*June – July 2020*

# UK Competition Law Newsletter

## Highlights

— Supreme Court rejects Mastercard and Visa MIFs appeal on liability but allows "pass on" appeal

— CMA fines suppliers and retailer of musical instruments for retail price maintenance

— High Court grants the CMA's first director disqualification application

— CMA fines Aspen, Tiofarma, and Amilco for their market sharing agreement in relation to the supply of fludrocortisone acetate tablets

— CMA publishes online platforms and digital advertising Market Study Report

## Supreme Court Rejects Mastercard And Visa Appeal On Liability But Allows "Pass On" Appeal

On 17 June 2020, the Supreme Court handed down a much anticipated judgment concerning the default multilateral interchange fees (**MIFs**) set by Mastercard and Visa (together, the **Appellants**).[1]

The case considered appeals relating to three separate damages actions brought by retailers against the operators of four-party payment schemes, Visa and Mastercard. Underlying each of these claims is an allegation that the fees agreed between banks participating in the Visa or Mastercard payment schemes were higher than they would be in a competitive market, which in turn inflated the charges that merchants paid when accepting Visa or Mastercard payment cards. The cases raised a number of common issues around the competitive counterfactual (what would the fees have been without an anticompetitive agreement) and how much of the overcharge was passed-on by the merchants to customers.

On liability, the Supreme Court upheld the [Court of Appeal's] finding that the Appellants' MIFs had infringed Article 101 TFEU. The Court rejected the Appellants' arguments that the MIFs were not anticompetitive on three grounds.

— First, the Court held that it was bound by the CJEU's judgment in 2014 upholding the European Commission's decision that Mastercard's cross-border MIFs infringed

[1] *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and others* [2020] UKSC 24.

Article 101(1) TFEU.[2] The Court rejected the Appellants' argument that the CJEU's decision was factually distinguishable and so did not bind the English courts. The Court found that the "*essential factual basis*" underlying the CJEU Mastercard Decision was mirrored in the appeals.[3] The Court also noted that, were it not bound to do so, it would nevertheless have followed the CJEU in finding that the MIFs restricted competition.

— Second, the Court held that any party seeking to rely on the legal exception under Article 101(3) must "*identify, substantiate and evaluate the claimed efficiencies and to verify their causal link with the anticompetitive conduct*" and provide "*cogent empirical evidence in support of that claim.*"[4] The Court rejected the Appellants' argument that this requirement was inconsistent with the standard of proof on the balance of probabilities.

— Third, the Court held that restrictive effects suffered by consumers on one market (in this case, merchants on the card-acquiring market) could not be compensated by benefits enjoyed by consumers on another market (cardholders on the card-issuing market) "*unless the two groups of consumers are substantially the same.*"[5] Cardholder benefits therefore could not be taken into account when deciding whether consumers received a fair share of any efficiencies under Article 101(3).

On damages, however, the Supreme Court upheld grounds of appeal concerning the application of the "passing on" defence. The Appellants had argued that some or all of the loss suffered by retailers was offset by retailers passing on that overcharge to their customers. Although the Court agreed with the retailers that the burden is on the defendant to plead and prove that the merchants mitigated their loss, the Court held that "*in accordance with the compensatory principle and the principle of proportionality, the law does not require unreasonable precision in the proof of the amount of the prima facie loss which the merchants have passed on to suppliers and customers.*"[6] The Supreme Court accepted the Appellants' argument that the Court of Appeal should not have required a greater degree of precision in the quantification of pass-on from the defendant than from a claimant.

The Court's judgment will have significant consequences for the payments sector and more widely.

— The judgment will have a direct impact on ongoing litigation in the payments sector, including pending class action litigation in *Merricks v Mastercard* (a collective damages case brought on behalf of cardholders), the Sainsbury's claims remitted to the Competition Appeal Tribunal for assessment of damages (and reassessment of Article 101(3), as well as other ongoing claims against Visa and Mastercard.

— The Court's conclusions on "pass on" will also have a significant effect on competition damages claims in other sectors. There is some encouragement both for claimants, since the Court confirmed that the burden of proof lies on the defendant to show that loss was mitigated, and for defendants, since the Supreme Court upheld the "broad axe" approach to proving "pass on" that had been rejected by the Court of Appeal and referred to the "*heavy evidential burden on the merchants to provide evidence as to how they have dealt with the recovery of their costs in their business [...] in order to forestall adverse inferences being taken against [them].*"[7]

[2] *MasterCard Inc v European Commission* (Case C-382/12 P) [2014] 5 CMLR 23 (**CJEU Mastercard Decision**).

[3] Para. 93.

[4] Paras. 118 and 128.

[5] Para. 144.

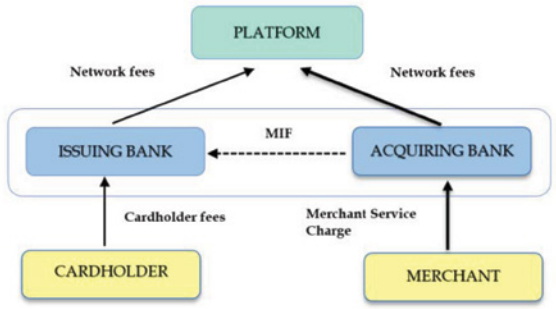
[6] Para. 225.

[7] Para. 216.

— The judgment also sets an important precedent as to how the exemption criteria under Article 101(3) TFEU and section 9, Competition Act 1998 should be applied in cases involving two-sided markets.

The judgment is summarised in more detail below.

## Four-Party Payment Schemes




Source: Supreme Court Judgment, page 3

The Appellants operate four-party payment card schemes. Issuing banks (**Issuers**) and Acquiring banks (**Acquirers**) can join the scheme, subject to complying with the scheme rules. Under a four-party payment scheme, debit or credit cards are issued to cardholders by the Issuer. Merchants enter into relationships with Acquirers, which allow the merchant to accept the schemes' payment cards in return for the payment of a merchant service charge (**MSC**). To settle a transaction between a cardholder and a merchant, the Issuer pays the transaction price, less the MIF, to the Acquirer, who passes the payment on to the merchant, less the MSC. The Court's judgment concerns the effect of the schemes' default MIFs on competition in the acquiring market.

## Procedural Background

In 2007, the EC found that MIFs under the Mastercard scheme were determined by an unlawful collective agreement that removed the competitive pressures that would otherwise have driven MIFs, MSCs, and (ultimately) consumer prices, downward. The EC Mastercard Decision was subsequently upheld by the General Court and CJEU.

The appeal to the Supreme Court related to three sets of UK damages actions by retailers who claimed to have been overcharged as a result of the MIFs set by Visa and Mastercard respectively. The first-instance judgments in these three cases reached different and arguably contradictory conclusions. These proceedings were heard together by the Court of Appeal (**CA**), which overturned all three first-instance judgments. The CA found that the MIFs had restricted competition and remitted questions of whether the MIF agreements were exempt under Art. 101(3) to the CAT.[8] Visa and Mastercard appealed to the Supreme Court and a number of retailers, including Asda (together, **AAM**), cross-appealed against the remittal order.

## Restriction of Competition

The CA considered itself bound by the CJEU Mastercard Decision, which found that certain Mastercard MIFs restricted competition within the meaning of Art. 101(1). The Appellants argued that the CA had erred in coming to that conclusion, as the MIFs at issue in the English proceedings were factually distinguishable from those at issue in the CJEU Mastercard Decision. In particular, the EC had considered MIFs that applied in cross-border transactions within the EU, whereas the damages proceedings related mainly to MIFs charged on domestic UK transactions. Under *Budapest Bank*,[9] the Appellants argued, it was for the national court to determine whether particular MIFs at issue that set a floor under the MSC restricted competition.

The Court rejected the Appellants' arguments and found that the essential factual basis upon which the CJEU Mastercard Decision had been based was applicable to the case at hand. In both cases, according to the Court: *"(i) the MIF is determined by a collective agreement between undertakings; (ii)*

[8] Art. 101(3) provides for a legal exception to the Art. 101(1) prohibition where the agreement improves the production or distribution of good or promotes technical or economic progress while allowing consumers a fair share of the resulting benefit.

[9] *Gazdasági Versenyhivatal v Budapest Bank Nyrt* (Case C-228/18) EU:C:2020:265.

*it has the effect of setting a minimum price floor for the MSC; (iii) the non-negotiable MIF element of the MSC is set by collective agreement rather than by competition; (iv) the counterfactual is no default MIF with settlement at par (that is, a prohibition on ex post pricing); (v) in the counterfactual there would ultimately be no bilaterally agreed interchange fees; and (vi) in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower.*"[10] *Budapest Bank* could be distinguished because it was concerned with a different issue, namely whether the restriction should be characterized as an infringement by object, rather than by effect, and involved a different type of MIF agreement and counterfactual. The CA was therefore correct in considering itself bound by the CJEU Mastercard Decision.

The Court held that, if not bound by the CJEU Mastercard Decision, it would have reached the same conclusion: the collective agreements that set the MIF immunized a significant portion of the MSC from competitive bargaining by fixing an artificial minimum price floor that amounted to a positive financial charge. The Court therefore dismissed the appeal on this ground.

## Standard of Proof

The CA held that EU law requires cogent factual and empirical evidence to satisfy the requirements under Art. 101(3); economic theory alone is insufficient. The Appellants complained that the CA had thereby subjected them to an unduly onerous standard of proof. Instead, the standard of proof should be determined by national law, subject to the principles of effectiveness and equivalence.

The Court did not reject that submission. It found, however, that the core of the Appellants' complaint related not to the standard of proof but to the nature of evidence sufficient to satisfy the standard. The CA was correct that while the usual civil standard of proof applied, the nature of evidence required must be informed by EU law. Against that background, the Court held that Art. 101(3) requires cogent empirical evidence in order to be able to evaluate efficiencies and benefits as required under Art. 101(3). The merchant indifference test[11] advanced by the Appellants was not a "*silver bullet*" to address the issue, but could only serve as a starting point. The appeal was consequently dismissed on this ground.

## Fair Share of Benefits

The third issue concerned the second Art. 101(3) condition, which requires that consumers "*receive a fair share of the benefits resulting from the restriction of competition*." The Court emphasised the importance of taking into account the fact that the Appellants' schemes operated in a two-sided market. In that context, the question was whether benefits to cardholders could outweigh the restrictive effects felt by merchants. The CA answered this question in the negative.

The EC had found that "*the efficiencies must in particular counterbalance the restrictive effects to the detriment of merchants*."[12] According to the Court, the EC had therefore proceeded on the basis that anticompetitive harm felt by consumers can be offset only by benefits enjoyed by them directly. The Court found that this approach was consistent with the EC's guidelines on the application of Art. 101(3).

The Court rejected reliance on certain paragraphs of the CJEU Mastercard Decision, including the statement that "*[…] all the advantages on both consumer markets in the MasterCard scheme, including therefore on the cardholders' market, could, if necessary, have justified the MIF if, taken together, those advantages were of such a character as to compensate for the restrictive effects of those fees*."[13] The Court found that this comment was

[10] Para. 93.

[11] The merchant indifference test seeks to calculate what level of fee would need to apply for the merchant to be indifferent between accepting a card payment or cash.

[12] EC Mastercard Decision, para 740.

[13] CJEU Mastercard Decision, para. 241.

concerned with the first condition of Art. 101(3), and there was no justification for applying this approach to the second condition. Moreover, such treatment would effectively remove any difference between the two requirements. Instead, the second condition was found to add a distinct requirement of fairness. The appeal on this ground was therefore dismissed.

## "Broad Axe"

At issue in the fourth ground of appeal was the burden on a defendant seeking to argue that the claimant has mitigated its loss by passing on all or part of an overcharge to its customers.

As a starting point, the Court analysed the requirements EU law imposes on claims for damages for losses incurred as a result of breaches of competition law, which are compensatory in nature. In the absence of rules at EU level, Member States may lay down procedural rules governing actions that safeguard rights derived from EU law. Domestic rules cannot make it practically impossible or excessively difficult to exercise rights guaranteed by EU law. The Court held, however, that national courts were not prevented from taking steps to ensure that such protection does not enable unjust enrichment. In the English legal system, the Court held, pass-on is an element of quantification that is not only required by the compensatory principle but also necessary to avoid double recovery. It is therefore a question of fact for the national court to decide whether a claimant has mitigated its loss resulting from an overcharge in breach of competition law.

The Court agreed with the retailers that they were entitled to claim as the *prima facie* measure of their loss the overcharge in the MSC that resulted from the MIF. Requiring merchants to plead and prove their loss of overall profit, the Court found, would most likely offend the principle of effectiveness for two main reasons: (i) a complex trading entity that is required to prove the effect of a particular overcharge on its overall profits may face an insurmountable burden to establishing its claim; and (ii) the claimants may be undercompensated if the overcharge has caused it to forgo discretionary expenditure which had no immediate effect on its profits. The burden of proof that the merchants have mitigated their loss rests on the defendants.

Once there is evidence that a claimant has passed on all or part of an overcharge to its customers, however, the compensatory principle requires the court to consider mitigation of loss. In the words of the Court, there is "*a heavy evidential burden on the merchants to provide evidence as to how they have dealt with the recovery of their costs in their business*."[14]

The Court held that there is no requirement to quantify the extent of any pass-on with precision if such precision cannot reasonably be achieved. The court must have regard to the overriding objective of the Civil Procedure Rules: legal disputes should be dealt with at a proportionate cost. The Court observed that where the cost of achieving precision would be disproportionate, the court may have to forgo precision. On the facts of the case, the extent of pass-on could only be a matter of estimation. Insofar as the CA had required a greater degree of precision, the Court allowed this ground of appeal.

## Remittal

AAM's cross-appeal was also allowed by the Court. The CA found that AAM should have succeeded on its claim under Art. 101(1), but remitted the question of whether Mastercard could benefit from legal exception under Art. 101(3). The CA's remittance order provided that it was not open to the parties to advance a new case or adduce new evidence on the remittal, but that the parties could rely on evidence from the other two proceedings.

The Court concluded that the CA's remittal order was impossible to justify without the parties' consent, as the order would not allow the parties to rebut evidence from the other proceedings.

More fundamentally, remitting the case for reconsideration would offend against the principle

[14] Para. 216.

of finality of litigation. Under this rule, a party is precluded "*from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones*".[15] According to the Court, Mastercard was aware of the significance of the issue of pass-on and had already had the opportunity to present any evidence it wished in support of its case. Mastercard had lost on this issue after a full and fair trial and should not be allowed to re-litigate the issue.

# Judgments, Decisions, and Other News

## Court Judgments

***Sabre Corporation v Competition and Markets Authority.*** On 1 June 2020, the CAT published the summary of an application by Sabre Corporation (**Sabre**) against the CMA's decision prohibiting Sabre's proposed acquisition of Farelogix Inc. The CAT had previously granted an extension of time to submit the application given the impact of the COVID-19 outbreak on companies engaged in the travel industry. Sabre is seeking an order quashing the CMA's decision and Final Report and requiring the CMA to pay its costs in bringing the application.

The American Society of Travel Advisors (**ASTA**) sought permission to intervene in the proceedings. On 16 June 2020, the CAT refused permission to intervene on the grounds that: (i) ASTA did not have sufficient interest in the outcome of the proceedings to satisfy the legal threshold; (ii) ASTA was not in a position materially to assist in questions of legal interpretation or facts relating to the application; and (iii) ASTA did not participate in the administrative stage before the CMA. The hearing of the main application has been listed for 24 November 2020.

***JD Sports Fashion plc v Competition and Markets Authority.*** On 2 June 2020, JD Sports Fashion plc (**JD Sports**) applied to the CAT for an extension of time to file a notice of application for review of the CMA decision published in May 2020, prohibiting its acquisition of Footasylum plc (see UK Competition Newsletter, April-May 2020). The CAT granted a 14-day extension on the basis that the COVID-19 outbreak had placed disproportionate demands on the retail industry and disrupted preparation of the application. The summary of the application was published by the CAT on 23 June 2020. JD Sports is seeking an order quashing the CMA's decision and remitting the matter to the CMA, and an order for the CMA to pay JD Sports' costs in bringing the application.

Frasers Group plc applied for permission to intervene in the proceedings. On 6 July 2020, the CAT refused permission for two reasons: (i) there was little scope for the introduction of new evidence in an application for judicial review of this kind; and (ii) the requisite threshold of sufficient interest was not met. The hearing of the main application has been listed for 23 September 2020.

***Royal Mail Group Ltd v DAF Trucks Ltd & Ors; BT Group plc & Ors v DAF Trucks Ltd & Ors; Dawsongroup plc & Ors v DAF Trucks N.V. & Ors ("Trucks").*** On 23 June 2020, the CAT handed down its judgment on the costs of a preliminary issues hearing in the *Trucks* litigation. The preliminary issue concerned whether, and to what extent, the recitals in the European Commission's *Trucks* decision were binding on defendants in the damages action. The CAT ordered that each of Royal Mail, BT, and Dawsongroup could recover 75% of their costs attributable to the domestic law questions, on the grounds that: (i) the claimants were the "*overall 'winner' of the abuse of process issue*"; (ii) these issues were substantial and involved significant consideration of jurisprudence; and (iii) the 25% discount was sufficient to reflect the fact that the claimants were not wholly successful. The remainder of costs of the preliminary issue would be costs in case.

[15] *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, para. 17; *Henderson v Henderson* (1843) 3 Hare 100.

***Churchill Gowns Ltd and Student Gowns Ltd v Ede & Ravenscroft Ltd and Ors.*** On 26 June 2020, the CAT published a summary of a claim brought by Churchill Gowns and Student Gowns seeking damages from Ede & Ravenscroft, Radcliffe & Taylor, WM Northam & Company, and Irish Legal and Academic. The claimants allege that the defendants abused their dominant position in the market for the sale and hire of academic dress (in particular gowns and hoods) for use at graduation ceremonies in the UK through the conclusion of exclusivity agreements with certain universities. They also claim that these agreements breach the Chapter 1 Prohibition.

***Competition and Markets Authority v Michael Christopher Martin.*** On 3 July 2020, the High Court handed down its judgment on an application by the CMA under the Company Directors Disqualification Act 1986. The CMA's application, which sought the disqualification of a former director of a residential estate agent that was fined for breaking competition law, is the first application by the CMA of its kind. The CMA had found in 2017 that six estate agents in Somerset, with an estimated combined market share of up to 95%, had agreed to fix a minimum commission rate of 1.5% for residential estate agency services. While not involved in the day-to-day sales, Mr Martin was aware of the cartel arrangement and took no steps to prevent or end the breach of competition law. As Mr Martin had declined to offer formal undertakings, the CMA issued court proceedings against him in 2019. The High Court issued a disqualification order prohibiting Mr Martin from being involved in the management of a company for seven years.

***Volvo Car AB And Volvo Personvagnar AB V MOL (Europe Africa) Ltd And Others.*** On 13 July 2020, the CAT published an order consenting to the withdrawal by Volvo Car AB and Volvo Personvagnar AB (Volvo) of their claim against Kawasaki Kisen Kaisha Ltd for damages based on the February 2018 settlement decision of the European Commission relating to the maritime car carriers cartel.

***Phones 4U Ltd (In Administration) v EE Ltd and others.*** On 17 July 2020, the High Court handed down a ruling on disclosure issues arising in the standalone competition damages case claim brought by Phones 4U Ltd's (**P4U**) administrators against mobile network operators (**MNOs**) EE, Deutsche Telekom, Orange, Vodafone, and O2. The administrators claim that the MNOs had colluded, in breach of the Chapter I Prohibition and Article 101 TFEU, to force P4U into administration by refusing to renew their MNO contracts with P4U. The High Court examined P4U's applications in relation to the disclosure of document "hold notices" and "hit" reports, the appointment of appropriate custodians for documentary searches, early disclosure, how unfiltered searches should be conducted, and access to the personal devices of individuals in the MNOs' employment. The High Court ordered that the defendants should arrange for the disclosure of documents held by four key custodians on their personal devices.

On 20 July 2020, the High Court handed down a ruling refusing EE, Deutsche Telekom, and Orange's security of costs application in the amount of 75% of their costs estimate, rather than 65%, which was the amount that P4U had agreed as security with the other defendants. The High Court did not consider the application justified purely on the basis that there was a chance P4U could ultimately be ordered to pay indemnity costs. On 24 July 2020, the High Court rejected an application for an order requiring P4U to provide further particulars of its claim against Deutsche Telekom within 42 days after disclosure, finding that the request was premature and inappropriate. The High Court suggested that P4U consider the position again following its review of the defendants' disclosure.

***Strident Publishing Limited v Creative Scotland.*** On 21 July 2020, the CAT published a ruling refusing to grant Strident Publishing Limited (**Strident**) permission to appeal against a finding that Creative Scotland was not an undertaking for the purposes of the Competition Act 1998. Strident had claimed that Creative

Scotland breached the Chapter 2 Prohibition, but the CAT ruled on 17 April 2020 that the provision of grants by Creative Scotland was not an economic activity carried on by an undertaking (see UK Competition Newsletter, April-May 2020). Strident applied for permission to appeal 11 weeks after the judgment was handed down, rather than the required three weeks. The CAT was not satisfied that there was any good reason why Strident should be allowed to proceed despite its lateness. In any event, the CAT did not consider that Strident's application raised any point of law, and considered that Strident had no real prospect of success on appeal.

***Federal Deposit Insurance Corporation v Barclays Bank and others.*** On 27 July 2020, the High Court dismissed an application by UBS AG to strike out or obtain summary judgment in relation to the Federal Deposit Insurance Corporation's (**FDIC-R**) claims alleging that UBS AG and other banks had colluded to manipulate the United States Dollar London Interbank Offered Rate (**USD LIBOR**) benchmark in breach of the Chapter 1 Prohibition and Article 101 TFEU. FDIC-R brought an action on 10 March 2017, more than six years after the conduct at issue. UBS argued that the claim was time barred and that FDIC-R had no real prospects of overcoming the requirements of the limitation defence as set out in section 32(1)(b) of the Limitation Act. The High Court found that it was entirely realistic for FDIC-R to contend that, prior to the publication of various regulatory findings against certain defendant banks in 2012, there was no solid evidence that challenged the assumption that the sustained low level of US LIBOR stemmed from innocent causes. UBS failed to persuade the High Court that it would be unrealistic for FDIC-R to run a case at trial in reliance on Section 32(1)(b) that its claims are not statute barred.

***SP Power Systems Limited and others v Prysmian S.p.A and others.*** On 30 July 2020, the CAT published a consent order by which it stayed a damages claim brought by SP Power Systems Limited and a number of other Scottish Power companies against Prysmian for breach of Article 101 TFEU. The action is based on a 2 April 2014 European Commission decision which fined manufacturers of high voltage cables for participation in a worldwide market-sharing and customer-sharing cartel. The consent order states that the parties have entered into a confidential settlement agreement, and all further proceedings in this claim have been stayed except for the purpose of carrying the terms of the agreement into effect.

## Antitrust/market studies

***CMA Secures Director Disqualification Undertaking In Fludrocortisone Acetate Tablets.*** On 1 June 2020, the CMA secured the disqualification of Mr. Amit Patel, former director of Auden McKenzie and current director of Amilco, for breaches of competition law. Auden McKenzie was found by the CMA in March 2020 to be party to an anti-competitive agreement relating to the supply of nortriptyline tablets to a large pharmaceutical wholesaler. Mr. Patel appealed the CMA's infringement decision to the CAT (see UK Competition Newsletter, April-May 2020) but withdrew his appeal on 3 June 2020. Amilco was found in October 2019 to have engaged in anti-competitive agreements with two other pharmaceutical companies in relation to the supply of fludrocortisone tablets. Mr. Patel admitted that Amilco and another pharmaceutical company, Tiofarma, stayed out of the UK fludrocortisone market to enable the market leader, Aspen, to maintain its position as the sole supplier to the UK.

***CMA Issues Supplementary Statement Of Objections And Partial Settlement In Roofing Investigation.*** On 12 June 2020, the CMA issued revised provisional findings in its investigation into suspected anti-competitive arrangements by firms supplying rolled lead for construction. The CMA found that there were four individual arrangements in breach of competition law, rather than a single cartel. Two of these firms, Associated Lead Mills and BLM British Lead, admitted to their parts in the arrangements and agreed to pay fines to be determined by the CMA.

***CMA Opens Unfair Pricing Investigation Into Hand Sanitiser Products.*** On 18 June 2020, the CMA launched investigations into four pharmacies and convenience stores in relation to suspected excessive and unfair pricing of hand sanitiser products during the COVID-19 pandemic. On 13 July 2020, the CMA closed three of its investigations as the retailers' prices do not, or are unlikely to, infringe competition law. The fourth investigation remains ongoing.

***CMA Issues Infringement Decisions In Relation To Unfair Pricing Of Musical Instruments And Equipment.*** On 29 June 2020, the CMA issued decisions against Roland UK and Korg UK finding that they had infringed competition law by engaging in retail price maintenance (**RPM**). The fines against Roland UK and Korg UK total £5.5 million which, together with the fines issued previously against Fender and Casio, brings the total fines imposed by the CMA for illegal conduct by firms in the musical instruments sector to £13.7 million. Separately, GAK, a retailer of musical instruments, admitted that it had engaged in RPM with Yamaha. On 17 July 2020, the CMA issued a decision finding that GAK had breached competition law by engaging in RPM, and imposed a fine of £278,945. The fine includes a 20% discount to reflect savings due to GAK's admission and cooperation with the CMA. The fine imposed on GAK represents the first time that the CMA has taken enforcement action against a retailer in an RPM case. Yamaha received full immunity under the CMA's leniency programme, conditional on its continuing to meet the requirements of the leniency policy in the investigation. The CMA has issued an open letter to the musical instruments industry warning suppliers and retailers against engaging in RPM. The CMA published a case study on this case on 22 July 2020 to help the musical instruments industry learn the lessons from these investigations.

***CMA Fines Privately Funded Ophthalmology Providers.*** On 3 July 2019, the CMA launched an investigation into suspected anti-competitive arrangements in the private healthcare sector. According to the CMA, the investigation revealed that Spire Healthcare Limited, its parent company (Spire), and seven consultant ophthalmologists have infringed competition law by taking part in illegal price fixing of initial consultation fees for self-pay patients at a hospital in the north of England. The CMA imposed fines totalling over £1.2 million on Spire and six consultant ophthalmologists on 1 July 2020. The fine includes a 20% settlement discount due to the parties' admission and cooperation with the CMA. The other consultant ophthalmologist was not fined as they brought the illegal activity to the CMA's attention and fully cooperated during the investigation.

***CMA Publishes Online Platforms And Digital Advertising Market Study Report.*** On 3 July 2019, the CMA launched a market study into online platforms and the digital advertising market in the UK. The study focused on (i) the market power of online platforms in user-facing general search and social network services; (ii) consumers' ability and willingness to control how data about them is collected and used online; and (iii) the potential distortion of competition in digital advertising by platforms with market power. The CMA published its interim report in December 2019. On 1 July 2020, the CMA published its final report, concluding that competition is weak in these markets: over a third of UK internet users' time online is spent on the two largest platforms (Google and Facebook), which have also taken up a significant share of the search and display advertising market. The CMA did not make a market investigation reference but instead recommended that the government pass legislation to establish a new regulatory regime and code of conduct for digital platforms.

***CMA Publishes Letter to Shelby Finance Limited On Breaches of the Payday Lending Order.*** On 7 July 2020, the CMA published the letter it sent to Shelby Finance Limited regarding breaches of the Payday Lending Market Investigation Order 2015 (**Order**). Shelby Finance breached the Order by failing to provide a total of 15,218 customers with summary of borrowing statements as required by the Order. Due to the impact on potentially vulnerable consumers, the CMA considers the cumulative effect of the

breaches to be serious. The letter notes that in response to the CMA's investigation, Shelby Finance has taken steps to minimise the impact of its breaches on customers and ensure future compliance with the Order.

***CMA Issues Directions to Cardiff Pinnacle Regarding Non-Compliance With The Payment Protection Market Investigation Order 2011.*** On 8 July 2020, the CMA issued directions to Cardif Pinnacle (**CP**) concerning breaches of Article 4 of the Payment Protection Market Investigation Order 2011 which requires payment protection insurance (**PPI**) providers to send annual reviews to customers. According to the directions, CP issued inaccurate annual reviews which either overstated or understated the annual cost of PPI and/or the average monthly cost of PPI. While the CMA noted the actions taken and proposed by CP, it considered that the fact that the breaches went undetected for a number of years indicates that CP's internal processes are not robust enough to ensure compliance. There is therefore a need for formal action and further measures to ensure future compliance by CP.

***Ofwat Amends Scope Of Investigation Into Thames Water.*** On 21 June 2019, Ofwat announced that it had opened an investigation into Thames Water, concerning allegations of abuse of a dominant position relating to: (1) the approach Thames Water had taken when installing digital smart meters and the subsequent impact on data logging services; (2) the accuracy of customer data it made available to retailers; and (3) the fairness of certain contractual credit terms it imposed on retailers (see UK Competition Newsletter, June-July 2019). On 9 July 2020, Ofwat announced that it no longer considers that the Competition Act 1998 is the most appropriate tool to use in relation to this third allegation. It now proposes to investigation this under sections 66DA and 117F of the Water Industry Act 1991 in relation to compliance with the Wholesale Retail Code, and has therefore opened a separate investigation.

***CMA Levies Fines In Pharma Probe.*** On 9 July 2020, the CMA issued an infringement decision imposing fines on suppliers of fludrocortisone acetate tablets, a prescription-only medicine mainly used to treat Addison's Disease. The CMA found that between March and October 2016, Aspen, Tiofarma, and Amilco had breached competition law by entering into an anti-competitive agreement in relation to the supply of fludrocortisone acetate 0.1 mg tablets in the UK. More specifically, the investigation found that Amilco and Tiofarma had agreed to stay out of the fludrocortisone market to allow Aspen to maintain its position as the sole supplier in the UK. The three suppliers have admitted breaching competition law by entering into this agreement. The CMA's investigation has resulted in fines which total almost £2.3 million and a payment of £8 million to the NHS.

***CMA Issues Supplementary Statement Of Objections In Liothyronine Tablets Investigation.*** On 10 July, the CMA issued a second supplementary statement of objections to address issues arising from the Court of Appeal's judgment of 10 March 2020 in the phenytoin litigation. The CMA still alleges that Advanz Pharma breached the Chapter 2 Prohibition and Article 102 TFEU from at least 1 January 2009 to at least 31 July 2017 by charging excessive and unfair prices for liothyronine tablets in the UK.

***CMA Publishes Update On Citizens Advice's Super-Complaint On Loyalty Penalty.*** On 13 July 2020, the CMA published its third update on the loyalty penalty investigation in the mobile, broadband, household insurance, cash savings, and mortgage markets. On September 2018, Citizens Advice submitted a super-complaint to the CMA raising concerns about the loyalty penalty in these five markets. The CMA found this to be a significant issue and set out a number of recommendations to regulators in these markets. The CMA's third update considers the progress since January 2020. The update notes that COVID-19 has affected all five markets under investigation. As these markets represent essential services, their effective operation is regarded as critical. The FCA's introduction of broader

market-wide interventions such as mortgage payment deferrals was welcomed by the CMA.

***CMA Resumes Pharmaceutical Sector Investigations.*** On 20 July 2020, the CMA announced that it had resumed its investigations into suspected anti-competitive behaviour in relation to the supply of nitrofurantoin and prochlorperazine in the UK. The two investigations had been paused in April 2020 in order to reallocate resources to ensure that the CMA was able to focus on urgent work during the COVID-19 pandemic. On 25 July 2020, the CMA issued a statement of objections alleging that Advanz Pharma Services (UK) Limited (previously AMCo), Alliance Healthcare (Distribution) Limited, Morningside Healthcare Limited and Morningside Pharmaceuticals Limited have breached UK and EU competition law by participating in anti-competitive agreements and/or concerted practices in relation to the supply of nitrofurantoin 50mg and 100mg capsules in the UK. The CMA also alleges that Advanz Pharma disclosed sensitive pricing information to Morningside with the aim of reducing competition between them.

## Merger Developments

PHASE 2 INVESTIGATIONS

***TVS Europe Distribution Limited/3G Truck & Trailer Parts.*** On 12 June 2020, the CMA decided to refer the completed acquisition by TVS of 3G Truck & Trailer Parts for an in-depth investigation. The parties are wholesalers of commercial vehicles and trailer parts in the UK. The CMA had announced on 2 June 2020 that it would refer the merger for a Phase 2 investigation unless it received acceptable undertakings from TVS, but no undertakings were received. Following its Phase 1 investigation, the CMA found that the merger could lead to higher prices and poorer service for customers. The parties' internal documents showed, according to the CMA, that the parties were close rivals and that they monitored each other's prices. On 6 July 2020, the CMA published its Issues Statement, setting out the proposed scope of its investigation. The CMA's Phase 2 investigation will focus on the supply of commercial vehicle and trailer parts to the independent aftermarket, the area in which the CMA found that the merger gives rise to a realistic prospect of an SLC.

***JD Sports Fashion plc/Footasylum plc.*** On 18 June 2020 the CMA gave notice that it was minded to accept the proposed undertakings given by JD Sports to divest the Footasylum business, implementing the CMA's decision to prohibit the transaction on 6 May 2020 (see UK Competition Newsletter, April-May 2020). The CMA's investigations had found that the merger was expected to result in an SLC in the market for sports-inspired casual footwear and apparel both in-store and online in the UK. JD Sports applied to the CAT on 17 June 2020 for review of the CMA's decision. On 13 July 2020, the CMA accepted final undertakings given by JD Sports to divest the Footasylum business within a required timeframe (subject to the outcome of JD Sports' appeal). The parties also undertook to draw up a list of potential purchasers for approval by the CMA.

***Amazon/Deliveroo.*** On 24 June 2020, the CMA issued revised provisional findings in relation to the anticipated acquisition by Amazon of certain rights and a minority shareholding in Roofoods Ltd (trading as Deliveroo). The CMA had provisionally cleared the acquisition in April 2020 (see UK Competition Newsletter, April-May 2020), finding that Deliveroo was likely to exit the market unless it received the additional funding available through the transaction. As a result of the COVID-19 pandemic, however, market conditions and Deliveroo's financial situation changed materially, such that the CMA considers it is no longer likely to exit the market absent the transaction. Despite this, the CMA has found still that the merger is unlikely to result in an SLC.

***viagogo/StubHub.*** On 25 June 2020, the CMA announced its decision to refer the completed acquisition by viagogo of eBay's StubHub business to a Phase 2 investigation. Prior to this, the CMA had decided that it would refer the acquisition for an in-depth investigation unless it received acceptable undertakings from the parties. Both

parties are active in the secondary ticketing market in the UK. The CMA found that the parties are close competitors in a concentrated market and that the merger could lead to an increase in the price of resale tickets for customers. The CMA published its Issues Statement on 23 July 2020. The CMA will investigate whether the deal gives rise to an SLC in the supply of secondary ticketing exchange platforms and whether these platforms compete with primary ticketing platforms and other online services.

***Yorkshire Purchasing Organisation/Findel Education.*** On 30 June 2020, the CMA referred the anticipated acquisition by Yorkshire Purchasing Organisation of Findel Education Limited for an in-depth investigation. The Issues Statement was published on 27 July 2020. The CMA intends to investigate whether the merger gives rise to an SLC as a result of horizontal unilateral effects and/or coordinated effects in relation to the supply of educational resources to nurseries, primary and secondary schools by distributors offering a broad range of educational resources on a national or regional basis in the UK.

***Taboola/Outbrain.*** On 9 July 2020, the CMA referred the anticipated acquisition of Outbrain, Inc. by Taboola.com Ltd to an in-depth investigation. The CMA's Phase 1 investigation found that the parties were the two largest providers of content recommendation services to publishers in the UK, with a combined market share of over 80%. The Phase 2 investigation will examine further whether the transaction has resulted, or may be expected to result, in an SLC within any market in the UK, including the supply of content recommendation platform services to publishers in the UK. The CMA aims to publish its Issues Statement in August 2020, with provisional findings expected to be published in late October 2020. The statutory deadline for the CMA to publish its final report is 23 December 2020.

***Hunter Douglas N.V./247*** Home Furnishings Ltd. On 16 July 2020, the CMA provisionally found the completed acquisition by Hunter Douglas N.V. of a controlling interest in 247 Home Furnishings Ltd (**247**) would give rise to competition concerns in the online retail supply of made-to-measure blinds (**M2M**) in the UK. Hunter Douglas acquired its interests in 247 through two separate transactions in 2013 and 2019, respectively (see UK Competition Newsletter, February – March 2020). Blinds2Go, Hunter Douglas' principal subsidiary, is the largest supplier of online M2M blinds in the UK and several times larger than the second largest supplier. 247 is the third largest supplier. The CMA found that the parties were close competitors and that other suppliers would not represent an effective competitive constraint on the parties after the merger. The CMA has invited comments on its provisional findings by 5 August 2020, and will publish its final report by 15 September 2020.

UNDERTAKINGS IN LIEU OF PHASE 2 REFERENCE

***Bauer Media Group/Celador Entertainment.*** On 1 June 2020, the CMA accepted final undertakings in lieu of a Phase 2 reference in relation to the acquisition by Bauer of several radio businesses of Celador Entertainment. The CMA had found that the four acquisitions would result in a substantial lessening of competition (**SLC**) in the market for the supply of representation for national advertising to independent radio stations in the UK. The undertakings include a commitment by Bauer to continue providing sales representation services to independent radio stations (see UK Competition Newsletter, April-May 2020).

***Stryker/Wright Medical Group NV.*** On 30 June 2020, the CMA announced its decision to refer the acquisition by Stryker of Wright to a Phase 2 investigation unless it received acceptable undertakings from the parties. The CMA found that the parties had a high combined share of supply in certain ankle prostheses products in the UK and that the merger would lead to the loss of a competitor in an already-concentrated market, leaving no other significant competitors. On 7 July 2020, Stryker offered undertakings to the CMA. On 14 July 2020, the CMA announced that that it had reasonable grounds for believing that the undertakings offered by Stryker, or a modified version of them, might be accepted by the CMA.

***ION Investment/Broadway Technology.*** On 7 July 2020, the CMA announced its decision to refer the completed acquisition by ION Investment Group Limited of Broadway Technology for a Phase 2 investigation unless acceptable undertakings in lieu of reference are offered. The companies supply specialist trading systems to financial organisations to enable the trading of foreign exchange and fixed income securities. Based on parties' internal documents and feedback received from their customers, the CMA concluded that ION was the largest supplier of these systems and that Broadway was one of only two significant competitors. The acquisition was therefore likely to lead to customers facing a significantly reduced choice of supplier. On 21 July 2020, the CMA announced that it had reasonable grounds for believing that the undertakings offered by ION, or a modified version of them, might be accepted by the CMA.

PHASE 1 CLEARANCE DECISIONS

***Danone/Harrogate Water Brands Limited.*** On 9 June 2020, the CMA cleared the acquisition by Danone of Harrogate Water. The parties overlap in the supply of still and sparkling bottled water in two distribution channels in the UK. The CMA found that the merged entity would continue to be constrained by the parties' main competitors in both distribution channels, including Nestlé S.A., The Coca-Cola Company, and Highland Spring Limited.

***Dechra Pharmaceuticals PLC/Osurnia business of Elanco Animal Health Incorporated.*** On 9 June 2020, the CMA cleared the anticipated acquisition by Dechra Pharmaceuticals PLC of part of the business of Elanco Animal Health Incorporated. Both are pharmaceuticals companies specialising in animal health. Dechra is based in the UK and Elanco in the US.

***Aragorn (KKR & Co Inc )/OverDrive Holdings Inc.*** On 16 June 2020, the CMA cleared the acquisition by Aragorn Parent Corporation (KKR & Co Inc) of OverDrive Holdings Inc under the *de minimis* exception. The CMA had served an initial enforcement order on 8 June 2020. KKR & Co is a US investment firm and Overdrive is a US distributor of eBooks, magazines, streaming videos and other publications.

***Pharm-a-Care/Haliborange.*** On 23 June 2020, the CMA cleared the anticipated acquisition of the Haliborange business of the Proctor & Gamble Company by Pharm-a-Care. Pharm-a-care is a wholesaler and distributor of prescription drugs and consumer products headquartered in Australia. Proctor & Gamble's Haliborange is a brand of food supplements aimed at children.

***Circle Health/BMI Healthcare.*** On 29 June 2020, the CMA published its decision to accept undertakings from Circle Health in lieu of a reference for the completed acquisition by Circle Health of GHG Healthcare (parent company of BMI Healthcare). Both parties provide elective care to NHS and privately funded patients in the UK. Circle undertook to divest Circle Bath Hospital and Circle Birmingham Hospital (see UK Competition Newsletter, April-May 2020).

ONGOING PHASE 1 INVESTIGATIONS

| Parties | Decision Due Date |
|---|---|
| Ardonagh Group/Bennetts Motorcycling Services | 16 June 2020 |
| Bupa Insurance Limited/Civil Service Healthcare Society Limited | 15 October 2020 |
| Carlsberg UK Holdings Limited/Marston's PLC | 20 October 2020 |
| Elis UK Limited/Central Laundry Limited | TBC |
| Facebook, Inc/Giphy, Inc | TBC |
| Sinch Holding AB/SAP Digital Interconnect Unit | TBC |

## Further Developments

***Digital Markets Taskforce Launches Call For Information.*** The Digital Markets Taskforce, which will advise the government on matters relating to digital markets, was formally launched on 1 July 2020. As part of its work, the taskforce has called for information from a wide range of stakeholders to inform its advice. The Taskforce has also issued questionnaires to businesses who sell or distribute their products and services using UK online marketplaces or app stores.

***Digital Regulation Cooperation Forum.*** On 1 July 2020, the CMA announced that it has formed a Digital Regulation Cooperation Forum (**DRCF**), together with Ofcom and the Information Commissioner's Office (**ICO**). The DRCF aims to support cooperation and coordination between the three agencies in digital markets, and other areas of mutual importance.

***CMA Publishes Annual Report 2019/20.*** On 14 July 2020, the CMA published its Annual Report and Accounts for 2019 to 2020. While the report provides full accounts and an overview of the CMA's performance, it is a slimmed down version in light of the current situation resulting from COVID-19. The Annual Report is accompanied by an impact assessment report which presents the estimated benefits of the CMA's work averaged over a three-year period and the ratio of these benefits to costs.

***UK Government Launches a Consultation on the Internal Market White Paper.*** On 16 July 2020, the UK government published its UK Internal Market White Paper, which consults on "policy options" to protect the flow of goods and services within the UK after the Brexit transition period. The Government proposes to uphold principles of mutual recognition and non-discrimination as between UK nations after further devolution post-Brexit, as well as to establish of an independent body or expert committee to oversee and assess the functioning of the UK internal market. The broad consultation questions include: "*What areas do you think should be covered by non-discrimination but not mutual recognition*." The deadline for responding to the proposals in the White Paper is 13 August 2020.

***UK Government Lowers Merger Notification Threshold For Certain Critical Sectors.*** On 21 July 2020, the Enterprise Act 2002 (Share of Supply) (Amendment) Order 2020 and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2020 came into force. Both Orders amend the jurisdictional thresholds for mergers in certain sectors. Under the new rules, the thresholds have been lowered in cases where the target business is active in artificial intelligence, cryptographic authentication, or advanced materials. In these cases, a transaction will qualify as a relevant merger situation if: (1) the target's UK turnover exceeds £1 million (rather than £70 million); or (2) the target has at least a 25% share of supply or purchases in the UK (without the need for

any increment to that share of supply). The pre-existing share of supply test (requiring the creation or strengthening of a 25% share of supply or purchases) continues to apply in these sectors as well. The Department for Business, Energy and Industrial Strategy (**BEIS**) has published guidance which explains why the Government amended the Enterprise Act 2002 and describes the practical and legal implications of these amendments.

***CMA Consults On Amending Leniency Guidance On Applications For Leniency And No-Action In Cartel Cases.*** The CMA's Guidance on applications for leniency and no-action in cartel cases provides detailed guidance on the principles and process for leniency applications. On 30 July 2020, the CMA invited comments on a proposed addendum to clarify the way the CMA will exercise its discretion in relation to the grant of Type B leniency in RPM cases. Type B cases are cases where the applicant is the first to apply for leniency but where the CMA has already opened an investigation into the suspected infringement. Type B applicants are eligible for discretionary corporate immunity from penalties or a reduction in penalty of any amount to 100%. On the basis of its experience applying its leniency policy in RPM cases, the CMA considers that its policy in relation to Type B applications has the potential to be overly generous. It considers that RPM cases are by their nature less likely to be secretive, meaning that a Type B applicant would be less able to add value to the CMA's investigation in an RPM case compared with a horizontal cartel case. The CMA also considers that granting 100% immunity in RPM cases reduces the incentives on business to comply with the law. The CMA proposes to amend its guidance to state that the CMA will not generally grant immunity or discounts of more than 50% to Type B applicants in RPM cases.

***CMA Publishes Response To Consultation On Reforming Regulation.*** As part of the Spring Budget 2020, the government launched the Reforming Regulation Initiative to invite ideas from businesses and the public for regulatory reform to ensure that regulation is sensible and proportionate, particularly for small businesses. On 31 July 2020, the CMA published its response to the consultation, which discussed the relationship between competition and regulation. The CMA examined the pro-competitive and pro-consumer potential of regulation, and identified features of regulation that may inhibit competition or provide worse outcomes for consumers. The CMA also made a number of recommendations for policy makers when considering, designing, and reviewing regulation.

## COVID-19

***CMA secures refund undertakings from holiday lets firm.*** On 9 June 2020, holiday lettings firm Vacation Rentals gave undertakings that it would offer a full refund in the event that a booking is cancelled because of restrictions associated with the coronavirus outbreak. This follows the launch in April 2020 of the CMA's investigation into the cancellation policies of holiday accommodation, as well as other sectors, as a result of reports of businesses failing to respect cancellation rights in the context of the COVID-19 pandemic. On 3 July 2020, the CMA announced that it had secured undertakings from another major holiday lettings firm, Sykes Cottages (**Sykes**), which will apply to the 24 businesses and brands owned by Sykes. Sykes has agreed to offer a full cash refund to customers in the event a booking cannot go ahead due to governments restrictions, convert credit vouchers to cash (if the customer prefers), and provide the CMA with monthly reports on the number of refunds made and accepted.

***CMA publishes open letter to pharmacy owners and superintendent pharmacists.*** On 29 June 2020, the CMA and the General Pharmaceuticals Council sent a joint open letter to pharmacy owners and superintendent pharmacists informing them of reports alleging that a small minority of pharmacies were charging unjustifiably high prices for essential products. The purpose of the letter was to explain the roles and expectations of the General Pharmaceuticals Council and the CMA, and urge pharmacies to consider these expectations carefully before making pricing decisions. The letter came days

after the CMA launched investigations into four pharmacies and convenience stores in relation to suspected excessive and unfair pricing of hand sanitiser products during the COVID-19 pandemic (see *Antitrust/market studies* above).

***Courts and Tribunals Recovery Plan.*** On 1 July 2020, the Lord Chancellor and Minister for Justice, Robert Buckland QC MP, the Judiciary and HMCTS each published an update on recovery plans for courts and tribunals in response to the COVID-19 outbreak. Options considered include the staggering and extension of court and tribunal operating hours, the identification of other buildings that could be used on a temporary basis, and the expansion of access to audio and video technology to allow for remote hearings.

***CMA Publishes Update On COVID-19 Task Force.*** On 4 April 2020, the CMA launched an online service allowing consumers and businesses to report unfair business practices during the COVID-19 pandemic. The CMA's third update published on 3 July 2020 explains that from 10 March to 28 June 2020, the CMA has been contacted more than 80,000 times about coronavirus-related issues. The rate at which consumers contacted the CMA in June (around 3,500 per week) has fallen back from levels seen in May (almost 7,000 per week). The majority of complaints still relate to unfair practices in relation to cancellations and refunds and unjustifiable price rises.

***Joint Statement Against Price Gouging.*** On 3 July 2020, the CMA, alongside a number of trade bodies, published a joint statement warning about price gouging during the outbreak of COVD-19. According to the statement, the CMA and trade bodies remain concerned about the behaviour of a small number of businesses; the vast majority of businesses have responded responsibly.

***COVID-19 Cancellations: Package Holidays.*** On 7 July 2020, the CMA opened an investigation into suspected breaches of consumer protection law in the package holiday sector. Since launching its COVID-19 Taskforce, the CMA has received several reports that businesses have not been respecting customers' statutory rights to a refund for package holidays that were cancelled by either party due to certain lockdown restrictions imposed by authorities in the UK and abroad. On 10 July 2020, the CMA sent an open letter to the package travel sector.

***Questions About EU Temporary Framework To Support The Economy.*** On 7 July 2020, the House of Lords EU Goods Sub-Committee published a letter it had sent to BEIS asking further questions about the EU Temporary Framework for state aid measures to support the economy in the context of the COVID-19 outbreak. The initial questions focus on the third amendment to the Temporary Framework, which waives the 'Undertaking in Difficulty' test for micro and small businesses.

***BEIS Updates Register Of Agreements Relating To Competition Exclusion Orders.*** On 10 July 2020, BEIS published an updated register of agreements notified under public policy exclusion orders made by the Secretary of State to exclude certain categories of agreements from the Chapter I Prohibition due to the exceptional reasons of public policy arising from Covid-19. Five new agreements in the grocery sector have been published. These relate to the delivery of emergency food boxes to vulnerable customers, and coordination between Asda, Sainsbury's, Tesco, and Iceland on activities such as prioritising deliveries or opening stores at specific times for particular groups of customers.

***CMA Publishes Paper By Andrew Tyrie Discussing How Competition Policy Should React To COVID-19.*** On 21 July 2020, the CMA published a paper written by the CMA Chair, Andrew Tyrie, that explores how competition policy should react to COVID-19. The paper reviews the CMA's response to COVID-19 and looks at the potential longer-term response of competition policy to recovery. Lord Tyrie argues that the pandemic is likely to cause enduring changes that may aggravate already rising market concentration, give rise to "killer acquisitions", and deepen public distrust of markets. He notes two important roles the CMA has in assisting

with the recovery: (1) it needs to promote the role of competitive markets in the face of probable political and structural headwinds; and (2) it must sustain trust and confidence in markets, by protecting consumers from unfair practices.

***Competition Appeal Tribunal (Coronavirus) (Recording and Broadcasting) Order 2020 comes into force.*** On 24 July 2020, the Competition Appeal Tribunal (Coronavirus) (Recording and Broadcasting) Order 2020 (**Order**) came into force. The Order clarifies the conditions to be satisfied for the recording and broadcast of proceedings in the CAT.

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