

August/September 2019

# UK Competition Law Newsletter

## Highlights

- An analysis of the UK Government's recent increased scrutiny of mergers on public interest grounds
- Competition and Markets Authority secures payment of £8 million by Aspen to the NHS
- Competition and Markets Authority effectively prohibits Tobii's completed acquisition of Smartbox

## Increased Public Interest Scrutiny Of Mergers

The Enterprise Act 2002 gives the UK Government the power to intervene in UK and EU mergers on certain public interest grounds (national security, media plurality, and the stability of the UK financial system). Historically, this power has been used sparingly, with only 13 interventions between 2002 and 2017.<sup>1</sup> But the number and frequency of interventions have increased over the last two years: there have been five interventions since the beginning of 2018, three of which occurred between June and September 2019.<sup>2</sup> This article considers these recent public interest interventions and assesses whether they are symptomatic of a more interventionist approach.

### Background To The UK Public Interest Intervention Regime

The UK Government can currently intervene in mergers on public interest grounds in three circumstances:<sup>3</sup>

1. If a merger qualifies for review in the UK<sup>4</sup> and raises concerns relating to: (i) national security, (ii) plurality of the media, or (iii) the stability of the UK financial system, the Government can issue a public interest intervention notice (**PIIN**);

<sup>1</sup> Of these 13 interventions, eight related to national security, four to media plurality, one to the stability of the UK financial system.

<sup>2</sup> The five interventions since January 2018 are: (i) [Trinity Mirror/Northern & Shell Media](#) on 1 May 2018 on media plurality grounds, (ii) [Gardner Aerospace/Northern Aerospace](#) on 17 June 2018 on national security grounds, (iii) [International Media/Lebedev Holdings](#) on 27 June 2019 on media plurality grounds, (iv) [Connect Bidco/Inmarsat](#) on 22 July 2019 on national security grounds, and (v) [Advent/Cobham](#) on 17 September 2019 on national security grounds.

<sup>3</sup> Whether the Government is able to intervene in mergers that meet EU thresholds in the event the UK exits the EU depends on the outcome of Brexit negotiations. See Cleary Gottlieb [UK Competition Newsletter November/December 2018](#).

<sup>4</sup> See Cleary Gottlieb Alert Memo [UK Introduces New Thresholds for National Security Mergers](#), March 2018.

2. Irrespective of whether the UK jurisdictional thresholds are met, if a merger raises such public interest concerns and one of the parties is either (i) a government contractor holding confidential information relating to defence, or (ii) a company that has at least a 25% share of supply of newspapers or broadcasting in the UK, the Government can issue a special public interest intervention notice (**SPIIN**); and
3. If the EU jurisdictional thresholds are met and measures are required to protect the UK's "*legitimate interests*", including: (i) protecting public security, (ii) ensuring media plurality, and (iii) protecting prudential rules, the Government can issue a European intervention notice (**EIN**).

If the Government issues an intervention notice, the Competition and Markets Authority (**CMA**) may request information about the transaction from the merging parties and will invite third-party comments, consult with relevant Government departments and regulators, and report (typically within 40 working days) to the Government with (i) its assessment of the jurisdictional and competition issues, (ii) a summary of third-party representations, and (iii) advice (if any) on the public interest considerations.<sup>5</sup> Following the CMA's report, the Government must decide whether or not to make a reference to Phase 2 on competition and/or public interest grounds. It may also accept undertakings in lieu of a reference.

## UK Public Interest Interventions Pre-2019

Pre-2019, eight interventions related to national security, four to media plurality, and one to the stability of the UK financial market:

Case	Description	Outcome
NATIONAL SECURITY		
1. <a href="#"><u>General Dynamics/Alvis (2004)</u></a>	Proposed acquisition by a US company of a supplier of military vehicles to the Ministry of Defence.	Transaction abandoned after General Dynamics was outbid by BAE.
2. <a href="#"><u>Finmeccanica S.p.A./AgustaWestland (2004)</u></a>	Acquisition by an Italian company of the lead designer of UK armed forces' helicopters.	Concerns resolved by undertakings to maintain UK strategic capabilities and protect classified information ( <b>Undertakings</b> ).
3. <a href="#"><u>Finmeccanica/BAE (2005)</u></a>	Acquisition by an Italian company of a UK manufacturer of military aircraft, submarines, radar, guided weaponry, and other defence products.	Concerns resolved by Undertakings.
4. <a href="#"><u>Lockhead Martin/Insys (2005)</u></a>	Acquisition by a US company of a UK specialist defence engineering and R&D contractor supplying the UK and allied armed forces.	Concerns resolved by Undertakings.
5. <a href="#"><u>General Electric/Smiths Aerospace (2007)</u></a>	Acquisition by a US company of a UK supplier of aerospace systems and equipment, with critically important UK capabilities in combat weaponry.	Concerns resolved by Undertakings.

<sup>5</sup> Following an EIN, the CMA does not undertake a substantive competition assessment because jurisdiction over such issues remains with the European Commission.

Case	Description	Outcome
6. <a href="#">Atlas Elektronik/Qinetiq (2009)</a>	Acquisition by a German company of a key supplier of research, advice, enabling technology and support to UK's armed forces.	Concerns resolved by Undertakings.
7. <a href="#">Hytera/Sepura (2017)</a>	Acquisition by a Chinese company of a UK-based provider of radio devices to the UK emergency services.	Concerns resolved by Undertakings.
8. <a href="#">Gardner Aerospace/Northern Aerospace (2018)</a>	Acquisition by a UK company of a UK manufacturer of structural assemblies and parts for the aerospace industry.	Transaction had no adverse effect on national security.
MEDIA PLURALITY		
9. <a href="#">BSkyB/ITV (2007)</a>	Acquisition by a UK television broadcasting company of a 17.9% stake in a UK free-to-air television broadcaster.	Transaction had no adverse effect on media plurality, but BSkyB's stake had to be reduced to 7.5% on competition grounds.
10. <a href="#">News Corp/BSkyB (2010)</a>	Proposed acquisition by a US media company of the remaining (61%) stake in a UK television broadcasting company.	Transaction abandoned after phone-hacking scandal implicating News Corp.
11. <a href="#">Global Radio/Guardian Media Group (2012)</a>	Acquisition by a UK radio network of Guardian Media's radio stations, including the Smooth Radio network.	Transaction had no adverse effect on media plurality, but competition concerns required divestment of several local radio stations.
12. <a href="#">21st Century Fox/Sky (2017)</a>	Proposed acquisition by a US media company of the remaining (61%) stake in a UK-based entertainment and communications company.	Media plurality concerns required divestment of Sky News. Transaction abandoned after Comcast Corporation outbid Fox. <sup>6</sup>
STABILITY OF THE UK FINANCIAL SYSTEM		
13. <a href="#">Lloyds TSB/HBOS (2008)</a>	Acquisition by a UK-based financial services group of a UK mortgage lender. <sup>7</sup>	The Government used its powers to allow the acquisition in spite of a realistic prospect of a substantial lessening of competition. <sup>8</sup>

<sup>6</sup> See Cleary Gottlieb [UK Competition Newsletter July/August 2018](#).

<sup>7</sup> At the time, the only specified public interest considerations were national security and media plurality. By order, the Secretary of State added "*the interest of maintaining the stability of the UK financial system*" as a new public interest consideration.

<sup>8</sup> The Government concluded that the possible anti-competitive effects identified were outweighed by the public interest in maintaining the stability of the UK financial system at a time of stress in the worldwide financial markets.

## 2019 Public Interest Interventions

Between June and September 2019, the Government intervened in three transactions on public interest grounds, the most interventions in a single year since the Enterprise Act 2002 came into force.

**International Media/Lebedev.** The Secretary of State for Digital, Culture, Media & Sport issued a PIIN on media plurality grounds on 27 June 2019 in relation to the acquisitions of 30% stakes in Lebedev Holdings (the majority owner of the Evening Standard) and Independent Digital News and Media (a digital consumer media business delivering content through, *inter alia*, independent.co.uk). The acquisitions were discovered to have both been made by Saudi investor Sultan Mohamed Abuljadayel. The PIIN was issued due to concerns over editorial independence, freedom of expression, and accurate news reporting. However, as explained below (under *Court Judgments*), the Secretary of State was time-barred from referring the transactions to Phase 2.

**Connect Bidco/Inmarsat.** The Secretary of State for Digital, Culture, Media & Sport issued a PIIN on national security grounds in relation to Connect Bidco's proposed acquisition of Inmarsat on 22 July 2019. Connect Bidco, a joint venture owned by four private equity firms, had agreed to take Inmarsat – Britain's largest satellite company – private. The Secretary of State intervened despite the fact that the Government had already accepted voluntary undertakings from Connect Bidco which ensured that, for three years, the majority of Inmarsat's strategic decisions would be taken in the UK, its important global network operation centres located in the UK would remain in the UK, and its skilled UK engineering resources would be retained. The CMA submitted its report to the Secretary of State on competition and public interest issues on 17 September 2019. The Ministry of Defence's concerns related to the protection of classified information

and the continuity of supply of services that are important to its ability to operate.

**Advent/Cobham.** The Secretary of State for Business, Energy and Industrial Strategy issued an EIN on national security grounds on 17 September 2019 in relation to the US private equity firm Advent International's proposed acquisition of Cobham, a UK-based aerospace and defence manufacturer, which specialises in "air-to-air" refueling. The Secretary of State intervened after Lady Cobham, widow of the former CEO and daughter-in-law of the founder, publicly asked the Government to block the deal to prevent Advent from asset-stripping. The intervention in this case was unusual because it was made before the European Commission had started its merger investigation.

## Implications for Future Mergers

Political interest in merger control is a recent global phenomenon – as demonstrated in particular by the introduction of many new foreign direct investment regimes, the strengthening of existing regimes, and a greater willingness on the part of politicians to vocalise their opinions on mergers.<sup>9</sup> The UK is no exception. Parliament is currently considering legislation that would significantly increase the Government's powers to intervene on national security grounds<sup>10</sup> and MPs have publicly raised concerns about possible acquisitions of UK companies.<sup>11</sup>

That being said, the recent uptick in public interest interventions may not be driven by politics alone. It may also be a result of the increase in foreign investors interested in UK companies given the fall in the value of the pound. Indeed, the circumstances surrounding the interventions in *International Media/Lebedev*, *Connect Bidco/Inmarsat*, and *Advent/Cobham* are not dissimilar to those made previously. Increased concentration

<sup>9</sup> See, e.g., Federal Ministry for Economic Affairs and Energy, Altmaier and Le Maire adopt joint Franco-German Manifesto on Industrial Policy, 19 February 2019. See also N. Levy, D. Little and H. Mostyn, European Champions: Why politics should stay out of EU merger control, Concurrences, 2019.

<sup>10</sup> See Cleary Gottlieb Alert Memo UK Government Proposes National Security and Investment Regime, August 2018. The background briefing to the Government's October 2019 Queen's Speech states: "[t]he new power would be economy-wide ie all sectors and apply to businesses of any size, reflecting the need for flexibility to address national security risks."

<sup>11</sup> See, e.g., Secretary of State for Defence Ben Wallace's letter to Lady Cobham: "Let me assure you that I will at all times bear in mind the security and skills needed to best protect the country."

in the media sector, and the sale to foreign bidders of companies providing satellite services, or pioneering “air-to-air” refueling systems to the Ministry of Defence, are in line with the previous interventions set out above.

With respect to media plurality, the Government continues to monitor (and protect against) concentration in the media sector closely. With

national security, none of the interventions so far has resulted in prohibition. The Government’s concerns have always been addressed by undertakings ensuring the maintenance of UK strategic capability and the protection of classified information. Whilst there has been much rhetoric about the UK’s increasingly interventionist approach, the 2019 cases so far are consistent with those from 2004 to 2018.

## Judgments, Decisions, and News

### Court Judgments

***Lebedev Holdings Limited and another v Secretary of State for Digital, Culture, Media and Sport***. On 16 August 2019, the CAT ruled on the time limit for the Secretary of State to issue a PIIN (and make a Phase 2 reference) in respect of certain acquisitions of shares in Lebedev Holdings Limited (**LHL**) and Independent Digital News and Media (**IDNM**) (*see* Article above). LHL and IDNM argued that this had been made out of time. The CAT bemoaned the complexity of the statutory provisions governing public interest merger cases, describing them as “*labyrinthine*”. It nonetheless held that what constitutes a relevant merger situation for the purposes of issuing a PIIN is determined in accordance with sections 23 and 24 of the Enterprise Act 2002. This means that the question of whether a relevant merger situation has been created shall be determined at the time at which a PIIN is issued. The PIIN can therefore only catch transactions four months before that date – but the CMA needs to have received notice of “*material facts*” relating to the transaction, or else such “*material facts*” need to have been so publicized as to be generally known or ascertainable before the four month period begins. The CAT held that although an article about the transactions had been published in the Financial Times on 25 February 2019, this was not sufficiently detailed to give the CMA the “*material facts*” – in particular as it did not contain sufficient information on the parties involved. As a result, the CMA did not have notice of the “*material facts*” until 1 March 2019, when it received LHL’s letter to the Secretary of State explaining the transactions.

The PIIN had therefore been validly issued within four months of that date. However, the CAT went on to conclude that the four month time limit also applied to the Secretary of State’s power to make a reference in a public interest case. This had expired on 1 July 2019, so a reference was no longer possible in this case.

### Antitrust/market studies

***CMA Investigation into Entertainment and Recreation Services Sector***. On 1 August 2019, the CMA opened an investigation into alleged anti-competitive agreements and suspected abuse of dominance in the entertainment and recreation services sector. The CMA has not yet reached a view on whether there is sufficient evidence to issue a statement of objections, and is expected to decide whether to proceed in December 2019.

***CMA Fines Casio Following Online Discounting Investigation***. On 1 August 2019, the CMA announced that it had fined Casio Electronics Co. Ltd £3.7 million for resale price maintenance. The fine reflects a 20% settlement discount. Casio admitted breaching competition law between 2013 and 2018 by implementing a policy designed to restrict retailer freedom to set prices online, requiring digital pianos and keyboards to be sold at or above a minimum price. Casio also used software to monitor online prices in real time and ensure widespread compliance. This is the CMA’s largest fine for resale price maintenance to date.

**CMA Musical Instruments Sector**

**Investigation.** On 5 August 2019, the CMA decided to proceed with two investigations ([Case 50565-5](#) and [Case 50565-6](#)) into alleged anti-competitive agreements in the musical instruments and equipment sector. The CMA is aiming to decide on whether to issue a statement of objections in each case in winter 2019. In April 2018, the CMA launched five investigations into such practices in this sector. It has already issued a decision in one (Casio, see above) and decided to proceed with two others. A sixth investigation, launched in May 2019, was [closed](#) on 6 August 2019 on administrative priority grounds.

**CMA Announces Settlement with Aspen.**

On 14 August 2019, the CMA [announced](#) that Aspen has offered to pay the NHS £8 million, as part of a wider settlement package, to address competition concerns in relation to the supply of fludrocortisone acetate 0.1 mg tablets (used to treat adrenal insufficiency). This is the first time the CMA has secured such a payment to the NHS in one of its pharmaceutical investigations. The settlement follows a CMA investigation which commenced in October 2017 and also includes (i) an admission of illegality, (ii) a commitment to restore competition by ensuring that in future there will be at least two suppliers of fludrocortisone in the UK, and (iii) payment of a maximum fine of £2.1 million, once the CMA has concluded its investigation, if it reaches a formal decision that the law has been broken. The CMA is currently investigating (unrelated) potential anti-competitive practices in relation to six other pharmaceutical drugs.

**Ofcom Issues Statement of Objections in**

**Parcel Delivery Services Investigation.** On 19 September 2019, Ofcom [announced](#) that it had issued a statement of objections provisionally finding that Royal Mail Group Limited and a reseller of its business parcel delivery services, The SaleGroup, have breached the Chapter I Prohibition of the Competition Act 1998 and Article 101 of the Treaty on the Functioning of the European Union by entering into an anti-competitive agreement pursuant to which neither

company would offer parcel delivery services to the other's business customers. Both companies have admitted infringing competition law. Royal Mail reported the agreement to the CMA in May 2018 and will therefore receive immunity from fines, provided it continues to cooperate fully with Ofcom's investigation. The SaleGroup has accepted a fine of £40,000.

**CMA Announces That Two Pharmaceutical Companies Have Admitted Anti-Competitive Information Exchange.**

On 20 September 2019, the CMA [announced](#) that King Pharmaceuticals Limited and Alissa Healthcare Research Limited, two suppliers of the antidepressant nortriptyline, have admitted to breaking competition law by exchanging strategic and competitively sensitive information with one another and with a third supplier, Lexon. The CMA had issued a statement of objections to all three suppliers in June 2019, which provisionally found that they had exchanged commercially sensitive information about prices, volumes, and entry plans in order to keep prices up. The CMA's investigation into Lexon is ongoing as the firm denies involvement in the alleged infringement.

**Merger Developments****PHASE 2 INVESTIGATIONS**

**Ecolab/Holchem Group.** On 6 August 2019, the CMA [announced](#) its [provisional findings](#) in its Phase 2 investigation into Ecolab's completed acquisition of Holchem. The CMA provisionally found that the transaction may be expected to result in a substantial lessening of competition in relation to the supply of formulated cleaning chemicals (and ancillary services) to food and beverage customers in the UK as a result of the horizontal overlap between the parties' activities. The CMA therefore published a [notice of possible remedies](#), including unwinding the deal. The statutory deadline is 8 October 2019.

**Bauer Media Group Acquisitions of Celador Entertainment/Lincs FM Group/Wireless Group/UKRD Group.**

On 7 August 2019, the CMA [announced](#) that it had referred Bauer Media Group's completed acquisitions of certain



businesses of (i) Celador Entertainment Limited, (ii) Lincs FM Group Limited, and (iii) Wireless Group Limited, as well as the entire business of the UKRD Group Limited for an in-depth Phase 2 investigation. The parties provide commercial radio services in the UK. In its Phase 1 review, the CMA concluded that the transactions may result in a substantial lessening of competition in, *inter alia*, the supply of local commercial radio advertising. The statutory deadline is 21 January 2020.

**Tobii AB/Smartbox Assistive Technology Limited.** On 15 August 2019, the CMA [announced](#) its effective prohibition of Tobii's completed acquisition of Smartbox. The CMA concluded that the transaction raised significant competition concerns in the supply of augmentative and assistive communication solutions (which help people with speech and language needs) as Tobii and Smartbox are two of the UK's leading suppliers and close competitors. The CMA found that the only effective way to address the loss of competition is for Tobii to sell Smartbox to a suitable purchaser, to be approved by the CMA. Tobii has lodged an application for review of the CMA's decision with the CAT, arguing that the CMA, *inter alia*, (i) breached its duty of procedural fairness by refusing to disclose evidence relevant to the CMA's conclusions on the substantial lessening of competition and remedies, (ii) did not support its substantial lessening of competition findings with relevant, reliable and sufficient evidence, and (iii) imposed a remedy which was disproportionate and unreasonable.

**Sabre Holdings Corporation/Farelogix Inc.** On 2 September 2019, the CMA [announced](#) that it had referred Sabre's anticipated acquisition of Farelogix for an in-depth Phase 2 investigation. The parties provide IT systems that enable airlines and travel agents to sell tickets and related add-ons. This follows the CMA's 16 August [announcement](#) that, should the deal go ahead as planned, the CMA is concerned that Sabre would not face enough competition from other suppliers, leading to higher prices or lower quality services, as well as reduced innovation in the industry generally. The CMA noted that this could have

adverse effects for airlines, travel agents, and consumers across the UK. The statutory deadline is 16 February 2020.

**Prosafe SE/Floatel International Limited.**

On 17 September 2019, the CMA [announced](#) that it had referred Prosafe's anticipated acquisition of Floatel for an in-depth Phase 2 investigation. The parties provide semi-submersible offshore accommodation support vessels – which are used to provide accommodation, storage and working space for employees working offshore – to oil and gas companies. This follows the CMA's 5 September [announcement](#) that, should the deal go ahead as planned, it is concerned that the parties' customers would face higher prices or lower quality offers when tendering due to insufficient competition, given that the parties are two of the largest suppliers in the market and close competitors. The statutory deadline is 2 March 2020.

**Advent International Corporation/Cobham plc.**

On 17 September 2019, the Secretary of State for Business, Energy and Industrial Strategy [announced](#) that it had issued a EIN in relation to the proposed acquisition of UK defence company Cobham by a subsidiary of Advent International, a US private equity firm. Cobham supplies radar and other electronic products for the defence and aviation industries, including mid-air refueling technology used by RAF planes to extend their range. The Secretary of State has asked the CMA to report to her by 29 October 2019 on whether it believes that the transaction would result in a European relevant merger situation. The report will also summarise any representations the CMA receives on the national security public interest consideration. The Secretary of State will then decide on whether the transaction may be expected to operate against the public interest and should be referred for an in-depth Phase 2 review.

**JD Sports Fashion plc/Footasylum plc.** On 19 September 2019, the CMA [announced](#) that it would refer JD Sports' completed acquisition of Footasylum for an in-depth Phase 2 investigation unless the parties offer suitable undertakings in lieu of a reference. Both parties sell sports-inspired

casual clothing and footwear. The CMA's Phase 1 investigation found that the transaction could remove one of JD Sports' closest competitors and that the parties are only two of a limited 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.

**PayPal Holdings Inc/iZettle AB.** On 24 September 2019, the CMA published its decision to impose a £250,000 penalty on PayPal for breaching the initial enforcement order (IEO) issued in the context of the CMA's review of its completed acquisition of iZettle (which was cleared unconditionally in Phase 2 on 12 June 2019). PayPal had requested (and the CMA granted) various derogations from the IEO to allow it to engage in integration activities including cross-selling pilot campaigns. These derogations did not extend to the UK business (or any activity that could affect the UK business). PayPal nonetheless contacted a significant number of potential UK customers as part of cross-selling pilot campaigns in Germany and France. The CMA considered that by doing so, PayPal had (i) risked undermining the separate sales and brand identities of PayPal and iZettle, (ii) risked impairing the ability of PayPal and iZettle to compete independently, and (iii) not operated the customer lists of the two businesses in the UK separately.

**Liqui-Box Inc/DS Smith Holdings Limited.** On 30 September 2019, the CMA announced that it had accepted undertakings in lieu of referring Liqui-Box's anticipated acquisition of DS Smith for an in-depth Phase 2 investigation. The CMA's Phase 1 investigation revealed that Liqui-Box and DS Smith are two of the four main UK suppliers of specialist Bag-in-Box packaging for food, wine, dairy, and drink manufacturers. Pursuant to the undertakings, Liqui-Box will divest various assets including Bag-in-Box manufacturing and assembly equipment, customer lists, and manufacturing know-how to a CMA-approved up-front buyer, Peak Packaging Limited.

## PHASE 1 CLEARANCE DECISIONS

**Calvin Capital UK Holdings/BV Holdings Limited.** On 12 August 2019, the CMA cleared Calvin Capital UK Holdings Limited's anticipated acquisition of BV Holdings Limited. Both parties offer meter asset provider services for traditional gas and electricity meters.

**Abellio East Midlands Limited/East Midlands Rail Franchise.** On 15 August 2019, the CMA announced that it had accepted final undertakings in lieu of a Phase 2 reference from Abellio East Midlands in relation to its award of the East Midlands rail franchise by the Department of Transport. The CMA's investigation identified competition concerns on the Norwich and Ely and Thetford and Ely routes, as Abellio would operate both East Midlands Trains and Greater Anglia, and so provide the only services on this line. To address these concerns, Abellio has agreed to (i) include inflation-linked fare caps on certain fares on these routes and (ii) maintain the availability of advance fares on both routes at existing levels.

**Aintree University Hospital/Royal Liverpool and Broadgreen University Hospitals.** On 22 August 2019, the CMA cleared Aintree University Hospital NHS Foundation Trust's anticipated acquisition of the Royal Liverpool and Broadgreen University Hospitals NHS Trust. Both parties are large teaching hospital trusts in Liverpool. Aintree provides accident and emergency services, as well as services for a wide range of acute and non-acute conditions. Royal Liverpool has a national centre for ocular oncology and other cancer treatment services.

**Rentokil Initial plc/MPCL (formerly Mitie Pest Control Limited).** On 22 August 2019, the CMA announced that it had accepted final undertakings in lieu of a Phase 2 reference in relation to Rentokil's completed acquisition of MPCL. The parties are two of the leading suppliers of pest control services to commercial customers in the UK. To address the CMA's concerns that the transaction may lead to a substantial lessening of competition for customers that primarily use a single provider across the whole or a large part of the UK, Rentokil has, among other things, agreed



to divest a number of MPCL's pest control service contracts together with any assets needed by a purchaser to become an effective competitor.

On 14 August 2019, the CMA fined Rentokil £27,000 for failing, without reasonable excuse, to respond fully to several information requests issued between October 2018 and February 2019. The CMA considered that these failures (which concerned the omission of certain internal documents) had an adverse impact on its Phase 1 investigation, requiring it to expend additional time and resources to ensure that it had all the information required. In addition, the CMA found that Rentokil had failed to provide evidence that was highly relevant to the CMA's analysis (and which was inconsistent with Rentokil's submissions). Had the CMA not made proactive efforts to obtain this, it may have reached a different conclusion on the substance (of benefit to Rentokil). In light of the significant adverse impact on the Phase 1 inquiry and the serious nature of the breach, the CMA considered it appropriate to impose a penalty close to the statutory maximum of £30,000.

***Anschutz Entertainment Group, Inc./Onex Corporation/Wildlife Holdings Inc.*** On 11 September 2019, the CMA cleared Anschutz Entertainment Group's and Onex Corporation's proposed acquisition of joint control over Wildlife Holdings, a new joint venture. Anschutz operates and runs various venues in the UK including SSE Arena, Wembley Arena, and the O2 in London. Onex owns SMG Holdings which in turn operates and runs numerous venues including Manchester Arena. Wildlife Holdings will control the venue management businesses of Anschutz and SMG.

***Inspired Entertainment/Novomatic.*** On 20 September 2019, the CMA cleared Inspired's proposed acquisition of certain business of Novomatic (UK) Limited. Inspired is a leading supplier of Category B2/B3 gaming terminals in the UK. The transaction involves the Gaming Technology Group of Novomatic, a leading supplier of Category B3, C, and D gaming

terminals. These categories of gaming terminals are "casino style" slot machines typically supplied to pubs, arcades, and motorway service stations. The categories are based on location, the maximum amount of the bet, and the maximum amount the machine can pay out.

#### ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision Due Date
<u>Bottomline Technologies (de), Inc./Experian Limited</u>	7 October 2019 On 2 August 2019, the CMA served an unwind-ing order on Bottomline, requiring it to segregate confidential information received from Experian.
<u>Connect Bidco Limited/Inmarsat plc</u>	8 October 2019
<u>CGI Group Holdings Europe Limited/SCISYS Group plc</u>	10 October 2019
<u>Kohlberg &amp; Company/Nelipak Corporation, Inc</u>	1 November 2019
<u>Kohlberg &amp; Company, LCC/Bemis Company, Inc</u>	1 November 2019
<u>Danspin A/S/Lawton Yarns Limited</u>	5 November 2019
<u>Unite Group plc/Liberty Group plc</u>	6 November 2019
<u>First Rail Holdings &amp; Trenitalia UK/West Coast Partnership Rail Franchise</u>	21 November 2019
<u>Salesforce.com, Inc/Tableau Software Inc</u>	29 November 2019
<u>Amazon/Deliveroo</u>	11 December 2019
<u>Roche Holdings, Inc./Spark Therapeutics, Inc.</u>	16 December 2019
<u>National Fostering Agency/Outcomes First Group</u>	18 December 2019

## Other Developments

***Application For Collective Proceedings Following European Commission FX Cartel Settlement.*** On 9 August 2019, the CAT [published](#) an application to commence collective opt-out proceedings against the banks involved in the European Commission's May 2019 foreign exchange (**FX**) cartel settlement (JPMorgan Chase, UBS, Barclays, Citigroup, and RBS). The proposed proceedings would combine follow-on claims against these banks based on the European Commission's finding that they infringed competition law by exchanging sensitive information and trading plans, and occasionally coordinating their trading strategies through various online professional chatrooms. The proposed class includes anyone who entered into a "Relevant Foreign Exchange Transaction", and is intended to capture the "main customers" of FX traders at the relevant banks: asset managers, pension funds, hedge funds, major companies, and other banks. The application is brought by Michael O'Higgins, former head of the UK's pensions regulator.

***BEIS Guidance: Merger Review and Anti-Competitive Activity After Brexit.*** On 8 August 2019, the Department for Business, Energy and Industrial Strategy (**BEIS**) [issued](#) guidance on the impact of a no-deal Brexit on merger control review and antitrust investigations in the UK. The guidance states that the CMA will acquire jurisdiction over the UK elements of ongoing EU antitrust and merger matters which have not been concluded prior to Brexit, and warns of the possibility that no agreement may be reached regarding jurisdiction. For further details on the implications of a no-deal Brexit on competition law, see our recent [briefing note](#).

***CMA Blog Posts On How The CMA Investigates Cartels.*** On 6 September 2019, the CMA [published](#) a blog post on "How the CMA investigates cartels", which explains how the CMA is alerted to suspicious activity and how it decides on whether the information provided merits further investigation. The post also explains how the CMA

conducts its investigations and takes enforcement action. In a previous blog post [published](#) on 9 August 2019, CMA Director Sean McNabb discusses similar issues and provides links to resources on historic cartel case studies and an online quiz to help determine whether suspicious behavior is illegal.

***Competition (Amendment etc.) (EU Exit) (No.2) Regulations 2019.*** On 10 September 2019, the Competition (Amendment etc.) (EU Exit) (No.2) Regulations 2019 (**Regulations**) were [published](#), together with an [explanatory memorandum](#). The Regulations ensure that, in a situation where no withdrawal agreement is reached, the UK can continue to benefit from commitments given to the EC to address competition concerns identified in the course of EU antitrust or merger control investigations. The memorandum explains that it was previously thought that the EC would continue to monitor and enforce commitments insofar as they relate to the UK. However, EC guidance published in March 2019 suggested that post-Brexit, the EC might allow requests from parties to vary or remove commitments insofar as they relate to the UK. In such circumstances, the UK competition authorities could not enforce the original commitments or put in place new commitments to remedy the harm (to do so would require them to retrospectively review a merger that had already been cleared or open a new antitrust investigation). The Regulations seek to fill this enforcement gap by empowering the UK competition authorities to monitor and enforce the commitments given to the EC (including any new commitments given before exit day).

***CMA Publishes Responses To Statement Of Scope in Online Platforms and Digital Advertising Market Study.*** On 11 September 2019, the CMA [published](#) the responses it had received to its Statement of Scope in relation to its online platforms and digital advertising market study. The majority of respondents welcomed the launch of the market study and its proposed scope.

Many respondents expressed concerns about the quantity of data collected by online platforms. A number of respondents claim that the volume of data accumulated by certain online platforms has resulted in market power and barriers to entry. The current deadline for the CMA's decision on whether to make a market investigation reference is 2 January 2020.

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