November 2020

UK Competition Law Newsletter

Highlights

— CMA proposes new procedural and substantive merger guidance

— Court of Appeal rules that admissions in EC settlement decisions are binding in follow-on cases

— Competition Appeal Tribunal quashes CMA prohibition decision in *JD Sports/Footasylum*

— CMA imposes fines over £9m in *Roofing Lead* cartel

— CMA fines *ComparetheMarket* £17.9m for most-favourite-nation clauses

CMA proposes new procedural and substantive merger guidance

On 6 November, the CMA published new draft guidance on jurisdiction and procedure in UK merger cases (**Draft J&P Guidance**) and on the CMA's mergers intelligence function. On 17 November, it published new draft guidance on the substantive assessment of mergers in the UK (**Draft Substantive Guidance**). The draft sets of Guidance incorporate developments in the case law, reflect the evolution of the CMA's policies and procedures, and take account of changes in the legal framework concerning public interest mergers. Together, they confirm the CMA's expansive approach to asserting jurisdiction and reinforce a more interventionist and less formalistic approach to assessing mergers, especially in digital markets, that has been evident in the run-up to Brexit.

Draft Jurisdiction and Procedural Guidance

The Draft J&P Guidance would replace the CMA's existing guidance, which was published in 2014. The most significant changes are described below:

— **Share of Supply Test.** The Draft J&P Guidance reflects the approach taken in recent cases, including *Roche/Spark, Sabre/Farelogix and Mastercard/Nets*, emphasizing the CMA's broad discretion in applying the share of supply test.[1] The Draft Guidance explains that the CMA will consider the "*commercial reality*" of the merging companies' activities when assessing how products or services are supplied, "*focusing on the substance rather than the legal form of*

[1] A transaction qualifies as a relevant merger situation under this test if the merger creates or strengthens a 25% share of supply or purchases of goods or services of the same description in the UK.

arrangements." The CMA will consider any "*reasonable description*" of products or services when deciding whether the test is met, which does not necessarily have to correspond with a recognized industry standard, and whether "*sufficient elements of common functionality*" exist between the merging parties' activities. The Draft J&P Guidance states that the CMA may decide to aggregate intra-group and third party sales when applying the share of supply test, even if these sales are treated differently for the purposes of its substantive assessment.

While the description of the share of supply test set out in the Draft J&P Guidance largely builds on the CMA's current and recent practice, it does little to provide clarity to parties considering whether a transaction qualifies for review. The CMA has signaled that it will continue to assert jurisdiction in any case that it suspects raises competition concerns even where the UK nexus is limited or the parties' UK activities are small.

— **Fast-Track Processes & Conceding a substantial lessening of competition.** The CMA has for a long time allowed merging parties to request a fast-track Phase 1 procedure in cases that are likely to require an in-depth investigation. Under this process, parties can agree not to contest the CMA's findings at Phase 1, allowing the transaction to proceed more quickly to a Phase 2 investigation. The CMA has previously considered requests for a fast-track process only in exceptional circumstances. Under the Draft J&P Guidance, the CMA will consider requests in all cases and will allow parties to request a fast-track process either during pre-notification or early in Phase 1. It will also consider requests for a fast-track process in cases where the parties intend to offer Phase 1 remedies (undertakings-in-lieu of a reference) rather than contest the CMA's findings. In fast-track cases, the merging parties must agree to accept that the test for Phase 2 reference is met and waive their right to challenge that position during Phase 1.[2]

Under the Draft J&P Guidance, merging parties will be able to make formal concessions that a transaction would result in a substantial lessening of competition (**SLC**) in one or more markets at Phase 2. This approach is intended to allow the CMA more time to focus its assessment on other markets or to align its consideration of remedies with that in other jurisdictions. Merging parties will be required to accept in writing that the CMA has evidence that establishes an SLC and agree to waive their right to challenge this finding in Phase 2. This added procedural flexibility should shorten the CMA review process and facilitate coordination between the CMA and other agencies. The potential time saving may, however, be small in the context of a long multi-jurisdictional merger review process. The envisaged process also requires companies to concede that a merger raises *prima facie* competition concerns, and may therefore be used only rarely.

— **Use of formal interviews.** The Draft J&P Guidance includes new guidance on the CMA's use of formal notices to require individuals to give evidence by interview. The CMA has long had the power to require the production of information in this way but has rarely done so. The Revised J&P Guidance emphasises the fact that failure to comply with a formal notice can result in penalties, stating: "*[t]his is a more formal process than an ordinary information-gathering call with the merging parties (or third parties), and a failure to comply with such a notice can result in enforcement action…*"[3]

The Draft J&P Guidance signals a likely increase in the use of formal interviews in future cases but provides little guidance on the specific circumstances in which the CMA will use these powers. One motivation for this change of policy appears to be concerns about under-enforcement of merger control rules in digital markets. This has in turn led to calls for the CMA to use a wider range of evidence when seeking to understand the rationale for transactions. The powers are not, however,

[2] For example, the CMA recently accepted a request to fast-track the proposed joint venture between Liberty and Telefonica to an in-depth Phase 2 review (*Liberty Global/Telefonica*, decision of 11 December 2020). Other instances where cases were fast-tracked to a Phase 2 review include *Sainsbury/Asda* (2018), *Central Manchester University Hospitals/University Hospital of South Manchester* (2017), and *Tesco/Booker* (2017).

[3] Draft J&P Guidance, ¶9.8(c). Most recently, the CMA used this power in its investigation of *Amazon/Deliveroo*.

limited to digital markets and they could be used in any merger investigation.

— **Coordination in multi-jurisdictional mergers.** The Draft J&P Guidance explains that the CMA will "*communicate and coordinate extensively with other authorities in reaching decisions on the competition assessment and remedies.*"[4] For that purpose, merging parties are encouraged to discuss the process and timing of multi-jurisdictional reviews at an early stage and to provide confidentiality waivers. The CMA may take merger control proceedings in other jurisdictions into account when considering whether to open an investigation and may decide not to do so where remedies imposed or agreed in those proceedings would be likely to address possible competition concerns in the UK. These revisions reflect the expansion of the CMA's role post-Brexit, when it will be called upon to review more global transactions in parallel with other agencies, including the European Commission.

Draft Substantive Guidance

The Draft Substantive Guidance updates the CMA's existing guidance, which was published in 2010. In addition to reflecting case law developments, changes in policy and legislation, the CMA has "*largely adopted*"[5] the findings made in the Furman[6] and Lear[7] reports. Both reports suggested there had been under-enforcement of merger control rules in digital mergers.[8]

Overall, the Draft Substantive Guidance signals that the CMA intends to adopt a less formalistic approach to merger review, allowing the CMA greater flexibility in its substantive assessment. The CMA will, for example, no longer place significant reliance on market definition or market share thresholds, and will instead seek to assess a transaction's impact on competition by looking at all available evidence in the round. The proposed changes may make it easier for the CMA to intervene in transactions.

The most significant changes are described below.

— **More flexible approach to market definition.** The Draft Substantive Guidance states that, while market definition plays an important role in merger assessment, the CMA will focus on considering what competitive constraints the merged entity would face both within and outside the relevant market. This approach is likely to be most relevant in differentiated markets where the boundaries of competition are less clear and in digital markets where the CMA and other agencies have expressed concerns that a strict approach to market definition does not allow them to capture some potentially harmful transactions.

— **Substantive lessening of competition.** The Draft Substantive Guidance explains how the CMA will decide whether a transaction would result in a substantial lessening of competition. As a starting point, the Draft Guidance seeks to describe what "substantial" means in this context. Applying various case law, the CMA explains that "substantial" does not necessarily mean "'*large', 'considerable' or weighty' in absolute terms, and is capable of meaning 'not trifling' at one extreme and 'nearly complete' on the other.*"[9] The Draft Guidance suggests that even a small lessening of competition in a market that is large or otherwise important to UK customers, or where there was limited competition to begin with, may be considered "substantial." The Draft Guidance also contains the following additional guidance:

[4] Draft J&P Guidance, ¶7.6.

[5] Draft revised Merger Assessment Guidelines, Consultation Document 17 November 2020, ¶1.6 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/935598/Consultation_Document_-.pdf

[6] Unlocking digital competition, the Report of the Digital Competition Expert Panel, March 2019.

[7] Ex-Post Assessment of Merger Control Decisions in Digital Markets, Final Report, May 2019.

[8] For example, the Furman report recommended that: "*The CMA's Merger Assessment Guidelines should be updated to reflect the features and dynamics of modern digital markets, to improve effectiveness and address under enforcement in the sector.*" The Lear report concluded that: "*There is a concern that merger policy has put too much weight on the risk of incorrect intervention (type I error) compared to the risk of incorrect clearance (type II error) when assessing mergers in the digital sector, leading to increased concentration in digital markets.*"

[9] Draft Substantive Guidance, ¶2.9.

- When considering closeness of competition in undifferentiated markets, the Guidance states that it "*does not apply any thresholds to market share, number of remaining competitors or any other measure to determine whether a loss of competition is substantial*."[10] This is a significant change from the current guidance, which indicates that a combined share below 40% is unlikely to give rise to concerns.

- In differentiated product markets, the Guidance posits that "*the smaller the number of significant players, the stronger the prima facie expectation that any two firms are close competitors, and therefore the less detailed analysis is necessary to further assess closeness between them*."[11] It is questionable whether this presumptive approach to assessing competition is consistent with the CMA's duty to determine the effects of a transaction on a "balance of probabilities."

- The Guidance includes a list of scenarios that are likely to give rise to an SLC.

— **Wider evidence base.** The Draft Substantive Guidance confirms that the CMA will rely on a broad range of evidence. It gives the CMA considerable latitude in interpreting evidence and placing weight on any piece of evidence. Although there is no "*prescriptive list of evidence,*" the Draft Guidance explains that the CMA will look to internal documents and deal valuation when assess a transaction's rationale. The Draft Guidance explains that the CMA will allow itself a wide margin of appreciation when assessing evidence relating to fast-moving markets, where traditional forms of evidence may be less available. In these cases, the CMA may consider the expected number of competitors post-merger, similarities between their (developing) products or services, and the views and expansion plans of other market players.

Adopting a recommendation from the Lear report, the Draft Guidance explains that "*the presence of some uncertainty will not in itself preclude the CMA from finding competition concerns on the basis of all the available evidence*."[12] While it is clear that the CMA will (and should) consider all available evidence, the Draft Guidance raises questions as to how much weight the CMA will in practice place on different types of evidence, including the testimony of competitors who may have a commercial interest in opposing a merger. It is also questionable whether placing reliance on "uncertain" evidence simply because no compelling evidence is available could represent a sufficient basis for intervention.

— **Competition on non-price parameters.** The Draft Guidance explains that competitive harm is not limited to rising prices but can also arise from a reduction in innovation or the range and quality of products and services, including in markets where services are offered to consumers free of charge. The Draft Guidance mentions privacy, sustainability, add-free content, the ability to interact with a large base of other users, and brand reputation as relevant competitive parameters.

— **Greater flexibility in assessing the counterfactual.** Under the Draft Guidance. the CMA will vary the time horizon used for assessing a transaction against the competitive counterfactual depending on the market in question. In particular, the CMA points to digital markets where it argues that successful entry can take longer than two years. The Draft Guidance also explains that uncertainty about future developments will not in itself lead the CMA to assume that the pre-merger situation is the most appropriate counterfactual. This would in principle allow the CMA to intervene on the basis that competition might develop in a certain way absent the transaction, even where those developments are uncertain.

[10] Draft Substantive Guidance, ¶2.8.

[11] Draft Substantive Guidance, ¶4.9.

[12] Draft Substantive Guidance, ¶¶2.10, 2.26 and 3.14.

— **Assessment of two-sided platforms.** Following recommendations in the Lear Report, the Draft Guidance signals greater flexibility in the way the CMA will assess competition in two-sided markets. The CMA may consider competition on each side separately or include both sides in one assessment. Its approach will depend on how competition works in practice (whether competition primarily focuses on one side or both), competitive conditions in the market (including the number and strength of alternatives available), and the presence of network effects.

— **Assessment of potential competition and innovation.** The Draft Guidance includes a new section describing the CMA's approach to potential competition and innovation. Responding to findings in the Furman Report, the Draft Guidance explains how the CMA will assess whether a merger would harm competition in innovation. The Guidance envisages two scenarios. First, a merger with a potential entrant may remove future competition on innovation. In these cases, the CMA's assessment may focus on the parties' internal documents, business forecasts, and valuation models, and the likely characteristics of the potential entrant's future product or service. Second, a merger could involve parties already engaged in a dynamic competitive process (*i.e.*, competing to innovate in order to protect or expand future profits). The Draft Guidance gives the example of two pharmaceutical companies engaged in researching treatments for the same medical conditions. In these cases, the CMA will consider the impact of the loss of dynamic competition even if the outcome of that competitive process is uncertain: where dynamic competition gives customers the *chance* of benefitting from better quality or a wider variety of products in the future, a reduction in this dynamic competitive process could be considered harmful to consumers.

Conclusion

The Draft J&P and Substantive Guidance would give the CMA significant flexibility to intervene in mergers. The changes are particularly targeted at transactions in digital markets where the CMA, along with other agencies, is grappling with the challenge of how to differentiate pro-competitive (or competitively neutral) transactions from those that would have anticompetitive effects. That challenge arises in part from the fast-moving nature of digital markets and the difficulty of predicting likely future developments using traditional forms of evidence. The Draft Guidance would allow the CMA greater flexibility in the types of evidence it considers and the way in which it assesses that evidence. The absence of limiting principles would, if adopted by the CMA and endorsed on appeal by the Competition Appeal Tribunal, make it easier for the CMA to challenge mergers than in the past.

Judgments, Decisions, and News

Court Judgments

AB Volvo (Publ) v Ryder Ltd. On 11 November 2020, the Court of Appeal handed down its judgment clarifying the ability of parties that settle European Commission (**Commission**) antitrust investigations to challenge the Commission's findings in follow-on-damage actions. The judgment concerns an appeal relating to a preliminary issue arising in seven claims for damages following on from the 2016 Commission Trucks settlement decision (the **Settlement Decision**). The Court of Appeal held that the five truck manufacturers could not deny facts they had admitted in settling with the Commission – facts that were subsequently recorded in the Settlement Decision.

Please see our 7 December alert memo (*No Reversing Allowed: Trucks Defendants in Follow-on Cases Required to Stand by Their Admissions to the Commission*) for a detailed analysis of the judgment.

JD Sports Fashion plc v Competition and Markets Authority. On 13 November 2020, the Competition Appeal Tribunal (**CAT**) partially upheld JD Sports' appeal against the CMA's decision to prohibit its completed acquisition of Footasylum requiring it to fully divest Footasylum.[13] The CMA found that the parties were close competitors in sports-inspired casual clothing and footwear in stores and online. The CMA concluded there was no evidence that the impact of COVID-19 would remove its competition concerns.

JD Sports raised three grounds of appeal. The CAT upheld the second ground, finding that the CMA's conclusions on the likely effect of the COVID-19 pandemic was not based on sufficient evidence. The CAT concluded that the CMA should have sought further information, especially from principal suppliers and Footasylum's primary lenders, on the possible or likely effect of COVID-19. This failure meant the CMA was not in a position properly to answer the statutory questions required in a merger investigation. The CAT dismissed the CMA's argument that it had not sought out further information given the late stage of its review and that the information provided by the parties was too generalised and speculative to be reliable. The CAT found that this should not have deterred the CMA from seeking out further information and that its file showed that it was able to collect other evidence at a later stage. The CAT also dismissed the CMA's argument that any information that could be collected would be too uncertain to be useful, finding that dealing with uncertainty is inherent in the CMA's assessment in merger cases. The CAT also partly upheld the third ground of appeal, finding that the CMA had erred by declining to inform itself on the post-merger constraints of Nike and Adidas's own direct to customer retail in light of the COVID-19 pandemic. The CAT quashed the CMA's decision in so far that it was based on the CMA's assessment of the likely effects of the COVD-19 pandemic and required the CMA to reconsider the case.

Facebook, Inc. and Facebook UK Limited v Competition and Markets Authority. On 13 November 2020, the CAT dismissed Facebook's appeal of the CMA's decision to refuse consent to a carve-out request to the initial enforcement order imposed on Facebook and GIPHY. This judgment is discussed in detail in our October UK Competition Newsletter.

Antitrust/market studies

CMA Fines Roofing Lead Cartel Over £9m. On 4 November 2020, the CMA fined Associated Lead Mills Ltd (**ALM**) and H.J. Enthoven Ltd (trading as BLM British Lead) (**BLM**) over £9m for breaching the Chapter 1 Prohibition and Article 101 TFEU. ALM and BLM, two of the largest players in the UK market for rolled lead used mainly for roofing, were found to have entered into four anticompetitive arrangements between October 2015 and April 2017. The parties exchanged commercially sensitive information, colluded on prices, shared the rolled lead market by agreeing not to target certain customers, and agreed not to supply a new business to avoid disrupting existing customer relationships. Admitting their role, the parties benefited from a settlement discount. The CMA closed its investigation into a third supplier.

Market Study Into the UK Rail Signalling Market. On 12 November 2020, the Office of Rail and Road launched a second market study into the UK rail signalling market, particularly the supply of signalling systems tendered to Network Rail. The market study builds on an earlier study launched in 2020 which was closed due to the lack of engagement from stakeholders caused by their need to respond to the COVID-19 crisis. The market study will focus on three themes: (1) incentives to compete in the market; (2) the impact of the digital railway, with a particular focus on the ability of the supply chain to build up capacity; and (3) the impact of competition on the outcomes that National Rail is able to obtain (including the choice available, prices, and buyer power). Interested parties are invited to respond by 11 January 2021.

[13] *See* UK Competition Newsletter, April-May 2020 and UK Competition Newsletter, February-March 2020.

CMA Fines ComparetheMarket £17.9m. On 19 November 2020, the CMA announced that it had fined ComparetheMarket £17.9 million for including 'wide most favoured nation' clauses in contracts with home insurers selling through its platform. These clauses prohibited home insurers from offering lower prices on other comparison websites and shielded ComparetheMarket from being undercut. Additionally, the clauses made it difficult for ComparetheMarket's rivals to expand and challenge the company's strong market position and reduced price competition between home insurers.

CMA Opens Investigation Into Dar Lighting. On 25 November 2020, the CMA announced that it had opened an investigation into suspected resale price maintenance in the supply of domestic lighting products in the UK by Dar Lighting Limited.

Merger Developments

PHASE 2 INVESTIGATIONS

Yorkshire Purchasing Organisation/Findel. On 2 November 2020, the CMA cancelled its Phase 2 investigation into the anticipated acquisition by Yorkshire Purchasing Organisation of Findel Education Limited following written assurances from the parties that the proposed acquisition had been abandoned. The CMA had provisionally found on 16 October that the merger should be prohibited (*see UK Competition Newsletter, October 2020*).

FNZ (Australia) Bidco Pty Ltd/GBST Holdings Limited. On 5 November 2020, the CMA published its final report on the completed acquisition by FNZ of GBST. The parties are two of the leading suppliers of retail investment platform solutions in the UK (*see UK Competition Newsletter, October 2020*). The CMA confirmed its provisional finding that 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. On 15 December, the CMA consulted on the parties' undertaking to divest GBST.

Crowdcub/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. 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.

PHASE 1 CLEARANCE DECISIONS

Stryker/Wright. On 4 November 2020, the CMA announced it had accepted undertakings from Stryker Corporation (**Stryker**) in lieu of referring its anticipated acquisition of Wright Medical Group N.V. (**Wright**) to Phase 2. Stryker and Wright manufacture orthopaedic products for patients requiring implants in their feet, ankles and hands. The CMA accepted the parties' request to fast-track its Phase 1 decision. The CMA considered that an SLC was likely to arise in the supply of total ankle replacement prostheses products in the UK. The parties were found to have a 90-100% combined share (with a significant increment) and the merger removed the only sizable constraint in a highly concentrated market. To remedy those concerns, Stryker offered to sell its global Scandinavian Total Ankle Replacement product and assets to Colfax Corporation, removing the overlap. The CMA cooperated closely with the US Federal Trade Commission (**FTC**), and extended its consideration of the remedies to align with the FTC's timing and ensure that the remedies were acceptable for both jurisdictions. The decision was published on 11 November 2020.

ION Investment/Broadway Technology. On 10 November 2020, the CMA announced that it had accepted undertakings from ION Investment (**ION**) in lieu of referring its completed acquisition of Broadway Technology to Phase 2. The parties provide foreign exchange and fixed income

trading systems. The CMA found a realistic prospect of an SLC in the worldwide supply of fixed income trading systems. In addition to combining the number one with one of two main competitors, the CMA found that the parties were close competitors and that there was only a limited constraint from self-supply. ION had offered to divest the Broadway Technology fixed income business to a consortium led by Broadway Technology's former CEO. The CMA's decision was published on 24 November 2020.

Evolution/NetEnt. On 16 November 2020, the CMA announced that it has cleared the anticipated acquisition by Evolution Gaming Group AB of NetEnt AB. Evolution develops, produces, markets, and licenses fully-integrated Live Casino solutions to gaming operators. NetEnt is a digital entertainment company, which develops games and system solutions for gaming operators. The CMA found that although the parties' combined share in the supply of online live casino games to gambling operators in the UK was fairly high, the increment would be small in light of NetEnt's minor presence. Sufficient competitive constraints would exist post-merger. The CMA's decision was published on 8 December 2020.

Mitie Group plc/Interservefm (Holdings) Ltd. On 17 November 2020, the CMA announced that it had cleared the anticipated acquisition by Mitie Group plc of Interservefm (Holdings) Ltd. Mitie is a leading facilities management and professional services company. Interservefm is a holding company for subsidiaries that provide comprehensive management and maintenance services. The CMA concluded that the parties overlapped in the supply of (total) facilities management services, including to nuclear sites, in the UK. Although the parties are close competitors in the respective services with national coverage and to nuclear sites, the CMA found that their combined share was low and there would remain sufficient in the market for the merger not to result in an SLC. The CMA's decision was published on 17 December 2020.

XPO Logistics/Kuehne and Nagel. On 19 November 2020, the CMA announced that it cleared the anticipated acquisition by XPO Logistics, Inc. of Kuehne + Nagel Drinkflow Logistics Holdings Limited. XPO Logistics is a top ten global provider of transportation and logistics services. Kuehne + Nagel is a leading provider of logistics services. The parties were found to overlap in the supply of contract logistics services in the UK, in particular in the food, drink and retail segments, with a primary overlap in secondary drinks distribution ('last mile' distribution of drinks to retail outlets of on-trade customers). The CMA concluded that the parties would remain the second largest supplier with a slightly increased share, that they were not particularly close competitors and that XPO exercised only a limited competitive constraint on Kuehne + Nagel. The CMA's decision was published on 2 December 2020.

Ardonagh Group/Bennetts Motorcycling Services. On 20 November 2020, the CMA announced that it had accepted undertakings-in-lieu of a Phase 2 reference for the completed acquisition by Ardonagh Group Limited of Bennetts Motorcycling Services Limited. The parties are the two leading distributors of motorcycle insurance to private customers in the UK (*see UK Competition Newsletter, August–September 2020*). The CMA accepted Ardonagh's commitment to unwind its acquisition of Bennetts. The CMA's decision was published on 27 November 2020.

CSL Behring LLC/uniQure biopharma BV. On 24 November 2020, the CMA announced that the commercialisation and licencing agreement entered into between SL Behring LLC (**CSL**) and uniQure biopharma BV (**uniQure**) on 24 June 2020 did not create a relevant merger situation under the Enterprise Act as the parties have not ceased to be distinct. Under the agreement, CSL acquired the right to develop and commercialise uniQure's pipeline treatment for Haemophilia B, AMT-061. The CMA's decision was published on 27 November 2020.

ONGOING PHASE 1 INVESTIGATIONS

Liberty Global (Virgin Media)/Telefónica (O2). On 19 November 2020, the CMA announced that the Commission had accepted its request

to refer the case to the CMA and that its formal investigation would immediately. The transaction has been referred to phase 2 under the CMA's fast-track process.

Parties	Decision Due Date
TFL Ledertechnik/ LANXESS Deutschland	15 December 2020
Sonoco Products Company/ Can Packaging SAS	21 December 2020
Tronox Holdings plc/ TiZir Titanium and Iron	4 January 2021
Liberty Global plc/ Telefónica S.A.	1 February 2021
Facebook, Inc/Giphy, Inc	TBC

OTHER DEVELOPMENTS

CMA Publishes Revised Guidance On Competition Act Investigation Procedures. On 4 November 2020, the CMA has published its revised guidance regarding its investigation procedures under the Competition Act 1998. The CMA has in parallel published its response to the consultation on its draft guidance (see *UK Competition Newsletter, August–September 2020*). While the CMA has clarified some aspects of the guidance in response to concerns raised by respondents, the guidance remains largely unchanged.

CMA Publishes Confidentiality Waiver Template. On 4 November 2020, the CMA published a confidentiality waiver template enabling it to share confidential information and discuss merger proceedings with other competition authorities in multi-jurisdictional merger investigations.

New National Security and Investment Bill. On 11 November 2020, the government proposed a new national security regime which, if approved, would significantly strengthen the UK's ability to intervene in potentially hostile foreign investments that threaten UK national security. The proposed regime would require mandatory notification for transactions in certain specified sectors and give the Government the ability to "call in" other transactions up to five years after closing. Transactions subject to mandatory notification would be void if closed before approval. Transactions closed on or after 12 November 2020 but before the bill is enacted may be called in retrospectively. Please see our 13 November alert memo (*UK Proposes A Mandatory, Pre-Closing National Security Regime)* for a detailed analysis of the new regime.

CAT Announces Nomination Of New Chairman. On 12 November 2020, the CAT announced that the Honourable Lord Ericht, a judge of the Outer House of the Court of Session in Scotland has been nominated by the Lord President to sit as a Chairman.

Government Response to CMA's Digital Advertising Market Study. On 27 November 2020, the government has published its response to the CMA's Online Platforms and Digital Advertising Market Study (*see UK Competition Newsletter, August–September 2020*). The government broadly agreed with the CMA's recommendations in four areas. First, to introduce an enforceable code for firms with substantial and enduring market power to protect competition in digital markets funded by online advertising. Second, to establish a dedicated Digital Markets Unit (**DMU**) to introduce, maintain and enforce a code of conduct. Third, that measures governing the behaviour of platforms with substantial and enduring market power should be mandatory and enforceable. Finally, while the government agrees in principle with giving pro-competition powers to the DMU, it recognises that the interventions are complex and come with significant policy and implementation risks. As a result, the government has stated that this recommendation is subject to further consideration.

The government will now: (1) consider the Digital Markets Taskforce's advice on the design and implementation of the regime, which is due by the end of 2020; (2) establish and resource the DMU from April 2021, as a part of the CMA, to build on the Taskforce's work and operationalise elements

of the regime; (3) consult on proposals for a new pro-competition regime in early 2021; and (4) legislate for pro-competition reforms as soon as parliamentary time allows.

CMA Publishes First The State Of UK Competition Report. On 30 November 2020, the CMA published its first State of UK Competition report. The report was requested by the Chancellor and the Business Secretary in February 2020 to measure and understand the state of competition in the UK now and in the future. The CMA found that competition in the UK may have weakened over the last two decades, with both concentration and profits rising. Although these findings are provisional, the report concludes that the government and regulators need to take care to protect and promote competition, especially in light of the COVID-19 pandemic.

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