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Antitrust Matters
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Editorial

By Bertold Bär-Bouyssière

Dear Readers of Antitrust Matters,

Greetings from the Home Office – our first Antitrust Matters issued under COVID-19 lockdown conditions. It contains three country reports (Ireland, Italy and Arabian Gulf) and two horizontal contributions (Green Deal and Buyer Power), that will ideally keep you some company while in confinement and solitude. You may in fact welcome to read something which is not about the virus. Feel free to also visit our COVID-19 Resource Center to follow our live updates.

We included the contribution on Ireland to benefit from the recent opening of our rapidly growing Dublin Office, and we welcome our new colleague Darach.

Already, competition enforcement adapts to the new situation. Certain competition authorities have even already started investigations related to the Coronavirus outbreak. Regulators scrutiny any changes in business practices relating to first-need goods, in particular excessive price increases for sanitary products on online platforms. Companies creating the perception – rightly or wrongly – to take advantage of the situation, risk particular harsh enforcement action.

The crisis may prompt economic operators in all sectors to engage in new or more intense horizontal or sector-wide collaborations. For example, pharmacies may wish to pool their stock and supermarkets may wish to cooperate in home delivery of groceries. Collaboration between competitors is always sensitive. While the exceptional circumstances caused by the Coronavirus outbreak may provide more margin for justifying horizontal collaboration, it remains important to document justifications and to seek legal advice.

On 23 March, the EU competition authorities u-issued a joint statement declaring that they “will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply”, as the “extraordinary situation may trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products.” However the competition rules stay in force.

Companies with questions should turn to their advisers, but if necessary the authorities themselves are open to give guidance in borderline cases. At the same time, the regulators emphasized that they will not hesitate to come down on companies trying to restrict or increase the cost of essential medical supplies, or “taking advantage of the current situation by cartelising or abusing their dominant position.”

Further, unilateral conduct of companies may also need to be adjusted. Companies supplying key products that become scarce, should be careful in handling demands exceeding supply. Generally, is it safe to ensure a non-discriminatory treatment of all customers, and in a situation of shortage, a pro-rata allocation of available resources (as “opposed to the first gets it all”) is considered antitrust-compliant.

On 30 March the European Commission has launched a dedicated COVID-19 Antitrust website to provide guidance. It has also set up a mailbox (COMP-COVID-ANTITRUST@ec.europa.eu) where companies may seek informal guidance on specific initiatives adopted to tackle the corona crisis.

On the upside, and with a clin d’œil, probably less need to be afraid of surprise inspections (“dawn raids”). However, if companies engage in sensitive conduct, evidence thereof can easily be detected during raids carried out when things are back to normal.

Clearance of merger filings will also face substantial delays. In Europe, regulators move to teleworking, as the rest of us. Merger clearances will take longer, and the regulators do not want to deal with difficult cases that require meetings. Countries will use foreign direct investment reviews to limit foreign takeovers in the life science sector out of fear that valuable assets capable of combating the virus may fall into foreign hands.

On 19 March, the European Commission has published the new Temporary Framework for State aid. Several types of measures from direct grant to guarantees, subsidized interest loans and export credit insurance, will be approved swiftly by the Commission.

Good health to all of you!
Competition law developments in Italy

By Domenico Gullo

Italian competition law’s primary sources are Law no. 287 of 10 October 1990, which regulates anticompetitive agreements, abuses of dominant position and control of concentrations; and the relevant EU rules – in particular, articles 101 and 102 of the Treaty on the Functioning of European Union.

The Law implements article 41 of the Italian Constitution, which protects the freedom of private economic initiative. Its provisions largely reflect the EU rules and – as expressly specified by article 1(4) of the same Law – must be interpreted in accordance with the principles of EU competition law.

Article 10 of the Law establishes an independent administrative authority (Autorità Garante della Concorrenza e del Mercato, or AGCM), which is in charge of applying national and EU provisions, within the framework of (EC) Regulation no. 1/2003.

The AGCM has the power to conduct investigations; adopt interim measures in urgent cases where there is a risk of serious, irreparable damage to competition; ascertain potential infringements of competition law; and impose pecuniary fines on the liable undertakings.

Under Italian law, anti-competitive agreements and abuses of dominant position are administrative violations (with no direct consequences for individuals), unless the conduct in question also constitutes a criminal offence (for example, bid rigging may also result in a violation of articles 353 and following of the Italian Criminal Code).

The AGCM also has broad advocacy powers, which have become increasingly important during years, including:

- the power to conduct general fact-finding investigations in areas of business where the development of trade, the evolution of prices or other circumstances suggest that competition may be impeded, restricted or distorted (article 12 of the Law; the results of such investigations often lead to the opening of cartel and abuse of dominance investigations);
- the power to notify Parliament and the government of any distortions of competition arising from legislative provisions, regulatory measures and general administrative acts, and the power to issue an opinion on the appropriate initiatives for the removal or prevention of such distortions (article 21 of the Law);
- the power to take legal action against general administrative acts, regulations or measures of any public administration infringing competition law, by submitting a reasoned opinion to the public entity concerned and, in the event of failure by the addressee to comply with this opinion, lodging an appeal to the competent administrative court (article 21-bis of the Law, which substantially reflects the EU law infringement procedure);
- the power to express opinions on draft legislation or regulations and on problems relating to competition whenever the AGCM deems it appropriate or whenever requested to do so by the government departments and agencies concerned (article 22 of the Law).

Recent enforcement developments

ANTICOMPETITIVE AGREEMENTS

Between 2018 and 2019, the AGCM concluded 16 proceedings regarding anticompetitive agreements, mainly consisting of horizontal cartels. As such, its enforcement policy was mainly focused on bid-rigging practices.

As clarified in its 2018 Annual Report, the AGCM deems combatting collusion in public tenders as a priority, both to restore fair competition in the affected markets, and reduce public expenditure, enabling public authorities to devote resources to the elimination of social inequalities and to national economic development.

Five out of six cartel investigations concluded in 2019 with the imposition of fines for bid rigging (I806 – Affidamento appalti per attività anticincendio boschivo; I808 – Gara Consip FM4-Accordi tra i principali operatori del facility management; I814 – Diritti internazionali; I816 – Gara So.Re.Sa Rifiuti sanitari Regione Campania; I822 – Consip/Gara sicurezza e salute 4).

The highest fines against cartels were imposed in cases I805 – Prezzi del cartone ondulato (around EUR285 million in total) and I808 – Gara Consip FM4-Accordi tra i principali operatori del facility management (around EUR234 million in total).

In the Prezzi del cartone ondulato case, AGCM ascertained – partly on the basis of evidence from leniency applicants – the existence of two secret cartels between primary undertakings active in the manufacture and marketing of corrugated cardboard sheets and packaging materials (having particular
importance for the packaging and delivery of items sold online, both implemented through intense exchanges of information between the parties.

In particular, the first infringement was the joint fixing of retail prices of corrugated cardboard and the joint decision to reduce output, to the detriment of non-vertically integrated competitors.

The second infringement was the joint definition of price increases and other relevant commercial conditions (e.g. payment terms) for the sale of corrugated cardboard boxes, and for client partitioning through non-aggression agreements.

In the *Gara Consip FM4* case, the AGCM found that the undertakings coordinated their behavior on a tender issued by Consip (the Italian central purchasing body, fully owned by the Ministry of Economy and Finance) in 2014 for the provision of facility-management services in real-estate properties – mainly used for office purposes – owned by public authorities and public universities or research centers (*Gara Consip FM4*).

AGCM’s investigation revealed the absence of competitive overlaps between the offers submitted by the parties for 18 regional lots to be awarded, in accordance with a “chessboard” scheme. And even in the only two cases where the offers of the parties overlapped, one of the participating undertakings would have submitted an “offer of convenience” to mask coordination.

**ABUSE OF DOMINANT POSITION**

Between 2018 and 2019, the AGCM closed ten proceedings for abuse of dominant position.

Two cases resulted in fines in two of the three investigations against vertically integrated energy operators in the electricity markets for preemption strategies (*A511* – *Enel/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica*; *A513* – *ACEA/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica*).

In these cases, the AGCM found the undertakings had exploited their prerogatives and privileged information on customers held as providers of the “enhanced protection service” in the electricity sector (governed by regulated conditions). They did so to transfer protected customers to their free market operators and contracts before implementation of full liberalization by the lawmaker, provided at that time for July 2020 (now postponed to January 1, 2022).

However, in two judgements of October 2019, the competent administrative court of first instance annulled the AGCM’s decision concerning ACEA due to lack of evidence of the effective existence of its alleged abusive practice.

Recently, the AGCM has focused on the digital economy sector by opening an investigation against Google for alleged abuse of dominant position (*A529* – *Google/Compatibilità app Enel X Italia con sistema Android Auto*).

In the *Google* case, the AGCM is checking whether the company unlawfully used its dominant position in the market for smart-device operating systems by refusing to integrate an app developed by Enel (the main electricity operator in Italy) to provide consumers with information and services for recharging electric-car batteries into the Android Auto environment, which allows owners of Android smartphones to easily and safely use certain apps and mobile phone features when driving a vehicle.

The AGCM considered that the exclusion of Enel X Recharge could adversely affect the usability of the app and the possibility of consumers to benefit from the utilities connected to it, such as booking charging stations.

In the AGCM’s view, Google might have an interest in defending and strengthening the business model of its Google Maps app, which offers similar services to end-users.

**MERGER CONTROL**

Most of the concentrations notified to AGCM between 2018 and 2019 were cleared in Phase I as being not able to lead to the creation or strengthening of a dominant position in the affected markets, whereas mergers cleared in Phase II amount to 11.

Among other cases, AGCM conditionally cleared in November 2019 two concentrations concerning, respectively, the market for television broadcasting infrastructures and the market for natural gas distribution (*C12245* – *F2I S.G.R./Persidera*; *C12258* – *Ascopiave/Rami di azienda di AcegasApsAmga*).

The first case concerned the acquisition of sole control of Persidera, a network operator in the digital terrestrial television broadcasting market, by an investment fund through the demerger of Persidera into two new companies, respectively holding its tangible and intangible assets.

In the AGCM’s view, the transaction could have determined the creation of a dominant position of the post-merge entity in the television broadcasting infrastructures market and in the downstream markets, because the acquiring investment fund already controlled a competitor of the target undertaking. For this reason, the AGCM imposed structural and behavioral remedies aimed at eliminating the competition concerns arising from the Phase II investigation, also taking into account the commitments proposed by the parties.
In the Ascopiave case, the AGCM conditionally cleared the acquisition of sole control of the business unit AcegasApsAmga by Ascopiave relating to natural gas distribution in the north-east of Italy.

In particular, the AGCM imposed a comprehensive package of remedies aimed at reducing information and financial barriers, as well as organizational measures for addressing employment issues. The purpose of these remedies is to provide incentives for potential external participants in the future tender, and to offset the advantages linked to the incumbency of the target company that currently holds the largest part of the concessions for natural gas distribution in the ATEM (Minimum Territorial Area) of Padua 1.

Increasing attention to the digital economy markets
As noted above, AGCM has recently focused on the developments and competitive conditions in the digital economy markets.

On 10 February 2020, AGCM released the final report of a sector-inquiry on Big Data, launched on 30 May 2017 and jointly conducted with the Italian Communications Authority (Autorità per le Garanzie nelle Comunicazioni, or AGCOM) and the Italian Data Protection Authority (Garante per la protezione dei dati personali) to assess the impact of Big Data on their respective areas of competence.

The joint sector inquiry identifies several areas of potential risk deriving from Big Data (including foreclosure, price discrimination and the use of pricing algorithms which may facilitate collusion), and highlights the complementarity between antitrust, consumer and privacy law tools to protect competition in the digital ecosystem, with particular regard to the so-called data-driven zero-price markets.

The final report also includes cooperation guidelines and policy recommendations (already published in July 2019), which show an innovative approach based on a permanent cooperation between the regulators and on the implementation of synergies between before – and after-the-event regulation.

More in details, with regard to antitrust aspects, such cooperation guidelines and policy recommendations envisage:

- the need to fight abusive practices by key players in the digital economy and anticompetitive agreements that might be facilitated by the development of new software and pricing algorithms, with a closer eye on the practices of digital platforms having a potential adverse impact on the good functioning of competition in the market;
- the need to adopt a new definition of relevant market in the light of the multidisciplinary nature of the digital economy, and given that the so-called digital champions operate in several markets;
- as regards global digital platforms, the need to introduce new measures aimed at increasing transparency in relation to user profiling, as well as opt-in mechanisms for users on the degree of chosen profiling;
- the need to amend merger-control rules to catch corporate acquisitions in the digital sector, especially acquisitions of high-innovative start-ups by primary digital operators (so-called “killing acquisitions,” which have been considered under German control merger rules for the introduction of a “value of transaction” threshold), as well as the need to better align the Italian assessment procedure to the EU one; and
- the need to strengthen the power of collecting information of the authorities outside formal investigations (by introducing ad hoc administrative penalties in the event of refusal or delay), and the need to increase the maximum applicable amount of penalties for unfair commercial practices, to ensure an effective deterrence of consumer protection law.

Based on the above, after the opening of the abuse of dominant position case against Google in 2019, more enforcement developments are expected in the field of digital economy.
Buyer power – the less famous form of market power

By John Huh, Julie Gryce and Daniel Wojtczak

Introduction

Every transaction and every market consists of two sides: the supplying side and the buying side. The supplying side is usually considered more likely to cause competition law concerns: strong suppliers can reach agreements or abuse a dominant position, which negatively impacts competitors and ultimately consumers. Significant market power of one or more suppliers can therefore be easily and intuitively perceived as a source of potential competition law concerns. On the other side, buyer power is a less obvious source of similar concerns.

Why buyer power is important

In general, buyer power can be defined as the ability to obtain favorable purchasing terms and conditions from suppliers. It serves to discipline suppliers who could otherwise solely determine purchasing terms and conditions for their benefit. However, if one buyer or buyers who have joined forces are sufficiently strong and face weak sellers, buyer behavior can affect competition in the same way as strong suppliers. Large buyers may be able to force some of their dependent suppliers out of the market, distort competition or obtain purchasing conditions that they would not be able to obtain on a competitive market.

The various regulations and guidelines available both in EU competition law and in US antitrust law focus mainly on the anticompetitive effects of actions of strong suppliers and pay relatively little attention to the dangers that buyer power can pose to competition.

Increasingly, however, competition authorities are showing interest in analyzing and addressing the results of buyer power enjoyed by certain buyers. Anticompetitive buyer power can also result from significant bargaining power, which does not raise to the level of a monopsony situation but is a result of illegal buyers’ cooperation or an abuse of a dominant position by a dominant buyer.

While companies usually focus their market intelligence on their customers and competitors in the downstream market, it is often more difficult for them to assess what buying position they have on markets concerning various input products. For those reasons, potential competition law concerns may be overlooked.

Agreements between buyers

When several buyers form a “buying alliance,” it can increase their buyer power and create efficiencies that can be passed on to consumers. However, agreements between purchasers can sometimes result in similar competitive concerns as classical cartels between competitors. Agreements between buyers that aim to fix purchasing prices or establish purchasing quotas are regarded by the European Commission as anticompetitive by their very object, regardless of potential efficiencies they may create.

Examples of such obviously anticompetitive agreements concerning purchasing conditions can be found in decisions concerning purchases of raw tobacco. In 2004, the European Commission found that agreements entered by four Spanish processors of raw tobacco aimed to fix the maximum average delivery price of raw tobacco. In addition, the tobacco processors shared quantities of each variety of tobacco bought. In 2005, a similar decision addressed an agreement between Italian tobacco processors. Such alignment allowed the buyers to reduce competition and had a clear object of restricting competition.

It must be noted, however, that not every coordination between purchasers is a restriction of competition by object. Buying consortia can be justified as they can improve terms and conditions according to which smaller buyers can obtain input products and exert certain pressure on strong suppliers. If the combined market share of the buyers involved in such an agreement does not exceed 15 percent, they may benefit from a safe harbor under EU competition law as such relatively low combined market share increases the likelihood that the alliance will allow the participant to counterbalance the supplier’s power rather than create a competition distortion.

Abuse of dominant purchasing position

Countervailing buyer power is an important but often forgotten factor as competition authorities still tend to strongly rely on the market shares analysis. In reality, even if a supplier has a relatively high market share, its market power can be effectively counterbalanced by one or a limited number of strong buyers, which makes finding a dominant position unlikely.
Pure abuse of a dominant position held on the purchasing side of the market seems rare. The most obvious abuse may occur if a dominant buyer can exercise enough pressure on his much weaker suppliers to e.g. force some suppliers out of the market, or force suppliers to accept preferential purchasing terms. A strong buyer can also make purchases beyond their needs and therefore make it difficult for others to obtain the necessary input products.

Unfair purchasing practices
It has been recognized that, in the case of non-dominant buyers who do not engage in an obvious purchasing cartel, general competition law provisions may be insufficient to address certain concerns that buyer power can create.

Potential exploitation of suppliers by strong buyers is, therefore, more commonly associated, at least in certain jurisdictions, with the imposition of unfair purchasing terms and conditions.

Because concerns about buyer power seem to be present, at least to some extent, in relation to the strong international retail chain often contracting with much smaller national suppliers, some EU member states have tried to address those concerns by lowering the threshold required to declare an undertaking dominant (e.g. if the buyer is engaged in food retailing, as in Finland and Latvia), or by introducing provisions on the abuse of an economic dependence, which does not require fining of dominance (as in Belgium, France and Poland). Other potential solutions considered to involve the promotion of industrial codes of practice (as in Australia, Slovakia, Spain and the UK). It is not clear which of those potential solutions will prove to be most effective in addressing buyer power concerns.

In order to address certain buyer power issues, the EU adopted a directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain in April 2019. Member states must implement that directive by May 1, 2021. While its scope is limited to the agricultural and food supply chain, it shows an interesting development in EU policy as it basically transposes certain consumer protection provisions to business-to-business relationships that are not covered by EU competition law.

US perspective
In the US, antitrust case law on monopsony and buying power is far less clear and less prevalent than case law involving seller-side market power, particularly monopoly power. However, several notable cases and recent agency activity provide insight into how US courts and federal enforcement agencies have approached – and will likely continue to approach – buy-side power in the context of US antitrust laws. As early as 1948, the US Supreme Court held that a buyer cartel – just like a seller cartel – that possessed market power was subject to per se treatment. *Mandeville Island Farms v. American Crystal Sugar Co.*, (1948) held that a buyer cartel of sugar refiners that possessed monopsony power was subject to per se treatment. For collaborations among buyers other than cartels, however, US courts and antitrust agencies apply the rule of reason analysis – balancing any anticompetitive effects with potential justifications for the collaboration.

For instance, the Supreme Court has applied the rule of reason to joint purchasing arrangements. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, (1985), the Court held that, unless it is shown that a buying cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion from such a joint purchasing cooperative is virtually always likely to have an anticompetitive effect is not warranted. Absent such a showing with respect to a cooperative buying arrangement, courts should apply a rule-of-reason analysis. Id.

In 2007, the Supreme Court addressed buying power in a unilateral conduct case, *Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co.*, in which a sawmill operator alleged that its competitor monopolized and attempted to monopolize the Pacific Northwest input market for alder sawlog through its purchase of sawlogs. Supreme Court held that the test that applied to claims of predatory pricing also applied to claims of predatory bidding, because of the close theoretical connection between monopoly and monopsony. Namely, a predatory-bidding plaintiff must prove that the predator’s bidding caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs. A plaintiff also must prove that the defendant has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power.

In more recent years, there has been an increased focus by the antitrust enforcement agencies on monopsony and buyer power, particularly in the context of labor markets. For instance, in July 2018, in *In the Matter of Your Therapy Sources, LLC, et al.*, the US Federal Trade Commission (FTC) charged a Texas company that provides therapist staffing services to home health agencies, its owner and the former owner of a competing staffing company with unlawfully agreeing to reduce pay rates for therapists and inviting other competitors to collude on the rates. The FTC charged the company and the two individuals with violating Section 5 of the Federal Trade Commission Act by unreasonably restraining competition to offer competitive pay rates to therapists, fixing or reducing pay rates for therapists and depriving therapists of competition between therapist staffing companies. At the same time the complaint was filed, the parties entered into a proposed consent order prohibiting the parties
from colluding with competitors on compensation paid to their employees or independent contractors. The parties were barred from entering into or organizing agreements with any person to lower, fix, maintain or stabilize the compensation that they or the other person pays, or is willing to pay, in competing with each other for employees or independent contractors. They are also barred from inviting competitors to enter such agreements and from exchanging information with competitors related to compensation of employees and independent contractors.

In September 2018, just two months after In the Matter of Your Therapy Sources, LLC et al., the FTC held a series of panel discussions on monopsony and buyer power at its second hearing on competition and consumer protection in the 21st century. The theme of the hearing was “Monopsony and the state of US antitrust law.” Much of the focus during these panel discussions was on monopsony or buyer power and their potential to impact competition in labor markets.

The US Department of Justice has also increasingly focused its attention on buy-side issues in labor markets and in the merger context. In October 2019, Doha Mekki, Counsel to the Assistant Attorney General of the DOJ Antitrust Division, testified before the House Judiciary Committee on Antitrust and Economic Opportunity: Competition in Labor Markets that the Division had been actively developing and implementing screens to help agency staff detect mergers that are likely to create or enhance monopsony power in labor markets. Mekki further testified that, because labor is an input which merging parties buy, Division staff assess whether a proposed transaction would allow the merged firm to reduce competition substantially in a labor market and use its enhanced bargaining power to depress workers’ wages and benefits, including salary, commissions and reimbursements. This buy-side competitive effects analysis employs a similar framework to that used to evaluate sell-side competitive effects.

**Conclusion**

While it is clear buy-side conduct may violate EU and US antitrust laws, buy-side market power has historically received less attention than sell-side power. Importantly, however, this may be changing. Antitrust enforcers are under pressure to take fresh looks at issues like competition in labor markets and merger control and appear to increasingly recognize the salience of monopsony and buyer power generally. In the coming years, issues related to buy-side power may occupy a much more significant place in EU and US antitrust law.

Activities on the buyer side of the market may require special attention as they seem to sometimes escape close competition authorities’ scrutiny and attention of the market players as they focus on their customers and competitors.
Competition law developments across the Arabian Gulf

By Eamon Holley

[Precis: Competition laws are relatively new and varied across the Arabian Gulf. Businesses working across the region need to be mindful of the differences in these laws and the various exceptions to them. Businesses can no longer be complacent about competition law, or a lack of enforcement, in the region. With Saudi Arabia’s General Authority for Competition taking the lead in investigating anticompetitive practices in a number of key sectors, we expect that other countries and sectors will follow.]

The Middle East isn’t known as an active arena for competition law or its enforcement. But this is changing. Regional governments have started to implement economic reforms to diversify economies from oil dependency and attract foreign investment. Competition laws are an obvious plank to support this. Since 2004, each Gulf Cooperation Council (GCC) country has passed a competition law.

But it’s enforcement of competition law that really matters. In this article, we provide a short summary of competition laws in the GCC, and insights on the enforcement activities of their regulators.

General overview

Although standalone competition laws are relatively new in the GCC, many jurisdictions have long had commercial laws designed to protect businesses from what are termed “anti-competitive practices.” But these laws were not developed on the basis of general economic principles prohibiting collusion or abuse of market power; they were designed to protect businesses’ confidential information, such as client lists, or restrain managers or employees from competing against activities of the business.

The first GCC country to issue a competition law was Saudi Arabia, in 2004. The most recent GCC country to pass a standalone competition law was Bahrain, in 2018.

These laws largely align with the main concepts found in competition laws elsewhere, prohibiting collusion and abuses of competition, and sometimes incorporating merger-control rules.

Business must consider not only whether a GCC country has a national-level competition law, but also whether there are sector-specific rules that may apply to them. The telecommunications sector, for example, generally has sector-specific competition rules.

With certain exceptions, such as Saudi Arabia, or the Bahrain Telecommunications Regulatory Authority (TRA Bahrain), the region isn’t known for the enforcement of competition law. Saudi Arabia’s General Authority for Competition has been active in investigating and publishing findings on collusive behavior. TRA Bahrain has a good reputation regionally for being a competition-driven regulator, investigating allegations and issuing decisions on operators’ practices, and developing before-the-event regulation where appropriate. But even in jurisdictions where investigations into collusion and abuse of dominance don’t occur frequently, or at all, merger controls to protect against economic concentration may still apply and must not be overlooked.

Given the recent opening of various economies in the GCC, and the influx of foreign investment by international businesses, the enforcement of competition law should become a more common event.

Though most international businesses entering the region will be well-acquainted with competition law concepts, and have systems and internal processes that align with these, many GCC regional businesses aren’t used to these concepts, or don’t account for competition law enforcement in their day-to-day dealings. Indeed, some features of the regional

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1 See for example articles 905 to 909 of the UAE Federal Law No. 5 of 1985, as amended, promulgating the Civil Transactions Law of the United Arab Emirates.

2 See for example, article 86 of UAE Federal Law No. 2 of 2015 on Commercial Companies and article 127 of UAE Federal Law No. 8 of 1980 Concerning the Regulation of Labour Relations.
legal and corporate landscape – such as requirements to use local partners as majority shareholders of a business, or the concept of “commercial agents” – are most likely inconsistent with traditional competition law concepts and, in some cases, are express exceptions to a competition law. One example is the UAE's Competition Law exemption of commercial agency arrangements.

This difference in experience and approach can sometimes lead to a clash of cultures between two or more parties coming from different legal traditions, with one or both sides to a transaction not necessarily understanding the other’s concern with, or seeming disregard for, competition law precepts considered standard in mature competition law regimes with a history of enforcement.

As the region’s economic landscape changes, and as businesses both move into, and expand out of, the region, competition law will continue to evolve. And possibly quite rapidly, as regional governments and policymakers strive to develop markets that both foreign investors and regional businesses can rely on as openly competitive.

Saudi Arabia

Saudi Arabia is by far the largest market in the GCC, both in terms of GDP and population. As at 2017, the country’s GDP was estimated at USD1.775 trillion, with a population of about 33 million. Saudi Arabia’s recent economic reforms have meant that many more businesses are considering market entry.

The country’s first competition law was issued in 2004, but in early 2019 it has been amended to make clearer that fines for collusion, abuse of dominance or unapproved mergers can be up to a maximum of 10% of the total value of annual sales, or a fine not exceeding SAR10 million (USD2.6 million) when it’s impossible to assess the value of annual sales. The competition regulator, the General Authority For Competition (GAC) can, at its own discretion, replace this with a fine of up to three times the value of gains made by the offender.

The GAC is possibly the most active competition regulator in the GCC, with 52 findings of a breach of the Kingdom’s competition law since 2014. The findings have related to:

- collusion to impose terms regarding selling operations in central markets;
- market sharing;
- price fixing;
- requiring clients not to deal with competitors; and
- bid rigging.

The markets where these investigations have occurred are varied, including foodstuffs, medical gases and concrete. Investigations have also concerned bids made to tenders from government bodies.

For example, apart from naming the violators in its findings, the GAC has also issued fines in 2019 ranging from SAR900,000 (USD240,000) to SAR5 million (USD1.3 million). The GAC also has powers to order businesses to cease activities that breach the law.

Perhaps emboldened with this experience, in January 2020 the GAC launched a public consultation on anti-competitive practices in the pharmaceutical sector, seeking information on:

- the prevalence of brand-name prescriptions by healthcare professionals; and
- the range and variety of incentive packages paid by distributors to healthcare providers, including pharmacies.

United Arab Emirates

After Saudi Arabia, the UAE is considered to be the next largest market for business, and is often seen as a regional hub by international businesses.

The UAE published its competition law in 2012, but implementing regulations were not published until 2014, which provided more detail around merger control, and details about ratios and defining small and medium-sized businesses for the purposes of certain exceptions.

EXCEPTIONS

The UAE competition law contains the expected prohibitions against collusion and abuse of dominance, but the exceptions to them are just as interesting as their enforcement.

The law doesn’t apply to:

- federal, emirate-level of local government authorities, or establishments owned or controlled by those authorities according to controls specified by the UAE Federal Cabinet
- small and medium establishments defined by regulation
- the following sectors, activities and businesses:

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4 Ibid
• telecommunication sector
• financial sector;
• cultural activities (readable, audible and visual);
• oil and gas sector;
• production and distribution of pharmaceutical products;
• postal services including the express mail service;
• activities related to production, distribution and transportation of electricity and water;
• activities on the treatment of sewerage, garbage disposal, hygiene and the like, in addition to supportive environmental services; and
• sectors of land, marine or air transport, railway transport and related services.

Another essential exception to the UAE competition law's prohibitions on anti-competitive behavior applies to commercial agencies. This is a concept that many international businesses aren't aware of when moving into the region. Commercial agents are a form of regulated agency agreement that effectively provides a UAE business with exclusive rights to act as the UAE distributor in the UAE for a foreign principal. Because these agreements exclude the use of other distributors and agents, entering into them must be considered carefully by foreign principals, as they can be difficult to terminate.

With certain exceptions, "weak impact agreements" are also generally excepted from the prohibition against collusion. These are defined in the Regulation on Ratios and Controls as an agreement where the total share of the parties don't exceed 10% of the total transactions in the concerned market. There is no guidance on how these transactions are measured – for example, based on revenue or volumes of sales.

Finally, the Minister of Economy can issue decisions excluding the prohibitions on restrictive agreements or abuses of dominance, provided that the relevant establishments can prove that the agreement or practice will:

• reinforce economic development;
• improve performance and competitiveness of the establishments;
• develop the production and distribution systems; or
• realise specific benefits for consumers.

TELECOMMUNICATIONS
As noted above, the telecommunications sector is excluded from the scope of the UAE competition law. This sector is regulated by the UAE's Telecommunications Regulatory Authority, which has published a number of competition regulations for the sector.

Bahrain

GENERAL
Bahrain published its competition law in January 2019. It's similar to the UAE Competition Law, though does not contain the same level of exceptions, for example in carving-out specific industries, sectors or activities, or expressly excluding commercial agencies.

The scope of the law captures activities practiced outside of Bahrain that affect competition within Bahrain. However, it does not apply to:

• arrangements approved by the international conventions in force in Bahrain;
• utilities and projects owned or operated by the State of Bahrain; or
• arrangements required for the use, exploitation, transfer or licensing of the exploitation of intellectual property rights prescribed by law, provided that the arrangements don't impair, without justification, the transfer or diffusion of technology or result in a hinderance to competition.

Unlike both Saudi Arabia and UAE, Bahrain has not yet – at the time of writing – fully established an independent regulator. It has temporarily appointed the Consumer Protection Directorate of the Bahrain Ministry of Industry, Commerce and Tourism as the relevant authority.

TELECOMS
Before the Bahrain Competition Law was published, Bahrain's telecommunications sector was heavily regulated under a liberalization program underpinned by competition law principles. Though there has been much before-the-event regulation in the form of retail tariff controls on the incumbent telecoms operator, the Bahrain telecommunication sector's regulator, the Telecommunications Regulatory Authority of Bahrain, also has after-the-event powers, and has started investigating behavior in the Bahrain telecommunications sector.

The new Bahrain Competition Law does not repeal the powers of the regulator regarding the telecoms sector. Indeed, the General Director of the regulator is required to be a board member of the authority, along with a member nominated from the Bahrain
Central Bank, a member nominated by the Bahrain Chamber of Commerce and Industry, and other members from prominent economic sections of Bahrain.

It remains to be seen how the Bahrain authority will enforce its law, or if it will take over or work in conjunction with other sectors with specific competition powers, such as the telecoms regulator.

Elsewhere in the GCC
Qatar, Oman and Kuwait all have competition laws. Qatar’s and Kuwait’s regulators have both been involved in merger approvals, but as at the time of writing we aren’t aware of any enforcement for the standard competition law prohibitions.

What’s next?
Traditionally, businesses both outside and inside the GCC either did not think economic regulation like competition law existed in the GCC region, or did not consider it a significant risk. However, regional governments are updating their laws in order to attract international businesses and foster homegrown business success stories and talent. More importantly, such laws must be enforced and in a transparent and consistent manner.

Unfortunately for businesses working across the GCC region, though the overall principles in competition laws may be similar, the legislative landscape is still quite mixed in terms of detail, and also in terms of the various different exceptions that may apply to these regimes. Finally, with certain exceptions, the level of enforcement in this field has not been particularly strong – though we expect this to change. Both international and regional businesses should keep an eye on competition law developments in the region, and establish and maintain robust internal governance against anti-competitive practices in their organizations and with others.
European green deal – will competition policy be reshaped to promote sustainability in the EU?

By Martijn van Wanroij and Moustapha Assahraoui

Introduction
Sustainability has moved to the top of the new European Commission's agenda. The Commission's new president, Ursula von der Leyen, has set an ambitious goal of making Europe the world's first climate-neutral continent. Her plan, also referred to as the European Green Deal, moves firmly beyond the 2030 Sustainable Development Goals agreed by the United Nations. All EU policies should contribute to the achievement of the European Green Deal, including the block's competition policy.

During her speech at the October 2019 GCLC Conference on Sustainability and Competition policy, EU Competition Commissioner Margrethe Vestager emphasized the importance of sustainability and the role of competition policy in realizing that goal.

EU competition policy
In several ways, the traditional goals of EU competition policy are already compatible with the objective of creating markets that are more sustainable. First, when markets are competitive, businesses are incentivized to refrain from using scarcer – and more expensive – resources than they absolutely need. Further, competitive markets help drive innovation and the development of new technologies that enable us to live more sustainably. Finally, competitive markets imply that businesses must listen to consumers demanding more sustainable products. As a concrete example, over the past four years, Europe's organic food market grew from €20 to €30 billion and the number of electric and hybrid cars on the road in Europe has grown exponentially over the past years to roughly two million.

Commissioner Vestager has emphasized that achieving a more sustainable economic model through EU competition policy does not necessarily require the adoption of new competition rules.1 There still is room for companies to better understand the opportunities they already have to promote or increase sustainability. In this regard, the Commission's review of the rules and guidelines on horizontal cooperation also presents an opportunity to further explain how companies can put together sustainability agreements without harming competition.

It should nevertheless be kept in mind that collaboration between companies, particularly between competitors, whether or not in the name of sustainability, may not lead to agreements to the detriment of competition and consumers. A balanced approach remains necessary, and promoting sustainability itself will most likely remain insufficient to justify restrictive consequences of cooperation initiatives if there is a significant adverse impact on competition and, ultimately, on the economic interests of customers and consumers.

The support of sustainability initiatives shows a somewhat divergent picture across the different policy areas of EU competition law.

STATE AID
In relation to the EU state aid rules, Commissioner Vestager emphasized that these rules have helped decrease the public financing cost of subsidies for renewable energy by ensuring that governments use competitive tenders to distribute those subsidies.

The EU state aid rules complement the EU Greenhouse Gas Emissions Trading Scheme (ETS), a 2005 initiative that aims to tackle CO₂ emissions in a cost-effective way to combat climate change, by allowing EU member states to compensate companies if the ETS would result in energy-intensive industries paying too much for electricity.

In 2012, the Commission adopted guidelines on certain state aid measures in the context of the ETS post-2012, which outline the conditions under which EU member states can compensate electro-intensive undertakings active in a sector exposed to international trade.2 As these guidelines shall expire on December 31, 2020, the Commission has already launched a public consultation to obtain input for the revision of their ETS state aid guidelines.3

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1 EU Commission’s Speech by Margrethe Vestager of 24 October 2019, Competition & Sustainability.
3 Ibid, paragraph 56.
CARTEL PROHIBITION
Agreements between competing undertakings and those between undertakings within the same production and supply chain – even if aimed at promoting sustainability – can be at odds with competition law. Such agreements may have side effects, whether desirable or undesirable, that restrict competition and may therefore fall within the scope of the European cartel prohibition as laid down in Article 101(1) TFEU.

Commissioner Vestager indicated that companies may convene to agree standards of sustainability and create a well-monitored label. However, these sustainability agreements may not be used as a cover for a cartel or lead to undertakings that create extra costs for consumers.4

Moreover, these sustainability agreements may not foreclose markets by misusing the idea of sustainability to define what products are allowed in the market in a way that suits them and keeps others out. Each business interested in helping define the standard must (i) have a chance to get involved, and (ii) have a fair and equal right to use the standard to ensure that any product meeting the threshold for a sustainability label should be able to use that label.

Article 101(3) TFEU provides for an exemption from the aforementioned cartel prohibition as certain restrictive agreements may yield efficiencies outweighing its restrictive effects on competition. However, the exemption criteria of Article 101(3) are not always easy to apply in the context of sustainability initiatives, leaving considerable room for interpretation and a corresponding lack of legal certainty.

In this sense, the ban on anticompetitive agreements generates legal hurdles for companies who wish to engage in collaborations promoting sustainability. The promotion of such initiatives would be aided by the adoption of additional regulations and policies that provide more clarity and add to the predictability of the impact of the cartel prohibition on cooperation in relation to the achievement of sustainability goals.

MERGER CONTROL
Although benefits to sustainability have never been considered a valid argument to approve a merger, the Commission has cited impacts on the environment as a reason to investigate deals in greater depth.

In November 2019, the Commission launched an in-depth investigation into the proposed acquisition of a Belgian-Spanish metals recycler by a German copper producer, stating that the transaction may potentially reduce competition in the purchasing of copper scrap for refining.

In March 2019, the Commission opened a Phase II investigation between an acquisition of two leading suppliers of aluminum to the automotive industry. Commissioner Vestager stated that the “use of light materials, such as aluminium, allows car manufacturers to produce vehicles that are more fuel-efficient and reduce emissions.” Therefore, the proposed transaction would be highly scrutinized if it were to result in encouraging European manufacturers to make heavier, more fuel-guzzling cars.

Further developments in this area will clear the way to a better understanding of what the weight of environmental arguments will be in mergers and how such arguments would play a role in determining their approval.

Sustainability initiatives in the Netherlands
CURRENT FRAMEWORK
On May 6, 2014, the Dutch government published policy rules on competition and sustainability,5 outlining the aspects to be taken into consideration when applying the four exemption conditions as laid down in Article 101(3) TFEU and Article 6(3) DCA in relation to sustainability initiatives. Within the same week, the Dutch Competition Authority (ACM) issued a Guidance Paper providing further clarity.6 In 2016, said policy rules were overhauled by a more detailed version, which is still valid today.7

The ACM outlined the following key principles with respect to competition and sustainability:

- the ACM shall not actively intervene in widely supported sustainability agreements;
- in the event of complaints or signs regarding sustainability agreements, the ACM may launch an investigation and
- the ACM aims for a prompt solution for potential problems.8

It should be noted, however, that previous cases have demonstrated that, even when applying the Guidance Paper, the ACM still assesses agreements between companies promoting sustainability mainly from an economic perspective.

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4 EU Commission’s Speech by Margrethe Vestager of 24 October 2019, Competition & Sustainability.
6 Dutch Competition Authority, Guidance Paper Competition & Sustainability, 9 May 2014.
(i) Chicken of Tomorrow initiative
On January 26, 2015, the ACM published its findings of the investigation it had launched on the economic effects of the so-called Chicken of Tomorrow initiative and its assessment of whether it could be exempted under Article 101(3) TFEU and Article 6(3) DCA.9

The initiative entails proposed cooperation between representatives of poultry breeders, poultry meat processors and supermarkets to establish a minimum standard for chicken meat production aiming to enhance animal welfare and environmentally friendly production methods. Participating Dutch supermarkets would commit to only purchasing chicken meat that meets these standards.

The ACM held that the respective agreement would infringe Article 6(1) DCA and Article 101(1) TFEU because consumers would no longer be able to buy regular chicken meat (i.e., meat that does not comply with the standard) in supermarkets. Since the latter is the main sales channel of chicken meat for consumers, the ACM held that the restrictive effects would be appreciable. The agreement would also have cross-border effects, because chicken meat from other EU member states not in compliance with these standards could no longer be purchased and sold by participating Dutch supermarkets.

The ACM held that the proposed initiative would appreciably restrict competition with respect to the sale of chicken meat to consumers and could not benefit from the exemption from the cartel prohibition.

(ii) Coal plant closure agreement
On September 26, 2013, the ACM held that the planned agreement between electricity generators to close five coal-fired power plants infringed competition law. This agreement was one of many elements of the Social and Economic Council of the Netherlands’ Energy Agreement for Sustainable Growth. The objective of the agreement was to help make energy supply in the Netherlands and the Dutch economy more sustainable.

However, the ACM held that the agreement would reduce production capacity as the undertakings involved would have less capacity to produce energy. The agreement would lead to the closure of production capacity amounting to approximately 10 percent of total production capacity available in the Netherlands, with the likely result that capacity with a higher cost price per unit of production would have to be utilized, given a certain level of demand, which would lead to an upward pressure on prices.

WAY FORWARD?
On July 4, 2019, the Dutch Government submitted a legislative proposal regarding sustainability initiatives to the Dutch House of Representatives.10 The proposal aims to encourage the collaboration between undertakings to reach sustainability goals while preventing the cartel prohibition from impeding the development of sustainability initiatives.

The proposal would allow parties to propose sustainability initiatives to the relevant Dutch minister and request the initiative to be translated into regulation by ministerial decree. The initiative would then become a legal obligation to be observed by companies, removing it from the sphere of cartel prohibition (exception légale).

The Dutch Council of State has criticized the proposal for removing the adoption of potentially far-reaching regulation from the control of the legislator, which, under the current proposal, will not be able to assess the necessity, proportionality and value of sustainability initiatives regulated by ministerial decree. It therefore remains to be seen whether the proposal will successfully pass the Dutch House of Representatives and, afterwards, the Dutch Senate. However, the proposal demonstrates that sustainability has become such a high priority for the Dutch government that it is willing to limit the scope of the cartel prohibition for this purpose. This is a clear step beyond previous efforts aimed at reconciling competition law and sustainability initiatives. Should the legislative proposal be adopted, it will be interesting to observe whether other jurisdictions will follow the Netherlands’ example.

9 Dutch Competition Authority’s assessment of 26 January 2015, Chicken of Tomorrow; and Economic Bureau of the Dutch Competition Authority’s assessment of October 2014, Economic effects of Chicken of Tomorrow.

Recent developments in Irish merger control

By Darach Connolly

Ireland is a popular destination for investment, taking the largest share of US multinational investment in Europe. As an important hub for international firms doing business in Europe, decision makers are best to be aware of the regulatory aspects of doing business in Ireland. This article looks back on significant Irish merger control decisions of 2019 and trends for 2020.

Who is in charge?
While the Competition and Consumer Protection Commission (CCPC) is the authority with responsibility for merger control review in Ireland, it regularly collaborates with the European Commission and the UK’s Competition and Markets Authority (CMA) on parallel cross-border merger reviews.

In 2019, there was an evident step-up in merger control enforcement, with the CCPC engaging in two of the longest-ever investigations since the modern Irish merger control regime was introduced in 2003. In that time, only three deals have ever been prohibited outright, one of which was later successfully appealed in the Irish High Court. Even where transactions are cleared unconditionally elsewhere, the CCPC is increasingly prone to intervene in pursuit of novel remedies in markets with national or local effects such as in healthcare, food and beverage, real estate, financial and retail services. As explored below, that trend continued in 2019.

Divestment commitment in 3-to-2 laundry deal
In Berendsen (Elis)/Kings Laundry, the CCPC conducted a 336-calendar-day Phase 2 review of a 3-to-2 laundry merger. Although no formal complainant emerged, healthcare and hospitality customers expressed competition concerns about the reduction of potential bidders for laundry services to the CCPC. On completion of the Phase 2 review, the CCPC identified that the deal would raise concerns in the healthcare market, where the merged entity enjoyed a share of 60 to 70 percent.

The detailed, 175-page decision in Berendsen indicates that the parties argued Kings Laundry did not intend to expand in the healthcare market. Relying on internal documentation obtained from the parties, the CCPC preferred to place emphasis on pre-merger statements that suggested Kings Laundry did intend to expand in the healthcare market – even though the merging parties argued such statements were merely “loose talk” – which would in turn hinder the ability of a third player, Celtic Linen, to compete effectively. Ultimately, to address the CCPC’s concerns, Berendsen committed to divest an undisclosed set of contracts for laundry services to healthcare customers to another supplier. Following a market test, the CCPC accepted the remedy and conditionally approved the deal. Interestingly, for the first time in 10 years, the CCPC issued an Assessment, similar to a Statement of Objections at EU level, which required the CPCR to hold an oral hearing and allow the parties access to the CCPC’s case file.

Behavioral commitment obtained for live event deal
Another significant deal, LN Gaiety/MCD Productions, concerned a major tie-up between two major music promoters and live event organizers in which the CCPC conducted a 326-calendar-day Phase 2 review. Relevantly, the parent company of LN Gaiety, Live Nation, also operated Ticketmaster, a significant provider of ticketing services with an estimated 60- to 90-percent share of live music ticketing in Ireland. The CCPC was concerned that the merger might impact competition for ticketing services, the promotion of live events and the operation of live event venues in Ireland. To address the CCPC’s concerns, the parties submitted a variety of behavioral commitments to ensure the separation of the Ticketmaster business. Key among these was a commitment for LN Gaiety to put in place an information firewall to prevent certain information about upcoming artist promotion by independent promoters being shared with MCD. Further, MCD and Ticketmaster committed to contract for ticketing services on an “arm’s length” basis. Finally, the parties committed (i) not to refuse to provide live events to a venue if it chooses to use ticketing services other than Ticketmaster and (ii) to tell the CCPC of any proposal to acquire control of a live music festival or operator in Ireland, including for below-thresholds deals.

The merger control process in LN Gaiety was made more complex by the fact that, since January 2017, the CCPC had been investigating the ticketing sector under sections 4 and 5 of the Irish Competition Acts (equivalent to Articles 101 and 102 TFEU). To further complicate matters, the UK’s CMA conducted a Phase 2 review of the deal, which somewhat unusually focused in part on the effect of the transaction in Ireland. Relying on a critical
diversion analysis to calculate the minimum proportion of lost business for ticketing services that would have to switch from a competitor to MCD to make a foreclosure strategy profitable to Live Nation, the CMA concluded that Live Nation would not have an incentive to put a foreclosure strategy in place and cleared the transaction unconditionally.

**Vertical remedies increasingly in vogue**

In addition to the input foreclosure concerns identified in **LN-Gaiety/MCD Productions**, the CCPC subjected two Irish mergers to an extended Phase 1 review on the basis of vertical concerns. This procedure allows the CCPC to request information from the merging parties during the 30-working-day review period in Phase 1 and, once responded to, has the effect of restarting the review process. In each case, the CCPC accepted behavioral commitments to remedy the vertical concern.

First, in **Pandagreen/Knockharley Landfill and Natureford**, the CCPC engaged in a 213-calendar-day review of the proposed acquisition of certain landfill sites by Pandagreen, a waste collector and processor. The CCPC estimated that the deal would allow Pandagreen to control in excess of 50 percent of the non-hazardous waste recovered in the Greater Dublin Area, raising concerns that Pandagreen would have the ability and incentive to deny rival waste collectors access to certain landfill sites and raise costs for competitors. To address the concerns, Pandagreen committed to a novel access remedy by (i) reserving waste recovery and disposal capacity at the Knockharley landfill site for third-party use and (ii) capping its recovery and disposal usage volume at Ballynagran, another landfill site with which Pandagreen had a long-term supply agreement, at pre-transaction levels. While the remedy appears attractive, monitoring will be by way of self-certification to the CCPC.

Second, in **Formpress Publishing (Iconic)/Assets of Midland Tribune**, the CCPC conducted a 154-calendar-day review of a media merger that raised vertical concerns in relation to placing advertising in local newspapers. In particular, Mediaforce, the parent company of Formpress, already held “a very strong position” in the market for placing advertising in local newspapers. The CCPC was concerned that Formpress would (i) be able to discriminate against the placement of advertising in competing local/regional newspapers and (ii) share competitively sensitive information about competing newspapers. To address these concerns, Mediaforce agreed to enter a non-discrimination commitment and a management separation and non-disclosure of information commitment. Unlike in **Pandagreen**, an independent trustee was appointed to monitor compliance with the commitments.

**CCPC joins global trend of enforcers tackling procedural breaches**

In the wake of a string of recent enforcement actions by the Commission for procedural breaches of the EU Merger Regulation, in 2019 the CCPC secured the first-ever criminal prosecution for a “failure-to-file” infringement related to the acquisition of a motor dealership in December 2015. The deal came to the CCPC’s attention after the merging parties approached the CCPC about the completed transaction in August 2017. Following consultation, the parties notified the deal and it was later cleared in February 2018. Subsequently, the CCPC referred the case to the Irish Director of Public Prosecutions (DPP). This is because the CCPC is not currently empowered to impose civil or criminal fines, although this is expected to soon change following implementation of the ECN+ Directive. The DPP prosecuted the case in the District Court and both the buyer and target were ordered to pay a €2,000 contribution to the CCPC costs and a €2,000 charitable donation.

A second, more recent case has been investigated for breach of the Irish standstill obligation. This rule requires merging parties to await approval from the CCPC before completing a transaction. In January 2020 in the case of **DMG Media/JPI Media**, the CCPC published a press release that stated DMG Media had unlawfully completed its £50 million acquisition of JPI Media on the same day it notified the CCPC, and that the transaction was consequently void under the Irish Competition Acts 2002-2017. In March 2020, the CCPC unconditionally approved the deal, although it repeated that, in its view, the acquisition was void due to implementation prior to clearance. It is not yet clear whether the CCPC plans to further investigate the case or whether the parties may simply re-execute the deal paperwork, given that the target media business is primarily active in the UK and not in Ireland.

Given that DMG Media publishes newspapers in Ireland, it is worth noting that Ireland operates a mandatory merger notification regime for media mergers – which can unsuspectingly capture non-Irish-centered deals. A “media business” is defined broadly to include the publication of newspapers or broadcasting of television content. A “media merger” occurs where at least one of the merging firms operates a media business in Ireland, i.e., has an office or branch in Ireland or has sales of more than €2 million in Ireland. In addition to mandatory review by the CCPC, media mergers require notification to the Minister for Communications, Climate Action and the Environment.
As well as review in Ireland, the DMG Media/JPI Media deal is facing a parallel review in the UK. In December 2019, the CMA imposed hold-separate obligations on the parties. Later, in January 2020, the UK Secretary of State for Digital, Culture, Media and Sport issued a Public Interest Intervention Notice (PIIN), which effectively requires the CMA to review and report on jurisdiction and competition matters, and Ofcom to review and report on the plurality of views in newspapers. The case again highlights the important consequences for transactions triggering mandatory merger obligations.

CCPC seeks to reduce burden on business

In an effort to capture larger, more competition-sensitive transactions, on January 1, 2019, Ireland introduced higher financial thresholds for mandatory notification to the CCPC. The previous lower thresholds captured many “no issue” deals and raised concerns about unnecessary administrative burden for business. The new thresholds are met where two firms generate combined turnover of no less than €60 million in Ireland, and each firm generates no less than €10 million turnover in Ireland. In line with the CCPC’s goal, the number of transactions notified since introduction of the revised thresholds in 2019 (47) has decreased by 52 percent compared to 2018 (98). Based on current deal flow, 2020 is likely to generate a similar level of notifiable transactions as reported in 2019.

Moreover, in June 2019, the CCPC announced a new simplified merger notification procedure to further reduce “red-tape” for business. Following consultation on draft guidelines in late 2019, the new regime will be introduced in Q1 2020 for mergers that clearly do not raise competition concerns. Similar to the Short Form CO regime at EU level, this marks the first time the CCPC will introduce a streamlined approach to notified mergers. Under the new simplified regime, the CCPC will allow parties to submit a shortened merger notification form, effectively absolving the merging parties from the obligation to complete parts of section 4 of the existing notification form (ie, detailing areas of overlap and contact details for the merging parties’ major customers, suppliers and competitors). The simplified merger procedure will be available where (a) the merging parties are not active, or potentially active, in the same product or geographic market, on a horizontal or vertical basis; (b) the merging parties are active in the same horizontal product or geographic market but their combined market share is less than 15 percent, or on a vertical basis, the market share of the merging parties in each upstream or downstream market is less than 15 percent; or (c) where a firm with joint control is to acquire sole control of a business. In a variety of scenarios, the CCPC has reserved the ability to revert to the standard merger notification procedure, for example, where the transaction occurs in an already concentrated market, concerns a maverick firm or concerns an important pipeline product in the digital or pharmaceutical sectors.

2020 outlook

After three years of uncertainty, the UK will now leave the EU at the end of 2020. Ireland will remain. While that brings challenges for the Irish economy, 2020 promises decision makers a better understanding of the regulatory implications of Brexit in light of the soon-to-be negotiated future EU-UK relationship. Although the precise mechanisms are not yet clear, it can reasonably be expected that the CCPC will continue to engage closely with its UK counterpart, the CMA, on future cross-border merger cases, even if formally the CMA is no longer a member of the European Competition Network (ECN). Another agenda item for 2020 is the outsized role played by the Irish Data Protection Commissioner, Helen Dixon, given her prominent role as supervisory authority for numerous technology companies established in Ireland with EU-wide activities. This will be interesting to observe, particularly in relation to data-intensive mergers which have faced calls for tighter scrutiny from other data protection authorities in Europe. Finally, the impact of higher thresholds and a new simplified procedure in Ireland is likely to focus CCPC resources on a few, more complex cases – allowing no issue deals to proceed smoothly, yet reserving increased scrutiny for transactions raising competition concerns.
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Global merger control handbook

Why?
With an increasing number of cross-border mergers and strategic corporate reorganizations in today's fast-changing global environment, an understanding of – and compliance with – the applicable regulations and requirements is of vital importance.

Merger control regulation has greatly evolved and expanded in recent years:

- In many jurisdictions, the substantive merger test has evolved beyond a straightforward dominance assessment based on market shares, to a more comprehensive and inclusive assessment of the transaction's impact on the requirements of dynamic competition
- The nature and the number of variables taken into account by competition authorities have increased, making it more complex to assess the likely outcome of a merger review
- In some jurisdictions, the rules of merger procedure have evolved into a substantial risk for the parties to a notifiable transaction, and
- Even fairly straightforward mergers and acquisitions may require numerous clearances around the world today, with each filing being subject to different procedural requirements and substantive tests in different countries including, in some cases, assessment on factors other than purely their impact on competition

What it is?
The Global Merger Control Handbook is a comprehensive three-volume handbook, which is available in hardcopy and in digital formats (e.g. pdf and ebook), and is designed to serve as a helpful reference guide for in-house counsel and other individuals involved in mergers and corporate reorganizations, when analyzing merger control requirements and navigating the merger clearance process in the 55 jurisdictions covered in the book.

The handbook's key features include:

- A detailed overview of relevant local rules, methodology, process and timing requirements in more than 50 jurisdictions across Europe, North and South America, Africa, the Middle East and Asia Pacific
- Authored by competition and antitrust lawyers in local offices at DLA Piper and a number of its relationship firms, providing on-the-ground guidance on the regulatory issues involved in merger control
- A supporting dedicated Global Merger Control Handbook webpage with regular updates on the latest relevant developments in each of the jurisdictions covered in the handbook

For our clients
Additional information on this publication can be found at https://www.dlapiper.com/en/us/insights/publications/2019/02/global-merger-control-handbook/

Should you have any questions in relation to the handbook, please reach out to your regular DLA Piper lawyer or the authors of the respective chapters.