

COMPETITION & REGULATORY NEWSLETTER

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CMA launches initial review of artificial intelligence models

INTRODUCTION

The UK Competition and Markets Authority (CMA) has recently announced that it will start examining the impact of artificial intelligence (AI) foundation models on consumers, businesses, and the economy. The launch of this review demonstrates the CMA's appetite to be proactive in responding to the growing use of AI from a competition and consumer protection perspective, in line with the UK Government's recent proposals for an 'outcomes-based' approach to AI regulation.

BACKGROUND

Foundation models (including large language models and generative AI) have emerged in the last five years as a type of AI technology trained on vast quantities of data, which can be applied to a wide range of tasks. This includes, for example, chatbots such as ChatGPT and code writing assistants. Foundation models can also be used to automate parts of processes or workflows within organisations.

The review [announced](#) by the CMA follows the publication of the UK Government's long awaited 'Pro-innovation approach to AI regulation' White Paper, released in March 2023. In its [White Paper](#), the UK Government proposed an "outcomes-based" framework for AI regulation and asked the UK regulators, including the CMA, to examine how the innovative development and deployment of AI could be supported in line with five overarching cross-sectoral principles: safety, security and robustness; appropriate transparency and explainability; fairness; accountability and governance; and contestability and redress.

In line with the CMA's role and objectives, the CMA's review now seeks to help this "*emergent and rapidly scaling technology develop in ways that result in open, competitive markets*" in the UK. The review is intended to help create an early understanding of:

- the market for foundation models and how their use could evolve;
- the opportunities and risks which these scenarios could bring for competition and consumer protection in the UK; and
- what competition and consumer protection principles will therefore best guide the development of these markets going forward.

SCOPE OF THE CMA'S REVIEW

The focus of the CMA's review will be on the likely implications of the development of AI foundation models for the structure and functioning of competition and for consumer protection in the UK.

Specifically, the CMA has stated that it will focus on three key themes in its review:

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- **Competition and barriers to entry in the development of foundation models:** As part of this, the CMA will consider potential barriers to entry, including the extent to which there are economies of scale and other characteristics of AI foundation model development and deployment that tend towards market concentration, consolidation and integration.
- **The impact foundation models may have on competition in other markets:** Since foundation models may become an input to products and services in other markets, such as search and productivity software, the CMA will consider how the market might develop in ways which give rise to competition concerns in other product markets. As part of this work, it is likely that the CMA will examine vertical integration issues and whether large firms may be incentivised to engage in exclusionary conduct in respect of AI solutions.
- **Consumer protection:** The CMA will consider the consumer protection risks that could arise from the use of foundation models in products and services, including those arising from false or misleading information being provided to UK consumers.

The CMA has stated that it intends to examine how the markets currently work as well as how they might develop in the future, to inform the CMA's forward-looking work.

The CMA acknowledges in its launch document that there are other important questions raised by foundation models, such as copyright and intellectual property, online safety, data protection, security and more. As the CMA's view is that other authorities and/or Government are better placed to address these questions, the CMA is not proposing to focus its review on these areas.

IMPLICATIONS AND NEXT STEPS

The CMA has stated that it welcomes views and submissions from interested parties until 2 June 2023. After evidence gathering and analysis, the CMA intends to publish a report outlining its findings in September 2023.

The review is conducted by the CMA under its general review function, which enables the CMA to obtain, compile and keep under review information about matters relating to the carrying out of its functions (Section 5 of the Enterprise Act 2002). The CMA has stated that it is carrying out this review with a view to, among other things, *"ensuring it has sufficient information to take informed decisions in relation to its work"*.

We can therefore expect the findings of the review to inform the CMA's work both in respect of merger control reviews and in relation to antitrust matters, including investigations into suspected anti-competitive agreements and abuses of dominance. In addition, while the CMA's review is not a formal market study at this stage, its findings may be used to inform a CMA decision to open a market study in due course, which might then result in the opening of a market investigation. In the shorter term, another possible outcome of this review could be the CMA's issuance of high-level guidance on competition law or consumer protection principles, targeted at firms developing or using AI foundation models in their products.

Foundation models were prioritised in the CMA's 2022 scan of important future technological developments, and the CMA's focus on AI is expected to continue during the year ahead. It remains to be seen whether the UK Government's sector-specific approach, and overarching cross-sectoral principles, will be successful in practice and how the CMA's findings will help inform the UK's wider AI strategy.

We continue to track closely developments in the areas of Generative AI and its implementation by and for our clients. For more information on AI, see our [Regulating AI hub](#) and [Series](#).

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OTHER DEVELOPMENTS

MERGER CONTROL

CMA CLEARS VIASAT/INMARSAT MERGER FOLLOWING PHASE 2

On 9 May 2023, the CMA issued its [final decision](#) to grant unconditional Phase 2 clearance in relation to the proposed acquisition of Inmarsat Group Holdings Limited by Viasat, Inc. Both parties are Satellite Network Operators (SNOs) that own and manage a fleet of satellites which are used to provide connectivity services to customers across different industries including fixed broadband, government, maritime, offshore energy, and aviation.

The CMA initially referred the case for an in-depth Phase 2 review on 6 October 2023, on the basis of concerns that the merger would give rise to a realistic prospect of a substantial lessening of competition (SLC) as a result of horizontal unilateral effects in relation to (a) the global supply of broadband IFC services to commercial aviation customers, and (b) the global supply of broadband IFC services to business aircraft.

In its final report, the CMA concluded that the proposed merger may not be expected to result in an SLC in the supply of broadband FC services on flights used by UK customers. The dynamic nature of the satellite connectivity sector meant that the market has now been disrupted by new players and that significant developments had taken place during the CMA's phase 2 investigation - a trend which, according to the CMA, is set to continue for the foreseeable future. When assessing the proposed transaction, the CMA applied a forward-looking approach which took into account the future evolution of competitive conditions in the coming years, including looking at the parties' competitive offers as well as the competitive offers of their rivals. The CMA concluded that three other competitors (Intelsat, Panasonic and Anuvu) would constrain the merged entity and that the emerging supplier Starlink would likely become a significant constraint on the merged entity.

PHILIPPINE COMPETITION COMMISSION ISSUES DRAFT GUIDELINES FOR THE REVIEW OF MERGERS AND ACQUISITIONS IN DIGITAL MARKETS

The Philippine Competition Commission (PCC) published [draft guidelines](#) on the circumstances in which it may choose to review mergers and acquisitions in digital markets (Draft Guidelines) for public consultation. The consultation was open until 15 May 2023.

The Draft Guidelines aim to help digital companies determine whether the PCC may consider that a transaction could harm competition and lead to a review by the PCC, even if the standard merger filing thresholds are not met. The Draft Guidelines consider a range of non-exhaustive indicators and note that the presence of two or more indicators could trigger a review by the PCC so prior consultation, and potentially voluntary notification, are recommended. These include transactions involving gatekeepers, data-centric operations, innovators, and parties under investigation. Notably, transactions involving parties with a significant share (30% or more) of the supply of a good or service may be considered a red flag, even if that good or service would not constitute a market on its own in a merger review.

The PCC's consultation is in line with the APAC trend of regulating digital markets, such as China's updated [Anti-Monopoly Law](#) and [accompanying regulation](#) that explicitly regulate digital platforms, and Australia's [consultation](#) on ex-ante regulations on digital platforms. We therefore expect antitrust scrutiny on deals in digital markets to continue to increase, both in APAC and globally.

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STATE AID

ADVOCATE GENERAL KOKOTT CONSIDERS THE COMMISSION ERRED IN FINDING THAT LUXEMBOURG GRANTED UNLAWFUL STATE AID TO ENGIE IN THE FORM OF TAX ADVANTAGES

On 4 May 2023, Advocate General (AG) Juliane Kokott [issued an opinion](#) considering that the Commission was wrong to find that Luxembourg had granted unlawful State aid to Engie SA, Engie Global LNG Holding Sàrl and Engie Invest International SA (together Engie) in the form of tax advantages.

In its June 2018 decision, the Commission found that Luxembourg had granted Engie a selective advantage through two tax rulings which allowed certain Engie group subsidiaries to not pay tax on 99% of profits in Luxembourg between 2008 and 2014. The Commission decided that the tax rulings issued by Luxembourg endorsed Engie's financial structures through which the company channelled profits from one subsidiary to another by treating the same transaction both as equity and as debt, resulting in untaxed profits. The Commission found that the tax rulings issued by Luxembourg gave a selective advantage to the Engie group which could not be justified. Therefore, it decided that Luxembourg's tax treatment of Engie endorsed by the tax rulings was illegal under EU State aid rules and ordered Luxembourg to recover the illegal State aid (amounting to circa €120 million). (For details on the Commission decision, see a [previous edition](#) of the newsletter.)

Luxembourg and Engie challenged the Commission decision before the General Court (GC). In a judgment of 12 May 2021, the GC dismissed the appeals and confirmed that Engie's preferential tax treatment constituted a selective advantage and therefore unlawful State aid. (For details on the GC judgment, see a [previous edition](#) of the newsletter.)

On further appeals to the Court of Justice of the European Union (CJ), the AG has now opined that tax rulings do not, in themselves, constitute illegal State aid and that they are an important instrument for creating legal certainty. According to the AG, tax rulings are unproblematic in terms of State aid law as long as they are open to all taxpayers and are in line with the relevant national tax law, which forms the sole reference framework. The AG found that in this case, the Commission and the General Court proceeded on the basis of an incorrect reference framework.

In addition, the AG considers that not any incorrect tax ruling, but only tax rulings that are manifestly erroneous in favour of the taxpayer, may constitute a selective advantage and be considered an infringement of State aid law. In the present case, according to Kokott, the tax rulings were not manifestly erroneous. Lastly, she concluded that the existence of abuse of legal structural possibilities under Luxembourg law had not been established by the Commission. The AG therefore proposes that the CJ should uphold the appeals and overturn the judgment of the GC and annul the Commission decision.

Since the AG's opinion is not binding, it will be interesting to see if the CJ follows the AG's opinion. Most of the Commission's State aid decisions on tax rulings have now been overruled by the European courts. Most recently, in November 2022, the CJ handed down its judgment in the Luxembourg and Fiat case, finding that the Commission and the GC had erred in their conclusion that Luxembourg had granted unlawful State aid to Fiat (for more information, see [this edition](#) of our newsletter).

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