SQUIRE PATTON BOGGS

Changes to the Updated CMA Guidance

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Main Changes Introduced to the Updated CMA guidance, Compared to the Previous Guidance, to Reflect the Digital Markets, Competition and Consumers Act (DMCCA).

Mergers

Safe Harbour Threshold

The DMCCA introduced a new "safe harbour" threshold: transactions in which none of the enterprises concerned has a UK turnover exceeding £10 million will escape the jurisdiction of the CMA's merger control review. The updated guidance provides a few examples of how this threshold is to be applied in practice. Please see the box below.

(a) In a straightforward acquisition, where the acquirer (A) and the target (T) cease to be distinct from each other, T is the target enterprise and A is the "other enterprise concerned". Therefore, the relevant turnovers for the purpose of the safe harbour threshold are the individual turnovers of A and T. Each of A and T will need to have a turnover of £10 million or less for the 'safe harbour' threshold to apply.

(b) In a situation where two or more companies (A and B) form a joint venture incorporating their assets and businesses in a particular area of activity (T1 and T2), T1 and T2 are the target enterprises and companies A and B are the "other enterprises concerned". Therefore, the relevant turnovers for the purposes of the "safe harbour" threshold are the sum of the turnover of T1 and T2, the individual turnover of company A and the individual turnover of company B. Each of T1+T2, company A and company B will need to have a turnover of £10 million or less for the "safe harbour" to apply.

(c) In a situation where two enterprises (A and B) come together to form a full legal merger, the relevant turnovers for the purposes of the "safe harbour" threshold are the individual turnover of A and the individual turnover of B. Each of A and B will need to have a turnover of £10 million or less for the 'safe harbour' to apply.

(d) In a situation where two or more companies (A, B and C) form a joint venture (Newco) incorporating all their assets and businesses, the relevant turnovers for the purposes of the "safe harbour" threshold are the individual turnover of A, the individual turnover of B, and the individual turnover of C. Each of A, B and C will need to have a turnover of £10 million or less for the 'safe harbour' to apply.

Expansive Nature of The Share of Supply Test

The updated guidance repeats from the previous guidance that in "applying the share of supply test, the CMA may under section 23(5) [of the Enterprise Act 2002] have regard to the value, cost, price, quantity, capacity, number of workers employed or any other criterion, or combination of criteria, in determining whether the 25% threshold is met", thus crystallising the CMA's expansive application of the share of supply test in recent decision making, such as in Sabre/Farelogix, Roche/Spark and Google/Looker.

New Merger Review Thresholds

The DMCCA introduced a new hybrid threshold for the CMA to assert its merger control jurisdiction where: "the person(s) that carry on an enterprise concerned supply or acquire at least 33% of goods or services of any description in the UK (or a substantial part of the UK); the same enterprise concerned has a UK turnover exceeding £350 million; and any other enterprise concerned has a UK nexus (this is referred to as the 'hybrid test')."

The updated guidance explains that the hybrid test can be satisfied in relation to all types of mergers (horizontal mergers as well as vertical and conglomerate mergers where the parties are not active at the same level of the market) and provides some practical examples. Please see the box below for some examples of how the hybrid test will apply in practice.

The DMCCA also introduced a new mandatory merger control regime for undertakings designated as having SMS, which requires them to report certain mergers to the CMA prior to completion.

(a) In a straightforward acquisition where there are two enterprises concerned (i.e. the acquirer (A) and the target (B)), the hybrid test will be satisfied if, for instance, pre-merger, A has a UK share of supply of at least 33% and a UK turnover in excess of £350 million, and B has a UK nexus.

(b) In a situation where two or more companies (A and B) form a joint venture incorporating their assets and businesses in a particular area of activity (A1 and B1), the hybrid test will be satisfied if, for instance, pre-merger, A has a UK share of supply of at least 33% and a UK turnover in excess of £350 million, and B1 has a UK nexus.

(c) In a situation where two enterprises (A and B) come together to form a full legal merger, the hybrid test will be met if, for instance, pre-merger, A has a UK share of supply of at least 33% and a UK turnover in excess of £350 million, and B has a UK nexus.

Extraterritorial Nature of a Section 109 Notice

The CMA can issue so-called "section 109 notices" to require a person to provide documents or information, or to give evidence as a witness. Under the DMCCA, the CMA now has the power to give such notices to a person who is located outside of the UK (to require the production of documents or the supply of information) if one of two conditions is satisfied:

(a) The merger parties connection condition

(b) The UK connection condition

The updated guidance provides further details on the "merger parties connection condition", "the UK connection condition" and when those conditions would be satisfied. Please see the box below.

The Merger Parties Connection Condition

The first condition allows the CMA to send section 109 notices to individuals and companies (or other body of persons corporate or unincorporate) located outside the UK which have, or have had, a connection to one of the merger parties. This condition will be satisfied where the person located outside the UK is or was:

- Part of one of the enterprises ceasing to be distinct
- Involved with one of the enterprises ceasing to be distinct
- Carrying on one of the enterprises ceasing to be distinct

For instance, the CMA can send a section 109 notice to companies located outside the UK which belong to the corporate group of one of the merger parties (e.g. a non-UK parent or Topco); to the seller of the target enterprise; to investors (e.g. minority shareholders); to advisers (e.g. financial advisers or management consultants) to one of the merger parties for the purposes of the transaction in question; or to lenders/debt financers for the purposes of the transaction in question.

For the avoidance of doubt, the first condition does not require that the individuals or companies located outside the UK have (themselves or through others) a physical or business presence in the UK for them to be addressees of a section 109 notice.

The UK Connection Condition

The second condition allows the CMA to send section 109 notices to individuals and companies (or other body of persons corporate or unincorporate), located outside the UK which are not related to the merger parties but have a UK connection. This includes third parties such as competitors and customers of the merger parties.

A person has a UK connection if one of the following conditions is met:

- The person is a UK national
- The person is an individual who is habitually resident in the UK
- It is a body incorporated under the law of any part of the UK
- It carries on business in the UK

This extra-territorial effect is an extension of the CMA's information gathering powers, and is a big change which a multitude of different businesses need to look out for.

Unlimited Extension on Phase 2 Review

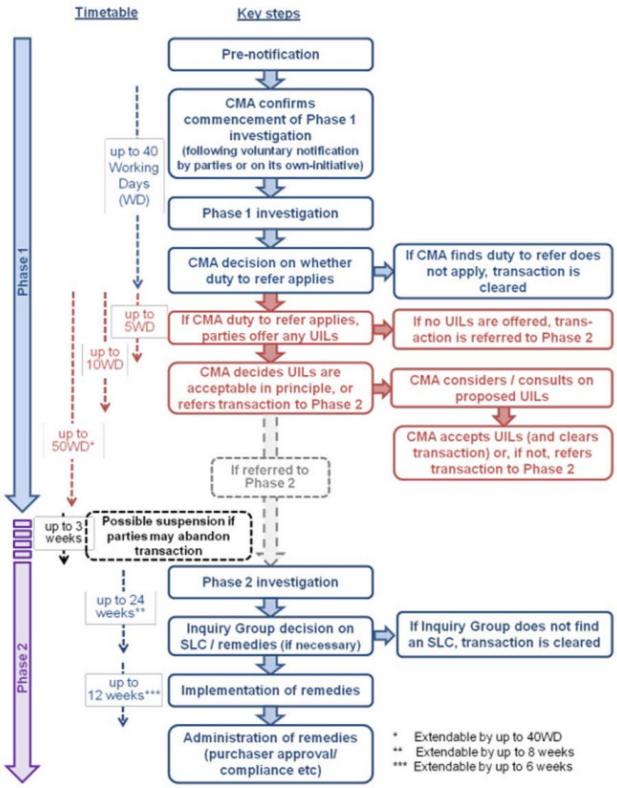
Under the DMCCA, there is no limit on the duration of the extension (or the number or extensions) that can be agreed between the CMA and the merger parties. The updated guidance states how "[t]he CMA may agree to an extension in order to align its proceedings with those in other jurisdictions or regulatory processes where the CMA considers that doing so will increase the overall efficiency of the case or the effectiveness of its investigation." It goes on to say that: "[t]he CMA is unlikely to agree an extension to facilitate alignment of proceedings where it does not consider that alignment will contribute to either the efficiency or effectiveness of its own review. Where the CMA considers that there would be limited benefit to the efficiency or effectiveness of an investigation through alignment of proceedings without a waiver, the CMA is unlikely to agree an extension for that purpose unless a waiver is in place."

The updated guidance appears to concede that a waiver should not be a pre-condition of extensions being granted by agreement in the interests of good administration. The CMA is still able to cooperate to some extent with international authorities where no waiver is in place, and it still makes good administrative sense to align proceedings where possible. The decision whether to provide a waiver remains voluntary.

Extension of Four-month Deadline

The updated guidance discusses how the CMA is now permitted to extend the four-month deadline post-completion for a call-in in certain circumstances. For example, the CMA may extend the time period if an information request issued by it under a section 109 notice is not complied with.

The updated guidance also provides an updated flow chart of a typical CMA's merger control process. Please see the figure below.



Publishing Decisions and Phase 2 Fast-track

The updated guidance discusses how the CMA will not need to publish a reasoned Phase 1 decision in fast-track to Phase 2 cases. However, the CMA will still be required to do so in fast track to Phase 1 undertakings in lieu of reference cases. This reflects a new change in relation to the fast-track procedure as parties no longer must concede a substantial lessening of competition (SLC) finding to go directly to Phase 2. The importance of this is that if a Phase 2 (fast-track) reference is likely, parties are able to engage with the Inquiry Group at an earlier point in proceedings, especially with regard to remedies.

Interim Measures

In relation to the section "timing and implementation of Interim Measures" there is a substantial number of additions to the updated guidance. One such addition states how: "[w]here Interim Measures are to be imposed on completion, the CMA will not normally address the Interim Measures to the target business's ultimate UK parent pre-completion, unless there are case-specific factors which indicate that this would be appropriate. Such factors may include, in particular, the extent to which the pre-completion ultimate UK parent may have control over the target post-completion."

Where the acquirer or the target business is an investment vehicle, the CMA will typically address Interim Measures to both the investment vehicle itself and any entity which manages the investment vehicle. Furthermore, the updated guidance discusses how when addressing Interim Measures to a Fund Management Entity, the CMA may consider reducing the scope of some provisions which apply to the Fund Management Entity.

Additionally, the updated guidance discusses how the CMA generally considers the steps that are likely to be necessary to ensure compliance with Interim Measures. This mirrors the previous guidance, but there is an additional step of reviewing ongoing contracts or contract proposals involving both merging parties.

The updated guidance discusses how the CMA might consider Interim Measures necessary regarding an anticipated merger where the steps which the parties are taking, or are about to take, would be prohibited if the standard template Interim Measures were in force. The guidance then sets out some instances (non-exhaustive) of this.

There are also some new additions regarding the derogations to Interim Measures. For example, the updated guidance crystallises what has always been good practice: "[t]o the extent that merging parties are in the planning stage of an action, at a management or board level, whose implementation may breach the Interim Measures, they should keep the CMA updated and seek a derogation in advance of entering into any commitments (eg contracts) to implement such an action or taking steps that are difficult to reverse which are likely to lead to a breach of Interim Measures in place." The guidance then lists some actions which the CMA is likely to consider would require a derogation.

Within the section "guidance on more complex derogations", there is a subsection discussing "replacement of key staff or significant changes to the merging parties' organisational or management structures". For example, the guidance discusses which staff members the CMA will consider to be a key, and it should be noted that the individuals or roles that constitute key staff may depend on the nature of the business in question. Hence, if in doubt, this should be discussed with the CMA and some questions which the CMA may ask to assess "who is key staff" includes:

> "(a) Where do they fit within the company's reporting or grading structure…and at what thresholds do they have to delegate decisions to a higher authority at the company in question?
>
> (b) Do they play or have they played a significant role in developing and maintaining the company's competitive capability (for instance through a key innovation)?"

Further changes have been made in the section relating to "monitoring trustees and hold separate managers". For example, it is stated that "[i]t is the responsibility of the merging parties to engage with the CMA before taking any action that may infringe the Interim Measures, and not to delegate this responsibility to the monitoring trustee." Furthermore, appointing "a monitoring trustee at phase 2 is often required to guard against the potential for the incentives of the acquirer to change during the course of the CMA's phase 2 investigation." The updated guidance now discusses how the "CMA will assess throughout a hold separate manager's engagement whether they continue to be suitable for the role, based on both ability and independence from the acquiring business. If the CMA reaches a view after a hold separate manager's appointment that they are no longer suitable for the role…the CMA may require amendments to the hold separate manager's terms of engagement or that the merging parties terminate the hold separate manager's engagement and appoint an alternative hold separate manager."

Antitrust

A few changes have been made in this updated guidance, including the following:

- There is an addition regarding how to make a competition complaint and the CMA offering "financial rewards of up to £250,000 (in exceptional circumstances) for information about cartel activity."
- In relation to the duty to preserve documents relevant to antitrust investigations, the updated guidance mentions how "[w]hether a person knows that the CMA is carrying out, or is likely to carry out, an investigation will be a question of fact." Additionally, it discusses how "[e]ven if a person does not have actual knowledge that the CMA is carrying out an investigation, or is likely to carry out an investigation, the duties set out in section 25B of the CA98 will also apply where they suspect that such an investigation is being, or is likely to be, carried out. Whether a person suspects that an investigation is being, or is likely to be, carried out will also be a question of fact."

- In relation to the power to require individuals to answer questions, the updated guidance discusses how the CMA can require an individual to answer questions on any matter relevant to the investigation after giving formal written notice. But also, how this "power can be used whether or not the individual has a connection with a business which is a party to the investigation."
- Regarding "limits on the CMA's powers of investigation", the updated guidance articulates the CMA's most recent approach to privileged documents and brings it more into line with the European Commission's so-called sealed brown envelope procedure:

> "[d]uring a search or an inspection, if a party considers that a communication is privileged, it should provide the CMA officer with material of such a nature as to demonstrate to the officer's satisfaction that the communication, or parts of it, for which privilege is claimed fulfils the conditions for it being privileged. If there is a dispute as to whether a communication (or parts of a communication) is privileged which cannot be resolved during the search or inspection, the CMA officer may request that it is placed in a sealed envelope or package. The CMA officer will then discuss the arrangements for the safekeeping of any such items pending resolution of the dispute."

> "[w]here the CMA obtains electronic material during an inspection which may contain privileged communications, specialist CMA staff who are operationally separate from the case team will filter the material using a set of keywords designed to isolate items which are, or may be, privileged. The CMA will invite suggestions for proposed keywords. The CMA will give the party an opportunity to make representations on any amendments made to the list of proposed keywords but the final determination on the appropriateness of keywords will be made by the CMA."
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> "[a]ny items identified as potentially privileged will be provided to a lawyer not involved in the investigation, typically a member of the CMA staff. Having first invited and considered the party's representations, that lawyer will consider whether these items are in fact privileged."
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> "[a]t the end of the process, any communication or part of a communication that is considered to be privileged will not be provided to the CMA case team. The CMA will return or delete any such privileged material unless it is not reasonably practicable to separate it from the rest of the electronic material without prejudicing its lawful use, for example as evidence. Where it is not reasonably practicable to return or delete such privileged material, it will be retained and secured on a separate computer network which is not accessible by the CMA case team."