

COMPETITION & REGULATORY NEWSLETTER

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CMA CEO says that CMA is “rising to the challenge on growth”

Just over a month on from the launch of the new UK Government’s [Industrial Strategy Green Paper](#) on 14 October 2024, the Chief Executive of the Competition and Markets Authority (CMA), Sarah Cardell, has [set out](#) how the CMA is rising to the challenge of promoting economic growth for the UK economy. The same day, the CMA published its [response](#) to the Green Paper.

The CMA’s response follows a warning shot from UK Prime Minister Keir Starmer in his [speech](#) to the International Investment Summit on 14 October, during which he vowed to “*rip out the bureaucracy that blocks investment*” and “*make sure that every regulator in this country...especially our economic and competition regulators...takes growth as seriously as [his audience] does.*”

Rising to the challenge on growth

Cardell is clear in her mission - to deliver a competition regime that “*leaves no one in any doubt that the UK is open to business*”, while at the same time “*remaining true to [the CMA’s] statutory duty and Parliament’s intent: to help realise for the UK all the benefits that flow from effective competition*”. She is also confident that the CMA can rise to the challenge.

Cardell considers that competition must be a core component of the Government’s industrial strategy, but that it can be balanced with other policy objectives - both by the Government, but also within the competition regime itself, where the CMA has several “*levers*” to take account of other factors. She is also clear that competition drives investment, rather than deterring it as some have suggested. But she nevertheless takes seriously concerns that the way the competition regime is applied could chill investment, even when those concerns are “*more based in perception than reality*” - for the CMA, she says, “*perceptions matter*”.

No doubt with these perceptions in mind, Cardell took the opportunity in her speech to give the clearest signal yet of a shift in the CMA’s approach to merger remedies. In what has been regarded by competition law experts as a clear softening of the CMA’s tone (although Cardell was at pains to point out that it had “*always been the case*”), Cardell explained the goal for merger control: “*every deal that is capable of being cleared either unconditionally or with effective remedies should be. Only a truly problematic merger, where the harm to businesses and consumers cannot be effectively addressed through remedies, should not proceed.*”

With this in mind, the CMA is launching a review of its approach to merger remedies in the New Year - specifically, its approach to behavioural remedies, which it has historically (and vocally) regarded with scepticism due to concerns around the need for ongoing monitoring and the risk of market distortions. The CMA’s position on this came under considerable pressure in Microsoft/Activision, when the CMA prohibited the deal having rejected behavioural remedies just weeks before the European Commission cleared the

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deal on the basis of the same remedies (the CMA subsequently approved a modified version of the deal). The first potential signal of a new approach came recently in Vodafone/Three, where the CMA has provisionally found that binding commitments combined with short-term protections for some customers could address its concerns (the final decision is due by 7 December).

The CMA's review of its approach will consider, amongst other things: (i) when behavioural remedies may be appropriate (including any distinction for regulated sectors - where oversight mechanisms may already be in place); (ii) the scope for remedies that lock in genuine rivalry-enhancing efficiencies; (iii) the role for remedies to preserve relevant customer benefits which may offset anti-competitive effects; and (iv) how to move to effective remedies discussions as quickly in the review process as possible.

CMA response to the Green Paper

Shortly after Cardell's speech, the CMA published its [response](#) to the Green Paper, focussing on four key issues:

- *Driving investment* - The CMA considers that competition plays a significant role in promoting investment. Nevertheless, it notes that competition is not sufficient on its own to drive investment, which depends on a broad set of conditions including access to skilled workers and quality infrastructure, policy certainty and clear and proportionate regulation.
- *The CMA's role in industrial strategy* - It sees its role as supporting the industrial strategy in two broad ways: (i) advising Government to ensure that policies, investment support and procurement harness the power of competition; and (ii) through the direct use of its powers to promote open, competitive markets. In line with Cardell's speech, it acknowledges that competition must be balanced with other policy objectives.
- *Targeting growth driving sectors* - The CMA supports the Government's strategic focus on eight key growth-driving sectors, and commits to supporting the Government in assessing the competitive dynamics in relevant sectors as the Government develops its industrial strategy.
- *Creating a pro-business environment* - The CMA provides views on the policies put forward in the Green Paper to create a pro-business environment, including innovation policies, people and skills, data in the industrial strategy, and energy and infrastructure.

Comment

The warning shot from Keir Starmer in October seems to have been heard - since his comments, "growth" has been the focus of a number of CMA speeches.

Deal makers and competition advisers will keenly await the outcome of the remedies review. The final decision in Vodafone/Three in the coming days should hopefully also provide encouraging signs of the direction of travel in this respect. Nevertheless, companies would be well-advised not to expect radical changes, and - whatever the outcome of the review - transactions seen as consolidating market power or reducing choice are likely still to face intense scrutiny. Any change is more likely to impact the marginal cases - particularly those where the CMA might historically have found itself forced to diverge from the outcome reached in other jurisdictions.

OTHER DEVELOPMENTS

ANTITRUST

European Commission seeks feedback on Corning commitments

On 6 November 2024, the European Commission [announced](#) that it has launched a formal investigation into Corning, a US glass producer of Alkali-AS glass, known as 'Gorilla Glass' used in smartphones, for allegedly abusing its dominant position through exclusive agreements with phone manufacturers and glass finishers (processors of raw glass), thereby excluding rival Alkali-AS glass producers from large segments of the market.

The investigation concerns Corning's supply agreements with mobile phone manufacturers which include exclusive sourcing requirements and exclusivity rebates. The Commission has also raised concerns about so-called

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“English clauses” where manufacturers were obliged to report to Corning on rivals’ offers and could only pursue alternative offers if Corning failed to match these offers. Regarding Corning’s agreements with glass finishers, the Commission is looking into exclusive purchase obligations and clauses precluding glass finishers from challenging Corning’s patents.

In parallel to the launch of the investigation, the Commission also adopted a preliminary assessment, setting out the Commission’s competition concerns and, in effect, inviting Corning to offer commitments. On 25 November 2024, the Commission, in a press release, [publicised](#) Corning’s proposed commitments. These include:

- Waiving all exclusivity clauses in its current agreements with phone manufacturers and Alkali- AS glass finishers and committing not to use such clauses in the future;
- For phones manufactured for the EEA market, not to require manufacturers to purchase or cause their supply chain to purchase any quantity of Alkali-AS glass from Corning nor implement conditional price advantages;
- For phones manufactured for the non-EEA market, not to require manufacturers to purchase more than 50% of their demand for certain types of glass from Corning nor implement conditional price advantages;
- Not requiring glass finishers to purchase more than 50% of their combined demand for certain types of glass from Corning nor implement conditional price advantages; and
- For Corning only to enforce its patents relating to break-resistant cover glass on a patent infringement basis and not breach of contract, and not to use any contractual mechanisms to reinforce its patent claims.

The Commission is now seeking industry feedback on Corning’s proposals, with a six-week period for comments. If the Commission is satisfied with the market test, the commitments will become binding and the investigation will be closed without an infringement finding. These commitments, if accepted, will be applicable worldwide and their implementation will be monitored for at least nine years.

CAT fines Pfizer and Flynn for excessive pricing of epilepsy drug

On 20 November 2024, the Competition Appeal Tribunal (CAT) [delivered](#) its judgment in the long-running Phenytoin litigation, setting aside the CMA’s decision and remaking it.

In December 2016, the CMA found that Pfizer and Flynn had abused their dominant positions by charging excessive prices for phenytoin sodium capsules (used to treat epilepsy). The CMA imposed fines of £84.2 million and £5.2 million respectively on Pfizer and Flynn for overpricing in the UK. Pfizer and Flynn appealed the decision which was subsequently set aside by the CAT despite the CAT upholding the CMA’s findings on market definition and dominance. For more details, see our client briefing [here](#). Upon appeal to the Court of Appeal in 2020, the CAT’s findings were upheld and the case was remitted to the CMA. For more details, see our previous briefing [here](#).

After re-assessing part of the case, the CMA published its decision on 21 July 2022, finding four instances of infringement and imposing fines of £63,300,000 and £6,704,422 on Pfizer and Flynn. For more details, see a previous edition of our newsletter [here](#). Pfizer and Flynn appealed the CMA’s second decision.

On appeal, the CAT set aside the CMA’s decision. The CAT found that the CMA had made sufficiently material errors that its decision could not stand on the basis of the stated reasoning, including in relation to the approach to calculating a “*reasonable rate of return in its cost-plus approach*” and so in calculating its cost. It also found other errors, such as the CMA’s assessment of whether prices were unfair, as well as issues of procedural unfairness. However, the CAT, in exercising its power to remake the decision itself, ultimately found that all four infringement findings against Flynn were made out, and three of the four infringement findings against Pfizer were also made out - finding that Pfizer’s prices for the 25mg capsules did not infringe the Chapter II prohibition. In its judgment, the CAT stated that both Pfizer and Flynn were “*gouging the market in a manner that can only be characterised as unjustifiable or opportunistic or - in a word - unfair*”.

On remaking the decision, the CAT imposed a fine of £62,370,000 on Pfizer and a fine of £6,704,422 on Flynn - the same level of fines as initially imposed by the CMA with a 1% reduction of Pfizer’s fine to account for one less

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infringement. The CMA has since [issued](#) a statement disagreeing with the CAT's findings and reasoning in relation to the CMA's decision and is said to be considering whether to appeal.

GENERAL COMPETITION

Teresa Ribera confirmed as next EU Competition Commissioner

Teresa Ribera has been [confirmed](#) as the next EU Competition Commissioner. On 27 November 2024, the European Parliament granted final approval to Ursula von der Leyen's new European Commission. The Commissioners took office on 1 December for a five-year term. The new Commission - which had to be confirmed by the European Parliament as a whole and on the basis of a majority of the votes cast - received 370 votes in favour, 282 against, and 36 abstentions, marking the narrowest majority in history for a newly appointed Commission.

Under Ribera's leadership, we can expect tech to remain in focus. Ribera has said she plans "*vigorous enforcement*" of the DMA along with antitrust enforcement "*to ensure that European tech start-ups have a real shot at success*". Ribera also intends to swiftly find a way for the Commission to scrutinise "*killer acquisitions*", and to continue with "*rigorous*" enforcement of the Foreign Subsidies Regulation. But we may see some bigger changes under Ribera. Following the Draghi report in September, von der Leyen's mission letter to Ribera provided a clear signal that Europe needs a "*new approach to competition policy*" that is "*more supportive of companies scaling up in global markets*". Ribera is on board with this agenda and is planning to review the Horizontal Merger Guidelines to ensure EU merger policy gives the "*right weight*" to the EU economy's needs and reflects overall policy objectives and market realities. It will also be interesting to see how Ribera will navigate the "green agenda" and competition policy. For more information please see our previous newsletter [here](#).

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