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# Competition Law Newsletter
# March 2021

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The March 2021 issue of Ashurst's competition law newsletter features some of the key competition law developments including important rulings by the European Courts on State aid and abuse of dominance, policy developments on the future of UK competition and consumer law, including the UK's post-Brexit subsidy control regime, and court rulings on cartel cases in Australia, France, Germany, Hong Kong and Singapore, as well as other news.

# Content

# The General Court issues the first two judgments in Ryanair's State aid saga

**EU – STATE AID**

**On 17 February 2021, the General Court handed down two judgments dismissing Ryanair's challenges against decisions by the European Commission, approving French and Swedish measures to support airlines in the context of the pandemic (Cases T-238/20 and T-259/20). These judgments are the very first to consider Covid-19 aid.**

**WHAT YOU NEED TO KNOW – KEY TAKEAWAYS**

- In the wake of the Covid-19 crisis, the Commission has approved a flurry of aid measures to the aviation sector. Ryanair has lodged a torrent of actions in annulment against these decisions, essentially arguing that they contravene the principle of non-discrimination.
- In its two first judgments, the General Court ruled that State aid may be limited to undertakings with close and stable links to the national economy. Sweden and France were therefore permitted to limit eligibility to their schemes for airlines having a national licence.
- Ryanair announced that it would appeal these judgments before the Court of Justice.

## BACKGROUND

In the context of the Covid-19 pandemic, Member States notified a flurry of aid measures to the Commission to alleviate the adverse effects of the crisis, notably on the aviation industry.[1] Among its first decisions in this sector, the Commission approved in March and April 2020 respectively:

- a French aid scheme deferring the payment by airlines of certain aeronautical taxes to compensate them for part of the damage suffered due to the Covid-19 outbreak on the basis of Article 107(2)(b) TFEU; and
- a Swedish loan guarantee scheme to airlines on the basis of the Temporary Framework (adopted under Article 107(3)(b) TFEU).

Both schemes are reserved to airlines holding either a French or Swedish operating licence (i.e. those which have their principal place of business in France or Sweden).

Ryanair, which – as an Irish-registered airline – is not eligible under either scheme, challenged the Commission's decisions, essentially arguing that they are at odds with the EU principle of non-discrimination on grounds of nationality.

Given the urgency of the situation at hand, the General Court accepted Ryanair's requests for an expedited procedure and issued its judgments less than 10 months after the application was lodged.

[1] An overview of the options available for Member States to grant financial support compatible with State aid rules during the Covid-19 can be found in our more detailed guide on Covid-19 related State aid.

### Judgments

The General Court acknowledged that the eligibility criterion in both schemes results in a difference in treatment, which may amount to discrimination on grounds of nationality. It then clarified that:

- any discrimination on grounds of nationality is prohibited 'without prejudice to any special provisions'; and
- it is therefore important to ascertain whether the difference in treatment is permitted under the legal basis used to approve the

As regards both schemes, the General Court concluded that the difference in treatment was justified. This is because the schemes were necessary and proportionate in light of their objective, i.e. to remedy the effects of the pandemic.

The limitation to airlines with a national licence was justified as it ensures that only airlines with 'stable reciprocal links' which tie them to national economies would be aid recipients.

The General Court notably dismissed Ryanair's argument that it is the third largest carrier in France and fourth largest in Sweden, and should therefore also be eligible for aid. It recognised that Member States' resources are finite and must address priorities. Sweden was therefore entitled to reserve support to airlines contributing the most to Sweden's connectivity and France to airlines which were most severely affected by the travel restrictions (and proportionately much more affected than Ryanair).

It also confirmed that the case law does not require proof that no other less restrictive measure exists. The Commission is thus not required to examine every alternative measure possible.

Interestingly, the General Court also held:

- in both judgments, that the context in which the decisions have been adopted (here, the pandemic and extreme urgency) is a relevant factor when assessing compliance by the Commission with the duty to state reasons; and
- in the Swedish case, that there is no obligation under Article 107(3)(b) or the Temporary Framework to carry out a balancing test, i.e. to weigh the beneficial effects of aid against its adverse effects on trading conditions and the maintenance of undistorted competition.

### COMMENT

These judgments provide support to the Commission's approach to State aid in the context of the Covid-19 crisis. Their impact therefore extends well beyond the aviation sector.

However, Ryanair has surely not yet said its last words. The airline announced that it would appeal the judgments before the Court of Justice, stating that "*now is the time for the Commission to stop caving in to national governments' inefficient bail-out policies and start protecting the single market, Europe's greatest asset for future economic recovery*". Moreover, 15 of its challenges are still pending, including against individual aid to national flagship airlines such as Air France KLM, Lufthansa and SAS. The General Court may yet change tack where individual aid is concerned or where the criteria for eligibility to a scheme do not guarantee a stable and close link with the national economy.

# EU Commission accepts commitments from Aspen to address excessive pricing in pharma case

**EU – ANTITRUST – ABUSE OF DOMINANCE CASE**

**On 10 February 2021, the European Commission accepted commitments from Aspen under Article 9(1) of Regulation 1/2003, concluding a three year investigation into suspected excessive pricing practices affecting six critical cancer medicines.**

**WHAT YOU NEED TO KNOW – KEY TAKEAWAYS**

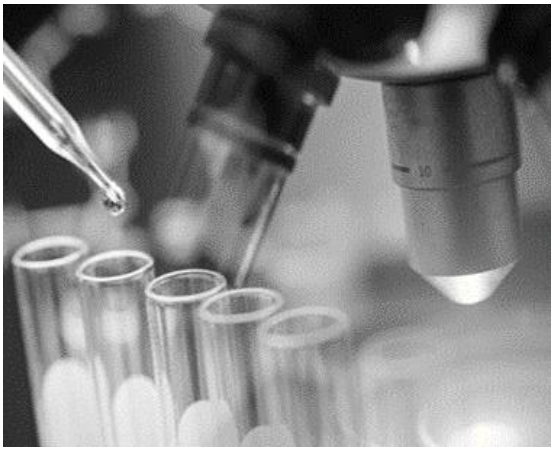
- The Commission based its assessment of pricing levels on the absolute and relative profitability of the medicines; considering Aspen's costs as well as profit levels of other similar businesses in the pharmaceutical industry.
- The Commission also considered the lack of potential justifications for price and profit levels; in this case the main product development investments had long since been recouped.
- The appropriate price levels for the medicines were determined based on proposals by Aspen, which were then market tested.

Aspen was suspected to have acted in breach of Article 102 of the Treaty on the Functioning of the European Union ("TFEU") by raising prices for six off-patent medicines, mainly used in the treatment of leukaemia and other a dominant position on almost all national markets for these products across the EEA.

The Commission's investigation revealed price increases, often of several hundred percent, from May 2019 onwards. Available details show that the Commission based its assessment of the excessive nature of Aspen's pricing practices on absolute and relative profit margins:

- The Commission reported product prices exceeding relevant costs by almost three hundred percent throughout financial years 2013 to 2019.
- The Commission also determined that Aspen's average EEA-wide profit levels were more than three times higher than average profitability levels of a selection of similar businesses in the pharmaceutical industry. Aspen's average profits were also higher than any of the comparator businesses individually.

The Commission considered that there was no justification for the price and profit levels in this case, given that the medicines had been off-patent for approximately 50 years and that Aspen was not considered to have invested in significant product innovation or development since acquiring the medicines in 2012.



In response to the Commission's allegations, Aspen proposed a series of commitments, which were adjusted in light of the outcome of a market test organised in July 2020 and finally accepted by the Commission on 10 February 2021. Aspen has committed to:

- set maximum prices for the six medicines which are, on average, approximately 73% lower than pre-commitment levels and on average below the levels applicable prior to the price increase in 2012;
- keep prices below the price cap for a period of ten years, commencing 1 October 2019. Aspen is therefore required to reimburse the excessive portion of its prices retroactively; and
- guarantee the supply of the medicines for the next five years. For the following five years, Aspen will be required to either continue to supply the medicines or to make

its marketing authorisations available to other suppliers.

These commitments were made binding on Aspen by the Commission's Article 9(1) Regulation 1/2003 decision, which has yet to be made public. This decision will also conclude that, in light of the commitments, there are no longer grounds for action by the Commission, in the form of an adverse decision and fines for instance. However, it should be noted that the Commission's decision does not prevent courts from applying Article 102 TFEU to this same conduct in national proceedings.

Excessive pricing cases are notoriously complex and place competition authorities in the problematic position of deciding the appropriate price for a given product. This decision could therefore represent a model for enforcement of these types of cases at the EU and national levels, most notably in requiring the suspected party to propose a fair price which is later market tested. Further details of the Commission's precise methodology for identifying excessive prices should be made available in the final commitments decision, once published.

# The Court of Justice rules on double jeopardy in the Slovak Telekom abuse of dominance case

**EU – ANTITRUST – ABUSE OF DOMINANCE CASE**

**On 25 February 2021, the European Court of Justice handed down a preliminary ruling on the division of competences between national competition authorities ("NCA"s) and the Commission in the context of concurrent proceedings, also providing guidance on the application of the rules on double jeopardy (ne bis in idem) where fines are imposed by both authorities.**

**WHAT YOU NEED TO KNOW – KEY TAKEAWAYS**

- Under Article 11(6) of Regulation No 1/2003, NCAs are relieved of their ability to apply Articles 101 and 102 TFEU where proceedings initiated by the Commission relate to alleged infringements identical to those in proceedings brought by the NCAs (ie. the same practices, the same product, geographical markets, and period of time).
- An undertaking cannot be fined twice for the same EU competition law infringement - first by an NCA then by the Commission - as the NCA would lack the power to do so under Article 11(6).
- Therefore, arguments based on the double jeopardy principle are unlikely to succeed in concurrent investigations by an NCA and the Commission, because under Article 11(6), the NCA lacks the power necessary to adopt the adverse decision in the first place.

After opening an investigation in September 2005, the Slovak competition authority ("SCA") imposed a € 17.5 m fine on Slovak Telekom in April 2009 for abusing its dominant position by adopting a margin squeeze strategy on the prices for retail telecommunications services and wholesale interconnection services between 2001 and 2009.

In parallel to the SCA proceedings, the EU Commission initiated proceedings against Slovak Telekom in April 2009 for alleged abuses of a dominant position on the Slovak market. These proceedings were initiated based on suspected refusals to supply unbundled access to Slovak Telecom's local loops and other wholesale broadband access services, as well as a margin squeeze as regards to wholesale local loop access, other wholesale broadband access services, and retail access services in Slovakia.

In October 2014, the Commission adopted a decision imposing a fine of € 38.8 m on Slovak Telekom, jointly and severally with parent company Deutsche Telekom, for abuse of dominance in the form of a margin squeeze and refusal-to-supply strategy as regards access to its local loops between 2005 and 2010.

In the context of Slovak Telecom's challenge to the SCA's decision before national courts, the Slovak Supreme Court, hearing the case on appeal, submitted two questions to the European Court of Justice:

- the first, on the scope of Article 11(6) of Regulation No 1/2003, under which NCAs are "*relieved*" of their competence to apply Articles 101 and 102 TFEU once the Commission initiates proceedings for the adoption of a decision; and
- the second, on the application of the double jeopardy principle - according to which the same person cannot be sanctioned twice for the same conduct - in circumstances in which an NCA and the Commission impose fines separately on an undertaking for infringements under Article 102 TFEU, in exercise of their powers under Article 11(6) of Regulation No 1/2003.

On the first question, the Court of Justice held that, pursuant to Article 11(6), where the Commission initiates proceedings for an alleged competition infringement, NCAs are relieved of their powers to bring proceedings against the same undertaking(s), for the same allegedly anticompetitive practices, occurring on the same product and geographical market(s) during the same period(s).

The Court considered that, in this case, the proceedings initiated by the Commission targeted the unbundled local loop and other broadband access services, whereas the proceedings initiated by the SCA concerned abusive conduct on the wholesale and retail markets for telephone services and low speed (dial-up) internet access services.

Whilst leaving it to the national court to establish the exact scope of the national proceedings, the Court concluded that the two proceedings appeared to relate to separate product markets. Therefore, the SCA had in principle not been relieved of its power to apply Article 102 TFEU in proceedings against Slovak Telecom by virtue of Article 11(6).

On the second question, the Court recalled that the application of the double jeopardy principle in competition proceedings is subject to a twofold condition:

- first, there must be a prior definitive decision by a competition authority; and
- second, the prior decision and the subsequent proceedings or decisions must concern the same anticompetitive conduct.
- Therefore, the second condition was in principle not met in this case, as the conduct at issue in the relevant proceedings concerned different product markets.

More broadly, the Court noted that, even if the exact same conduct were at issue in both proceedings, the double jeopardy principle could not be applied. It follows from the Court's response to the first question that, in such circumstances, the SCA would lack the power necessary to adopt an adverse decision against Slovak Telecom based on Article 102 TFEU, by virtue of Article 11(6). Therefore, the first condition cannot be met if the second is.

This case suggests that arguments based on the double jeopardy principle will be exceptionally difficult to use in the context of concurrent Commission and NCA proceedings; even if the conduct at issue in those proceedings were to precisely overlap. Instead, the Court quite clearly indicates that such issues should be addressed on the grounds of competence, applying the provisions of Article 11(6).

# Shipping firm fined $24 million by Australian court for criminal cartel conduct

**AUSTRALIA – ANTITRUST - CARTELS**

**On 4 February 2021 the Federal Court of Australia ("Court") convicted Norwegian shipping firm Wallenius Wilhelmsen Ocean AS ("WWO") of criminal cartel conduct, and imposed a fine of AUD $24 million. This is only the third sentence for criminal cartel conduct handed down in Australia since criminal sanctions were introduced in 2009.**

**WHAT YOU NEED TO KNOW – KEY TAKEAWAYS**

- The seriousness of criminal cartel conduct will not be measured solely by revenue or profit, but by the capacity to limit or distort competition in the relevant market.
- The pecuniary penalty or criminal fine imposed by a court for cartel conduct will typically be one that deters the accused from considering anti-competitive conduct as an "*acceptable cost of doing business*".
- An early guilty plea, limited financial gain and efforts to enhance corporate compliance culture, may not weigh as heavily in the court's consideration as cooperation with the regulator.

## BACKGROUND

WWO's conviction for criminal cartel conduct follows its guilty plea, on 18 June 2020, to a single charge of giving effect to cartel provisions. That charge relates to conduct engaged in between about 1 June 2011 and 31 July 2012, in Japan and elsewhere, giving effect to a cartel arrangement between WWO and its competitors, in relation to the supply of roll-on roll-off ocean shipping services.

"*Roll-on roll-off*" (or "*Ro-Ro*") refers to the way that cargo is loaded and discharged from a shipping vessel. In this case, cars were rolled on and off WWO's vessels on their own wheels (as opposed to being lifted onboard).

WWO's conduct involved a "rule of respect" or "guiding principle" among certain shipping firms, that they would seek to allocate certain customers between themselves on certain international shipping routes, including to Australia. This involved the sharing of competitively sensitive information regarding freight rates, entering into anti-competitive agreements and the submission (or non-submission) of bids or quotes to customers in what should have been competitive tender processes.

The determination of this proceeding concludes the Australian Competition and Consumer Commission's ("ACCC") long-running investigation and prosecution of an international shipping cartel involving several major shipping firms. In Australia's first and second criminal cartel cases, respectively, the Federal Court fined Japanese shipping firms Nippon Yusen Kabushiki Kaisha ("NYK") AUD $25 million in 2017, and Kawasaki Kisen Kaisha ("K-Line") AUD $34.5 million in 2019, in

circumstances where the maximum applicable penalty to each firm was AUD $100 million.

### Calculation of the penalty

Having pleaded guilty, the key issue for the Court to determine was the extent of the financial penalty to be imposed on WWO. Under Australian competition law, the maximum financial penalty applicable is whichever is greater of $10 million, three times the gain from the conduct, or (where the gain cannot be ascertained) 10% of the firm's annual turnover connected with Australia. The extent of the penalty imposed also depends on a range of mitigating and aggravating factors which the Court must take into account in exercising its discretion to impose the appropriate penalty in all the circumstances.

In WWO's case, the factors considered by the Court as weighing in favour of a substantial fine included the extreme seriousness of the offence, the deliberate and systematic nature of the conduct, the involvement of senior managers at WWO and the clear benefit that WWO received as a result of the cartel conduct.

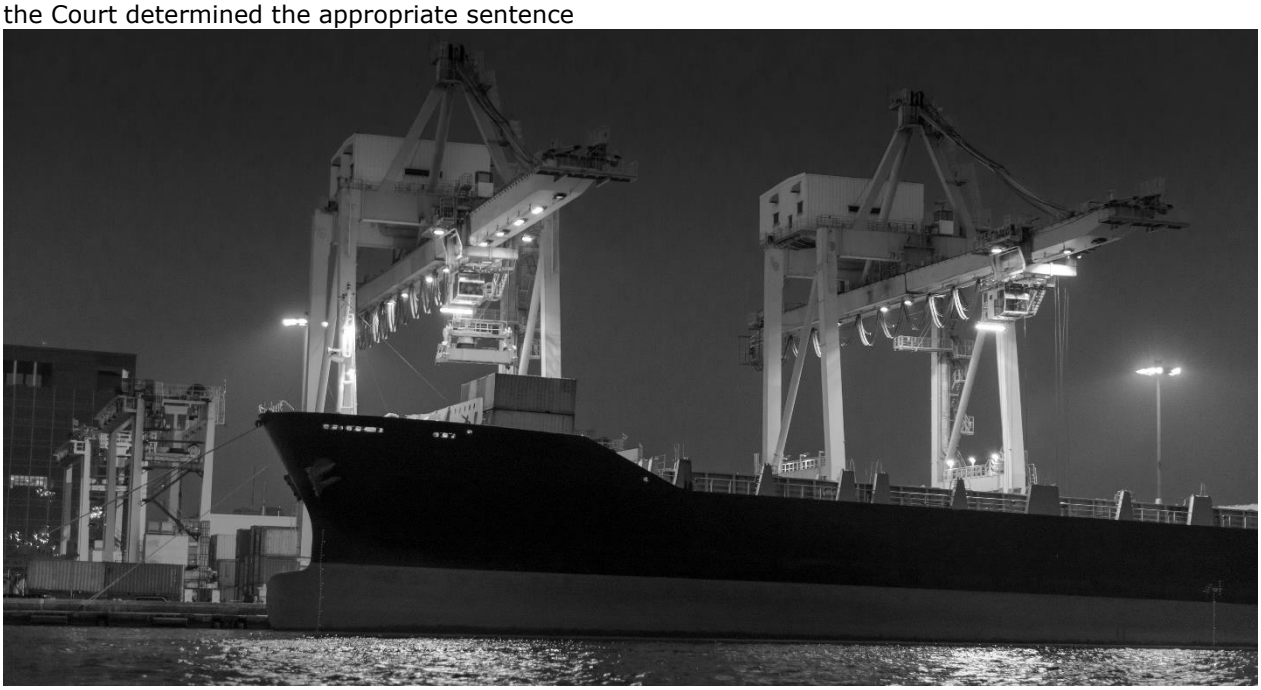
On the other hand, factors that weighed in favour of a lesser penalty included WWO's early guilty plea, the steps taken by WWO to rehabilitate itself by changing its corporate culture of compliance, the lack of a prior record of corporate criminal conduct in Australia, and the fact that WWO had already been punished overseas for participation in the cartel which gave rise to the Australian offence.

Having regard to all relevant circumstances, the Court determined the appropriate sentence was a fine of AUD $24 million, incorporating a discount of 20% for the early plea of guilty (in the absence of which, the fine imposed would have been AUD $30 million). The maximum fine that could have been imposed was approximately AUD $48 million (10% of WWO's annual turnover in the 12 month period after the end of the conduct).

The Court also applied the 'parity principle' – that persons involved in the same contravention should receive the same punishment, all other things being equal. The Court observed that WWO's offence was objectively less serious than the offences of the other two shipping firms, NYK and K-Line, prosecuted in Australia, and most likely garnered less financial gain.

The above notwithstanding, WWO received a significantly lower discount on its penalty than had previously been received by NYK and K-Line. The key differentiating factor appears to be that WWO did not cooperate by providing assistance to the ACCC; it pleaded guilty much later in the prosecution process than NYK and K-Line.

Justice Wigney also noted that cartel conduct is an economic crime that is notoriously difficult to detect, investigate and prosecute. Accordingly, any sentence imposed by a court must be sufficiently high so that, after conducting a balancing exercise of weighing the financial benefit against the risk of prosecution, a penalty could not possibly be regarded as an "*acceptable cost of doing business*".



# French Supreme Court upholds 2019 fine reduction granted in flour cartel

**FRANCE – CARTELS**

**In February 2021, the French Supreme Court confirmed the approach adopted by the Paris Court of Appeal when determining the duration of participation in a cartel by an undertaking that attended only one of the four collusive meetings it was invited to.**

**WHAT YOU NEED TO KNOW – KEY TAKEAWAYS**

- The other cartelists' perception of an undertaking's participation in a cartel is key to determining the duration of its participation.
- As long as an undertaking receives invitations to participate in collusive meetings, other members of the cartel are deemed to consider that it continues to participate in the cartel.
- Unless an undertaking expressly and publicly distances itself from a cartel, it is likely that the duration of its participation will depend on its co-cartelists, who may continue to invite the undertaking to meetings.

On 10 February 2021, the French Supreme Court put an end to the judicial saga of the flour cartels, in which the French Competition Authority ("FCA") imposed sanctions notably for the conclusion of a non-aggression pact between French and German millers in 2012, by upholding a decision handed down by the Paris Court of Appeal on 4 July 2019.

In its ruling (see September 2019 edition of our competition newsletter here), the Paris Court of Appeal significantly reduced the amount of the penalties initially imposed by the FCA on two undertakings, following a reassessment of the duration of their participation in the cartel.

In substance, the Paris Court of Appeal considered that the participation of these two undertakings could not have lasted until the end date of the litigious practices, since they attended only one collusive meeting and did not participate in any thereafter. However, the Court found that as long as an undertaking continues to receive invitations to meetings which relate to the same collusive context as the previous meeting in which it participated, it is deemed to take part in the cartel. Thus, according to the Court, the undertakings' participation in the cartel ended on the date on which the other cartelists stopped inviting them to meetings.

One of the undertakings concerned (Goodmills) appealed the judgment to the French Supreme Court, claiming in particular that a lack of distancing cannot be the only element used to determine its continued participation in the cartel, in view of the fact that it had ceased to take part in the collusive meetings it was invited to.

The French Supreme Court dismissed Goodmills' appeal, considering that the Paris Court of Appeal's finding of continued participation in the cartel up until the time Goodmills ceased to receive invitations to collusive meetings was legally justified.

In light of the Supreme Court's ruling, it is likely that, unless an undertaking expressly and publicly distances itself from a cartel, the duration of its participation will depend on its co-cartelists, who may continue to invite the undertaking to meetings. The ruling of the French Supreme Court is available here (French only).

# French Commercial Court makes abuse of dominance ruling in the search-related online advertising market

**FRANCE – ANTITRUST – ABUSE OF DOMINANCE**

**In the context of a stand-alone action – which falls under the new provisions resulting from the transposition of the Damages Directive – the Paris Commercial Court ruling at first instance orders Google to pay EUR 1,2 million in damages to Oxone, a telephone directory services company.**

Oxone alleged that its Google Ads account was illegally suspended on multiple occasions, before Google applied a new rule limiting Google Ads services to all telephone directory services companies.

Google argued that it took action following widespread consumer complaints about telephone directory services companies and frequent fraudulent activity. Google ceased to offer Google Ads for telephone directory services providers by modifying its Ads terms and conditions in March 2020, after 6 months' notice.

**WHAT YOU NEED TO KNOW – KEY TAKEAWAYS**

- The fact that the *plaintiff* commenced a "*stand-alone*" action did not prevent the French Commercial Court from heavily relying on previous findings of the FCA in an earlier (but entirely separate) case in relation to Google's position in the same market.
- The abuse of economic dependence – prohibited by Article L. 420-2 of the French Commercial Code – seems to remain subject to a strict interpretation, requiring in particular proof that the economic dependence is not the result of a deliberate choice by the plaintiff.

In order to estimate the damages, the French Commercial Court took into account the gross margin (rather than the contribution margin) that Oxone would have generated during the interruption of supply of Google Ads services. The case was brought by a telephone directory services provider which accused Google of abuse of dominant position and abuse of economic dependence. In France, the latter is regulated by Article L. 420-2 of the Commercial Code which prohibits, where it is likely to affect competition, "*the abusive exploitation by an undertaking or group of undertakings of the state of economic dependence in which a client or supplier undertaking finds itself in relation to it.*"

The Court held that Google engaged in abuse of dominance by applying non-transparent rules for access to Google Ads services. The Court found that the plaintiff's account was suspended several times without a sufficient explanation or justification, and in most cases by means of a notice sent to the plaintiff in a foreign language. The Court also took into account the fact that Google's decision to cease offering Google Ads to telephone directory services occurred concurrently with Google offering a competing service, "*Click to Call*". Although it does not use the expression, this appears to be suggestive of a form of 'self-preferencing'.

Although the case is formally considered as a "*stand-alone*" action, the Court's reasoning heavily relies on previous findings of the FCA. In particular, it refers to the fact that the FCA established Google's dominant position in the search-related online advertising market, and found that Google Ads' rules were "neither objective, transparent nor uniformly applied", in order to support its findings in the case at hand.

With respect to the claim of abuse of economic dependence, the Court found that the cumulative criteria usually required to characterise a customer's economic dependence on a supplier were established. However, it ultimately dismissed the claim on the ground that the plaintiff had not been able to show that its dependency was not the consequence of its own choice to concentrate its activity with a single partner. This reasoning

suggests that the severe sanction previously imposed on Apple for abuse of economic dependency by the FCA has not impacted the restrictive interpretation of the practice usually applied by French courts.

Finally, with respect to damages, the Court considered that the infringement directly caused harm to the plaintiff. It calculated the damages by taking into account the length of time during which the operator was not supplied Google Ads services due to Google's actions, as well as the gross margin. That approach deviates from the Paris Court of Appeal's recommendations, which present the contribution margin as being more appropriate.

Google has said it will appeal the decision to the Paris Court of Appeal. Google argues that its ads policies are designed to protect against misleading and fraudulent content; and that ads were restricted in this case because Call Directory, Forwarding and Recording services were subject to user complaints and frequent fraudulent activity.

# German competition authority fines steel forgers €35 million for information exchange

**GERMANY – ANTITRUST - CARTELS**

**On 4 February 2021, the German Federal Cartel Office ("FCO") fined three steel forgers – CDP Bharat Forge GmbH and Bharat Forge CDP GmbH (both belonging to the Indian Bharat Forge group) and Johann Hay GmbH & Co. KG Automobiltechnik – and two senior employees a combined sum of €35 million. The FCO found that over the course of at least 14 years, the parties exchanged information with the objective of passing on increased costs for the production of steel without being undercut by their competitors.**

**WHAT YOU NEED TO KNOW – KEY TAKEAWAYS**

- The exchange of competitively sensitive information can give rise to issues under competition law. In this case, the parties involved were competitors that exchanged information on their respective costs, pricing strategies (in particular how to pass on cost increases to their customers) and details of their negotiations with suppliers and customers.
- Competition authorities have concluded multiple investigations into information exchange practices in the context of trade association meetings.
- Compliance training can mitigate the risk of competition law infringements when employees attend trade association meetings. A recent change under German law also means that compliance programmes may be considered a mitigating factor when calculating any fines.

The information exchange was brought to the attention of the FCO following a leniency application by the steel forger Hirschvogel Umformtechnik GmbH, which was awarded immunity and escaped the imposition of any fines.

Between October 2002 and December 2016, the companies were found to have met on at least 44 occasions, in particular during working group meetings of the European steel forgers' association EUROFORGE, which was often accompanied by dinner arrangements. Between trade associations meetings, the participants also met in person and communicated information via telephone or e-mail. EUROFORGE itself was not found to have been involved in the information exchange.

The FCO found that through these various exchanges, the participants sought to pass on increased production costs to the fullest extent possible onto their customers without being undercut by their competitors. To achieve this goal, the participants exchanged their respective input costs for stainless steel, as well as their costs for electricity and wages. Additionally, the participants exchanged information on the results, developments and strategies of their negotiations with customers and suppliers.

The EUR 35 million fine imposed by the FCO takes into account that all of the companies involved in the information exchange cooperated extensively with the FCO during the investigation, and ultimately entered into a settlement with the FCO.

**COMMENT**

The FCO's decision comes in the wake of another decision in December 2020 concerning the aluminium sector, in which five aluminium forgers were fined for information exchanges practices over a similar period (2006 to 2018), which also involved the mutual aim of passing on rising costs to customers. The steel forger case illustrates the risks of competition law infringements in the context of trade association meetings in particular. It is therefore important that effective compliance training is provided to employees that attend such meetings, particularly following the 10th Amendment of the German Act against Restraints of Competition, which recognises that adequate and effective compliance measures may be a mitigating factor for the calculation of any cartel fines (see Ashurst Newsletter of February 2021).

# Competition Tribunal fines decoration contractors for price fixing and market allocation

**HONG KONG – CARTEL CONDUCT - PENALTIES**

**On 5 January 2021, the Hong Kong Competition Tribunal ("Tribunal") issued fines totalling approximately HKD 3.26 million against six decoration contractors and two individuals for engaging in cartel conduct in contravention of section 6 of the Competition Ordinance ("Ordinance"), which prohibits anticompetitive agreements.**

**WHAT YOU NEED TO KNOW – KEY TAKEAWAYS**

- The Hong Kong Competition Commission ("HKCC") has identified cartel conduct in the construction sector as a priority area for enforcement action. In line with this position, the Tribunal noted that anti-competitive behaviour in the renovation industry is a long-standing and widespread practice. As such, penalties for similar cases will not be strictly bound by the penalties imposed to date, but are likely to be increased.
- In its determination of penalties, the Tribunal will take into account aggravating and mitigating factors, and apply discounts where there is evidence of cooperation with the HKCC. This is an important consideration for parties under investigation by the HKCC.

The conduct involved allocating customers and coordinating pricing in relation to the provision of renovation services for a public housing estate between June and November 2017. This is the fourth cartel case brought since the Ordinance came into force on 14 December 2015, and the third to involve renovation services.

## Penalty Decision

The Tribunal followed a four step method to calculate the pecuniary penalty to be imposed upon the parties found to have breached competition law

(a) Determine the "base amount"

The base amount of the fine reflects the nature and extent of the anti-competitive conduct. The starting point for the calculation of the base amount is the value gained (directly or indirectly) from the contravention of competition law. The base amount then is multiplied by the number of years over which the contravention took place.

In this case, the value gained by each defendant was calculated from the work orders and invoices that had been issued in relation to the renovation services that were the subject of the HKCC's investigation. The HKCC recommended a severity percentage increase of 24% be applied, reflecting the seriousness of the infringement; however the Tribunal reduced this to 20% on the basis that the number of entities involved, their market share, and sales values were less than in the Hing Construction case. The Tribunal then applied a duration multiplier of 1, despite the conduct only lasting five months.

(b) Adjust the base amount according to aggravating and mitigating factors

A 30% discount was awarded to one contractor on the basis that it did not intend to contravene the Ordinance, but did so as a result of inaction and a failure to investigate when it learned that another company was being prosecuted for cartel conduct. A 50% discount was applied to the four other contractors on the basis that they shared their profit equally with their subcontractors.

(c) Consider the statutory maximum

(d) The maximum penalty for cartel conduct under the Ordinance is 10% of a company's annual turnover in Hong Kong for the duration of the contravention (capped at three years). The Tribunal calculated this amount for each respondent to ensure that the final penalty imposed did not exceed the maximum.

(e) Discount for cooperation with the HKCC

The defendants each received discounts of between 5 to 10% for cooperation with the HKCC during its investigation.

# Hong Kong hotel groups and tour operator reprimanded for facilitating cartel conduct

**HONG KONG – CARTEL CONDUCT**

**On 26 January 2021, Hong Kong's Competition Commission (HKCC) issued infringement notices to six hotel groups and a tour operator for facilitating a cartel arrangement between two competing travel service providers, which fixed the prices of tourist attractions and transportation tickets in Hong Kong.**

The hotel groups and the tour operator admitted to a contravention of Section 6(1) of the Competition Ordinance (which prohibits anticompetitive agreements) and made commitments to address competition compliance within their organisations. An investigation into the conduct of the competing travel service providers is ongoing.

**WHAT YOU NEED TO KNOW – KEY TAKEAWAYS**

- Infringement notices may be issued by the HKCC where it has reasonable cause to believe that there has been a contravention of cartel rules.
- The HKCC will not bring proceedings against a person or business that has been issued with an infringement notice, unless the person/business has not complied with the notice within the compliance period (or the HKCC has otherwise withdrawn the infringement notice).
- The HKCC has a wide discretion to determine the actions required by an infringement notice, which may include (but is not limited to) requiring a person or business to refrain from specified conduct, or to take actions that the HKCC considers appropriate, or to admit to a contravention of the Competition Ordinance.
- Businesses should be mindful that even "*mediums*" or "*facilitators*" of cartel arrangements can fall foul of competition law.

The HKCC's investigation revealed that between March 2016 and May 2017, competing travel service providers Gray Line Tours of Hong Kong Limited and Tink Labs Limited agreed to fix the prices of tourist attractions and transportation tickets in Hong Kong, which were sold by various hotel groups across Hong Kong.

The hotel groups themselves did not directly sell tourist attraction and transportation tickets to customers. However, it was held that they acted as *facilitators* by passing on pricing information requests and communications between these two competing travel service providers, which actively contributed to the implementation of the price fixing arrangements. The HKCC had reasonable cause to believe that the arrangements had the object of harming competition in the travel services industry, to the detriment of other tourist operators and consumers.

This is the first time that the HKCC has taken enforcement action against parties for the facilitation of cartel conduct. The HKCC issued infringement notices to obtain commitments from the parties in lieu of initiating proceedings before the Competition Tribunal. The HKCC considered this to be a proportionate approach having regard to the parties' role as "*facilitators*" and their active cooperation during the HKCC's investigation.

# Competition Appeal Board reduces record fine for cartel conduct

**SINGAPORE – CARTEL CONDUCT - PENALTIES**

**On 4 December 2020, Singapore's Competition Appeal Board ("CAB") reduced penalties imposed on eight out of thirteen distributors of fresh chicken found to have engaged in cartel conduct in September 2018. The reduction in fines ranged from 20% to 70%.**

**WHAT YOU NEED TO KNOW – KEY TAKEAWAYS**

- While trade associations exist to facilitate legitimate forms of interaction between industry participants, they also present a high risk environment for information sharing and anti-competitive coordination.
- Cartelists that are "passive" or "followers" are culpable for breaches of competition law, although having a passive or limited role in a cartel arrangement could be taken into account by the Competition and Consumer Commission of Singapore ("*CCCS*") as a mitigating factor when determining fines.

Only four appeals were made to the CAB (although eight appellants were involved in the proceedings because the Lee Say Group consisted of five entities).

A fifth appeal was filed by Kee Song Food Corporation ("*Kee Song*"), however this was dropped after Kee Song reached an agreement with the CCCS on the quantum of fine payable during an earlier stage of the hearing. The remaining four parties to the CCCS's decision who did not file appeals were leniency applicants.

Substantively, the appeals were made not only in respect of the quantum of financial penalties but also against the CCCS's findings that the parties had participated in anticompetitive behaviour.

The first issue before the CAB was whether each of the appellants had infringed section 34 of the *Competition Act* through their participation in:

**the Non-Aggression Pact** ("NAP") – a market sharing agreement under which the appellants were alleged to have agreed not to compete for each other's customers; and

- **Price Discussions** - the subject matter of those discussions included agreements with respect to the quantum and timing of price movements in relation to the sale and distribution of fresh chickens (including via the exchange of price information and future pricing intentions).

Based on the evidence before it, the CAB found there was insufficient evidence to establish that seven of the eight appellants had participated in the NAP. In the case of the remaining appellant, one of its directors had admitted during CCCS's witness examination process that it had participated in the NAP. With respect to the Price Discussions, the CAB upheld the CCCS's finding of infringement against all eight appellants.

The second issue for the CAB to consider was the appropriate amount of any financial penalties.

The CAB took into account several factors in re-assessing the penalties to be imposed on each of the appellants. Notably, the CAB corrected the CCCS's earlier proposition that a "*mere passive or follower role*" is not a mitigating factor. Having regard to the *CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016*, the CAB held that a passive and limited role could amount to mitigating circumstances, and applied this principle in its re-assessment of penalties.

# Pharmaceutical cartel sanctioned by the Spanish competition authority

**SPAIN – ANTITRUST - CARTELS**

**The Spanish Competition Authority ("CNMC") has fined Advanced Accelerator Applications Ibérica, S.L.U. ("AAA") and Curium Pharma Spain, S.A. ("CURIUM") as well as two directors of those companies for an infringement of the Spanish Competition Act ("SCA"), constituting a bid-rigging cartel for the supply of radiopharmaceutical fluorodeoxyglucose ("18-FDG").**

**WHAT YOU NEED TO KNOW – KEY TAKEAWAYS**

- This case shows once again the interest of the CNMC in addressing collusion in public tenders.
- The CNMC has used its power to ban the infringing companies from participating in public tenders, again leaving the State Public Procurement Advisory Board to determine the scope and duration of the ban.
- The CNMC has also fined directors of the companies involved.
- The conduct was detected by the CNMC thanks to its new economic intelligence unit, which investigated public tenders submitted for the supply of radiopharmaceuticals to hospitals and healthcare centres in Spain.

The CNMC has once again shown its focus in addressing collusion in public tenders by fining the two main companies active on the 18-FDG market in Spain, AAA and CURIUM. The fines amount to EUR 5.76 million and the CNMC has also decided that the companies' respective parent companies (Novartis Groupe France, S.A. and Glo Holdco, S.C.A) were jointly and severally liable for the infringement. Lastly, the CNMC has banned both companies from participating in public tenders and the State Public Procurement Advisory Board will be responsible for determining the scope and duration of the ban.

The conduct consisted of an agreement to deliberately lose bids to supply radiopharmaceuticals to hospitals, as a part of a geographic market sharing agreement, under which the companies had assigned specific hospitals to each other. Thus, hospitals ended up paying higher prices for radiopharmaceuticals than they would have done under competitive conditions. Subsequently, the companies subcontracted services to each other at prices significantly lower than those charged to the hospitals. Furthermore, the companies maintained a non-competition pact in respect of a number of customers. This was implemented through 'self-exclusions' from tenders (e.g., by failing to attend negotiations, or by making deliberate errors in tender submissions, or submitting bids in excess of the maximum price specified in the tender documents).

The CNMC found that the agreements were implemented from at least from June 2014 until November 2018, when the CNMC inspected the headquarters of both companies

This case shows once again the interest of the CNMC in addressing collusion in public tenders (see for example here and here), as well as the increasing relevance of the economic intelligence unit of the CNMC, which detected the conduct by investigating public tenders

submitted for the supply of radiopharmaceuticals to hospitals and healthcare centres in Spain. Furthermore, this case also evidences some divergence amongst regional and national competition authorities in the use of new legal tools to deter anticompetitive conduct, such as the power to ban companies from participating in public tenders. The CNMC remains of the view that the scope of such public bans must be determined by the State Public Procurement Advisory Board, whereas the Spanish regional competition authorities, such as the Catalan Competition Authority, consider that Spanish Competition authorities can determine the scope and duration of such bans (see, for example, previous article).

# The Penrose Report "*Power to the People Stronger Consumer Choice and Competition – so markets work for people, not the other way round*"

**In September 2020, John Penrose MP was commissioned by the UK Chancellor of the Exchequer and the Secretary of State for BEIS to write an independent report on how the UK's approach to competition and consumer issues could be improved.**

In particular, the UK Government's terms of reference included five key questions, asking (in summary) how the UK's competition regime can best: (i) meet post COVID-19 challenges and drive recovery; (ii) help to '*level-up*' across all nations and regions of the UK; (iii) increase consumer trust (including tackling consumer rip offs and bad business practices); (iv) support UK disruptors take risks on new ideas and challenge incumbents; and (v) make best use of data, technology and digital skills.

The Penrose Report, entitled "Power to the People" (the "Report") was published on 16 February 2021, and sets out Mr Penrose's findings and recommendations in response to those questions.

## Summary of findings

In summary, the Report explains that: *"[the UK] independent competition and consumer regulation regime currently has a good reputation, but not a great one. International rankings put [UK] major competition institutions behind USA, France, Germany, EU and Australia. Sector regulators intervene heavily, creating regulatory burdens … Investors and business leaders say that officialdom moves too slowly in an increasingly fast-paced digital world. Citizen-consumers feel ripped off when they buy things like energy or car insurance, and increasingly feel that markets aren't set up to work for them. In other words, the system needs to be updated, improved and refreshed."*

## Report recommendations

The Report contains a number of recommendations for addressing these issues, including measures to:

- **drive faster and better competition decisions**. The Report recommends that: (a) the CMA's civil consumer law enforcement powers should be updated so they have the same importance as its competition law powers; (b) penalties for non-compliance with competition investigations are strengthened; (c) the CMA should be allowed to accept legally-binding undertakings at any stage in a market study or investigation or merger review; (d) all appeals should be dealt with by the CAT; and (e) the Government should establish a taskforce to review and redesign CMA and CAT procedures and case management;
- **increase competition in "industries burdened by red tape"**. The Report emphasises that public contracting and procurement is one of the areas currently most "*held back by red tape*", and recommends that the Government implements the broad changes

outlined in its new procurement green paper as fast as possible;

- **increase competition in digital industries**. Recommendations to achieve this include supporting the new CMA digital markets unit to make pro-competitive interventions to reinstate normal competitive conditions where possible and proportionate (e.g. through data portability schemes), whilst ensuring that its powers are tightly ring-fenced to prevent regulatory creep;
- **increase competition in economically-regulated industries**. In this respect, the Report focusses on the sectoral regulators in the UK, such as Ofwat, Ofcom and Ofgem, which regulate network monopolies with a regulated asset base. The Report includes a number of recommendations which aim to turn these sectors into "*'normal' pro-consumer, high-standards competitive market[s]"* as much as possible. For example, the Report suggests (among other measures) auditing and amending the sector regulators' legal duties so they have a "*competition for the benefit of consumers first, regulation only as a last resort primary legal duty*";
- **increase competition outside the UK South East**. This includes finding ways to give small firms and consumers quicker and easier ways to enforce their rights. Recommendations include, for example: (a) making Small Claims Courts and ADR services available 24/7; (b) creating fast-track County Competition Courts for local and regional cases; and (c) giving local authority trading standards teams powers to mount antitrust and consumer investigations;
- **"stick-up for" consumers**. In particular, the Report identifies three "*gaps*" where it finds that consumer protection rules need to be stronger. In summary, these are:
    - price discrimination and the so-called "*loyalty penalty*", with the Report recommending that a general consumer-protection regulation is put in place to address this. In this context, the Report refers to the FCA's consultation on a rule requiring firms to offer the same prices to new and existing customers for home and motor insurance. The Report also recognises that future-proofing such a regulation may be challenging, and suggests that the CMA should update its guidelines on what treating customers fairly means in practice;
    - asymmetry of information between sellers and buyers, due to lack of visible prices, complicated small print, and '*take it or leave it*' digital offerings where alternatives may not be available. To tackle this, the Report recommends, for example, that the CMA should: track digital comparison tools to ensure they are continuing to enable buyers to make reliable choices; consider how to improve transparency of the price consumers are paying through provision of their data; and consider how to increase competition in local digital monopoly markets; and
    - '*nudging*' people the wrong way, i.e. "*sludge*" (for example, subscription traps, making '*opt-out*' icons smaller/less visible, or creating a sense of urgency around price or availability). To address this, the Report proposes that the CMA should undertake a market investigation to assess how sludge should be recognised and measured in future, and to identify relevant consumer protection techniques; and
- ensure that going forward, the **UK's approach to state aid and subsidies control** is carefully considered and balanced, to avoid damaging the UK's attractiveness for FDI.

The Report is very detailed, covering a wide number of issues and making a significant number of recommendations. Whether, and if so, how, these recommendations are adopted and implemented remains to be seen, but they could have a significant impact on both the competition law and consumer protection law regimes in the UK in the future.

# Guidance for UK businesses on sustainability agreements

## UK – ANTITRUST – ANTICOMPETITIVE AGREEMENTS & SUSTAINABILITY

**The UK's Competition and Markets Authority (CMA) has published guidance for businesses to help them understand how to avoid participation in sustainability agreements raising competition law issues that can have serious consequences for those businesses. Recognising that many sustainability agreements are entered into in order to set new standards, the CMA has laid out the "do's and don'ts" for businesses that are participating in such standard-setting agreements.**

**WHAT YOU NEED TO KNOW – KEY TAKEAWAYS**

- The CMA recognises that collaboration can help achieve sustainability goals, but sustainability agreements cannot be used as a cover for anticompetitive behaviour.
- If a sustainability agreement is found to breach UK competition law, this can have very serious consequences for the businesses involved.
- It is recommended that businesses seeking to cooperate to achieve sustainability goals read the CMA's guidance on sustainability agreements and consider seeking independent legal advice before entering into an agreement, to ensure that their actions do not breach UK competition law.

### Considerations when entering into sustainability agreements

It is recognised by the CMA that collaboration can be effective in helping to achieve sustainability goals. However, where businesses (on an industry-wide basis or decisions of trade associations or standardisation organisations) cooperate to achieve these goals, this can create competition law issues. In particular, the CMA has warned that sustainability agreements cannot be used as a cover for anticompetitive behaviour. There are serious consequences for businesses found to have breached UK competition law, including fines of up to 10% of worldwide turnover, reputational damage, and third party claims for damages.

In its guidance, the CMA sets out that "*competition law issues are most likely to arise where cooperation significantly restricts competition. However, even then an agreement must be assessed in its economic context and, in some cases, sustainability agreements may deliver benefits that outweigh the potential consequence of restricting competition*."

The CMA confirms that beneficial forms of cooperation, for example, grouping together to purchase common inputs or for research and development, are unlikely to harm competition, providing the businesses do not have market power. It also verifies that where such benefits arise, exemptions from competition law might be possible, either on an individual basis or under an existing block exemption.

### Standard-setting agreements

The purpose of many sustainability agreements is to set new standards, by which businesses,

often through trade associations or standardisation organisations, set standards on the environmental performance of products, production processes, or the resources used in production. In order to help ensure that such agreements do not hamper competition, the CMA has set out "do's and don'ts" for businesses making such standard-setting agreements.

In particular, it is important that businesses, trade associations and/or standardisation organisations:

- keep stakeholders aware of developments to standardisation work;
- ensure that all competitors in the markets affected by the standard are able to participate in the standard-setting process and join the agreement;
- ensure access to the standard is on fair, reasonable and non-discriminatory terms for all businesses which comply with it;
- disclose in good faith any intellectual property rights (IPRs) that might be essential to the implementation of the standard and offer to licence these IPRs to all third parties on fair, reasonable and non-discriminatory terms; and
- ensure that all members of a standard setting organisation remain free to develop alternative standards (including higher standards) or products that do not comply with the agreed standard

Conversely, businesses, trade associations and/or standardisation organisations should avoid:

- exchanging commercially sensitive information beyond what is necessary to set a standard;
- imposing obligations (either directly or indirectly) to comply with a standard on businesses that do not wish to participate;
- making it difficult (by creating barriers) for businesses to develop alternative standards (including higher standards) or products that are not in compliance with the agreed standard; and

  using quality standards to prevent a technology or a competitor from entering the market.

# CMA keeps it fresh with updated Digital Markets Strategy

**UK – NEW POLICY**

**On 9 February 2021, the UK Competition and Markets Authority ("CMA") published a 'refresh' of its Digital Markets Strategy, which was first published in July 2019. The updated strategy takes into account recent policy developments, including the forthcoming launch of the Digital Markets Unit ("DMU"), which will operate from within the CMA and have the power to designate digital firms with substantial, entrenched market power as having "*strategic market status*" ("SMS").**

## BACKGROUND

The CMA published its Digital Markets Strategy in July 2019 in response to changes taking place across the economy, and society as a whole, as a result of the growth in digital markets. The Digital Markets Strategy sets out the CMA's strategic aims and priority focus areas in respect of those markets.

There have been numerous developments since the first publication of the Digital Markets Strategy. These include:

- the UK Government accepting the strategic recommendations of the Furman Review in March 2020 (see our April 2020 newsletter);
- the CMA publishing its final report following a market study into online platforms and digital advertising in July 2020 and making

recommendations for a new regulatory framework (see our July 2020 newsletter); and

- the UK Government confirming in November 2020 that it would establish and resource the DMU from April 2021 and, in December 2020, committing to a consultation on proposals made by the Digital Markets Taskforce in early 2021 (see our article, New UK regulatory regime for tech giants proposed).

### The CMA's strategic aims in digital markets

The refreshed Digital Markets Strategy states that the overarching ambition across the CMA's work in digital markets is now to support the establishment of the DMU within the CMA. The UK Government has committed to introduce new legislation as soon as parliamentary time allows, and a consultation on the functions and powers of the DMU is anticipated this year. The CMA also identifies a number of strategic aims that will apply "in the interim, pending new powers". These objectives broadly include continuing to use existing competition and consumer law tools to address digital markets, building knowledge in digital markets, undertaking work to establish the DMU within the CMA, continuing to work with the UK Government to pursue reform, as well as updating CMA guidance in relation to digital markets.

### The seven priority areas of focus

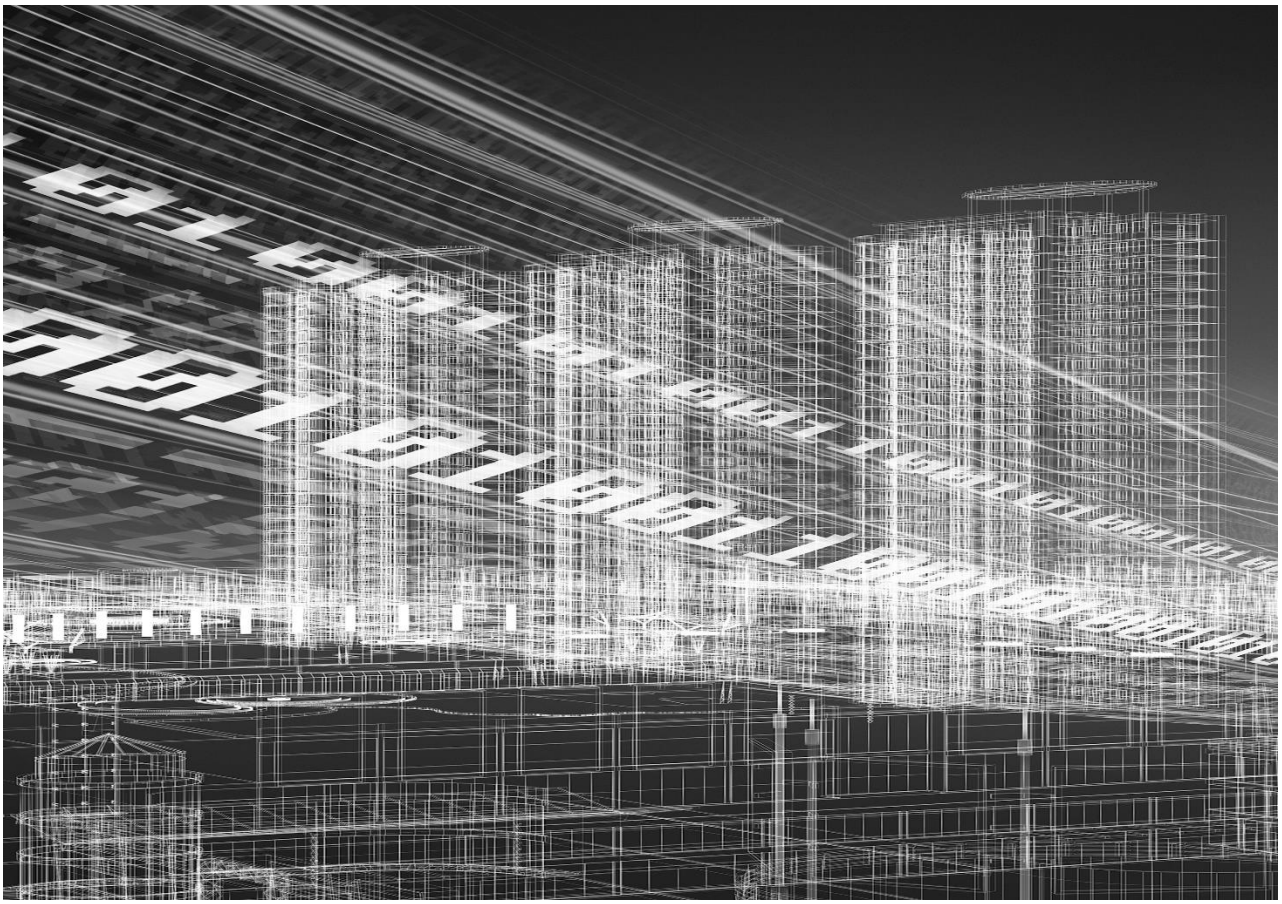
The CMA has also revised its priority areas of focus in relation to digital markets, and has identified the following seven priorities to support its strategic aims:

- **Priority 1**: working closely with the UK Government to operationalise and establish the organisational design for the DMU, including supporting the Government in its work to develop the legislative framework, developing guidance on how the DMU will exercise its powers, and gathering evidence with which to assess which digital firms should be designated as having SMS under the new regime.
- **Priority 2**: using existing powers to the fullest extent possible in digital markets, including through antitrust and consumer protection law enforcement action, merger assessments and market inquiries.
- **Priority 3**: the work of the Data Technology and Analytics ("DaTa") unit within the CMA, which supports the CMA's digital markets casework, research and policy through the use of data engineering, machine learning and artificial intelligence techniques. The DaTa unit has also expanded to include behavioural scientists to enhance the CMA's analysis of consumer behaviour.
- **Priority 4**: working closely with Ofcom and the Information Commissioner's Office through the Digital Regulation Cooperation Forum ("DRCF") on digital work of mutual importance, as well as other regulators with relevant responsibilities in relation to digital markets. The DRCF is expected to shortly publish a workplan on cooperation between regulators in digital markets.
- **Priority 5**: developing close relationships with other competition and consumer authorities in relation to their digital work, including through the Multilateral Assistance and Cooperation Framework, the Organisation for Economic Cooperation and Development, the International Competition Network and the International Consumer Protection and Enforcement Network, and by pursuing work through the UK's Presidency of the G7 in 2021.
- **Priority 6**: supporting the UK Government on reform proposals in relation to the CMA's existing competition, consumer, markets and merger tools, which include proposals that are specific to the CMA's work in digital markets.

- **Priority 7**: updating guidance on how the CMA operates when using its existing powers in digital markets.

## COMMENT

The focus of the CMA's updated Digital Markets Strategy is the establishment of the DMU within the CMA which, if implemented, will have the power to designate digital firms with substantial, entrenched market power as having SMS. It is currently envisaged (following recommendations by the Digital Markets Taskforce in December 2020) that firms with SMS will be subject to additional regulation including a legally binding code of conduct, pro-competitive market interventions by the DMU, and enhanced merger rules. The UK Government has committed to consulting on the functions and powers of the DMU later this year. There are parallels between the CMA and UK Government's ongoing policy work and other international competition regimes that are reviewing the application of competition rules to digital markets. The European Commission, for example, has proposed a new Digital Markets Act that would apply to large platforms that behave as "*gatekeepers*" in online markets, whereas the German legislature has recently introduced amendments to antitrust rules that provide for earlier enforcement action in the digital economy (see our February 2021 newsletter).consumers pay higher prices for funerals because they are not in a position to make the best choices and are vulnerable to exploitation.



# Designing a UK subsidy control regime

**UK – BEIS CONSULTS ON NEW LEGAL FRAMEWORK**

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**On 3 February 2021, the Department for Business, Energy & Industry Strategy ("BEIS") published a consultation paper outlining proposals for a new subsidy control regime in the UK ("Consultation Paper").**

The need for a new subsidy control regime has been prompted primarily by:

- the State Aid (Revocations and Amendments) (EU Exit) Regulations 2020, which had the effect of ensuring that EU State aid law does not form part of UK domestic law after the end of the transition period; and
- provisions of the UK-EU Trade and Cooperation Agreement ("TCA") requiring the UK to develop and maintain an effective system of subsidy control.

The Consultation Paper outlines, in broad terms, how a UK subsidy control regime could operate. In doing so, the paper seeks to differentiate the proposed UK subsidy regime from the EU State aid regime. However, in practice, many of the features of the proposed framework will be familiar to those with experience of applying the EU State aid rules.

A number of key issues have been left open and BEIS is seeking input from stakeholders on 43 different issues across the Consultation Paper.

## BACKGROUND

The Consultation Paper recognises that a UK subsidy regime must be designed in a way to comply with the UK's international trade obligations. These obligations are derived from a number of sources:

- First, the TCA contains detailed and far-reaching provisions on subsidy control, which are similar to EU State aid law principles.

- Second, the UK is a member of the World Trade Organisation ("WTO"), and the WTO Agreement on Subsidies and Countervailing Measures ("ASCM") restricts members' use of subsidies and regulates the actions members can take to counter the effects of another member's subsidies.
- Third, other free trade agreements that the UK has negotiated or is in the process of negotiating may contain provisions on subsidies.

## PROPOSED FRAMEWORK

The Consultation Paper identifies the following key objectives of the UK subsidy regime: (i) facilitating interventions to deliver on the UK's strategic interests, (ii) maintaining a competitive and dynamic market economy, (iii) protecting the UK internal market and (iv) ensuring the UK acts as a responsible trade partner.

These objectives are intended to facilitate strategic state interventions to deliver Government priorities such as levelling up and achieving net zero carbon.

### Definition of a "subsidy"

The Consultation Paper proposes the following four limb definition of a subsidy:

1. There must be a financial contribution (e.g., a grant, loan, guarantee, or other forms of financial assistance) originating from public resources.
2. The subsidy must confer a benefit on persons supplying goods or services in the course of a business, which would not be available under commercial terms.
3. The subsidy must be specific to an enterprise, or enterprises within a particular sector, industry or region.
4. The subsidy has, or could have, a harmful or distortive effect on trade or investment within the UK or internationally.

### Scope of the regime

The regime proposes to cover all sectors of the UK economy, except the audio-visual sector and subsidies for the purposes of defence and safeguarding national security, which are exempt from the regime. Feedback is also being sought on the extent the regime should also apply to agricultural and fisheries subsidies and activities undertaken by the Bank of England.

The Consultation Paper proposes that subsidies granted by public authorities must meet a number of principles before a subsidy can be granted, which have been adopted from the UK's obligations under the TCA. Additionally, BEIS has outlined a further principle, that public authorities should seek to minimise any harmful or distortive effects on competition within the UK internal market that might arise from a subsidy.

The Consultation Paper recognises that the UK has agreed with the EU under the TCA to prohibit certain types or subsidies altogether (e.g., unlimited state guarantees, and subsidies to ailing or insolvent enterprises where there is no credible restructuring plan), and to attach strict conditions to the granting of subsidies in certain situations (e.g., restructuring subsidies for certain financial institutions, subsidies granted to airlines, and subsidies for cross-border cooperation projects).

## EXEMPTIONS

The Consultation Paper proposes a number of exemptions from the requirement to apply the compatibility principles before granting a subsidy. Those exemptions, which are aligned with the provisions of the TCA, include:

1. **Small amounts:** the Consultation Paper is seeking views on whether the de minimis threshold should be lower than that specified in the TCA (i.e., 325,000 Special Drawing Rights (SDRs) over a three year fiscal period, which is approximately £340,000).

2. **Exceptional circumstances:** the Consultation Paper proposes that subsidies granted to compensate exceptional occurrences such as drought, flood, severe storms, wildfire or pandemic would be exempt from the normal compatibility principles.
3. **Temporary subsidies to address national or global economic emergencies:** the Consultation also proposes that measures taken to respond rapidly to national or global economic emergency should be exempt, provided any such measures are well-targeted, proportionate and likely to be effective in achieving their stated policy objective.
4. **Services of Public Economic Interest (SPEIs):** the Consultation Paper outlines a proposal in respect of subsidies to provide services that would not otherwise be supplied without public intervention (SPEIs). SPEIs will be subject to a number of conditions, to comply with the UK's TCA obligations. The subsidy regime would not apply to SPEIs below 750,000 SDRs (approx. £790,000) over a 3 year fiscal period and the transparency requirements would not apply to SPEIs below 15 million SDRs (approx. £15.7 million) per task. BEIS is seeking views on whether these amounts should be lowered.

### Other proposals

The Consultation Paper is also seeking views on additional ways to protect the "UK Internal Market". The most significant of these is the proposal for public authorities to conduct competition impact reviews for high risk subsidies before they are awarded.

Other proposed measures include prohibitions on subsidies for uneconomic relocations (i.e., the relocation of businesses to other parts of the UK), a presumption of compliance for low risk subsidies and sector or category specific subsidy conditions.

### Transparency obligations

BEIS has developed a publicly accessible transparency database which public authorities will be required to use to record subsidies within six months of the award date, in order to meet TCA, WTO and FTA requirements. BEIS is seeking feedback on proposed financial thresholds above which the transparency obligations will apply.

### Oversight and enforcement

The TCA requires the UK establish an independent body as part of the domestic subsidy regime. No firm commitments are set out in the Consultation Paper on the functions or role of that body, nor does the Consultation Paper identify the body that will be responsible for exercising those functions.

It is clear that the Government wants to reduce bureaucracy and wants to ensure that public authorities are able to take decisions with respect to the award of subsidies without the need to seek prior approval from the independent body having oversight of the UK subsidy control regime. In practice, this objective is not as radical as it may sound. This is on the basis that the majority of aid measures under the EU State aid regime fall within the scope of exemptions (i.e., the General Block Exemptions Regulation and de minimis aid Regulation). Therefore, public authorities should already have extensive experience of self-assessing subsidy measures. However, the Government will need to ensure that the regime provides for appropriate scrutiny of larger and more complex subsidy measures.

BEIS is consulting on the potential responsibilities and functions of the independent body. These range from (a) having responsibility for explaining the regulatory framework to public and private bodies, (b) carrying out reviews and reporting on the effectiveness of the subsidy control regime, (c) having a limited role in providing advice to public authorities before they grant subsidies, (d) having powers to review certain types of subsidy awards (e.g., following a complaint), and (e) being able to exercise enforcement powers in respect of unlawful subsidies.

As regards proposals for a post-award review mechanism, the Consultation Paper canvasses issues at a high level without firm commitments on how those enforcement powers would operate in practice. No firm commitments are made, for example, in respect of possible enforcement options such as the issuing of penalty notices for non-compliance with the regime and powers to require public authorities to amend decisions.

It is also unclear how the independent body's enforcement powers would interact with traditional rights of interested parties to seek judicial review of unlawful decisions. The Consultation Paper does, however, acknowledge that decisions by a public authority to award a subsidy will be open to challenge through the courts for breaches of statutory duty and other public law principles.

The UK has committed to provide a review process and ensuring Courts can award remedies such as the suspension and prohibition of subsidy measures, damages and the recovery of unlawful subsidies. The Consultation Paper indicates that this will be achieved through judicial review with challenges to be brought within one month of the subsidy scheme being made publicly available, and limited to circumstances where subsidies are unlawful.

The Consultation Paper also canvasses views on (a) how the recovery powers might be implemented, (b) whether standstill periods should apply to the award of certain high risk subsidies, and (c) whether a specialist judicial forum, such as the Competition Appeal Tribunal, should hear challenges to subsidy schemes and awards.

## NEXT STEPS

With 43 questions included in the Consultation Paper, it is clear that there are a number of policy issues to be resolved. Despite the Consultation Paper seeking to break new ground for subsidy control in the UK, it is clear that the framework reflects various elements of the EU State Aid regime, and will be limited by UK's obligations under the TCA, WTO agreements and other trade agreements being negotiated by the UK. Feedback received as part of the consultation process is likely to play a key role in influencing the final form of the regime. The deadline for responding to the Consultation Paper is 31 March 2021.

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