



Competition Law Association

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WEBINAR

Merger Control: developments from recent cases and proposals for reform of UK merger control

Date: Wednesday 13 October 2021

Speakers: Colin Raftery and John Fingleton

** The text below is a collated summary of the remarks of both speakers and should not necessarily be attributed to either speaker or any institution that they are affiliated with*

Introduction

The discussion opened with a brief overview of recent CMA merger enforcement. The statistics clearly demonstrate a higher intervention rate over the last 2+ years: more cases are being referred to phase 2 and more transactions prohibited or abandoned at Phase 2. The CMA has also published revised Merger Assessment Guidelines (MAGs) and updated procedural guidance to take account of the expiry of the Brexit Transition Period.

CR noted that it was important to put the statistics into context. Enforcement rates need to be considered in the context of:

- Natural fluctuations which occur over time (and reflect the nature of the deals that merging business agree) which ultimately give rise to the cases which are notified to the CMA and which it investigates on its own initiative).
- The need to look at the nature of concerns identified in cases that have been reviewed. Whilst there has been a greater focus on dynamic and potential competition theories of harm, the majority of cases in the last 12 months concern "traditional" horizontal unilateral theories of harm, primarily in concentrated markets.
- How the CMA compares with other international authorities: the CMA is not a significant outlier in this regard and there is significant consensus in practice across key agencies. There has only been one case where the CMA has ended up with a different outcome to another global agency (*Sabre/Farelogix*).

Has the CMA got become more interventionist?

- There are diverging views as to whether the CMA has got 'tougher'. One school of thought is that over time the CMA has just got better at/more sophisticated with investigation mergers and gathering, testing and weighing the evidence. Overall, the process is probably more rigorous but some confusion can surround words like 'tougher'; it suggests that the CMA has unilaterally moved the bar on what the statute is meant to say but this is not necessarily the case.
- The CMA has lots of discretion and can interpret statute in a way that would usually fall to the courts in other countries e.g. the USA, Ireland and Australia. The CMA has arguably used this discretion to move the bar within the statute. So, whilst not doing anything outside its statutory power, perhaps the CMA has become 'tougher' within those limits.

- There is an argument that the fluctuations in numbers of blocked mergers in recent years do not represent natural fluctuations and rather they show a structural break in the statistics. E.g. from 2003-2018 between 1 and 3 mergers were blocked or collapsed each year but 2019 and 2020 saw a significant increase, with 6 and 10 mergers undone respectively.
- The CMA has become more thorough with internal documents, talking to parties and exploring novel theories of harms but the standard of review has not changed.
- There is an interesting question as to whether, if the CMA has got 'better' at investigating mergers, there are cases between 2004-2018 that were anti-competitive but which got through a gap in the system?

Is the way that the CMA uses its powers changing?

- Internal documents are important sources of evidence that are increasingly used in phase 1 investigations. There is no particular hierarchy; where there is less evidence on other fronts, internal documents may be more important and *vice versa*. Internal documents may be an important way that companies monitor competitors but other companies may have aggressive document retention policies.
- S.109 requests may be used where there aren't many internal documents and there may be some benefit in interviewing senior executives of a company to understand how decisions are taken (and understand documents in their proper context). However, compulsory interviewing powers under s109 have not been used much to date and the CMA does not expect to use these powers frequently in future at Phase 1.
- There is an interesting question as to whether the CMA needs to look at third party internal documents more closely especially when looking at dynamic theories of harm. This can be a problem as smaller companies are less likely to have internal documents and it is burdensome on businesses.

Interaction between EC and CMA processes

- Following Brexit, some cases are going through parallel EC and CMA reviews. It is a bit early to tell how this is working from an alignment and procedural flexibility perspective as the cases so far are those which have not been problematic and which consequently do not present much difficulty in aligning outcomes on substance and remedies. However, it seems to be working well so far and the CMA has a good relationship with DG COMP.
- There is no single model more dual EC/UK cases; various approaches are possible dependent on the theories of harm and the centre of gravity of each case.

The share of supply test

- There was a discussion on the share of supply test within the context of the current reform proposals, in light of the CAT judgment in *Sabre* and the recent application of the test by the CMA.
- CR noted that the debate on the share of supply test seemed to have moved on following the CAT's judgment. Previously, concerns had been raised about the CMA's interpretation of the test in a small number of cases concluded between December 2019 and July 2020. Now, following the *Sabre* judgment, the concerns raised are being framed slightly differently, with the suggestion being that the test, by its nature, doesn't provide enough certainty for business and results in inefficient behaviours.
- CR noted that the CMA had, however, seen little or no change (since the CMA cases that are considered to give rise to this concern) in: the overall number of cases reviewed by the CMA; the proportion of cases being voluntarily notified to the CMA; the proportion of cases being called in by the mergers intelligence committee (MIC); or the very small number of cases in which a merger subject to formal investigation was 'found not to qualify'. The only observable change in practice the CMA has seen since this time is an increase in the number of 'briefing notes' submitted to the MIC, which increased from 25 in 2018/19 to 82 in 2019/20 (with the CMA also having received 83 'briefing notes' in the financial year to date). While there could be other reasons for this change, to the extent that it reflects some additional uncertainty about the interpretation of the share of supply test, it also highlights the role that the MIC plays in providing certainty for business.
- In this regard, in the last three years, there were only two cases in which a formal investigation was opened after a 'no further questions' letter was sent to the merging parties. As the MIC considered more

than 2,000 mergers over the same period, these two cases accounted for around 0.1% of all mergers considered by the MIC.

Voluntary v mandatory merger notification regime and initial enforcement orders (IEOs)

- The new mandatory regime for national security (under the NSA Act) begs the question as to why we don't have a mandatory notification regime for mergers and whether the voluntary regime still delivers benefits (given the potential impact of IEOs in completed deals).
- Although there has been suggestion that the *Facebook* judgment indicates that there is a *de facto* mandatory regime in the UK, it is important to remember the context; a mandatory regime is where you cannot compete until you get clearance from the authorities or you will receive a fine. This system would arguably lose the benefits for businesses and the CMA of the voluntary regime of focusing on narrow cases that could raise competition concerns.
- With the IEO regime, there is a risk of extrapolating examples that are anecdotal in nature and exist in only a handful of cases. The average number of IEOs imposed in completed merger cases in recent years has been between 10 and 20.
- The most significant problems in practice arise where the CMA calls in a case for investigation that completed a long time ago i.e. cases where the merging parties chose not to notify or get a steer from the Merger Intelligence Committee as to whether there would be an issue.
- In other circumstances, IEOs are used where merging parties know they will have to notify the CMA of potential competition issues but during commercial negotiations decide to close after weighing up the risks and costs against other commercial objectives. While IEOs might be an additional burden for some bidders, it is not the place of merger control to provide a level playing field for all bidders that might be pursuing a business in this context where the competition risks that each bidder might raise vary.

Behavioural remedies and commitments at phase 1

- The CMA has accepted behavioural remedies in the past but in practice it is difficult to design and enforce them properly to the required legal standard (i.e. clear cut solution). If crafted effectively, behavioural remedies could be accepted at Phase 1 but experience shows that this would likely only be in exceptional cases.

Checks and balances in the CMA

- There was a debate on checks and balances (particularly in the context of recent Phase 2 prohibitions and abandonments), and whether this might suggest that the panel system no longer provides the merging parties with a "fresh pair of eyes" in the way that perhaps was the case previously.
- CR explained that there are multiple protections underpinning the independence of the panel process. Of course, perceptions are also important for the whole regime to operate fairly and be seen to operate fairly. The process is designed to ensure that parties have a fair hearing with multiple opportunities to engage with a highly qualified and experienced panel of decision-makers.

CMA coordination with the DOJ and other regulators

- Agencies will do everything they can to reach outcomes that are aligned but there may be reasons why this may not always be the case (not always linked to disagreement between agencies on substance but more to do with the impact on competition in different markets).

Parallel merger regimes

- The CMA has been considering whether there are gaps in the context of the SMS merger regime and how to address those gaps in a proportionate way that minimises the possibility of unintended adverse consequences.
- It's important to remember that the general regime and SMS regime have slightly different targets; the general regime applies across the economy but the SMS regime is much narrower in scope.