

EU and UK Merger Regulators Look Beyond Horizontal and Vertical, With Digital ‘Ecosystems’ a New Focus

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Key Points

- EU competition regulators are increasingly considering “ecosystems” of products and services in their analysis of the competitive impact of mergers — a framework that often does not fit with the historical focus on horizontal and vertical relationships.
- The merging parties’ rationales and internal documents have taken on a greater importance in both EU and U.K. merger reviews.
- EU and U.K. regulators are resorting more frequently to “stop the clock” mechanisms, thereby extending the time they have to investigate transactions.
- Agencies are continuing to apply traditional frameworks of assessment in most non-horizontal mergers, and large, complex deals are still getting cleared where the parties employ the right strategy.

The regulatory review of mergers in dynamic and innovative markets has become more complex and fragmented across key jurisdictions. On the back of perceived underenforcement, several competition authorities in Europe have seen their ability to review deals in innovative markets increase with the introduction of flexible jurisdictional rules and new notification thresholds.

Regulators also continue to refine their substantive assessment of mergers in dynamic markets, shifting their focus to new concerns, a trend that is particularly visible in digital markets. Authorities are increasingly investigating digital ecosystems competition, platform-based competition, access and interoperability issues, user data concerns and interplay between competition and data protection.

Authorities in Europe continue to adapt their framework of analysis for large, complex deals in digital markets that do not fit squarely in their traditional approach to horizontal, vertical or conglomerate effects. They are considering complex interconnecting theories of harm, anticipating multiple repercussions of a transaction across numerous markets.

The European Commission (EC) is particularly attentive to transactions that involve a combination of horizontal and non-horizontal effects that can reinforce each other. A good example of this approach is the review of Google’s 2021 acquisition of Fitbit, where the EC examined multiple effects across several business segments and apps.

In addition, regulators are increasingly concerned about restrictions of potential competition, examining the long-term effects of a merger on products or services that have not yet been developed. As part of their assessment, regulators query the merging parties’ growth strategies, including:

- Innovations.
- Investments and product development.
- How these impact the parties’ ability and economic incentive to enter or expand in the relevant market.

The trend of testing novel theories of harm is also apparent in the U.S., where the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have been focusing on the elimination of potential competition from nascent competitors and looking beyond traditional horizontal and vertical theories of harm.

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In their July 2023 draft revised merger guidelines, the agencies take the position that mergers that could entrench or extend a dominant position are problematic, even if the deal parties do not compete or vertically intersect with one another. The agencies also provide guidelines specifically dealing with mergers involving platform competition. (See [“As US Antitrust Agencies Double Down on Merger Enforcement Approach, New Deal Strategies Emerge.”](#))

EC’s New Focus on ‘Ecosystem’ Mergers

The EC has stepped up its focus on mergers that involve “ecosystem” markets where, according to the EC, a company operates in several linked markets. As a result, not only the acquisition of a direct competitor but also the addition of a linked service to a company’s ecosystem of services raises concerns.

The EC’s decision in September 2023 to block the proposed merger between the hotel reservation platform Booking.com and the flight booking platform Etraveli is the regulator’s first prohibition resulting from concerns arising from a service ecosystem.

The EC concluded that the transaction would have channeled Etraveli customers to Booking.com, allowing the latter to expand its travel services ecosystem business and strengthen its position on the market for online travel agencies. It considered the proposed remedies offered by Booking.com (including to show flight customers a choice screen on the flight check-out page with multiple hotel offers from competing hotel online travel agents) to be insufficient to address the concerns.

With its decision, the EC departed from its merger guidelines and adapted its framework of analysis to the novel nature of these online businesses. In sharp contrast, the U.K. Competition

and Markets Authority (CMA) cleared the transaction a year earlier without conditions, concluding that customers do not necessarily purchase different travel services from the same provider.

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Ecosystem theories have also been considered in other cases. The EC examined Meta’s ecosystem in the context of its acquisition of cloud-based customer relationship management services provider Kustomer. The agency considered whether the deal would enable Meta to steer more customers into its ecosystem, but this fed onto a traditional non-horizontal foreclosure theory of harm: that Meta would have the ability, as well as an economic incentive, to engage in foreclosure strategies toward Kustomer’s close rivals and new entrants.

In the U.K., when the CMA initially prohibited Microsoft’s acquisition of Activision, it considered the effect on Microsoft’s ecosystem. The CMA eventually cleared the transaction with conditions after it was restructured. In contrast, the FTC in the U.S. filed an administrative complaint, and later a federal lawsuit, challenging the proposed acquisition alleging vertical theories of harm. (The U.S. District Court for the Northern District of California eventually allowed the merger to proceed).

There is no clear definition of what an “ecosystem” is, but authorities appear attentive to strong links among different markets with one central hub, even where there are no clear horizontal or vertical business relations.

This new theory of harm is not confined to the digital space, and the EC indicated the possibility of new guidelines for how it will handle ecosystem mergers in the future.

Increased Focus on Deal Rationale and Internal Documents

European competition authorities have also been placing ever-greater focus on deal valuation, large and unexplained deal premiums and deal rationale — *i.e.*, the parties’ future intentions and the impending implications of the deal for the market. In addition, regulators continue to use the parties’ internal documents and third-party evidence and market tests.

The EC regularly asks for copies of documents produced for other regulators, including internal documents provided to the FTC and DOJ in the context of “second requests” for information.

Similarly, in the U.K., the CMA’s revised merger assessment guidelines emphasize the importance of internal documents to reveal the parties’ intent, particularly when other data or sources of evidence are scarce and market developments are uncertain.

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The CMA increasingly relies on this type of evidence, and its decision to block Meta’s acquisition of Giphy in 2022 was almost entirely based on the internal documents of the merging parties, third-party evidence and the CMA’s discussions with market participants.

Both the EC and the CMA do not hesitate to use their formal information-gathering powers, with threats of penalties for failure to comply.

Longer In-Depth Merger Reviews

The duration of “stop the clock” periods in in-depth merger investigations has been increasing in large, complex cases. The EC and the CMA can suspend the statutory deadlines of in-depth investigations if the merging parties fail to respond to requests for information on time.

Although stop-the-clock suspensions have long been part of the transaction review process, they have become more common in recent years, contributing to longer review proceedings.

The Way Forward

In the vast majority of non-horizontal mergers, agencies continue to apply traditional frameworks of assessment, examining the ability, incentive and potential effects of foreclosure. Large, complex deals still get cleared where the parties have the right strategy.

However:

- Merging parties should identify early on in their negotiations which authorities are most likely to have an interest in the deal.

- They should also consider right from the start how regulators will perceive their deal rationale.
- Lastly, parties should plan realistic deal timetables to factor in early engagement with authorities and burdensome, resource-heavy document production processes.

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