

February 2021

UK Competition Law Newsletter

Highlights

- CMA publishes new Digital Markets Strategy.
- Government publishes independent report on competition and consumer protection in the UK by John Penrose MP.
- Government consults on UK subsidy regime.

CMA Digital Markets Strategy Refresh

The CMA published a “refresh” of its Digital Markets Strategy (**DMS II**) on 9 February 2021. The first iteration (**DMS I**) was published in June 2019 but the CMA explains that “*much has changed*” in the interim, not least “*significant developments in the political and regulatory landscape for digital markets.*”

Initial digital markets strategy

The CMA developed DMS I in response to “[t]he *profound changes being brought about by the digital economy.*” In particular, the CMA highlighted the expansive national and international reach of digital markets, the creation of entirely new services

(such as social media, apps and online shopping) and the rapid pace of change in the sector. It also highlighted the continually increasing reliance that consumers place on digital services.

The CMA explained that its aim was “*first and foremost ensuring that the enormous innovation and benefits brought about through digitalisation can continue.*” Specifically, the CMA sought to ensure that all players can compete on the merits of their offering, that consumers trust online markets and that new competitors can enter digital markets.

DMS I identified five strategic aims and seven priority areas of focus.

DMS I	
Strategic Aims	Priority Areas of Focus
A. Use existing tools effectively and efficiently	1. Use existing consumer and antitrust enforcement and merger assessment powers to fullest extent possible (<i>Strategic Aim A</i>)
B. Build knowledge and capability to understand digital business models	2. The work of the Data, Technology and Analytics (DaTA) Unit, which supports the CMA with technical understanding of working with data and using algorithms (<i>Strategic Aims A, B, C, D, E</i>)
C. Adapt tools to meet the challenges of the digital economy	3. Conduct market study on online platforms and digital advertising (<i>Strategic Aims B, C, D, E</i>)
D. Consider the case and options for regulation	4. Review merger control standards applied to digital markets (<i>Strategic Aims A, B</i>)
E. Consider potential future digital-focused remedies	5. Consider the creation of a Digital Markets Unit, as recommended by the Furman Report ¹ and accepted in principle by the Government (<i>Strategic Aims D, E</i>)
	6. Support the Government on reform of enforcement tools to keep pace with the digital economy (<i>Strategic Aim C</i>)
	7. International cooperation and collaboration (<i>Strategic Aims A, B, C, D, E</i>)

Pathway to DMS II

In the 18-month period since DMS I was launched, the CMA has undertaken “a significant amount of work” and there have been “significant developments in the political and regulatory landscape” related to digital markets. Among others, DMS II identifies the following examples.

- The Government commissioned a Digital Markets Taskforce in March 2020, on the recommendation of the Furman Report, to provide advice to the Government on the design and implementation of a pro-competition regime for digital markets. Published in December 2020, the CMA Digital Markets Taskforce’s advice proposed an *ex ante* regulatory regime comprising three pillars: (i) an enforceable Code of Conduct for firms with Strategic Market Status (**SMS**); (ii) procompetitive interventions targeted at SMS firms; and (iii) SMS

merger control rules.² The new regime would be administered by a Digital Markets Unit (**DMU**), which the Government agreed should be established within the CMA from April 2021.³

- The Digital Regulation Cooperation Forum (**DRCF**) was established with the Information Commissioner’s Office (**ICO**) and Ofcom. Launched in July 2020, the DRCF aims to support cooperation and coordination between the constituent regulators on their respective responsibilities related to digital services.
- The CMA’s DaTA Unit published in January 2021 a paper on algorithms research to be used (alongside any responses to the accompanying call for information) to inform the CMA’s work in digital markets through the DMU. The paper describes possible harms that could be caused to consumers by algorithms, and how

¹ J Furman and the Digital Competition Expert Panel, H.M. Treasury, [Unlocking Digital Competition: Report of the Digital Competition Expert Panel](#) (13 March 2019) (**Furman Report**), Chapter 2. See [CGSH Alert Memorandum](#), “Unlocking Digital Competition: UK Expert Panel Publishes Report on Competition in Digital Markets”, 11 April 2019.

² See [UK Competition Newsletter, December 2020](#) for further details relating to the CMA Digital Markets Taskforce’s advice.

³ See the Government’s [response](#) to the CMA’s Online Platforms and Digital Advertising Market Study, paras. 21-23.

algorithms can be used to exclude competitors and reduce competition.

- The CMA has prohibited a number of mergers involving the digital sector, including [Tobii/Smartbox](#) (concerning augmentative and assistive communication software and solutions), [Sabre/Farelogix](#) (concerning merchandising and distribution software solutions for airlines), and [viagogo/Stubhub](#) (concerning online secondary ticketing services). In addition, the CMA has taken enforcement action to tackle [fake and misleading online reviews](#), [non-disclosure of incentivised endorsements on social media platforms](#) and [“most favoured nation clauses”](#) used by a price comparison website for home insurance providers.
- There is growing international consensus concerning the need to strengthen competition in digital markets. At EU level, the European Commission proposed a Digital Markets Act in December 2020 which, similar to the UK Digital Taskforce’s proposals, envisages an *ex ante* regime focused on large online platforms that are said to act as “gatekeepers” to the digital sector. In the U.S., the House Committee on the Judiciary’s Antitrust Subcommittee investigated competition in digital markets in 2020 and [made](#) numerous suggestions to strengthen antitrust enforcement in a host of online markets.

Having achieved many of the aims identified in DMS I, the CMA has issued DMS II to provide a new and “refreshed” strategy.

CMA’s aims and priorities under DMS II

DMS II is designed to “*build towards a proactive new pro-competition regulator for digital markets in the shape of the DMU,*” which is “*altogether different and marks a step-up*” from DMS I. The CMA’s goal is to “*establish the DMU as a centre of expertise for digital markets.*” The DMU will start work on 1 April 2021 and its powers are subject to legislation. Pending the introduction of such legislation, DMS II sets out four strategic aims and seven priority areas of focus. It explains that the CMA “*expect[s] to be an increasingly active enforcer in relation to digital markets,*” including because cases that previously fell to the European Commission are now within the CMA’s jurisdiction.

DMS II	
Strategic Aims	Priority Areas of Focus
A. Use existing tools to maximum effect to address problems in digital markets	1. Establish the DMU by working with the Government on its operational design and function, including supporting development of the new legislative framework (<i>Strategic Aim C</i>)
B. Build knowledge and capability to understand digital business models	2. Use existing tools to the fullest extent possible in digital markets (<i>Strategic Aim A</i>)
C. Establish the DMU within the CMA and support the Government to develop a regulatory framework for digital markets	3. The work of the Data, Technology and Analytics Unit, which is now fully operational (<i>Strategic Aims A, B, C, D</i>)
D. Adapt existing tools to meet the challenges of the digital economy	4. Work alongside Ofcom and the ICO through the Digital Regulation Cooperation Forum (<i>Strategic Aims A, B, C, D</i>)
	5. International cooperation and collaboration, including via the Multilateral Mutual Assistance and Cooperation Framework signed by the UK in September 2020 (<i>see UK Competition Newsletter, August-September 2020</i>) (<i>Strategic Aims A, B, C, D</i>)
	6. Support the Government on reform of enforcement tools to keep pace with the digital economy (<i>Strategic Aim D</i>)
	7. Update CMA guidance to reflect the CMA's current operating environment and approach (<i>Strategic Aim D</i>)

DMS II focuses on the rapidly evolving thinking around regulation of, and competition in, digital markets. The CMA's Digital Market Taskforce Advice describes the duties of the DMU as the “lynchpin” of the *ex ante* regulatory regime for SMS firms, and states that it should have an “*explicit focus*” on “*promoting beneficial innovation.*” Speaking during an International Competition Network Virtual Spotlight Event on 2 February 2021, the CMA's Chief Executive, Andrea Coscelli, noted that the extent to which the UK Government deviates from the EU in relation to the regulation of digital markets could be an “*early test of Brexit.*”⁴

While DMS II places significant emphasis on the proposed new regulatory regime for digital markets, the CMA will continue to look for opportunities to investigate and intervene in digital markets using its existing regulatory toolkit. The DMU will principally be responsible for the regulation of large digital platforms, whereas the CMA's existing toolkit allows it to intervene across a wider range of markets. To this end, the CMA has indicated that it intends to work with Government to reform its existing powers to “*keep pace*” with the digital economy.

⁴ International Competition Network Virtual Spotlight, Leading your Agency through Change, 2 February 2021.

The other principal strand of DMS II is an apparent recognition by the CMA that its current guidance documents do not adequately reflect how the CMA analyses competition in digital markets. The recent reform of the CMA's Merger Assessment Guidelines are one example of the CMA seeking to apply its existing powers more flexibly to take account of dynamic competition in digital markets. The CMA is also consulting on the application of competition law to vertical agreements, with a particular emphasis on online markets. It is possible that the CMA will also review other elements of its

procedural and substantive assessment guidance to reflect an increased focus on competition in digital markets.

The publication of DMS II only 18 months after the CMA published DMS I confirms the importance attached by the CMA to enforcing competition rules in the digital sector and to sharpening its toolkit in anticipation of the introduction of the proposed new regulatory regime for digital markets.

Judgments, Decisions, and News

Court Judgments

Phones4U (In Administration) v. EE, Deutsche Telekom, Orange, Vodafone, Telefonica and Telefonica O2. On 2 February 2021, the Court of Appeal rejected an appeal by several mobile network operators (**MNOs**) to overturn disclosure orders that the MNOs' executives' personal devices and communications be examined by independent IT experts. Phones4U entered administration in 2014, following the termination of its contracts with several important commercial partners, including the defendant MNOs, from January 2013 onwards. Phones4U's administrators filed a damages claim against the MNOs in 2018, seeking £1 billion in damages. They allege that the defendant MNOs engaged in anti-competitive collusion "*to injure [Phones4U] by unlawful means*", whilst the MNOs argue that the contracts were allowed to expire or were not renewed for commercial reasons.

The Court of Appeal ruled that IT experts may examine the devices, subject to "*comprehensive undertakings*", to check for any information indicating that the defendant MNOs had engaged in anti-competitive collusion to the detriment of Phones4U. The Court acknowledged that in anti-competitive conduct cases, sensitive communications between individuals may take place away from work devices or work communications channels. The Court of Appeal's judgment provides guidance on the approach to

disclosure where competition and privacy law considerations are relevant. The trial is expected to take place in 2022.

Preventx v. Royal Mail Group. On 11 February 2021, the High Court issued a consent order dismissing Preventx's abuse of dominance claim against Royal Mail following a joint application by the parties, which had reached a confidential settlement. *See* [UK Competition Newsletter August-September 2020](#) for further background.

Epic Games v. Apple and Epic Games v. Google. On 22 February 2021, the Competition Appeal Tribunal (**CAT**) ruled that Epic Games (**Epic**) could not pursue a claim against Apple in the UK. It allowed some aspects of a similar claim brought by Epic against Google to be heard in the UK on the ground that permission is not required to serve claims in the CAT against the Irish anchor defendants. With respect to Apple, Roth J held that Apple and Epic are both large U.S. companies, and the most appropriate forum for their dispute is a court in the United States (despite finding that Epic could make good arguments that Apple's conduct caused harm to Epic in England). Epic filed its claims before the CAT in December 2020, after it accused Apple and Google of breaching the Chapter 1 and Chapter 2 prohibitions under the Competition Act 1998 in relation to app distribution and payments for apps. Epic has filed similar claims against both companies in the US and in Australia.

Lexon (UK) Limited v Competition and Markets Authority. On 25 February 2021, the CAT dismissed Lexon (UK) Limited's (**Lexon**) appeal against a decision by the CMA finding an infringement under Chapter 1 of the Competition Act 1998. In March 2020, the CMA concluded an investigation into the supply of nortriptyline tablets in the UK between 2015 and 2017. The CMA found that Lexon, King Pharmaceuticals Ltd and Alissa Healthcare Research Ltd had entered into a concerted practice to inflate the price of nortriptyline tablets during this period. The CMA levied fines against all three companies and fined Lexon £1,220,383. Lexon subsequently appealed the CMA's decision. The CAT found that Lexon had engaged in a concerted practice in relation to the supply of nortriptyline tablets. Lexon was found to have disclosed competitively sensitive information concerning prices and volumes. The CAT judgment also allows the CMA to continue director disqualification proceedings in the High Court against a former director of Lexon.

Antitrust/Market Studies

Financial Conduct Authority Publishes The Woolard Review Concerning The Unregulated Credit Market. On 2 February 2021, the Financial Conduct Authority (**FCA**) published the Woolard Review of the unsecured credit market in the UK. The review identifies concerns relating to buy-now-pay-later (**BNPL**) credit products, which have recently been marketed to consumers as an alternative form of credit to payday loans. Among its recommendations, the review makes three urgent proposals to both the FCA and UK Government. First, it recommends amending legislation to regulate BNPL credit products. Second, it recommends action to ensure suitable debt solutions are available to serve those in financial difficulties (of which there are likely to be more following the COVID-19 pandemic). Third, it recommends that the FCA review how forbearance (temporary postponement of loan repayments) is reflected in credit information and impacts decisions by lenders and customers.

CMA Action Letter Against Lloyds Banking Group Following Further Breaches Of Payment Protection Insurance Market Investigation Order 2011. On 3 February 2021, the CMA wrote a letter to Lloyds Banking Group (**LBG**) following LBG's self-reported breaches of the CMA's 2011 Payment Protection Insurance (**PPI**) Order (**Order**) by sending customers incorrect information. The Order requires PPI providers such as LBG to inform customers annually of the cost of their PPI policy, their type of cover and their right to cancel. LBG has committed to remedying the breaches and to complying with an action plan to prevent future breaches of the Order. The CMA's letter describes LBG's voluntary action to contact all 8,800 affected customers with an open policy and to offer refunds to those eligible. The CMA intends to monitor LBG's voluntary steps but does not currently contemplate further formal enforcement action.

CMA Publishes Infringement Decision Relating To The Use Of Most Favoured Nation Clauses By Price Comparison Websites. On 9 February 2021, the CMA published its full text decision (dated 19 November 2020) concerning wide most favoured nation (**MFN**) clauses in agreements entered into by between BGL (Holdings) Limited, BGL Group Limited, BSL Limited and Compare The Market Limited (together, **BGL**). The CMA identified agreements between BGL and 32 home insurers, between 1 December 2015 and 1 December 2017, which contained wide MFN clauses that prevented these home insurers from advertising lower prices on rival price comparison websites. The CMA has imposed a fine of £17,910,062. On 15 February 2021, BGL lodged an appeal with the Competition Appeal Tribunal against the CMA's decision.

CMA Approves Slot Release Agreement Relating To Atlantic Joint Business Agreement. On 22 February 2021, the CMA announced its approval of United Airlines (**United**) as a new competitor on the London to Boston flight route in accordance with the earlier interim measures decision relating to the Atlantic Joint Business Agreement (see UK Competition Newsletter August-September 2020). Following United's

success during a tender process in late-2020, United was awarded a daily return route for a total of six International Air Transport Association (IATA) seasons starting from the IATA Summer Season 2021. As part of the interim measures decision, the remaining slots on the flight routes from London to Boston, Dallas and Miami will be subject to a tender process from March 2022 for two years.

Merger Developments

PHASE 2 INVESTIGATIONS

viagogo/Stubhub. On 2 February 2021, the CMA published its final report following its Phase 2 investigation of viagogo's completed acquisition of StubHub. The CMA found that the transaction would result in a substantial lessening of competition in the supply of uncapped secondary ticketing exchange platform services for live events in the UK.

The CMA found that both parties were close competitors, enjoyed a high level of substitutability between users, and had a very high combined market share. It found in particular that StubHub, a U.S.-focused business, was making significant inroads into the UK market to complement viagogo's already strong position. The CMA had concerns that there were insufficient competitive constraints to mitigate against the strong network effects, especially in relation to the ability of third parties to enter the market. The CMA ordered a partial divestment, requiring viagogo to sell off StubHub's operations outside North America.

PHASE 1 CLEARANCE DECISIONS

Diageo/Chase Distillery. On 11 February 2021, the CMA cleared the anticipated acquisition by Diageo Great Britain Limited of Chase Distillery (Holdings) Limited.

Adevinta/eBay. On 16 February 2021, the CMA announced its decision to refer Adevinta's anticipated £6.5bn purchase of eBay Classifieds Group (eCG) for a Phase 2 investigation unless the

parties offer acceptable undertakings. Adevinta and eCG both operate online classified advertising platforms in the UK: Shpock and Gumtree, respectively. Following its Phase 1 investigation, the CMA identified concerns that the merger could lead to a loss of competition between Shpock, Gumtree and eBay's marketplace. On 2 March 2021, the CMA announced that it had accepted undertakings in principle, involving the divestment of the Shpock and Gumtree UK businesses.

Graco BV/Hi-Tech Spray Equipment. On 18 February 2021, the CMA cleared the anticipated acquisition of Hi-Tech Spray Equipment by Graco BV. The parties produce polyurethane foam proportioning equipment and polyurea proportioning equipment, and related spare parts and accessories including spray guns and heated hoses. The products supplied by both parties are used in a variety of applications including for building insulation and in storage tanks and pipes. The CMA cleared the transaction on the basis that the markets concerned were insufficiently important to justify making a reference. Accordingly, the CMA did not need to conclude whether the merger would give rise to a realistic prospect of a substantial lessening of competition.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision Due Date
Facebook, Inc/Giphy, Inc	25 March 2021
Uber Technologies/GPC Software (Autocab)	29 March 2021
Bellis Acquisition Company 3 Limited/Asda Group Limited	20 April 2021
NVIDIA/Arm	TBC
Veolia/Suez	TBC

Other Developments

BEIS Opens Consultations On Design Of New UK Subsidy Control Regime. On 3 February 2021, the Department for Business, Energy and Industrial Strategy (**BEIS**) opened its consultation on the future UK subsidy control regime. The consultation seeks views on the design of the proposed UK regime, many aspects of which have been shaped by the UK's obligations under its Trade and Cooperation Agreement with the EU. In addition to honouring the UK's international commitments on subsidy control (including under Free Trade Agreements and the World Trade Organisation rules on subsidies), a number of aspects of the proposed regime contemplate protecting the UK internal market. The consultation closes on 31 March 2021.

Payments Systems Regulator Consults On Delivery And Regulation Of New Payments Architecture. On 5 February 2021, the Payment Service Regulator (**PSR**) launched a consultation on ways to reduce identified risks to the successful implementation of the New Payments Architecture (**NPA**). The NPA is the payment industry's proposed organisation of the clearing and settlement process during retail interbank payments, including Bacs transfers and Faster Payments, and is designed to meet the increased demand for digital-oriented banking. The consultation considers risks that could lead to a lack of value for money for consumers, a reduction in effective competition, and a delay or absence of innovation. The first part of the consultation closed on 19 March 2021, and the second on 5 May 2021.

CMA CEO, Andrea Coscelli, Says Regulator Must "Get Closer To Consumers" To Respond To Changing Markets And Business Practices. On 9 February 2021, Andrea Coscelli delivered the annual Bannerman Competition Lecture in association with the Australian Competition and Consumer Commission. The speech argued there is a need for regulators to "*stay ahead of the curve*

as markets and business practices evolve and change" particularly in light of digital markets. Dr Coscelli highlighted specific threats including "*algorithmic collusion, anticompetitive self-preferencing, and acquisitions of nascent rivals*". The speech also argued for "*amplifying the consumer voice*" to enhance evidence gathering and analysis by regulators, and urged stronger international cooperation in digital regulation.

CMA Consultation On The Retained Vertical Block Exemption Regulation. On 10 February 2021, the CMA announced its consultation on the Retained Vertical Block Exemption Regulation (**RVBER**): the existing EU block exemption regulations retained in UK law following the end of the Transition Period. The RVBER exempts most vertical agreements entered into by businesses with market shares of 30% or less from prohibition under Chapter 1 of the Competition Act 1998. The RVBER will expire, unless it is varied or replaced, on 31 May 2022. The consultation, which closes on 6 July 2021, is designed to assist in the scope and composition of a successor regulation.

Government Publishes Independent Report on UK Competition Policy by John Penrose MP.

On 16 February 2021, the Treasury and the Department for Business, Energy and Industrial Strategy published the anticipated Penrose Report, an independent review of the state of UK competition and consumer law. The report focuses on eight analytical themes: (i) competition and consumer policy; (ii) the efficiency of regulatory decision-making; (iii) reducing "red-tape"; (iv) enhancing competition in digital industries; (v) increasing competition in economic sectors which have their own dedicated regulators; (vi) stimulating competition outside the South-East of the UK; (vii) providing stronger consumer protections; and (viii) the place of state aid and subsidies in UK government policy. See CGSH Alert Memorandum "*Putting Customers in Charge: Penrose Report on the State of UK Competition*", 15 March 2021, for further details.

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