# Advanced International Competition Law 2021 Conference – 26th May 2021

# Major events and policy issues in competition law on the past 12-months

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***Speaking notes***

Good morning from Bristol.

When I was asked give a *tour d'horizon* on major events and policy issues in the last 12 months in the EU and UK, my first thought was – "will there be enough to speak about?" When Covid first struck last year, I and many others thought that with working from home, there would be less competition enforcement and less new policy.

But, we all quickly got used to the new environment and that hasn't been the case. We've all worked remotely, investigations and litigation have continued remotely and there have been many new policy initiatives – digital markets, competition and sustainability, to name but two. Then there's been Brexit!

So, the *horizon* is vast and my *tour* will inevitably be brief and incomplete. I can merely try and set the scene for our discussions over the next two days.

Many of the cases and events I will mention could merit an entire conference of their own, or at least a panel session. So, we are fortunate that I will be followed over the next two days by numerous expert panels that can discuss and examine these in more detail than I can, including anything that I have to miss out.

**SLIDE 2 – BREXIT AND RELATED ISSUES**

On Christmas Eve last year, most of us were at home for the festive period, when the Trade and Cooperation Agreement was concluded between the UK and EU to govern their future relationship. It took effect at the end of the transition (implementation) period on 31 December 2020.

The Withdrawal Agreement continues to be relevant to competition lawyers.

First under article 92, existing Commission anti-trust, merger control and state aid investigations as at 31 December 2020 will continue, with the Commission adopting decisions at the end of those investigations.

Second, under Article 93, the Commission can continue to open investigations into state aid granted by the UK before the end of the transition period and can do so until 31 December 2024

Third, under Article 95

- Commission Decisions adopted before 31 December 2020 addressed to the UK or UK companies/individuals remain binding on and in the UK
- So too do decisions adopted by it after this date in on-going investigations
- Appeals against these decisions must be made to the Court of Justice
- The Commission can enforce commitments given or remedies imposed in merger and antitrust decisions

Fourth, the State aid rules continue to apply in certain circumstances. I'll return to this later.

Turning to the TCA itself. It contains "level playing field" provisions for competition policy and subsidy control. The definitive TCA was ratified at the of April. New article numbers were given to replace the temporary ones used at the end of December. So check them!

In competition law the parties' obligations are to have and enforce effective competition law. So, little change in practice in EU or UK.

TCA – State aid/subsidy control – significant changes, since – in the absence of a UK subsidy control regime, the TCA's rules have had effect in UK law. Will return to this later.

Changes in UK competition law

- Significant and detailed revisions to Competition Act 1998, mostly in an SI - Competition (Amendment etc.) (EU Exit) Regulations 2019
- Importantly, existing rights and obligations under arts. 101 and 102 as at 31 December 2020 continue to have effect – therefore, can continue to bring damages actions for breaches of arts 101/102 before that date (even if Commission infringement decision is after it)
- CMA cannot apply arts 101/102 – existing investigations continue under Chapter I and II prohibitions
- Under s.10 Competition Act 1998 agreements meeting requirements of EU block exemption had a "parallel exemption" from the Chapter I prohibition. These are now "retained exemptions" with EU regulations now "retained block exemption regulations". These continue to apply until expiry. SoS has made changes to reflect UK circumstances – so check using correct version!
- Interpretation – s.60 governing principles – revoked and replaced by s.60A: GCEU and CJEU decisions made before 31 December are binding in applying CA 1998; those after are not. Regard to be had to Commission decisions and guidance from before that date, but not binding. Various exceptions. CMA has published guidance. The Tribunal considered its duties under S.60A in *Generics*

*UK* including consideration of possible application of exceptions. So, possibility of substantive divergence between UK and EU competition law

**SLIDE 3 – ANTI-COMPETITIVE AGREEMENTS**

We have had a number of important judgments concerning "pay for delay" agreements.

In a series of judgments, including *Lundbeck v Commission* (C-591/16P) EU:C:2021:243 and *Ranbaxy v Commission* (C-586/16P) EU:C:2021:241, the Court of Justice confirmed that pay for delay agreements between a patent owner and generics manufacturers infringe art 101 by object.

In *Lundbeck* the Court also confirmed that the class of agreements that may restrict competition by object is not closed: even if the same type of agreement has not previously been found to be unlawful, an agreement will be an object restriction if, from its specific characteristics, it is by its very nature injurious to competition. The generics manufacturers were potential competitors as the patents in question were not an insurmountable barrier entry as the generic manufacturers were prepared to challenge the patent's validity and take the risk of infringement actions. The Competition Appeal Tribunal reached the same findings in its supplementary judgment in *Generics UK v CMA* [2021] CAT 9 (concerning paroxetine): the very substantial transfers of value to the generics manufacturers were evidence of restrictions of competition by both object and effect, given they led to higher prices and profits.

In *International Skating Union v Commission* (T-93/18) EU:T:2020:610 (appeal pending C-124/21P) the General Court held that disciplinary measures imposed on speed skaters who competed in unauthorized events infringed art 101 by object. They were not objectively justified as they protected ISU's economic interests as an organizer of its own events and were not imposed for sporting integrity and regulatory reasons, and the penalties imposed on skaters were disproportionate.

In *Lexon v CMA* [2021] CAT 5, another pharmaceuticals case, the Competition Appeal Tribunal held that an exchange of information between competitors will infringe competition by object if it has no legitimate commercial justification and reduces uncertainty between the participants. Where the exchange does have a commercial justification, it may still restrict competition by effect, which requires a case by case analysis

In November 2020, the CMA fined BGL – operator of the Compare the Market price comparison website – nearly £18m for using wide MFN clauses in agreements with home insurers that prevented the insurers from offering lower prices on other PCWs. This reduced competition both between PCWs and between insurers, leading to higher commission fees for CTM and higher premiums for home owners. They thus infringed art 101 and the Chapter I prohibition by effect. An appeal is pending before the CAT and will be heard in November this year.

The Court of Justice has handed down two important judgments on parental liability.

In *Goldman Sachs v Commission* (C-595/18P) EU:C:2021:73, a private equity manager was liable for infringement by a portfolio company in which it held all the voting rights, even if its shareholding was lower than 100%.

In *Deutsche Telekom v Commission* (C-152/19) EU:C:2021:238, DT was jointly and severally liable for Slovak Telecom's abuse of a dominant position with a shareholding of 51%, as its senior managers were directors of ST and were involved in developing its commercial policy, such that it exercised decisive influence.

**SLIDE 4 – ANTI-COMPETITIVE AGREEMENTS (2)**

Covid has obviously been the biggest global issue of the last year. How competition law should be applied in the pandemic has been considered by the Commission, the CMA and numerous other competition authorities around the world.

The Commission/European Competition Network and CMA have both published guidance. along the same lines, as has the International Competition Network. The Commission has also published guidance in its April 2020 "Temporary Framework Communication".

A common theme in all guidance is that temporary cooperation or collaboration between competitors to address the crisis by increasing production and optimizing supplies of critical products would not infringe competition law, if it did not go further or last longer than strictly necessary to avoid shortages or ensure security of supply. This could include sharing information on capacities, stocks, demand etc and coordinating/allocation production of scarce, critical or essential goods and services, including medicines, equipment to test for/treat Covid and food. However, the pandemic was not an excuse for crisis cartels: products must remain available at competitive prices.

The Commission has also published two "comfort letters", reflecting these principles.

*Medicines for Europe* (April 2020): coordination of capacity and production of essential intensive care medicines.

*Matchmaking* (March 2021): match-making event and information exchanges relating to vaccine production.

In particular, the sharing of confidential information would be limited to that which was indispensable and in a forum established by the Commission.

Briefly on enforcement:

> *CMA v Martin* [2020] EWHC 1751 (Ch) – first contested director disqualification application: director disqualified for 7 years – was aware of employee involvement in price-fixing cartel, but took no steps to stop it.
>
> *FP McCann* v CMA [2020] CAT 28– detailed review by CAT of application of CMA Fining Guidelines
>
> *Roland v CMA* [2021] CAT 8 – a salutary reminder to parties settling CMA antitrust investigations that they risk losing their settlement discount if they appeal against penalty. Fine increased by about £1m.
>
> *Yamaha/GAK (musical instruments, online RPM)* (17 July 2020) – first time retailer fined for participating in RPM – had actively complained about and monitored rivals non-compliance, and ignored a CMA warning letter to change its practices

**SLIDE 5 – ABUSE OF A DOMINANT POSITION**

*Lundbeck* and *Generics* confirm that, as well as infringing art 101, pay for delay agreements involving a dominant firm will also constitute the abuse of a dominant position. However, in *Generics*, the CAT quashed the imposition of a separate penalty on GlaxoSmithKline, as at the time the agreements were entered into there was uncertainty as to the correct approach to market definition and thus as to whether GSK had been dominant.

There have been several important cases on exclusionary abuses related to access to infrastructure, including *Slovak Telecom* and *Lithuanian Railways*.

*Deutsche Telekom v Commission* (C-152/19P), *Slovak Telecom v Commission* (C-165/19P) EU:C:2021:238, 239: upholding finding of abuse of dominance through the imposition of unfair terms for access to unbundled local loops leading to a margin squeeze. The Court held that there was no need for the infrastructure to be "indispensable" in the sense applied in the "essential facilities" cases (such as *Bronner*), since access was being provided, albeit on unfair terms, under sector specific regulation as Slovak Telekom had significant market power.

*Lietuvos geležinkeliai v Commission (Lithuanian Railways)* (T-814/17) EU:T:2020:545 (appeal pending C-42/21P): finding of abuse from dismantling of railway track between Lithuania and Latvia. The list of abusive practices laid down in the text of art 102 is not exhaustive. There was no objective justification for the removal,. Again *Bronner* case law not applicable, due to regulatory obligations to provide access and to keep infrastructure in good repair, so no need to show the track was "indispensable", merely that its removal would have anti-competitive effects on the downstream market for rail freight transport services.

*Royal Mail v OFCOM* [2021] EWCA Civ 669: Court of Appeal dismissed appeal against finding that differential pricing for last mile delivery service was abusive. OFCOM was not required to show that this conduct would have eliminated as "as efficient competitor", since the AEC test is only one means of establishing abuse.

Two cases of alleged exploitative abuse were settled.

In *Aspen* (commitments given to EC, 10 February 2021), the Commission accepted commitments to reduce prices of off-patent medicines by an average of 73% for 10 years and a commitment to supply them for five years, after which Aspen would either continue to supply them or authorize others to market them. This reversed price increases of several hundred percent that had led to very high profit margins.

In *Essential Pharma* (commitments given to CMA, 18 December 2020), the CMA accepted commitments to not to withdraw a bipolar drug for 5 years and to supply it at a price agreed with the UK health service. This case seems to have basically been a pricing dispute between a monopoly supplier and a monopsony purchaser with the latter initially having sought to impose a price that the supplier considered to be unprofitable.

In a second *Slovak Telecom* case (*Slovak Telekom* (C-857/19) EU:C:2021:139), the Court of Justice gave important guidance on the allocation of jurisdiction between the Commission and NCAs. In particular, where NCA brings an action before a national court to enforce arts 101/102 it must, once the Commission opens proceedings under

Regulation 1/2003, must withdraw its action if it covers the same alleged anti-competitive practices.

In *Qualcomm v Commission* (C-466/19P) EU:C:2021:76, the Court of Justice held that the Commission has broad powers of investigation and it is for it to decide what information is necessary for its investigation.

**SLIDE 6 – PRIVATE ENFORCEMENT IN THE UK**

As mentioned earlier, the UK courts can continue to hear damages actions for breach of arts 101 and 102 committed before 31 December 2020, even if the Commission decision is adopted later, given the provisions of arts 92 and 95 of the Withdrawal Agreement. Therefore, existing claims can continue and new ones brought.

The Supreme Court has handed down important judgments on the binding nature of Commission decisions and EU court judgments.

In *Sainsburys Supermarkets v Visa, Mastercard* [2020] UKSC 24 (another case relating to multilateral interchange fees), the Supreme Court considered that it was bound by the Court of Justice's earlier judgment in *Mastercard*, in which the Court of Justice upheld the Commission's decision that the MIFs constituted a restriction of competition by effect. This was because the factual basis of that judgment was the same as in the proceedings before the Supreme Court. The Supreme Court also confirmed a party seeking to rely on article 101(3) must provide robust and cogent empirical evidence that the agreement has benefits/efficiencies that outweigh the detriments caused by it. The benefits must be for the consumers in the same market as that in which the detriments arise. Finally, in considering "pass on", it is not necessary to calculate the precise amount passed on: the "broad axe" principle applies.

In *Secretary of State for Health v Servier* [2020] UKSC 44*,* the Supreme Court held that the principle of *res judicata* does not apply where an appeal against a GC judgment is pending before the CJEU. However, in any event, the GC's judgment in question annulled the finding of an infringement of art 102, so even if its judgment had been definitive, the factual findings made by the GC would not be binding in a claim for damages brought under art 101.

The Supreme Court also handed down its judgment in *Merricks v Mastercard* [2020] UKSC 51, in which it laid down (by a majority) the correct test to be applied by the Competition Appeal Tribunal when hearing an application for certification of the class representative in collective proceedings. In making a "collective proceedings order", the Tribunal must determine whether the claims are "suitable" to be brought in collective proceedings, this means suitable relative to individual claims and individual damages awards. The CAT cannot decline to make a CPO because it may be difficult to calculate damages, due to incomplete data and difficulties in interpreting it: the court must do its best to calculate damages in collective proceedings, applying its "broad axe", as it would in individual claims. At the certification stage, there is also no need for the proposed method for distributing aggregate damages to enable the calculation of individual losses – there is no need to calculate individual loss.

The *Merricks* case was remitted to the CAT to reconsider the application for a CPO. Judgment is pending. Judgment on CPOs is also awaited in two related claims

concerning *Trucks*, and in the *Rail Fares* cases. Hearings are pending in the *FOREX, Car Carrier* and *BT Line Rental* collective claims.

**SLIDE 7 – MERGER CONTROL**

Despite the pandemic, authorities have remained busy in the merger field, with both investigations and policy initiatives. So too have the courts.

On the merger policy side, key initiatives include

- Multilateral working group for pharmaceutical mergers – US agencies, Canadian Competition Bureau, DG COMP, CMA – this will likely lead to a new and aggressive approach to reviewing pharma mergers, possibly with new theories of harm, analysis of effects on innovation and remedies. FTC is leading a public consultation, which is open until 25 June
- Second, CMA, Bundeskartellamt and Australian ACCC have made a joint statement, on the need for rigorous and effective merger enforcement, particularly in dynamic and fast-paced markets and where incumbents acquire smaller players. Covid-19 will not be an excuse for allowing anti-competitive mergers, so there will be no relaxation of standards. No presumption that mergers are efficiency-enhancing: parties generally over-estimate efficiencies and pro-competitive outcomes. Preference for structural remedies.
- Third. DG COMP – new guidance on art 22 referrals: Commission will accept referrals of mergers falling below national merger control thresholds, to capture "killer acquisitions" of small, nascent and innovative businesses, including completed mergers. This will increase merger reviews and uncertainty for merging parties. DG COMP is investigating Illumina's acquisition of Grail (a world leader in genome sequencing), after referral by the French Autorité de la concurrence. Illumina's application for interim relief was rejected by the Conseil d'Etat. A separate challenge is pending before the General Court.

The General Court has handed down two important judgments in appeals challenging merger prohibitions.

In *Heidelberg Cement v Commission* (T-380/17) EU:T:2020:471, it dismissed a very wide-ranging appeal. It provided important guidance on the concept of "undertakings concerned" under the Consolidated Jurisdictional Notice when an acquisition is effected through an existing joint venture: it is necessary to look at the economic reality of the transaction to determine the undertaking concerned.

In *CK Telecoms v Commission* (T-399/16) EU:T:2020:17 (appeal pending: C-376/20P), a strong five member General Court over-turned the prohibition of the Three/O2 mobile merger in the UK. Amongst several key findings were:

- The "significant impediment to effective competition" test does not lower the threshold for prohibiting a merger: unilateral effects of a horizontal merger must be equivalent to those from the creation or strengthening of a dominant position
- In a unilateral effects case, to be an "important competitive force" a party must stand out from its competitors and this must be shown with clear evidence
- Where the Commission wants to rely on "closeness of competition" between the parties, it must show that they are particularly close competitors

This is a hugely important case for merger control. It sets the bar for prohibiting a merger high. An appeal by the Commission is pending.

In the UK, in *JD Sports v CMA* [2020] CAT 24 we saw a rare successful challenge to a CMA merger prohibition, the CAT finding that the CMA had failed to obtain evidence on and consider properly the impact of the pandemic, even though this started only at the very end of its investigation timetable and after its provisional findings – to prohibit the merger – had been published. The CMA was refused permission to appeal and it is considering further the merger on remittal.

Facebook were less successful in challenging the CMA's imposition of an Interim Enforcement Order: *Facebook v CMA* [2021] EWCA Civ 701. The Court of Appeal confirmed that the CMA has a broad jurisdiction in adopting IEOs and can use a standard form template. Whilst parties can request derogations they must cooperate with the CMA and provide all information necessary to enable it to make a decision. Facebook had not done do.

As you can see on the slide, DG COMP and the CMA have been active in challenging mergers, with a number of mergers being approved subject to significant remedies, or being abandoned in Phase 2.

Not on the slide is the CAT's judgment last Friday in *Sabre v CMA* [2021] CAT 11, in which it dismissed a challenge to the CMA's assumption of jurisdiction under the share of supply test. The CMA has been expansive and aggressive in applying this test. The CAT confirmed that the CMA has a broad discretion in applying the test, including in defining the goods or services to be used, and when a party supplies in the UK, which can be without charge. The increment in share from the merger can be very small

**SLIDE 8 – FOREIGN INVESTMENT CONTROLS**

Foreign investment controls seem all the range at the moment. These are in addition to the usual merger reviews on competition grounds. Many are modelled on the US CFIUS review system and are targeted primarily at Chinese acquisitions.

The EU Foreign Direct Investment Regulation is now in force. It provides a framework for screening non-EU Foreign Direct Investment on national security and public order grounds, and sets out minimum standards that national regimes must meet. Screening remains a matter for national authorities under their national laws, taking account of the framework, but with coordination of national reviews and the sharing of information between national authorities. The Commission cannot take final decisions, but may issue opinions to national authorities. It must do so if requested by one third of Member States (i.e. nine). It may do so up to 15 months after a completion of a transaction. The Regulation may encourage more Member States to adopt FDI control regimes.

In the UK, the National Security and Investment Act 2021 has received Royal Assent and will come into force later this year. However, it has retrospective effect from last November. Various trigger events apply – crossing 25%, 50%, 75% thresholds (shareholding or voting rights), as well as acquiring material influence (if below 25%). There are no turnover or share of supply thresholds. It may apply to some "foreign to foreign" deals. Deals will be reviewed by the Investment Security Unit, within BEIS. Some transactions will be subject to mandatory notification and cannot be closed until

approved. Others can be notified voluntarily, but can be reviewed even if not notified. Further secondary legislation and guidance is awaited.

**SLIDE 10 – STATE AID AND SUBSIDY CONTROL**

In the UK we have a new term to learn: "subsidy control" is in, state aid is out (well, almost). It's all a bit Animal Farm, if you ask me…

Why do I say "well, almost" re State aid? Because it hasn't entirely gone away, despite Brexit, for three reasons.

> First, the Commission can continue to investigate State aid granted in the UK before 31 December 2020, including by launching new investigations into non-notified aid.
>
> Second, the State aid rules continue to apply to financial support under EU structural funds in which the UK continues to participate, until their expiry – ERDF, ESF
>
> Third, under art 10 of the Northern Ireland Protocol, the EU state aid rules apply to aid for goods and electricity, where it is liable to affect trade between Northern Ireland and the EU. Whilst not limited to aid granted to beneficiaries in Northern Ireland, the UK Government considers that only exceptionally will aid to businesses in Great Britain fall within art.10. The Commission disagrees: it considers art.10 can be met where a business either engages in NI/EU trade or has customers that operate in or export from NI.
>
> Fourth, aid granted before 31 December 2020 may continue to be challenged before the UK courts, as may aid granted after then that is subject to the EU rules

As yet the UK has no domestic subsidy regime. The Government consulted on the new regime earlier in the year. It has not yet published its response or its definitive proposals. A Subsidy Control Bill was announced in the Queen's Speech, but nothing has yet been published. So, we don't know exactly what the new "bespoke" UK regime will look like. However, it won't be like the EU system and won't include a prior review system. Quite what role the CMA (as independent authority) will play is unclear. Challenges will probably need to be brought in the courts. Hopefully, there will be a system of block exemptions, to give some degree of legal certainty.

So, what does the UK have at the moment?

Articles 363 to 375 of the Trade and Cooperation Agreement cover subsidy control. As with the competition section, the concepts used are at least similar to those used in EU law, even if the terminology is different, including as to what measures are considered to be "subsidies" – i.e. financial assistance from public resources that confers an economic advantage that is specific and could affect trade or investment between the UK and EU.

Article 366 sets out six key principles to be respected in awarding a subsidy, including that it is proportionate, remedies a market failure and has overall positive effects. These articles have effect in UK law under s.29 of the European Union (Future Relationship) Act. They must therefore be respected by public authorities in granting subsidies. Legal challenges based on them can be brought by way of judicial review. BEIS has published

guidance, but is very general. Therefore, awarding authorities and beneficiaries alike are often sticking closely to the terms of EU law, in particular the General Block Exemption Regulation when assessing the compatibility of subsidies with the TCA.

**SLIDE 11 – STATE AID AND SUBSIDY CONTROL (2)**

Vast sums of public money have been spent in all Member States and the UK. In March 2020 the Commission adopted a Temporary Framework for the application of the State aid rules for public support to businesses affected by the pandemic, in particular those whose viability would be threatened due to a liquidity shortage. This has been amended five times (last on 28 January 2021) and extended until 31 December 2021. Hundreds of public measures have been approved under the Temporary Framework, as well as under other Treaty articles -arts 107(2)(b), 3(b) and 3(c).

As at 21 May 2021, the list of approved measures ran to 44 pages of A4.

Some Commission decisions have been challenged in the EU courts, mainly by Ryanair challenging recapitalization and other support measures for EU airlines. It unsuccessfully challenged aid to Finnair, Scandinavian Airlines, Air France and Spanish airlines, but was successful in challenging aid to KLM and TAP, due to inadequate reasoning by the Commission. No doubt it will now adopt better reasoned approval decisions.

The EU Courts have also adopted several important judgments in the field of State aid. These are listed on the slide. The Polish and Hungarian cases (*Commission v Poland* (C-562/19P) EU:C:2021:201, *Commission v Hungary* (C-596/19P) EU:C:2021:202, as well as the Amazon tax subsidy case (*Luxembourg v Commission* (T-816/17) EU:T:2021:252) contain useful guidance on when a measure will be "selective" and thus an aid measure. In each case, the Commission's finding of aid was annulled. However, its finding of aid to Engie was upheld.

In the *Hinkley Point* case (*Austria v Commission* (C-594/18P) EU:C:2020:567), the Court of Justice dismissed a challenge to the Commission's approval of public support measures for the new nuclear power station being built in the UK. The court confirmed that the construction of nuclear power plants may benefit from state aid, although the Commission cannot approve aid that contravenes EU environmental rules. There is, however, no requirement in the State aid rules that to be approved aid must pursue an objective of common interest and it is for each Member State to choose its own energy mix, which can include nuclear. State aid policy cannot be used to influence this.

Finally, the Commission has published a draft regulation that would, if adopted, give it the power to review and take action against subsidies by non-EU governments that could distort competition within the internal market, whether in M&A transactions or public procurement procedures. Mandatory notification would be required in some cases.

**SLIDE 13 - COMPETITION LAW AND CLIMATE CHANGE**

**SLIDE 14 – DIGITAL MARKETS**

A lot has been said and written about how competition law should be applied in the fight against climate change and in controlling the behaviour of dominant gatekeepers in digital markets.

The last two slides summarize recent policy developments in these areas. No doubt they will be considered and discussed in great detail during the sessions today and tomorrow.

Thank you for listening!