

June/July 2019

# UK Competition Law Newsletter

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## Highlights

- Supreme Court grants Mastercard permission to appeal in multilateral interchange fee case
- CMA launches market study into online platforms and digital advertising
- CMA publishes report evaluating merger control in digital markets

## CMA Publishes Merger Remedy Evaluation

In June 2019, the CMA published its Merger Remedy Evaluations [Report](#) (the **Report**) – the latest in a series of case evaluations conducted to develop the CMA’s expertise, policy, and practice on merger remedies. The Report notes that its findings will be “*used to inform the way in which the CMA approaches remedy design and implementation in subsequent cases.*” The Report contains useful guidance for parties on the types of remedies that the CMA is prepared to accept or may require.

### A preference for structural remedies

Divestments represent the “*clear majority*” of remedies in UK mergers – only one in six remedies agreed or imposed over the last year were behavioural. Structural remedies are generally considered superior to behavioural remedies “*in terms of their effectiveness, risk profile, and durability.*” The Report identifies three lessons learned from the CMA’s implementation of divestiture remedies.

First, the CMA will carefully consider how the scope of the divestiture package affects the type and number of potential buyers. If the CMA has doubts about the viability of a potential divestiture package, the Report recommends that a “*more onerous*” fall-back remedy should be proposed.

Second, the Report confirms the importance of a thorough purchase suitability assessment. The assessment should include both a “*stress test*” of the buyer’s financial viability to ensure it can withstand changing economic conditions, as well as a detailed examination of the buyer’s intentions, specific plans for the business, and how the purchase fits within its overall strategy. The Report emphasises that the interests of the divested business’s management should be assessed: if the management are opposed to the sale, this increases the risk of an inefficient sale process and makes it more appropriate to use a monitoring trustee.

Third, the Report highlights the importance of the CMA carefully overseeing the divestiture process in line with clearly-defined timetables. Where parties miss milestones, the CMA is more likely to appoint a monitoring trustee. The Report also stresses the importance of including a provision to appoint a

monitoring trustee to sell the divestiture package at no minimum price.

### **Behavioural remedies are suitable in narrowly-defined circumstances**

While expressing a preference for structural remedies, the Report notes that behavioural remedies can provide an effective solution to competition concerns “*if sufficient care is taken over the design and implementation of behavioural remedies and if active and informed monitoring arrangements are put in place.*” The following five elements should be borne in mind when proposing a behavioural remedy.

First, behavioural remedies have a greater chance of being accepted in industries where the pace of change is slow. The Report notes that the behavioural remedies in the *Arqiva* case – where the CMA accepted remedies involving guaranteed price reductions – were effective partly due to the “*stability of the industry.*”

Second, behavioural remedies are more likely to operate satisfactorily where the merging parties compete in a regulated environment and the CMA can delegate aspects of the monitoring to a dedicated regulator. Given the need for ongoing monitoring of behavioural remedies, the Report notes that there is a “*strong benefit of involving either the industry regulator or a third-party monitor to ensure compliance.*” The Report points to its successful behavioural remedy in *Centrica*, where Ofgem had a central role in monitoring the remedies.

Third, like divestiture remedies, the Report highlights the importance of including a credible contingency remedy option to ensure that the parties give effect to a proposed behavioural remedy. This could include enforcement of the remedy by order or the implementation of a more intrusive divestiture remedy.

Fourth, price cap remedies are unlikely to be effective in markets where bidding is involved, because they may result in bids coalescing around the price cap. Price controls can also force firms that are unable to compete with the controlled

price out of the market or deter new entry.

Finally, the Report notes that it is difficult to design behavioural remedies that will be effective indefinitely. At the time of accepting a behavioural remedy, the CMA should be clear that a future event is likely to arise that would remove the need for the remedy.

### **Interim Measures**

The UK merger system is fairly unusual because it does not require mandatory pre-notification: parties can close transactions without receiving clearance. This can give rise to risks for the CMA if, where a merger has already completed before the CMA has carried out its investigation, the parties take steps that might prejudice the CMA from taking remedial action.

The CMA has powers to put in place interim measures to prevent such steps during the course of an inquiry, such as imposing hold separate arrangements, using monitoring trustees, and appointing hold separate managers. The Report notes that the CMA has learned over time to “*put in place stronger interim measures so as to allow effective remedies to be implemented if needed later on.*” The CMA’s recent practice shows its increased readiness to penalise companies for breaching procedural rules consistent with recent action by the European Commission and national agencies in the EU.<sup>1</sup>

The Report’s discussion of past cases likewise emphasises the need for effective and robust enforcement of interim measures – and it notes the problems that can arise from taking too little action. The main risk identified is that firms “*may be able to run the business in such a way as to undermine the effectiveness of a divestiture package.*” The Report therefore notes the importance of putting measures in place to protect against this and to ensure that compliance with such measures is actively monitored. Overall, the Report – together with the CMA’s recent practice – suggests that the CMA will continue to take a robust approach on interim measures and to closely scrutinize compliance with its procedural rules.

<sup>1</sup> See [UK Competition Newsletter, February 2019, UK Clamps Down on Gun Jumping](#).

## Conclusion

The Report continues the CMA's work in reviewing past cases with a view to improving its future decision making. It contains some valuable insights for parties looking to design suitable remedy packages in the merger context. The Report notes that, as the UK leaves the European

Union, the CMA's workload will increase and this will have an additional impact on its remedies work, including a greater need for international cooperation on multi-jurisdictional mergers. The Report considers that the lessons learned from its evaluations "will help ensure that the interests of UK consumers are safeguarded" through this potentially turbulent period.

## Judgments, Decisions, and News

### Court Judgments

***Gutmann v First MTR South Western Trains and another; Gutmann v London & South Eastern Railway.*** On 4 June 2019, the CAT refused an application by two train operators to stay class certification proceedings against them pending the Supreme Court's decision whether to grant permission to appeal in *Merricks v MasterCard*. The CAT refusal was based on its assessment that any risk and potential expenses associated with consequential amendments to pleadings arising from the Supreme Court's final judgment would be insufficient to justify a stay.

***R (on the application of Advanz Pharma Corp) v CMA.*** The case concerns an abuse of dominance investigation by the CMA into the supply of Liothyronine tablets in the UK by Advanz Pharma (Advanz), previously Concordia. Because some of the arguments in the CMA's statement of objections (issued in November 2017) depend on the ongoing cases *Flynn Pharma* and *Pfizer*, Advanz asked the CMA to delay its own case pending final outcomes in those cases. The CMA declined, arguing that its conclusions would be the same regardless of the outcome in those cases. On 5 March 2019, Advanz filed a judicial review claim challenging the CMA's refusal to delay, which was refused by the High Court on 13 June 2019.

***Secretary of State for Health v Servier and others.*** Recent hearings in this case concern the implications of findings made in *Servier's* favour by the EU General Court in *Servier's* appeal of the European Commission's infringement decision against it. *Servier* is seeking to rely on the General Court's factual findings in the UK case. In April 2019, a High Court decision found that not all

factual matters decided in a General Court ruling should be treated as settled in future proceedings (see *UK Competition Newsletter, April 2019*). On 27 June 2019, the Court of Appeal dismissed *Servier's* appeal against the High Court's April decision. The Court of Appeal agreed that the finding that the relevant product market was not limited to perindopril, was binding on the UK Court. But it held that the factors relied on for that assessment were not binding in themselves.

***Achilles Information v Network Rail.*** On 19 July 2019, the CAT ruled that Network Rail illegally enforced its 'RISQS-only' rule on other users of its infrastructure. The policy requires infrastructure users to obtain supplier assurance through the Railway Industry Supplier Qualification Scheme (**RISQS**). Achilles challenged the policy on the basis that competing schemes such as its own were unfairly excluded. The CAT held that the policy was an abuse of Network Rail's dominance and violated the prohibition on anticompetitive agreements.

***Credit Suisse v HRMC.*** On 19 July 2019, the High Court dismissed an action for damages brought by Credit Suisse and others against HM Revenue and Customs. The claim alleged that the bank payroll tax constituted illegal state aid because it unduly favoured banks who paid bonuses outside the period of imposition. The High Court held that Credit Suisse had been unable to establish that a selective advantage was given, as the untaxed banks did not receive better treatment than they would under the old system.

***Merricks v Mastercard.*** On 25 July 2019, the Supreme Court granted Mastercard permission to appeal the Court of Appeal's judgment of April

2019. The Court of Appeal judgment had [allowed](#) Mr Merricks' appeal against the CAT's [refusal](#) to grant him a collective proceedings order in his claim against Mastercard. The claim concerns claims for damages from overcharging resulting from the level of multilateral interchange fees that, it is argued, were passed on to merchants and consumers. See [UK Competition Newsletter, April 2019](#) for more details.

## **Antitrust / market studies**

***CMA Issues Statement of Objections to Estate Agents.*** On 13 June 2019, the CMA [issued](#) a statement of objections alleging that four estate agents participated in a cartel to fix and maintain minimum commission fee levels. The alleged cartel concerned the Berkshire area and started in September 2008, lasting almost seven years.

***CMA Issues Statement of Objections to Suppliers of Antidepressant Drugs.*** On 18 June 2019, the CMA [issued](#) a statement of objections finding that four pharmaceutical companies broke competition rules when selling the antidepressant drug Nortriptyline. The CMA alleges that two of the companies fixed sales quantities and prices, while three of the companies exchanged commercially sensitive information with the intention of keeping Nortriptyline prices high.

***CMA Launches Market Study into Online Platforms and Digital Advertising.*** On 3 July 2019, the CMA [commenced](#) a market study into online platforms and the UK digital advertising market. The market study forms part of the CMA's digital market strategy and appears to follow the CMA's stated aim of "*promoting better competition in online markets*" set out in its Annual Plan 2019/2020. The CMA has sought comments on the issues [raised](#) in the study's Statement of Scope from interested parties including online platforms, advertisers, government and consumer groups.

***CMA Investigation of Anti-Competitive Arrangements in Private Healthcare.*** On 4 July 2019, the CMA [launched](#) an investigation into suspected anticompetitive arrangements in the private healthcare sector.

***Ofwat Opens Investigation into Thames Water.*** On 21 June 2019, Ofwat [announced](#) that it had opened an investigation into Thames Water, concerning alleged abuse of a dominant position. The allegations derive from Thames Water's approach to installing digital meters and the subsequent impact on data logging service providers, the accuracy of data made available by Thames Water to retailers, and the fairness of the contractual credit terms imposed on retailers.

***CMA Issues Statement of Objections Alleging Antibiotic Market-Sharing.*** On 25 July 2019, the CMA [announced](#) that it had issued a statement of objections to four pharmaceutical companies (Advanz Pharma, Alliance Healthcare, Morningside Healthcare, and Morningside Pharmaceuticals), alleging that they concluded market-sharing arrangements from 2014 until 2017 regarding the antibiotic drug, Nitrofurantoin.

***Ofgem Publishes Decision Fining Economy Energy, E(Gas and Electricity) and Dyball Associates.*** On 26 July 2019, Ofgem [published](#) an infringement decision imposing fines of £870,000 on Economy Energy, E(Gas and Electricity) and Dyball Associates for entering into anticompetitive agreements in the supply of gas and electricity to domestic customers.

***CMA Secures Competition Disqualification Undertakings in Design, Construction and Fit-Out Services Cartel.*** On 31 July 2019, the CMA [secured](#) the disqualification of three further directors involved in the Design, Construction and Fit-Out Services Cartel (see [UK Competition Newsletter, May 2019](#)).



## Merger Developments

### PHASE 2 INVESTIGATIONS

#### ***Thermo Fisher Scientific / Roper Technologies.***

On 10 June 2019, the CMA cancelled its Phase 2 investigation into the anticipated acquisition by Thermo Fisher Scientific of the electron microscope peripherals business of Roper Technologies, following reassurances from the parties that they had abandoned the transaction.

***PayPal Holdings / iZettle.*** On 12 June 2019, the CMA published its final report into the completed acquisition by PayPal Holdings, Inc. of iZettle AB. The CMA's decision confirmed its provisional findings, published on 30 April 2019, that the transaction would not result in any SLC (see UK Competition Newsletter, April 2019).

#### ***Illumina / Pacific Biosciences of California.***

On 27 June 2019, the CMA referred the anticipated acquisition of Pacific Biosciences by Illumina for a Phase 2 investigation. The parties are suppliers of DNA sequencing systems to universities, laboratories, and research institutes. Illumina is the largest supplier of DNA sequencing systems in the UK and worldwide. Following its Phase 1 investigation, the CMA found that the merger could potentially remove Illumina's most significant competitor, and customers have limited alternatives. The CMA has until 11 December 2019 to issue its final report.

***LN-Gaiety Holdings / MCD Productions.*** On 25 July 2019, the CMA referred the anticipated acquisition of MCD Productions Unlimited Company by LN-Gaiety Holdings Limited for a Phase 2 investigation, after rejecting the parties' proposed remedies. Both parties organise music festivals, and MCD also promotes live music events. The CMA has concerns that the transaction could result in less competition in the music promotion industry in Northern Ireland.

### PHASE 1 DECISIONS

#### ***Rheinmetall Defence / BAE Systems Global.***

On 13 June 2019, the CMA cleared the anticipated acquisition of BAE Systems by Rheinmetall Defence. Both parties are suppliers of defence products and technology.

***Iconex / Hansol Denmark and R+S Group.*** On 18 June 2019, the CMA announced that the parties had abandoned the anticipated acquisition of Hansol Denmark and R+S Group by Iconex LLC. On 10 June 2019, the CMA had announced that the transaction would be referred for a Phase 2 investigation because the CMA was concerned the transaction would lead to insufficient competition in the supply of lightweight thermal paper rolls and labels.

***Tadano Limited / Terex Corporation.*** On 18 June 2019, the CMA cleared the anticipated acquisition of the Demag Brand Crane Business and eight subsidiaries of Terex Corporation by Tadano Limited. The parties supply all-terrain cranes in the UK and the EEA.

***AstenJohnson Holdings Limited / Heimbach GmbH.*** On 19 June 2019, the CMA cleared the anticipated acquisition of the paper machine clothing business of Heimbach by AstenJohnson Holdings Limited. The parties supply specialised fabrics used in the manufacture of paper.

***Fiserv, Inc. / First Data Corporation.*** On 2 July 2019, the CMA cleared the anticipated acquisition of First Data Corporation by Fiserv. Both parties are providers of electronic payment systems.

***Nicholls' Fuel Oils / DCC Energy.*** On 16 July 2019, the CMA published a decision imposing a penalty of £146,000 on Nicholls' (Fuel Oils) Limited for failing to comply, without reasonable excuse, with an initial enforcement order regarding its completed acquisition of the oil distribution business of DCC Energy in Northern Ireland. The breaches included moving ex-DCC staff from DCC's premises to Nicholls' premises without the CMA's consent, using Nicholls' branded vehicles to make deliveries to ex-DCC customers, and failing to provide compliance statements to the CMA by the required deadline.

#### ***Abellio East Midlands Limited / East***

***Midlands rail franchise.*** On 19 July 2019, the CMA announced that the award of the East Midlands rail franchise to Abellio East Midlands Limited would be referred for a Phase 2 investigation unless the parties offered acceptable undertakings in lieu of reference. On 25 July 2019

the CMA [announced](#) that it would review the undertakings offered by the parties.

**Liqui-Box, Inc. / DS Smith.** On 19 July 2019, the CMA [announced](#) that the anticipated acquisition of DS Smith by Liqui-Box would be referred for a Phase 2 investigation absent acceptable undertakings in lieu of reference. On 2 August 2019, the CMA announced that it was considering undertakings offered by Liqui-Box.

**Connect Bidco / Inmarsat.** On 23 July 2019, the Secretary of State [issued](#) a PIIN in relation to the anticipated acquisition of Inmarsat by Connect Bidco. On 16 July 2019, the CMA [announced](#) that the transaction had been brought to the attention of the Secretary of State for DCMS as potentially raising public interest concerns. The CMA is required to submit a report to the Secretary of State concerning both competition and public interest issues arising from the transaction by 17 September 2019. The Secretary of State will then decide whether to refer the transaction for a Phase 2 assessment.

**OneSavings Bank / Charter Court Financial Services Group.** On 30 July 2019, the CMA [cleared](#) the anticipated acquisition of Charter Court Financial Services Group by OneSavings Bank plc. Both parties are specialist mortgage lenders and providers of financial services.

**Sabre Holdings Corporation / Farelogix Inc.** On 21 June 2019, the CMA [announced](#) the opening of an investigation into the anticipated acquisition by Sabre Corporation of Farelogix Inc. The CMA invited comments on the transaction from any interested party by 5 July 2019 and referred the transaction to Phase 2 (absent acceptable undertakings) on 16 August 2019.

## ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision Due Date
<a href="#">International Media Company / Lebedev Holdings Limited</a>	23 August 2019
<a href="#">Scalable LP / Independent Digital Media News Limited</a>	23 August 2019
<a href="#">Prosafe SE / Floatel International Limited</a>	5 September 2019
<a href="#">Anschutz Entertainment Group, Inc. / Onex Corporation / Wildlife Holdings Inc.</a>	18 September 2019
<a href="#">JD Sports Fashion plc / Footasylum plc</a>	19 September 2019
<a href="#">Inspired Entertainment Inc. / Novomatic (UK) Limited</a>	20 September 2019
<a href="#">Bottomline Technologies (de), Inc. / Experian Limited</a>	7 October 2019
<a href="#">Connect Bidco Limited / Inmarsat plc</a>	8 October 2019
<a href="#">Roche Holdings, Inc. / Spark Therapeutics, Inc.</a>	TBC
<a href="#">Amazon / Deliveroo</a>	TBC
<a href="#">Danspin A/S / Lawton Yarns Limited</a>	TBC
<a href="#">Unite Group plc / Liberty Group plc</a>	TBC

## Other Developments

**CMA Publishes Report Evaluating Merger Control Decisions in Digital Markets.** On 3 June 2019, the CMA [published](#) a report reviewing historic merger decisions in the digital sector, covering the CMA's decisions in *Facebook / Instagram*, *Google / Waze*, *Priceline.com / Trivago*, and *Amazon / The Book Depository*. Although the report identifies certain gaps in the CMA's assessments conducted at the time, it does not find that competitive harm occurred as a result. The report includes a number of recommendations to improve the assessment of digital mergers, including carrying out dawn raids, extending the timeframe for assessing of digital mergers, and scrutinising transaction values and monetisation strategies more rigorously.

Andrea Coscelli, Chief Executive of the CMA, [discussed](#) Lear's findings in a speech of the same day, stating that the "CMA's merger control tools are and remain, in the main, fit-for-purpose." The CMA has nevertheless [published](#) a Call for Information to revise the Merger Assessment Guidelines, which have not been updated since 2010. The focus of the consultation includes the relevant features of digital markets, theories of harm, and the CMA's assessment of the counterfactual.

**CMA Publishes Speech by Michael Grenfell on UK Competition Law Enforcement Post-Brexit.**

On 11 June 2019, the CMA [published](#) a speech by Michael Grenfell, the CMA's Executive Director of Enforcement, on enforcement of UK competition law after Brexit. Dr Grenfell stressed that the CMA had been ready in March for Brexit and remained ready to take on its expanded responsibilities post-Brexit – Brexit was not distracting the CMA from its "day job."

**CMA Publishes Digital Markets Strategy.**

On 3 July 2019, the CMA [published](#) its Digital Markets Strategy, setting out its five strategic aims for this sector, which aim to address the "profound changes" being brought about by the digital economy. While the strategic aims include abstract procedural goals (for instance: "Use our existing tools effectively and efficiently", and

"Consider the case and options for regulation"), the priority focus areas hint at where the CMA will be most active. These include developing the approach on how digital merger cases are assessed, and scaling up the new Data, Technology and Analytics unit to support the CMA's work in this area.

**BEIS Publishes New Strategic Steer for CMA.**

On 18 July 2019, BEIS [published](#) an updated Strategic Steer for the CMA, setting out in brief the Government's vision of the CMA's role in the UK's Industrial Strategy. The Strategic Steer retains much from the previous version published in 2015, including a focus on minimising barriers to new businesses and on running cases efficiently. One notable change is an expanded and emphasised section on the CMA's role in championing consumers, in which the CMA is encouraged to "focus its activities on businesses and markets where the potential for harm is clear" and "make markets work well for vulnerable consumers."

**CMA Publishes Annual Report, Accounts, and Impact Assessment.**

On 18 July 2019, the CMA [published](#) its Annual Report and Accounts for 2018-19, [accompanied](#) by an impact assessment of the CMA's work over the past year. The Annual Report notes successes such as the prohibition of the *Sainsbury's / Asda* merger, and progress in transparency for online hotel bookings, but also recognises the upcoming challenges presented by Brexit. The accompanying impact assessment estimates the CMA generated a direct financial benefit to consumers of £3.3 billion from 2016 to 2019, 74% of which was accounted for by the impact of the market studies and investigations regime.

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