

# COMPETITION & REGULATORY NEWSLETTER

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## CMA requires CHC to unwind helicopter services deal

The Competition and Markets Authority (CMA) has ordered CHC Group LLC to unwind its £10 million completed acquisition of Babcock's oil and gas offshore transportation services business. The CMA announced the decision on 1 June 2022 in its [final report](#). The decision follows an in-depth Phase 2 investigation into the four-to-three acquisition. The CMA found that the parties exerted a significant competitive constraint on one another and that the loss of that constraint would lead to a significant reduction in competition between an already limited numbers of competitors.

### BACKGROUND

In August 2021 CHC acquired Babcock's international offshore oil and gas aviation transportation business. In November 2021 the CMA referred the completed merger for a Phase 2 review. In March this year the CMA announced its [provisional findings](#) that the merger raised substantial competition concerns.

### CMA FINAL REPORT

#### COUNTERFACTUAL

On the counterfactual, the parties put forward two main arguments.

First, Babcock submitted that, prior to the offer by CHC, it had seriously considered exiting the market - the decline of the market, coupled with poor performance, had led Babcock to conclude that either a sale of its oil and gas transportation service, or a staged end to contracts, would be the best strategy to pursue. Babcock explained that since 2017, the business had been 'managed for value' with little investment, a downsizing of its fleet of aircraft and restricted participation in tenders.

The CMA rejected this argument on that basis that, whilst Babcock had seriously considered exit, this was only one of several options it was considering. On the 'manage for value' strategy, the CMA concluded that there was insufficient evidence to demonstrate that Babcock had followed this strategy: Babcock had bid for, and won, two contracts since 2017 which required investment in new capacity.

Second, the parties argued that there was no suitable alternative purchaser for Babcock's oil and gas transportation services other than CHC. On this point, the CMA concluded that the evidence suggested that there may have been other alternative purchasers if the CHC offer had not been accepted. The value of the business, and interest shown by other parties, demonstrated that Babcock could have found a less anti-competitive purchaser.

The CMA ultimately concluded that if the transaction had not gone ahead, the most likely counterfactual was that the business would have continued to operate in the relevant market in the short to medium-term - either under Babcock's ownership or that of an alternative buyer.

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## COMPETITIVE ASSESSMENT

In its assessment of the loss of competition arising from the merger, the CMA found that CHC's and Babcock's oil and gas transportation businesses imposed a significant constraint on one another. The CMA found that the parties often competed head-to-head in tenders with only one other bidder, adding that Babcock's 'manage for value' strategy did not undermine its competitive position. As regards the two other relevant market players, the CMA considered that they did not offset the loss of competition which would result from the transaction. The CMA considered that, beyond these four effective suppliers, there was no alternative which could act as a competitive constraint.

The CMA therefore concluded that the remedies package put forward by the parties consisting of partial divestiture was insufficient to prevent a substantial lessening of competition. Only full divestiture of the acquired business would be an effective remedy.

Following the publication of the final report, Kip Meek, Chair of the CMA inquiry group, [said](#):

*"Offshore oil and gas are important industries for the UK, and helicopter companies play a vital role in transporting workers safely to and from oil rigs. While the industry faces commercial challenges, UK customers continue to spend hundreds of millions of pounds on offshore helicopter services each year. Competition is vital to avoid higher prices or poorer quality, problems that ultimately increase costs to UK consumers."*

Previously in April, in [response](#) to the CMA's provisional findings, the parties submitted that the CMA had expanded the substantial lessening of competition test beyond its established boundaries, extending the concept "to cover almost any loss of competition that could arise where the number of competitors present in the market is reduced and goes from four to three".

CHC and Babcock can appeal the decision up to 29 June 2022. It remains to be seen whether they will do so.

## OTHER DEVELOPMENTS

### ANTITRUST

#### PFIZER AND FLYNN PHARMA WIN APPEAL OF ANTITRUST LITIGATION COSTS RULING

On 25 May 2022 in *Competition and Markets Authority (Respondent) v Flynn Pharma Ltd and another (Appellants) and Competition and Markets Authority (Respondent) v Pfizer Inc and another (Appellants)* [2022] UKSC 14, the Supreme Court overturned a Court of Appeal ruling and held that public bodies such as the CMA cannot be shielded from adverse costs consequences arising from cases brought to court even if they are brought in the public interest.

In December 2016 the CMA fined Pfizer and Flynn Pharma £84.2 million and £5.2 million respectively for charging excessive prices for phenytoin sodium capsules, used to treat epilepsy. That decision was overturned by the Competition Appeal Tribunal (CAT) which found that the CMA had incorrectly applied the legal test for unfair pricing and remitted the case back to the CMA. The CMA appealed to the Court of Appeal, which in March 2020 largely agreed with the CAT, quashing the fines and remitting the case back to the CMA (as reported in a [previous client briefing](#)). The CMA provisionally (re-)found that Pfizer and Flynn Pharma had charged unfair prices in August 2021 (as reported in a [previous edition](#) of this newsletter).

In March 2019 the CAT ordered the CMA to pay several million pounds in litigation costs to Pfizer and Flynn. The CMA successfully appealed the costs ruling to the Court of Appeal, prompting Pfizer and Flynn to appeal to the Supreme Court.

In its judgment upholding the appeal, the Supreme Court highlighted that there is no principle which dictates that all public bodies should enjoy a protected status with respect to costs in litigation where they unsuccessfully

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bring or defend cases in exercise of their function of protecting the public interest. Hence, it upheld the CAT's position and ruled in favour of the appellants.

## HONG KONG COURT OF APPEAL OVERTURNS COMPETITION TRIBUNAL'S DISCOUNTED RATE FOR SUBCONTRACTORS' BREACHES

On 2 June 2022 the Hong Kong Court of Appeal (CA) [ruled](#) in favour of the Hong Kong Competition Commission (HKCC) in its appeal against the Competition Tribunal's decision to discount the HKCC's recommended fines by 30 per cent where the anticompetitive conduct had been carried out by subcontractors, with no direct involvement by the respondents themselves.

The Competition Tribunal decisions under appeal were handed down in [April 2020](#) and [January 2021](#) and found certain construction and engineering contractor companies had engaged in market sharing and price-fixing in relation to specific renovation projects at two public housing estates in Hong Kong.

On appeal, the CA found that that the Competition Tribunal was wrong to reduce the relevant respondents' fines by 30 per cent solely because it was their subcontractors which had entered into the market sharing and price fixing agreements in question and the respondents had no direct participation in the cartel. This was because each party concerned was considered part of the same undertaking and should be liable for the entire penalty that is imposed on the undertaking. Despite the fact that the parties invited the CA to depart from EU jurisprudence in considering the appeal, the CA followed fairly closely the analysis adopted in the EU.

This judgment underlines the significant influence of EU jurisprudence and the importance for businesses of ensuring that their subcontractors also comply with competition law, risking high fines if they fail to do so.

## GENERAL COMPETITION

### COMMISSION PUBLISHES DG COMP 2021 ACTIVITY REPORT

On 30 May 2022 the European Commission published its [2021 annual activity report](#) for the Directorate General for Competition. EU competition policy continued to play an important role in the EU's efforts to respond to the health and economic crises resulting from the pandemic, and also supported the Commission's general objectives - namely, the 'European Green Deal', a 'Europe fit for the digital age and an economy that works for people', as well as 'the pathway out of the pandemic'.

The report notes that the Commission adopted more than 1000 State aid decisions in 2021, of which more than 675 concerned State aid granted to ease economic distress caused by the pandemic. These decisions assessed state support totalling €3.13 trillion to companies affected by the pandemic.

In terms of enforcement action, in 2021 the Commission adopted ten cartel decisions and one amendment decision, with fines totalling €1,746 million. These decisions covered financial markets, railway transport services, car emission technology, food and biofuels. It values the total estimated customer savings from cartel prohibitions and merger interventions between €10.5 billion and €17.2 billion.

In respect of mergers, the Commission adopted 396 decisions and conducted 14 in-depth investigations. Of these cases, 78 per cent were approved under the simplified notification procedure.

According to the report, the Commission also made significant progress in its review of EU competition rules and guidance, with the objective of ensuring that EU competition policy remains fit for the future and contributes to the green and digital transitions, among other things.

Nevertheless, though contributing to the European Green Deal, the digital transition and an economy that works for the people remain core objectives, the report highlights abrupt falls in the following KPIs when measured as a percentage of total State aid in the EU: (i) total State aid expenditure for environmental protection, renewables and energy savings; (ii) total State aid expenditure for broadband; and (iii) total State aid expenditure falling

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under the General Block Exemption Regulation. These abrupt falls were attributed to the economic impact of the pandemic, and efforts to mitigate its effect.

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