

THE PUBLIC  
COMPETITION  
ENFORCEMENT  
REVIEW

ELEVENTH EDITION

Editor  
Aidan Synnott

THE LAWREVIEWS

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COMPETITION  
ENFORCEMENT  
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Aidan Synnott

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# PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention. Indeed, there are several examples of cross-border engagement in the chapters that follow, including discussions of parallel investigations in multiple jurisdictions. We also read of bilateral and multilateral exchanges between and among various countries' competition officials, including a report from Turkey noting its entry into memorandums concerning international cooperation with several Balkan countries last year.

We continue to see the evolution and refinement of approaches to competition law enforcement in several jurisdictions. For example, our Argentine contributors provide an informative discussion of a new Antitrust Law, enacted following 'many years of effort by practitioners and authorities.' The authors note that this new law introduces 'significant changes to antitrust enforcement in Argentina.' Notably, in this edition we welcome for the first time in the *Review* a contribution from Indonesia, which provides an informative overview of competition enforcement there.

Cartel enforcement remains robust. In the pages that follow, we read that, late last year, the Italian Competition Authority levied 'its largest ever overall fine in a cartel case'. This case involved automotive companies' captive banks, which provide consumer financing. A record administrative penalty was also assessed by South African authorities in connection with allegations related to an alleged auto parts cartel. While the chapter from China notes that fines in 2018 were 'relatively low compared with . . . previous years,' it also points to a 'significant increase in the number of cartel cases'. Meanwhile, leniency applications have increased in both India and in France, where our contributors suggest the uptick 'could be explained by the increasing number of small and medium-sized companies applying for leniency'. In 2018, Canada revised its immunity and leniency programmes, and those revisions are discussed in that chapter.

Online platforms – and the 'digital economy' more generally – have been the subject of regulatory scrutiny by European Union, French, German, Japanese, Swedish, Taiwanese, and British authorities, among others. These chapters contain useful discussions of developments in those areas. In addition, the EU Overview provides a helpful primer on the record fine imposed by the European Commission on Google related to internet search and its Android operating system. Italian authorities released preliminary results of an investigation into 'big data' and called for regulation in that area. The chapters from France and Germany highlight a cooperative study being conducted by the *Autorité de la Concurrence* and the *Bundeskartellamt* concerning competitive effects of algorithms. Elsewhere in the areas of restrictive agreements and dominance, authorities in Greece issued fines in two cases that included allegations of resale price maintenance, a practice that was also met with scrutiny

by authorities in Poland. Both Italian and Polish authorities focused on issues of dominance in the utilities sector.

Merger review and enforcement activity remains robust. The chapters that follow note activity in many diverse sectors. The United States chapter discusses the recent news of the government losing its appeal in the *AT&T/Time Warner* case: the appeals court there ruled that the lower court did not commit a clear error when it denied the government's request to block that deal. Several chapters – including the submissions from Argentina, Brazil, Canada, China, India, Mexico, and the United States – discuss investigations of the *Bayer/Monsanto* deal. China conditionally cleared the *Essilor/Luxottica* deal in the eyeglasses industry, while Italy cleared a different *Luxottica* deal with conditions. The *United Technologies/Rockwell Collins* deal is discussed in the China and United States chapters; and the *Praxair/Linde* deal is discussed in the Brazil, India, and United States chapters. Both Argentine and Colombian authorities issued updates to their merger review guidelines, which are discussed in the respective chapters. Similar to last year, the report from China notes several enforcement actions arising from reporting violations.

Particularly notable again this year is the chapter from the United Kingdom, as authorities there adapt to a post-Brexit enforcement regime. Readers will be quite interested in the informative discussion of the effect of Brexit on the future of competition enforcement. In that regard, the authors discuss recent guidance from the Competition and Markets Authority (CMA), potential consequences of various Brexit scenarios, and the expected increase in the CMA's workload. We will watch with interest to see how Brexit may affect competition enforcement in the United Kingdom and the European Union in the year to come.

**Aidan Synnott**

Paul, Weiss, Rifkind, Wharton & Garrison LLP

New York

April 2019

# UNITED KINGDOM

*Marc Israel, Sophie Sahlin and Arthur Henderson*<sup>1</sup>

## I OVERVIEW

The biggest talking point in UK competition law continues to be the UK's withdrawal from the EU (Brexit). At the time of writing, the UK is fast approaching the 29 March 2019 Brexit deadline, and the prospect of a 'no deal' Brexit is increasingly possible. In the face of ongoing uncertainty, the Competition and Markets Authority (CMA) continues to devote significant time and resources to preparing for Brexit: guidance has been published on the CMA's role in merger cases,<sup>2</sup> antitrust enforcement<sup>3</sup> and state aid<sup>4</sup> in the event of a 'no deal' Brexit, and more in-depth draft guidance on the effects of a 'no deal' exit on the CMA was released at the end of January.<sup>5</sup> As the CMA notes in its 2019–2020 annual plan, 'we have made great strides to ensure we have the people, skills and infrastructure to launch or take over major international cartel or antitrust cases, merger investigations and State aid enforcement when the UK leaves the EU'.<sup>6</sup> This growth is necessary because the CMA anticipates an increased workload post-Brexit: as the annual plan states, the CMA expects 'to take on a bigger role on the world stage post-Exit'.<sup>7</sup> The CMA has been given additional funding to meet this challenge. Improvements and efficiencies are considered to be a crucial part of Brexit preparation – as Ann Pope, the Senior Director for Antitrust has stated, 'Brexit makes it imperative that we are working as smartly and efficiently as possible so we are ready to take on larger and more complex cases'.<sup>8</sup> At the same time it is relocating its headquarters to Canary Wharf in September 2019 to allow for expansion and cost-cutting in London. The Edinburgh office is also being significantly expanded.<sup>9</sup>

1 Marc Israel is a partner, Sophie Sahlin is a counsel and Arthur Henderson is a trainee at White & Case LLP.

2 See [www.gov.uk/government/publications/amas-role-in-mergers-if-theres-no-brexit-deal/amas-role-in-mergers-if-theres-no-brexit-deal](https://www.gov.uk/government/publications/amas-role-in-mergers-if-theres-no-brexit-deal/amas-role-in-mergers-if-theres-no-brexit-deal).

3 See [www.gov.uk/government/publications/amas-role-in-antitrust-if-theres-no-brexit-deal/amas-role-in-antitrust-if-theres-no-brexit-deal](https://www.gov.uk/government/publications/amas-role-in-antitrust-if-theres-no-brexit-deal/amas-role-in-antitrust-if-theres-no-brexit-deal).

4 See [www.gov.uk/government/publications/the-amas-state-aid-role-if-theres-no-brexit-deal/uk-state-aid-if-theres-no-brexit-deal](https://www.gov.uk/government/publications/the-amas-state-aid-role-if-theres-no-brexit-deal/uk-state-aid-if-theres-no-brexit-deal).

5 See [www.gov.uk/government/consultations/effects-of-a-no-deal-eu-exit-on-the-functions-of-the-cma](https://www.gov.uk/government/consultations/effects-of-a-no-deal-eu-exit-on-the-functions-of-the-cma).

6 See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/778629/AnnualPlan-201920-FINAL-TRACKED.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778629/AnnualPlan-201920-FINAL-TRACKED.pdf).

7 Ibid.

8 See [www.gov.uk/government/speeches/the-future-of-competition-enforcement-in-the-uk](https://www.gov.uk/government/speeches/the-future-of-competition-enforcement-in-the-uk).

9 Ibid.

**i Brexit**

While a deal may still be struck with the EU, in which case there would likely be a transition period during which time EU competition law would remain in force, the publication in January 2019 of ‘no deal’ draft guidance has gone some way to clarifying the position and remit of the CMA in the event of a ‘no deal’ Brexit.<sup>10</sup> The draft guidance makes it clear that certain CMA functions are unlikely to be materially affected by Brexit, namely regulatory appeals, market studies, market investigations and the criminal cartel offence. In instances where CMA guidance on these functions refers to EU law, the Competition (Amendment etc.) (EU Exit) Regulations 2019 statutory instrument (the Competition SI) will work to remove such references. This statutory instrument is designed to disentangle UK and EU competition law and allow for a stand-alone UK regime post-Brexit. As the draft guidance explains, the Competition SI ‘revokes EU competition regulations, European Commission decisions made under EU regulations and treaty rights that will be incorporated into UK law on Exit Day. It also amends the CA98, EA02, European Block Exemption Regulations and other legislation containing competition provisions, as appropriate’.

The CMA’s merger control and antitrust (including cartels) functions will be affected in varying ways by a ‘no deal’ Brexit. In terms of merger control the draft guidance clarifies that mergers previously under the exclusive jurisdiction of the European Commission may now also be reviewable in the UK, meaning that certain mergers may be subject to simultaneous review by both the Commission and the CMA. If no decision on a merger case reviewable by the European Commission has been taken prior to Exit Day, the CMA will no longer be prohibited by the EU Merger Regulation (EUMR) from taking jurisdiction and will be able to review the merger if the jurisdictional thresholds in the UK are met. The UK merger control regime will remain voluntary: there will be no obligation on merging parties to notify the CMA, but the CMA has a statutory four-month period in which to refer a completed merger for a Phase II investigation. Post-Brexit, this four-month period will apply to completed mergers from EU exit or from the point at which the CMA is considered to have been provided with notice of the material facts about the merger (whichever is later). This means that the CMA may obtain jurisdiction over completed mergers on Exit Day, and will then have a four-month period in which to choose whether or not to begin a Phase II investigation (provided the material facts of the merger were not brought to the CMA’s attention at an earlier date).

In terms of cases opened after Brexit, the CMA will no longer be prevented from investigating, under the Enterprise Act 2002 (EA02), a merger that has a Community dimension. As mentioned above, this is likely to lead to a number of mergers that are reviewed at both CMA and Commission level. The draft guidance emphasises that the CMA will endeavour to cooperate with the Commission in such cases, and will attempt to ‘coordinate merger reviews’, including the exchange of confidential information where possible. It is also possible that some cases that would have previously been reviewable under the EUMR no longer meet the jurisdictional thresholds once the parties’ UK turnover is no longer taken into account and that national filings in certain Member States are required instead.<sup>11</sup>

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10 See [www.gov.uk/government/publications/the-cmas-state-aid-role-if-theres-no-brexite-deal/uk-state-aid-if-theres-no-brexite-deal](http://www.gov.uk/government/publications/the-cmas-state-aid-role-if-theres-no-brexite-deal/uk-state-aid-if-theres-no-brexite-deal).

11 It should be noted that transactions without a Community dimension can be reviewed by the European Commission in certain circumstances, which may apply in some of these situations.

As regards antitrust enforcement, the effect of Brexit is that the CMA will cease to have jurisdiction to apply Article 101 of the Treaty on the Functioning of the European Union (TFEU) on anticompetitive agreements (including cartels) and Article 102 TFEU on abuse of dominance. Instead the prohibitions in the Competition Act 1998 (CA98) will be applied, but under the Competition SI the CMA and UK courts will still be required to interpret the prohibitions consistently with pre-Brexit EU case law. At present, Section 60 CA98 requires UK competition authorities and courts to ensure that the application of UK competition law is consistent ‘so far as possible’ with EU competition law. The Competition SI would repeal Section 60 CA98 and replace it with Section 60A. Under Section 60A there will be no requirement to take post-Brexit EU case law into account and the UK courts may depart from pre-Brexit EU case law where appropriate in light of particular circumstances. Once again there is a strong likelihood that anticompetitive behaviour will be reviewed simultaneously by the CMA and the Commission, and the draft guidance goes into depth on the status of investigations opened before and after Exit Day. It is worth noting that the Block Exemption Regulations, which work to exempt certain agreements from the Article 101 prohibitions, will be preserved by the Competition SI and will continue to apply in the UK as ‘retained exemptions’. This draft guidance will, of course, only be relevant in the event that Britain fails to agree a deal with the EU.

## **ii UK competition law regime**

Alongside Brexit preparations, the Secretary of State for Business, Energy and Industrial Strategy is due to publish a review of the UK’s existing competition regime, and has separately said that he will trigger ‘a far-reaching review into business practices, centred on concerns over companies using big data to exploit consumers in a vulnerable situation’.<sup>12</sup> This ties in with the CMA’s priorities for 2019–2020, which are discussed below. Although the exact contents of the review are as yet unknown, it is unlikely that it will suggest changes to the fundamental aspects of UK competition law, which are as follows.

CA98 prohibits agreements or concerted practices that prevent, restrict or distort competition (Chapter I prohibition) and abuse of a dominant position (Chapter II prohibition), in each case within the UK. EA02 contains the criminal cartel offence, and the legal basis for UK merger review and market investigations.

The CMA has primary responsibility for public enforcement of competition law in the UK – both the Chapter I and Chapter II prohibitions and, as it currently stands, Articles 101 and 102 TFEU – although these provisions may also be enforced by private parties before the courts. Clearly, the CMA will no longer be able to enforce Articles 101 and 102 TFEU post-Brexit but that will not affect the substantive provisions of the equivalent rules in the UK. In addition, a number of sectoral regulators (such as Ofcom for communications, Ofgem for energy, Ofwat for water, the Office for Rail and Road and the Civil Aviation Authority for rail and air transport respectively, the Financial Conduct Authority (FCA) and the Payment Systems Regulator (PSR) for financial services, and UREGNI for utilities in Northern Ireland) have concurrent power to enforce the Chapter I and Chapter II prohibitions and (currently) Articles 101 and 102 TFEU in their sectors.

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12 See [www.gov.uk/government/consultations/cma-annual-plan-consultation-201920](http://www.gov.uk/government/consultations/cma-annual-plan-consultation-201920).

In recent years one of the most active sectoral regulators has been the FCA, which has only been a concurrent enforcer of competition law since April 2015. In November 2017 it issued its first statement of objections (SO) to four asset management firms alleged to have shared information on the pricing of two IPOs and one share placing.<sup>13</sup> Market studies into the wholesale insurance broker market<sup>14</sup> and the investment platforms market are ongoing. The mortgages market study final report is also expected in spring 2019<sup>15</sup> and a credit information market study will launch in June 2019.<sup>16</sup> The FCA's 2018–2019 business plan makes it clear that competition is a high priority objective, stating that 'Our work across wholesale and retail markets aims to promote innovation and keep markets open and competitive, driving benefits to consumers and the wider economy'.<sup>17</sup> To that end the FCA entered into a memorandum of understanding (MOU) with the CMA in April 2018. The MOU aims to set out in practical detail how the CMA and FCA will work together within the framework of competition law.<sup>18</sup> In the wider financial services sphere, in February 2018 the PSR announced that it had opened its first CA98 case involving a number of 'dawn raids',<sup>19</sup> and a market review into the supply of card-acquiring services has recently been announced.<sup>20</sup> The CMA now publishes an annual 'concurrency report' to summarise the operation of these concurrency arrangements, the most recent of which was published in April 2018.<sup>21</sup> In a case opened in November 2018 into suspected anticompetitive practices in the financial sector, the CMA and FCA agreed that the CMA would investigate.<sup>22</sup>

The main focus of the CMA's attention in recent years (Brexit aside) has been on increasing enforcement. In a February 2016 report, the National Audit Office criticised the CMA's first couple of years for advancing too few enforcement cases to a decision.<sup>23</sup> It found resources were disproportionately used on market investigations, noting that UK competition authorities imposed only £65 million of competition enforcement fines between 2012 and 2014, compared with almost £1.4 billion of fines imposed by their German counterparts. However, the CMA has increased its enforcement action. Between 2010 and 2015, the CMA (or its predecessor the Office of Fair Trading (OFT)) opened an average of seven CA98 cases a year, but in 2016–2018 this rose to an average of 10.<sup>24</sup> As the 2019–2020 annual plan notes, the CMA will enter 2019–2020 with 23 competition enforcement cases, six consumer enforcement cases, 12 merger investigations, and two market studies under way.<sup>25</sup> Factoring in the increased activity at the FCA, the direction of travel in the UK is very much towards increased enforcement.

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- 13 See [www.fca.org.uk/news/press-releases/fca-issues-first-statement-objections-four-asset-management-firms](http://www.fca.org.uk/news/press-releases/fca-issues-first-statement-objections-four-asset-management-firms).
  - 14 See [www.fca.org.uk/publications/market-studies/ms17-2-wholesale-insurance-broker-market-study](http://www.fca.org.uk/publications/market-studies/ms17-2-wholesale-insurance-broker-market-study).
  - 15 See [www.fca.org.uk/publications/market-studies/mortgages-market-study](http://www.fca.org.uk/publications/market-studies/mortgages-market-study).
  - 16 See [www.fca.org.uk/news/news-stories/fca-delay-launch-credit-information-market-study](http://www.fca.org.uk/news/news-stories/fca-delay-launch-credit-information-market-study).
  - 17 See [www.fca.org.uk/publication/business-plans/business-plan-2018-19.pdf](http://www.fca.org.uk/publication/business-plans/business-plan-2018-19.pdf).
  - 18 See [www.fca.org.uk/publication/mou/fca-cma-concurrent-competition-powers-mou.pdf](http://www.fca.org.uk/publication/mou/fca-cma-concurrent-competition-powers-mou.pdf).
  - 19 See [www.psr.org.uk/sites/default/files/media/PDF/Carole-speech-BIIC-Feb-18.pdf](http://www.psr.org.uk/sites/default/files/media/PDF/Carole-speech-BIIC-Feb-18.pdf).
  - 20 See [www.psr.org.uk/psr-publications/market-reviews/mr181.2-final-terms-reference-cards](http://www.psr.org.uk/psr-publications/market-reviews/mr181.2-final-terms-reference-cards).
  - 21 See [www.gov.uk/government/publications/competition-and-markets-authority-annual-concurrency-report-2018](http://www.gov.uk/government/publications/competition-and-markets-authority-annual-concurrency-report-2018).
  - 22 See [www.gov.uk/cma-cases/financial-services-sector-suspected-anticompetitive-practices](http://www.gov.uk/cma-cases/financial-services-sector-suspected-anticompetitive-practices).
  - 23 [www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf](http://www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf).
  - 24 See [www.gov.uk/government/speeches/the-future-of-competition-enforcement-in-the-uk](http://www.gov.uk/government/speeches/the-future-of-competition-enforcement-in-the-uk).
  - 25 See all cases at [www.gov.uk/cma-cases](http://www.gov.uk/cma-cases).

To facilitate this enforcement, and indeed the other work of the CMA in an increasingly digitalised world, a new data science team has been set up to expand the CMA's expertise in the digital sector. The unit will focus on:

- a* understanding how firms use data and algorithms in their business models and what implications this might have for competition and consumers;
- b* developing how the CMA obtains and uses data in its ongoing work; and
- c* engaging with the tech business, academic research and government data communities in the UK and internationally.

### **iii Prioritisation and resource allocation of enforcement authorities**

A 2015 spending review saw the CMA being allocated a budget of £65.94 million (as well as a capital budget of £7.4 million).<sup>26</sup> This represented around a 7 per cent decrease in real terms over four years, however in the 2017 autumn budget the government allocated the CMA an additional £2.8 million funding each year, earmarked for increased enforcement.<sup>27</sup> This means that the CMA's total budget for 2019–2020 will be £68.75 million. The Treasury also allocated £23.6 million in additional funding in the 2018–2019 financial year to enable the CMA to continue Brexit preparations. A full departmental spending review for the period up to 2023–2024 is expected from the Treasury in 2019–2020.<sup>28</sup>

The CMA's increased enforcement activity is borne out by statistics on how CMA staff time was split across different types of work in 2017 and 2018: 45 per cent of staff time was spent on enforcement in 2018, compared with 42 per cent from April 2016 to March 2017. This increase came at the expense of staff time allocated to market investigations and regulatory appeals, which fell from 13 per cent in 2017 to 9 per cent in 2018. Time devoted to mergers rose from 20 per cent in 2017 to 23 per cent in 2018.<sup>29, 30</sup> The annual plan makes it clear that, in the event of a 'no deal' Brexit, there will be a 'short-term opportunity cost' in the sense that the CMA will have even less time to launch discretionary work using its markets and enforcement powers.<sup>31</sup>

As mentioned above, the CMA has also announced its intention to increase its presence in Scotland, increasing its headcount to around 30, allowing the office to both establish a talent base and prepare for Brexit.<sup>32</sup> The CMA has also recruited additional personnel to handle an increased post-Brexit workload, although the annual plan acknowledges that only around three-quarters of the required staff have so far been recruited.<sup>33</sup>

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26 See [assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604425/cma-annual-plan-17-18-print-ready.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604425/cma-annual-plan-17-18-print-ready.pdf).

27 See [www.gov.uk/government/topical-events/autumn-budget-2017](http://www.gov.uk/government/topical-events/autumn-budget-2017).

28 See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/778629/AnnualPlan-201920-FINAL-TRACKED.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778629/AnnualPlan-201920-FINAL-TRACKED.pdf).

29 See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/704594/Annual\\_Plan-201819.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/704594/Annual_Plan-201819.pdf).

30 See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/778629/AnnualPlan-201920-FINAL-TRACKED.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778629/AnnualPlan-201920-FINAL-TRACKED.pdf).

31 See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/778629/AnnualPlan-201920-FINAL-TRACKED.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778629/AnnualPlan-201920-FINAL-TRACKED.pdf).

32 See [www.gov.uk/government/news/scotland-to-benefit-from-cma-expansion](http://www.gov.uk/government/news/scotland-to-benefit-from-cma-expansion).

33 See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/778629/AnnualPlan-201920-FINAL-TRACKED.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778629/AnnualPlan-201920-FINAL-TRACKED.pdf).

#### iv Enforcement agenda

In its annual plan for 2019–2020, the CMA focuses on priority themes rather than specific objectives due to the ongoing uncertainty surrounding Brexit.<sup>34</sup> The CMA's intention is to 'refine and explain' its plans as more clarity emerges. The high-level themes (almost identical to those in the 2018–2019 annual plan) which the annual plan proposes are:

- a protecting vulnerable consumers;
- b improving trusts in markets;
- c promoting better competition in online markets; and
- d supporting economic growth and productivity.

Online and digital markets continue to be a high-priority area for the CMA. The CMA has been active in the digital sector in recent years, looking at online sales bans (see below for discussion of the Competition Appeal Tribunal's (CAT) decision in the *Ping* case), resale price maintenance for internet sales, and 'most favoured nation' provisions in price comparison websites. The government has recently launched a Digital Competition Expert Panel,<sup>35</sup> which will conduct an independent review of the state of competition in the digital economy, and the CMA plans to strengthen its Data, Technology and Analytics Unit in the coming year.<sup>36</sup> A study into pricing algorithms was published in October 2018, with a focus on whether they could aid either price fixing or personalised pricing, where customers are shown different prices based on their individual data (e.g., browsing history).<sup>37</sup>

The CMA has also recently looked at social media endorsements, and – under its consumer law powers – obtained undertakings from 16 online 'influencers' who agreed to disclose when they had been paid or incentivised to promote a product or service online.<sup>38</sup> Another recent area of focus has been online hotel booking, which resulted in six online hotel booking sites providing formal commitments to cease misleading practices on their websites.<sup>39</sup> Secondary ticketing websites also came under scrutiny, and proceedings were issued against ticketing website viagogo.<sup>40</sup> In this vein, the CMA is considering a UK digital advertising market inquiry into what is a £13 billion UK market, and the Cairncross Review into the sustainability of high-quality journalism, published in February 2019, also proposed that the CMA carry out an investigation of this kind.<sup>41</sup> The annual plan makes it clear, however, that this is 'heavily dependent on the outcome of EU Exit negotiations',<sup>42</sup> and an investigation will in any event not be launched before the Furman Review into competition in digital markets publishes its findings in March 2019. This is all in the broader context of the CMA considering and engaging in debates around whether the digitalisation of commerce

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34 See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/778629/AnnualPlan-201920-FINAL-TRACKED.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778629/AnnualPlan-201920-FINAL-TRACKED.pdf).

35 See [www.gov.uk/government/consultations/digital-competition-expert-panel-call-for-evidence/digital-competition-expert-panel](http://www.gov.uk/government/consultations/digital-competition-expert-panel-call-for-evidence/digital-competition-expert-panel).

36 See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/778629/AnnualPlan-201920-FINAL-TRACKED.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778629/AnnualPlan-201920-FINAL-TRACKED.pdf).

37 See [www.gov.uk/government/news/algorithm-research-builds-on-work-in-digital-markets](http://www.gov.uk/government/news/algorithm-research-builds-on-work-in-digital-markets).

38 See [www.gov.uk/cma-cases/social-media-endorsements](http://www.gov.uk/cma-cases/social-media-endorsements).

39 See [www.gov.uk/cma-cases/online-hotel-booking](http://www.gov.uk/cma-cases/online-hotel-booking).

40 See [www.gov.uk/cma-cases/secondary-ticketing-websites](http://www.gov.uk/cma-cases/secondary-ticketing-websites).

41 See [www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism](http://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism).

42 See, for example, [www.theguardian.com/media/2018/oct/12/uk-digital-advertising-market-competition-regulator-considering-inquiry](http://www.theguardian.com/media/2018/oct/12/uk-digital-advertising-market-competition-regulator-considering-inquiry).



represents a paradigm shift in competition dynamics requiring a rethink of competition law and policy, and whether intervention (e.g., by enforcement or interim measures) is warranted in fast-changing technology markets. As the annual plan puts it, ‘the nature of competition in the digital economy remains the subject of international debate, including how to enforce antitrust laws in the digital age’.

A further tool at the CMA’s disposal is company director disqualifications. This power was granted to UK competition authorities in 2003, but was never used by the OFT: in December 2016, the CMA secured its first disqualification against the director of a company that participated in an agreement on the price of posters and frames sold through Amazon’s UK website.<sup>43</sup> In April 2018, the CMA secured the disqualification of two directors involved in an estate agency cartel for three and three-and-a-half years respectively.<sup>44</sup> The CMA has confirmed its desire to send a clear message that directors and managers may be held personally liable if their businesses commit breaches of competition law, and that further disqualification undertakings are to be expected in the future.<sup>45</sup> New guidance on competition disqualification orders was published by the CMA in February 2019.<sup>46</sup>

The CMA has also sought to innovate enforcement in other respects in recent years by deploying flexibly other enforcement tools beyond infringement decisions.<sup>47</sup> The CMA produces compliance materials and promotes its message at trade association meetings in sectors where there have been competition issues, and has launched a ‘stop cartels’ campaign across social media. The CMA also sends advisory and ‘stronger’ warning letters to businesses that it suspects of being in breach of competition law (which are publicly available<sup>48</sup>) where the conduct concerned does not merit devoting resources to a full investigation. Further, like other competition authorities, the CMA makes use of settlements, commitments and interim measures. The CMA has also resorted to removing the possibility of immunity from fines under CA98 for small companies for non-price fixing agreements.<sup>49</sup> A useful tool for competition practitioners and businesses alike that the CMA has made use of is issuing ‘no grounds for action’ decisions, which give a reasoned indication of what an enforcer considers acceptable conduct in potential grey areas.<sup>50</sup> It is without a doubt that the CMA will seek to be at the forefront of competition policy in the global post-Brexit competition landscape.

## II CARTELS

Under the current UK regime, cartels are enforced by both civil and criminal means: corporate civil liability under the Chapter I prohibition contained in CA98 or the criminal cartel offence for individuals under EA02, or both. In many cartel cases, both investigations will proceed simultaneously.

The CMA continues to regard cartel enforcement as a major priority, and is working to ensure that it has the requisite people, skills and infrastructure to launch or take over major

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43 See [www.gov.uk/cma-cases/online-sales-of-posters-and-frames-director-disqualification](http://www.gov.uk/cma-cases/online-sales-of-posters-and-frames-director-disqualification).

44 See [www.gov.uk/cma-cases/residential-estate-agency-services-suspected-anticompetitive-arrangements](http://www.gov.uk/cma-cases/residential-estate-agency-services-suspected-anticompetitive-arrangements).

45 [www.gov.uk/government/speeches/the-future-of-competition-enforcement-in-the-uk](http://www.gov.uk/government/speeches/the-future-of-competition-enforcement-in-the-uk).

46 See [www.gov.uk/government/publications/competition-disqualification-orders--2](http://www.gov.uk/government/publications/competition-disqualification-orders--2).

47 See [www.gov.uk/government/speeches/uk-competition-enforcement-where-next](http://www.gov.uk/government/speeches/uk-competition-enforcement-where-next).

48 See [www.gov.uk/government/publications/competition-law-warning-and-advisory-letters-register/warning-letters-issued-by-the-cma](http://www.gov.uk/government/publications/competition-law-warning-and-advisory-letters-register/warning-letters-issued-by-the-cma).

49 See [www.gov.uk/government/news/cma-removes-immunity-from-fines-for-mobility-scooter-supplier](http://www.gov.uk/government/news/cma-removes-immunity-from-fines-for-mobility-scooter-supplier).

50 See, for example, [www.gov.uk/cma-cases/consumable-goods-suspected-anticompetitive-conduct](http://www.gov.uk/cma-cases/consumable-goods-suspected-anticompetitive-conduct).

international cartel cases post-Brexit. As mentioned above, the draft ‘no deal’ guidance goes into detail on how cartel cases will be treated in the event that Britain leaves the EU without a deal in place.<sup>51</sup>

### **i Significant cases**

In 2018, the CMA only issued one cartel decision, fining two of the main suppliers of household coal for barbecues £3.4 million for taking part in a market-sharing cartel.<sup>52</sup> An investigation in the pharmaceutical sector was launched in October 2017, but was discontinued in November 2018 on administrative priority grounds.<sup>53</sup> In 2017, the CMA issued three cartel infringement decisions concerning ‘cleanroom’ laundry services, furniture parts and real estate agents, and brought its criminal investigation into the construction industry to a close. It also successfully defended an infringement decision before the CAT in *Balmoral Tanks*, a case that raised important points of principle in relation to information exchange.

#### ***Supply of solid fuel***

As mentioned above, the CMA in 2018 fined two bagged household fuels suppliers over £3.4 million for rigging competitive tenders to secure supply to Tesco and Sainsbury’s through a market-sharing cartel.<sup>54</sup> This case started after intelligence work following a tip-off to the CMA’s cartels hotline. The two suppliers had an arrangement wherein for each tender concerned, the other supplier would intentionally submit a higher bid that it was designed to lose, in turn ensuring that the existing supplier could retain their customer. The two suppliers also exchanged competitively sensitive information and confidential pricing information such as ongoing tendering processes, in order to facilitate their market-sharing cartel. The two companies admitted infringing competition law and received a 20 per cent fine discount for settling the case.

#### ***Residential estate agency services***

On 31 May 2017, the CMA issued a decision finding that six estate agents operating in the Burnham-on-Sea area in South-West England had taken part in a cartel to fix prices in relation to the provision of residential estate agency services, with fines totalling £370,084.<sup>55</sup> This followed the admission of liability by four other estate agents and their paying fines totalling £372,233 under a settlement agreement reached with the CMA on 2 March 2017. On the basis of information received during that investigation, the CMA has opened an investigation into estate agents in other locations across the UK, which are undisclosed at the time of writing.<sup>56</sup> This case is still at an early stage, and the CMA has not reached a view on infringement – an update is due by the end of April 2019.<sup>57</sup>

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51 See [www.gov.uk/government/consultations/effects-of-a-no-deal-eu-exit-on-the-functions-of-the-cma](http://www.gov.uk/government/consultations/effects-of-a-no-deal-eu-exit-on-the-functions-of-the-cma).

52 See [www.gov.uk/government/case-studies/household-fuel-cartel-case-study](http://www.gov.uk/government/case-studies/household-fuel-cartel-case-study).

53 See [www.gov.uk/cma-cases/pharmaceutical-sector-suspected-anticompetitive-agreements](http://www.gov.uk/cma-cases/pharmaceutical-sector-suspected-anticompetitive-agreements).

54 See [www.gov.uk/government/news/34m-fine-for-bbq-and-household-coal-supplier-cartel](http://www.gov.uk/government/news/34m-fine-for-bbq-and-household-coal-supplier-cartel).

55 See [www.gov.uk/cma-cases/residential-estate-agency-services-suspected-anticompetitive-arrangement-s](http://www.gov.uk/cma-cases/residential-estate-agency-services-suspected-anticompetitive-arrangement-s).

56 See [www.gov.uk/cma-cases/provision-of-residential-estate-agency-services](http://www.gov.uk/cma-cases/provision-of-residential-estate-agency-services).

57 See [www.gov.uk/cma-cases/provision-of-residential-estate-agency-services](http://www.gov.uk/cma-cases/provision-of-residential-estate-agency-services).

## **FCA**

In November 2017, the FCA issued its first SO as part of its investigation into information exchange in the asset management sector – an investigation that is ongoing at the time of writing.<sup>58</sup> Four asset management firms are alleged to have shared information, generally on a bilateral basis, on prices they intended to pay in relation to one or more of two initial public offerings and one placing, shortly before the prices were set. This may lead to the FCA's first CA98 infringement decision. Such a decision would be taken by a three-member Competition Decision Committee group within the FCA, but separate from the case investigation team, similar to the procedure followed by the CMA. Further SOs and eventually decisions are to be expected in the future as the FCA seeks to cement its role as a concurrent competition enforcer. In that regard, the FCA also opened a CA98 investigation into alleged collusion in the aviation insurance market. This was subsequently transferred to the Commission, whose investigation is ongoing.<sup>59</sup>

## **Balmoral Tanks**

In respect of the CMA's cartel enforcement, in 2017 the CAT upheld a decision fining Balmoral Tanks (Balmoral) £130,000 for exchanging confidential information on prices and price intentions with competitors manufacturing galvanised steel tanks.<sup>60</sup> The decision concerned a single meeting in July 2012 at which Balmoral was invited to join a long-running price-fixing cartel. Balmoral refused to take part in the cartel, but exchanged confidential information with competitors. The meeting had been covertly recorded by the CMA. The CAT confirmed that even sharing information on a single occasion, even when refraining from joining others in price fixing or market sharing, can constitute a breach of competition law. Balmoral subsequently challenged the CAT's ruling in the Court of Appeal, but the decision was upheld in its entirety in February 2019.<sup>61</sup>

## **ii Trends, developments and strategies**

As part of its commitment to drive greater enforcement, the CMA continues to focus on raising awareness of competition law. In October 2018, the CMA launched a cartel awareness campaign which aims to educate businesses about illegal practices and to encourage whistle-blowing.<sup>62</sup> Alongside this campaign the CMA released ICM research which showed that, out of 1,000 companies surveyed:

- a* only 57 per cent knew it was illegal to fix prices;
- b* nearly half either did not know or thought it was legal to discuss prices with competing bidders when quoting for new work (23 per cent said 'don't know, and 25 per cent actually thought it was legal); and

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58 See [www.fca.org.uk/news/press-releases/fca-issues-first-statement-objections-four-asset-management-firms](http://www.fca.org.uk/news/press-releases/fca-issues-first-statement-objections-four-asset-management-firms).

59 See [www.competitionpolicyinternational.com/eu-commission-targets-aviation-brokers-in-antitrust-probe](http://www.competitionpolicyinternational.com/eu-commission-targets-aviation-brokers-in-antitrust-probe).

60 See [www.catribunal.org.uk/cases/127711217-1-balmoral-tanks-limited-and-2-balmoral-group-holdings-limited](http://www.catribunal.org.uk/cases/127711217-1-balmoral-tanks-limited-and-2-balmoral-group-holdings-limited).

61 See [www.gov.uk/government/news/cma-welcomes-court-ruling-to-uphold-fine-in-steel-tanks-case?utm\\_source=634bc982-1bfa-407d-a7c8-115a8f01eaf5&utm\\_medium=email&utm\\_campaign=govuk-notifications&utm\\_content=immediate](http://www.gov.uk/government/news/cma-welcomes-court-ruling-to-uphold-fine-in-steel-tanks-case?utm_source=634bc982-1bfa-407d-a7c8-115a8f01eaf5&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate).

62 See [www.gov.uk/government/news/cma-sends-tough-message-to-business-cheats-with-cartel-campaign](http://www.gov.uk/government/news/cma-sends-tough-message-to-business-cheats-with-cartel-campaign).

c significantly more than half (59 per cent) did not know or thought that dividing up and sharing customers with rivals was legal (24 per cent said ‘don’t know’ and 35 per cent actually thought it was legal).<sup>63</sup>

This campaign followed on from the CMA’s ‘Cracking Down on Cartels’ campaign, which promised anonymity and rewards of up to £100,000 for individuals reporting cartel activity.<sup>64</sup> This campaign was followed by a 30 per cent rise in the number of tip-offs.<sup>65</sup> The CMA has also introduced a new tool to spot bid rigging that procurement professionals can download and use free of charge.<sup>66</sup>

The CMA has noted that the cartel awareness campaign is designed to target industries including construction, manufacturing, recruitment, estate agents and property management and maintenance, as these sectors have been identified as being particularly susceptible to cartel behaviour. The CMA’s view is that compliance work of this sort is of increasing importance, as Brexit may distract businesses from competition compliance concerns.<sup>67</sup>

### iii Outlook

At the time of writing the CMA is expecting an increased cartel workload post-Brexit, when it will be responsible for investigating and enforcing the UK elements of major international cartels. As mentioned above, the CMA is focusing on raising awareness of cartels at a time when competition law is at risk of being neglected by companies primarily concerned with Brexit.

## III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The prohibition in Chapter I of CA98 captures a range of restrictive agreements, including both cartels and those agreements (both vertical and horizontal) that do not constitute hardcore cartels but nevertheless damage competition. The most important such Chapter I cases for 2017/2018 are outlined below, together with Chapter II cases (dealing with the abuse of a dominant position).

### i Significant cases

#### *Restrictive agreements under Chapter 1*

##### *Ping*

The most significant development in 2018 was the CAT’s decision in *Ping Europe Limited v. Competition and Markets Authority*.<sup>68</sup> The CMA had fined Ping, a golf club manufacturer,

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63 See [www.gov.uk/government/news/cma-sends-tough-message-to-business-cheats-with-cartel-campaign](http://www.gov.uk/government/news/cma-sends-tough-message-to-business-cheats-with-cartel-campaign).

64 See [www.gov.uk/government/news/cma-launches-campaign-to-crack-down-on-cartels](http://www.gov.uk/government/news/cma-launches-campaign-to-crack-down-on-cartels).

65 See [www.gov.uk/government/news/new-campaign-targets-cartels-as-tip-offs-rise-by-third](http://www.gov.uk/government/news/new-campaign-targets-cartels-as-tip-offs-rise-by-third).

66 See [www.gov.uk/government/publications/screening-for-cartels-tool-for-procurers/about-the-cartel-screening-tool](http://www.gov.uk/government/publications/screening-for-cartels-tool-for-procurers/about-the-cartel-screening-tool).

67 See [www.gov.uk/government/speeches/the-future-of-competition-enforcement-in-the-uk](http://www.gov.uk/government/speeches/the-future-of-competition-enforcement-in-the-uk).

68 See [www.catribunal.org.uk/judgments/127911217-ping-europe-limited-v-competition-and-markets-authority-judgment-2018-cat-13-7](http://www.catribunal.org.uk/judgments/127911217-ping-europe-limited-v-competition-and-markets-authority-judgment-2018-cat-13-7).

£1.45 million for banning two UK retailers from selling its golf clubs online, and ordered Ping to bring the online sales ban to an end.<sup>69</sup> Ping appealed the decision, arguing that the sales ban was justified on the grounds that:

- a Ping's freedom to sell the kind of product it wanted to sell (e.g., customised golf clubs) was infringed by forcing it to sell non-customised clubs online, contrary to the European Union Charter on Fundamental Rights;
- b the online sales ban was not a restriction of competition by object;
- c the CMA's finding that the online sales ban was disproportionate because 'less restrictive' options were available was wrong because those less restrictive options would be impractical and less effective than the ban;
- d the online sales ban fell within the 'ancillary restraint doctrine' or was exempt under Article 101(3) TFEU and Section 9 of the CA 1998, as it produced real benefits to consumers that could not be achieved any other way;
- e the CMA should not have imposed a fine as the alleged infringement was not committed intentionally or negligently; and
- f the fine was excessive and should be reduced.

The CAT dismissed the human rights argument, and upheld the CMA's finding that the ban was a restriction of competition 'by object'. The CAT also dismissed Ping's arguments around proportionality and objective justification, but the fine was reduced by £200,000 because the CMA had erred in treating director involvement as an 'aggravating factor'.

#### *Conduct in the transport sector (facilities at airports)*

The CMA fined Heathrow £1.6 million for restricting competition parking prices in a lease with the operator of a Terminal 5 hotel. The pricing restriction prevented the hotel group from charging non-hotel guests prices that were cheaper than those offered at other Heathrow car parks. The hotel group was granted immunity for coming forward under the CMA's leniency programme and was not fined.<sup>70</sup>

#### *Atlantic joint business agreement investigation*

In October 2018, the CMA opened an investigation into the Atlantic Joint Business Agreement, which was signed by American Airlines, British Airways, Iberia and Finnair. The Commission accepted commitments in 2010 in relation to six routes, and the CMA has now decided to 'review afresh the competitive impact of the agreement in anticipation of the expiry of the commitments'.<sup>71</sup> Ordinarily this could be left to the Commission but in light of Brexit (and the fact that five of the six routes in question are from the UK) the CMA has launched what it describes as its 'first 'Brexit' case'.<sup>72</sup>

#### ***Abuse of dominant position under Chapter II***

No abuse of dominance cases reached a decision at CMA level in 2018, but the CAT handed down judgments in the appeals against the CMA's pay-for-delay (*GlaxoSmithKline*) and

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69 See [www.gov.uk/government/news/cma-fines-ping-145m-for-online-sales-ban-on-golf-clubs](http://www.gov.uk/government/news/cma-fines-ping-145m-for-online-sales-ban-on-golf-clubs).

70 See [www.gov.uk/government/news/heathrow-and-arora-admit-to-anticompetitive-car-park-agreement](http://www.gov.uk/government/news/heathrow-and-arora-admit-to-anticompetitive-car-park-agreement).

71 See [www.gov.uk/cma-cases/investigation-of-the-atlantic-joint-business-agreement](http://www.gov.uk/cma-cases/investigation-of-the-atlantic-joint-business-agreement).

72 See [www.gov.uk/government/speeches/the-future-of-competition-enforcement-in-the-uk](http://www.gov.uk/government/speeches/the-future-of-competition-enforcement-in-the-uk).

excessive drug pricing (*Pfizer/Flynn*) cases. In respect of *Pfizer/Flynn*, the CAT in June 2018 quashed the record £84.2 million and £5.2 million fines that were imposed on Pfizer and Flynn respectively, after finding that the CMA's test for unfair pricing had been wrongly applied.<sup>73</sup> In the GSK paroxetine pay-for-delay case, the CAT issued an intermediate judgment dismissing a number of the grounds for appeal and referring a number of legal questions to the CJEU.<sup>74</sup>

## ii Trends, developments and strategies

Although no decisions were rendered in 2018, the pharmaceutical sector remains high among the CMA's antitrust enforcement priorities, particularly given that by far the largest customer of pharmaceutical products in the UK is the taxpayer-funded National Health Service. A number of the CMA's open cases are in the pharmaceutical sector. A supplementary statement of objections was issued in January 2019 in the CMA's *Liothyronine Tablets* investigation<sup>75</sup> and the *Hydrocortisone Tablets* investigation is ongoing. The CMA's wide-ranging investigation into suspected anticompetitive agreements and concerted practices and suspected abuse of dominance in relation to the supply of generic pharmaceutical products is also ongoing (currently in the information gathering stage).<sup>76</sup>

## iii Conclusion

Increased antitrust and cartel enforcement should be expected post-Brexit, as the CMA and sectoral regulators become the sole authorities able to review conduct in and affecting the UK. Key areas of interest are likely to continue to be pharmaceuticals and the digital commerce sector.

## IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The CMA and concurrent regulators have wide powers to study and investigate markets that they consider may not be working properly, and to make recommendations and impose remedies to improve the operation of competition in those markets. Market studies and investigations are a particular feature of the UK system, with previous investigations being high-profile and tending to focus on consumer-facing industries. Until the recent increase in enforcement activity, much of the competition regulators' efforts were concentrated on such investigations.

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73 See [www.catribunal.org.uk/cases/127511217-flynn-pharma-ltd-and-flynn-pharma-holdings-ltd](http://www.catribunal.org.uk/cases/127511217-flynn-pharma-ltd-and-flynn-pharma-holdings-ltd).

74 See [www.gov.uk/cma-cases/investigation-into-agreements-in-the-pharmaceutical-sector#intermediate-judgment-by-competition-appeal-tribunal](http://www.gov.uk/cma-cases/investigation-into-agreements-in-the-pharmaceutical-sector#intermediate-judgment-by-competition-appeal-tribunal).

75 See [www.gov.uk/cma-cases/pharmaceutical-sector-anticompetitive-conduct](http://www.gov.uk/cma-cases/pharmaceutical-sector-anticompetitive-conduct).

76 See [www.gov.uk/cma-cases/pharmaceuticals-suspected-anticompetitive-agreements-and-conduct](http://www.gov.uk/cma-cases/pharmaceuticals-suspected-anticompetitive-agreements-and-conduct).

## **i Significant investigations**

### ***Investment consultants market investigation***

The CMA published its final report in its investment consultants market investigation in December 2018.<sup>77</sup> The CMA uncovered competition uses within the investment consultancy and fiduciary management markets. In the fiduciary market, for example, it was found that many pension schemes use the same provider that they use for investment consultancy.

### ***Care homes, funerals sector***

One of the CMA's key areas of ongoing concern is the protection of vulnerable consumers. The market investigation into care homes, which tied into this theme, concluded in November 2017<sup>78</sup> and was followed by a specific consumer enforcement action in which more than £2 million in compensation was secured for care home residents who had paid 'upfront fees'.<sup>79</sup> In the same vein the CMA launched an investigation into the funeral market after identifying serious concerns, which is understandable as a funeral purchaser is typically a distressed consumer with no previous experience of the market.<sup>80</sup>

### ***Statutory audit***

In October 2018, the CMA launched a market study into the statutory audit market.<sup>81</sup> This investigation will be of interest as it will focus closely on the current collective dominance of the 'Big Four' audit providers, KPMG, PwC, EY and Deloitte.

### ***Super-complaint***

Although not technically a market investigation, there is an ongoing 'super-complaint' submitted by Citizens Advice under EA02 which makes provision for designated consumer bodies to make super-complaints where it considers that a market is or appears to be 'significantly harming the interests of consumers'.<sup>82</sup> The super-complaint is focused on loyalty penalties across 'essential markets' (savings accounts, mortgages, household insurance, mobile and broadband) following the finding that eight out of 10 bill payers are charged significantly higher prices for staying with their existing supplier in at least one essential market. The cost to consumers is estimated at several billion pounds a year.<sup>83</sup> As a result of this super-complaint the CMA began a consumer law investigation into the anti-virus software market and whether the business practices and terms and conditions associated with the automatic renewal of subscriptions are fair.<sup>84</sup>

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77 See [www.gov.uk/cma-cases/investment-consultants-market-investigation](http://www.gov.uk/cma-cases/investment-consultants-market-investigation).

78 See [www.gov.uk/cma-cases/care-homes-market-study](http://www.gov.uk/cma-cases/care-homes-market-study).

79 See [www.gov.uk/government/news/2-million-in-compensation-for-care-home-residents](http://www.gov.uk/government/news/2-million-in-compensation-for-care-home-residents).

80 See [www.gov.uk/government/news/cma-proposes-major-funerals-probe-after-identifying-serious-concerns](http://www.gov.uk/government/news/cma-proposes-major-funerals-probe-after-identifying-serious-concerns).

81 See [www.gov.uk/cma-cases/statutory-audit-market-study](http://www.gov.uk/cma-cases/statutory-audit-market-study).

82 See [www.gov.uk/cma-cases/loyalty-penalty-super-complaint#what-is-a-super-complaint](http://www.gov.uk/cma-cases/loyalty-penalty-super-complaint#what-is-a-super-complaint).

83 See [www.citizensadvice.org.uk/about-us/policy/policy-research-topics/consumer-policy-research/consumer-policy-research/excessive-prices-for-disengaged-consumers-a-super-complaint-to-the-competition-and-markets-authority/](http://www.citizensadvice.org.uk/about-us/policy/policy-research-topics/consumer-policy-research/consumer-policy-research/excessive-prices-for-disengaged-consumers-a-super-complaint-to-the-competition-and-markets-authority/).

84 See [www.gov.uk/cma-cases/anti-virus-software](http://www.gov.uk/cma-cases/anti-virus-software).

## ii Outlook

The 2019–2020 annual plan mentions that, in the event of a ‘no deal’ Brexit, ‘taking on new and mandatory cases . . . will heavily constrain [the CMA’s] ability to launch other new, but more discretionary work using our markets and enforcement powers.’<sup>85</sup> While market investigations therefore remain an important part of the CMA’s suite of powers, the extent to which the CMA has the time and resources to carry out investigations will hinge on the outcome of Brexit negotiations.

In terms of ongoing cases, the CMA is minded not to initiate a market investigation following the statutory audit market study as it considers recommendations to the government to change the law as likely to be more effective.<sup>86</sup> Elsewhere the conclusions in the funeral market study are expected in the middle of the year.

## V MERGER REVIEW

The CMA carries out both Phase I and, if warranted, in-depth Phase II merger investigations in the UK. Save for a limited category of investigations (in which the government makes the final decision), decisions at Phase II are made by a panel independent from the case so as to avoid any ‘confirmation bias’. The UK regime is also unusual in that merger notifications are voluntary, but the CMA has the ability to investigate non-notified transactions, and it has an active Merger Intelligence Committee that monitors merger and acquisition activity for transactions that may raise competition concerns.

### i Significant cases

#### *Sainsbury/Asda*

Arguably the most significant ongoing case is the anticipated *J Sainsbury Plc/Asda Group Ltd* merger.<sup>87</sup> The merger was referred to Phase II under the fast-track procedure<sup>88</sup> at the request of the parties. Sainsbury’s and Asda are respectively the second and third largest grocery retailers and overlap in a number of other areas including procurement of groceries, retail supply of fuel, and supply of general merchandise. The merger would create the UK’s largest supermarket group.

The parties are the first to successfully challenge the CMA in court over the timetable of a merger investigation: after being given limited time in which to respond to the CMA’s numerous ‘working papers’ the CAT ruled that the timetable for responding to the material and attending a hearing was unfair.<sup>89</sup>

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85 See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/778629/AnnualPlan-201920-FINAL-TRACKED.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778629/AnnualPlan-201920-FINAL-TRACKED.pdf).

86 See [https://assets.publishing.service.gov.uk/media/5c17cf2ae5274a4664fa777b/Audit\\_update\\_paper\\_S.pdf](https://assets.publishing.service.gov.uk/media/5c17cf2ae5274a4664fa777b/Audit_update_paper_S.pdf).

87 See [www.gov.uk/cma-cases/j-sainsbury-plc-asda-group-ltd-merger-inquiry](http://www.gov.uk/cma-cases/j-sainsbury-plc-asda-group-ltd-merger-inquiry).

88 In exceptional circumstances, the CMA may ‘fast track’ a case to Phase II at the request of the parties. The CMA must have evidence in its possession at an early stage of the investigation that justifies a belief that the test for reference is met. This is particularly likely in cases that raise clear competition issues, or where there are complex issues which the parties do not consider will be resolved in Phase I.

89 See [www.catribunal.org.uk/sites/default/files/2019-01/1300\\_Sainsburys\\_Judgmentn\\_CAT\\_1\\_180119.pdf](http://www.catribunal.org.uk/sites/default/files/2019-01/1300_Sainsburys_Judgmentn_CAT_1_180119.pdf).



### ***21st Century Fox/Sky***

The final decision in the *Fox/Sky* investigation was published in June 2018, following an intervention by the Secretary of State over concerns in relation to media plurality and broadcasting standards. The Secretary of State accepted the CMA's recommendation that the acquisition was not in the public interest and that a proportionate remedy would be the divestment of Sky News to a third party.<sup>90</sup> In the event Fox was ultimately outbid by Comcast.<sup>91</sup>

### ***SSE Retail/Npower***

In October 2018 the CMA cleared SSE Retail's merger with Npower after a Phase II investigation, although the deal was ultimately abandoned.<sup>92</sup> The merger would have created the second largest energy supplier in the UK, but the CMA found that consumers would still have plenty of choice in relation to standard variable tariffs.

### ***Electro Rent Corporation/Test Equipment Asset Management and Microlease***

In May 2018, the CMA ordered that Electro Rent sell its UK division after a Phase II investigation. The case gained extra significance because it involved the CMA's first ever fine for breach of an interim order. As the merger was already completed at the time the CMA began its investigation, an interim enforcement order (IEO) was put in place to prevent Electro Rent from taking any 'pre-emptive' steps (e.g., beginning to integrate the two businesses). At the beginning of the Phase II investigation the IEO was replaced by a similar interim order (IO).

In June 2018, the CMA fined Electro Rent £100,000 after it terminated the lease over its UK premises whilst the IO was in force.<sup>93</sup> The monitoring trustee (appointed to ensure compliance with the IO) was informed of Electro Rent's intention to terminate the lease did not object (partly on the basis of incorrect information provided in good faith), but did not receive all the relevant information and in any event had no authority to consent on behalf of the CMA (who were not informed). Taking into account all the circumstances the CMA did not consider that acting following approval from the monitoring trustee constituted 'reasonable excuse'. The CMA considered the fine was appropriate, reasonable and proportionate, and that it would act as a specific and general deterrent. The decision was appealed by Electro Rent but was upheld by the CAT.<sup>94</sup> The fine may be viewed as part of the wider trend towards increased enforcement by the CMA, which now also appears to be targeting breaches of IEOs and IOs.

Electro Rent was fined a further £200,000 in February 2019 for a separate failure to comply with the interim order, after it failed to obtain the consent of the CMA before appointing the CFO of Electro Rent as director of Test Equipment Asset Management Limited and its subsidiaries.<sup>95</sup>

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90 See [www.gov.uk/cma-cases/twenty-first-century-fox-sky-merger-european-intervention-notice#final-report](http://www.gov.uk/cma-cases/twenty-first-century-fox-sky-merger-european-intervention-notice#final-report).

91 See [www.bbc.co.uk/news/business-45615441](http://www.bbc.co.uk/news/business-45615441).

92 See [www.gov.uk/cma-cases/sse-retail-npower-merger-inquiry](http://www.gov.uk/cma-cases/sse-retail-npower-merger-inquiry).

93 See [https://assets.publishing.service.gov.uk/media/5b1fb924e5274a18e8bf5230/Decision\\_on\\_Penalty.pdf](https://assets.publishing.service.gov.uk/media/5b1fb924e5274a18e8bf5230/Decision_on_Penalty.pdf).

94 See [www.catribunal.org.uk/judgments/1285101218-electro-rent-corporation-v-competition-and-markets-authority-judgment-2019-cat](http://www.catribunal.org.uk/judgments/1285101218-electro-rent-corporation-v-competition-and-markets-authority-judgment-2019-cat).

95 See [https://assets.publishing.service.gov.uk/media/5c66a73ee5274a72c19f7c54/190212\\_Final\\_Decision\\_on\\_Penalty.pdf](https://assets.publishing.service.gov.uk/media/5c66a73ee5274a72c19f7c54/190212_Final_Decision_on_Penalty.pdf).

## ii Trends, developments and strategies

The most significant development in 2018 related to mergers that may raise national security concerns. Following a government consultation the intervention thresholds were lowered in three key sectors:

- a* the development or production of military or dual-use goods;
- b* the design and maintenance of computing hardware; and
- c* the development or production of quantum technology.

Following changes implemented in June 2018 the government can now intervene in these areas if the annual UK turnover of the target is over £1 million (the threshold in all other sectors is £70 million) or if the target alone accounts for 25 per cent or more of purchases or sales of any goods or services in the UK (in all other sectors the parties have to overlap such that there is an increment leading to a combined share of supply of 25 per cent or more).<sup>96</sup> Long-term changes are also expected, with draft legislation due in 2019. Under the proposals set out in a June 2018 White Paper, the government will be able to call in transactions that are not notified if it believes the transaction raises national security concerns. The paper suggests a number of ‘trigger events’ that would allow the government to review the transaction regardless of market share or revenue.<sup>97</sup>

## iii Outlook

As discussed in the introduction, the CMA expects a significant increase in the number of merger investigations carried out post-Brexit given its widened jurisdiction. In addition, the government anticipates that between five and 29 additional cases per year will be caught by the national security amendments introduced in June 2018 (see above). If the long-term changes are implemented as currently proposed this will materially increase the number of cases expected to be reviewed on national security grounds: the Department for Business, Energy & Industrial Strategy has estimated 100 cases will be subject to detailed review of which around half are likely to be subject to some form of remedy.<sup>98</sup> It is therefore to be expected that the CMA will spend a greater proportion of its time on merger work in 2019 and beyond.

## VI CONCLUSIONS

Despite the impending deadline for Britain’s departure from the EU, at the time of writing there is still a considerable lack of clarity surrounding the Brexit process. Whether or not the government can agree a deal with the EU is unclear, and there is an increasing possibility that Brexit will be delayed. The status, or indeed existence, of any transition period in which European competition law might continue to apply, is therefore unknown. The CMA’s draft ‘no deal’ guidance has gone some way towards clarifying the position in the event that Britain leaves the EU without a deal, and there is now legislation in place that sets out the extent to which European competition law would be either dis-applied or retained post-Brexit.

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96 See [www.gov.uk/government/news/new-merger-and-takeover-rules-come-into-force](http://www.gov.uk/government/news/new-merger-and-takeover-rules-come-into-force).

97 See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/728310/20180723\\_-\\_National\\_security\\_and\\_investment\\_-\\_final\\_version\\_for\\_printing\\_\\_1\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728310/20180723_-_National_security_and_investment_-_final_version_for_printing__1_.pdf).

98 Ibid.

Regardless of the outcome it seems clear that Brexit will expand the CMA's jurisdiction and increase its workload, particularly in merger control and competition enforcement. The CMA will also take responsibility for enforcing a new UK state aid regime.<sup>99</sup> The CMA continues to view Brexit as an opportunity, albeit a challenging one. The CMA envisions a close relationship with the Commission and other international competition authorities post-Brexit, but also sees an opportunity to expand its remit and increase its presence and power as a competition law enforcer.

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99 See [www.gov.uk/government/speeches/the-future-of-competition-enforcement-in-the-uk](https://www.gov.uk/government/speeches/the-future-of-competition-enforcement-in-the-uk).

## ABOUT THE AUTHORS

### MARC ISRAEL

*White & Case LLP*

Marc is a partner in the firm's global antitrust practice. He has considerable experience in a wide range of antitrust work, and has been involved in some of the most high-profile UK and European cases in recent years in the fields of M&A, cartels and antitrust litigation. A number of cases in which Marc has advised have set long-standing legal precedents such as *IBA Health v. Office of Fair Trading* or clarified important legal principles as in *Federation of Wholesale Distributors v. Office of Fair Trading* and *Pernod Ricard/Allied Domecq*.

Much of Marc's work involves dealing with cross-border cases (both for UK and overseas clients), and he regularly represents clients before the UK and European competition authorities, and has also appeared before the UK and European courts in competition cases.

Marc is recommended in the *Global Competition Review 100* and is ranked by *Chambers and Partners* in the field of competition law.

He is admitted to the Bar in England and Wales and Roll of Solicitors in Ireland.

He took the legal practice course and common professional examination at the College of Law, London, and he holds a master of arts from the University of Cambridge and studied modern and medieval languages at St John's College, University of Cambridge.

Marc is fluent in English and French.

### SOPHIE SAHLIN

*White & Case LLP*

Sophie is a counsel in the global antitrust practice. She advises clients on a range of competition law matters, with a particular focus on assisting clients with complex EU and international merger control proceedings. She also regularly advises clients on antitrust questions relating to the operation of joint ventures.

### ARTHUR HENDERSON

*White & Case LLP*

Arthur is a trainee at the firm. He spent six months in the antitrust practice assisting with a wide range of competition law matters.

**WHITE & CASE LLP**

5 Old Broad Street

London EC2N 1DW

United Kingdom

Tel: +44 20 7532 1000

Fax: +44 20 7532 1001

[marc.israel@whitecase.com](mailto:marc.israel@whitecase.com)

[sophie.sahlin@whitecase.com](mailto:sophie.sahlin@whitecase.com)

[www.whitecase.com](http://www.whitecase.com)

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**Business**  
**Research**

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