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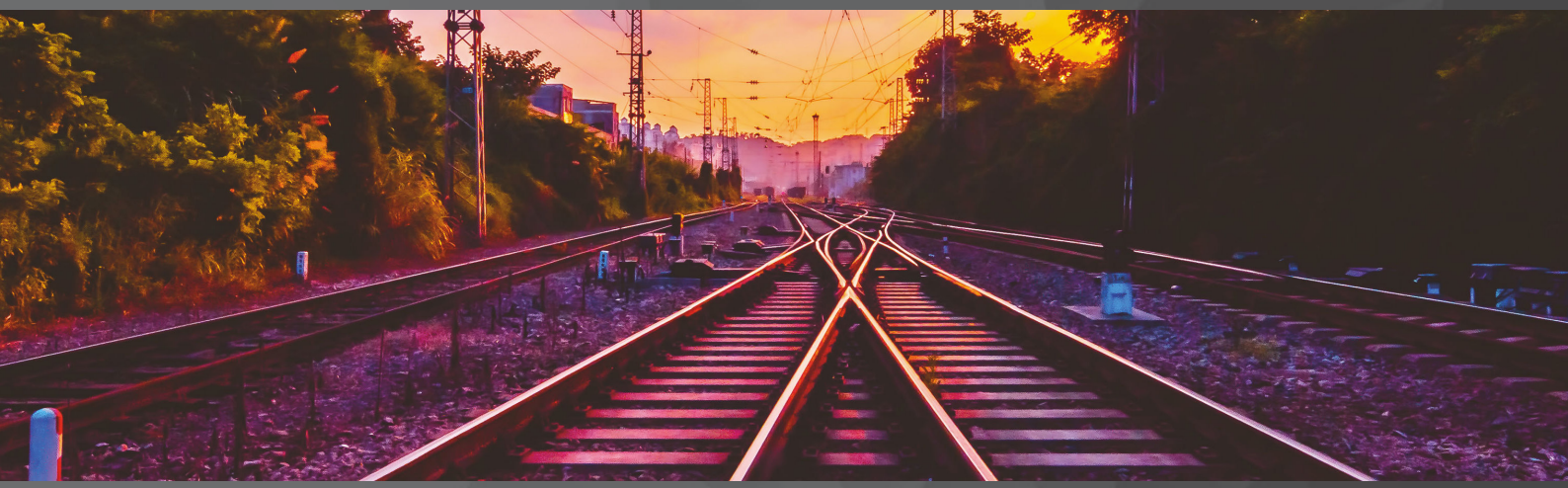

Merger Control 2020

A practical cross-border insight into merger control issues

16th Edition

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Af Gammelt Jern Smedes Nye Våben: Vestager's First Term in EU Merger Control and What to Expect Going Forward


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1 Introduction

The old Danish proverb "*Af gammelt jern smedes nye våben*", which roughly translates to "*Of old iron, new weapons are forged*", has perhaps never rung more true following the (unprecedented) re-appointment of Margrethe Vestager as the EU's Commissioner for Competition, and, in a dual role, as Executive Vice-President responsible for coordinating the European Commission's ("EC") agenda on a Europe fit for the Digital Age.

President-elect Ursula von der Leyen's new Commission (which includes eight Vice-Presidents, three of whom will enjoy a dual role similar to Commissioner Vestager) due to take office at the beginning of November 2019, subject to European Parliament approval, will serve a five-year term.

In her Mission Letter to Commissioner Vestager, President-elect von der Leyen entrusts her with, *inter alia*:

- In her role as Executive Vice-President for a Europe fit for the Digital Age:
  - in striving for digital leadership, focusing on making markets work better for consumers, business and society, and to support industry to adapt to globalisation;
  - co-leading efforts on a new long-term strategy for Europe's industrial future – maximising the contribution of investment in research and innovation;
  - a new SME strategy focusing on supporting small businesses, entrepreneurs and start-ups, notably by reducing the regulatory burden and enabling them to make the most of digitisation;
  - upgrading European liability and safety rules for digital platforms, services and products as part of a new Digital Services Act; and
  - coordinating work on digital taxation to find a consensus at international level by the end of 2020 or to propose a fair European tax.
- In her second term as Competition Commissioner:
  - strengthening competition enforcement in all sectors, focusing on improving case detection, speeding up investigations and facilitating cooperation with and between national competition authorities;
  - evaluating and reviewing Europe's competition rules, covering the antitrust regulations that will expire in the course of her mandate, the ongoing evaluation of merger control and the review of state aid rules and guidance;
  - using sector inquiries in new and emerging markets that are shaping Europe's economy and society; and
  - bridging the gap between competition and industrial strategy to ensure a level playing field that provides businesses with the incentive to invest, innovate, and grow.

During her current term, Commissioner Vestager made a name for herself on the global stage by focusing on the digital sector through a plethora of high profile, high value, and often controversial decisions, some of which have been recently overturned by the European Court of Justice. In this brief chapter, we take a look back at some of the most salient points of Vestager's first term from an EU merger control perspective, and discuss what can be expected during her upcoming term. If her past record is anything to go by, we can expect continued rigorous competition enforcement in the EU. Further, her dual role as Commissioner for Competition and Executive Vice-President-elect for a Europe fit for the Digital Age, combined with some of the language in the Mission Letter, may well suggest a convergence between EU competition law on the one hand, and certain policy considerations on the other – something that most readers will recall was flatly rejected in the EC's recent prohibition decision in *Siemens/Alstom*.

2 Convergence of EU Competition Law and Policy: A New Paradigm?

Most readers will vividly remember the debate that ensued following the EC's prohibition of Siemens' proposed acquisition of Alstom in February of this year. Criticism of the decision was rife across a broad spectrum of governments, businesses, academics, and practitioners – rarely has the otherwise sober world of EU merger control ruffled as many feathers. Commissioner Vestager's dual nomination comes hot on the heels of the debate on the interplay between policy and competition law.

In June 2018, Siemens, the German multinational, formally notified the EC of its intention to acquire French rival Alstom, which would have combined the parties' transport equipment and services activities. Following an in-depth Phase II investigation, the EC prohibited the proposed transaction after having found that the merger would have created the "*undisputed*" market leader in certain signaling markets, a "*dominant player*"

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in very-high-speed trains, and that the remedies offered by the parties were not sufficient to address these concerns. More specifically, the EC found that the proposed transaction:

- regarding signaling systems, would have eliminated a very strong competitor in several mainline and urban signaling markets; and
- regarding very-high-speed trains, would have reduced the number of suppliers by eliminating one of the two largest manufacturers of this type of trains in the EEA.

As a result, the EC concluded that the proposed transaction would deprive customers in these areas, including train operators and rail infrastructure managers, an adequate choice of suppliers and products.

During the EC's review, Siemens advocated that the EC should take into consideration the competitive constraint exerted by Asian (and particularly Chinese) suppliers. In its assessment, the EC flatly rejected these arguments finding that there were no Chinese suppliers in the EEA today, that no attempts had been made by them to enter, and that any effective entry could not be substantiated in the foreseeable future.

In reaction to the decision, Bruno Le Maire, France's Minister of Economy and Finance, stated that the "*current EU rules are obsolete*" and that the decision was "*a political mistake: the role of the Commission is to defend the economic interests of Europe*". His sentiments were echoed by Peter Altmaier, Germany's economy minister, who commented that European companies can only compete on an equal footing with rivals from China and the U.S. "*if you allow mergers, so the companies we have in these industries can achieve [necessary] scale*". In defence of his Competition Commissioner, President Juncker responded that the EC "*will never play politics or play favourites when it comes to ensuring a level playing field*".

In February 2019, France and Germany published a "Franco-German Manifesto for a European Industrial Policy Fit for the 21st Century". In order not to disadvantage European companies *vis-a-vis* their global counterparts, the manifesto suggests, *inter alia,* that the current EU merger guidelines be updated, and that greater consideration be given to state-owned and subsidised companies within the context of EU merger control.

Fast-forward a few months and one can only speculate as to how (much) the EC's decision and the manifesto played in President-elect von der Leyen's mind as she put pen to paper in her Mission Letter to her nominee. A few points of the Mission Letter bear particular emphasis in that regard.

First, and most obviously, was the decision to entrust the Commissioner for Competition with the dual role of Executive-Vice President for a Europe fit for the Digital Age (the digital economy having its fair share of large U.S. and Asian players). In particular, Executive-Vice President Vestager is asked to "*co-lead work on a new long-term strategy for Europe's industrial future*".

Second, and as to Competition, Commissioner Vestager is tasked with evaluating and reviewing Europe's competition rules, including the "*ongoing evaluation of merger control*" – rumours had been circulating since early September when President-elect von der Leyen apparently told the European Parliament in a closed-door session that she wanted to reconsider market definition. Further, President-elect von der Leyen goes on to stress that "*competition will have an important role in our industrial strategy*", and that as part of that industrial strategy Commissioner Vestager "*should develop tools and policies to better tackle the distortive effects of foreign state ownership and subsidies in the internal market*".

The second limb is particularly interesting as it could be read to argue a potential deficiency in the current EU merger rules (which were deemed fit for purpose not so long ago by Commissioner Vestager's special advisers, as discussed further on in this article), whilst positively recognising that competition will have an important role in the EU's industrial strategy. The role of competition law in industrial policy begs the question as to whether that statement applies equally to industrial policy in competition law or whether the role or influence in the former scenario is one-directional. Further, the reference to the "*distortive effects of foreign state ownership*" suggests a nod of acknowledgment to the very arguments that the parties ran, and which the EC rejected, in *Siemens/Alstom* – CRRC being an often cited, state owned, Chinese competitor in that decision.

In sum, whilst the EC has traditionally strongly resisted, or at least strongly denied, the influence of other policy considerations in its application of EU merger control law, the roles and tasks conferred on Commissioner Vestager for her upcoming term may create new tensions in this regard. That said, when questioned by the Committee on Economic and Monetary Affairs on the issue in September, Commissioner Vestager stated that she sees "*no trade-offs between the two legs of my portfolio, but rather synergies: it will allow me to use the insights and general market knowledge acquired under the competition portfolio when designing regulatory initiatives in digital matters*" and that independence in EC casework is "*simply non-negotiable*". This statement of impartiality was reiterated before the European Parliament in Commissioner Vestager's hearing on 8 October 2019, but she indicated that the EC faced a "*dual challenge: on the one hand to secure fair competition within our single market, so that customers and consumers are well served; and at the same time to stand up for our European businesses when they are met with unfair competition outside of Europe*".

3 Enforcement Trend

Notwithstanding Commissioner Vestager's highly publicised first term, changes in overall levels of EU merger control enforcement have been more subtle. By way of example, the tally of Phase II prohibition decisions comes in at six during Commissioner Vestager's current tenure, as compared to Mr. Almunia's four. Similarly, the number of transactions approved in Phase II comes in at six (with no conditions) and 26 (with conditions), as compared to her predecessor's nine and 20, respectively. The starkest difference, when looking purely at the EC's statistics, was the increase in the number of conditional Phase I clearances (86 *vs.* 44 during their respective terms).

4 Procedural Infringements in EU Merger Control

Whilst the above figures clearly point to an increase in appetite for remedial action in merger control at the EU level, Commissioner Vestager's legacy term has been particularly marked by the EC's more bullish approach to procedural infringements, enforcement of which has seen a sharp rise in frequency and severity during her tenure, as explored below.

Gun-Jumping

Under the EU Merger Regulation ("EUMR") merging firms are prohibited from integrating their businesses or otherwise coordinating their commercial behaviour until the proposed transaction has been approved by the EC (*standstill obligation*). The purpose of the standstill obligation is to provide the EC with an opportunity to evaluate the competitive impact of a proposed transaction before it can have any effect on the market or the merging parties' activities. Merging parties that "jump the gun", *i.e.*, violate the standstill obligation by prematurely integrating their businesses or attempting to influence each other's activities prior to EC clearance, can face substantial fines. Similarly, merging parties that are competitors should refrain from coordinating their commercial behaviour prior to closing. Even if no actual coordination occurs, the mere exchange of competitively sensitive information between actual or potential competitors may compromise competition between the parties.

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The EUMR contains both a positive obligation on companies to notify reportable concentrations (Article 4(1)), and a negative obligation not to close or implement a reportable concentration prior to its approval (Article 7(1)). Under Article 7(1) EUMR, concentrations with a Union dimension cannot be implemented before they have been declared compatible with the internal market. The concept of a "*concentration*" is defined by Article 3 EUMR, and refers to a "*change of control on a lasting basis*" as the determining factor. Control equates with the possibility, conferred by rights, contracts or other means, of exercising decisive influence on an undertaking. The EC can impose fines of up to 10% of the aggregate worldwide group turnover of the undertaking concerned for intentional or negligent violations of the obligation, as well as interim measures (Article 14(2)).

In April 2018, the EC imposed a record fine of €124.5 million on the multinational telecoms provider Altice for partially implementing its acquisition of the Portuguese telecoms and multimedia operator PT Portugal, before obtaining the EC's approval. The EC's fine followed Altice's fine of €80 million two years earlier from the French Competition Authority ("FCA") for a similar infringement in relation to its acquisition of SFR Group and OTP Group. In both instances, Altice was found to have gained and exercised decisive influence over the day-to-day business of the target entities in the period between signing and closing. The EC and the FCA concluded that Altice did so through restrictive covenants in the purchase agreement, effective influence on day-to-day business decisions, both within the scope of and beyond those covenants, and the exchange of competitively sensitive information without the implementation of proper safeguards.

It bears emphasis that, up to and until *Altice*, the EC had not issued any decision or provided any other type of guidance on pre-closing behaviour (apart from a very old case on set-top boxes). Prior cases did not, for example, provide specific guidance on the conduct of companies in the period between signing and closing. Notwithstanding the absence of precedent, the EC's new-found appetite for enforcing procedural infringements was aptly reflected in the severity of the fine.

Misleading/Incorrect Information

Under Article 14(1)(a) EUMR, notifying parties who, either intentionally or negligently supply incorrect or misleading information may be liable for fines of up to 1% of the aggregate turnover of the undertaking concerned. In addition, pursuant to Article 6(3)(a) and Article 8(6)(a) EUMR, the EC may revoke its decision on the compatibility of a notified concentration where it is based on incorrect information for which one of the undertakings is responsible.

In May 2017, the EC fined Facebook €110 million for providing incorrect or misleading information during the EC's 2014 investigation under the EUMR of Facebook's acquisition of WhatsApp. Specifically, Facebook stated in its notification form and in a subsequent response to a request for information that it would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts. Notwithstanding this statement, in August 2016, WhatsApp announced updates to its terms of service and privacy policy, including the possibility of linking WhatsApp users' phone numbers with Facebook users' identities. Following a Statement of Objections, the EC's decision found that contrary to Facebook's statements during its merger review process, the technical possibility of automatically matching users' accounts existed, and the Facebook employees were aware of said possibility at the time. Whilst the EC decision bore no impact on the outcome of the transaction itself, Commissioner Vestager commented that the decision "*sends a clear signal to companies that they must comply with all aspects of EU merger rules, including the obligation to provide correct information. And it imposes a proportionate and deterrent fine on Facebook. The Commission must be able to take decisions about mergers' effects on competition in full knowledge of accurate facts*".

Shortly after its decision against Facebook, in July 2017 the EC launched a simultaneous attack against each of GE and Merck/Sigma-Aldrich for allegedly providing misleading or incorrect information during their respective merger review processes (it should be noted that at the same time, the EC also issued a statement of objections against Canon, in its acquisition of Toshiba Medical Systems, for alleged gun-jumping, which ultimately resulted in a fine of €28 million in June 2019). An overview of the GE proceedings is provided below; the *Merck/Sigma-Aldrich* investigation is still pending.

In April 2019, the EC fined General Electric €52 million for providing incorrect information during the EC's investigation under the EUMR of GE's planned acquisition of LM Wind. In GE's January 2017 notification of the proposed transaction, it stated that it did not have any higher power output wind turbines for offshore applications in development beyond its existing 6 megawatt turbine. However, through its market investigation, the EC discovered that GE was offering a 12 megawatt offshore wind turbine to potential customers. Following the discovery, GE pulled and refiled the same transaction, this time including complete information on this future project. The EC cleared the transaction in March 2017. Following a Statement of Objections issued against GE in July 2017, the EC found in its decision that, contrary to GE's statements in its first notification, GE had indeed been offering a higher output offshore wind turbine to potential customers. Although that fact had no ultimate bearing on the EC's clearance decision, it was incorrect.

In its July 2017 Statement of Objections against *Merck/Sigma-Aldrich*, the EC set out its preliminary conclusion that the companies had provided incorrect or misleading information in the context of the transaction. Following a conditional clearance decision in June 2015, the EC required that the parties divest certain Sigma-Aldrich assets to address concerns regarding specific laboratory chemicals. In its preliminary conclusion, the EC found that the parties had failed to provide the EC with important information concerning an innovation project that would, in the EC's view, have had to be included in the remedy package. The EC's investigation is currently ongoing.

The sharp increase in EC penalties for procedural infringements during Commissioner Vestager's first term is a stark reminder for companies, and their counsel, to ensure that procedural rules in EU merger control are strictly adhered to, and that sufficient care and regard be taken to ensure that notifications are comprehensive, accurate, and complete. In light of President-elect von der Leyen's Mission Letter to Commission Vestager (described above) we can expect continued rigorous enforcement of procedural infringements at both the EU and national level.

5 "Killer" Acquisitions

The idea of "killer" acquisitions surfaced during Commissioner Vestager's first term, with her commenting earlier this year (and neatly setting out the proposed theory of harm) that the EC "*hear[s] many worries that big digital businesses might be blocking paths that deliver innovation to consumers. We hear that promising ideas from smaller innovators can disappear, not because consumers don't like them but because bigger businesses buy up those innovations just to close them down*".

In theory, killer acquisitions can typically be divided into two buckets. The first bucket, referred to as true "killer" acquisitions, involves an (alleged) direct harm to competition where an incumbent of a digital market acquires a target that is an actual

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or potential competitor. Here, the theory of harm presumes that the acquirer will, for example, discontinue a target's pipeline product that would have competed with it.

The second bucket, referred to as "spoiler" acquisitions, involves an (alleged) indirect harm to competition where an incumbent acquires a target that supplies a complementary product/service, thereby depriving its direct (actual or potential) competitors of the opportunity to improve their products and better challenge the incumbent.

The impetus for this novel theory of harm came from a string of high profile (and often high value) acquisitions that did not fall within the EC's jurisdiction under the EUMR because the EUMR employs a fairly high revenue test in order to assess whether a transaction is notifiable to the EC. Many of the target companies in question had many end-users but more modest revenues, thereby allowing the transactions to fall below the EC's radar (the competition authorities in Germany and Austria recently added alternative transaction value-based thresholds for this very reason). That said, it should be noted that a number of these transactions did ultimately end up before the EC under the EUMR's referral process, such as Facebook's acquisition of WhatsApp , as mentioned above.

Much debate has since ensued as to when, how, and if the EC should deal with these types of transactions. In response, the EC published a report in April 2019 prepared by three special advisers to Commissioner Vestager to explore how EU competition policy should evolve in the digital age (the "Report"). The Report advocates for "*vigorous*" enforcement and certain adjustments to the way competition law is currently applied, including:

- tougher treatment of a dominant platform's alleged "self-preferencing" of its own products and services; and
- potential data-sharing or interoperability remedies for dominant technology companies if required to ensure effective competition by breaking down network effects and data-related entry barriers.

Interestingly, the Report advocates for no change to the current EUMR thresholds to capture "killer" acquisitions, suggesting instead that if these types of transactions are identified, it should be for the companies concerned to prove no anti-competitive effects or offsetting efficiencies. In the interim, the Report suggests that it is more appropriate to monitor the performance of the new thresholds linked to transaction value that were recently introduced in Germany and Austria (mentioned above).

Rather than conclusively opining on how EU rules on competition should adapt to the mercurial digital economy, the Report usefully contributed to the ongoing debate as to whether existing rules are fit for purpose. Commenting on the Report, Commissioner Vestager stated that the EC will "*need to take some time to think about those ideas and to discuss and debate before conclusions are reached*". In light of Commissioner Vestager's new term, and her dual role as Executive Vice-President-elect responsible for coordinating the EC's agenda on a Europe fit for the Digital Age, now would seem like the perfect time to do so. Indeed, in response to questions put by the Committee on Industry, Research and Energy, Commissioner Vestager indicated that she is "*convinced that [EU] merger enforcement must capture all mergers that can harm competition across borders in the Single Market*" and that the evaluation of said rules will be a priority during her upcoming term. Indeed, this was confirmed during Commissioner Vestager's hearing before the European Parliament where she confirmed, in the context of applying competition law to a "*world that's changing fast*", to "*move forward with the review*" that the EC has started of the current EU rules on antitrust, mergers and state aid.

The irons are most definitely in the fire…

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