TRAVERS SMITH

The CMA’s new merger control guidance – casting a wide net for non-UK deals, but extra procedural flexibility for PE firms

07 Aug 2024

Overview

Last week, the UK Competition & Markets Authority (CMA) published new draft merger control guidance for consultation, updated to reflect how the CMA's new powers under the UK Digital Markets, Competition and Consumer Act 2024 (DMCCA). The guidance confirms how the CMA can use the new incoming jurisdictional tests to cast a wide net and catch a broad range of deals. But the guidance also provides for greater procedural flexibility during the CMA's reviews – including specifically for private equity firms. See below for some initial takeaways, prior to the guidance being finalised.

The new ‘hybrid’ jurisdictional test – casting a wide net

As explored in our earlier briefing, the DMCCA introduces new jurisdictional thresholds which give the CMA the ability to review transactions where:

- one of the transaction parties – likely the acquirer – has: (i) at least a 33% share of supply of goods/services in the UK, and (ii) total UK turnover of £350 million; and
- another transaction party – likely the target – satisfies a ‘UK nexus test’.

The new draft guidance confirms that the CMA intends to operate this new ‘hybrid’ test flexibly to catch cross-border deals with limited UK physical presence (e.g. in the tech sector) and/or transactions where the merging firms do not directly compete with each other. The target entity needs only a tangential link to the UK to be caught – almost any operational link to the UK will be enough. For example, the target need not necessarily generate UK turnover or have a UK physical presence, and it would be sufficient for the target to only have taken preparatory steps to service UK customers, including by obtaining relevant licenses or registering intangible assets in the UK.

‘Hold separate orders’ – more flexibility for private equity firms

Particularly in completed deals, the CMA can impose ‘hold separate’ orders designed to stop transaction parties from integrating during the CMA’s review. Often being global in scope and granular in detail, they can prove onerous to comply with and carry the real prospect of fines if parties inadvertently breach them. This can be a particular headache for private equity fund structures which include multiple funds and/or portfolio companies.

Here, the CMA has signalled some welcome flexibility, suggesting that – while the order may still be imposed on the firm managing the relevant investment fund acquiring the target – aspects of the hold separate order may be limited to only the relevant portfolio company whose operations overlap with those of the target. To do this, it must be clear that, day-to-day, the overlapping portfolio company operates independently from the managing private equity firm.

More broadly, the draft guidance suggests that the CMA may now provide the parties limited opportunity to provide comment and tailor the ‘hold separate order’ prior to it being imposed.

Consultation runs until 12 September – new thresholds expected to kick-in in Autumn

The new draft guidance documents also contain a range of other administrative changes and additional guidance, reflecting updates to the CMA’s review procedures in more difficult cases (e.g. a new statutory fast-track procedure to in-depth Phase 2 reviews), more detailed guidance on hold separate orders and derogations to them (e.g. regarding changes to staffing and ongoing contracts/tenders involving both merging parties), as well as enhanced powers to obtain documents held abroad as introduced by the DMCCA (see our earlier briefing here).

The consultation will run to 12 September, and the new jurisdictional thresholds under the DMCCA are expected to come into force this autumn.