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# Main Developments in Competition Law and Policy 2020: United Kingdom

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The legal impact of exiting the European Union after 47 years of membership, a growing focus on digital markets, and increasingly robust enforcement by the Competition and Markets Authority ("CMA") are among the defining developments in UK competition law and policy during 2020. In addition, as with many jurisdictions worldwide, the Covid-19 pandemic has had a significant impact.

**Brexit**

Following the expiry of the Brexit transition period at 23:00 GMT on 31 December 2020 ("Transition Period"), directly applicable EU law, including competition law, ceased to have effect in the UK. Consequently, Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") and EU merger control rules (EU Merger Regulation or "EUMR") no longer apply in the UK. However, EU competition law continues to apply to agreements and conduct of UK businesses after the Transition Period where there is an effect on trade within the EU.

Under a new section 60A of the Competition Act 1998, the CMA and the UK courts are required to ensure that there is no inconsistency between their decisions under UK competition law and EU law and the decisions of the CJEU before 31 December 2020. They must also have regard to the European Commission ("EC") decisions and statements before that date. However, they can depart from the principles of the TFEU and CJEU case law pre-dating 31 December 2020 where they consider it 'appropriate' to do so, in light of certain factors prescribed in section 60A. It is no longer possible for the UK courts to refer questions on the interpretation of EU law to the CJEU.

EU block exemptions relating to vertical agreements, motor vehicles, research and development, technology transfers, specialisation, liner shipping consortia, and road, rail and inland waterway transport under EU competition rules have been transposed into UK domestic law as retained EU law from 1 January 2021.

In December 2020 the CMA published final guidance on its functions after the end of

the Transition Period, covering merger control and antitrust, as well as consumer protection. The CMA's guidance contrasts between its powers in relation to 'live' cases initiated before but continuing after 31 December 2020, and cases initiated after this date. Key aspects of CMA's guidance are outlined below. These changes also apply to UK concurrent regulators' enforcement powers under the Competition Act 1998.

*Merger Control*

After 31 December 2020, the EC no longer has jurisdiction to review mergers with an effect in the UK, and UK national merger rules apply under the Enterprise Act 2002. However, mergers that also have an EU dimension may still need to be notified to the EC under the EU merger rules. Consequently, a merger may be subject to concurrent reviews by both the CMA and the EC. For EU merger proceedings initiated before the end of the Transition Period, the EC retains exclusive jurisdiction and the CMA is not entitled to examine the merger.

The EC retains jurisdiction over transactions impacting the UK market where the EU merger notification thresholds were met and which were notified to the Commission before 31 December 2020. Merger control decisions issued by the EC will be binding on any UK businesses involved in the procedure and any appeals will be reviewed by the EU courts.

There remains the potential for part or all of live merger investigations by the EC to be referred back to the CMA. The CMA could also take on the role of monitoring and enforcing EU remedies or undertakings agreed before the Transition Period ended that impact the UK.

If a merger had not been notified to the EC by 31 December 2020, the CMA can open its own UK domestic merger investigation after that date (under the Enterprise Act 2002), in parallel with any EU merger investigation (under the EUMR), where the CMA believes there is a realistic prospect that the deal may lead to a substantial lessening of competition in a UK market. Notification of mergers in the UK remains voluntary.

In its guidance, the CMA emphasises the importance of communication and cooperation with the EC where a merger is subject to parallel review under EU and UK merger control rules. The CMA will endeavour to coordinate merger reviews with the EC as well as other competition authorities.

*Antitrust*

EU competition law (Articles 101 and 102 TFEU) continues to apply to agreements and conduct of UK businesses after the Transition Period where there is an effect on trade within the EU. However, EU competition law no longer applies to effects on trade within the UK, in which case UK national competition law (Chapters 1 and 2 of

the Competition Act 1998) applies. Therefore the CMA and concurrent regulators will no longer enforce EU competition law after the Transition Period.

After the end of the Transition Period, the CMA can investigate suspected infringements of UK domestic competition law in relation to conduct in the UK both before and after 31 December 2020. The CMA may also take on the role of monitoring and enforcing EU commitments or remedies agreed before the Transition Period ended that relate to the UK.

The EC continues to be competent for antitrust cases in the UK initiated under EU competition law before 31 December 2020. EC decisions resulting from such investigations will be binding on the UK and any appeals will be reviewed by the EU courts, even after 31 December 2020.

If the EC formally initiated an antitrust investigation before the Transition Period ended, but the infringement continues in the UK after 31 December 2020, the CMA will have jurisdiction to investigate aspects of the infringing conduct that continues in the UK after 31 December 2020. There will therefore be a risk of parallel antitrust investigations by the EC and CMA where the CMA considers there is an effect on trade in the UK.

If no EU antitrust proceedings are formally initiated before the Transition Period expired, the CMA will have jurisdiction to investigate any conduct that affects the UK, even if the conduct occurred before 31 December 2020.

As regards the vertical agreements block exemption that has been carried over into UK law, the CMA has indicated in its guidance that, in certain circumstances, passive sales bans affecting sales to a UK market or UK customer are capable of falling within the scope of UK competition law and may be a hardcore restriction of competition.

Follow-on and standalone damages litigation claims arising from competition law infringements are also affected by Brexit. As explained in the CMA's guidance, follow-on damages claims based on EC infringement decisions may still be brought in the UK courts in respect of EC decisions made before 31 December 2020, or EC antitrust investigations that were live before 31 December 2020 (known as "continued competence cases") but concluded after this date. This includes EC cases that have not exhausted the appeals process. Standalone damages actions, on the other hand, can only be brought in UK courts after 31 December 2020 in relation to infringements of EU competition law that occurred before this key date. The ability of claimants to rely on infringement decisions of the CMA and UK concurrent regulators in pursuing follow-on damages claims in the UK are unaffected.

### Digital Markets

In November 2020 the UK government announced the creation of a new Digital Markets Unit ("DMU") within the CMA from April 2021. This follows recommendations in the Furman Report, published in 2019, and the CMA's own recommendations in July 2020 following its online platforms and digital advertising market study. In December

2020, the CMA published recommendations of the Digital Markets Taskforce ("Taskforce") for the creation and operation of a new digital markets regime that will be enforced by the DMU.

The Taskforce, which is led by the CMA and cooperates with the Office of Communications ("Ofcom") and the Information Commissioner's Office ("ICO"), was created in March 2020 to consult the UK government on how best to promote competition in digital markets.

The new proposed regime will apply to digital platforms that are considered as having 'strategic market status' ("SMS") and covers key areas including a legally binding code of conduct, market interventions, and enhanced merger control measures.

The Taskforce recommended creating an enforceable code of conduct for digital companies with SMS. The code would directly apply to activities that fall within the SMS category, with the ultimate aim of curbing conduct by dominant firms that could be anticompetitive or harm consumers. The DMU will have significant powers to enforce compliance with the code, including the ability to impose fines of up to 10% of a company's global turnover.

The DMU would also be authorised to carry out pro-competitive interventions ("PCIs"), intended to promote competition and innovation in the digital sector. In contrast to the CMA's existing market investigation powers, PCIs allow for a more dynamic and continuous assessment of digital market forces – with the aim of understanding the root cause of market power and any resulting competition concerns.

New enhanced merger control rules would enable the CMA to more closely scrutinise M&A transactions involving SMS firms. This includes a new mandatory and suspensory merger notification regime, and a more cautious legal test when looking at the likelihood of harm to consumers in order to address concerns about CMA's historic under-enforcement of mergers involving big tech firms. This important change, if implemented, would mean that UK merger notifications will no longer be voluntary for SMS companies where the new regime applies.

The DMU, which will work closely with regulators including Ofcom and ICO, will be responsible for providing guidance for categorising SMS activities. This will grant the CMA significant scope in influencing the DMU's approach to digital market investigations to fit its long term competition and consumer protection goals.

If implemented, these new powers will carve out a specific role for the CMA in digital enforcement, via the DMU, and likely increase its standing as a powerful standalone competition authority following Brexit. The UK government will consult on proposals for the new regime in early 2021 and plans to legislate to put the DMU on a statutory footing when parliamentary time allows.

These developments come alongside similar efforts at the EU level, within several EU member states, and worldwide, to tackle competition issues in digital markets.

## CMA's robust enforcement

*Disqualification of company directors for antitrust breaches*

During 2020 the CMA has continued actively pursuing individual sanctions for directors of companies found to have breached competition law. Under section 9A of the Company Directors Disqualification Act 1986, the CMA can seek a competition disqualification order ("CDO") where a company commits a breach of competition law and the director knew or ought to have known of the infringing behaviour. UK sector regulators with concurrent competition powers can also seek CDOs. The personal consequences of a CDO are severe, with the potential for directors to be disqualified from acting as a director or being involved in the management of a company in the UK for a period of up to 15 years.

The CMA, and sector regulators, can also accept legally enforceable competition disqualification undertakings ("CDUs") by directors. CDUs are written commitments given by directors implicated in competition law infringements to refrain from acting as a director or being involved in the management of a company for a period of time. The effect of a CDU is the same as a CDO, as are the consequences of breaching it. However, there are important benefits to offering a CDU – the CMA, or sector regulator, will not seek to recover its legal costs if the CDU is offered before court proceedings commence, and will usually consider a reduction in the disqualification period depending on when the CDU is offered.

So far, the CMA has secured at least 19 director disqualifications across industry sectors involving online retail, construction, estate agents and pharmaceuticals. The vast majority of these director disqualifications have been secured during 2019 and 2020, through CDUs, although 2020 saw the first-ever CDO case contested in court. That case was decided in the CMA's favour, in July 2020, and the estate agency director was disqualified for seven years and ordered to pay £100,000 in legal costs.

Further CMA disqualification cases are already pending. The CMA now routinely considers the possibility of seeking director disqualifications in antitrust cases, and its robust enforcement action is expected to continue in 2021 and beyond.

In seeking CDOs or CDUs, the CMA and concurrent sector regulators can rely on conduct found to have infringed EU competition law, in addition to UK competition law, before the Brexit Transition Period ended. Director disqualifications relating to conduct that occurs after 1 January 2021 will be based on infringement of UK competition law only.

*Increased merger control scrutiny*

The CMA's increasingly vigorous and proactive approach to merger control has continued apace during 2020, characterised by the CMA's preparedness to open in-depth Phase 2 merger investigations and to impose significant fines for breaches of interim measures. While UK merger notifications are voluntary (subject to new proposed merger control rules for SMS firms in digital markets, discussed above) the

CMA's robustness in 'calling in' and closely scrutinising transactions, and imposing what are in effect 'gun jumping' fines for breaching interim orders, can significantly increase commercial risks for M&A deals that meet the UK merger review jurisdictional thresholds but are not notified. The impact can be particularly severe where the transaction had completed and is subsequently forced to be unwound due to the CMA's prohibition decision, or where the CMA's merger block in the UK leads to the collapse of an international M&A deal.

*Growing number of blocked or abandoned mergers*

In 2020 the number of merger control reviews by the CMA has been on the rise, as have the number of mergers blocked or referred to Phase 2. For the CMA's FY2019-2020, over 30% of mergers investigated were either referred to in-depth Phase 2 review or required remedies to clear at Phase 1. Approximately 61% of mergers were cleared unconditionally at Phase 1 (compared to 72% in FY2018-2019), and 15% of cases at Phase 2 were prohibited, with 23% abandoned and 23% cleared unconditionally. 38% of Phase 2 mergers were cleared with remedies.

In the first 9 months of the CMA's FY2020-2021, between 1 April and 31 December 2020, over 45% of transactions were either referred to Phase 2 or cleared subject to conditions. Perhaps most worryingly, of the 9 mergers referred for in-depth Phase 2 review during this period, just two were cleared (one unconditionally, one subject to remedies), while three were prohibited and four were abandoned.

Measured another way, of the thirteen Phase 2 merger investigations the CMA concluded in the 2020 calendar year, four mergers were blocked (Sabre/Farelogix, JD Sports/Footasylum, Hunter Douglas/247 Home Furnishing, FNZ/GBST Holdings); six were abandoned (Illumina/Pacific Biosciences, Prosafe/Floatel International, McGraw-Hill/Cengage, Kingspan/Building Solutions, Taboola/Outbrain, Yorkshire Purchasing Organisation/Findel Education); and only three were cleared – two unconditionally (Bottomline Technologies/Experian and Amazon/Deliveroo) and one subject to remedies (Bauer Media).

Three of the CMA's 2020 merger prohibition decisions were challenged before the Competition Appeal Tribunal ("CAT") – in Sabre/Farelogix, JD Sports/Footasylum, and FNZ/GBST Holdings. The CAT judgment is still pending in the first case, which challenged the CMA's jurisdiction to review the merger and its substantive findings on competition. The second case was partially upheld in November 2020 on the basis of arguments that the CMA inadequately considered the impact of the Covid-19 pandemic on market conditions; in December 2020 the CAT refused permission for the CMA to appeal the judgment. In the third case, in December 2020, the CMA took the unusual step of admitting errors in its market share calculations and asking the CAT to remit the FNZ/GBST Holdings prohibition decision for reconsideration by the CMA.

In 2020 the CAT dismissed two further appeals, concerning CMA's Phase 2 merger prohibitions issued in 2019: Tobii/Smartbox and Ecolab/Holchem. This underscores the difficult task parties face in challenging CMA merger prohibitions on judicial

review grounds before the CAT.

Even cases cleared unconditionally at Phase 2 courted controversy – the Amazon/Deliveroo deal involved only a minority shareholding acquisition, initially raised 'failing firm defence' arguments relating to the Covid-19 pandemic, and the CMA unusually issued a revised provisional decision as its analysis of the transaction evolved.

The CMA's robust merger control enforcement continues in the new year. In January 2021, the CMA already prohibited TVS European Distribution's proposed acquisition of 3G Truck and Trailer Parts, while Tronox's anticipated acquisition of TiZir Titanium and Iron was abandoned after the CMA rejected remedies offered by the purchaser and referred the deal to Phase 2 review.

*Frequent use of interim measures*

Interim measures are used by the CMA to prevent or unwind pre-emptive action in M&A deals pending the conclusion of merger investigations. Such measures may include 'hold separate' orders prohibiting merging parties from taking any steps to integrate the businesses in such a way as to hinder their ability to act independently in any of the markets affected by the transaction. An Initial Enforcement Order ("IEO") is a type of interim measure issued during Phase 1 investigations, while Interim Orders ("IO") are used during Phase 2.

2020 saw continued frequent use of IEOs in mergers reviewed by CMA where the CMA believes that the businesses involved will take steps to or have effectively merged. For example, 32% of the 62 Phase 1 mergers investigated during CMA's FY2019-2020 involved interim measures. There have also been frequent use of monitoring trustees to prevent breaches of IEOs.

The CMA has not shied from enforcing compliance with its interim measures. In July 2020, the CMA imposed a record £300,000 fine in the JD Sports/Footasylum merger for a single breach of an IEO. That fine was subsequently withdrawn by the CMA, in October 2020, in light of issues raised on appeal before the CAT. However, in November 2020, the CMA did succeed in fending off a CAT judicial challenge against an IEO it imposed in the completed Facebook/Giphy transaction.

These developments show that, despite the voluntary nature of UK merger control notifications, parties whose M&A transactions meet jurisdictional thresholds for UK merger review may still be subject to restrictions pending clearance – and fines for non-compliance – reminiscent of 'gun jumping' rules in mandatory and suspensory merger regimes (such as the EUMR, and national merger control rules in most other jurisdictions). The CMA's robust approach to merger control is set to continue in 2021.

**Covid-19**

The Covid-19 pandemic has given rise to unprecedented issues around the need to produce, supply, source and transport essential products and equipment, including personal protective equipment and ventilators, and to ensure the continued supply of food and groceries to consumers, as well as a variety of other business continuity challenges in almost every sector. In many cases, this has necessitated competitors coming together to collaborate in a way that would normally raise competition law risks. The CMA, much like the EC and competition authorities in various EU member states, has sought to provide guidance to help provide businesses with greater legal certainty and assurances on how they can deal with these challenges within the bounds of competition law. Additionally, the UK government has implemented several statutory exemptions from competition law, on a temporary basis, in certain industry sectors.

*Antitrust*

In March 2020, CMA issued guidance for businesses on its general approach to enforcing existing competition law during the pandemic. The CMA states it will not take enforcement action where temporary, necessary measures to coordinate activities are taken by businesses in order to ensure the supply and fair distribution of scarce or essential products and services affected by the pandemic to all consumers. This could include joint production initiatives. However, the coordination must be:

- appropriate and necessary in order to avoid a shortage, or ensure security, of supply;
- clearly in the public interest;
- contribute to the benefit or wellbeing of consumers;
- deal with critical issues that arise as a result of the Covid-19 pandemic; and
- last no longer than is necessary to deal with these critical issues.

The key factor for the CMA is the potential for coordination to cause harm to consumers or to the wider economy. Where the coordination is necessary (for example) to ensure that essential supplies find their way to consumers or that key workers can travel safely to their place of work, it is unlikely that it would cause harm to consumers. This applies even if the coordination leads to a reduction in the range of products available to consumers so long as the reduction is necessary to avoid supply shortages of the relevant product or service.

The CMA's approach does not give a 'free pass' to businesses to engage in conduct that could lead to harm to consumers in other ways. Likewise, the CMA will not tolerate businesses that attempt to exploit the crisis as a 'cover' for non-essential collusion. The CMA's guidance only applies to enforcement action and does not protect against private litigation claims for perceived competition law breaches. However, conduct falling within parameters of this guidance is in practice unlikely to attract such claims given the extraordinary circumstances of the pandemic.

Additionally, the CMA established a dedicated Covid-19 Taskforce to rapidly tackle business practices that exploit the Covid-19 crisis by, for example, charging excessive prices or making misleading claims about their products. Complainants can use a

dedicated CMA email address to report suspected breaches of competition or consumer protection law relating to the Covid-19 situation.

From a consumer protection perspective, the CMA published guidance on the CMA's expectations of businesses whose provision of services to consumers has been impacted by the crisis.

In 2020 the CMA also launched a number of investigations into suspected competition and consumer law infringements and published communications targeting industries most susceptible to anti-competitive or unfair business practices during the Covid-19 pandemic, such as pharmaceutical, food and beverage, retail, nursery care, hospitality, travel and events.

Separately, the UK government temporarily relaxed UK competition rules, on public policy grounds, to enable cooperation among businesses in the grocery, healthcare, maritime transport, and dairy produce sectors in response to the Covid-19 pandemic. The measures were intended to help ensure the security of supply of groceries to consumers; to enable independent healthcare providers to support the National Health Service ("NHS") by expanding its capacity to respond to the Covid-19 crisis; to ensure the operation of passenger and freight crossing services across the Solent between the Isle of Wight and ports in mainland UK during the pandemic (including essential 'lifeline services' such as transportation of medical supplies or of residents to access healthcare); and to allow the dairy industry to collaborate to minimise waste of surplus milk and to prevent harm to the environment.

These measures were embodied in a number of Coronavirus Public Policy Exemption Orders ("Orders"). The Orders have variously come into effect in March and April 2020 to permit certain types of agreements, referred to as "qualifying activities". Agreements falling within the scope of the Orders are exempted from the prohibition on anti-competitive agreements, and thus provide more legal certainty for UK businesses than the CMA's non-sector specific guidance (see above). They also protect businesses from potential private litigation claims for perceived competition law breaches. However, the Orders do not exempt cooperation that is not in response to the Covid-19 crisis, and do not cover the direct sharing of prices or costs information among businesses; such conduct may still infringe competition law.

To be exempted under the Orders, agreements must be notified in writing to the Secretary of State. The Orders are temporary and apply for as long as they are considered necessary in light of the Covid-19 pandemic. Orders applying to the dairy products and grocery sectors ceased to have an effect in August and October 2020, respectively. The remaining Orders will stay in force until they are revoked.

*Merger control*

In April 2020, the CMA issued guidance on how it intends to approach merger assessments during the Covid-19 pandemic. Although the CMA's normal framework and procedures for such assessments continue to apply, the guidance sets out various practical concessions to difficulties posed by the pandemic, including case-by-case

adjustments. For example, cases may spend longer in the pre-notification process and, where companies are able the demonstrate that they are experiencing Covid-19-related issues in responding to requests for information, the CMA is not likely to impose penalties and may well choose to "stop the clock" where merging parties are struggling to provide information by the specified deadlines.

The CMA anticipates receiving a greater number of submissions asserting that businesses, at risk of failure due to Covid-19 disruption, could exit the market if the merger in question did not go ahead. In response, the CMA prepared a summary of the principles (annexed to the wider guidance) setting out how it would assess such 'failing firm' claims, namely, where firms involved in mergers are failing financially and would have exited the market absent the merger in question.

To date, Covid-19 related arguments in support of UK merger clearance have been largely unsuccessful. For example, the CMA dismissed such arguments in JD Sports/Footasylum (although a judicial challenge on this point was upheld by the CAT, as discussed above), and in its ongoing review of StubHub/viagogo. In Amazon/Deliveroo, the CMA initially accepted a Covid-19 'failing firm defence' argument to provisionally clear the deal in April 2020. However, in June 2020, the CMA took the unusual step of revising its provisions findings after further analysis revealed the failing firm test would not be satisfied. Ultimately, the deal was cleared unconditionally in August 2020 without needing to rely on Covid-19 failing firm arguments.

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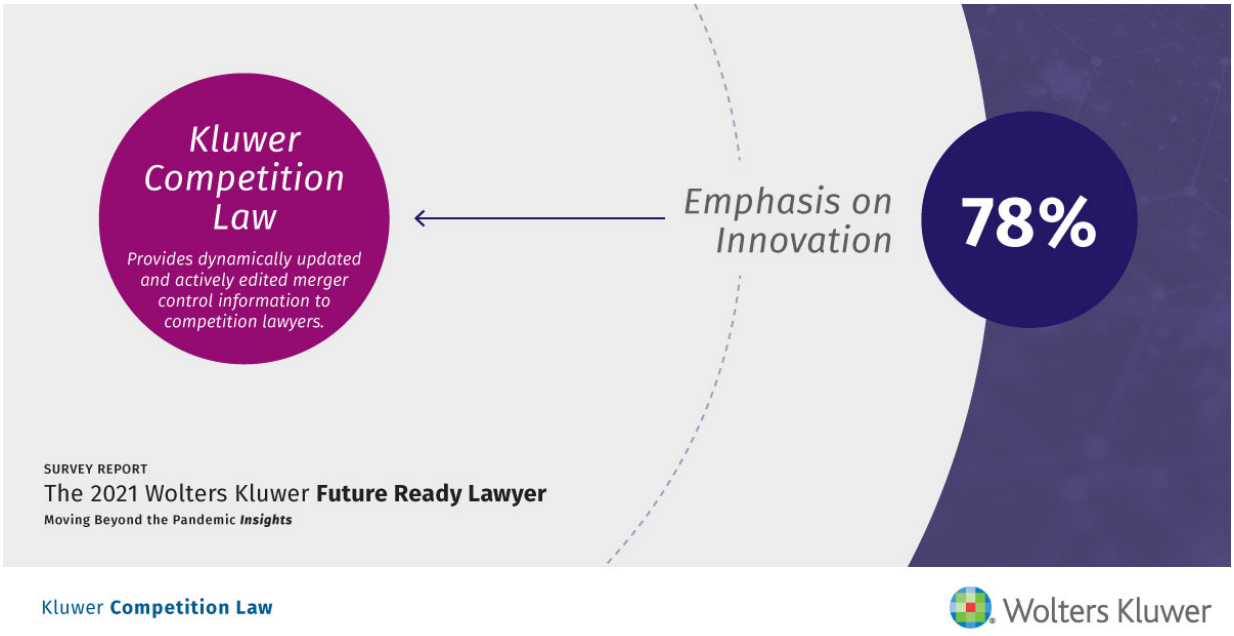


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