

## CMA Policy: UK Competition Authority Asserts Itself in Anticipation of Brexit

As Roche (SWX: ROG), Illumina (ILMN) and Salesforce (CRM) have recently learned firsthand, UK antitrust enforcers are flexing their power, anticipating a new post-Brexit prominence in reviewing mergers and policing competitive conduct.

For years the country's Competition and Markets Authority (CMA) deferred to the European Commission on the most significant antitrust matters. But in the past 12 months the CMA has emerged as a regulator to be reckoned with, increasingly on par with its counterparts in Brussels, Beijing and Washington, D.C.

And the CMA is further ramping up its efforts in light of the UK's scheduled October 31 departure from the European Union, said Caitlin Seymour, a spokesperson for the enforcer.

“The UK's exit from the EU presents opportunities for the CMA to secure better outcomes for UK consumers as we expect to take on a bigger role on the world stage,” she told *The Capitol Forum*. “Ensuring that we are ready for the new arrangements, and to take advantage of these opportunities, continues to be a key priority for us.”

Even in advance of Brexit, the CMA has surprised deal lawyers and investors through its aggressive approach to a number of high-profile deals.

In June, the CMA opened an in-depth Phase II investigation into Illumina's proposed \$1.2 billion acquisition of gene-sequencing rival Pacific Biosciences (PACB). Less than a month later, the CMA released a pointed litany of concerns about the deal, preliminarily rejecting the companies' argument that Illumina's short-read technology doesn't compete with PacBio's long-read instruments.

Also in June, Swiss pharmaceutical giant Roche disclosed that the CMA had issued an interim order preventing it from integrating its planned \$4.3 billion buyout of gene therapy start-up Spark Therapeutics (ONCE). The move appeared to catch the companies off guard, and Spark [said](#) in a securities filing disclosing the order that it believed the CMA lacked jurisdiction over the merger.

And on July 31, the CMA served an enforcement order preventing Salesforce (CRM) from integrating its \$15.7 billion acquisition of Tableau Software (DATA), even though the deal had already won antitrust clearance in the U.S. The companies closed their merger the following day, but said they would hold their businesses separate until the CMA concludes its inquiry.

The CMA's new assertiveness could lead to more scrutiny of "killer acquisitions" in which market leaders attempt to buy smaller, nimbler rivals, hampering innovation, antitrust lawyers and economists said.

And more broadly, Brexit should provide the UK enforcer new latitude to chart its own merger enforcement course, the practitioners said.

The CMA "will now have an element of freedom to look at mergers in a different way," said Sarah Long, a partner at Euclid Law in London, adding that the CMA could ultimately move away from the European Commission's approach in some key respects.

"We're not going to see overnight the CMA taking wildly different views from the commission," Long said. "But I think that over time what we might see is a policy drift towards other jurisdictions, for example the U.S."

**Political impact.** The CMA's current Chair, Andrew Tyrie, came to the authority in June 2018 from the UK Parliament, where he was a Conservative member for 20 years. Tyrie is also the former Chairman of the UK's Treasury Select Committee as well as the Parliamentary Commission on Banking Standards.

But Tyrie's freedom to chart out a more enforcement-minded path post-Brexit won't be unlimited, as new UK Prime Minister Boris Johnson could restrain the CMA from becoming too aggressive.

Johnson fired moderate officials in the cabinet shortly after taking office July 23, replacing them with Brexit hardliners, who tend to be more business friendly. And if he follows through on his pledge to leave the EU—with or without a renegotiated withdrawal agreement—Johnson would be in the position of trying to attract European firms to his nation's shores, and could be loath to see an enforcement-minded CMA interfere with those efforts.

Johnson's office didn't respond to requests for comment.

Businesses will have to pay heed to the regulator if they wish to participate in the world's fifth largest national economy. Although the UK market is smaller than the EU's, the country's capital, London, is a leading financial and trade center. The UK also is home to some of the world's biggest companies, including GlaxoSmithKline, Vodafone, Unilever, HSBC Holdings and BP.

The CMA's drive to establish itself as a distinct entity from the EC's Directorate-General for Competition (DG COMP) could create added complexity for business, said Sir Jonathan Faull, formerly the commission's most senior British official.

“My hope is that London and Brussels will work hard together to avoid unnecessary divergence, but there may be a deliberate policy shift,” said Faull, now chair of European public affairs at Brunswick. “So many transactions will have an impact on both markets, and you don’t want to have response X in one place and response Y in another.”

Merging companies should prepare for higher costs resulting from separate filings with the CMA and the commission, and account for the two regulators’ differing review periods, practitioners said.

**Timing uncertainty.** Ultimately, the CMA’s post-Brexit path probably will depend on the conditions and timing of its departure from the EU. The uncertainty surrounding Brexit has forced competition lawyers to prepare clients contemplating mergers for three scenarios, said a London-based lawyer who wished to remain anonymous: the UK leaves under the current terms; the country makes a hard break; or it decides to stay in the EU.

This uncertainty is weighing on a number of high-profile pending mergers, including U.S. pharma giant AbbVie’s (ABBV) \$63 billion June 25 agreement to acquire rival Allergan (AGN).

The companies will notify the CMA of their proposed merger “only in the event of any exit by the United Kingdom from, or suspension or termination of its membership in, the European Union such that a United Kingdom governmental entity has jurisdiction under any antitrust law to review the transaction,” Allergan said in a preliminary proxy statement filed Monday.

**Power to investigate.** Under UK law, CMA enforcers have the power to begin a merger investigation on their own initiative and then refer it to an in-depth Phase II review even if the parties haven’t notified them of the deal. The CMA can demand remedies on transactions that have closed and unwind anticompetitive mergers it concludes are unfixable.

Alan Davis, a partner at Pinsent Masons in London, said the UK has become stricter on merger cases recently, especially when it comes to non-notified deals, to test their skills in demonstrating that they can manage parallel notifications at EU and UK levels post-Brexit.

“In this regard, Brexit could have major implications for merger control in the UK,” he said.

“The existing rules, whereby firms notify the CMA of mergers on a voluntary basis, may require amendment so that the CMA can work effectively with its EU counterparts ahead of Brexit,” Davis said, adding that the CMA has proposed “mandatory merger control filings for mergers above a certain threshold, accompanied by a ‘standstill obligation,’ designed to prevent parties from proceeding with the merger prior to the CMA’s approval.”

An EU official familiar with UK-EU relations in the competition sphere said that although companies will no longer benefit from the one-stop-shop principle on antitrust review, the CMA and DG COMP could continue to cooperate through bilateral agreements or waivers issued by companies allowing information-sharing between the regulators.

**Cost and considerations.** Companies and their competition attorneys may also need to adjust their filing strategies to account for the different timetables of UK and EC enforcers. The CMA’s Phase I merger investigations have a 40 working-day deadline, whereas DG COMP has a 25 working-day schedule for its Phase I reviews. The CMA’s Phase II process is 24 weeks, whereas DG COMP’s is 90 working days, subject to extensions.

Timing isn’t the only consideration.

“Mergers for firms after Brexit will be more costly,” said Massimo Motta, a professor at the Barcelona Graduate School of Economics and the former chief economist at DG COMP. Inevitably, there will be “a duplication of work even if the approaches [of CMA and the EC] don’t differ.”

Companies should keep in mind, though, that the approaches sometimes will differ as the CMA strives to become a force in competition oversight, Long said.

If the CMA needs “to make a decision which is relevant to the UK market but potentially diverges from the commission, I think they’re going to have to be willing to do that,” she said.