Merger control in a post-Brexit world: is the CMA up to the task?

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> "The CMA has been planning extensively for the UK's departure from the EU, and we are ready to assume our new responsibilities at the end of the transition period."[1]

Brexit will have the effect of dramatically increasing the CMA's caseload, since all mergers meeting the UK's voluntary notification thresholds will now fall under its jurisdiction where before the EU would have had exclusive competence to review a proportion of them. Some of the new influx of cases will be so-called "non-issues" transactions, mergers that technically meet the jurisdictional threshold for a voluntary notification and are notified in the interests of legal certainty, but which pose no real competition concerns. In addition to such cases, however, the CMA will now be able to review some of the world's largest cross-border transactions.

Of course, whilst this article will focus on the CMA, the impact of Brexit on EU merger control should not be ignored. With the removal of UK turnover, many larger transactions that may previously have met the thresholds for mandatory notification to the European Commission may be reviewable instead by national competition authorities, albeit still with the possibility of a referral "upwards" to Brussels under the European Merger Regulation (EUMR). Concomitantly, and quite aside from Brexit, the EU is strengthening art.22 EUMR, allowing the use of such upwards referral even where a transaction does not meet national thresholds.[2]

This article will explore how the CMA has already begun to adapt to its new and expanded role in a post-Brexit world. In doing so it will ask whether the CMA's approach to reviewing mergers—an approach which of late has undoubtedly become more interventionist in a number of ways—can be considered sustainable. Will the CMA be able to continue, for example, to review quite so many completed mergers where doing so will only add to its ever-expanding to-do list? Can the CMA afford to view prohibition as the only appropriate remedy for some mergers, especially when some competition authorities, including the European Commission, may be more open to accepting behavioural or quasi-structural remedies?

Ultimately we will consider the changes made, whether any more might be needed, and what all of this will mean for those merger parties who fall subject to the CMA's jurisdiction.

A new approach to jurisdiction and procedure

The CMA has clearly carefully considered its new and expanded role.

In a January 2021 blog post Colin Raftery and Joel Bamford, Senior Directors for Mergers at the CMA, noted the greatest single change that lies ahead: the "largest cross-border transactions", which had previously fallen under the exclusive jurisdiction of the European Commission, could now also fall to be reviewed by the CMA.[3] The post also noted that not much had changed during last year's Transition Period. Indeed, as long as a merger had already been notified to the Commission before the end of its 2020 session, it would remain under the Commission's exclusive competence. *London Stock Exchange Group/Refinitiv*,[4] for example, was a case in point. There is of course the exception of cases that were notified to the Commission before the expiry of the Transition Period, but were referred to the CMA under art.9(2) EUMR, as in the case of *Liberty Global/Telefónica*[5,6] In fact, one of the bases upon which referral was requested in that case was the lack of relevance of the merger to EU policy objectives post-Brexit.[7]

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[1] Andrea Coscelli, as quoted in "The UK's withdrawal from the EU—The CMA's role post Brexit" (28 January 2020), *https://www.gov.uk/government/news/the-uk-s-withdrawal-from-the-eu-the-cma-s-role-post-brexit* [Accessed 12 May 2021].

[2] Margrethe Vestager, "The Future of EU merger control" (11 September 2020), *https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en* [Accessed 12 May 2021].

[3] Colin Raftery and Joel Bamford, "How the end of the Transition Period affects UK merger control" (6 January 2021), *https://competitionandmarkets.blog.gov.uk/2021/01/06/how-the-end-of-the-transition-period-affects-uk-merger-control/* [Accessed 12 May 2021].

[4] Commission Decision of 13.05.2020 pursuant to Article 8(2) of Council regulation 139/2004 (COMP/M.9564—*London Stock Exchange Group/Refinitiv*).

[5] Commission Decision of 21.12.2020 (COMP/ME/6914/20—*Liberty Global/Telefónica*).

[6] CMA, "European Commission refers review of Virgin and O2 deal to CMA" (19 November 2020), *https://www.gov.uk/government/news/european-commission-refers-review-of-virgin-and-o2-deal-to-cma* [Accessed 12 May 2021].

[7] CMA, "Joint venture between Liberty Global plc and Telefónica S.A.": Request pursuant to Article 9(2) of the Council Regulation (EU) 139/2004 *https://assets.publishing.service.gov.uk/media/5f84629b8fa8f5045d715757/M-9871_-_Liberty_Global_plc_-_Telefonica_SA_-_JV_-_CMA_Article_9_Request__WEB.pdf* [Accessed 12 May 2021], para.22.

The CMA has, however, been taking a number of preparatory steps to ready itself for an expanded role. Raftery and Bamford note that the CMA has been "closely tracking the 'pipeline' of possible cases", with pre-notification discussions ongoing that can now proceed to the formal notification stage. Inevitably, updates have been made to the way the CMA will operate.

An update on jurisdiction

Towards the end of 2020, the CMA issued revised guidance on its jurisdiction and procedure which will apply to all new merger situations.[8]

Some provisions of the new guidance might appear to have little to do with Brexit specifically, but speak volumes about the approach the CMA will take to its own jurisdiction. The CMA is thus able to forewarn parties to some of the largest global transactions about what exactly it is looking out for.

The ambiguity of "material influence"

One of the key jurisdictional areas where one may have hoped for clarification was the CMA's control test. The standard of "material influence" (the lowest control threshold in the UK), with its possibility of being found in cases with a shareholding of below 15 per cent, is seen by many as nebulous.[9,10] Those hoping for more clarification will have been left largely disappointed; the CMA noted in its revised guidance that principles of material influence could be set out, but a hard and fast approach not prescribed.[11] The guidance even notes that the list of factors which could be taken into account "is by no means exhaustive".[12]

For example, one of the key factors which can be considered is board representation, which may be taken either in and of itself, or in combination with a minority shareholding, to be constitutive of material influence.[13] A key change in the 2020 guidance from the previous guidance is in the clarification of the rule relating to the *right* to board representation, even before this right is exercised. In fact, even where there is no certainty about *whether* it will be exercised, the CMA makes clear that it will take into account the acquisition of the right in its jurisdictional assessment, and perhaps also in the substantive assessment.[14]

This is just one example of where the CMA is able to use the existing concept of material influence as part of a potentially broader approach to the transactions it will be able to review. We should note that the CMA had lain itself open to the accusation that it was using the test to grant itself more discretion even before the new guidelines were published. For example, the CMA asserted jurisdiction in the *Amazon/Deliveroo*[15] merger by focusing on Amazon's general expertise and its right to appoint a board member, rather than its acquisition of a minority stake alone, in order to establish material influence.[16] In the context of such an expansive interpretation of material influence based on a range of factors, perhaps only limited comfort can be found in the CMA's statement that it "has only rarely found shareholdings of less than 15 per cent to confer material influence on the acquirer".[17]

A low and ambiguous control threshold will only seek to compound the CMA's growing caseload in years to come.

Expansive interpretation of the share of supply test

At the same time, an expansive approach to jurisdiction can increasingly be seen through the application of the CMA's share of supply test, arguably giving it more discretion than a straightforward market share test. In 2019, the CMA controversially asserted jurisdiction over the *Sabre/Farelogix*[18] merger; using the share of supply test, the CMA found jurisdiction largely based on Farelogix's service agreements with American Airlines, and in turn the latter's interline agreements with British Airways.[19] A 25 per cent share of supply was thus found in spite of the fact that Farelogix itself generated no revenue from UK customers.[20] The transaction was ultimately prohibited by the CMA following a lengthy Phase 2 review. Perhaps more controversially, the CMA asserted jurisdiction in *Roche/Spark*;[21] in this case, Spark

[8] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/977486/Mergers_-_Guidance_on_the_CMA_s_jurisdiction_and_procedure__2020_-_revised_-_guidance__--.pdf* [Accessed 12 May 2021].
[9] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), para.4.27.
[10] Miranda Cole and Rolf Ali, "The CMA's approach to jurisdiction in recent merger cases" (27 August 2020), *Covington Competition*, *https://www.covcompetition.com/2020/08/the-cmas-approach-to-jurisdiction-in-recent-merger-cases/* [Accessed 7 February 2021].
[11] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), para.4.24.
[12] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), para.4.24.
[13] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), para.4.33.
[14] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), para.4.34.
[15] CMA (COMP/M.6836/19—*Amazon/Deliveroo*).
[16] CMA, "Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo: Final report" (4 August 2020), *https://assets.publishing.service.gov.uk/media/5f297aa18fa8f57ac287c118/Final_report_pdf_a_version_-----.pdf* [Accessed 14 February 2021]. See further Cole and Ali, "The CMA's approach to jurisdiction in recent merger cases" (2020).
[17] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), fn.45.
[18] CMA (COMP ME/6806/19—*Sabre/Farelogix*).
[19] CMA, "Anticipated acquisition by Sabre Corporation of Farelogix Inc.: Final report" (9 April 2020), *https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf* [Accessed 12 May 2021], paras 28–32.
[20] David Riley, "UK Merger Control: An Expansive Approach to Jurisdiction" (5 November 2019), *Kluwer Competition Law Blog*, *http://competitionlawblog.kluwercompetitionlaw.com/2019/11/05/uk-merger-control-an-expansive-approach-to-jurisdiction/?print=prin* [Accessed 12 May 2021].
[21] CMA (COMP/M.6836/19—*Amazon/Deliveroo*).

did not supply products to the UK, and jurisdiction was instead founded upon the more nebulous basis that it was "active in the process" of supply.[22]

Additionally, the CMA found that it had jurisdiction to review the *Tronox Holdings/TiZir*[23] transaction. The parties had submitted that the CMA was not competent to review the transaction, since their activities in the supply of chloride feedstock did not overlap in the UK.[24] The CMA disagreed, however, finding that Tronox's self-supply of chloride feedstock to its own plant in the UK could count towards the share of supply to the UK market. In doing so, the CMA noted that previous decisional practice on the irrelevance of self-supply related to the *substantive* assessment of competition concerns, rather than the jurisdictional assessment.[25] Thus, the CMA was able to find a share of supply of over 25 per cent and therefore jurisdiction to review the merger, eventually referring it to an in-depth Phase 2 investigation following the rejection of undertakings in lieu submitted by the parties, thereby causing the parties to abandon the transaction.[26]

Similar to its interpretation of the concept of material influence, the CMA's application of the share of supply test will further compound the rising number of cases where it finds it has jurisdiction to review.

Completed mergers: a sustainable approach?

The CMA's keenness to investigate any merger with potential impact on the UK market can be demonstrated by its approach to completed mergers. Whilst the UK's merger control regime is voluntary, the CMA can, and increasingly will, take the decision to investigate mergers which have not been notified to it where it believes that the transaction constitutes a relevant merger situation that gives rise to a realistic prospect of a substantial lessening of competition (SLC).[27] The CMA may become aware of a merger either through its merger intelligence unit, or because a complaint is made to it.[28] Examples of Phase 2 investigations where the investigation was initiated only following complaints by third parties include *Tobii/Smartbox*[29] and *Vanilla Group/Washstation*.[30] *FNZ/GBST*[31] is another completed merger investigated by the CMA in which it went on to require the full divestiture of GBST after a Phase 2 inquiry.[32] Whilst the CAT remitted this decision back to the CMA following an appeal by FNZ, the provisional report on the remittal suggests, again, that the merger could lead to an SLC.[33]

The CMA has clearly not shied away from fully investigating completed mergers; approximately a third of the merger investigations closed by the CMA in 2019 and 2020 related to completed acquisitions.[34] None of the mergers within this group that was referred to Phase 2 was unconditionally cleared, with all either being prohibited or requiring some form of remedy.[35] Notwithstanding the size of the relevant market, already in 2021 the CMA has ordered the divestment of 3G Truck & Trailer Parts Ltd following its completed acquisition by TVS Europe Distribution Ltd.[36]

On the other hand, if the CMA is to continue to review completed mergers on this scale, it may need to be more selective; the *Vanilla Group/Washstation* merger involved a Phase 2 prohibition, where the relevant market was "managed laundry services to higher education customers under vend share agreements in the UK".[37] As well as operating in a niche market, Washstation's turnover in the year prior to the launch of the merger inquiry was less than £3 million.[38] Clearly the CMA would rightly argue that its intervention in this case was warranted in order to protect vulnerable consumers. Even so, this case still highlights the need for the CMA to review its policy in relation to markets of insufficient importance, as well as its de minimis thresholds, not least to ensure a manageable caseload going forward.

[22] CMA, "Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc.: Decision on relevant merger situation and substantial lessening of competition" (16 December 2019), *https://assets.publishing.service.gov.uk/media/5e3d7c0240f0b6090c63abc8/2020207_-_Roche_Spark_-_non-confidential_Redacted-.pdf* [Accessed 12 May 2021], para.92.
[23] CMA (COMP/M.6905/20—*Tronox Holdings/TiZir*).
[24] CMA, "Anticipated acquisition by Tronox Holdings plc of TiZir Titanium & Iron A.S.: Decision on relevant merger situation and substantial lessening of competition" (4 January 2021), *https://assets.publishing.service.gov.uk/media/6038c3c98fa8f5048c84c380/-_Tronox-TTI_-_decision_-_web_---_PDF.pdf* [Accessed 12 May 2021], para.47.
[25] CMA, "Anticipated acquisition by Tronox Holdings plc of TiZir Titanium & Iron A.S.: Decision on relevant merger situation and substantial lessening of competition" (2021), para.50.
[26] CMA, "Anticipated acquisition by Tronox Holdings plc of TiZir Titanium & Iron A.S.: Decision on relevant merger situation and substantial lessening of competition" (2021), para.319.
[27] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), para.6.4.
[28] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), fn.111. Further information on the functioning of the CMA's Merger Intelligence Unit can be found in the "Guidance on the CMA's merger intelligence function" (December 2020), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947380/CMA56_dec_2020.pdf* [Accessed 12 May 2021].
[29] CMA (COMP/ME/6780/18—*Tobii/Smartbox*).
[30] CMA (COMP/ME/6792/17—*Vanilla Group/Washstation*).
[31] CMA (COMP/ME/6866-19—*FNZ/GBST*).
[32] Press release, "CMA blocks investment technology merger" (5 November 2020), *https://www.gov.uk/government/news/cma-blocks-investment-technology-merger* [Accessed 12 May 2021].
[33] CMA, "Competition concerns remain about FNZ's purchase of GBST" (15 April 2021), *https://www.gov.uk/government/news/competition-concerns-remain-about-fnz-s-purchase-of-gbst* [Accessed 12 May 2021]. At the time of writing, the full text decision has not been published.
[34] Original research based on CMA merger cases closed between 1 January 2019 and 31 December 2020 *https://www.gov.uk/cma-cases?case_type%5B%5D=mergers&closed_date%5Bfrom%5D=01%2F01%2F2019&closed_date%5Bto%5D=31%2F12%2F2020&page=2* [Accessed 12 May 2021].
[35] Original research based on CMA merger cases closed between 1 January 2019 and 31 December 2020.
[36] See, "CMA breaks up motor parts merger" (12 January 2021), *https://www.gov.uk/government/news/cma-breaks-up-motor-parts-merger* [Accessed 12 May 2021].
[37] CMA, "JLA and Washstation: A report on the completed acquisition by JLA New Equityco Limited of Washstation Limited" (11 October 2018), *https://assets.publishing.service.gov.uk/media/5bbf72da40f0b63870687853/jla-washstation_-_final_report.pdf* [Accessed 12 May 2021], para.22.
[38] Washstation Limited Report and Financial Statements (31 December 2017), p.10.

Finally on this point, it should be noted that an overly expansive and expanding approach to jurisdiction when coupled with the ability to review completed mergers could erode the erstwhile benefits of the UK's voluntary merger control regime. Inevitably merger parties, faced with the prospect of the CMA reviewing their completed merger, may well decide to notify their transactions simply to achieve certainty. Whilst this may fit with the CMA's desired policy objectives, such notifications will of course compound the expanding workload of the regulator and add greater time and cost to the consummation of mergers.

More mergers—better procedures?

And so we are faced with a CMA which will now have at least the option to review more mergers, and which has—even without the advent of Brexit—taken an arguably expansionist position on which mergers it can review both on the basis of the control test and the share of supply test. The question then becomes what effect this will have on the way in which merger parties interact with the CMA.

The CMA notes in yet more guidance published in 2020 that it "welcomes… short briefings from merger parties about their transactions".[39] In exceptional circumstances, a briefing paper can even be submitted prior to there being a signed merger agreement, such as where there has been a binding public offer or an announcement pursuant to r.2.7 of the UK Takeover Code.[40] Following the submission of such a briefing paper, there will typically be some follow-up questions about the merger, including in relation to jurisdiction or overlaps between the parties.[41] After this engagement, the CMA may indicate that it wishes to start an investigation (either by giving the option of a formal notification or sending an information request under s.109 of the Enterprise Act 2002 (the Act)). Alternatively, it will indicate that it has no further questions; whilst this does not preclude more questions or the opening of an investigation at a later stage, such an investigation must still be opened within four months of the date on which the enterprises ceased to be distinct (s.24 of the Act)).[42] We see here also a nod to the CMA's evolving approach to co-operation with other competition authorities; the fact that another competition authority is investigating the merger is now listed as a reason why the CMA may choose, at least at the briefing paper stage, not to open a merger investigation.[43] This is certainly preferable to only making such a decision following the pre-notification stage, which can typically take between six and eight weeks, and occasionally longer.

Therefore, the CMA has, perhaps unintentionally, created the blueprint for the equivalent of the simplified procedure which the European Commission has for mergers which are unlikely to raise any competition concerns.[44] The CMA has indicated that it is minded to establish a formal simplified notification procedure, but in the interim perhaps increased use of briefing papers will produce benefits for both the CMA and merger parties. With the submission of a briefing paper, the CMA will have relevant information at an earlier stage and can therefore decide whether to investigate a merger before rather than after it is completed.[45] This may be particularly useful for non-issues cases which are unlikely to pose competition concerns, of which many more may technically fall under the CMA's jurisdiction post-Brexit. For merger parties, whilst the result at this stage is not definitive, it will at least provide them with some level of comfort, perhaps reducing the still-present risk that the transaction will be called in at a later stage.

International co-operation

Aside from briefing papers, there is further indication that the CMA may take advantage of review in other jurisdictions to lessen its own responsibilities in the evaluation of multi-jurisdictional mergers.

One of the more significant changes in the revised guidance on jurisdiction and procedure is the advent of a new section devoted to multi-jurisdictional mergers, with the CMA recognising that it will have an enhanced role in reviewing even those global transactions that traditionally meet the thresholds for a notification to the European Commission.[46] The guidance begins by noting the importance of international co-operation between competition authorities so as to ensure, among other things, that there is consistency in remedies imposed (considered further below)[47]; the standard approach, we are told, is that the CMA will request a confidentiality waiver so as to allow the exchange of information with other authorities who are also reviewing the same transaction.[48] However, a provision of the (otherwise unrelated) National Security and Investment Act would allow the CMA to disclose information received in merger proceedings to overseas authorities without seeking the parties' prior consent.[49]

[39] CMA, "Guidance on the CMA's merger intelligence function" (2020), para.3.1.
[40] CMA, "Guidance on the CMA's merger intelligence function" (2020), fn.7.
[41] CMA, "Guidance on the CMA's merger intelligence function" (2020), para.3.5.
[42] CMA, "Guidance on the CMA's merger intelligence function" (2020), paras 4.1–4.2.
[43] CMA, "Guidance on the CMA's merger intelligence function" (2020), para.4.3.
[44] Council Regulation (EC) 139/2004 on the control of concentrations between undertakings [2004] OJ L24/1, Annex 1, para.1.1.
[45] Note that this is particularly useful given that the timetable for a Phase 1 merger inquiry is only forty working days, and the CMA has just four months from completion of a merger to make a Phase 2 reference (subject to limited exceptions, see "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), fn.69).
[46] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), s.18.
[47] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), para.18.2.
[48] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), para.18.4.
[49] National Security and Investment Act 2021 s.59. This amends s.243(3)(d) of the Enterprise Act 2002, so that information which comes to a public authority during a merger investigation under Pt 3 of that Act may be disclosed to an overseas public authority to assist with its investigation.

In addition, the CMA indicates that more complex cases may necessitate earlier contact between authorities, and even alignment of timetables.[50] The emphasis the CMA appears to be putting on international co-operation with other competition authorities may go some way to assuage concerns that, post-Brexit, the CMA will be concerned with competition in the UK in isolation, rather than as part of a global competitive landscape.

Despite the enhanced ability that the CMA will have to review multi-jurisdictional mergers, it is noted that the CMA may decline to review a merger when it is being reviewed elsewhere; relevant factors to be considered may include the presence of international markets and the likelihood of satisfactory remedies.[51] Hence we can see one example of the CMA allowing for the downsizing of its own caseload.

More generally, where the CMA does choose to investigate at the same time as other competition authorities, the standard procedure set out in the new guidance can be varied, for example by fast-tracking a case to consideration of undertakings in lieu of a reference to a Phase 2 investigation, or to a Phase 2 investigation itself.[52] According to the CMA, this may aid the alignment of the CMA's substantive assessment and/or remedies process with the proceedings in other jurisdictions.[53] This could, for example, be achieved through the merger parties conceding that the merger has resulted, or could be expected to result, in an SLC (thus cutting down on the time it would take for the CMA to reach this conclusion itself).[54] This would certainly entail a time-saving and, therefore, a possible easing of the pressure on the CMA's resources.

By allowing the curtailment of a Phase 2 merger investigation where the parties concede an SLC, there is the possibility of still greater alignment with the timetables of other competition authorities.[55] This new approach will allow for the consideration of remedies at an earlier stage than might otherwise have been possible, and will mean that neither the CMA nor merger parties will be required to endure a lengthy Phase 2 process when it is clear that some form of remedy will be required.[56] The issue was well highlighted by John Penrose MP in his *Power to the People* report on the UK's competition regime.[57] He noted that whilst some cases are of course "complicated and difficult, with lots of detailed discussions and careful analysis required", there is a class of simpler cases where "both the CMA and the firms in the industry itself may all agree what needs to change, but they aren't legally allowed to reach an agreement before the end of a phase one or two merger investigation".[58] In Penrose's words, this created "unnecessary delays, expense and pointlessly unproductive work".[59] The CMA's new approach is to be welcomed, and will serve to make its processes more efficient as well as easier to align with parallel investigations by other competition authorities.

The CMA is clear, however, that there will occasionally be a need for divergence with other competition authorities, for example where market dynamics or applicable legal tests vary across jurisdictions.[60] In such cases, "the CMA will be mindful of its role as the UK's competition agency and will not depart from its duty to protect UK consumers".[61]

Aside from explicit changes to the CMA's procedures, it has also taken a number of steps to enhance its already strong credentials when it comes to international co-operation. In April 2021, the CMA issued a joint statement on merger control with the Australian Competition and Consumer Commission (ACCC) and the *Bundeskartellamt*.[62] The authorities spoke of the need for a uniform approach when assessing mergers, particularly those in dynamic markets, and especially in the context of the COVID-19 pandemic.[63] Separately, the CMA has joined an international working group tasked with reviewing and updating the way in which pharmaceutical mergers are analysed and assessed, the other members being the European Commission, the US Federal Trade Commission and Department of Justice, the Office of State Attorneys General, and the Canadian Competition Bureau.[64] It is also encouraging that formal

[50] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), para.18.6.
[51] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), para.18.7(a).
[52] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), para.18.7(c). The approach of fast-tracking an investigation to Phase 2 was used in the *Crowdcube/Seedrs* merger inquiry. There, the parties applied to the CMA for use of the procedure, and it took less than a month for the CMA to find that there was a realistic prospect of a substantial lessening of competition, see *https://assets.publishing.service.gov.uk/media/5fc8d7c7d3bf7f7f5c134ad6/Crowdcube__Seedrs_-_full_text_SLC_decision.pdf* [Accessed 12 May 2021].
[53] CMA, "Draft revised guidance on the CMA's jurisdiction and procedure in relation to mergers (including the CMA's mergers intelligence function) — Consultation Document" (November 2020), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933278/Consultation_Document_-_CMA2_CMA56.pdf* [Accessed on 12 May 2021], para.2.8.
[54] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), s.7.
[55] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), paras 7.18–7.21.
[56] CMA, "Mergers: Guidance on the CMA's jurisdiction and procedure" (2020), paras 7.18–7.21.
[57] John Penrose MP, "Power to the People: Stronger Consumer Choice And Competition So Markets Work For People, Not The Other Way Around" (February 2021), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961665/penrose-report-final.pdf* [Accessed 12 May 2021].
[58] John Penrose MP, "Power to the People: Stronger Consumer Choice And Competition So Markets Work For People, Not The Other Way Around" (2021), para.2.4.
[59] John Penrose MP, "Power to the People: Stronger Consumer Choice And Competition So Markets Work For People, Not The Other Way Around" (2021), para.2.4.
[60] Tim Geer and Anna Caro, "International cooperation in merger investigations" (5 March 2021), *https://competitionandmarkets.blog.gov.uk/2021/03/05/international-cooperation-in-merger-investigations/* [Accessed 12 May 2021].
[61] Geer and Caro, "International cooperation in merger investigations" (2021).
[62] CMA, ACCC and *Bundeskartellamt*, "Joint statement on merger control enforcement" (20 April 2021), *https://www.gov.uk/government/publications/joint-statement-by-the-competition-and-markets-authority-bundeskartellamt-and-australian-competition-and-consumer-commission-on-merger-control/joint-statement-on-merger-control-enforcement* [Accessed 12 May 2021].
[63] CMA, ACCC and *Bundeskartellamt*, "Joint statement on merger control enforcement" (2021).
[64] CMA, "CMA joins global partners to consider approach on pharma mergers" (16 March 2021), *https://www.gov.uk/government/news/cma-joins-global-partners-to-consider-approach-on-pharma-mergers* [Accessed on 12 May 2021].

talks regarding an antitrust co-operation deal are due to begin soon between the European Commission and the CMA.[65]

Enforcement: The rise of the IEO

There are several key areas in which we can see the CMA becoming more deliberately interventionist, and one such area is initial enforcement orders (IEOs).

From April 2019 to March 2020, the CMA imposed 20 IEOs, largely in relation to completed mergers.[66,67] This accounted for roughly a third of merger inquiries initiated in this period, largely in line with recent years but representing a change from a decade ago where the proportion was less than half of this.[68] The scope of recent IEOs is likewise impressive; the order imposed in *Facebook/GIPHY*[69] prevented the integration of the businesses even outside of the UK.[70] The general purpose of an IEO is to prevent pre-emptive action to integrate the businesses of the merging parties.

There is perhaps reason to believe that the CMA is becoming much more dogged in its enforcement of such orders; the CMA imposed a penalty of £300,000 in the *JD Sports/Footasylum*[71] merger when Footasylum terminated a lease without the prior consent of the CMA.[72] This was in spite of Footasylum's contention that the decision was in the ordinary course of business, and the monitoring trustee had been informed.[73] It should be noted, however, that this penalty was later withdrawn after appeal to the Competition Appeal Tribunal (CAT).[74]

Fines totalling £300,000 were similarly imposed but unsuccessfully appealed on two occasions in the *Electro Rent Corporation/Test Equipment Asset Management and Microlease* merger.[75,76] The CMA is clearly unflinching in the face of breaches, particularly where these may severely impact its ability to impose structural remedies.

More generally, the CMA is clearly alive to the issue of non-compliance with IEOs, noting in its current consultation on interim measures in merger investigations that "merging parties are taking insufficient steps to ensure compliance with interim measures which is undermining the effectiveness of the UK's voluntary, non-suspensory merger regime".[77] Thus a revised draft IEO template imposes "stronger requirements relating to compliance processes".[78]

A new substantive approach?

In addition to the revised guidelines on jurisdiction and procedure, on 18 March 2021, the CMA also published a revised set of merger assessment guidelines.[79] The guidelines provide several key insights into how the substantive approach of the CMA to assessing mergers will change post-Brexit.

Chief among these is that it appears the CMA will be considering a broader range of merger effects, branching out from the immediate and foreseeable (who sells now, and who will sell after?) and instead making a conscious decision to enquire more extensively into dynamic competition.

Counting counterfactuals

This can be clearly seen through revisions to the section of the guidance on counterfactuals; when assessing whether a merger will lead to an SLC, the CMA will need to compare the conditions of competition in a world with the merger to those in a world without the merger. The question therefore becomes what exactly the CMA will view as the relevant situation absent the merger.

Under the 2021 guidance, the approach to counterfactuals is largely the same as in the 2010 guidance, except in relation to the exiting firm scenario. Under the 2010 guidance, the following three questions would be asked when deciding on an exiting firm counterfactual:

[65] Lewis Crofts, "EU eyes post-Brexit antitrust cooperation deal with UK" (4 May 2021), MLex, *https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1290168&siteid=190&rdir=1* [Accessed on 4 May 2021].
[66] CMA, Merger Inquiry Outcome Statistics (Last updated 7 April 2021) *https://www.gov.uk/government/publications/phase-1-merger-enquiry-outcomes* [Accessed 12 May 2021].
[67] CMA, "Guidance on initial enforcement orders and derogations in merger investigations" (5 September 2017), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/642070/guidance-initial-enforcement-orders-and-derogations-merger-investigations.pdf* [Accessed 12 May 2021], para.2.3 explains that "the CMA will only exceptionally impose an IEO in relation to a merger which has not yet completed".
[68] CMA, Merger Inquiry Outcome Statistics.
[69] CMA (COMP/ME/6891/20—*Facebook/GIPHY*).
[70] CMA, "CMA welcomes Tribunal judgment in Facebook and Giphy case" (13 November 2020), *https://www.gov.uk/government/news/cma-welcomes-tribunal-judgment-in-facebook-and-giphy-case* [Accessed 12 May 2021].
[71] CMA (COMP/ME/6827/19—*JD Sports/Footasylum*).
[72] CMA, "*JD Sports/Footasylum* merger inquiry case page" (17 May 2019), *https://www.gov.uk/cma-cases/jd-sports-fashion-plc-footasylum-plc-merger-inquiry* [Accessed 12 May 2021].
[73] CMA, Concurrences, "Completed acquisition by JD Sports Fashion plc of Footasylum plc – Decision to impose a penalty on Pentland Group Limited and JD Sports Fashion plc under section 94A of the Enterprise Act 2002" (29 July 2020), paras 26 and 58(b)(ii), *https://www.concurrences.com/IMG/pdf/ieo_breach_-_final_-_web_version_---_pdf_a.pdf?62235/0e8e1752f30855ebd6601b013861ec36a9714068* [Accessed on 4 May 2021].
[74] CMA, "*JD Sports / Footasylum* merger inquiry case page" (2019).
[75] CMA (COMP/ME/6676-17—*Electro Rent Corporation/Test Equipment Asset Management and Microlease*).
[76] CMA, "Electro Rent Corporation / Test Equipment Asset Management and Microlease" (6 February 2017), *https://www.gov.uk/cma-cases/electro-rent-corporation-test-equipment-asset-management-and-microlease-merger-inquiry* [Accessed 12 May 2021].
[77] CMA, "Interim measures in merger investigations — Consultation document" (7 April 2021), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/976063/Interim_measures_in_merger_investigations_consultation_document_-.pdf* [Accessed 12 May 2021], para.1.6.
[78] CMA, "Interim measures in merger investigations — Consultation document" (2021), para.1.6.
[79] CMA, "Merger Assessment Guidelines" (18 March 2021), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970322/MAGs_for_publication_2021_.pdf* [Accessed 12 May 2021].

1. Would the firm have exited the market?
2. Would there have been an alternative purchaser?
3. What would have happened to the sales of the exiting firm?[80]

The new guidance removes the third of these above limbs.[81] This is in spite of the fact that in April 2020, when publishing guidance on merger assessments during the COVID-19 pandemic, the CMA's summary of its position on mergers involving "failing firms" in fact broadened the third limb, adapting it to ask "What would the impact of exit be on competition compared to the competitive outcome that would arise from the acquisition?", a question which involved "taking all relevant parameters of competition into account".[82] This was a recognition, said the CMA, that the third limb was applied less mechanistically than the 2010 guidance suggested.[83] The removal of the third limb arguably allows for more ready deployment of the exiting firm scenario, and likely gives the CMA more discretion in setting the counterfactual where the exiting firm scenario is deployed, leaving the question of exact market effects to the substantive assessment stage. So much was acknowledged in the consultation document that accompanied the draft revised guidelines, where the removal of the third limb was described as giving "greater analytical coherence".[84] The approach is also in line with that taken by other competition authorities around the world.[85] Allowing for a broader range of considerations when examining the exiting firm scenario chimes with the CMA's stated policy that it will be sceptical, particularly in the context of the COVID-19 pandemic, of accepting the failing firm defence.[86]

Two insights can be gleaned from the development of the CMA's approach to the exiting firm scenario. The first is that the CMA is perhaps more willing than before to depart from considering the pre-merger situation to be the appropriate counterfactual. The second, seen through the initial expansion of the third limb (which now likely sits at the substantive assessment stage), is that the CMA is unwilling to be constrained in the types of effects it will consider when assessing a merger.

In this context, it makes sense that the CMA has added to the guidance that "Uncertainty about the future will not in itself lead the CMA to assume the pre-merger situation to be the appropriate counterfactual".[87] This is demonstrated by the Phase 1 clearance decision in *Evolution/NetEnt*,[88] where although the CMA adopted the prevailing conditions of competition as the appropriate counterfactual, it noted that such conditions "involved an environment where the Parties and their competitors would have continued their growth path absent the merger".[89] This is in spite of the fact that the parties' achievement of these goals was by no means certain. Similarly in *PayPal/iZettle*,[90] the CMA concluded that the appropriate counterfactual was one which clearly took account of the parties' likely development strategies, eventually clearing the merger unconditionally at Phase 2.[91] This was in spite of the fact that the transaction might have been suspected of being a so-called "killer acquisition", where a larger market player sought to remove a new or potential entrant.

It is hard to deny that we are in an age of innovation where the elimination of a competitor could have untold effects for the market beyond just a reduced number of market players. At the same time, there may be some cause for concern in a more ready departure from the prevailing conditions of competition as the appropriate counterfactual. After all, whilst innovation may be planned, achievement of it is just speculative, and it is not clear that the CMA is best placed to ascertain where the market, left to its own devices, will be further down the line. The pre-merger situation, whilst imperfect, at least presented certainty. As novel counterfactuals such as the one in *PayPal/iZettle* are developed, it could become easier for the CMA to see mergers as harming innovation and the market itself, thereby providing a pretext for greater intervention.

Assessment of competitive effects

Even where the counterfactual itself is not modified, it is clear that a market's dynamic nature is increasingly forming an integral part of the substantive assessment of the merger's effects. For example, in *Sonoco Products Company/Can Packaging SAS*,[92] the CMA adopted the pre-merger situation as the appropriate counterfactual

[80] OFT, "Merger Assessment Guidelines" (September 2010), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf* [Accessed 12 May 2021], para.4.3.8.
[81] CMA, "Merger Assessment Guidelines" (2021), para.3.21.
[82] CMA, Annex A to "Summary of CMA's approach to mergers involving 'failing firms'" (April 2020), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/880565/Summary_of_CMA_s_position_on_mergers_involving__failing_firms_.pdf* [Accessed 12 May 2021], paras 8 and 21.
[83] CMA, Annex A to "Summary of CMA's approach to mergers involving 'failing firms'" (2020), para.21.
[84] CMA, "Draft Revised Merger Assessment Guidelines — Consultation Document" (17 November 2020), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/935598/Consultation_Document_-.pdf* [Accessed 12 May 2021], para.1.37.
[85] CMA, "Draft Revised Merger Assessment Guidelines — Consultation Document" (2020), para.1.38.
[86] CMA, ACCC and *Bundeskartellamt*, "Joint statement on merger control enforcement" (2021).
[87] CMA, "Merger Assessment Guidelines", para.3.14.
[88] CMA (COMP/ME/6894/20—*Evolution/NetEnt*).
[89] CMA, "Anticipated acquisition by Evolution Gaming Group AB of NetEnt AB: Final Report" (16 November 2020), *https://assets.publishing.service.gov.uk/media/5fcf4e158fa8f54d564aefe9/EvolutionNetEnt_-_full_text_Decision.pdf* [Accessed 12 May 2021], para.28.
[90] CMA (COMP/ME/6766/18—*PayPal/iZettle*).
[91] CMA, "Completed acquisition by Paypal Holdings, Inc. of iZettle AB: Final Report" (12 June 2019), *https://assets.publishing.service.gov.uk/media/5cffa74440f0b609601d0ffc/PP_iZ_final_report.pdf* [Accessed 12 May 2021], paras 7.62–7.65.
[92] CMA (COMP/ME/6902/20—*Sonoco Products Company/Can Packaging SAS*).

when clearing the merger, but remarked that it "carefully considered the Parties' respective commercial strategies absent the Merger within its competitive assessment".[93] Specifically, the CMA believed that Sonoco "would have continued to innovate to meet customer demand for more recyclable packaging".[94]

This can be seen as part of a general trend of thinking regarding what damage exactly is done to the market when a competitor is lost; elsewhere, the merger assessment guidelines continue to take a broader view than previously of the competitive process and note, for example, the payment of non-monetary prices for the consumption of digital services or content.[95] Even if consumers are not charged higher prices, a merger may result in their being required to provide more data and relinquish more privacy. It is of note that such focus on the harm of acquisitions in the tech sector is not coupled with the CMA explaining the particular *benefits* of such deals; greater integration between online platforms, for example, may produce a simplicity that is of particular benefit to consumers, and may be achievable through inorganic growth.[96]

In any case, the expanded view of what competition is and, more importantly, what harm can be done to it, is borne out by the guidelines' consideration of mergers involving potential entrants. Here, the CMA notes that not only will a merger involving a party who will either enter the market or expand within it often remove competition between the merger firms, but it can also inflict harm on the market more generally; in a dynamic market, when firms have less incentive to compete, they have less incentive to innovate and to win new customers.[97] Such are the effects of so-called "killer acquisitions". The CMA is clearly conscious of the impact this has on the tech sector specifically, noting that a potential digital platform entrant which would likely have invested heavily in order to become successful could be bought at an early stage in the investment process; the investment it makes will be lost as the undertaking is scooped up by a killer-tech giant.[98]

The CMA is especially cognisant of the attention which the tech sector requires; following the publication of a March 2019 report by the Digital Competition Expert Panel (the so-called "Furman Report"), the CMA established a Digital Markets Taskforce (DMT) to design a strategy for the implementation of "pro-competitive measures for unlocking competition in digital markets".[99] To further control the idiosyncrasies of the tech sector, several striking recommendations were made in the DMT's 2020 report.[100] The report recommends that for firms with "strategic market status" (SMS), there should be an enforceable code of conduct to, for example, ensure that such firms do not abuse their powerful positions.[101] The Digital Markets Unit (DMU), which was launched on 7 April 2021 and sits within the CMA, may be granted the power to impose "pro-competitive interventions" to address specific harms, such as enforcing personal data mobility.[102] Importantly, SMS firms would be subject to additional merger control requirements; parties to transactions meeting the clear-cut thresholds of this new regime would be required to make a mandatory notification.[103] When assessing these mergers, the CMA would be able to depart from its traditional standard of proof, asking whether there is a "material risk" of an SLC rather than whether an SLC is more likely than not.[104] However, based on the government response to the CMA's digital advertising market study, it is unclear whether changes to merger assessments in the digital sector will be quite so radical.[105] Clearly, the implementation of any such recommendations will not be without controversy, not least in relation to which companies it is appropriate to designate as having SMS.

The motivations of the CMA with regards to the regulation of dynamic markets generally, and of the tech sector specifically, may be understandable. The large tech companies have the financial firepower to buy any potential competitor—deals were being done by Alphabet, Amazon, Apple, Facebook and Microsoft in the summer of 2020 at a faster rate than at any time since 2015.[106] Such abilities entail the theoretical freedom *not* to innovate and it is easy to spin this into a theory of harm to consumers. For example, whilst Facebook's acquisitions of Instagram and WhatsApp in 2012 and 2014 respectively did not lead to abandonment of the target brands, there is certainly an argument to be made that by losing the targets as independent competitors, the opportunity was lost to seriously challenge Facebook in the photo-sharing and messaging sectors.

[93] CMA, "Completed acquisition by Sonoco Products Company, Inc of Can Packaging SAS: Final Report" (21 December 2020), *https://assets.publishing.service.gov.uk/media/6012d85de90e076260d08dc0/Sonoco_Can_Packaging_-_Decision_on_SLC_-_VERSION_FOR_PUBLICATION_---.pdf* [Accessed 12 May 2021], para.77.
[94] CMA, "Completed acquisition by Sonoco Products Company, Inc of Can Packaging SAS: Final Report" (2020), para.77.
[95] CMA, "Merger Assessment Guidelines", para.2.4.
[96] See for example Digital Competition Expert Panel, "Unlocking digital competition" (March 2019), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf* [Accessed 12 May 2021], para.3.54.
[97] CMA, "Merger Assessment Guidelines", para.5.3.
[98] CMA, "Merger Assessment Guidelines", para.5.4.
[99] CMA, "Digital Markets Taskforce" (3 April 2020), *https://www.gov.uk/cma-cases/digital-markets-taskforce* [Accessed 12 May 2021]. See further Digital Competition Expert Panel, "Unlocking digital competition" (2019).
[100] Digital Markets Taskforce, "A new pro-competition regime for digital markets" (December 2020), *https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf* [Accessed 4 March 2021].
[101] Digital Markets Taskforce, "A new pro-competition regime for digital markets" (2020), s.4.
[102] Digital Markets Taskforce, "A new pro-competition regime for digital markets" (2020), s.4.
[103] Digital Markets Taskforce, "A new pro-competition regime for digital markets" (2020), s.4.
[104] Digital Markets Taskforce, "A new pro-competition regime for digital markets" (2020), para.4.153.
[105] The Department for Business, Energy & Industrial Strategy, "Government response to CMA digital advertising market study" (The Stationary Office, 2020), *https://www.gov.uk/government/publications/government-response-to-the-cma-digital-advertising-market-study/html* [Accessed 12 May 2021].
[106] Miles Kruppa, "Big Tech goes on pandemic M&A spree despite political backlash" (28 May 2020), *Financial Times*, *https://www.ft.com/content/04a62a26-42aa-4ad9-839e-05d762466fbe* [Accessed 12 May 2021].

What is problematic is that the CMA aims to solve the perceived issue of killer acquisitions in the tech sector by dealing in uncertainty. Thus, the revised guidance points out that "uncertainty about the outcome of a dynamic competitive process does not preclude the CMA from assessing the impact of the merger on that dynamic process".[107] In fact, uncertainty can be a powerful factor in the CMA's substantive assessment, as the guidance also points out

> "The elimination of an entrant as a potential competitor may lead to an SLC even where entry by that entrant is unlikely and may ultimately be unsuccessful, because the removal of the threat of entry may lead to a significant reduction in innovation or efforts by other firms to protect their future profits".[108]

There are two key issues with this approach. The first is that a substantive approach which gives more weight to what is inherently uncertain could give rise to outcomes which are at best unpredictable, and at worst presumptive of harm in reality, if not in name. Whilst the CMA is not going as far as is suggested by Caffarra, Crawford and Valletti and *creating a presumption* that acquisitions by "super-dominant firms" are anti-competitive, the results may be similar.[109] The new approach could ironically lead to the CMA taking a very narrow view of the market, and one that is not borne out by the views of the parties, or more importantly of other market participants. It is for this reason that the CMA would do well to pay less attention to concretising uncertainty, and should rely more on the probative value of the range of evidence available to it.[110] In order to add greater colour to its picture of the market, the CMA could even seek a broader range of views and information; the revised merger assessment guidelines do not emphasise the probing of the views of market participants other than the merger parties when assessing dynamic markets, but the ability to, for example, request third party documents could well be a positive step in bringing greater certainty to the assessment. In this respect it is encouraging that the CMA's joint statement with the ACCC and *Bundeskartellamt* highlights the role of third parties in merger control, whilst acknowledging the challenges posed by what is usually a lack of representation and reluctance to jeopardise a future commercial relationship with the merged firm.[111] By finding new tools to properly interrogate the peculiarities of particular markets, the CMA will also be able to resist the urge to view dynamic markets as a whole class of sectors where inorganic growth should be prevented at all costs; for example, the CMA would be more justified in guessing at the future of a small pharmaceutical company with a product ready to bring to market than it would be in making similar guesses of an entrant in the tech sector.[112]

The second, related problem, is that the CMA appears to ignore the considerable benefits of new and potential entrants being bought—or having the option of being bought—by the largest firms in their sector. This is particularly true when we consider nascent competitors run by entrepreneurs who see acquisition by larger firms as their eventual aim. As Jung and Sinclair acknowledge,

> "a new wave of over-enforcement based on highly speculative theories of harm would likely have a dampening effect on investment in technology, a key driver of economic growth".[113]

If antitrust authorities begin to over-enforce, this "reduces the likelihood of eventual exit through a sale to an industry participant".[114] Taken to its extreme, this may even deter early-stage investors and venture capital funds from giving entrepreneurs the space to innovate to begin with, such investors no longer having the viable exit strategy of a buy-out.[115] In this context, concerns that over-enforcement may stifle innovation may appear quite legitimate.

The CMA's post-Brexit comments however, which have included warning tech companies of future investigations and criticising EU decisions in the sector (such as *Google/Fitbit*[116]), may be a worrying sign that the CMA has already become wedded to certain presumptive theories of harm, at least when it comes to mergers in the tech sector.[117]

The effect on merger remedies

And so arguably the CMA's substantive approach to merger assessment has expanded and will continue to do so. But what does this mean in practice? What will the remedies be where such harms are identified? What will the CMA do where, for example, it has substantiated a

[107] CMA, "Merger Assessment Guidelines", para.5.20. Note the similarity of language to para.3.14 (cited above), and a clear desire of the CMA to show that it is willing to combat uncertainty.
[108] CMA, "Merger Assessment Guidelines", para.5.23.
[109] Cristina Caffarra, Gregory Crawford and Tommaso Valletti, "How tech rolls: Potential competition and 'reverse' killer acquisitions" (11 May 2020), *VoxEU*, *https://voxeu.org/content/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions* [Accessed 12 May 2021].
[110] Daniel Sokol, as quoted in "Digital and competition: should the rules be changed?" (9–12 March 2021), *Concurrences*, *https://events.concurrences.com/IMG/pdf/concurrences_interview_210312_daniel_sokol_.pdf* [Accessed 12 May 2021].
[111] CMA, ACCC and *Bundeskartellamt*, "Joint statement on merger control enforcement" (2021).
[112] Daniel Sokol, as quoted in "Digital and competition: should the rules be changed?" (2021).
[113] Nelson Jung and Elizabeth Sinclair, European Competition Law Review, "Innovation theories of harm in merger control: plugging a perceived enforcement gap in anticipation of more far-reaching reforms?" (2019) 40(6) E.C.L.R. 268.
[114] Jung and Sinclair, "Innovation theories of harm in merger control: plugging a perceived enforcement gap in anticipation of more far-reaching reforms?" (2019) 40(6) E.C.L.R. 275.
[115] Daniel Sokol, as quoted in "Digital and competition: should the rules be changed?" (2020).
[116] Commission Decision of 15.06.2020 pursuant to Article 8(2) Council Regulation 139/2004 (COMP/M.9660—*Google/Fitbit*).
[117] Kate Bioley and Javier Espinoza, "UK competition watchdog warns Big Tech of coming antitrust probes" (22 February 2021), *Financial Times*, *https://www.ft.com/content/da5c30a8-6fab-4131-b6bd-f8f05dcf5a46* [Accessed 12 May 2021].

dynamic theory of harm, holding that a merger will have a negative impact on innovation and, ultimately, consumers?

In a speech in March of 2020, Andrea Coscelli, the CEO of the CMA, delivered what could be taken as a caution. He warned that because of the nature of the loss of dynamic competition, it is unlikely that behavioural remedies will be sufficient for mergers in highly dynamic markets. Instead, it is likely to be the case that only structural remedies or prohibition could truly address the CMA's concerns. "These factors may make our decisions appear more 'interventionist' than in the past… it is often the case that prohibition is the only appropriate remedy in these markets".[118]

An interventionist CMA, if not necessarily one prone to "over-enforcement", is increasingly what we are seeing. The tougher line which the CMA is taking with regards to merger control dispels any notion businesses might have had that the CMA will now just be a "smaller national competition authority" unthinkingly adopting the approaches of the EU and US antitrust authorities in the aftermath of Brexit.[119] In fact, the CMA has demonstrated the desire and ability to seriously impact global deals through its imposition of remedies; the Final Report in *Viagogo/Stubhub*[120] indicated that only full divestment of Stubhub's business outside of the US and Canada would be sufficient to remedy the CMA's concerns.[121] Similarly, the CMA in the *Adevinta/eBay*[122] merger inquiry expressed concerns that the deal could lead to a loss of competition between Shpock, Gumtree and eBay's marketplace, leaving only Facebook Marketplace as a significant competitor, and it thus indicated that the transaction will be referred for an in-depth Phase 2 investigation unless sufficient undertakings are offered.[123] The CMA has indicated it is willing to consider substantial structural remedies offered by the parties, including the divestment of Shpock and the UK Gumtree business.[124] Joel Bamford noted that this transaction "is the latest in a series of merger probes by the CMA involving large tech companies, where we are thoroughly examining deals to ensure that competition is not restricted, and consumers' interests are protected".[125]

In truth, we began to see this more interventionist CMA long before Brexit, as demonstrated by the fact that more than a third of Phase 2 merger investigations opened in the UK since April 2010 has resulted in outright prohibition or abandonment.[126] Even where a prohibition was avoided, a significant number of the remaining Phase 2 investigations still required remedies.[127]

In fact, there is good reason to believe, in line with Coscelli's indications above, that the CMA is becoming *still more* interventionist. 75 per cent of the CMA's Phase 2 merger investigations in the April 2020 to March 2021 period ended in prohibition, cancellation or abandonment, with only one receiving unconditional clearance.[128] This contrasts starkly with even the same period in 2019–20, where the comparable figure was just 38 per cent.[129]

The figure for abandoned or cancelled transactions is of particular note; in the period April 2020–March 2021, six transactions were cancelled or abandoned at either Phase 1 or Phase 2.[130] Whilst this is largely in line with the five that were cancelled or abandoned at either Phase 1 or Phase 2 in 2019–20, it contrasts starkly with, for example, the period 2017–18, where the number was just one.[131] Cases such as *Tronox Holdings/TiZir*, where the merger was abandoned following a rejection of undertakings in lieu of a Phase 2 reference, perhaps signal that the CMA has already become even less amenable to accepting behavioural or quasi-structural remedies.[132] Such an approach is in direct contrast to the attitude adopted by the European Commission in several high-profile cases. For example, in *Mastercard/Nets*,[133] the remedy accepted by the Commission was the grant of a "global license to distribute, supply, sell, develop,

[118] Andrea Coscelli, "Speech at GCR Live: Telecoms, Media and Technology 2020" (2 March 2020), notes available from *https://www.gov.uk/government/speeches/speech-at-gcr-live-telecoms-media-and-technology-2020* [Accessed 12 May 2021]. This position was reinforced in the joint statement released by the CMA, ACCC and *Bundeskartellamt*, which stated that on account of "the complexity of dynamic markets and the need to undertake forward-looking assessments", structural remedies, including prohibition, will be preferred (see CMA, ACCC and *Bundeskartellamt*, "Joint statement on merger control enforcement" (2021)).
[119] David Parker, James Baker, Luís Campos, Malcolm Tan and Fraser Davison, "2021 outlook: Four themes for the competition year ahead" (undated), *Frontier Economics*, *https://www.frontier-economics.com/uk/en/home/#* [Accessed 12 May 2021].
[120] CMA (COMP/ME/6868/19—*Viagogo/Stubhub*).
[121] CMA, "Completed acquisition by PUG LLC (viagogo of the StubHub business of eBay Inc.: Final Report" (2 February 2021), *https://assets.publishing.service.gov.uk/media/601940a6d3bf7f70c3a495d1/v_sh_finalreport_.pdf* [Accessed 12 May 2021], para.10.330ff.
[122] CMA (COMP/ME/6897/20—*Viagogo/Stubhub*).
[123] CMA, "Adevinta's purchase of Gumtree raises competition concerns" (16 February 2021), *https://www.gov.uk/government/news/adevinta-s-purchase-of-gumtree-raises-competition-concerns* [Accessed 12 May 2021].
[124] CMA, "Adevinta / eBay merger inquiry" (2 December 2020), *https://www.gov.uk/cma-cases/adevinta-ebay-merger-inquiry* [Accessed 12 May 2021].
[125] CMA, "Adevinta / eBay merger inquiry" (2020).
[126] CMA, Merger Inquiry Outcome Statistics.
[127] CMA, Merger Inquiry Outcome Statistics.
[128] CMA, Merger Inquiry Outcome Statistics.
[129] CMA, Merger Inquiry Outcome Statistics.
[130] CMA, Merger Inquiry Outcome Statistics.
[131] CMA, Merger Inquiry Outcome Statistics.
[132] CMA, "Metallurgy firms abandon merger during CMA investigation" (18 January 2021), *https://www.gov.uk/government/news/metallurgy-firms-abandon-merger-during-cma-investigation* [Accessed 12 May 2021].
[133] Commission Decision of 29.01.2021 pursuant to Article 6(1)(b) in connection with Article 6(2) Council Regulation 139/2004 (COMP/M.9744—*Mastercard/Nets*), *https://ec.europa.eu/competition/mergers/cases1/202114/m9744_1443_3.pdf* [Accessed 10 May 2021].

modify, upgrade or otherwise use Nets' Realtime 24/7 technology".[134] Similarly, some European national competition authorities, including France and Austria as well as the Netherlands, have shown a greater openness to behavioural remedies.[135]

It is worth noting here that the CMA's Merger Remedies Guidance has not been updated since December 2018, and it would appear likely to remain the case that behavioural remedies will only be accepted in limited circumstances.[136,137] Moreover, the abandonment of the *Tronox Holdings/TiZir* transaction and the prohibition in *Vanilla Group/Washstation* both concerned markets far removed from the tech sector, signalling that it is impossible to isolate the CMA's more interventionist approach to just a handful of "hot topic" markets.

Of course, the CMA may reject the idea that it is displaying a tougher approach than before when it comes to merger assessment and remedies. There has been a general decline in the number of merger investigations carried out each year; there were 62 Phase 1 investigations in 2019–20, but only 38 in 2020–21, largely as a result of a depressed M&A market due to COVID-19.[138] Given this decline in the number of mergers investigated, each intervention would make the CMA appear proportionately more interventionist, even if there were no actual change in approach. Moreover, we need to recognise that the markets which the CMA is investigating are themselves changing; they are becoming more digitalised and more concentrated, and so well-established theories of harm may be more easily substantiated. One example of this is the *Crowdcube/Seedrs*[139] merger, which involved two parties operating in the digitalised crowdfunding sector; the parties had a combined market share of at least 90 per cent, and the merger was abandoned after the CMA's provisional findings report indicated that only prohibition would be the appropriate remedy.[140] In addition, due to the difficulties with abuse proceedings when it comes to companies in the tech sector, it should be expected that more scepticism is likely to be shown to such companies at the merger control stage.[141] Finally, given the voluntary nature of the UK regime, one could also argue that there is a greater likelihood of the cases which the CMA investigates raising competition concerns; the statistics would not tell the full story.

On the other hand, one might also have expected that with fewer notifications, the proportionate amount of intervention would at least remain stagnant. And yet, as demonstrated above, this is not what we see even when we compare 2020–21 to 2019–20. Indeed, to go further, the proportion of merger investigations which resulted in cancellation, abandonment or prohibition in even 2019–20 was more than double the ten-year average.[142]

Given the unprecedented level of intervention by the CMA, it is perhaps unsurprising that disappointed merger parties are finding reasons to challenge the CMA on some of its decisions. In *Sabre/Farelogix*,[143] the outcome of an appeal to the CAT is currently awaited. Sabre is disputing the CMA's controversial assertion of jurisdiction, as well as its substantive findings.[144] On the CMA's request, the CAT also remitted back to it the *FNZ/GBST* merger inquiry, in which the CMA found it had made errors relating to market share data.[145] FNZ had submitted to the CAT that the CMA erred in its determination of the counterfactual and market definition, as well as its finding that there would be an SLC and that full divestiture was the only appropriate remedy.[146] Moreover, The Court of Appeal has refused the CMA permission to appeal the CAT's judgment in *JD Sports/Footasylum*, and so the decision has been remitted back to the CMA.[147] Grounds to be considered in the remittal include whether the CMA was correct to exclude from the counterfactual the effect of COVID-19 on Footasylum.[148] It will be interesting to

[134] Commission press release, "Mergers: Commission approves acquisition of Nets' account-to-account payment business by Mastercard, subject to conditions" (17 August 2020), *https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1487* [Accessed 12 May 2021]. See also the behavioural remedies accepted by the Commission in its clearance decisions in (i) Commission Decision of 15.06.2020 pursuant to Article 8(2) Council Regulation 139/2004 (COMP/M.9660—*Google/Fitbit*): "Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions" (17 December 2020), *https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484* [Accessed 12 May 2021]; (ii) Commission Decision 28.04.2017 pursuant to Article 8(2) Council Regulation 139/2004 (COMP/M.8306—*Qualcomm/NXP*): "Mergers: Commission approves Qualcomm's acquisition of NXP, subject to conditions" (18 January 2018), *https://ec.europa.eu/commission/presscorner/detail/en/IP_18_347* [Accessed 12 May 2021]; and (iii) Commission Decision 14.10.2016 pursuant to Article 6(1)(b) Council Regulation 139/2004 (COMP/M.8124—*Microsoft/LinkedIn*): "Mergers: Commission approves acquisition of LinkedIn by Microsoft, subject to conditions" (6 December 2016), *https://ec.europa.eu/commission/presscorner/detail/en/IP_16_4284* [Accessed 12 May 2021].

[135] Thomas Williamson, "Merger remedies — is it time to go more behavioural?" (21 February 2020), *Kluwer Competition Law Blog*, *http://competitionlawblog.kluwercompetitionlaw.com/2020/02/21/merger-remedies-is-it-time-to-go-more-behavioural/?print=print#_ftn18* [Accessed 12 May 2021].

[136] CMA, "Merger Remedies" (13 December 2018), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764372/Merger_remedies_guidance.pdf* [Accessed 12 May 2021], paras 7.1–7.3.

[137] CMA, "Anticipated acquisition by Tronox Holdings plc of TiZir Titanium & Iron A.S. — Decision not to accept undertakings in lieu of a reference" (26 February 2021), *https://assets.publishing.service.gov.uk/media/6038c39de90e070559938bb5/Decision_on_UILs_Tronox_-_web_-_PDF.pdf* [Accessed 12 May 2021].

[138] CMA, Merger Inquiry Outcome Statistics.

[139] CMA (COMP/ME/6879/20—*Crowdcube/Seedrs*).

[140] CMA, "Crowdcube and Seedrs abandon merger during CMA investigation" (25 March 2021), *https://www.gov.uk/government/news/crowdcube-and-seedrs-abandon-merger-during-cma-investigation?utm_medium=email&utm_campaign=govuk-notifications&utm_source=5ddcab36-6f76-4be8-b095-d14933c44975&utm_content=immediately* [Accessed 12 May 2021].

[141] See comments made by Andreas Mundt, President of the *Bundeskartellamt*, "UK, Australia and Germany issue statement on merger control" (20 April 2021), *https://www.gov.uk/government/news/uk-australia-and-germany-issue-statement-on-merger-control* [Accessed 12 May 2021].

[142] CMA, Merger Inquiry Outcome Statistics.

[143] CMA (COMP/ME/1345—*Sabre/Farelogix*), *https://assets.publishing.service.gov.uk/media/5eeb4888d3bf7f7fc7a46359/Notice_of_making_the_Order_-_Sabre_Fairlogix.pdf* [Accessed 12 May 2021].

[144] CAT, "Summary of application under Section 120 of the Enterprise Act 2002" (1 June 2020), *https://www.catribunal.org.uk/sites/default/files/2020-06/1345_Sabre_summary_010620.pdf* [Accessed 12 May 2021].

[145] CMA, "*FNZ / GBST* merger inquiry case page" (18 November 2019), *https://www.gov.uk/cma-cases/fnz-gbst-merger-inquiry* [Accessed 12 May 2021].

[146] CAT, "Summary of application under Section 120 of the Enterprise Act 2002" (2020).

[147] CMA, "*JD Sports / Footasylum* merger inquiry case page" (17 May 2019), *https://www.gov.uk/cma-cases/jd-sports-fashion-plc-footasylum-plc-merger-inquiry* [Accessed 12 May 2021].

[148] CMA, "*JD Sports / Footasylum* merger inquiry remittal — Conduct of the Remittal" (31 March 2021), *https://assets.publishing.service.gov.uk/media/6063a33ae90e074e4e4e85f0/JDFA_Conduct_of_the_Remittal_---.pdf* [Accessed 12 May 2021], para.2.

see whether the provisional outcome of the remittal in *FNZ/GBST*, effectively upholding the original finding, is replicated in the outstanding cases.[149,150]

The National Security and Investment Act 2021

There is of course a broader question about what it will be like to do business in the UK after Brexit; merger assessment and the CMA's approach thereto is but one part of that. And yet it cannot be considered in isolation from the forthcoming sea-change to the way that acquisitions with a UK nexus will be dealt with.

Traditionally, the UK's regime for regulating foreign investment has largely consisted in considering it as part of the merger control process, with the added possibility that the government could issue a public interest intervention notice on the grounds of national security, media ownership and plurality, and financial stability.[151] There tended to be a higher risk of intervention in certain sectors such as defence and critical infrastructure, as well as lower notification thresholds in certain other sectors.[152]

Whilst the pre-existing public interest regime will continue to apply in some cases, the new National Security and Investment Act was passed into Law on 29 April 2021. It establishes a regime for national security clearance totally separate to merger control, in fact establishing a mandatory notification regime for seventeen designated sectors.[153] Even outside of the mandatory regime, the Government will have the right to "call in" investments for review, and will be able to review transactions for up to five years after they close.[154]

The Act means added scrutiny for transactions which already need to navigate a CMA with increasingly interventionist tendencies; it has retroactive application (deals closing between 12 November 2020 and the day before the Act comes into force can be "called in"), and an exceedingly broad scope (even foreign entities and assets can fall under the regime if they are used in connection with activities in the UK, or supply goods or services to it).[155] What is most striking is the sheer volume of transactions that will fall within the Act's ambit. The Department for Business, Enterprise and Industrial Strategy (BEIS) predicts that there will be between 1,000 and 1,830 transactions caught within it every year, with up to 95 being called in for review.[156] In practice, the number of notifications is likely to be higher still, since even parties to unproblematic transactions will want legal certainty. To put this volume into perspective, only 62 mergers were investigated by the CMA from April 2019 to March 2020 (and of course this number too is likely to be significantly higher post-Brexit).[157]

There is thus an increased chance, when the Act is considered alongside developments at the CMA level, that the largest global transactions with a UK nexus may be subject to review by the CMA as well as by BEIS. This will ultimately add greater time and expense to transactions, as well as greater uncertainty.

Conclusion

So, what does all this mean for merger parties in a post-Brexit world?

The CMA will now review more of the largest multi-jurisdictional transactions, co-operate more with other competition authorities, and perhaps use its own initiative to assert jurisdiction over a rising number of mergers. In doing all of this, it will use an approach to substantive assessment that is potentially better equipped for dealing with dynamic markets and modern theories of harm, such as those that arise in the tech sector. And, of course, the CMA will continue to be unafraid to exact remedies appropriate to the seriousness of the risk it believes is posed to competition by a particular transaction, or prohibit mergers outright where it deems this necessary. When considered alongside the National Security and Investment Act, one thing is clear: doing business in the UK after Brexit will be more challenging for merger parties than it has ever been.

Brexit will present the CMA with many and varied tests. Whilst the CMA has already begun to adapt, there is no doubt that it has more to do to streamline its procedures, not least so that it is able to keep in-step with investigations of other major competition authorities around the world.

[149] CMA, "Competition concerns remain about FNZ's purchase of GBST" (2021).
[150] In addition to the cases here noted, other merger cases ongoing before the CAT at the time of writing include *Facebook/GIPHY* ([2020] CAT 23), in respect of a refusal to grant derogations from an IEO.
[151] Department for Business, Energy and Industrial Strategy, "Enterprise Act 2002: changes to the turnover and share of supply test for mergers: guidance" (Withdrawn) (The Stationary Office, 2018), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902610/EA02_guidance.pdf* [Accessed 12 May 2021].
[152] Department for Business, Energy and Industrial Strategy, "Enterprise Act 2002: changes to the turnover and share of supply test for mergers: guidance" (Withdrawn) (The Stationary Office, 2018).
[153] National Security and Investment Act s.14.
[154] National Security and Investment Act s.2.
[155] National Security and Investment Act s.2(4) and s.7(3).
[156] Home Office, "Impact Assessment for National Security and Investment Bill" (9 November 2020), *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/934276/nsi-impact-assessment-beis.pdf* [Accessed 12 May 2021], s.4.3.2.
[157] CMA, Merger Inquiry Outcome Statistics.