THE MERGER CONTROL REVIEW

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I INTRODUCTION

The Competition and Markets Authority (CMA) is a non-ministerial government department tasked with the conduct of merger control reviews in the UK. It has 930 full-time equivalent staff.[2] Approximately 22 per cent of the CMA staff time is spent on mergers.[3]

The United Kingdom's merger control regime operates in a fundamentally different way compared with many other jurisdictions around the globe. Crucially, the nature of the regime is non-suspensory and voluntary. The upshot is that, even if a transaction meets the jurisdictional thresholds, the parties are free to complete the deal without prior notification or approval; however, by doing so, they take the risk of a post-completion investigation by the CMA (see Section III.ii, below). At the same time, the CMA's criteria for establishing jurisdiction to investigate mergers are wide and flexible (see Section III.i, below). On 25 April 2023, the UK government introduced to Parliament draft legislation in the form of the Digital Markets Competition and Consumers Bill (the DMCC Bill), seeking to further widen the CMA's jurisdictional reach (see Section V.i, below).

II YEAR IN REVIEW

i Beyond the statistics: is the CMA stricter than its peers?

The CMA is often cited for its high rate of intervention in merger cases. Of the 43 Phase I decisions in 2022–2023, only 25 per cent were approved unconditionally, 30 per cent were approved with remedies, and a further 33 per cent were referred to Phase II.[4]

In Phase II, of the 13 decisions in 2022–2023, 46 per cent involved cases that were either prohibited or cancelled. Only 15 per cent were approved unconditionally and 38 per cent were approved with remedies.[5]

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2 As at 31 May 2023. Source: Response from Competition and Markets Authority (CMA) to Milbank LLP's information request lodged under the Freedom of Information Act 2000, received on 13 July 2023 (CMA FoIA Response).

3 'Competition and Markets Authority Annual Plan 2023/24', page 29 (CMA Annual Plan 2023/24) (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1146961/A_CMA_ANNUAL_PLAN_2023-2024_.pdf (accessed 18 July 2023)).

4 See CMA Merger Statistics Outcomes (https://www.gov.uk/government/publications/phase-1-merger-enquiry-outcomes (accessed 18 July 2023)).

5 id.

Based on the statistics alone, the CMA would appear to take the lead in global interventions; however, statistics can be misleading, particularly when the number of cases (43 Phase I and 13 Phase II) is very small.

Taken together, however, if we consider the total number of transactions that are formally notified to the CMA, and those that are screened informally, in a given year, the statistics look very different. In 2022–2023, the CMA considered around 700 transactions in total. If the universe of 700 cases is a hypothetical denominator to calculate an intervention rate, the picture looks far different. By way of example, the proportion of Phase II referrals would be around 2 per cent and the proportion of prohibitions and cancellations less than 1 per cent. By these standards, the rate of intervention appears relatively low.

Ultimately, the CMA is clearly a very active regulator, and has not hesitated to take positions that diverge from other leading competition authorities; however, the statistics that are often used to assert that it more actively intervenes than its peers can be misleading, given the unique features of UK merger control.

ii Technology cases

The CMA routinely identifies digital and technology markets as a priority, noting that it is 'appropriate to apply a high degree of scrutiny to acquisitions of nascent competitors by large digital players so that digital markets continue to develop in a way that fosters innovation and competition, stimulating growth and benefiting UK customers'.[6] Although the CMA notes that it clears the vast majority of mergers it reviews, including those carried out by technology firms, it also has defended its interventions as ensuring greater innovation.[7]

The CMA is currently at the centre of one of the most consequential technology mergers in memory, having recently published a final report to prohibit Microsoft's acquisition of Activision, the largest gaming transaction to date, on 26 April 2023.[8] In brief, the CMA concluded that the transaction would lead to a substantial lessening of competition in the cloud gaming sector. The CMA cited concerns that the transaction would stifle competition in this rapidly growing sector, notwithstanding remedies offered by Microsoft to license important gaming content, in particular, Call of Duty. Indeed, the same remedies formed part of the European Commission's approval of the transaction.

At the time of writing, the ultimate outcome of *Microsoft/Activision* remains far from clear. Following the CMA's Final Report, Microsoft sought judicial review of the CMA's decision from the Competition Appeal Tribunal (CAT); however, in an unprecedented turn of events, Microsoft and the CMA jointly applied to the CAT to pause proceedings, while the CMA considers 'any proposals of Microsoft to restructure the transaction in a way that

6 See Speech, Berkeley Spring Forum: Mergers policy and practice (22 April 2022) (https://www.gov.uk/government/speeches/berkeley-spring-forum-mergers-policy-and-practice (accessed 18 July 2023)). See also Speech, Sarah Cardell, 'Competition and Innovation: a priority for the CMA' (16 June 2023) https://www.gov.uk/government/speeches/competition-and-innovation-a-priority-for-the-cma (accessed 18 July 2023)).

7 See Speech, Sarah Cardell (op. cit note 6), (citing Case ME/6920/20 *Meta/Kustomer* (27 September 2021); Case ME/6940/20 *Microsoft/Nuance* (2 March 2022); *Amazon/iRobot* (16 June 2023); *Meta/Giphy* (Final Report, 30 November 2021), *Illumina/PacBio* and *Viasat/Inmarsat* (Final Report, 10 May 2023)).

8 See *Microsoft/Activision* (Final Report of 26 April 2023).

would address the concerns in the final report'. Subsequently, on 14 July, the CMA extended the deadline to issue its Final Order in the case to 29 August 2023, to consider in particular a detailed submission from Microsoft.

Microsoft/Activision will remain closely watched and enormously consequential for the CMA as it touches on key issues, such as the CMA's approach to innovative and rapidly developing markets, as well as behavioural remedies. *Microsoft/Activision* is also consequential in the parallel review of global transactions as the CMA reached a divergent outcome from the European Commission and many other regulators. The timing of the joint application to the CAT to stay the proceedings is notable, given that it immediately followed the rejection in the attempt by the US Federal Trade Commission to preliminarily enjoin the transaction.

iii Wider economic context: cost of living and failing firms

On several occasions, the CMA has pointed at the importance of its interventions at a time when consumers face serious cost pressures; for example, in a press release reporting a recent substantial lessening of competition (SLC) decision in the veterinary sector, the CMA commented that at a time when 'household budgets are already stretched, it's crucial that we ensure continued access to good quality pet care at a fair price'.[9] Similarly, when the CMA prohibited a merger of suppliers of ready-to-bake products at Phase II, the CMA's press release stated that as 'living costs continue to rise, it's our responsibility to make sure that competition can play its part in delivering the best possible deals for customers'.[10] The Phase II decision in that case also highlighted the particular importance of private label products against the background of rising costs of living.[11] The CMA's 'Annual Plan 2023/24' and the government's draft strategic steer to the CMA raise the same theme of protecting consumers at a time when budgets are tight.[12]

At times of financial hardship, the question regularly comes up whether the CMA is prepared to wave through deals on account of financial difficulties faced by the target company. The CMA has traditionally taken a cautious approach to the 'failing firm defence', requiring two conditions to be met: first, the failing firm would be likely to have exited the market and, second, there would not have been an alternative, less anticompetitive purchaser for the target.[13] It happens fairly regularly that evidence is available to substantiate the first limb but not the second. As a practical matter, the purchaser will normally have limited insight of the identity and availability of alternative purchasers. In a rare case involving dairy producers, the CMA accepted the failing firm defence at Phase I. Remarkably, the CMA found that the target company was not marketed to potential purchasers, which would normally have prevented CMA approval based on the failing firm defence. Nevertheless,

9 CMA, press release (18 May 2023) re: *Medivet/Multiple independents* (https://www.gov.uk/government/news/vet-business-takeovers-raise-competition-concerns-for-pet-owners (accessed 18 July 2023)).

10 CMA, press release (20 January 2023) re: *Cérélia/Jus-Rol* (https://www.gov.uk/government/news/cma-unwinds-dough-deal-to-protect-uk-grocers-and-shoppers (accessed 18 July 2023)).

11 *Cérélia/Jus-Rol* Phase II decision, Paragraph 7.5 (https://assets.publishing.service.gov.uk/media/63ce8119d3bf7f3c4df5999b/Final_Report_FINAL.pdf (accessed 18 July 2023)).

12 For example, CMA Annual Plan 2023/24: foreword at page 6 and Paragraphs 6.5 (table), 6.10 and 6.12. For a discussion of the strategic steer, see further below.

13 CMA, 'Merger Assessment Guidelines', Paragraph 3.21 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051823/MAGs_for_publication_2021_--_.pdf (accessed 18 July 2023)).

the CMA ultimately reached out to potential alternative purchasers, who all confirmed that they would not have been interested in acquiring the target company, after which the CMA accepted the defence.[14]

III THE MERGER CONTROL REGIME

i Wide jurisdictional net

The CMA's jurisdictional net is wide and is expected to become even wider in the foreseeable future. At the time of writing, an acquisition can be reviewed by the CMA if either the 'turnover test' or the 'share of supply' test is satisfied.

Under the turnover test, the target business would need to have achieved UK turnover of more than £70 million in the preceding financial year.[15] The DMCC Bill seeks to increase this threshold to £100 million in line with inflation.[16]

Under the share of supply test, the parties would both need to supply or acquire goods or services of a particular description in the United Kingdom and, post-transaction, they would need to supply or acquire at least 25 per cent of those goods or services in the United Kingdom or a substantial part of it.[17]

In recent years, the CMA has adopted a rather elastic interpretation of the share of supply test.[18] In *Sabre/Farelogix*, the CAT confirmed the CMA's broad discretion in applying this test.[19] Further, the DMCC Bill proposes to widen the CMA's jurisdiction even further by adding a third test, aimed at capturing acquisitions of nascent competitors, also known as 'killer acquisitions'. One of the parties, in practice normally the purchaser, would need to supply at least 33 per cent of goods or services in the United Kingdom, or a substantial part of the United Kingdom, and its UK turnover would need to exceed £350 million. The only other requirement would be that the other party, normally the target business, is active in the United Kingdom or supplies goods or services in the United Kingdom.[20] Crucially, there would no longer be a need for a competitive overlap between the parties.

The relevant threshold for control is also low. In particular, an acquisition of the ability to materially influence the policy of the target business in the marketplace is deemed to qualify as control for jurisdictional purposes (albeit the lowest level of control);[21] for example, when Amazon acquired a 16 per cent stake in Deliveroo, the CMA found that this would give rise to material influence, particularly given Amazon's board seat (one of a total of seven),

14 Phase I Decision in *Nijjar Group Holdings (Acton) Limited/Medina Holdings Limited* of 30 March 2022, Paragraphs 30–38 (https://assets.publishing.service.gov.uk/media/62445422e90e075f14254701/Decision_Summary_-_A.pdf (accessed 18 July 2023)).

15 Enterprise Act 2002 (EA 02), Section 23(1)(b).

16 Digital Markets Competition and Consumers Bill (DMCC Bill), Schedule 4, Paragraph 2.

17 EA 02, Section 23, Clauses (3) and (4).

18 See, e.g., *Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc.*, Decision of 16 December 2019, Case No. ME/6831/19.

19 *Sabre Corporation v. Competition and Markets Authority*, Competition Appeal Tribunal judgment of 21 May 2021, Case No: 1345/4/12/20.

20 DMCC Bill, Schedule 4, Paragraph 5.

21 EA 02, Section 26(3); CMA, 'Mergers: Guidance on the CMA's jurisdiction and procedure' (January 2021, amended January 2022), Paragraph 4.17 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1044636/CMA2_guidance.pdf (accessed 18 July 2023)).

shareholder rights and Amazon's status and expertise.[22] The material influence threshold is below the level where decisive influence is normally found, which is the relevant standard under the EU Merger Regulation.[23]

ii Deal conditionality and risk allocation

The UK merger control regime is non-suspensory in nature, and should the parties choose to notify they can do so before or after completion. The parties can also choose not to notify at all, taking the risk that the CMA may initiate an investigation on its own initiative.

These decisions have consequences for risk allocation; for example, if completion of an acquisition is not conditional on CMA approval, the purchaser will generally accept the UK competition risk, which typically comprises two key risks.

First, the CMA could initiate an investigation on its own initiative; for example, on the back of market intelligence or a third-party complaint. In a worst-case scenario for the parties, this might result in Phase I and Phase II investigations (see Section III.vi), followed by a forced divestment of the whole or part of the acquired business. For example, in *Tobii/Smartbox*, the CMA found that the only acceptable remedy would be a divestment of the acquired business to a third party.[24]

Second, in the case of an investigation into a completed merger, the CMA will routinely impose an initial enforcement order (IEO) for the duration of the investigation, which is burdensome in practice. This risk applies even if the purchaser decides to notify post-closing. IEOs are discussed further in Section II.v, below.

If a purchaser is not prepared to take these risks, completion of the transaction will typically be made conditional on prior CMA approval, or at least a satisfactory response from the CMA following the submission of a briefing paper (see Section III.iii, below). As a CMA condition in the transaction documents has the effect of shifting most of the competition risk between the parties, the parties will often address this point in their contract negotiations. The outcome typically depends on the substantive issues in the case and the parties' respective negotiating positions. By way of example, a seller might insist on an agreed 'reverse break free' payable by the purchaser to the seller if no CMA approval has been obtained, or an obligation on the purchaser to do anything necessary to achieve approval (also known as a 'hell or high water' obligation).

iii Briefing paper versus merger notice

Parties considering whether to notify their transaction to the CMA have an alternative to a formal merger notice, as they can also submit an informal, confidential briefing paper to the CMA's mergers intelligence committee.[25] This is more than just a matter of administrative expediency, as the choice will have a material bearing on the CMA review process.

22 CMA, Phase II Decision, *Amazon/Deliveroo* of 4 August 2020.

23 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings

24 CMA, Phase II Decision, *Tobii AB/Smartbox Assistive Technologies Limited and Sensory Software International Ltd* of 15 August 2019.

25 Conversely, the CMA's mergers intelligence committee may also reach out proactively to the parties to a transaction and request information about the transaction.

The EA 02 envisages that the normal entry point for a CMA review is the submission of a merger notice, in a form prescribed by the CMA.[26] The submission of a complete merger notice starts the 40-business day clock on a Phase I investigation by the CMA.[27] Before the CMA confirms that the merger notice is complete, there tends to be a period of pre-notification contacts with the CMA (see further at Section III.vi, below).

In 2016, however, the CMA formally opened an alternative entry route for mergers: the parties can submit a briefing note to the CMA's mergers intelligence committee after the signing of a merger agreement.[28] The note, which should not exceed five pages, will normally provide an outline of the transaction and the reasons why the transaction does not warrant a formal investigation by the CMA. In a best-case scenario, the CMA will confirm within a short period (normally between one and three weeks) that no further information is required at that stage. Although this view is not legally binding on the CMA, it provides a significant degree of practical comfort.[29]

Conversely, parties may decide to make no submission to the CMA. In such cases, the CMA's mergers intelligence committee may reach out proactively to parties and ask for information about the transaction. Following this engagement, the CMA could decide that it has no further questions. It could also raise further questions or indicate that it believes that an investigation is needed.

In practice, the vast majority of transactions screened by the CMA are reviewed following the submission of a briefing paper or proactive outreach by the mergers intelligence committee. In financial year 2022–2023, the CMA reviewed around 700 transactions, of which, we understand, 146 were brought to the CMA's attention by the parties using the briefing note route.[30] In addition, of the 700 reviewed transactions, only 43 (around 6 per cent) were formally investigated in Phase I.[31]

iv Pre-notification

In voluntarily notified mergers, a period of pre-notification engagement with the CMA tends to be necessary, before the CMA is prepared to confirm that it has sufficient information to be able to begin its Phase I investigation and thus start the statutory Phase I clock of 40 working days.[32] In practice, this pre-notification period typically consists of the CMA reviewing the draft merger notice and the parties responding to multiple information requests from the CMA. The process is largely similar in cases that are not voluntarily notified, in that a case tends to start with an enquiry letter from the CMA followed by various information requests. When the CMA has sufficient information to begin its investigation, it confirms to the parties that the clock has started to run on the statutory Phase I period of 40 working days.

26 EA 02, Section 96.

27 ibid., Section 34ZA.

28 CMA, 'Guidance on the CMA's mergers intelligence function' (December 2020), Paragraphs 3.2–3.5 (the first version of this guidance document was published in 2016).

29 ibid., Paragraph 4.2.

30 CMA FoIA Response (op. cit. note 2).

31 id.

32 CMA, 'Mergers: Guidance on the CMA's jurisdiction and procedure' (op. cit. note 21), Paragraph 6.12.

The most recent data available shows that the average length of pre-notification in financial year 2022–2023 was 71 working days,[33] which is nearly twice the average duration of 37 working days in 2019–2020.[34]

v Initial enforcement orders

In a non-suspensory and voluntary merger control regime, such as the United Kingdom, it would be theoretically possible for a transaction to complete and the purchaser to integrate the acquired business within its own organisation before the CMA has reached a decision. If, in those circumstances, the CMA found that remedial action (e.g., a divestment) was necessary, the CMA would be faced with the unenviable task of overseeing an extraction of parts of the already integrated businesses. This is colloquially referred to as 'unscrambling the eggs', since it can be difficult, if not impossible.

The answer to this challenge is the CMA's ability to issue IEOs aimed at preventing 'pre-emptive action'.[35] The CMA's template IEO seeks not only to prevent the integration of the acquired business but also to freeze the acquirer's business operations in all material respects.[36] When Facebook challenged the latter aspect on the basis that it would potentially restrict its hundreds of businesses and more than 50,000 employees worldwide, the CAT and the Court of Appeal confirmed that the CMA was right to include the Facebook organisation within the global ring-fence.[37] As a next step following the imposition of an IEO, it would be up to the parties to seek derogations from the CMA to be permitted to deviate from specific restrictions under the IEO. In practice, the parties and their advisers spend a significant amount of time discussing derogations with the CMA's case team. The CMA routinely imposes an IEO in completed transactions: in financial year 2022–2023, the CMA imposed IEOs in 36 cases, which is a high number given that the CMA made 43 Phase I decisions in total.

The CMA's power to impose IEOs is seen as a necessary corollary of having a voluntary non-suspensory regime.[38] The CMA specifically highlighted this point when it imposed a £50.5 million penalty on Meta for IEO breaches, including Meta's refusal to provide the CMA with comprehensive compliance updates in the context of Facebook's acquisition of Giphy.[39] The CMA is also able to order the reversal of integration steps that took place before the IEO;[40] for example, the CMA required Bottomline to undo, to the extent possible,

33 CMA FoIA Response (op. cit. note 2).

34 'UK Merger Control: 2019 in review and a forward look at 2020' (presentation by Colin Raftery to the Competition Law Section of the Law Society on 10 March 2020).

35 EA 02, Section 72(2).

36 For example, the purchaser is not permitted to make any changes to its key staff without the CMA's prior consent (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1042682/Template_Initial_enforcement_order.pdf (accessed 18 July 2023)).

37 *Facebook, Inc. v. CMA*, Court of Appeal judgment of 13 May 2021, Paragraphs 57–60.

38 CMA guidance, 'Interim measures in merger investigations', Paragraph 1.6 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1042670/CMA108_interim_measures_in_merger_cases.pdf (accessed 18 July 2023)).

39 CMA, Penalty decision of 20 October 2021 in *Facebook, Inc./Giphy, Inc.*, Paragraphs 120, 154, 221 and 332.

40 EA 02, Section 7, Clauses (3A) and (3B).

certain commercial information sharing that had already taken place in the context of an acquisition in 2019.[41] The CMA will only rarely impose an IEO in relation to transactions that have not yet completed.[42]

vi Investigation: Phases I and II

The CMA will formally launch its investigation if either the parties' merger notice contains all necessary information or the CMA has otherwise gathered sufficient information. This marks the start of a statutory Phase I timetable of up to 40 business days.[43] The most recent statistics suggest that the average Phase I duration is 38 working days.[44] If the CMA refers a transaction to Phase II for in-depth investigation, the final report needs to be issued within 24 weeks (extendable by up to eight weeks if there are special reasons). The average Phase II duration is nearly 26 weeks.[45] The long duration of Phase II investigations creates an incentive to offer potentially far-reaching remedies at Phase I. Parties will often face a trade-off between a speedy resolution of the investigation and a satisfactory outcome from a value perspective.

There is a significant difference in the legal standard for finding concerns at Phase I compared with Phase II:

At Phase I, the CMA is under a statutory duty to refer a transaction if the CMA believes that 'it is or may be the case that' the transaction gives rise to an SLC in the United Kingdom.[46] The CMA's interpretation is that a reference would require it to have 'a reasonable belief, objectively justified by relevant facts, that there is a realistic prospect that the merger will lessen competition substantially'.[47] It is possible, therefore, that a merger is referred to Phase II if the CMA assesses the likelihood of concerns arising at less than 50 per cent.[48]

By contrast, at Phase II the standard for finding concerns is the balance of probabilities. In other words, the CMA will need to determine whether it is more likely than not (a likelihood of more than 50 per cent) that an SLC will result.[49]

The decision maker is also different: at Phase I, decisions are made by a senior CMA official whereas at Phase II the decision maker is an independent panel drawn from a group of experts in various fields. In financial year 2022–2023, the CMA made 43 Phase I decisions and 13 Phase II decisions.[50] As mentioned above, the CMA reviewed more than 700 merger cases in 2022–2023, which shows that the vast majority of cases are reviewed outside the formal Phase I and Phase II framework.

41 CMA, Unwinding order in *Bottomline/Experian Payments Gateway business* of 2 August 2019.

42 CMA guidance, 'Interim measures in merger investigations' (op. cit. note 37), Paragraph 2.19.

43 EA 02, Section 34ZA(3).

44 The figure relates to financial year 2022–2023 (source: CMA FoIA Response (op. cit. note 2)).

45 The average figure is 25.8 weeks, based on a review of all Phase II decisions issued in the period between 1 January 2022 and 30 June 2023. *Cargotec/Konecranes* is somewhat of an outlier with 37 weeks, mainly because of the clock being stopped. Without that case, the average duration would be 24.3 weeks. In financial year 2022–2023, the average Phase II duration was 6.1 months (source: CMA FoIA Response (op. cit. note 2).).

46 EA 02, Section 22(1).

47 CMA, 'Mergers: Guidance on the CMA's jurisdiction and procedure' (op. cit. note 21), Paragraph 3.8.

48 This is the case provided that the likelihood is not 'purely fanciful'. See Court of Appeal in *OFT v. IBA Health* (19 February 2004), Paragraph 48.

49 CMA, 'Merger Assessment Guidelines' (op. cit. note 13), Paragraph 2.36.

50 Merger inquiry outcome statistics, published on the CMA website.

vii Fast-track options

Parties can request that their case is fast-tracked, at Phase I, Phase II or both. This comes at a price, however, as the CMA requires parties to formally accept that the test for reference is met (at Phase I) or that the merger results in an SLC (at Phase II).[51] The fast-track may be useful if the parties want to commence remedies discussions more quickly or to align the assessment with merger control reviews in other jurisdictions. If it is abundantly clear from the start that a case will be referred to Phase II for in-depth investigation anyway, parties may want to avoid the time, cost and effort associated with an involved Phase I process, including an 'issues letter';[52] for example, in *Ali Holding Srl/Welbilt, Inc* the Phase I review period was reduced to 10 business days (from the statutory maximum of 40 business days).[53] This was followed by an unusually fast remedy process (22 business days) involving the divestment of part of the target business.

In 2022–2023 financial year, fast-track requests were submitted and awarded for four of the CMA's 43 decisions (9.3 per cent) at Phase I and for two of the 13 (15.4 per cent) cases at Phase II.[54]

viii Remedies

If the CMA decides at Phase I that a transaction has resulted, or may be expected to result, in an SLC, the parties have up to five business days to submit undertakings in lieu of reference (UILs). The CMA will be required to decide within 10 business days of the date of the Phase I decision whether the UILs offer is acceptable in principle, before definitively agreeing the UILs. The CMA will only accept UILs if they are considered clear-cut. This is a relatively high bar to meet that results in parties frequently giving up more than if they had decided to fight the case in a lengthy Phase II investigation. This feeds into the tactical decision faced by parties as to whether to offer UILs or to proceed to Phase II.

At Phase II, in completed mergers, the CMA will decide on the remedy that is necessary to resolve the concerns. This could involve the forced divestment of the entire business acquired by the purchaser. Considering the tight time frames and inevitable publicity associated with a CMA process, the resemblance of a 'fire sale' often results in depressed valuations. For example, Meta is reported to have made an 83 per cent loss on the sale of Giphy following the CMA's divestment order in 2023.[55] In anticipated mergers, the CMA will also decide on the necessary remedy, but then the parties are free to decide whether the remedy is acceptable and to proceed with the deal.

In financial year 2022–2023, the CMA accepted UILs (i.e., Phase I remedies) in 13 cases. Of the 13 Phase II decisions in the same year, 10 were prohibited, remedied or cancelled.[56]

51 The DMCC Bill (Schedule 5) seeks to codify the fast-track route to Phase II.

52 CMA, 'Mergers: Guidance on the CMA's jurisdiction and procedure' (op. cit. note 21), Paragraphs 7.1–7.21.

53 CMA, Decision of 9 June 2022.

54 CMA FoIA Response (op. cit. note 2).

55 'Meta sells Giphy to Shutterstock for $53mn after regulators step in', *Financial Times* (23 May 2023).

56 Merger inquiry outcome statistics, published on the CMA website.

ix Judicial review

Persons aggrieved by a CMA merger decision may apply to the CAT for a review of that decision.[57] The CAT is unable to review the merits of the CMA's decisions or second-guess the assessments made by expert decision makers at the CMA, particularly if the decisions involve 'an element of economic prediction'.[58]

Instead, the CAT will apply judicial review principles. This requires a determination as to whether the CMA's conclusions are adequately supported by evidence, the facts have been properly found, all material factual considerations have been taken into account, and material facts have not been omitted.[59] Decisions by the CAT may be appealed to the Court of Appeal on points of law. Subsequent appeals to the Supreme Court are rare in merger cases.[60]

IV OTHER STRATEGIC CONSIDERATIONS

i Parallel proceedings

Many transactions trigger reviews in multiple jurisdictions, particularly post-Brexit as the United Kingdom is no longer part of the European Commission's 'one-stop shop'. In a recent letter to Parliament, the CMA commented that '[a]cross much of its work, including merger control, the CMA works closely with competition authorities around the world, including the Federal Trade Commission (FTC) and Department of Justice in the US, and the European Commission', and that '[e]ffective international cooperation is particularly important for the CMA now that the UK has left the European Union'.[61]

This reflects the general trend that competition authorities often seek waivers to speak with one another, and merging parties likewise need to closely and carefully coordinate multi-jurisdictional matters to obtain efficient and consistent outcomes. This involves coordination of both timing and substantive matters; for example, in the context of CMA proceedings, the duration of equivalent merger control proceedings can vary, with a CMA Phase I investigation somewhat longer than an equivalent European Commission Phase I review – particularly if remedies are involved. Furthermore, although strategic coordination of multi-jurisdictional matters typically results in consistent outcomes, it is not always the case, as *Microsoft/Activision* demonstrates. To cite another example, the CMA approved Amazon's acquisition of iRobot[62] whereas the European Commission elected to open a Phase II investigation.

57 EA 02, Section 120.

58 *AkzoNobel v. Competition Commission* [2013] CAT 13, Paragraph 38.

59 *Unichem Limited v. the Office of Fair Trading* [2005] CAT 8, Paragraph 174.

60 An example was the *Eurotunnel* case, in which the Supreme Court provided guidance on the legal test for assessing the circumstances in which the merger control rules apply to the acquisition of business assets (*Société Coopérative de Production SeaFrance SA v. The Competition and Markets Authority* [2015] UKSC 75).

61 See Letter of 26 May 2023 from Sarah Cardell, chief executive officer of the CMA, to Darren Jones MP, Business and Trade Select Committee (https://committees.parliament.uk/publications/40218/documents/196404/default/ (accessed 18 July 2023)).

62 See *Amazon/iRobot* (CMA, Summary of Phase I Decision (16 June 2023)).

ii Interaction with national security regime

The National Security and Investment Act 2021 (the NSI Act) introduced a new mandatory notification regime from 4 January 2022 for acquisitions in sectors that are considered sensitive from a national security perspective. Therefore, transactions may be subject to parallel reviews under the competition and national security regimes. The CMA and government's Investment Security Unit (ISU) entered into a memorandum of understanding (published on 16 June 2022) that sets out the principles for cooperation. One of the stated aims is to avoid a clash at the remedies stage. It is conceivable, for example, that the CMA would approve a divestment purchaser whose affiliations might give rise to national security concerns.

If the government has decided a case under the NSI Act, it can issue a direction to the CMA to do or not do anything under the merger control rules, provided that this is necessary for the purpose of remedying a national security risk.[63] In appropriate cases, it would be sensible for parties to seek early stage engagement with the ISU and the CMA to minimise the risk of delays arising because of conflicting views or remedies.

iii Look-back at long-completed deals

The CMA is normally able to decide completed deals up to four months from completion; however, if the deal has not been made public and the CMA has not been informed of it, the four-month clock does not start to run from completion but from the date of publication or the CMA being made aware.[64] An important practical question is when a transaction is made public. The CMA's position is that this will normally be the case if material facts relating to the transaction (i.e., the parties' names, the nature of the transaction and the completion date) have been publicised in the national or relevant trade press in the United Kingdom and the acquirer has prominently displayed a press release on its own website.[65]

As a result, there can be a substantial time gap between completion and the CMA's investigation. In a recent case involving the acquisition of a veterinary practice, more than 11 months had passed since completion by the time the CMA found out about the transaction. In that case, the CMA also determined that mentioning the transaction on a website for the provision of recruitment services for veterinary surgeons was insufficient to constitute publication in the trade press.[66] Therefore, to avoid a long period of uncertainty, the purchaser would need to inform the CMA of the transaction or otherwise take the necessary steps to publicise the transaction. On the latter point, the CMA has made it clear that it does not regard a regulatory filing regarding the same transaction made in another jurisdiction as sufficient to start the four-month clock.[67]

63 National Security and Investment Act 2021, Section 31.

64 EA 02, Section 24.

65 CMA, 'Mergers: Guidance on the CMA's jurisdiction and procedure' (op. cit. note 21), Paragraph 4.49.

66 *Independent Vetcare Limited/Multiple* of 17 February 2023, Paragraphs 30(b) and 82.

67 Phase II Decision in *Bottomline Technologies (de), Inc/Experian Limited's Payments Gateway business*, Paragraph 5.26.

V OUTLOOK AND CONCLUSIONS

i Digital Markets, Competition and Consumers Bill

On 25 April 2023, the UK government introduced the DMCC Bill to Parliament. This highly anticipated Bill is sizeable, with 388 pages, and seeks to introduce wide-ranging changes across several areas, including the regulation of digital markets and the reinforcement of consumer protection rules. As already highlighted, the DMCC Bill also involves a proposal for further expansion of the CMA's jurisdictional remit in relation to killer acquisitions.

As part of the regulation of digital markets, it is proposed that the CMA will have the power to designate firms as having strategic market status (SMS). This designation will have far-reaching consequences for SMS firms, as they will be subject to a set of conduct requirements that the CMA will tailor to each firm. The most important conditions for SMS designation are that the firm has substantial and entrenched market power as well as a position of strategic significance in respect of a digital activity. The DMCC Bill also imposes an obligation on SMS firms to report to the CMA their acquisitions of stakes of 15 per cent or more, provided that the consideration for the transaction is at least £25 million. This report needs to be submitted to the CMA before completion, with a mandatory waiting period of five working days, giving the CMA an opportunity to consider whether to open an investigation under the usual merger review rules. Given the long-standing voluntary and non-suspensory nature of the merger control regime in the United Kingdom, the introduction of this stand-still obligation would mark a sea change, albeit in relation to a small and specific group of companies.

ii Blockbuster cases

Although there have been a number of notable cases, without doubt one of the leading cases of the year to date is the CMA's review and prohibition of Microsoft's acquisition of Activision. As discussed above, the CMA's review raises issues concerning the developing technology markets, the treatment of behavioural remedies in technology markets and divergent outcomes among regulators in global transactions. The CMA's prohibition was under review by the CAT, but those proceedings have been paused while the CMA considers proposals by Microsoft to restructure the transaction. Meanwhile, the CMA has extended the deadline by which it would adopt its final order. Taken together, although the outcome is far from clear, this unprecedented series of events ensures that *Microsoft/Activision* will be a blockbuster case in the United Kingdom for years to come.

The second eagerly awaited review is the CMA's investigation of the *Vodafone/CK Hutchinson* joint venture announced in June 2023. In a pre-Brexit world, the CMA asked the European Commission for the review of the *Three/O2* merger to be referred to the CMA. The Commission refused this and ultimately blocked the transaction – an outcome that was recently validated by the Court of Justice of the European Union.[68] The *Vodafone/CK Hutchinson* transaction provides the CMA with the first opportunity to review a merger of mobile network operators. Given the complexity, this will undoubtedly be a blockbuster case in 2023.

68 See Case C-376/20 P – *Commission v. CK Telecoms UK Investments* (Judgment of 13 July 2023).

iii Government's strategic steer

On 12 May 2023, the government published a consultation document relating to its draft strategic steer to the CMA.[69] Though the draft steer does not specifically address merger control, the government's general focus on certain areas could indicate increased merger control scrutiny. For example, the government expects the CMA to prioritise action that addresses cost of living challenges, particularly markets in which high costs disproportionately affect household budgets (see also Section II.iii). In addition, the government expects the CMA to enable consumers and businesses to capitalise on the opportunities created by the growth of the digital economy. The new regulatory framework set out in the DMCC Bill (discussed above) is important in this regard. It is possible that, in certain situations, the focus areas highlighted in the strategic steer would tip the balance towards transaction parties making a voluntary merger control notification to the CMA.

69 Consultation relating to 'Draft strategic steer to the Competition and Markets Authority, 2023', published 12 May 2023.