Ashurst competition law newsletter

November 2018

Contents

From the Editor

The November issue of Ashurst's European competition law newsletter is now out, featuring a round-up of a number of developments that have caught our eye. This edition includes a comparative guide to how regulators around the world treat compliance programmes when calculating a fine, what UK competition law might look like in a "no deal" Brexit scenario, the European Commission's clearance of Disney's acquisition of Fox, the French application of the Coty judgment and an insight into Royal Mail's grounds for appealing Ofcom's abuse of dominance fine, as well other topics.

Rare annulment of State aid decision not to raise objections to aid scheme

EU (STATE AID)

On 15 October 2018, the General Court ("GC") annulled a European Commission ("Commission") decision authorising a Dutch aid scheme concerning subsidies for the acquisition of land for conservation and cultural activities. The scheme had been put into effect in breach of the notification requirement. According to the GC, the Commission clearly faced serious difficulties during its preliminary examination of the scheme and should therefore have initiated a formal investigation instead of deciding not to raise objections to the scheme.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- It is possible for competitors of aid beneficiaries to appeal Commission decisions to approve grants of aid. However, there is an admissibility hurdle: complainants need to be able to show that they are seeking to safeguard their procedural rights.
- When the Commission approves aid following a preliminary investigation and fails to open a formal investigation in circumstances in which it ought to have done, a complainant would have been denied its procedural right to submit comments in that formal investigation.
- The Commission is obliged to open a formal investigation where it encounters serious difficulties in assessing the compatibility of a State aid measure during its preliminary investigation.
- The existence of serious doubts can be revealed by evidence relating (a) to the preliminary examination stage (such as the circumstances and length of the procedure) and (b) to the content of the decision.

Back in 2008, two private foundations (later succeeded by the Association for Equal Rights for Landowners or "VGG") filed a complaint about measures adopted in favour of certain organisations entrusted by the Netherlands to carry out nature conservation activities which had been designated as public service obligations.

The measures, which included subsidies, were intended to enable the beneficiaries to acquire land to carry out their public service obligations.

Six years and eight months after the initial complaint, the Commission finally took a formal State aid decision not to raise objections to the scheme on the grounds that it was compatible with the EU's internal market rules. VGG appealed the decision by lodging an application at the GC.

In its judgment, the GC noted a number of established principles in State aid cases:

- First, interested parties, such as complainants, do not have a procedural right to submit comments during the Commission's preliminary investigation procedure. However, the Treaty on the Functioning of the European Union imposes an obligation on the Commission to give notice to interested parties to submit their comments on a State aid measure after the formal investigation procedure has been initiated.
- Second, an interested party should have standing to challenge a Commission decision not to open a formal investigation (for example, where the Commission does not consider the aid raises issues and therefore does not raise objections) where that party is seeking to safeguard the procedural rights it would have had during a formal investigation. Direct or indirect competitors of aid beneficiaries are generally considered to be interested parties provided the granting of aid has a material impact on their situation.
- Third, the Commission must initiate the formal procedure where it experiences serious difficulties in establishing whether or not aid is compatible with the EU's internal market rules.

An applicant seeking the annulment of a decision not to raise objections therefore has to prove that the Commission had or ought to have had serious doubts as to the aid's compatibility with the internal market. This can be demonstrated by reference to a body of consistent evidence relating to the conduct of the preliminary examination stage, the information made available to the Commission during its preliminary investigation and the content of the contested decision. In the case at hand, the GC found that the unusually and partially unjustified long duration of the preliminary investigation together with the content of the contested decision evidenced the existence of serious difficulties. The GC therefore annulled the decision in so far as the latter infringes the procedural rights of the applicant.

Successful actions for annulment of Commission decisions not to raise objections to State aid measures are relatively rare. This is on the basis that:

- it can be difficult for applicants to negotiate the admissibility hurdle;
- applicants are generally required to demonstrate that the Commission has made a manifest error of assessment, which is a high threshold; and
- it is well-established that the Commission enjoys a wide margin of discretion in making the complex assessments involved in State aid cases.

However, this case shows that both the admissibility and standard of proof hurdles may be lower for applicants seeking the annulment of a decision not to raise objections compared with applicants seeking the annulment of a decision following a formal investigation.

Commission allows Disney to capture Fox

EU (MERGER CONTROL)

On 6 November 2018, the European Commission ("Commission") approved Disney's USD 71.3 billion bid to acquire parts of Fox, subject to Disney divesting its stake in television channels joint venture. As a result of the transaction, Disney and Fox will combine their film and television studios and their cable and international television businesses. The Fox Broadcasting network and stations, Fox News Channel, Fox Business Network, FS1, FS2 and Big Ten Network are not part of the transaction.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Phase 1 commitments are acceptable only when the competition problem is readily identifiable and can easily be remedied. However, the Commission has only 25 working days (subject to a 10 working day extension if commitments are offered) to complete its Phase 1 investigation.
- Therefore, it is advisable to allow sufficient time to engage in comprehensive pre-notification discussions with the Commission in cases that give rise to prima facie competition concerns and where the parties would be willing to offer Phase 1 commitments - in the Disney/Fox case there was a delay of nine months between the announcement of the transaction and the formal notification to the Commission.
- In practice, such pre-notification contacts mean that the case team is more likely to be able to rule out more remote competition concerns and to be in a position to identify those competition concerns capable of being easily remedied.

The transaction was first announced on 14 December 2017, but was not notified to the Commission until 14 September 2018, some nine months later. During its investigation, the Commission investigated the impact of the transaction in those markets in which the parties' activities overlap.

The Commission investigated how the transaction could impact on suppliers such as producers, actors and make-up artists, as well as distributors of films and content such as cinemas and pay-tv broadcasters. However, the Commission did not identify any competition concerns as a result of overlaps in the parties' activities in relation to either:

- the production and distribution of films for release in movie theatres; or
- the distribution of content for home entertainment and licensing of films and other TV content.

This was on the basis that the merged entity would continue to face significant competition from other players, such as Sony, Universal and Warner Bros.

The Commission identified competition concerns in several EEA Member States as a result of overlaps in the parties' activities in relation to the wholesale supply of "factual" TV channels, i.e., channels that predominantly broadcasting documentaries. However, these concerns were addressed as a result of commitments offered by Disney to divest its interest in all factual channels it controls in the EEA, namely: History, H2, Crime & Investigation, Blaze and Lifetime. These channels are currently controlled by A+E Television Networks, a joint venture between Disney and Hearst.

As a result of the commitments offered by Disney, the Commission was able to clear the transaction without opening a longer Phase 2 investigation.

Whilst this decision does demonstrate that it is possible to obtain a Phase 1 clearance in respect of large and complex transactions, giving rise to significant competitive overlaps, it is an important reminder that this will in all likelihood require:

- a lengthy informal pre-notification stage;
- the parties to have reached a clear position on the remedies they would be willing to offer in advance of the formal notification date; and
- full divestiture of overlapping businesses in those markets that give rise to significant competition concerns.

Failure to hold oral hearing in raids obstruction

EUROPEAN COURT OF HUMAN RIGHTS (PROCEDURE)

On 23rd October 2018 the European Court of Human Rights ("ECtHR") held that the Slovenian Supreme Court breached Produkcija Plus Storitveno podjetje's right to a fair trial by refusing to grant it an oral hearing in its appeal against a fine for obstruction during a dawn raid (Produkcija Plus Storitveno Podjetje d.o.o. v. Slovenia)

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- An oral and public hearing constitutes a fundamental principle under Article 6 of the European Convention of Human Rights, which guarantees the right to a fair hearing by a court. The principle is of particular importance in the criminal context.
- Decisions finding substantive competition law infringements and accompanied by a cease and desist order may not be of a criminal character, where there is no need for criminal intent or negligence and where no fine can be imposed.
- However, decisions finding obstruction during a dawn raid where significant fines can be imposed are likely to have a criminal character. Failure to hear the evidence of the accused and to hold an oral hearing in such cases constitutes a violation of the right to a fair hearing;
- The fact a competition infringement decision is not of a criminal character does not mean there is no right to an oral hearing. A right may also exist under the civil head of Article 6 ECHR. In proceedings before a court of first and only instance such a right can be dispensed with only in exceptional circumstances.

In March 2012, the Slovenian Competition Protection Office ("the Office") adopted a decision fining the media company Produkcija Plus Storitveno podjetje d.o.o. ("PPSP") EUR 0.1 million for obstruction during a dawn raid for alleged abuse of dominance ("Obstruction Decision"). Subsequently, the Office addressed a statement of objections to PPSP on the substance of the case. It received written observations from PPSP but rejected PPSP's request for an oral hearing. In April 2013, the Office adopted a decision finding an abuse of dominance by PPSP and ordering it to stop the impugned practices ("Abuse Decision").

PPSP appealed both decisions before the Slovenian Supreme Court. The Supreme Court rejected the appeals and held that there was no need to hold an oral hearing.

PPSP brought an action before the ECtHR alleging breaches of its right to a fair trial under the criminal head of Article 6 ECHR.

The ECtHR rejected the action as far as it concerned the Abuse Decision because the latter was not of a criminal character. When adopting that decision, the Office was acting in a supervisory capacity. Its powers were limited to finding violations of competition law, requiring the company to cease the infringement and imposing measures suitable for remedying the violation. The decision was intended to restore market conditions, not to punish or deter. No fine was imposed. The ECtHR underlined also that no measures were imposed in this case.

By contrast the Obstruction Decision was of a criminal character according to the ECtHR. It was intended to ensure the effective exercise of the Office's powers and could lead to the imposition of substantial fines aimed at punishing the offending company and preventing reoffending.

The accused in a criminal trial has a right to an oral and public hearing, where he can give and hear evidence and examine and cross-examine witnesses. In PPSP's case, the observations of the Office's agents were the sole basis for the obstruction conviction. The Supreme Court had refused to hold an oral hearing to give PPSP a chance to present its evidence. The ECtHR concluded that PPSP's right to a fair hearing under Article 6 ECHR had been violated.

The ECtHR's finding that there was a violation of the right to a fair trial in relation to the Obstruction Decision is unsurprising. The procedure was clearly of a criminal nature and there was absolute failure to hold an oral hearing or, it seems, even review PPSP's written evidence.

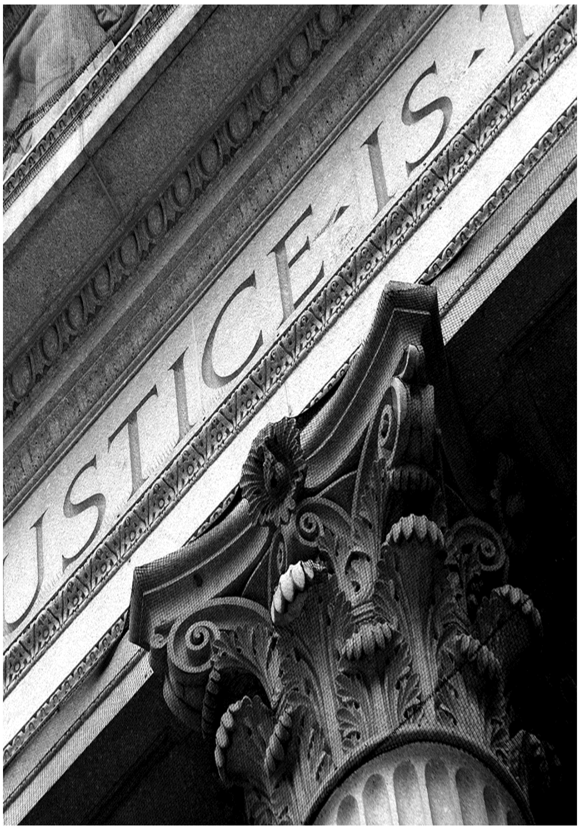
Competition law decisions have generally been classed as criminal in previous ECtHR judgments, so the ECtHR's finding that the Abuse Decision was not of a criminal character is somewhat novel. However, the conditions of that finding appear strict (in particular no power to impose a fine and no remedial measures). As such they are unlikely to be met in the vast majority of cases.

Perhaps due to the scope of PPSP's action, the ECtHR only looked at the requirement of an oral hearing in criminal proceedings. However, there is also a requirement to hold an oral hearing in civil proceedings. Even in civil proceedings before a court of first and only instance, the right to an oral hearing can be dispensed with only in exceptional circumstances.

ECJ on reinstatement of former cartelists as trusted procurement tenderers

EU (ANTITRUST – ANTICOMPETITIVE AGREEMENTS, PUBLIC PROCUREMENT)

On 24 October 2018, the European Court of Justice ("ECJ") ruled for the first time on the new EU public procurement rules regarding the process of allowing an economic operator to take part in procurement proceedings despite its past involvement in a cartel. The preliminary ruling gives some guidance as to the level of cooperation required from an economic operator to be reinstated as a trusted tenderer.



WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Contracting authorities can or may be required by national law to exclude competition law infringers from their public tender procedures.
- An excluded company is, however, able to 'rehabilitate' itself. For this purpose, it has to show to the contracting authority that it has:
    - paid (or undertaken to pay) damages to parties harmed by the infringement;
    - cooperated with the competition authorities (under e.g. the leniency or settlement procedures); and
    - taken technical, organisational and personnel measures such as the dismissal of the employees responsible for the infringement and implementing a compliance programme.
- Contracting authorities can ask the undertaking to cooperate actively with it for the purposes of ascertaining its reliability. In this context, it can require a copy of the competition authority's decision.

THE NEW EU PUBLIC PROCUREMENT RULES ON EXCLUSION FROM PUBLIC TENDERS AND SELF-CLEANING

Under Article 57(4)(d) of Directive 2014/24 ('the 2014 Public Procurement Directive') an economic operator can be excluded from public tender procedures where the contracting authority has "sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition". Exclusion can be automatic or at the discretion of the contracting authority.

Exclusion from public tenders for breach of competition law was already possible under the previous 2004 Public Procurement Directive, although under the heading of "grave professional misconduct" (C-470/13 Generali-Providencia Biztosito).

An important innovation of the 2014 Public Procurement Directive is the possibility of so-called "self-cleaning" measures, so that an economic operator can recover its eligibility to participate in tenders. Under Article 57(6) an economic operator should no longer be excluded if it sufficiently demonstrates its reliability to the contracting authority by proving that it has:

- paid (or undertaken to pay) compensation for the damage caused by the misconduct;
- actively collaborating with the investigating authorities to clarify the facts and circumstances; and
- adopted concrete technical, organisational and personnel measures that are appropriate to prevent further offences.

The new rules also specify that the exclusion period should not exceed three years from the "relevant event".

BACKGROUND OF THE CASE

The case (Case C-124/17, Vossloh Laeis - v - Stadtwerke München) originated in Germany where a contracting authority (Stadtwerke München) excluded Vossloh Laeis GmbH ("Vossloh") from its public contract award procedure following the Bundeskartellamt's decision fining Vossloh for its involvement in a rail track cartel until 2011.

Vossloh sought to avoid the exclusion by demonstrating that it had taken organisational and personnel measures to reform itself and prevent the repetition of anti-competitive conduct. It also expressed its willingness to compensate the damage caused by its unlawful behaviour. However, Vossloh refused to submit the Bundeskartellamt decision to the contracting authority on the ground that its cooperation with the competition authority in the framework of the leniency programme should be regarded as sufficient. Such refusal was most likely motivated by the parallel action for damages brought by Stadtwerke München against Vossloh in relation to the rail cartel. Because of this refusal, the contracting authority rejected Vossloh's self-cleaning claims.

Vossloh challenged the exclusion decision before the public procurement board for South Bavaria which referred questions to the ECJ. Those questions related to the extent cooperation with the contracting authority could be required and the 'relevant date' for calculating the start of the three-year exclusion period.

THE ECJ RULING

The ECJ ruled that the contracting authority can ask an undertaking to actively cooperate in order to provide it with proof of the re-establishment of its reliability, but only to the extent that that cooperation is limited to the measures strictly necessary for that examination. The ECJ further specified that:

- the procurement entity can request the undertaking to provide the competition authority decision even if such access might facilitate the introduction of a damages claim against it;
- the transmission of the decision establishing the infringement but applying a leniency rule to the tenderer should suffice to prove to the contracting authority that it has collaborated with the competition authority to clarify the facts and circumstances;
- the contracting authority can, if necessary, ask the tenderer for factual information to show that the self-cleaning measures are appropriate even if that evidence has already been requested by the competition authority.

The ruling also clarified that the three-year exclusion period for competition law infringements starts when the competition authority's decision is adopted and not when the participation to the cartel ended.

COMMENT

The judgment provides useful guidance as to the level of cooperation required from tenderers to re-establish their reliability. But, at the same time, it leaves several questions open about the required standard to be reinstated as a trusted tenderer and also articulation between the self-cleaning procedure and damages claims:

- First, the present ruling confirms that cooperation with the competition authority is key to successful self-cleaning. Cooperation under a leniency procedure should be enough to demonstrate that the facts and circumstances of the infringement have been clarified. Cooperation under a settlement procedure or more informal forms of cooperation are also relevant. The contracting authority should, however, be able to ask for the competition authority's decision to verify whether the economic operator has indeed cooperated with the latter authority.
- Second, it is not clear from the ruling which version of the competition authority's decision (only the non-confidential version or also the confidential one) the contracting authority can require. In Germany, decisions fining an undertaking are usually not published by the competition authority. However, access to the non-confidential version is guaranteed to damage claimants. In the case at hand, Stadtwerke München may have an interest in seeing the confidential version of the decision to gather additional evidence for its follow-on damage action. In this context, the referring court will have to decide whether access to the confidential version is necessary to ascertain the re-establishment of the tenderer's reliability.
- Third, infringement decisions are frequently challenged and may not become final for many years. In the vast majority of cases, damages claims also go on for many years after infringement decisions. Yet, the ruling confirms:
  - o that the three-year exclusion period runs from the date of the competition authority's decision; and
  - o that self-cleaning requires payment of (or an undertaking to pay) compensation.

  Together, these different factors imply that an operator could effectively be required to give up the damages claim battle if it wants a successful and timely self-cleaning process. It remains to be seen whether the payment of (or undertaking to pay) compensation can be made contingent on the outcome of any ongoing court proceedings.
- Lastly, the judgment gives no concrete guidance as to the technical, organisational and personnel measures to be undergone to ensure a successful self-cleaning process. Recitals of the 2014 Public Procurement Directive nonetheless refer to a series of relevant compliance measures, which include monitoring and audits. The centrality of compliance programmes to restoring reliability indeed mirrors a trend in Europe towards taking the existence of such programmes into account as a mitigating factor, in the event of competition law breaches..

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French Competition Authority applies Coty judgment

FRANCE (ANTITRUST – ANTICOMPETITIVE AGREEMENTS)

The French Competition Authority ("FCA") has imposed a fine of EUR 7 million on Stihl, a manufacturer of mechanical garden equipment, for prohibiting the sale of certain dangerous products on its distributors' websites between 2006 and 2017. The FCA, however, confirmed Stihl's right to ban the sale of its products on online platforms.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The creation of a selective distribution network can be justified for the supply of high quality and technical products that also present a safety risk to end users.
- However, a requirement that goods are delivered by hand by authorised distributors would not be justified as this would amount to a de facto exclusion of online sales.
- Applying the "Coty" criteria, the FCA nevertheless considers that a supplier may prevent its authorized distributors from reselling its products via third party online platforms.

This is the first case since the European Court of Justice's Coty judgment in which the FCA has considered restrictions on online sales imposed on members of a selective distribution network.

Stihl, a manufacturer of mechanical garden equipment such as chainsaws, brush cutters, and pole-saws imposed two restrictions on online sales by its authorised distributors:

- First, authorised distributors were required to hand deliver those products that Stihl deemed to be "dangerous". In particular, these products either had to be collected by the customer at the distributor's premises or they had to be delivered by the distributor itself to the customer. In particular, the authorised distributors were prevented from using third party logistics companies to deliver any "dangerous" products to their customers. According to the FCA, this amounted to a de facto prohibition of the online sale of the relevant products.

  Interestingly, neither EU nor national rules governing the sale of the products which Stihl had described as "dangerous" required those products to be delivered by hand. The FCA also noted that none of Stihl's competitors imposed such constraints on their distributors. Thus, the FCA held that this de facto restriction on online sales was an infringement of competition "by object" which was not justified by the efficiencies claimed by Stihl (which boiled down to the assurance that customers would listen to the security recommendations).
- Second, Stihl prohibited the resale of all of its products on third party platforms. The FCA considered that this prohibition was justified in light of the Coty precedent. Crucially, the FCA noted that the Coty judgment is relevant not only for luxury products but also for any products where there is a need to protect their quality or intended use.

In the present case, the FCA considered that Stihl was entitled to make sure that its

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products were sold only by authorised distributors liable to provide timely and relevant advice on the safe use of those products and to control the implementation of its sales criteria. In this regard, authorising the resale of these products on third party platforms could have prevented Stihl from carrying out these controls for two main reasons:

- Stihl may not have been aware of the use of third party platforms by its distributor; and
- it would have had no contractual right to act against a platform that failed to comply with its sales criteria.

The FCA finally noted that the platform ban was not disproportionate given the very limited use of platforms by retailers in general.

The FCA decision is a new illustration of the balance struck by competition authorities between the necessity to protect selective distribution networks and the freedom to sell online. Whilst the FCA is keen to ensure distributors' freedom to sell online, it confirms that their use of online platforms may infringe quality or safety requirements applying to certain product.

Creation of a consortium is not a *per se* infringement

SPAIN (ANTITRUST – CARTELS)

The High Court (Audiencia Nacional) has quashed a decision from 2016 in which the Spanish Competition Authority ("CNMC") fined Viajes Halcón and Viajes Barceló EUR 1.2 million and EUR 0.6 million respectively, for creating a temporary consortium in order to bid for public tender procedures. The Court explained that the creation of a temporary consortium did not constitute a per se infringement and that any conduct carried out by it would have required an effects analysis

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The creation of temporary consortia does not constitute a per se infringement of Spanish competition law.
- Therefore, alleged anticompetitive coordination as a result of the creation of a temporary consortium will require the CNMC to carry out an effects-based analysis to prove that it has the effect of restricting competition, increasing the burden of proof on the CNMC

The case is related to a decision taken by the CNMC in 2000, in which several companies, including the aforementioned, were fined for bid-rigging. The CNMC considered that the relevant companies constituted a temporary consortium with legal personality, with the only aim of distorting competition and sharing contracts among themselves. Both the Spanish High Court and the Spanish Supreme Court confirmed the authority's findings following appeals.

In 1998, during the investigation, the companies changed the nature of their collaboration such that it no longer had legal personality. The CNMC became aware of this change. However, the CNMC issued a new decision in 2015 in which it accused the companies of bid-rigging in the period between 1998 and 2014.

This decision was appealed before Spain's High Court, which has ruled that the creation of informal consortium without legal personality does not constitute an infringement of competition "by object" as it does not involve secret and anticompetitive conduct, in contrast with the conduct analysed in the 2000 decision. Therefore, any potential competition law infringements carried out by the consortium could only have constituted effects infringements. However, in order to establish an effects infringement, the CNMC would have been required to carry out an autonomous and independent analysis.

Thus, in ongoing and future cases, the CNMC should not treat the creation of a temporary consortium as a per se infringement and any conduct carried out by it should be analysed from an effects perspective.

Royal Mail appeals Ofcom £50m abusive price discrimination decision

UK (ANTITRUST – ABUSE OF DOMINANCE)

On 26 October 2018, Ofcom published a non-confidential version of its decision imposing a fine of GBP 50 million on Royal Mail for conduct amounting to abusive price discrimination (the "Decision"). The Decision found that by issuing Contract Change Notices on 10 January 2014 which introduced discriminatory prices, Royal Mail abused its dominant position. Royal Mail filed an appeal against the Decision at the Competition Appeal Tribunal ("CAT") on 12 October 2018. Ashurst are acting for Royal Mail.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Under Article 102(c) TFEU, "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage" may constitute an abuse of a dominant position.
- Ofcom has imposed a fine of GBP 50 million on Royal Mail for abusive price discrimination, in circumstances in which the relevant prices were announced but never charged and paid. Ofcom has also concluded that it is not necessary to assess whether Royal Mail's conduct would have foreclosed an equally-efficient operator.
- Royal Mail has appealed Ofcom's decision and fine to the CAT.

Ofcom's Decision followed a 4½ year investigation which was triggered in January 2014 by a complaint by Whistl. Whistl is a Royal Mail wholesale access customer and, at the time of the complaint, had started to roll out its own network to deliver business bulk mail letters to addresses in parts of the UK.

On 10 January 2014, Royal Mail announced price changes under its access contract, which included a price differential between the different price plans available to its access customers. These price changes were due to enter into effect at the end of March 2014. On 21 February 2014, following Whistl's complaint, Ofcom opened an investigation into whether Royal Mail had abused a dominant position. As a result of Ofcom's decision to open an investigation, the price changes were suspended in accordance with provisions in Royal Mail's access contract.

On 14 August 2018, Ofcom announced that it had decided that Royal Mail had abused a dominant position in breach of the Chapter II prohibition of the Competition Act 1998 and/or Article 102 of the Treaty on the Functioning of the European Union ("TFEU") and imposed a fine of GBP 50 million. In particular, Ofcom concluded that:

- the price differential announced by Royal Mail amounted to discrimination against operators that sought to compete with Royal Mail;
- its analysis of profitability, prices and costs showed that the price differential would have had a material impact on the profitability of an end-to-end entrant (which was particularly evident in the case of Whistl). As a result, entry or expansion in bulk mail delivery would become significantly more difficult and therefore less likely to occur. The Decision concluded that it was neither necessary nor appropriate to assess whether the announced price differential would have foreclosed an equally efficient competitor ("EEO");
- the price differential was therefore reasonably likely to distort competition from

the point at which the CCNs were issued. The Decision states that its conclusions on competitive disadvantage are supported by the finding that the introduction of the differential materially contributed to Lloyds Development Capital's ("LDC") (a proposed investor in Whistl) decision not to complete its proposed investment in January 2014 and Whistl's decision to reduce and then suspend its roll out; and

- Royal Mail's conduct reflected a deliberate strategy to limit competition from its first and only significant competitor.

Royal Mail's appeal raises a number of legal, economic and factual grounds against the Decision, including that:

- for an allegation of abusive price discrimination contrary to Article 102(c) to be established, the prices must be actually "applied" (i.e. charged or paid) and that the Decision errs in law in finding that the announcement of future price changes constituted the application of unlawful discriminatory pricing, in circumstances where the industry knew that they would be suspended if Ofcom opened an investigation, and were in fact suspended;
- the Decision errs in finding that the price differential was likely to place end-to-end direct delivery competitors at a competitive disadvantage. The Decision's conclusions on competitive disadvantage, which rely on a finding that the price differential would have reduced the profitability of end-to-end competitors, irrespective of whether such rivals were as efficient as Royal Mail are inconsistent with established precedent;
- the Decision errs in concluding that the announcement of the price differential was a material contributing factor to LDC and Whistl's decision making, and that such a finding supports a conclusion that the price differential was likely to give rise to a competitive disadvantage; and
- the fine of GBP 50 million was manifestly disproportionate given the novelty of the infringement, its short duration (six weeks, from announcement to suspension), and the efforts Royal Mail made to comply with its legal and regulatory obligations.

The appeal therefore raises a number of fundamental questions of law and economics as to how allegations of abusive price discrimination should be assessed. In particular, the CAT will need to consider whether Ofcom is correct to maintain that abusive price discrimination can arise simply as a result of price announcements, even where the announced prices were never charged or paid. In addition, the CAT will need to consider whether, in particular in light of the European Court of Justice's recent judgements in Intel and MEO, Ofcom is correct to conclude that it was neither necessary nor appropriate to assess whether Royal Mail's conduct would have foreclosed an EEO.

Comparative guide to designing compliance programmes: Does Italy now lead the way?

MULTI-JURISDICTIONAL (ANTITRUST – CARTELS / ANTICOMPETITIVE AGREEMENTS / ABUSE OF DOMINANCE)

In certain jurisdictions having an antitrust compliance programme in place is recognised as a potential mitigating factor by the local regulator when setting fines for breaches of competition law. Italy is one of those jurisdictions. On 25 September 2018, the Italian Competition Authority ("AGCM") adopted formal guidelines covering: (a) the content that compliance programmes must have to benefit from a fine reduction; (b) the level of fine reduction that can be obtained from the AGCM; and (c) what criteria will be applied by the AGCM in deciding whether, and to what extent a fine reduction will be awarded (the "AGCM Guidelines"). Part A of this article summarises the key points of the AGCM Guidelines, while Part B provides a comparative guide to how competition authorities in other jurisdictions around the world treat the existence of an antirust compliance plan when it comes to the setting the level of fines.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- All companies should consider implementing an effective antitrust compliance programme
- The content of any compliance programme should follow international best practices in order to be effective
- An antitrust compliance programme should be tailored to the characteristics of the company concerned and the market environment in which it operates
- Whilst different jurisdictions will place different weightings on the importance of compliance programmes when deciding whether to discount any fine, the existence of an effective compliance programme is likely to materially reduce to risk of an infringement in the first place

PART A: Italian AGCM Guidelines on the content of the compliance programme

The AGCM Guidelines clarify that only a compliance programme that is designed and implemented consistently and takes into account the characteristics of the company, such as the nature of its business and its size as well as its market position, is considered appropriate and potentially effective. Furthermore, in line with international best practices, the AGCM Guidelines confirm that the main elements of an effective antitrust compliance programme should include:

- a clear recognition of the value of competition as an integral part of corporate culture and policy;
- the identification and assessment of antitrust risk specific to the company based on a thorough risk analysis;
- a suitable system (such as internal reporting, regular due diligence and internal audits) to manage processes to reduce antitrust risk;
- an adequate system of disciplinary measures and incentives aimed at encouraging compliance with the programme; and
- the execution of training and periodic monitoring and updating of the compliance programme.

AGCM GUIDELINES ON REQUESTING POSSIBLE MITIGATION

If a company wishes to obtain a reduction in the fine in view of the quality of its compliance programme, the burden of proof will fall on such company to demonstrate the adequacy and effective implementation of its compliance programme. The AGCM Guidelines set out that, in order to benefit from a reduced fine, a company must submit a request to the regulator, accompanied by an explanatory report that :

- illustrates the reasons why the compliance programme is to be deemed adequate for the prevention of competition infringements; and
- provides examples of concrete initiatives put in place by the company, which need to be substantiated by documentary evidence, to ensure the effective and efficient implementation of the compliance programme.

The AGCM Guidelines emphasise the importance to include in the report internal documents evidencing:

- the holding of regular staff training programmes;
- the periodic updating of the programme and training; and
- the appointment of programme managers and staff assigned to implement the compliance programme. These individuals must have appropriate powers of supervision and must report to senior management.

WHAT LEVEL OF DISCOUNT IS AVAILABLE?

The AGCM Guidelines provide the following criteria applied by the AGCM in assessing potential reductions to fines.

Compliance programmes in place before an investigation:

Where compliance programmes were adopted before the opening of antitrust proceedings, a regulatory fine may be discounted by:

- *up to 15%* where the company has an "effective" compliance programme in place prior to the investigation which should lead to:
    - prompt detection of the infringing conduct;
    - prompt interruption of the conduct; and
    - where applicable, a leniency application being made;
- *up to 10%* for compliance programmes which are not "effective",[1] but are not "manifestly inadequate". A discount may be awarded provided that:
    - the company adequately amends its compliance and implements those changes within six month after the opening of an investigation; and
    - the compliance programme is not "manifestly inadequate". In this regard, the company needs to demonstrate that:
        - the original compliance programme was carefully and consistently implemented, with appropriate gravity, throughout its lifetime , even though it did not ultimately prevent the occurrence of unlawful conduct; and
        - the changes to the compliance programme correct any previous deficiencies which prevented the original programme from being fully "effective".
- *up to 5%* where the company has a pre-existing programme which was "manifestly inadequate" but has modified it within six months after the opening of an investigation. The AGCM Guidelines provide examples of compliance programmes that are deemed to be "manifestly inadequate":
    - a compliance programme which has serious deficiencies in its content;
    - there is absence of evidence of the effective implementation of the programme; and
    - top management where involved in the infringement.

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[1] i.e. have not promptly detected or interrupted the conduct.

Compliance programmes implemented after an investigation:

Where compliance programmes were adopted after the opening of antitrust proceedings, a fine reduction will be capped at 5%. Such a reduction will only be considered if the company effectively implements a compliance programme within six month after the start of an investigation.

Other design features

The AGCM Guidelines also provide the following guidance in terms of the design of a compliance programme:

- compliance programmes should be tailored to the activity, market position and antitrust risks of the company;
- "sufficient resources" must be dedicated to the design, implementation and monitoring of the programme. In this regard, a more direct reporting line with senior management might be required in cases where current compliance programmes are managed by lawyers who report to the internal legal function;
- regular monitoring and updating of the adequacy and efficacy of the programme is required;
- the guidelines also advise regular training on antitrust risks as the law and/or company's activities develop, especially for employees operating in the divisions most exposed to the risk of anticompetitive behaviour;
- a whistleblowing system is strongly advised and, if adopted, should ensure anonymity and protection of the reporting agent from possible retaliation.

How are repeat offenders treated?

Any discount awarded under the AGCM Guidelines will be capped at 5% if the company has previously been found to have infringed competition law, provided they can demonstrate the changes made to the compliance programme after the opening of proceedings. However, any such discount will not be available at all if the repeat offender has in the past already benefited from a discount under the AGCM Guidelines in view of the adoption of a compliance programme.

How are group companies treated?

For a compliance programme to benefit from a discount under the AGCM Guidelines, it must cover the whole group. A compliance programme which has only been implemented at the parent company level will not release the parent from any liability for the subsidiary's conduct.

PART B: ANTITRUST COMPLIANCE PROGRAMMES IN OTHER JURISDICTIONS

Compliance with competition law is a priority for many competition regulators around the world. To this end, various competition regulators have issued helpful publications to encourage and assist businesses to implement compliance programmes.

Sometimes these authorities have also provided, as the AGCM has, clear indications as to what may be considered as an effective compliance programme. However, at the time of writing, most antitrust authorities will not grant fine reductions for the implementation of a compliance programme.

Set out below is a summary of the positions in a number competition law jurisdictions around the world.

Country	Compliance programme as a mitigating factor	Extent of potential fine reduction
Australia	**Yes**. The regulations and guidelines do not provide express guidance on this point. In practice, however, the ACCC and Federal Court have proceeded on the basis that an effective and well-managed antitrust compliance programme may be a mitigating factor when assessing penalties. The mere existence of a compliance programme is not sufficient.	Not explicitly defined in regulations or guidelines.
Belgium	**No**. The Belgian Competition Authority's fining guidelines follow the principles of the European Commission's 2006 guidelines, which do not include the existence of a compliance programme as a mitigating factor.	N/A
Brazil	**Yes**. The guidelines provide that a robust compliance programme may be considered as an attenuating circumstance leading to a lower fine. A robust program must include: (a) an effective commitment by the company through the involvement of senior management, proper allocation of resources and granting the programme manager autonomy; (b) the identification and assessment of antitrust risk specific to the company, prioritizing compliance in areas that pose greater competition risks; (c) development of internal training, inclusion of compliance provisions in the company's code of conduct, effective monitoring and documenting compliance activities and enforcement; and (d) continuous review and adjustment of the programme.	Not explicitly defined in regulations or guidelines.
China	**No.** The regulations and guidelines do not provide express guidance on this point. In practice, the mere existence of a compliance programme is not sufficient to impact the level of the fine. However, parties can approach the regulators to request that any such compliance guidance is taken into account and/or implement a compliance programme as part of any remedies.	Not explicitly defined in regulations or guidelines.

Country	Compliance programme as a mitigating factor	Extent of potential fine reduction
European Union	**No**. The European Commission's 2006 fining guidelines do not include the existence of a compliance programme as a mitigating factor.	N/A
France	**No**. Not after October 2017. The French competition regulator, the Autorité de la concurrence ("Autorité") had, until October 2017, a framework document on antitrust compliance programmes which encouraged companies to set up or to upgrade an existing compliance programme according to a list of "best practices". However, the Autorité repealed this framework document in October 2017, after the entry into force of a settlement procedure (*procédure de transaction*) repealing the former "no contest of objections procedure".	N/A
Germany	**No**. Historically, the FCO (German competition authority) has, so far, has not considered compliance programmes as a mitigating factor. However, in a case in 2017 which concerned tax law breaches, the Federal Court of Justice (FCJ) recognised a compliance management system as a possible mitigating factor when setting administrative fines. In the competition law community, it has been argued that the reasoning of the FCJ's decision could also apply to competition law infringements. Whether the FCO will follow the FCJ's decision remains to be seen.	N/A
Hong Kong	**Potentially.** Only the Hong Kong Competition Tribunal can impose pecuniary penalties, and it has not yet ruled in any case. However, the Hong Kong Competition Commission Enforcement Policy states that, in choosing an enforcement response (including whether to seek a pecuniary penalty), it will consider the compliance efforts of the persons involved and whether they can demonstrate that they have made a genuine effort to comply with the law.	Not explicitly defined in regulations or guidelines.
Italy	**Yes**, provided that the programme meets the guideline's minimum criteria, which differ based on whether the programme was in place prior to, or introduced after, the commencement of an investigation.	Up to 15% where the compliance programme was in place prior to the investigation, led to prompt detection and interruption of the infringement, and a leniency application has been made (where applicable). Up to 10% where the company has modified a pre-existing programme which was not totally effective.

Country	Compliance programme as a mitigating factor	Extent of potential fine reduction
		Up to 5% where the company has modified a pre-existing programme which was "manifestly inadequate", or has introduced a satisfactory programme after the launch of an investigation.
Japan	**Yes**. The regulations and guidelines do not provide express guidance on this point. In practice, however, the fact that a company has a competition compliance programme in place will be considered in the context a cease and desist order, as well as by court as a general mitigating factor for sentencing. However, it is not a mitigating factor when it comes to the setting of an administrative fine by the Japan Fair Trade Commission.	Not explicitly defined in regulations or guidelines.
South Korea	**No.** The current regulations state that having a highly rated compliance program can only lead to a reduction in the scope of a requirement to publish corrective notices, and an exemption from ex officio investigations, not a reduction in fines.	Not explicitly defined in regulations or guidelines.
Netherlands	**Yes**. In a speech in 2015, the chairman of the Dutch Competition Authority ("ACM") stated that the fact that a company has a compliance programme is not an argument for ACM to reduce the fine. However, in a recent case (2017), the ACM considered that a compliance programme could be a mitigating factor in specific circumstances only (however, the ACM did not ultimately grant a discount in that case). To qualify the ACM has historically considered the following features of a compliance programme when determining the level of a fine, whether: (a) it was implemented prior to the infringement; (b) it was actually implemented; (c) it was effective; (d) it was sufficiently monitored with strict procedures to ensure compliance; (e) the infringement involved senior representatives of the company.	Not explicitly defined in regulations or guidelines.
Singapore	**Yes.** The guidelines indicate that, in considering how much mitigating value to be accorded to the existence of any compliance programme, the regulator will take into account the compliance policies and procedures in place, whether the programme has been actively implemented, whether it has the support of, and is observed by, senior management, whether there is active and ongoing training for employees and whether the programme is periodically evaluated and reviewed.	Not explicitly defined in regulations or guidelines.
Spain	**No**. However, in a recent case the Spanish competition regulator has taken the implementation of a compliance programme after the start of the investigation as a	N/A

Country	Compliance programme as a mitigating factor	Extent of potential fine reduction
	factor leading to a slight reduction of the fine imposed.	
Sweden	**No.**	N/A
Switzerland	**Yes**, although not explicit.	Not explicitly defined in regulations or guidelines.
Taiwan	**No.** The regulations do not expressly permit mitigation on this basis. Instead, they state that reasons for fine reductions include cooperation with the FTC's investigations and taking remedial measures.	Not explicitly defined in regulations or guidelines.
United Kingdom	**Yes**. Adequate steps taken with a view to ensuring compliance with competition rules will be considered as one of the mitigating factors. Generally, the extent of reduction to potential fines are not explicitly set out, however, the CMA states in its fining guidelines that it may consider a discount of the penalty of up to 10% where the infringing company "*demonstrates that adequate steps, appropriate to the size of the business concerned, have been taken to achieve a clear and unambiguous commitment to competition law compliance…*".	Up to 10% if adequate steps are taken.
United States of America	**Yes**, but only on very limited occasions, and only for extraordinary compliance measures taken after the discovery of wrongdoing. For example the Department of Justice agreed to a fine reduction for Barclays in the 2015 Euro/USD rigging case, a fine reduction for Kayaba in the 2015 auto parts case, and took into account the compliance efforts of BNP Paribas in determining the ultimate fine in the 2018 foreign currency rigging case. In May 2018, the Department of Justice year was considering whether it might recognise pre-existing compliance programs with some form of credit.	N/A

SUMMARY

The adoption of the AGCM Guidelines provides welcome clarity and some certainty on what companies can expect if they have an effective compliance programme in place, at least in relation to conduct in Italy. It remains to be seen whether the move by the AGCM will set a trend amongst other competition regulators.

They also provide some helpful guidance in relation to how such compliance programmes might be designed.

Whilst the potential reduction of any regulatory sanctions is an important reason for business to implement effective antitrust compliance programmes or review existing ones, the driving factor behind any business' compliance programme should be to avoid an investigation in the first place.

The AGCM Guidelines are available at: http://www.agcm.it/dotcmsdoc/linee-guida-compliance/linee_guida_compliance_antitrust.pdf, an English version is also available at: http://en.agcm.it/dotcmsdoc/guidelines-compliance/guidelines_compliance.pdf

No Deal, Withdrawal Agreement and future Relationship: Brexit's impact on competition law

UK (BREXIT)

Are you wondering what competition law in the UK might look like post-Brexit? The answer differs depending on whether the UK faces a "no deal" scenario or whether the wording of the draft withdrawal agreement agreed between the UK government and European Commission ("Commission") on 14 November 2018 ("Withdrawal Agreement") is ultimately ratified. The position changes further if one considers the potential implications of the backstop period, or the future longer term UK-EU relationship.

WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- A "no deal" Brexit scenario is the outcome where the UK leaves the EU at 11pm GMT on 29 March 2019 ("Brexit Day") without any withdrawal agreement or transitional arrangements formally agreed and in place (see our previous article for a description of each of these). A Withdrawal Agreement scenario is the outcome where the Withdrawal Agreement of 14 November 2018 is ratified in its current form.
- Whilst there may some changes to parts of the UK merger regime and antitrust regime post-Brexit, they should remain largely familiar in both a "no deal" and Withdrawal Agreement scenario.
- The "no deal" plans for State aid involve transposing an EU State aid model into UK law and introducing a UK State aid regime, applied by the Competition and Markets Authority ("CMA"). Under a Withdrawal Agreement scenario, 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. In that scenario, the CMA will take on its new role only at the end of the transition period.
- The biggest impact of a "no deal" scenario from a competition law perspective is likely to be on businesses that are part way through a Commission merger control or antitrust investigation on Brexit Day.
- The biggest impact of a Withdrawal Agreement scenario on competition law will be the continuing application of EU law "to and in" the UK and the continuing jurisdiction of the Commission and European Courts during the transition period. In addition, new antitrust and merger control rules will be introduced as part of a post-transition period backstop arrangement (should it kick in), which will focus on the effect on trade between the UK and the EU.
- Currently, UK regulators and courts must interpret UK competition law consistently with EU law by virtue of section 60 of the Competition Act 1998. Post-Brexit, the current "no deal" position is that this will change to an obligation to ensure there is no inconsistency with 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. An implication of the Withdrawal Agreement is that section 60 would not be repealed, at least during the transition period, and the UK would need to continue to apply UK competition law consistently with EU law during that period.

BACKGROUND

We set out below 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 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.

- On 29 October 2018 The Competition (Amendment etc.) (EU Exit) Regulations 2019 (the "Competition SI") were published.

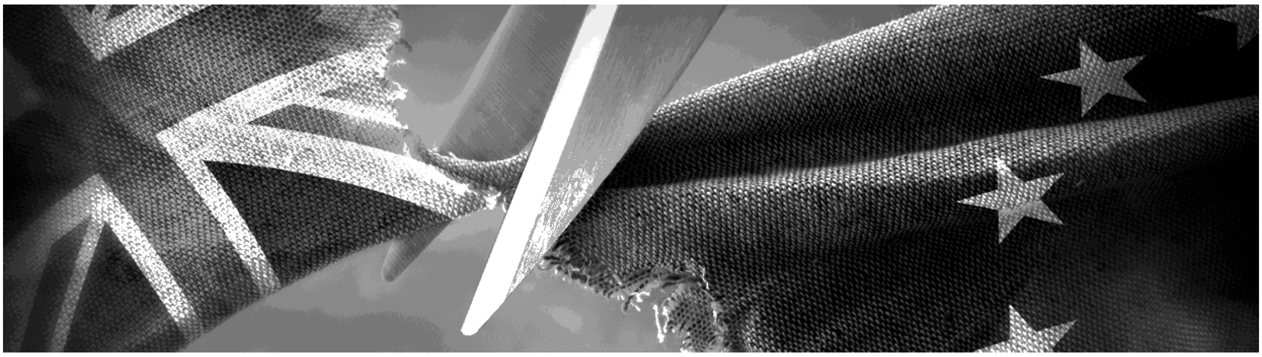
- On 30 October 2018, the CMA published three Brexit related updates on the role of the CMA in a "no deal" scenario, shedding some light on what UK competition law might look like should no agreement be reached with the EU by 29 March 2019. These updates cover antitrust ("Antitrust Update"), merger control ("Merger Control Update"), together with a general overview. It also published an update speech by the CMA's newly appointed Director of State Aid, Juliette Enser ("State aid update").

- On 14 November 2018 it was announced that the UK government and the Commission have 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 Withdrawal Agreement is still subject to ratification by the UK Parliament, as well as other European institutions and Member States as part of the Article 50 process. Even if ratified, it will need implementation into UK law through legislation.

- To accompany the Withdrawal Agreement, on 14 November 2018, the UK government issued an "Explainer" for the withdrawal agreement and the Commission issued a Factsheet on the Protocol (explaining the proposed Irish hard border backstop arrangement).

- On 22 November 2018, a fuller version of the Political Declaration on the Future Relationship was published which, at that stage, had been agreed at negotiators' level and agreed in principle at political level but was still subject to the endorsement of Member States on 25 November.

We set out below a summary of the 30 October CMA updates, the CMA's view of how a "no deal" scenario would affect the State aid, merger control and antitrust rules in the UK and the alternative impact the ratification of the Withdrawal Agreement might have, as well as what competition law might look like as part of the proposed future relationship arrangements.



STATE AID

Proposed changes

The UK is currently subject to the EU State aid rules, which apply with direct effect without any UK implementing legislation, and which are enforced by the Commission. The UK government's Post-Brexit State aid plans are expected to be similar to the rules that would apply in a Withdrawal Agreement scenario.

Transposing EU State aid rules into UK domestic legislation

- **"No deal":** The EU State aid rules will be transposed into UK domestic legislation under the European Union (Withdrawal) Act 2018. This will apply to all sectors and would mirror the existing provisions and block exemptions.
- **Withdrawal Agreement:** Should the Withdrawal Agreement be ratified, the UK will remain within the EU's State aid regime for the duration of the transition period.

At the time of writing there remains uncertainty as to whether the Withdrawal Agreement will ultimately be ratified. Consistent with UK government policy, the CMA, together with BEIS, is working to ensure that the new regime is ready for 29 March 2019 if there is a "no deal" outcome.

Enforcement

- **"No deal":** The CMA would take on the role of supervision and enforcement in place of the Commission from Brexit Day.
- **Withdrawal Agreement:** The current 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, regarding aid granted before the end of the transition period. The CMA will take on its new role as the UK State aid regulator only at the end of the transition period. However, for up to four years from 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. As part of its new role, it has also been mentioned that the CMA may also have competence over aid granted in the UK prior to the end of the transition period, provided that the Commission has not already taken jurisdiction in a way referred to above. **Practical issues**

The CMA's State aid Update provides the following additional comments in relation to a "no deal" outcome, and potentially regarding the period after the end of the transition period, when the UK expects to adopt its own State aid regime:

What will the substance of the new regime look like?

The UK government intends to adopt legislation under the European Union (Withdrawal) Act 2018 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. The CMA has stated that the expectation is that, from a substantive perspective, the regime will look very much like the EU regime. This means that aid grantors and beneficiaries can work on the basis that it will be "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 current EU State aid provisions is likely to remain important for interpreting future UK State aid rules, at least in the short term, "*whatever shape [the UK's] exit from the EU might take*".

The State aid Update also provides 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 post-Brexit transition period (see section below for further insights regarding 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 final outcome of which remains uncertain.

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 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 working to produce guidance on how the new regime will operate, which it expects to issue in the coming months. This guidance will explain how the CMA will conduct substantive assessments as well as how to notify a new aid measure or initiate a complaint. This will supplement the legislation being prepared by the UK government which is expected to be brought forward this year.

The ultimate adoption of a UK State aid regime mirroring that of the EU's is unsurprising as the adoption of State aid rules were always expected to be a prerequisite to any wide ranging future trade deal the UK hopes to agree with the EU (see section below for further insights regarding the post-transition period). But the CMA's State aid Update and technical notice of 23 August should at least give UK businesses expecting to receive State aid some welcome certainty as to what the post-Brexit UK regime might look like if there is a no deal with the EU, or in a post-transition period world.

MERGER CONTROL

Proposed changes

The following proposed changes to the merger control rules in the event of a "no deal" or Withdrawal Agreement scenario are likely:

No substantial changes to UK regime

- **"No deal":** Whilst the UK will cease to be a part of the EU one-stop shop regime in a "no-deal" scenario on Brexit Day, the UK government does not propose to make any changes to UK merger control in the event of a "no deal" outcome. The only changes will be 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). However, in a speech on 23 October 2018, Andrea Coscelli (the CMA's Chief Executive) is reported to have left open the possibility that after Brexit, the UK's merger control regime may shift from its current voluntary notification regime to a "mandatory" or "hybrid" approach.

- **Withdrawal Agreement:** The Withdrawal Agreement proposes that the current EU merger control regime will continue to apply until the end of the transition period. No changes to UK merger control are expected to flow as a result of this during the transition period, but see the section below regarding the potential post-transition backstop period.

Jurisdiction

- **"No deal":** The current parallel EU/UK merger control system is described as a "one-stop shop", whereby larger 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. A "no deal" Brexit will remove the "one-stop shop" principle so far as the UK is concerned so that EU clearance will no longer cover the UK, and transactions can be reviewed by both the Commission and the CMA. In a "no deal" scenario, the loss of the "one-stop shop" principle will take place on Brexit Day.

- **Withdrawal Agreement:** The EU merger control rules, including the "one-stop shop" principle, will continue to apply during the transition period.

Practical implications

What will happen to Commission decisions published before Brexit Day?

- **"No deal" and Withdrawal Agreement:** If the Commission has issued a decision on or before 29 March 2019 then, 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.

What will happen to Commission cases in mid-review on Brexit Day?

- "No deal": If the Commission has not issued a decision on or before 29 March 2019, then the CMA is no longer excluded by the EU Merger Regulation from taking jurisdiction over the UK aspects of the merger and the provisions of UK merger control will apply, enabling the CMA to review the merger if it has jurisdiction. Where merging parties anticipate that such a scenario is possible, the Merger Control Update advises parties to engage with the CMA at an early stage, particularly where the transaction may raise potential competition concerns in the UK. The CMA may suggest to the merging parties that they begin pre-notification discussions with the CMA. The CMA will continue to monitor non-notified merger cases, including cases falling under the jurisdiction of the Commission over which the UK may obtain jurisdiction in relation to the UK aspects of the merger after Brexit Day.
- **Withdrawal Agreement:** As explained above, post-Brexit, the Commission will continue to have jurisdiction over investigating a merger if it has been 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

in full or in part following an appeal to the EU courts, the UK will have no jurisdiction over such a merger.

What happens to cases referred from the Commission to the CMA before Brexit?

- **"No deal" and Withdrawal Agreement:** The CMA will continue to apply its usual processes in Phase 1 and 2. The timetable for Phase 1 will remain at 40 working days.

Fees

- **"No deal":** 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 reference or clearance decision post-Brexit.

Other practical implications of a "no deal" outcome for merger control that are not covered by the Merger Control Update include the following:

Parallel filings

- **"No deal":** As the EU's one-stop shop for mergers will no longer apply in the UK after Brexit Day, 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-Brexit merger may therefore potentially trigger parallel filings in both jurisdictions, with potentially differing outcomes.
- **Withdrawal Agreement:** Post-Brexit, and during the transition period, the EU Merger Regulation will continue to apply to the UK and so the one-stop shop principle will continue to apply. This means that parallel notifications will not be a feature of the transition period.

Deal timing

- **"No deal":** One of the key implications of parallel filings is that the UK and EU merger control regime review periods differ significantly.[2] There is no indication in the 13 September notice or the Merger Control Update that the UK government will harmonise the UK merger timetable with the EU process. Accordingly, the different timescales will need to be considered by deal teams in the context of post-Brexit transactions.
- **Withdrawal Agreement:** 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.

Live cases

- "No deal": In a "no deal" scenario there may be no agreement between the UK and the EU as to whether the Commission has jurisdiction over the UK aspects of a merger which is being reviewed on Brexit Day. The technical notice recommends that if businesses are considering a merger transaction or have made a merger notification but have not received clearance prior to 29 March 2019, they should approach the Commission and the CMA, who will be able to advise if any further action is necessary.
- Withdrawal Agreement: Post-Brexit, the Commission will continue to have jurisdiction over transactions which have been notified to it under the EU Merger Regulation before the end of the transition period.

ANTITRUST ENFORCEMENT

Proposed changes

The Antitrust Update sets out certain implications of a "no deal" scenario on the UK antitrust system, some of which were set out in the technical notice of 13 September. These are considered below, together with the potential impact of the Withdrawal Agreement:

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[2] (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).

Changes to the competition regime:

- **"No deal":** It remains the case that, as with merger control, no substantive changes to the UK antitrust regime are expected to be made immediately following a "no deal" outcome. This means that the UK will be treated the same as a third country, like the USA, in relation to antitrust law.
- **Withdrawal Agreement:** The Withdrawal Agreement provides that EU law will continue to apply to the UK as if it is a member state for the transition period. Moreover, as with a "no deal" outcome, no substantive changes to the UK antitrust regime are expected, at least during the transition period. (However, see the section below in relation to the potential impact of the Withdrawal Agreement's backstop protocol after the transition period.) This means that the UK will not be treated the same as a third country during the transition period in relation to antitrust law.

Will the obligation to follow EU law end?

- **"No deal":** Under the Competition SI, following the UK's exit from the EU, the CMA will no longer have jurisdiction to apply Article 101 TFEU on anti-competitive agreements (including cartels) and Article 102 TFEU on abuse of dominance (but equivalent provisions will continue to apply under the Competition Act 1998). The CMA will inform all affected parties if the scope of an investigation involving them is affected by this development. Similarly, there will be no requirement for UK law to remain consistent with EU law. In this regard, section 60 of the Competition Act 1998, which requires that UK competition law should be "*dealt with in a manner which is consistent with*" EU competition law, will no longer apply, including to cases already opened on or before 29 March 2019. Instead, a new provision, section 60A, will apply to such cases which provides that 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 in the light of specified circumstances*" (for example, differences in UK and EU law prior to Brexit, differences in EU and UK markets, developments in the form of economic activity, generally accepted principles of analysis, and developments in EU case law).

  Section 60A will apply from the point of Brexit to all competition law investigations and UK court cases whether the facts of those cases arose before or after Brexit.

- **Withdrawal Agreement:** 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 would not be repealed during the transition period.

Jurisdiction

- **"No deal":** As set out in the technical notice of 13 September, the CMA and concurrent regulators will only investigate anticompetitive conduct that affects UK markets and the Commission will no longer be able to commence investigations into cases involving anticompetitive conduct in the UK. However, the Commission will continue to have the power under EU law to investigate UK firms if they engage in conduct that has effects on competition within the EU, and EU businesses operating in the UK must comply with UK competition law as they do now.
- **Withdrawal Agreement:** The Commission will continue to have jurisdiction to enforce EU antitrust law as it does now up until the end of the transition period.

Block exemption regulations

- **"No deal":** The EU Withdrawal Act will preserve seven EU block exemption regulations[3] 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;
  - 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, for example intellectual property licences, expiring on 30 April 2026.

  The CMA expects to consult on the block exemptions as they expire in order to provide advice to the Secretary of State, who will have the power to amend or revoke them post-Brexit.

- **Withdrawal Agreement: The** Withdrawal Agreement provides that EU law will continue to apply to the UK as if it is a member state for the transition period. This implies that the EU block exemption regulations will continue to apply in the UK during this period.

Practical implications

Divergence

- **"No deal"**: 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 may well diverge from EU law.
- **Withdrawal Agreement:** Because the Withdrawal Agreement provides that EU law will continue to apply to the UK as if it is a member state for the transition period, divergence is not likely to be a feature of such an outcome, at least during the transition period. Any material divergence is not likely to take place until after the end of the transition period, depending on the final terms of the agreement governing the future relationship of the UK and the EU.

Parallel Exemptions

- **"No deal":** 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 Brexit.
- **Withdrawal Agreement:** As explained above, the EU block exemption regulations will continue to apply in the UK during the transition period.

Cases where the Commission has granted a marker/accepted a leniency application before Brexit but not formally opened an investigation

- **"No deal" and Withdrawal Agreement:** The Antitrust Update states 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

[3] 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.

also covered by the CMA's leniency policy, should make a separate application for leniency to the CMA (as would have been the case pre-Brexit).

What happens to live cases under investigation by the Commission?

- **"No deal":** The Competition SI prevents the CMA from opening investigations into infringements of UK competition law after Brexit where, before Brexit, the Commission had relieved the CMA of competence and has reached an infringement decision (which was not subsequently annulled).

  The Antitrust Update also states that after Brexit, the CMA may conduct investigations into breaches of the domestic prohibitions occurring before or after Brexit Day, including in cases where the CMA was relieved of its competence by the Commission, but where the Commission did not make a decision before Brexit.

  This means that the CMA can open cases in relation to any conduct in relation to which the Commission has not published a decision before Brexit, even where a Commission investigation is continuing, but had not concluded, by 29 March 2019. The technical notice of 13 September 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 sectoral regulator).

- **Withdrawal Agreement:** Post-Brexit the Commission will continue to have jurisdiction over investigating compliance with EU competition law if it has initiated proceedings before the end of the transition period.

Parallel cases

- **"No deal":** Because the Commission will not be able to conduct new investigations in relation to UK conduct, it is likely that in many circumstances (such as a pan-European-wide cartel) both the Commission and the CMA (or the relevant UK sectoral regulator) will undertake parallel investigations into the same conduct. In such cases, leniency applications and settlement considerations would need to be assessed in relation to both jurisdictions at the same time.

- **Withdrawal Agreement:** Post-Brexit Day, the Commission will continue to have jurisdiction over investigating compliance with EU competition law if it has initiated proceedings before the end of the transition period. Parallel UK-EU cases will therefore not arise during the transition period.

AFTER THE TRANSITION PERIOD

The backstop arrangement under the Withdrawal Agreement

If the draft Withdrawal Agreement is ratified but the EU and the UK do not agree the terms of a future relationship before the end of the transition period (in particular if there would otherwise be a hard border between Northern Ireland and the Republic of Ireland), 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 backstop would remove the need for customs checks by creating a "single customs territory" between the EU and the UK. As part of this arrangement, the UK government has committed to a "level playing field" based on open and fair competition between the EU and the UK. This would include the introduction of the following competition law-related requirements during the period for which the backstop arrangement would apply:

- **in relation to State aid:** the following requirements are provided for:
  - the UK will harmonise with the EU's State aid rules, which means introducing its own State aid regime aligned with EU's rules (which is already envisaged by the UK government, as explained above);
  - the CMA (as the proposed UK State aid regulator) will be responsible for enforcing State aid measures that affect trade between Great Britain and the EU, and will work in close cooperation with the Commission;
  - the Commission will remain responsible for enforcing State aid measures that affect trade between Northern Ireland and the EU, and will be required to keep the CMA fully and regularly informed; and
  - a Joint Committee will allow both Parties to discuss matters of interest and seek commonly acceptable solutions to disagreements. In case no mutually agreed solution can be found, interim measures and an arbitration system are provided for.
- **in relation to merger control:** new UK-EU merger control provisions (the "UK-EU Merger Control Rules") would be implemented, which would prohibit mergers which are notifiable to the United Kingdom, EU, or one or more Member States and which "*threaten to significantly impede or to substantially lessen effective competition … in so far as they affect trade between the [EU] and the United Kingdom*". This effectively seeks to combine the UK's and EU's merger control test;
- **in relation to antitrust rules:** new antitrust rules which prohibit anticompetitive agreements and abuses of a dominant position in so far as they affect trade between the UK and the EU (the "UK-EU Antitrust Prohibitions") would be implemented. This means that the UK will not be treated in the same way as a third country, such as the USA, during the backstop period; and
- **in relation to both the UK-EU Merger Control Rules and UK-EU Antitrust Prohibitions:** the EU and the UK would commit to ensuring that their respective competition laws effectively enforce these agreed rules, with the UK also committing to ensure that administrative and judicial proceedings are in place to ensure "*effective and timely action against violations*" of these competition rules.

The Political Declaration regarding the future UK/EU relationship

On 14 November 2018, together with the publication of the 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 was published on 22 November which, at that stage, had been agreed at negotiators' level and agreed in principle at political level but was still subject to the endorsement of Member States on 25 November. The declaration is very broad, with much less detail than the Withdrawal Agreement or Protocol.

In relation to competition law, it envisages that as part of any future deal, the UK's competition regime will need to include State aid and competition law regimes which will *"[build] on the level playing field arrangements provided for in the Withdrawal Agreement*". In this regard, this might ultimately lead to:

- continued alignment of UK and EU competition rules, such as that envisaged by the Withdrawal Agreement, potentially with section 60 of the Competition Act 1998 staying in its present form; and
- potentially similar rules to the UK-EU Merger Control Rules and UK-EU Antitrust Rules referred to above being applied. This would minimise the extent to which the UK might be treated the same as a third country, such as the USA, post the transition period.

The details are yet to be determined during the course of any future negotiations and there is therefore no certainty at this stage.

SUMMARY

Whilst there may be some changes to parts of the UK merger regime and antitrust regime post-Brexit, they should remain largely familiar in both a "no deal" and Withdrawal Agreement scenario.

The biggest immediate impact of a "no deal" outcome is likely to be on businesses that are part way through a Commission merger review or antitrust investigation on Brexit Day. In such cases there would be no agreement as to the jurisdiction of the UK aspects of those live investigations. The CMA has provided some pragmatic guidance on some of these issues, but what is missing at this stage is an indication of how the Commission will approach such cases in a "no deal" outcome. In practice, it is expected that the long established cooperative relationship between the CMA and the Commission would secure a pragmatic outcome on both sides.

The biggest impact of a Withdrawal Agreement scenario from a competition law perspective is likely to be the ongoing application of EU law in the UK, and the ongoing jurisdiction of the Commission and European Courts during the transition period.

We await to see what UK competition law might look like after the end of the transition period.

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