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THE YEAR AHEAD IN EU MERGER CONTROL: FIVE KEY TRENDS TO WATCH

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The dawn of a new year provides a great opportunity to take stock of where EU merger control might go in the next year. In this blog, we outline what we consider to be five key trends to watch out for in EU merger control in 2020.

New Commission, Same Competition Commissioner

In December, we reported on the new European Commission taking office (see our blog here). Unusually, the Competition Commissioner, Margrethe Vestager, has been appointed for a second consecutive term, albeit with a wider and more powerful portfolio encompassing a Vice Presidency of the Commission overseeing Europe's digital agenda. In this respect, Vestager's ongoing crackdown on "big tech" and her laser focus on digital issues in competition law will continue. Vestager has said herself that her digital sector work may not have gone far enough during her first term, so we expect that she will hit the ground running in her second term with her broader mandate and enhanced experience on the job.

While the Commissioner remains the same, changes are coming at the top of the Directorate General for Competition – the body responsible for the day to day enforcement of EU competition law. In December 2019, the Commission announced that Olivier Guersent had been appointed as new Director General of DG Competition. While he is currently in charge of the Commission's Financial Services initiatives, Guersent spent a significant part of his earlier career at DG Competition, including in the Merger Task Force. So, like Vestager, we expect Guersent will hit the ground running. We also note that Vestager has a very deep bench of advisers in her own private office (or Cabinet), including merger specialist Michele Piergiovanni who ran the DG Competition merger team specialising in technology and digital deals.

As a result, we expect continuity in approach from Vestager at the top and throughout DG Competition – that is, tough, focussed and enforcement-minded in particular with regard to the digital sector.

Merger Control, Politics and European Champions

That being said, there may be some muddying of the waters with regards to EU competition policy in 2020 – especially in the merger sphere. One of the most discussed and debated decisions of the Commission during Commissioner Vestager's first term was the prohibition in February 2019 of the proposed merger of Siemens and Alstom's railway businesses. Siemens and Alstom argued that the merger was needed in order to allow them to compete more effectively against overseas companies – and, in particular, Chinese competitors. The Commission, however, did not buy that argument and claimed that the transaction would lead to a significant loss of competition in Europe.

The decision to block the transaction was greeted with significant political criticism – particularly from senior government ministers in Germany and France, being the home countries of Siemens and Alstom respectively. It was argued that, if European businesses were going to compete on the world stage, then European competition law needed to better allow for the creation of "European champions". By blocking the Siemens/Alstom merger, the argument goes, the Commission was preventing them from being able to compete effectively on the world stage. On the other hand, the Commission blocked the deal to safeguard competition at home and did not see merit in the European Champions argument.

Since then, a debate has been raging over whether European competition law requires amendments in order to better allow European companies to compete. This has seen a joint manifesto issued by the French and German governments calling for changes to the EU's merger control, state aid and other procedural competition rules, and a position paper from the Dutch government setting out a number of suggestions to ensure government backed foreign companies do not gain an unfair advantage on European markets. Various members of the European Parliament and other political groups have also made similar comments.

Not everyone is supportive of changes to European competition law, however. Indeed, Commissioner Vestager herself was firm in the face of criticism that the Siemens/Alstom decision was correct. Many prominent competition lawyers and economists have also made it clear in open letters that they do not consider that changes to EU competition law are required. The Austrian competition agency has also set out its view in a position paper that, among other issues, the Franco-German proposals would benefit businesses from large Member States to the detriment of companies from smaller countries, such as Austria.

While there is by no means consensus on what the issues – if indeed there are any – that need to be addressed in the EU's current competition law regime are, this is an area where we anticipate that discussion and debate will continue throughout 2020. Whether the new Commission – led by a German, Ursula von der Leyen – pushes for substantive changes to EU merger control and other competition laws remains to be seen. It is, however, possible that some of the first movement is already being seen, with Commissioner Vestager announcing in a December speech that the Commission would be reviewing its approach to market definition. While this may be primarily aimed at addressing issues in the "digital economy" (see below), it is possible that the Commission will also consider issues relating to the geographic extent of competition (and particularly from non-

European companies) as part of this review. Indeed, the French government has already claimed the announcement as a victory in the fight for changes to EU competition law.

Tech, Notification Thresholds, Big Data and more…

The question of how merger control should deal with the tech industry and so-called "big data" continues to be a hot topic of debate, with no sign of that abating as we move into 2020. Over recent years, questions have been raised as to whether current merger control thresholds are sufficient to capture all transactions of interest in the technology industry, and also as to whether new approaches to assessing substantive competition concerns need to be addressed.

While these debates are nothing new, 2019 saw a number of key reports on competition law and the digital era in the EU, the UK and Germany. These reports all cover the ability of competition law as a whole to address concerns in the digital sector but, in that context, they also contain specific discussion of merger control issues.

The European Commission launched a consultation in late 2016 to determine whether new "transaction value" thresholds should be introduced to ensure that deals where large incumbents purchase start-up companies with low revenues do not slip through the merger control cracks. While Austria and Germany have now had such thresholds in place for two years (with, it appears, no transactions of interest being captured), the EU and German digital reports both suggested that it is not yet necessary to introduce such thresholds at EU level. The Commission has, however, stated that it will continue to monitor whether a threshold change may be needed in future. Other alternative approaches have also been discussed by competition agencies, the Commission and in the various reports – such as allowing agencies to have a "residual" power to "call in" transactions that may be of interest but are not otherwise notifiable (as the Swedish competition agency currently has the ability to do), and requiring large technology companies to notify any transactions they undertake.

Whether the perceived "enforcement gap" could be filled by such thresholds is still up in the air, but so far the Austrian and German experience has showed that gap may not exist in practice. The French competition agency has also rejected such an approach and has been considering whether it wants to take the Swedish residual approach "just in case" a case may be missed under their existing regime.

The substantive assessment of such acquisitions has also been put in the spotlight. The EU's expert report on competition law for the digital era suggested that the Commission should revisit its theories of harm in order to address such mergers – with a particular focus on dominant platforms acquiring fast growing start-ups. We expect such questions to form part of the Commission's ongoing review of competition law in the EU.

Questions have also been asked as to whether the rest of the EU competition "toolbox" is sufficiently stocked to assess the competition harm that can arise from deals in the tech industry

and, in particular, those deals that involve significant data sets and significant platforms. As noted above, Commissioner Vestager has already announced that a review will be undertaken of how the Commission approaches market definition, which may signal the first step in updating the toolbox for assessing technology deals. Further work on and, potentially, changes to Commission (and Member State) guidelines and review procedures are likely to take place in 2020. The Commission may also use cases in 2020 as an opportunity to test theories of harm relating to the acquisitions of large amounts of data – indeed, in response to questions concerning Google's proposed acquisition of Fitbit, Commissioner Vestager hinted that the Commission will pay very close attention to the impact of the combination of user data on competition.

Procedural Infringements – Continued Vigilance Needed in 2020

In our blog at the start of 2018, we indicated that a crackdown on procedural infringements in merger control rules across Europe (and, indeed, globally) was gaining momentum and likely to continue. That prediction has proven correct, and has shown no signs of slowing down.

At the Commission level, Canon was fined EUR28 million in June 2019 for gun jumping – that is, partially implementing its transaction with Toshiba Medical Systems before it had notified, and received clearance from, the Commission. This followed Europe's largest ever gun jumping fine – EUR124.5 million – which was levelled against Altice in 2018. Earlier in 2019, the Commission had fined General Electric EUR52 million for providing incorrect information in the course of a merger review.

But it's not just at Commission level where the enforcement drive continues. Throughout 2019 we saw around 20 fines for various different procedural infringements at EU level and in a number of EU Member States, including Austria, Bulgaria, Denmark, Poland, Romania, Slovenia, Spain and the UK.

With this ongoing focus on procedural infringements in merger cases around Europe, we anticipate agencies will find safety in numbers and continue the crackdown during 2020. We expect that agencies will continue to look for merger control breaches and use their powers to prosecute them throughout 2020 and beyond. As ever, companies involved in corporate transactions – from acquisitions to joint ventures to minority stake purchases – should be extra vigilant in this environment and ensure they have merger control compliance front and centre during their deal process.

Brexit Uncertainty (Still…) and CMA Enforcement

In late December 2019, the UK Parliament approved the Brexit withdrawal agreement. Currently, it is expected that the European Parliament will ratify the agreement in early 2020. However, that does not mean that Brexit uncertainty will end.

Whenever Brexit happens, and whatever the final terms of the UK's exit from the EU are, there will be an impact on merger control. Currently, if a transaction meets the notification thresholds (based on EU-wide revenues of the parties) under EU merger control law, it must be notified to the European Commission, and the UK's Competition & Markets Authority ("CMA") does not have jurisdiction to review that transaction. The removal of the UK from the EU merger control regime could mean that merger parties find themselves notifying transactions to both the European Commission and the UK's CMA. This will also mean that the CMA may find itself reviewing major international transactions that would previously have been reviewed in Brussels. Although the CMA has beefed up its staffing levels for this eventuality, the CMA will without doubt need to re-assess how it prioritises its caseload.

However, there may also be some positives for merging companies – particularly for companies that generate significant UK revenues. Notification to the UK's CMA is always voluntary, meaning that parties to mergers that do not raise substantive competition law concerns are unlikely to notify them to the CMA. At the same time, following Brexit, revenues generated in the UK will no longer count towards the EU merger control thresholds. Accordingly, companies that generate significant UK revenues, with relatively limited revenues across the rest of the EU, may find that they now fall below EU thresholds and accordingly that non-problematic transactions that may previously have required EU notification no longer need to be notified in the EU or the UK.

We expect that, as the Brexit deal is finalised and the impact of any transitional period becomes clearer, there will be further clarity on precisely how the CMA will operate post-Brexit. In the meantime, the CMA appears to have been more active than usual in "calling in" transactions that have not been notified to it, which may be explained by the increased staffing levels in preparation for Brexit.

BCLP's Antitrust & Competition group advises on merger control in the EU and globally. If you have any questions about this blog or merger control more generally, then feel free to contact any of the lawyers listed.

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