

November – December 2021

UK Competition Law Newsletter

Highlights

- CMA publishes revised Guidance on interim measures in merger investigations
- CMA publishes Interim Report on UK Mobile Ecosystems
- CMA, FTC And DOJ make Joint Statement following G7 Competition Enforcers Summit

CMA Revised Guidance on Interim Measures in Merger Investigations

The UK Government has stated that the review of mergers in the UK “*should be as efficient as possible, focusing its attention on mergers most likely to be harmful to competition and consumers, without unduly hindering benign investment.*”¹ To that end, the UK has a voluntary, non-suspensive system of merger control, intended to promote greater flexibility and proportionality than a suspensory regime.

Interim measures are the corollary to the UK’s voluntary merger regime, where parties are able to complete transactions without seeking clearance and the Competition and Markets Authority (**CMA**) can, and often does, investigate transactions that

have already closed.² Interim measures enable the CMA to halt integration between merging firms and unwind steps that have already taken place in order to prevent pre-emptive action (*i.e.*, to prevent steps that might affect the CMA’s ability to carry out its investigation or impose remedies if needed)³ and to preserve a market’s pre-merger competitive structure.⁴ The Competition Appeal Tribunal has largely endorsed the CMA’s approach to interim measures, finding that “[w]ithin the UK’s voluntary notification regime, interim measures play a vital role in allowing the CMA to ensure that...a merger and the actions of merging parties do not impact the pre-merger competitive structure of the market during the period of the CMA’s investigation.”⁵

¹ UK Department for Business, Energy & Industrial Strategy, *Reforming Competition and Consumer Policy* Consultation (July 2021), para. 1.90.

² Interim measures comprise (i) an initial enforcement order, (ii) an interim order, or (iii) interim undertakings.

³ Pre-emptive action refers to “action which might prejudice the reference concerned or impede the taking of any action under [Part 3 of the Act] which may be justified by the CMA’s decisions on the reference”. See s. 72(8) of the Enterprise Act 2002.

⁴ The Revised Guidance explains that “[t]he CMA’s ability to impose Interim Measures on merging parties, and to impose penalties where these have not been complied with, are the necessary corollary of having a voluntary regime.” See para. 1.6.

⁵ *Facebook v Competition and Markets Authority* [2020] CAT 23, para. 21.

Interim measures can take different forms: an Initial Enforcement Order (**IEO**), an Interim Order, or Interim Undertakings. At (or before) phase 1, the CMA will issue an IEO. The practical effect of these measures is the same: parties are prevented from integrating the merging businesses, from sharing confidential information, from making significant changes to either party's business, and the merging businesses must operate independently while the CMA carries out its investigation. The CMA routinely imposes interim measures if it decides to investigate a merger that has completed or completes while the CMA's investigation is ongoing. The CMA can also impose interim measures to prevent completion from taking place but has stated that, other than where a transaction has been referred to phase 2, it will do so only in exceptional cases, where the act of completion would itself result in pre-emptive action.⁶ The CMA has powers to fine parties for breaching its interim measures and can enforce their provisions through the courts.

On 21 December 2021, the CMA published revised Guidance on its use of interim measures in merger investigations (CMA108) (the **Revised Guidance**). This is the third in a series of revisions to the CMA's merger-related guidance following Brexit: first to its Guidance on Jurisdiction and Procedure published in December 2020 (CMA2revised), with further amendments in January 2022; and then to its Merger Assessment Guidelines published in March 2021 (CMA129).

Reasons for Revision

The CMA published consolidated guidance on interim measures in merger investigations as recently as June 2019.⁷ Since then, the CMA has become "*increasingly aware that merging parties are taking insufficient steps to ensure compliance with interim measures which is undermining the effectiveness of the UK's voluntary, non-suspensory merger regime and has taken enforcement action where appropriate.*"⁸

This has resulted in greater use of the CMA's powers to fine companies for failing to comply with interim measures:

- **PayPal/iZettle**, September 2019. The CMA fined PayPal £250,000 for breach of an IEO. PayPal had been granted a derogation relating to its non-UK business but the CMA found that PayPal's campaigns outside the UK to promote iZettle to PayPal customers resulted in PayPal contacting potential UK customers as well. The CMA found that, in doing so, PayPal "*risked impairing the ability of iZettle and PayPal to compete independently*", "*risked undermining the separate sales or brand identities*" of the parties. It also found that the parties had failed to operate the customer lists of the two businesses separately.⁹
- **JD Sports/Footasylum**, August 2020. The CMA imposed a fine of £300,000 on JD Sports for breach of an IEO. The CMA determined that Footasylum had terminated a lease on one of its stores without the CMA's prior consent, in breach of the obligation under the IEO preventing disposals of any of the assets of the Footasylum business without the CMA's consent. The CMA subsequently withdrew this penalty after an appeal by JD Sports. The CMA later imposed separate fines on JD Sports and Footasylum totalling close to £5 million for exchanging confidential information in breach of the IEO.
- **ION/Broadway**, August 2021. The CMA fined ION a total of £325,000 for two breaches of an IEO. First, the CMA determined that ION and Broadway continued pre-existing collaboration on a draft response to a bid proposal, in breach of several provisions of the IEO. Secondly, the CMA determined that ION's compliance reporting contained material inaccuracies and/or omissions, leading to a further £25,000 fine.¹⁰

⁶ Revised Guidance, paragraph 2.22.

⁷ Previously, CMA guidance on this topic was divided between Guidance on initial enforcement orders and derogations in merger investigations (CMA60) and Guidance on the CMA's Jurisdiction and Procedure (CMA2).

⁸ Interim measures in merger investigations, Consultation document, 7 April 2021, para.1.6.

⁹ *PayPal/iZettle*, Notice of penalty pursuant to section 94A of the Enterprise Act 2002, 24 September 2019.

¹⁰ Decision to impose a penalty on ION Investment Group Limited and ION Trading Technologies Limited under section 94A of the Enterprise Act 2002, 7 August 2021.

— **Facebook/GIPHY**, October 2021. The CMA imposed fines totalling £50.5 million on Facebook for breaches of an IEO. The CMA fined Facebook £50 million for intentionally carving out parts of its business, activities and staff from the scope of its fortnightly compliance statements. The CMA fined Facebook a further £500,000 for changing its Chief Compliance Officer twice without seeking consent from the CMA.¹¹ And in February 2022, the CMA fined Facebook (Meta) a further £1.5 million for making changes to key staff without CMA consent.¹²

Amendments to the Guidance

The amendments contained in the Revised Guidance and standard-form IEO mainly clarify (1) to whom the CMA will address interim measures and (2) recommended steps to ensure compliance.

Addressees of interim measures

The CMA's standard-form IEO states that an IEO is "*normally*" imposed on the target, the target's ultimate UK parent company, the acquirer, and the acquirer's ultimate UK parent company. It also states that, where the acquirer and/or target are overseas companies, the IEO will "*typically*" be imposed on both the ultimate overseas parent and (if there is one) the UK parent company of each party.

This change reflects the CMA's recent practice to impose IEOs on both merging parties and to take a cautious approach with respect to overseas activities, *i.e.*, to impose an IEO that applies globally in the first instance. Where obligations imposed on overseas businesses are disproportionate and could create significant compliance burdens, the CMA may be willing to grant derogations to carve out certain business activities from some of the provisions in an IEO, but will typically do so only once it is sufficiently comfortable that this will not result in pre-emptive action.¹³

Compliance with interim measures

The Revised Guidance introduces two main changes relating to compliance with interim measures.

— **Paragraph 2.15. In completed mergers, the acquirer is "*normally additionally responsible*" for ensuring compliance by the target.** There is a tension between the provisions of CMA interim measures that prevent the acquirer from making changes to the target business on the one hand, and the provisions obliging the acquirer to allow the target to operate independently and preventing the target from sharing information with the acquirer on the other. The Revised Guidance recognises that the acquirer's ability to ensure compliance may be constrained by the IEO's "hold-separate" requirements or by the extent to which the acquirer controls the target (*e.g.*, where the transaction involves a non-controlling minority shareholding). The CMA states that "*in practice, the nature of the obligations on an acquiring business is likely to differ to that on a target business*".

These changes implicitly accept that the CMA's standard-form IEO is not fit for all types of transactions. They also recognise that there are circumstances where it will be impossible for an acquirer to comply with some provisions of an IEO without breaching others. It is nevertheless for the parties to manage these contradictions and seek derogations from the CMA if needed.

— **Paragraph 2.16. The CMA expects merging parties to take a "*risk-based approach*" to compliance.** The Revised Guidance lays out the CMA's expectation that merging parties "*undertake a thorough review*" of each area of their respective businesses in order to identify compliance risks, as this "*should enable merging parties to ensure that any steps taken are appropriately tailored to their respective*

¹¹ Decision to impose a penalty on Facebook, Inc., Tabby Acquisition Sub Inc., and Facebook UK Limited under section 94A of the Enterprise Act 2002, 20 October 2021.

¹² Decision to impose a penalty on Meta Platforms, Inc., Tabby Acquisition Sub Inc., and Facebook UK Limited under section 94A of the Enterprise Act 2002, 4 February 2022.

¹³ Revised Guidance, para. 3.40.

businesses.” The Revised Guidance sets out the steps that “*are likely to be, as a minimum, necessary to ensure effective compliance with Interim Measures*”, namely:

- Guidance and training for all members of staff, management, and the board, with additional training for personnel operating in “*higher risk areas*”;
- Periodic internal written communications from management and the board, reiterating the importance of compliance;
- Clear internal governance structures overseeing compliance with interim measures;
- Delegations of authority by the acquirer to the target business; and
- Ongoing oversight and reporting mechanisms.

The Revised Guidance also explains that the CMA will typically require the appointment of a monitoring trustee to monitor compliance with interim measures in cases where certain risk factors apply (such as substantial integration of the two businesses prior to the implementation of the interim measures), and where the CMA is concerned about the ability or willingness of the merging parties to comply fully with the IEO. The CMA routinely requires the appointment of a monitoring trustee where a completed transaction is referred to phase 2.

CMA Consultation Responses

The Revised Guidance also adopts a number of other changes in response to comments made in the CMA’s consultation. The Revised Guidance clarifies:

- Interim measures imposed post-completion will not normally be addressed to the seller of the target, unless there are particular reasons to do so in the circumstances of the case.¹⁴

- Investment vehicles and private individuals should not be responsible for compliance with interim measures unless they have oversight or control over the target.¹⁵

- In circumstances where the target business does not have separate management, its parent company or a CMA-appointed hold-separate manager should take steps to ensure compliance with the obligations set out in interim measures.¹⁶

- Personnel will require compliance training and guidance if “*their day-to-day responsibilities could ordinarily involve them taking actions that could be affected by the applicable interim measures.*”¹⁷

Conclusion

The changes introduced in the Revised Guidance are relatively minor and incremental. They do, however, underline the CMA’s determination to apply and enforce interim measures strictly. The CAT has largely endorsed the CMA’s discretion to adopt a “cautious” approach and apply global hold-separate orders on a routine basis. Even minor and inadvertent breaches of interim measures can result in significant penalties. The Revised Guidance places the burden of complying with interim measures firmly on the merging parties.

The UK’s merger regime continues to be a voluntary regime. Many transactions complete with CMA clearance, and without any interaction with the CMA at all. The CMA does, however, actively monitor for transactions that have not been notified and can call-in mergers for review if it believes they may raise competition concerns. The cost and administrative burdens of operating under interim measures is therefore becoming an increasingly important factor for companies considering the pros and cons of submitting a voluntary notification to the CMA.

¹⁴ Interim Measures in merger investigations, Summary of responses to the consultation (**Consultation Response Summary**), para. 2.6(a). Revised Guidance, fn. 22.

¹⁵ Consultation Response Summary, para. 2.8(a).

¹⁶ Revised Guidance, para. 2.17. Consultation Response Summary, para. 2.8(c).

¹⁷ Revised Guidance, para. 2.16(a). Consultation Response Summary, para. 2.8(f).

Judgments, Decisions, and News

Court Judgments

Mercury Pharmaceuticals Limited & Others/ HG Capital LLP/ Cinven (Luxo 1) S.a.r.l. & Others v Competition and Markets Authority.

On 18 November 2021, the Competition Appeal Tribunal (CAT) published summaries of three appeals by Mercury Pharmaceutical Limited, HG Capital LLP and Cinven (Luxo 1) S.a.r.l. against the Competition and Markets Authority (CMA). The appeals relate to the CMA's decision that the above parties abused dominant positions by charging excessive and unfair prices with respect to the supply of 20mcg liothyronine sodium tablets in the UK. The CAT issued an order requiring the CMA to file a consolidated defence to these appeals, and gave the CMA until 14 January 2022 to do so.

Ryder Limited And Another v MAN SE & Others.

On 19 November 2021, the CAT published a ruling on disclosure in the case of *Ryder Limited and another v MAN SE and others*, one of several actions being brought against truck manufacturers following the European Commission's trucks cartel decision. Ryder sought disclosure of an unredacted extract from Iveco's Statcom system (used to calculate the expected net profitability of each truck sold and to update its finance and accounting system). A redacted version of the extract had previously been disclosed pursuant to a CAT disclosure order. Ryder has now argued that disclosure of nine columns of information (relating to the period 1995 to 2004) is necessary to enable their expert to calculate the alleged overcharge. The CAT concluded that it was necessary and proportionate for seven columns to be disclosed, noting that removing redactions did not involve significant additional costs.

Dune Shoes Ireland Limited & Others v Visa Europe Limited & Others. On 26 November 2021, the CAT ruled on eight sets of proceedings associated with the Mastercard or Visa payment cards schemes. The card schemes are alleged to have set multilateral interchange fees (MIFs)

for their schemes at anticompetitive levels and therefore infringed Article 101 and/or 102 of the Treaty on the Functioning of the European Union (TFEU) and the Chapter 1 and/or 2 Prohibition of the Competition Act 1998. The claims concern UK and Irish domestic MIFs, EEA MIFs and intra-regional MIFs (and, in the case of two proceedings, Italian domestic MIFs as well). They cover transactions with consumer cards as well as transactions with commercial cards. The claimants, including French Connection, JD Wetherspoon and Odeon Cinemas, applied for an early-stage summary judgment on the basis that the alleged Article 101(1) infringement has already been resolved by the Court of Appeal and Supreme Court. The CAT awarded summary judgment against Visa and Mastercard for claims concerning UK and Irish domestic and intra-EEA MIFs for the period from 19 December 2006 to 8 December 2015. It refused summary judgment for the period after 9 December 2015 and for inter-regional consumer MIFs, MIFs for commercial cards and Italian domestic MIFs.

Kelkoo.com (UK) Limited & Others v Google UK Limited & Others. On 30 November 2021, the CAT published an order of the High Court transferring a damages action brought by Kelkoo.com (UK) Limited and ten other group company claimants (together, **Kelkoo**) against Google from the High Court to the CAT. The claims are being brought under section 47A of the Competition Act 1998 (**CA98**) in respect of alleged infringements of Article 102 TFEU and/or the Chapter 2 CA98. Kelkoo operates online price comparison sites. It claims that Google unlawfully favoured its own shopping comparison service over Kelkoo's site in Google search results.

Justin Gutmann v London & South Eastern Railway And South Western Trains, Stagecoach South Western Trains. On 6 December 2021, the CAT published a ruling on permission to appeal and costs, following its earlier judgement that refused to strike out collective proceedings brought by Mr. Justin Gutmann against London

& South Eastern Railway and South Western Trains, Stagecoach South Western Trains. The grounds of appeal included alleged errors in law in determining the merits threshold for the opt-out collective proceedings and establishing the prospect of success of the abuse allegations. The defendants also questioned the existence of “common” issues across the class, contended that the claimants lacked a credible and plausible methodology, and argued that inadequate weight had been given to the defendants’ cost-benefit analysis. The CAT determined that none of the grounds of appeal raised by the defendants had a reasonable prospect of success and therefore refused the right to appeal against the existing Collective Proceedings Orders (CPOs).

Notice Of Application Filed To Commence Collective Proceedings Against Govia Thameslink

Thameslink. On 16 December 2021, the CAT published a notice of application brought by Mr. Justin Gutmann to commence collective proceedings against Govia Thameslink. The proceedings have been stayed, pending the outcome of the collective proceedings brought by Mr. Gutmann against South Eastern Railway Ltd and First MTR South Western Trains Limited, which were certified in October 2021.

Antitrust/Market Studies

CMA Opens Chapter 1 Investigation Into Capacity-Sharing Agreement Between P&O Ferries And DFDS

On 11 November 2021, the CMA launched an investigation into a capacity-sharing agreement between P&O Ferries Holdings Limited and DFDS A/S concerning driver-accompanied freight shipments on the Dover-Calais route. The CMA is investigating whether the capacity-sharing agreement has potential to prevent, restrict or distort competition within the UK, contrary to Chapter 1 of the CA98.

Google Offers Modified Commitments In Abuse Of Dominance Investigation Arising From Google’s “Privacy Sandbox” Browser Changes

On 26 November 2021, the CMA launched a consultation on the modified commitments offered

by Google to address the CMA’s competition concerns relating to Google’s “Privacy Sandbox” project. The CMA’s notice of intention to accept modified commitments offered by Google sets out the CMA’s provisional view is that Google’s revised offer addresses the CMA’s competition concerns.

CMA Updates Investigation Into Pricing Of Rangers FC-Branded Replica Football Kit

On 7 December 2021, the CMA decided on grounds of administrative priority to end its investigation into the activities of Hummel A/S as part of its wider inquiry into the pricing of Rangers FC-branded replica football kits in the UK. The investigation began in December 2020 on the basis of suspected infringements of the Chapter 1 Prohibition and Article 101 TFEU. The CMA will continue its investigation into the remaining parties to the investigation: The Rangers Football Club Limited, LBJ Sports Apparel Limited (trading as Elite), Greaves Sports Limited and JD Sports Fashion Plc.

CMA Publishes Issues Statement In Land Mobile Radio Network Services For Police And Emergency Services

On 13 December 2021, the CMA published an issues statement in relation to its market study into the supply of Land Mobile Radio network services, a secure network communications service supplied solely by Airwave Solutions and used by ‘blue light consumers’ (e.g. emergency services). The CMA will seek to understand issues such as the contractual relationship over time between Airwave Solutions and customers; the process through which terms were set and renegotiated; and the pricing charged for services at special events (such as G7 summit coverage).

CMA Publishes Its Interim Report On UK Mobile Ecosystems

On 14 December 2021, the CMA published its Interim Report in its market study into UK mobile ecosystems. Mobile ecosystems include hardware (e.g. mobile devices) and associated software (e.g. mobile operating systems, applications and browsers). The market study is considering the competitive dynamics between Apple (iOS) and Google (Android).

CMA Publishes Full Infringement Decision In Liothyronine Abuse Of Dominance Investigation.

On 15 December 2021, the CMA published its infringement decision in its investigation into excessive and unfair pricing in the supply of liothyronine sodium tablets in the UK. The CMA found that Advanz Pharma Corp Limited had breached the Chapter 2 Prohibition. The CMA concluded that between 2009 and 2017, Advanz charged excessive and unfair prices for 20mcg liothyronine sodium tablets. At this time, Advanz was the sole UK-licensed supplier of such tablets. The CMA imposed a total penalty of £40.9 million, bringing the overall fines imposed in this investigation to just over £100 million.

CMA Publishes Statement Of Objections To Dar Lighting For Preventing Retailers From Offering Discount.

On 16 December 2021, the CMA issued a statement of objections to Dar Lighting, a supplier of domestic lighting products, alleging that the company has breached the Chapter 1 Prohibition by preventing online retailers from offering discounts. The CMA has provisionally concluded that Dar restricted the freedom of online retailers by requiring them to sell their products at or above a minimum price between 2017 and 2019. The CMA launched the investigation in November 2020.

Merger Developments

PHASE 2 INVESTIGATIONS

CMA Issues Provisional Findings In Cargotec Corporation/Konecranes Plc Merger.

On 26 November 2021, the CMA published provisional findings in its Phase 2 investigation into the anticipated merger between Cargotec Corporation and Konecranes Plc. The CMA has provisionally found that the anticipated merger may result in an SLC through horizontal unilateral effects in the supply of several categories of equipment in Europe (including the UK), including rubber tyre gantry cranes, automated stacking cranes and heavy duty forklift trucks. The CMA concluded that the SLC may result in, for example, higher prices and/or reduced quality, range or service to UK customers. The CMA also published a notice

of possible remedies, which identifies prohibition, partial divestiture, and behavioural commitments as possible remedies. The CMA has extended the statutory deadline for its Final Report by eight weeks, until 1 April 2022, owing to the scope and complexity of the enquiry.

CMA Requires Full Divestment Of Giphy By Facebook.

On 30 November 2021, the CMA published its Final Report in its Phase 2 investigation into the completed acquisition by Facebook, Inc (Meta Platforms, Inc) of Giphy, Inc. Largely in line with its Provisional Findings, the CMA found that the acquisition had resulted or would result in an SLC due to a loss of horizontal competition in the supply of display advertising and through input foreclosure in the supply of social media services. The CMA concluded that its competition concerns could be addressed only by Facebook divesting Giphy in its entirety to an approved buyer.

CMA Publishes Issues Statement In Phase 2 Investigation Of NVIDIA/Arm Merger.

On 20 December 2021, the CMA published an issues statement in its Phase 2 investigation into the anticipated acquisition of Arm's Intellectual Property Group business by NVIDIA Corporation. The proposed acquisition was referred for a Phase 2 investigation by the Secretary of State for Digital, Culture, Media and Sport on both competition and national security grounds on 16 November 2021. The statutory deadline for the CMA to report to the Secretary of State on the outcome of its Phase 2 investigation is 2 May 2022.

CMA Invites Comments On Draft Final Undertakings In JD Sports Fashion/ Footasylum Merger.

On 6 December 2021, the CMA published a notice of its intention to accept final undertakings in relation to the completed acquisition of Footasylum plc by JD Sports Fashion plc. The draft final undertakings require JD Sports to divest the entire Footasylum business to an approved purchaser. This followed the publication of the CMA's Final Report in its remitted investigation into the transaction on 4 November 2021. The CMA found that the merger had resulted or would result in SLCs in: (i) the retail supply

of sports-inspired casual footwear in-store and online in the UK, and (ii) the retail supply of sports-inspired casual apparel in-store and online in the UK.

CMA Refers Veolia/Suez Merger For Phase 2 Investigation. On 21 December 2021, the CMA announced its decision to refer the completed acquisition of a minority shareholding in Suez S.A. (**Suez**) by Veolia Environnement S.A. (**Veolia**), together with Veolia's anticipated public takeover bid for the remaining share capital of Suez, for a Phase 2 investigation. Both parties are active in waste and water management services.

CMA Publishes Issues Statement In Phase 2 Investigation of CHC/Babcock Merger. The CMA published an Issues Statement in its Phase 2 investigation of the completed acquisition of Offshore Helicopter Services UK Limited, Offshores Services Australasia Pty Ltd and Offshore Helicopter Services Denmark A/S by CHC Group LLC. Both parties are active in the supply of helicopter services to transport crews to and from offshore oil and gas platforms. The CMA will explore whether the transaction is likely to give rise to horizontal unilateral effects in the supply of offshore oil and gas transportation services, including by assessing whether there are sufficient good alternatives to the merging parties. The CMA announced its decision to refer the transaction to phase 2 on 29 November 2021.

CMA Announces Provisional Findings In Phase 2 Investigation Of Cellnex/CK Hutchison UK Merger. On 16 December 2021, the CMA provisionally concluded that the acquisition of CK Hutchison by Cellnex would lead to a substantial lessening of competition as a result of horizontal unilateral effects in the supply of access to passive infrastructure sites used by UK mobile network operators (*i.e.* elevated structures which host telecommunications equipment). In its notice of possible remedies, the CMA stated that, in principle, a divestiture of a subset of CK Hutchison's sites could be sufficient to address the provisional SLC.

CMA Refers Dye & Durham/TM Group For Phase 2 Investigation. On 23 December 2021, the CMA announced that the completed acquisition of TM Group by Dye & Durham (UK) would be referred to a Phase 2 investigation. Both parties provide property search services. As set out in its Phase 1 decision, the CMA is concerned that the merger could lead to a reduction in competition, given the parties are two of four large independent businesses providing these services across England and Wales.

UNDERTAKINGS IN LIEU OF PHASE 2 INVESTIGATIONS

Admiral Taverns/Hampden Pub Estate. On 9 November 2021, the CMA announced that it was considering undertakings offered by Admiral Taverns on 3 November 2021. Admiral Taverns offered to divest seven pubs to address the CMA's competition concerns in seven local areas. On 16 November, the CMA published its Phase 1 SLC decision and consultation on the proposed undertakings.

Hytera Communications/Sepura. On 3 December 2021, the Secretary of State for Business, Energy and Industrial (**BEIS**) accepted revised statutory undertakings in relation to the 2017 acquisition of Sepura plc (**Sepura**) by Hytera Communications Corporation Limited (**Hytera**). Both parties manufacture and supply Professional Mobile Radio communications systems to public sector and commercial customers. The original undertakings had been accepted in May 2017 in lieu of a Phase 2 reference following a Public Interest Intervention Notice (**PIIN**). The CMA found that the parties supplied over 25% of a UK radio device that functions on the 'Terrestrial Trunked Radio' network (**TETRA**). The undertakings have been expanded to reflect the fact that the TETRA network is being replaced by a network known as the Emergency Services Network.

Huws Gray/Grafton. On 9 December 2021, the CMA published a consultation on proposed undertakings in lieu of a Phase 2 reference offered by Patagonia Bidco Limited in connection with

its anticipated acquisition of certain builders' merchant businesses of Grafton Group Plc. Patagonia Bidco Limited is the holding company of the Huws Gray builders' merchant business. The CMA found that two of the parties' branches were located less than three minutes' drive from each other. Under the undertakings, the parties will divest one of these branches. The CMA published its Phase 1 SLC decision on 15 December.

Circle Health/BMI Healthcare. On 10 December 2021, the CMA published provisional findings in its review of the undertakings given by Circle Health Holdings Limited (**Circle Health**). In June 2020, the CMA accepted undertakings from Circle Health to divest its Circle Bath and Circle Birmingham hospitals, in lieu of a Phase 2 reference. Circle Health divested Circle Bath in June 2021, but received no offers for Circle Birmingham. Circle Health subsequently requested the CMA vary the undertakings as regards Circle Birmingham. The CMA has provisionally found that the divestiture of Circle Birmingham as envisaged in the current undertakings is no longer an effective remedy to the SLC and should therefore be varied. The CMA considers that a divestiture of BMI Priory or a divestiture of Circle Birmingham on more flexible terms would address its competition concerns.

Pennon Group/Bristol Water Holdings. On 22 December 2021, the CMA announced that unless acceptable undertakings were offered, it would refer Pennon's completed acquisition of Bristol Water to Phase 2 under the Water Industry Act 1991 (as amended by the Water Industry Act 2014). The CMA concluded that the exclusion of small mergers under s33 of the Act did not apply, and that the merger has already, or is likely to, prejudice Ofwat's ability to make comparisons between water enterprises. The CMA had already separately concluded that the transaction would not raise competition concerns and so any reference would relate solely to the CMA duties under the Water Industry Act.

PHASE 1 CLEARANCE DECISIONS

Arthur J. Gallagher & Co./Willis Towers Watson (Treaty Reinsurance business). On 22 November 2021, the CMA announced that it had cleared the acquisition by Arthur J. Gallagher & Co. of the Treaty Reinsurance business of Willis Towers Watson. Both parties supply non-life treaty reinsurance broking services across a large number of different risk lines to customers worldwide. On 10 December 2021, the CMA published the full text of its Phase 1 decision.

Thermo Fisher Scientific Inc/PPD Inc. On 3 December 2021, the CMA cleared the anticipated acquisition of PPD Inc. by Thermo Fisher Scientific Inc. Thermo Fisher Scientific Inc is an American supplier of scientific products and PPD Inc is a global research organisation focusing on life sciences and drug development.

iQSA Holdco Limited/Assets of GCP Student Living Plc; Scape Living plc/ GCP Student Living Plc. On 6 December 2021, the CMA cleared the anticipated acquisition of certain assets of GCP Student Living Plc by iQSA Holdco Limited. iQSA develops corporate purpose-built student accommodation and GCP Student Living is a real estate investment trust with a portfolio of 11 student properties. The CMA also approved a similar acquisition by Scape Living Plc. Scape Living is [...]

Scottish Sea Farms Limited/Grieg Seafood Hjaltland UK Limited. On 8 December 2021, the CMA cleared the anticipated acquisition by Scottish Sea Farms Limited of Grieg Seafood Hjaltland UK Limited. Scottish Sea Farms is a UK-based company active in marine aquaculture. Grieg Seafood Hjaltland is active in the farming and processing of Scottish salmon.

Bellis Acquisition Company/Asda Group. On 9 December 2021, the CMA cleared the acquisition of Asda Group by Bellis Acquisition Company 3 Limited following the divestment of 27 retail fuel sites. The CMA's Phase 1 decision found significant overlap in the supply of auto-LPC, retail supply of road fuel and retail supply of convenience groceries.

DPD/CitySprint. On 16 December 2021, the CMA [announced](#) that it had cleared the anticipated acquisition of CitySprint UK by DPDgroup UK Limited. DPDgroup UK Limited is a parcel delivery network. CitySprint UK is a same-day distribution network.

APi Group/Chubb. On 17 December 2021, the CMA [published](#) the full text of its clearance decision in the anticipated acquisition of Chubb Limited by APi Group Corporation, which it cleared on 6 December 2021. APi Group provides safety, specialty and industrial services. Chubb is a fire safety and security systems provider.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision Due Date
CVS/Quality Pet Care	18 February 2022
Ritchie Bros Auctioneers Incorporated/Euro Auctions Group	4 March 2022
Microsoft Corporation/Nuance Communications, Inc.	9 March 2022
IAA, Inc./SYNETIQ Holdings Limited	9 March 2022
CD&R/Morrisons	24 March 2022
Clayton, Dubilier & Rice/Morrisons	24 March 2022
Boparan Private Office/Banham Poultry	25 March 2022
Nijjar Group Holdings/Medina Holdings	30 March 2022
Energystore Limited/WarmFill Ltd	6 April 2022
VetPartners Limited/Goddard Holdco Limited	28 April 2022
Korean Air/Asiana Airlines	TBC

Other Developments

CMA Publishes Recommendation To Replace Retained EU Vertical Agreements Block Exemption Regulation With New UK Vertical Agreements Block Exemption Order. On 3 November 2021, the CMA [published](#) its recommendations to the Secretary of State regarding the replacement of the EU Vertical Agreements Block Exemption Regulation (**VBER**) with a new UK Vertical Agreements Block Exemption Order (**UK Order**). Following a consultation that ended in July 2021, the CMA recommends that the VBER be replaced with a UK Order when the VBER expires on 31 May 2022 that would last six years.¹⁸

Dr Michael Grenfell Gives Speech On Whether Competition Authorities Should Intervene In Digital Markets. On 4 November 2021, the CMA [published](#) a speech by Dr Michael Grenfell (the CMA's Executive Director of Enforcement) at an event hosted by the Institute of Economic Affairs and Information Technology and Innovation Foundation. Discussing whether competition authorities should intervene in digital markets, Dr Grenfell noted that competition authorities are often viewed negatively by the technology sector as “*the big bad guys in this story*” and are perceived to disrupt the smooth functioning of the market and deprive the public of transformational technological benefits. Dr Grenfell said that most competition authorities view the digital revolution as “*overwhelmingly a force for good*” and digital markets and the tech sector as “*ultimately good for all our economic well-being*.” He also described what we saw as the risks for consumers and society if tech companies acquire, entrench or exploit market power: “[t]he role of competition policy and competition law enforcement is to steer a course where, as a society, we capture the benefits and minimise the risks.”

Second Breach Of 2002 SME Banking Undertakings By Danske Bank.

On 12 November 2021, the CMA [wrote](#) to Danske Bank regarding non-compliance with the [Small and Medium-sized Enterprises Banking](#)

¹⁸ See Cleary Antitrust Watch, CMA Publishes Consultation To Replace The Retained Vertical Agreements Block Exemption Regulation.

Undertakings given by Danske Bank in 2002. The Undertakings prohibit their signatory banks from directly or indirectly requiring customers to open and maintain a business current account (BCA) as a condition of receiving, servicing or maintaining a loan. Starting in May 2020, Danske Bank required up to 205 of its small and medium-sized enterprise (SME) customers to open a BCA in order to apply for a loan under the Government's Bounce Back Loan Scheme, which aimed to give SMEs access to finance during the COVID-19 pandemic. Danske Bank notified the CMA of this - its second - breach of the Undertakings in April 2021, and took a number of remedial actions. Citing the challenging circumstances of the COVID-19 pandemic and the constructive approach taken by Danske Bank to end the breach and prevent further breaches, the CMA is not taking formal enforcement action at this time.

Jonathan Scott Gives Speech On How The CMA Is Responding To Global Challenges. On 19 November 2021, Jonathan Scott (CMA Chair) gave closing remarks at the Chatham House Competition Policy Conference. He set out how the CMA is contributing to the challenges posed by big tech, climate change and post-pandemic recovery. Mr Scott identified on three areas of focus for the CMA: heightening international cooperation, delivering on its statutory mandate to promote competition in the interests of consumers and supporting the Government with changes to the legal framework in order to deliver on its statutory mandate more effectively.

CMA Publishes Call For Input On Retained Research And Development And Specialisation Block Exemption Regulations.

On 24 November 2021, the CMA published an invitation for input on the retained EU Research and Development Block Exemption Regulation and the retained EU Specialisation Block Exemption Regulation, which exempt certain categories of horizontal agreements from Article 101(2) TFEU. The Research & Development Block Exemption provides a safe harbour for agreements where two or more parties collaborate on research and development of products, technologies and processes. The Specialisation Block Exemption provides a safe harbour for certain joint

production agreements. The retained EU Block Exemption Regulations are due to expire on 31 December 2022.

CMA Publishes Independent Report Providing Compendium Of Approaches To Improving Competition In Digital Markets.

On 29 November 2021, CMA published a compendium of policy approaches to improve competition and innovation in digital markets by thirteen competition authorities (the G7 competition authorities plus four guest authorities). The report, which is described as the first time in the history of competition law and policy that so many authorities have prioritised the examination of the same markets, discusses the enforcement actions, policy projects and legislative as well as regulatory reforms and proposals in each jurisdiction. It is presented as a “*demonstration of the profound international concern in this area, as well as an opportunity for the global competition community to demonstrate its deep commitment to learning from one another and supporting one another as we address these challenges individually and collectively.*”

CMA Invites Consultation On Its Annual Plan for 2022/2023.

On 2 December 2021, the CMA published a consultation on its proposed Annual Plan for 2022/2023. The CMA plans to encourage compliance with consumer law to reduce anticompetitive behaviour during and after the pandemic. It will place particular focus on markets that have the most consumer complaints following COVID-19, including the PCR testing and package-holiday sectors. The CMA also intends to support the UK's transition to low carbon growth by prioritising cases involving practices that could impede the economy's low carbon transition.

CMA, FTC And DOJ Issue Joint Statement Following G7 Competition Enforcers Summit.

On 3 December 2021, the CMA and the US Federal Trade Commission and Department of Justice Antitrust Division issued a joint statement following their attendance of the G7 Competition Enforcers Summit. The agencies stressed the similar challenges they are facing and emphasised the importance of their

continued cooperation in parallel investigations. The CMA hosted the summit in London between 29 November and 3 December.

CMA Sends Letter To Make UK And The British Chambers Of Commerce About Container Shipping. On 3 December 2021, the CMA [published](#) the letter it had sent to Make UK and the British Chambers of Commerce in response to their concerns about the impact that increased costs and supply disruption in the container shipping sector have had on UK businesses. The CMA noted in the letter that, despite numerous business complaints, the CMA has yet to establish concrete evidence of anticompetitive infringements which would fall within its jurisdiction. The CMA is also hesitant to launch a market investigation into container shipping as many of the sectoral issues are international in scope, and the CMA is constrained in regard to the information it can access and the remedies it can ultimately impose.

CMA Revises Guidance On Investigation Procedures In Competition Act 1998.

On 10 December 2021, the CMA [updated](#) its Guidance on investigation procedures in Competition Act 1998 cases. In particular, the CMA has revised its Guidance on the CMA's settlement procedure. The CMA considers that the revisions align the Guidance with established case law. A settling party can now agree to waive its right to appeal in circumstances where it is entering a voluntary settlement process, has been informed of the case against it and parties involved, and has the time to consider the implications of the settlement.

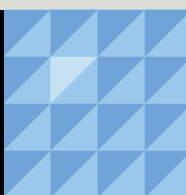
CMA Updates Guidance On Appropriate Penalty Levels Under Competition Act 1998.

On 16 December 2021, the CMA [published](#) revised Guidance on the appropriate amount of a penalty under CA98. The Guidance focuses on the need to ensure that the level of penalty is proportionate and results in effective deterrence.

Government Publishes The National Security And Investment Act 2021 (Commencement No. 2 And Transitional And Saving Provision) Regulations 2021.

On 20 December 2021, the Government [published](#) the National Security and Investment Act 2021 (Commencement No. 2 and Transitional and Saving Provision) Regulations 2021 (**Regulations**). The effect of Regulation 3 is to bring those provisions of the National Security and Investment Act 2021 that are not already in effect into force on 4 January 2022. The Regulations also include certain transitional and saving provisions.

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