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Session 4B - Merger and Foreign Direct Investment Control

Common themes for obtaining clearances in an increasingly protectionist world

Panel: Neil Dryden (Compass Lexecon), Richard Romney (CMA),
Lucie Richmond-Wigg (Linklaters), Francis Yang (Junhe), Chaired by Bruce Kilpatrick (Linklaters)

SUMMARY OF SESSION

Introductions

Bruce Kilpatrick introduced the panel and opened the session, stating the key theme for discussion was the role of merger control in promoting economic growth. With a new labour administration, European Commission and Trump administration it was likely that there would be renewed policy debate on the promotion of economic growth. He introduced the key themes which the speakers would be exploring.

Role of Merger Control

Richard Romney summarised the CMA's priorities:

- The starting position is the CMA's primary duty to promote the benefit of consumers. The CMA's work supports an investment environment and productivity growth. Effective merger control plays an essential role in making sure markets remain competitive. Competitive markets drive efficiency and innovation, drive investment and support economic growth.
- Within the merger control framework, the CMA will consider benefits arising from a merger which may offset any harm such as rivalry enhancing efficiencies (**REEs**). Relevant customer benefits can be reviewed at the remedy stage, although they are tightly defined in the act and must accrue to UK customers.
- There is a lot of commentary on the extent to which the CMA might “over-intervene” and have a chilling effect on investment. This commentary does not take account of the bigger picture that there are over 50,000 M&A deals a year and last year there was only one prohibition (Microsoft/Activision) and one abandonment. CMA intervention rates are very low.
- The CMA operates independently of government intervention. Government input is received through the strategic steer used for setting strategy and organisational priorities. Individual case decisions are taken without government interference. Public interest mergers cover a very narrow range of mergers.

Neil Dryden considered the interplay between merger control and industrial policy in the EU:

- The recent Draghi Report looked at the future of competition policy, including the interplay between merger control and industrial policy. The key objective of this report is to lay out a new industrial strategy for Europe to overcome barriers to competitiveness and boost growth including greater emphasis on the weight of innovation and future competition in EU merger decisions.
- There is a question of how the Commission should address the risk of killer acquisitions of nascent European companies particularly from foreign acquirers.

Lucie Richmond-Wigg commented on killer acquisitions:

- An ability to review killer acquisitions, often through innovative theories of harm, is an important element in the regulator's toolkit. There is a balance to strike between protecting consumers from e.g. the loss of dynamic competition and continuing to encourage innovation and investment. A key challenge with innovative theories of harm is often the considerable uncertainty in the counterfactual, and ensuring regulators have sufficient comfort that intervening or not intervening would be in the best interest of the consumer overall.
- There are also comity considerations in the context of killer acquisitions, on who has the jurisdictional reach to pick-up on these and which regulator is best placed. If industrial policy leaks into merger reviews, it is more likely to result in divergence despite convergence on the pure competition analysis.

Francis Yang summarised the following recent trends in Chinese merger control:

- There is a new call-in power which can be used if the authority thinks a sub-threshold transaction might have anti-competitive effects. This power has only been used twice and Mr Yang summarised those cases.
- The authority has not provided formal guidance on the use of the call-in power but in communications it has suggested it will use the power carefully.

Convergence and alignment between agencies and merging parties

Richard Romney summarised the CMA's new phase 2 reforms (which are now in use):

- The new phase 2 procedural reforms allow for earlier engagement between the parties and the Phase 2 panel and staff on both substance and remedies. Mr Romney outlined the key features of the reforms and how they are working (in the early stages) in practice.
- Earlier engagement on remedies allows merging parties to come to the CMA without prejudicing their position on substance, so that they don't end up being timed out of engaging on remedies during the statutory timetable.
- Failure to provide confidentiality waivers for the CMA to share confidential information with other authorities does not prevent the CMA from engaging with those authorities. Mr Romney provided further details on the way in which the CMA engages and shares information with other agencies.

Francis Yang discussed the use of behavioural remedies in China:

- The authority will consider the parties' market shares and concentration of the market. They will also consider qualifying factors such as the impact of the transaction on market entry,

impact on consumers, impact on competitors and impact on upstream/ downstream factors, etc.

- The authority has a preference for behavioural remedies, even where there are horizontal overlaps, rather than divestment remedies.
- Price commitments are also used, requiring merging parties to maintain the price of products (or reduce prices by a certain percentage) for Chinese customers for a set period. Another common remedy is a continued supply requirement on equivalent terms. The authority may also require the parties not to engage in abusive conduct post closing i.e. exclusive dealing, impose differential treatment, engage in tying / bundling sales etc).

Lucie Richmond-Wigg discussed foreign investment regimes:

- It is common across all regimes to consider both target and acquirer risks.
- With the development of these regimes, common themes on sensitive industries are emerging. For example, energy infrastructure and key technologies are emerging as key sectors for FDI agencies.
- China and Russia are not the only jurisdictions under scrutiny; it is clear that even sovereign wealth funds can fall within scope and face scrutiny.