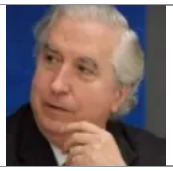

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Skadden Discusses Proposed UK Reforms to Merger Process

By Bill Batchelor and Aurora Luoma December 6, 2023

Comment

On November 20, 2023, the UK's Competition and Markets Authority (CMA) announced proposed reforms to its in-depth merger control review process (the phase 2 review) that seek to provide more opportunities for engagement with decision makers and incentivise parties to bring forward remedies at an early stage.

The CMA's proposed revisions to its Guidance (Draft Guidance) are a welcome change to what was often seen as an inflexible process that offered merging parties only limited access to the decision-makers and did not provide opportunities for constructive remedy discussions at a sufficiently early stage. Moreover, the proposal to publish a new interim report, providing an early insight on the Inquiry Group's substantive concerns, would enable merging parties to advocate their position and discuss the merits of the case in person with the Inquiry Group at the main party hearings (provided the initial report is sufficiently developed).

Key Points

The UK merger control process involves a two-stage review. The phase 1 decision is a finding to a "reasonable prospects" standard that the merger calls for in-depth inquiry at phase 2. The phase 2 review is overseen by a panel of part-time senior officials with experience in business, economics/accounting, law and the public sector, who form the Inquiry Group. The appointment of an independent group is intended to provide a "fresh pair of eyes" in relation to the CMA's phase 1 investigation, in which a member of CMA staff decides whether the test for reference is met. The revised procedures seek to address concerns that these decision-makers might have little engagement with the merging parties on the merits beyond set-piece hearings occurring late in the evidence gathering stage. The key changes include:

- **Early presentations to the panel on the merits:**Codifying the CMA's working practices, the parties would be invited to make early presentations on the business and products ("teach-ins") and merits of the phase 1 decision.
- **Interim report and merits hearing:**An interim report and merits hearing would replace the provisional findings and main parties hearing. This is intended to address the perception that (i) the provisional findings come too late in the process to be meaningfully influenced; and (ii) the main party hearings tend to be focused on specific fact-finding rather than an opportunity for engagement on the merits of the case.
- **Encouraging earlier offers of credible remedies:**Additional and earlier opportunities to engage with the Inquiry Group on remedies, including a remedy meeting to discuss the Inquiry Group's feedback on the remedy proposal.
- **De minimis exception widens from £15 million to £30 million:**There is a welcome broadening of the size of market test exception to merger review, meaning that markets in the UK worth less than £30 million may be deprioritised. The practical impact of the wider exception remains to be seen, as the CMA reserves significant discretion to find that that an otherwise low-value market is strategically important.

The Proposed Changes

Earlier focus on key issues

The CMA has addressed feedback that the main party hearings could focus more on substantive issues and that the provisional findings come too late in the process to enable a meaningful response in most cases.

- **No issues statement.**The CMA intends to streamline the starting point for the phase 2 investigation by abolishing the issues statement (which reflects the theories of harm on which the CMA is focusing and is often heavily based on the phase 1 decision) and would instead simply use the phase 1 decision to identify the key issues for the start of the phase 2 process. Parties would be invited to provide comments on the phase 1 decision at the outset of the phase 2 process.
- **Interim report replaces provisional findings.**The CMA proposes to replace the provisional findings report with a new "interim report" containing the Inquiry Group's provisional decision on jurisdiction and substance. The interim report would be published earlier in the process than the current provisional findings are and, crucially, ahead of the main party hearings. The counter to this benefit is that the assessment would be less definitive

than provisional findings and therefore more likely to change in light of new evidence or submissions (leading to supplementary interim reports). Parties would be invited to make written submissions on the interim report ahead of the main party hearing.
- **Substantive main party hearing.**The main party hearing would take place after the publication of the new interim report, and a significant proportion of the hearing would be reserved for the parties' oral submissions. These revisions are designed to refocus the hearings away from information-gathering and to enable parties to engage on the merits of the case and address the Inquiry Group's substantive concerns.
- **Earlier disclosure of evidence.**The CMA proposes to remove the annotated issues statement (which sets out emerging thinking before the main party hearing) and the working papers and to instead retain flexibility throughout the investigation to disclose key evidence and analysis to the parties and invite representations where appropriate. This revision is designed to enable the CMA to publish its assessment of the key substantive questions earlier and with a more comprehensive level of reasoning than would typically be found in existing working papers.
- **No access to file.**The CMA does not, however, intend to grant merging parties with access to the underlying third-party evidence relied on by the Inquiry Group, despite feedback that full access to file would enable a more meaningful discussion on the substantive case, and that the CMA's practice of providing only the "gist" of third-party submissions is at odds with the practice of competition authorities in other jurisdictions, including the European Commission.

Improved engagement

The CMA has addressed feedback requesting more opportunities to engage directly with the Inquiry Group, in particular at the beginning of the phase 2 process.

- **Earlier meetings with the Inquiry Group.**The Draft Guidance formalises the practice of holding a teach-in session, often together with a site visit, at the start of the investigation. While teach-ins provide for a factual briefing on the business, the CMA also proposes to introduce a new "initial substantive meeting" for parties to present their case, in person, to the Inquiry Group at an early stage (following the submission of the merger parties' response to the phase 1 decision).
- **More frequent discussions with the case team.**The case team would make more use of informal update calls with the parties to enable improved focus on the key areas, provide more transparency over emerging thinking and facilitate more targeted submissions. The CMA also explicitly provides for it to have direct engagement with the merger parties' economic advisers where appropriate.

Remedies

The CMA has also proposed modest changes to address feedback that constructive discussions on remedies take place too late in the statutory timetable.

- **Encouragement of early proposals.**The Draft Guidance now clarifies at various stages that the CMA welcomes "without prejudice" discussions on remedies at an early stage of the investigation, which formalises recent statements made by CMA officials that early proposals are welcomed.
- **Increased and earlier engagement opportunities.**The revised process introduces an early discussion with the Inquiry Group, before the interim report is issued, in cases where parties table a credible remedy proposal at the outset, and "at least one" later remedies meeting to develop an acceptable proposal (alongside more frequent, informal discussions with the case team throughout the phase 2 process to improve the preparation of remedy proposals).
- **Interim report on remedies.**Parties would be provided with an interim report on remedies after the main hearing, setting out the Inquiry Group's assessment of the remedy options and its provisional decision on remedies. A new remedies form should be used to submit remedies in response to the interim report, although parties are encouraged to submit earlier. Following the parties' response to this interim report, they would typically be invited to a "final" remedies call with the CMA to clarify any outstanding issues on the remedy.

De minimis exception

The CMA also plans to expand its de minimis exception, which allows the CMA to de-prioritise investigating certain mergers where the costs of a phase 2 would not be merited due to the low value of the market in question in the UK. The proposed reforms include increasing the threshold beneath which the CMA may consider exempting a transaction from a phase 2 review from £15 million to £30 million. It remains to be seen how impactful these changes will be in practice, as the CMA retains significant discretion to find that a reference may nevertheless be justified for small markets. For example, the CMA noted that it would be unlikely to de-minimise deals concerning small, individual local markets across a sector, as the cumulative effect of consolidation may be significant, notwithstanding small individual deal size.

Other changes

In addition to the changes to the phase 2 processes outlined above, the CMA proposes a number of other, more minor, revisions to its Guidance. This includes amendments to (i) bring it in line with recent case law on both the standard of proof and the use of confidentiality rings and confidentiality excisions; (ii) clarify that, in addition to providing confidentiality waivers to allow the CMA to exchange confidential information with other authorities or regulators, parties may also be invited to provide confidentiality waivers in respect of other UK authorities or regulators; and (iii) reflect the CMA's current phase 1 practices.

Next Steps

The CMA invites comments on the Draft Guidance and accompanying documents by January 8, 2024, and intends to finalise its revised Guidance with

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's memorandum, "Proposed UK Reforms to Merger Process Offer Wider Small Market Exception and Better Engagement With Senior Officials on Merits and Remedies," dated November 28, 2023, and available here.