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UK Competition Law Newsletter

Highlights

— CMA's Standstill Enforcement Under the Spotlight

— CMA revokes JD Sports' gun-jumping fine

— CMA provisionally finds that *Viagogo / StubHub* should be blocked, unless a divestment remedy can be found

— CMA provisionally finds that *TVS Europe / 3G Truck & Trailer* should be blocked

— CMA provisionally finds that *Yorkshire Purchasing Organisation / Findel* should be blocked

CMA's Standstill Enforcement Under the Spotlight

On 15 October 2020, the Competition and Markets Authority (**CMA**) revoked a £300,000 penalty it had imposed on JD Sports Fashion plc for breach of an interim enforcement order (**IEO**) issued in connection with JD Sports' completed acquisition of Footasylum plc. The penalty was withdrawn "*[i]n light of issues raised on appeal*." This is the first time that a CMA procedural fine has been revoked or overturned on appeal. On 19 and 20 October 2020, the Competition Appeal Tribunal (**CAT**) heard Facebook's appeal against the CMA's refusal to grant a derogation from an IEO issued in connection with Facebook's completed acquisition of GIPHY, Inc. This article considers potential implications of these cases for future UK mergers.

Standstills under UK Merger Control

Under the UK's voluntary, non-suspensory merger control regime, merging parties are free to complete and implement transactions without first obtaining clearance from the CMA. The "*necessary corollary of having a voluntary regime*",[1] though, is that, if the CMA decides to investigate a completed transaction, it has the power to prevent the merging parties from taking any action that might prejudice the outcome of its investigation or its ability to impose remedies, and to unwind any such action that has already been taken.[2]

[1] CMA108, Interim Measures in Merger Investigations, para 1.6.

[2] See, e.g., Unwinding Order: completed acquisition by Bottomline Technologies (de), Inc of Experian Limited's Experian Payments Gateway business and related assets (6 August 2019).

The CMA prevents "*pre-emptive action*" by imposing hold-separate orders in the form of an IEO. The IEO will remain in force until the merger is cleared or remedial action is taken (unless varied, revoked, or replaced). IEOs essentially require both the acquiring and target businesses **worldwide** to be carried on separately and at arm's length. Merging parties may not, without the CMA's consent, take any action that might lead to integration, transfer ownership or control, or impair the parties' ability to compete independently. IEOs also impose positive obligations on the parties, including obligations to ensure (a) separate brand identity, (b) sufficient resources are available to the target, (c) maintenance of the nature, range and quality of goods supplied in the UK, and (d) that all assets are maintained and not disposed of. In addition, the parties must report regularly to the CMA certifying their compliance with the IEO.

In completed mergers, the CMA's policy is to impose an IEO unless there is "*compelling evidence*" that there is no risk of pre-emptive action, or there is "*self-evidently no competition concerns*" (and thus no prospect of a Phase 2 reference).[3] As a matter of course, therefore, the CMA imposes an IEO in almost all completed mergers that it investigates, including mergers that complete during its investigation.

The CMA's guidance recognises that, when imposing IEOs, a balance must be struck between "*the need to guard against pre-emptive action [and] the burdens IEOs can place on the merging parties*."[4] In practice, however, the IEOs almost always result in administrative burdens and cost for merging parties. There is little room to negotiate the content and reach of the CMA's standard-form IEO. Parties can, however, apply to the CMA for derogations allowing them to take steps that would otherwise be prohibited.

The CMA takes a restrictive approach to granting derogations, particularly at the early stages of its investigation. It requires derogation requests to be fully specified, reasoned, and supported by relevant evidence, as to why the derogation is necessary and will not prejudice the CMA's ability to carry out its investigation or take remedial action if competition concerns are identified.

JD Sports' gun-jumping fine

The CMA has increasingly adopted a strict approach to enforcing IEOs.[5] Since its first gun-jumping fine on Electro Rent in June 2018,[6] the CMA has imposed fines on Ausurus,[7] Electro Rent (again),[8] JLA,[9] Nicholls' (Fuel Oils),[10] and Paypal.[11] Lastly, JD Sports was fined £300,000 on 29 July 2020 because Footasylum served a break notice on the lease of its Wolverhampton store without the CMA's consent.[12] The CMA considered that this action might have prejudiced the CMA's ability to impose a remedy by preventing Footasylum from operating a store and competing independently in Wolverhampton after a divestment. JD Sports argued

[3] CMA108, Interim Measures in Merger Investigations, para 2.26.

[4] *Ibid*., para 2.5.

[5] See Cleary Gottlieb, CMA Ramps Up Merger Control Enforcement Ahead of Brexit, February 26, 2020. See too Cleary Gottlieb, UK Competition Newsletter, January 2020.

[6] Electro Rent was fined £100,000 for terminating a lease of premises in breach of an IEO (see completed acquisition by Electro Rent Corporation of Test Equipment Asset Management Limited and Microlease, Inc., 11 June 2018, Penalty Notice available here).

[7] Ausurus was fined £300,000 for directing the acquired customers to make payments into Ausurus's bank accounts and making payments to the acquired suppliers from Ausurus's bank accounts (see completed acquisition by Ausurus Group Ltd of CuFe Investments Ltd, 20 December 2018, Penalty Notice available here).

[8] Electro Rent was fined £200,000 for failing to seek the CMA's consent before appointing the CFO of Electro Rent as a director of Microlease (see completed acquisition by Electro Rent Corporation of Test Equipment Asset Management Limited and Microlease, Inc., 12 February 2019, Penalty Notice available here).

[9] JLA was fined £120,000 for selling the entirety of its stock of certain machines to the former owner of the acquired business (see completed acquisition by JLA New Equityco Limited through its subsidiary Vanilla Group Limited of Washstation Limited, 8 March 2019, Penalty Notice available here).

[10] Nicholls' (Fuel Oils) was fined £146,000 for: moving staff between premises before receiving the CMA's consent; using a Nicholls-owned and branded mini-tanker to make deliveries to customers of the former business without consent; and failing to provide certain compliance statements to the CMA (see completed acquisition by Nicholls' (Fuel Oils) Limited of the oil distribution business of DCC Energy Limited in Northern Ireland, 28 June 2019, Penalty Notice available here).

[11] PayPal was fined £250,000 for engaging in cross-selling campaigns to target iZettle customers (see completed acquisition by PayPal Holdings, Inc. of iZettle AB, 24 September 2019, Penalty Notice available here).

[12] Completed acquisition of Footasylum plc by JD Sports Fashion plc, 29 July 2020, Penalty Notice no longer available.

unsuccessfully that, among other things, such CMA consent was unnecessary, as Footasylum had already planned to close the store before the merger, and was therefore acting in the ordinary course. The CMA rejected JD Sports' submissions:

— ***Immaterial that the IEO was not addressed to Footasylum.*** The CMA considered it appropriate that the IEO was addressed to JD Sports, not Footasylum. The CMA's guidance and practice clarifies that IEOs should be addressed to the acquiring business. JD Sports, as the acquirer, was therefore responsible for maintaining the competitiveness of the target business after completion.

— ***The break notice fell outside the ordinary course of business.*** The CMA found that the decision to close a store in the retail context is a significant one, which related to strategy rather than the day-to-day supply of goods or services. In addition, the CMA pointed to the CAT's findings in Electro Rent in which service of a break notice was considered to fall outside the ordinary course of business.

— ***The break notice amounted to pre-emptive action.*** The CMA found that closure of even a single store would likely impair Footasylum's ability to compete, and therefore would prejudice a potential divestment remedy.

— ***JD Sports took insufficient steps to procure Footasylum's compliance.*** The CMA found that JD Sports should have known that store numbers were an important parameter of competition and should therefore have required Footasylum, as a term of its delegated authority, to obtain legal advice before disposing of any store.

JD Sports appealed to the CAT under section 114 of the Enterprise Act 2002.[13] Unlike with respect to the CMA's substantive decisions, which are explicitly subject to judicial review,[14] the Enterprise Act is silent as to the standard of review for CMA penalty decisions. The CAT, however, found in Electro Rent that penalty decisions are subject to merits review (*i.e.*, the CAT is entitled to consider the evidence and substitute the CMA's decision with its own judgment).[15]

Before the appeal was heard, however, the CMA revoked JD Sports' fine. The precise rationale for the revocation is unfortunately unclear. The only explanation provided was that it was driven "*by issues raised on appeal*". The outcome itself, though, appears to constitute recognition from the CMA that it had either overzealously enforced the IEO or failed properly to take account of the parties' submissions. It also reveals that merging parties' right to an appeal on the merits in the CAT can – at least in some circumstances – provide an effective check on the CMA's procedural enforcement.

Facebook's refused derogation request

The CMA opened an investigation into Facebook's completed acquisition of GIPHY in June 2020 and, consistent with practice, imposed a global hold separate order shortly afterwards. Facebook immediately sought a number of derogations, including that the IEO not apply to parts of Facebook's business that were unrelated to GIPHY's activities (the supply of GIFs). The CMA requested a "*fully specified, reasoned and evidenced request*"[16] demonstrating the necessity of the derogation and that it would not prejudice the outcome of the CMA's investigations or its ability to impose remedies. Facebook did not provide such evidence, but instead argued that "*absent the CMA granting the derogations requested, it would be impossible for Facebook to carry on its ordinary course business activities unrelated to GIPHY or GIFs.*"[17] The CMA refused to grant the derogation because the necessary evidence was not forthcoming.

[13] The grounds were as follows: (i) the fine was unfair and contrary to the CMA's penalties procedures; (ii) it was based on a fundamental factual error as to steps taken to comply with the IEO; (iii) Footasylum had not failed to comply with the IEO; (iv) the CMA had erred in its assessment of whether there was a reasonable excuse; (v) there was no basis to address the decision to Pentland Jersey; (vi) there was no basis to impose a penalty; and (vii) the fine amount was unjustified and disproportionate.

[14] Substantive decisions may only be challenged on public law grounds of illegality, irrationality, and procedural unfairness.

[15] *Electro Rent Corporation v CMA* [2019] CAT 4, para 68.

[16] CMA Interim Measures Guidance, paragraph 2.30.

[17] *Facebook v CMA* [2020] CAT 23, paragraph 55.

Facebook appealed the CMA's decision to the CAT on the grounds that it was irrational and disproportionate (*i.e.*, on judicial review grounds). Facebook argued that the global nature of the IEO was disproportionate and that the requested derogation – carving out non-GIF related businesses – would not have prevented the CMA from taking any remedial action. The CAT dismissed the appeal, finding that the CMA "*has a wide margin of appreciation to decide what information is needed*" and is not "*bound to accept assertions made by merging parties without verification*."[18]

Potential implications for future UK mergers

The CAT's judgment in Facebook endorses the CMA's cautious approach to IEOs. The CAT accepted that the CMA was right to impose an IEO that applied globally and to both parties' businesses. It also agreed that the CMA was right not to grant derogations without a full and reasoned submission, explaining not only the scope of the derogation requested but why a derogation is needed.

As to the enforcement of IEOs, it is unlikely that the JD Sports case will result in a material change in the CMA's approach. The fine – and revocation of the fine – imposed on JD Sports related to the specific facts of that case. While the possibility of appeal may provide some comfort to companies trying to manage complex IEO arrangements, the CMA has given no indication that it will enforce IEOs less assiduously in future. Indeed, only last year, the CAT upheld a similar fine imposed by the CMA on Electro Rent, stating: "*interim orders serve a particularly important function where [a] merger [is] completed before it [is] examined by the CMA*" and it is *"a matter of public importance that the merger control process, and the duties that it creates, are* ***strictly, and conscientiously, observed***."[19]

Parties should therefore expect the CMA to continue to (a) impose IEOs in all completed mergers and mergers that complete during the CMA's investigation, (b) impose IEOs on a global basis, extending to both the acquirer's and target's businesses, (c) scrutinize compliance with IEOs carefully, and (d) be cautious about granting derogations, and do so only on the basis of specific, reasoned, and evidenced submissions. Failure to comply with IEOs is likely to result in penalties, and the CMA has indicated that it "*may consider proportionately larger penalties in future cases should this prove necessary in the interests of general deterrence*".[20] To date, the CMA's fines have been relatively low compared with those imposed by the European Commission and other European agencies in gun-jumping cases, despite the CMA having the power to impose fines up to 5% of a party's worldwide turnover.

Judgments, Decisions, and News

Court Judgments

National Grid Electricity Transmission plc v ABB Ltd and Others (Power Cables Cartel). On 21 October 2020, the National Grid Electricity Transmission plc (**NGET**) withdrew its claim against ABB following settlement. NGET claimed losses resulting from price fixing of underwater power cables, as identified by the European Commission's April 2014 Power Cables decision.

Antitrust / market studies

CMA Opens Investigation Into Suspected Abuse Of Dominance In Supply Of Lithium-Based Medication For The Treatment Of Bipolar Disease. On 6 October 2020, the CMA announced an investigation into Essential Pharma's potential abuse of dominance in the supply of lithium-based medicines for treating bipolar disorder. Essential Pharma proposed

[18] *Ibid*., paragraph 128.

[19] *Electro Rent Corporation v CMA* [2019] CAT 4, para 120 and 200 (emphasis added). See too *Stericycle International LLC v Competition Commission* [2006] CAT 21.

[20] Decision to impose a penalty on Ausurus Group Ltd and European Metal Recycling Ltd under section 94A of the Enterprise Act 2002, para 128.

to withdraw supply of the drug Priadel to UK patients, which would result in thousands of patients having to switch to alternative, more expensive treatments. The Department of Health and Social Care requested the CMA to impose interim measures to prevent withdrawal. Essential Pharma has since agreed to continue supply of the drug while price discussions with the Department of Health are ongoing.

Merger Developments

PHASE 2 INVESTIGATIONS

TVS Europe Distribution Limited/3G Truck & Trailer Parts. On 20 October 2020, the CMA published provisional findings in its Phase 2 investigation into TVS Europe's completed acquisition of 3G Truck & Trailer. The parties are wholesalers of commercial vehicles and trailer parts to the UK independent aftermarket. The CMA has provisionally found that the merger could result in a substantial lessening of competition (**SLC**) in the wholesale supply of parts in the UK, combining two of the three largest suppliers. Internal documents indicated that the parties were each other's closest competitors. On 21 October 2020, the CMA published its remedies notice, indicating that a structural remedy short of full divestiture was unlikely to address the SLC comprehensively. Accordingly, the CMA considers full divestiture of 3G likely as the only effective remedy. The reference period for the inquiry was extended until 21 January 2021.

Yorkshire Purchasing Organisation/Findel. On 16 October 2020, the CMA published provisional findings in its Phase 2 investigation of Yorkshire Purchasing Organisation's (**YPO**) anticipated acquisition of Findel. YPO and Findel are the second and third largest suppliers of educational materials to schools and nurseries across the UK. The CMA provisionally found an SLC given high combined market shares, a significant increment, and insufficient alternative sources of supply. The parties' (as well as third parties') internal documents consistently indicated that YPO and Findel were each other's closest competitors. The CMA's provisional view is that the merger should be prohibited.

Viagogo/StubHub. On 22 October 2020, the CMA published provisional findings in its Phase 2 investigation of Viagogo's completed acquisition of StubHub. The parties are the two largest providers of secondary ticketing services for live events in the UK. The CMA provisionally found that the merger has resulted in an SLC in the supply of uncapped secondary ticketing services for the resale of tickets to UK events. The CMA found that the parties had 90-100% combined market share, with 30-40% increment, and that the market was characterised by indirect network effects that prevented new entry. The CMA has published a notice of possible remedies, indicating that it will consider partial divestiture of StubHub or Viagogo, including a "mix-and-match" package with assets from both parties, provided a suitable purchaser can be identified. If not, full divestiture would represent the only comprehensive and effective remedy.

PHASE 1 CLEARANCE DECISIONS

Carlsberg UK Holdings Limited /Marston's PLC. On 9 October 2020, the CMA cleared the anticipated joint venture between Carlsberg and Marston's, two brewers of beer and cider.

Sinch Holding AB/SAP Digital Interconnect Unit from SAP SE. On 21 October 2020, the CMA announced that it had cleared the anticipated acquisition by Sinch Holding of SAP's Digital Interconnect Unit. Sinch is a cloud communications platform for mobile messaging and the Digital Interconnect Unit is a communication unit that offers cloud-based communications products.

Elis UK Limited/Central Laundry Limited. On 23 October 2020, the CMA announced that it had cleared the completed acquisition by Elis UK of Central Laundry. Elis UK provides commercial laundry and facilities management services to the hospitality and healthcare sector. Central Laundry also provides commercial laundry services. The CMA found a realistic prospect of an SLC in the supply of linen and laundry services to certain healthcare customers, but deemed the market of insufficient importance to justify a reference. Accordingly, it cleared the merger, exercising its discretion to apply the *de minimis* exception.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision Due Date
TFL Ledertechnik GmbH / LANXESS Deutschland GmbH	15 December 2020
Crowdcube Limited / Seedrs Limited	17 December 2020
Sonoco Products Company Inc / Can Packaging SAS	21 December 2020
Facebook, Inc / Giphy	TBC
Liberty Global / Telefonica	1 February 2021

Other developments

Liberty Global (Virgin Media)/Telefónica (O2). On 8 October 2020, the CMA announced that it had made a request to the European Commission under Article 9 of the EU Merger Regulation to request transfer of the proposed joint venture between Liberty Global and Telefónica to the CMA. The joint venture would merge the parties' UK operating businesses Virgin Media and O2. The CMA submitted that the case should be referred to the UK given its potential impact on competition in UK retail and wholesale telecommunication markets and the imminent end of the Brexit transition period. The European Commission referred the merger to the CMA on 19 November 2020.

Jonathan Scott Appointed As Interim Chair Of The CMA. On 9 October 2020, the Secretary of State for Business, Energy and Industrial Strategy, Alok Sharma, announced the appointment of Jonathan Scott as the interim chair of the CMA with immediate effect. Mr Scott will occupy the position of interim chair for a period of up to one year, while a recruitment round is carried out to find a permanent replacement for Rt Hon Lord Tyrie, who stepped down last month. Mr Scott was previously senior partner and chair of Herbert Smith Freehills.

Dr Andrea Coscelli On Digital Markets. On 9 October 2020, Dr Coscelli, CEO of the CMA, delivered the key note speech at the Fordham Competition Law conference. Drawing on the CMA's report into online platforms and digital advertising, he discussed the need for a new approach to promote competition and innovation in digital markets.

CMA Consults On Draft Guidance On The Functions Of The CMA After The End Of The Transition Period. On 2 October 2020, the CMA invited views on its Draft Guidance on the Functions of the CMA after the end of the Transition Period, including its review of mergers and cases over which the European Commission has 'continued competence' under the Withdrawal Agreement.

Power To Depart From Retained EU Case Law Extended To The Court Of Appeal And Other Appellate Courts. Following amendment of the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, the Court of Appeal and a number of appellate courts were given the power to depart from retained EU case law after the end of the transition period.

CMA and SFO Memorandum of Understanding. On 21 October 2020, the CMA published a memorandum of understanding that records the basis on which it will cooperate with the SFO to investigate and prosecute individuals for the criminal cartel offence under section 188 of the Enterprise Act.

Ofcom Issues Statement of Objections to Motorola. On 23 October 2020, Ofcom issued a statement of objections to Motorola setting out its provisional view that Motorola infringed Chapter 1 of the Competition Act 1998 and Article 101 TFEU by exchanging competitively sensitive information relating to future pricing intentions of TETRA devices and related services used by emergency services in the UK.

LONDON TEAM

London Office
2 London Wall Place
London EC2Y 5AU

Maurits Dolmans
+44 20 7614 2343
mdolmans@cgsh.com

Nicholas Levy
+44 20 7614 2243
nlevy@cgsh.com

Romano Subiotto QC
+32 2 287 2092
rsubiotto@cgsh.com

Paul Gilbert
+44 20 7614 2335
pgilbert@cgsh.com

Richard Pepper
+32 2 287 2181
rpepper@cgsh.com

Paul Stuart
+44 20 7614 2207
pstuart@cgsh.com

Esther Kelly
+32 2 287 2054
ekelly@cgsh.com

John Messent
+44 20 7614 2377
jmessent@cgsh.com

Henry Mostyn
+44 20 7614 2241
hmostyn@cgsh.com

Romi Lepetska
+44 20 7614 2292
rlepetska@cgsh.com

Alexander Waksman
+44 20 7614 2333
awaksman@cgsh.com

Wanjie Lin
+32 2 87 2076
wlin@cgsh.com

Alexandra Hackney
+44 20 7614 2371
ahackney@cgsh.com

Adam Bruell
+32 2 287 2311
abruell@cgsh.com

Lanto Sheridan
+44 20 7614 2308
lsheridan@cgsh.com

Courtney Olden
+44 20 7614 2298
colden@cgsh.com

Patrick Todd
+44 20 7614 2330
ptodd@cgsh.com

Courtenay Stock
+44 20 7614 2375
cstock@cgsh.com

Fay Davies
+44 20 7614 2276
fdavies@cgsh.com

Chloe Hassard
+44 20 7614 2295
chassard@cgsh.com

Ranulf Outhwaite
+44 20 7614 2228
routhwaite@cgsh.com

Mark Gwilt
+44 20 7614 2313
mgwilt@cgsh.com

Kikelomo Lawal
+44 20 7614 2319
klawal@cgsh.com

Gaia Shen
+44 20 7614 2371
gshen@cgsh.com

Shaun Tan
+44 20 7614 2366
shtan@cgsh.com

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