SLAUGHTER AND MAY

Competition & Regulatory Newsletter

24 October - 6 November 2018 / Issue 23

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No deal? CMA announces standalone post-Brexit competition regime

A "no deal" Brexit would result in a standalone UK competition regime, with the Competition and Markets Authority (CMA) taking over jurisdiction on merger and antitrust reviews which are ongoing after exit day. A "no deal" scenario would also lead to the UK launching its own domestic State aid regime in March 2019.

Overview

While the UK Government is negotiating a withdrawal agreement with the EU, it is also preparing for "no deal" Brexit. To this end, on 29 October the Government laid before Parliament the **Competition (Amendment etc.) (EU Exit) Regulations 2019** (the Competition SI), which makes provision for the transition to a standalone UK competition regime on 29 March 2019. The Competition SI is accompanied by an **explanatory memorandum**.

In addition, on 30 October 2018 the CMA published a **series of statements** outlining its plans for the UK's competition regime in the event of a "no deal" Brexit. The statements set out how the CMA intends to proceed in respect of mergers, antitrust and State aid.

Mergers

The CMA has **stated** that, in a "no deal" scenario, it will not have jurisdiction to review any merger which is approved by the European Commission on or before 29 March 2019 (unless the Commission's decision is subsequently annulled, in which case special provision is made to ensure the CMA will have jurisdiction without being timed-out).

For those mergers in respect of which the Commission has not reached a decision before exit day, the CMA will no longer be precluded from taking jurisdiction over the UK aspects of the merger, and the provisions of the Enterprise Act 2002 will apply. The CMA will therefore have jurisdiction to review the merger, subject to the UK merger control thresholds being met.

The CMA therefore advises parties to a merger that may not be cleared by the Commission before exit day and which may have a UK element, to engage with the CMA at an early stage (e.g. around announcement), particularly where the

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

transaction may raise potential competition concerns in the UK. The CMA may suggest to the merging parties that they begin pre-notification discussions. The CMA will continue to monitor non-notified mergers, including those that would have previously fallen under EU jurisdiction.

Antitrust

Under the Competition SI, the CMA (and sectoral regulators such as Ofgem and Ofcom) will no longer have jurisdiction to apply Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), which prohibit anti-competitive agreements (including cartels) and abuse of dominance, respectively. However, the CMA will continue to apply the equivalent UK national prohibitions in Chapters I and II of the Competition Act 1998. Additionally, although the CMA, sectoral regulators and UK courts will no longer be bound to interpret Chapters I and II in a way that is consistent with the decisions and principles of the Court of Justice of the European Union, they will be obliged to ensure no inconsistency with pre-Brexit case law, unless they deem it appropriate to depart from such precedent in the particular circumstances.

The CMA has **stated** that, following a "no deal" Brexit, it will not have jurisdiction to investigate an infringement of UK competition law which has been investigated by the Commission before Brexit, and which resulted in an infringement decision (which has not been subsequently annulled). The CMA will have jurisdiction to investigate breaches of UK competition law occurring before or after exit day, including cases in respect of which the Commission has launched an investigation but in respect of which no decision was reached before Brexit. The CMA will have regard to its **prioritisation principles** when deciding which matters to investigate.

At present, there are seven EU block exemption regulations which specify types of agreements which are deemed compliant with Article 101 TFEU, covering liner shipping, transport, vertical agreements, motor vehicles, joint production agreements, research and development and intellectual property licencing. The Competition SI will transpose these block exemptions into UK competition law, and make necessary amendments to account for Brexit. In practice, this means that agreements that met the criteria of these EU block exemption regulations will remain exempt from the UK competition prohibitions. All bar one of the existing block exemptions is time limited; the current expiry dates will be retained and the CMA expects to consult on the future of these exemptions as each expiry date approaches.

The CMA's leniency programme, under which participants in a cartel can receive immunity from or a reduction in fines for coming forward and providing useful information to the CMA, operates independently of the Commission's leniency programme and will be largely unaffected by Brexit. There is no "one stop shop" for leniency applications in the EU, meaning companies involved in a cross-border cartel should make a separate leniency application to each competition authority that may have jurisdiction, including the CMA.

In terms of follow-on damages actions, the **Competition SI** will ensure that Commission infringement decisions reached before Brexit will continue to be a binding basis for damages in UK courts, even if the decision does not become final until after Brexit (for instance because the decision is under appeal). Infringement decisions of the Commission reached after Brexit will no longer be binding on UK courts in follow-on damages claims. Similarly, UK courts will no longer be required to treat a decision of a Member State national competition authority made after Brexit as prima facie evidence of a breach of Article 101 or 102 TFEU for the purposes of a follow-on claim for damages. Decisions of national competition

authorities reached before exit day will remain prima facie evidence of a breach (even if only made final after Brexit).

State aid

Juliette Enser, who has been appointed as the CMA's Director for State aid, **expects** that the EU legal concepts in respect of State aid, and the case law that has developed, are likely to be of continuing relevance to the UK's post-Brexit State aid regime. She also notes that the question of when the new State aid regime will become operational remains subject to the outcome of negotiations between the EU and UK.

Assuming the UK Government is successful in negotiating a withdrawal agreement with the EU, the UK will remain within the EU's State aid regime for the duration of the implementation period. However, if no deal is reached then the CMA will take up the role of State aid regulator on exit day. The Government intends to transpose the existing State aid regime into domestic law after Brexit, subject to modifications to allow the system to work in a domestic context. Enser clarified that in the short term there will therefore be little change to how State aid rules will apply in the UK, and that although the UK will ultimately take back control of its own State aid policy, it may commit to "dynamic alignment" with the EU rules in the longer term.

Other developments

Merger control

European Commission approves Mars's acquisition of AniCura, subject to conditions

On 29 October 2018 the European Commission **announced** its clearance of the proposed acquisition of AniCura, a veterinary clinic chain active in several EU Member States, by Mars, a global manufacturer of pet food. The approval is conditional on the divestment of AniCura's VetFamily business which purchases, among other things, dietetic pet food for member veterinary clinics.

The Commission examined the proposed transaction's effects on the retail market of dietetic food sold by veterinarians.[1] Following its preliminary investigation, the Commission identified concerns that the proposed transaction would have enabled Mars to exclude its dietetic pet food competitors from downstream retail channels, namely AniCura's veterinary clinics and VetFamily's member clinics.

This concern related only to Denmark and Sweden where AniCura and VetFamily together account for a very significant share of sales of dietetic pet food.[2] In these Member States, the Commission was concerned that the proposed transaction could affect the ability of other producers of dietetic pet food to

[1] Dietetic pet food is typically recommended by a veterinarian to meet the specific dietary requirements of a pet suffering from one or more health or dietary issues.

[2] Other countries where AniCura and VetFamily's clinics operate were not a cause of Commission concern because clinics there have a much smaller share of sales of dietetic pet food.

compete with Mars. This could have resulted in less choice, quality and innovation in dietetic pet food, as well as higher prices.

To address the Commission's concerns, Mars offered to divest AniCura's VetFamily business in its entirety in the whole of Europe. Mars will therefore not be able to influence the purchasing activities of clinics belonging to VetFamily, a business which will instead be subject to competition from Mars's competitors. The Commission is satisfied that these commitments fully address its concerns as they will significantly reduce Mars's influence on the downstream retail channels in Denmark and Sweden.

Antitrust

Court of Appeal confirms a global essential patent licence can be FRAND

On 23 October 2018 the Court of Appeal (the Court) unanimously **dismissed** Huawei Technologies (Huawei)'s appeal of the High Court's highly significant **judgment** in *Unwired Planet v Huawei*. That case marked the first time an English court had made a FRAND (fair, reasonable and non-discriminatory) determination and set a FRAND royalty rate as well as granting a new FRAND injunction. Huawei appealed the first instance decision on three grounds leading the Court to conclude that:

- *A global licence can be FRAND*. The Court rejected Huawei's argument that the imposition of a global licence on terms set by a national court in the context of litigation on UK only patents was wrong in principle and could not be FRAND. The High Court was entitled to impose a global licence because the scope of the FRAND commitment given to ETSI has international effects.[3] Additionally, this is what a willing licensor and a willing licensee in the position of Unwired Planet and Huawei might do. It does not follow that every essential patent licence will be global; this is to be decided on a case-by-case basis with reference to, among other things, the size and extent of the licensor's essential patent portfolio and the geographic scope of the prospective licensee's business.

  The Court did, however, depart from the first instance decision that there can only be one set of FRAND terms for any given circumstances. Yet the practical effect is likely to be limited as the licensor will have discharged its commitment to license on FRAND terms if it makes a FRAND offer.

- *Differential pricing is not per se objectionable*. The Court confirmed that the non-discrimination limb of FRAND requires an essential patent holder to offer a rate which reflects the proper valuation of the patent portfolio (the benchmark rate); it does not, as Huawei argued, depend on the identity of the licensee. The licensor may, at its discretion, charge less for a licence than the benchmark rate.

- *Failure to follow the procedural steps outlined by the Court of Justice (CJ) in Huawei v ZTE does not automatically give rise to an abuse of dominance and serve as a bar to injunctive relief*. The Court rejected Huawei's argument that ***Huawei v ZTE*** lays down a series of mandatory conditions to be satisfied in the course of licensing negotiations. While the Court recognised that the licensing framework laid down by the CJ provides a 'safe harbour' for licensors, the only mandatory

[3] ETSI is the European Telecommunications Standards Institute. The patents which apply to its mobile telephony standards belong to the same patent family, irrespective of the jurisdiction where they are licensed, and are incorporated into equipment which is sold around the world.

requirement is for the licensor to give prior notice to, or consult with, the alleged infringer before commencing proceedings for injunctive relief. A case-by-case assessment then needs to be made when considering whether an application for injunctive relief can amount to an abuse for the purposes of competition law.

Hong Kong Competition Commission issues decision for the banking industry on the Code of Banking Practice

On 19 October 2018 the Hong Kong Competition Commission (HKCC) issued its **Decision** that the Code of Banking Practice (Code) is not excluded from the application of the First Conduct Rule of the Competition Ordinance (CO) by or as a result of the legal requirement exclusion in section 2 of Schedule 1 to the CO (Legal Requirement Exclusion). Banks' compliance with the Code is therefore subject to the CO. The HKCC published a **Statement of Reasons** to accompany the Decision. In the Statement of Reasons, the HKCC confirms that it has no current intentions to pursue any investigation or enforcement action in respect of the Code.

On 11 December 2017 an application (Application) was submitted to the HKCC by 14 institutions authorised under the Banking Ordinance (AIs). The purpose of the Application was to obtain legal certainty for the applicants and the wider banking community that their continued compliance with the Code (in particular, the provisions which touch upon fees, interest rates and charges and which have been temporarily suspended) would not contravene the CO. Slaughter and May advised on the Application.

The HKCC placed weight on various features of the Code in reaching its decision, including: the Code is stated as a voluntary and non-statutory code of conduct issued by the relevant industry associations, rather than by the Monetary Authority pursuant to any functions under the Banking Ordinance; it contains "recommendations" on banking practice which are "supplementary to and do not supplant" any relevant legislation, codes, guidelines or rules applicable to AIs; and it is not referred to in the Banking Ordinance or subsidiary legislation issued thereunder.

We have produced a **Client Briefing** which discusses in further detail the HKCC's reasoning and the Decision, and considers the implications for undertakings seeking to rely on the Legal Requirement Exclusion in the future.

Brussels	London	Hong Kong	Beijing
T +32 (0)2 737 94 00	T +44 (0)20 7600 1200	T +852 2521 0551	T +86 10 5965 0600