The wolf in sheep's clothing? The consequences of the CMA asserting broad jurisdiction over global mergers

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So far, 2020 has seen the UK Competition and Markets Authority (CMA) continue to take an increasingly interventionist approach to global deals, including those with little to no UK *nexus*, pushing the boundaries of its jurisdiction and the interpretation of the share of supply test. This builds on a number of highly interventionist decisions taken by the CMA in 2019. With the apparent policy agenda to increase its profile globally post-Brexit, this trend is expected to continue. It is clear that it is increasingly risky for parties to global deals to complete all but the most straightforward transactions without engaging the CMA first, even if the deal has little UK *nexus* and is being reviewed by a major global competition authority such as the US DOJ or FTC.

Pushing the boundaries of jurisdiction

The extent of the CMA's increased interventionism was brought to the fore in February 2020 with the publication of the CMA's Phase 1 decision in *Roche Holdings, Inc. / Spark Therapeutics, Inc.* and the publication of the CMA's Provisional Findings in its Phase 2 investigation of Sabre Corporation's acquisition of Farelogix, Inc. Both cases reveal the CMA's expanding interpretation of the UK jurisdictional share of supply test, particularly in cases where the CMA is determined to review non-UK acquisitions in the technology space and innovation-focussed sectors.

In *Roche / Spark* the target, Spark Therapeutics, was not engaged in the commercial supply of goods or services in the UK and did not generate turnover in the UK. Nonetheless, the CMA held that it had jurisdiction over the transaction based on the 25 per cent share of supply test being met. The CMA held that the share of supply test was met on the basis of (i) the number of UK-based employees engaged in activities relating to the treatment of haemophilia A; and/or (ii) the number of UK patents procured from an administrative patent authority in relation to the treatment of haemophilia A. For Spark, such activities related only to research and development relevant to the development of a potential treatment, which was only in the phase 2 (or more advanced) stage of the clinical development pipeline. This approach to the share of supply test differs to the CMA's previous approaches to jurisdiction in similar markets and other pharmaceutical cases.

Similarly, in *Sabre / Farelogix,* the CMA has provisionally concluded that it has jurisdiction over the transaction based on the provision of technical services by the target, Farelogix, to a UK airline via one of Farelogix's US customer relationships, despite Farelogix having no turnover in the UK and generating no

revenue from UK customers. This is the CMA's fourth attempted formulation of the share of supply test over the course of that case in order to try to assert jurisdiction over the transaction.

These attempts to stretch the share of supply test in both *Roche / Spark* and *Sabre / Farelogix* exemplify the lengths that the CMA is willing to go to to assert jurisdiction over transactions that it wishes to investigate substantively, even when the deals are already being investigated by other major global competition authorities with a much greater *nexus* to the transaction (the US FTC in the case of *Roche / Spark* and the US DOJ in the case of *Sabre / Farelogix*).

Part of a broader pattern of increasing interventionism across Europe?

Over the past five years, the CMA has prohibited six per cent of all transactions that it assessed, compared to, for example, just one per cent of deals scrutinised by the US authorities. More recently, in the last eleven months to March 2020 alone, the CMA has referred 17 per cent of all cases to an in-depth Phase 2 investigation, with the CMA prohibiting 22 per cent of cases at Phase 2 and the merging parties abandoning a further 44 per cent of cases at Phase 2. In comparison, in FY2018-2019, the CMA only prohibited 9 per cent of cases at Phase 2 and the merging parties only abandoned 27 per cent.

The CMA's increasingly interventionist position is perhaps not surprising given the post-Brexit political landscape; the CMA is looking to take its place at the table alongside other major global competition authorities. Concerns about under-enforcement of technology mergers were also brought up in the Lear report in June 2019, which found that the CMA's predecessor had been overly cautious in intervening when it came to technology mergers. As a result, the Chief Executive of the CMA, Andrea Coscelli, has recently indicated that the CMA will be taking a more active role in scrutinising large, international mergers, including being more dynamic in its assessment of what would have happened in the market if the merger had not occurred.

Therefore, the latest CMA decisions fit with a wider trend of competition authorities broadening merger control review in response to concerns of so-called "killer acquisitions" in the pharmaceutical sector and under-enforcement with respect to mergers in the technology sector. Other European competition authorities (or their governments/legislators) have changed their merger control jurisdictional thresholds. For example they have introduced an additional transaction value threshold to capture acquisitions of start-up companies or recent market entrants by incumbent players as both Germany and Austria did in 2017. Other authorities such as France are currently considering such changes to enforcement tools. With the current European *Zeitgeist* moving towards increased intervention and enforcement of mergers in innovative sectors, it is likely that the CMA's interventionist approach is not going to change any time soon.

Key lessons and potential risks for businesses going forward

The increase in competition agencies across the globe claiming jurisdiction over the same deals has the potential to increase the regulatory burden for merging parties. It also increases the risk of conflicting and inconsistent decisions, including both decisions on remedies and on case outcomes. As a result, there could be significant implications for deal evaluation, planning, and regulatory timetables going forward, in particular if merging parties have to take into account multiple merger review and potential appeal processes globally with differing procedures.

The approach of the CMA and other global agencies reinforces the need for businesses to think carefully, and up-front, about how best to manage the risk of increased merger control review by multiple jurisdictions, including the UK. This is the case even if the transaction has extremely limited or no apparent *nexus* to the UK.

It remains to be seen whether or how global competition agencies will limit divergence and therefore keep the regulatory burden for businesses of complying with multiple merger control regimes on the same deal in check. These are challenging times for global dealmakers.

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