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Competition Law Newsletter

Welcome to the Q1 2020 edition of our Competition Law Newsletter. A quarterly update covering key developments in EU and UK competition law.

European Commission opens Phase II into Johnson & Johnson / Takeda merger

On 25 March 2020, the European Commission ("**Commission**") opened a Phase II in-depth investigation into Johnson & Johnson's proposed acquisition of Tachosil (owned by Takeda). The Commission is concerned that the deal may reduce potential competition and innovation in the supply of dual haemostatic patches.

Tachosil is a leading producer of such patches which are used for the most problematic bleeding control and tissue sealing during surgery. Johnson & Johnson is one of Europe's leading manufacturers of haemostats which is a surgical tool that prevents blood flow.

During Phase I, the Commission found that there was a distinct market for dual haemostatic patches that was dominated by Tachosil in Europe. The market was also characterised by high barriers to entry and expansion due to high development costs, strong brand loyalty among surgeons and Tachosil's established position and clinical track-record.

The Commission is concerned that the deal would remove Johnson & Johnson as the best placed entrant in an already concentrated market – although Johnson & Johnson does not sell dual haemostatic patches in the EU. Absent the deal it could enter with existing products not available in the EU market or with new dual patches that it could develop. There are also concerns that the deal may reinforce Johnson & Johnson's leading market position and hinder rival expansion, leading to reduced choice for surgeons and patients and higher prices for health services or a slow development of alternative solutions to manage difficult bleeding scenarios.

Johnson & Johnson did not submit commitments to address the Commission's concerns in Phase I. The Commission will now carry out its Phase II investigation and has until 10 August 2020 to issue a decision.

The Commission has six other ongoing Phase II investigations, but suspended three of these investigations in March because companies failed to comply with information requests. The Commission said that the Covid-19 pandemic may have impacted the companies' ability to provide the requested data.

As reported in Stephenson Harwood's briefing on the "Impact of COVID-19 on Merger Control", the pandemic is posing significant challenges for competition authorities, including the Commission during one of the most important merger waves in EU merger control history. Nonetheless, the Commission has made clear that it is still open for business and although it remains a difficult and complex time for many, it will continue to ensure merger control remains effective and operational.

EU Commission fines Meliá over customer discrimination

On 21 February 2020, the Commission announced that it had fined the Spanish group Meliá €6.68 million due to its anti-competitive practice of discriminating against customers on the basis of

their country of origin. The clauses in question restricted active and passive sales for hotel accommodation which therefore breached Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**") which prohibits anti-competitive arrangements between two or more undertakings which have the object or effect of restricting or distorting competition in the internal market.

The Commission had opened an investigation into Meliá in February 2017 following consumer complaints. The Commission concluded that Meliá had entered into agreements with four tour operators to prevent the latter from freely offering hotel accommodation to consumers under the same terms across the bloc. Specifically, Meliá included standard terms and conditions in its contracts with tour operators which prohibited any reservations being made by consumers who were not residents of certain specified countries. As such, these restrictive provisions had the potential effect of arbitrarily partitioning the Single Market given that consumers from certain countries may have been unable to benefit from full hotel availability or make bookings at the most competitive prices.

These practices were, the Commission concluded, at odds with one of the fundamental principles of the Single Market, namely that all individuals from all Member States should have the opportunity to benefit from the most competitive array of choice and prices.

It should be noted that the Commission also opened investigations into the four tour operators in conjunction with its investigation into Meliá – Kuoni,[1] REWE,[2] Thomas Cook[3] and TUI.[4] However, the Commission ultimately decided to drop these investigations after a careful investigation of the relevant facts and circumstances.

With regard to the level of the fine imposed, the Commission took the decision in line with the 2006 Commission Fining Guidelines.[5] The Commission noted, however, that Meliá had both admitted wrongdoing and cooperated in relation to the provision of evidence beyond its legal obligation to do so. On these grounds, the Commission granted a reduction of 30% on the level of the fine imposed on Meliá.

This decision now opens the door for affected parties and consumers to bring claims for follow-on damages, if they can establish that they suffered loss as a result of Meliá's anti-competitive actions. Follow-on damages claims are brought before the national courts of individual Member States. European case law establishes that any Commission decision will constitute binding evidence that Meliá has been guilty of anti-competitive practices – it will be for the parties to establish that they have suffered loss as a result.

It is important for companies operating across the EU to bear in mind the following key messages from this case: (i) do not enter into agreements which discriminate between customers on the basis of the customer's state of residency or nationality or which divide up the market/share customers such as to carve up the Single Market; (iii) co-operation with the Commission can result in a significant reduction in any fine; and (iv) never think you will not get caught out – regulators take customer complaints very seriously.

European Commission accepts commitments by Transgaz to facilitate natural gas exports

On 6 March 2020, the Commission announced that commitments offered by Societatea Națională de Transport Gaze Naturale Transgaz S.A. ("**Transgaz**") had been accepted and thus made legally binding under EU antitrust rules.

The Commission had launched an investigation in 2017 to assess whether Romania's gas transmission system operator, Transgaz, has been hindering gas exports from Romania to other EU Member States. Specifically, the Commission were concerned that Transgaz might have been abusing a dominant position and thus committing an infringement under Article 102 TFEU. Romania is the second largest natural gas producer in the European Union (after the Netherlands) and has important gas reserves,

[1] Case No. AT.40527. See https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40527

[2] Case No. AT.40524. See https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40524

[3] Case No. AT.40526. See https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40526

[4] Case No. AT.40525. See https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40525

[5] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02), published on 1 July 2006. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006XC0901(01)

including newly discovered natural gas fields in the Black Sea. Transgaz is the sole operator of the natural gas transmission system in Romania (including all interconnectors with neighbouring countries) and the Commission was concerned that it may have been exploiting this position by:

- Underinvesting in, or delaying construction of, infrastructure for gas exports;
- Interconnection tariffs for gas exports that made exports commercially unviable; and
- Using unfounded technical arguments as a pretext for restricting exports.

Following the opening of the Commission's investigation, Transgaz offered commitments to the Commission to address its concerns. Subsequently, on 21 September 2018 the Commission sought views from other market players and industry stakeholders as to whether the commitments offered by Transgaz would be sufficient to address the Commission's concerns. The original commitments offered by Transgaz have been slightly amended following this consultation. Transgaz has committed to:

- Make available minimum export capacities of 1.75 billion cubic metres per year at the interconnection point between Romania and Hungary (equivalent to around one sixth of Hungary's annual gas consumption);
- Make available a minimum export capacity of 3.7 billion cubic metres per year at two interconnection points between Romania and Bulgaria. This export capacity is equivalent to more than half of Bulgaria and Greece's annual gas consumption;
- Ensure that its tariff proposals to the Romanian national energy regulator (i.e. ANRE) will not discriminate between export and domestic tariffs in order to avoid interconnection tariffs that would make exports commercially unviable; and
- Refrain from using any other means of hindering exports.

Article 9 of Regulation 1/2003 allows the Commission to conclude investigations by accepting commitments in lieu of making a final determination. In so doing this does not amount to a decision as to whether EU antitrust rules have been infringed, but it does ensure that the commitments become binding and that any breach by Transgaz would result in a fine of up to 10% of its worldwide turnover without the Commission needing to prove any outright infringement of the EU antitrust rules.

The commitments will remain in force until 31 December 2026. A trustee will be in charge of monitoring the implementation and compliance with the commitments.

Commission confirms extension to liner shipping block exemption

On 20 November 2019, the Commission announced that it was intending to extend the Consortia Block Exemption Regulation ("**BER**") by another four years to 25 April 2024. The BER had been due to expire on 25 April 2020, but the Commission launched a consultation on whether the BER should be extended beyond this date in September 2018. The Commission confirmed the extension to the BER on 24 March 2020.[6]

Block exemptions are bespoke carve-outs to the usual EU competition rules that permit the conduct of activities within specified industries or sectors that might otherwise be considered anti-competitive conduct. But such conduct is permitted given the wider economic benefits and improvements to the competitive functioning of the market.

The BER applies to shipping consortia and recognises that these generally help to improve the quality and productivity of international shipping services. *Inter alia*, consortia generate improved economies of scale through the joint operation of vessels, utilisation of port facilities, coordination of shipping timetables, slot exchanges and use of joint operations offices.

The BER allows consortia agreements provided that these agreements do not attempt to: (i) fix prices; (ii) limit capacity or sales (save where this occurs in response to supply/demand fluctuations; or (iii) allocate customers or markets. In addition, the parties to the agreement must not have a market share of 30% or over on any market in which they operate and the parties must have an unconditional right to exit the agreements on 6 months' notice.

[6] See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_518.

Broadcom offers settlement in abuse of dominance case

In June 2019, the Commission sent Broadcom a Statement of Objections seeking also to impose interim measures alleging that Broadcom had abused its dominant position in the markets for systems-on-a-chip ("**SoCs**") for TV set-top boxes, fibre modems, xDSL modems and cable modems.

Broadcom allegedly included exclusivity and quasi-exclusivity purchasing obligations in its contracts with six original equipment manufacturers (i.e. OEMs) operating within the various SoC markets that enabled it to reinforce its dominance. It also granted manufacturers commercial advantages such as rebates, early access to its technology and premium technical support, conditioned on the customer buying products exclusively or quasi-exclusively from Broadcom.

In October 2019, the Commission then used interim measures for the first time in 18 years to require Broadcom to end its conduct as the probe continued.

Broadcom has now proposed a range of commitments to address the Commission's competition concerns in order to resolve the dominance investigation.

At worldwide level (excluding China), Broadcom has committed:

a) Not to require or induce by means of certain types of advantages an original equipment manufacturer (OEM) to obtain more than 50% of its requirements for SoCs for TV set top boxes, xDSL modems and fibre modems from Broadcom; and

b) Not to condition the supply of, or the granting of advantages for, SoCs for TV set top boxes, xDSL modems and fibre modems on an OEM obtaining from Broadcom more than 50% of its requirements for any other of these products, or for other products which were within the scope of the interim measures Statement of Objections or decision (i.e. SoCs for cable modems, Front End Chips for STBs and modems and/or Wi-Fi Chips for STBs and modems).

At the EEA level, Broadcom committed:

c) Not to require or induce by means of certain types of advantages an OEM to obtain more than 50% of its EEA requirements for SoCs for TV set top boxes, xDSL modems and fibre modems from Broadcom; and

d) Not to condition the supply of, or the granting of advantages for, SoCs for TV set top boxes, xDSL modems and fibre modems on an OEM obtaining from Broadcom another of these products or any other product within the scope of the interim measures Statement of Objections or decision.

The commitments also include additional provisions with regard to obligations and inducements to bid equipment based on Broadcom products as well as certain commitments with regard to service providers in the EEA.

The commitments would apply for five years and Broadcom would submit an annual compliance report to the Commission. The Commission is assessing whether the commitments are sufficient to ensure that "consumers reap the benefits of choice and innovation". The Commission is seeking views from third parties over the next six weeks before taking any decision.

UK Developments

CMA provisionally allows "failing firm" defence for Amazon / Deliveroo

On 17 April 2020, the Competition & Markets Authority ("**CMA**") announced that it had provisionally cleared the investment by Amazon.com, Inc ("**Amazon**") in the online food delivery giant Roofoods Ltd ("**Deliveroo**") on the basis of the "failing firm" defence (pending the outcome of a 3-week consultation period in which it will seek the views of industry players of interested parties). The CMA will make a final determination by or before the statutory deadline of 11 June 2020.

Amazon led a funding round in Deliveroo in May 2019 totally $575 million in exchange for a 16% stake in the company. In October 2019, the CMA launched a Phase 1 review of the transaction and subsequently referred the case for a full Phase 2 review in December 2019. In referring the transaction for an in-depth review, the CMA noted its concern that Amazon's minority shareholding in Deliveroo, together with certain other rights, may give the former the ability to exercise material influence over the latter. Moreover, the CMA considered whether Amazon – which had a competing online food platform in the UK until November 2018 – could have re-entered the market as an additional competitor if the merger did not go ahead. The online food delivery market is a highly concentrated one with just three large suppliers operating in the UK: Deliveroo, Just Eat and Uber Eats. If Amazon's investment were prohibited, the CMA considered whether Amazon's subsequent re-entry into the market as an independent competitor would have encouraged competition. Though barriers to entry in the online food delivery market are high (e.g. the need to build relationships with restaurants, couriers and consumers, and to develop the necessary technology to power the logistics), Amazon would have likely been well-placed to overcome these barriers given its previous experience, financial resources and customer relationships. This could have increased the competitive pressure in the market, creating net benefits for consumers and restaurants by ensuring lower costs and faster delivery times.

The CMA further believed that the parties competed in the online convenience groceries market and were two of the largest suppliers in this market. Moreover, both parties had plans to expand in this market.

However, in the course of its Phase 2 review Deliveroo notified the CMA that the ongoing “lockdown” in the UK was having a severely detrimental effect on its financial stability, where the closure of restaurants and the resulting impact on its online delivery platform had not been offset by its attempts to ramp up its online grocery business. As such, Deliveroo informed the CMA that, without the investment from Amazon, it would inevitably exit the market. This submission was supported by evidence from the company’s financial advisers.

Given the extraordinary circumstances posed by COVID-19, the CMA determined that it would be very difficult for a business like Deliveroo to obtain the necessary funding it would need to prevent its exit from the market from any other entity than Amazon.

In light of this, the CMA was disposed to provisionally approve the merger on the basis of the “failing firm defence”. In essence, this allows for the CMA to approve a transaction if the target company is likely to exit the market due its financial difficulties and where this would be a more anti-competitive outcome than allowing the merger transaction to take place. The CMA noted that this could also mean that some customers are cut-off from online food delivery altogether, with others facing higher prices or a reduction in service quality.

Although this is only a provisional view at this stage, the CMA is clearly willing to take into account COVID-19 pandemic effects. It is the first application of the “failing firm” defence during the crisis, and may well inspire more merging parties in the UK across other industries to seek clearance for merger transactions on the basis of this defence given the impact of the pandemic on the economy.

However, any parties seeking to employ this defence will need to convince the CMA that the exit of the target would be inevitable, cause more anti-competitive harm than if the merger was allowed and that no alternative buyer / source of funding was available to prevent the target from leaving the market. This remains a relatively steep hurdle to overcome.

CMA approves Just Eat and Takeaway.com’s £6 billion merger

Just days after its provisional approval of Amazon’s investment in Deliveroo, on 23 April 2020 the CMA cleared the merger between Just Eat plc (“**Just Eat**”) and Takeaway.com N.V. (“**Takeaway.com**”). The transaction is one of the largest cross-border mergers seen in the UK in recent years. Both parties are listed companies; Just Eat floated on the London Stock Exchange (“**LSE**”) in 2014 whilst Takeaway.com concluded its IPO on Euronext Amsterdam in 2016.

Before the CMA launched its investigation, Takeaway.com had seen off a £5.5 billion hostile all-cash offer for Just Eat from Prosus, a Dutch-listed international investment unit of Naspers, the South African internet conglomerate. Prosus is Europe’s largest publicly listed consumer internet group, with a market capitalisation of more than €110 billion. Just Eat’s shareholders roundly rejected Prosus’ 800p per share offer and the deal with Takeaway.com was finalised in January.

Subsequently, the CMA chose to launch an eleventh-hour probe into the merger following concerns that it would prevent Takeaway.com, which had been an active player in the UK market before its exit in 2016, from re-entering the UK market as an independent competitor. As such, the CMA’s initial grounds for concern largely mirrored those vis-à-vis Amazon’s investment in Deliveroo. Namely, the risk that the transaction would prevent independent players from entering the online food delivery market, which may have resulted in less competitive prices and a reduction in service quality for consumers.

The CMA stated that, as there are only a small number of companies that act as the middle-man between restaurants and customers, re-entry by Takeaway.com could have given UK customers more choice – and possibly better value for money or quality of service – when deciding what to order. The increasing preference for online food delivery is seen by some as a "once in a generation shift", and there were concerns of the market becoming too concentrated.

However, after scrutinising the parties' internal documents and investigating the online food delivery market closely, the CMA concluded that there was no evidence that Takeaway.com would have planned to re-enter as an independent competitor absent the merger. As such, the CMA determined that the transaction raised no competition concerns.

Shares in the combined entity, known as Just Eat Takeawy.com, are now trading on the LSE.

CMA issues merger guidance in light of COVID-19

On 22 April 2020, the CMA took the step of issuing detailed guidance[7] as to how the regulator will approach the issue of merger reviews in light of the COVID-19 pandemic. This move from the CMA reflects its awareness of the growing challenges that the present situation is bringing to businesses and the lack of certainty or clarity in how competition regulators (not just the CMA) will approach merger reviews during these uncertain times.

Broadly, the CMA has confirmed that its overall approach to merger reviews remains the same. The established processes and statutory deadlines which it follows have not changed, and it will continue to review mergers on the same grounds. However, in light of various factors, not least the working home arrangements it has been forced to implement and the reallocation of its staff, the CMA has issued some guidance vis-à-vis some specific aspects of its general approach and how these may be affected by COVID-19:

1. **Information gathering:** Recognising that businesses will face difficulties in responding to information requests, the CMA has stated its willingness to relax the usually strict statutory deadlines to respond to any request for information ("**RFI**"). Provided businesses can substantiate the fact that they are facing difficulties linked to COVID-19, the CMA has said this will constitute a reasonable excuse for not providing information in the timeframe originally stipulated by the CMA. The CMA is therefore unlikely to impose penalties where businesses are unable to comply with statutory requests for information by the specified deadline in such circumstances. Additionally, the CMA may also "stop the clock" in merger reviews where parties are unable to respond timely to information requests.
2. **The timing of investigations:** The CMA has noted its priority to keep progressing merger reviews as quickly and expediently as possible, though it has also acknowledged that COVID-19 will, in all likelihood, delay the progress of merger reviews (not least given the aforementioned difficulties in obtaining information from companies). In an attempt to square this circle, the CMA has said that it is not, unlike other competition authorities (e.g. the Commission), asking parties to delay merger notifications. Rather, given that the 40-day Phase I review period may not be commenced if it cannot obtain third party views, the CMA will ask parties to consider whether merger filings could be postponed. The CMA has thus requested merging parties to provide as much information as possible when engaging with the regulator and to be realistic about the timings of the case. Merging parties have also been asked to update the CMA on a regular basis regarding any changes in the timing of mergers under consideration or changes in the likelihood that these mergers will proceed under current market conditions
3. **Meetings and hearings:** The CMA has clarified that all meetings will, and are, being conducted remotely via videoconferencing or telephone. This step has been taken to bring the CMA procedures into line with the UK government's policies on social distancing. Moreover, the CMA has stated that the "site visits" which typically occur during a Phase 2 review, will not be conducted in light of COVID-19. Rather, the CMA will arrange alternative opportunities to gain a more detailed understanding of the parties' businesses.
4. **Interim measures:** In light of the COVID-19 outbreak and the resulting difficulties being experienced by companies, the CMA has received numerous requests to relax its usual approach to issuing interim measures. Interim measures consist of both initial enforcement orders ("**IEOs**") and interim orders ("**IOs**"). The former are issued at the commencement of the CMA's review of a merger transaction and typically take the form of a "Hold Separate Order", which prevents any integration of the merging parties until the CMA has made a decision as to whether to allow or prohibit the merger. However, in the present climate, interim measures such as "Hold Separate Orders" may be unusually punitive for companies to abide by given, for instance, the

[7] See, the Competition & Markets Authority. *Merger assessments during the coronavirus (COVID-19) pandemic*. Published on 22 April 2020. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880570/Merger_assessments_during_the_Coronavirus__COVID-19__pandemic_.pdf. This development is a further update to the CMA's position described in Stephenson Harwood's briefing on the Impact of COVID-19 on Merger Control.

need to address operational challenges raised by COVID-19. Whilst the CMA has said that interim measures will be applied as normal and will continue to apply where they have been issued already, it has also stated that it will consider allowing derogations for parties in situations where the parties can demonstrate that it is necessary for the commercial viability of their businesses. Such derogations can be, and have been, granted swiftly. If parties wish to seek a derogation to any interim measures, the CMA has encouraged them to engage quickly and provide fully specified and reasoned evidence.

5. **The "failing firm" defence:** In a separate Annex to its general guidance on merger control in light of COVID-19,[8] the CMA has also provided clarity on its approach to employing the "failing firm defence". The CMA has reiterated that its approach to assessing mergers under this defence remains the same. That is to say, it will not necessarily be more predisposed to allow uses of the defence in light of the present economic uncertainty per se, but will assess each merger on a case-by-case basis. The criteria for assessing whether to allow the "failing firm " defence are as follows:

   a) Whether the firm would have exited the (through failure or otherwise) absent the transactions?

   b) Whether there would have been an alternative purchaser for the firm or its assets; and

   c) What the impact of exit would be on competition compared to the competitive outcome that would arise from the acquisition?

Importantly, the CMA have also clarified that it will not, for the purposes of substantive assessment of the "failing firm" defence, treat completed acquisitions any differently to anticipated ones. As such, the fact that a merger has signed and completed will not be factored into consideration by the CMA vis-à-vis its review insofar as this would make it more disposed to clear the acquisition. Indeed, a completed merger will inevitably affect the CMA's assessment of the counterfactual (the hypothetical scenario that would exist absent the merger). Only events that are not a result of the merger under review can be incorporated into the counterfactual. As such, depending on the circumstances of the merger, this may or may not be helpful for the purposes of arguing the "failing firm" defence.

In its concluding remarks, the CMA's guidance also reminds businesses that, although the UK remains a voluntary regime and there is no obligation to inform the CMA of any transaction even when the threshold tests are met,[9] there are certain costs and risks involved where a decision not to notify is made. Specifically, the CMA will impose interim measures in completed mergers, which will require the acquiring business to preserve the viability and competitive capability of the target. The CMA may also use its powers to unwind integration that took place prior to interim measures coming into force. It is therefore the case that the investigation of a completed transaction is likely to result in the acquirer incurring significant additional transaction-related costs, even if the acquisition is ultimately cleared.

Finally, the CMA recommends that businesses engage with it early on in any ongoing (or likely) merger review and to discuss what information the CMA case team is likely to require in order to conduct its assessment.

CMA issues £3.4 million in fines and secures director disqualification over the supply of antidepressant

Resulting from a long-running investigation opened in October 2017, the CMA announced on 4 March 2020 that it had issued two separate infringement decisions against four pharmaceutical companies amounting to over £3.4 million, as well as a payment of £1 million to the National Health Service ("**NHS**") and the disqualification of a director.[10]

[8] The Competition & Markets Authority. *Merger assessments during the coronavirus (COVID-19) pandemic*. Published on 22 April 2020 - Annex A: Summary of CMA's position on mergers involving 'failing firms'. Published on 22 April 2020. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880565/Summary_of_CMA_s_position_on_mergers_involving__failing_firms_.pdf

[9] In the UK, a transaction will be notifiable if: (i) the target company generates annual turnover of £70 million in the UK; and/or (ii) the combined entity would have a combined market share of 25% or more.

[10] See https://www.gov.uk/government/news/over-3m-in-fines-and-1m-for-nhs-in-cma-pharma-probe

The first infringement decision, which related to market sharing, found that King Pharmaceuticals Ltd ("**King**") and Auden McKenzie (Pharma Division) Ltd ("**Auden**") shared between them the supply of nortriptyline to a large pharmaceutical wholesaler. The two companies engaged in the concerned action of agreeing between themselves to supply 25mg and 10mg of the anti-depressant tablets respectively between September 2014 and May 2015. Consequently, the CMA has fined King £75,573. Accord-UK Ltd, which has since taken over Auden's nortriptyline business, was fined £1,882,238. The CMA has also secured that King and Accord-UK Ltd will make a £1 million payment to the NHS in conjunction with the aforementioned fines.

The second of the two investigations related to illegal information sharing between King, Lexon (UK) Ltd ("**Lexon**") and Alissa Healthcare Research Ltd ("**Alissa**"). The CMA found that the three companies were colluding between 2015 and 2017, at a time when the cost of nortriptyline was falling, by exchanging information as to the price and volume at which the King and Lexon were selling the drug at and Alissa's plans to enter the market. King and Alissa were fined £75,573 and £174,912 respectively, having admitted in September 2019 to an illegal information exchange. King's and Alissa's fines were reduced to reflect their cooperation and admission of breaking the law. Lexon, however, did not admit breaching competition law and, as a result, received a much higher fine of £1,220,383.

In addition, a director at King, Dr Philip Hallwood, who was involved in the conduct of the former's illegal activity through a separate consultancy firm of which he was sole director, has signed a legally binding undertaking which prevents him from taking on a leadership or management role at any company for a period of seven years.

Guitar maker fined £4.5 million for illegally preventing price discounts

Fender Musical Instruments Europe Ltd ("**Fender**") was fined £4.5 million by the CMA on 22 January 2020 for engaging in illegal retail price maintenance ("**RPM**") by requiring online retailers in the UK to enter into pricing policies that prevented the latter from offering discounted prices. RPM often results in consumers missing out on the most competitive prices, as retailers are all prohibited from selling below a minimum price threshold. RPM is illegal under both Article 101 of the TFEU and Chapter I of the Competition Act 1998.

The sale of musical instruments in the UK accounts for an estimated £440 million worth of sales annually, where 40% of those sales are estimated to take place online. In this case against Fender, the pricing policy extended to all online sales of Fender's UK resellers – it allowed resellers to calculate a minimum price, but prevented the resellers from offering online discount codes. The policy was also verbally communicated to resellers and updated through the circulation of price lists and follow-up calls to the resellers. There was therefore no written agreement, but the CMA noted that in the absence of such a written agreement, tacit acquiescence was sufficient to give rise to an agreement for competition law purposes. Had the policy not been in place, the resellers would have set their own prices. The policy resulted in higher prices for consumers.

The fine is the most severe the CMA has yet issued for a case of RPM and comes soon after the CMA fined Casio £3.7 million in August 2020 for a similar form of RPM vis-à-vis the online sales of its electronic pianos and keyboards.[11]

Notwithstanding the severe level of the fine ultimately imposed on Fender, the amount was reduced by 60% under the CMA's Leniency Programme after Fender admitted wrongdoing and then by a further 20% in line with an agreed settlement.

RPM is an issue being taken increasingly seriously in both the UK and the EU, where the latter issued fines to four separate companies for RPM in July 2018.[12] The CMA has issued an open letter on the subject[13] as well as tailored guidance to retailers.[14] It is also worth noting that the CMA has, at present, three

[11] See https://www.gov.uk/government/news/piano-supplier-fined-3-7m-for-illegally-preventing-price-discounts.

[12] The four companies were Philips, Pioneer, Asus and Denon.

[13] Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/620454/resale-price-maintenance-open-letter.pdf

[14] The Competition & Markets Authority. *Resale price maintenance: advice for retailers.* Published on 21 July 2016. Available at: https://www.gov.uk/government/publications/resale-price-maintenance-advice-for-retailers/resale-price-maintenance-advice-for-retailers

other ongoing anti-trust investigations into the musical instruments and equipment sector.[15]

Tesco asked to remove anti-competitive clauses from leases

It has recently come to light that Tesco has included restrictive covenants and/or exclusivity arrangements in up to 23 of its lease contracts with landlords that prevented the renting of UK property to the grocer's rivals. Such practices are prevented under the Groceries Market Investigation (Controlled Land) Order 2010 (the "**Order**"). Specifically, Tesco had:

a) Included three restrictive covenants which could have prevented other tenants from opening competing stores near Tesco outlets; and

b) Entered into / rolled over up to 20 agreements which gave Tesco exclusive rights to sell groceries in certain areas for longer than the permitted five-year period.

Both actions infringed Articles 5 and 8 of the Order respectively. The Order was implemented following a market investigation conducted by the Competition Commission (the predecessor organisation to the CMA) into the supply of groceries in the UK concluded on 30 April 2008[16]. This market investigation found, *inter alia*, the existence of restrictive covenants and exclusivity arrangements contained within the leases between large grocery retailers in the UK such as Tesco that served to distort competition in this market by creating artificial barriers to entry for smaller competitors. The Competition Commission thus highlighted this practice as one of the adverse effects on competition ("**AECs**") it identified in the UK grocery market. One of the results of this market investigation was the passing of the Order which made restrictive covenants of over five years illegal for large retailers to redress the imbalance vis-à-vis smaller market players.

The CMA had discovered the existence of one of the 23 restrictive covenants and, having alerted Tesco to its existence, Tesco subsequently identified the 22 remaining restrictive covenants from a review of its 5,354 land agreements. It was understood that these land agreements had been entered into before the implementation of the Order and subsequently renewed without ensuring that their terms were compliant. In a letter to Tesco CEO Dave Lewis, Andrea Gomes da Silva, the Executive Director of Mergers and Markets at the CMA, outlined the CMA's concern over Tesco's failure to ensure that the provisions within its land agreements were compliant, particularly given Tesco's size and resources.[17]

Tesco has now voluntarily agreed to take remedial action to address the causes behind its failure to identify the existence of the restrictive covenants and exclusivity arrangements within its leases. To that end, Tesco is:

a) Taking all steps it can to release any affected party from a land agreement term which breaches the Order;

b) Improving training for its staff on the Order, specifically about what is and is not permitted in land agreements; and

c) Requiring its external property lawyers to ensure that each new land agreement is subject to specific checks relating to compliance with the Order.

Importantly, though failure to comply with the Order is illegal, the CMA is not empowered under it to give any fines to companies that fail to comply. Rather, the CMA is limited to the ability to impose remedies. In light of this, Andrea Gomes da Silva has called on the government to expand the powers available to the CMA in this area and allow it to impose fines on infringing companies.

CMA refers FNZ / GBST to a Phase 2 review

On 30 March 2020, the CMA announced that it had concluded its Phase 1 review into the acquisition by FNZ (Australia) Bidco Pty Ltd ("**FNZ**") of GBST

[15] Synthesisers and hi-tech equipment: suspected anti-competitive agreements (Case No. 50565-4); Electronic drum sector: suspected anti-competitive agreements (Case No. 50565-5); and Musical instruments and equipment: suspected anti-competitive agreements (Case No. 50565-6).

[16] The Competition Commission. *The supply of groceries in the UK market investigation*. Published on 30 April 2008. Available at: https://webarchive.nationalarchives.gov.uk/20140402235418/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538.pdf

[17] Letter available to view at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/865854/letter_to_Tesco_14_February.pdf

Holdings Ltd ("**GBST**") and decided to refer the transaction to a full Phase 2 investigation. FNZ agreed to acquire GBST in a deal worth £220m in July 2019 and the CMA launched its initial investigation through the issue of an initial enforcement order ("**IEO**") on 22 November 2019.

The CMA has identified the potential for a substantial lessening of competition ("**SLC**") in relation to the market for the provision of software and servicing solutions for retail investment platforms. The CMA considers FNZ and GBST to be close competitors in what is a concentrated market with few other significant suppliers. Barriers to entry are high given the reluctance of customers to change suppliers and the risks involved in doing so. The CMA also found FNZ had a particularly strong position in the supply of platform tech servicing and that GBST was one of only a few rivals that exerted a competitive constraint on FNZ in this remit.

The CMA has a statutory deadline of 22 September 2020 to publish its decision as to whether it will clear (with or without conditions) or prohibit the merger.

The CMA has made increasing numbers of Phase 2 references in recent years; 7 in the calendar year 2015-2016 and 11 in the financial year 2018-2019.

CAT refuses to allow appeal over the CMA's Tobii / Smartbox decision

On 17 February 2020, the Competition Appeal Tribunal ("**CAT**") refused to allow an appeal over its decision not to reverse the CMA's prohibition of the merger between Tobii AB ("**Tobii**") and Smartbox Assistive Technologies Limited and Sensory Software International Limited (together "**Smartbox**").

Tobii acquired Smartbox in October 2018 for a total consideration of £11 million. Both parties are active in the supply of dedicated augmentative and assistive communication ("**AAC**") solutions in the UK. AAC solutions concern devices that enable people with complex speech and language needs to communicate. The parties' customers include the National Health Service, schools, charities and local authorities.

The CMA commenced an investigation into the transaction on its own initiative and issued an IEO on 28 September 2018, prohibiting Tobii from taking steps to implement the transaction. However, Tobii and Smartbox had already taken certain steps, including entering into a reseller agreement for Tobii's products in the UK and Ireland, withdrawing certain products from sale in the UK and Ireland, and discontinuing certain R&D projects. Consequently, the CMA had recourse to issue its first ever unwinding order on 28 March 2019 in light of its concerns that the extent of integration already undertaken by both Tobii and Smartbox would undermine its investigation and prejudice its ability to impose any effective remedy(ies) if the transaction was deemed to be anti-competitive. *Inter alia*, the parties were required to terminate the reseller agreement and Smartbox was forced to supply the discontinued products and to reinstate the R&D projects.

Having referred the merger to a Phase 2 investigation in February 2019, the CMA published its findings on 15 August 2019 that the acquisition would give rise to a substantial lessening of competition ("**SLC**") due to horizontal and vertical overlaps between the parties in various markets. The CMA concluded that the only way it could approve the acquisition was the divestiture by Tobii of Smartbox to a suitable purchaser within a timeframe specified by the CMA.

On 13 September 2019, Tobii filed an application to the CAT for the judicial review of the CMA's decision. Tobii submitted that it had identified "serious errors" with the authority's investigation, including the methodology it used in its market testing process and its definition of the relevant market.

In addition, on 16 October 2019 Tobii filed an application to the CAT seeking specific disclosure from the CMA of a number of documents or classes of documents that the CMA relied on during the course of its investigation on the basis that such disclosure was necessary, relevant and proportionate. Tobii alleged that the CMA had "breached its duty of procedural fairness" by refusing to provide it with the evidence on which the CMA based its findings.

Tobii argued that these documents were necessary for it to determine whether: (a) the CMA's questionnaires suffered from design flaws; and (b) the evidence received by the CMA was inherently unreliable, and on that basis to verify the reliability and lawfulness of the CMA's substantive findings on the relevant market and theories of harm relating to the alleged horizontal unilateral effects and vertical foreclosure effects. According to Tobii, these documents would indicate the insufficiency of the CMA's finding of any SLC as a result of both input foreclosure and customer foreclosure and would allow the CAT to fairly and justly determine whether the CMA's finding of an SLC due to vertical foreclosure was supported by evidence submitted by competitors.

Tobii also suggested that these documents would further demonstrate: (a) the scale of the CMA's misunderstanding (as it transpired from its decision in relation to market definition and the degree and intensity of competition faced by the merging parties); (b) that the CMA, in its approach to market definition and its substantive analysis, took into account irrelevant considerations; and (c) whether the CMA took relevant considerations properly into account.

The CMA, in turn, argued that Tobii's disclosure request was unnecessary and disproportionate.

Following a hearing which concluded on 8 November 2019, the CAT made a ruling on the disclosure request. The CAT determined that Tobii could reasonably request disclosure of some of the documents (namely, the 30 customer questionnaire responses) as these would likely assist the CAT to justly determine whether the customer evidence received by the CMA in response to its customer questionnaires was reliable. However, the CAT denied Tobii's two further disclosure requests, which related to the CMA requests for information to the parties' competitors and their responses, and an un-redacted version of a market share table and market data.

On 10 January 2020, the CAT upheld the CMA's decision to require Tobii to divest Smartbox to a suitable purchaser. Whilst the CAT annulled the CMA's finding of a risk of vertical input foreclosure, it upheld the CMA's original finding of horizontal competition concerns.

Tobii then sought permission to appeal the CAT's ruling to the Court of Appeal, arguing that the former had failed to consider the (alleged) fact that the CMA excluded other competitors and devices from its definition of the relevant market and how this would have affected the CMA's analysis. Tobii maintained that this resulted in inconsistent findings in relation to the CMA's assessment on how the companies competed with each other and the likelihood of any post-merger price increases.

In its ruling on 17 February 2020, the CAT refused to grant permission to Tobii to appeal its decision to the Court of Appeal. Tobii, the CAT argued, were merely attempting to re-argue issues of fact or judgment as opposed to a disputed point of law which, under Sections 120(6) and (8) of the Enterprise Act 2002 is the sole grounds for an appeal to the Court of Appeal in these types of merger review cases.

This latest ruling from the CAT on the Tobii / Smartbox merger brings the case to a final conclusion, with no further mode or method of appeal for the parties to explore. Tobii will be forced to divest Smartbox to a suitable purchaser, where such process will be observed closely by a monitoring trustee.

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