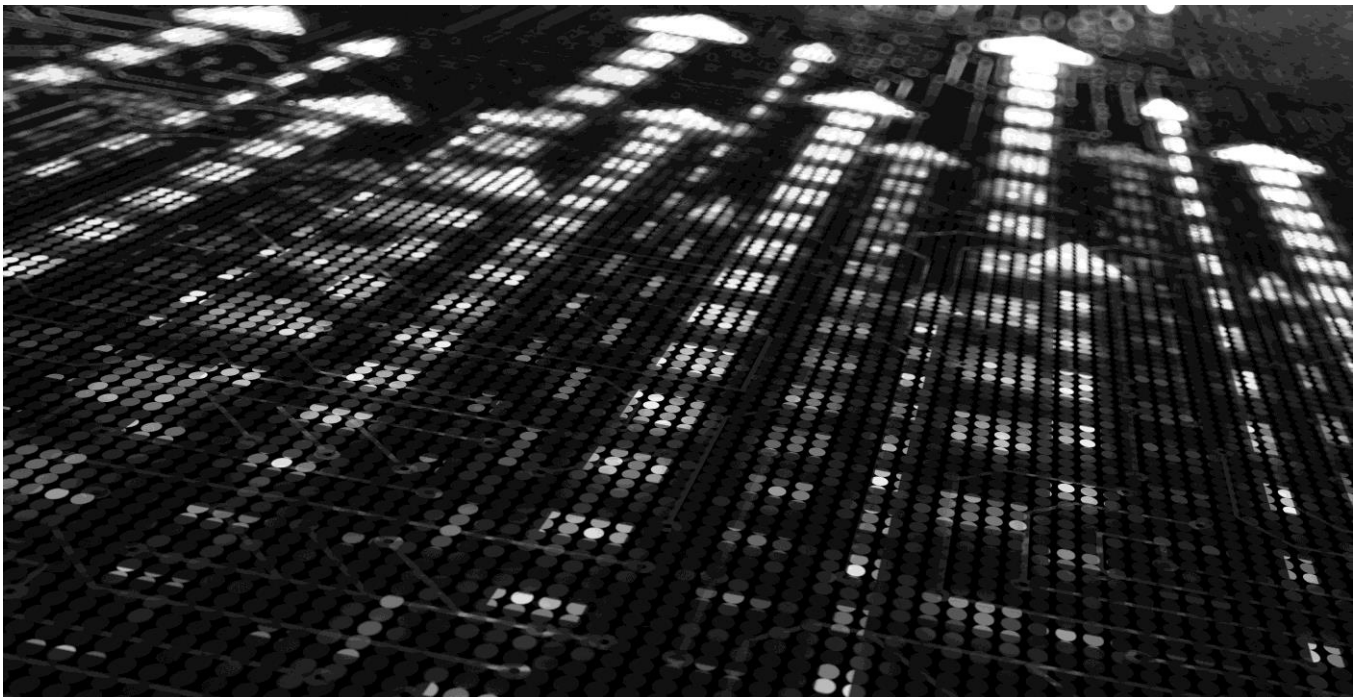


Ashurst competition
law newsletter – April 2019



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From the Editors

This April issue of Ashurst's competition law newsletter features a round-up of a number of developments that have caught our eye. This edition covers Google's €1.5b advertising market fine, the EU's and the UK's reports on the role of competition policy in the digital era, the EU's new FDI screening regime, new developments in Belgian competition law, two further European Commission territorial restriction cases, and recent key developments in Australia as well other topics.

You'll also find two special feature articles in this edition: an updated article on the impact of Brexit on competition law, and the EU's report on competition law in loan syndication.

Google fined €1.49b for practices on the online advertising market

EU - ANTITRUST – ABUSE OF DOMINANCE

On 20 March 2019, the European Commission ("Commission") fined Google for the third time since June 2017 for abusing its dominant position contrary to Article 102 TFEU. The Commission has concluded that Google imposed a number of restrictive clauses in contracts with third-party websites that prevented Google's competitors from placing their search adverts on these websites.

The formal investigation was prompted by complaints examined by the Commission in 2010. Following a nine year investigation, the [Commission decided](#) to fine Google €1.49 billion in respect of alleged misconducts that lasted over 10 years regarding online search advertising intermediation services on third-party websites. The Commission considered that the relevant restrictive clauses contributed to denying Google's rivals the possibility to compete on the merits and to innovate.

The Commission found that Google was the market leader in online search advertising intermediation in the European Economic Area with a market share above 70% from 2006 to 2016.

The Commission states that Google's rivals were not able to compete on the merits due to:

- the imposition, from 2006, of an **exclusive supply obligation** which prohibited publishers from placing search adverts from competitors on their search results pages;

- the replacement, from March 2009, of these exclusivity clauses by "**Premium Placement**" clauses that required publishers to reserve the "most profitable space" on their search results pages for Google's adverts and request a minimum number of Google ads;
- the inclusion, from March 2009, of an **obligation for publishers to seek written approval** from Google before making changes to the way in which any rival adverts were displayed.

According to the findings of the Commission, the above-mentioned clauses concerned over half the market by turnover from 2006 to 2016. The exclusivity clauses prevented publishers from placing search adverts of Google's competitors on their search results pages while the 'relaxed exclusivity' provisions prevented Google's rivals from placing these adverts in the most visible and clicked parts of the websites' search results pages and enabled Google to monitor how attractive and clicked on competing search adverts could be.

In 2014, a series of commitments that would have seen Google make various changes to its contract terms were tested and eventually rejected by the Commission following submissions from third parties. Nevertheless, despite the Commission's continued antitrust probe, in 2016 Google voluntarily introduced the changes discussed in its proposed 2014 commitments, which marks the point when the infringement is considered to have terminated.

The next big competition topic to hit financial services? Commission report on loan syndication

EU - ANTITRUST – ANTICOMPETITIVE AGREEMENTS

On 5 April 2019, the European Commission (the "Commission") published a report on EU loan syndication market and its impact on competition in credit markets (the "Report"). The Report is based on an extensive study involving lenders, borrowers and sponsors active in six Member States (the "Study"), and follows regulatory interest and investigations across Europe into potential competition issues arising from loan syndication activities. Syndicated lending raised over \$1 trillion in Europe in 2018 and competition regulators will continue to closely monitor the sector. All lenders need to be aware of the risk areas identified in the Report and ensure their activities are compliant.

WHAT YOU NEED TO KNOW – PRACTICAL TAKEAWAYS

- Financial institutions should review their compliance programmes in light of the Report, to ensure they are up to date and compliant.
- The Study was not a formal competition investigation. However, the Commission may launch a sector inquiry and/or investigations into individual companies to follow-up on issues identified in the Report.
- Loan syndication is generally recognised to be beneficial in terms of increasing liquidity and diversifying risk, and the Report found that there were a large number of lenders competing in most markets.
- However, loan syndication necessarily involves close cooperation between market participants. This may give rise to potential competition law risks. For example:
 - market soundings by mandated lead arrangers ("MLAs"), particularly where contact is made with institutions that are competing with the MLA to originate the loan. Risks are greater where the sounding moves from truly generic to

being deal-specific. The Report emphasises the need for documented client consent for deal specific soundings;

- exchanges of competitively sensitive information between lenders, leading to worse outcomes for borrowers. This may be due to a lack of effective separation between origination and syndication desks, difficulties in enforcing non-disclosure agreements and discussions which go beyond the scope of the client's consent;
 - tying, where there is an obligation or strong expectation that ancillary services will be obtained from the MLA or the syndicate;
 - the dual role of institutions as debt advisor and lender on the same transaction, where there is insufficient functional separation between the roles;
 - the syndicate may have the power to increase prices on refinancing and restructuring, particularly where a borrower is in financial difficulties and has few outside options.
- The Report recommends closer monitoring of markets where there are fewer potential MLAs, such as countries which do not use the euro or pound.

COMPETITION RISK AREAS DURING THE SYNDICATED LENDING PROCESS

The Report focused on syndicated lending in France, Germany, the Netherlands, Poland, Spain and the UK, in relation to project finance, leveraged buyouts and infrastructure projects. It is based on feedback from 37 lenders and 100 borrowers and sponsors and identified the following key risk areas:

STAGE IN PROCESS	POTENTIAL RISKS	SAFEGUARDS	SPECIFIC COMMENTS/CONCERNS
Competition for appointment to the lead banking group	<ul style="list-style-type: none"> • MLA makes market soundings with other institutions who are competing to originate the loan. 	<ul style="list-style-type: none"> • Obtain client consent for deal-specific soundings. 	
		<ul style="list-style-type: none"> • Effective functional separation between syndication desks receiving soundings and origination desks. 	
	<ul style="list-style-type: none"> • MLA also has a role as adviser to the borrower, creating a conflict of interest. 	<ul style="list-style-type: none"> • Effective functional separation between advisory and lending roles. 	<ul style="list-style-type: none"> • Dual roles more common in Project Finance/Infrastructure.
	<ul style="list-style-type: none"> • Bundling of advisory and lending roles. 	<ul style="list-style-type: none"> • Competitive process to appoint advisor. 	<ul style="list-style-type: none"> • Lenders have differing attitudes to bundling.
Between mandate and loan agreement	<ul style="list-style-type: none"> • Discussions between lenders lead to worsened terms for borrower. 	<ul style="list-style-type: none"> • Bilateral negotiation of terms between borrower and each lender, with joint discussions limited to agreeing loan documentation and syndication strategy. 	
		<ul style="list-style-type: none"> • For club deals, borrower to monitor discussions between lenders and ensure they remain within the permitted scope. 	<ul style="list-style-type: none"> • Less sophisticated borrowers are more vulnerable.

STAGE IN PROCESS	POTENTIAL RISKS	SAFEGUARDS	SPECIFIC COMMENTS/CONCERNS
Awarding of ancillary services	<ul style="list-style-type: none"> MLAs make the provision of ancillary services by them a condition of the loan. 	<ul style="list-style-type: none"> Competitive process to allocate ancillary services, either alongside the initial loan terms or separately 	<ul style="list-style-type: none"> The practice of making the loan conditional on the awarding of ancillary services appears to be prevalent in Spain.
			<ul style="list-style-type: none"> Higher risks where a limited number of syndicate banks can provide each ancillary service (e.g. smaller national markets and bespoke Project Finance/Infrastructure deals).
		<ul style="list-style-type: none"> In the UK, prohibition of "right of first refusal"/"right to match" for ancillary services not directly related to the loan. 	
Sale of loan on secondary market	<ul style="list-style-type: none"> Co-ordinated activity between lenders to manipulate prices in the secondary market. 	<ul style="list-style-type: none"> Borrower restrictions on secondary trading. 	<ul style="list-style-type: none"> No evidence of manipulation of secondary market prices was found.
Refinancing in conditions of default	<ul style="list-style-type: none"> Discussions between syndicate members on restructuring leads to a co-ordinated outcome. 	<ul style="list-style-type: none"> Effective functional separation between restructuring teams and origination teams. 	
	<ul style="list-style-type: none"> Limited bargaining power of the borrower, particularly in pricing of ancillary 	<ul style="list-style-type: none"> Involving lenders from outside the original syndicate. 	

PREVIOUS REGULATORY INTEREST

The Report is the Commission's first comprehensive assessment of syndicated lending. However, there has been significant interest in this topic at a national level. For example:

- in 2018 the Spanish national competition authority [fined four banks €91 million](#) for colluding to charge above-market prices for the interest rates of derivatives that were used as instruments for the hedging of the interest rate risk associated with project finance syndicated loans;
- in 2016 the UK Financial Conduct Authority (the "FCA") uncovered evidence suggesting [potential competition law infringements](#) by firms engaged in syndicated lending, concerning the disclosure/exchange of competitively sensitive information relating to lending terms and conditions. The FCA has responded by issuing formal 'on notice' letters to firms, which led to firms strengthening their competition law compliance practices;
- the Dutch national competition authority conducted market studies into the [syndicated loan market](#) in 2010 and the [property finance industry](#) in 2011, and ultimately found evidence of limited choice for borrowers; and

- the Loan Market Association (the "LMA") published a [notice on the application of competition law to syndicated loans](#) in May 2014, recommending caution in relation to certain activities in this context (for example, when conducting general market soundings).

NEXT STEPS AND IMPLICATIONS FOR FINANCIAL INSTITUTIONS

The Report will be of significant interest to the industry. In particular, the Commission and National Competition Authorities are expected to closely monitor the markets and potential competition issues identified in the Report. This may result in the launch of a formal sector enquiry and/or stand-alone competition investigations/enforcement action against the undertakings concerned.

It remains important for financial institutions in this market to ensure they have up to date and appropriate competition law compliance programmes in place, which are fully understood by all employees who engage in origination and syndication activities, and that such programmes are implemented effectively.

Ashurst has advised numerous clients on competition investigations and competition law compliance in relation to syndicated lending.



GE shocked by €52m fine for misleading Commission

EU - MERGER CONTROL, PROCEDURE

The European Commission ("Commission") has fined General Electric ("GE") €52 million for providing incorrect information during the Commission's investigation of its proposed acquisition of LM Wind, even though GE had later corrected its mistake.



WHAT YOU NEED TO KNOW – PRACTICAL TAKEAWAYS

- The case acts as a reminder that the Commission is ramping up its enforcement of the EU Merger Regulation's procedural rules.
- Parties need to ensure the accuracy of all information submitted at all times.
- Any infringement of an obligation to provide accurate information can potentially result in a fine, even if the information does not ultimately impact the Commission's substantive assessment.

GE notified the Commission of its proposed acquisition on 11 January 2017, stating that, other than its existing 6 megawatt turbine product, it did not have any high power output wind turbine for offshore applications in development. However, through a third party, the Commission learnt that GE was offering a 12 megawatt offshore wind turbine to potential customers. On 2 February 2017, GE withdrew the original notification and re-notified the Commission on 13 February 2017 with the complete and correct information.

Under Article 14(1)(a) of the EU Merger Regulation, *the Commission may impose fines*

not exceeding 1% of the aggregate turnover of the undertaking concerned where, intentionally or negligently, they supply incorrect or misleading information in a notification or supplement to that notification. Despite the withdrawal and re-notification of the acquisition with complete information, the [Commission took the decision to fine GE](#); the obligation to provide accurate information that is not misleading arises even where the information does not affect the Commission's assessment. The incorrect information provided in the first notification was also used in the Commission's assessment of Siemens' acquisition of Gamesa in its assessment of the market for wind turbines.

The Commission found the fine to be proportionate to the infringement and an adequate deterrent. In doing so, the Commission had considered that GE should have been aware of the relevance of the information required for the assessment and of GE's obligations under the EU Merger Regulation. Also considered was the fact that GE had had continuous contact with the Commission during the review process, particularly in regards to what pipeline products GE had in the wind turbine market.

Commissioner Vestager commented on the fine - *"Our merger assessment and decision-making can only be as good as the information that we obtain to support it. Accurate information is essential for the Commission to take competition decisions in full knowledge of the facts. The fine imposed... on General Electric is proof that the Commission takes breaches of the obligation... to provide us with correct information very seriously"*.

As the information was rectified in the second notification, the infringement decision had no impact on the Commission's approval of the transaction under EU merger rules on [20 March 2017](#).

This fine is not an isolated case in relation to the enforcement of the Merger Regulation's procedural rules:

- The fine was the second biggest imposed by the Commission on a company for providing incorrect information after it fined [Facebook €110 million](#) for providing misleading information on its acquisition of WhatsApp in May 2017.
- In July 2017, the Commission sent [Statements of Objections to Merck and Sigma-Aldrich](#), alleging that Merck and Sigma-Aldrich breached procedural rules in the EU Merger Regulation for providing incorrect or misleading information. This investigation is ongoing.

- The Commission has also launched a number of gun-jumping investigations and decisions (see our previous [article](#)).

The decision is a very serious reminder to provide complete and correct information during the review process and that the EU Commission is not afraid to impose large fines regardless of whether the information was withheld intentionally or negligently.

EU report recommends competition policy for the digital era: game changer or too early to tell?

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

On 4 April 2019, the European Commission ("Commission") published "Competition Policy for the digital era", a report commissioned in March 2018 by the Competition Commissioner Margrethe Vestager from three special advisers (Professor Heike Schweitzer, Professor Jacques Crémer and Assistant Professor Yves-Alexandre de Montjoye, on the future challenges of digitisation for competition policy) (the "Report"). The Report comes at a time when competition authorities around the world are grappling with similar issues.

WHAT YOU NEED TO KNOW – PRACTICAL TAKEAWAYS

- The Report concludes that the existing framework of EU competition law provides a sound and sufficiently flexible basis for protecting competition in the digital era.
- However, it recommends a number of important, and potentially controversial, amendments to the traditional tools of analysis and enforcement to adapt to the challenges posed by the digital economy.
- In particular, the Report suggests that competition law enforcement in digital markets should err on the side of disallowing potentially anti-competitive

conduct, even where consumer harm cannot be precisely measured, in the absence of clearly documented benefits for consumers.

- This could include lowering, or even reversing, the standard and burden of proof, requiring incumbents to demonstrate the pro-competitiveness of their conduct.
- The Report also suggests a duty on dominant firms to ensure data access, and possibly data interoperability, in respect of data requests for the purpose of serving complementary markets or after markets. However, it also emphasises that an assessment of "indispensability" of the data remains key to an assessment under Article 102 TFEU, and that regulation, rather than competition law, may be better placed to deal with data access issues in many cases.
- In relation to "killer acquisitions" of small start-ups by large/dominant companies, the Report suggests revisiting substantive theories of harm and considering whether the acquisition is part of a possible strategy against partial user defection from the ecosystem.
- The Commission has stated that it will now

take some time to process the Report before presenting its own conclusions. So don't expect any immediate changes to the law any time soon.

The [Report](#) follows on from a conference organised by the European Commission on the same topic on 17 January 2019 (covered in the [January edition](#) of this newsletter).

THE "KEY CHARACTERISTICS" OF THE DIGITAL ECONOMY

The Report's authors were asked by the Commission to explore how competition policy should evolve to continue to promote pro-consumer innovation in the digital age. Their recommendations have been made against the background of three key characteristics of the digital economy, all of which can result in significant competitive advantages for incumbents:

- **extreme returns to scale:** the cost of production of digital services is proportionally much less than the number of customers served;
- **network externalities:** the usefulness for each user of a particular technology or service increases with the number of users that adopt it, making it difficult for new entrants to persuade individual users to migrate to an alternative; and
- **the role of data:** the evolution of technology has made it possible for companies to collect, store and use ever-increasing amounts of data, and the ability to use data to develop new, innovative services and products has become a key competitive parameter whose relevance will continue to increase.

The Report concludes that the combination of these characteristics results in strong "economies of scope" in the digital economy, which favour the development of ecosystems and large incumbent digital players that are very difficult for new entrants to dislodge.

RECOMMENDATIONS IN RELATION TO ANTITRUST ENFORCEMENT

The Report concludes that the existing framework of EU competition law continues to provide a sound and sufficiently flexible basis for protecting competition in the digital era. However, the authors suggest that a

"rethinking" of the traditional tools of analysis and enforcement is required to adapt to the challenges posed by the digital economy. The Report focuses in this regard on the competition law concerns arising in two areas: dominant platforms, and use of/access to data.

Platforms

The Report recognises that as a consequence of the above-identified characteristics of the digital economy, there may only be room in the market for a limited number of platforms, – especially in the absence of multi-homing (i.e. users using more than one platform), protocol and data interoperability or differentiation.

This means that it is essential to protect competition "for" the market, and consider carefully how to respond to strategies that dominant platforms might use to limit the threat of market entry or expand their market power into neighbouring markets. Equally, it is important to protect competition "in" the market (i.e. competition on a dominant platform), with dominant platforms having a responsibility to ensure that competition on their platforms is fair, unbiased and pro-users.

Whilst emphasising that a case-by-case analysis will always be required, the Report suggests a number of interesting, and potentially controversial, adjustments to existing competition law concepts and methodologies to address these challenges:

- **market definition vs theories of harm:** competition authorities should place less emphasis on analysis of market definition in the digital world (due to the rapidly evolving and complex nature of market boundaries), and more emphasis on theories of harm and identification of anti-competitive strategies;
- **"by object" abuses?:** strategies employed by dominant platforms aimed at reducing the competitive pressure they face should be forbidden in the absence of clearly documented "consumer welfare" gains, even where consumer harm cannot be precisely measured due to uncertainties around analysis of effects (effectively treating such strategies as "by object" abuses);
- **burden of proof:** enforcement in digital markets should err on the side of disallowing potentially anti-competitive conducts, and the burden of proof should be lowered or even reversed in some circumstances, requiring incumbents to demonstrate the

pro-competitiveness of their conduct. For example:

- any measure by which a dominant platform restricts multi-homing should be treated as suspect and the firm in question should bear the burden of providing a solid efficiency defence;
- a presumption in favour of a duty to ensure interoperability may be appropriate where dominant platforms try to expand into neighbouring markets (thereby growing into digital ecosystems which become ever more difficult for users to leave), or where dominant platforms control specific competitively relevant sets of user or aggregated data that competitors cannot reproduce;
- **platforms' "regulatory power"**: dominant platforms, in particular marketplaces, have "regulatory power", in the sense that they set the rules through which their users interact. As such they have a responsibility to ensure that their rules do not impede free, undistorted and vigorous competition without objective justification, and must not use their rule-setting power to determine the outcome of competition; and
- **"self-preferencing"**: intervention may be necessary wherever "self-preferencing" conduct by a dominant platform is likely to result in a leveraging of market power which is not justified by a pro-competitive rationale.

Data

The Report includes a detailed (and complex) discussion of the current legal framework relating to data, including the General Data Protection Regulation ("GDPR"), and the various challenges posed by different types of data in different contexts. It emphasises that data is increasingly a crucial input for the competitiveness of firms in the digital economy and their opportunities to innovate. However, data markets, data sharing and data pooling arrangements are not fully developed, and the wider legal framework is still in its infancy (for example, it is unclear how the right to data portability under the GDPR will be interpreted and implemented).

The Report considers that competition law has an important background role to play in this context, but that further regulation/legislation (at times sector-specific) is also needed. In terms of the consequences of the economics of

data for competition policy, the Report concludes that:

- **significance of data and data access**: the significance of data and data access for competition will always depend on an analysis of the specificities of a given market, the type of data and data usage in a given case;
- **assessment of market power**: any discussion of market power should analyse, cases by case, the access to data available to the presumed dominant firm but not to competitors, and the sustainability of any such differential access to data;
- **data sharing and data pooling**: data sharing and data pooling arrangements can produce significant efficiencies, but may also raise important competition concerns. As experience with the assessment of such arrangements grows, the Commission may need to contemplate the adoption of a block exemption Regulation in this area;
- **access to data under Article 102**: as regards access to data under Article 102 TFEU (abuse of a dominant position), it should remain the case that this is appropriate only where access to the data in question is truly indispensable. As such the "essential facilities" doctrine is not the best tool to deal with data requests by claimants who pursue business purposes that are essentially unrelated to the market served by the dominant firm (such as access to data for the purpose of training AI algorithms for unrelated purposes);
- **data access through sector-specific regulation**: however, in some settings, such as data requests for the purpose of serving complementary markets or after markets, it may be appropriate to impose a duty to ensure data access, and possibly data interoperability, potentially by way of sector-specific regulation. (In this regard, whilst not in the context of anticompetitive conduct, access to data has already been used in the UK, through sectoral regulation, to help inert customers switch banks (see the Competition and Markets Authority's Open Banking remedy). But the conditions need to be right for this to work. See our [article from 2018](#) for an insight into some of these conditions.)

RECOMMENDATIONS IN RELATION TO MERGER CONTROL

The Report focusses on concerns about acquisitions by dominant platforms of small start-ups with a quickly growing user base and significant competitive potential. Many such acquisitions currently fall outside the scope of EU merger control, as the start-ups in question do not yet generate sufficient turnover to meet the thresholds set out in the EU Merger Regulation. Some EU Member States, notably [Austria and Germany](#), have attempted to tackle this issue by introducing alternative thresholds based on the value of the transaction, but the Report notes that the practical effects of such alternatives have yet to be verified.

In summary, the Report concludes that:

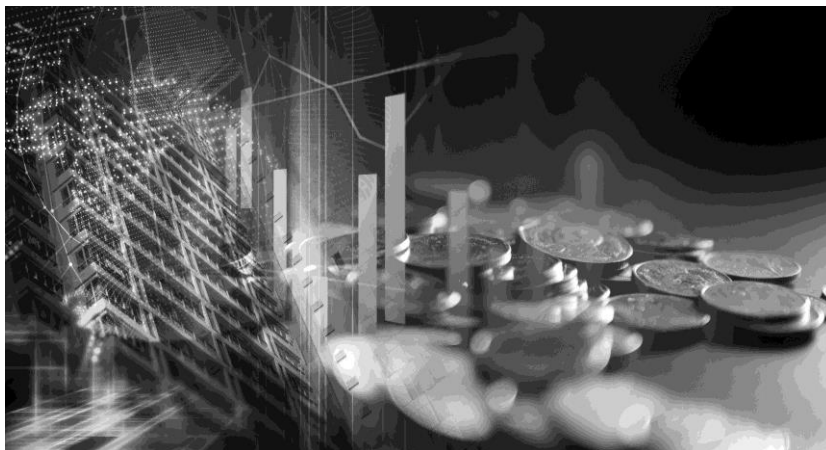
- **too early to change EUMR:** it is too early to change the jurisdictional thresholds of the EU Merger Regulation to address challenges posed by acquisitions in the digital field, but this option should remain under review, whilst also monitoring the performance of the transaction value-based thresholds introduced by some EU Member States;
- **SIC test:** the "significant impediment to competition" test remains a generally sound basis for assessing mergers in the digital economy;
- **new theories of harm?:** there is however a need to revisit the substantive theories of harm to properly assess cases where a dominant platform and/or ecosystem acquires a target with a low turnover but a large and/or fast-growing user base and a high future market potential;

- **burden of proof:** in such cases, competition authorities should consider whether the acquisition is part of a possible strategy against partial user defection from the ecosystem ("killer acquisitions"), and if so, require the parties to bear the burden of showing that adverse effects on competition are offset by pro-competitive efficiencies (although this should not be seen as creating a presumption against the legality of such mergers).

NEXT STEPS

This Report comes at a time when competition authorities around the world are grappling with similar issues. The Report's authors have emphasised that "it certainly cannot be, and is not intended to be, the final word on how competition policy should adapt to the digital era". However, it is an important contribution to the ongoing debate, and should be read alongside other recent publications in this field such as the [Furman Report in the UK](#) and the [preliminary report of the Australian Competition and Consumer Commission's inquiry into digital platforms](#).

Much will depend on how the Commission chooses to take matters forward, and how it aligns with the approach taken by competition authorities in other jurisdictions. Commissioner Vestager has indicated that the Commission will now take some time to process the Report before presenting its own conclusions. In practice, this seems unlikely to happen before the appointment of a new Commission following European Parliament elections in May, but the wider debate around the various issues raised in the Report will no doubt continue in the meantime.



New EU framework for screening foreign direct investment

EU - FOREIGN DIRECT INVESTMENT

On 21 March 2019, the European Union agreed new rules on screening foreign direct investment ("FDI") for threats to security and public order in Regulation 2019/452 (the "Regulation"). The new rules come into force on 11 October 2020.

WHAT YOU NEED TO KNOW – PRACTICAL TAKEAWAYS

- The new rules enter into force in October 2020.
- The Regulation does not oblige Member States to adopt a FDI screening mechanism.
- The ultimate decision as to whether FDI should be permitted remains with Member States.
- However, where FDI is screened by a Member State, it will be required to disclose relevant information to the European Commission ("Commission") and other Member States who have a 35 day time limit to submit their views. This deadline can be extended.
- Where FDI is not subject to screening, the Commission and Member States can request information and submit their views on FDI up to 15 months after completion.

MEMBER STATE FDI SCREENING MECHANISMS

The [Regulation](#) does not oblige Member States to adopt FDI screening mechanisms. However, where Member States do have such mechanisms, the Regulation sets out a number of minimum requirements, including transparent and non-discriminatory rules and procedures, explicit timeframes and the ability to challenge screening decisions.

The Regulation also sets out a non-exhaustive list of criteria the Commission and Member States may take into account in determining whether FDI is likely to affect security or public order. These include:

- The potential effects of the FDI on:
 - critical infrastructure in various sectors including energy, transport, water, communications, aerospace and defence, amongst others;
 - critical technologies and dual-use items, including artificial intelligence, robotics, cybersecurity, quantum and nuclear technology, and nanotechnology;
 - the supply of critical inputs;
 - access to sensitive information; or
 - freedom and pluralism of the media.
- Whether the investor:
 - is directly or indirectly controlled by the government of a third country; or
 - has already been involved in activities affecting security or public order in a Member State.
- Whether there is a serious risk that the foreign investor engages in illegal or criminal activities.



EU COOPERATION MECHANISM

The Regulation creates a framework for the Commission and other Member States to share their views on FDI. The rules differ depending on whether the host Member State has a screening mechanism in place, and are reinforced where FDI affects projects or programmes of EU interest, such as the Trans-European Networks for Transport, Energy and

Telecommunications. Features of this cooperation mechanism include the following:

- Member States are required to notify and provide the Commission and other Member States with information on any FDI undergoing screening as soon as possible.
- Other Member States can submit comments to the host Member State if they consider the FDI is likely to affect security or public order.
- The Commission can issue opinions if it considers that the FDI is likely to affect security or public order in more than one Member State.
- The Commission and Member States must state their intention to submit views within 15 days of notification, and have a further 20 days to do so. If additional information is requested by them, the deadline is extended by a further 20 days following the receipt of that information.
- The host Member State must give due consideration to comments and opinions -

and take utmost account of Commission opinions concerning projects or programmes of Union interest - but remains in all cases the final decision-maker.

CONCLUDING REMARKS

The EU screening mechanism should be set in the context of increasing concerns regarding the possible access of foreign powers to critical infrastructure and assets. This is leading many countries, both within and outside the EU, to adopt or enhance foreign investment rules. For example, the rules in the USA, France and Germany have recently been strengthened, and the [UK is planning to introduce a specific foreign investment regime](#).

Although the EU mechanism does not give the Commission or other Member States the power to block (or permit) foreign acquisitions, it may have an impact on transaction timing as Member States will in most cases need to wait for the outcome of the EU screening process before issuing their final decision.

Just don't do it: Nike fined for geo-blocking

EU - ANTITRUST – ANTICOMPETITIVE AGREEMENTS

On 25 March 2019, the European Commission (the "Commission") imposed a fine of €12.5 million on Nike for restricting cross-border sales of football merchandising products in breach of Article 101 of the Treaty on the Functioning of the European Union ("TFEU").

WHAT YOU NEED TO KNOW – PRACTICAL TAKEAWAYS

- In the wake of the e-commerce sector enquiry and the 2018 the EU Geo-blocking regulation, the Nike decision confirms the Commission's renewed focus on vertical agreements and its commitment to continue to pursue cross-border restrictions. Entering into any such restrictions requires detailed competition law considerations.

- Both direct and indirect means of restricting out-of-territory sales can infringe competition law.
- This is another notable example of the Commission recently rewarding cooperation by applying an informal settlement discount (i.e. settling outside its formal settlement procedure, which is reserved for cartel conduct).

BACKGROUND

In [June 2017](#), the Commission opened a formal antitrust investigation into certain licensing and distribution practices of Nike.

The enquiry focused on Nike's role as a licensor of merchandises featuring football clubs' branding, such as jerseys, bags, stationary, bedsheets and mugs. These products bear the logos from some of Europe's best-known football clubs (e.g. FC Barcelona, Manchester

United, Juventus) and national teams (e.g. the French Football Federation).

THE COMMISSION'S FINDINGS

Following a 21-months probe, the [Commission found that](#) from 2004 to 2017, Nike illegally prevented licensees in Europe from selling merchandise cross-border and online and in so doing breached Article 101 TFEU.

The restrictions were implemented through the whole distribution chain and included inter alia:

- direct measures restricting cross-border sales by licensees, including clauses expressly prohibiting these sales, obligations to refer orders for out-of-territory sales to Nike and clauses imposing double-royalties on these sales; and
- indirect measures monitoring and penalising these sales, including threats to end agreements, refusal to supply "official product" holograms (holograms on tags or stickers which help customers identify genuine merchandise) and audits to ensure compliance.

The decision follows up on the [results of the Commission's e-commerce sector enquiry](#) (see our [previous newsletter article](#)) and underscores the Commission's commitment to eliminating commercial practices that threaten to partition the EU Single market to the

detriment of European consumers. Similar enquiries are ongoing and concern alleged geo-blocking by Universal Studios for merchandise related to films like Despicable Me and Minions, and by Sanrio over brands like Hello Kitty.

REWARDING COOPERATION

The decision is also notable as it provides a new example of the Commission rewarding cooperation (Nike was granted a 40% fine reduction) in a non-cartel case. In this case, the Commission took account of the fact that Nike:

- disclosed information that allowed the Commission to extend the scope of the case;
- provided evidence with significant added value; and
- acknowledged the facts and the infringements.

After the [ARA](#), the [consumer electronics' RPM](#) and the [Guess](#) cases, this decision again shows that the Commission is likely in the future to attach more and more importance to cooperation also in relation to non-cartel cases. Based on the [factsheet](#) it published in December 2018 and on these first precedents, companies cooperating with the Commission (even after the notification of the Statement of objections) may obtain a fine reduction up to 50%.



Yet another cross-border restriction case!: pay-TV commitments accepted

EU - ANTITRUST – ANTICOMPETITIVE AGREEMENTS

The European Commission ("Commission") has closed its investigation into the licensing practices of a number of Hollywood studios and Sky UK following the parties' agreement to accept legally binding commitments (the "Commitments") to change their practices to address competition concerns identified by the Commission. The Commission had reached the preliminary view that the relevant licensing restrictions, which conferred "absolute territorial protection", might eliminate cross-border competition between pay-TV broadcasters and might partition markets along national boundaries, in breach of competition law.

WHAT YOU NEED TO KNOW – PRACTICAL TAKEAWAYS

- The case shows that the Commission will investigate vertical licensing agreements where these may be expected to create absolute territorial protection and eliminate cross-border competition.
- The Commission will treat cross-border restrictions in licensing agreements in much the same way as it would in distribution agreements for the supply of goods.
- The Commitments do not affect the rights of any party unilaterally to employ geo-filtering technology.
- The Commitments are without prejudice to the studios' rights under copyright law.

BACKGROUND

Following the European Court of Justice's 2011 findings in the [Premier League/Murphy](#) case, which concerned the exclusive licensing of broadcasting rights for Premier League football matches, the Commission initiated a fact-finding investigation in 2012 into licensing agreements for premium pay-TV content. This resulted in the Commission opening formal proceedings in January 2014 to investigate

whether provisions in licensing agreements between several major US film studios (Twentieth Century Fox, Warner Bros, Sony Pictures, NBCUniversal, Paramount Pictures) and the largest European pay-TV broadcasters (such as BSkyB of the UK, Canal Plus of France, Sky Italia of Italy, Sky Deutschland of Germany and DTS of Spain) prevented broadcasters from providing their services across borders. The Walt Disney Company was added to the proceedings in 2015.

In [July 2015](#), the Commission sent a Statement of Objections ("SO") to the six film studios and Sky UK. In its SO, the Commission identified clauses in the licensing agreements between the film studios and Sky UK, which:

- required Sky UK to block access to films through its online and satellite pay-TV services to consumers located outside its licensed territory; and
- prevented certain film studios from permitting broadcasters other than Sky UK to make their pay-TV services available in the UK and Ireland (Sky UK's licensed territory).

The Commission reached the preliminary view in its SO that such licensing restrictions may eliminate cross-border competition between pay-TV broadcasters and may partition markets along national boundaries in breach of Article 101 of the TFEU, because they prevent service providers from responding to unsolicited orders from outside the licensed territory (so-called "passive sales").

The Commission previously accepted binding Commitments offered by Paramount Pictures to address the Commission's competition concerns in [July 2016](#). In November and December 2018 - following a [failed appeal to the General Court](#) (brought by Groupe Canal+) challenging the Commission's acceptance of Paramount's commitments - the other studios and Sky UK also offered Commitments.

THE COMMITMENTS

On [7 March 2019](#), the Commission announced that it has closed its investigation, following the remaining parties' agreement to accept the legally binding Commitments to address the competition concerns identified by the Commission. In particular, the parties have agreed not to use, honour or seek to enforce restrictions in their licence agreements which:

- prevent pay-TV broadcasters providing output to customers outside their licensed territory in response to unsolicited customer requests; and
- require studios to ensure that, in their licences with broadcasters other than Sky, such broadcasters are prevented from responding to unsolicited orders for their pay-TV services from customers in the UK and Ireland (Sky's licensed territory).

The parties each agree to appoint a monitoring trustee to monitor and report annually to the Commission on their compliance with the Commitments. The Commitments will apply throughout the EEA for a period of five years.

The Commission has stated expressly that the Commitments are without prejudice to rights conferred upon the studios under the Portability Regulation (concerning consumers' access to online services when they travel in the EU) or under copyright law. In other words, the studios may still engage in legitimate and legally permissible licensing and enforcement of rights under copyright law. Further, the Commitments do not affect the rights of the studios or Sky UK unilaterally to employ geo-filtering technology to prevent services being accessed outside a territory.

There may be a tendency to think that the distribution of content through licensing is exempt from the competition law rules which apply to the supply of goods, or that the Commission is focused solely on investigating cartels between competitors. However, this case serves as a reminder that the Commission will also investigate such licensing agreements where there is a risk that they contain restrictions of competition which are contrary to the EU's single market objectives.

Non-infringing parents can be liable in damages for subsidiaries' conduct

EU - PRIVATE DAMAGES ACTIONS

On 14 March 2019, the European Court of Justice ("ECJ") handed down its preliminary ruling in response to a request made by the Finnish Supreme Court in a domestic action for damages, resulting from a cartel in the Finnish asphalt market. The questions referred to the ECJ related to the fact that three of the fined companies were not participants in the cartel themselves, but rather the acquirers of cartel participants which had since themselves been dissolved. Applying the same principles as those applicable in the context of imposition of fines, the ECJ ruled that the acquirer companies could be liable for the damage caused by anti-competitive conduct of their dissolved subsidiaries.

WHAT YOU NEED TO KNOW – PRACTICAL TAKEAWAYS

- The ruling may widen the scope for private damages actions in future, with infringing companies unable to escape liability for historic cartel participation through later group restructurings or acquisitions.
- Purchasers of companies need to ensure that their due diligence is sufficiently robust to ensure that they are not acquiring the risk of liability for cartel fines and therefore any resulting damages claims.
- When a parent company is considering whether one of its acquired subsidiaries should apply for leniency for historic conduct, a parent company needs to consider that it may also be liable for any resulting damages claims, notwithstanding that it might receive leniency in relation to any fine.

- More generally, parent companies should ensure that competition law compliance programmes extend to the whole of their group (from top to bottom) and are not just focused on the parent entities.

BACKGROUND

Between 1994 and 2002, a cartel operated in Finland in the asphalt market. Three of the companies that participated in this cartel were Sata-Asfaltti Oy, Interasfaltti Oy and Asfalttinieli Oy, all of which were liquidated between 2002 and 2003 and had their shares and commercial activities transferred to their sole shareholders: Skanska Industrial Solutions ("SIS"), NCC Industry and Asfaltmix respectively. In September 2009, the Supreme Administrative Court of Finland imposed penalty payments on seven companies for anti-competitive conduct in relation to the asphalt cartel, including these three parent companies.

ACTION FOR DAMAGES

On the basis of this judgment, in December 2009 the Finnish City of Vantaa brought an action for damages against, inter alia, SIS, NCC Industry and Asfaltmix, maintaining that all cartel members were jointly and severally liable for the additional cost Vantaa had paid as a result of the cartel. The District Court ordered the three companies to pay damages, including in respect of the conduct of their now dissolved subsidiaries. Noting that it was otherwise practically impossible for the party who had suffered damage to obtain compensation, the District Court maintained that the economic continuity principle must apply in order to ensure the effectiveness of Article 101 TFEU.

On subsequent appeal, the Finnish Court of Appeal found that this principle should not be applied to actions for damages, and that the effectiveness of EU law should not override the fundamental characteristics of Finnish civil liability rules; namely, the national rule that only the legal entity that caused the damage is liable. Vantaa's claims were dismissed to the extent that they applied to the three parent companies.

Vantaa appealed to the Finnish Supreme Court, which in turn made a preliminary reference to the ECJ. The preliminary reference posed three questions to the ECJ:

- whether the determination of the parties that are liable for the compensation of harm

caused by conduct contrary to Article 101 TFEU is a matter for EU law or domestic law;

- if the determination of entities liable for damage is a matter for EU law, whether the concept of 'undertaking' as defined in Article 101 TFEU and the principle of economic continuity as used when determining liability for fines should be applied; and/or
- if the determination of entities liable for damage is a matter for domestic law, what the balance should be between the requirement of effectiveness of EU law, and national rules which would not attribute liability to a parent company in these circumstances.

ECJ RULING AND IMPLICATIONS

The [ECJ held](#) that, while the rules governing the right to claim compensation for the harm resulting from an infringement of Article 101 TFEU are a matter of domestic law, the determination of the entity required to provide compensation for this harm is directly governed by EU law. The ECJ noted that the broad definition of 'undertaking' as provided in Article 101 TFEU should apply in this context, and that an organisational change in the entity could not be regarded as creating a new undertaking when the two remained identical from an economic perspective.

The ECJ rejected Asfaltmix's contention that this principle of EU law had until now only been applied in relation to the imposition of fines and could not therefore be applied in actions for damages. The ECJ stated that the right to claim compensation for damage caused by an agreement or conduct prohibited by Article 101 TFEU ensures the full effectiveness of that provision. Allowing undertakings to avoid penalties through a company restructuring would jeopardise the proper enforcement of EU competition rules. Having ruled on the first two questions, the ECJ did not need to consider the third question referred.

The ECJ's ruling confirms the authority of EU law over national rules when determining the parties that are liable for damages for EU competition law infringements. The ruling that liability for cartel damages should be attributed in the same way as liability for Commission fines may widen the scope for private damages actions in future, with infringing companies unable to escape liability for historic cartel participation through later group restructurings or acquisitions.

UK CFC Financing Exemptions partly illegal and partly justified under State aid rules

EU - STATE AID

On 2 April 2019, the European Commission ("Commission") found that the UK's Controlled Foreign Company ("UK CFC") scheme was in breach of State aid rules in cases where multinationals received an exemption for financing income derived from UK activities. This decision, which follows the recent annulment of the Belgian excess profits decision by the EU General Court, was more limited in scope than the initial investigation and consequently the overall amount subject to claw-back by the UK will be significantly lower than expected.

WHAT YOU NEED TO KNOW – PRACTICAL TAKEAWAYS

- The Commission has limited its findings in the UK CFC decision, thereby reducing potential exposure of companies in the event of a claw-back by the UK.
- Only companies which benefited from an exemption for financing income derived from UK activities could be considered by the UK authorities as aid beneficiaries and be required to pay back the aid. However, in the midst of Brexit, there is much uncertainty surrounding the UK's recovery obligations.
- It is also yet unknown whether the UK or UK taxpayers will challenge this decision. Such appeals would add to a series of high-profiled cases introduced against the Commission's recent fiscal State aid decisions.

In October 2017, the Commission opened an in-depth investigation to verify whether the Group Financing Exemption ("GFE") included in the UK CFC rules complied with State aid rules (see our previous [Global Tax Insight article](#)). The GFE provided a derogation from the general CFC rules by partially or fully exempting from taxation the UK financing income received by an offshore subsidiary from another foreign group company, even where

this income is derived from "UK activities"¹ or if the capital used is "UK connected"².

In April 2019, the Commission's investigation concluded that the GFE and, hence, the different treatment, is partially justified:

- In particular, the Commission found that the GFE is justified when financing income from a foreign group company is financed with UK connected capital. This is because such an exemption avoids complex and disproportionately burdensome intra-group tracing exercises that would be required to assess the exact percentage of profits funded with UK assets. The exemption in this case provides a clear proxy that ensures the effectiveness of the CFC rules.
- Conversely, the Commission considered that it is neither burdensome nor complex to assess to what extent income is derived from UK activities such that a proxy rule in this case is not justified. It therefore found that the GFE was unjustified in this respect.

Since the opening of the formal investigation in October 2017, a number of multinationals have declared that they would earmark millions of pounds in potential tax repayments, preparing for the worst.³ In this context, the Commission's final decision will significantly reduce the exposure of companies to UK tax authorities if the income does not derive from UK activities.

Against this background, it is notable that this decision, involving a tax "scheme",⁴ comes in the aftermath of the annulment by the EU General Court of the Commission's decision

¹ When lending activities, which are most relevant to managing the financing activities and thus generating the financing income, are located in the UK.

² When loans are financed with funds or assets, which derive from capital contributions from the UK.

³ For example, UK spirits producer Diageo declared that it faced a potential maximum liability of £250 million.

⁴ The UK CFC decision and the Belgian excess profits decision are the only two cases involving tax schemes in the Commission's recent crackdown on alleged fiscal advantages granted to multinationals.

concerning the *Belgian excess profits* scheme.⁵ This decision was annulled on 14 February 2019 on the basis that the Commission had failed to prove that the measure was a general "scheme" and not a series of individual rulings. The Commission is now "carefully reflecting" on how to respond to this Court setback. It may either appeal this judgment to the European Court of Justice or alternatively start 35 individual investigations against the concerned multinationals. An appeal would buy time as the Commission waits for judgments in the current high-profile cases involving individual taxpayers⁶ in Ireland and Luxembourg.

It remains to be seen whether the UK or any alleged beneficiaries of the CFC exemption scheme will challenge the Commission's UK CFC decision in the midst of the Brexit conundrum. Such appeals would join an already long list of pending cases against the Commission's recent fiscal State aid decisions revealing how controversial these are for both Member States and taxpayers



⁵ Joined cases T-131/16 and T-263/16, Kingdom of Belgium and Magnetrol International v European Commission, EU:T:2019:91. The Belgian excess profits decision was subject to 29 appeals by the Belgian State and by alleged beneficiaries (including companies such as AB InBev, BASF, Atlas Copco etc.). Given the number of appeals, the General Court chose two cases (that of the Belgian State and Magnetrol) to spearhead the challenge and stayed the 27 other appeals.

⁶ Such as Fiat, Starbucks, Amazon, Apple and Engie.

⁷ The General Court judgment in the Belgian excess profits case left unanswered a number of substantive questions which would have helped in assessing the merits of other cases.

New Belgian law on abuse of economic dependence and other illegal practices in B2B relationships

BELGIUM - ANTITRUST - ABUSE OF DOMINANCE

On 21 March 2019, Belgium adopted a law introducing three new types of infringements in B2B relationships: abuses of 'economic dependence', abusive clauses, and unfair market practices. The new law extends the concept of 'abuse of a dominant position' to prohibit abusive conduct by companies that can be considered as indispensable commercial partners for other companies. Together with the new rules on abusive clauses and unfair practices, the freshly adopted provisions aim at protecting smaller trading partners especially in vertical relationships.

WHAT YOU NEED TO KNOW – PRACTICAL TAKEAWAYS

- The new rules on abuse of 'economic dependence' are targeted at companies that can be regarded as indispensable commercial partners for other companies. They are likely to apply, in particular, to relationships between producers of fast-moving consumer goods (such as food) and supermarket chains, as well as between franchisers and franchisees (regardless of their size or market position). They are also likely to raise complex issues of interpretation.
- Whilst the Belgian Competition Authority ("BCA") has welcomed the possibility of tackling vertical abuses, its limited resources may delay the actual enforcement of these new rules.
- The prohibition of "abusive clauses" in B2B relationships concerns clauses that create a clear imbalance between the rights and obligations of the parties. This prohibition will have an important impact on companies' contractual practices. In particular, it is likely to make pre-contractual negotiations between companies more difficult, especially as some of the clauses that are regarded as presumptively unlawful under the law are

relatively common and very useful in practice.

- The new rules on unfair market practices target, in particular, aggressive and misleading market practices.

ABUSE OF ECONOMIC DEPENDENCE

The main change brought about by the new law⁸ is the introduction of a new category of competition infringement in the Belgian Code of Economic Law (CEL), in addition to anti-competitive agreements and abuses of dominance. The new Article IV.2/1 CEL prohibits companies from *abusing another company's 'economic dependence'* in circumstances where *competition is likely to be affected* in the Belgian market concerned or a substantial part of it.

For the purpose of the application of the new provision, 'economic dependence' is defined as a *"subordinate position of an undertaking in relation to one or more other undertakings, characterised by the absence of reasonably equivalent alternatives available within a reasonable period of time, on reasonable terms and at reasonable costs, allowing it or each of them to impose services or conditions that could not be obtained under normal market circumstances"*.

The (non-exhaustive) list of 'abuses' is similar to that included in Article IV.2 CEL/Article 102 TFEU and covers the following conduct:

- refusal to deal;
- imposition of unfair prices or trading terms;
- output limitation;
- discrimination between trading parties; and
- abusive tying.

⁸ Law of 21 March 2019 amending the Code of Economic Law as regards abuses of economic dependence, abusive clauses and unfair market practices between companies, full text available [here](#) (in French and Dutch).

This is intended to allow the BCA as well Belgian courts to rely on existing case law in order to find an abuse.

An abuse of economic dependence may be pursued by the BCA acting on its own initiative or following a complaint, and may be sanctioned with a fine of up to 2% of the company's annual turnover. Companies may also challenge such abuses through a court action seeking injunctive relief or damages.

These rules will enter into force on the first day of the thirteenth month following the publication of the law in the Belgian Official Gazette, i.e. most likely on 1 May 2020.

ABUSIVE CLAUSES

The new law also prohibits abusive clauses in contracts between companies (Article IV.91/3, §1 CEL). A clause is considered as abusive whenever it creates, alone or in combination with other clauses, a *clear imbalance between the rights and obligations of the parties*. The law however specifically excludes any assessment of the adequacy of the price paid in consideration for the products or services covered by the agreement, which would have to be caught by other general or specific legal provisions (such as e.g. competition law).

This general prohibition rule is accompanied by two (non-exhaustive) lists of clauses:

- Clauses in the 'black list' (Article IV.91/4 CEL) are considered abusive and prohibited in all cases without the need for any further evaluation. These include, for example:
 - potestative clauses (i.e. that depend solely on the will of one party);
 - clauses giving a party the unilateral right to interpret any clause of the contract;
 - clauses requiring one party to waive any means of recourse against the other party in the event of a dispute, or;
 - clauses which irrefutably establish one party's adherence to clauses of which it has not had the opportunity to become aware before the conclusion of the contract.
- Clauses in the 'grey list' (Article IV.91/5 CEL) are presumed to be unfair unless proven otherwise. These include clauses that :

- authorise a party to unilaterally change the price or other terms of the contract without a valid reason;
- tacitly extend or renew a fixed-term contract without specifying a reasonable period of notice;
- place, without counterpart, the economic risk on a party when this risk would normally be borne by another party;
- exclude or inappropriately limit the rights of a party in the event of total or partial non-performance;
- bind the parties without specifying a reasonable period of termination;
- exempt a party from liability for willful misconduct or gross negligence and except in cases of force majeure, for any failure to fulfil the essential obligations covered by the contract;
- limit the means of evidence that a party may use; or
- in the event of non-performance or delay in the performance of a party's obligations, provide for excessive damages.

In assessing whether a clause is abusive or not in a particular case, the overall context must be taken into account including, in particular, the intention of the parties as well as all the nature of the products covered by the contract, the circumstances in which it was concluded, the general economy of the contract, normal practice in the industry sector concerned, as well as all other clauses of the contract or of any other contract on which it may depend.

The new rules on abusive clauses do not, for the time being, apply to financial services or public procurement contracts. They will enter into force on the first day of the nineteenth month following the publication of the law in the Belgian Official Gazette, i.e. most likely on 1 November 2020, and will only apply to contracts entered into, renewed or modified after the date of their entry into force.

UNFAIR MARKET PRACTICES

The new law further specifies the pre-existing general prohibition of unfair market practices between companies by prohibiting *misleading and aggressive* commercial practices (Articles VI.105-105/1 and Articles VI.109/1-VI.109/2 CEL). The law thereby extends to B2B

relationships provisions that already existed previously in B2C relationships.

These rules will enter into force on the first day of the fourth month following the publication of the new law in the Belgian Official Journal, i.e. most likely on 1 August 2019.

COMMENTS

The new law brings about a substantial change in Belgian competition law by introducing the new concept of '*abuse of economic dependence*' which presupposes the existence of a relative dominant position. In doing so, the Belgian legislator has, following the example of other Member States such as Germany, Austria, France and Italy, decided to make use of the possibility offered by Article 3(2) of Regulation No 1/2003, which allows EU Member States to enforce stricter national rules to prohibit and sanction unilateral conduct by companies. The parliamentary debates show that the lawmakers' main concern was to protect small and medium-sized companies from unfair practices by other companies that are indispensable commercial partners for them. The debates specifically refer to relationships between food producers and supermarket chains, as well as between franchisers and franchisees, as examples of relationships that are particularly susceptible to such abuses. Whilst the BCA has welcomed the possibility of tackling vertical abuses, its limited resources may delay the actual enforcement of this new provision.

However, the provisions of the new law are likely to raise complex issues of interpretation and create a high degree of legal uncertainty for companies especially to the extent that they rely on vague concepts. In particular, the question of whether a company can be regarded as having no reasonable substitute and thus being 'economically dependent' on another company is likely to be hotly debated in every case. This is illustrated, for example, by the German *Rossignol* case,⁹ in which the ski manufacturer *Rossignol*, which had a market share of only about 8% in Germany, was nonetheless found guilty of an abuse when it refused to continue to supply a small German retailer that only sold a limited number of skis of the brand. The German courts found that the reputation of the *Rossignol* brand was such that the retailer's image could be damaged if he was no longer able to sell skis of that brand.

This was deemed sufficient to establish a link of economic dependence.

Furthermore, the prohibition of abusive clauses in B2B relationships is also likely to create difficulties in pre-contractual negotiations between companies, especially as some of the clauses appearing in the 'grey list' (for example, clauses that shift liability to one party for a particular risk that is normally borne by another party) are relatively common and very useful in practice.

Overall, the new Belgian law reflects a stricter stance towards companies which, whilst not being dominant on the market within the meaning of competition rules, are nonetheless in such a strong position that they may be able to, in practice, impose unfair terms on their commercial partners. These rules are likely to be relevant to a large number of companies (regardless of their size and market position) and will have an important impact on companies' contractual practices.



⁹ BHG [20 November 1975] KZR 1/75.

CNMC fines 15 rail cartelists €118m and its directors €0.6m

SPAIN - ANTITRUST – ANTICOMPETITIVE AGREEMENTS

The Spanish Competition Authority ("CNMC") has fined 15 companies and 14 directors which participated in three cartels for breaching EU and Spanish antitrust rules by distributing contracts among themselves for the provision of certain services in the rail sector.

WHAT YOU NEED TO KNOW – PRACTICAL TAKEAWAYS

- The case reflects the CNMC's continued focus on stamping out bid-rigging conduct, following on from the creation of specialised new economic intelligence unit which conducts market screening activities and targets in particular potential bid-rigging in public procurement activities.
- The CNMC has used, for the first time, a legal procedure set out in the Public Procurement Law that enables it to ban infringers from participating in public tenders.
- The scope and duration of such ban will be determined by the National Consultancy Board for Administrative Contracting.

CONDUCT AND FINES

The [CNMC concluded](#) that the companies constituted three different cartels to share contracts tendered by *Administrador de Infraestructuras Ferroviarias* ("ADIF"), the company responsible for the administration of the infrastructure of Spanish railways:

- one cartel constituted 13 companies that distributed among themselves, during eight years, 24 contracts for the electrification and maintenance of the high-speed railway line for a total value of €837 million. To this end, the companies agreed to create several consortia in the form of *Uniones Temporales de Empresas* ("UTES" - temporary, single purposes joint venture vehicles) that, when awarded the contract, shared part of its production and profit margin with the rest of

the companies (which submitted their tenders just to simulate competition in the procedure);

- another cartel constituted 10 companies that, during 14 years, adopted agreements to distribute among themselves at least 239 tenders for the electrification of the conventional railway, among which 173 were awarded to them for a total value of €134 million. To this end, the directors of the companies agreed an allocation method by the drawing of the tenders that established the awarding order among them. Then, the "losing" companies were compensated with a 6% of the profit derived from the contract that was shared equally among them; and
- a further cartel constituted two companies, to which a third one joined later, that, during three years, agreed to share public tenders and one private tender for the building, installation and maintenance of electromechanical equipment on high-speed lines for a value of at least €84 million.

The CNMC initiated its investigation after Alstom Transporte submitted a leniency application, for which the CNMC granted immunity from a €8.9 million fine (€8.8 million of which was attributable to the company and €155,700 of which to the directors involved in the infringement). In addition, the CNMC granted a 45% reduction in Siemens' fine for cooperating with the CNMC (which reduced its fine from €16.8 million to €9.24 million).

BANS FROM PARTICIPATING IN PUBLIC TENDERS

In addition to fining the companies and their directors directly involved in the infringement, the authority, for the first time, has used a legal procedure set out in the Public Procurement Law (Law 9/2017) and introduced in 2015 to ban the infringers (with the exception of Alstom and Siemens, who cooperated with the authority under the leniency program) from submitting public tenders. However, the CNMC did not determine the scope and duration of the ban, which will

be determined by the National Consultancy Board for Administrative Contracting (as provided for by the Public Procurement Law).

This case illustrates one of the main priorities for the CNMC since 2016: addressing collusion in public tenders. Since then, the CNMC has addressed behaviour in response to tenders in recent decisions. However, this is the first time that it has but this one is of great importance as it imposed fines on directors and a ban on participation in public tenders.



UK report on competition law in the digital economy and CMA's response

UK - MERGER CONTROL, ANTITRUST – CARTELS, ANTITRUST – ANTICOMPETITIVE AGREEMENTS, ANTITRUST – ABUSE OF DOMINANCE, MARKET INVESTIGATIONS & SECTOR INQUIRIES

On 13 March 2019 the "Digital Competition Expert Panel" to the UK government published the "Unlocking digital competition" report ("Furman Report"), which considers the appropriateness of the current UK competition law regime in dealing with the emerging digital economy and makes a number of proposals to the government. On 22 March 2019, the UK's Competition and Markets Authority ("CMA") published its response to those recommendations, in which it stated that it "strongly welcome[d] the panel's report and is very supportive of [the] overall approach".

WHAT YOU NEED TO KNOW – PRACTICAL TAKEAWAYS

- These two UK publications form part of a wider global debate on the role of competition law in digital markets (see for example our article on the [EU "Competition Policy for the digital era"](#) report commissioned by the European Commission).
- They recommend a number of important, and potentially controversial, changes to the traditional tools of analysis and enforcement to adapt to the challenges posed by the digital economy for consideration.

- It should be noted that the issues discussed are proposals and items for consideration at this stage. Whilst stakeholders should not expect any immediate changes to the law any time soon, they should keep a close eye on developments and any public consultations that the CMA might launch in case they wish to contribute.

Set out below is a summary of the [Furman Report's recommendations](#), together with a summary of the CMA response in each case.

1. The establishment of a pro-competition digital markets unit, tasked with securing competition, innovation, and beneficial outcomes for consumers and businesses. The report recommends that the new digital markets unit should:

- establish a digital platform code of conduct, based on a set of core principles. The code would apply to conduct by digital platforms that have been designated as having a strategic market status;
- pursue personal data mobility and systems with open standards where these will deliver greater competition and innovation;
- use data openness as a tool to promote competition;

- have new powers available to impose solutions and to monitor, investigate and penalise non-compliance;
- be able to impose measures where a company holds a strategic market status – with enduring market power over a strategic bottleneck market; and
- have the specialist skills, capabilities and funding needed to deliver its functions successfully.

CMA'S RESPONSE:

- The CMA welcomes the Furman Report's recommendations in relation to the new digital markets unit and associated regulatory functions, including the code of conduct, personal data mobility, systems with open standards and data openness.
- In particular, the CMA notes that enforcement action is no longer enough to address the wider concerns in online markets, and that ex-ante regulation in some form is likely to be required, complementing existing approaches. It points to the [Groceries Supply Code of Practice](#) and [Open Banking](#) as examples.

2. Merger assessment in digital markets needs "a reset". The CMA should take more frequent and firmer action to challenge mergers that could be detrimental to consumer welfare through reducing future levels of innovation and competition, supported by changes to legislation where necessary. In particular:

- the CMA should further prioritise scrutiny of mergers in digital markets and closely consider harm to innovation and impacts on potential competition in its case selection and in its assessment of such cases;
- digital companies that have been designated with a strategic market status should be required to make the CMA aware of all intended acquisitions;
- the CMA's Merger Assessment Guidelines should be updated to reflect the features and dynamics of modern digital markets, to improve effectiveness and address under-enforcement in the sector; and
- changes should be made to legislation to allow the CMA to use a 'balance of harms' approach which takes into account the scale

as well as the likelihood of harm in merger cases involving potential competition and harm to innovation.

CMA'S RESPONSE:

- The CMA agrees that there are challenges in considering mergers in digital markets. For example, that some traditional forms of substantive analysis, focused on price effects, may fail to capture other metrics of competition effectively, including quality and innovation (in particular where services are 'free').
- However, the CMA does not believe that addressing these challenges requires fundamental changes to the existing legislative regime at this stage – the current regime is "fit for purpose" (including in capturing a range of theories of harm in fast-moving and dynamic markets based on recent inquiries in this sector).
- But the CMA does agree that there is likely to be benefit in a review of the Merger Assessment Guidelines (following extensive consultation) to better reflect its current thinking and practice in relation to digital markets.
- There are practical challenges in applying a 'balance of harms' test in a transparent and robust way without unintended consequences, and this would require a significant shift in merger policy.

3. The CMA's enforcement tools against anti-competitive conduct should be updated and effectively used, to help them play their important role in protecting and promoting competition in the digital economy. In particular:

- the CMA should perform a retrospective evaluation of selected cases not brought and decisions not taken, where infringements were suspected or complaints received, to assess how markets have subsequently evolved and what impact this has had on consumer welfare;
- the CMA's processes should be streamlined to facilitate greater and quicker use of interim measures to protect rivals against significant harm;

- the review applied by the Competition Appeal Tribunal to antitrust cases, including interim measures, should be changed to more limited standards and grounds;
- if appeal standards are changed the government should introduce more independent CMA decision-making structures for antitrust enforcement cases;
- the government should ensure those authorities responsible for enforcing competition and consumer law have sufficient and proportionate information gathering powers to enable them to carry out their functions in the digital economy; and
- the CMA should continue to prioritise consumer enforcement work in digital markets, and alert government to any areas where the law is insufficiently robust.

CMA'S RESPONSE:

- The CMA broadly welcomes the Furman Report's recommendations in relation to the CMA's enforcement tools, noting that many of them align with those set out in the CMA Chairman's letter to the Secretary of State for BEIS of [21 February 2019](#), in particular: streamlining the processes for it to use interim orders (for example, through the introduction of a new overriding statutory duty to protect the interests of consumers, and possible reforms to access to file requirements) changing the standard of appeal for antitrust cases and the time those cases take; prioritising consumer enforcement work in digital markets.
- Regarding changes to CMA decision-making structures, the CMA suggests that its existing decision-making process, with strong checks-and-balances including the "Case Decision Group" system, has its merits and any change would need careful consideration.

4. The government, CMA and the Centre for Data Ethics and Innovation should continue to monitor how use of machine learning algorithms and artificial intelligence evolves to ensure it does not lead to anti-competitive activity or consumer detriment, in particular to vulnerable consumers.

CMA'S RESPONSE:

- This is an area the CMA is already investing heavily in, but the CMA believes that it needs strengthened information gathering powers to enable it to deliver on this recommendation.
- It references in this regard the proposals made in its [21 February letter](#), in particular the proposed introduction of a new general power to require businesses to provide information to the CMA, outside the context of a "formal" investigation. The CMA considers that this would enable it better to monitor, for example, growth in the use and sophistication of algorithms.

5. The CMA should conduct a market study into the digital advertising market

encompassing the entire value chain, using its investigatory powers to examine whether competition is working effectively and whether consumer harms are arising.

CMA'S RESPONSE:

- The CMA is aware of the concerns regarding this market and is actively considering further work in this area, contingent on the outcome of EU Exit negotiations and any resulting resource constraints.

6. Government should engage internationally on the recommendations it chooses to adopt from this review,

encouraging closer cross-border co-operation between competition authorities in sharing best practice and developing a common approach to issues across international digital markets. In particular:

- the government should promote the UK's existing competition policy tools, including its market studies and investigation powers, as flexible tools that other countries may benefit from adopting;
- the UK should use its voice internationally to prevent patent rights being extended into parts of the digital economy where they are not currently available;
- the government should support closer co-operation between national competition authorities in the monitoring of potential anti-competitive practices arising from new

technologies and in developing remedies to cross-border digital mergers; and

- to ensure platforms and businesses have a simple landscape in which to operate, government should encourage countries to consider using pro-competition tools in digital markets. As part of this work, government should work with industry to explore options for setting and managing common data standards.

CMA'S RESPONSE:

- The CMA notes that the inherently global nature of digital markets means that it is increasingly important to consider issues at an international level and to have effective frameworks for cooperation in place to facilitate this. In this regard the CMA intends to play a leading role on the international stage.

Fender fined for concealing documents during raid

UK - ANTITRUST – ANTICOMPETITIVE AGREEMENTS, PROCEDURE

On 20 March 2019, the CMA imposed a penalty of £25,000 on Fender Musical Instruments Europe Limited ("Fender") for failing, without reasonable excuse, to comply with a requirement to produce relevant documents during an unannounced inspection, relating to an investigation into the suspected breach of Chapter I of the Competition Act 1998 in the musical instruments and music-making equipment sector. The details are set out in the CMA's penalty notice, published on 26 March 2019 ("Penalty Notice").

WHAT YOU NEED TO KNOW – PRACTICAL TAKEAWAYS

- This decision demonstrates the CMA's willingness to impose penalties for failing to comply with the procedural aspects of its enforcement, and emphasises the importance of ensuring compliance throughout organisations with all aspects of competition law at all steps of an investigation.
- Even in today's world of digitised communications, those subject to a raid must recognise that hard copy files, papers and notebooks might be relevant, including personal notebooks, and therefore need to be handed over.
- Because the failures of employees and

officers are attributable to the company, employers should ensure that their staff are fully aware of the obligations to cooperate imposed on them by competition law.

- The CMA did not take into account Fender's recent steps to improve compliance in coming to an alternative conclusion that no deterrence was required. See our [previous article](#) for how different jurisdictions approach compliance programmes when determining the level of any fine.

FURTHER DETAILS

On 17 April 2018, the CMA launched an investigation into Fender and other undertakings, and carried out an unannounced inspection at Fender's premises between 17 and 19 April 2018 (see [here](#) for the CMA's case page). The [Penalty Notice](#) states that the investigating officer served a written notice on Fender setting out the documents that were required to be produced, and reminded a senior officer within Fender that this included "any hard copy documents including notebooks belonging to Fender Europe staff".

According to the Penalty Notice, the Fender senior officer provided one notebook to the CMA, but told the investigating officer that previous notebooks "*only contained Human Resources notes etc.*", and had been disposed of. However, on 11 May 2018, Fender's advisers notified the CMA that the senior officer

in fact had 10 other notebooks that had not been provided to the CMA.

The CMA therefore found that Fender had, without reasonable excuse, failed to comply with the requirement to produce relevant documents. The CMA did not accept Fender's submissions that the senior officer was a "rogue employee", and the Penalty Notice states that *"employees and officers form part of the same undertaking as their corporate employer and therefore an employee's actions are attributable to the undertaking"*.

The CMA considers that the penalty was appropriate given the breach was *"flagrant and was committed intentionally"*, with the Penalty Notice stating that the conduct *"implies that [the officer] was aware that the documents were relevant to the CMA's investigation (as indeed they were) and potentially probative of an infringement"*.

In setting the level of the penalty, the CMA also took into account the potential for significant harm to the CMA's investigation and the involvement of a senior officer. However, the CMA considered that the maximum possible penalty level of £30,000 was not appropriate because Fender had taken steps to remedy the breach (i.e. by investigating the issue and

providing the notebooks to the CMA three weeks after the inspection) and the breach had limited adverse effects on the investigation.

The CMA also considered that this penalty was necessary to achieve deterrence, and did not take into account Fender's recent steps to improve compliance in coming to an alternative conclusion that no deterrence was required.

CONCLUDING REMARKS

This decision demonstrates the CMA's willingness to impose penalties for failing to comply with the procedural aspects of its enforcement, and emphasises the importance of ensuring compliance throughout organisations with all aspects of competition law at all steps of an investigation.

In addition, it is noted that the CMA's website emphasises that *"the competition law investigation is ongoing and no assumption should be made that Fender Europe has been involved in anti-competitive behaviour"*. However, in the context of an ongoing investigation, companies should seek to avoid both the procedural penalty, and the associated publication of related details.

Intellectual Property loses competition law exemption and small businesses win right to apply for no adverse cost orders in competition litigation

AUSTRALIA - ANTITRUST – ANTICOMPETITIVE AGREEMENTS, ANTI-TRUST – CARTELS, PRIVATE DAMAGES ACTIONS

WHAT YOU NEED TO KNOW – PRACTICAL TAKEAWAYS

- Parliament has removed the exemption in the Competition and Consumer Act 2010 (Cth) (CCA) for certain dealings with IP rights. These dealings will now breach the competition prohibitions if they involve cartel conduct or have the purpose or effect of substantially lessening competition.
- The repeal takes effect six months from the date that the Bill receives Royal Assent, but

will operate retrospectively and apply to arrangements entered into before that date.

- Parliament has also created a new mechanism for small businesses to seek orders, in applications for damages for breach of the CCA, that they are not liable for costs of the other party if their application is unsuccessful.

WHAT YOU NEED TO DO

- If you are a party to a dealing that was exempt from competition law (whether as grantor or grantee of the IP right), you should review the arrangement in the next 6 months to ensure that it complies with the prohibitions in Part IV of the CCA.
- Be aware that small business may have a greater appetite for competition litigation now that it can apply for a no adverse costs order if it is unsuccessful.

PARLIAMENT PASSES BILL REPEALING IP EXCEPTION TO COMPETITION LAWS

On 18 February 2019, Parliament passed the *Treasury Laws Amendment (2018 Measures No. 5) Bill 2018* (the **Bill**) which, alongside changes to income tax laws, also repeals section 51(3) of the *Competition & Consumer Act 2010* (**CCA**).

This section exempts some licensing and assignments of IP rights from certain prohibitions of anti-competitive conduct in the CCA.

We have briefly summarised the repeal and its effect below.

Section 51(3)

Section 51(3) of the CCA provides an exemption for certain dealings with IP rights. In particular, it applies to:

- conditions in licenses and assignments of patents, registered designs, copyright or protected circuit layouts, to the extent those conditions relate to the subject matter of the patent/registered design etc;
- provisions included in contracts, arrangements or understandings that authorise the use of certification trade marks (in accordance with part XI of the Trade Marks Act 1995); and
- provisions included in contracts, arrangements or understandings between registered proprietors and registered users of other (non-certification) trade marks that relate to the kinds, qualities or standards of goods bearing the trade mark.

The effect of section 51(3) is that these dealings do not contravene division 1 (cartel provisions), and sections 45 (anti-competitive contracts, arrangements, understandings and concerted practices) and 47 (exclusive dealing) of Part IV of the CCA. However, section 51(3) does not provide protection from breaches of sections 46 (misuse of market power) and 48 (resale price maintenance).

RATIONALE FOR REPEAL OF THE EXEMPTION

Section 51(3) was based on an understanding that there is a conflict between the use of IP rights, which by their nature may confer monopoly rights, and competition laws.

However, both the *Competition Policy Review* (the Harper Review, completed in March 2015) and the *Intellectual Property Arrangements Inquiry Report* (Productivity Commission, completed in December 2016) considered that this rationale was no longer correct. Further, the Productivity Commission considered that the repeal of section 51(3) of the CCA would only affect a small number of arrangements, and that the benefits of repealing section 51(3) are likely to increase going forward as licensing and cross licensing arrangements increase (particularly in pharmaceutical and communications markets).

The Explanatory Memorandum to the Bill also observed that other major jurisdictions, including the US, Canada and the EU, do not have an equivalent exemption to section 51(3).

COMMENCEMENT AND EFFECT OF THE REPEAL

The repeal of section 51(3) means that the dealings with IP rights set out above will breach sections 45 and/or 47 of the CCA if they have the purpose or likely effect of "substantially lessening competition".

The Explanatory Memorandum commented that the risk of substantially lessening competition may arise where there are few substitutes for a particular IP right, or where the concentration of IP rights creates market power.

Importantly, it also exposes these dealings to civil and criminal cartel regulation. In broad terms, this issue will be relevant where the dealings involve an element of coordination about price, production, output or supply, boycotts or bid-rigging between actual or potential competitors.

The repeal of section 51(3) will take effect six months from the day that the Bill receives Royal Assent (Royal Assent is usually 7-10 days after the Bill passes Parliament). We expect the repeal will take effect no later than August 2019.

The repeal applies to licences, assignments and contracts, arrangements or understandings entered into before and after the commencement of the Bill. In other words, once the six month period after Royal Assent passes, even arrangements entered into before that time are potentially subject to the prohibitions on anti-competitive conduct in the CCA.

ENSURING COMPLIANCE WITH THE NEW LAW

As the repeal operates retrospectively, it is essential that participants in the types of IP arrangements listed above review their compliance with the CCA in the six months before the repeal takes effect.

This is especially true of any arrangements that may constitute a cartel provision: an agreement between competitors to price fix, restrict output, allocate customers, suppliers or territories, or bid-rig. Cartel conduct can result in both civil and criminal penalties, raising the stakes for failing to identify a cartel provision in an IP arrangement.

Both licensors and licensees should consider the arrangements that they are a party to. This is because, although the exclusive dealing provision in section 47 generally applies to a person imposing a condition (ie the licensor), the cartel provisions and section 45 applies generally to making or giving effect to contracts, arrangements or understandings. Therefore, even licensees in arrangements that substantially lessen competition in a market may breach section 45 of the CCA.

In reviewing their arrangements, parties should consider whether the conditions they have imposed have the purpose, or effect or likely effect, of substantially lessening competition in an Australian market.

Parties should also be aware that the mere fact that a dealing with a patent or trade mark is authorised by patent or trade mark legislation does not mean that the dealing will not breach the CCA (see section 51(1)(a)).

NEW PROTECTIONS AND ASSISTANCE FOR SMALL BUSINESSES AND FAMILY ENTERPRISES

In addition to the IP exception repeal, the Bill also adds additional protections and assistance for small businesses challenging breaches of Part IV of the CCA by other market participants. The rationale is that it will assist financially weaker businesses in challenging conduct by stronger rivals.

The new subsections 82(3)-(7) allow an applicant who is seeking compensation for a breach of Part IV to apply during the proceedings for a "no adverse costs order". If granted, this order means that the applicant will not be liable for the costs of the respondent to the proceedings, even if the applicant does not succeed in their case.

A court may only make this order if it is satisfied of the following:

- the proceedings raise a reasonable issue for trial;
- the issue is significant not only for the applicant, but may also be significant for other persons or groups of persons; and
- the disparity between the financial positions of the applicant and any respondents is such that the possibility of an adverse costs order would deter the applicant from pursuing the proceedings.

The court may only determine the above three matters on the basis of evidence filed in the proceedings.

Small businesses and family enterprises may also request assistance from the Small Business and Family Enterprise Ombudsman (the **Ombudsman**) when applying for a no adverse costs order.

A small business is defined as an business with fewer than 100 employees, or with revenue of \$5,000,000 or less for the previous financial year (or current financial year, if the business did not trade in the previous financial year). A family enterprise is a small business operated as a family enterprise (see *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth) s 6). In the context of no adverse cost orders, it is not clear what the inclusion of family enterprises adds, given that all family enterprises will be small businesses under this definition.

The Ombudsman may assist these businesses by advising the business on arguments and evidence that might be used in an application for a no adverse costs order, and by preparing arguments that may be made in such an application.

IMPLICATIONS FOR BUSINESSES

The provision enabling no adverse cost orders applies to any actions for compensation commenced on or after 1 July 2019. The wording suggests that the conduct that is challenged in proceedings may occur before 1 July 2019, so long as the proceedings themselves commence on or after that date.

The intent of the Bill is clearly to encourage small businesses and family enterprises to more often seek compensation for losses suffered due to the anti-competitive conduct of larger businesses.

The terms of the no adverse costs order provision are broad and do not rely upon standards common in other legal tests (eg the test is not "the public interest", but significance "for other persons or groups of persons"; and a disparity does not need to be "substantial", a word used elsewhere in the CCA, but a disparity such that it would deter the applicant).

Given these factors, it is difficult to predict the exact effect the new protections and assistance for small businesses and family enterprises will have on the number of enforcement actions against larger businesses.

Consequently, all businesses should assess their conduct towards weaker suppliers and acquirers that they engage with, as even conduct ultimately proven not to breach Part IV of the CCA may still result in lengthy, complex legal proceedings and the incurring of irrecoverable costs.



Don't merge before completion: Federal Court imposes \$1.05 M penalty in first "gun jumping" case

AUSTRALIA - MERGER CONTROL, PROCEDURE

WHAT YOU NEED TO KNOW – PRACTICAL TAKEAWAYS

- Gun jumping is likely to be an increasing focus area for the ACCC. This decision serves as a strong reminder that merger parties must remain independent, even after they've signed a sale agreement, until the sale is actually completed.
- Merger parties that prematurely coordinate or integrate their business before completion of the sale could be captured by the cartel prohibitions or concerted practices provision under Australia's competition laws. Significant civil and criminal penalties may apply.

WHAT YOU NEED TO DO

Merger parties should seek advice from competition counsel where it is proposed that, prior to completion:

- either party be restricted in any way from making independent decisions about how it will run its business;
- a merger implementation team comprised of key operational staff members from both parties be established to consider joint strategies; or
- the parties otherwise coordinate their conduct, make collective decisions with respect to their competitive activities or exchange confidential or competitively sensitive information.

It may be appropriate in some circumstances to implement a competition governance protocol to mitigate risk of the parties engaging in cartel conduct or concerted practices prior to completion of the merger.

WHAT'S THE CONDUCT OF CONCERN?

On 13 February 2019, the Federal Court imposed a \$1.05 million penalty on Cryosite Ltd (**Cryosite**) after it admitted to "gun jumping" conduct in respect of a proposed sale to Cell Care Australia Pty Ltd (**Cell Care**) of the assets of its cord blood and tissue business.

The Federal Court found that Cryosite had engaged in cartel conduct by, first, signing an asset sale agreement that contained an obligation to refer all customer enquiries to Cell Care before the sale was completed and, secondly, giving effect to that provision before the sale was completed.

Gun jumping occurs when merger parties are competitors and coordinate conduct before the actual completion of the transaction, therefore engaging in cartel conduct that is strictly prohibited under the Competition and Consumer Act 2010 (Cth) (**CCA**).

This is the ACCC's first action against gun jumping conduct, and its success suggests that further enforcement of the cartel prohibitions in relation to merger and acquisition transactions is likely to follow.

THE RELEVANT FACTS

Between March 2016 and June 2017, the two sale parties, Cryosite and Cell Care, were the only private suppliers of the collection, processing, storage and release of umbilical cord blood and tissue containing stem cells (**CBT banking services**).

On 23 June 2017, Cryosite agreed to sell Cell Care the assets used in its CBT banking services business (**Proposed Sale**).

The sale agreement included a term stipulating that, between 23 June 2017 and the completion of the Proposed Sale, Cryosite would refer all customer enquiries for its CBT banking services to Cell Care (**Cryosite Restraint**).

From 23 June to August 2017, Cryosite gave effect to the Cryosite Restraint by ending its supply of CBT banking services to new customers, and establishing a process to refer potential customers to Cell Care (including reporting to Cell Care that it had referred customers).

The merger parties attempted to bypass the ACCC merger clearance process because they considered there was a great risk that the ACCC would try to stop the Proposed Sale. Nevertheless, the ACCC learned about the Proposed Sale and raised concerns about the Cryosite Restraint in August 2017. The sale parties then stopped giving effect to that term. However, in October 2017, Cryosite closed its business of supplying CBT banking services to new customers.

The ACCC announced that it would not make a merger clearance decision on the Proposed Sale in December 2017, and instead continued to investigate the Cryosite Restraint. The sale parties abandoned the Proposed Sale in January 2018.

Relevantly, even without the Proposed Sale occurring, Cell Care became the only private supplier of CBT banking services in Australia. Cryosite only stores cord blood and tissue for pre-existing customers.

In July 2018, the ACCC commenced proceedings against Cryosite for cartel conduct in relation to the Proposed Sale.

Cryosite admitted that, by agreeing to the Cryosite Restraint and implementing it, it had breached the cartel prohibitions. The ACCC and Cryosite agreed on proposed penalties to be submitted to the Federal Court. These were a penalty of \$600,000 for making the sale agreement, and a penalty of \$450,000 for giving effect to the Cryosite Restraint.

AGGRAVATING AND MITIGATING PENALTY FACTORS

Justice Beach had regard to the following aggravating factors in relation to the imposition of the penalties:

- Cryosite established a process to refer customers to Cell Care, and had stopped the supply of CBT banking services to new customers;
- while Cryosite engaged in the conduct “openly in the course of its business”, the

conduct was not readily detectable by third parties and may not have been detected had the ACCC not inquired into the Proposed Sale;

- senior representatives of Cryosite were involved in the contravention;
- Cryosite received a benefit of \$500,000 from the Proposed Sale, but had the potential to receive further annual payments totalling at least \$2.5 million if the Proposed Sale occurred; and
- the conduct strengthened Cell Care’s market position and “rendered more remote the possibility that Cryosite might recommence supplying CBT banking services to new customers”.

Ultimately, Justice Beach weighed the above aggravating factors with the following mitigating factors and concluded the penalty agreed between Cryosite and the ACCC was of sufficient specific deterrent effect:

- the cartel conduct occurred from June to August 2017 only;
- Cryosite had low profits and a poor net asset position;
- Cryosite may not have intentionally contravened the CCA – in fact, it had retained lawyers to assist in the drafting and negotiation of the contract, and they did not raise any cartel concerns; and
- Cryosite cooperated with the ACCC after the ACCC made inquiries in August 2017.

In light of Cryosite’s size and financial position, and the fact that the benefit it obtained from the cartel conduct was \$500,000, Justice Beach held that a penalty of \$1.05 million (only about 10% of the applicable maximum of \$10 million) was appropriate.

The fact that the Court expressed a concern as to whether the penalty was sufficient to satisfy the objective of general deterrence should serve as a warning sign that the penalty will likely be substantially larger for similar conduct by larger companies extending over a longer period of time and generating greater benefits.

GREATER FOCUS ON GUN JUMPING AND CARTEL RISKS IN THE M&A CONTEXT

In the context of a corporate transaction, Cryosite’s conduct may seem to be motivated

by 'good' intentions – Cryosite's purpose was to sell its CBT banking services business to Cell Care, so it took steps to promote Cell Care's eventual ownership of the business.

The decision of the Federal Court, however, emphasises the importance of sale parties remaining independent and competing with each other unless and until completion actually occurs.

In instituting proceedings against Cryosite in July 2018, the ACCC Chair Rod Sims stated that "gun jumping undermines the effective functioning of the ACCC and the merger process". The Federal Court's decision reinforces the key message that cartel conduct involving coordination of competing businesses prior to a sale/merger may permanently alter the structure of a market.

Relevantly, Justice Beach observed the penalty "needs to be sufficiently high to deter businesses who may otherwise be able to circumvent the proper application of s 50 and its associated divestiture remedy or at the least render less effective or nugatory such a remedy".

Justice Beach stated that Australian courts do not have power to order divestiture of shares or assets to remedy structural effects resulting from cartel conduct, if that conduct does not in fact result in an acquisition of shares or assets. This contrasts with comparable jurisdictions (including the United States, Canada and United Kingdom), in which courts are empowered to order divestiture in response to market participants engaging in cartel conduct or abusing a dominant position.

The lack of such a power in Australia emphasises that the ACCC is likely to be particularly sensitive to potentially anti-competitive conduct that occurs before a sale or acquisition, particularly where permanent structural changes will result.

Additionally, the changes to the competition laws in 2017, following the Harper Review, may further empower the ACCC to take action against cartel conduct between merger parties. These changes implemented the prohibition on "concerted practices" between parties in competition with one another. While the ACCC has yet to institute enforcement proceedings in respect of an alleged concerted practice, a merger involving the sharing of competitively sensitive information such as current or future

pricing strategies may give rise to an anti-competitive concerted practice in breach of the CCA.

Finally, the size of the penalty in Cryosite is no comfort to would-be gun jumpers. The relatively small amount primarily resulted from Cryosite's size and poor financial position, and the fact that the Cryosite Restraint had a relatively limited operation (only 12 customer enquiries were referred to Cell Care). Cartel penalties in other cases (including \$46 million in ACCC v Yazaki and \$15 million in ACCC v Air New Zealand) better indicate the scale of penalties awaiting large market participants engaging in cartel conduct affecting large numbers of customers.

MITIGATING COMPETITION RISK IN A MERGER OR ACQUISITION

With the prospect of further ACCC action against gun jumping, and the likelihood of significantly higher penalties, merger parties should take steps to ensure that any current and future transactions are conducted in a manner consistent with the CCA.

Either party to a proposed merger may be liable to ACCC action against gun jumping. In this instance, Cryosite was the target company and Cell Care obtained the benefit of customer referrals from Cryosite. Nevertheless, Cryosite was the subject of the ACCC action because it had made and given effect to a cartel provision.

If a provision in a sale agreement is likely to have the effect of restraining or altering either party's conduct in the market before completion of the deal, it should be reviewed for potential cartel risks before the agreement is executed. As part of a merger clearance process, the ACCC is likely to be interested in restraint of trade or market sharing provisions in the sale agreement, and accordingly any such provisions should be reviewed for compliance with the CCA before being implemented.

Additionally, merger parties should seek competition law advice regarding any proposed exchange of confidential or competitively sensitive information, or discussion of joint strategies or business plans. It may be appropriate to implement a competition governance protocol to mitigate risk of cartel conduct or anti-competitive concerted practices.

No deal, transitional arrangements and a potential future deal: Brexit's practical impact on competition law

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 withdrawal agreement agreed between the UK government and European Commission ("Commission") on 14 November 2018 ("Withdrawal Agreement"), or some other similar transitional agreement, is ultimately ratified. The position changes further if one considers the potential implications of the backstop period set out in the Withdrawal Agreement, or the future longer term UK-EU relationship and what that might look like.

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

- **No deal scenario:** *the outcome where the UK leaves the EU without any transitional arrangements formally agreed and in place.*
- **A Withdrawal Agreement scenario:** *a scenario where the Withdrawal Agreement, or some other similar transitional agreement, is ratified. Whilst it remains unclear at the time of writing whether the Withdrawal Agreement will ultimately be ratified, it is anticipated that the competition law provisions in any similar transitional agreement would remain largely the same (on the basis that the competition provisions of the Withdrawal Agreement were generally non-contentious). For the purposes of this note, this scenario is referred to as the "Withdrawal Agreement" scenario and covers the transition period during which any such agreement applies.*
- **Backstop:** *The potential implications of the backstop period set out in the November 2018 Withdrawal Agreement.*
- **Future relationships:** *The impact of the likely future longer term UK-EU relationship, covering a few of the possibilities.*

WHAT YOU NEED TO KNOW

- *At the time of writing, the day on which the UK leaves the EU ("Brexit Day") has been extended from 29 March 2019 to 23:00 UK time on 31 October 2019, with the option of leaving the EU earlier if the Withdrawal Agreement has been ratified before then (i.e. a flexible extension). This follows the UK parliament's rejection of the Withdrawal Agreement on three occasions and the European Council's decisions to twice extend the two-year Article 50 process, once on [22 March 2019](#) and then on [10 April 2019](#).*
- *But a no deal outcome is still a risk. At the time of writing, the flexible extension has been agreed in order to help avoid a no deal outcome. However, it is not guaranteed that the Withdrawal Agreement, or any other form of transition arrangement, will be ratified before the end of this flexible extension. Moreover, if the Withdrawal Agreement has not been ratified by 22 May 2019, the UK must hold European Parliament elections on 23-26 May 2019 or leave the EU at 23:00 BST on 31 May 2019 without a deal. The possibility of a no deal scenario therefore remains a live risk, both before and after the end of the flexible extension. The European Council has said it will "review progress at its meeting in June 2019".*
- *In summary, at the time of writing, the UK will leave the EU on one of the following dates: (a) 23:00 UK time on 31 May 2019 if the UK has not held elections to the European Parliament and has not ratified the withdrawal agreement by 22 May 2019; (b) 23:00 UK time on the last day of the month in which the ratification procedures for the withdrawal*

agreement are completed; or (c) 23:00 UK time on 31 October 2019 with no deal if neither of the above apply, and there is no third extension, and the UK has not revoked its Article 50 notice.

- 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"). In 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 immediate 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, or are determining whether new transaction is likely to be caught by the EU or UK merger control rules, or both.
- 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.
- The impact on competition law of the future longer term UK-EU relationship will largely depend on the shape of that relationship. It is expected that the two systems are likely to remain relatively closely aligned.
- 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.

1. Background

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

- On [19 April 2018](#) the House of Lords EU Internal Market Sub-Committee published a report on the impact of Brexit on UK competition and State aid law.
- On [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 30 October 2018, the CMA published three Brexit related updates on the role of the CMA in a no deal scenario, shedding some light on what UK competition law might look like should no agreement be reached with the EU by Brexit Day. These updates cover [antitrust](#) ("Antitrust Update"), [merger control](#) ("Merger Control Update"), together with a [general overview](#). 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](#)"). At the time of writing, the Withdrawal Agreement is still subject to ratification by the UK Parliament (having been rejected three times already), as well as other European institutions and Member States as part of the Article 50 process. Even if ratified, it will need to be implemented 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 was agreed at negotiators' level and agreed in principle at political level, and which received the endorsement of the European Council on 25 November.
- On 21 January 2019, a draft version of the [State Aid \(EU Exit\) Regulations 2019](#) (the "Draft State Aid SI") was laid before Parliament.
- On 24 January 2019, the [Competition \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) (SI 2019/93) (the "Competition SI"), a draft version of which was laid before Parliament on 29 October 2018, were published, having been made on 22 January 2019. On the same day, the final version of the accompanying [explanatory memorandum](#) was also published.
- On 28 January 2019, the CMA opened a public consultation on the [draft guidance on the effects of the UK's 'no deal' exit from the European Union on the functions of the CMA](#). The public consultation closed on 25 February 2019.
- On 4 March 2019, the CMA opened a public consultation on the [draft procedural guidance on state aid notifications and reporting](#). This public consultation closed on 18 March 2019. Also on 4 March, the CMA published guidance on the [CMA's state aid role if there's no Brexit deal](#) (the "Guidance on the CMA's State Aid Role").
- On 11 March 2019, the Commission and UK government published a [joint statement](#) supplementing the Political Declaration on the Future Relationship of 22 November 2018. The joint statement covered the parties' intention to agree and bring into force the future relationship agreement as swiftly as possible (and by the end of the transition period), while working towards avoiding the application of the Irish backstop provisions in the Withdrawal Agreement.
- On 18 March 2019, the CMA published its final [Guidance on the functions of the CMA after a 'no deal' exit from the EU](#) ("CMA Mergers and Antitrust Guidance").
- On 25 March 2019, the Commission published a [Notice to Stakeholders on the Withdrawal of the United Kingdom and EU Competition Law](#) ("Commission Notice") as part of its series of [Brexit Preparedness Notices](#). The notice seeks to provide informal guidance on the Commission's view of the main implications that it foresees of a no deal scenario for the application of EU competition law.

Based on the above background and the guidance documents published to date, set out below is a summary of the key practical changes to the State aid, merger control and antitrust rules in the UK after Brexit Day in a no deal scenario, in a Withdrawal Agreement scenario (as it stands at the time of writing), as well as what competition law might look like as part of the proposed future relationship arrangements.

2. State aid

Changes to the legal framework

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. State aid rules will continue to apply in both no deal and Withdrawal Agreement scenarios, except in slightly different forms. Pursuant to the European Union (Withdrawal) Act 2018 and the Draft State Aid SI, the EU State aid rules will be transposed into domestic law and, in the event of no deal, the CMA is given the function of being the UK State aid enforcement authority, in place of the Commission, from Brexit Day. The substance of the EU State aid framework is not materially altered under the Draft State Aid SI.

Transposing EU State aid rules into UK domestic legislation

- **No deal:** Pursuant to the European Union (Withdrawal) Act 2018 and the Draft State Aid SI, the EU State aid rules will be transposed into domestic law on Brexit Day and the CMA will be given the function of being the UK State aid enforcement authority, in place of the Commission. The substance of the EU State aid framework is not materially altered under the Draft State Aid SI and would apply to all sectors and include the 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 any form of transition agreement will ultimately be ratified. Consistent with UK government policy, the CMA, together with BEIS, has been working to ensure that the new regime was ready for the original 29 March 2019 Brexit date in case there was a no deal outcome on that day.

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 EU State aid rules will continue to apply until the end of the transition period. The Commission will continue to have jurisdiction over State aid issues in the UK, including receiving and assessing notifications from UK aid grantors, 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 and the Guidance on the CMA's State Aid Role provide 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 has laid the Draft State Aid SI before Parliament to incorporate the EU State aid rules into UK law, subject to certain technical modifications to ensure that the regime operates effectively in a domestic context. These include adopting the existing block exemptions covering all sectors of the economy and giving effect to existing Commission approvals. 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 *The longer term: after the transition period/ future relationship* 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.

What will happen to Commission approvals issued before Brexit Day?

The Guidance on the CMA's State Aid Role confirms that State aid approved by the Commission in advance of Brexit Day will not need to be approved again by the CMA. This also applies to aid given prior to Brexit Day under a block exemption. However, the CMA will have powers to act in cases where aid granted prior to Brexit Day that has been approved or was exempted from approval is misused.

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

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

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 currently consulting on a draft procedural guidance on State aid notifications and reporting which, in particular, provides general information on the processes it intends to use when examining and investigating notified aid in the event of a no deal. The consultation closed on 18 March 2019.

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

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

The ultimate adoption of a UK State aid regime mirroring that of the EU'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 *The longer term: after the transition period/ future relationship* below for further insights regarding the post-transition period). But the guidance documents published by the CMA to date should at least give UK businesses expecting to receive State aid 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.

3. Merger control

Changes to the legal framework

The following proposed approach to the merger control rules will be applied in the event of a no deal or Withdrawal Agreement scenario:

No substantial changes to UK merger 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 (see below), the UK government does not propose to make any immediate changes to UK merger control in the event of a no deal outcome. The only changes are those necessary to implement Brexit and to keep the regime running largely as it is (e.g. removing certain references in UK merger guidance to applications for mergers to be referred to or from the Commission under the EU Merger Regulation ("EUMR")). However, the CMA has made a number of public statements regarding possible changes to the UK merger control regime which are not linked to Brexit.
- **Withdrawal Agreement:** In a Withdrawal Agreement scenario, 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 backstop arrangement under the Withdrawal Agreement of November 2018* 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 issued before Brexit Day?

- **No deal and Withdrawal Agreement:** If the Commission has issued a decision on or before Brexit Day 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. Where a decision is annulled, the CMA could assert jurisdiction from the date of the European Court decision if the UK jurisdictional requirements are met.

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

- **No deal:** The CMA Mergers and Antitrust Guidance states that if the Commission has not issued a decision on or before Brexit Day, then the CMA is no longer excluded by the EUMR 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. However, the Commission's view on when it believes it has jurisdiction, may not always align with the CMA Mergers and Antitrust Guidance (see *What if the parties' UK turnover determines whether the EUMR is triggered? The Commission's view on jurisdiction*).

Where merging parties anticipate that such a scenario is possible, the CMA 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 has suggested to 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.

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

- **Withdrawal Agreement:** As explained above, post-Brexit, the Commission will continue to have jurisdiction over 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 if the parties' UK turnover determines whether the EUMR is triggered? The Commission's view on jurisdiction

- **No deal:** The Commission's rules provide that the relevant date for establishing the Commission's jurisdiction over a merger is the date of the conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest or the date of the first merger notification, whichever date is earlier. The Commission Notice states that these rules will not be altered by a no deal Brexit. This means that:
 - if the relevant date for establishing jurisdiction (e.g. date of signing a binding agreement) takes place after Brexit, UK turnover is not relevant for determining if the EUMR thresholds are met (because the UK would not be an EU member state at that time);
 - if the relevant date for establishing jurisdiction takes place before Brexit, UK turnover is relevant for determining if the EUMR thresholds are met.

It should be noted that the Commission's approach to determining jurisdiction differs from the CMA's approach as set out in the CMA Mergers and Antitrust Guidance. The Commission focuses on whether signing has taken place pre-Brexit, whereas the CMA considers whether a Commission decision has been issued pre-Brexit. This implies that it is possible for:

- the Commission to commence a merger review just before Brexit; and
- for the CMA to review the same transaction in parallel the day after Brexit if the Commission has not yet issued a decision.

In practice, we would expect the CMA and the Commission to adopt a pragmatic approach to allocate the case appropriately in order to provide greater certainty for the parties and to avoid duplication of unnecessary work.

- **Withdrawal Agreement:** As explained above, the Commission's jurisdiction remains unchanged during the transition period, and so UK turnover remains relevant to EUMR thresholds during this period.

Substantive assessment

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

Commission's information and search powers

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

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

- **No deal:** In instances where an Article 4(5) EUMR submission (i.e. a submission by the parties for a case to be referred to the Commission) has been made prior to Brexit and where a non-EUMR qualifying merger is capable of being reviewed in three Member States, one of which is the UK, the Commission will acquire jurisdiction if, prior to Brexit, 15 working days has elapsed without any competent Member State expressing its disagreement. The fact that a merger is capable of being reviewed in the UK will no longer be relevant for the application of Article 4(5) for submissions made after Brexit.

If the UK has requested an Article 22 EUMR referral (i.e. a submission by the UK/CMA for a case to be referred to the Commission), or joined a referral request by another Member State, the case will only be considered to be referred with respect to the UK if: the UK's submission was made prior to Brexit; and the Commission has decided before Brexit to examine the merger.

- **Withdrawal Agreement:** The usual referral mechanisms will continue to apply during the transition period.

What happens to cases referred to the Commission before Brexit Day?

- **No deal:** The CMA will gain jurisdiction to review the merger under the same terms as before Brexit Day if a referral is accepted by the Commission prior to Brexit Day. If a request for referral to the CMA is not accepted by the Commission before Brexit Day, then the Commission will retain jurisdiction to review the case. However, if the Commission has not reached a decision before Brexit Day, the CMA can assert jurisdiction over the merger if the UK jurisdictional requirements are met.
- **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.

Application of the referral process post Brexit Day

- **No deal:** Neither the Commission, the CMA, nor the merging parties will be able to make new referrals under Articles 4(4) and 9 EUMR (i.e. referrals from the Commission to the CMA), and Articles 4(5) and 22 EUMR (i.e. referrals from the CMA to the Commission) post Brexit Day.
- **Withdrawal Agreement:** The usual referral mechanisms will continue to apply during the transition period.

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.

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. In addition, the Commission, CMA and merging parties will no longer be able to request/make a reference under the EUMR between the Commission and the CMA.
- **Withdrawal Agreement:** Post-Brexit, and during the transition period, the EUMR 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.¹⁰ There is no indication in the guidance documents published by the CMA that the CMA will harmonise the UK merger timetable with the EU process, although (as explained above) the CMA is considering reforms separately to Brexit. 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.

Completed mergers

- **No deal:** The CMA has a four-month statutory deadline before it can call in a completed merger for review and refer it for a Phase 2 investigation. As the CMA will only obtain jurisdiction over mergers that would otherwise fall under the jurisdiction of the Commission after Brexit Day, the statutory four-month period will apply from Brexit Day, or from the point at which the CMA is considered to have been provided with notice of the material facts about the merger (whichever is later).

For mergers completed post-Brexit Day, the statutory four-month period will apply from the point at which the CMA is considered to have been provided with notice of material facts about the merger.

- **Withdrawal Agreement:** The rules relating to the four-month statutory deadline remain the same: subject to certain exceptions, the CMA can refer a merger situation for a Phase 2 inquiry at any time up to four months from the date of completion of the transaction, or from the date on which facts about the transaction became public (e.g. when it is announced, or when it receives significant press coverage in the national or trade press), whichever is the later.

4. Antitrust enforcement

Changes to the legal framework

The following proposed changes to the antitrust regime legal framework are expected to take place in the event of a "no deal" no deal or Withdrawal Agreement scenario.

¹⁰ (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 antitrust regime:

- **No deal:** It remains the case that, as with merger control, no substantive changes to the UK antitrust regime are to be made immediately following a no deal outcome, although (as explained above) the CMA is considering reforms separately to Brexit. This means that the UK will be treated the same as a third country, like the USA, in relation to antitrust law.
- **Withdrawal Agreement:** 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 *The backstop arrangement under the Withdrawal Agreement of November 2018*, 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 of the Treaty on the Functioning of the European Union ("TFEU") on anticompetitive agreements (including cartels) and Article 102 of the TFEU on abuse of dominance (but equivalent provisions will continue to apply under the Competition Act 1998). The CMA has stated that it will inform all affected parties if the scope of an investigation involving them is affected by this development. Similarly, the Competition SI repeals section 60 of the Competition Act 1998, which requires that UK competition law should be "*dealt with in a manner which is consistent with*" EU competition law, including in relation to cases already opened on or before Brexit Day. Instead, a new provision, section 60A, will apply to such cases which provides that UK competition regulators and UK courts:
 - will continue to be bound by an obligation to ensure there is "*no inconsistency*" with pre-Brexit EU competition case law when interpreting UK competition law; but
 - may depart from such pre-Brexit EU case law where it is considered "*appropriate in the light of specified circumstances*" (for example, differences in UK and EU law prior to Brexit, differences between EU and UK markets, developments in the form of economic activity, generally accepted principles of competition analysis, and developments in EU case law).

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 Day. In other words, it will apply to any CMA or concurrent regulator investigations or UK court cases which are "live" at the point of Brexit and in relation to pre-Brexit facts.

- **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 2018, 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, as set out in the Commission Notice, 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. As under a no deal scenario, all Commission decisions adopted under Articles 101 and 102 of the TFEU before Brexit Day will remain valid.

What will happen to Commission decisions issued before Brexit Day?

- **No deal and Withdrawal Agreement:** All Commission decisions adopted under Articles 101 and 102 of the TFEU before Brexit Day will remain valid, unless annulled in full or in part by the European Court after Brexit Day.

Block exemption regulations

- **No deal:** The EU Withdrawal Act will preserve seven EU block exemption regulations¹¹ 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 Commission guidance issued to accompany its block exemptions will also remain relevant to interpreting the block exemptions retained by the UK.

The CMA expects to consult on the 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:** 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 is likely to diverge from EU law.
- **Withdrawal Agreement:** Because the November 2018 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.

¹¹ 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.

- **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 has 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 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).
- **No deal:** Whilst prior to Brexit Day leniency applicants to the Commission can obtain a "no names" marker from the CMA pending confirmation from the Commission as to the availability of immunity from the Commission, this will no longer be possible post-Brexit Day. In addition, it will no longer be the case that the CMA can be expected to grant no action letters to the implicated employees and directors of an undertaking that has qualified for immunity by the Commission but has not also qualified for Type A immunity in the UK, for example, because another undertaking has already qualified for Type A leniency in the UK.

What happens to live cases under investigation by the Commission?

- **No deal:** The Competition SI prevents the CMA (and concurrent regulators) 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). If a Commission decision taken before Brexit Day is annulled in full or in part by the European Court after Brexit Day, the CMA may commence its own investigation into the same conduct.

The CMA's guidance documents also state 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 Brexit Day. The technical notice of 13 September 2018 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).

Where the CMA or concurrent regulators are conducting an ongoing investigation on Brexit Day which contains an EU element, they must drop the EU element and proceed on the basis of the Competition Act 1998 prohibitions only, but can continue to use evidence gathered before Brexit Day.

- **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.

Director disqualification orders

- **No deal:** The CMA and concurrent regulators will continue to be able to pursue director disqualification orders on grounds of a breach of Article 101 or 102 of the TFEU (in addition to Chapter I or II of the Competition Act 1998) before Brexit Day. However, post-Brexit Day, the CMA can only rely on breaches of Chapter I or II.

Impact on follow-on/stand-alone claims

- **No deal:** The CMA Mergers and Antitrust Guidance provides that decisions by the Commission reached before Brexit Day can still form the basis of follow-on damages claims, including cases that have not exhausted the appeals process. However, if an infringement decision under EU law is reached by the Commission after Brexit Day, even if it relates to pre-EU Exit facts which have effect in the UK, claimants will no longer be able to rely on that decision in UK courts as a binding finding of an infringement under the Competition Act 1998. Claimants will continue to be able to rely on infringement decisions of the CMA and concurrent regulators in pursuing follow-on damages claims in the UK.

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

The above implications on damages claims, however, is likely to be subject to the international application of English tort law.

- **Withdrawal Agreement:** As with most areas of competition law in the UK, the position will remain unchanged during the transition period.

Commission's information and search powers

- **No deal:** The Commission will no longer be able to carry out dawn raid inspections in the UK. However, the Commission will still be able to obtain issue formal requests for information to parties in the UK, as it currently can in relation to undertakings in third-party countries.
- **Withdrawal Agreement:** The Commission's pre-Brexit powers will continue during the transition period.

5. The longer term: after the transition period/ future relationship

The backstop arrangement under the Withdrawal Agreement of November 2018

If the draft Withdrawal Agreement of November 2018 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 of November 2018.

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 UK, 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 would be implemented (the "UK-EU Antitrust Prohibitions"). 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.
- **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, which was agreed at negotiators' level and agreed in principle at political level, was published on [22 November 2018](#) and received the endorsement of Member States at a special meeting of the European Council on 25 November 2018. The Political Declaration was supplemented, on 11 March 2019, by a [joint Commission/UK government statement](#) which covered the parties' intention to agree and bring into force the future relationship agreement as swiftly as possible (and by the end of the transition period), while working towards avoiding the backstop provisions in the Withdrawal Agreement. The Political 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 or a new form of section 60A which provides the UK with less freedom to part from EU precedent than the currently drafted section 60A would.
- 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.

Customs union

For some period of time just before the referendum result, and shortly afterwards, there was a flurry of speculation about whether the UK's future relationship with the EU may take the form of customs union membership (the "Turkish model") or EFTA and EEA membership (the "Norway model"), or follow some other model (e.g. Swiss, Canada, Ukraine). Since then, these models began to look increasingly less likely. However, recent political developments in the UK have meant that of these options, the Turkish model may be the most likely alternative to the Withdrawal Agreement, with numerous MPs supporting a form of "permanent and comprehensive UK-wide customs union with the EU".

Whilst the details of any such customs union arrangement are far from clear at this stage, and would in any event be bespoke to the UK, one might look to the EU-Turkey customs union arrangements as an indication as to how competition law might be affected. The relevant competition law features of the EU-Turkey customs union are reflected in [Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995](#), implementing the final phase of the Customs Union between EU and Turkey on 1 January 1996 (the "CU Decision"):

- **In relation to antitrust:** articles 32 and 33 of the CU Decision prohibit both anticompetitive agreements (reflecting the wording of Article 101 of the TFEU) and abuses of a dominance (reflecting the wording of Article 102 of the TFEU) in so far as they may affect trade between the EU and Turkey. Whilst these provisions do not appear to be enforced in a way that was initially envisaged by the CU Decision, an EU-UK customs union arrangement might contain equivalent provisions in relation to conduct which affect trade between the EU and the UK. Similar provisions are already contained in the Irish backstop arrangement under the Withdrawal Agreement of November 2018 (see above). However, the question would arise as to who would enforce any such rules.
- **In relation to State aid:** similarly, Article 34 of the CU Decision prohibits State aid granted by EU Member States or by Turkey in so far as it affects trade between the EU and Turkey. Whilst these provisions have found their way into Turkish State aid rules, they are not in force. But the question remains whether the EU-UK customs union arrangement might contain equivalent provisions in relation to State aid which affects trade between the EU and the UK. As with antitrust, the question would arise as to who would enforce any such rules.
- **In relation to merger control:** the CU Decision does not cover merger control, so it is less clear if this would be affected by a EU-UK customs union, for example, would the UK-EU Merger Control Rules provided for under the Irish backstop arrangements under the Withdrawal Agreement (see above) be introduced?
- **In relation to antitrust alignment with EU competition law:** Turkey is under an obligation to harmonize as far as possible its laws with the EU's legal framework in areas of direct relevance to the operation of the CU. In relation to competition law, Article 39 of the CU Decision provides that Turkey must ensure that its competition legislation is compatible with that of the EU, and is applied effectively. This might imply that the UK might have to potentially reinstate section 60 of the Competition Act 1998 in its present form, or a new form of section 60A which provides the UK with less freedom to part from EU precedent than the currently drafted section 60A would.

It is far too early at this stage to predict with any confidence what impact any EU-UK customs union might have on competition law. What is clear, however, is that any comparison with Turkey, or even Ukraine, must take into account that those countries have historically sought to converge towards the EU, with a view at some point to becoming members. The UK, on the other hand, is leaving the EU. Any EU-UK customs union would have to find the right balance between the UK seeking its "independence" and having a closely aligned economic relationship with the EU.

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