17th International Conference on Competition and Regulation (CRESSE)

"Merger Policy in Dynamic Industries and Ecosystems"

Remarks by Benoît Coeuré, President of the French Competition Authority

Ixia, Rodhes, 1 July 2023, 11:20 – 13:10

Thank you for inviting me to join this important discussion. As a practitioner, I wish I can take home an improved toolbox to deal with these complex cases. I will therefore be asking questions rather than providing answers. I will focus on three areas: (i) jurisdiction to review the case, (ii) substantive assessment and theories of harm, and (iii) remedies.

1. The issue of jurisdiction

The starting point of our discussion today is not a pretty one. While in the last decade or so we have witnessed a wave of acquisitions in dynamic industries, including but not limited to acquisitions by digital platforms, most of these acquisitions were not reviewed by competition agencies, including some that were potentially problematic.

In France, our national merger control thresholds are exclusively based on turnover and have not been modified, so that our direct experience with assessing digital mergers remains limited at this stage.

In the European Union (EU), mergers in dynamic markets such as digital are mostly reviewed:

- by jurisdictions with notification thresholds based on different criteria than merely the turnover of the parties, such as Spain (market shares above 30% or 50%), Germany ("value of consideration" and "target significantly active in Germany") and Austria (same type of thresholds as Germany),

- and, of course, by the European Commission (the "Commission"). EU thresholds are met due to high turnovers of the parties (e.g. Google/Fitbit; Microsoft/Activision), or because of a referral from the parties under article 4(5) of the EU merger regulation (e.g. Facebook/Whatsapp) or from a national competition authority (NCA) under article 22 of the EU merger regulation.[1]

Our first concern is therefore whether transactions that could impact competition are escaping merger review, either at national or EU level.

If so, then of course this raises the question of possible solutions. Should we amend our national or EU thresholds to include new criteria that may widen our jurisdiction, such as the value of transaction or market shares; should we include the possibility of an ex post review of mergers; should we make a better use of existing tools?

The Autorité de la concurrence has been proactively considering this issue and has organized several public consultations in this respect as of 2017-2018. The outcome was that in our view article 22 of the EU merger regulation was the most appropriate and proportionate response to better address the phenomenon of predatory or consolidating acquisitions "under the thresholds". This was also the European Commission's conclusion a few years later, in 2021, when it issued its evaluation of procedural and jurisdictional aspects of EU merger control.

We all know what happened next: the Commission announced a revised approach on article 22 whereby it would start to accept referrals from national competition authorities even when national thresholds were not met. To address companies' concerns with respect to legal certainty around this referral mechanism, the Commission published a guidance in March 2021 on substantive and procedural issues and more recently, in December 2022, a Q&A on more practical aspects.

Two years after, where do we stand on the issue of jurisdiction?

In the Illumina/Grail case, the EU General Court has validated the Commission's revised approach on article 22.[2] From the French perspective, we have strengthened our internal means to monitor the market in order to detect potentially problematic mergers. We have repeatedly

[1] Under this provision, referrals have been made either from a NCA which had jurisdiction to review the case at national level (e.g. Adobe/Figma and Facebook/Kustomer, both from Austria) or from a NCA whose national thresholds were not met (e.g. Illumina/Grail, from France).
[2] Case T-227/21 | Illumina v Commission, link.

been contacted by third parties who wanted to signal acquisitions which were potentially good candidates for an article 22 referral.

In addition, useful information will be provided through article 14 of the Digital Markets Act, which obliges gatekeepers to inform the European Commission of any intended concentration where the merging entities or the target provide services in the digital sector or enable the collection of data.

Furthermore, following the EU Court of Justice 'Towercast' decision, using article 102 TFEU is (again) a possible way forward to address problematic mergers, although likely to be used only exceptionally.[3]

So, the first step towards an appropriate scrutiny of such mergers lies in establishing jurisdiction over them. We have found a suitable solution to the past under-enforcement, and are positive that the jurisdictional system now in place in the EU will allow us to review problematic mergers whenever necessary.

Looking ahead, there is no room for complacency. The stakes will become higher as data-related concerns permeate all industries – cars, health, etc., where new ecosystems may be emerging. 360 degree scrutiny will be needed. Just a few days ago, in our market study on cloud services, we expressed concerns related to a possible reinforcement of hyperscalers' ecosystems due to concentration in this industry.[4]

2. The substantive assessment of merger cases

The substantive assessment of mergers in dynamic markets has been the subject matter of many reports and studies across jurisdictions[5], and we now have, at least at EU level, a growing decisional practice to which we can refer.

One of the relevant questions that is often raised around the substantive assessment is whether the traditional theories of harm (horizontal, vertical and conglomerate) are still relevant and sufficient to catch all possible anticompetitive effects of these mergers, whether some adjustments are needed, and whether new theories of harm should be elaborated, including an "ecosystem theory of harm".

[3] Case C-449/21 | Towercast, link.

[4] Autorité de la concurrence, "Cloud computing: The Autorité de la concurrence issues its market study on competition in the cloud sector", 29 June 2023, link.

[5] A comprehensive discussion can be found in the OECD Competition Policy Roundtable background note, "Theories of harm for digital mergers", June 2023, link.

The reason why we question the suitability of traditional theories of harm is the particular nature and key features of digital markets which are well known by now: multi-sided platforms, network effects, ecosystems, the importance of data, zero-price markets, etc.

When outlining a theory of harm in these markets, several difficulties may arise:

- assessing the target's potential competitive significance – see for instance the UK Competition and Markets Authority (CMA)'s assessment of Giphy as potential competitor to Facebook's advertising services in the UK,
- defining a credible counterfactual scenario absent the transaction in fast-changing and rather unpredictable markets,
- predicting the future interplay between the products and services offered by the parties.

Indeed, these markets are so rapidly evolving that the parties themselves may not be fully aware of the potential of the transaction, of the target's competitive force and how the target's business will be intertwined with the acquirer's post-merger.

In general, these types of acquisitions have called for conglomerate (tying and bundling, degrading interoperability, etc.), vertical (access degradation, input data foreclosure, such as in Microsoft/Linkedin), and horizontal types of theories of harm (for instance when the parties combined their datasets, such as in Google/Fitbit or Meta/Kustomer). Competition agencies have already adapted these traditional theories of harm to the specific characteristics of these markets.

The traditional framework has proved to be rather flexible, but some questions remain.

Indeed, in some cases, ecosystems-related anticompetitive effects may be identified where horizontal, vertical and conglomerate considerations on different markets are intertwined. This raises the question of whether specific ecosystem theories of harm need to be elaborated.

In essence, this would involve working with conglomerate theories of harm and assessing whether the target firm may pose a competitive threat to the acquirer's strength and position in the ecosystem. This is challenging, as it will involve concepts that are new to merger control, such as how to define the competition space of ecosystems and the assessment of its power, how to think about the means by which the target firm may challenge the acquirer's ecosystem rather than its potential threat to the acquirer in a specific market, etc.[6]

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[6] The German Bundeskartellamt appears to have attempted such an approach in the Meta/Kustomer case, in which it contemplated the effects of the merger to impact the Meta ecosystem. In particular, the Kartellamt considered that the operation would allow Meta to acquire Kustomer's data and communication technology, which could lead

Foresight is of the essence. Launching market studies on fast developing industries will be key to understanding the dynamics at play in a holistic way. We've just done that with cloud services, and we are doing it on charging docks for electric vehicles.

To conclude, in an increasing number of cases, the benefits of an ecosystem-related approach may well exceed the costs.

- On the one hand, there are many conceptual and empirical difficulties, and a risk of not being followed by competent courts of appeal.
- On the other hand, an operation involving ecosystems may lead to an entrenchment of the position and strength of the whole ecosystem, and make entry permanently more difficult. The risk of cross-system effects is exacerbated by the combination of datasets following a merger, which could have potential uses in different areas of the ecosystem. Hence, an insufficient assessment resulting in an incorrect clearance, or insufficient commitments, is highly costly.

3. The question of remedies

We all have examples in mind of mergers that were reviewed in parallel by various EU and non-EU jurisdictions and which gave rise to divergent outcomes.

This is of course problematic on many levels but I believe it is important to understand - case by case - the reasons underlying these differences:

- Were these divergent outcomes attributable to differences in applicable legal standards, in particular with respect to the definition of appropriate remedies?[7]
- Were there differences in the nature of cases? Indeed, while the parties to the merger are the same, the effects may vary in different jurisdictions, e.g. because of the presence of local competitors and specific local market characteristics, etc.
- Were there differences in merger control policy, rather than the legal framework itself?

to a strengthening of Meta's ecosystem, which would then indirectly translate into the strengthening of Meta's market position in specific individual markets. Nevertheless, the Kartellamt also found that it was not possible to establish these effects to the necessary likelihood to warrant an in-depth investigation.

[7] EU rules and case law bar the Commission from automatically dismissing non-divestiture measures that might adequately remedy competition concerns. The Commission therefore may accept other types of commitments in circumstances where the other remedy proposed is at least equivalent in its effects to a divestiture, and this is particularly frequent in non-horizontal cases with the use of "access" commitments.

Against this background, one clear issue of divergence is the suitability of behavioural and divestiture remedies to address the competition concerns identified, and the standard of proof for prohibiting a merger.

One prominent recent example is of course Microsoft/Activision, with the Commission clearing the deal with behavioural remedies, the CMA prohibiting the merger, and the US Federal Trade Commission filing a complaint to block it. This is a relevant example because both the CMA and the Commission focused their concerns on the same theory of harm, i.e. vertical effects (input foreclosure) in the market for the supply of cloud gaming services, but with different outcomes.[8]

In a statement commenting the Commission's decision, the CMA indicated, in essence, that Microsoft's remedies amounted to regulating the market for the next 10 years, by setting the terms and conditions for this market instead of having a free, open and competitive market that was only starting to develop.[9]

In future months, it will be interesting to see what the Commission, CMA, the US and other agencies will decide in the Broadcom/VMware transaction, and whether it will be an additional example of diverging outcomes.

Although all these examples are in the digital and tech sector, it is important to mention that the divergences in the assessment of remedies do not only appear in dynamic and innovative markets, but also in more traditional ones.[10]

Against this background, one wonders who is on the right side. Although behavioural remedies should remain part of the toolbox, their shortcomings are increasingly apparent: they can be

[8] The Commission considered that the commitments (*i.e.* a comprehensive licensing commitments, with a 10-year duration) not only fully addressed the competition concerns identified on the market for the distribution of PC and console games via cloud game streaming services, but represented a significant improvement for cloud gaming as compared to the current situation. On the other hand, the CMA considered that the (same) commitments did not meet its standard in terms of effectiveness and cost. It considered three options: (i) prohibition of the merger, (ii) partial divestiture and (iii) behavioural remedies. On the latter, the CMA considered that the remedies did not fully address the substantial lessening of competition (SLC) identified and that they had significant shortcomings in terms of timing and duration, practicality, specification, circumvention, distortion, monitoring and enforcement. The CMA also considered that the SLC identified outweighed by a significant and growing margin the relevant customer benefits that would be lost as a result of prohibition.

[9] Another relevant example of divergent outcomes is the Facebook/Giphy acquisition, with an Austrian court clearing the transaction subject to remedies (the transaction being below the EU thresholds), and the CMA requiring Meta to sell Giphy. But the disagreements aren't one-sided: in Facebook/Kustomer, the CMA cleared the deal without commitments whereas the Commission requested remedies.

[10] We can for instance mention the Cargotec/Konecranes deal in the container and cargo handling equipment sector, which was cleared by the Commission in February 2022 subject to structural remedies. The CMA and the Department of Justice (DoJ) were not satisfied with the structural commitments offered by the parties - the DoJ calling the commitment offer a "patchwork settlement that will not replace the competition that is lost by the merger". After the CMA prohibited the merger, the parties abandoned the deal.

gamed, they are costly to monitor, and they raise governance issues as they bring competition authorities close to the line which separates enforcement and regulation.

However fashionable today, structural remedies won't be easy either. To give but one example, what about divestiture commitments in dynamic markets involving considerations around the collection and use of data? Divesting or destroying data might be challenging, and is likely to involve complex discussions with data protection authorities.

There is no general answer to these questions as they rely on a case-by-case assessment, but caution is needed in these fast evolving and complex ecosystem markets. The recent Commission's statement of objections in the Google alleged abuse of dominance case, which considers that only the mandatory divestment by Google of part of its services would address its competition concerns, is another sign of toughening of EU competition policy in this area.

Thank you for your attention.