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Trends and Developments in UK Merger Control: Buyer Beware


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1 Introduction

The last year has been eventful for UK merger control, with 2022/23 further highlighting the interventionist nature of UK merger control and thus the importance of merging parties and their advisors pro-actively engaging with the risks raised by UK merger control (as also discussed in our chapter in *ICLG – Merger Control 2023*).[1] "Buyer beware" would be a good summary of UK merger control in 2023. The UK Competition and Market's Authority's ("CMA's") perspective on this is that such intervention is entirely appropriate, with the material changes to its Merger Assessment Guidelines in 2021 reflecting this policy view.

This chapter addresses various developments in UK merger control by considering four topics:

(a) Section 2: The risks associated with trying to fly under the "radar" of UK merger control, particularly in the context of "buy and build" strategies where firms make a series of acquisitions in the same or related markets. These risks are well illustrated by the CMA investigations of a series of completed mergers involving local vets, leading to the appointment of monitoring trustees and divestments. On 7 September 2023, the CMA also announced a market review of the vet sector, with this review being motivated, at least in part, by the increase in market concentration observed in recent years.[2]

(b) Section 3: A review of the outcomes of UK Phase 1 merger decisions between 1 April 2010 and 31 March 2023, focussing particularly on comparing decisions over the last four years with those taken in earlier years (which highlights intervention trends), and the key theories of harm that are most prevalent in cases where the CMA finds a substantial lessening of competition ("SLC") at Phase 1.

(c) Section 4: The CMA's prohibition decision in *Microsoft/Activision*, including its rejection of a cloud streaming licensing remedy accepted by the European Commission (the "Commission"). An appeal against the CMA's prohibition decision was filed with the Competition Appeal Tribunal ("CAT"), but subsequently abandoned when the parties agreed with the CMA to re-notify a restructured transaction. The restructured transaction involves the sale of Activision's cloud stream rights to Ubisoft, with the CMA nevertheless consulting on undertakings to ensure that the terms of this sale are enforceable by the CMA , with these undertakings then being accepted. The case particularly highlights the CMA's aversion to behavioural remedies, even in circumstances where these are quasi-structural.

(d) Section 5: The CAT's rejection of the appeal of the CMA's prohibition decision in *Cérélia/Jus-Rol*, which confirms the high bar to a successful judicial review of a CMA merger decision.

Section 6 then draws some brief conclusions.

2 The Risks of Trying to Fly Under the UK Merger Control Radar, Particularly in the Context of "Buy and Build" Strategies

With the challenges currently seen in the M&A market for large-scale standalone acquisitions, one widely applied M&A strategy is "buy and build", namely serial acquisitions in the same or adjacent markets, to grow scale and profits and leverage multiple arbitrage opportunities on the acquired assets.

This strategy may make commercial sense, particularly where assets serve localised markets, such as retailers, wholesalers and local service providers (such as vets, dentists and gyms). However, there may be material merger control risks associated with such a strategy.

While UK merger control is ostensibly voluntary (in the narrow sense that there is no general obligation to notify mergers prior to completion or at all), over the last three years the CMA's Merger Intelligence Unit ("MIU") has reviewed approximately 700 unnotified transactions per year and opened Phase 1 investigations in relation to 40–60 of these per year. In short, flying under the merger control radar is hard, and the CMA imposes intrusive initial enforcement orders in relation to the completed mergers it investigates at Phase 1. Moreover, the CMA is interested in preserving competition in local markets, as well as national and international markets. As noted below in Section 3, in the seven years to 31 March 2023, over a third of the CMA's Phase 1 cases (39%) where it found a SLC related to mergers affecting local markets.

One possible response to this investigation risk is for the parties to minimise the publicity associated with their merger. However, while the CMA only has four months to investigate completed mergers, this time limit only starts to run when the material facts relating to the merger are "*generally known or readily ascertainable*". In practice, this means the material facts have been publicised in the national or relevant trade press in the UK, and where the acquiring party has taken steps to publicise the transaction at large, for example, by displaying a press release prominently on its own website.

These risk factors are well illustrated by the CMA's recent decisions in relation to various completed mergers in the veterinary sector. In all these cases, the CMA's MIU called the mergers in, imposed initial enforcement orders (including a monitoring trustee in all but one of the cases), and only cleared the mergers subject to undertakings to divest local vets.

In February 2022, the CMA reached a SLC finding associated with CVS's acquisition of The Vet, and CVS gave undertakings to divest the entirety of The Vet. In April 2022, the CMA also reached an adverse finding associated with VetPartners' acquisition of Goddard and the merger was cleared only subject to divestment undertakings. In December 2022/January 2023, the CMA similarly decided to investigate Medivet's completed acquisitions of 17 independent vet businesses.[3] Two of these were found not to qualify for investigation, three were cleared unconditionally, and 12 were subject to divestments. On 17 February 2023, the CMA similarly decided that each of IVC's completed acquisition of eight independent vet businesses would be referred, absent any divestment undertakings.[4]

In its various press releases, the CMA emphasised that the number of independent vets had fallen sharply in recent years due to their acquisition by a small number of corporate groups, and that it had received complaints about higher prices or lower quality due to a high number of local practices being under common ownership.

On 7 September 2023, the saga continued when the CMA announced a review of the vet sector, which also referred to consolidation in the sector. It seems likely that this review will consider the extent of local competition. In particular, the CMA's press release raised the question of whether the incentives of local vet practices to compete could be reduced if people were unaware that their vet is part of a group that owns other local practices, or that the services that are being sold to them (such as diagnostic tests or treatments at a specialist animal hospital) are provided by that group.

Buy and build strategies may also become more complicated due to planned changes to UK merger control. In April 2022, the government proposed introducing a new share of supply threshold. Under this new threshold, a merger may qualify for investigation where at least one party has an existing share of supply of goods or services of 33% or more in the UK (or a substantial part of the UK), and a UK turnover of at least £350 million.[5] This is intended "*to enable review of so-called 'killer acquisition' and other mergers which do not involve direct competitors*".[6] Accordingly, this will also enable the CMA to investigate mergers where the buy and build strategy involves acquisitions at different stages of the supply chain (i.e. vertical mergers), such as between input suppliers and their customers.

3 The Outcomes of UK Merger Decisions Indicate that Self-Assessment is Commercially Important

To put the themes of the chapter into a commercial context, this Section considers:

(i) The outcomes of the 755 Phase 1 decisions taken by the Office of Fair Trading ("OFT") and CMA between 1 April 2010 and 31 March 2023, excluding mergers that were found not to qualify for investigation.[7]

(ii) The outcomes of Phase 2 decisions.

This Section updates the analysis in last year's chapter.

Table 1: SLC findings at – Phase 1 and Phase 2 from 1 April 2010 to 31 March 2023

Time period	2010/11–2015/16	2016/17–2018/19	2019/20–2022/23
Qualifying mergers at Phase 1 with SLC (%)	28% (112/400)[8]	32% (55/172)	45% (83/183)
SLC findings at Phase 2 (%)	25% (13/52) (54% cleared unconditionally, 28/52; 21% abandoned, 11/52)	52% (13/25) (32% cleared unconditionally, 8/25; 16% abandoned, 4/25)	53% (24/45) (18% cleared unconditionally, 8/45; 28% abandoned, 12/45)

Source: AlixPartners' analysis.

From Table 1, two points are striking. First, before assessing any trends, over the last four years ending 31 March 2023, the CMA reached a SLC finding in 45% of all qualifying mergers investigated at Phase 1.[9] This focus on investigating potentially problematic mergers contrasts with the position in many other jurisdictions where all mergers are subject to compulsory pre-completion merger filing obligations, based on turnover or assets size criteria.

Second, UK merger control has become more interventionist over time at both Phase 1 and Phase 2. At Phase 1, trends are more complicated to assess as the CMA may decline to investigate qualifying mergers that it considers do not warrant investigation at Phase 1 based on short briefing papers submitted by the merging parties or responses to enquiry letters.[10] Nonetheless, the proportion of qualifying mergers where a SLC was found at Phase 1 has increased from 28% in the six years prior to 2015/16 (2010/11 to 2015/16) to 45% over the last four years (2019/20–2022/23). Indeed, in 2022/23, a SLC finding was reached in 69% of Phase 1 cases. However, this data may not be representative of a long-term trend, as it is based on a single year and the CMA might have declined to investigate more mergers.

At Phase 2, fewer cases are investigated and many referred mergers are abandoned. This complicates the assessment of trends. However, when abandoned mergers are included, the proportion of mergers cleared unconditionally at Phase 2 has fallen from 54% from 2010/11 to 2015/16, to 32% from 2016/17 to 2018/19 and just 18% in the four years ending 31 March 2023. When abandoned mergers are excluded, the proportion of mergers cleared unconditionally fell from 68% (28/41) from 2010/11 to 2015/16, to 38% (8/21) from 2016/17 to 2018/19, and 26% (8/31) in the four years ending 31 March 2023.

The theories of harm that are the key driver of Phase 1 SLC findings

The statistics from the previous sub-section highlight the importance of careful self-assessment by the parties to mergers that may warrant a Phase 1 investigation by the CMA, simply because the CMA has reached an adverse finding in 45% of Phase 1 investigations over the last four years. This Section considers the nature of competition concerns that have particularly driven Phase 1 SLC findings.

Before exploring this further, we highlight two health warnings. First, the CMA is continuing to widen the scope of the competition concerns that it assesses.[11] Accordingly, the past may not be a good guide to future investigations, especially in digital markets where such concerns are more likely (for example, where dominant firms acquire start-ups that could have become major rivals – so-called "killer acquisitions"). Second, each case turns on its facts: if a merger is likely to reduce rivalry and harm customers, then the CMA is likely to investigate even if the underlying issues arise less frequently.

There are broadly two categories of mergers: horizontal mergers (i.e. mergers between competitors); and non-horizontal mergers (such as where the merger parties supply essential inputs to rivals or are major purchasers of other inputs, or where the merger parties supply complementary/related products purchased by customers). Horizontal mergers can be further segmented into two broad categories (although a merger may raise both issues). First, mergers with unilateral effects, where the loss of rivalry between the merging parties makes it profitable for the merged entity to increase its prices unilaterally or otherwise worsen its competitive offering. This is commonly summarised as price, quality, range, or service (hence "PQRS"), or innovation.

Second, mergers with "coordinated" effects, where the concerns relate to the merger facilitating competitive coordination between rivals to the detriment of customers.

The CMA's Merger Assessment Guidelines of 2021 indicate that non-horizontal mergers may enable firms to foreclose competition by, for example, denying rivals access to essential inputs or customers/distribution channels, or by leading to competitive coordination between rival firms. In short, the Guidelines describe various ways in which mergers may lead to an SLC.

So far, certain competition concerns have been more prevalent drivers of SLC findings at Phase 1. Table 2 below analyses 214 Phase 1 mergers referred or subject to UILs between 1 April 2010 and 31 March 2023 (excluding the two water mergers subject to automatic reference). We show our analysis of these decisions in the tables below. We split this analysis into two periods: the six years to 31 March 2016 and the seven years to 31 March 2023. Unilateral effects may arise in a variety of scenarios (which are therefore considered separately), and SLC findings might be reached based on a variety of theories of harm (reflecting the merging parties may be active in multiple markets, and mergers that create market power at one level of the supply chain may also have adverse vertical or conglomerate effects).

Table 2: SLC findings from 1 March 2010 to 31 March 2016 and 1 April 2016–31 March 2023

	1 April 2010–31 March 2016		**1 April 2016–31 March 2023**	
	Total Phase 1 SLC cases	%	Total Phase 1 SLC cases	%
Unilateral effects				
High Market Shares	**44**	**52%**	**69**	**53%**
High Market Shares only (40% plus)	37	44%	59	46%
And loss of potential competition	3	4%	2	2%
And vertical Effects	3	4%	8	6%
And coordinated and vertical	1	1%	0	0%
4–3 or fewer	**37**	**44%**	**50**	**39%**
Retailer / Wholesaler / Service Provider	33	39%	36	28%
Other	4	5%	13	10%
And coordinated effects	0	0%	1	1%
Vertical effects and loss of potential competition[12]	0	0%	2	2%
Low shares (<40%) but close competitors[13]	0	0%	2	2%
Unilateral – Mergers leading to closure of existing business not part of merger	3	4%	0	0%
Vertical effects (only)	1	1%	5	4%
Loss of potential competition (only)[14]	0	0%	1	1%
Total	**85**	**100%**	**127**	**100%**

Source: AlixPartners' analysis.

Table 2 indicates that the vast bulk of SLC findings relate to horizontal unilateral effects, in two specific scenarios. First, where the merger created or enhanced high market shares of 40% or more. Between 1 April 2010 and 31 March 2023, these mergers represented 53% of all mergers where the OFT/CMA referred the merger or accepted UILs.[15] Notably, this proportion has stayed about the same over the full period (it was 52% in the six years to 31 March 2016 and 53% in the next seven years).

Second, the merger reduced the number of rivals from four to three or fewer. These mergers made up 39% of all mergers where the OFT/CMA referred the merger or accepted UILs between 2010–2023.[16] The majority of these cases related to mergers between local retailers, wholesalers or service providers. However, the CMA has not applied fascia counts at Phase 2 in several more recent retailer mergers (see, for example, *Sainsbury's/Asda* (2019)).[17] In short, competition concerns have been found with lower market shares and more competitors in several recent Phase 2 cases, perhaps most notably *Sainsbury's/Asda* and *JD Sports/Footasylum* (2021), and in the latter case the CMA's adverse finding was limited to a small competitor (Footasylum, with a market share of 0–5% in differentiated markets) worsening its offering.

Only one SLC finding involved excessive buyer power (*European Metal Recycling/Metal & Waste Recycling* (2018)) and no cases involved conglomerate effects.[18]

There are now six cases referred because of pure vertical effects, including three in the last year (namely, *London Stock Exchange Group PLC/Quantile Group Limited*, *UnitedHealth Group/EMIS*, and *Broadcom/VMware*).[19] Notably, the number of SLCs from vertical effects found in Phase 1 has more than doubled in the most recent seven years (increasing from five to 14), albeit that such observations should be treated cautiously as there are few cases. In this regard, in April 2022, the CMA published an interesting report by E.CA on the CMA's decisions in relation to four vertical mergers, which reported that: "*We found that the CMA treated vertical mergers (or the vertical effects of mergers with both horizontal and vertical elements) more leniently than horizontal mergers*".[20] The increased focus on vertical mergers and SLC findings at Phase 1 is therefore not surprising.

SLCs based on coordinated effects are also very rare. Since the Enterprise Act came into force in June 2003, as at 31 March 2023 there are only two adverse findings based on coordinated effects at Phase 2: *Anglo American/Lafarge* (2011), and *Asda/Sainsbury's* (2019).[21] One other case – *Yorkshire Purchasing Organisation/Findel Education* (2020) – led to a SLC at Phase 1 due to both coordinated and horizontal unilateral effects. However, the CMA did not find a SLC from coordinated effects at Phase 2.[22]

The CMA also clears mergers where there was compelling evidence that one of the parties would have exited the market in absence of the merger, the so-called "exiting firm" argument.[23] Similarly, in potential competition cases, the CMA may also clear a merger if there is sufficient evidence that one of the parties would enter the market only in the event of the merger proceeding.[24]

However, there may also be an exiting firm "offence", where the parties decide to close related businesses around the time of the merger, and this may reduce competition. In particular, since 1 April 2010, there are three cases where the OFT/CMA's reference decision was heavily influenced by their conclusion that, in the absence of the merger, one of the parties may not have exited various markets (notwithstanding that the business activities that had ceased were not sold to the acquiring party)[25] and/or would have entered a market where the other party was active.[26] These are now relatively old cases, but such concerns are still important to assess.

The extent to which market shares and/or number of competitors are key drivers of SLC decisions

In our review of Phase 1 SLC decisions in 2019,[27] we concluded that the following factors increase the risk of a SLC finding:

- the merger creates a concentrated market structure by:
  - (i) increasing the merged entity's market share by at least five percentage points to over 40%; or
  - (ii) reducing the number of rivals from four to three or fewer, particularly in retailing/wholesaling/service provider or bidding/negotiating markets;
- the merger affects a large number of local markets as the parties have many nearby outlets or depots. This is primarily due to the complexity of assessing a large number of overlaps; and
- the merger relates to differentiated product markets, including, in exceptional cases, where the parties have a low combined market share.[28] In such cases, the CMA may be concerned that the loss of rivalry between the parties creates incentives for the merged entity to increase its prices or otherwise worsen its offer.

The CMA's Guidelines of 2021 no longer refer to any market share or number of competitors where competition concerns are unlikely. It is therefore interesting to examine whether there has been any change in outcomes over time based on the parties' market shares. In the tables below we focus on the four years ending 31 March 2023.

Table 3 below shows the parties' average combined market shares across cleared, UIL and referred cases over the last three years. This shows that, on average, the parties' combined market shares for cleared cases range between 26% and 38% (32% average), while combined shares for SLC cases average above 40% (47% for UIL cases and 65% for referred cases).[29] There is obviously variation around these averages and market shares in differentiated markets may not capture the closeness of competition between the parties. Nonetheless, there is a clear general difference in market shares between cases cleared unconditionally and those subject to UIL or referred.

Additionally, over the last four years the average market shares of the parties in the cases cleared are not particularly low: the parties' average market shares are still in the approximately 30% or more range for mergers that are cleared unconditionally in Phase 1.

Table 3: Average market shares by Phase 1 case outcome, aggregated over 1 April 2019–31 March 2023

Phase 1 Outcome	Average lower bound	Average midpoint	Average upper bound	Total
Cleared	26%	32%	38%	97
Cleared – UIL	40%	47%	54%	34
Referred	58%	65%	72%	42
Total	36%	43%	49%	173

Note: Abandoned mergers and *de minimis* merger clearances are excluded. Note that this includes purely vertical and conglomerate mergers, although there are few of these types of mergers (see Table 2 above).

Source: AlixPartners' analysis.

Table 4 below shows how these percentages have evolved over the last four years, including in the two years after the CMA's Guidelines were finalised in March 2021. This shows some fluctuation from year to year (possibly due to small sample sizes), but in the year ending 31 March 2023 the parties' average combined market shares as regards mergers referred was at its highest point (71%). However, two years of data is not a sound basis to reach firm conclusions.

Table 4: Average combined shares by Phase 1 outcome and period, 1 April 2019–31 March 2023

Phase 1 Outcome	Share			
	2019/20	2020/21	2021/22	2022/23
Cleared	30%	41%	32%	27%
Cleared – UIL	52%	59%	32%	45%
Referred Total	66%	65%	57%	71%
Total	41%	52%	37%	46%

Source: AlixPartners' analysis.

It is also informative to look at the underlying distribution of the parties' combined shares as regards cleared, UIL and referred cases. Table 5 indicates that mergers have been referred or subject to UIL where the parties' combined shares are low (but only three cases where the parties' combined shares are in the 20–30% range or less, out of 64 reference and UIL cases). However, the majority of adverse findings relate to mergers where the parties' combined shares are at least 40% (78% of cases, 50/64).

In addition, some cases where the parties' combined market share is high have still been cleared unconditionally. In particular, 16 mergers were cleared unconditionally despite the parties' combined shares being over 50%. Indeed, considering the 55 cases where the parties' combined share exceeded 50%, 16 of these were cleared unconditionally (29%) but a further 39 mergers were referred or being subject to UIL (71%).

Table 5: Phase 1 merger outcomes according to the merger parties' combined market shares from 1 April 2019 –31 March 2023

Market share range	Cleared	Cleared – UIL	Referred
0–10	8	1	0
10–20	15	1	0
20–30	26	0	1
30–40	18	9	2
40–50	6	4	7
50–60	4	2	7
60–70	3	4	3
70–80	3	4	3
80–90	5	0	9
90–100	1	1	6
Grand Total	89	26	38

Note: CMA Phase 1 cases, April 2019–March 2023. Excludes five *de minimis* cases, four abandoned cases, and 19 cases without information on market shares/shares of supply (four referred, eight cleared unconditionally and seven after UILs were accepted). We have also examined just those cases where the market share increment is between 0–5% (to remove any effects due to high increments) but the general outcomes remain the same.

Source: AlixPartners' analysis.

The loss of rivalry between the parties is also likely to be affected by the increment in market shares (as well as their combined market share), albeit in differentiated markets firms with low market shares may still be close competitors due to their products/services being closer substitutes and a small competitor's current share might not reflect its competitive importance if it is expanding. Accordingly, Table 6 examines the outcomes of Phase 1 cases according to the increment in the merging parties' share. This analysis shows that increments for cleared cases average around 8%, while UIL and referred cases average 12% and 17% respectively. While there has been some fluctuation year to year, there does not appear to be any underlying trend.

Table 6: Phase 1 outcomes according to the increment in the parties' combined market share

Phase 1 Outcome	Increment				Total
	2019/20	2020/21	2021/22	2022/23	
Cleared	8%	6%	7%	9%	8%
Cleared – UIL	13%	14%	8%	13%	12%
Referred	12%	20%	20%	18%	17%
Total	10%	11%	9%	13%	11%

Source: AlixPartners' analysis.

Table 7 below shows the distribution of the cases for each increment range. Obviously, where the increment in market share is large (say 20–30% plus), then the parties' combined share will be high (i.e. at least 40%) and either the firm's rivals will be materially smaller or there will be few sizable rivals remaining. Whilst the majority of mergers with market share increments of 0–10% are cleared unconditionally, there are still a number of UILs and reference cases where the increment in market share is low – and nine mergers were referred or subject to UIL where the increment in market share is 0–5%.

Table 7: Number of Phase 1 cases by increment, 1 April 2019 –31 March 2023

Increment range	Cleared	Cleared – UIL	Referred
0–5	39	2	7
5–10	26	4	4
10–20	18	15	12
20–30	1	2	8
30–40	2	0	6
40–50	0	0	1
Missing	3	3	0
Grand Total	89	26	38

Source: AlixPartners' analysis.

4 *Microsoft/Activision*: the CMA is Highly Cautious About Accepting Behavioural Remedies

A general theme in the CMA's remedies guidance is that they prefer structural remedies (i.e. divestiture of a business and its assets) and remain cautious and sceptical of behavioural remedies (such as price caps, supply commitments or restrictions on the use of long-term contracts), which they note "*are unlikely to deal with an SLC and its adverse effects as comprehensively as structural remedies and may result in distortions when compared with a competitive market outcome*".[30] This sentiment is echoed by the Commission, with Olivier Guersent (Director General at the Commission's antitrust unit) recently observing that the Commission has a strong preference for stand-alone divestitures of fully functional standalone businesses and is ("*less minded to accept remedies made of bits and pieces of existing businesses*").[31] Similarly, he adds that airlines hoping to clear mergers will need to do more than simply propose remedies that lower barriers to entry.[32]

Despite these statements and intentions, some behavioural remedies are accepted by the UK, even in horizontal mergers. Examples include *Bauer Radio* (2020), *Breedon/Cemex* (2020),[33] several rail franchise mergers,[34] and *Imerys/Goonvean* (2013).[35] However, more often than not, the CMA requires structural remedies.

However, there does appear to be a difference in policy between the CMA and the Commission as regards the use of behavioural remedies in relation to vertical mergers. As regards vertical mergers, Mr Guersent emphasises that non-divestiture remedies may meet the Commission's standards if they are "*effective, easy to implement and monitor, and in line with market realities*", and he gives the example of non-structural remedies that address "*specific interoperability and market access concerns*".[36] The *Microsoft/Activision* case illustrates this divergence well.

In early 2022, Microsoft agreed to purchase Activision for $68.7 billion.[37] The merger would combine Activision's large catalogue of gaming content (including Call of Duty, World of Warcraft, and Candy Crush), with Microsoft's strong gaming ecosystem (including the Xbox console and store, various gaming studios, and Microsoft's cloud gaming service).[38] The CMA's Phase 2 review concluded that the merger would result in an SLC in cloud gaming services in the UK. This was based on Microsoft's strong position in the market, with an estimated 60–70% market share globally, which would be made even stronger with the addition of Activision's titles (which the CMA found would be important for the competitive offering of cloud gaming services as the market continues to grow and develop).[39]

To remedy the SLC, Microsoft offered a behavioural remedy that would obligate it to support gaming service providers for a 10-year period.[40] After the final report was issued by the CMA, the Commission accepted commitments that were substantively the same as the remedy proposed. These commitments had two key elements. First, a free licence to consumers in the EEA that would allow them to stream, via any cloud game streaming services of their choice, all current and future Activision Blizzard PC and console games for which they have a licence. Second, a corresponding free licence to any cloud game streaming service providers to allow EEA-based gamers to stream any Activision Blizzard's PC and console games.[41]

The Commission's view was that these remedies fully address its concern and were an improvement to the current pre-merger situation. This is because Activision Blizzard does not currently licence its games to cloud game streaming services, nor does it stream the games itself. The Commission observed that these licences "*will ensure that gamers that have purchased one or more Activision games on a PC or console store, or that have subscribed to a multi-game subscription service that includes Activision games, have the right to stream those games with any cloud game streaming service of their choice and play them on any device using any operating system*". The Commission also emphasised that the remedies would also ensure that Activision's games available for streaming will have the same quality and content as games available for traditional download.

However, the CMA took a different view, both in its final report and its subsequent decision of August 2023 relating to whether there had been a material change of circumstances or special reasons.

In its final report, the CMA concluded that the only effective remedy to the SLC was to prohibit the merger, based on its views as to the complexity of the remedy and the difficulty in monitoring the outcomes given the dynamic/evolving market and its views as to the risk of circumvention.[42] The CMA also dismissed a late change to the deal that included agreements with Nintendo and other cloud gaming service providers to allow Activision on their platforms, with Microsoft claiming these were relevant customer benefits that make prohibition disproportionate.[43] However, the CMA concluded that the customer benefits were either highly uncertain or limited, such that prohibition was not disproportionate in order to protect competition.[44]

In May 2023, Microsoft then appealed the prohibition to the CAT, based on several grounds including: the CMA making fundamental errors in its assessment of the current position of cloud gaming services (and failing to consider native gaming); failing to take proper account of the long-term commercial agreements with cloud gaming providers; the finding that Activision would have likely made its gaming content available on cloud gaming services absent the merger was irrational; the finding that the merging parties would have the ability and incentive to foreclose rival cloud gaming services was unlawful; and that the CMA failed to consider a range of remedies, which led to a disproportional outcome.[45]

However, in July, the CAT appeal was put on hold, pending four recent developments since the CMA's final report. These were: 1) the acceptance of the Commission's commitments, which Microsoft argued provided an enforcement structure to the cloud gaming licensing agreements with Nvidia, Boosteroid and Ubitus; 2) an agreement to provide Sony with access to Call of Duty; 3) new evidence from US litigation; and 4) new information Microsoft gathered through the CAT appeal (noted above).[46]

However, the CMA was dismissive of these points. The CMA argued that some of the evidence or new developments were already known at the time of the final report, while other aspects, while new, only impact a subset of providers or have a limited impact on the CMA's substantive assessment. The CMA concluded that: "*Given that cloud gaming is a nascent, dynamic, and rapidly growing market, we do not consider that developments concerning a limited number of current rivals address the fundamental concern about the risk of foreclosure of other current and future rivals in the market more generally, including those with innovative and new business models.*"[47] The CMA also noted that they had already assessed in detail a remedy that was substantially the same as the Commission's commitments, and that adoption of a remedy by one or more overseas competition authorities is "*unlikely to have a material impact on the CMA's decisions in the final report*".[48]

The case took a potential final turn in September 2023 when the CMA announced that they were prepared to accept a revised deal alongside remedies that should address the residual issues.[49] In its press release, the CMA notes that Microsoft will not purchase the cloud gaming rights held by Activision, which will instead be sold to a third-party (Ubisoft). This effectively means Microsoft will no longer control cloud gaming rights for Activision's content, so it cannot withhold those rights from rivals to the benefit of its own games/services. The deal with Ubisoft also requires Microsoft to port Activision games to operating systems other than Windows and support game emulators when requested, addressing the CMA's other main shortcoming with the previous remedies package. Finally, the restructured deal also requires Microsoft's sale of rights to Ubisoft be enforceable by the CMA. Following consultation, these undertakings were accepted by the CMA.

5 *Cérélia/Jus-Rol*: The Bar for Judicial Review is High

In January 2023, the CMA ordered Cérélia to sell Jus-Rol after a detailed Phase 2 investigation.[50]

By way of background, the merging parties, which focus on ready-to-bake products including products such as shortcrust and puff pastry, pizza and patisserie dough, generate over £100m in revenue in the UK alone. Cérélia is the largest supplier of own-brand (also referred to as private label, "PL") ready-to-bake products (supplying the UK's largest grocery retailers), while Jus-Rol is the largest supplier of branded ready-to-bake products.

The CMA's decision to block the merger relied on several factors. First, the CMA found that the two merging parties competed closely, with a number of grocers telling the CMA that they valued the ability to trade-off Jus-Rol against Cérélia (and *vice versa*) when buying ready-to-bake products to get better deals for their customers.[51] There is also a significant overlap in the product ranges, as the CMA found own-brand and branded products to be substitutes for both grocers (with limited shelf space) and the end consumer.[52]

Second, the CMA found that the merging parties were the leading suppliers in the market, with over two-thirds of sales of such products to grocery retailers in the UK. The merging parties also faced minimal competition from alternative suppliers (both individually and in aggregate), with only two other suppliers (Bells and Henglein, which are predominantly private label suppliers) having a material market share, albeit substantially lower than the parties.[53] The CMA also found that there was limited switching between branded products over the last five years. However, they did find that switching between own-brand products occurred more frequently, with five instances among the six largest grocers in six years.[54]

Third, the CMA dismissed the potential countervailing buyer power of the large grocery retailers. This was because the existence of buyer power depends on having alternative options to respond to deteriorating competitive conditions, e.g. by switching suppliers, sponsoring entry, or self-supplying, which was reduced due to the merger.[55] This is despite the parties submitting that countervailing buyer power was evident from grocers previously threatening to delist their products.[56] The CMA therefore concluded that the only viable remedy was the full asset divestment of the Jus-Rol business to a suitable purchaser.[57]

To sum up, the concerns centred on the extent of pre-merger competition between parties and how the merger enabled them to increase prices. Jus-Rol was a branded business and had no manufacturing facilities (Cérélia manufactured its products on its behalf), and Cérélia only manufactured private label products on behalf of retailers. However, there was limited evidence of retailers threatening to switch to private label products during price negotiations with Jus-Rol. Additionally, the merger did not reduce the number of suppliers of branded products. As regards private label products, the main constraint on Cérélia increasing prices would be retailers switching to alternative private label suppliers (Jus-Rol had no manufacturing facilities and thus could not supply private label products). But such switching was observed both before and during the course of the CMA's investigation (see further below). In short, how credible were retailers' concerns about potential price increases?

The parties then appealed the CMA's Phase 2 decision on the following grounds: Ground 1: the SLC finding was unsupported by evidence, and the CMA's investigation into the merger was irrational; Ground 2: the divestment remedy had no rational basis and was disproportionate; Ground 3: the CMA conducted a procedurally unfair investigation; and Ground 4: the CMA's eight-week extension of the enquiry period for "special reasons" was unjustified, and the CMA's decision to extend the enquiry period was *ultra vires*.[58]

Rather than looking at all the grounds, we focus on the main part of Ground 1, that the SLC finding was unsupported by evidence. (All grounds were rejected by the CAT.)

Cérélia argued three main points. First, that the CMA failed to establish a coherent framework and failed to gather relevant evidence and carry out the basic economic analysis that would support the CMA's conclusions.

Cérélia argued that the CMA's evidence included an assumption that retailers could easily rebalance between branded and private label goods.[59] However, the parties contended that Cérélia's internal documents showed sufficient evidence that few customers would divert between branded and private label if a retailer withdrew a product from sale, with customers more likely to switch to another branded product. Cérélia also argued that the CMA failed to seek data that would show "*whether rebalancing was too costly for retailers to present a credible threat to suppliers, particularly given evidence obtained by the CMA that, Cérélia asserts, shows purchasing decisions by retailers are informed by customer demand*".[60] Cérélia notes that the "[d]*ecision undertakes almost no analysis of retailers' ability or incentive to carry out this threat, or the competitive impact that any rebalancing would have on Cérélia and Jus-Rol*".[61]

In addition, Cérélia was critical that the CMA relied on concerns raised by retailers rather than concrete evidence, suggesting the theory of harm was more theoretical than real.[62] Cérélia argued that the CMA had evidence that contradicted the rebalancing assumption, including: that rebalancing decisions are based on what their customers want to buy and that those customers want choice; that the products are sold at different price points, with customers willing to pay a "brand premium"; that under the Groceries Supply Code of Practice, retailers must provide notice and reasons for delisting; and the fact that retailers were unable to substantiate their concerns about the merger with relevant documentary evidence.[63]

On these points, the CAT concluded that the "*CMA's analysis is entirely reasonable*".[64] The CAT noted that the retailers' stated concerns that the merger would constrain their ability to exert bargaining leverage across private label and branded products was consistent with the way the parties compete. The CAT therefore rejected Cérélia's argument that rebalancing is so costly it should be ruled out as a means of negotiating, and concluded "[w]*e do not see any irrationality in the CMA's contrary view that some such rebalancing is likely to be a more or less inevitable consequence of any unilateral increase in price of one of the merging firm's products*".[65] This conclusion is striking as there was little documentary evidence of retailers threatening to rebalance their ready-to-bake sales to exercise bargaining power, and that there were limited examples of delisting events.[66]

Second, Cérélia argued that the CMA relied uncritically on the statements of retailers, instead of adopting their views to reach its conclusions.[67] However, again the CAT sided with the CMA, concluding:

"[h]aving reviewed both Cérélia's and the CMA's analyses of the retailer evidence, we do not agree that the CMA misunderstood or misrepresented these views in reaching its conclusions in the Decision. As we have concluded above, there is a clear and highly plausible link between a retailer's concern with loss of bargaining power and an SLC effect, and, whilst the CMA reminded us that there was no definitive hierarchy in the categories of evidence that it should take into account, it is legitimate for the CMA to take serious account of the views of customers who would be affected by a Merger."[68]

The CAT's conclusion on whether further evidence is required is also worth highlighting:

"Had the CMA's enquiries evidenced more, or more concrete, examples of retailers actually threatening to shift shelf space allocations, that would of course have provided further support for the CMA's SLC Finding. But the relative absence of such concrete evidence, when viewed in the commercial context described in the Decision, does not support Cérélia's contention that the retailer's statements about bargaining were unreliable or that the CMA's conclusions were irrational."[69]

Third, Cérélia argued that the CMA failed to properly assess the relative importance of alternative competitive threats, mainly the ability of alternative private label suppliers (Bells and Henglein) to displace the parties, particularly as substantial spare capacity was available and that the CMA did not adjust their assessment when Bells agreed a large new private label contract with a major retailer.[70] Interestingly, it appears to us that the CAT had some sympathy with Cérélia's argument. Given the diverse mix of factors taken into account when considering Bell as an effective competitor, the CMA might have reached a different SLC outcome and that "[i]*t was open for the CMA to have done more to explore whether any given loss of Cérélia's PL volume to a rival PL supplier would (if credible) have been sufficient to provide an effective competitive constraint on Cérélia's pricing of PL products, thereby placing less emphasis on simple market share considerations*". However, the CAT also highlighted that "*the CMA is entitled to considerable discretion when making this assessment*" (emphasis added). The CAT also agreed with Cerelia's argument that the CMA should be considering the aggregate constraint offered by both Bells and Henglein. However, since the CMA's assessment was not "*obviously irrational or wrong*", it did not change the CAT's conclusion.[71]

To us, this case highlights, in the CAT's words, the "*considerable discretion*" that the CMA is allowed to exercise, even where it has limited economic evidence and instead relies on the views of third parties (in this case the grocery retailers). This also reinforces the high bar for getting a CMA decision overturned via judicial review, as the CMA just has to show that its approach was not "*obviously irrational or wrong*".

6 Conclusions

The developments during 2022/23 highlight that UK merger control is interventionist and the merging parties and their advisors need to be mindful of the associated risks. This includes both the risk, or more accurately the likelihood, of the CMA investigating unnotified mergers and requiring divestments if there are competition issues. The veterinary sector investigations and divestments – and recently announced market review – highlight the real risks of buy and build strategies.

Similarly, trends in merger decision outcomes at both Phase 1 and 2 suggest a trend towards greater intervention, although certain issues/theories of harm continue to be prevalent drivers of merger control risks.

In addition, the CMA – like many competition authorities globally – are cautious when accepting remedies, and there appears to be divergence between the CMA and the Commission as regards their views as to the suitability of behavioural remedies in relation to vertical mergers. The *Microsoft/Activision* case is very striking in this regard.

Finally, the high bar to judicial review of merger decisions continue to raise the stakes of adverse CMA decisions, a point particularly noteworthy in the case of *Cérélia/Jus-Rol*.

Endnotes

1. See Jules Duberga, Ben Forbes & Mat Hughes, AlixPartners UK LLP, "Assessing the Risk of a Merger Being Found to Be Anti-Competitive in the UK", *ICLG – Merger Control* 2023.
2. https://www.gov.uk/cma-cases/veterinary-services-market-for-pets-review
3. https://www.gov.uk/cma-cases/medivet-group-limited-slash-multiple-independent-veterinary-businesses-merger-inquiries
4. https://assets.publishing.service.gov.uk/media/63ef601cd3bf7f62f1a4fe16/IVC_-_Summary_of_phase_1_decision.pdf
5. https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response
6. https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response
7. This excludes 94 decisions where the transaction was found not to qualify for investigation and nine mergers that were abandoned. See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1176626/Merger_outcomes_to_July_23.ods
8. This excludes two water mergers subject to automatic reference.
9. A substantial proportion of qualifying mergers are considered at a Case Review Meeting ("CRM"), which assesses whether the merger potentially warrants detailed Phase 2 investigation. The number of qualifying mergers considered at a CRM are: 150/400 from 2010/11 to 2015/16 (38%); 83/172 from 2016/17 to 2018/19 (48%); and 89/183 from 2019/20 to 2022/23 (49%).
10. See "Guidance on the CMA's mergers intelligence function", CM56revised, December 2020. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947380/CMA56_dec_2020.pdf
11. In particular, it has specifically added a new section as regards mergers that may reduce dynamic and potential competition. See "*Assessing the loss of potential and dynamic competition under UK and EC Merger Control: prediction is difficult especially if it's about the future*", *Global Legal Insights, Merger Control Laws and Regulations 2021*, Ben Forbes, Camelia O'Brien, and Mat Hughes.
12. These two cases are *Facebook/Giphy* (2020) and *Microsoft/Activision* (2022).
13. This category includes cases where the parties' combined shares under 40% but the CMA nonetheless found an SLC from horizontal unilateral effects due to the parties' being close competitors. These two cases are *JD Sports/Footasylum* (2019) and *Ardonagh/Bennetts* (2020).
14. There has been only one Phase 1 case since 2010 in which a SLC was found solely from the loss of potential

competition – namely *Sony Music Entertainment/AWAL and Kobalt Neighbouring* (2021), where the CMA was concerned that the merger would remove a fast-growing and disruptive firm from the market for wholesale distribution of recorded music in the UK.
15. 113/212. In some of these cases, additional SLCs were also found relating to the loss of potential competition (five cases), vertical effects (11 cases) coordinated and vertical effects (one case).
16. 85/212 cases.
17. In some of these cases, competition concerns were identified based on the merged entity's local market share rather than the number of competitors.
18. A noteworthy case in relation to conglomerate effects is *Information Resources Inc./Aztec* (2014). The CMA's first clearance decision was successfully appealed to the Competition Appeal Tribunal, but the CMA cleared the merger again at Phase 1. The CMA has also more recently at Phase 1 considered conglomerate effects in *Sabre/Farelogix* (2019), *ION Investment Group/Broadway Technology* (2020), *S&P Global/HIS Markit* (2021), although the CMA did not find a SLC on that basis.
19. The other three cases being *BT/EE* in 2015, ICE/Trayport in 2016, and *Liberty Global/Telefonica* in 2020. While *BT/EE* and *Liberty Global/Telefonica* were both cleared unconditionally at Phase 2, in ICE/Trayport the CMA required full divestment, which is particularly noteworthy as the parties did not notify the merger. Note that *Tesco/Booker* (2017) was predominantly referred due to vertical competition concerns, with this merger being cleared unconditionally at Phase 2. *Microsoft/Activision Blizzard* was also mostly a vertical effects merger, although there was also a potential competition theory of harm
20. Available at *Ex-post evaluation of vertical mergers* (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1074008/E.CA_Report_on_Ex-post_Evaluation_of_Vertical_Mergers_-_public_version__stc_06.05.22_.pdf).
21. A SLC based on coordinated effects was only found for online groceries in those local areas not serviced by Ocado. See *Sainsbury's/Asda*, Phase 2 Final Report, paragraph 81.
22. See Yorkshire Purchasing Organisation/Findel Education (2020).
23. See further "The failing firm defence during and post-COVID-19: policy and the evidence required", *Competition Law Journal Volume 21 Issue 1* (2022) by John Bruce, Mat Hughes and Gemma Smith.
24. For example, in *Takeaway.com N.V./Just Eat Plc* (2020), the CMA determined that Takeaway, which was not currently operating in the UK, was unlikely to enter the UK absent the merger and therefore there was no loss of actual or potential competition. See the *Takeaway.com N.V./Just Eat Plc* (2020), paragraphs 48–49.
25. In *Stena/DFDS*, OFT decision of 8 February 2011 (paragraphs 164–167) and *Ratcliff Palfinger/Ross & Bonnyman Limited*, OFT decision of 18 February 2011 (paragraphs 106–112), one of the merging parties rationalised its operations such that it exited certain markets and only sold part of its businesses to the purchaser. At Phase 1 in each of these cases, the OFT's SLC finding was based on the counterfactual evidence that these exits would not otherwise have occurred in the absence of the merger.
26. In *Linergy/Ulster Farm* (2016), at Phase 2, the CMA concluded that, despite a memorandum of understanding signed in 2012 setting out the parties' intention to merge, the parties would have taken the same decision to close one plant and not to open another. Therefore, under both the counterfactual situation and the actual situation at the time of the merger, the parties did not operate competing rendering plants. The CMA therefore concluded at Phase 2 that the merger did not result in any horizontal overlaps between the parties (see further paragraphs 5–18).
27. "The risk of a Phase 2 reference in UK merger control: lessons and future direction", *Global Legal Insights, Merger Control 2019*, Ben Forbes & Mat Hughes.
28. For example, in its Phase 1 decision in *A.G.Barr/Britvic* (2013), the OFT found a SLC notwithstanding that the merged business had a combined market share of 10–20 per cent in the supply of carbonated soft drinks to the "off-trade" (i.e. sales via retailers for consumption at home). This merger was cleared unconditionally at Phase 2. The CMA's adverse Phase 2 decision in *JD Sports/Footasylum*, discussed above, is also noteworthy.
29. The reason for the ranges of lower bound, midpoint and upper bound is that precise market shares are typically redacted from published CMA decisions but presented in ranges.
30. CMA Merger Remedies Guidance, paragraph 3.5. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764372/Merger_remedies_guidance.pdf
31. Speech by Olivier Guersent, "EU Competition policy: Plus ça change…", *Fordham*, New York, 22 September 2023. Available at: https://competition-policy.ec.europa.eu/system/files/2023-09/20230922_Fordham_Olivier-Guersent_speech.pdf
32. https://globalcompetitionreview.com/article/eu-adopting-rigorous-approach-airline-remedies-guersent-says#:~:text=EU%20adopting%20%E2%80%9Crigorous%20approach%E2%80%9D%20to%20airline%20remedies%2C%20Guersent%20says,-Victoria%20Ibitoye&text=Airlines%20hoping%20to%20see%20their,entry%2C%20Olivier%20Guersent%20has%20indicated
33. https://www.gov.uk/cma-cases/breedon-group-plc-cemex-investments-limited
34. See for example, https://www.gov.uk/government/news/cma-accepts-price-caps-on-west-coast-rail-lines
35. https://www.gov.uk/cma-cases/imerys-goonvean-merger-inquiry-cc
36. Speech by Olivier Guersent, "EU Competition policy: Plus ça change…", *Fordham*, New York, 22 September 2023.
37. *Microsoft/Activision*, Final Report, paragraph 2.17. Available at: https://assets.publishing.service.gov.uk/media/644939aa529eda000c3b0525/Microsoft_Activision_Final_Report_.pdf
38. *Microsoft/Activision*, Final Report, paragraphs 2–3.
39. *Microsoft/Activision*, Final Report, paragraph 4.
40. *Microsoft/Activision*, Final Report, paragraph 5.
41. See https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705
42. *Microsoft/Activision*, Final Report, paragraph 6.
43. *Microsoft/Activision*, Final Report, paragraph 7.
44. *Microsoft/Activision*, Final Report, paragraphs 8–9.
45. Competition Appeal Tribunal, "Summary of application under Section 120 of the Enterprise Act" 2002, Case No. 1590/4/12/23, available at: https://www.catribunal.org.uk/sites/cat/files/2023-05/2023.05.25_Microsoft_Activision_Rule_14_summary_final.pdf
46. *Microsoft/Activision Blizzard* Merger Inquiry – Final Decision on possible material change of circumstances or special reason for deciding differently under section

41(3) of the Enterprise Act 2002, dated 25 August 2023, page 4. Available at: https://assets.publishing.service.gov.uk/media/64e85b07db1c07000d22b40e/MS_A_-_Final_Decision_on_possible_MCC_and_SR__PUBLICATION_VERSION_.pdf
47. *Microsoft/Activision Blizzard* Merger Inquiry – Final Decision on possible material change of circumstances or special reason for deciding differently under section 41(3) of the Enterprise Act 2002, paragraph 9.
48. *Microsoft/Activision Blizzard* Merger Inquiry – Final Decision on possible material change of circumstances or special reason for deciding differently under section 41(3) of the Enterprise Act 2002, paragraph 10.
49. https://www.gov.uk/government/news/new-microsoft-activision-deal-addresses-previous-cma-concerns-in-cloud-gaming
50. *Cérélia/Jus-Rol* (2023), Final Report. Available at: https://assets.publishing.service.gov.uk/media/63ce8119d3bf7f3c4df5999b/Final_Report_FINAL.pdf
51. *Cérélia/Jus-Rol* (2023), Final Report, paragraph 37.
52. *Cérélia/Jus-Rol* (2023), Final Report, paragraph 40.
53. *Cérélia/Jus-Rol* (2023), Final Report, paragraph 45.
54. *Cérélia/Jus-Rol* (2023), Final Report, paragraphs 46–47.
55. *Cérélia/Jus-Rol* (2023), Final Report, paragraphs 52–53.
56. *Cérélia/Jus-Rol* (2023), Final Report, paragraph 54.
57. *Cérélia/Jus-Rol* (2023), Final Report, paragraph 67.
58. 1579/4/12/23 *Cérélia Group Holding SAS and Cérélia UK Limited v Competition and Markets Authority* Judgment (henceforth "Cérélia v CMA"). Available at: https://www.catribunal.org.uk/sites/cat/files/2023-09/157941223%20C%C3%A9r%C3%A9lia%20Group%20Holding%20SAS%20and%20C%C3%A9r%C3%A9lia%20UK%20Limited%20v%20Competition%20and%20Markets%20-Authority%20-%20Judgment%20%201%20Sep%202023.pdf
59. *Cérélia v CMA*, Judgment, paragraph 102(1).
60. *Cérélia v CMA*, Judgment, paragraph 102(1).
61. *Cérélia v CMA*, Judgment, paragraph 103.
62. *Cérélia v CMA*, Judgment, paragraph 103.
63. *Cérélia v CMA*, Judgment, paragraph 108.
64. *Cérélia v CMA*, Judgment, paragraph 125.
65. *Cérélia v CMA*, Judgment, paragraph 131.
66. *Cérélia v CMA*, Judgment, paragraph 146.
67. *Cérélia v CMA*, Judgment, paragraph 146.
68. *Cérélia v CMA*, Judgment, paragraph 154.
69. *Cérélia v CMA*, Judgment, paragraph 158.
70. *Cérélia v CMA*, Judgment, paragraph 161–162.
71. *Cérélia v CMA*, Judgment, paragraph 171.

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