Q2 2020

Competition Law Newsletter

Welcome to the Q2 2020 edition of our Competition Law Newsletter. A quarterly update covering key developments in EU and UK competition law.

EU Developments

Facebook challenges the EU Commission's requests for information ("RFIs")

Facebook has commenced a legal action on 15 July 2020 against the European Commission ("**Commission**") in the EU's General Court in response to what it claims are excessively broad probes into its affairs which threaten the privacy of its employees. Additionally, Facebook is seeking an interim injunction against the Commission that prevents it from collecting the information requested or taking enforcement action against Facebook for not complying with the RFIs.

The Commission is currently undertaking a two-pronged investigation into Facebook's operations, with one evaluating the effect on the digital advertising space caused by its 'Marketplace'[1] platform and the other assessing its methods of gathering data from its users. These investigations, commenced in June 2019, have been prompted by such events as the Cambridge Analytica scandal, in which Facebook was accused of allowing its users' data to be passed on without the latter's consent, and form part of the Commission's increasingly hawkish stance vis-à-vis big tech and the digital marketplace.

However, the Commission's latest RFI has been met with resistance by Facebook, which claim that it is excessively broad in nature and captures much information that is both irrelevant to the former's investigation and highly sensitive to individual Facebook employees, such as private financial documents, medical records and information on wider family members. Facebook's Tim Lamb has stated that, even if it is successful in limiting the breadth of the RFI, it still expects to provide hundreds of thousands of documents to the Commission, if not more.

This is not the first time that the Commission has faced resistance over the extent of its RFIs. On 13 June 2017, Qualcomm lodged an appeal with the General Court over a Commission decision relating to an RFI issued in the Commission's investigation into Qualcomm's alleged predatory pricing in the electronic chip market. Having refused to respond (at least in full) to the RFI, the Commission issued a decision to legally compel Qualcomm to do so. In the subsequent hearing, despite arguing (*inter alia*) that the RFI went beyond what was necessary for Qualcomm to provide and imposed an unreasonable timeframe in which to respond given the volume of work involved in doing so, the General Court dismissed the claim in April 2019.[2] The Commission, the General Court determined, had abided by the conditions around the issue of RFIs set out in Article 18 of Regulation (EC) 1/2003[3] and, as such, the RFI was lawful. The case did, however, expand upon the provisions of Article 18 by further establishing the parameters around which the Commission may issue RFIs. Firstly, the RFI must be limited to eliciting what information is necessary[4] to the Commission's investigation (i.e. there must be a link between the information requested and the alleged infringement) and, secondly, the party(ies) must be permitted to comment on any new matters of fact or law that arise from any RFI response.

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[1] Launched in 2016, 'Marketplace' is a platform provided by Facebook for users whereby they may buy and sell goods between themselves.

[2] See full text of decision at: http://curia.europa.eu/juris/document/document.jsf?docid=212829&text=&doclang=EN&part=1&occ=first&mode=LST&pageIndex=0&cid=729897

[3] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. See: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=EN

[4] It should be said that the determination as to what is 'necessary' falls within the Commission's powers of discretion.

The Qualcomm precedent is thus likely to set a high bar for Facebook in its efforts to challenge its own RFI. RFIs serve as important weapons in many regulators' armoury, and the Commission is no exception. Any verdict in Facebook's favour will be something of a historic victory, even if it ultimately turns out to be a Pyrrhic one in its ongoing dealings with the Commission.

Google's takeover of Fitbit sent for a Phase II review

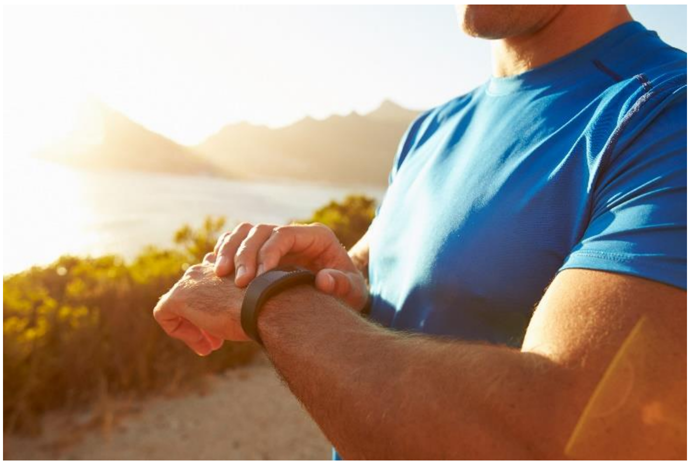
In November 2019, it was announced that Google had agreed to acquire Fitbit, Inc. ("**Fitbit**") in a deal worth US$2.1 billion. Fitbit manufactures watch devices that track its users' fitness and other related health data, providing real-time and ongoing feedback on users' exercise programs and lifestyle patterns.

The deal immediately raised considerable concerns from regulators, industry stakeholders and consumer groups alike over the amount of personal data (specifically health data) that the internet giant would have access to should the acquisition come to fruition. There have been burgeoning calls for some time among regulators and politicians for a tougher stance to be taken against data harvesters like Google and for their reach to be curtailed.

In May 2020, the European Consumer Organisation, BEUC, issued a lengthy statement calling upon the Commission to scrutinise the deal very carefully. Describing it as an important test case for the Commission in the realm of digital markets, the BEUC expressed serious concerns in relation to the data Google would have access to, stating that the latter would "*have every incentive and, indeed, unique ability to use this data to strengthen its already dominant position in multiple markets, potentially significantly harming competition and thereby reducing consumer choice (including degrading data privacy options), limiting innovation and raising prices*".[5]

Google filed the merger with the Commission on 15 June 2020.[6]

On 13 July 2020, Google offered a remedy solution to the Commission, proposing to agree to a 5-year restriction on any use of Fitbit's data to target advertisements through its platform in exchange for a Phase I approval. In so doing, Google offered to cordon off certain data collected from Fitbit in a so-called "data silo", ensuring that it could not be used during this 5-year period. The effect of the remedy offering in the first instance was to extend the Phase I review clock until 4 August 2020.



However, the Commission did not ultimately consider Google's proffered commitment to be sufficient to address its concerns, and on 4 August 2020, confirmed that it was referring the transaction to a full Phase II review. Google's commitment was rejected on the basis that its "data silo" would not cover all data to which it would have access to post-merger and such data that it would have access to would be available for its advertising purposes. In making the Phase II reference, the Commission cited strong concerns over the effect of the merger on Google's entrenched market position in both search advertising[7] and display advertising[8], in addition to the aforementioned concerns over Google's access to significant quantities of Fitbit users' health data.

The Commission now has until 9 December 2020 to make a final decision on the transaction.

Commission launches review into the effect of foreign subsidies on the single market

On 17 June 2020, the Commission launched a new White Paper[9] entitled "Levelling the Playing Field as regards Foreign Subsidies". It is aimed at strengthening the EU's State aid regime to address what it sees as the potentially (and increasingly) distortive risk and unfair advantage that foreign subsidies (i.e. subsidies provided by non-EU Member

[5] BEUC, the European Consumer Organisation. Google-Fitbit merger: Competition concerns and harm to consumers. 13 June 2020. Available at: http://www.beuc.eu/publications/beuc-x-2020-035_google-fitbit_merger_competition_concerns_and_harms_to_consumers.pdf
[6] Case No. M.9660. See https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9660
[7] Search advertising is the process whereby sponsored ads are provided in response to users' internet search queries.
[8] Display advertising is the process in which static or video ads are displayed alongside the content a user is interested in.
[9] The European Commission. White Paper on levelling the playing field as regards foreign subsidies. 17 June 2020. Available at: https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf

States) given to companies that operate within the EU bloc have on the wider single market.

The EU has long had a clear and robust position on any internal State aid provided by Member States to European companies that lack objective justification and risk distorting the ideal of the 'level playing field' sought by the single market. However, the State aid rules do not necessarily apply to support given by non-EU States to beneficiaries active in the EU. This marks the first time that the EU has sought to sharpen its regulatory tools to address any imbalances (perceived or otherwise) that could be caused by the actions of non-EU Member States to companies that operate within the bloc.[10] It is also noteworthy that the White Paper has been launched off the back of a enormous raft of State aid measures that have been issued by governments across the EU in wake of the COVID-19 pandemic.

The most equivalent laws the EU currently have to the proposed State aid amendments concern anti-dumping, which prevent non-Member States flooding the European market with foreign subsidised exports that are significantly cheaper than their counterparts in the Single Market, the effect of which may be to distort competition and negatively affect domestic European companies active in the same markets.

The aim of the White Paper is to launch a "broad discussion" with EU Member States, industry and societal stakeholders, researchers and the general public.[11]

The White Paper puts forward three solutions to the issue of foreign subsidies, called "**Modules**", which are as follows:

1. **General Instrument to capture effects of foreign subsidies (Module 1)**

   Under Module 1, the Commission (and relevant Member State authorities[12]) would be able to conduct a review on the effect of any foreign subsidies granted to companies active in the EU. Information leading to such a review may stem, for instance, from market operators and/or industry stakeholders active in the bloc.

   Any review would commence with a preliminary assessment to see whether there is indeed any evidence of a foreign subsidy that could affect the internal market. Following this preliminary assessment, the case could be closed or could be referred to a full in-depth review. During an in-depth review, the Commission (or relevant national authority) would for instance have powers to conduct site visits and request information from the parties. Should any in-depth review conclude that a foreign subsidy exists which has (or has the potential to cause) a distortive effect on the internal market, the Commission or relevant national authority would then be able to impose remedies to redress such distortions.

   These remedies would, under normal procedures in State aid cases, usually involve the compulsory reimbursement of the subsidy to the donor in question. However, the White Paper notes that it would likely be difficult in practice to ensure that any subsidies are paid back to the non-EU Member State or related foreign entity that bestowed it. A non-exhaustive list of suggested redressive measures include:

   - Forcing the undertaking in receipt of foreign subsidies to divest of certain assets;
   - Prohibiting certain investments;
   - Blocking the proposed acquisition;
   - Compelling the undertaking in question to license what it has gained as a result of foreign subsidies on fair, reasonable and non-discriminatory ("**FRAND**") terms;
   - Prohibiting of a specific market conduct linked to the foreign subsidy;
   - Requiring the publication of certain R&D results, in a way that allows other undertakings to reproduce them; and
   - Ordering redressive payments to the EU or to Member States.

   The White Paper suggests that subsidies below a certain threshold (€200,000 is suggested) would be immune from any such scrutiny given that it would be unlikely to have any distortive effect. Equally, there are a number of identified categories of foreign subsidies that are deemed to be more likely to merit a review.[13] However, the

[10] It should be noted as well that the new proposed amendments to state subsidies would apply to parent undertakings of companies within the EU, even if the former are domiciled outside of it.
[11] The European Commission. White Paper on levelling the playing field as regards foreign subsidies. 17 June 2020, p 4. Available at: https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf
[12] Member State authorities would be able to review a foreign subsidy where the effect of it solely relates to that Member State alone.
[13] The forms of subsidies deemed likely to require a review are: (i) subsidies in the form of export financing; (ii) subsidies to companies in financial difficulty; (iii) subsidies whereby a national government guarantees the debts and/or liabilities of undertaking without limitation to their amount or duration; (iv) subsidies in the form of tax reliefs outside of general measures already in existence; and (v) foreign subsidies directly facilitating an acquisition of an EU company.

White Paper makes it clear that even if foreign subsidies fall outside of these categories there may still be distortive effects on the market.[14] In these cases, the White Paper states that foreign subsidies must be examined more closely in order to ascertain whether there is any distortive effect on the single market and, in making a determination, a list of the following non-exhaustive indicators should be considered:

- The relative size of the subsidy in question;[15]
- The situation of the beneficiary;[16]
- The situation on the market concerned;[17]
- The market conduct in question;[18] and
- The level of activity in the internal market of the beneficiary.[19]

If it is found that a foreign subsidy has been made which is capable of producing a distortive effect in the internal market, but such foreign subsidy may yet have a positive impact on the internal market or be permissible under public policy grounds, a test should be applied whereby any distortion is assessed vis-à-vis such potentially positive effect to determine whether the latter outweighs the former (the "**EU interest test**"). The EU interest case would incorporate such factors as the EU's public policy objectives[20] and general consumer interests to determine whether a foreign subsidy creates a net positive outcome. If, in applying the EU interest test, it is found that any foreign subsidy is sufficiently mitigated by its positive impact then the ongoing investigation would not need to be pursued further.

2. Foreign subsidies facilitating the acquisition of EU targets (Module 2)

Module 2 aims to prevent the provision of any advantage to EU companies looking to acquire others within the bloc via the grant of foreign subsidies which would enable such acquisitions. The White Paper notes that a distortive effect may be created in this way through: (i) directly providing a subsidy which is explicitly linked to a specified acquisition; or (ii) indirectly increasing the financial strength of an acquirer through a subsidy which serves to facilitate a specified acquisition.

The Module proposes an *ex ante* review of acquisitions where foreign subsidies are involved under a mandatory notification system if proposed acquisitions meet certain thresholds (which have not as yet been determined). Unlike Module 1, the Commission only would review a transaction under Module 2. The review system would comprise a mandatory notification requirement followed by a standstill period in which the transaction would be prevented from closing during an initial review period. At the end of the standstill period, the Commission would either: (i) approve[21] the transaction and allow the parties to close the transaction, or (ii) initiate an in-depth review. If an in-depth review is launched, the standstill period would be prolonged until such review is concluded. If an in-depth review determines that there are any substantive issues in a transaction, the same redressive measures as outlined under Module 1 would in

[14] Such distortive effects may include, for example: (i) causing less efficient operators to grow and increase their market share at the expense of more efficient operators that do not receive such subsidies; (ii) resulting in those operators receiving foreign subsidies being able to offer their goods or services more cheaply than their competitors; and (iii) allowing the beneficiaries of foreign subsidies to outbid their competitors who may in fact be more efficient when it comes to the purchase of goods or the acquisition of undertakings.

[15] The White Paper states that the higher the amount of a subsidy in relative terms, the more likely it is to have a negative impact on the internal market

[16] The White Paper states that the larger a beneficiary, the more likely that the subsidy causes distortions.

[17] According to the White Paper, subsidies to beneficiaries active in markets with a high degree of concentration are more likely to cause distortions than others. Likewise, subsidies in fast-growing high-tech markets may be more likely to cause distortions.

[18] There are some conducts that might cause more concerns than others, for instance outbidding in acquisitions or distortive bidding in procurement procedures.

[19] The White Paper argues that subsidies granted to undertakings with limited activity in the internal market are less likely to cause distortions in the internal market. Equally, however, it states that consideration should be given as to whether the beneficiary in question has privileged access to its domestic, which may lead to an artificially competitive advantage that could be leveraged in the internal market.

[20] These include: (i) creating jobs; (ii) achieving climate neutrality and protecting the environment; (iii) digital transformation; (iv) security; (v) public order and safety; and (vi) resilience.

[21] It is important to note that any approval of acquisitions under Module 2 is separate from any merger control or FDI review.

principle apply *mutatis mutandis* under Module 2.[22]

In regards to what sort of acquisitions may trigger a review under Module 2, the same criteria and list of factors as under Module 1 will be considered. Equally, the EU interest test will be applied to ascertain whether the acquisition can be approved or otherwise.

3. Foreign subsidies in public procurement (Module 3)

Module 3 proposes amendments to the EU's rules on public procurement. Its intention is to prevent any EU entity in receipt of a foreign subsidy from gaining an unfair advantage in winning public procurement contracts. For example, foreign subsidies may allow entities to undercut their rivals with lower bids for contract awards.

The White Paper thus proposes a mechanism whereby bidders would mandatorily notify the relevant contracting authority in instances where they have received financial subsidies from non-EU Member States.[23] This would require the relevant parties to self-assess whether such a notification was necessary. As such, in recognition that relying on parties to self-assess would risk errors or outright avoidance, the White Paper proposes that there should be strict deterrents in place to compel parties to self-assess accurately. Such deterrents might include significant fines and even exclusion from a bidding process or termination of an ongoing contract. Moreover, third parties and competitors would be entitled to inform contracting authorities where they consider a notification should have been made.[24]

Upon receipt of such notification, the contracting authority would pass on the information to either the Commission or relevant Member State regulator. As under Modules 1 and 2, there would be an initial review followed by an in-depth review if deemed necessary. During both review periods, the contracting authority would be prohibited from awarding the contract in question to the party being reviewed.

If, at the end of an in-depth review, it is found that a bidder has received a foreign subsidy which has distorted the public procurement procedure, the bidder would be removed and their bid discounted. The same bidder may also face being excluded from future procurement procedures for a maximum period of 3 years.

A final point to note is that the new proposed regime on foreign subsidies is intended to be complimentary to the existing merger control regimes and, indeed, the impending FDI screening regulation which is due to come into effect in October 2020. The latter particularly will likely be bolstered to reflect the suggestions put forward in the White Paper.

This move from the Commission is an ambitious re-evaluation and recalibration of its existing regulatory tools. The White Paper consultation will last until 23 September 2020 and it is likely that a great deal of feedback will be received on the proposals. Should the Modules set out in the White Paper be adopted in their present or modified form, it would represent an added layer of complexity for foreign investors into the EU.

Protectionism has crept up the agenda and given Covid19, this has only exacerbated concerns as to the vulnerability of economies and businesses across the EU. It will be interesting to see if these proposals do eventually materialise into legislation.

Commission settles first price purchasing cartel

On 14 July 2020, the Commission fined Orbia, Clariant and Celanese a fine of €260 million for conspiring to lower the price paid for ethylene, whilst Westlake Chemical avoided a €190 million fine as a result of securing immunity because it blew the whistle.[25]

This is the first time that the Commission is penalising a purchasing cartel in the chemical industry since its 2006 Fining Guidelines. Margrethe Vestager explained that the EU's competition rules "*not only prohibit cartels related to coordination of selling prices, but also cartels related to coordination of purchasing prices*".

From December 2011 to March 2017, the four companies coordinated their negotiation strategies and exchanged price-related information to influence the monthly benchmark price of ethylene in Belgium, France, Germany and The Netherlands. The benchmark figure impacts the month-to-month price of ethylene and was used as part of the pricing

[22] There may, however, be some differences in the redressive measures imposed under Modules 1 and 2. For instance, redressive payments and transparency obligations may, in practice, be less likely to be effective redressive measures under Module 2 as it is more likely that remedies under Module 2 will focus on structural remedies.

[23] There is a suggested limitation period of 3 years prior to the bidding procedure for any foreign subsidies to be considered under Module 3.

[24] Such notifications from third parties or competitors would need to be substantiated with prima facie evidence.

[25] The Commission's press release can be viewed at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1348

formula in certain long-term supply agreements in these EU Member States.

Interestingly, as the cartel related to the purchase and not sale of ethylene, the Commission used the value of each company's purchases in the EU to calculate its fines. However, those figures would have been lowered as a result of the cartel behaviour and so the Commission increased the fine imposed on each of the companies by 10% in order to reflect the economic impact of the cartel. The Commission, however, agreed to reduce the level of the fine by the same amount because the companies agreed to settle.

The Commission has another ongoing purchasing cartel in the chemical sector which it opened in 2018 after raiding styrene monomer companies. Similarly, a number of national competition authorities are also investigating these types of cartel, such as Germany (purchasing cartel in steel for car manufacturing) and The Netherlands (purchasing cartel in the agricultural sector).

Purchasing cartels are more difficult to enforce because of the pro-competitive effects that arise from buyers driving prices down, but it is a fine line between a lawful purchasing group and a buying cartel.

Commission approves Alstom/Bombardier deal

On 31 July 2020, the Commission approved Alstom's €6.2 billion acquisition of Bombardier's rail equipment division, subject to a significant divestment package which addressed the Commission's concerns in the markets for very high-speed trains, mainline trains and mainline signalling.[26]

The divestments include:

- Bombardier shall divest assets held in its joint venture with Hitachi to co-develop the Zefiro V300 model, one of the world's fastest passenger trains; and
- Alstom will divest its mainline Coradi Polyvent train model used for regional and intercity journeys in Europe. It will also sell a production facility in France, its mainline Talent 3 train model and part of a production facility in Germany.

Alstom and Bombardier have also agreed to offer behavioural remedies, including a commitment to supply legacy on-board unit signalling systems to Dutch infrastructure ProRail and other signalling competitors. Alstom has also promised to preserve its joint bid with Hitachi for the construction of the state-of-the-art High Speed 2 railway line project across the UK.

These are significant divestments allowing other rail market operators to buy these assets which is considered very rare in the industry. The Commission has not imposed an upfront buyer remedy on the parties in light of the currently coronavirus affected economy and so it awaits to be seen which entity shall purchase these assets.

The clearance of this merger in Phase I has allowed the merging parties to become the world's second largest train manufacturer followed by China's CRRC.

The deal is scheduled to close at the end of 2020 and also requires merger control approval in several other countries. The parties have notified the deal in 14 jurisdictions, including US, Canada, Brazil, Australia and China.

This is one of the first very complex merger control investigations carried out by the Commission in a very timely manner and entirely from home given the Covid19 pandemic.

UK Developments

CMA finally clears Amazon's investment in Deliveroo

On 4 August 2020, the CMA confirmed its clearance of the US$575 million investment by Amazon.com, Inc ("**Amazon**") in Roofoods Ltd ("**Deliveroo**") over a year after the deal was announced.[27]

[26] The Commission's official press release can be viewed at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1437

[27] The CMA's final report is available at: https://assets.publishing.service.gov.uk/media/5f297aa18fa8f57ac287c118/Final_report_pdf_a_version_-----.pdf

Amazon led the US$575 million funding round in Deliveroo in May 2019[28]. The CMA subsequently launched a Phase I review in October 2019 and full Phase II review in December 2019. At the time, 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 in the UK is a highly concentrated one with just three large suppliers operating in the UK: Deliveroo, Just Eat and Uber Eats. The CMA thus considered whether it was likely Amazon would have re-entered the market if the merger was prohibited[29] and, if it did, whether this would have a positive effect on competition.[30]

In spite of these concerns, the CMA decided on 17 April 2020 that it would provisionally clear the transaction on the basis of the "failing firm defence". The CMA was persuaded by Deliveroo's submissions that the nationwide lockdown was having a devastating effect on its financial stability and, without Amazon's investment, it would almost inevitably exit the market. The closure of restaurants and the resulting impact on Deliveroo's online delivery platform had not been offset by its attempts to ramp up its online grocery business. On the basis of these submissions that Deliveroo faced inevitable insolvency absent Amazon's investment, the CMA stated in its provisional findings that the transaction was not expected to result in an SLC in the online delivery market or the market for online convenience groceries ("**OCG**") in the UK.

However, this clearance was conditional and on 10 June 2020 the CMA announced that, due to its evaluation of Amazon's and Deliveroo's internal documents and comments received from third parties, its review of the deal would need be extended by a further 8 weeks. Among the third parties to make submissions on the CMA's provisional findings was Just Eat, which expressed "doubts over the credibility of the exiting firm scenario put forward by Deliveroo as it believes that there were alternative avenues available to it to raise funding".[31]

After seeing fit to re-examine the deal again, the CMA made a further U-turn by provisionally providing clearance for a second time on 24 June 2020. This second provisional clearance came with a revised deadline of 6 August 2020 for the publication of the final report, which was eventually made on 4 August 2020.

The noteworthy backtracking and prevaricating from the CMA over its review of the Amazon / Deliveroo deal might perhaps raise concerns that the regulator is yet to get to grips with the task of monitoring the tech and digital marketplaces. Certainly, it may give pause for thought for parties operating in similar spaces to make acquisitions in light of the rather opaque way the CMA views such deals and its similarly opaque methods for assessing them. Following the publication of its final report on online platforms and digital advertising, this is clearly an area of focus for the CMA but its preparedness for reviewing these areas are, perhaps, still in a nascent stage and in need of refining before it can do so effectively.

YPO / Findel deal referred to a Phase 2 review

On 30 June 2020, the Competition & Markets Authority ("**CMA**") referred the acquisition by the Yorkshire Purchasing Organisation ("**YPO**") of Findel Education Limited ("**Findel**") in a deal worth £50,000,000 for an in-depth Phase 2 review.[32]

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28 Amazon's investment was made in return for a 16% stake in Deliveroo.
29 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.
30 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.
31 Just Eat's submissions on the CMA's provisional findings can be viewed at: https://assets.publishing.service.gov.uk/media/5ec27cc1e90e071e31153684/Just_Eat_Takeaway.com_N.V_180520.pdf
32 See full decision at: https://assets.publishing.service.gov.uk/media/5f1ea9cfe90e074567f1f843/Decison_YPO-FED_FINAL_Official_-_PDF_A_-.pdf

YPO is a public sector buying organisation consisting of 13 different local authorities who control it in equal parts.[33] Among its various operations, YPO operates public procurement contracts for the supply of educational resources[34] to learning establishments. Findel supplies educational and related resources to various educational institutions including nurseries, primary and secondary schools, both in the UK and internationally (indeed, Findel operates in 130 countries).

YPO has stated that its commercial rationale for seeking the acquisition is to consolidate product sourcing and premises, share mutual expertise and technology, cut transport costs and reduce overheads, among others. The Studio Retail Group plc ("**Studio**"), the owner of Findel, has stated that Findel, whilst it has been an important part of its operations until this point, is no longer an appropriate strategic fit for the company.

In the course of its Phase 1 review, the CMA has found that both YPO and Findel operate competitive constraints on other and the merger of the two entities may create a substantial lessening of competition ("**SLC**") in the market for the supply of educational resources to educational institutions. The CMA noted its concern that, post-merger, YPO and Findel would be the largest distributor of educational resources in the UK, with particular concentrations in regions such as London, the North East and the North West of England, with a combined share of supply of between 40% and 50%. The market for the supply of educational resources is rather saturated, and the CMA only identified three main competitors against YPO and Findel,[35] being RM plc, Eastern Shires Purchasing Organisation ("**ESPO**") and Kent Country Suppliers. Not only this, but YPO and Findel have a large overlap across a number of different regions in the UK. Additionally, the parties' internal documents, along with comments received from third parties, seem to demonstrate that entry and expansion into the relevant market is difficult given the concentrated competitive dynamics and any entry would be unlikely to sufficiently counter any SLC arising from the merger. Internal documents also indicate that YPO and Findel have benchmarked each other in recent years.

YPO and Findel chose not to offer any undertakings in lieu ("**UILs**") to the CMA, which may have obviated the need for a Phase II reference had they been acceptable to remedy the potential SLC the CMA had identified. As such, the CMA confirmed the Phase II referral on 30 June 2020.

On the basis of the foregoing concerns the CMA have identified, YPO and Findel face a tough battle to try and obtain clearance from the CMA, certainly without the imposition of remedies. The statutory deadline for a Phase II decision has been set as 14 December 2020.

The CMA has been showing an increased willingness to make Phase 2 references in recent years. In 2019, the CMA referred a total of 11 mergers to an in-depth Phase II review compared with 5 mergers the year before in 2018. There have also been 8 Phase II references made so far in 2020 alone. This is, perhaps, a clear indication from the CMA that it is resolved to take a strong stance on competition regulation post-Brexit.

Royal Mail accused of exploiting a dominant position over the posting of sexual health testing kits

Royal Mail is the subject of a lawsuit from Preventx Limited ("**Preventx**"), a company that provides remote diagnostic testing services for sexually transmitted infections ("**STIs**") in partnership with local public health authorities.

Preventx operates by sending out STI testing kits to users who then return the kits with samples to be tested. Preventx has, for a period of over 10 years, used Royal Mail's freepost service to enable its operations under a licence agreement that has been renewed annually (and as recently as last September). Under such arrangement, customers

[33] The Founder Member LAs are the following: (i) Barnsley Metropolitan Borough Council; (ii) The Borough Council of Bolton; (iii) City of Bradford Metropolitan District Council; (iv) Borough Council of Calderdale; (v) Doncaster Borough Council; (vi) The Council of The Borough Of Kirklees; (vii) Knowsley Metropolitan Borough Council; (viii) North Yorkshire County Council; (ix) Rotherham Borough Council; (x) St Helens Borough Council; (xi) Wakefield Metropolitan District Council; (xii) Wigan Borough Council; (xiii) Council of The City of York.

[34] Educational resources encompass a variety of product categories including stationery, furniture, art and craft materials, sport, science and SEN equipment and other curriculum products

[35] It should also be noted that YPO and Findel have been identified as the 2nd and 3rd largest players in this market.

are able to avoid paying any postage fees as Preventx pick up these costs while customers simply provide their samples through 'No Stamp Required' envelopes. This is mutually convenient for both customers, who are able to avoid expense and maintain anonymity, and for Preventx, which is able to gain customers through this reassurance of the limited logistical obstacles involved in using the testing kits.

However, Preventx had recourse to filing a claim against Royal Mail on 29 June 2020[36] after the latter insisted that, going forward, all STI test kit samples must be sent using tracked delivery as opposed to the freepost service. Preventx is dually accusing Royal Mail of exploiting its dominant position in the postal market and breach of contract. Additionally, Preventx is seeking an injunction in the High Court to prevent Royal Mail from forcing it to use the tracking service.

The move by Royal Mail to insist on the use of its tracking service for the postage of STI testing kits – something Royal Mail will need to justify on the grounds of reasonableness and proportionality – is, Preventx argues, having a devastating effect on its business. If its users are forced to transition to a tracked service (where individuals' names and addresses must be provided), quite apart from the additional expense this incurs it also irrevocably undermines the confidentiality of Preventx's business model which is crucial to its success. Users of the STI testing kits are generally very conscious about their identities due to the high sensitivities around individuals' sexual health. Anonymity is thus crucial for users, Preventx argues, particularly those who are vulnerable or from ethnic minority backgrounds. As such, Royal Mail's conduct is significantly affecting user demand for Preventx's STI testing kits. Moreover, the importance of remote STI testing is more important at this time than at any other given the fact that STI walk-in clinics have been shut down during the COVID-19 pandemic.

Preventx has also accused Royal Mail of threatening to destroy testing samples already in circulation if the former did not agree to the tracking move. This not only risks fundamental damage to Preventx as a viable company but also endangers the health and wellbeing of those users.

Though a unique case, Preventx has submitted that it involves fundamental issues of competition law – that of the abuse of a dominant position in the market by Royal Mail. This would also not be the first time that Royal Mail has found itself on the wrong side of competition laws. In 2018, the regulator Ofcom fined Royal Mail £50,000,000 for abusing a dominant position through price discrimination against rival delivery company Whistl.

For its part, Royal Mail has stated that Preventx's arguments are flawed and submitted that there is a "bespoke arrangement" on the table for Preventx whereby testing kits would not need to be labelled.

A two-day hearing was heard in the High Court between 22 to 23 July 2020 where Preventx applied for the injunction to prevent Royal Mail imposing the transition to its tracked service. Preventx has further stated its plan to take the wider competition suit to the Competition Appeal Tribunal ("**CAT**").

High Court confirms director disqualification

On 3 July 2020, the UK High Court upheld the disqualification order made against Michael Martin, a former director of Gary Berryman Estate Agents, for failing to prevent cartel activity between his own firm and five others in the Burnham-on-Sea area.[37] Mr Martin had contested his disqualification order in a 4-day trial heard between 8 and 11 June 2020.

The CMA had issued an infringement decision on 31 May 2017 against these estate agents, having found that they had agreed between themselves to fix a minimum level of commission fees[38] for residential property sales between 4 February 2014 and 24 March 2015.[39] At the time, the CMA estimated that the six estate agents' collective market share in the Burnham-on-Sea area was as high as 95%. The CMA

[36] Preventx Limited v Royal Mail Group Limited (case number CP-2020-000011).
[37] The other members of the cartel were Abbot & Frost, Greenslade Taylor Hunt, Saxons PS, West Coast Property Services and Annagram Estate Agents. It should be noted that Annagram Estate Agents received immunity from any fines owing to the fact that it was the whistleblower in this case.
[38] The minimum commission fee was set at 1.5%.
[39] The CMA's decision is available to view at: https://assets.publishing.service.gov.uk/media/59bf839d40f0b60d81570509/Non-confidential_decision.pdf

issued fines totalling £370,084 for this conduct,[40] determining that it resulted in customers losing out on better deals for the sale of their properties during this period that they might otherwise have been able to achieve.

Following the issuance of its infringement decision, the CMA began targeting individual directors involved in the cartel. Two directors of Abbot & Frost received disqualification orders in April 2018 and the CMA initiated proceedings against Mr Martin from Gary Berryman Estate Agents in February 2019. Under the Company Directors Disqualification Act ("**CDDA**") 1996, directors can be disqualified either through a settlement agreement with the CMA or through a court order. The latter was applied for by the CMA with regard to Mr Martin.

In the hearing heard by the High Court, it was submitted by Mr Martin that a disqualification order against him would be both disproportionate and unlawful, given that he had had no knowledge or awareness of the cartel. He also argued that such an order would amount to a fundamental infringement of his rights under the Human Rights Act 1998. By contrast, the CMA maintained that the High Court was bound to observe the provisions of Section 9A of the CDDA, which were met in this case; namely, that there had been a breach of competition which Mr Martin, as a director, ought to have known about even if he did not actually know about it (though the CMA submitted that he did) which, as such, made him unfit to manage a company.

The High Court ruled in favour of the CMA and upheld the CMA's order for disqualification of Mr Martin as a company director for a period of 7 years.

The ruling is something of a watershed moment for the CMA insofar as director disqualification orders are concerned, as it represents the first time such order has been resisted and reached trial by appeal in the High Court. In a press release, the CMA unequivocally confirmed that the ruling represents a shot across the bow to company directors whose companies are involved in breaches of competition law. Ignorance of anti-competitive activities will not serve as a defence when directors ought to have known about the conduct their companies are involved in.

[40] The breakdown of fines issued was as follows: Abbot & Frost were fined £30,099; Gary Berryman Estate Agents were fined £93,555; Greenslade Taylor Hunt was fined £170,549; Saxons was fined £20,257; and West Coast Property Services was fined £55,624.

UK on potential collision course with the EU over State aid

Negotiations between the UK and the EU on a future post-Brexit trade deal look at risk of being frustrated over the issue of State aid. The UK has been unwilling to commit itself to maintaining an EU-style State aid regime post-Brexit, preferring instead to rely on World Trade Organisation ("**WTO**") rules. The EU views such a regime as too lax and insufficient to ensure fair and consistent competition rules between the bloc and the UK.

Indeed, it was reported in *The Financial Times* on 27 July 2020 that there were calls among UK government officials to adopt a minimalistic, 'light touch' State aid regime at the end of the transition period.[41] Such a move, if taken, would create a further schism in the UK-EU negotiations as it would fundamentally undermine the 'level playing field' the EU insists is necessary.

State aid is a particularly important issue for the EU at present. In addition to the White Paper on foreign subsidies (see above), the Commission is considering redressive actions in the wake of its recent defeat against both Apple and Ireland in the €13 billion so-called 'sweetheart' tax deal. The EU General Court ruled in this case that the Commission had failed to demonstrate that any advantage had been conferred to Apple by Ireland in accordance with Article 107 of the Treaty on the Functioning of the European Union ("**TFEU**"). The Commission has since indicated that it has by no means tempered its desire to clamp down on what are (in its opinion) examples of illegal state aid subsidies and will be exploring its options. Such options may include legislative amendments.

In light of the above, attempts by the UK to move away from strict State aid rules will likely prove an anathema to the EU in light of the latter's concurrent efforts to further tighten such regulations. Fundamental issues, such as whether or not the UK will empower a regulator to monitor state aid post-Brexit, will need to be resolved between the two sides if a trade deal is to be secured before the end of the transition period.[42]

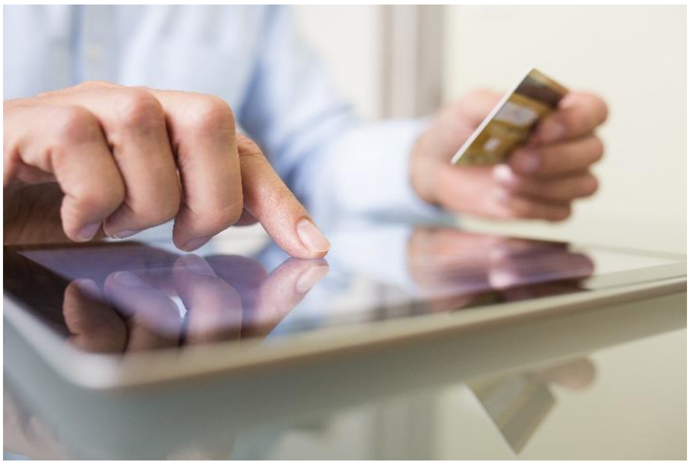
Mastercard receives damaging blow from Supreme Court ruling

On 17 June 2020, the Supreme Court largely dismissed the appeals from Mastercard Incorporated ("**Mastercard**") and Visa Europe Services LLC

[41] See https://www.ft.com/content/e29430c7-9dae-440e-8093-74f705ce62c3.
[42] The CMA had been poised to take on the role of State aid regulator, though the current position from the UK government is unclear and it has even been suggested by a government official that the UK will not look to appoint a State aid regulator at all.

("**Visa**") against a 2018 ruling by the Court of Appeal[43] where it was determined that their multilateral exchange fee ("**MIF**") were a breach of Article 101 of the TFEU.[44] The Supreme Court judgment relates to originally separate actions brought by the retailers Sainsburys, Asda, Argos and Morrisons (the "**Retailers**") which were heard together.

The Supreme Court judgment is the latest in a long-running dispute for Mastercard and Visa over their MIF which ran between 1992 and 2007. MIFs are a form of interchange fee, a fee levied on all bank card transactions. When a customer pays for goods or services, their bank (known as the "**Issuing Bank**") generates a fee to the retailer's bank (the "**Acquiring Bank**") as part of an overall service charge. MIFs can either be set by agreement between the Issuing Bank and the Acquiring Bank, or they can be imposed unilaterally by the payment platform. This latter form of MIFs are what Mastercard and Visa were found to be using for a 15-year period. These MIFs are ultimately paid by the retailer itself (charged back to it by the Acquiring Bank) and the issue therein with these MIFs imposed by the payment platform is that, absent any negotiation of MIFs by the Acquirer's Bank, there is no downward pricing pressure on MIFs. As such, this effect is anti-competitive and led the Commission to issue a decision in 2007 that Mastercard's / Visa's MIFs had artificially inflated costs without generating any efficiencies or having any other ancillary benefit that would have made this permissible.[45] Mastercard subsequently appealed the 2007 decision to the EU General Court in 2012[46] and then to the EU Court of Justice ("**CJEU**") in 2014,[47] both of which dismissed the appeals. The 2014 decision by the CJEU is referred to as the "**Mastercard CJ**" decision.



The appeals heard by the Supreme Court in January 2020 involved Mastercard and Visa challenging the Court of Appeal's decision (in line with the EU's original 2007 decision) that the MIFs were unlawful and, as such, the retailers were entitled to compensation. The issues to be determined by the Supreme Court were as follows:

1. Whether the Court of Appeal made an error in law by finding that the MIFs were unlawful under Article 101 of the TFEU, given that the English courts were not necessarily bound by Mastercard CJ (the "**restriction issue**");
2. Whether the Court of Appeal was wrong to determine that Mastercard and Visa were required to satisfy a higher evidential standard than that would normally apply in civil litigation due to the need to prove that their MIFs were permissible under Article 101(3) of the TFEU (the "**standard of proof issue**");
3. Whether the Court of Appeal made an error in law by deciding that, in order to prove that consumers received a resulting share of the benefit in MIFs under Article 101(3) of the TFEU, Visa was required to demonstrate that the benefits to merchants of the MIFs outweighed the costs involved (the "**the fair share issue**"); and
4. Whether the Court of Appeal made in an error in law by deeming that Mastercard and Visa had to prove the exact amount of loss that had been mitigated in order to reduce damages (the "**broad axe issue**").

In its judgment, the Supreme Court upheld the restriction issue, the standard of proof issue and the

[43] [2018] EWCA 1536 (Civ); original Court of Appeal decision available at: https://www.judiciary.uk/wp-content/uploads/2018/07/mastercard-appeals-judgment.pdf
[44] The full Supreme Court judgment is available at: https://www.supremecourt.uk/cases/docs/uksc-2018-0154-judgment.pdf
[45] The Commission's original decision can be viewed at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/34579/34579_1889_2.pdf
[46] MasterCard Inc v European Commission (Case T-111/08) [2012] 5 CMLR 5.
[47] MasterCard Inc v European Commission (Case C-382/12 P) [2014] 5 CMLR 23.

fair share issue and dismissed Mastercard's and Visa's appeals over these issues. The appeal over the broad axe issue was successful, though the significance of this is minimal insofar as the liability of Mastercard and Visa in competition law over their MIFs is now firmly established.

Expanding upon the Supreme Court's decisions vis-à-vis the specific issues in question:

1. **The restriction issue**

   In assessing the restriction issue, the Supreme Court boiled this down to two essential questions: (i) whether the Mastercard CJ decision was binding on this point; and (ii) if not, whether that decision ought to be followed.

   Both Visa and Mastercard had submitted that the Mastercard CJ decision was "factually distinguishable" from the present proceedings given that the retailers did not face the same competitive pressures as a result of the MIFs as were identified in Mastercard CJ. Moreover, Visa and Mastercard noted that it is a well-established principle in English law that the courts are not bound by factual assessments made by the Commission.[48] Relying on a similar case in Hungary that centred on banks which were involved in the MIF schemes,[49] Visa and Mastercard contended that it did not follow from Mastercard CJ that retailers and/or consumers in various national jurisdictions (the UK in this case) were automatically affected by the same anti-competitive pressures. Rather, this is a question that must first be determined by the relevant national courts after conducting an in-depth investigation.

   However, the Supreme Court disagreed. It was found that, even if the Supreme Court was not bound by Mastercard CJ, it would have followed the precedent in any event as its conclusions on the anti-competitive effects of MIFs would have been the same.

2. **The standard of proof issue**

   The standard of proof in this case related to Article 101(3) of the TFEU, which is an exemption to any finding of anti-competitive conduct under Article 101(1) of the TFEU. To qualify for this exemption, it must be satisfied that the anti-competitive conduct in question: (i) contributes to improving the production or distribution of goods or to promoting technical or economic progress; (ii) allows consumers a fair share of the resulting benefit;.(iii) only imposes such restrictions on participating undertakings as are indispensable to achieving the objectives; and (iv) must not enable the parties to eliminate competition in respect of a substantial part of the products in question.

   In its decision, the Supreme Court distinguished between the standard of proof required, which is a matter of domestic law, and the nature of the evidence required, which is matter of EU law and practice. Mastercard's and Visa's objections related to the latter and, as such, did not constitute a grounds for which the Supreme Court could allow their appeal.

3. **The fair share issue**

   This ground of appeal related directly to one of the requirements for satisfaction of the Article 101(3) exemption: namely, that consumers receive a fair share of the benefit of the anti-competitive conduct. Visa and Mastercard contested the Court of Appeal's original finding that, regardless of whether MIFs created *some* net benefits for consumers, these did not offset the overall negative impacts of MIFs on the marketplace.

   The Supreme Court upheld the Court of Appeal's decision on this ground, though noted that, in the case of MIFs, the retailers themselves are the consumers. These consumers must be compensated *fully* by the impact of the MIFs (which they were not).

4. **The broad axe issue**

   Mastercard submitted here that, in order for it to have damages reduced as a defendant, it was not necessary for it to be precise as the exact amount of losses mitigated by the claimants (which, in this case, was through pass-on charges). On this limb of the appeal, Mastercard and Visa were successful and the Supreme Court ruled that the earlier ruling from the Court of Appeal that they needed to demonstrate a high degree of precision in calculating this mitigation was not proportionate or in accordance with established principles of English law.

This is a highly significant ruling as it is likely to open the floodgates for a tremendous number of follow-on damages claims from other merchants and retailers who will sue to recover the sums lost between the period 1992 and 2007 for the MIFs. The total liability for both Mastercard and Visa could amount to tens of billions of pounds.

[48] Crehan v Inntrepreneur Pub Co (CPC) (Office of Fair Trading intervening) [2007] 1 AC 333; [2006] UKHL 38.

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

Moreover, the ruling is also important vis-à-vis the collective group action claim being brought by Walter Merricks on behalf of 46.2 million British consumers who, Merricks argues, have also footed the bill for the MIFs and deserve compensation. Such a claim would be conducted under a collective proceedings order ("**CPO**"), a process akin to a class action lawsuit in the U.S. In May 2020, the Supreme Court heard an appeal from Mastercard against allowing the CPO, something which the Court of Appeal (overturning a previous decision of the Competition Appeal Tribunal) had ruled could proceed in April 2019.[50] The Supreme Court's decision in this matter is still pending and, should the CPO be confirmed as eligible to proceed, will inevitably mean both Mastercard and Visa face a difficult road ahead.

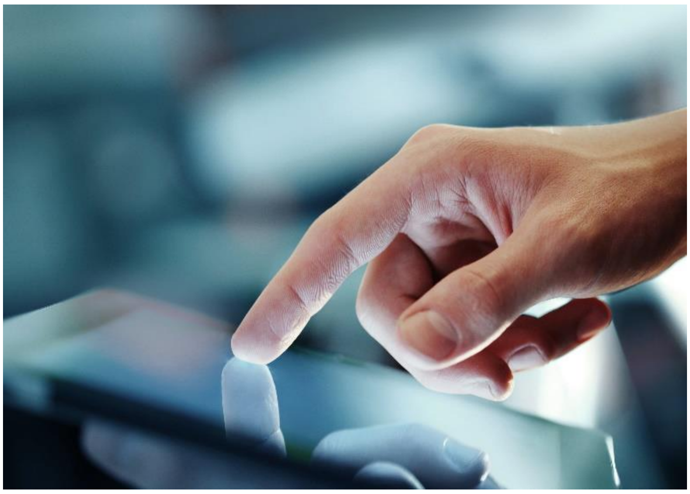
The CMA signals a tougher stance against Big Tech

On 1 July 2020, the CMA published its final report on online platforms and digital advertising that was launched almost a year previously on 1 July 2019.[51] The Market Study had been launched due to burgeoning concerns over the impact of online platforms on individuals' lives and the potentially anti-competitive effects they posed to search advertising[52] and display advertising markets.[53]

In its final report, the CMA warned that the pace at which online platforms have developed and the lack of transparency which pervades them has meant that regulations (particularly competition laws) have not been able to keep pace. For this reason, the CMA's existing powers are considered to be insufficient to deal with the magnitude of the problem, and in particular, the competition issues that online platforms give rise to. According to the CMA, new legislative tools are needed which will enable it to clamp down on the risk posed to the competitive marketplace in the UK by online platforms. As such, the CMA has called upon the UK government to introduce a new pro-competition regulatory regime for online platforms. It should be noted that this request from the CMA comes soon after the establishment of a Digital Markets Taskforce, a new advisory unit to the UK government comprising officials from the CMA and other sectoral regulators (such as Ofcom) responsible for advising the government on the functions, processes and powers which are needed to regulate the digital marketplace.

Importantly, the CMA's recommendations largely mirror those already set out in the Report of the Digital Competition Expert Panel (also known as the "**Furman Review**")[54] published in March 2019.[55] Two of the main features in a new pro-competition regulatory regime the CMA calls for are:

1. A new binding code of conduct[56] specifically tailored to online platforms; and
2. The establishment of a new Digital Markets Unit ("**DMU**") which would have powers to introduce 'pro-competition interventions' to tackle the sources of market power and increase the competitiveness of the digital marketplace.[57]



Unsurprisingly, the two main companies in the crosshairs of the CMA's focus on online platforms are Google and Facebook. The CMA states one third of all internet activity in the UK is linked to Facebook and Google. Moreover, both companies have significant market shares: Google has more than a 90% share of the £7.3 billion search advertising market in the UK and Facebook has more than a 50% share in the display advertising market in the

[50] [2019] EWCA Civ 674; full judgment available to view at: https://www.bailii.org/ew/cases/EWCA/Civ/2019/674.html
[51] The Competition & Markets Authority. *Online platforms and digital advertising*: market study final report. 1 July 2020. Available at: https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf
[52] *Search advertising* is the process whereby sponsored ads are provided in response to users' internet search queries.
[53] *Display advertising* is the process in which static or video ads are displayed alongside the content a user is interested in.
[54] The full report is available to view at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf
[55] The recommendations set out in the Furman Review were adopted by the UK government in March 2020.
[56] Such code of conduct would govern the behaviours of online platforms and be constructed around the CMA's high-level objectives of 'fair trading', 'open choices' and 'trust and transparency'.
[57] Proposed powers for the DMU also include powers to gain access to data, support consumer choice and order the structural or functional separation of platforms where necessary or required.

UK. The CMA notes that many of the concerns it has identified in the digital marketspace are linked to the dominant positions held by both Google and Facebook. These concerns include the following:

- Limited innovation and development of new, valuable services for consumers;
- The high costs of digital advertising being reflected in the prices of goods and services across the UK economy;[58]
- Consumers receiving inadequate compensation for their attention and for the use of their personal data;
- Limited choice and competition resulting in consumers being less able to control how their data is used; and
- The proliferation of online platforms funded by digital advertising has led to wider social, political and cultural harm through the decline of authoritative and reliable news sources.

As a result of these concerns, the CMA has signalled that digital sector mergers will face a high level of scrutiny going forward. A particular precedent which the CMA wishes to avoid in the future is one which recalls the approval of Facebook's acquisition of Instagram, which, in the CMA's view, should not, in retrospect, have been approved. At the time of approval, Instagram was a small player and its significance to the digital market place (particularly in the hands of Facebook) had been underestimated.

Both in the UK and globally, the tension between Big Tech and policymakers is intensifying. These tensions will, perhaps, only be exacerbated by news at the end of the second financial quarter that, while the UK and U.S. economies have shrunk considerably as a result of the COVID-19 pandemic, the earnings of Facebook, Apple, Amazon and Google have massively increased. The combined market capitalisation of these four companies has now exceeded US$5 trillion for the first time.

The CMA, it seems, is trying to lead the way in the regulatory fight against Big Tech and time will tell as to how much the wild west of the digital marketplace can be effectively legislated and monitored.

[58] The costs of digital advertising in the UK in 2019 were around £14 billion, which is the equivalent of £500 for every UK household. It is estimated that 80% of this £14 billion advertising spend was on Facebook and Google. These costs are estimated to be far higher than they would be in a more competitive marketplace.

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