# Competition Law in the United Kingdom: Overview

**by Timothy McIver and Anne-Mette Heemsoth, Debevoise & Plimpton LLP**

Country Q&A | Law stated as at 01-Sep-2023 | United Kingdom

A Q&A guide to competition law in the United Kingdom.

The Q&A provides a high-level overview of the antitrust and competition law rules for restraints of trade and dominance, merger control and the legal approach to joint ventures.

The section on restraints of trade and dominance covers the regulatory framework applicable to horizontal and vertical restraints, monopolistic behaviour and abuses of dominance; the regulatory authorities; exemptions and exclusions; penalties; third-party claims; and appeals.

The section on merger control covers the relevant rules for acquisitions; notification requirements; the timelines and rules regarding publicity and confidentiality; the substantive test; remedies, penalties; third-party claims; and appeals.

## Regulatory Framework

1. What is the competition law framework?

Restrictive agreements and practices are regulated by *Chapter I* of the Competition Act 1998 (Competition Act), the UK equivalent of Article 101 of the *Treaty on the Functioning of the European Union* (TFEU). See *Question 3*.

Monopolies and abuses of market power are regulated by the *Chapter II* prohibition in the Competition Act, the UK equivalent of Article 102 of the TFEU. See *Question 4*.

UK merger control is governed by the Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013 (ERRA). The ERRA came into force on 1 April 2014. See *Question 13*.

Following ERRA, Part 6 of the Enterprise Act 2002 also provides for a criminal (cartel) offence for individuals involved in the most serious forms of anti-competitive activity, namely price-fixing, limitation of production, market-sharing, and bid-rigging.

In April 2023, the UK government published the *Digital Markets, Competition and Consumers Bill* (DMCC Bill), which includes proposals to change the UK's current competition law regime as well as to introduce a new regime for digital markets in the UK. The DMCC Bill is expected to enter into force in 2024.

 

## Regulatory Authority

2. Which authority or authorities regulate competition?

The *Competition and Markets Authority* (CMA) regulates competition in the UK. The CMA can investigate potential breaches of competition law, conduct market investigations, pursue enforcement actions, impose fines (or other sanctions) and review mergers.

Eight of the UK's sectoral regulators, including the *Office of Communications* (Ofcom), the *Office of Gas and Electricity Markets* (Ofgem) and the *Financial Conduct Authority* (FCA), have concurrent powers to investigate alleged competition-related breaches in their sector.

## Restrictive Agreements and Practices

3. What is the basic legal framework governing restrictive agreements and practices?

Restrictive agreements and practices are regulated by Chapter I of the Competition Act, which prohibits undertakings (businesses) from entering into agreements, decisions by associations or concerted practices that may appreciably prevent, restrict or distort competition within the UK, in particular agreements that:

- Fix prices.
- Limit or control production, markets, technical development or investment.
- Share markets or sources of supply.
- Unfairly discriminate.
- Make contracts conditional on unconnected additional obligations.

It is also a criminal offence for individuals to engage in hard-core cartel activity under the Enterprise Act.

## Monopolies and Abuses of Dominance

 

4. Are there specific rules that apply to monopolistic or dominant companies?

Monopolies and abuses of market power that may affect trade within (part of) the UK are regulated by the Chapter II prohibition in the Competition Act.

5. How is dominance/monopoly power determined?

The test for dominance is similar to that under EU law and is a question of market power. A dominant position arises if an undertaking has a position of economic strength that enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers (*United Brands v Commission (Case C-27/76) [1978] ECR 207*).

Whether an undertaking is dominant is assessed by reference to various factors, including:

- Market structure and the competitive constraint exerted by existing competitors.
- Market share (an undertaking with a market share persistently above 50% is presumed dominant, but unlikely to be individually dominant with a share below 40%).
- Barriers to entry and expansion.
- The degree of countervailing buyer power.

6. Are there any recognised categories of behavior that may constitute abusive conduct?

Chapter II of the Competition Act provides that conduct that may constitute an abuse of dominance includes:

- Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.
- Limiting production, markets or technical development to the prejudice of consumers.

 

- Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.
- Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

Generally, it is possible to distinguish between two main categories of abuse:

- Exploitative abuses, where the dominant undertaking uses its position to exploit its customers or suppliers (for example, by charging excessively high prices).
- Exclusionary abuses designed to remove or weaken actual or potential competition.

## Exemptions and Exclusions

7. Are there any exemptions from the competition laws? If so, what are the criteria for individual exemption or block exemptions?

An agreement that is not excluded (see *Question 9*) can benefit from an individual exemption where all of the following criteria are met:

- It promotes technical or economic progress, or improves production or distribution.
- Consumers enjoy a fair share of the resulting benefit.
- The restrictive elements are indispensable to the aim pursued.
- It does not give the parties the opportunity to substantially eliminate competition.

(Section 9, Competition Act.)

Additionally, an agreement will benefit from parallel exemption from the Chapter I prohibition if it falls within the scope of one of the EU block exemptions which were retained in UK law at the end of the Brexit transition period on 31 December 2020 (European Union (Withdrawal Agreement) Act 2020 (Withdrawal Act);Competition (Amendment etc.) (EU Exit) Regulations 2019; SI 1993 No. 93 (Competition SI)). The retained exemptions include the EU block exemptions on vertical agreements, horizontal co-operation, liner shipping consortia agreements, technology transfer agreements and rail, road and inland waterways transport. The relevant Secretary of State can also make UK block exemptions for certain categories of agreements. The only block exemption currently made under the Competition Act relates to public transport ticketing schemes.

Some of the retained exemptions have since expired and been replaced:

 

- Vertical Agreements Block Exemption Order (VABEO) entered into force on 1 June 2022.
- Research and Development Agreements Block Exemption Order came into force on 1 January 2023.
- Specialisation Agreements Block Exemption Order came into force on 1 January 2023.
- Motor Vehicle Agreements Block Exemption Order came into force on 1 June 2023.

In February 2023, CMA published its *draft guidance on Environmental Sustainability Agreements*. In August 2023, the CMA also published its latest *Guidance on Horizontal Agreements*.

In addition to the above, Schedule 3 to the Competition Act exempts various categories of agreement from the domestic competition rules (for example, those relating to coal and steel products, and to agricultural products).

8. Is it possible to obtain guidance from the authority as to whether an agreement or practice is likely to restrict competition?

The CMA does not generally offer the possibility to obtain informal guidance, save for in certain specific contexts, such as currently envisaged in the draft guidance on Environmental Sustainability Agreements or during COVID-19.

9. Is any conduct excluded from the scope of the competition laws?

## Exclusions

Certain agreements are automatically excluded from Chapter I including transactions subject to UK merger control and agreements that are subject to competition scrutiny under the Broadcasting Act 1990 or Communications Act 2003.

Agreements with *de minimis* (non-appreciable) effects are not subject to Chapter I. When defining these, the CMA takes into consideration the approach of the European Commission (EC) as set out in the *Notice on Agreements of Minor Importance (OFT401).*

"Small agreements" between undertakings whose combined group turnover does not exceed GBP20 million have limited immunity from fines. However, they may still face CMA investigation or civil action by third parties.

The Competition Act sets out a number of specific exclusions from the Chapter I and Chapter II prohibitions for certain categories of conduct:

 

- Conduct within the merger provisions of the Enterprise Act or that would be subject to *Regulation (EC) 139/2004 on the control of concentrations between undertakings* (Merger Regulation).
- Services of general economic interest.
- Conduct engaged in to comply with a legal requirement.
- Necessary to avoid conflict with international obligations.
- Necessary for compelling reasons of public policy.

The Competition Act provides limited immunity from fines for conduct of minor significance where the undertaking's annual turnover does not exceed GBP50 million. However, this does not protect the undertaking from damages actions brought by third parties.

### Statutes of Limitation

There is no formal limitation period for CMA action under the Competition Act.

Since the Consumer Rights Act 2015, the limitation period for private claims to be brought before the *Competition Appeal Tribunal* (CAT) is six years from the date of the cause of action. If the cause of action arose before 1 October 2015, however, then the old CAT limitation rules continue to apply and the period remains two years.

### Penalties

10. What penalties or sanctions are available for breaching the competition laws?

### Orders

The CMA can impose such directions as it considers appropriate to end the infringement. These may require the modification or termination of the infringing agreement or practice. Where the CMA considers it necessary to act urgently, either to prevent "significant damage" to a person or to protect the public interest, it can require a business to comply with temporary directions (interim measures) pending the outcome of the investigation.

### Fines and Monetary Remedies

The CMA can impose an administrative fine of up to 10% of the worldwide turnover of the offending undertaking in the year preceding the infringement for breaches of Chapter I or Chapter II (or both) of the Competition Act.

### Personal Liability

 

**Disqualification of directors.** The CMA and certain sectoral regulators have the power to apply to the High Court for a Competition Disqualification Order (CDO), disqualifying a director from being involved in the management of a company for up to 15 years. Under the Company Directors Disqualification Act 1986, the court must award a CDO if it is satisfied that both:

- There has been a breach of UK competition law (involving a company of which the individual was a director), or if the conduct occurred before 1 January 2021, a breach of EU or UK competition law.
- The director's behaviour in connection with that breach makes him unfit to be concerned in the management of a company.

Alternatively, the CMA may accept competition disqualification undertakings (CDUs) from a director, instead of continuing with an application for a CDO. A director can offer to give a CDU at any time during an investigation or during court proceedings. CDUs have the same effect as CDOs but are likely to lead to a shorter period of disqualification.

To date, 29 directors have been disqualified for their involvement in illegal anti-competitive practices, all by way of CDUs offered by the individuals concerned. The CMA is also currently seeking the disqualification of a further seven directors. While disqualifications between two to five years are more common, in the concrete drainage case, two directors were disqualified for 11 and 12 years (the longest period for disqualification to date). In July 2020, the High Court provided the first judicial guidance on a CMA application for a CDO against a separate individual (CMA v Michael Christopher Martin [2020] EWHC 1751 (Ch)).

**Cartel offence.** Although director disqualification has been the focus of the CMA's recent enforcement activities, individuals can also face penalties under the cartel offence in the Enterprise Act. Individuals convicted of the cartel offence are liable to a maximum of five years of imprisonment and/or an unlimited fine.

However, to date, there have been only four prosecutions for the cartel offence despite a number of criminal investigations. The relevant cases are:

- *Marine Hose*.
- *Air Passenger Fuel Surcharges*.
- *Galvanised Steel Tanks.*
- *Concrete Drainage Products.*

## Immunity/Leniency

Parties to a restrictive agreement can escape up to 100% of administrative fines, and individuals who have committed the cartel offence can escape imprisonment, by blowing the whistle on unlawful arrangements. To benefit from immunity an applicant must meet the following conditions:

- Be the first cartel participant to inform the authorities of the arrangement.
- Accept participation in a cartel activity.
- Provide the CMA with all non-legally privileged information available to it.
- Maintain continuous and complete co-operation throughout the investigation and until the conclusion of any criminal proceedings and appeals arising as a result.

 

- Stop all further participation in cartel activity.
- Not have taken steps to coerce another undertaking to take part in the cartel activity.

If some but not all of these criteria are met, smaller reductions in administrative fines (of up to 50%) may be available. Co-operating individuals are likely to avoid director disqualification.

Small agreements (that is, agreements that do not fix prices between undertakings with a combined annual turnover that does not exceed GBP20 million) that infringe Chapter I have limited immunity from fines.

### Impact on Agreements

Offending provisions of an agreement are void and unenforceable. If, under contract law, they are not severable from the agreement, the whole agreement is void. The CMA can also order modification or termination of an infringing agreement (see above, *Orders*).

## Third Party Damages Claims

11. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or abuse of dominance? Are collective/class actions possible?

### Follow-on/Standalone Actions

A third party that can show that it has, or is likely to, suffer loss as a result of a prohibited restrictive agreement or practice can bring a civil action for damages and other civil remedies (for example, injunctions). The action can be subsequent to or independent of any CMA investigation.

If the CMA makes a decision that Chapter I of the Competition Act was infringed and this decision is no longer subject to appeal, third parties can also bring a follow-on action for damages before the CAT or the High Court without further need to prove an infringement.

Under the Consumer Rights Act 2015, third parties can now also bring full standalone actions for a finding of infringement and the award of damages in the CAT, whereas it was previously possible only to bring follow-on actions in the CAT.

### Procedures or Rules

Third parties can bring actions for damages and other civil redress before the CAT as well as in the High Court, and the limitation period for both is the same (six years) (see also *Question 9*, *Statutes of Limitation*).

Decisions by the CMA that can no longer be appealed are binding on both the CAT and the High Court. EC decisions reached before 31 December 2020, as well as decisions in respect of cases over which the EC continues to have competence, can still form the basis of follow-on damages claims in the UK courts after 31 December 2020 (including cases that have not exhausted

 

the appeals process). However, claimants are no longer able to rely on an EC infringement decision or an infringement decision by an EU national competition authority in respect of a case initiated after 31 December 2020 as a binding finding of an infringement for the purposes of bringing a follow-on damages claim in the UK.

Finally, a "fast-track procedure" is available to individuals and SMEs seeking redress for anti-competitive harm, which is a faster and cheaper way than was previously possible.

## Class/Collective Actions

Under the Consumer Rights Act 2015, several possibilities are available for consumers to seek collective redress for anti-competitive behaviour. The legislation:

- Provides for opt-out and opt-in collective proceedings (previously, all proceedings were opt-in only).
- Allows the CAT to make collective settlement orders where a collective proceedings order has been made in relation to opt-out collective proceedings.
- Allows the CMA to approve voluntary redress schemes.
- Sets out that the CAT (like other courts) is bound by findings of fact by the CMA, unless the CAT directs otherwise.

As at July 2023, 33 collective proceedings had been registered with the CAT of which ten had been certified and moved to substantive trial. A number of others, such as *Mobility Scooters* have been discontinued or appealed.

In addition, it is still possible to bring follow-on claims for multiple parties in the High Court:

- Part 19 of the Civil Procedure Rules (CPR) makes certain provisions for bringing, or joint management, of representative actions, which might be considered a form of class action. The attempt to establish a representative claim in the air cargo litigation in *Emerald Supplies* (see above) failed.
- Part 19 of the CPR also provides the court with the power to make a group litigation order, which allows for the collective management by the court of a number of separate cases that give rise to common or related issues of fact or law.

## Appeals

12. Is there a right of appeal against any decision of the authority? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

## Rights of Appeal and Procedure

 

The recipients of an appealable decision and any third parties with sufficient interest can apply to the CAT for review. Appealable decisions are defined in sections 46 and 47 of the Competition Act. For parties to an agreement in respect of which the CMA has made a decision, or parties in respect of whose conduct the CMA has made a decision, the type of appealable decisions are set out in section 46(3). These include decisions as to the infringement of the Chapter I and Chapter II prohibitions, the imposition of a penalty or the amount of any penalty.

Third parties can appeal a reduced list of decisions as set out in section 47(1).

An appeal can be on points of law or fact. Making an appeal automatically suspends the obligation to pay fines but not the decision itself. However, the CAT can order suspension of a decision, pending the hearing. The CAT's powers include:

- Confirming or setting aside the decision.
- Sending the case back to the CMA or sectoral regulator for further investigation.
- Confirming or amending the amount of a financial penalty.
- Adopting interim measures.
- Giving directions, for example, bringing to an end an abuse of dominance.

There is also the possibility of bringing a claim in the High Court for judicial review.

### Third Party Rights of Appeal

A third party with sufficient interest in the proceedings has the same rights of appeal to the CAT as a party (see above, *Rights of Appeal and Procedure*).

## Merger Control

13. What merger control rules apply to mergers and acquisitions in your jurisdiction?

### Regulatory Framework

UK merger control is governed by the Enterprise Act, as amended by the ERRA.

### Guidance Documents

**Procedure.** The CMA published its most-recently revised *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) in January 2022. CMA2 provides general information and advice on the procedures used by the CMA in operating the UK merger control regime. CMA2 and CMA56 (which sets out the operation of the CMA's *Merger Intelligence function*) have been updated regularly including to account for the UK's departure from the EU, the implementation of the National Security and Investment Act 2021 (NSI Act) and recent decisional practice and approach.

 

CMA2 should be read alongside:

- *Administrative Penalties: Statement of policy on the CMA's approach* (CMA4).
- *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6).
- The documents listed in Annex D of CMA2, which have been adopted by the CMA Board.

**Substantive assessment.** The *2021 Merger Assessment Guidelines* (CMA129) set out the CMA's approach to analysing mergers and the standard of proof applied when referring a case for an in-depth Phase 2 investigation. CMA129 reflects developments in practice and case law, in particular in relation to the digital sector.

14. What are the relevant jurisdictional triggering events?

A relevant merger situation arises when the following criteria are met:

- Two or more enterprises cease to be distinct, or will cease to be distinct, as a result of being brought under common ownership or control. The Enterprise Act distinguishes three levels of interest that amount to control (including moving from one level to another):
  - material influence (ability materially to influence commercial policy, irrespective of shareholding);
  - de facto control (control of commercial policy); and
  - a controlling interest (*de jure* or legal control).
- The jurisdictional thresholds are met.

Either the merger has not yet taken place, or it must have taken place not more than four months before a Phase 2 referral is made (see *Question 16, Phase 2: Full Investigation by the CMA*), unless the merger took place without having been made public and without the CMA being informed of it.

For details of the latest jurisdictional thresholds see, *Merger Control Quick Compare Chart: United Kingdom.*

To compare jurisdictions, see the *Merger Control Quick Compare Chart.*

For details of the latest thresholds from the UK competition authority, see *www.gov.uk/mergers-when-they-will-be-investigated*

The CMA has discretion not to refer a merger when certain criteria are met (see *Question 16*).

## Notification

 

15. What are the notification requirements for mergers? Are they mandatory or voluntary?

Either party can notify. However, it is customary for the acquiring party to do so.

Notification is made to the CMA (Mergers Unit).

Notification is made by completing a prescribed merger notice, either in the format of the template or in a format of the parties' choosing, though this should contain all information requested in the template. The *relevant templates* are available online.

Notification is voluntary in that there is no requirement to notify the CMA. However, if a transaction meets the jurisdictional thresholds and the parties do not notify, the CMA can open an investigation on its own initiative where it considers there is a reasonable chance that an investigation will identify a relevant merger situation that gives rise to a realistic prospect of a substantial lessening of competition. This can be triggered by its own "mergers intelligence" function or because of a complaint (see also the latest guidance for CMA56 and CMA2).

The decision not to notify the CMA in cases where a transaction raises substantive competition issues carries particular risks. The CMA will normally make an interim enforcement order, which prevents any action (for example, integrating the merging businesses) that may prejudice the reference to a Phase 2 investigation or impede its investigation. This will remain in force until the transaction is cleared or remedial action is taken. 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 unwound.

The CMA, following a Phase 2 investigation, may also require the disposal of the acquired businesses or assets. Any such forced sale is more likely to be at a discount to market value or on otherwise unfavourable terms.

## Procedure and Timetable

16. What are the procedures and timetable?

### Phase 1: Initial Examination by the CMA

**Pre-notification discussions (for voluntary notification).** If the parties intend to make a formal notification of a merger to the CMA, they should first submit a request for a case team to be allocated. The CMA encourages parties to contact it at an early opportunity to start the pre-notification process during which the CMA will liaise with them regarding the nature and scope of the information required.

 

**Voluntary notification (Merger Notice).** Businesses can formally notify a merger to the CMA by completing a Merger Notice using the *online form*.

**Own-initiative investigation.** The CMA conducts an own-initiative investigation if it believes there is a reasonable chance that the test for a reference to an in-depth Phase 2 investigation will be met. In these cases, it will either:

- Provide the parties with the option to notify.
- Send the merger parties an enquiry letter to which they must respond with the requested information.

Once the CMA has sufficient information, it informs the parties and confirms the statutory deadline for its Phase 1 investigation.

**Phase 1 assessment.** The statutory assessment period is 40 working days:

- **Day 1.** The investigation period begins on the first working day after the CMA confirms to the merger parties that it received a complete Merger Notice or that it has sufficient information (for an own-initiative investigation).

  The CMA then:

  - engages in information gathering and invites views from interested third parties;
  - may also directly contact third parties; and
  - carries out a substantive examination of the proposed transaction taking into account the information gathered from publicly available sources, third parties and the merger parties.

- **Days 15 to 20.** The CMA holds "state of play" discussions with the parties (usually over the phone).
- **Days 25 to 35.** An issues meeting is held in cases raising more complex or material competition issues. The CMA sends an issues letter in advance of the meeting.
- **By day 40.** The CMA issues a clearance decision or a decision that the test for reference to Phase 2 is satisfied.

**Phase 1 decision.** The CMA makes one of the following decisions at the end of Phase 1:

- Unconditional clearance.
- Clearance subject to legally binding undertakings (see *Question 19*).
- Reference for a Phase 2 investigation (see below, *Phase 2: Full Investigation by the CMA*).

The CMA must refer a transaction if it believes that it is, or may be the case that, the transaction has resulted, or may be expected to result, in a substantial lessening of competition (SLC) on the market or markets concerning the UK (see *Question 18*). In practice, if the CMA believes the likelihood is notable, but below 50%, it has a wide margin of appreciation in exercising its judgment about whether to refer.

The CMA also has a broad degree of freedom in its interpretation of evidence. This is demonstrated most in younger and/or fast-moving markets where, given the limitations on the availability of evidence, the CMA has stated that it may place particular weight on the following:

 

- Internal documents.
- The expected number of competitors after the merger.
- Similarities between the characteristics of the products or services that are under development.
- The views and expansion plans of market participants.

The CMA has discretion not to refer a merger if any of the following applies:

- For anticipated mergers, the arrangements are not sufficiently far advanced, or likely to proceed, to merit a Phase 2 investigation.
- The market concerned is generally considered of insufficient importance to merit a Phase 2 investigation (the *de minimis* exception). The relevant thresholds may be found in CMA64 at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/898406/Mergers_Exceptions_to_the_duty_to_refer.pdf*.
- Any relevant customer benefits outweigh the SLC and its adverse effects.

In addition, the CMA has the discretion not to make a reference in certain other circumstances, including when considering whether to accept undertakings in lieu (UILs) instead of making a Phase 2 reference.

## Phase 2: Full Investigation by the CMA

The CMA has a statutory period of 24 weeks to conduct its investigation and publish a report. This period can be extended by up to eight weeks at the CMA's discretion. The investigation includes both written submissions from the parties to the transaction and interested third parties, and oral hearings with the parties to the transaction and very significant third parties.

The CMA must decide whether there is a relevant merger situation and, if so, whether it may lead to an SLC. The CMA must make one of the following decisions at the end of Phase 2:

- Unconditional clearance.
- Conditional clearance, subject to legally binding undertakings proposed by the merging parties and negotiated with the CMA or as a result of the CMA exercising its order making powers.
- Prohibition.

For an overview of the notification process, see *United Kingdom Merger Notifications Flowchart.*

See also *Checklist: UK Merger Notification*.

## Fast-track Procedure

While previously granted only in exceptional circumstances, the updated CMA2 guidance now sets out the situations in which the parties can request their case be fast-tracked in order to either proceed more quickly to offer UILs with the objective of reaching a Phase 1 clearance with remedies, or to proceed directly to an in-depth Phase 2 investigation.

 

The fast-track procedure can be requested pre-notification or during Phase 1I. It requires the parties to both accept that the test for reference to an in-depth review has been met and agree to waive their right to challenge that position during a Phase 1 investigation.

In the case of a fast-tracked Phase 2 review, the parties additionally have the option to concede an SLC where it facilitates an efficient review (for example, to align the CMA's remedies process with proceedings in other jurisdictions).

The CMA expects the fast-track procedure to allow it to diverge from and shorten the standard procedural timetable. The CMA generally reduces the time provided for third-party consultation, given that third parties have an opportunity to present their views during the consultation on UILs or the Phase 2 investigation (as applicable).

## Publicity and Confidentiality

17. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

## Publicity

Information published by the CMA during Phase 1 (see *Question 16, Phase 1: Initial Examination by the CMA*) includes:

- The statutory deadlines for its decisions.
- Invitations to third parties to comment.
- Any initial enforcement order made and associated derogations granted.
- Decisions as to whether the merger meets the test for Phase 2 reference (see *Question 16, Phase 2: Full Investigation by the CMA*).
- Decisions as to whether undertakings instead of a Phase 2 investigation may be suitable, and the related consultation process.

The CMA publishes more detailed information on its website at Phase 2. This information may include certain main and third-party submissions, summaries of hearings, responses to the issues statement, provisional findings and its final report.

## Automatic Confidentiality

Generally, all confidential information relating to a business or an individual that the CMA obtains in connection with its investigation remains confidential. However, the CMA can disclose information in the following circumstances:

- If it obtains consent from the party the information relates to (or the disclosing party).
- To comply with a legal requirement.

 

- In connection with the investigation of a criminal offence (provided the disclosure is proportionate).
- If necessary to facilitate its statutory functions.

### Confidentiality on Request

A party can specify that information is confidential. The CMA cannot disclose information if its disclosure either would be contrary to the public interest or may significantly harm an undertaking's legitimate business interests or an individual's interest.

### Substantive Test

18. What is the substantive test?

The substantive test is whether a merger has resulted, or may be expected to result, in an SLC within a market or markets in the UK for goods or services.

There are three main reasons why mergers may lead to an SLC:

- **Unilateral effects.** These may arise in horizontal mergers where the merger involves two competing firms and removes the rivalry between them, allowing the merged firm to profitably raise prices or degrade non-price aspects of its offering.
- **Co-ordinated effects.** These may arise in both horizontal and non-horizontal mergers where the merger enables or increases the ability for several firms within the market (including the merged firm) jointly to increase prices or otherwise align behaviour because it creates or strengthens the conditions under which they can co-ordinate.
- **Vertical or conglomerate effects.** These may arise principally in non-horizontal mergers between firms that do not directly compete where the merger creates or strengthens the ability of the merged firm to use its market power in at least one of the markets to foreclose (that is, restrict a rival's access to things such as suppliers or customers) or otherwise harm rivals in the other.

There is no need for the CMA's assessment of competitive effects to be based on a highly specific description of a market definition and the CMA may take a simple approach when defining the market (for example, by reference to the constraints on the parties).

### Merger Remedies

 

19. What are the types of remedies that can be required as conditions of merger clearance?

The CMA can accept UILs instead of making a reference at the Phase 1 stage (see *Question 16, Phase 1: Initial Examination by the CMA*). CMA2 confirms that for some mergers, it may also be appropriate for the case team to hold informal discussions on remedies with the merger parties at any point from the start of the pre-notification process onwards.

The CMA's *CMA87 Guidance* sets out guidance on remedies for Phase 1 and Phase 2 merger investigations.

## Timing

The parties may discuss UILs with the CMA at any earlier stage of the Phase 1 investigation. However, they have only up to five working days after receiving the CMA's SLC decision to formally offer UILs in writing. Where parties have offered UILs, the CMA has until the tenth working day after parties received the SLC decision to decide whether the UIL offer (or a modified version of it) may be acceptable in principle as a suitable remedy. The CMA will then consider the proposed UILs in detail within 50 working days of the SLC decision, subject to a 40-working day extension at the CMA's discretion. The CMA may extend its four-month statutory timetable for considering completed mergers to avoid running out of time to assess the offered UILs.

## Procedure

As the CMA has no power to impose remedies at Phase 1, the onus is on the parties to propose suitable UILs that address the CMA's competition concerns. The CMA can propose modifications to UILs submitted. Where the CMA considers that the UIL offer (or a modified version of it) may be acceptable as a suitable remedy, it will confirm this to the parties who made the offer and issue a public announcement to that effect (UIL decision).

At Phase 2 (see *Question 16, Phase 2: full investigation by the CMA*), the CMA can accept undertakings as a condition of clearing a transaction. These are negotiated and implemented only when the CMA has reached an adverse finding that the merger results (or may be expected to result) in an SLC.

At both Phase 1 and Phase 2, the remedy can be either:

- Structural, for example, divesting the part of the business where overlaps cause competition concerns.
- Behavioural (that is, formal commitments in relation to future conduct).

Behavioural undertakings are less common and highly unlikely to be acceptable at Phase 1. The CMA generally prefers structural remedies because behavioural remedies are considered less likely to deal with any adverse effects as comprehensively and may themselves lead to market distortion. The CMA may require on-going monitoring in the event it accepts behavioural remedies, though how this is facilitated will be decided on a case-by-case basis. Irrespective of the remedy applied, the CMA has a statutory duty to keep under review any UILs made under the Fair Trading Act 1973 and the Enterprise Act. From time to time, it must therefore consider whether, by reason of any change of circumstances, undertakings are no longer appropriate and need to be varied, superseded or released.

## Penalties

 

20. What are the penalties for failing to comply with the merger control rules?

## Failure to Notify Correctly

Notification is voluntary and as such there is no penalty for not notifying.

## Implementation Before Approval or After Prohibition (Gun-Jumping)

A transaction can generally be completed before clearance has been obtained unless it has been referred for a Phase 2 investigation (see *Question 16, Phase 2: Full Investigation by the CMA*). However, at any point when the CMA is investigating a merger, it can impose interim measures to prevent or unwind pre-emptive action, such as integration steps (although the circumstances in which the CMA might consider interim measures to be needed before a merger completes are relatively rare).

The CMA can impose a fixed penalty (but not a daily penalty) for failure to comply with interim measures (for example, an undertaking or order to suspend pre- or post-merger integration). The penalty is capped at 5% of the worldwide turnover of the enterprises owned or controlled by the person on whom the penalty is imposed.

## Failure to Comply with Investigatory Requirements

The CMA may fine a party if it fails, either intentionally or without reasonable excuse, to comply with investigatory requirements, including failures to attend interviews or meetings with the CMA or to produce documents and other evidence.

Administrative penalties can be imposed in the form of a fixed amount, by reference to a daily rate, or a combination of both. The maximum penalty amounts are set by order and are, since 1 April 2014:

- GBP30,000 for a fixed amount penalty.
- GBP15,000 for a daily penalty.

## Failure to Observe

If a party fails to comply with any undertakings it has given or any order imposed on it by the CMA (including a prohibition decision), the CMA can start civil proceedings for an injunction or interdict, or any other appropriate relief or remedy available in the UK courts. In addition, any third party affected by the contravention who has sustained loss or damage can bring a private action.

The CMA can also start civil proceedings to enforce interim measures and the statutory prohibitions on certain actions during a Phase 2 reference (sections 77 and 78, Enterprise Act).

## Criminal Offences

 

It is an offence punishable by a fine (see above) or a maximum of two years' imprisonment (or both) to:

- Intentionally alter, suppress or destroy any information that the CMA has required to be produced under an information request notice.
- Knowingly or recklessly supply false or misleading information to the CMA, the Office of Communications (Ofcom), Monitor (now under NHS Improvement) or the Secretary of State in connection with their merger control functions.

## Appeals

21. Is there a right of appeal against the regulator's decision and what is the applicable procedure? Are rights of appeal available to third parties or only the parties to the decision?

### Rights of Appeal

The merging parties and any interested third parties may apply to the CAT or the relevant Secretary of State to review a CMA decision. "Decision" is broadly defined and includes, for example, a decision to clear, refer or prohibit a transaction, or to reject a complaint in respect of a merger, as well as a decision to impose penalties. However, an appeal to the CAT can only be made on grounds of judicial review.

### Procedure

An application for review must be made within two months of the date on which the applicant was notified of the decision or its publication, whichever is the earlier. In determining an appeal of a CMA merger decision, the CAT must apply the same principles a court applies for judicial review applications. Although its Guide to Proceedings states that it will normally regard applications for review of merger decisions as meriting a high degree of urgency, the CAT is not subject to any set timetable to give its judgment.

The CAT's decision can in turn be appealed (on points of law only) to the Court of Appeal within 14 days.

### Third Party Rights of Appeal

Third parties who are aggrieved by the relevant decision of the CMA or the relevant Secretary of State have rights of appeal as described above (see above, *Rights of Appeal*).

 

22. Has the regulatory authority issued guidelines or policy on its approach in analysing mergers in a specific industry?

The CMA has not issued any guidelines or policies on its approach in analysing mergers in specific industries. The CMA may consult sectoral regulators, such as Ofcom or Ofgem, about any mergers in which those regulators are likely to have industry-specific knowledge.

The *Digital Markets Unit* (DMU) was established in April 2021 within the CMA, on a non-statutory basis to focus on preparing for the UK government's new regime for digital markets. The relevant legislation, the DMCC Bill, was published by the UK government on 25 April 2023 and is expected to introduce significant reforms to UK competition law, including merger control. The DMCC Bill is currently expected to come into force in 2024.

## Joint Ventures

23. How are joint ventures analysed under competition law?

A joint venture may constitute a relevant merger situation under the Enterprise Act if previously distinct business activities come under common control (that is, more than one shareholder has "control" as defined by the Enterprise Act (see *Question 14*).

**Contributor Profiles**


### Timothy McIver, Partner

**Debevoise & Plimpton LLP**
**T** +44 207 786 5488
**F** +44 207 588 4180
**E** *tmciver@debevoise.com*
**W** *www.debevoise.com*


**Professional qualifications.** Solicitor, England and Wales, 2003

**Areas of practice.** EU and UK competition law.

**Recent transactions**

 

- Clayton, Dubilier & Rice and TPG in their USD4 billion take-private of Covetrus, a global animal-health technology and services company.
- Aveva Group, a global leader in industrial software, in its USD5 billion acquisition of OSIsoft.
- GoDaddy in its acquisition of Neustar's Registry business, a registry technology platform that includes an extensive portfolio of top-level domains.
- InterXion in its combination with Digital Realty, valuing InterXion at USD8.4 billion.
- Elliott Management in its USD683 million acquisition of Barnes & Noble, the largest retail bookseller in the US.
- American Express in its acquisition of Resy, a leading digital restaurant reservation booking and management platform.
- Solenis in obtaining merger approvals for its combination with BASF's paper and water chemicals business.
- American International Group in obtaining merger approvals for its USD5.56 billion acquisition of the Validus Group, a leading provider of reinsurance, primary insurance and asset management services.
- Discovery Communications in obtaining merger approvals for its USD14.6 billion acquisition of Scripps Networks Interactive.
- The Special Committee of the Board of Directors of Dell in the USD24.9 billion sale of Dell to an investor group including Michael Dell and Silver Lake.
- Warner Music Group in its USD765 million acquisition of the Parlophone Label Group from Universal Music Group.


### Anne-Mette Heemsoth, Associate

**Debevoise & Plimpton LLP**
**T** +44 207 786 5521
**F** +44 207 588 4180
**E** amheemsoth@debevoise.com
**W** www.debevoise.com


**Professional qualifications.** Solicitor, England and Wales, 2014

**Areas of practice.** EU and UK competition law.

**Recent transactions**

- Bregal Sagemount in its strategic growth investment in Neptune Flood Incorporated, a leading digital insurtech platform and private flood insurance provider.

- HarbourVest Partners as co-lead investor in a EUR1.63 billion continuation fund, sponsored by Triton, to acquire four portfolio companies from Triton Fund IV.
- INDICOR, a Clayton, Dubilier & Rice portfolio company, in the USD670 million sale of its Compressor Controls Corporation division, a leading provider of turbomachinery control and optimization solutions, to Honeywell.
- Kelso & Company in its investment in Pathstone, an independently operated, partner-owned advisory firm offering comprehensive family office services.
- Mitsui in the formation of the Blue Water Alliance, a joint venture in partnership with Olin Corporation.
- Resolution Life in its strategic partnership with Blackstone, including a USD500 million strategic investment, for its life insurance and annuity consolidation business.
- Clayton, Dubilier & Rice in the financing aspects of its USD5.8 billion acquisition of Cornerstone Buildings Brands, the largest manufacturer of exterior buildings products in North America.
- Clayton, Dubilier & Rice in its acquisition of a majority stake in the industrial businesses of Roper Technologies, which operates market-leading businesses that design and develop vertical software and application-specific products, in a transaction valued at USD3.7 billion.
- Clayton, Dubilier & Rice and TPG in their USD4 billion take-private of Covetrus, a global animal-health technology and services company.
- Dover Corporation in its USD225 million acquisition of Malema, a designer and manufacturer of flow-measurement and control instruments for the biopharmaceutical, semiconductor, and industrial sectors.
- Solenis, a leading global producer of specialty chemicals, in its acquisition of German chemical producer SCL.

**END OF DOCUMENT**