Hogan Lovells

Antitrust, Competition and Economic Regulation Quarterly Newsletter

Autumn 2018

Contents

This ACER Quarterly includes Hogan Lovells articles, alerts and blogs published between 1 September and 30 November 2018. The content was produced around the time of the developments in question. Matters covered may therefore have been subject to further developments since initial publication.

From HSR filing to closing in six months: The US DOJ's new plans for merger reviews

A resounding complaint from merging parties heard time and time again is the negative impact on operations resulting from protracted merger reviews that consume significant resources. The duration of the merger review process has increased steadily and has shown no indication of abating – until yesterday. In prepared remarks, the head of the Antitrust Division of the US Department of Justice ("**DOJ**") declared lengthy merger reviews a problem and articulated the DOJ's new plans for completing merger reviews within six months of the parties making their Hart-Scott-Rodino ("**HSR**") filings. The result of this new goal could be a major win for both the DOJ and the merging parties.

Makan Delrahim, the assistant attorney general for the DOJ's Antitrust Division, announced major changes to the DOJ's merger review process on September 25, 2018 at the 2018 Global Antitrust Enforcement Symposium hosted by Georgetown University Law Center. Delrahim acknowledged that lengthy merger reviews significantly disrupt normal business operations, citing statistics revealing that, in 2017, second requests conducted by US antitrust enforcers took an average of 10.8 months to resolve, up from 7.1 months (or 65 percent) in 2013. He described the extensive review time as a problem and highlighted three realities underlying the increasing delay:

- the enormous quantity of data and documents merging parties possess in the electronic age and that are required to be produced during the merger review process
- the growing number of transactions that are international in scope, necessitating cooperation among enforcers
- where remedies are needed, the increasingly common requirement that the merging parties offer an acceptable upfront buyer that the DOJ must vet before proceeding to closing

Delrahim, quoting former Assistant Attorney General William Baxter, said that mergers are "an important and extremely valuable capital market phenomenon, that they are to be in general facilitated, and that it is socially desirable that uncertainty and risk be removed wherever possible." To that end, he set out a number of reforms the DOJ will be implementing "to avoid unnecessary interference with the larger universe of mergers that are either competitively beneficial or neutral." These reforms all are aimed at resolving most merger investigations within six months of the parties' HSR filings.

- **Front office staff who are primarily responsible for recommending the scope and issuance of a second request will be available for an initial, introductory meeting with the merging parties.** Historically, the DOJ leadership has not engaged in face-to-face conversations with the merging parties until the end of the merger review process. Early involvement of front office staff should hasten their knowledge and understanding of the products and industry at issue and should bring greater transparency to the merger review process so parties can better plan for burdensome second request investigations.
- **The DOJ will publish a Model Voluntary Request Letter to enable the parties to begin collecting information crucial to resolving DOJ concerns at the earliest point in the process, even before making the HSR filing.** Experienced antitrust practitioners already recognize the information enforcers need to evaluate whether a transaction poses any competitive harm and should counsel clients to begin collecting this information early. The Model Letter, however, is essentially an invitation for the parties to submit information even earlier without necessarily waiting for the DOJ to issue a Voluntary Request Letter. The merging parties thus have greater control over timing and can get the ball rolling on educating staff on the parties and industry by making early, pre-HSR filing submissions.
- **The DOJ has created a system to track what happens following a "pull and refile"** (when the acquiring party voluntary withdraws and refiles its HSR form, re-starting the HSR waiting period and effectively giving the Antitrust Division an additional 30 days to review the

transaction). This is an accountability tool that ensures the DOJ has an investigation plan in place to maximize its use of the additional time. This should engender greater transparency that will enable merging parties to better evaluate the strategic decision of whether to pull and refile. Because a pull and refile automatically results in an additional 30-day delay, it generally is not a sound option unless the additional time is highly likely to eliminate or significantly curtail a second request. Experienced counsel can advise on whether or not it makes strategic sense to pull and refile in a given transaction.

- **The DOJ will publish a model timing agreement.** A timing agreement is a mechanism that infuses the merger review process with certainty in terms of timing, number of custodians, number of depositions, and other elements of the merger review process. They can allow the merging parties to plan for closing or to meet certain deadlines outlined in transaction agreements, among other potential benefits.
- **The DOJ outlined a number of reforms to timing agreements aimed at reducing the overall time of the merger review.** Specifically — and subject to modification by a deputy assistant attorney general — the DOJ will seek documents from a maximum of 20 custodians, will take a maximum of 12 depositions, and will make a decision within 60 days of the merging parties declaring substantial compliance. In return, the DOJ will expect faster and earlier document and data productions from the parties, narrower privilege logs, and a longer post-complaint discovery period.
- **The DOJ will enforce deadlines and specifications in civil investigative demands ("CIDs") issued to third parties in connection with a merger investigation more vigorously.** Compliance with CIDs is burdensome, time-consuming, and expensive, particularly for third parties who are not benefitting when the DOJ clears a transaction. This occasionally can lead to slow or incomplete third party compliance. Historically, CID enforcement actions were scarce, but Delrahim's comments indicate that the DOJ is prepared to take a hard line to obtain materials needed for its reviews in a timely manner. We are hopeful enhanced enforcement is accompanied by a corresponding reduction in the scope of data and documents requested from third parties. CID recipients should proceed cautiously and should consult experienced counsel to negotiate the scope of CID specifications and deadlines to minimize the burden and expense of compliance while warding against an enforcement action.
- **The DOJ will improve coordination with foreign enforcers in parallel merger investigations.** Delrahim's goal is to minimize delay resulting from enforcers' inability to cooperate and share information quickly and effectively.
- **The DOJ withdrew its 2011 Policy Guide to Merger Remedies (the "Guide")**. The Guide will be replaced with an updated policy, but, until that time, the 2004 Guide will be in effect. Delrahim stated that the DOJ's intent is to reduce delay resulting from protracted remedy negotiations. However, the revisions likely will also reflect current DOJ leadership's aversion to behavioral remedies even in vertical cases (where the agencies have traditionally employed such remedies). Delrahim reiterated the DOJ's position on behavioral remedies in his comments at the Georgetown conference, but he did not totally foreclose behavioral remedies. Another DOJ official, Julia Schiller, also commented on behavioral remedies in response to a question at the conference, saying that the DOJ will continue to consider behavioral remedies in a narrow range of cases where the transaction will create significant efficiencies that cannot be achieved if there is a structural remedy.
- **The DOJ will release aggregated merger review statistics periodically.** Current statistics relating to the average length of initial merger reviews and second requests are not regularly released. This reform will hopefully create greater accountability and transparency and will ensure that the DOJ staff follows the principles outlined by Delrahim.

These reforms are concrete steps that could lead to shorter, more transparent merger reviews; however, these welcome benefits do not come without a price. The DOJ's expectation is that the merging parties will implement reforms on their end to ensure the DOJ receives what it needs to evaluate whether a transaction will result in any competitive harm. (In fact, Delrahim titled his remarks, "It Takes Two: Modernizing the Merger Review Process.") This means even earlier and more frequent productions of documents and data; potentially earlier involvement of outside consultants, such as expert economists; and greater availability and involvement of personnel from each of the merging parties to respond to DOJ questions and provide necessary education.

While shorter merger review periods are welcome, these demands on the parties are often burdensome, a drain on the parties' time and financial resources, and disruptive to ordinary course business operations. There are, however, many ways the parties can strategize to maximize their cooperation while minimizing disruption and cost. Experienced antitrust counsel can guide the parties through the process and develop creative ways to satisfy DOJ requests, particularly through the use of timing agreements and appropriately scheduling educational meetings with DOJ staff and the front office. To better understand how you can most benefit from these reforms on your next deal or the extent to which these reforms will impact Federal Trade Commission merger reviews, contact the authors.

Delrahim's full remarks are available here [1]

Jan McDavid
Partner, Washington, D.C.
T +1 202 637 8780
janet.mcdavid@hoganlovells.com

Logan Breed
Partner, Washington, D.C.
T +1 202 637 6407
logan.breed@hoganlovells.com

Tracy Penfield
Senior Associate, Washington, D.C.
T +1 202 637 5593
tracy.penfield@hoganlovells.com

1 www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust

CADE issues a new regulation to foster private antitrust enforcement in Brazil

The Brazilian Competition Authority, or the Administrative Council for Economic Defense ("CADE"), has issued a resolution providing specific procedures and rules to be considered by private plaintiffs aiming to obtain access to evidence held by the CADE that may be necessary or useful to support follow-on damage claims resulting from anti-competitive conduct, such as cartel activity (Resolution No. 21/2018, from 12 September 2018).

Under the new rule, the affected parties may have access to certain documents and information that were provided to the CADE by the applicant as part of a leniency agreement, settlement agreements (in Portuguese, "Termos de Compromisso de Cessação – TCCs") or dawn raids.

Although the CADE does not directly assist private plaintiffs pursuing damages claims, the CADE sees civil lawsuits brought by private plaintiffs as a crucial deterrent to potential violations of the antitrust laws and as a way to compensate the victims. Therefore, private claims act as a supplementary tool in the fight against anti-competitive behavior.

The existence of an ongoing cartel investigation and, in particular, of a conviction imposed by the CADE constitutes "prima facie evidence" of an infringement of the antitrust laws and entitles the affected parties to seek compensation for the damages caused (e.g., overprice).[2] Accordingly, obtaining documents and information held by the CADE is important to support private claims. This is particularly relevant in Brazil because there is no "civil discovery" that allows private plaintiffs to obtain data and documents directly from the cartel participants.

In its assessment of whether information or documents should be made available to any third party, the CADE will take into account the current stage of the antitrust investigation. From the beginning of the negotiation of the leniency agreement until its conclusion, all documents related to the proposal or that are relevant to the investigation will be kept unavailable to third parties. During the "fact-finding stage," third parties will have access only to nonconfidential versions of the technical note that initiates the investigation and the technical note that concludes the investigation. Finally, most of the confidential documents and information related to leniency and settlement agreements and dawn raids will be made public after the CADE's tribunal issues its final decision on a case.

However, there are exceptions to this resolution; certain documents will not be available to third parties, even after the CADE's final decision. The following documents, for example, will remain confidential: confidential versions of the "History of Conduct" (also called "Corporate Statement")[3] and its annexes, trade secrets, competitively sensitive information, documents with confidentiality protected under any regulation, and materials provided by an applicant in an unsuccessful leniency or settlement negotiation. On the other hand, the Public Prosecutor's Office, which takes part in negotiating leniency agreements, will have full access to the documents and information concerning the conduct under investigation and may use these to support civil and criminal lawsuits, provided that the confidentiality is maintained.[4]

Access to the confidential documents mentioned above will only be granted to third parties in exceptional circumstances, such as

- when the access is authorized by law or court order;
- when confidentially is waived by the party that provided the information and the CADE approves the disclosure of the information; or
- as a result of a cooperation between the CADE and a foreign authority (and only if the party that provided the information agrees with the disclosure).

2 The Intergovernmental Economic Organisation OECD presumes that there is a 10 percent to 20 percent overcharge that results from cartel conduct.

3 This is a document prepared by CADE's general superintendence based on self-incriminatory information and documents voluntary provided by applicants in a leniency agreement or settlement agreement

4 Brazilian law provides for criminal, administrative, and civil sanctions for the improper disclosure of confidential information to third parties.

The resolution also establishes that the CADE's tribunal and the CADE's general superintendence may apply a discount to the fines or pecuniary contribution to be paid by the applicant of a settlement agreement or a convicted party if the company can demonstrate that it has already indemnified the affected party.

The new rule is an important measure to ensure more predictability and transparency regarding which materials and information are available to private plaintiffs aiming to seek compensation for damages caused by anti-competitive conduct in Brazil. Private claims are still very incipient in Brazil and the new resolution aims to encourage private enforcers to seek damages for any damages resulting from anticompetitive behavior.

Should you require more information, please contact us.

Isabel Costa Carvalho
Partner, São Paulo
T +55 11 3074 3501
isabel.carvalho@hoganlovells.com

Kathryn (Katie) Hellings
Partner, Washington, D.C.
T +1 202 637 5483
kathryn.hellings@hoganlovells.com

Rafael Szmid
Senior Associate, São Paulo
T +55 11 3074 3506
rafael.szmid@hlconsultorialtda.com.br

Can you be personally liable for contravening Hong Kong competition law?

In the latest cartel case before the Competition Tribunal, the Hong Kong Competition Commission ("**HKCC**") has, for the first time, brought direct action against individuals and sought pecuniary penalties from them.

The HKCC commenced proceedings against three renovation service companies and two individuals on 6 September 2018 for cartel conduct. The HKCC's case is that in or around June to November 2017, the three companies allocated customers and coordinated pricing in relation to the provision of interior renovation services at a subsidised public housing estate in Kowloon. The HKCC considers that this constituted market sharing and price fixing, in contravention of the First Conduct Rule of the Competition Ordinance. According to the HKCC, the two individuals were involved in the contravention as a result of their personal participation in the cartel. The HKCC is also seeking a director disqualification order against one of the individuals.

This is the third case brought by the HKCC to the Tribunal since the Ordinance came into full force in December 2015, and the second case against cartels targeting residents of public housing.

Application to individuals

This case serves as a timely reminder that the Ordinance applies to both individuals and companies, and any person "involved" in a contravention of a competition rule may be held liable. This means a person who:

- attempts to contravene the rule;
- aids, abets, counsels or procures any other person to contravene the rule;
- induces or attempts to induce any other person, whether by threats or promises or otherwise, to contravene the rule;
- is in any way, directly or indirectly, knowingly concerned in or a party to the contravention of the rule; or
- conspires with any other person to contravene the rule.

This broad application raises the question whether any employee in an organisation, no matter how junior, will be held liable. According to the HKCC's enforcement policy, the HKCC will prioritise action against directors and managers of the company concerned (or those who had otherwise directed the cartel conduct). With this approach, the HKCC is likely to target those who make decisions for the company, rather than front line or junior staff who are merely following the directions of management.

Where an individual is involved in a contravention of a competition rule, the HKCC has discretion to agree not to take action against that individual in return for the individual's assistance to the HKCC. It is worth noting that the Ordinance prohibits employers from terminating, threatening to terminate, discriminating, intimidating or harassing an employee, or causing the employee any injury, loss, or damage, because of the employee's assistance to the HKCC.

Penalties and remedies

The Tribunal has broad powers to impose penalties and remedies for contraventions of the competition rules under the Ordinance. These include declarations of contravention of a competition rule, orders imposing pecuniary penalties, injunction orders, interim orders, director disqualification orders and orders to unwind transactions.

Companies can be fined up to 10 percent of the company's (or group's) gross Hong Kong turnover per contravention for up to three years in which the contravention occurred. Individuals may also be fined but the Ordinance prescribes no limit on the amount.

In determining the amount of the pecuniary penalty, the Ordinance mandates the Tribunal to have regard to:

- the nature and extent of the conduct that constitutes the contravention;
- the loss or damage, if any, caused by the conduct;
- the circumstance in which the conduct took place; and
- whether the party has previously been found by the Tribunal to have contravened the Ordinance.

The potential financial consequences do not end there. The Tribunal may order payment of the HKCC's investigation costs, payment of damages to an aggrieved party, or even payment of any profit gained or loss avoided by the contravening party as a result of the contravention.

If the Tribunal has found that a party has breached the Ordinance, or where the party has admitted the contravention in a commitment accepted by the HKCC, the party may also be exposed to private follow-on actions by those that have suffered loss or damage as a result of the contravention.

Last word

The current cartel case before the Tribunal sends a clear message that both companies and individuals need to comply with competition law or otherwise risk facing enforcement action and the many consequences that come with investigations and litigation.

The HKCC has made it clear that where actions against individuals are concerned, it will focus on those who are in a management position or those who direct the anti-competitive conduct. That said, given the broad scope of application of the Ordinance to any person involved in a contravention of a competition rule, this does not preclude the HKCC from taking action against regular employees in the right circumstances.

Adrian Emch
Partner, Beijing
T +86 10 6582 9510
adrian.emch@hoganlovells.com

Eugene Low
Partner, Hong Kong
T +852 2840 5907
eugene.low@hoganlovells.com

PJ Kaur
Associate, Hong Kong
T +852 2840 5634
pj.kaur@hoganlovells.com

CAT upholds CMA Decision: Ping out of bounds

On 7 September 2018, the CAT upheld the CMA's 2017 infringement decision in which it fined golf club manufacturer Ping £1.45m for breaching the EU and UK competition law prohibitions on anti-competitive agreements by preventing UK retailers from selling Ping golf clubs online. As part of its judgment, the CAT confirmed that the CMA was correct to characterise the online ban as a 'by object' infringement of the prohibitions. This was despite accepting that Ping had been pursuing a legitimate commercial aim (of promoting custom fit golf clubs to the benefit of consumers) and that such an aim could, in the abstract, be regarded as pro-competitive.

The 'by object' classification – a concept still in the rough?

In this judgment, the Competition Appeal Tribunal (the "**CAT**") has revisited the much discussed and contentious issue of identifying a 'by object' infringement of the prohibitions on anti-competitive agreements (under Article 101 of the Treaty on the Functioning of the European Union ("**Article 101**") and Chapter I of the Competition Act 1998 ("**Chapter I**")). These laws prohibit agreements and concerted practices which have as their 'object' or 'effect' the prevention, restriction or distortion of competition.

Although the distinction between 'object' and 'effect' has been the subject of significant debate, in principle a 'by object' restriction denotes conduct that is deemed to be intrinsically (obviously) anti-competitive. In short, such a restriction is considered presumptively anti-competitive – making it easier for competition authorities and litigants to establish an infringement.

By contrast, where an agreement is not evidently anti-competitive to the extent that it is a 'by object' infringement, a more detailed examination is required of the agreement in its market context in order to ascertain whether it will actually generate anti-competitive 'effects'.

Not the fairway to sell

Although Ping achieved a small reduction in the size of the fine imposed by the Competition and Markets Authority (the "**CMA**"), the other six grounds of its appeal were all dismissed.

The CAT first considered whether the CMA had breached Ping's human rights by requiring Ping to sell a product (ie non-custom fit golf clubs) that it did not want to sell. On this issue the CAT was satisfied that the CMA had acted appropriately, noting that, according to Ping's own figures, Ping already sells non-custom fit clubs (10-20% of Ping's sales); that it does not have an online sales ban in the USA; and that selling online does not prevent Ping from continuing to promote custom fit clubs.

Of most interest from a competition law perspective, the CAT then upheld the CMA's finding that the online sales ban was a restriction of competition 'by object'. This was despite the Tribunal noting significant flaws in the methodology adopted by the CMA and otherwise accepting that Ping was pursuing a legitimate commercial aim.

The CAT was also satisfied with the CMA's determination that the online ban was disproportionate (primarily on the basis that there were other, less restrictive means available to promote custom fitting) and that the policy was not objectively justified (because it was not necessary to implement the ban in order to preserve non-price competition).

Furthermore, and since the CAT had already established that the ban was not necessary to promote custom fitting, Ping's suggestion that the ban was an ancillary restraint (ie necessary to achieve that pro-competitive aim) was also dismissed by the Tribunal.

Finally, Ping was no more successful in its attempts to persuade the CAT that the ban met the criteria for exemption under Article 101(3) and the Chapter I equivalent. While the CAT conceded that the ban led to a small increase in the custom fitting rate of Ping's clubs, and that this amounted to an 'efficiency', it found that the ban was not necessary to prevent free riding (customers would not be able to get fitted in a physical store and then use the specifications to buy online as the custom fitter could simply withhold the specifications from the customer) and there were less restrictive means to promote custom fitting. These factors meant that the online ban was not indispensable to the efficiency achieved. Further, consumers did not receive a fair share of the benefit since the downsides of the policy (inconvenience for consumers, reduced ability to price compare, reduced ability for retailers to compete outside their geographic catchment areas) significantly outweighed the slight increase in the custom fitting rate of Ping clubs.

However, there was a small silver lining for Ping as it succeeded in persuading the CAT to reduce the fine levied by the CMA. The Tribunal found that the involvement of a Ping director in the online ban should not have been treated as an aggravating factor. Taking this into account, and considering the overall fairness and proportionality of the penalty, the CAT reduced the fine from £1.45m to £1.25m.

Teed up for appeal?

This was a closely watched case in an area of the law which continues to evolve. Whilst the outcome was not a complete surprise, the judgment has caused a degree of controversy, most notably in its consideration of the 'by object' assessment. The CAT seems to have wrestled hard with the issue describing it as *"not, in the Tribunal's view, entirely straightforward" and acknowledging that it was "counterintuitive" that Ping's legitimate aim (of improving the consumer experience) had been classed as a 'by object' restriction resulting in a "quasi-criminal fine".*

Pierre Fabre – a tough one to read

The CAT criticised the CMA for considering the issue as to whether the ban was objectively justified (and whether it was proportionate) as part of its 'by object' assessment under the Article 101 and Chapter I prohibitions. The CAT held that, instead, objective justification should only be considered when determining whether the criteria established in the seminal Metro[5] case apply (which take the restrictions in a selective distribution system outside of the reach of the prohibitions altogether) or when applying the criteria for exemption from the prohibitions.

Many would say that this is a sensible interpretation of the law, although it should be acknowledged that it is somewhat difficult to reconcile with the 2011 European Court of Justice ("**ECJ**") ruling in Pierre Fabre which seems to state (at paragraph[6] 47 of the judgment) that a ban on internet sales is a 'by object' restriction unless it is "objectively justified". However, the CAT was at pains to emphasise (as the ECJ had been in its subsequent Coty[7] ruling) that the judgment in Pierre Fabre was specific to the facts of that case.

Further, in a somewhat strained interpretation, the CAT stated that it understood the objective justification reference at paragraph 47 in Pierre Fabre to apply to the Metro criteria, and not (as the text, on its face, seems to indicate) to the 'by object' assessment.

Regardless, the CMA's error in law was not sufficient to quash the decision – the CAT upheld the CMA's finding that the online ban was in fact a restriction 'by object'.

The importance of your aim

Ping argued that the concept of a 'by object' restriction should be interpreted narrowly and can only apply where there is no "plausibly pro-competitive rationale" for the agreement. This approach was commended by some commentators as the most sensible way to cut through the thicket of (often somewhat inconsistent) case law on the subject and, as such, suggested as the methodology that the CAT should have taken in deciding this case.

However, the CAT viewed things differently, referring more closely to the ECJ ruling in Carte Bancaires – now the leading case on the approach to the 'by object' assessment. While the[7] judgment in that case makes clear that the concept of a 'by object' restriction should be interpreted narrowly (applying only where an agreement "reveals a sufficient degree of harm to competition"), there is no mention in it of a requirement that the agreement lack a plausibly pro-competitive rationale.

5 Case 26/76 *Metro SB-Großmärkte v Commission EU:C:1977:167*

6 Case C-439/09 *Pierre Fabre Dermo-Cosmétique EU:C:2011:649*

7 Case C-230/16 *Coty Germany GmbH v Parfumerie Akzente GmbH EU:C:2017:603*

Instead, Cartes Bancaires confirms and restates the test for a 'by object' assessment. The provisions of the agreement should be objectively analysed in the relevant legal and economic context to determine the object of the agreement. The subjective intention of the parties may be taken into account, but it is not determinative and need not form part of the assessment.

Therefore, the CAT held, it is not the presence of a plausibly pro-competitive rationale which is required to escape a 'by object' classification; rather, it is the absence of an anti- competitive object flowing from the agreement. As the CAT noted, this was the same analysis applied by the

ECJ in its review of the BIDS[8] cartel case in which a 'crisis cartel' emerged to deal with overcapacity in the market. The market participants agreed that certain competitors would exit the market (and be compensated for doing so) to return the market capacity to an efficient level. The subjective intention of the parties was pro-competitive but, reading the provisions in their legal and economic context, the object of the agreement was market sharing and so amounted to a restriction 'by object'. That the ECJ's judgment in the BIDS case is one of the shortest that it has ever issued, appears to reflect the certainty of its views on the issues in hand.

In the Ping case, the CAT confirmed that the CMA had correctly analysed the legal and economic context, determining that in the context in question such a ban, by its very nature, revealed a sufficient degree of harm to competition to be classed as a 'by object' restriction. Ping's legitimate commercial aim was not relevant to this assessment – any benefits to the consumer should only be considered under the exemption criteria (which on the facts here were not satisfied). As such, the 'by object' classification was upheld.

Time for another round?

Whether Ping will accept this judgment remains to be seen; a further appeal by it would not be at all surprising. However, what is without doubt is that any manufacturer continuing to operate an absolute ban on internet sales must be willing to tolerate a significant risk of competition law enforcement action, however well justified the manufacturer may believe the ban to be.

Mark Jones
Partner, London
T +44 20 7296 2428
mark.jones@hoganlovells.com

Joshua Esam
Associate, London
T +44 20 7296 5102
joshua.esam@hoganlovells.com

8 Case C-67/13 P *Groupment des Cartes Bancaires v Commission EU:C:2014:2204*

9 Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd EU:C:2008:643*

Exploring the contrasting views about antitrust and big data in the US and EU

Are some tech companies using their cache of big data to crush competition?

US regulators don't think so. At the US Department of Justice ("**DOJ**") Technology Policy Institute Conference in August 2018, Deputy Assistant Attorneys General Barry Nigro and Roger Alford said they'd be unlikely to bring antitrust cases against big tech companies based on their collections of large amounts of data. But this view contrasts with the European Union ("**EU**"), where a few companies already face enormous fines for what regulators there consider competitive dominance in big data.

In this hoganlovells.com interview, Hogan Lovells partners Falk Schöning, based in Brussels, and Logan Breed, based in Washington DC, discuss the contrasting perspectives of the EU and United States regarding big data, competition, and antitrust law, and how regulators are attempting to level the playing fields between large tech companies, smaller firms, and new entrants into the open market.

How do regulators in the US view the competitive significance of big data in their antitrust investigations?

Logan Breed: The question of how the antitrust laws should handle the issue of big data is somewhat uncertain in the United States. There have not been any cases brought by US antitrust enforcement agencies based on the idea that a set of data is competitively significant enough to cause any competitive violation to occur or for a transaction to be competitive. However, it is a topic that is getting attention in antitrust circles.

The US Federal Trade Commission ("FTC") recently embarked on a series of hearings to assess the state of competition and consumer protection law in the 21st century, and it will hold two days of hearings in November on the topic of "Privacy, Big Data, and Competition." It will be an opportunity for both sides of the debate to air their views publicly, and for the FTC to either come to some conclusions and write a report or leave those comments out there. It's unclear exactly how this will end up. Moreover, the US Attorney General and the head of the DOJ Antitrust Division recently met with multiple state Attorneys General reportedly to discuss potential actions against big tech companies.

There are examples of merger cases where data was significant, and there has been at least one case that the FTC brought, in which the remedy involved a licensing of data. But that's not exactly what the concept of big data and its competitive significance really means when people talk about it in the abstract.

One potential issue would be if an acquisition or merger between two companies that have big datasets will create a unified dataset that is an impossible barrier to entry for other companies to compete with. Again, we've never seen a case like that. I suppose in the abstract, it's possible. But most big datasets are not unique and are not uniquely competitively significant. As a practical matter, I think it would be very difficult for a US antitrust agency to prove that a transaction violated Section 7 of the Clayton Antitrust Act, which prohibits mergers and acquisitions that may tend to substantially lessen competition in a relevant antitrust market, solely on the basis of the fact that the merging companies have a lot of data.

So when companies with a lot of big data merge datasets, you don't anticipate it will become a legal issue in the United States in the near term?

Breed: At a recent conference, two DOJ Antitrust Division front-office leaders talked about big tech companies that have large amounts of data and the protests by smaller companies against the bigger companies about their data. But the upshot of their comments was that they think it would be very difficult in the United States to bring that kind of a case. Nevertheless, the economic power of big tech companies is a hot topic at a political level in the US on both the left and right of the political spectrum, and big data will likely continue to be one of the issues that the detractors of big tech use.

So the takeaway for clients is, there's a lot of noise right now about whether antitrust laws are adequate to rein in big companies, including big tech companies, and whether big data is an existential competitive threat that's going to undermine competition going forward. I think the answers to those questions are first, the antitrust laws are sufficient to take into account the competitive significance of big tech companies and their datasets. And second, big data in the abstract is not an existential threat to competition.

There is some general concern that companies with big data may impact competition, but is there a specific issue that's up for debate?

Falk Schöning: The starting point, and the big picture question, is whether or not there actually is a problem that any company has control of big data. To be provocative, you could say, these companies may have vast amounts of data, but so what?

There is some agreement in both the United States and the EU that there could be an antitrust problem with those companies that control big data, but it is unclear what the problem is and for whom? Is it a problem for the consumers; for competitors, including the smaller digital companies out there; or the old, offline economy which is disrupted by big data companies? Depending on your perspective, you will come to totally different answers.

How this is being handled in Europe? Are attitudes similar or different to the United States?

Schöning: Indeed, they are somewhat different. This makes the topic interesting, relevant, and also difficult to handle for clients.

In Europe, all the fuss about big data and antitrust that Logan mentioned has somewhat resonated with the authorities and politicians. It's not just an academic debate. The European Commission, the German Federal Cartel Office, the French Competition Authority and others — they all are not only talking at conferences about this. They have set up teams internally and they have published papers where they laid the groundwork for future antitrust investigations. So while I think we still have yet to have the big data case, I'm quite sure the authorities would want to look at the cases where all these theories are dealt with — and you can see from some of the enforcement actions that they're trying to.

The other aspect, which I also find interesting, is whether antitrust law is fit for its purpose here. Should it actually be revamped to be brought into the 21st century? In Europe, there is a debate as to whether antitrust is really the instrument you want to use, or whether you need regulation of big data companies similar to telecommunications regulation. Such a real data regulator would be set up very specifically to protect companies from the abuse of a strong position by having that much data.

That's the debate that politicians raise, and for our clients, that's a debate to be followed and engaged in because this would eventually decide about leveling the playing field where they are active.

Breed: I think clients should think about whether they want to engage with these FTC hearings that are coming up, too. There will be opportunities for public comment.

For companies in Europe, are there forums similar to the upcoming FTC hearings that Logan mentioned, where companies can engage in the debate?

Schöning: They are plenty of public consultations on specific aspects of this, so that's an opportunity to engage and respond. For the larger digital players, you can assume that they all have their offices in Brussels and in the EU Member States and they do talk to the regulators, sit on panels, and express their views. Smaller or more specialized companies tend to so less, but they could think about using trade associations to get their voice heard.

That part of the work is more public affairs. I think what's more interesting from a legal perspective, for us and our clients, is the compliance aspect.

In Europe antitrust authorities may pick up this potential theory of harm about having a lot of data. So when you have a lot of data, you need to be very careful about what you're doing with it because otherwise someone could allege you are abusing it. So that becomes a compliance question.

And for clients, the challenge is to include this new world in their existing compliance programs, which is typically done by training salespeople, or having audits where you look at salespeople's e-mails. But in a world of big data, you actually have to talk to the IT and software engineers and understand what they are working on.

So you suggest companies rethink their compliance programs and involve their software engineers?

Schöning: Yes, and there's even a term for it developed by the authorities in Europe: the European Commissioner for Competition is asking companies to apply something she calls "compliance by design," which means you can't hide behind an algorithm if you infringe antitrust laws.

So we say, for example, my engineer developed the software that monitors the prices of all my competitors online. Whenever they change their price, my algorithm automatically changes our price, too. That may be nice if prices go down, but if everyone applies a similar algorithm, and if these algorithms are probably even self-learning, the computer programs may conclude that they are all better off if they increase prices.

And then the question is, who's responsible? The machine can't be responsible in legal terms, so is the guy who developed the software responsible? Or the procurement person who bought the software from a third-party vendor? If you consider the aforementioned European Commission's approach, the company that applies the software could be responsible. But the legal conclusion to come to that point is not that straightforward.

What do you expect to happen next in the discussion about big data and antitrust law?

Schöning: The next level is whether it's a problem that we should solve at all by means of competition law.

Here are two adjectives that describe competition law: it's flexible and it's case specific, so it will only be applied, say, to the company that has big data but not to all companies that hold some form of data. The sandwich shop, which happens to have a website where you can order your food, will not be the focus of the antitrust authorities.

In contrast, regulation applies to everyone meeting certain criteria. Whereas the regulation could say, if you operate a website, you need to do this — competition law would not prescribe specific conduct but rather enforce the law only afterwards if problems occur. For large global companies, that's not a problem, because they have enough resources to deal with this. But for the sandwich shop, it could be a problem. That is — of course generalizing — the difference between competition law, which is flexible, and regulation.

On the other hand, regulation also has advantages: it gives you predictability of rules. Competition law is what the lawyer calls ex post — only after something has happened. It's applied only if a regulator thinks your behavior is problematic.

As you may have seen, some large digital players have been fined already in Europe. Even for a large company, these have been very significant fines. And because there is no book that talks about how you run a search engine or a social network by the law, the antitrust enforcement is not predictable. As Logan said, in the United States, to date there is much less risk of a fine. But in Europe, this lack of predictability can cost companies a lot of money.

What's your perspective as to why Europe and the US have such different approaches to big data and antitrust enforcement?

Schöning: I think some Europeans are more concerned with data in the hands of companies than in the hands of the State.

This is very different from the understanding of freedom in the United States, which is more about ensuring that your data is not in the hands of the state. That's very different, and it triggers why the EU has things like GDPR, which basically regulates how private companies can deal with your data, but not what the state can do with it.

About Logan Breed:

Logan Breed has handled many of the most cutting-edge antitrust reviews of mergers and acquisitions since 2002, as well as numerous nonmerger conduct investigations and antitrust litigation matters. He has particular experience with issues at the intersection of antitrust and intellectual property law.

About Falk Schöning:

Praised by clients as an "excellent procurement and antitrust expert," Falk Schöning focuses on solving international legal challenges. He has vast experience in merger control, antitrust compliance, and foreign investment control in Germany, throughout Europe, and abroad. Schöning is a dedicated, solution-oriented, and pragmatic advisor who handles the full range of matters from straightforward notifications to the global coordination of merger control reviews in complex multibillion dollar transactions.

Logan M. Breed
Partner, Washington, D.C.
T +1 202 637 6407
logan.breed@hoganlovells.com

Dr. Falk Schöning
Partner, Brussels
T +32 2 505 0911
falk.schoening@hoganlovells.com

Two key Brazilian regulators have entered into a cooperation agreement to fight transnational corruption and cartels

The Brazilian Competition Authority, or the Administrative Council for Economic Defense ("**CADE**"), and the Ministry of Transparency, Supervision and Comptroller-General ("**CGU**") will now formally exchange information and documents among themselves as part of a joint effort to increase the prosecution of Brazilian and foreign companies involved in corruption and/or cartels. This cooperation was materialized by Joint Ordinance No. 4, published in the Official Gazette of Brazil on 1 June 2018.

According to Joint Ordinance No. 4, the CADE will share with the CGU information and documents related to any incident of transnational bribery of which it is aware and the CGU will provide information in connection with any anti-competitive conduct. Each authority will share information regarding potential wrongdoing as soon as the conduct is identified (i.e., before the conclusion of the investigation). All documents and information exchanged among the authorities must be treated as confidential.

This cooperation should increase enforcement of both Brazil's anti-corruption and antitrust laws given that bid-rigging combined with corruption is a hot topic and a clear priority for the CADE, which is reviewing dozens of cases linked to Operation Car Wash (potentially more than 30 investigations are under investigation before the CADE, including both confidential and public investigations).

In addition, companies and enforcement agencies have self-disclosed or named Brazil 36 times (i.e., the most mentioned country) in disclosures about ongoing Foreign Corrupt Practices Act (FCPA) related investigations, according to the latest data from FCPA Tracker, which is a strong indicator that US authorities are also looking at transnational corruption involving Brazil.

Transnational bribery is defined in Article 2 of the Joint Ordinance No. 4 as the "offer, promise or payment of money or any other undue advantage, directly or through third parties, by a Brazilian or foreign company, with headquarters, branch or representative office in Brazil, to a foreign public official, to obtain an advantage that will damage the foreign public administration."

Under the Brazilian Anti-corruption Law, legal entities are strictly liable for corrupt practices. Sanctions include:

- fines of up to 20 percent of a company's gross revenue in the year prior to the initiation of the investigation (or R$6,000 to R$60 million if it is not possible to determine the company's revenues); and
- an obligation to publish the decision that applied the fine in a newspaper. If the conduct also included a violation of the Public Procurement Law in Brazil, an entity can also be barred from participating in future bids or from executing agreements with public bodies, which significantly impacts the business of subject companies due to the importance of public procurement contracts in Brazil.

Other sanctions include:

- confiscation of the subject company's assets;
- suspension of the subject company's activities or the mandatory dissolution of the entity itself; and
- prohibition from receiving incentives, subsidies, grants, donations, or loans from public bodies, public financial institutions, or those companies controlled by the public authorities for a prescribed period of time.

Under the Brazilian Antitrust Law, the CADE can impose fines from 0.1 percent to 20 percent of the gross revenues of a company, group of conglomerates, earned in the year before the initiation of the proceeding before the CADE, in the business line where the violation took place. The fine will never be lower than the advantage obtained with the conduct in cases where it is possible to estimate the company's advantage with the conduct. Additional sanctions can also be applied to the legal entity, as

- the obligation to publish the CADE's decision in a newspaper of wide circulation;
- a prohibition on contracting with financial institutions and participating in biddings held by public bodies;
- a split up of the company or a divestiture of certain assets;
- a prohibition on granting an arrangement for payment of tax in installments; and
- individuals involved in the conduct may also be fined in 1 percent to 20 percent of the fine imposed on the legal entity.

Should you require more information, please contact us.

Isabel Costa Carvalho
Office Managing Partner, São Paulo
T +55 11 3074 3501
isabel.carvalho@hoganlovells.com

Kathryn (Katie) Hellings
Partner, Washington, D.C.
T +1 202 637 5483
kathryn.hellings@hoganlovells.com

Rafael Szmid
Senior Associate, São Paulo
T +55 11 3074 3506
rafael.szmid@hlconsultorialtda.com.br

The French Competition Authority sanctions for the first time an operator of the health industry for abusive price increases

The French Competition Authority ("**FCA**") found that Sanicorse, a monopoly provider of services to hospitals in Corsica, abused its dominant position by having imposed significant, sudden and unjustified price increases upon hospitals.

Whilst acknowledging that competition authorities are entitled to assess pricing policies of dominant companies and to sanction those which impose unfair commercial conditions, the FCA has nevertheless shown some reluctance so far to interfere in companies' price-setting.

Case law on excessive pricing practices, which was established by EU courts decades ago and according to which excessive prices may be established where product prices appear to be clearly disproportionate compared to their economic value or their production costs, seems to have given rise to some renewed interest recently throughout Europe. In the pharmaceutical sector, excessive pricing issues have become one of the enforcement priorities, not only of the European Commission, but also of a number of national competition authorities, notably in Italy, Spain and the UK.

In this case, the FCA found that the price increases implemented by Sanicorse between 2011 and 2015, should be regarded as abusive considering not only their significant level but also the conditions in which they were imposed upon hospitals.

The FCA found that Sanicorse imposed its price increases on its customers without providing any notice and threatened to terminate the contracts if they refused the new pricing conditions. As regards the level of the price increases, the FCA first made clear that there is no pre-defined threshold beyond which a price increase should be regarded as being significant. In this case, however, the level of the annual price increases implemented by Sanicorse between 2011 and 2015 was beyond 60%. More importantly, such price increases could not be justified on the basis of cost increases borne by Sanicorse.

Although Sanicorse provides services for the treatment of infectious clinical waste, the FCA's reasoning would be applicable to the provision of medicines and medical devices (subject or not to regulated prices).

Indeed, any anticompetitive practices leading to higher prices for the public health insurance system, hospitals and/or patients are always regarded as particularly serious by the FCA. The competitive functioning of the healthcare sector has been an enforcement priority for a number of years. In that respect, the FCA should make recommendations to French President Macron and the government on how to increase competition and lower prices of medicines in the coming months (the press release relating to the FCA sector inquiry regarding the functioning of competition in the healthcare sector is available here[10]).

Sanicorse being a very small company, the amount of its fine (199,000 euros) is negligible compared to fines usually imposed by the FCA in the health sector (e.g., 25 million euros for a pharmaceutical company in 2017, 41 million euros for another one in 2013). But there is no doubt that the FCA has issued this decision so as to send a clear message to all players in the health industry regarding their pricing policies.

François Brunet
Partner, Paris
T +33 1 53 67 47 47
francois.brunet@hoganlovells.com

Eric Paroche
Partner, Paris
T +33 1 53 67 47 47
eric.paroche@hoganlovells.com

Céline Verney
Senior Associate, Paris
T +33 1 53 67 47 47
celine.verney@hoganlovells.com

10 http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=663&id_article=3068&lang=en

UK National Security Investment Regime: What might it mean for Private Equity?

The UK Government has been consulting on a new regime which will grant it wide powers to intervene in deals on grounds of national security. The consultation period in relation to the Government's proposals has recently closed and we have been considering the implications for Private Equity.

Pending introduction of the necessary legislation to implement the new regime, the Government has amended the merger regime for transactions involving goods or services for (or potentially for) military use, computing hardware and quantum technology, by lowering the target turnover threshold from L70m to L1m and changing the share of the supply test so that these sectors can now be reviewed for national security concerns if the target has a turnover of more than L1m or a share of supply of 25% or more (alone or together with the acquirer) in the UK. These sector specific amendments to the merger regime will be repealed when the broader national security investment regime is implemented.

Key features of new regime

Key features of the proposed national security investment regime include:

- **Applies to the acquisition of assets, and, in certain circumstances, loans as well as share acquisitions**
- **No turnover or market share thresholds**
- **Not sector specific**
  - but guidance does suggests the risks are seen to be in "core areas" including national infrastructure (nuclear, defence, communications, energy and transport) and certain advanced technologies, but it might also include critical suppliers to businesses in the core areas
- **Voluntary regime, no obligation to notify**

  BUT
- **"Call in" powers**
  - the Government has the power to "call in" a deal before or within six months' of completion of a transaction if a "trigger event" occurs and there is a reasonable suspicion that the trigger event may give rise to a risk to national security
- **Trigger events**

  The trigger events in relation to a corporate transaction are the acquisition of:
  - More than 25% of an entity's shares or votes
  - Significant influence or control (which it is proposed may include the right to appoint a director to the board)
  - Further significant interest or control (including further acquisitions leading to holdings of over 50% or 75% of an entity's shares or votes, or the acquisition of additional rights e.g. board appointments)
- **When will the trigger events raise concerns about a risk to national security?**

  When will the trigger events raise concerns about a risk to national security?
  - The "target risk" – could the entity (or asset) be used to undermine the UK's national security?
  - The "trigger event risk" – does the trigger event risk (the acquisition) have the means or ability to undermine the UK's national security?
  - The "acquirer risk" – may the acquirer pose a risk to national security?
- **Full unwind**

  Remedies potentially include a "full unwind" of the transaction.

What might it mean for Private Equity? Funds will need to get to grips with the new regime

Funds regularly investing in the sensitive "core" areas will need to understand the new regime and work out their approach to the regime as practice develops. Given the scope of the regime is potentially wide, all funds that intend investments in "core" areas, will need to have the national security risk regime on their radar, so as not to trip up over it advertently.

PE fund buyer

A PE fund contemplating acquiring a company in a core, sensitive area (or even a key supplier to such a company) will need to consider whether it, its co-investors or its debt providers are likely to be deemed to raise an acquirer risk (to national security) and if so whether to notify a proposed transaction. The Government's proposals are currently unclear about whether the fund's limited partners will be considered relevant in making the acquirer risk assessment. We assume this will be unlikely where a fund has a typical institutional investor base (in light of the LPs' lack of control), but significant LPs with links that may pose a national security concern, could potentially fall within scope. There are also potential issues in relation to the acquirer risk which debt providers may pose in the Government's proposals. Hopefully the legislation, when introduced, will seek to clarify these issues.

Current proposals include the possibility of an unwinding of the transaction (the seller re-acquiring the target), rather than simply a disposal obligation on the acquirer. If this particular proposal is implemented, any buyer which might be considered to pose a national security risk will almost certainly choose to notify the transaction and will therefore be severely disadvantaged in an auction for a sensitive target.

When acquiring a sensitive target, a PE fund buyer's exit opportunities will be subject to (and therefore limited by) the new regime.

PE fund seller

A PE fund running a sale process for a sensitive asset will need to consider the risks of a national security investment referral when assessing potential buyers. If the value proposition of a buyer that might be deemed to pose a risk to national security is sufficiently compelling to risk a referral, documentation will need to take account of the referral process in terms of conditionality and, potentially, break fees.

If there is any perceived risk of call in of the transaction, and the "full unwind" remedy finds its way onto the statute book, then it is unlikely buyers will enter into unconditional transactions. Even where the risks are seen as marginal, a PE fund would have to decide whether the full unwind risk would be a risk too far, which may depend upon where it sits in its own lifecycle and unused investment capacity.

Please contact us if you wish to discuss the UK National Security Investment Regime.

Ed Harris
Partner, London
T +44 20 7296 2809
ed.harris@hoganlovells.com

Mark Jones
Partner, London
T +44 20 7296 2428
mark.jones@hoganlovells.com

Graham Nicholson
Counsel, London
T +44 20 7296 7296
graham.nicholson@hoganlovells.com

A toss up: Payment theory prevails but the rule of reason reigns

On 31 October, the 10th US Circuit Court of Appeals overturned the US District Court for the District of Utah's decision in *United States v. Kemp & Associates, et a*l. that dismissed the government's indictment as time barred. *United States v. Kemp & Assoc. Inc.*, No. 17-4148 (10th Cir. 31 October 2018). While the 10th Circuit strongly urged the District Court to reconsider its order holding that the case be adjudicated under the rule of reason standard, the 10th Circuit found that the issue was not ripe for appeal. Despite the favorable ruling on the motion to dismiss, the government now faces a dilemma: proceed to trial under the rule of reason standard in contravention of long-standing Antitrust Division policy or dismiss the case.

In the District Court, Kemp & Associates moved to dismiss the government's indictment as time barred under the statute of limitations and asked the District Court to order that the case be adjudicated under the rule of reason. Surprisingly, the District Court granted both motions on 28 August 2017.

In its indictment, the government alleged that the defendant and its co-conspirators engaged in a horizontal, continuous agreement to allocate customers for heir-location services. In the past, courts have considered horizontal agreements to be illegal per se, meaning that once an agreement is reached there is no pro-competitive justification that can mitigate the agreement's harm. The Kemp District Court disagreed with this precedent, holding that the horizontal agreement to allocate customers alleged in the indictment was different for three reasons:

- the agreement had an "unusual manner of operation" *Id.* at 13-14
- the alleged agreement only affected "a small number of estates"
- the agreement occurred in a "relatively obscure industry"

For these reasons, the court held that it "cannot predict with any confidence" that the customer allocation agreement would "[operate] as a classic customer allocation," and therefore the agreement contained "efficiency-enhancing potential" and should be adjudicated under the rule of reason. *Id.* at 14. The rule of reason standard allows the defendant to argue that despite entering into an agreement with its competitors, it should not be found guilty because any harm to competition was outweighed by the pro-competitive benefits of the agreement.

The District Court did not stop there, but then dismissed the case as time barred under the statute of limitations period. The defense argued in the District Court that the indictment was untimely because Kemp & Associates' last agreement to allocate customers with its fellow heir-locators ended sometime before 30 July 2008. The District Court agreed with the defense, and held that a conspiracy ceased to exist once Kemp & Associates and its alleged co-conspirators stopped allocating customers. The District Court rejected the government's argument that the conspiracy continued so long as the defendants continued to benefit from some "economic enrichment" as a result of the agreement. The District Court held that the purpose of the conspiracy was to allocate customers, therefore, once Kemp & Associates stopped allocating customers, the conspiracy ended.

The government appealed both the Kemp District Court's order dismissing the indictment as well as it order to adjudicate under the rule or reason to the 10th Circuit. After oral argument on both issues, the 10th Circuit soundly rejected the District Court's statute of limitations analysis, but held that it could not rule on the District Court's order to adjudicate under the rule of reason.

The 10th Circuit overturned the District Court's decision that the conspiracy ceased in 2008, determining that the conspiracy continued so long as the firms received payments on the unlawfully obtained contracts. The court stated, "a Sherman Act conspiracy, such as the one alleged here, remains actionable 'until its purpose has been achieved or abandoned.'" *Id.* at 6. It went on to say that "the obvious reason that two firms would suppress and eliminate competition by agreeing to allocate customers would be to reap the economic benefits of such efficiency."

The court found that the customer allocation was not "an end onto itself, but rather a means [for] reducing overhead and increasing profit." *Id.* at 9. Thus, the court held that payments made as a result of a prior agreement were enough to trip the statute of limitations. This decision reaffirmed payments theory, or the theory that receiving payments after the termination of an agreement as benefit resulting from that agreement is acting in furtherance of a conspiracy.

The 10th Circuit, however, also held that it did not have jurisdiction over the rule of reason analysis in this case. In criminal cases, the government may not appeal unless there is express statutory authority authorizing the government to do so. 18 U.S.C. 3731 provides the statutory authority for the government to appeal "from a decision, judgment, or order of a district court." The 10th Circuit determined that the government's appeal from an order granting adjudication under the rule of reason analysis is not an appeal from a final judgment, since the government may yet proceed to trial. The court also found that an interlocutory appeal and mandamus were inappropriate in light of the lack of finality in the decision.

Although the 10th Circuit ultimately determined that it did not have jurisdiction over the rule of reason determination, it went through a lengthy analysis of the per se and rule of reason frameworks. It stated that rather than analyzing the industry writ large, as done by the District Court, the court should focus on the restraint alleged in the indictment. The 10th Circuit went on to determine that the practice in this case was a horizontal agreement generally analyzed under the per se approach. The court stated that "it is undisputed that an agreement to allocate or divide customers between competitors constitutes a per se violation of §1 of the Sherman Act." The court further posited that the "indictment describes the conduct at issue to do just that."

The court was not persuaded by the defendants' arguments in support of the rule of reason analysis. It stated that "it is immaterial" whether a customer allocation agreement applies to new or existing customers, and that there is no rule that allocation agreements should be adjudicated under the per se analysis only if customers are allocated geographically. Further, the court stated that the size of the pool of potential customers is irrelevant to the per se analysis. The court pointed out that the deciding court's familiarity with the industry is also unimportant. Finally, the court stated that net economic benefits are not a factor under US Supreme Court precedent to determine eligibility for per se analysis. It summed the opinion by remanding to the lower court and instructing it to consider *Palmer, Topco, Reicher,* and *Maricopa*, (all per se analysis cases) stating that, "perhaps on remand the district court will reconsider its rule of reason order."

While this opinion returned court precedent of payments theory to norm, it is less evident what the outcome of the rule of reason remand will be, although the court laid the groundwork for the decision it wishes the District Court to reach. While it is possible Judge David Sam will reverse himself under the direction of the circuit court, he is not obligated to do so.

In that instance, the government will have no choice but to try a criminal antitrust case under the rule of reason analysis. The United States Attorney's Antirust Manual explains that the Antitrust Division only prosecutes criminal per se cases. The Antitrust Division has never criminally prosecuted a case under the rule of reason analysis. In its briefing before the 10th Circuit, the government stated that it would adhere to its policy and dismiss the case versus trying it under a rule-of-reason framework. If the government follows through with its statements, Kemp & Associates will have lost the battle but won the war.

This opinion provides the following takeaways.

- Adds yet another case that holds payments are sufficient to extend the statute of limitations. Given the depth and breadth of case law supporting payments theory, it is unlikely that a defendant will prevail at trial arguing against the application of payments theory.
- Given the 10th Circuit's holding that a motion adjudicating the rule of reason cannot be appealed until after a final judgment, once the district court grants a motion to adjudicate under the rule of reason the government must proceed to trial applying that analysis. Given the Antitrust Division's policy statements, practically speaking it is unlikely that they would ever actually proceed to trial if they had to try the case under the rule of reason. Therefore, effectively, once a district court grants a motion to adjudicate under the rule of reason the Antitrust Division will most likely choose to dismiss the case.

Olga Fleysh, Law Clerk in the Washington D.C. office, contributed to this article.

Kathryn (Katie) Hellings
Partner, Washington, D.C.
T +33 1 53 67 47 47
kathryn.hellings@hoganlovells.com

Susan Musser
Senior Associate, Washington, D.C.
T +1 202 637 5457
susan.musser@hoganlovells.com

Selective Distribution & Online Sales: Higher Regional Court of Frankfurt confirms CJEU findings and provides further guidance

Following the landmark judgment of the Court of Justice of the European Union ("**CJEU**") in Coty[11] (on reference for a preliminary ruling), the Higher Regional Court of Frankfurt ("**HRC Frankfurt**") issued its final ruling on 12 July 2018. As expected the HRC Frankfurt decided that the specific ban for online sales via non-authorised third-party platforms in the selective distribution system at issue does not violate Art. 101 TFEU.[12] The judgment provides further practical guidance on the definition of the 'luxury image' of a product, as well as on the application of the so-called "Metro criteria" in cases of 'incomplete selective distribution systems'.

In its recently published Annual Report 2017, the German Federal Cartel Office ("**FCO**") welcomed the clarifications provided by the CJEU's judgment, but made it clear that many questions in relation to platform bans for online sales still remain open.

1. The CJEU Coty Judgment

In its much anticipated Coty judgment the CJEU on 6 December 2017 held that EU competition law does not preclude a contractual clause that prohibits authorised distributors of a selective distribution system of luxury goods designed, primarily, to preserve the luxury image of those goods, from using, in a discernible manner, non-authorised third-party platforms for online sales, as long as the prohibition is non-discriminatory and proportionate.

In particular, the CJEU concluded that such a clause does not amount to a total ban of sales through online platforms, as opposed to the Pierre Fabre-case, as it still allows authorised distributors to distribute the contract products via their own internet sites or via third-party platforms in a non-discernible manner.

In the event that a competition law authority or court was to conclude that the clause at issue is caught by the Art. 101 TFEU prohibition, for example because it was discriminatory, that clause could still benefit from the EU Vertical Block Exemption Regulation ("**VBER**"). The VBER creates a presumption of legality for vertical agreements depending on the market share of the supplier and the distributor (the supplier's and the distributor's market share must each be equal to or less than 30%) and the absence of hardcore restrictions of competition, which are automatically excluded from the benefit of the VBER.

2. The HRC Frankfurt confirms the CJEU's ruling and provides further guidance

On 12 July 2018, the HRC Frankfurt applied the CJEU's judgment to the present case following the Court's reasoning and deciding that the specific third-party platform ban did not violate Art. 101 TFEU.

Existence of a 'luxury image'

Dealing with the 'luxury image' of the goods at issue, the HRC Frankfurt notes that the goods covered by the selective distribution system do enjoy the luxury image claimed by the plaintiff and require selective distribution in order to preserve the quality of the product. As the CJEU stated in its judgment, the quality of luxury goods is not just the result of their material characteristics, but also of the "allure and prestigious image which bestow on them an aura of luxury. That aura is an essential aspect of those goods in that it thus enables consumers to distinguish them from other similar goods." In addition, the HRC states that the assessment of a 'luxury image' does not require the collection of evidence about the actual perception of consumers. The HRC argues that a 'luxury image' is not essentially created by itself, but is largely based on corresponding marketing activities of the manufacturer. According to the HRC, in the current case the plaintiff specifically positions and sells the products at issue as 'luxury cosmetics' on the basis of its own distribution channel.

11 CJEU, judgment of 6 December 2017, C-230/16, EU:C:2017:941, Coty Germany v Parfümerie Akzente (Coty).

12 Higher Regional Court of Frankfurt, judgment of 12 July 2018, 11 U 96/14 (Kart), DE:OLGHE:2018:0712.

Completeness and consistency of selective distribution system is not required

The HRC further considers that the quality criteria laid down by the plaintiff for the distribution of the products at issue are applied uniformly and in a non-discriminatory fashion. It clarifies that the legality of a selective distribution system does not depend on the supplier having to guarantee its consistency. The defendant had claimed that the plaintiff's products at issue were offered for sale via the same non-authorised third-party platform mentioned in the prohibition clause as well as in a 'non-luxury' ambience, e.g. in airplanes or in duty free shops at airports. According to the HRC, the incompleteness and inconsistency of a selective distribution system does not prevent non-discriminatory application as long as the gaps in the distribution network are based on a comprehensible and non-arbitrary sales policy.

Question of proportionality of the clause finally left open

In examining the proportionality of the prohibition clause in light of the pursued objective, the HRC recognizes that other clauses could have been drafted which interfere less with the distributor's freedom without disproportionately affecting the plaintiff's legitimate interests. In this context, the HRC also holds that the CJEU did not take into account the fact that in Germany, in particular, sales via online platforms are far more important than in other Member States. However, it questions its power to make its own assessment of the criterion of proportionality with regard to the detailed considerations of the CJEU. Since the facts on which the CJEU had based its judgment are still considered to be correct, the HRC concludes that there is much to suggest that a further review is not within its competence, but finally leaves the question open.

Clause benefits from the VBER

In any case, the HRC concludes that the clause at issue can benefit from an exemption under the VBER, as both the defendant and the plaintiff have a market share of less than 30% in the relevant market. The exemption is also not excluded under Art. 4 of the VBER, as the clause does not contain a hardcore restriction, mainly for the following reasons: (i) the use of the internet is not completely excluded; (ii) within the group of online buyers, customers of third-party platforms cannot be distinguished; and (iii) distributors are actually allowed to advertise online under certain conditions, e.g. via online search tools.

3. Outlook

The judgment is not yet final as the appeal is currently pending at the German Federal Supreme Court. The statements of the German FCO in its recently published Annual Report 2017 make it clear that although the CJEU's ruling contains important clarifications, it only deals with certain factual constellations. The discussion about the assessment of distribution restrictions for online sales under EU competition law is far from over.

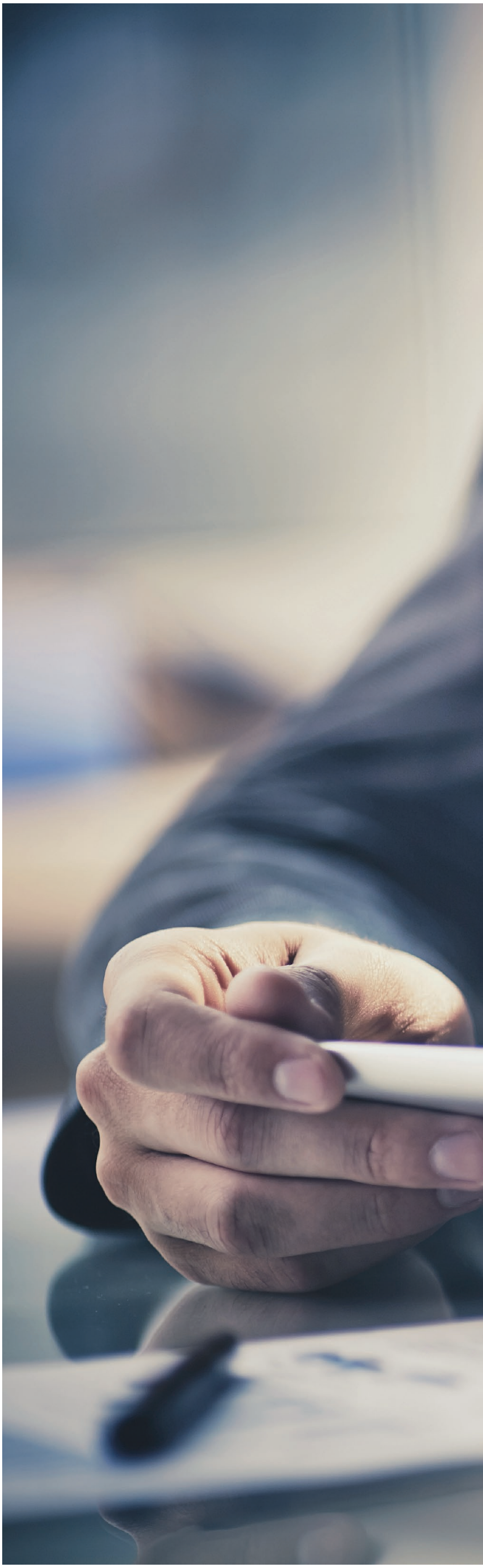
For example, it remains to be seen whether the CJEU's position that platform bans for 'luxury goods' in a selective distribution system do not constitute a hardcore restriction under the VBER also applies to branded goods other than 'luxury goods'. In a recent statement at the 45th Annual Conference on International Antitrust Law and Policy at Fordham University School of Law (New York), Advocate General Wahl of the CJEU reportedly stated that it is his understanding that the reasoning behind the Coty judgment is not limited to the distribution of 'luxury goods'. In practice this is important as many manufacturers of consumer goods have market shares below 30%. So the issue of hardcore restrictions is often decisive in determining whether a platform ban can be block-exempted under the VBER, especially as the German FCO, so far, has taken a stricter approach in relation to brand owners imposing bans for sales via third-party platforms.

Although the CJEU's judgment technically has a binding effect beyond the national court on whose initiative the reference for a preliminary ruling was made, Member State authorities will continue to play a key role in enforcing competition rules. Companies should therefore continue to monitor carefully the developments in Germany and on an EU-level, especially bearing in mind the following points:

- The Coty judgment does not seem to offer a "carte blanche" for all companies and all circumstances. In fact, the judgment imposes certain conditions that companies will have to follow.
- It remains to be seen whether the Coty judgment findings will be applied only to the luxury and prestige sector or also to other types of consumer and technological goods, e.g. branded goods other than 'luxury goods'.
- As recently restated by the German FCO, the Coty judgment only dealt with a specific constellation of facts with still many questions open regarding the competition law assessment of vertical restraints in online markets.

Dr. Salomé Cisnal De Ugarte, LL.M. (Harvard)
Office Managing Partner, Brussels
T +32 2 505 0908
salome.cisnaldeugarte@hoganlovells.com

Christian Ritz, LL.M. (USYD)
Senior Associate, Munich
T +49 89 290 12 0
christian.ritz@hoganlovells.com



UK preparations for a 'no deal' Brexit – competition law

On 30 October 2018, the UK government published a draft version of a statutory instrument ("**Competition SI**") and guidance issued by the Competition and Markets Authority ("**CMA**") which, taken together, clarify how a 'standalone' UK competition regime would operate in the event of a 'no deal' Brexit scenario. Though the Competition SI seeks to preserve as far as possible the current competition framework and policy, it makes specific provision for the immediate transition to such a standalone UK regime – in particular, confirming that the CMA, operating under newly repatriated powers, would be free to take jurisdiction over ongoing EU antitrust and merger reviews as of 30 March 2019.

Antitrust

By operation of the Competition SI[14], section 60 Competition Act 1998 ("**CA98**") will be repealed in its entirety. As it currently applies, section 60 CA98 requires that the UK courts and regulatory authorities interpret the UK antitrust provisions in a manner consistent with decisions and principles established by the Court of Justice of the European Union while also having regard to decisions and statements of the European Commission. This change means the CMA and UK courts will not be obliged to follow (or have regard to) EU Court judgments or Commission decisions that occur after Brexit.

In place of section 60 CA98, the Competition SI will introduce a new provision, section 60A, which will govern the treatment of EU Court judgments and Commission decisions rendered before Brexit. In short, it will require UK authorities and courts to ensure there is no inconsistency with pre-existing EU case law when applying/interpreting UK competition law. Nevertheless (under section 60A(7) CA98), the UK authorities and courts will be able to diverge in the future from pre-exit EU case law where it is considered *"appropriate in the light of particular circumstances"*.[13] Specified circumstances include the development of post-Brexit EU case law, differences between markets in the UK and EU, developments in economic activity, and the particular circumstances under consideration.

The UK authorities and courts will, therefore, have some flexibility regarding the extent to which they continue to track EU case law. While the benefits of legal certainty for business would point against divergence, there will no doubt be cases where this is considered appropriate. One can envisage future arguments being made in this respect about the inappropriateness of pre-Brexit EU case law where, for example, protection or promotion of the Single Market was a primary focus.

The Competition SI also confirms that after the UK's exit from the EU on 29 March 2019, the CMA (in addition to no longer being able to apply EU antitrust provisions – namely Articles 101 and 102 TFEU) will be unable to open an investigation into infringements of UK competition law where, before the UK's exit, the Commission:

- had relieved the CMA of competence (ie where the Commission initiated formal proceedings in relation to conduct that affected inter-state trade, this would have prevented the CMA and UK courts from applying Articles 101/102 TFEU to that case); and
- had reached an infringement decision (which has not since been annulled on appeal).

However, where a Commission investigation remains ongoing as of 29 March 2019 (ie no decision has been published before the UK's exit), it will be open to the CMA to conduct its own investigation into possible infringements of UK law (happening before or after 29 March 2019). The CMA will have regard to its 'prioritisation principles' taking into account the circumstances of the UK's exit when deciding whether to open such a case.

13 See also CMA Guidance: CMA's role if there's no Brexit deal, available here: https://www.gov.uk/government/publications/cmas-role-if-theres-no-brexit-deal

14 See CMA Guidance CMA's role in antitrust if there's no Brexit deal, available here: https://www.gov.uk/government/publications/cmas-role-in-antitrust-if-theres-no-brexit-deal/cmas-role-in-antitrust-if-theres-no-brexit-deal

Mergers

In terms of mergers, the government confirms that where an 'EU dimension' concentration (ie one meeting the jurisdictional thresholds under the EU Merger Regulation ("**EUMR**") and over which the Commission normally has sole jurisdiction to review) has been cleared by the Commission before 29 March 2019, the UK will not have jurisdiction to review as a 'relevant merger situation' under section 23 Enterprise Act 2002 ("**EA 2002**") unless the Commission's clearance decision is subsequently annulled (in whole or in part following an appeal).[15]

However, where a Commission merger review straddles 29 March 2019 (ie remains ongoing), the CMA will not be excluded from taking jurisdiction over the UK aspects of the deal where the UK jurisdictional thresholds under EA 2002 are met. The CMA recommends that parties who envisage the possibility of such a situation should engage with the CMA at the earliest possible opportunity – in particular, where the transaction throws up substantive issues in the UK (with the CMA suggesting that pre-notification discussions might begin at that point). Going forward, the CMA states that it will continue to monitor non-notified merger cases, including cases falling under the EUMR.

It has been speculated that Brexit will likely lead to a substantial increase in merger work for the CMA, with some estimates suggesting that an additional 30 to 50 transactions annually will now fall for review by the CMA (ones that would otherwise have been dealt with in Brussels). While provisions and budget have already been made for such an expanded role, a 'no deal' scenario, potentially resulting in a sudden spike in additional cases, would no doubt represent a serious and immediate challenge for the CMA's resources.

Additional thoughts

Beyond the gathering pace of preparation for a 'no deal' scenario (and the implications for mergers and antitrust specifically), there are of course other implications brought about by Brexit. For example, where a competition law infringement decision is reached by the Commission after Brexit, claimants seeking to pursue follow-on damage claims in a UK court (traditionally the most popular European venue for such claims) will no longer be able to rely on the decision as a binding finding of infringement. Instead, they will have to run a standalone claim, and prove infringement of one of the EU antitrust prohibitions as a breach of a foreign tort.

The UK government has also committed to establishing its own domestic State aid regime. Though the CMA has given assurances that the regime will look very much as it does currently (and that under any future EU agreement, the UK may agree to "remain in step" beyond the Brexit 'implementation' period), the challenges for the CMA as the post-Brexit State aid authority are considerable. This would be particularly so in the context of a 'no deal' Brexit – ie in terms of the timely marshalling of requisite resources and expertise whilst also navigating the inevitable politics associated with State aid (a major point of contention in the Brexit debate). Regardless of these obstacles, the CMA claims that the newly created State aid function will be ready for March 2019 "*if necessary*".[16]

Finally, while the recent UK guidance and draft legislative provisions focus naturally on the UK's likely response to a 'no deal' situation, it is also necessary to consider how the Commission and the remaining Member State authorities might respond to the jurisdictional uncertainties thrown up by such a scenario. Consider, for example, a merger being reviewed by the Commission under the EUMR in which the UK revenues of the parties, taken into account for jurisdictional purposes at the time of the transaction's signing pre-Brexit, are subsequently stripped out on 30 March 2019. Arguably this

15 See CMA Guidance CMA's role in mergers if there's no Brexit deal, available at: https://www.gov.uk/government/publications/cmas-role-in-mergers-if-theres-no-brexit-deal/cmas-role-in-mergers-if-theres-no-brexit-deal

16 See CMA speech: "Post-Brexit state aid in the UK" – Juliette Enser, Director of State Aid (30 October 2018), available at: https://www.gov.uk/government/speeches/post-brexit-state-aid-in-the-uk

could result in the merger ceasing to have an 'EU dimension' – with the Commission losing its EUMR jurisdiction and Member States potentially gaining jurisdiction under their national rules. Gauging the Commission's view on such an eventuality (and, in particular, how it might plan to pre-empt any potential disruption by, for example, pre-determined arrangements with the remaining Member States) would seem highly prudent for parties whose transactions risk being live in front of the Commission at the time of Brexit (and regardless of whether the UK gains its own jurisdiction to review such deals).

Josephine Macintosh, a trainee in the London office, contributed to this article.

Angus Coulter
Partner, London
T +44 20 7296 2965
angus.coulter@hoganlovells.com

Mark Jones
Partner, London
T +44 20 7296 2428
mark.jones@hoganlovells.com

Matt Giles
Senior Professional Support Lawyer, London
T +44 20 7296 2155
matt.giles@hoganlovells.com

From rule makers to rule takers? State Aid in the UK post-Brexit

On 14 November 2018, the European Commission and the UK government announced that they had agreed a draft Withdrawal Agreement.[17] While this agreement still requires the consent of the UK Parliament and the remaining 27 EU Member States, the path forward for the continued application of State aid law in the UK appears clearer.

As we described in our blog post[18] published following the June 2016 referendum, the draft Withdrawal Agreement makes it very likely that the UK domestic State aid system introduced after Brexit will closely mirror the EU regime. Adherence to some form of subsidy control (i.e. State aid rules) is a major consideration for any agreement with the EU on market access as demonstrated by the recent free trade agreements concluded by the EU and other third countries.

Even in the event that the Withdrawal Agreement does not overcome the political hurdles mentioned above and results in a "no deal" outcome, the UK government has already announced that it will incorporate EU State aid rules into domestic legislation under the UK's European Union (Withdrawal) Act 2018 ("**EUWA**"), including existing block exemptions.

Therefore, despite political uncertainty about the application of EU competition rules, the path for businesses with operations in the UK and in continental Europe is relatively straightforward: continuing compliance with State aid rules will inevitably remain a requirement for UK companies (and non-UK companies engaging in activities in the UK). Therefore (and as the future relationship between the UK and the EU hopefully becomes clearer in the coming weeks and months), it would be advisable for such businesses to continue business as usual whilst actively staying abreast of any policy announcements made in London or Brussels.

1. The draft withdrawal agreement

a. Continued EU State aid control during the transition period (and beyond)
The draft Withdrawal Agreement provides for a dedicated chapter on State aid. According to the agreement, the European Commission's State aid control over the UK would not immediately come to an end but, instead, would be phased out over a period of four years after the end of the transition period. During this period, the European Commission will retain its competence to initiate State aid proceedings for aid granted before the end of the transition period. The European Commission's competence extends to all ongoing procedures initiated during that time. Considering the length of State aid procedures, EU State aid control might in practice remain for longer than four years.

b. UK competence for enforcing State aid control after the end of the transition period
At the end of the transition period, the EU's competence to investigate new cases affecting the UK will come to an end, however the application of EU State aid law will not. The mechanism provided in the draft Withdrawal Agreement (Annex 8) anticipates that EU State aid law will continue to apply to measures which affect trade between the UK and the remaining EU member states. However, enforcement competence would transfer from the European Commission to the UK.

This concept follows an earlier proposal by the UK government for maintaining an ambitious "common rulebook" with the EU on State aid following the UK's exit from the EU. To give effect to this rulebook, the UK would commit to a process of"ongoing harmonisation" whereby any new or amended State aid rule proposed by the EU post-Brexit would be incorporated into UK law (subject to parliamentary approval) and *"due regard"* would be paid by the UK courts to the case law of the Court of Justice of the EU regarding the interpretation of State aid rules.

17 https://ec.europa.eu/commission/files/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018_en

18 https://www.hoganlovells.com/blogs/focus-on-regulation/together forever-how-state-aid-law-will-affect-the-uk-even-after-brexit

The draft Withdrawal Agreement provides for the incorporation into UK law of the following:

i. The primary EU State aid rules under Articles 107-109, 93 and 106 of the Treaty on the Functioning of the EU ("**TFEU**");

ii. Acts referring to the notion of aid - i.e. the "Notice" on the notion of aid, the "Communication" regarding services of general economic interest and the "Notice" on guarantees;

iii. The block exemption regulations including the General Block Exemption Regulation;

iv. The procedural rules;

v. The compatibility rules for specific sectors (e.g. guidelines for agriculture, rescue and recovery aid, R&D aid and many more); and

vi. The Directive on transparency of financial relations between Member States and public undertakings.

2. Possible implementation of the withdrawal agreement in the UK

In order to transfer State aid competence from the European Commission to the UK at the end of the transition period, the draft Withdrawal Agreement introduces the concept of an *"independent authority"*. The UK has already announced that the Competition and Markets Authority ("**CMA**") will take on this role.

Due to its experience and understanding of markets as the UK's competition regulator, the CMA will act as the new State aid regulator post-Brexit. The government has pledged to provide the CMA with the financial, human and IT resources it needs to take on this new role. An additional £23.6 million was recently allocated to the CMA for 2018-19 to prepare for Brexit.

Following the end of the transition period (likely 31 December 2020), the CMA will be responsible for enforcing the common rulebook and approving aid notifications. The government has stated that the CMA will be granted a full suite of enforcement powers, similar to those of the European Commission, including the power to open investigations and seek further information. As for domestic enforcement, the UK government proposes that State aid appeals post-Brexit should be made through the Competition Appeal Tribunal and the UK courts.

The government has recognised the importance of the CMA's independence with the UK being required under the draft Withdrawal Agreement to ensure the CMA's objective decision-making powers in its new role as a State aid regulator. However, it remains unclear how aggressively the CMA will enforce State aid rules immediately after it takes over from the European Commission as State aid regulator, particularly in view of limited resources and the drastically increased workload that can be expected post-Brexit.

Dispute resolution: With regard to the application of the common rulebook, the government has stated that there should be a *"robust provision for dispute resolution"* in place to resolve disputes between the CMA and the European Commission including *"recourse to [an] independent arbitration panel"*. The draft Withdrawal Agreement introduces the concept of a "Joint Committee" which will be responsible for the implementation and application of the Withdrawal Agreement. If the Joint Committee cannot find a mutually agreeable solution, the EU or the UK may request the establishment of an arbitration panel.

The UK's future relationship with the European Commission: The government has proposed maintaining a *"robust regulatory dialogue between the CMA and DG Comp"* following Brexit in order to *"share best practice and discuss developments in case law"*. This chimes with the UK's commitment to a process of *"ongoing harmonisation"*.

The involvement of the devolved administrations (Wales, Scotland and Northern Ireland): The government has stated that it is *"engaging"* with the devolved administrations in planning a future UK-wide

State aid regime and is working with these entities to produce technical notices. The government has recognised that such engagement is crucial and that *"[f]ailing to implement a UK-wide regime of State aid control when the UK leaves the EU would mean there would be no legal framework to prevent subsidies that distort trade within the UK"*. Further consultation with the devolved administrations will take place as part of the forthcoming review of the UK's competition regime.

These proposals are set out in the UK government's *Letter to the House of Lords' EU Internal Market Sub-Committee* [19] (published on 28 March 2018), its *Response to the House of Lords' EU Internal Market Sub-Committee report on UK competition policy after Brexit*[20] (published on 29 March 2018), and its *Framework for the UK-EU partnership*[21] (published on 25 July 2018).

3. Alternative proposals for a "no deal" scenario

As the political situation is still in a state of flux and it remains unclear at this stage whether the draft Withdrawal Agreement will ultimately be agreed, we should also reflect on the implications of a "no deal" scenario. While the UK, in a "no deal" scenario, would only be bound by WTO rules on subsidies and could therefore operate more flexibly than under the EU State aid rules, it seems unlikely that the current UK government would choose such a path. Maintaining tight control of subsidies may not only be required for fiscal reasons to deal with the effects of a disorderly exit from the EU, but may also serve as an encouraging sign from the UK for any future trade agreement discussions.

Therefore, the UK government has already stated that it strongly supports a "rigorous" State aid system. In the event no withdrawal agreement is reached with the EU, a UK-wide subsidy control framework will be created to ensure the continuing control of anti-competitive subsidies. This would likely involve the unilateral incorporation of EU State aid rules into UK domestic legislation under the EUWA, including replicating existing block exemptions (e.g. the Agricultural Block Exemption Regulation and the Fisheries Block Exemption Regulation). Substantive State aid law in the UK in this case would therefore not materially differ from that negotiated under a negotiated exit. However, in a "no deal" scenario, the CMA would immediately take over the regulation of State aid in the UK from 30 March 2019 onwards.

Moreover, the government has recommended that if no deal is reached with the EU, the WTO Agreement on Subsidies Countervailing Measures ("**ASCM**") will act as a backstop for subsidy control following the UK's exit from the EU.

These proposals are set out in the UK government's *Guidance on State aid if there's no Brexit deal*[22] (published on 23 August 2018) and further elaborated in a *speech by the CMA's Director for State Aid*[23] (published on 30 October 2018).

4. Differences in outcome between the negotiated settlement and a "no deal" scenario

There are three significant differences in outcome between the situation under the draft Withdrawal Agreement and a "no deal" scenario:

i. **Start date for CMA oversight of State aid procedures** – If a negotiated settlement is agreed with the EU, the switchover will happen on 31 December 2020. However, if no agreement is reached, the switchover will take place immediately on 30 March 2019.

ii. **Transition period** – If the negotiated settlement with the EU includes an agreement to implement a transition period, the European Commission will continue to manage the process for approving and monitoring aid during the transition period and, as described above, for a further four year phase-out period. However, if no deal is agreed, any aid approved

19 https://www.parliament.uk/documents/lords-committees/eu-internal-market-subcommittee/brexit-competition/Letter-Andrew-Griffiths-to-Rt-Hon-Lord-Whitty-State-aid.pdf

20 https://www.parliament.uk/documents/lords-committees/eu-internal-market-subcommittee/brexit-competition/290318-Government-Response-to-HoL-EU-Internal-Market-Sub-Committee-competition.pdf

21 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/734935/2018-08-17_F_O_Competition_Slides_FINAL.pdf

22 https://www.gov.uk/government/publications/state-aid-if-theres-no-brexit-deal/state-aid-if-theres-no-brexit-deal#after-29-march-2019-if-theres-no-deal

23 https://www.gov.uk/government/speeches/post-brexit-state-aid-in-the-uk

by the European Commission before 30 March 2019 (including block exemption approvals) will remain valid. Any aid not yet approved by the European Commission will have to be re-submitted to the CMA.

iii. **Ongoing harmonisation** – If no exit agreement is reached, the UK will not be required to follow the proposed "common rulebook", nor will it be bound to align its guidance with that of the EU or reflect future amendments to EU rules in domestic legislation. By contrast, the draft Withdrawal Agreement provides for an express duty of cooperation between the European Commission and the CMA as an independent authority.

Open questions

With these different scenarios in mind, we have identified three main open questions that we consider to be relevant for the future UK national State aid system, regardless of whether the Withdrawal Agreement is agreed or not:

- **Independence of the CMA:** Can a domestic regulator such as the CMA, established and funded by the government, effectively "police" State aid decisions made by the government? The political dimension of State aid is a sensitive issue given what Brexit proponents (on both the left and right) promised and/or expected from a UK freed from EU rules. Given the political uncertainty brewing and the possibility of a general election before 29 March 2019, the future of a UK State aid regime is far from settled.
- **Effective enforcement:** Given the economic proximity of the UK and the EU, both sides will likely want to ensure that the other side effectively enforces its State aid rules. In this respect, the proposed post-Brexit cooperation between the CMA and the European Commission in this field could potentially benefit from the long-standing relationship of the two authorities via participation in the European Competition Network (ECN). It nevertheless remains to be seen how effective the CMA will be at enforcing State aid rules post-Brexit given, its limited resources (and experience) and its significantly increased workload (across all areas of competition law enforcement) post-Brexit.
- **Dispute resolution:** How will disagreements be settled between the CMA and the European Commission regarding the application of the "common rulebook"? While the draft Withdrawal Agreement provides for a system of review by the Joint Committee and the possibility of arbitration, this may eventually result in less stringent State aid control compared to the current system under the supervision of the European Courts.

Next steps and consequences for businesses

The UK government published a statutory instrument on State aid in autumn 2018. Further State aid guidance is expected to be published by the CMA in early 2019 and, of course, detailed discussion about the political fate of the Withdrawal Agreement continues.

In the meantime, as a matter of law, all companies active in the UK (or UK companies active in the EU) are still bound by EU State aid rules. While many important questions regarding a future national State aid system will undoubtedly be discussed, we believe that EU State aid rules will continue to be of importance for British companies and for EU-27 companies doing business in Europe. In particular, the EU State aid rules provide the only relevant guidance for any newly arising UK State aid questions. Therefore, it is likely that the CMA and UK courts, absent any national decisions, will turn to EU case law in order to interpret the new UK rules. Businesses are well advised to continue monitoring EU State aid law and to review their business conduct in the light of any future EU State aid law developments

Catherine Hegarty, a trainee in the Brussels office, contributed to this article.

Falk Schoening
Partner, Brussels
T +32 (2) 505 09 06
falk.schoening@hoganlovells.com

Alicante
Amsterdam
Baltimore
Beijing
Birmingham
Boston
Brussels
Budapest*
Colorado Springs
Denver
Dubai
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta*
Johannesburg
London
Los Angeles
Louisville
Luxembourg
Madrid
Mexico City
Miami
Milan
Minneapolis
Monterrey
Moscow
Munich
New York
Northern Virginia
Paris
Perth
Philadelphia
Riyadh*
Rome
San Francisco
Sao Paulo
Shanghai
Shanghai FTZ*
Silicon Valley
Singapore
Sydney
Tokyo
Ulaanbaatar*
Warsaw
Washington, D.C.
Zagreb*

*Our associated offices

www.hoganlovells.com