SLAUGHTER AND MAY/

NEWSLETTER

5 - 18 MARCH 2025

ISSUE 5

COMPETITION & REGULATORY NEWSLETTER

QUICK LINKS

All change for UK merger control? Government announces reforms to jurisdictional tests as CMA launches review of merger remedies

On 17 March 2025, the UK Government previewed plans to revamp the UK merger control regime to provide more certainty to businesses. The announcement follows the launch just a week earlier of a long-anticipated review by the Competition and Markets Authority (CMA) of its approach to merger remedies, starting with a wide-ranging call for evidence. The review will look at both process and how the CMA can strike the right balance between different types of remedies in merger cases, with fresh guidance to be consulted on and implemented by the end of 2025.

In parallel, the CMA released a new Mergers Charter. The Charter sets out the key principles and expectations for how the CMA will engage with businesses and their advisors during merger investigations.

UK Government to consult on merger control reforms

In its latest push to promote growth and business confidence, the UK Government has announced that it is bringing forward a consultation in the coming months on proposals for legislative reform to improve the "*pace, predictability and proportionality of the UK's competition regime*".

This will include proposals to provide more certainty on where mergers will be subject to investigation in the UK. Specifically, the Government identifies the 'material influence' test (which gives the CMA jurisdiction over acquisitions of certain interests in a business that fall short of *de facto* control) and the 'share of supply' test (which gives the CMA jurisdiction over deals where they give rise to a 25 per cent share of supply of goods and services in the UK) as creating unpredictability which the legislative proposals will seek to address.

In recent years, dealmakers have criticised the CMA's expanding approach to its jurisdiction under these tests as giving rise to significant deal uncertainty. The CMA had previously stated its intention to consult on draft Guidance in June 2025 to "*clarify and delineate*" its remit to review deals under these two tests "*so far as legally possible*". With this latest announcement, the Government is clear that it intends to go a step further and put the reforms on a statutory footing.

The call for evidence on merger remedies

Just a week earlier, the CMA formally launched its review of its approach to merger remedies. Through a list of detailed questions, the CMA is seeking feedback from stakeholders on three broad remedy themes:

For further information on any EU or UK Competition related matter, please contact the Competition Group or your usual Slaughter and May contact.

Square de Meeûs 40
1000 Brussels
Belgium
T: +32 (0)2 737 94 00

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

1. **How the CMA approaches remedies.** The CMA's current mergers guidance requires Phase 1 remedies to be "*clear-cut*" and "*capable of ready implementation*". Signalling its potential willingness to revisit this approach, the CMA is asking stakeholders what alternative standard the CMA could apply, within the confines of the statutory framework, to create opportunities for "*more complex remedies*" to be accepted at Phase 1. The review will also consider the distinction between so-called 'structural' and 'behavioural' remedies, including whether that distinction remains helpful, the circumstances in which 'behavioural' remedies may be effective to offset the impact of lost competition, and how the CMA should assess their likely effectiveness. In addition, the CMA is seeking feedback on its approach to carve-out divestment remedies, as well as how the CMA could assess, monitor and enforce remedies more effectively. The CMA is considering how its new powers under the Digital Markets, Competition and Consumers Act 2024 to fine merger parties for breaches of their remedy obligations under remedy undertakings and orders might influence the types of remedies it is prepared to accept.

2. **How remedies can be used to preserve any pro-competitive effects of a merger and relevant customer benefits.** The review will assess the CMA's current approach to genuine rivalry enhancing efficiencies that may arise from a merger. It will reconsider how the "*materiality*" and "*likelihood*" of any claimed rivalry enhancing efficiencies are assessed and what improvements could be made to the remedies process to capture and "*lock-in*" such efficiencies. The CMA is also inviting feedback on its approach towards 'relevant customer benefits' arising from mergers, and whether there are any barriers to merging parties engaging with the CMA about these at both Phase 1 and Phase 2.

3. **How the process of assessing remedies can be made as quick and efficient as possible**. This will involve an examination of any process barriers to achieving a remedies outcome at both Phase 1 and Phase 2, including on how the Phase 1 process could be improved to allow more complex remedies to be assessed within a Phase 1 timeframe. The review will also consider the role played by other UK government departments or other regulators in increasing the chance of a successful remedy outcome and the circumstances in which it may be appropriate for the CMA to recommend other regulators take action to remedy competition concerns arising from a merger. Finally, the CMA will assess how its process can effectively take account of the parallel actions of competition authorities in other jurisdictions.

The CMA is clear in its appetite to make the merger review process more efficient and proportionate, in line with its programme to improve the pace, predictability, proportionality and process of the merger control regime (the '4Ps'). The questions put to stakeholders echo the key themes laid out in Sarah Cardell's November 2024 speech, where she indicated that every deal that is capable of being cleared "*either unconditionally or with effective remedies should be and only a truly problematic merger, where the harm to businesses and consumers cannot be effectively addressed through remedies, should not proceed*".

While the CMA has historically been sceptical of efficiency arguments and has had a marked preference for structural remedies – more so than many other European competition authorities – there have been encouraging signs of a changing direction of travel in recent merger reviews. In December 2024, the CMA announced its decision to clear the Vodafone/Three UK joint venture based on the behavioural remedies offered by the parties, which included investments in infrastructure. Dealmakers and competition advisers will keenly await the outcome of the remedies review, but businesses should expect incremental rather than radical changes in approach from the CMA.

The Mergers Charter

Published on the same day, the Mergers Charter sets out the overarching principles which will govern both how the CMA deals with businesses during merger investigations and the expectations it has from businesses during this process. The Charter is structured around the '4Ps' (pace, predictability, proportionality, and process) and what they mean in practice for CMA merger reviews.

The Charter does not add significantly to the package of proposals recently announced by the CMA. As a statement of the CMA's intent, it is not subject to consultation. Joel Bamford, Executive Director for Mergers at the CMA, previously announced that the CMA will issue draft KPIs on information gathering in June 2025 for

consultation, alongside revised Guidance on the CMA's approach to jurisdiction (as explained above). These plans may be impacted by the Government's recent announcement of its own consultation on legislative reforms.

Next steps

The UK Government is expected to issue a final "*growth-focused*" strategic steer to the CMA in the coming weeks, following its recent consultation on the draft steer. It remains to be seen how these announcements will impact the final version of the CMA's annual plan for 2025-2026, which is also expected in the next few weeks.

The CMA's call for evidence on merger remedies will remain open until 12 May 2025. Alongside this, the CMA will host a series of outreach and roundtable sessions with certain interested parties, such as business and industry groups (including those with direct experience of the CMA's remedies process), other competition regulators, and advisor firms.

The CMA will review the feedback received on its approach to remedies and develop specific proposals for consultation in the early autumn, with the final guidance expected by the end of 2025.

OTHER DEVELOPMENTS

ANTITRUST

CAT dismisses proposed abuse of dominance class action against UK water companies

On 7 March 2025, the UK Competition Appeal Tribunal (CAT) dismissed applications for collective proceedings orders (CPOs) brought by Professor Carolyn Roberts on an opt-out basis on behalf of several million potential household consumers against six UK water and sewerage companies. The claims alleged that the water and sewerage companies had abused their dominant position by allegedly under-reporting the number of pollution incidents on their respective networks to their regulator (Ofwat), resulting in an overcharge for household customers.

The companies submitted that the applications should be dismissed on two separate grounds. Firstly, they argued that, in accordance with recent case law from the Supreme Court, the claims were excluded under s18(8) of the Water Industry Act 1991 (WIA91). They argued that the remedies sought by Professor Roberts were not available in respect of the relevant acts/omissions otherwise than by virtue of their "*constituting, causing or contributing to*" a contravention of the companies' conditions of appointment. The contravention of the conditions of appointment was an essential ingredient of the claims and therefore the only remedies available were those provided for under the WIA91, rather than by way of the private law damages before the CAT. Secondly, they argued that, as their activities were regulated by Ofwat in the public interest and that all the companies were statutory monopolies in their respective areas of appointment, the statutory structure left no scope for competition in their supply to household customers. Competition law (and the prohibition on abuses of a dominant position) therefore did not apply to the alleged conduct.

The CAT held in favour of the water companies on s18(8) and found that the alleged failure of the companies to supply accurate information in the context of the statutory regime of price control under the WIA91 was an essential ingredient of Professor Roberts' claims for breach of statutory duty. The CAT held that, absent contravention of the regime for the determination of price control, the proposed class members would have no independent basis for their claims and they were accordingly excluded under s18(8). The CAT therefore declined to certify the claims. However, the CAT rejected the companies' second argument that competition law did not apply, ruling that a statutory monopoly that does not face competition could still abuse its dominant position in the market, including by its conduct towards third parties. The CAT also noted that the companies supplied businesses as well as households, and that, since competition existed in the supply of water and sewerage services to businesses, it would be unfair for the companies' conduct to give rise to a remedy under competition law for adversely affected business customers but not household customers. The CAT otherwise found that the authorisation and eligibility conditions were satisfied, such that in the absence of the exclusion under s18(8), it would have granted a CPO in each set of proceedings.

This was the first environmental private damages claim brought under the UK competition collective proceedings regime. It has been regarded as a key case for testing whether standalone claims for alleged breaches of competition law may be brought as collective proceedings where the substance of the claim arises from an actual or alleged breach of regulatory obligations.

Hong Kong sees first criminal conviction for non-compliance with HKCC's investigation powers

On 28 February 2025, Hong Kong saw the first successful conviction of an individual for disposing of and concealing documents in contravention of the Competition Ordinance. The individual, an employee of Hong Kong Commercial Cleaning Services Limited (the Company), attempted to delete five documents and a number of computer links during a dawn raid conducted in 2021 by the Hong Kong Competition Commission (HKCC). The defendant was sentenced to imprisonment for two months and was granted bail pending her appeal. The Magistrate's decision to impose a custodial sentence, rather than just a fine, sends a strong message and underscores the gravity of such conduct (even though the volume of documents here was not significant). The ruling sets a clear precedent for how seriously similar conduct will be treated in the future. This is the first prosecution and conviction for non-compliance with the HKCC's investigation powers, which is an offence punishable by a fine of up to HK$1,000,000 and imprisonment for up to two years.

Notably, the employee's act of obstructing the HKCC's investigation also had direct implications on the Company's liability for the underlying price-fixing cartel case. The Company (and all other parties to the proceedings) admitted liability for exchanging commercially sensitive information when bidding for 17 contracts with the Hong Kong Housing Authority. The Competition Tribunal handed down its reasons for judgment on 14 February 2025, and the Company was fined HK$10,960,000 (approximately £1,085,000). In determining the fine, the obstruction of the HKCC's investigation by the Company's employee was taken into account as an aggravating factor, resulting in a 50 per cent uplift.

These judgments highlight the importance of providing adequate competition compliance training to employees. Businesses should ensure that their employees are aware of the potential consequences of obstructing a HKCC investigation, which may result in criminal liability for the individual as well as an increased pecuniary penalty for the business.

GENERAL COMPETITION

Sarah Cardell speech previews CMA early priorities for new consumer protection regime

On 10 March 2025, Sarah Cardell, the CMA Chief Executive, gave a speech at techUK's Tech Policy Conference that set out the CMA's early priorities ahead of its new consumer protection enforcement powers coming into effect on 6 April.

The speech confirmed that the CMA will publish various streamlined final guidance documents at the start of April in relation to their new powers. Cardell touched on two key areas. First, she highlighted that the CMA will take a phased approach on drip pricing, a practice which involves adding untrailed mandatory charges at the end of a purchase. She explained that the April guidance would set out a clear framework for complying with the parts of the law that are largely unchanged, whilst the guidance on the more complex aspects would not follow until the autumn, with a supplementary consultation in the summer. The CMA will not take enforcement action on these more complex aspects in the interim period. In relation to fake reviews, the CMA will focus on supporting businesses with their compliance efforts for the first three months of the regime, rather than on enforcement.

The speech gave further insight into the CMA's overall early enforcement approach, with Cardell announcing that they would likely focus on the "*most egregious breaches*", such as aggressive sales practices that prey on vulnerability and providing information to consumers that is objectively false. When determining penalties, the CMA will take into account where businesses have taken proactive steps to correct infringing conduct. The CMA

has since published the final version of its guidance on direct consumer enforcement, following its consultation last summer (see our previous client briefing on the CMA's consultation).

Cardell also took the speech as an opportunity to underline the CMA's commitment to the '4Ps' approach set out at the end of 2024 (and in the recently published Mergers Charter, as highlighted above) in relation to the digital markets regime. For instance, Cardell clarified that, in the context of 'proportionality', when making a decision on when to intervene, the CMA intends to prioritise those interventions which have a clear and direct impact for UK consumers and businesses, and which have strategic significance. As for global issues, she said the CMA is less likely to act where action by another agency effectively addresses any UK concerns. Where, however, there is a clear case for UK-specific action, the CMA will look for an effective and proportionate solution that best delivers for the UK. The Chief Executive further specified that, in some cases, it will make sense to replicate effective outcomes from other jurisdictions.

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650