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UK Competition Law Newsletter

Highlights

- Joint statement by the CMA, ACCC and Bundeskartellamt on the need for rigorous merger enforcement.
- CMA consults on its revised Interim Measures Guidance.
- CMA opens Phase 2 investigation into Facebook's acquisition of Giphy.

Joint statement by the CMA, ACCC and Bundeskartellamt on the need for rigorous merger enforcement

In recent years, the CMA has been strengthening its approach to merger control as it prepares for its new status as a global enforcer with expanded jurisdiction following the UK's exit from the EU. Since 1 January 2021, the CMA has been able to investigate the UK aspects of mergers that also qualify for review by the EU Commission (**EC**). Many transactions, including major global deals, are therefore now subject to parallel review by the EC and CMA.

Parallel merger review by the CMA is particularly significant because the CMA has become one of the strictest enforcers of merger control in the world. It has effectively prohibited more than 20 transactions since 2018, with around 70% of Phase 2 investigations resulting in prohibition or

abandonment in the last two years (a significant increase on its historical average of 35%). It has taken an expansive view on jurisdiction, reviewing transactions like *Sabre/Farelogix* or *Roche/Spark*, where the target had no revenues in the relevant markets in the UK – and the Competition Appeal Tribunal (**CAT**) has recently endorsed the CMA's approach in its *Sabre judgment*.¹ It has adopted new [Merger Assessment Guidelines](#) that signal an overall tougher approach to its substantive assessment. And it has enforced its procedural powers more frequently and more rigorously, penalising companies for breaching hold-separate orders, and requiring companies to unwind lawfully-taken integration steps.²

¹ See Cleary Gottlieb alert memorandum, "[CMA Ramps Up Merger Control Enforcement Ahead of Brexit](#)", 26 February 2020. See also "[Waiting for Brexit: Five Ways the CMA Could Improve UK Merger Control](#)" in the European Competition Law Review (ECLR) by N. Levy, P. Gilbert and L. Sheridan, 4 September 2020.

² See [Cleary Gottlieb UK Competition Newsletter, March 2021](#).

Against this background, the CMA recently joined the Australian Competition and Consumer Counsel (**ACCC**) and Bundeskartellamt (the Federal Cartel Office (**FCO**), the German competition authority) in [publishing](#) a statement intended to highlight “the need for rigorous and effective merger enforcement.” The statement and the [accompanying panel interview](#) of the three agency heads provide insight into the merger enforcement priorities of the three agencies. It is interesting and important for a number of reasons – it represents a powerful and public rebuttal of the [Franco-German Manifesto’s](#) call for more permissive enforcement; it underscores the emergence of a coalition of agencies that believe merger control has been under-enforced in Europe and the U.S. and that a more sceptical, interventionist, and muscular policy is needed; it serves as a reminder that the U.S. agencies and EC are by no means the only agencies of importance; and it confirms that businesses cannot expect an easy ride from at least the CMA, FCO and ACCC once the world emerges from the pandemic. Although the joint statement contained little that had not been trailed by the CMA, FCO and ACCC over the past 18 months, the fact that the agency heads authored and presented the document together was unusual and significant. Five notable points can be identified:

First, the agencies warn of a perceived danger of increasing concentration in many industries. According to the CMA’s Chief Executive, Andrea Coscelli, “we have learned over the last few years that concentration has increased too much in a number of markets and when we look at the outcomes... [they] are not good.” He explained, for example, that the market for accountancy services is concentrated due to a “mistake many years ago in merger under-enforcement” stemming from the 1997 combination of Price Waterhouse and Coopers & Lybrand, which reduced the number of elite accountancy firms from 6 to 5.

Second, in line with several recent reports and initiatives, such as the [Furman report](#) and the EC’s report on [Competition policy for a digital era](#), the agencies believe that the trend for increased concentration is particularly pronounced in

digital markets. According to Bundeskartellamt President Andreas Mundt, “we have all been struggling for quite a while with platforms, ecosystems, digital gatekeepers and the effects they have on the economy and antitrust.”

Dr Coscelli also highlighted the ad technology sector as an example of a highly concentrated market, claiming that the *Google/DoubleClick* merger is “clearly the source of a number of the problems we find.”

Third, the agencies note the challenge raised by the “forward-looking nature of merger control,” which is particularly difficult in dynamic markets or with mergers involving small companies with large potential. They stress, however, that “uncertainty as to the future should not necessarily mean that potentially anticompetitive mergers are cleared because of that uncertainty”; the agencies will re-assess their historic approach “so that a degree of uncertainty about future developments in the relevant markets does not lead, by default, to a clearance decision.” Accordingly, the agencies emphasise that in the future they want “to challenge the presumption [...] that mergers are generally efficiency-enhancing and should be restrained only where there is certainty that serious detriment will result.” Going even further, the ACCC Chair Rod Sims suggested introducing a new presumption for mergers that “if in doubt, bias towards competition.”

The agencies’ statement about being more prepared to challenge mergers involving small companies with large potential can already be observed in the CMA’s decisional practice. In recent years, the CMA has investigated several cases with such fact patterns (such as *PayPal/iZettle*, *Sabre/Farelogix*, and *Amazon/Deliveroo*) based on the theory that absent the merger there would be stronger competition than the prevailing conditions of competition. Most recently, the CMA found in *Facebook/Giphy* (at the end of a Phase 1 investigation) that the merger creates competition concerns in digital advertising even though Giphy is not active in that market but had plans to expand in the future. In the same vein, the CMA’s new Merger Assessment Guidelines explain that

“uncertainty about the future will not in itself lead the CMA to assume the pre-merger situation to be the appropriate counterfactual.”

Fourth, as to remedies, the agencies express clear preference for structural over behavioural remedies. They argue that “complex behavioural remedies” have five major downsides: (i) they create continuing economic links and dependencies that are therefore “unlikely to recreate the pre-merger competitive intensity of the market”, (ii) they can raise significant circumvention risks, (iii) they can quickly become outdated as market conditions change, (iv) they can distort the natural development of the market, and (v) “place a burden on competition agencies and businesses by necessitating extensive post-merger monitoring of companies and their conduct.”

Finally, the agencies discuss their approach to merger control in light of the difficulties companies face as a result of Covid-19. They oppose calls to relax enforcement standards beyond existing failing-firm defence legal frameworks, arguing that competitive market growth underpinned by strong merger control policy is the only sustainable path for economies to emerge from the pandemic with reduced debts and higher tax revenues. When necessary, the agencies may factor the short-term pandemic impact into some merger assessments. This, however, must be rigorous and evidence-based – and balanced against the merger’s impact on all firms in the market. While the pandemic should hopefully subside, these “mergers are forever” and the agencies are keen to avoid irreparable harm.

Overall, the joint statement from the agencies is consistent with several trends from the CMA since the UK left the EU. First, as also seen in the recent “Five Eyes” initiative,³ the CMA is keen to work closely with its international partners on merger review and align in its thinking, where possible.⁴ Second, the CMA will not, though, be afraid to deviate from other agencies where it considers

it appropriate to do so: for example, while the joint statement expresses scepticism regarding behavioural remedies, the EC has shown it is more willing to accept such remedies, in cases like *Intel/McAfee*, *Qualcomm/NXP*, *Microsoft/LinkedIn*, and *Google/Fitbit*. Third, the CMA is seeking to take a more “vigilant” approach to merger control, given perceived indications of a weakening in competition across at least some sectors of the economy.⁵

We identify five main implications for businesses planning future transactions that might affect the UK:

- The CMA’s expansive approach to jurisdiction is likely to continue. The CMA may seek jurisdiction over transactions even if the target has no revenues or customers in the UK.
- The CMA is likely to remain one of the most interventionist agencies in the world.
- The CMA will review global transactions in parallel with the EC and other agencies. It will seek to coordinate with international agencies in those investigations, but it will not be afraid to deviate from other agencies where it believes there may be concerns.
- The CMA will actively focus on transactions in the digital sector. It may be sceptical to clear a merger based on uncertainty as to whether one of the merging parties would have grown into a credible rival in the future. It should also be expected to be sceptical of behavioural remedies as a means to address competition concerns.
- The CMA will continue to require rigorous evidence to clear a merger based on the failing firm defence, even during the economic fallout from Covid-19.

³ Cleary Gottlieb Newsletter, [CMA Signs ‘Five Eyes’ Cooperation Framework With US, Canadian, Australian, And New Zealand, August 2020](#).

⁴ The CMA’s revised [Jurisdictional & Procedural Guidance](#), for example, notes that it is beneficial for the CMA to “communicate and coordinate extensively with other authorities in reaching decisions on the competition assessment and remedies.”

⁵ CMA, [The State of UK Competition](#), (November 2020).

Judgments, Decisions, and Other News

Court Judgments

Forrest Fresh Foods Limited v Coca-Cola European Partners Great Britain Limited.

On 23 April 2021, the Competition Appeal Tribunal (CAT) [published](#) notice of an abuse of dominance claim brought by Forrest Fresh Foods against Coca-Cola's UK bottler. Forrest claims that Coca-Cola's UK bottler infringed competition rules by using Forrest's confidential customer lists, which it obtained in exchange for offering advantageous pricing on its products, to supply Forrest's customers directly. It also complains that the bottler refused to reimburse it for sugar tax levies on Coca-Cola products.

Roland (U.K.) Limited and another v Competition and Markets Authority. On 19 April 2021, the CAT [dismissed](#) Roland's appeal against a £4 million fine imposed by the CMA (see [UK Competition Newsletter, August – September 2020](#)). Roland appealed, alleging that the CMA's fine overstated the seriousness of the infringement and that the CMA's leniency discount had been too low. The CAT disagreed, finding that the CMA's calculation decisions were in line with previous decisions in similar cases. In fact, by appealing against the CMA's decision, Roland had breached its settlement agreement with the CMA whereby Roland accepted a lower fine in return for agreeing not to appeal. Therefore, the CAT ruled that Roland should lose the benefit of its settlement discount, reversing a 20% discount on Roland's fine.

OTC Computers Limited (In Liquidation) v Infineon Technologies AG and Micron Europe Limited. On 14 April 2021, the Court of Appeal [dismissed](#) an appeal by Infineon and Micron against a High Court judgment finding that an action for damages, allegedly suffered as a result of the DRAM cartel, was not time-barred (see [UK Competition Newsletter, April – May 2020](#)). The Court of Appeal upheld the High Court's decision that, for limitation purposes, a claimant in liquidation could not be expected to have the same knowledge as a trading company at the time the cartel investigation

opened. The Court took the view that nothing in section 32 of the Limitation Act 1980 requires a claimant to be treated as if it were in business at the time the wrongdoing emerged.

Antitrust/market studies

CMA Consults on Revised Interim Measures Guidance. On 7 April 2021, the CMA [published](#) for consultation a revised version of its guidance on the use of interim measures in merger investigations and its template Initial Enforcement Order. The CMA's proposed revisions aim to provide further clarification in relation to whom interim measures will typically apply, as well as the steps that the CMA expects merging parties to take to ensure compliance with interim measures. This is on the ground the CMA has become "increasingly aware that merging parties are taking insufficient steps to ensure compliance with interim measures." The revised guidance and template initial enforcement order put merging parties and their advisers on notice as to the stronger requirements relating to compliance processes that will apply and the likelihood of penalties where parties fail to comply with interim measures.

Department for Business, Energy and Industrial Strategy (BEIS) sets out the terms of reference for the new CMA Digital Markets Unit (DMU).

On 7 April 2021, BEIS [announced](#) the launch of the DMU in non-statutory form. In its current form, the DMU will prepare to implement the new statutory regime, support and advise the Government on establishing the regime, gather evidence on digital markets and engage with stakeholders in the UK and overseas. The DMU will also work with the UK's communications regulator Ofcom on a potential code of conduct to govern the relationships between platforms and content providers.

CMA Consults on Draft Funerals Markets Investigation Order 2021. On 21 April 2021, the CMA [published](#) for consultation a draft order to implement remedies identified in its market

investigation into the supply of services by funeral directors. The draft Funerals Market Investigation Order 2021 sets out the proposed implementation of these remedies, including: (i) a requirement on funeral directors and crematorium operators to disclose certain price information to customers, (ii) a requirement on funeral directors to disclose specific commercial information to customers, (iii) a prohibition on funeral directors from entering into certain arrangements with hospitals, hospices or care homes, and (iv) a requirement on some funeral directors and all crematorium operators to provide the CMA with specific price and volume information on the goods and services that they provide to customers.

Merger Developments

PHASE 2 INVESTIGATIONS

Liberty Global/Telefonica. On 14 April 2021, the CMA announced the provisional findings of its Phase 2 investigation into the proposed joint venture between Liberty Global plc and Telefónica SA to merge their UK operating businesses Virgin Media/Virgin Mobile and O2 (see UK Competition Newsletter, January 2021), provisionally clearing the proposed transaction on the ground that it is unlikely to lead to a substantial lessening of competition (SLC) within any markets in the UK, including as a result of vertical effects.

FNZ/GBST. On 15 April 2021, the CMA announced the provisional findings of its reconsideration of the completed acquisition. The CMA provisionally found that the merger may be expected to result in an SLC for the supply of retail platform solutions. In reaching this provisional conclusion, the CMA took into account additional and updated evidence showing that FNZ and GBST are close competitors and that there are few other significant suppliers offering effective and competitive alternatives. The CMA also found that the merged business would be the largest supplier in the market.

viagogo/StubHub. On 9 April 2021, the CMA published a notice of its acceptance of final undertakings. The undertakings follow the CMA's finding that viagogo's completed acquisition of StubHub would result in an SLC in the supply

of uncapped secondary ticketing exchange platform services for live events in the UK (see UK Competition Newsletter, February 2021). Under the undertakings, viagogo is required to divest StubHub's entire business outside North America.

Facebook/Giphy. On 1 April 2021, the CMA announced that it had decided to refer the completed acquisition by Facebook of Giphy to a Phase 2 merger investigation. As a result of its Phase 1 investigation, the CMA had concerns that Giphy would have less incentive to expand into digital display advertising, leading to a loss of competition in a sector where Facebook has material market power (as set out in the CMA's Market Study into online platforms and digital advertising, which it refers to throughout this decision). The CMA considered vertical effects, raising concerns that Facebook could restrict the supply of Giphy's GIFs to Facebook's social media and display advertising rivals. The CMA also considered theories of harm relating to: (i) the merger giving Facebook an increased data advantage, raising barriers to entry in display advertising; and (ii) the loss of Facebook as a future competitor in the supply of searchable GIF libraries. The CMA ultimately found that these were unlikely to give rise to an SLC.

Bellis Acquisition Company/Asda Group. On 20 April 2021, the CMA announced its decision to refer the completed acquisition by Bellis Acquisition Company of Asda to a Phase 2 merger investigation unless acceptable undertakings in lieu of reference are offered. The CMA concluded that the merger gives rise to a realistic prospect of an SLC in relation to the supply of road fuel in 36 areas across the UK and the supply of a specific type of fuel, auto-LPG, in a further area. It is therefore concerned that the merger could lead to higher prices for motorists in these locations.

Imprivata/Isosec. On 29 April 2021, the CMA announced that it would refer the anticipated acquisition for a Phase 2 investigation unless acceptable undertakings in lieu of reference are offered. The CMA is concerned that the proposed merger could reduce choice and stifle innovation in authentication management solutions for accessing sensitive NHS data, and decided not

to exercise its discretion to apply the *de minimis* exception to this merger.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision Due Date
Cellnex/CK Hutchison UK towers	13 July 2021
Montagu/ParentPay	12 July 2021
Advanced Micro Devices, Inc/Xilinx, Inc	6 July 2021
SK Hynix/Intel's NAND and SSD business	5 July 2021
NVIDIA/Arm	30 July 2021
Veolia/Suez	TBC
Sony Music Entertainment/Kobalt Music Group	TBC

Other Developments

UK Government responds to CMA State of Competition Report 2020. On 1 April 2021, BEIS [published](#) the government's response to the CMA's State of Competition report 2020 (see [UK Competition Newsletter, November 2020](#)), welcoming the report as "an excellent first step towards raising...collective understanding of the level and nature of competition across the UK economy".

The National Security and Investment Act 2021 becomes law. On 29 April 2021, BEIS announced that the UK National Security and Investment Bill had received Royal Assent. The regime is expected to come into force later this year when secondary legislation is introduced, but will have retrospective effect, applying to transactions taking place from 12 November 2020.

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