STEPHENSON HARWOOD

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Competition Law Newsletter

Welcome to the Q2 2021 edition of our Competition Law Newsletter. A quarterly update covering key developments in UK and EU competition law.

UK Competition Law Developments

UK Government reviews NVIDIA's acquisition of Arm on national security grounds

On 19 April 2021, the Secretary of State ("**SoS**") for Digital, Culture, Media and Sport issued a public interest intervention notice ("**PIIN**") instructing the Competition & Markets Authority ("**CMA**") to review NVIDIA Corporation's ("**NVIDIA**") acquisition of Arm Limited ("**Arm**") on national security grounds.[1] As a result, the CMA has now launched a Phase I investigation in which it will examine the transaction from both a competition and a national security standpoint.

Headquartered in Cambridge, Arm's primary business model involves selling licenced technology and intellectual property ("**IP**") to customers in exchange for a fee, with a particular focus on computer software, semi-conductors and artificial intelligence ("**AI**"). Arm's business does not involve the sale of any physical products, but rather its licenced technology is used by customers for the development of their own products. Indeed, Arm's technology has become ubiquitous around the world, used in everything from televisions, consumer electronics (like Amazon's Kindles and Apple's iPads) and a wide variety of so-called "smart" technologies including smart cars, smartphones and smartwatches (e.g. Fitbits). Importantly, Arm's technological capabilities are also relied upon by many companies in the military and aerospace sectors, both in the UK and worldwide. Arm was acquired by the Japanese Softbank Group Capital and the Softbank Vision Fund (together, "**Softbank**") in 2016 for $31.4 billion.

Nvidia, meanwhile, is a U.S. company which sells (and, indeed, invented) graphics processing units ("**GPUs**") which are used in a plethora of different industries, from computer game development to accelerated computing. Nvidia is headquartered in Delaware and is listed on the Nasdaq stock exchange.

Nvidia announced on 13 September 2020 that it had agreed to acquire Arm in a deal worth $40 billion. The transaction is facing an intense level of scrutiny on multiple fronts in the U.S., the EU, China and also in the UK.

From a competition perspective, many stakeholders have raised concerns that Nvidia's investment in Arm could lead to substantial theories of harm. Qualcomm, for instance, has argued that, since Nvidia operates at a lower level of the supply chain to Arm – i.e. Nvidia is one of the many companies that rely on Arm's licensed technology for the development of its products – post-merger Nvidia could act as a gatekeeper to Arm's technologies. Apart from the risk of unilaterally withholding the licensing of Arm's technologies to its competitors completely, Nvidia could also take more subtle steps to act anti-competitively in this fashion , for instance by raising the prices competitors would have to pay for such licensing or by including overly punitive contractual terms in the relevant licensing agreements.

Moreover, the deal also faces a tough challenge in obtaining clearance on national security grounds. This aspect of the review of Nvidia's investment in Arm may be one of the final swansongs for national security reviews conducted under the UK's public interest regime. For years, the UK has had no official screening regime for foreign direct investment ("**FDI**"), but rather has relied on a number of legislative provisions known as the public interest regime, which is set out under the Enterprise Act 2002 ("**EA02**"). Under the public

[1] The PIIN is available to view at: [PIIN text - REDACTED (publishing.service.gov.uk)]

interest regime, the UK Government (acting through the relevant SoS) can intervene in deals which trigger the UK's merger control thresholds if it suspects that the deal in question may raise certain public interest considerations (in this case, national security concerns). However, the UK's new National Security and Investment Act 2021 ("**NSIA**"), which received Royal Assent on 29 April 2021, will replace this aspect of the public interest regime and introduce a new, standalone FDI system for FDI review in the UK. As the NSIA regime is not anticipated to enter into force until the end of 2021 (owing to the volume of secondary legislation that will need to be published to give effect to it), Nvidia's investment will be scrutinised under the existing public interest regime.

Crossing the Rubicon? The implications of the Nvidia-Arm deal

This deal presents high stakes for a number of interested stakeholders, namely regulators in the UK and advocates for the UK's proprietary technologies and capabilities. Indeed, it is possible that, depending on the outcome of the review, the Nvidia-Arm deal could arguably signal a point of no return in a number of different senses.

1. It is, possibly, the highest-profile merger the CMA has yet undertaken since the end of the Brexit transition period. The outcome of the merger review will have significant implications for how the CMA approaches such deals in future and potentially puts the CMA's professed desire to be counted among the top regulators in the world with the UK's desire for continued investment on a direct collision course.

2. Though the national security review will take place under the public interest regime as opposed to the NSIA, the deal is likely nonetheless to be extremely illuminating vis-à-vis future reviews under the UK's newly introduced FDI regime. The NSIA has been introduced against a backdrop of increased scepticism and fears over foreign investment, where the UK considers it necessary to take a tougher and more stringent approach to FDI reviews. As such, it will be interesting to see whether any possible prohibition of the Nvidia-Arm deal on national security grounds could be taken as a chance to throw down a gauntlet. In other words, to signal that the UK will now be taking a much harder line against deals which carry a perceived national security risk.

Moreover, there have been a number of high-profile statements and interventions warning against the risk of Arm's technologies being acquired by a foreign buyer. Notably, Dr Hermann Hauser, an original founder of Arm, has stated publicly that the deal would result in UK job losses and would irrevocably damage the UK's so-called "technological sovereignty". In other words, the deal would jeopardise key know-how and technological capabilities which are currently in the hands of the UK. Voicing similar arguments, Lord Peter Mandelson has stated that the UK Government cannot square a desire for domestic '*champions*' in tech and AI and yet allow the sale of Arm to Nvidia to go through, arguing this would be akin to '*waving the Union Jack whilst selling off the Crown Jewels'*. Whilst some have pointed out that Arm is already under the ownership of the Japanese Softbank – which, they say, means that any such fears over foreign ownership amount to closing the stable door once the horse has already bolted – Dr Hauser points out that Softbank has lived up to its promise to maintain focus on Arm's activities at its Cambridge headquarters, whilst there are strong reasons to fear that Nvidia would not do the same.

Given these significant implications of the Nvidia-Arm deal, it will be very interesting to see whether any actions are taken to prevent the deal on competition or national security grounds (or both).

CMA digs in its heels reiterating an SLC finding in the FNZ/GBST transaction

In our Q1 2020 *Competition Law Newsletter*,[2] we reported on the CMA's referral of FNZ's (Australia) Bidco Pty Ltd's ("**FNZ**") acquisition of rival investment software firm, GBST Holdings Limited ("**GBST**") ("**Transaction**") for a Phase 2 investigation.[3] The Transaction was initially

[2] https://www.shlegal.com/insights/competition-law-update---q1-2020

[3] As is the CMA's usual practice, the parties had the opportunity to offer the CMA undertakings to address its

prohibited and following FNZ's Competition and Appeal Tribunal ("**CAT**") appeal and the CMA's re-examination of evidence, the CMA has now affirmed its view that the Transaction raises significant competition concerns, albeit offered some flexibility in remedy options.

In April last year the CMA referred the Transaction for a Phase 2 investigation on the basis it raised competition concerns in the provision of retail investment platform solutions in the UK. Both FNZ and GBST are two of the leading suppliers of these solutions in the UK and close competitors.

On 5 November 2020 the CMA blocked the Transaction and ordered FNZ to sell GBST on the basis the Transaction could lead to a reduction in the quality of service and higher prices. The CMA concluded:

- Post-Transaction, the merged entity would be, by far, the largest supplier of retail platform solutions to investment platforms in the UK where FNZ and GBST would hold almost half of the UK market;
- Based on a range of evidence from the parties' own tender data and internal documents and information provided by numerous customers, competitors and other stakeholders; the loss of competition brought about by the deal could lead to investment platforms (and UK consumers who rely on these to administer their pensions/other investments) facing higher costs and lower quality services; and
- Notwithstanding the CMA found differences in the parties' respective business models, with FNZ providing an integrated software and servicing solution and GBST being a software-only provider, the CMA concluded the two competed closely and presently faced few other significant suppliers. Additionally, the CMA found no basis to suggest that entry or expansion by other suppliers into the sector would mitigate the harm caused by the Transaction.

On 24 December 2020, FNZ applied to the CAT to challenge the CMA's Phase 2 decision. Following receipt of the notice of FNZ's application, the CMA identified certain potential errors in its market share calculations as a result of the provision of inconsistent information during the course of its investigation. On this basis, the CMA requested a remittal of its Phase 2 decision from the CAT which the CAT granted on 21 January 2021 (the remittal being in respect of the CMA's prohibition decision and remedy).

Following the CMA's re-examination of additional and updated evidence and assessment of the Transaction, on 15 April 2021, the CMA announced its provisional findings that its significant competition concerns around the Transaction remained. Nonetheless, during the remittal process the CMA considered different remedy options to address these concerns rather than entirely unwinding the deal as it originally prescribed. Specifically, the CMA provisionally found that its competition concerns could be effectively and proportionately addressed by requiring FNZ to sell GBST to an independent CMA approved third party, but with a right to subsequently buy back a limited set of assets from GBST relating to its capital markets business. These assets would be restricted to those that did not affect GBST's competitiveness in the supply of retail investment platform solutions – and GBST's capital markets business not currently competing with any of FNZ's activities in the UK.

Following its consultation on this proposed remedy, on 4 June 2021 the CMA announced that the revised remedy proposal was sufficient to prevent any reduction in competition as a result of the Transaction.

A CMA spokesperson stated that the proposed remedy would, *'protect investment platforms and the people they serve, including millions of people with pensions and other investments, from facing higher prices or poorer service in the future.'*

Double trouble...appeal loss and fine increase for instrument maker Roland

The CAT has dismissed UK musical instrument maker Roland's ("**Roland**") appeal against a resale price maintenance ("**RPM**") fine it agreed to pay as part of a CMA settlement and, at the same time, increased the penalty. Roland's double loss at the CAT serves as a reminder for businesses to carefully and strategically assess potential upsides and downsides both settlement and appeal processes offer.

In June 2020, the CMA fined Roland and another musical instrument supplier, Korg, as well as an online retailer, a total of £5.75 million for RPM – Roland incurring a £4 million penalty. Both Roland and Korg admitted they had forced retailers to sell their musical instruments (including, electronic drum kits, related components and accessories) at or above a minimum price between January 2011 and

competition concerns, and in so doing, avoid a Phase 2 reference.

April 2018. The CMA determined that the RPM policy was clearly *'designed to restrict retailer freedom'* and that enforcing these agreements was in breach of the competition rules.

The CMA's investigation into Roland's commercial practices began in 2018 where it raided Roland, and subsequently in March 2020, sent a 'Statement of Objections' ("**SO**") to Roland setting out its provisional findings, evidence and proposed action. In the SO, the CMA alleged that the companies had used *'all-seeing'* online price-monitoring software to impose minimum prices on retailers.

Roland ultimately applied for leniency to the CMA - and in return for Roland's admission of wrongdoing and cooperation - the CMA reduced Roland's fine by 100% for its conduct from 2011 - 2012 and by 20% from 2013 - 2018. Notably, the CMA also discounted the fine by a further 20% because Roland agreed to settle. Roland entered into settlement agreements with the CMA and, as part of that, agreed to pay its fines.

Nonetheless, in August 2020, Roland appealed the CMA's decision to the CAT arguing:

(i) The CMA had overstated the seriousness of Roland's infringement (i.e. the RPM practices) when calculating the penalty by setting the starting point of its fine at 19% of Roland's annual turnover; and

(ii) The 20% leniency discount was too low and failed to reflect Roland's early cooperation with the CMA's investigation.

The CMA in response requested that the CAT dismiss the appeal and revoke the 20% discount it had granted Roland.

On 19 April 2021, the CAT (perhaps unsurprisingly) rejected Roland's arguments against the CMA's RPM fine. In its findings the CAT:

- Disagreed with Roland's argument that RPM was not a serious enough infringement compared to other anticompetitive conduct to warrant the CMA setting its fining starting point at 19% of annual turnover. Importantly, the CMA had not set the starting point between 21% - 30% which it was entitled to do but which it reserved for cartels and the 19% level appropriately reflected RPM's seriousness;
- Found no evidence to support Roland's claim that its behaviour had a pro-competitive aim such that the CMA should have considered its infringement as less serious than conduct with an anticompetitive goal – and in so doing, use a starting point of no more than 3.5% for its assessment;
- Dismissed Roland's argument that the 19% starting point was too high due to the limited scope of its infringement because Roland had only implemented the practice with one online reseller. The CAT was entitled to consider that the infringement had wide adverse effects in the market; and
- Noted that the CMA had stated that it gathered most of the relevant evidence during dawn raids before Roland applied for leniency and was not persuaded by Roland's argument that the CMA's 20% leniency discount was inadequate. The CAT also determined that it was not in a position to assess the value of the information Roland provided by comparing it with evidence the CMA collected during raids, but, attached weight to the CMA's assessment of the value added by Roland.

In a further blow to Roland, the CAT granted the CMA's application to revoke the settlement discount and increased Roland's fine to £5 million. In so doing, the CAT:

- Rejected Roland's argument that requiring a company to choose between paying a discounted fine as part of a settlement and foregoing an appeal or paying the full penalty is *'coercive or shields the CMA from scrutiny'*; and
- Found *'no valid reason'* to ignore this *'essential bargain'* and permit a settling company that brings an appeal to retain a discounted fine as this would undermine the settlement process itself.

The CMA welcomed the CAT's judgment stating, the ruling *'…sends a strong message that when a company agrees to end an investigation through a settlement, it cannot reopen the question by appealing without losing its discount'* which *'…reinforces the CMA's view that settlements should be final.'*

Facebook goes head to head again with the CMA

In our Q3 and Q4 2020 *Competition Law Newsletters,*[4] we reported on Facebook, Inc's ("**Facebook**") challenge to the CMA's hold separate powers at the CAT following the CMA's investigation of its acquisition of Giphy, Inc ("**Giphy**") ("**Acquisition**") last year. Facebook ultimately lost its appeal. Now, Facebook is looking to go head to head with the CMA again in a Phase 2 probe of the Acquisition after it refused to offer remedies to the CMA to address its competition concerns.

In May 2020 Facebook announced its €340 million acquisition of Giphy - a graphic interchange format ("**GIF**") website. Giphy is an online database and search engine that allows users to share GIFs and stickers via Giphy's website, its application or through other social media platforms such as Facebook, WhatsApp, Twitter and Snapchat. Importantly, prior to the Acquisition Giphy competed with Facebook outside the UK in digital advertising through paid partnerships with brands, such as Pepsi and Dunkin' Donuts.

Importantly, and demonstrative of the CMA's increasingly wide application of the share of supply test for jurisdictional purposes, the CMA established jurisdiction to review the Acquisition on two share of supply bases:

(i) First, it was possible for the parties to increase their share of supply to the market for GIF searches. Specifically, among apps and/or websites that allowed UK internet users to search for GIFs, Facebook and Giphy already held a combined share of 50–60% by average monthly searches which could potentially increase by 0–5%; and

(ii) Second, among searchable libraries of animated stickers — including both GIF and non-GIF stickers — provided direct to users in the UK, the companies held a combined share by sticker library size of 80–90%, with an increment of 0–5%.

It is possible the CMA included both bases because it has not previously examined the sector and which approach, while uncommon, is not unprecedented. Nonetheless, it is also clearly consistent with the CMA's increasing trend to flex the share of supply test as and when it has an appetite to review a particular transaction.

On 25 March 2021, in its Phase 1 decision the CMA determined that the Acquisition raised concerns in relation to: (i) digital advertising; and (ii) the supply of GIFs; but Facebook decided it would not offer any remedies in order to address the CMA's concerns. Specifically, the CMA found:

- GIFs have unique characteristics meaning they cannot be substituted for other types of content (i.e. videos, music, emojis, etc.) and Giphy's internal documents did not suggest it considered other content types as constraints. Indeed, an important part of Facebook's Acquisition rationale focused on the importance of GIFs and the impact on Facebook were it to lose access to Giphy's database;
- It was important to draw upon the conclusions of its recent online platforms and digital advertising market study which had found Facebook was by far the largest supplier of digital advertising (with a share of over 50%) as well as a 'must-have' for advertisers. Consequently, the removal of any constraint to Facebook's dominance had to be considered in the context of its existing market power;
- The Acquisition could reduce Giphy's incentive and efforts to expand its digital advertising business and reduce future competition in display advertising. While Giphy was not currently active in digital advertising in the UK it had planned to monetise its GIFs outside the US and to increase the overall scale of its digital advertising business which could have

[4] https://www.shlegal.com/insights/competition-law-update---q3-2020
https://www.shlegal.com/insights/competition-law-update---q4-2020

strengthened the advertising offerings of Facebook's competitors; and

- GIFs were an important feature to drive user engagement on online platforms and could be even more important as an advertising channel within messaging in the future. Moreover, third party feedback confirmed a significantly worse GIF offering (i.e. if Giphy were to cease supplying GIFs or to do so on worse terms post-Acquisition) would impact overall competitiveness and the ability to win and retain users for rival social media platforms.

On 1 April 2021, the CMA opened an in-depth Phase 2 investigation into the Acquisition.

The CMA's close scrutiny of the Acquisition highlights its focus to regulate the 'tech titans' and so-called 'killer acquisitions'. The CMA commented, *'It is vital we ensure that Facebook, as a large and powerful Big Tech firm, isn't using its strong market position to stifle competition'.*

A Facebook spokesperson commented that Facebook would fully cooperate with the CMA's investigation and that the Acquisition was, *'…good for competition and in the interests of everyone in the UK who uses Giphy and our services – from developers to service providers to content creators.'*

The CMA is due to issue its final decision by 15 September 2021.

CMA clears the blockbuster merger between Virgin and O2

After publishing its provisional findings a month before, on 20 May 2021 the CMA officially approved the merger between Liberty Global plc ("**Liberty Global**") and Telefónica S.A. ("**Telefónica**") after an in-depth, Phase II review.[5] Liberty Global, which owns Virgin Media Inc. ("**Virgin**"), and Telefónica, which owns O2 Holdings Limited ("**O2**"), operate two of the largest telecommunications companies in the UK. The merger between Liberty Global and Telefónica is constructed as a 50:50 joint venture ("**JV**") where their respective Virgin and O2 brands will be combined in this newly created entity. The CMA requested a referral of the deal from the Commission, to whom the transaction had been originally notified, in October 2020.[6] In successfully arguing the basis for this referral, the CMA submitted (*inter alia*) that the transaction risked having a significant effect on the UK and that, in any event, the post-Brexit transition period would end after 31 December 2020, after which time the CMA would have full jurisdiction to review these sorts of mergers without having to request referral from the Commission.

Virgin is the second largest supplier of wholesale leased lines in the UK. Leased lines are used by mobile network operators ("**MNOs**")[7] for mobile backhaul purposes – that is to say, in order to connect their radio base stations and their core network. Breaking this down, MNOs provide their mobile services by linking their mobile network towers (which, in turn, communicate with SIM cards in individual users' mobile devices) with the UK radio spectrum. The radio spectrum essentially refers to the radio signal frequencies that need to be accessed in order to provide wireless services, including mobile services – it is a finite resource and, in the UK, the radio spectrum is controlled by the network regulator Ofcom.[8] MNOs purchase space on the radio spectrum from Ofcom in auction sales. Without the means to connect their network towers to the radio spectrum through radio base stations, MNOs like O2 cannot operate their services. This connection between the radio spectrum and network towers is known as mobile backhaul, which is enabled through leased lines.

O2, on the other hand, is an MNO and the largest supplier of retail mobile services to consumers in the UK. Additionally, O2 also supplies wholesale mobile access services to mobile virtual network operators

[5] The Competition & Markets Authority. *Anticipated joint venture between Liberty Global plc and Telefónica S.A. – Final Report.* 20 May 2021. Available at: https://assets.publishing.service.gov.uk/media/60a55ec58fa8f520c5e44021/Virgin_O2_-_Final_Report_20.5.21.pdf

[6] The transaction was subsequently transferred by the Commission to the CMA's jurisdiction in November 2020.

[7] There are four MNOs in the UK market: O2, EE, Vodafone and Three. MNOs are licensed by Ofcom and supply around 90% of the retail mobile market in the UK, with the remainder being provided by mobile virtual network operators. See para 2.24 of the CMA's Final Report.

[8] Officially, Ofcom is known as the Office of Communications.

("**MVNOs**").[9] In essence, MVNOs also provide retail mobile services to consumers but do not have any access to the radio spectrum themselves and so cannot provide such services on an entirely independent basis. Rather, MVNOs obtain access to the radio spectrum *through* MNOs. In this way, MNOs are a bit like tenants of a building who give MVNOs access to the same building through a sub-lease style arrangement.

As Virgin also has an active MVNO in the UK (Virgin Mobile), the two parties overlap on both a vertical basis (in relation to Virgin's supply of leased lines to MNOs like O2) and a horizontal basis (through O2's wholesale mobile access services to MVNOs like Virgin Mobile). The CMA therefore focused its investigation on two main possible theories of harm:

a) Virgin's supply of wholesale leased lines to MNOs; and

b) O2's supply of wholesale mobile services to MVNOs.

Ultimately, the CMA concluded that neither theory of harm would lead to any substantial lessening of competition ("**SLC**") in the UK, since:

- With regard to the supply of wholesale leased lines, the CMA were concerned that the merged entity could increase prices, decrease the quality of the mobile backhaul and/or withdraw the supply of leased lines entirely which could lead to the foreclosure of various MNOs who compete with O2. There were two main reasons why the CMA concluded that these concerns would not materialise. Firstly, Openreach (a subsidiary of BT, though one which is functionally and legally separate from it) is the UK's largest supplier of wholesale leased lines with almost ubiquitous UK coverage – as such, it would not be difficult for MNOs to switch supplier. Secondly, the CMA found that leased lines constituted, in any event, a small proportion of MNOs' costs. As such, the merged entity would have limited ability or incentive to negatively affect competition in the supply of wholesale leased lines.
- With regard to the wholesale mobile services to MVNOs, the CMA was concerned that the merged entity could foreclose certain MVNOs by increasing prices or reducing the quality of its wholesale mobile services. In a very similar outcome to wholesale leased lines analysis, however, the CMA found that the merged entity would have neither the ability nor the incentive to pursue any foreclosure strategy given that (*inter alia*) the four MNOs in the UK compete actively to supply their services to MVNOs and that the costs of these wholesale mobile services were, for the MVNOs, only a small proportion of their overall costs.

In light of these outcomes from its investigation, the CMA confirmed its unconditional approval for the merger between Virgin and O2. This result has, perhaps, come as a surprise to some given that there were expectations that the CMA would look to assert its post-Brexit authority in such a high profile merger review and, at the very least, impose conditions on its approval.

The CMA's approval is, therefore, a reassuring sign that even anticipated or completed mergers that would seem to herald a high level of scrutiny can be cleared if there are sufficiently strong pro-competitive arguments underpinning them.

CAT definitively confirms – and potentially broadens – CMA's already expansive scope to review deals in airline booking merger

In our Q4 2020 *Competition Law Newsletter*[10], we reported on Sabre Corporation's ("**Sabre**") appeal to the CAT where it challenged the CMA's jurisdiction to review and prohibit its proposed takeover of Farelogix Inc ("**Farelogix**") in 2020 for $360 million ("**Proposed Takeover**"). In an anticipated judgment, the CAT dismissed Sabre's appeal and endorsed the wide discretion the CMA has to assert jurisdiction to investigate deals with significant implications for merging parties.

On 21 May 2021, the CAT handed down its judgment dismissing all four grounds of Sabre's appeal against the CMA's prohibition decision of the Proposed Takeover. Broadly, the CMA had blocked the Proposed Takeover on the basis that the deal would have reduced innovation in the airline ticketing industry – and as well, fees for certain products may also have increased. All of this, the CMA considered, leading to worse outcomes for airlines, travel agents and UK passengers alike.[11]

Importantly, Sabre had initially challenged the CMA's decision on the basis that the CMA lacked jurisdiction to review the Proposed Takeover and had irrationally and unlawfully found it may be expected to substantially lessen competition for UK consumers.

[9] Around 150 MVNOs have been launched in the UK in the last decade, including Sky Mobile, iD Mobile, Virgin Mobile and Lycamobile. See para 2.29 of the CMA's Final Report.

[10] https://www.shlegal.com/insights/competition-law-update---q4-2020

[11] Sabre and Farelogix provide information technology systems allowing airlines to sell tickets through travel agents and add-ons (e.g. onboard internet connectivity / meals).

However – and as the CMA emphasised in its statement on the judgment – Sabre's appeal only related to the question of whether the CMA had jurisdiction to review the deal as it had withdrawn its challenge on the SLC finding. The Proposed Takeover did not meet the CMA's *'turnover test'*[12] but the CMA had found jurisdiction on the basis that the Proposed Takeover met its *'share of supply'* test[13] ("**SOS Test**").

Sabre challenged the CMA's exercise of its SOS Test on a number of bases. Specifically:

(i) Legal Error

Sabre argued that the CMA had made a legal error in how it had defined its relevant description of services for purposes of application of the SOS Test where it had defined that as, *'the supply of IT solutions to UK airlines for the purpose of airlines providing travel services information to travel agents, to enable travel agents to make bookings'.* In particular, Sabre claimed the CMA had considered and abandoned a series of different formulations of the relevant services before deciding on a final version that was *'vague and sweeping in some respects and convoluted in others'.*

However, the CAT rejected Sabre's argument which it described as *'disparate and overlapping'* and confirmed the CMA's *'broad discretion'* in setting the criteria to identify services of a particular description. Importantly also, the CAT noted that because Sabre was challenging a public authority's decision it was required to prove that the choice of the services defined was *'irrational',* which, it had failed to do.

(ii) Supply of Services

The CAT agreed with the CMA's conclusion that Farelogix supplied services of the relevant description in the UK. Sabre argued that the CMA had erroneously asserted jurisdiction on the basis Farelogix supplied services to British Airways ("**BA**"), despite the absence of an agreement and a lack of awareness from BA that it was in receipt of services.

Nonetheless, the CAT determined that the CMA's conclusion was sound because Farelogix's agreement with BA allowed BA to use some of its services for an itinerary in the context of a separate arrangement with American Airlines and this agreement meant Farelogix supplied its services within the UK. The CAT determined: *'That contract enables the benefit to be obtained. Absent the contract the benefit of the service could not be acquired'.*

(iii) Increment

Interestingly – and ambitiously - Sabre had attempted to challenge the CMA's application of the SOS Test itself, arguing the CMA relied on a *'hypothetical and vanishingly small'* share of supply increase to assert jurisdiction over the Proposed Takeover. Specifically, the CMA had concluded that Farelogix's share of supply was less than 1% but that any increment would suffice to satisfy the statutory SOS Test. Additionally, Sabre submitted that the CMA only had jurisdiction over a deal if one supplier had a UK share of supply over 25% and there was also an increase in the share of supply as a result of the deal, whereas in this case, the CMA's analysis ignored the second limb here.

Critically, the CAT rejected Sabre's arguments and confirmed that the CMA's approach to the SOS Test was correct and emphasised that this approach was not irrational.

(iv) Third Party Suppliers

Finally, the CAT dismissed Sabre's submission that the CMA had wrongly excluded third party suppliers from the relevant description of services. Specifically, Sabre claimed that the CMA's description was *'arbitrary and inconsistent'*, which had left out a wide range of other services without justification.

As it happens, although the CAT accepted that the CMA's rationale for excluding some suppliers from the description of services was confused and not clearly expressed, it nonetheless held that the CMA's approach was not irrational. The CAT further noted that even if it did agree with Sabre's argument on this point, that would still not justify it overturning

[12] Target's UK turnover >£70 million.
[13] Post-transaction the parties will together, supply or acquire 25% or more of a particular good or service within the UK and the deal has led to an increment (i.e. there must be an overlap between the parties).

the CMA's prohibition decision on the Proposed Takeover.

A Sabre spokesperson stated that Sabre had noted the decision and intended to study the judgment before considering next steps. It had been important to appeal against the CMA's decision as *'…Farelogix had no presence in the UK.'*

The critical takeaway from the CAT's judgment is that if the CMA considers a merger could raise a substantive competition issue in the UK it now has significant latitude to find a way to investigate that deal.

Coca-Cola accused of abuse of dominance for allegedly poaching customers from a supplier

On 23 April 2021, a claim was brought against Coca-Cola European Partners Great Britain Limited ("**Coca-Cola**") in the CAT by a UK food and drink wholesale supplier, Forrest Fresh Foods Limited ("**FFL**"). In its claim, FFL has alleged that Coca-Cola abused its dominant position by allegedly obtaining customer details from FFL in order to then supply its products to those customers directly. The proceeding serves as an important reminder for businesses to ensure that not only commercial arrangements but also conduct and interactions with commercial partners remains in compliance with competition rules.

Coca-Cola is minority-owned by The Coca-Cola Company and is the only licenced bottler of Coca-Cola products in Great Britain. Coca-Cola makes and distributes soft drinks including Coca-Cola, Fanta and Sprite in Great Britain and other countries across Europe. FFL had been a wholesale purchaser and supplier of Coca-Cola products since 2011. FFL sold Coca-Cola's products onto other wholesalers as well as restaurants and take away outlets in the UK.

In 2016 and 2017, FFL entered into a series of agreements with Coca-Cola and other wholesalers ("**Agreements**"). The object of the Agreements was for FFL to provide Coca-Cola with information about FFL's customer list, as well as details around quantities purchased and frequency of orders. In return, Coca-Cola would offer FFL its products at an advantageous price.

Coca-Cola allegedly subsequently used the information it obtained from FFL to sell its products directly to FFL's customers which, in turn, restricted FFL's access to the market.

FFL further alleged that Coca-Cola:

- Requested FFL's assistance in removing Coca-Cola stock sold in Ireland and Georgia from the UK market between January 2011 and April 2016;
- Instructed FFL to purchase stock from a specific cash and carry in April 2012 in order to boost the latter's sales figures, for which Coca-Cola reimbursed FFL as the cash and carry's pricing was not attractive to FFL; and
- Refused to reimburse FFL for sugar tax levies (which the UK Government imposes on drinks containing certain amounts of sugar) going back as far as October 2017 on Coca-Cola products exported to Europe and beyond.

FFL claims that Coca-Cola has abused its dominance in breach of competition laws, which has affected and will continue to affect and/or has the potential to affect trade between FFL and its UK and global market places.

Specifically, FFL has submitted that Coca-Cola's conduct will, if unrestrained, '*seriously distort competition on downstream markets.*' FFL has sought damages (including exemplary damages), interest and further or other relief.

A spokesperson for Coca-Cola said the company denies liability and will defend its position '*robustly*'.

Royal Mail loses second appeal against £50 million fine

In our September 2019 *Competition Newsletter,*[14] we reported on Royal Mail's appeal which was dismissed by the CAT, and affirmed the Office of Communication's ("**Ofcom**") findings, that Royal Mail had abused its dominant position in 2014 for excluding its competitor / customer, Whistl, from the wholesale market for bulk mail delivery services by

[14] https://www.shlegal.com/news/competition-law-update---september-2019

increasing its prices. The £50 million fine was the highest ever fine imposed by Ofcom.

On 7 May 2021, the Court of Appeal handed down its judgment dismissing Royal Mail's further appeal against the CAT's 2019 decision, which was brought on the basis that Ofcom wrongly failed to test whether Royal Mail's conduct was capable of excluding a rival.

More specifically, Royal Mail argued the following two grounds:

1. That the CAT was wrong to conclude that it was unnecessary to take into account or give any weight to the 'as-efficient competitor' ("**AEC**") test; and
2. That the CAT should have concluded that Ofcom had not given enough consideration to the AEC analysis submitted by Royal Mail during the administrative process.

Whilst reviewing these grounds of appeal, the Court of Appeal considered the role of an AEC test in cases where the alleged abuse of dominance arises from the dominant undertaking's pricing practices. The Court concluded that the purpose of the AEC test is to use a '*hypothetical economic analysis'* to determine whether the dominant entity's pricing practices could drive an equally efficient economic competitor from the relevant market by making it '*very difficult or practically impossible'* for that competitor to make a profit from offering its goods or services in that market.

The Court of Appeal reviewed previous case law and summarised in relation to AEC tests that:

- There is no obligation on a competition authority to carry out an AEC test before concluding that a pricing practice is contrary to competition laws;
- While an AEC test can be useful in some instances, it is not always relevant;
- The dominant undertaking may rely on an AEC test in support of an argument that its conduct is not abusive;
- Where an AEC test does support the dominant undertaking's argument, it is relevant but '*not necessarily decisive*' in the dominant undertaking's favour; and
- The AEC test is capable of being outweighed by other factors.

In relation to the first ground of appeal, the Court of Appeal found that the CAT had made no error of law in concluding that Royal Mail's abuse of dominance was established by other evidence, agreeing with the CAT's decision that in the present case, the AEC was not straightforward and therefore not conclusive evidence.

In relation to the second ground of appeal, the Court of Appeal noted that Ofcom was not required to treat the AEC test as either '*determinative*' or '*highly relevant*', and had given sufficient consideration to the AEC test relied upon by Royal Mail. The Court of Appeal held that the CAT was not wrong to find that Ofcom had given adequate consideration to the AEC test, thereby dismissing both grounds of appeal.

It remains unclear whether Royal Mail will bring a further appeal against this judgement in the Supreme Court.

CMA provides further guidance on its post-Brexit merger control tools

After publishing revised guidelines in November 2020 and opening the same up to a public consultation which concluded on 8 January 2021, the CMA officially adopted its updated merger assessment guidelines ("**MAGs**") on 18 March 2021.[15] The MAGs have not been updated since 2010 and they provide an excellent insight as to how the CMA will undertake its assessment of mergers and how stringent it will be. Separately, also, on 7 April 2021 the CMA supplemented its updated MAGs by issuing an additional consultation on the interim measures it will impose in the course of its merger reviews.[16]

[15] The Competition & Markets Authority. *Merger Assessment Guidelines*. 18 March 2021. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/986475/MAGs_for_publication_2021_-.pdf

[16] The Competition & Markets Authority. *Interim measures in merger investigations – Consultation document*. 7 April 2021. Available at: https://assets.publishing.service.gov.uk/government/uploads/

Both of these steps from the CMA are indicative of the approach it will take to merger assessments post-Brexit where the CMA appears to be officially adopting some of its more aggressive tendencies. Both advisers and parties should take head that the CMA is clearly resolute in its ambition to have a seat at the top table discussing international mergers.

Beware the ides of March – what do the new MAGs tell us?

There are a number of salient points to take away from the new MAGs, some of which merely confirm points about the CMA's approach that has long been known or suspected whereas others come as more of a surprise. These include:

1. **Parties should not assume that small total size or value deals are safe from scrutiny**

   The new MAGs confirm that the CMA can find there is an SLC even in mergers where the market concerned is '*small in total size or value*'.[17] Moreover, even regardless of the size or value of the market itself, it similarly does not make a difference if the acquirer or target (or both) generate what might be perceived as '*low*' levels of turnover and if the value of the transaction is accordingly low value as a result. The MAGs note a number of possible scenarios where the CMA can determine an SLC will arise, none of which bear any relevance to the size or value of the parties or the relevant market:

   a) The merger involves the market leader and the transaction would see the number of other competitors reduced from four to three;

   b) The parties in question are close competitors;

   c) The merger would reduce the incentives of the merged entity to continue investing in research and development ("**R&D**") and wider innovation; and

   d) The merger would increase the risk of anti-competitive coordination between the competitors in the relevant market.[18]

2. **An increased focus on so-called "killer acquisitions"**

   In a very similar vein to point 1 above, the CMA has also noted that an SLC can arise in markets which are '*large or otherwise important to UK customers*' or, alternatively, where there is '*limited*' pre-existing competition. This, too, applies even where there might be perceivably little change in the competitive structure post-merger – for instance, if the market share increment of the combined entity would be small or minimal.

   The clear focus of this barbed statement is on "killer acquisitions"; namely, acquisitions where strong market incumbents buy up small competitors or new entrants in order to remove potential competition. Many regulators around the world have raised concerns around this practice, including the CMA. Indeed, many other merger control jurisdictions are less equipped to deal with this issue than the UK given that most only have a turnover test to determine whether the merger is reviewable. In other words, "killer acquisitions" may fly under the radar in other jurisdictions given that the target, by nature of being small and/or a new market entrant, is unlikely to have high turnover.

3. **Little emphasis will be put on market shares and market definitions**

   Perhaps the most interesting (and disconcerting) aspects of the MAGs is the CMA's stated view that market definitions and parties' respective shares of these markets will play a relatively insignificant factor in the CMA's approach to merger assessments. This, for many competition lawyers, is a complete paradox. Determining the relevant, applicable markets to a deal and the parties' respective shares of these markets is very much a phoenix-and-

system/uploads/attachment_data/file/976063/Interim_measures_in_merger_investigations_consultation_document_-.pdf

[17] The Competition & Markets Authority. *Merger Assessment Guidelines*. 18 March 2021. Para 2.9. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/986475/MAGs_for_publication_2021_-.pdf

[18] Ibid. paragraph 2.18.

flame style scenario where no meaningful theories of harm can be identified without taking this incipient step. The fact that the CMA has stated market definitions and market shares will only '*sometimes be helpful*' is a somewhat arresting viewpoint.[19] It will mean that parties and their legal advisers will need to take an even more thorough and cautious approach in their '*up front*' assessments as to whether a voluntary filing will be triggered in the UK by a particular deal. That is to say, these assessments will need to go beyond identifying the relevant markets and constructing market shares – in fact, parties and their advisers will almost need to step into the CMA's shoes and perform a much more in-depth assessment to identify where any theories of harm may arise as a result of the merger.

In short, the new MAGs are a stark reminder that mergers in the UK face an increasingly high level of scrutiny.

Going forward – the interim measures consultation and post-Brexit landscape

As noted above, the CMA have now put out a consultation document on its revised interim measures guidance. Interim measures, which typically take the form of initial enforcement orders ("**IEOs**"), are imposed on parties during the course of the CMA's merger review process and are intended to prevent the parties in question from taking any pre-emptive actions which could jeopardise the outcome of the review (in the event that the CMA determines that a remedy or even outright prohibition is necessary). In this area, too, the CMA has been increasingly aggressive in recent years, being willing to impose "hold separate" and even unwinding orders in respect of completed mergers. Compliance with interim measures is extremely important and, once the revised guidance has been consolidated after the consultation, it will be necessary to review it carefully. For now, the main change to take note of is that interim measures are intended, going forward, to be applicable to <u>all</u> parties involved in a transaction, both target and acquirer, <u>including</u> all parent companies. This change has, no doubt, been at least partly informed by the Facebook / Giphy case – see our story above – where the IEO in that case was imposed on Facebook's global business, not just its UK subsidiary.

More generally, both the updated MAGs and interim measures guidance are part of the CMA's post-Brexit framework. Now that the Brexit transition has ended, the "one-stop shop" which endured for many years – i.e. where mergers with an EU dimension fell under the Commission's jurisdiction even where there was a strong UK nexus, unless the UK made a specific referral request – has come to an end. This means, on the one hand, that the CMA is likely to have a significantly higher number of mergers to review on an annual basis. The CMA clearly feels it will, as a result, need sufficiently strong tools at its disposal to address this increased workload and, to judge from the MAGs and interim measures guidance, the CMA will be taking a robust approach to its regulatory role. Time will tell whether the CMA's desire to be seated at the top table of international regulators can be squared with the UK Government's desire to encourage high levels of investment and commercial activity.

CAT reduces fines imposed by the CMA on drug makers and annuls fine against GSK for abuse of dominance, despite upholding pay-for-delay decision

In our Q3 2020 *Competition Law Newsletter*[20], we reported on the Court of Justice of the European Union's ("**CJEU**") ruling on a number of questions which had been referred to it by the CAT regarding an appeal brought by GlaxoSmithKline plc ("**GSK**"), Generics UK and Alpharma to the CAT in relation to the CMA's fine of £44.99 million imposed against the companies in relation to pay-for-delay agreements.

On 10 May 2021 the CAT published its decision upholding the CJEU's decision (which confirmed that competition can exist between the holder of a pharmaceutical patent and generic drug makers that are in a patent dispute) and supporting the CMA's 2016 infringement decision against GSK, Generics UK and Alpharma. However, the CAT reduced the fines imposed by the CMA by £27.1 million due to the uncertainty of the law at the time and the novelty of the case. In addition, in a significant win for GSK, the CAT completely annulled the CMA's fine on GSK for abuse of dominance. The case is a relatively rare example of a well strategized appeal with a clearly successful outcome for the appealing parties.

Pay-for-delay agreements are arrangements whereby a pharmaceutical company which has developed a new medicine (the patent holder) agrees to pay another pharmaceutical company which has developed (or, is in the process of

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[19] Ibid. paragraph 9.3.

[20] https://www.shlegal.com/news/competition-law-update---q3-2020

developing) a similar generic product in order to delay the release of that competitor's product.

In this instance, GSK held the patent for the active ingredient in the antidepressant tablet paroxetine, and the pay-for-delay agreements dated back to early 2000 when GSK brought patent infringement proceedings against generic drug makers IVAX Pharmaceuticals, Generics UK and Alpharma. GSK subsequently reached settlements with those drug makers enforced between 2001 – 2004 under which it agreed to pay the pharmaceutical companies not to enter the UK paroxetine market with their own products. As a result, the companies delayed the launch of equivalent drugs to paroxetine on the UK market, thereby artificially increasing the price of the drugs for consumers.

In 2016, the CMA found that GSK had abused its dominant position in the market for paroxetine, and also fined GSK, Generics UK and Alpharma for entering into the pay-for-delay agreements. Subsequently, the companies appealed against the CMA's infringement decision to the CAT.

On 10 May 2021, the CAT issued its judgment on the remaining issues it was to determine.

(i) <u>Reduction in Pay-For-Delay Fines</u>

Noting the criteria set out by the CJEU, the CAT rejected the appellants' argument that Generics UK and Alpharma were not potential competitors to GSK in the UK market for the supply of paroxetine. In particular, the CAT found that Generics UK did not dispute it had both the ability and firm intention to enter the market had it not been restrained by GSK; and the CAT rejected Alpharma's arguments that it did not have a *'firm intention'* to enter.

Additionally, the CAT also noted that the CJEU ruled that a settlement agreement where a generic challenger had agreed to abandon entry to the market and not to challenge the patent could constitute a *'by-object restriction'* of competition rules. In other words, one of the most serious breaches of the competition rules and each agreement in this case was, *'in principle'* such a restriction by object.

Importantly, however, the CAT considered that the CMA's determination of the penalties was *'flawed'* for the following reasons and as a result, reduced those penalties:

- At the time of the pay-for-delay agreements, there had been no finding that agreements of this kind infringed EU or UK competition laws (noting that their consideration was also uncertain in the US);
- There was no suggestion that any of the parties entered into further agreements of this kind since the opening of the investigation; and
- The CMA had *'failed'* to *'reflect sufficiently'* the effect of the *'very substantial passage of time'* between the infringing arrangements (early 2000s) and the start of the CMA's investigation (2011), which did not involve the companies until 2013. As well, the CMA observed that the appellants no longer had access to many of the relevant documents and that their witnesses' recollections were also affected, all of which impacted their defence.

(ii) <u>Annulment of GSK's Abuse of Dominance Fine</u>

In response to the CMA's finding of abuse of dominance against GSK, GSK had argued on appeal that it could not reasonably have been aware in the early 2000s that it held a dominant position in the market. However, the CAT found that GSK should have known that paroxetine was a distinct product market in which it had substantial market power.

The annulment of GSK's fine for abuse of dominance was instead founded on a combination of factors, notably including the novelty of the case. Specifically, given that when GSK entered into the pay-for-delay agreements there was no precedent case to suggest these would be considered anticompetitive. Emphasising that *'each case is different and an assessment of novelty excusing a fine is very dependent on the particular facts',* the CAT determined that in the particular circumstances of this case, no penalty should be imposed on GSK for abuse of dominance.

(iii) <u>Outcome</u>

In its judgment the CAT reduced GSK's fine from £37.6 million to £22 million, whilst Generics UK's fine was reduced from £5.8 million to £3.8 million and Alpharma's from £1.5 million to £1 million. The CAT also dismissed GSK's fine for abuse of dominance entirely.

The CMA stated the judgment sends a strong message that agreements between pharmaceutical companies aimed at delaying generic entry are unlawful and *'won't be tolerated'*. However, the CMA is disappointed with the CAT's reduction of the parties' penalties and intends to carefully consider the judgment and next steps.

EU Competition Law Developments

European Commission provisionally determines that Apple abused its dominant position as row over the AppStore intensifies

On 30 April 2021, the European Commission ("**Commission**") issued a formal SO to Apple, Inc. ("**Apple**") setting out its preliminary determination that the latter had abused its dominant position in relation to downloads through its proprietary platform for software purchases and downloads (known as the "**AppStore**").[21] Specifically, the Commission has provisionally concluded that Apple abused its dominant position in relation to music streaming apps, following an official complaint from Spotify. The Commission launched an official investigation into Apple in June 2020 after Spotify had lodged an official complaint with the Commission the previous year in March 2019.

In abuse of dominance cases, simply holding a dominant position in any market is not an offence in and of itself; rather, companies will breach the relevant competition laws where they are found to have exploited any position of dominance to the detriment of consumers, customers and/or competitors.[22] Classic examples of abuse of dominance include: (i) increasing prices for their goods/services above supra competitive levels; and (ii) forcing counterparties to agreements to accept punitive or onerous contractual terms. Abuse of dominance investigations are often complex, not least because they require establishing that a company holds a *prima facie* dominant position in the first place, which can sometimes be a difficult exercise and requires a thorough analysis of the particular market in which a company operates.

In cases where an abuse of dominance is suspected, the Commission will launch an official investigation into the matter which, given the complexity of dominance cases, can last up to a year or more. The Commission will issue an SO at the stage where it has gathered enough evidence to suspect an infringement. The SO, which is addressed to the party(ies) concerned, will set out the Commission's reasons for its preliminary conclusion(s) and gives the parties the chance to respond to them. Issuing an SO does not necessarily mean that any adverse decision will be forthcoming or will be inevitably published. Nonetheless, unless the parties to whom SOs are addressed can persuade the Commission that its suspicions are unfounded and/or new evidence comes to light, it is likely that the Commission will subsequently adopt an official infringement decision.

In this specific case, Apple is believed to hold a dominant position in respect of its so-called "gatekeeper" role in relation to apps downloaded through the AppStore. A company is known as a "gatekeeper" where it operates a platform through which companies are forced to go in order to access certain customers/markets. In this case, companies like Spotify are forced to go through the AppStore if they wish to target users of Apple products like iPhones who, given the ubiquity of Apple products across the world, represent a substantial proportion of the market. The nature of Apple's mobile operating system ("**iOS**") is such that iPhone and iPad users can only download apps through the AppStore. Hence why companies must provide their apps through the AppStore in order for these customers to access them.

Apple is alleged to have exploited this "gatekeeper" role through the punitive rules it imposes on companies like Spotify. In particular, the Commission has identified two main areas of concern about Apple's alleged misconduct:

1. Though music-streaming apps like Spotify are free to initially download, they operate a subscription-based service which is purchased through the app. Apple is believed to impose a 30% commission on all subscription purchases consumers make through apps like Spotify. The subscription payments themselves go through Apple's in-app payment system ("**IAP**"), which app providers like Spotify are forced to sign-up to as a condition of using the AppStore.
2. Apple employs so-called "anti-steering provisions" whereby it prevents companies like Spotify from informing its users about alternative means to purchase their music-streaming products. In other words, though music-streaming products like Spotify's are available in formats other than apps (which, as noted, are only available through the AppStore) and can therefore be purchased elsewhere,

[21] See the Commission's press release at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2061

[22] The prohibition against abuse of dominance is set out under Article 102 of the Treaty on the Functioning of the European Union ("**TFEU**").

Apple prevents Spotify from informing iPhone and iPad customers of this.

It is also worth noting – though the Commission has not yet voiced any opinion on this subject – that the picture vis-à-vis any abuse of dominance over music-streaming apps may be further clouded by the fact that Apple operates its own music-streaming serving through its eponymous Apple Music. This fact may give the Commission further reason to suspect that the IAP system and "anti-steering provisions" serve an anti-competitive purpose.

These provisional findings, if substantiated, could well lead the Commission to conclude that Apple has abused its dominant position in relation to music-streaming apps. Apple will now provide its responses to the Commission's SO and, to judge from the rhetoric contained in public statements, will vociferously contest these findings.

A fight on multiple fronts

It is interesting that the Commission have narrowed the focus on Apple's alleged abuse of dominance on music-streaming apps specifically. Despite the fact that the original complaint was brought by Spotify in relation to its music-streaming services, the Commission may nonetheless have felt that the issues at the heart of the complaint were worth investigating at all levels of the AppStore to see if the alleged concerns were shared by app developers in different areas. Indeed, this contrasts with the CMA's own separate investigation into the AppStore, which focuses on the wider practices on the platform more generally.

Nonetheless, Apple is facing a war on multiple fronts and in different jurisdictions in regard to the AppStore, where it faces legal actions in the UK, the EU and in the U.S. Whilst the nature and extent of the complaints and/or investigations over the AppStore in these jurisdictions all vary, it remains the case that Apple is coming under increasing fire over its downloading platform. Whether Apple can successfully defend all these cases against it remains to be seen.

European Commission continues to penalise provision of false or misleading information in merger investigations

On 3 May 2021, the Commission announced that it had fined life sciences firm Sigma-Aldrich €7.5 million for providing incorrect or misleading information during the Commission's merger investigation into its acquisition by Merck.

On 21 April 2015, the Commission was notified of the transaction by Merck, and on 15 June 2015, the Commission approved it, subject to divestment of certain Sigma-Aldrich assets. During the course of the divestment process, the Commission was made aware by a third party of an innovation project, called iCap, which was closely linked to the divestment business and had been specifically developed for products included within this business.

Prior to this point, not only had the project never been disclosed to the Commission, including in remedy discussions, but information about it had actually been withheld in replies to specific Commission requests for information, and there were indications that this was in order to avoid the project's transfer to the purchaser of the divestment business.

In July 2017, the Commission sent an SO to both Merck and Sigma-Aldrich, setting out its preliminary view that both companies had provided incorrect or misleading information about iCap, in breach of their procedural obligations. The objections were later dropped against Merck.

The Commission has now concluded that Sigma-Aldrich committed three separate infringements, by providing, intentionally or at least negligently, incorrect or misleading information in its explanatory submission describing the remedy package and in the replies to two requests for information sent by the Commission. The Commission considered that Sigma-Aldrich's infringements were of a particularly serious and grave nature. This was reflected in the amount of the fine.

This is the third time that the Commission has fined a company for providing false or misleading information since the 2004 Merger Regulation came into force. The other two companies fined were General Electric (€52 million in 2019) and Facebook (€110 million in 2017). It therefore shows that the EC is committed to taking strong action when it considers that companies have not been honest in their dealings with the Commission.

De-railed! European train companies fined for cross-border freight cartel

On 20 April 2021, the Commission sanctioned three railway companies, Österreichische Bundesbahnen ("**ÖBB**"), Deutsche Bahn ("**DB**") and Société Nationale des Chemins de fer Belges ("**SNCB**"), for taking part in a customer allocation cartel in the market for EU cross-border rail cargo transport services.

The companies all provided these services in the EU under a freight-sharing model. The services were carried out in "blockchains" – i.e. cargo trains which ship goods from one site to another without being split up or stopped along the way. These are frequently used on high-volume routes between, for example, busy European ports and large industrial sites in Germany and Austria such as refineries or chemical plants.

The freight-sharing model enables railway companies which provide cross-border rail services to offer customers a single overall price for the service under a single, multilateral contract, rather than the customer having to enter into different contracts with different companies for the different stages of the journey.

However, ÖBB, DB and SNCB were found to have exchanged competitively sensitive information on customer requests and provided each other with inflated prices for their particular segments of the journey. This was deemed by the Commission to amount to illegal customer allocation. This behaviour lasted between 8 December 2008 and 30 April 2014 (although SNCB only participated from 15 November 2011 onwards).

Following a settlement procedure, the Commission imposed fines of over €48 million on the companies, with the vast majority of this payable by DB (whose fine was increased by 50% for recidivism). ÖBB received full immunity as the whistle-blower – otherwise it would have faced a fine of around €37 million.

CJEU rejects Italmobiliare's appeal over €35.9 million cartel fine for its subsidiary affirming parent company liability again…

The Court of Justice of the European Union ("**CJEU**") has rejected Italmobiliare's appeal against a fine imposed on it for the involvement of its subsidiary, Sirap-Gema ("**SG**"), in three food packaging tray cartels. The CJEU determined that Italmobiliare held *'decisive influence'* over the company and therefore was liable for its conduct (including SG's breach of the competition rules). The ruling again confirms liability for parent companies (including private equity firms) for the actions of their subsidiaries where the requisite relationship of control exists as the CJEU clearly determined in the *Goldman Sachs/Prysmian* case[23]. In short, another reminder for businesses to beware of the actions of subsidiary and portfolio companies and to foster compliance cultures across the group.

Five cartels were uncovered by the Commission in June 2015 which had been operating in Europe between 2002 and 2008. Nine companies comprising manufacturers and distributors of food packaging trays were fined a total of €115.8 million for their participation in the cartels which involved fixing prices and allocating customers. The successful immunity applicant, Linpac, escaped any fine. Italmobiliare, an Italian investment company, was held jointly and severally liable for the fines imposed on its subsidiary, SG for its participation in three of the cartels and amounting to €35.9 million.

Italmobiliare and four plastic tray makers – Coveris Rigid France, Coopbox, Huhtamäki and Silver Plastics subsequently appealed against the Commission's decision to the General Court ("**GC**"). In judgments issued in 2018 to 2019, the GC upheld the Commission's decisions against all of the companies apart from Coopbox.[24] Italmobiliare subsequently

[23] Case C-601/18 P, 24 September 2020, https://curia.europa.eu/juris/document/document.jsf;jsessionid=3E32D990C702A82D17515D7115F63B19?text=&docid=231564&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4490640

[24] The GC reduced that company's fine by two-thirds after finding that the Commission had failed to state reasons when calculating its penalty.

lodged an appeal to the CJEU in October 2019. In its appeal Italmobiliare argued:

- The GC had incorrectly determined that it could be held liable for SG's conduct because it owned all of its shares; and
- It should have been granted immunity from fines and the Commission had incorrectly calculated its fines.

In its clear judgment on 15 April 2021, the CJEU rejected Italmobiliare's appeal and determined that:

(a) Italmobiliare could be held liable for SG's conduct, because a parent company's decisive influence over its subsidiary is *'considered proven'* if it owns all the subsidiary's shares. In other words, it is settled case law that in cases of 100% ownership it is presumed the parent exercises that influence;

(b) Critically, it will be the parent that will bear the burden of rebutting the decisive influence presumption to give sufficient evidence to demonstrate that its subsidiary behaves independently. In the absence of this the parent company can be held jointly and severally liable for a fine imposed on the subsidiary. The GC noted that Italmobiliare did not deny it held all of SG's shares, and therefore, the Commission did not need to examine if Italmobiliare actually held decisive influence or not;

(c) Italmobiliare's claim that the GC had incorrectly interpreted EU immunity rules and failed to explain why Italmobiliare did not fulfil the conditions to receive immunity was unfounded;

(d) Specifically, Italmobiliare had argued Linpac did not provide the Commission with sufficient information about the cartel and instead, it was its own subsequent application which informed the Commission; and, because Linpac was still part of the cartel when it applied for immunity it should not have been able to benefit from a fine reduction. However, the CJEU determined that Linpac was still the first company that provided information and evidence to the Commission that enabled it to conduct the dawn raids and it was unclear whether immunity would have been awarded to another company without this; and

(e) The GC was correct to conclude that the Commission could increase Italmobilaire's fines by 16% due to the gravity of the infringement. Additionally, it was open to the Commission to include the costs SG charged customers for transporting the plastic trays when calculating the value of sales the company made and this being used for the Commission's fining calculation purposes.

Commission fines three banks €28.4 million in SSA Bonds cartel

On 28 April 2021, the Commission fined Bank of America Merrill Lynch, Crédit Agricole and Credit Suisse more than €28 million for breaching the EU competition rules. The banks, along with Deutsche Bank who received immunity from fines as it revealed the existence of the cartel, participated in a cartel in the secondary trading market of Supra-sovereign Sovereign and Agency ("**SSA**") bonds[25] denominated in US Dollars in the European Economic Area ("**EEA**").

A core group of traders from the four banks - and who knew each other personally - frequently communicated through chatrooms on Bloomberg terminals to provide recurring updates on their trading activities; exchanged commercially sensitive information; coordinated on prices shown to their customers, or, to the market in general; and aligned their trading activities on the secondary market for these bonds.

More specifically, the Commission found that the traders:

[25] Bonds are a type of debt security that enable entities to raise cash and are distinguished by currency. Bonds are issued on the primary market and then traded by financial institutions on the secondary market. Customers such as investment and pension funds approach banks on the secondary market for independent price quotations and available quantities of a particular bond.

- Agreed to refrain from bidding or offering on the market when they might come into competition with one another;
- Agreed to remove (or *'kill'*) a bid or offer from the market when they might come into competition with one another; and
- Split trades between each other and combined or reduced their respective positions to meet a specific customer's demand, without the customer being aware it was dealing with more than one trader meaning in practice the customer had limited choice.

The cartel operated over a five-year period and affected the trading of US denominated SSA bonds on the secondary market in the entire EEA. Bank of America Merrill Lynch received the highest fine of €12,642,000 followed by Credit Suisse which was fined €11,859,000 and Crédit Agricole, which participated in the cartel for just over two years, received the smallest fine of €3,993,000.

Executive Vice-President of the Commission Margarethe Vestager commented that the cartel '*harmed the financial markets*', and the decision '*sends a clear message that the Commission will not tolerate any type of collusive behaviour*'.

Spain refers European Super League Football case to CJEU

The Commercial Court of Madrid ("**Court**") referred a preliminary question to the CJEU seeking clarification as to whether UEFA and FIFA violated EU competition rules by banning football clubs from participating in the proposed European Super League ("**ESL**"). Given the public and political controversy that the ESL has caused in the UK and across the EU alike, the CJEU's judgment will be much anticipated.

On 11 May 2021, the Court referred several questions to the CJEU following the Court's imposition of a preliminary injunction on both football governing bodies - temporarily banning them from penalising clubs or players that attempted to join the ESL. The Court is currently hearing a lawsuit brought by the ESL against UEFA and FIFA, alleging the two are abusing their dominance and thereby violating the competition rules by attempting to stop the ESL from going ahead.

In April 2021, a dozen European football clubs initially joined the breakaway league but subsequently all but three dropped out following UEFA and FIFA's resistance (including the threat of sanctions against the clubs) as well as public and political backlash. Notably, the United Kingdom's Prime Minster, Boris Johnson, heavily criticised the proposed league dubbing it a *'cartel'* and *'against the basic principles of competition'*. The three remaining clubs included, Real Madrid, FC Barcelona and Juventus with UEFA and FIFA now investigating these clubs for violating their rules and having threatened sanctions against both the clubs and individual players (subject to the injunction referred to above).

In its decision on 11 May 2021, the Court asked the CJEU to consider the following issues:

1. Have UEFA and FIFA infringed Articles 101 or 102 of the Treaty on the Functioning of the European Union ("**TFEU**") by requiring third parties to obtain their prior consent before establishing any international club competitions in Europe? In particular, when there is no procedure for granting such requests based on objective, transparent and non-discriminatory criteria?
2. Do EU antitrust rules prohibit UEFA and FIFA from threatening sanctions against clubs or players participating in the ESL, or, is the actual imposition of sanctions unlawful given they are not based on the same necessary criteria?
3. If the competition rules do apply in this case, can UEFA and FIFA qualify for an exemption to Article 101 TFEU in this instance, or, can they argue an objective justification for their conduct under Article 102?
4. Can UEFA lawfully claim ownership of all commercial rights emanating from football competitions in Europe?
5. Do UEFA and FIFA governing statutes violate any other fundamental freedoms guaranteed under EU law?

Interestingly, EU courts have previously ruled that sporting bodies cannot unreasonably penalise athletes from joining rival leagues unless they can objectively justify doing so. In particular, in December last year, the GC upheld the Commission's finding that the International Skating Union's lifetime ban for skaters who competed in a rival league amounted to an abuse of dominance.

The Court has asked the CJEU to issue its preliminary rulings on these points on an expedited basis so that the procedure will take closer to eight months instead of a year and a half. In the meantime, the national proceedings in Spain will remain on hold and the injunction over the sanctions will remain in place unless FIFA and UEFA argue for an exemption.

Commission updates its guidance on Member State merger referrals

On 26 March 2021, the Commission issued official guidance ("**Guidance**") on its approach to the use of the mechanism set out in Article 22 of the Merger Regulation to certain categories of cases. This is stated to '*complement*' its previous (2005) guidance provided in the Commission Notice on Case Referral, but in practice it demonstrates a marked shift in the Commission's policy regarding referrals of mergers from Member States to the Commission.

Prior to the Guidance being issued, Member States had used the Article 22 mechanism to refer mergers to the Commission in respect of cases which met their domestic merger control thresholds. However, the Guidance specifically notes that '*the wording, the legislative history and the purpose of Article 22…as well as…the [EC's] enforcement practice*' make it clear that Article 22 applies to all concentrations (i.e. even those which do not meet the referring Member State's merger control thresholds).

The reason behind the Commission's focus now on these types of concentrations is its desire to review (and potentially modify/remedy) transactions where the target generates little or no turnover (thus not necessarily triggering merger control thresholds in either Member States or at an EU level) but nevertheless has the potential to play a significant competitive role on the market(s) where it is active. Such transactions are particularly common in the digital and pharmaceutical industries.

The Guidance therefore specifically provides for the referral of transactions of this type from Member States to the Commission, even where the transaction does not meet the relevant Member State's domestic merger control thresholds. The criteria for referral are that the transaction:

(i) affects trade between Member States (i.e. has a discernible influence on the pattern of trade between Member States); and

(ii) threatens to significantly affect competition within the territory of the Member State(s) making the request (i.e. there is a real risk of a significant adverse impact on competition).

The Guidance notes that the type of transaction that would usually be considered appropriate for referral is one where the turnover of at least one of the undertakings does not reflect its actual or future competitive potential (e.g. start-ups/recent entrants, innovators, companies with access to competitively significant assets, and/or companies providing key inputs/components for other industries). The value of consideration may also be taken into account.

The Guidance stipulates that even completed transactions may be referred to the Commission for review, as well as transactions that have already been notified in one or more other Member State.

This change in approach by the Commission is seen by some market commentators as a "land grab" by the Commission to enable them to review transactions that would otherwise escape their remit.

The first case to be reviewed under this new policy is the proposed acquisition by Illumina, a US-based pharmaceutical company, of Grail, a US start-up that has developed multi-cancer early detection tests. Grail has not yet launched any products and has no EU turnover. However, on 19 February 2021, the Commission invited Member State competition authorities to request a referral. On 9 March 2021, the French Competition Authority did so, and this was subsequently supported by the competition authorities in Belgium, Greece, the Netherlands, Iceland and Norway. On 20 April 2021, the Commission announced that it had accepted the referral requests. Illumina has since appealed this acceptance decision to the General Court (having previously unsuccessfully appealed the French Competition Authority's referral in the French courts). The appeal has been fast-tracked by the General Court but is yet to be heard. In the meantime, Illumina has filed the transaction with the Commission.

The Commission is still accepting referrals under the pre-existing Article 22 procedure (i.e. where the transaction does meet (a) Member State(s)'s domestic merger control thresholds). For example, on 12 May 2021, the Commission announced that it would review Facebook's proposed acquisition of customer service software developer Kustomer, following a referral request by Austria (whose domestic merger control thresholds the transaction met). The referral request was backed by competition authorities in Belgium, Bulgaria, France, Iceland, Italy, Ireland, the Netherlands, Portugal and Romania.

Plans afoot to update the Commission's Horizontal Guidelines

The Commission is set to revise its horizontal block exemption rules and accompanying guidelines, including its horizontal guidelines. This will be welcome news to many practitioners and companies, who consider the current guidelines to be outdated, unclear and overly strict, as well as failing to address contemporary issues such as pro-competitive agreements in digital markets and sustainability collaborations, as well as joint purchasing initiatives.

The action follows almost two years of consultation on, and evaluation of, the existing rules and guidelines. The Commission will seek to address criticisms that these do not reflect recent case law and offer limited guidance on market developments that have occurred in the 10 years since the current versions were last updated.

Particular frustrations expressed in the consultation included that sufficient legal clarity was not provided to allow companies to self-assess agreements pursuing sustainability objectives or network sharing agreements. Suggestions for improvement included raising the market share "safe harbour" thresholds in order to include pro-competitive collaborations and simplifying the market definition and market share calculation mechanisms, which are currently seen as overly burdensome and complex.

On 7 June 2021, the Commission published its "impact assessment" on the proposed revisions, which stakeholders had been invited to feed into. Some of the issues identified in the consultation were addressed further in the impact assessment, with the Commission proposing the clarification of complex definitions and the review of conditions for exemption set out in the block exemption. The Commission also acknowledged the need to update the Horizontal Guidelines to take account of recent case law and enforcement practice, and to potentially introduce/expand chapters to address new and emerging forms of cooperation, In particular, it noted the need for greater clarity regarding collaboration on sustainability objectives, and stated that it is considering introducing specific guidance on data sharing and pooling.

Stakeholders have until 5 July to comment on the impact assessment. The Commission will then launch a public consultation on the policy options and revisions to the rules and guidance. However, the rules and guidance themselves will likely not be formally revised until December 2022, when the current rules expire.

EU plans to get tough on foreign subsidised companies

On 5 May 2021, the Commission announced proposals to introduce sweeping new rules for companies seeking to do deals in the EU, where the companies' EU activities are backed by foreign government subsidies.

If the proposed legislation passes into force, companies would be forced to notify both: (i) EU deals that involve a financial contribution by a non-EU government, and (ii) public procurement bids made by companies benefiting from subsidies from a non-EU government. The Commission would then have the power to block such operations if it considered that the subsidy would distort competition in the EU, or to impose behavioural or structural conditions if considered necessary. Failure to notify a relevant operation could potentially result in fines and *ex-post* investigation.

Although *de minimis* thresholds for mandatory notification in each case are proposed, the Commission also wants the power to investigate smaller deals and bids on its own initiative.

The intention is to level the playing field between EU companies (whose subsidies from EU governments are closely scrutinised under EU State aid rules) and non-EU companies (whose subsidies from non-EU governments currently receive no scrutiny).

The EU's action follows hard on the heels of the UK's own efforts in this area, which have been reported in previous editions of this newsletter.

The proposed legislation is currently open for public consultation and will also be discussed by Member States and the European Parliament. Watch this space for further developments…

Contact us

London

Marta Isabel Garcia
Partner

T: +44 20 7809 2141
E: marta .garcia@shlegal.com

Anna Victoria Delahey
Senior associate

T: +44 20 7809 2013
E:annavictoria.delahey@shlegal.com

Rhiannon Davies
Senior associate

T: +44 20 7809 2033
E: rhiannon.davies@shlegal.com

Will Spens
Associate

T: +44 20 7809 2365
E: will.spens@shlegal.com

Lucy Moseley
Trainee solicitor

T: +44 20 7081 4165
E: lucy.moseley@shlegal.com

Paris

Jean-Julie Lemonnier
Partner

T: +33 1 44 15 80 78
E: jj.lemonnier@shlegal.com

Laetitia Ghebali
Senior associate

T: +33 1 44 15 82 02
E: laetitia.ghebali@shlegal.com

STEPHENSON HARWOOD