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ANTITRUST REVIEW 2021

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Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

GCR's Europe, Middle East and Africa Antitrust Review 2021 is one of a series of regional reviews that deliver specialist intelligence and research to our readers – general counsel, government agencies and private practitioners – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Americas and the Asia-Pacific region, this book provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in both public enforcement and private litigation. In this edition, Sweden is a new jurisdiction alongside updates from the European Commission (including a new article on the abuse of dominance), Cyprus, Denmark, France, Germany, Greece, Norway, Portugal, Russia, Spain, Switzerland, Turkey, the United Kingdom, Ukraine, COMESA, Angola, Israel, Mauritius and Mozambique.

In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

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UK: Merger Control

Peter Harper, Kate Newman, Claire Morgan, Annabel Borg and Laura Wright
Eversheds Sutherland

In summary

The past year has seen the UK's merger control regime in the headlines both in the UK and internationally, with the Competition and Markets Authority (CMA) prohibiting or causing to be abandoned more transactions in 2019–2020 than in the previous three years combined. Like other authorities around the world, the digital sector – and the possibility of killer acquisitions – has continued to be a priority for the CMA.

Discussion points

- Key themes arising from CMA decisions, including dynamic counterfactual and competition
- CMA's increased willingness to intervene in transactions with a limited nexus to the UK, through a flexible approach to its share of supply test
- CMA activities in continuing to develop its approach in digital markets
- CMA's continued focus on enforcing the voluntary regime
- Impact of the covid-19 pandemic so far and in the years to come
- Update on the impact of Brexit on the UK merger control regime

Referenced in this article

- UK Competition and Markets Authority
- Case ME/6806/19, anticipated acquisition by Sabre Corporation of Farelogix Inc
- Case ME/6795/19, anticipated acquisition by Illumina of Pacific Biosciences of California
- Case ME/6766/18, completed acquisition by PayPal Holdings of iZettle
- Case ME/6830/19, completed acquisition by Bottomline Technologies (de), Inc of Experian Limited's Experian Payments Gateway business and related assets
- Case ME/6836/19, anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo
- *Tobii AB (publ) v. Competition and Markets Authority* [2020]

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Key themes in Competition and Markets Authority's decision-making

We set out below some key themes from decisions and commentary from the Competition and Markets Authority (CMA) during the past year. While these themes are somewhat pronounced in digital mergers, they are being raised across the CMA's full caseload.

Dynamic counterfactual

Traditionally, the CMA adopted the prevailing conditions of competition as the counterfactual.[1] With digital mergers, however, and particularly with acquisitions of small start-ups by larger companies, the CMA has been concerned that assessing the competitive effects of start-up tech companies on a static basis (at the time of a transaction) and not considering how they may develop in the future, risks under-enforcement and clearing transactions that might otherwise require intervention. The CMA has therefore applied a 'dynamic counterfactual' in a number of cases.

For example, the CMA considered a dynamic counterfactual in PayPal's acquisition of iZettle in June 2019, which was cleared unconditionally in June 2019.[2] PayPal had submitted that the rationale for the merger was to combine two complementary product offerings, namely PayPal's online payment service solutions with iZettle's in-store and offline product offering, to supply enhanced omni-channel payment solutions. PayPal told the CMA that the 'most likely' counterfactual was that it would have continued as before and not significantly develop its offline offering. Based on internal documents, the CMA disagreed with this and found evidence that PayPal would have become a stronger competitor in offline than it was at the time of the transaction. The CMA did not consider that it needed to identify which specific option, or options, that PayPal might have pursued. However, the CMA's view was that whichever option PayPal pursued would have substantially improved or replaced its offline offering.[3]

Similarly, in *Bottomline/Experian* (which received unconditional Phase II clearance),[4] the CMA considered that the target was a weak competitor at the time of the transaction and assessed in detail whether, absent Bottomline's acquisition, the target may have become a stronger competitive force. The CMA found that the target would have been acquired by an alternative (identifiable) buyer. However, in that situation, the evidence showed that the alternative buyer had no plans to invest significantly in the business or to target new customers and so the target would have remained a weak competitor.

1 Consideration of whether a merger gives rise to a realistic prospect of a significant lessening of competition test involves the comparison of the prospects of competition with the merger against the competitive situation without the merger (the latter being the 'counterfactual').

2 Case ME/6766/18, Completed acquisition by PayPal Holdings, Inc. of iZettle AB, Final Report dated 12 June 2019.

3 By contrast, in considering whether iZettle would have moved into the online space, the CMA was satisfied, based on the evidence that iZettle's strategy was likely to have focused on developing its existing services.

4 Case ME/6830/19, Completed acquisition by Bottomline Technologies (de), Inc. of Experian Limited's Experian Payments Gateway business and related assets, dated 17 March 2020.

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Dynamic competition

The CMA has also continued to be forward-looking in assessing competitive conditions more generally, taking into account evidence of how the market would be likely to develop, including the threat imposed by potential competitors who have yet to enter the market. Internal documents often set out merging parties' commercial strategies several years into the future and the CMA has deployed its broad information gathering powers to access these to inform its assessment. For example, in *PayPal/iZettle*, the CMA reviewed 12,500 documents in total, comprising both internal emails from the parties focusing on their business plans absent the merger, and third-party internal documents that set out their commercial strategies and plans going forward.

Similarly, in the CMA's Phase I review of Amazon's acquisition of a minority investment[5] in online food platform, Deliveroo,[6] the CMA assessed what future competition between the parties might look like in online convenience grocery delivery, finding evidence of major expansion plans, which, the CMA considered, would bring the parties in even closer competition in future. In terms of online restaurant delivery, which Amazon had exited in the United Kingdom in November 2018, after analysing large volumes of Amazon's internal documents and conducting interviews with its senior management, the CMA found that Amazon had a 'strong continued interest' in the restaurant delivery sector, and may have re-entered the market, most likely through an alternative investment. The CMA found sufficient concerns at Phase I to refer the transaction to a detailed Phase II review. As discussed further below, the case was subsequently provisionally cleared at Phase II on the basis of the failing firm defence arising from covid-19.

In Takeaway.com's acquisition of Just Eat,[7] the CMA also examined whether Takeaway.com was likely to have re-entered the online food platforms market in the United Kingdom and therefore whether the acquisition would lead to a loss of potential competition. However, based on Takeaway.com's internal documents, financial information and third-party views, the CMA determined that there was no realistic prospect that Takeaway.com would have re-entered the supply of online food in the United Kingdom, and the transaction was cleared at Phase I.

Transaction rationale and value

The CMA's current position is that it does not need to introduce a transaction value element to the jurisdictional test. However, when a transaction attracts a high purchase price, the CMA will scrutinise the rationale for a transaction with particular rigour, in case the price reflects the value of the loss of competition from acquiring a burgeoning competitor.

5 The decision is also a notable example of the Competition and Markets Authority [CMA] 'calling in' a minority stake, which it considered gave Amazon the ability to exercise material influence over Deliveroo (Amazon's expertise in online marketplaces, logistics networks and subscription services could allow it to influence other Deliveroo shareholders and board members).

6 Case ME/6836/19, Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo, Provisional findings report dated 16 April 2020.

7 Case ME/6881/20, Completed acquisition by Takeaway.com N.V. of Just Eat plc, Full text decision dated 7 May 2020.

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For example, the CMA considered whether the consideration paid by PayPal for iZettle[8] suggested that it had taken account of a potential reduction in competition. The CMA reviewed internal documents and estimates of synergies arising from the transaction, also taking into account broker comments at the time of the acquisition. In that case, the CMA found that the consideration appeared justified and it was not evidence of anticompetitive motive.

By contrast, when reviewing Illumina's acquisition of Pacific Biosciences, the CMA found evidence in Illumina's internal documents suggesting that 'the transaction could be an opportunity for Illumina to eliminate a competitive threat – either the threat of PacBio alone, or the risk that PacBio could be acquired by another major player'.[9] The deal was later abandoned in light of the CMA's concerns and a US review.

Reduced innovation as a competition harm

Historically, the typical competition harms arising from horizontal concerns were higher prices or a reduction in quality or output. In recent years, more focus has been placed on loss of innovation as a non-price competition harm. For example, this was evident in the CMA's analysis in *Tobii/Smartbox*, which was prohibited at Phase II with the CMA ordering a full divestment.[10]

In *Sabre/Farelogix*, the CMA also concluded at Phase II that the merger may be expected to result in a loss of innovation in both merchandising and distribution solutions through reduced customer choice, fewer new features and upgrades being released more slowly.

These decisions demonstrate the importance of internal documents to the CMA's review. As the CMA has to rely on the parties and their advisers to locate and provide relevant internal documents, we expect to see increased enforcement activity around failure to produce these documents (see below).

Supportive internal documents can be very helpful, as shown by *Google/Looker*, which was cleared at Phase I in February 2020.[11]

Increased scrutiny of non-UK transactions

In a number of recent cases, the CMA has demonstrated an increased willingness to intervene in transactions with a limited nexus to the United Kingdom, primarily through a flexible approach to its jurisdictional test, the share of supply test.[12] The CMA has made clear that the share of supply

8 US$2.2 billion, which was much higher than the expected initial public offering evaluation.

9 In that case, the offer price represented a 71 per cent premium to the target's pre-offer trading price.

10 The parties were market leaders in the design and supply of technology to help people with complex speech and language needs to communicate. The CMA's decision also emphasised that these were vital technologies bought on behalf of vulnerable people by the National Health Service, charities and schools. While not often raised as a consideration in a merger control context, this is reflective of the fact that protection of vulnerable consumers is at the heart of the CMA's Annual Plan.

11 Case ME/6839/19, Completed acquisition by Google LLC of Looker Data Sciences, Inc., Summary of Phase I decision dated 13 February 2020.

12 Pursuant to the share of supply test under the Enterprise Act 2002, the CMA has jurisdiction to review a merger if the parties have a share of supply in the UK (or in a substantial part of the UK) of 25 per cent or more in relation to goods or services of any description.

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test can be satisfied when the target has little or even no turnover in the United Kingdom and there is a negligible increment (ie, zero to 5 per cent) in the share of supply of a combined entity post-transaction, provided that the acquiring company has a market presence in the UK. As a result, the CMA has been able to assert its jurisdiction in cases where, arguably, there is likely to be little or no impact or change to the competitive dynamics in the relevant UK market.

In *Illumina/BioPacific* , the CMA asserted jurisdiction over the proposed transaction solely on the basis of a zero to 5 per cent increment of share of supply in a broad DNA sequencing systems market (even though the target was active in a narrow part of that market).

In *Roche Holdings/Spark Therapeutics*,[13] the CMA described the share of supply test as a 'key gateway to providing the CMA with the power to intervene in transactions' that are relevant to UK markets or activities, and may be expected to raise competition concerns that could affect UK consumers.[14] In this case, the CMA found that the share of supply test was satisfied based on the number of UK-based, full-time equivalent employees engaged in activities relating to haemophilia A treatments.

In *Sabre/Farelogix*, the CMA found the share of supply test to be satisfied merely by virtue of Farelogix's sales to a single airline in the United Kingdom. It was sufficient that the 25 per cent share of supply threshold was met on the basis of Sabre's share and that the CMA was able to identify 'some increment' for Farelogix's supply of the relevant services.

Tougher stance by the CMA?

The CMA has prohibited, or caused to be abandoned, eight transactions in 2019–2020, which is more than the number prohibited or abandoned in total in the three years prior to this. Moreover, according to the CMA's published statistics,[15] approximately 26 per cent of the CMA's merger investigations involved either Phase I remedies or a referral for an in-depth Phase II investigation.[16] This is a high rate of intervention compared to other competition authorities. For example, of the 455 notifications made to the European Commission (the Commission) from the beginning of 2019 to February 2020, just 5 per cent (22 cases) resulted in Phase I remedies or a Phase II investigation.[17]

The CMA's level of intervention reflects that, as a voluntary regime, the CMA will typically investigate fewer transactions, but the transactions it does investigate can often raise potential competition concerns.

13 Case ME/6831/19, Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc., full text decision dated 16 December 2019.

14 id., at para. 81.

15 For the year from 31 March 2019 to 31 March 2020.

16 See https://www.gov.uk/government/publications/phase-1-merger-enquiry-outcomes.

17 See http://ec.europa.eu/competition/mergers/statistics.pdf.

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There has been a degree of commentary as to whether this reflects a new, tougher stance. The CMA has denied any particular shift in policy as such, rather pointing out that there has simply been an increase in companies trying to merge in increasingly concentrated markets, and noting the evolution of the watchdog's approach to digital mergers (see below).[18]

Against this backdrop, it is interesting to note that the CMA has had two of its Phase II prohibition decisions appealed to the UK Competition Appeals Tribunal in the past year (albeit neither challenge was successful).[19]

Focus on mergers in digital markets

The CMA has spent a significant amount of time and resources during the past year considering and consulting on the appropriate approach to digital mergers going forward.

In March 2019, the UK government's Digital Competition Expert Panel[20] issued its final report[21] (the Furman Report), which determined that there has been under-enforcement in digital mergers in the UK and globally,[22] and recommended that the CMA should take more frequent and firmer action to challenge mergers that could be detrimental to consumer welfare through reducing future levels of innovation and competition. Specifically, the Furman Report suggested giving higher priority to merger decisions; requiring digital companies that hold a 'strategic market status' to make the CMA aware of all intended acquisitions; and revamping the CMA's Merger Assessment Guidelines to reflect the features and dynamics of modern digital markets. The Furman Report also suggested a further step, namely a change to the substantive test set down in legislation to allow the CMA to use a 'balance of harms' approach that takes into account the scale and the likelihood of harm in merger cases involving potential competition and harm to innovation. The CMA's initial feedback to the Furman Report was to welcome the proposals generally, but that they considered that the challenges presented do not require fundamental changes to the legislative regime at this stage.

Thereafter, there was significant activity from the CMA during summer 2019, with the publication of a number of policy documents, including 'Call for information: Digital mergers' (June 2019),[23] the CMA-mandated independent study 'Ex-post Assessment of Merger Control Decisions in Digital Markets' by economic consultancy Lear (June 2019)[24] and the CMA's Digital Market Strategy in July 2019. The CMA also launched a market study on online platforms and digital advertising in July 2019.

18 See, eg, comments made during the International In-house Counsel Journal 6th Annual Competition Law Conference, Law Society, London, 19 November 2019, as reported by Mlex.

19 See *Ecolab Inc. v. Competition and Markets Authority* [2020] CAT 12, dated 21 April 2020 and *Tobii AB (publ) v. Competition and Markets Authority* [2020] CAT 1, dated 10 January 2020.

20 The panel consisted of Professor Jason Furman, Professor Diane Coyle CBE, Professor Amelia Fletcher OBE, Professor Derek McAuley and Professor Philip Marsden.

21 'Unlocking digital competition', Report of the Digital Competition Expert Panel, March 2019.

22 id., paras. 3.42 to 3.45.

23 CMA, 'Call for information: Digital mergers', June 2019, CMA109con.

24 Lear, 'Ex-post Assessment of Merger Control Decisions in Digital Markets', Final report, June 2019.

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The CMA has been tasked by the government to lead a digital markets taskforce, which will build on the work done by the Furman Report, advising the government on how to promote competition, and how to address the anticompetitive effects that can arise from the exercise of market power in digital platform markets.

These steps are intended to put the CMA in a strong place to contribute and help to direct the global discussion on the application of competition law (including merger control) to the digital economy.

Greater enforcement of UK's voluntary regime

Another major theme of the CMA's decisions and policy during the past two years has been its focus on enforcing the procedural aspects of the UK's merger control regime. This is not only in relation to its powers to investigate transactions that have not been notified to it, but also in terms of its use of initial enforcement orders (IEOs) and interim orders (IOs), and issuing fines for failure to comply with requests for information.

CMA's substantial use of its power to investigate deals of its own initiative

A key way in which the CMA enforces the UK merger control regime is through its power to investigate transactions of its own initiative (ie, those transactions that have not been notified to it) and its monitoring of merger activity to determine whether any unnotified merger should be 'called in' for review. The CMA's monitoring function is performed by the CMA's Mergers Intelligence Committee (MIC). The MIC has continued to be highly active, reviewing between 600 and 700 cases a year. Around a third of all decisions during the period 31 March 2019 to 31 March 2020 were in respect of mergers called in by the CMA. While deals are typically called in relatively shortly after completion, in the past year the CMA has called in deals in which new information came to light at a later stage (eg, *Takeover.com/JustEat*), or in which other regulators have already cleared the transaction (*Google/Looker* had already been cleared in Australia and the United States when the CMA called it in for review).

Interestingly, in the last 13 Phase II decisions since March 2019, seven of these mergers were called in by the CMA, rather than actively notified, which suggests a degree of success on the MIC's part in terms of spotting and identifying transactions that may result in harm to competition.

Stringent application of IEOs

When the CMA calls in a completed merger for review, it will impose a separate IEO on the merging parties as a matter of course at Phase I. The IEO requires, among other things, that the target business is run independently and separately, with the CMA halting (and, on occasion, reversing) any integration of the business. Should the transaction move to Phase II, an IO replaces the IEO. On a practical level, compliance with an IEO and an IO is becoming increasingly time and resource intensive; if the merging parties require a derogation from the IEO (to implement a change in key staff, for example), they must make a written derogation request to the CMA and receive clearance before taking any such activity. There are also continuing reporting requirements, and the possibility of the CMA requiring the appointment of a monitoring trustee (typically at Phase II, but increasingly also at Phase I) to oversee compliance.

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The CMA issued guidance on these orders in June 2019,[25] emphasising the importance of compliance, and has also been active in imposing fines for non-compliance. For example, in September 2019, the CMA imposed a fine of £250,000[26] (its highest to date) on PayPal for conducting cross-selling pilot campaigns, intended to target customers in Germany and France, that led it to contacting potential customers in the United Kingdom. The CMA found that PayPal had failed to comply with the obligation to compete independently, risking undermining the separate sales or brand identities of PayPal and iZettle.

The CMA issued its first-ever unwinding order in *Tobii/Smartbox* in February 2019,[27] requiring the termination of a distribution agreement and the reinstatement of certain development projects and the supply of products that had been discontinued. A further order was issued in *Bottomline/Experian* in August 2019,[28] requiring Bottomline (the buyer) to segregate all confidential information belonging to the target company, requiring that target staff do not have access to Bottomline's confidential information, and that they destroy and delete any confidential information already received.

Fines for failure to produce internal documents

The CMA has issued three fines during the past year for failure to respond to formal requests for information:

- *Rentokil/Mitie Pest Control*: The parties provided documents, which the CMA had asked for early in the process, in response to later requests. The CMA noted the evidence was highly relevant to its assessment and was inconsistent with Rentokil's submissions, and was evidence that, had the CMA not asked additional questions, may never have come to the attention of the CMA. The CMA issued a penalty of £27,000.[29]
- *AL-KO/Bankside Patterson*: In 12 March 2019, AL-KO produced almost 500 documents in response to a request with a deadline of 9 November 2018. The CMA issued a penalty of £15,000.[30]
- *Sabre/Farelogix*: The CMA issued a penalty of £20,000[31] for failure to produce internal documents, and for provision of redacted documents on the grounds of legal privilege in circumstances where the documents did not contain any legally privileged information.

25 CMA, 'Interim measures in merger investigations', 28 June 2019, CMA108con.

26 Case ME/6766/18, Completed acquisition by PayPal Holdings, Inc. of iZettle AB, Penalty notice dated 24 September 2019

27 Case ME/6780/18, Completed acquisition by Tobii AB (Publ) of Smartbox Assistive Technology Limited and Sensory Software International Limited, Enforcement order dated 28 February 2019.

28 Case ME/6830/19, Completed acquisition by Bottomline Technologies (de), Inc. of Experian Limited's Experian Payments Gateway business and related assets, Unwinding order dated 6 August 2019.

29 Case ME/6784 – 18, Completed acquisition by Rentokil Initial plc of MPCL Ltd (formerly Mitie Pest Control Ltd), Penalty notice dated 7 August 2019.

30 Case ME/6776/18, Anticipated acquisition by AL-KO Kober Holdings Limited of Bankside Patterson Limited, Penalty notice dated 21 May 2019.

31 Case ME/6806/19, Anticipated acquisition by Sabre Corporation of Farelogix Inc, Penalty notice dated 27 September 2019.

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Mergers giving rise to public interest concerns in the UK

Since the introduction of the revised thresholds for intervention in transactions raising public interest concerns in June 2018, the UK Government has been more active in scrutinising deals on the grounds of national security concerns in particular. By way of illustration, the UK Government has made five interventions on the grounds of national security since June 2018 alone, compared to only seven interventions between 2004 and 2017. When the UK Government believes that a transaction raises public interest concerns, it can direct the CMA to investigate and report on these concerns. The CMA does not advise or make recommendations on the public interest consideration, but rather takes representations from relevant parties, such as the Ministry of Defence and the Home Office.

A number of recent cases have led to the parties offering commitments in order to avoid the Secretary of State referring the transaction to the CMA for a Phase II inquiry. This included *Connect Bidco/Inmarsat*[32] and *Cobham/Advent International*.[33]

The UK government has also used its powers to make orders requiring merging companies to hold their businesses separate and prohibiting them from taking any steps to integrate the businesses for the first time. This happened in *Gardner Aerospace/Impcross* and in *Aerostar/Mettis Aerospace*.[34]

The impact of the covid-19 pandemic

The CMA published guidance on 22 April 2020 on merger assessments during the covid-19 pandemic ('Merger assessments during the Coronavirus (COVID-19) pandemic' (the covid-19 guidance)). The overarching message on a procedural level was that it is business as usual, although the CMA would be sympathetic to requests for extensions to respond to requests for information, and that pre-notification discussions may be expected to take longer.

The covid-19 guidance also highlights that its overall approach on the substance of cases remains unchanged. The CMA noted that there may be an increase in submissions that firms involved in mergers are failing financially, and would have exited the market absent the merger in question (the failing firm defence), and issued a 'refresher' on the topic alongside the covid-19 guidance. Typically, this has been a difficult test to meet, requiring compelling and consistent

32 Anticipated acquisition by Connect Bidco Limited of Inmarsat Plc, Decision notice and signed undertakings dated 29 October 2019.

33 Anticipated acquisition of Cobham Plc by AI Convoy Bidco Ltd, Decision notice and signed undertakings dated 20 December 2019.

34 Anticipated acquisition by Aerostar (and/or Ligeance Aerospace Technology Co Ltd) of Mettis Aerospace Limited, Decision notice 26 February 2020.

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evidence across all three limbs,[35] backed by internal documentation. The CMA's covid-19 guidance signals that the failing firm defence will not necessarily act as a 'saviour' for distressed acquisitions arising during and after the pandemic.

However, interestingly, one of the first major merger control decisions that the CMA took during the covid-19 pandemic in April 2020 was to provisionally clear at Phase II Amazon's acquisition of a minority in Deliveroo,[36] following receipt of new evidence that Deliveroo would fail financially and exit the market without Amazon's investment (Amazon being the only investor willing and able to invest in the circumstances). The provisional decision shows the CMA applying the test for the failing firm defence, so while perhaps a pragmatic and timely decision for Amazon and Deliveroo, this should not necessarily be taken as an indicator of a change of approach by the CMA.

Future of the relationship between UK and EU merger control

During the transition period

As readers will be aware, on 31 January 2020, the United Kingdom left the European Union and a transition period commenced. Between then and 31 December 2020, the terms of the UK's relationship with the European Union are governed by the Withdrawal Agreement. During the transition period, the Commission continues to have exclusive jurisdiction to assess transactions that meet the turnover thresholds set out in the EU Merger Regulation, including the aspects of the deal that could affect any UK market. Furthermore, the UK competition authorities and courts must continue to ensure consistency with EU merger decisions and case law.

'Live' cases at the end of the transition period

The Commission will retain jurisdiction to assess the UK aspects of EU merger filings formally notified to it within the transition period (ie, 'live' cases), and the CMA will continue sharing and receiving information relating to these cases until the Commission reaches a final decision (whether at Phase I or Phase II). Furthermore, according to the CMA's guidance on the UK's exit from the EU (the Guidance) , the CMA expects to be invited to advisory committee meetings for these cases but without any voting rights.

Of course, as is currently the case, the CMA (or the parties) can request that a transaction be referred back to it in whole or in part if the CMA is better placed to review the transaction (eg, when it concerns largely UK markets). If such a request is accepted by the Commission prior to the end of the transition period, the CMA will retain jurisdiction to review the transaction.

In terms of commitments, the Commission will continue monitoring and enforcing all aspects of commitments, including any UK elements, which it accepts from parties prior to the end of the transition period, or relating to its 'live' cases at the end of the transition period.

35 The Merger Assessment Guidelines set out a three-limb framework for assessing the exiting firm situation, requiring the CMA to consider (1) whether the firm would have exited (through failure or otherwise) absent the transaction, (2) whether there would have been an alternative purchaser for the firm or its assets, and (3) what the impact of exit would be on competition compared to the competitive outcome that would arise from the acquisition.

36 id., at 13.

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Under the terms of the Withdrawal Agreement, however, the Commission and the CMA can agree to transfer the responsibility relating to the UK elements of such commitments to the CMA.

The United Kingdom will remain bound by all Commission merger decisions and EU judgments adopted after the transition period relating to proceedings initiated within the transition period. This includes the effects of these mergers within any UK market. As is currently the case, the UK courts do not have jurisdiction to review Commission decisions or the UK-related aspects of these decisions.

After the end of the transition period

According to the Guidance, the CMA expects to have exclusive authority to review transactions that meet the UK merger thresholds after the end of the transition period, regardless of whether the same transaction is also being considered by the Commission. If the same transaction is subject to investigation in the United Kingdom and other jurisdictions, the CMA will endeavour to coordinate merger reviews regarding the same or related cases with the Commission and other competition authorities.

To prepare for its enhanced workload (estimated to be an additional 30 to 50 transactions annually), the CMA has invested in more resources and intends to monitor cases that may fall within its jurisdiction at the end of the transition period. Parties to transactions that may fall within both the Commission's and the CMA's jurisdiction, and that have not been formally notified by the end of the transition period, are encouraged to engage in discussions with both authorities.

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Peter Harper is a partner in Eversheds Sutherland's competition, EU and trade group. He has more than 13 years of experience inadvising clients on competition law issues before the European Commission, the UK's Competition and Markets Authority and other regulators around the world working in London, Brussels and Madrid.

Peter advises on a broad range of competition matters. He has extensive experience of securing merger control clearances for clients on high-profile and strategic UK and global acquisitions and joint ventures. He also regularly advises clients on behavioural investigations and compliance issues, and on market investigations and market studies.

Peter has particular experience in the financial services sector, including payments, advising financial institutions on matters relating to the competition law regimes of the UK Financial Conduct Authority and Payment Systems Regulator. Peter also has experience of advising clients in regulated sectors, including in the water industry.

Kate Newman
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Kate Newman is a partner in Eversheds Sutherland's competition, EU and trade team. She has more than 18 years of experience in the competition field and has expertise across a wide spectrum of EU and UK competition law matters, including the application of competition law to strategic collaborations, commercial strategies, trade practices and agreements; abuse of dominance; mergers and acquisitions; joint ventures; and advising clients who are the subject of investigation by the competition authorities, including cartel investigations and market investigations.

Kate has written articles on competition law for *Competition Law Insights*, *Global Competition Review*, the *Trade Practices Law Journal*, *LexisNexis* and is co-author of the mergers section of the first edition of the *CCH Australian Master Trade Practices Guide*. Kate is regarded by *The Legal 500*, *Chambers and Partners* and the *Acritas Stars Database* as a leading individual, being recognised for 'the breadth of her experience', 'her commitment to client service' and her experience in 'providing strategic and compliance related competition advice'. Kate is a regular speaker on competition law matters and has lectured at the University of Leeds.

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Claire Morgan is a principal associate in the Eversheds Sutherland Competition, EU and Trade team. She has experience in a broad range of competition law matters, including the application of competition law to commercial agreements and arrangements, cartel investigations, creating tailored compliance and training material for clients on competition law.

Claire's primary focus is on merger control. She has acted for a clients across a range of industries, and has notified many deals and achieved clearances in front of the European Commission and the UK Competition and Markets Authority, as well as managing filing processes across a number of jurisdictions such as China, Russia, Ukraine and the United States.

Claire is also an Irish qualified solicitor, having trained and worked in a leading firm in Dublin. She has degrees in law (LLB) from Trinity College Dublin (2002–2006) and intellectual property and competition (LLM) from the London School of Economics (2008–2009).

Annabel Borg
Eversheds Sutherland

Annabel Borg is a principal associate in Eversheds Sutherland's competition, EU and trade group. She has more than 10 years' experience in advising clients on all aspects of EU and UK competition law, including abuse of dominance, cartels, compliance, competition litigation, market studies and investigations, merger control and routes to market.

Annabel is also experienced in advising clients on more general EU law matters, regulatory and trade law issues. She has also had a strategic role in advising clients on Brexit and is recognised in *The Legal 500* for her work on Brexit.

Annabel has written many articles on competition law, including for *Competition Law Insights*, *Global Competition Review*, *Public Competition Enforcement Review* and *LexisNexis*. She is a member of LexisNexis' Brexit Q&A Expert Panel and a contributor to the competition chapter in *Navigating Brexit*, an online book published by Intersentia. Annabel is a regular speaker on competition law and Brexit matters.

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Laura Wright
Eversheds Sutherland

Laura Wright is a senior associate in Eversheds Sutherland's Competition, EU and trade team. She advises on a broad range of competition law issues, including anticompetitive agreements, abuses of a dominant position, market investigations and cartels.

Laura's primary focus is on merger control and foreign investment. She has acted for clients in a range of industries, and has notified deals to the European Commission, the UK's Competition and Markets Authority (CMA) and the German Federal Cartel Office, and has managed complex filing processes in a number of jurisdictions, including South Africa, Brazil, China and Russia. Her recent experience includes advising a well-known high street retailer on the CMA's Phase II investigation into its acquisition by a competing retailer.

Prior to joining Eversheds Sutherland, Laura worked on a number of high-profile matters, including advising a global telecommunications company on the European Commission's Phase II investigation into the sale of its UK mobile business to a competitor, and advising a global agrochemical and agricultural biotechnology corporation in obtaining Phase II merger clearance with disposals from the European Commission and around 30 other ex-North America clearances for its acquisition by a competitor.

Laura has a law degree from the University of Oxford.

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As a global top 15 law practice, Eversheds Sutherland provides legal advice and solutions to a global client base ranging from small and medium-sized businesses to the largest multinationals. Clients describe us as creative and well-versed in cutting-edge legal work, and our work is acknowledged as understanding how and where we can be most effective and add the greatest value.

Eversheds Sutherland's global competition, EU and trade team is recognised as one of the world's leading competition and antitrust groups. We were named the Legal Business Competition Team of the Year 2018 and were awarded the GCR Behavioural Matter of the Year Europe in 2017.

Our international team of over 70 competition lawyers located across Europe, the United States and Asia offers strategic advice and representation on national and global matters relating to merger control, competition and antitrust practices, behavioural matters, competition litigation, compliance, trade and export control. The practice handles the most complex behavioural and investigatory work (civil and criminal), as well as any ensuing litigation. A number of our team members are former regulators. We understand the way regulators work and maintain a strong network of contacts with key decision makers.

Our team of merger control lawyers have extensive experience of achieving clearances for transactions which raise complex and difficult competition. Despite merger control investigations becoming significantly more onerous in recent years, we have maintained an enviable success rate in achieving clearances, including at Phase I and Phase II, for deals that raise difficult competition issues.

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