*March 2018*

# UK Competition Law Newsletter

## Highlights

— Payment Systems Regulator conducts dawn raids in its first case under the Competition Act 1998.

— Competition Appeal Tribunal refers questions to the European Court of Justice on whether pharmaceutical pay-for-delay agreements restricted competition "by object" or "by effect".

— English High Court rules that the applicable law for follow-on damages actions is generally the law of the country where the restriction of competition occurs.

## Concurrent Agency Jurisdiction Increases the Scope for Enforcement Activity in the UK Financial Services Sector

On 28 February 2018, the UK's Payment Systems Regulator ("PSR") announced that it had opened its first case under the Competition Act 1998 ("CA98"). The investigation, which began with dawn raids at business premises across the UK, represents a significant step in the evolution of the UK's approach to competition enforcement in financial services. The PSR follows in the steps of the Financial Conduct Authority ("FCA"), which launched its first competition enforcement case in 2016 and issued its first Statement of Objections in 2017.

### Background

The PSR was created in March 2013 and gained concurrent competition law powers on 1 April 2015, at the same time as the FCA. The PSR's powers cover agreements and conduct relating to participation in payment systems, which includes the operation of the payment system and the provision of infrastructure and payment services. The FCA's powers are broader, covering agreements and conduct relating to the provision of financial services.[1] There is therefore potential for overlap, both as between the PSR and the FCA, and as between these concurrent regulators and the Competition and Markets Authority ("CMA"), which can enforce competition law across all sectors of the economy.

[1] The term "financial services" is not defined but, in the FCA's view, "*includes any service of a financial nature such as banking, credit, insurance, personal pensions or investments…[and] extends beyond financial services regulated by us or other bodies*": see FG15/8, "The FCA's concurrent competition enforcement powers for the provision of financial services – A guide to the FCA's powers and procedures under the Competition Act 1998", July 2015, paragraph 1.2, available at https://www.fca.org.uk/publication/finalised-guidance/fg15-08.pdf.

Under the concurrency arrangements, the general principle is that the "*better or best placed*" authority will be responsible for the case.[2] These arrangements have already been tested: in September 2017, the CMA launched an investigation into the use of most favoured nation clauses by a price comparison website (Compare the Market) in relation to home insurance products. The CMA explained at the time that it would lead the investigation in light of its "*experience of considering most favoured nation clauses, the wide range of sectors in which such clauses may be in use, and the potentially broader competition policy implications of considering them*." In doing so, the CMA is co-operating closely with the FCA.[3]

## Procedure

As regulators with wider responsibilities for the functioning of their sectors, the PSR and the FCA have access to a broad range of sector-specific regulatory powers and enforcement mechanisms to address any competition concerns they identify. However, both authorities have a statutory duty to give "primacy" to CA98 enforcement in certain situations.[4] Various observers have remarked on the FCA's use of its Financial Services and Markets Act 2000 ("FSMA") powers, rather than its competition powers, to carry out market studies (the former are not subject to as strict a statutory timetable but are limited to regulated activities). This interplay between the FCA's and the PSR's competition and regulatory powers will also be relevant to their approach to CA98 investigations, and could become a point of divergence from CMA practice.[5]

The FCA (and its predecessor, the Financial Services Authority) has significant experience in bringing enforcement actions under FSMA through its dedicated enforcement division. This institutional expertise may influence the FCA's approach to CA98 investigations, in particular in cases involving conduct that may infringe both CA98 and FSMA. To date, the FCA has exercised its CA98 enforcement powers confidently, perhaps in part due to its regulatory enforcement experience. Although it has launched only two cases, it has done so seemingly independently and, in an investigation into aviation insurance, the FCA was able to conduct a series of co-ordinated dawn raids across four large companies. By contrast, as a smaller regulator without the benefit of the FCA's institutional history, the PSR has generally relied on the CMA. Its recent dawn raids, which "*involved visits at a significant number of sites around the UK*," were carried out in "*close collaboration with the CMA*."[6]

## Use of the FCA's and PSR's CA98 Powers to Date

The FCA's competition investigations to date have focused on anti-competitive information exchange:

— The first CA98 investigation concerned the exchange of competitively sensitive information within the aviation insurance sector. Although the antitrust investigation has since been taken over by the European Commission, the FCA is in parallel conducting a market study into the wholesale insurance broking sector.[7]

— The second CA98 investigation undertaken by the FCA concerns the exchange of pricing information in the context of initial public offerings and share placements, shortly before the share prices were set. The FCA issued Statements of Objections in November 2017.[8]

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[2] See CMA10, "Regulated Industries: Guidance on concurrent application of competition law to regulated industries", March 2014, paragraph 3.22, which contains a list of factors relevant to which authority will be best placed.

[3] See https://www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses.

[4] See Financial Services and Markets Act 2000, section 234K for the FCA, and Financial Services (Banking Reform) Act 2013, section 62 for the PSR.

[5] This is particularly relevant for firms authorised by the FCA, which are obliged under Principle 11 of the FCA Handbook to notify the FCA of anything "*relating to the firm of which the regulator would reasonably expect notice*." This includes circumstances where a regulated firm becomes aware that it may have infringed competition law (SUP 15.3.32(1)). Such notifications provide a further source of possible CA98 investigations for the FCA.

[6] Speech by C. Begent, PSR Head of Legal, delivered on 28 February 2018 at Competition in Financial Services Conference, London, available at https://www.psr.org.uk/sites/default/files/media/PDF/Carole-speech-BIIC-Feb-18.pdf.

[7] See "FCA launches Wholesale Insurance Brokers Market Study", FCA Press Release of 8 November 2017, available at https://www.fca.org.uk/news/press-releases/fca-launches-wholesale-insurance-brokers-market-study.

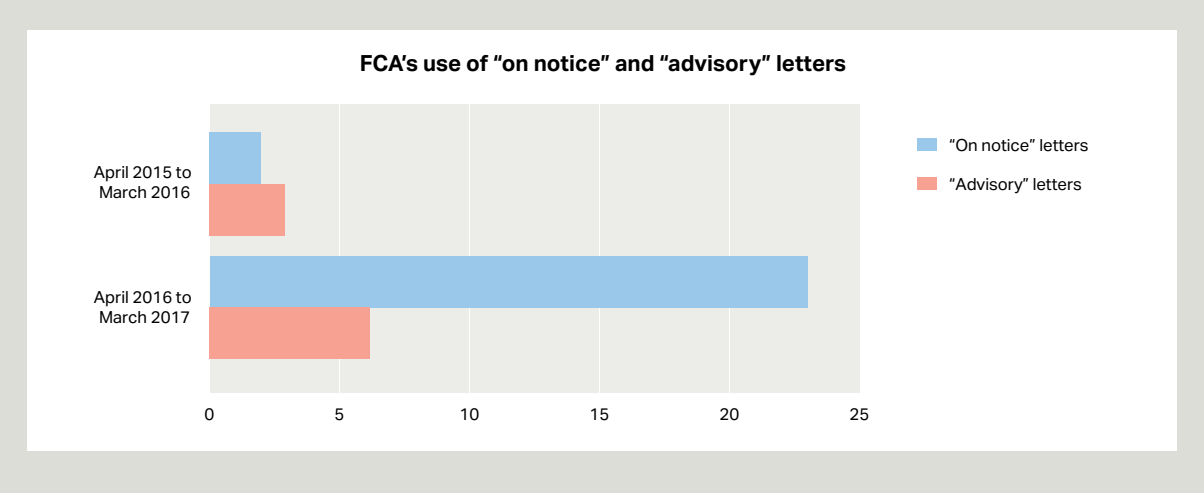
[8] See "FCA issues first statement of objections to four asset management firms", FCA Press Release of 29 November 2017, available at https://www.fca.org.uk/news/press-releases/fca-issues-first-statement-objections-four-asset-management-firms.

These investigations provide an early sign that the FCA is ready to tackle complex competition issues that arise in the financial services sector. Although the exchange of certain categories of information can be problematic (*e.g.*, future pricing intentions), the effective operation of many financial markets relies on information exchange between companies that act as both counterparties and competitors (*e.g.*, in the derivatives trading context, banks trade with each other as well as competing to trade with other customers). In such circumstances, it is difficult to draw the line between permissible and anti-competitive conduct. That being said, both the European Commission and the CMA's predecessor, the Office of Fair Trading ("OFT"), have imposed significant fines on financial services companies found to have engaged in anti-competitive information exchange (*e.g.*, the European Commission's various IBOR-related interest rate derivatives investigations and the OFT's investigation into the disclosure of sensitive information by RBS to Barclays). The FCA will have to decide where to draw the line in such cases, with the benefit of its experience as a financial regulator.

In its competition role, the FCA has also employed softer enforcement tools, in the form of "on notice" and "advisory" letters. These are similar to the CMA's "warning" and "advisory" letters, and are issued when the FCA has identified a possible competition violation, but has decided not to open an investigation following a prioritisation assessment. "On notice" letters prompt addressees to take remedial action, while "advisory" letters are intended to raise awareness of competition law and increase compliance. Between April 2016 and March 2017, the FCA issued 23 "on notice" and six "advisory" letters (compared with two "on notice" and three "advisory letters" in the previous year).[9] The type of behaviour targeted by the letters "*included inappropriate exchanges of competitively sensitive information, across a range of financial services sector.*"[10]

Although the FCA's CA98 enforcement activity is relatively recent, it has significant experience in conducting competition-focused market studies (having completed six to date, with a further three ongoing). These studies have provided the FCA with an opportunity to analyse certain financial markets in detail and identify potential competition issues, better equipping the FCA to commence standalone CA98 investigations.

There is as yet no publicly available information as to the suspected conduct or identity of the companies that form the subject of the PSR's investigation.




[9] By comparison, the CMA issued 19 "warning" letters and 42 "advisory" letters in 2017 (compared with 63 "warning" letters and 31 "advisory" letters in 2016).

[10] See FCA Annual Competition Report 2016/17, p.17.

### What Next?

Three years since becoming concurrent competition regulators, the FCA and PSR have demonstrated their willingness to use their CA98 enforcement powers. Deb Jones, Director of Competition at the FCA, has noted that the FCA's practice sends "*a signal that we take competition law seriously alongside other regulatory enforcement*."[11]

The FCA and PSR are showing signs of evolving into significant competition law enforcers in the UK. Following the UK's departure from the European Union, their roles may be expected to grow still further. Post-Brexit, large-scale antitrust investigations in the financial services sector (such as the recent EU investigations into LIBOR and FX) may well be carried out by the FCA or PSR, as well as the European Commission. As a result, leniency applicants will need to apply in the UK (to the CMA) as well in the EU, and there may be potential for divergence in both substantive analysis and procedure. This new enforcement landscape will present both challenges and opportunities for companies active in the financial services and payment systems sectors in the UK.

## Judgments, Decisions, and News

### Court Judgments

**Pay-for-delay Agreements.** On 12 February 2016, the CMA found that a group of pharmaceutical companies, including GlaxoSmithKline ("GSK"), Alpharma Limited ("Alpharma"), and Generics (UK) Limited ("GUK"), had infringed Chapter I CA98 and/or Article 101 TFEU by entering into a series of agreements to delay generic entry of the drug paroxetine (a prescription-only anti-depressant) in the UK. The CMA also found that GSK's conduct constituted an abuse of its dominant position in breach of Chapter II CA98. The CMA imposed fines totalling £44.99 million (£37.6m on GSK, £5.8m on GUK and its former parent, and £1.5m on Alpharma and its successor companies). GSK, Alpharma, and GUK appealed the CMA's decision. On 8 March 2018, the Competition Appeal Tribunal ("CAT") handed down an "intermediate" judgment in relation to the appeals.

In light of the similar issues raised by the pending European appeals in *Lundbeck* and *Servier*, the CAT referred the following questions to the European Court of Justice ("ECJ"):

— Whether the generic manufacturers Alpharma and GUK should be considered as potential competitors to GSK, in circumstances in which Alpharma and GUK were subject to interim court orders preventing them from entering the market;

— Whether the relevant agreements constituted "object" restrictions of competition, in circumstances in which the agreements were entered into because the terms agreed were commercially more advantageous than continuing with the litigation (rather than for fear of losing the pending patent proceedings);

— Whether the relevant agreements restricted competition "by effect" when considering the counterfactual; and

— Whether generic medicines should be considered as part of the same product market as the branded drug.

The CAT dismissed the appellants' arguments that GSK's agreements with Alpharma and GUK should be exempted under the Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000 or Regulation 2790/1999 (the vertical agreements block exemption in force at the time). The relevant agreements constituted settlement agreements which restricted Alpharma's and GUK's ability to sell paroxetine in competition with GSK in the UK. They could not be viewed as distribution agreements between parties active at different levels of the supply chain to GSK. Nor could the agreements benefit from individual

[11] Speech by D. Jones, FCA Director of Competition on "The FCA's Competition Powers", delivered on 23 March 2016 at The Impact of Competition Powers on Financial Services Conference, London, available at https://www.fca.org.uk/news/speeches/fca%E2%80%99s-competition-powers.

exemption – the restrictions on Alpharma and GUK were not indispensable and the structure of the agreements gave GSK the possibility of eliminating competition in the paroxetine market.

The CAT also dismissed various procedural arguments relating to the rights of defence and the attribution of liability:

— Although there was a significant time lapse between the termination of the relevant agreements (2004), the start of the OFT investigation (August 2011), and the CMA's final decision (February 2016), the appellants did not identify any witnesses or documentary evidence that would have affected the content of the CMA's decision or the outcome of the appeal proceedings before the CAT.

— The CMA attributed liability for the Alpharma agreement to: (i) Actavis (which was then known as Alpharma Ltd.), (ii) Xellia (which was then known as Alpharma ApS); and (iii) ALLC, the functional and economic successor of Alpharma Inc. As the evidence overwhelmingly demonstrated the direct involvement of Xellia and ALLC, through their senior executives, in the conclusion of the Alpharma agreement, the CAT upheld the CMA's decision to hold them jointly and severally liable.

The CAT noted that it would be inappropriate to decide the appellants' challenges to the penalties imposed in advance of the preliminary ruling from the ECJ.

**Deutsche Bahn v MasterCard.** In 2007, the European Commission found that MasterCard's multilateral interchange fees ("MIF") infringed Article 101 TFEU. Deutsche Bahn and various other retailers brought follow-on claims against MasterCard for transactions where the MIF had been applied. These transactions had taken place within and across a number of EEA countries, and over a period of 15 years (1992-2007), during which the choice of law rules for tortious claims had changed twice. The parties agreed that it was first necessary to determine the applicable law for the claims. The High Court therefore considered this as a preliminary issue, handing down its judgment on 9 March 2018.

The High Court distinguished between three periods of claim. While different rules applied in each period, they generally conformed to the same principle: the applicable law is the law of the country in which the restriction of competition took place.

— **Period from 11 January 2009.** The parties agreed that the Rome II Regulation governed the choice of applicable law in this period. Article 6(3) provides that the law applicable to competition damage claims "*shall be the law of the country where the market is, or is likely to be, affected*," which the parties agreed was the country in which the merchant was based at the time of the transaction.

— **Period from 1 May 1996 to 10 January 2009.** The High Court found that the Private International (Miscellaneous Provisions) Act 1995 ("the 1995 Act") applied during this period. This established the general rule that the applicable law is the law of the country in which the events (or the most significant events) constituting the tort occurred. The parties disagreed on whether this would be (i) the place where the MIFs had been set (Belgium, where MasterCard's senior management were based for much of the relevant period); or (ii) where the restriction on competition was felt, in the form of higher prices, lower quality, or fewer competitors. The High Court concluded that the restriction of competition was the most important element for a competition damages claim. In this case, this occurred in the country in which the merchant was established and its law was therefore the applicable law.

— **Period from 22 May 1992 to 30 April 1996.** The parties agreed that English common law determined the applicable law during this period. As a result, a tort claim relating to an act committed in a foreign country that was being actioned in the English courts would be governed by English law, unless "*clear and satisfying grounds*" justified this departure from the *lex fori* in favour of the *lex locus delicti* (the law of the country where the wrong was committed). Consistent with its reasoning in interpreting the 1995 Act, the High Court concluded that

the *lex locus delicti* was the law of the country in which the restriction on competition was felt (in this case, the country in which the merchant was established). However, as no justification had been shown for disapplying English law, the *lex locus delicti* would not apply to the claims concerning conduct in this period.

This judgment provides valuable guidance for claimants involved in follow-on claims against historic conduct spanning several EEA Member States. The outcome can be considered a victory for MasterCard, as the limitation period is longer in Belgium compared with the other relevant countries, meaning part of the claims may ultimately be time-barred. Deutsche Bahn and the other claimants are currently seeking permission to appeal.

**Ping Europe Limited v CMA.** On 14 March 2018, the CAT ruled in favour of Ping, the sports equipment manufacturer, in its application for disclosure of a witness statement. This judgment arose in the context of Ping's appeal against an August 2017 decision that Ping had unlawfully prohibited UK retailers from selling its golf clubs on their websites. The witness statement had been provided by a complainant that sought to preserve its anonymity to avoid harming its commercial interests. The CAT accommodated this concern by ordering the statement's disclosure to Ping in a confidentiality ring that excluded executives involved in handling the complainant's account with Ping.

## Antitrust Decisions

**Household Fuel Cartel Infringement Decision.** On 29 March 2018, the CMA announced its decision that two of the UK's main suppliers of bagged household fuels (including coal and fire logs) had infringed Article 101 TFEU and Chapter 1 CA98 by rigging competitive tenders to supply Tesco and Sainsbury's and sharing pricing information. The parties were fined £3,444,381 (reflecting discounts for leniency and settlement). The CMA launched its investigation following a tip off via its cartels hotline, leading to dawn raids at the parties' premises.

## Merger Developments

PHASE 2 INVESTIGATIONS

**Mole Valley Farmers Limited/Countrywide Farmers Plc.** On 6 March 2018, the CMA opened a Phase 2 investigation into the proposed merger of two country store businesses that supply bulk agricultural products and retail products such as fertilisers, fencing, and tools. The CMA found the combination could lead to higher prices in the catchment areas of 25-45 Countrywide stores. The CMA also expressed doubts regarding the parties' proposed undertakings to exclude 25 stores from the transaction and establish maximum list prices for overlapping products in certain other stores. On 4 April 2018, the CMA closed its investigation after the parties abandoned the transaction.

PHASE 1 CLEARANCE DECISIONS

**Refresco Group N.V./Cott Corporation Inc.** On 29 March 2018, the CMA announced its decision to conditionally clear the merger of two UK soft drink manufacturers, Refresco Group and Cott Corporation. The CMA considered the transaction to be a three-to-two merger, which could lessen competition in the market for made-from-concentrate, aseptically-filled plastic-packaged juice drinks. To secure clearance, the parties agreed to sell a bottling facility in Lancashire, together with associated customer contracts and revenues.

**GVC Holdings plc/Ladbrokes Coral Group plc.** On 21 March 2018, the CMA announced its decision to clear GVC Holdings' acquisition of Ladbrokes Coral Group. GVC is a FTSE 250 operator of online sports betting and gaming services, while Ladbrokes is a leading operator of online (and offline) betting services. The CMA looked closely at betting services for individual sports and games but found no competition concerns, owing to GVC's small presence in the UK, the large number of rival online providers, and the fact that the parties were not close competitors.

**Bain Capital/Zenith Hygiene Group plc.** On 19 March 2018, the CMA announced its decision to clear the acquisition of Zenith Hygiene Group by Bain Capital. Both parties manufacture cleaning and hygiene products. The CMA did not identify

any horizontal competition concerns, as the merger increment in the markets of overlap was generally under 10% and the parties would continue to face significant competition post-transaction. The CMA dismissed possible input foreclosure concerns on the basis of the parties' limited sales to third parties and the presence of alternatives in the market.

**Sysco Corporation/Cucina Lux Investments/Brake Bros Limited/Kent Frozen Foods Limited.** On 16 March 2018, the CMA cleared the acquisition of Kent Frozen Foods by Sysco, a US catering supplies distributor. Due to data limitations, the CMA relied primarily on evidence from tender data and third parties to clear the transaction on the basis that the parties were not close competitors and that numerous alternative national, regional and local food wholesalers would remain post-transaction.

**Derby Teaching Hospitals NHS FT/Burton Hospitals NHS FT.** On 15 March 2018, the CMA announced its decision to clear the merger between two NHS trusts. It placed significant weight on the advice of NHS Improvement, the sectoral regulator, that the merger would deliver substantial overall benefits to the resource-constrained trusts (even if it would reduce patient choice for some services).

**Vp/Brandon Hire Group.** On 7 March 2018, the CMA announced its decision to clear Vp's acquisition of Brandon Hire, a construction equipment hire company. Both parties supply tool and equipment hire services. The CMA concluded that this overlap would not give rise to competition concerns based on the parties' moderate combined shares (20-30%), their focus on different customer groups, the fact they were not close competitors, and the presence of other national and local competitors.

ONGOING PHASE 1 INVESTIGATIONS

| Parties | Decision due date |
|---|---|
| Vanilla Group/Washstation | 3 April |
| SSE Retail/Npower | 26 April |
| Tarmac Trading Limited/Breedon Group plc | 26 April |
| Breedon Group plc/Tarmac Holdings Limited | 3 May |
| Tiancheng International Investment/Biotest AG | 23 May |

# Other Developments

**European Council adopts new guidelines on post-Brexit relationship with UK.** On 23 March 2018, the European Council adopted guidelines on the framework for post-Brexit relations with the UK. These build on the principles set out in its Brexit negotiation guidelines of April and December 2017. They reaffirm the EU's desire for a close partnership between the EU-27 and the UK, including a "*balanced, ambitious and wide-ranging free trade agreement*" (although this may not offer the same benefits as full EU/Single Market membership). The guidelines indicate that any future relationship should ensure a level playing field through "a *combination of substantive rules aligned by EU and international standards*", including on competition and State aid, and tax, social, environmental, and regulatory measures and practices.

**UK government confirms CMA would be State aid regulator following Brexit.** In a 28 March 2018 letter to the chair of Parliament's EU Internal Market Sub-Committee, the UK government acknowledged that as a future trade agreement with the EU could require mutual controls on State aid, the UK "*should be prepared to establish a full, UK-wide subsidy control framework, with a single UK body for enforcement and supervision.*" The government considered the CMA would be "*best placed*" to take on the role of State aid regulator, in view of "*its understanding of markets as the UK's competition regulator and the independence of its decision-making from Government.*"

**CMA consultation on draft guidance on changes to the jurisdictional thresholds for UK merger control.** On 15 March 2018, the UK Government published new merger thresholds to allow greater intervention in transactions that may raise national security concerns. These thresholds will apply to firms that develop or produce items for military use, computer hardware, or quantum technology. The Government will be able to intervene where the target's UK turnover exceeds £1 million, or the target has a UK share of supply of at least 25% (even where that share will not increase following the merger). The CMA is consulting on guidance on the circumstances in which merging parties may wish to notify mergers falling within the amended thresholds to the CMA. The deadline for responding to the consultation is 11 April 2018. For further details, please see our alert memo on this topic.

**CMA consultation on draft guidance on internal documents requests.** The CMA is consulting on draft guidance in relation to requests for internal documents in UK merger investigations. This guidance is being updated in light of recent experience of businesses' failing to respond properly or promptly to such requests. The proposed guidance is intended to clarify and ensure more consistent use of the CMA's compulsory powers and facilitate the imposition of fines where appropriate. The deadline for responding to the consultation is 24 April 2018.

## Cleary Gottlieb Event

Cleary Gottlieb is hosting a seminar on **"UK Competition Law After Brexit: What to Expect, How to Prepare"**, held at our new London offices on Wednesday, 2 May 2018. The speakers will include Michael Grenfell, Executive Director for Enforcement at the CMA, John Fingleton of Fingleton Associates and Anneli Howard of Monkton Chambers. To register your interest, please view our invitation here.

LONDON TEAM

**London Office**
2 London Wall Place
London EC2Y 5AU

**Maurits Dolmans**
+44 20 7614 2343
mdolmans@cgsh.com

**Henry Mostyn**
+44 20 7614 2241
hmostyn@cgsh.com

**Nicholas Levy**
+44 20 7614 2243
nlevy@cgsh.com

**Romi Lepetska**
+44 20 7614 2292
rlepetska@cgsh.com

**Romano Subiotto QC**
+32 22872092
rsubiotto@cgsh.com

**Alexander Waksman**
+44 20 7614 2333
awaksman@cgsh.com

**Paul Gilbert**
+44 20 7614 2335
pgilbert@cgsh.com

**Wanjie Lin**
+44 20 7614 2359
wlin@cgsh.com

**David Little**
+44 20 7614 2338
drlittle@cgsh.com

**John Kwan**
+44 20 7614 2293
jkwan@cgsh.com

**Richard Pepper**
+32 22872181
rpepper@cgsh.com

**Xuyang Zhu**
+44 20 7614 2265
xuzhu@cgsh.com

**Paul Stuart**
+44 20 7614 2207
pstuart@cgsh.com

**Shahrzad Sadjadi**
+44 20 7614 2235
ssadjadi@cgsh.com

**John Messent**
+44 20 7614 2377
jmessent@cgsh.com

**Nina Fischer**
+44 20 7614 2244
nfischer@cgsh.com

**Esther Kelly**
+32 22872054
ekelly@cgsh.com

**Niccolò Torrigiani**
+44 20 7614 2298
ntorrigiani@cgsh.com

**Carlos Martínez Rico**
+32 22872185
camartinez@cgsh.com

**Philip Herbst**
+44 20 7614 2256
pherbst@cgsh.com

**Ricardo Zimbron**
+44 20 7614 2307
rzimbron@cgsh.com

**Andrew Boyce**
+44 20 7614 2217
aboyce@cgsh.com

**Vass Karadakova**
+44 20 7614 2221
vkaradakova@cgsh.com

**Jack Winfield**
+44 20 7614 2238
jwinfield@cgsh.com