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The Next Phase for UK Merger Control: Implications of the CMA's Procedural Reforms for Complex Global Mergers

Date: 6 March 2023

Venue: Weil, Gotshal & Manges LLP, 110 Fetter Lane, EC4A 1AY

Speakers: Rebecca Saunders, Competition and Markets Authority
Jenine Hulsmann, Weil, Gotshal & Manges LLP

Chair: Bruce Kilpatrick

1. Introduction

(1) The CMA issued a consultation in November 2023 about proposed changes to its merger control process in Phase 2 investigations. In particular following its changed workload following Brexit. The CMA's consultation closed in January 2024. Rebecca Saunders spoke about the key proposals, noting however that the CMA's response to the consultation output has not yet been published and therefore she did not discuss any of the CMA's ongoing internal thinking.

2. Rebecca Saunders -- Key proposals on reforms to the UK's Phase 2 merger investigation process

(2) The main purpose of the proposed changes is to improve the quality of engagement between parties involved in a merger review and the CMA, as well as to increase transparency and efficiency. The three main buckets of changes are:

a. Additional opportunities for parties to engage with the CMA earlier in the process and throughout (*e.g.* via teach-ins, site visits, an initial substantive meeting). Interested third parties will also have the opportunity in appropriate cases to present their views on the impact of a merger before the Phase 2 Inquiry Group.

b. A more streamlined process at the start of Phase 2, with a focus on key issues earlier on – *e.g.* the Annotated Issues Statement and Provisional Findings will be replaced by an earlier Interim Report. The Main Party Hearing will take place after the Interim Report, which will give merger parties greater opportunities to engage on the substance, as well as responding to the Inquiry Group's questions.

c. Changes to the remedies process should help to incentivise merger parties to bring forward credible remedies to address any concerns at the earliest possible stage, including on a without prejudice basis where appropriate. Earlier remedy discussions should also help parties co-ordinating remedies discussions with international authorities. The CMA has published a draft Phase 2 Remedies Form, which provides guidance on the relevant information required. In addition to these changes, the Digital Markets, Competition and Consumers Bill (**DMCC**), which is expected to come into effect in Autumn 2024, will introduce a new mechanism to extend the Phase 2 timetable by mutual agreement between the CMA and merger parties, which may be particularly helpful early in the process for alignment on remedy discussions.

(3) The proposed changes will not change the following aspects of the Phase 2 process:

a. Earlier remedy discussions should not be seen as an invitation to negotiate or attempt to "game the system". The CMA will require good faith engagement from merger parties, on the basis of credible solutions. While the CMA welcomes parties seeking to address any competition concerns and coming to it with credible proposed solutions, the merger process works best when this is discussed openly and constructively with the CMA through the appropriate channels. What does not fit so well is parties unilaterally seeking to remedy potential concerns part way through the CMA's review.

b. The CMA is not proposing any changes to its substantive position on remedies and its statutory duties remain the same. Behavioural remedies may be appropriate in some circumstances, however, the bar for acceptance remains high though not insurmountable. Nevertheless, it is hoped that better and earlier engagement on remedies should increase the likelihood that the CMA can satisfy itself that any risks associated with proposed remedies are not material or can be sufficiently mitigated.

c. The proposed changes (including the DMCC) should provide greater scope to align timelines with overseas regulators where appropriate, and ensure appropriate coordination of parallel reviews. To this end, the CMA also published draft revisions to the template consent waivers, alongside its consultation. These waivers work to the benefit of parties as well as the CMA, so the CMA encourages parties to provide these. However, alignment is not in and of itself an outcome the CMA seeks, as the CMA's role is to protect competition and consumers *in the UK*. Inevitably, there will continue to be cases where the CMA's position diverges from other authorities, but this is still very much the exception, and is typically driven by specific differences in regimes, in the evidence base across jurisdictions or by local market dynamics.

d. Although the CMA's consideration of consultation responses in relation to access to file remains ongoing, the CMA is already under a strict duty to disclose the "gist" of its case to the merging parties, and already shares un-redacted versions of Provisional Findings via confidentiality rings. Under the proposals, merger parties' advisors will be invited to enter a confidentiality ring at the time of the Interim Report, enabling merger parties to understand the CMA's thinking earlier. Where the Inquiry Group considers it appropriate in a particular case, the CMA may consider additional disclosure of particular information. The CMA ultimately needs to balance different considerations: transparency for merger parties and safeguarding their rights of defence; facilitating third party participation without dissuading them due to concerns around confidentiality or excess process burden; and internal resourcing considerations to ensure a thorough investigation within the statutory timetable. The Tribunal has confirmed on several occasions that the existing process for the disclosure of evidence is sufficient to ensure procedural fairness. When the CMA's practice to the disclosure of evidence has been challenged, there has also not been any suggestion that the CMA is withholding, distorting or otherwise failing to adequately provide the gist of the evidence appropriately.

(4) Ultimately, the CMA is tasked with coming to the right outcome for UK competition and consumers based on the evidence. The CMA hopes that the proposed reforms will represent a positive step change in constructive engagement, as well as supporting transparency, efficiency and agility. Merger parties and their advisors will need to engage constructively with the CMA for this to be achieved.

3. Jenine Hulsmann -- The merger control landscape, substantive assessment and remedies

(5) The CMA's proposals and engagement are a positive step, which everyone has welcomed and anticipated post Brexit. These reforms should be viewed within the wider context of UK

merger control, which is different from the predominant administrative model adopted by other agencies worldwide. The CMA has a hybrid, "quasi-judicial" process. Over time, the CMA model has moved closer to the administrative model. This is particularly evident in the closer integration of Phase 1 and Phase 2 case teams (as seen in recent cases), and this trend is expected to continue with the proposed reforms, where the Phase 1 decision will become the starting point for Phase 2.

a) Access to file

(6) Nevertheless, the UK is still out of line with other international regulators' processes, in particular in in relation to access to file. The more flexible approach in the proposed revised guidance will be helpful. Merger parties will prefer full access to file to be in line with international practice. But even access to a particularly important piece of analysis, in particular economic analysis, can be key to ensuring a smooth process. In 2023, the CMA published addendums to its Provisional Findings in three cases.[1] In at least some of these cases, earlier access to economic modelling, for example, would have allowed merger parties to discuss issues with the CMA earlier and to avoid the need for such changes at a later stage.

b) Remedies

(7) Remedies are a key theme in technology mergers in Europe. The European Commission has been looking at remedies earlier in its merger review process. This trend will continue following *Amazon/iRobot* and *Booking/eTraveli*,[2] which were cleared at Phase 1 by the CMA, but where the Commission indicated early on that remedies were required, but remedies were ultimately not found. The CMA's proposed changes are therefore welcomed, as they will provide more flexibility, however the CMA may also find that merger parties may want to engage on remedies even earlier than the start of Phase 2.

(8) Remedies, particularly in international deals, are often as complex as the substance. For example, in *Sika/MBCC*, a fast-track Phase 2 case, where the merger parties conceded a substantial lessening of competition ("**SLC**") to the CMA and went straight to remedies, the process still took five months, despite early and full engagement between the CMA and the merger parties from day one.[3] Structural and carve-out remedies are complicated, and this is being seen across the board.

(9) In relation to fix-it-first remedies, part of the reason why merger parties are considering them relates to the rise of strict terms in consent decrees sought in the US. Explaining to clients that the US courts will take contractual arrangements between merger parties into account, however the CMA is not as comfortable doing so, can be challenging. It is therefore important, both for merger parties and third parties, to understand what the CMA's remedies guidance requires in relation to structural elements.

(10) Relatedly, there is also currently a debate before the Ninth Circuit in the US, as to whether agreements entered into to remedy overseas regulators' concerns can be taken into account. The outcome will be an important development, particularly as more international deals are being reviewed in parallel by the European Commission and the CMA.

c) New theories of harm

(11) Theories of harm used by regulators are multiplying globally with the identification of new types of issues that may give rise to concerns. For example, *Booking/eTraveli*, which has

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1 *Microsoft/Activision Blizzard* (2023) (link available here), *Copart/Hills Motors* (2023) (link available here), *Hitachi/Thales* (2023) (link available here).

2 *See* M.10920 – Amazon/iRobot (2024) (link available here) and M.10615 – *Booking Holdings/eTraveli Group* (2023) (link available here).

3 See Sika/MBCC (link available here).

not yet been published, a post-merger increase in barriers to entry which protects an existing position of dominance was considered to be a significant impediment to effective competition, while the 2023 US Merger Guidelines also heavily focus on the "entrenchment" of dominance.[4]

(12) With so many new theories of harm, there is a risk that agencies may linger on both weak and strong non-horizontal theories of harm for too long, rather than focusing resources on filtering out weaker theories of harm (for the benefit of both agencies and merger parties).[5] A report on vertical mergers commissioned by the CMA found evidence of this.[6] *Microsoft/Activision Blizzard* is interesting in this respect, as market power would have traditionally been viewed as a clear indication of whether vertical concerns exist, yet despite the fact that Microsoft was the third largest player, agencies still maintained foreclosure concerns.[7] In the past, such filters were called "*safe harbours*", however these have disappeared from a number of agencies' guidelines.

(13) This dynamism is not specific to the CMA, and to increase predictability, it should be considered whether new filters can be put in place to streamline cases, including through a review of the CMA's Merger Assessment Guidelines.

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4 *See* US Department of Justice and Federal Trade Commission, "*2023 Merger Guidelines*", December 18, 2023 (link available here).

5 *See*, Lear Final Report, "*Ex-post Assessment of Merger Control Decisions in Digital Markets*", May 9, 2019 (link available here).

6 See E.CA Economics, "*Ex-post Evaluation of Vertical Mergers*", March 31, 2022 (link available here).

7 *See* M.10646 – *Microsoft/Activision Blizzard* (2023) in the EU and *Microsoft/Activision Blizzard* (2023) in the UK (links available here and here, respectively).