

# **EU-China competition week**

## **24 to 28 October 2016**

### **Day 2**

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# Session III – Pre-Notification Consultations

# Overview

- Recap of UK and EU merger control system
- Procedure for pre-notification
- Purpose of pre-notification
- CMA's current scorecard
- Potential issues
- Case Study 1 – *BT/EE*
- Case Study 2 – *Greene King/Spirit*
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- Introduction to the EU system
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- EU Case Study
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# Recap of UK and EU merger control system

- The United Kingdom operates a voluntary merger notification system. But, once a party decides to notify, process is largely the same process as the EU.
- The CMA can also 'call in' cases that are not notified if certain criteria are met.
- The CMA does not maintain or require a short-form notification system.
- The European Union operates a mandatory notification system, with severe penalties for failure to notify and implementation before clearance. Mergers that do not give rise to prima facie concerns can be notified using a short-form notification system. Pre-notification contacts are highly recommended in the EU system to avoid subsequent delays in the procedure.
- Given the low threshold for identifying problems at Phase 1, effective pre-notification discussions are very much in the Parties' interests. This is an important point to emphasise.

# Procedure for pre-notification

- In the UK, in anticipated cases, parties submit a case-team allocation request form. Parties then submit a draft 'Merger Notice'. The Merger Notice sets out a series of questions that must be answered. This draft forms the basis for pre-notification discussions with the case team.
- The CMA will not start the 40-day clock until the case team accept the Merger Notice as complete. This is the same approach as in the EU.
- We discuss with the parties where to focus their efforts – in some cases some questions may be redundant. In others, we may require much more detailed information.
- We aim to spend 2-4 weeks of pre-notification (although in complex cases it can be much longer).
- The CMA can only 'accept' a Merger Notice once the transaction is in the public domain.

# Purpose of pre-notification

- **Frame the transaction**, including its rationale and any efficiencies.
- **Educate** the case team where markets are complex or unfamiliar.
- **Clarify** the evidence and information that the agency will require (e.g. specific internal documents, data, etc.).
- Identify what information may not be required.

## Purpose of pre-notification (2)

- Discuss methodology for specific work streams – e.g. local overlap analysis (filtering), surveys, any quantitative evidence the parties may wish to collect.
- Discuss early approach to remedies (in appropriate cases).
- Discuss the possibility of fast-track to Phase 2 (in appropriate cases).

## Purpose of pre-notification (3)

- Ultimately, effective pre-notification maximises the merging parties' chances of a Phase 1 outcome/clearance.
- Pre-notification can help inform market testing by ensuring that questionnaires are well drafted and reflect an understanding of the market. This increases the response rate. But pre-notification is no substitute for market testing.
- In the EU, pre-notification is also used to confirm that the European Commission has jurisdiction.



## CMA's current scorecard

Average time allocating teams	4 working days
Average time in pre-notification	10 working days
Pre-notification discussions finalised in 20 working days	currently 97%

# Issues that arise

- Discussions must be targeted. There is a risk that the case team may become overwhelmed by information that is in fact useful. A distinction must be drawn between what is essential information and what information is '*nice to have*'.
- There are reputational risks if the parties are put to excessive cost collecting information that is not perceived to be relevant to the investigation.
- The case team must be proactive in reviewing information received and clarifying whether it is adequate or not in a timely fashion. It is advisable for the agency to agree a scheduled timetable to ensure that pre-notification discussions do not over-run and that there are strong internal checks monitoring the length of pre-notification periods.

# CMA Case Study 1 – *BT/EE*

- Pre-notification began in January 2015. Phase 1 began in May 2016 and Phase 2 began in June 2016.
- This was an extremely complex case. BT and EE were, respectively, the largest suppliers of fixed communications services and mobile communications services in the UK.
- BT also provides many fixed services to other communications providers, including backhaul services to mobile communications providers, such as EE, O2, Three and Vodafone. These services connect their radio masts to their core network. EE also provides wholesale mobile services to other mobile service providers.
- The CMA found that the retail mobile market in the UK, with 4 main mobile providers and a substantial number of smaller operators, was competitive. The CMA also investigated a number of vertical theories of harm in relation to backhaul, wholesale mobile or wholesale broadband services. We ultimately did not find competition concerns and cleared the case in January 2016.

# What happened in pre-notification?

- Explored interaction with regulation – Ofcom.
- Site visits to the parties' operations – understanding telecoms (in particular backhaul.
- Scoping potential theories of harm – at one point we had 16! This was eventually reduced to eight in Phase 2.
- Large number of vocal third parties – we arranged meetings with many of these during pre-notification in Phase 1. This also helped to scope the information requests to the parties.

## **CMA Case Study 2 – *Greene King/Spirit***

- Greene King runs approximately 1,900 pubs, restaurants and a small number of hotels in the UK.
- Spirit Pub Company (Spirit) runs approximately 1,200 pubs across the UK.
- The CMA found that around 1,000 Spirit pubs overlap with a Greene King pub in a local area.

# What happened in pre-notification?

- We worked with the parties to design and implement a customer survey before notification. We agreed all major aspects of the survey with them, including the survey mode (online), the questionnaire design, and the selection of pubs to be surveyed.
- We also started the analysis of the results and discussed interpretation during the pre-notification period. This was possible because we were happy with an online survey and the parties had a large mailing list of customers.
- As a result, the CMA identified only 16 local areas where the transaction gave rise to concerns and the parties offered to divest a property in each of those areas at phase 1 to remedy concerns.
- This compares to other cases where parties refused to engage with the case team (and the statisticians) early on and then attempted to carry out a survey late in the day that we placed very limited weight on. In some cases this ultimately meant that the case was referred to Phase 2 (and subsequently cleared).

## **CMA Case Study 3 – *Ladbrokes/Coral***

- Ladbrokes was a fast-track case, so Phase 1 was used mainly to prepare phase 2. We found it was very efficient that economists could focus from the beginning on the phase 2 work.
- In pre-notification we designed and commissioned the consumer survey (there were ‘shadow’ group meetings before the official start of phase 2 to approve the survey), we drafted data and information requests (data to be used in phase 2) and we did some thinking about the market and planned the work and analysis for phase 2.

# Introduction to the EU system

- Pre-notification contacts at the discretion of the parties but highly encouraged.
- Ensure Commission's competence to review the transaction, identify potential issues and functioning of markets.
- Ensure completeness of the notification form.
- Timing in the hands of the parties but informal green light sought from the case team.



# EU Case Study - M.7252

## *Holcim/Lafarge (1)*

- Very significant merger between two major cement manufacturers active worldwide – Public offer
- Deal announced in April 2014, first contacts initiated at that date, notification in October and clearance (phase 1) in December
- Long pre-notification (6 months) to:
  - Assess the scope and the remedies (countries and regions involved)
  - Assess the modalities of their implementation (divestiture or Stock exchange introduction); and
  - Ensure parties would be ready to launch public offer just after clearance.

# Recap: Pre-notification: It's a balancing act (1)

- Pre-notification is essential to:
  - get the scope of the Merger Notice right early on;
  - get more information, but only where it is relevant to the case; and
  - Ensure we are 'ready to go' with third parties on Day 1
- But we have a '*goldilocks*' dilemma:
  - too little and we risk missing an issue or being surprised by third parties
  - too much and we risk being burdensome to business<sub>18</sub>

**Questions?**

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