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8TH GLOBAL MERGER CONTROL CONFERENCE
#3 In-house counsel showcase session
(level playing field, market definition, mergers which do not meet thresholds, non-competition law considerations...)

Webinar – 4 December 2020*

Third webinar of the 8th Global Merger Control Conference organised in partnership with Dechert.

Mélanie Thill-Tayara

A lot has happened in 2020 in the imagination of competition authorities to fill alleged the enforcement gap and expand the scope of merger control. Competition authorities are facing a triple phenomenon: digitalisation, globalisation, and the rise of issues that go beyond a strict competition law assessment. Faced with this evolution, the European Commission (the "Commission") and National Competition Authorities ("NCAs") are trying to adapt and find answers. The Commission is going to make announcements in mid-December, but we do not know yet what exactly the scope of future regulatory tools will be. In-house counsels and lawyer are left with a relatively high level of uncertainty.

This calls for two remarks. Firstly, agencies search for solutions to adapt to a changing environment and to enable effective market regulation. Secondly, one may be worried about competition authorities' activism, which is going ever further at the risk of undermining the companies' rights of defence. In that respect, several questions have been essential in the year 2020. First, we witness uncertainty and insecurity. Commissioner Vestager's initiative on the extension of the referral mechanism of Article 22 of the European Union Merger Regulation ("EUMR") is concerning. Among other things, this provision gives Member States the possibility to refer mergers to the Commission, even when national thresholds are not met.

"AGENCIES SEARCH FOR SOLUTIONS TO ADAPT TO A CHANGING ENVIRONMENT AND TO ENABLE EFFECTIVE MARKET REGULATION."
MÉLANIE THILL-TAYARA

This specific possibility has never or rarely been used until now. Companies are now wondering how to deal with such exposure when they are negotiating their transactions in the EU.

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Indeed, it arises from public interventions of DG COMP officials and NCAs chairpersons that it is still not sure whether common guidelines on the implementation of this mechanism will be adopted. This new concern roots back to the debate over adopting new thresholds possibly based on deal value. When this proposal was made, companies and lawyers reacted negatively. However, they now face an alternative proposal that seems to be even less certain and secured for the business environment.

In addition to this, the upcoming *ex-ante* regulation, and New Competition Tool ("NCT") is worrying. The Commission intends to fill an "enforcement gap" with these new instruments. Nevertheless, it is still unclear how these will fit in the existing antitrust law framework. In particular, one may question what market features will trigger the enforcement of the NCT. The Commission has mentioned its intention to use it in markets with structural failures, but this concept seems rather blur. Furthermore, the NCT could be applied across all sectors and would not require dominance nor a prior finding of infringement. It would allow the Commission to impose serious remedies on companies. In that respect, these must be ensured with the appropriate safeguards.

Another upcoming issue is the Commission's initiative on foreign subsidies to guarantee a level playing field within the internal market. A specific control would address the limits of both State aid rules and foreign direct investments controls.

Finally, the debate on the definition of relevant markets is still on and attracts many comments relating to the inclusion of potential competition.

Pascal Belmin

Pascal Belmin recalled that the traditional interest of merger control is its predictability. However, the Commission and NCAs seem ready to call into question predictability to address what they see as an enforcement gap with "killer acquisitions". This is the bottom line behind the new approach to Article 22 EUMR referrals. Such a shift in competition policy will not trigger any legislative debate. There will not be any debate or consultation to assess (i) whether there is an enforcement gap regarding killer acquisitions and, (ii) if such a gap exists, what its precise scope is. If the Commission and NCAs continue on that path with Article 22 EUMR, predictability will need to be recreated.

Enforcers will have to issue guidelines to provide clarity regarding the criteria likely to trigger a referral. In particular, they should specify what sectors are targeted.

"BEFORE DRAFTING NEW ENFORCEMENT TOOLS, SUCH AS THE NCT, THE COMMISSION SHOULD DEMONSTRATE THAT THERE IS A PROBLEM THAT CANNOT BE DEALT WITH THROUGH *EX-ANTE* REGULATION."
PASCAL BELMIN

Likewise, proposals of regulatory and enforcement tools are problematic. The link between *ex-ante* regulation of gatekeepers and the NCT is not obvious. Before drafting new enforcement tools, such as the NCT, the Commission should demonstrate that there is a problem that cannot be dealt with through *ex-ante* regulation. The hurry to update the enforcement toolbox receives scepticism. Under the NCT, the Commission may act without any dominant position and without finding any abuse. This is a revolution for antitrust law and a serious setback for Article 102 of the Treaty.

Another point of interest is the recent White Paper on foreign subsidies. It comes within a context where the EU strives to ensure its strategic autonomy. This initiative goes far beyond competition law. Therefore, there must be dedicated instruments. Some may be implemented by DG COMP but cannot be mixed with competition law assessment. This does not mean that competition law shall be blind to other issues. On the contrary, it is interesting to see that the notion of "European interest test" enshrined in the White Paper creates some room for open discussions in competition cases. From a company's perspective, it is worth noting that these tools are non-discriminatory and will apply to all companies, even European ones that could directly or indirectly receive foreign subventions. It must become a concern when entering transactions or taking part in public procurement.

Finally, the definition of the relevant market is not an essential part of the reform of competition law. What matters is competitive analysis. In that respect, integrating other policy priorities is no longer a taboo.

François Garnier

François Garnier highlighted the fact that predictability is essential for companies. Legislators have transferred decision-making to regulators because they were unable or unwilling to tackle market issues. Now, it seems that regulators contemplate the possibility to intervene in a discretionary manner. This has been a general phenomenon in competition law over recent years. There have been many comments about "killer acquisitions". Yet, they account for less than 10% of transactions, which does not appear to be significant. In the pharmaceutical industry, however, the question may make sense as some transactions take place so far upstream during the research process that turnover is not a relevant criterion for assessing the merger.

In any case, companies are always adapting to regulatory changes. In the absence of guidelines, companies will go directly to the Commission and NCAs and will ask for certainty on their deals. Article 22 EUMR implementation may well trigger more dialogue to avoid any risk on transactions.

"IN THE ABSENCE OF GUIDELINES, COMPANIES WILL GO DIRECTLY TO THE COMMISSION AND NCAS AND WILL ASK FOR CERTAINTY ON THEIR DEALS."
FRANÇOIS GARNIER

Regarding the NCT, the pharmaceutical industry has long had experience about regulators intervening to ensure market access and market fluidity. This has been the case with generics producers or with drug prices in recent years. The Commission may sometime twist the concepts to achieve a result that corresponds to its political priorities. To that extent, it may be a good solution to have a structured tool rather than the continuous twisting of competition law concepts. Likewise, concerning foreign subsidies, it may be doubtful that competition law provides the appropriate instruments to address such broad issues.

Finally, debates on the definition of relevant markets may rely on the experience in the pharmaceutical sector, where the assessment of potential competition is frequent. However, it is striking to consider that the Commission tends to delineate relevant markets with a certain idea. For a company, it may be frustrating because the relevant market identified by the Commission may not always correspond to what businesspeople consider as being the market.

Clara Ingen-Housz

Clara Ingen-Housz considered that the proposal of deal value thresholds would certainly have provided certainty in the short term. Nevertheless, it would have generated additional constraints and would probably have missed the problematic operations. Article 22 EUMR referral mechanism is interesting. However, the process of the Commission is questionable. It invoked a provision of EUMR enacted years ago and that was never implemented, while there may be significant practical problems. In addition to this, the articulation between the national and European levels is likely to create uncertainty. Even if the Commission issues guidelines, their implementation will rely on NCAs, which may pursue different policy agenda. A single transaction may result in a referral in a Member State while being seen as unproblematic by other NCAs.

Regarding the NCT and *ex-ante* regulation, it seems necessary for the Commission to adopt procedures to frame this tool. The scope of the NCT will have to be precise. It is not completely inaudible to discuss market investigations with possible remedies. However, this requires prior identification of a problem and delineation

"THERE IS AN OBVIOUS ENFORCEMENT GAP: STATE AID RULES DO NOT APPLY TO SUBSIDIES GRANTED BY FOREIGN GOVERNMENTS, AND THE WTO RULES HAVE PROVED TO BE INEFFICIENT."
CLARA INGEN-HOUSZ

of the enforcement gap. In that respect, it is not sufficient to draft the NCT broadly while mentioning that it will only be used for digital markets. It is necessary to define and justify the cases for which the NCT could be applied. Proper drafting of legislation is necessary to make sure that the Commission's objectives are well and proportionally achieved.

Another important recent issue is foreign subsidies. The Commission White Paper is a major and well-received initiative in terms of the objective and the approach taken. In that area, there is an obvious enforcement gap: State aid rules do not apply to subsidies granted by foreign governments, and the WTO rules have proved to be inefficient. Against that background, some distortions of competition remain unanswered. The novelty of the White Paper reflects a voluntarist and political approach. The White Paper wants to capture a very large set of factual situations. From a practical point of view, it will nevertheless be difficult for the Commission to gather sufficient evidence without initiating long investigations. There is indeed a risk of launching endless procedures, which would not be efficient to ensure a level playing field.

The debate on foreign subsidies will be very important as it is very far-reaching. However, it should not affect the nature of competition law even if inter-institutional cooperation is an important element.

Finally, the debate over market definition has extended to entire competition law. The competition assessment test is usually based on price. However, competition now relies on criteria that go beyond price. Products and services can differentiate themselves based on their impact on the environment and the use of digital data. Likewise, we need to open the competition analysis to other perspectives such as potential competition and effects over time. ■