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ANTITRUST REVIEW 2021

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ANTITRUST REVIEW 2021

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This article was first published in July 2020

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Published in the United Kingdom
by Global Competition Review
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL
© 2020 Law Business Research Ltd
www.globalcompetitionreview.com

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ISBN: 978-1-83862-260-2

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

GCR's Europe, Middle East and Africa Antitrust Review 2021 is one of a series of regional reviews that deliver specialist intelligence and research to our readers – general counsel, government agencies and private practitioners – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Americas and the Asia-Pacific region, this book provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in both public enforcement and private litigation. In this edition, Sweden is a new jurisdiction alongside updates from the European Commission (including a new article on the abuse of dominance), Cyprus, Denmark, France, Germany, Greece, Norway, Portugal, Russia, Spain, Switzerland, Turkey, the United Kingdom, Ukraine, COMESA, Angola, Israel, Mauritius and Mozambique.

In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

Global Competition Review

London

June 2020

UK: Cartel Enforcement

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Morgan Lewis & Bockius UK LLP

In summary

This article provides an overview of cartel enforcement action in the United Kingdom during the period March 2019 to March 2020, including judgments and civil enforcement by the UK Competition and Markets Authority. It also highlights major developments following the United Kingdom's exit from the European Union and measures taken in respect of the covid-19 pandemic.

Discussion points

- UK civil enforcement under section 2 of the Competition Act 1998 or article 101 of the Treaty on the Functioning of the European Union
- Recent competition director disqualification undertakings and judicial proceedings
- Antitrust regulatory measures undertaken by the UK government within the context of the covid-19 pandemic
- Developments following the United Kingdom's departure from the European Union on 31 January 2020

Referenced in this article

- Competition and Markets Authority
- Competition Appeal Tribunal
- Section 2 of the Competition Act 1998
- Article 101 of the Treaty on the Functioning of the European Union
- Multilateral Interchange Fees damages litigation
- Case C-307/18, *Generics (UK) Ltd and others v. Competition and Markets Authority (Paroxetine)*
- *Ping Europe Limited v. Competition and Markets Authority* [2020] EWCA Civ 13
- Covid-19
- Brexit

The UK Competition and Markets Authority (CMA) is the primary enforcement authority in the United Kingdom (UK) for civil cartels under article 101 of the Treaty on the Functioning of the European Union (TFEU)¹ and the equivalent Chapter I prohibition under section 2 of the UK Competition Act 1998 (CA98),² and with regard to criminal cartels under section 188 of the UK Enterprise Act 2002 (EA). Criminal cartels include agreements relating to price-fixing, the sharing of markets or customers, limiting production or supply, or bid rigging. Breaches of Chapter I can give rise to fines of up to 10 per cent of global group turnover for a company, and disqualification from serving as a director for up to 15 years for an individual. Participation in a criminal cartel may also give rise to the imposition of a five-year prison sentence or unlimited fines (or both), for an individual, and disqualification from serving as a director for up to 15 years.

On 19 March 2020, the CMA published its annual plan for 2020 to 2021.³ The CMA stated that the authority's competition law enforcement caseload was 'at a record level'. It also highlighted that the year 'will be one of profound change for the United Kingdom and for the CMA'. Although this was written in the light of the UK's departure from the European Union on 31 January 2020 (Brexit) and the end of the Brexit transition period on 31 December 2020 (unless extended), the CMA also drew attention to 'the rapidly escalating concerns around the spread of coronavirus (covid-19)'. The CMA said that, as a result of Brexit, it would expect to see an increase in workload further to which the authority may 'have limited opportunities to launch many major new discretionary projects over the coming year'. In March 2020, as a result of the impact of covid-19, the CMA paused a number of its investigations under Chapter I and article 101 of the TFEU (article 101). The CMA said this was so that it could reallocate resources to ensure that its most urgent work could be done on time, in particular, where statutory deadlines apply.

Civil enforcement under article 101 and Chapter I

In the second half of 2019 and in early 2020, the CMA issued infringement decisions in the musical instruments and equipment sector, the construction industry, the pharmaceutical industry and the estate agency sector. All decisions were issued pursuant to settlement agreements by all or most of the undertakings under investigation.

The period was also an active one for cartel enforcement by the UK communications regulator, the Office of Communications (Ofcom), and the UK gas and electricity regulator, the Office of Gas and Electricity Markets (Ofgem), which have concurrent competition law powers with the CMA.

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- 1 EU law continues to apply in the UK as if it continues to be an EU member state during the transition period until 31 December 2020 (unless extended).
 - 2 Article 3(1) of Council Regulation 1/2003 provides that the Competition and Markets Authority [CMA] has to apply article 101 TFEU where the CMA applies section 2 of the Competition Act 1998 (national equivalent to article 101 TFEU) to conduct that may affect trade between EU member states.
 - 3 'Annual Plan 2020 to 2021', published 19 March 2020, available at <https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2020-to-2021/annual-plan-2020-to-2021#our-priorities-for-202021>.

In 2019, Ofcom opened two investigations under Chapter I,⁴ and Ofgem issued an infringement decision finding an agreement or concerted practice in relation to the supply of gas and electricity to domestic customers.⁵

Supreme Court proceedings

Damages actions against MasterCard and Visa payment schemes

On 19 December 2007, the European Commission (the Commission) issued an infringement decision (the Commission's MIF Decision) against MasterCard that its European Economic Area (EEA) multilateral interchange fees (MIFs), governing fee payments between banks relating to transactions made using payment cards, breached article 101.⁶ The Commission's decision was upheld by the General Court (GC) on 24 May 2012⁷ and the Court of Justice of the European Union (CJEU) (with the GC, the European courts) on 11 September 2014.⁸

On 14 July 2016, the Competition Appeal Tribunal (CAT) found for Sainsbury's, a UK retailer, in a stand-alone damages action against MasterCard, in relation to losses suffered by Sainsbury's as a result of MasterCard's UK MIF.⁹ The CAT held that the MasterCard UK MIF was a restriction on competition by effect under Chapter I and article 101. Accordingly, Sainsbury's was entitled to recover an amount equivalent to the overcharge paid by it during the claim period, and Sainsbury's was awarded £68.6 million plus interest in damages. MasterCard appealed the CAT's judgment to the Court of Appeal.

On 30 January 2017, in a separate but similar stand-alone action, the High Court of England and Wales (the High Court) rejected a stand-alone action for damages brought by several other UK high street retailers (namely, Asda, Arcadia, Next, B&Q, Comet, New Look, Iceland, Argos, WM Morrisons and Debenhams), ruling that MasterCard's UK, Irish and EEA MIFs were not

4 'Competition investigation regarding the provision of equipment and related services in the electronic communication sector', investigation opened on 7 June 2019. Case information available at https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01241; and 'Competition investigation regarding parcel delivery and pick-up services', investigation opened on 22 November 2019. Case information available at https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01251.

5 'Investigation into whether Economy Energy, E (Gas and Electricity) and Dyball Associates have infringed Chapter I of the Competition Act 1998 with respect to a suspected anti-competitive agreement', investigation opened in September 2016. Case information available at <https://www.ofgem.gov.uk/publications-and-updates/investigation-whether-economy-energy-e-gas-and-electricity-and-dyball-associates-have-infringed-chapter-i-competition-act-1998-respect-suspected-anti-competitive-agreement>.

6 COMP/ 34579 – *MasterCard I*, Commission decision of 19 December 2007, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/34579/34579_1889_2.pdf.

7 Case T-111/08, *MasterCard and Others v. Commission*, judgment of 24 May 2012, available at <http://curia.europa.eu/juris/documents.jsf?num=T-111/08>.

8 Case C-382/12, *MasterCard and Others v. Commission*, judgment of 11 September 2014, available at <http://curia.europa.eu/juris/liste.jsf?num=C-382/12&language=en>.

9 *Sainsbury's Supermarkets Ltd v. MasterCard Inc and Others* [2016] CAT 11, judgment of 14 July 2016, available at http://catribunal.org/files/1241_Sainsburys_Judgment_CAT_11_140716.pdf.

restrictive of competition under Chapter I and article 101.¹⁰ The High Court held that it was not bound by the CAT's findings of law or fact in the separate Sainsbury's proceedings. The retailers appealed the judgment to the Court of Appeal.

In other separate but related proceedings, Sainsbury's and, separately Asda, Argos and Morrison (with a number of other UK retailers that have since settled) brought a stand-alone damages action under Chapter I and article 101 against Visa as regards Visa's UK MIFs. On 30 November 2017, the High Court held that Visa's UK MIFs did not restrict competition for the purposes of Chapter I and article 101(1).¹¹ Both the retailers and Visa appealed aspects of the judgment to the Court of Appeal.

The appeals relating to all the MIF stand-alone judgments (namely, the CAT's and the High Court's *MasterCard MIF* judgments and the High Court's *Visa MIF* judgment) were heard jointly by the Court of Appeal in April 2018. On 4 July 2018, the Court of Appeal determined that it was bound to follow the CJEU's 2012 decision against MasterCard and held that Visa's and MasterCard's setting of their UK MIFs was a restriction of competition under article 101(1). The case was remitted by the Court of Appeal to the CAT for reconsideration of the possible application of article 101(3) and for the assessment of the quantum of the claim.¹²

Visa and MasterCard appealed the Court of Appeal's judgment to the Supreme Court, while some of the retailers appealed certain aspects of the judgment. The Supreme Court heard the appeals in January 2020. As it had done with regard to the Court of Appeal proceedings, the Commission made written submissions and appeared before the Court to make oral submissions. The Supreme Court handed down its judgment on 17 June 2020,¹³ at the time this article was due for publication. The Supreme Court rejected all the appeals by Visa and MasterCard and upheld the finding of the Court of Appeal that the default UK MIFs charged within the Visa and MasterCard payment card schemes was an unlawful restriction of competition under article 101(1) and Chapter I. Prior to the relevant proceedings, there had been no English or European ruling that Visa's MIF was a restriction of competition. The Supreme Court's judgment will have significant implications for the payment card schemes that now have a competition infringement finding against them in relation to their MIFs from the highest court in the United Kingdom, and the Supreme Court's judgment has been eagerly awaited, including by the scores of claimants whose proceedings have been stayed pending the outcome of these lead cases. The appeals to the Supreme Court also tested the circumstances in which the English courts are bound by judgments of the European courts; whether the standard of proof is reserved for national law; the type of evidence that is required to meet the standard of proof under English law with regard

10 *Asda Stores Ltd and Others v. MasterCard Inc and Others* [2017] EWHC 93 (Comm), judgment of 30 January 2017, available at www.bailii.org/ew/cases/EWHC/Comm/2017/93.html.

11 *Sainsbury's Supermarkets Limited v. Visa Europe Services LLC and others* [2017] EWHC 3047, judgment of 30 November 2017, available at <http://www.bailii.org/ew/cases/EWHC/Comm/2017/3047.html>.

12 *Sainsbury's Supermarkets Limited v. MasterCard Incorporated and Others* [2018] EWCA 1536 (Civ), judgment of 4 July 2018, available at <https://www.bailii.org/ew/cases/EWCA/Civ/2018/1536.html>.

13 *Sainsbury's Supermarkets Ltd (Respondent) v. Visa Europe Services LLC and Others (Appellants) and Sainsbury's Supermarkets Ltd and Others (Respondents) v. MasterCard Incorporated and Others (Appellants)* [2020] UKSC 24, judgment of 17 June 2020, available at <https://www.bailii.org/uk/cases/UKSC/2020/24.html>.

to article 101(3); the basis upon which an agreement that is restrictive of competition under article 101(1) can be exempted under article 101(3) provided it satisfies certain conditions; how damages are to be assessed; and the principle of finality in litigation. The appeals turn on points of material importance in competition law damages claims, and are of a much wider significance, including with regard to a collective damages action brought against MasterCard on behalf of UK consumers under the United Kingdom's opt-out regime (see below with regard to the proceedings in *Walter Hugh Merricks CBE v. MasterCard Inc and Others*). The Supreme Court's judgment of 17 June 2020 will be discussed in more detail in next year's report.

In separate proceedings in 2015, Dixons and Europcar brought a separate follow-on claim for damages against MasterCard, based on the Commission's MIF Decision, for the period from 22 May 1992 to 21 June 2008. These follow-on proceedings are distinct from the stand-alone proceedings against MasterCard (and Visa) referred to above. In these proceedings, Dixons and Europcar alleged that they suffered damages as a result of the UK MIF, but that the level of the UK MIF resulted from the EEA MIF and was therefore caused by the infringement found by the Commission in its MIF Decision against MasterCard. MasterCard applied for summary judgment, arguing that the actions were time-barred in respect of losses during the period between 1992 and 20 June 1997. On 14 February 2019, the CAT handed down a judgment on a preliminary issue relating to a limitation in follow-on actions, ruling that the retailers' claims were not time-barred and, as a result, it dismissed MasterCard's application for summary judgment.¹⁴ MasterCard sought permission to appeal the CAT's judgment. On 9 April 2019, the CAT granted MasterCard permission to appeal its judgment as regards the question whether the retailers' claims were time-barred.¹⁵

In addition to the UK damages actions by retailers, in September 2016, a collective damages action was brought against MasterCard on behalf of UK consumers under the opt-out regime in section 47B of the CA98 in *Walter Hugh Merricks CBE v. MasterCard Inc and Others*.¹⁶ On 21 July 2017, the CAT held that the claim was not eligible for inclusion in collective proceedings.¹⁷ On 16 April 2019, the Court of Appeal upheld an appeal against the CAT's judgment, finding that the CAT had erred in refusing to grant a collective proceedings order (CPO).¹⁸ Accordingly, the Court remitted the CPO application back to the CAT for rehearing. On 24 July 2019, MasterCard was granted permission to appeal the judgment to the Supreme Court. This action concerns the

14 *DSG Retail Limited and Another v. MasterCard Incorporated and Others* [2019] CAT 5, judgment of 14 February 2019, available at https://www.catribunal.org.uk/sites/default/files/2019-02/1236-1265-1268_DSG_DIXON_Europcar_Judgment_CAT_5_140219.pdf.

15 *DSG Retail Limited and Another v. MasterCard Incorporated and Others* [2019] CAT 10, ruling of 9 April 2019, available at https://www.catribunal.org.uk/sites/default/files/2019-04/1236-1265-1268_DSG_Dixon_Europcar_Judgment_CAT_10_090419.pdf. On 22 May 2020, the Court of Appeal handed down a judgment in favour of MasterCard. This judgment will be discussed in next year's report.

16 Section 47B, UK Competition Act 1998 allows representative litigants to apply to the Competition Appeal Tribunal [CAT] to bring proceedings for damages on an opt-out basis on behalf of a class of claimants.

17 *Walter Hugh Merricks CBE v. MasterCard Inc and Others* [2017] CAT 16, judgment of 21 July 2017, available at www.catribunal.org.uk/files/2.1266-Walter_Hugh_Judgment_CAT_16_210717.pdf.

18 *Walter Hugh Merricks CBE v. MasterCard Incorporated and Others* [2019] EWCA Civ 674, judgment of 16 April 2019, available at <https://www.bailii.org/ew/cases/EWCA/Civ/2019/674.html>.

largest collective claim in the United Kingdom to date and, as a test case, will be of broader significance in the development of the UK's collective proceedings regime. As a result of this, other CPO applications lodged with the CAT in 2018 against a number of truck manufacturers were vacated pending the outcome of the appeal to the Supreme Court in *Merricks*.¹⁹

'Pay for delay' in Paroxetine case

CJEU preliminary ruling following referral from CAT

On 30 January 2020, the CJEU handed down a preliminary ruling on a number of questions referred to it by the CAT in relation to appeals brought by five pharmaceutical companies challenging the CMA's infringement decision fining the companies for agreeing to delay generic entry into the market for the drug paroxetine.²⁰

In February 2016, the CMA imposed fines totalling £44.99 million on GlaxoSmithKline (GSK), Alphapharm Ltd and Generics (UK) Ltd under Chapter I and article 101 with regard to pay-for-delay arrangements.²¹ The CMA found that, between 2001 and 2004, GSK (the originator supplier of branded paroxetine) had agreed to make payments and other value transfers totalling more than £50 million to two generic manufacturers (Alphapharm and Generics (UK)), which were aimed at delaying the generic firms' potential UK entry with generic versions of paroxetine.

GSK, Generics (UK), Xellia and Alpharma, Actavis UK and Merck appealed against the CMA's decision to the CAT.

As there were significant overlaps between the five appeals, the CAT heard them together and, on 8 March 2018, referred a number of the questions relating to pay-for-delay in the context of patent disputes and patent litigation to the CJEU for a preliminary ruling, while ruling on some of the other points in favour of the CMA.²²

On 30 January 2020, the CJEU ruled, among other points, that a patent settlement agreement between a manufacturer of originator medicines and a manufacturer of generic medicines (who are potential competitors, whereby the generic manufacturer commits not to enter the market or not to challenge the patent in return for a transfer of value) has the object of restricting competition if it is clear that the transfer of value can have no explanation other than the commercial interest of the parties to the agreement being not to engage in competition on the merits, unless the relevant settlement agreement is accompanied by pro-competitive effects.

19 See, eg, <https://www.catribunal.org.uk/cases/12897718-road-haulage-association-limited>.

20 Case C-307/18, *Generics (UK) Ltd and others v. Competition and Markets Authority*, judgment of 30 January 2020, available at <http://curia.europa.eu/juris/liste.jsf?num=C-307/18>.

21 *Paroxetine* – Case CE/9531/11, CMA decision of 12 February 2016, available at <https://assets.publishing.service.gov.uk/media/57aaf65be5274a0f6c000054/ce9531-11-paroxetine-decision.pdf>.

22 *GlaxoSmithKline PLC v. Competition and Markets Authority* [2018] CAT 4, judgment of 8 March 2018, available at https://www.catribunal.org.uk/sites/default/files/1.1251-1255_Paroxetine_Judgment_CAT_4_080318.pdf.

Appeal against CMA's decision in Sports Equipment

On 21 January 2020, the Court of Appeal issued a judgment dismissing an appeal by Ping Europe Ltd (Ping), a manufacturer of golf clubs and accessories, against the CAT's judgment upholding the CMA's infringement decision fining the company for imposing an online sales ban on retailers.²³

In August 2017, the CMA issued an infringement decision and a fine against Ping under Chapter I and article 101 for having prevented two UK retailers from selling Ping's golf clubs on their website.²⁴ On appeal, the CAT considered that the CMA had erred in law in conducting a full proportionality analysis in its assessment of whether Ping's internet policy was objectively justified, but concluded that this error made no difference to the overall conclusions reached by the CMA and was not a ground for quashing the CMA's infringement decision. Accordingly, the CAT upheld the CMA's finding that Ping's ban on internet sales constituted a restriction of competition 'by object' under Chapter I and article 101.²⁵

Ping appealed the CAT's judgment to the Court of Appeal. On 21 January 2020, the Court of Appeal held that the imposition by a supplier of a prohibition on internet sales by its authorised dealers in a selective distribution network, *prima facie*, reveals a sufficient degree of harm to competition and is a restriction of competition by object under Chapter I and article 101. The Court also held that the CAT was right to conclude that there was nothing in the economic or legal context in which the relevant online sales ban operated to negate that conclusion.²⁶

Civil investigations

Investigations in the musical instruments and equipment sector

On 17 April 2018, the CMA announced that it had opened five investigations concerning alleged anticompetitive agreements or concerted practices in relation to musical instruments and equipment. These investigations have progressed independently from one another.

23 *Ping Europe Limited v. Competition and Markets Authority* [2020] EWCA Civ 13, judgment of 21 January 2020, available at <https://www.bailii.org/ew/cases/EWCA/Civ/2020/13.html>.

24 Online sales ban in the golf equipment sector – Case 50230, CMA decision of 24 August 2017, available at <https://assets.publishing.service.gov.uk/media/5a3b7d11e5274a73593a0ce5/sports-equipment-non-confidential-infringement-decision.pdf>.

25 *Ping Europe Limited v. Competition and Markets Authority* [2018] CAT 13, judgment of 7 September 2018, available at https://www.catribunal.org.uk/sites/default/files/2018-10/1279_Ping_Judgment_CAT_13_070918.PDF.

26 On 31 January 2020, Ping said that it will ask the Supreme Court for permission to appeal the Court of Appeal's judgment, but as at 27 May 2020, it has not filed its appeal with the Supreme Court.

Digital pianos and keyboards

On 1 August 2019, the CMA issued an infringement decision against Casio Electronics Co Limited, finding that the company had engaged in resale price maintenance. The CMA imposed a fine of £3.7 million, which included a 20 per cent discount to reflect the company's admission of liability and cooperation with the CMA under a settlement agreement.²⁷

Guitars

On 22 January 2020, the CMA issued a decision finding that Fender Musical Instruments Europe Limited (Fender) had infringed competition law by engaging in resale price maintenance. Even though the fine imposed by the CMA on Fender was discounted by 60 per cent under the CMA's leniency programme, and by a further 20 per cent to reflect that Fender had settled, the CMA's £4.5 million fine was the largest UK fine for resale price maintenance.²⁸

Synthesisers and hi-tech equipment

On 24 March 2020, the CMA issued separate statements of objections (SOs) reaching a preliminary conclusion that two suppliers of electronic drum kits and hi-tech music equipment and synthesisers to UK retailers, Roland (UK) Limited and Korg UK Limited, had engaged in resale price maintenance by restricting online discounting for their products. The CMA said that both companies had made use of software services that enabled online price monitoring.²⁹

Investigations in the construction industry

In 2019, the CMA took enforcement action in relation to a number of companies operating in the supply of goods and services to the construction industry. This followed a statement in March 2019 by Andrea Coscelli, the CMA's chief executive, that the CMA 'is concerned it is seeing a lot of evidence of anticompetitive conduct in the construction industry'.³⁰

27 Online resale price maintenance in the digital piano and digital keyboard sector – Case 50565-2, CMA decision of 1 August 2019, available at https://assets.publishing.service.gov.uk/media/5d9c539aed915d399eb2160b/non_conf_decision_arrow.pdf.

28 Online resale price maintenance in the guitar sector – Case 50565-3, CMA decision of 22 January 2020, available at https://assets.publishing.service.gov.uk/media/5e79d8aed3bf7f52efedfcad/20200320_50565-3_-_DECISION.pdf.

29 Synthesisers and hi-tech equipment: suspected anti-competitive agreements – Case 50565-4, investigation opened on 17 April 2018. Case information available at <https://www.gov.uk/cma-cases/musical-instruments-and-equipment-suspected-anti-competitive-agreements-50565-4>. Electronic drum sector: suspected anti-competitive agreements – Case 50565-5, investigation opened on 17 April 2018. Case information available at <https://www.gov.uk/cma-cases/musical-instruments-and-equipment-suspected-anti-competitive-agreements-50565-5>.

30 See <https://www.gov.uk/government/news/5-office-fit-out-firms-to-pay-7-million-fine-for-breaking-competition-law>.

Roofing materials

On 27 March 2019, the CMA issued an SO in which it provisionally found that three suppliers of rolled lead had entered into a market sharing agreement.³¹ The CMA reached a preliminary conclusion that the undertakings had colluded on pricing, exchanged commercially sensitive information and shared customers, and that they had collectively refused to supply another company that threatened to disrupt the alleged market sharing arrangement.

Groundworks products

On 9 April 2019, the CMA issued an SO to three suppliers of groundworks products to the construction industry. Further to an investigation commenced by the CMA pursuant to information provided by one of the suppliers under its leniency programme, the CMA reached a preliminary conclusion that the suppliers had coordinated their commercial behaviour, in particular their pricing practices.³²

Design, construction and fit-out services

On 16 April 2019, the CMA issued a decision finding that six office fit-out firms had infringed competition law by engaging in cover bidding. Cover bidding relates to a practice whereby companies agree between them to place bids that are intended to lose the contract, thereby reducing the intensity of competition during the bidding process. The CMA imposed fines totalling more than £7 million on five of the six companies, which had previously agreed to settle with the CMA. The sixth company was granted immunity from fines under the CMA's leniency programme.³³

Pre-cast concrete drainage products

On 23 October 2019, the CMA issued an infringement decision and imposed fines totalling £36 million on three suppliers of pre-cast concrete drainage products, finding that the companies had infringed competition law by entering into agreements to fix or coordinate prices and share the market.³⁴ As part of the CMA's settlement process, two of the suppliers under investigation

31 Roofing materials – Case 50477, investigation opened on 11 July 2017. Case information available at <https://www.gov.uk/cma-cases/roofing-materials>.

32 Supply of groundworks products to the construction industry, investigation opened on 28 February 2017. Case information available at <https://www.gov.uk/cma-cases/provision-of-products-and-or-services-to-the-construction-industry-civil-investigation>.

33 Design, construction and fit-out services – Case 50481, CMA decision of 12 April 2019, available at https://assets.publishing.service.gov.uk/media/5cf10117e5274a5eb3eed038/Case_50481_-_Decision_-_non-confidential_version.pdf.

34 Supply of products to the construction industry (pre-cast concrete drainage products) – Case 50299, CMA decision of 23 October 2019, available at https://assets.publishing.service.gov.uk/media/5dfb98e7ed915d54a62419a6/Non-confidential_decision_201219_----.pdf.

admitted to participating in the alleged cartel and agreed to pay fines. A third company under investigation, FP McCann Limited, was not party to the settlement and filed an appeal on 20 December 2019 with the CAT against the CMA's infringement decision.³⁵

Investigations in the pharmaceutical industry

In 2019 and 2020, the CMA progressed a number of ongoing investigations in the pharmaceuticals sector. In setting out the CMA's annual plan for 2020–2021, the CMA emphasised its continuing focus on the sector, noting that it 'will continue to have a strong focus on the UK pharmaceutical sector, to ensure that the UK National Health Service (NHS) does not pay significantly more than it should for essential medicines and treatments, and that consumers who depend upon these drugs and treatments do not lose out'.³⁶

Prochlorperazine tablets

On 23 May 2019, the CMA issued an SO alleging that four pharmaceutical companies had infringed competition law by entering into anticompetitive market sharing agreements in relation to the supply of prochlorperazine tablets, an anti-nausea drug.³⁷

Nitrofurantoin capsules

On 25 July 2019, the CMA issued an SO alleging that three pharmaceutical companies had participated in anticompetitive agreements or concerted practices in relation to the supply of nitrofurantoin capsules, an antibiotic commonly used to treat urinary tract infections.³⁸ According to the CMA, two pharmaceutical suppliers had entered into arrangements under which a pharmaceutical wholesaler would buy equal volumes of the drug from each of the two suppliers, giving rise to market sharing.

35 *FP McCann Limited v. Competition and Markets Authority*, Case 1337/1/12/19, registered 20 December 2019. Case information available at <https://www.catribunal.org.uk/cases/133711219-fp-mccann-limited>.

36 'Annual Plan 2020 to 2021', published 19 March 2020, available at <https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2020-to-2021/annual-plan-2020-to-2021#our-priorities-for-202021>.

37 Pharmaceuticals: suspected anti-competitive agreements – Case 50511-2, investigation opened on 10 October 2017. Case information available at <https://www.gov.uk/cma-cases/pharmaceuticals-suspected-anti-competitive-agreements>.

38 Pharmaceutical drugs: suspected anti-competitive agreements – Case 50511-1, investigation opened on 10 October 2017. Case information available at <https://www.gov.uk/cma-cases/pharmaceutical-drugs-suspected-anti-competitive-agreements>.

Fludrocortisone tablets

On 3 October 2019, the CMA announced that it had issued an SO to three pharmaceutical companies.³⁹ The CMA provisionally concluded that, in 2016, the pharmaceutical company Aspen had unlawfully agreed to pay two other firms, Amilco and Tiofarma, to stay out of the UK market for fludrocortisone acetate tablets, a medicine used to treat primary or secondary adrenal insufficiency. The SO followed Aspen's admission, in August 2019, that it took part in the alleged anti-competitive arrangement and its agreement to a maximum penalty of £2.1 million should the CMA ultimately issue a fining decision.⁴⁰ Following the SO, Tiofarma also admitted its participation in the alleged anticompetitive agreement. The third party under investigation, Amilco, made no admissions, and the CMA's investigation against it is continuing.

Hydrocortisone tablets

On 12 February 2020, the CMA announced that it had issued a single supplementary SO in relation to three separate investigations concerning hydrocortisone tablets. The CMA's procedural approach is without precedent. The CMA had previously conducted three separate investigations concerning (1) alleged excessive and unfair pricing by Actavis UK (formerly Auden Mckenzie (Auden)) under Chapter II of the CA98 and article 102 of the TFEU (article 102), (2) an alleged pay-for-delay agreement between Actavis/Auden and Concordia under Chapter I and article 101 and alleged exclusionary conduct by Actavis/Auden under Chapter II and article 102, and (3) an alleged pay-for-delay agreement between Auden and Waymade under Chapter I and article 101 and alleged abusive conduct by Auden under Chapter II and article 102. The CMA had issued three separate SOs in 2017 and 2019 in the respective investigations.⁴¹ In (1), Actavis/Auden responded to the SO and the CMA proceeded to a draft penalty statement; in (2), the parties responded to the SO and attended oral hearings; and in (3), the CMA decided that the recipients of the SO need not respond to it. In bringing the three investigations together and issuing a single SO on 12 February 2020, the CMA stated that, in view of the alleged 'interrelationship of the facts and allegations in the three hydrocortisone investigations, the CMA brought them together and revised certain aspects of its provisional findings in the respective statements of objections'.

39 Fludrocortisone acetate tablets: suspected anti-competitive agreement – Case 50455, investigation opened on 10 October 2017. Case information available at <https://www.gov.uk/cma-cases/pharmaceutical-drugs-suspected-anti-competitive-agreements-and-conduct>.

40 As part of a package of commitments offered by Aspen in relation to the CMA's related investigation into competition concerns under Chapter II and article 102 of the TFEU, Aspen also undertook to pay £8 million to the National Health Service [NHS] to address the CMA's concerns that, as a result of the impact of Aspen's behaviour, the NHS had paid a higher price for the supply of fludrocortisone tablets. See Decision to accept binding commitments offered by Aspen in relation to the supply of fludrocortisone acetate 0.1 mg tablets – Case 50455, CMA decision of 22 January 2020, available at https://assets.publishing.service.gov.uk/media/5d94c607ed915d5540d5b093/Case_50455_-_Commitments_Decision.pdf.

41 Hydrocortisone tablets: alleged excessive and unfair pricing, anti-competitive agreements and abusive conduct – Case 50277. Case information available at <https://www.gov.uk/cma-cases/hydrocortisone-tablets-alleged-excessive-and-unfair-pricing-anti-competitive-agreements-and-abusive-conduct-50277>.

Nortriptyline tablets

On 4 March 2020, the CMA issued two separate decisions in respect of infringements relating to nortriptyline tablets, an anti-depressant.⁴²

The first decision found market sharing. The CMA determined that two pharmaceutical suppliers, Auden and King Pharmaceuticals (King), had shared between them the supply of nortriptyline tablets to a large pharmaceutical wholesaler, and that the two firms had colluded to fix quantities and prices. Both pharmaceutical companies admitted to the infringement. As part of the settlement, Auden and King received reduced fines and Auden agreed to make a payment of £1 million to the NHS in consideration for damages the NHS was said to have suffered as a result of the infringements. However, on 4 May 2020, a former director and joint owner of Auden filed an appeal with the CAT against the CMA's decision.⁴³

The second decision concerned information exchanges. The CMA found that three pharmaceutical companies, King, Lexon (UK) Ltd (Lexon) and Alissa Healthcare Research Ltd (Alissa), had shared commercially sensitive information concerning prices, volumes and market entry plans. Two of them, King and Alissa, admitted to the infringement and received reduced fines as a result. The third company, Lexon, did not admit to the infringement and, on 11 May 2020, it filed an appeal with the CAT against the CMA's infringement decision.⁴⁴

Residential estate agency services

Further to enforcement action against a number of estate agents in 2015⁴⁵ and 2017,⁴⁶ the CMA issued a decision on 17 December 2019, finding that four estate agents, Michael Hardy & Company (Wokingham) Ltd (Michael Hardy), Prospect Estate Agency Ltd and Prospect Holdings (Reading) Ltd (together, Prospect), The Romans Group (UK) Ltd and Romans 1 Ltd (together, Romans), and Richard Worth Ltd (in administration) and Richard Worth Holdings Ltd, had infringed competition law by agreeing to fix and maintain a minimum level of commission charged for the provision of residential estate agency services.⁴⁷ The conduct was brought to the attention of the CMA by one

42 Nortriptyline investigation: anti-competitive agreement and conduct – Case 50507.2, investigation opened on 10 October 2017. Case information available at <https://www.gov.uk/cma-cases/pharmaceutical-sector-suspected-anti-competitive-agreements-and-conduct-50507-2>.

43 *Amit Patel v. Competition and Markets Authority*, Case 1348/2/12/20. Case information available at <https://www.catribunal.org.uk/cases/134821220-amit-patel>.

44 *Lexon (UK) Limited v. Competition and Markets Authority*, Case 1344/1/12/20. Case information available at <https://www.catribunal.org.uk/cases/134411220-lexon-uk-limited>.

45 Property sales and lettings investigation, investigation opened on 18 December 2013. Case information available at <https://www.gov.uk/cma-cases/investigation-into-property-sales-and-lettings-and-their-advertising>.

46 Residential estate agency services in the Burnham-on-Sea area, investigation opened on 11 December 2015. Case information available at <https://www.gov.uk/cma-cases/residential-estate-agency-services-suspected-anti-competitive-arrangement-s>.

47 Residential estate agency services – Case 50543, CMA decision of 17 December 2019, available at https://assets.publishing.service.gov.uk/media/5e296768e5274a6c44d681d4/Case_50543_-_Infringement_Decision_-_non_confidential.pdf.

of the estate agents (Romans) and in return, Romans received immunity from fines. Two others, Michael Hardy and Prospect, admitted to the alleged infringements and, as a result, they received discounted fines, while the fourth estate agent, Richard Worth, is in administration. In issuing its decision, the CMA noted that it hoped that the issuance of fines would 'reinforce our message that we expect the sector to clean up its act'.

Other civil enforcement action

In the second half of 2019, the CMA also launched investigations into suspected anticompetitive arrangements in the entertainment and recreation services sector⁴⁸ and the private healthcare sector.⁴⁹ These are in addition to the CMA's current investigations into the Atlantic Joint Business Agreement,⁵⁰ the supply of construction services,⁵¹ the use of most favoured nation clauses by a price comparison website,⁵² the supply of musical instruments and equipment,⁵³ and the financial services sector.⁵⁴

Competition director disqualification orders

In 2002, the EA gave the UK competition authorities the power to seek the disqualification of directors of companies found to have participated in a criminal cartel⁵⁵ for up to 15 years. Under the EA, participation in a criminal cartel may also give rise to the imposition of a five-year prison sentence, unlimited fines, or both. However, this power was essentially unused until a change in the law, which provided that, for conduct after 1 April 2014, it was no longer necessary for the CMA to prove

48 'Entertainment and recreation services sector: suspected anti-competitive agreements and conduct', investigation opened on 1 August 2019. Case information available at <https://www.gov.uk/cma-cases/entertainment-and-recreation-services-sector-suspected-anti-competitive-agreements-and-conduct>.

49 Privately funded healthcare services, investigation opened on 3 July 2019. Case information available at <https://www.gov.uk/cma-cases/privately-funded-healthcare-services>.

50 'Investigation of the Atlantic Joint Business Agreement', investigation opened on 11 October 2018. Case information available at <https://www.gov.uk/cma-cases/investigation-of-the-atlantic-joint-business-agreement>.

51 'Supply of construction services', investigation opened on 19 March 2019. Case information available at <https://www.gov.uk/cma-cases/supply-of-construction-services>.

52 'Price comparison website: use of most favoured nation clauses', investigation opened on 26 September 2017. Case information available at <https://www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses>.

53 Musical instruments and equipment: suspected anti-competitive agreements – Case 50565-6. Case information available at <https://www.gov.uk/cma-cases/musical-instruments-and-equipment-suspected-anti-competitive-agreements-50565-6>.

54 'Financial services sector: suspected anticompetitive arrangements', investigation opened on 13 November 2018. Case information available at <https://www.gov.uk/cma-cases/financial-services-sector-suspected-anti-competitive-practices>.

55 Criminal cartels are the most serious and damaging forms of anticompetitive agreements, known as 'hard core cartels'. They include agreements relating to price-fixing, the sharing of markets or customers, limiting production or supply, or bid rigging.

that an individual had acted 'dishonestly' in committing the cartel offence to secure a competition director disqualification order (CDO). This effectively made the participation in a cartel by a director a strict liability offence.

In February 2019, the CMA published revised guidance on CDOs. The revised guidance sets out a list of non-exhaustive factors that the CMA will consider in deciding whether or not to apply for a CDO.⁵⁶ These include the nature and seriousness of the infringement, the extent of the director's responsibility for the infringement, the conduct of the director during the CMA's investigation and the deterrent effect of a CDO in the relevant market.

In a speech on 11 June 2019,⁵⁷ Dr Michael Grenfell, the CMA's Executive Director in Enforcement, said that the CMA had 'ramped up [its] activity in seeking the disqualification of directors of companies' and that the CMA was 'determined to protect the public from individuals who, in their business activities, are involved in anticompetitive practices – and to send a clear message about the personal responsibility that business people have for ensuring compliance with competition laws.'

The CMA has demonstrated its determination to pursue CDOs by seeking to obtain CDOs against directors who participated in the cartel activity found by the CMA in its infringement decisions. In relation to the CMA's 2017 infringement decision concerning residential estate agent services in the Burnham-on-Sea area,⁵⁸ the CMA has secured a disqualification undertaking from one director and it is actively pursuing High Court proceedings in an endeavour to secure the award of a CDO against a second director.⁵⁹ In relation to the CMA's 2019 infringement decision concerning residential estate agency services in Berkshire,⁶⁰ the CMA has also commenced High Court proceedings seeking the disqualification of two directors.⁶¹

To avoid the CMA bringing High Court actions to obtain a CDO, a number of directors have offered disqualification undertakings, some of which have been accepted by the CMA. The CMA has, for example, accepted disqualification undertakings from six company directors in relation to its 2019 infringement decision concerning design, construction and fit-out services.⁶² It also

56 See <https://www.gov.uk/government/publications/competition-disqualification-orders--2>.

57 Available at <https://www.gov.uk/government/speeches/uk-competition-law-enforcement-the-post-brex-it-future>.

58 Case 50235 - Residential estate agency services, CMA decision of 31 May 2017, available at https://assets.publishing.service.gov.uk/media/59bf839d40f0b60d81570509/Non-confidential_decision.pdf.

59 See <https://www.gov.uk/cma-cases/residential-estate-agency-services-in-the-burnham-on-sea-area-director-disqualification>.

60 Residential estate agency services – Case 50543, CMA decision of 17 December 2019, available at https://assets.publishing.service.gov.uk/media/5e296768e5274a6c44d681d4/Case_50543_-_Infringement_Decision_-_non_confidential.pdf.

61 See <https://www.gov.uk/cma-cases/residential-estate-agency-services-in-the-berkshire-area-director-disqualification>.

62 Design, construction and fit-out services – Case 50481, CMA decision of 16 April 2019, available at https://assets.publishing.service.gov.uk/media/5cf10117e5274a5eb3eed038/Case_50481_-_Decision_-_non-confidential_version.pdf. See also <https://www.gov.uk/cma-cases/design-construction-and-fit-out-services-director-disqualification>.

accepted disqualification undertakings from two directors in relation to its 2019 infringement decision concerning the supply of pre-cast concrete drainage products⁶³ (and it has commenced director disqualification proceedings against two current directors who did not offer disqualification undertakings).⁶⁴ Further, the CMA also accepted a disqualification undertaking from a director in relation to its 2020 infringement decision concerning nortriptyline tablets.⁶⁵

Covid-19

In an endeavour to assist companies in dealing with the covid-19 pandemic, on 19 March 2020, the UK government announced that, as part of a package of measures to allow supermarkets to work together to feed the nation during the pandemic, elements of competition law would be temporarily relaxed for the food sector.⁶⁶ Shortly afterwards, on 25 March 2020, the CMA issued guidance on its approach to business cooperation during the pandemic. The CMA's guidance explained that it would allow a degree of coordination between businesses in certain circumstances, such as to avoid shortages, to ensure security of supply, to ensure a fair distribution of scarce products, or to continue essential services.⁶⁷ However, the CMA also emphasised that it would not tolerate coordination between businesses (or unilateral conduct by dominant firms) that sought to exploit the crisis, such as arrangements that used the crisis as a cover for non-essential collusion, including arrangements for the exchange of commercially sensitive information on future pricing or business strategies; arrangements to artificially keep prices high; or arrangements to deny rivals access to supplies or services. The CMA also emphasised that its guidance does not bind the Commission in its application of EU competition law in the UK and does not offer protection against private litigants having recourse to the courts in respect of a suspected infringement, including to recover losses in respect of the same. Against the background of concern on the part of the CMA that businesses might exploit the situation, the CMA has also established a dedicated covid-19 taskforce to scrutinise market developments and take enforcement action.⁶⁸

63 Supply of products to the construction industry (pre-cast concrete drainage products) – Case 50299, CMA decision of 23 October 2019, available at https://assets.publishing.service.gov.uk/media/5dfb98e7ed915d54a62419a6/Non-confidential_decision_201219_----.pdf.

64 See <https://www.gov.uk/cma-cases/supply-of-precast-concrete-drainage-products-director-disqualification>.

65 Nortriptyline investigation: anti-competitive agreement and conduct – Case 50507.2, CMA decision of 4 March 2020. Case information available at <https://www.gov.uk/cma-cases/pharmaceutical-sector-suspected-anti-competitive-agreements-and-conduct-50507-2>. See also <https://www.gov.uk/cma-cases/suppliers-of-antidepressants-director-disqualification>.

66 See <https://www.gov.uk/government/news/supermarkets-to-join-forces-to-feed-the-nation>.

67 'CMA approach to business cooperation in response to COVID-19', guidance of 25 March 2020. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875468/COVID-19_guidance_-.pdf.

68 See <https://www.gov.uk/government/publications/covid-19-cma-taskforce/cma-covid-19-taskforce>.

Brexit

On 31 January 2020, the UK government ratified the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement).⁶⁹ This marked the end of the UK's membership of the European Union. The Withdrawal Agreement provides for a transition period until 11pm on 31 December 2020, unless extended (the transition period). During the transition period, EU law continues to apply in the UK as if it is still an EU member state.

On 28 January 2020, the CMA published guidance on the functions of the CMA under the Withdrawal Agreement during the transition period.⁷⁰ As a result of the continuing application of EU law in the UK, the guidance says that, during the transition period, existing arrangements for the discharge of the CMA's functions will be largely unaffected. Accordingly, EU competition law will continue to have effect in the UK during the transition period and the CMA is obliged to apply it in relevant cases. Notably, section 60 of the CA98, which incorporates into UK law a governing principle that UK competition law should not diverge in its substantive application from equivalent EU law, will continue to apply during the transition period. The guidance also explains the CMA's treatment of 'live' cases, that is, cases that are being reviewed by the Commission or the CMA during and towards the end of the transition period. The CMA says it expects to see an increase in its workload as a result of, first, the requirement to take on transnational mergers and cartel cases that have previously been within the Commission's jurisdiction and, second, the CMA's anticipated new enforcement power under a UK national subsidy control regime. The CMA has also forewarned that the increase in its workload, at least in the first few months, may give rise to a lower number of new 'projects'.

The CMA's guidance does not cover the UK's relationship with the European Union after the end of the transition period, which, at the time of writing, remains subject to negotiation with the EU.

69 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by the European Council on 13 December 2019.

70 Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864371/EU_Exit_guidance_CMA_web_version_final_---2.pdf.



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ISBN: 978-1-83862-260-2