Clifford Chance LLP has very kindly hosted a very interesting discussion on the interplay between merger control and Article 102. This is a high level summary of the discussion.

**Alastair Mordaunt**

The discussion was opened by Alastair Mordaunt, partner at Clifford Chance LLP and previously Director of Mergers and Director of a dedicated competition enforcement team at the Office of Fair Trading. Alastair set the ground for the discussion giving a very useful summary of the key differences in the assessment of mergers and of abuses of dominance, such as the purpose of the regime, the statutory test, the extent to which efficiencies are taken into account, and other practical issues such as the time for review, the standard of proof, incentives to cooperate and likelihood of succeeding on appeal.

Alastair raised a number of interesting comments:

* Market definition tends to be downplayed in Merger control decisions, whereas it is typically a critical part of the assessment in Article 102 – even despite the fact that Article 102 has moved towards a more effects-based assessment
* Assessment of dominance is not required in merger control although it is sometimes included in the assessment.  Although it is a required part of Article 102, dominance is often assessed using form-based criteria (for instance in the OFT's recent vet diagnostics decision)
* Efficiencies can play a role in merger control although they are not often accepted. In Article 102, efficiencies can be a key part of the objective justification assessment

 Alastair produced a table summarizing the distinctions available via the ‘past events’ section of the CLA website.

**Dr Cristina Caffarra**

Dr Cristina Caffarra is Vice President at Charles River Associates and head of CRA’s European Competition practice.

Dr Caffarra focused her talk on recent case law. Issues are more acute with vertical/conglomerate mergers, where theory of harm resolves around foreclosure / hold up arising from tying/bundling or refusal to supply.

High technology markets are particularly prone to this type of theory of harm. Key features of high technology markets (for instance the reliance on multiple components/systems/complementarities, high barriers to entry, high sunk costs, potential for tipping, potential to entrench dominance and IP rights) make foreclosure a particularly acute concern in this sector. Anti-competitive tactics can have large effects quite fast. This makes the high tech sector a good candidate for early intervention.

Dr Caffarra reviewed three recent mergers in the high tech sector:

* Intel/McAfee – cleared in Phase I with a behavioural interoperability remedy (similar to remedies adopted in Article 102 cases)
* Microsoft/Skype – cleared in Phase I with no remedy
* Google/Motorola – cleared in phase I with no remedy but Art 102 investigation opened back to back

In Intel/McAfee, the stated motivation of the merger was to improve security of Intel chips by integrating security software of McAfee in Intel’s chips. Symantec expressed concerns that post merger, Intel might downgrade interoperability with their products in order to favour its new subsidiary McAfee. A wide-ranging behavioural commitment was offered by Intel according to which McAfee competitors would have access to all necessary information to use functionalities of Intel's chipsets in the same way as those functionalities used by McAfee.

Intel/McAfee is a particularly good example where ex ante intervention appeared to make sense as the merger would have created a technical tie (as opposed to a contractual tie as for instance in GE/Honeywell), which would have been very difficult to unscramble. However Dr Caffarra made a few points:

* The interoperability commitment offered by Intel goes beyond the commitment offered by Microsoft in the server case, by covering merger-specific innovations developed by the merged entity
* Efficiencies in the merger are very ‘merger specific’ as such efficiencies could not be induced through arms-length contracts (prior to the merger, Intel tried to achieve a similar outcome through reaching contractual arrangements, but failed) – query whether synergies were appropriately taken into account in the assessment and whether the remedy to a large extent undermined the value of the merger
* Free access to joint innovations with Intel might discourage innovation

Microsoft/Skype is a mirror case to the Microsoft Media Player case. The merger was cleared with no remedy (appeal by Cisco) on the basis that:

* Horizontal overlap for consumer video calls on PCs (share 80%) but low entry barriers and price sensitive consumers
* Two sided market. Theory of harm less straight forward as monopoly on the free product, but monopoly rent

Google/Motorola

There were a range of complaints. Some were on a conventional foreclosure basis (access to Android platform) but the main focus moved towards the significance of the IP portfolio (competition in the market). Motorola was litigating prior the merger, and there was no obvious reason to believe that Google would necessarily be more aggressive. The merger was cleared – but Article 102 investigation opened.

Following the review of the case, Dr Caffarra has come up with a few ‘tentative’ themes.

* There has been a convergence of merger control and Article 102 analysis, as set out in the Commission’s Guidelines on the assessment of non-horizontal mergers and its Article 102 Guidance
* In today’s world, a theory of harm is unlikely to be built on an ex ante basis around a contractual tying
* A technical tie is an issue which must be tackled ex-ante (McAfee) – less significant issues in 2 sided platform in which the authorities can ‘wait and see’ before intervening
* The enforcer’s dilemma for ex-ante intervention is not trivial. Too early intervention dampens incentive to innovate.

Cristina produced slides available via the ‘past events’ section of the CLA website.

**Miguel de la Mano**

Miguel is Deputy Chief Economist at the European Commission. Recently he has been on secondment as Acting Chief Economist at the UK Competition Commission.

Miguel gave a lively account of the enforcer’s dilemma – when is the right time for intervention. He focused on the need to reduce Type 1 errors under merger control and Type 2 errors under Article 102.

Ex ante intervention is justified if:

* The conduct is difficult to reverse
* There is immediate harm to consumers
* Anti-competitive harm can be predicted with reasonable accuracy

Miguel discussed efficiencies and the risk in merger control of intervening where a merger will create efficiencies – efficiencies are key to a merger control assessment. Where efficiencies generate sufficient benefits, the authorities are more likely to consider behavioural remedies or to defer intervention. Miguel pointed out that the review of efficiencies is not a ‘black and white’ exercise, but should be considered on a balance of probabilities, as any other competitive assessment – is the merger likely to result in efficiencies?

Merger control differs to Article 102 in several aspects:

* Merger control prevents market power – it is presumed that a company acquiring market power will have the incentive to enter into exploitative abuse (even absence dominance). For instance EDF/GDF
* Unlike merger control, Article 102 requires the dominance to be proved. On the other hand, dominance is not prohibited per se.

There is a significant dilemma for the authorities between a risk of hawkish intervention (shoot good mergers) and dovish enforcement. Dovish enforcement might be a temptation given that competition concerns could be fixed under Article 102; however this is not a solution because Article 102 would be applicable only if there is dominance and harm might already have been produced by the time of enforcement action.

Miguel noted that in article 102 cases, dominance acts as a screen but an imperfect screen: some large players are not necessarily dominant ‘as yet’ but their practice might be harmful. For example the following practices might be harmful even if they do not arise from a dominant player:

* In the Pharma sector, entry deterrence might protect significant rents
* Patent holds-up
* Predation by a new entrant

In Rambus, the way around the fact that Rambus was not dominant at the time of the practice (patents’ ambush) was to state that Rambus acquired a dominant position through deceptive conduct and then exploited it when it was considered dominant.

There is an impossible theorem in relation to Article 102: - not all these statements can be valid at the same time:

* Dominance is not abusive per se
* A dominant player is one with market power
* Market power is the ability to raise prices above competitive levels
* Excessive prices are prices above the competitive levels
* Excessive prices are an abuse of dominance

**Questions from the floor**

* It was pointed out that it was difficult to obtain behavioural remedies in merger cases. Miguel responded that the prospect of efficiencies should raise the appetite for behavioural remedies. In vertical or conglomerate mergers, efficiencies are more likely than in horizontal mergers, and therefore better candidates for behavioural remedies. However behavioural remedies are not always practical in Phase 1 because of timing.
* A question was raised on the chances of success of appeal in Article 102 cases – it seems very difficult to overturn Article 102 cases. Alastair pointed out that the notification process for mergers mean that many mergers are reviewed. Fewer Article 102 cases see the day (by virtue of the prioritisation principles) and as result only strong cases are taken by the authorities. Also Article 102 are based on past practices; whereas merger control is more speculative and therefore there is a need for greater caution.