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UK Competition Law Newsletter

Highlights

— CMA's Digital Markets Taskforce proposes a new regulatory regime for digital markets

— UK Supreme Court rules on the certification standard for collective proceedings in *Mastercard v Merricks*

— CMA accepts commitments from Essential Pharma following investigation into supply of Priadel

— CMA launches market study into the electric vehicle charging sector

— CMA fines construction suppliers over £15m for colluding to reduce competition and maintain or increase prices

CMA's Digital Markets Taskforce proposes a new regulatory regime for digital markets

On 8 December, the CMA published its Digital Markets Taskforce's (**DMT**) advice to the Government on the design and implementation of a new regulatory regime for digital markets (the **Advice**). The DMT is comprised of experts from the CMA, Ofcom, and the Information Commissioner's office. The Advice recommends an *ex ante* regime with three pillars: (1) an enforceable Code of Conduct for firms with Strategic Market Status (**SMS**); (2) procompetitive interventions (**PCIs**) targeted at SMS firms; and (3) SMS merger control rules. The new regime would be administered by a Digital Markets Unit (**DMU**) that would sit within the CMA.

The Advice also proposes reforms to competition and consumer laws that would relate to digital markets more generally, not only to SMS firms.

The Advice follows the March 2019 Furman Report[1] and the July 2020 report on the CMA's year-long market study into online platforms and digital advertising,[2] both of which recommended a number of changes to the UK's regulation of digital markets, including the creation of the DMU, a Code of Conduct for SMS firms, and the introduction of data access and interoperability requirements.

[1] Report of the Digital Competition Expert Panel, chaired by Jason Furman, March 2019. In March 2020, the UK Government accepted the recommendations made in the Furman Report and instructed the DMT to "consider the practical application of the potential pro-competitive measures set out by the DCEP".

[2] In November 2020, the UK Government accepted the CMA's four main recommendations following the online platforms and digital advertising market study. *See* the Government's response to the CMA's online platforms and digital advertising market study, 27 November 2020.

The proposals, if implemented, would have significant implications for firms operating in digital markets. Most notably, the Advice recommends:

— A shift from an *ex post* to an *ex ante* regulatory approach for digital markets, under which the DMU would be "*focused on proactively preventing harm*"[3] and firms with SMS would be subject to Codes of Conduct that "*set clear 'rules of the game' up-front, preventing the firm taking advantage of its powerful position.*"[4] The regime would also allow the DMU to take action to restore competition after harm had occurred, including to "*address the root cause of the market power*"[5]; and

— A shift from a voluntary merger control regime to a mandatory and suspensory regime for certain transactions undertaken by SMS firms. Currently, merging parties can assess for themselves whether to notify a transaction that meets the UK merger regime's jurisdictional thresholds and can, in most circumstances, close transactions without prior clearance from the CMA.[6] SMS firms would no longer benefit from the same rules, but would instead need to alert the CMA to certain transactions and undergo a mandatory review before closing could occur.

The most significant aspects of the Advice are discussed further below.

What is 'Strategic Market Status'?

The SMS test. The proposed regime would regulate firms with SMS. SMS is defined to mean having "***substantial, entrenched*** *market power in at least one digital activity, providing the firm with a* ***strategic position*** (*meaning the effects of its market power are likely to be particularly widespread and/or significant*) (emphasis added)."[7] SMS is a higher standard than dominance. In greater detail:

Substantial market power arises where "*users of a firm's product or service lack good alternatives*" and "*there is a limited threat of entry or expansion by other suppliers*" thereby enabling the firm to "*increase prices and/or reduce quality and innovation.*"[8] An assessment of 'market power' under the SMS standard would draw on competition law principles, although the DMU would not be required to carry out a formal market definition exercise.[9]

Entrenched means "*not merely transitory and likely to be competed away in the short term.*"[10]

Strategic position means "*the effects of its market power are particularly widespread or significant*", assessed by reference to a range of factors, which would be considered in the round, including:[11]

— the firm has "*very significant size or scale in an activity*" (for example, if it is "*regularly used by a very high proportion of the population or where the value of transactions facilitated by a specific product is large*");

— the firm is an "*important access point to customers*" for a range of other businesses, or the activity is an important "*input*";

— the firm has developed an 'ecosystem' or can use the activity to "*extend market power*" into other activities;

— the firm can "*determine the rules of the game*" for other market participants; and

[3] Advice, para. 14.

[4] Advice, para. 4.5.

[5] Advice, para. 4.60.

[6] Parties cannot, however, complete without the CMA's consent once a Phase 2 investigation has been opened.

[7] Advice, para. 12.

[8] Advice, para. 4.10.

[9] Advice, para. 4.14.

[10] Advice, para. 4.12.

[11] Advice, para. 4.19.

— the activity impacts markets with "*broader social or cultural importance*."

Scope of an SMS designation. SMS would be applied to particular '**digital activities**' and would not automatically apply to a firm's activities as whole.[12] Examples of 'activities' given in the Advice include the "*buying, selling and selection of advertisements for display on websites*"[13] and the provision of online marketplaces, app stores, social networks, web browsers, online search engines, operating systems, and cloud computing services.[14] An activity would be considered 'digital' if "*digital technologies are material to the products and services provided as part of the activity.*"[15]

Importantly, this means that the Code of Conduct would apply only to a firm's designated digital activities. The SMS firm's non-designated activities would not be subject to the Code of Conduct except to the extent that the firm could not "*make changes to non-designated activities that further entrench the position of its designated activity unless the change [could] be shown to benefit customers.*"[16] SMS 'status' would apply to the entire corporate group to ensure, among other things, that corporate restructurings do not frustrate the application of remedies.[17]

SMS designation process. SMS would be assessed by the DMU as "*an independent regulator*," conducting an evidence-based economic assessment of whether (i) the criteria for designation are met, and (ii) whether it is "*appropriate*" to designate the firm.[18] The DMU would publish guidance on the designation process and would conduct assessments openly and transparently. The DMT recommends that the DMU be subject to a statutory deadline to complete the designation process, and suggests a 12 month timeframe would be appropriate.[19] The DMT expects that "*only a small number of digital firms*" would meet the SMS test.

The Advice recommends that the DMU should publish guidance on the factors it will consider when prioritising its assessment of firms for possible SMS status, including:

— the firm's revenue (firms with annual UK revenue in excess of £1 billion and annual global revenue in excess of £25 billion);

— activities in particular sectors (focusing on "*online marketplaces, app stores, social networks, web browsers, online search engines, operating systems and cloud computing services*"); and

— whether a sectoral regulator is better placed to address the issues of concern.

Duration. Designation as an SMS firm would last for a fixed period of time—around five years—and during that period, the SMS firm could make an application to the DMU *"to remove designation in relation to an activity where there had been a material change in circumstances.*"[20]

The Role of the DMU

The Advice contemplates the DMU overseeing digital markets with a primary duty to "*further the interests of consumers and citizens in digital markets by promoting competition and innovation*."[21] As well as designating SMS firms and activities, the DMU would be responsible for developing and monitoring SMS firms' compliance with Codes of Conduct, ordering PCIs, enforcing the SMS regime, and monitoring digital markets more broadly, to "*spot opportunities where intervention*

[12] Advice, paras. 4.7 and 4.15.

[13] Advice, para. 4.15

[14] Advice, para. 4.23.

[15] Advice, para. 4.16.

[16] Advice, para. 4.51.

[17] Advice, para. 4.31.

[18] Advice, para. 4.8.

[19] Advice, para. 4.25

[20] Advice, para. 4.29.

[21] Advice, para. 3.3.

could better support competition and innovation" (for example, through personal data mobility or interoperability).[22] The DMU would be expected to work closely with other digital markets regulators in the UK and in other jurisdictions, including Ofcom, the ICO, and other competition authorities.

The Codes of Conduct

The DMT recommends a legally enforceable and tailored Code of Conduct (or **Code**) for each SMS firm. The Advice does not make specific recommendations as to what the Codes should include, only that they should be drafted by the DMU to set out "*how the firm is expected to behave in relation to the activity motivating its SMS designation*" with "*clear 'rules of the game' up-front*" that could address exploitative or exclusionary practices.[23]

The DMT endorses a regime under which each Code would comprise 'objectives' (*i.e.*, what the Code seeks to deliver, such as 'Fair Trading'), 'principles' (*i.e.*, standards that achieve a particular objective, such as "*trade on fair and reasonable contractual terms*"), and 'guidance' (*i.e.*, how the principles should be interpreted and specific examples of conduct that would breach the Code 'principles'). The objectives would be prescribed in legislation, whereas the principles and guidance would be developed by the DMU and tailored to the SMS firm and digital activities at issue.[24] Principles would be "*evidence-based and targeted*" at the designated activity, "*forward-looking*", and "*coherent*" in the sense that they would align with other regimes (*e.g.*, data protection).[25] The DMU could grant exemptions from the Code's principles where the practices in question generate efficiencies, innovation or "*other competition benefits.*"[26]

The Pro-competitive Interventions

In addition to the Codes of Conduct, the DMT recommends that the DMU be given powers to order PCIs of any type (other than structural separations) to address "*the sources of market power and drive longer-term dynamic changes.*"[27] These might include:[28]

— data-related interventions (*e.g.*, to support greater user control, third party access, and data separation/data silos);

— interoperability measures, including to support data mobility;

— consumer choice measures, including to address "*the power of defaults*";

— obligations to provide access on fair and reasonable terms to an operating system or marketplace; and

— operational and functional separations between units within SMS firms.

The legal test for implementing a PCI would be "*to rectify an adverse effect on competition or consumers, in activities in which the SMS firm operates, which relate to the firm's market power and strategic position in a core activity.*"[29] PCIs would be implemented "*for a limited duration*" and could be 'layered', starting with the least interventionist measures.[30] The DMU would be under a duty to conduct its assessments in an open and transparent manner and ensure the intervention is "*effective and proportionate, without causing significant adverse consequences for the firm's wider business.*"[31]

[22] Advice, para. 3.14.

[23] Advice, para. 4.5.

[24] Advice, para. 4.39.

[25] Advice, para. 4.39.

[26] Advice, para. 4.40.

[27] Advice, para. 4.5

[28] Advice, para. 4.68.

[29] Advice, para. 4.76.

[30] Advice, para. 4.81.

[31] Advice, para. 4.77.

The introduction of PCI powers was also recommended by the CMA following its market study into online platforms and digital advertising.

Monitoring and Enforcement

Powers. The DMU would have the power to investigate compliance with Code obligations and PCI orders, supported by *"strong information gathering powers."*[32] The DMU would seek to address concerns using a "*participative approach*" where possible, by engaging with SMS firms proactively, focusing on *"supporting SMS firms to comply,"* and intervening early *"where it identifies risks of potential problems occurring."*[33] Where a formal investigation is appropriate, it would be carried out within a fixed statutory deadline of around six months (with a subsequent period for imposing penalties).[34]

Penalties. The DMU would have hard-edged enforcement powers at its disposal if a participative approach would be inappropriate or insufficient. These would include mandatory orders, interim orders, and penalties of up to 10% of global turnover.[35] The DMU would not be able to order structural separations.

Appeal rights. The DMT contemplates that DMU decisions could be challenged only on judicial review grounds —not a full merits appeal.

The SMS Merger Rules

The Advice proposes a new merger control regime operated by the CMA that would apply to all M&A activity undertaken by SMS firms, not only transactions relevant to SMS-designated activities. The proposed regime has two main features:

— **Mandatory and suspensory notifications** of acquisitions of *de jure* or *de facto* control (not acquisitions of material influence) that meet as-yet-unspecified transaction value thresholds and have a nexus to the United Kingdom,[36] as well as a **general reporting obligation** for all other M&A activity.[37]

— **Lowered standard of proof for finding an SLC**, from 'balance of probabilities' to a 'realistic prospect' (the standard that the CMA applies at Phase 1), thereby lowering substantially the threshold for intervention for SMS mergers.[38]

These proposals represent a significant departure from the UK's existing regime. The DMT justifies the additional merger control scrutiny for SMS firms in light of "*the powerful positions of these firms and the potential harms that such transactions might raise*" and "*widely-held concerns about historic underenforcement against digital mergers in the UK and around the world*."[39]

Other Reforms

Finally, alongside the SMS regime, the DMU would have the power to monitor digital markets more broadly and take action to:[40]

— address unlawful or illegal content;

— enable effective consumer choice, in particular, "*addressing instances where choice architecture leads to consumer harm*"; and

— enforce more strongly the Platform to Business Regulation.

[32] Advice, para. 4.84.

[33] Advice, para. 3.12-3.13.

[34] Advice, para. 4.93.

[35] Advice, paras. 4.95-4.98

[36] Advice, paras. 4.136-148.

[37] Advice, para. 4.135.

[38] Advice, paras. 4.149-4.155.

[39] Advice, paras. 4.120-121.

[40] Advice, para. 5.11.

Conclusion

The Advice contains wide-reaching proposals that, if implemented, will have significant implications for the way digital firms operate in the UK. The Government has committed to consult on the new digital markets regime in early 2021 and to set up the DMU by April 2021. As the Government considers the proposals and moves the legislation forward in the coming months, key issues for digital firms to watch include:

— The proposed **content of the Codes of Conduct** for SMS firms. The Advice describes the CMA's thinking only at a high level, and the detail of how SMS firms would need to modify their behaviour remains to be developed. The Advice contemplates a consultation process before each Code is introduced, which would allow interested parties to voice their views.

— The **scope of PCI powers**. The Advice recommends powers that would allow the DMU to impose any remedies it sees fit, except for structural separations. But, whether the Government will accept this proposal is unclear, especially given its reaction to a similar recommendation following the online platforms and digital advertising market study: "*...these interventions are complex and come with significant policy and implementation risks. More work is required to understand the likely benefits, risks and possible unintended consequences of the range of proposed pro-competitive interventions.*"[41]

— Any **divergence between approaches taken by different regulators**. The UK is not alone in considering a new digital markets regime, with similar work underway across the globe, including in the U.S., the EU, Australia, and Japan. In particular, the Advice was published at the same time as the European Commission's proposals for a new Digital Markets Act, which would establish a specific set of rules for "gatekeepers." While the DMT has recommended that the DMU would work closely with other regulators, there is no guarantee that the regulatory regimes will be aligned across jurisdictions.

Judgments, Decisions, and News

Court Judgments

Mastercard Incorporated And Others (Appellants) v Walter Hugh Merricks CBE (Respondent). On 11 December 2020, the UK Supreme Court handed down its judgment concerning the standard to be applied when certifying collective proceedings before the Competition Appeal Tribunal (**CAT**) for breaches of the Competition Act 1998 (the **Act**). Under the Act, collective proceedings may not be pursued beyond the issue and service of a claim form without the CAT's certification, in the form of a Collective Proceedings Order (**CPO**). The certification process requires the CAT to be satisfied as to two main criteria: (1) it must be just and reasonable for the applicant to act as the class representative; and (2) the claims must be eligible for inclusion in collective proceedings, meaning that they must all raise the same, similar or related issues of fact or law and be suitable to be brought in collective proceedings.

In this case, the claimant, Mr. Merricks, brought an opt-out collective proceeding before the CAT in September 2016 in reliance on the European Commission's 2014 decision that Mastercard had levied unlawfully high multilateral interchange fees (**MIF**) for international card transactions during the 16-year period between 22 May 1992 to 20 June 2008. The class that Mr. Merricks seeks to represent comprises an estimated 46.2 million people with total estimated damages of £14 billion.

In its July 2017 judgment, the CAT decided that the claims failed the second certification criteria because: (1) the claims were not suitable for an aggregate award of damages due to incomplete

[41] The Government's response to the CMA's online platforms and digital advertising market study, 27 November 2020, para. 28.

data to quantify loss and difficulties interpreting that data; (2) Mr. Merricks' proposed distribution of any award did not take account of the loss suffered by each class member, rather it proposed that damages be distributed on a *per capita* basis; and (3) the MIFs being passed on between merchants and consumers was not a common issue to all the claims.

In April 2019, the Court of Appeal allowed Mr. Merricks' appeal, finding that the CAT had made five errors of law (UK Competition Newsletter, April 2019). Mastercard appealed to the Supreme Court. This is the first collective proceedings case of this kind to reach the Supreme Court.[42]

The Supreme Court agreed with the Court of Appeal that the CAT's decision was undermined by errors of law and remitted Mr. Merricks' application for a CPO to the CAT. The Supreme Court held that the CAT had erred in five aspects of law in refusing to grant the CPO. First, the CAT was incorrect to conclude that MIF pass-on by card merchants was not a common issue to all claims. Second, the CAT placed too much weight on its decision that the case was not suitable for aggregate damages. While this is a relevant factor for certification, it is not a condition. Third, whether a claim is 'suitable' for collective proceedings or for an aggregate award of damages means suitable *relative* to individual proceedings. Therefore, the CAT should have asked itself whether the claims were suitable to be brought in collective proceedings as compared to individual proceedings, and suitable for an award of aggregate damages as compared to individual damages. If the forensic difficulties would have been insufficient to deny a trial to an individual claimant, they should not have been sufficient to deny certification for collective proceedings. Fourth, difficulties with incomplete data and interpreting the data were not good reasons to refuse certification. The Supreme Court noted that courts regularly face issues with quantifying loss. Finally, the CAT was wrong to require Mr. Merricks' proposed method of distributing aggregate damages to take account of the loss suffered by each class member. A central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss and the Act expressly modifies the ordinary requirement for the separate assessment of each claimant's loss.

The CAT will hear Mr. Merricks' application for a CPO on 25 and 26 March 2021.

Robin Davies v The Competition And Markets Authority. On 17 December 2020, the CMA announced that, subsequent to a High Court order granted on 10 November 2020, director of Alissa Healthcare Research Limited (**Alissa**), Mr. Robin Davies, had been granted limited permission to continue to act as a director of Alissa, subject to strict conditions, following his disqualification. The exemption was approved due to Alissa's essential role as a supplier of pharmaceutical products during the COVID-19 pandemic and the fact that there was no one suitable who could replace him as the sole executive director.

FP McCann Limited v Competition And Markets Authority And (1) Eoin McCann (2) Francis McCann. On 22 December 2020, the CAT dismissed FP McCann Limited's (**FPM**) appeal against the penalty imposed on FPM by the CMA for participating in an illegal cartel relating to precast concrete drainage products (*see* UK Competition Newsletter, October 2019). The CMA had imposed the maximum penalty: £25.45 million, representing 10% of FPM's turnover. FPM argued that the CMA's Penalty Guidance, used to assess the level of the fine, is ultra vires and therefore void because Parliament intended the maximum penalty to be reserved for the most serious offences of the relevant kind and the Penalty Guidance does not follow this approach. FPM also argued that the penalty was inappropriate as the CMA had incorrectly applied the Penalty Guidance. The CAT rejected FPM's arguments, holding that Parliament did not intend to limit the CMA's discretion to impose the maximum penalty to only the most serious cases and the penalty was appropriate, the Penalty Guidance having been applied properly at each step.

[42] *See* U.K. Antitrust Collective Damages Actions, UK Competition Newsletter, March 2019.

Antitrust/Market Studies

CMA Launches Market Study Into The Electric Vehicle Charging Sector. On 2 December 2020, the CMA launched a market study into electric vehicle charging. The market study will centre on two themes: (1) how to develop a competitive sector while also attracting private investment to help the sector grow; and (2) how to ensure people using electric vehicle charge-points have confidence that they can get the best out of the service. The deadline for responses to the invitation to comment was 5 January 2021.

CMA Opens Investigation Into Pricing Of Rangers FC-branded Replica Football Kit. On 15 December 2020, the CMA announced that it had opened an investigation into suspected anti-competitive behaviour regarding the prices at which Rangers FC-branded replica football kits were sold in the UK.

CMA Fines Construction Suppliers Over £15m. On 17 December 2020, the CMA fined Vp plc (**Vp**) and M.G.F (Trench Construction Systems) Ltd (**MGF**) over £15m for breaching the Chapter 1 Prohibition and Article 101 TFEU. A third company, Mabey Hire Ltd (**Mabey**), also took part in the illegal conduct but was not fined, in accordance with the CMA's leniency programme. Vp, MGF, and Mabey, UK-based companies who supply groundworks products used to protect excavations from collapse to large construction firms, were found to have colluded illegally to reduce competition and maintain or increase prices. This involved sharing confidential information on future pricing and commercial strategy. They also coordinated their commercial activities to reduce uncertainty, including monitoring each other's prices and challenging quotes they deemed too low.

CMA Publishes Final Report On Review Of Legal Services Market Study. On 17 December 2020, the CMA published its final report on the findings of its review of the England and Wales legal services market study. The 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, and the CMA's review assessed the implementation and impact of those recommendations. The CMA's review found some positive developments but concludes more progress is needed. More specifically, the CMA found that increased transparency on price, service, redress, and regulatory status had enhanced consumer choice, but found that service providers should publicise more information on quality, and that there only appears to have been a limited impact on the intensity of competition between legal service providers. Further, the CMA recommends: (1) a wholesale regulatory review of the Legal Services Act 2007; (2) the establishment of a mandatory public register of all unregulated legal service providers, requiring them to provide appropriate redress; and (3) the Legal Services Board review the activities that are reserved to certain legal services providers to ensure that such restrictions are necessary and proportionate.

CMA Publishes Final Report In Funerals Market Investigation. On 18 December 2020, the CMA published the final report on its in-depth market investigation into funeral services. The CMA will introduce several 'sunlight' remedies to the sector, intended to help consumers when choosing a funeral director or crematorium, including: (1) an obligation on funeral directors and crematoriums to be transparent regarding prices and conditions for service, including the terms of business such as whether a deposit may be required; (2) an obligation on funeral directors and crematoriums to disclose any relevant commercial interests to consumers; (3) a prohibition on referral fees from care homes and hospitals to particular funeral directors; (4) establishment of an independent inspection and registration regime to monitor the quality of funeral services, as a prelude to a more established regulatory framework for the sector. The CMA will continue to monitor the funerals sector, including to assess the impact of COVID-19. The statutory deadline for implementing the remedies is 17 June 2021.

CMA Accepts Commitments From Essential Pharma Following Investigation Into Supply of Priadel. On 18 December 2020, the CMA decided to accept the commitments offered by Essential Pharma to continue supplying Priadel, a lithium-based medication for bipolar disease treatment, at an affordance price for at least five years. In October 2020, the CMA launched an investigation suspecting that Essential Pharma may have abused a dominant market position by adopting a strategy to withdraw Priadel from UK patients (*see* UK Competition Newsletter, October 2019). The CMA's acceptance of the commitments brought the investigation to an end, with no decision as to whether the Competition Act 1998 or the TFEU were infringed.

Merger Developments

PHASE 2 INVESTIGATIONS

Breedon Group plc/Cemex Investments Limited. On 1 December 2020, the CMA announced it had accepted undertakings from Breedon Group plc (**Breedon**) in lieu of referring its completed acquisition of certain assets of Cemex Investments Limited (**Cemex**) to Phase 2. Breedon and Cemex are two leading producers and distributors of construction materials in the UK and Ireland. The CMA's Phase 1 decision found that the deal raises competition concerns in the supply of building materials in some local areas in the UK (*see* UK Competition Newsletter, August–September 2020). To remedy those concerns, Breedon offered to divest certain assets in the local areas identified by the CMA. The assets will be divested to Tillicoultry Quarries Limited as the approved upfront buyer.

Crowdcube/Seedrs. On 12 November 2020, the CMA announced that it had agreed to refer the anticipated merger of Crowdcube and Seedrs to Phase 2 under its "fast track" process (*see* UK Competition Newsletter, November 2020). The parties are the two largest equity crowdfunding platforms in the UK. The criteria for a "fast-track" reference were met as the CMA concluded (1) there was a realistic prospect of an SLC in the supply of equity crowdfunding platforms to SMEs and investors; (2) the parties would have a very high combined share in the UK; and (3) third parties and the parties' internal documents suggested they are very close competitors. The Issues Statement was published on 4 December 2020. The CMA will investigate whether the proposed merger may be expected to result in an SLC in the supply of equity crowdfunding platforms to SMEs and investors in the UK. The statutory deadline for the CMA's Phase 2 investigation is 28 April 2021.

Hunter Douglas N.V./247 Home Furnishings Ltd. On 14 September 2020, the CMA issued its final decision ordering Hunter Douglas N.V., owner of the online blinds retailer Blinds2Go, to sell the majority of its shares in 247 Home Furnishings Ltd (*see* UK Competition Newsletter, August–September 2020). On 7 December 2020, the CMA announced that it had accepted the parties' final undertakings to divest 51% of the ordinary share capital of 247 Home Furnishings Ltd to an approved purchaser.

Liberty Global plc/Telefónica S.A. On 11 December 2020, the CMA agreed to refer the anticipated merger of the operating businesses of Liberty Global plc and Telefónica S.A, Virgin Media/Virgin Mobile and O2, respectively, to Phase 2 under its "fast-track" process. This follows the EC's referral of the case to the CMA on 19 November 2020 (*see* UK Competition Newsletter, November 2020). The CMA's Phase 1 investigation found that there is a realistic prospect that the merger will result in an SLC as a result of input foreclosure in the supply of: (1) wholesale access and call origination on public mobile networks to mobile virtual network operators in the UK; and (2) passive fibre leased lines to mobile network operators, at each of the access and aggregation layers on a local basis. The statutory deadline for the CMA to publish its final report is 27 May 2021.

FNZ (Australia) Bidco Pty Ltd/GBST Holdings Limited. FNZ (Australia) Bidco Pty Ltd (**FNZ**) and GBST Holdings Limited (**GBST**) are two of the leading suppliers of retail investment platform solutions in the UK. In its final report

published on 5 November 2020, the CMA found the transaction was likely to result in an SLC in the supply of retail platform solutions in the UK and concluded that the only effective remedy would be the full divestiture of GBST (*see* UK Competition Newsletter, November 2020). On 15 December 2020, the CMA announced that it intended to accept the parties' final undertakings to divest GBST. On 18 December 2020, FNZ applied to the CAT for a review of the CMA's decision on the grounds that the CMA erred in law and/or acted irrationally by incorrectly determining the counterfactual, failing to properly define the relevant market, finding an SLC, and directing the full divestment of GBST. In response, the CMA stated that it had identified possible market share calculation errors which resulted from not being provided with consistent information during the course of its investigation, and will request that the CAT sends the case back to the CMA for reconsideration.

PHASE 1 CLEARANCE DECISIONS

TFL Ledertechnik/LANXESS Deutschland. On 4 December 2020, the CMA announced that it has cleared the anticipated acquisition of the leather chemicals business of LANXESS Deutschland by TFL Ledertechnik. The parties overlap in the supply of beamhouse, wet-end and finishing leather chemicals in Europe to customers that supply leather to a range of industries, including footwear, automotive and upholstery. The CMA found that sufficient competitive constraints would exist post-merger in the market for the supply of leather finishing chemicals and in the downstream market for the supply of leather to the automotive industry. The decision was published on 24 December 2020.

Sonoco Products Company, Inc/Can Packaging SAS. On 21 December 2020, the CMA announced that it has cleared the completed acquisition of Can Packaging SAS by Sonoco Products Company, Inc. The parties both supply packaging products.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision Due Date
Adevinta/eBay	16 February 2021
SDE Group/Innserve Limited	3 March 2021
Bellis Acquisition Company 3 Limited/Asda Group Limited	TBC
Facebook, Inc/Giphy, Inc	TBC
NVIDIA/Arm	TBC

OTHER DEVELOPMENTS

CMA Publishes EU Exit Guidance. On 1 December 2020, the CMA published further guidance to explain how it will conduct its work following the end of the Transition Period for the UK's exit from the EU.

CMA Publishes Economic Research On Loyalty Price Discrimination. On 1 December 2020, the CMA published a research report on the economic theory of the loyalty penalty. The report was prepared by Professors Paul Heidhues and Johannes Johnen of E.CA Economics.

CMA Consultation For Its Annual 2021/22 Plan. On 3 December, the CMA announced its consultation on its 2021-22 Annual Plan. The CMA has identified four main themes of focus: (1) protecting consumers and driving recovery during and after the COVID-19 pandemic; (2) taking its place as a global competition and consumer protection authority; (3) fostering effective competition in digital markets; and (4) supporting the transition to a low carbon economy. The consultation is open until 28 January 2021.

CMA And Global Regulators Secure App Store Privacy Changes. On 8 December 2020, the CMA announced that it, in partnership with the Netherlands Authority for Consumers and Markets and the Norwegian Consumer Authority, helped lead the international effort to increase information transparency concerning the use

of personal data by apps available in Apple's App Store. This followed concerns, articulated by the International Consumer Protection and Enforcement Network, that consumers were not being provided with sufficient information concerning how their personal data would be used and what would be shared with third parties before selecting an app. Apple will now indicate on its App Store what personal data each app uses.

Internal Markets Bill Receives Royal Assent. The Internal Markets Bill received royal assent on 17 December 2020, passing into law as the United Kingdom Internal Markets Act 2020. The bill was put before parliament on 9 September 2020 (*see* UK Competition Newsletter, August–September 2020).

CMA Publishes Revised Guidance On Jurisdiction And Procedure And The Mergers Intelligence Function. On 23 December 2020, the CMA published the final revised guidance on jurisdiction and procedure and mergers intelligence function guidance following the consultation period in November (*see* UK Competition Newsletter, November 2020).

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