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UK Competition Law Newsletter

Highlights

- CMA publishes guidance on cooperation to achieve sustainability goals.
- Flynn Pharma and Pfizer granted permission to appeal costs ruling following successful appeal of a CMA decision.
- National security and investment bill introduced to the House of Lords.

Cooperation to achieve sustainability goals – CMA publishes guidance

On 27 January, the CMA [published](#) guidance for businesses on the application of UK competition law to co-operative agreements aimed at achieving environmental or sustainability objectives (the **Guidance**). The role of competition law in supporting environmental initiatives has seen greater focus as the UK government pursues its 2050 net zero target and the European Union seeks to become the first climate-neutral continent by 2050 (discussed [here](#)). The Guidance explains the application of existing block exemptions and guidance for firms assessing whether agreements with sustainability objectives risk infringing competition law, and is part of a wider programme of activities that the CMA is carrying out to support sustainability objectives.

The CMA's Wider Sustainability Objectives

The CMA's 2020/21 Annual Plan, published on 19 March 2020, identified sustainability as one of six priority areas. It stated that the CMA would focus on "*Climate change – supporting the transition to a low carbon economy,*" with an aim to "*ensure that businesses engaged in sustainable initiatives know to how to comply with competition law and do not unnecessarily shy away from those initiatives on the basis of unfounded fears of being in reach of competition law.*"¹ The same objective is repeated in the [CMA's draft 2021/2022 Annual Plan](#).

The Guidance is the third initiative that the CMA has undertaken in support of its climate change commitments. It follows the announcement in early December 2020 of a market study into

¹ <https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2020-to-2021/annual-plan-2020-to-2021#our-priorities-for-202021>.

electric vehicle charging,² and a call for evidence in relation to misleading environmental claims about consumer products in November 2020.³

Substance of the Guidance

The Guidance is divided into three main sections: (i) advice for setting standards (for instance, on environmental performance); (ii) an explanation of the types of agreement that are considered to restrict competition ‘by object’; and (iii) exemptions that may apply.

Standard setting

The CMA recognises that many sustainability agreements involve standard setting, where agreements are reached between businesses on, for instance, performance of products, production processes and the resources used in production. The Guidance explains the rules that organisations must follow when agreeing new standards with other firms, including: (i) ensuring that standard setting processes are transparent, up to date and easily accessible for affected parties; (ii) allowing all interested competitors to participate in the standard setting process; (iii) ensuring access to the standard on fair, reasonable and non-discriminatory terms; and (iv) compulsory IP licensing where those IPRs are essential to the implementation of the standard.

The CMA goes on to provide four examples of practices in which standard setters should not engage: (i) the disclosure of commercially sensitive information not necessary for setting the standard; (ii) directly or indirectly obliging businesses to comply with the standard; (iii) hindering the development of alternative standards; and (iv) limiting access to the market, such as through pressuring third parties to market only standard compliant products.

‘By object’ restrictions

The CMA reminds firms of the rules on cartel agreements and sharing competitively sensitive

information. The Guidance nevertheless explains that sharing competitively sensitive information may be permitted if (i) it is shared only with a third-party to create aggregated market-wide statistics, (ii) the third party collating the data does not disclose individualised information and (iii) the data is not used to facilitate coordination between competitors.

Available exemptions

The CMA outlines three ways in which organisations may be permitted to co-ordinate their behaviour to achieve sustainability objectives: (i) the parties have low combined market shares (ranging from 10% for agreements of minor importance, to 20% for cooperation related to production agreements) and the agreement does not contain any hardcore restrictions of competition; (ii) the parties fall within an existing EU block exemption, which form part of retained EU law post-Brexit; or (iii) the agreement benefits from an individual exemption on the basis that it generates efficiencies for consumers that cannot be achieved by other less restrictive means.

What does the Guidance mean in practice?

The Guidance seeks to support the UK’s transition to a low-carbon economy in summarizing the application of competition law to co-operative agreements aimed at achieving environmental or sustainability objectives. The CMA makes clear, though, that it will continue to investigate suspected infringements even where the underlying conduct has a sustainability objective. It also acknowledges that firms are likely to need expert legal advice to apply the Guidance, while recognising the CMA’s discretion to issue short-form opinions.

The Guidance does not advance new substantive rules for the assessment of agreements that are designed to achieve environmental or sustainability objectives. A number of questions

² See <https://www.gov.uk/government/news/cma-to-examine-electric-vehicle-charging-sector>.

³ See <https://www.gov.uk/cma-cases/misleading-environmental-claims>.

therefore remain unanswered, including whether the CMA will take environmental benefits into account when applying the criteria for exemption under section 9, Competition Act 1998. For example, how will the CMA assess agreements between competing groceries shops to phase out plastic packaging or agreements to close down production facilities that cause pollution? Will the CMA consider and assign a value to the cost of carbon emissions, which would support an analysis of whether a sustainability agreement could be considered “necessary” for the purposes of an individual exemption assessment?

The Guidance is unlikely to be the CMA’s last word on this subject, not least because it does not say anything new. In a [blog post](#) that accompanied the publication of the Guidance, the CMA referred to ongoing international discussions on competition law and environmental sustainability.⁴ It suggests that there could be future developments on whether environmental efficiencies (such as reduced CO₂ emissions) should be taken into account when considering the availability of individual exemptions. The public policy debate centres on considering whether and

how competition law should be influenced by sustainability. The debate is, however, sometimes reduced to “competition law versus sustainability,” ignoring that the two can coexist, by incorporating sustainability considerations within existing competition law frameworks.

In November 2019, the European Commission launched a public consultation on the horizontal block exemption regulations and its guidelines on horizontal cooperation agreements, to which the Guidance expressly refers. In the Commission’s summary of contributions, 11 national competition authorities stressed the need for more guidance on sustainability agreements.⁵ And, as the OECD has found, many non-European countries are already considering sustainability in their enforcement practice.⁶ Various commentators have argued (including [here](#)), that the European Commission can and should include environmental agreements in its revised guidelines on horizontal cooperation agreements. When the current Commission guidelines expire, the UK will need to decide whether to continue to follow the Commission’s approach or introduce UK-specific guidance.

Judgments, Decisions, and News

Court Judgments

FP McCann Limited v Competition And Markets Authority. On 13 January 2021, the CAT [published](#) an order confirming FP McCann Limited (**FPM**) had infringed the Chapter 1 Prohibition by engaging in a price-fixing and market sharing cartel. As a result, the first condition required for a competition directors disqualification order (**CDO**) against two of FPM’s directors, Eoin McCann and Francis McCann, was satisfied.

In a decision published on 23 October 2019, the CMA had found that FPM and two other

undertakings had engaged in price-fixing in relation to the supply of pre-cast concrete drainage products. Following its decision, the CMA [announced](#) on 15 January 2020 that it would seek CDOs against the directors of the infringing companies. The CDO proceedings were stayed after FPM launched an appeal of the CMA’s decision. The CAT considered whether there had been an infringement for the purposes of the CDOs at the same time as considering the appeal by the company. The CAT rejected the company’s appeal in its judgment handed down on 22 December 2020, which preceded its January order confirming that FPM had breached the

⁴ The blog post cites the following reports: OECD (2020), *Sustainability and Competition, OECD Competition Committee Discussion Paper*; the Dutch competition authority (the ACM) Draft Guidelines on Sustainability Agreements, 9 July 2020; and the Greek competition authority (the HCC) Technical Report on Sustainability and Competition, January 2021.

⁵ Summary of the contributions of National Competition Authorities to the evaluation of the R&D and the Specialisation Block Exemption Regulations and the Commission Guidelines on Horizontal Cooperation Agreements, p.8, available here: https://ec.europa.eu/competition/consultations/2019_hbers/NCA_summary.pdf.

⁶ OECD (2020), *Sustainability and Competition, OECD Competition Committee Discussion Paper*, paragraph 112.

Chapter 1 Prohibition. The remainder of the CDO proceedings have been referred to the High Court in Northern Ireland.

UKRS Training Limited v NSAR Limited.

On 15 January 2021, the CAT [published](#) an order consenting to UKRS Training Limited (**UKRS**) withdrawing its action against NSAR Limited (**NSAR**) alleging a breach of the Chapter 2 prohibition. In 2016, UKRS brought a damages claim and applied for an interim injunction after its accreditation under the Rail Training Accreditation Scheme (**RTAS**) was suspended by NSAR. UKRS provided training to individuals working on Network Rail's infrastructure, and was subject to quality assurance carried out by NSAR. NSAR suspended UKRS from providing this training because of alleged breaches of various rules relevant to the RTAS scheme. UKRS alleged that this constituted an abuse of NSAR's dominance in relation to these accreditation services, on the basis of discrimination and a refusal to supply. The claim was stayed in 2017 pending the outcome of an appeal of a decision by Network Rail. RTAS is an accreditation required by any training provider that provides training to people wishing to work on Network Rail's infrastructure.

FNZ (Australia) Bidco Pty Ltd v Competition And Markets Authority. On 25 January 2021, the CAT [published](#) an order remitting the assessment of the completed acquisition of GBST Holdings Limited (**GBST**) by FNZ (Australia) Bidco Pty Ltd (**FNZ**) back to the CMA for reconsideration. The order was made following the CMA's request that the CAT send the case back to the CMA for reconsideration because it had identified potential errors in its market share calculations.

Justin Le Patourel v BT Group PLC. On 26 January 2021, the CAT [published](#) an application to commence a collective proceedings order against BT for charging excessive prices to customers supplied with certain residential landline services. The claim arises from a review of the market for standalone landline telephone services conducted by Ofcom in 2017. Ofcom found that BT charged prices above the competitive level to customers who bought

standalone residential landline telephone services (voice only customers).

The proposed class includes all persons domiciled in the UK (except in the Hull Area, which has a separate network) who, during the Claim Period, bought a BT Standalone Fixed Voice Service (**BT SFV Service**), excluding BT Basic and BT Home Phone Saver (**Excluded Services**). The class is further split into two sub-classes:

- BT Voice Only Customers: Members of the class who bought a BT SFV Service but did not, at the same time, buy a broadband service, either from BT or any other provider; and
- BT Split Purchase Customers: Members of the class who bought at the same time both (i) a BT SFV Service; and (ii) a broadband service, either from BT or any other provider.

Kerilee Investments Limited v International

Tin Association Limited. On 26 January 2021, the CAT [published](#) notice of a claim for damages by Kerilee Investments Limited (Kerilee) against the International Tin Association Ltd (ITA). Kerilee is a metal trading SME, incorporated in the UK. The ITA is a UK-based and incorporated trade association and special purpose entity incorporated by guarantee in the UK. The ITA is responsible for the governance, policy, financial, executive and secretariat functions of the International Tin Supply Chain Initiative (ITSCI) conflict mineral due-diligence programme. Kerilee claims it has suffered loss flowing from (a) the ITA's decision to exclude Kerilee from membership of the ITA/ITSCI without due process or a justifiable reason, (b) the provision of discounted price subsidies which are unavailable to non-ITSCI members, such as Kerilee, (iii) the application of punitive sanctions which unfairly discriminated against Kerilee and (iv) actions by ITA/ITSCI which restrict communications and activities from non-members and discourage members from trading with non-members.

CMA v Flynn Pharma Ltd and Pfizer Inc. On 27 January 2021, the Supreme Court [announced](#) that, on 17 December 2020, it granted Flynn

Pharma and Pfizer permission to appeal against a May 2020 judgment of the Court of Appeal. The Court of Appeal had allowed an appeal by the CMA against a costs ruling made by the CAT. After successfully appealing to the CAT against a CMA decision, which found that Pfizer and Flynn Pharma had abused their dominant positions by imposing unfair prices for phenytoin sodium capsules in the UK, the CAT subsequently handed down a ruling on costs, finding that the CMA was liable to Flynn Pharma and Pfizer for a proportion of their costs to reflect their overall level of success. In May 2020, the Court of Appeal allowed the CMA's appeal against this costs ruling, finding that the CAT had erred in its approach and was wrong not to have given any weight at all to the position of the CMA as a public authority carrying out its functions in the public interest. The Court of Appeal therefore made no order as to costs of the CAT proceedings, effectively removing the CMA's liability to pay costs even though the parties had successfully appealed the CMA's infringement decision.

Antitrust/market studies

CMA Investigates Possible Abuse of Dominance Arising From Google's "Privacy Sandbox" Browser Changes. On 8 January 2021, the CMA [announced](#) it had opened an investigation into Google's "Privacy Sandbox" project, which aims at disabling third party cookies on the Chrome browser and Chromium browser engine and replacing them with a new set of tools for targeting advertising and other functionality that are said to protect consumers' privacy to a greater extent. The investigation will assess whether the Privacy Sandbox could cause advertising spend to become even more concentrated on Google's ecosystem at its competitors' expense. Given the purported importance and potential impact of Google's proposed changes, the CMA was already considering the Privacy Sandbox, in conjunction with the ICO and Google. But, following the concerns raised by the complainants including Marketers for an Open Web Limited, a group of newspaper publishers and technology companies, the CMA has decided that a formal investigation should be launched.

Ofcom Closes Competition Investigation In Business Parcel Delivery And Pick-up Sector.

On 20 January 2021, Ofcom [announced](#) that it had closed its investigation, launched in November 2019, into agreements between providers of business parcel delivery and pick-up services that it suspected were establishing minimum prices and impose online sales restrictions. Ofcom has closed the investigation on administrative priority grounds, stating that its resources would be better directed towards other matters. Ofcom noted that, in closing this investigation, it had neither reached a conclusion on the merits of the case, nor had it made a finding on whether there has been a breach of competition law.

CMA Closes Investigation In Pharmaceuticals Sector On Administrative Priority Grounds.

On 22 January 2021, the CMA [announced](#) its decision to close its investigation of whether suspected individual agreements between of each of (1) Alliance Pharmaceuticals and Focus and (2) Focus, Lexon and Medreich in relation to the supply of prochlorperazine 3mg buccal tablets in the UK infringed competition law. The CMA will, however, continue its investigation into a suspected overarching agreement between Alliance Pharmaceuticals, Focus, Lexon and Medreich in relation to the supply of prochlorperazine 3mg buccal tablets.

CMA Sends Advisory Letters In Relation To Price-Fixing Of Supplies To Disabled Students.

On 29 January 2021, the CMA [announced](#) that it had sent advisory letters to a number of firms, reminding them of their obligations under competition law, after learning of allegations that some suppliers had colluded over the price of important services and equipment. Disabled students can receive funding through the Disabled Student Allowances grant scheme, managed by the Student Loans Company, which acts for UK and Welsh governments' education departments. Under the current system, an independent needs assessor will provide the Student Loans Company with recommendations for products and services to be provided in particular cases along with quotations from suppliers, and the Student Loans Company will work with the student to put the support in place. The CMA is concerned that the

Student Loans Company – and ultimately the taxpayer – may have overpaid for some goods and services because suppliers had agreed prices before providing quotations. The CMA clarified that it has not made a legal finding as to whether competition law has been broken at this stage, but it will keep this sector under review, with the possibility of further action if its concerns are not fully addressed.

Merger Developments

PHASE 2 INVESTIGATIONS

TVS Europe Distribution Limited/3G Truck & Trailer Parts. On 12 January 2021, the CMA [published](#) its final report on the completed acquisition by TVS Europe Distribution Limited (TVS) of 3G Truck & Trailer Parts Limited (3G). The CMA confirmed its provisional findings 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 (see [UK Competition Newsletter, October 2020](#)). The CMA concluded that only a full divestiture of 3G would be an effective remedy. TVS is now required to sell the whole of the 3G business to a purchaser approved by the CMA.

Liberty Global (Virgin Media)/Telefónica (O2). On 21 January 2021, the CMA [published](#) an issues statement setting out the topics it will consider in its Phase 2 investigation. The CMA will focus on markets for (a) the supply of wholesale mobile services in the UK and (b) the supply of passive fibre leased lines at each of the access and aggregation layers on a local basis. Two vertical theories of harm are being considered by the CMA, namely (a) input foreclosure in the supply of wholesale mobile services to mobile virtual network operators (MVNOs) and (b) input foreclosure in supply of wholesale leased lines to mobile network operators (MNOs). Subject to receiving new evidence, the CMA does not intend to investigate the effects of any horizontal overlaps. The CMA invites responses to the issues statement by 4 February 2021.

Tronox Holdings/TiZir Titanium and Iron A.S.

On 18 January 2021, the CMA [announced](#) that it will not exercise its discretion under section 73(2) of the Enterprise Act 2002 to accept undertakings offered by Tronox in lieu of a Phase 2 reference of Tronox's proposed acquisition of TiZir Titanium and Iron A.S. The CMA considered that the undertakings were not a clear-cut solution to the competition concerns that it had identified. Both companies are involved in the supply of materials used in the production of titanium dioxide pigment. TiZir Titanium & Iron (TTI) supplies chloride slag, one of the mineral feedstocks used to make titanium dioxide pigment, and Tronox is a producer of titanium dioxide pigment. Following the CMA's announcement, Tronox announced its intention to abandon the proposed transaction.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision Due Date
SDE Group (jointly controlled by Heineken UK Limited and Carlsberg UK Limited)/Innserv Limited	3 March 2021
Diageo Great Britain Limited/Chase Distillery (Holdings) Limited.	4 March 2021
Graco BV/Hi-Tech Spray Equipment merger inquiry	9 March 2021
Facebook, Inc/Giphy, Inc	25 March 2021
Uber International B.V./GPC Computer Software Limited and its subsidiaries (Autocab)	26 March 2021
NVIDIA Corporation/Arm's Intellectual Property Group business.	TBC
Bellis Acquisition Company 3 Limited/Asda Group Limited	TBC

OTHER DEVELOPMENTS

The CMA's Blog Post On How The End Of The Transition Period Affects UK Merger Control. On 6 January 2021, the CMA [published](#) a blog post on how the end of the Brexit transition period affects UK merger control. The CMA explains that the end of the transition period at 11pm on 31 December 2020 brought with it the most significant change to UK merger control in close to 20 years. The largest cross-border transactions, which previously came under the exclusive remit of the European Commission, can now also fall to the CMA to review. The CMA can review transactions that were not initiated by the EC before the end of the transition period if the CMA's own threshold tests for jurisdiction are met. The EC's review of mergers will no longer cover the UK. The EC continues to be responsible for merger cases initiated before the end of the transition period. The CMA has been preparing for the end of the transition period for some time, building its capabilities and tracking cases. The CMA has been engaging in pre-notification discussions with a number of merging parties for several months. With the end of the transition period, the CMA is able to engage in more formal investigatory steps in these cases. The CMA expects to work closely with the EC in the same way as it does with other international competition authorities. In this regard, the CMA has recently published its [revised guidance](#) on how it intends to approach multi-jurisdictional mergers.

The CMA Publishes Its Business Impact Target Reporting For Year To December 2020. On 6 January 2021, the CMA [published](#) its Business Impact Target (BIT) report for the period 13 December 2019 to 16 December 2020. The BIT concerns the economic impact of regulation on businesses. Some types of regulatory provisions are exempt from the BIT, including those which are deemed to have a pro-competitive impact. The report sets out the CMA's non-qualifying regulatory provisions for the last year, and provides a summary of the CMA's work in 2020. Specifically, it details the guidance published by the CMA on competition enforcement, Brexit and the Covid-19 pandemic. It also details the CMA's

case work, including competition cases launched and closed in the relevant period, and other investigatory milestones reached in ongoing cases. The report notes the number of warning and advisory letters sent to industry, and the mergers, markets, regulatory work and remedy reviews undertaken by the CMA over the relevant period.

BIES Updates Register Of Agreements Relating To Competition Exclusion Orders.

On 18 January 2021, the Department for Business, Energy and Industrial Strategy (BEIS) [published](#) an updated register of agreements under public policy exclusion orders. Under the orders, certain categories of agreements are excluded from the Chapter 1 prohibition due to exceptional and compelling reasons of public policy arising from the 2019 novel coronavirus disease outbreak (COVID-19). The exclusion orders relate to certain agreements concerning groceries, dairy produce, Solent maritime crossings and health services for patients in England and Wales.

The CMA's Research Paper On Harms To Competition And Consumers Caused By Algorithms. On 19 January 2021, the CMA [published](#) its research on algorithms. The research paper notes algorithms have enabled considerable gains in efficiency and effectiveness and have provided considerable benefit to consumers. However, the CMA highlights the risk that they can be used in ways that reduce competition and harm consumers. The research that the CMA is carrying out will be used to inform its work in digital markets, including the operation of the Digital Markets Unit. Following the publication of the paper, the CMA [published](#) a call for information inviting views and evidence on the harms outlined in the research paper. The deadline for providing input is 11:45pm on 16 March 2021.

National Security and Investment Bill Introduced To House Of Lords. On 20 January 2021, the National Security and Investment Bill (HL Bill 165) had its [first reading](#) in the House of Lords. The Bill is aimed at preventing national security risks arising from the acquisition of control over certain types of entities and assets.

The first reading is a formality that marks the start of the Bill's journey in the House of Lords. The date of the second reading in the, which involves a debate on the Bill, has not been scheduled.

Three New Members Appointed To The CAT's Panel Of Chairmen. The CAT announced on 22 January the appointment of Bridget Lucas QC, Justin Turner QC and Andrew Young QC (Scotland) to the panel of chairmen of the CAT. Bridget Lucas QC was called to the Bar of England and Wales in 1989 and appointed Queen's Counsel in 2018. She is a member of Fountain Court Chambers and her practice has

covered a wide range of company and commercial litigation, arbitration and advisory work. Justin Turner QC was called to the Bar of England and Wales in 1992 and appointed Queen's Counsel in 2009. He is a member of 3 New Square and specialises in all aspects of intellectual property litigation with a particular interest in the pharmaceutical and biotechnology sectors. Andrew Young QC was called to the Scottish Bar in 1992 and was appointed Queen's Counsel in 2007. His practice covers a wide range of commercial and tax litigation alongside clinical negligence, professional negligence and high value personal injuries.

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