Competition & Markets Authority

Darren Jones MP
Business and Trade Select Committee
House of Commons
London
SW1A 0AA

From: Sarah Cardell
Chief Executive Officer

Direct line: 020 3738 6286

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Dear Darren

Thank you for the opportunity to give evidence to the Committee on 16 May. During the session, I committed to follow up in writing on two points relating to the CMA's international engagement. The Committee has since asked for further information on a third point, which this letter also seeks to address.

Contact with the FTC in relation to Microsoft's planned acquisition of Activision[1]

Across much of its work, including merger control, the CMA works closely with other competition authorities around the world, including the Federal Trade Commission (FTC) and the Department of Justice in the US, and the European Commission. Such engagement enables us to identify common policy issues, shared goals and challenges, best practice, and to learn from each other, ultimately benefitting people, businesses and the wider economy.

Engagement in relation to individual cases can also bring substantial benefits. In particular, it can enable authorities to identify commonalities and differences in their analytical approach and assessment, and better understand each other's processes. In relation to merger reviews, such engagement can also help to reduce burdens on merger parties, as this exchange of information can serve to reduce the volume of questions sent by each individual authority.

In any individual merger case, engagement will typically occur at a working level, and will often be fairly frequent. The content and detail of such engagement will depend on whether the authorities in question have received a waiver from one or more parties that consents for the authorities to share between them confidential information relating to each party. In most inquiries where there is engagement between

[1] QQ 13-14

authorities, merging parties provide such a waiver to help facilitate inter-authority engagement.

As part of the CMA's investigation of Microsoft's anticipated acquisition of Activision, there was engagement with numerous overseas competition authorities. The CMA had waivers in place from the merging parties, as well as some third parties, in relation to several overseas authorities, including the FTC and the European Commission. This enabled the CMA to share certain information with those authorities more freely. One difficulty which the CMA can face in cases such as this, and indeed did face in this case in relation to the FTC in the latter stages of the investigation, is that these waivers can be withdrawn, which – while not preventing engagement with counterparts – can limit the extent to which the CMA can exchange certain information, unless other gateways for information exchange are available.

I committed to follow up with the Committee in particular on a question raised about the number of "oral and written" contacts between the FTC and the CMA in relation to this case. Between the start of the CMA's Phase 2 inquiry on 15 September 2022, and the publication of its final report on 26 April 2023, the CMA had approximately 26 meetings (including calls and virtual meetings) and exchanged (i.e. sent and received) approximately 74 emails with the FTC (including administrative emails to arrange the calls) in relation to this case.[2] Searches are still being conducted, and we will update the Committee as soon as this process is complete; but we do not expect the final numbers to differ materially from those presented here.

Co-operation with the European Commission[3]

Effective international cooperation is particularly important for the CMA now that the UK has left the European Union.

Post-Brexit, the CMA can no longer participate in the European Competition Network (ECN), which is a formal forum facilitating cooperation and extensive mutual assistance between the national competition authorities of Member States and the European Commission. Within the ECN, the EU enforcers are able to exchange, and use in evidence, confidential information about all aspects of investigations and potential infringements, as well as to share experience and best-practice.

As set out above, there are significant advantages brought by close cooperation with overseas competition authorities; and that is why we think it is so important to establish an agreement with the EU that allows the greatest scope for CMA engagement with the European Commission and Member State competition authorities.

The UK-EU Trade and Cooperation Agreement (TCA) makes provision for a competition cooperation agreement between EU enforcers and the CMA. The CMA stands ready to work with other parts of the UK Government and EU counterparts to progress such an agreement as soon as it is possible to do so. We are hopeful that

[2] This figure includes emails exchanged to schedule the calls and meetings that took place between the FTC and the CMA.
[3] Q34

recent developments, such as the Windsor Framework, will open up the opportunity to begin negotiations on cooperation in the coming months.

We also welcome the reforms proposed by the Government in the Digital Markets, Competition and Consumers Bill, which will assist us in deepening cooperation: for example, provisions on information sharing with overseas partners, subject to strict safeguards, would allow for mutual investigative assistance.

Should it be helpful, we would be happy to provide input into any review of the TCA arrangements being carried out by the Committee.

Communication with Microsoft in advance of the CMA's decision in relation to its anticipated acquisition of Activision

Following the evidence session on 16 May, the Committee asked for further information relating to the Microsoft/Activision case. In particular, the CMA was asked if it could "say something about the CMA's strategy for communication with Microsoft about its stance in advance of the decision, and whether there was any departure from the CMA's usual practice".

The CMA's process provides for extensive engagement with merger parties in advance of any decision, and that process was followed in the CMA's investigation in the Microsoft/Activision case.

In the early stages of any Phase 2 investigation, we set out the theories of harm which will form the framework of the CMA's assessment through a published issues statement and invite written submissions on these concerns from the merger parties and other interested parties. We then often hold a site visit to gain a greater understanding of the parties' businesses and to engage with key commercial and operational staff. Our more developed thinking is then shared with the merging parties through an annotated issues statement, and key working papers may also be shared, once again inviting comments from the merging parties. Following that, we hold a hearing with each of the merging parties to test certain evidence and explore key issues in our investigation. After considering the merging parties' responses to our working papers and comments at the oral hearings, we publish our provisional findings and, if relevant, remedies notice for public consultation.

All of these steps were followed in the Microsoft/Activision merger investigation, in addition to our broader evidence gathering such as more generally requesting information and documents from the merging parties and third parties. The merging parties made use of the range of opportunities they were given to engage with the CMA on the issues under focus in the investigation.

Our provisional findings are not final. They are an opportunity for merger parties, and other interested parties, to respond to, challenge, and correct our thinking. The parties have opportunities after this point to engage with us on both the substance of our concerns and on potential remedies. Indeed, in this case, we received submissions and evidence in response to our provisional findings report, including from Microsoft, which led the independent group to change its provisional decision on one of the

theories of harm originally set out, such that it was no longer considered to be a concern.

Before reaching a final decision, we consider the merging parties' written responses to our provisional findings and any remedies notice, as well as those received from other interested parties. We hold a response hearing with each of the merging parties, where we discuss their views on our provisional findings and any remedies proposals. If we still have concerns, we share a working paper with the parties containing a detailed assessment of the different remedies options and setting out a provisional decision on remedies. We invite comments from the merging parties on this working paper and consider their written submissions. Again, all these steps were followed in the Microsoft/Activision merger investigation, and the merging parties engaged with these.

In some cases, such as this one, we hold additional calls or meetings with the merging parties to discuss different aspects or possible modifications to their remedy offer. It is only after this extensive engagement on the substance of our decision and potential remedies, and shortly before our statutory deadline for publishing our Final Report, that we finalise our engagement with the parties and proceed to a decision.

Overall, our process provides for close and continuous engagement with merger parties throughout the investigation. There was no departure from our usual practice in this case, and the parties benefited from the full scope of engagement and legal protections provided for in our merger investigation process.

I hope that you and your Committee find this response helpful. Please do not hesitate to contact me if you have further questions.

Yours sincerely,

Sarah Cardell
Chief Executive
sarah.cardell@cma.gov.uk