UK Merger Control: CMA Interventionism on the Rise

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The UK operates a voluntary merger control regime[1]. In addition, the European Commission (EC) operates a 'one-stop shop' jurisdiction to review the largest and most complex cases on behalf of all EU Member States, including the UK. The combination of a voluntary UK regime and EC jurisdiction over major deals has resulted in the UK's antitrust authority – the Competition and Markets Authority (CMA) – having a lower profile than many other major G20 enforcement authorities.

With Brexit now looming, however, the CMA is seeking to raise its global profile and to articulate more explicitly and publicly its enforcement priorities. It has recruited additional personnel (200+ new staff since the referendum)[2], sought increased government funding and started to apply its discretionary powers more broadly across a range of transactions. This briefing highlights the CMA's willingness to intervene in global deals and the factors companies should consider when assessing the merits of voluntary notification in the UK.

CMA powers to 'call-in' deals

The voluntary UK merger control system was originally designed to reduce the burden on transacting parties. Companies are required to conduct a self-assessment to determine whether a transaction may potentially be of interest to the CMA. Traditionally, most companies have only opted to engage with the CMA in cases where there is direct competition potentially resulting in relatively high combined shares in a plausible market.

Although the system is voluntary, the CMA nevertheless has a dedicated – and increasingly interventionist – Merger Intelligence Unit that monitors the trade press and which engages with transacting parties where a notification is not submitted. This allows the CMA to identify transactions of potential interest for review, unless the companies can demonstrate that the transaction falls outside the CMA's jurisdiction. This can be challenging, as the CMA has wide discretion in applying its jurisdictional tests.

In fiscal year 2018-2019, 16 CMA decisions (29% of the total) related to cases 'called in' for review. It is becoming increasingly common to receive letters from the Merger Intelligence Unit, even where the target business only has a limited presence in the UK. Companies should be wary of the potential for intervention by the CMA late in the deal process, particularly in instances where they do not have a robust account of their reasons for not notifying the deal.

CMA's use of interim powers

Where the CMA reviews a merger, it has a range of measures in its 'toolkit' to prevent pre-clearance integration of the merging parties' businesses. In particular, the CMA is increasingly using initial enforcement orders (**IEOs**) either to prevent closing or (more often) to impose 'hold separate' obligations

[1] For a review to take place, the following jurisdictional thresholds must be satisfied: (i) the target enterprise has annual UK turnover exceeding £70 million; and/or (ii) the merger creates or enhances a UK share of supply of 25% or more. Lower thresholds apply in cases where national security or interests are potentially relevant to the assessment.

[2] As at 31 March 2019, the CMA had 853 staff members, when compared to an average of 628 in the financial year 2017/2018.

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on companies post-closing. In the last two years, there have been 11 pre-closing IEOs, compared to only 3 pre-closing IEOs in the preceding three years.

This increased willingness to intervene pre-closing again underlines the importance of conducting a thorough self-assessment before determining whether to engage with the CMA in parallel with antitrust regulators in other major jurisdictions.

Increased use of financial sanctions

The increased use of IEOs has been coupled with fines for companies breaching interim measures. Since June 2018, the CMA has imposed five fines, ranging between £120,000 and £300,000. These are a reminder that, although the UK regime is voluntary, the CMA is willing to use its discretionary powers to intervene in potentially problematic mergers and sanction parties for non-compliance with its orders.

Since 2017, the CMA has also demonstrated its willingness to impose financial sanctions for non-compliance with disclosure requirements. One striking recent example is the £20,000 fine imposed by the CMA on Sabre in September 2019. The CMA sought to rely on disclosures made by Sabre to the US Department of Justice (DOJ). The DOJ asked Sabre to review approximately 12,000 documents withheld on privilege grounds. More than 6,000 were wrongly classified and ultimately disclosed to the DOJ, with a sub-set also submitted to the CMA. The CMA determined that the incomplete initial disclosure was a sufficiently serious breach to warrant financial sanction, continuing its recent practice of imposing fines for failure to comply fully with information requests. This sanction is notable because US merger reviews frequently involve the review and production of millions of documents and it is not unusual for parties to revise their privilege logs and remove the claim of privilege from a significant number of documents based upon discussions with the US authorities.

Looking ahead

Post-Brexit, the CMA estimates its merger control caseload will increase by approximately 50-60%. The majority of the additional cases will be complex, cross-border deals that would previously have fallen within the jurisdiction of the EC. Even before the UK formally leaves the EU, however, the CMA will have increased capacity to look at a wider range of transactions than has historically been the case. Transacting parties should be aware of the wide discretion allowed the CMA by its jurisdictional tests and its ability to intervene in transactions with only a limited UK nexus.

The CMA Chairman, Lord Tyrie, has also suggested that the UK give serious thought to moving to a mandatory notification system, particularly for large mergers. Although such a change is unlikely in the short term, this proposal offers insight into the CMA's determination for UK merger control to be a priority consideration for transacting parties, on a level footing with the established top tier of antitrust regulators elsewhere.

Tyrie has also tabled proposals that would allow the CMA to impose binding remedies in market investigations without first demonstrating an adverse effect on competition. Companies that do not comply with these remedies would be liable to fines. Coupled with this, there are also moves to extend the scope of the CMA's information-gathering powers to compel disclosure even where no formal case file is open. Although it is not certain that these proposals will be taken forward, the CMA is clearly giving thought to how to enhance its 'toolkit' so that it can more easily take action against companies that may previously have escaped scrutiny.

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