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Catch-22: The European Commission Keeps Broadening Merger Control Intervention Powers and Gives a Glimpse of The Future

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A recent speech[1] by the European Commission's (the Commission)'s Commissioner for Competition Margrethe Vestager (the Commissioner), on the 30th anniversary of the EU Merger Regulation (EUMR), praised it as having created "a better life for everyone", "saved customers billions of euros each year" and, in "a matter of life and death", ensured the continuation of promising new drugs. Importantly, this speech also provided a glimpse into the future of EU merger control. Based on her statements, here is what to expect in the months and years to come.

Continuing vigorous merger control enforcement

The Commissioner made it clear that the pandemic will not materially impact merger control. She insisted the current crisis provides no reason to abandon or even ease competition law enforcement. At the same time, she acknowledged an obvious need to "make sure [the Commission's] efforts are focused where they're needed."

While a comprehensive evaluation of the merger rules is still ongoing, the Commissioner presented some far-reaching "preliminary conclusions". And, although the Commission apparently has not identified a need to change the EUMR, it has identified "a number of things we can do, to make the rules work even better" (even if some proposals seem to re-engineer the spirit of the EU's jurisdictional system):

- **Filing thresholds:** Aiming at "killer acquisitions" (deals where incumbents buy up potential rivals in their nascent stages, before they generate enough turnover to meet the EUMR's turnover-based filing thresholds), the Commissioner noted "there are a handful of mergers each year that could seriously affect competition, but which we don't see because the companies' turnover doesn't meet our thresholds." She dismissed the introduction of transaction value thresholds (like Germany and Austria have done in recent years) as too imprecise, but revealed the Commission intends to use an instrument "hiding in plain sight": Article 22 of the EUMR.
  Article 22 allows transactions to be referred to the Commission if they "[affect] trade

between Member States and [threaten] to significantly affect competition within the territory of the Member State or States making the request". For historical reasons, a referral under Article 22 does not require the transaction to meet the filing thresholds or otherwise be reportable in the referring Member State. In fact, the Netherlands and Finland were among the first Member States to request a referral before their national merger control regimes were introduced. The Commission has also in the past accepted referrals from Member States whose (existing) national thresholds were not met.

While the Commission has the power to reject referral requests—and had in the past discouraged Member States from referring cases that are not reportable under their national regimes—the Commissioner announced that the Commission will change its approach. In mid-2021, the Commission will start accepting referrals of cases "that are worth reviewing at the EU level" whether or not the national filing thresholds are met, and the Commission will provide guidance in that respect.

- **Simplification:** The Commissioner conceded "there's still a lot we can do to make life easier for companies that have to file mergers." She suggested an even broader application of the EUMR's simplified procedure (today accounting for around 75% of all cases) in the future, which would feature reduced information requirements for the parties, and a speedier review process (in particular by cutting back pre-notification discussions in cases that are "so straightforward that there's really nothing to discuss before the merger is filed").
- **Substantive assessment:** Beyond these procedural changes, the Commissioner announced a review of the substantive assessment to see whether the Commission "is getting things right". This would include a review of the Commission's past decisions (which may once again aim especially at acquisitions of nascent players in digital industries), and a "reflection, to discuss ideas and share evidence on how to improve our merger rules – rules that still work very well, but which also need to adapt to a world that keeps changing." In particular, the Commissioner emphasized digitalization and a growing concentration of European markets, but stressed the Commission's openness to "to ideas, no matter where they come from." However, changes to the substantive assessment will not be coming any time soon. Pointing to the pending appeal in the Hutchison/O2 merger case, Commissioner Vestager noted that a revision "wouldn't make sense" now. Given that (i) the Commission has filed its appeal only recently and (ii) appeal proceedings before the European Court of Justice can take years, any substantial reform will not happen for quite some time.

Practical impact of the announced changes

While the full report of the evaluation will likely be published early 2021, the Commission is on the right track for its willingness to reduce the red tape in "no brainer deals" and getting closer to the efficiency of some national merger regimes. For example, the German Bundeskartellamt has been much better in limiting the information required, the intensity of the inquiry and the length of the review period for deals raising no issues. One must hope that a broader use of the simplified procedure and cutting down the pre-notification phase is only the starting point towards more efficient merger control. More can be done to simplify the EU's merger control regime, for example: digitalizing the filing process (the current crisis shows it

works well); increasing the thresholds for "affected markets"; introducing "de minimis" exemptions for markets with negligible economic importance; and – for deals that do not qualify for the simplified procedure – more readily dropping non-issues, more targeted and well-timed RFIs and, in particular, document requests.

As to the referral system, it seems worth considering to revise Article 4(5) of the EUMR to allow for a direct notification with the Commission if a transaction meets the filing thresholds in three or more member states, thus eliminating the need for the Form RS-based referral process and the duplications from having to submit a referral request and an EU notification afterwards.

The Commission's focus on perceived "killer acquisitions" is remarkable, especially given that there is no broad consensus that an enforcement gap exists and that deals detrimental to competition slip through the cracks. The Commission's reluctance to introduce new thresholds (contrary to and perhaps based on the initial experience of Germany and Austria) and distort a set of thresholds that has proven to work well is clearly a positive sign. However, the suggestion to use Article 22 systematically to target transactions that do not meet any filing thresholds – neither at the EU level, nor in any EU Member State – indicates that the Commission may be trying to introduce through the back door (without changing the EUMR) a new tool to ex officio investigate at EU level all mergers that might lead to competition concerns. Ultimately, under the new approach, the Member States are encouraged to refer at will, and the Commission could accept such referral at its discretion. That means merging parties have to live with the uncertainty that their transaction may face a merger control review in the EU even where no filing thresholds are met – and that any review will be done at the EU level, which is the most burdensome review in terms of documentation and procedure.

Clear, reliable thresholds are of tantamount importance for merging parties. They need to be able to plan their transaction and know with certainty whether or not they must undergo a merger control review. This needs to be reflected in the transactional documents, the overall deal timing, communications to employees, customers and other stakeholders, etc.

While the wording of Article 22 may generally allow for a review of transactions that do not meet the EU or Member State filing thresholds, this so-called "Dutch clause" was never intended as a tool to catch cases that would otherwise escape scrutiny under existing thresholds. It was introduced to allow for a referral where a Member State – like the Netherlands at the time of the adoption of the EUMR – lacked a merger control regime altogether. Using such a formally existing possibility to pursue a very different policy objective is questionable. At a minimum, a broad public consultation seems in order.

One of the key benefits of EU merger control since its inception has been its predictability as to whether a transaction requires a filing. This key achievement should not be given up lightly. Any exceptions should be narrow, focused well-grounded, and not based on subjective scepticism about deals in digital industries involving some of the technology giants that the Commission and other competition authorities are so focused on these days.

[1] “The future of EU merger control”, the International Bar Association Annual Conference, September 11, 2020.

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