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Antitrust Matters

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Contents

Editorial

By Bertold Bär-Bouyssiere

Dear Readers of Antitrust Matters,

We hope you, your colleagues and loved ones all made it safely through the first wave of the coronavirus and are as determined to live the "new normal" as we are. The new normal will be somewhat different from the past, with more home working, less business travel, and an even more digital world. No wonder that the antitrust agencies around the globe are gearing up to ensure a level playing field for all suppliers in the digital environment, ultimately for the benefit of the consumer. At the same time, competition enforcement is becoming even more geopolitical, at least in certain parts of the world. All of this is positive. Competition enforcement tools must adapt to the world we live in, and it is good to see the enthusiasm and energy with which the regulators, and notably the European Commission, are embracing these challenges in an unprecedented launch of new policy consultations, white papers and the like. Some of the changes they are putting forth are quite daring. But there is hope. At the turn of the millennium, the European judiciary, which reviews the conduct of the Commission, overturned a series of merger decisions in which the Commission had tested a novel economic concept – novel but up to the legal standard of proof. The impact was such that the prestigious Merger Task Force was dismantled. In the last three months, we have seen again a number of courageous judgements in which the judiciary reminded the Commission about the burden of proof – and that neither the facts nor economic and legal concepts can exempt the Commission from proving that a company's conduct is unlawful. We hope that these recent reminders will be reflected in the Commission's ultimate policy reforms, and that the rule of law – which the member states included in the COVID-19 rescue package – will be at the fore.

Enough said. In this summer issue of *Antitrust Matters*, you will read contributions from DLA Piper's global Antitrust and Competition practice, not just reporting news but commenting on recent developments and offering food for thought. We hope that you will enjoy this issue. We also thank all of you, the many readers (clients, peers and third parties), who regularly provide us with good (and sometimes critical) observations. Please never hesitate to engage with us. Your feedback is always valuable to us.

Wishing you continued good health and economic well-being. Your dedicated DLA Piper Global Antitrust & Competition Community.

It's all linked: A close look at the EC's proposed Digital Services Act and its moves to protect strategic EU industries

By Bertold Bär-Bouyssiere and Richard Sterneberg (Head of Global Government Relations, Brussels)

The Digital Services Act (DSA) is a legislative package first announced by European Commission President Ursula von der Leyen in the political guidelines back in July 2019 and confirmed in February 2020 in the Commission's communication, Shaping Europe's digital future. The package aims to create a modern legal framework for digital services, strengthening the Digital Single Market and ensuring that digital service providers in the European Union act responsibly to mitigate risks emanating from the use of their service, respecting EU rights and values and protecting fundamental rights. With this new legislation, the Commission would be able to intervene and ensure a shift in behavior or organization of a company without finding any illegal behaviour per se.

By way of background, the Commission launched three public consultations on June 2, 2020: two concern the DSA legislative proposal, while the third one relates to a "New Competition Tool" proposed by the Commission to address potential enforcement gaps in the digital sector (although it will be used more widely). Interested parties are invited to submit their views by September 8, 2020.

The New Competition Tool is being developed for a number of reasons. Overall, it is the intention of the Commission to use this law to prevent fast-moving digital markets from "falling" too far towards a particularly dominant company. Digital markets evolve so swiftly, and the subtext of the legislative proposal is clearly that existing measures are insufficient to manage this. In addition, there is a clear intention to open up and invigorate markets that for a variety of reasons may not be functioning properly, most likely because there are underlying structural issues. In terms of opening up markets, it seems clear that the scope of this new legislation would go beyond digital markets – that this could be applied more broadly.

At the same time, and this is no coincidence, the Commission unveiled plans on June 17, 2020 to take a tougher line on subsidized foreign companies in the EU market. Under this proposal, the EC seeks to "safeguard critical EU companies" in strategic industries such as pharma and agri-food so that they do not fall victim to "hostile takeovers conducted by large dominant players." It is clear that the Commission's rules with regard to subsidies and aid are often far stricter than those of other jurisdictions, where such rules may not even exist or may not be enforced. This difference puts EU industry at a distinct disadvantage, and the proposal to safeguard strategic industries could allow the EU to address this concern.

It remains to be seen what the exact effect of the consultation rounds the Commission is holding and the resulting direction of legislation may be. But this legislative push is likely to have a very measurable effect on antitrust as well as digital policies for many years to come. The Commission has clear ambitions when it comes to supporting the international development of European industry. At the same time, it will be interesting to see whether a strong competition policy and leading by example will make it harder to champion European interests.

Digital Services Act package

WHAT IS IT?

The current European legal framework for digital services is built around the **e-Commerce Directive**, adopted in 2000, that sets out principles allowing cross-border provision of services and minimum standards of liability for online intermediaries across the EU. However, over the years, the **fragmented implementation of the Directive** across member states, as well as the fast-changing online environment, showed that the act was no longer adequate to regulate a highly transformed and expanded digital market.

The Commission is currently drafting a legislative proposal, known as the DSA package, that seeks to update the existing horizontal rules. The package consists of two main pillars:

- New set of rules, ranging from the freedom to provide digital services across the EU to the responsibility of online platforms, will establish a clearer and more modern framework harmonizing the role and obligations of digital services across the EU, as well as a more efficient governance system guaranteeing the respect of fundamental rights and the correct enforcement in member states.
- Ex ante rules that aim to enhance competition among online platforms, so that consumers have the widest choice and newcomers have better opportunities to enter the market.

WHAT ARE THE POLICY OPTIONS?

Among the different policy options put forward by the Commission, one of the most interesting is a comprehensive legal intervention that, while maintaining its principles, would update the rules of the 2000 e-Commerce Directive, clarifying the liability and safety rules for digital services, putting forward specific, binding and proportionate obligations, and introducing transparency, reporting and independent audit obligations. Such measures may well be extended to all services provided on the European single market and might therefore also tackle services established outside the EU. In addition, a set of rules aiming at creating an effective system of regulatory oversight, enforcement and cooperation across member states is likely to be established.

WHO IS CONCERNED?

The DSA is expected to impact social media platforms, search engines, video gaming platforms, online marketplaces and other information society services and internet service providers.

Ex ante regulation of large online platforms acting as gatekeepers

WHAT IS IT?

As mentioned above, as part of the DSA Package consultation, the Commission is also seeking views on the adoption of a regulation that would ensure that markets dominated by large platforms with significant network effects acting as gatekeepers remain fair and competitive.

WHAT ARE THE POLICY OPTIONS?

The Commission envisages three policy options, which are not mutually exclusive: (1) revising the Platform-to-Business Regulation to establish additional horizontal rules for all online intermediation services (namely to reinforce transparency requirements); (2) adopting a horizontal framework to allow a dedicated EU regulatory body to collect information from large online platforms acting as gatekeepers (with the power to act upon a refusal to provide the requested data); and/or (3) adopting a new ex ante regulatory framework (with the power to impose substantive remedies).

The new ex ante regulatory framework comes with two policy options:

- A list of obligations and prohibited practices ("blacklisted" practices) that gatekeepers would need to stay clear of (*eg*, self-preferencing) which could be complemented by another set of prohibitions applicable to certain actors concerned by more specific issues (*eg*, algorithmic transparency).
- As a complement or alternative option, the framework could empower the Commission to impose tailor-made remedies "where considered necessary and justified following a prior assessment." Examples given by the Commission of such remedies include platform-specific non-personal data access obligations, personal data portability or interoperability requirements.

The New Competition Tool

The Digital Era Report published in April 2019 prepared by three Commission-appointed special advisors acknowledged a number of perceived shortcomings of traditional competition law tools in dealing with digital markets and identified possible solutions for stricter enforcement.[1] Building on that report, the New Competition Tool's promise to restructure markets without seeking findings of infringements/fines may sound tempting, but at what cost?

WHAT IS IT?

The New Competition Tool would strengthen the Commission's enforcement powers by granting it the possibility to impose behavioral/structural remedies without the need to prove an infringement of EU competition law (and no fine, nor possibility of a follow-up damage claim). In essence, the Commission would be able to create market conditions more favorable to competition without going through the standard lengthy and costly process of an investigation with an uncertain outcome. However, these measures may come at a cost for the companies affected by the remedies, and it will be difficult to conduct a proportionality assessment of the measures in the absence of a finding of an infringement.

WHEN WILL IT BE USED?

The Commission would use this tool (1) to address structural competition issues arising from a combination of market characteristics and the conduct of certain companies (*eg*, to prevent market tipping in favor of one company or the creation of powerful market players) and (2) to address structural market failures going beyond the conduct of a particular company due to structural features of the market (*ie*, high entry barriers, consumer lock-in, lack of access to data).

WHAT ARE THE POLICY OPTIONS?

The Commission is seeking views on whether the New Competition Tool should be limited to particular sectors (*ie*, digital markets) and whether it should only address issues arising from dominant companies' conduct or be applicable to any market-structure competition issue.

1 European Commission: *Competition policy for the digital era, A Report by Jacques Crémer Yves-Alexandre de Montjoye Heike Schweitzer*, available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf

It is unclear at this stage what type of legal test the Commission will need to satisfy in order to use this tool, which remedies it will be able to impose, and how this tool will complement parallel proceedings under Articles 101 and 102 TFEU. Determining the necessity and exact scope of this tool including the Commission's investigative powers under this tool are key objectives of this public consultation.

The Commission also kicked off a consultation for a new Market Definition Notice, which must be seen in the same context. The New Competition Tool would allow the Commission to go after price-aligning algorithms – as unilateral conduct are not caught by the traditional competition rules unless the user is dominant. The market definition notice may provide a shortcut to finding dominance, which is the prerequisite for finding an abuse.

The White Paper on Foreign Subsidies

WHAT IS IT?

The White Paper on Foreign Subsidies is based on the Commission's observation that subsidies granted by non-EU authorities to undertakings operating in the EU may distort competition in the internal market. However, such subsidies fall outside EU state aid control and are, according to the White Paper, not sufficiently regulated by trade policy instruments.

Other concerns expressed in the White Paper include the impact of foreign subsidies on the acquisition of EU targets and on public procurement (ie, risk of excessive purchasing price, risk of discouraging non-subsidies companies from participating in the first place and, ultimately, the risk of restricting non-subsidised acquirers from accessing key technologies).

WHAT ARE THE POLICY OPTIONS?

The White Paper proposes several approaches (complementary rather than alternative) to address the distortions created by foreign subsidies:

- **Module 1**: creation of a general instrument that would allow national authorities or the Commission to act upon any indication or information that a company in the EU is benefiting from a foreign subsidy. Following an investigation, should the relevant authority find that the foreign subsidy is distortive, this distortion will be weighed up against the possible positive impact that the supported economic activity/investment might have within the EU (so-called EU Interest Test). Should the distortion be sufficiently mitigated (*ie*, the test is met), the investigation will be stopped. However, if the test is not met, measures such as a divestment could be imposed to remedy the distortive impact of the foreign subsidy in question.
- **Module 2**: acquisitions of EU companies potentially facilitated by foreign subsidies would have to be notified ex ante to the Commission above a given threshold (with standstill effect). This assessment would be done in parallel but separately from the EU merger control analysis. The EU Interest Test would also apply in this context.
- **Module 3**: creation of an obligation for economic operators participating in public procurement procedures to notify to the contracting authority when submitting their bid whether they (including consortium members, subcontractors and suppliers) have received/expect to receive foreign subsidies. The tenderer who has received a distortive foreign subsidy will be excluded from the public procurement procedure in question and possibly from future procedures (for a maximum period of three years).

The White Paper also mentions the issue of access to EU funding. The objective is to ensure a level playing field for companies competing for EU funding and to avoid a situation where a subsidized company could make an abnormally low-price offer and have easier access to EU funding than would a non-subsidized company. The White Paper suggests creating an obligation for participating companies to notify foreign subsidies (above a certain value) that they have received such subsidies in the last three years and also to indicate whether they expect to receive subsidies during the execution of the contract.

In combination with the FDI Regulation that will go live this year, the envisaged measures on nullifying distortive foreign subsidies can create many hurdles for foreign investment. To avoid harming the EU's larger economic interests, in these measures, jurisdiction should be clearly regulated to avoid multiple clearing processes, the procedural rules must guarantee due process and effective judicial review, and the substantive rules need to be coherent.

TIMELINE:

the DSA legislative proposal is expected to be adopted by the Commission in the fourth quarter of 2020. In the European Parliament, the Committee on the Internal Market and Consumer Protection (IMCO), the Committee on Civil Liberties, Justice and Home Affairs (LIBE) and the Legal Affairs Committee (JURI) have published their draft reports, which should be adopted in September 2020. Similarly for the New Competition Tool, a legislative proposal can be expected by the end of 2020. As for the White Paper on Foreign Subsidies, the new legal framework is not expected to be in place before Spring 2021.

Some thoughts

All of the above initiatives are linked to the goal of making the Commission "geopolitical" and it is easy to identify the current developments to which these proposals react. Even those who may agree with this policy push are concerned about an array of issues.

- In the fast-moving world of digital services, e-commerce and artificial intelligence, how can a legislative framework with a one-size-fits-it all approach regulate the whole range of digitalized industries, and how can it build in safeguard mechanisms that will make it adaptable to the rapid pace of novel developments?
- Concerns are also being raised about the New Competition Tool, which, bluntly, aims to find collusion absent proof of collusive conduct, and to find an abuse without a clearly defined dominant position. From the viewpoints of not just free enterprise but legal certainty, is it a desirable goal – to allow the competition authorities to stop practices and/or force remedies where no infringement can be proven *because it did not take place*? If the competition authorities have the power to interfere with business conduct that does not infringe the competition rules, is Europe really better off?
- Finally, as to the White Paper on foreign subsidies, many observers have found the multiple scenarios it envisages to be, at best, confusing – some describe it as vertiginous.

Together with Copenhagen Economists, we have started guiding clients through the intricacies of this dense policy jungle, to help them make impact assessments and formulate submissions to the Commission's consultations. To learn more, please contact either of the authors.

South Africa: Asset transactions during COVID-19 and the role of merger control approval

By Werner Rysbergen, Brian Malcomess, Caleb Kipa and Menzi Jali

The decision by governments to impose restrictions on businesses to slow the spread of coronavirus disease 2019 (COVID-19) has had a severe impact on the global and South African economy. Statistics South Africa's (Stats SA) COVID-19 business impact survey shows that the turnover of nine in ten businesses was lower during the lockdown period than had been expected, and it is estimated that South Africa's gross domestic product will show a decline at least 5 percent.

Financially distressed firms will be considering different options to ameliorate their financial position, including the disposal of assets or (parts of) their business, often under severe time constraints. Merger control approval will play an important role in the parties' transaction timetable. Given the inherent difficulty of successfully running a competitive sale process within short deadlines (due to the inherent short-term liquidity requirements of a financially distressed seller), often these "forced sales" result in purchasers acquiring assets or business units at a price which is below full market value or on terms favorable to the purchaser. This could present an opportunity for firms with a strong balance sheet to acquire the business or assets of a competitor.

Commercial considerations

The nature of any distressed sale is likely to be impacted by the amount of debt the selling entity is required to settle in the short to medium term. The sooner the debt owing to creditors is due and payable, the higher the likelihood of such creditors exerting influence on any business or asset sale process. In this regard, such creditors may influence the distressed firm to sell the business or assets at either a high or low price, depending on how the sale price may impact its interests. Accordingly, the best time to approach a financially distressed entity which may be looking to dispose of certain of its assets can vary from case to case, depending on whether the prospective purchaser believes the seller's board, business rescue practitioner or liquidator (as the case may be) will be more receptive to the transaction. A potential purchaser will need to bear in mind the influence major creditors may have on the selling entity's ability to conclude an asset disposal transaction, especially in circumstances where the selling entity is under business rescue or in the process of liquidation. Generally, the implementation of a major asset or business unit disposal will be more straightforward in circumstances where an entity has yet to commence formal business rescue or liquidation proceedings (although both parties will need to consider the possibility of a liquidator having the ability to set a disposal aside on the basis of it being deemed a voidable disposition in terms of the Insolvency Act, 1934).

The above considerations will also play a role in determining the structure of a potential disposal transaction. When deciding on the optimal structure of a transaction, two of the key questions arising are: can parties to an asset purchase avoid needing to apply for merger control approval? And, if parties are required to apply, will the Commission prioritize and expedite merger control approval?

When is merger control approval required?

Only transactions which constitute a "merger" and meet the prescribed financial thresholds require approval. A "merger" is defined in the Competition Act as the direct or indirect acquisition of control over the whole or part of the business of another firm. The acquisition of so-called bare assets would therefore not constitute a business and would fall outside the scope of the merger control provisions – but when would an asset constitute a business?

The Competition Act does not define a business, but decisions by the Competition Tribunal and Competition Appeal Court (CAC) provide useful guidance.

In *Competition Commission v Edgars Consolidated Stores Ltd*, Edgars Consolidated Stores Ltd (Edcon) purchased the book debts of the Retail Apparel Group (RAG). Initially, the parties did not notify the transaction and argued that the transaction amounted to a mere acquisition of assets and not a part of the RAG business. The Tribunal disagreed and found that the purchase of RAG's debtors book constituted a merger given that Edcon would be acquiring an asset which would (i) enhance its competitive position and (ii) result in the permanent transfer of productive capacity and an increase in Edcon's market share.

The test in Edcon was amplified by the CAC in *Caxton and CTP Publishers and Printers Limited and Others v Multichoice Proprietary Limited and Others* where the CAC had to decide whether a "Commercial and Master Channel Distribution Agreement" concluded between MultiChoice and the SABC constituted a merger. The Tribunal found that the agreement did not result in a merger given that (i) there was no transfer of productive capacity or market shares and (ii) the agreement was of limited duration (five years). On appeal, the CAC upheld the Tribunal's decision, but also considered whether there was a "transfer of a business as a going concern", which is ordinarily a labor law concept. In doing so, the CAC considered whether there was a transfer of an identified set of activities and structures which can now be identified as a separate business undertaking and which could be pursued by the purchaser.

The Edcon and Caxton cases illustrate that the acquisition of assets may in certain circumstances not amount to a merger, but that careful consideration is still needed. Even if the transaction constitutes a merger, it is still necessary to consider whether the relevant financial thresholds are met. Implementing a notifiable merger before it has been approved by the competition authorities is a contravention of the Competition Act. Administrative penalties may be imposed and there is likely to be severe reputational harm for the parties involved.

Timeline for merger control approval

In terms of the Commission's Service Standards, the Commission undertakes to complete the assessment of non-complex mergers within one to two months from the date of filing. This turnaround time could prove to be a significant obstacle in transaction negotiations between parties. However, the Commission recently indicated that it is committed to prioritizing mergers in sectors that have been severely impacted by COVID-19. This – together with the fact that certain businesses could be considered "failing firms" – may result in an expedited review process by the Commission. A "failing firm" is a firm that is not able to meet its financial obligations and is at risk of exiting the market in the near future if not for the merger. Parties to a transaction which involves a failing firm should therefore request that the merger be reviewed on an expedited basis, given that further job losses in the current economic climate will have a significant detrimental impact on the livelihood of people. However, this is not to say that all mergers involving a failing firm will be approved on an expedited basis. The Commission will still need to carry out a competition and public interest assessment, which may result in delays if the Commission identifies any concerns.

The current economic climate could therefore present an opportunity for firms to acquire assets or businesses at a price which is below full market value. However, the structure of the transaction and whether merger control approval is required should be considered carefully.

State aid rules in pandemic times: flexing or bending?

By Miguel Mendes Pereira and Carla Marcelino

At the sound of pandemic sirens, Margrethe Vestager, EU Competition Commissioner, launched on 19 March the State aid Temporary Framework[1] and laid out with Scandinavian linearity the Commission's views:

"The economic impact of the COVID-19 outbreak is severe. We need to act fast to manage the impact as much as we can. And we need to act in a coordinated manner. This new Temporary Framework enables Member States to use the full flexibility foreseen under State aid rules to support the economy at this difficult time."

As of 27 August, a staggering amount of EUR1.358 billion in State aid measures to be granted by Member States across the EU to tackle the economic impact of the coronavirus outbreak had been approved by the Commission.

The (extended) Temporary Framework

The main thrust of the package vetted by the Commission has been approved under the Temporary Framework, which was designed to cover aid granted 'to remedy a serious disturbance in the economy of a Member State'[2]. The initial version focussed on:

- direct grants, selective tax advantages and advance payments;
- state guarantees for loans taken by companies from banks;
- subsidised public loans to companies;
- safeguards for banks that channel State aid to the real economy;
- short-term export credit insurance.

On 3 April, the Commission amended the Temporary Framework[3] such as to cover:

- coronavirus-related research and development;
- construction and upscaling of coronavirus-related testing facilities;
- production of products relevant to tackle the coronavirus outbreak;
- deferral of tax payments and/or suspensions of social security contributions in those sectors, regions or for types of companies that are hit the hardest by the outbreak;
- wage subsidies for employees of those companies in sectors or regions that have suffered most from the coronavirus outbreak and would otherwise have had to lay off personnel.

On 8 May, the Commission expanded the Temporary Framework[4] to enable targeted public interventions in the form of recapitalisation and subordinated debt measures to non-financial companies, focussing on:

- conditions on the necessity, appropriateness and size of intervention;
- conditions on the State's entry in the capital of companies and remuneration;
- conditions regarding the exit of the State from the capital of the companies concerned;
- conditions regarding governance;
- prohibition of cross-subsidisation and acquisition bans.

Finally, on 29 June, the Commission extended the Temporary Framework[5] to enable Member States to provide public support to micro and small companies, even if they were already in financial difficulty on 31 December 2019.

The Commission also adapted the conditions for recapitalisation measures for those cases where private investors contribute to the capital increase of companies, irrespective of size, together with the State. The aim is to encourage capital injections with significant private participation in companies, limiting the need for State aid and the risk of competition distortions, in particular, if the State decides to grant recapitalisation aid but private

1 Temporary Framework to support the economy in the context of the coronavirus outbreak, OJ C 91I, 20.3.2020, p. 1–9.

2 Article 107(3)(b) of the Treaty on the Functioning of the European Union ("Treaty").

3 First Amendment to the Temporary Framework to support the economy in the context of the coronavirus outbreak, OJ C 112I, 4.4.2020, p. 1–9.

4 Second amendment to the Temporary Framework to support the economy in the context of the coronavirus outbreak, OJ C 164, 13.5.2020, p. 3–15.

5 Third amendment to the Temporary Framework to support the economy in the context of the coronavirus outbreak.

investors contribute to the capital increase in a significant manner (at least 30% of the new equity injected) at the same conditions as the State.

Under those circumstances, conditionality for approval by the Commission is significantly reduced, namely in terms of acquisitions and dividend bans, remuneration caps for the management and State's exit.

As of 27 August, the Commission had approved EUR1.264 billion of State aid measures to be granted under the Temporary Framework[6].

Exceptional occurrences

The Commission also approved "aid to make good the damage caused by natural disasters and exceptional occurrences"[7].

The Commission considered that the COVID-19 outbreak qualifies as an "exceptional occurrence", as it is an extraordinary, unforeseeable event having a significant economic impact. As a result, exceptional interventions by the Member States to compensate for the damages directly linked to the outbreak are deemed justified.

The "exceptional occurrence" argument was used by fewer Member States than the "serious disturbance in the economy" defence in their notifications to the Commission. The likely reason is the heavier burden of proof linked to the need to evidence the damages and show the direct causal link to the coronavirus outbreak. Not that such proof is under the current circumstances impossibly cumbersome, but it requires additional fact-finding work in less obvious cases and thus, more time. As swiftness is a must in the ongoing salvage exercise, more Member States opted for the "serious disturbance in the economy" grounds.

As of 27 August, the Commission had approved EUR28 billion of State aid measures to compensate for damages caused by "exceptional occurrences".

Rescue and restructuring aid

The Temporary Framework (as much as the "exceptional occurrences" grounds) does not apply to "undertakings in difficulty", i.e. companies which are almost certainly condemned to going out of business in the short or medium term without intervention by the State, either because most of its share capital has vanished as result of accumulated losses, or it is subject to insolvency proceedings or its debt to equity ratio is fragile. In these cases, Article 107(3)(c) of the Treaty and the "rescue and restructuring rules"[8] apply, rendering the undertaking at stake subject to a restructuring exercise.

As of 27 August, only two cases (TAP Air Portugal and SATA) had been approved by the Commission under these rules (EUR1.3 billion).

6 The Commission approved an additional amount of EUR64 billion of aid technically outside the Temporary Framework but still under Article 107(3)(b) of the Treaty, the same provision on which the Temporary Framework is grounded.

7 Article 107(2)(b) of the Treaty.

8 Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249, 31.07.2014, p. 1–28.

Sectors

In addition to horizontal schemes or measures aimed at supporting the economy at large, Member States have notified a number of sector or category-specific measures.

As of 27 August, these are the most significant sectors and categories having received the Commission's approval for governmental support:

TABLE 1

SECTORS*	AMOUNT OF STATE AID (BILLION EUR)
Air Transport	20.711
Credit insurance market	13.048
Transport services**	6.849
Automobile industry	5.071
Agriculture, floriculture, forestry, fishery, aquaculture	3.531
Travel operators	1.373
Production, supply and R&D of medical equipment relevant for Covid-19 outbreak	1.269
Restaurant industry	0.12
Large or cultural events organizers	0.7
Media companies	0.3

*Schemes aimed at the overall support of the economy are not included.

**Air transport is not included.

Source: European Commission, Coronavirus Outbreak – List of Member State Measures approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework, updated as of 27 August 2020.

TABLE 2

BENEFICIARIES*	AMOUNT OF STATE AID (BILLION EUR)
Self-employed	28.5**
SMEs and Midcaps	20.2
Exporting companies	6

*This is not an exhaustive list of beneficiaries.

**Out of which EUR2.3 billion for "companies and self-employed".

Source: European Commission, Coronavirus Outbreak – List of Member State Measures approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework, updated as of 27 August 2020.

In terms of sectors, unsurprisingly the amount allocated to air transport stands out in comparison with other activities, given the almost total freeze that was imposed on air traffic and the sheer cost of entire fleets stranded on the ground.

In terms of categories of beneficiaries, the amount allocated to self-employed people might appear slightly more surprising, although the absence of furlough schemes for the self-employed provides a likely justification.

Déjà vu, or maybe not

The Commission has been widely praised for the swiftness in handling the requests from national governments. The pace at which notifications have been dealt with (in some cases the green light has been given in 24 hours) reminds of the fractional tempo used by the "task forces for the financial crisis" set up by DG Competition during the 2008 financial and economic crisis.

In fact, this is the second time in ten years that this scale of public intervention in the economy under the form of State aid occurs in the EU. Fortunately, as opposed to the 2008 crisis, this time around there is no systemic risk at stake in the financial sector and no link between undertakings (or rather, banks) in difficulties and sovereign countries threatens to drown the solvency of both. That's that as to the good news, thou.

The Covid-19 outbreak has directly hit the real economy, causing both supply and demand to collapse at the same time. On the other hand, the epidemiological situation remains, the disease is still active and until an effective vaccine exists, containment measures will continue to be necessary across Europe. As such, industries will continue to be severely affected by the decrease in consumption, as it is expected that consumers' behaviour continues to adjust to the containment measures and to their fear of the disease.

The expectation is therefore that the injection of public money in the economy will continue for some time to come. Differently from what was the case during the 2008 crisis, the coronavirus outbreak is a symmetric occurrence for all EU economies and moral hazard does therefore not play a role in the competition assessment carried out by the Commission. This will certainly facilitate the continued approval of further State aid.

Flex or bend?

The Commission's resolute approach in flexing State aid rules to mitigate the impact of the coronavirus outbreak has not won unanimous praise.

Some Member States burdened with heavier financial constraints growled at the apparent ease with which the Commission approved across-the-board support schemes for companies established in financially more powerful Member States. According to the disgruntled countries, seemingly bottomless aid betrays the goal of an Internal Market free of competition distortions induced by protectionist measures of national governments, the very reason State aid rules were created in the first place.

On the other hand, some companies have expressed dissatisfaction at the imbalance brought about by State aid grants in markets where private and State-owned enterprises compete neck-to-neck. Low-cost airline Ryanair has probably been the most vocal of the protesters and has so far announced legal challenges against the decisions by the Commission approving aid to Finnair, Lufthansa, SAS, and as well as against the decisions approving a French tax deferral scheme for airlines with a French-issued license and a Swedish loan-guarantee program for airlines with a Swedish-issued license.

It is now up to the Court of Justice in Luxembourg to decide whether the Commission has flexed or bent EU State aid rules. Stay tuned.

Three/O2: all-you-can-eat merger control?

By Darach Connolly

On May 28, 2020, the General Court of the European Union delivered an important judgment that goes to the heart of how EU merger control functions, comprehensively overturning a 731-page merger prohibition the European Commission (Commission) had issued in *Three/O2* in May 2016. Before *Three/O2,* the EU courts had not been asked to rule on whether the creation of a non-dominant firm would give rise to a "significant impediment to effective competition" (SIEC). We discuss whether the judgment lowers the bar for merger approval and paves the way for future industry consolidation.

To merge or not to merge

The market economy, central to the European project, has served consumers well. A key feature of this system is the freedom for firms to merge or divest in response to changes in market conditions. Although state intervention has taken a less prominent role, consumer welfare remains protected by an EU-wide merger control regime. Under the 1989 regime, the Commission could only block mergers if it could show (a) dominance and (b) a reduction in competition. An academic debate raged as to whether there was an "enforcement gap" that stymied the Commission's legal ability to challenge problematic mergers. On May 1, 2004, the modernized EU Merger Regulation came into effect and reformulated the old two-limb approach in a single SIEC test. This was understood, at least by the Commission, to extend its ability to block mergers beyond the concept of dominance if it could prove anti-competitive effects would flow from the unilateral behaviour of a non-dominant firm.

Across Europe, tight oligopolies are common in the telecommunications industry, among others. In 2006 in *T-Mobile/tele.ring,* the Commission began to rely on the broader SIEC test when it scrutinized a four-to-three telecom deal in Austria. Even though Mobilkom was the largest mobile network operator (MNO) in Austria at the time, the Commission identified an SIEC as the acquisition by T-Mobile of tele.ring (with 10 to 20 percent market share) would remove a "maverick" firm with an aggressive marketing strategy that had doubled its market share in recent years. The deal was only cleared on the basis of a mast and spectrum divestment. Similarly, under Commissioner Almunia, four-to-three telecoms deals were subjected to lengthy investigations in *Hutchison/Orange* in Austria in 2012, in *Three/O2* in Ireland in May 2014 and in *Telefonica/E-Plus* in Germany in July 2014. These were only cleared on the condition that the merged entities granted varying degrees of wholesale access to mobile virtual network operators (MVNO).

The UK deal, which was structured as a EUR10.25 billion acquisition by Three of O2, would have seen two of the four MNOs combine to form the largest player on a market already characterized as a tight oligopoly. Post-transaction, Three/O2 would have held about 30-40 percent, with BT/EE holding slightly less and Vodafone holding about 20-30 percent. While each case is unique, the UK deal was anticipated to receive close scrutiny – but, ultimately, approval – as Three committed to grant one or two MVNOs access to certain of its network capacity and divest O2's stake in Tesco Mobile. However, after a nine-month investigation, the Commission blocked the deal on the basis it would (1) reduce competition on the UK market for retail mobile telecommunications, (2) hinder the development of UK mobile network infrastructure, and (3) reduce the MNOs willing to offer wholesale access to MVNOs. During the review in *Three/O2,* UK stakeholders pressed to block the deal (the CMA and Ofcom were publicly opposed and unsuccessfully sought jurisdiction to review the deal) and, notably, the Commission was under new political leadership. Following the prohibition in May 2016, it was unclear whether there was a "magic number" for telecoms deals. Indeed, a conditional clearance in *Hutchison 3G Italy/Wind/JV* in Italy in August 2016 saw Iliad enter the Italian market as a full-blown *fourth* MNO on the basis of a remedy package, and while the four-to-three *T-Mobile NL/Tele2 NL* deal in the Netherlands in November 2018 obtained *unconditional* clearance, it involved the acquisition of a competitively weak "flailing firm."

Role of important competitive force

In its 2004 Horizontal Merger Guidelines, the Commission suggested that one of the factors that may indicate whether a merger creates an SIEC is whether it eliminates an "important competitive force." Application of this element has been controversial. In its prohibition decision, the Commission portrayed Three as an important competitive force that would be eliminated by the merger. Three claimed that this overestimated the constraint it exercised in the retail market, noting that its market share was consistently below 10 percent and it had weak subscriber growth prior to the deal. On appeal, the General Court agreed. It held that the Commission confused three distinct concepts: (i) the concept of an SIEC as the legal test for prohibition, (ii) the concept of an "important competitive constraint" referred to in recital 25 of the EU Merger Regulation, and (iii) the concept of elimination of an "important competitive force" used in the Horizontal Merger Guidelines. This mischaracterization led the Commission to water down the meaning of an important competitive force to effectively justify it finding an SIEC in any horizontal merger, which was an unlawfully broad interpretation of the test. Rather, the Commission must prove (i) a reduction in competitive pressure, and (ii) the merger eliminates "important competitive constraints" that the merging parties exert upon each other. Notably, the General Court held the Commission may only prohibit mergers where the market effect is *equivalent* to a position of individual or collective dominance enabling the merged entity to "become a price maker instead of remaining a price taker." This is a dramatic reformulation and may be welcomed by industry consolidators for its elegant simplicity. It remains to be seen whether it is an acceptable operational definition.

Role of closeness of competition

In *Three/O2,* the Commission relied on a limited survey of approximately 100 subscribers and switching data to estimate a diversion ratio between Three and O2 to assess closeness of competition. During the hearing, however, the General Court probed this data and concluded that while Three and O2 were *relatively* close, they were not *particularly* close competing MNOs, and that factor alone was not enough to prove an SIEC. Arguing from first principles, the General Court surmised that to hold otherwise would mean that any four-to-three merger would be capable of prohibition. On the flipside, the Commission may argue on appeal that only 11 mergers have been prohibited since 2004, with few prohibition decisions ever relying on the non-dominant theory of harm such that any "floodgate"-type argument is hypothetical rather than real. A notable four-to-three exception includes the *UPS/TNT* prohibition, which was later annulled for procedural reasons.

Role of economic analysis

Since 1998, it has been recognized that the Commission has a margin of discretion to carry out complex economic assessments during its merger review. The General Court in *Three/O2* noted that its role was to verify that the evidence relied on by the Commission was "factually accurate, reliable and consistent" and supported its final conclusions. One takeaway is the refreshing way in which the General Court sense-checked the assumptions and logic underpinning the Commission's economic analysis. In the previous Irish and German telecoms cases, the Commission conducted a similar upward pricing pressure (UPP) analysis to estimate the effect of the merger on average prices, predicting an average price increases of 6.6 percent in the Irish case and 9.5 percent in the German case. Both transactions were conditionally cleared. Yet, in *Three/O2,* the Commission outlined a 65-page UPP analysis (and calibrated merger simulation) that illustrated that the deal would only increase average overall prices by 7.3 percent. The General Court found that the UPP analysis in *Three/O2* lacked probative value and criticised the fact that *any* UPP analysis of a four-to-three merger was likely to indicate a price-rise post-transaction, and failed to account for efficiencies stemming from the "rationalisation and integration of production and distribution processes." This is likely to have a significant effect on how the Commission conducts detailed economic analysis (with limited information) under the timetable pressure imposed by merger review.

Other concerns

The General Court overturned the Commission's other substantive findings. First, it held that the Commission was incorrect to find *Three/O2* would hinder the network arrangements between the MNOs. Sharing of telecommunications infrastructure is a common feature in the industry. Pre-merger, Three was in a net-share with BT/EE (called MBNL), and O2 was in a net-share with Vodafone (called Beacon). While it anticipated that the merger might mean that the MBNL or Beacon net-share would become redundant or the partner's interests mis-aligned, the General Court criticized the notion that disruption to MBNL or Beacon was an element which alone gave rise to an SIEC. In other words, the termination, renegotiation or alteration of a net-share arrangement could not be characterised as an SIEC. Taking the argument to its logical conclusion, the Commission could block any four-to-three merger not between existing net-share partners, which the General Court rejected as an incoherent proposition. Separately, the General Court dismissed the idea that the merger could raise competition issues for MVNOs on the wholesale market, citing the fact that Three's market share for wholesale access was less than 5 percent in the four years prior to the merger.

Commission re-think

Time will tell whether *Three/O2* is as seismic as the infamous triplet of judgments annulling merger decisions in *Airtours, Tetra/Laval* and *Schneider* in 2002. Following a number of changes to the Commission's merger control practice, including the adoption of an in-house Chief Economist team, challenging the Commission's position on the EU Merger Regulation has been perceived as being very difficult. Recently, however, a series of judgments called this view into question: *UPS/TNT* (prohibition annulled for breach of procedural rights in March 2017, upheld in January 2019); *Austria Asphalt* (concerning when a joint venture is notifiable in September 2017); *KPN* (annulling a clearance decision in October 2017); *Lufthansa* (annulment of a refusal to review a merger commitment in May 2018); and *Ernst & Young* (concerning the definition of gun-jumping in May 2018). Further, the *Three/O2* ruling may encourage appellants in other recent prohibitions, such as *Tata Steel/ThyssenKrupp* in June 2019.

In July 2020, the Commission confirmed it will appeal the General Court's judgment in *Three/O2.* A key focus of the appeal will be the standard of proof. In 2008, the Court of Justice held in *Impala* that "the inherent complexity of a theory of competitive harm" put forward by the Commission when assessing a merger must be taken into account when assessing its plausibility. Significantly, the Court of Justice ruled that a complex theory of harm did not, of itself, have an impact on the standard of proof that the Commission was required to meet and that it was for the Commission to approve or prohibit a deal based on the "most likely" outcome. In *Three/O2,* however, the General Court suggested that the standard of proof to show an SIEC in a four-to-three merger is stricter than "more likely than not" or "on the balance of probabilities." Rather, the Commission must show a "strong probability" of an SIEC, although it need not prove it "beyond all reasonable doubt." The General Court concluded that the standard of proof for *unilateral* effects on an oligopolistic market is not "substantially different" from that needed to show *coordinated* effects. If so, this is a significant clarification and sets a very high evidential hurdle for competition authorities, particularly given the limited timelines for merger review. The clear message to the Commission is to focus its review on *real issues* and not on theoretical outcomes. Not all are convinced. The former Chief Economist during the *Three/O2* merger review, Massimo Motta, criticized the judgment as setting the standard too high: "you cannot have a standard of proof which goes close to beyond a reasonable doubt." This was echoed by another former Chief Economist, Tommaso Valletti, who described such a standard as "almost impossible to meet in oligopoly mergers."

Yet, there are positive lessons for the Commission. Despite the significant volume of mergers each year, there is precious little case law. Now is an opportunity to reset and address certain concerns regularly aired by the legal community during merger review – such as ever-widening theories of harm, the fundamental right of merging parties to fair procedures, and invidious ever-lengthening information requests.

For Three, it is clear that it achieved a resounding legal victory. Yet the UK mobile market has evolved: on May 7, 2020, O2 and Virgin Media agreed to a major EUR31.4 billion *joint venture.* Should *Three/O2* be upheld, Three will no doubt closely watch UPS's EUR1.7 billion action for damages against the EU for the unlawful prohibition of its merger with TNT in 2013. That will have to wait. For now, Three sells its mobile subscription plans under the moniker All You Can Eat – the judgment begs the wider question whether a more permissive approach to the SIEC test will promote a wave of all-you-can-eat industry consolidation.

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Global merger control handbook

Why?

With an increasing number of cross-border mergers and strategic corporate reorganizations in today's fast-changing global environment, an understanding of – and compliance with – the applicable regulations and requirements is of vital importance.

Merger control regulation has greatly evolved and expanded in recent years:

- In many jurisdictions, the substantive merger test has evolved beyond a straightforward dominance assessment based on market shares, to a more comprehensive and inclusive assessment of the transaction's impact on the requirements of dynamic competition
- The nature and the number of variables taken into account by competition authorities have increased, making it more complex to assess the likely outcome of a merger review
- Even fairly straightforward mergers and acquisitions may require numerous clearances around the world today, with each filing being subject to different procedural requirements and substantive tests in difference countries including, in some cases, assessment on factors other than purely their impact on competition, and
- In some jurisdictions, strict enforcement of merger control requirements has evolved into a substantial risk for the parties to a notifiable transaction

What it is?

The *Global Merger Control Handbook* is a comprehensive three-volume handbook, which is available in hardcopy and in digital format (pdf), and is designed to serve as a helpful reference guide for in-house counsel and other individuals involved in mergers and corporate reorganizations, when analyzing merger control requirements and navigating the merger clearance process in the 50+ jurisdictions covered in the book.

The handbook's key features include:

- A detailed overview of relevant local rules, methodology, process and timing requirements in more than 50 jurisdictions across Europe, North and South America, Africa, the Middle East and Asia Pacific
- On-the-ground guidance on the regulatory issues involved in merger control, authored by competition and antitrust lawyers in local offices at DLA Piper and a number of its relationship firms

New updates available!

On our dedicated *Global Merger Control Handbook* webpage, regular updates are posted on the latest relevant developments in each of the jurisdictions covered in the handbook.
A new series of updates covering legal developments and recent landmark cases was posted in spring/summer 2020.
The updates are available on: https://www.dlapiper.com/en/us/insights/publications/2019/02/global-merger-control-handbook/

For our clients

Should you have any questions in relation to the handbook, please reach out to your regular DLA Piper lawyer or the authors of the respective chapters. Their contact details are accessible through the weblink above.