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Post-Brexit, a More Demanding UK Merger Review Process

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This article is from Skadden's ***2021 Insights***.

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On January 1, 2021, the U.K. Competition and Markets Authority (CMA) became a merger regulator independent of the European Commission's "one stop shop" for merger control. The CMA has made clear its plans to become "a global competition and consumer protection authority" in reviewing global mergers. The CMA has the tools at its disposal to do so — in the form of highly flexible tests to determine whether the CMA has jurisdiction to review a merger, and powers to impose global freezing orders on merging parties and unwind transactions. With few merger decisions thus far substantively overturned on appeal, the CMA promises to be a competition authority to watch in global M&A in 2021.

The post-Brexit change is significant; the CMA now has the jurisdiction to investigate mergers potentially impacting the U.K., whereas it previously could not pursue cases already under EU review. (See our October 5, 2020, client alert, "Antitrust Planning During the Countdown to Brexit.") The agency has hired new staff and estimates it will review an additional 30-50 transactions per year in its new capacity — a 50% increase on its existing workload.

As with other key competition authorities such as the European Commission, the CMA has stated (in its draft annual plan for 2021-22) its intent to maintain competition in digital markets as a strategic focus: "Digital markets are widely recognised as being one of the most dynamic and innovative areas of most economies. ... It is imperative that we ensure that these markets operate in a way that fosters innovation and growth, and that we remain vigilant to the risk of harm to consumers." Also, the CMA proposes to focus on protecting consumers and driving recovery during and after the COVID-19 pandemic, in addition to taking its place as a global competition and consumer protection authority, among other things.

In the past two years, the CMA has been taking an increasingly assertive stance to merger reviews. It recently reviewed, and in some cases prohibited, a number of global mergers in the digital and life sciences sectors — including mergers where the target appeared to have limited revenues or direct activity in the U.K. The CMA has not been shy about prohibiting transactions where it identifies problems — even where the transactions have been approved by other global authorities — either on antitrust merits or the suitability of proposed remedies. Based on the CMA's published statistics from January to November 2020, 30% of transactions reviewed by the CMA in Phase 1 were moved into an in-depth Phase 2 review (which may take a year or longer). Of those nine Phase 2 transactions, only two were ultimately approved; three were blocked and four others abandoned. By comparison, in the past five to 10 years, an average of around 15% of transactions were moved into Phase 2.

While the increased scrutiny has led to a corresponding uptick in appeals to the U.K. Competition Appeal Tribunal (CAT), claimants have had limited success in overturning a merger decision on its merits. In 2019-20, there were 10 appeals to the CAT relating to merger

decisions — almost twice as many as the prior five years. Of the 10, only one was upheld in a material respect (two appeals remain pending). In part this is because, unlike EU merger decisions, where a full review on merits is available, an appellant can only appeal a merger decision by the CMA based on the judicial review standard. An applicant therefore faces an unattractive appellate route for mergers in the U.K. — it must demonstrate that the CMA's application of its broad substantive test and evidential evaluation has been irrational, illegal or procedurally defective, while the CMA is required only to disclose "the gist" of the evidence upon which it has relied to reach its decision.

The CMA's interventionist approach looks set to continue. In its most recent report in November 2020 on the state of competition in the U.K., the CMA noted that the weakening of competition "gives sufficient cause for the CMA, regulators and government to remain vigilant in protecting and promoting competition, especially as the U.K. emerges from the severe economic impact of the pandemic." The CMA also recently issued new guidelines on its assessment of mergers, which include a focus on recently developed theories of harm such as "killer acquisitions" and innovation competition, and also signal the CMA's growing willingness to engage in enforcement in the face of uncertainty when considering the likely effects of a merger. (See our December 3, 2020, client alert, "UK Competition and Markets Authority Has Proposed Updates to Merger Assessment.")

Further reforms on the application of competition rules in the U.K. are also expected. The existing reform proposals by the former chairman of the CMA, Lord Andrew Tyrie, remain on the table, and a new report on competition policy in the U.K. by Member of Parliament (MP) John Penrose is imminent. This report promises to consider how the U.K. competition regime can evolve to promote a dynamic, innovation-driven economy within the context of Brexit and recovery from the impact of COVID-19. One point under deliberation is the introduction of a mandatory merger control regime. Although the current U.K. merger control regime has been voluntary since its inception in 2002, the proposal of a new mandatory filing regime in the context of national security review may pave the way for a further shift in approach. (See "UK Follows Global Trend To Enhance National Security Protections.") Indeed, when it comes to regulating digital markets, the CMA has advised the introduction of a mandatory notification for certain mergers by companies designated as having "strategic market status."

At the same time, the CMA has signaled its intention to cooperate closely with other regulatory authorities from a procedural perspective — which includes potentially not opening an investigation over some global mergers within its jurisdiction where any concerns could be dealt with through another regulator's review. It is not yet clear under which circumstances this type of cooperation would apply; it will likely depend on the strength of the merging parties' nexus to the U.K. and perception of risk of harm based on the sector in which the parties operate. The CMA has also indicated potential flexibility in its process for reviewing remedies in order to fit in with other jurisdictions.

Given recent developments, parties to a merger that may touch on the U.K. (in particular in digital markets) are well advised to consider early on whether the transaction may fall within the jurisdiction of the CMA. Planning in the early stages for a CMA review and the implications that may have on a transaction will be important to the deal timetable and outcome.