Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2023 – United Kingdom

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Continuing with the trend from previous years, important competition law and policy developments emerged in the UK during 2023. Amongst other things, highly anticipated proposals for major legislative reform were finally introduced in the UK Parliament, the UK's competition and sector authorities continued to handle a substantial enforcement caseload, whilst the UK government continued to review a growing number of cases under the national security and investment screening regime. Also building on last year's developments, the number of collective proceedings increased, whilst the UK's new subsidy control regime came fully into force in January 2023.

Heading into 2024/2025 the UK's primary competition regulator, the Competition and Markets Authority ("**CMA**"), had 24 merger investigations (including one live in-depth "Phase 2" review), 11 competition enforcement cases, nine consumer protection cases, one market study, and two market investigations underway. Since April 2023, the CMA issued one infringement decision, imposing just £880,000 in fines, as well as two commitments decisions. In addition, four of the CMA's decisions have been appealed to the Competition Appeal Tribunal ("**CAT**").

This paper provides an 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 the CMA 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.

Blocked and abandoned mergers

Due to timing reasons, this paper covers merger review outcomes data spanning two CMA

financial years: FY2022-23 (running from 1 April 2022 to 31 March 2023) and FY2023-24 (for the period from 1 April 2023 to 31 March 2024).

According to the CMA data, 54% of mergers investigated in FY2023-24 were either referred to Phase 2 review or required remedies to clear at Phase 1 (compared to 63% of cases in FY2022-23 and 29% in FY2021-2022), while the number of new merger cases subject to review varied considerably between different financial years: 54 cases in FY2023-2024 and 43 cases in FY2022-23 (compared to 55 cases in FY2021-22). 33% of mergers were cleared unconditionally at Phase 1 in FY2023-24 (compared to 25% in FY2022-23 and 60% in FY2021-22). Of the nine Phase 2 mergers reviewed in FY2023-24, two transactions (22%) were prohibited, cancelled or abandoned; five (56%) were cleared unconditionally; and two (22%) were cleared subject to divestiture remedies. When considering the thirteen Phase 2 mergers reviewed in FY2022-23, six transactions (46%) were prohibited, cancelled or abandoned; two mergers (15%) were cleared unconditionally; and five (39%) were cleared subject to divestiture remedies.

Measured differently, during the 2023 calendar year, the CMA completed the review of 32 Phase 1 mergers (of which five were referred for in-depth Phase 2 investigation) and ten Phase 2 mergers (some of which continued from the previous calendar year). Of these ten Phase 2 mergers, two were prohibited (Cérélia/Jus-Rol involved a completed acquisition that now has to be unwound, while Microsoft/Activision-Blizzard involved a proposed acquisition), one was partially prohibited (Cochlear/Oticon), one was cleared conditionally subject to divestiture remedies (Hitachi/Thales), and two were abandoned (Adobe/Figma and ForFarmers/Boparan). Only four Phase 2 mergers were cleared unconditionally (UnitedHealth/EMIS, Broadcom/Vmware, Copart/Hills Motors, and Viasat/Inmarsat).

Both the Cérélia/Jus-Rol and Microsoft/Activision-Blizzard merger prohibitions were appealed to the CAT. The CAT dismissed the Cérélia/Jus-Rol appeal, as did the Court of Appeal ("**CoA**") in a subsequent judgment, and Cérélia has since applied to the UK Supreme Court for permission to appeal the CoA's ruling. In Microsoft/Activision-Blizzard, the CAT appeal was ultimately withdrawn. In an unprecedented move, the originally proposed transaction was restructured to allay the CMA's main competition concerns (i.e. divesting cloud streaming rights to an independent rival company). The reconfigured Microsoft/Activision-Blizzard transaction was submitted for separate merger review, which the CMA conditionally approved at Phase 1. The CMA's unprecedented approach in Microsoft/Activision-Blizzard was met with mixed reviews: some commended the CMA for its willingness to engage with transaction parties to resolve competition concerns, whilst others raised concerns that the CMA's novel approach could undermine legal certainty in future CMA merger assessments.

As was the case in the previous calendar year, the CMA again did not impose any behavioural remedies in 2023, maintaining its preference for structural remedies to address competition concerns arising from mergers. In Hitachi/Thales, Hitachi divested its mainline signalling business in the UK, France, and Germany, to obtain the CMA's merger approval.

Rigorous assessment

The CMA continues to enforce robustly UK merger control rules, raising some concerns about its perceived interventionism especially in nascent markets – including a broad approach to asserting

jurisdiction over international merger deals – and reluctance to accept behavioural remedies. In a speech in November 2023, the CMA's CEO, Sarah Cardell, defended the CMA's intervention in mergers involving rapidly developing "early-stage" markets, highlighting the need to mitigate risks associated with under-enforcement of merger control in these dynamic and evolving markets. Digital mergers that attracted CMA scrutiny in 2023 include Microsoft/Activision-Blizzard (the original deal prohibited at Phase 2, and the subsequent restructured deal conditionally approved at Phase 1), Adobe/Figma, UnitedHealth/EMIS, Broadcom/VMware, Viasat/Inmarsat, and Amazon/iRobot. In late 2023, the CMA also invited comments on whether it should examine two further digital mergers: the proposed Qualcomm/Autotalks acquisition and the Microsoft/OpenAI partnership. Qualcomm/Autotalks was abandoned in March 2024 while, more recently, the CMA launched an invitation to comment concerning certain other AI partnerships and related arrangements.

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 Microsoft/Activision Blizzard merger was conditionally approved at Phase 2 by the Commission, but prohibited at Phase 2 by the CMA (although as already noted, the new restructured deal – which does not impact the EU – was subsequently cleared by the CMA). Other parallel UK and EU merger reviews that resulted in divergent outcomes during 2023 include Amazon/iRobot (unconditional UK approval at Phase 1, but the deal was abandoned during EU Phase 2 review); Cochlear/Oticon (unconditional EU Phase 1 clearance, and UK conditional Phase 2 approval); Booking/eTraveli (unconditional Phase 1 approval in UK in 2022, and EU prohibition in 2023 following Phase 2 review); and Broadcom/VMware (Phase 2 approval in both jurisdictions, however clearance was conditional in the EU and unconditional in the UK).

Additionally, acquisitions in the UK may 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, while Interim Orders ("**IO**") are used during Phase 2. CMA data shows sharp variations in the use of IEOs. 36 IEOs were issued during CMA's FY2022-23, more than in any other financial year, however this number dropped to only eight IEOs in FY2023-24.

In December 2023, Copart received an aggregate penalty of £2.5 million for three separate IEO breaches where Copart responded to requests for proposals for the provision of salvage and related services on the basis of a combined Copart/Hills Motors business although the completed merger was still under CMA review. The CMA also publicly reprimanded Copart for seeking to influence their customers' responses to CMA queries during the merger investigation.

Recent and proposed reforms

The highly anticipated Digital Markets, Competition and Consumers ("**DMCC**") Bill was finally passed by the UK Parliament and became law (the "**DMCC Act**") on 24 May 2024, more than a year after the legislative process began in April 2023. The DMCC Act makes wide-ranging changes in three key areas: establishing new ex ante digital competition rules (discussed further below); strengthening existing competition rules – including merger control; and enhancing consumer protection rights and enforcement. Substantive provisions of the DMCC Act will come into force on future date(s) to be specified by regulations.

In terms of merger control, the DMCC Act amends the jurisdictional merger thresholds which must be met before the CMA has power to review a UK merger. The UK target annual turnover threshold will increase to £100 million (from £70 million currently), while the alternative 25% (combined) share of supply jurisdictional threshold remains unchanged. An additional jurisdictional threshold has also been introduced, to enable the CMA to more readily scrutinise so-called "killer acquisitions" in fast moving markets (e.g. technology and pharma sectors). The CMA will have 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* an annual UK turnover of £350 million or more, and the merger has a sufficient connection with the UK – e.g. the target carries on certain activities in the UK.

Other notable amendments include the introduction of a small merger "safe harbour" that prevents the CMA from reviewing mergers where each party's annual UK turnover is less than £10 million; and new provisions empowering the UK government to intervene in M&A transactions where a foreign power seeks to gain control or influence over newspaper enterprises. It also amends the new special merger regime for energy network firms in Great Britain, which was created in October 2023 by the Energy Act 2023 and for which the CMA recently published new guidance.

The DMCC Act also provides for the "fast tracking" of some merger review cases and enables the CMA to accept competition commitments from buyers to resolve other merger review cases before the case progresses to an in-depth Phase 2 review stage.

Antitrust enforcement

During 2023, the CMA and one UK sector regulator, the Financial Conduct Authority ("**FCA**"), together completed eight antitrust investigations. Three investigations were resolved with commitments (all involved the technology sector: Amazon, Meta, and ESS), two were closed without further enforcement action being taken, while penalties for competition law infringements were imposed in the remaining three cases. The highest fine, totalling nearly £60 million, was imposed on 10 construction firms implicated in a demolition services bid-rigging cartel. Two of the parties involved, Squibb Group and Keltbray, have appealed the CMA's infringement decision. The Squibb appeal was withdrawn in March 2024, while the Keltbray appeal was heard in late April 2024 and judgment is awaited. Substantially lower fines were imposed in two other antitrust cases: £880,000 for market-sharing and price-fixing conduct involving sports apparel, and £154,500 for price-fixing by three money transfer firms. The CMA's Annual Plan 2024/25 only mentions the £880k penalty, as the £60 million fine was imposed by the CMA in March 2023 and the £154k penalty was imposed by the FCA.

In an effort to increase the detection of serious competition law infringements, in June 2023 the

CMA also increased the maximum reward for cartel whistle-blowers to £250,000, up from £100,000.

Two of the three new Competition Act (**"CA98"**) investigations that the CMA opened during 2023 involve the chemicals industry (in the construction and fragrance sectors), and the third investigation concerns labour services in the media/television content production sector. The CMA is increasingly focused on competition law compliance in labour markets – in February 2023 it issued guidance for employers on how to avoid anticompetitive behaviour and published further material in early 2024; whilst the fragrance antitrust investigation was extended in January 2024 to cover alleged no-poach agreements. The CMA's focus on antitrust issues in labour markets is expected to continue in 2024, and reflects a wider enforcement trend by competition authorities in the EU and the US.

As already noted, following Brexit, antitrust enforcement concerning multinational businesses has involved parallel investigations by the CMA and the European Commission, increasing complexity and the potential for divergent outcomes. Scrutiny is not limited to inherently cross-border sectors or services, such as digital platforms, and recent parallel EU and UK investigations have involved fragrance ingredients and construction chemicals (both cases entailed separate dawn raids conducted in parallel by the respective EU and UK competition authorities), as well as the pharmaceutical sector.

In April 2024, the UK government indicated that it is launching talks with the European Commission on a post-Brexit competition cooperation agreement that will have implications for future parallel UK and EU competition investigations. This will be complemented by the DMCC Act, which introduced provisions to help support international cooperation and information-sharing between the CMA and other regulatory agencies.

As the number and complexity of investigations increases, so do appeals challenging the CMA's infringement decisions. Notably, the CAT delivered four separate judgments in the hydrocortisone case on excessive and unfair pricing (abuse of dominance), market sharing (cartel infringements and 20mg agreement), and due process. The first two substantive judgments upheld the CMA's CA98 infringement decisions and largely upheld the fines imposed. However, in a highly unusual development, the CAT's third judgment, delivered in early 2024, set aside the £106 million cartel infringement penalty on procedural grounds, although the £129 million abuse of dominance penalty remains in place. The fourth CAT judgment upheld a separate £2.8 million penalty imposed by the CMA concerning a market sharing agreement involving 20mg tablets. The CMA has appealed the CAT's due process ruling to the CoA, while the pharmaceutical companies involved have also appealed the CAT's cartel infringements judgment to the CoA.

In the liothyronine case, the CAT largely dismissed the appeal, upholding the CMA's findings that the pharmaceutical company charged excessive and unfair prices in breach of competition law. The CAT also upheld the pharma company's £40.9 million fine, but reduced two former parent companies' respective fines down to £6.2 million and £37.1 million.

During 2023 the CAT also heard appeals in two other pharma cases, prochlorperazine and phenytoin (on remittal). On 23 May 2024, the CAT upheld the prochlorperazine appeal, setting aside the CMA's infringement decision and penalties totalling over £35 million, finding that the CMA did not sufficiently demonstrate the parties' participation in a "pay for delay" agreement in breach of competition law. The CMA's related applications to disqualify seven company directors

over their alleged involvement in the infringement also failed. Separately, judgment is still awaited in the phenytoin case.

In light of the CMA's continued enforcement in the pharmaceutical industry, in November 2023 it published a prioritisation statement on "combination therapies" (i.e. treatments using two or more medicines in combination). This clarifies how competing pharmaceutical firms can work together – in specific circumstances – to give themselves a better chance of meeting regulatory requirements and getting vital medicines to market, whilst having comfort about the risk of a potential CMA antitrust investigation.

Beyond the pharmaceutical sector, other important judgments have dealt with issues around the CMA's extraterritorial investigatory powers, and dawn raids of residential premises. In the first case, the CoA confirmed that the CMA has the power to require overseas companies to produce documents and information when the CMA is investigating suspected anticompetitive conduct in the UK. The ruling, which relates to the CMA's ongoing antitrust investigation into end-of-life vehicle ("**ELV**") recycling practices, overturned an earlier CAT judgment. Separately, the DMCC Act will expressly give the CMA such extraterritorial investigatory powers in future CA98 investigations.

In the second case, the CMA's ongoing antitrust investigation into construction chemicals supply practices, the CAT refused the CMA's application for a dawn raid warrant in respect of domestic premises. The CAT was not persuaded that, absent the dawn raid, the individual in question would be likely to destroy the evidence sought by the CMA. The ruling indicated that the CAT would take a rigorous approach when deciding whether to grant a warrant allowing a UK competition authority (the CMA, or a UK sector regulator with concurrent competition powers) to dawn raid the residential premises of an individual suspected of being involved in competition law infringement. However, the CAT's ruling was successfully challened by the CMA on judicial review grounds before the High Court, which found that the CAT "erred in law" when it refused to grant the CMA a warrant to enter a domestic property and "exceeded its powers" in other respects, thus lowering the bar for future CMA domestic search warrant applications. Competition dawn raids of domestic premises are expected to increase as working from home has become more prevalent in recent years.

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 six cases, all but one involving the digital sector.

Director disqualifications

The CMA has continued to pursue director disqualifications, holding business directors responsible for their involvement in competition law breaches. In 2023, four company directors were disqualified for periods ranging between 4.5 and 7.5 years over their involvement in anticompetitive conduct involving the supply of construction/demolition services. Two directors subsequently applied to the High Court for limited permission to act as directors. One application was granted, in May 2023, subject to strict conditions, and the second application was refused in early 2024.

Separate court proceedings, to disqualify seven company directors for their alleged involvement in

anticompetitive conduct concerning the supply of prochlorperazine tablets, were rejected in May 2024, after the CAT annulled the CMA's infringement decision and fines in that case.

Under the new *ex ante* digital competition regime created by the DMCC Act, company directors involved in certain breaches of those new competition rules will also be at risk of disqualification, for up to 15 years, as is already the case for directors implicated in CA98 infringements.

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 again continued to grow. In 2023, the CAT certified three further mass actions, involving video games (Neill v Sony), smartphones (Gutmann v Apple), and train fares (Gutmann v Govia Thameslink Railway). A further collective proceeding, involving digital platforms, was certified in early 2024 (Gormsen v Meta). Together the four claims are worth almost £8 billion.

At the start of 2024, in total 46 collective proceedings were before the CAT, with an aggregate value of around £100 billion. Further claims are expected. Of the 46 claims, 14 have been certified (granted a Collective Proceedings Order ("**CPO**") so they can proceed to trial), including those mentioned above, while further claims were listed for hearing to determine the CPO application. The vast majority of mass actions have been brought on an "opt-out" basis. In the Forex appeal, in late 2023, the CoA held, contrary to an earlier CAT judgment, that large and sophisticated corporate claimants should be able to bring "opt-out" class actions just as easily as SMEs or consumers, and the CAT should not assume that "opt-in" actions are more suitable for corporate clients – thus further lowering the bar for CAT certification of "opt-out" claims.

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 has been confirmed on appeal in the *Trucks* case). Of the collective claims currently awaiting certification, only two are opt-in actions.

Increasingly, the CAT has to determine carriage disputes between rival collective proceedings before a CPO application can be decided. Where the respective proposed class representatives agree, the CAT may consolidate the rival mass actions rather than allowing only one to move forward to certification and ultimately to trial. If class representatives in a carriage dispute do not agree to amalgamate their claims, the CAT decides the preferred claim to progress toward a CPO application hearing, the second claim is stayed and may be revived only if the preferred claim fails to be certified or is withdrawn. In the *Forex* case, a claim that did not progress beyond the carriage dispute was subsequently discontinued by consent.

Mass actions before the CAT variously involve claims against major corporations across a range of industries including technology, communications, financial services, commercial vehicles, rail transport, consumer goods, energy, and water services. 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.

The UK Supreme Court judgment, in PACCAR, that certain litigation funding agreements ("**LFAs**") entered into by representative bodies were in fact damages-based agreements ("**DBAs**") and subject to additional statutory conditions, cast doubt over the enforceability of various LFAs – particularly in "opt-out" collective proceedings where DBAs are rendered unenforceable by the CA98. In response, class representatives and funders have sought to amend LFAs to bring them outside the statutory definition of DBAs. The CAT has largely permitted LFA changes in recent cases aimed at overcoming difficulties raised by *PACCAR*. However a forthcoming appeal may well change the CAT's approach to post-*PACCAR* funding arrangements.

The UK government has separately sought to retrospectively reverse the impact of *PACCAR* on LFAs through legislative changes. Initially the DMCC Bill – before it was passed by Parliament and became an Act – was amended to achieve this. Subsequently, recognising that *PACCAR's* impact extends beyond competition law, the change was to be effected by means of new legislation. However, the new proposed legislation appears to have lapsed following the dissolution of the UK Parliament triggered by the announcement, on 22 May 2024, of forthcoming UK general elections.

The Merricks v Mastercard "follow-on" opt-out claim is the first collective proceeding to reach trial in the CAT. The "split" trial consists of two parts: causation and value of commence, and pass-on. The first trial was heard in July 2023 and the CAT delivered its judgment in February 2024. The second trial is scheduled for late 2024 and early 2025. The first ever trial in a "standalone" opt-out claim (Le Patourel v BT Group) was heard between January and March 2024, and the CAT's judgment is awaited. Meanwhile, in December 2023, the CAT approved the first-ever collective settlement, involving one of several defendants in the follow-on collective claim concerning maritime vehicle transport services.

The CAT actively manages its burgeoning caseload, both across collective proceedings and direct claims. For example, in early 2024, it issued a new practice direction to help manage confidential information in increasingly complex disclosure procedures.

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 2023, hundreds of individual damages claims were pending in the UK courts, the majority of which involve follow-on claims from various cartel decisions (most relate to interchange fee infringements by Mastercard and Visa). Many of these cases have been transferred to the CAT from the High Court.

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 have now largely been revised and replaced with new UK versions:

- UK's Vertical Agreements Block Exemption Order ("**VABEO**") came into force on 1 June 2022,

replacing the UK's retained EU law Vertical Agreements Block Exemption Regulation ("**VBER**") that expired on 31 May 2022. The VABEO, which is accompanied by guidelines finalised in July 2022, 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. The EU rules on vertical agreements were also replaced with a revised VBER and accompanying guidelines that apply in the EU, which are also in force from 1 June 2022.

The UK and EU regimes are largely similar, but there are some important differences, including in relation to 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, allowing for the possibility for greater divergence between the EU and UK rules in the event of a substantive revision of the UK rules post 1 June 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 (and expire on 31 December 2035), and replaced the UK's retained EU law Horizontal Block Exemption Regulations ("**HBERs**") on R&D and Specialisation agreements that expired on 31 December 2022. New CMA guidance on horizontal cooperation agreements, and on environmental sustainability agreements, was issued in August 2023 and October 2023, respectively, and replaced pre-existing EU guidance on horizontal cooperation 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 – must comply with the new rules from 1 January 2024. The EU's R&D and Specialisation HBERs and accompanying horizonal cooperation guidelines have also been revised. The new EU rules apply from 1 July 2023 and expire on 30 June 2035.

The UK and EU regimes are, once again, largely similar but with some notable differences, such as in relation to the assessment of sustainability agreements. The CMA has adopted an open-door policy where it can provide informal guidance to businesses on their proposed environmental sustainability agreements in the UK. The UK and EU horizontal rules also have different commencement, transitional period, and expiry dates, and may diverge further in the future.

- The UK's new Motor Vehicle Block Exemption Order ("**MVBEO**"), along with accompanying CMA guidance applies, from 1 June 2023, to motor vehicle aftermarkets agreements in the UK, subject to a one-year transitional period for pre-existing agreements that complied with the old rules. The MVBEO replaced the retained EU law Motor Vehicle Block Exemption Regulation ("**MVBER**") which expired on 31 May 2023.

In the EU, the Commission prolonged the duration of the MVBER by five years until 31 May 2028 rather than adopting new rules, as it considers it premature to make substantive changes to the MVBER given some parts of the motor vehicle sector will evolve rapidly over the coming years. Instead, the Commission updated its Supplementary Guidelines ("**SGLs**") for the now-prolonged MVBER. The revised SGLs and the new UK rules are largely aligned (e.g. on access to essential inputs by independent operators; and topics such as technical information, vehicle-generated data, and tools and training).

- In early 2024, the CMA announced that it would not recommend replacing the retained EU law Liner Shipping Consortia Block Exemption Regulation ("**CBER**") with renewed UK block exemption rules, when the CBER expired on 25 April 2024. The CBER exempted from competition law certain forms of cooperation between liner shipping companies, but was no longer considered necessary. The equivalent EU block exemption likewise was not renewed by the Commission and expired on the same date.
- The CMA was expected to formally consult in 2023 on proposals for replacing, with a UK version, the retained EU law Technology Transfer Block Exemption Regulation ("**TTBER**") which expires on 30 April 2026. However, this has yet to materialise. Separately, the European Commission has progressed its own review of the EU TTBER and related guidelines during 2023 and further developments are expected during 2024.

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 Act (mentioned above) will make various important changes to UK competition law once it comes into effect. These include enhanced CMA investigatory powers during dawn raids of residential premises under warrant, a new duty obliging parties not to destroy evidence in CA98 investigations, and expanded powers to access information stored in electronic form which is accessible from the premises being searched, 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 of 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, decisions, and concerted practices implemented outside of the UK that are "likely to have an immediate, substantial and foreseeable effect on trade within the United Kingdom", in essence adopting the "qualified effects" doctrine into UK competition law.
The DMCC Act also provides for the extraterritorial application of notices given by the CMA to persons outside the UK, and in relation to production of documents or information held outside the UK (as in the ELV litigation discussed above). 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.

The DMCC Act also empowers the CMA to use consumer protection enforcement more effectively. Presently, the CMA must apply to the court for an enforcement order against a company for consumer law infringements. Once the DMCC Act comes into force, however, the CMA will be able 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 also obtains new powers to impose significant fines on businesses that breach consumer protection undertakings they have given or directions that the CMA has issued, and to impose substantial fixed and daily penalties on businesses as well as individuals for failing to comply with statutory information requests. The DMCC Act also introduces new rules in relation to subscription contracts, drip pricing, consumer savings schemes, secondary ticketing, and adds "fake consumer reviews" to the list of prohibited unfair commercial practices.

Repeal of retained EU law

The Retained EU Law (Revocation and Reform) Act 2023 ("**REUL Act**"), which came into force on 1 January 2024, has removed the special features of EU law that remained in the UK legal system following the Brexit transition period that ended on 31 December 2020. This includes revoking directly effective EU law rights that could override domestic legislation, and revoking the duty that required UK courts to interpret domestic legislation consistently with EU laws. To reflect these changes, retained EU law has now been renamed as "assimilated law". The REUL Act has also revoked hundreds of specific pieces of secondary legislation and EU legislation at the end of 2023.

In terms of UK competition law, the REUL Act facilitates further the UK courts' ability to depart from established EU case law, potentially leading to significant divergence over time from legal jurisprudence developed by the EU courts. The REUL Act's impact on core UK competition law legislative provisions is limited, for two 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 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) either have already been or are being replaced with UK versions, or will be allowed to lapse when they expire.

Market inquiries regime

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 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 2023 and into early 2024, the CMA completed two market studies (road fuel and housebuilding) and opened a new market study (infant formula), all of which consider the impact of cost-of-living pressures on UK consumers. The CMA's recommendations in the road fuel market study had already been partially implemented, with further measurers to be given effect through legislative changes introduced by the DMCC Act. The CMA's housebuilding market study recommendations are yet to be actioned, although the CMA had already opened a spin-off CA98 investigation into suspected antitrust infringements allegedly uncovered during the market probe. Meanwhile UK sector regulators – the FCA and the Office of Communications ("**Ofcom**") – completed two further market studies (involving wholesale data and cloud services, respectively) during this time, with the FCA consulting stakeholders on next steps, while Ofcom's findings prompted it to make an MIR to the CMA (see further below). A third sector regulator market study (railway station catering), launched by the Office of Rail and Road ("**ORR**"), is ongoing.

In the same period, the CMA completed one in-depth market investigation (mobile radio network services), launched a new cloud services market investigation following an MIR made by Ofcom and, in May 2024, it opened a new market investigation into veterinary services for household pets following an earlier public consultation. Price-cap remedies that the CMA imposed following the conclusion of its mobile radio network services market investigation, in April 2023, had subsequently been upheld on appeal by the CAT.

In another successful CMA appeal, the CoA overturned an earlier CAT judgment impugning the CMA's decision to make an MIR and launch an in-depth market investigation into mobile browsers and cloud gaming. The appeal concerned statutory interpretation of the market inquires regime under the EA02. The mobile browsers and cloud gaming market investigation, originally launched in November 2022, was suspended during the CAT and CoA appeal proceedings. Following the CoA's judgment in November 2023, and absent further appeal to the UK Supreme Court, the CMA market investigation recommenced in January 2024.

Most of the above market studies and investigations 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 Annual Plan for 2024-25.

Reform proposals

The DMCC Act (discussed above) makes 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, while other amendments will give the CMA more flexibility when deciding whether or not to make an MIR (as seen in the appeal proceedings concerning the mobile browsers and cloud gaming

market investigation, discussed above). The DMCC Act also implements certain CMA recommendations from the road fuel market study. Other legislative changes enable the CMA to require businesses to "trial" remedies before their final format is 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.

Digital markets competition regime

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 has, until now, operated in shadow form within the CMA, without its own specific legislative powers. The enactment of the DMCC Act in late May 2024 (also discussed above) has created new *ex ante* digital competition rules that will be enforced by the CMA, primarily through the DMU. Once it comes into force, the new regime will apply only to firms that are designated by the CMA as having "strategic market status" ("**SMS**") in respect of a digital activity. Each SMS firm will have to comply with its own specific set of conduct requirements, which will be developed and enforced by the CMA.

Designation, behavioural rules, and regulatory interventions

The CMA can designate a digital firm as having SMS where all five cumulative conditions are met, namely (i) the firm carries on a digital activity; (ii) that digital activity is linked to the UK; (iii) the firm has substantial and entrenched market power and (iv) a position of strategic significance and (v) has annual group turnover exceeding £25 billion worldwide or £1 billion in the UK. The DMCC Act explains how each criterion will apply and defines key concepts and terminology. It also prescribes the designation process, relevant timeframes, and details around the duration, variation, and review of SMS designation. The "turnover condition" is the only bright-line threshold for SMS designation, the other four criteria give the CMA considerable flexibility in deciding whether a firm should be designated.

The CMA will formulate behavioural rules, known as conduct requirements, stipulating how the designated firm must act in relation to a relevant digital activity. Importantly, the conduct requirements will be individually tailored to each SMS firm. Conduct requirements imposed under the DMCC Act must comply with two key requirements: they must align with at least one of three objectives (fair dealing, open choices, and trust and transparency); and must be of a "permitted type" – that is, one or more category of positive and/or negative obligations listed in the DMCC Act (these are largely based on principles derived from abuse of dominance cases involving UK or EU competition law). The CMA must publicly consult on proposed conduct requirements before they become binding, and can use various investigatory and enforcement powers to ensure compliance.

In addition to imposing and enforcing conduct requirements tailored to each SMS firm, the CMA will also be able to investigate, of its own volition, potential competition issues in digital markets, even when there is no suspected breach of conduct requirements. Such investigation may lead to the CMA imposing pro-competition interventions ("**PCIs**") on SMS firms. The PCI regime, and the associated procedures, investigatory powers, and ability to impose various behavioural and

structural remedies, largely mirror the market investigations regime under the EA02 (discussed above).

Mandatory merger reporting

Mandatory reporting and standstill obligations will apply to SMS firms in respect of proposed M&A transactions that trigger specific thresholds around share of equity or voting rights and value of consideration. Proposed transactions will need to be reported where (i) the SMS firm acquires over a 15% equity or voting share after the transaction; (ii) the total value of the SMS firm's holding is over £25 million; and (iii) the target or joint venture vehicle (as the case may be) is a "UK-connected body corporate" as defined in the DMCC Act. A standstill period applies (i.e. the M&A deal cannot complete) for five working days after the CMA has officially accepted the merger report.

These new rules are intended to help the CMA detect and review so-called "killer acquisitions" in the digital sector more effectively, but do not create or amend substantive merger control rules. After receiving such a SMS report the CMA will decide whether it has jurisdiction to review the proposed M&A deal under the wider UK merger control regime in the EA02. The amended merger control jurisdictional thresholds under the EA02, discussed above, will apply for this purpose.

Enforcement and sanctions

The DMCC Act gives the CMA extensive powers to investigate suspected infringements, which largely mirror its powers under the CA98, including the ability to make compulsory information and document requests and conduct dawn raids. Non-compliance with a CMA investigation may lead to substantial fines for companies and individuals, including criminal sanctions in certain circumstances.

Substantive breaches of the new rules will be punishable by fines up to 10% of the company's global annual turnover. The CMA will also be able to use other powers, such as making enforcement orders, interim orders or accepting commitments, or taking court action. The CMA will also be able to seek the disqualification of company directors implicated in infringements of SMS conduct requirements or requirements imposed in the context of a PCI.

The CMA has previously published details of how it intends to use its new powers to regulate competition in digital markets. Following enactment of the DMCC Act the CMA has published for consultation draft guidance on how it expects the new regime will operate and be enforced.

EU and UK divergence

While the proposed UK digital competition rules largely align with the substantive objectives of the EU's Digital Markets Act ("**DMA**"), there are some important differences between the UK and EU regimes. For example, the proposed UK regime is generally more bespoke and consultation-

driven than the EU rules which are largely self-executing. There are also differences around the availability of possible defences to certain infringements, maximum penalties, sanctions on individuals, scope and design of remedies, mandatory merger reporting, and standards of appeal. It is likely that firms designated as SMS in the UK will also be designated as "gatekeepers" under the DMA and may have to navigate and ensure compliance with both *ex ante* digital competition regimes in relation to their digital activities.

Continued application of wider competition rules

Importantly, the new *ex ante* digital competition rules described above will not replace or disapply existing competition law and consumer protection rules – these will continue to apply to SMS firms alongside the digital markets competition regime. Digital firms which are not designated will continue to be subject to existing competition and consumer protection laws, including rules prohibiting abuse of dominance.

The CMA already uses its powers under the CA98 and EA02 to scrutinise and address competition concerns or infringements in the digital sector, as discussed above. For example, in November 2023, the CMA closed two separate competition investigations into Amazon and Meta after it secured legally binding commitments from each firm that addressed the CMA's antitrust concerns. The CMA is also examining competition and consumer protection issues relating to artificial intelligence ("AI") foundation models, and recently published its first horizon scanning report on 10 trends in digital markets and their potential future impact on competition and consumers. Recent, ongoing, and anticipated CMA work involving digital markets was discussed in speeches given by the CMA's Chair and the CMA's CEO, set out in the CMA's Annual Plan for 2024-25 and, most recently, was discussed at the CMA's 10-year anniversary event.

National security and investment regime

The National Security and Investment Act 2021 ("**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 established a standalone hybrid mandatory and voluntary/call-in system, which can also apply to certain foreign-to-foreign transactions. It is administered by the UK government rather than the CMA. Initially, the Department for Business, Energy & Industrial Strategy ("**BEIS**") was responsible for administering the NSIA, however following 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. The regime applies to both foreign and domestic investors.

While 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 memorandum of understanding between the CMA and BEIS (the MoU has been updated and remains in force after Cabinet Office took 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 since it came into force. In the first full reporting year that the regime has been operational (1 April 2022 to 31 March 2023) 866 notifications were made in total. While this is well below the UK government's initial estimates – made before the NSIA began to apply – of between 1,000 and 1,830 notifications each year, it is nonetheless a considerable number. According to the NSIA Annual Report for 2022-23, there were 671 mandatory notifications, almost half of which were in the defence sector, and 180 further voluntary notifications were made during the 12-month reporting period. A further 15 retrospective validation applications were made – forms that can be submitted where an acquisition subject to mandatory notification was completed without seeking the approval of the Secretary of State.

During 2022-23, both mandatory and voluntary notifications were accepted on average within four working days, and 93% of notified cases were cleared within 30 days. The Cabinet Office called-in 65 deals for further assessment – 37% of those deals were associated with the military and dual use area of the economy, 29% with defence, and 29% with advanced materials. More than half of call-in cases involved UK or US acquirers. In 15 cases, the Secretary of State issued a "final order" requiring organisations to either block or unwind deals or where it imposed conditions on an acquisition. Of those 15 final orders, eight involved acquirers associated with China, four with the UK, and three with the US. Deals in the defence, communications, energy, advanced materials, and computing hardware sectors were subject to the most final orders.

According to the 2022-23 annual report, the median number of working days between an acquisition being called in and the Secretary of State making a final order was 81 – beyond the default statutory timescale of 75 working days for the call-in process (the timeframe can be extended with the agreement of the acquirer). This indicates that notifications subject to a final order may expect a lengthy review process of six months or more.

In April 2023, the UK government published a second edition of its market guidance, drawing on insights from stakeholders and practical experience at the time. The market guidance was revised once again in May 2024, as part of a wider effort to update the NSIA regime announced by the UK government in April 2024. These changes follow a call for evidence, launched by the UK government in November 2013, on potential updates to the NSIA regime to help ensure the UK investment screening regime remains up to date, proportionate and transparent for businesses, while protecting national security.

National security vs public interest regime

The NSIA sits alongside the existing "public interest" EA02 regime for mergers, under which the UK government can intervene in a merger on one or more public interest grounds. "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.

Recent concerns over the proposed acquisition of a UK media firm by a foreign government

backed purchaser (RedBird IMI/Telegraph Media Group) have led to the introduction of a new regime, under the DMCC Act, that empowers the UK government to intervene in and block M&A transactions where a foreign power seeks to gain control or influence over newspaper enterprises. Draft regulations relating to the new regime have been published for consultation.

New subsidy control regime

The UK's Subsidy Control Act 2022 ("**the Act**") came into force on 4 January 2023, providing the UK with its own domestic subsidies regime to replace the interim subsidy control measures in the Trade and Cooperation Agreement ("**TCA**") signed by the UK and EU.

Under the domestic regime, public bodies granting subsidies are ultimately responsible for ensuring that these are consistent with subsidy control requirements. There are rules which – depending on the value and/or type of subsidy being granted – permit or require public bodies to submit their subsidy control assessments to the CMA for review before the grant of the subsidy in question. However, the CMA reports are advisory only, so that it is ultimately for public bodies themselves to decide whether or not to act on any CMA recommendations on how to improve their compliance assessments.

Separately, it is for public authorities to determine whether or not an arrangement into which they enter might involve the grant of a subsidy. To the extent that an interested party wishes to challenge the decision of a public authority not to treat a particular arrangement as involving a subsidy, they may do so only by means of seeking the judicial review of that decision.

Thus far there has only been one application for a review of a subsidy-related decision under the Act. More specifically, in the *Durham* case (The Durham Company Limited (trading as Max Recycle) v Durham County Council [2023] CAT 50), Max Recycle sought to challenge an arrangement whereby Durham County Council shared vehicles and employees between its household and commercial waste collection operations. The applicant argued that the arrangement effectively involved the subsidisation of a commercial activity. However, on 27 July 2023, the CAT dismissed the application, having concluded that under UK law – and unlike the position in the EU – a public authority cannot subsidise itself in that the grant of a subsidy must involve a grantor and a recipient and the same entity cannot be both at the same time.

The CAT's decision might point to a UK legislative loophole which could, under certain circumstances, allow public authorities to escape subsidy control oversight, by sharing resources across different internal departments.

The decision also appears to raise questions as to the compatibility of the Act with the TCA, in that the definition of a subsidy under Article 366(3) TCA would seem broader than the definition which the Act provides.

To the surprise of many, there have so far been no other applications to the CAT for a review of subsidy decisions. A possible reason for this might be the prohibitively high costs of complaining through the courts, which is the only available forum for the review of subsidy decisions.

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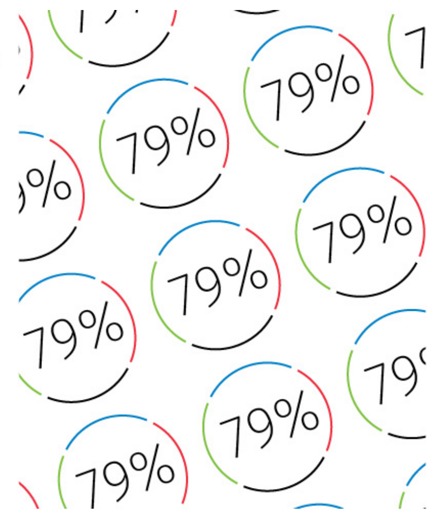

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