2021 OUTLOOK

Four themes for the competition year ahead

2021

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FOUR THEMES FOR THE COMPETITION YEAR AHEAD

Recent years have seen an expansion of the role and importance of competition law, with the actions of competition authorities being front page news. And while many aspects of normal life have been put on hold during the pandemic, competition law will continue to make the headlines in 2021. We have picked out four themes to be aware of this year: the impact of Brexit for global mergers; the revolution in digital antitrust; the impact of the General Court's Judgment in *CK Telecoms*; and the juggernaut that is the Trucks litigation.

1. BREXIT AND THE CMA

Not for the first time, the impact of the UK's departure from the European Union is featuring prominently in debates about the outlook for competition policy in Europe. Brexit is now a reality and in 2021 the effect will be felt most keenly in the sphere of merger control. With the end of the transition period, the Competition and Markets Authority (CMA) will now gain jurisdiction over a range of mergers that would previously have been the exclusive purview of the European Commission (EC). This means that mergers that materially affect consumers in the UK as well as the EU will now be separately investigated by both the CMA and EC. What does this mean for businesses?

At first blush the impact may appear limited. After all, many companies operate in globalised markets that require them to seek clearance in multiple jurisdictions when looking to merge. To take just one current example, the London Stock Exchange Group's acquisition of data provider Refinitiv – which the EC conditionally cleared this month – had to be cleared by competition authorities in more than a dozen jurisdictions around the world. Will adding one more to the to-do list really make that much difference?

Unfortunately for many businesses, the answer will likely be yes. The CMA has developed a reputation for taking a tough line on mergers in recent years. As the second chart below shows, more than a third of in-depth (Phase 2) merger investigations opened in the UK in the last decade have resulted in outright prohibition or abandonment, with a significant share of the remainder requiring the businesses to offer remedies (such as promising to divest certain assets) to secure clearance. And the CMA appears to have become even more interventionist of late, with eight of the 12 Phase 2 investigations it opened in the last three years leading to prohibition or abandonment; only two resulted in unconditional

clearance (see first chart below). This is a far lower success rate than businesses have achieved with the EC over the same period.

FIGURE 1 THE CMA'S TRACK RECORD ON IN-DEPTH MERGER INVESTIGATION DECISIONS

Source: Frontier Economics

Even firms that expect to secure unconditional clearance should not bank on an easy ride, as UK businesses that have survived the meat grinder of a Phase 2 CMA investigation will be all too aware. Some smaller national competition authorities are heavily influenced by (and to some extent piggyback off) probes in the US and EU when it comes to granting clearance. Companies should not expect the CMA to take a similar approach. European firms that will be encountering the CMA for the first time would do well to study its voluminous final reports on previous merger investigations and steel themselves for some tough questioning.

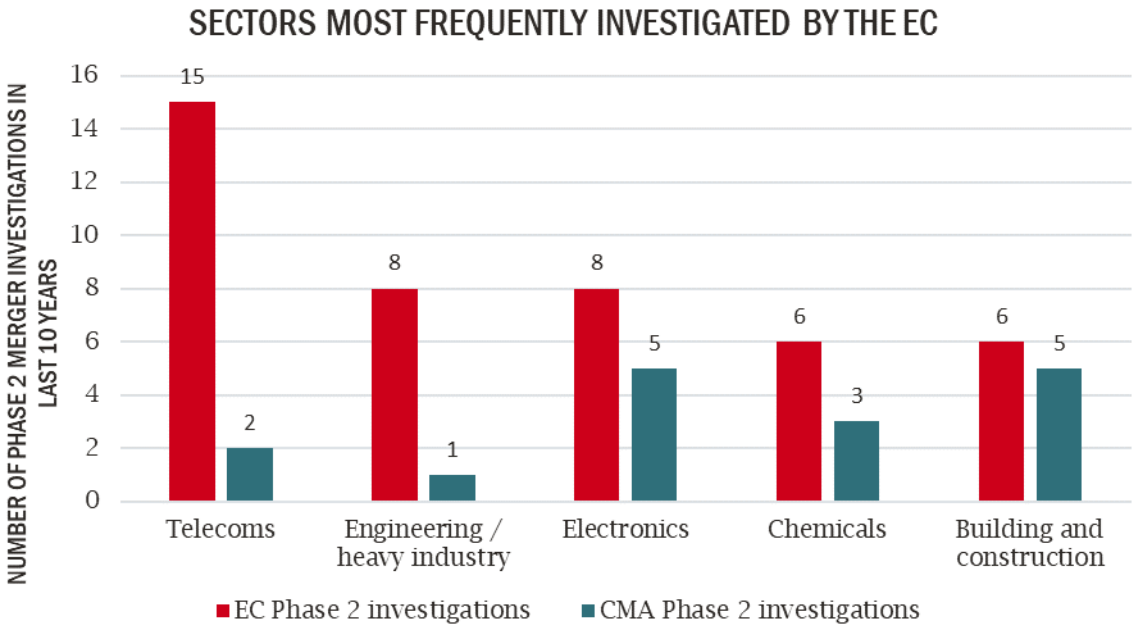
The challenges confronting businesses seeking merger clearance in 2021 could be amplified by two challenges that the CMA itself faces in adapting to its new responsibilities.

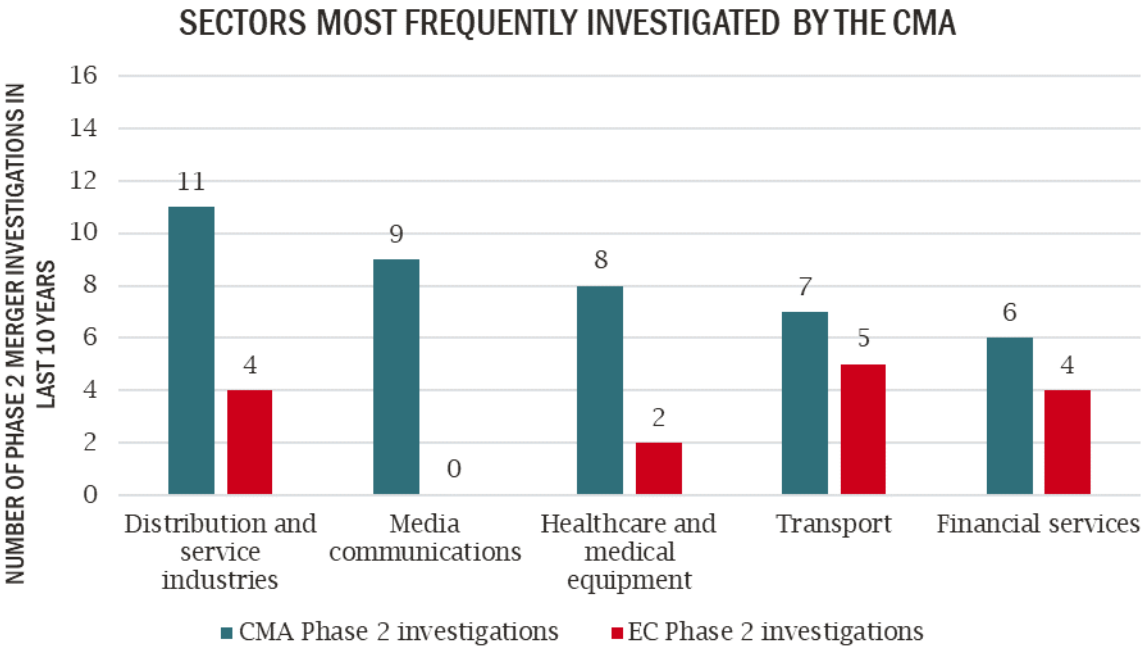
- **New processes**. The CMA has less experience than the EC when it comes to working alongside competition authorities in other jurisdictions. Over the years, regulators in Brussels have honed a number of procedures to streamline interaction with other authorities and reduce duplication of effort (such as confidentiality waivers that, with the consent of the businesses, allow competition

authorities to share information). The CMA has less experience of this regulatory ballet dance, particularly at more advanced stages of merger investigations once the question of who has jurisdiction has been resolved. While the CMA and EC will no doubt find effective ways of working alongside one another over the coming years, these processes will take time to smooth out. Businesses going up before both the EC and CMA in 2021 will be guinea pigs. They should make allowances for some inevitable inefficiency.

- **New sectors**. While the CMA has conducted investigations in a range of industries, its experience is not uniformly spread. As can be seen from the charts below, the sectors in which the CMA has most experience in merger control differ markedly from those that form the bread and butter of much of the EC's work. European businesses that have previously locked horns with the EC should not assume that the CMA will be starting with the same baseline of knowledge about how their industry operates. For example, while the EC has conducted no fewer than fifteen Phase 2 merger investigations in the telecoms sector in the last decade, the CMA has conducted just two. In one sense, this presents an opportunity: businesses may have more scope to help shape the CMA's thinking about a sector in which it has little previous experience. But it also means more risk: after all, for businesses that need to secure merger clearance in both Brussels and London, it can only be bad news if the EC and CMA reach different conclusions.

FIGURE 2 BREAKDOWN OF CMA AND EC IN-DEPTH MERGER INVESTIGATIONS BY INDUSTRY SECTOR (TOP FIVE SECTORS, 2010 – 20)





Source: Frontier Economics

With time, the CMA will no doubt master these challenges as new processes for interacting with Brussels bed in and it builds experience in unfamiliar sectors. But as the risk of short-term disruption recedes, the risk of longer-term divergence may grow. As the fraught negotiations over the level playing field between UK and EU businesses post-Brexit made clear, the UK is keen to forge its own 'independent' path in competition policy, which may lead London and Brussels to drift apart after decades of close alignment.

The speed and direction of this divergence is uncertain: as we explored in a recent article, the future path of UK competition policy remains especially unclear. However, the scope for divergence is amplified by the fact that competition policy as a whole is at a crossroads. A number of forces ranging from globalisation to decarbonisation are pushing policymakers to ask fundamental questions about what the overarching objectives of antitrust enforcement should be and how competition authorities should be trying to achieve them. The challenges arising from the digitalisation of the economy provide perhaps the most pertinent case in point…

2. DIGITAL REGULATION IN 2021 – THE DOCTOR IS IN THE HOUSE

If 2020 was the year of diagnosis for digital markets, 2021 looks set to be the year of action. However, different jurisdictions are prescribing different courses of treatment and this divergence is especially evident between Brussels and London.

At the European level, last year the EC invited views on its proposals for the ex ante regulation of "very large online platforms acting as gatekeepers" and a New Competition Tool (NCT) that took inspiration from the CMA's market investigation regime. This culminated in the publication of the EC's proposals for the Digital Markets Act (DMA) on 15 December 2020 – an early Christmas present – which laid down some ground rules for digital markets. Squarely in the EC's cross hairs are so-called gatekeeper platforms, although plans to introduce the potentially far-reaching NCT have now been scrapped.

2020 also saw the conclusion of the UK CMA's market study into online platforms and digital advertising, followed later in the year by the publication of the Digital Markets Taskforce's (DMT) advice to the UK government on potential regulatory measures for digital firms.

DOCTOR, DOCTOR, GIVE ME THE NEWS

The core of the EC's proposals in the DMA is a list of do's and don'ts for gatekeeper platforms – with a gatekeeper defined as a firm operating "a core platform service which serves as an important gateway for business users to reach end users", "has a significant impact on the internal market" and "enjoys an entrenched and durable position". For the first two of these criteria, the DMA employs quantitative thresholds that, if met, lead to a presumption that these criteria are satisfied – for example, annual EEA turnover of more than €6.5 billion (or a market capitalisation above €65 billion) and an active customer base of more than 45 million end users and 10,000 business users.

One set of measures (Article 5) is aimed at ensuring that users/businesses are free to minimise their use of gatekeeper platforms – for example, via rules around tying behaviour and prohibiting automatic log-ins across platforms. Another set of measures (Article 6) is focused more on establishing a level playing field, including via measures relating to self-preferencing, interoperability and switching, as well as the use of/access to data.

In the UK, the DMT's prescription for digital markets is centred on establishing a Digital Markets Unit (DMU) to oversee a regulatory framework for digital firms designated as having Strategic Market Status (SMS). The main components of this framework are summarised in Figure 3 below.

FIGURE 3 SUMMARY OF CMA'S PROPOSALS FOR THE DIGITAL MARKETS UNIT

The DMT's focus has been on establishing the broad parameters for this regime – including the core principles of the Code of Conduct (namely, fair trading, open choices and trust/transparency) – but no specific measures have been put forward.

What is clear from the proposals, however, is that the DMU will have wide discretion as to who is captured by the regime, what measures can be used and how these are implemented. For instance, the DMT's definition of SMS relates to "substantial, entrenched market power… providing the firm with a strategic position", but this leaves much scope for interpretation. It also begs the question of how this relates to the

traditional concept of dominance, which is typically characterised as the ability to act independently of competitors and customers.

SAME PATIENT, DIFFERENT PRESCRIPTIONS

A compare-and-contrast of the DMA and the DMU shows significant differences between the two regimes. Overall, the UK's approach appears to be more targeted at specific firms, more restrictive and allows for more discretion, while the DMA captures a broader range of firms but is generally less interventionist (one could liken this to narrow vs. broad spectrum antibiotics).

The fact that the DMU's requirements go beyond the EC's proposals is, as explored in the first theme above, in line with the CMA's general direction of travel on enforcement (which is also evident from its updated Merger Assessment Guidelines published in December).

There are a few key differences between the regimes worth highlighting:

- **Different philosophies**. The DMA's focus is on defining the "rules of the road" for digital gatekeepers to follow, with the aim of ensuring that these markets are contestable and the gatekeepers can be challenged. By comparison, the principal aim of the DMU appears to be to tackle proactively the presence of gatekeepers themselves – in particular, by addressing "the root cause of market power" (CMA, "A new pro-competition regime for digital markets – advice of the Digital Markets Taskforce", December 2020, paragraph 4.60).

- **In-scope firms**. The DMU's regime is more targeted at specific digital firms – its report states explicitly that it expects only a small number of companies to fall under the SMS designation – and the rules will be tailored to each one. By contrast, the DMA's gatekeeper criteria are based primarily on absolute size rather than market power, so a potentially wide range of digital firms could fall within scope. Moreover, the rules set out in the DMA's Articles 5 and 6 would apply equally to all gatekeepers, irrespective of size or industry.

- **Remedies**. The DMA allows the EC to impose both behavioural and structural remedies, but these are limited to repeat offenders who have shown systematic non-compliance over an extended period of time. On the other hand, the DMU is likely to be able to impose more far-reaching remedies, in particular through the pro-competitive interventions that form a core part of its proposed toolkit. On top of this, the CMA would retain the significant powers already available to it through its market investigations regime. In this sense, the UK could be seen as instituting a "market investigations plus" regime for digital firms.

COULD THIS MEAN "DIGITAL BREXIT"?

What then are the implications of the divergence between the DMA and the DMU?

Although we are unlikely to see an immediate impact in 2021, not least because these plans are still at the proposal stage, one may observe changes in the future in the way large digital firms navigate different regimes, especially the DMU.

One logical implication is that digital businesses may look to roll out new products outside the UK first, for example in the EU, to test both the commercial and regulatory waters before launching those products in

the UK. This may ultimately mean that digital innovation in the UK will lag behind other EC countries, so one could characterise this as "digital Brexit".

This hypothesis obviously remains to be seen, but it suggests some caution may be required to make sure that any regulatory medicine does not leave a sour taste in the mouth.

3. LANDMARK CK TELECOMS JUDGMENT CASTS LONG M&A SHADOW

In 2016 the European Commission blocked *CK Telecoms'* bid to purchase O2 UK in a £10.25bn deal, over concerns that customers in the UK would have less choice and pay higher prices. On 28 May of this year, the General Court of the EU annulled the Commission's decision, following an appeal by *CK Telecoms*. As the first major overturning of the Commission's interpretation of the Commission's Horizontal Merger Guidelines, it poses a serious challenge to the approach taken by the EC when assessing mergers which do not lead to or strengthen a dominant position (often called merger gap cases).

The ruling strongly indicates that the EC has not applied correctly the legal test required to assess whether such mergers lead to a significant impediment of effective competition (SIEC). This is an important contribution to a long-standing debate over the correct legal test that should be applied in these cases – and, by implication, how strong the economic evidence must be to conclude that a merger results in an SIEC. The Court's decision seems to suggest that the threshold in a merger gap case should not be markedly different from the one applicable in mergers leading to or strengthening a dominant position.

ROBUST EVIDENCE NEEDED

The standard of proof indicated by the ruling is higher than that which, in the view of the General Court, the EC applied in *CK Telecoms*. According to the court, the Commission needs to rely on robust evidence indicating a strong probability that the adverse impact on competition arising from a merger is significant.

- The mere reduction of competitive pressure on the merging parties is not sufficient to conclude that a merger leads to a SIEC. Eliminating the competitive pressure of a small player does not by itself lead to a SIEC, even if the player is pricing competitively and winning market share. In order for such a removal to raise concerns, the Commission needs to show that the small player was particularly aggressive and forcing rivals to respond. Similarly, the Court finds that it is not enough to show that merging parties are close competitors – this is true to a greater or lesser extent in all four-player markets – the EC had failed to show that they were particularly close.

- It is not enough only to consider the factors which create an incentive to increase prices after a merger (so-called 'upward pricing pressure' or UPP analysis) – as this type of analysis will always forecast some increase in prices. The Commission also needs to take into account how merger efficiencies impact prices, and how the responses of competitors might counteract price increases over the medium term.

- It is not enough for a merger to have a negative impact on competitors in order to find a SIEC. The Commission needs to demonstrate that this will feed through to competition and customers, and that the effect is significant. The Court considered that the EC had failed to show that this would be the case if the merged entity were to bar its rivals from accessing its network.

WAITING FOR THE ECJ

What will this mean for mergers in 2021 and beyond?

Perhaps not much will change. The EC has appealed the ruling so we may need to wait for the final decision from the ECJ. Furthermore, the judgment leaves a number of areas unresolved that allow the Commission to retain some level of discretion in applying the SIEC, even once the General Court's ruling has been taken into consideration. For example, the Court found that the EC had failed to meet the evidentiary threshold for significance in this case. But it did not specify what is and what is not significant. Similarly, the Court ruled that there must be a strong probability of an adverse effect in order to reach a SIEC finding, but it was not more specific.

And yet, the cat is out of the bag. Merging parties will no doubt be raising questions if they find that the evidence presented and the standard of proof considered by the Commission in the year ahead do not meet the criteria laid down by the General Court. The EC may need to consider these in order to avoid further court challenges. In this context, the Commission may find it particularly challenging to meet the standard set out in the *CK Telecoms* ruling when tackling perceived concerns in the digital sector.

DIGITAL START-UPS A BIG TEST FOR EC APPROACH

Showing that the purchase of a small start-up has an adverse effect on competition may be hard enough for the Commission, as such a conclusion often relies on reaching a view on what the start-up may or may not do in the medium term. Demonstrating that a future outcome is likely to arise with a strong probability will become even harder. Furthermore, the Commission may find it more difficult to dismiss the impact of merger efficiencies or the countervailing impact resulting from rivals' responses in the medium term. For example, any evidence suggesting that the acquisition of a small competitor would strengthen the ecosystem of a digital platform would now seem more open to challenge.

The decision of the General Court in *CK Telecoms* indicates that it would not be enough for the Commission to consider the efficiencies driving, or implied by, the strengthening of that ecosystem, e.g. by using data gathered in one market in another market. The EC would also have to take into account any response the merger may prompt by other digital players with their own ecosystems.

These are areas on which the Commission has traditionally placed limited weight, but the *CK Telecoms* decision suggests they cannot not be considered separately when assessing concerns about the digital sector. The General Court has therefore set a higher bar in terms of standard of proof which the EC may have difficulties meeting, in particular with regards to mergers in the digital sector. In light of this, it is perhaps no coincidence that the EC is considering applying a different legal framework to the digital sector (outside of merger control) through the Digital Service and Markets Acts.

4. TRUCKS CASES DRIVING FORWARD – BUT TO WHAT DESTINATIONS?

The coming year may prove to be a milestone in the development of pan-European competition litigation, with damages cases following on from the European Commission's Article 101 TFEU infringement finding in *Trucks* moving towards key judgments in a number of jurisdictions. The widely dispersed nature of truck manufacturers' customer bases, coupled with the EEA-wide and long-lasting nature of the infringement, has led to an unprecedented volume of cases across a wide range of European countries with

varying levels of experience in competition litigation. Significant strides forward are expected in 2021 for cases that have been filed in some of the leading venues for competition litigation, such as the UK and the Netherlands. Trials have been timetabled for the first wave of proceedings in the UK, beginning in early 2022, and the recent Supreme Court judgment in *Merricks/Mastercard* paves the way for two applications for collective actions to be heard. In the Netherlands, the Amsterdam District Court is expected to issue interim rulings on certain topics in the first batch of proceedings in late February. In other jurisdictions, such as Spain and Germany, preliminary judgments have already been handed down in some cases and more are expected, together with appeal judgments, in 2021.

These examples highlight the marked variation in how *Trucks* cases are progressing, which is largely a reflection of the diversity in the legal architecture for competition litigation and the level of experience that courts have with these types of cases. For example, there are notable differences across jurisdictions in:

- **Approaches to case management**: standard timelines for submitting evidence can differ by several years. Case sequencing can also vary significantly due to the nature and scope of disclosure regimes (with disclosure typically occurring before the submission of economic evidence in the UK and a few other countries, and after it in many continental jurisdictions). There is also considerable variation in when and how often expert evidence can be presented. In Spain, it can be a one-shot game, whereas in Germany a staggered approach is often possible and several iterations can be submitted. These differences have not been lost on judges involved in *Trucks* cases, who appear actively to be monitoring developments elsewhere. For example, judges from the Netherlands and Spain have attended UK case management conferences.

- **The role of expert evidence**: in some jurisdictions, economic experts for the parties to the proceedings typically make submissions that serve as inputs for court-appointed experts, whereas elsewhere they are viewed as expert witnesses in their own right. There is also significant variation in the level of experience of national courts and their willingness to engage with economic evidence. Courts in countries with a long history of competition damages cases, such as the UK, Germany and the Netherlands, tend to be familiar with the relevant concepts and can readily deal with them. In contrast, in less experienced jurisdictions, such as Spain, Italy and countries in eastern Europe, courts may face a steeper learning curve.

THE ROAD AHEAD

As *Trucks* cases continue to advance during 2021, the impacts of these differences are likely to become clearer. This could raise a number of challenging questions for the European competition litigation community to consider, including:

- **What impact will variation in approaches to economic evidence have on judgments in different jurisdictions?** Since the introduction of the European Commission's practical guide to quantifying harm in competition litigation cases in 2013 and the EU Damages Directive in 2014, there has been convergence in the standard types of economic analysis put forward in competition litigation cases. However, there remains significant scope for variation in precisely how these standard types of economic analysis are applied, and ultimately the devil is in the detail. This issue, coupled with variation in the level of experience of courts in handling economic evidence, suggests that there may scope for divergence in how such evidence is interpreted. This could potentially lead to

judgments on similar issues differing from one jurisdiction to another. There is recent form in this regard: in countries with regional court systems, such as Spain, different courts have already issued significantly dissimilar rulings on *Trucks* cases.

- **How will courts deal with economic evidence in cross-jurisdictional cases?** *Trucks* cases have been filed in a number of jurisdictions, including Germany, the Netherlands and the UK, relating to truck purchases in other countries. Such cross-jurisdictional cases may necessitate economic analysis relating to the country where the truck was bought rather than the jurisdiction in which the claim is brought. To the extent that cases are also brought in the country of purchase, this provides scope for divergence across jurisdictions in the economic analysis that is considered by courts in relation to the same country of purchase, and it is unclear whether or how such inconsistencies will be resolved.

While these questions may arise most imminently for the *Trucks* litigation, the answers could determine the general development of competition litigation regimes across Europe in the longer term, making 2021 arguably one of the most important years for the European competition litigation community since the introduction of the Damages Directive in 2014.

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