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THE END OF AN ERA? A TRANSATLANTIC MERGER CONTROL RETROSPECTIVE

With Gail Slater confirmed to lead the Antitrust Division of the US Department of Justice (DOJ), and Andrew Ferguson already having taken over as the new Chair of the Federal Trade Commission (FTC), the recent "Bermuda triangle" of global merger enforcement has completed an overhaul, with new administrations now in place in the US, EU and UK.

As dealmakers wait to see what this means for global merger control policy, the signs are that we are heading for another watershed moment. On either side of the channel, stakeholders are engaged in renewed and vigorous debate about the role of competition policy in furthering industrial policy and promoting growth. The European Commission has taken action with the recent unveiling of its Competitiveness Compass. And the UK Competition and Markets Authority (CMA) has made efforts to demonstrate that it is on board with the UK government's pro-growth agenda, including through its conditional clearance of *Vodafone/Three* and CEO Sarah Cardell's announcement of the CMA's proposals to drive growth and investment – amongst them, the publication last week of a mergers charter outlining how the CMA and businesses should engage on merger reviews, and the launch of the CMA's merger remedies review. Meanwhile, in the US markets keenly await the impact President Trump's antitrust appointments will have on merger control policy and enforcement.

While we wait to see how this pans out and what it means for international merger control over the next few years, we took a trip down memory lane to remind ourselves what happened on deals which were subject to parallel reviews in these jurisdictions during the previous administrations.

From one paradigm shift to the next

The last watershed moment in international merger control came early in 2021. The end of the Brexit transition period saw the CMA able and eager for the first time to review global deals that would previously have fallen within the exclusive competence of the European Commission. Indeed, the CMA had already sent a clear message, with cases like *Sabre/Farelogix*, that it intended to make its mark on the international merger control stage. Across the Atlantic, following his inauguration in January 2021, President Biden made clear his stance on antitrust enforcement with the appointments of Lina Khan as Chair of the FTC and Jonathan Kanter as head of the DOJ Antitrust Division, and the issuing of an executive order aimed at promoting competition and innovation, including through greater scrutiny of mergers. Meanwhile in Europe, Vestager appeared to be in something of an unassailable position, following her unprecedented re-appointment to a second term in 2019.

Post-Brexit divergence between the EU and UK authorities has been much discussed. With the benefit of hindsight, we look back over the transatlantic merger reviews carried out during that period to see how the US authorities fit into that picture.[1]

Of course, diverging outcomes in some cases are to be expected - explained by different competitive dynamics in the relevant national or sub-national markets. This was the case for around half of the transactions we examined that saw some sort of transatlantic divergence.[2] Such cases are not really divergence at all, but simply the authorities dealing with different facts.

In a high-profile example, the DOJ sued to block *Aon/Willis Towers Watson* (ultimately leading to the deal's abandonment), while the EC conditionally cleared the deal at Phase 2. Vestager explained that the different outcomes resulted from the fact that, while the authorities reached similar conclusions in some markets, certain issues did not arise in both jurisdictions. London Stock Exchange's takeover of US-based Refinitiv was unconditionally approved by the DOJ following a second request when the DOJ found neither vertical nor

[1] We looked at concluded cases between 2021 and the end of 2024 in which the CMA and/or European Commission intervened (in the form of remedies, prohibition or abandonment by the parties), and examined which of those cases were also subject to merger review in the US. We are aware of 16 such cases during the period.

[2] Of the 16 cases between 2021 and the end of 2024 which saw CMA and/or European Commission intervention and were reviewed in the US, 11 saw some sort of transatlantic divergence. In five of those cases the divergence can be explained by different competitive dynamics in the relevant national or sub-national markets.

horizontal concerns on the facts, while the parties had to offer remedies to secure EC Phase 2 clearance after the EC found both horizontal and vertical concerns. Similarly, it is not surprising - given the Spanish focus of the deal - that the DOJ did not intervene in *IAG/Air Europa (I)*, while the EC's rejection of the parties' remedies led them to abandon the deal. The DOJ also closed its investigation into Veolia's bid for rival French water and waste-management company Suez, while both the EC and CMA found horizontal overlaps which raised concerns - Veolia offered Phase 1 divestments to resolve those concerns in the EC investigation (which the EC accepted) but declined to offer remedies at Phase 1 in the UK, leading the CMA to unwind the transaction in the UK following its Phase 2 investigation. Most recently, in *Korean Air/Asiana* the authorities each considered different geographic markets and unsurprisingly reached different outcomes, with the CMA and EC accepting remedies to address their specific concerns (the CMA at Phase 1, the EC at Phase 2) while the DOJ ultimately took no action.

In another case, the authorities reached similar outcomes but diverged in the theories of harm they pursued. While all three authorities in *S&P/IHS Markit* ultimately cleared the deal with remedies, the authorities focused on different theories of harm. The EC maintained vertical concerns, whilst the CMA and DOJ pursued a horizontal theory of harm. This divergence was reflected in the remedies offered, with different parts of the business needing to be divested in order to address each regulator's concerns.

Which brings us to the most interesting cases - those in which the authorities pursued broadly similar theories of harm in respect of the same or similar markets, but still arrived at different conclusions. In some cases, these different outcomes were down to the authorities' different stances on remedies, the CMA and US authorities (at least at the time) generally being more rigid on remedy design than the EC. We saw this for example in *Cargotec/Konecranes* – the EC cleared the deal conditionally at Phase 2, while the CMA blocked the deal having rejected the same remedy package, on the basis that the divestment business was a "mix and match" of both parties' pre-existing assets. The DOJ, like the CMA, rejected the parties' settlement proposal, with Assistant Attorney General Jonathan Kanter noting that "*the [DOJ] will not accept patchwork settlements that do not replace the competition that is lost by a merger*".

In *Microsoft/Activision* in 2023 the regulators again diverged on remedies - the EC cleared the acquisition with behavioural access remedies just weeks after the CMA prohibited the deal on the basis of the same remedies. The CMA then approved a modified version of the deal five months later. In the meantime, the FTC tried and failed to block the deal, and continues to appeal.

In other cases, the authorities pursued similar theories of harm in respect of the same or similar markets, but nevertheless arrived at different conclusions on the substance. In *Broadcom/VMware* a key issue for all three regulators during their in-depth investigations was whether the merged entity might reduce interoperability between VMware's software and the hardware offered by Broadcom's competitors. While the EC found that such concerns were substantiated (and accepted comprehensive access and interoperability commitments to address these concerns), the CMA took a different view, finding that while the merged entity might be able to reduce interoperability, it would have no incentive to do so - it cleared the deal unconditionally. Similarly, and despite a lengthy investigation, the FTC took no action.

The FTC then switched allegiance, aligning with the EC in *Amazon/iRobot*. Again, all three regulators were focused on vertical theories of harm, including potential foreclosure of iRobot's rivals by preventing or hampering them from selling on Amazon marketplace. The CMA cleared the deal unconditionally in Phase 1, having found that while Amazon would have the ability to foreclose the merged entity's robot vacuum cleaner rivals, it would lack the incentive to do so. In contrast, the EC preliminarily found that Amazon would have had both the ability and the incentive to foreclose iRobot's rivals. The deal was abandoned as a result. Although the FTC ultimately didn't sue to challenge the transaction, it welcomed the abandonment, noting that its investigation had also been focussed on "*Amazon's ability and incentive to favor its own products and disfavor rivals'*" and "*revealed significant concerns about the transaction's potential competitive effects*".

Looking forward

There were signs that international divergence in merger control had reached its high-water mark in 2023 with *Microsoft/Activision*, and that things were settling down - in *Adobe/Figma* for example the authorities in all three jurisdictions were broadly aligned in their concerns (leading ultimately to the deal's abandonment).

But that was before the changes of administration, and it remains to be seen just what impact they will have. On the one hand, the renewed focus on domestic industrial strategy and the rise of protectionist sentiment might mean that dealmakers will have to factor in an increasing likelihood of conflicting regulatory approaches on global transactions, particularly for deals which touch on politically sensitive sectors. But on the other hand, the geopolitical climate and focus on growth and competitiveness will increase the scrutiny on any authority going out on a limb and blocking global deals which are on track to be cleared elsewhere.

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