# Kluwer Competition Law Blog

## Main Developments in Competition Law and Policy 2021 – United Kingdom

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2021 was another busy year for the UK competition regulator, the Competition and Markets Authority ("**CMA**"), building on the previous year's focus on merger control, antitrust enforcement, and digital markets.  Heading into 2022, the UK's Competition and Markets Authority ("**CMA**") had 36 merger investigations, 14 competition enforcement cases, 13 consumer protection cases, three market studies and a market investigation underway. This increased workload reflects partly the fact that, post-Brexit, the CMA is handling a number of cases that would have previously been reserved for the European Commission.

Separately, in 2021, the UK Government conducted a number of public consultations on competition law reform proposals, whilst new standalone national security and investment rules that sit alongside the domestic merger control regime came fully into force in January 2022.

This paper seeks to provide a brief overview of these developments.

**Merger Control**

*Blocked and abandoned mergers*

In 2021, the proportion of mergers reviewed by the CMA that have been blocked or referred to in-depth Phase 2 investigation continued to grow.  For the CMA's 2020-2021 Financial Year (running from 1 April 2020 to 31 March 2021), almost 40% of mergers investigated were either referred to Phase 2 review or required remedies to clear at Phase 1. This is despite the number of new merger cases dropping by nearly 40%.  Only 47% of mergers were cleared unconditionally at Phase 1 (compared to 61% in Financial Year 2019-2020).  Of the Phase 2 mergers reviewed in Financial Year 2020-2021, 75% of transactions were prohibited, cancelled or abandoned, whilst only one Phase 2 merger was cleared unconditionally and 20% of cases were cleared subject to divestiture remedies.

In the first nine months of the CMA's Financial Year 2021-2022, between 1 April and 31 December 2021, just over 24% of transactions were referred to Phase 2 or cleared subject to conditions, and some 65% of mergers were unconditionally cleared at Phase 1. Of the four mergers referred for a Phase 2 investigation during this period, only one was cleared unconditionally (Liberty Global/Telefónica), whilst another was cleared subject to extensive divestiture remedies (FNZ/GBST), and two were prohibited (remittal decision in JD Sports/Footasylum; and Facebook/Giphy . Facebook (now Meta) appealed the merger prohibition to the Competition Appeal Tribunal in December 2021.

The CMA has favoured the use of divestiture remedies in Phase 2 investigations during 2021. In StubHub/Viagogo, the CMA required all of the target business outside North America to be divested; while in FNZ/GBST the CMA required FNZ to sell GBST to an independent third party approved by the CMA with a right to subsequently buy back a limited set of assets.

*Interim measures*

The CMA routinely uses interim measures to prevent or unwind pre-emptive action pending the conclusion of merger investigations. An Initial Enforcement Order ("**IEO**") is a type of interim measure issued during Phase 1 investigations, whilst Interim Orders ("**IO**") are used during Phase 2. During 1 April to 31 December 2021, 60% more IEOs were used at Phase 1 compared to Financial Year 2020-2021.

During 2021, the CMA imposed record fines for IEO breaches. In August 2021, the CMA fined ION Investment Group £325,000, having found that the merger parties presented themselves as an integrated business – in breach of an IEO – before merger clearance was given. In October 2021, the CMA fined Facebook (now Meta) £50.5 million for breaching IEO terms in the *Facebook/Giphy* merger.

The fine imposed in *Facebook/Giphy* followed an unsuccessful attempt by Facebook to challenge before the Competition Appeal Tribunal ("**CAT**") the terms of the IEO for unduly restricting the parties' global rather than UK-only business operations. Facebook's further appeal to the Court of Appeal was unsuccessful in May 2021 and the terms of the IEO were upheld.

*Rigorous competition assessment*

In addition to penalising IEO breaches, the CMA is taking a tougher stance on the substantive assessment of mergers. Relevant in this context is also the joint statement by the CMA, the Germany's Bundeskartellamt and the Australian Competition and Consumer Commission ("**ACCC**"), in April 2021, which stressed the importance of effective, rigorous merger control as a means of ensuring good outcomes for consumers and the economy. In particular, the authorities were concerned that so-called 'killer acquisitions' in digital markets, which eliminate technology start-ups which could otherwise grow to become formidable competitors, may tip the market in favour of an established technology firm and entrench its market position over the long-term. This in turn may reduce competition, adversely impact innovation and service quality, increase prices, and lead to consumer harm.

The CMA, ACCC and Bundeskartellamt also recognised that weakened economic conditions following the COVID-19 pandemic could conceivably lead to an increase in valid failing firm claims, but stressed the need to focus on the long-term consequences of potential mergers, and that the pandemic was not a reason to lower the standard for accepting failing firm claims. The pandemic prompted unsuccessful "failing firm" arguments in the JD Sports/Footasylum merger, concerning the impact of COVID-19 on consumer behaviour and future competition. The CMA was generally sceptical of the pandemic's impact on Footasylum's business and found that the target business was in good financial health despite the impact of COVID-19.

Reflecting its tougher stance on the substantive assessment of mergers, the CMA revised its Merger Assessment Guidelines in March 2021. Given the changing economic landscape over the preceding decade since the publication of the previous version of the Merger Assessment Guidelines, the new guidelines incorporate updated illustrative examples of when a substantial lessening of competition might occur. The CMA is now also taking a more dynamic approach to assessing mergers by considering not only how firms compete today but also how competition might be expected to develop. This could include, for example, considering the firms' development strategies as well as whether the firms might have the potential to become competitors in the future. The CMA has been applying this dynamic assessment approach in recent investigations, such as Facebook/Giphy.

Separately, as noted earlier, acquisitions in the UK are now also facing increased scrutiny by virtue of the implementation of the National Security & Investment Act 2021 (the "**NS&I Act**") which came into full effect on 4 January 2022. Under the NS&I Act, the UK Government Department for Business, Energy & Industrial Strategy ("**BEIS**") has powers to scrutinise potential or completed acquisitions and ultimately prohibit them on the basis of national security concerns. This is discussed in more detail later in this note.

*Reform proposals*

The UK Government has proposed reforms to enhance the competition law and consumer law enforcement powers of the CMA. The proposals include changes to jurisdictional merger thresholds which must be met before the CMA has power to review a UK merger. The UK target turnover threshold would increase to £100 million (from £70 million). Additionally, a new jurisdictional threshold is proposed that would allow the CMA to review a merger where *either* party has annual UK turnover of £100 million *and* at least a 25% share of supply of particular goods or services in the UK. This change, if implemented, is likely to lead to an increase in the number of acquisitions or joint ventures that come under regulatory scrutiny, not least in relation to larger companies with strong market positions acquiring start-ups (or forming or gaining control over joint ventures involving a start-up). In addition, with a view to tackling so-called 'killer acquisitions, the UK Government has put forward proposals for a special merger regime that would apply to certain acquisitions in the digital sector. This is discussed in more detail, in the section on *Regulation of Digital Markets*, later in this note.

**Antitrust**

From 1 January 2021, only UK competition law (Chapters 1 and 2 of the Competition Act 1998 ("**CA98**")) applies to agreements and conduct of businesses that have an effect on trade within the UK. The CMA and concurrent regulators can no longer enforce EU competition law in the UK. Of course, that does not affect the application of EU competition law (Articles 101 and 102 TFEU) which continues to apply to agreements and conduct of UK businesses where this might have an effect on intra-EU trade.

*Digital markets*

Enforcement of potential abuses in digital markets has been a key priority of the CMA. During 2021 the CMA launched new investigations into three major global digital firms – Google, Apple and Meta (previously called Facebook) – in relation to potential competition law infringements. These investigations are being conducted by the CMA. In this regard, it should also be noted that a dedicated Digital Markets Unit was created in April 2021 as part of a new UK regime for regulating digital markets (see *Regulation of Digital Markets*, later in this note).

*Sustainability and UK's transition to a low carbon economy*

The CMA's work also involves supporting the UK's transition to a low carbon economy. In July 2021, the CMA published a final report on its high-profile market study into the electric vehicle charging market. Although the CMA did not refer the market study for a full market investigation, it did set out several recommendations to help ensure greater market investment, to promote effective competition, and build trust in the electric vehicle charging sector. In particular, the CMA found that measures would be needed to ensure a national network of electric vehicle chargepoints is in place to meet the 2030 ban on the sale of new petrol and diesel cars.

The market study also led to an antitrust investigation into long-term exclusive arrangements between a leading chargepoint operator and three major motorway service area providers. The CMA expressed concerns about potential foreclosure of competing operators from entering the market and potentially impeding rollout of the UK Government's Rapid Charging Fund – an initiative designed to assist with upgrading infrastructure and connections into the electricity grid for electric vehicle charging sites. The investigation has led to the parties offering undertakings to address the CMA's competition concerns.

In January 2021, the CMA published guidance to help businesses and trade associations understand better how competition law applies to sustainability agreements. The guidance outlines considerations that businesses should take into account when entering into sustainability agreements and sets out the legal framework for assessing compatibility of sustainability initiatives with competition law.

Separately, as part of its consumer protection remit, the CMA published in September 2021 a so called 'Green Claims Code', to help businesses comply with consumer protection legislation when making environmental claims about goods and services. Also in September 2021, the CMA opened a consultation on how the competition and consumer regimes can support better the UK's Net Zero and sustainability goals. The CMA has sought views from industry on how legal frameworks restrict or block initiatives that might support the UK's Net Zero and sustainability goals, suggested legislative changes to support these goals, and any policy tools that could be used to support these goals. The outcome of this consultation is expected in early 2022.

*Other notable investigations*

The pharmaceuticals sector remained a key focus for the CMA in 2021. In the market for supply of hydrocortisone tablets in the UK, the CMA imposed over £260 million in aggregate fines after it found anticompetitive market sharing agreements had been entered into between a pharmaceutical company supplying the National Health Service and two of its competitors to ensure they stayed out of the market. The CMA also found breaches of Chapter 2 of CA98 involving excessive pricing.

In 2021, the CMA also launched new investigations into potential competition law infringements under Chapter 1 of the CA98, including capacity sharing agreements for driver accompanied freight shipments between Dover and Calais and, separately, in relation to the sale of Leicester City Football Club-branded products and merchandise.

*Director disqualifications*

The CMA has continued to pursue director disqualifications, holding responsible business directors for their involvement in competition law breaches.

In March 2021, two former company directors were disqualified, over an 11- and 12-year period, for their involvement in a concrete products cartel. Elsewhere, the CMA secured the disqualification of three company directors involved in a roofing materials cartel. The disqualification periods range from 3 to 6.5 years.

*Damages claims and private enforcement*

Opt-out class actions in competition cases, which involve a court-approved group of claimants seeking damages from parties alleged to have breached competition law, have gathered pace during 2021. This trend is set to continue in 2022. In 2021, the CAT certified four mass actions involving payment card interchange fees *(*Merricks v Mastercard*)*, landline telephone services (Le Patourel v BT), and two related claims involving train fares (Gutmann v South Western Trains and London & South Eastern Railway), which together involve claims worth approximately £12.6 billion.

At the start of 2022, a further 10 such collective proceedings were before the CAT, including five proceedings where hearings had concluded and judgments were awaited. These mass actions involve claims against major corporations across a range of industries including technology, financial services, commercial vehicles, and maritime and rail transport. As the UK's mass actions regime develops, focus is expected to shift away from "certification" (i.e. court approval) of opt-out collective proceedings, to substantive legal arguments at trial about causation, quantum, and applicable defences, often involving complex economic analysis.

*Reform proposals*

The UK Government has proposed reforms to enhance the competition law and consumer law enforcement powers of the CMA.  Proposals include refining the CMA's leniency programme to allow businesses that self-report competition law infringements to secure not only immunity from fines, prosecution and director disqualification (as at present) but also immunity from private damages actions by third parties. Given the rise of private damages claims, this change is intended to be a key incentive for businesses to engage with the CMA in its investigations and self-report any suspected competition law infringements. The Government is also consulting on plans to increase sanctions for non-compliance with information requests by increasing administrative penalties and expanding personal liability (including potential disqualification) for company directors.

There is also a range of proposals to empower the CMA to use consumer protection enforcement more effectively to promote positive outcomes for consumers. Presently, the CMA must apply to court for an enforcement order against a company for consumer law infringements. The proposals would allow the CMA to determine, without court order, when consumer law has been infringed and to fine companies up to 10% of global turnover – mirroring the CMA's existing antitrust enforcement powers. The Government is also planning to introduce administrative penalties for non-compliance with information requests in consumer protection investigations. A scheme is also being considered that would allow consumers to bring collective damages claims for breach of their consumer rights.

The consultation period ended on 1 October 2021 for responses to the proposals. The CMA's own consultation response, published on 4 October 2021, welcomed the proposed changes.

*Block exemptions post-Brexit*

Following the UK's departure from the EU, a range of EU block exemption regulations relating to horizontal agreements, vertical agreements, motor vehicles, research and development, technology transfers, specialisation – and other areas – were transposed into UK domestic law as retained EU law. In November 2021, the CMA announced a review of two retained horizontal block exemption regulations ("**HBERs**") ahead of their expiry on 31 December 2022, as well as related horizontal cooperation guidelines. According to its consultation, the CMA is interested in understanding whether the HBERs have contributed to promoting competition and have increased economic activity that benefits consumers in the UK that would not otherwise have occurred. Further, the CMA would like to ascertain if conditions for block exemption are sufficiently clear and whether the market share thresholds that apply remain appropriate. The CMA's consultation ended in January 2022 and is running in parallel with the EU's review of the two HBERs and horizontal cooperation guidelines.

Separately, in November 2021, the CMA recommended that the retained vertical block exemption regulation ("**VBER**") be replaced, after it expires on 31 May 2022, with a revised UK-specific regime – the Vertical Agreements Block Exemption Order ("**VABEO**"). The EU is separately revising its own VBER and the UK's new VABEO is expected to largely align with EU's revisions albeit with some divergence. For example, UK's VABEO is expected to take a more permissive approach than the EU in relation to dual distribution, but a stricter approach to wide 'most favoured nation' clauses ("**MFNs**") which will be prohibited as "hardcore" restrictions. Narrow MFNs will remain exemptible both in the UK and the EU.

**Regulation of Digital Markets**

The UK is preparing to introduce a new 'pro-competition' regime for digital markets to be overseen by the new Digital Markets Unit ("**DMU**") that was established in April 2021 and sits within the CMA. The DMU is currently a non-statutory body. However, the UK Government plans to provide the DMU with a statutory footing and has been consulting on the powers it should be given to carry out its functions.

The DMU's main task will be to regulate businesses it deems to have "strategic market status" ("**SMS**"). SMS businesses will be expected to comply with bespoke codes of conduct and pro-competitive interventions ("**PCIs**"). The SMS regime is expected to be limited in scope to activities where digital technologies are a core component of the products and services provided. The codes of conduct will contain legally enforceable provisions applicable to SMS businesses. Under current proposals, the DMU will have powers to impose financial penalties of up to 10% of a firm's worldwide annual turnover for code breaches or failure to comply with PCI or code orders. The DMU would also have powers to impose interim code orders, so it can act swiftly to address non-compliance. The Government is also considering measures involving personal liability for senior management akin to the director disqualification regime.

*New merger rules proposed*

Special merger control rules are proposed that would oblige SMS designated firms to give the CMA advanced notice of all imminent merger activity, creating greater scope to review transactions involving target businesses that have either assets, revenues, users, employees, R&D activities or a legal presence in the UK. Under the proposals, the CMA would have jurisdiction to review transactions that meet a certain transaction value threshold and have a UK nexus. A subset of the largest SMS transactions would be subject to mandatory merger review. The legal test for launching in-depth Phase 2 review of SMS mergers would also be lowered.

Such new merger control rules could significantly increase the compliance burden for SMS businesses. Accordingly, their introduction is likely to lead to firms strongly resisting SMS designation whether by means of an appeal against such designation at the CAT or by means of a request to the DMU for an early 'release' from such designation.

*Collaboration among enforcement authorities*

The DMU and its proposed new powers reflect a wider trend amongst competition authorities in tackling – sometimes in conjunction with other regulators – anti-competitive practices in digital markets and preventing so-called 'killer acquisitions' from taking place.

In November 2021, the CMA hosted the first meeting between heads of G7 competition authorities, and competition authorities from certain other jurisdictions, to increase collaboration on competition enforcement in digital markets. As part of the UK's G7 presidency in 2021, the CMA led on the publication of a compendium, that provides an overview of how competition authorities are collaborating to promote competition in digital markets including opening investigations, conducting studies or bringing enforcement actions to address concerns about digital firms' market strength. While the compendium is a one-off exercise, the competition authorities involved are committed to continuing these discussions and work, either through the G7 or other international fora.

Also in November 2021, the UK's Digital Regulation Cooperation Forum (consisting of the CMA, Information Commissioner's Office, Office for Communications, and Financial Conduct Authority) launched a technology horizon scanning programme to ensure a greater level of cooperation between these organisations given the unique challenges posed by regulation of online platforms.

**New National Security and Investment Regime**

The NS&I Act received Royal Assent on 29 April 2021 and came into full force on 4

January 2022. It introduced a standalone hybrid mandatory and voluntary/call-in system (which can also apply to certain foreign-to-foreign transactions) that is administered by BEIS rather than the CMA. Although the NS&I Act does not itself involve competition law assessment, its requirements may need to be considered alongside the UK's existing merger control regime by businesses engaging in M&A activity that has a UK nexus.

*Mandatory regime*

Mandatory pre-notification requirements apply to share transactions (or acquisitions of voting rights) where (i) the target is active in a 'key sector' and (ii) the share acquisition is of 25% or greater in any 'qualifying entity' (or equivalent levels of voting rights and/or the ability to block resolutions governing the affairs of the company) or involves the acquirer moving from one level of control (e.g. 25%) to a higher level of control (e.g. over 50%)). This can include minority stake acquisitions and certain group reorganisations.

A 'qualifying entity' is broadly defined and includes any company, limited liability partnership, other body corporate, partnership, unincorporated association or trust. The 17 designated 'key sectors' for mandatory notification are: advanced materials; advanced robotics; artificial intelligence; civil nuclear; communications; computing hardware; critical suppliers to government; cryptographic authentication; data infrastructure; defence; energy; military and dual-use; quantum technologies; satellite and space technologies; suppliers to emergency services; synthetic biology; and transport. Each 'key sector' is subject to a detailed definition (sometimes including bespoke thresholds). Some of the definitions are wide, and so consideration is required on a case-by-case basis.

Over and above considerations about the appropriateness of a merger notification to the CMA, businesses involved in NS&I regulated transactions that relate to a designated key sector now also need to consider carefully whether a mandatory notification should be made to BEIS. Failure to obtain clearance before completing a transaction falling within the mandatory regime could result in the transaction being deemed void, as well as criminal sanctions (imprisonment of up to five years) and civil penalties (of up to 5% of worldwide turnover or £10 million – whichever is greater).

*Voluntary/call-in regime*

A transaction that does not fall within one of the 17 key sectors does not require mandatory notification, but may be notified voluntarily if the parties are nonetheless concerned about national security issues arising. If a transaction is not notified voluntarily, it may be 'called-in' for a national security review by BEIS at any point within five years of completion. The 'call-in' power also applies retrospectively to transactions that were completed between 12 November 2020 and the commencement date (4 January 2022), albeit this power will be used on an exceptional basis where the transaction was completed before the new regime entered into force. There are no civil or criminal penalties if a transaction is called-in post-completion unless it falls within the mandatory notification thresholds, but an unexpected BEIS intervention could, nonetheless, have an adverse impact on the timing or commercial rationale of a transaction.

The voluntary/call-in regime applies to a wider range of transactions than the mandatory notification regime in that, in addition to the share/voting rights acquisition thresholds mentioned above, it also includes the acquisition of 'material influence' (i.e., below 25% shareholding/voting interest). In addition to corporate acquisitions, the acquisition of certain rights or interests in 'qualifying assets' giving control or use in relation to the asset can be caught and may give rise to call-in powers being exercised. The definition of 'qualifying assets' is broad and includes land, tangible (moveable) property, and ideas, information or techniques which have economic value (e.g. designs, algorithms, databases, plans, drawings and specifications, software, trade secrets, source code, and formulae etc.).

*National security vs public interest regime*

It is worth clarifying that the NS&I Act sits alongside the existing "public interest" regime for mergers, which allows the Secretary of State to intervene in a merger on one or more public interest grounds under the Enterprise Act 2002. Accordingly, "public interest" mergers that do not involve national security considerations (e.g. media plurality, financial stability, public health emergencies) will continue to be assessed under the Enterprise Act with the CMA's involvement.

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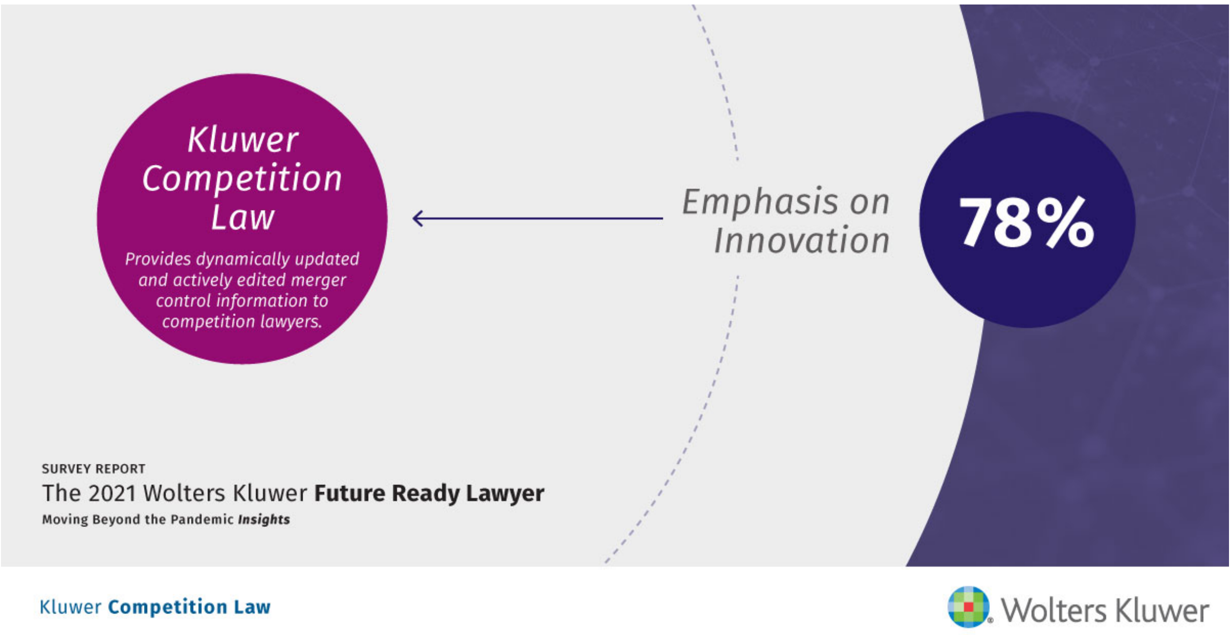


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