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To what extent can we expect to see a more flexible approach to pro-growth arguments and merger remedies from the CMA going forward?

Speakers: Claire Jeffs, Slaughter & May (**CJ**)
Nicole Kar, Paul, Weiss, Rifkind, Wharton & Garrison LLP (**NK**)
David Parker, Berkley Research Group (**DP**)
Chaired by Bruce Kilpatrick, Linklaters LLP (**BK**)

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Introductions

Bruce Kilpatrick introduced the panel and opened the session. He provided an overview of the current political climate, highlighting the challenge of keeping up-to-date with all the changes taking place over the last couple of months. BK then introduced the key themes that will be explored in the discussion.

Reflecting on Vodafone/Three merger

Claire Jeffs, having worked on the merger, shared her reflections on the transaction:

- Previously efficiency defences had been unsuccessful, and the CMA has shown a reluctance in recent years towards accepting behavioural remedies. However, in this case the parties made successful efficiencies arguments and agreed behavioural remedies. CJ considered the factors that contributed to this success:
    - At the government and OFCOM level there was a timely focus on growth and investment. After Microsoft/Activision the CMA was criticised for not promoting economic growth. At OFCOM there was broad acceptance that a step change in mobile network quality was needed in the UK.
    - Work to accurately evidence efficiencies was done from the start of the merger investigation. Engineers could demonstrate the benefit of establishing a standalone 5G network in detail.
    - OFCOM is supervising the network remedies and could attest to their benefits.
- Going forward, this is indicative that the CMA may be more open to efficiencies arguments and behavioural remedies than previously. However, a general caution is likely to remain. As such, it is only worth proposing efficiencies arguments if they are solid.
- BK commented that in most merger situations, it is unlikely that the parties will have the level of evidence that was available to demonstrate efficiencies in the Vodafone/Three merger. CJ agreed with BK highlighting that guidance from the CMA on the type of efficiencies they would be prepared to accept would be useful.

The current competition law landscape

Nicole Kar expressed her surprise that this period of political change would arise under the Labour Government rather than the Conservatives. NK alluded to an undercurrent of frustration with merger control that has been expressed to the Treasury and the UK Government for years by businesses about UK merger control which has bubbled to the surface now and which despite the media linking this with Microsoft/Activision is more a result of CMA interventions in AI partnerships.

NK discussed the recently published Mergers Charter and was generally welcoming of it. She thought it introduced a lot of reasonable positions to the process of merger control. She reflected on the following:

- The general narrative of increased engagement between the CMA and merging parties is positive. NK reflected that the requirement for parties to have submitted a draft merger notice to the CMA before the CMA is willing to engage with them causes delays and the CMA being out of step with other regulators and so would encourage CMA engagement with parties before that stage.

- It would be useful to have more senior oversight at the start of the Phase I process so that senior CMA staff can triage cases with significant competition issues from those without (as MIC does).

NK noted that she had not worked on the two mergers which have now gone through the new process at phase 2 of merger control investigations. However, having spoken to the advisers who had, she reflected on the following:

- The CMA asked for a lot of information upfront and over the summer in the first case which was a surprise to the client.

- CEOs were pleased with improved engagement with the CMA at the phase 2 stage.

- NK questions how dependable the interim report will be, in light of the amount of information that is being collected, how little time there is to do economic analysis and the pressure to produce the report quickly. Is there really enough time to reach dependable (preliminary) conclusions?

- She speculated that the pressure on phase 2 timetables could minimise communication from case teams as they are under pressure to meet deadlines.

NK reflected on what we might see going forward:

- ‘Not open season on bad deals’ – the CMA is looking for deals that it can use to show its independence and focus on competition law issues so merger parties should not think anything goes.

- It seems the CMA is being asked to reconsider its risk appetite – NK highlighted it would be beneficial if it were open to increasing its risk appetite by being more accommodating on behavioural remedies and less rigid in Phase I around upfront buyer requirements and de-risking standard third party consent requirements.

- Likely more third-party challenges as parties use the Mergers Intelligence Committee (MIC) to investigate mergers instead of putting in phase 1 notifications and the CMA utilising this process to “lean back” from foreign-to-foreign deals lacking “distinct and direct” UK impact.

Pro-growth arguments and merger remedies

David Parker, building on the previous discussions, focussed on the appetite for efficiencies arguments and merger remedies. DP commented that it is likely the CMA will now have more of a listening ear to efficiencies arguments and pro-growth arguments when relevant.

DP gave some examples of efficiencies that could be accepted by the CMA in the right case.

- Complementary skills – where one firm brings capability X to the table and the other brings capability Y e.g.: Pfizer offered global manufacturing and distribution capabilities for BioNTech's innovative mRNA vaccine technology.

- Fixed cost efficiencies – it is often argued that only costs that are variable in the short run affect pricing decisions, but eventually all fixed costs will become variable, so it will likely be possible to demonstrate that at some point at least a proportion of notionally "fixed cost" savings will be passed on to prices.

- Export benefits – suppose a UK manufacturer merges with a firm with European distribution – this could give rise to increased exports, and hence employment and profits in the UK. This is not typically a merger efficiency argument but would fall squarely in the camp of potential growth stories.

  DP also commented on the role of merger specificity. The CMA is likely to require that merging firms demonstrate that efficiencies that could not be achieved through a contractual arrangement other than a merger situation. However, there are many situations in which contracts are not as good as merger for creating the right incentives and for covering all contingencies. For example, in Vodafone/Three, OFCOM confirmed that contractual solutions such as network sharing weren't working as well as they could, as incentives couldn't be efficiently aligned. However, this alignment was achievable through the merger.