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Ex-US Merger Control: Five Trends for 2024

In recent years, there has been a global shift towards tougher merger control, new theories of harm, more expansive regimes, and more regulatory hurdles emerging. It's no surprise that once esoteric phrases like "killer acquisitions," "competence creep" *and* "behavioural remedies" *are entering the mainstream lexicon. Against this backdrop, here are the top five issues in merger control to look out for in 2024:*

#1: Heightened risk of divergent merger control reviews

A key concern will be the heightened risk of divergent assessments between different regulators across multinational deals, leading to reduced predictability and deal certainty. The global political landscape is increasingly polarised and protective, as demonstrated by the surge in FDI regimes (see point 5). Also, there is a risk of less cooperation between certain regulators on global transactions.

The case that gathered the most attention last year was the $69 billion *Microsoft/Activision* transaction, which was blocked by the UK's Competition and Markets Authority ("**CMA**"), but conditionally cleared by the European Commission ("**Commission**") after their respective Phase 2 investigations. The CMA's prohibition aligned with the US's Federal Trade Commission ("**FTC**")'s filing for an injunction against the merger, but shortly after the FTC's injunction was rejected by the US courts, the CMA also cleared a new package of divestment remedies proposed by Microsoft.

The divergent and drawn-out outcome(s) of *Microsoft/Activision* were not isolated: for example, (i) *Booking/eTraveli* was cleared unconditionally by the CMA at Phase 1 but blocked by the Commission a year later, and (ii) *Facebook/Kustomer* was cleared unconditionally at Phase 1 by the UK regulator, but required remedies at the Commission level (M.10262 – *Facebook/Kustomer*).

Booking/eTraveli resulted in the Commission's first prohibition decision based on "ecosystem" concerns, where it focused on the entrenchment of dominance. The Commission considered that Booking had a dominant position in the market for *hotel* online travel agency services, and that by acquiring eTraveli, a *flight* online travel agent, Booking would be able to benefit from network effects with potentially detrimental consequences for both hotels and consumers.

The emergence of a new theory of harm coupled with increasing divergence complicates analysis, which may now require a granular jurisdiction-by-jurisdiction assessment, and not simply limited to traditional horizontal and vertical reviews.

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#2: Unpredictable and expansive jurisdictional tests in Europe

Recent developments have seen an extension of EU and national jurisdiction into previously unreportable deals. In March 2021, the Commission *de facto* widened its powers to assert jurisdiction over transactions that are not reportable under either national or EU thresholds by revamping its use of Article 22 of the EU Merger Regulation ("**EUMR**"). Since then, three deals have been notified to the Commission that were otherwise non-reportable in any EU jurisdiction (*Illumina/Grail*; *Qualcomm/Autotalks*; and *EEX/ Nasdaq Power*).

One controversial example is *Illumina/Grail*, where the target, Grail, had zero revenues in the EU, and therefore fell well below the EUMR and Member State merger control rules. Illumina appealed the Commission's jurisdiction in 2021, but the General Court sided with the Commission, noting that Article 22 provides the Commission the flexibility it requires to ensure that un-notifiable concentrations do not escape review. Illumina unsurprisingly appealed (C-611/22), with the judgment expected this year. If the court confirms the Commission's expansive approach, this could embolden the Commission and create even more deal uncertainty, especially where the target is small but in an emerging sector.

Similarly, at the national level, the 2023 judgment in *Towercast* (C-449/21) has effectively expanded the scope of national competition authorities to review *non-reportable mergers*. The judgment means that Member States can review whether non-reportable acquisitions by a dominant undertaking could be an abuse of its dominant position. The case is already having ramifications: shortly after the judgment, the Belgian Competition Authority opened an *ex-officio* review of the completed *Proximus/ EDPnet* transaction despite the original transaction not meeting the Belgian merger control thresholds, and imposed interim measures to ensure the operational autonomy of EDPnet. Ultimately, the transaction was voluntarily unwound when Proximus decided to divest EDPnet Belgium to Citymesh.

Finally, the new Digital Markets Act ("**DMA**"), which entered into force in 2023, places burdensome obligations on designated "gatekeepers" (currently Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft) to report to the Commission any proposed acquisitions of entities that provide digital services, regardless of their turnover or presence in the EU. While the Commission cannot review deals under the DMA itself, it may still seek to review them under Article 22. As a result, we can expect that the DMA obligations may create new avenues for merger control investigations.

Similarly, in the UK, the government is pushing through new legislation—the Digital Markets Competition and Consumers Bill ("**DMCC**")—that may expand the jurisdiction of the CMA even further.

The CMA already has one of the most expansive regimes, given its flexible interpretation of the "share of supply" test, but the DMCC in its current form potentially expands this further by introducing an additional 'acquirer'-based test, which looks at whether (i) one party has more than £350 million turnover in the UK and 33% share of supply—without a need for overlap in activities and (ii) another party to the transaction has nexus to the UK—which requires some activity in the UK, but has no de minimis. Although the CMA has indicated that the purpose of the new threshold is to capture killer acquisitions, it remains to be seen how it will be applied in practice. As a result, large PE investors may have to mitigate against CMA enforcement in a larger number of transactions than previously.

#3: ECJ-(re)lowered standard of proof for the Commission to block transactions

The ECJ's 2023 ruling in *CK Telecoms* (C-376/20) lowers the standard of proof the Commission is required to achieve in its merger reviews—potentially leading to more prohibitions in the future.

First, the ECJ held that the Commission needs only to demonstrate by a simple "balance of probabilities" that a transaction will result in a significant impediment to effective competition ("**SIEC**"). In doing so, the ECJ lowered the standard of proof required by the Commission from the General Court's threshold of "strong probability."

Second, the Commission was not required to establish that the parties were particularly close competitors in order to establish an SIEC. The ECJ lowered the standard of competitive restraint a competitor should have on a market in order to be considered an important competitive force. In its *CK Telecoms v Commission* judgment, the ECJ found that the Commission was not required to demonstrate that a competitor competed particularly aggressively on price or pursued a pricing policy that could significantly alter the competitive dynamics on the market; instead, the Commission need only demonstrate that that competitor had more influence on the competitive process than its market share would suggest.

These findings are likely to embolden the Commission, and may lead to more prohibitions as a result.

#4: New mandatory and suspensory regime for transactions with ex-EU foreign subsidies

The highly anticipated Foreign Subsidies Regulation ("**FSR**"), which seeks to address distortive effects of non-EU subsidies on the EU market, came into force in July 2023. While the Commission has set the target revenue threshold relatively high at €500 million, in practice it has not limited the number of notifiable transactions: within the first six weeks, the Commission had already received its predicted annual quota of notifications (around 40).

One of the reasons is that once the target threshold is met, the Commission requires only €50 million (across the parties) of foreign financial contributions (*i.e*, from non-EU countries) in the past three years. Financial contributions are defined widely to include e.g. sales from ordinary government contracts. The consequence is a broader jurisdiction than arguably intended, which could have excessive ramifications for the Commission and investors too, even if most financial contributions do not end up constituting "foreign subsidies" (which are defined more narrowly).

In a welcome sign that the Commission is acknowledging the impact on regular investors and the consequential effect on inbound investment in the EU, we understand that discussions are under way between DG COMP and DG FISMA to establish a private equity exemption.

#5: More mandatory and suspensory regimes for foreign direct investment

As national protectionist sentiment has risen, there has been a surge of new foreign investment controls around the world, creating additional

filing obligations. Within the EU, 22 out of 27 Member States now have regimes in force, with more expected (e.g. Ireland). Further afield, a new regime is expected in Singapore in 2024, which marks a significant shift from a traditionally welcoming jurisdiction for overseas investors.

Financial investors should be aware that FDI regimes do not focus exclusively on 'hostile' countries—they may also act to preserve domestic capability; nor do they focus exclusively on control investments—they may also catch minority acquisitions and even limited partnership interests.

Unlike merger control, FDI decision-making is opaque, and remedies (usually behavioural) are more frequently imposed. To counter this, transaction agreements may impose onerous obligations on buyers, such as to offer any remedies necessary to obtain FDI clearance ('hell or high water' provisions).

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