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UK Mergers after Brexit: Disruption or continuation?

Webinar - 24 February 2021*

> "The United Kingdom is emerging at the forefront of merger control enforcement and is now one of the more interventionist authorities."
>
> Catriona Hatton

Catriona Hatton

The United Kingdom is emerging at the forefront of merger control enforcement and is now one of the more interventionist authorities, pursuing many of the newer theories of harm and stretching its jurisdictional 25% share of supply jurisdictional threshold to take jurisdiction over international deals where the target has little or no UK revenues. This has resulted in several lengthy investigations, including post-closing investigations, prohibitions, and deals abandoned in the face of antitrust challenge. Concerns around harm to innovation and elimination of emerging competitors or potential entrants have been at the centre of several high-profile investigations including Illumina's attempted acquisition of Pacific Biosciences, Amazon's minority investment in Deliveroo, and Sabre's attempted acquisition of Farelogix.

With Brexit, the CMA gains broader powers to review deals that were previously under the exclusive jurisdiction of Brussels and it is also considering mandatory notification requirements for all deals involving some of the larger digital platforms. With this expanded role, the CMA is set to take an even more prominent role at the forefront of international merger enforcement, but questions remain on how it will prioritise cases so that its focus remains on those deals most likely to impact the UK market and when might it step back and allow other jurisdictions to lead an investigation in the expectation that the outcome will also protect UK consumers.

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Manish Das

> “Companies need to think carefully in terms of what evidence is going to help the CMA to appreciate the positive benefits of the transaction.”

Manish Das

Manish Das provided the perspective of an in-house antitrust specialist on new UK enforcement trends. The now non-application of the one-stop-shop of the EU leads to a certain prominence of special features of the UK regime. There is a continuation in UK mergers because the CMA continues to review transactions as it has always done but some businesses need to become familiar with the system. First, while the UK is a voluntary regime, the CMA can call on transactions and is very vigilant. Therefore, the voluntary system might signal that you do not have to think about the UK merger control, but this may not be the case according to the active role of the CMA. Second, the market test is very flexible. For instance, minority acquisitions can make a difference as *Amazon/Deliveroo* showed. In a wider context, there is a perception of a different attitude of the CMA in the post-Brexit era.

The CMA is making visible its independent voice. The emphasis on digital and the impact of mergers on consumers are key features that lead to a greater degree of uncertainty about how to approach merger control in the UK, whether you want informal contact to get some comfort or to notify to get rid of the uncertainty. There is a huge amount of preparatory work to be done for companies, particularly trade investors, to ascertain what the impact of the transaction may be and how the CMA may view it. From an industry perspective, this self-assessment is burdensome, especially in terms of information-gathering, and without the insurance of a formal clearance. Pulling together economic and internal evidence for market information is a bigger exercise that leads to a greater timing application and uncertainties.

The advantages of the companies to serve customers out of the transaction are hard to qualify and to prove. A small trade player merging with a big player will eventually have access to funding, expertise and a distribution network. Internal documents may serve as a self-serving statement to demonstrate these benefits, but they may also sink the deal. Companies need to think carefully in terms of what evidence is going to help the CMA to appreciate the positive benefits of the transaction, whether there is efficiency or a relevant benefit for customers. In terms of timing, the CMA may request documents instantly. The company will need to set up a forensic internal process to seize documents created during the preparation of the transaction and to examine certain points, such as the description of the potential rivalry, the statement made by the executive, etc. This major task should lead the in-counsel to help the CMA in speeding up its review because it will be able to share the company’s in-depth view of the transaction.

Alexander Baker

> “The draft revised guidelines seem to focus only on the dynamics between the merging parties, but the market dynamics can also arise from other sources.”

Alexander Baker

In terms of the CMA’s workload, a major policy question will arise as to whether, just because they can review those mergers in-depth, they should. Some global deals, typically in intermediate markets, may have little relevance to end consumers in the UK. The CMA should focus its limited resources on deals that have a clear link with end consumers of the UK. CMA’s approach to merger control is not unpredictable. It is tougher and producing results that merger parties and advisors may not like, but it is not unpredictable. Through decisions taken since its creation in 2013, it has arrived at a new policy position and henceforth, supported by the publication of detailed decisions and guidance, it is predictable where the CMA land over issues.

However, uncertainty remains in two areas: in deals in sectors where the CMA has limited or no case experience because the review was undertaken in Brussels; and with the operation of the merger’s intelligence function, making it difficult to predict in certain cases whether or not the CMA will open a file. The CMA has a different cultural approach, and this may be a shock to companies that previously only dealt with EU agencies.

The operation of the share of supply test sometimes leads to what appear like strange decisions by the CMA to qualify deals for review. For instance, the *Sabre/Farelogix* transaction was qualified through a back-to-back contract American Airlines had with British Airways

despite Farelogix not operating in the UK. This resulted in an increment in the share of supply. The CMA took jurisdiction and blocked the deal while some other agencies opposed to the deal failed to do so because of the specificities of their regime. Also, the scope of the initial enforcement order process for consummated deals gives the impression that the CMA may have a disproportionate impact on the global stage compared to the size of the UK economy. However, this is consistent with the CMA's focus on developing its international profile since the Brexit referendum in 2016.

The CMA is rightly concerned about the impact of a loss of dynamic competition and potential entry on innovation and productivity. But dynamic competition is not new, and the concerns about the impact of deals by large platforms are probably overstated (for example, *Facebook/ Instagram*). Concerning the revised merger assessment guidelines, it is worth noting the way evidence will be used for dynamic and potential competition theories given this is all about prediction. The draft focused heavily on the importance of internal documents of merging parties, with less focus on evidence provided by third parties. In a dynamic theory, the CMA will have to triangulate views from different parties, and this may involve the requisition of some documents by third parties. The draft revised guidelines seem to focus only on the dynamics between the merging parties, but the market dynamics can also arise from other sources, such as changes in consumer demand or from the rest of the market.

Joel Bamford

The CMA has jurisdiction where it is appropriate and consistent with the purpose of the UK merger control regime, which has been recognised as a matter of public importance by the English courts. The CMA has a role to play in monitoring M&A activity in the UK to ensure that mergers do not slip through the net. The system enables the CMA to focus formal investigations on a smaller number of mergers than a mandatory system. The merger intelligence function reviews between 500 to 700 actions. The number of Phase I cases is between 40 to 65 per year and the in-depth investigation for a classic Phase II is between 5 to 10 per year. The voluntary regime allows the CMA to dispense with the mandatory review of transactions and offers the advantage of self-assessment to companies. They can provide the merger intelligence committee with a briefing note to put forward why there are no competition concerns. However, the corollary of the benefit of this voluntary system is that the CMA has the flexibility in its jurisdictional test to review mergers that are likely to disrupt competition and have a real impact on UK consumers. The share of supply test enables the CMA to look at transactions that have an impact on the UK. The voluntary regime also enables the CMA to take a back seat in global deals where other competition authorities are already engaged and will address global competition concerns that the merger might give rise to. Companies will provide information on these processes to demonstrate how any UK potential concerns will be tackled by global remedies and whether there is wanted for the CMA to open a formal investigation.

On dynamic competition, the emphasis on assessing direct evidence of firm intent and on the rationale for the merger itself is reflected in the revision of the guidelines. In the competition assessment, the CMA considers whether taking the strength of a potential entry into account would lead the merger to less competition. Over the past four years, the CMA has used its legal information-gathering power to make sure with competitors and customers that the evidence obtained fit with the narrative given by these companies. This ensures that the incentive of everybody is taken into account in a merger review process and the stringent test of evidence is designed to exclude a distorted test with, on the one hand, a hard test for merging parties and on the other hand, a fairly lax test from competitors. Also, merging companies are often represented by law firms and economists that strongly advocate for their views of the market. Competition authorities test this defence by examining the evidence. The merger review process relies on the commitment of end customers to provide viable evidence that can support the assertions, but it is not uncommon for some companies to be reluctant to provide information that may jeopardise their relationship with the merging firms, particularly if that firm is a key supplier.

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Rameet Sangha

Rameet Sangha

Rameet Sangha focused on trends in the new draft merger guidelines that were released for consultation in November 2020. The creation of a section on potential competition reflects the focus on examining future and dynamic competition, including details on technology markets and the experience of the CMA in recent cases. Potential competition and potential entry were indeed crucial issues in three of the nine last published Phase II merger decisions. For instance, in *Amazon/Deliveroo* (where Amazon's 16% stake in Deliveroo was cleared), *Sabre/Farelogix* (which was blocked) and *Bauer Media Group*, cleared with behavioural remedies. However, potential competition is a prominent feature in many in-depth cases and an emphasis in the guidelines demonstrates that advisors must continue to carefully consider potential competition, extending it to potential entry into a critical market that could affect the transaction.

The emphasis on the market definition has been reduced in the draft Guidelines, which is a practice that simply reflects the way CMA has been addressing cases in recent years. Furthermore, the lack of clear thresholds is a source of uncertainty. The guidelines will consecrate a case-specific assessment. In phase I, many cases will be cleared. The CMA ensures that many cases that should not go into Phase II do not go there. The in-depth review of Phase II is an interesting feature of the UK system, but we need to see if it will generate some degree of uncertainty or consistency in the UK regime over time. ■

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