

Ten key issues in post-Brexit merger control

February 22, 2021

From 1 January, UK merger control is fully independent of EU merger control. Companies, their advisers and funders involved in transactions affecting the UK should be aware of the consequences of this major change. Here are 10 key issues to bear in mind:

1. **Parallel UK and EU merger reviews.** Transactions meeting EUMR thresholds and which qualify for review in the UK could now face parallel UK and EU merger reviews, because the "one-stop shop" provided by EU merger control no longer applies to the UK. As a result, the CMA expects to review an extra 30-40 transactions a year.
2. **Potentially divergent outcomes.** We may see divergent approaches between the CMA and EC. CMA officials have intimated that they would be willing to follow other competition authorities' lead in transactions where the UK is not the central jurisdiction, but equally will want to take the lead where the UK is the centre of gravity. Divergence could also arise when remedies to address competition concerns are offered by merging parties.
3. **Timetable challenges.** Merging parties will want to align the timing of a UK merger review with reviews in other jurisdictions. The CMA's timelines are not always flexible (or certain) and are longer in Phase 1 than the EC's and those of other EU member states. Companies and their advisers should therefore consider discussing alignment with the CMA as early as possible in relation to their transaction.
4. **A more vigilant and interventionist CMA.** In recent years, the CMA has become increasingly assertive in its merger reviews, both in asserting jurisdiction over transactions (including international transactions) and in its extensive use of Initial Enforcement Orders and information-gathering powers. This trend is likely to continue, as outlined in the CMA's recently published draft Merger Assessment Guidelines.
5. **Tough UK merger reviews.** UK merger reviews have arguably become more challenging. The CMA has recently subjected around 25% of investigated mergers to a detailed Phase II review, with 70% of Phase II cases blocked, unwound or abandoned. This can be expected to continue, as the CMA recently stated in its Annual Plan that "faced with businesses weakened by the recession, it is even more important for the CMA to carefully assess mergers which could weaken competition".
6. **Is UK merger control still "voluntary"?** Notifications in the UK officially remain voluntary. However, the CMA's close monitoring of merger activity, as well as its ability to "call in" a transaction up to four months after completion (or, if later, the deal being made public), and its imposition of onerous and wide-ranging Initial Enforcement Orders, can make non-notification very risky.
7. **Fewer EU merger filings, but more merger filings in EU member states.** Brexit will mean fewer EU merger filings, as turnover in the UK no longer counts for EU turnover thresholds. This will mean more filings in EU member states (as opposed to Brussels), if their merger control thresholds are met.
8. **More scrutiny of minority investments.** UK merger control permits greater scrutiny of minority investments than EU merger control, because the CMA can review transactions which give the buyer of a minority stake a 'material influence' over the target. That can arise with a shareholding of less than 15 per cent, depending on relevant circumstances.
9. **Different sector exposure for the CMA.** The CMA has been particularly active in mergers involving delivery services, healthcare, media, financial services and transport. However, transactions in some other sectors, such as

communications, chemicals and industrials, tended to fall to Brussels for review. So this could create opportunities to influence the CMA's thinking in markets in which it has limited prior experience.

10. **Watch out for the UK's new national security regime.** The UK is introducing a new National Security and Investment Bill, which is likely to become law in the next few months. The new law could subject transactions to retroactive review, no matter their value, if they threaten national security. The new law will also require prior notification and approval for transactions involving targets in any of 17 specified sectors, including several high-tech areas, as well as defence. The UK government is expecting around 1,800 transactions to be notified to it each year.

Your Key Contacts



Adrian Magnus

Partner, London

D +44 20 7320 6547

M +44 7768 523225

adrian.magnus@dentons.com



Christopher Graf

Partner, London

D +44 20 7246 7206

M +44 7824 320864

christopher.graf@dentons.com



Michael Dean

Partner, Glasgow

D +44 141 271 5730

M +44 7785 577425

michael.dean@dentons.com



Catriona Munro

Partner, Edinburgh

D +44 131 228 7121

M +44 771 309 6135

catriona.munro@dentons.com



Nicholas Barnabo

Associate, London

D +44 20 7320 6553

nicholas.barnabo@dentons.com