**Mergers – Competition issues**

This section considers the effect of UK (and EU) Competition Law on a proposed corporate merger transaction

**Introduction to Mergers and Competition Law**

A corporate transaction will often involve the coming together or ‘**merger**’ of two businesses or companies: this is clearly the case with an acquisition by one company of another company or business.

It is important that, at a very early stage in a transaction involving a merger with a UK aspect, both parties’ solicitors consider whether the proposed acquisition is likely to be affected by the merger provisions set out in **UK competition law**.  If the merger also has an EU aspect, the parties should also consider whether it is large enough also to be affected by **EU competition law**.

The applicability of these provisions will depend on the **relative size and share of supply** of the parties to the merger (in the case of a straightforward acquisition, these would be the target and the buyer).

If the competition authorities have authority to review the transaction and they consider that the merger may have substantial **anti-competitive effects**, then they have the power either to **block the merger** or to clear it **subject to conditions**.

Our focus in this knowledge stream, as referenced in the previous slide, is on UK and EU competition law.  However, there are **competition rules that apply around the world**.  If any of the parties have activities (e.g. sales or assets) in other parts of the world, they will need to consider whether there are any additional laws that must be complied with.  The parties may well consult **specialist competition lawyers** to advise them if they find themselves in this scenario.

**UK Merger Control: Primary Legislation/Regulator**

Primary legislation:  **Enterprise Act 2002**

Main UK Competition Body:  **The Competition and Markets Authority ('CMA')**

The CMA’s function is to review information relating to a relevant merger situation to consider whether it may be expected to result in a ‘**substantial lessening of competition’ ('SLC')** in a UK market.

**UK Merger Control: Relevant merger situation**

A merger occurs where two or more enterprises cease to be distinct. It therefore occurs if they are brought under **common ownership or control**.

Common control can be acquired through:

1. a legal, controlling interest (for example, a majority share stake); or
2. the ability to control policy (for example, a lower share stake if not all shareholders usually exercise their vote); or
3. the ability to exercise ‘material influence’ (for example, a 25% share stake or lower, depending on circumstances).

Acquisition of **100% of a company or a business** would clearly fall within this definition – but acquisitions of a smaller proportion of a company's shares (or a collection of assets) could also count as a merger (or certain joint ventures).  
There is a **small merger safe harbour** available in a merger where each party’s turnover in the UK is less than £10 million (in practice, the safe harbour is only relevant regarding the 25% share of supply threshold).

A merger may be **reviewed by the CMA** only if the safe harbour does not apply and:

* + - Target turnover threshold: The value of the turnover in the UK of the target enterprise exceeds £100 million; and/or
    - 25% share of supply threshold: The combined enterprise will supply or acquire 25% or more of any goods or services in the UK (or a substantial part of the UK) and the transaction increases the overall share (i.e. will lead to an 'increment')  -  so if one party had an existing share of supply of 25%+, the merger will still be caught if this share would be enlarged by the transaction; and/or
    - Hybrid (or acquirer-focused) threshold:
      * Party 1(intended to be the acquirer) has: an existing share of supply of goods or services of 33% or more in the UK, or a substantial part of the UK; AND an annual UK turnover of £350 million or more; AND
      * Party 2 has a “UK Nexus”.

The Hybrid threshold will apply to acquisitions even if the parties do not have overlapping activities.

**CMA Notification Process**

Save for mergers of certain digital firms as noted below, notification is **voluntary**. If not notified, the **CMA** has up to **four months** from the later of completion and the transaction becoming public/coming to its notice in which it can call it in for review and potential take the actions below. As the transaction could be blocked or unwound it may be necessary to dispose of part, or all, of the Target quickly it will be advisable to notify if the CMA is thought likely to call-in for review anyway.

The parties may instead decide to submit an informal "briefing paper" to the CMA, explaining why there are no competition issues – if the CMA indicates it has "no further queries", this provides informal comfort that the CMA is unlikely to call-in if not formally notified (BUT not absolute comfort)

Phase 1 (N.B. informal "pre-notification discussions" stage)

Once the CMA accepts the Merger Notice as complete, it has **40 working days** to decide whether to:

* **refer** the merger for Phase 2 investigation (because it reasonably believes that there is a realistic **prospect** that the merger would result in a substantial lessening of competition (SLC)); or
* **clear it** unconditionally; or
* clear it on the basis of ‘**undertakings in lieu’ (UILs**)

Phase 2

**Investigation in depth**, while the merger is suspended, giving the CMA’s Inquiry Group a period of 24 weeks (subject to certain possible extensions) to decide on whether it may be expected to result in an SLC. This could lead either to:

* **clearance** (with or without remedies); or
* **blocking/unwinding of the merger**.

**Acceptable UILs/Remedies**

Where a relevant merger is cleared by the CMA on the basis of undertakings or agreed remedies, these should be clearly able to address the identified competition issue (particularly where the CMA is accepting the approach in lieu of a reference to Phase 2).

1. Structural Undertakings
   1. Note: Usually the CMA’s preferred route – generally to be completed within a time frame
   2. Example 1: Sale of a part of the business to an approved purchaser
   3. Example 2: Licensing of know-how or intellectual property rights (although depending how structured/terms, licensing could be behavioural in nature rather than structural)
2. Behavioural Undertakings
   1. Note: These are complex as they require ongoing monitoring. The CMA is currently reviewing its approach to remedies, including behavioural remedies.
   2. Example 1: Change to sale practices / a cap on pricing
   3. Example 2:  Provision of access for third parties to essential facilities

**Consequences of Breach**

The CMA can impose ‘**interim measures’** at any time during its investigation (requiring the two merging businesses to be **held separate** during the investigation):  
Breaching interim measures or failing to comply with agreed undertakings / remedies on clearance can lead to **enforcemen**t by:

* The CMA imposing penalties of up to 5% of global group turnover for any breach (plus possible daily penalties and penalties on individuals);
* Application by the CMA for injunctions or ‘interdicts’; and/or
* Claims for damages by any party affected by the contravention.

**UK Merger Clearance: Condition Precedent**

The risk of completing an acquisition that may raise competition concerns with the CMA is primarily with the **buyer**.

This is because the CMA could direct the buyer to unwind the transaction OR accept remedies that could undermine the business case for the acquisition – even after completion of the transaction.

The buyer may therefore require the inclusion of a **condition precedent** in the acquisition agreement – making completion conditional on the transaction being cleared at Phase 1 (or possibly at Phase 2), on terms that are satisfactory to the buyer.

**UK Merger Control: Digital sector mergers**

The Digital Markets, Competitions and Consumers Act 2024 has introduced a **mandatory** reporting requirement for digital companies (large tech firms) that have **Strategic Market Status (‘SMS’).**

Mandatory reporting includes a short waiting period and the purpose of the report is to ensure the CMA is aware of relevant transactions involving SMS firms and has sufficient information to decide whether to conduct a review under its general merger control regime.

A company will be designated as having SMS if it has:

* substantial and entrenched market power and a position of strategic significance in respect of a digital activity that is linked to the UK; and
* the company’s annual UK turnover exceeds £1 billion or its global turnover exceeds £25 billion.

A SMS company/group member **must** report to the CMA if:

* the SMS company/group member increases its share of equity or voting rights in a "UK-connected body corporate" from:
  + - less than 15% to 15% or more,
    - from 25% or less to more than 25%,
    - or from 50% or less to more than 50%); and
* The total value of all consideration provided by the SMS company/group member for those shares/voting rights is at least £25 million.

**European merger control**

If a transaction satisfies the jurisdictional criteria set out in the European Union Merger Regulation, the European Commission has the power to scrutinise cross-border mergers and acquisitions and to prohibit them if incompatible with the EU Merger Regulation.

The EU Merger Regulation applies to **concentrations** which have a ‘**EU Dimension’**. Concentrations can include any situation where there is a **change of control**. ‘EU Dimension’ is calculated by reference to **turnover**.

A concentration will be prohibited if it "**significantly impedes effective competition** in particular as a result of the **creation or strengthening of dominance**".

Concentrations MUST be notified “**prior to their implementation and following the conclusion of the agreement**” but the concentration cannot be put into effect unless approved by the Commission. The acquisition agreement MUST therefore contain a **condition precedent** that the agreement will not come into force until the Commission has approved the transaction. Once signing has occurred the transaction must be notified for investigation and approval.

The Commission has **25 working days** (subject to extensions) to make its initial report after which it must give clearance or move to Phase II. The Commission has 90 working days to reach a conclusion in Phase II (subject to extensions).

**Mergers - Summary**

In this element, you have learnt that mergers may be prohibited or made conditional under UK (and/or EU) competition law. It is therefore important to identify at the outset of the transaction whether or not a merger should be notified to the CMA (and/or to the European Commission).

* To ascertain whether the merger might be subject to UK merger control, a legal adviser should consider:
  + - Does the target have a turnover in the UK in excess of £100 million?
    - Will the merged entity have a share of supply or acquisition in the UK of 25% or more that is increased by the merger?
    - Does either party (in particular, the acquirer) have a share of supply 33% or more and UK turnover of more than £350 million?
    - Does the transaction involve a digital company designated as having Strategic Market Status?
* The buyer may want to include a condition precedent in the acquisition agreement making completion conditional upon clearance (this would be required if a relevant transaction involving an SMS firm).