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United Kingdom: Merger Control Interim Enforcement Orders

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Two unusual features of the United Kingdom's merger control regime are that notification is voluntary and there is no 'suspension' obligation. This means that mergers can be – and routinely are – completed without notification to and/or approval by the Competition and Markets Authority ("**CMA**").

In this article, I examine the CMA's use of its new powers to impose interim measures in the case of completed mergers. Through these powers, the CMA can prevent or limit the integration of the merged businesses pending completion of the CMA's merger review. Self-evidently, this can have significant commercial consequences for the merging parties, in particular the acquiring party.

Background: notification is voluntary, but the CMA routinely investigates non-notified mergers

Whilst notification of a merger to the CMA is voluntary, it can investigate any merger that is not notified to it. It often does so, as did its predecessors, the Office of Fair Trading ("**OFT**") and Competition Commission ("**CC**"). Where the CMA finds that a merger results in a substantial lessening of competition ("**SLC**"), it can either prohibit the merger completely or impose significant remedies in order to restore competition. This can, in effect, lead to the complete or partial unwinding of a merger that has already been completed.

This flexible approach is commercially welcome and allows mergers to be completed quickly. However, two particular risks arise if a completed merger is found to result in an SLC. First, the CMA may find it difficult to impose effective remedies if the merging businesses have been integrated or restructured post-closing (the 'unscrambling of the eggs' problem). Second, the merging parties carry the risk of prohibition or an SLC finding and, therefore, of remedies that may alter or even unwind their transaction, which may have significant adverse commercial consequences. Of course, this second risk is one that the parties take voluntarily, as the Competition Appeal Tribunal observed in its recent judgment in *Eurotunnel*.

New CMA enforcement powers

The UK merger control regime underwent a number of important changes on 1 April 2014, with the entry into force of the Enterprise and Regulatory Reform Act 2013 ("**ERRA 2013**"). On this date, the CMA assumed the CC's functions and the OFT's competition functions, including merger control under the Enterprise Act 2002 ("**EA 2002**"). The CMA has also published new guidance on jurisdiction and procedure (the "**CMA Mergers Guidance**"). Whilst these reforms did not change

either the jurisdictional rules applicable to, or the substantive assessment of, mergers, they did lead to significant institutional, procedural and enforcement changes.

Importantly, whilst notification remains voluntary and there is no suspension obligation, the ERRA provided the CMA with new enforcement powers. In particular, the CMA can impose an interim enforcement order to prevent the parties from integrating their businesses, to prevent further integration taking place or to require existing integration to be unwound. It may do so where such integration would either prejudice the investigation or, in the event of an SLC, the imposition and implementation of effective remedies (these are referred to as 'pre-emptive action'). Interim orders may be imposed at any time during a CMA investigation. Whilst they are more likely to be imposed in cases of completed mergers, they can also be imposed in respect of anticipated mergers, for example, if there is a risk of competitively sensitive information being shared, business integration, joint commercial activities or a loss of key staff before completion.

Content of interim enforcement orders

The CMA has published a template for interim enforcement orders, which forms the basis for enforcement orders. As well as a general requirement not to integrate the parties' businesses, the template includes the following obligations, in respect of *each* party's business

• not to impair its ability to compete independently

• to carry it on separately and as a going concern under its brands and in accordance with its pre-merger business plan

• to maintain its assets, including

• not to integrate its IT systems

• to undertake separate negotiations with customers

• not to make changes to key staff and to make reasonable efforts to ensure they remain with the business

• to protect and not share confidential or other proprietary information

In addition to these obligations, the CMA Merger Guidance envisages that the CMA will, in appropriate cases, impose further interim measures, in particular:

• the appointment of monitoring trustees and/or hold separate managers

• arrangements to prevent the sharing of confidential information

• specific measures to ensure the retention of key staff

The CMA may also require existing integration steps to be unwound, if there is an acute risk of prejudice to its ability to impose effective remedies in the event of an SLC finding. This may be more likely in Phase II investigations, given their longer duration. These measures could include: reversing the rebranding of the target's business or assets; destruction of confidential information that has been exchanged; and reversal of changes to a business's organisational structure, including replacement of key staff who have left a business or the separation of functions (such as sales or

production) that have been integrated.

Derogations

In appropriate cases, the CMA may consider a derogation request. A request must be fully reasoned, supported by evidence, specify the integration steps that it is wished to implement and demonstrate that there would be no risk of 'pre-emptive action' taking place. In particular, the CMA may grant a derogation if the effect of the order (or certain provisions of it) would to threaten the viability of the target business or to impose a disproportionate burden on the parties.

Enforcement

The CMA's template order contains obligations to ensure compliance and requires the parties subject to an order to furnish to the CMA reports on a regular basis. These reports must be signed by the party's CEO. In addition, the CMA must be informed of material developments relating to a business, including changes to key staff, business interruption events, substantial customer wins and/or losses and substantial changes to arrangements with suppliers.

The CMA can direct a party to take specified action to ensure compliance with an interim order. In addition, penalties of up to 5% of turnover may be imposed for failure to comply with enforcement orders.

Recent CMA practice in adopting interim enforcement orders

In the case of completed mergers, the CMA has routinely required merged businesses to be held separate: since 1 April 2014, the CMA has imposed an interim enforcement order in respect of each completed merger that it has investigated, although in many cases it has granted derogations or consented to action that would otherwise breach an order. It has not yet required integration steps to be unwound or imposed an order in respect of an anticipated merger.

The majority of the CMA's orders have been in 'standard form' in accordance with the CMA's template order. For example, in *Spire Healthcare/St. Anthony's Hospital*, the CMA's order prevented the integration of the target's business with that of the purchaser and prohibited any act that would impair either of the parties' businesses from competing independently as going concerns under their own brand identities. The CMA subsequently adopted a derogation order, permitting certain steps in relation to the target's employees, compliance with regulatory obligations applicable to hospitals and certain insurance and financial reporting obligations. However, in *Vodafone/Phones 4U* , an acquisition of stores from a mobile phone retailer that had entered into administration, the order did not include specific obligations relating to carrying on separately Phones 4U's business as a going concern, preserving its assets and goodwill and not integrating IT system. This was presumably because the Phones 4U assets were no longer trading as a going concern and that, if the merger were to lead to an SLC, divestment of overlapping stores in affected areas could still be implemented without difficulty.

In both *Noble Egg/Manton*, and *IRI/Aztec*, the CMA directed the acquirer to appoint a monitoring trustee to monitor compliance with the order. In *Noble Egg/Manton*, the appointment was required to be made within five days. In *Alliance/IBA Molecular*, the CMA required the appointment of both a monitoring trustee and a hold separate manager, to manage independently the acquired business.

In numerous cases, including *Roanza/Enza/Robert Smith Group* and *Enterprise/Burnt Tree*, the CMA required compliance reports to be submitted every two-weeks, rather than (as anticipated by the template order) monthly.

The CMA has shown a willingness to be flexible in using its enforcement powers. In a number of cases, it has granted derogations or consents, where this is justified, and has also revoked an order in one case.

For example, in *Marston/Collectica* it granted two separate derogations. Under the first, Marston was entitled to undertake certain human resources activities on behalf of Collectica, including employee recruitment and disciplinary activities, as Collectica did not have its own HR function and it would be difficult to implement separate functions on an interim basis. Marston was also permitted to migrate certain IT and telecoms activities, provided that appropriate ring-fencing arrangements were put in place. Under the second derogation, Marston was permitted (subject to appropriate confidentiality obligations) to access certain high-level financial information to enable it to prepare management accounts and compliance statements.

In *Wolseley/Fusion*, the CMA consented to steps taken in respect of health and safety, compliance with licensing requirements and (subject to confidentiality conditions) financial reporting and human resources. In *Enterprise/Burnt Tree*, a merger of car rental companies, an Enterprise employee was authorised to negotiate vehicle supply contracts with vehicle manufacturers, provided Burnt Tree's own management identified its vehicle requirements and this information was kept confidential. In *Immediate Media/Future Publishing*, the acquirer was permitted to operate the target businesses under its own brand, to take strategic decisions to maintain its value and to integrate various functions, including IT, accounting and other back-office functions; as the derogation was adopted only one day after the adoption of the interim enforcement order (on the day the merger was completed), this reflected the outcome of pre-closing discussions between the CMA and the parties over the preceding month that could not be reflected in the order itself.

In *ProStrakan/Archimedes*, the CMA did not adopt a derogation. However, it did consent to the integration of the parties' businesses outside the UK, provided this did not impact the standalone viability of their UK businesses. In addition, in order to ensure compliance with the order (in particular to ensure that Archimedes had sufficient resources to carry on business as a going concern), the CMA consented to Archimedes providing to ProStrakan information on its monthly overall funding requirements. The CMA also consented (subject to confidentiality conditions) to financial information being provided to ProStrakan if required for statutory reporting purposes.

The CMA has been prepared to release a party from hold separate obligations where these are no longer justified. In *Oasis Dental Care/Apex*, the CMA revoked its initial order. Whilst the reasons for this are unclear, the CMA subsequently concluded that it did not have jurisdiction to review the merger; presumably once it had formed this view, it revoked the order. In *CALA/Banner* the CMA released the acquirer from hold separate undertakings (given by it to the OFT under the former regime) because they were causing 'disproportionate harm' to the acquirer. Presumably, at this point in its investigation, the CMA had concluded that the merger did not raise competition concerns.

The CMA has yet to require existing integration steps to be unwound. This is likely only if the merger raises prima facie competition concerns and the integration would prejudice the implementation of remedies. It is unclear whether the CMA might require a completed merger to

be unwound, or prohibit completion of an anticipated merger, but this would be wholly exceptional.

Conclusions

The CMA is routinely exercising its powers to impose ‘hold separate’ obligations in respect of completed mergers. Given that, in a majority of cases, a merger is unlikely to give rise to competition concerns, it may be appropriate to consider whether this is reasonable and proportionate, given the cost occasioned, in terms of ensuring compliance, significant business interruption and (in some cases) remunerating trustees. It is, however, welcome that the CMA is prepared to be flexible in the precise terms of orders, granting derogations and consents, and revoking an order when it is no longer required.

In the case of completed mergers that the CMA investigates (whether as a result of a notification or an own-initiative investigation), the merging parties should both expect an order to be imposed and therefore engage with the CMA as to its precise scope, so as to limit, where possible, interference with legitimate business activity. Where the merger will self-evidently not give rise to competition concerns, the parties should demonstrate this to the CMA which may then be prepared not to impose an order, although it has not yet been prepared to take this course. However, if a merger has already been completed before the parties engage with the CMA, the CMA will not enter into negotiations before imposing an interim enforcement order, either as to the necessity for or the content of the order.

Acquiring parties should also expect to be under at least a degree of regulatory scrutiny during the CMA’s investigation, particularly if there is (in Phase I) a prospect of a Phase II investigation or (in a Phase II investigation) an SLC finding. They should, therefore, as part of their transaction planning, consider whether a CMA investigation is likely and, if so, take account of this when devising post-closing integration and restructuring plans.

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