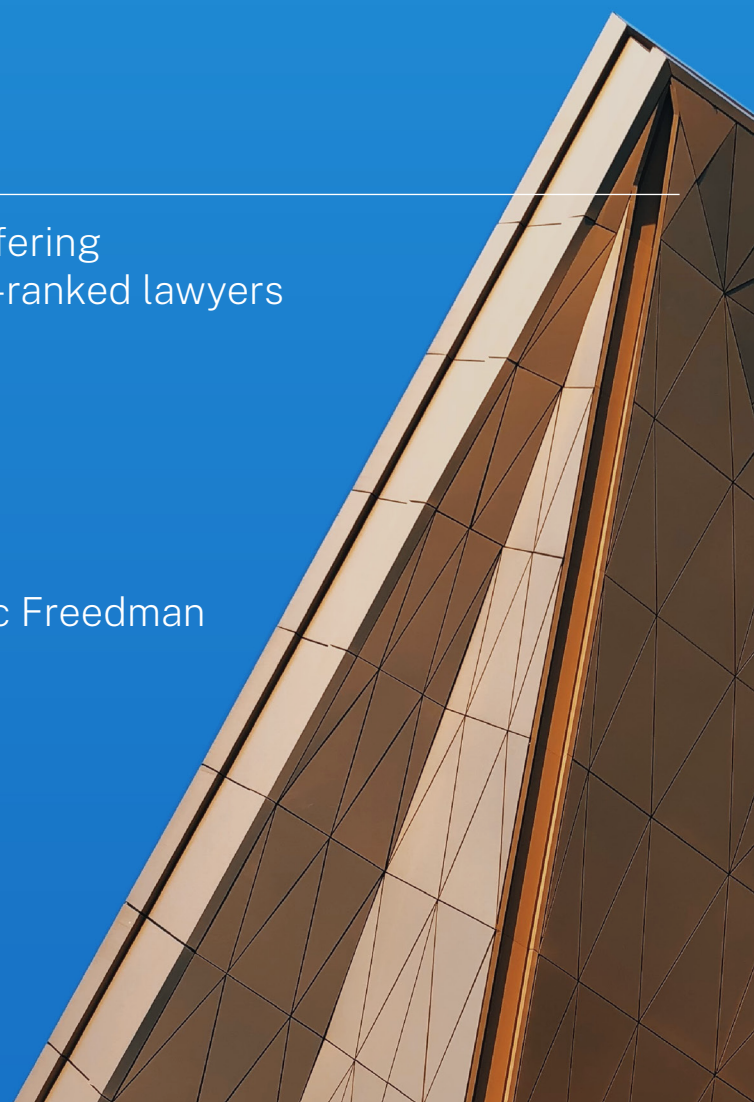
Chambers
AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

Merger Control 2023

Definitive global law guides offering comparative analysis from top-ranked lawyers



UK: Law & Practice

Alex Stratakis, Reign Lee, Marc Freedman and Todor Papanov
Van Bael & Bellis

UK

Law and Practice

Contributed by:
Alex Stratakis, Reign Lee, Marc Freedman and Todor Papanov
Van Bael & Bellis

Contents

Van Bael & Bellis is widely acknowledged as having one of the leading practices in EU and UK competition law, including merger control. From its main office in Brussels and its newest office in London, the competition team at Van Bael & Bellis has assisted clients at both the EU and national levels, notably appearing before the European Commission, the UK Competition and Markets Authority (CMA), and the EU and UK courts, where the firm has acted as counsel in many landmark cases. Within the field of merger control, Van Bael & Bellis has a dedicated team of EU and UK specialists who regularly represent merging parties as well as third parties and complainants in cases involving key issues of jurisdiction, procedure, and substantive law. The firm has succeeded in obtaining clearance for numerous complex transactions before the European Commission and the CMA. It is frequently called on to co-ordinate merger control filing efforts across the world.

The team would like to thank Sophie Sundaram for her assistance in helping to prepare this chapter.

Authors

Alex Stratakis is a partner and head of Van Bael & Bellis' UK competition practice. He is a dual EU and UK qualified lawyer. Alex has almost 20 years of experience advising on all aspects of competition law, focusing on complex merger control (including a number of Phase 2 reviews), foreign direct investment, abuse of dominance, market studies and market investigations, distribution, and subsidy control. He frequently represents clients before the UK CMA, the European Commission, and national competition authorities across the globe, as well as before the European and national courts.

Reign Lee is head of strategy at Van Bael & Bellis and an associate in the London office. She focuses on all aspects of UK and EU competition law, with a particular emphasis on merger control, horizontal and vertical agreements, and market investigations. Reign specialises in the interplay between competition law and other areas such as data protection law and consumer law. She also focuses on emerging issues, including digital markets regulation, sustainability agreements, and subsidy control. Reign's experience additionally includes advising third parties in EU antitrust investigations concerning Big Tech companies and advising on complex distribution arrangements.

Marc Freedman is a senior associate at Van Bael & Bellis and regularly advises clients on complex UK, EU, and multi-jurisdictional merger control (including Phase 2 investigations and appeals), foreign direct investment screening, antitrust investigations, abuse of dominance, market studies, and market investigations. He has particular expertise in relation to UK merger control, having recently completed a year-long secondment to the Phase 1 mergers team of the UK's Competition and Markets Authority (CMA). In the digital space, in addition to his substantial merger control experience, Marc has also advised various clients on a number of recent UK and EU antitrust investigations and sector inquiries concerning Big Tech companies.

Todor Papanov is a senior associate at Van Bael & Bellis and is a dual UK and EU qualified lawyer. He has secured merger control approvals under both the UK and the EU regimes, and also has considerable experience in UK Phase 2 investigations, as well as appeals before the UK CAT. His experience also includes cartel investigations, follow-on litigation, sector inquiries, EU and UK digital market investigations, and competition law compliance. In addition, he has assisted a broad range of international clients as they seek to navigate the increasingly complex national security and FDI screening landscape.

Van Bael & Bellis

Holborn Gate
330 High Holborn
London
WC1V 7QH
UK

Tel: +44 20 7406 1471
Email: london@vbb.com
Web: www.vbb.com

VAN BAEL & BELLIS

1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013 (EA), provides the legal basis for the UK merger control regime.

The Competition and Markets Authority (CMA) is the primary competition regulator in the UK and is responsible for enforcing the UK merger control regime.

The CMA has published a collection of guidance on its mergers work, which can be found on its website, including:

- Mergers – the CMA's jurisdiction and procedure – CMA2;
- Merger Assessment Guidelines;
- Mergers: How to notify the CMA of a merger;
- Mergers: Exceptions to the duty to refer and undertakings in lieu;
- Merger Remedies; and
- Providing initial documents to the CMA.

1.2 Legislation Relating to Particular Sectors

The National Security and Investment Act 2021 ("NSI Act"), which entered into force on 4 January 2022, created a separate investment screening regime in the UK. The NSI Act gives the government powers to investigate transactions on the grounds of national security (see **9.1 Legislation and Filing Requirements**).

In addition, under the EA, the Secretary of State has the power to intervene in "public interest mergers" and "special public interest mergers". "Public interest mergers" include transactions involving media enterprises, the UK financial system, and public health emergencies. "Special public interest mergers" include transactions involving newspaper and broadcasting companies.

Although there is no separate sectoral merger control legislation, the CMA has published sector-specific merger-related guidance, including:

- Water and sewerage mergers: CMA49;
- Retail mergers commentary: CMA62; and
- Review of NHS mergers: CMA29.

1.3 Enforcement Authorities

The CMA is the sole merger control authority in the UK (see **1.1 Merger Control Legislation**).

There are no specific merger control provisions for other regulated industries, such as electricity, gas, telecommunications, postal services, rail, airports, and air traffic services (see **1.2 Legislation Relating to Particular Sectors**). That said, a transaction in these industries may require the modification of an operating licence or give rise to other issues falling within the competence of the relevant sectoral regulator. The CMA therefore works closely with sectoral regulators where mergers raise questions which fall within their sectoral competence or expertise.

2. Jurisdiction

2.1 Notification

The UK is technically a voluntary (and non-suspensory) jurisdiction. However, it should more accurately be described as a "self-assessment" or even "ignore at your own risk" regime.

Whilst the EA does not oblige merging parties to notify a merger to the CMA (and there is thus no requirement for merging parties to

obtain clearance from the CMA before completing a transaction), the CMA has a duty to track merger activity in order to determine whether an unnotified merger which falls within the CMA's jurisdiction may raise potential substantive concerns. As such, the CMA's mergers intelligence function not only receives complaints but also very actively scans for proposed or completed mergers to investigate on its own initiative.

Therefore, the decision not to notify in cases where the CMA could investigate carries potentially significant risks – especially for the purchaser. In addition to the typical legal/deal execution, cost, and timing implications of a thorough review by a sophisticated and well-resourced merger control authority, the CMA also has the power to issue interim orders, which prevent any action that may prejudice or impede its investigation (eg, integrating the merging businesses). If the CMA has reasonable grounds to believe that the parties to a completed merger are integrating their businesses, it can require that this integration is stopped (and potentially unwound) (see **2.2 Failure to Notify**).

Accordingly, where a proposed transaction meets the relevant jurisdictional thresholds – and, more importantly, potentially gives rise to competition concerns which will very likely attract the CMA's attention if unnotified – the purchaser is typically incentivised to file a formal merger notification with the CMA for reasons of legal certainty.

Briefing Note

The merging parties also have the option of submitting a short "briefing note" (usually of around five pages) to the CMA's mergers intelligence function. The CMA will consider a briefing note only after the parties have entered into the transaction agreement.

In such a note, the merging parties explain why the relevant merger should not attract further CMA scrutiny – ie, typically because (i) the jurisdictional thresholds may not be met, and (ii) in any event, the transaction does not give rise to any competition concerns in the UK. If such a briefing note is persuasive, and the CMA does not decide to investigate immediately, the merging parties will obtain a level of comfort that the CMA is not, at that moment, minded to investigate. Many purchasers will decide to proceed to closing on that basis. That being said, the CMA also has the power to investigate – and take action against – mergers that have completed, provided that completion has taken place not more than four months before the reference to an in-depth Phase 2 investigation is made.

In light of this, parties may decide to make completion of the transaction conditional on a positive response from the CMA to the briefing note (ie, "no further questions" indicating that an investigation will not be immediately opened).

2.2 Failure to Notify

As the UK merger control regime is voluntary, there are no penalties for failing to notify a merger to the CMA.

However, if the transaction raises substantive competition concerns and the CMA decides to investigate, it is typical for the CMA to issue interim orders preventing any action that may prejudice or impede its investigation (see **2.1 Notification**).

Moreover, following a Phase 2 investigation, the CMA may also require termination of a completed transaction – and, thus, the disposal of the acquired businesses or assets (see **5.4 Typical Remedies**).

2.3 Types of Transactions

The UK merger control rules apply to "relevant merger situations". Although purely internal restructurings or reorganisations will not usually amount to a relevant merger situation, it is possible that changes to shareholders' agreements and articles of association could, where they lead to a change in control (see **2.4 Definition of "Control"**).

A "relevant merger situation" arises when:

- two or more enterprises cease to be distinct, or will cease to be distinct, due to being brought under common ownership or control;
- the applicable jurisdictional thresholds are met (see **2.5 Jurisdictional Thresholds**); and
- the transaction has not yet completed or was completed within the CMA's four-month time limit to issue a decision on referring a transaction for a Phase 2 investigation.

Note that in the case of a transaction being completed (i) without the CMA being notified or (ii) without any public notification (such as a press release), the four-month period will start running from the date the CMA was notified or the date when completion was publicised, whichever is earlier.

As the term "enterprise" is broadly defined under the EA as "the activities, or part of the activities, of a business", consequently, acquiring the assets of a business may be considered as acquiring an enterprise, rather than "bare assets". In order to make the distinction, the CMA will take account of "economic continuity" when:

- acquiring the assets gives the acquirer more than they might have acquired by going into the market and buying factors of production; and
- that extra benefit obtained by the acquirer is attributable to the fact that the assets were previously used in combination in the "activities" of the target business.

In its assessment of economic continuity and the facts related to the transaction, the CMA will also take account of the transfer of specific types of assets such as intellectual property rights (trade marks, trade names, and domain names), business data, employees, tangible/intangible assets, and/or goodwill.

2.4 Definition of "Control"

The EA sets out three levels of control.

- Legal control – a controlling interest generally means holding more than 50% of the voting rights in a company.
- De facto control – the ability to unilaterally determine the target company's commercial policy, despite holding less than the majority of the voting rights in the target.
- Material influence – the acquirer's ability to exert material influence over the target's commercial policy and conduct on the market, which may be evidenced through shareholding, board representation, contractual, financial, or other arrangements. In general, the CMA considers that material influence will arise if the acquirer has more than 25% of the shares in the target. However, material influence can be conferred by a lesser shareholding (15%) as the CMA takes a holistic view.

The CMA will also take account of transactions that increase control in stages. Where there are multiple transactions or events increasing control over a target in a single two-year period, the CMA may consider the transactions as a whole and, for the purposes of review, take the date of the most recent transaction as the date of

completion – and, in this context, the CMA may also take account of transactions that have not yet completed but are in contemplation.

2.5 Jurisdictional Thresholds

Under the general UK merger control regime, there are two alternative jurisdictional thresholds that apply, and the CMA can open an investigation if one is met.

- Turnover Test – applies if the annual UK turnover of the target exceeded GBP70 million.
- Share of Supply Test – applies if there are at least two enterprises that supply or purchase goods or services of a particular description, and the transaction results in a combined share of supply or procurement of 25% in the UK, or a substantial part of the UK, for those goods or services of a particular description – with an increment in such share of supply as a result of the transaction. Importantly, as this is not a market share test (see **2.6 Calculations of Jurisdictional Thresholds**), the CMA therefore enjoys significant discretion in its application of this test (and, thus, asserting jurisdiction over mergers which do not meet the Turnover Test).

See **10.1 Recent Changes or Impending Legislation** for relevant changes being contemplated under the Digital Markets, Competition, and Consumer (DMCC) Bill.

Note that, in certain sector-specific mergers (such as those involving two or more water and sewage companies), sector-specific jurisdictional thresholds apply (see **1.2 Legislation Relating to Particular Sectors**).

2.6 Calculations of Jurisdictional Thresholds

Calculation of the Turnover Test

For the purposes of calculating the turnover threshold, the term "turnover" refers to revenue achieved by the target and derived from the sale of products and/or the provision of services in the ordinary course of business in the UK in the last completed business year for which accounts are available (see **2.5 Jurisdictional Thresholds**).

- Revenues are calculated on the basis of net turnover (ie, after the deduction of sales rebates, value added tax, and any other taxes directly related to the relevant turnover).
- The CMA may adjust the turnover value if it is appropriate to do so (eg, where an acquisition or divestment following the end of the financial year materially impacts the turnover value).

Note that the CMA's merger guidance provides additional details on applying the Turnover Test to different contexts such as joint ventures, and outlines the specific provisions that apply to enterprises in financially regulated markets such as credit institutions, financial institutions, and insurance businesses.

Calculation of the Share of Supply Test

In determining share of supply, the CMA will examine three key elements and, in doing so, will exercise broad discretion.

- Product – the CMA will give a description of the goods or services supplied or procured by the parties. This is distinct from a market share test, but the CMA will have regard to any "reasonable description" of a group of goods or services.
- Territory – the CMA will determine what constitutes a substantial part of the UK. Although

the CMA will take several key factors into account, including the size of territory, population, and economic importance, the "substantial part of the UK" is not required to be comprised of a single, unified geographic area.
- Level of supply or purchase – the CMA will consider what measures are appropriate to calculate the merging parties' combined share of supply or purchase and to determine whether the combined share meets the 25% threshold.

Notably, it is not required for either of the merging parties to realise any turnover in the UK in order to satisfy the Share of Supply Test (eg, Roche/Spark). Further, there is no de minimis increment in the share of supply or procurement (eg, Sabre/Farelogix).

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Linked Enterprises

The CMA may consider other enterprises linked to the target when calculating the turnover test (see **2.5 Jurisdictional Thresholds**). Where enterprises – consisting of two or more businesses – are under common ownership or control, the applicable turnover will be calculated by adding together the applicable turnover of each business. For example, the turnover of any enterprise over which the target has control (meaning, at least, the ability to materially influence policy) will be included when determining the applicable turnover (see **2.4 Definition of "Control"**).

Joint Ventures

In the case of joint ventures, the approach the CMA takes is dependent on whether the enterprises will remain under the same ownership or control. Where a 50:50 joint venture is formed, incorporating all assets and businesses from each enterprise, neither enterprise will remain under the same ownership or control as previously, therefore, the highest turnover of the enterprises would be excluded from determining the applicable turnover. In contrast, where the joint venture incorporates assets and businesses in a particular area of activity, and the parent companies remain under the same ownership and control post-merger but cease to be distinct from the target business they have each contributed to, the relevant turnover will be the sum of the turnover of each of the contributed enterprises only less the turnover of the parent companies.

Intra-group Transactions

In the case of intra-group transactions, the approach the CMA takes is dependent on post-merger ownership and control. With enterprises that will remain under the same common ownership or common control post-merger, only external sales are to be taken into account when calculating the applicable turnover. However, the CMA has discretion, in certain cases, to take previously internal sales into account and attribute an appropriate value to those sales, if needed. With enterprises that will cease to be under the same common ownership or common control post-merger, the CMA may assess the applicable turnover based on the amounts derived from previously internal transactions. Again, in this case, the CMA has discretion to attribute an appropriate value to such transactions if it believes that the turnover attributed is not reflective of open market value.

2.8 Foreign-to-Foreign Transactions

The jurisdictional thresholds are based on the Turnover Test and the Share of Supply Test (see **2.5 Jurisdictional Thresholds**), which take

account of the merging parties' activities in the UK, irrespective of whether one or all the merging parties have a local presence. Notably, the Share of Supply Test does not require the parties to generate turnover in the UK. Therefore, foreign-to-foreign transactions may be subject to UK merger control.

2.9 Market Share Jurisdictional Threshold

There is no market share jurisdictional threshold test (see **2.5 Jurisdictional Thresholds**).

2.10 Joint Ventures

To the extent that a joint venture satisfies the criteria of a "relevant merger situation", then it may be subject to UK merger control rules (see **2.3 Types of Transactions**).

2.11 Power of Authorities to Investigate a Transaction

The CMA has the authority to investigate transactions when at least one of the jurisdictional thresholds is met.

The CMA has a four-month time limit – within which to issue a decision on referring a transaction for a Phase 2 investigation – from the time the completed transaction was notified to the CMA or publicised (see **2.3 Types of Transactions**).

For the purposes of the CMA's investigation, a transaction will be considered publicised by the acquirer if:

- material facts related to the transaction have been published in the UK press (national and relevant trade publications); and
- the acquirer has published details prominently on its website (usually, in the form of a press release).

2.12 Requirement for Clearance Before Implementation

As the UK merger control regime is non-suspensory, there is no general standstill obligation requiring parties to suspend implementation of a transaction until they have received clearance.

However, and as noted above, in cases where the CMA decides to investigate a merger, it may impose interim measures to ensure that no pre-emptive action which might prejudice the outcome of a Phase 2 investigation (or impede an appropriate remedy) is taken by the parties. Most typically, such interim measures will prohibit integration, including actions related – for instance – to the sale or closure of sites, key employee retention, the dilution of brand independence, altering product lines, and exchanging confidential and commercially sensitive information. However, in exceptional circumstances, the CMA can also prevent the completion of a transaction – if this in itself could result in pre-emptive action (eg, Gardner Aerospace/Northern Aerospace).

Initial Enforcement Orders (IEO)

During Phase 1 investigations, the CMA can impose IEOs to prevent and/or unwind pre-emptive action in relation to completed and anticipated transactions. An IEO will remain in force until clearance or remedial action is taken, unless varied, revoked, or replaced. The CMA may also use its powers to unwind integration that has already taken place prior to the IEO coming into force. Each transaction under investigation will be assessed on a case-by-case basis.

Generally, the CMA will use its standard IEO template (available on its website).

Interim Orders (IO)

Once a transaction has been referred for a Phase 2 investigation, the IEO will remain in force unless the CMA imposes an IO at Phase 2. The CMA may also accept interim undertakings from the parties at Phase 2.

Restrictions imposed by the EA

Separate to the imposition of interim measures – and where a transaction has been referred to Phase 2 – the EA prevents the parties of an anticipated transaction from acquiring any interest in shares in a company involved as a merging party in the investigation without the CMA's consent. In completed transactions, the EA prevents the parties from completing any further matters in connection with the transaction, including changes to ownership or control of the target business, without the CMA's consent.

Complying with interim measures

In most cases, the CEOs of both parties will be required to provide the CMA with a compliance statement each fortnight confirming that the relevant business has complied with the interim measures during the appropriate period.

The CMA may also require, at the parties' expense, the appointment of a monitoring trustee, and/or a hold-separate manager as an additional safeguard to oversee compliance with interim measures.

Note that the CMA may grant derogations from interim measures, in order to consent to the parties taking actions that would otherwise be prohibited under such measures.

The CMA expects full compliance with such interim measures and can impose a fine of up to 5% of the worldwide turnover of the relevant parties for non-compliance. A recent example of the CMA's heightened enforcement activity in this area is its imposition of fines totalling GBP52 million upon Meta for various failures to comply with interim measures imposed in relation to its proposed acquisition of Giphy.

2.13 Penalties for the Implementation of a Transaction Before Clearance

See **2.12 Requirement for Clearance Before Implementation**.

2.14 Exceptions to Suspensive Effect

See **2.12 Requirement for Clearance Before Implementation**.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

See **2.12 Requirement for Clearance Before Implementation**.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

As notification is voluntary in the UK, there is no deadline for notification.

3.2 Type of Agreement Required Prior to Notification

There is no requirement to have a formal agreement in place prior to notification. A good-faith intention to proceed with the transaction is generally enough if it is sufficient to satisfy the CMA.

However, with respect to submitting a briefing note to the CMA, generally, the parties will need to have entered into a transaction agreement in order for the CMA to take the matter under consideration (see **2.1 Notification**).

3.3 Filing Fees

Filing fees are determined based on the size of the UK turnover of the target in its financial year preceding the date of completion or the date of clearance (for anticipated transactions). Fees are also payable in cases where the CMA investigates a transaction on its own initiative (and reaches a decision accordingly).

Where payable, these are:

- GBP40,000 (target's UK turnover is GBP20 million or less);
- GBP80,000 (target's UK turnover is GBP20 million to GBP70 million);
- GBP120,000 (target's UK turnover is GBP70 million to GBP120 million); or
- GBP160,000 (target's UK turnover is above GBP120 million).

It is worth noting that there are limited exceptions where the merger filing fee is not applicable.

If the CMA finds that the transaction does not qualify as a relevant merger situation, then no fee is payable.

No fee is payable for submitting a briefing note.

3.4 Parties Responsible for Filing

As there is no penalty for not filing, no party has a legal responsibility to file. However, the usual practice is for the purchaser to file, being responsible for paying the filing fee. Where two parties are merging or forming a joint venture, it is usually the case that both file jointly.

3.5 Information Included in a Filing

Notifying a transaction to the CMA requires completing the CMA's template merger notice (available on its website). The merger notice sets out the categories of information to be provided by the parties, and the specific information that will be required will be dependent on the relevant facts (eg, the activities of the parties and any horizontal overlaps).

For the purposes of advancing pre-notification discussions, merging parties are encouraged to submit a draft notice to the CMA that includes any information the parties consider necessary for a Phase 1 investigation, and providing brief explanations as to why any information requested but not provided is not relevant. During pre-notification discussions, it is common practice for the CMA to issue a number of requests for further information.

Given that the CMA typically reviews transactions that raise at least potential competition concerns, the merger notice requires extensive information on the transaction, the parties, market definition, competitive constraints, contact details, and the potential effects of the transaction in the relevant industry context.

In addition to the merger notice, the CMA will expect parties to provide a substantial number of supporting documents, including copies of any related documents prepared by or for senior management and shareholders, as well as reports on prevailing market conditions. Although it is possible to agree on a narrower scope of required supporting documents during pre-notification discussions with the CMA, it is frequently the case that the CMA requests a large volume of internal documents which it considers relevant to the potential theory(ies) of harm/competition concern(s).

The CMA typically also requests such documents where there has been no voluntary noti-

fication and it has commenced a review of the transaction on its own initiative.

Merger notices should be provided in English.

3.6 Penalties/Consequences of Incomplete Notification

There are no penalties as such for providing an incomplete draft merger notice. However, a Phase 1 investigation will begin only once the CMA has confirmed that the merger notice is satisfactory.

In order to obtain the information it requires, the CMA may issue notices under Section 109 of the EA (a "Section 109 Notice") – which are, in essence, mandatory information requests. Issuing such a notice has the effect of compelling any person given the notice to provide documents, witness evidence, or information by a deadline set by the CMA. If a party fails to respond by the prescribed deadline, the CMA may extend the statutory timetable for its review.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

There are criminal and administrative penalties for providing inaccurate, false or misleading information and/or failing to comply with information requests.

Criminal Penalties

Intentionally altering, suppressing or destroying any document required under a Section 109 Notice, or knowingly or recklessly providing false or misleading information to the CMA in connection with any of their merger functions are criminal offences, which could lead to up to two years of imprisonment for an individual found guilty of such offences as well as a fine.

Administrative Penalties

Failure to comply with the requirements of a Section 109 Notice, either intentionally or without reasonable excuse, may result in the CMA imposing administrative penalties of a fixed amount (GBP30,000) and/or a daily rate (GBP15,000).

3.8 Review Process

The CMA's review process consists of two phases: a standard Phase 1 review and, if necessary, an in-depth Phase 2 investigation.

Phase 1

A standard CMA Phase 1 review lasts up to 40 working days, running from the first working day following the CMA's confirmation to the parties that it has received a complete Merger Notice or that it has sufficient information to begin an investigation. This timeline may be extended in certain circumstances, such as where the parties fail to respond to a Section 109 Notice by the prescribed deadline.

During Phase 1, the CMA will also solicit views from interested third parties (see **7.2 Contacting Third Parties**) and, separately, may receive spontaneous feedback in response to its public announcement of the review.

At the end of Phase 1, the CMA will decide whether to refer the transaction for a Phase 2 investigation. However, as explained in more detail in **5.4 Typical Remedies**, if the parties offer remedies (so-called "undertakings in lieu", or UILs) to address any concerns identified by the CMA at Phase 1 (with a view to avoiding an in-depth, Phase 2 review), an additional period for negotiating and finalising such remedies may apply.

Phase 2

The CMA has a statutory time period of up to 24 weeks to conclude a Phase 2 investigation. This deadline may be extended once, by a period of up to eight weeks, if there are justifiable reasons why the extension is required, or if the parties fail to respond to a Section 109 Notice by the prescribed deadline (see **10.1 Recent Changes or Impending Legislation** for relevant changes being contemplated under the DMCC Bill).

In addition, in cases where the CMA proposes to impose remedies on the parties, or to clear the transaction on condition that remedies are implemented, it will have a period of 12 weeks from the date of its Phase 2 Final Report – as potentially extendable by up to a further six weeks, in certain circumstances – within which to negotiate and finalise those remedies.

3.9 Pre-notification Discussions With Authorities

Pre-notification discussions with the CMA are common prior to the commencement of a Phase 1 review, where the parties are planning to formally notify the transaction. This reduces the risk of a notification being declared incomplete after submission (see **3.6 Penalties/Consequences of Incomplete Notification**). It may also reduce the risk of a transaction being referred for a Phase 2 investigation.

If the notifying parties wish to participate in pre-notification discussions, the process is initiated by submitting a Case Team Allocation Form to the CMA (available from its website). The CMA will aim to allocate a case team within five working days. Upon allocation, the case team will review the draft merger notice and identify any additional information that it requires or considers necessary. This process may involve multiple rounds of questions to reach the stage of the merger notice being considered satisfactory.

As pre-notification is not part of the formal process, it has no fixed timeline and, in certain cases, can last for several months. The case team will often wish to ensure that they have a thorough understanding of the markets and competitive issues involved in a transaction before the clock officially starts. Therefore, the CMA may begin informal market testing if the parties have already made the transaction public. Despite this, all pre-notification discussions are confidential.

3.10 Requests for Information During the Review Process

In addition to the extensive information provided at the filing stage (see **3.5 Information Included in a Filing**), it is common for the CMA to request further information from the parties. These detailed requests may arise due to competition concerns raised by interested third parties in relation to the transaction or where complex issues require further investigation (eg, a transaction is referred for a Phase 2 review).

3.11 Accelerated Procedure

There is no official accelerated procedure under the UK merger control regime. However, parties may submit a request to the CMA to fast-track its review from a Phase 1 investigation to either a consideration of UILs or a Phase 2 investigation (see **10.1 Recent Changes or Impending Legislation** for relevant changes being contemplated under the DMCC Bill).

If there are other timing constraints due to the fact that a transaction is subject to other regulatory procedures (eg, filings in other jurisdictions), the parties may inform the CMA and request that it exercise its discretion to come

to a decision earlier than the statutory deadline. Such requests will be assessed by the CMA on a case-by-case basis.

4. Substance of the Review

4.1 Substantive Test

The substantive test is whether a relevant merger situation has resulted or may be expected to result in a substantial lessening of competition (SLC) in one or more markets within the UK.

- At Phase 1, the legal standard is met if the CMA forms a reasonable belief that there is a realistic prospect of an SLC in light of the relevant facts of the case.
- At Phase 2, the legal standard is an assessment on the balance of probabilities (ie, an SLC is more likely than not).

What constitutes "substantial" in the context of the SLC test will be determined by the CMA on a case-by-case basis. Notably, the CMA does not apply market share or concentration thresholds to assess whether a loss of competition is substantial.

If, on the basis of its review, the CMA determines that a transaction is likely to result in an SLC – meaning a 50% or more likelihood – it must refer the transaction for a Phase 2 review. If the likelihood of a transaction resulting in an SLC is less than 50% but still a distinct possibility, the CMA must exercise its discretion as to whether a Phase 2 reference is required.

At Phase 2, if the CMA establishes – on the balance of probabilities – that the transaction has resulted, or may be expected to result, in an SLC, it must decide whether the SLC or any resulting adverse effect(s) should be remedied, mitigated, or prevented.

4.2 Markets Affected by a Transaction

The CMA does not apply any thresholds to market share, number of remaining competitors, or on any other measure to determine whether a loss of competition is substantial.

Based on the range of evidence before it, considered in the round, the CMA will consider whether a merger would give rise to an SLC on one or more of the following bases.

- Unilateral effects – where a horizontal merger involves two competitors and effectively removes the rivalry between them, resulting in a loss of competition that would enable the new merged entity to profitably raise prices.
- Co-ordinated effects – where a merger (horizontal or non-horizontal) impacts market conditions in such a way that it allows or increases the potential for several entities within the market, including the merged entity, to co-ordinate their activities and jointly raise prices.
- Vertical or conglomerate effects – where a merger (principally, non-horizontal mergers) reduces rivalry by enabling the merged entity – either through creating or strengthening its ability – to use its market power in at least one relevant market.

In order to determine which markets may be affected by a transaction, the CMA assesses the competitive effects of a transaction by examining the relevant market, typically taking account of the product scope as well as the geographic scope.

Product Scope

Determining the relevant product market includes identifying the most significant competitive alternatives available to the merging parties' customers, and the CMA will generally consider evidence from the parties, the parties' customers, and/or competitors as well as third-party reports.

- The CMA will examine the parties' overlapping products in the narrowest plausible candidate product pool in a horizontal merger (ie, merging parties are competitors).
- In a non-horizontal merger (ie, parties are at different levels of the supply chain or at the same level but not competing), the CMA will start with at least one party's product.
- The CMA may then widen the product scope and consider either demand-side substitution (such as how customers would respond to a small but significant and sustained increase in price (SSNIP test)), or supply-side substitution (such as how competitors would respond to a small but significant and sustained increase in price). Note that the CMA may also review evidence that relates to non-price considerations.
- Note that while the CMA's assessment is representative of current competitive constraints, it will also take account of how competitive conditions will develop and evolve in the future.

Geographical Scope

Determining the relevant geographic market involves identifying the territory where the merging parties' customers can source the most important competitive alternatives. This assessment typically involves consideration of demand-side substitution, and the CMA will review relevant evidence.

The CMA will usually only make a definitive assessment of the boundaries of the relevant market at the Phase 2 stage. At Phase 1, the CMA may formulate an initial analysis without reaching a definitive conclusion.

4.3 Reliance on Case Law

The CMA is not required to follow its previous decisions. That being said, the CMA's past decisions, as well as decisions of major jurisdictions (particularly in the US and EU) may inform the CMA's assessment – but, importantly, the CMA can depart from (and has departed from) – its past decisional practice frequently, especially in the last ten years.

4.4 Competition Concerns

See **4.1 Substantive Test**.

4.5 Economic Efficiencies

The CMA is able to take account of any factors that may prevent or appreciably reduce any harmful impact of the merger, and parties are encouraged to engage with the CMA on this issue as early as possible, if any efficiencies are to be claimed.

The CMA considers two types of efficiencies.

- Rivalry-enhancing efficiencies – these are efficiencies that incentivise the merging parties to act as stronger competitors to their rivals (eg, by reducing their marginal costs which incentivises them to provide better prices or a better quality, range, or service to customers).
- Relevant customer benefits – these are benefits to UK customers resulting from the merger (such as improved innovation resulting from the combination of unique assets of the merging parties applying to products on which the parties do not compete, or reduced carbon emissions to the extent that the par-

ties do not normally compete on sustainability).

In claiming such efficiencies, parties will need to provide supporting evidence demonstrating that:

- the efficiencies are timely, likely, and sufficient to prevent an SLC; and
- the efficiencies are transaction-specific such that they could not exist in the absence of the transaction.

4.6 Non-competition Issues

The general UK merger control regime assesses transactions on the basis of competition concerns. However, there are certain contexts where non-competition issues may be considered.

National Security

The NSI Act enables the UK government to examine and intervene in mergers on the grounds of national security. If a transaction requires both a national security and a competition review, the Investment Security Unit (ISU) and the CMA will work closely together (see **9.1 Legislation and Filing Requirements**).

Sustainability

In assessing economic efficiencies such as relevant customer benefits, the CMA may consider sustainability enhancements. Recently, the CMA has been vocal in its willingness to take account of environmental improvements where appropriate and, in general, supporting the UK's Net Zero Strategy.

Public Interest

The Secretary of State is able to intervene in "public interest mergers" and "special public interest mergers" under the EA (see **1.2 Legislation Relating to Particular Sectors**). In public interest mergers, transactions will be assessed on public interest grounds and may also be assessed on competition grounds. In special public interest mergers, transactions will be assessed on public interest grounds only.

4.7 Special Consideration for Joint Ventures

Joint ventures are assessed using the same considerations as other relevant merger situations.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

At Phase 2, if the CMA establishes that the transaction has resulted, or may be expected to result, in an SLC, it must decide whether the SLC or any resulting adverse effect(s) should be remedied, mitigated, or prevented (see **4.1 Substantive Test**). In general, this means the CMA will typically impose remedies at the end of the Phase 2 review, which may include prohibiting, or unwinding a completed transaction.

5.2 Parties' Ability to Negotiate Remedies

Merging parties may offer remedies to address competition concerns raised by the CMA at either Phase 1 or Phase 2, or during pre-notification discussions. Merging parties are encouraged to consider possible remedy packages at an early stage of the process, if a transaction is expected to raise competition concerns. This approach is usually taken to avoid a Phase 2 reference, aiming to offer remedies capable of resolving issues raised by the CMA at Phase 1, known as "undertakings in lieu of reference" (UILs).

If the CMA decides to accept offered UILs, it will no longer be able to refer the case to Phase 2. Therefore, the CMA will need to be convinced that the UILs would effectively resolve the identified competition concerns and are capable of being implemented within the Phase 1 timetable.

Note that the CMA is not able to unilaterally impose UILs on merging parties – ie, they are entirely voluntary and up to the parties to formulate and offer them as they see fit.

5.3 Legal Standard

In considering any remedies put forth, the CMA is required by the EA to have regard to the need to achieve a comprehensive solution that is fit for the purpose of remedying, preventing or mitigating an SLC as well as any resulting adverse effects, taking account of how reasonable, proportionate and practicable such a solution would be.

5.4 Typical Remedies

The CMA's guidance on merger remedies sets out the common principles that apply to the assessment of remedies at Phase 1 and Phase 2. In seeking remedies that are effective in addressing an SLC and any resulting adverse effects (see **5.2 Parties' Ability to Negotiate Remedies**), the CMA should:

- aim to select the least costly and intrusive remedy that it considers to be effective;
- ensure that any remedies offered are not disproportionate in relation to the SLC and its adverse effects; and
- have regard to any relevant customer benefits arising from the merger.

In addition to these common principles, the CMA's guidance lays out specific requirements for both structural and behavioural remedies.

Structural Remedies

The CMA has expressed a clear preference for structural remedies, ie, divestments, as these are designed to have immediate and lasting market impact and do not require ongoing oversight.

Divestments typically relate to the business being acquired. However, the CMA will consider divestment in relation to the acquirer, so long as the SLC can be effectively addressed in that way.

In determining the scope of the divestiture package, the CMA will typically seek to identify the smallest viable, standalone business that can independently compete successfully on an ongoing basis and that includes all the relevant operations applicable to the area of competitive overlap.

- At Phase 1, the CMA will usually require an "upfront buyer" for a divestment. An "upfront buyer" is a purchaser who:
  (a) has contractually committed to purchasing the divested business; and
  (b) is approved by the CMA – where no such buyer is found, the CMA may still refer the transaction for a Phase 2 review.
- At Phase 2, although the parties are still able to proactively offer remedies, the CMA has the power to ultimately impose remedies, eg, full divestment of the target's business in a completed transaction.

Behavioural Remedies

The CMA is generally more sceptical of behavioural remedies (ie, commitments by the parties to behave in a certain way on the market) as these tend to be more complex to implement and monitor.

The CMA will generally only use behavioural remedies where:

- structural remedies are not feasible;
- the SLC is not expected to be sustained; or
- at Phase 2, such measures would preserve substantial relevant customer benefits that would otherwise be eliminated by structural measures.

Examples of behavioural remedies include supply obligations, access to key technology or infrastructure, licensing commitments, and firewall measures.

Note that the CMA may use behavioural commitments to supplement structural remedies.

5.5 Negotiating Remedies With Authorities

See **5.2 Parties' Ability to Negotiate Remedies** and **5.4 Typical Remedies**.

The parties may:

- offer UILs at Phase 1 once the CMA has identified an SLC; and
- propose remedies at Phase 2 once the CMA has reached a provisional finding of an SLC.

Process for Proposing UILs at Phase 1

Offered UILs should be formally submitted to the CMA using the CMA's Remedies Form for Offers of Undertakings in Lieu of Reference and the CMA's applicable template (available from the CMA's website). The UIL process at Phase 1 can be summarised as follows.

- Upon receipt of the CMA's SLC decision, the parties have up to five working days to offer UILs to address the SLC.
- Once UILs are offered, the CMA has until the tenth working day after receipt of the SLC decision by the parties to decide on the acceptability of the offer. If the CMA decides to accept a modified version of the UILs offer, the parties will have a short period of time to confirm their agreement with the modified package.
- If the CMA decides that the offered UILs might be acceptable in principle, it will confirm that to the parties and publish a non-confidential version of its decision on its website which triggers a public consultation process.
- Third parties will have the opportunity to submit their views to the CMA during the public consultation period which lasts at least 15 calendar days. If the UILs are modified in a material way, then a second consultation of at least seven calendar days is required.
- Taking account of third-party comments, a full assessment of the offered UILs will be undertaken by the CMA and it will have to decide on whether to accept the UILs within 50 working days of the SLC decision. An extension of up to 40 working days is available, if the CMA considers that there are special reasons for doing so.

Process for Proposing Remedies at Phase 2

Following a Phase 2 investigation, if the CMA reaches a provisional finding of an SLC, it will consider potential remedies it deems appropriate to address the SLC and will consult with the merging parties as well as third parties on any proposed remedies. The CMA will also publish a notice of possible remedies to address such competition concerns, and the publication of such notice is typically the starting point for (formal) remedies discussions between the merging parties and the CMA (although, earlier informal engagement is not uncommon).

- Once the CMA has consulted as required, it will issue a remedies working paper to the parties, setting out its provisional decision on remedies based on its assessment of the different options. The parties will usually have at least five working days to respond to the working paper. The CMA may also consult specific third parties in this context and may decide to consult publicly further, if necessary.
- The CMA will then make a final decision, which it will publish in the form of a final report on its website.
- Following the final report, the CMA has 12 weeks to accept final undertakings, where offered by the parties, or to make a final order. The time period may be extended by up to six weeks, if the CMA considers that there are special reasons for doing so. During that time, the CMA will publish the agreed draft undertakings with the parties and will again invite third-party views via a public consultation process, prior to publishing the final version of the undertakings.

5.6 Conditions and Timing for Divestitures

The acquisition of a divestment by an "upfront buyer" will be subject to the CMA's acceptance of UILs (at Phase 1) or undertakings (at Phase 2). See **5.4 Typical Remedies** and **5.5 Negotiating Remedies With Authorities**.

The process and timing regarding the divestment to a "non-upfront buyer" is slightly different but it still requires the parties to obtain the CMA's approval of an appropriate purchaser, and conclude a sales agreement with that purchaser.

The length of time for the merging parties to achieve effective disposal of the agreed divestiture package to a non-upfront buyer – ie, the divestiture period – will depend on each individual case, but it will normally be for a maximum period of six months.

In determining the appropriate divestiture period, the CMA will seek to strike a balance between factors which favour a shorter duration (such as minimising asset risk and giving timely effect to the remedy) and those which favour a longer duration (such as sourcing and selection of suitable purchasers and facilitating adequate due diligence).

If no appropriate purchaser is found within the specified time period, the CMA may appoint a monitoring trustee to sell the divestment business at no minimum price.

If a case has been referred for a Phase 2 review, or interim measures or undertakings are in place, it is possible to complete a transaction while the divestment process is in progress, so long as the CMA consents to that.

If any remedies or conditions are breached by the parties, the CMA can take enforcement measures by commencing civil proceedings. Affected third parties may also choose to commence proceedings, such as damages actions.

5.7 Issuance of Decisions

The CMA will provide the formal, confidential version of its decision to the parties at Phase 1 and/or Phase 2 – typically very shortly before such decision is formally announced. Commercially sensitive information of third parties will be excised.

The CMA will then – in due course – publish a formal, non-confidential version of its decision on its website, with commercially sensitive information of parties involved excised.

In addition, the CMA's merger decision will be announced via the Regulatory News Service.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

See **2.5 Jurisdictional Thresholds** and **2.8 Foreign-to-Foreign Transactions**.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

The CMA will not usually give a view in its merger decision as to whether or not a transaction-related restriction constitutes an ancillary restraint.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Third parties play an important role throughout the CMA's review process, and the CMA will actively seek third-party feedback at key stages of the review, including in the context of remedies (see **3.8 Review Process**, **5.5 Negotiating Remedies With Authorities**, and **7.2 Contacting Third Parties**).

Examples of how third parties may be involved in the review process include:

- where merging parties have notified a transaction and it raises competition concerns, the CMA will typically contact businesses that the parties have identified in the notification as their main competitors, customers, or suppliers;
- where the CMA has decided to initiate its own investigation, the CMA must consult any person likely to be impacted in a substantial way by the CMA's decision; and
- during a Phase 2 review, the CMA will usually publish key documents (with confidential information excised) related to the transaction on its website, which third parties may be invited to comment on.

7.2 Contacting Third Parties

See **7.1 Third-Party Rights**.

The CMA may request or invite information from third parties in writing or orally. In practice, this may take the form of questionnaires, telephone calls, and/or online or in-person meetings.

In addition, the CMA may require third parties to provide information or documents, or give evidence as a witness, by issuing a Section 109 Notice which constitutes a mandatory request (see **3.6 Penalties/Consequences of Incomplete Notification**).

In the context of remedies, and following the CMA's provisional finding of an SLC, it will invite comments from interested third parties on any proposed remedies (see **5.5 Negotiating Remedies With Authorities**).

7.3 Confidentiality

The CMA has an obligation to protect the confidentiality of commercially sensitive information provided to it by the merging parties as well as interested third parties of a transaction. However, the CMA is also required to publish its decisions as well as the supporting reasons, which sometimes creates a trade-off between these two obligations.

During the CMA's investigation, it will actively publicise the transaction at issue so as to solicit views from interested third parties. Therefore, upon submitting a merger notice, parties are required to confirm that the transaction has been publicised (see **3.5 Information Included in a Filing**).

With respect to documents published by the CMA in the context of an investigation, the parties may request that certain commercially sensitive information is kept confidential and excised from such documents before publication.

7.4 Co-operation With Other Jurisdictions

The CMA generally seeks to co-operate with other competition authorities in multi-jurisdictional mergers. This co-operation may relate to substantive assessment of the transaction as well as any potential remedies. However, the CMA maintains its independence as a decision-making authority uninfluenced by the decisions of other regulators (note recent examples of divergence such as Cargotec/Konecranes and Microsoft/Activision, where the UK took a more interventionist approach compared to the EC, and Booking/eTraveli, where the EC prohibited a transaction that the CMA had already cleared unconditionally at Phase 1).

As the CMA is not permitted to disclose confidential information of businesses, the CMA will typically ask merging parties to sign a confidentiality waiver before exchanging information relevant to the transaction with other competition authorities in relevant jurisdictions.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

A CMA merger decision (such as a decision to clear, refer, or prohibit a transaction) can be reviewed on an application to the UK Competition Appeal Tribunal (CAT) under Section 120 of the EA. Decisions imposing fines can also be appealed before the CAT.

An appeal to the CAT can only be made on grounds of judicial review. Therefore, the CAT's review will be limited to examining the lawfulness of the decision and not the merits of the case.

The CAT may decide to either dismiss the application or quash the decision and refer the matter back to the CMA, in which case the CMA will be under a direction to reconsider and issue a new decision.

8.2 Typical Timeline for Appeals

An application to the CAT must be made within four weeks of the date of the CMA's decision.

The CAT's Guide to Proceedings states that it will typically consider applications for review of merger decisions with a certain level of urgency. However, the CAT is not subject to a fixed statutory timetable within which to deliver its judgment. In practice, the main hearing will generally take place within three months.

A judgment of the CAT may be appealed on a point of law to the Court of Appeal of England and Wales within 14 days and with leave to appeal from either the CAT or the Court of Appeal.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Clearance decision can be challenged by third parties who are aggrieved by the relevant decision of the CMA.

Aggrieved third parties will typically be market competitors, but may extend to customers and interest groups.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

The NSI Act created a separate investment screening regime in the UK which captures foreign direct investment (FDI) in certain sectors with potential national security implications (see **1.2 Legislation Relating to Particular Sectors** and **4.6 Non-competition Issues**). While certain specified sectors are subject to mandatory notification, transactions outside of those sectors may be voluntarily notified or called in for review if they pose a national security risk.

Mandatory Notification

The mandatory regime of the NSI Act applies to 17 sensitive sectors of the economy, such as artificial intelligence, data infrastructure, defence, energy, military and dual-use, and suppliers to emergency services and transport (the full list is accessible in the UK government's guidance on how the rules apply to acquisitions).

Qualifying transactions include:

- transactions involving the acquisition of a 25% or more stake in an entity in a key sector;
- transactions where the acquirer increases their level of interest exceeding certain thresholds (eg, from 25% to more than 50%); and
- that the entity carries on activities in the UK or supplies goods or services to persons in the UK.

There are no turnover or share of supply thresholds under the NSI regime. Thus, any planned acquisition in one of the 17 mandatory sectors will require approval from the UK Secretary of State before it can be completed. Otherwise, such an acquisition would be void and may lead to civil and criminal penalties.

Voluntary Notification

For acquisitions involving entities outside of the 17 sectors, the parties may choose to voluntarily notify if the transaction may give rise to national security concerns. Where the transaction is not notified, the Secretary of State has the power to "call it in" for NSI assessment. Any transaction can be caught under the "call-in" regime as there are no identified sectors.

The voluntary regime and the call-in power also apply to asset deals resulting in the acquisition of land, tangible moveable property and intellectual property. However, it is likely that such a transaction will be called in if it relates to one or more of the 17 sectors under the mandatory regime (otherwise the asset deal in question would be less likely to raise a national security concern).

10. Recent Developments

10.1 Recent Changes or Impending Legislation

On 25 April 2023, the UK government published the much-anticipated Digital Markets, Competition, and Consumer (DMCC) Bill. The DMCC Bill

proposes a new digital markets regime in the UK as well as significant reforms to UK competition law, both of which include merger control implications.

Strategic Market Status (SMS)

Firms with substantial and entrenched market power, in at least one digital activity, providing them with a strategic position in respect of that digital activity will be designated with SMS by the Digital Markets Unit (DMU) of the CMA. This new targeted regime is designed to actively shape the behaviour of the most powerful players in the digital sphere. Only firms with a global turnover above GBP25 billion, or UK turnover above GBP1 billion, will be in scope.

Notably, the Bill provides for the following.

- Firms with SMS designation will be obligated to report certain transactions for a consideration of at least GBP25 million.
- Transactions leading to the increase of shareholding to 15% or more, to more than 25%, or to more than 50%.

Reforms to Competition Law

The DMCC Bill also introduces significant changes to merger control thresholds. However, the general UK merger control regime will remain voluntary and non-suspensory.

Proposed changes include:

- the creation of a new "acquirer-focused" merger control threshold under which the CMA will have jurisdiction if:
  (a) one of the parties has an existing share of supply of goods or services in the UK of at least 33% and a UK turnover of more than GBP350 million; and
  (b) the other party is a UK business, or supplies goods and services in the UK (the current share of supply test will continue to apply in parallel);
- the turnover threshold relating to the target will be raised from GBP70 million to GBP100 million (except in the case of public interest interventions in media mergers, where the turnover threshold will remain at GBP70 million); and
- the introduction of a "safe harbour" for small mergers, exempting transactions from review if neither party's UK turnover exceeds GBP10 million.

The Bill includes various procedural amendments such as codifying the "fast-track" route for referral to Phase 2 and enabling the CMA to extend the statutory timetable for up to 11 weeks as opposed to the usual eight-week maximum extension.

The Bill is working its way towards parliamentary approval and is expected to come into force in the second half of 2024.

Separately, on 29 June 2023, the CMA launched a call for information to invite interested parties to provide views on aspects of the Phase 2 investigation process that could be revised to ensure that the process operates as effectively and efficiently as possible. The consultation focused on changes that could be made within the existing legislation, taking into account the impact of the changes already proposed to the UK merger control regime in the DMCC Bill. The consultation closed on 25 August 2023. Non-confidential responses to the consultation are due to be published.

10.2 Recent Enforcement Record

In recent years, the CMA has been one of the most active competition authorities, referring

a number of transactions for Phase 2 reviews, imposing significant fines for breaches of IEOs (JD Sports/Footasylum, and Meta/GIPHY), and diverging from the approaches of other competition authorities (Cargotec/Konecranes, Microsoft/Activision, and Booking/eTraveli).

By September 2023, the CMA's track record (since 2019) shows that, of the transactions it investigated, 56% were cleared at Phase 1 and 22% were referred to Phase 2. At Phase 2, a small number of transactions were unconditionally cleared (13%), a larger number of transactions were blocked, unwound, or abandoned (33%), and only 10% of these cases were cleared with remedies.

10.3 Current Competition Concerns

The CMA states that its main goal in all decisions is to protect UK consumers and businesses from anti-competitive mergers. Following Brexit, the CMA now reviews all major international transactions that would have been previously reviewed by the European Commission.

While the CMA continues to assess transactions taking account of the usual theories of harm, the authority has clearly indicated that deals in the digital space will be tightly monitored and scrutinised (see **10.1 Recent Changes or Impending Legislation**). It is also worth noting that novel theories of harm seem to be gaining increasing traction with the CMA (eg, the ecosystem theory of harm mentioned at Phase 1 in Microsoft/Activision).

Moreover, increased intervention is also a clear trend on the basis of national security, with five cases prohibited and a further ten subject to remedies under the NSI Act as of June 2023 (see **9.1 Legislation and Filing Requirements**).

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com