Chapter

EU Merger Control: 2012 and beyond

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Below is a brief discussion about a number of issues which have marked EU merger control in the past twelve months and which are likely to remain on the merger control agenda in the next year and beyond.

1. Merger control in times of crisis

From October 2011 through September 2012, the Commission issued one prohibition decision and nine Phase II decisions of which five were subject to significant remedies. One transaction was aborted/withdrawn after the Commission opened a Phase II investigation.

In times of economic crisis, the pressure on the Commission to come to the "right" decision is enormous. Companies are faced with extremely challenging industry and market conditions. One way to confront these challenges is to construct and negotiate mergers or acquisitions, some of which effectively restructure an entire industry. Companies are then obliged to put the faith of their proposed strategy in the hands of the Commission.

The most salient recent examples are of course the Deutsche Börse/NYSE Euronext and the Olympic/Aegean mergers, both of which were prohibited by Commission, as well as the Vivendi Universal/EMI merger, where the Commission reportedly obliged the merging parties to divest more than half of the target's European business. The Deutsche Börse/NYSE Euronext transaction was in part a response to the strong growth of alternative and less regulated trading venues, the challenges faced by the Greek airline industry hardly need any explanation, and the Vivendi Universal/EMI transaction cannot be seen independently from the cannibalisation by digital music of more traditional physical recorded music. Other potentially industry-transforming transactions that are still under a Phase II review at the time this article was submitted for publication include Outokumpu/Inoxum (stainless steel), UPS/TNT Express (logistics industry), Hutchison/Orange Austria (mobile telecommunications) and Ryanair/Aer Lingus (air transport).

As the Commission's decisions in the above transactions have not yet been published (with the exception of Olympic/Aegean), it is difficult to express an informed view on whether the Commission indeed came to the right decision. Still, a number of observations can be made.

Commissioner Almunia has repeatedly expressed his resistance to calls for industrial-policy intervention through competition law, including merger control. For example, in a speech of 10 February 2012, he stated that "*[D]iscretionary State intervention and protectionism are not the way forward to overcome the crisis and to adapt to the process of globalisation. The way forward is exactly the opposite; more open and more competitive markets and less discretionary public support*". In other words, competition (and not State intervention and protectionism) is seen as a necessary tool to promote growth: "*I've been insisting on the need to establish a stronger link between the different competition policy instruments and our main priorities in this difficult juncture: setting the best conditions to stimulate growth and deepening and extending the Single Market as one of our best tools to do it.*" (Speech of 9 October 2012 at the European Parliament).

While generally considered fairly uncontroversial (but occasionally contested), this policy choice limits the Commission's freedom in merger control to achieve industrial policy objectives in times of severe economic crisis. This contrasts with, for example, China, where "the effect that the concentration of undertakings may have on the development of the national economy" is one of the criteria that the PRC Ministry of Commerce is obliged to take into account when assessing a proposed concentration, alongside (and of the same importance as) the more traditional competition criteria for merger control.

Nevertheless EU competition law provides the Commission with the freedom to take the economic crisis into account when reviewing mergers.

First, the fact that the European and global economy is and will remain in crisis for the short- or even mid-term must be an integral part of the Commission's conclusions on likely future effects of a proposed transaction. Projecting such future effects is to an important extent dependent on the market conditions in which the merging parties operate and the Commission needs to ensure that it accurately captures these market conditions in its analysis. To state one obvious example: the Commission should consider projected industry growth rates which are adjusted to reflect an economy in crisis. In addition, market behaviour and firms' incentives may change dramatically in the context of a recession. As such, behaviour in past (more prosperous) times is not necessarily the correct yardstick to predict future conduct. Also, the fact that the crisis is global means that the Commission also needs to understand similar changes in the behaviour and incentives of non-European players active in Europe. This latter analysis must necessarily include any state aid and/or other public support measures that non-European countries may take to protect their own industry in the face of lowering growth prospects.

A specific application of the general principle that the Commission should base its analysis on market reality is the use of the correct counterfactual: what will happen to the merging parties and the industry in which they operate absent the proposed concentration? Again, the past is often not (or at least not necessarily) the correct benchmark to construct an accurate counterfactual. As mentioned above, many transactions currently proposed are driven by the

merging parties' desire to implement significant structural changes to confront the challenges posed by the economic climate. Presumably, whatever the parties could do unilaterally would already have been done, and a merger or acquisition allows them to do more or better than they could do alone. The Commission therefore must consider how competition would evolve absent the merger and assess whether this is a more desirable outcome than the post-merger situation. For example, if absent a merger, the recession would force a company to shut down part of its production in Europe, this needs to be compared to the post-merger outcome, taking into account the transaction rationale and the proposed synergies which the Parties hope to achieve through the merger. The Olympic/Aegean decision is notable in that it contains a detailed description of the Commission's approach to counterfactuals under the EU Merger Regulation ("EUMR"). However, the decision also shows the Commission's relative reluctance of using counterfactual market conditions and firm conduct/strategy that significantly deviate from the status quo ante. In the recent UPM/Myllykoski & Rhein Papier decision, the Commission also considers a counterfactual different from the pre-merger situation, but concluded that it did not need to weigh the post-merger situation versus this counterfactual to come to a decision.

The Failing Firm chapter in the Commission's Horizontal Merger Guidelines also provides some guidance on the use of the counterfactual for firms in difficulties. The conditions for the Failing Firm defence are very difficult to meet, hence the rare application of the defence (see again Olympic/Aegean as an example). The Commission should consider whether a broader "flailing" firm defence would be more appropriate in the context of the current economic environment.

Third, proposed efficiencies should be analysed in the same overall market context. The Commission considered efficiencies in a number of the Phase II cases in the past twelve months, but consistently did not think them sufficient to overcome the competition concerns raised by those mergers. In Deutsche Börse/NYSE Euronext, for example, the Commission's press release indicates that efficiencies were reviewed but that they were not large enough, not merger-specific and not certain to be passed on to consumers. The 2011 Olympic/Aegean decision does contain a detailed discussion of the proposed synergies but simply rejects them. What is not entirely clear is to what extent the Commission used the proposed efficiencies in its substantive analysis (as opposed to merely as an efficiency defence), including in terms of their effects on the Parties' and their competitors' market behaviour and incentives and as an integral part of the Commission's analysis of the post-merger situation versus the appropriate counterfactual.

The last issue is the treatment of remedies. The Commission's Remedies Notice imposes a number of stringent conditions on the type of remedies that are acceptable to the Commission and their modalities: for example, reluctance to accept behavioural remedies, especially in horizontal cases, requirements of viability, marketability and competitiveness, certainty of quick implementation, etc. In addition, the Commission's approach is fairly binary: once the Commission has identified that a transaction raises certain concerns, the stringent requirements of the Remedies Notice kick in. To a certain extent, the magnitude of the Commission's concern and its relative importance in the context of the above market reality, the appropriate counterfactual and the importance of efficiencies may become subordinate to the requirements of the Remedies Notice. Query whether issues such as viability, marketability and competitiveness (which often entirely depend on the ultimate purchaser of a divestiture business and are therefore difficult to predict at the stage of the remedies negotiations) can be weighed better against the integrity of the industrial project which merging parties have designed to confront the challenges posed by the harsh economic environment, including through the realisation of important efficiencies.

It is clear from the Commissioner's public statements that the Commission continues to be reluctant to give a role to industrial policy in merger control. However, the reality of the market and the responses proposed by actors in the industry need to be an integral part of the Commission's analysis (including in remedies discussions).

2. Access to File Issues

Access to file is a key step in every EU merger control investigation. Under the EUMR the term "access to file" generally refers to the right to access documents in the Commission' file by the addressee of a Statement of Objections. This a fundamental procedural guarantee intended to apply the principle of equality of arms and to protect the rights of defence. The same term is sometimes used also with respect to the right by third-party complainants or other involved (non-notifying) parties in a merger proceeding. As further explained below, the two situations are distinct in terms of scope and rights.

Access to file is critical. It allows parties to check the factual evidence relied upon by the Commission in its assessment of the case, but also provides the opportunity to discover exculpatory evidence that can be used to refute the conclusions drawn by the Commission.

Irregularities with regards to file access can lead to lengthy and cumbersome disputes between the Commission and the parties, the involvement of the Hearing Officer and, more importantly, the risk of an appeal to the Luxembourg Courts. This explains why the Commission in its internal guidelines recommends extreme caution in the preparation and disclosure of the file (see EU Antitrust Manual of Procedure - Access to file and confidentiality, Module 12, March 2012).

The issue of file access re-gained much attention in June 2012 when the Court of Justice of the European Union ("CJEU") handed down its judgment in two related cases, *Odile Jacob* (case C-404/10 P), and *Agrofert* (C-477/10 P). In the two judgments, the CJEU set aside prior judgments of the General Court that had annulled decisions of the Commission to refuse access to third parties to certain documents submitted by the notifying parties in the merger investigation.

The judgments provided the opportunity for the CJEU to examine for the first time the relationship between Regulation 1049/2001 (the "Transparency Regulation") and the EUMR. Both Regulations have different objectives as regards to access to information held by the Commission. Regulation 1049/2001 is designed to ensure the greatest possible transparency of the decision-making process of the EU institutions and of the information on which they base their decisions. Its aim is to facilitate, as much as possible, the exercise of the right of access to documents, and to promote good administrative practices. However, it is neither specific to the European Commission nor to the exercise of the Commission's powers in competition law matters, let alone merger control. The file access rules in the EUMR are designed to ensure, *inter alia*, compliance with the duty of professional secrecy in the specific context of EU merger control proceedings.

Given that there is no clear hierarchy between the two regulations, they need to be applied in a manner compatible with both and which enables a coherent application.

In both cases, the Commission had refused to disclose documents

relating to merger control proceedings to third parties, relying on the exceptions to the right of access in Article 4 of the Transparency Regulation relating to, inter alia, the protection of commercial interests and the protection of the purpose of investigations. The General Court had annulled the Commission's decisions on 7 July 2010 (T-111/07), on the basis that, even if it were accepted that the relevant documents could be covered by the exceptions the Commission had relied on, the Commission had failed to demonstrate, in a concrete and individual manner, that those documents did in fact undermine the interests protected by those exceptions.

Pursuant to the Commission's appeal, the CJEU overruled the General Court and acknowledged a *general presumption* that disclosure of documents exchanged between the Commission and undertakings in the course of merger control proceedings undermines, in principle, the protection both of the objectives of the Commission's investigation activities and of the commercial interests of the undertakings involved in those proceedings.

The CJEU has made clear that a generalised access to those documents would jeopardise the balance in the EUMR between (i) the obligation on the undertakings concerned to send the Commission possibly sensitive commercial information to enable it to conduct its assessment of the effects of the proposed merger, on the one hand, and (ii) the guarantee of increased protection, with regard to the requirement of professional secrecy and business secrecy, for the information so provided to the Commission, on the other.

Based on the above, the Commission is entitled to deny *third parties* access to documents relating to merger control proceedings and exchanged between the Commission and notifying parties and third parties, without a requirement to carry out an individual examination of those documents and regardless of whether the merger proceedings are still pending. In other words, the exceptions in the Transparency Regulation are applicable even where the Commission merger investigation has been concluded. On the other hand, access to internal documents of the Commission and produced in connection with merger control proceedings can only be denied for the duration of those proceedings and as long as they are likely to be reopened by the Commission following legal proceedings before the EU courts.

The judgments of the CJEU re-establish some clarity on the correct approach to file access that had been put in question by the 2010 judgment of the General Court. First, in the merger control context the right of access provided by the Transparency Regulation must be assessed in conjunction with the requirements of the EUMR. Second, documents submitted by a party in a merger investigation are presumed to contain commercially sensitive information, and/or that their disclosure may jeopardise the course of the merger investigation. It is therefore up to the third party that requests access to such documents to demonstrate why this presumption would not apply to a particular document or why disclosure would be in the public interest.

It needs to be emphasised that in both cases addressed by the judgments, the request for access to confidential documents was made by third parties and not by the notifying parties in the merger proceedings. Although the CJEU does not explicitly distinguish the two situations, it seems plausible to conclude that the Commission's approach to file access should be different when the request originates from the notifying party. Notifying parties and third parties do not enjoy the same procedural rights with regard to access to file. The General Court has confirmed that in merger control proceedings the notifying party enjoys greater rights to be heard than third-party complainants or other involved parties (see for example Case T-96/92). The notifying party is in principle directly affected by the Commission's decision, whereas third parties are more likely to suffer only incidental or indirect effects. This general principle naturally extends to right of access to the merger file. In other words, to be able to fully exercise its right of defence, a notifying party should have a greater right of access to file than a third party, and any limitations to the disclosure based on the legitimate protection of confidential information should be applied more strictly.

The Commission has looked at ways to streamline the procedure for implementing access to file by increasing reliance on alternative procedural practices. One option is the negotiated disclosure procedure, whereby the party entitled to access to file negotiates with the information provider to receive all or part of the information provided instead of only being given access to the redacted versions of the documents. Under this procedure, the receiving party would agree, for example, to limit access to a restricted number of persons within the company on a need-to-know basis. The second option is access to the file through a "data room" procedure organised by the Commission itself. This procedure allows a restricted group of persons, normally the external legal counsel and/or economic advisers of the investigated party to access confidential information within the Commission's premises. The outside advisers are allowed to use the information to provide advice to their client, but are not allowed to disclose any confidential information to the client.

Both procedures are common in antitrust investigations but are not necessarily ideal in merger control investigations. The negotiated disclosure procedure is simply not feasible given the number of parties involved in a typical Commission procedure, the different incentives to disclose information in a merger investigation and the strict and tight deadlines applicable under the EUMR. A confidential data room is sometimes used (for example for the disclosure of economic evidence), but may not always be workable given the strict limitations imposed on the outside advisers who visit the data room, as well as the time-consuming nature of this exercise.

In the context of merger control proceedings, it would be advisable to design more efficient procedures for access to file while safeguarding the legitimate protection of confidentiality claims. A possible alternative would be to provide only to the notifying party's external advisers full, unredacted versions of the documents (including confidential information) subject to appropriate non-disclosure agreements between the advisers and the Commission.

3. Cooperation between NCAs under the new Best Practices of the EU Merger Working Group

In November 2011, the European Competition Network (ECN) adopted the Best Practices on cooperation between EU national competition authorities in mergers which fail to meet the EUMR filing thresholds but are subject to notification to, or investigation by, National Competition Authorities ("NCAs") in multiple Member States (so-called "multi-jurisdictional mergers").

The ambitious goal of the Best Practices is to foster cooperation and sharing of information between NCAs in cross-border mergers. This should in turn lead to overall efficiency, transparency, effectiveness and timeliness of the merger review process.

Acknowledging some of the limits of this cooperation, the Best Practices make clear that they are non-binding on the NCAs, and that NCAs reserve their full discretion in their implementation. This clarification in the text puts into question the full effectiveness of the Best Practices.

The Best Practices apply only to multi-jurisdictional cases that raise some competition issues in two or more jurisdictions. In these cases, it is up to each NCA to decide, on a case-by-case basis, whether cooperation with other NCAs is necessary or even appropriate. Cooperation in these cases may be useful to share views and information about (i) jurisdictional issues regarding notifiability of the merger under national merger control laws, (ii) product markets that are the same or similar in the various Member States, and (iii) potential remedies that need to be designed in more than one Member State.

The Best Practices attribute distinct roles to the NCAs and to the merging parties. NCAs have to inform each other of notified transactions by way of the existing ECA Notice system, which involves the exchange of non-confidential information. This was common practice already before the adoption of the Best Practices. For cases that require or suggest closer cooperation, the NCAs aim to keep each other appraised of their progress at key stages of their respective investigations, including about the intention to open a phase II investigation or to start entering into remedy discussions.

Under the Best Practices, however, the merging parties appear to be required to have a more pro-active role in the process. First, they are encouraged to contact each NCA where the merger is notifable and to provide them with basic information about the transaction (including list of filings, date of proposed filing in each jurisdiction, names and activities of the parties, product and geographic scope of their businesses). The Best Practices make clear that the submission of this information will not automatically trigger the cooperation between the NCAs, but that it may be useful to provide this information at the pre-notification stage to align as much as possible the timing of parallel proceedings. Second, merging parties are invited to coordinate the timing and scope of any remedy proposal to the relevant NCAs to avoid risk of inconsistent remedy packages. Last, the Best Practices require the parties to submit confidentiality waivers to allow NCAs to share views and information.

The new Best Practices are worthy of praise to the extent that their objective is to coordinate and even harmonise the work of the NCAs in their review of multi-jurisdictional mergers. It is, however, difficult to see how these objectives can be fully realised in practice, given the important differences between the legal systems of individual EU Member States, which will continue to make increased coordination impracticable in many respects.

Today, there are 26 merger control regimes in the EU, with stark differences on a number of levels: (i) some jurisdictions have a mandatory pre-closing filing obligations, while others only voluntary filing systems; (ii) the jurisdictional thresholds and the definition of what constitutes a notifiable transaction vary significantly from one system to another; (iii) some jurisdictions impose an automatic suspension obligation, preventing closing of the transaction pending competition approval, while others do not apply it or do so only in Phase II; (iv) some jurisdictions apply the suspension obligation to prevent closing on a global basis while others limit the effects of the suspension to the relevant jurisdiction only; (v) there are significant differences with regard to the extent and scope of the information to be provided in the various notifications and the format in which this information must be submitted (despite the existence of a model form); (vi) some jurisdictions encourage or even impose the use of pre-notification contacts or submissions, while others do not require a pre-notification procedure; (vii) the applicable review periods differ substantially, with some jurisdictions where a concentration can sometimes be approved in less than a week, and others where the approval process can last up to two months, even in simple cases; and last (viii) there is no harmonised substantive test among different NCAs, which may potentially lead to different outcomes.

Given all these differences, it remains difficult for merging parties to effectively plan for a coherent and efficient filing strategy in multi-jurisdictional mergers. For example, if a merger requires competition approvals in two or more jurisdictions that have different suspension obligations, the merging parties inevitably would prioritise their efforts in the preparation and submission of the filing to the NCA that applies a suspension. The same consideration applies in relation to jurisdictions with different review periods: clearly parties will have an interest in starting the procedure first in the jurisdiction that takes longest.

The Best Practices are a welcome step in the process of streamlining different national notification and approval systems in the EU. However, given the persistence of so many important procedural and substantive differences in the EU national merger review processes, it is not clear how the Best Practices can achieve "the alignment of timing and the overall efficiency, transparency, effectiveness and timeliness of the merger review processes" in the absence of greater convergence among the EU national legal systems.

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