October 2019

UK Competition Law Newsletter

Highlights:

— CMA accepts commitments by Aspen to make structural divestments and pay compensation to health service

— CMA imposes fines of £36 million for precast concrete cartel

— JD Sports Fashion/Footasylum merger referred for in-depth investigation

— Ofgem appoints new Chief Executive

A Farewell to Arms? Compensating Victims Of Anti-Competitive Conduct Without Litigation

On 3 October 2019, the CMA accepted commitments ending part of a two-year investigation into Aspen, a pharmaceutical producer.[1] These commitments include an undertaking never previously employed by the CMA to compensate victims of the alleged anti-competitive conduct without the need for private enforcement. The investigation is ongoing in respect of market sharing agreements that the CMA alleges Aspen has entered into with Tiofarma and Amilco.

Background

Aspen is the sole UK supplier of fludrocortisone acetate tablets used to treat primary or secondary adrenal insufficiency, which the CMA describes as "*vital, life-saving drugs, on which thousands of patients depend*."

In November 2015, Tiofarma obtained a marketing authorisation to supply an 'ambient storage' version of the tablets as an alternative to Aspen's 'cold storage' tablets. The CMA found that the 'cold storage' and 'ambient storage' versions of the tablets were substitutable and that Tiofarma represented "*a significant competitive threat to Aspen … as it presented a route to market for a new entrant*."

In October 2016, Aspen acquired the worldwide rights over Tiofarma's product and withdrew Aspen's own 'cold storage' product from the market. The CMA provisionally concluded that the acquisition constituted an abuse of dominance, removing the only source of competitive threat to Aspen's position

[1] Case 50455, *Aspen*, CMA decision of 3 October 2019.

as the sole UK supplier and preventing—or considerably delaying—the emergence of a rival.

As a result, so the CMA found, the acquisition "*left Aspen free to price above competitive levels*," charging eight times more for the acquired 'ambient storage' product than the 'cold storage' product that had been withdrawn.

The Commitments

To address the CMA's concerns, Aspen committed to divest UK rights over 'ambient storage' fludrocortisone tablets to an independent third party and reintroduce its own 'cold storage' version of the product.

These commitments have several unusual features. First, structural remedies are rarely used in behavioural cases; the last time structural remedies were imposed in the UK (outside of merger cases) was in 2013, following Ofwat's investigation into an alleged abuse of dominance in the water sector.[2] Second, acquisitions are typically reviewed under merger control rules rather than prohibitions on abuses of dominance or anti-competitive agreements. The European Commission has only rarely applied similar theories of harm in a handful of cases that pre-date the entry into force of the EU Merger Regulation in 1990.[3] Third, the commitments require Aspen to reintroduce its cold storage tablets to the market, even though the CMA did not claim that Aspen was under a positive 'duty to supply' these products in the first place.

But the most unusual aspect of the commitments is Aspen's undertaking to pay £8 million to UK healthcare authorities as compensation for the higher prices that Aspen was able to charge, compared with a counterfactual scenario in which Tiofarma entered the market independently. This is the first occasion on which CMA commitments have included a provision to compensate potential victims. The commitments were entered into even though the CMA had not reached a final decision on whether Aspen's conduct violated competition rules, which would have enabled affected healthcare authorities to commence follow-on actions for damages. The only comparable case in the UK was the OFT's investigation into price-fixing by independent schools, in which the participating schools agreed to make payments to a charitable trust that would benefit affected pupils.[4]

The Compensation Provision

A compensation commitment has several potential benefits. As the CMA notes, it enables compensation without "*the potential need for lengthy and costly litigation to seek damages following any final CMA decision*" and contributes to deterrence against anti-competitive conduct, even without the CMA reaching an infringement decision.

Compensation commitments may also provide an alternative to 'voluntary redress schemes' which the CMA can approve as programs to pay victims 'full and final' settlements without the need for follow-on damages.[5] The statutory framework for these schemes was introduced in 2015, but they have not been used in practice, possibly because of their complexity, cost, and the absence of any guarantee that setting up a redress scheme will lead to a fine reduction or remove the possibility of private damages actions.[6] At most, the CMA "*does not rule out reconsidering whether it would be appropriate for the party to retain its reduction in fine*"[7] if the infringing company agrees to set up a voluntary redress scheme. By contrast, agreeing compensation as part of a commitments package enables a company under investigation to avoid a fine altogether.

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[2] Case 02/13, *Severn Trent*, Ofwat decision of January 2013.

[3] See, for example, Case IV/26811 *Continental Can Company*, Commission decision of 6 December 1971; and Cases IV/33.440 Warner- Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others, Commission decision of 10 November 1992.

[4] Case CA98/05/2006, *Exchange of information on future fees by certain independent fee-paying schools*, OFT decision of 20 November 2006.

[5] Section 49C to 49E of the Competition Act 1998.

[6] In particular, applicants to set up a voluntary redress scheme have to put in place a Chairman and Board to oversee the scheme, and commit to operate it for at least 9 months. Moreover, potential beneficiaries who decide not to apply for redress under an approved scheme do not lose their right to seek compensation through follow-on litigation.

[7] CMA40, Guidance on the approval of voluntary redress schemes for infringements of competition law, 14 August 2015, paragraph 4.14.

However, a compensation commitment may not be appropriate or feasible in all cases.

First, it requires cooperation from both the company under investigation and the victims of the potentially anti-competitive conduct. In the *Aspen* case, the UK health authorities were the only apparent victims and were willing to "*provide an assurance that this payment will be taken into account in the event of any follow-on damage proceedings*." In other cases, victims may be unwilling to give such assurances (for example, if they believe the proposed compensation should be higher).

Second, in cases where the loss is dispersed among a large number of potential victims, it may be impractical for the CMA to gather similar assurances from each and every party that may be entitled to bring follow-on claims. For example, losses may be widely dispersed in cases concerning practices that affect consumer goods.[8]

Third, there was no apparent dispute in the *Aspen* case about who were the victims of the alleged anti-competitive conduct and how damages should be apportioned between them. This assessment would be substantially more complex in cases where the victims have potentially competing claims. For example, in *Reckitt Benckiser*—another case concerning the anti-competitive withdrawal of a pharmaceutical product—claims were brought by both customers (*i.e.*, health authorities) and competitors whose entry to the market was said to have been delayed.[9]

Finally, agreeing to pay compensation may reduce the attractiveness of offering commitments in the first place. One of the perceived benefits of settling an investigation through commitments is that it avoids a finding of infringement that could then form the basis of follow-on damages actions. While a commitments decision could not form the basis for follow-on damages actions as a technical matter, a commitment to pay compensation could make it easier for other potential claimants to demonstrate loss in standalone actions.

Therefore, while there are advantages in resolving compensation claims in proceedings before the CMA, it may be used as an exceptional tool, rather than an ordinary course feature of commitments decisions.

Judgments, Decisions, and News

Court Judgments

CMA v Flynn Pharma Ltd and others. On 4 October 2019, the Court of Appeal granted the CMA permission to amend its grounds of appeal in a landmark case concerning excessive pricing in the supply of phenytoin sodium capsules, a medicine used to control epileptic seizures. The CMA imposed fines of £84.2 million and £5.2 million on Pfizer and Flynn, respectively, which were overturned by the CAT in June 2018. The CAT ruled that the CMA ought to have taken account of the prices charged for 'comparator' products, but had failed to do so. In its Application appealing the CAT's ruling, the CMA argued that it *had* taken comparator prices into account. But in its skeleton argument, the CMA claimed that it was not required to carry out this comparison, since the prices charged by Pfizer and Flynn were unfair 'in and of themselves'. Pfizer argued that the CMA's positions in its Application and skeleton argument were inconsistent. Accordingly, the CMA sought permission to amend its grounds of appeal, arguing that the position in its skeleton argument was a 'clarification' of the grounds set out in its Application. The Court of Appeal granted the CMA permission on the basis that the issues arising were of substantial economic and societal importance with implications for health policy and financing, even though the position in the CMA's skeleton argument was "*discreet and qualitatively different*" from the CMA's original grounds of appeal.

[8] For example, in the *Replica Football Shirts* case (*The Consumers' Association v JJB Sports Plc,* Competition Appeal Tribunal, Case 1078/7/9/07), JJB Sports and Which? reached a settlement whereby each affected consumer could be compensated £20.

[9] Case CE/8931/08, *Reckitt Benckiser*, OFT decision of 12 April 2011.

The CAT Allows CityFibre And BT Intervention In CAT Appeal By TalkTalk And Vodafone. On 17 October 2019, the CAT allowed interventions by CityFibre and British Telecommunications (BT) in the appeal by TalkTalk Telecom Group plc and Vodafone Limited against Ofcom's finding that BT does not enjoy significant market power in the market for high speed business services (leased lines) in the UK. Ofcom's decision affects the regulatory conditions to which BT should be subject. The CAT determined that CityFibre would be materially impacted by the outcome of Ofcom's decision and that its inclusion would not add time or complexity to the case. The CAT also considered that CityFibre's market information would assist the CAT in making their price control determinations.

Antitrust/market studies

CMA Issues Statement Of Objections In Relation To Fludrocortisone Acetate Tablets Market Sharing Agreements. On 3 October 2019, the CMA announced that it had issued a statement of objections to a pharmaceutical company, Aspen. The CMA alleges that Aspen unlawfully agreed to pay two other firms, Amilco and Tiofarma, to stay out of the UK market for fludrocortisone acetate tablets. These tablets are prescription-only medicines that are used in the treatment of Addison's Disease. The CMA alleges that this agreement had the effect of protecting Aspen's monopoly in the supply of the drug to the NHS and gave Aspen the opportunity to increase prices by up to 1800%. It has provisionally concluded that Tiofarma and Amilco colluded with Aspen to ensure Aspen maintained its position as the UK's sole supplier of fludrocortisone. In exchange, Tiofarma was made the sole manufacturer of fludrocortisone for direct sale in the UK, and Amilco received a 30% share of the increased prices that Aspen was able to charge. The statement of objections follows Aspen's admission in August 2019 that it took part in this allegedly anti-competitive conduct. If the CMA concludes there has been an infringement, Aspen has agreed to a maximum penalty of £2.1 million. Amilco and Tiofarma have made no admission.

CMA Accepts Aspen's Offer Of Commitments To Resolve An Anti-Competitive Arrangement. On 3 October 2019, the CMA also accepted Aspen's offer of commitments to resolve a related competition concern relating to Aspen's 2016 purchase of a competitor fludrocortisone product, which would bring all existing fludrocortisone marketing authorisations in the UK permanently under Aspen's ownership. Aspen has offered to pay the NHS £8 million and to ensure that there will be at least two suppliers of fludrocortisone in the UK to help the NHS access more competitive prices. This is discussed in greater detail above.

FCA Publishes Interim Report Of Market Study On General Insurance Pricing. On 4 October 2019, the FCA published the interim report of its market study into pricing practices for home and motor insurance. The FCA launched this market study to understand whether pricing practices in home and motor insurance support effective competition and positive outcomes for consumers. This followed a thematic review showing that consumers who stayed with the same provider for a long time paid on average significantly more for home insurance than new customers. The FCA has found that these markets are not working well for consumers. Firms use complex pricing practices that allow them to raise prices for consumers that renew their insurance products with the same providers each year. This practice—known as 'price walking'—is not generally disclosed to consumers. The FCA is considering 'supplyside remedies' that target suppliers of insurance products directly as well as 'demand-side remedies' aimed at prompting consumers to make better decisions. In particular, the FCA is considering banning or restricting price increases for customers who renew their policies with the same provider, restricting the use of automatic renewals, and requiring firms to disclose price differentials between customers.

CMA Issues Statement Of Objections To Fender Europe For Restricting Online Discounting. On 8 October 2019, the CMA announced that it had issued a statement of objections to Fender Musical Instruments. The CMA alleges that, between 2013 and 2018, Fender Europe required its guitars to be sold at or above certain prices, thereby preventing

discounted sales online. It has provisionally concluded that this conduct qualifies as unlawful resale price maintenance. The CMA launched its investigation on 17 April 2019. At the same time, it conducted a without-notice inspection of Fender Europe's premises between 17 and 19 April 2018 during which a senior officer of Fender Europe concealed certain notebooks that contained information relevant to the investigation. As a result, Fender Europe was fined £25,000 on 26 March 2019 for failing to produce relevant documents.

CMA Decides To Proceed With Investigation Into The Supply Of Construction Services. On 9 October 2019, the CMA announced that it had decided to continue its investigation into suspected anti-competitive agreements in the supply of construction services. The CMA launched its investigation in March 2019 and has not provided any further information about the nature of the anti-competitive practices under investigation or the parties involved. The CMA states that it will provide a further update on the investigation in April 2020. The CMA has several other ongoing investigations in the construction sector.

CMA Publishes Response To Roberton Review On Competition In Scottish Legal Services Market. On 10 October 2019, the CMA published its response to the Roberton Review which arose as a result of a 2016 CMA market study into the Scottish legal services market. The study found that competition was not working well due to poor information on options, price, and quality of service being made available to consumers, in particular in Scottish probate law and oath administration. The CMA response welcomed the recommendation that a new regulatory model should be principles-based and noted that an optimal framework would be independent and have a primary objective to maximise consumer benefits. The CMA also believes that a regulatory framework should be flexible enough to adapt to market changes and new business models, proportionate and clear. The CMA agreed with the proposal to establish an independent regulator, noting that differences in the legal markets in Scotland versus England and Wales may justify the costs of having more than one regulator.

CMA Imposes Fines Of £36 Million On Supply Of Precast Concrete Drainage Products Cartel. On 23 October 2019, the CMA announced that it had fined FP McCann, Santon Bonna Concrete, and CPM Group £36 million for price-fixing, sharing the market by allocating customers, and regularly exchanging competitively sensitive information. The CMA found that these arrangements started in 2006 and continued until March 2013, and involved meetings between senior executives at each firm. The CMA fined FP McCann £25.45 million for its role in the cartel. The CMA fined Stanton Bonna £7.47 million and CPM Group £4 million under the CMA leniency and settlements procedures after both companies accepted liability in 2018.

Merger Developments

PHASE 2 INVESTIGATIONS

JD Sports Fashion plc/Footasylum plc. On 1 October 2019, the CMA announced that it had referred JD Sports' completed acquisition of Footasylum for an in-depth Phase 2 investigation. The parties sell sports-inspired casual clothing and footwear. This follows the CMA's announcement on 19 September 2019 that the transaction could remove one of JD Sports' closest competitors. It considered the parties to be two of a small number of companies active in the UK that have the brand relations and market presence to be able to credibly meet the demands of sports fashion customers. The statutory deadline is 16 March 2019.

Ecolab/Holchem Group. On 7 October 2019, the CMA announced its effective prohibition of Ecolab's completed acquisition of Holchem. In the Final Report, the CMA concluded that the transaction has resulted, or may be expected to result, in a substantial lessening of competition in the supply of formulated cleaning chemicals (and ancillary services) to food and beverage customers in the UK. The CMA found that the divestiture of Holchem would be the most effective and proportionate remedy. The CMA's decision is under appeal before the CAT.

Sabre/Farelogix. On 11 October 2019, the CMA announced that it had fined Sabre £20,000 under s 110 of the Enterprise Act 2002 ("**EA02**") for failure, without reasonable excuse, to produce certain materials in relation to notices served by the CMA under s 109 of the EA02. The CMA referred Sabre's anticipated acquisition of Farelogix for an in-depth Phase 2 investigation on 2 September 2019.

On 26 March 2019, the CMA requested from Sabre the methodology that had been used for selecting documents provided to the CMA. Sabre responded by telling the CMA that it had searched within documents provided to the Department of Justice as part of the US merger review process. It subsequently provided 1,117 documents to the CMA, some of which had been redacted on the basis of privilege.

On 23 April 2019, the CMA made a further request for documents related to the merger and to the adoption and implementation of certain technologies. Sabre responded by providing around 5,000 documents with some being partially redacted on the basis of privilege.

In June 2019, Sabre realised that it had incorrectly categorised certain documents as being privileged, which resulted in a further 444 documents being disclosed to the CMA. The CMA concluded that the documents provided were responsive to both of its s 109 EA02 notices meaning that Sabre had failed to comply. The CMA noted that it is ultimately the parties' responsibility to ensure that relevant material is produced in response to a document request and that reliance on external US counsel to conduct a privilege review does not constitute a reasonable excuse for failing to do so.

Bottomline Technologies (de), Inc/Experian Limited. On 21 October 2019, the CMA announced that it had referred Bottomline's completed acquisition of Experian for an in-depth Phase 2 investigation. This follows the CMA's announcement on 7 October 2019 that the transaction would be referred unless the parties offered suitable undertakings in lieu of a reference. Both parties provide payments software used by businesses to submit direct debits, run payroll, and pay suppliers. The CMA's Phase 1 investigation found that the new merged entity may increase prices, reduce product availability, or reduce its investment in innovation. This stems from the CMA's finding that if Bottomline had not acquired Experian, another player in the industry may have done so, which could have resulted in a more competitive market with greater product development and more choice for consumers. The statutory deadline is 5 April 2020.

Illumina, Inc./Pacific Biosciences of California, Inc. On 24 October 2019, the CMA published its provisional findings in relation to the anticipated acquisition by Illumina of Pacific Bio. Both parties are global suppliers of Next-Generation DNA sequencing systems to various organisations, including universities, laboratories, and research institutes. DNA sequencing is vital for the study of genetic variation which is used for essential disease research and drug development. The CMA provisionally found that the transaction may result in a substantial lessening of competition due to horizontal competition concerns in the market for the supply of Next-Generation DNA sequencing systems in the UK. The statutory deadline is 11 December 2019.

PHASE 1 CLEARANCE DECISIONS

CGI Group Holdings Europe Limited/SCISYS Group plc. On 2 October 2019, the CMA cleared the anticipated acquisition by CGI Group Holdings Europe Limited of SCISYS Group plc. CGI provides global IT consultancy services and SCISYS is a pan-European provider of computer software and services.

MUFG Bank Ltd./DVB Bank SE. On 4 October 2019, the CMA cleared the anticipated acquisition by MUFG Bank Ltd relating to the aviation finance business of DVB Bank SE and the anticipated acquisition of its aviation investment management services and aviation asset management services businesses.

Kohlberg & Company, LLC/Nelipak Corporation, Inc. On 25 October 2019, the CMA cleared the completed acquisition by Kohlberg & Company, LLC of Nelipak Corporation, Inc. Kohlberg is a private equity firm headquartered in Mount Kisco, New York and Nelipak is a leading

global manufacturer of custom-designed packaging for medical devices and pharmaceuticals.

Kohlberg & Company, LLC/Bemis Company, Inc. On 25 October 2019, the CMA cleared the completed acquisition by Kohlberg & Company, LLC of certain subsidiaries of Bemis Company, Inc. Kohlberg is a private equity firm headquartered in Mount Kisco, New York and Bemis is a manufacturer of healthcare packaging with operations in Ireland, Northern Ireland, and the UK.

Connect Bidco Limited/Inmarsat plc. On 29 October 2019, the Secretary of State for Digital, Culture, Media & Sport accepted statutory undertakings from the parties in lieu of a reference to the CMA for further assessment. Connect Bidco is a special purpose vehicle set up by a consortium of investment firms for the purpose of the acquisition. Inmarsat is a UK-based provider of fixed and mobile two-way satellite communication services.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision Due Date
Danspin A/S/Lawton Yarns Limited	5 November 2019
Unite Group plc/Liberty Group plc	6 November 2019
First Rail Holdings & Trenitalia UK/West Coast Partnership Rail Franchise	21 November 2019
Salesforce.com, Inc/Tableau Software Inc	29 November 2019
Cartamundi NV/Naipes Heraclio Fournier S.A./United States Playing Cards Company	9 December 2019
Amazon EU SARL/Roofoods Ltd (Deliveroo)	11 December 2019
Stonegate Pub Company/Ei Group plc	13 December 2019
USCO SpA/Knockturn Limited	13 December 2019
Roche Holdings, Inc./Spark Therapeutics, Inc.	16 December 2019
National Fostering Agency/ Outcomes First Group	18 December 2019
OVO Group Ltd/SSE Energy Services Group Ltd	18 December 2019

Other Developments

New Ofgem Chief Executive Appointed. On 2 October 2019, Ofgem announced that Jonathan Brearley had been appointed as Ofgem's new Chief Executive, replacing Dermot Nolan, from February 2020.

Queen's Speech 2019: Competition Implications. The Queen's Speech on 14 October 2019 announced the legislative agenda of the government for the next parliamentary session. The Background Briefing Notes referred to legislation designed to upgrade and strengthen the government's existing powers to scrutinise and intervene in business transactions (including takeovers and mergers) to protect national security. These new powers are flexible, economy-wide and apply to businesses of any size. Neither the Queen's Speech nor the Background Briefing Notes mention plans to revise the competition regime, modernise consumer markets, or reform digital markets to work better for consumers, despite the government's April 2018 Green Paper, and the Furman Review on competition in the digital economy.

CMA Appointed New Senior Director For Strategy, Communications, Nations and Regions. On 16 October 2019, the CMA announced the appointment of Stuart Hudson as Senior Director for Strategy, Communications, Nations and Regions. This is a newly created role within the CMA. Stuart Hudson will have overall responsibility for the CMA's strategy, external communications, devolved nations, and English regions activity. He will report directly to the CMA's CEO, Andrea Coscelli, and will be a member of the CMA's Executive Committee.

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