SLAUGHTER AND MAY/

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QUICK LINKS

“*Rapid, meaningful change*”: CMA unveils new proposals for merger reviews in line with UK Government’s strategic steer

On 13 February 2025, the UK Government issued its long-awaited draft strategic steer to the Competition and Markets Authority (CMA) for consultation. The steer sends a clear message that the Government expects the CMA to support its pro-growth agenda in the exercise of its statutory functions. On the same day, Sarah Cardell, Chief Executive of the CMA, revealed new proposals to improve the UK merger control regime, in a bid to drive investment and business confidence.

The strategic steer follows the recent appointment of Doug Gurr as the CMA’s interim Chair on 21 January 2025. Gurr replaced Marcus Bokkerink, who had been leading the CMA since September 2022 (for more background, see a previous edition of this newsletter).

The strategic steer

The steer sets out how the Government expects the CMA to support and contribute to “*the overriding national priority of this government – economic growth*”. The steer includes high-level directions inviting the CMA to:

1. **Use CMA tools proportionately, with growth and investment in mind in all areas where the CMA has discretion.** The steer instructs the CMA, where it has discretion, to (i) prioritise pro-growth and pro-investment interventions, (ii) focus on markets and harms that particularly impact UK-based consumers and businesses and (iii) support growth and international competitiveness in the Government’s industrial strategy’s key sectors.

    - The Government invites the CMA to consider actions taken by competition authorities in other jurisdictions and “*where appropriate, seek to ensure parallel regulatory action is timely, coherent and avoids duplication where these parallel actions effectively address issues arising in markets in the UK*”. This echoes some of the criticism directed at the CMA in recent years, in cases such as Microsoft/Activision.
    - The steer also appeals for the CMA to use the new digital markets regime under the Digital Markets, Competition and Consumers Act 2024 flexibly, proportionately and collaboratively. This includes taking particular care to ensure growth and innovation benefits are prioritised, as the development of markets driven by new and emerging technologies can be uncertain.

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2. **Minimise uncertainty by engaging with those affected by the CMA's work and report on impact of work.** The Government calls on the CMA to provide proactive, timely, predictable and responsive engagement with businesses to enable them to engage quickly and effectively with the CMA. This entails reviewing procedural guidance and practice and listening to feedback from businesses, to ensure that businesses receive a "*best in class*" experience.

3. **Engagement with Government and accountability.** The CMA is expected to continue to engage with the Government on key policy issues, including to identify areas where it can support the Government's growth agenda. As regards accountability, the Government intends to amend the CMA framework agreement to include reporting requirements on the CMA's implementation of the strategic steer, as well as a requirement on the CMA to require regular feedback from stakeholders, such as businesses and consumers.

The CMA's new proposals

Echoing the Government's strategic steer, the CMA's package of "*proposals for rapid change*" focuses on improvements to the UK merger control regime. Central to the proposals is the CMA's "*4Ps approach*", focusing on pace, predictability, proportionality and process. Framed as a roadmap for the CMA's work over the coming months, the 4Ps proposals include the following objectives:

- **Pace:** the CMA intends to reach faster decisions on mergers and "*minimise in-depth reviews*". It recognises that speed of decision-making is paramount to reduce uncertainty and costs for businesses. With this goal in mind, the CMA aims to achieve the following by June 2025: (i) establish a new KPI to complete the pre-notification phase within 40 working days (as compared to the current average of 65) and (ii) approve "*straightforward*" Phase 1 cases within 25 working days (as compared to the current target of 35).

- **Predictability:** the CMA acknowledges that predictability is key to investor confidence but recognises that UK law gives the CMA "*an unusually broad jurisdiction by international standards*". Specifically, Cardell 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 'share of supply' test (which gives the CMA jurisdiction over deals where they give rise to a 25% share of supply of goods and services in the UK) as requiring further clarification. 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 states that it will seek to "*clarify and delineate*" its remit to review deals under these two tests "*so far as legally possible*" and issue updated guidance for consultation in June 2025.

- **Proportionality**: the CMA's stated objective is for "*as many of the deals as possible which raise competition concerns to be cleared with effective remedies, rather than be prohibited*". The CMA will launch a review of its approach to remedies in March 2025, focusing on both the process of imposing remedies and the need to strike the right balance between different types of remedies, including behavioural remedies. There have already been signs of a shift in approach in practice. 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. As part of its review, the CMA will also consider the potential for deals to deliver pro-competitive investment benefits and expressed a willingness to "*take a proportionate approach to looking at global deals*". It is exploring how far, under the current legal regime, it might be able to distinguish deals with a distinct and direct UK impact from those where action from overseas authorities could resolve UK concerns.

- **Process:** to promote fairness and consistent treatment across its investigations, the CMA will publish a Mergers Charter in March 2025 to lay out its new commitments and ensure the success of its new approach. The Charter is set to be underpinned by a number of actions to create more direct engagement for investigations and beyond, a targeted outreach programme, and more meetings in the early phases of the review process.

Next steps

The CMA's proposals will be welcomed by dealmakers. The final version of the CMA's Annual Plan setting out its priorities for 2025/2026 is due to be issued by the end of March 2025, following an earlier consultation in January (see our previous newsletter).

The Government's consultation on the draft strategic steer closes on 6 March 2025.

OTHER DEVELOPMENTS

ANTITRUST

European Court of Justice rules on parent company liability in antitrust damages claims

On 13 February 2025, the European Court of Justice (CJ) ruled that antitrust damages claims can be brought against a parent company in its home country if it has "*decisive influence*" over a subsidiary that has infringed competition law in another EU Member State. *"[D]ecisive influence"* is presumed where a parent company holds all or almost all of its subsidiary's shares. The judgment follows a request for a preliminary ruling on jurisdictional questions by the Dutch Supreme Court in a case concerning an antitrust damages action brought by Macedonian Thrace Brewery against Heineken and its Greek subsidiary, Athenian Brewery.

The concept of *"decisive influence"* - and its presumption when a parent company owns all or almost all of its subsidiary's shares - already applies in EU antitrust proceedings. Where a parent company exercises *"decisive influence"* over its subsidiary, it can be held liable for the conduct of that subsidiary.

The Recast Brussels Regulation (Regulation) sets out the rules for EU courts to determine jurisdiction in cases involving more than one EU Member State. Article 8(1) of the Regulation states that a person domiciled in one Member State may be sued in another Member State where another defendant is domiciled provided that the claims are *"so closely connected"* that it is expedient to hear the claims together. According to the judgment, national courts may rely on the presumption that a parent has *"decisive influence"* over its subsidiary if it holds all or almost all of its subsidiary's shares to establish this close-connection requirement and accept jurisdiction. The CJ, however, further noted that the defendants must have the right to rebut the presumption of *"decisive influence"* by presenting firm evidence. The judgment largely follows the opinion delivered by Advocate General Kokott in September 2024 (see a previous edition of this newsletter).

The referral to the CJ by the Dutch Supreme Court relates to the Greek Competition Commission's decision in 2015 fining Athenian Brewery €31.5 million for infringing Greek competition law by abusing its dominant position in the Greek beer market. Heineken itself is not active in Greece and was not a party to the infringement decision. Rival Greek beer company Macedonian Thrace Brewery filed a claim in the Netherlands (where Heineken is based) targeting both Heineken and Athenian Brewery for damages worth over €100 million in relation to the Greek infringement decision. Heineken and Athenian Brewery disputed the Dutch courts' jurisdiction to hear the case. In light of the CJ's ruling, Heineken could face litigation for damages in the Netherlands for a breach of antitrust rules by its subsidiary Athenian Brewery - the parent company can, however, try to rebut the presumption of control over its subsidiary.

European Commission consults on review of technology transfer block exemption regulation

On 31 January 2025, the European Commission opened a public consultation and launched a call for evidence to seek feedback on possible revisions to the Technology Transfer Block Exemption Regulation (TTBER) and the accompanying Guidelines.

The TTBER exempts certain types of technology transfer agreements from falling within the scope of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), which prohibits anti-competitive agreements. The revision of the TTBER is taking place in light of the Commission's competitiveness strategy as recently set out in its Competitiveness Compass (for details, see a previous edition of this newsletter). In the Compass, the Commission committed to reviewing the TTBER for the purposes of *"facilitating technology dissemination, incentivising initial R&D, and promoting innovation"* as part of its plans to foster a thriving tech sector. The Commission aims to ensure that the TTBER and the Guidelines are clear, simple, and up-to-date.

In the results of its preliminary evaluation published in November 2024, the Commission found that the TTBER and the Guidelines have *"overall met their objectives"* since they were introduced in 2014, but that developments in the digital economy and technology markets raise questions about their ongoing effectiveness. These include the following areas:

- **Data licensing agreements** - the Commission notes the increasing importance of data in the digital economy and is assessing whether data licensing agreements should be expressly covered by the TTBER.
- **Market share thresholds** - the Commission is seeking to address difficulties reported by stakeholders in applying the TTBER's market share thresholds for technology markets, such as when applying the market share thresholds in dynamic markets characterised by a high degree of innovation.
- **Technology pools** - the Commission is considering revising the soft safe harbour for technology pools - which allow multiple technology rights holders to license their patents jointly - to ensure that only agreements which fall outside the scope of the Article 101(1) TFEU prohibition are covered.
- **Licensing Negotiation Groups (LNGs)** - the Commission is considering whether to provide competition law guidance on LNGs, under which technology implementers agree to negotiate jointly the terms of technology licences.

The Commission has set out proposed policy options on the above areas, on which interested parties can submit their views by 25 April 2025 via the Commission's online portal. The Commission intends to publish a draft revised TTBER and draft revised Guidelines for public consultation in the summer of 2025. The current TTBER is set to expire on 30 April 2026.

GENERAL COMPETITION

Korean Fair Trade Commission amends e-commerce decree to regulate online dark patterns

On 14 February 2025, amendments to the Korean Act on Consumer Protection in Electronic Commerce (Act) and related amendments to the Enforcement Decree and the Enforcement Rules on the Act (Enforcement Decree) came into effect in Korea. These amendments are aimed at regulating deceptive marketing schemes, commonly known as *"dark patterns"*.

In particular, the revised legislation seeks to regulate six types of dark patterns, namely: (i) hidden renewal (e.g. automatically converting a free subscription into a paid subscription without informing the consumer), (ii) sequential disclosure of cost, also known as 'drip-pricing' (e.g. displaying only a partial price of the product before the checkout page), (iii) pre-selection of purchase options (e.g. automatically selecting 'add-on' options by default), (iv) false hierarchy (e.g. favouring certain products by applying different visual formats to attract consumers), (v) interference with cancellation or withdrawal (e.g. making the process of cancelling or unsubscribing from services complicated for consumers), and (vi) repeated interference (e.g. using pop-up windows repeatedly to induce consumers to change their decisions).

The revised Enforcement Decree provides more specific guidance on what online practices may be considered dark patterns and therefore prohibited under the Act. Violations of the Enforcement Decree may result in fines of up to KRW 5 million (approximately £2,800), or business suspension for up to one year in certain circumstances. The Korean Fair Trade Commission has expressly committed to combatting dark patterns online, so businesses with operations in Korea should expect enforcement actions to be taken once the Act is in effect.

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