STEPHENSON HARWOOD

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Competition Law Newsletter

Welcome to the Q4 2020 edition of our Competition Law Newsletter. A quarterly update covering key developments in UK and EU competition law.

UK Competition Law Developments

ComparetheMarket fined £17.9 million over clauses with home insurer providers

In a landmark decision, the Competition & Markets Authority ("**CMA**") has handed down a fine for the first time over the use of so-called most favoured nation ("**MFN**") clauses.[1] The infringement decision, issued on 19 November 2020, was addressed to Compare The Market Limited ("**ComparetheMarket**") and others[2] and comes after a two-year investigation, where the CMA issued its initial Statement of Objections ("**SO**") on 2 November 2018.[3]

MFN clauses are typically imposed by platforms such as Price Comparison Websites ("**PCWs**") and limit the price at which a manufacturer or supplier can offer a product[4] through alternative sales channels.[5] Typically, MFNs take one of two forms: (i) 'wide' MFNs, where a PCW places an obligation on a supplier not to offer its product(s) at a cheaper price through any alternative PCW; and (ii) 'narrow' MFNs, where a supplier agrees not to set any lower prices for its products through its own direct sales channel than those listed on a PCW's website.

Narrow MFNs, whilst appearing to restrict competition in principle, are typically considered objectively justifiable and, indeed, necessary to PCWs' business models. The credibility of PCWs' platforms would be undermined if consumers could find cheaper offers for the same product(s) on a supplier's own website – in fact, there is an argument that suppliers could otherwise "free ride" off PCWs by allowing consumers to use them for "window shopping" prices if 'narrow' MFNs were not relied upon. By contrast, 'wide' MFNs are broadly held to restrict competition by preventing consumers from finding cheaper prices elsewhere and by removing the competitive constraint posed by rival PCWs (as well as making it more difficult for new players to enter the market).

Competition authorities have been taking an increased interest in the use of MFNs for a number of years. In September 2017, the CMA concluded a market study into digital comparison tools ("**DCTs**")[6] which found that, on the whole, DCTs were pro-competitive as, among other things, they encouraged suppliers using their platforms to compete harder by providing lower prices and a greater array of choice for consumers.[7] However, the CMA's market study also identified the use of MFNs by DCTs as one of the key areas of concern. Indeed, a separate market study by the CMA into the private motor insurance market in 2014 resulted in a subsequent prohibition over the use of wide MFN clauses in this market.[8] Similarly, the European

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[1] MFN clauses are also known as parity clauses.
[2] In full, the CMA's infringement decision was addressed to BGL (Holdings) Limited, BGL Group Limited, BISL Limited and Compare the Market Limited.
[3] See the original press release at: https://www.gov.uk/government/news/comparethemarket-home-insurance-deals-could-deny-people-better-prices?utm_source=a8f17cd4-dcf3-4e07-bab3-e898ddce3e92&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate
[4] Please note that, in this context, the term "product" can refer to a service as well as a good.
[5] The Competition & Markets Authority. *Digital comparison tools market study – Final report.* 26 September 2017. Available at: Digital comparison tools market study: final report (publishing.service.gov.uk)
[6] DCTS include all comparison sites and apps available to consumers that provide a breakdown of the different prices offered by different suppliers for the same goods or services. They therefore encompass (*inter alia*) all forms of PCWs.
[7] The Competition & Markets Authority. *Digital comparison tools market study – Final report.* 26 September 2017. Available at: Digital comparison tools market study: final report (publishing.service.gov.uk)
[8] The Competition & Markets Authority. *Private motor insurance market investigation – Final report*. 24 September 2014. Available at: https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final_report.pdf

Commission ("**Commission**") has investigated the use of MFNs in the Amazon / E-book case,[9] in which the Commission ultimately accepted binding commitments from Amazon that the latter would not rely on MFN clauses requiring publishers to offer equivalent terms and conditions to Amazon as they offered to Amazon's competitors.[10]

In relation to ComparetheMarket, the CMA provisionally concluded in its SO issued in 2018 that the former had been imposing 'wide' MFN clauses on home insurance providers using its platform which prevented them from offering cheaper prices on alternative PCWs. This provisional conclusion has now been confirmed in the CMA's infringement decision. It sets out that ComparetheMarket's use of these 'wide' MFN clauses restricted competition between both home insurance providers and other PCWs through which they sold their policies by ensuring that no cheaper prices could be found on any PCWs other than ComparetheMarket. The CMA found that the relevant insurers[11] covered by its 'wide' MFN clauses accounted for approximately 40% of sales of home insurance sales between 1 December 2015 and 1 December 2017.[12]

Furthermore, ComparetheMarket's market share was found to be over 50% during the same period, significantly more than its closest competitors.[13] ComparetheMarket's internal documents revealed the strategic importance it placed over its 'wide' MFN clauses, believing that without them it would face more pressure from its competitors. Furthermore, the CMA found that ComparetheMarket both enforced these clauses on a number of occasions and refused requests from affected insurers to remove then.[14]

This case serves as a stark warning in relation to the serious penalties companies face for the use of 'wide' MFN clauses. Saliently, the CMA specifically notes that the £17.9 million fine was so high partly so as to act as a deterrent to other companies from using such clauses. The case is also a reminder that, whilst PCWs undoubtedly play an important role in helping encourage price competitiveness, these channels can present certain risks to competition which need to be addressed.

A direct challenge to the scope of the CMA's jurisdiction

The CMA's ability to bring merger deals under its review – specifically, the application of its share of supply test[15] – is being directly challenged by Sabre Corporation ("**Sabre**") over the former's decision to block Sabre's acquisition of Farelogix, Inc. ("**Farelogix**") in April 2020.

Both Sabre and Farelogix are U.S. technology and software companies active in the global travel industry, providing Passenger Service System ("**PSS**") IT modules[16] to airlines and travel agents. Sabre is one of three major global players[17] operating a Global Distribution System ("**GDS**"),[18] which is used by travel agents to search for and sell airline tickets. Farelogix sells technology to airlines

[9] Case AT.40153. *E-book MFNs and related matters (Amazon)*. 4 May 2017. Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40153/40153_4392_3.pdf
[10] Case AT.40153. *E-book MFNs and related matters (Amazon)*. 4 May 2017. Para 159. Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40153/40153_4392_3.pdf
[11] The CMA's use of the term "insurer" in this context covers underwriters, brokers and retail partners.
[12] The Competition & Markets Authority. *Price comparison website: use of most favoured national clauses – Summary of decision*. 19 November 2020. Para 5. Available at: https://assets.publishing.service.gov.uk/media/5fb52495d3bf7f63d8c04de7/Summary_of_Infringement_Decision_-_19_Nov_2020.pdf
[13] Ibid. ComparetheMarket's closest competitors during this period were MoneySupermarket, Confused and GoCompare.
[14] Ibid.
[15] The share of supply test under the Enterprise Act 2002 (the "**EA 2002**") provides that the CMA may review a transaction if the parties concerned will have a combined share of supply in respect of any goods or services in excess of 25% in the UK (or a substantial part of the UK) post-merger.
[16] PSS IT modules are a complex set of systems that manage various tasks in the booking process, such as determining the price of tickets and the number of available seats on any given flight. So-called "Core PSS" modules are used for central reservations, inventory and departure control, whilst so-called "Non-Core PSS" modules enable airlines to offer services that are ancillary to the core booking, such as additional leg room. The Competition & Markets Authority. *Anticipated acquisition by Sabre Corporation of Farelogix Inc. – Final report*. 9 April 2020. Available at: https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf
[17] Ibid. The three largest operators of a GDS are Sabre, Amadeus and Travelport, which together account for approximately 85-95% of all GDS bookings worldwide.
[18] Ibid. GDSs are two-sided platforms serving both airlines and travel agents. A GDS receives content from an airline's PSS and from third parties (fare and flight schedule information). It then aggregates content across airlines and distributes it to travel agents.

which enables them to communicate personalised ticket types and ancillary services to customers outside of the main ticket booking, such as additional luggage, extra leg room and certain in-flight meal options ("**Merchandising Solutions**").

In order for the CMA to have jurisdiction to review a merger, one (or both) of the turnover[19] and share of supply tests must be met. Whilst it was clear that the merger did not trigger the turnover test, the CMA concluded – controversially – that the share of supply test *was* met on the basis that Farelogix effectively provided technology and Non-Core PSS IT modules to British Airways via the latter's partnership arrangement with American Airlines (to whom Farelogix supplied these services directly). On the basis of this assessment and the fact that Sabre had a share of supply to UK airlines in excess of 25%, the CMA deemed that this share of supply would be increased post-merger *(regardless of how small the increment was)*. In this way, the CMA deemed itself to have jurisdiction to review the merger.

On 9 April 2020, the CMA ultimately blocked the Sabre / Farelogix merger on the basis that it would lead to a substantial lessening of competition ("**SLC**") vis-à-vis the provision of Merchandising Solutions and the supply of information via GDSs. In regard to the former, the CMA stated that the merger would deleteriously affect Farelogix's incentive to innovate,[20] which would manifest itself though a reduced amount of consumer choice and fewer new features / upgrades. In regard to the latter, the CMA believed that, post-merger, it was likely that customers would face higher prices being directed through GDSs worldwide. Despite the parties offering remedies – which included commitments to maintain pricing and investment levels – the CMA believed these would be insufficient to address the SLCs they had identified and prohibited the merger entirely.

Sabre announced almost immediately after the CMA's prohibition decision that it would challenge the ruling and ultimately commenced a 4-day hearing at the Competition Appeal Tribunal ("**CAT**") on 24 November 2020. In essence, Sabre has argued that the CMA erred in claiming jurisdiction by artificially establishing the relevant product market in which Sabre and Farelogix were deemed to overlap in such a way that overlooked the commercial reality of the two companies' activities. Moreover, Sabre has alleged that the CMA then went one step further by wrongly deciding that Farelogix had a share in this market in the UK despite having no UK turnover and no UK business presence. Rather, the CMA had come to this view based solely on British Airways' partnership arrangement with American Airlines, which merely involved selling American Airline tickets that incorporated a flight segment operated by British Airways and a hypothetical right (which was never exercised) for Farelogix to charge British Airways directly. As such, Sabre argued that the CMA's decision to claim jurisdiction in the first instance was without merit and such action goes beyond the intent of the legislation underpinning the UK's merger control rules. Notwithstanding this (allegedly) erroneous claiming of jurisdiction, Sabre also argued that the CMA were further wrong to determine that the share of supply test was met when Farelogix's share of the relevant UK market (if it indeed had one) was extremely small and constituted a tiny increment.

The CMA, for its part, has refuted the allegation that it falsely conflated an indirect supply to British Airways as a direct one. It has also countered, in relation to the share of supply test, the assertion that it is immaterial how large or small an increment is – the only decisive factor is whether the parties would have a combined share of 25% or more post-merger, and the actual amount by which this share is increased does not matter.

The CAT's forthcoming decision in this appeal will have significant implications vis-à-vis the extent of the CMA's powers – namely, its ability to call in multinational mergers for review. The CMA has been adopting an increasingly bullish approach to its merger review powers, something that is likely to be

[19] The turnover test under the EA 2002 provides that the CMA may review a transaction involving a target with turnover of £70 million or more in the UK.
[20] The CMA stated that Sabre and Farelogix "monitor each other closely" and, as such, Farelogix's Merchandising Solutions were believed to be something Farelogix had incentive to develop as a means of competing with Sabre.

only exacerbated after the end of the Brexit transition period. In some quarters, this increasingly interventionist position is raising some concerns over the level of certainty with which parties can approach deals. If the CMA will apply its threshold tests – particularly the share of supply test – with unprecedented flexibility and in such a way that would apparently extend beyond what the legislative wording intends / allows for, this will make it more difficult in future for parties to determine whether the CMA will claim jurisdiction on any deal they are contemplating. Indeed, this fear will perhaps have only been increased by the CMA's recent publication of its revised guidance on its jurisdiction and procedure. In this revised guidance, the CMA has stated that, in applying the share of supply test, it need not necessarily relate to any "relevant economic market" and will instead focus primarily on the "commercial reality" of the parties' activities and will apply "such criteria as it considers appropriate" to identify such overlaps as there may be between the parties.[21] This would seem to indicate that the CMA intends to only increase the flexibility with which it can apply the share of supply test in future.

On this basis, it will be very interesting to see what decision the CAT ultimately reaches and whether this will curtail the CMA's approach to its jurisdictional assessment in future.

CMA publishes report looking into the competitiveness of the UK economy

On 30 November 2020, the CMA published a "State of the Union" style report into how effectively competition has been working in the UK economy. (**"Report"**).[22] Having been commissioned by the Chancellor of the Exchequer and the Secretary of State for Business Energy and Industry Strategy ("**BEIS**") in February 2020, the purpose of the Report is to use its findings to help inform and guide future public policy in this area as well as encourage wider academic and public debate. Similar cross-economy assessments of competition have recently been undertaken by national authorities in countries such as Germany[23] and New Zealand.[24]

That said, the CMA has also stressed that the Report does not amount to a market study. In other words, the conclusions it reaches in respect of any particular sector or industry are not definitive and are not intended as precedent views that will form the basis of any future investigation the CMA may take in any particular areas. Equally, unlike an official market study, there are no official remedies suggested that would then trigger a consultation period with relevant stakeholders and, ultimately, require implementation. Rather, the Report is simply a health check on the competitiveness of the UK economy with suggestions as to where further work and analysis may be useful to increase understanding. As the CMA notes, free and fair competition encourages companies to innovate, improve productivity and lower prices for goods and services which provides consumers with better deals and ultimately contributes to higher real wages across the wider UK economy.[25]

The Report's overriding conclusion is that levels of competitiveness have deteriorated in the UK since the global financial crisis in 2007/2008 and, whilst there has been some evidence of at least partial recovery since, this is still someway short of the levels experienced in the preceding period from 1998 onwards. In reaching this conclusion, the CMA examined the following:

1. Concentration and industry structure

In short, the CMA has found that the market power of leading firms has increased in the 20-year period the Report covers. Indeed, it has concluded that the average combined share of the ten largest firms in each industry[26] remained three percentage points higher in 2018 as compared with the same figures from 1998.[27]

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[21] The Competition & Markets Authority. Mergers: Guidance on the CMA's jurisdiction and procedure – Draft for consultation. November 2020. Paragraph 4.63(a)-(c). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/934592/Draft_revised_CMA2_guidance.pdf

[22] The Competition & Markets Authority. The State of UK Competition. 30 November 2020. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939636/State_of_Competition_Report_Nov_2020_Final.pdf

[23] Monopolkommission. *Trends in indicators of market power in Germany and Europe*. 2018. Available at: http://www.monopolkommission.de/images/HG22/Main_Report_XXII_Market_Power.pdf

[24] New Zealand Productivity Commission. *Competition in New Zealand: highlights from the latest data*. August 2019. Available at: https://www.productivity.govt.nz/assets/Documents/competition-in-new-zealand/6be4ffe03a/Competition-in-New-Zealand.pdf

[25] The Competition & Markets Authority. *The State of UK Competition*. 30 November 2020. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939636/State_of_Competition_Report_Nov_2020_Final.pdf

[26] The CMA has considered a wide range of industries using statistical data sourced from the Office for National Statistics ("**ONS**") including: (i) finance and insurance; (ii) wholesale and retail trade; (iii) professional and support services; (iv) manufacturing; (v) construction; (vi) information and communication; (vii) transport and storage; (viii) utilities; (ix) real estate; (x) agriculture, forestry and fishing; and (xi) mining, quarrying and utilities.

[27] The Competition & Markets Authority. *The State of UK Competition*. 30 November 2020. Paras 2.56 – 2.57. Available at: https://assets.publishing.service.gov.uk/government/uploads/syste

Dynamic measures which can counter the entrenched positions of big firms, particularly entry and exit rates, have been found to be ultimately inconclusive. The entry and exit rates of new firms has been found to be relatively stable between 1998 and 2018, but this may not necessarily denote that the various UK industries are well-functioning – it may be that new companies enter and exit regularly as they are unable to challenge incumbent firms.[28]

2. **Mark-ups and profitability**

The CMA has found that mark-ups[29] (which are generally taken by economists to be a measure of companies' market power) have risen 7% in the two decades from 1998 to 2018. However, this picture becomes less clear when taken with the additional evidence that fixed costs and returns on capital have remained flat and fallen respectively.

3. **Consumer and business survey evidence**

The data the CMA has sourced from consumers indicates that the UK has rather middling levels of performance in the markets for both goods and services. Out of 30 European States included in the report, the UK is in 11th position for overall consumer perceptions of market performance, below both Germany (5th) and France (6th).[30]

Moreover, though the Report ostensibly only covers 1998 to 2018, it has also included some provisional assessments of the impact of the COVID-19 pandemic on the competitiveness of the UK economy. Though the CMA notes that it is too early to draw definitive conclusions on this, it has still cited some worrying emerging trends, including:

- Since the start of the pandemic, around 40% of consumers are reportedly shopping around less (i.e. are buying goods/services from a more restricted number of suppliers);
- 40% of companies have postponed or reduced their plans to expand; and
- A number of sectors (such as construction, accommodation, food services, entertainment and recreation) are likely to report that the number of competitors has decreased and that a smaller number of new businesses have been created.[31]

As has been said, the CMA's Report does not indicate or suggest that any sweeping changes are required in areas such as the UK's merger control rules or the level of fines for anti-competitive misconduct (and much less does it elaborate on what exactly these changes should be). All the same, the publication of the Report at a time when the CMA is becoming increasingly assertive would seem to augur that the regulator will be more inclined to clamp down on anything that might risk restricting competition in the UK in the future.

Facebook loses its court challenge to the CMA's hold separate powers

In our *Q3 Competition Law Newsletter* we reported on Facebook, Inc's ("**Facebook**") challenge to the CMA's wide-reaching hold separate powers at the CAT. Facebook has since lost its CAT appeal.

Please see further detail included in our *Q3 Competition Law Newsletter,* but, briefly, in June this year the CMA served an initial enforcement order ("**IEO**") on Facebook and Giphy, Inc ("**Giphy**") for Facebook's completed acquisition of the latter. Facebook subsequently requested that the CMA 'carve-out' certain provisions of the IEO such that they would not apply to Facebook. However, the CMA refused Facebook's request on the basis that it did not believe it had the necessary information to reach such a decision. Facebook sought a review of the CMA's decision, filing a claim with the CAT on 26 August 2020.

By way of overview of the derogations or carve-outs Facebook requested, four of the five derogations related to: (1) human resources and physical

m/uploads/attachment_data/file/939636/State_of_Competition_Report_Nov_2020_Final.pdf
[28] Ibid.
[29] The CMA has defined "mark-up" as the ratio of the price charged for a good/service to the incremental cost to produce/provide it.
[30] The Competition & Markets Authority. The State of UK Competition. 30 November 2020. Page 65. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939636/State_of_Competition_Report_Nov_2020_Final.pdf
[31] Ibid. See also the CMA's press release at: https://www.gov.uk/government/news/cma-reports-on-the-state-of-competition-in-the-uk

security matters; (2) the resumption of pre-IEO work on upgrading Giphy's privacy protections; (3) the provision of ongoing funding by Facebook to Giphy; and (4) Facebook's continued provision of insurance cover for the Giphy business under the Facebook group insurance policies. Of these four derogation requests, some aspects of each were withdrawn by Facebook or put on hold, whilst other minor parts of the derogation requests were granted by the CMA (though some were rejected also).

The fifth derogation request – which is the subject of Facebook's application to the CAT - related to derogations to the effect that paragraphs 4(b),[32] 5(c),[33] 5(e),[34] 5(i),[35] 5(k)[36] and 8[37] of the IEO should no longer apply to Facebook and that paragraph 5(d)[38] of the IEO should apply only to that part of the Facebook business that related to the procurement or supply of particular products/services related to Giphy's business. Facebook submitted that such a derogation was proportionate and in line with the aims of the IEO, particularly in circumstances where the parties' activities did not horizontally overlap and the Giphy business generated no UK revenues. Additionally, Facebook argued that all obligations would continue to apply to the Giphy business, thereby preserving the CMA's remedial options (should the CMA find the transaction gave rise to any competition concerns) and were, in this way, eminently reasonable. This fifth derogation, however, was rejected.

Facebook put forward three grounds for its appeal to the CAT:

(a) The CMA's refusal to relax the IEO was irrational and disregarded the statutory purpose;

(b) The CMA's refusal was disproportionate; and

(c) The CMA's decision infringed the requirement of legal certainty.

For its part, the CMA argued it had been content to consider Facebook's request for derogations on the basis of relevant evidence. However, Facebook refused to engage or respond to the CMA's requests for information ("**RFIs**"), and nor did Facebook explain or justify the exemptions it sought. The CMA did not, therefore, have the necessary information to properly understand the basis of the derogations Facebook was seeking and to assess the risks of pre-emptive action as between the parties.

On 13 November 2020 the CAT issued its judgment whereby it dismissed all three of Facebook's grounds of appeal.[39] The CAT found that it was "most unsatisfactory" that Facebook had "not sought to engage" with the CMA or provide responses to the RFIs. The CAT thus determined the following:

- The CMA had "acted rationally" in deciding that it would not determine the carve-out requests without further information;
- It dismissed Facebook's claims that the IEO was disproportionate or infringed the requirement of legal certainty;
- In response to Facebook's submission that the IEO imposed a disproportionate burden and that it was commercially impracticable for Facebook to comply, the CAT said that this was not "directed towards the reasonableness of the CMA's request for further information, but instead to the breadth of the template IEO and its continued imposition" and that this was "a matter for the CMA to assess under the carve-out requests when it has the relevant information to enable it to carry out its assessment"; and
- Unless the information requested by the CMA in its RFIs was so clearly without "reasonable foundation", it was not for the CAT to "second

32 Prohibition on the transfer of ownership or control of either business to a third party.
33 Prohibition on changes to the organisational structure of, or, management responsibilities within, either business (except in the ordinary course of business).
34 Requirement for the maintenance of assets (inc. goodwill and facilities) and no disposal of the same in either business (except in the ordinary course of business).
35 Prohibition on changes to key staff of either business.
36 Requirement for reasonable steps to be taken to ensure key staff remain in either business.
37 Reporting obligations for the parties to the CMA relating to either business.
38 Requirement for the maintenance and preservation of the goods / services supplied in the UK by each of the parties (inc. nature, description, range and quality of goods / services).
39 https://www.catribunal.org.uk/cases/136641220-facebook-inc-and-facebook-uk-limited

guess what information is sufficient for the CMA to assess. In any event, the type of information which the CMA and requested appeared to the CAT to be "rational".

Facebook is currently considering its options following the CAT's decision, which reinforces the high threshold that the CMA will set for parties seeking exemptions from or variations to IEOs the CMA issues (which it will do routinely in relation to completed transactions).

JD Sports wins in the CAT

As mentioned in our Q3 Competition Law Newsletter 2020, the CMA published its Phase 2 decision on JD Sports Fashion Plc's ("**JD Sport**") acquisition of Footasylum Plc ("**Footasylum**") on 6 May 2020, finding that the transaction gave rise to an SLC in the retail supply of sports-inspired casual footwear and casual apparel at a national level. The CMA found that JD Sports and Footasylum were close competitors and, post-merger, would not face sufficient competition from other market players (such as Nike and adidas). Indeed, the CMA stated that the merged entity would have the ability and a strong incentive to deteriorate price, quality, range and services post-merger.

In this case, the CMA considered whether the merger review would change in light of the COVID pandemic and it concluded that it could not determine with sufficient certainty whether any COVID effects would change the competitive dynamics of the deal. The CMA acknowledged that the investigation and information gathered was mostly finished before the effects of COVID began. Also, all retailers in the sector would be subject to any COVID market changes and so the CMA did not consider that COVID would likely materially reduce the extent to which JD Sports and Footasylum were close competitors or significantly increase the competitive constraints exercised on the parties by their rivals.

Ultimately, a full divestiture remedy requiring JD Sports to sell Footasylum to a suitable purchaser was necessary. The CMA granted the parties a longer time than usual to find a buyer for the divestiture business given the current economic climate arising from COVID.

JD Sports decided to appeal the CMA's final decision to block its takeover of Footasylum on 17 June 2020, arguing that the assessment of the effects of the merger on competition were too broad and that the CMA had failed to gather enough information regarding the effects of COVID in the retail sector.

On 13 November 2020, the CAT found in its judgment[40] that the CMA had failed to properly gather sufficient information about the effects of COVID on the UK retail sector and fully take account of the impact of COVID on the transaction when it had time to do so. Instead, the CMA relied on information which was "of a very generalised and speculative nature". It was irrational for the CMA not to seek further evidence about the effect of COVID. Therefore, the CAT sent the case back to the CMA for reconsideration.

In particular, the CAT concluded that the CMA should have followed-up enquiries with suppliers or made direct enquiries of Footasylum's primary lender. Given the CMA had not done these things, this meant that the conclusions reached about the impact of the pandemic and the competitive constraints to the merged entity were carried out without materially important evidence necessary to draw such conclusions properly. In fact, the CAT said that the CMA disregarded evidence that showed the negative impact of the pandemic on the merging parties and wider retail sector. Such evidence also showed that social distancing measures would be more detrimental to Footasylum, than its competitors.

The CMA argued that it did not carry out these further enquiries because there was considerable uncertainty at the time around the extent and duration of COVID or its potential impact on the marketplace. The CMA also referred to its statutory timetable which made it difficult to carry out such further enquiries. The CAT dismissed these arguments. The CMA had acted irrationally in not taking reasonable steps to factor in COVID. The CMA

[40] See: 1354/4/12/20 JD Sports Fashion plc v Competition and Markets Authority - Judgment [2020] Cat 24 | 13 Nov 2020 (catribunal.org.uk)

was able to consider evidence submitted as late as end of April 2020. Moreover, it appeared that the CMA had merely "closed its mind" to the possibility that any concrete evidence on the impact of COVID was available for purposes of its merger control review.

The CAT did, however, hold that the CMA was correct to find that the merging parties were close competitors and that the deal would still result in an SLC.

On 1 December 2020, the CMA announced that it had applied for permission to appeal the CAT's judgment on the grounds that the latter had misapplied the law in reaching its decision and had not given sufficient weight to the CMA's wide margin of appreciation in its merger assessments. In a further blow to the CMA, the CAT announced on 17 December 2020 that it had refused the CMA's request to appeal. *Inter alia*, the CAT stated that any suggestion that the CAT had not sufficiently considered the CMA's margin of appreciation is a misunderstanding of its judgment. The key issue was that the CMA did not seek sufficient evidence as to the impact of COVID-19. Indeed, the conclusions the CMA came to as to the effects of COVID-19 could not have been properly drawn from the (limited) evidence such that it *did* have.

The CMA will now appeal directly to the Court of Appeal.

New Digital Competition Regime

In July 2020, the CMA published its final report following its Market Study of Online Platforms and Digital Advertising[41] ("**Market Study**") (see our previous briefing on this topic in our Q2 Competition Law Newsletter 2020). The Market Study encouraged the Government to create a new regulatory regime and regulatory body to address the market dominance of large technology companies and online platforms, such as Google and Facebook, in order to ensure a competitive marketplace where businesses and consumers are protected.

The CMA, Office of Communications ("**Ofcom**") and the Information Commissioner's Office ("**ICO**") then set up a Digital Markets Taskforce ("**Taskforce**") to build on the conclusions of this Market Study and advise the Government on how to design the new regulatory regime. Subsequently, the Government announced in November 2020[42] that it would be setting up a Digitals Market Unit ("**DMU**") within the CMA which would begin to enforce and oversee the new regime in April 2021.

On 8 December 2020, the CMA delivered the advice[43] of the Taskforce to the Government on the design and implementation of the UK's new pro-competitive regime for digital markets. The proposals are based on principles rather than on rules or outcomes. It recommends an *ex ante* regime that will apply only to strategic market status ("**SMS**") firms. This includes those firms with "substantial entrenched market power and where the effects of that market power are particularly widespread and significant".

The new regime has recommended the following three strands:

- **Code of Conduct:** A legally binding Code of Conduct that will be tailored to each company and its activities where there is evidence of potential concerns. It will consist of high-level principles, accompanied by guidance on how to apply these principles. The DMU shall oversee the code and govern how digital companies should do business and treat users.
- **Pro-Competitive Interventions:** The DMU should oversee pro-competitive interventions to address the sources of market power, encourage competition and allow other market rivals to innovate. Such intervention could include imposing interoperability requirements on technology companies and improving consumers' ability to control and share data.
- **Mandatory Merger Rules:** Implementation of a new mandatory merger notification regime with lower thresholds in order to scrutinise transactions involving SMS firms more carefully. This is on the basis that the UK's current merger regime thresholds can sometimes fail to capture acquisitions by some powerful technology companies. The CMA has said that it is likely that only a small number of digital companies will meet the test, prioritising those entities that have an annual UK revenue of over £1 billion.

The Taskforce has also recommended that the DMU should have a range of powers to monitor compliance with any Codes of Conduct and to address any concerns. Such tools could include, for instance, the ability to gather or require periodic and *ad hoc* information from SMS entities, the ability to carry out checks and reviews of practices and to hold confidential discussions with stakeholders. Where there is a significant concern, it is recommended that

[41] See: Final_report_1_July_2020_.pdf (publishing.service.gov.uk)
[42] See: Government response to the CMA digital advertising market study (publishing.service.gov.uk)
[43] See: Advice of the Digital Markets Taskforce (publishing.service.gov.uk)

the DMU should have the ability to impose interim measures, carry out formal investigations and impose significant penalties (e.g. up to 10% of the relevant entity's global turnover).

The Government will launch consultations on these recommendations in early 2021, drawing upon industry and technical expertise with the intention of legislating to establish the DMU as soon as parliamentary time allows.

This proposed digital competition regime comes at a time where new rules for online markets are also being considered and implemented across Europe. For instance, the Commission has brought forward legislative proposals for a new *ex ante* regulation regime which sets out new responsibilities for online platforms that are classified as "gatekeepers" of digital ecosystems according to specific criteria (i.e. draft Digital Markets Act and Digital Services Act). These new rules are designed to ensure technology companies and platforms behave fairly and can be challenged by new entrants and existing competitors, so that consumers have the broadest choice and the markets remain as competitive as possible open to innovations. In addition, the verticals agreement block exemption and guidelines, as well as the revised market definition notice, have the potential to address the challenges posed by digital markets and shape the future direction of EU competition law policy.

Of note, which we have captured in a separate briefing, the Government is also looking to introduce [the National Security and Investment Bill](#) ("**NSIB**") which will scrutinise deals giving rise to national security concerns. The NSIB will inevitably capture a large number of technology deals. More broadly, the NSIB heralds numerous changes which involve the imposition of significant regulatory hurdles for parties investing and/or operating in the UK – it will be important for parties to keep up to date with all these developments in the sector.

National Grid settles the last of its follow-on damages claims in power cables cartel

On 11 November 2020, it was reported that National Grid Electricity Transmission plc ("**National Grid**") had reached a settlement agreement with Prysmian S.p.A. and its subsidiaries[44] (together, "**Prysmian**") in relation to National Grid's follow-on damages claim in advance of a trial before the CAT.[45]

National Grid had brought its claim for follow-on damages in light of the Commission's 2014 infringement decision ("**EC Decision**") in respect of the power cables cartel ("**Cartel**").[46] In the EC Decision, the Commission concluded that 11 different producers of high voltage, undersea power cables had engaged in the Cartel for a period of around 10 years starting in 1999. The Cartel was a global one encompassing six European, three Japanese and two Korean power cables producers and involved the participants: (i) carving out geographic markets by agreeing between themselves to stay out of their respective territories; (ii) allocating projects according to their geographic territories and customer bases; and (iii) fixing and colluding on prices via illegal information sharing in relation to specific project bids. Prysmian received a fine of €104.6 million for its involvement, the largest of any other single participant in the Cartel.[47] In total, the Commission issued fines of €301.6 million against the 11 power cable producers and, in some cases, their parent companies.[48]

National Grid's is one of a number of follow-on damages claims in the UK against various

[44] Prysmian Construction Company Limited, Prysmian Cables (2000) Limited, Prysmian Cables & Systems Limited and Prysmian Cavi e Sistemi SRL were also joined with Prysmian S.p.A. in the claim.
[45] The settlement announcement can be viewed at: https://www.catribunal.org.uk/sites/default/files/2020-11/1340_Powercables_Order_stay_of_claim_101120.pdf
[46] The European Commission. *Case At.39610 – Power Cables*. 2 April 2014. Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39610/39610_9899_5.pdf

[47] It is worth noting that Pirelli & C. S.p.A. ("**Pirelli**") and The Goldman Sachs Group, Inc. ("**Goldman Sachs**") were held jointly and severally liable with Prysmian as the latter's parent companies and Prysmian's fine was apportioned between them.
[48] The EC Decision is a salient reminder of the risk that parent companies can be found jointly and severally liable for the misconduct of their subsidiaries, even in instances where their shareholding in the company in question is intended purely as an investment.

addressees[49] of the EC Decision. SSE plc ("**SSE**"),[50] Greater Gabbard Offshore Winds Limited ("**Greater Gabbard**")[51], Vattenfall AB ("**Vattenfall**") and Scottish Power UK plc ("**Scottish Power**")[52] have all brought their own claims against certain Cartel members who they allege have caused them to suffer direct losses as a result of the Cartel. In its own claim, National Grid accused Prysmian, ABB, NKT and Safran of charging excessive prices in relation to 109 different projects which involved National Grid's purchase of high voltage power cables in the UK and claimed £160 million in damages. Though National Gird had originally pursued a separate claim in the High Court, it later petitioned to have its claim joined with Scottish Power's given the considerable overlap in the two claims. The High Court granted this request in May 2019 and the joint claim between National Grid and Scottish Power was transferred to the CAT.

Following the confidential settlement with Prysmian, National Grid has now settled with all the defendants to its claim. Indeed, all National Grid's settlements have come in quick succession, where it settled with Safran in August 2020,[53] with NKT in September 2020[54] and with ABB in October 2020.[55] With Scottish Power having similarly settled with each of the defendants to its claim, National Grid's latest settlement with Prysmian brings their joint claim to an end before trial began before the CAT.

The joint hearing of the National Grid / Scottish Power claims before the CAT had promised the first ever use of the so-called "hot tubbing" of expert evidence in a cartel follow-on damages claim. This involves experts such as economists providing their evidence concurrently in relation to different claims where the overlapping issues between the claims are broadly similar. Defendants such as ABB and NKT had originally expressed concerns that the use of "hot tub" expert evidence would restrict the opportunity for a thorough cross-examination of each expert's views, which would in turn prejudice the defendants' right of defence. Nonetheless, the CAT had confirmed that the experts' "hot tub" evidence would proceed and it is perhaps a slightly missed opportunity, now that the claims have settled, that we will have to await another trial in future to demonstrate how effectively "hot tub" expert evidence can work in follow-on damages claims.

National Grid's settlement with Prysmian brings another chapter of this long running and highly complex Cartel to a close. However, defendants such as Prysmian continue to face ongoing damages claims from other affected parties due to their involvement in the Cartel and the full saga in relation to this Cartel is still yet to be played out.

In addition to those claims vis-à-vis the Cartel outlined above, there are also a number of other high-profile follow-on damages claims currently ongoing in the UK. One such claim relates to the Commission's infringement decision against Mastercard in 2007 over the use of its multilateral interchange fee ("**MIF**"), where a collective action led by Walter Merricks CBE ("**Merricks**") is currently attempting to recover £14 billion in damages on behalf of 46 million UK consumers – the largest claim filed in English legal history. As we recently reported, on 11 December 2020 the Supreme Court handed down a much-anticipated judgment which

[49] In full, the EC Decision was addressed to: (i) ABB AB and ABB Ltd (together "**ABB**"); (ii) Brugg Kabel AG and Kabelwerke Brugg AG Holdings (together, "**Brugg**"); (iii) Nexans France SAS and Nexans SA (together, "**Nexans**"); (iv) nkt cables GmbH and NKT Holding A/S (together, "**NKT**"); (v) Prysmian; (vi) Safran SA ("**Safran**"); (vii) Silec Cable, SAS; (viii) General Cable Corporation; (ix) Sumitomo Electric Industries, Ltd.; (x) Hitachi Metals, Ltd.; (xi) J-Power Systems Corporation; (xii) Furukawa Electric Co, Ltd.; (xiii) Fujikura Ltd; (xiv) VISCAS Corporation; (xv) SWCC Show A Holdings Co, Ltd. (xvi) Mitsubishi Cable Industries, Ltd. (xvii) EXSYM Corporation; (xviii) LS Cable & System Ltd.; and (xix) Taihan Electric Wire Co, Ltd.

[50] Scottish and Southern Energy Power Distribution Limited, SEE Services plc, Southern Electric Power Distribution Power plc, Scottish Hydro Electric Power Distribution plc and Scottish Hydro Electric Transmission plc are also attached to SSE plc's claim.

[51] SEE plc, SSE Renewables Holdings (UK) Limited, SEE Renewables Onshore Windfarm Holdings Limited and SEE Renewables Limited are also attached to Greater Gabbard's claim.

[52] SP Power Systems Limited, Scottish Power Energy Networks Holdings Limited, SP Manweb plc and SP Transmission plc.

[53] The settlement announcement can be viewed at: https://www.catribunal.org.uk/sites/default/files/2020-09/1340_NationalGrid_Consent_Order_090920.pdf

[54] The settlement announcement can be viewed at: https://www.catribunal.org.uk/sites/default/files/2020-09/1340_NationalGrid_Order_160920_0.pdf

[55] The settlement announcement can be viewed at: https://www.catribunal.org.uk/sites/default/files/2020-10/1340_NationalGrid_Consent_Order_withdrawal_of_claim_D1-D9_201020.pdf

found that the CAT had made fundamental errors of law in its refusal to certify the Merricks claim (i.e. allow it to proceed to trial). The Merricks case has now been sent back to the CAT for re-consideration and if – as appears likely – the CAT now subsequently certifies the case, it may yet herald a new era of follow-on damages claims in the UK brought on a collective basis (i.e. on behalf of a large group of small businesses and/or consumers).

As ever, the threat of follow-on damages actions represents a cautionary tale to companies vis-à-vis the risks of breaching the relevant EU/UK competition laws.

CMA publishes its updated merger assessment guidelines

Following the publication of its [revised guidance on jurisdiction and procedure] on 6 November 2020, the CMA has now issued updated guidelines on its approach to merger assessment (the "**Guidelines**").[56] With the end of the Brexit transition period now less than a fortnight away, the Guidelines give an excellent insight as to how the CMA intends to approach its merger control oversight once the "one-stop-shop"[57] arrangement with the Commission comes to an end. It is estimated that, after 31 December 2020, the CMA will receive approximately 50 additional merger filings per year, which is a significant increase to what it currently receives. Moreover, the CMA has been increasingly hawkish in recent years, both in terms of the number of transactions it has decided to review and in terms of its approach to the review process itself, where the CMA has been more willing to refer transactions to an in-depth Phase II review and even prohibit mergers where it deems it necessary. As such, the Guidelines are an excellent indication of the CMA's vision for the future merger control environment in the UK.

Principally, the Guidelines make clear the CMA's view that new technologies and markets are continuing to develop at a substantial pace and that, as a result, it needs to ensure that its approach to assessing the potential impact of mergers in the UK is as flexible[58] and holistic as possible. In this regard, the CMA has been particularly influenced by expert publications such as the Furman[59] and Lear Reports,[60] which explore the changes wrought by digital markets in particular. The CMA stresses that these changes have not introduced new theories of harm or economic principles in the field of merger control, nor have they warranted any changes to the turnover and share of supply tests (which will remain the same). Rather, they have required the CMA to consider carefully its approach to the assessment of mergers in certain areas in order to ensure that it is delivering on its duties to promote competition for the benefit of consumers.[61] Therefore, in light of this ever-evolving market landscape the purpose of the Guidelines is to provide clarity around how the CMA will approach its assessments in order that businesses considering UK acquisitions are as informed as possible.

Some of the key takeaways from the Guidelines include:

1. **Expanded guidance on when an SLC might arise**: Whilst the CMA notes that the "case-specific nature of the competitive dynamics and evidence" makes it impossible to provide an exhaustive list of factors, it has nonetheless included certain indicative scenarios where it would generally consider an SLC to arise.[62] *Inter alia*, these are where:

   a) The merger involves the market leader and the number of significant suppliers in a market is reduced from four to three;

   b) The merging firms are close competitors in a differentiated market;

   c) Absent the merger, one of the merging firms would have entered or expanded and

[56] The Competition & Markets Authority. *Merger Assessment Guidelines*. 17 November 2020. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/935593/Revised_MAGs_Nov_2020.pdf

[57] Whilst the UK remains subject to the European Merger Regulation ("**EUMR**") rules until the end of the transition period, any transaction which has an EU dimension (i.e. triggers one or both of the turnover tests under the EUMR) will be notifiable solely to the Commission despite any significant UK overlaps there may be (subject to certain exceptions).

[58] The CMA notes that the "*methodologies employed in merger analysis should not be applied in a rigid and mechanistic way*" and that, as such, it will treat each merger on its own specific facts. See para 1.12 of the Guidelines.

[59] Unlocking digital competition – Report of the Digital Competition Expert Panel (the "**Furman Report**"). March 2019. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

[60] Ex-post Assessment of Merger Control Decisions in Digital Markets – Final report. May 2019. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf

[61] The Competition & Markets Authority. *Merger Assessment Guidelines*. 17 November 2020. Para 1.4. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/935593/Revised_MAGs_Nov_2020.pdf

[62] The Competition & Markets Authority. *Merger Assessment Guidelines*. 17 November 2020. Para 2.17. Available at: https://assets.publishing.service.gov.uk/government/uploads/syste

could have been expected to become a strong competitor; and

d) A merger involves firms at different levels of a supply chain, or a merger between firms in otherwise related markets, and is expected to lead to the foreclosure of one important rival.[63]

2. **A heightened focus on parties' internal documents**: The CMA has long had a strong focus on parties' internal documents, evidenced by its increased willingness to issue notices under Section 109 of the EA 2002, which require the parties to whom they are issued to submit certain specified materials to the CMA as part of a mandatory legal obligation. The Guidelines make clear the CMA's belief that internal documents are very revealing, not just vis-à-vis the parties' intent behind the merger itself but also in terms of identifying the relevant counterfactual and the potential loss in competition the merger may trigger. Internal documents are also useful in ascertaining the level of coordination the parties may have pre-merger and, indeed, are likely to have post-merger. As such, the Guidelines indicate that the CMA will only have a stronger focus on internal documents in future.

3. **Removal of the third limb under the "failing firm" scenario**: Perhaps most interestingly of all, the CMA has mooted the possibility of removing one limb of the so-called "failing firm"[64] scenario as part of its assessment of the counterfactual. The "failing firm" scenario looks to identify whether, if the merger had not taken place, one of the parties would have exited the market. In this way, the "failing firm" scenario can be a defence for parties looking to justify the merger to the CMA, arguing that the net outcome of the merger is pro-competitive as it prevented the target leaving the market. The CMA proposes to remove one limb of this test whereby it will no longer consider how the sales of the exiting party would be re-distributed among its competitors. The fact that the CMA is considering amending this "failing firm" assessment is very noteworthy. As we reported in April this year, it was (and remains) likely that the extraordinary impact on business as a result of the COVID-19 pandemic might mean companies will increasingly look to rely on the "failing firm" scenario as a justification for their transactions. The fact that the CMA is re-considering the application of this test is therefore very interesting and is perhaps suggestive of its recent experiences in applying this test in its assessments of the counterfactual.

The CMA has now opened up the Guidelines to a consultation process which will conclude on 8 January 2021.[65] Subject to how many amendments may be introduced as a result of the consultation, it seems clear that we can only expect a tougher level of scrutiny from the CMA in regards to its merger control assessments in future.

EU Competition Law Developments

Commission continues to show intolerance over "pay for delay" agreements in latest €60.5 million fine

On 26 November 2020, the Commission fined Cephalon, Inc. ("**Cephalon**") and Teva Pharmaceutical Industries Ltd ("**Teva**") €30 million and €30.5 million respectively in relation to "pay for delay" agreements over the drug modafinil, a medicine used in the treatment of sleep disorders such as narcolepsy.[66] Cephalon (who marketed the drug under the brand name "Provigil") entered into the agreement with Teva in 2005 whereby it agreed with the latter not to launch a generic version of the drug on the EEA market in exchange for a package of commercial side-deals and some cash payments. At the time, Teva held its own patents relating to modafinil's production process and was ready to launch its own generic version – indeed, it had already launched the product in the UK at a 50% discount price to Cephalon's own brand.

"Pay for delay" agreements involve one pharmaceutical company (which holds patents in a particular drug) paying another company not to launch a generic version of the same drug on a given market with which it would then have to compete. The availability of generic drugs invariably pushes down the price for which consumers and/or other companies need to pay for it, encouraging price competition and innovation. Regulators in both the EU and the UK are taking an increasingly tough approach to pharmaceutical companies who are found to have entered into these agreements.

m/uploads/attachment_data/file/935593/Revised_MAGs_Nov_2020.pdf
[63] Ibid.
[64] Also known as the "exiting firm" defence.
[65] The consultation document is available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/935598/Consultation_Document_-.pdf
[66] The non-confidential version of the Commission's decision is not yet available, but see the Commission's press release at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2220

The Commission's most recent fine stems from a long running investigation originating from Teva's acquisition of Cephalon in 2011 in a deal that was in fact reviewed and approved by the Commission.[67] As part of its approval decision at the time, the Commission required Cephalon's "Provigil" drug to be divested given the identified overlap with Teva's own generic version of the drug. Helpfully, the merger approval decision, in addition to tipping off the Commission about the existence of the "pay for delay" agreement, also crystallised the period of infringement. Once Teva and Cephalon became (in effect) a single entity, this rendered a key term of the two companies' "pay for delay" agreement null and void, which had set out that Teva would be permitted to commence selling its generic version of modafinil in 2012 in exchange for royalty payments to Cephalon. As such, the merger between the two parties made it clear that the years of 2005 to 2011 constituted the period in which the EEA market was deprived of lower prices for the drug.

More broadly, the Commission has confirmed in this case that consideration provided vis-à-vis "pay for delay" agreements need not be limited to lump sum payments. Rather, the various commercial side deals provided by Cephalon – which included a distribution agreement, the purchase of raw materials and the granting of access to clinical data – were sufficient to constitute an effective "value transfer". This will be an important precedent in future for pharmaceutical companies who may attempt to circumvent the rules in this area by providing alternative forms of consideration to competitors in exchange for their delayed entry into a given market.

It is worth noting that the Commission has now issued fines in four separate investigations over "pay for delay" agreements. In addition to the fines issued against Teva and Cephalon over the modafinil drug, the Commission has also fined:

- The French pharmaceutical company Servier and five other generic manufacturers €427.7 million in 2014 over the blood pressure medicine perindopril;
- Johnson & Johnson and Novartis €16 million in 2013 over the painkiller fentanyl; and
- The Danish company Lundbeck and other generic producers €93 million in 2014 over the antidepressant drug citalopram.

This latest decision from the Commission has now cleared the last of its (current) ongoing investigations in this area from its desk. Many of the Commission's findings in relation to "pay for delay" have been (or are currently being) appealed by the relevant parties to either the EU's General Court or the Court of Justice of the European Union ("**CJEU**"). Indeed, the CJEU have also taken referrals from the CMA in this area. As we reported in our Q3 Competition Law Newsletter,[68] the CJEU recently confirmed the narrow interpretation of "pay for delay" agreements which led the CMA to issue fines totalling £44.99 million in the Paroxetine case – namely, that the test to be applied is whether there is a "real and concrete" possibility that, absent any agreement, a competitor would have entered the market with an equivalent product.

For its part, Teva has made clear that it intends to appeal the Commission's decision to the General Court, though this may yet be influenced by the outcome of the appeal in the Lundbeck case which is currently awaiting judgment from the CJEU (and is likely to be given in March 2021). Lundbeck's chances of success seem slim, however, after Advocate General Juliane Kokott – who also gave the underlying opinion in the CJEU's ruling in the Paroxetine case – proposed that the Commission's original fine should be upheld.

Despite wrapping up the last of its current investigations in this area, it is eminently clear that the Commission has now got "pay for delay" agreements firmly within its line of sight and will consider this a key priority area going forward. Indeed, the Commission has also launched what it has dubbed its "Pharmaceutical Strategy for Europe" which will focus on ensuring a "future proof" regulatory environment in the EU that will allow EU citizens equal access to safe and affordable

[67] Case No COMP/M.6258 – Teva/Cephalon. 13 October 2011. Available at: https://ec.europa.eu/competition/mergers/cases/decisions/m6258_1865_2.pdf

[68] See: q3-competition-law-newsletter-2020.pdf (shlegal.com)

medicines.[69] Clearly, "pay for delay" agreements will stand in diametric opposition to the Commission's aims for the pharmaceutical industry going forward. As such, it is likely that we can only expect tougher enforcement and a still more inimical attitude from the Commission over "pay for delay" agreements in future.

Amazon under attack on all sides

On 10 November 2020, the Commission issued an SO to Amazon alleging a potential abuse of a dominant position in relation to its use of data from third party sellers on its marketplace. At the same time, the Commission also opened a second antitrust investigation into Amazon's e-commerce practises regarding "Buy Box" and the Amazon Prime Offer.[70]

Use of Competitor Data

According to the SO, Amazon's market conduct distorts competition in online retail markets in violation of the abuse of dominance rules. The Commission alleges that Amazon are able to accumulate and use a significant amount of non-public data from more than 800,000 active third party sellers in the EU on its platform to its advantage in its own retail business. Such information includes, for example: (i) sellers' revenues on its platform; (ii) sellers' past performance; (iii) number of ordered and shipped units of products; (iv) number of visits to sellers' offers; and (v) consumer claims on products including activated guarantees. The data is available to employees of Amazon's retail business and flows directly into the automated systems of that business, which aggregate the data and use it to set Amazon's retail offers and strategic business decisions prejudicing other marketplace sellers. By illustration, it allows Amazon to focus its offers in the best-selling products across product categories and to adjust its offers in view of non-public data of competing sellers.

The Commission alleges that this conduct allows Amazon "to avoid the normal risks of retail competition" (i.e. risks of investing in and launching new products) and "to leverage its dominance in the market for the provision of marketplace services". In particular, it can avoid its business risks as a retailer and further strengthen its dominance in the marketplace services sector in the largest markets for Amazon (i.e. France and Germany).

It is surprising that the marketplace case has reached this stage since Amazon previously denied that it uses data from its marketplace to gain an unfair advantage.

The Commission's SO is a formal step in the procedure. Undertakings concerned by the investigation can then access the case file, submit written comments on the preliminary allegations and request an oral hearing. The SO, like the formal procedure itself, does not in principle prejudge the outcome of the investigation.

Buy Box and Prime Features

The new investigation announced at the same time focuses on whether Amazon has set certain rules on its platform to artificially favour its own retail offers as well as the offers of sellers that use Amazon's logistics and delivery services. It will cover the entire EEA (with the exception of Italy, which has launched its own investigation).

In particular, the Commission will investigate how Amazon decides which sellers to link to using its "Buy Box". By means of the "Buy Box" customers can put certain products directly into their shopping cart. This is important to marketplace retailers because the display of their offer in the "Buy Box" (i.e. being chosen as the offer that features in this box) results in them being shown as the one single seller for a chosen product on Amazon's platform, which generates the vast majority of all sales.

The Commission will also investigate whether retailers ultimately have the possibility to effectively reach "Prime customers", especially under Amazon's Prime loyalty programme. Given that the number of Prime users has been steadily increasing and they are amongst the most frequent buyers on Amazon, it is key for retailers to reach such customers. The Commission is concerned that Amazon may be unfairly encouraging retailers to use its own logistics and delivery services in order to get access to "Prime customers".

The SO and the new investigation mark a significant escalation in the antitrust scrutiny of Amazon's practices in the EEA. These cases are expected to shape the assessment of digital platform markets

[69] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *Pharmaceutical Strategy for Europe*. COM(2020) 761 final. 25 November 2020. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0761&from=EN

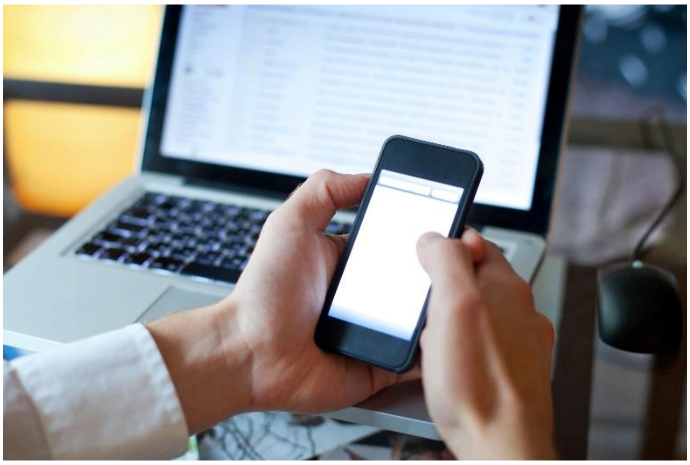
[70] Antitrust: Amazon (europa.eu)

and, as such, their respective outcomes are greatly anticipated.

Liberty Global's Telefonica deal subject to higher scrutiny with a CMA referral

Liberty Global plc's ("**Liberty**") proposed joint venture with Telefonica S.A. ("**Telefonica**") had appeared ready to navigate calm waters with a relatively straightforward EU merger clearance process. However, the parties are likely to face choppier waters now as a result of the Commission's decision to approve the referral of the merger to the CMA.

On 30 September 2020, Liberty (an international video, broadband and communications company) and Telefonica (a fixed and mobile communication network operator) formally notified the planned merger of Liberty's Virgin Media[71] and Virgin Mobile[72] with Telefonica's O2[73] to the Commission. Notwithstanding that the merger fell within the Commission's remit to review, it was open to the CMA under the EU merger control rules to request that, on account of the nature of the transaction and its potential competitive effects in the UK, the CMA was better placed to review it - subject to the Commission's consent.



On 8 October 2020, the CMA requested that the Commission refer the proposed joint venture to its jurisdiction for the CMA to undertake the merger review. The CMA submitted that:

(a) The legal requirements for the case to be transferred to the CMA's jurisdiction for review were met;

(b) Any potential impact on competition would be limited solely to UK consumers (including on several retail and wholesale telecommunications markets in the UK); and

(c) Notwithstanding that the Commission has previously highlighted its strong interest in ensuring consistency across different merger cases in the telecommunications sector – (indeed, the Commission has rarely referred telecoms mergers to national competition authorities)[74] – the CMA argued this was not relevant in this case. Specifically:

    (i) as a result of Brexit and at the end of the transition period (i.e. 31 December 2020), mergers affecting only UK territory would no longer be subject to EU jurisdiction in any event; and

    (ii) if the Commission were to reject the referral request, this would raise a "material risk" that an EU decision on the transaction would conflict with future UK reviews of telecoms deals.

On 19 November 2020, the Commission agreed to grant the CMA's request and refer the transaction to the latter for its review. On the same day, the CMA opened its formal Phase 1 investigation to assess whether the transaction would lead to an SLC within any market(s) in the UK.

Additionally, the CMA permits merging parties to request a fast-track referral to a Phase 2 review so as to preserve time, cost and resources of the merging parties (as well as the CMA's) when there is sufficient evidence to suggest a deal could harm competition. This fast-track procedure has been used in previous deals, including BT's takeover of mobile network operator EE in 2016. On 11 December 2020, the CMA accepted the parties' fast-track referral request and commenced an in-depth Phase 2 review. Importantly, the Commission's referral of the deal to the CMA clearly increases the risk the parties will face, both in securing any unconditional (i.e. no remedy) merger clearance and also in attempting to meet their own deal timetable (whereby the parties had sought to close the deal by mid-2021). Certainly, the CMA will be focused on the following:

- The CMA has already outlined a number of objections to the deal, in particular:
  - That the merged entity could have the ability and incentive to restrict the supply of mobile services to mobile virtual network operators (which do not own their own network

[71] A telecommunications company.
[72] A mobile virtual network operator.
[73] A mobile network operator.

[74] For example, in October 2015, the CMA issued a request for the Commission to refer another Telefonica transaction, the Three/O2 merger, to the CMA for investigation but the Commission ultimately rejected the CMA's referral request.

infrastructure) and, instead, piggyback on the networks of rivals;

- That the merged company could limit the access of rival mobile operators to Virgin Media's 'backhaul services'; and
- In addition to these vertical effects, the CMA has warned that the deal could lead to higher prices and less choice or innovation by strengthening O2's position as one of the UK's largest mobile operators.

The CMA has shown an increased assertiveness in recent merger reviews and in its prohibition decisions and, against this background, the CMA is expected to, at a minimum, give lengthy and intense scrutiny to the deal.

Finally, it would not be unwarranted to assume that the CMA will take this opportunity to flex its "post-Brexit muscles". In other words, the CMA will seek to demonstrate to businesses the high thresholds it will ask them to meet such that it will be persuaded that a deal raises no competition concerns, given the criticism it faced for being "too easy" on the BT/EE transaction it cleared in 2016.

Liberty and Telefonica maintain that the transaction is pro-competitive and that there are "virtually no competitive issues at all" with the deal. The CMA will have 24 weeks (subject to a possible extension of 8 weeks) for its Phase 2 investigation, by which time it will confirm as to whether or not it agrees with this assessment.

Qualcomm's challenge to its abuse of dominance fine set to offer guidance on the rules around rebates and exclusive business arrangements

Qualcomm, Inc. ("**Qualcomm**") and the Commission are set to battle it out at a hearing in February 2021 over the near €1 billion fine the Commission issued in 2018 to Qualcomm for abusing its dominant position in long-term evolution ("**LTE**") chipsets for smartphones.[75]

In January 2018, following a two-year investigation, the Commission imposed a €997 million fine on Qualcomm, an American chip maker whose technology underpins much of the world's mobile phone industry, for abusing its dominant market position in breach of the competition rules. The Commission determined that Qualcomm had attempted to squeeze out competitors from the market for LTE baseband chipsets by preventing its rivals from competing.

By way of background, Qualcomm is the world's largest supplier of LTE baseband chipsets, though there are other chip manufacturers active in this market. In particular, Intel Corporation ("**Intel**"), the largest supplier for chipsets used in computers, has tried to challenge and compete with Qualcomm for customers. In 2011, Qualcomm signed an agreement with Apple, committing to make significant payments to Apple, Inc. ("**Apple**") on condition that the company would exclusively use Qualcomm chipsets in its 'iPhone' and 'iPad' devices. The agreement made clear that Qualcomm would cease these payments if Apple commercially launched a device with a chipset supplied by a rival.

Further, in the course of the Commission's investigation, internal documents demonstrated that Apple had given serious consideration to switching part of its baseband chipset requirements to Intel but that Qualcomm's exclusivity condition was a material factor as to why Apple decided against doing so. In September 2016, when the agreement was about to expire and the cost of switching under its terms was limited, Apple began to source part of its baseband chipset requirements from Intel.

In determining that Qualcomm had abused its dominant market position the Commission held that:

(a) Qualcomm induced Apple not to purchase LTE baseband chipsets from rivals and thereby prevented rivals from competing by making "significant payments" to Apple, amounting to billions of US dollars for over a five-year period;

(b) Apple was a "key customer" and these payments were not just reductions in price - they were made on the condition that Apple would exclusively use Qualcomm's baseband chipsets in all its iPhones and iPads' – in effect, that Apple would not buy from Qualcomm's competitors;

(c) Ultimately, this meant that no rivals could practically or effectively challenge Qualcomm in this market, regardless of how good their products may have been. In this way, "Qualcomm's behaviour denied consumers and other companies more choice and innovation"; and

(d) This conduct cemented Qualcomm's market dominance in the global market for LTE

[75] Case AT.40220 – Qualcomm (Exclusivity payments). 24 January 2018. Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40220/40220_2702_4.pdf

baseband chipsets over the period investigated (i.e. between at least 2011 and 2016) with more than a 90% market share for the majority of this period.

In response to the Commission's findings, Qualcomm said it was "confident" that the agreement with Apple "did not violate EU competition rules or adversely affect market competition" and that it would appeal the Commission's decision. The three-day hearing where Qualcomm will be seeking to overturn the significant fine is currently set to run before the EU's lower-tier General Court from 2 – 4 February.

The hearing will be much anticipated from the perspective of other large technology operators as well as competition practitioners, all of whom are hoping that the EU judges will provide clarity and guidance around how rebates and other exclusive business arrangements may give rise to competition concerns - and where they will be permissible.

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