UK Reforms Phase 2 Merger Review Process

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Bill Batchelor
Partner / London
44.20.7519.7312
bill.batchelor@skadden.com

Aurora Luoma
Partner / London
44.20.7519.7255
aurora.luoma@skadden.com

One Manhattan West
New York, NY 10001
212.735.3000

2 Bishopsgate
London EC2N 4BQ
44.20.7519.7000

On 25 April 2024, the UK Competition and Markets Authority (CMA) announced reforms to its in-depth merger control review process (the Phase 2 review). The updates include:

- **An expanded de minimis exception.** The CMA will have the discretion not to refer for in-depth review markets with a UK value of less than £30 million.
- **Greater access to decision-makers.** The Phase 2 decision-makers are senior, part-time appointees, typically with finance, public administration or legal/economics backgrounds, appointed to a "panel" to supervise the Phase 2 review under an inquiry chair (the Inquiry Group). Generally, merging parties have only one or two opportunities in a Phase 2 review to meet the panel and put forward their views, while other CMA staff undertakes day-to-day running of the case. The revised procedures ensure more opportunities and earlier engagement with the panel during the process.
- **An earlier interim report.** The iterative nature of Phase 2 inquiries has meant that provisional findings are released typically six months into an eight-month process, at a point when merging parties have limited opportunity to change the outcome of the review. The revised procedure envisages releasing an earlier stage interim report (approximately 12 to 14 weeks after the start of Phase 2) to give the parties more time to address concerns.
- **Merits hearing.** Historically the main parties' hearing was primarily intended to be a fact-finding meeting with the parties prior to the generation provisional findings, rather than to engage on the case merits. The revisions repurpose the hearing as a merits hearing.
- **Early remedies discussions.** Remedies were previously back-loaded in the CMA process, formally considered only at a late stage after provisional findings. The revised process is intended to incentivise early engagement with remedies.

The reforms provide a welcome filter for low-value deals and address some perceived weaknesses in the CMA's processes to allow earlier focus on the case merits and engagement with decision-makers. The updates stopped short, however, of more trenchant reforms. In particular, no changes were made to the rules for disclosure of the CMA's evidence base: The authority will continue to disclose only the "gist" of evidence and will generally withhold underlying documents.

The Two-Stage Review Process

The UK merger control process involves a two-stage review. For deals that raise concerns, the Phase 1 decision is a finding to a "reasonable prospects" standard that may call for in-depth review at Phase 2. The Inquiry Group then oversees Phase 2 review: The panel calls on its members' experience in business, economics/accounting, law and the public sector to provide a "fresh pair of eyes" independent from the Phase 1 case team and decision-maker.

The amendments to the process seek to address concerns that the Inquiry Group might have little engagement with the merging parties on the merits beyond set-piece hearings which, until now, have occurred late in the evidence gathering stage of a Phase 2 review.

These amendments to the Phase 2 process are separate from the proposed changes to the UK competition law regime (including changes to the jurisdictional tests for the UK merger control regime) that are included in the Digital Markets, Competition and Consumers Bill that the UK Parliament is currently considering.

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Details and Impact of the Proposed Changes

Exemptions From Review

The update starts with a cost-effective recalculation of the threshold that first determines what mergers the CMA will review.

- **Expansion of the de minimis exemption from £15 million to £30 million.** The CMA has expanded its de minimis exemption, which allows the CMA to decide not to refer certain mergers to Phase 2 that raise competition concerns where the costs of a Phase 2 cannot be justified due to the low value of the market in question in the UK. The threshold beneath which the CMA may consider applying this exemption has increased to cover markets with aggregate annual revenues of £30 million or less (increased from £15 million).

  The practical impact of this remains to be seen, as the CMA reserves significant discretion to find that that an otherwise low-value market is strategically important; however, there will no longer be a requirement that the de minimis exemption is only used where there are no clear-cut remedies. Historically the CMA (and its predecessors) have a strong track record of intervening in transactions involving small markets that raise competition concerns. For example, the CMA noted that it would be unlikely to disregard deals concerning small, individual local markets across a sector, as the cumulative effect of consolidation may be significant, notwithstanding small individual deal size.

Reviews Featuring Improved Engagement and Focus on Key Issues

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. The amended process will allow the parties to present the merits of the case, enable main parties' hearings to focus more on substantive issues and generate provisional findings early enough in the process to allow parties to produce a meaningful response in most cases. The specific mechanisms are:

- **Elimination of the issues statement.** The CMA intends to streamline the starting point for the Phase 2 investigation by abolishing the issues statement (which has reflected the theories of harm on which the CMA is focusing and is often heavily based on the Phase 1 decision). The authority will instead simply use the Phase 1 decision to identify the key issues for the Phase 2 review and invite parties to provide comments on the Phase 1 decision at the outset of Phase 2. Note though that in cases involving a fast-tracked Phase 1 (where the merging parties accept that there are sufficient competition concerns to refer a deal to Phase 2) — which see a more limited Phase 1 decision, the Inquiry Group may publish an extra statement early in Phase 2 setting out any additional theories of harm that the panel is considering.
- **Earlier meetings with the Inquiry Group.** The CMA will invite merging parties to make early presentations on the planned business and products ("teach-ins" on factual matters) and, separately, on the merits of the Phase 1 decision. Teach-in sessions will become standard practice, often together with a site visit, at the start of the Phase 2 review. The CMA will also introduce new "initial substantive meetings" for parties to present their views on the competition issues, in person, to the Inquiry Group at an early stage. These meetings will follow the submission of the merging parties' response to the Phase 1 decision.
- **More frequent discussions with the case team.** The CMA's case teams are expected to make more use of informal update calls with merging parties to improve focus on key areas developing in the review, provide more transparency about the CMA's emerging thinking and facilitate more targeted submissions. However, as the scope and frequency of informal update calls will vary on a case-by-case basis, the guidance does not include a prescriptive description for update calls. The guidance also provides for the authority to directly engagement with the merging parties' economic advisers where appropriate.
- **A new interim report followed by the main parties' hearing.** The CMA is replacing the provisional findings report with a new "interim report", which will set out the Inquiry Group's provisional decision on jurisdiction and substance. The panel will publish the interim report earlier than the authority currently publishes provisional findings: The new publication timeline is approximately 12 to 14 weeks after the start of Phase 2 and, crucially, ahead of the main parties' hearing. There is a risk that the assessment in the interim report may be less definitive than provisional findings, and therefore more likely to change in light of new evidence or submissions (which would then lead to supplementary interim reports). The CMA will invite parties to make written submissions on the interim report ahead of the main parties' hearing.
- **A substantive main parties' hearing.** A significant portion of the main parties' hearing, now occurring after the publication of the interim report, will be reserved for the parties' oral submissions. This change will refocus the hearings away from information gathering, instead allowing parties to engage on the merits of the case and address the Inquiry Group's substantive concerns.
- **Earlier disclosure of evidence.** The CMA plans to remove the annotated issues statement (which sets out emerging thinking before the main parties' 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.

- **A protected evidence file.** The CMA does not, however, intend to grant merging parties access to the underlying third-party evidence relied on by the Inquiry Group, despite feedback that (a) full access to file would enable a more meaningful discussion on the substantive case, and (b) 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.

Remedies

The CMA has made changes to the remedies process to address concerns that constructive engagement on remedies occurred too late in Phase 2 reviews. The updates provide new and earlier opportunities to engage with the Inquiry Group on remedies, including a remedy meeting to discuss the panel's feedback on the remedy proposal. The proposed amendments include:

- **Encouragement of early remedies proposals.** The CMA now welcomes "without prejudice" discussions on remedies at an early stage of the investigation (possibly as soon as a case is referred to Phase 2).
- **Increased and earlier feedback on remedies.** The revised process introduces (a) 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 (b) "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.** The CMA will provide parties 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. (In anticipated transactions, the CMA has clarified that it will only include remedy proposals that the parties have indicated that they are willing to implement). Following the parties' response to this interim report, the CMA may invite parties to a final call to clarify any outstanding issues on the remedy, if necessary. There will be a final date, after which the CMA will not be able to consider further representations on remedies (or on other substantive issues).

Other Changes

In addition to the changes to the Phase 2 processes outlined above, the CMA has made several other, more minor revisions to its guidance. This includes amendments to (i) align the guidance 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 concerning other UK authorities or regulators; and (iii) reflect the CMA's current Phase 1 practices.

Entry Into Force

The new processes and guidance will apply to all CMA merger reviews where the Phase 1 review starts on or after 25 April 2024. Reviews that commenced before 25 April 2024 will be governed by the previous process and guidance.

Professional support lawyers **Lizzie Malik** and Simon Dodd contributed to this article.