



Chambers Global Practice Guides

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Merger Control 2021

UK

Trends & Developments

Nicholas Levy, Paul Gilbert,

Jackie Holland and Courtney Olden

Cleary Gottlieb Steen & Hamilton LLP

practiceguides.chambers.com

Trends and Developments

Contributed by:

*Nicholas Levy, Paul Gilbert, Jackie Holland and Courtney Olden
Cleary Gottlieb Steen & Hamilton LLP see p.9*

UK Merger Control in 2021: The CMA, Brexit and Digital Platforms

Introduction

Over the past 20 years, UK competition law enforcement has experienced continuous reform and innovation. That process has accelerated since the UK voted to leave the EU in June 2016. Brexit constitutes the most significant recalibration of the UK's relationship with Europe since the UK joined the European Economic Community in 1973. Its implications have been far-reaching, including in the enforcement of merger control, where, as of 1 January 2021, the independent UK antitrust agency, the Competition and Markets Authority (CMA), has had jurisdiction to investigate the UK aspects of mergers that also qualify for review by the European Commission (EC).

The CMA's leadership was quick to realise that Brexit provided an historic opportunity to strengthen the authority's claim to being one of the world's leading competition agencies. As the CMA's Chief Executive, Dr Andrea Coscelli, has explained, the CMA's "ambition is very much to be at the top table discussing international mergers." To fulfil this ambition, the CMA secured considerable additional funding (around a 30% boost); moved to larger premises in London; opened new offices in Edinburgh, Belfast, and Cardiff; and increased its headcount (by 300 employees since 2016, a 55% increase). Dr Coscelli believes that the UK is now "in a very strong position to lead" global competition enforcement, because "the upside [of leaving the EU] is that you take back control – genuinely – of the decisions."

In preparation for its expanded role, the CMA has become markedly more active and ambitious in its enforcement of UK merger rules. As described below, it has taken an increasingly expansive view of the jurisdictional scope of UK merger control, overhauled its procedural and substantive guidance, and challenged over 20 transactions since 2019, a number of which would likely have been approved in the past.

Jurisdiction

The CMA has taken an increasingly expansive and creative approach to applying the UK's jurisdictional "share of supply" test. The CMA's approach, which was recently confirmed by the Competition Appeal Tribunal (CAT) and Court of Appeal, has conferred jurisdiction over a number of transactions that were not obviously subject to UK merger control, including because one of the parties generated no UK sales.

Substantive assessment

The CMA's substantive assessment has become stricter, reflected in new Merger Assessment Guidelines published this year. The CMA continues to place less weight on market shares, focusing instead on closeness of competition between the merging parties. As a result, it has intervened in transactions where the parties' combined market shares were below 40% and/or where the share increment has been small.

Hold-separate orders

The CMA routinely imposes hold-separate orders (called initial enforcement orders or IEOs) in all completed mergers. These orders impose wide obligations on both parties to maintain their businesses and seek consent from the CMA for

minor organisational changes. IEOs typically cover the entirety of the merging parties' businesses, not just those in overlapping markets, and apply on a global basis, as confirmed by the CAT.

Procedural penalties

The CMA has applied its formal investigation powers strictly, penalising companies for procedural failings, including minor infractions of hold separate orders or failures to respond correctly and completely to information requests.

Together, these trends and developments have created a complex and challenging merger regime in the UK. In addition, for a number of sectors, the regulatory environment is set to become even more onerous. The UK government is in the process of establishing a new regulatory regime for digital platforms and has enacted a sweeping national security screening regime, adding further complexity to the UK environment.

The CMA's expanded role

The CMA's role significantly expanded following the expiry of the Brexit transition period on 31 December 2020, when it acquired jurisdiction over cases previously reserved to the EC. Mergers that meet both the UK and EU jurisdictional thresholds are now subject to parallel review by the CMA and the EC. The CMA has already begun investigating international mergers that are also subject to review in Brussels and expects its merger caseload to increase by around 50% (approximately 50 additional merger cases per year) compared with the period before Brexit.

In parallel, the CMA has applied the "share of supply test" increasingly flexibly and creatively to review mergers which appear to have little to no nexus to the UK. The "share of supply" test is one of two jurisdictional tests that apply under

UK merger control and in most cases allows the CMA to intervene where the merging parties' activities overlap in the UK and they have a combined share of supply or purchases of at least 25%. This test has been applied to capture mergers even where one of the parties made no overlapping sales in the UK. In Sabre/Farelogix (discussed below), Farelogix had no UK sales, while in Roche/Spark, Spark had no UK sales and the CMA established jurisdiction by applying the "share of supply" test to the share of specialist researchers employed by the parties in the UK.

Most recently, in Facebook/Giphy, the CMA established jurisdiction by applying the "share of supply" test on two separate bases even though Giphy does not earn any revenue outside the US: the CMA calculated, first, the parties' combined share of apps that allow UK users to search for GIFs (measured by average monthly searches), and, second, the parties' combined share of searchable animated sticker libraries supplied to UK users (measured by sticker library size). The CMA has also displayed creativity in its ongoing substantive assessment of the transaction's impact on online display advertising and social media, by examining the merger against two different "realistic" counterfactuals: under the first, Giphy would have continued to operate independently of Facebook; while, under the second, Giphy would have been acquired by an alternative purchaser, possibly another social media platform.

International co-operation

The CMA's expanded role has increased the risk of divergent outcomes across merger reviews in different jurisdictions, particularly in cases that require remedies. To manage this risk, the CMA is seeking to co-operate more closely with competition agencies around the world. Although the CMA has lost its automatic access to information shared within the European Competition

UK TRENDS AND DEVELOPMENTS

Contributed by: Nicholas Levy, Paul Gilbert, Jackie Holland and Courtney Olden, Cleary Gottlieb Steen & Hamilton LLP

Network, it continues to work closely with the EC and share information through the use of confidentiality waivers. It has also entered into new co-operation arrangements with other agencies.

- In September 2020, the CMA signed the Multilateral Mutual Assistance and Cooperation Framework alongside the USA, Canadian, Australian, and New Zealand competition authorities (the so-called Five Eyes), made up of (i) a Memorandum of Understanding; and (ii) a Model Agreement that is expected to serve as a template for the authorities to negotiate and implement bilateral agreements to enhance co-operation further. Although it does not create new legal powers or obligations, it does formalise co-operation that currently takes place on a less formal basis, creating default expectations as to how the authorities will share information and co-operate.
- In March 2021, the CMA formed a Multilateral Working Group with the US Federal Trade Commission, the US Department of Justice, the EC, the Canadian Competition Bureau, and three Offices of Attorneys General to update the analysis of pharmaceutical mergers. The working group will explore issues including current theories of harm and whether they should be expanded, the full impact of pharmaceutical mergers on innovation, and the types of remedies needed to address any competition concerns. In its announcement, the EC noted that the working group “will bring enhanced scrutiny and more detailed analysis of these kinds of mergers in the future, for the benefit of consumers.”
- In April 2021, the CMA issued a joint statement with the Australian and German competition authorities, stressing that “there is a common understanding across competition agencies on the need for rigorous and effective merger enforcement.” The statement signals a warning that mergers, particularly

in highly concentrated and digital markets, will attract scrutiny and “strong action” will be taken where the authorities consider it appropriate.

Increased intervention rates

Over the past two years, the CMA has taken an increasingly interventionist approach.

- 2020 saw the CMA frustrate ten mergers, following eight in 2019. In 2020, four transactions were blocked and another six were abandoned after the CMA raised antitrust concerns (Illumina/Pacific Biosciences of California, Prosafe/Floatel International, McGraw-Hill Education/Cengage Learning, Kingspan/Building Solutions, Taboola/Outbrain, and Yorkshire Purchasing Organisation/Findel Education).
- Of the four prohibitions, two were remitted to the CMA for further investigation following appeal (JD Sports/Footasylum and FNZ (Australia)/GBST Holdings), although the CMA has again concluded that the FNZ (Australia)/GBST Holdings transaction raises competition concerns and that a divestment would be required.
- To date in 2021, the CMA has prohibited one transaction, TVS Europe Distribution/3G Truck & Trailer Parts, has required the divestment of one party’s entire business outside North America in another (viagogo/StubHub), and has caused the abandonment of a further three transactions (Crowdcube/Seedrs, Tronox /TiZir Titanium and Iron, and Impri-vata/Isosec).

Perhaps the most significant transaction to be prohibited over the past couple of years was Sabre/Farelogix, which involved suppliers of software solutions to facilitate airline travel. The case illustrates the CMA’s readiness to stretch the “share of supply” test to assert jurisdiction over transactions with very little UK nexus. As to

the CMA's substantive assessment, the transaction was found to reduce innovation and customer choice. The CMA's prohibition decision was upheld on appeal in an important judgment that confirms the CMA's expansive approach to establishing UK jurisdiction on the basis of the "share of supply" test.

Traditional sectors have not escaped the CMA's enforcement over the last year. The CMA blocked JD Sports/Footasylum, a completed acquisition involving retailers of sports-inspired casual footwear and apparel. The prohibition decision was appealed and remitted (in part) to the CMA for reconsideration. JD Sports/Footasylum illustrates the importance of closeness of competition to the CMA's substantive assessment, where the CMA concluded that the parties were close competitors on the basis of their internal documents, two customer surveys, the similarity of their offerings, and economic analysis.

The CMA also blocked TVS Europe Distribution/3G Truck Trailer Parts, a completed acquisition involving wholesalers of commercial vehicles and trailer parts to the UK independent aftermarket, and Hunter Douglas/247 Home Furnishings, a completed acquisition involving online retailers of made-to-measure blinds, both as "three to two" mergers.

Implications for parties considering a voluntary filing

UK merger control is voluntary, and there is no duty to notify to the CMA, even where the jurisdictional thresholds are met. As a result, parties can complete transactions without notifying the CMA, and many do. The CMA can, however, "call in" transactions that it believes may be caught by UK merger control. The increased risk of CMA intervention, described elsewhere, has raised increasingly difficult strategic questions for merging parties considering whether to notify transactions proactively.

The decision to notify the CMA requires an often finely-balanced assessment of whether the transaction meets the jurisdictional thresholds, whether it raises potential competition concerns, and the likelihood that the CMA will decide to open an investigation. This assessment has become more complex in light of the CMA's recent enforcement practice. In many cases, it can be difficult to conclude with certainty that the jurisdictional tests are not met. In addition, the CMA's move away from market share safe harbours and greater focus on dynamic competition has made it harder to predict the CMA's substantive findings.

In these circumstances, rather than bearing the risks associated with closing a transaction without having secured CMA approval or incurring the costs and delay associated with a notification and CMA review, many companies are choosing to voluntarily inform the CMA about transactions by way of short briefing papers that explain why there are no competition concerns and seek the CMA's confirmation that it does not intend to open an investigation.

Overhaul of procedural and substantive guidance

Over the last year, the CMA has overhauled its Merger Assessment Guidelines and its Guidance on Jurisdiction and Procedure. The CMA has emphasised that the new guidance reflects an evolution (not a revolution) in its practices and takes account of recent case law. The new guidance nevertheless gives a good insight into the CMA's policy intentions.

The new Merger Assessment Guidelines give the CMA greater flexibility in assessing mergers. When determining the counterfactual to the merger, for example, the CMA will vary the time horizon over which it assesses the counterfactual depending on the context and notes that uncertainty about the future "will not in itself lead

Contributed by: Nicholas Levy, Paul Gilbert, Jackie Holland and Courtney Olden, Cleary Gottlieb Steen & Hamilton LLP

the CMA to assume the pre-merger situation to be the appropriate counterfactual.” This would in principle allow the CMA to intervene on the basis that competition might develop in different ways absent the transaction, even where those developments are uncertain and may not take place in the short term. An increasingly flexible approach to the counterfactual will make it more difficult for merging parties and their advisers to determine the baseline against which the effects of a transaction should be measured, creating greater uncertainty and unpredictability.

The new Guidelines also suggest the CMA will continue to rely on theories of harm based on a loss of potential competition between the parties and will focus on the closeness of competition between the parties, rather than simply looking at market shares. These factors can result in the CMA looking to intervene in mergers even where the combined market shares are low or where the evidence of current anticompetitive effects is slim, resulting in even less predictability for merging parties. The CMA will also continue to place reliance on reviewing internal documents. It has invested in its document review technology and often places considerable weight on the parties’ internal documents when conducting its substantive assessment.

Under the CMA’s new Guidance on Jurisdiction and Procedure, the CMA has signalled that it will continue to assert jurisdiction in any case that it suspects raises competition concerns even where the UK nexus is limited or the parties’ UK activities are small. The CMA has also sought to flex its processes to allow it to co-ordinate more closely with other competition agencies. Merging parties are able to: (i) request a fast-track Phase 1 process by conceding that the test for reference to Phase 2 is met; and/or (ii) make formal concessions during Phase 2 in order to shorten the CMA review process and facilitate

co-ordination between the CMA and other agencies when assessing remedies.

Impact of COVID-19 on the CMA’s substantive assessment

In April 2020, the CMA published guidance on its approach to merger investigations during the COVID-19 pandemic. It explained that its substantive assessment and investigational standards would not change and reiterated that the test applied to the “failing firm” defence (where the parties maintain that the target is likely to exit the market in the counterfactual) is stringent and rarely met. The CMA’s recent practice has been consistent with that guidance, demonstrating that the CMA’s standard of review was not relaxed during the pandemic.

- In Amazon/Deliveroo, the CMA provisionally cleared the acquisition of a 16% interest in Deliveroo on the basis that the “failing firm” defence might be available due to the deterioration in Deliveroo’s financial position. Two months later, the CMA reversed its position on whether Deliveroo was a failing firm because its financial position had improved. The CMA cleared the transaction on other grounds in August 2020.
- In JD Sports/Footasylum, the CMA considered the impact of COVID-19 on market for sports equipment retailing, concluding that Footasylum would have continued to compete effectively absent the merger and that the impact of COVID-19 on Footasylum was insufficiently clear to incorporate into the counterfactual. The CMA’s findings in relation to the likely effects of the COVID-19 pandemic were quashed on appeal, where the CAT found that the CMA’s conclusions were not based on sufficient evidence and that the CMA should have sought further information, in particular from principal suppliers. The transaction was remitted to the CMA and a

final report is expected around September 2021.

These cases underline the difficulties associated with assessing the impact of COVID-19, particularly while the crisis was ongoing. The reversal of the CMA's provisional findings in Amazon/Deliveroo shows that the CMA is ready to revisit its substantive assessment should circumstances change. More generally, the CMA's decisions during the course of 2020 and 2021 show the CMA's reluctance to clear mergers on the basis that one or other business is suffering as a result of COVID-19; the CMA must be convinced that the businesses in question are suffering disproportionately or that the pandemic has resulted in enduring structural changes to the market.

Enforcement of procedural rules and use of IEOs

The CMA issued two penalty decisions for breaches of procedural rules over the past year, compared with nine in 2019: Amazon was fined GBP55,000 for failing to provide complete responses to requests for information in the context of its acquisition of a minority stake in Deliveroo, and JD Sports was fined GBP300,000 for failing to comply with a hold-separate order in relation to its acquisition of Footasylum. JD Sports filed an appeal, and the CMA withdrew the penalty before the Tribunal delivered its judgment. While the number of penalty decisions has fallen, it would be wrong to infer a wider change of policy from these statistics. The CMA continues to use its formal investigation powers, including mandatory information requests, on a regular basis.

Of particular note, the CMA continues to impose IEOs in completed merger cases on a routine basis. These orders go far beyond simply holding the businesses separate – they impose wide obligations on both parties to maintain their businesses, requiring CMA consent for even minor

organisational changes. The CMA's approach to IEOs has been endorsed by the CAT and Court of Appeal in connection with the Facebook/Giphy merger. The courts confirmed the CMA's policy of imposing IEOs on a pre-cautionary basis, covering the whole of the merging parties businesses (including unrelated products and services) and on a global basis. Parties may seek derogations, although the CMA requires a reasoned submissions and must be satisfied that the steps in question would not prejudice the CMA's investigation.

The CAT and Court of Appeal endorsed the CMA's use of IEOs and emphasised that the CMA has a wide margin of appreciation in discharging its statutory functions, which includes deciding what information it requires to carry out its review. Unless the information the CMA requests is "so manifestly without reasonable foundation," it is not for the courts to second-guess what information is sufficient for the CMA. Welcoming the Court of Appeal's judgment, Dr Coscelli said that the judgments reinforce "an important and unequivocal message – initial enforcement orders are key to the CMA's ability to protect UK consumers while carrying out its merger reviews. Both the Court of Appeal and Competition Appeal Tribunal have now endorsed our approach and our handling of this issue."

Regulation of digital markets

Fostering effective competition in digital markets has been at the forefront of the CMA's enforcement priorities in recent years. The CMA reviewed a number of digital mergers over the past year, including Taboola/Outbrain, Ion Group/Broadway Technology, viagogo/StubHub, Crowdcube/Seedrs, Facebook/Giphy, Adevinta/eCG, Uber/Autocab, and Imprivata/Isossec. Notwithstanding the possibilities under the present regime to review digital sector transactions, the CMA has concerns that its existing tools are insufficient to

UK TRENDS AND DEVELOPMENTS

Contributed by: Nicholas Levy, Paul Gilbert, Jackie Holland and Courtney Olden, Cleary Gottlieb Steen & Hamilton LLP

deal with the potential harms that digital mergers may raise.

Partly in response to these concerns, the UK government commissioned a Digital Markets Taskforce to provide advice to the government on the design and implementation of a pro-competition regime for digital markets. Published in December 2020, the Digital Markets Taskforce's advice proposed, among other things, a new merger control regime specifically for firms with "strategic market status" (SMS). The proposed SMS merger regime has two main features that represent a significant departure from the UK's existing regime:

- mandatory and suspensory notifications of acquisitions of de jure or de facto control (but not acquisitions of material influence) that meet as-yet-unspecified transaction value thresholds and have a nexus to the UK, as well as a general reporting obligation for all other M&A activity; and
- a lower standard of proof for finding an SLC in respect of SMS mergers at Phase 2, from a "balance of probabilities" to a "realistic prospect" (the standard that the CMA applies at Phase 1).

In 2021, the government established a Digital Markets Unit, housed within the CMA, charged with administering the new regime, and continues to work on the legislative framework for the proposed new digital markets regime.

A new national security investment regime

In May 2021, the UK government enacted a new national security and investment regime, which will allow the Secretary of State for Business, Energy and Industrial Strategy to screen and prohibit 'potentially hostile' investments that threatened UK national security. The regime is set to be among the most wide-ranging and onerous in the world, adding a new layer of mandatory review and imposing non-trivial costs on investments in any company with UK activities. The new rules are expected to come into force towards the end of 2021, when the implementing regulations are expected to be introduced.

Conclusion

Following Brexit, the CMA has cemented its position as one of the leading global authorities in merger review. It has taken an expansive view of the jurisdictional scope of UK merger rules, has applied its procedural rules strictly, and, most importantly, has challenged a series of transactions that would in the past likely have been approved. The CMA's muscular enforcement policy is likely to be maintained in the coming years, requiring companies and their advisors to take account of UK merger control early in the deal planning process.

*Contributed by: Nicholas Levy, Paul Gilbert, Jackie Holland and Courtney Olden,
Cleary Gottlieb Steen & Hamilton LLP*

Cleary Gottlieb Steen & Hamilton LLP has been a pioneer in globalising the legal profession and has 16 offices in major financial centres around the world. The firm employs approximately 1,100 lawyers from more than 50 countries and diverse backgrounds. Cleary's world-leading antitrust practice comprises approximately 230 antitrust lawyers based in the USA, Europe, Asia and Latin America and includes former senior officials from the Department of Justice, the US Federal Trade Commission, the UK Competition and Markets

Authority and the European Commission's Directorate-General for Competition. Cleary's world-renowned practice in EU merger control has comprehensive expertise in every type and stage of investigation by the EU Commission and national antitrust authorities in a range of industries. In the UK, Cleary Gottlieb advises on all aspects of competition law, and represents clients before the Competition and Markets Authority, concurrent sector regulators, the Competition Appeal Tribunal and civil courts.

AUTHORS



Nicholas Levy has extensive experience in notifying transactions to the European Commission, the Competition and Markets Authority, and antitrust agencies around the

world. He advises on all aspects of antitrust law, including anti-cartel enforcement, collaborative arrangements, vertical agreements and unilateral conduct. He joined Cleary Gottlieb in 1990 and became a partner in 1999. Nicholas is consistently recognised as one of the leading antitrust lawyers in Europe. Recent publications include: "Reforming EU Merger Control to Capture 'Killer Acquisitions' – The Case for Caution", *Competition Law Journal* (2020), and "UK Government Introduces New Powers to Intervene in Mergers on Public Interest Grounds", *The Columbia Law School Blue Sky Blog* (2020).



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, the Competition and Markets Authority, the Competition Appeal Tribunal, and the Court of Appeal. Paul joined Cleary in 2011 and became counsel in 2015. He was previously Deputy Director of Competition Policy at the UK Office of Fair Trading. Recent publications include: "UK Merger Control, the New Normal", *Financier Worldwide* (2020), and "Waiting for Brexit: Five Ways the CMA Could Improve UK Merger Control", *European Competition Law Review* (2020).

UK TRENDS AND DEVELOPMENTS

*Contributed by: Nicholas Levy, Paul Gilbert, Jackie Holland and Courtney Olden,
Cleary Gottlieb Steen & Hamilton LLP*



Jackie Holland focuses on EU and UK antitrust enforcement, merger control, state aid/subsidies, competition litigation, market investigations, and sectoral regulation. She

represents clients before the Competition and Markets Authority, the European Commission, sectoral regulators, the UK Competition Appeal Tribunal, and the European Court of Justice. Jackie joined Cleary as a partner in 2021. She previously held senior positions at the UK Office of Fair Trading, including Senior Director of the Policy Group and a Phase 1 decision-maker for mergers. She helped to reform the agency's merger control regime and antitrust procedures, and introduced a Procedural Officer to oversee the agency's casework.



Courtney Olden focuses on EU and UK competition law, including merger control, anti-competitive agreements, and abuse of dominance. She has represented clients before

the European Commission, the UK Competition and Markets Authority and other jurisdictions. Courtney joined Cleary in 2020 as an associate, having previously practised at firms in London and Australia. She is qualified in Australia. Recent publications include "Putting Customers in Charge: Penrose Report on the State of UK Competition", Cleary Gottlieb Alert Memorandum (2021).

Cleary Gottlieb Steen & Hamilton LLP

2 London Wall Place
London
EC2Y 5AU
England

Tel: +44 20 7614 2200
Fax: +44 207 600 1698
Email: nlevy@cgsh.com
Web: clearygottlieb.com

CLEARY GOTTLIB