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## Annual Report on Competition Policy Developments in the United Kingdom

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This report is submitted by the United Kingdom to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 3-4 December 2019.

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## *United Kingdom*

### **1. EXECUTIVE SUMMARY**

1. The UK's Competition and Markets Authority (CMA) carried out important work in 2018 in markets that really matter to millions of households and businesses across the UK, building on progress and capitalising on the investments it made in its early years as the UK's primary competition and consumer agency.
2. This report focuses on the CMA's work in 2018, some elements of which remain ongoing or have subsequently been completed.

#### **1.1. Protecting consumers through effective enforcement**

3. Protecting consumers from illegal, anti-competitive practices and unfair trading whether online or on the high street is central to the CMA's purpose. The CMA's competition and consumer protection enforcement investigations span online commerce, major global companies and markets for goods and services that matter to the economy and to people's everyday lives.
4. In 2018, the CMA launched eight new anti-competitive conduct cases, including one relating to a business agreement between five airlines on cross-Atlantic routes. In 2010, the airlines had given commitments to the European Commission for a period of ten years to address its competition concerns. Given the approaching expiry of the commitments, the UK's impending exit from the European Union and the fact that five of the six routes subject to commitments are between the UK and US, the CMA decided to review the competitive impact of the original agreement.
5. Competition enforcement in the pharmaceutical sector has been a priority for the CMA for several years. Illegal, anti-competitive practices would harm consumers in any market, but if the UK's National Health Service has to pay significantly more than it should for essential medicines and treatments because of anti-competitive actions, then the people who depend on these drugs lose out, as do millions of other NHS users as there is less money to go around.
6. The CMA continues to reflect on and act when necessary in relation to the impact of technological changes and welcomes the benefits that digitisation can bring, including increased choice, convenience, lower prices and the increased spurs to efficiency in the economy. It recognises, however, that this same technology can also create new risks of consumers losing out, being poorly treated or not getting the full facts to inform their purchase. The CMA contributed to the Furman review, led by former economic adviser to President Barack Obama, Professor Jason Furman. The independent expert panel examined competition in the digital economy and whether the UK competition regime can ensure that digital markets are competitive, and consumers are protected. The panel reported in March 2019, finding that UK competition rules must be updated to be fit for the digital age. The CMA welcomed these findings.
7. In 2018, the CMA established a Data, Technology and Analytics (DaTA) unit, to enable the CMA to better understand how firms are using data, what their machine learning

and AI algorithms are doing, the consequences of these algorithms and, ultimately, what actions authorities such as the CMA need to take.

8. Another example of CMA work in this area has been its digital comparison tools market study, which in part led to the CMA's online hotel booking consumer protection investigation. This also led to competition enforcement investigation in which the CMA has provisionally found that clauses in many of the contracts that Compare The Market has with home insurers break competition law and could mean that customers are missing out on better deals.

9. In June 2019, the CMA launched its digital markets strategy, setting out how it will continue to protect consumers in rapidly developing digital markets, while fostering innovation.

10. In relation to other investigations, the Competition Appeal Tribunal (CAT) dismissed an appeal by Ping Europe, the golf club manufacturer, against the CMA's decision to fine it for breaking the law by banning retailers selling its clubs online. This is now under appeal at the Court of Appeal.

11. In addition to the competition-related enforcement cases, the CMA launched and continued to investigate its interventions in relation to the consumer law enforcement programme such as in relation to online hotel booking and the online secondary ticketing market.

12. The CMA is determined to protect the public from individuals who, in their business activities, are involved in anti-competitive practices and to send a clear message about the personal responsibility that business people have for ensuring compliance with competition laws.

### *1.1.1. The mergers regime*

13. Protecting consumers from the harmful effects of mergers is a core part of the CMA's role. During 2018 the CMA carried out a large number of phase 2 investigations, including into the proposed merger of two of the UK's biggest supermarkets, Sainsbury's and Asda. The CMA concluded that their combination would have led to increased prices in stores, online and at many petrol stations across the UK, and therefore blocked it.

14. In several of our phase 2 investigations, the CMA was the only authority conducting such an in-depth review, despite them being multi-jurisdictional transactions. This approach demonstrates the CMA's ability and willingness to review mergers that have the potential to harm UK consumers, even where they have not raised concerns in other jurisdictions. The UK currently operates a voluntary notification regime and a significant proportion of these mergers were not notified to the CMA, with some completed prior to the CMA's investigation.

15. As with the CMA's consumer protection enforcement, mergers and acquisitions in the online world featured prominently in the CMA's work. The CMA carried out reviews of the mergers of TopCashback/Quidco and Experian/Clearscore, resulting in the companies abandoning their mergers, and PayPal's acquisition of Swedish start-up iZettle.

16. The CMA took strong action where necessary to protect competition. For example, the CMA required JLA and Washstation to completely unwind their completed merger. The CMA investigated a proposed merger, subsequently abandoned, of two of the UK's biggest energy suppliers, SSE and Npower. The CMA concluded that these companies were not close competitors for an important set of customers, being those on standard variable

tariffs. There are also dozens of energy suppliers in the market and many of the people who switch move to one of the smaller energy suppliers, which now account for more than 20% of the market.

17. Even where mergers were subject to review by the European Commission rather than the CMA, the CMA worked hard to ensure that UK consumers were protected. In particular, in the context of significant pressure from the French and German governments to establish a European ‘industrial champion’, the CMA joined forces with other European national competition authorities to raise concerns about the Siemens AG and Alstom SA merger. In a joint letter, the CMA advised the EU Competition Commissioner that the overall loss of competition in rail signalling systems and rolling stock would be both widespread and very significant, and that the concessions offered by the companies fell far short of what would be needed to address these concerns.

18. The CMA continually seeks to refine its approach to merger control and make it even clearer and more efficient for companies considering merging and their advisors. The CMA published revised guidance on exceptions to the duty to refer mergers and on merger remedies and also published good practice in the design and presentation of consumer survey evidence.

### *1.1.2. Making markets work better*

19. The CMA’s enforcement powers are significant but there are times when markets are not working in people’s favour and need to change, even where there is no breach of competition or consumer protection law. In 2018 the CMA carried out in-depth reviews of markets that are central to people’s lives and essential to a well-functioning economy.

20. Firms in the investment consultancy and fiduciary management sector have influence over half of all UK households’ retirement savings and advise on pension schemes worth £1.6 trillion. The CMA’s market investigation set out a suite of improvements that will help ensure that the sector works better for pension scheme members. It was also concluded three months ahead of the statutory deadline under the first use of the CMA’s streamlined procedure.

21. Following the launch of the CMA’s audit market study in October 2018, the CMA identified a number of reasons why it believed audit quality was falling short. The CMA published an update paper in December 2018 outlining serious competition concerns and proposed changes to legislation to improve the audit sector for the benefit of savers and investors alike. The CMA completed the market study and published its Final Report in April 2019 which included a number of recommendations to government.

22. Heat networks are a key part of the UK government’s decarbonisation strategy and in July 2018 the CMA concluded a market study in this sector. It made recommendations to UK and devolved governments to improve transparency and consumer protection in a market that is expected to grow significantly as energy-efficient technology develops.

23. Following a super-complaint from Citizens Advice, the CMA investigated concerns that not enough has been done to tackle the ‘loyalty penalty’ being paid by longstanding customers in five key markets. The CMA set out a package of reforms which the CMA believe will help existing customers get a fairer deal.

24. Households and small businesses continue to see the impact of the CMA’s market-wide review of retail banking as more of the CMA’s orders come into force. For example,

banks must now display information on their customers' opinion of their services, and that of their rivals.

## 1.2. A strong voice for competition

25. The CMA has remained a strong voice for competition across the UK and overseas, advising and challenging policy-makers domestically and supporting the development of the competition and consumer protection regimes internationally.

26. The CMA's advocacy team worked on a wide range of issues, engaging with national, devolved and local government officials and lawmakers both publicly and privately to encourage pro-competitive policy-making in the interests of consumers. Issues the CMA worked on included housing, public transport, local journalism, motorway fuel pricing, government outsourcing and the design of the competition for the next National lottery licence.

27. Transport has been an important focus for CMA advocacy. The CMA took part in the Task and Finish Group commissioned by the Department for Transport into the regulation of taxis and private-hire vehicles (including apps like Uber). In December 2018, the CMA published advice for the Department for Transport on competition impacts of airport slot allocation alongside the government's aviation strategy.

### 1.2.1. Strong partnerships at home and overseas

28. The CMA is a UK-wide institution committed to working on behalf of consumers and businesses across all the nations and regions of the UK, supported by offices in Belfast, Cardiff and Edinburgh. In June 2018, the CMA opened an expanded office in Edinburgh, which has now grown to more than 40 staff across a wide range of professions including policy, law and economics. The CMA expect numbers to continue to increase over the coming year and also plans modest expansions in Belfast and Cardiff.

29. During 2018 the CMA worked with the devolved governments in Scotland and Wales on several policy initiatives, including public transport, property management and district heating. The CMA made two formal responses to the Scottish government, on the creation of a state-owned energy company and of a new agency, 'Consumer Scotland'. The CMA also supported the Review of the Regulation of Legal Services in Scotland based on the findings of the CMA's 2017 [market study](#) on legal services in England and Wales.

30. The CMA has begun to develop relationships to enable the effective operation of the UK State aid regime across all three devolved nations.

31. In 2017/18, the CMA established a network of English Region Champions, drawn from amongst CMA Directors. They have been gradually building relationships, particularly focussing on promoting campaigns to raise awareness of cartels, and on engaging with the legal and business communities and local government.

32. Meanwhile the CMA's latest Annual Concurrency Report shows that joint working between the CMA and sector regulators has increasingly become embedded into day-to-day working. There has been particularly good progress with delivery of competition law cases by sector regulators.

33. Market studies and sectoral reviews also form an important part of the concurrency arrangements and both the CMA and the regulators have carried out significant work during the year, including the CMA's investment consultants market investigation and heat

networks market study. A further good example was the response to Citizens Advice's super-complaint. The CMA worked closely with the Financial Conduct Authority (FCA) and Office of Communications (Ofcom), and both provided staff secondments to ensure this work benefited from their market-specific expertise.

### **1.3. Preparing for the UK's exit from the European Union (Exit)**

34. The CMA is prepared to take on increased responsibilities for merger control, antitrust and state aid enforcement. Planning for the new arrangements continues to be an important priority for the CMA, working closely with the government.

35. Over the past two years the CMA has stepped up its antitrust enforcement activity and streamlined and clarified aspects of its mergers and markets work, with the result that the UK regime is in good shape as the UK prepares to exit the EU.

36. The CMA is also focused on ensuring operational readiness for its post-exit role, predicated on an assumption that it will take a significantly increased merger and antitrust review role, as well as the enforcement of state aid rules. In order to be ready to take on state aid control responsibilities in a 'no deal' scenario the CMA has recruited staff, including with state aid experience in private practice, national and devolved government and the European Commission. Following the extension of the UK's EU membership agreed in April 2019, the CMA continues to have a state aid team on standby to take on full state aid control responsibility when required.

37. At this point the exact characteristics of the UK's future relationship with the EU are not known, and although it is the stated aim of both the UK government and the EU that there be an implementation period in the event of a deal scenario, the CMA does not know exactly when it will take on new casework. From the CMA's perspective, it is keen to ensure a smooth transition as and when jurisdictional changes take effect, both to avoid unnecessary duplication as well as to minimise the risk of enforcement gaps and ensure UK consumers are properly protected.

## **2. CHANGES TO COMPETITION LAWS AND POLICIES, PROPOSED OR ADOPTED**

### **2.1. Summary of new legal provisions of competition law and related legislation**

38. In March 2019, the Department for Business, Energy & Industrial Strategy (BEIS) published its post-implementation review of statutory changes introduced by the Enterprise and Regulatory Reform Act 2013 (ERRA). This review is part of a wider Government evaluation of the UK competition and consumer law regimes. It considers the performance of the current framework compared to pre-2013 arrangements and concludes that the direction of change is broadly positive. The review notes that more competition cases are being opened, merger reviews and market studies are being brought to conclusion more quickly, and stakeholder views suggest a good degree of confidence in the regime. However, it also states that further consideration is needed to assess how well-equipped the UK's competition framework is to respond to current and future competition challenges. This will be the role of the forthcoming Competition Green Paper, which will also complement the Government's work on consumer enforcement powers, following the 2018 Modernising Consumer Markets Green Paper.

39. In 2018 there was one change to the legal provisions of competition law and related legislation. This was made to the Enterprise Act 2002 to lower the jurisdictional thresholds for investigating mergers which might raise national security concerns, namely those involving enterprises active in the development or production of items for military or military and civilian use, quantum technology and computing hardware. The change came into force on 11 June 2018, although there is the potential that the change may be overwritten by subsequent government proposals to upgrade its powers to scrutinise investments in or acquisitions of businesses or assets that have national security implications.

40. On 29 October 2018, the Government laid before Parliament a draft statutory instrument (SI) - The Competition (Amendment etc.) (EU Exit) Regulations 2019 - intended to make certain changes to the Competition Act 1998 (CA98) and the Enterprise Act 2002 and certain other competition-related legislation in order to correct deficiencies arising from EU Exit in the event that the UK leaves the EU without a deal; this SI was adopted on 22 January 2019. The Competition (Amendment etc.) (EU Exit) (No.2) Regulations 2019 were made on 9 September, introducing some further small changes to the UK competition framework in the event that the UK leaves the EU without a deal.

## 2.2. Other relevant measures, including new guidelines

41. In 2018, the CMA updated two sets of competition-related guidelines: guidance on the appropriate amount of penalties to be imposed for infringements of competition law in the UK, as well as revised guidance about how the CMA conducts CA98 investigations. The changes to the penalties guidance included adding further details as to how the CMA assesses the seriousness of an infringement; further examples of an aggravating factor and the requirements for particular mitigating factors and; additional information on financial indicators the CMA uses when assessing proportionality and deterrence. Other changes include text detailing the possibility of a discount when approving a voluntary redress scheme and further clarification on how the CMA applies discounts for leniency, settlement or redress schemes. The CA98 investigation procedural guidance has been updated in various respecting the main substantive changes falling into the following areas: complaint handling; information handling; interim measures; engagement with the parties and; commitments.<sup>1</sup>

42. In August 2018, the Secretary of State for Business, Energy and Industrial Strategy requested that the Chairman of the CMA advise him on legislative and institutional reforms to safeguard the interests of consumers and to maintain and improve public confidence in markets. The CMA published its submission to the Secretary of State in February 2019. See section 4 below.

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<sup>1</sup> See <https://www.gov.uk/government/publications/appropriate-ca98-penalty-calculation> and <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases>. The CMA's response to the consultation on the latter can be found at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/771570/summary\\_of\\_responses.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/771570/summary_of_responses.pdf).

## 2.3. Government proposals for new legislation

### 2.3.1. *EU withdrawal*

43. In March 2017, the UK notified its intention to leave the European Union. Depending on the future relationship between the UK and the EU, the UK's exit from the EU is liable to require changes to the enforcement of competition law by the CMA.

44. On 26 June 2018, the European Union (Withdrawal) Act 2018 (EU(W)A) became law in the UK following its passage through the parliamentary process. The EU(W)A, as originally passed, was due to have effect from 11pm on 29 March 2019. Further to an extension to the Article 50 process agreed between the UK and the EU, this has now been extended to 11pm (GMT) on 31 October 2019 (Exit Day).

45. Using powers granted to it under the EU(W)A, the UK government introduced the Competition (Amendment etc) (EU Exit) Regulations 2019 (Competition SI), which were made on 22 January 2019. The Competition SI will come into force on Exit Day and seeks to correct deficiencies which would arise by virtue of the UK no longer being an EU Member State and European competition law ceasing to apply in the UK.

46. At the time of writing, the terms of the UK's withdrawal from the EU have not yet been approved by the UK Parliament. However, under the terms of the Withdrawal Agreement negotiated by the EU and UK government, there would be a transition or implementation period which would run until 31 December 2020 (with the possibility that this timeframe could be extended). During this implementation period, the UK would continue to abide by EU rules including in relation to competition law. In the event of a Withdrawal Agreement being agreed, the Competition SI would either not come into effect or an amended version reflecting the Withdrawal Agreement would come into effect at the end of the implementation period.

47. There are a number of possible scenarios for the UK's departure from the EU, with or without a Withdrawal Agreement. Negotiations are ongoing to secure a Withdrawal Agreement with the EU before 31 October.

### 2.3.2. *State aid*

48. In March 2018 the UK government announced that as part of the UK's EU exit arrangements, the CMA will take on responsibility for state aid regulation within the UK. Legislation for this purpose is currently before Parliament. The legislation will require the CMA to publish statements of policy regarding the exercise of its powers.

### 2.3.3. *New rules for government to scrutinise mergers that may raise security concerns*

49. In June 2018 the UK government made changes to the UK's merger regime to recognise the growing importance of small British businesses in developing cutting edge technology products with national security applications. In order to address changes in the market, the government amended the threshold tests applicable to public interest interventions for businesses in the military, dual-use, computing hardware and quantum technology sectors that are most likely to have implications for the UK's security.

50. The changes allow UK ministers to intervene on certain grounds in mergers and in these sectors when the target business's UK turnover is more than £1 million, down from £70 million under the previous rules. The rules also remove the requirement that a merger

or takeover in these sectors lead to an increase in the parties' combined share of supply of relevant goods or services before the government is able to intervene.

51. In July 2018, the government also set out in a White Paper its plans to upgrade its powers to scrutinise investments and address the risks that can arise from hostile parties acquiring ownership of, or control over, business or other entities and assets that have national security implications. If such plans are implemented, they would overwrite the changes that came into law in June 2018.

52. The White Paper proposes how the government would be able to "call in" transactions that may give rise to national security risks to assess them more fully and take any necessary remedial actions. This "call-in" power would be economy-wide, reflecting the need for flexibility to address national security risks wherever they arise. For more detail on the Government's proposal, see the White Paper and Draft Statutory Statement of Policy Intent.<sup>2</sup>

### 3. ENFORCEMENT OF COMPETITION LAWS AND POLICIES

#### 3.1. Civil action against anticompetitive practices, including agreements and abuses of dominant positions

53. At the end of December 2018, the CMA had 21 ongoing CA98 investigations including six cartel cases. Two infringement decision were issued during the year, one involving airport carparking and another in a cartel case involving solid fuel products.

##### *3.1.1. Summary of activities of competition authorities*

54. The CMA continues to prioritise work that had the greatest impact on protecting consumers, with a focus on the most vulnerable, and where we could support innovation and economic growth.

55. It has continued to pursue a significant number of competition enforcement investigations into a range of alleged illegal anti-competitive practices by several pharmaceutical companies, with 9 active investigations in the sector at the end of 2018.

56. The CMA took interest in the needs of, and harm suffered by, people in a vulnerable situation. The CMA also focused on the actions of business or wider functioning of markets that could damage consumer trust.

57. The CMA remained active in the digital sphere, for example issuing a Statement of Objections alleging that a major price comparison website (Compare The Market) broke competition law by preventing home insurers from offering lower prices elsewhere. The CMA also published research into pricing algorithms and associated potential competition concerns.

<sup>2</sup> <https://www.gov.uk/government/consultations/national-security-and-investment-proposed-reforms>

### *3.1.2. Description of significant cases, including those with international implications*

#### *Paroxetine investigation: anti-competitive agreements and conduct*

58. In February 2016, the CMA issued a decision fining six pharmaceutical firms for engaging in conduct to keep generic pharmaceuticals out of the market. The decision was subsequently appealed by all the addressees. In March 2018, the CAT referred a number of legal questions to the Court of Justice of the European Union (CJEU) before issuing its final judgment. For more details please refer below to section 3.4 (Litigation).

#### *Phenytoin investigation: excessive pricing.*

59. In December 2016, the CMA issued a decision against Pfizer and Flynn Pharmaceuticals, fining both companies for charging unfair prices for the sale of phenytoin sodium capsules. For more details please refer below to section 3.4. Litigation.

#### *Pharmaceutical sector: suspected anti-competitive agreements and conduct*

60. On 10 October 2017, the CMA launched investigations under Chapters I of the CA98 and Articles 101 of the Treaty on the Functioning of the European Union (TFEU) into suspected breaches of competition law by various parties. The investigations related to alleged anti-competitive agreements and/or concerted practices in the supply of various pharmaceutical products.

61. During 2018, the CMA closed some of those cases on administrative priority grounds, while one investigation remains ongoing.

#### *Hydrocortisone tablets: suspected unfair and excessive pricing, and exclusionary agreements and conduct*

62. In December 2016, the CMA issued a Statement of Objections alleging that Actavis UK has breached UK and EU competition law by charging excessive and unfair prices in relation to the supply of hydrocortisone in the UK. In August 2017, the CMA issued a further Statement of Objections to Intas Pharmaceuticals Limited and Accord Healthcare Limited, which acquired Actavis UK in January 2017, alleging that Actavis UK has breached and continues to breach UK and EU competition law by charging excessive and unfair prices in relation to the supply of hydrocortisone tablets in the UK and proposing to find them jointly and severally liable for the alleged infringements from their period of ownership.

63. In March 2017, the CMA issued a Statement of Objections alleging that Concordia (previously AMCo) and Actavis UK (previously Auden Mckenzie and now Accord-UK Limited) have breached UK and EU competition law by entering into anti-competitive agreements in relation to the supply of 10mg hydrocortisone tablets in the UK. In doing so, the CMA also alleges that Actavis UK abused its dominant position by inducing Concordia not to enter the market independently in the UK market.

64. In February 2019, the CMA issued a Statement of Objections alleging that Auden Mckenzie and Waymade have breached UK and EU competition law by entering into anti-competitive agreements to share the market in relation to the supply of 10mg and 20mg hydrocortisone tablets in the UK. In doing so, the CMA also alleges that Auden Mckenzie

abused its dominant position by making monthly payments to Waymade not to enter the market.

*Liothyronine tablets: suspected excessive pricing*

65. In November 2017, the CMA issued a statement of objections alleging that Advanz Pharma (formerly Concordia) has breached Chapter II of CA98 and Article 102 TFEU by charging excessive and unfair prices in relation to the supply of liothyronine tablets in the UK. In January 2019, the CMA issued a supplementary statement of objections revising certain aspects of its provisional findings.

*Prochlorperazine tablets: suspected exclusionary agreements*

66. In May 2019, the CMA issued a Statement of Objections alleging that Alliance Pharmaceuticals, Focus, Lexon and Medreich had breached competition law by entering into anti-competitive agreements in relation to the supply of prochlorperazine ‘buccal’ tablets in the UK. The CMA alleged that Lexon and Medreich were paid a share of the profits earned by Focus on the supply of the Alliance Pharmaceuticals product and agreed not to compete for the supply of Prochlorperazine in the UK.

*Nortriptyline tablets: suspected market sharing and exchange of commercially sensitive information*

67. In June 2019 the CMA issued a Statement of Objections alleging that Auden Mckenzie, King, Lexon and Alissa had breached competition law by entering into the following anti-competitive agreements in relation to the supply of nortriptyline tablets in the UK. The CMA has alleged that King and Auden Mckenzie shared the supply of nortriptyline to a large pharmaceutical wholesaler, by agreeing that Auden Mckenzie would supply only 10mg nortriptyline tablets and King would supply only 25mg nortriptyline tablets, as well as agreeing to fix the quantities and the prices of supply. The CMA has also alleged that King, Alissa and Lexon exchanged commercially sensitive information, including information about prices, volumes and entry plans, to try to keep nortriptyline prices high. On 18 September, King and Alissa admitted infringing competition law by exchanging commercially sensitive information. Lexon is continuing to contest the allegation. The investigation into suspected information exchange and the suspected market sharing is on-going.

*Nitrofurantoin Capsules: suspected market sharing arrangements and exchange of commercially sensitive information*

68. In July 2019 the CMA issued a Statement of Objections alleging that, from 2014 until at least October 2017, 2 suppliers, AMCo (now Advanz) and Morningside, and a wholesaler, Alliance Healthcare, entered into arrangements under which Alliance Healthcare would buy equal volumes of the drug from each of the 2 suppliers so that they would not compete. During 2015 and 2016, the two suppliers also committed to supply the drug exclusively to Alliance Healthcare. The CMA has provisionally found that there was a concerted practice between Morningside, Alliance Healthcare and AMCo that had the object of sharing the market. The CMA also provisionally found that each of AMCo and Morningside entered into an agreement with Alliance Healthcare that had the object of facilitating the market sharing between the two suppliers.

69. The CMA also provisionally found that, in May 2014, AMCo disclosed sensitive pricing information to Morningside with the aim of reducing competition between them.

*Price comparison websites: use of most favoured nation clauses*

70. In November 2018, the CMA issued a statement of objections alleging that BGL (Holdings) Limited, BGL Group Limited, BISL Limited (BISL), and Compare The Market Limited breached UK and EU competition law by using retail wide most favoured nation clauses in certain contracts with home insurance providers. The investigation continues the CMA's work in the sector following a market study into digital comparison tools. The study, which concluded in September 2017, showed that many people visit more than one comparison site as they shop around for the best deals. It also laid out clear guidelines for price comparison sites on how to use people's personal data and how to display important information such as price and product description.

*Musical instruments and equipment: suspected anti-competitive agreements*

71. In April 2018, the CMA launched five standalone investigations under Chapter I CA98 and Article 101 TFEU into suspected breaches of competition law by various parties. On 11 April 2019, in the most advanced of these investigations the CMA issued a statement of objections alleging that Casio Electronics Co. Ltd (Casio) has breached UK and EU competition law by restricting retailer freedom to discount digital pianos and digital keyboards supplied by Casio online. In August the CMA issued an infringement decision against Casio following Casio's agreement to settle the case. The CMA has fined Casio £3.7 million.

*Investigation of the Atlantic Joint Business Agreement*

72. In October 2018 the CMA launched a competition investigation into the Atlantic Joint Business Agreement. In line with the approach of the European Commission when it first investigated the agreement during 2009 to 2010, the investigation is being conducted under Chapter I CA98 and, to the extent applicable, Article 101 TFEU. Four airlines are currently signed up to the Atlantic Joint Business Agreement: American Airlines, British Airways, Iberia, and Finnair.

*Supply of precast concrete drainage products: civil investigation*

73. On 13 December 2018, the CMA issued a Statement of Objections alleging that 3 suppliers of pre-cast concrete drainage products breached competition law by taking part in a cartel agreement to fix or coordinate prices and share the market in relation to the provision of certain pre-cast concrete drainage products in Great Britain.

*Supply of groundworks products to the construction industry*

74. In February 2017, the CMA launched an investigation into suspected anti-competitive behaviour in relation to the supply of groundworks products to the construction industry in the United Kingdom. In March 2018, the CMA made the decision to proceed with the investigation. The CMA has now issued a Statement of Objections setting out its provisional findings that three suppliers to the construction industry breached competition law by coordinating their commercial behaviour.

*Roofing materials*

75. In July 2017, the CMA launched an investigation into suspected anti-competitive arrangements in the UK roofing materials sector under the CA98. In December 2018, the CMA made the decision to proceed with the investigation and has now issued a Statement of Objections setting out its provisional findings that three suppliers of roofing materials breached competition law by coordinating their commercial behaviour.

*Design, construction and fit-out services*

76. In July 2017 the CMA launched an investigation into suspected anti-competitive arrangements in relation to the supply of design, construction and fit-out services in the UK which may infringe Chapter I CA98. In July 2018, the CMA made the decision to proceed with the investigation and extend it to include more parties. The CMA announced in April 2019 a decision finding an infringement by 6 firms.

*Financial services sector: suspected anti-competitive arrangements*

77. On 13 November 2018, the CMA launched an investigation into suspected anti-competitive arrangements in the financial services sector which may infringe Chapter I CA98 and/or Article 101 TFEU.

78. The CMA and the Financial Conduct Authority (FCA) have concurrent functions to enforce competition law infringements in the financial services sector. It has been agreed (pursuant to regulation 4 of the CA98 (Concurrency) Regulations 2014) that the CMA will exercise those functions in relation to this investigation.

*Provision of residential estate agency services*

79. In March 2018, the CMA launched an investigation into suspected anti-competitive arrangement(s) in the residential estate agency sector which may infringe Chapter I CA98. The investigation was launched on the basis of information received following the decision of the CMA in a previous investigation in the sector (Residential estate agency services in the Burnham-on-Sea area).

*Remicade: suspected abusive discount scheme*

80. In March 2019, the CMA decided to close its investigation into a suspected abuse of a dominant position by Merck, Sharp & Doham Limited (MSD) on the basis that there were no grounds for action on the CMA's part. The investigation focused on a discount scheme for the supply of Remicade to the NHS, with the CMA previously issuing a Statement of Objections to MSD in May 2017.

**3.1.3. Criminal action against anticompetitive practices**

81. As at the end of 2018 the CMA had no continuing criminal investigations under the cartel offence contained in the Enterprise Act 2002. The CMA will open further criminal cartel investigations as appropriate.

### *3.1.4. Judicial review proceedings*

#### *Gallaher and Somerfield v CMA*

82. Gallaher and Somerfield challenged, by way of judicial review, the decision of the Office of Fair Trading (OFT) (one of the CMA's predecessor bodies) not to repay the fines they had agreed to pay the OFT (as part of the early resolution process) in relation to the OFT's decision in 2010 that they had breached the CA98 in relation to the sale of tobacco products (the Tobacco Decision). Gallaher and Somerfield did not appeal the Tobacco Decision to the CAT.

83. The claimants challenged the OFT's refusal to repay their penalties, following the OFT's decision to repay one of the settlement parties, TM Retail. The OFT had repaid TM Retail on the basis that certain statements had been made to TM Retail by the OFT during the early resolution process as to the effect of successful appeals by third parties on TM Retail, and that TM Retail had relied upon these statements in making its decision not to appeal. The claimants considered that they had been treated unequally by the OFT in this regard, whereas the OFT believed they had an objective justification in treating TM Retail differently from any other non-appellant.

84. The CMA was successful in the Administrative Court, and both Gallaher and Somerfield appealed to the Court of Appeal. The Court of Appeal, agreeing with the claimants, quashed the judgment of Collins J and ordered the repayment of the penalties.

85. The CMA successfully applied to the Supreme Court for permission to appeal the Court of Appeal judgment. The appeal was heard on 13-14 March 2018. On 16 May 2018 the Supreme Court allowed the CMA's appeal. It found that the decision was rational and that there was an objective justification for the OFT to treat TMR differently to Gallaher and Somerfield, given the mistaken statements made to TMR. It also found that there was no distinct principle of equal treatment within domestic administrative law, this being an aspect of the rationality test usual to reviews under administrative law principles.

#### *CMA v Concordia International RX (UK)*

86. On 5 October 2017 the CMA applied to the High Court for a warrant to search the premises of Concordia International RX (UK) (Concordia) for information concerning an ongoing investigation into suspected anti-competitive practises in the market in relation to a number of drugs, which was granted by Mann J.

87. Upon execution of the warrant Concordia applied to the High Court for the warrant to be varied or discharged in respect of two of the drugs, on the basis that Concordia was, at the time, cooperating with the CMA in on-going anti-trust investigation concerning the said drugs and there were therefore no reasonable grounds to suspect Concordia would not produce documents to the CMA if requested. During the course of these investigations a number of s26 notices had been issued by the CMA to Concordia, requiring the production of documents in respect of these drugs. The CMA had, when applying for the warrant, put information before the judge which was ultimately deemed to be protected by Public Interest Immunity (PII) which suggested there did exist material undisclosed to the CMA by Concordia which gave the CMA reasonable grounds to suspect that, if the relevant information was requested from Concordia it would not be produced.

88. When the matter came before Marcus Smith J on 3 November 2017 to determine the preliminary issue of the process of dealing with challenges to warrants issued under CA98, he came to the view that an application to vary or discharge a warrant must be

determined without relying upon any relevant material the disclosure of which has been withdrawn from the subject of the warrant on the grounds of PII, notwithstanding that material may form the basis of the granting of the warrant.

89. The CMA appealed this decision. Prior to the matter being heard in the Court of Appeal, Marcus Smith J's ruling on this point was considered and rejected by the Supreme Court in the case of *Haralambous*, which concerned a very similar issue under the Police and Criminal Evidence Act 1984 in a criminal context.

90. Following the judgment in *Haralambous*, where the Supreme Court confirmed that a judge hearing a challenge could consider PII material in a closed material proceeding, the CMA and Concordia agreed that Marcus Smith J's judgment could not stand, and the Court of Appeal subsequently handed down judgment on 7 August 2018, allowing the CMA's appeal and confirming that PII material can (and indeed must) be taken into account by a judge determining the challenge.

91. The Court of Appeal also dismissed Concordia's cross-appeal, confirming that where PII information is utilised within a warrant application it cannot be disclosed to the subject of the warrant, even via the use of a confidentiality ring limited to independent outside Counsel. If the subject applies for the variation or discharge of a warrant obtained using PII material this material will be evaluated via a closed material procedure. At the substantive hearing of Concordia's application to vary or discharge the warrant held on 19 December 2018, Marcus Smith J upheld the warrant in its entirety.

## 3.2. Mergers and acquisitions

### *3.2.1. Statistics on number, size and type of mergers notified and/or controlled under competition laws*

92. The CMA received 53 merger filings in 2018. UK merger control has two phases and the CMA has considered all cases investigated at Phase 2 as in-depth reviews. 21% (11) of the Phase 1 cases were referred to Phase 2 for further investigation with, in one case, the in-depth Phase 2 investigation beginning in early 2019.

### *3.2.2. Summary Qualifying mergers which created a realistic prospect of a substantial lessening of competition (SLC)*

93. The CMA investigated a number of high-profile mergers, including a major media merger on public interest grounds.

#### *Phase 1 Undertakings in Lieu of Reference (UILs)*

##### Tarmac Trading/Breedon Group

94. In April 2018, the CMA identified competition concerns following an investigation into the proposed purchase of concrete plants by a leading building materials company. Following its initial Phase 1 review, the CMA found that the proposed merger gave rise to competition concerns in the supply of RMX in the Cardiff, Bridgend and Carnforth areas, where both companies are close rivals.

95. In June 2018, the CMA accepted undertakings from Tarmac that Tarmac would not acquire the SLC RMX plants for a period of 10 years in lieu of a reference.

### Motor Fuel Group/MRH

96. In August 2018, the CMA identified concerns at 29 locations in the UK where Motor Fuel Group (MFG) and MRH are close competitors, and where the takeover could result in prices rising for local motorists. Both companies run petrol stations across the UK, supplying fuel, food and convenience services.

97. In September 2018, Clayton Dubilier & Rice Fund IX, L.P. (CD&R), a fund which includes in its portfolio the MFG of MRH (GB) Limited, offered to divest the site or sites. In November 2018, the CMA accepted undertakings in lieu of reference for the completed acquisition.

### *Phase 2 investigations*

#### Mole Valley/Countrywide Farmers

98. In March 2018, the CMA announced an investigation into the anticipated acquisition by Mole Valley Farmers Limited of the retail business of Countrywide Farmers Plc. and referred the merger for an in-depth Phase 2 investigation. In April 2018, the parties decided to abandon the transaction.

#### Electro Rent/Microlease

99. In May 2018, the CMA decided that Electro Rent must sell its UK division to preserve competition following its merger with Microlease. The purchase was deemed likely to lead to a worse deal for renters of testing and measurement equipment used in industries such as telecommunications, defence, utilities and information technology. It was a condition that the CMA approve the new owner of Electro Rent UK.

100. The CMA also imposed on Electro Rent a penalty of £100,000, under section 94A of the Enterprise Act 2002 (EA02), for Electro Rent's failure to comply with interim measures issued by the CMA under section 81 EA02.

#### Fox/Sky

101. In January 2018, the CMA found that Fox's anticipated acquisition of the shares in Sky it did not already own would not be in the public interest, on the grounds of media plurality but not because of a lack of a genuine commitment to meeting broadcasting standards in the UK. In May 2018, the CMA sent its final report to the Secretary of State for Digital, Culture, Media and Sport (DCMS), who in June 2018 accepted the CMA's recommendation that the anticipated acquisition would not be in the public interest and that the most effective and proportionate remedy was for Sky News to be divested to a suitable third party.

#### European Metal Recycling (EMR)/ Metal & Waste Recycling (MWRL)

102. In August 2018, the CMA found that European Metal Recycling (EMR) must sell five of the sites it bought from Metal & Waste Recycling (MWR) due to competition concerns that prices might worsen for suppliers and customers. The CMA considered that the merger was likely to lead to a worse deal for customers in the UK that buy a certain type of scrap metal known as new production steel. In other areas of the business, including the buying (not via a tendered contract) and selling of general scrap metal, the CMA did not find the merger would substantially weaken competition.

### SSE Retail/Npower

103. On the 10 October 2018, the CMA decided that the proposed merger between SSE Retail (SSE) and Npower could proceed, following a thorough review. The decision came after a provisional clearance from the inquiry group of independent CMA panel members, who investigated how the merger would affect householders. The group specifically examined competition concerns around how the deal would impact ‘standard variable tariff’ prices. Following a period of consultation, the CMA decided to clear the merger after finding that SSE and Npower are not close rivals for customers on these tariffs.

### Vanilla Group/Washstation

104. On 11 October 2018, the CMA decided that JLA must sell Washstation’s higher education business to a new owner to be approved by the CMA. It found a substantial loss of competition resulting from the merger and that customers might be expected to pay more for, or receive lower quality, managed laundry services.

### Nielsen/Ebiquity

105. On 22 November 2018, the CMA investigated the proposed merger of data company Nielsen and the advertising intelligence division of Ebiquity. It found that, although Nielsen and Ebiquity sell advertising intelligence products to UK and international customers, the design of their products, how they are used, and the fact that very few customers switch between the companies meant that they do not compete closely and therefore cleared the merger.

### Menzies Aviation (UK)/Airline Services Ltd

106. In June 2018, the CMA launched a merger inquiry into the completed acquisition by Menzies Aviation (UK) Limited of part of the business of Airline Services Limited. Both companies supply UK airlines and airports with support services, including the de-icing of aircraft engines and wings; ground handling (including passenger, ramp, baggage and airside cargo handling); and the cleaning and maintenance of aircraft interiors.

107. The CMA’s Phase 1 investigation identified competition concerns regarding de-icing services at Edinburgh, Glasgow and London Heathrow airports, and ground handling services at London Gatwick and Manchester airports. In August 2018, the CMA referred the merger to an in-depth Phase 2 investigation. The CMA subsequently cleared the merger, finding that the market for ground handling services has a strong recent history of companies entering and competing for contracts. The CMA also found that Menzies and Airline Services are not close competitors in the market for de-icing services, meaning the takeover would not lead to a substantial lessening of competition.

### Rentokil Initial/Cannon Hygiene

108. In June 2018, the CMA referred the completed acquisition by Rentokil plc of Cannon Hygiene Limited for an in-depth investigation. In October 2018, it provisionally found that Rentokil Initial’s purchase of Cannon Hygiene could lead to higher prices or lower quality for some customers.

109. The CMA subsequently decided that Rentokil Initial, must sell several large supply contracts to satisfy its concerns. It found that the deal was likely to result in higher prices or a worse service for customers seeking a single supplier of waste disposal services at multiple locations across the whole or a large part of the UK. These contracts would will

be sold to a different company to recreate the pre-existing competitive intensity for future national contracts, with the company to be approved by the CMA. The new washroom services supplier would also, should it so require, be able to acquire Cannon infrastructure such as vehicles and equipment to enable it to provide an effective service to these customers. The CMA accepted final undertakings to fully determine the reference.

#### Experian/ClearScore

110. On 28 November 2018, the CMA provisionally found that the merger could stifle product development, by substantially reducing the pressure to continue to develop innovative offers and to make other improvements in services, and so negatively impact consumers. Experian and ClearScore decided not to continue with the deal and on 27 February 2019 the CMA cancelled its merger investigation.

#### TopCashback/Quidco

111. In November 2018, the CMA launched a merger inquiry into the acquisition by Top Online Partners Group Limited of Maple Syrup Group Limited. Since then, the CMA referred the merger to a Phase 2 investigation on the grounds that it gave rise to serious competition concerns because the companies would face only limited competition from other suppliers of cashback websites and similar services, such as voucher websites and comparison sites.

112. The companies subsequently decided not to continue with the deal and the CMA cancelled the merger reference.

#### Sainsbury's/Asda

113. In April 2018, Sainsbury's and Asda announced a proposed merger between the two companies. A formal investigation was launched on 23 August 2018. In September the CMA referred the proposed merger for a Phase 2 investigation. The CMA found that UK shoppers and motorists would be worse off if Sainsbury's and Asda – two of the country's largest supermarkets – were to merge. This was due to expected price rises, reductions in the quality and range of products available, or a poorer overall shopping experience. The CMA therefore blocked the merger.

#### Thermo Fisher/Roper

114. In October 2018, the CMA launched its merger inquiry into the acquisition by Thermo Fisher of Gatan from Roper Technology. In December 2018 the merger was referred for a Phase 2 investigation. Since then the CMA published provisional findings in its inquiry. It found that the proposed deal might be expected to result in a substantial lessening of competition in all the relevant markets in the UK, enhance Thermo Fisher's already strong market position, and lead to higher prices or lower quality for customers using electron microscopes. Additionally, the merger might leave Thermo Fisher with insufficient competition in the markets for certain peripherals, as Gatan is currently one of only a small number of competitors in the supply of these instruments. It published a Remedies Notice setting out the actions which it might take to remedy the problems identified in the provisional findings report. The parties subsequently abandoned the transaction and the CMA cancelled its inquiry.

### PayPal/iZettle

115. In October 2018, the CMA launched a merger inquiry into the acquisition by PayPal of Swedish start-up iZettle. In November 2018, the CMA announced a Phase 1 investigation into PayPal's completed takeover of iZettle, identifying raised concerns that the deal could leave PayPal facing insufficient competition in the UK market for mobile point of sale devices. In December 2018, the CMA referred the acquisition for an in-depth Phase 2 investigation.

116. Subsequently in June 2019, the CMA cleared the merger. The investigation revealed that, while iZettle and PayPal are 2 of the largest suppliers of mPOS devices, and that PayPal would have been likely to develop its offer to better compete absent the merger, their customers are also willing to switch to 'traditional' POS devices, which have far higher penetration among even very small businesses than mPOS devices. The two largest suppliers of payment services to smaller merchants, Worldpay and Barclaycard, account for almost 60% of the larger POS including mPOS market at present and will continue to constrain the merged company. The merged company will also face significant competition from other mPOS-only players, such as Square and SumUp, which have both grown significantly in recent years. In omni-channel services (providing both online and offline payments through a single provider) the CMA found that iZettle would only have been expected to develop its offering slowly and would have remained a marginal player for the foreseeable future. The CMA also found that other significant omnichannel competitors would be more important constraints on PayPal.

### Tobii/Smartbox

117. In November 2018, the CMA launched a merger inquiry into the acquisition by Tobii of Smartbox. The companies are the leading suppliers of augmentative and assistive communication solutions, and each other's main competitors. As such, the CMA was concerned that the merged company would face little competition, which could lead to a reduced range of products being offered, higher prices and fewer new products being developed.

118. Following an in-depth Phase 2 investigation, on 15 August the CMA concluded that the loss of competition could lead to reductions in the existing product range and quality, less new product development and higher prices. It decided that the only effect way of addressing the loss of competition resulting from the merger was for Tobii to sell Smartbox to a new owner, who must be approved by the CMA.

## 3.3. Market investigations and market studies

119. In 2018, the CMA commenced, completed or continued its work on a number of significant markets cases. The UK markets framework under the Enterprise Act 2002 sets out two principal types of case.

120. The first are market studies which have statutory information gathering powers and a maximum length of one year but do not give the CMA direct power to remedy competition issues. Following the conclusion of a market study, and public consultation, the CMA Board can then choose to make a market investigation reference to an independent group of panel members.

121. Market investigations are the second type of case and have a maximum length of 18 months and in the event of finding an adverse effect on competition, the CMA can

impose legally binding remedies on parties. Concurrent regulators may also make ‘references’ to the CMA. The Enterprise Act also allows certain consumer organisations to make a ‘super-complaint’. The CMA has 90 days to respond to super-complaints and state what, if any, action is required.

### *3.3.1. Care homes*

122. In November 2017, the CMA published its findings from its market study into whether the residential care homes sector was working well for older people and their families. The study found that the system for providing care is not sustainable without additional funding. The CMA set out a series of recommendations for government, local authorities, sector regulators and the adult social care industry to address the issues identified.

123. During 2018 the CMA issued guidance for care homes on compliance with consumer law and secured undertakings from two care home groups in relation to fees charged to residents.

### *3.3.2. Investment consultants*

124. In December 2018, the CMA published its findings from the market investigation into investment consultants and fiduciary managers which was launched in September 2017, following a reference from the Financial Conduct Authority. Investment consultants advise pension trustees, who oversee companies’ pension schemes, on how to invest their funds. Some pension trustees delegate investment decisions to fiduciary managers, who may also be investment consultants. These firms have influence over half of all UK households’ retirement savings and advise on pension scheme assets worth £1.6 trillion.

125. The CMA found competition problems within both the investment consultancy and – to a greater degree – the fiduciary management markets. The investigation found that pension trustees often chose their incumbent investment consultant to be their fiduciary manager even if better deals were available and that there was often insufficient information available to trustees to understand the fees and quality of providers. The remedies imposed included requiring trustees to hold tenders when first adopting fiduciary management services and for fiduciary managers to provide information on fees in a standardised format. The CMA also made recommendations to government on amendments to the regulatory framework.

### *3.3.3. Heat networks*

126. In July 2018, the CMA concluded its market study into heat networks, which provide heat and hot water from a central source to 450,000 customers in the UK. Customers of each network may either be resident in a single building or spread across a number of buildings in a local area. Unlike other sources of energy, heat networks are not subject to regulation in the UK. The CMA recommended that Ofgem, the UK energy regulator, should be given responsibility for regulating heat networks. The CMA recommended that any future regulator should introduce various measures including consumer protection for all heat network customers, improved levels of transparency including better customer information, and minimum standards on the equipment used.

### *3.3.4. Statutory audit services*

127. In October 2018, the CMA launched a market study into the statutory audit market to address competition problems and measures to improve the audit market in the UK. The CMA published an update paper in December 2018 that included proposals for remedies for consultation. The CMA identified shortcomings in the quality of audits and a lack of choice for the largest customers.

128. The CMA published its Final Report in April 2019 which contained several recommendations to increase the effectiveness of audit committees, increase choice and resilience in the market and to promote a focus on audit quality within firms. The CMA made four key recommendations and set out a number of other possible measures for government to consider. The CMA recommended that: (1) any future audit regulator should also regulate audit committees to ensure stronger governance; (2) the largest companies should be jointly audited by two firms, including one firm outside of the ‘Big 4’; (3) an operational, but not structural split of audit and non-audit parts of professional service firms to reduce incentives on cross-selling non-audit services; (4) and a comprehensive review of the impact and effectiveness of any new regulations five years after full implementation.

### *3.3.5. Funerals*

129. In June 2018, the CMA launched a market study into funeral directors and crematoria. In November 2018, the CMA published its interim report which found that there had been significant price rises above the rate of general inflation for over ten years. The CMA proposed that a reference should be made to address the problems identified and following consultation, a reference was subsequently made by the CMA Board in March 2019.

### *3.3.6. Loyalty penalty*

130. In September 2018, the CMA received a ‘super-complaint’ from Citizens Advice, the consumer group, about long-term, ‘loyal’ customers overpaying for key services in five markets. The CMA identified damaging practices which included: continual year-on-year stealth price rises; costly exit fees; time-consuming and difficult processes to cancel contracts or switch to new providers; and insufficient warnings that contracts will be rolled over or renewed. The CMA responded in December 2019 with recommendations for the sector regulators to take action separately and collectively to protect consumers and has convened a working group to deliver change across multiple sectors. The CMA also identified anti-virus software as a further area of concern and opened a consumer enforcement case.

### *3.3.7. Online Platforms and Digital Advertising*

131. In June 2019 the CMA commenced a market study into online platforms and the digital advertising market in the UK. The market study has three main focuses. First, to examine the market power of online platforms in consumer-facing markets, including in search and social media. Second, to examine the level of consumer control over data collection practices. This includes whether consumers have the knowledge, skills and desire to control how data about them is collected and used by the online platforms, and how far they are able to exercise such choice. Finally, the study will examine the level of competition in the supply of digital advertising. This will include the extent to which platforms’ market power might distort competition in digital advertising, as well as concerns around transparency and conflicts of interest in the intermediation of advertising.

The CMA is aiming to publish an interim report at the end of 2019 and a final report by 2 July 2020.

### **3.4. Litigation**

#### ***3.4.1. Tobacco***

132. The OFT issued an infringement decision in April 2010 against various tobacco manufacturers and retailers. That decision was subject to an appeal by some (but not all) of the parties before the CAT, which subsequently set aside the OFT's decision. Gallagher and Somerfield (who had not appealed) then sought repayment of the penalty (plus interest) they had paid. The OFT refused this request, which was then challenged in judicial review proceedings. In January 2015 the High Court dismissed their claims. However, in June 2016 the Court of Appeal allowed the appeal, and the CMA was subsequently granted permission to appeal to the Supreme Court. In March 2018, a hearing was held at the Supreme Court and in a judgment given on 16 May 2018 the Court allowed the CMA's appeal.

#### ***3.4.2. Paroxetine***

133. The CMA issued its decision in the Paroxetine case in February 2016, which fined six pharmaceutical firms for engaging in conduct to keep generic pharmaceuticals out of the market. This decision was appealed by all addressees in April 2016.

134. In March 2018, the CAT referred elements of the case to the CJEU for a preliminary reference and dismissed all other elements of the parties' appeals. The CMA is awaiting a date for the oral hearing.

#### ***3.4.3. Phenytoin***

135. In December 2016, the CMA issued a decision against Pfizer and Flynn Pharmaceuticals, fining both companies for charging unfair prices for the sale of phenytoin sodium capsules, a drug used for treating epilepsy patients. An application for interim relief (suspending a CMA order lowering prices) was made by Flynn, and a hearing was held on 17 January 2017. The application was unsuccessful. Both parties appealed the substantive decision and a hearing was held in November 2017.

136. On 7 June 2018 the CAT handed down its judgment, setting aside the CMA's decision, upholding the CMA's position on market definition and dominance and remitting the question of whether Pfizer abused its dominant position back to the CMA. All parties sought permission to appeal aspects of the CAT's judgment. In December 2018 the Court of Appeal granted the CMA application for permission, partially granted Flynn's application and refused Pfizer's application. The remittal back to the CMA has been stayed pending these appeals. The European Commission has been granted permission to intervene and the 3-day hearing is set to commence on 26 November 2019.

#### ***3.4.4. Balmoral Tanks Ltd***

137. In December 2016, the CMA issued a decision fining Balmoral Tanks Ltd for sharing commercially sensitive information regarding their current and future pricing intentions with competitors. Balmoral appealed this decision on 24 February 2017 and a hearing was held in the CAT in July 2017. The CAT handed down its judgment on 6 October 2017, dismissing Balmoral's appeal. Balmoral appealed to the Court of Appeal

which was heard in January 2019. The Court of Appeal handed down its judgment on 15 February 2019, dismissing Balmoral's appeal.

#### ***3.4.5. Ping Europe Limited (Ping)***

138. In August 2017, the CMA issued a decision fining Ping Europe Ltd for a ban on its approved retailers selling its golf clubs over the internet. Ping appealed this decision on 25 October 2017 and a hearing was held in May 2018. The CAT handed down its judgment on 7 September 2018 which dismissed Ping's appeal as to liability, but partially reduced the penalty. On 29 November 2018, Ping applied to the Court of Appeal for permission to appeal the CAT's judgment. On 26 March 2019, the Court of Appeal granted Ping permission to appeal on two of the four grounds it had sought. The hearing is listed for two days in November 2019.

#### ***3.4.6. Concordia***

139. In October 2017 Concordia International (Rx) UK Limited applied to vary or discharge a search warrant obtained by the CMA. In determining a preliminary issue before hearing the substantive challenge to the warrant, on 16 November 2017 the High Court held that an application to vary or discharge a warrant must be determined without relying upon any relevant material that has not been disclosed to the subject of the warrant on the grounds of Public Interest Immunity (PII). The CMA appealed and on 7 August 2018 the Court of Appeal handed down its judgment, allowing the appeal and confirming that any PII material must be taken into account by a judge determining a challenge to a warrant, which will be evaluated by way of a closed material procedure.

140. In November 2018, the High Court refused Concordia's application to appoint a special advocate to test the CMA's PII material in the substantive hearing, and in December 2018 the High Court upheld the CMA's assertions of PII over confidential material it would rely on at the substantive hearing. The substantive application to vary or discharge the warrant was heard in the High Court in December 2018, and on 16 January 2019 the High Court handed down its judgment, upholding the CMA's warrant in its entirety.

#### ***3.4.7. Lundbeck intervention***

141. The CMA is leading on a UK intervention in support of the European Commission. Lundbeck, a Danish pharmaceutical company, was fined by the Commission for engaging in conduct to keep generic pharmaceuticals out of the market. The Commission's decision was appealed to the General Court. The appeal was unsuccessful and the General Court's judgment was then appealed to the CJEU. The UK submitted its Statement in Intervention on 2 October 2017. The CJEU heard the matter on 24 January 2019. We are awaiting the CJEU's judgement.

#### ***3.4.8. O2 / Three intervention***

142. The CMA is leading on another UK intervention, in support of the Commission, in CK Telecoms UK's (3) appeal against the Commission's decision to prohibit its acquisition of Telefonica UK (O2). The CMA and the UK's telecoms regulator Ofcom were closely involved at the administrative stage and the Commission's original prohibition decision was supported by the UK: a successful challenge to the Commission's decision would adversely affect the market for mobile networks in the entire UK and ultimately UK consumers. The UK submitted its Statement in Intervention on 31 August 2017. An oral

hearing was requested by the parties, and the General Court heard the parties' submissions in May 2019.

#### **3.4.9. B&M**

143. On 1 November 2018 the CMA designated B&M European Value Retail ("B&M") as a 'Designated Retailer' pursuant to The Groceries (Supply Chain Practices) Market Investigation Order 2009. In December 2018 B&M challenged this designation, and sought interim relief suspending the effects of the CMA's designation pending the resolution of its challenge. In February 2019 B&M's application for interim relief was refused. In April 2019 B&M agreed to withdraw its challenge.

#### **3.4.10. Sainsbury/Asda**

144. On 30 April 2018 Sainsbury's and Asda announced a proposed merger between the two companies. The CMA launched a formal investigation on 23 August 2018 and the following month referred the proposed merger for a Phase 2 investigation.

145. After consulting the parties, the CMA adopted an administrative timetable to manage its statutory obligation of publishing a final report within 24 weeks of the reference. In November 2018 the CMA provided the parties with Working Papers, setting a deadline by which the parties must respond, and setting a date for the main party hearing in which to explore key issues with the parties. On 30 November 2018 the parties requested the CMA extend its statutory timetable by eight weeks, to extend the Working Papers deadline and to push back the date of the main party hearing. The CMA declined to extend the deadline in the terms requested by the parties.

146. In December 2018 the parties applied to the CAT seeking an order extending the deadlines by which to respond to the Working Papers. By the time of the hearing, the parties revised their application to seek an order quashing the CMA's decisions as to the deadline for response and as to the date for the main hearing. On 14 December 2018 the CAT heard the parties' application and decided, in the exceptional circumstances of the case, to grant the parties applications with full reasons to follow. On 18 January 2019 the CAT handed down its judgment, granting the parties' applications and quashing the CMA's decision. As noted in section 3.2.2 above, the CMA subsequently blocked the merger.

#### **3.4.11. Electro Rent**

147. On 11 June 2018 the CMA issued a penalty Decision finding that Electro Rent Corporation, a party who had completed a merger that had been notified to the CMA, had breached an interim order imposed by the CMA during the merger inquiry to prevent action that might prejudice the outcome of the merger inquiry and/or impede the CMA from taking appropriate remedial action that might be justified by the CMA's decision on the merger, by failing to seek prior written consent from the CMA before serving a notice to exercise a break option terminating a lease over Electro Rent's only UK premises. The CMA fined Electro Rent £100,000.

148. In July 2018 Electro Rent appealed the CMA's penalty decision to the CAT, seeking an order quashing the CMA's Decision or, in the alternative, reducing the penalty. Electro Rent's appeal was heard in the CAT in October 2018 over two days. On 11 February 2019 the CAT handed down its judgment, upholding the CMA's decision and dismissing Electro Rent's appeal. The CAT emphasised the particular importance in merger control of interim enforcement orders where mergers had been completed before being examined by

the CMA. The CAT also emphasised the CMA's role in conducting merger review, and its ability to do so effectively, as a matter of public importance.

#### **3.4.12. *Advanz Pharma v CMA***

149. On 30 January 2019 the CMA issued a Supplementary Statement of Objections (SSO) in respect of an investigation into alleged unfair pricing by Advanz Pharma (this followed a prior Statement of Objections issued in November 2017). The CMA set a deadline for Advanz Pharma to respond to its SSO, to which Advanz Pharma requested an extension pending the outcome of the ongoing Phenytoin appeal. The CMA declined. In March 2019 Advanz Pharma issued a claim for judicial review of this decision and in June 2019 Advanz Pharma's claim was rejected by the High Court.

#### **3.4.13. *CMA v Mr Martin and Mr Thompson***

150. On 26 February 2019 the CMA issued proceedings under the Company Directors Disqualification Act 1986, seeking Competition Disqualification Orders against two directors of companies found to have agreed to fix a minimum level of commission fees in respect of the sale of residential properties. The CMA considers the directors' conduct as directors during the infringing period makes them unfit to be concerned in the management of a company.

151. On 29 April 2019 the CMA accepted an undertaking from one director, Mr Graham Thompson, not to be a director of any company for a period of five years, and discontinued its application against him. The hearing in respect of its application against the other director, Mr Michael Martin, has been set for June 2020.

## **4. THE ROLE OF COMPETITION AUTHORITIES IN THE FORMULATION AND IMPLEMENTATION OF OTHER POLICIES E.G. REGULATORY REFORM, TRADE AND INDUSTRIAL POLICIES**

152. The CMA worked on a wide range of issues, engaging with national, devolved and local government officials and lawmakers both publicly and privately to encourage pro-competitive policy-making in the interests of consumers. Examples include the following:

### **4.1. The competition landscape in the United Kingdom**

153. In August 2018, the Secretary of State for Business, Energy and Industrial Strategy (BEIS) asked the Chairman of the CMA to make proposals on legislative and institutional reforms to safeguard the interests of consumers and to maintain and improve public confidence in markets. These proposals were sent to the Secretary of State on 21 February 2019 and have been published in full. The reforms aim to respond at the challenges posed by the growth of the digital economy and declining public confidence in market competition, by creating new duties and responsibilities on the CMA. These would be backed by strengthened tools and powers to facilitate earlier and more robust intervention to address consumer detriment, and to deter wrongdoing. The CMA is currently supporting

BEIS on the development of these proposals and the UK Government is expected to consult on them in due course. <sup>3</sup>

154. The CMA published its Annual Concurrency Report 2019 (covering the period from 1 April 2018 to 31 March 2019), which assesses the operation of the concurrency arrangements, as required by the Enterprise and Regulatory Reform Act 2013, during the preceding year. This is the fifth annual report produced by the CMA since the relevant requirements of the ERRA took effect on 1 April 2014.<sup>4</sup>

155. In July 2018 the CMA responded to the Scottish Government's consultation on Consumer Scotland. The response highlighted five themes that the Scottish Government may wish to consider in the design of a new consumer body.

#### **4.2. Government outsourcing**

156. The CMA worked with the UK Government to develop a new market management policy for government outsourcing.

#### **4.3. Advocating competition in policy-making**

157. The CMA ran a Competition Impact Assessment workshop with officials from the Northern Ireland Executive.

#### **4.4. Transport**

158. The CMA responded to the Welsh Government's consultation on proposals to create a single public transport authority and introduce a single set of taxi and public hired vehicle regulations.

159. The CMA provided advice to the UK Government to improve competition in the aviation industry. We proposed introducing market-mechanisms, such as auctions, for airport slot allocation, to reduce barriers to expansion within the industry and improve market efficiency.

160. The CMA continued to work with Transport Scotland on the development of their policy proposals for bus services in Scotland where the effect of competition is a key aspect of the consideration of different models which include franchising and local authority owned bus companies. This included submitting evidence to the Scottish Parliament's rural economy and connectivity committee on the Transport (Scotland) Bill in September 2018.

#### **4.5. Energy**

161. In February 2018 the CMA responded to the Scottish Government's second consultation on district heating.

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<sup>3</sup> <https://www.gov.uk/government/publications/letter-from-andrew-tyrie-to-the-secretary-of-state-for-business-energy-and-industrial-strategy>

<sup>4</sup> <https://www.gov.uk/government/publications/annual-report-on-concurrency-2019>

162. The CMA submitted evidence to the Scottish Parliament's committee inquiry<sup>5</sup> on the publicly owned energy company in September 2018.

#### 4.6. Audit

163. In October 2018, the CMA launched a market study into the statutory audit market to address competition problems and measures to improve the audit market in the UK. The CMA published an update paper in December 2018 that included proposals for remedies for consultation and in early 2019 published a final report which contained a number of recommendations to government.

#### 4.7. Loyalty Penalty

164. The CMA responded to a super-complaint on the loyalty penalty applied to longstanding customers in certain markets. It made recommendations to regulators in the mobile, broadband, cash savings, home insurance and mortgages markets to better protect the interests of loyal consumers.

#### 4.8. Leaseholds

165. The CMA has provided advice to the Welsh Government on their leasehold reform proposals through CMA membership of a Task and Finish Group.

#### 4.9. Legal services

166. The CMA responded to the Independent Review of Legal Services in Scotland call for evidence in spring of 2018 and has continued to work with the Scottish Government on how the regulatory framework can be reformed to best serve the consumer of legal services.

## 5. RESOURCES OF COMPETITION AUTHORITIES

### 5.1. Resources overall (current numbers and change over previous year)

#### *5.1.1. Annual budget:*

167. The CMA's budget in 2018-19 for its competition related activities was approximately £33 million. This figure does not include overheads but is inclusive of an additional £2.8m of funding to carry out new competition enforcement work. The CMA also received additional EU exit funding to continue our preparations for the UK exiting the EU.

#### *5.1.2. Number of employees (person-years):*

168. The CMA employed a total of 586 staff members. Taking into account of part-time working hours, that is equivalent to a total of 563 full-time employees. This excludes agency / contract workers and those out of the office on maternity leave, long term sick leave, career break, or secondment / loan out.

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<sup>5</sup> The Economy, Jobs and Fair Work Committee

**5.2. Human resources (person-years) applied to:**

169. The CMA estimates that approximately 229 members of staff worked in enforcement against anticompetitive practices and approximately 138 members of staff worked in markets and mergers. The CMA operates a matrix working system where staff are deployed on different kinds of casework, including consumer protection and working on regulatory appeals related to price controls and licensing. Staff may also be involved in advocacy; policy; supporting intelligence-gathering; working with sectoral regulators; and developing remedies.

**5.3. Period covered by the above information:**

170. 1 January 2018 to 31 December 2018.

**6. SUMMARIES OF OR REFERENCES TO NEW REPORTS AND STUDIES ON COMPETITION POLICY ISSUES**

171. See above.