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Sustainability issues in merger review

Introduction

The treatment of sustainability issues in merger review is an increasingly hot topic. Several stakeholders have called on competition authorities to take into account both the positive and negative environmental impacts of deals when conducting their merger reviews.

This interest is reflected in the September edition of the Competition Merger Brief (the Brief), which is produced by DG Competition and includes a summary of the European Commission's current approach to sustainability in EU merger control in the context of the European Green Deal. The Brief notes that, while the Commission's merger review is focused on harm to competition and it does not have a mandate to intervene in mergers on environmental grounds, sustainability considerations are nonetheless an increasingly relevant and important aspect of its merger review, as described below.

Market definition

The current draft of the Commission's revised Market Definition Notice specifically lists sustainability as a factor that the Commission will take into account when defining relevant product and geographic markets.

This is consistent with recent case practice where the Commission has taken account of customer preferences for sustainable products and sustainability-related targets when defining markets. By way of example in Case M.7292 *DEMB/Mondalez/Charger Opco,* the Commission differentiated between organic, fair trade coffee and conventional coffee, on the basis the two products meet different consumer needs in terms of sustainability. In Case M.9706 *Novelis/Aleris,* the Commission concluded that aluminium and steel for car body parts were not part of the same market, particularly given the demand by car manufacturers for aluminium rather than steel in order to meet CO_2 emission reduction targets.

Sustainability considerations can also be relevant when defining geographic market. In Case M.10047 *Schwarz Group/Suez Waste Management Companies,* the fact that customers in the Netherlands sought to minimise CO_2 emissions by avoiding transporting goods over long distances was a relevant factor in the Commission defining the geographic market as national.

Competitive assessment

Sustainability considerations can also be relevant to substantive assessments of competitive impact, including when assessing closeness of competition between merging parties and their competitors. Merging parties who produce similar environmentally-friendly products may well be considered closer competitors than those who produce similar products but to different environmental standards. In Case M.7278 *GE/Alstom*, for example, the Commission found Alstom, GE and Siemens to be largely targeting the same profile of customers given they had all developed machines that were relatively similar in terms of emissions.

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Sustainability related aspects can also be relevant to other aspects of the competitive assessment. For example, in Case M.8713 *Hyundai Heavy Industries/Daewoo Shipbuilding & Marine Engineering*, the Commission looked at how certain innovative vessel technologies, including those enabling lower fuel consumption and lower emissions, could pose barriers to entry or expansion. The impact of a merger on innovation may also be relevant to sustainability considerations as innovation can be a means of bringing green(er) technologies, products or services to the market.

Efficiencies

In the context of the assessment of merger efficiencies, the Brief notes that the Commission will consider whether there are positive environmental effects of a merger (for example, products with decreased levels of toxicity, or new "green" products) that might compensate for any anti-competitive harm. For example, in Case M.9409 *Aurubis/Metallo*, a case relating to the access to copper scrap in the EEA, the Commission concluded that there was at least a possibility that efficiencies relating to better valorisation of copper scrap would materialise, and if so, that they would at least partly be passed on to consumers, thereby partially offsetting any adverse effect on price resulting from the transaction.

However, under the Horizontal Merger Guidelines, efficiencies need to occur within the markets where the competition concerns are found. Despite demand from some stakeholders for the Commission to consider a longer time horizon and *overall* benefits to society when considering efficiencies in a sustainability context, there have so far been no cases where the Commission has accepted such "out-of-market" efficiencies.

"Green killer" acquisitions

The Brief argues that green innovation is often carried out by smaller companies whose low turnover means an acquisition by a bigger incumbent may escape merger review, and that the Commission's "recalibrated" approach to Article 22 EUMR will close the potential enforcement gap for such acquisitions. Nevertheless, the Commission's new policy of using Article 22 EUMR to review cases that do not qualify for review under the merger control laws of the requesting Member State is controversial and does not appear to be particularly targeted at transactions that raise sustainability considerations. Although the approach to Article 22 has been confirmed by the General Court (GC), it is currently being appealed to the Court of Justice (CJ). It is discussed in detail in our Client Briefing.

Conclusion

The Commission's case practice indicates that there are a range of ways in which it has taken account of sustainability-related aspects where relevant to a particular transaction.

The Commission is not alone in considering how merger control can contribute to a greener future. For example, the UK Competition and Markets Authority provided some guidance on the issue in its revised Merger Assessment Guidelines and in its 2021 consultation on environmental sustainability and the competition and consumer law regimes (see our previous Client Briefing for more information). Following this consultation, the CMA published advice to the UK Government, which notes that, while stakeholders welcome the guidance in the recent Merger Assessment Guidelines, more guidance could give businesses greater certainty to pursue opportunities and projects. As a result the CMA "*plans to engage with stakeholders to consider what practical guidance [it] can usefully provide*".

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OTHER DEVELOPMENTS

MERGER CONTROL

First below-threshold deal cleared with remedies in China

On 22 September 2023 the Chinese competition authority, the State Administration for Market Regulation (SAMR), conditionally cleared the proposed acquisition by Simcere Pharmaceutical of a batroxobin injections manufacturer, Beijing Tobishi Pharmaceutical. This case is significant as it is one of the rare cases reviewed by SAMR that did not meet the notification thresholds and is the first time SAMR has imposed conditions in such a case.

Batroxobin – an enzyme derived from snake venom which can reduce fibrinogen levels in blood and treat hearing loss – is used to create batroxobin concentrate active pharmaceutical ingredient (batroxobin API). Simcere had become the sole supplier of batroxobin API in China after entering into an exclusive agreement with Dutch pharmaceutical company DSM Nutritional Products in April 2019 and, in 2021, SAMR fined Simcere RMB 100m for abusing its dominance when it refused to supply batroxobin API to Tobishi to produce batroxobin injections.

Pre-transaction, however, Tobishi is the only manufacturer of batroxobin injections in China, though Simcere is involved in research and development of batroxobin injections with plans to develop a business in this space, giving rise to a horizontal overlap between the parties.

SAMR was concerned that the deal might eliminate potential entry in the market for batroxobin injections in China and consolidate Tobishi's dominant position in the relevant market for batroxobin API. Mirroring its 2021 abuse of dominance decision, SAMR also noted concerns that the merged entity may refuse to supply batroxobin API to potential competitors and concluded that the acquisition may exclude or restrict competition in the market for batroxobin injections in China.

To address these issues, SAMR approved the deal subject to a number of behavioural conditions for at least six years, together with a structural remedy. The conditions included:

- Simcere must terminate the exclusive agreement with DSM regarding the supply of batroxobin API in China;
- Simcere will divest the batroxobin injections business it has been developing;
- after the merger, the end user price of clinically-used batroxobin injections has to be reduced by at least 20% of the current online procurement price;
- after the merger, the merged entity must supply sufficient batroxobin injections to meet clinical demand; and
- if the exclusivity agreement has not been terminated, the divestment has not been completed or the buyer fails to conduct research and development within the required timeframe, the end user price of clinically used batroxobin injections has to be reduced by at least 50% of current online procurement prices.

SAMR also made use of its new stop-the-clock mechanism, stopping the clock on 25 April and resuming it on 21 September (the day before it approved the deal).

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As in other jurisdictions, we expect SAMR may be more willing to exercise its powers to review below-threshold transactions in particularly concentrated markets going forward, especially involving companies that have previously attracted SAMR's attention.

ANTITRUST

European Commission re-imposes fine on Intel for having abused its dominant position in the computer chips market

On 22 September 2023 the European Commission adopted a decision re-imposing a fine of circa €376.36 million on Intel. The Commission issued its initial decision in 2009, finding that Intel had abused its dominant position in the market for x86 central processing units (CPUs) by engaging in two specific illegal practices. These were: (i) giving conditional rebates to computer manufacturers so that they would buy all of their x86 CPUs from Intel, and (ii) paying computer manufacturers to halt or delay the launch of specific products containing competitors' x86 CPUs (known as the 'naked restrictions').

In 2022, the GC annulled the 2009 decision insofar as it related to Intel's conditional rebates practices due to "*incomplete*" analysis on the Commission's part. This aspect of the judgment was appealed by the Commission and is currently still pending before the CJ. In the same 2022 judgment, though, the GC confirmed that Intel's naked restrictions amounted to an abuse of dominant position contrary to EU antitrust rules. Ultimately, the GC considered it was not in a position to identify the amount of the fine relating solely to the naked restrictions, and therefore annulled the fine in its entirety. For further details on the GC 2022 judgment, see our previous Client Briefing.

The Commission's decision re-imposing the fine on Intel relates to the naked restrictions only. In particular, it confirms the Commission's original findings as regards the restrictions taking place between November 2002 and December 2006, which consisted in payments made by Intel to three computer manufacturers (HP, Acer and Lenovo) to halt or delay the launch of specific products containing competitors' x86 CPUs and to limit the sales channels available to these products. The new decision resulted in the fine constituting over a third of the original €1.06 billion imposed on Intel in 2009. However, it remains to be seen what the outcome will be of the CJ's ruling in the pending appeal as regards the conditional rebates.

The decision makes clear that the infringement amounted to a serious breach of EU competition rules and that the Commission is committed to ensuring that such anti-competitive practices "*do not go unsanctioned*", as commented by Commissioner Didier Reynders.

General Court dismisses Valve's appeal against Commission decision in PC video games geo-blocking case

In 2021 the European Commission fined Valve, owner of the online PC gaming platform 'Steam', along with five video game publishers a total of €7.8 million for bilaterally agreeing to geo-block video games within certain EEA states in breach of Article 101 TFEU. The Commission concluded that geo-blocking prevented customers in the EEA from taking advantage of lower prices in other Member States and artificially partitioned the single market in violation of EU antitrust rules. Specifically, the Commission concluded that Valve and the publishers engaged in the following geo-blocking practices: (i) bilateral agreements and/or concerted practices between Valve and each of the five video game publishers, implemented by means of geo-blocked Steam activation keys, which prevented the activation of certain of these publishers' video games outside certain Member States, including in response to unsolicited consumer requests (so-called "passive sales"); as well as (ii) geo-blocking practices in the form of licensing and distribution agreements concluded bilaterally between four out of the five PC video game publishers and some of their PC video games distributors in the EEA (other than Valve), containing clauses which restricted cross-border passive sales of the affected PC video games within the EEA. See a previous edition of this Newsletter for more detail.

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In response, Valve brought an appeal before the GC. Valve argued inter alia that that it could not be held liable for video game publishers seeking to enforce their valid copyright. In particular, Valve claimed that whilst it had provided publishers with the technical function to limit geographic access to certain games, it did not demonstrate any concurrence of wills, and thus collusion, to engage in specific conduct on the market.

In its judgment of 27 September 2023, however, the GC rejected the appeal. It found that the Commission established to the requisite legal standard the existence of an agreement or concerted practice between Valve and each of the five publishers having as its object the restriction of parallel imports. It also found that geo-blocking sought to prevent the video games, distributed in certain countries at low prices, from being purchased by distributors or users located in other countries where prices are much higher. Therefore, the geo-blocking arrangements did not aim to protect the copyright of publishers of the PC video games, but were used to eliminate parallel imports of video games and ultimately safeguard “*the margins earned*” by Valve.

The GC further observed that copyright ensures the proper commercial exploitation of protected property by legitimate rights holders. However, this does not allow rights holders to “*demand the highest possible remuneration*” or engage in conduct which results in “*artificial price differences between the partitioned national markets*”. Finally, the GC confirmed that the conduct was correctly established by the Commission to be sufficiently harmful to competition and a restriction by object.

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