International merger control – is there a new sheriff in town?

The UK Competition and Markets Authority flexes its muscles.

Over the past 20 years, parties planning substantial deals requiring international merger control clearance have become used to planning for the risk that the US, EU or increasingly the Chinese anti-trust authorities might put a substantial spoke in their wheels or even prohibit their proposed deals. Other national jurisdictions such as Brazil or Canada have also on occasion been troublesome but the "three majors" causing the most difficulty over the last decade have clearly been the US, the EU and China.

The regulatory news for multinationals and their advisors is that it now looks like there is a "new sheriff in town". The UK Competition and Markets Authority has been gearing up for a life after Brexit with a clear vision of its role at the top table of merger control enforcers. In the last 18 months, its investigations have led to the blocking or contributed to the collapse of a significant number of international deals where the UK activities of the parties were minor. These included 3 essentially US to US deals, ThermoFisher's attempt to acquire Gatan's electron microscope business, Sabre's proposal to buy Farelogix's travel technology management business and the Cengage/ McGraw Hill education publishing merger. Its investigations have also "pressed the pause button" on deals with a UK or European focus. Its late intervention in Dutch Takeaway's acquisition of UK's Just Eat a few days before the closing of the public deal, gave rise to unexpected hold separate arrangements and was a major shock to the investor market, which was strongly critical. In the end, that deal was cleared after a detailed investigation. Similarly, the markets were surprised by the CMA's intervention and in-depth enquiry into Amazon's acquisition of a minority stake in Deliveroo (the outcome of which is pending). Parties have also found themselves faced with painful and expensive orders to unwind previously completed deals during investigation, this has happened twice in the last year, including in Bottomline/ Experian, a merger of software payments suppliers

To many observers, this represents a major spike in the CMA's willingness to investigate and take enforcement action against mergers, including multi-jurisdictional ones, in the run-up to the end of the Brexit transition period, currently expected by the end of 2020. From the end of the transition, many multijurisdictional deals which have a significant European element will likely face enquiries both in London for the UK market as well as in Brussels for the EU 27 (and EEA states). In this way, the CMA will often have a key role to play in those investigations, in any remedy negotiations and in possible probation or withdrawal of the deals. The recent spike in enforcement activity in the transition period strongly suggests that attention will need to be paid to the CMA alongside the European Commission, the US FTC /DOJ and China's SAMR. Major deals which would have faced this in the past had the UK not been a member of the EU would have included AB InBev/SAB Miller, Holcim/Lafarge and Bayer /Monsanto.

What are the key takeaways from this recent spike in activity?

- First, that the CMA is prepared to test the limits of its jurisdiction by intervening in cases where it is clearly questionable. This trend can be seen clearly in Roche's acquisition of Spark Therapeutics gene therapy business where the CMA established its jurisdiction without any UK turnover being involved and based only on the parties research presence in the UK. In Thermo Fisher and Sabre where the UK activities of the target were also minimal, the parties objected strongly against the CMA's rights to intervene on jurisdictional grounds. In Sabre, even though the deal is not proceeding, Sabre has announced that it will appeal.

- Second, the CMA is not afraid to threaten to block deals between US headquartered parties even though they have been cleared to proceed in the US (in the case of Sabre by the federal

court on appeal from the DOJ decision) on the basis that they are protecting the UK consumer. In the past, most observers would have been surprised by the CMA being prepared to go this far.

- Thirdly, the CMA is keen to emphasise that it is already a major player alongside other international agencies. In Cengage McGraw-Hill, the CMA trumpeted in its final press release that it had "worked closely" with the US DOJ and other agencies.

- Fourthly, despite the UK being what is known as a "voluntary jurisdiction", meaning that making a filing for merger clearance is not mandatory, parties can run a considerable risk of being "called in" and investigated thoroughly at a late stage if they do not file, even for those deals which filing would have probably historically not been considered necessary. The late intervention in Takeaway/Just Eat is a case in point.

- Finally, it is now harder than ever for advisors to predict accurately the likely level of CMA interest and concern in the transaction, the time it may take to complete an investigation and the ultimate outcome.

One of the consequences of the CMA' s newly expansive interpretation of its jurisdiction and enforcement activity is heightened media coverage, often critical, of the CMA. The CMA doesn't much like this attention but it was a surely inevitable consequence. Parties are now prepared to be more outspoken about their concerns about CMA actions both on process and substance. Similarly, the broader "political" dimensions of cases including potentially positive (and negative) public interest considerations, such as on employment, are being considered and communicated to relevant stakeholders more than before - and this effect will be exacerbated by the Covid -19 crisis.

The current senior leadership of the CMA under Chairman Lord Andrew Tyrie and CEO Andrea Coscelli have made their enforcement ambitions for the authority clear. A key part of their ambition is to obtain new broader and tougher powers for the CMA and they have made the case forcefully to the UK Government claiming that the new powers and tools are needed to avoid the CMA "falling short of the duties and responsibilities placed on it" by Parliament and the public. In the meantime, whilst those powers are awaiting new legislation (and are likely delayed by the COVID-19 crisis) the CMA has clearly set out its stall for greater intervention under its current powers by its recent case work (and not only in the merger control arena but also investigations into the commercial behaviour of companies, particularly in digital markets). Some of its activity is likely to be tested by appeals to the Competition Appeal Tribunal but in practice not many deals can be saved by this route in a timely manner. For now, it is important for parties and their advisors to know that the UK sheriff in town doesn't seem to be very concerned about the risks of being over ruled by a higher authority.