SLAUGHTER AND MAY/

NEWSLETTER

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QUICK LINKS

CMA adopts revised Phase 2 process for merger cases

On 25 April 2024, the UK Competition and Markets Authority (CMA) adopted a revised process for in-depth merger investigations. Following extensive consultation with a broad range of stakeholders, the CMA's updated mergers guidance aims to streamline the start of Phase 2 investigations, improve the opportunities for businesses to engage with the CMA decision makers overseeing the investigation and facilitate earlier remedies discussions.

Background

In June 2023, the CMA launched a call for information seeking views from interested parties on opportunities to improve the CMA's Phase 2 process and practices. Following extensive feedback from stakeholders, in November 2023, the CMA consulted on proposed updates to its Guidance on Jurisdiction and Procedure (the Guidance). The CMA proposed to adjust its Phase 2 process and timetable to allow for greater engagement between the CMA Inquiry Group (being the decision makers at Phase 2), the merger parties and third parties affected by the proposed merger, and to encourage earlier and more constructive discussions on remedies.

On 25 April 2024, the CMA formally adopted the revised version of its Guidance (the Revised Guidance), incorporating clarifications to address stakeholder feedback received during the consultation.[1] The new Phase 2 process applies to all cases where a Phase 1 investigation commences after 25 April 2024 and is then referred for an in-depth investigation.

What's new? Key changes to the Phase 2 process

Enhanced engagement between the CMA and the merger parties

To facilitate a greater focus on substantive issues and engagement between the CMA and the merger parties, the CMA is implementing the following key changes to Phase 2:

- **Streamlined start to the Phase 2 process:** the issues statement has been abolished, with the Phase 1 decision becoming the starting point to identify the key issues the Phase 2 inquiry will consider. Parties will be invited to provide written submissions in response to the Phase 1 decision.
- **Additional early opportunities to engage with the Inquiry Group:** the CMA has formalised its practice of holding a teach-in session (which may include a site visit) at the outset of the process. The Revised Guidance notes that these will now "*typically*" be held. In addition, the CMA has introduced a new initial substantive meeting for the merger parties (and, in some cases, key third parties) to present their case in person to the Inquiry Group. This meeting will typically follow the parties' written response to the Phase 1 decision.

[1] At the same time, the CMA published a template Phase 2 Remedies form, updated merger notice forms and an updated template confidentiality waiver. The CMA also made changes to its guidance on exceptions to its duty to refer mergers for a Phase 2 investigation. This article focuses on the Revised Guidance and changes to the CMA's merger review practices at Phase 2.

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- **Direct engagement with the merger parties' economic advisers:** the CMA may hold discussions with the merger parties' economic advisers on evidence or aspects of the CMA's analysis, in particular where the theories of harm being considered are novel or complex. These discussions are designed to be informal in nature and provide an opportunity for an open exchange of views. External legal advisers will be able to attend in an observational capacity.
- **Update calls:** the CMA is planning to make increased use of informal update calls with the merger parties at appropriate points of the inquiry. These can be used to indicate areas where the Inquiry Group would benefit from particular evidence, to discuss upcoming requests for further information, to identify where additional submissions may be useful, or to provide procedural updates. The CMA considers that this greater engagement will "*enable improved focus on the key areas, provide more transparency over emerging thinking, and facilitate more targeted submissions*".

New interim report and redesigned main party hearings

Provisional findings will no longer be issued by the CMA. Instead, the CMA will publish an interim report earlier in in the Phase 2 timetable. According to the CMA, the interim report will provide a "*clear and detailed articulation of the Inquiry Group's provisional assessment*" and is designed to address concerns that parties only hear the case against them too late in the statutory timetable to engage meaningfully with the Inquiry Group on the substance of its assessment.

Following submission of the merger parties' written response, the CMA will host the parties for a substantive, main party hearing which "*will be the centrepiece of the phase 2 inquiry*". This hearing will be less focussed on information gathering and more interactive than under the previous regime. The main party hearing provides an opportunity for the merger parties to orally explain their position on the issues raised in the interim report directly to the Inquiry Group. In some circumstances, the CMA may also invite relevant third parties to a joint hearing with the merger parties or to a separate hearing.

Changes to the remedies process

To address feedback from stakeholders, the Revised Guidance offers a more interactive remedies process where merger parties will be actively encouraged to engage earlier with the case team on a "without prejudice" basis. The parties will also gain an additional opportunity to obtain feedback from the Inquiry Group before the interim report is issued (where a "*specific, credible*" remedy proposal has been offered at an early stage). There will also be more frequent, informal meetings or calls with the case team throughout the Phase 2 process to facilitate the development of remedy proposals.

Following the main party hearing, the CMA will invite merger parties to attend "*at least one meeting or call*" to discuss possible remedies with the Inquiry Group. An interim report on remedies setting out the Inquiry Group's assessment will then be sent to the merger parties for comment, before the merger parties are invited to a final remedies call with the CMA to discuss any outstanding issues.

The CMA has also introduced a Phase 2 Remedies Form (similar to the current Phase 1 Remedies Form) which sets out a standard presentation for a detailed remedies proposal to be submitted to the CMA following the Inquiry Group's interim report. A draft Phase 2 Remedies Form can be submitted to the CMA in the early stages of the process.

Comment

With these changes, the CMA is hoping to address the concerns highlighted by many respondents to the CMA consultation around the insufficient opportunities for constructive dialogue between the merger parties and the CMA Phase 2 decision makers on both substance and remedies. It remains to be seen how the CMA will operationalise these changes in practice and the extent to which the CMA's evolving thinking on a merger under review will be communicated to the parties as the case progresses.

Despite extensive stakeholder feedback urging the CMA to grant merger parties better access to the third-party evidence relied on by the Inquiry Group to come to its decision, the CMA will continue to provide only the "gist" of these submissions. The CMA's decision not to provide full access to file to the merger parties places the CMA at odds with the practice of many other competition authorities, including the European Commission, where access to the competition authority's file is a fundamental procedural guarantee to protect the parties' rights of defence. In this regard, the Revised Guidance represents a missed opportunity to improve a significant shortcoming of the UK merger control process.

Slaughter and May responded to the CMA's call for evidence and consultation on its proposed changes to the Phase 2 process. Our responses can be accessed here and here on the CMA's website.

OTHER DEVELOPMENTS

MERGER CONTROL

South Korea updates merger review criteria for digital mergers

The Korean Fair Trade Commission (KFTC) recently revised its merger review guidelines with new criteria for reviewing mergers and acquisitions involving the digital economy, with effect from 1 May 2024. Key amendments include:

- **Free services in digital markets:** The revised guidelines include an updated methodology for defining relevant markets in digital sectors, particularly in cases involving services that are provided free of charge. In determining substitutability for such markets, the KFTC may refer to non-price factors, such as the effect on user demand if the quality of the services were to reduce.
- **Market for intermediate transactions:** For intermediary services (e.g., food delivery platforms), the KFTC may consider there to be a single multisided market if the number of users on one side of the market has an impact on the demand for services on the other side.
- **Network effects to be considered:** When analysing any potential anti-competitive effects of a merger or acquisition, the KFTC will include as part of its assessment the potential network effects resulting from the transaction (i.e., platform services becoming more valuable to users as more people use it) and the potential for such effects to amplify a platform's market power and tip digital markets towards monopoly.

The revised guidelines align with the KFTC's amendment draft published for public consultation in November last year. In keeping with the current trend of updating competition rules to address digital challenges, the revisions formalise the KFTC's latest approach to assessing digital mergers and reflects the authority's expectation for more deals to come in this space.

SUBSIDY CONTROL

European Commission carries out first ever dawn raid under the EU Foreign Subsidies Regulation

On 23 April 2024, the European Commission announced that it has carried out its first ever dawn raid under the EU Foreign Subsidies Regulation (FSR), which came into force on 12 January 2023 and started to apply from 12 July 2023. According to various press reports, the raids took place at the Warsaw and Rotterdam offices of Nuctech, a Chinese state-owned company active in the production and sale of security equipment. The Commission was accompanied by officials of the relevant national competition authorities at the location of the two inspected offices. The Commission stated that it had indications that the inspected company may have received foreign subsidies capable of distorting the internal market pursuant to the FSR, however stressed that the inspections do not necessarily mean that the company has actually received distortive foreign subsidies.

The raids represent the first time the Commission has carried out unannounced inspections as part of an *ex officio* investigation under the FSR, which allows the Commission to investigate on its own initiative any type of economic activities and market situations when it suspects that a foreign subsidy may be involved. This development highlights the Commission's willingness to use unannounced inspections as an evidence-gathering tool not only in antitrust cases, but also in new areas where it has the powers to do so. The Commission has noted in its press announcement that it will open an in-depth investigation in the event it finds sufficient indications of the existence of distortive foreign subsidies from the information obtained from the dawn raids.

The Commission has so far opened three in-depth investigations into public procurement procedures. Its first ever in-depth investigation under the Regulation was launched in February 2024 and focused on a notification submitted by a Chinese state-owned train manufacturer in relation to its tender in a public procurement procedure for the provision of several electric "push-pull" trains and related maintenance services – the deal was subsequently abandoned by the parties. For more information on this case, see previous editions of our newsletter here and here. The second and third in-depth investigations under the FSR concerned Chinese companies bidding for the construction and operation of renewable energy projects in Romania. In addition, Competition Commissioner Margrete Vestager announced that the Commission has launched an investigation concerning subsidies granted to Chinese suppliers of wind turbines for the development of wind parks in EU Member States. It is striking that the Commission has so far been focussing on Chinese investment in the EU. For further information on how the FSR may impact foreign investments from Asia, see our client briefing.

GENERAL COMPETITION

UK Government confirms next steps for NSI regime following call for evidence

The UK Government has confirmed its intended next steps for the National Security and Investment Act (NSI) regime as part of its response to a call for evidence launched in December 2023, which saw the Government receive 110 full responses. Between now and Autumn 2024, the Government will focus on five areas:

- Publish an updated statement on how the Secretary of State expects to exercise the call-in power (NSI Section 3 Statement) in May 2024. This is to help stakeholders better understand what the Government is seeking to protect and the factors the Secretary of State expects to take into account when exercising the call-in power. Some respondents also called for a fast-track process for certain types of acquirers, but the Government made clear that it is not considering such a process as part of the changes to the NSI regime.
- Publish updated market guidance in May 2024, which will include specific guidance on how the NSI regime applies to academia as well as outward direct investment. Based on feedback received in relation to the application of the mandatory notification requirement to Automatic Enforcement Provisions in secured lending agreements, and the very small number of notifications the Government has received in respect of these transactions, the Government does not expect to exempt transfers of control under Automatic Enforcement Provisions. Rather, the Government will consider where it can provide further guidance in this area.
- Publish a consultation on updating the mandatory notification area definitions by Summer 2024, which will include proposals for a standalone semiconductor area and a standalone critical minerals area, in addition to the possibility of adding water to the mandatory notification areas.
- Consider technical exemptions to the mandatory notification requirement. The Government reported that a quarter of respondents supported an exemption for the appointment of a liquidator, official receivers and special administrators from the NSI's mandatory notification system, and respondents also suggested possible exemptions for certain internal company reorganisations, which are currently caught by the regime. However, the Government stated that further assessment will be required to consider the potential national security impact before targeted exemptions could be introduced.
- Improve the operation of the NSI system, in particular the portal used for making notifications.

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