April – May 2020

UK Competition Law Newsletter

Highlights

— CMA publishes guidance on its merger investigations during the COVID-19 pandemic

— CMA provisionally clears Amazon's minority acquisition of Deliveroo

— CMA blocks *Sabre/Farelogix* merger

— Collective proceedings issued in the CAT alleging damages to new vehicle purchasers from *Maritime Car Carriers* cartel

CAT Confirms High Threshold for Review of CMA Merger Decisions

CMA merger decisions are subject to judicial review by the Competition Appeal Tribunal (CAT). Challenges to the CMA's substantive decision-making have, however, generally been unsuccessful. Although the CAT has been willing to intervene on matters of procedural fairness and errors of law, as recent decisions confirm, the CAT is reluctant to intervene in the CMA's assessment of competitive effects and identification of remedies.

The wide margin of appreciation that the CMA enjoys derives from the CAT endorsing a broad "probabilistic" approach to the assessment of evidence together with its strict application of the judicial review standard of "irrationality." As a result, merging parties have found it difficult to overturn the CMA's substantive findings on appeal absent a clear and unequivocal error.

The cost implications of judicial review have also increased following a series of recent judgments. Unsuccessful applicants are likely to find themselves responsible for substantially all of the CMA's litigation costs, including costs incurred by in-house lawyers, while successful applicants can no longer assume that the CMA will be liable for the costs that they have incurred.

The Standard of Review

The CMA must decide, on a balance of probabilities,[1] whether a transaction constitutes a relevant merger situation and whether it is expected to result in a substantial lessening of competition (**SLC**).[2] If it does, the CMA must also decide (on a balance of probabilities) what remedies will be effective in addressing that

[1] The Court of Appeal has endorsed the approach of expressing an expectation as a more than 50 per cent chance. See *IBA Health Ltd v OFT [2004] EWCA Civ 142*, paragraph 46.

[2] Enterprise Act 2002, sections 35 and 36.

SLC and which of the available remedies is least intrusive.[3]

When applying this standard, the CMA is not obliged to find that any particular theory of harm is more likely than not to occur, or that any particular evidence is dispositive. Rather, it must give "*full and proper consideration to the evidence which it has gathered, and apply the 'probabilistic test' at the end-point*"[4] and may consider evidence "*in the round*." In circumstances where the CMA identifies a catalogue of arguments against a merger, this "probabilistic" approach makes it difficult to challenge the CMA's conclusions even if individual arguments are susceptible to criticism.

While the CMA can prohibit a merger based on a balance of probabilities, the threshold for challenging the CMA's finding before the CAT is higher. In reviewing the CMA's merger decisions, the CAT applies a judicial review standard.[5] There are four established grounds of challenge in judicial review in the UK: illegality, irrationality, procedural unfairness, and proportionality. The CAT has consistently held that, in questions of substantive assessment, CMA decisions will be reviewed under strict principles of irrationality under the *Wednesbury* unreasonableness test, *i.e.*, was the decision so irrational that no reasonable competition authority could have reached the same decision? The CAT applies this test not only to questions of economics and competitive effects, but also when reviewing the CMA's assessment of proportionality and matters of procedure. For example, the CAT does not ask itself whether a remedy is effective and proportionate but whether the CMA was irrational to reach the conclusion it did on the effectiveness and proportionality of remedies.

Even where applicants are successful, the CAT's remedial powers are limited to setting aside the decision (in whole or in part) and, if appropriate, remitting the matter to the CMA.[6] The CAT cannot replace the CMA's decision with its own.[7]

Recent Challenges to CMA Merger Decisions

Recent CAT judgments show how difficult it is for parties to succeed in applications for judicial review of CMA merger decisions. In *Ecolab/ Holchem*,[8] the CMA found that the merger would likely give rise to an SLC in the supply of formulated cleaning chemicals and ancillary services to food and beverage manufacturers in the UK, a market in which the parties had a combined market share of below 40%. The CMA rejected Ecolab's proposed remedy to transfer customers and assets to a rival. Instead, it ordered Ecolab to divest the Holchem business, effectively prohibiting the transaction.

Ecolab challenged the CMA's decision before the CAT on four grounds relating to the CMA's SLC decision and its rejection of Ecolab's proposed divestment remedy.[9] The CAT rejected all four grounds on essentially the same basis: it restated that the CMA has a "wide margin of appreciation" in deciding the extent to which it is necessary to carry out investigations to discharge its statutory duties and maintained that the CAT should intervene only if no reasonable public authority could have arrived at the same conclusion on the basis of the available evidence.[10] It concluded that

[3] Enterprise Act 2002, section 41.

[4] *Intercontinental Exchange v CMA* [2017] CAT 6, at 245.

[5] *See* sections 120(4) and 179(4) of the Enterprise Act 2002 (the Act). Note that a different standard applies to penalties imposed by the CMA in the course of merger investigations. The CMA may impose penalties for failure to respond to information requests (section 10(1) and (3)) and for breaches of interim measures (section 94A). These decisions are excluded from the general rights of review under ss.120 and 179 of the Act and are subject to a dedicated avenue of appeal (section 114). In the case of *Electro Rent Corporation v CMA* [2019] CAT 4, the CAT decided that, although the Act does not set out the standard of review that should be applied, it is not limited to judicial review (at paragraph 68).

[6] Sections 120(5) and 179(5) of the Enterprise Act 2002.

[7] The standard of review in the UK differs from that of the EU, where the General Court can conduct a "full judicial review" of the EC's merger decisions, meaning that it can review the factual basis of the decision, the interpretation of the law on which it is based, and the grounds on which a merger is authorised or prohibited. Although the General Court has said that the EC has "*a certain discretion, especially with respect to assessments of an economic nature*," its treatment of EC merger decisions makes it clear that it will subject the EC's analysis to rigorous scrutiny.

[8] Completed acquisition by Ecolab Inc. of The Holchem Group Limited, 8 October 2019.

[9] *Ecolab Inc. v Competition and Markets Authority* [2020] CAT 12.

[10] *Ibid.*, at paragraphs 58 and 110.

the CMA had gathered sufficient evidence to reach an SLC finding and to reject Ecolab's alternative remedy. It further found that the CMA did not have to carry out further consultation on Ecolab's proposed remedy because, in the CMA's view, there was no reason to suppose that modifications to that proposal would have been able to overcome the shortcomings already identified by the CMA.[11]

In *Tobii/Smartbox*,[12] the merging parties supplied hardware, software, accessories and related services to enable people with speech, language and communication difficulties to communicate (known as augmentative and assistive communication solutions (**AAC**)). The CMA found—on the basis of both horizontal and vertical theories of harm—that the merger would give rise to an SLC as a result of reductions in the existing product range and quality, less new product development, and higher prices. It ordered Tobii to sell Smartbox.

Tobii challenged the CMA's decision before the CAT arguing that the CMA had: (i) breached its duty of procedural fairness by refusing to disclose to Tobii and/or its external advisers relevant evidence which formed the basis of the CMA's findings, (ii) failed properly to define the market for AAC solutions, and (iii) failed to support its SLC findings with relevant, reliable, and sufficient evidence due to material errors in the CMA's collection of evidence.[13]

The CAT rejected the majority of Tobii's grounds. First, it rejected the submission that the CMA had failed to provide Tobii with sufficient evidence because, having reviewed the evidence, the CAT considered Tobii had enough information to understand the gist of the case. Second, it found that the CMA had properly defined the market for AAC solutions, including because, on the facts of the case, the CMA was not under a duty to ask customers how they would respond to a 5 to 10% price increase (the classic "SSNIP test") or take into account product differentiation when defining the market. Third, the CAT dismissed Tobii's challenge to the CMA's approach to the collection of evidence to support its SLC, restating that "*the question of precisely where the line is drawn in determining whether an inquiry has gone far enough is an issue for the relevant authority to evaluate and the Tribunal will need to be shown a strong case to show that the relevant authority manifestly drew the line in the wrong place*."[14]

Tobii succeeded, however, in demonstrating that the CMA's finding of harm to competition due to partial input foreclosure did not have a sufficient evidential basis. The CAT first restated that the CMA has a "wide margin of appreciation" as to the extent to which it is necessary to carry out investigations.[15] It nevertheless concluded that the CMA had failed to establish that the merged entity would have an incentive to engage in partial input foreclosure, in particular because it did not calculate the likely diversion ratio that would arise in a partial foreclosure scenario, or whether it would exceed the minimum diversion ratio that would make a partial foreclosure strategy profitable. This finding did not alter the outcome or legality of the CMA's decision, meaning that Tobii remained under a duty to sell Smartbox.

Challenges to the CMA's Timetable

The CAT has shown greater willingness to intervene on matters of procedure. In *Sainsbury/Asda v CMA*,[16] the CMA sent the parties 19 Working Papers[17]

[11] *Ibid.*, at paragraph 110.

[12] Completed acquisition by Tobii AB of Smartbox Assistive Technologies Limited and Sensory Software International Ltd, 15 August 2019.

[13] *Tobii AB (Publ) v Competition and Markets Authority* [2020] CAT 1.

[14] *Ibid.*, at paragraph 199. See also Akzo Nobel N.V. v Competition Commission [2013] CAT 13 at 160.

[15] *Ibid.*, at paragraph 431.

[16] *J Sainsbury plc and Asda Group Limited v. Competition and Markets Authority* [2019] CAT 1.

[17] By para 52 of Schedule 4 of the Act, a group must have regard to any guidance issued by the CMA Board. The CMA Board adopted the guidance previously issued by the Competition Commission entitled *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7 Revised). Para 7.3 states that there is no general obligation to disclose any of the many internal working papers produced in the course of an inquiry by and for the Group. It then continues: "*However, Groups may disclose some working papers (or extracts from them) during the course of an inquiry or review, where they consider that to do so would assist parties to understand their developing thinking. Whether it is appropriate or practical to do so may depend upon timing considerations; for example, it would not be sensible to do so when the CC is soon to disclose that thinking in an annotated issues statement or provisional findings. However, parties will have the ability to comment following disclosure.*"

between 9 and 28 November 2018, asking for responses to all of them by 7 December 2018. The parties asked for an eight-week extension to the CMA's statutory timetable[18] and proposed to respond to all the Working Papers by 4 January 2019. The CMA said that this proposed timeline would jeopardise subsequent stages of the process, even accounting for a possible eight week extension. It asked the Parties to submit their responses by 17 December at the latest and offered to hold a main party hearings in the week ending 14 December.

On 12 December 2018, the parties applied to the CAT, challenging the CMA's refusal to grant an extension to respond to the CMA's Working Papers, as well as its decision to schedule the main party hearings on a date that did not give the parties time to explain their position on important points in the Working Papers to the decision makers. The CAT agreed, finding that the original 7 December deadline was unreasonable and unfair, given the volume and complexity of the Working Papers. It also ruled that the CMA had not given the parties sufficient time to prepare for the main hearing. It did not, however, stipulate new deadlines, leaving this to the discretion of the CMA.

Comparison with the EU General Court

The EU's courts, the General Court and Court of Justice, have historically subjected European Commission merger decisions to more rigorous review than the CAT in respect of CMA decisions, and have overturned around 20% of the prohibition decisions rendered by the European Commission since the European Merger Regulation came into force.

Most recently, on 28 May, the General Court in *Three/O2* overturned the European Commission's prohibition of a transaction that would have combined two of the four UK mobile telecoms providers.[19]

The facts are complex, but there are two clear differences of approach between review of this decision by the General Court and judicial review before the CAT: (i) the European Commission was held to a higher standard of proof (namely a "strong probability" standard) than has been required of the CMA, and (ii) the General Court broadly applied a "manifest error" standard of review, while the CMA continues to apply a strict irrationality standard.

Costs Awards in CAT Appeals

A series of recent judgments show that the CAT will be generous to the CMA in cases where it successfully defends its decisions, while applicants may not recover any costs even when they are successful.

Unlike the position in most civil courts,[20] there is no general rule in the CAT that the unsuccessful party must pay the costs of the successful party. Rather, the CAT has a discretion to make "*any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings*."[21] The CAT's starting point in regulatory appeals had historically been that costs follow the event.[22] Following the Court of Appeal's judgment in *BCMR*, that position has changed. In *BCMR*, British Telecom successfully appealed a decision by Ofcom and was awarded costs. The Court of Appeal overturned this award. It held that, where Ofcom was acting in a purely regulatory capacity and its actions in defending its decision were reasonable, the CAT should not start from an assumption that Ofcom would be liable for costs.[23]

[18] The CMA is required to prepare and publish its report within a period of 24 weeks from the start of Phase 2. Under section 39 of the Enterprise Act 2002, the CMA may extend that period by no more than eight weeks if the CMA considers that there are "special reasons" why the report cannot be prepared and published within 24 weeks. *See, e.g.*, Tobii/Smartbox Notice of extension of inquiry period under section 39(3) of the Enterprise Act 2002) (paragraph 76).

[19] Case COMP M.7612 *Hutchison 3G UK/Telefonica UK* (O2), Commission decision of 11 May 2016.

[20] Civil Procedure Rules, Rule 44.2(2)(a).

[21] Rule 104(2) of the CAT Rules 2015. Rule 104(4) sets out a list of factors that may be taken into account when making an order under rule 104(2) determining the amount of costs which includes, amongst others, whether a party has succeeded on part of its case, even if that party has not been wholly successful.

[22] *See, e.g.*, *Tesco plc v Competition Commission* [2009] CAT 26 and *PayTV* [2013] CAT 9.

[23] *British Telecommunications plc v Office of Communications* [2018] EWCA Civ 2542, paragraphs 72 and 83. The Court of Appeal applied a principle established in *Perinpanathan* [2010] EWCA Civ 40.

The Court of Appeal restated this principle in *Flynn/Pfizer (Costs)*, discussed in more detail below.[24] In this case, the appellants successfully appealed an abuse of dominance decision by the CMA and were awarded costs. The Court of Appeal overturned this award. It held that—even in competition cases—there should be no assumption that the CMA will be liable for costs when it loses on appeal. This principle has not yet been tested in judicial review of a merger decision.

In contrast, the CAT has been generous in awarding costs to the CMA. In *Ping (Costs)*[25] and *Tobii (Costs)*,[26] the CAT held that the CMA could recover costs incurred by in-house lawyers as well as costs incurred by outside counsel. The CMA has sought to recover in-house legal costs at Government solicitors' guideline hourly rates (**GHRs**), even though these rates greatly exceed the costs of employing CMA staff.[27] Following *Re Eastwood*,[28] the CAT took the view that attempting to produce a comprehensive analysis of all the costs attributable to the work of in house solicitors would entail an immensely complex investigation. As there was no better way to calculate the CMA's costs, the CAT considered that it was not in a position to postulate alternative rates. It expressed misgivings about the CMA's GHRs but nevertheless allowed it to recover its costs at that rate, concluding that *in almost all cases … disbelief must be suspended and strained logic must be tolerated "for the merit of simplicity and of avoiding the burden of detailed enquiry*."[29]

Conclusions

Recent cases confirm that the CAT is likely to intervene in the CMA's substantive assessment of mergers only where the CMA has clearly acted irrationally. A combination of the CMA's probabilistic approach to assessing evidence and the CAT's strict application of the irrationality threshold mean that applications for review face an uphill battle absent a clear and unequivocal error by the CMA Recent rulings also place the cost risk of litigation firmly on applicants. The CMA is likely to recover substantially all of its costs, including in house costs, if it wins, and may not be liable for the merging parties' costs even if they are successful in their appeal.

Judgments, Decisions, and Other News

Court Judgments

Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others. On 1 April 2020, the CAT published a summary of an application to commence collective proceedings under section 47B of the Competition Act 1998. The application was filed by Mark McLaren Class Representative Limited, a special purpose vehicle, alleging losses arising from the European Commission's February 2018 *Maritime Car Carriers* settlement decision, which found an infringement of Article 101 TFEU. The claim is brought against the addressees of the European Commission's decision on a follow-on basis. The proposed class comprises individuals and businesses that purchased or financed a new car or van in the UK between 18 October 2006 and 6 September 2015. The application alleges that the proposed class paid an unlawfully inflated delivery charge for certain brands of new cars and vans.

DS Smith Paper Limited and Others v MAN SE and Others. On 2 April 2020, the CAT published a High Court order dated 21 January 2020, transferring to the CAT a claim by the DS Smith

[24] *Competition and Markets Authority v Flynn and Pfizer* [2020] EWCA Civ 617.

[25] In *Ping (Costs)*, for example, the CMA proposed to recover over £170,000 for work carried out by its Assistant Legal Director. This was equivalent to two and half years of that individual's salary. Ping argued that these rates were in breach of the indemnity principle, which provides that a litigant may only recover the cost that have actually been incurred in the course of the litigation. *Ping Europe Limited v. Competition and Markets Authority* [2019] CAT 6.

[26] *Tobii AB (Publ) v Competition and Markets Authority* [2020] CAT 6.

[27] *Ping Europe Limited v. Competition and Markets Authority* [2019] CAT 6, at paragraph 24.

[28] *Re Eastwood (dec'd); Lloyds Bank Ltd v Eastwood and others* [1975] Ch 112.

[29] *Ibid*., at paragraph 50, citing *Sidewalk Properties v Twinn and others* [2016] 2 Costs LR 253.

group against the addressees of the European Commission's July 2016 *Trucks* decision, which found an infringement of Article 101 TFEU. The CAT is already considering a number of other follow-on damages actions arising from the *Trucks* decision, including two collective proceedings actions.

Granville Technology Group Limited (In Liquidation) and Others v Infineon Technologies AG and Others (DRAM cartel). On 9 April 2020, the High Court handed down a ruling on costs following its preliminary issue judgment on limitation in a follow-on claim for damages arising from the European Commission's 2010 *DRAM* settlement decision. The question as to the allocation of costs arose because the High Court had found that two of the claimants' claims were time-barred, whereas the third claimant's claim was not, but the three claimants constituted a *de facto* single claimant. The High Court held that the claimants should pay 60% of the defendants' costs and the defendants should pay 40% of the claimants' costs, on the grounds that the time-barred claims required a greater share of the work.

Strident Publishing Limited v Creative Scotland. On 17 April 2020, the CAT handed down its preliminary issue judgment on whether the defendant, Creative Scotland, constitutes an undertaking for the purposes of the Competition Act 1998. The issue arose in a claim by Strident Publishing Limited, a small independent book publisher, for an alleged abuse of dominance by Creative Scotland in breach of the Chapter 2 prohibition, by providing "investment finance" to publishers of literary works. Unless Creative Scotland was an undertaking, the Chapter 2 prohibition would not apply. Creative Scotland is the principal public-sector arts funder in Scotland. The CAT determined that the essential nature of Creative Scotland's activity was the awarding of grants from public funds to support creative activity for the public benefit; while funding for the arts is not as "core" or "essential" as other public functions, it is of sufficient importance to make such a description apposite. The CAT considered that public funding of arts involves the exercise of powers that are "*typically those of a public authority*". For this and other reasons, including that Creative Scotland's powers derived directly from legislation, the CAT held that Creative Scotland did not constitute an undertaking for the purposes of the claim.

Ecolab Inc. v Competition and Markets Authority. On 21 April 2020, the CAT dismissed Ecolab's appeal against the CMA's decision of 8 October 2019 that (i) Ecolab's completed acquisition of the Holchem Group resulted in a SLC in the supply of formulated cleaning chemicals, and (ii) the most effective and proportionate remedy was for Ecolab to divest the overlapping Holchem business to an approved purchaser. Ecolab appealed to the CAT on four grounds challenging the CMA's SLC finding and its decision on remedies. The CAT rejected all of Ecolab's grounds of appeal, finding that the CMA's decisions were within its margin of appreciation, and so were not irrational for the purposes of judicial review. The CAT also rejected Ecolab's argument that the CMA should have investigated further whether Ecolab's proposed remedy would have offered an effective remedy to the SLC, as the CMA has a wide margin of discretion in deciding what steps to take when carrying out its investigations.

Flynn Pharma Ltd and Flynn Pharma Holdings Ltd v CMA. On 12 May 2020, the Court of Appeal handed down its judgment in an appeal against the CAT's cost ruling in the successful appeals by Pfizer and Flynn against the CMA's abuse of dominance decision relating to the anti-epilepsy drug, phenytoin sodium. In its costs ruling, the CAT considered that the relevant starting point was that the unsuccessful party should pay the successful party's costs. Accordingly, the CAT held that the CMA, having been found to have made errors in its excessive pricing decision, should pay a proportion of Pfizer's and Flynn's costs. The Court of Appeal held that the CAT had erred in attaching no weight to the fact that the CMA, as a public authority, was carrying out its function in the public interest, and that there is a public interest in encouraging public bodies to exercise their public function without fear of exposure to undue financial prejudice.

The Court found that the correct starting point should be that no order for costs should be made against a regulator which has brought or defended proceedings in the CAT acting purely in its regulatory capacity. While the CAT may depart from that starting point for good reason, the mere fact that the regulator has been unsuccessful is insufficient. Given the CAT's finding that the CMA had not acted unreasonably and that neither Pfizer nor Flynn suffered financial hardship, the Court decided not to remit the case back to the CAT, and allowed the appeal making no order as to costs for the CAT proceedings.

DSG Retail Limited and Dixons Retail Group Limited v Mastercard. On 22 May 2020, the Court of Appeal handed down its judgment in an appeal by Mastercard against the CAT's ruling on a preliminary issue of limitation. Dixons' claim was issued as a follow-on claim relying on the European Commission's 2007 *Mastercard* interchange fee decision, which found an infringement of Article 101 TFEU from 22 May 1992 to 21 June 2008. On 14 February 2019, the CAT rejected Mastercard's attempts to use changes to the rules governing limitation periods for damages claims in the CAT to exclude historic losses. Mastercard argued that rule 31(4) of the CAT Rules 2003, which applies pursuant to rule 119 of the 2015 CAT rules, excludes any claim arising before 20 June 1997 because those claims would have been time-barred on 20 June 2003 when the Enterprise Act 2002 came into force. The CAT found that none of the claims brought against Mastercard, including those that arose before 20 June 1997, were time barred. The Court of Appeal held that the CAT had erred in its interpretation of rule 31(4) by interpreting it in light of the 2015 CAT rules, and that the pre-20 June 1997 claims were *prima facie* time barred. The Court stated that the 2015 legislation was restoring the six-year limitation period that applied under the Limitation Act 1980; it did not revive claims that had been already been statute-barred. The Court of Appeal also held, however, that the CAT had made errors when considering whether the claimants could with reasonable diligence have discovered the facts concerning the infringement before June 1997, and therefore whether the limitation period should be extended for deliberate concealment. In view of these findings, the Court of Appeal held that Mastercard's application for summary judgment ought to have been dismissed in its entirety; the question of whether pre-June 1997 claims are time barred will be determined at trial.

Lexon (UK) Limited v CMA. On 28 May 2020, the CAT published the summary of an appeal by Lexon (UK) Limited against the CMA's decision of 4 March 2020. The CMA found that Lexon and several other suppliers of nortriptyline tablets had engaged in a concerted practice by which they exchanged competitively sensitive strategic information in relation to the supply of nortriptyline tablets in the UK. The CMA identified two separate infringement periods and characterised both periods as a single and continuous infringement. Lexon raises three grounds of appeal: (i) the CMA had failed to prove that Lexon exchanged information with the objective to maintain prices; (ii) there was no single and continuous infringement by Lexon; and (iii) the CMA's fine was harsh and inappropriate given that Lexon had, in part, introduced competition in the market which led to the fall in prices.

Amit Patel v CMA. On 28 May 2020, the CAT published the summary of an appeal by Amit Patel, a former director of Auden Mckenzie (Pharma Divisions) Limited and Auden Mckenzie Holdings Limited (together, **Auden Mckenzie**), against the CMA's decision of 4 March 2020. The CMA had found that King Pharmaceuticals Ltd, Praze Consultants Ltd, and Auden Mckenzie were parties to an anticompetitive agreement relating to the supply of nortriptyline tablets to a large pharmaceutical wholesaler. Mr Patel brought two grounds of appeal: (i) the CMA erred in its application of the concept of restriction of competition by object, as it did not properly assess the implications of its factual findings as to the content of the agreement for its legal assessment; and (ii) the CMA committed a procedural error by adopting a procedure which did not allow for the facts and conclusions in its decision to be established and tested.

Antitrust/market studies

CMA Pauses Timetable On Nitrofurantoin and Prochlorperazine Investigations. On 7 April 2020, the CMA announced that it has paused its investigations under Chapter 1 of the Competition Act 1998 and Article 101 of the TFEU into suspected anti-competitive agreements and concerted practices relating to the supply of nitrofurantoin capsules and prochlorperazine tablets in the UK. The cases remains open as the CMA reallocates resources to focus on urgent work during the COVID-19 pandemic.

ORR Closes Market Study Into Railway Signalling. On 8 April 2020, the Office of Rail and Road (**ORR**) announced that it was closing its market study into the UK signalling market (see *UK Competition Newsletter, January 2020*) due to the COVID-19 outbreak. The ORR found that carrying on the study would have placed a great burden on critical personnel, and stated that re-opening its study will be a high priority when the railway industry stabilises.

CMA Finds Metro Bank In Breach Of The Retail Banking Market Investigation Order 2017. On 20 April 2020, the CMA found Metro Bank in breach of Part 6 of the Retail Banking Order for its failure to inform nearly 130,000 of its customers about charges for unarranged overdrafts. Metro Bank has offered remediation to address the breaches.

Investigation Of The Atlantic Joint Business Agreement. On 7 May 2020, the CMA published a notice of its intention to accept commitments offered by International Consolidated Airlines Group and American Airlines in respect of the CMA's investigation into the revenue sharing joint venture, known as the Atlantic Joint Business Agreement (**AJBA**). The CMA's investigation follows the European Commission's approach when it first investigated the AJBA from 2009 to 2010. The investigation is being conducted under the Chapter 1 prohibition and, to the extent applicable, Article 101 of the TFEU. The European Commission accepted commitments in respect of the AJBA in 2010, which are due to expire in 2020. As five of the six routes subject to commitments are from the UK, the CMA decided to review the competitive impact of the AJBA in anticipation of the expiry of the EU commitments. The CMA believes that its concerns about a reduction of competition on these five routes (all London to US city-pairs) are addressed by commitments that will, among other things, make slots available to competitors and maintain minimum capacity levels.

CMA Publishes Analysis Of Investigation Into Illumina/Pacific Biosciences Of California. On 13 May 2020, the CMA published a paper exploring the lessons learned from assessing mergers in dynamic markets by reference to its investigation into the proposed $1.2 billion acquisition by Illumina of Pacific Biosciences of California. The main lessons were: (i) where the merging parties operate in a dynamic market, it is important to assess the merger in a dynamic context (*i.e.*, focusing on non-price factors, such as innovation); (ii) uncertainty regarding the future development of a market does not mean that a merger is unlikely to lead to competition concerns and does not mean that a different standard of proof will apply; (iii) the CMA may find concerns when the market share increment is low, particularly when the market is concentrated; (iv) internal documents are a vital source of evidence in forward-looking assessments; and (v) international cooperation, particularly when markets are global, is very useful.

CMA Secures Undertaking In Its Programme Aimed At Tackling Fake And Misleading Online Reviews. On 22 May 2020, the CMA announced that it has secured commitments from Instagram to tackle the risk that people can buy and sell fake and misleading reviews through the platform. Instagram's undertakings relate to updating and revising its policy guidelines, taking down content that the CMA or Instagram had already identified, and putting in place robust systems to detect and remove harmful material. The CMA launched the programme on 21 June 2019 to tackle fake and misleading online reviews, and had previously secured similar undertakings from Facebook and eBay.

CMA Launches Investigation Into Misleading Online Reviews. On 22 May 2020, the CMA launched an investigation into several major

websites that display online reviews. The investigation will examine whether these websites are taking sufficient measures to protect consumers from fake and misleading reviews.

Merger Developments

PHASE 2 INVESTIGATIONS

Kingspan Holdings (Panels) Limited/Building Solutions (National) Limited. On 7 April 2020, the CMA announced that the anticipated acquisition of Building Solutions by Kingspan would be referred to a Phase 2 investigation, unless the parties could offer acceptable undertakings. The CMA's Phase I investigation found that Kingspan and Building Solutions were two of the three main suppliers of standard foam sandwich panels, which are used as insulated cladding on commercial and industrial buildings. The merger was therefore expected to result in an SLC. As the parties did not offer undertakings, the CMA published its decision to refer the transaction to Phase 2 on 21 April 2020. Following the parties' announcement that they had abandoned the proposed deal, the CMA announced the cancellation of its Phase 2 reference on 21 May 2020.

Circle Health Holdings Limited/GHG Healthcare Holdings Limited. On 8 April 2020, the CMA announced that it would refer the completed acquisition by Circle Health of GHG Healthcare for a Phase 2 investigation unless the parties offered acceptable undertakings. Both parties provide elective care to NHS and privately funded patients in the UK. As a result of its Phase 1 investigation, the CMA found that the merger could result in a substantial reduction in competition between private healthcare services in Bath and Birmingham. The CMA, having taken into account the impact of the COVID-19 outbreak, is concerned that if the businesses were to merge, patients who pay for their own healthcare in Birmingham and Bath could face higher prices, and NHS and privately funded patients could face a lower quality of service in those areas. To address this concern, Circle has offered undertakings to divest Circle Bath Hospital and Circle Birmingham Hospital. On 24 April 2020, the CMA announced that it had reasonable grounds for believing that the undertakings offered, or a modified version of them, might be accepted by the CMA.

FNZ (Australia) Bidco Pty Ltd/GBST Holdings Limited. On 8 April 2020, the CMA announced that it had decided to refer the completed acquisition of GBST Holdings by FNZ to an in-depth Phase 2 investigation. The parties are two of the leading suppliers of solutions involving software and/or servicing to retail investment platforms in the UK. The CMA found that the market was concentrated with few other significant suppliers. The CMA published its Issues Statement on 7 May 2020, which explains that the CMA is looking only at horizontal unilateral effects in the supply of retail platform solutions. The CMA issued an interim order to prevent integration on 13 May 2020.

Tobii AB/Smartbox Assistive Technology Limited and Sensory Software International Ltd. On 9 April 2020, the CMA granted a derogation to the 19 December 2019 Enforcement Order requiring Tobii to hold the Smartbox businesses separate, and refrain from taking any action which might prejudice the effective divestiture (see *UK Competition Newsletter, November-December 2019*). As a result of the impact of the COVID-19 pandemic, the CMA accepted that Smartbox is temporarily required to take certain mitigating actions to preserve the Smartbox business and maintain it as a going concern. These actions include: (i) cancellation of certain discretionary activity; (ii) suspension of certain development projects; (iii) reduction or redistribution of payments; (iv) a reduction of working time; and (v) specified furloughing. On 21 April 2020, the CMA consented to a second derogation.

Sabre Holdings Corporation/Farelogix Inc. On 9 April 2020, the CMA published its final report in its investigation into the anticipated $360 million purchase of Farelogix by Sabre Corporation. Sabre provides technology solutions to airlines and travel agents, including a Global Distribution System (GDS) that distributes airline information to travel agents, while Farelogix supplies technology solutions for

airlines, including merchandising services that assist airlines in managing their operations. Following its in-depth Phase 2 investigation, the CMA prohibited the merger, on the ground that Sabre would have less incentive to innovate and develop its own merchandising services for airlines. Sabre and Farelogix announced on 1 May 2020 that they had abandoned the merger as a result of the CMA's prohibition. Sabre is appealing the CMA's decision, challenging both the CMA's jurisdictional and substantive assessment.

Amazon/Deliveroo. On 17 April 2020, the CMA provisionally cleared the anticipated acquisition by Amazon of certain rights and a minority shareholding in Roofoods Ltd (trading as Deliveroo). The CMA had referred the transaction to Phase 2 on the grounds that the transaction might discourage Amazon from re-entering the online delivery restaurant food market, which would significantly increase competition in the UK, and that the parties were two of only a small number of suppliers capable of supplying "ultrafast" delivery of groceries (see *UK Competition Newsletter, November-December 2019*). Due to a deterioration in its financial position resulting from the COVID-19 pandemic, Deliveroo submitted evidence showing that it would fail financially and exit the market without Amazon's investment. The CMA provisionally found that the transaction was not expected to result in an SLC on the basis that (i) Deliveroo was likely to exit the market absent Amazon's investment; (ii) no less anti-competitive investor was available; and (iii) the loss of Deliveroo as a competitor would be more detrimental to competition and consumers than permitting Amazon's investment to proceed.

Bauer Media Group/Celador Entertainment Limited. On 24 April 2020, the CMA gave notice of the proposal to accept final undertakings in connection with the completed acquisition by Bauer of several radio businesses in 2019. The CMA had found that the four acquisitions would result in an SLC in the market for the supply of representation for national advertising to independent radio stations in the UK (see *UK Competition Newsletter, November-December 2019*). The CMA concluded that a divestiture remedy would not be feasible, but that a behavioural remedy that committed Bauer to providing sales representation services to independent radio stations would be an effective and proportionate remedy.

McGraw-Hill Education, Inc./Cengage Learning Holdings II, Inc. On 27 April 2020, the CMA extended the inquiry period for its Phase 2 investigation into the anticipated acquisition of Cengage Learning by McGraw-Hill Education. The parties are publishers of textbooks and associated materials for higher education students, both headquartered in the US. The CMA had found that the merger would give rise to an SLC in relation to 51 courses in which both companies offered textbooks, and rejected the parties' proposed divestment undertakings (see *UK Competition Newsletter, February – March 2020*). On 4 May 2020, the parties announced that they had abandoned the transaction .

Hunter Douglas N.V./247 Home Furnishings Ltd. On 30 April 2020, the CMA published its Issues Statement as part of its Phase 2 investigation into the 2013 and 2019 completed acquisitions of 247 Home Furnishings by Hunter Douglas (see *UK Competition Newsletter, February – March 2020*). The CMA will examine whether it has jurisdiction to investigate both acquisitions. The CMA is considering when sufficient information about the 2013 transaction was in the public domain to trigger the statutory four month review period. It will also assess whether the acquisitions reduced competitive constraints on Hunter in the retail supply of online blinds. The statutory deadline for the investigation is 15 September 2020.

JD Sports Fashion plc/Footasylum plc. On 6 May 2020, the CMA prohibited the acquisition of Footasylum by JD Sports. Both companies sell sports-inspired casual clothing and footwear in stores in the UK and online, with JD Sports being the leading UK retailer of sports fashion footwear and clothing. The CMA confirmed its provisional findings that the parties provided similar offerings, closely monitored and responded to each other, and that their customers and other retailers considered them to be close substitutes

(see *UK Competition Newsletter, February-March 2020*). The CMA considered that the remaining constraints post-merger would be insufficient to prevent an SLC. There was, moreover, no evidence that the impact of COVID-19 would remove the CMA's competition concerns.

REFERENCE TO THE EUROPEAN COMMISSION

Mastercard/Nets. On 3 April 2020, the CMA announced that it has joined Denmark in its request to refer the UK aspects of the anticipated acquisition by Mastercard of parts of the corporate services business of Nets to the European Commission under Article 22 of the EU Merger Regulation. The parties are both active in payment services solutions. The merger agreement indicated that the transaction was subject to merger clearance by the Danish and Norwegian Competition Authorities. Despite the target not having any assets or business activities in the UK, the CMA considered that the share of supply test was met, on the basis that (i) VocaLink (a subsidiary of Mastercard) and Nets had both registered to make their services available to prime bidders who might compete in a UK procurement project for payment services infrastructure; and (ii) there were only five to eight other suppliers of these services, which gave the combined parties a share of supply of 20-30%. On 6 April 2020, the Commission accepted the referral request.

PHASE 1 CLEARANCE DECISIONS

Future Plc/TI Media Limited. On 17 April 2020, the CMA accepted undertakings offered by Future in respect of its planned acquisition of TI Media Limited. Future and TI Media both publish digital and print magazines on specialist subjects. Future offered to divest one of TI Media's magazines in each of the football and photography categories and one technology website to resolve the competition concerns identified in the SLC decision. The CMA published the full text of the decision on 22 April 2020.

Cellnex UK Limited/Arqiva Services Limited. On 22 April 2020, the CMA cleared the anticipated acquisition by Cellnex UK Limited of Arqiva Services Limited. Both companies are independent providers of telecommunication infrastructure across the UK. Following the acquisition, Cellnex will acquire more than 7,000 sites currently operated by Arqiva. The CMA found that the transaction would not raise competition concerns as alternative suppliers and customers that self-supply were well-placed to serve as competitive constraints on the merged entity.

Takeaway.com N.V./Just Eat plc. On 23 April 2020, the CMA cleared the acquisition by Takeaway.com N.V. of Just Eat plc. Both parties are suppliers of online food platforms. Just Eat is one of the main food delivery firms in the UK market, while Takeaway.com has not been active in the UK since 2016. After a comprehensive assessment of Takeaway's internal documents and third-party submissions, the CMA concluded that there was no realistic prospect that Takeaway would have re-entered the supply of online food platforms in the UK absent the merger.

Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust/Poole Hospital NHS Foundation Trust. On 27 April 2020, the CMA cleared the anticipated merger by The Royal Bournemouth and Christchurch Hospitals NHS Foundation and Poole Hospital NHS Foundation Trust. The Competition Commission had prohibited a previous merger between these Trusts that resulted in the parties entering into a 10-year commitment not to merge without the CMA's permission. On 27 February 2020, the CMA launched a Phase 1 investigation into the anticipated merger between the two Trusts. The investigation revealed that, following significant changes of policy within the NHS, the Trusts had little incentive to compete with each other and collaboration between NHS hospitals in the area was now seen as a better way to respond to increasing demand.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision Due Date
Yorkshire Purchasing Organisation/Findel Education	19 June 2020
Taboola/Outbrain	26 June 2020
Pharm-a-Care/Haliborange	7 July 2020
ION Investment Group Limited/Broadway Technology Holdings LLC	7 July 2020
Stryker/Wright Medical Group NV	15 July 2020
Breedon Group plc/Cemex Investments Limited	TBC

Further Developments

CMA Announces New Register Of Significant Breaches Of Market And Merger Remedies. The CMA has announced its intention to publish a register of all significant breaches of market remedies and merger remedies notified to it since 1 April 2020. The CMA considers that this publication will serve as a deterrent to breaching CMA orders and undertakings. The new register will include a summary of all significant breaches, including breaches that do not result in either directions or a public letter.

UK Government Publishes Draft Legal Texts For UK-EU Relations Negotiations. On 19 May 2020, the government published the text of a draft UK-EU Comprehensive Free Trade Agreement (CFTA), which will form the basis of negotiations with the EU on UK-EU future relations. The draft CFTA includes the provisions that would: (i) oblige the UK and EU to take appropriate measures to proscribe "*anti-competitive business conduct*" and coordinate in their enforcement of their respective competition laws; (ii) ensure that UK and EU state-owned enterprises operate in a non-discriminatory manner when engaging in commercial activities; (iii) oblige the UK to establish its own regime of subsidy control with reciprocal commitments on transparency about the award of subsidiaries and an obligation to notify; and (iv) prohibit the UK and EU from adopting measures that, for example, limit the number of enterprises that may carry out a specific economic activity.

COVID-19

CMA Delays Work Of The Digital Markets Tasks Force. On 3 April 2020, the CMA announced that, due to the pressures placed on many key groups of stakeholders from the Covid-19 pandemic, it had decided not to publish its formal consultation or proceed with its plans for extensive engagement at this time. The Task Force has been asked by the Government to provide advice on the functions, processes, and powers needed to protect consumers in the digital economy, whilst ensuring robust, competitive markets.

CMA Publishes Update On COVID-19 Task Force. On 4 April 2020, the CMA launched an online service allowing consumers and businesses to report unfair business practices during the COVID-19 pandemic. Consumers are invited to submit details about any unfair behaviour, including: unfair prices, misleading claims, and problems with cancellation, refunds or exchange. The CMA's update published on 21 May 2020 explains that from 10 March to 17 May 2020, the CMA had been contacted more than 60,000 times about coronavirus-related issues. The majority of complaints received by the CMA since mid-April have been about unfair practices in relation to cancellations and refunds.

House of Lords Library Publishes Article On COVID-19 Brexit Implications. On 7 April 2020, the House of Lords Library published an article on the implications of COVID-19 on the Brexit transition period. Part two of the article addresses

the continuing application of most EU rules to the UK, which no longer enjoys a formal role in EU decision-making, until the expiry of the transition period. The UK therefore remains subject to EU rules on state aid. Since the adoption of a temporary framework on state aid on 19 March 2020, the Commission has so far approved three UK state aid schemes.

Competition Law To Be Relaxed To Allow Dairy Industry To Work Together. On 17 April 2020, the Department for Business, Energy and Industrial Strategy (**BEIS**) announced that it would relax certain elements of UK competition law to support the dairy industry during the pandemic. Legislation will be introduced to allow the dairy industry to respond to changes in the supply chain, such as reduced demand from customers in the hospitality sector. While the Government has already taken steps to relax competition rules to allow grocery suppliers and logistic service providers to work together (see *UK Competition Newsletter, February – March 2020*), this legislation will facilitate further collaboration between farmers and producers to avoid waste. The Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020 (SI 2020/481) came into force on 1 May 2020.

CMA Publishes Guidance On Merger Assessments During COVID-19. On 22 April 2020, the CMA published guidance on its approach to merger investigations during the COVID-19 pandemic. The guidance shows that the CMA's overall approach to assessing whether a merger gives rise to competition concerns remains unchanged. The CMA will continue to undertake thorough investigations of potential competitive concerns, and consider evidence in relation to the impact of COVID-19. The CMA recognises that the pandemic may cause some firms to miss deadlines for responding to statutory information requests. It is therefore unlikely to penalise firms that can provide substantiated reasons for missing deadlines in such circumstances and may "stop the clock" until information is provided. The CMA also encourages merging parties to consider postponing filings where a merger may not ultimately proceed, or where an anticipated merger is still in its early stages.

BEIS Publishes Register Of Agreements Relating To Competition Exclusion Orders. On 21 May 2020, BEIS published a register of agreements covered by Public Policy Exclusion Orders aimed at enabling a rapid and coordinated response to COVID-19. These Orders exclude certain agreements in relation to the grocery sector, the dairy industry, Isle of Wight ferry services, and health services for patients in England and Wales from the Chapter 1 prohibition.

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