



United Kingdom Global merger control handbook – update

APRIL 2020

Merger control legislation updates since 1 July 2018

No update in the UK merger control legislation since 1 July 2018.

Worth noting: the UK left the EU on 31 January 2020. The UK Withdrawal Agreement provides for a transition period, currently due to expire on 31 December 2020, during which the UK will be treated as an EU Member State and any UK turnover of the merging parties will be counted towards the EU Merger Regulation's jurisdictional test (Regulation 139/2004). Following expiry of the transition period, the main consequence from a merger control perspective is that the one-stop-shop principle in the EU Merger Regulation will no longer apply in the UK. After expiry of the transitional period, the UK regulator, the Competition and Markets Authority, will be able to investigate mergers with an EU dimension (which hitherto fall within the exclusive competence of the European Commission, subject to the exceptions provided for in Regulation 139/2004).

After the transitional period, the European Commission will continue to have jurisdiction over all mergers which were notified to it prior to 31 December 2020 (i.e. prior to the end of the transitional period). Merging parties hoping to have their merger reviewed by the European Commission and have the one-stop shop principle apply to the UK will therefore need to ensure that their merger is formally notified to the European Commission prior to the end of the transition period (taking careful note of the timing implications of any pre-notification discussions, Commission opening hours during the Christmas period etc.). Even if a filing is made in time, the Competition and Markets Authority may nevertheless be able to review the merger pursuant to its powers under the EU Merger Regulation to request that mergers be referred down to it in whole (if the effect of the merger is solely within the UK) or in part (if a distinct UK market is affected). In practice therefore, parties will be advised to consider discussing potential filings with the EU and the CMA during the latter end of the transition period.

Landmark merger control cases since 1 July 2018

Aer Lingus/City Jet (ME/6782/18) is a rare example of the CMA accepting a failing firm argument as the counterfactual to allow a merger to proceed.

The CMA's prohibition of the Sainsbury's/Asda merger after a Phase 2 investigation garnered significant interest and publicity in the UK. The CMA's final report found that UK shoppers and motorists would suffer expected price rises, decreasing quality and range of products available and/or a poorer shopping experience. Interestingly, the CMA noted that groceries constitute an essential expenditure, representing a significant proportion of household spend (particularly for low-income households), even though the UK merger control regime does not make any explicit reference to the nature of the sector being a relevant consideration in assessing mergers.

In Tobii AB/Smartbox Assistive Technology Limited (ME//6780/18 of 28 February 2019) the CMA issued its first unwinding order in relation to a completed acquisition in a case that was referred to phase 2 for an in-depth investigation. A similar order was subsequently also issued in Bottomline Technologies (de), Inc/ Experian Limited, where the CMA issued an unwinding order requiring the parties to segregate confidential information which they had already shared following completion.

The CMA has taken an expansive approach to jurisdiction in certain cases. For example, in Amazon/Deliveroo it imposed an IEO on the parties to halt integration pending its assessment of Amazon's acquisition of material influence over Deliveroo. While

the CMA's power to intervene on the basis of an acquisition of material influence is not new, it has pursued relatively few cases on this basis. Similarly, in Sabre / Farelogix the parties accused the CMA of merging the substantive assessment of whether a transaction would result in a substantive lessening of competition and the jurisdictional issue of whether the share of supply test is met. The parties also argued that they do not currently compete with each other to a substantial extent and would not do so in the foreseeable future. The CMA's inquiry group in Phase 2 specifically considered the issue of jurisdiction, which is rarely done as part of a Phase 2 assessment, but ultimately concluded that the CMA had jurisdiction to review and prohibited the merger.

In 2019, the CMA also issued 5 penalty decisions on purchasers for infringing their IEO obligations and proceeding with sales of assets or integration while the CMA was conducting its merger review.

Finally, 2019 saw an increase in the number of public interest interventions in mergers, with four public interest intervention notices and one European intervention notice being issued.

Web link to the national competition authority

Competition and Markets Authority: <https://www.gov.uk/government/organisations/competition-and-markets-authority>. No material merger control legislation updates took place since 1 July 2018.

Your merger control contact in the United Kingdom

DLA Piper UK LLP

London

www.dlapiper.com



Alexandra Kamerling

Partner

T +44 20 7796 6490

alexandra.kamerling@dlapiper.com



Martin Strom

Associate

T +44 20 7153 7557

martin.strom@dlapiper.com