Access to file is overdue in CMA phase 2 mergers

Is it not about time the CMA gave merging parties proper access to the case file in phase 2 mergers? Guiding a client through a recent CMA phase 2 reminded me of the contrast with the European Commission process, where access to third party submissions is a routine step in the phase 2 proceedings. And yet, in its phase 2 merger consultation, launched on 20 November, the CMA has batted away calls for the introduction of access to file in the UK. My colleague, Natalie Greenwood, has commented more widely on the CMA's consultation. This piece focuses on the question of access to file.

Access to file enables parties to address this body of third party evidence head-on – evidence on which the merger authorities place considerable weight and, importantly, the potentially exculpatory evidence on which the authorities have placed insufficient weight. In the UK, the parties and their advisors have to rely on anonymised, aggregated summaries mediated via the CMA. There follows plenty of reading between the lines just to discern the outlines of what needs to be rebutted.

The European Commission is by no means an outlier when it comes to access to file. Other major European jurisdictions, such as France, Germany, Italy and Spain, provide for a similar right of access in phase 2.[1] While underlying third party information is not provided in the US to the merging parties following the issue of a "Second Request", the US agencies – unlike the CMA – have to go to court if they want to prevent the merger going ahead. In the small number of cases which are litigated in the US courts, defendants have broad discovery rights to such documents.[2]

Access to file could make a bigger difference in some cases as compared to others. In our recent CMA phase 2, third party customer evidence was ultimately critical to the

[1] The author is grateful to Anthony Bourgery (Loi & Stratégies) on France, Dr Till Steinvorth (Noerr) on Germany, Andrea Zulli (Euclid Law) on Italy and Pablo González de Zárate Catón (Ramón y Cajal) on Spain.

[2] The author is grateful to Francis Fryscak (SecondSight Law) on the US position.

CMA's unconditional clearance of the transaction. Disclosure of this evidence to the merging parties would have enabled them to help the CMA reach its conclusion more expeditiously. The CMA was, however, unwilling to grant access to even a small set of specified documents, which the parties proactively requested. Although the prospects of overturning a statement of objections in the EU are not high, access to file has made all the difference in a number of high-profile EU cases where the SO findings have been reversed in whole or part.[3]

The CMA has a statutory duty to consult merging parties before coming to a merger decision.[4] This includes "*so far as practicable, giv[ing] the reasons … for the proposed decision*"[5]. In practice, and according to the CMA's guidance, it is its provisional findings report which is "*the main means the CMA uses to satisfy its duty to consult*". The CMA rarely departs drastically from its provisional findings, which means it is important for parties to provide input before the CMA's thinking has crystallised. Yet, at the critical moment in the phase 2 proceedings – when the CMA is refining its concerns but has not yet come to a provisional decision – the CMA's view is that it discharges its consultation duty by providing an annotated issues statement – a short statement of concerns – together with key working papers.[6] These key working papers can vary dramatically from high-level slides to detailed decision-like reasoning. What the parties receive in a given case is therefore subject to the vagaries of the particular case team (as supervised by the independent inquiry group charged with deciding the case).

The CMA's 20 November consultation has proposed replacing the provisional findings with an earlier interim report. It has also proposed dispensing with the annotated issues statement and working papers in favour of the somewhat vague notion of "*flexibility throughout the investigation to disclose key evidence and analysis to the merger parties and their advisers*"[7]. It would certainly be welcome for the parties to receive an earlier indication of the CMA's detailed concerns in phase 2. However, improving the timing of disclosure does not solve concerns about the substance of that disclosure.

By contrast to the CMA, the European Commission is obliged to provide access to "*key documents*" after it issues a statement of objections. It takes these to be third party submissions contrary to those of the parties, especially those referred to in the decision referring the proceedings to phase 2. Moreover, third parties, which can show a particular interest in the outcome of the case, may also be granted access to file.

[3] See for instance M.9409 *Aurubis/Matallo* where the merger was ultimately unconditionally cleared.
[4] Enterprise Act, s. 104(2)
[5] *Ibid.*, s. 104(3)
[6] Mergers: Guidance on the CMA's jurisdiction and procedure (2022 - revised guidance, paragraph 12.3
[7] Changes to CMA mergers guidance (CMA2), Consultation document, 20 November 2023, paragraph 3.12

A number of advantages would flow from allowing access to file. It would better enable merging parties to exercise their rights of defence. The CMA would not need to make judgment calls about summarising the contents of third party documents. The parties' submissions would be better calibrated to the evidence before the CMA. After all, the case law indicates that "*one of the reasons why fairness may require disclosure is to enable the person affected to have a proper opportunity to respond, challenge and correct*"[8]. This in turn would better enable the CMA to come to the right decision and more swiftly. It might also reduce the need for parties to appeal merger decisions and, on appeal, minimise disputes about whether the CMA should have disclosed certain information during the administrative proceedings.

Moreover, access to file would reduce the risk of confirmation bias vis-à-vis the phase 1 decision identifying competition concerns. While the CMA has an independent inquiry group reviewing phase 2 mergers, they are heavily reliant on a case team staffed by CMA officials, particularly to filter the large volumes of documents and information which are gathered in a phase 2. A key feature of confirmation bias is attaching less weight to exculpatory evidence, which may be entirely omitted when the CMA sets out its concerns to the parties. If the merging parties, or at least their advisors, could see this evidence, then this would go some way to overcoming this risk of confirmation bias.

There are legitimate views against providing too much disclosure. The CMA rightly notes that it is under a statutory duty to balance the need to preserve confidentiality in third party submissions with the obligation to consult (and hence disclose information to) the merging parties.[9] For example, the UK's Competition Appeal Tribunal (CAT) has observed that providing all the underlying evidence to the parties could lead to third parties being less willing to co-operate and could lead to delays in making merger decisions.[10] The CMA has reiterated these concerns in its 20 November consultation.[11]

These apparent concerns can, however, be adequately addressed. Third party submissions can, where appropriate, be anonymised, redacted and/or limited to the eyes of external advisors. These redactions can, in the first instance, be outsourced to the third parties concerned in order to speed up the process. The CMA rather weakly argues in its 20 November consultation that there could be breaches of a confidentiality ring and third parties may be less willing to co-operate if there is full access to file. However, confidentiality rings operate effectively in many other UK legal processes, and third parties happily co-operate with the merger control authorities in other jurisdictions where access to file applies. While not essential, if

[8] Tobii AB (Pulb) v CMA [2020] CAT 1, paragraph 177, in turn citing Ryanair v Competition Commission [2014] CAT 3, paragraph 133

[9] Mergers: Guidance on the CMA's jurisdiction and procedure (2022 - revised guidance), paragraph 13.6

[10] See, for instance, Tobii AB (Pulb) v CMA [2020] CAT 1, paragraph 146.

[11] Changes to CMA mergers guidance (CMA2), Consultation document, 20 November 2023, *inter alia*, paragraphs 3.34-3.44

certain key third parties were also given access to file, then this could incentivise them to co-operate to an even greater extent.

Phase 2 proceedings are inherently in-depth, which means there should be sufficient time for access to file to take place. After all, the European Commission regularly manages such procedures during its phase 2 proceedings. Indeed, as an established and workable means for protecting rights of defence, access to file has also been rolled out in the EU's new regime for reviewing foreign subsidies.[12] The CMA rather weakly notes that the EU and other regimes have "stop the clock" mechanisms, which enable them to prolong their procedures. However, this argument misses the mark, because (i) "stop the clock" is not a mechanism designed to deal with access to file timelines; (ii) the CMA itself has similar "stop the clock" powers, if information notices are not answered in time; and (iii) in any case, a CMA phase 2 is, as noted, already sufficiently long to accommodate access to file without increasing its length.

The CMA's 20 November consultation states that establishing an external advisors confidentiality ring at the time of the proposed earlier interim report "*will enable the merger parties to better engage with, and respond to, third-party evidence*"[13]. However, this is again merely a welcome improvement in the timing, rather than the substance, of disclosure.

Reading a right to access the CMA's case file into the existing UK legislation would be tempting, but unlikely to succeed. General public law requires an authority to provide the "gist" of the case to an affected person. As the CAT has observed, "*'gist' is a peculiarly vague term*" and "*[c]ompetition cases are redolent with technical and complex issues, which can only be understood, and so challenged or responded to, when the detail is revealed.*"[14] However, the fact that the CMA is not obliged to provide each and every piece of information has been confirmed by the CAT in various cases, as has the principle that it is the disclosure of provisional findings, whereby the CMA discharges its duty to consult the merging parties.[15]

In its 20 November consultation, the CMA cites the CAT's judgments as proof that "*there is currently no evidence of systemic failings in the existing process*"[16], and hence as an argument against providing access to file. However, the role of the courts is simply to interpret the existing law and determine whether the CMA has complied with it. It is not the CAT's role to recommend reforms of the law which may result in an improvement of the process and thereby better decisions. Moreover, the absence of

[12] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, Article 42(4)
[13] Changes to CMA mergers guidance (CMA2), Consultation document, 20 November 2023, *inter alia*, paragraph 3.38
[14] BMI Healthcare Limited v Competition Commission [2013] CAT 24, paragraph 39(7)
[15] Tobii AB (Pulb) v CMA [2020] CAT 1, paragraph 117; Ryanair v Competition Commission [2014] CAT 3, paragraph 128; BMI Healthcare Limited v Competition Commission [2013] CAT 24, paragraph 20
[16] Changes to CMA mergers guidance (CMA2), Consultation document, 20 November 2023, *inter alia*, paragraph 3.36

"*systemic failings*" in a given process, even if true, is hardly a sound reason for failing to make reforms to that process.

Since the CMA is evidently not inclined to introduce access to file on its own initiative, any change may therefore require legislative reform. Now would be an appropriate moment to make that change, in the context of the CMA's general proposals for reforming phase 2 merger procedures.

Interestingly, roles are reversed between the European Commission and CMA, when it comes to what each discloses to the world at large compared to the merging parties. While the CMA does not give access to file to the parties, it publishes far more case information on its website than the Commission. This includes non-confidential versions of its provisional findings. By contrast, the Commission provides greater transparency to the parties to the case through access to file. However, it publishes little to the world at large. Indeed, it was considered newsworthy when the Commission recently publicised, for the very first time, the mere fact that it had issued a statement of objections in the *Broadcom/VMware* case (although, as usual, it did not publish the contents of the statement of objections). In an ideal world, each authority would borrow from the other, providing proper transparency to the merging parties and to the public in general.

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