

Competition & Regulatory Newsletter

25 March - 7 April 2020 / Issue 7

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CMA clears two high profile mergers at Phase 1

The Competition and Markets Authority (CMA) has recently cleared two high profile mergers at Phase 1. On 27 March 2020 the CMA cleared the completed acquisition of the “i” newspaper and website by Daily Mail and General Trust, following the decision by the Secretary of State for Digital, Culture, Media and Sport (the Secretary of State) not to refer the deal to a Phase 2 investigation on public interest grounds. Then, on 31 March 2020, the CMA approved the anticipated purchase by Flutter Entertainment plc (owner of Paddy Power and Betfair) of The Stars Group Inc. (owner of Sky Bet), a deal set to create one of the largest gaming and betting companies in the world, again at Phase 1.

DMGT / “i” newspaper

Background

DMGT completed its acquisition of the “i” newspaper and its sister website, “inews.co.uk”, on 29 November 2019, noting that it intended to notify the transaction to the CMA.

The following month, then-Secretary of State Nicky Morgan issued a [Public Interest Intervention Notice](#) on the basis that the transaction could threaten media plurality in the UK. Following the intervention, the CMA [reported](#) to the Secretary of State on the jurisdictional and competition aspects of the transaction, and the UK’s regulator for broadcasting and telecommunications (Ofcom) [reported](#) on the public interest considerations.

Clearance decision

The CMA’s [report](#) to the Secretary of State on jurisdictional and competition matters advised that the transaction was not expected to result in a substantial lessening of competition in any UK market. In particular, the CMA found that the parties were not close competitors in the markets for the publishing of and advertising in national print newspapers, and that the merged entity would continue to face significant competitive constraints from other sources. In relation to the supply of online news and digital advertising, the CMA found that

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the parties had a limited presence and were constrained by a range of other suppliers.

Ofcom's [report](#) concluded that - in the context of a challenging environment for newspapers brought about by the growth of online news, in which investment in the long-term viability of newspapers should be supported - the transaction would not reduce the plurality of views across newspaper groups in the UK. While the number of national newspaper groups with a UK-wide reach had been reduced as a result of the transaction, the number of titles was not affected, and the "i" represented only a small increase to the overall consumption of DMGT titles post-merger. Ofcom also considered that the "i" would remain a distinct voice within the DMGT range of titles, such that there were no concerns about a reduction of plurality within the DMGT group itself.

On the basis of these two reports, the Secretary of State decided not to refer the merger to a Phase 2 investigation on public interest grounds and the case was remitted to the CMA which proceeded to clear the transaction unconditionally.

Flutter / Stars

Background

Flutter and Stars both provide online gambling services and the proposed merger will create a global leader in the online betting and gaming sectors. In the UK, the main overlap between Flutter and Stars is online sports betting, where they are two of the major online betting providers. The CMA launched its inquiry into the proposed £10 billion global merger in February 2020, with its investigation focussed on whether, as a result of the proposed merger, online customers could be offered less favourable odds, less generous promotions or poorer quality products, through reduced innovation in pricing or app experience.

Clearance decision

The CMA [found](#) that there are several large and small market players to whom customers could "easily switch", who would continue to act as a strong competitive constraint on the merged entity. As such, while the parties compete closely, they are among a number of close competitors and the transaction would not give rise to competition concerns.

The CMA's approval is seen as a significant milestone and follows approvals by the competition authorities in Australia, Germany, Spain, Austria and Malta. Days before the CMA's decision, the companies released a [joint statement](#) reiterating their strong belief in the strategic rationale of the combination, despite the potential impact of the COVID-19 pandemic on both businesses and the industry more generally: numerous sports fixtures have been cancelled or postponed due to the virus, leading to a fall in revenue for betting companies. The companies consider that their combined international presence, diversified product portfolio and financial synergies arising from the deal will prove strong bulwarks against any COVID-19-related disruption.

Decisions on the deal are still awaited from the competition authorities in Ireland and Bulgaria, among others, with delays expected due to COVID-19.

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Conclusion

As more and more businesses move from bricks and mortar to online businesses, consolidation and competition in digital markets has become a marked issue for regulators around the world. With calls for increased intervention in mergers in digital markets on the rise, the CMA's recent decisions are an encouraging sign that the CMA is still willing to clear transactions with a digital angle where the competition assessment shows that sufficient competitive constraints will remain post-merger.

Slaughter and May advised Daily Mail and General Trust and The Stars Group Inc.

Other developments

Merger control

European Commission opens in-depth investigation into Johnson & Johnson/Tachosil merger

On 25 March 2020 the European Commission **announced** that it has decided to open an in-depth Phase 2 investigation into the proposed acquisition of Tachosil by Johnson & Johnson. The Commission is concerned that the proposed acquisition may reduce potential competition and innovation in the supply of dual haemostatic patches. The Commission's decision to enter into a Phase 2 investigation indicates that EU merger cases under investigation may continue as normal during the COVID-19 crisis, though the full impact of the crisis on the Commission's processes remains to be seen.

Johnson & Johnson is a leading manufacturer of haemostats globally and invests in the development of new products. Tachosil is the leading dual haemostatic patch product producer in Europe and currently owned by pharmaceutical company, Takeda. Haemostats are used to manage bleeding during surgeries, with dual haemostatic patches used for the most problematic bleeding situations.

The Commission's preliminary market investigation suggests that dual haemostatic patches constitute a distinct product market, which is currently dominated by Tachosil across the EEA/UK. The Commission's initial investigation found that this potential market is characterised by high barriers to entry and expansion related to the existence of significant development costs, the strong brand loyalty among surgeons and the already established position and clinical track-record of Tachosil. Although Johnson & Johnson does not currently sell dual haemostatic patches in the EEA/UK, it does sell a haemostatic patch outside the EEA/UK. The Commission is therefore concerned that the proposed transaction may: (i) remove Johnson & Johnson as the best placed potential entrant to the already concentrated market for dual haemostatic patches; and (ii) enable Johnson & Johnson, through the reinforcement of its leading position in the haemostats space, to hinder competitors' ability to enter or expand their activities. Both of these factors could result in higher prices, less choice and less innovation in the market.

The Commission will carry out an in-depth investigation into the effects of the proposed transaction for which it now has 90 working days, until 10 August 2020, to take a final decision.

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European Commission launches dedicated website to provide companies with COVID-19 guidance

On 30 March 2020 the European Commission launched a [dedicated website](#) to provide guidance to companies on the compatibility with EU competition rules of cooperation initiatives in response to the current COVID-19 crisis. The Commission [explained](#) that the aim of the initiative is to help businesses design “*new and temporary cooperation arrangements in a pro-competitive way*” in order to help Europe overcome the current COVID-19 crisis in a united manner.

The website consolidates the various guidance already available to help companies assess the compatibility of their business arrangements, notably the [Commission’s Guidelines on Article 101\(3\)](#), the [Horizontal](#) and the [Vertical](#) Guidelines, and the European Competition Network’s [joint statement](#) on the application of the antitrust rules during the current coronavirus crisis.

The website also provides details of the Commission’s new “dedicated mailbox” (<mailto:COMP-COVID-ANTITRUST@ec.europa.eu>). This has been set up to enable businesses to seek informal guidance on specific cooperation initiatives that need to be swiftly implemented in order to tackle the effects of the COVID-19 outbreak. Companies are asked to provide upfront as much detail as possible on the initiative, including: (i) the firms, products or services concerned; (ii) the scope and set-up of the cooperation; (iii) the aspects that may raise concerns under EU antitrust law; and (iv) the benefits that the cooperation seeks to achieve, with an explanation of why the cooperation is necessary and proportionate to achieve those benefits in the current circumstances.

School’s out - Hong Kong booksellers accused of longstanding textbook cartel

On 20 March 2020 the Hong Kong Competition Commission (HKCC) brought its sixth enforcement action before the Competition Tribunal against T.H. Lee, Commercial Press, Sino United Publishing (the ultimate 100% owner of Commercial Press), and Mr. Hui Chiu Ming (the General Manager of T.H. Lee). The case concerns an alleged cartel between two school textbook sellers. The HKCC alleges that the conduct dates back to 2011, when the two booksellers agreed (in the context of trade association meetings) not to “poach” one another’s customers. As a result, the parties allegedly engaged in bid rigging, price fixing and market sharing in relation to school textbook tenders.

Three aspects of the case are of particular note:

1. **“Single and continuous infringement”**. Although the Competition Ordinance was not implemented until December 2015, the HKCC alleges that the parties nonetheless engaged in anti-competitive conduct after 2015 by continuing to give effect to the 2011 arrangement. As part of its case, the HKCC has introduced the EU concept of a “single and continuous infringement” to the Tribunal for the first time, which would allow pecuniary penalties to be calculated on the basis of the relevant duration (after December 2015 when the Competition Ordinance came into full effect).
2. **Parental liability**. One of the respondents, Sino United, does not appear to have been directly involved in the alleged conduct - the allegations against it are primarily based on the fact that it is

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the ultimate owner of the subsidiary bookseller. Here, the HKCC relies heavily on the EU rules on parental liability, which are not recognised under Hong Kong rules of attribution. If this concept is endorsed in full by the Tribunal, it could expose parent companies to antitrust liability incurred by any Hong Kong company it has “decisive influence” over.

- 3. Other trade association members are not part of the HKCC’s proceedings.** The HKCC alleges that the 2011 arrangement was made and reaffirmed in trade association meetings, where other booksellers (in addition to the two respondent booksellers) were present and formally part of the relevant arrangements. It is curious why they are not subject to the same proceedings. It could be due to a lack of sufficient evidence or because the other booksellers in question did not in fact give effect to the 2011 arrangement. This will be an interesting aspect of the case to look out for as it progresses in the Tribunal.

Cartel enforcement (including against individuals) clearly remains a top priority for the HKCC. This is also a welcome opportunity for the Tribunal to consider important points of competition law, in particular on the extent of parental liability for the activities of their subsidiaries and the concept of a “single and continuous infringement” in the context of Hong Kong law.

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