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## Ashurst European competition law newsletter – March 2019

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## From the Editors

The March issue of Ashurst's European competition law newsletter is now out, featuring a round-up of a number of developments that have caught our eye. This edition covers the novel Facebook abuse of dominance decision in Germany, the latest Commission decision on territorial sales restrictions, France's new settlement procedure, the Italian car finance cartel, UK's Court of Appeal's view on information exchange, and the UK FCA's first competition decision, as well other topics.

# Lightning strikes twice as Commission prohibits two mergers on the same day

## MERGER CONTROL

**On 6 February 2019, the European Commission ("Commission") decided to prohibit two mergers following in-depth investigations: Siemens' proposed acquisition of Alstom, and Wieland's proposed acquisition of Aurubis Rolled Products and Schwermetall. Commission prohibition decisions are rare. These latest prohibitions are only the ninth and tenth prohibition decisions under the 2004 EU Merger Regulation ("EUMR").**

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Commission has the power under the EUMR to prohibit proposed transactions that could have a significant impact on effective competition.
- The parties to a merger that could have a significant impact on effective competition can offer structural or behavioural commitments to remedy any adverse effects on competition resulting from a proposed merger so that the Commission can approve the transaction.
- However, the Commission will only be willing to accept those commitments where it can be demonstrated that they fully address the Commission's competition concerns on a lasting basis.
- These two recent prohibition decisions highlight the Commission's preference for clear-cut structural remedies which reduce the risk of anticompetitive effects such as

higher prices, reduced choice and input foreclosure on vertically-linked markets.

- The Siemens/Alstom case in particular acts as a reminder of the Commission's continued approach to prioritise the protection and promotion of competition over the creation of "European champions".

## SIEMENS/ALSTOM

The proposed acquisition of Alstom by Siemens was notified to the Commission on 8 June 2018.

Both Alstom and Siemens compete in tenders for the manufacture and supply of (a) high speed, mainline and urban rolling stock, and (b) signalling solutions on mainline and urban rail networks. The proposed transaction would have combined the two largest suppliers of rolling stock and signalling solutions in the EEA.

On 13 July 2018, the Commission opened an in-depth Phase 2 investigation into the proposed transaction in the light of initial concerns that the proposed transaction would remove a very strong competitor and reduce the number of suppliers in the EEA of rolling stock and signalling systems.

Upon completion of its Phase 2 investigation, the Commission found that the proposed acquisition would remove a very strong competitor and reduce the number of suppliers in the EEA of both:

- signalling systems for mainline and metro systems; and
- very high-speed trains (i.e. trains capable of travelling in excess of 300 km/h).

As a result, the Commission considered that there would not be effective competition in those markets following the completion of the proposed transaction.

The parties offered commitments to the Commission in an attempt to remedy any adverse effects on competition:

- As regards mainline signalling solutions, the parties offered to divest a mixture of Siemens and Alstom assets. However, some of those assets would only be transferred in part and others licensed or copied. In addition, the Commission's press release notes that businesses and production sites would have had to have been split, with staff transferred only in some cases. The Commission considered that this remedy package was not sufficient to address the serious competition concerns it had identified in relation to signalling solutions as a result of the threat of higher prices and reduced choice for railway operators and infrastructure managers. In particular, the Commission had doubts as to the effectiveness of the remedy on the basis that it did not comprise a standalone business capable of competing against the merged business.
- As regards very high-speed rolling stock, the parties offered to divest either: (a) a train not currently capable of running a very high speeds: or (b) a licence for very high-speed technology, subject to multiple restrictive terms and carve-outs that would not have given the purchaser the ability and incentive to develop a competing very high-speed train. The Commission considered that neither of these alternatives constituted an effective remedy.

## **WIELAND/AURUBIS ROLLED PRODUCTS/SCHWERMETALL**

The proposed acquisition of Aurubis Rolled Products and Schwermetall by Wieland was notified to the Commission on 13 June 2018.

Wieland and Aurubis Rolled Products both produce rolled copper products and copper alloys. Rolled copper products are used as an input in the manufacturing of many products, including transformers, semiconductors, heat exchangers and roofing materials. In addition, Aurubis Rolled Products produces billets, an input in the manufacturing of copper tubes. Schwermetall produces pre-rolled strip made of copper, and copper alloys. Pre-rolled strip is used as an input

in the manufacturing of rolled copper products. Schwermetall sells pre-rolled strip to both Wieland and Aurubis Rolled Products, as well as to other copper manufacturers.

On 11 July 2018, the Commission opened a Phase 2 investigation into the proposed acquisition in the light of initial concerns that the proposed transaction could:

- resulting in higher prices and reduced choice for rolled copper products;
- make access to pre-rolled strip more costly or difficult for Wieland's competitors in rolled copper products; and
- make access to billets more costly or difficult for Wieland's competitors in the copper tubes sector.

Upon completion of its Phase 2 investigation, the Commission found that the proposed acquisition would have allowed Wieland to eliminate competition from one of its most important challengers and become a dominant player in the markets for rolled copper products in the EEA. As a result, downstream industrial customers would have faced significant price increases.

Wieland offered commitments to the Commission in an attempt to remedy any adverse effects on competition. In particular, Wieland offered to divest two Aurubis plants that manufacture rolled copper products in Stolberg and Zutphen, but it was not willing to divest Aurubis' 50% stake in Schwermetall. The Commission considered its competition concerns could not be effectively addressed without Wieland agreeing to divest Aurubis' stake in Schwermetall because:

- following a transitional period, the Stolberg and Zutphen plants would no longer have access on the same terms to pre-rolled strip from Schwermetall and thus would no longer be able to recreate the competitive pressure that existed before the merger; and
- through its controlling stake in Schwermetall, Wieland would have been able to raise smaller competitors' input costs and get access to their confidential commercial information.

## **CONCLUDING REMARKS**

It would be easy to jump to the conclusion that there has been a shift in Commission's policy with respect to merger remedies as a result of the coincidence of it prohibiting two mergers on the same day. However, in practice, in both of

these merger investigations the merging parties fell short of offering adequate commitments to remedy the Commission's competition concerns.

Therefore, these cases serve as a reminder of the Commission's position that the merging parties need to put forward suitable and comprehensive remedies that eliminate the Commission's competition concerns entirely. In particular, in both of these cases, the proposed remedies did not comprehensively address the Commission's concerns with respect to higher prices, reduced customer choice and possible input foreclosure. These decisions can be contrasted with the Commission's recent decision in the BASF/Solvay case (see our article of [March 2019](#)), which was approved after the parties agreed to offer a package of structural and behavioural remedies

capable of removing similar types of serious competition concerns.

These two recent prohibition decisions have, however, prompted further discussion about possible reforms of the EU merger control rules. In particular, the decision to block Siemens proposed acquisition of Alstom has been highly politicised as senior politicians in both France and Germany have argued that there is a need to create "European champions" to respond to increased global competition. This case is a reminder of the Commission's continued approach to prioritise the protection and promotion of competition over the creation of "European champions".



## EU Commission loses UPS-TNT appeal

### MERGER CONTROL, PROCEDURE

**On 16 January 2018, the EU Court of Justice ("ECJ") upheld the General Court judgment quashing European Commission ("Commission") decision to block the takeover of TNT by UPS.**

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

- The Commission's prohibition of the UPS-TNT merger was annulled by the General Court on grounds of breach of UPS' rights of defence: the Commission failed to communicate changes to econometric models used before adopting the decision. The ECJ upheld that finding.
- The ECJ confirmed that UPS was not required to demonstrate that, if the Commission had

communicated the final econometric model, the decision would have been different. UPS only needed to show that there was a slight chance it would have been better able to defend itself in the merger proceedings.

On 30 January 2013, the Commission prohibited UPS' proposed acquisition of TNT on the grounds that, based on econometric modelling, the transaction would have led to a significant reduction in effective competition in 15 Member States on the global express delivery market ("the Decision").

Between the statement of objections and the Decision, the Commission had considerably reduced in scope the extent of its competition concerns. That evolution in the Commission's position was partly due to changes made to the econometric model used to determine expected

effects of the merger on the prices of the different national markets.

UPS challenged the Decision and, on 7 March 2017, the General Court quashed it on the ground that the Commission had changed the econometric model it used to reach its final conclusion without informing the parties beforehand. The General Court found that such an omission violated UPS' rights of defence.

In its appeal against the General Court's judgment, the Commission argued that it was not required to disclose to the parties the final version of its econometric model before adopting the Decision. The parties have no right to full access to such amendments, the models being equivalent to an internal document. The Commission also claimed that, in order for UPS' action to be successful, it had to demonstrate that the prohibition decision would have been different if UPS had been informed of the changes to the model. It was not enough for UPS to show that there was a slight chance that it would have been better able to defend itself.

On 16 January 2019, the ECJ rejected the Commission's appeal and upheld the General Court's findings. In its judgment, the ECJ reiterated that companies must have the chance to comment on changes to the methodology used to assess competitive effects of a merger before a prohibition decision is adopted. It also rejected the Commission argument based on the need for speed which characterises merger control proceedings – the Commission had sat on the amended model for two months before the final Decision.

UPS' victory is bittersweet. While the annulment action was pending before the General Court, FedEx acquired TNT. Moreover, although UPS has brought an action for damages against the Commission, that is far from a guaranteed success. Such actions require the claimant to show, among others, that the Commission committed a 'sufficiently serious breach' of EU law, a notoriously high standard of proof, particularly in areas such as merger control where the Commission enjoys broad discretion.



# Guess what? Fashion label fined for online and territorial sales restrictions

## ANTITRUST – ANTICOMPETITIVE AGREEMENTS

On 17 December 2018, the European Commission (the "Commission") imposed a fine of €39.9 million on Guess for restricting authorised retailers from advertising online and selling cross-border to consumers in other Member States, in breach of Article 101 of the Treaty on the Functioning of the European Union ("TFEU").

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The Guess decision confirms the Commission's determination to continue to pursue online distribution restrictions.
- This decision categorises absolute bans on the use of trademarks and brand names for online sales advertising as an "object" restriction under Article 101.
- This is the first instance that the Commission has reached an infringement decision in relation to online search advertising restrictions.
- Consistent with the scope of the 2018 EU Geo-blocking regulation, the decision states that restrictions on passive sales to end-consumers are prohibited, and that any restrictions on active cross-border sales or advertising must be compliant with competition law.
- This is another notable example of the Commission recently applying an informal settlement discount (i.e. settling outside its formal settlement procedure, which is reserved for cartel conduct) provides some guidance on obtaining a fine reduction for cooperation outside cartel cases.

In June 2017, the Commission opened a formal antitrust investigation into the distribution agreements and practices of Guess, a branded clothing company, which operates a selective distribution system in the EU. The case follows up on the results of the Commission's e-commerce sector enquiry.

After an 18-month enquiry, the [Commission's decision](#) found that from 2014 to 2017, Guess restricted its retailers from:

- using Guess' brand names and trademarks for online search advertising purposes;
- selling online without Guess' prior authorisation;
- selling to consumers located outside the retailers' allocated territories;
- cross-selling between authorised wholesalers and retailers; and
- independently deciding their retail prices for Guess products.

These restrictions effectively allowed Guess to protect its own online sales business and partition the EU market, resulting in 5-10 per cent higher prices in Central and Eastern European countries as compared to Western European countries. On this basis, the Commission concluded that Guess' practices were illegal under Article 101 TFEU.

This is the first instance that the Commission has reached an infringement decision in relation to online search advertising restrictions.

The decision also complements the 2018 EU Geo-blocking regulation (Regulation (EU) 2018/302), under which a supplier cannot contractually prohibit "passive sales" by retailers to customers. The Commission specifies that Guess' practices which restricted such sales to end-consumers are also prohibited. In addition, while the Geo-blocking regulation does not prohibit restrictions on active sales, the Commission confirms that such restrictions need to be compliant with EU competition rules.

Moreover, the decision is a notable example of the Commission rewarding the investigated company's cooperation (Guess obtained a 50 per cent fine reduction) in non-cartel cases. In particular, the Commission published a fact-sheet providing guidance as to how it assesses cooperation in cases to which the (cartel) leniency guidelines do not apply. Relevant factors which contributed to the 50 per cent

discount in this case included the fact that Guess:

- disclosed to the Commission, before the issuance of the SO, restrictive conduct which was not known to the Commission;
- provided additional valuable evidence;
- acknowledged the infringement; and
- waived certain procedural rights which led to a shorter investigation.



## €570m Mastercard penalty: the next chapter in the interchange saga

### ANTITRUST – ANTICOMPETITIVE AGREEMENTS

**On 22 January 2019, the European Commission ("Commission") fined Mastercard €570 million, having concluded that Mastercard's cross-border card payment rules were in breach of EU antitrust rules as they prevented retailers from benefitting from lower fees in other Member States.**



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

- The Commission decision has to be read in the context of the Commission investigations into interchange fees for cross-border transactions in the EEA. It condemns the prohibition on offering cross-border card payment services to retailers.
- Despite the restrictions being in place for decades, the Commission's infringement decision only spans the period February 2014 to December 2015 (the period from

when the Commission settled an investigation into these restrictions with Visa, to when Mastercard complied with the new EU rules on interchange fees).

- The Commission applied its informal settlement procedure applicable to non-cartel cases, which is likely to have also contributed to the contracted infringement period.

In 2007, the Commission already found that Mastercard's interchange fees on cross-border transactions in the EEA were restricting competition between banks. The Commission's findings were confirmed by the Court of Justice in 2014 and new EU rules on interchange fees were adopted in 2015.

The Commission's 2019 decision does not concern the level of the interchange fees. It covers the obligation imposed by Mastercard on retailers' banks (also called "acquiring banks") to apply the interchange fee of the country in which the retailers were located. This prevented retailers in a high-interchange fee country from benefitting from lower interchange fees offered by acquiring banks in other, lower fee, countries.

The Commission concluded that these rules amounted to a restriction of competition under Article 101 TFEU, as they prevented banks from competing across borders in the EEA, and led to an artificial segmentation of the market.

Although the restrictions had been in place for decades, the Commission limited the duration of the infringement to less than two years. This relatively short infringement period may be down to a number of contributing factors, including the following:

- it reflects the period from which the Commission settled its interchange investigation with Visa, to when Mastercard complied with new EU rules on interchange fees; and

- Mastercard settled with the Commission under its informal settlement procedure, which also led to a 10% reduction of the fine.

However, the Mastercard interchange fees investigation is not over yet, as the Commission is still pursuing its investigation into inter-regional interchange fees applicable to payments made in EEA with consumer debit and credit cards issued outside the EEA. The interchange fee saga continues.

## BASF/Solvay nylon deal wins conditional EU approval

### MERGER CONTROL

**On 18 January 2019, the European Commission ("Commission") cleared the proposed acquisition of Solvay's polyamide (nylon) business by BASF following an in-depth investigation, leading to what European Commissioner for Competition Margrethe Vestager called "the creation of a significant European player". The approval is conditional upon full compliance with a range of commitments agreed with the parties to remedy the Commission's concerns in relation to access to key inputs in the nylon production chain.**

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

- The vast majority of mergers notified to the Commission are approved during an initial 25 working day investigation ("Phase 1").
- Where the Commission identifies serious competition concerns, it may decide to open an in-depth "Phase 2" investigation, providing it with an additional 90 working days to adopt a decision.
- The Commission decided to approve the present transaction following a Phase II investigation, but that decision was conditional upon wide-ranging behavioural and structural commitments offered by the parties which had the effect of removing overlaps between BASF and Solvay in the

areas where competition concerns had been identified.

### THE COMMISSION INVESTIGATION

On 19 September 2017, BASF announced that it had agreed to purchase Solvay's polyamide (nylon) business. Both companies manufacture nylon fibers (used for clothing and sportswear) and heat-resistant engineering plastic that is used in the automotive and electronics industries. The transaction was notified to the Commission on 22 May 2018.

The nylon value chain stretches from the essential upstream input Adiponitrile ("ADN") at the top to nylon 6.6 engineering plastics at the bottom. Before the transaction, Solvay and BASF both had strong market positions at multiple levels of the chain and, in particular, in the higher-margin- business of engineering plastics. At the time of the notification, however, Solvay was the only manufacturer in the EEA active at all levels of the nylon 6.6 value chain. Most importantly, BASF did not own any production capacity for the key precursor ADN, which is arguably the most important compound in the whole nylon value chain. Therefore, the acquisition of Solvay's polyamide business would provide BASF with access to the only European production site for ADN. BASF considered that securing access to ADN production capacity was of particular strategic importance as it expected there to be

shortages in supply in the short term due to a lack of production capacity.

In the light of these facts, the Commission was concerned that the transaction would give rise to horizontal and vertical effects at multiple levels of the nylon value chain in the EEA.

As a consequence, in June 2018, the Commission decided to open an in-depth probe Phase 2 investigation into the transaction as it was concerned that the transaction might:

- lead to input foreclosure, as only a few manufacturers provide key inputs (including ADN and adipic acid) required to manufacture nylon products; and
- reduce competition in the supply of key inputs in the nylon production chain and lead to price increases in a number of markets related to the nylon industry, including the markets for ADN and for adipic acid.

The Commission noticed that due to high barriers to entry in these upstream markets, there was no indication that the existing level of competition could be maintained by new entrants.

## THE COMMITMENTS

To resolve the competition concerns identified by the Commission, BASF and Solvay offered to:

- divest Solvay's facilities located in France, Poland, and Spain producing certain essential inputs downstream of ADN for the production of nylon to a single suitable buyer;
- create a production joint venture in France between the combined entity and the buyer of the divested assets, for the production of adipic acid; and

- conclude long-term supply agreements for ADN to meet the divestment business' requirements.

The Commission found that this combination of structural and behavioural remedies fully removes the overlap between BASF and Solvay in the markets where it had identified competition concerns. Thus, it concluded that the transaction, as modified by the commitments, would no longer raise competition concerns in the EEA.

This case demonstrates that the Commission is willing to approve transactions giving rise to significant competitive overlaps. However, in order to obtain the Commission's approval to implement such transactions, the Commission will require the parties to offer clear-cut remedies that comprehensively address any competition concerns in relation to the risk of higher prices, reduced choice and possible input foreclosure. As regards the final point it may be necessary for the parties to combine both structural and behavioural commitments so that any divested business can continue to access the key inputs it requires to compete effectively with the merged business.



# Leniency Plus "à la française" in household appliance sector

## ANTITRUST – CARTELS, PROCEDURE

**On 5 December 2018, the French Competition Authority ("FCA") fined six household appliance manufacturers a total of €189 million and applied for the first time the notion of "single continuous infringement" and a so-called "leniency plus".**

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This is the first application in France of the concept of single and continuous infringement.
- A leniency applicant who provides fresh evidence that the infringement lasted longer than the FCA had evidence to support may receive immunity in relation to that additional duration.

In October 2013, the FCA carried out dawn raids at the premises of six household appliance manufacturers. The BSH group applied for leniency following these dawn raids. It later entered into a settlement with the FCA.



Two areas of investigation were raised by the FCA. Firstly, from September 2006 to January 2007 and from May 2008 to April 2009, the FCA alleged that the companies involved agreed to increase their recommended retail prices of "white" electrical goods during secret meetings. Secondly, between May and September 2009, the companies had agreed on a change in the sales terms applied to kitchen installers for exhibition models.

Although the price-fixing agreements were discontinued, the FCA considered it as a single and continuous infringement, applying the Trelleborg case for the first time (cases T-147/09 and T-148/09). The FCA noted that the manufacturers had participated in the infringement before and after the interruption and that they had pursued during these periods a single objective, which the FCA based on the identity of the objectives of the practices involved, the products concerned, the participants, the main terms of its implementation, the participants' representatives, and the geographical scope of the practices. The manufacturers were fined for their participation in this single infringement but the interruption period was not taken into account in the calculation of the fine.

Whilst the exact calculation of the fine is not clearly set out in the settlement decision, the FCA rewarded BSH for its significant and active cooperation to the investigation in two ways:

- First, the FCA decided to raise the fine granted to BSH above the maximum of 45% which it had been conditionally granted when applying for leniency. That kind of reward is rare in the FCA's decisional practice albeit not unique.
- Secondly, the FCA applied for the first time the concept of "Leniency plus". Since BSH had provided compelling evidence which allowed the FCA to increase the duration of the price-fixing agreements, the FCA decided not to impose a fine on BSH for this increased duration (i.e. the FCA granted de facto immunity). BSH also provided compelling evidence allowing the FCA to discover the second infringement. For this reason, the FCA stated that BSH obtained a further reduction of fine, on a basis similar to the UK Competition and Markets Authority's and US Federal Trade Commission's "leniency plus" regimes. However it is unclear from the settlement decision whether the FCA in fact granted full immunity in relation to this second infringement.

This decision might be a sign that the FCA is ready to extend the rewards granted to leniency applicants who offer significant contributions that allow the FCA to uncover

new infringements or establish a longer duration of conduct already under investigation.

## French Competition Authority publishes settlement procedure guidance

### PROCEDURE

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**On 27 December 2018, the French Competition Authority ("FCA") finally published its procedural notice providing guidance on the application of the settlement procedure ("Notice").**

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

- The settlement procedure has already been applied by the FCA in a number of cases and the publication of this guidance provides welcome clarity on the process.
- French settlement has a wider scope than the European Commission process, as it also applies to cases of abuse of dominant position.
- It also allows undertakings to negotiate the fine – not just a reduction – with the investigation services.

The French settlement procedure allows undertakings to benefit from a reduction of fine if they do not contest the statement of objections and admit liability. It has been applied by the FCA in 11 cases since its introduction into French law in 2015.

According to the Notice, a settlement may be entered into in relation to both anticompetitive agreements and abuses of dominant position (whereas the formal European Commission settlement procedure only envisages settlements in respect of the former category). Settlement may be combined with the leniency procedure, but the fine reduction a company

may expect from a settlement will not be equal to or exceed the discount possible through leniency.

A company wishing to use the settlement procedure will have to negotiate and agree on a fine range (minimum/maximum) with the General Rapporteur (the head of the investigation services).

The General Rapporteur has a wide discretion as to whether to settle and to determine the fine range. The FCA's Communication on the calculation of fines will however constitute a basis for its negotiation with the company.

When deciding on the level of fine, the FCA's jurisdictional body ("Collège") is bound by the fine range set out in the settlement report that formalises the result of the negotiation. If it considers that the requirements for a settlement are not met, it may order further investigation under the ordinary procedure. In such a scenario, the documents provided to the General Rapporteur during the settlement negotiation will be excluded from the file.

In its Notice, the FCA states that it will give priority to the implementation of settlement procedures where all the parties accept to settle (i.e. excluding "hybrid" settlements). To that end, the General Rapporteur may inform other parties to which the statement of objections has been notified of the existence of negotiations that will allow them to consider also negotiating a settlement.

# Facebook slapped with significant data collection restrictions in Germany

## ANTITRUST – ABUSE OF DOMINANCE

On 7 February 2019, the German competition authority ("FCO") imposed on Facebook far reaching restrictions regarding the processing of user data. As a result, Facebook is no longer allowed to require its users to consent to Facebook collecting and assigning non-Facebook data to their Facebook user accounts.

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- This case is one of the most important global precedents regarding the application of competition law in the digital economy.
- It is the first case in which an abuse of dominance is based on an infringement of data protection law. According to the FCO, inappropriate contractual terms and conditions relating to the collection of data, combined with the extent to which Facebook collects, merges and uses data in user accounts, constitute exploitative abusive conduct.
- While, technically, the FCO's decision only applies to Facebook's business in Germany, in practice it may impact Facebook more widely given that its operational model operates in a similar way globally.
- Dominant companies which collect and use large amounts of data should be aware that there may now be limitations under competition law as to how that data is used without the user's consent.

The decision of the FCO can be summarised as follows:

- Facebook was held to be dominant in the market for social networks in Germany and is therefore subject to special obligations under competition law. In this case, Facebook is required to take into account that its users cannot readily switch to other social networks.
- Facebook's terms and conditions require users of the social network to consent to

Facebook collecting user data from Facebook-owned services, such as Instagram or WhatsApp, but also from third party websites outside of the Facebook website/app which users access via Facebook. All data collected on the Facebook website/app, by Facebook-owned services and on third party websites can be combined and assigned to the Facebook user account. This means, for example, that if you visit an online shop through a link on Facebook to buy shoes, data on you visiting that third party site is sent back to Facebook and processed.

- The FCO found that in view of Facebook's superior market power, requiring customers to consent to such conduct as condition of using Facebook, without the option to opt out, is unsatisfactory and infringes European data protection rules.

The FCO therefore held that, under these circumstances, the way in which Facebook collects, merges and uses data from user accounts constitutes and exploitative an abuse of a dominant position.

The FCO concluded that:

- **Facebook-owned services like WhatsApp and Instagram** can continue to collect data. However, assigning the data to Facebook user accounts will only be permissible with the users' consent and in circumstances where the customer is given the opportunity to opt out.
- **Collecting** data from third party websites and assigning them to a Facebook user account will also only be possible if users give their voluntary consent.

Facebook has announced that it will appeal the decision. Due to the novelty and complexity of the economic and legal issues at stake, it can be expected that it will take many years before a final decision will be taken by the competent court. In the meantime, other competition authorities are likely to be considering whether to follow the FCO's approach against Facebook.

# Cartel damages prima facie evidence test rejected by top German Court

## PRIVATE DAMAGES ACTIONS

On 11 December 2018, the German Federal Court of Justice ("FCJ"), the highest German civil court, overruled a judgment of the Higher Regional Court of Karlsruhe in a follow-on damages action regarding the rail track cartel case. The FCJ held that for quota and client-allocating cartels, the existence of a cartel is not prima facie evidence of harm to a claimant, nor that the cartel affected individual purchases. Instead a rebuttable presumption shall apply.

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- If claimants could show (i) the existence of a "hardcore" cartel (typically by submitting an infringement decision of a competition authority) and (ii) that it had made business transactions concerning the cartel-affected products during the cartel period, German courts so far have applied the prima facie evidence and on this basis have assumed that a victim of a cartel had suffered at least some damage.
- The FCJ in its recent decision, however, rejected an application of the prima facie evidence since the required "typicality" of course of events is not apparent in cartel damages cases due to the diversity and complexity of cartels and also considering that cartels are not always implemented successfully.
- Rather, the FCJ allows a softer (rebuttable) "factual presumption" that a cartel leads to higher prices. For the question whether this "factual presumption" of a cartel-induced price increase can be applied in a given case, the FCJ requests the courts to comprehensively evaluate all circumstances of the individual case in an overall assessment.
- The decision of the FCJ and its practical impact are currently being intensively debated within the German competition law

community and it remains to be seen how German courts will apply the decision of the FCJ in practice. In any event, the impact of the decision of the FCJ is limited to damage claims that arose before 26 December 2016, since with the implementation of the EU Damages Directive the German legislator has introduced a legal presumption of damage.

## BACKGROUND

In recent years, German civil courts established - on the basis of economic theories postulating that cartels typically lead to higher prices - case law that a victim of a "hardcore cartel" (i.e. price fixing, customer allocation, quota fixing) would have suffered at least some damage. Claimants simply needed to show:

- the existence of a "hardcore" cartel (as opposed to a non-"hardcore" cartel, e.g. pure information exchange), typically by submitting infringement decisions of antitrust authorities; and
- that it had made business transactions during the cartel period in the relevant market.



If the claimant could show the above, it could rely on the prima facie evidence rule that a cartel had affected its business transaction and that it thus had suffered a damage as a result. On this basis, German courts in the past were willing to decide in "basic" rulings that the cartelists are "in principle" liable for cartel

damages where the exact quantum of damages had not yet been determined (which would be decided at a later stage in the proceeding).

## REJECTION OF THE PRIMA FACIE EVIDENCE PRINCIPLE BY THE FCJ

The FCJ in its recent decision, however, rejected the application of the prima facie evidence principle. This is because:

- the principle can only apply where the result which the prima facie evidence is seeking to prove is an outcome which is expected to naturally occur in the ordinary course of events (the "typicality" requirement); but
- the FCJ held that higher prices do not always flow from cartels to the extent required by the "typicality" requirement, in particular given the diversity and complexity of cartels, and that cartels are not always implemented successfully.

Rather, according to the FCJ, whether damages will have resulted depends on various factors which may change from time to time, such as the number of market participants, the number of the cartelists, their ability to exchange the information required for the implementation of the cartel, the market coverage of the cartel, the (extent of the) cartel "discipline" and the ability of customers to switch suppliers. In the case in question, the FCJ also took into account that the claimant was not a regular customer of the defendant, whereas the customer allocation cartel concerned regular customers.

While in light of this the FCJ did not assume the "typicality" required for the prima facie evidence, the FCJ allowed a different (rebuttable) "factual presumption" - that a cartel leads to higher prices and recognised that this presumption is of high indicative significance for a court when considering evidence. For the question whether a "factual presumption" of a cartel-induced price increase can be applied in a given case, the FCJ requests courts to comprehensively evaluate all circumstances of the individual case in an overall assessment.

## CONCLUSIONS AND OUTLOOK

The decision of the FCJ and its practical impact are currently subject of intensive debate within the German competition law community since, by way of example, the following aspects are not entirely clear:

- While the FCJ in its judgment has limited the exclusion of the applicability of a prima facie evidence rule to quota and customer allocating cartels, it is a matter of debate whether its legal reasoning suggests that prima facie evidence generally should be applied with caution (for example in the case of price fixing cartels) or whether in cases where additional circumstances mean damages are more likely to be present in all cases that the prima facie evidence rule can apply.
- In the decided case, the FCJ concluded that a "factual presumption" that a cartel leads to higher prices should be applied. For courts, under German law, the "weight" of "factual presumption" when considering evidence is one level below the prima facie evidence rule and thus the "factual presumption" - in comparison to the prima facie evidence typically requires more substantiation to establish. However, in its judgment the FCJ also indicated that the "factual presumption" in cartel cases should have a high indicative significance (implying it should be higher than the usual standard of a factual presumption), it is a matter of debate as to what the practical distinction between prima facie evidence and "factual presumption" should actually be in such cartel cases.

As can be seen from the above, it remains unclear how German courts will apply the decision of the FCJ in practice. It is to be noted that the impact of the decision of the FCJ is limited to damages claims that arose before 27 December 2016 - as for example in the rail track and truck cartel - since with the implementation of the EU Damages Directive, the German legislator has introduced a legal presumption of damage for claims that arose thereafter.

# Bonnet blown off 15 year Italian car financing cartel with highest ever Italian fine

## ANTITRUST – CARTELS, PROCEDURE

**On 20 December 2018, the Italian Competition Authority ("ICA") concluded its investigation into a cartel concerning car financing products. The ICA found that the parties had been exchanging sensitive information on current and future quantities and prices over a 15 year period. The fines imposed totalled €678 million, the highest fine ever imposed by the ICA.**

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Importance of leniency applications: the information provided to the ICA in a leniency application was found to be decisive in establishing the infringement.
- Antitrust parental liability: this is the first case where the ICA attributed antitrust liability to parent companies based on their dominant influence over subsidiaries that were not wholly owned.
- Importance of antitrust compliance programmes: the ICA granted 10% fine reductions to companies that had implemented antitrust compliance programmes before the proceedings.

Following a leniency application filed by Daimler AG and Mercedes Benz Financial Services Italia S.p.A., the ICA decided to investigate whether so called "captive banks" linked to car manufacturers had exchanged sensitive commercial information in violation of competition law.

The ICA found that a group of captive banks, acting through their trade associations, had regularly exchanged commercially sensitive

information which was not publicly available on a range of strategic matters, including future interest rates, other fees charged to consumers and the cost of financing.

The ICA considered that the type of data exchanged was sufficiently sensitive to give rise to a violation of competition law by object by the relevant captive banks.

Interestingly, the ICA considered that the parent companies of FCA Bank and Banca PSA Italia (which were essentially autonomous joint ventures) were liable for the conduct of their respective joint ventures. However, since the ICA was applying this parent liability principle for the first time, the parent companies of FCA Bank and Banca PSA Italia were not fined.

The amount of fines imposed, nearly €678 million, is the highest fine ever imposed by the ICA. This is in part due to the fact that the infringement continued over a 15 year period. We understand that the ICA, in applying its current fining guidelines, initially calculated much higher fines. However, that a reduction of approximately 80% was applied on proportionality grounds in the light of the relationship between the vehicle financing costs and the purchase price of a vehicle.

Of particular note is that a 10% reduction was granted to companies that had adopted an antitrust compliance programme prior to the launch of the investigation and had further integrated those programmes following the start of the proceedings. This follows on from the FCA's recent guidelines which set how compliance programmes can be designed to benefit from fine reductions (see our article of [November 2018](#)).

# Spanish Supreme Court confirms annulment of €120m abuse of dominance messaging fines

## ANTITRUST - ABUSE OF DOMINANCE

**The Spanish Supreme Court upheld a High Court ruling quashing a 2012 decision from the Spanish Competition Authority ("SCA") finding that Telefónica, Vodafone and Orange (France Télécom) abused their dominant positions in the wholesale termination market for SMS (Short Message Service) and MMS (Multimedia Messaging Service) by charging excessive prices.**

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Complex economic assessments in the SCA's decisions are susceptible to judicial review by national courts.
- The SCA is required to carry out a fresh analysis of the market definition in each new case, especially in dynamic markets.

In December 2012, the SCA fined Telefónica, Vodafone and Orange €46.4 million, €43.5 million and €29.9 million, respectively, for excessive pricing practices in the wholesale termination market for SMS and MMS. In order to define the market and determine the companies' dominant position, the SCA relied on previous decisions from the Spanish Telecommunications Regulator ("STR") regarding the call termination market in 2006 and 2008, concluding that the network of each company constituted a relevant market in itself and, thus, each company held a 100% market share in each of those markets.

The companies appealed the SCA's decision to the Spanish High Court, which quashed it on two main grounds. Firstly, the High Court identified procedural failings in the SCA's investigation as regards verifying whether the evidence it was seeking to rely on was factually accurate, reliable and consistent with its conclusions. Secondly, the High Court considered that the SCA had vitiated its conclusions by failing to carry out a proper economic assessment of the definition of the relevant markets and, in particular, by solely relying on precedents in other markets.

The Spanish Supreme Court has now confirmed the High Court's ruling, stating that:

- the scope of judicial review covers the analysis of the evidence relied on by the SCA during its investigation (including complex economic matters). Therefore, when the Court considers that the conclusions drawn from that evidence are unreliable or illogical, the Court may annul the authority's decision; and
- when defining the relevant market, the SCA can rely on decisions from the STR as long as they are current and suitable (which was not the case as the decisions from the STR related to different markets and years), but that does not mean that it does not need to carry out its own analysis of any relevant markets on a case-by-case basis, especially when the market definition depends on economic and technological factors that change over time (which is the case in dynamic telecoms markets).



In light of this ruling, the Spanish Supreme Court has confirmed an extension to the scope of judicial review of the SCA's decisions by the national courts such that it also covers:

- complex economic matters, regulating the authority's margin of appreciation; and
- the need to carry out a fresh analysis of the market in each new decision, especially in dynamic markets.

# FCA issues its first decision under competition law

## ANTITRUST - ANTICOMPETITIVE AGREEMENTS

**On 21 February 2019, the UK's financial services regulator, the Financial Conduct Authority ("FCA") issued an infringement decision under the Competition Act 1998 against three asset management firms in relation to bilateral information sharing between those firms. This is the FCA's first formal decision under its competition enforcement powers and relates to the information sharing between Newton Investment Management Limited ("Newton"), River and Mercantile Asset Management LLP ("RAMAM") and Hargreave Hale Ltd".**

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Since 1 April 2015, the FCA has had the ability to enforce against infringements of competition law, in addition to the UK Competition Markets Authority and other sectoral regulators.
- This is the FCA's first formal decision under its competition enforcement powers since it received concurrent powers.
- It is also the first time the FCA has given immunity from fines to a party under its competition leniency programme

The FCA's has publically described the infringements as comprising:

- the "sharing of strategic information", on a bilateral basis, between competing asset management firms (Newton, RAMAM and Hargreave Hale Ltd) during one initial public

offering and one placing, and that this took place "shortly before the share prices were set"; and

- that the firms "disclosed and/or accepted otherwise confidential bidding intentions, in the form of the price they were willing to pay and sometimes the volume they wished to acquire".

The FCA has decided that this conduct allowed one firm to know another's plans during the IPO or placing process when they should have been competing for shares.

The FCA has fined Hargreave Hale £306,300 and RAMAM £108,600. The difference in the amount of the fines reflects the parties turnover in the relevant market. The FCA has not imposed a fine on Newton because it was given immunity under the FCA's competition leniency programme.

Separately, on 5 February 2019, the FCA announced that it had fined an individual under the Financial Services and Markets Act 2000 for conduct related to some of the same facts investigated under this case.

Ashurst is acting for Hargreave Hale on this investigation.

# Balmoral appeal tanks in Court of Appeal: one-off information exchange can breach completion law

## ANTITRUST - ANTICOMPETITIVE AGREEMENTS

On 15 February 2019 the UK Court of Appeal upheld the December 2016 decision of the UK Competition and Markets Authority ("CMA") imposing a fine of £130,000 on Balmoral Tanks ("Balmoral") for engaging in illegal information exchange at a single meeting with other suppliers of galvanised steel tanks. The Court of Appeal confirmed that a one-off exchange of pricing information may constitute an infringement of competition "by object". It also confirmed that Balmoral's refusal to join a cartel involving the other suppliers did not prevent it from nonetheless being found liable for a separate competition law infringement in respect of the exchange of sensitive information.

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- Attendance at a single meeting where competitively sensitive information is disclosed may be sufficient to constitute an infringement of competition law "by object".
- If you are present at a meeting where discussions begin to stray into sensitive areas, you should clearly state your objections (and ensure they are recorded) and leave the meeting immediately.
- Exchanging pricing information with members of a cartel may constitute a separate competition law infringement, even if you are not part of the underlying cartel.

In December 2016 the CMA adopted an infringement decision finding that four suppliers of galvanised steel tanks had participated in a customer allocation and price-fixing cartel (the "Main Cartel Decision"). In that decision, the CMA found that Balmoral had actively refused to be part of this cartel despite pressure to join, but nonetheless adopted a second decision (the "Information Exchange Decision"), finding that Balmoral had infringed competition law by sharing commercially sensitive information

regarding current and future pricing intentions at a meeting with three of the cartel members in July 2012. The CMA fined Balmoral £130,000 in respect of this infringement, but did not impose any additional fines on the cartel participants.



The CMA's Information Exchange Decision was upheld on appeal to the UK Competition Tribunal in November 2017 (see our [earlier newsletter article](#)). On further appeal to the Court of Appeal, the court confirmed the decision. In particular, it held that:

- Although the two infringements which the CMA found to have been committed had elements in common, it was nonetheless appropriate to distinguish between them, as they were "different animals". As such, there was no inconsistency in finding that Balmoral was not a party to the main cartel but had nonetheless infringed competition law by exchanging pricing information at the July 2012 meeting.
- A one-off exchange of pricing information at a single meeting may constitute an infringement of competition "by object" in circumstances where it creates conditions of competition which do not correspond to the normal conditions of the market in question. In this case, a single indication as to future pricing could affect a material number of bids and a material value of potential work, over a significant period into the future.
- The fact that Balmoral in fact continued to compete vigorously on price following the

meeting did not change the fact that at the meeting it had given clear indications that it was not intending to push prices down.

- The CMA was entitled to decide to impose a fine solely on Balmoral in respect of the information exchange infringement, in circumstances where large penalties had

already been imposed on the other suppliers (relative to their size), which were attributable to anti-competitive behaviour over a period that encompassed the July 2012 meeting, and where no additional deterrent effect was deemed necessary.

## Tender participants beware: Five fined for office fitting bid-rigging

### ANTITRUST - CARTELS

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**On 1 March 2019, the UK Competition and Markets Authority ("CMA") announced that it has found that five office fit-out firms had engaged in bid-rigging in breach of competition law.**

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

- This case demonstrates the CMA's continued focus on bid-rigging, following a number of recent cases and campaigns related to this conduct.
- It is a further example of how "cover bidding" (where companies agree place bids that are deliberately intended to lose the contract) can infringe completion law, following the OFT's construction fines of 2009.
- Companies involved in either private or public tenders should be aware that both sectors are within the regulator's spotlight.

### THE CONDUCT AND THE FINES

The CMA's investigation has found that each of Fourfront, Loop, Coriolis, ThirdWay and Oakley (all of which provide services such as fit-out, design and refurbishment of commercial and non-residential premises) engaged in "cover bidding" in competitive tenders, colluding on the prices they would bid for contracts.

Cover bidding involves companies agreeing with each other to place bids that are deliberately intended to lose the contract, thereby reducing the intensity of competition. It is classed as a form of bid-rigging and can

lead to customers paying an artificially inflated prices or receiving poorer quality services. It was also investigated in the construction sector back in 2004-2009, which led to fines on over 100 construction firms in England.

The five companies agreed to pay fines totalling over £7 million after admitting being involved in cartel behaviour. The companies have agreed to pay the following fines, reflecting a number of factors including their size and financial position, and their role in the conduct:

- Fourfront, £4,143,304
- Loop, £1,090,816
- Coriolis, £7,735
- ThirdWay, £1,780,703
- Oakley, £58,558

### THE CMA AND BID-RIGGING

For a long time now the CMA has focused on bid-rigging, both in the public and private sector. In particular, this decision comes in the wake of the following:

- the CMA's investigation into bid-rigging in the solid fuel products sector;
- numerous CMA campaigns aimed at targeting a range of industries that are at greater risk of cartels forming, including construction (of which office fit-out is part of), manufacturing and business support services;

- the CMA's launch of digital tool to fight bid-rigging, aimed at indicating if bid-rigging has taken place; and
- the publication of bid-rigging advice for public sector procurers.

This case demonstrates the CMA's continued focus on bid-rigging, and that both private and public tenders are within the regulator's spotlight.

## CMA Sainsbury's/Asda merger review deadlines unfair

### MERGER CONTROL

**On 18 January 2019 the UK Competition Appeal Tribunal (the "CAT") held that the UK Competition and Markets Authority (the "CMA") treated Sainsbury's and Asda unfairly in not allowing them more time to respond to evidence submitted as part of an investigation into their proposed £12 billion merger.**

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

- Sainsbury's and Asda announced their intention to merge on 30 April 2018. The CMA referred the proposed merger for Phase 2 investigation on 19 September 2018. The statutory deadline of 24 weeks would therefore expire on 5 March 2019, though an 8-week extension (under the Enterprise Act 2002) would mean an end date of 30 April 2019.
- Sainsbury's / Asda applied jointly to the CAT on 12 December 2018, asking whether the CMA had acted unfairly in setting: the dates and times by which they should respond to various CMA Working papers; and the timing of the main party hearing.
- The CAT ruled that the CMA had acted unreasonably and unfairly in not giving the parties sufficient time to: (a) respond to the numerous and voluminous Working Papers; or (b) to prepare for the main hearing, in particular to digest the emerging thinking on the key issues, to explain their position at the hearing.
- The case demonstrates the difficulties created by the statutory deadlines for both the CMA and the parties involved, in the

case of a large, complex merger where the CMA's analysis involves significant technical detail.

On [30 April 2018](#), Sainsbury's and Asda Group (two of UK's largest supermarket groups) announced their intention to merge and engaged in a period of pre-notification discussions with the CMA. Sainsbury's/Asda had been pressing for a longer pre-notification process but, after refusing to extend the pre-notification process further, the CMA began its formal investigation and on 26 June 2018 Sainsbury's/Asda submitted a formal request the CMA to use its fast-track process (i.e. requesting that the merger go straight to a Phase 2 review).

As part of the Phase 2 review, Sainsbury's/Asda received their first CMA Working Paper from the CMA on 9 November 2018, followed by two more on 14 November, and another two on 16 November. The CMA sent 14 more Working Papers in the space of a week from 21 to 28 November, followed by the annotated Issues Statement on 28 November. The CMA asked for responses to all the Working Papers by 7 December 2018.

After submitting their response to the first Working Paper on 30 November 2018, Sainsbury's/Asda requested (not for the first time) that the CMA extend its statutory timetable by eight weeks and stated that the 7 December deadline was unreasonable. They proposed to provide responses to "the more standalone Working Papers" to the extent possible before 7 December, and proposed a deadline of 11 January 2019 for the rest, on a staggered basis.

On 3 December, when the CMA published summaries of the other party hearings, Sainsbury's/Asda considered they would not therefore be in a position to attend their main party hearing, which had been scheduled for the next day on 4 December. In response, on 6 December the CMA offered a limited extension for some of the papers to 14 December 2018 and agreed that the main party hearing could be postponed to 12 December.

Sainsbury's/Asda's responded the same day, suggesting that they could deliver their responses to the Working Papers (except for the three which they had agreed to provide by 7 December) on 21 December for seven of the papers, and by 4 January 2019 for the rest.

On 7 December, the CMA wrote to Sainsbury's/Asda explaining that this proposed timeline would jeopardise subsequent stages of the process, even when accounting for the possible eight week extension. The CMA's final suggestion was that the deadline for responses to the Working Papers could be extended to 9am on 17 December at the latest and the hearing could be held in the week ending 14 December 2018.

## THE APPLICATION

On 12 December 2018 Sainsbury's/Asda applied to the CAT, challenging the CMA's refusal to:

- grant an extension of time to prepare meaningful written responses to the CMA's complex Working Papers; and
- schedule the main party hearings on a date which would allow Sainsbury's/Asda the opportunity effectively to explain their position on key points in the Working Papers to the Phase 2 decision-makers.

## THE CAT'S RULING ON THE FAIRNESS OF THE CMA'S PROCEDURE

The [CAT stated](#) that the parties should have time to digest the detail of the Working Papers in advance of the main party hearings.

The CAT had no doubt that imposing the original 7 December deadline to respond to the voluminous Working Papers was unreasonable and unfair, in particular given that:

- Sainsbury's/Asda had, from the outset, consistently urged for a longer pre-notification period;
- the volume of substantive and complex Working Papers was exceptional; and
- several of the Working Papers introduced new analytical approaches to the CMA's merger assessment and at least one of them reasonably required the parties to process empirical data.

The CAT also ruled that the CMA had not given the parties sufficient time to prepare for the main hearing, in particular to digest the emerging thinking on the key issues, to explain their position at the hearing.

The CAT emphasised that fairness did not, however, require Sainsbury's/Asda to be given until as late as 4 January 2019 for some of the responses, as this would have rendered the statutory timetable unachievable for the CMA.

## FINAL THOUGHTS

The present case emphasises the fine balance between two of the CMA's objectives: aiming to meet its statutory timetables; and the need to achieve due process. The CAT considered the imposed deadlines were unfair in spite of the fact that Sainsbury's/Asda are well-resourced with large teams of advisors. There is certainly scope for complex mergers involving similar levels of technical and economic analysis, to cause similar timing problems for both the CMA and the concerned parties.

In addition, the CAT recognised that this problem is likely to become more common if [Brexit](#) leads to the CMA reviewing large-scale, international mergers affecting the UK, which would currently fall within the European Commission's exclusive jurisdiction. The timing challenges that the CMA faced in the present case, and the potential changing context of the CMA's work post-Brexit, may lead to a reconsideration of the statutory deadlines and/or extended pre-notification periods.

Since the CAT's judgment, the CMA has, on 20 February 2019, issued its provisional findings, which provisionally conclude that the merger would lead to extensive competition concerns. The final report is due by 30 April 2019.

# CMA requires substantial remedies in Rentokil / Cannon merger

## MERGER CONTROL

**On 25 January 2019, the UK's Competition and Markets Authority ("CMA") published its final decision in its Phase 2 investigation into the completed acquisition by Rentokil Initial plc of Cannon Hygiene Limited ("Cannon"). The CMA identified competition concerns in relation to the supply of washroom services to national and multi-regional customers. To address the CMA's concerns the parties must sell all Cannon waste disposal contracts with customers that have premises nationally and across multiple regions.**

### WHAT YOU NEED TO KNOW – KEY TAKEAWAYS

- The case is a reminder that remedies in completed mergers can require the parties to divest substantial parts of the acquired business.
- The CMA's proposed remedy in this case raises questions as to whether the divestment of only Cannon's national and multiple regional contracts will be sufficient to replicate a competitor that is as efficient as the pre-existing operators in the market (due to the costs in serving those customers).

The parties overlap in relation to:

- the supply of washroom services (servicing washrooms in public, office and industrial buildings);
- the supply of healthcare waste collection services; and
- the supply of mats services (including the supply of indoor and outdoor mats which help prevent trips and slips).

The [CMA's Phase 2 investigation](#) focussed on the supply of washroom services, as the Phase 1 investigation did not identify competition concerns in relation to the supply of healthcare waste collection services or the supply of mats services. In relation to washroom services, the

CMA considered the supply of waste disposal services to represent a distinct segment of the market and identified product markets in relation to: national and multi-regional customers; and regional and local customers.

In its assessment of local and regional competition, the CMA identified two branches where the merger would reduce the number of suppliers to three or fewer. However, since the parties were not close competitors in either area, the CMA found no prospect for a substantial lessening of competition ("SLC") in the supply of services to local and regional customers.

In relation to national and multi-regional competition, the parties were two of the three main players in the provision of the waste disposal services, and prior to the merger, they were each other's second closest competitors; with both competing most closely against the other main supplier (PHS). The CMA found limited availability of credible alternative waste disposal services to direct purchasers and to public and private buyer groups negotiating agreements on behalf of their member users (known as frameworks).

The CMA's Phase 2 inquiry group decided by a majority that the merger has resulted, or may be expected to result, in a SLC in relation to the supply of waste disposal services to the following national and multi-regional customers:

- customers located in eight or more regions of the UK purchasing directly for their premises from a washroom services supplier; and
- public and private framework customers with national or multi-regional coverage.

To address the competition concerns in these markets, the CMA decided that the merged entity must sell all Cannon's customer contracts in the markets affected by the SLCs plus any Cannon UK operations and infrastructure required by a prospective purchaser. This option was preferred over a divestiture of Cannon's entire UK business.

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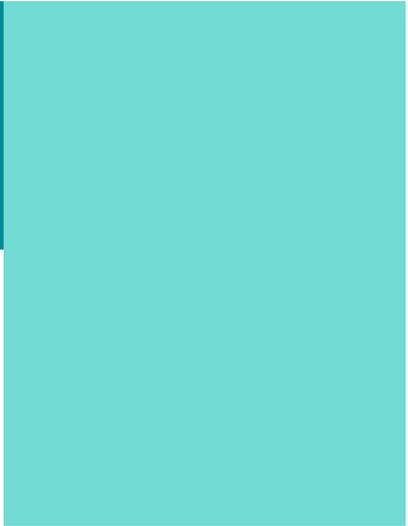
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