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Since June 2021
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From 2019 to 2021
Deputy Director-General in charge of State Aid, Directorate General for Competition, European Commission, Brussels

From 2014 to 2019
Deputy Director-General in charge of Merger Control, Directorate General for Competition, European Commission, Brussels

The most important merger decisions

Between 2014 and 2019, you were deputy director-general for mergers, but your experience with merger control starts well before that, notably when you were a member of the Merger Task Force before your stint in the cabinet of Mario Monti. You are one of the most experienced practitioners in this field in Europe. Among the thousands of EU merger decisions, if you had to pick the three most important EU decisions, which ones would these be? And why?

I am tempted to answer that the most important decisions are the large number—more than 300 by now—of first-phase decisions with remedies. They do not very often attract attention but show merger control at its best: the authority and the parties working together to remove competition concerns and allowing the deals to move ahead quickly, without harm to consumers.

But I'll play the game and pick three decisions. First, *GE/Honeywell*, because it established the Commission's role as a major merger control authority in global M&A deals. Second, paradoxically, *Airtours/First Choice*; its annulment by the Court, followed by two other a few months later, prompted a major reform of the Merger Regulation in 2004. This set the ground for the development of the modern and balanced merger control legal framework and enforcement system that the Commission has been applying since and that is recognised as a model worldwide. And finally, I would mention *Siemens/Alstom*, as one particular example of the independence that the Commission has always demonstrated in assessing mergers. This decision also relaunched a major debate on the relationship between competition and industrial policy; older merger decisions, *De Havilland/Aerospatiale/Alenia* or *Volvo/Scania* had raised similar discussions in previous decades. I am confident that, once again, the view that will prevail is that a competitive EU single market, which guarantees a level playing field for all, is a key asset to ensure the competitiveness of the EU industry, at home and on the world stage.

The SIEC test

In 2004 a new EU Merger Regulation came into force. It introduced the significant impediment of effective competition (SIEC) test. At the time, there was a concern that the dominance test, which was in use before, was unable to catch so-called "gap cases" in oligopolistic markets. More than fifteen years later, how, in your view, has the SIEC test changed merger control in practice?

The SIEC test has contributed very significantly to consolidate a system of merger control based on sound economic analysis. It has allowed the Commission to focus on the effects of the merger—on prices, on output, on innovation—rather than on structural features of the market. We always think about the impact of the SIEC test on the assessment of horizontal mergers in oligopolistic markets, where it has allowed the Commission to challenge mergers that do not create a leading market player but that could nevertheless have a negative impact on prices or other parameters of competition; but it has also an important impact on how vertical mergers are assessed, by placing the focus on the effects of foreclosure practices.

This evolution has been driven by the Commission's decisional practice, without the Court having to take a position in fifteen years on how the Commission was interpreting the Merger Regulation in these cases. This has changed now, the *Three/O2* judgement questions some of the key tenets of this interpretation; it will be very welcome that the ECJ clarifies how the SIEC test should be applied in the future when it rules on the appeal to the GC judgement submitted by the Commission.

Three/O2 judgements

In May 2020 the General Court of the European Union annulled the Commission decision to prohibit the merger between Three and O2, two of the four main providers of mobile telephony services in the United Kingdom.[1] The Commission has appealed the judgement before the Court of Justice, so it ain't over till the fat lady sings.

That said, I have a question for you about this judgement. The judgement recalls the standard of proof that is required for merger control. The Commission has to "*produce sufficient evidence to demonstrate with a strong probability the existence of* [SIEC]." The judgement clarifies that the prevailing standard of proof is stricter than the "more likely than not" standard. Do you agree with the General Court's view on the required standard of proof?

I was surprised to see that the General Court decided to question the "more likely than not" standard in this judgement, in particular, given that the ECJ had already taken a position previously on the "balance of probabilities" standard applicable more generally in merger control. There were other ways to examine the application of the SIEC test in this case that did not require reopening this fundamental question.

Personally, I think that a symmetrical test that does not impose a higher burden for one type of outcomes than for others is warranted in systems like the one prevailing in EU merger control, where the authority needs to adopt a decision both when it approves and when it opposes the concentration. An asymmetrical test, requiring a higher standard of proof for prohibitions, would place the authority in the impossible situation to have to clear a merger, and motivate this clearance, even in situations where it would be more likely than not that it would lead to anticompetitive effects. On top of this, this approach would be difficult to reconcile with the identical language in Article 2(2) and (3) of the Merger Regulation for respectively clearing and prohibiting mergers.

The efficiency defence

In April 2017, after an in-depth investigation, the Norwegian Competition Authority has cleared the acquisition of Phonero by Telia, two of the largest players in the business segment of the mobile telecommunications market.[2] Importantly, to clear the deal without commitments, the authority relied on the fact that this acquisition would lead to cost savings that in turn would benefit customers.

In contrast, since 2004 when the EC horizontal merger guidelines were published, the Commission has not cleared one single transaction on the basis of offsetting efficiencies. In fact, on rare occasions when some efficiencies have been accepted (e.g., *UPS/TNT*, *Vodafone/Liberty Global*), the gains have not been deemed sufficiently large to offset the likely unilateral effects. Although it is well understood that the onus is on the parties to show likely efficiency gains, with so many merger decisions since 2004, don't you think that the requirements to show efficiencies are simply too hard to be met?

I think we are confronted with a chicken and egg problem, here. As there is the impression that the test to prove efficiencies is hard, you do not see so often the parties making the effort to present convincing cases on efficiencies. It is true that in all these years efficiency claims have not been decisive to change the orientation of a decision, from prohibition to clearance, for instance, but they have been taken into account in a number of cases to limit the objections raised by the Commission, which should not be underestimated. My recommendation to parties would be not to shy away from presenting efficiency claims to the Commission. There are certainly deals where, with some effort, these can be documented and can be shown to be significant enough to offset the possible anticompetitive harm.

1 https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200065en.pdf.

2 https://konkurransetilsynet.no/clears-telias-acquisition-of-phonero/?lang=en.

Digital mergers and killer acquisitions

Some commentators made the case that Big Tech's killer acquisitions escape merger control. The guidance published by the Commission to accept requests from national competition authorities (under Article 22 of the EU Merger Regulation) to investigate mergers that fall below the EU or even the national merger control threshold is likely to fix that. However, calls have been made to also change the substantive test for transactions involving Big Tech. Recently, the UK CMA proposed that acquisitions by Big Tech (technically so-called firms with strategic market status) should be reviewed using a phase I standard. That is, instead of the balance of probabilities that is currently applied in phase II, these acquisitions would be assessed to determine whether there is a "realistic prospect" that the merger gives rise to a substantial lessening of competition (SLC). This proposed change would alter the standard dramatically. Do you think a similar change to the EU merger test is required?

There are good reasons for competition authorities to worry about "killer" acquisitions. But there are also pro-competitive factors that explain why established market players acquire start-ups or new innovative companies; to facilitate scaling up and distribution, for instance. And we should not forget either that the prospect of being acquired is a strong incentive for innovators to develop new products and companies. In my view, these situations, therefore, require a case-by-case examination rather than a blanket approach.

Lowering the standard in these cases could negatively affect the financing of start-ups and innovators and may lead to false negatives. In recent years, actually, we have seen some of these deals being cleared unconditionally after serious scrutiny by competition authorities; *Apple/ Shazam* is a good example of this. Would these deals have been allowed under the lower standard?

It is true that in these markets there may be an asymmetry of information as the authorities do not always have the tools to identify future trends and evolutions and they risk missing some important market developments. But the lack of appropriate investigative tools, on its own, does not justify lowering the standard in these cases. We should have more evidence about both false positives and false negatives before introducing far-reaching changes. I think authorities, at this stage, should rather aim at conducting *ex post* assessments and at sharpening their assessment methods in these dynamic markets rather than tilting the field in their favour with a lower standard; the legitimacy of competition enforcement will benefit from it.

The Apple State aid case

In July 2020 the General Court annulled the Commission's State aid decision against Apple. To recall the Commission found that Irish tax rulings were crafted in a selective manner so as to advantage Apple. Accordingly, the Commission held Ireland liable for generating a lawless tax bounty in excess of 13 billion euros, which it ordered to be recovered from Apple by 3 January 2017. Without entering into the intricate details of the judgement would you say that this judgement signals the end of State aid enforcement in the international taxation arena?

The Commission has obtained some important successes in its campaign against distortive tax rulings. The Court has, indeed, recognised that these must respect the State aid rules. More specifically, it has also confirmed that by not applying the arm's length principle properly, a Member State might be granting a selective advantage to some companies.

The record is mixed, however, in the application of these principles to specific cases. So far the Commission has prevailed in the judgements with regard to Fiat and Engie, but its decisions have been annulled, for a different set of reasons, in the *Starbucks*, *Apple* and *Amazon* cases. These annulments might underline some of the limitations of the State aid instrument to tackle complex tax international issues, but no firm conclusions can be reached at least until the ECJ rules on the Apple appeal. Legal certainty on these matters will be beneficial for all.

It is important to note that, in any case, these enforcement cases have raised the profile of the fight against distortive taxation regimes and gathered support for fairer taxation systems. This has prompted a number of initiatives, both at the EU and at the global level, to try to find solutions via legislative changes. These, more than individual cases, could become in the medium term the most enduring success of this Commission initiative.

Covid-19 and State aid

The Commission reacted very quickly to the Covid-19 pandemic by adopting a temporary framework to review much-needed State aid granted by Member States. In some cases, however, competitors have complained that national governments have used the pandemic as a pretext to prop up large "zombie" companies. For example, the Commission cleared the State aid received by some of the largest European airlines such as Lufthansa and Air France, yet other airlines, mostly Ryanair, complained that these aids are distorting competition. Those who complained argue that all airlines were adversely affected by the pandemic, but not all airlines have been supported with State aid. How do you respond to this?

Member States, as long as they comply with the State aid rules, are free to set up their compensation and support regimes to deal with the effects of the pandemic. As the Court has recognised, they are not obliged to provide the same level of support to all economic players in the same sector. For the cases where support was provided, the Commission has ensured that the aid was necessary, proportional and, when necessary, appropriate safeguards and compensations have been put in place. For recapitalisations, in particular, it is important to note the mechanisms inbuilt in the regimes to incentivise exit of the state as well as the compensations required in those

cases where the aid would strengthen existing situations of significant market power, including slot divestitures at congested airports.

I would not deny that a pan-European scheme applying equally across Member States and airlines may have been preferable to the present diversity of national solutions, but one should be realistic about what could be achieved in the short run, in particular in view of the urgency and the gravity of the situation in the sector due to Covid. It could be interesting that Member States and the Commission reflect about such an idea for eventual future needs, though.

The Green Deal and competition rules

Commissioner Vestager has launched an important debate about how competition policy can support the EU Green Deal. This initiative raises some difficult questions. One of them is: should competition rules be changed to foster the EU Green Deal? If so, which ones?

Changes to the State aid rules are clearly warranted to adapt the current framework, and in particular the Energy and Environmental Guidelines, to the new priorities and market developments in this field. The existing guidelines have already contributed significantly to de-carbonisation, while, at the same time, limiting competition distortions and reducing the costs for taxpayers (e.g., by introducing market mechanisms in the allocation of support for renewables), but more needs to be done to foster de-carbonisation, both in energy generation and in industrial processes. At the same time, it may be necessary to reflect whether the existing level of support for fossil fuels is compatible with the new priorities in this field. The new draft just published by the Commission goes in these directions.

I am less convinced that major changes are also needed in mergers or antitrust. Some clarifications with regards to horizontal agreements to foster sustainability may be helpful, but in general these frameworks are sufficiently broad to adapt easily to new market developments.

The Commission proposed regulation on foreign subsidies

Very recently, the Commission proposed a new instrument to address potential distortive effects in the Single Market. Whilst there is a broad consensus in Europe that foreign subsidies in some cases can cause distortion, there is a concern that the new regulation is far-reaching, and specifically some of the new measures could be counterproductive. For instance, the regulation establishes a new instrument to control that the acquisition of EU targets by foreign investors is not supported by foreign subsidies. However, it is not clear that subsidised acquisitions cause much economic harm. This calls into question whether the proposed new regime creates additional costs that may deter foreign investors for little benefits. How would you respond to this critique?

The main goal of the regulation on foreign subsidies is to guarantee the level playing field in the internal market. The EU has been assessing State aids granted by Member States for 60 years, and it is developing now the tools needed to ensure that subsidies by third countries that might distort the internal market are subject to an equivalent level of scrutiny. A subsidy to facilitate an acquisition is unlikely to be considered compatible under State aid rules, so it is understandable that the EU would want to ensure that such a subsidy would be considered unlawful also when the grantor is a third country. All players in the internal market should be subject to the same rules.

It will be very important, however, that this goal is achieved without creating undue costs and obstacles to legitimate business. Defining the appropriate thresholds in the regulation to identify the concentrations that should be notified *ex ante* is an important first step in this direction. These thresholds can remain relatively high, and therefore cover only a limited number of deals, because the regulation proposal already foresees a safety net: the Commission will have the power to examine *ex post* those deals not covered by the notification obligation but that could nevertheless distort competition in the internal market. There will also be other tools, such as the possibility to exempt certain categories of deals from notification, foreseen already in the proposal, that will allow the Commission to build on the experience gained in applying it and fine-tune the instrument further to avoid unnecessary red tape. I hope the right balance is eventually achieved, with a legal framework that protects the level playing field but does not create undue burdens nor discourages legitimate investment. ■