SLAUGHTER AND MAY

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On 26 July 2017 **Advocate General Wahl issued his opinion in the *Coty* case**, stating that a supplier of luxury goods may prohibit its authorised retailers from selling its products on third-party platforms. For a detailed analysis, please see our **upcoming briefing on the topic**.

Quick Links

The future of UK competition law and policy: BCLWG report on the implications of Brexit

On 26 July 2017 the Brexit Competition Law Working Group (BCLWG) published its **report** containing its conclusions and recommendations on the implications of Brexit for UK competition law and policy (Report). The BCLWG, chaired by Sir John Vickers, comprises experts in the study and practice of competition law. Following the UK's vote to leave the EU on 23 June 2016, the BCLWG was established to encourage public debate and inform government policy on the repercussions of Brexit for competition law and policy. Premised on the assumption that the UK will leave both the 'single market' and the European Economic Area (EEA) as a consequence of Brexit, the Report closely follows the analysis of the **issues paper** (October 2016), notes on the **first** and **second** roundtables (November and December 2016, respectively), **provisional conclusions and recommendations** (April 2017) and **responses** to these documents.

The Report recognises the significant convergence in competition law, policy and enforcement across the world, which has resulted in increased effectiveness, consistency and international cooperation in this area. It further notes that even post-Brexit, UK firms and transactions will often still be subject to EU competition law. In pursuing its aim to help achieve a smooth and effective transition for UK competition policy in a post-Brexit era, the Report has two key themes. First, that the interests of the UK economy, businesses and consumers will be best protected by the legislative and institutional continuity of UK competition law. Secondly, transitional arrangements to facilitate coordination and cooperation between the UK and EU competition authorities are highly desirable.

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

Substantive law

The Report considers that Brexit does not require significant changes to the landscape of UK competition law, policy and enforcement, and in fact argues that such changes would be undesirable. Given that the UK competition law provisions closely mirror their EU equivalents, Brexit will not cause a legislative

or enforcement 'gap'. The most significant legislative amendment is likely to be to section 60 of the Competition Act 1998 (CA98), which imposes a duty on UK courts and authorities to act consistently with European jurisprudence. Potential amendments to this provision were discussed at the Competition and Markets Authority's (CMA) **June 2017 board meeting**. The Report recommends that the provision be altered such that UK courts and authorities need only "*have regard to*" European jurisprudence, noting that this duty "*should not be onerous*"; the CMA and courts should not need to devote substantial resource to explaining any departure from EU precedent. Such a change would allow parties to rely on well-established principles in the short-term (in the interests of legal certainty) whilst ultimately leaving room for UK competition law to evolve organically.

As regards antitrust, retaining the current provisions contained in Chapters I and II of the CA98 will provide legal certainty to businesses, regulatory authorities and consumers. Additionally, the criminal offence for cartel behaviour enshrined in the Enterprise Act 2002 (EA02) may prove to be an important enforcement tool for the CMA post-Brexit. The BCLWG further recommends that the possibility of liability in private actions should be preserved. With respect to block exemptions, the Report suggests that, subject to their expiry or amendment or revocation by UK authorities, current exemptions should continue to apply (with the exception of the agricultural products exemption). In contrast, future EU block exemptions should not have any effect as a matter of domestic law; instead, the UK authorities should enact their own block exemptions.

The Report does not recommend any substantive changes to the legislation for mergers or market investigations, as the BCLWG considers the current regimes to be fit for purpose (other than advocating against importing a domestic equivalent of the current EU provision that precludes remedies relating to agreements between firms that go further than the antitrust rules). The BCLWG acknowledges that many transactions previously reviewable at EU-level will also be reviewable in the UK post-Brexit, which will result in parallel investigations and require close cooperation with the European Commission.

Transitional arrangements

Transitional arrangements are paramount to ensuring the continued smooth operation of UK competition law post-Brexit, in order to provide a degree of certainty for businesses, consumers and regulatory authorities. The BCLWG stresses the need for urgent clarification of the practical procedures for transition, coordination and competition.

For both antitrust and merger control cases, the BCLWG recommends that transitional provisions should be put in place regarding: (i) the nationalisation of existing Commission commitments or remedies affecting UK markets, such that they remain binding and enforceable by the CMA; (ii) the continued recognition of legal professional privilege in Commission cases involving pre-Brexit acts or conduct; and (iii) in cases involving pre-Brexit behaviour, clear and effective procedures for information sharing and case allocation between the EU and the UK. Although the aim is to avoid the duplication of work between the EU and UK competition authorities, parallel investigations are conceivable and this further emphasises the need for effectual information sharing and cooperation.

To avoid the risk of under-enforcement of antitrust cases involving pre-Brexit conduct and affecting UK markets (which may arise if the Commission drops such investigations or, post-Brexit, struggles to justify the time and resource expenditure of an investigation with a UK focus), the BCLWG recommends that the CMA retains its power to enforce Articles 101 and 102 of the Treaty on the Functioning of the European

Union (TFEU) with respect to such conduct. The Report further recommends that where the CMA is conducting a parallel investigation alongside the Commission, the CMA should recognise any pre-Brexit conditional leniency granted by the Commission.

For merger reviews that have been notified to the Commission by the time of Brexit, the Report proposes the pre-emptive use of referral procedures under the European Merger Regulation (EUMR), beginning at least nine months before Brexit is implemented. Under the EUMR, the merging parties or a national competition authority may request the referral of a merger review back to the relevant Member State. For cases in pre-notification at the time of Brexit, the BCLWG recommends that the merging parties enter discussions with both the CMA and the Commission, who should collaborate and properly allocate the case to either the UK or the EU upon notification.

Coordination and cooperation

Brexit poses a significant risk in terms of duplication of work by the EU and UK competition authorities. This could affect the efficiency and effectiveness of case delivery, increase costs and reduce legal certainty. Accordingly, the BCLWG recommends that the UK government negotiate for the UK's continued participation in the European Competition Network (or, failing that, the forum for European Competition Authorities) to ensure continued proficient case delivery across parallel investigations. Alternatively, the BCLWG proposes a series of bilateral agreements between the UK competition authorities and other national competition authorities, prioritising jurisdictions with active merger control regimes that are likely to be triggered by deals that also have a significant UK nexus, such as the EU or major EU Member States. These agreements should make provision for: (i) communication at the outset of and during an investigation in which substantial cooperation may be advantageous; (ii) the coordination of investigative timings; (iii) the harmonisation of information gathering; and (iv) the coordination of remedies. In addition, for wider policy issues, the BCLWG recommends that the UK continues to actively participate in relevant international bodies, such as the Organisation for Economic Cooperation and Development and the International Competition Network.

CMA: resourcing, process and priorities

As a result of Brexit, the CMA's workload is likely to substantially increase and diversify. The Report indicates that the additional financial resources and personnel required should be in place before Brexit, to avoid diverting focus from other CMA work streams (such as market studies or consumer law enforcement). This may be a cost-neutral situation as the financial burden may be met through the merger filing fees and potential infringement fines generated by this additional work. Separately, the BCLWG does not recommend any measures to reduce the CMA's workload, but does pose some alternative solutions to simplify the merger review procedure; for example, the introduction of a shortened, simplified Phase II procedure for parallel EU/UK cases or targeted, narrower analysis and information requests for Phase I cases.

The EFTA option

The Report considers the possibility of the UK becoming a member of the European Free Trade Association (EFTA) (thus remaining within the EEA) as a transitional measure post-Brexit. Given that most EU

competition law and practice is replicated within the EEA and that the UK is already a contracting party to the EEA, this would require far fewer changes than if the UK were to leave the EEA entirely. Amendments to legislation and sectoral guidance would focus on replacing the EU provisions with their EFTA equivalents, rather than any substantive changes. This would, however, result in an increased workload for the EFTA institutions.

Other developments

Merger control

Manchester hospital merger clears CMA screening

On 1 August 2017 the CMA **announced** that it had cleared the anticipated merger between Central Manchester University Hospitals NHS Foundation Trust and University Hospital of South Manchester NHS Foundation Trust. The CMA **launched** its merger inquiry in February 2017 and **referred** the merger to Phase II in accordance with the parties' request for a fast-track reference.

In its **final report** issued on 3 August 2017, the CMA concluded that the merger may be expected to give rise to a substantial lessening of competition (SLC) in NHS elective and maternity services and NHS specialised services. Although it considered that any adverse effect resulting from such an SLC was likely to be significantly constrained by, amongst other things, recent policy developments, the devolution of health and social care in Greater Manchester and increased regulatory oversight of the merging parties, the CMA concluded that the only practicable and effective remedy to the SLC was prohibition. Partial divestiture was not considered a practicable and effective remedy given the difficulty of divesting individual clinical services. Neither would behavioural remedies be practicable and effective as any such remedy may be unlikely to address the SLC and adverse effects at source and may not be effective in mitigating the SLC or its adverse effects.

The CMA found, however, that there would be 11 relevant customer benefits (RCBs) within the meaning of section 30 of the EA02 likely to represent improvements in patient outcomes, including reductions in patient mortality, clinical complications and infection rates. Such RCBs were expected to accrue within a reasonable period of the merger and were unlikely to accrue without it. The CMA also found that the merger was likely to improve patient access and patients' choice of location for treatment in respect of certain services and a significant number of patients. The CMA received advice from NHS Improvement and consulted with local commissioners, local authorities and the devolved health and social care body in Manchester and NHS England, all of whom expressed strong support for the merger. The CMA concluded that the benefits of the RCBs that would be lost as a result of prohibition were substantially greater than the adverse effects of any SLC and consequently cleared the merger.

Philippine Competition Commission opens first Phase II review

On 21 July 2017 the Mergers and Acquisitions Office of the Philippine Competition Commission (PCC) **announced** that it has opened a Phase II review of Alipay Singapore Holding Pte. Ltd.'s proposed acquisition of shares in Globe Fintech Innovations, Inc., a company incorporated in the Philippines. The

decision to move to Phase II was made on 27 June 2017. This is the first Phase II review to be conducted by the PCC since the merger control regime took effect in June 2016.

Alipay operates a third-party payment service platform and is part of Ant Financial Group, which operates data and technology platforms to provide digital financial services to consumers and small merchants. Globe Fintech provides fintech solutions, including micropayment and tech-based lending services, to consumers, merchants and organisations.

Following a Phase I review period of 30 calendar days, the PCC decided to continue its inquiry to investigate, among other things, whether the transaction would lead to a loss of competition and foreclosure of competitors in the market for electronic money payment and related services, and whether the transaction would increase the likelihood that competitors providing electronic money payment and related services will coordinate their behaviour or strengthen existing coordination in a manner that harms competition. The PCC has a period of 60 calendar days to conduct a Phase II review. The PCC cannot 'stop the clock' as a means to extend its review period, but it does have the power to grant extensions at the request of the parties; in this case, the PCC has granted a seven-day extension of the Phase II review period pursuant to Alipay's request.

In its statement, the PCC pointed out that the commencement of a Phase II review does not indicate that it has made a judgment on whether there has been a substantial lessening of competition, but it merely indicates that a more detailed analysis is needed based on further information from the notifying parties.

Antitrust

CMA digs deeper into the UK construction sector

On 26 July 2017 the CMA **announced** that on 19 July 2017 it had launched an investigation into suspected anti-competitive arrangements in the design, construction and fit-out services sector in the UK. This investigation is separate to the CMA's **ongoing civil investigation** into suspected anti-competitive behaviour in the provision of products and/or services to the UK construction industry, which was opened on 28 February 2017.

The investigations concern potential infringements of Chapter I of the CA98 and/or Article 101 of the TFEU, which prohibit anti-competitive agreements and concerted practices. The CMA is currently engaged in information gathering, and has not issued any statements of objections or implicated any companies in either investigation. A decision on whether the CMA will proceed with the design, construction and fit-out services investigation is expected in December 2017. On 1 August 2017 the CMA updated the timetable for its investigation into the provision of products and/or services to the construction industry, noting that a decision had been taken to proceed with the investigation and that a further update is to be expected by the end of February 2018.

The CMA had separately been carrying out a criminal investigation into suspected cartel activity in the supply of products to the construction industry. The criminal proceedings in relation to Barry Kenneth Cooper remain ongoing, after he pleaded guilty to the criminal cartel offence at a pre-trial hearing on 21 March 2016. On 13 June 2017 the CMA **decided** that there is insufficient evidence to charge any further individuals with the criminal cartel offence under section 188 of the EA02 and concluded the investigation.

CMA publishes consultation on revised fining guidance

On 2 August 2017 the CMA published a **consultation document** to accompany its **draft revised guidance** on the appropriate amount of a penalty in respect of infringements of the prohibitions against anti-competitive agreements (Chapter I of the CA98 and Article 101 of the TFEU) and abuse of a dominant position (Chapter II of the CA98 and Article 102 of the TFEU). The consultation maintains the six-step fine calculation framework set out in the **current guidance** (published in September 2012) but proposes some limited changes to take account of recent decisional practice. The amendments aim to provide further transparency in the penalty-setting process and thereby increase certainty for businesses. They include:

(i) Starting point for fines. While the revised guidance retains 30 per cent of a company's relevant turnover as the maximum starting point for the fine, it provides further detail as to how the CMA applies the percentage range in order to reflect the seriousness of the infringement, in particular in less severe cases.[1] Although the CMA aims to avoid a prescriptive system, it will generally use a starting point of between 21 per cent and 30 per cent for the most serious types of infringement, including, from a Chapter I/Article 101 prohibition perspective, cartel activities (such as price fixing and market sharing) and other 'by object' infringements and, from a Chapter II/Article 102 prohibition perspective, conduct that is likely to have a serious exploitative or exclusionary effect (such as excessive and predatory pricing). A starting point of between 10 per cent and 20 per cent is likely to be appropriate for less serious 'by object' infringements and infringements 'by effect' under Chapter I/Article 101, and for infringing conduct under Chapter II/Article 102 that is less likely to be harmful. The CMA also proposes to clarify the factors it considers when deciding whether the starting point should be adjusted and that its seriousness assessment is made with regard to the specific circumstances of the case.

(ii) Adjustment for aggravating and mitigating factors. The CMA plans to include failure to comply with competition law following receipt of a warning or advisory letter in respect of the same or similar conduct as an additional example of a potential aggravating factor. The CMA also describes in the revised guidance several additional factors that it considers show a clear commitment to competition law compliance, such that it may reduce the fine. These include a company publishing a statement on its website regarding its commitment to comply with competition law, and reviewing compliance activity periodically and reporting this to the CMA. In addition, the CMA intends to include the provision of voluntary witness interviews and/or witness statements as an example of when it may make a reduction for co-operation with the investigation.

(iii) Adjustment for specific deterrence and proportionality. The revised guidance states that the CMA will typically consider profit after tax, net assets and dividends as reliable indicators of a company's size and financial position and that it may consider any relevant indicator over a period of time (usually three years) in order to get an accurate picture of a company's true financial position.

[1] The final amount of the penalty imposed, once adjustments have been made, may be up to a maximum of 10 per cent of the company's worldwide turnover.

(iv) Reductions for leniency and settlement. The CMA intends to update the fining guidance to reflect the possibility of a discount where a company obtains approval for its voluntary redress scheme.[2]

Interested parties are invited to submit their views on the proposed revisions, and also to indicate whether there are any other areas of the current fining guidance that could usefully be clarified, by 27 September 2017.

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[2] The CMA and concurrent regulators were given the power to approve certain voluntary redress schemes (a form of alternative dispute resolution) under the Consumer Rights Act 2015.