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Call for Information: Phase 2 merger investigations

We welcome the CMA's consideration of areas for improvement in Phase 2 merger inquiries and we are grateful for the invitation to the recent round table discussion on this topic. We welcome the willingness to consider all potential options for improvement. Dentons has a wide-ranging competition practice and is involved in merger control on every continent.

It would appear that at various stages of the Phase 2 process there is an unhelpful stand-off or mismatch of the needs of parties and the CMA and indeed third parties. Phase 2 is time constrained for all concerned. Parties seek to anticipate and address the concerns, advocating their case and the supporting analysis. Parties need to know in sufficient time the basis of Inquiry Group thinking. This is also what the CMA no doubt wishes to achieve within the constraints involved. Importantly, parties need to be assured their arguments have been given the opportunity to be presented and considered. Parties may be reluctant to signal what they perceive as preparation for defeat of those arguments through early engagement in potential remedies.

Any efficiencies and savings in terms of time should be captured. Yet the CMA is wary of a ticking clock and procedural challenge if it is seen to depart from procedures or less than formal communication.

As a general, point, it was clear from the discussion that certain of the inefficiencies experienced by parties and by the CMA appear to originate with a reluctance to engage too much for the fear of prejudicing one's position or opening up to court challenge.

Transition from Phase 1 to Phase 2:

What can be done to clearly signal the open mind with which Inquiry Groups and case teams wish to embark on a Phase 2 inquiry and persuade parties this is genuinely the case? Phase 2 is a new inquiry, and whilst some of the ground will have been covered it is a fresh look. More perhaps should be done to mark that transition. (It was interesting to note that the CMA may view as overblown concerns among advisers that a senior case team member from Phase 1 can have too much influence on Phase 2 Inquiry Group thinking. The reality may be that any Phase 1 official would soon lose credibility with the Phase 2 Group (and the CMA mergers team in general) if observed to be pushing the Phase 2 group to the thinking behind a Phase 1 decision. Perhaps addressing that head on and issuing more public comfort in that regard would be helpful).

Few parties would embark upon a Phase 2 inquiry unless they believed in their case. In fact, it is likely that a number of those parties which abandon their merger on reference to a Phase 2

investigation also believe in their case but either wish to avoid the expense or may feel the struggle is an uphill one and they will not change the regulator's position.

It would be helpful for parties to understand that their considered critique of the Phase 1 decision might be of assistance to the Phase 2 Inquiry Group as the latter get to grips with the markets, parties and issues. An early opportunity for parties to give a high level critique of the Phase 1 decision would potentially be of assistance without prejudice to their position on Phase 2 findings as it progresses.

The utility of a site visit was questioned. In some cases it will be of assistance to aid an understanding of the products or services. It may be an opportunity for the Inquiry Group to assess the organisation. That may be also an opportunity to kick the tyres on issues which the parties may feel have not been sufficiently well understood in relation to the products or services. In some cases the site visit may not be possible, or may not seem to be worthwhile, which then may deprive those parties of an opportunity to present their case, in which case another opportunity could be provided.

Oral Hearing

The main party hearing is a constrained environment where it is difficult for parties to feel they have had an opportunity not just be heard but also genuinely listened to. The suggestion that it is more of an inquisitional experience with limited opportunity to advocate is one which resonates with us. It should not be an opportunity to put executives "on the spot" but a genuine informed dialogue. This is where there can be genuine frustration for the parties. In advance of the oral hearing some flagging by both the CMA and the parties of their lines of inquiry and their arguments might help to make the experience more fruitful.

Communication

Written responses to working papers are time constrained and it is difficult for parties to gauge whether or the extent to which points made are truly being taken on board. Some acknowledgement of how the responses land with the case team at least might be helpful.

Regular and informal contact between the case team and advisers would be beneficial. The CMA is nervous about any informal/under-cooked thoughts or views being shared with parties and subsequently being relied upon against the CMA in a challenge before the CAT. In a proper objective good faith process that should not happen.

It would seem not beyond the capabilities of the CMA and adviser community to devise an appropriate system of caveats and undertakings from advisers to avoid concerns that informal communications would be held against the CMA. Breach of any such undertaking would potentially impact on a professional advisers' standing before the CMA in subsequent transactions. There are other communications by the CMA which expressly are not disclosable (informal guidance and the current briefing paper procedure).

Every organisation knows or at least believes that regulators have long memories and a lack of trust will not aid their case at some later stage. The CMA will assert that such considerations would be irrelevant to decision making. All would acknowledge, however, that professional relationships based on trust go a long way in achieving a constructive dialogue.

Informal contacts

We would suggest that it is not impossible to envisage a specific set of more informal contacts to be identified (with all appropriate caveats) between parties on the one hand and CMA on the other. This could be beneficial in terms of the intermediators/interlocutors keeping parties informed at an early stage of developing thinking.

Requests for Information

Time is at a premium. In advance of a formal request it would in many cases be possible for the case team to give advance warning of the type of information likely to be requested formally in a few days' time or what concerns are being looked at. At a very practical level, time is no doubt expended on carefully drafting written requests of information or formulating in writing working papers might it be possible to give the advisers advance notice so that when the official document lands some consideration or preparation has been undertaken by the parties (which could be as simple as ensuring the appropriate individual within a business is identified/available to respond).

With appropriate safeguards this may help to avoid surprises in terms of information requests.

A point we made in the roundtable is that there really should be little room for surprises as one approaches provisional findings.

We agree that the time set aside for the remedies hearing might be better spent, at least potentially allowing the parties to address concerns with the provisional findings insofar as issues have not already been addressed. In our experience, where the provisional findings are negative and clients

have difficulty accepting them, that feels to clients as a difficult time to be discussing remedies in a constructive manner. It is also late in the day to begin consideration of potentially complex remedy options.

It would be preferable for a dialogue to be initiated on some basis that gives the parties confidence it will not feed through the inquiry group as an indication of readiness to concede. The dialogue could be tentative and could consider if any of the realistic, as opposed to fanciful, theories of harm are established what kind of remedy, if any, might be considered. A separate discussion with an individual at the CMA in the case team rather than the Inquiry Group might be able to kick start without prejudice thinking around remedies. It is appreciated that that is difficult for clients to reconcile the continued defence of the merger whilst apparently signalling a lack of confidence in the arguments by preparing for a negative outcome.

Relevant to this latter point, and to many of the above issues of engagement is any lack of confidence that the process is objective based on the appropriate facts and theories of harm, as opposed to this being a process of one side winning its argument for the sake of it.

Third party input

Third parties should feel free to provide genuine views or concerns without exposing them to subsequent commercial retribution especially where they are a supplier or customer.

The CMA could use it Section 109 powers (and powers to require individuals to give evidence) in order to obtain evidence from third parties or indeed providing them with "cover" for having made submissions or provided material which is adverse to a merging party.

As regards concerns about the veracity of third party evidence, it might be helpful if the CMA adopted a more pugilistic approach to the provision of information which is subsequently shown to be misleading (though clearly a balance with encouraging third parties to contribute might be appropriate). Third party evidence also must be faithfully reproduced in the decision, of course.

Dentons
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