MARCH 2014

THE UK'S NEW COMPETITION AND MARKETS AUTHORITY: REFORM OF THE UK MERGER CONTROL REGIME

The UK's new competition enforcement regime begins on April 1. As described in our recent **Antitrust Alert**, a single authority, the Competition and Markets Authority ("CMA") replaces the Office of Fair Trading ("OFT") and Competition Commission ("CC") and has greater powers than its predecessors to enforce competition law in the UK. The reforms involve significant changes to merger control, market investigations, investigations into suspected anticompetitive practices, and the criminal cartel offense. This *Commentary*, the first in a series of four covering these topics, addresses the main changes to UK merger control and the expected implications for businesses.

Detailed guidance as to the new UK merger control regime is set out in the CMA's merger guidance on **jurisdiction and procedure**, published in January (the "Guidance").

WHAT IS NOT CHANGING

Although there are some important changes to the UK merger regime, several of the main features of UK merger control remain unchanged. In particular, the voluntary nature of the notification system, the jurisdictional thresholds, the substantive test, and a two-phase review process are left untouched.

Contrary to expectations that the government would introduce mandatory merger notifications once defined materiality thresholds were crossed, the voluntary regime remains in place. The majority of respondents to the government's consultation were strongly opposed to the introduction of a mandatory notification. Accordingly, merging parties will continue to be able to take a view as to whether to notify a transaction to the CMA when the relevant thresholds are met.

Those thresholds remain the same. Thus, the CMA will have jurisdiction to examine a merger where either:

- The UK turnover of the acquired enterprise exceeds £70 million (so-called "turnover test"), or

- The two enterprises supply or acquire at least 25 percent of the same category of goods or services supplied in the UK, and the merger increases that share of supply (so-called "share of supply test").

The substantive test remains the same: the CMA will examine whether the merger results in a realistic prospect of a substantial lessening of competition. Finally, the current system of a Phase 1 (initial assessment) and Phase 2 (in-depth inquiry) review is also maintained.

MAIN CHANGES OF THE NEW REGIME

Two Phases, One Authority

Currently, the two phases of a merger investigation are carried out by separate organizations. At Phase 1, the OFT carries out the initial assessment and decides whether or not there is a competition issue to be addressed. If so, it must refer the case to the CC, which will carry out a more in-depth inquiry at Phase 2. From April 1, the OFT and the CC will cease to exist and will merge into the CMA, which will carry out both phases of the review process. All mergers not yet formally notified to the OFT by March 31 will be subject to the new procedural rules. Those currently under consideration by the OFT will transfer to the CMA and become subject to the CMA's new enforcement powers but will retain the old OFT timetable for OFT decisions (see below). Those deals already referred to the CC will transfer fully to the new procedures, save for those already subject to remedies discussions, which will retain the old timetable.

At Phase 1, the CMA will determine whether it believes that the merger results in a realistic prospect of a substantial lessening of competition. If so, the CMA will have a duty to launch an in-depth assessment. The creation of a single authority to undertake both Phase 1 and Phase 2 of a merger control investigation mirrors the approach at the European Commission and most EU Member States. A notable difference, however, concerns the composition of the case team at Phases 1 and 2. Because the CMA will be responsible for both Phase 1 and Phase 2, and in order to ensure a transparent and distinct process, the decision-makers at Phase 2, comprising of a panel of independent members, will be different from the decision-makers at Phase 1.

The provision of different decision-makers at Phases 1 and 2 provides reassurance to merging parties that, in the event their transaction is referred for an in-depth investigation, the individuals responsible for deciding whether the transaction raises competition concerns do not include those who have previously highlighted concerns at the end of the Phase 1 process—and might therefore be perceived to wish to support that line of thinking. Nevertheless, this fresh pair of eyes approach does not extend fully to the case team at Phase 2, which will include members of the Phase 1 case team. There may be a natural tendency for those officers to defend the view they took at Phase 1—a criticism sometimes leveled at European Commission case teams—and the CMA will therefore need to remain vigilant to guard against any potential loss of objectivity. In addition, although the retention of some of the Phase 1 case team should provide for continuity, it seems to us likely that it will continue to be the case that merging parties in practice need to start from square one at the beginning of the Phase 2 investigation. This will entail once more describing the transaction, the basis of the jurisdiction, the markets in which the parties operate, and the parameters of competition (as is the case at present) rather than beginning Phase 2 with a more focused analysis on the specific concerns raised in Phase 1, consistent with the approach adopted, for example, before the European Commission.

New Time Limits

There are new time limits, aimed at streamlining the process and bringing certainty and predictability to businesses.

Phase 1. Under the previous regime, different time frames applied to merger reviews depending on the notification format chosen by the notifying party. The OFT had up to 30 working days to rule on mergers notified by way of a Merger

Notice. In the majority of cases, including all completed deals, notification was made by way of a so-called Informal Submission, and the OFT aimed to decide on a reference within 40 working days. However, that deadline was not binding and in practice was regularly not met. From April 1, the CMA will have a statutory deadline of 40 working days in which to complete its Phase 1 review of both anticipated and completed mergers. The statutory period will start to run on the first working day after the CMA confirms:

- That it has received a satisfactory Merger Notice, containing the information it requires for its review; parties wishing to notify mergers to the CMA will have to use a Merger Notice, and it will no longer be possible to make an informal submission, or

- In the case of an investigation started on the CMA's own initiative, that it has received sufficient information to enable it to begin its investigation.

Although these new time limits remove the ability currently enjoyed by OFT to extend the administrative review timetable to allow for further information to be provided, the CMA will be able to stop the clock where a relevant person (not just the merging parties) has failed to comply with a statutory information request of the CMA. Thus, pre-notification discussions will become even more important for merging parties seeking to manage the process expeditiously and to establish from the outset the level and extent of information that the CMA will require. The ability for the CMA to stop the clock where third parties have failed to comply with an information request raises the prospect of competitors deliberately seeking to disrupt merging parties' merger clearance timetables. The CMA therefore has also been given power to impose daily fines for failure to respond to information requests (see below), and it will need to be diligent in using those powers where appropriate.

The CMA "strongly encourages" parties to contact it not less than two weeks before the intended date for notification, even in cases that the parties consider to be non-problematic. Based on Jones Day's recent experience with UK merger control, we would in most cases advise parties to contact the CMA at least four weeks before intended notification and to be prepared for detailed and sometimes lengthy pre-notification discussions with the authority.

Undertakings. A notable change concerns consideration of undertakings in lieu. Such undertakings can be proposed by notifying parties to remedy, mitigate, or prevent a substantial lessening of competition where the CMA has concluded that the merger should be referred to a Phase 2.

In future, parties will have five working days to offer undertakings in lieu following communication to them of the Phase 1 decision. In other words, they need no longer offer undertakings before the OFT has concluded that the deal may give rise to a substantial lessening of competition—a practice that often unsettled merging parties, who had to trust that the offer of undertakings would not influence the OFT's decision as to whether the transaction raised concerns worthy of a referral to the CC. The CMA will have until the 10th working day following the communication to the parties of its Phase 1 decision to decide whether the offer of undertakings might be acceptable as a suitable remedy to address the alleged risk of a substantial lessening of competition. If so, the CMA will discuss the terms of the undertakings with the notifying parties, and the CMA must decide whether to accept them, or a modified form of them, within 50 working days of the communication to the parties of its Phase 1 decision (subject to an extension of 40 working days in special circumstances). If the CMA rejects the undertakings, then the referral to Phase 2 commences.

These new time limits will provide greater transparency and certainty to merging parties than exists under the current regime. For example, in recent years, time frames for the adoption of undertakings have varied from one month (*iSOFT/Torex* case in 2004) to nearly a year (*Global Radio UK Limited/GCap Media* case).

Phase 2 Remedies. The existing 24-week time limit (extendable by up to eight weeks) for Phase 2 decisions remains, but a 12-week statutory time limit (extendable by six weeks if there are special reasons, and the CMA will have to publish a notice explaining what those reasons are) following the CMA's final report is introduced, in which the CMA and notifying parties may agree remedies where the CMA has decided

that a deal would otherwise result in an substantial lessening of competition. Previously, the CC aimed at obtaining final undertakings within eight weeks of the publication of the final report, but the process could drag beyond this indicative timetable (since 2004, the average duration has been 20 weeks, with several cases involving negotiations lasting more than 25 weeks). The new statutory time limit will therefore shorten the current process for agreeing remedies.

Interim Measures

Under the previous voluntary regime, a large number of transactions were completed before being investigated, making it difficult for the authorities to implement remedies. To address this, the CMA has been given strengthened powers to intervene in merger cases, to prevent harm to competition.

Low Threshold to Impose Remedies. Currently, the OFT can prevent parties from taking new steps to integrate businesses that have already merged. The CMA will have powers not only to suspend integration but also to reverse steps already taken in completed mergers at the start of Phase 1 or even before. Notably, there is no requirement that a deal has completed or been notified for merger clearance before the CMA can intervene.

Interim Orders in Completed and Anticipated Mergers. The CMA's use of interim orders will be less frequent in anticipated mergers than in completed mergers. This is because the risk of "preemptive action" (i.e., any action that might prejudice the reference and/or impede the taking of any remedial action) in an anticipated merger is generally much lower than in a completed merger. In anticipated mergers, the CMA expects to make interim orders in Phase 1 only in those rare cases where it considers that there are concerns about preemptive action that is difficult or costly to reverse. Again, except in rare cases, the CMA does not expect to impose interim orders that will prevent the parties to an anticipated merger from completing the transaction. In completed mergers, however, the CMA will expect to make an interim order suspending or preventing further integration—the only exception being that the CMA has been provided with clear evidence that there is no risk of preemptive action.

No More Interim Undertakings in Phase 1. Finally, a distinction is made between interim orders (imposed by the CMA) and interim undertakings (proposed by the parties). Currently, at the OFT's request, the notifying parties typically offer interim undertakings to the OFT (based on a standard text) when the OFT investigates a completed deal. From now on, at Phase 1, the CMA will not be able to accept interim undertakings. Instead, the CMA will impose interim orders on the parties. Where the investigation proceeds to Phase 2, these orders are likely to be carried over. In certain cases, however, including where no interim order was in place at Phase 1, the parties may offer interim undertakings at Phase 2. It remains the case that no further integration of the merging businesses may take place once a Phase 2 investigation begins.

Penalties

The CMA will be able to impose fines of up to 5 percent of the combined worldwide turnover of the merging enterprises for breach of an order preventing or reversing integration. Penalties will be imposed only if the failure to comply is "without reasonable excuse," a concept that is not defined in the applicable law. The CMA has stated in its **guidance on administrative penalties** that it will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis.

A significant development, as noted above, is the power of the CMA to impose a fine (up to £15,000 per day) for failure to comply with a request for information. This will apply both to merging parties and third parties, and we envisage disputes arising where the CMA has issued an onerous information request with an unreasonably short deadline.

CONCLUSION–EXPECTED IMPLICATIONS FOR BUSINESSES

The new statutory time limits will provide greater transparency and certainty to parties. They also mean that the CMA will have less flexibility to extend timetables, and this is likely to lead to even longer pre-notification discussions with the CMA than currently take place with the OFT.

The power to fine parties who do not comply with information requests will focus the minds of both merging parties and third parties and should encourage full engagement with the case team and, ultimately, a timely decision. The changes to the system for agreeing Phase 1 undertakings in lieu and Phase 2 remedies should ensure that cases do not drag on for too long. They may also increase the pressure on the purchaser promptly to find a buyer for any business to be divested.

The CMA's increased powers to intervene in completed mergers, in particular to unwind integration that could prejudice the CMA's investigation and/or impede it taking appropriate remedial action, act as a stronger disincentive on parties to complete and implement a merger without seeking prior UK merger clearance.

We shall issue three further *Commentaries* in the coming days covering the main changes to the UK competition law regime.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at **www.jonesday.com**.

Matt Evans
London
+44.20.7039.5959
mevans@jonesday.com

Vincent Brophy
London
+44.20.7039.5192
vbrophy@jonesday.com