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United Kingdom: a recent rush of Phase I merger enforcement by the CMA

Matthew O'Regan (St Johns Chambers, United Kingdom) · Monday, February 2nd, 2015

In an earlier post, of 2 December 2014, in which I reviewed the Competition and Markets Authority's ("**CMA**") draft annual plan for 2015/2016, I observed that (as of that date) the CMA had not, since assuming the functions of the Office of Fair Trading and Competition Commission on 1 April 2014, opened a Phase II merger investigation. Since then, and notwithstanding the holiday period, the CMA has been extremely active in merger enforcement: it has referred four mergers for in-depth Phase II investigations, has accepted Phase I remedies in a fifth and is consulting on remedies in a sixth.

In this post, I review the CMA's recent merger activity and identify a number of aspects of the CMA's practice that may be of wider application. Two preliminary observations should first be made. First, in the United Kingdom there is no obligation to notify a merger to the CMA, such that completion may take place both in the absence of any notification and before the CMA has granted clearance, whether following notification or as a result of an own-initiative investigation; however, the CMA can (and routinely does) in such cases impose interim enforcement orders requiring the merging businesses to be held separate and maintained as viable businesses (see here for an earlier post on such orders). Second, as a Phase I investigation is a 'first screen', the CMA is obliged to open a Phase II investigation if it holds a reasonable and objectively justified belief that the merger may be expected substantially lessen competition (see the Court of Appeal judgment in *Office of Fair Trading v IBA Health*).

***Xchanging/Agencyport*: Phase II investigation into completed and non-notified '4 to 3' merger after no remedies offered**

On 8 December 2014, the CMA opened a Phase II investigation into XChanging's completed acquisition of certain software businesses from Agencyport. The CMA had initially launched its own investigation into the transaction (which was completed in July 2015) and adopted an interim enforcement order, with subsequent limited derogations to permit joint bids for certain specific customer tenders.

The CMA considered that the transaction reduced to three the number of suppliers of certain software products used in the insurance industry for policy administration, in particular in the Lloyd's of London market. The characteristics of the parties' products, customer views, bidding data and internal documents showed that they were close competitors , even though Xchanging's current product was a legacy product and its replacement was under development and had not yet been launched. In addition, Agencyport was the leading supplier, there were only two credible alternative suppliers and there were high barriers to entry. Given these factors, and the parties' combined market share of 30-40%, the CMA identified likely horizontal unilateral effects. The CMA did not identify competition concerns in respect of other types of software products in which the parties' activities overlapped.

As Xchanging did not offer any remedies, the CMA opened a Phase II investigation, which must be completed by 24 May 2015. Having commenced its Phase II investigation, the CMA ordered Xchanging to appoint a Monitoring Trustee, both to oversee compliance with its initial interim enforcement order and to ensure that the Agencyport businesses remain viable businesses. On 13 January 2015, it published its Issues Statement.

***Sonoco/Weidenhammer*: Phase II investigation into non-notified completed 'foreign to foreign' merger between close competitors**

In August 2014, the U.S. based packaging group Sonoco Products agreed to acquire Weidenhammer, a German manufacturer of rigid and other packaging. The transaction was completed on 31 October 2014, but was not notified to the CMA, which opened an own-initiative investigation, apparently in October 2014. An interim enforcement order was adopted on 5 November 2014, requiring Sonoco to hold separate and maintain as a going concern the entire Weidenhammer business, worldwide; this was subsequently limited to the parties' respective UK businesses.

The CMA subsequently identified competition concerns in respect of composite cans for food products, notably potato chips and coffee. The CMA considered that the merger combined the two largest suppliers of composite packaging in the UK, who faced competition from only two much smaller suppliers of composite cans and little competition from manufacturers of other types of packaging. As the CMA has not yet published its Phase I decision, the detailed reasoning for its referral decision is not clear, but it would appear to be based upon unilateral effects concerns, with a risk of post-merger price increases.

It would appear that Sonoco offered remedies to the CMA, but that these were rejected as not being a clear-cut solution to the CMA's concerns. It is not yet clear what remedies were offered and why they were rejected by the CMA.

***Reckitt Benckiser/K-Y Brand*: rejection of remedies proposal leads to Phase II investigation**

In March 2014, Reckitt Benckiser ("**RB**") agreed to purchase the personal lubricants brand K-Y Jelly from Johnson & Johnson ("**J&J**"). No fixed assets or employees were to be acquired, with J&J continuing to manufacture and supply the product to RB. It is unclear whether the transaction was notified to the CMA, but completion in the UK is conditional upon CMA approval. From the parties' public statements, it would appear that the principal focus of the transaction was K-Y's leading market positions in the United States, Canada and Brazil. The merger has received merger approval in a number of jurisdictions worldwide, including the United States.

RB's products include another branded lubricant, Durex. The CMA identified competition concerns in the supply of personal lubricants to grocery retailers and pharmacies. Although somewhat differentiated products in terms of branding and marketing, Durex and K-Y are the two leading brands of such lubricants in the UK. They face little or no competition from other brands, with own-label products imposing only a limited constraint. Indeed, in the grocery segment, there were no alternative brands, which the CMA considered could increase RB's bargaining power. The CMA was therefore concerned that the merger could lead to higher prices or reduced quality and range of products. Whilst this market is small, the CMA declined to exercise its '*de minimis*' discretion not to open a Phase II investigation.

It would appear that RB offered (as yet unpublished) remedies to resolve the CMA's concerns, but that these were rejected as not being a clear-cut solution to the CMA's concerns.

Pork Farms/Kerry Foods**: Phase II investigation after no remedies offered in '4 to 3' or '3 to 2' merger**

On 5 January 2015, the CMA announced that it was opening a Phase II investigation into a transaction pursuant to which a food manufacturer, Pork Farms, acquired the chilled savoury pastry business of a competitor, Kerry Foods. The transaction was completed prior to being notified to the CMA. However, it would appear that the CMA was satisfied that the notification was complete only on 22 October 2014, some two months after initial contact was made with the CMA, as an interim enforcement order was made on 21 August 2014, after completion of the transaction on 17 August 2014. This would suggest a lengthy period of pre-notification discussions.

The CMA identified competition concerns in respect of the supply of a number of branded and own-label chilled savoury pastry products, including pies, sausage rolls, pasties and slices. There are a limited number of suppliers of these products to grocery retailers and convenience stores and the merged entity will the largest or second largest supplier of some of these products, with only one or two other competitors. Pork Farms did not offer any remedies.

Motor Fuel/Murco**: divestment remedy under consideration after competition concerns raised in one local market for motor fuel retailing**

On 30 September 2014, Motor Fuel Group ("**MFG**") acquired 228 petrol stations operated under the Murco brand and contracts to supply fuel to a further 226 independently operated stations. Although the transaction was completed, the parties nevertheless notified it to the CMA.

The CMA identified competition concerns in only one local market in the town of Hythe, in Kent, where both parties had petrol stations. Using isochrones analysis, the CMA found that MFG's station faced competition from only a Murco station (which was its closest station) and one other station, such that a post-merger price rise could not be ruled out. By contrast, Murco's station faced competition from several other stations, as well as MFG's, so demonstrating the asymmetric nature of competition between the parties' stations.

The CMA did not identify horizontal concerns in any other areas, despite there being 57 local areas (defined by 10 minute drive isochrones) in which the parties overlapped and six in which a detailed assessment was required. In these areas, the CMA generally identified sufficient alternative competitors; in one, where the merger reduced the number of independently competing brands from 3 to 2, the CMA found that the parties' stations were in fact in different towns, were not particularly close competitors and did not monitor each other's prices. The CMA also dismissed any risk of vertical effects arising from MFG being active at both the wholesale and retail levels: the parties' shares of supply were low and independent operators had sufficient choice of alternative wholesale suppliers from whom they could purchase fuel.

MFG has offered to divest its station in Hythe. The CMA has indicated that it considers that this remedy will resolve its competition concerns in this local market. It is presently consulting on whether to accept the remedy. As the station is a standalone business, the CMA is not requiring an upfront buyer.

***Immediate Media/Future Publishing*: divestment to up-front-buyer accepted by CMA**

On 6 January 2015, the CMA accepted a divestment remedy to resolve competition concerns identified in respect of magazines aimed at two specialist consumer segments, needlecraft (in which the merger created a near-monopoly) and genealogy (in which the parties' published two of the three leading titles). Immediate Media will divest three titles (in both print and digital format) to another publisher, Dennis.

In assessing the effectiveness of this remedy, the CMA considered whether Dennis would be a suitable purchaser and was satisfied that it would operate the divested titles in competition with Immediate Media. The divestment included all assets, licences and employees (including the titles' editorial teams) required to successfully publish the divested titles. In this case, the CMA had required an upfront buyer, as the titles did not constitute standalone businesses.

Analysis

It is clear that, after a slow start, the CMA has recently engaged in a high level of Phase I merger enforcement. This rush of activity probably reflects the random nature of which mergers do and do not raise competition concerns, but does confirm the CMA's strategic focus of restraining anti-competitive mergers.

It is notable that five of the six cases concerned completed mergers, at least two of which (*Xchanging/Agencyport* and *Sonoco/Weidenhammer*) were not notified to the CMA and were investigated by it on an 'own initiative' basis, exemplifying its intention of using its merger intelligence function in a targeted way to identify and investigate potentially problematic non-notified mergers. Additionally, *Sonoco/Weidenhammer* was a 'foreign to foreign' merger between foreign entities, albeit with UK activities; this is a warning to foreign companies that the CMA will likely identify – either directly or following complaints by customers or competitors – their mergers should they not be notified but fall within the UK's jurisdictional rules and potentially give rise to competition concerns.

In each case, the CMA has relied upon horizontal unilateral effects concerns to identify competition concerns that are sufficient for it to open a Phase II investigation, although in its Issues Statement in Xchanging/Agencyport, the CMA indicates that it is also considering possible conglomerate effects issues. The CMA has investigated mergers in both local markets (*Motor Fuel/Murco*) and small markets (*Reckitt Benckiser/K-Y Brand*). This has included a number of '4 to 3' mergers, including *XChanging/Agencyport* and *Pork Farms/Kerry Foods*. '4 to 3' (and even '3 to 2' mergers) are often are found not to give rise to substantive competition concerns following a full Phase II investigation, which allows for an in-depth assessment of the competitive constraint that the parties impose on each other, the constraints that others impose upon them and the likelihood and magnitude of any post-merger price increase. (In its last year, the Competition Commission approved unconditionally a number of such mergers, including *Barr/Britvic*, *Tradebe/Sita* and *AEG/Wembley*: see here for analysis.) This may explain why no remedies were offered in *Xchanging/Agencyport* or *Pork Farms/Kerry Foods*.

The CMA will examine carefully remedies offered in Phase I. To be accepted, these must, in accordance with the CMA's guidance, resolve in a clear-cut manner, the competition concerns identified by the CMA without the need for further investigation and be effective and capable of ready implementation. The CMA was therefore able to accept divestment remedies in both *Motor Fuel/Murco* and *Immediate Media/Future Publishing*, where viable businesses could be divested, even if, in the latter case, the divestment business was not a standalone business, thus necessitating the use of an up-front buyer.

The reasons why the CMA rejected remedies offered in both *Reckitt Benckiser/K-Y Brand* and *Sonoco/Weidenhammer* are unclear: it is possible that these were behavioural in nature, which will almost certainly not satisfy the 'clear cut' criterion. In its *Reckitt Benckiser/K-Y Brand* decision (which has been published) , when considering whether to exercise its *de minimis* discretion, the CMA did indicate that divesting the K-Y brand in the UK by way of licensing to a third party would not have been a clear-cut solution in Phase I.

Conclusions

The CMA clearly remains very active in its merger enforcement functions. This includes identifying and investigating mergers that are not notified to it voluntarily, including foreign-to-foreign transactions and transactions in small markets.

Whilst most mergers are cleared unconditionally in Phase I (49 out of 60 between 1 April and 31 December 2014, with another eight found not to qualify for investigation: see here), the CMA will review mergers robustly. Where concerns are identified, the CMA will accept Phase I remedies only where it is satisfied that these will resolve the CMA's competition concerns in a clear-cut manner.

Merging parties must therefore expect their transactions to be investigated (if not notified and within the CMA's jurisdiction) and, if competition concerns are identified, to need to either offer acceptable Phase I remedies or face an in-depth, lengthy Phase II investigation. If they have completed their merger, they should also expect the CMA to make an interim enforcement order, requiring the businesses concerned to be held separate, which will severely limit or even impede completely any merger integration plans, in some cases under the supervision of a monitoring trustee. This should be taken into account when planning transactions that may be subject to merger review by the CMA.

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