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UK Merger Control Regime Is More Than Just Voluntary

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The U.K. has a voluntary merger control regime, meaning that it is not a requirement to obtain approval from the U.K.'s Competition and Markets Authority (the "CMA") in order to complete and implement a transaction if the jurisdictional thresholds are met. On this basis, companies often choose not to notify transactions to the CMA.

But as companies going through the merger review process in the U.K. are discovering, it may be preferable to notify the CMA of an anticipated merger, even though notification is not mandatory, not least because it is the CMA's standard practice for "completed mergers" (i.e. transactions that have closed) it calls in for investigation to impose an "Initial Enforcement Order" ("IEO") that applies worldwide and that can be seriously disruptive. The IEO applies with immediate effect, i.e. before the CMA has obtained any information from the parties to assess whether it has jurisdiction over the transaction at hand. The disruptive effect of IEOs is particularly acute for foreign listed companies that would prefer to avoid informing shareholders that integration of a completed transaction could be frozen for months.

The Disruptive Effect of IEOs

The CMA recently published guidance on its use of IEOs (the "guidance"). It is clear from this guidance that the CMA's policy remains to apply IEOs to companies, assets or employees based not only inside but also outside the U.K. Therefore, for an international deal, the impact of an IEO becomes worldwide.

In particular, for multinational companies with operations in the U.K. an IEO can be imposed on an overseas TopCo (and the U.K. TopCo) without negotiation with the parties. This means that the following actions would be prohibited in respect of operations in the U.K. and also overseas without the express consent of the CMA, and until any derogations have been obtained (see further the CMA's template IEO and regarding derogations, see further below):

- Any action that could lead to the integration of the "businesses";
- The transfer of ownership of control of entities in the respective groups;

- Any action that could impair the parties from competing independently in any of the markets affected by the transaction.

The CMA details these generic prohibitions by providing that:

- The businesses should be carried out separately while the order is in force, with separate sales and brand identities;
- The businesses should be "maintained as a going concern" and sufficient resources made available for the development of the businesses in line with premerger business plans;
- No substantive changes should be made to the organizational structures of or management responsibilities within the businesses;
- No changes should be made to key staff and all reasonable steps should be taken to encourage all key staff to remain with the businesses;
- No confidential information or information of a proprietary nature should be exchanged between the businesses;
- "Material developments" that would affect the businesses should be reported to the CMA (ongoing reporting requirement).

It is apparent that the impact of an IEO can be seriously disruptive as it could have consequences such as the following until negotiations on derogations with the CMA, which can take several weeks, are finalized:

- The nature of the information reported to a TopCo based overseas would need to be redacted or amended so that information on the target's customers or on certain sensitive financial information (e.g. turnover per country or turnover generated by a particular customer) is not to be shared; this presents issues of supervision over a business that has been acquired;
- To the extent that plans involving staff have been implemented, new teams may need to be created or certain responsibilities carved out so that the supply chain to the U.K. is maintained separate from supply to other countries, which may involve the promotion of individuals to fulfill particular functions and the maintenance of separate premises;
- Key staff in departments affecting the supply chain or provision of a service in the U.K. cannot be dismissed or transferred into a new department, meaning that team integration plans would have to be put on hold (e.g. R&D departments which could be based overseas) and to the extent that key staff wish to resign, incentives would have to be created to encourage them to remain with the businesses (including the provision of large bonuses or performance based bonuses).

In summary, the scope of an IEO without derogation creates obstacles for the implementation of measures aimed at achieving the expected synergies from a transaction, including integration overseas.

Derogations

To limit the scope of the IEO, it is necessary to request derogations. In terms of "parts of the merging parties' businesses that have no relevance to their relevant activities in the UK," the CMA states in its guidance that it will be "willing to grant derogations that will facilitate the integration of the non-U.K. aspects of the merging parties' businesses unless the continued separation of these businesses is necessary to guard against pre-emptive action" (see para 3.26 of the guidance).

The CMA notes however that it will be "particularly cautious" about granting derogations for parts of the merging business that have no relevance to the U.K. "at the earlier stages of its investigation" where the merging parties' activities and in particular, the links between the U.K. and non-U.K. activities "have not yet been fully analysed." Therefore, the CMA considers that "it will be most straightforward to obtain derogations in relation to the non-UK aspects of the merging parties' businesses where it is clear that these businesses have no material connection to the functioning of their respective UK businesses" (see para 3.29 of the guidance).

The following example is cited as a scenario where staff in the U.K. business are responsible for "markets outside the UK":

"[…] the CMA has previously consented to a derogation that enabled identified employees in a target's UK business to be involved in certain activities, which were generally prohibited by the IEO, in relation to markets outside the UK. The derogation was granted subject to the condition that their involvement in these activities should not have any impact on the development, manufacture, distribution and/or sale of the target's products in the UK. The relevant employees were also required to enter into nondisclosure agreements in order to prevent the dissemination of commercially sensitive information to any non-authorised employees."

The CMA further notes that as its investigation develops "it may be possible to grant derogations in relation to non-U.K. aspects of the merging parties' businesses that do have some connection to their U.K. businesses. It may, in particular, be possible to grant derogations in relation to non-U.K. businesses that are active only in relation to products/services in which the CMA has been able to dismiss competition concerns or non-U.K. businesses that would not form part of any remedial action that might be justified by the CMA's decision on the reference" (see para 3.31 of the guidance).

Conclusion

It will be apparent from the overview above that the CMA has the ability to impose a particularly draconian measure that can affect implementation of a transaction worldwide until derogations are granted, and from which it may not be straightforward or quick, or even possible to obtain a derogation. Accordingly, merging parties need to consider carefully whether to notify the CMA of a transaction despite the regime being voluntary, especially when filing would not delay closing, given the serious disruption that may result to integration of the merging businesses during the CMA's investigation.

The CMA's guidance is available here.

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