

January 2020

UK Competition Law Newsletter

2019 Highlights

- CMA maintains more interventionist approach towards mergers.
- UK Government increases public interest interventions in mergers.
- CMA increases enforcement activity in relation to gun-jumping and failure to respond to formal information requests.
- CMA launches Digital Markets Strategy and publishes interim report on online platforms and digital advertising.
- CMA increases focus on individual responsibility and director disqualifications.
- CMA carries a record number of Phase 2 investigations and antitrust cases into 2020.

2019 Review

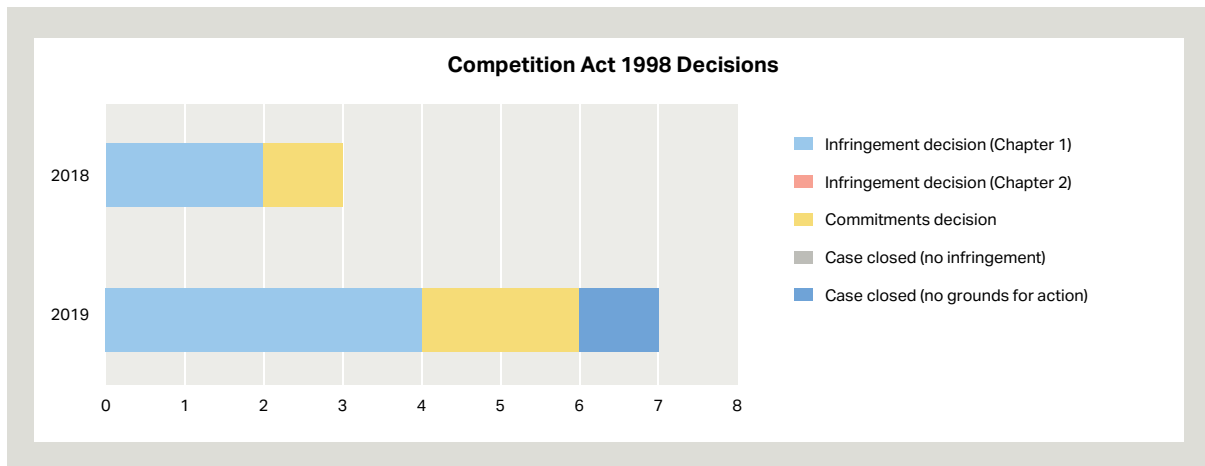
CMA Activity

In 2019, the CMA devoted considerable resources to preparing for the UK's exit from the EU. It carried out a [consultation](#) and [published guidance on the functions of the CMA after a 'no deal' exit from the EU](#). In anticipation of its increased workload, it recruited additional staff at all seniority levels and completed its move to new premises in Canary Wharf. It also increased its focus on digital markets and took a less permissive approach to gun-jumping and failures to provide full responses to formal requests for information.

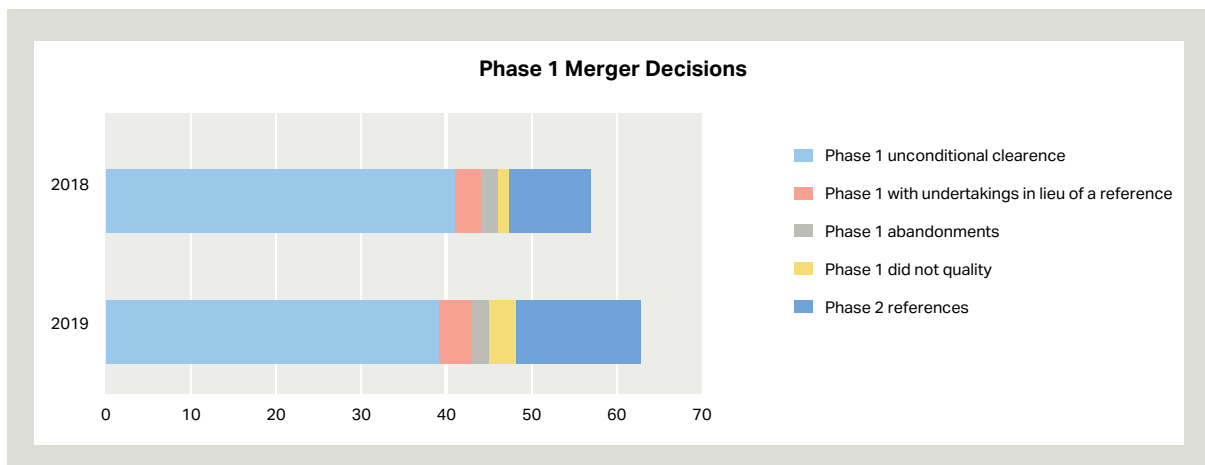
The CMA continued its efforts to enforce competition law on a business-as-usual basis, increasing its antitrust activity compared to the previous year. In 2019,¹ the CMA issued:

- Four Chapter 1 infringement decisions, compared with two in 2018;
- No Chapter 2 infringement decisions, as in 2018;
- Two decisions closing a case with no infringement finding, compared with one in 2018; and

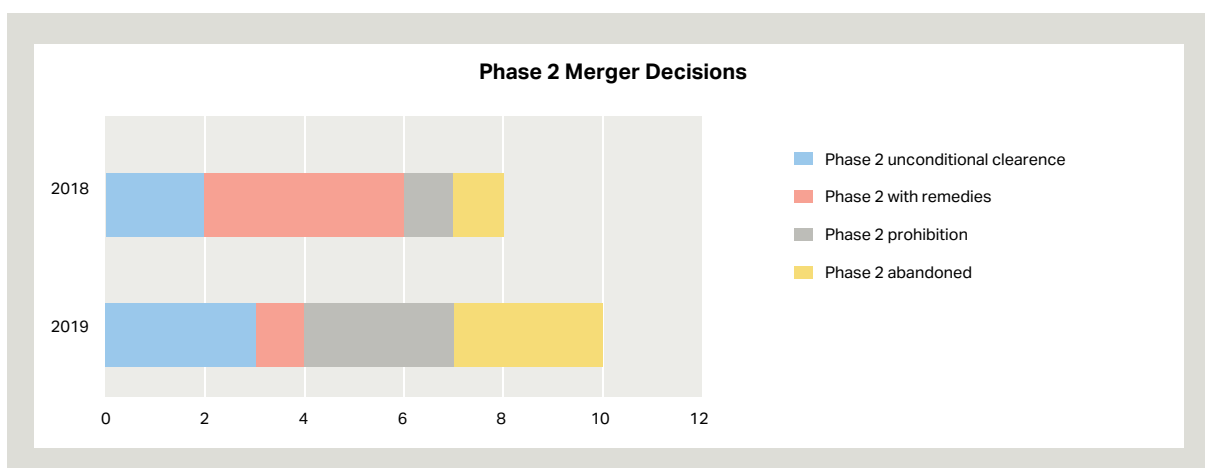
¹ The statistics presented in this briefing measure the CMA's activity between January and December 2019. This differs from the CMA's official annual statistics, which are compiled on the basis of its financial year (starting on April of each year).



The CMA adopted a more interventionist approach towards mergers in 2019 compared with 2018 as well. At Phase 1, the proportion of cases cleared unconditionally in 2019 (61%) was lower than in 2018 (72%). It also referred 15 mergers to Phase 2, representing a 50% increase on the previous year.



At Phase 2, three out of 10 cases were unconditionally cleared in 2019, compared with two out of eight cases in 2018. The proportion of transactions that were effectively blocked increased sharply: six out of 10 mergers subject to Phase 2 review were prohibited (or abandoned followed provisional prohibitions) in 2019, compared with two out of eight transactions in 2018.



According to its [draft annual plan](#) for this year, the CMA entered 2020 carrying an unprecedented number of Phase 2 merger investigations, as well as a record-level competition law enforcement caseload. At the time of publishing, the CMA has five ongoing Phase 2 merger investigations, 15 competition enforcement cases, one market study, and one market investigation. In addition, the concurrent sector regulators have a number of ongoing Competition Act enforcement cases, covering business parcel delivery (Ofcom), electronic communication equipment (Ofcom), digital smart meters (Ofwat), wholesale energy trading (Ofgem), as well as a number of market studies.

Focus on Digital Markets

Consistent with its [2019 objective](#) of promoting better competition in online markets, the CMA launched its [Digital Markets Strategy](#) in July 2019. This was a response to what the CMA sees as “profound changes being brought about by the digital economy,” requiring competition authorities to “develop a path that protects consumers while ensuring robust competitive and innovative digital markets.”² The CMA sought to tackle questions around companies’ use of data, whether certain platforms have market power or ‘gatekeeper’ status, the use of increasingly sophisticated technology to target advertising, and the risk of ‘killer acquisitions’. The CMA set out several priority areas, including: (i) a [market study on online platforms and digital advertising](#) (also launched in July 2019), (ii) a review of the CMA’s approach to reviewing digital mergers, (iii) policy work to consider a possible ‘digital markets unit’, (iv) proposals to reform interim measures and other enforcement tools to enable swifter action, and (v) cooperation with international agencies.

On 18 December 2019, the CMA [published](#) its interim report on online platforms and digital advertising. Although it is not currently minded to make a market investigation reference, it is considering a range of recommendations to improve competition in the sector, including an enforceable code of conduct, rules to improve transparency and give users greater control over their data, and requirements on Google and Facebook to provide data access and interoperability to rivals. The CMA is required to publish its final Market Study Report by 2 July 2020.

Increased Public Interest Interventions

In 2019, the Government intervened in five transactions on public interest grounds, the most interventions in a single year since the Enterprise Act 2002 came into force. The [first of these](#) was in relation to acquisitions by the same Saudi investor of 30% stakes in Lebedev Holdings (the majority owner of the Evening Standard newspaper) and Independent Digital News and Media (a provider of media content to independent.co.uk).³ The Secretary of State issued a PIIN on media plurality grounds due to concerns over editorial independence, freedom of expression, and accurate news reporting. In a judgment clarifying the statutory provisions governing public interest merger cases, the CAT [ruled](#) that the Secretary of State was time-barred from referring the case to Phase 2.⁴ The four other interventions involved the proposed acquisitions of Britain’s largest satellite company,⁵ of two UK-based aerospace and defence manufacturers,⁶ and of a UK supplier of precision-forged and machined components,⁷ all on national security grounds.

² See The CMA’s Digital Market Strategy Policy Paper, 3 July 2019

³ [International Media/Lebedev](#)

⁴ [Lebedev Holdings Limited and another v Secretary of State for Digital, Culture, Media and Sport](#)

⁵ [Connect Bidco/Inmarsat](#).

⁶ [Advent/Cobham and Improcross/Gardner](#)

⁷ [Aerostar/Mettis](#)

The increase in public interest interventions in the UK is consistent with a broader political interest around the world in merger control, as demonstrated by the introduction of many new foreign direct investment regimes, the strengthening of exiting regimes, and a greater willingness on the part of politicians to comment on mergers.⁸ The UK Government's reaction may also reflect increased foreign investment in UK companies. Indeed, the circumstances surrounding the interventions in 2019 are not dissimilar to those made in previous years.

Renewed focus on individual responsibility

In February 2019, the CMA issued [new guidance](#) on directors' competition disqualification orders ("CDOs").⁹ The new guidance aimed to make it easier for the CMA to secure director disqualification in competition cases, by simplifying the application procedure and creating greater incentives for directors to offer undertakings rather than face an application to Court. Following the publication of this guidance, the CMA pursued a series of director disqualification cases:

— On 26 April 2019, the CMA secured disqualification undertakings from two directors of concrete drainage maker CPM Group following CPM's admission that it breached competition law through price fixing and market sharing.¹⁰ The two directors are prohibited from being involved in managing any company based in the UK for seven and a half years and six and a half years, respectively.

— On 29 April 2019, the CMA accepted a competition disqualification undertaking from a former director of Saxons PS Limited following the CMA's decision that six estate agencies fixed commission fees for residential sales in Burnham-on-Sea.¹¹ The former director undertook not to be involved in the management of any UK company for five years. This follows undertakings given by two directors of CPM Group Limited in 2018 relating to the same investigation.

— On 10 May 2019, the CMA secured the disqualification of three directors following its finding of an infringement in relation to cover bidding in the supply of design, construction, and fit-out services in the UK. The three directors undertook not to be involved in the management any UK company for five years, two and a half years, and two years, respectively.¹²

These cases can be seen as part of a broader trend towards sanctioning individuals in an effort to achieve deterrence with competition rules. Lord Tyrie, in a February 2019 [letter to the Government](#),¹³ called for more individual responsibility in competition law enforcement, and suggested that CDOs should also be extended to consumer enforcement.

Penalties for failure to respond to information requests

In 2019, the CMA increased its enforcement activity in relation to failures to respond to formal information requests.¹⁴ The CMA found infringements in [AL-KO Kober/Bankside Patterson](#), [Rentokil/MPCL](#), [Sabre/Farelogix](#), all for failure to provide full responses to information requests by the CMA's deadline. The CMA

⁸ See, e.g., Federal Ministry for Economic Affairs and Energy, Altmaier and Le Maire adopt joint Franco-German Manifesto on Industrial Policy, 19 February 2019. See also N. Levy, D. Little and H. Mostyn, European Champions: Why politics should stay out of EU merger control, *Concurrences*, 2019

⁹ [CMA102 Guidance on Competition Disqualification Orders](#)

¹⁰ See <https://www.gov.uk/government/news/construction-cartel-directors-disqualified>

¹¹ See <https://www.gov.uk/cma-cases/residential-estate-agency-services-in-the-burnham-on-sea-area-director-disqualification>

¹² <https://www.gov.uk/government/news/3-directors-of-office-fit-out-firms-disqualified>

¹³ [Letter from Andrew Tyrie, CMA chair, to the Secretary of State for Business Energy and Industrial Strategy, 25 February 2019](#)

¹⁴ [Enterprise Act 2002, section 109.](#)

considered that, in each of these cases, there was a pattern of non-compliance by the relevant companies that merited imposing fines ranging from £15,000 to £27,000. This represents a sharp increase in enforcement cases relative to 2018, where the CMA did not find any such infringements.

This increase in enforcement cases comes on the back of the [CMA's guidance](#) published in January 2019 on requests for internal documents in merger investigations.¹⁵ The guidance states that the CMA intends shifting from making informal requests to using s.109 notices, which compel companies to respond within a prescribed deadline.¹⁶ It also clarifies the likely scope of information requests in merger investigations, including that the CMA may—at any stage of the investigation—request any document in the merging parties' possession that has been prepared, sent, or received by an officer or employee (including emails, internal analysis, instant messages, and handwritten notes). In 2019, the CMA issued increasingly burdensome document requests at early stages of its merger investigations, often extending to thousands of pages.

Guidance on merger remedies

In June 2019, the CMA published its Merger Remedy Evaluations [Report](#), part of a series of case evaluations conducted to develop the CMA's expertise, policy, and practice on merger remedies. The Report notes that its findings will be “used to inform the way in which the CMA approaches remedy design and implementation in subsequent cases.” It contains guidance on the types of remedies that the CMA is prepared to accept or may require. It confirms that structural remedies are generally preferred, and identifies lessons for the CMA, such as requiring “crown jewel” fallback remedies where there are doubts about the viability of a package, carrying out more thorough purchaser approval processes, and sticking to

clearly-defined timetables for divestitures. It also found that behavioural remedies could be acceptable, particularly in slow-moving and regulated industries, and encourages the CMA to make greater use of interim measures—such as hold-separate orders—to ensure that remedies can be implemented if needed later on. The CMA's consistent use of initial enforcement orders throughout 2019 suggests that it has taken on board this recommendation.

Expectations for 2020

As the CMA prepares for its new role as an independent global enforcer with expanded jurisdiction, to review transactions and conduct investigations in parallel with the European Commission, we expect that it will continue to strengthen its procedures and take a more interventionist approach in its assessment of mergers and antitrust cases. We expect that much of its energy will be devoted to strengthening its merger control regime, given the expected 50% increase in the number of merger cases from January 2021, many of which will be much larger mergers than the CMA has historically reviewed.

We also expect a sharp focus on digital markets. Authorities around the world have recognised the importance of coordinating their approach to these issues. In Germany, for example, the Ministry of Economics published its draft 10th amendment to the German Competition Act in 2019, which includes new requirements for companies with “paramount significance for competition across markets”. These are similar to some of the CMA's proposed requirements for companies with “strategic market status” in the UK, as well as those set out in the European Commission's [European Strategy for Data](#). We expect the CMA to continue working with international regulators to develop *ex ante* regulation to promote competition in digital markets.

¹⁵ [CMA100 Guidance on requests for internal documents in merger investigations](#)

¹⁶ [CMA 100, Guidance on requests for internal documents in merger investigations](#), paragraph 16: “The CMA's practice in relation to whether to request internal documents using informal or statutory requests has varied in previous investigations. To support the CMA's ability to carry out its statutory functions, which is dependent, in large part, on being able to rely on the accuracy and comprehensiveness of merging parties' submissions, the CMA is likely to use section 109 notices as standard in future investigations where internal documents are requested from main parties in both Phase 1 and Phase 2 merger investigations”

Judgments, Decisions, and News

Court Judgments

Tobii AV v Competition and Markets Authority.

On 10 January 2020, the CAT handed down its [judgment](#) on Tobii's appeal of the CMA's SLC decision and order requiring the full divestiture of Smartbox. Tobii appealed on five grounds. The CAT rejected most of these, including arguments that the CMA had failed to comply with its duty of procedural fairness, or that its approach to the collection of evidence, market definition, horizontal unilateral effects, and vertical customer foreclosure effects was unreasonable or irrational. The CAT upheld ground 5(b), however, finding that the CMA's theory of harm to competition due to partial input foreclosure did not have a sufficient evidential basis. The CAT agreed to quash these sections of the CMA's final report but concluded that "there is no realistic prospect" that the outcome of the case would be "materially different" if the CMA reached a different conclusion on that aspect because the CMA's horizontal competition and customer foreclosure concerns were well-founded and justified the divestiture order.

Antitrust/market studies

CMA Adds Party To Its Investigation Into Atlantic Joint Business Agreement.

On 16 January 2020, the CMA [announced](#) that it has added Aer Lingus to its Chapter 1/Article 101 TFEU investigation into the Atlantic Joint Business Agreement between American Airlines, members of International Airlines Group (British Airways and Iberia) and Finnair. The CMA expects to make a decision on whether to issue a statement of objections in early 2020.

CMA Fines Fender Europe For Restricting Online Discounting Of Guitars.

On 22 January 2020, the CMA [announced](#) its decision to impose a fine of £4.5 million on Fender Europe for online resale price maintenance in guitars. This is the largest-ever fine imposed in the UK for resale price

maintenance. In the course of its investigation, the CMA found that Fender sometimes applied pressure to retailers to raise their online prices, and that certain Fender employees tried to cover up their actions by recording as little as possible in writing. The fine was discounted by 60% under the CMA's leniency programme and by a further 20% to reflect settlement.

CMA Announces Settlement With Tiofarma Regarding Supply Of Fludrocortisone Acetate Tablets.

On 23 January 2020, the CMA [announced](#) that Tiofarma admitted that it took part in an agreement that resulted in significant price hikes for an essential medicine (fludrocortisone acetate tablets). This means that two out of the three companies under investigation by the CMA have now admitted that they illegally took part in an anticompetitive agreement. Tiofarma agreed to pay a maximum fine of £186,000 if the CMA finds that agreement breached competition law. The third company under investigation, Amilco, has not admitted liability, and the CMA's probe is ongoing.

ORR Opens Market Study Into Railway Signaling.

On 27 January 2020, the Office of Rail and Road ("ORR") [opened](#) a market study into the supply of rail signalling. The ORR will focus on the level of competition for the delivery of significant signalling projects to Network Rail, including the strength of competition for tenders, and whether there are any barriers to innovation or entry. The ORR will examine, in particular, whether there is fair and commercially reasonable access to interlocking technology, and other aspects of the installed railway infrastructure base, which are necessary to deliver complex signalling projects.

CMA Publishes Research And Working Papers In Funerals And Crematoria Market Investigation.

On 30 January 2020, CMA [published](#) research conducted by Ipsos MORI in relation to the CMA's market investigation into the supply of services by funeral directors at the point of need and the supply of crematoria services. The

updated overview of the CMA's key research and analysis can be found [here](#). The CMA expects to publish its provisional findings in April/May 2020.

Merger Developments

PHASE 2 INVESTIGATIONS

illumina, Inc./Pacific Biosciences of California, Inc. On 3 January 2020, the CMA [announced](#) its decision to cancel its Phase 2 investigation into the anticipated acquisition by Illumina of Pacific Bio following the parties' decision to abandon the merger.

DMG Media Limited/JPI Media Publications Limited. On 21 January 2020, the Secretary of State for Digital, Culture, Media and Sport [issued](#) a PIIN on the public interest ground of sufficient plurality of views in newspapers in relation to the completed acquisition by DMG Media of JPI Media. DMG Media owns newspapers such as the *Daily Mail* and *Metro*. The acquisition involves JPI Media's national newspaper *i*. This PIIN triggers the requirement for the CMA to report to the Secretary of State on jurisdictional and competition matters, and for Ofcom to report on media plurality. The CMA and Ofcom are due to submit their reports by 13 March 2020.

Prosafe SE/Floatel International Limited. On 30 January 2020, the CMA [issued](#) its provisional findings in Prosafe's anticipated acquisition of Floatel. Both companies supply semi-submersible offshore accommodation support vessels (ASVs) to oil and gas companies, which provide accommodation for employees working offshore. The CMA provisionally [found](#) that this transaction would result in the combination of the two largest, and each other's closest, competitors in the market for semi-submersible ASVs in North West Europe. The CMA provisionally found that these companies win the vast majority of contracts and have a combined share of supply in excess of 80%. The CMA also [issued](#) its Notice of Possible Remedies, finding that the only effective structural remedy is the prohibition of the merger. The CMA's final report will be issued by 23 March 2020.

PHASE 1 CLEARANCE DECISIONS

Platinum Equity LLC/Wesco Aircraft Holdings Inc. On 2 January 2020, the CMA [cleared](#) the anticipated acquisition by Platinum Equity LLC of Wesco Aircraft Holdings Inc. Platinum Equity is a global private equity investment firm specialising in mergers, acquisitions, and operations of companies in diverse industries. Wesco Aircraft Holdings is a leading global distributor and provider of supply chain management services in the global aerospace industry.

Hasbro Inc./Entertainment One Ltd. On 16 January 2020, the CMA [cleared](#) the anticipated acquisition by Hasbro Inc. of Entertainment One Ltd. Hasbro is a global toy, board game, and entertainment company. Entertainment One is multinational entertainment company specialising in the acquisition, distribution, and production of films, music, and television series.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision Due Date
Google LLC/Looker Data Sciences, Inc	13 February 2020
World Fuel Services Inc/UVair European Fuelling Services Limited	20 February 2020
Jacobs U.K. Limited/Wood Nuclear Limited	4 March 2020
McGraw-Hill Education, Inc./Cengage Learning Holdings II, Inc.	10 March 2020
Future Plc/TI Media Limited	16 March 2020
Hunter Douglas N.V./247 Home Furnishings Ltd.	20 March 2020
RHI Magnesita N.V./Kümaş Manyezit Sanayi A.Ş	23 March 2020
PepsiCo, Inc./Pioneer Food Group Limited	26 March 2020
Breedon Group plc/Cemex Investments Limited	TBC
Circle Health/BMI Healthcare	TBC
FNZ (Australia) Bidco Pty Ltd./GBST Holdings Limited	TBC
Takeaway.com N.V./Just Eat plc	TBC
viagogo/StubHub	TBC

Other Developments

CMA Notifies BEIS That Jacobs U.K. Limited/Wood Nuclear Limited Merger May Raise Public Interest Considerations. On 13 January 2020, the CMA [announced](#) that it had brought the anticipated acquisition by Jacobs U.K. Limited of Wood Nuclear Limited and affiliated companies to the attention of the Secretary of State for Business, Energy and Industrial Strategy under section 57 of the Enterprise Act 2002. The CMA considered that the transaction might raise public interest considerations, such as national security. Wood Nuclear Limited is an Aberdeen-based energy services firm, while Jacobs is a US engineering firm. In August 2019, Wood Nuclear Limited announced that it was selling its nuclear business to Jacobs U.K. Limited for £250 million.

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