Flexible Thresholds for European Merger Control...and more?

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The EU merger control regime which has been in existence for 27 years is generally considered to be robust and successful. Soon the Regulation will be receiving another overhaul in the form of a public consultation. Sir Philip Lowe gives an overview of how the EU merger control regime developed and analyses the recent efforts to make the Regulation for control of mergers even more effective.

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After seventeen years of negotiation between its Member states, the European Community adopted in 1989 a Regulation for control of mergers at European level that combined some unique and attractive elements. In the first place, it defined quite carefully what constituted a merger, in terms of the acquisition, directly or indirectly, of the decisive control of an undertaking which could operate independently of any other entity and was ongoing. And it required mergers of this kind, which had been decided on, to be notified to the Commission and not be put into effect in any way without the Commission's approval. This meant that in most cases, firms and their legal representatives could determine whether and when they needed to notify a transaction.

Secondly, it found a way of dividing out the responsiblities for merger control between the Commission at European level and competition authorities at national level. It established turnover thresholds which broadly determined whether on the one hand, a merger had implications for competition on markets in more than one Member state (that is, it had a 'Community dimension'), in which case it should be dealt with by the Commission, or on the other, the centre of gravity of the transaction was national and therefore should continue to be subject to national merger control rules.

Thirdly it established the principle of a 'one-stop shop' which meant that any merger of Community dimension would be dealt with solely by the Commission and would not be subject to the approval of any other competition authority within the EU Member states.

Fourthly, it allowed for situations where despite the arithmetic of the thresholds, national authorities could still request referral to them of cases which raised major concerns for competition on markets within their borders. The Commission could refuse to refer a case but only if it intended to open an in-depth investigation into the case because it raised 'serious doubts' as to its compatibility with the internal market.

Fifthly, it set firm legal deadlines within which the Commission had either to authorise a merger with or without conditions, or to prohibit it, or indeed to refer it to a national authority.

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The combination of these five main elements produced a cocktail which had the potential to please everyone. As Commissioner Vestager said recently, 'European merger control needs to work for business and consumers alike' and the 1989 Regulation aimed to do just that: it offered the prospect of strong enforcement against anticompetitive mergers while guaranteeing a high degree of legal certainty, a reasonable administrative burden and predictable deadlines for business. And through the workings of the thresholds, it was possible to ensure that the majority of the cases were allocated easily to the Commission or to national authorities.

Despite some initial scepticism as to whether it was capable of being as effective and efficient as the Regulation required, the Commission met the challenge. As a result, successive reviews of the EU merger control, from 1997 through 2003 and 2009 to 2014, concluded similarly to the consultation on the 2014 White Paper, that 'EU merger control works well and that no fundamental overhaul of the system is needed'.

This has not prevented the Commission from proposing 'specific amendments (to the regime) in order to make it more effective'. As a result, the calculation of legal deadlines was refined in 1997. More significantly in 2003, the substantive test for mergers was changed from 'dominance' to 'substantial impediment to effective competition' in order to capture some mergers which were potentially damaging to competition but which did not necessarily involve creation or strengthening of a dominant position. In addition the revision of the Regulation in 2003 allowed for easier referrals of cases from the Commission to authorities or vice versa.

In addition to other improvements, the 2014 White Paper subsequently put the spotlight on the extent to which the acquisition of minority shareholdings could have similar effects to an anticompetitive merger and therefore should possibly come under the aegis of the EU Merger Regulation. Commissioner Vestager's reluctance to make any proposal on this reflects the concern to ensure that 'successful enforcement... (focusses)... on the things which matter'. Too expansive a definition of what could be considered as potentially anticompetitive could result in an excessive burden of notification for business and a heavy burden of largely unnecessary administration for the Commission, given that already so many notified mergers present no competition problems and that notification of purchase of shareholdings could only frustrate effective competition enforcement.

In this sense EU merger control faces similar challenges to European fisheries policy: how to control the size and pattern of nets to ensure that the fish you want to catch are in the net and that others are not.

The emphasis of the latest March 2016 Consultation on simplification and focus reflects the well-founded concern reflected in the debate on the 1989 Regulation to ensure that the public interest is protected without imposing an excessive burden of notification, disclosure and delay, not only on the parties to the merger but on all those who may need to be consulted. Extensive pre-notification contacts, while useful both to the merging parties and to the Commission undoubtedly add to the perception that the procedural requirements of the Regulation are increasingly heavy. To this extent, the Commission's emphasis on more simplified notification (or no obligatory notification) is welcome. In parallel any possible additional streamlining of referral procedures to and from national authorities, as well as more convergence on the substantive assessment of mergers among national competition authorities and between them and the Commission, goes in a direction which will be in the interests of business and consumers as well as the parties themselves.

At the same time the March consultation raises the equally important public policy issue as to whether the application of turnover thresholds alone fails to capture potential competition problems of mergers and takeovers in emerging product and service markets. Admittedly, the assessment of these markets usually results in new market definitions and allows competition authorities to catch situations where turnover is still low but increasing rapidly. However frequently new and disruptive competitors are the targets of irresistible financial offers from incumbents. IT mergers such as Facebook/WhatsApp, Microsoft/LinkedIn and Verizon/Yahoo raise the question as to whether valuation of tangible and intangible assets might in some circumstances be a useful additional criterion for potentially anticompetitive mergers which may not meet either EU or Member state turnover thresholds for notification.

Given the evident difficulty of establishing value-related thresholds for the purposes of compulsory notification, the next issue is therefore whether the Commission and/or national authorities could be empowered to request notification of certain transactions, subject to certain defined criteria related to a merger's potentially damaging effects on competition. Such an approach could well be

an attractive one in Europe but would of course confront the traditional US view that monopolization problems should be dealt with when they occur post-merger.

In any event, a move away from the crude but clear turnover thresholds is likely to give rise to considerable concerns in business as to the predictability and effectiveness of EU merger control. Given that it would imply more powers for the Commission in relation to global mergers, it may paradoxically revive the debate in some Member states on the extent to which mergers should be assessed at national level, not just in relation to competition criteria but also with respect to a wider public interest definition (including for example preservation of R+D assets and skills within a country or in the EU as a whole).

Next Tuesday's breakfast gives us a unique opportunity to hear from Carles-Esteva Mosso, a talented and key player in this debate, but someone who has also decades of valuable practical experience in EU Merger control, as to how he assesses the prospects for incorporating some of these new ideas into the currently successful and robust EU merger control regime.

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