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UK National Security and Competition: To file or not to file?

With the adoption of the National Security and Investment Act 2021 (NS&I Act), the UK will for the first time require mandatory filing of all transactions in 17 strategic sectors. The Government will also gain the ability to investigate a wider range of transactions in any sector of the economy if it considers there is a national security risk, including transactions that were completed between November 2020 and when the Act comes into force. The new regime will not come into force until the Investment Security Unit at the Department for Business (BEIS) is ready and necessary guidance has been published, which will most likely be towards the end of the year.

The NS&I Act will require mandatory notification of any acquisition of shares or voting rights in a company active in these sectors if one of the relevant thresholds of 25%, 50% or 75% is passed, regardless of the nationality or identity of the purchaser or any applicable merger control thresholds. Only the national security implications of notification transactions will be considered.

The new national security screening regime will be in direct contrast to the voluntary notification aspect of the general UK merger control rules, which will continue to apply to the competition and other public interest aspects of transactions affecting the UK. This article pulls together our thoughts on how purchasers and sellers should proceed in the period *before* the mandatory notification regime comes into effect.

So where do you start? Fundamentally, parties should first consider whether there the Competition and Markets Authority (CMA) has jurisdiction to review a merger under the competition regime. This is most easily established if the UK turnover of the target is above £70m or above £1m in certain sectors with potential national security implications.

More controversially, the CMA will also have jurisdiction to review any merger where a UK share of supply of 25% or more is being created or increased as a result of the merger. This is not a market share test and, as confirmed by the UK Competition Appeal Tribunal in the

recent *Sabre v CMA* case, the CMA has a very wide discretion to define supply however it sees fit to establish jurisdiction. This includes, for example, the ability to take into account UK employment of personnel engaged in pharmaceutical R&D projects or the right of a UK customer to receive services *even where no services are in fact provided*. The CMA is able to develop its jurisdictional assessment in an iterative way throughout its investigation and may keep trying different approaches, using information gathered using its compulsory powers, until it has found a definition that it considers is defensible. In practice, the CMA is able to assert jurisdiction using the share of supply test over almost any merger that it is interested in.

Whether the CMA will be interested in a merger depends on whether it considers that there may be a substantive competition problem. In the past, this was based on a reasonably predictable assessment based on market shares and the presence of horizontal or vertical overlaps. In recent years, the CMA's approach has become more assertive and less predictable, especially with regard to transactions in the tech and pharmaceutic sectors, where there is significant interest in spotting so-called "killer acquisitions".

So how is this relevant to consideration of wider public interest aspects, which for the remainder of 2021 will include national security? The short answer is that the Government has the ability to intervene in transactions that raise specified public interest concerns, including (currently) national security, media plurality, the stability of the financial system, and the country's ability to combat a public health emergency. In cases where such concerns have been identified, the Government may issue a "public interest intervention notice". This has the effect of opening up a parallel track to the competition review to cover public interest aspects and transfers decision-making at key points in the investigation from the CMA to a Secretary of State. While such intervention is purely at the discretion of ministers, it is worth noting that the CMA must notify the Government of any transaction it is reviewing that it considers raises public interest issues.

In addition to the above, the CMA is pushing for the Government to introduce a new mandatory notification regime specifically for acquisitions by large technology companies. While legislation to introduce such a regime remains a long way off, if it is passed at all, the CMA has effectively introduced a de facto mandatory regime for such transactions in the meantime, as a result of its intense scrutiny of the sector.

How does one navigate the overlapping regimes, in the absence of mandatory merger control notification? In principle, this is a complex process that will be very case specific. Summarising the key factors in a very concise way, we would highlight the following factors:

1) *Is there conceivably a substantive competition issue?* If not, it would be unusual to notify or otherwise engage with the CMA, unless the acquirer is a large technology or life sciences company or if there is a clear public interest issue (such cases are usually easily identifiable).
2) *Is there conceivably a national security issue?* If no CMA engagement is proposed, BEIS may be approached informally to discuss mergers with national security risk features,

to flush out the risk of an intervention or of a retrospective review once the NS&I Act is in force. Such cases include mergers where the target produces products, or develops technology, that it sells to the UK Government, that may have military or dual-use applications or that is subject to export control restrictions or where the identity or nationality of the buyer raises concerns. In practice these elements are intertwined, in that a sensitive technology being acquired by a lower-risk acquiror can be as problematic as a less sensitive technology being acquired by a higher-risk buyer. When making this assessment, it is relevant to consider whether the transaction will complete before the NS&I Act comes into force.

To notify or not to notify? And to whom?

That is indeed the question. The answer will be easier to determine once the NS&I regime is in force, since from that point a national security notification *must* be made if the transaction falls within one of the defined sectors. The question of whether to make a competition notification will from that point be an entirely separate consideration. While it is not possible to make an NS&I notification before the regime is active, as set out above it is already possible to seek comfort from BEIS if there is an identifiable national security risk. As a result, the question of whether to notify the CMA and/or to informally consult with BEIS officials will remain somewhat connected for the time being.

It is important to note that the receipt of informal comfort from BEIS officials indicating a lack of national security concerns will not remove the obligation to notify the transaction once the new regime comes into force. Equally, it does not remove the CMA risk, which needs to be considered separately. A CMA review can be a very drawn-out process, typically including extensive pre-notification discussions, evidence submission and document production. The CMA also charges substantial fees for reviewing a transaction. As a result, a CMA notification should not be taken on lightly. Since a CMA filing remains a voluntary step, many parties decide, quite legitimately, to close the transaction without any CMA engagement. In such cases, the purchaser takes on the risk of a later CMA review, while hoping that the deal never reaches the attention of the CMA. Alternatively, the CMA has developed an informal hybrid approach, under which parties can submit a briefing paper to a preliminary review unit to flush out any concerns in advance of closing.

Where all this leads, almost inevitably, is more complex merger agreements, with flexible and convoluted conditions precedent and extended longstop dates to govern what happens between exchange and closing. Once a transaction is closed, the risk is on the purchaser. Typically the seller will at that point have taken the sale proceeds and be largely immune from any subsequent scrutiny, since it will be commercially difficult to share that risk through earn-outs or other price adjustments.

As always, looking at all the possibilities and being prepared for intervention from both the CMA and BEIS will enable purchasers to make an informed assessment. Many acquisitive companies are preparing the ground by making more frequent informal approaches to the

CMA and BEIS in order to establish a good compliance profile, even if their current deal may not merit it. Who knows, the next one may be more difficult!

Oliver Bretz & Becket McGrath

Euclid Law

Meet the Authors

Becket McGrath is a partner in the London and Brussels office of Euclid Law. Before joining Euclid in June 2020, Becket was a partner at US firm Cooley.

Becket advises clients on all aspects of EU and UK competition law, with an emphasis on online distribution, defending companies against antitrust investigations and merger control. He is qualified as a solicitor in England & Wales and as a Belgian advocaat.

Becket has experience of enforcing UK and EU competition law at a senior level in the UK's Office of Fair Trading (now the Competition and Markets Authority). He was listed in GCR's 40 under 40 Competition Lawyers and is listed in the current Who's Who Legal/GCR directory of leading competition lawyers.

Oliver Bretz is a partner in the London and Brussels office of Euclid Law. Oliver founded Euclid Law at the end of 2014. Oliver has been involved in a multitude of high-profile, high-value deals throughout his career.

Before founding Euclid Law, he spent 12 years as a partner at Clifford Chance, spending 4 years from 2010 as global managing partner of the Antitrust Practice and head of EU Public Policy.

Oliver has a wealth of experience advising on cartels, mergers, behavioural antitrust, competition litigation, as well as across a diverse variety of sectors notably banking and finance yet also energy, media, telecommunications, transport and oil and gas.

Oliver has been awarded various legal awards and is also a CEDR qualified mediator.

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