Q4 2021

Competition Law Newsletter

Welcome to the Q4 2021 edition of our Competition Law Newsletter. A quarterly update covering key developments in UK and EU competition law.

UK Competition Law Developments

The end of the road? JD Sports ordered to sell Footasylum as CMA blocks merger for second time

As reported in our *Competition Law Newsletter* from Q3 of 2021[1], the Competition and Markets Authority ("**CMA**") looked set to block the £90 million merger between JD Sports Fashion Plc ("**JD Sports**") and Footasylum Plc ("**Footasylum**"), after it provisionally concluded the deal could negatively affect competition in the UK sportswear retail market. On 4 November 2021 the CMA did so, ordering JD Sports to sell Footasylum for a second time. In its final findings, the CMA concluded that the deal would result in a substantial lessening of competition in the online and in-store retail supply of 'sports-inspired' casual footwear and apparel, reducing choice and increasing prices for customers at Footasylum. In particular, it found that, in spite of the increasing aggregate constraints posed on Footasylum by rival retailers such as Nike, Adidas and Foot Locker, they were still insufficient to offset the competitive constraint exerted by JD Sports - "*by far and away the closest alternative for shoppers at Footasylum*" - that would disappear post-merger. Therefore, the CMA concluded, the removal of JD Sports as a competitor to Footasylum would 'more likely than not' encourage a drop in price, quality, range and service at Footasylum.[2]

Almost immediately after it published its final conclusions, JD Sports hit back at the CMA's decision, stating the prohibition of the merger 'defied logic' and was 'inexplicable'. In doing so, JD Sports noted the CMA's revised findings – which mirrored JD Sports' own arguments – that Footasylum was no longer JD Sports' most important competitor, and that this title was instead held by the Direct to Consumer ("**DTC**") operations of global brands including Nike and Adidas.

Nonetheless, with the four-week deadline to appeal having lapsed on 2 December 2021, it seems JD Sports has finally come to terms with the CMA's decision. On 6 December 2021, the CMA launched a consultation to invite comments on the proposed final undertakings put to it by JD Sports, Pentland[3] and Footasylum, designed to give effect to the regulator's divestiture requirement. Alongside the need for JD Sports to sell Footasylum within a specified timescale to a CMA-approved purchaser, the draft undertakings also provide for the appointment of a monitoring trustee[4], include detailed asset maintenance obligations (including on Pentland) relating to Footasylum's business and employees, and prohibit JD Sports and Pentland from re-acquiring Footasylum within 10 years of disposal.[5]

More than two and a half years since JD Sports' £90m acquisition of Footasylum was completed on 12 April 2019 – a period that has seen two full Phase 2 CMA investigations and one successful appeal to the Competition Appeal Tribunal ("**CAT**")[6] – it appears the back-and-forth battle between the CMA and the transaction parties is finally coming to an end. The CMA's consultation concludes on 21 December 2021 after which the sale deadline will be set, and JD Sports' search for a buyer will being in earnest.

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[1] Competition law update - Q3 2021 (shlegal.com)
[2] More information about the CMA's conclusions can be found in its full final report, and the summary of it.
[3] "Pentland" refers to the entities within the Pentland Group, which holds a 51.9% shareholding in JD Sports
[4] A "monitoring trustee" is an individual appointed by the CMA to scrutinise ongoing compliance with the final undertakings agreed between the CMA and the deal parties.
[5] See Draft final undertakings (publishing.service.gov.uk)
[6] In which the CAT upheld JD Sports' arguments relating to the CMA's assessment of the possible effect of the COVID-19 pandemic on Footasylum under the counterfactual, and its impact on the likely post-merger constraints imposed by other competitors' DTC offers.

Compare the Market appeal progresses whilst class actions are launched

In our *Competition Law Newsletter* from Q4 of 2020[7], we reported that the CMA had imposed a fine of £17.9 m on Compare the Market for competition law breaches. Fast forward to 18 November 2021, the hearing in BGL (Holdings) Limited's[8] appeal of the CMA's decision was brough to a close. Meanwhile, on 1 November 2021, a follow-on collective damages claim was brought on behalf of over 20 million purchasers of home insurance, claiming that Compare the Market's conduct caused them to overpay for their policies. The CAT's decision whether to uphold the CMA's original findings is eagerly awaited by all.

Background – the CMA's investigation

The CMA's market investigation into digital comparison tools ("**DCTs**") found a mostly positive picture of peoples' use of and attitudes to DCTs, though some concerns arose, including in relation to DCTs' transparency and accessibility. However, it also gave rise to the opening of a competition law investigation in September 2017 into one DCT's contracts with home insurers, which limited insurers' ability to charge a lower price on one platform than on another ('most favoured nation' ("**MFN**") clauses).

On 19 November 2020 the CMA issued an infringement decision against BGL (Holdings) Limited, BGL Group Limited, BISL Limited (BISL), and Compare the Market Limited (together "**BGL**"), finding that between 1 December 2015 and 1 December 2017 Compare the Market's wide MFN clauses in its agreements with home insurers had the appreciable effect of preventing, restricting or distorting competition between price comparison websites and between home insurers competing on those websites. During this period, Compare the Market was found to have a market share in excess of 50%, and its network of wide MFNs accounted for approximately 40% of sales of home insurance made through price comparison websites. This network of agreements therefore also made it harder for Compare the Market's competitors to expand and challenge its strong market position. The CMA fined BGL £17,910,062 for engaging in the infringement.

BGL's appeal

On 2 February 2021, BGL launched an appeal of the CMA's decision to the CAT. BGL's six grounds of appeal included that the CMA had incorrectly applied the hypothetical monopolist test and made a number of significant methodological errors, and that it erred in its legal and evidential assessment of market coverage. Further, that the CMA failed to assess key evidence of an effect on retail pricing, price comparison website commissions or promotional deals. Finally, that the CMA failed to properly analyse the counterfactual and made factual errors in relation to Compare the Market.

A case management conference was held on 5 March 2021, and the hearing began on 1 November. BGL argued before the CAT that since the infringements are not 'by object', the CMA must show *"appreciable adverse effects on competition"*. However, it had not put forward evidence based on pricing data, relying on theoretical harms to competition. Further, that the CMA should have considered a broader market definition – beyond insurance provided by price comparison websites, e.g. to include insurers' direct sales – and had not correctly analysed the impact of promotional deals. The CMA responded by reference to "softened" price competition as a result of the wide MFNs, emphasising the impact of Compare the Market's market power.

Class actions are launched

On 1 November 2021 – as the appeal hearing began – an opt-out collective claim was filed by Home Insurance Consumer Action against BGL in the CAT, on behalf of over 20 million consumers of home insurance.

The claim alleges that BGL's infringement resulted in <u>all</u> purchasers of home insurance overpaying for their policies, whether those policies were bought from Compare the Market, a competing price comparison website, or elsewhere. Purchases of home insurance between 1 October 2015 and 1 June

[7] [Competition law update - Q4 2020 (shlegal.com)]

[8] Together with BGL Group Limited, BISL Limited and Compare the Market Limited

2020 (including renewals) are claimed to have been affected by Compare the Market's conduct – a longer period than that covered by the infringement found by the CMA.

Home Insurance Consumer Action has indicated that it does not intend to take further steps in the claim until the appeal has been concluded. If the CMA is successful, it will ask the CAT to certify the claim to enable it to move to trial. If, however, the CAT agrees with BGL and quashes the CMA's decision in its entirety, it seems highly likely that the collective action will also fall away. The CAT's decision is now of even greater importance for BGL given its broader implications.

Facebook told to sell Giphy after record-breaking fine for IEO breach

In our *Competition Law Newsletter* from Q3 of 2021[9], we reported that the CMA looked set to unwind the completed acquisition of Giphy Inc ("**Giphy**") by Facebook Inc ("**Facebook**")[10]. In particular, the CMA warned that Facebook's $400m acquisition would result in a substantial lessening of competition in both the social media and display advertising sectors. In line with these provisional findings, on 30 November 2021, the CMA ordered Facebook to divest Giphy in its entirety, marking the first time that the regulator has unwound a completed 'Big Tech' transaction. In a double blow to the tech giant, the order comes less than six weeks after Facebook received a record-breaking fine for breaching the terms of the initial enforcement order ("**IEO**") imposed on it while the CMA conducted its investigation into the Giphy acquisition.

CMA unwinds Giphy acquisition

The decision follows the CMA's conclusion that the merger would result in a "*Substantial Lessening of Competition in the supply of digital advertising in the UK… and in the supply of social media services worldwide*"[11]. In particular, the CMA cited Facebook's pre-merger termination of Giphy's advertising services – which removed Giphy as a potential competitor in the digital advertising sector – as a key detrimental horizontal effect of the deal. Vertical foreclosure concerns were also raised, based on Facebook's ability to increase its already significant market power in the social media sector as a result of the merger– including by preventing or limiting competitors' access to Giphy's services or allowing access on worse terms than before the merger – with the CMA concluding that Facebook would have both the ability and incentive to act in this way should the deal have been approved. By ordering Facebook to sell Giphy, the CMA stated that it is "*protecting millions of social-media users and promoting competition and innovation in digital advertising*".[12]

The CMA's decision comes at a time of increased efforts to prevent so-called 'killer acquisitions'[13] by Big Tech companies, marking a clear signal from the CMA that it is prepared to break up deals that raise concerns, even where the horizontal effects identified arise from a loss of potential (rather than current) competition. Looking ahead, Facebook has indicated that it is currently considering appealing the CMA's decision. Should it choose to do so, it has four weeks from the date of the decision to lodge an appeal with the CAT – an option it seems likely to exercise. If it opts not to appeal, Facebook will be tasked with finding a CMA-approved buyer within the deadline to be set by the regulator. Given the apparent paucity of viable buyers, and Facebook's extremely weak bargaining position should it find one, Facebook faces an uphill battle to recoup much of the $315 million price it paid some 19 months ago.

Facebook hit with record penalty for IEO non-compliance

Prior to reaching its final decision, the CMA announced on 20 October 2021 that Facebook had been fined a record £50.5m for repeated failures to comply with the terms of an IEO imposed on its

[9] Competition law update - Q3 2021 (shlegal.com)
[10] Recently re-named Meta Platforms, Inc..
[11] See the CMA's Final Report – 'Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) or Giphy, Inc.'
[12] CMA press release 30 November 2021 "*CMA directs Facebook to sell Giphy"*
[13] 'Killer acquisitions' involve the purchase of a company, which is identified as a potential or future competitor, before it poses a threat to the acquirer's business.

business during the review of Facebook's acquisition of Giphy. The fine comes after Facebook twice failed to overturn the freezing order in the UK Courts and is the largest ever imposed by the CMA for non-compliance, far greater than the previous highest of £325,000, issued against ION Investment Group in 2020.

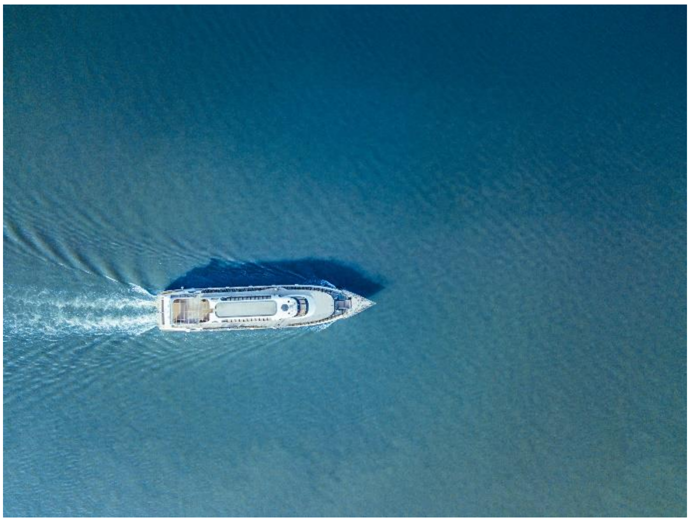
IEOs are used by the CMA to prevent merging parties from taking pre-emptive action which could affect the outcome of a review or prevent the appropriate remedial action from being taken. IEOs work to ensure the merging entities are 'held separate', so that they continue to compete as they would have done absent the merger while the investigation takes place. The Enterprise Act 2002 gave the CMA powers to impose financial penalties of up to 5% of the merging parties' combined global turnover where there was a failure to comply with an IEO without a reasonable excuse.

The CMA identified three breaches committed by Facebook. The first, for which Facebook was fined £50 million, was a year-long failure by Facebook to provide regular updates to the CMA that outlined its compliance with the IEO. Instead, the CMA noted that Facebook deliberately significantly limited the scope of the updates provided, despite repeated warnings from the CMA. Secondly, Facebook failed to notify the CMA when Tenor – one of its two GIF suppliers – became globally unavailable on its messenger platform. Thirdly, Facebook twice changed its chief compliance officer without the seeking the prior consent of the CMA, for which a penalty of £500,000 was imposed. The CMA rejected Facebook's submissions against the penalty being imposed, noting that the level of the fine was proportionate, including on the basis that it represented only 0.09% of Facebook's global turnover (well below the 5% statutory maximum). In its decision notice, the CMA criticised Facebook's 'high-risk strategy' and stated that it was appropriate to impose a penalty for the first and third breaches *"due to the serious and flagrant nature of Facebook's failure to comply with the IEO and the risks arising from it"*

Separately, in October 2021, the government concluded a consultation on, amongst other topics, the CMA's powers of enforcement.[14] It proposed a marked expansion of the CMA's powers, such that they also include an ability to charge a daily penalty of up to 5% of daily turnover while non-compliance continues, and an ability to disqualify directors who make false declarations. It will be interesting to see whether this record fine imposed on Facebook – together with the proposed strengthening of the CMA's powers to penalise – marks the beginning of a much tougher stance by the CMA in the face of non-compliance.

Ferry operator arrangements under review

On 12 November, the CMA launched an investigation into two ferry operators - P&O Ferries Holdings Limited ("**P&O**") and DFDS A/S ("**DFDS**") - after they entered into a mutual space charter agreement (otherwise sometimes referred to as a space or capacity sharing agreement) in May 2021. The CMA is concerned that such arrangement has the potential to "prevent, restrict or distort competition within the UK". Two weeks later, on 25 November 2021, France's Competition Authority issued a Statement of Objections ("**SO**") to the parties accusing them of unlawfully allocating freight shipment services. The SO does not provide any further details about the concerns of the French regulator.



Together, P&O and DFDS carry more than 2.5 million lorries across the English Channel every year. Under the agreement, freight drivers can board the next available sailing when they arrive at the Port of Dover or the Port of Calais – regardless of which of the two ferry companies is operating the crossing.[15] The ferry operators consider that the arrangement was the "best way" to ensure that they could continue to run vital freight services between Dover and Calais. The arrangement would *"maintain customer service levels on the route and ensure its continued resilience"* as well as help reduce port

[14] The full government consultation document can be found here.
[15] P&O Ferries operates five vessels on the Dover-Calais route and DFDS runs three. Since June, Irish Ferries has also run freight ferry services on this route. The mutual sharing agreement is intended for freight vehicles only and does not apply to sailings on the Dover-Dunkirk route, which is solely operated by DFDS.

waiting times for freight customers, allow drivers access to a departure every 36 minutes improving traffic flows, which is vital on the busiest trade route between the UK and continental Europe. Further, all commercial activities and relationships with freight customers would “remain entirely under the control of each operator”.

Both the UK and French competition authorities are yet to reach a view as to whether there is sufficient evidence of an infringement of competition law. We await the outcome of the review given that slot or capacity or mutual sharing agreements are not uncommon in the industry.

CMA poised to accept binding commitments from parties active in the electric vehicle charging market

On 17 November 2021, the CMA published a notice of intention to accept binding commitments from Gridserve Holdings Limited, owner of The Electric Highway Company Limited, (together, "**Gridserve**") and three separate motorway service area ("**MSA**") operators ("**MSA Operators**") in relation to exclusivity arrangements discovered by the CMA in commercial agreements between these parties.[16] The CMA originally launched an investigation into these entities, all of which are active in varying capacities in the electric vehicle charging market ("**EV Market**"), on 22 July 2021 after concluding a wider market study into the EV Market in the UK as a whole.

The commitments offered by the parties seemed sufficient to the CMA to address the anti-competitive concerns it had identified as arising from the long-term exclusivity arrangements, and were opened up to a public consultation, which closed on 2 December 2021.

The CMA's scrutiny in this area is perhaps reflective of a burgeoning need felt by the regulator to ensure that new green energy and sustainability markets in particular, which are vital to the future economic success of the UK as it looks to move towards carbon neutrality, are functioning effectively to ensure fair and equal competition.

Background and the parties

The COP26 environmental summit highlighted more than ever the difficulties facing many countries in meeting their Net Zero emissions targets. For the UK, a big part of this drive will be the roll-out of electric vehicles ("**EVs**"), against the background of the Government's pledge to end the sale of all new diesel and petrol automobiles by 2030. This entails various challenges, however: estimates suggest that an upper limit of around 480,000 more public charge points will be needed to serve the number of EVs on the road – more than ten times the current number of approximately 25,000.[17] Another problem will be addressing the so-called "charging deserts" – that it to say, those rural or tourist areas where EV charge points and related infrastructure are severely lacking, making it challenging for EV owners to visit these areas and still more challenging for the areas' local residents to adopt EVs for use in their day-to-day lives.

Motorways are one of the areas where more EV charge points are needed, though competition in this particular sector of the EV Market has been very limited. Gridserve has generally been the sole charge point operator ("**CPO**") operating at many MSAs across the UK and has an estimated share of supply of 80% in this area.

In the course of the CMA's market study into the EV Market –principally commissioned to ensure that competition was working effectively in this market and ascertain whether any targeted interventions were necessary – the CMA discovered the existence of long-term exclusivity agreements ("**Contracts**") between Gridserve and three separate MSA Operators.[18] Crucially, the various Contracts with each of the three MSA Operators granted Gridserve the exclusive right (subject to certain carve-outs and limitations) to supply, install, operate and maintain EV charge points at specified MSAs run by the different MSA Operators across the UK[19] (which amounted in practice to around two thirds of all the MSAs in the UK).[20]

On the grounds that the Contracts potentially constituted forms of anti-competitive agreements under Chapter I of the Competition Act 1998 ("**CA 1998**") – and that their existence may have come

[16] The Competition & Markets Authority. *Notice of intention to accept binding commitments in relation to certain exclusive arrangements for the supply of electric vehicle charge points*. 17 November 2021. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1037425/Proposed_NIAC_for_EV_chargepoints_PV_date_edits_2.pdf

[17] The Competition & Markets Authority. *Electric vehicle charging market study*. 23 July 2021. Paragraph 3. Available at: https://www.gov.uk/government/publications/electric-vehicle-charging-market-study-final-report/final-report

[18] The MSAs in question were MOTO Hospitality Limited and MOTO Holdings Limited ("**MOTO**"), Roadchef Limited ("**Roadchef**") and Extra MSA Property (UK) Limited ("**Extra**").

[19] Ibid. Paragraph 2.24.

[20] Ibid. Paragraph 3.12.

about as a result of Gridserve's abuse of a dominant position under the Chapter II prohibition set in the CA 1998 – the CMA launched a separate investigation into these issues once its market study into the UK's EV Market was concluded.

Consequences of the exclusivity arrangements

The CMA's chief concern regarding the Contracts was that they could foreclose other rival CPOs in the EV Market. Indeed, of the two chief barriers to entry for CPOs in the EV Market identified by the CMA, one was the total grid capacity for the installation of more charge points but the other was the mere existence of the Contracts. Moreover, the CMA found that, without the existence of the Contracts, the MSA Operators themselves might have benefitted from greater competition as they might have been able to self-supply in the area of EV charge points.

The CMA did note that Gridserve faced some competitive constraints and that that there were some limitations to the exclusivity arrangements in the Contracts. For instance, Tesla UK ("**Tesla**") was found to have the right to supply, install and operate its own EV charge points at the same MSAs covered by the Contracts and, as an overarching carve-out, the terms of the Contracts did not extend to the installation of EV charge points in MSAs' petrol forecourts. However, since Tesla operates a closed EV infrastructure network in the UK where at present only its eponymously branded EVs can use its charge points (which severely limits the number of EV owners that can benefit from them) and due to the fact the EVs in petrol forecourts suffer from much less demand owing to their poor proximity to MSAs' amenities, such constraints and exclusivity limitations were not found to address the CMA's foreclosure concerns. Moreover, the CMA ultimately concluded that the specific nature of the Contracts and Gridserve's dominant position meant that the anti-competitive arrangements in question could not be wholly outweighed by Gridserve's planned investments in this area.

Proposed Commitments

Gridserve offered binding commitments to the CMA that it would *inter alia*:

1) Not renew or enforce the exclusivity provisions in the Contracts with the three MSA Operators after 18 November 2026;
2) Not enforce the exclusivity provisions in the Contracts against the three MSA Operators or CPOs where the MSA Operators or a CPO plans to utilise RCF-funded additional grid capacity to install or operate EV charge points; and
3) Not enforce the exclusivity provisions in the Contracts to prevent or hinder the three MSA Operators from engaging with CPOs to enable the CPOs to begin operating EV charge points intended to utilise RCF-funded additional grid capacity at an MSA site.

The CMA considers, on balance, that these proposed commitments would quickly and efficiently resolve the concerns it had identified. Further, that ongoing compliance with these commitments would be simple to discern and monitor. On this basis, the CMA believes that it will be appropriate to accept these commitments and opened them up to public consultation (which concluded on 2 December 2021). Provided that the results of this consultation support the CMA's conclusions, the proposed commitments will be accepted and become legally binding on the parties, and the investigation will be closed.

Comment

The CMA – like many other global antitrust regulators – is becoming increasingly focused on issues of clean energy and sustainability and, specifically, how competition laws and regulatory enforcement powers can be used to bolster these areas to help sustainable markets function effectively. As such, this sector, along with digital technology markets, is likely to become an increasing area of priority for the CMA. Companies operating within it would be advised to review their practices and policies to ensure continued compliance with the competition rules.

CMA looks set to block Cargotec/Konecranes merger as provisional findings published

In our *Competition Law Newsletter* from Q3 2021[21], we reported that both the CMA and the Commission were opening in-depth investigations into the proposed merger between Cargotec Corporation ("**Cargotec**") and Konecranes Plc ("**Konecranes**"). At the time of this investigation announcement, concerns were growing that the proposed acquisition could reduce competition in the supply of certain container and cargo handling equipment. Fast forward to 26 November 2021, the CMA announced the provisional findings of its Phase 2 investigation, asserting the $5 billion merger between Cargotec and Konecranes was likely to harm competition in seven separate container handling markets.

CMA's competition concerns

The CMA is one of several competition authorities across the world taking a keen interest in this proposed merger between the two largest container handling companies in Europe. In addition to the Commission, regulators in the United States and New Zealand are reviewing the transaction, while the Australian Competition and Consumer Commission sent the parties its statement of issues in October 2021. Interestingly, Russia's Federal Antimonopoly Service approved the deal unconditionally in mid-November 2021, while China's competition authority cleared it in August 2021.[22] After its fast-tracked in-depth investigation however, the CMA has provisionally found that the proposed merger will result in an SLC as a result of 'horizontal unilateral effects' in the supply of numerous categories of container handling equipment ("**CHE**").[23]

A key question facing the CMA during its assessment was whether each type of CHE should be considered a separate product market, or whether it formed part of one broader product market. In doing so, the CMA found that the limited 'demand-side substitutability' and 'supply-side substitutability' between different types of Gantry Cranes (such as rubber tyre gantry cranes and automated stacking cranes), Mobile Equipment (such as reach stackers, forklift trucks and empty container handlers) and Automated Terminal Tractors ("**ATT**") ensured each product type warranted its own separate market.[24] By contrast, the relative ease with which suppliers of 'straddle carriers' could switch their operations to supply 'shuttle carriers' ensured the CMA considered these two products as part of the same market.

Crucially, in all but one of the product markets identified and then assessed by the CMA – that for ATT – Cargotec and Konecranes were held to be close competitors. In addition, it was only in one product market – that of Heavy Duty Forklift Trucks ("**HDFLT**") (a sub-market within the Forklift truck market) – that more than two potential competitors for Konecranes and Cargotec were identified. Even in the HDFLT market, the competitive strength of Linde Material Handling ("**Linde**") and Svetruck AB ("**Svetruck**") was limited, with the former not supplying HDFLTs with lifting capacities above 18 tonnes, and the latter predominantly active in the EU rather than the UK. Similarly, the existing contractual arrangement between Konecranes and Terberg Group B.V. ("**Terberg**") convinced the CMA that, even in the ATT market – where Cargotec and Konecranes are not currently considered close competitors – approving the transaction would remove two potentially key challengers to Cargotec in this emerging market, and leave the merged entity facing very few constraints from the remaining suppliers. As a result, the CMA believes that allowing the merger between Cargotec and Konecranes to proceed would be to remove a significant competitor from the numerous CHE markets, leaving the newly merged entity with very few meaningful constraints, even with the benefits that Chinese state-sponsorship affords its rivals, ZPMC[25] and Sany Heavy Industrial Co., Ltd. In turn, this could lead to a reduced quality of service or

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[21] Competition law update - Q3 2021 (shlegal.com).
[22] See Global Competition Review - UK calls for remedies in Cargotec/Konecranes review.
[23] See Provisional findings (publishing.service.gov.uk).
[24] "Demand-side substitutability' refers to the ability of consumers to switch to substitute products offered by alternate suppliers, or to source their service requirements elsewhere. Conversely, "supply-side substitutability" refers to the ease with which firms engaged in the production of one product can quickly and inexpensively shift its operations to producing the alternative products of the suppliers concerned.
[25] "ZPMC" is the widely used acronym for Zhenhua Port Machinery Company Limited.

increased prices for CHE customers offered by the merged entity.

The CMA is now seeking guidance on suitable remedies. The CMA invited comments on possible remedies, with the consultation period closing on 10 December 2021. Although it has suggested behavioural commitments by the parties would be considered, the CMA has already cast doubts over whether these could amount to an 'effective remedy', not least because of the ongoing monitoring of the parties that would be required to guarantee compliance.[26] Instead, it seems the prohibition of the merger is currently the CMA's preferred solution, with Cargotec and Konecranes continuing to operate separately as independent competitors. While a partial divestiture would be considered, the CMA has asserted it could only be deemed effective if a suitable purchaser was found, who could operate as an effective competitor in the relevant markets. The significant difficulty of achieving such an outcome makes this a high-risk remedy in the eyes of the CMA.

Comment

The Cargotec/Konecranes investigation marks the first phase 2 assessment that the CMA has conducted alongside the Commission since the UK has left the EU. With the CMA citing its subsequent ability to focus on the specific impact on people and businesses in the UK, the outcome of the two parallel investigations may offer valuable insights into future cooperation between regulators. The consultation on its provisional findings is open until 17 December 2021, while the statutory deadline for the CMA to publish its final report has been recently extended to 1 April 2022. Therefore, unfortunately for Cargotec and Konecranes, it looks set to be a not so happy new year when 2022 comes around.

EU Competition Law Developments

Global airlines in for a turbulent ride as cartel damages claims all set for take-off

On 11 November 2021, the European Court of Justice ("**ECJ**") issued a ruling that judges in the Rechtbank Amsterdam District Court could award damages for conduct carried out before 2004 (i.e. before the current EU competition rules came into effect in relation to flights from the EU to third countries) by several major airlines as part of an airfreight cartel found by the European Commission ("**Commission**"). As a result, the claimants – two Dutch litigation vehicles[27] – will potentially be entitled to damages payouts worth hundreds of millions of euros more than they otherwise would have been if they can prove causation. This extension of the scope of Article 101 TFEU contrasts with the Commission's prior conclusions that it did not have jurisdiction to impose fines for certain pre-2004 infringing conduct, a view supported by the UK High Court in 2017 - upheld by the Court of Appeal in 2019 - when it was faced with the question of its competence to apply Article 101 retroactively.

Background

On 7 December 2005, Deutsche Lufthansa AG ("**Lufthansa**") submitted an application for immunity to the Commission under the 2002 Leniency Notice, revealing the existence of a long-standing global airfreight cartel. Unannounced inspections were subsequently carried out, prompting the submission of 11 further leniency[28] applications between 3 March 2006 and 27 June 2007. In its final decision, issued over three years later on 9 November 2010, the Commission found that the airlines had aligned on fuel and security surcharges to ensure a flat rate was imposed, with increases or decreases applied in a coordinated manner, and had collectively refused to pay commission on such surcharges. As a result, the Commission imposed fines totalling some €799.45m on the 11 undertakings[29] involved. Importantly, although fines were imposed for the whole period of the infringement (1999-2006) for flights within the EEA, since the 1987 Regulation granting the Commission powers to apply Article 101 TFEU with respect to air transport within the EU[30] excluded air transport between the EU and third countries, the Commission did not find an infringement or impose fines for anticompetitive conduct concerning air transport between EU airports and airports in third countries before 1 May 2004.

Ten of the airlines appealed the Commission's decision to the General Court, which found contradictions between the ground of the

[26] See Remedies Notice (publishing.service.gov.uk).
[27] The two purpose-built litigation vehicles were Stitching Cartel Compensation ("**Stitching**") & Equilib Netherlands BV ("**Equilib**").
[28] "Leniency" refers to the total or partial reduction of fines (or other penalties) granted by a competition authority to cartel participants in exchange for disclosing the existence of the cartel, or for information shedding light on the nature or operations of the cartel.
[29] The airlines fined were: Air Canada, Air France-KLM, British Airways, Cathay Pacific, Cargolux, Japan Airlines, LAN Chile, Martinair, SAS, Singapore Airlines and Qantas. Lufthansa received full immunity under the leniency programme after it was the first entity to provide information about the cartel.
[30] Council Regulation (EEC) No 3975/87 of 14 December 1987

Commission's decision and its operative part. Since these inconsistencies infringed the airlines' rights of defence and prevented the General Court from effectively exercising its power of review, the decision was annulled. The Commission re-adopted the 2010 decision – addressing the procedural errors - imposing fines totalling almost €776.5 million on the airlines on 17 March 2017.[31]

ECJ's Ruling

Following a referral to the ECJ from the Amsterdam District Court in November 2019, the ECJ echoed the opinion of the EU Advocate-General handed down in May 2021 that Article 101 has direct effect[32] on relations between individuals and creates rights in favour of individuals which national courts must protect. Further, that national courts' jurisdiction to apply Article 101 derives from this direct effect. Whilst courts must be prevented from taking contradictory decisions to the Commission, since in the present case the Commission considered, in both its 2010 and 2017 decisions, that it did not have jurisdiction to apply Article 101(1) to the conduct at issue, the ECJ concluded that the airlines could not rely on the existence of a risk that the Dutch court would adopt a decision which is incompatible with a decision adopted by the Commission.

Furthermore, the airlines' additional core argument – that the absence of an appropriate regulation or directive to give effect to Article 101 principles, and the limited application of competition rules to the air transport sector prior to 2004, served to limit the scope of Article 101 – was also rejected by the ECJ. Six months earlier, Advocate-General Bobek likewise rejected these arguments, instead suggesting "[the alleged exclusion] of air transport from… Article 101 TFEU was limited to the *administrative* enforcement of the principles… [and] did not affect the *judicial* application by the national courts" of Article 101.[33] The ECJ noted in its ruling that Regulation No 1/2003 could not be regarded as having established a new regime of substantive law applicable to sectors of the economy in which they did not exist before its entry into force. It was only a "reminder" of the jurisdiction enjoyed by those courts by virtue of the direct effect of Articles 101 and 102 TFEU.

Comment

Reflecting on his client's success in the ECJ, Stitching's counsel highlighted the potentially far-reaching impact that the ruling could have. Looking ahead, with competition law infringements now seemingly seen as being 'clearly distinct' from the decision of a national competition authority, national courts may no longer be confined to the temporal or geographical scope of the infringement found by regulators. Although the statute of limitations defence[34] will likely ensure the ECJ's ruling, and any subsequent decision of the Dutch court, does not lead to any further damages claims in the airfreight cartel case, it will be interesting to learn how, or whether, this development will impact future cases. In the meantime however, all eyes – and especially those of the airlines – will return to the Rechtbank Amsterdam District Court, as we wait to discover what the ultimate financial consequences of the ECJ's ruling will be for the airfreight cartelists.

General Court upholds the Commission’s Google shopping decision

In a decision of 10 November 2021, the EU General Court ("**General Court**") dismissed (for the most part) Google's appeal against the Commission’s infringement decision in the Google Shopping case and upheld the fine imposed on Google and its parent company.

Background

On 27 June 2017, the Commission found that Google had abused its dominant position on the market for online general search services in 13 countries in the European Economic Area by favouring its own comparison shopping service (e.g. in the way that

[31] Martinair's significant drop in turnover, and the subsequent reduction in its fine largely accounting for the €23 million discrepancy between the 2010 and 2017 figures.
[32] The principle of "direct effect" enables individuals to immediately invoke a provision in EU law before a national/European court, even where the EU country itself has not yet adopted the EU act in question into its internal legal system. It is one of the fundamental pillars in ensuring the application and effectiveness of European law in EU Member States.
[33] See [Opinion of Advocate-General Bobek, Stitching Cartel Compensation and Equilib Netherlands (europa.eu)]
[34] The "statute of limitations" defence is invoked by a defendant to assert that the timeframe in which legal proceedings relating to a specified action must be brought has lapsed.

search results were displayed) over competing comparison shopping services. The Commission fined Google €2.4 billion.[35]

Google and Alphabet appealed the Commission's decision to the General Court,[36] seeking its annulment or, alternatively, a reduction of the fine imposed. Google and Alphabet relied on six pleas in support of the action, alleging that the Commission had erred in its findings, *inter alia* on the basis that it had misstated the facts, that no discrimination had occurred, that the alleged abusive conduct had the stated impact and that the Commission had not shown that the conduct was likely to have anticompetitive effects.

General Court Judgment

In its judgment of 10 November 2021 the General Court largely dismissed Google's arguments and upheld the fine imposed by the Commission.

- Regarding the anticompetitive nature of the practice at issue, the General Court rejected Google's claim that the Commission should have analysed its conduct under a refusal to supply test.

Google claimed that the Commission treated the practices at issue as a 'refusal to supply' without verifying, in particular, that access to the elements concerned, namely, the general results pages and its own specialised results (Product Universals and Shopping Units), was 'indispensable' and that there was a risk of all competition being eliminated.

The General Court rejected this view, concluding that the abuse constituted a discriminatory practice. On this basis, it ruled that the Commission was not required to establish that the conditions for refusal to supply set out in the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569), were satisfied in order to make a finding of an infringement on the basis of the practices identified.

- Regarding the effects of the practices at issue, the General Court considered that Commission correctly found harmful effects on competition.

In particular, the General Court rejected Google's claim that the Commission failed to take account of the competitive pressure exerted by merchant platforms on the relevant market, although they are drivers of competition and innovation in the markets for comparison shopping services. The General Court confirmed the Commission's assessment that merchant platforms were part of a separate market to comparison shopping services as both sellers and buyers use the two for different purposes.

However, the General Court considered that the Commission did not prove that Google's conduct had - even potential - effects on the market for general search services. It therefore annulled the finding of an infringement regarding that market alone.

- Google argued that that its conduct had pro-competitive characteristics, including because it had improved the quality of its search service.

The General Court rejected those arguments and found that while Google's ranking algorithms may represent pro-competitive service improvements, those efficiency gains did not justify the company's unequal treatment of its competitors in search results.

- Finally, regarding the amount of the penalty, the General Court considered that the annulment of part of the Commission's decision did not affect the amount of the fine. Therefore, the amount of the fine was confirmed.

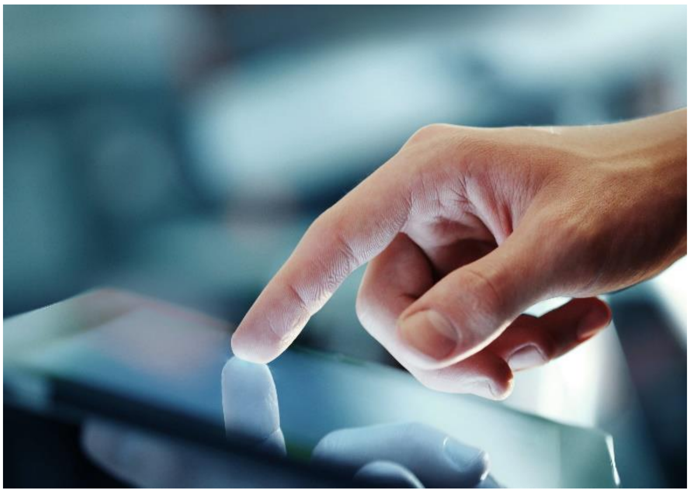
This judgment of the General Court confirms that self-preferencing practices can constitute potential abuses of a dominant position, in particular in the digital sector. The General Court clarified that the legality of such practices does not need to be assessed in accordance with traditional tests relating to essential facilities or an abusive refusal to provide access.

This approach seems in line with the Commission's draft Digital Markets Acts which prohibits digital gatekeepers from self-preferencing with regard to ranking services and also includes an obligation to

[35] Alphabet, its parent company, was jointly and severally liable for €523 518 000 of the fine.

[36] On 11 September 2017

apply fair and reasonable and non-discriminatory terms to those services.



Notably, the Commission announced on 22 June 2021 that it had opened another investigation against Google in the online advertising sector, to assess whether Google has violated EU competition rules by favouring its own online display advertising technology services in the so called "ad tech" supply chain, to the detriment of competing providers of advertising technology services, advertisers and online publishers. The Italian competition authority began a similar investigation in 2019 but announced in November 2021 that it had decided to close the probe since the conduct being examined by the Commission overlapped with its own probe. Google's failure to overturn the Commission's decision in the Google Shopping case may well lead to a similar finding at the end of the Commission's ongoing investigation.

Illumina / GRAIL's breach of the standstill obligation and applicable interim measures

As we reported in our *Competition Law Newsletter* from Q2 of 2021[37], the requirement to suspend the acquisition of GRAIL by Illumina pending approval from the Commission (known as the standstill obligation)[38] became binding on Illumina and GRAIL once the Commission accepted the Article 22 referral request (made by each of France, Belgium, Greece, Iceland, the Netherlands and Norway) in April 2021.[39] Illumina is a global health technologies company and a leading supplier of next generation systems ("**NGS**") for genetic and genomic analysis. GRAIL is a customer of Illumina, developing cancer detection tests relying on NGS systems. Following receipt of the parties' official merger filing in June 2021, the Commission subsequently determined on 22 July 2021 that an in-depth Phase 2 review was necessary, identifying concerns in relation to the development and supply of NGS -based cancer detection tests. In defiance of the standstill obligation, Illumina and GRAIL proceeded to close their deal on 18 August 2021.

Subsequently, as we detailed in our *Competition Law Newsletter* from Q3 of 2021[40], the Commission promptly issued a Statement of Objections ("**SO**") outlining both that it was considering the imposition of interim measures on the parties and that it would consider whether or not to impose a fine for illegal gun-jumping. Whilst the latter point is still under consideration, the Commission confirmed on 29 October 2021 the adoption of interim measures against the parties. Specifically:

- GRAIL must be kept separate from Illumina and (an) independent Hold Separate Manager(s) will be appointed to ensure this;
- Illumina and GRAIL are prohibited from sharing competitively sensitive information other than in specified limited circumstances;
- Illumina will be required to provide GRAIL with sufficient funds to allow it to continue operating and developing independently;
- Illumina and GRAIL will be required to deal with each other strictly at arm's length; and
- GRAIL will need to actively consider alternative options to the transaction in case the transaction is ultimately prohibited by the Commission.[41]

Parties beware – gun-jumping comes at a cost

Whilst, as noted, the decision as to whether or not to fine the parties for gun-jumping has not yet been determined, if such decision were adopted then Illumina and GRAIL could face fines of up to 10% of their annual worldwide turnover.[42]

Moreover, the parties face similar levels of financial penalty if they breach any of the interim measures adopted against them.[43]

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[37] Competition law update - Q2 2021 (shlegal.com)
[38] The standstill obligation is set out in Article 7(1) of the EUMR.
[39] Article 22(4) of the EUMR specifically provides that the standstill obligation applies to deal parties in the event of an Article 22 referral "from the date on which the Commission informs the undertakings concerned that a request has been made".
[40] Competition law update - Q3 2021 (shlegal.com)
[41] See the Commission's press release at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5661
[42] Article 14(2)(b) of the EUMR.
[43] Failure to comply could entail penalty payments of up to 5% of the parties' average daily turnover and/or fines of up to 10% of their annual worldwide turnover.

It is yet another reminder of the perils of falling foul of the EU merger control rules. There are no concrete indications as to the exact level of any fine the Commission may impose on Illumina and GRAIL for infringing the standstill provisions but, based on previous fines such as in relation to Altice / PT Portugal – where the Commission imposed a €124.5 million fine on Altice for implementing its acquisition of PT Portugal before notification or approval by the Commission - it seems safe to assume that any such fine will be high enough to constitute a sufficient deterrent to parties not to breach the standstill obligation in future. Indeed, since this is the first use of interim measures in an ongoing merger review, the novelty of the breach may prompt the Commission to be particularly severe if it ultimately decides to levy a financial penalty.

Illumina's ongoing appeals

Illumina has since lodged an appeal contesting the imposition of the interim measures with the General Court on 3 December 2021. This latest appeal follows that already lodged by Illumina with the General Court, contesting the validity of the initial Article 22 referral. In this, Illumina argued, in essence, that the Commission should not have jurisdiction to review deals under the Article 22 mechanism where the deal in question does not meet the merger control thresholds in any EU Member State. Despite the guidance from the Commission in March 2021 confirming this extension of the Article 22 referral system, Illumina argues that it has no legal basis under the correct interpretation of Article 22 of the EUMR and is *ultra vires* as a result.

It is clear, therefore, that Illumina and GRAIL are set for a lengthy legal battle with the Commission, in parallel with the Commission's ongoing Phase 2 investigation into the deal.

Comment

As well as their implications for the immediate Illumina / GRAIL transaction, the General Court's decisions in both appeals will be extremely important to merging parties going forward, as they will confirm the extent of the Commission's powers under both Article 22 and in relation to the imposition of interim measures as a response to gun-jumping.

More broadly, the Commission will now have until 4 February 2022 to make its final determination in its Phase 2 review of the merger. Given the acrimony between the parties and the Commission to date, it seems that further confrontations will be inevitable in the event that the Commission feels minded to prohibit the transaction or impose remedies as a condition to any approval.

When the chips are down...NVIDIA prepares for a Phase 2 review from both the Commission and the CMA

NVIDIA Corporation's ("**NVIDIA**") increasingly beleaguered attempts to acquire the UK-based technology licensing company Arm Limited ("**Arm**") suffered a further blow recently as both the Commission [44] and the CMA[45] announced that they would be referring the deal to an in-depth Phase 2 assessment. NVIDIA is currently fighting a war on multiple fronts as it attempts to assuage concerns held by regulators – not just in the EU and the UK, but in the United States and China as well – that its acquisition of Arm will have an adverse impact on many different and important semiconductor markets.

Importantly, whilst the Commission is conducting its review solely on competition grounds, the CMA has been instructed by the UK Government to conduct a parallel review of the deal on national security grounds as well. With all of this regulatory scrutiny, the prospects of securing clearance for this transaction are looking increasingly remote.

Background and the parties

Arm is a UK-headquartered company which develops, owns and licences intellectual property relating to semiconductor technology and solutions ("**Semiconductor IP**"). Arm has particular expertise in designing and licensing Semiconductor IP relating to central processing units ("**CPUs**") for use in mobile telephones, embedded devices,[46] datacentres and automobiles. Such is the ubiquity and importance of Arm's Semiconductor IP that, by one recent estimate, around 70% of the world's population uses products that have been manufactured and/or designed with it.[47]

[44] See the Commission's press release at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5624

[45] See the CMA's press release at: https://www.gov.uk/government/news/cma-finds-competition-concerns-with-nvidia-s-purchase-of-arm

[46] Embedded devices are essentially any objects that rely an internal computer system to perform at least one of its main functions. As such, the concept of embedded devices cover a very broad spectrum of objects.

[47] See paragraph 1.3 of the CMA's Phase 1 Report at: https://assets.publishing.service.gov.uk/government/uploads/syste

NVIDIA, meanwhile, is a US company that pioneered the development of the graphics processing unit ("**GPU**"). As well as forming key components of computing gaming systems, GPUs are used in many of the same fields as CPUs – such as datacentres and automotive applications – but, importantly, are only substitutable in a limited number of applications and serve largely disparate functions. GPUs are also increasingly important in the development of artificial intelligence ("**AI**") and internet-of-things ("**IoT**")[48] devices.

NVIDIA announced its intention to acquire Arm on 13 September 2020 with the stated rationale of combining its AI capabilities (driven by GPUs) with Arm's expertise in CPUs in order to pursue technological advances not just in AI but also in advanced computing, autonomous self-driving vehicles, robotics and IoT devices.

Concerns held by the Commission and the CMA

It is noteworthy that both the Commission and the CMA, though conducting entirely separate reviews, have raised almost identical concerns regarding the possible anti-competitive effects that the NVIDIA-Arm merger may have on the European and UK markets respectively.

Interestingly, the NVIDIA-Arm deal giving rise to vertical theories of harm. Generally speaking, where parties do not have horizontally overlapping activities(as NVIDIA and Arm), any vertical overlaps are not usually considered to be of significant concern. However, Arm holds a unique position in the global semiconductor market. Its Semiconductor IP is heavily relied upon by companies across the globe for the purpose of designing and manufacturing their products. What is more, many of Arm's technologies – particularly in the area of CPUs – are non-substitutable (i.e. there are few (if any) competitors supplying equivalent technologies). The result is that companies the world over – including NVIDIA – are reliant on Arm for the continued and uninterrupted upstream supply of Arm's Semiconductor IP. Consequently, Arm serves as a so-called gatekeeper in the supply of semiconductor technologies.

This has the consequence that post-merger, NVIDIA would assume Arm's gatekeeping role and – according to concerns raised by the Commission and the CMA – would have both the ability and incentive to foreclose its rivals' access to Arm's Semiconductor IP. Such foreclosure could take numerous forms, including withholding supply, significantly increasing the price of licensing Arm's Semiconductor IP or reducing its interoperability with the technologies of NVIDIA's downstream competitors. Both the Commission and the CMA believe NVIDIA may implement foreclosure strategies vis-à-vis datacentres,[49] which rely on both CPUs and GPUs in order to operate. If NVIDIA were to acquire Arm, it is feared that it would take steps to limit the interoperability of CPUs comprising Arm's Semiconductor IP with competing GPUs in future.

Other areas in which both the Commission and the CMA identified foreclosure concerns in vertical supply arrangements with Arm's Semiconductor IP, as well as other more general areas that could potentially give rise to a competition concern as a result of the merger, included:

- the supply of systems-on-chip "**SoCs**") used in high-performance IoT applications;
- the supply of semiconductors used for automotive advanced driver-assistance systems ("**ADAS**") and "infotainment" applications in automobiles; and
- the supply of SoCs used in general purpose gaming consoles and personal computers.

It is notable that in the U.S., the Federal Trade Commission filed an administrative complaint on 2

m/uploads/attachment_data/file/1033732/GOV.UK_-_NVIDIA_Arm_-_CMA_Report_to_DCMS__Web_Accessible_.pdf

[48] The IoT refers to the connection of electronic devices to the internet and to other devices to allow them to collect, process and share data. IoT devices include everyday consumer devices like smart speakers, and devices in industrial applications like robotic systems. See https://www.gov.uk/government/news/cma-finds-competition-concerns-with-nvidia-s-purchase-of-arm

[49] Datacentres are, in essence, large groups of networked computer systems which are used for the purposes of generating, storing and transmitting generate large quantities of data, particularly data which is generated by virtual computer ecosystems such as the Cloud and edge computing.

December 2021 in a bid to block the deal on the basis of similar foreclosure concerns held by the CMA and the Commission.

Regulators unconvinced by pro-competitive submissions and the offer of commitments

NVIDIA has made a number of submissions to support the purportedly pro-competitive benefits of the merger. One particular submission was the argument that a combined NVIDIA-Arm would further stimulate innovation across multiple sectors, particularly vis-à-vis datacentres. NVIDIA argued here that the CPUs supplied by both Intel Corporation and Advanced Micro Devices, Inc. – which are based on a specific instruction set architecture ("**ISA**")[50] known as x86 – are predominantly used in datacentres instead of Arm's own CPU ISA and that, in future, Arm will struggle to compete against x86-based CPUs without NVIDIA's investment. The CMA was unconvinced by this claim, noting that many high-profile clients such as Amazon Web Services and Alibaba Group had begun adopting Arm's CPU ISA in this area and that this shift was only set to increase.

Moreover, both the CMA and the Commission concluded that, given the significant foreclosure concerns associated with the proposed merger, the behavioural commitments offered by NVIDIA would be insufficient to address them. These included commitments to maintain Arm's open approach to licensing its Semiconductor IP and that all current and future licensees would have equal access to the same technologies post-merger (in other words, NVIDIA would not take steps to make its rivals continued access to Arm's technologies more difficult or expensive). As such and given the lack of any suitable structural remedies being offered or otherwise available, both regulators determined that a Phase 2 reference was necessary.

UK's national security concerns

As mentioned above, the CMA has produced a provisional assessment of the national security issues raised by the NVIDIA-Arm deal, which prompted the Secretary of State to refer the matter for an in-depth review on this basis as well. NVIDIA-Arm is one of a handful of remaining deals that the CMA will review on national security grounds under the Enterprise Act 2002's public interest regime before the National Security and Investment Act 2021 ("**NSIA**") enters into force on 4 January 2022. Thereafter, the jurisdiction for such reviews will pass to the Department for Business, Energy & Industrial Strategy ("**BEIS**"), which will oversee the NSIA regime.

In its Phase 1 Report, the CMA does not provide extensive details of the relevant national security concerns.[51] However, it does note two particularly significant points (among others):

1) Importance of protecting critical sectors dependant on Arm's technologies

Arm's Semiconductor IP is relied upon (directly or indirectly) by many critical sectors in the UK, including civil nuclear, communications, defence and the emergency services. All these sectors rely (to greater or lesser extents) on technologies like edge-computing, AI and cyber security, all of which rely on CPUs developed with licensed technology from Arm. On this basis, the CMA noted that the acquisition of Arm could bear inherent risks for the maintenance and improvement of these critical sectors of the UK economy.

2) The UK's technological sovereignty and self-reliance

In a related point, it was noted that entrusting the ownership of Arm to NVIDIA would risk placing too much reliance on the United States ("**U.S.**") in the development of these existing technologies (and in the innovation of new ones). Indeed, one third party reportedly claimed that a nation can only achieve technology sovereignty (something deemed critical to a country's security) when it controls its own IT infrastructure (including datacentres). If NVIDIA, as a U.S. company, were to control Arm, this would, according to this line of reasoning, make the UK dependant on the U.S. for the necessary technologies to maintain its IT infrastructure.

Domestic and global political concerns compound competition ones

It is also worth noting the geopolitical headwinds which are also buffeting NVIDIA's attempted takeover. In the UK, there have been prominent interventions arguing that, quite apart from the implications of losing the crown jewel of the UK's technology capabilities, Arm - often dubbed the "Switzerland" of semiconductor technology for its necessary impartiality in dealing with downstream companies all over the world on an equal basis (including NVIDIA) - must retain this impartiality and not fall under NVIDIA's control. Herman Hauser,

[50] An ISA is, in essence, an abstract computer modelling system that defines how a CPU is controlled within a device and how it interacts with hardware and software. See [What is Instruction Set Architecture (ISA)? – Arm®](#)

[51] Indeed, this largely reflects the approach that BEIS will take under the NSIA, where specific details of individual deals will not be published or disclosed publicly.

Arm's founder, has been particularly vocal of these views, publishing an open letter outlining these and other points to Boris Johnson.

Elsewhere, China, like countless other countries, also has a long list of companies (such as Huawei) that rely on Arm's Semiconductor IP. China fears that a U.S.-owned Arm could be susceptible to ongoing geopolitical tensions, not least given previous moves taken by the Trump Administration to block Huawei's access to U.S. technologies.

Any way you look at it, the NVIDIA-Arm deal's prospects of success look increasingly unlikely.

Next steps

Providing the clock is not stopped for any reason and no extension of the review timeline is applied, the CMA will have 24 weeks to complete its Phase 2 review. As the reference was made on 16 November 2021, this means that no decision will be forthcoming from the CMA until at least 2 May 2022.

Meanwhile, the Commission has officially stopped the clock on its review of the deal. The Commission had an original deadline of 12 April 2022 and it is not yet clear when it will make its final decision.

It seems NVIDIA will face many more months of uncertainty and forensic regulatory scrutiny before any decision is made by either regulator.

The Commission fines five banks €344 million over Foreign Exchange spot trading cartel

On 2 December 2021, the Commission announced that it had fined UBS, Barclays, Royal Bank of Scotland ("**RBS**"), HSBC and Credit Suisse a total of €344 million for participating in an illegal Foreign Exchange ("**Forex**") spot trading cartel. UBS, Barclays, RBS and HSBC all participated in the Commission's settlement procedure and were fined a total of €261 million. The investigation against Credit Suisse was conducted under the ordinary procedure, resulting in a fine on the bank of €83 million. UBS received full immunity, avoiding a fine of around €94 million.

Background

The Commission found that between May 2011 and July 2012, certain traders acting on behalf of the fined banks exchanged sensitive information and trading plans, and occasionally coordinated their trading strategies on G10 currencies, the most liquid and traded currencies worldwide (including the Euro, US dollar, Pound Sterling, Japanese yen and Swiss franc), through an online chatroom called *Sterling Lads*.

The Commission concluded that these information exchanges allowed the banks to avoid the risks inherent in making independent trading decisions. Indeed, they enabled the traders to make informed market decisions, which allowed them to decide whether and when to trade currencies in their portfolios. The information exchanges also occasionally enabled the traders to identify opportunities for coordination, for example through a practice called "standing down", whereby some of them would temporarily refrain from trading to avoid interfering with another trader.

This decision concludes the third part of the Commission's wider Forex investigation conducted since 2013. Two settlement decisions were adopted in May 2019 as part of this wider investigation:

- The Forex (Three Way Banana Split) settlement decision[52] which concerned information exchanges from 18 December 2007 to 31 January 2013 in three different chatrooms ("Three Way Banana Split / Two and a half men / Only Marge") among traders from UBS, Barclays, RBS, Citigroup and JPMorgan; and
- The Forex (Essex Express) settlement decision[53] which involved communications between 14 December 2009 and 31 July 2012 across two chatrooms ("Essex Express 'n the Jimmy / Semi Grumpy Old men") among traders from UBS, Barclays, RBS and Bank of Tokyo-Mitsubishi.

[52] See case AT.40135 – summary of the Commission decision available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020AT40135(05)&from=EN

[53] See case AT.40135 – summary of the Commission decision available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020AT40135(02)&from=EN

In this third and final decision, the Commission makes use of the so-called "hybrid-settlement" procedure (*i.e.* when, in the same proceedings, the Commission adopts a decision against those parties cooperating within the framework of the settlement procedure, whilst continuing the ordinary procedure against other parties involved). As noted above, UBS received full immunity for being the first to bring the infringement to the Commission's attention. Barclays, UBS and HSBC also received reductions to the fines that would otherwise have been imposed for cooperating with the Commission's investigation under the leniency framework. By participating in the settlement procedure, these four banks received a further 10% reduction in the level of their fines. Credit Suisse did not cooperate under the leniency framework or the settlement procedure, and consequently was fined under the ordinary procedure.

The adoption of settlement and contested infringement decisions on the same date contrasts with the Commission's practice of adopting two separate decisions on different dates: first, a settlement decision (given that the settlement procedure is intended to lead to a shorter, quicker, administrative process) and, second, an infringement decision using the ordinary procedure. For example,

the Commission's settlement decision in Steel Abrasives was adopted on April 2014 while the infringement decision against Pometon (the non-settling party) was adopted on May 2016.[54] Similarly, the settlement decision in Yen Interest Rate Derivatives was adopted on December 2013 while the infringement decision against ICAP (which did not cooperate under the settlement procedure) was not adopted until February 2015[55]. It remains to be seen whether the Commission will try to coordinate decision dates in hybrid decisions going forward. To the extent it does (and the number of hybrid cases increases), it may cast doubt upon the ability of the settlement procedure to deliver the procedural efficiencies that it was created for.

Dawn raids on the rise…

Competition authorities around the world during the height of the COVID-19 crisis when strict lockdown rules were imposed suspended dawn raids against companies suspected of alleged infringements of competition law. This cut off one of the regulators' principal means of gathering evidence against anti-competitive practices, resulting in a backlog of cases requiring enforcement action.

As countries started to lift lockdown restrictions, and in particular since June 2021, the Commission and several European National Competition Authorities ("**NCAs**") have resumed their dawn raid activities.

Indeed, the Commission has so far revealed that it has conducted 4 dawn raids since June 2021. First, on 22 June 2021, the Commission carried out surprise inspections at the German premises of a company active in the clothing sector, suspected of infringing competition rules. Then, in October 2021, the Commission carried out two raids – one against a group of companies in the wood pulp sector across several Member states due to concerns they participated in a cartel and a pharmaceutical company active in animal health in Belgium. Lastly, on 23 November 2021, the European Commission conducted unannounced inspections at the premises of a company active in the defence sector.

Similarly, several Member States competition authorities have announced that they have carried out surprise inspections. For examples, since the summer of 2021, dawn raids had been carried out in Greece, Poland, France, Norway, Hungary, Romania, Slovenia, Spain and Portugal.

Commissioner Margrethe Vestager speaking at the Italian Antitrust Association Annual Conference on 22 October 2021 made very clear that it was the Commission's intention to carry out a number of dawn raids stating: "*And now, as the pandemic starts to recede, our work on collecting evidence is gathering pace. Last week, we carried out our first international dawn raid in two years, when we inspected companies in several EU countries, on suspicion of a cartel in the wood pulp industry. And*

[54] See case AT.39792 - settlement decision available at : [39792_2603_3.pdf (europa.eu)] and infringement decision available at : [39792_2737_3.pdf (europa.eu)]

[55] See case AT.39861 – settlement decision available at : [39861_4165_3.pdf (europa.eu)] and infringement decision available at : [39861_4230_3.pdf (europa.eu)]

that's just the start of a series of raids that we're planning for the months to come – you'll understand if I don't say exactly when or where they're going to happen".[56] Other senior competition officials across Europe have also made similar stern public statements indicating their intention to carry out dawn raids. Speaking at a public symposium on 25 June 2021, Andrea Coscelli, the Chief Executive of the UK Competition and Markets Authority, suggested a pattern of persistent under-enforcement by the agency in relation to antitrust, noting that the CMA did not presently have enough antitrust cases under investigation.

Yet, as a result of COVID-19, the working world is a very different place with a hybrid working model, which has had a significant impact on employers' ability to collect information as well as how regulators look and are able to investigate businesses should they suspect a business is involved in anti-competitive conduct. Especially, there are significant challenges, for instance, in how to capture data from new platforms such as WhatsApp, chat function on Zoom or Teams. With increased home-working employees are increasingly using personal devices for work emails making it in some cases difficult to access relevant data due to GDPR/privacy rules. Carrying out and supervising raids at an employees' homes are also increasingly more complex, albeit the French competition authority recently announced in November 2021 that it had raided private homes of employees during the course of its raid in the food retail sector.

It is also clear that the Commission and other regulators are on the lookout for new types of collusion. Commissioner Vestager recently announced an increased focus on variations on buyer-side cartels and atypical cartels, including wage fixing or no-page agreements in labour markets. These are new forms of collusion that indeed have been on the radar of many competition authorities across the world and are likely to come under more intense scrutiny in Europe. Indeed, in her farewell speech, the former head of the French competition authority stated that the French competition authority must continue to focus on competitive harm in labor markets and also mentioned the importance of punishing companies that undermine sustainable goals.

[56] Speech by EVP M. Vestager at the Italian Antitrust Association Annual Conference - "A new era of cartel enforcement" | European Commission (europa.eu)

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