*April 2019*

# UK Competition Law Newsletter

## Highlights

— Court of Appeal overturns CAT ruling on collective proceedings order in Mastercard litigation

— CMA publishes final report on competition in UK audit sector

— CMA publishes final report prohibiting the proposed merger of Sainsbury's and Asda

## Five Years of 'Enhanced Concurrency' in UK Antitrust

In November 2013, David Currie – then Chairman of the CMA – identified the low volume of competition cases in regulated sectors: "*These sectors account in total for some 25% of the economy. They are also typically characterised by monopolistic or oligopolistic market structures. This might suggest the need for more, rather than less, competition enforcement than in other parts of the economy.*"[1]

From 2004 to 2013, sectoral regulators issued just two infringement decisions, despite receiving almost 50 substantiated complaints of anti-competitive behaviour.[2] The OFT's former Chief Executive Officer, John Fingleton, identified a 'chicken-and-egg' problem of enforcers being reluctant to bring competition proceedings in regulated sectors where there were few competition precedents, which in turn contributed to the lack of competition cases.[3] Others suggested that sectoral regulators preferred to rely on their non-competition powers.

### Enhanced Concurrency

To address these concerns, the Enterprise and Regulatory Reform Act 2013 (**ERRA**) aimed to "*enhance competition and make markets work more effectively in the regulated sectors*,"[4] including greater competition enforcement among the (currently) nine sectoral regulators.[5]

[1] David Currie, The new Competition and Markets Authority: how will it promote competition? Speech, Beesley Lecture, 7 November 2013.

[2] *See* Office of Rail and Road, English Welsh and Scottish Railway Limited (2006); and GEMA (now Ofgem), *National Grid* (2008), upheld on appeal. Both of these cases concerned abuses of dominant positions.

[3] John Fingleton, Challenges and opportunities for the competition regime, Speech, King's College, 5 July 2010.

[4] CMA, Baseline annual report on concurrency, 2014, p.5.

[5] These are the Civil Aviation Authority (**CAA**), Financial Conduct Authority (**FCA**), NHS Improvement (**NHSI**), Northern Ireland Authority for Utility Regulation (**NIAUR**), Ofcom, Office of Rail and Road, Ofgem, Ofwat, and the Payment Systems Regulator (**PSR**).

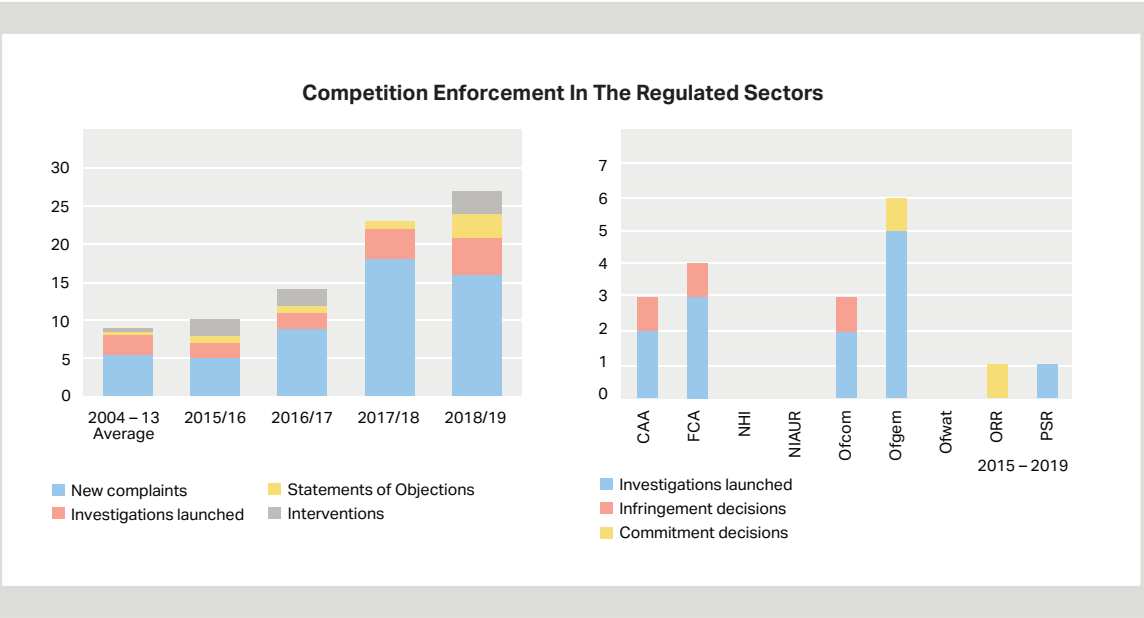
The ERRA introduced a requirement for sectoral regulators to consider whether it is more appropriate to use their powers under the Competition Act 1998 (**CA98**) in a particular case, rather than sector-specific regulation. If so, CA98 powers must be used. At the same time, the government gave the CMA a 'strategic steer' to work with sectoral regulators to make fuller use of competition law and afforded the CMA a 'leadership role' in deciding which agency should lead a particular case.

Five years after the ERRA came into force, the Department for Business, Energy & Industrial Strategy (**BEIS**) is carrying out a review of the UK's competition regime. Its April 2018 Green Paper, 'Modernizing Consumer Markets,' asks whether "*the 2014 reforms to the competition regime helped to deliver competition in the UK economy for the benefit of consumers.*" As the Green Paper notes, the Secretary of State has the power to withdraw concurrent CA98 powers from sectoral regulators. So where does concurrent competition enforcement stand?

## Enforcement by Numbers

As the charts below show, enforcement by concurrent competition agencies has increased substantially since the ERRA came into force.[6] From 2015 to 2019, sectoral regulators launched 13 new investigations, issued three infringement decisions, and settled two cases with commitments.[7] The growth of complaints (averaging 17 per year in the past two years) may signal confidence among stakeholders in the ability and willingness of sectoral regulators to take action. Only two sectoral regulators – the Northern Ireland Authority for Utility Regulation and NHS Improvement – are yet to open CA98 investigations.

The combined enforcement activity of the nine sectoral regulators, though, is still significantly outpaced by the CMA. In 2017/18, the CMA opened 10 new CA98 proceedings and issued seven infringement or commitment decisions.[8] It is not, however, solely the quantity of cases that matters. Recent actions by concurrent enforcers raise important points of principle and could have a significant legal and commercial impact.




[6] Based on data from the CMA's annual concurrency reports. 'Interventions' include infringement decisions and commitment decisions.

[7] In addition, the CMA issued two infringement decision in the regulated sectors, including prohibiting restrictive agreements for parking arrangements at Heathrow airport (with assistance from the CAA) in 2018, and issuing an infringement decision in relation to conduct in the ophthalmology sector in 2015.

[8] This includes two commitment decisions and five infringement decisions: CMA Annual Report and Accounts 2017/18 (year ending 31 March 2018).

In August 2018, Ofcom imposed a £50 million fine on Royal Mail for abusive discrimination – the second largest fine in UK competition proceedings to date, after the CMA's (annulled) decision in *Pfizer/Flynn*. This case raises difficult legal questions, including whether conduct that is threatened but not implemented can give rise to an abuse, and the extent to which competition agencies have to assess pricing practices under the as efficient competitor test. How these questions are answered before the CAT will affect the development of UK competition law in general, not only in the postal sector.

In February 2019, the FCA imposed its first fine for competition violations on three asset managers. This case applied the principles of information exchange to bidding intentions in upcoming IPOs and placings. Aside from developing the law, the FCA viewed this decision as important to maintain the "*credibility of the book-building process as a way to raise capital for companies*," particularly since "*over £31 billion was raised on just the London Stock Exchange (LSE) markets in new investment between 2015 and 2018*." The FCA also provided a reasoned 'no grounds for action' decision in respect of certain information exchanges that were not liable to distort competition, thereby providing useful guidance for companies and their advisors.[9]

### The Future

Concurrent enforcement has the advantage of bringing together the competition experience of the CMA with the specialist knowledge of the sectoral regulators. It has been strengthened by the UK Competition Network (**UKCN**), which helps the CMA and sectoral regulators to share expertise, coordinate investigations, and manage resources, including arranging inter-agency secondments. Since 2015, the CMA has published an annual concurrency report to monitor progress.

In its response to BEIS' consultation, the CMA pointed to the increased volume of new cases launched by sectoral regulators since the ERRA came into force, arguing that regulators are not "*defaulting to their regulatory powers where competition enforcement powers could be used*."[10] The CMA also noted a "step change" in its cooperation with sector regulators since the ERRA reforms. Aside from enforcement proceedings, sectoral regulators collaborate with the CMA in merger and market investigations (including energy and retail banking), as well as carrying out their own market studies.

Looking ahead, concurrent antitrust enforcement may become even more prominent following the UK's withdrawal from the EU, particularly for cases that might otherwise be investigated exclusively by the European Commission.[11] BEIS is due to release the results of its consultation later this year.

# Judgments, Decisions, and News

### Court Judgments

**Dixons/Europcar v Mastercard.** On 9 April 2019, the CAT granted Mastercard partial permission to appeal the CAT's February 2019 judgment. In that judgment the CAT had dismissed arguments that certain follow-on damages actions against Mastercard were time-barred under the CAT Rules and the Limitation Act 1980. The CAT refused permission to appeal its findings on the Limitation Act, holding that its original judgment followed settled law. However, it granted Mastercard permission to appeal its findings on CAT Rule 31(4) (that the Dixons proceedings were not time-barred and that the Rule was not applicable in the Europcar proceedings), recognising that the case raised a novel issue and had a real prospect of success.

[9] *See* https://www.fca.org.uk/news/press-releases/fca-issues-its-first-decision-under-competition-law; and Case CMP/01-2016/CA98, Anti-competitive conduct in the asset management sector, FCA decision of 21 February 2019, paragraph 5.83 and Part 15.

[10] Modernising consumer markets Green Paper: CMA response to Government consultation, 17 July 2018.

[11] Whish, The United Kingdom's 'enhanced concurrency regime' Competition Law Journal, 2018, Vol. 17, No. 2.

**Merricks v Mastercard.** Following a 2007 European Commission infringement decision concerning Mastercard's multilateral interchange fee (**MIF**), Mr. Merricks sought to bring collective proceedings against Mastercard. These proceedings sought to claim damages on behalf of 46.2 million people in the UK who were purportedly affected by the MIF. The CAT rejected Mr. Merricks' request for a collective proceedings order. On 16 April 2019, the Court of Appeal overturned that judgment. It found that the CAT had applied too stringent a test on the quality of the evidence provided at this preliminary stage, and that only a "*real prospect of success*" was required in order for the collective proceedings order to be granted. Similarly, the CAT had been wrong to consider whether an appropriate method of distributing the aggregate damages existed at this stage. Mastercard has stated that it intends to appeal the case to the Supreme Court. The outcome will have important implications for the UK's nascent collective proceedings regime.

**Secretary of State for Health v Servier and others.** On 17 April 2019, the High Court ruled on the extent to which factual findings of the General Court of the European Union are binding on claimants in follow-on damages actions before UK national courts. This case concerns damages claims against Servier, following the European Commission's 2014 infringement decision, which found that Servier had abused a dominant position and entered 'pay for delay' agreements with rivals. The General Court partially annulled that decision late last year, finding that the Commission defined the product market too narrowly and therefore erred in treating Servier as dominant. Servier argued that the General Court's ruling prevented the claimants from disputing the extent of competition between Servier's perindopril treatment and other drugs (which remained relevant for damages arising from the 'pay for delay' infringements). The High Court disagreed, stating that only findings of fact that are "*inseparable from, and necessary to explain, the operative part*" of the General Court judgment are treated as settled under the doctrine of '*res judicata*'. The doctrine does not apply to the other "*myriad factual findings*" and "*subsidiary conclusions*". Therefore, the General Court's judgment did not prevent the claimants from disputing the extent of competition between perindopril and other drugs in the follow-on litigation.

## Antitrust/market studies

**CMA Bank Directions.** On 1 April 2019, the CMA issued directions to five retail banks (Bank of Ireland, Danske, HSBC, Lloyds Banking Group and Santander), to ensure compliance with the Retail Banking Market Investigation Order 2017 (**Order**). The directions relate to the Open Banking Remedy, which required the banks to deliver functionality for account information and payment initiation services to operate across browsers/apps by 13 March 2019. As the banks failed to implement the Order in time, the directions specify agreed target dates, an implementation timetable and a progress review mechanism.

**CMA Proceeds with Second Investigation in Musical Instruments and Equipment.** On 2 April 2019, the CMA announced that it is proceeding with a second investigation into alleged anti-competitive agreements in the musical instruments and equipment sector. The initial investigation was launched on 17 April 2018, and a decision as to whether a statement of objections will be issued is expected in summer 2019.

**CMA Publishes Issues Statement of Funerals and Crematoria Services Market Investigation.** On 8 April 2019, the CMA published an Issues Statement regarding its investigation into the supply of funerals. The investigation, which will last 18 months and encompass all services provided by funeral directors, will consider: (i) what customers consider are the essential components of a funeral; (ii) the extent to which vulnerability affects customers' ability to engage with the process; (iii) how the manner and timing of prices being given impacts customer choices; (iv) the profitability of funeral directors; and (v) the nature of competition between private and local authority crematoria.

**CMA Issues Statement of Objections in Relation to the Groundworks Products Construction Cartel.** On 9 April 2019, the CMA reported that a Statement of Objections had been sent to three major suppliers of groundworks products to the construction industry. The investigation was opened in March 2017, and the CMA has provisionally found that a cartel took place through the sharing of confidential information on pricing and commercial strategy, and the coordination of commercial activities.

**CMA Issues Statement of Objections to Casio Electronics Co.** Ltd. On 11 April 2019, the CMA issued a Statement of Objections which provisionally found that Casio Electronics Co. Ltd (**Casio**) implemented a policy restricting UK retailers' freedom to set their own prices for digital pianos and keyboards. For a period of five years from 2013 to 2018, Casio allegedly required retailers to sell their products at a minimum price and subsequently prohibited price discounts.

**CMA Investigation of Atlantic Joint Business Agreement.** On 11 April 2019, the CMA decided to proceed with its investigation of the Atlantic Joint Business Agreement between American Airlines, British Airlines, Iberia and Finnair. The investigation concerns behaviour suspected to be in breach of Chapter 1 of the Competition Act 1998, and is expected to last until the summer.

**CMA Issues Infringement Decision in Fit Out Sector.** On 12 April 2019, the CMA issued an infringement decision against six office fit out firms who engaged in cover bidding in the supply of design, construction and fit out services in the UK. One firm benefited from leniency; the other five were fined a total of £7m. The non-confidential version of the decision has not yet been published.

**CMA Publishes Final Report on Competition in UK Audit Industry.** On 18 April 2019, the CMA published a report of its study on competition concerns in the UK audit industry. The study was launched in October 2018 in response to quality concerns which were exacerbated by the fact that only four firms audit the biggest companies. The CMA has made four recommendations to the UK government: (i) robust regulatory oversight of the committees that manage the selection process for audited companies and oversee the audit, to ensure accountability; (ii) mandatory joint audit (with very large companies exempt as well as those choosing a sole challenger auditors); (iii) an operational separation between The Big Four's audit and non-audit businesses; and (iv) a five year review by the regulator.

**CMA Disqualifies Directors Involved in Construction Cartel.** On 26 April 2019, the CMA announced legally binding disqualification undertakings given by two directors of a company involved in a construction cartel. The disqualification commitment formed part of the settlement process concluding the investigation that commenced in June 2017.

## Merger Developments

PHASE 2 INVESTIGATIONS

**Thermo Fisher/Roper Technologies.** On 17 April 2019, the CMA published its provisional findings in relation to the anticipated acquisition of the electron microscope business of Roger Technologies Inc. by Thermo Fisher Scientific Inc. Thermo Fisher manufactures electron microscopes used in scientific research. Roper Technologies produces specialised add-ons for microscopes including cameras and detectors. The CMA provisionally found that the transaction may result in a substantial lessening of competition (**SLC**) in the market for the supply of direct detection cameras and filters. The CMA also identified concerns of input foreclosure in the supply of general imaging cameras, direct detection cameras and filters. The CMA invited responses to possible remedies by 7 May 2019.

**Ecolab/Holchem.** On 24 April 2019, the CMA announced that it will refer the completed acquisition of Holchem Group Limited by Ecolab Inc. for Phase 2 review. Both parties produce and supply cleaning chemicals to businesses. On 10 April 2019, the CMA announced that it would make a Phase 2 referral unless acceptable undertakings were offered by 17 April 2019. The CMA was concerned that as the two largest suppliers of cleaning chemicals, the acquisition

could result in higher prices or lower quality services. Ecolab decided not to offer undertakings in lieu.

**Sainsbury's/Asda.** On 25 April 2019, the CMA published its final report prohibiting the proposed merger of J Sainsbury Plc and Asda Group Ltd in its entirety. The parties are the second and third largest grocery retailers in the UK, operating supermarkets, convenience stores, petrol stations and provide online delivered groceries. The CMA largely confirmed its provisional findings published on 20 February 2019 and considered that, on the balance of probabilities, the merger may result in a SLC at both local and national level, lead to price rises and reduce the quality and range of products available. The CMA concluded that no divestiture package would provide an effective remedy to the SLC which would result from the proposed merger.

**PayPal/iZettle.** On 30 April 2019, the CMA published the provisional findings of its Phase 2 investigation into the completed acquisition of iZettle AB by PayPal Holdings. The CMA provisionally concluded that the merger has not, and is not expected to result in a SLC. PayPal and iZettle are two of the largest suppliers of devices that enable businesses to process payments through card readers connected to a smartphone or tablet. The CMA found that customers are willing to switch to 'traditional' payment devices. The merged entity would be constrained by rivals including Worldpay and Barclaycard – the two largest suppliers of payment services to small businesses. The CMA also concluded that, absent the merger, iZettle would remain a marginal player in the emerging market for 'omni-channel' payment services The CMA has invited comments on its provisional findings by 21 May 2019. The final report will be published by 16 July 2019.

PHASE 1 CLEARANCE DECISIONS

**RWE AG/E.ON SE.** On 8 April 2019, the CMA cleared the anticipated acquisition of a 16.67% minority stake in E.ON SE by RWE AG. Both parties are energy suppliers in the UK.

**OSRAM/RGI Light and Ring Automotive.** On 8 April 2019, the CMA cleared the anticipated acquisition of RGI Light (Holdings) Limited and Ring Automotive Limited by OSRAM Limited. OSRAM manufactures and supplies lighting products in Europe and RGI is a UK supplier of automotive products including light bulbs.

**Global Radio Services/Semper Veritas.** On 16 April 2019, the CMA cleared the completed acquisition of Semper Veritas Holdings S.ar.l by Global Radio Services Limited. Both parties are involved in the operation of radio broadcasting stations.

**Swissport Group UK/Heathrow Cargo Handling.** On 18 April 2019, the CMA cleared the anticipated acquisition of Heathrow Cargo Ltd by Swissport Group UK Ltd. Both parties provide airport cargo handling services.

**AL-KO Kober/Bankside Patterson.** On 24 April 2019, the CMA cleared the anticipated acquisition of Bankside Patterson Limited by AL-KO Kober Holdings Limited. Both parties manufacture industrial components including chassis and modular steel frames.

**ARMS Business Solutions/E.M.A. Computer Solutions.** On 26 April 2019, the CMA cleared the completed acquisition of E.M.A Computer Solutions (2018) Limited by ARMS Business Solutions Limited. Both companies develop automotive software products.

**Rentokil/MPCL Limited.** On 30 April 2019, the CMA announced that it is considering in detail undertakings offered by Rentokil Initial plc in lieu of a Phase 2 investigation of its completed acquisition of MPCL Limited (formerly Mitie Pest Control Limited). On 12 April 2019, the CMA announced that it would refer the transaction unless acceptable undertakings in lieu of reference were offered. The CMA indicated that there are reasonable grounds for believing that the undertakings offered by Rentokil may be acceptable. The parties are commercial suppliers of commercial pest control services in the UK.

ONGOING PHASE 1 INVESTIGATIONS

| Parties | Decision Due Date |
|---|---|
| Core Assets Group Limited/ Partnership in Children's Services Limited | 5 June 2019 |
| Enterprise Rent-A-Car UK Limited/S.H.B. Hire Limited | 7 June 2019 |
| Iconex LLC/Hansol Denmark ApS and R+S Group GmbB | 10 June 2019 |
| Rheinmetall Defence UK Ltd/BAE Systems Global Combat Systems Ltd | 13 June 2019 |
| Illumina, Inc./Pacific Biosciences of California, Inc. | 18 June 2019 |
| Tadano Limited/Terex Corporation | 20 June 2019 |
| AstenJohnson Holdings Limited/Heimbach GmbH | 26 June 2019 |
| Non-Standard Finance plc/ Provident Financial plc | 23 July 2019 |
| Bauer Radio Limited/UKRD Group Limited | TBC |
| Anschutz Entertainment Group, Inc./Onex Corporation/Wildlife Holdings Inc. | TBC |

# Other Developments

**House of Commons Report on The Future of Audit.** On 2 April 2019, the House of Commons Business, Energy and Industrial Strategy Committee published its report titled 'The Future of Audit'. The report proposed three sets of reforms, one of which centred around competition in the audit services market. These proposals included segmented market caps for the 'Big Four' audit firms; shortening audit contracts, and making them non-renewable so as to allow audit firms to ask hard questions without fear of losing repeat business; and the separation of audit services from non-audit services. The report encourages the government to effect legislative change in a timely manner, and argues that failure to make meaningful change will necessitate a full structural break-up of the Big Four. Lord Tyrie (Chair of the CMA) wrote to Rachel Reeves MP on 18 April 2019 as chair of the Committee to welcome the report. *See also* ***CMA Publishes Final Report on Competition in UK Audit Industry***, above.

**Ministry of Justice Updates CPR to Facilitate UK State Aid Investigations by the CMA in Case of a No-Deal Brexit.** On 9 April 2019, the Ministry of Justice published its 107th update to the Civil Procedure Rules. The amendments will only come into force in the case of a no-deal Brexit, and set out the procedure for the CMA to apply for warrants to obtain evidence in relation to a state aid investigation. The updates will be required because the CMA will immediately inherit state aid assessment powers if a no-deal Brexit occurs, and CPR provisions relating to EU instruments and treaties will need to be amended accordingly.

**CMA Publishes Annual Concurrency Report 2019.** On 10 April 2019, the CMA published its annual concurrency report, reviewing how concurrency arrangements between the CMA and sectoral regulators have worked in the previous years. *See also* ***Five Years of Enhanced Concurrency in UK Antitrust***, above.

**CMA's Response to the Health and Social Care Committee.** On 17 April 2019, the CMA submitted information to the Health and Social Care Committee on its role in health mergers and the NHS tariff. The information will contribute to the committee's inquiry into the legislative proposals put forward to support the implementation of the NHS Long Term Plan – proposals which include the CMA surrendering its role in reviewing NHS mergers concerning foundation trusts. The CMA does not oppose this limitation to their jurisdiction, and points out that many of the normal conditions and dynamics of competition between suppliers that can be seen in other industries are not present in the NHS in any case.

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