Global merger control: Navigating stormy seas

There have been a number of developments in merger control in 2020 and Q1 2021. Some are related to the repercussions of the COVID-19 pandemic, while others are borne out of the ambitions and changes sought by individual competition authorities or unexpected jurisprudence

By Axel Schulz and Rebecca Farrington

Early on in the Coronavirus crisis, the European Commission's Directorate-General for Competition (DG Comp) sent a daunting message to businesses across the world when it recommended that the parties delay their merger notifications where possible. DG Comp warned it would likely "face difficulties in collecting information from third parties, such as customers, competitors and suppliers" and may "face limitations in terms of access to information and databases" due to remote working measures.

However, it only took a short time for the directorate-general to adapt and it soon began encouraging companies to submit merger notifications through electronic platforms such as the Merger Registry or the eTrustEx platform, and things slowly got back to a new normal.

In a September 2020 speech entitled "The future of EU merger control", the European commissioner for competition, Margrethe Vestager, said that in light of the current economic context, and the need to "stay competitive in a fast-changing world", changes to merger notifications at the EU level ought to be looked at.

The commissioner suggested a broader application of the EU Merger Regulation's simplified procedure, which would feature reduced information requirements for the parties, and a speedier review process. In particular, Vestager said pre-notification discussions in cases that are "so straightforward that there's really nothing to discuss before the merger is filed" could be cut back.

On 26 March 2021, the European Commission launched an impact assessment on policy options for further targeting and simplification of merger procedures, inviting stakeholders to submit their views by 18 June 2021. This was accompanied by the publication on the same day of a Staff Working Paper (SWP). This Paper summarises the European Commission's findings of its evaluation (launched back in August 2016) of procedural and jurisdictional aspects of EU merger control. With respect to simplification, the paper notes the potential room for the additional expansion of the simplified procedure, and identifies scope for reductions in the information requirements for simplified procedure reviews.

Business and legal advisers would welcome the further simplification of merger procedures, as it is something that many have been advocating for a long time, and especially during the COVID-19 crisis.

Another pressing issue tackled by Vestager in her speech was the review of EU notification thresholds. This has been a hot topic in competition circles, as national competition authorities have begun advocating for and adopting value based thresholds in order to trigger notifications, to supplement turnover based thresholds.

The goal of these new mechanisms is mainly to enable authorities to catch so-called "killer acquisitions" — incumbent firms acquiring innovative targets to pre-empt future competition, before the targets are big enough to reach turnover based thresholds.

Vestager suggested that value based thresholds would not be among the future measures to be adopted in order

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to catch this type of deal, but did reveal the European Commission's intention to use Article 22 of the EU Merger Regulation to address this issue. The reasoning was confirmed by the SWP which concludes that more referrals under Article 22 of transactions that do not meet EU or Member State merger control thresholds might address the perceived enforcement gap.

The change in the EC's Article 22 referral policy became effective in March 2021 when the EC published its guidance on the application of the Article 22 referral mechanism (Article 22 Guidance). The European Commission now encourages national competition authorities to use the referral mechanism even where transactions do not meet the national merger control thresholds of the referring Member States.

The Guidance details the categories of transactions which may be suitable candidates for referral. The EC's focus is predominantly on transactions in the digital and pharmaceutical sectors, but also on other sectors, for example where innovation or access to competitively valuable assets is an issue.

The Article 22 Guidance states that the European Commission will generally not consider a referral appropriate if 6 months have passed since transaction closing, or where the transaction has been notified in one or several Member States that did not request a referral to the EC. However, the European Commission considers that in exceptional circumstances a later referral may be appropriate based on, for example, the magnitude of the potential competition concerns and of the potential detrimental effect on consumers.

The guidance implements a major policy change and has important consequences for dealmakers. Any transaction that could be assessed as threatening competition within the EU may now be reviewed by the EC – no matter how small the target, and even after the deal has closed. This impacts deal risk assessment, transaction timelines, and deal documentation for certain transactions.

In her September 2020 speech,the Commissioner also announced a review of the substantive assessment to see whether the Commission "is getting things right". However, Vestager also made it clear that no decision on substantive assessment would be taken until the European General Court had considered the Commission's appeal against its judgment in the landmark Hutchison mobile case, which dealt with the burden of proof that DG Comp must meet in its merger decisions.

In particular, the court clarified that "the mere effect of reducing competitive pressure on the remaining competitors is not, in principle, sufficient in itself to demonstrate a significant impact on effective competition". It also said the commission "is required to produce sufficient evidence to demonstrate with a strong probability the existence of significant impediments following the concentration".

While at first glance this case may seem to exclusively benefit companies undergoing a merger review process, it might turn out to be a double edged sword. Indeed, while a higher burden of proof makes it harder for the European Commission to demonstrate the competition concerns raised by a proposed merger to the requisite legal standard, this could ultimately result in companies and their outside counsel having increased document production requirements.

This risk was raised in a speech by DG Comp official Guillaume Loriot in September. Loriot told a competition webinar: "I actually fear that this judgment creates, even more, a spiral of having to motivate more and therefore getting even more evidence to reach a decision, whether negative or positive. And that's not really in the interest of anyone."

The European Commission also appears to be increasingly stringent when it comes to the enforcement of procedural rules. Indeed, decisions such as Facebook/WhatsApp, Canon/Toshiba Medical Systems Corporation, GE/LM Wind and Altice/PT Portugal have been characterized by the imposition of hefty fines for procedural violations such as gun jumping or the provision of incorrect or misleading information.

Article 22

of the EU Merger Regulation stipulates that national authorities can refer transactions to the EC in specific cases that raise potential competition concerns, even if national turnover thresholds are not met

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National competition policy

At the national level, the activity of the French Competition Authority (FCA) and of the German Federal Cartel Office (FCO) provides a good example of the developments in competition policy and enforcement at the European national level.

The FCA has recently shifted the focus of its merger control activity toward digital issues, in particular to large digital platforms. One particularly innovative example is the novel approach of modernizing its market definitions to consider the development of online sales in the retail sector.

In a decision authorizing the merger between toy retailers Luderix and Jellej Jouets, the FCA determined that the relevant market included both in-store and online sales. Such a stance was further confirmed in its study on competition and e-commerce released in June 2020, in which the FCA highlighted the rapid growth of e-commerce during the COVID-19 pandemic. It said it had adapted its analytical framework by more frequently identifying relevant markets that cover both online and offline sales.

This trend has been unequivocally confirmed in the new FCA merger guidelines introduced in July 2020, which now contain a specific section dedicated to online sales, describing in detail the elements to consider when assessing the substitutability of in-store and online sales.

An evolution of particular interest when considering notifications to the German FCO concerns the timing of proceedings. Recent practice has shown a trend to extend Phase II proceedings (in some cases even more than once), leading to a significantly longer total review period than the four months German law currently stipulates.

However, planned amendments to applicable German laws aim to address these de facto prolonged review periods by extending the review deadlines. Current deadlines are automatically extended by one month in case the parties offer remedies, and the FCO can further extend them multiple times without any limitation, but only with the parties' consent. Contrary to an original proposal, there will be no limit to the sum of further extensions.

In the UK, the Competition and Markets Authority (CMA), has taken a rather interventionist approach to merger control. This seems evident from its approval of Roche's takeover of Spark, in which the CMA found that the share of supply test — one of the tests triggering notification — was met, despite the fact that Spark did not have any sales in the UK.

The CMA justified this by pointing to the existence of numerous UK-based employees, defined as "assets" by the decision. This aggressive stance was repeated in the Amazon/Deliveroo decision, in which, despite the fact that Amazon was only acquiring a minority 16 percent stake in Deliveroo, and had exited the restaurant delivery market, the CMA still asserted jurisdiction and performed an in-depth review of the transaction.

While both deals were ultimately found not to give rise to competition problems in the UK and were cleared, there are various cases from the past year in which the CMA's concerns resulted in a transaction being blocked.

In its decision over travel technology company Sabre's proposed acquisition of ticketing technology business Farelogix, for example, the CMA found that the share of supply test was satisfied on the basis of revenue in the supply of IT solutions to UK airlines, even though Farelogix had an indirect agreement with only one UK airline. The decision to block the deal came after the US District Court of Delaware had cleared it, ruling against the US Department of Justice (DOJ), which had challenged the merger.

The US focus

On the other side of the Atlantic, antitrust agencies have largely adapted to the challenges created by COVID-19.

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The US Federal Trade Commission (FTC) and DOJ have continued to be active in merger investigations and successfully introduced a Hart-Scott-Rodino (HSR) Act e-filing system.

In the first quarter of 2021, coinciding with the inauguration of the Biden Administration, senators from both the Republican and Democratic Parties have each introduced legislation aimed at altering existing antitrust laws. While these proponents come from different ends of the political spectrum, the new bills share many similarities. Most notably, both bills create rebuttable presumptions of illegality or harm based solely on the size of the acquirer and increase the focus on enforcement of vertical mergers. While it remains to be seen whether these bills will become law, there has been increased debate on Capitol Hill about the possibility of significantly changing existing antitrust laws, exacerbated by the current discourse on under-enforcement in dynamic industries like big tech and pharma.

Nevertheless, both the FTC and the DOJ began 2021 with heightened merger enforcement activity. In January, Visa and Plaid abandoned their planned merger as a result of a DOJ lawsuit alleging Visa had nefarious incentives for the acquistion, mainly to preserve its monopoly in online debit services by eliminating a nascent competitor to Visa. The new administration's first vertical merger enforcement move occurred in February when the DOJ issued Second Requests to Slack and Salesforce. In March, the FTC announced it was forming a working group alongside the UK's Competition and Markets Authority, Canada's Competition Bureau, and the European Commission, to update the FTC's approach to analysing the effects of pharmaceutical mergers, and in particular, to broaden the approach in reviewing these mergers. Just two weeks later, the FTC challenged DNA sequencing provider Illumina's proposed acquisition of Grail, maker of early cancer detection liquid biopsy tests. Illumina provides an essential input for development and commercialization of Grail's tests, making this the agency's first vertical merger challenge in decades.

18 June 2021

Submission deadline for views on policy options for the simplification of EU merger control procedures

The US agencies have also demonstrated a continued focus on transactions involving nascent competitors, as evidenced by the FTC's challenges to Edgewell Personal Care's acquisition of razor manufacturer Harry's and the life sciences merger between Illumina and Pacific Biosciences, as well as the DOJ's challenge to Sabre/Farelogix.

These cases also reflect that the agencies are still focused on killer acquisition theories, with the DOJ alleging that Sabre's acquisition of Farelogix was an attempt to neutralize or eliminate an innovative competitor. Despite the pandemic, the US agencies also released new vertical merger guidelines, which reflect the agencies' approach to investigating the competitive impact of vertical mergers.

Although COVID-19 has been at the forefront of most people's minds, the development of merger control policy and rules worldwide shows that companies looking to take advantage of the disrupted economic environment need to make sure they are abreast of the changes to navigate their way through the uncertainty that still lies ahead.