Speaking Notes

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MERGER REVIEW QUESTIONS AND ANSWERS

1. "What are the most common theories of harm your agency considers in merger review — unilateral effects, coordinated effects, foreclosure, loss of potential competition, innovation harm, or others? How early in the investigation should the agency settle on a theory of harm?"

   The most common theory of harm the FairTrading Commission ("FTC") considers in merger investigations is Unilateral Effects i.e. the ability of the merged firm to exercise market power (raise prices profitably (lower quality and innovation)). We consider whether the merger would result in the merged firm acquiring market power that it never had before, maintaining market power it would have lost had it not been for the merger or extending its market power.

   A theory of harm should be developed/ devised at the outset, however, as information is gathered and the investigation progresses/evolves it may be revised or changed.

2. "How do economists and lawyers work together during merger review? At what stage should economic analysis begin?"

   In Jamaica there are no express merger review or merger notification provisions in our legislation the Fair Competition Act ("FCA"). However, the FTC reviews mergers under s.

17 of the FCA which makes provisions is agreements void if they have the purpose, effect or likely effect of substantially lessening competition in a market.

Lawyers and Economists work together from the beginning of a merger review to determine the competitive effects of the merger & develop the theory of harm, and each has different functions and roles. Lawyers concentrate on examining the purpose of the agreement, while the Economists examine and analyze the effect or likely effect of the agreement. The Lawyer will examine the agreement within the context of section 17 of the FCA. This entails examining the purpose of the agreement to determine if same has the object of substantially lessening competition. The Attorneys also examine any restraint of trade clauses to determine if they are reasonable and necessary to protect the legitimate interests of the party seeking the enforcement of the said clause, usually the vendor in the case of a merger. The economic analysis begins at the outset. The Economist will do the overlapping product report in order to assist in defining the relevant market, they will also calculate the market share to determine if the merger results in a highly concentrated market and will do an analysis of the effect of the merger to see if it results or is likely to result in a substantial lessening of competition.

Lawyers and economists work together throughout the merger investigation and will meet to compile the report and devise an appropriate remedy where one is necessary.

3. "In smaller economies, where markets are concentrated and data may be limited, how do you distinguish a transaction that merely looks concerning from one that is likely to harm competition?"

   In situations where we do not have quantitative data we rely on qualitative data. The FTC in these instances will seek data from stakeholders- competitors/ rivals, suppliers, customers and regulators and get their opinions on the transaction and how it may affect them. We also obtain information from newspapers and other media sources. We use this information to assist us in analyzing the transaction and whether it is likely to harm competition substantially in the relevant market.

   Some years ago the FTC conducted a merger investigation in the insurance brokerage sector. We did not have sufficient data to calculate market share and so we asked competitors to rank the companies in the industry and we used that information to guide our analysis.

4. “When should an agency reject remedies and instead seek to block or oppose a merger?”

> If the remedies proposed by the merging parties do not address the harm caused by the merger. i.e. does not restore the competition lost or that would be lost as a result of the merger. Or
> If the proposed remedy is too costly to monitor.

5. “What is one lesson your agency has learned about improving merger review in practice?”

Start thinking about remedies early on (towards the end of Phase I) and the consequences for breach(es).

> For example in recent investigation in relation to the acquisition of Massy Distribution Retail Ltd. by Caribbean Distribution Partners Limited now Acado it was determined that the acquisition would result in Acado acquiring control of the leading brands of insulin distributed in the market in Jamaica thereby creating a monopoly in the insulin market in Jamaica. In this case remedies were devised from the early stages of this investigation.

6. “If you were advising a newer competition authority building its merger review system, what would be your top practical recommendation?”

> Formal Mandatory merger notification & Merger review thresholds for parties to notify the FTC should be enshrined in legislation.
> It would also help to draft merger guidelines that are tailored to the particular country.
> Plan to include a review of all mergers 2-3 years post-consummation which should be built into the merger review process.

7. “What is one common mistake agencies should avoid when relying on market shares or concentration measures?”

> Market shares/ market concentration does not always equal market power so just because a firm/ company has a large market share does not mean it has market power which is the ability to raise prices above the competitive level, restrict output or act independently of rivals and consumers for a sustained period of time / the ability to operate without effective constraint from competitors and potential competitors. In assessing a merger it is important to determine whether the merger results in the merged entity acquiring market power. Things such as barriers to entry and expansion and availability of substitutes are important considerations in this determination.
> 8. “How much weight should be given to complaints from competitors, compared with evidence from customers or suppliers?”

The general rule is that information from independent sources are normally preferred and given greater weight than information from an interested party such as a rival. However, all information is subject to verification and scrutiny. So, if for example information was received from a party to a complaint whether the informant and respondent and an independent 3rd party, the information from the third party would be given greater weight.