November/December 2018

UK Competition Law Newsletter

Highlights

— The Court of Appeal finds that CAT rulings relating to applications for a collective proceedings order are subject to appeal.

— CMA opens an investigation into the financial services sector.

— CMA publishes Interim Report in its Funeral Market Study and consults on whether to open a Market Investigation.

— CMA publishes Final Report in its Investment Consultants Market Investigation.

— CMA responds to the "loyalty penalty" super-complaint by Citizens Advice.

"Deal" Vs "No Deal" Exit – Potential Implications For UK Competition Law Enforcement

The UK is set to leave the EU on 29 March 2019 ("**Exit Day**"). On 25 November 2018, the UK and the EU concluded a withdrawal agreement setting out the terms of the UK's departure from the EU and a political declaration on the framework for their future relationship, as provided for under article 50(2) of the Treaty on European Union ("**TFEU**") (the "**Withdrawal Agreement**").

It is uncertain whether the Withdrawal Agreement will be ratified by the UK Parliament (which is expected to vote in the week of 14 January 2019) and/or modified by the UK Parliament or the EU. In any event, the provisions relating to competition law seem relatively settled and are unlikely to change.

If the Withdrawal Agreement is ratified, its competition law provisions will be implemented in the UK by virtue of the European Union (Withdrawal Agreement) Bill (the "**Withdrawal Bill**") which would amend certain provisions of the EU Withdrawal Act 2018 ("**EUWA**"). If, however, the Withdrawal Agreement is not ratified and the UK leaves the EU without an agreement (a "no deal" exit), the application of EU competition law in the UK would be governed by the provisions of the EUWA as they currently stand and the current draft Competition (Amendment etc.) (EU Exit) Regulations 2019[1] (the "**Competition Regulations**").

We summarise the position under each of these possible outcomes below, highlighting the most significant differences.

[1] This draft Statutory Instrument has been passed by Parliament and will be made official in January. It will enter into effect only in the event of a "no deal" exit.

Agreed Exit

The Withdrawal Agreement – and the Withdrawal Bill brought forward to implement it – provides a framework for: (i) sharing competencies as between UK and EU institutions during and after the transition period; and (ii) assessing practices that may affect trade between the EU and UK.

Transition Period. The Withdrawal Agreement preserves the *status quo* for EU competition cases during a transition period from 29 March 2019 until 31 December 2020 (the "**Transition Period**"), which could be extended by a joint committee of EU and UK representatives. There would be no material changes to competition law enforcement during this Transition Period: EU law would remain binding in the UK, the EU Merger Regulation ("**EUMR**") would continue to apply to transactions that might otherwise be subject to UK merger review, and EU institutions (including the Court of Justice ("**CJEU**")) would retain their existing competencies in the UK.

Post-Transition Period. Save for cases initiated by the European Commission ("**Commission**") before the end of the Transition Period and practices affecting trade between the EU and the UK (both explained further below), EU competition law would cease to apply in the UK. This would also mean that the Commission would lose competence over the UK aspects of concentrations reportable under the EUMR, which would instead be potentially subject to parallel review by the Competition and Markets Authority ("**CMA**"). The EUWA and the Withdrawal Agreement contain a number of relevant provisions:

— Direct EU legislation (including decisions of the EU courts), so far as it is operative immediately before the end of the Transition Period, would form part of UK domestic law during and after Transition Period;[2]

— The European Communities Act 1972 would be repealed on Exit Day by the EUWA, thereby removing the authority for EU law to have effect as national law in the UK. The Withdrawal Bill, however, would ensure that the effects of the European Communities Act 1972 continue to apply during the Transition Period;[3]

— Principles and decisions of EU courts would not bind UK courts after the Transition Period, although UK courts could "*have regard to anything done*" after the Transition Period by EU institutions, including EU courts. UK courts would decide questions concerning retained EU law in accordance with any retained case law and general principles of EU law; they would have no power to make preliminary references to the CJEU on the interpretation of EU law. When deciding whether to depart from retained EU case law, UK courts should apply the same tests as they apply when deciding to depart from domestic case law.

After the Transition Period, competence for competition law enforcement would be shared as follows:

— ***Antitrust cases.*** The Commission would retain competence over cases where proceedings were initiated before the end of the Transition Period, including the enforcement of any remedies.[4] The CJEU would remain competent to review the legality of Commission decisions in such cases.

— ***Merger cases.*** The Commission would retain competence over cases (including the enforcement of remedies[5]) where, before the end of the Transition Period: (i) a merger had been formally notified to the Commission; (ii) a referral request had been made and the 15 working day period had passed without any Member State expressing disagreement to the referral;[6] or (iii) the Commission had decided to examine a notification upon request by a Member State

[2] As determined by the 24 July 2018 White Paper on Legislating for the Withdrawal Agreement between the United Kingdom and the European Union, paras. 57-59.

[3] As determined by the 24 July 2018 White Paper on Legislating for the Withdrawal Agreement between the United Kingdom and the European Union, para. 60.

[4] Unless the Commission and the CMA agree that it is appropriate to transfer the monitoring or enforcement to the UK authority.

[5] Ibid.

[6] Article 4(5) EUMR allows the Commission to review a concentration without an EU dimension upon request by the notifying parties if the transaction is capable of being reviewed by the national competition authorities of at least three Member States.

competition authority.[7] The CJEU would remain competent to review the legality of these cases.

— In both antitrust and mergers cases, Commission decisions taken in cases that were formally opened before the end of the Transition Period would also be binding on the UK even if they were adopted after the end of the Transition Period. In cases where the Commission has retained competence, UK lawyers would be treated as EU lawyers and their communications would continue to be protected by EU legal privilege.

These provisions likely mean that EU decisions would remain binding in the UK well after the end of the Transition Period – Commission proceedings initiated shortly before the end of the Transition Period could take several years to conclude and could be followed by lengthy appeals and follow-on damages claims.

Backstop provisions. Unless an agreement governing the future relationship between the UK and the EU is concluded during the Transition Period, the "backstop" provisions of the Withdrawal Agreement would come into effect. In this circumstance:

— UK companies would remain subject to Article 101 TFEU (which prohibits anti-competitive agreements between independent undertakings) and Article 102 TFEU (which prohibits abusive conduct by dominant companies) to the extent that agreements or conduct may affect trade between the EU and UK. Similarly, mergers that are reportable to the Commission in the EU or to the CMA in the UK and that threaten to significantly impede or lessen effective competition would be "declared incompatible" insofar as they affect trade between the EU and UK. The EU and UK would implement these rules using relevant EU acts, frameworks, guidelines and notices as "*sources of interpretation*" (although what exactly this entails is not yet clear).

— The UK would be required to maintain an "*independent authority*" and both the EU and UK agencies would cooperate on competition cases, including through the exchange of information. The Withdrawal Agreement also envisages that a separate framework for coordination could be drawn up by the relevant competition authorities.

"No Deal" Exit

The provisions for a "no deal" exit from the EU are set out in the Competition Regulations,[8] which are accompanied by an Explanatory Memorandum. The CMA has also published guidance on its role after exit, explaining how it would tackle merger and antitrust cases in an event of a "no deal" exit.[9]

No Transition Period. Under a "no deal" exit there would be no Transition Period. EU competition law and EU competence, including the EUMR, would no longer apply in the UK on Exit Day. The EUWA will revoke certain EU retained law as described above, with the notable difference that only direct EU legislation and EU Court decisions as operative on or before Exit Day (in contrast to the end of the Transition Period), would form part of domestic law.

Obligation to ensure consistency with pre-Exit Day EU competition law. The Competition Regulations ensure that there would be no post-Exit Day divergence between UK and EU competition rules by replacing Section 60 of the Competition Act 1998 with a new Section 60A. This would oblige UK competition regulators and courts to ensure consistency with pre-Exit Day EU competition case law when interpreting UK competition law, although they could depart from pre-Exit Day case law where it would be "*appropriate to act otherwise*" in light of specified circumstances.[10]

[7] Article 22(3) EUMR allows the Commission to review a concentration without an EU dimension upon request by Member States if the concentration is considered to affect trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

[8] The Competition Regulations amend the Competition Act 1998 and Enterprise Act 2002 and revoke certain EU retained law (under the EUWA), including the EUMR and Regulation 1/2003.

[9] *See* The CMA's role in antitrust if there's no Brexit deal, available here; and The CMA's role in mergers if there's no Brexit deal, available here.

[10] Relevant factors include: differences in UK and (pre-Exit Day) EU law provisions; differences between markets in the UK and EU; developments in economic activity since the relevant precedent or statement; generally accepted principles of competition analysis or the generally accepted application of those principles; principles or decisions of the EU Courts on or after Exit Day; and the particular circumstances under consideration.

Antitrust cases after exit. After Exit Day, an investigation by the Commission would no longer relieve the CMA of competence to investigate the same agreement or practice under UK competition law. The CMA would be unable to open an investigation under UK competition law if the Commission had already taken a decision in relation to the same agreement or conduct before Exit Day (and such a decision was not subsequently annulled). The CMA guidance states that if the Commission had not reached a final decision before Exit Day, the CMA would be free to open its own investigation even if the Commission had already opened formal proceedings. It is, however, debatable whether the CMA would be able to open parallel proceedings in these circumstances, as a decision to open formal proceedings under Article 11 of Regulation No. 1/2003 (depriving the CMA of jurisdiction) taken before Exit Day could be considered binding UK law under EUWA. Additionally:

— ***Leniency applications.*** There is no one-stop-shop principle for leniency applications in the EU today. Companies wishing to benefit from leniency from fines in the UK as well as at EU level already need to make separate applications to the CMA and the Commission. Post-Exit Day, companies that have sought leniency for ongoing EU investigations would need a full UK leniency application in the event that the CMA opens a parallel investigation.

— ***No dawn raid assistance.*** The CMA would no longer assist the Commission in carrying out dawn raids in the UK (or carry them out on its behalf).

— ***Block exemption regulations.*** UK law would retain the Commission Block Exemption Regulations. The Secretary of State would have the power to amend or revoke the block exemptions in consultation with the CMA, most likely as they fall due to expire in 2022-2026. In practice, this would mean that the legal position in the UK concerning those areas currently governed by the Block Exemption Regulations would not diverge materially from the existing position (until they are revoked or amended).

Merger cases after exit. The UK would no longer be subject to the EUMR. Provisions relating to the referral of cases between the Commission and CMA would no longer apply. There are no planned changes, however, to the UK's jurisdictional thresholds, the substantive test that the CMA applies, the time periods for UK merger review, and the voluntary nature of the UK merger control regime.

As noted, the CMA would not be able to open merger reviews where the Commission has reached a decision prior to Exit Day. The CMA may, however, launch a review of the UK aspects of concentrations that are being reviewed by the Commission on Exit Day and assess whether the UK's thresholds are met by these ongoing Commission merger cases. This also applies where a pre-Exit Day decision rendered by the Commission is subsequently annulled in full or in part on appeal. The Competition Regulations include provisions to ensure that, in such cases, the CMA would not be "timed out" from its ability to review the case.

The CMA has advised merging parties that anticipate a parallel UK review post-Exit Day to engage with the CMA at an early stage (*e.g.*, at the time of announcing the deal), especially if UK competition concerns are likely. This will ensure that merging parties are not forced to start a review process with the CMA from scratch on Exit Day. Until Exit Day, the CMA would not be able to use its formal information gathering powers, and parties would need to provide information to the CMA on a voluntary basis.

If the Commission has not issued a decision pre-Exit Day, any European Intervention Notice by UK Ministers (*e.g.*, on public security grounds) could be converted to a public interest intervention in the UK merger review.

Private Enforcement.

Claimants would be able to bring standalone claims (meaning that the claimant has to prove the infringement as well as showing causation and loss) relating to violations of EU competition law in the UK courts under UK law only if the alleged violation occurred pre-Exit Day. Commission

decisions issued pre-Exit Day would remain binding on the UK courts for the purposes of follow-on damages actions, and these decisions would continue to be binding for the purposes of damages even if they are made final only after Exit Day (*i.e.*, after any appeals have been exhausted or the time for an appeal to be brought has expired). UK courts would only have to treat decisions of other Member State competition agencies that are issued pre-Exit Day as prima facie evidence of breaches of EU competition law. Post-Exit Day, follow-on claimants would be able to rely on CMA decisions as breaches of UK law (though their territorial ambit will not likely extend to loss suffered outside the UK) and claimants may still seek to rely on Commission decisions as evidence of a foreign tort (namely, breach of EU law).

Judgments, Decisions, and News

Judgments

Walter Hugh Merricks CBE v Mastercard. On 13 November 2018, the Court of Appeal found that rulings of the CAT relating to applications for a collective proceedings order are subject to appeal.

On 21 July 2017, the CAT had refused an application by Walter Merricks for a collective proceedings order relating to a £14 billion opt-out claim against Mastercard. The CAT found that there was no plausible way of reaching "even a rough-and-ready approximation" of the loss each individual claimant suffered. On 28 September 2017, the CAT denied permission to appeal against that ruling. It held that an appeal to the Court of Appeal was possible only in relation to CAT decisions involving "awards of damages" under s 49(1A)(a) of the Competition Act, not in relation to decisions on class certification.

The Court of Appeal disagreed, finding that a refusal to grant a collective proceedings order is not merely procedural, because it is likely to prevent individual members of the class who have suffered loss from receiving compensation. It is therefore the "end of the road for a class action of this kind," and falls within the definition of a decision as to the "award of damages." The Court of Appeal has said that it will proceed to hear and determine the appeal.

BritNed Development Ltd v ABB AB and ABB Ltd. On 14 November 2018, the High Court ruled on costs following its judgments in the action brought by BritNed Development Ltd ("**BritNed**") to claim damages incurred as a result of the power cables cartel from ABB AB and ABB Ltd (together, "**ABB**").

The High Court ruled that the costs of this case should lie where they fell. Although BritNed had been awarded damages, it had been unsuccessful in a significant amount of its claim. Further, ABB had made a settlement offer which exceeded the amount of damages awarded. As this offer had been withdrawn prior to judgment, there should be no costs order in favour of ABB. It would nevertheless have been unjust for ABB to pay any of BritNed's costs, given that its earlier settlement offer had not been not beaten by BritNed.

Antitrust Developments

CMA Issues Statement Of Objections Relating To A Cartel For Supply Of Precast Concrete Drainage Products. On 13 December 2018, the CMA issued a statement of objections alleging that three suppliers of pre-cast concrete drainage products (CPM Group Limited, FP McCann Limited and Stanton Bonna Concrete Limited) had breached competition law by taking part in a cartel agreement to fix or coordinate prices and share the market in relation to the provision of certain pre-cast concrete drainage products in Great Britain. The CMA alleges that the cartel was operated through regular secret meetings from 2006 throughout a period of almost seven years. Stanton Bonna Concrete Limited and CPM Group Limited had already reached a settlement agreement with the CMA, and have admitted participation in the cartel. In September 2017, Stanton Bonna Concrete director Barry Kenneth Cooper was found guilty of criminal cartel activity for his role in price-fixing and market sharing arrangements with competitors. He was sentenced to two years' imprisonment

suspended for two years, made the subject of a six-month curfew order, and was disqualified from being a company director for seven years.

CMA Updates The Timing Of Its Investigations Into The Supply Of Hydrocortisone Tablets. On 20 November 2018, the CMA provided updates on the progress of its ongoing investigations into alleged breaches of EU and UK competition law in relation to the supply of hydrocortisone tablets.

The first case, opened in March 2016, alleges that Actavis UK charged excessive and unfair prices to the NHS for the supply of hydrocortisone tablets in the UK. The CMA notes that, since September 2017, it has been considering the parties' written and oral representations on the statement of objections, issued a draft penalty statement and letter of facts, and been considering responses to these. It now plans to continue its evidence-gathering and analysis stage until around 2019.

The second case, opened in April 2016, concerns allegations that Concordia and Actavis UK entered into anti-competitive agreements under which Actavis UK incentivized Concordia not to enter the UK market with its own competing hydrocortisone tablets. In doing so, the CMA also alleges that Actavis UK abused its dominant position by inducing Concordia not to enter the UK market independently. The CMA notes that it has considered the written and oral responses to the statement of objections and that it now plans to continue its evidence-gathering and analysis stage until June 2019.

CMA Opens Competition Investigation In Financial Services Sector. On 16 November 2018, the CMA announced that it is investigating alleged anti-competitive arrangements in the financial services sector. The CMA and the Financial Conduct Authority ("**FCA**") have agreed that the CMA will be conducting the investigation. The CMA will be conducting its initial investigation (information gathering, issuing information requests, analysing and reviewing information, and holding state of play meetings with parties under investigation) until August 2019.

CMA Issues Statement Of Objections To Comparethemarket. On 2 November 2018, the CMA issued a statement of objections alleging that ComparetheMarket had breached competition law through the use of "wide most favoured nation" clauses in many contracts with home insurance providers. Such clauses prevent home insurance providers from quoting lower prices on rival sites and through other sales channels. The CMA alleges that these clauses prevent rivals from winning insurance customers through lower prices, and also reduce the incentives for comparison websites to compete on the commissions they charge to insurance providers (as commissions can be increased without the risk that the provider will offer a lower price on a competing comparison website). This investigation follows the CMA's market study into digital comparison tools, which concluded in September 2017 and its Private Motor Insurance Market Investigation in March 2015, which outlawed certain wide MFN clauses in relation to private motor insurance.

Market Investigations

CMA Responds To "Loyalty Penalty" Super-complaint. On 19 December 2018, the CMA responded to a "loyalty penalty" super-complaint filed by Citizens Advice concerning penalties paid by longstanding customers in five markets: mobile; broadband; cash savings; home insurance and mortgages. The CMA found that loyalty penalties in these markets together amount to around £4 billion annually, and that vulnerable people are most at risk. The CMA identified a number of harmful practices, including: (i) continual year-on-year stealth price rises; (ii) costly exit fees; (iii) difficult contract switching or cancellation processes; and (iv) auto-renewals.

To tackle these issues, the CMA has proposed a package of eight reforms and recommendations to government, Ofcom, the FCA and other regulators. The reforms include: (i) increased enforcement and scrutiny of these practices, starting with the CMA's opening of a consumer law enforcement investigation in the anti-virus software sector; (ii) the creation of a number of principles that businesses in all markets should follow, for example the creation of mechanisms

allowing consumers to leave a contract as easily as they enter it; (iii) public accountability for loyalty penalties, and that regulators should publish the size of the loyalty penalty for each supplier on a yearly basis; and (iv) the consideration of targeted price caps to protect vulnerable consumers in particular.

CMA Proposes Audit Sector Reforms. On 18 December 2018 the CMA published an update paper on its statutory audit market study outlining legislative proposals to reform the audit market. The CMA considers that choice in the audit market is too limited, with the "Big Four" audit firms (KPMG, Deloitte, EY and PwC) conducting 97% of the audits of the largest companies in the UK. The CMA also found that the ability of companies to choose their own auditors has resulted in the same auditor being appointed frequently, even where another may offer better quality and tougher scrutiny. To address these concerns, the CMA proposes legislation that will separate audit and non-audit businesses into separate operating entities. The CMA also proposes an increased role for auditors outside the "Big Four", and suggested audits of the UK's FTSE350 companies should be carried out by two firms, with at least one from outside the "Big Four". This would provide a cross-check on quality, and would allow mid-tier firms access to the largest clients. The CMA proposes that there should be closer scrutiny of audit appointment and management to increase the accountability of those appointing auditors. The CMA is inviting comments on its proposals until 21 January 2019.

CMA Publishes Final Report In Investment Consultants Market Investigation. On 12 December 2018, the CMA published the final report of its market investigation into investment consultancy services ("**IC services**") and fiduciary management services ("**FM services**").[11] The CMA found that competition is not operating effectively within both the IC services and FM services markets and has announced a package of remedies to address these concerns.

The CMA found that, in both markets, pension trustees are unable to compare between services effectively, resulting in a reduced incentive for providers to compete to provide a good deal for pension trustees and, ultimately, the pensions they manage.[12] There are a number of market features leading to this outcome: (i) pension trustees will sometimes choose their existing investment consultant to be their fiduciary manager even if they could get a better deal elsewhere; (ii) investment consultants offering FM services are able to steer their existing customers towards their own service; (iii) pension trustees often have insufficient information on the fees or quality of the IC services and FM services to judge whether they are getting a good deal; and (iv) the markets are characterised by high switching costs.

The CMA's remedies include: (i) pension trustees wishing to use FM services to make investment decisions for more than 20% of their assets for the first time will need to run a competitive tender with at least three fiduciary managers (and if they have already delegated this level of scheme assets without a competitive tender process, they will have to run a competitive tender within five years); (ii) providers of FM services must provide potential clients with clear information on fees and standardised performance metrics to enable pension trustees to compare services accurately; and (iii) investment consultants must separate marketing their FM services from their IC services when competing for clients. The CMA has recommended that the Pensions Regulator should produce new guidance to help pension trustees and that the Government should broaden the regulatory scope of both the FCA and Pensions Regulator, to ensure greater oversight in the future. The CMA will consult on a draft order setting out the details of these remedies in early 2019.

CMA Publishes Interim Report On The Funeral Market Study And Consults On Market Investigation Reference. On 29 November 2018, the CMA published an interim report on its market study into the supply of

[11] This follows publication of its Provisional Decision Report in July 2018 and the consultation of 2 November 2018 on the definitions IC services and FM services for the purposes of remedies.

[12] The CMA notes that IC services influence over £1.6 trillion of pension scheme assets and that these services affect up to half of all UK households.

funerals in the UK, and has begun consulting on a potential market investigation reference, requesting parties to comment on the issues identified in its report by 4 January 2019. The CMA's initial work has indicated that problems in the market have led to price rises both for funeral director services and crematoria services. Among other things, it has found that: (i) in the last 10 years the price of the essential elements of a funeral has increased by more than two-thirds and fees charged by crematoria have increased by 84%; (ii) organising a funeral now costs those on the lowest incomes nearly 40% of their annual outgoings; (iii) people organising a funeral are usually distressed and not in a position to shop around, allowing funeral directors to charge higher prices; (iv) the larger chains in particular have consistently increased prices; and (v) people purchasing funeral services remain vulnerable to exploitation.

Merger Developments

PHASE 2 INVESTIGATIONS

Menzies Aviation (UK)/Airline Services. On 14 December 2018, the CMA published its provisional findings in its Phase 2 investigation into the completed acquisition by John Menzies plc (through its subsidiary Menzies Aviation (UK) Limited) ("**Menzies**") of part of the business of Airline Services Limited. In a number of UK airports, the parties' activities overlaps in: (a) ground handling services, which comprise ramp and baggage handling, passenger services, and other related tasks involved in servicing the arrival and departure of an aircraft; and (b) de-icing services, the removal and prevention of build-up of ice on wings and fuselages. The CMA has provisionally concluded that the merger would not result in a substantial lessening of competition in relation to ground handling or de-icing services in the UK, given the dynamic nature of the market and limited competition between the merging parties.

J Sainsbury/Asda. On 13 December 2018, the CMA published a revised administrative timetable for its Phase 2 investigation into the anticipated merger between J Sainsbury Plc and Asda Group Ltd, stating that the CMA intends to publish its provisional findings in January or early February 2019 (rather than early January 2019). This followed a challenge brought to the CAT by the merging parties relating to certain deadlines that had been set by the CMA. At a hearing on 14 December 2018, the CAT held that the CMA had not given the merging parties sufficient time to respond to certain of its Working Papers. The CAT did not order a specific deadline for the responses, but suggested that merging parties' request for an extension until the 4 January 2019 may be longer than necessary. The CAT also found that it was unfair for the CMA to schedule the parties' oral hearing in the same week that they were required to submit responses to the Working Papers.

PayPal Holdings/iZettle AB. On 5 December 2018, the CMA announced that it has decided to refer the completed acquisition by PayPal Holdings, Inc. of iZettle AB to an in-depth Phase 2 investigation. The CMA states that PayPal has chosen not to offer undertakings in lieu. The CMA has found that PayPal and iZettle are the two largest suppliers of mobile point-of-sale devices in the UK, and that PayPal could face insufficient competition in the UK after acquiring its market-leading rival. PayPal is an online payments system that facilitates online transfers and iZettle is a financial technology company that allows small businesses to take payments on card readers.

Experian/Credit Laser (ClearScore). On 28 November 2018, the CMA published its provisional findings in its Phase 2 investigation into the anticipated acquisition by Experian Limited of Credit Laser Holdings Limited. ClearScore and Experian are the first and second-largest credit checking firms (both free and paid). The CMA has found that competition between the firms is helping to drive quality and innovation in both free and paid-for credit checking services. The CMA's provisional finding is that the merger would substantially reduce the pressure to continue to develop innovative offers and to make other improvements in services. At this stage, the CMA's view is that the only effective remedy is prohibition of the merger and the CMA invites comments on the effectiveness of a prohibition remedy by 12 December 2018.

PHASE 2 CLEARANCE DECISIONS

Nielsen/Ebiquity. On 22 November 2018, the CMA published its final report on the merger of data company Nielsen and the advertising intelligence division of Ebiquity. On 12 October 2018, the CMA had provisionally found that the proposed merger was not expected to result in an SLC in the supply of Deep Dive AdIntel and International AdIntel products to UK customers (AdIntel is a tool which analyses advertising spend). The CMA Inquiry Group found that Nielsen and Ebiquity were not close competitors and that both faced competitive pressure from changes to the advertising landscape, in particular the rapid increase in online advertising.

Motor Fuel Group/MRH. On 9 November 2018, the CMA announced that it had accepted undertakings offered by C&R Fund IX (which indirectly controls the Motor Fuel Group) in lieu of reference to a Phase 2 investigation. The parties both operate petrol stations across the UK, supplying fuel, food and convenience services. The CMA found that competition would not be harmed at a national level, as the merged entity would continue to face sufficient pressure from supermarkets and petrol retailers. At a local level, the CMA identified 29 overlap areas where the merging parties are close competitors, and where the merger could result in price increases. To address these concerns, CD&R offered to divest a list of identified sites in the local areas that give rise to competition concerns. The CMA was satisfied that the undertakings would remove the competition concerns identified.

Ausurus Group/Metal & Waste Recycling. On 5 November 2018, the CMA published a notice confirming its acceptance of final undertakings in relation to the completed acquisition by Ausurus Group Ltd, through its subsidiary European Metal Recycling Limited ("**EMR**"), of Metal & Waste Recycling Limited ("**MWR**"). The CMA had found that the merger would harm suppliers of scrap metal (such as car breakers) in the South East of England, and others such as car manufacturers that sell large volumes of scrap metal through tendered contracts in the West Midlands and the North East of England. It also found that the merger would likely result in a worse deal for UK customers of new production steel (a type of scrap metal). To address the substantial lessening of competition identified, EMR was required to sell five of the sites it bought from MWR: three in the West Midlands (Cradley, Hockley, and Telford), one in the North East (Seaham), and one in the South East (MWR Hitchin), including all necessary plant, assets, contracts, rights and staff.

PHASE 1 INVESTIGATIONS

Samworth Brothers Limited/Boparan Holdings Limited. On 24 December 2018, the CMA cleared the anticipated acquisition by Samworth Brothers Limited of the Manton Wood Manufacturing Site of Boparan Holdings Limited (2 Sisters Food Group). The full text of the decision is not yet available.

Aer Lingus Limited/Cityjet Designated Activity Company. On 21 December 2018, the CMA cleared an agreement under which Aer Lingus took over scheduled passenger flights and landing slots from CityJet on the London City Airport to Dublin route. The CMA found that CityJet had taken the decision to stop providing services on this route prior to its agreement with Aer Lingus and the CMA's investigation showed that no other airline would have been interested in taking over the business. The merger therefore prevented loss of capacity for customers on the London to Dublin route. The full text of the decision is not yet available.

Thermo Fisher Scientific/Roper Technologies. On 19 December 2018, the CMA announced that it would refer the acquisition by Thermo Fisher Scientific Inc of the electron microscope peripherals business of Roper Technologies Inc (the "**Gatan business**") to Phase 2 review unless the parties offer sufficient undertakings in lieu. Thermo Fisher manufactures, among other things, high-tech electron microscopes used for scientific research, while the Gatan business produces highly-specialised "peripherals" or add-ons which enhance the performance of microscopes. The CMA found that the markets were highly concentrated, with the Gatan business being the only (or one of very few) providers of certain peripherals.

Loxam Group/UK Platforms. On 19 December 2018, the CMA cleared the proposed acquisition by the Loxam Group through Nationwide Platforms Limited of UK Platforms Limited. The full text of the decision is not yet available.

Baxter, Inc/Hospira UK Limited's compounding business. On 13 December 2018, the CMA cleared the proposed acquisition by Baxter, Inc of Hospira UK Limited's compounding business and related assets. Compounding is the process of combining, mixing or altering ingredients to create a medication.

Valeo Foods/Tangerine Confectionery. On 5 December 2018, the CMA cleared the completed acquisition by Valeo Foods of Taurus 3 Limited. The only material overlap between the parties's activities was in private label mints. The CMA found that the parties were not close competitors within this segment due to significant supply and demand-side differences between products they each offer (mint imperials in the case of Valeo and mint humbugs in the case of Tangerine).

Cox Automotive UK Limited/Auto Trader Limited. On 21 November 2018, the CMA cleared the anticipated joint venture between Cox Automotive UK Limited and Auto Trader Limited. The new business will combine three businesses on to a single platform. Cox Automotive is a supplier of automotive solutions and services and Auto Trader is an automotive advertising business that specializes in new and second hand automotive sales. Under the anticipated joint venture, Cox will contribute its "*Dealer-Auction.com*" and "*Manheim Online*" businesses and Auto Trader will contribute its "*Smart Buying*", its retailer-to-retailer platform (the joint venture will be held 51% by Cox and 49% by Auto Trader). The joint venture will provide a platform for prospective buyers to view a large selection of wholesale vehicles.

Tayto Group Limited/The Real Pork Crackling Company Limited. On 13 November 2018, the CMA cleared the completed acquisition by Tayto Group Limited of The Real Pork Crackling Company Limited. Tayto Group Limited is a crisps and corn-based snacks manufacturer and the Real Pork Crackling Company Limited is a pork scratchings manufacturer.

Barry Callebaut AG/Burton's Foods Limited merger inquiry. On 8 November 2018, The CMA cleared the anticipated acquisition by a subsidiary of Barry Callebaut AG of certain business assets of Burton's Foods Limited. Barry Callebaut AG is a supplier of premium chocolate and cocoa products. Burton's Foods Limited is a British biscuit manufacturer.

Nicholls' (Fuel Oils) Limited/DCC Energy Limited in Northern Ireland. On 7 November 2018, the CMA cleared the completed acquisition by Nicholls' (Fuel Oils) Limited of the oil distribution business of DCC Energy Limited in Northern Ireland.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision due date
TopCashback/Quidco	7 January 2019
Tobii AB/Smartbox Assistive Technology Limited and Sensory Software International Ltd	25 January 2019
Nasdaq, Inc./Cinnober Financial Technology AB	7 February 2019
CareTech Holdings plc/ Cambian Group plc merger inquiry	11 February 2019
eBay Inc/Motors.co.uk	12 February 2019
PepsiCo Inc/Pipers Crisps Limited	13 February 2019
Headlam Group/Ashmount Flooring	TBC
Headlam Group/Garrod Bros Business	TBC
Headlam Group/Rackhams	TBC
Ecolab Inc/The Holchem Group Limited	TBC
Global Radio Services Limited/Semper Veritas Holdings	TBC
Lakeland Dairies (N.I.) Limited/LacPatrick Dairies Co-Operative Society Limited	TBC
Rentokil Initial plc/MPCL Limited (formerly Mitie Pest Control Limited)	TBC

Other Developments

On 13 December 2018, the CMA published revised guidance on remedies for Phase 1 and Phase 2 merger investigations. The CMA has stated that the approach outlined in the revised guidance is consistent with previous guidance published by the OFT and the CMA, but has been updated and extended to take account of the CMA's experience of merger investigations in recent years, judgments of the CAT and the CMA's research into the outcomes of remedies. This revised guidance applies to any Phase 1 merger investigations commenced or referred to Phase 2 after 13 December 2018.

On 7 November 2018, the House of Commons Library published a report on EU state aid rules and WTO subsidies agreement. The report explains the rules around state aid and subsidies, their motivations and differences. It also looks at what might change after the UK leaves the EU. The report notes that the UK Government is in favour of an independent UK state aid regime and is already working on creating one. It will introduce UK regulations to replace the existing EU law. The CMA will enforce the system.

On 6 November 2018, the CMA published an updated version of its guidance note on the payment of merger fees. The note explains that where merger fees apply, the level of the fees remained unchanged and the circumstances in which a merger fee is not payable (in particular, the criteria for small or medium-sized enterprises, as defined by reference to certain provisions in the Companies Act 2006). It also contains guidance on how to make a payment, including the bank details for BACS and CHAPS payments.

LONDON TEAM

London Office
2 London Wall Place
London EC2Y 5AU

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

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

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

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

Romano Subiotto QC
+32 22872092
rsubiotto@cgsh.com

Wanjie Lin
+44 20 7614 2359
wlin@cgsh.com

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

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

David Little
+44 20 7614 2338
drlittle@cgsh.com

John Kwan
+44 20 7614 2293
jkwan@cgsh.com

Richard Pepper
+32 22872181
rpepper@cgsh.com

Shahrzad Sadjadi
+44 20 7614 2235
ssadjadi@cgsh.com

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

Niccolò Torrigiani
+44 20 7614 2298
ntorrigiani@cgsh.com

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

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

Esther Kelly
+32 22872054
ekelly@cgsh.com

Hayk Kupelyants
+44 20 7614 2228
hkupelyants@cgsh.com

Vass Karadakova
+44 20 7614 2221
vkaradakova@cgsh.com

Sienna Smallman
+44 20 7614 2299
ssmallman@cgsh.com

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

Emmett Saigal
+44 20 7614 2386
esaigal@cgsh.com

18.1023.01_010719