EUCLID LAW

August 2023

CMA Call for information: Phase 2 merger investigations – Euclid Law comments

Euclid Law welcomes the CMA's review of those aspects of the Phase 2 investigation process that could be revised to ensure that the process operates as effectively and efficiently as possible, and the opportunity to contribute to that review.

In summary, Euclid Law believes that, in many cases, the process is not currently working well. In particular, meaningful engagement with the Inquiry Group is very limited, including at the outset and in relation to the theories of harm once these have crystallised in the PFs, as well as during the remedies phase.

Introduction

The CMA's unique Phase 2 structure, with decision-making by a group of independent panel members, not reporting to the CMA executive and not previously involved with the case in Phase 1 but informed by the work of the case team, presents unique opportunities to introduce greater objectivity and to avoid confirmation bias. It does, however, also present some specific challenges:

- While the parties may have regular engagement with the case team, engagement with the Inquiry Group tends to be confined to formal set pieces, i.e. the site visit, main party hearing and response hearing. Since it is the Inquiry Group that are the decision-makers, it is essential that the process allows for more meaningful engagement with them throughout the process.

- If the case team includes many of the same staff members in Phase 1 and Phase 2 (and in particular, the Project Director), the dangers of confirmation bias are clear, and the role of the Inquiry Group is to counter that. But if the Inquiry Group is exposed day-to-day to the views of the case team, while having limited opportunities for meaningful engagement with the parties, there is an imbalance that the current process does little to address.

- The separation and delegation of work between the Inquiry Group and the case team may mean that the Inquiry Group is not sighted on the detailed underlying evidence, and so may not be well-placed to identify weaknesses in the case being presented by the case team and therefore counter any potential confirmation bias.

These fundamental challenges underlie many of the points raised below.

More frequent and meaningful engagement with the Inquiry Group

- Engagement with Inquiry Groups in relation to the competitive assessment is often limited.

    - Although the site visit is a welcome USP of the UK system, it is designed to enable the Inquiry Group to understand the industry and general dynamics of the relevant markets – it is not designed directly to address the issues raised by the theories of harm found in Phase 1.

    - The main party hearing comes before the PFs are issued and is focused on fact-finding by the Inquiry Group, and cannot therefore be regarded as a meaningful opportunity to respond to the theories of harm and evidence on which the CMA ultimately relies. Whilst the parties will have received the AIS and working papers at this point, in our

experience, the hearing remains a fact-finding process rather than an exploration of the evidence received to date and developing theories of harm.

- Although the response hearing takes place after the PFs are issued, this is typically focused on remedies and very limited time is afforded to engaging on the core competitive assessment.

- The opportunity to engage on remedies is limited to the response hearing, which is still in the preliminary stages of the options. Further meaningful engagement would be welcome as the Inquiry Group develops its thinking.

- Engagement would be enhanced with more frequent meetings between the Inquiry Group and the parties (analogous to what the European Commission refers to as "state of play" meetings) to keep the parties informed on progress of the Group's thinking (acknowledging, of course, that it will not yet be able to give any views on conclusions) and to enable the parties to raise specific points. Although the parties may have the opportunity to talk to members of the CMA case team, there is no formal forum for this and so willingness to engage varies from case to case and Project Director to Project Director. It is also never clear to the parties whether and to what extent key messages raised with the case team are filtering through to the Inquiry Group itself. Given the difficulties already apparent in trying to coordinate Members' diaries to arrange formal hearings and the site visit, such "state of play" meetings need not involve all Inquiry Group members but should involve at least one or two, including where possible the Chair.

- Given the imbalance in exposure of the Inquiry Group to the views of the parties and the views of the case team, and the possible confirmation bias of the case team, it is important to allow the parties to engage with the Inquiry Group on the substantive issues early in the process. This will go some way to ensuring that the Inquiry Group approaches the case understanding the views of the parties as well as those of the case team.

- Engagement with the Inquiry Group on remedies is also extremely limited and, in practice, confined to the response hearing. In our experience, the quality of response hearings can also be variable, and in some cases barely skim over the surface of the key issues. This may in part be due to their formal nature. The interactive discussion required to develop suitable remedy proposals is arguably less well suited to a formal hearing. We would recommend the introduction of more regular meetings with the Inquiry Group (along the lines of "state of play" meetings discussed above) following the remedies notice once it becomes clear that remedies are likely to be required. While acknowledging that remedies are not a matter for negotiation, this would nevertheless allow for a more iterative and constructive approach to resolving the competition issues raised.

Access to file

- The Parties are not provided with "access to the CMA's file" and are not therefore able properly to challenge the evidence on which the CMA's case is based or to identify any exculpatory evidence that may also be in the CMA's possession but not included in the PFs. Publication of third-party submissions on the CMA's website are often too limited and delayed for the Parties to use them effectively in their own submissions and other engagement with third parties (such as notes of calls or meetings) will often not be made public. In addition, there is very limited engagement and visibility of important pieces of evidence, such as responses to third party questionnaires, on which the CMA often places significant weight.

- Due to the inevitable separation (and delegation) of work between the Inquiry Group and case team, the Inquiry Group members may not be aware of all the evidence available to the case team or the detail of the evidence (including any weaknesses) on which they are relying, and so access to file would be an important safeguard. This is particularly important given the narrower judicial review standard of any appeal to the CAT. The procedural officer should play an enhanced and active role in overseeing the disclosure process.

Facilitating a more meaningful opportunity to engage with the PFs

- As a result of the above, and how late they come in the process, the PFs are effectively a draft decision on which the Inquiry Group has already made up its mind. Given the confirmation bias that naturally operates once the PFs are published, it is extremely difficult to change the group's mind afterwards. The statistics on the number of times where the Inquiry Group has changed its mind post-PFs to exclude one or more theories of harm speak for themselves. Three recent cases where the CMA has exceptionally published an addendum to the PFs amending its provisional findings are the exception that proves the rule.

- There is also nothing in principle to prevent the Inquiry Group identifying new theories of harm and relying on new evidence for the first time in its PFs. Given the lack of time and opportunities to engage post-PFs, this is evidently unfair.

- Accordingly, the PFs should come earlier in the process. This would make it more likely that the PFs are genuinely provisional, and the response hearing is a genuine opportunity to respond to those findings. It may also have efficiency benefits as an earlier issue of the PFs should mean that the annotated issues statement and working papers are unnecessary.

- One significant challenge is that the PFs are currently a public document. This reinforces the confirmation bias intrinsic to preparation of the PFs – the Inquiry Group is more likely to attach weight to evidence that confirms its existing position once that position has been made public, as it is harder to row back from a public position. The public nature of the PFs also means that the PFs themselves may be less informative than the working papers that currently accompany the AIS. If the PFs are to be brought forward to replace the AIS and working papers, it is important that they are used as a genuine statement of the Inquiry Group's current thinking based on the available evidence (rather than the "case for the prosecution"): transparency as to the Inquiry Group's thinking should not be compromised by the fact that the PFs will be made public. Serious consideration should be given therefore to keeping the PFs confidential to the Parties and publishing only a summary version for the benefit of third parties.

Summary of recommended process changes

Euclid Law proposes therefore that the Phase 2 process should be revised to maximise its effectiveness and efficiency, so that:

- There are more regular "state of play" meetings with the Inquiry Group, including an initial meeting which provides an opportunity for the Inquiry Group to understand the Parties' views on the Phase 1 decision. This could be offered in parallel to the site visit, which should also take place very early on in the process to ensure the Inquiry Group is brought up to speed as quickly as possible.
- The fact-finding main parties hearing takes place earlier in the process than currently e.g. before week 10.

- The Provisional Findings could then be issued earlier in the process.
- At the same time as issuing the PFs, the CMA would grant the parties access to file.
- The response hearing should be remodelled so that it provides the parties with a genuine and meaningful opportunity to engage with the Inquiry Group on the competitive assessment, taking into account the access to file that has been provided.
- More meaningful engagement on remedies – as discussed above, this may be more constructive if not by way of a formal "hearing". This can then be followed by more regular "state of play" meetings with the Inquiry Group to allow appropriate and meaningful engagement with the Inquiry Group on remedies.

Professionalisation of the Panel

- We also recommend that the size of the CMA's Panel be substantially reduced, with an increased expectation of time devoted to inquiry work, so that each Panel Member spends relatively more time on inquiry work. This will have two main advantages: (i) professionalising the Panel, so that additional case time enhances their expertise and experience, improving their engagement; and (ii) reducing panel members' outside commitments, thus making it easier to diarise key hearings and meetings (which can be a significant obstacle to efficient progress of the investigation).
- We are aware that our proposals necessarily entail a greater time commitment from the Inquiry Group in any individual case. Greater professionalisation of the Panel may help to facilitate this.

Addressing confirmation bias

- When the OFT and CC were first merged into the CMA, care was taken to have largely separate teams and, especially, separate Project Directors at Phase 1 and Phase 2 to safeguard against confirmation bias in the case team. While the trade-off between efficiency (e.g., avoiding duplication) and safeguarding against confirmation bias was always acknowledged, the balance was in favour of safeguards. Gradually since then, steps have been taken to increase efficiency at the expense of those safeguards, including retaining the same Project Director (and/or Assistant Director) throughout. Recent experience suggests that the balance has shifted too far in the interests of efficiency and excessive confirmation bias has crept back in. We would recommend that case team staffing in Phase 2 be reviewed and that, in particular, a new Project Director be appointed at Phase 2.

We respond to each of your specific questions, as follows:

- *Are there ways in which merging parties (and others) would be able to engage more effectively with Inquiry Groups in relation to the competitive assessment of a merger?*

  See above. The Phase 2 process should be revised so that there are regular "state of play" meetings with the Inquiry Group, starting with a kick-off meeting where the parties can respond to the Phase 1 decision. The fact-finding hearing with the main parties should take place earlier in the process than currently e.g. before week 10, thus also enabling the Provisional Findings to be issued earlier in the process. This would make it more likely that the PFs are genuinely provisional, and the response hearing is a genuine opportunity to respond to those findings. At the same time as issuing the PFs, the CMA would grant the parties access to file.

- *Are there ways in which merging parties (and others) would be able to engage more effectively with Inquiry Groups in relation to remedies?*

  As discussed above, more iterative and frequent engagement is required between the parties and the Inquiry Group post-Remedies Notice.

- *Do the existing key opportunities to make written submissions (ie in response to the issues statement, annotated issues statement/working papers, provisional findings, and remedies working paper) work well? How could they be improved?*

  The statement of issues used to be an opportunity for the Inquiry Group to take ownership of the case, and put their "own stamp" on their approach to the case. It would give the parties meaningful guidance as to the Inquiry Group's approach to the case. The statement of issues has, however, increasingly become a simple cut and paste of a summary of the Phase 1 decision and therefore provides very little value beyond the Phase 1 decision itself. Most Parties will have already submitted an initial submission in response to the Phase 1 Decision, and so responding also to the statement of issues is repetitive and largely a waste of resources and leads to unnecessary delays in the process. We would suggest removing the issues statement altogether, saving time and resources which could be allocated to an initial meeting with the Inquiry Group during which the parties would be able to provide their views on the Phase 1 decision.

  Other written submissions work reasonably well except that the response to the PFs comes too late in the process to be effective in influencing the Inquiry Group. If the PFs are published earlier on in the process, it may also become unnecessary to issue an AIS with working papers.

- *Do the existing key opportunities for direct in-person engagement with the Inquiry Group (ie the site visit, main party hearing, and response hearing) work well? How could they be improved?*

  The site visit remains an effective opportunity for early engagement in a less formal setting and to enable the Inquiry Group to understand the industry and markets concerned by the case. It is therefore highly valued and an example of best practice that could be followed by other agencies around the world. Early engagement with the Inquiry Group on the Phase 1 Decision could be added alongside the site visit.

  As discussed above, the main party hearing comes too early, however, and the response hearing too late, to facilitate effective engagement on substantive issues. We propose therefore that these are brought forward in the process (so that the current main parties' hearing explicitly becomes a fact-finding forum) and an additional opportunity for engagement on substantive issues is inserted at the beginning of Phase 2. The response hearing would also be significantly improved by disclosure of evidence on the CMA's file and extending the time available to engage on the competition assessment.

- *What are the perceived barriers to engagement on possible remedies prior to the CMA's provisional findings (and what factors might explain why the existing mechanism for 'without prejudice' remedies discussions in Phase 2 investigations has rarely been used in practice since its introduction in 2020)?*

  There are probably two main reasons for this:
  - First, notwithstanding the ostensible "without prejudice" nature of the discussions, the inevitable mistrust that engagement on possible remedies will undermine the strength of arguments that no SLC arises in the first place; and

- Secondly, it is difficult for the Parties to engage on possible remedies before understanding the theories of harm that the CMA is likely to pursue, and indeed the strength of evidence on which those theories rely.

In practice, the above two considerations mean that engagement prior to receiving the AIS is unlikely. Given the need to respond to the AIS and prepare for the main parties hearing, in practice engagement on remedies is unlikely until after the hearing. Since it may only be a few weeks between the hearing and the PFs, many parties may believe it is not worth engaging on remedies at that stage and prefer to wait to receive the CMA's assessment in the PFs before doing so.

However, in appropriate cases where it is clear that either some form of remedy will be required or the complex nature of any remedies means that engagement on remedies needs to begin prior to issue of the Remedies Notice, there should be a clearer process to engage with the Inquiry Group itself rather than just the case team on a "without prejudice" basis. Bringing forward the PFs may therefore also present an opportunity to engage earlier also on remedies.

- *Are there aspects of regimes in other jurisdictions that you consider might work well within the UK regime?*

The proposed changes above would bring the PFs closer to the European Commission's Statement of Objections (and access to file). Lessons should however be learned to take the best and to avoid the worst of the EU mergers regime. For example:

- Site visit and fact-finding hearing should be retained as part of CMA's Phase 2 process – the absence of this type of engagement early on in the EU process is a serious deficiency.
- The PFs would not need to be a one-sided "case for the prosecution" (as the European Commission's SO always is) but more of a genuine attempt for the CMA to state its provisional thinking, incl. where it is still undecided on certain points.
- Access to file could be simplified to reduce the number of documents disclosed, subject to more proactive oversight of disclosure by the procedural officer.

Euclid Law Limited