fingleton

Fingleton Insights

CMA Remedies Wrapped - Part Three

How to face the music in 2023

Joel Bamford // Carlo Sushant Chari

March 2023

2022 was a big year for interesting merger remedy decisions. We have taken the 'Spotify Wrapped' idea and produced 'CMA Remedies Wrapped', a mini-series in which we cover four main themes linked to merger remedy decisions. Each theme is paired with an emblematic tune, not necessarily representative of Fingleton's tastes.

The themes (and practical takeaways) are most likely to interest fellow advisors close to UK merger policy and businesses planning transformative mergers.

This article - Theme #3 in the series - looks at when it's a good idea for merging parties to 'drop the bombshell' and concede a substantial lessening of competition during a Phase 2 investigation (you can also revisit Theme #1 and Theme #2 in this series).

Theme #3: Drop the bombshell - revolution in Phase 2 procedure

Among the procedural innovations in the 2021 update to the CMA's guidance on jurisdiction and procedure was the idea of allowing the parties to "*concede a substantial lessening of competition*" during a Phase 2 investigation.[1]

Merging parties can now formally concede that the CMA has evidence that establishes a harm to competition to the required standard for the CMA to block the merger or require remedies. This mechanism was untested until 2022 when the parties conceded SLCs in two mergers (one

1 This was in addition to another commonly used procedural mechanism available to merging parties: the Phase 1 fast-track to undertakings in lieu of reference to Phase 2 (UILs). That mechanism allows the parties to proceed more quickly to offering UILs, with the objective of reaching a Phase 1 clearance with remedies. If successful, it can remove the need for a Phase 2; however, the test for accepting UILs at Phase 1 is stricter than for accepting remedies at Phase 2 so the fast-track procedure comes with pros and cons.

of which we advised on). The strategy led to quick and efficient remedy outcomes for the merging parties in both cases.

Time savings were substantial. On average a Phase 2 investigation in 2021 / 22 took about seven months from the start of Phase 2 to the Final Report. The concession cases each took about four months.

But what else do these CMA decisions imply for advisors and businesses considering whether to 'drop the bombshell' (a la Powerman 5000)? And when might an SLC concession be a bad idea?

To concede or not to concede?

The CMA is not obliged to accept an SLC concession request so it is not a decision parties can take lightly. If it backfires, the parties will effectively forgo the opportunity to credibly argue against the findings of harm, having already attempted to concede it. Parties need to ask themselves whether a concession request is likely to be granted on the facts of their merger.

Carpenter / Recticel and *Sika / MBCC* (the cases where the CMA accepted SLC concessions this year) provide some indications of the types of markets where an SLC concession is more likely to be accepted:

- Consolidation in a relatively easily defined market with already high market shares and a clear horizontal unilateral effects theory of harm.
- Relatively mature and easily understood markets (flexible foams in *Carpenter / Recticel* and chemical additives into concrete/cement mix chemicals in *Sika / MBCC*).
- No potential competition issues (while R&D was an important competitive parameter in designing the remedy in both cases, new entry / substantial potential competition did not play a major part in the Phase 1 reference decisions).

The CMA will be less likely to accept an SLC concession request if it does not have a clear understanding of the boundaries of the SLC, for example:

- if one of the merging parties is a potential entrant and the nature / scope of the potential competition the merger would destroy is not fully understood; or
- if the product markets are not easily understood such that the CMA is not able to disentangle - without further investigation - the links between competition in different markets where the parties overlap.

Why concede?

The concession strategy creates a number of levers that the parties can use to influence the CMA process (well in advance of dropping the bombshell at Phase 2).

- **Decide on an SLC concession strategy early and develop the Phase 1 narrative to focus the SLC finding:** If the parties plan ahead, they may be able to set a narrative early on in the process that helps demonstrate to the CMA the key market(s)

where SLC concessions are contemplated. Phase 1 advocacy can also help ensure that there is common ground between the CMA and the parties on principles of the remedy package (e.g. if certain intangibles are not relevant competitive parameters for remedy design, they could already be downplayed in pre-notification / Phase 1).

- **Educate the case team on the principles of the remedy package:** Time is now on your side and the CMA has just short-circuited the heavy Phase 2 SLC workload. The parties can use the early weeks of Phase 2 (post-concession) to educate the CMA on the scope of any interlinkages between the proposed divestment business and the retained business. The aim: high-level consensus on the principles of an effective remedy and how to decide what's in and what's out.

- **Limit iterations or show that changes to the package are consistent with consensus principles:** Iterations of the remedy package are sometimes unavoidable, particularly as negotiations may be underway in different jurisdictions, but there is also a risk that they damage the parties credibility. The SLC concession can help here in two ways: (i) it provides extra time to get the remedy packages across jurisdictions aligned before submitting a near-final package to the CMA; and (ii) if the parties started the engagement with the CMA in Phase 2 by getting to agreed principles, any changes to the remedy package can be shown to be consistent with those principles.

In summary, the Phase 2 SLC concession mechanism presents businesses with a unique set of risks and opportunities in CMA engagement. Now that the seal has been broken on this strategy, more businesses might consider it to be a viable course of action with the CMA.

If you'd like to explore these ideas further with us, we would be happy to continue the conversation.

Profiles

Carlo Sushant Chari
Principal
carlo@fingleton.com

Carlo helps clients understand complex competition and regulatory challenges, identifying and mitigating multi-jurisdictional risks on complex and high-value deals. He draws on his experience advising in Fingleton and legal private practive to provide thoughtful and innovative advice with a view to protecting long-term value.

Joel Bamford
Director
joel@fingleton.com

Joel specialises in strategic advice on complex transactions that touch the UK. His experience and approach help clients gain a deep understanding of the objectives and priorities of key stakeholders so that they can successfully anticipate and navigate regulatory processes. Before joining Fingleton in February 2022, Joel was Senior Director of Mergers at the UK Competition and Markets Authority.