May 2019

UK Competition Law Newsletter

Highlights

— CMA secures disqualification for directors of companies involved in design, construction and fit out services cartel.

— CMA publishes provisional findings of Phase 2 investigation of Smartbox Assistive Technology Limited and Sensory Software International Ltd by Tobii AB.

— Lord Tyrie delivers speech on consumer interests in competition law.

CMA's Use Of Director Disqualification Powers Reflects Renewed Focus On Individual Responsibility

In May 2019, the CMA obtained competition disqualification undertakings ("CDUs") from three individuals for involvement in a cartel relating to design, construction and fit out services. This follows new guidance in February this year on directors' competition disqualification orders ("CDOs"). The new guidance is intended to make it easier for the CMA to secure director disqualification in competition cases, by simplifying the application procedure and creating greater incentives for directors to offer undertakings rather than face an application to Court. This can be seen as part of a broader desire to use sanctions against individuals to achieve deterrence, which is not limited to competition cases. Lord Tyrie, in a February 2019 letter to the Government,[1] called for more individual responsibility in competition law enforcement, and suggested that CDOs should also be extended to consumer enforcement.

Competition Disqualification Orders

The CMA has the power to apply to the Court for a CDO of up to 15 years.[2] The Court may grant a disqualification order if two criteria are satisfied: (1) the individual in question is a director (or shadow director) of a company that has infringed UK or EU competition law; and (2) their conduct renders them unfit to be concerned in the management of a company.[3] In practice, directors under investigation may avoid court proceedings by voluntarily entering into CDUs.

[1] Letter from Andrew Tyrie, CMA chair, to the Secretary of State for Business Energy and Industrial Strategy, 25 February 2019.

[2] These powers originate from the Company Directors Disqualification Act 1986 ("CDDA"), as amended by the Enterprise Act 2002.

[3] CDOs are also available in criminal cases. In the *Marine Hose* case, three directors were disqualified and imprisoned.

The CMA has previously highlighted the importance of individual sanctions as a way of enhancing compliance. Despite the CMA's stated intention to increase the use of individual sanctions, however, CDOs and CDUs have historically been underused. This is because of the complexity of the procedure and the resultant difficulties for the CMA in bringing cases.

The New Guidance

In an effort to reduce this complexity, the CMA adopted updated guidance on the process to be followed when deciding whether to apply for CDOs on 6 February 2019 (the "New Guidance"). The New Guidance seeks to improve the efficiency of the investigation and decision-making process, through the following main reforms:

— Introducing more flexibility to the CMA's decision-making process, replacing the more prescriptive five-step test with a list of factors to be considered;

— Streamlining the administrative process by removing the automatic right for directors to make oral representations;

— Extending a director's ability to benefit by cooperating with the CMA beyond formal leniency proceedings, allowing the CMA to reduce the length of the disqualification period for material cooperation that does not fall under the leniency programme; and

— Providing that the length of a CDU will likely be shorter the earlier in the process it is offered.

The Latest CDUs and Emerging Trends

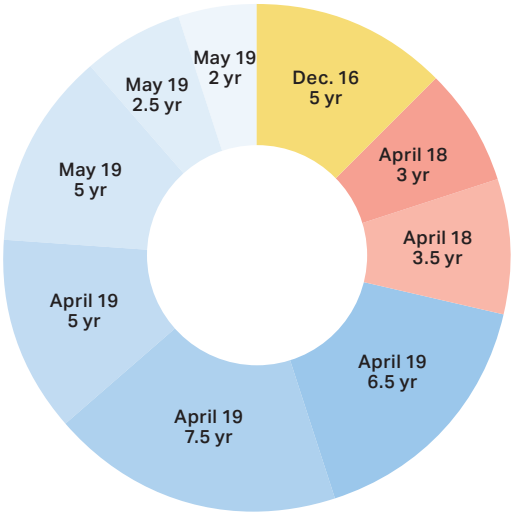
Since accepting CDUs from directors in relation to anti-competitive conduct in online sales of posters and estate agencies (in December 2016 and April 2018, respectively), the CMA has secured CDUs from five more directors in two further cases, and accepted an additional CDU in the estate agents case.

Date of undertaking and infringement	Nature of infringement	Length
1 December 2016 *Online sales of posters and frames.*	Price-fixing between March 2011 and July 2015	5 years
10 April 2018 *Residential estate agency services in the Burnham-on-Sea area.*	Price-fixing between Feb 2014 and March 2015	3 years 3.5 years
26 April 2019 *Supply of products to the construction industry.*	Price fixing, market sharing and information exchange from July 2006 to March 2013	6.5 years 7.5 years
30 April 2019 *Residential estate agency services in the Burnham-on-Sea area.*	Price-fixing between Feb 2014 and Feb 2015	5 years
10 May 2019 *Design, construction and fit-out services.*	Colluding on 12 tenders in November 2006 and between June 2011 and May 2016	5 years
	Colluding on 2 tenders (lasting 2 months and 4.5 months)	2.5 years
	Colluding on 2 tenders (lasting 3 months and 1 month)	2 years

As shown in the table above and the chart below, the CMA has obtained CDUs amounting to a total of 40 years in length since April 2016, with six individuals disqualified in the last two months alone. The average disqualification period is 4.4 years. The length of the disqualification periods relates to the length and severity of the conduct, although there are two instances in which the period was increased because the individuals failed to co-operate fully with the CMA's investigation. In one of these cases, the CDU was only offered after the CMA had issued

court proceedings. In the other, the director concerned would have benefited from immunity from disqualification (since his company was the immunity applicant), but this was forfeited when he refused to submit voluntarily to an interview requested by the CMA. Although it is unlikely that all of these CDUs were offered under the New Guidance (given its introduction only in February this year), the CMA is clearly increasing its use of its powers.

Competition Disqualification Undertakings Secured by CMA



Lord Tyrie's Letter and the Future for Individual Responsibility

The CMA's increased focus in this area was supported by proposals from the new chair of the CMA, Lord Tyrie, on 25 February 2019, in which he suggested that CDOs should be extended to apply also to serious consumer law breaches. According to the letter, the CMA is already developing this proposal, so it may not be long before we hear more.

Given the express reference to CDOs and the CMA's increasing use of this power, this regime may act as the blueprint. The letter also raises concerns with the CDO approach, however, citing its ultimate reliance on the courts and its inapplicability to individuals below director level as weaknesses. That said, it seems difficult to sustain an objection to the involvement of the courts in circumstances where the CMA has now secured eight undertakings in two and a half years without resorting to the court. In only two instances has it applied for a court order and, in one of these cases, this elicited a CDU within two months (although the CDU was lengthier than for other directors involved in the same conduct). The director disqualification regime is broad and can apply in any instance where a company director is deemed 'unfit'. For example, directors can be disqualified in the context of insolvency proceedings, and as of March 2019, there are over 6,600 former directors currently disqualified for misconduct connected to insolvency.

Lord Tyrie also proposed strengthening individual responsibility in competition infringements beyond director disqualification. He raised the prospect of fining individuals as well as companies, while recognising the need for further assessment of the proposal. In particular, he identified the difficulty in identifying individual responsibility without lengthy legal argument. In circumstances where company directors already see the threat of disqualification as a significant deterrent, second only to criminal enforcement,[4] it is possible that the benefit of any additional deterrent effect from imposing individual fines would be outweighed by delay to the investigative process and burden on the CMA's resources.

This leads into Lord Tyrie's final concern on individual responsibility: the limited availability and practical limitations of individual criminal responsibility for anti-competitive behaviour. He proposes that the CMA cede responsibility for criminal prosecutions to the Serious Fraud Office ("SFO"), which would allow the CMA to focus on civil enforcement and might increase the number of criminal prosecutions given the SFO's greater familiarity with such proceedings. According to Lord Tyrie, this proposal "merits reconsideration," suggesting that it is lower down the priority list than consumer enforcement, on which proposals are already being developed.

[4] As referred to in our April 2018 edition, a 2007 report by Deloitte for the OFT found that directors disqualification was perceived as the second most important sanction available for competition law, behind only criminal penalties.

Conclusions

The CMA has increased its focus on individual responsibility. The court's decision whether to order a CDO in the pending case where a CDU has not been agreed will provide an important precedent and will likely have a significant impact on the direction of travel of CDOs and CDUs. Success for the CMA would help to emphasise and publicise the role of director disqualification as a deterrent to individuals. But if the court does not award the CDO, it could well encourage directors threatened with disqualification proceedings to hold out from CDUs and force the CMA to try again before the court. Ultimately, this might well be the deciding factor in whether Lord Tyrie's concern at the dependence of the CMA on the court to order CDOs results in reform to the CMA's statutory powers. Either way, the enforcement focus on individual responsibility seems here to stay, with competition law leading the way for consumer law to follow.

Judgments, Decisions, and News

Court Judgments

Media Saturn and others v Toshiba; Media Saturn and others v Panasonic. These two linked claims seek to recover damages incurred as a result of alleged anti-competitive conduct concerning the sale of cathode ray tubes ("CRTs"). A 2012 European Commission decision found that the parent companies of the Defendants (Toshiba and Panasonic) had engaged in anti-competitive conduct by fixing prices and other selling conditions in relation to CRTs between July 1999 and June 2006. The Claimants had bought downstream products containing the cartelized CRTs, and sought redress in the English courts on two grounds: (i) breach of Article 101 TFEU; and (ii) economic tort claims under English law. On 2 May 2019, the High Court struck out the economic torts claims on the basis that the Claimants did not have an arguable case that the Defendants had the requisite intention to injure the Claimants. The Claimants' arguments that they would be able to show that the Defendants knew or ought to have known that their conduct would cause the Claimants injury were rejected. The Court refused, however, to strike out the claims against Toshiba and Panasonic based on a breach of Article 101 TFEU. The Court held that there was an arguable case that both the Toshiba and Panasonic subsidiaries were aware of and/or knowingly participated in the cartel at the relevant time, or that liability could be attributed to them on other grounds, despite their not being addressees of the Commission infringement decision. The EU law claims could not, therefore, be struck out. The Court rejected the Defendants' jurisdictional challenge, which had argued that it was not reasonably foreseeable to either Defendant that it would be sued in the English court, and that the sole purpose of the claim against the UK-domiciled Panasonic Defendant, was to remove the other Panasonic Defendants from their jurisdiction of domicile outside the UK.

Wolseley and others v Fiat Chrysler and others. This case is one of seven sets of ongoing proceedings against addressees of the July 2016 European Commission decision which fined participants in a truck manufacturing cartel (the so-called "Trucks" cases). The claim was brought by 153 separate Claimants belonging to six corporate groups, against members of the Iveco and DAF groups. The Defendants in this action have brought contribution proceedings under Part 20 of the CPR against parties including Daimler AG, which will (if successful) grant indemnity or a contribution if the Defendants are held liable in the main action. Daimler disputes that it has any liability to Wolseley, and accordingly sought declarations that, *inter alia*, none of the Defendants were liable to the Claimants for the alleged loss and damage claimed, and/or that Daimler specifically was not liable. Wolseley argued that the additional claim was improperly issued and did not satisfy the established principles for the grant of declaratory relief. It also argued that the additional claim was unnecessary, and that each part of it would be dealt with properly in either the main action or the contribution proceedings. It therefore sought

either an order declaring the additional claim improperly issued, or summary judgment in its favour. While the CAT found that the additional claim may have been improperly issued, it judged this error to be remediable. It agreed, however, that Daimler did not have a realistic prospect of success given that the declarations it sought would not serve any legitimate, useful purpose. It therefore struck out Daimler's additional claim on 8 May 2019.

UK Trucks Claim v Fiat Chrysler and others; Road Haulage Association v Man SE and others. On 17 May 2019, hearings regarding collective proceedings orders ("CPOs") in two collective damages actions (also "Trucks" cases) were adjourned by the CAT in light of the ongoing case *Merricks v Mastercard* ("Merricks", *see* UK Competition Newsletter, April 2019). Merricks concerns the proper legal standard for certification of CPOs. Mastercard, is in the process of applying for permission to appeal the Court of Appeal's judgment in Merricks to the Supreme Court. For this reason, the CAT held that it was more expedient to adjourn the applications in Trucks until Merricks is finally decided.

Antitrust/market studies

CMA Investigation of Alleged Anti-Competitive Agreements in Musical Instruments Sector. On 9 May 2019, the CMA announced that it was proceeding with its five investigations into alleged anti-competitive agreements in the musical instruments and equipment sector, which were launched in April 2018. The CMA states that it will conduct further investigations until summer 2019, after which point it will likely decide whether or not to issue a statement of objections to any of the parties under investigation.

CMA Competition Disqualification Undertakings in Construction and Fit Out Services Cartel Investigation. On 10 May 2019, the CMA confirmed that three directors of companies found to have infringed the Chapter 1 prohibition through cartel activity in design, construction and fit out services, had given disqualification undertakings. (See main article above for more detail.)

CMA Consumer Survey in Funerals and Crematoria Services Market Investigation. On 21 May 2019, the CMA invited responses to its draft quantitative survey of consumers who have recently arranged a funeral. The CMA is conducting conduct a survey as part of its market investigation into the supply of funeral director and crematoria services.

PSR Consults on Approach to Merchant Survey as Part of Card-Acquiring Market Review. On 22 May 2019, the PSR published a consultation on its approach to surveying merchants to determine whether the supply of card-acquiring services is working well for merchants and consumers. The proposed survey will examine: (i) whether merchants have credible alternatives to card-acquiring services for Mastercard and Visa and the ability to steer customers' choice of payment method; (ii) how merchants access and assess information about card acquiring services; (iii) whether merchants are satisfied with the quality of the service they receive; and (iv) how the supply of card acceptance products affects merchants' choice of card acquiring services provider. 1,200 responses will be sought through structured interviews. The consultation addresses the sampling methods used to select participants.

CMA Statement of Objections to Four Pharmaceutical Companies Alleging Market Sharing. On 23 May 2019, the CMA published a statement of objections alleging that four pharmaceutical companies – Lexon, Medreich, Focus, and Alliance – had agreed not to compete for the supply to the NHS of prescription-only Prochlorperazine tablets, a drug used to treat nausea and dizziness that was exclusively distributed by Focus for Alliance. The CMA has provisionally found that the prices paid by the NHS for Prochlorperazine rose by 700% from 2013 and 2017. According to the CMA's statement of objections, Lexon and Medreich agreed not to enter with a rival product and were paid a share of the profits earned by Focus.

Merger Developments

PHASE 2 INVESTIGATIONS

Ecolab/Holchem. On 14 May 2019, the CMA published an issues statement in relation to the completed acquisition of The Holchem Group Limited by Ecolab Inc. The issues statement sets out the factors the CMA is likely to consider in its assessment of market definition and the horizontal unilateral effects theory of harm. The CMA announced its decision to refer the transaction for Phase 2 investigation on 24 April 2019. The CMA invited responses to the issues statement by 27 May 2019.

Rentokil Initial/Cannon Hygiene. On 16 May 2019, the CAT published a summary of an application by Personnel Hygiene Limited ("PHS") for review of the CMA's decision to accept final undertakings following its Phase 2 investigation into the completed acquisition of Cannon Hygiene Limited by Rentokil Initial plc. The CMA had required that Cannon divest certain customer contracts (together with any operations or infrastructure that would be required by a prospective purchaser to deliver those contracts) to remedy a substantial lessening of competition ("SLC") in the supply of waste disposal services. PHS argue that the CMA erred in accepting that an approved purchaser could be an entity which is able "*to become an effective competitor*" since a remedy must have an actual and immediate effect. On 23 May 2019 the CAT issued an order giving case management directions in the application, and Rentokil has been granted permission to intervene in the case in support of the CMA. A hearing is listed for 2 July 2019.

Sainsbury's/Asda. On 23 May 2019, the CMA published a notice of consultation on a proposed Final Order under Section 84 and Schedule 10 of the Enterprise Act 2002, prohibiting the merger between J Sainsbury Plc and Asda Group Ltd. On 25 April 2019, the CMA issued a final report prohibiting the proposed merger in its entirety following a Phase 2 investigation. Under the draft Order, neither party may acquire an interest in any entity in the other's corporate group for ten years.

Tobii/Smartbox Assistive Technology. On 30 May 2019, the CMA published the provisional findings of its Phase 2 investigation into the completed acquisition of Smartbox Assistive Technology Limited and Sensory Software International Ltd by Tobii AB. Both parties supply augmentative and assistive communication ("AAC") solutions: products and services to assist people with speech, language and communication needs. The CMA has provisionally concluded that the merger has or may be expected to result in an SLC in the horizontal supply of ACC solutions, possible input foreclosure by the merged entity to downstream rivals, and vertical competition concerns with regard to customer foreclosure. On 30 May 2019, the CMA published a notice of possible remedies which considered that the full divestiture of Smartbox by Tobii would likely be the only effective and proportionate remedy to the SLC.

PHASE 1 DECISIONS

ForFarmers UK/Bowerings Animal Feeds Limited. On 13 May 2019, the CMA cleared the anticipated acquisition by ForFarmers UK Limited of the business and certain assets of Bowerings Animal Feeds Limited. Both parties are suppliers of animal feed to farmers.

Broadview Holding BV/Formica Group. On 17 May 2019, the CMA cleared the anticipated acquisition of Formica Group by Broadview Holding BV. Broadview is a Netherlands-based industrial holdings conglomerate. Formica manufactures and supplies solid-surfacing products.

Send For Help/SoloProtect. On 17 May 2019, the CMA announced that the anticipated acquisition of SoloProtect Limited by Send For Help Limited had been abandoned by the parties. On 10 May 2019, the CMA had announced that it would refer the transaction for a Phase 2 investigation unless acceptable undertakings in lieu were offered. The parties are two of the UK's largest suppliers of personal alarm devices for employees such as social workers.

AL-KO Kober Holdings/Bankside Patterson. On 28 May 2019, the CMA imposed a penalty of £15,000 on AL-KO Kober Holdings Limited for failing to comply with requirements in two information notices, without reasonable excuse. The information notices had been issued in the context of the Phase 1 investigation into AL-KO's proposed acquisition of Bankside Patterson Limited. AL-KO identified errors in its response to two information requests, and on the second occasion this led to the late production of a large number of documents to the CMA. The CMA concluded that the errors were negligent and not caused by an event beyond AL-KO's control. The penalty was deemed to be proportionate and capable of acting as a general deterrent.

Core Assets Group/Partnership in Children's Services Limited. On 29 May 2019, the CMA cleared the completed acquisition of Partnership in Children's Services Limited and Boston Holdco Limited by Core Assets Group Limited. The parties are both fostering and children's services agencies. The CMA's decision is yet to be published.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision Due Date
Iconex LLC/Hansol Denmark ApS and R+S Group GmbB	10 June 2019
Rheinmetall Defence UK Ltd/BAE Systems Global Combat Systems Ltd	13 June 2019
Illumina, Inc./Pacific Biosciences of California, Inc.	18 June 2019
Tadano Limited/Terex Corporation	20 June 2019
AstenJohnson Holdings Limited/ Heimbach GmbH	26 June 2019
LN-Gaiety Holdings/MCD Productions	11 July 2019
Liqui-Box, Inc./DS Smith	22 July 2019
Non-Standard Finance plc/ Provident Financial plc	23 July 2019
Bauer Radio Limited/UKRD Group Limited	24 July 2019
Anschutz Entertainment Group, Inc./Onex Corporation/Wildlife Holdings Inc.	TBC
JD Sports Fashion plc/Footasylum plc	TBC
Bottomline Technologies (de), Inc/ Experian Limited	TBC

Other Developments

CMA Responds to Consultation on Interim Measures in Mergers. On 1 May 2019, the CMA published a summary of responses to the consultation on interim measures in merger investigations. The CMA is preparing new guidance to explain its approach to interim measures and accordingly conducted a consultation canvassing views on the comprehensiveness, format and presentation, and policies of the guidance. The responses received included: (i) a recommendation for the creation of a separate internal team dedicated to the handling of interim measures; and (ii) a suggestion that the CMA provides greater clarity on the roles of the CMA and the monitoring trustee, where one is appointed.

Lord Tyrie Gives Speech on Consumer Interests in Competition Law. On 8 May 2019, the CMA published a speech given by Andrew Tyrie, CMA Chairman, on the protection and promotion of consumer interests in the modern economy. Lord Tyrie discussed the long-standing consensus that intervention in markets should be carried out by independent competition or regulatory bodies, , rather than by politicians. He noted a number of concerns that are calling this consensus into question, namely: (i) the benefits of globalization have not been evenly distributed and income distribution has not materially widened; (ii) flexible forms of employment and automation have reduced certainty of employment prospects; and (iii) the gap between the UK's richest and poorest has widened, both with regard to wages and health. The CMA has submitted a number of proposals to the Government for reform of competition and consumer law, including: (i) the power to order practices that are harming consumers to cease, pending an investigation, under threat of a fine; and (ii) an increase of board level responsibility for consumer protection and the ability to order director disqualification in the event of serious breaches (similarly to the procedure for competition law breaches).

Government Responds to House of Lords Committee Report on Regulating the Digital World. On 24 May 2019, the Government responded to the report "Regulating in a Digital World," published by the House of Lords Select Committee on Communications in March 2019. The Government considered its approach to digital regulation to be broadly aligned with the Committee's recommendations and announced its establishment of a new statutory duty of care compelling companies to take responsibility for the safety of their online users. An independent regulator will implement, oversee, and enforce the new regulatory framework.

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