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Cross-border Mergers – Contribution from the United Kingdom

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More documentation related to this discussion can be found at: oe.cd/gfc24.

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Cross-border Mergers

- Contribution from the United Kingdom -

1. Introduction

1. The purpose of the CMA's merger control, and our general competition enforcement, is to help people and businesses in the UK by promoting competitive markets and tackling unfair behaviour. The CMA's statutory duty is to promote competition, which is an engine for growth, and we protect consumers, which helps to ensure fairness and opportunity for everyone. Together, these support prosperity for the UK.

2. In an increasingly interconnected world, competition issues are often global in nature and may require a global solution. To have this positive impact for UK consumers and businesses and for the UK economy, the CMA must be an active member of the international community. Cooperation and inter-agency communication are essential for promoting competition and achieving growth in each jurisdiction.

3. The CMA's experience in cross-border mergers is that open channels of communication between different authorities reviewing the same transaction are generally beneficial – both for the authorities and for the merging parties. Authorities can share substantive analysis with international counterparts and the merging parties are able to streamline jurisdictional processes, timeframes and remedies.

4. On the other hand, the goal of international cooperation from an agency perspective is not to achieve an alignment of outcomes. Each authority conducts its own assessment on the basis of particular facts in each market and applies its own legal test. Our decision-making process is independent, based on the evidence before us. However, we note that very often, authorities in parallel investigations reach similar conclusions, and that divergence is relatively rare.

5. This submission discusses the CMA's approach to cross-border mergers and is structured as follows:

- Section 2 provides background of the CMA's increased remit to consider global mergers after its exit from the European Union;
- Section 3 explains the CMA's jurisdiction to review a merger, especially in relation to companies not based in the UK;
- Section 4 provides the CMA's approach to international cooperation in substantive analysis of multi-jurisdictional mergers;
- Section 5 explains the CMA's position on divergent outcomes between authorities reviewing parallel deals;
- Section 6 provides the CMA's approach to international cooperation in remedy discussions;
- Section 7 provides some examples of the CMA's consideration of cross-border mergers, and
- Section 8 provides some examples of the CMA's involvement in cooperation agreements and multilateral networks.

2. Background

6. The CMA has always worked closely with competition authorities around the world. Since 2021, the CMA has had responsibility for a wider range of mergers than in the past due to the UK's exit from the EU. As the European Commission no longer has jurisdiction over the UK competition assessment of merger investigations, the CMA is dealing with more of the large international cases that touch a number of jurisdictions. The scope, scale and intensity of international cooperation has increased, and today we have an even closer working relationship with a range of authorities responsible for merger control across the globe. This is highlighted by the fact that approximately 40% of all mergers the CMA reviewed in 2023/2024 were cross-border.[1] We co-operated with the relevant competition authorities in roughly half of these deals.

7. Merger investigations with a multi-jurisdictional element have been more complex both in substance and procedure. This is because of the rise of the digital sector whose suppliers typically operate across the globe and involve more dynamic and fast-evolving product markets. These mergers can present an increased complexity in suitable remedies needed for competition authorities to resolve any competition concerns, again due to their market characteristics.

3. Jurisdiction

8. The CMA is able to review cross-border mergers through the share of supply element in its jurisdictional test as it captures the nexus of the transaction in the UK. This section details the legal framework of the UK's merger regime.

3.1. Legal test

9. The CMA may come to review a merger if either: (i) the parties voluntarily notify a merger to the CMA; or (ii) the CMA opens an investigation of its own initiative.[2] The legal threshold for the CMA to review a transaction is in two scenarios: either where the UK turnover of the company being acquired exceeds £70 million;[3] or where the merging companies will together supply more than 25 per cent of a particular good or service in the UK, or a substantial part of it (and where the merger results in an increment to that share of supply).[4]

3.2. UK nexus

10. The interconnectedness of the global economy and the UK openness to international investment means that mergers between non-UK companies can significantly

[1] Sorcha O'Carroll, 'UK merger control: 2022/23 in review and a forward look to 2024' (April, 2024).

[2] The CMA will take a decision to 'call-in' and investigate a non-notified merger if it believes that there is a reasonable chance that the test for a reference to an in-depth Phase 2 investigation will be met. For further information see: CMA's mergers intelligence function: CMA56 - GOV.UK, (CMA56, 23 December 2020), para 1.2.

[3] Enterprise Act 2002, s23(1)(b).

[4] Enterprise Act 2002, s22(2)(a). This will be expanded under the DMCC Act, which is addressed further in the paper.

affect UK markets, impacting UK businesses, consumers and the UK economy. The jurisdictional tests in the CMA's legislation are designed to ensure that the CMA can review deals that have a material effect on the UK, even if the transaction takes place between two non-UK companies, with its 'centre of gravity' elsewhere. The question that the CMA is required to address when considering a merger is if it will result in a substantial lessening of competition (SLC) in a UK market,[5] regardless of whether the merging parties are headquartered within the UK.

11. This ensures that consumers in the UK benefit from the positive outcomes of competition and investors have confidence in UK markets remaining open. This is why the UK Parliament entrusted the CMA to 'promote competition, both within and outside the United Kingdom, for the benefit of consumers'.[6] If the CMA were to confine its consideration to mergers only involving UK-based companies, it would be leaving UK competitors, suppliers and customers of non-UK merging business with operations or sales in the UK without scrutiny of global mergers. This could have a significant impact on consumers' costs, choices, prices and quality.

3.3. The UK's voluntary regime

12. The UK merger control regime has been voluntary since its inception.[7] The benefit of having a voluntary merger control regime is that the CMA can focus on investigating deals that have the most impact on UK consumers, businesses and the UK economy. This also means that the CMA is not required to review deals that may reach our jurisdictional thresholds but are unlikely to have an impact on competition in the UK. The importance of the deals to the UK, and each transaction's impact on the UK's economy, permeates the CMA's analysis throughout the entirety of the merger assessment process.

13. In practice, this means that the CMA would not on its own initiative review a merger between two US companies which had no competitive impact in the UK, regardless of whether it exceeded the CMA's jurisdictional thresholds. Equally, the CMA does not review a deal simply because the target company happens to be based in the UK. This applies to businesses of all sizes, from start-ups to larger, established businesses.

14. As a result, the CMA can typically investigate a lower number of cases each year compared with economies of a similar size, underscoring the proportionality of the UK regime in its focus on a small number of potentially problematic deals. This enables businesses to complete non-problematic transactions quickly and effectively in the UK without having to wait for merger control clearance. This can be illustrated by the fact that the CMA opened 54 phase 1 investigations in 2023-24, compared with approximately 266

[5] Enterprise Act 2002, s22(1)(b).

[6] Enterprise and Regulatory Reform Act 2013, 25(3).

[7] The Mergers Intelligence Committee is a function within the CMA that tracks merger activity to determine whether any unnotified merger may give rise to a substantial lessening of competition. The CMA will take a decision to investigate a merger if it believes that there is a reasonably chance that the test for a reference to an in-depth phase 2 investigation will be met. For more information on the Mergers Intelligence Committee see CMA56: Guidance on the CMA's mergers intelligence function.

investigations opened to France in 2023[8] and approximately 800 investigations opened in Germany.[9]

3.4. Digital Markets, Competition and Consumer (DMCC) Act

15. Some aspects of digital markets, in particular involving the biggest firms, are international. The scrutiny of these firms' M&A activity is therefore important to UK consumers, businesses and the wider economy. The DMCC Act introduces new mandatory reporting requirements for mergers involving digital firms designated with 'Strategic Market Status (SMS)'.[10] These firms typically have global reach and therefore the assessment of these reportable mergers will likely be cross-border.

16. To be reportable, these transactions will need to involve the acquisition by the SMS firm of at least 15%, 25% or 50% of shares or voting rights in a target with a UK nexus and a total consideration value of at least £25 million. Having mandatory early sight of potentially problematic mergers and acquisitions involving SMS firms before they are completed assist the CMA to further target its investigations on those transactions most likely to harm competition and to result in problematic outcomes for innovating businesses and investors.

17. The same is true of a new 'acquirer threshold', a hybrid threshold that will capture 'killer acquisitions' of nascent enterprises, where one of the merging parties has a share of supply of at least 33%, a UK turnover of over £350 million, and the other merging party has a UK nexus.[11] The new hybrid test does not require an overlap between the merger parties or actual suppliers of goods or services in the UK by the target at the time of the merger. This will reinforce the CMA's ability to investigate whether competition concerns may arise, where large acquirers seek to entrench their market position by acquiring potential competitors, or potential entrants in adjacent markets.

18. Importantly in relation to cross-border mergers, the DMCC Act also facilitates deepening cooperation, for example in information sharing with overseas authorities, subject to strict safeguards and in allowing us to enter into mutual investigative assistance. In addition, the DMCCA:

- enables the CMA to serve notice on persons and require the production of information or documents held outside the UK where (i) the person has or has had a connection to one of the merger parties or (ii) the person has a UK connection[12], and
- amends Part 9 of the EA02, which gives the CMA more flexibility to share information with overseas regulators in certain circumstances.[13]

[8] Autorite de la Concurrence: 2023rapportannuel-planche.pdf

[9] Bundeskartellamt: Bundeskartellamt - Homepage - Bundeskartellamt presents its Annual Report for 2023/24.

[10] Section 57(1) of the DMCC Act.

[11] Digital Markets, Competition and Consumers Act 2024 (section144 and Schedule 13).

[12] Digital Markets, Competition and Consumers Act 2024 (Schedule 13, paragraph 16).

[13] Digital Markets, Competition and Consumers Act 2024 (section 326).

19. These changes recognise that the CMA will review transactions where the entities are headquartered outside the UK and may require an increase in cooperation between competition authorities.

4. International cooperation during the investigation of a merger

20. The CMA recognises that in many of the most complex cases with a global dimension, the process (and the parties) benefit from coordination with other competition authorities, and we strive to achieve this where possible within the legal framework. This is why the CMA generally seeks to align its timing and processes with other authorities where it makes sense to do so.

21. Aligning across multiple international authorities' procedures is difficult, given the complexities of each regime, varying rules for extensions, provisions to 'stop the clock', and the propensity of authorities to invoke them. Merger parties are encouraged to discuss process and timing of the review of a multi-jurisdictional merger with the CMA at an early stage. This can include pre-notification discussions and the commencement of formal proceedings before the CMA and/or competition authorities to ensure, as far as possible, the alignment of respective timetables.

22. The CMA's ability to exchange confidential information and evidence with other competition authorities can be beneficial for the merging parties, as well as the CMA. It can assist with international coordination and cooperation, which in turn supports the speed and efficiency of the CMA's investigation. To facilitate this information exchange, the CMA regularly seeks the necessary consents from the merging parties to the disclosure of information to an overseas authority in the form of a waiver, [14] permitting the CMA to disclose information to another (named) authority.[15]

5. Divergence

23. Having recognised some efficiencies in coordination, consistency of outcomes is not an end in itself. With different statutory regimes and different decision makers, as well as variances in market structures and evidence bases, instances of divergence are inevitable and entirely proper. This is true for both the assessment of competition concerns raised by a merger and the appropriate solutions to remedy them. The CMA does not seek, or seek to avoid, divergent outcomes, but will seek the outcomes guided by the evidence that is right for UK consumers and businesses.[16]

24. Having said that, divergence has arisen in a comparably very small number of cases and has been the exception, rather than the rule. This divergence has typically been driven by specific differences in the regimes or in the evidence base across competition authorities. For the vast majority of cases, there is no divergence at all. As Martin Coleman, Panel Chair of the CMA stated in October 2024, '*'there can be few other areas of international decision-making where countries across the world with different legal systems, economies*

[14] Enterprise Act section 239.

[15] The CMA's standard confidentiality waiver can be found here: Confidentiality waiver template - GOV.UK.

[16] Recent examples of cases that had divergent outcomes with other authorities include: *Cargotec / Konecrane, Microsoft / Activision, Amazon / iRobot.*

and cultures align so often around a common set of economic principles to ensure consistent outcomes.'[17]

6. International cooperation in remedies

25. In the event that the CMA finds concerns with a deal either in phase 1 or phase 2, this does not mean that the deal cannot go ahead in any form. The CMA is open to discussing solutions which can remedy its concerns with a particular deal, asking first if that remedy is effective, and then proportionate to address the identified competition concern.

26. Discussions on remedies that might be put in place to address any competition concerns can be particularly important to coordinate when dealing with a cross-border merger. This is to ensure that any potential remedies for different competition authorities are consistent, or at least mutually compatible, while meeting the applicable statutory requirements.

27. While there is no 'one size fits all' approach to international alignment, the CMA's procedural guidance was updated in anticipation of its increased role in global mergers post exit from the EU to explain in more detail the various levers available to support multi-jurisdictional coordination. These are summarised here.

6.1. Decisions to open investigations

28. The CMA might decide not to open an investigation immediately where a transaction is subject to review by a competition authority outside the UK and any remedies imposed or agreed in those proceedings would be likely to address any competition concerns that could arise in the UK.[18]

6.2. Fast-track remedies

29. A procedural tool that has assisted merging parties and national authorities to seek alignment on process and substance in merger cases has been the ability to fast-track remedies. As set out in the CMA's guidance, merger parties are able to waive their rights in relation to certain procedural steps within a merger investigation in order to enable a binding outcome to be arrived at more quickly.[19]

30. In agreeing to fast-track the case to the consideration of undertakings in lieu (UILs), the CMA can have regard to its administrative resources and the efficient conduct of a case. This can then assist to align the timing of consideration of potential remedies with other competition authorities to find a workable solution to resolve any competition concerns. Further, section 128 of the DMCC Act removes the need to concede that the merger may give rise to competition concerns to allow a fast-track Phase 2 reference. This allows a Phase 2 reference to be made upon request by the merging parties.

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[17] Merger control and public policy - GOV.UK (www.gov.uk).

[18] CMA, *Guidance on the CMA's mergers intelligence function* (CMA56, December 2020), paragraph 4.3.

[19] CMA, Mergers guidance on the CMA's jurisdiction and procedure (2024 - revised guidance) (CMA2 (revised, 25 April 2024) (section 7).

6.3. Decision maker involvement

31. The fact that competition authorities are considering a merger that the CMA is also investigating is one of the circumstances in which the CMA decision maker in phase 1 (or the Inquiry Group, in phase 2) may choose to become involved in remedies discussions before the SLC decision. The decision maker is typically only involved in remedies discussions after the SLC decision is taken.

7. Examples of the CMA's consideration of cross-border mergers

32. This section sets out a summary of recent CMA merger investigations of cross-border deals, both where outcomes have diverged and aligned.

33. If it becomes apparent that the CMA might be heading in a different direction on the outcome of a case to another authority, the CMA will seek to understand the reasons why. Depending on these reasons, it may lead us to gather additional evidence or revisit the evidence we have already collected and the analysis of it. However, it is inevitable that the CMA will have some cases where the outcome is different, and a number of factors can contribute to that.

34. In some cases, the markets we are examining are national and the market conditions are different. In 2022, the CMA cleared unconditionally **Booking.com's** acquisition of **eTraveli** whereas the European Commission prohibited the merger. [20] When the CMA investigated the merger, it had the same concerns as the European Commission about the potential impact of Booking.com's acquisition of a flight online travel agency (OTA) on barriers to entry and expansion in the supply of accommodation OTA services – bearing in mind Booking.com's existing market power.

35. In particular, the CMA considered the impact of the potential loss of eTraveli as a customer retention and/or acquisition channel for rival suppliers of accommodation OTA services in the UK. But these are national markets and on the facts that CMA found that eTraveli is a very small player in the UK, and therefore, the deal was unlikely to have that effect in the UK. Where markets are national and conditions of competition are different, this is no different to a decision where the European Commission finds competition concerns in some Member States and not others.

36. Similarly, in **Amazon / iRobot**, market conditions differ between the UK and some EC member states.[21] The CMA too found that Amazon would have had the ability to foreclose iRobot's rivals for similar reasons, but we found that in the UK its incentive to do so would be low. This was largely due to the fact that the robot vacuum cleaner market in the UK is small – and significantly smaller than in a number of other European countries and the US – and not growing very quickly. The CMA found that Amazon would not stand to gain much from a foreclosure strategy, either in terms of direct financial benefits, or more broadly in terms of the size of the benefits it might receive from integrating UK customer data from its robot vacuum cleaners into its broader ecosystem.

37. Sometimes the nature of our evidence base is also different. In **Cargotec / Kronecranes**, the CMA and the European Commission both agreed that the merger was

[20] CMA, Case ME/6991/22, *Anticipated acquisition by Booking Holdings Inc. of certain activities of eTraveli Group AB* (29 September 2022).

[21] CMA, Case ME/7012/22, *Anticipated acquisition by Amazon.com, Inc of iRobot Corporation* (16 June 2023).

problematic.[22] However, the CMA prohibited the deal, rejecting the remedies package accepted by the European Commission. In that case, there were differences in the market feedback that we received on the proposed remedy. Ultimately, the CMA has to take decisions based on the evidence that it has gathered during its investigation.

38. Similarly, in **Broadcom / VMWare**, the CMA gathered evidence from VMWare customers active in a wide range of sectors, including UK focused customers (as well as customers active globally).[23] The CMA gathered evidence that showed that the Merged Entity would not have an incentive to foreclose rival hardware providers, so the CMA found no SLC. By contrast, the EC's market investigation found competition concerns in relation to the supply of one particular product (Fibre Channel Host-Bus Adapters). The EC found that Broadcom would have the ability and incentive to foreclose Marvell, the only rival on the market for the supply of these products.

39. In the vast majority of cases, the CMA finds similar concerns as other authorities. The recent **Adobe / Figma** deal, for example, involved a merger in the creative design sector.[24] A number of agencies were reviewing the merger alongside the CMA, including the US Department of Justice and the European Commission. The agencies discussed procedural issues around areas such as document production and substantive issues around assessment of forward-looking competition. There was not only broad alignment on concerns across all the agencies but, to the point often raised by advisors, also broad alignment on the case timetables. The deal was ultimately abandoned, so there was no final decision by any authority.

40. Another example of a case involving dynamic theories of harm that resulted in a consistent outcome in Europe and the UK was **Viaasat / Inmarsat**, which both the CMA and EC cleared unconditionally.[25] The CMA found that the satellite sector was dynamic, that there was ongoing disruptive entry and we ultimately found that the constraints the merged business would likely face from rivals were significant and likely to increase.

41. **Sika / MBCC** and **Ali / Welbilt** are also good examples of clear and effective international coordination between authorities. In both cases competition concerns, shared by multiple authorities, were resolved through international remedy packages, with multiple authorities accepting substantially the same remedy to address their concerns. In both cases, the CMA worked closely with other authorities on the substance, the effectiveness of potential remedies and the suitability of the proposed purchaser:

42. In **Ali / Welbilt** the majority of this engagement happened during pre-notification and the CMA and the European Commission cleared the case at phase 1 subject to remedies.[26]

[22] CMA, Case ME/6927/21, *Anticipated merger of Cargotec Corporation and Konecranes Plc* (29 March 2022).

[23] CMA, Case ME/7011/22, *Anticipated acquisition by Broadcom Inc. of VMWare, Inc* (21 August 2023).

[24] CMA, Case ME/7021/22, *Anticipated acquisition by Adobe Inc. of Figma, Inc.* (30 November 2023).

[25] CMA, Case ME/6895/22, *Anticipated acquisition by Viasat, Inc. of Connect Topco Limited* (10 May 2023).

[26] CMA, Case ME/6956/21, *Anticipated acquisition by Ali Holding S.r.l. of Welbilt, Inc* (9 June 2022).

43. In **Sika / MBCC** the CMA engaged throughout phase 1 and phase 2 and accepted remedies at phase 2 following a shorter than usual process after the parties conceded the SLC (with the European Commission accepting remedies at phase 1).[27]

8. Multilateral networks and cooperation agreements

44. Whilst all competition authorities remain independent and sovereign in their decisions, the CMA strives for close relationships and knowledge sharing with its fellow enforcement authorities. Multinational fora like the OECD, ICN, ICPEN (International Consumer Protection and Enforcement Network) and UNCTAD (United Nations Conference on Trade and Development) give opportunities to bring many competition and consumer authorities together to share approaches, knowledge and learnings.

45. The CMA is taking an active role, for example, in the update of the ICN Merger Recommended Practices and is also a member of the drafting group for the update of the OECD Recommendation on Merger Reviews. The CMA's contributions to these projects ensures it continues to advocate for the adoption of best practices in mergers competition policy globally.

46. In addition, the CMA supports UK government in establishing the framework for cooperation with other countries and authorities. For example, this Autumn the UK and the EU have concluded negotiations for a competition cooperation agreement. Once adopted, the agreement will support international cooperation on competition and will allow for closer cooperation between the CMA and EU's competition authorities. This agreement also showcases that the UK Government is committed to promoting open and fair competition globally to ensure the best opportunities for UK businesses and consumers.

47. The same applies for establishing agency-to-agency frameworks and Memorandums of Understanding (MoUs). The CMA signed the Multilateral Mutual Assistance and Cooperation (MMAC) Framework with counterparts in Australia, Canada, New Zealand and the US back in September 2020. This precisely sets out a vision for deeper international cooperation and envisages deepening cooperation between the signatories on large international cases.

9. Conclusion

48. Large multi-jurisdictional deals impact consumers, business and the UK economy. It is therefore imperative that the CMA assesses these transactions to ensure it fulfils its statutory duty to promote competition within and outside the UK. Working together with our counterparts is an essential mechanism for the CMA to achieve this aim.

49. Consistency of outcomes in merger reviews is not the main goal, and divergent outcomes in cases are the outlier compared to the vast majority of decisions that are in alignment. The CMA continues to utilise its multinational fora to share knowledge on specific cases, foster bilateral relationships and seek to achieve the benefits of international co-operation.

50. The CMA's decisions are independent, and evidence based. We ultimately seek the outcome that is right for UK consumers and businesses and for the UK economy. In a world

[27] CMA, Case ME/6984/22, *Anticipated acquisition by Sika AG of MBCC Group* (21 February 2023).

of global markets, this translates to not just focusing on UK companies, but all companies who operate in the UK. This focus on promoting competitive markets helps people, businesses and the UK economy grow.