

# **EU-China competition week**

## **24 to 28 October 2016**

### **Day 2**

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# **Session IV – The Merger Review Process and Interactions with Other Government Departments**

# Overview (1)

- Introduction
- Interaction with other government departments and the ‘public interest’ test
- Public Interest – Law and process
- Public Interest – Practice and procedure
- Public Interest – Practical examples
- Defence
- Media plurality
- Financial stability
- Interaction with other competition regulators
- Interaction with the European Commission
- The Commission’s inter-service consultation process

# Introduction

- The CMA has a mandate to protect competition and a statutory role in relation to merger control.
- We work with **other government departments** (which have wider policy agendas) when a **public interest issue** arises in a merger.
- It works with **other UK agencies** that have a **competition function**, but which have wider mandates in specific sectors (such as the Financial Conduct Authority, which also regulates the financial sector).
- We also work with **other competition authorities** in other jurisdictions (such as the EU Commission and the US FTC).
- We will now consider some worked examples in each case.

# ‘Public interest’ and the interaction with other government departments (1)

- Under the Enterprise Act, political involvement was removed from almost all merger decisions.
- However, the Act provides that the Secretary of State may at any time, up to the date that the CMA decides on clearance, reference or undertakings in lieu, intervene in a merger case which raises issues of public interest either that are currently specified under section 58 or that the SoS thinks ought to be specified.

# ‘Public interest’ and the interaction with other government departments (2)

- These include at present:
  - **National security** (including public security);
  - **Media plurality**; and
  - **Stability of the UK financial system.**

## ‘Public interest’ – Law (1)

- The Secretary of State has the power to issue a ‘public interest intervention notice’ or ‘**PIIN**’ in relevant cases under section 42 of the Enterprise Act.
- Public interest encompasses areas that are currently specified under section 58 or that the Secretary of States thinks ought to specified.
- When a PIIN is issued, the CMA will still need to conduct a competition assessment and report the findings of that assessment to the Secretary of State.

## **‘Public interest’ – Law (2)**

- The CMA has to undertake an investigation regardless of whether the case was notified. For media plurality cases, Ofcom will also report on the public interest consideration.
- The Secretary of State will then be solely responsible for deciding whether to (i) refer the merger, (ii) clear the merger or (iii) require remedies.



# ‘Public interest’ – Practice (1)

- We will coordinate with other government departments (including in pre-notification) to explore whether a case could give rise to public interest concerns.
- This can include discussing what remedies may be required to address public interest issues with those departments and with the parties.
- This open and collaborative process facilitates our assessment of competition and mitigates the risks for time delays and unexpected public interest concerns coming up late in the process.

## ‘Public interest’ – Practice (2)

- We will then usually formally invite the Secretary of State to issue a PIIN in appropriate cases.
- Also: Where a merger is notified to the European Commission (under the EUMR), but has an impact on the UK, the Secretary of State can issue a European Intervention Notice under Section 67 of the Enterprise Act, as in the *News Corporation/BskyB* case in November 2010.

# Defence – examples

- Two cases:
  - *Anticipated acquisition by Lockheed Martin UK Ltd of INSYS Group Ltd (2005).*
  - *Anticipated acquisition by Atlas Elektronik GmbH through Atlas Elektronik UK Limited of Quinteq underwater (2009).*
- No competition concerns identified.
- However, Secretary of State required UILs in both to address public interest concerns.

## Media plurality – examples

- *Completed acquisition by British Sky Broadcasting Group plc of a 17.9% shareholding in ITV plc (2007)*
- Competition concerns were identified alongside public interest concerns.
- BskyB was required to reduce its shareholding to less than 7.5% on competition grounds.

# Stability of the UK financial system – examples

- *Anticipated acquisition by Lloyds TSB of HBOS (2008).*
- The CMA identified competition concerns with the merger.
- However, the Secretary of State overrode those competition concerns and allowed it to proceed.

# Interactions with other sector regulators

- In relation to mergers involving regulated industries (water, gas electricity, telecommunications, rail, aviation, health and financial services), the respective sector regulators have a formal or informal role.
- The relevant regulator will, as a matter of practice, be consulted by the CMA to assist in reaching its decision on whether or not to make a reference.
- The role of the water regulator (Ofwat) and the communications regulator (Ofcom) is in certain circumstances prescribed by statute (see Special sectors).

## Example – BT/EE (1)

- As the telecom regulator, Ofcom played an important role in this inquiry. We considered Ofcom's role and the regulation it applies to the extent that it was relevant to our assessment. However, merger control is limited to an assessment of what the effect of the merger is, and not whether the market itself operates correctly.
- Ofcom played a constructive role as the industry expert in the telecoms industry. They were extremely helpful in the information-gathering phase and in testing the various submissions of third parties (waivers were in place for information to be shared with Ofcom).

## Example – BT/EE (2)

- Ofcom also provided a secondee and responded to numerous information requests on technical issues.
- Where Ofcom's role in regulation was relevant (Backhaul and Superfast Broadband – VULA), we maintained an arms-length relationship. Ofcom made formal submissions, which were published, and attended two hearings (summaries of which were also published). We treated Ofcom's submissions as we would any other submission, recognizing of course its significant expertise in this market.
- The merger review did not impact Ofcom's wider strategic review of the telecoms sector.



# The European Commission

- External: Interaction with national competition regulators
- Internal: The Commission's Inter-Service consultation process

**Questions?**

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