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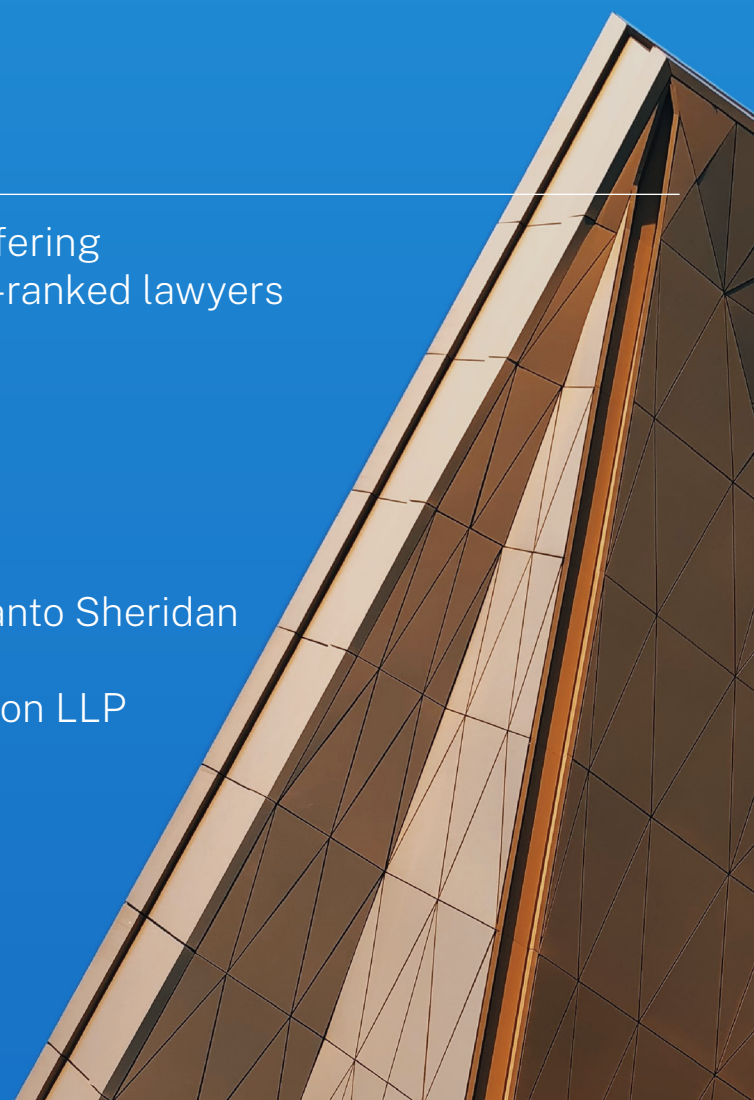

UK: Trends & Developments

Paul Gilbert, Jackie Holland, Lanto Sheridan and Vanessa Marton
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Paul Gilbert focuses on EU and UK competition law, including merger control, anti-competitive agreements, abuse of dominance and sectoral regulation. He has represented clients before the European Commission, Competition and Markets Authority, Competition Appeal Tribunal and Court of Appeal. Paul joined Cleary in 2011, became counsel in 2015 and became a partner in 2021. He was previously Deputy Director of Competition Policy at the UK Office of Fair Trading.

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The CMA's Year in Review: Full Steam Ahead

The UK's Competition and Markets Authority (CMA) has had another busy year, carrying out 43 Phase 1 investigations and 13 Phase 2 investigations in 2022/2023. While the number of formal cases was lower than in some recent years (for example, there were 55 Phase 1 investigations the previous year), this does not provide a complete picture of the CMA's workload and the complexity of cases it has investigated.

First, formal Phase 1 and 2 investigations reflect only part of the CMA's merger work. The CMA's Mergers Intelligence Committee (MIC) carried out around 800 initial screenings of mergers in 2022/2023, according to the CMA's Chair. In addition to reviewing briefing papers submitted by merging parties, the MIC actively monitors press reports, trade publications and the internet, and speaks to other agencies to identify potentially problematic transactions that have not been notified to the CMA due to the voluntary nature of the UK regime, but should be "called in" for investigation. The number of briefing papers submitted by merging parties is on the rise, with over 170 being considered by the MIC in 2021/2022. The MIC "called in" 14 cases for formal investigation in 2021/2022.

Second, many of the cases considered by the CMA at Phase 1 have been more complex cases subjected to the full 'case review meeting' (CRM) route, requiring the CMA to send an issues letter to the parties and hold an issues meeting with the Phase 1 decision-maker. The percentage of CRM cases at Phase 1 increased to 72%, from a previous record of 50% in 2020/2021. This was reflected in the proportion of Phase 1 cases referred for a Phase 2 investigation, which increased to a record high of 33%.

Overall, out of the 13 Phase 2 cases in 2022/2023, the CMA prohibited three transactions and a further three were withdrawn by the parties. Five cases resulted in divestment remedies. The proportion of Phase 2 cases being given unconditional clearance fell to just 15%.

The CMA's interventionist approach began under the CMA's previous leadership, which was vocal in stressing the overly permissive nature of merger enforcement over the past 30 years. It was also reflected in the CMA's revised Merger Assessment Guidelines in 2021 (the MAGs), which signalled a greater focus on harm that might arise from a loss of potential future competition, including in technological and innovation-driven markets. The MAGs clarified that the presence of some uncertainty about how markets might develop in the future (eg, due to an absence of direct evidence) should not preclude the CMA from finding competition concerns.

The CMA's new leadership appears set on maintaining this course. In December 2022, Sarah Cardell succeeded Andrea Coscelli as CEO of the CMA. Ms Cardell explained that it was a "conscious decision" for the CMA to investigate cases on the basis of more "novel" concerns, including theories of harm relating to dynamic and potential competition, and the accumulation of market power across vertical and adjacent markets. The UK has also proposed legislative changes revising the jurisdictional tests and introducing a new requirement for certain digital firms designated as having "strategic market status" to inform the CMA in advance of their proposed acquisitions. This will provide an even stronger footing to intervene in such cases.

In addition, rather than only assessing UK-focused transactions, the CMA now also carries out parallel reviews of high-profile global

transactions that would previously have fallen within the exclusive jurisdiction of the European Commission under the EU's "one-stop shop" principle. The international dimension necessarily introduces complexities around co-ordination with other agencies on substance, timing and remedies.

In a handful of parallel reviews, the CMA's rigorous approach has resulted in notable divergences with other agencies. For example, on two occasions the CMA has blocked transactions that the European Commission was prepared to clear with remedies: Microsoft/Activision and Cargotec/Konecranes. Ms Cardell has emphasised that the CMA will continue to "seek the outcome guided by the evidence that is right for UK consumers and businesses". At the same time, the CMA is working increasingly closely with international agencies and has shown a growing willingness to co-ordinate on evidence-gathering and points of process.

Endorsement of Dynamic Competition

The CMA's recent focus on dynamic markets stems from concerns about the potential impact of mergers on innovation. In these markets, incumbents tend to be under constant pressure to improve their products and services to avoid losing sales to potential entrants or expanding firms. An acquisition by the incumbent of a potential competitor may therefore reduce its incentive to innovate, leading to a loss of "dynamic competition".

The MAGs set out how the CMA would assess dynamic competition, noting the uncertainty inherent in this type of forward-looking assessment. The CMA may focus on entry and expansion in relation to specific products. But, if it cannot identify specific overlaps at the point of assessment, the CMA may nevertheless "consider a broader pattern of dynamic competition". This includes considering "any direct response of an incumbent merger firm to the threat of entry or expansion by the other merger firm" or "evidence on the incumbent's incentive to respond to any such threat".

The CMA has relied on theories about the loss of dynamic competition to prohibit mergers such as Sabre/Farelogix and Meta/Giphy.

The Competition Appeal Tribunal (CAT) endorsed this approach in June 2022 in the appeal of the Meta/Giphy prohibition. It confirmed that the CMA may find a substantial lessening of competition even if the dynamic competition has not yet manifested. In other words, the incumbent need not have responded to the actual or perceived threat from the potential entrant. The CAT identified the appropriate framework for assessing dynamic competition, giving the CMA a clear methodology for intervening in such cases going forward.

A Rigorous but Case-by-Case Approach

While the CMA's review of transactions in dynamic markets has been rigorous, it has nevertheless cleared several such deals unconditionally, including Amazon/iRobot (USD1.7 billion) and Microsoft/Nuance (USD19.7 billion) at Phase 1 and Viasat/Inmarsat (USD7.3 billion) and NortonLifeLock/Avast (USD8.6 billion) at Phase 2.

These cases show that the CMA's dynamic assessment of mergers in technological markets is not always to the detriment of merging parties. It can also help clear cases that present risk factors under a more static approach, such as high market shares, provided there is sufficiently robust evidence of a future constraint.

Viasat/Inmarsat is a prime example. The merging parties are two leading providers of in-flight satellite internet that compete closely and have a market share of up to 80% in Europe. The merger would reduce the number of large players in the market from four to three, historically a "red flag". The CMA nevertheless approved the deal unconditionally because a new generation of satellite connectivity providers is emerging, particularly SpaceX/Starlink, which is expected to constrain the merged entity.

Similarly, in NortonLifeLock/Avast, the CMA cleared the merger of two leading providers of consumer cyber safety solutions with a combined share of more than 50% and only one major rival. The CMA found that the market is "rapidly evolving" and the parties are constrained by its main rival, a range of smaller providers and Microsoft, whose security offering is bundled with its operating system, which is becoming an "increasingly important" alternative.

The CMA has also unconditionally cleared cases at Phase 1 where other agencies have identified concerns. In Booking/eTraveli, the CMA considered closely but dismissed the concern that the merger might entrench Booking's strong position in online accommodation booking at Phase 1. By contrast, the European Commission opened a Phase 2 investigation and issued a Statement of Objections (outcome pending at time of writing). Similarly, the CMA unconditionally cleared the Facebook/Kustomer transaction at Phase 1 while the parties had to offer a behavioural remedy to resolve the European Commission's concerns.

Finally, while the CMA's prohibition of Microsoft/Activision has generated a great deal of publicity, the case demonstrates the CMA's willingness to keep an open mind on its theories of harm. The CMA reversed its Phase 2 provisional finding that concerns arose in gaming consoles following further consideration of the available evidence, focusing its remaining concerns on cloud gaming.

Spotlight on Non-Horizontal Mergers

The CMA's 2021 MAGs diverge from the "well-established principle" in the previous 2010 Guidelines that non-horizontal mergers "are benign and do not raise competition concerns". This reflects the CMA's current view that "non-horizontal mergers remain an important focus of its work". Consistent with this statement of intention, the CMA commissioned an ex-post evaluation of vertical mergers in March 2022 that, among other things, questions the distinction drawn in past CMA cases between horizontal and vertical effects and how that affected its standard of review.

Several high-profile "non-horizontal" cases are ongoing or have recently concluded. Many reflect novel theories of harm and have been subject to parallel review by the European Commission, including:

Microsoft/Activision: In April 2023, the CMA prohibited Microsoft's USD69 billion acquisition of Activision Blizzard, which the European Commission subsequently approved on the basis of a package of behavioural remedies that the CMA had rejected. The CMA found that Microsoft's acquisition would reinforce its position in the nascent market for cloud gaming services by giving it control over popular videogame franchises. The CMA considered cloud gaming to be an important disruptive force and that allowing Microsoft to strengthen its position at this early juncture would risk undermining the necessary innovation. The CMA therefore concluded that innovation and choice would be "best achieved

by allowing the current competitive dynamics in cloud gaming to continue to do their job".

Booking/eTraveli: In September 2022, the CMA unconditionally cleared Booking's acquisition of e Traveli at Phase 1. Two months later, the European Commission opened an in-depth Phase 2 investigation into the transaction, which remains ongoing. Booking and eTraveli operate online travel agency services, respectively focusing on accommodation and flights. The CMA considered whether the potential loss of eTraveli as a way for Booking's rivals to acquire or retain customers – because they buy accommodation and flights together – may make it "more difficult" for them to compete. The CMA found that, although Booking has significant market power in accommodation and material barriers to entry and expansion exist, eTraveli is not a particularly important way to attract customers: UK consumers buy travel services from multiple providers and "shop around", and there are alternative ways for rivals to attract accommodation customers. The European Commission's review is ongoing.

Broadcom/VMware: The CMA is conducting an in-depth Phase 2 investigation of Broadcom's USD61 billion acquisition of VMware. Broadcom's and VMware's products do not compete. The CMA is investigating whether VMware could use its position in server virtualisation software – a product that allows enterprises to manage heterogeneous hardware in their datacentre servers – to harm the competitiveness of Broadcom's server-component rivals. The European Commission carried out a parallel Phase 2 investigation into the transaction.

The close scrutiny of these cases is consistent with the CMA's broader approach under the 2021 MAGs to consider non-traditional theories of harm.

The CMA is also investigating non-horizontal mergers that are not subject to parallel review by the European Commission, such as United Health/Emis, which was referred to an in-depth Phase 2 investigation due to initial concerns about how the merger might impact downstream competition to develop and supply digital and data analytics products to the NHS.

Alignment of Parallel Remedies Processes

Since Brexit, there has been a concerted effort by the CMA and other agencies, in particular the European Commission, to improve the co-ordination of remedy processes in parallel reviews. There have been high-profile examples of divergent outcomes, notably Microsoft/Activision and Cargotec/Konecranes. In many more cases, however, the CMA and European Commission have been able to align on common remedy packages, including in Veolia/Suez, Sika/MBCC and Parker-Hannifin Corporation/Meggitt.

The CMA has made a conscious effort to promote such alignment. In December 2020, the CMA published an updated version of its Jurisdiction and Procedure Guidance, coinciding with the end of the Brexit transition period. The updated guidance seeks, among other things, to improve the CMA's communication and co-ordination with international competition agencies post-Brexit. It includes an entirely new section titled "Multi-Jurisdictional Mergers" and introduces greater timeline flexibility with a fast-track process that enables parties to move more quickly into Phase 2 remedies discussions.

As the CMA explains, the fast-track process aims to "aid the alignment of the CMA's remedies process with proceedings in other jurisdic-

tions". The window for agreeing remedies with the CMA often falls at a late stage in an already lengthy process, by which time remedy discussions in other jurisdictions are well advanced or have concluded. At Phase 2, parties have historically only been able to engage meaningfully with the CMA on remedies after it has released its Provisional Findings. Remedy discussions are therefore compressed into the final one to two months of a CMA investigation, which means Phase 2 remedy cases are often extended by eight weeks.

Under the updated guidance, parties are now able to request that a case be "fast-tracked" to Phase 2 remedy discussions so that they can engage with the CMA more quickly on remedies. However, this requires the parties to concede that there may be a substantial lessening of competition, waiving their procedural right to challenge this position throughout the investigation (and forgoing the opportunity to obtain unconditional clearance).

The fast-track process has recently been road-tested in two cases: Carpenter/Recticel and Sika/MBCC. In addition to shortening the overall investigation timeline, this brought about a streamlined investigation process that reduced the burden on the parties (and the CMA) from a resourcing perspective and allowed them to focus their efforts on remedy discussions. For example, the fast-track process can remove the need for investigative steps into the markets and theories of harm, including Main Party Hearings. The CMA's fast-track process therefore introduces greater flexibility to the UK remedies timeline, making it easier to co-ordinate parallel investigations where the parties agree there are issues that need fixing.

The CMA's ambitions for greater international co-ordination are also being realised in other ways. It is standard practice for the CMA to require production of confidentiality waivers from merging parties, that are in principle voluntary, enabling them to exchange confidential information about the transaction with other agencies. Despite differences in their analytical frameworks, international agencies are now increasingly exchanging internal documents and other types of evidence at a working level. In respect of its recent investigation of Microsoft/Activision, the CMA disclosed that it had held 26 meetings with the US Federal Trade Commission and exchanged around 74 emails. International co-ordination helps agencies identify common issues and relevant facts. To the extent agencies are content to rely on each other to frame information and document requests appropriately, it may also ease the burden on merging parties by reducing the volume of duplicative questions.

Consumer-Facing Markets Attract Scrutiny

The CMA highlighted in its Annual Plan the importance of the cost-of-living crisis to its work, and Ms Cardell reaffirmed in March 2023 that the CMA would prioritise sectors that matter to consumers. This focus is apparent from a number of cases where the CMA has chosen to investigate mergers involving horizontal overlaps in local markets.

These include a number of investigations into acquisitions in the dentistry and veterinary sectors, including VetPartners/Goddard, Riviera/Dental Partners Group, Portman/Dentex, IVC/multiple independent veterinary businesses, and Medivet/multiple independent veterinary businesses, partly driven by financial investors' "roll-up" strategies (the acquisition of several targets in the same sector). The CMA has required the parties to offer divestment remedies

in some overlapping local areas to secure Phase 1 clearance in each of these cases.

Other examples include Asda/Arthur (Co-op), where the CMA conducted a detailed analysis of each local area affected by the transaction and found competition concerns in local areas in relation to the supply of petrol and/or groceries, and Ali/Welbilt, where the parties offered the divestment of Welbilt's global ice-making machine business to address the CMA's (and the European Commission's) concern that the transaction could lead to higher prices for the hospitality sector to the detriment of ultimate consumers.

The CMA is also increasingly trying to resolve mergers that raise local concerns by using its fast-track process for Phase 1 remedies. For industries with which the CMA is familiar through past cases, it may indicate early to the merging parties that remedies may be necessary to resolve issues arising in certain local areas, which allows resources to be focused on agreeing the remedy package. In Bestway/Lexon/Asurex, for example, the CMA's Phase 1 decision was issued in just 13 working days.

Upcoming Reforms

On 25 April 2023, the UK Government published its long-awaited Digital Markets, Competition and Consumers Bill. As currently framed, the Bill will introduce a wide-ranging set of reforms to UK competition and consumer law, along with a new regulatory regime for digital markets.

In relation to merger control, the Bill proposes some significant changes to the jurisdictional thresholds, including:

- increasing the target turnover threshold from GBP70 million to GBP100 million (to reflect inflation);
- introducing a safe harbour where each of the merging parties has UK turnover below GBP10 million; and
- introducing an alternative jurisdictional test to cover so-called "killer" acquisitions, where one of the merging parties has a share of supply of at least 33% and UK turnover over GBP350 million.

In addition, the Bill envisages that a small number of firms will be designated as having "Strategic Market Status" (SMS) in relation to specific digital activities. These SMS firms will be subject to a duty to report transactions where they acquire a 15%+ stake in a target that has a value over GBP25 million and where the transaction has a UK nexus. The SMS firm may not close the transaction until the expiry of a five-day "waiting period" after reporting the transaction to the CMA, unless the CMA consents.

The Bill is now proceeding through the UK Parliamentary process, but is unlikely to come into force before 2024.

Conclusion

As illustrated by recent cases, the CMA has shown a readiness to pursue increasingly creative and novel theories of harm relating to dynamic and potential competition and an increased interest in non-horizontal effects. This trend is expected to continue as the CMA gears up in anticipation of its new powers under the proposed legislative reforms, particularly in relation to mergers in digital and innovative markets. Although recent cases, notably Microsoft/Activision, have starkly highlighted the risk of divergences between international agencies' assessments, the CMA's increased co-operation with

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other agencies, including the expected signing of a co-operation agreement with the European Commission, may give businesses a degree of confidence that divergent conclusions over similar issues will remain in the minority.

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