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CMA closes online gaming investigation following improvements by Sony and Nintendo to subscription practices

INTRODUCTION

On 13 April 2022 the Competition and Markets Authority (CMA) [announced](#) the closure of its consumer law investigation into the auto-renewal practices of Sony, Microsoft and Nintendo. The investigation followed a super-complaint in 2018. The closure of the investigation follows improvements made by these companies to their gaming subscription practices.

CRACKING DOWN ON THE ‘LOYALTY PENALTY’

In September 2018 the UK mass consumer claims handler Citizen’s Advice lodged a ‘[super-complaint](#)’ against what it referred to as the ‘loyalty penalty’. Citizen’s Advice was concerned that customers who stay with providers might end up paying more than new customers, with a particular focus on the markets for mobile, broadband, savings accounts, mortgages and household insurance.

CMA INVESTIGATION

The CMA’s [investigation](#) into the supply of online gaming memberships for the Nintendo Switch, Sony PlayStation and Microsoft Xbox was launched in April 2019 and was the second in a series of actions taken by the CMA in response to the super-complaint (the first being its investigation into companies offering anti-virus software).

The CMA wrote to Nintendo, Sony and Microsoft requesting information about their online gaming contracts and called on customers who use those services to share their customer experiences. The investigation examined several issues, including:

- Fairness of contract terms: do the contract terms give the companies wide discretion to vary the quality of the deal, for example, by reducing the number of games included or increasing price?
- Ease of obtaining a refund or cancelling an existing contract: are there factors which make it difficult for customers to cancel the contract or get their money back?
- Fairness of the auto-renewal process: are customers clearly told that their contract will rollover and/or are they regularly reminded they are on a rollover contract before further payment is taken? Is auto-renewal the default option?

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MICROSOFT'S UNDERTAKINGS

Microsoft's Xbox Live Gold and Game Pass online service products allowed customers to access a games library and play together online. These could be purchased as memberships entered into on an auto-renewal basis and were among the services investigated by the CMA.

In January 2022 the CMA [procured](#) undertakings from Microsoft which it felt adequately addressed its concerns. The improvements include:

- Better upfront information: Microsoft undertook to provide more transparent, upfront information to help customers understand their membership and contract terms, including that the contract will auto-renew, when that auto-renewal will occur, how much it will cost and how they can receive a refund following an accidental renewal;
- Refunds: Microsoft will contact existing customers on recurring 12-month contracts and give them the option to cancel and claim a pro-rata refund;
- Inactive memberships: Microsoft undertook to contact customers who have not used their membership for a long time but are still paying, to remind them how to cancel. Further, if they continue not to use their memberships, Microsoft will not take further payments; and
- Better information on price increases: Microsoft will give clearer notification of any price increases and ensure customers know how to 'turn-off' auto-renewal if they do not wish to pay those higher prices.

NINTENDO AND SONY FOLLOW SUIT

Following similar [improvements](#) from Nintendo and Sony to their subscription practices, on 13 April 2022 the CMA brought the 2019 investigation to a close.

The CMA secured an undertaking from Sony in relation to its PlayStation Plus product. Sony agreed to ensure protection of customers who have not used their memberships for a long time but are still paying. Sony also promised to contact these customers to remind them how to stop payments and, like Microsoft, promised ultimately to stop taking further payments if customers continue not to use their memberships.

Nintendo changed its contract terms during the course of the investigation to ensure the Nintendo Switch Online Service was no longer sold with automatic renewal set as the default option.

CONCLUSION

In announcing the conclusion of the investigation, Michael Grenfell, Executive Director of Enforcement at the CMA, cautioned that “[c]ompanies in other sectors which offer subscriptions that auto-renew should review their practices to ensure they comply with consumer protection law.”

Companies active in other sectors where such practices are common will therefore no doubt be taking guidance from this case as to the types of changes they should put in place to avoid catching the CMA's attention.

OTHER DEVELOPMENTS

MERGER CONTROL

CMA PUBLISHES REVIEW OF VERTICAL MERGER DECISIONS

On 14 April 2022 the CMA published a [review](#) carried out by E.CA Economics, providing an *ex-post* evaluation of four merger clearance decisions involving vertically-related firms, namely Tulip/Easey, Heineken/Punch, Tesco/Booker and Mastercard/Vocalink, each of which the CMA assessed in 2017.

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The report found that the CMA “*largely carried out high-quality work*” but also felt that the CMA could improve its analytical choices. In particular, the report emphasised that the nature of the market interactions was more complex than was accounted for by the CMA’s studies of the theories of harm. The report also concluded that the CMA treated vertical mergers more leniently than horizontal ones and that the CMA’s toolkit, as set out in the [2021 Merger Assessment Guidelines](#), lacked an adequate framework to address cases of potential competition which involve a vertical element; especially complex cases in which vertical and horizontal effects are intertwined. Furthermore, the report recommended that mergers with a vertical component need more careful consideration of theories of harm based on wider engagement with business evidence than in horizontal cases.

The report also concluded that vertical mergers tended not to be isolated events in a sector but rather part of an industry trend. For instance, parallel transactions were either occurring or about to occur in all of the four aforementioned cases. Consequently, the report encouraged the CMA to assess a vertical merger against the evolving picture of the entire industry, by considering the counterfactual to the merger and also the future market evolution, more dynamically than it currently does.

Overall, the report recommended that the CMA utilise greater flexibility when developing theories of harm rather than “*shoehorning new issues into old categories*” such as drawing a hard distinction between vertical and horizontal issues. To address this, the report advocated that the CMA focus resources on key theories of harm but simultaneously approach industry evidence with an open-mind to understand market evolution.

GENERAL COMPETITION

UK PUBLISHES NSI ACT ENFORCEMENT GUIDANCE

On 11 April 2022 the UK Government’s Department for Business, Energy & Industrial Strategy (BEIS) published [guidance](#) on how to comply with the National Security and Investment Act and what can be expected if you are subject to orders and notices, including:

- Notices and orders that may be issued by the Secretary of State which include call-in notices, information notices and attendance notices in addition to interim and final orders. Information notices may be issued at any point, including during contemplation of an acquisition. Failure to respond to an information notice can result in enforcement action.
- BEIS intends to utilise attendance notices to hear from people involved in the acquisition, including parties’ representatives.
- Interim orders, which can apply to people outside the UK, set conditions for compliance and could include preventing the exchange of confidential information. Parties will receive interim orders by email and these will not routinely be made public.
- Final orders can include structural and behavioural conditions in order to mitigate national security risks and importantly include the blocking of an acquisition. Final orders remain in place until varied or revoked by the Secretary of State but an expiry date may apply to some of the conditions. However, the Secretary of State will only consider a party’s request to vary or revoke a final order if there has been a material change in circumstances. A publication notice about the final order will be published but the final order itself will remain private.

The guidance also emphasises the importance of demonstrating compliance, stating that any evidence provided to the Investment Security Unit (ISU) within BEIS must be clear and unambiguous. Additionally, the ISU should be

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notified immediately if a party encounters any issues with complying with an order or notice. The guidance outlines examples of the compliance requirements orders could include, such as providing the ISU with regular statements of compliance on a weekly basis. Furthermore, the guidance outlines examples of non-compliance which can result in enforcement action, such as providing incomplete information in response to a notice. Details on the factors that affect the decisions on the level of a monetary penalty are also provided - these include whether there are multiple and repeated breaches and whether the parties have committed fraud or negligence.

UK GOVERNMENT GRANTS CMA MORE POWERS

On 20 April 2022 BEIS [published](#) the Government's response to its July 2021 consultation on the reform of competition and consumer policy (for more details on the consultation, see our [previous client publication](#)). The consultation covered three themes: strengthening the enforcement of consumer law; updating consumer rights and promoting competition. Many of the reforms require legislation to implement and the Government is now considering how best to take them forwards.

Under the proposed reforms to consumer law, the CMA would be able to directly enforce consumer law and has been granted the ability to fine firms up to 10 per cent of their global turnover for breaching consumer law. This would replace the current requirement for the CMA to go through a lengthy court process to seek redress. Additionally, the CMA, instead of the court, would be able to award compensation to consumers and impose financial penalties of up to 5 per cent of a business' global annual turnover for breaching undertakings provided to the CMA.

In relation to competition law, the proposed reforms provide for stronger enforcement against illegal anti-competitive conduct. These reforms include, for instance, granting the CMA stronger powers to deter companies from colluding to increase prices. In particular, the CMA's evidence-gathering powers are proposed to be strengthened and the territorial scope of the cartel prohibition expanded to apply to agreements implemented outside of the UK, depending on the effects of the conduct within the UK, in order to protect UK consumers from anti-competitive conduct wherever it is carried out. This will not alter the application of the Chapter I prohibition to conduct which is implemented in the UK. Other potential reforms include changing the standard of review for interim measures and introducing a new statutory framework for confidentiality rings.

On mergers, the proposed reforms include bolstering the CMA's powers to combat so-called 'killer acquisitions' and other mergers which do not involve direct competitors by introducing a new jurisdictional threshold whereby the CMA will be able to review mergers where one of the parties to the transaction has an existing share of supply of goods and services of 33 per cent or more in the UK, and UK turnover of over £350 million. In another reform, to reduce the burden on small businesses, mergers between companies where each party's UK turnover is less than £10 million would be excluded from the CMA's merger control. Government also proposes enabling the CMA to deliver more effective and efficient merger investigations by accepting commitments from businesses which resolve competition issues earlier during a Phase 2 investigation, and enhancing and streamlining the merger 'fast track' procedure.

A client briefing providing further detail on the reforms will follow in due course.

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