Q3 2020

Competition Law Newsletter

Welcome to the Q3 2020 edition of our Competition Law Newsletter. A quarterly update covering key developments in EU and UK competition law.

Payment provider caught in crosshairs over exclusivity clauses

The sectoral regulator for gas and electricity markets in the UK, Ofgem, issued a Statement of Objections ("**SO**") on 17 August 2020 to Paypoint plc ("**Paypoint**") over an alleged abuse of dominance.[1]

Paypoint is a digital payment platform which specialises in over the counter payment facilities ("**OTC terminals**"), such as electronic point of sale systems ("**EPoS**") and card payment technologies. As one of its service offerings, Paypoint enables UK energy customers who are on prepaid energy meters to add credit to their accounts held with energy providers using Paypoint's over the counter ("**OTC**") payment facilities ("**OTC terminals**"). Once Paypoint receives payment from these energy customers, it transfers the sum on to the relevant energy providers in exchange for a transaction fee.

Paypoint operates approximately 27,000 of these OTC terminals across the UK, which are typically found in newsagents or local supermarket chains. These retail outlets are paid a commission by Paypoint for hosting these OTC terminals, which allow energy customers to top up their accounts when visiting these outlets.

Ofgem's SO alleges that Paypoint inserted exclusivity clauses in its contracts with energy service providers whereby customers who wanted to top up their prepayment gas and electricity would be forced to do so using one of Paypoint's OTC terminals. These exclusivity clauses took one of two forms: (i) energy providers were explicitly prohibited from using rival OTC payment providers; or (ii) Paypoint offered energy providers discounts on the condition that they did not use rival OTC payment providers.

In its SO, Ofgem finds that Paypoint held a dominant position in the market for OTC payment services for UK energy customers on pre-paid energy meters between April 2009 and October 2018. Paypoint is alleged to have abused that dominant position by leveraging its position to require energy service providers to enter into exclusivity clauses (either legally or de facto), to the detriment of other OTC payment providers and, ultimately, consumers.

Unless Paypoint is able to deliver sufficient representations to Ofgem that would demonstrate to their satisfaction that it did not actually exploit its dominant market position through these exclusivity clauses, Ofgem has the power to fine Paypoint up to 10% of its annual worldwide turnover.

CMA sheds further light on cartel and price fixing offences

The UK's Competition & Markets Authority ("**CMA**") has launched a new campaign page to improve

[1] National competition authorities and sectoral regulators issue SOs where an infringement of competition has been provisionally determined and the parties to whom they are addressed are then given the opportunity to make written representations in response to the arguments set out therein.

businesses' awareness of the risks of collusive activities.[2]

This latest development from the CMA is the most recent in a number of similar moves it has taken in recent years to ensure that businesses operating in all industries and at every economic level are aware of the relevant competition rules. In 2018, the CMA published a research report[3] which found that the general level of awareness of competition law among businesses was mixed at best.[4]

The CMA's present campaign is intended to bolster businesses' awareness of competition law concerns. Indeed, the hawkish tone of the campaign alone suggests that the CMA will look to adopt an increasingly tough stance against infringing companies in future. The CMA notes at the bottom of the campaign page three recent cases in which it issued heavy fines to companies for collusive and price fixing activities.[5]

The campaign page provides a useful, high-level overview of the most egregious and frequent forms of anti-competitive collusion, in particular:

- It is illegal for businesses to coordinate the prices they charge for goods or services they provide (price fixing);
- Businesses should not share any information which is competitively sensitive, *i.e.* any information that (when shared with competitors) would reduce the strategic uncertainty in the market and allow businesses to coordinate their overall strategies. Examples of competitively sensitive information include: (i) details on the pricing of products or services (including any formulae used to determine them); (ii) marketing and strategy documents; (iii) customer lists; and (v) pipeline products or R&D plans;
- In tendering for projects or contracts, rival bidders should not discuss or pre-agree what they will bid as this will allow them to raise the price of tenders and result in higher costs incurred (bid rigging); and
- Competitors should not carve-up markets by agreeing between themselves which geographic areas or customers they will target (market sharing).

The CMA has prepared a range of animated video guides to illustrate and contextualise each offence, as well as setting out an overview of the anti-competitive impacts such offences can have on the market, the consequences for these offences and typical "red flags" to look out for to ensure individuals and their colleagues can recognise when such offences may be taking place. The CMA has additionally included an interactive quiz that can be taken to ensure those visiting the campaign page have understood the key takeaways.

As noted above, it seems clear that the CMA will adopt an increasingly tough position vis-à-vis competition law infringements. This is particularly likely given that the end of the Brexit transition period is looming ahead, which will likely see the CMA taking on a greater volume of cases (representing (to a degree) cases that would previously have been subject to the review of the European Commission). It will be important, therefore, for companies to be aware of the relevant

[2] The CMA's campaign page can be accessed at: https://cheatingorcompeting.campaign.gov.uk/?utm_source=GOV.UK&utm_medium=Homepage-image&utm_campaign=Cheatingorcompeting_2020

[3] *Inter alia*, the report found that, though roughly 60% of the 1,200 businesses surveyed knew that price fixing could lead to imprisonment, only 34% were aware that it was also illegal to set minimum retail prices and only 18% were aware that reporting anti-competitive activities in which they might be involved to the CMA could result in immunity from any fines (i.e. whistleblowing).

[4] This report can be viewed at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/750149/icm_unlimited_cma_competition_law_research_2018.pdf

[5] These cases were: (1) a fine of £36 million issued against three concrete companies on 25 February 2020 who were found to have entered into illegal price fixing and market sharing arrangements (https://www.gov.uk/government/case-studies/concrete-companies-construction-cartel); (2) a fine of over £7 million issued against five design companies who engaged in bid rigging between 2006 and 2017 (https://www.gov.uk/government/case-studies/office-design-and-fit-out-cartel-case-study); and (3) a fine of over £600,000 issued against four Berkshire estate agents who were found to have set a minimum level of commission fee between September 2008 and May 2015 (https://www.gov.uk/government/case-studies/estate-agents-fined-over-600000-for-illegal-price-fixing).

UK competition laws and ensure that all aspects of their respective businesses are in compliance at all times with them to avoid the risk of fines and sanctions.

JD Sports successfully challenges fine for breach of IEO

On 13 October 2020, the Competition Appeal Tribunal ("**CAT**") issued an order confirming that the CMA had withdrawn the penalty issued against JD Sports Fashion Plc ("**JD Sports**") and Pentland Group plc (JD Sport's majority shareholder) for allegedly breaching an initial enforcement order ("**IEO**") issued in respect of JD Sport's acquisition of Footasylum Plc ("**Footasylum**").

JD Sports completed its acquisition of Footasylum on 12 April 2019 for £90.1 million and the CMA issued the IEO on 17 May 2019. The CMA may issue an IEO in respect of completed mergers in order to prevent the merged parties from taking steps to integrate their businesses if this would, in the event of a prohibition by the CMA, make it difficult (and perhaps even impossible) to unwind the merger. The IEO imposed on JD Sports was one which prevented any business integration.

Under the terms of the IEO, JD Sports was required (*inter alia*) to ensure that no changes were made to Footasylum's portfolio of stores. However, the CMA discovered that Footasylum had served a break notice on one of its stores in Wolverhampton to close the store in April 2020. The CMA considered that this amounted to a breach of the IEO and issued a fine of £300,000 on 29 July 2020.

Separately, and before the issuance of the fine for the IEO breach, the CMA had taken the decision to block JD Sport's acquisition of Footasylum on 6 May 2020. The CMA found that the two parties were close competitors in the UK retail space and that the merger would result in an SLC in the markets for sports-inspired casual footwear and clothing.[6]

JD Sports lodged two appeals at the CAT, the first appealing the CMA's decision to block the merger and the second appealing the fine for the breach of the IEO. In respect of the IEO breach, JD Sports argued that the decision to exercise the break clause on the Wolverhampton store had been taken by Footasylum's management before the merger took place and that, in any event, the store did not ultimately close.

The CMA decided to withdraw its decision to impose a penalty before JD Sports' appeal on this point was heard. JD Sports' appeal of the decision to block the transaction continues, however, with a decision expected shortly.

The CMA is taking an increasingly tough stance in merger control cases, signalling more willingness not just to fine parties for infringing IEOs (and to issue IEOs in the first instance) but also to refer transactions for an in-depth Phase II and, indeed, ultimately prohibit them. By extension, parties have recently had an increased recourse to abandon transactions in the face of the CMA's increased levels of scrutiny. For example:

- On 2 November 2020, the CMA confirmed that it would cancel its investigation into the Yorkshire Purchasing Organisation's acquisition of Findel Education Limited after the parties had confirmed that the deal would be abandoned (after it had been referred to a Phase II review).[7]
- In January 2020, DNA sequencing companies Illumina, Inc. and Pacific Biosciences called off their proposed $1.2 billion merger following competition scrutiny from the CMA and the US Federal Trade Commission.
- In 2020, the CMA also blocked Sabre's US$360 million takeover of airline ticketing software rival Farelogix and also claimed credit for the abandonment of McGraw-Hill Education's merger with rival textbook publisher Cengage.
- The CMA also recently blocked FNZ/GBST, while issuing Facebook/Giphy with a hold-separate

[6] The CMA's prohibition decision is available at: https://assets.publishing.service.gov.uk/media/5eb2bcc0d3bf7f5d456fde96/Final_report__NON_CONFI_---_version1_---_web_publication_06052020.pdf

[7] Please see our previous coverage of this deal in our Q2 Newsletter.

order while it investigates the latter acquisition (see news item above).

- Last month also, the CMA warned that it may have to block Viagogo's already completed €3.3 billion acquisition of rival ticket reseller StubHub, after raising major concerns about the effectiveness of the potential structural remedies.

It seems clear that, in future, merging parties will face an even tougher challenge in gaining the CMA's approval of a transaction and will need to ensure strict compliance with any IEOs that the CMA chooses to issue.

CMA updates its merger control guidance ahead of Brexit

On 6 November 2020, the CMA published draft updated guidance on numerous aspects[8] of its merger control regime ahead of the end of the Brexit transition period on 31 December 2020. This is the first time such guidelines are being updated since 2014 and reflects a series of changes in UK merger control over recent years as the CMA's practice has developed and the courts have clarified various aspects of the legislative framework.

Firstly, the CMA has published amended guidance on its jurisdiction and procedure, which (as the name suggests) outlines the circumstances in which the CMA will have jurisdiction to review a given transaction and the procedure it will follow when doing so.[9]

Notably, the CMA has maintained (and expanded upon) its broad discretion to identify overlapping markets for the purposes of the share of supply test.[10] The share of supply test provides that a transaction is reviewable by the CMA if it results in a combined 25% share of supply of goods or services in the UK between merging parties (i.e. they together supply or acquire the same categories of goods or services). The CMA has come under criticism in the past for what some believe is an "overly flexible" application of the share of supply test, allowing the CMA to review some transactions it may not otherwise have had jurisdiction over. In the revised guidance, the CMA has stated that, in applying the share of supply test, it need not relate to "a relevant economic market" and will instead focus primarily on the "commercial reality" of the parties' activities and will apply "such criteria as it considers appropriate" to identify overlaps.[11] This means that it could capture deals involving overlaps in pipeline products or services or where sufficient elements of commonality between the merging parties exist.

Moreover, the updated jurisdiction and procedure guidance also stresses the need for parties to engage early with the CMA vis-à-vis transactions that are subject to multiple merger control reviews in different regimes (including the UK).[12] This amendment clearly reflects the fact that the CMA expects to receive a greater volume of reviews after the end of the Brexit transition period and that it will likely need to coordinate more often and with a greater number of other national competition authorities.

The new draft guidance also provides that merging companies may wish to admit during a Phase 2 investigation that their deal substantially lessens competition if doing so could facilitate the efficient conduct of the case. For instance, if this might aid the alignment of the CMA's remedies process with proceedings in other jurisdictions or allow the CMA and merging parties to focus their efforts during the review on key areas of assessment.

Secondly, the CMA has also published revised guidance on its market intelligence function.[13] This provides further details on how the CMA will continue to gather information on mergers within its jurisdiction going forward and, in particular, how the CMA will decide whether to launch an investigation into a given deal. Given that the UK is a voluntary regime, it is prudent for parties to be aware of the many ways in which the CMA may learn about a transaction in the event that the parties concerned choose not to make a voluntary notification. Importantly, the draft guidance states that the CMA will consider other ongoing merger probes when deciding whether to review a multijurisdictional deal. The CMA may elect not to open an investigation if enforcers in other countries are likely to impose remedies that could resolve its own concerns.

[8] Specifically, the updated guidance relates to the CMA's jurisdiction and procedure and to its market intelligence function.
[9] The Competition & Markets Authority. *Mergers: Guidance on the CMA's jurisdiction and procedure – Draft for consultation*. November 2020. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933262/Draft_Revised_Guidance_CMA2.pdf
[10] Ibid. See paragraphs 4.62 to 4.70.
[11] Ibid. See paragraph 4.63(a)-(c).
[12] Ibid. See Section 18 on Multi-jurisdictional Mergers.
[13] The Competition & Markets Authority. *Guidance on the CMA's mergers intelligence function – Draft for consultation*. November 2020. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933264/Draft_Revised_Guidance_-_CMA56.pdf

Both of the above documents have been opened to a public consultation process which will conclude on 4 December 2020. Following the end of this consultation period, the CMA will review all comments it receives and subsequently finalise all of the revised guidance documents by the end of 2020.[14]

Additionally, the CMA also expects to publish revised merger assessment guidelines and expects to open up a separate consultation process on this towards the end of November 2020.

The CMA has over the last two years become increasingly aggressive and interventionist in its merger control assessments. The draft updated guidelines reflect that this approach will continue going forward. Parties are therefore advised to consider merger control assessments and strategies vis-à-vis the CMA early on in order to ensure as smooth a process as possible.

CMA clears Visa / Plaid merger

On 24 August 2020, the CMA cleared the acquisition of Plaid, Inc. ("**Plaid**") by Visa International Service Association ("**Visa**") after an initial Phase I review. Visa had announced its intention to acquire Plaid in January 2020 in a deal worth US$5.3 billion.

Visa is a global supplier of a variety of electronic payment technologies, with a particular focus in consumer-to-business ("**C2B**") payments through its VisaNet platform. Plaid is a Silicon Valley-based company specialising in connecting Fintech organisations with their customers' payment accounts. Plaid's primary offerings are focused on account information services ("**AIS**") and payment initiation services ("**PIS**").[15] The latter enables the initiation of real-time account-to-account ("**A2A**") payments that inform a payee (e.g. a retailer) of when a customer has commenced payment proceedings, which thus gives the payee confidence to complete a transaction (i.e. by releasing the goods for which payment is being received). PIS services thus include C2B payments and are something of a new frontier in banking as a result of the new Open Banking regulations[16], which enable the use of API technology by third-party developers as a means to access customers' financial information. Plaid is one of a number of new entrants[17] in the PIS market and established payment providers (such as Visa, Mastercard, PayPal and American Express) are also looking to enter the space in a bid to capture new revenue opportunities.

It was feared in some quarters that the transaction could amount to a so-called "killer acquisition",[18] where large market incumbents buy out start-up firms who have recently entered a similar market space to themselves and act as a competitive constraint in order to prevent them from disrupting the market. Killer acquisitions are often marked by a hefty and seemingly disproportionate valuation – indeed, the US$5.3 billion sum paid by Visa amounted to double Plaid's private valuation of US$2.65 billion received in 2019. The excessive purchase price for killer acquisitions is linked to the value placed on the removal of future competition.

On this basis, it seemed an unlikely prospect that the CMA would approve the merger without, at the very least, a Phase II referral. It was clear that the parties overlapped in the supply of services enabling C2B payments and their combined share of supply was found to be between 60-70%. However, the CMA found, during its Phase I review, that alternative PIS providers active in the UK already posed a sufficient competitive constraint on Visa and removing Plaid as just one of these competitors would not result in any SLC.

Similarly, the CMA found that barriers to entry in the PIS market were relatively low and that new entrants would continue to emerge such that the competitive pressure on Visa (and other established payment providers) would be maintained post-merger. Moreover, the CMA found that the merged entity would not be able to foreclose its rivals due to the fact that merchants often source payment services from multiple suppliers and that PIS providers themselves could have recourse to a variety of counterstrategies vis-à-vis the Visa / Plaid merger (e.g. by seeking mergers and partnerships themselves to facilitate customer acquisition).

On this basis, the CMA found no compelling evidence that the merger would allow Visa to increase its prices, lower the quality and/or range of its services or reduce its investment in R&D and innovation.

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[14] The consultation document on the revised jurisdiction and procedure guidance is available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933278/Consultation_Document_-_CMA2_CMA56.pdf and the consultation document on market intelligence is available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933264/Draft_Revised_Guidance_-_CMA56.pdf

[15] Both AIS and PIS are forms of technology known as Application Programming Interfaces ("**APIs**").

[16] Open Banking was established by the CMA as a result of the Second Payment Services Directive published by the European Commission.

[17] Other new entrants in the PIS market include TrueLayer Limited, Tink AB, Token.io Ltd and Yapily Ltd.

[18] See further the story on the European Commission's planned use of Article 22 referrals to counter "killer acquisitions" below.

Such an outcome illustrates that there are instances where transactions that give the impression of being "killer acquisitions" (or otherwise inherently anti-competitive) do not, in fact, give rise to any risk of an anti-competitive outcome. It shows the need for objective and pragmatic analysis and should give a degree of confidence to companies planning similar deals in future.

The UK looks to tighten its merger control rules in wake of COVID

On 22 June 2020, the UK government tabled (and, in one case, passed) further amendments to the Enterprise Act 2002 (the "**Act**") that will afford it greater discretion to intervene in certain transactions.[19] Specifically, the government may now additionally intervene in transactions which may (if implemented) negatively affect the country's ability to respond to a public health emergency or else concern key technologies (such as Artificial Intelligence). Such amendments have been prompted by the COVID-19 pandemic and the perceived need to ensure that key domestic companies and assets either remain in domestic hands or else will not be prejudiced by transferring into foreign ownership.

The UK government has set out two key legislative changes:

1. A new public interest consideration

Utilising the Secretary of State's discretionary power under Section 58(3) of the Act to add or remove public interest considerations, the UK government has now given itself the discretion to intervene in a relevant UK merger where it has reasonable grounds to believe the merger may compromise its ability to combat and mitigate a public health emergency.[20] As set out in the accompanying Explanatory Memorandum,[21] the COVID-19 pandemic has shown the UK government the need to ensure that its critical public health and crisis mitigation capabilities are maintained, preserved and strengthened in order to protect the welfare of the British people. Indeed, COVID has demonstrated the need to quickly mobilise domestic resources and capabilities in order to deal efficiently with the effects of the virus. The UK government, therefore, wish to afford themselves a greater degree of discretion to investigate transactions in the healthcare sector in order to ensure that no change of ownership of such vital companies and assets will prejudice future efforts to respond to COVID and similar public health emergencies.

2. Proposed national security amendments

In addition to the new public interest consideration (which is now effective as of 23 June 2020), the UK government has also proposed changes that will widen the circumstances in which it can intervene in mergers on national security grounds. These changes will need to be approved by both Houses of Parliament before coming into force.

In 2018, the thresholds for both the turnover test and the share of supply test were reduced to allow the UK government to intervene more easily in transactions involving one (or more) of the three following areas related to national security: (i) the development or production of military or dual-use goods; (ii) the design and maintenance of computing hardware; and (iii) the development or production of quantum technology. This was achieved by reducing the turnover test to £1 million and amending the share of supply test such that it could be met if only the target had a pre-existing market share of 25% (i.e. no increment in market share was required) for a transaction concerning a UK target company involved in one (or more) of these three areas.[22]

The proposed changes brought before Parliament on 22 June 2020 expand the categories of national security that fall under these reduced thresholds. Should they be approved by Parliament, the UK government will have the power to review

[19] Under the existing regime, the relevant Secretary of State may intervene (on behalf of the UK government) in transactions that raise public interest concerns by issuing a by issuing a public interest intervention notice ("**PIIN**") in a relevant merger situation (i.e. a situation where the UK merger control thresholds are triggered). The full list of defined public interest concerns can be found at Section 58 of the Act. Where a PIIN is issued, the CMA is required to issue a report to the relevant Secretary of State advising as to whether the latter should refer the transaction to a detailed Phase II investigation, accept undertakings from the merging parties in lieu of a Phase II reference or else approve the transaction on the basis that no public interest considerations are raised.

[19] France, Germany, Hungary, Italy and Spain have all announced changes to their respective FDI regimes as a result of COVID-19.

[20] This amendment was passed through the Enterprise Act 2002 (Specification of additional section 58 consideration) Order 2020.

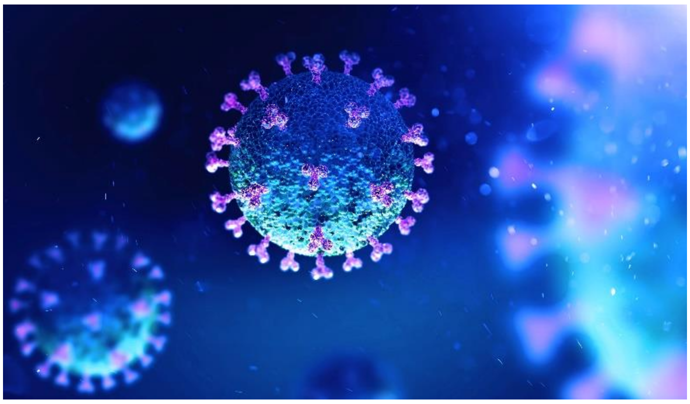
[21] Explanatory Memorandum to the Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2020. Available at: https://www.legislation.gov.uk/uksi/2020/627/pdfs/uksiem_20200627_en.pdf

[22] The turnover test and share of supply test were amended by the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018 (S.I. 2018/593) and the Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018 (S.I. 2018/578) respectively.

transactions under the following areas deemed to be crucial to national security:

1) Artificial intelligence;
2) Cryptographic authentication technology; and
3) Advanced materials.[23]

These proposed new categories represent a growing recognition that the traditional battle grounds for national security are changing as new, more subtle and complex forms of threats are emerging. As a government Green Paper phrased it in 2017, the UK's powers of scrutiny need to modernise in light of an increasingly complex and interconnected international political and economic landscape, and in a world with ever-evolving technology and new security challenges.[24]



Though neither of these legislative amendments are explicitly presented to reflect such a purpose, it is clear that the broader principle underscoring each is the UK government's desire for greater freedom to review and intervene in transactions involving a foreign buyer (or a buyer with a foreign parent company). Whilst it should be noted that, at present, nothing in the UK's review framework distinguishes between foreign and domestic investment – in theory, at least, the rules apply equally to any transaction regardless of the domicile of the buyer – the UK government has been growing increasingly conscious of the need to implement a similar system of foreign direct investment ("**FDI**") screening as exists in (e.g.) various EU Member States and the U.S.[25] The general axiom of any FDI screening regime is that certain key industries (for instance, the healthcare sector) should be kept under the ownership and influence of domestic persons in order to minimise the risk of interference by potentially hostile foreign actors. Even where there may no hostile intent vis-à-vis the acquisition of a domestic company or asset by a foreign buyer, it may nonetheless be felt that ownership of the same should remain in domestic hands due (e.g.) to its critical dependency or political sensitivity. The companies and assets comprising the NHS fall under both camps.

Moreover, the move comes ahead of the approval of the UK's new National Security and Investment Bill, which was first proposed in a government White Paper in July 2018 and subsequently put forward in the Queen's Speech on 19 December 2019. The new National Security and Investment Bill looks to establish a comprehensive national security and FDI screening regime for the UK, though it has been delayed in being presented to Parliament for a second reading due to the ongoing COVID crisis.[26] Saliently, no transaction has yet been blocked in the UK on public interest grounds. Thus, it is likely that the new National Security and Investment Bill will be intended to remedy what could be seen as a fundamental deficiency in the UK's review framework, whilst the aforementioned changes to the Act will serve as a stop-game in the intervening period.[27]

A challenge to the CMA's wide-reaching hold separate powers

The CMA's hold separate powers are being scrutinised at the CAT. For companies active in M&A, the CAT's determination will be of interest as the CMA's IEO and hold separate powers prove onerous for merging parties at the best of times.

In June this year, the CMA opened an investigation into Facebook, Inc's ("**Facebook**") completed

[23] The term "advanced materials" includes (inter alia): (i) materials capable of modifying the appearance, detectability, traceability or identification of objects by humans or sensors within specified ranges up to and including ultraviolet; (ii) alloys formed from chemical and electrochemical reduction of metals, polymers and ceramics in their solid state; (iii) processes taking solid state alloys in or into crude or semi-fabricated forms, or powders for additive manufacturing; and (iv) other metamaterials (not including fibre-reinforced plastics in certain applications and packaged device components for civil application).

[24] National Security and Infrastructure Investment Review. *The Government's review of the national security implications of foreign ownership or control*. October 2017. Available at:

[25] A number of other European countries have recently tightened their own FDI regimes and the new EU FDI Screening Regulation has recently come into force which will allow an EU-wide cooperation framework to deal with foreign investments (see below).

[26] National Security and Investment: A consultation on proposed legislative reforms (July 2018). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728310/20180723_-_National_security_and_investment_-_final_version_for_printing__1_.pdf

[27] It is currently unclear when the UK's National Security and Investment Bill will be brought before Parliament for another reading.

acquisition of Giphy, Inc ("**Giphy**") (Giphy being an image-sharing platform with no employees, assets or revenue in the UK).

On 9 June 2020, the CMA served an IEO on the parties to prevent Facebook from integrating with Giphy during the CMA's merger review – as well as appointed a monitoring trustee to oversee compliance with the IEO. The IEO applied to all of Facebook's subsidiaries active across the globe. In addition to the general prohibitions on integration that would otherwise impair Facebook and Giphy in operating independently, the IEO included the following specific obligations:

- prohibitions on making any substantive changes to the organisational structure and management at Facebook and Giphy – except in the ordinary course of business. The parties were also forbidden from making changes to key staff and were required to take reasonable steps to encourage key employees to remain with their respective employers (i.e. Facebook and Giphy);
- a requirement for Facebook and Giphy to maintain their UK goods/services/assets in the same form as they were (and would have been) without the transaction; and
- a requirement for Facebook to notify the CMA of certain events, including key staff additions or departures, substantial changes to customer volumes or contracts, or, any major changes to important supplier relationships.

On 10 June 2020, Facebook requested that the CMA "carve-out" certain provisions of the IEO by way of derogations[28] (parties are permitted to submit derogation requests from an IEO where they can be reasonably justified). However, the CMA refused Facebook's request.

Facebook subsequently filed a claim with the CAT on 26 August 2020 alleging the IEO was disproportionate, irrational and created impossible obligations. In particular, it appealed against the CMA's decision to refuse to grant derogations to the IEO arguing that, without derogations, the CMA's IEO was, first, unreasonable in terms of the compliance burden that it placed on Facebook and, second, disproportionate in the scope of its application.

A spokesperson for Facebook commented that the CMA imposed "unreasonable restrictions on Facebook's global business that are entirely unrelated to this transaction, covering product development, the sale of assets and the hiring of key staff anywhere in the world".

Facebook has asked the CAT to order the CMA to grant it the exemptions from the IEO that it requested in June. Alternatively, if the CAT declines to rule on the exemption application itself, Facebook has requested the CAT to send the matter back to the CMA with a set of principles the CMA must abide by when re-evaluating Facebook's request.

The CAT has said that it hopes to reach a decision in November but has not specified an anticipated date. Meanwhile, the CMA is still yet to formally launch its initial Phase I review into the merger and "start the clock" in its probe of the deal. As such, it will be sometime yet before this merger review comes to any definitive conclusion, notwithstanding any impending judgment from the CAT concerning the IEO.

Restrictive Covenants and Competition Law Remain Aligned

The recent case on restrictive covenants, Peninsula Securities Ltd ("**Peninsula**") v Dunnes Stores (Bangor) Ltd ("**Dunnes**") (2020), has both clarified the law on covenants seeking to restrict the use of land as well as clearly aligned the position under competition law where such restrictive clauses can also be challenged.

Dunnes, a retail anchor tenant, appealed against its landlord's (Peninsula's) attempts to challenge a restrictive covenant in their lease prohibiting Peninsula from letting space to any businesses that competed with Dunnes. The restriction was

[28] Facebook's claim has not specified what exemptions were requested.

originally granted by Peninsula in order to secure Dunnes as an "anchor tenant" in what was to be a new development in a rundown area. Dunnes constructed its own store and Peninsula constructed the remainder of the shopping centre and a car park and the centre opened in 1982. Subsequently, ownership of the centre transferred to the landlord company in which the original owner and covenantor was a director and majority shareholder.

Peninsula argued that the covenant was, in fact, unenforceable and Peninsula should not be bound by it on the basis that it fell within the "restraint of trade" doctrine.[29] Specifically, Peninsula submitted the covenant prevented it from undertaking development which might have helped to revive trade within the shopping centre overall.

The Supreme Court had to determine whether the restraint of trade doctrine was triggered (i.e. either when the covenant was granted and/or when the shopping centre was transferred to the landlord) and, if so, whether that restraint was so unreasonable as to render the covenant unenforceable. After a hearing between 28 and 29 January 2020, the Court ultimately found, in a judgment delivered on 19 August 2020, that the covenant did potentially restrain trade and that "restraint of trade" applied more widely than was argued for by Peninsula and covered business as it was understood in its widest sense. This would include the business of the landlord as a developer and a property owner.

Additionally, the Court confirmed that, because the restraint of trade doctrine is founded in public policy, it should be guided by common law which, in turn, is governed by and reacts to new events and new ideas and, in so doing, moves with the times. This is the "trading society test" and the Court confirmed under this test that the doctrine would not be engaged by a covenant which restrained the use of land if it was a type *"which has passed into the accepted and normal currency of commercial or contractual or conveyancing relations"* and which may therefore be taken to have *"assumed a form which satisfies the test of public policy"*. In this case, the restrictive covenant was in such an accepted form, as it had long been accepted that the grant of such covenants in leases was commercially acceptable. The Supreme Court therefore upheld the restrictive covenant.

Importantly, the Supreme Court's judgment aligns with competition law. Specifically, agreements which have as their "object or effect" the restriction of competition will be strictly prohibited unless (where possible) exempted if that agreement created countervailing pro-competitive benefits. However, in the context of land agreements, the CMA accepts that in a case where, without a restrictive covenant in favour of the anchor tenant, a shopping centre would not have been constructed at all that an agreement is unlikely to be found to restrict competition. Similarly, at the EU level, recent Latvian case law confirmed that land agreements that allow an anchor tenant to restrict leasing of space to rivals are not a category of agreement that have as their "object" the restriction of competition and instead must be assessed in the relevant legal and economic context to determine if the restriction has the "effect" of restricting competition.

The new EU FDI Framework comes into effect

On 11 October 2020, the EU Foreign Direct Investment Screening Regulation (the "**FDI Framework**")[30] entered into full operational force.

The FDI Framework was initially passed in March 2019 and afforded Member States an 18-month period in which to prepare for its full implementation.

The FDI Framework establishes a mandatory cooperation mechanism between the European Commission (the "**Commission**") and individual Member States, whereby the latter are now required to inform the Commission (and, indeed, other Member States) of any FDI transaction within their jurisdiction.[31] Upon receipt of this notification, other

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[29] The restraint of trade doctrine is a common law doctrine relating to the enforceability of contractual restrictions on the freedom to conduct business.

[30] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investment into the Union. Published on 21 March 2020. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0452&from=EN

[31] Note that this refers to transactions which have been brought to the attention of NCAs by triggering the relevant merger control rules.

Member States then have a period of 15 calendar days to inform the Commission of their intention to provide comments on any such transaction and ensure such comments are ultimately submitted within 35 calendar days of the original notification, in order to enable the Commission to incorporate these comments into its review. Subsequently, the Commission itself may then issue an official (although non-binding) opinion to the Member State who made the referral advising as to whether, in the Commission's view, the transaction poses any level of threat to the Union.[32] Saliently, the FDI Framework does <u>not</u> afford to the Commission the authority to block any FDI transaction – this decision still rests with the relevant national authority of the Member State(s) in question.

The Commission's decision to pass the FDI Framework is a reflection of the burgeoning need to put in place an EU-wide framework for FDI screening.[33] The value of EU assets held by foreign investors has increased significantly in the last decade and there are fears over how much influence foreign actors may be able to accumulate if such trends continue without proper scrutiny.[34] Many countries, not just the EU, are adopting a more protectionist position over key national industries, sectors and infrastructures for fear of sinister interference (or assimilation of control) over the same by hostile foreign actors.

The need for a supranational FDI Framework in the EU reflects the unique position of its single market – namely, there exists a risk that FDI transactions may slip "under the radar" of the wider Union by being reviewed solely by the authorities of the Member State(s) to whom they nominally affect. In such instances, it is likely that the effects of these transactions would still be felt at an EU level even if the investment is only being made into one Member State (given the freedom of movement of goods and services across Member States' porous borders). Without the proper visibility over these FDI transactions within the bloc, the EU may not be able to ascertain whether they pose any threat until it is too late (i.e. the transaction has been approved and fully implemented). As such, the Commission has recognised the need for a coordinated EU-wide framework for FDI review among its Member States.

Another important point to note is that Member States can provide comments on transactions that are being planned or contemplated in another Member State *<u>even if</u>* these transactions are not being reviewed (from an FDI perspective or otherwise) in that Member State. In these cases, the Member State receiving such comments is obligated to pass them on to the Commission. This provision is intended as a safeguard in the event that a particular Member State has no system of FDI screening in place (and thus no basis on which to notify the Commission that is reviewing a transaction on such grounds). In other words, potentially Union-affecting FDI transactions will not fall through the cracks simply because a Member State does not have an FDI screening regime.

The above notwithstanding, the Commission has also taken steps to try and ensure that all Member States do implement domestic FDI screening regimes. Whilst the FDI Framework itself does not require Member States to do this, on 25 March 2020 the Commission published a set of guidelines on FDI in response to the COVID-19 pandemic which calls upon those Member States that do not currently have any FDI screening regime in place to take all necessary steps to establish one.[35] As a guide to any Member State looking to adopt any new FDI screening rules (or strengthen existing ones), Article 4 of the FDI Framework sets out a list of areas that are relevant to consider, namely:

- Critical infrastructure (e.g. energy, transport, aerospace, defence, financial institutions and real estate);

[32] Note that, in general, a "threat" will be anything that threatens security and/or public order.
[33] Note that the European Commission has defined FDI as an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct
[34] See https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1867
[35] Communication from the Commission – Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation). C(2020) 1981 final. Published on 25 March 2020. Available at: https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf

- Critical technologies (e.g. artificial intelligence, cybersecurity, quantum and nuclear);
- Supply of critical inputs (e.g. raw materials, water and food);
- Access to sensitive information (e.g. personal data); and
- The freedom and pluralism of the media.

From a practical and logistical standpoint, the new FDI Framework will mean that transactions involving a foreign buyer (or a domestic buyer with a foreign parent company) will be subject to an added layer of complexity in considering whether any domestic FDI regime in the EU will apply to the transaction (and thus trigger the cooperation mechanism). In the event that transactions are deemed to constitute FDI and will be subject to a Commission opinion, this will need to be factored into deal timetables and may result in transaction closing dates being delayed. In worst case scenarios for foreign investors, transactions may be blocked by national competition authorities and contemplated transactions may be abandoned if they are putatively in breach of any relevant FDI regime in an EU Member State.

The Commission signals intent to significantly expand the use of Article 22 powers to combat the risk of "killer acquisitions"

Speaking recently on the subject of "The future of EU merger control", the Commissioner for Competition announced that, from mid-2021, the Commission will start accepting referrals from the national competition authorities ("**NCAs**") of Member States concerning transactions that fall below both the EU-wide merger control thresholds[36] (which would ordinarily trigger a Commission review) and the merger control thresholds of those Member States themselves.[37] In other words, the Commission may well investigate any transaction with an EU-dimension[38] even if that transaction does not trigger *any* merger control rules *anywhere* in the EU. This is a sensational announcement.

The authority for such a wide-ranging power lies in Article 22 of the EC Merger Regulation.[39] Article 22 states that:

> "One or more Member States may request the Commission to examine any [transaction that does not trigger the EU merger control rules but which] affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request"[40]

The original purpose of Article 22 was to safeguard against situations where a particular Member State(s) (in which a transaction was being effected) did not have their own domestic system of merger control in place and thus no basis on which to review any transaction within its borders. In such instances, it would have been possible for the Member State(s) in question to refer the transaction upwards to the Commission to review where the former (though it did not have a merger control system) had reason to believe that the transaction might pose a risk of an SLC. In the present day, almost all EU Member States have some form of domestic merger control and thus this original purpose of Article 22 is now somewhat obsolete. It has been something of a tacit understanding in recent years – underscored by a proposed amendment to Article 22 in 2014 to make it official – that a Member State should not rely on Article 22 to refer a transaction upwards to the Commission unless the transaction in question triggered that Member State's own merger control rules.

However, nothing in the wording of Article 22 prohibits Member States from making referrals even if its merger control rules are *not* triggered and it is this broad interpretation of Article 22 that the Commission has described as a tool "hiding in plain sight".

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[36] The EU merger control rules provide that a transaction must be notified to the Commission if: (1) the combined aggregate worldwide turnover of all undertakings concerned is more than €5 billion and the aggregate EU-wide turnover of at least two of the undertakings concerned is more than €250 million; or (2) the combined aggregate worldwide turnover all the undertakings concerned is more than €2.5 billion, €100 million worth of turnover of all the undertakings is generated in each of at least three Member States and in each one of these Member States at least two of the undertakings generate €25 million worth of turnover individually, and the aggregate EU-wide turnover of at least two of the undertakings concerned is more than €100 million; unless each of the undertakings concerned achieves more than two thirds of its aggregate EU-wide turnover within one Member State (in which case it may be referred to the competition authority of that Member State).

[37] Speech by Margrethe Vestager, the Commissioner for Competition (European Commission), at the International Bar Association – 24th Annual Conference. *The future of EU merger control*. 11 September 2020. Transcript available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en

[38] By "EU dimension", we mean: (i) a transaction involving a target domiciled in an EU Member State; or (ii) a transaction where any party derives turnover in the EU.

[39] Article 22 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "**EC Merger Regulation**"). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=en

[40] Article 22(1) of the EC Merger Regulation.

The drive behind this development is a fear that the present EU merger control rules (and the merger control rules of each Member State) allow some transactions to fall through the cracks. That is because the EU's (and the vast majority of Member States') merger control rules are based purely on turnover. Unlike other jurisdictions (like the UK, for instance), very few Member States have any form of market share test. As such, it is possible (theoretically at least) for a transaction which involves the acquisition of an 80-90% market share not to face any sort of review by an NCA or the Commission if the parties' turnover is below the relevant thresholds. On this basis, there is a particular fear that "killer acquisitions" – i.e. transactions involving the acquisition of a start-up company by a dominant competitor active in the same market – will fall under this category. This is because start-up companies generally have low turnover[41] and, as a result, markets may begin to operate dysfunctionally if new entrants are snapped up by competitors in order to entrench dominant positions without any sort of regulatory scrutiny.

Laudable though the Commission's aim is to shore up those areas of its merger control rules which may not wholly guarantee the proper functioning of the internal market, this move will create a significant degree of uncertainty for companies operating within the bloc. A lot of basic questions remain unanswered at this point. How, for instance, are companies to assess whether a deal will "significantly affect competition" if the relevant turnover thresholds are not met? Will this be based on the parties' combined market share post-merger? In some cases, of course, such a determination would be clear enough if the parties were very close competitors, but what about in more borderline cases? Will parties be required to make a much more detailed and granular assessment of a deal than has been required in the past? Under the present merger control rules, it is clear-cut whether transactions need to be notified to the Commission or an NCA of a Member State based on the parties' turnover and parties can comfortably make a clear judgement call about whether a filing is needed. Now, however, this previous certainty will be fundamentally eroded.

The Commission has stated that it will, in due course, look to publish guidance on the practicalities of Article 22 referrals before it begins to accept them, which will hopefully give as much clarity on the issues as possible. Nonetheless, it is very likely that parties and their legal advisers will inevitably face a tougher challenge in making any initial assessment as to whether a deal will be reviewed by the Commission in future. The practical effect of Article 22 referrals will be to create a hybrid between a mandatory and voluntary notification jurisdiction where, even when the relevant turnover thresholds are not met, a merger may still risk being "called in" by the Commission. In light of this, the Commission will face a tough challenge in reassuring companies contemplating acquisitions that they can continue to plan with any degree of certainty.

The Vertical Block Exemption Regulation to be updated for the age of e-commerce and online platforms

Following its launch of a consultation on the Vertical Block Exemption Regulation ("**VBER**") and related Vertical Guidelines in 2018, the Commission has now determined that, although the VBER remains useful to facilitate the self-assessment of vertical arrangements, there is evidence indicating that it is no longer fit for purpose due to the growth of e-commerce and online platforms. The VBER and Vertical Guidelines should therefore be revised so as to reflect current market conditions and provide businesses with the legal certainty they need.

The VBER provides an exemption from the EU rules on anticompetitive agreements to companies operating at different levels of the production or distribution chain. To fall within the VBER vertical agreements must not contain any "hard core" competition restrictions (i.e. cartels) – or other excluded restrictions – and nor must either party's market share be above 30%. The Vertical Guidelines advise businesses how to interpret and apply the VBER and how to assess vertical agreements outside its safe harbour.

On 8 September 2020, the Commission published the results of its evaluation on the VBER and Vertical Guidelines. The Commission gathered evidence from a broad range of sources, including a public and targeted consultation of national competition authorities, a stakeholder workshop and an external evaluation support study.

By way of overview, the Commission's evaluation found that marketplaces have changed significantly since the Commission adopted the VBER in 2010. These changes have included:

[41] It should be noted that this would be the case even where the transaction value is extremely high. As in the Visa / Plaid merger (see above), "killer acquisitions" are often market by a disproportionately high purchase price vis-à-vis the actual value of the target based on the premium placed on removing future competition from the market.

- the growth of online sales and new market players such as online platforms;
- changes to distribution models (including increased direct sales by suppliers and a greater use of selective distribution systems); and
- new types of vertical restrictions that have emerged, such as price parity clauses and restrictions on online sales and advertising which are now prevalent.

As a result of these developments and market evolutions, the Commission concluded that some of the VBER's provisions now lack the requisite clarity for market operators while others are difficult in their application and / or are no longer adapted to the current business environment. The Commission has now identified the following key issues:

- there are difficulties in applying the existing rules to new market players in the digital economy that "do not fit into traditional supply and distribution concepts" and to new forms of online sales restrictions (e.g. retail parity clauses and restrictions on the use of price comparison websites);
- recent case law such as the European Court of Justice's 2016 *Coty* judgment[42] needs to be reflected in the rules;[43]
- national competition authorities and national courts diverge in their approaches and interpret the rules inconsistently;[44] and
- while the list of practices that do not benefit from the VBER (i.e. hard-core restrictions) are broadly appropriate, it may be worth considering whether amendments are necessary to the conditions for exemption set out in the VBER which may create some exceptions to hard core restrictions themselves.

While the Commission is yet to determine the scope and detail of any particular revisions to the VBER rules, industry commentators remain sceptical that radical change is on the way. Nonetheless, the Commission's VBER consultation has been welcomed by relevant stakeholders with a broad consensus that the VBER and Vertical Guidelines need to be updated to reflect the digital world and e-commerce, as well as it being essential for businesses to have clarification in the application of the rules and a common framework of assessment for national competition authorities in place.

The Commission is now due to conduct an impact assessment to consider how it might best revise the VBER rules and subsequently launch a public consultation at the end of the year. At this stage, the Commission's intention is to publish a draft of the revised rules for stakeholder comments next year with the revised VBER to be in place by the end of May 2022 when the current VBER is due to expire.

"Pay for delay" agreements highlight the tension between patent and competition laws

Recent clarity has been given to the legality of "pay for delay" arrangements under EU competition laws by the Court of Justice of the European Union ("**CJEU**") in two separate cases, both of which have been welcomed by the Commission and the CMA. The CJEU first gave a landmark ruling in January 2020 concerning the *Paroxetine* case[45], and the ruling therein has since been followed in an opinion given in the *Lundbeck* case[46] on 4 June 2020. Both cases have confirmed that "pay for delay" agreements may contravene the EU's competition laws.

"Pay for delay" agreements involve one pharmaceutical company which has developed a new medicine (the "**Originator**") agreeing to pay another pharmaceutical company which has developed (or is in the process of developing) an equivalent product to delay the launch of such product. These agreements are typically entered into once an Originator's patent in a new medicine has expired, which no longer affords them any legal recourse to prevent a competitor from launching a generic version of the medicine on the market. Clearly, Originators wish to avoid having to compete with generic manufacturers for as long as possible, as the availability of equivalent products to their own on the market inevitably lowers the price they can sell for and reduces their market share. As such, "pay for delay" agreements enable incumbent pharmaceutical companies to maximise their profits whilst rival

[42] Case C-230/16. *Coty Germany GmbH v Parfümerie Akzente GmbH*. 6 December 2017.
[43] This case found (*inter alia*) that a selective distribution system can be permissible specifically in the context of prohibiting authorised dealers of luxury goods from using third party platforms when selling those goods on the internet.
[44] By way of illustration, national enforcers have differed in their treatment of most favoured nation clauses. Whereas authorities in France, Italy and Sweden previously accepted Booking.com's offer to only apply a narrow price parity clause, Germany's Federal Cartel Office pursued the online travel comparison site for antitrust infringements which has since reached the country's highest court.
[45] Case C-307/18 Generics (UK) and others v CMA (Paroxetine).
[46] See the Court of Justice of the European Union's Press Release – Advocate General's Opinion in *Lundbeck v Commission* (Case C-591/16 P). Available to view at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-06/cp200066en.pdf

pharmaceutical companies are provided with either a lump sum or a share in the former's profits (or both) as consideration for not entering the market.

"Pay for delay" agreements have been on the radar of competition authorities for many years, given the belief that they generally contradict both Articles 101 (the prohibition on anti-competitive agreements) and 102 (abuse of dominance) of the Treaty on the Functioning of the European Union ("**TFEU**"). In 2009, the Commission published an inquiry report into the pharmaceutical sector in which the effect of "pay for delay" agreements featured prominently.[47]

The CJEU's ruling in January 2020 came about as a result of a reference from the CAT in the UK. The CAT had been hearing an appeal on the CMA's ruling in *Paroxetine*[48] in which fines of £44.99 million were imposed on GlaxoSmithKline plc ("**GSK**"), Generics (UK) Limited and others in relation to "pay for delay" agreements over the anti-depressant drug paroxetine.[49] The CMA found that the arrangement delayed the arrival of equivalent drugs to paroxetine on the UK market, which had the effect of artificially raising the price consumers faced for the drug. On hearing the appeal, the CAT referred a number of questions to the CJEU including: (i) whether generic manufacturers of medicines can be considered potential competitors; and (ii) whether the agreements constituted a restriction of competition by object and effect.

The CJEU found that "pay for delay" agreements would violate Article 101 of the TFEU "by effect" if there was a real and concrete possibility that a generic manufacturer would enter the market. This test will be satisfied so long as a generic manufacturer had the intention and the wherewithal to enter the market with an equivalent product. The CJEU stopped short, however, of finding that "pay for delay" agreements should *automatically* be considered to constitute a restriction of competition "by object" (i.e. that they constitute a restriction of competition in and of themselves). Such a ruling would have significant implications, as infringements of competition by object do not require the usual burden of proof for regulators, as an infringement arises by default merely by entering into such agreements. A determination of whether "pay for delay" agreements constitute infringements of competition "by object" will need to be decided on the facts of each case.[50] Furthermore, the CJEU determined that "pay for delay" agreements could also amount to an abuse of dominance but that, again, this would need to be informed by the specific facts of each given case.

Separately, Advocate General Juliane Kokott – who gave the opinion in the CAT's reference from *Paroxetine* which underpinned the CJEU's ruling – also gave an addition opinion on 4 June 2020 in relation to the appeal made by Lundbeck Limited and H. Lundbeck A/S (together, "**Lundbeck**") over the €94 million fine imposed on it by the Commission over "pay for delay" agreements it entered into over the production of a medicine known as citalopram. In this opinion, too, Kokott reiterated the position of "pay for delay" agreements she had advanced in the *Paroxetine* reference and ruled that Lundbeck's appeal should be dismissed on the grounds that the agreements constituted a breach of Article 101 of the TFEU.

These latest rulings represent a cautionary tale to pharmaceutical companies contemplating entering into "pay for delay" agreements. Though it is prudent to take all steps necessary to protect patents, these rulings and opinions from the CJEU make it clear that companies should not go so far as to create barriers to entry and prevent generic products being available on the market. It is likely that the CMA – in the present COVID era when it is more important than ever for medicines to be widely available on the market for as competitive a price as possible – will take an even tougher approach in this area in the future.

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[47] The European Commission. *Pharmaceutical Sector Inquiry – Final Report*. Published on 8 July 2009. Available at: https://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/staff_working_paper_part1.pdf

[48] Case CE-9531/11 – Paroxetine. The Competition and Markets Authority. Published on 12 February 2016. Available at: https://assets.publishing.service.gov.uk/media/57aaf65be5274a0f6c000054/ce9531-11-paroxetine-decision.pdf

[49] GSK marketed the paroxetine drug under the brand name "Seroxat".

[50] The CJEU noted that a "pay for delay" agreement would only be an infringement of competition "by object" if there was no other explanation for the agreement "other than the commercial interest of both the holder of the patent and [the generic manufacturer] not to engage in competition". In other words, if they cannot be justified on any other grounds.

The Commission extends the Temporary Framework on State aid

On 13 October 2020, the Commission announced that it would prolong the Temporary Framework[51] enacted on 19 March 2020 to allow Member States to support ailing national industries and companies in the wake of the COVID-19 pandemic.[52] The Temporary Framework was originally due to last until 31 December 2020 but will now remain in force until 30 June 2021.

The EU's usual State aid rules generally prevent the conferring of any advantage (in any form whatsoever)[53] by a national government on a particular company, industry or sector. The rationale behind this general prohibition is that Member States should not pick "selected winners" at the expense of other entities and thus distort the organic competitive functions of the internal market. However, there are occasions whereby the granting of State aid is permissible, including in situations where it is intended to "remedy a serious disturbance in the economy of a Member State".[54] The Temporary Framework therefore clarifies that the COVID-19 outbreak qualifies as a "serious disturbance" and Member States can (subject to the Commission's approval) continue to support national industries most affected by the pandemic. The Temporary Framework allows the following forms of State aid:

- Up to €800,000 worth of relief;
- State guarantees for corporate loans;
- Subsidised State loans;
- Safeguards for banks that channel State aid to the real economy; and
- Short-term export credit insurance.

This most recent extension of the Temporary Framework also included two additional amendments, allowing Member States to:

1. Cover up to 30% of ailing companies' turnover that was generated in the same period in 2019, up to a maximum amount of €3 million per undertaking. This additional measure aims to support businesses' cash flow and help them meet their overhead costs in the absence of their usual revenue; and
2. Member States may now sell down pre-existing equity shareholdings they have in national companies at a price determined by an independent valuation. Prior to this amendment, Member States could provide recapitalisation packages to stricken companies through subscribing for shares (as well as other measures), but they could only exit via a buy-back by the company in question or else a trade sale on the open market at the trading share price (if the company is listed) or at a price determined by an open and non-discriminatory consultation with private purchasers.

This latest development will be welcomed by struggling companies in the wake of continuing COVID restrictions in many countries across the EU. Separately, State aid has been one of the biggest impasses hindering an EU-UK free trade agreement ahead of the Brexit transition period ending on 31 December 2020 – see our previous client alert on the effect of the UK's Internal Market Bill. Assuming that the UK does not accept the EU's demand for a "level playing field", it will be free to determine how it subsidises its national companies without reference to instruments like the Temporary Framework. Alternatively, if the UK ultimately accepts the continued application of the EU's State aid rules, it will be a comfort to know that, until 30 June 2021 at least, it can continue to provide support packages to companies struggling in the wake of COVID-19.

[51] Communication from the Commission – Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (C(2020) 1863 final) published on 19 March 2020. Available at: https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid_19_temporary-framework.pdf

[52] The Commission's press release is available to view at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1872

[53] On this basis, State aid can take many different guises and forms, including: (i) tax breaks or exemptions; (ii) state loans or guarantees; (iii) renting or selling land at below market rates; and (iv) promises to buy minimum values or levels of goods and services.

[54] Article 107(3)(b) of the Treaty on the Functioning of the European Union.

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