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Merger Control

UK: Trends & Developments

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Trends and Developments

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Trends and Developments in UK Merger Control, 2020

Introduction

Merger control in the UK is primarily carried out by the Competition and Markets Authority (CMA), an independent authority that performs a range of competition law functions and has a primary duty to promote competition for the benefit of consumers. Over the past year, the CMA has cemented its reputation as an active, interventionist agency in the field of merger control, asserting jurisdiction over transactions that might previously have escaped UK merger control, challenging a number of transactions that might in the past have been approved unconditionally, and penalising procedural violations. In parallel, the CMA has prepared for the UK's exit from the EU (it moved to larger premises and increased its headcount by 40%), so that, as explained by the CMA's Chief Executive, Dr Andrea Coscelli, it may "play an important role in helping the UK to continue, up to and beyond its Exit from the EU, to be a dynamic competitive economy for consumers and businesses."

Impact of UK exit from the European Union

Following the UK's departure from the EU on 31 January 2020, the UK entered a transition period due to end on 31 December 2020. EU competition law continues to apply in the UK until the transition period ends (and to mergers notified to the European Commission before the end of that period), meaning that the European Commission continues to have exclusive jurisdiction over transactions with an EU dimension, including those impacting UK markets.

The UK Government has said that it will not request an extension of the transition period beyond 2020 (although that could change). Accordingly, as of January 2021, the CMA expects to have jurisdiction over transactions currently subject to exclusive review by the European Commission, provided they meet the UK thresholds as well. As Dr Coscelli, has noted, "[t]he upside [of leaving the EU] is that you take back control — genuinely — of the decisions".

The CMA expects a 40-50% increase in its annual mergers workload – an additional 30-50 Phase 1 investigations and around six more Phase 2 investigations. As the CMA's Head of Enforcement, Dr Michael Grenfell, has said: "Post-Brexit, the Competition and Markets Authority can be expected to take responsibility for a swathe of competition cases affecting the UK that previously would have been reserved to the European Commission".

Expansive approach to jurisdiction

The CMA can review mergers where the target's UK revenue exceeds GBP70 million the merging parties' activities overlap and they have a combined UK share of supply or purchases of at least 25%. Lower thresholds apply in some sectors that raise possible issues of national security. In recent years, the CMA has adopted an increasingly expansive and creative approach in the way it applies the "share of supply" test, particularly in digital markets.

The CMA's Executive Director for Markets and Mergers, Andrea Gomes da Silva, has stated that the share of supply test gives the CMA "a degree of freedom and flexibility that is not the case in other jurisdictions".

In Sabre/Farelogix, the target had no customers or revenue in the UK. The CMA nevertheless found that the share of supply test was satisfied because

- the parties were both active in the supply of software solutions to facilitate the booking of airline travel;
- Sabre's share of supply in the UK exceeded 25%; and
- Farelogix's arrangement with American Airlines for the supply of these services encompassed the interline segments between American Airlines and British Airways.

The CMA therefore asserted jurisdiction on the ground that both parties provided IT solutions to UK airlines.

In Roche/Spark, the CMA asserted jurisdiction over a transaction where the target did not offer any products that competed with Roche but was in the process of developing a gene therapy expected to compete with Roche in future. The CMA asserted jurisdiction based on the companies' share of UK-based employees engaged in activities relating to the relevant gene therapy.

In Mastercard/Nets, although the target had no assets or business activities in the UK, the CMA asserted that the transaction met the share of supply test because VocaLink (a subsidiary of Mastercard) and Nets had both registered to make their services available to prime bidders for part of a procurement project (providing infrastructure services related to the UK's New Payment Architecture), and there were only five to eight other suppliers of these services (giving the combined parties a share of supply of 20-30%).

By using broad categories of "products" or "services", and by placing greater importance on potential competition, the CMA has been testing the boundaries of its jurisdictional powers. If unchecked by the courts, this approach will enable the CMA to assert jurisdiction over transactions that would previously have been expected to fall outside the scope of UK merger control.

Interventionist approach to merger control

The CMA has taken an increasingly interventionist approach to merger control. Over the last decade, the CMA referred, on average around 13% of Phase 1 merger cases to an in-depth Phase 2 investigation. This has increased in recent years; in 2019, the CMA referred over 20% of Phase 1 mergers to Phase 2.

Likewise, over the last decade, around one third of mergers referred to Phase 2 were prohibited or abandoned. In 2019, however, more than 50% of mergers referred to Phase 2 were prohibited or abandoned. The CMA has been particularly aggressive when reviewing deals involving technology companies or online platforms.

As Dr Coscelli recently explained, "The argument that companies were making seven or eight years ago was that it was very difficult to predict how it was going to play out. We now realise that there are strong barriers to entry and expansion. When we look at the current deals we have a higher degree of scepticism". In 2019, the CMA completed ten Phase 2 merger investigations, prohibiting three of those ten transactions.

In Sainsbury's/Asda, the CMA blocked the proposed merger of two of the UK's four national supermarket retailers, finding that the transaction would lead to higher prices in stores, online, and at many petrol stations. The CMA extended its usual practice of assessing retail mergers at local level to include novel theories of harm at a national level. It also rejected the merging parties' argument that discounters (such as Aldi and Lidl) and online retailers would pose a sufficient competitive constraint post-merger.

Ecolab/Holchem

In Ecolab/Holchem, the CMA blocked a completed merger in which the parties' combined market share was below 40%, finding that the transaction would reduce competition in the market for the supply of cleaning products to food and beverage customers. The CMA rejected the parties proposed divestment remedy and instead ordered Ecolab to divest substantially all of the Holchem group.

Tobii/Smartbox

In Tobii/Smartbox, the CMA blocked a completed merger between suppliers of technology that enable people with complex speech and language needs to communicate. The CMA concluded that the merger would lead to higher prices and/or lower quality for these products, as well as upstream and downstream foreclosure of competitors. The CMA rejected Tobii's offer of a partial divestment combined with behavioural commitments, deciding that only a full divestiture of the target would remedy the substantial lessening of competition. Given the relatively low value of the transaction (approximately GBP11 million), this prohibition shows the CMA's continued willingness to intervene even in very small technology transactions.

Prosafe/Floatel

In Prosafe/Floatel, the CMA investigated an anticipated merger between two suppliers of semi-submersible Accommodation Support Vessels, which are floating structures that provide accommodation and support services to offshore oil and gas operators. The CMA provisionally found that the parties were the two largest, and each other's closest, competitors in the market, and that the merger would likely lead to a substantial lessening of competition in the form of higher prices, reduced service quality, and/or reduced product range.

The parties decided to abandon the merger following the CMA's provisional findings.

Sabre/Farelogix

In April 2020, the CMA blocked Sabre/Farelogix, an anticipated acquisition involving suppliers of software solutions to facilitate airline travel. Sabre offered a system that travel agents use to search for and sell airline tickets, and Farelogix offered IT solutions to airlines enabling them to connect directly to travel agents and offer customers in-flight extras. The CMA concluded that the deal would result in a substantial lessening of competition (SLC) manifested in reduced innovation, which would lead to less customer choice, fewer new features, and upgrades being released more slowly.

The CMA found that partial divestiture would not be an effective remedy because it would be difficult to identify the staff and assets needed to be divested to remedy each SLC.

JD Sports/Footasylum

Finally, in May 2020, the CMA blocked JD Sports/Footasylum, a completed acquisition involving retailers of sports-inspired casual footwear and apparel. The CMA concluded that the parties were close competitors on the basis of their internal documents, two customer surveys, the similarity of their offerings, and economic analysis indicating that entry by Footasylum was associated with a fall in nearby JD Sports store revenues. The CMA considered that the constraint posed by other retailers was "modest at best" and would not prevent an SLC.

It concluded that the merger would result in an SLC in the markets for sports-inspired casual footwear and apparel, and that no remedy other than a full divestiture would be effective. The CMA considered the impact of COVID-19 on the industry but found that it did not change its assessment of the transaction because the parties were not advancing a "failing firm" argument, and there was no other evidence to suggest that either of them would be "hit harder" by COVID-19 than any other retailers.

Appeals to the Competition Appeal Tribunal

CMA merger decisions are subject to appeal to the Competition Appeal Tribunal (CAT) on judicial review grounds. Accordingly, the CAT cannot re-assess the merits of a case, but can decide only whether the CMA's decision was unlawful, irrational or procedurally unfair. The CAT's review of CMA merger decisions shows a high degree of deference to the CMA's factual and economic assessment.

Two of the prohibition decisions taken in 2019, Ecolab/Holchem and Tobii/Smartbox, were appealed to the CAT. In both cases, the CAT upheld almost every aspect of the CMA's decisions, finding that the only effective way of addressing the SLC resulting from the mergers was to effectively block them. In Tobii/Smartbox, although the CAT overturned one strand of the CMA's substantive conclusions, it commented that "as long as there was some evidence on which to base its decisions, it was for the CMA to weigh up the totality of the evidence it had and to reach conclusions that were supported by evidence of some probative value."

Increased use of hold-separate orders

The CMA may impose hold-separate orders (referred to as initial enforcement orders (IEOs)), at any stage of an investigation, provided it has reasonable grounds for suspecting that "arrangements are in progress or in contemplation" which, if carried into effect, will result in two or more enterprises ceasing to be distinct.

The CMA's standard practice is to impose IEOs on all completed mergers, as well as on anticipated mergers in which it determines that there is a risk of the companies taking steps that would be prohibited if a standard IEO were in place. If the CMA considers that the merging companies lack the ability or willingness to comply with its IEO, it may appoint a monitoring trustee to monitor and prepare regular reports on compliance. A failure to comply with an IEO can result in fines of up to 5% of total global group turnover.

Over the past 18 months, the CMA has for the first time penalised companies for breaching IEOs (by, among other things, appointing unauthorised staff and engaging in joint marketing). Since June 2018, the CMA has fined Ausurus, JLA, Nicholls' (Fuel Oils), PayPal, and Electro Rent (two separate fines), between GBP100,000 and GBP300,000 each.

Extensive requests for internal documents.

Unlike in the United States, where the federal agencies routinely issue broad "Second Requests" that require the disclosure of significant numbers, often many thousands, of documents, the CMA has historically assessed transactions largely on the basis of written submissions from merging companies and other industry participants. That is changing. Last year, the CMA issued new guidance on requests for internal documents.

The guidance states that the CMA may—at any stage of its investigation—request any document in the merging parties' possession that has been prepared, sent, or received by an officer or employee (including emails, internal analysis, instant messages, and handwritten notes).

Since the publication of its guidance, the CMA has made increasingly burdensome document requests at early stages of its merger investigations (including during pre-notification). It is now common to receive requests for internal emails and draft documents, often extending to thousands of pages, and sometimes hundreds of thousands. This can be challenging, particularly given the CMA's tight deadlines for responding, and the fact that mergers are often subject to parallel—and rarely identical—requests for information from different competition authorities.

Penalties for failing to provide internal documents or respond to information requests.

The CMA is making greater use of its statutory power to issue formal information requests under Section 109 of the Enterprise Act 2002. In its recent guidance, the CMA made clear that it intends to shift from making informal requests to using Section 109 notices, which compel companies to respond within a prescribed deadline. The CMA may "stop the clock", effectively extending the statutory deadline for completing its investigation, if it determines that a company has failed to provide a complete response.

Companies that fail to provide complete responses to Section 109 notices without a reasonable excuse may be subject to a fixed fine of up to GBP30,000 and/or daily fines of up to GBP15,000.

Over the past three years, the CMA has for the first time imposed penalties on companies that failed to comply with formal information requests. The fines have ranged from GBP15,000 to GBP27,000, all for failures to provide full responses to infor-

mation requests by the CMA's deadline. The CMA has, thus far, pursued cases in which it sees a pattern of non-compliance.

In many cases, the CMA has "stopped the clock" pending the production of a response.

Interim orders to unwind completed mergers.

Last year, the CMA exercised for the first time its power to require parties to unwind steps taken to implement a merger while the CMA carried out its investigation. In March 2019, the CMA imposed an unwinding order on Tobii/Smartbox requiring the parties to terminate a reseller agreement and Smartbox to reinstate its R&D projects and resume the sale of discontinued products. In August 2019, the CMA imposed an unwinding order before the Phase 1 process had begun in Bottomline/Experian, requiring Bottomline to segregate all Experian confidential information and refrain from using any commercially sensitive information relating to the Experian business to solicit customers.

Response to COVID-19

On 22 April 2020, the CMA published new guidance on its approach to merger investigations during the COVID-19 pandemic. It explained that its binding statutory deadlines, as well as its substantive assessment standards, have not changed. It noted, however, that the timing of merger investigations may be extended if the CMA encounters difficulties in engaging with third parties during the pre-notification process (which may lead the CMA to postpone the date on which it starts the statutory 40-working-day clock), and where businesses encounter difficulties in responding to statutory information requests (which allows the CMA to "stop the clock").

In relation to derogation requests to hold-separate orders, the CMA will continue to address each request on a case-by-case basis and grant derogations where merging parties demonstrate that they are necessary to ensure the viability of their business and appropriate safeguards are put in place to protect the CMA's ability to take appropriate action to protect UK consumers.

Conclusion

The CMA is soon likely to have jurisdiction over some of the largest global mergers. Its expansive approach to jurisdiction, increasingly interventionist approach, extensive requests for information, and strict procedures may be expected to increase the costs and burden on companies engaging in transactions subject to global merger control. The COVID-19 pandemic may extend the timeline of merger investigations in cases where merging parties or other industry participants have difficulty in producing timely responses to the CMA's requests for information.

Longer term, the CMA will continue its drive to become one of the leading competition authorities in the world.

Cleary Gottlieb Steen & Hamilton LLP has 16 offices in major financial centers around the world. The firm employs approximately 1,300 lawyers from more than 50 countries and diverse backgrounds. Cleary's leading antitrust practice comprises approximately 230 antitrust lawyers based in the USA, Europe, Asia and Latin America and includes former senior officials from the Department of Justice, US Federal Trade Commission, UK Competition and Markets Authority, and European Commission's Directorate-General for Competition. Cleary's practice in EU merger control has comprehensive expertise in every type and stage of investigation by the EU Commission and national antitrust authorities in a range of industries. In the UK, Cleary Gottlieb advises on all aspects of competition law, and represents clients before the Competition and Markets Authority, concurrent sector regulators, Competition Appeal Tribunal and civil courts.

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