briefing note

Competition

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Ten trends for 2015

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In 2014, Margrethe Vestager was appointed as the new EU Competition Commissioner, to replace Joaquín Almunia. One awaits with interest to see what will be Vestager's legacy. In the meantime, we expect yet another year of robust enforcement of the competition rules. Companies of all sizes and operating in all sectors worldwide should therefore ensure that they have an up-to-date and "effective" competition compliance programme in place, to help avoid infringing antitrust laws and mitigate against any fine.

Almunia's term in office is best known for the record fines he imposed on companies for breaches of the competition rules, his increasing use of settlement and commitment decisions, the high profile investigations into the financial services sector, the long running issues involving Google and, of course, his straight talking no nonsense attitude with the press.

Vestager has already made very clear she will prioritise energy, financial services and digital markets, she will take a tough stance on cartels, she will not cave into accepting commitments that do not address the issues, she will maintain State aid scrutiny of national tax breaks and support for banks as well as continue to maintain an economic approach to competition cases (given her background in economics).

We expect that Vestager's handling of the European Commission's current competition portfolio (which includes the Google and Gazprom cases) in 2015 will provide a good indication as to how she intends to approach enforcement during her five year mandate.

Our top ten trends for 2015 in the EU and UK are:

1. An increasingly investigative and intelligence led approach to civil and criminal cartel enforcement by the UK's Competition and Markets Authority ("**CMA**")
2. Continued vigorous enforcement against cartels by the European Commission and regulators worldwide
3. Increased private damages actions in the EU and a greater uptake of complaints mechanisms
4. Increasing reliance on the settlement procedure in cartel investigations and on the formal commitment procedure to resolve abuse of dominance investigations by the European Commission
5. Continued scrutiny of vertical restrictions, especially in relation to online sales
6. Competition authorities continuing to promote and reward companies that have effective competition compliance programmes in place
7. Reform of the EU competition rules to close the merger control "enforcement gap" in relation to minority shareholdings
8. Increasing focus on the healthcare sector – especially in the UK
9. Continued proactive review of rail franchise awards by the UK's CMA
10. Increased scrutiny and monitoring of the maritime sector

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1 An increasingly investigative and intelligence led approach to civil and criminal cartel enforcement by the UK's Competition and Markets Authority ("CMA")

With the CMA having made significant investment in developing its ability to take a more proactive and increasingly forensic approach to cartel enforcement and with further investment in the pipeline, we expect to see a more investigative and intelligence led approach to cartel enforcement by the CMA during 2015.

Leading competition authorities across the globe widely regard the combination of a developed intelligence function and an effective leniency regime as the best approach to uncovering cartels.

A leniency regime in isolation has significant limitations, as it relies on companies voluntarily approaching competition authorities to disclose the existence of cartels. More often than not, leniency applicants approach a competition authority to disclose late stage or failing/unstable cartels. Competition authorities recognise that they must, therefore, also adopt a proactive intelligence led approach to uncovering successful cartels in which the cartelists have little to no motivation to come forward voluntarily.

Since its introduction in April 2014, the CMA has made significant investment in developing its ability to take a more proactive and increasingly forensic approach to cartel enforcement and reducing its reliance on leniency programmes. This development has focused on the training and recruitment of specialist staff to enable the CMA to uncover cartels through intelligence activities.

Most notably, in December 2014 the CMA strengthened its Cartels and Criminal Group by appointing the Financial Conduct Authority's ("**FCA**") former head of digital forensics to the newly created role of Director of Digital Forensics and Intelligence. This new role will be responsible for developing the CMA's digital forensics and intelligence capabilities, supporting case and project teams in the CMA's Cartels and Criminal Group, and advancing the CMA's conduct of internet investigations and the capture and review of digital evidence – for example during dawn raids.

These developments are a key part of the CMA's stated aim to continue developing as a world class enforcement agency, and underline its determination to increase the number, speed and effectiveness of the cartel investigations that it pursues.

Although it will take some time before this change in approach by the CMA is fully realised, the immediate message to current or potential cartelists is clear – the CMA is determined to uncover and sanction cartel activity.

Looking back at UK cartel enforcement in 2014, the only cartel investigation to be concluded was the supply of healthcare products to care homes investigation. This investigation concerned a market-sharing agreement (which lasted from May 2011 to November 2011) whereby the parties (Lloyds Pharmacy Limited and Hamsard 3149 Limited) agreed not to supply prescription medicines to each other's existing care home customers. The CMA granted full immunity to Lloyds Pharmacy Limited, and reached a settlement of £370,226 with Hamsard 3149 Limited.

Even though the fine was small, this decision does highlight that the CMA will investigate cartels that last a short period of time and/or are entered into by small companies. This approach was also evidenced by the 2013 decision in the access control and alarm systems investigation where the Office of Fair Trading ("**OFT**" – the predecessor to the CMA) imposed total fines of £53,410 on three companies (with a fourth company receiving full immunity) for engaging in collusive tendering arrangements affecting at least 65 tenders with a combined value of approximately £1.4 million. In its decision, the OFT stated that this "sends a clear message to businesses, however large or small, that we will pursue enforcement action where we believe competition law has been broken".

On the criminal cartel side, it is notable that on 1 April 2014 the dishonesty element was removed from the UK criminal cartel offence under the Enterprise and Regulatory Reform Act 2013 ("**ERRA 2013**"). The aim of this change was to make it easier to bring criminal cartel charges in the UK. This new criminal cartel test will only apply to conduct taking place after 1 April 2014, and therefore it will likely be some time before we see the new test put into action. It is also worth noting that new exclusions and defences to the criminal cartel offence were also introduced on 1 April 2014 under the ERRA 2013, and it will be interesting to see how these evolve.

Looking back at UK criminal cartel charges in 2014, in the Galvanised Steel Tanks criminal cartel investigation one individual pleaded guilty to criminal cartel charges in June 2014 and a further two individuals were charged in July 2014 (they pleaded not guilty on 26 January 2015 and the case has been adjourned until trial on 1 June 2015). These were the first criminal cartel charges to be brought in the UK since 2010, when the OFT was unsuccessful in its prosecution of four individuals in the British Airways case. Prior to that, in 2008 the OFT did successfully prosecute three individuals in the marine hose cartel case.

Another notable development on the criminal cartel side was the signing of a memorandum of understanding between the CMA and the UK's Serious Fraud Office. This memorandum will entail the pooling of staff during investigations and sharing of information between the two authorities.

The year ahead

The CMA is due to receive a 31% budget increase for 2015/16 (i.e. from £52 million in 2014/15 to £68 million in 2015/16) which it is understood will be largely directed toward combatting cartels, and the CMA has announced that it will be recruiting additional staff throughout the year for dedicated enforcement roles.

Therefore, the CMA is striving to continue developing as a world class enforcement agency during 2015, and it will look to increase the number, speed and effectiveness of the cartel investigations that it pursues. It is keen to increase its intelligence led approach to cartel investigations. However, we expect that leniency applications will continue to play an important role in cartel enforcement.

Based on the CMA's past investigations, we expect to see enforcement activity across all sizes of companies, markets and sectors, and to apply to even the shortest of infringements. We also expect the CMA to actively pursue more criminal prosecutions. Companies of all sizes should therefore continue to ensure that they have effective competition compliance programmes in place.

2 Continued vigorous enforcement against cartels by the European Commission and regulators worldwide

The European Commission's new EU Competition Commissioner, Margrethe Vestager, has made very clear that she will pursue effective enforcement against cartels as a top priority during her five year mandate (more details below). Indeed in 2015 we expect antitrust authorities worldwide to continue to vigorously pursue cartel activity, especially given the eye watering fines imposed on companies in 2014 with the US, EU, Brazil and South Korea now all breaking the US$1 billion threshold with ease; and Brazil and South Korea imposing half of the world's US$5.3 billion cartel fines.

Brazil not only imposed a billion dollar fine on a decade long cement cartel, but also required innovative structural/behavioural remedies from the cartel participants. In effect, the cartelists were required to divest cross-shareholdings, to reduce assets by 20% in certain markets, not to cooperate on projects or buy assets from one another for five years. It will be an interesting development if other regulators worldwide follow in Brazil's footsteps, in particular, given the continued concerns that high fines do not necessarily act as a sufficient deterrent on companies or individuals partaking in cartel activity.

Companies need to take note that their activities will be scrutinized and heavily fined, even in jurisdictions that up until recently have been considered "emerging and new" competition authorities (i.e. Brazil, South Korea) as many such jurisdictions now have experienced enforcement regimes.

The European Commission's usually steady enforcement activity against cartels peaked significantly in 2014, with ten cartel decisions. This was more than double the four cartel decisions that the European Commission reached in 2013. By way of further comparison, the European Commission reached five cartel decisions in 2012, four in 2011 and seven in 2010.

The total fines of £1.689 billion imposed in these ten decisions in 2014 were, however, lower than both the totals for 2013 (£1.883 billion) and 2012 (£1.876 billion). The largest case fine imposed in 2014 was in the automotive bearings case, with total fines of £953 million. This is the fourth largest case fine imposed by the European Commission since 1969. The largest undertaking fine was on Schaeffler (£370 million) for its involvement in the automotive bearings case. This is the eighth largest undertaking fine imposed by the European Commission since 1969.

The European Commission reported two dawn raids for suspected cartels during 2014, in relation to the automotive

exhaust systems industry and in the oil and biofuel sector (the European Commission also conducted dawn raids in this sector in 2013). 2014 was therefore a relatively quiet year compared to 2013, when the European Commission conducted four dawn raids for suspected cartels in a range of industries, including white sugar, cargo train transport services, oil and biofuels and consumer electronic products and small domestic appliances. This relatively low number of dawn raids for suspected cartels in 2014 (in comparison to 2013 (four), 2012 (five) and 2011 (eight)) may, however, be indicative of the large resource requirements that the on-going investigations have necessitated given the complexities of the markets involved and the competition issues raised.

Meanwhile, the European Commission's dawn raid practices continued to be subject to challenges in 2014. In January 2014, Deutsche Bahn appealed to the European Court of Justice ("**ECJ**") against the General Court's judgment that upheld decisions of the European Commission authorising unannounced inspections. Deutsche Bahn claimed that the General Court made errors in law in relation to the need for prior court authorisation of inspection decisions, and in relation to the scope of the inspections conducted under the inspection decisions (i.e. the extent to which they can be used as "fishing expeditions"). The appeal is pending.

Nevertheless, the European Commission will have taken comfort from decisions of the ECJ and the General Court in two other appeals:

- On 25 June 2014, the ECJ dismissed in its entirety an appeal by Nexans against the General Court's judgment relating to unannounced inspections in the electrical cables sector. The ECJ's judgement clarifies that where the European Commission states in its inspection decisions that an infringement has a global reach, the European Commission does not need to provide further detail on the geographic extent of the market. The ECJ also confirmed that the European Commission is entitled to inspect documents relating to conduct outside the EU on the basis that these are likely to provide relevant information on the suspected infringement.
- On 25 November 2014, the General Court dismissed an appeal relating to unannounced inspections at premises of France Telecom and Orange. The General Court's judgment clarified that where an inspection decision is intended to enable the European Commission to gather the information needed to assess whether there has been an infringement of EU competition law, the inspection decision is not contrary to the principle of proportionality even if the European Commission already has evidence/proof of the existence of an infringement. The European Commission may legitimately take the view that it is necessary to order further investigations enabling it to better define the scope of the infringement, to determine its duration or to identify the circle of undertakings involved. This judgment also confirms that the European Commission is not constrained in taking action just because an investigation has been conducted by a national competition authority.

The European Commission's leniency regime is a key method used by the European Commission to uncover cartel activity. As part of the negotiations leading up to the final text of Directive 2014/104 on actions for damages, the European Commission sought to protect the confidentiality of leniency applications as far as possible to maintain the effectiveness of its leniency regime – judges will have to ensure that disclosure orders in private actions for damages are proportionate and that confidential information is duly protected. Leniency statements and settlement submissions will be protected at all times.

Alongside its leniency regime, the European Commission will also continue to use an investigative and intelligence approach to uncovering cartel activity, and is increasingly using advanced forensic tools in its investigations. Thousands of deleted documents were retrieved during the inspections in the power cables investigation, which proved crucial in the European Commission's infringement decision.

The European Commission will also seek to continue to uncover cartels through cooperation with national competition authorities in the EU and worldwide. On 1 December 2014, the European Commission's cooperation agreement with Switzerland entered into force. This is particularly notable because it is the first "second generation" cooperation agreement to come into force, allowing the European Commission and the Swiss competition authority to exchange information and documents from their investigations without obtaining confidentiality waivers from the companies involved. Margrethe Vestager has stated that this will lead to more efficient competition law enforcement. The European Commission now has five cooperation agreements in the field of competition with each of the United States, Canada, Japan, South Korea and Switzerland, and the European Commission is currently in negotiations with the Canadian Competition Bureau concerning an upgrade to a "second generation" cooperation agreement.

The year ahead

New EU Competition Commissioner Margrethe Vestager has already made steps towards backing-up her claims of making effective enforcement against cartels a top priority by sending a Statement of Objections to companies involved in a cartel in the trucking sector and overseeing a €21.5 million fine on companies involved in an envelope cartel.

With the aim of increasing effective enforcement against cartels, we expect to see increased and more effective cooperation between competition authorities globally, having seen the very first "second generation" cooperation agreement (between the European Commission and Switzerland) entering into force during 2014, and with a second such agreement already under negotiation (between the European Commission and Canada).

There was one development in the EU in 2014 which may potentially expose businesses to greater levels of competition risk – "umbrella pricing". On referral from Austria's Supreme Court, the European Court of Justice concluded that where it has been established that a cartel has resulted in non-cartelists also raising prices on a market, the "victims" of the price increase by the non-cartelists can claim compensation for losses from the cartel members. EU law does not require a contractual link between the "victim" and the cartelists. Cartelists are potentially at risk of both direct and umbrella claims, with a potentially huge impact on the level of damages they could have to pay.

In addition, the risk of non-cartelists being sanctioned for "facilitating" cartels will be greater in 2015 and beyond. Already in 2015, the European Commission has imposed a €14.9 million fine on interdealer broker ICAP for a facilitator role in six of the seven cartels in the Yen interest rate derivatives sector (a decision ICAP is appealing to the European Courts). This is the first time that the facilitator concept has been applied to the financial services sector, and could open the floodgates for the European Commission to apply the facilitator concept to other sectors. This decision follows-on from the European Commission's fines totalling €670 million imposed on UBS, RBS, Deutsche Bank, Citigroup, JP Morgan and broker RP Martin in December 2013 for several cartels in the Yen interest rate derivatives sector. The 2013 fines were made under a settlement agreement, but ICAP chose not to settle the case. The European Commission found that ICAP contributed to the anticompetitive objectives pursued by the cartelists by disseminating misleading information to certain panel banks, using its contacts with several panel banks that did not participate in the infringements with the aim of influencing their JPY LIBOR submissions; and serving as a communications channel between a trader of Citigroup and a trader of RBS and thereby enabling the anticompetitive practices between them. Margrethe Vestager has stated that this latest fine is not the end of the European Commission's "efforts to fight anticompetitive practices in financial markets."

3 Increased private damages actions in the EU and a greater uptake of complaints mechanisms

The European Commission's Directive 2014/104 on actions for private damages was published in the EU's Official Journal on 5 December 2014, and entered into force on 27 December 2014. Member States now have until 27 December 2016 to implement Directive 2014/104 into their national laws. We expect to see an increase in private damages actions in the EU, together with a greater uptake by companies of complaints mechanisms.

Directive 2014/104 is aimed at making it easier for EU citizens and companies to receive effective compensation for harm caused by antitrust violations. Some key provisions of Directive 2014/104 include:

- A rebuttable presumption that cartels cause harm;
- Easier access to evidence necessary in actions for damages (however, leniency statements and settlement submissions will be protected from disclosure at all times);
- Clear limitation period rules (victims will have at least five years to bring damages claims, starting from the moment when they had the possibility to discover that they suffered harm from an infringement);
- Victims should obtain full compensation for the harm suffered, covering compensation for actual loss and for loss of profit, plus payment of interest from the time the harm occurred until compensation is paid;
- Cartelists will be jointly and severally liable for the harm caused by their infringement and each cartelist will be bound to provide compensation for the harm in full. However, derogations from this principle are provided for both immunity recipients and SMEs who in certain circumstances will be liable only to their own direct or indirect purchasers; and
- Defendants in a damages action may rely on the passing on defence (i.e. that the claimant passed on the whole or part of the overcharge to its customers). The European Commission will issue guidelines on the passing on of overcharges.

Nevertheless, for EU citizens and companies looking to claim effective compensation for harm caused by antitrust violations, bringing a direct action at a Member State court can be costly (in terms of time and money) and uncertain. In particular, gathering evidence and proving that an infringement took place is fraught with difficulty.

As a result, one of the most important provisions of Directive 2014/104 is that a final infringement decision by a national competition authority or appeal court of a Member State will be binding for the purposes of a damages action brought in that Member State, and an infringement decision from another Member State will be prima facie evidence that the infringement has occurred.

A final infringement decision by a national competition authority or appeal court of a Member State will therefore be invaluable to EU citizens and companies looking to claim effective compensation for harm caused by antitrust violations.

Where no such infringement decision exists for EU citizens and companies to rely upon, they can either commence a direct action for damages at a Member State court, or try to convince a Member State competition authority to investigate the alleged anticompetitive conduct. Companies often forget or are unaware that they can use EU and national competition rules to bring complaints against competitors, suppliers or customers that are allegedly involved in anticompetitive practices (i.e. as a sword rather than merely as a shield).

Where a complainant is successful in persuading a competition authority such as the European Commission to investigate and enforce the competition rules against the alleged infringer, the benefits for the complainant can be significant. The European Commission has the power to:

- Issue a final infringement decision (which complainants can then rely upon in court as prima facie evidence that an infringement has occurred);
- Order the defendant to bring an end to the anticompetitive behaviour either by ceasing or modifying certain practices;
- Declare a commercial agreement as null and void;
- Impose fines of up to 10% of the defendant's worldwide turnover; and/or
- Grant interim measures against the defendant if there is a serious and irreparable harm caused by the defendant's commercial practices.

The European Commission is currently in the process of revising its antitrust procedures to bring them into line with Directive 2014/104. The European Commission has launched a public consultation on its revised documents, with a 25 March 2015 deadline for comments.

In addition, in November 2014 the UK government confirmed its intention to proceed with plans for opt-out collective damages actions before the Competition Appeal Tribunal, as part of a package of measures to enable consumers and businesses who have suffered loss due to anticompetitive conduct to obtain redress.

The year ahead

With Directive 2014/104 introducing changes aimed at removing a number of practical difficulties which victims of infringements of the EU competition rules (such as those relating to cartels and abuses of dominant market positions) frequently faced when trying to obtain compensation for the harm they have suffered, we expect to see an increase in the number of private damages actions in the EU. However, because Member States have until 27 December 2016 to implement Directive 2014/104 into their national laws, 2015 may come too early to see any noticeable increase.

Nevertheless, one of the more immediate impacts we expect to see is a greater uptake of complaints mechanisms by EU citizens and companies wishing to claim effective compensation for harm caused by antitrust violations, as they look for infringement decisions that they can later rely upon in court. Given that complaints and subsequent investigations can take years to conclude, the sooner complaints are made the better.

4 Increasing reliance on the settlement procedure in cartel investigations and on the formal commitment procedure to resolve abuse of dominance investigations by the European Commission

Since the introduction of the settlement procedure in June 2008, we have seen an increasing reliance by the European Commission on settlement decisions to resolve cartel investigations. In particular, the European Commission's eight settlement decisions in 2014 marked a significant increase on the three settlement decisions reached in 2013. Furthermore, during Joaquín Almunia's mandate as EU Competition Commissioner from February 2010 to October 2014, eleven abuse of dominance investigations were concluded with commitment decisions, and only five were concluded with prohibition decisions. We expect both of these trends to continue into 2015 and beyond.

Settlement procedure

The European Commission concluded ten cartel investigations in 2014, eight under the settlement procedure and only two under the normal procedure. This figure for settlements could have been as high as nine, but during the smart card chips investigation the European Commission decided to discontinue the settlement discussions and revert to the normal procedure after a lack of progress in the settlement discussions.

The European Commission's final settlement decision of 2014 (in the envelope producers investigation) was its seventeenth settlement decision out of thirty-nine cartel decisions since the introduction of the settlement procedure in June 2008. This is a clear trend towards the settlement procedure to resolve cartel cases.

The settlement procedure tends to be favoured by the European Commission and suspected cartelists alike. One of the key reasons why the European Commission tends to favour settlement decisions is the shorter timeframe involved in comparison to the standard procedure (with evidence indicating that they take on average three years to conclude from immunity application to final decision, as opposed to five years under the standard procedure). This shorter timeframe results in procedural efficiencies for the European Commission, reducing costs and freeing up resources to allow the European Commission to undertake additional investigations.

As for the suspected cartelists, their cooperation can be rewarded by a 10% reduction in the fine as well as: (i) the possibility to more quickly put an end to the investigation than under the normal procedure; and (ii) a shorter decision text published by the European Commission. However, agreeing to a settlement decision is an important balancing act, because by settling an investigation a defendant admits involvement in the cartel and effectively loses its opportunity to appeal. So far, there have been no appeals against settlement decisions.

The European Commission's reliance on settlement decisions is also often the subject of critique. Although settlements do result in penalties and a decision with a finding of an infringement, the decision texts are usually significantly shorter than decisions under the normal procedure and therefore contain less information (on average between twenty to forty pages long, as opposed to several hundreds of pages under the standard procedure) making it more difficult for victims of cartels to rely on settlement decisions when pursuing private damages actions.

Commitment decisions

Commitment decisions in abuse of dominance cases continue also to prevail due to administrative efficiencies (e.g. there is no need for the European Commission to necessarily prove a theory of harm or issue a Statement of Objections) and the shorter timeframe in which investigations can be concluded, resulting in a quicker resolution of the competition concerns on the market.

Commitment decisions have often been considered particularly useful for investigations in fast moving and dynamic markets (e.g. technology markets) and in regulated industry sectors (e.g. energy) allowing for a quicker and more targeted resolution than prohibition decisions. For example, a fairly swift resolution was reached in 2014 in the Samsung case where commitments were successfully negotiated within a period of just over two years (a significantly shorter period than under the standard procedure).

On the other hand, it is unclear whether the commitment process will ever reach a suitable outcome in the Google case. So far, the European Commission has rejected three sets of commitments offered by Google as they have not fully addressed the European Commission's competition concerns. The case has now been handed over to Margrethe Vestager, who has already met with numerous complainants and Google. This move should help the European Commission decide the next step in the case. Margrethe Vestager has already stressed that the European Commission will not negotiate or compromise by accepting commitments that do not fully address the European Commission's competition concerns. In the background, a non-binding measure was resolved by the European Parliament to unbundle search engines from other commercial services in the EU, indicating that there is significant political pressure for strong remedies to be imposed on Google.

Also, the European Commission was initially very much in favour of concluding the Gazprom investigation with a commitment decision. In the end, however, Gazprom's commitments discussions

with the European Commission (aimed at remedying concerns that it has been impeding the flow of natural gas to Central and Eastern Europe, restricting the diversification of gas supplies, and illegally linking gas prices to oil prices) broke down. The European Commission has recently indicated it will decide how to move forward in a matter of weeks. The European Commission could issue formal charges in 2015.

The year ahead

The significant increase in the number of settlement decisions reached over the past two years indicates that the settlement procedure is favoured by both the European Commission and defendants for resolving cartel investigations. The fact that no settlement decisions have been appealed to the European Courts also suggests that settlement decisions result in a good outcome for both parties. Therefore, we expect the trend towards settlement decisions to continue, and to see a higher percentage of cases being concluded with settlement decisions.

With regards to commitment decisions, the Google investigation will undoubtedly continue to dominate the headlines throughout 2015 and it will be interesting to see if a fourth set of commitments is offered (or whether the European Commission will issue a Statement of Objections, which would undoubtedly shed more clarity on the European Commission's case against Google).

The increasing reliance by the European Commission on commitment decisions is likely to result in increasing concerns that:

- The deterrent effect from private damages actions is being impeded, because when investigations are concluded with commitments there is no infringement decision for victims to rely upon in follow-on private damages actions (which was a key focus of Directive 2014/104);
- There is an ever increasing lack of up to date jurisprudence, which could result in the European Commission and national competition authorities having to rely on outdated case law; and
- Commitment decisions risk marginalising the European Courts, as such decisions are rarely, if ever, appealed.

5 Continued scrutiny of vertical restrictions, especially in relation to online sales

Issues arising from vertical arrangements in the online sector (e.g. restrictions aimed at preventing online sales and Most Favoured Nation ("MFN") clauses) were the subject of scrutiny by many competition authorities during 2014 worldwide. In the EU in particular, Germany's Federal Cartel Office ("FCO") declared that it was assuming the role of an international pioneer in this important sector. With many of these investigations still on-going, and new (often parallel) investigations being opened, we expect scrutiny of vertical arrangements in the online sector to continue into 2015 and beyond.

Restrictions imposed by manufactures on retailers to prevent them from selling online (e.g. outright bans on online sales and dual pricing systems) as well as MFN clauses have increasingly been the subject of intense scrutiny by competition authorities.

Two recent examples of investigations into outright bans on internet sales are the Adidas and Asics investigations conducted by Germany's FCO during 2014 – these have both been described as "test cases". The FCO objected to practices by Adidas and Asics to use selective distribution systems to prohibit retailers selling via online market places such as eBay and Amazon Marketplace. The Adidas investigation was closed when Adidas agreed to remove the ban on online sales. The FCO opened the Asics investigation due to concerns that Asics' distribution system primarily served to control price competition in both online and offline sales. The Asics investigation is on-going, although in December 2014 Asics made changes to its distribution policy. Some of the changes included allowing online traders of Asics shoes to use price comparison websites. All of the changes were discussed with the FCO prior to their introduction.

In the UK, the Office of Fair Trading's ("**OFT**" – the predecessor to the Competition and Markets Authority ("**CMA**")) 2013 Mobility Scooters (Roma) investigation found that agreements prohibiting online sales of Roma branded mobility scooters were infringements of competition law. Currently, the CMA is gathering information about how makers of branded clothes and luxury goods (such as eBay and Amazon.com) restrict internet retail platforms from selling products online. This is part of a project that monitors how online trade is working.

The FCO has also been assessing the potential for dual pricing systems to restrict online sales in several cases. In the Bosch investigation, the FCO looked at a rebate system that disadvantaged dealers in Germany which sold Bosch products both online and in shops. The rebate system operated so that the more sales the dealers generated online, the less rebate they received. The FCO's concern was that this rebate system created

an incentive for dealers to limit sales online. The investigation was dropped in December 2013 after Bosch agreed to offer the same rebates for both online and bricks-and-mortar sales. Bosch was the fourth dual pricing investigation to be closed by the FCO. Garden company Gardena also agreed in November 2013 to remove a similar rebate discounting system following an investigation by the FCO.

No fines were imposed in any of the investigations. However, now that the precedent has been set and businesses have been warned that such systems are not acceptable, any future investigation could possibly result in fines at least in Germany.

MFN clauses (also known as price parity, price relativity or best price clauses) generally provide that a seller will reduce the price that it charges a buyer for a product or service to match a lower price that it offers to any other buyer during the term of the agreement.

Although MFN clauses can be viewed as procompetitive, they may raise concerns when they are: (i) jointly adopted among competitors; (ii) used in agreements covering a significant portion of transactions in a given market; (iii) negotiated into agreements by sellers with high market shares; or (iv) accepted by buyers with significant buyer power. Recently, there have been concerns over the potential for MFN clauses to soften price competition between platforms (i.e. the risk that the "best price" can act as a "price floor", thereby having a similar effect to Resale Price Maintenance ("**RPM**")) and/or exclude new entrants.

Both the OFT and the FCO have investigated the use of MFN clauses by Amazon in relation to Amazon Marketplace. Amazon enforced an MFN policy prohibiting retailers from offering products through any other online sales channel cheaper than they sell on Amazon Marketplace. The OFT and FCO had concerns over the potential for the MFN clauses to soften price competition between platforms and exclude new entrants. Both investigations were closed in 2013 after Amazon agreed to remove the restrictions in all EU Member States (not just in the UK and Germany).

The UK Competition Commission's market investigation and 2013 final report on the private motor insurance is noteworthy for its detailed analysis of MFN clauses and the distinction between:

- Narrow MFN clauses – a promise by a motor insurer to a price comparison website not to undercut prices on its own website; and
- Wide MFN clauses – where the MFN promise extends to cover third party websites also.

The report found that in general narrow MFNs do not restrict competition, whilst wide MFNs will soften price competition which can "lead to less entry, less innovation and higher commission fees, all leading to higher premiums".

In December 2013, the FCO banned online travel agent HRS from including MFN clauses in its contracts with German hotels. The MFN clauses in question obliged the hotels to offer HRS their lowest price, highest room availability and best cancellation terms, and not to offer better terms to customers directly (i.e. front desk). The FCO's decision was upheld following an appeal by HRS.

Similar investigations have been opened by competition authorities in Sweden, France, Switzerland, Italy, Czech Republic and Austria. Denmark and Belgium have requested information from companies involved in the industry, and Hungary is taking a broader look at the industry. Although the European Commission gathered information relating to this sector, it has left national competition authorities to handle the situation, which might give rise to inconsistent outcomes at the national level.

The OFT concluded its investigation in this sector in January 2014 by accepting commitments from Booking.com, Expedia and InterContinental Hotels (including a commitment to amend any MFN clauses not in line with the commitments). However, this settlement was challenged by Skyscanner – this was the first time that a company not under investigation has challenged a decision of a UK competition authority to settle a case. In September 2014, the Competition Appeal Tribunal ("**CAT**") overturned the OFT's decision and therefore the CMA is reviewing the sector again in line with investigations by other national competition authorities.

Also, in June 2014 the European Commission followed up on its previous investigation into the use of MFN's in the ebook market, asking publishers and other players about pricing clauses and distribution deals. Some of the questions focused on non-price MFN clauses (i.e. provisions related to business models), showing that the European Commission is still monitoring the ebook market and may still have some concerns in relation to the role of MFN clauses.

Looking at vertical arrangements more generally (i.e. not just in the online sector), it is clear that competition authorities around the globe are continuing to sanction RPM practices.

Looking first at the EU, in March 2014 Poland imposed a €36,500 fine on Excellent (a distributor of bathroom equipment) for RPM practices. Even though the companies had removed RPM clauses from their contracts, the Polish competition authority found that they had continued to enforce it informally. Furthermore, in April 2014 Denmark imposed a €13,400 fine on

a Danish hair product distributor, even though the RPM was only imposed on only one dealer and for just two months.

Outside the EU, in October 2014 China imposed fines on Chrysler and Chrysler dealers for dealership agreements containing RPM clauses, business policies aimed at maintaining resale prices, imposing sanctions for non-compliance with RPM agreements and involvement in meetings to unify maintenance and repair fees for Chrysler, Jeep and Dodge brands. In the same month China also imposed fines on FAW-Volkswagen and Audi dealers in Hubei for involvement in meetings to agree prices of Audi cars and relevant services, and implementation of a separate price fixing agreement between the dealers. In addition, in February 2014 South Korea imposed a US$1.7 million fine on Johnson & Johnson Korea for setting the minimum price of its Acuvue contact lens in South Korea by providing the product at a discount to retailers in return for their promise to maintain prices in accordance with pricing scheme. Johnson & Johnson Korea also prohibited retailers from selling to third parties and sanctioned non-compliance by retailers by cutting-off supply.

The year ahead

In October 2014, Joaquín Almunia stated that national competition authorities needed to arrive at consistent individual decisions in relation to the online sector, and give legal certainty to businesses so that it is clear what restrictions companies can legitimately impose in distribution contracts relating to the use of the internet.

In December 2014, the French, Swedish and Italian competition authorities reached a preliminary settlement with Booking.com, which has agreed to remove its MFN clauses from arrangements with other online travel agents. Although investigations into the other companies involved are on-going, it is hoped that the preliminary settlement with Booking.com will serve as a precedent, with the aim of introducing a pan-European solution, and hopefully avoid inconsistent outcomes.

Now that precedents have been set by competition authorities for the application of competition law to a number of vertical restrictions (i.e. outright bans on internet sales, dual pricing), we expect competition authorities to take a more strict approach (i.e. fines) to any infringements in 2015 and beyond.

6 Competition authorities to continue to promote and reward companies having effective competition compliance programmes

In 2014, new EU Competition Commissioner Margrethe Vestager and competition authorities worldwide (including in particular the UK's Competition and Markets Authority ("CMA")) were very clear that promoting competition compliance will be a top priority. The CMA especially has advised that a clear, established and well understood compliance programme that is advocated from the top down across the entirety of an organisation mitigates the very real and significant risks associated with breaking competition law – heavy fines, prison sentences, director disqualifications and reputational damage.

Experience has shown that all sizes of business operating in all types of markets can be investigated and fined for breaches of competition rules, no matter how long or short such infringements lasted.

In November 2014, the CMA jointly published a short guide with the Institute of Risk Management aimed at helping businesses comply with competition law. The guide provides a basic overview of competition law, outlining the steps businesses and risk professionals can take to help identify and reduce competition law risks. The CMA's aim is that competition compliance should become cultural norm and a standard consideration in corporate risk exercises.

Having an effective compliance programme in place can not only help reduce the risk of infringing competition law, but can also be taken into consideration as a mitigating factor by competition authorities when an infringement has taken place, resulting in a fine reduction. This is a positive move given that until recently some competition authorities took the opposite view (i.e. that having in place a competition compliance programme which was not adhered to by the company and its employees should in fact be viewed as an aggravating factor).

For example, when calculating fines the CMA will consider whether the existence of a compliance programme merits a discount of up to 10%. The CMA will require evidence of adequate steps having been taken to achieve a clear and unambiguous commitment to competition law compliance throughout the organisation (from the top down) together with appropriate steps relating to competition law risk identification, risk assessment, risk mitigation and review activities in order to treat it as a mitigating factor. The company will need to demonstrate that the steps taken were appropriate to the size of the business concerned and its overall level of competition risk, and provide evidence of the

steps it took to review/amend its compliance programme in light of the events that resulted in the investigation.

In March 2014, the Office of Fair Trading ("**OFT**" – the predecessor to the CMA) issued its decision in the home medicine cartel case. Although the OFT initially reached a settlement agreement under which Hamsard 3149 Limited agreed to pay a maximum fine of £387,856, the OFT reduced this to £370,226 in its decision, after deciding to grant a further discount in respect of Hamsard 3149 Limited's competition compliance programme.

France, Singapore, South Korea, Australia, Canada and Italy also reward compliance efforts through fine reductions in certain circumstances. Italy is the latest country in the EU to do so, having introduced new fining guidelines in 2014 offering a reduction of up to 15%. As in the UK, the mere existence of a compliance programme will not be enough for a fine reduction. The Italian competition authority will require proof of effective commitment and monitoring to ensure compliance with the programme at all levels of the organisation, together with appropriate tools.

Examples of competition compliance tools that companies can use to manage their competition risk include competition compliance policies, training, audits, reporting incentives, risk matrixes, checklists, key risk indicators and newsletter updates.

By contrast with these national competition authorities, the European Commission will not take the existence of compliance programmes into consideration when calculating fines.

The year ahead

In 2015, it will be important for companies to proactively identify the main areas of competition law risk that they face and ensure they have an effective compliance programme in place to minimise these risks. In particular, it will be important to put in place a programme that is comprehensive, clear, relevant and practical; in particular, a policy that covers all relevant international jurisdictions (including new and emerging markets) pertinent to the organisation.

As mentioned previously, competition authorities worldwide are imposing increasingly large fines on companies for breaches of competition law. Already in 2015, China has imposed the largest ever antitrust fine in China's history on Qualcomm for anticompetitive practices (i.e. alleged abuse of its dominant position in the Chinese market for the licensing of standard essential patents). The US$975 million fine amounts to 8% of Qualcomm's 2013 revenue in China, and is therefore just below the maximum of 10% allowed under Chinese law. Qualcomm's decision to fully cooperate with the investigators will have been a consideration when setting the fine. Not only is this the largest ever antitrust fine in China's history, it is also almost double the largest fine ever imposed by the US on a single company.

One important UK development in 2015 to be aware of is that in April the Financial Conduct Authority ("**FCA**") will be given concurrent competition law powers in relation to the provision of financial services, giving the FCA the ability to enforce against breaches of the Competition Act 1998 and to refer markets to the CMA for in-depth investigation under the Enterprise Act 2002. This is therefore a very important development from a risk perspective for companies active in the financial services sector. Companies with existing compliance programmes should ensure that these are up to date and "effective".

7 Reform of the EU competition rules to close the merger control "enforcement gap" in relation to minority shareholdings

In July 2014, the European Commission published a White Paper setting out proposals to introduce a system for reviewing acquisitions of minority shareholdings. This follows on from its "Towards more effective EU merger control" public consultation in 2013. Given that many merger control rules worldwide are based on EU merger control, it will be interesting to see if any of these jurisdictions see the need to adopt similar rules on minority share acquisitions and the wider implications.

A minority shareholding in a competitor can lead to anticompetitive horizontal unilateral effects. Companies with minority shareholdings in a competitor can benefit from reducing output and/or increasing prices because if a significant number of their customers switch to that competitor then they will still earn a profit (i.e. through dividends or capital growth). The acquisition of minority shareholdings may also lead to anticompetitive coordinated effects as they can make it easier (and more attractive) for competitors to coordinate their conduct. Acquisitions of minority shareholdings in companies in upstream or downstream markets may lead to competition concerns by input or customer foreclosure. In addition, there is also the risk of the exchange of commercially sensitive information.

Under the EU Merger Regulation ("**EUMR**"), the European Commission has jurisdiction to review acquisitions of "control". Acquisitions of minority shareholdings, however, do not normally confer "control".

One often cited and very public example of the European Commission's lack of jurisdiction to review an acquisition of a minority shareholding leading to a potential horizontal competition concern was the Ryanair/Aer Lingus case. Ryanair, having already acquired a significant minority shareholding in Aer Lingus, notified the European Commission of its intention to acquire control in 2006. Although the European Commission was able to twice block Ryainair's plans due to concerns that the acquisition would harm competition by creating and strengthening dominant positions on a number of flight connections to Ireland, the European Commission did not have jurisdiction to order Ryanair to divest its minority shareholding in Aer Lingus.

Some national competition authorities, including Austria, Germany and the UK, have the authority to review acquisitions of minority shareholdings. For example:

- In the UK, acquisitions of minority shareholdings are currently reviewable where a minority shareholder would be able to exert "material influence" over a target business as a result of the acquisition. Material influence is assumed to exist for shareholdings of 25% or more and may even extend to shareholdings of less than 15% where other circumstances exist which confer material influence over policy (e.g. special voting rights attached to the minority shares and/or supply arrangements or other contracts between the shareholder and the target).
- In Germany, a notification is required for all acquisitions of at least 25% of shares (capital or voting rights) in a company, or when the shareholding allows the shareholder to directly or indirectly exercise a "competitively significant influence" over another company – this has allowed Germany's Federal Cartel Office ("**FCO**") to review acquisitions of minority shareholdings far below 25%.

Acquisitions of non-controlling minority shareholdings typically account for approximately 5% of all mergers notified in the UK and 10-12% in Germany.

In many jurisdictions outside the EU, such as Canada, the US and Japan, merger control rules already allow for the review of similar structural links.

By contrast to the European Commission, the UK's Competition Commission (the predecessor to the Competition and Markets Authority) did have jurisdiction to review Ryanair's minority shareholding in Aer Lingus. The Competition Commission concluded that the minority shareholding gave Ryanair the ability to influence the commercial policy and strategy of a main competitor by allowing Ryanair to block special resolutions, by restricting Aer Lingus's ability to issue shares and raise capital and by limiting Aer Lingus's ability to effectively manage its portfolio of Heathrow slots. The Competition Commission ordered Ryanair to reduce its 29.8% stake in Aer Lingus down to 5%, and prohibited Ryanair from acquiring further shares and appointing representatives to the Aer Lingus board. Ryanair appealed this decision to the Competition Appeal Tribunal, and although it lost the appeal in March 2014, it was granted the right to challenge the decision at the Court of Appeal. In February 2015, the Court of Appeal dismissed the appeal.

The White Paper proposes a one-stop shop system (i.e. one review at EU level rather than multiple national filings) for the review of acquisitions of minority shareholdings that have the potential to result in anticompetitive harm. For transactions meeting the EUMR turnover thresholds, such a system would bring all related notifications/procedures under one roof and could replace national procedures that currently allow for the review of acquisitions of minority shareholdings.

The White Paper proposes a targeted transparency system, designed to avoid unnecessary administrative burden and to work alongside the existing system of merger control at the EU

and national levels. The targeted transparency system would apply to acquisitions creating a "competitively significant link" between the buyer and the target, i.e.:

- Acquisitions of a minority shareholding in a competitor or vertically related company (i.e. there needs to be a prima facie competitive relationship between buyer and target); and
- The competitive link would be considered significant if the level of acquired shareholding is:
  (i) around 20%; or
  (ii) above 5%, but accompanied by additional elements such as rights which give the acquirer a "de facto" blocking minority for certain shareholders' resolutions, a seat on the board of directors, or access to commercially sensitive information of the target.

The European Commission has targeted the system at strategic acquisitions made by industrial investors by limiting jurisdiction to competitively relevant transactions. The European Commission expects that in practice the system should not affect investments made by private equity investors or banks, whose business is generally not related to that of their investments.

Parties will have to submit a short information notice informing the European Commission of the acquisition. The European Commission will use this information notice to decide whether to investigate the transaction. Member States can request that the acquisition be referred back to them. Potential complainants will also be invited to provide their views.

The year ahead

2014 was one of the European Commission's busiest years in terms of the number of merger notifications that it received. The European Commission received 303 merger notifications, and over the last six years only 2011 resulted in a higher number of merger notifications (309 notifications). This is an interesting development given that the number of merger notifications had been in decline since 2011. We expect 2015 to see a further increase in the number of merger notifications to the European Commission.

In 2015 and beyond, effectively managing merger notifications will become even more challenging for businesses and their advisors – especially once the targeted transparency system comes into effect.

Many jurisdictions worldwide rely heavily on EU competition law when drafting and interpreting their own competition law rules. Therefore, in 2015 and beyond it will be interesting to see if any of these jurisdictions also start to consider introducing similar rules on the acquisition of minority shareholdings.

8 Increasing focus on the healthcare sector – especially in the UK

Competition authorities worldwide have indicated that the healthcare sector will be a top sector focus in 2015. This is particularly true in the UK. With Monitor having had concurrent competition powers in relation to the provision of healthcare services in England since 1 April 2013, and the UK Competition and Markets Authority ("CMA") having expanded its ability to review Private Patient Unit ("PPU") arrangements, we expect both the CMA and Monitor to take increasingly active roles in the healthcare sector in 2015.

PPU arrangements

In April 2014, the CMA published its Final Report on the Private Health Care Investigation. The CMA defined privately-funded healthcare services as services provided to patients via private facilities/clinics including PPUs, through the services of consultants, medical and clinical professionals who work within those facilities.

With regards to PPU arrangements, the CMA found that certain PPU arrangements had been structured in such a way that they did not constitute a merger situation. As a consequence, the CMA did not have jurisdiction to review these PPU contract awards and therefore competition concerns were not adequately scrutinised.

This lack of jurisdiction was a concern for the CMA because it found that that there were:

- High barriers to entry and expansion for private hospitals; and
- Weak competitive constraints on private hospitals in many local markets, including central London,

in the provision of privately-funded health care by private hospital operators, including in PPU.

The CMA concluded that these features lead to higher prices being charged for inpatient treatments as well as some day-case and outpatient treatments to self-pay patients in those local areas. The CMA considered it important that it has jurisdiction to review all types of PPU arrangements, and on 1 October 2014 the CMA published its Final Order introducing a new competition test (with immediate effect) to cover PPU arrangements where the CMA previously lacked jurisdiction.

Under the new test, the CMA will have power to review PPU arrangements and to take remedial action where a private hospital operator, facing weak competitive constraints in a particular local area, acquires, or intends to acquire, the right to carry on PPU arrangements in the same local area and the arrangements will, or may, result in a substantial lessening of

competition in the provision of privately-funded healthcare services in that area.

The Final Order enables the CMA to require information about PPU arrangements from the parties. It also allows the parties to volunteer information about proposed PPU arrangements prior to entering into such arrangements. The CMA will review PPU arrangements to decide whether the arrangements have resulted, or may be expected to result, in a substantial lessening of competition. The CMA may have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant PPU arrangements concerned.

If the CMA decides that the arrangements have resulted, or may be expected to result, in a Substantial Lessening of Competition ("**SLC**"), then it can decide whether to take action to remedy, mitigate or prevent the SLC. Such action may be to prohibit the making or performance of the PPU arrangements; to require the termination of the arrangements; to accept appropriate undertakings; or to require the parties to take other appropriate action in relation to the relevant private healthcare services being provided.

A review under the new test will consist of only one stage (i.e. no Phase 1 and Phase 2) and will be conducted within a reasonable time frame, but without a prescribed time limit. As with the normal merger procedure, the CMA must commence a review no more than four months following the day on which material facts were public or known to the CMA.

Therefore, two competition regimes now apply to the setting up of PPUs in the UK:

- The existing merger control rules provided for in the Enterprise Act 2002; and
- The new competition test set out in the Final Order.

While it is not entirely unique, this new test is a departure from the norm in competition and mergers analysis and it creates an additional burden on the parties to PPU arrangements.

Allowing the CMA to review these additional PPU arrangements will increase the competitive constraints on incumbent private hospital operators in any local areas where an NHS Trust wishes to partner with a private hospital operator to operate a PPU. Such a review will potentially open up local markets by enabling alternative providers to enter or expand in areas in which incumbents face weak competitive constraints.

Mergers

The CMA has jurisdiction to review mergers involving NHS foundation trusts (including mergers between an NHS foundation trust and an NHS trust) and mergers between NHS trusts and other enterprises. Monitor (the sector regulator for health services in England – its concurrent competition powers in relation to the provision of healthcare services in England came into force on 1 April 2013) has a statutory duty to advise the CMA on the benefits of NHS mergers that are reviewed by the CMA. In addition, Monitor is responsible for reviewing mergers solely between two or more NHS trusts and providing advice to the NHS Trust Development Authority on the effect of the merger on choice and competition.

In July/August 2014, the CMA and Monitor published several guidance documents (both jointly and individually), aimed at helping NHS providers navigate the merger process. One of the key messages of the guidance documents is that NHS providers considering a merger should contact Monitor early in their planning to ensure that the proposals work well for patients. Monitor will then provide expert support at an early stage to help NHS foundation trusts understand whether a particular merger is the best way forward and makes sense from quality, operational, financial and (where relevant) choice and competition perspectives. This new approach applies to joint ventures and major investments as well as mergers and acquisitions.

In May 2014, the CMA cleared the acquisition by Frimley Park Hospitals NHS Foundation Trust of Heatherwood and Wexham Park Hospitals Foundation Trust. Monitor's advice to the CMA was that this merger is expected to result in better care and improved healthcare service. This is the first ever acquisition of an NHS foundation trust by another NHS foundation trust. By comparison, in 2013 the Competition Commission blocked the proposed merger between Royal Bournmouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust.

In December 2014, the CMA cleared the proposed merger of Chelsea and Westminster NHS Foundation Trust and West Middlesex University Hospital NHS Trust. The CMA concluded that the merger will not lead to a material reduction in the quality of services for patients (including clinical factors such as outcomes, infection rates and mortality rates, and non-clinical factors such as waiting times and patient experience) and will not materially reduce the hospitals' incentives to innovate and improve their services.

In August 2014, the CMA cleared a pathology services joint venture between Basildon and Thurrock University Hospitals NHS Foundation Trust, Southend University Hospital NHS Foundation Trust and Integrated Pathology Partnerships Limited. It was only as recently as 2013 that the Office of Fair Trading (the predecessor to the CMA) cleared its first ever pathology joint venture, between University College London Hospitals NHS Foundation Trust, Royal Free London Foundation Trust and the Doctors Laboratory Limited.

In addition, in March 2014 Monitor concluded its review of a proposed merger between the pathology services of Brighton & Sussex University Hospitals NHS Trust and Surrey & Sussex Healthcare NHS Trust (because this was a merger solely between two NHS trusts, Monitor had jurisdiction). Monitor reached the conclusion that the merger was not likely to lead to a loss of competition for pathology services or reduce the incentives for pathology providers to improve the quality and efficiency of their services. This was the first transaction to be reviewed by Monitor under its partnership agreement with the NHS Trust Development Authority.

The year ahead

It is widely expected that the trend of NHS hospitals seeking to establish or expand their PPU offerings will continue during 2015. As a result of the new competition test under the CMA's Final Order on the Private Health Care Investigation, which will allow the CMA to review additional types of PPU arrangements, we expect to see the CMA reviewing more and more PPU arrangements during 2015.

The Final Report on the Private Health Care Investigation is currently the subject of appeals by AXA PPP Healthcare Limited, HCA International Limited and the Federation of Independent Practitioner Organisations for review of some of the decisions the CMA made. The CMA has invited the Competition Appeal Tribunal to remit these matters to the CMA to reconsider, as this will give the parties the opportunity to make representations on the errors to the CMA and for the CMA to consider those representations before final decisions are taken.

More generally, considering the continuing clinical and financial difficulties facing some NHS hospitals, we expect further mergers by NHS providers as a way to address these difficulties. Monitor will play an increasingly important role, as highlighted in the published guidance documents, with the CMA relying on Monitor's experience and expertise in this sector.

Already in 2015 there has been an interesting development in merger control, with the CMA referring the merger between Ashford and St Peter's Hospitals NHS Foundation Trust and Royal Surrey County Hospital NHS Foundation Trust for an in-depth Phase 2 investigation in order to fully assess whether the merger would be in patients' interests. The CMA was not convinced (on the basis of available evidence during its Phase 1 investigation) that the potential benefits of the merger outweighed its concerns relating to the potential loss of competition.

In addition, in January 2014 the European Commission gave its "Expert Panel on Effective ways of Investing in Health" a new mandate to investigate if and how health systems in the European Union could benefit from competition among providers of health services, in terms of enhancing equitable access to improved quality of care, cost-effectiveness in service organisation and delivery and transparency and accountability and expenditure control. The Expert Panel's opinion is expected to be published in early 2015.

9 Continued proactive review of rail franchise awards by the UK's Competition and Markets Authority ("CMA")

In March 2013, the Department for Transport announced the start of a staggered programme to procure all its rail franchises over a period of eight years. The CMA reviewed the awards of four rail franchises in 2014 (including one that qualified for review at the EU level) and is currently reviewing the award of the InterCity East Coast franchise. We expect that the CMA will continue to take a proactive approach to reviewing rail franchise awards in 2015 and beyond.

Although the UK merger control regime is voluntary, the CMA has announced that it will be proactive in reviewing any awards over which it has/or could take jurisdiction. Under section 66(3) of the Railways Act 1993, entering into a rail franchise agreement constitutes an acquisition of control of an enterprise under the merger control provisions of the Enterprise Act 2002.

The CMA also confirmed in 2014 that where an award meets the EU merger control thresholds, it expects that there will be strong reasons for a referral back to the UK since rail franchises concern only the UK and the affected markets may not be a substantial part of the common market. Awards large enough to meet the high EU merger control thresholds are usually those involving two or more joint venture partners.

For example, the award of the Thameslink, Southern and Great Northern franchise to Govia Limited (a joint venture) did meet the EU merger control thresholds. However, the European Commission referred the award to the CMA under Article 4(4) of the EU Merger Regulation. The European Commission concluded that the award of the franchise may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market and that the principal impact on competition of the award is liable to take place on distinct markets in the UK. The CMA cleared the transaction at Phase 1.

It is worth remembering, however, that some awards will be small enough to avoid both EU and UK merger control. For example, when reviewing the award of the Caledonian Sleeper franchise in 2014, the CMA concluded that a relevant merger situation was not created because the award met neither the UK turnover test nor the share of supply test in section 23 of the Enterprise Act 2002. Therefore the award did not qualify for investigation.

Due to the relatively short timescale between the selection of the winning bid and the scheduled commencement date of the franchise, the CMA encourages all bidders to enter into pre-notification discussions with the CMA shortly after having submitted their bids – although the CMA will only conduct a formal Phase 1 merger investigation into the winning bid. The aim of this is to allow the CMA to gather sufficient information from the bidders during the pre-notification stage to allow the Phase 1 investigation timetable to commence the moment the winning bid is selected. The CMA has recommended that, at the very least, bidders should enter into pre-notification discussions four to six weeks prior to the expected date of the award. To date, all of the CMA's merger decisions relating to passenger rail franchise awards have been concluded prior to the scheduled commencement date. Furthermore, the CMA has recently indicated that where a merger clearance is not granted prior to the scheduled commencement date, then the franchisee may still commence operations on that date but subject to a "hold separate" order to prevent integration for the duration of the CMA's investigation.

At the EU level, the European Commission typically will not start pre-notification discussions until after the award. However, in recent rail cases the European Commission has engaged with bidders (and with the CMA regarding referrals back) at the bidding stage.

We have noticed that some recent franchise agreements have conferred upon the franchisee a lower level of control over the franchise than under a "traditional" franchise agreement. This can raise questions over jurisdiction. At a UK level, the award of any rail franchise constitutes an acquisition of control by virtue of section 66(3) of the Railways Act 1993. Therefore, even if the terms of the franchise agreement confer a minimal level of control (i.e. similar to a concession/management type contract) then it is still an "acquisition of control" – so long as the award is covered by the Railways Act 1993. The level of control can, however, be a significant factor in the substantive analysis.

An interesting exception to this was the award of the Docklands Light Railway franchise in 2014. Although, as noted above, section 66(3) of the Railways Act 1993 provides that the award of a rail franchise constitutes an acquisition of control of an enterprise, pursuant to the Railways (London Regional Transport) (Exemptions) Order 1994 this does not apply to franchises awarded by Transport for London ("**TfL**") or its subsidiaries. Because the Docklands Light Railway was awarded by Docklands Light Railway Limited (a subsidiary of TfL), the CMA therefore had to consider whether there was an acquisition of control when reviewing the award.

The CMA concluded that the award of the Docklands Light Railway franchise did not result in enterprises ceasing to be distinct as a sufficient level of control was not granted. The CMA found that the franchisor would retain control over commercial aspects of the franchise, including price levels, operational service levels, customer-facing activities, marketing, and long-term asset management. In addition, the franchisee faced a performance regime that covers the regular monitoring by the franchisor of a range of performance metrics and includes potentially serious financial consequences of missing targets.

The year ahead

With the Northern and TransPennine Express franchises due to be awarded in 2015, we expect that the CMA will continue its proactive approach to reviewing rail franchise awards. We also expect that where future franchise awards meet the EU merger control thresholds, the CMA will consider taking jurisdiction (whether or not the parties request the referral). The award of the ScotRail franchise to Abellio will, however, be reviewed by the European Commission (with 18 March 2015 as the initial Phase I decision deadline).

Furthermore, already in 2015 there have been two notable developments in the rail sector.

Firstly, in January 2015 the CMA announced that it has launched a Policy Project (not a formal investigation or market study) to investigate whether the current UK rail franchising system can be adapted for the future – by examining the desirability (and the feasibility) of expanding opportunities for in-market competition, with a view to securing greater value for money for passengers (and taxpayers) and to improving the passenger experience. The CMA will be engaging with interested parties (including providers and potential providers of passenger rail services (whether as franchisees or as open access operators), passenger groups, industry experts, and government both at UK level and in the devolved nations affected) with a view to producing a report setting out its interim findings in the summer of 2015. This report will then be the subject of a public consultation.

Secondly, in February 2015 the CMA completed its Phase 1 investigation of the award of the InterCity East Coast passenger rail franchise to Stagecoach/Virgin Trains (through Inter City Railways Limited). The CMA found that there is a realistic prospect that the award could lead to higher fares or reduced service quality on several overlap routes with East Midland Trains (operated by Stagecoach) and Scottish Citylink coach services (operated by Stagecoach and jointly owned with ComfortDelGro). Although the parties have offered undertakings, the CMA has not ruled out the possibility of an in-depth Phase 2 investigation if the proposed undertakings are not sufficient to address its competition concerns.

The CMA will undertake a public consultation to give third parties the opportunity to comment on the proposed undertakings.

Stakeholders in the rail sector will be watching both of these developments closely – to see how the CMA's Policy Project progresses, and whether Stagecoach/Virgin Trains are able to offer suitable undertakings to remedy the CMA's concerns.

10 Increased scrutiny and monitoring of the maritime sector

There was significant competition law activity in the maritime sector in 2014, with competition authorities worldwide investigating a series of proposals for liner shipping alliances. In the background, exemptions in key shipping jurisdictions that allow liner shipping alliances continued to be subject to legislative review. Many competition authorities also made progress in on-going investigations into anticompetitive cartel conduct. We expect that 2015 will continue to see significant competition law activity in the maritime sector.

In June 2014, China blocked the proposed P3 Network alliance (between AP Møller-Maersk, Mediterranean Shipping Company and CMA CGM) to share vessels and engage in related cooperative operating activities in the trades between the US and Asia, North Europe, and the Mediterranean under its merger control rules (unlike the EU and US which reviewed the alliance under their antitrust rules)

China's MOFCOM concluded that the P3 Network alliance would create a network centre that would make many of the most important operational and management decisions for the P3 Network alliance. This was distinct from a "traditional" liner shipping alliance in which members make those decisions individually. In effect, competition would be eliminated as individual members would lose control of their ability to affect decision making once the network centre became operational. In addition, there were concerns that the high market share of the parties on the Asia-Europe route (i.e. approximately 46.7% combined) and high concentration on the market would increase barriers to entry (especially given the capital intensive nature of the liner shipping industry) and weaken the negotiation power of shippers and ports post transaction. The P3 Network alliance parties were unable to persuade MOFCOM as to any efficiencies the alliance would have supposedly generated and such competition concerns could not be resolved by any remedy proposed by the parties.

Prior to this, the alliance had been cleared by the US Federal Maritime Commission ("**FMC**") – albeit the FMC did note that there may be circumstances that could permit the parties at some point in the future to unreasonably reduce services or unreasonably raise rates that could raise concerns. To address these concerns, the FMC imposed specific reporting requirements on the parties to assist with its monitoring. The European Commission did not formally investigate the alliance on the basis that it was for the parties to self-assess, but did informally discuss the proposals with the parties and indicated it would monitor the position closely in the event a formal investigation was necessary.

China's decision to block the merger emphasises the risk of conflicting approaches and decisions that companies face when entering into alliances and/or mergers. Moreover, it demonstrates that MOFCOM is not afraid to take its own decisions, even if they do differ significantly from other authorities worldwide.

Following the collapse of the P3 Network alliance, AP Møller-Maersk and Mediterranean Shipping Company submitted plans for a 2M alliance, to share vessels and engage in related cooperative operating activities in the trades between the US and Asia, North Europe, and the Mediterranean. This alliance was cleared by the FMC, subject again to reporting requirements on the parties to assist the FMC in its close monitoring of the agreement. The European Commission also approved the alliance, subject to close monitoring. Margrethe Vestager announced that the European Commission will be keeping a close eye on the 2M and other liner shipping alliances, and that the European Commission will strike if they find that such an alliance attempts to interfere with free competition. Margrethe Vestager also called on other industry players to notify the EU if they suspect anticompetitive behaviour, thereby encouraging potential complainants to come forward.

In addition, the following shipping alliances were cleared by the FMC (subject to reporting requirements) in 2014:

- The Ocean Three Alliance (CMA CGM, China Shipping and United Arab Shipping Co.) – but under the fast-track procedure (i.e. without the standard 45-day review by the FMC);
- The G6 alliance (American President Lines, Hapag-Lloyd, Hyundai Merchant Marine, Mitsui, Nippon, OOCL); and
- The CKYHE alliance (COSCO, K Line, Yang Ming, Hanjin, and Evergreen).

Hapag-Lloyd and CSAV also completed a merger in 2014 to become the fourth largest liner shipping company in the world. The merger was cleared by the European Commission in September 2014, with clearance conditional on CSAV withdrawing from two consortia on the trade routes between Northern Europe and the Caribbean and South America's West Coast, where the merged entity would have faced insufficient competitive constraint to avoid a risk of price raises.

Following the numerous alliances formed and expanded during 2014, the EU, US and Chinese regulators announced a willingness to cooperate more closely, share information and swap notes in dealing with the increasingly global shipping industry. There were even calls from the industry for a global shipping competition regulator, albeit this is currently unrealistic.

In 2014, the EU also decided to extend its block exemption for shipping consortia until 2020, and Malaysia introduced a block exemption for Vessel Sharing Agreements and Voluntary Discussion Agreements in respect of liner shipping services; whilst other jurisdictions worldwide contemplated whether or not to renew their block exemptions (e.g. Australia).

2014 was also notable for the enforcement action taken by competition authorities in the maritime sector. Most notably, in the global investigation into providers of maritime transport services for cars (i.e. the RoRo cartel), Japan imposed significant fines totalling US$223 million on all four of the cartelists. This was shortly followed by the US imposing fines totalling US$135 million in the same investigation on three of the cartelists – NYK (US$59.4 million), CSAV (US$8.9 million) and K Line (US$67.7 million). The European Commission is also investigating this cartel. Although it has been relatively silent on the case so far, it confirmed in 2014 that it was still investigating the suspected cartelists and would take action.

There were also criminal sanctions imposed in the maritime sector in 2014 – the former president of Sea Star Line was sentenced by the US to five years in prison for his involvement in the Coastal Water Freight price fixing conspiracy, the longest prison sentence issued to date in the US.

The year ahead

Exemptions for liner shipping agreements will continue to attract attention in 2015. Japan is due to review its antitrust immunity system for ocean carriers, and Australia is set to continue work on its draft Cartel Bill, which contains a proposal to repeal its liner shipping exemption. Liner shipping companies currently benefiting (or planning on benefiting) from these exemptions should monitor these reviews closely.

In addition, 2015 may see progress in the European Commission's price signalling investigation. The investigation is based on evidence which suggests a practice of price signalling, whereby the 14 companies under investigation made, in parallel, regular public announcements of price increase intentions through press releases on their websites and in the specialised trade press. The European Commission has concerns over the length of time between the price announcements and their implementation, as customers are unlikely to benefit from such announcements if they are made too far in advance. Settlement discussions between the European Commission and the parties are on-going, but it is possible that some companies may reject a settlement and instead test whether the European Commission is able to prove its case (in particular, given the difficulty of proving price signalling cases in practice).

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