NEW TRENDS IN MERGER CONTROL: THE BABY, THE BATHWATER, UNCERTAIN OUTLOOKS AND ETERNAL RETURNS

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Over the last few years there has been wide-ranging discussion about the adequacy of the existing merger control tools in the EU, and worldwide, to capture and sufficiently assess the concentrations that could significantly impede effective competition. These discussions are starting to materialize and to reveal the well-known risk of throwing the baby out with the bathwater, as well as the return of other public policy considerations to be included in the merger control assessment.

Without prejudice of further, more in-depth developments, in subsequent articles, we will briefly address the current debate concerning killer acquisitions, common (minority) shareholdings and potentially improved merger control assessment criteria.

1. KILLER ACQUISITIONS AND JURISDICTION FOR MERGER CONTROL PURPOSES

The increasingly omnipresent concept of killer acquisitions refers to transactions which rationale is principally to shut down pioneering firms, many of which have yet to generate turnover at the time of their acquisition while acquiring its high potential emerging technology and key staff, all this while simultaneously eliminating a competitive threat.

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The emergence of the killer acquisition issue within the merger control scenario is normally accompanied by an extensive list of non-notified acquisitions especially in the digital sector, because they did not trigger the existing merger control thresholds, especially in the EU, which are mainly turnover based. In fact, since 2006, Google has acquired over 200 companies, including Waze and YouTube, Microsoft over 100 companies, Apple over 90 companies, Facebook absorbed over 80 companies, including Instagram and WhatsApp, Amazon took over 70 companies, such as WholeFoods Market and Twitch – all acquisitions that are said to have contributed to the exponential growth of these tech giants.[1]

In the Facebook/WhatsApp case[2], perceived as an eye-opener case, the acquisition of WhatsApp by Facebook was not caught by the EU Merger Regulation ("EUMR") despite the multi-billion deal value and was only assessed by the European Commission ("EC") through the referral mechanism. Similarly, the acquisition of control by Apple over Shazam was only reviewed by the EC after it was referred by several Member States under Article 22(1) EUMR.[3] Nevertheless, and noticeably, both these acquisitions were approved, without remedies/commitments.

In any case, the idea that there could be an enforcement gap in this area led to the conclusion that EU Member States and the EU, as well as non-EU jurisdictions, required additional instruments in their toolkit to capture the acquisition of promising undertakings whose turnover was insufficient to trigger the existing merger control thresholds.

The main solution that has been envisaged is to amend the existing merger control thresholds in a way said to be directly inspired by the United States of America ("US") transaction value threshold. In fact, the transaction value threshold could translate the competitive potential of the acquirer business, even though it is susceptible to criticism, including the potential for encouraging attempts to artificially reduce the value of the transaction by splitting it up into several transactions.

In fact, a transaction value test was considered by certain Member States (*e.g.* France) and already introduced by Germany and Austria, which adopted

1 Based on publicly available information, as updated, for example, the *Ex-post Assessment of Merger Control Decisions in Digital Markets*, prepared by Lear for the Competition and Markets Authority ("CMA"), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf

2 Case (CE) COMP/M.7217 – *Facebook/WhatsApp*, of 3 October 2014.

3 Case (CE) M.8788 – *Apple/Shazam*, of 6 September 2018.

a transaction value-based threshold, thus imposing the mandatory notification of transactions that exceed a certain value, without having to fulfil the classical turnover threshold.

Also to this end, the United Kingdom ("UK") is assessing the possibility to adopt new tools to catch transactions involving digital businesses that are deemed to have "strategic market status" and which may include a new size--of-transaction test.[4] For the time being, the UK already has a tool which allows it to capture transactions that escape the EC's and other NCAs jurisdiction. In fact, over the last few years several merger transactions in the digital sector, despite not being caught by the EUMR (or by NCAs' pure turnover thresholds), triggered the UK alternative share of supply test threshold and were reviewed by the Competition and Markets Authority ("CMA"). This was the case of Amazon/The Book Depository[5], Facebook/Instagram[6], Google/Waze[7] and Priceline/Kayak[8] transactions.

France also considered the possibility of introducing an *ex-post* control mechanism or a new threshold based on the value of the transaction, but ultimately these were not included in the new merger control guidelines adopted by the Autorité de la Concurrence ("FCA") in July 2020. Instead, the FCA opted to rely on a broader interpretation of Article 22 EUMR, as suggested by the EC.[9]

On 26 March 2021, the EC issued new Guidance on the application of the referral mechanism set out in Article 22 EUMR to certain categories of cases and took the opportunity to re-purpose Article 22 EUMR, without needing to change the law, while introducing more uncertainty for businesses, increased costs, potential delays to closing and increased burdens in the drafting of the transaction documents.

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4 CMA's Report, of December 2020, *A New Pro-Competition Regime for Digital Markets – Advice of the Digital Markets Taskforce*, available at https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf

5 Case (CMA) ME/5085/11 – *Amazon.com/The Book Depository International Limited*, of 26 October 2011.

6 Case (CMA) ME/5525/12 – *Facebook/Instagram*, of 14 August 2012, at which time Instagram had not generated any turnover since it was established.

7 Case (CMA) ME/6167/13 – *Motorola Mobility Holding (Google, Inc.)/Waze Mobile Limited*, of 11 November 2013.

8 Case (CMA) ME/5882-12 – *Priceline.com/Kayak Software Corporation*, of 9 May 2013.

9 2020 *Merger Control Guidelines of the Autorité de la Concurrence*, of 23 July 2020.

2. THE IMPACT OF MINORITY/COMMON SHAREHOLDINGS

Merger control regimes have mainly focused on minority shareholding acquisitions that confer control (*i.e.* give the acquirer the possibility of exercising decisive influence over an undertaking), although some jurisdictions already apply merger control rules to acquisitions of non-controlling minority shareholdings.

The possibility that non-controlling shareholding acquisitions may harm competition even when there is no change of control of the target has been identified in cases, such as the Ryanair/Aer Lingus case.[10] Even though the EC did not allow Ryanair to acquire control of Aer Lingus, it could have used its minority shareholding to access Aer Lingus' confidential strategic plans and business secrets, thus lessening Aer Lingus' capacity to compete with Ryanair and/or weakening Ryanair's incentives to compete, given its desire to maintain the value of its investment in Aer Lingus.

Another case that apparently shed some light on the harmful horizontal effects that non-controlling minority shareholding acquisitions can have on competition was the Siemens/VA Tech case.[11] In this case, the EC considered that Siemens' minority shareholding in SMS Demag, a competitor of VA Tech, might threaten competition as Siemens could access strategic information about SMS Demag's business policy and therefore lessen competition in a highly concentrated market. In this sense, the merger was only approved after Siemens' commitments to transfer its rights as a shareholder of SMS Demag to a trustee pending the divestiture.

Similar reasoning was applied in the Arena Atlântida/Pavilhão Atlântico/Atlântico case[12] in Portugal, in which the remedies included the divestment by the acquirer's group of a minority shareholding in a competitor.

The EC also took into account common shareholdings in Dow/DuPont[13] and Bayer/Monsanto[14] in 2017 and 2018, although they have not become a regular feature in EU merger analysis.

Consequently, there are two main issues posed by minority/common shareholdings: (i) the requirement that control be acquired for jurisdictional

10 Case (CE) COMP/M.4439 – *Ryanair/ Aer Lingus*, of 11 October 2007.

11 Case (CE) COMP/M.3653 – *Siemens/VA Tech*, of 13 July 2005.

12 Case (AdC) Ccent. 38/2012 – *Arena Atlântida/Pavilhão Atlântico*Atlântico*, of 21 March 2013.

13 Case (CE) M.7932 – *Dow/DuPont*, of 27 March 2017.

14 Case (CE) M.8084 – *Bayer/Monsanto*, of 21 March 2018.

purposes; and (ii) the importance of non-controlling common shareholdings in competition law assessments.

In what concerns the first issue, in the EU, as in Portugal, a change of control on a lasting basis is the fundamental criterion for the merger control rules to apply to a given transaction. As such, although minority shareholding acquisitions that confer control fall within the scope of application of the EUMR, minority shareholding acquisitions that do not confer control are not subject to those rules. That being the case, the EC does not have the power to review or take action against non-controlling minority shareholding acquisitions that could potentially harm competition.

In 2014, the EC published a white paper ("White Paper")[15] that described in detail its concerns about non-controlling minority shareholdings and their potential horizontal and vertical effects on competition, namely (i) reducing competitive pressure between competitors; (ii) substantially facilitating coordination among competitors; and (iii) allowing companies to hamper competitors' access to inputs or customers.

The White Paper also proposed extending the EUMR's scope, setting out a "targeted" transparency system in which an undertaking would be required to submit an information notice to the EC if it proposes to acquire a minority shareholding that qualifies as a "competitively significant link". For an acquisition to be considered a competitively significant link, (i) there must be a competitive relationship between the acquirer and the target, or they must be vertically related; and (ii) the acquired shareholding must be at least 20%, or between 5% and 20% but accompanied by additional factors, such as a *de facto* blocking minority, a seat on the board of directors, or access to commercially sensitive information.

Under the White Paper, the EU would follow the examples of the UK, Germany and Canada and focus on the potential interest, influence or link that the acquirer could hold over the target to empower the EC to review and take action against non-controlling minority shareholding acquisitions that are potentially harmful to competition. The proposed amendment to the EU's merger control regime was finally not adopted due to the administrative burden it would place on companies.

As regards the *ex-post* issue, a number of recent studies have considered that the potential impact of common shareholdings on competition in and

15 White Paper *Towards more effective EU merger control*, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0449&rid=2

across markets in terms of the less vigorous competition is not totally clear. The conclusion, at least in the EU and the UK (which both published reports on this issue in 2020[16,17]), is that there is currently insufficient empirical evidence to take any action and that a more detailed analysis is needed on the causal link between a common shareholding and any actual impact on competition.

Given the known harmful effects that non-controlling shareholding acquisitions may have on competition and the inability or incapacity of many jurisdictions to presently review or take action against them in an *ex-ante* scenario, it is only natural that NCAs and the EC are looking for ways to bridge the gap.

In this sense, the NCAs and the EC are expected to pay increasing attention to minority shareholdings and the harmful effects these may have on competition. However, any merger control regime that intends to include in its scope the review of non-controlling minority shareholding acquisitions should focus on only capturing potentially anti-competitive acquisitions, as there is always the risk of broadening the scope to a point where almost any acquisitions would be subject to review, causing an unnecessary and disproportionate administrative burden on companies and NCAs.

3. REVISITING THE SUBSTANTIVE CRITERIA FOR THE ASSESSMENT OF MERGERS

In what concerns the substantive assessment of mergers, the apparent inadequacy of the current criteria, or at least of the traditional way of thinking focused on price increases, has led to calls for more importance to be given to the merger's impact in terms of reducing choice and harming innovation.

Even though mergers involving Big Tech firms have generally received clearance, some required extensive remedies, many of them related to the maintenance of an adequate level of user choice. For instance, in what concerns the remedies necessary to green light the Google/Fitbit transaction[18], which in the EU sought to ensure that European Economic Area users would

16 The EU Report on *Barriers to Competition through Joint Ownership by Institutional Investors*, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652708/IPOL_STU(2020)652708_EN.pdf

17 The CMA Report on *The State of UK Competition,* available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939636/State_of_Competition_Report_Nov_2020_Final.pdf

18 Case (CE) M.9660 – *Google/Fitbit*, of 17 December 2020.

have an effective choice to grant or deny the use of health and wellness data stored in their Google Account or Fitbit Account by other Google services (such as Google Search, Google Maps, Google Assistant and YouTube).

Antitrust authorities have continued to intervene based on concerns over a loss of, or reduction in, innovation in the last year. The FTC's, CE's and CMA's concerns that, for instance, forced Illumina to walk away from its acquisition of PacBio[19], or led to remedies (in the EU, US, China and South Korea) in Danaher's acquisition of GE's biopharma businesses[20], are high profile examples of the increasing weight placed on innovation concerns. Even in Spain, the CNMC only approved Pigment's acquisition of Ferro's coating business subject to a commitment that a certain level of innovation would be maintained.[21]

Consequently, assessing the impact of a merger on innovation is now common and, in many cases, the authorities' focus on innovation has gone hand-in-hand with concerns over the removal of nascent competition. Established guidance is being revised to take account of digital transformation, as evidenced by the EC's consultation on its over 20-year-old market definition notice (which was open from 26 June 2020 to 9 October 2020 and which results are expected in 2021).

Furthermore, we are once again seeing the eternal return of European competition law's eternal battle to rid itself of economic consumer welfare driven considerations, only to see the resurgence of these concerns in albeit different, and sometimes more "glamorous", forms.

After national champions protectionism seemed to have made a comeback in the reaction to the EC prohibitions in the Siemens/Alstom case[22], the Covid-19 crisis now appears to be serving as an excuse to include more economic policy considerations in merger control cases, even though the European Commissioner for Competition, Margrethe Vestager, stated that

19 Case (FTC) 9387 – *Illumina Inc./Pacific Biosciences of California, Inc*. and Case (CMA) ME/6795/18 – *Illumina / PacBio*.

20 Case (EC) M.9331 – *Danaher/GE Healthcare Life Sciences Biopharma*, of 18 December 2019 and Case (FTC) C- 4710 – *Danaher Corporation*, of 19 March 2020.

21 Case (CNMC) C/1116/20 – *Pigments / Negocio Ferro*, of 15 December 2020.

22 Case (EC) M.8677 – *Siemens/Alstom*, of 6 February 2019.

the Covid-19 crisis should not be a shield that allows mergers that harm consumers and slow down the recovery.[23]

That said, we are already seeing concerns being raised in some jurisdictions, even indirectly, that economic problems created by the pandemic are playing an increasing part in merger control assessment. One factor is the protection of workers. The same European Commissioner for Competition has, in the past, encouraged the participation of more stakeholders in the merger control process, with trade unions being invited to contact the Directorate-General for Competition during mergers and companies involved in mergers being reminded of their duty to inform and consult workers. In Germany, for instance, the preservation of jobs have already played a part in securing merger control approval.

Towards the end of 2020, we also saw NCAs start to consider how sustainability issues interact with antitrust policy. In its October 2020 call for contributions on competition policy and the Green Deal, the EC noted that mergers could eliminate the pressure between firms to innovate on sustainability aspects of some products or production processes.[24] And in its decision clearing the Aurubis/Metallo metal recycling deal in May 2020, the EC considered sustainability and the circular economy as a factor.[25]

While further analysis of the policy considerations in this area is needed, we can undoubtedly expect further developments in the near future and/or a more critical appraisal of the uncertain outlooks and eternal returns on this matter. Undertakings must remain vigilant for new rules and, especially, new, sometimes unexpected and often overcomplicated, enforcement approaches.

23 Declaration made during the American Bar Association Enforcers Roundtable panel discussion, in April 2020.

24 Outline of the call for contributions available at https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf

25 Case (EC) M.9409 – *Aurubis/Metallo Group Holding*, of 4 May 2020.