals section 60 of the Competition Act 1998. Instead, a new provision, section 60A, will apply come into force at the end of the Transition Period which provides that the UK competition regulators and UK courts:

  - will continue to be bound by an obligation to ensure there is "no inconsistency" with pre-Brexit EU competition case law when interpreting UK competition law; but
  - may depart from such pre-Brexit EU case law where it is considered "appropriate to act otherwise in the light of" specified circumstances (for example, differences in UK and EU law prior to Brexit, differences between EU and UK markets, developments in the form of economic activity, generally accepted principles of competition analysis, and developments in EU case law).

  As explained above, the Withdrawal Agreement Act has delayed the entry into force of the Competition SI until the end of the Transition Period. In this regard, the draft guidance on the effects of the UK's 'no deal' exit from the European Union on the functions of the CMA (of 25 February 2019) envisaged that section 60A would apply from the end of the Transition Period to all "live" competition law investigations and UK court cases, whether the facts of those cases arose before or after the end of the Transition Period. However, the final CMA Mergers and Antitrust Guidance (of 28 January 2020) makes no such explicit reference.

In any event, it is expected that the Competition SI will be amended to make specific provision for cases ongoing at the end of the Transition Period, and it therefore remains to be seen whether the UK Government will make any further changes to section 60 and section 60A of the Competition Act 1998.

Jurisdiction

- **Transition Period**: The Commission will continue to have jurisdiction to enforce EU antitrust law as it does now up until the end of the Transition Period. All Commission decisions adopted under Articles 101 and 102 TFEU before the end of the Transition Period will remain valid. Moreover, the Commission will continue to have responsibility for the monitoring and enforcement of any UK elements of commitments given or remedies imposed in connection with any Commission proceedings for the application of Articles 101 and 102 of the TFEU, unless it subsequently agrees to transfer those responsibilities to the CMA and concurrent UK regulators.
- **Post-Transition Period**: The CMA and concurrent UK regulators will only investigate suspected infringements of UK domestic competition law (i.e. Chapter I and Chapter II of the Competition Act 1998) and the Commission will no longer be able to commence investigations into cases involving anti-competitive conduct in the UK. However, as set out in the Commission Notice, the Commission will continue to have the power under EU law to investigate businesses in the UK that it suspects are engaging in anti-competitive conduct that has effects on competition within the EU and trade between Member States, and EU businesses operating in the UK must comply with UK competition law as they do today.

What will happen to Commission decisions issued before the end of the Transition Period?

- **Transition Period and post-Transition Period**: All Commission decisions adopted under Articles 101 and 102 TFEU before the end of the Transition Period will remain valid and the European Courts will retain exclusive jurisdiction to review any appeals challenging a decision by the European Commission post-Transition Period.

Block exemption regulations

- **Transition Period**: EU law continues to apply to the UK as if it were a Member State during the Transition Period. This implies that the EU block exemption regulations will continue to apply in the UK during this period.
- **Post-Transition Period**: The Competition SI preserves seven EU block exemption regulations[2] as parallel exemptions to the UK competition prohibitions. They will be retained within UK law largely unchanged, except to reflect the UK ceasing to be a Member State of the EU. The current expiry dates will be preserved. The relevant block exemption regulations are:
  - liner shipping regulation expiring on 30 April 2020;[3]
  - transport regulation (no expiry date);
  - vertical agreements regulation expiring on 31 May 2022;
  - motor vehicle distribution regulation expiring on 31 May 2023;
  - research and development regulation expiring on 31 December 2022;
  - specialisation agreement regulation expiring on 31 December 2022;
  - technology transfer regulation expiring on 30 April 2026.

Therefore, companies entering into new agreements after the end of the Transition Period will be able to benefit from the retained exemptions provided they meet the relevant criteria. The Commission guidance issued to accompany its block exemptions will also remain relevant to interpreting the block exemptions retained by the UK.

The CMA expects to consult on the retained block exemptions as they expire in order to provide advice to the Secretary of State, who will have the power to amend, extend or revoke them after the Transition Period.

Practical implications

Divergence

- **Transition Period**: Because the Withdrawal Agreement provides that EU law will continue to apply to the UK as if it were a Member State for the duration of the Transition Period, there will be no material divergence between UK and EU competition law during the Transition Period. Any material divergence is not likely to take place until after the end of the Transition Period, subject to the final terms of any trade agreements governing the future relationship between the UK and the EU.
- **Post-Transition Period**: In relation to UK competition law, because the CMA, UK courts and UK legislators will no longer be bound to follow post-Brexit EU law, over time UK competition law is likely to diverge from EU law. However, see *'Will the obligation to follow EU law end?'* above in relation to the interpretation of EU case law post-Transition Period.

Parallel exemptions

- **Transition Period**: As explained above, the EU block exemption regulations will continue to apply in the UK during the Transition Period.
- **Post-Transition Period**: Where existing UK agreements between companies have benefited from the parallel application of an EU block exemption, these exemptions will continue to apply, and companies will be able to benefit from them when they enter into new agreements that meet the relevant criteria after the Transition Period.

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[2] These block exemption regulations exempt certain types of agreements from the Chapter I prohibition where certain conditions are satisfied and there are benefits for consumers.

[3] At the time of writing, the Commission is recommending extending the duration of the existing block exemption regulation for another four years.

Cases where the Commission has granted a marker/accepted a leniency application before the end of the Transition Period, but has not formally opened an investigation

- **Transition Period**: The CMA Mergers and Antitrust Guidance confirms that the leniency regime applicable in the UK remains the same during the Transition Period, subject to any future amendment unrelated to Brexit.
- **Transition Period and Post-Transition Period**: The CMA Mergers and Antitrust Guidance confirms that, because there is no "one-stop shop" principle which applies to leniency applications in the EU, any existing or potential applicant for leniency under the Commission's leniency programme in respect of conduct which is also covered by the CMA's leniency programme should consider whether it would be appropriate to make a separate application for leniency to the CMA and vice versa (as would have been the case pre-Brexit).
- **Post-Transition Period**: Whilst up to the end of the Transition Period leniency applicants to the Commission can obtain a "no names" marker for Type A applicants[4] from the CMA pending confirmation from the Commission as to the availability of immunity from the Commission, the CMA 'No Deal' Guidance suggests that this exception to the usual rule will no longer be available post-Transition Period. This would mean that the identity of immunity applicants must be disclosed to the CMA, if the CMA subsequently confirms that Type A immunity is available.

  However, it will no longer be the case after the Transition Period ends that the CMA can be expected to grant no action letters to the implicated employees and directors of an undertaking that have qualified for immunity by the Commission, but have not also qualified for Type A immunity in the UK, for example, because another undertaking has already qualified for Type A leniency in the UK. The CMA Mergers and Antitrust Guidance confirms that this would be the case regardless of whether the application to the Commission was made before or after the end of the Transition Period.

What happens to live cases under investigation by the Commission or the CMA?

- **Transition Period**: The Commission will continue to have jurisdiction over investigating compliance with EU competition law, including opening new investigations, during the Transition Period.
- **Post-Transition Period**: The Competition SI, which will enter into force at the end of the Transition Period, prevents the CMA (and UK concurrent regulators) from opening investigations into infringements of UK competition law after the Transition Period where, before the end of the Transition Period, the Commission had relieved the CMA of its competence and has reached an infringement decision (that was not subsequently annulled).

  However, the CMA Mergers and Antitrust Guidance also notes there may be circumstances in which, during a 'live' investigation, the CMA (or UK concurrent regulators) may obtain jurisdiction after the Transition Period over elements of proceedings that have already been formally initiated by the Commission. This would be, for instance, where the anti-competitive behaviour is ongoing after the end of the Transition Period, by investigating facts postdating the Transition Period. The CMA notes that the precise scope of the jurisdiction of the CMA and UK concurrent regulators with respect to such future cases may be the subject of future legislation and it is considering issuing further guidance in due course. However, the technical notice of 13 September 2018 also recommends that businesses subject to an ongoing antitrust investigation should take legal advice on how to comply with any investigation of the Commission and/or the CMA (or the relevant UK concurrent regulator).

  The CMA Mergers and Antitrust Guidance also states that where the CMA or UK concurrent regulators are investigating conduct that may affect trade between EU Member States, and have not issued a decision before the end of the Transition Period and the case proceeds, they will no longer apply the EU prohibitions after the end of the Transition Period. Although this means that the CMA (or UK concurrent regulators) must proceed on the basis of the Competition Act 1998 prohibitions only, the CMA expects that all evidence obtained prior to the end of the Transition Period will remain valid for the purposes of the continuing investigation.

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[4] A 'Type A' immunity applicant is the first applicant for immunity in circumstances where there is no pre-existing investigation by the CMA.

Parallel cases

- **Transition Period**: Where the Commission formally initiates proceedings before the end of the Transition Period, the Commission will continue to be competent for the proceedings after the end of the Transition period. At least during the Transition Period, parallel UK-EU cases will not arise.
- **Post-Transition Period**: Because the Commission will not be able to conduct new investigations in relation to UK conduct that does not affect competition in the EU and trade between Member States, it is likely that in many circumstances (such as a pan-European cartel) both the Commission and the CMA (or the relevant UK concurrent regulator) may decide to undertake parallel investigations into the same conduct within their respective jurisdictions. In such cases, leniency applications and settlement considerations would need to be assessed in relation to both jurisdictions at the same time. See also above, in relation to the circumstances where parts of a Commission investigation which is 'live' at the end of the Transition Period may be taken on by the CMA (or UK concurrent regulators), so-called "repatriation".

Director disqualification orders

- **Transition Period**: The CMA and concurrent UK regulators will continue to be able to pursue director disqualification orders on grounds of a breach of Articles 101 and 102 TFEU (in addition to Chapter I and Chapter II of the Competition Act 1998) during the Transition Period.
- **Post-Transition Period**: At the time of writing, the CMA and concurrent UK regulators can pursue director disqualification orders after the Transition Period on grounds of a breach of the Chapter I and Chapter II prohibitions, but not in respect of breaches of Article 101 and Article 102 TFEU that had taken place during the Transition Period. The CMA Mergers and Antitrust Guidance states that the CMA expects the Competition SI to be amended in the future, so that the CMA and concurrent UK regulators can rely on conduct found to have breached Article 101 and 102 TFEU (in addition to the Chapter I and Chapter II prohibitions) during the Transition Period for the purpose of future applications for director disqualification orders post-Transition Period.

Impact on follow-on/stand-alone damages claims

- **Transition Period**: As with most areas of competition law in the UK, the position will remain unchanged during the Transition Period.
- **Post-Transition Period**: Decisions by the Commission reached before the end of the Transition Period can still form the basis of follow-on damages claims, including cases that have not exhausted the appeals process. However, if an infringement decision under EU law is reached by the Commission after the Transition Period, even if it relates to facts before the end of the Transition Period that have an effect in the UK, claimants will no longer be able to automatically rely on that decision in UK courts as a legally binding finding of an infringement of competition law. Claimants will continue to be able to rely on infringement decisions of the CMA and concurrent UK regulators in pursuing follow-on damages claims in the UK.

  Standalone actions can still be brought post-Transition Period in relation to infringements of Article 101 and/or Article 102 TFEU where these infringements occurred before the end of the Transition Period. The ability to bring standalone actions in relation to infringements of the Chapter I and/or Chapter II prohibitions will remain unchanged.

  The above implications of Brexit for damages claims for breaches of competition law are also likely to be subject to the international application of English tort law and the application of any future agreement between the UK and the EU relating to civil judicial cooperation.

Commission's information and search powers

- **Transition Period**: The Commission's pre-Brexit powers, including the right to carry out dawn raid inspections of UK business premises, will continue during the Transition Period.

- **Post-Transition Period**: The Commission will no longer be able to carry out dawn raid inspections in the UK. However, the Commission will still be able to issue formal requests for information to businesses in the UK, as it currently can in relation to undertakings in third-party countries.

The longer term: after the transition period/future relationship

The backstop arrangement under the Withdrawal Agreement

If the EU and the UK do not agree the terms of a future relationship before the end of the Transition Period, the Withdrawal Agreement provides for the implementation of a so-called "backstop" arrangement. This is set out in the "Protocol" to the Withdrawal Agreement.

The original Protocol differs materially from that contained in the Draft Withdrawal Agreement, in particular, as far as competition law is concerned. The 2018 version contained provisions to ensure a "level playing field" between Northern Ireland and the EU, in particular because it envisaged a single customs territory arrangement between the EU and UK, and so contained provisions relating to State aid, merger control and antitrust to ensure that competitive conditions between the EU and UK would not be distorted.

However, as this single customs territory arrangement no longer forms part of the Protocol arrangement between the EU and UK, these competition-related "level playing field" provisions were removed from the final Protocol, with the exception of State aid. In this regard, the Protocol provides that, should the backstop provisions be activated, the EU Sate aid rules will apply to the UK (including notification to, and enforcement by, the Commission) in respect of measures which affect trade between Northern Ireland and the EU (subject to some exceptions relating to aid below a certain level in relation to agricultural products).

The Political Declaration regarding the future UK/EU relationship and the UK and EU's negotiating positions

On 14 November 2018, together with the publication of the Draft Withdrawal Agreement, the UK Government and the Commission published an outline of the key features of what might form the future relationship between the UK and EU (the "Outline Political Declaration on the Future Relationship"). A fuller version agreed at negotiators' level and agreed in principle at the political level was published on 22 November 2018, and received the endorsement of Member States at a special meeting of the European Council on 25 November 2018.

Following three unsuccessful votes by the UK Parliament to ratify the Draft Withdrawal Agreement in January and March 2019, the UK Government and the Commission announced a revised text of the Political Declaration on 17 October 2019 (together with the Withdrawal Agreement), which replaces the version dated 25 November 2018. The Political Declaration is very broad, and contains much less detail than the Withdrawal Agreement.

In relation to competition law, the Political Declaration envisages that, as part of any future deal, the UK's competition regime will need to *"ensure open and fair competition, encompassing robust commitments to ensure a level playing field"*. However, in contrast to its earlier version, the current Political Declaration no longer makes reference to "building on the level playing field agreements provided for in the Withdrawal Agreement" in respect of competition and State aid, but instead envisages that the UK shall *"uphold the common high standards […] at the end of the transition period in the areas of state aid [and] competition"*.

A subsequent report by the European Union Committee of the House of Lords published on 10 January 2020 (the "House of Lords Revised Withdrawal Agreement and Political Declaration Report") suggests that changes to the text on the level playing field were not intended to signify a "lowering of ambition".

On 25 February 2020, the Commission announced that it had received its mandate to begin negotiations with the UK on the future UK/EU relationship. In its mandate, it is clear that the EU will continue to seek commitments from the UK ensuring a *"level playing field for open and fair competition" and "common high standards … on … state aid and competition matters"*.

On 27 February 2020, the UK Government published its own approach to the negotiations *("The Future Relationship with the EU The UK's Approach to Negotiations"*). In relation to competition policy, it takes a different approach to the "level playing field" approach sought by the Commission and states *"the [trade a]greement should commit the parties to maintain effective competition laws, covering merger*

control, anticompetitive agreements and abuse of dominance, while maintaining the right to provide for public policy exemptions. This does not require legal or regulatory alignment". On State aid, the document's chapter on "Subsidies" is equally vague and provides that *"the UK will have its own regime of subsidy control"* and that the agreement *"should include reciprocal commitments to transparency about the award of subsidies"*, but does not mention the term State aid expressly.

What does this mean for the shape of UK competition law under the future UK/EU relationship? All that is clear at the time of writing is that both the UK and EU are approaching the issue from different starting points, and there is therefore little certainty at this stage, although it would seem likely that the key provisions of UK merger control and the Chapter I and Chapter II prohibitions will remain the same, albeit with the material prospect of divergence of interpretation gathering pace in relation to the antitrust rules in relation to both substantive application of the prohibitions and procedural matters, including the rights of defence. But it is in relation to State aid that the greatest divergence may appear at an early stage.

Customs union, Canada model or something else?

For some period of time just before the referendum result, and shortly afterwards, there was a flurry of speculation as to whether the UK's future relationship with the EU may take the form of customs union membership (the "Turkish model") or EFTA and EEA membership (the "Norway model"), or would follow some other model (e.g. Swiss, Canada, Ukraine). Following the publication of the Draft Withdrawal Agreement there was initial support for a future trade agreement most closely resembling the Turkish model, with numerous UK Members of Parliament supporting a form of *"permanent and comprehensive UK-wide customs union with the EU"*.

However, the outcome of the UK General Election held on 12 December 2019 has heightened the possibility that the UK Government will pursue a trade agreement which will see the UK outside the EU customs union. Indeed, the Conservative party manifesto published during the election campaign promised to *"keep the UK out of the single market, out of any form of customs union, and end the role of the European Court of Justice"* and, at the time of writing, the Government is pursuing negotiations with the Commission in pursuit of a *"Canada-style"* trade agreement (that would not include the UK being within the EU customs union).

From the perspective of State aid, merger control and antitrust law, the absence of a customs union would appear to reduce the likelihood of a *"level playing field"* between the UK and the EU and, may therefore increase the likelihood of future divergence in respect of those rules.

However, it is still too early at this stage to predict with any confidence what impact the potential absence of any EU-UK customs union might have on competition law in the UK. What is clear, however, is that any comparison with Canada (or any other jurisdiction), must take into account the UK's specific circumstances, including its close proximity to the EU and its current arrangements with the EU.

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