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CLIENT ALERT

The revolution will be consulted upon beforehand: CMA requests comments on proposals for sea change in UK merger control

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Introduction

The UK Competition and Markets Authority (***CMA***) has stated repeatedly in the last few months that it intends to do UK merger control differently in the future.

The evolution in approach follows the Government's push for all UK regulators to promote economic growth, with the Government going so far as to replace the Chair of the CMA to ensure that its agenda will be sufficiently pursued.[1] The new management swiftly committed itself to reform in line with the "4Ps framework" it had identified as thematic business concerns with UK antitrust enforcement – namely Pace of decision making, Predictability of outcomes, Proportionality of investigations and remedial decisions, and improvements to Processes.

[1] See details in our prior alert here.

Each individual "P" presents a significant challenge in itself, however. While public statements had alluded to a small number of specific proposals, there had been precious little detail provided as to how the 4Ps framework would be applied to merger control in particular – essentially, how the CMA could do better but in less time.

The answers to this question are now beginning to reveal themselves. On 20 June 2025, the CMA published a draft of its updated guidance on merger jurisdiction and procedure (called ***CMA2***), and opened a public consultation to seek feedback (the ***Consultation***) until **1 August 2025**.

We highlight below three of the main developments introduced by the draft CMA2.

Three evolutionary changes

1. Approach to global mergers (*4P engaged – Proportionality)*

As a voluntary merger regime, the CMA has discretion as regards whether or not to formally investigate a transaction. This is fundamentally different to mandatory regimes, where deals must be notified if they meet the jurisdictional thresholds regardless of whether they can conceivably affect competition. For example, the majority of European Commission notifications are made under the simplified (or even "super simplified") procedure as they present very low risk – in the UK, the CMA does not even need to investigate these at all.

CMA2 indicates that, going forward, the CMA will be more willing not to investigate some global transactions at all. More specifically, while CMA2 envisages investigating global transactions that have a **direct UK impact**, for transactions that only affect global markets it states that the CMA will *'wait and see'*, to assess whether actions (such as remedies) taken by other international competition authorities will resolve any concerns that could arise in the UK.

The aim is to reduce the potential burden of duplicative investigations for a transaction with filings in multiple jurisdictions. This is a pragmatic policy, and the decision to formalise it through CMA2 should be welcomed.

That said, this approach requires discipline on the CMA's part. It would not be a good outcome if the CMA "*waits and sees*" for too long, and ultimately ends up calling in transactions late in the day.

More generally, it is a sign of the times that the CMA, shortly after proudly celebrating its 10th anniversary and its track record as a thought leader in global antitrust, is now seemingly prepared to take a back seat in at least some global reviews. It is worth noting that, even under the text of CMA2, there would be sufficient discretion to allow for a significantly different approach when political winds change in future.

2. More guidance on jurisdiction (*4P engaged – Predictability)*

When does influence become "material"?

The CMA can assert jurisdiction to review a transaction whenever a buyer acquires "*material influence*" over a target company. This is notably a lower threshold than the vast majority of merger regimes globally, with the higher "*decisive influence*" threshold generally being the global standard for merger control review.

An acquirer can materially influence the commercial policy of the target company without majority ownership or control of the board. The CMA's ability to assess such influence in light of "*all the circumstances*", and under essentially whatever criteria it considers appropriate, means jurisdiction is far from a straightforward analysis. For example, material influence has been found at interests below 20% in several past cases (including the acquisition by British Sky Broadcasting Group plc of just 17.9% in ITV plc in 2007, and Amazon's interest of approximately.16% in Deliveroo in 2020).

To improve predictability, CMA2 includes more detail on factors relevant to the consideration of an acquirer's level of influence. The factors themselves have not materially changed, and include: the level of shareholding held, any board appointment rights, as well as the relevance of any financial, commercial or consultancy agreements between the parties.

Even under the expanded discussion in CMA2, the criteria remain broad and subjective. CMA2 does however:

- Suggest slightly more firmly that material influence is unlikely to be found at a shareholding of less than 15% (i.e. only where other "*significant factors*" are present as well); and
- Include some examples from case law in which material influence was not found.

Does the "share of supply test" give the CMA carte blanche to review deals?

Separately, CMA2 indicates that the CMA will “typically” only consider the factors specifically mentioned in the Enterprise Act 2002 (the ***Act***) when assessing whether or not the 25% share of supply test is met.

The legal requirement under this jurisdictional threshold is simply an overlap and combined share of supply/purchasing of 25% or more of *"any reasonable description of a set of goods and services*".[2] This need not represent an economic market the business may recognise and, to merging parties, the threshold can feel close to limitless.

CMA2's clarification that the CMA will not “typically” consider factors beyond the Act itself is somewhat useful, even if not definitive. It should discourage (even if not exclude) at least the most convoluted of attempts to assert jurisdiction. Regardless, the threshold will still remain broad under the Act, however, given that this expressly includes as legitimate criteria for consideration "*value, cost, price, quantity, capacity, [and] number of workers employed*".

Is the jurisdictional question now resolved?

In short, no. Neither of these updates to the guidance on jurisdiction provides certainty, or arguably even material clarification. We remain a long way from a bright line threshold. Understandably, jurisdictional questions must

[2] See Section 23(5) of the Enterprise Act 2002.

instead be addressed by the Government through legislative changes, which is already on the agenda for the "coming months".[3]

More generally, however, the issue for businesses remains that the CMA does not formally take a decision on jurisdiction until the end of a Phase 1 review at the earliest – so even where jurisdiction is in doubt when going into a deal, the risk of a burdensome antitrust review remains as significant as ever. This reverses the position in most other jurisdictions, where jurisdiction is effectively the pre-condition to a formal investigation.

The additional comfort is welcome, however, even if only as a signal that the CMA does not *perceive* its jurisdiction to be limitless. We are also tentatively encouraged that increasing the legitimacy of all "*exit paths*" for the CMA once in a formal review (e.g. a finding of no jurisdiction, or a decision not to refer under the *de minimis* rules, in addition to a conclusion on the merits) may at least allow for a greater number of efficient resolutions on these grounds in future.

3. Procedural changes for pre-notification and Phase I (*4P engaged – Pace and Process)*

New timing KPIs

The CMA has introduced new key performance indicators (***KPIs***) of:

- **40 working days** for pre-notification (compared to the current average of 65 working days); and
- **25 working days** for announcing straightforward clearance decisions in Phase I proceedings (compared to the current practice of 35 working days).

These new KPIs will apply to all cases where the initial draft merger notice is submitted after the launch of this consultation (20 June 2025).

The KPIs represent significant time savings, in theory. The devil is in the details, however:

- The pre-notification KPI will only run from the point in time where the CMA has "*the necessary information*" to begin. This is reflected in changes to the merger form itself, which now requests upfront information such as internal documents typically provided at present on a rolling basis in parallel to engagement with the case team. This suggests the new KPI will only start running from an "advanced draft" filing, rather than from a "first draft" filing (as at present).

[3] See the UK Government's policy paper dated 31 March 2025: "*New approach to ensure regulators and regulation support growth*". This states: "*Next steps will include... bringing forward a consultation in the coming months on legislative reform proposals where the Government can take action to improve the pace, predictability and proportionality of the UK's competition regimes. This consultation will include proposals to provide more certainty on where mergers will be subject to investigation in the UK by addressing uncertainty with the existing Share of Supply and material influence tests*". https://www.gov.uk/government/publications/a-new-approach-to-ensure-regulators-and-regulation-support-growth/new-approach-to-ensure-regulators-and-regulation-support-growth-html.

- The merging parties can "*opt out*" of this target timeline, or it can be disapplied by the CMA itself if it deems the information provided has not been "*adequate*". CMA2 observes that this may be desirable to ensure synchronisation with international merger reviews, or even simply due to a transaction's complexity.

We therefore see a clear leeway in practice – either by mutual agreement or otherwise – for the start of the formal review to be delayed, such that pre-notification in fact takes significantly longer than the headline timeframe. Indeed, this would be eminently sensible in complex cases - simply put, 40 working days in pre-notification isn't always enough.

It therefore remains to be seen how long the full pre-notification period will take in reality, and whether there are material savings in practice when timing is measured from first engagement. We tentatively hope that, for most deals, it will indeed be a little quicker than at present.

Publication of case webpages and increased engagement

CMA2 includes a policy of launching a public case webpage at the start of pre-notification. This approach is unique amongst major global authorities (for example, the European Commission only launches a public webpage when the official notification has been filed after pre-notification). Along with the publication of the case page, it will also become routine for this to be accompanied by a public invitation to comment on the transaction.

This is a helpful change and standardises the rather ad hoc approach at present (with only some cases seeing an early invitation to comment, while in other cases third parties may be unaware that the CMA is even reviewing a deal until the formal review begins).

CMA2 also introduces a number of opportunities for earlier and more regular engagement between the CMA and the merging parties during an investigation (for example, by way of hosting an early teach-in and update calls during the pre-notification period on the priority areas for the investigation).

This will likely be the most material change introduced by CMA2 in practice, with the lack of engagement being the most common complaint by practitioners for years. These changes follows similar reforms to the Phase 2 process introduced last year.

Conclusion

The spirit of the reforms encapsulated in CMA2 is overwhelmingly positive for businesses, and the CMA deserves credit for the overall direction of travel in the draft.

A close reading of the precise text, however, suggests that there is leeway for certain reforms to be less impactful than what the headline changes might suggest, particularly with respect to time savings from the new KPIs. Accordingly, the CMA's consistent practice around the new policies will be key for building market confidence, and to achieve the "*predictability*" goal in particular.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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