

January 2018

# UK Competition Law Newsletter

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## Highlights

- 2017 in review: CMA prepares for Brexit while continuing to increase Competition Act enforcement activity and “call in” completed mergers.
- CMA provisionally finds that *Fox/Sky* would operate against the public interest, on media plurality grounds, by aligning the editorial positions of Sky News and News Corp.

## 2017 In Review

### Brexit

The CMA leadership spent much of 2017 preparing for Brexit and positioning the UK’s withdrawal from the EU as an opportunity to step out of the Commission’s shadow and establish the CMA as a leading global agency. As Dr. Andrea Coscelli, Chief Executive of the CMA, [said](#) in November 2017, the CMA’s “*ambition, and the ambition of the government, is for the CMA to be one of the top competition authorities worldwide.*”

The CMA’s ability to achieve that ambition will depend in part on the provision of increased resources. As Dr. Coscelli [indicated](#) in February 2017, the CMA expects its merger workload to increase by around 40-50% as a consequence of reviewing transactions that would, under the pre-Brexit regime, fall under the exclusive jurisdiction of the European Commission. It expects to review an additional 30-50 Phase 1 mergers each year, leading to an additional six or so Phase 2 investigations. The number of significant Competition Act investigations might also increase, as the CMA will no longer be precluded from investigating cases pursued by the European Commission. The CMA’s ability to exploit this opportunity could, however, be circumscribed if its resources become consumed by an increased merger workload.

The CMA’s resources have started to expand to meet the demands of its post-Brexit responsibilities. After obtaining a modest funding increase in the 2017 Autumn Budget, the CMA has begun recruiting and [announced](#) on 31 January 2018 that it plans to enlarge its current team in Scotland from three employees to 25-30, “*with ambitions to grow further.*” In addition to petitioning for the necessary resources, the CMA will need to work with the UK Government to resolve complex transitional issues, such as whether it will have the power to review mergers notified to, but not cleared by, the European Commission before Brexit occurs.

## CMA Activity

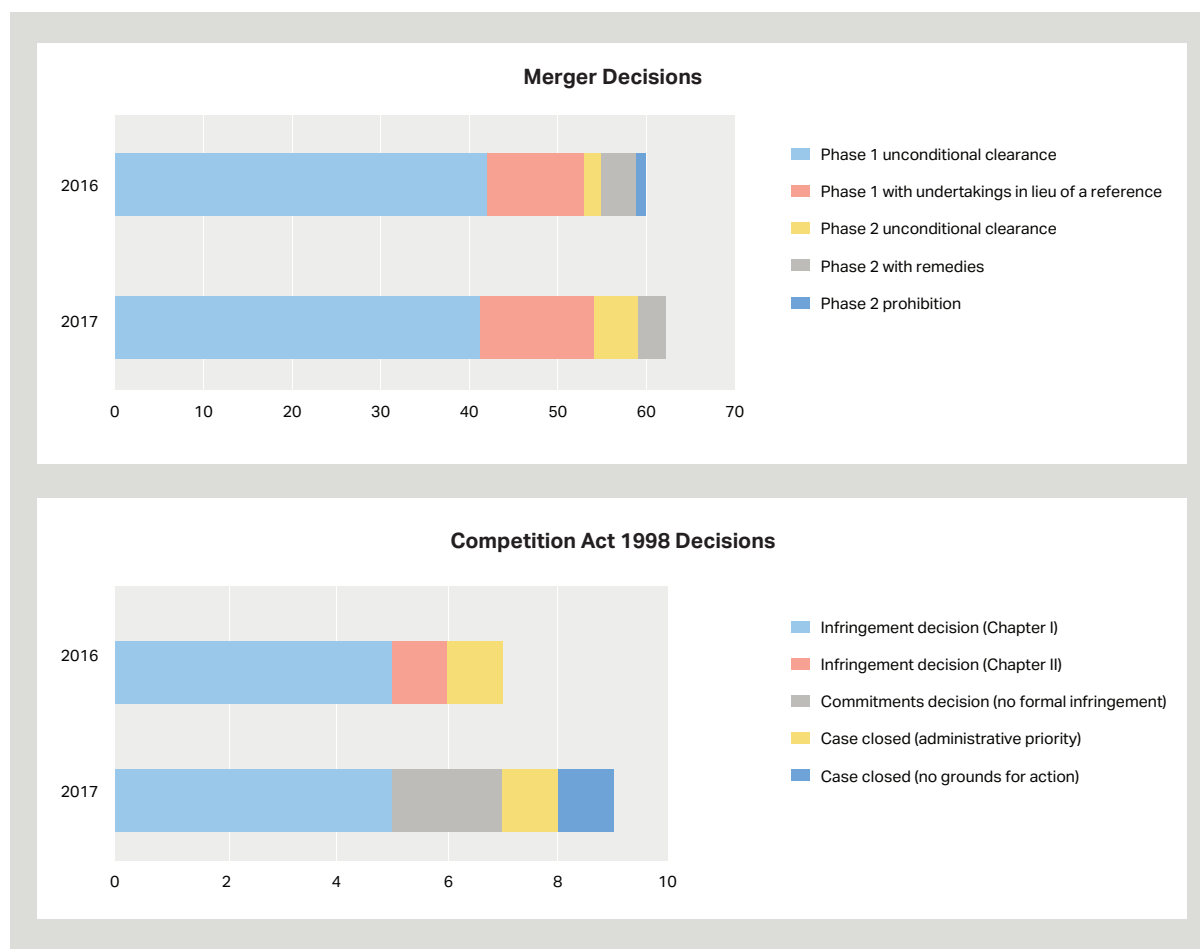
Aside from planning for Brexit, the CMA remained active. It continued to focus on increasing the number of enforcement cases, following publication of a National Audit Office report criticizing its performance prior to 2016. Dr. Michael Grenfell, the CMA's Executive Director for Enforcement, referred in November 2017 to "*the CMA's recent efforts to ramp up competition enforcement.*" In 2017, the CMA issued:

- Five Chapter I infringement decisions, the same number as in 2016;
- No Chapter II infringement decisions, compared with one in 2016;
- Seven statements of objections, compared with eight in 2016; and
- Fines for Chapter I and II infringements amounting to around £11.8 million. This is less than 10% of total fines in 2016 (around £142 million), although 2016 included the

record-breaking £84.2 million fine imposed on Pfizer for charging -excessive prices to the NHS.

In the first sentencing under the criminal cartel offence since 2015, one individual was sentenced in September 2017 to two years' imprisonment for his involvement in price fixing and market and customer allocation for the supply of precast concrete drainage products.

In mergers, the CMA reviewed a series of completed transactions that parties had not notified voluntarily, as part of its ongoing efforts to identify and prioritise cases that raise substantive concerns. The CMA called in 25 completed transactions in 2017, compared with 22 in 2016. More strikingly, a higher proportion of cases that were called in have been subject to intervention. By contrast, the CMA had a quiet year in markets cases: it launched only one market study (concerning heat networks) in 2017 compared with three in 2016, and received just one market investigation reference (into investment consultancy, referred by the FCA).



According to its draft [Annual Plan](#) for 2018/2019, the CMA is currently running 15 competition enforcement cases, seven consumer enforcement cases, 11 merger investigations, one market study, and one market investigation.

## National Security Consultation

On 17 October 2017, the UK Government published legislative [proposals](#) that would give it greater powers to intervene in mergers that raise national security considerations or involve national infrastructure. In the short term, the Government proposes reducing the jurisdictional thresholds for mergers involving firms in (1) the military and dual use sector, and (2) the advanced technology sector to enable review if the target's UK turnover exceeds £1 million or its share of supply is at least 25% (even where there is no increment as a result of the transaction).

The Government sets out two options for longer-term reform, either of which would enable a higher degree of intervention than the existing regime. The first option is a voluntary regime, with an expanded power to call in transactions, which would allow the Government to scrutinise a broader range of transactions for national security concerns, including new projects and bare asset sales. As an alternative to or in combination with the first option, the second option would entail mandatory notification for foreign investment into the provision of "essential functions," including the civil nuclear and defence sectors.

In November 2017, the CMA published its [response](#) to the proposals, recognising the Government's "*legitimate interest*" in protecting the UK's national security interests but cautioning that any new mechanisms should be designed so as to "*minimise consequential impacts on, or any extension of, the CMA's existing competition-based scrutiny of mergers*" and "*avoid unnecessary uncertainty and costs, both for businesses and the CMA, in practically applying the measures alongside the existing merger control regime.*"

## Review of Completed Mergers

The most cautionary trend for merging parties in 2017 was the willingness of the CMA to call in completed mergers that have not been notified, which can result in significant delay to integration. In 2017, 25 completed mergers were called in for review (comprising around 40% of all transactions investigated), and five of the CMA's nine Phase 2 investigations concerned completed mergers. Review of completed transactions delayed implementation, on average, by five months (*i.e.*, from the date that the CMA issued an interim enforcement order restricting integration between the merging parties until the date that the transaction was cleared or the order was released). The average delay was 3.5 months for Phase 1 cases, and 10 months for Phase 2 cases.

## Sector Focus

The CMA's [Annual Plan for 2017/2018](#) identified pharmaceuticals, energy, retail banking, telecommunications, legal services, passenger rail, and online marketplaces as areas of focus. This was largely reflected in practice. In particular, eight of the CMA's 15 ongoing antitrust investigations focus on pharmaceuticals. In several cases, the CMA has alleged excessive pricing to the NHS. At the end of 2016, the CMA imposed record fines on Pfizer and Flynn (c. £90 million) for increasing the price of phenytoin sodium by 2,600%, and issued a statement of objections to Actavis UK for increasing the price of hydrocortisone tablets by over 12,000%. Appeals by Pfizer and Flynn were heard before the Competition Appeal Tribunal ("CAT") in November 2017. In the same month, following a reported 6,000% price increase, the CMA provisionally found that Concordia had charged excessive prices for liothyronine tablets.

The CMA's enforcement activity in respect of allegedly excessive prices represents a departure from its historic reluctance to bring such cases and may encourage agencies in other jurisdictions to launch similar challenges. Aside from excessive pricing cases, the CMA also issued a statement of objections against Merck Sharp & Dohme relating

to the company's discount scheme for Remicade, and alleged that Actavis induced Concordia not to enter the market with rival hydrocortisone tablets.

Consistent with the focus of other competition agencies, the CMA devoted significant resources in 2017 to assessing competition in digital industries, noting in its 2017/2018 annual report that "*online aspects of markets have become a major focus of our work*" and "*we will [...] continue to be active in the digital sphere.*" In September 2017, the CMA published the [final report](#) on its market study into digital comparison tools, used by consumers to compare and switch between providers of various products and services. The CMA identified several benefits that these tools provide for competition and consumers, but also recommended improvements relating to clarity, accuracy, and ease of use. The CMA also launched a Chapter I investigation into the use of most favoured nation ("MFN") clauses by a [home insurance](#) comparison website, having previously prohibited the use by [motor insurers](#) of wide MFNs.

## Expectations for 2018

We anticipate a similar level of enforcement activity in 2018. The CMA's [annual plan](#) is broad and ambitious; it intends to focus, for example, on keeping pace with the evolution of online and digital markets. Several **ongoing merger investigations** will conclude in 2018, including the Phase 2 investigations of 21st Century Fox's [bid](#) to acquire sole control over Sky and European Metal Recycling's [acquisition](#) of Metal & Waste Recycling. Recent developments in these investigations are summarized in Section III below.

**Collective actions** are likely to be a feature of UK competition litigation in 2018; several claimants have brought collective damages claims against truck manufacturers, based on a 2016 European Commission infringement decision. Beyond its immediate enforcement priorities, the CMA will continue to face the challenge of preparing the UK competition regime for **Brexit** as the terms of a transitional and longer-term relationship between the UK and the EU are negotiated.

# Judgments, Decisions, and News

## Court Judgments

**Ping Europe Limited v CMA.** In August 2017, the CMA [found](#) that Ping had unlawfully prohibited two UK retailers from selling its golf clubs on their websites. The CMA fined Ping £1.45 million and ordered it to terminate the online sales ban and refrain from adopting similar measures in future. Ping appealed the CMA's decision. On 15 January 2018, the CAT granted Ping's application for the admission of new evidence that had not been presented during the CMA's investigation relating to alternative measures that Ping could have implemented to promote in-store custom fitting (short of an outright ban). The CMA argued that allowing Ping to rely on evidence withheld during the administrative procedure would adversely affect the UK enforcement regime. In response, Ping contended that the harm it would suffer from exclusion of the new evidence would outweigh any harm to the CMA from admission of the evidence. Ping also explained that it was dissuaded from submitting the evidence by the CMA's decision to issue a draft penalty statement before

finishing its substantive inquiry, suggesting that its mind was already made up. The ability of parties to submit new evidence to the CAT that was not made available during the CMA's administrative investigation may create new challenges for the CMA when carrying out its investigations. The trial is scheduled to begin on 10 May.

## Antitrust

**Conduct in roofing materials sector.** On 21 December 2017, the CMA [announced](#) its decision to proceed with its investigation into a suspected breach of Chapter I of the Competition Act 1998 and Article 101 TFEU. The CMA will provide a further update by the end of April 2018.

**Conduct in the design construction and fit-out services sector.** On 19 December 2017, the CMA [announced](#) its decision to proceed with a Chapter I investigation that it had opened in July 2017. The CMA has not to date provided further information about the nature of the anticompetitive practices under investigation or the parties involved.

**Cleanroom services companies fined.** On 14 December 2017, the CMA [fined](#) two suppliers of “cleanroom” laundry services a combined £1.7 million for agreeing not to compete for each other’s customers. Micronclean Limited and Berendsen Cleanroom Services Limited had been trading under the “Micronclean” brand since the 1980s pursuant to a joint venture agreement. In May 2012, the companies entered into new, reciprocal trademark licence arrangements pursuant to which they agreed not to compete against each other: Micronclean Limited would serve customers in an area north of a line between London and Anglesey, and Berendsen would serve customers located south of that line. The companies also agreed not to compete for certain other customers, irrespective of their location. The CMA found that the wider joint venture between the companies, including any benefits that flowed from it, did not justify these market-sharing arrangements.

## Markets

**Heat Networks Market Study.** On 7 December 2017, the CMA [launched](#) a market study into heat networks, which involve the generation and distribution of heat or cooling energy to buildings. The CMA will announce by 6 June 2018 whether it intends to make a market investigation reference.

## Phase 2 Merger Investigations

**Fox/Sky.** On 23 January, the CMA published [Provisional Findings](#) and a [Notice of Possible Remedies](#) relating to the proposed acquisition by 21st Century Fox, Inc (“21CF”) of the remainder of Sky plc that it does not currently own. The transaction, cleared by the European Commission on competition grounds, was referred to the CMA by the Secretary of State on two grounds: “media plurality” (*i.e.*, whether the acquisition by 21CF — which controls News Corp’s UK media assets, including The Times, The Sunday Times, The Sun, The Sun on Sunday, and a number of UK radio networks — of Sky News could result in an insufficient plurality of persons controlling UK media sources) and “broadcasting standards” (*i.e.*, whether 21CF had demonstrated a genuine commitment to broadcasting standards such as to be a suitable purchaser of Sky News).

The CMA identified no concerns in relation to the second ground: 21CF had demonstrated its commitment to compliance with the Broadcasting Code. However, the CMA provisionally concluded that the Murdoch Family Trust (“MFT”) would be able to exercise greater control (if not full editorial control) over Sky News after the merger. The transaction would therefore operate against the public interest, by aligning the editorial positions of Sky News and News Corp’s media assets and conferring upon the MFT greater influence over public opinion and the political agenda. The CMA’s Notice of Possible Remedies identifies several options for addressing the public interest concerns. They include: prohibition, approval subject to divestiture of 21CF’s interest in Sky News, approval subject to a spin-off of Sky News, and behavioural remedies. The CMA has also invited comments on whether any remedies could be structured to fall away if The Walt Disney Company completes its announced acquisition of 21CF. The CMA has until 1 May 2018 to publish its Final Report. The Secretary of State then has a further 30 working days to publish his decision (*i.e.*, June 14).

**Tesco/Booker.** On 20 December 2017, the CMA published the [final report](#) of its Phase 2 investigation into the anticipated acquisition by Tesco PLC (primarily a grocery retailer) of Booker Group plc (primarily a grocery wholesaler). Following a request by the parties, the CMA made a rare fast track referral to Phase 2 review. The CMA found no competition concerns relating to the limited horizontal overlaps, and focused instead on buyer power and vertical effects. As to buyer power, the CMA investigated whether the proposed transaction would lead to the merged entity receiving more favourable terms from some suppliers, potentially resulting in (1) those suppliers seeking to recoup profit lost on sales to the merged entity by raising prices for other customers, and (2) customers of other wholesalers switching to the merged entity to benefit from passed on lower costs. The CMA found that the merged entity would not receive substantially better supply terms, as the overall increment to Tesco’s share of procurement as a result of the transaction was generally low, and rival wholesalers would continue to compete effectively against the merged entity.



The CMA considered vertical effects both from wholesale to retail, and vice versa. First, the CMA investigated whether it would be profitable for the merged entity to raise wholesale price to rival retailers, on the basis that the profit gained by the locally competing Tesco store at the retail level (from additional shoppers it won) and from the merged entity's wholesaling activities (from larger margins on sales it retained) would exceed the profit that it lost (from retail customers that switched away, and lower sales to retail customers it retained). The CMA examined local areas in which over 12,000 stores supplied by Booker competed with Tesco stores, and found that foreclosing rival retailers would not be profitable, largely due to strong competition at the wholesale level. Secondly, the CMA considered whether it would be profitable for the merged entity to increase retail prices, since it might benefit at the wholesale level from increased sales to Booker-supplied retail stores that overlap with Tesco stores. The CMA examined local areas in which over 2,300 Tesco-owned stores faced competition from at least one Booker-supplied store, and found that such a strategy would not be profitable. If the merged entity were to raise its retail prices, it would incur losses through: other non-Booker-supplied retailers recapturing sales; Booker-supplied retailers not purchasing all their stock from the merged entity; and Booker's current wholesale margins being lower than Tesco's retail margins.

## Phase 1 Merger Investigations

**Refresco/Cott.** In the UK, Refresco and Cott manufacture, package, and distribute soft drinks. The CMA had raised concerns that the proposed \$1.25 billion [acquisition](#) by Refresco of Cott's worldwide beverage manufacturing business could lead to reduced competition in the manufacturing and packaging of certain juice drinks, and therefore lower quality or higher prices for consumers. On 18 January, Refresco offered to divest the only UK-based Cott factory that uses the aseptic production process on which the CMA's concerns focused. The CMA accepted this offer in principle

and will decide by 14 March whether to accept the proposed undertakings.

**European Metal Recycling/Metal & Waste Recycling.** On 24 January, the CMA decided to refer the completed [acquisition](#) by European Metal Recycling Limited of Cufe Investments Limited for a Phase 2 investigation unless European Metal Recycling offers acceptable undertakings. The CMA found that the transaction might lead to a reduction in choice, price, quality, and service to customers, given that the parties were the two main metal recycling companies in the area around and north of London.

**S.C. Johnson & Son/People Against Dirty Holdings.** The CMA published its [decision](#) to clear the proposed acquisition by S.C. Johnson & Son Inc. of two home-cleaning brands owned by People Against Dirty Holdings Limited. It found that the merging parties were not close competitors and that sufficient competitive constraints would remain post-merger.

The CMA has several ongoing Phase 1 investigations:

[Sysco Corporation/Cucina Lux Investments/Brake Bros Limited/Kent Frozen Foods](#)  
(decision due by 23 March 2018).

[Zenith Hygiene Group/Bain Capital](#)  
(decision due by 20 March 2018).

[Vp/Brandon Hire Group Holdings](#)  
(decision due by 16 March 2018).

[Aviagen Group/Hubbard Holding](#)  
(decision due by 16 March 2018).

[Derby Teaching Hospitals/Burton Hospitals](#)  
(decision due by 15 March 2018).

[Henderson Retail/Martin McColl](#)  
(decision due by 9 March 2018).

[Universal Sealants/Ekspan Holdings](#)  
(decision due by 7 March 2018).

[Mole Valley Farmers/Countrywide Farmers](#)  
(decision due by 28 February 2018).

## Other Developments

### **Brexit: European Union Withdrawal Bill.**

Following debate in the House of Commons in December 2017, the [EU Withdrawal Bill](#) progressed to the House of Lords on 18 January 2018. Two main changes were made to the Bill in the House of Commons: (1) the moment of “exit” was set for 29 March 2019 at 11:00 pm; and (2) it was agreed that any terms of the UK’s withdrawal from the EU must be approved by Parliament. The House of Lords Select Committee issued a report on the Bill on 28 January, arguing that the Bill was “constitutionally unacceptable” in its current form. The House of Lords debated the Bill from 30 to 31 January.

**Brexit: European Parliament publishes research on revocability of Art 50 TFEU.** The [report](#), published on 11 January, concludes that the Court of Justice of the European Union is the only authority competent to rule on the revocability of Article 50 TFEU.

**Speech by Lord Currie.** On 12 December 2017, the outgoing Chairman of the CMA, Lord Currie, delivered a wide-ranging [speech](#) to the Whitehall and Industry Group on “*why competition matters*.” Acknowledging that “*confidence in the efficacy of markets*” had weakened recently, he argued that “*even with good intentions, government can easily make matters worse by stepping in. That is especially the case if such interventions are driven by short-term political pressures, not on well thought-through analysis of the problems in a market and what can be done to address them.*” He also addressed recent comments by Commissioner Vestager and Director General Laitenberger concerning fairness in competition: “*if a widespread perception of unfairness erodes [trust in markets], then the market system will work less well and we will all be the losers. There is, however, a problem with fairness: there are often very different views on what is fair and unfair in a range of situations.*”

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