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United Kingdom
Merger Control

Contributor

Clifford Chance LLP

Jennifer Storey

Partner | jennifer.storey@cliffordchance.com

Daniel Harrison

Knowledge Director, Antitrust Practice | daniel.harrison@cliffordchance.com

This country-specific Q&A provides an overview of merger control laws and regulations applicable in United Kingdom.

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United Kingdom: Merger Control

1. Overview

The UK merger control regime – which is contained in the Enterprise Act 2002 – is one of the few voluntary, non-suspensory filing regimes in the world. If a transaction meets the relevant jurisdictional thresholds, the UK competition authority – the Competition and Markets Authority (CMA) – will have jurisdiction to review the transaction and to impose remedies to address any substantial lessening of competition to which it considers the transaction may give rise. However, merging parties have no obligation to notify the CMA of a relevant transaction and are free to complete it unless and until the CMA decides to open a second-phase investigation, or imposes an ad-hoc prohibition on closing during first-phase.

If a transaction is completed without the parties having first sought a clearance from the CMA by making a voluntary filing, then the purchaser of the relevant target business effectively assumes all antitrust risk in the transaction, including: (i) the risk that the CMA subsequently opens an investigation, concludes that the transaction is likely to lessen competition substantially and imposes remedies (which could include a requirement to divest the entire target business at no minimum price); and (ii) the financial cost of complying with strict hold-separate obligations that are invariably imposed by the CMA on both the target business and the purchaser's business for the entire duration of its investigation, through to implementation of any remedies that are required.

2. Is notification compulsory or voluntary?

Notification is voluntary in the UK. The only circumstances in which a merger filing is compulsory relate to certain acquisitions and joint ventures involving a firm that has been designated as having "strategic market status" under the UK's new digital markets regulatory regime, which will enter into force in December 2024/January 2025 (see section 6 below).

A separate national security screening regime, under the National Security and Investment Act, does impose mandatory filing obligations on transactions involving targets with UK activities in certain sensitive sectors. This guide covers only the UK merger control regime, not the national security screening regime.

3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?

During the 'first-phase' investigation by the CMA (see section 19 below for details of the stages of the review process), there is no automatic obligation to suspend implementation of the transaction. An automatic prohibition only becomes applicable if and when a second-phase investigation is opened. An exception to this applies in respect of notifiable mergers involving firms that have been designated as having strategic market status under the new digital markets regulatory regime (see section 6 below): such mergers cannot close for a "waiting period" of 5 working days from the date on which the CMA accepts the filing.

First-phase

The CMA has the power to impose an order prohibiting closing of an uncompleted transaction, for the purpose of preventing 'pre-emptive action'. Pre-emptive action is that which would prejudice the CMA's ability to investigate the merger or to remedy any competition concerns that it may subsequently identify. A prohibition on closing might therefore be necessary if the legal act of closing itself (as opposed to events that may take place after closing) will automatically impact the viability of the target as a standalone competing business. The CMA has given the example of a closing that would automatically lead to the loss of key staff or management capability for the target. Another example might be where the target has important and irreplaceable contracts that contain change of control provisions that will inevitably be exercised on closing, for example because the other party to the contract is a competitor of the purchaser.

The power to prohibit closing during the first-phase investigation was introduced on 1 April 2014 but has only been used by the CMA in a handful of cases to date. For example, in *Bouygue/Equans*, the CMA was concerned that the act of closing would trigger a legal obligation, under the rules of a tender procedure, for the parties to withdraw one of the two bids that each submitted for a major rail development contract. It therefore prohibited closing pending the negotiation and acceptance of commitments designed to ensure that the least economically advantageous bid was withdrawn.

The CMA also has powers to impose 'hold-separate' orders to prevent pre-emptive action being taken, both for completed and uncompleted transactions. These typically require the target business and the purchaser's competing business to be held and operated separately for the duration of the CMA's review, and for the period of implementation of any remedies. Complying with these obligations is often costly and onerous.

'Hold-separate' orders typically impose, among other things, obligations to:

- refrain from further integration of the target's business with those of the purchaser, or selling it to a third party;
- maintain as a going concern both the target's business and any competing businesses of the purchaser. This typically includes requirements to: (i) make available sufficient resources for the development of the business on the basis of pre-merger plans; (ii) not to change key staff, organisational structure or management responsibilities; (iii) take steps to encourage key staff to remain with the relevant business; (iv) preserve and maintain assets, facilities and goodwill; (v) not reduce the range and/or standard of goods and services supplied);
- prevent the flow of commercially sensitive information between the competing businesses of the target and the purchaser; and/or
- operate each business separately and independently, particularly as regards competitive decisions such as pricing.

For completed mergers, hold-separate orders are almost invariably imposed. For uncompleted mergers, the CMA has stated that it will usually only impose hold-separate orders if there is some evidence that pre-emptive action is already taking place (which is likely to be rare as, in many cases, such action would independently breach the separate prohibition on anticompetitive agreements under EU and/or UK competition laws).

In recent years the CMA has stepped up enforcement against breaches of hold separate orders. It imposed fines totalling £52 million on Meta for various breaches of a hold-separate order, including failures to provide complete compliance reports to the CMA and to inform the CMA about departures of key staff.

Second-phase

If the CMA opens a second-phase investigation, the parties are automatically prohibited from completing any transfer of shares in relation to the transaction, or – where the merger is already completed – further integrating the relevant businesses, without the consent of the CMA (which is rarely granted). An exception to the automatic prohibition on closing during the second-phase investigation applies where completion occurs pursuant to a pre-existing contractual obligation.

In addition, the CMA can impose 'hold-separate' orders (see above) during the second-phase investigation or can negotiate 'hold-separate' undertakings with the parties.

4. What types of transaction are notifiable or reviewable and what is the test for control?

The UK merger control regime applies to transactions that result in two or more businesses – referred to as 'enterprises' – 'ceasing to be distinct', and which meet the jurisdictional thresholds set out in section 6 below.

Businesses will cease to be distinct if they are brought under common ownership or control. This covers three distinct stages of control:

- Acquisition of a legal, controlling interest in the target. This will be the case where, for example, there is an acquisition of all, or the majority of the shares in the target.
- Acquisition of an ability to control the policy (i.e. the competitive conduct) of the target. This broadly corresponds to the concept of decisive influence under the EU Merger Regulation, and can arise on a de facto basis, e.g. where a 40% shareholding in a public company would allow the holder to exercise the majority of the voting rights because only 60% of the shareholders attend and vote at shareholder meetings.
- Acquisition of an ability to exercise 'material influence' over a target. The test for material influence is described in section 5 below.

An acquisition which causes the purchaser to move from one stage of control to a higher stage of control will be caught by the merger control regime, and will therefore be reviewable by the UK merger control authorities. So, for example, if a purchaser is able to exercise material influence over the target and then increases its stake so that it then has a controlling interest, that acquisition will be reviewable (provided the jurisdictional thresholds are met), irrespective of whether the earlier acquisition of material influence was reviewed by the CMA.

The CMA considers that a target may amount to an 'enterprise' even if it is no longer, or has not yet started, actively trading.

A different test for control applies to mergers involving firms that have been designated as having strategic market status under the new digital markets regulatory regime – see section 6 below.

5. In which circumstances is an acquisition of a minority interest notifiable or reviewable?

An acquisition will be reviewable if it confers, at a minimum, the ability to exercise 'material influence' over the competitive conduct of the target. This is a lower threshold than the 'decisive influence' test under the EU Merger Regulation. As a general rule, a shareholding of more than 25% is likely to be viewed as giving rise to material influence, and shareholdings of as low as 10-15% (with no board representation or other governance rights) might be viewed as conferring material influence, depending on the circumstances.

For acquisitions of public companies, a shareholding that would allow the holder to veto a 'special' resolution (taking into account typical levels of shareholder attendance and voting at shareholder meetings) will usually be sufficient to confer material influence.

For example, an acquisition by BSkyB of a 17.9% interest in ITV was found to have satisfied the material influence test, a finding that was upheld on appeal by the Competition Appeal Tribunal (CAT). However, in practice the CMA is unlikely to exercise jurisdiction over an acquisition resulting in such a low shareholding unless the transaction gives rise to substantial potential competition concerns.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)? Are there different thresholds that apply to particular sectors?

A merger that satisfies the control test described in section 4 above can be reviewed by the CMA if it meets either of the following jurisdictional thresholds:

- The target's UK turnover exceeds GBP 70 million (approximately EUR 81 million) in its most recent financial year. This is known as the 'turnover test'. In principle, this test can be met even if the purchaser has no sales or presence in the UK (although it is highly unlikely that the CMA would seek to investigate a transaction in those circumstances).
- The businesses which cease to be distinct will together supply or acquire at least 25% of a particular category or type of goods or services of any kind in the UK, or in a substantial part of the UK. This test is known as the 'share of supply' test. To qualify, the merger must result in an increment to the share of supply or consumption and the resulting share must be at least 25%. In practice, therefore, the share of supply test can only be met where the enterprises concerned both supply or acquire goods or services of a similar kind in the UK (i.e. a horizontal merger). The CMA has a broad discretion as to the category of goods or services that it uses as the frame of reference for assessing whether the share of supply test is met, and that category may be wider than the relevant economic product market to which the goods or services belong.

In December 2024 or January 2025, the following changes to the thresholds will become effective:

- the value of the target UK turnover threshold will increase from GBP 70 million to GBP 100 million.
- A new, alternative threshold will be introduced, allowing the CMA also to exercise jurisdiction if any party to the merger (which in practice be the acquirer) has at least a 33% share of supply and UK turnover of more than GBP 350 million, provided at least one other party to the merger has a UK nexus, i.e. it is a UK business or body, carries on activities in the UK or has sales to UK customers.
- A new exclusion from the CMA's jurisdiction to review will apply if the 25% share of supply threshold is met, but the UK turnover of each of the merging entities is less than GBP 10 million.

The CMA's jurisdiction to review a completed merger also has a temporal element. The CMA can open a second-phase investigation at any time up to four months from the date of completion of the transaction, or from the date on which facts about the transaction became public (e.g. when it is announced, or when it receives significant press coverage in the national or trade press), whichever is the later.

There are different thresholds for CMA jurisdiction in relation to:

- mergers involving two or more UK water and/or sewerage enterprises. These are reviewable only if the UK turnover of each of the water enterprise being acquired, and at least one of the water enterprises already belonging to the acquirer, are greater than £10 million;
- mergers involving two or more energy (gas or electricity) network operators of the same type. These are reviewable only if the turnover of the target energy network in Great Britain (excluding Northern Ireland) exceeds GBP 70 million; and
- mergers involving a firm that has been designated by the CMA as having “strategic market status" (SMS) under the new digital markets regulatory regime, which will enter into force in December 2024 or January 2025 (designations will not happen until the regime is in force). For such transactions, a mandatory filing to the CMA must be made if:
    - for acquisitions, (i) the SMS firm acquires shares or voting rights in a target that cause its total shares or voting rights to exceed a threshold of 15%, 25% or 50%; (ii) the consideration paid for that total interest exceeds £25 million; and (iii) the target carries on activities in the UK or supplies to UK customers; and
    - for transactions involving the creation of a joint venture vehicle that will have activities or sales in the UK: (i) the transaction results in the SMS firm having more than 15% of the shares or voting rights in the joint venture; (ii) the total value of all capital and assets contributed to the JV by the SMS firm and consideration for the transaction paid by the SMS firm exceeds £25 million; and (iii) the JV is expected or intended to carry on activities in the UK or supply to UK customers.

However, the CMA cannot make a second-phase referral of a notifiable merger involving an SMS firm, or accept first-phase remedies, unless the generally-applicable turnover or share of supply thresholds for a review are met.

Certain media sector transactions can also be investigated by the CMA, at the request of a government minister – the Secretary of State for Digital, Culture, Media & Sport – even if they fall below the generally-applicable turnover and market share thresholds. These are transactions involving newspaper publishers or broadcasters, where one of the parties to the transaction supplies or provides at least 25% of the newspapers of a particular type, or 25% of the broadcasting of any description (as the case may be), in the UK or a substantial part of the UK.

For these media sector transactions, the investigation will be into a public interest consideration specified by the Secretary of State (see section 14 below), with whom the final decision on those considerations rests. The CMA has no jurisdiction to investigate these mergers on competition grounds unless the other jurisdictional thresholds described above are also met.

Finally, the Secretary of State has a duty to intervene in any acquisition of influence by a foreign State over any newspaper with a UK turnover of more than £2 million. Unlike the generally applicable merger control rules, the level of influence need not be material. Rather any holding of any shares, voting rights, limited partnership interests, board seats or other forms of influence (no matter how small) will satisfy the test, even if held indirectly (e.g., if held in a minority investor in the acquirer). The Government intends to pass secondary legislation, likely before the end of 2024, that will allow foreign State-linked investors to hold shares in UK newspaper businesses up to certain (yet to be defined) thresholds.

7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

Turnover is calculated broadly in the same way as it is for the purpose of the EU Merger Regulation, i.e. sales to third parties in the most recent financial year of goods and services, net of sales rebates, discounts and turnover-related taxes (such as VAT) and adjusted to take account fully of acquisitions and disposals of businesses. Turnover is usually (but not always) allocated geographically according to the location of the customer.

A party's turnover and/or share of supply should be taken as including the turnover or share of supply of entire group of companies to which it belongs. However, the turnover or share of supply of the seller (and any of the seller's group companies) is not taken into account when determining the turnover or share of supply of the target. In addition, the group of entities that is to be taken into account for the purposes of calculating turnover under the EA is slightly wider in scope than that which is taken into account for the purposes of the EU Merger Regulation. In particular, the following entities may be included in the turnover calculation:

- Entities or persons that are 'associated' with the target, for example because they are family relations, or because they carry on business 'in partnership' with the target.
- Where the target has material influence or control over the policy of an enterprise, but does not have a legally controlling interest (as defined in section 4 above), the CMA can include its turnover with that of the target for the purpose of assessing whether it has jurisdiction, although it is not required to. The same applies with respect to enterprises that have a material influence or control of the target's policy, but do not have a legal controlling interest.

For outsourcing transactions, the CMA may treat as turnover sales between the target and the seller, and may attribute such value to those sales as it considers appropriate to reflect their open market value.

For the share of supply test, the CMA has a broad discretion as to the category of goods or services that it uses as the frame of reference for assessing whether the test is met. In particular, the CMA will not – for the purposes of assessing whether it has jurisdiction – carry out a detailed assessment of the relevant economic market. Rather, it will consider the scope of products or services which appear to be broadly comparable, and potentially substitutable, with the products or services of the merging parties. That category may be considerably wider or narrower than the proper relevant economic product market to which the goods or services belong.

In certain circumstances, the share of supply test can be met even if one of the parties has no turnover in the UK – see section 11 below. The CMA has also treated intra-group sales as relevant for the purposes of determining whether the share of supply test is met (see e.g. *Tronox/TiZir Titanium*).

As regards the geographic area that is used as the frame of reference for the share of supply test, this may be national, regional or local, depending on the circumstances (again, the CMA has a broad discretion).

8. Is there a particular exchange rate required to be used to convert turnover and asset values?

The CMA accepts the conversion of foreign currencies into GBP at the approved exchange rate applicable at the date of the accounts.

9. In which circumstances are joint ventures notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?

In relation to joint ventures, where both/all parents are contributing assets to the new joint venture, turnover of each of the businesses being contributed to the joint venture must be assessed, with the lowest business turnover being deemed the 'target' in this respect.

'Greenfield' joint ventures (i.e. joint ventures that commence a new business activity, rather than combining existing activities or business assets of the parent companies) are not typically notifiable under UK merger control rules, as such ventures have neither turnover nor share of supply (as noted in section 11 below, there has been a case in which the share of supply test has been met even though one party's products were still in development, but in that case the other party had significant levels of sales in the UK). In addition, certain greenfield joint ventures entered into by firms that designated as having strategic market status under the new digital markets regime will be subject to mandatory notification to the CMA (see section 6 above).

10. Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?

As a general rule, the CMA will consider all stages of a transaction as part of the same, reviewable transaction.

However, in the case of "break up bids" – in which a business is acquired with a view to dividing its assets between two or more purchasers according to a pre-existing plan upon completion of the transaction – the CMA is unlikely to investigate the initial acquisition where it is clear that the subsequent division of assets will occur within the four-month time period within which the CMA has the ability to initiate a second phase investigation (see question 6). Each acquisition of assets by the respective purchasers will instead be a separately reviewable transaction. Where it appears that the subsequent steps may not take place within four months, the CMA may open an initial investigation. If it considers that a second phase investigation would be required if the subsequent division of assets is not undertaken, then the CMA would require the parties, as a condition of not opening that investigation, to enter into binding commitments setting out when and how the assets will be divided among the investors.

11. How do the thresholds apply to "foreign-to-foreign" mergers and transactions involving a target /joint venture with no nexus to the jurisdiction?

The jurisdictional thresholds do not vary according to whether the transaction is 'foreign-to-foreign' (i.e. whether the legal entities acquiring and being acquired are all located outside the UK).

In addition, the thresholds described in Section 6 above mean that transactions having no territorial nexus with the UK should not fall within the CMA's jurisdiction. However, in some recent cases the CMA has interpreted those thresholds in ways that allowed it to exercise jurisdiction to review transactions that had very little nexus with the UK:

- In Sabre/Farelogix the CMA exercised jurisdiction on the basis that the parties both supplied services to airlines in the UK and had a share of those services exceeding 25%, despite Farelogix having no direct sales to any UK airline. The CMA considered that, because Farelogix's direct US-based customer, American Airlines, had asked Farelogix to make certain services available to British Airways, and British Airways had made the decision to accept those services in the UK, then Farelogix could be considered to have "derived value" from the supply of its services to a UK airline, and could therefore be considered to have a share of the supply of such services in the UK. The Court of Appeal subsequently approved this reasoning.
- In Roche/Spark, the target (Spark) had no UK sales, customers, or users. The CMA asserted that Spark was active in the supply of certain haemophilia treatments in the UK primarily because it had some staff undertaking activities in the UK relating to the R&D and commercialisation of a haemophilia treatment that Spark was developing at the time of the merger.

In addition, the new threshold described in section 6 above for acquirers with a share of supply of more than 33% and UK turnover in excess of GBP 350 million is likely to catch transactions with only minimal nexus to the UK, as it requires only that the target is a UK business or body, carries on activities in the UK or has sales to UK customers (no matter how insignificant those activities or sales are).

12. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?

Whether or not to notify voluntarily a merger to the CMA is a question to be determined by a commercial risk assessment. The parties are likely to view the risks differently, but the following points can be made.

On the one hand there is the question whether the merger raises any competition concerns, and if so whether they are likely to elicit complaints from customers/competitors and/or are of sufficient magnitude that a second-phase investigation is a realistic prospect. The CMA can open such an investigation at any time up to four months from the date of completion of the transaction, or from the date on which facts about the transaction became public (e.g. when it is announced, or when it receives significant press coverage in the national or trade press), whichever is the later. Acquirers effectively face the risk of the CMA opening an investigation on its own initiative if transactions are not made 'sufficiently public'; this was underlined by a case involving Tesco's acquisition, through a nominee company, of a single grocery store operated under the Brian Ford fascia, which resulted in a first-phase review being commenced almost five years after the transaction completed.

On the other hand, there is the desire for legal certainty. If the parties and their advisers consider that the risk of a reference is low, the parties may decide not to notify. Equally, the parties may take the view that the transaction is low-profile enough to escape the CMA's attention (notwithstanding the CMA's dedicated mergers intelligence unit that monitors various sources of information). Or the parties may take the risk that, even if the CMA hears about it, a second-phase investigation is unlikely. However, the interests of the purchaser may be better served by insisting upon a notification being made, backed up by clearance being a condition of closing. The potential consequences for a purchaser of completing a transaction without having obtained prior clearance are set out in Section 1 above.

13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?

The CMA has a duty to open a detailed second-phase investigation (known as 'referring' or 'making a reference' of the merger) if it has a reasonable belief, objectively justified by the relevant facts, that there is a realistic prospect that the merger will or may be expected to result in a substantial lessening of competition (SLC) in any market. By 'realistic prospect' is meant not only a prospect that has a more than 50% chance of occurring, but also a prospect that has a less than 50% chance of occurring, but is more than fanciful, though within this latter range the CMA can exercise its judgement.

If a second-phase investigation is opened, the CMA must decide whether a relevant merger situation has been created and, if so, whether that situation is likely – on the balance of probabilities – to result, or to have resulted, in an SLC in any market.

For mergers between water and sewerage companies and mergers between energy network companies a different substantive test applies: whether the merger would prejudice the ability of the Water Services Regulation Authority (Ofwat) or the Office of Gas and Electricity Markets (Ofgem), respectively, to make comparisons for the purpose of carrying out its statutory functions (such as setting price controls on regulated enterprises and other regulatory functions).

In addition, where the Secretary of State considers that a merger gives rise to certain public interest considerations, the relevant public interest issues will be considered alongside the competition issues, as described in Section 14.

14. Are factors unrelated to competition relevant?

Non-competition factors are relevant in certain 'public interest' cases. Currently, the following constitute relevant 'public interests':

- certain interests linked to the media, including the need for accurate presentation of the news and free expression of opinion, the need for (so far as reasonable and practicable) sufficient plurality of views in newspapers, the need for sufficient plurality of control of the media, the need for a wide variety of high quality broadcasting and the maintenance of broadcasting standards;
- the maintenance of the stability of the UK financial system; and
- the need to maintain in the United Kingdom the capability to combat, and to mitigate the effects of, public health emergencies.

Further public interest considerations can be introduced by the Secretary of State.

In 'public interest' cases, the Secretary of State has the power to intervene and, if they choose to do so, will then have the final decision as to whether to block a transaction, clear it, or clear it subject to conditions. In particular, the Secretary of State can decide:

- that the transaction gives rise to actual or potential competition concerns but that the relevant public interest nonetheless justifies clearing the merger (this happened in 2008 with the merger between the financial institutions Lloyds and HBOS); or
- that the relevant public interest necessitates the imposition of remedies beyond those (if any) that are required to address the transaction's competition concerns.

In addition, for any type of case, the CMA may take into account the existence of transaction-specific efficiencies and 'relevant customer benefits'. If these outweigh a transaction's negative effects on competition, the CMA may decide to clear the merger. It may also take relevant customer benefits into account when assessing what remedies should be required in order to address any anticompetitive effects of a transaction.

Relevant customer benefits include lower prices, higher quality or greater choice of goods or services, or greater innovation in relation to such goods or services.

15. Are ancillary restraints covered by the authority's clearance decision?

The CMA's guidance on acceptable ancillary restraints follows the approach of the European Commission towards ancillary restraints (see the European Union chapter of this guide).

Parties are expected to self-assess their compliance with the CMA's guidance, although the CMA may provide guidance where a novel or unresolved issue arises.

16. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

There is no filing deadline.

17. What is the earliest time or stage in the transaction at which a notification can be made?

Transactions may be notified even if the parties have not yet signed a sale and purchase agreement. The CMA will generally expect the parties to be able to demonstrate a good faith intention to proceed with the transaction, by reference to, for example, adequate financing, heads of agreement or similar, or evidence of board-level consideration.

As notification results in a public announcement by the CMA (see section 26), it is not, in practice, possible to notify a confidential transaction that has not been announced. For transactions that are not yet in the public domain, the parties can consider approaching the CMA for 'informal', non-binding advice on the likelihood that a second-phase investigation would be opened. Such advice is only available if certain criteria are met.

18. Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?

Yes. The CMA's guidance is that notifying parties should allow a minimum of two weeks of pre-notification discussions even for straightforward cases. However, given the voluntary nature of the UK merger control regime, notified transactions tend to be more likely to give rise to competition issues than under a mandatory filing regime, so a period of between four and eight weeks is more common, and pre-notification for very complex cases can often last for a number of months.

The CMA also operates a mechanism that allows parties to seek some informal, non-binding comfort that the CMA will not 'call in' a merger for review.

19. What is the basic timetable for the authority's review?

First-phase

The CMA is required to complete its first-phase investigation within 40 working days. This runs from:

- in the case of notified mergers, the date on which the CMA confirms that the filing form is complete (which it will typically do within five working days of the date on which the notice is submitted); or
- in the case of unnotified mergers (i.e., where the CMA decides to review a transaction on its own initiative), the date on which the CMA informs the parties that it has sufficient information to commence its first-phase investigation.

This 40 day period can be extended in the circumstances described in section 20 below. In particular, if the parties offer remedies during the first-phase investigation, an additional period for negotiation and finalisation of those remedies will apply.

Second-phase

Where a second-phase investigation is opened, the CMA must publish its report within 24 weeks from the date of reference, subject to the possible extensions described in section 20 below. If it proposes to impose remedies as a condition of clearance, it will have an additional period of 12 weeks (which can be extended by 6 weeks) to implement those remedies.

20. Under what circumstances may the basic timetable be extended, reset or frozen?

First-phase

At the end of the 40 working day first-phase period the CMA must decide whether the transaction risks giving rise to a substantial lessening of competition and should therefore be subject to a second-phase investigation, unless remedies are agreed. This 40 day period may be extended in the following circumstances:

- Where the parties fail to provide information to the CMA by the deadline specified in a request for information.
- If the Secretary of State serves notice that a relevant public interest should be considered (see section 14), the CMA can extend the period for its investigation by 20 working days. (The Secretary of State, however, is not subject to any specified binding deadline for his or her decision as to whether a second-phase investigation should be opened on public interest grounds.)

In addition, if the parties offer remedies during the first-phase, an additional period for negotiation and finalisation of those remedies will apply – see section 31.

Second-phase

The CMA can extend the 24-week period by a further eight weeks for special reasons. It can also 'stop the clock' from running if one of the parties to the merger has failed to comply with a formal notice requiring the provision of information and documents or the appearance of witnesses.

For uncompleted mergers, the CMA can also extend the 24 week period for up to three weeks if the parties indicate that they are considering abandoning the transaction, in order to give the parties time to decide whether or not to do so.

In addition, in cases where the CMA proposes to impose remedies on the parties, or to clear the transaction on condition that remedies are implemented, it will have a period of 12 weeks from the date of its second-phase report within which to negotiate and finalise those remedies. That period can be extended by six weeks in certain circumstances.

21. Are there any circumstances in which the review timetable can be shortened?

There are no formal mechanisms for shortening the review period. However, the CMA may be prepared to give early clearance in cases where no competition concerns arise and where the parties can demonstrate a credible and urgent need for early clearance.

22. Which party is responsible for submitting the filing?

As there is no penalty for not filing, no party has a legal responsibility to file. However, the usual practice is for the acquiring party to file, as it will be responsible for paying the filing fee. Where two parties are merging or forming a joint venture, it is usually the case that both file jointly.

23. What information is required in the filing form?

Because the UK filing regime is voluntary, transactions that are notified tend to be ones that raise at least potential or conceivable competition concerns. Consequently, the Merger Notice requires relatively extensive information. This includes information on the transaction itself, the parties' respective businesses, market definition, the nature of competitive constraints posed by the parties and their competitors, substitutability of their products (including any available bidding data), contact details for customers and competitors, the buying power of the parties and their customers, potential competition, the existence of horizontal, coordinated, conglomerate or vertical effects arising from the transaction, and barriers to entry and expansion in the relevant markets.

Where the parties' combined market share on a relevant market is below certain thresholds (15% for horizontally affected markets and 25% for vertically affected markets), the information to be provided is less extensive.

24. Which supporting documents, if any, must be filed with the authority?

The merger filing form requires submission of the following supporting documents:

- press releases and details of any notifications to listing authorities;
- transaction documents (including any heads of terms, memorandum of understanding and sale and purchase agreement) or drafts of such documents, if not finalised;
- if the offer is subject to the UK takeover code (for acquisitions and mergers of listed companies), copies of the offer document and listing particulars, or drafts of such documents;
- the most recent annual report and accounts and last set of monthly management accounts for each of the parties;
- copies of the most recent business plan for each of the parties, and for any specific division or brand of the parties that is relevant to horizontal or vertical overlaps between them;
- copies of any documents (e.g. minutes of meetings, studies, reports, presentations, surveys, analyses etc.), prepared by, or for, or received by, any member of the board of directors (or equivalent body) or senior management or shareholders of either party, which either set out the rationale for the merger; or analyse the merger with respect to various factors of competition (e.g. competitors, market conditions, pricing, potential for sales growth or expansion into new product or geographic areas etc.); this includes information memoranda relating to the transaction and post-merger business

plans (including integration plans and financial forecasts); and
- copies of recently-prepared documents (e.g. reports, presentations, studies, analysis, marketing and advertising strategies, industry/market reports, including customer research and pricing studies) which set out the competitive conditions, market conditions, market shares, or competitors in the industry or business areas where the merger parties have a horizontal overlap.

In some cases, it is possible to agree a narrower scope of required supporting documents, during pre-notification discussions with the CMA.

The CMA can also – and usually does – request these documents (or a sub-set of them) where there has been no notification and it has commenced a review of the transaction on its own initiative.

Documents that are submitted do not need to be legalised, certified or apostilled in any way. Where supporting documentation is in a foreign language, the parties are encouraged to provide a translation (if translations are not supplied, the CMA can ask for them).

A statutory merger notice must be signed by an 'authorised person', being a person with authority to bind the notifying party (or each notifying party, if the notification is submitted jointly).

25. Is there a filing fee?

Subject to some limited exceptions, the notification of any qualifying merger is subject to a filing fee irrespective of whether a second-phase investigation is opened. The CMA will also require payment of a filing fee where it carries out an 'own initiative' investigation into a transaction that has not been notified, unless it concludes that it does not have jurisdiction to review the transaction. Fees vary according to the value of the UK turnover of the acquired enterprise:

- £40,000, where the UK turnover of the target is £20 million or less;
- £80,000, if the target's UK turnover is over £20 million but not over £70 million;
- £120,000, where the UK turnover of the target exceeds £70 million; and
- £160,000, where the UK turnover of the target exceeds £120 million.

The fee is payable when the CMA (or, if applicable, the Secretary of State) publishes its first-phase decision.

For mergers that are not notified to the CMA (i.e. where the CMA has commenced a review on its own initiative), no fee is payable if the transaction involves the acquisition of a material interest which falls short of a 'controlling interest' (see section 5 above).

Mergers involving water enterprises or energy network enterprises may (if the parties also have competitive relationships in other areas of activity in the UK) be notified or reviewed under both of the sector-specific merger control regime and the regular merger control regime (see section 6 above for the applicable thresholds), in which case a separate fee will be payable for both filings/reviews.

26. Is there a public announcement that a notification has been filed?

Once notified or after the CMA begins an investigation on its own initiative (in the case of an un-notified merger), the CMA will publish an invitation to comment to third parties. This occurs on the CMA's website and on the Stock Exchange Regulatory News Service, typically within a day or two of notification or the commencement of the CMA's investigation. The announcement is brief and contains the names of the parties to the transaction, the relevant industry sector, whether the merger has already completed and an indication of the CMA's review timetable.

27. Does the authority seek or invite the views of third parties?

The CMA invariably invites third parties to comment on transactions that it is reviewing. In addition, within a few days of commencing its investigation, the CMA will usually directly contact relevant customers, suppliers and competitors of the parties, based on details supplied by the parties.

The CMA may also, where appropriate, solicit views on merger cases from other governmental departments, sectoral regulators, industry associations and consumer bodies.

28. What information may be published by the authority or made available to third parties?

Submissions to the CMA are treated in confidence, although the substance of the arguments put by the parties may be communicated by the CMA to interested third parties (except in cases where parties have sought informal advice from the CMA on a certain novel point of substantive assessment or procedure).

The CMA publishes all its decisions in cases where there is a relevant merger situation. Decisions not to open a second-phase investigation are announced briefly on the Stock Exchange Regulatory News Service. The full text of the CMA's decision is published shortly afterwards, subject to the excision of confidential information.

Decisions to open a second-phase investigation are also announced on the Regulatory News Service, but the CMA will also generally issue a press release stating the main concerns raised by the merger. The full text of the CMA's decision to open a second-phase investigation will be published shortly afterwards, subject to the excision of confidential information.

The CMA's second-phase reports are published, as are its interim reports, interim remedy reports and invitations to comment on proposed remedies during the investigation, although specific items of confidential information are usually excluded. The CMA publishes key submissions made by the parties (e.g. the initial submission and responses to the interim report and interim remedies report) as well as comments, or summaries of comments, received from third parties.

The parties (and third parties) are given an opportunity to request excisions from the published documents of the CMA to protect confidentiality.

The CMA is required by the Enterprise Act to balance its obligation to be transparent with the confidentiality needs of the parties or third parties. In so doing, it takes into consideration whether the parties or third parties would be significantly harmed by the publication and whether the publication would be against the public interest.

29. Does the authority cooperate with antitrust authorities in other jurisdictions?

Yes, for large, international mergers the CMA often cooperates with other antitrust authorities. In addition, formal talks regarding an antitrust co-operation deal between the CMA and the European Commission are currently (as of September 2024) in progress.

30. What kind of remedies are acceptable to the authority?

Where competition problems are identified, remedies in the form of structural, behavioural or a combination of structural and behavioural, undertakings may be negotiated.

Remedies offered at the end of the first-phase review with a view to avoiding a second-phase investigation are known as 'undertakings in lieu'. These need to be 'clear cut' solutions to the competition concerns. As such, structural remedies, in particular divestments, are likely to be considered more suitable than behavioural remedies. There is also a strong preference for structural remedies during the second-phase investigation.

There are examples of behavioural remedies being accepted by the CMA and its predecessors and, generally, the CMA is reasonably flexible regarding remedies in appropriate cases.

Where divestments are required, but the CMA has doubts regarding the attractiveness of the divestment business to purchasers, or otherwise doubts the availability and interest of suitable purchasers for the business, the CMA will usually seek an 'up-front buyer' remedy. Where an up-front buyer remedy is required, the CMA will not issue its clearance decision unless and until the parties have entered into a legally binding agreement for the sale of the divestment business to a third party before the end of the period within which first-phase remedies must be finalised, such third party having been approved by the CMA as a suitable purchaser (that period will usually be extended to 90 working days where an up-front buyer is required). If a binding agreement for sale of the divestment business to a suitable purchaser cannot be concluded within the requisite timeframe, the CMA will proceed to open a second-phase investigation.

31. What procedure applies in the event that remedies are required in order to secure clearance?

During the first-phase investigation, remedies can be offered at any time up to five working days after the CMA has informed the parties of a decision that the merger risks giving rise to a substantial lessening of competition, and will therefore be subject to a second-phase investigation unless suitable remedies are agreed and implemented. This means that the parties are not required to offer remedies without having been informed of the substance of the CMA's concerns and the markets to which they relate. In practice, it is possible to commence a dialogue on remedies at any stage in the process, or even before the CMA begins its investigation.

After the CMA has issued its SLC decision, the parties have five working days within which to offer remedies, and the CMA will have up to 10 working days from the

SLC decision within which to decide whether the offered remedies merit further negotiation (if it considers that they do not, it will open the second-phase investigation).

The CMA will then have up to 50 working days from the date of the SLC decision within which to negotiate, consult on, and finalise the remedies. This period can be extended to 90 working days if there are 'special reasons' (e.g. if an up-front buyer is required – see section 30 above).

During the second-phase investigation, the question of remedies will not normally be raised until the CMA has issued its provisional findings. The basic outline of any remedies will be finalised before the CMA takes its final second-phase decision on the merger. The detailed terms and conditions of the undertakings are negotiated after the final decision has been announced, and must be finalised within 12 weeks (which can be extended by six weeks, if there are special reasons). Where parties do not cooperate in the negotiation of second-phase remedies, the CMA can impose the required remedy in the form of an order on the parties.

32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

Regarding failure to notify and late notification, no such penalties apply, as there is no obligation to notify and no notification deadline. There is no prohibition on closing unless the CMA has either issued an order to that effect (in which case failure to comply with the order would give rise to penalties of up to 5% of the worldwide group turnover of the party in breach), or has initiated a second phase investigation (in which case a breach of the automatic prohibition on share dealing may result in injunctions and damages claims).

As noted in Section 3 above, the CMA routinely requires parties to completed mergers to operate their respective businesses separately for the duration of the CMA's review, and actively enforces breaches of such hold-separate orders (the maximum penalty for such breaches is also 5% of group worldwide turnover).

33. What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?

A person is liable to imprisonment for a term not exceeding two years, and/or to a fine if they:

- supply any information to the CMA which is false or misleading in a material respect and which they know to be false or misleading in a material respect (or if a person is reckless as to whether information is false or misleading in a material respect); or
- intentionally alter, suppress or destroy a document that the CMA has required to be produced.

In addition, the CMA can impose a fine of a fixed amount of up to £30,000, as well as daily fines of up to £15,000 for failure to comply with a binding CMA request for information, documents or attendance of witnesses, without reasonable excuse, or for intentionally obstructing the CMA from taking a copy of a document that is provided to it. This could apply, for example, if incomplete information is provided, or if information is not provided by the deadline specified in the request for information. From December 2024 / January 2025 the maximum fines that can be imposed on businesses and business owners for such procedural infringements will be up to 1% of a business' annual group turnover, with daily fines of up to 5% of daily turnover.

Finally, failure to provide information within the required timeframe may result in an extension of the CMA's first-phase or second-phase deadlines (see Section 20 above) and an extension of its four month deadline for jurisdiction to review completed mergers (see Section 6 above).

34. Can the authority's decision be appealed to a court?

Decisions of the CMA (or, in 'public interest' cases, the Secretary of State for Digital, Culture, Media & Sport – see Section 14 above) can be appealed to the Competition Appeal Tribunal by the parties, or by third parties with sufficient standing. Appeals are judged on the basis of 'judicial review' standards, which means that the CAT will not review the merits of the relevant decision (i.e., it will not decide whether the decision was correct in every respect), but will instead consider whether, for example, the CMA acted unreasonably, considered factors that it ought not to have taken into account, failed to consider factors that it ought to have taken into account, or otherwise exceeded the bounds of its discretion.

Appeals must be lodged within four weeks of the date on which the applicant was notified of the disputed decision, or the date of publication of the decision, whichever is the earlier.

35. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment

Since the end of the Brexit transition period on 31 December 2020, the CMA has acquired jurisdiction to review mergers that are also notifiable to the European Commission under the EU Merger Regulation (EUMR). As of September 2024, the CMA has reviewed 35 mergers in parallel to the European Commission, of which 10 went to Phase 2.

Of the parallel reviews, most have resulted in consistent outcomes, or have concerned different geographic markets, with different competitive conditions. In In a number of cases, however, there has been divergence between the CMA and European Commission when considering the same markets, either in respect of the substantive assessment, or the approach to remedies.

- In S&P Global/IHS Markit, the CMA identified competition concerns in a number of the same markets as the Commission, but came to opposite conclusions in a number of others, on issues such as whether the parties were meaningful competitors, whether one party's product was an important input for products supplied by the other and whether one of areas of overlap was too narrow to be considered a plausible market. On all of these points, the CMA's approach was more favourable to the merging parties;
- In Meta/Kustomer and Broadcom/VMWare, the Commission required remedies as a condition of Phase 2 clearance, to address concerns that the merger would foreclose rival suppliers. In contrast, the CMA cleared both transactions unconditionally, finding that the parties would have no incentive to pursue a foreclosure strategy; and
- in Cargotec/Konecranes and Microsoft/Activision, the two authorities agreed on the substantive competition issues, but the CMA rejected the remedies that had been accepted by the Commission. This lead to the abandonment of Cargotec/Konecranes and the renotification to the CMA of Microsoft/Activision with a more far-reaching structural remedy, which was subsequently accepted by the CMA.

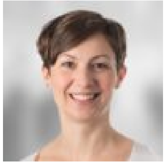
In at least two of the above cases (S&P Global/IHS Markit and Cargotec/Konecranes), the divergent outcomes appear to have arisen primarily because the authorities received different responses to their market testing questionnaires. In particular, in Cargotec/Konecranes the Commission based its conclusions on around 180 largely positive third party responses, whereas the CMA's conclusions were based on 23 largely negative responses. Consequently, it appears that future divergence could be mitigated by initiatives to ensure that the two authorities have greater access to third party evidence gathered by the other.

36. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

The Digital Markets, Competition and Consumers Act 2024 introduced substantial changes to merger control regime, primarily in relation to the thresholds for notification and the introduction of a mandatory filing regime for businesses that are designated as having strategic market status under the new digital markets regulatory regime. The relevant changes are described in the relevant sections above. The Government has announced that it intends to bring the changes into effect in December 2024 or January 2025. No further changes to the merger control regime are planned.

Contributors

Jennifer Storey
Partner
jennifer.storey@cliffordchance.com



Daniel Harrison
Knowledge Director, Antitrust Practice
daniel.harrison@cliffordchance.com