# Kluwer Competition Law Blog

## Main Developments in Competition Law and Policy 2022 – United Kingdom

Totis Kotsonis, Tadeusz Gielas (Pinsent Masons LLP) · Wednesday, April 5th, 2023

Competition law and policy developments in the UK have continued apace throughout 2022, ushering in several important changes to competition rules; further law reform proposals; a substantial caseload for UK's competition and sector authorities, as well as under the national security and investment screening regime, building on last year's developments; and a new UK subsidy control regime. Heading into 2023, the UK's primary competition regulator, the Competition and Markets Authority ("CMA"), had 32 merger investigations (including 5 in-depth or "phase 2" reviews), 13 competition enforcement cases, 7 consumer protection cases, three market studies and two market investigations underway. Since April 2022, the CMA issued two infringement decisions, imposing £72m in fines, as well as one commitments decision. In addition, four of the CMA's decisions have been appealed to the Competition Appeal Tribunal ("CAT"). This post provides a brief overview of these developments.

**Merger Control**

The UK has a voluntary merger control regime (under the Enterprise Act 2002 ("EA02"), meaning that the UK aspects of M&A transactions may legally close without prior CMA approval even where the turnover or share of supply threshold that gives rise to a notification right is met. However, the CMA may subsequently call in and investigate such mergers. If it determines that a merger will lead to a substantial lessening of competition, it can require part or all of the transaction to be unwound. The CMA's Mergers Intelligence Committee ("MIC") proactively screens for transactions that could be notifiable, On average this has led to around 13 cases in each of the past 5 years being called in for merger review.

*Blocked and abandoned mergers*

According to CMA data, during the CMA's 2021-2022 Financial Year (running from 1 April 2021 to 31 March 2022), 29% of mergers investigated were either referred to Phase 2 review or required remedies to clear at Phase 1 (compared to 40% in FY2020-2021), while the number of new merger cases reviewed increased by nearly 45% compared to the preceding financial year (55 cases, compared to 38 in FY2020-21). 60% of mergers were cleared unconditionally at Phase 1

(compared to 47% in FY2020-21). Of the seven Phase 2 mergers reviewed in FY2021-22, three transactions were prohibited, cancelled or abandoned; two mergers were cleared unconditionally; and two were cleared subject to divestiture remedies.

Measured differently, during the 2022 calendar year, the CMA completed the review of 49 Phase 1 mergers (of which 13 were referred for in-depth Phase 2 investigation) and 16 Phase 2 mergers (some of which continued from the previous calendar year). Of these sixteen Phase 2 mergers, 6 were prohibited (Meta/Giphy (remittal), Veolia/Suez, Dye & Durham/TM, CHC/Babcock, and JD Sports/Footasylum (remittal) involved completed acquisitions that had to be unwound, while Cargotec/Konecranes involved a proposed acquisition); 4 were cleared conditionally subject to divestiture remedies (Sika/MBCC, NEC Software Solutions/SSS, Carpenter/Recticel, Cellnex/CK Hutchison); and 3 were cancelled or abandoned (Shanghai Kington/Perpetuus, Ritchie Bros/Euro Auctions, and NVIDIA/Arm). Only 3 Phase 2 mergers were cleared unconditionally (London Stock Exchange/Quantile, NortonLifeLock/Avast, and Sony Music Entertainment/AWAL).

The CMA did not impose behavioural remedies during 2022, highlighting its ongoing preference for structural remedies to address competition concerns arising from mergers. In the global Sika/MCCC deal the target's entire UK business was divested; NEC Software Solutions and Carpenter/Recticel also entailed significant business divestments; while in Cellnex/CK Hutchison over 1,000 telecommunications tower sites were sold to address CMA's competition concerns. Notably, Sika and Cellnex both were '*fast-tracked*' to remedy negotiations with the CMA to help facilitate merger clearance, indicating the CMA's willingness to engage with transaction parties to resolve competition concerns more quickly during Phase 2 merger review.

*Rigorous assessment*

The CMA continues to enforce robustly merger control rules, raising some concerns about its perceived interventionism – including a broad approach to asserting jurisdiction over international M&A deals – and reluctance to accept behavioural remedies. In a recent speech, the CMA's CEO downplayed these concerns and expressed the view that digital sector mergers have historically been under-enforced. Indeed, mergers in the digital sector continue to attract close scrutiny (e.g. Meta/Giphy was ultimately prohibited following a protracted process and a partially-successful CAT appeal which culminated in the October 2022 remittal decision by the CMA (re)ordering the transaction to be unwound). It is also worth noting that two of the five Phase 2 merger investigations that the CMA opened during 2022 (Microsoft/Activision Blizzard, Viasat/Inmarsat, Copart/Hills Motors, Cochlear/Oticon, and Hitachi/Thales); involve the digital/technology sector (the first two).

Following the UK's departure from the EU ("Brexit"), transactions involving multinational businesses may be subject to parallel merger investigations by the CMA and the European Commission, increasing deal complexity, legal uncertainty, and the potential for divergent outcomes. For example, the Cargotec/Konecranes and Veolia/Suez mergers were prohibited by the CMA but conditionally cleared by the Commission. Sika/MBCC was cleared by both authorities subject to remedies. Microsoft/Activision Blizzard, Viasat/Inmarsat, and Hitachi/Thales, are all subject to parallel UK and EU merger reviews.

Additionally, acquisitions in the UK may now also face scrutiny on national security grounds

under the National Security & Investment Act 2021 (see discussion below).

*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. Almost twice as many IEOs were used at Phase 1 during CMA's FY2021-22 compared to the preceding financial year.

In February 2022, the CMA imposed two fines totalling approximately £6.2 million for breaches of interim measures, in two separate cases:

- Meta (formerly Facebook) was fined £1.5 million for failing to inform the CMA in advance of key staff leaving the company, in breach of the IEO. This was the second fine imposed on Meta in connection with the long-running Meta/Giphy merger review, which as noted above, was ultimately blocked and ordered to be unwound following a CAT appeal and a CMA remittal decision.
- JD Sports and Footasylum were together fined nearly £4.7 million for breaching an IO, by sharing commercially sensitive information without prior CMA consent, failing to immediately inform the CMA when this occurred, and failing to implement appropriate safeguards to prevent such information sharing from occurring in the first place. This was also the second such fine imposed in the JD Sports/Footasylum merger (although the first penalty, imposed in August 2020 for an IEO breach, was later withdrawn). Ultimately, this merger was also prohibited and ordered to be unwound following a CAT appeal and a CMA remittal decision.

*Reform proposals*

The UK Government consultation response on proposed reforms to enhance the competition law and consumer law enforcement powers of the CMA, published in April 2022, sets out the likely scope and content of forthcoming amending legislation. These latest proposals include changes to jurisdictional merger thresholds which must be met before the CMA has the power to review a UK merger, with some important changes to the initial proposals published in 2021.

In line with the original proposals, the UK target turnover threshold will increase to £100 million (from £70 million currently), and the alternative 25% share of supply jurisdictional threshold will remain. However, to improve the CMA's ability to scrutinise so-called "*killer acquisitions*" in fast-moving markets (e.g. technology and pharma sectors), the CMA will have additional jurisdiction to review mergers where an acquirer has *both* an existing share of supply of goods or services of 33% or more in the UK or a substantial part of the UK, *and* annual UK turnover of £350 million or more. These proposed thresholds have been raised substantially from the levels originally put out to consultation in 2021 (which were £100 million turnover and 25% share of supply, as for all other mergers). Additionally, this new 'killer acquisition' merger notification threshold will include a "*UK nexus*" criterion to ensure only mergers with an appropriate link to the UK are captured.

A small merger 'safe harbour' will also be introduced to prevent the CMA from being able to review proposed mergers where each party's UK turnover is less than £10 million. The proposed reforms will also provide for the 'fast tracking' of some merger review cases, and the CMA will also get new powers to enable it to accept competition commitments from buyers to resolve other merger review cases before the case progresses to an in-depth 'Phase 2' review stage.

The legislative changes will be brought about by the Digital Markets, Competition and Consumer Bill ("**DMCC Bill**"), which consolidates various legislative reforms of competition law and consumer protection law, and also creates a new legislative framework for the regulation of digital markets and operation of the Digital Markets Unit (see below for a discussion of the digital regulation regime). The DMCC Bill was first announced in May 2022 and was initially expected in 'draft' form, but in November 2022 the government said it would bring forward the DMCC Bill in the third parliamentary session – it is now expected in Spring 2023.

## Antitrust

From 1 January 2021, as a result of Brexit, 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. 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.

During 2022 the CMA and four sector regulators (Ofcom, PSR, Ofwat and ORR) together completed 10 antitrust investigations spanning a range of industry sectors. Five were resolved with commitments (in the digital, electric vehicle charging, water supply, rail transport, and maritime transport sectors), while penalties for competition law infringements were imposed in the remaining cases. The highest fines include £70 million imposed on Pfizer and Flynn Pharma for excessive pricing involving the supply of phenytoin sodium capsules; over £35 million imposed on pharmaceutical companies for anticompetitive conduct involving the supply of prochlorperazine tablets; and over £33 million imposed on five parties for market-sharing conduct in the prepaid cards sector – this was also the first antitrust case completed by the PSR (the payment systems regulator). The £70 million fine in the phenytoin case was levied after the CMA's original infringement decision in 2016 (which imposed a £90 million penalty) was successively appealed and remitted to the CMA for reconsideration; fresh appeals have already been lodged against the 2022 decision. The CMA's prochlorperazine infringement decision is also being appealed.

Four of the six new CA98 investigations opened during 2022 are in the digital sector (header bidding, online selling, app distribution, and ad-tech), adding to two existing cases against technology companies (app store exclusivity and advertising data). The remaining two investigations opened in 2022 involve the recycling of end-of-life vehicles (ELVs) and the production and broadcasting of sports content. Following Brexit, antitrust investigations concerning multinational businesses may involve parallel investigations by the CMA and the European Commission, increasing complexity and the potential for divergent outcomes. This particularly applies in the digital sector, but is not a given – the ELV investigation involves parallel UK and EU investigations and also marked the first time the CMA conducted antitrust dawn raids since the beginning of the Covid-19 pandemic.

As the number and complexity of investigations increased, so do appeals challenging the CMA's infringement decisions. Notably, in August 2022, the CAT set aside the CMA's infringement decision and £17.9 million fine against the price-comparison website, Compare The Market, finding that the CMA's market definition was flawed and that it failed to sufficiently demonstrate the digital platform's use of 'wide' most favoured nation (MFN) clauses (also known as 'parity clauses') had an anticompetitive effect. Additionally (as discussed below) the growing number of 'standalone' damages claims may encroach on issues pertaining to ongoing CMA investigations. To date the CMA has intervened in five cases, all but one involved the digital sector.

*Director disqualifications*

The CMA has continued to pursue director disqualifications, holding responsible business directors for their involvement in competition law breaches. In January 2022, one company director was disqualified for 4 years over his involvement in competitive conduct involving the supply of nortriptyline tablets. In September 2022, the CMA commenced High Court proceedings seeking the disqualification of seven company directors for their involvement in anticompetitive conduct concerning the supply of prochlorperazine tables.

*Damages claims and private enforcement*

Collective proceedings in competition cases, which involve a court-approved group of claimants seeking damages from parties alleged to have breached competition law, have continued to gain momentum during 2022. This trend is set to continue during 2023. In 2022, the CAT certified six mass actions involving maritime transport of motor vehicles (McLaren v MOL), LTE chipsets (Consumers' Association (Which?) v Qualcomm), trucks (Road Haulage Association v Man SE), app store arrangements (Kent v Apple Inc and Coll v Alphabet Inc), and train fares (Boyle v Govia Thameslink Railway), which together involve claims worth approximately £5.6 billion.

At the start of 2023, 27 collective proceedings were before the CAT in total, and a further four claims were announced but not yet filed. Of these 27 claims, 11 have been certified (granted a Collective Proceedings Order ("CPO") so they can proceed to trial), including those mentioned above, and a further six are listed for hearing to determine the CPO application. One further claim (Home Insurance Consumer Action v BGL), brought on a follow-on basis, was withdrawn in December 2022, after the underlying CMA infringement decision was set aside by the CAT following an appeal in August 2022 (see BGL v CMA). The vast majority of mass actions have been brought on an 'opt-out' basis. To date, only one CPO has been granted on an 'opt-in' basis, following a 'carriage dispute' between rival opt-in and opt-out claims arising from the same antitrust infringement (and that CPO ruling is being appealed). Of the collective claims awaiting certification, only two are opt-in actions.

The mass actions variously involve claims against major corporations across a range of industries including technology, financial services, commercial vehicles, rail transport, and consumer goods. A growing number of collective proceedings (whether opt-in or opt-out) are brought on a 'standalone' basis, meaning the claim must both establish the infringement and the resulting harm for which compensatory damages are sought. This contrasts with 'follow-on' actions, where the damages claimed are based on competition law infringement already established by a competition

authority. The CMA may seek to intervene in standalone claims that raise important or novel legal issues concerning competition law infringement that could have implications for the CMA's ongoing or future enforcement work.

Notably, no collective proceeding has yet progressed to trial and, even after a CPO has been granted, procedural steps leading to trial have often been disputed, while some CPOs have been appealed. However, as the UK's mass actions regime continues to develop, the focus will shift away from CPO "*certification*" (i.e. court approval) of collective proceedings, to substantive legal arguments at trial about causation, quantum, and applicable defences, often involving complex economic analysis. Additionally, in April 2022, the UK Supreme Court granted permission to appeal (R (on the application of PACCAR Inc v CAT) in a challenge to litigation funding agreements underpinning two rival mass actions involving the trucks cartel. The ruling, expected in the coming months, could significantly impact the collective proceedings regime in the future.

Individual damages claims may also be brought in the UK, outside the collective proceedings framework, and this has long been an active area of private competition law enforcement in the UK. In 2022, well over 300 individual damages claims were before the UK courts, the majority of which involve follow-on claims from various cartel decisions (most related to interchange fee infringements by Mastercard and Visa). Many of these cases have been transferred to the CAT from the High Court.

In June 2022 the CAT adopted a practice direction on "umbrella proceedings" to help streamline the consideration of cross-cutting issues relevant to different individuals and collect competition claims.

*Block exemption revisions*

Following Brexit, a range of EU block exemption regulations relating to vertical agreements, horizontal agreements (research and development agreements and specialisation agreements), motor vehicles, liner shipping consortia, and technology transfers – and other areas – were transposed into UK domestic law as retained EU law. These retained block exemptions are being revised and replaced with UK versions as they are due to expire.

- UK's new Vertical Agreements Block Exemption Order ("VABEO") came into force on 1 June 2022 and is accompanied by new guidelines that were finalised in July 2022, replacing the UK's retained EU law Vertical Agreements Block Exemption Regulation ("VBER") that expired on 31 May 2022. The VABEO sets out rules that provide safe harbours or 'block exemptions' for businesses to help ensure that their distribution, supply, and franchising agreements (known as 'vertical' agreements) comply with competition laws. New vertical agreements implemented on or after the 1 June 2022 commencement date must comply with the new rules from the outset, however, a one-year transitional period applies (until 1 June 2023) for existing vertical agreements that comply with the pre-existing vertical agreements block exemptions. The EU rules on vertical agreements were also replaced with revised new VBER and accompanying guidelines that apply in the EU, which are also in force from 1 June 2022 and likewise provide for a one-year transitional period. The UK and EU regimes are largely similar, but there are some important differences, e.g. concerning wide retail parity clauses, the maximum number of distributors per exclusive territory or customer group, and tacitly renewable (or 'evergreen') non-

compete obligations. Notably, the new UK rules will expire on 1 June 2028 while the new EU rules will expire on 31 May 2034, creating scope for greater divergence between EU and UK rules in the future once the UK rules are again reviewed leading up to mid-2028.

- New UK Horizontal Block Exemption Orders ("HBEOs") covering Research and Development ("R&D") Agreements and Specialisation Agreements came into force on 1 January 2023, replacing UK's retained EU law Horizontal Block Exemption Regulations ("retained HBERs") on R&D and Specialisation agreements which expired on 31 December 2022. Draft guidance accompanying the HBEOs is currently under consultation and will replace pre-existing EU guidance on horizontal cooperation agreements. This includes consultation on separate draft guidance concerning climate change and sustainability agreements. The HBEOs provide for a two-year transitional period (until 31 December 2024) for pre-existing R&D and Specialisation agreements that complied with the old rules. R&D agreements between "*undertakings competing in innovation*" – which are covered by a separate new test in the R&D HBEO – will have to comply with the new rules from 1 January 2024. The European Commission is separately updating its own R&D and Specialisation agreements HBERs and accompanying horizontal cooperation guidelines, that will apply in the EU. The Commission has extended the duration of existing EU HBERs and horizontal cooperation guidelines by 6 months, so they will now expire on 30 June 2023 instead of 31 December 2022, meaning that the new EU HBERs and horizontal cooperation guidelines will come into force on 1 July 2023.

- Proposals for a new Motor Vehicle Block Exemption Order ("MVBEO") in the UK are under consultation which first began in 2022. The new MVBEO will replace the retained EU law Motor Vehicle Block Exemption Regulation ("MVBER"), which expires on 31 May 2023 and sets out automatic exemptions for certain agreements concerning the purchase, sale and resale of spare parts for motor vehicles, as well as repair and maintenance services. The new UK rules, once finalised, will apply from 1 June 2023, and will be accompanied by revised guidance which is yet to be published. In a sign of potentially significant divergence between UK and EU rules, the European Commission has opted to extend the duration of the existing EU MVBER by 5 years, until 31 May 2028 without substantive amendment and instead plans to revise the accompanying EU guidelines to address how recent changes in motor vehicle sector (e.g. access to vehicle-generated data necessary for the provision of repair and maintenance services) should be taken into account when applying the existing EU MVBER.
- During 2022 the CMA began reviewing the retained EU law Liner Shipping Consortia Block Exemption Regulation ("CBER") to consider whether it should be replaced or varied when it expires on 25 April 2024 and published its initial recommendations to the government for consultation in early 2023. The CBER exempts certain agreements between liner shipping companies, allowing them to cooperate and provide joint services through 'consortia'; including the joint operation of liner shipping services, capacity adjustments in response to fluctuations in supply and demand, the joint operation or use of port terminals, and certain other ancillary activities. The CBER does not allow liner shipping companies to agree to fix prices, otherwise limit capacity or sales, or allocate markets or customers. Separately, the European Commission announced in 2022 that it is conducting its own review of the EU CBER.
- In the near future, the CMA is expended to consult also on proposals for replacing the retained EU law Technology Transfer Block Exemption Regulation ("TTBER"), which expires on 30 April 2026, with a UK version. In late 2022, the European Commission already launched its own process of revising the EU TTBER.

Critically, businesses that operate in both the UK and the EU will have to consider which of their

arrangements are subject to UK and/or EU rules and ensure that they comply accordingly, keeping in mind the possibility for even greater divergence in the future between the two regulatory regimes.

*Reform proposals*

The DMCC Bill (mentioned above) is expected to make important changes to competition law, reflecting the UK government's April 2022 consultation response. These include enhanced CMA investigatory powers during dawn raids of residential premises under warrant, a new duty not to destroy evidence in CA98 investigations, and a new regime for confidentiality rings in CA98 cases with fines for non-compliance. Maximum fines for failing to cooperate with CA98 investigations will increase sharply: businesses that fail to comply with statutory information requests (including providing incomplete or misleading information; or concealing, destroying or falsifying documents or information) will face fines up to 1% of their annual global turnover (up from a maximum £30,000 fixed penalty) and, additionally, could face daily penalties of up to 5% of daily global turnover for continued non-compliance (up from a maximum £15,000 daily penalty). Importantly, individuals will now also face fines, up to £30,000 (fixed penalty) and £15,000 (daily penalty) in this context. Further, businesses that breach commitments or undertakings, directions, orders or interim measures, will face civil penalties of up to 5% of a company's annual worldwide turnover, plus maximum daily penalties of up to 5% of daily global turnover while non-compliance continues.

The CMA's extraterritorial jurisdiction will also be extended so it can pursue infringements of Chapter 1 CA98 that cover "*agreements, concerted practices and decisions which are implemented outside of the UK, depending on the effects of the conduct within the UK*"; although this will not apply to abuses of dominance cases under Chapter 2 CA98. However, the *de minis* threshold for Chapter 2 cases will be reduced from £50 million to £20 million annual turnover, making it easier for smaller businesses to be investigated for abuse of a dominant position. In Chapter 1 cases, immunity will continue to apply to agreements (except for price-fixing agreements) where the combined turnover of all parties to the agreement is £20 million or less.

Other competition law changes include implementing a more challenging judicial review standard for appeals against CMA interim measures issued in the context of CA98 investigations, and giving the CAT jurisdiction to grant declaratory relief and discretion to award exemplary damages – although exemplary damages will not be available in collective proceedings. At the same time, the government has abandoned earlier proposals to allow businesses that self-report competition law infringements to secure immunity from private damages actions by third parties.

The DMCC Bill also contains 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 the court for an enforcement order against a company for consumer law infringements. The proposals would allow the CMA to determine, without a 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. Individuals can also be fined up to £300,000 for breaching consumer protection rules. In addition, the CMA will be able to require businesses to compensate consumers and make changes to their business practices to improve compliance.

The CMA will also obtain new powers to impose significant fines on businesses that breach consumer protection undertakings they have given or directions that the CMA has issued, and the power to impose substantial fixed and daily penalties on businesses as well as individuals for failing to comply with statutory information requests – these mirror the increased fines that can be imposed in CA98 investigations, as described above. New rules in relation to consumer subscriptions, and prohibiting fake online reviews of goods or services, are also proposed.

*Repeal of retained EU law*

The Retained EU Law (Revocation and Reform) Bill ("**REUL Bill**"), introduced to parliament on 22 September 2022, is designed to remove the special features of EU law that remain in the UK legal system following the end of the Brexit transition period on 31 December 2020. Under the REUL Bill, as currently proposed, large parts of 'retained EU law' will be repealed automatically on 31 December 2023 unless UK government ministers decide to preserve or replace them beforehand. 'Retained EU law' – former EU law that was incorporated into the UK legal system after Brexit – currently covers significant aspects of UK law.

The REUL Bill's impact on UK competition law is expected to result primarily to facilitating the UK courts' departure from retained EU case law, possibly leading to the loss of decades' worth of legal jurisprudence particularly in behavioural antitrust matters (e.g. on the assessment of anti-competitive agreements and abuse of dominance). The REUL Bill will insert a new subsection (10) in section 60A of the CA98 stating that "*Section 6(2) to (6) of the European Union (Withdrawal) Act 2018* ["EUWA"] *(which make provision similar to that made by this section) do not apply*". This means UK courts will no longer have a legislative basis for having regard to EU case law that came after the end of the Brexit transition period (from 1 January 2021 onwards). Section 6(2) of the EUWA currently provides that "*a court or tribunal may have regard to anything done on or after IP completion day* [end of the Brexit transition period] *by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.*"

The amended section 60A of CA98 will remain and continue to make provision for when the CMA (or a person acting on its behalf), and UK courts and tribunals may follow or depart from retained EU case law in competition cases. The impact on core UK competition law legislative provisions however is expected to be fairly limited for two main reasons:

- First; the UK has always had its own competition law regime as an EU member state: the CA98 is domestic UK legislation that (still) largely mirrors relevant provisions of the TFEU (but with respect to the UK rather than the EU), and the UK merger control regime (under EA02) was always separate from EU merger control rules (the EUMR); and
- Second, EU directly applicable regulations dealing with competition law that were transposed into UK domestic legislation as retained EU law (e.g. various block exemptions, as discussed above) have either expired or will soon expire and are being replaced with UK versions.

**Market inquiries**

Market studies and market investigations are regulatory tools, under the EA02, that enable the examination of certain markets to identify potential competition concerns (even if the antitrust

infringement is not suspected) and to make recommendations or take steps to address the concerns identified. The CMA as well as some UK sector regulators with parallel competition law powers may conduct a 'market study'. If serious competition concerns are identified during a market study, a 'market investigation reference' ("MIR") can be made, leading to a second, more in-depth, review known as a 'market investigation'. Only the CMA may conduct a market investigation and, depending on its outcome, the CMA has wide powers to impose a range of far-reaching remedies and orders, including structural changes. Statutory rules prescribe the procedural steps and timeframes that must be followed when a market study or investigation is carried out.

During 2022, the CMA completed three market studies, two involving the digital sector (mobile ecosystems and music streaming) and one concerning children's social care services. The CMA also progressed one existing market investigation (mobile radio network services) in 2022 and launched one new market investigation (mobile browsers and cloud gaming) in November 2022. Notably, the mobile radio network services market investigation was launched without a market study taking place (instead the CMA consulted on its proposals to make a MIR ), but the CMA's decision to make a MIR was upheld on appeal by the CAT in early 2022. Separately, the mobile browsers and cloud gaming market investigation aims to explore in-depth certain competition issues that emerged from the mobile ecosystems market study. However, CMA's launch of the market investigation has been appealed to by Apple. Additionally, in 2022, the CMA launched a new market study into the supply of road fuel within the UK, amid concerns over pricing increases in the sector.

These market studies and investigations all involve either digital markets or concerns about increasing cost pressures on consumers and taxpayers during the UK's ongoing cost-of-living crisis, in line with the CMA's focus described in its draft Annual Plan for 2023-24.

*Reform proposals*

The forthcoming DMCC Bill (discussed above) is expected to effect reforms that will allow the CMA to use its market study and market investigation powers more flexibly. For example, the CMA will be able to accept binding undertakings from businesses at any stage in market studies and market investigations. Also, if the CMA already has reasonable grounds to suspect 'adverse effects on competition' in a market, the CMA could more readily consult on a MIR directly, without first conducting a market study (as seen in the mobile radio network services market investigation). Other changes will enable the CMA to require businesses to 'trial' remedies before their final format are determined; and to amend remedies within a 10-year period after a finding of an adverse effect on competition, subject to an initial two-year cooling off period where the CMA cannot itself instigate remedy changes.

**Regulation of digital markets**

Since the Digital Markets Unit ("DMU") was established back in April 2021, as part of the UK government's proposed new 'pro-competition' regime for digital markets, it continues to operate in shadow form, within the CMA, pending the introduction of the DMCC Bill in parliament (see above for more detail about the DMCC Bill). The UK Government's consultation response, published in May 2022, on the proposed DMU regime indicates the likely scope and content of the

forthcoming legislation. While the Government response largely adopted initial proposals published in 2021, it also signalled some changes. Notably, the latest proposals narrow earlier plans for firms caught by the DMU regime (digital firms with 'strategic market status' or 'SMS') to inform the CMA of all imminent merger activity. Only the most significant transactions will now need to be reported, including where the SMS firm acquires over a 15% equity or voting share after the transaction; the value of the SMS firm's holding is over £25m; and the transaction meets the as yet undefined "*UK nexus*" test. The government also abandoned earlier proposals to lower the threshold for referring SMS firm mergers to a Phase 2 review. The parallel reform proposals for the wider UK merger control regime (see above) will also apply to the new SMS reporting requirements.

The DMU regime will broadly have the same objectives as the EU's Digital Markets Act regime, albeit with a more bespoke approach since the various conduct requirements under the UK regime will be tailored to address certain 'digital activities' of firms with SMS. A fuller assessment of the new regime and its potential impact on digital firms will be possible once the text of the DMCC Bill is published.

**National security and investment regime**

The National Security & Investment Act 2021 (the "NSIA") came into full effect on 4 January 2022, empowering the UK government to scrutinise potential or completed acquisitions and ultimately prohibit them on the basis of national security concerns. The NSIA introduced a standalone hybrid mandatory and voluntary/call-in system, which can also apply to certain foreign-to-foreign transactions, as explained in last year's udpate. At its inception, the regime was administered by UK Government Department for Business, Energy & Industrial Strategy ("BEIS"). However, following the reorganisation of certain government departments in February 2023, the NSIA is now administered by the Chancellor of the Duchy of Lancaster in the Cabinet Office.

Although the NSIA 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. In addition, while the CMA has no active role in administering the NSIA regime, under the June 2022 memorandum of understanding between the CMA and BEIS (which presumably remains in force despite the Cabinet Office taking over BEIs' role), the UK government could learn of NSIA notifiable transactions from the CMA, while the CMA could learn from the Government of transactions it may wish to review under merger control rules.

*Impact on transactions*

The NSIA has materially impacted the timing and deliverability of transactions in its first year in force. In the first three months of the regime's operation (4 January to 31 March 2022), 222 deal notifications were made under the NSIA of which 17 were called in by the government for further assessment. The 222 notifications comprised 196 mandatory and 25 voluntary notifications, and one retrospective notification.

The Secretary of State can impose 'final orders' on acquisitions to mitigate national security risks,

which can place conditions on a deal prior to its completion, block the deal altogether or unwind a completed transaction. While no final orders were made in the first three months of the regime, since June 2022 15 final orders were imposed, comprising 5 prohibitions and 10 behavioural remedy decisions. Additionally, since May 2022, three (publicly known) call-in notices were issued where no further action was taken by the government. The total number of call-in notices in 2022 (including those not made public) is likely to be substantially higher.

Of the five transactions prohibited by final order, two involved the military/dual-use sector (Beijing Infinite Vision/University of Manchester, and Super Orange/Pulsic), two were in the computing hardware sector (Nexperia/Newport Wafer Fab, and HiLight/SiLight), and one in the communications sector (LetterOne/Upp Corporation). It is noteworthy that the first-ever prohibition (Beijing Infinite) involved an asset transaction (IP licensing agreement) called in by the government for review which was not subject to the 'mandatory' notification regime. Separately, Nexperia involved a completed acquisition reviewed under the NSIA's retrospective provisions, which allow the government to 'call-in' transactions completed between 12 November 2020 and the regime's commencement date of 4 January 2022. Behavioural remedies imposed as part of the further 10 final orders were tailored to the specific circumstances of each case, although requirements to protect sensitive information or limit its disclosure appear most common.

In 2022, the government published new guidance to help businesses and practitioners alike gain a better understanding of how the new regime operates. This includes guidance for the higher education and research-intensive sectors, on new build downstream gas and electricity assets, compliance and enforcement, the regime's impact on people or acquisitions outside the UK, how the NSIA operates alongside other regulatory regimes, and various guidance notes. Further insights into case statistics, timeframes, outcomes, and emerging trends under the NSIA regime are anticipated in the next annual report, due for publication in mid-2023.

*National security vs public interest regime*

While the CMA does not administer the NSIA, it should be noted that the NSIA 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 EA02. Accordingly, "*public interest*" mergers that do not involve national security considerations (e.g. media plurality, financial stability, public health emergencies) continue to be assessed under the EA02 with the CMA's involvement.

**New subsidy control regime**

The Subsidy Control Act 2022 ("SCA") established a new UK subsidy control regime which came fully into force on 4 January 2023. The SCA builds upon the subsidy control obligations that arise under the UK-EU Trade and Cooperation Agreement ("TCA") – which regulates the trading relationship between the UK and the EU following the end of the Brexit transition – and creates a unique domestic subsidy control regime.

The substantive legal principles that underpin the SCA, including the core requirement that a subsidy cannot be granted unless it is shown to comply with certain conditions (known as 'subsidy

control principles') largely reflect those of EU State aid regulation. However, the procedural and regulatory aspects of the UK subsidy control regime, differ substantially from the EU State aid law equivalent. The UK regime is more permissive and nimbler, premised, as it is, on the principle of self-assessment compliance by granting bodies rather than prior approval by a regulator. At the same time, the new law incorporates various checks and balances, including the obligation or, in certain cases, the right for public authorities to request a CMA compliance report before granting a subsidy. The law also enables the UK government to put in place "*streamlined subsidy schemes*" which act as safe harbours so that, subject to certain conditions, the subsidy granted will be deemed compliant, without the need for further analysis.

The CMA, through its new Subsidy Advice Unit ("SAU"), will largely play an advisory rather than enforcement role (in contrast with the European Commission's function in EU State aid regulation). Accordingly, even where the CMA prepares a compliance report, the decision as to whether or not to follow the report's recommendations still resides with the public authority granting the subsidy.

A key component of the new regime is a set of transparency obligations, including a requirement to publish certain information about a subsidy award on a freely accessible online database. Interested parties which are concerned with the compliance of a subsidy decision, have one month from the publication of a subsidy award on the database either to challenge the subsidy award or seek further information from the subsidy grantor about its legal compliance. The receipt of that information then triggers an additional one-month period within which the subsidy decision may be challenged.

Challenges against subsidy decisions must be brought by means of a judicial review at the CAT (in most cases). Successful challenges are likely to lead to the quashing of the subsidy decision and a requirement to recover from the beneficiary the subsidy that has been granted unlawfully (potentially with interest). Given that, unlike in the EU, affected parties cannot complain to a regulator, it is possible that the new regime will give rise to numerous subsidy control judicial review challenges per year. The CAT already received its first subsidy control appeal on 3 February 2023, merely a month after the SCA came fully into effect. Previously, a subsidy control judicial review claim was issued in the administrative court in November 2022, under the so-called "interim" subsidy control regime which was based on the direct application of the TCA subsidy control provisions, by virtue of s.29 of the EU (Future Relationship) Act 2020, In that case, the court found against the claimants, concluding that in granting subsidies worth many billions of pounds to an energy supplier the Government had acted in compliance with subsidy control obligations.

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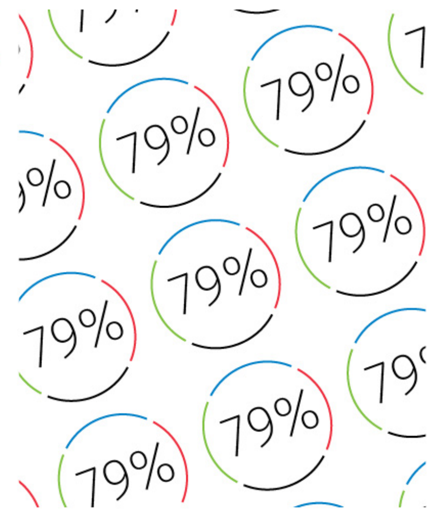

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