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UK Competition Law Newsletter

Highlights

— CMA signs 'Five Eyes' cooperation framework with US, Canadian, Australian, and New Zealand competition authorities

— UK Supreme Court hands down judgment on standard-essential patent dispute between Huawei and Unwired Planet

— Government introduces Internal Markets Bill and proposes new internal UK market role for CMA in effort to establish a UK-wide internal market for goods and services

— CMA unconditionally clears Amazon's acquisition of a minority shareholding in Deliveroo

— FCA publishes final report in home and motor insurance market study and opens a consultation on proposed remedies

CMA Signs 'Five Eyes' Cooperation Framework With US, Canadian, Australian, And New Zealand Competition Authorities

On 2 September 2020, the US Department of Justice Antitrust Division (**DoJ**), the US Federal Trade Commission, the UK Competition and Markets Authority (**CMA**), the Australian Competition and Consumer Commission, the New Zealand Competition Commission, and the Canadian Competition Bureau signed a framework agreement to improve cooperation in competition investigations.

The 'Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities' (the **Five Eyes Framework**) includes (i) a Memorandum of Understanding which, according to the DoJ press release, is intended to '*reinforce and improve existing case coordination and collaboration tools*' among the authorities; and (ii) a Model Agreement that is expected to serve as a template for the authorities to negotiate and implement bilateral agreements to further enhance cooperation. US Assistant Attorney General Makan Delrahim stated that '*[t]he Framework sets a new standard for enforcement cooperation, strengthening our tools for international assistance and evidence gathering in the increasingly digital and global economy.*'

The Framework contains non-binding mechanisms to enhance cooperation between the authorities. Although the Framework does not create new legal powers or obligations, it does formalise cooperation that currently takes place on a less

formal basis, creating default expectations as to how the authorities will share information and cooperate. The impact of the Five Eyes Framework may be particularly significant in antitrust cases, where authorities already have greater legal powers to share confidential information. More generally, the Framework sends a signal to companies that they can expect authorities to liaise more closely and coordinate their enforcement actions in future. The Framework also signals a greater willingness to cooperate on questions of policy, and envisages a 'Framework Committee' to administer the Framework, potentially anticipating an Anglosphere counterpart to the European Competition Network (**ECN**) and International Competition Network (**ICN**). The CMA will no longer form part of the ECN or benefit from the EU's series of bilateral agreements with other countries after the end of the Brexit transition period on 31 December 2020[1] and has expressed a desire to enter new co-operation agreements to replace and supplement the information-sharing mechanisms that currently exist.

Existing International Cooperation Mechanisms

The Five Eyes Framework explains that the matters investigated by the signatory authorities '*increasingly require engagement with counterpart competition authorities in other jurisdictions*'.[2] Cartel investigations and merger reviews that involve multinational corporations, for example, are often undertaken in several jurisdictions by different authorities in parallel. Expedience and efficiency require cooperation and information sharing between these authorities. International cooperation between competition authorities has accordingly been '*at the core*' of the Organisation for Economic Co-operation and Development's agenda for many years.[3]

Competition authorities around the world already coordinate in a number of ways. This coordination can take various forms, including bilateral cooperation agreements (*e.g.* the 1995 US–Canada Agreement, the 1991 EU-US Agreement, and the 1999 Canada-EU Agreement), multilateral arrangements (*e.g.* the ECN , ICN, European Competition Authorities,[4] the Nordic Agreement on Cooperation in Competition Cases,[5] and the COMESA Competition Commission), memoranda of understanding (*e.g.*, the EU-Brazil Memorandum of Understanding on Cooperation), non-binding frameworks, or ad hoc arrangements (*e.g.*, waivers obtained from merging parties to enable concurrently reviewing authorities to exchange information[6]).

These arrangements cover various aspects of investigations, such as agency procedures,[7] cooperation in merger reviews,[8] and information sharing in cartel investigations.[9] In addition, organisations such as the ECN and ICN engage with policy issues and conduct competition advocacy. A recent example of this work is the

[1] The CMA formally left the ECN on 'Brexit' day on 31 January 2020. During the transition period, the CMA and concurrent regulators have continued to have access to information shared amongst the ECN as if the UK were still a member state. Under the Withdrawal Agreement, however, the participation of the CMA and concurrent regulators in ECN meetings was by invitation only, and the CMA and concurrent regulators had no right to vote in these meetings. See CMA, UK exit from the EU: Guidance on the functions of the CMA under the Withdrawal Agreement, CMA113 (28 January 2020), para. 4.7, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864371/EU_Exit_guidance_CMA_web_version_final_---2.pdf. After 31 December 2020, when the transition period expires, the CMA and concurrent regulators will no longer have access to the information shared amongst the ECN and will no longer be invited to participate in ECN meetings (subject to any agreement reached between now and then).

[2] Five Eyes Framework, para. 1.3.

[3] OECD, Recommendation of the OECD Council Concerning International Co-operation on Competition Investigations and Proceedings (2014), at p. 2 https://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf.

[4] The European Competition Authorities (EC) consists of the competition authorities in the European Economic Area. See, e.g., European Competition Authorities, The Exchange of Information Between Members On Multijurisdictional Mergers Procedures Guide, https://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf.

[5] See Finnish Competition and Consumer Authority, Agreement on Cooperation in Competition Cases (8 September 2017), https://www.kkv.fi/en/facts-and-advice/competition-affairs/international-cooperation-related-to-competition-affairs/nordic/agreement-on-cooperation-in-competition-cases/.

[6] See, e.g., International Competition Network, Model Confidentiality Waiver for mergers (2005), https://www.internationalcompetitionnetwork.org/portfolio/model-confidentiality-waiver-for-mergers/.

[7] See, e.g., International Competition Network, ICN Framework on Competition Agency Procedures (2019), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf

[8] See, e.g., International Competition Network, International Competition Network's Framework for Merger Review Cooperation (2012), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_FrameworkforMergerReviewCooperation.pdf.

[9] See, e.g., International Competition Framework, Proposal for Establishing the ICN Framework for Promotion of Sharing Non-Confidential Information for Cartel Enforcement (2016), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_nonConfidentialInfoFramework.pdf.

ECN's joint statement on the application of competition law during the COVID-19 crisis, which anticipated, and in some cases permitted, cooperation between firms to ensure continuation of supply during the crisis.[10] The ICN published a similar statement.[11] The Five Eyes Framework is designed to '*complement*' rather than '*replace*' existing cooperation arrangements that the signatories are party to.[12]

The Five Eyes Framework

The Five Eyes Framework extends to merger control, cartels, and abuse of dominance. The Framework differs from some of the previous cooperation arrangements that its signatories have entered into, such as by setting out a non-legally binding 'expectation' of mutual assistance and cooperation as a default, and facilitating future formal agreements (bilateral or multilateral) by including a Model Agreement for deeper cooperation between signatories.

The Memorandum of Understanding signed by the authorities defines two types of information. First, there is information held by a signatory, which it is not prohibited from disclosing by law, but which is normally treated as non-public (**Agency Confidential Information**).[13] Second, there is information related to an investigation that is not in the public domain, which has been either compulsorily acquired by, or provided voluntarily to, a signatory and that the signatory is required to protect from disclosure (**Investigative Information**).[14]

The Memorandum contains an 'expectation' that the signatories will '*provide assistance and cooperation … including with respect to sharing public information, Agency Confidential Information and Investigative Information permitted to be disclosed by law or by waiver of confidentiality.*'[15] In addition, signatories are 'expected' to provide mutual assistance and cooperation, including with respect to: sharing information (including information that is not in the public domain); coordinating investigative activities; facilitating voluntary witness interviews; and providing copies of publicly available records.

These 'expectations' are, however, subject to the signatories' national laws.[16] In the UK, as a general rule, business secrets and information relating to the affairs of an individual cannot be disclosed unless a statutory 'gateway' applies. Under one of these gateways, the CMA may disclose specified information to an overseas authority for the purpose of enforcing legislation through criminal or civil proceedings (which excludes most mergers investigations). The CMA may also seek the parties' consents to disclose their information to an overseas authority under the terms of a confidentiality waiver.[17]

As noted, the Five Eyes Framework also contains a Model Agreement '*in an effort to assist any Participants that wish to pursue enhanced cooperation agreements or arrangements between or among themselves (bilaterally or multilaterally) to pursue the maximum level of assistance possible.*'[18] The Model Agreement is intended to be '*broadly reciprocal*'.[19] While the Model Agreement is subject to national law and may be amended by the agencies in question, it is intended to address (i) the nature of the assistance that can be requested; (ii) the process for making a request for assistance; (iii)

[10] European Competition Network, Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis (2020), https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf.

[11] International Competition Network, ICN Steering Group Statement: Competition during and after the COVID-19 Pandemic (2020), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/04/SG-Covid19Statement-April2020.pdf.

[12] Five Eyes Framework, Memorandum of Understanding, para. 1.1.

[13] Five Eyes Framework, Memorandum of Understanding, Definitions.

[14] Ibid.

[15] Five Eyes Framework, Memorandum of Understanding, Article 3.2.

[16] See, e.g., Five Eyes Framework, Memorandum of Understanding, Article 6.2 ('*The Agreement does not create any new legal rights or obligations under national law*'); Five Eyes Framework, Model Agreement, Article 3.2(a) ('*Information can be shared only to the extent permitted by national law or relevant consents*').

[17] Enterprise Act 2002, Section 241(1). See further CMA, Transparency and disclosure: Statement of the CMA's policy and approach, CMA6 (January 2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270249/CMA6_Transparency_Statement.pdf.

[18] Five Eyes Framework, Memorandum of Understanding, para. 4.3

[19] Five Eyes Framework, Memorandum of Understanding, para. 4.5.

the maintenance of the confidentiality of any Investigative Information; and (iv) the scope of permitted use of any Investigative Information shared by the participants. The 'Investigative Assistance' envisaged under the Model Agreement includes '*disclosing, providing or discussing Investigative Information*', and '*obtaining Investigative Information at the request of [another signatory authority*', including (i) taking testimony and witness statements; (ii) obtaining documents and records; (iii) locating or identifying persons or things; and (iv) executing searches and seizures.[20]

Finally, the Framework envisages the exchange of information, ideas and experience on competition policy issues, competition advocacy and outreach (to consumers, industry, and government), and best practices.[21] Such cooperation could take the form of seconding officials, experience-sharing events, and collaborating on projects of mutual interest.

From Europe To The Anglosphere

The European Commission and national competition authorities of EU Member States form the ECN. The ECN exists to provide a forum for cooperation between national authorities, enabling them to inform each other of new cases and anticipated enforcement decisions, coordinate investigations, exchange evidence, and discuss various issues of common interest.[22] Under Regulation 1/2003,[23] ECN members can exchange confidential information without parties' consent in cartel or abuse of dominance investigations. Regulation 1/2003 also enables a national authority or the European Commission to ask another national authority to carry out an inspection or fact-finding measure on its behalf, while the 'Network Notice' facilitates the re-allocation of cases to the best -placed authority to act.[24]

Throughout the Brexit transition period, the CMA and UK sectoral regulators have had access to the ECN—and the information shared within the EC—as if the UK were an EU member state (though their participation in meetings is by invitation only, invitations are only extended where discussions concern the UK, and the CMA is unable to vote at meetings it is invited to).[25] After December 31, 2020, when the Brexit transition period expires, the CMA will no longer have access to information shared within the ECN (unless an agreement is reached to the contrary). Nor will the UK benefit from the EU's bilateral cooperation agreements with third-countries, such as the US, Canada, Japan, and Switzerland (which, in the case of the EU's arrangement with Japan, is in the process of being strengthened[26]).[27]

After the transition period expires, many of the merger and antitrust investigations previously undertaken by the Commission will fall to the CMA to examine, either instead of or as well as the European Commission. At the same time, the increased global scope and complexity of these matters will require deeper cooperation between the CMA and its European counterparts. To maintain existing benefits of cooperation—and to maintain its status as a leading enforcement agency—the CMA will need to strike a series of bilateral agreements with other competition authorities to maintain existing levels of cooperation. As CMA CEO Andrea Coscelli said, '*As the UK prepares to leave the EU and the CMA embraces its expanded role, it is even more important for [the CMA] to forge strong relationships across the world, and work with partners both closer to home*

[20] Five Eyes Framework, Model Agreement, para. 3.3

[21] Five Eyes Framework, Memorandum of Understanding, para. 3.1.

[22] European Commission, European Competition Network, https://ec.europa.eu/competition/ecn/more_details.html. See also Commission Notice on cooperation with the Network of Competition Authorities (Official Journal C 101, 27.04.2004, p.43-53) (**Network Notice**).

[23] Article 12, Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty (Official Journal L 1, 04.01.2003, p.1-25) (**Regulation 1/2003**).

[24] European Commission, Cooperation in merger control, https://ec.europa.eu/competition/ecn/mergers.html.

[25] See fn. 1.

[26] See European Commission, Competition: EU and Japan start negotiations for a 2nd generation cooperation agreement in the field of competition (2017), https://ec.europa.eu/competition/international/bilateral/japan.html.

[27] For a full list of the European Commission's bilateral arrangements with third-countries, see European Commission, Bilateral relations on competition issues, https://ec.europa.eu/competition/international/bilateral.

and further afield.'[28] In this sense, the Five Eyes Framework is a first step in maintaining the CMA's status as a major global agency in a post-Brexit world.

The Five Eyes Framework does not, however, address the gap in the UK's network that will be left by the CMA losing access to information shared within the ECN and the benefits of the EU's bilateral arrangements with third countries that are not signatories to the Five Eyes Framework. This loss of access was identified by the National Audit Office in a 2018 examination of the progress made by the CMA in ensuring that the UK competition regime was ready for Brexit.[29] The CMA and the UK government did have '*plans to mitigate the potential loss of access*' to the ECN and bilateral EU and third country arrangements, such as, in the absence of a UK-EU arrangement, seeking to '*set up bilateral arrangements with individual member states*.'[30] The CMA has previously argued that some areas of competition enforcement should be subject to a formal UK-EU cooperation regime, namely notification and coordination of investigative measures; bilateral and multilateral evidence sharing (including confidential information) to facilitate civil and criminal enforcement by overseas agencies; obtaining evidence to assist overseas enforcers; and enforcement of investigative measures and remedies.[31] Dr Coscelli recently reiterated the CMA's view that it is '*essential for competition authorities to work with each other to share knowledge and expertise*', especially in light of the '*borderless markets*' that increasingly come under review by competition authorities.[32]

In addition to pursuing formal bilateral or multilateral agreements with other Five Eyes authorities (based on the Model Agreement), the CMA can therefore be expected to take steps to ensure that it continues to benefit from cooperation with the European Commission and national competition authorities.

Other Implications

The Five Eyes Framework does not change authorities' existing information-sharing mechanisms. It does, however, create an obligation to cooperate where possible. In this regard, it goes further than many other existing co-operation agreements. For example, the Five Eyes Framework can be contrasted with the 1995 US-Canada Agreement, which states only that '*The parties acknowledge that it is in their common interest to cooperate in competition matters … [and] will consider coordination of their enforcement activities*'. The Model Agreement anticipates even deeper cooperation between its signatories, which would bolster and accelerate existing cooperation on a more formal—and legally binding—basis in future.

The Five Eyes Framework is unlikely to change practices in merger control, where waivers will still be required before the agencies are able to share confidential information. The Five Eyes Framework is likely to have a more significant impact in antitrust investigations, where the agencies already have greater powers to share information without parties' consent. The Model Agreement envisages cooperation in particular on measures that are more commonly associated with antitrust investigations, such as witness statements, locating persons or things, and executing search and seizure powers. [33]

[28] CMA, Press Release, CMA to increase competition cooperation with international partners (2 September 2020), https://www.gov.uk/government/news/cma-to-increase-competition-cooperation-with-international-partners.

[29] National Audit Office, Exiting the EU: Consumer protection, competition and state aid (6 July 2018), https://www.nao.org.uk/wp-content/uploads/2018/07/Exiting-in-the-EU-consumer-protection-competition-and-state-aid.pdf.

[30] Ibid, para. 3.21.

[31] House of Lords European Union Select Committee, Brexit: competition and State aid, Chapter 5, para. 151, https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/67/6708.htm.

[32] Speech by Andrea Coscelli, CEO of the CMA, at Fordham University, New York, New York (October 2020).

[33] Five Eyes Framework, Model Agreement, para. 3.3.

Judgments, Decisions, and Other News

Court Judgments

Preventx v Royal Mail Group. On 20 August 2020, the High Court ordered an interim injunction against Royal Mail Group in favour of Preventx, a provider of remote diagnostic testing services and clinical referral services for sexually transmitted diseases (**STIs**). Preventx claimed that changes introduced by Royal Mail with respect to its returns service were an abuse of Royal Mail's dominant position in the market for untracked outbound/return postal services for STI test kits and completed samples by way of nationwide letterbox network (or equivalent) in the UK. Preventx claimed that Royal Mail had informed it that its samples should be shipped using a 'Tracked Returns' service because they were classified as 'dangerous goods'. Royal Mail threatened to destroy returns samples sent by 'Freepost' or to refuse to process them, and told Preventx at short notice that it would withdraw the relevant licence if Preventx did not migrate to the tracked service.

The High Court agreed with Preventx that insisting that Preventx include the word 'Tracked' on the packaging would have a deterrent effect on users of Preventx's service and may constitute an abusive unfair trading condition. The interim injunction prevents Royal Mail, until trial or a further court order, from refusing to provide its Freepost Standard service to Preventx for the return of its samples for as long as Royal Mail cannot offer its tracked 24 hour returns services without the requirement to be labelled 'Tracked'. The court also held that Royal Mail cannot refuse to process or deliver test sample packages that have been sent by Freepost'.

National Grid Electricity Transmission plc v ABB Ltd and Others. On 24 August 2020, Safran SA, a French technology group, entered into a deed of settlement with National Grid Electricity Transmission plc as part of the latter's claim for follow-on damages against Safran and 19 other defendants which were found to have been part of a power cables cartel. In 2015, National Grid and Scottish Power brought claims relating to 127 projects over a 10-year period. The claims were transferred to the CAT in February 2020. NKT A/S and NKT Verwaltungs GmbH settled with National Grid on 7 September 2020, while Scottish Power settled its claim on 29 July 2020. The trial was scheduled to begin on 4 November 2020.

Unwired Planet International Ltd and another v Huawei Technologies (UK) Co Ltd and another. On 26 August 2020, the UK Supreme Court issued its judgment in a standard-essential patent (**SEP**) dispute between Huawei and Unwired Planet (see *full alert memorandum*).

Unwired Planet is a patent assertion entity that acquires and licenses patents. In 2013, it acquired telecoms patents from Ericsson, 276 of which were declared to be SEPs to the relevant standard setting organisation, ETSI. In 2014, Unwired Planet sought an injunction against Huawei, Samsung, and Google based on five UK patents from the Ericsson portfolio. Huawei had previously licensed the patents from Ericsson, but the license expired in 2012 and Huawei had continued to use the patented technology without a license. The High Court had to determine whether the terms of the parties' latest licensing offers to each other were 'fair, reasonable and non-discriminatory' (**FRAND**), and, if not, to determine the terms that would be FRAND. The High Court set worldwide licence terms, holding that a UK-only licence would not be FRAND because a willing licensor with a global portfolio and a willing licensee with almost global sales could reasonably be expected to agree a worldwide licence. Birss J. imposed an injunction if Huawei did not accept the terms he had set. The Court of Appeal dismissed Huawei's appeal on all grounds (except that the Court of Appeals found that a FRAND royalty rate can be a range rather than a single percentage).

The Supreme Court unanimously dismissed Huawei's appeal against the Court of Appeal's judgment. The Court held:

— An English court has jurisdiction to enjoin infringement of a UK patent even if the infringer accepts a UK license on FRAND terms set by the courts but resists a worldwide license;

— England and Wales is a more appropriate forum for the dispute than China because Chinese courts have no jurisdiction to determine FRAND terms for global licenses without the parties' consent;

— The 'non-discrimination' prong of FRAND does not impose obligations that are separate from the 'fair and reasonable' prong, and does not prohibit different royalties for similarly-situated licenses, if commercially justified;

— The CJEU's ruling in *Huawei v ZTE* – where it was held that an SEP owner does not breach Article 102 TFEU by seeking an injunction prohibiting the infringement of a patent, if it has previously alerted the infringer of the infringement and presented a written offer for a license on FRAND terms, and the infringer has not accepted that offer – provides a 'safe harbour' for SEP holders seeking injunctions against infringers, but not a set of mandatory requirements; and

— An injunction may be a proportionate remedy for infringement of a UK patent unless a worldwide license is taken.

Lexon (UK) Limited v Competition and Markets Authority. On 27 August 2020, the CMA applied for a director disqualification order against Mr. Pritesh Sonpal in connection with its decision to fine the company of which he is a director, Lexon, for exchanging commercially sensitive information about Nortriptyline Tablets with two other companies. On 17 September 2020, the High Court published an Order transferring the question of whether Lexon had committed a breach of competition law to the CAT. If the CAT decides Lexon has committed a relevant breach of competition law, the High Court will then have to consider whether Mr. Sonpal's conduct in connection with that breach makes him unfit to be involved in the management of a company pursuant to section 9A of the Company Directors Disqualification Act 1986. Lexon has separately launched an appeal in the CAT against the fine that the CMA imposed. As part of the appeal, Lexon is challenging the CMA's classification of the infringement as a 'by object' infringement, the finding that it committed a single continuous infringement, and the level of the fine imposed. The hearings for the appeal and director disqualification action are scheduled to be held together from 16 November 2020 for five and a half days.

Roland (U.K.) Limited and Another v Competition and Markets Authority. On 1 September 2020, the CAT published an application by Roland (UK) Limited and Roland Corporation (together, **Roland**) against the level of the fine imposed by the CMA in its decision of 29 June 2020 finding that Roland had engaged in unlawful resale price maintenance (**RPM**). Roland was fined £4 million for engaging in online RPM in relation to electronic drum kits and other musical products through its single UK distributor between 7 January 2011 to 17 April 2018. Roland does not dispute the findings of fact made by the CMA that Roland infringed competition law through RPM, nor does Roland dispute the fact that a financial penalty was an appropriate outcome. Roland's appeal relates only to the level of fine imposed. It has submitted that the starting point for the fine of 19% of relevant turnover was excessive in the context of its unlawful conduct and that the 20% leniency discount was inadequate. Roland is seeking both a reduction in the level of the fine and an order from the CAT for the CMA to pay its appeal costs. The hearing has been listed for 9 December 2020.

JD Sports Fashion plc & Others v Competition and Markets Authority. On 1 September 2020, JD Sports Fashion and Pentland Group Limited filed an appeal against a CMA decision of 29 July 2020 to impose a penalty of £300,000 on the parties for failing to comply with the requirements of the CMA's initial enforcement order issued in the context of the completed acquisition by JD Sports of Footasylum plc.

JD Sports and Pentland are appealing the penalty decision on the grounds that (i) the decision was unfair and contrary to the CMA's own policy on penalties procedures; (ii) the decision was based on a fundamental factual error in relation to the steps taken by the appellants to comply with the order; (iii) there was no failure to comply with the order on the part of Footasylum; (iv) further or alternatively, the CMA erred in its assessment as to whether there was a reasonable excuse for the alleged breach of the order; (v) there was no basis for addressing the decision and/or penalty to Pentland Jersey; (vi) there was no basis for imposing a penalty on the appellants; and (vii) the amount of the penalty was unjustified and disproportionate and should be reduced to nil or a nominal sum. Case management directions were given by Order of the Chairman dated 18 September 2020. A hearing has been listed for 8 December 2020.

Antitrust/market studies

CMA Revokes HSBC Directions In Retail Banking Market Investigation. On 6 August 2020, as part of the ongoing activity resulting from the CMA's *Retail Banking* market investigation, which closed on 2 February 2017, the CMA revoked the 2019 directions issued to HSBC. The directions were imposed following the failure of HSBC and four other banks to implement the 'app-to-app redirection functionality' aspect of the 'Open Banking' remedy imposed as part of the investigation. App-to-app redirection functionality enables consumers to authenticate an app using their bank credentials to obtain account information services and payment initiation services. The implementation trustee confirmed to the CMA that HSBC was now compliant with the 2019 directions.

CMA Publishes Provisional Decision Report In Market Investigation Into The Funerals Market. On 13 August 2020, the CMA published its provisional decision report in its *Funerals* market investigation. The CMA has provisionally identified features of the relevant UK markets which alone, or in combination, prevent, restrict or distort competition in the supply of funeral director services and crematoria services at the point of need. In the funeral director services markets, there is a low level of customer engagement due to the challenging circumstances surrounding funerals. These concerns are compounded by the absence of accessible and comparable information on different products and services and the lack of awareness that customers have concerning the quality of care given by funeral directors. The CMA also identified concerns in the markets for crematorium services markets due to the challenging circumstances in which customers purchase crematorium services, and dues to high barriers to entry and high levels of local concentration in supply.

The CMA stated that, while the sector is not working well and reforms are needed, the COVID-19 pandemic has had a significant impact on the long-term solutions needed to design and implement far-reaching reform of the sector. The CMA therefore focused its provisional decision on short-term remedies, such as requiring all funeral directors and crematoria to provide customers with information on, and the prices of, the various services and packages they offer. The CMA has no legal power to suspend or further extend the market investigation. The report, however, recommends that, when conditions are more stable, the CMA should consider whether a supplementary market investigation is needed in order to assess the need for and viability of price regulation.

CMA Extends Parity Commitments In Monitoring Of Pricing Practices Of Online Travel Agents. On 20 August 2020, the CMA confirmed that Booking.com and Expedia have given voluntary commitments to allow hotels that advertise via their respective websites to continue to offer their rooms at differing prices, terms, and availability schedules via other travel agencies, including in the UK. Booking.com and Expedia committed in 2015 not to enforce 'wide' price parity clauses that had previously prevented hotels from offering more favourable terms via other online travel agents. These commitments expired on 1 July 2020.

CMA Closes Entertainment And Recreation Services Investigation. On 21 August 2020, the CMA closed an investigation into anticompetitive

agreements and suspected abuses of dominance in the entertainment and recreation services sector under Chapters 1 and 2 of the Competition Act 1998 and Articles 101 and 102 TFEU. The CMA decided to close its investigation on the grounds of administrative priorities.

CMA Stops Lloyds 'Bundling' Business Accounts With Loans. On 8 September 2020, the CMA found that Lloyds Banking Group had engaged in bundling of business accounts with loans, in breach of undertakings it had agreed with the CMA in 2002. Lloyds had required customers operating small businesses using their personal current accounts to open a business current account alongside their personal account in order to be granted a loan under the Bounce Back Loan Scheme; part of the UK government's response to the impact the COVID-19 pandemic has had on businesses. Lloyds business current account holders would be charged fees by the bank for keeping their business accounts open for longer than the fee-free period. In many cases, it was found that such fees would be unsuitable for owners of small businesses.

CMA Launches Review Of Market Study Of Legal Services In England And Wales. On 9 September 2020, the CMA launched a review into the market for legal services in England and Wales. The CMA's review follows a 2016 market study which concluded that there was insufficient competition for individual consumers and small businesses. As a consequence of these findings, the CMA made a number of recommendations to promote greater competition in the legal sector such as greater transparency on price, quality, and service, and additional protections for consumers. The CMA will now review the progress of competition in the legal sector and the implementation of its recommendations, as it indicated it would in its 2016 market study report. The CMA expects to publish its review report in December 2020.

CMA Imposes Interim Measures In Investigation Of The Atlantic Joint Business Agreement. On 17 September 2020, the CMA imposed interim measures to extend the terms of commitments given in 2010 relating to the Atlantic Joint Business Agreement (**AJBA**) until March 2024. Under the commitments, American Airlines, British Airways and Iberia Airlines agreed to make slots available at London Heathrow and Gatwick to new entrants, such as Virgin Atlantic, Delta and Norwegian, on routes to Boston, New York, Dallas and Miami. The parties also agreed to allow new entrants to offer tickets on their flights for these routes and to enable passengers on these flights to earn frequent flyer points accepted by the commitment parties. The CMA considered new commitment proposals by American Airlines and International Airlines Group (parent company of British Airways and Iberia Airlines). However, the CMA identified that the proposed commitments did not effectively account for the current state of competition and uncertainty created by COVID-19 in the airline industry. The CMA therefore decided to impose interim measures that effectively prolong the status quo to address the underlying competition concerns.

The extension is intended to avoid an 'enforcement gap' arising between the expiry of the 2010 measures and the conclusion of the CMA's investigation into the AJBA, which could not be completed before the expiry of the 2010 commitments. As a result of imposing the interim measures, IAG and American Airlines are obliged to release up to four slots at Heathrow and Gatwick airports to competitors for a period of up to three years (or six 'IATA seasons'). The CMA anticipates that the effect on IAG and American Airlines will not be significant owing to their robust businesses and extensive slot position at both airports.

FCA Publishes Final Report In Home And Motor Insurance Market Study And Opens A Consultation On Proposed Remedies. On 22 September 2020, the FCA published its final report in its market study into home and motor insurance pricing. The FCA has proposed reforms designed to address its concerns that consumers are not benefiting from the required levels of competition in the sector. As part of its new proposals, the FCA has recommended that when customers renew their home or motor insurance policies, insurance providers should be prevented

from gradually increasing the renewal prices to consumers (known as 'price walking') unless the prices changes are commensurate with the level of insurance risk. These pricing practices had the effect of increasing prices for loyal customers. The FCA identified six million policyholders who were paying higher prices than average for their risks in 2018 and would have otherwise saved £1.2 billion. Other proposed measures include requiring firms to consider how long-term fair value is being provided to insurance customers, reporting requirements to the FCA, and providing simpler methods to prevent automatic policy renewals. The FCA has requested views on its proposals by 25 January 2021 as part of its work to publish a policy statement and new rules next year. The FCA has published rules on publishing insurance comparison data, so that firms and consumers may benefit from increased transparency.

Ofgem Accuses PayPoint Of Abuse Of Dominance. On 30 September 2020, Ofgem announced that it has issued a statement of objections (**SO**) to PayPoint plc, a provider of over-the-counter payment services to prepayment energy customers. The SO alleges that PayPoint has abused a dominant position by using exclusivity clauses, lasting several years, in the majority of its contracts with energy suppliers and retailers. PayPoint operates a network of 27,000 prepayment terminals across the UK, which predominantly serve convenience stores. Ofgem alleges that PayPoint's contractual obligations limited customers' ability to switch providers and reduced the ability of PayPoint's competitors to compete between 2009 and 2018. The case will be considered by Ofgem's Enforcement Division Panel at a later date.

Merger Developments

PHASE 2 INVESTIGATIONS

Amazon/Deliveroo. On 4 August 2020, the CMA cleared the anticipated acquisition by Amazon of certain rights and a minority shareholding of 16% in Deliveroo. The CMA ultimately found that the investment would not substantially lessen competition in either restaurant delivery or online convenience grocery delivery. The CMA issued revised provisional findings on 24 June 2020. The acquisition was provisionally cleared in April 2020, but the investigation resumed after the change in Deliveroo's financial condition following the COVID-19 outbreak (see *UK Competition Newsletter, June-July 2020*). Separately, on 7 September 2020, the CMA imposed penalties of £25,000 and £30,000 on Amazon for failing to provide complete responses to two sets of statutory information requests without reasonable excuse. Amazon produced 189 documents, which the CMA considered relevant to its investigation, after the relevant deadlines.

FNZ (Australia) Bidco Pty Ltd/GBST Holdings Limited. On 5 August 2020, the CMA issued its provisional findings on the completed acquisition by FNZ (Australia) Bidco Pty Ltd. of a controlling interest in GBST Holdings in 2019. The companies are two of the leading suppliers of retail investment platform solutions in the UK, and both have a significant presence in the UK. The CMA has provisionally found that FNZ's purchase of GBST could result in a substantial lessening of competition, leading to UK consumers who rely on investment platforms to administer their pensions and other investments facing higher costs and lower quality services. Although there are differences in the two companies' business models, the CMA has provisionally concluded that FNZ and GBST compete closely in a concentrated market in which there are few other significant suppliers. In particular, the CMA's investigation found that FNZ and GBST have competed consistently against each other in recent tenders to supply major investment platforms in the UK, and that customers view them as close alternatives.

The merged business would be the largest supplier in the UK, holding close to 50% of the market. The CMA provisionally found that it would face limited competition, with only one other supplier (Bravura) offering similar capabilities. It also found that, in light of customers' reluctance to switch suppliers due to cost, complexity, and risks, it would be difficult for smaller or less well-established firms to enter or achieve scale in the UK. The CMA also published a Notice of Possible

Remedies consulting, in particular, on whether a full or partial divestment of GBST would be an effective and proportionate remedy. The reference period for the inquiry has been extended until 17 November 2020.

Hunter Douglas N.V./247 Home Furnishings Ltd. On 14 September 2020, the CMA issued its final decision ordering Hunter Douglas, owner of online blinds retailer Blinds2Go, to sell the majority of its shares in 247 Home Furnishings Ltd (**247**) to protect competition and prevent higher prices. In 2013, Hunter Douglas acquired an extensive package of rights in 247 including a 49% share of the voting rights, the discretionary right to convert its loan notes to ordinary shares at any time and certain veto rights allowing it to influence 247's commercial policy. Whilst these rights were subsequently reduced between 2016-17, the extent of Hunter Douglas' rights were kept confidential until they were disclosed to the CMA in November 2019. This prompted the CMA to launch an investigation after the 2019 transaction completed on 19 February 2019 whereby Hunter Douglas went on to acquire 100% of the shares in 247. The CMA had provisionally found on 16 July 2020 that the completed acquisition by Hunter Douglas of a controlling interest in 247 would give rise to competition concerns in the online retail supply of made-to-measure blinds in the UK (see *UK Competition Newsletter, June-July 2020*). In its Final Report, the CMA found that the merger would result in a reduction from three to two large firms in the market for online sales of made-to-measure blinds, with few other effective competitors. The CMA found that the acquisition would give Hunter Douglas full control to coordinate prices across Blinds2Go and 247. It therefore concluded that requiring Hunter Douglas to sell 51% of its shares in 247 was an effective way of offsetting the loss of competition from the 2019 transaction. The CMA will have full oversight of the sales process and will be required to approve potential buyers.

Taboola/Outbrain. On 14 September 2020, Taboola announced that it had decided to abandon its proposed purchase of Outbrain. The CMA confirmed the cancellation of its investigation into the acquisition on 22 September 2020. The CMA had referred the anticipated acquisition for an in-depth investigation on 9 July 2020 (see *UK Competition Newsletter, June-July 2020*). Taboola and Outbrain are both leading providers of content recommendation, a type of digital advertising, to advertisers and publishers including major UK news sites. After completing its initial Phase 1 investigation in June 2020, the CMA had found that the proposed deal raised competition concerns in the supply of content recommendation to UK publishers. The CMA published its Issues Statement on 4 August 2020.

UNDERTAKINGS IN LIEU OF PHASE 2 INVESTIGATIONS

Breedon Group plc/Cemex Investments Limited. On 26 August 2020, the CMA announced its decision to refer the completed acquisition by Breedon Group plc of certain assets of Cemex Investments Limited for a Phase 2 investigation unless the parties offered acceptable undertakings. Breedon and Cemex are two leading producers and distributors of construction materials in the UK and Ireland. The CMA found that the deal raises competition concerns in the supply of building materials in some parts of the UK. On 10 September 2020, the CMA announced that there are reasonable grounds for believing that the undertakings offered by Breedon, or a modified version of them, could alleviate its concerns.

Ardonagh Group/Bennetts Motorcycling Services. On 16 September 2020, the CMA published its decision to refer the completed acquisition by Ardonagh Group Limited of Bennetts Motorcycling Services Limited for a Phase 2 investigation unless it received acceptable undertakings in lieu of reference. Ardonagh, which operates the Carole Nash and Swinton brands, and Bennetts, are the two leading distributors of motorcycle insurance to private customers in the UK. On 30 September 2020, the CMA announced that it had reasonable grounds to believe that the proposal from Ardonagh to unwind its recent £26 million purchase of Bennetts should, in principle, be capable of remedying the competition concerns it had

identified. The CMA will take a final decision by 25 November 2020.

PHASE 1 CLEARANCE DECISIONS

Visa International Service Association/Plaid Inc. On 24 August 2020, the CMA cleared the anticipated acquisition by Visa International Service Association of Plaid Inc. Visa is a global leader in electronic payments. Plaid is a US-based technology platform provider that offers payment initiation services (**PIS**) in the UK, enabling consumers to make real-time account-to-account payments directly from a merchant's app or website.

Visa announced in January 2020 that it had agreed to buy Plaid for $5.3 billion. The CMA found that Plaid would have been an increasing competitive threat to Visa in future, but, given the number of PIS providers already active in the UK possessing similar or stronger competitive capabilities than Plaid, Visa would continue to face sufficient competition in the UK consumer-to-business electronic payments sector. The merged entity would also not have the ability to exclude other providers from the market, principally because customers often use several suppliers for their payment options.

Bupa Insurance Limited/Civil Service Healthcare Society Limited. On 24 September 2020, the CMA cleared the anticipated acquisition by Bupa Insurance Limited of Civil Service Healthcare Society Limited (**CS Healthcare**). The CMA had announced the launch of its merger inquiry by notice to the parties on 19 August 2020. CS Healthcare is a friendly society with approximately 18,500 members and was originally established in 1929 to provide health insurance cover for members of the UK Civil Service. Bupa is the UK's leading health insurer. The CMA assessed the impact of the merger in the supply of personal private medical insurance (**PMI**), where the parties overlap. The CMA decided that the merger does not give rise to a realistic prospect of a substantial lessening of competition in the supply of personal PMI based on the findings that: (i) while Bupa is the largest supplier of personal PMI in the UK, the increment from the merger will be small at less than 5%; (ii) the parties do not compete closely with each other, as they rely on different customer acquisition channels and focus on different customer bases; and (iii) the merged entity would face sufficient constraints from other suppliers.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision Due Date
Evolution Gaming Group AB/NetEnt AB	16 November 2020
XPO Logistics, Inc./Kuehne + Nagel Drinkflow Logistics Holdings Limited	20 November 2020
Mitie Group PLC/ Interservefm (Holdings) Ltd	24 November 2020
Facebook, Inc/Giphy, Inc	TBC

Further Developments

CMA Concludes Consultation On Guidance On The CMA's Investigation Procedures In Competition Act 1998 Cases. On 5 August 2020, the CMA concluded its consultation on its current guidance regarding its investigation procedures under the Competition Act 1998. The CMA has proposed incremental changes across several areas. Revisions to the guidance include increasing transparency in cases from the outset and sending draft penalty statements alongside statements of objections. The CMA also intends to clarify when, and on what basis, it may expedite its access to file procedure, the cross-disclosure of parties' representations regarding a statement of objections, CMA settlement practices, and the scope of the procedural officer's role. Other minor amendments proposed include: recommendations that compulsory interviews can be remotely held; clarifying the CMA's practice of providing extensions for written representation submissions; clarifying the CMA's expectations for attendees at oral hearings; and clarifying the CMA's practice in pursuing director disqualifications and undertakings for businesses under investigation for breaching competition laws. The CMA is currently processing the feedback received on its consultation.

CMA Consults On FDI Powers/Procedures Guidance. On 7 September 2020, the CMA launched a consultation on Foreign Direct Investments (**FDI**) and the draft Enterprise Act 2002 (EU Foreign Direct Investment) (Modifications) Regulations 2020 which could have required the CMA to collate and share information on FDI contemplated or completed in the UK with another EU Member State or with the European Commission. On 16 September 2020, however, the proposed regulations were withdrawn by the UK government following the decision by the European Commission that the regulations would not apply to the UK. The CMA accordingly paused and then subsequently withdrew its consultation on the CMA's powers and procedures regarding FDI investment screening into the European Union.

Lloyds agreed with the CMA that, in order to comply with its obligations, it would write to customers and explain that those customers who had opened business current accounts to obtain a Bounce Back Loan are free to switch to another bank and still retain their loan and that those who choose to stay have the option to switch their account to a loan servicing account that does not charge fees. Furthermore, from mid-September, new applicants for Bounce Bank loans will have the choice of opening a business current account or opening a no-fee loan servicing account. Lloyds will remain under monitoring obligations and will report back to the CMA on its progress.

Internal Markets Bill Is Put Before Parliament, Including Proposal For An Advisory Body Under The CMA For Internal Market. On 9 September 2020, the Internal Markets Bill was put before parliament. The bill aims to facilitate trade between the four nations of the UK by providing for regulatory continuity and a competitive market after the end of the Brexit transition period. The bill focuses on Northern Ireland and contains provisions designed to ensure continued trade flows between Northern Ireland and the rest of the UK. It includes a proposal for the establishment of the Office of the Internal Market (**OIM**) as an independent monitoring body within the CMA. If approved, the bill would give the CMA, through the OIM, new powers to monitor, advise and report on the internal market to the UK parliament and devolved administrations. The OIM's advice is intended to be technical, non-binding and designed to facilitate trade between the four nations of the UK. In addition, there are proposed provisions relating to: state aid; the mutual recognition of professional qualifications; and financial assistance powers to replace the EU funding grants program.

Government Sets Out Plans For New Approach To Subsidy Control. On 9 September 2020, the UK government confirmed that it intends to establish its own subsidy control regime following WTO subsidy rules after the expiry of the Brexit transition period on 31 December 2020. Further guidance will be published before the end of 2020 on the possible substance of the upcoming regime and the UK government will publish a consultation requesting input on its future scope. In tandem with the proposed Internal Markets Bill currently before parliament, the UK government intends that parliament alone should have the power to legislate on subsidy control.

CMA Publishes Updated Managers Guide To Competition Risk. On 10 September 2020, the CMA published new guidance for managers, directors, and advisers as it updates its competition risk guidance in partnership with the Institute of Risk Management. The CMA is increasingly pursuing company director disqualifications and recently secured its twentieth disqualification order over the course of the preceding four year period. The CMA has also emphasised that it is willing to impose fines on companies that do not comply with competition law. In order to publicise its efforts, the CMA is running its 'Cheating or Competing' awareness campaign. This campaign sits alongside the updated risk guidance so that managers and directors, and the professionals advising them, are aware of best practices to remain in compliance with their competition law obligations.

CMA Publishes Response To Commission Consultations On Digital Services Act Package And New Competition Tool. On 14 September 2020, the CMA published its response to the European Commission's public consultations in relation to the Digital Services Act (**DSA**) and the New Competition Tool (**NCT**). The CMA is broadly supportive of the Commission's DSA proposals. Notably, the regulation of large online platforms acting as 'gatekeepers' and the review of the E-Commerce Directive to ensure that it remains fit-for-purpose and provides online platforms with clear rules setting out their responsibilities have all been well received by the CMA.

The CMA provided input from its experience operating its own Market Investigation tool and sounded a note of caution that such tools are not a substitute for other competition methods of oversight and whether it is appropriate to use the NCT would have to be considered on a case-by-case basis. The CMA also cautioned that, even if it were possible to determine accurately when a market may "tip", it can still be difficult to act swiftly and implement appropriate remedies, meaning that the case for intervention is not always clear.

HM Treasury Announces Review Of UK Competition Policy. On 14 September 2020, John Penrose, MP, was announced as the head of an independent review commissioned by the UK government to analyse how the current UK competition rules could be developed in the context of COVID-19 and the end of the transition period from 1 January 2021. The aim of the review is to propose recommendations that will ensure that the UK competition regime is fit to enhance the UK government's stated policy objectives of promoting market dynamism and the fostering of innovative companies to benefit UK consumers.

PSR Publishes Interim Report On Market Review Into The Supply Of Card-Acquiring Services. Following the launch of its 2018 market review of the supply of card-acquiring services, the Payment Systems Regulator (**PSR**) published its interim report on 15 September 2020. The PSR has investigated the extent to which the 2015 Interchange Fee Regulation (**IFR**), which introduced a cap on the fees paid by the acquirer to the issuer on certain card payments, has facilitated cost savings to card merchants. The PSR's interim report concludes that most IFR savings have been passed on to merchants with the estimated value of the savings in 2018 being calculated as £600 million.

The interim report makes two recommendations. First, it recommends that all contracts for card-acquiring services should be drafted with a definitive end-date in order to encourage switching or re-negotiation of terms. Second, the PSR has identified that point-of-sale terminal contracts currently act as a barrier to switching due to their long initial durations and automatic renewal for successive fixed terms and early termination clauses. The PSR would like to see these point-of-sale contracts limited in duration to align with the 18-month limit under the Consumer Credit Act 1974, and to come without automatic renewal clauses for successive fixed terms. Point-of-sale contracts should also be easier to exit upon a change of terms in the card-acquiring service contract without incurring termination fees.

CMA Limits RPM Leniency Discount. On 24 September 2020, the CMA published an addendum to its Leniency Guidance which states that the CMA will not expect to grant immunity or discounts to financial penalties of more than 50% to Type B applicants reporting resale price maintenance (RPM) practices. 'Type B' leniency is available to an undertaking that is the first applicant to provide additional evidence of an infringement to the CMA where there is already a pre-existing civil or criminal investigation into the activity. In July 2020, the CMA launched a consultation on 'Type B' leniency guidance changes for RPM cases designed to clarify how the CMA would exercise its discretionary power to grant a Type B leniency decision. The CMA's policy change follows the CMA's reflection on its experience in RPM cases, where it considered that Type B leniency might be too generous and therefore limit deterrence.

CMA Consults On Merger Remedies Enforcement Guidance. On 30 September 2020, the CMA launched a consultation period on its draft guidance regarding its reporting, investigation, and enforcement powers to ensure compliance with actual or potential breaches of final merger remedies, undertakings, and orders. The guidance will codify the CMA's existing approach and promote greater transparency regarding these rules. The new guidance will not represent any significant departure from the CMA's current practices. The consultation will remain open for comments from stakeholders until 30 October 2020.

COVID-19:

CMA Drops Fourth Hand Sanitiser Excessive Pricing Probe. On 3 September 2020, the CMA closed its investigation into suspected charging of excessive and unfair pricing for hand sanitiser products during the COVID-19 pandemic. The CMA closed three other related investigations on 13 July 2020, where it considered that the prices that retailers had charged did not or were unlikely to have infringed competition law. The CMA closed its fourth investigation having concluded that pursuing the investigation would not lead to substantive consumer benefits in the event it was found that an infringement had occurred.

UK Government Revokes Dairy/Groceries COVID-19 Competition Exemptions. On 25 September 2020, the UK government officially revoked the Dairy Produce Order (**DPO**) and the Groceries Order, to take effect from 8 October 2020. The Orders, issued in April 2020, relaxed elements of UK competition law in the dairy and grocery industries in response to the COVID-19 pandemic. The DPO, a public policy exclusion order, was always designed to be temporary and contained a sunset provision mandating the DPO's expiry by the end of 1 August 2020.

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