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Bigger Isn't Always Better: the Trend Towards More Extensive Investigations in European Merger Control*

Richard Pepper

Abstract

The European Commission's (the 'Commission') merger control investigations have become increasingly complex in recent years, in particular through requests for large document production and more input from third parties. This project of building cases with larger datasets may be well-intentioned, but the steps needed to digest the resulting information create real difficulties for accurate decision-making. This article highlights some of those issues, and proposes suggestions to address them.

* This article focuses on the Commission's investigations under the EU Merger Regulation, though similar trends and issues arise in its administration of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), which cover joint conduct and unilateral conduct, respectively.

Introduction

The Commission's merger control investigations have become increasingly complex in recent years. Both anecdotal commentary[1] and hard evidence[2] point to longer reviews, filled with demanding requests for information from the merging firms and a growing appetite for third-party input.

This has significant implications for the procedural rights and costs of the merging parties. However, this article focuses on the practical difficulties associated with the Commission's review of large volumes of information, and the implications for substantive assessment. It urges the Commission to focus on these issues more than it has to date, including through public debate and discussion with other competition authorities.

Increasingly extensive market investigations in European merger control

The Commission's enforcement of the European Union Merger Regulation is currently at a high-water mark, at least since the Court of First Instance overturned the *Airtours*, *Schneider*, and *Tetra Laval* prohibition decisions in the early 2000s,[3] which resulted in a reform of the European merger control regime. The Commission's intervention rate has increased under Commissioner Margrethe Vestager, with interventions in approximately seven per cent of notified concentrations during her mandate, compared to approximately five per cent under that of her predecessor, Joaquín Almunia.[4] Part of that increase may reflect a greater readiness to require significant divestments based on unilateral and vertical concerns; the rest shows a greater willingness to consider less conventional theories of harm, such as a

1 See, eg, Nicholas Levy and Vassilena Karadakova, 'The EC's increasing reliance on internal documents under the EU Merger Regulation: issues and implications' (2018) 39(1) European Competition Law Review 12; Frances Dethmers, 'EU merger control: out of control?' (2016) 37(11) European Competition Law Review 435; and Gerwin van Gerven and Melissa Gotlieb, 'Data Gathering and Analysis: The Anatomy of a Merger Investigation' (2015) 39(1) Fordham International Law Journal 1.

2 See Christopher Cook, 'Real Review Timetables under the EU Merger Regulation' (2017) Concurrences No 2-2017.

3 Case T-342/99 *Airtours v Commission* [2002] ECLI:EU:T:2002:146; Case T-310/01 *SchneiderElectric v Commission* [2002] ECLI:EU:T:2002:254; and Case T-5/02 *Tetra Laval BV v Commission* [2002] ECLI:EU:T:2002:264.

4 Intervention data reflect Phase I conditional clearances, Phase II conditional clearances, prohibition decisions and Phase II withdrawals, comparing 2010-2014 for Commissioner Almunia, and 2015-2018 for Commissioner Vestager, based on Commission statistics published at http://ec.europa.eu/competition/mergers/statistics.pdf accessed 27 March 2019.

rejuvenated interest in conglomerate effects,[5] and an increased focus on prospective competition and innovation, epitomised by the concerns underlying the *Dow/DuPont* decision.[6]

The Commission is subject to an exacting standard of proof when it undertakes a prospective analysis of the impact of a transaction on the incentives of the merged firm,[7] and this is all the more important where the Commission steps outside well-defined principles of law or economics. The application of this standard (coupled with a desire to avoid successful legal challenge) can be seen in the increasing length of Commission merger control decisions, and related developments in the intensity of its investigations.

More information requested from merging firms

Practitioners have seen a sustained increase in the number and complexity of questions sent to merging parties, both before and after notification. The Commission's requests demand the iterative production of enormous volumes of data and qualitative explanations of the markets under investigation.[8] And, most recently, the Commission has followed in the footsteps of the United States authorities in requesting the production of large volumes of internal documents. Recently reported examples include more than 800,000 documents produced

5 *Qualcomm/NXP Semiconductors* (Case M.8306) [2018] OJ C 113/08; *Essilor/Luxottica* (Case M.8394) [2018] OJ C 335/08; *Microsoft/LinkedIn* (Case M.8124) [2016] not published in the OJ; and *Dentsply/Sirona* (Case M.7822) [2016] not published in the OJ. See also RBB Economics, 'Beyond internal documents: the Commission's recent conglomerate effects practice' (2018) RBB Brief 58.

6 *Dow/DuPont* (Case M.7932) [2017] OJ C 353/5. The Commission's focus on prospective competition and innovation has been reinforced by recent public commentary by Commissioner Vestager and the hierarchy of Directorate-General (DG) for Competition. Eg, the Chief Economist of DG Competition made several speeches in the latter part of 2018 advocating a shift in the burden of proof for 'killer acquisitions' made by 'super-dominant' companies to increase enforcement against deals that kill off innovative projects or future competition from smaller rivals. See Janith Aranze, 'DG Comp chief economist: Reverse burden of proof to catch killer acquisitions' (*Global Competition Review,* 20 November 2018) https://globalcompetitionreview.com/article/1177095/dg-comp-chief-economist-reverse-burden-of-proof-to-catch-killer-acquisitions accessed 30 January 2019. See also comments made by Johannes Laitenberger: 'We need to acknowledge that smaller firms may have the potential to grow and therefore threaten dominant companies… [Authorities might consider intervening] to protect not-as-yet-efficient competitors in order to prevent damage to competition and ultimately consumers', as reported in Global Competition Review on 31 January 2019.

7 See Case C-12/03 P *Tetra Laval v Commission* [2005] ECLI:EU:C:2005:87, para 39.

8 Gerwin van Gerven and Melissa Gotlieb, 'Data Gathering and Analysis: The Anatomy of a Merger Investigation' (2015) 39(1) Fordham International Law Journal 1, 12-21; Mitja Kovac and Ann-Sophie Vandenberghe *Economic Evidence in EU Competition Law* (Intersentia 2016); see also a United Kingdom perspective in Peter Davis, 'Economic Evidence and Procedural Fairness: Lessons from the UK Competition Regime' (2018) 14(1) Journal of Competition Law & Economics 1.

in *ArcelorMittal/Ilva*;[9] more than one million documents produced in *Qualcomm/NXP*[10] and almost three million documents produced in *Bayer/Monsanto*.[11]

More feedback sought from third parties

The Commission is also seeking more and more input from greater numbers of third parties. Contact details for the customers, competitors and suppliers of the merging firms have been required as part of Form CO since the adoption of the first EU Merger Regulation in 1989, but the Commission is contacting greater numbers of stakeholders, and asking more questions than before.[12] The Commission now commonly sends questionnaires featuring hundreds of questions to hundreds or even thousands of third parties in complex cases.[13] The most extreme example on public record is *Essilor/Luxottica*, where the Commission sent questionnaires to 42,000 European opticians.[14]

Longer investigations

Consequently, the length of reviews under the EU Merger Regulation is increasing for complex cases. While the statutory time periods have not substantially changed since the regulation was first adopted, the Commission is spending longer reviewing complex cases, through greater use of several procedural mechanisms: longer pre-notification periods, encouraging the merging parties to use provisions that extend statutory time periods, using 'stop-the-clock' powers pending the receipt of requested information, and porting 'pull-and-refile' tactics from the US merger control process. The average duration of Phase II reviews (from deal announcement to Commission decision) increased to 337 days in the 2011 to 2016 period, compared to 290 in the 2006 to 2010 period,[15] and the delay between deal announcement and filing in cases involving Phase I remedies or Phase II review increased from approximately 165 days to approximately 200 days in 2017 to 2018 alone.[16]

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9 *ArcelorMittal/Ilva* (Case M.8444) [2018] OJ C 351/9. See http://europa.eu/rapid/press-release_IP-18-3721_en.htm accessed 31 January 2019.

10 *Qualcomm/NXP Semiconductors* (Case M.8306) [2018] OJ C 113/08.

11 *Bayer/Monsanto* (Case M.8084) [2018] OJ C 459/10. See http://europa.eu/rapid/press-release_IP-18-2282_en.htm, accessed 30 January 2019.

12 See n 9 above.

13 See, eg, the 2,251 questionnaires sent in *Outokumpu/Inoxum* (Case M.6471) [2012] OJ C 312/06, para 112; and more than 1,000 questionnaires sent in *Volkswagen/MAN* (Case M.6267) [2011] OJ C 15/01, para 27.

14 *Essilor/Luxottica* (Case M.8394) [2018] OJ C 335/08, para 25.

15 Christopher Cook, 'Real Review Timetables under the EU Merger Regulation' (2017) Concurrences No 2-2017.

16 James Pressley, 'Comment: Megadeals stuck in EU "prenotification" talks leave investors in the dark' (*Mlex*, 30 January 2019) www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1061774&siteid=190&rdir=1 accessed 31 January 2019, citing a study undertaken by Dechert.

The Directorate-General (DG) for Competition has 30 years of experience in undertaking assessments under the EU Merger Regulation. Its staff and hierarchy are, therefore, well versed in many of the challenges associated with the collation and evaluation of evidence. However, as explained below, the nature of this task can change fundamentally as the volume of information grows.

Challenges presented by more extensive market investigations

It is generally straightforward to read a handful documents presented to a company's board and determine what they say about its reasons for entering into a transaction. Similarly, a few responses to a market test can be read, and the views of the respondents understood, without too much time or effort.

Conversely, even a small team of people cannot read hundreds of thousands of emails, or thousands of responses to a detailed market test within the statutory time limits of the EU Merger Regulation. For this reason, the staff of DG Competition must use forensic tools to assess large volumes of internal documents, and Commission decisions reveal a largely statistical approach to feedback from market tests.

These approaches may be necessary. But while they facilitate engagement with large volumes of material, they come with pitfalls that can lead authorities to miss relevant material, and even misconstrue the meaning of a given body of evidence.

Using forensic tools to assess large volumes of internal documents

Using forensic tools to identify pertinent information is essential for the review of hundreds of thousands of documents, as the linear review of all such documents is not possible in a short space of time.[17] Simply put, this approach requires reviewers to search for material they consider important through keywords (eg, 'price increase'), which radically reduces the number of documents that require manual review.

However, the choice of keywords used inevitably skews the information down-selected for manual review, by focusing on the information that a case team is looking for – this will typically be the information that evidences a proposed theory

17 Technology assisted review (TAR) can assist with extensive document productions, by using machine learning to identify responsive materials. TAR was used for the first time in an EU Merger Regulation case in *Thales/Gemalto* (Case M.8797) [2018] not yet published in the OJ. (See Natalie McNelis and Matthew Newman, 'Thales-Gemalto merger sees EU regulator road-test software to cull internal documents' (*Mlex*, 15 October 2018) www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1030822&siteid=190&rdir= accessed 31 January 2019). However, neither this technique, nor other machine learning tools, currently provide a ready solution to the difficulties associated with reviewing extensive document production described in this article.

of harm. In doing so, this approach overlooks all other information, both that which is easy to identify but may disprove the case team's theory ('known unknowns'), and that which the case team had not even thought about ('unknown unknowns'). It should be possible for case teams to check for 'known unknowns', though this requires time and inclination, which are sometimes in short supply in contentious merger cases. It is, self-evidently, more difficult to identify 'unknown unknowns'.

This issue may not be of great concern in certain antitrust contexts, where the Commission is seeking to identify 'smoking gun' evidence of a particular type. For example, in a cartel investigation, Commission staff may be tasked with finding any evidence of correspondence between competitors, as even a single incidence can be sufficient to constitute an infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU).[18] This may also be the case in certain behavioural contexts – for example, proof of predatory intent can be determinative in an Article 102 TFEU investigation.[19]

But this will rarely be the case in merger control, where the Commission is seeking to understand the ability and incentive of the merging firms to behave in a certain way in the real-world context of the relevant markets. The Commission has rejected complaints about selective use of documentary evidence in at least one prior case, on the basis that it is not obliged to provide a detailed assessment of information in its file.[20] That may be so, but it does not remove the need or importance of assessing available evidence in the round, as the court held in *Tetra Laval*:

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18 C-8/08 *T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECLI:EU:C:2009:343.

19 See, eg, *Wanadoo Interactive* (Case COMP/38.233) [2003] not published in the OJ; and Case T-340/03 *France Télécom v Commission* [2007] ECLI:EU:T:2007:22.

20 In *Ineos/Solvay/JV* (Case M.6905) [2014] C407/06, paras 54-61, the Commission rejected a complaint about an allegedly selective use of internal documents. The Commission's reasoning drew on an expansive interpretation of European Court precedent (Case T-79/12 *Cisco and Messagenet v Commission* [2013] ECLI:EU:T:2013:635, paras 108-109), which rather held that the 'the Commission is not obliged to adopt a position on all the arguments relied on by the parties', and that 'the Commission does not infringe its obligation to state reasons if, in its decision, it does not include precise reasoning as to the appraisal of a number of aspects of the concentration which appear to it to be manifestly irrelevant or insignificant or plainly of secondary importance to the assessment of the concentration'. Neither finding seems relevant to the allegation made by Ineos and Solvay, nor the broader question of whether the Commission may selectively rely on evidence, while not taking account of information that conflicts with its theory of harm. Indeed, the *Tetra Laval* judgment appears to contradict the Commission's position: 'Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it' (Case C-12/03 P *Tetra Laval v Commission* [2005] ECLI:EU:C:2005:87, para 39).

> 'Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it'.[21]

This issue is particularly acute given the increasing breadth of materials used by the Commission in complex cases. Whereas board documents were previously used as the starting point for merger control assessments,[22] the Commission has grown increasingly distrustful of these materials, partly because of the risk of prior review by counsel. By contrast, the assumption goes, authors of documents presented at lower fora of a company, and especially emails exchanged internally, may provide a more candid insight. That thought process may be reasonable, but there are important limitations to such materials:

- Authors of emails typically spend less time honing their content than is the case for board materials. This may be a virtue, insofar as they provide *in tempore non suspecto* evidence, but another consequence is that emails are prone to factual inaccuracy, oversimplification and overstatement.
- Emails reflect the views of an individual, not the views of a company. The fact that a single executive holds an opinion does not mean that perspective is shared by others in the company, or that it is even factually correct.
- Authors do not communicate from an objective perspective. The content of a document, especially an unconsidered email, is not only informed by the subjective perspective of its author, but also their individual motivations. An M&A executive might be motivated to overstate the potential gains arising from a particular transaction. A sales manager might exaggerate its achievements in selling a particular product. A product development executive might overstate the prospects of a pipeline product to maximise the prospects of further investment in a project in which it has a vested interest.[23]

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21 Case C-12/03 P *Tetra Laval v Commission* [2005] ECLI:EU:C:2005:87, para 39.

22 The scope of internal documents that need to be submitted with Form CO has steadily increased since the adoption of the EU Merger Regulation. Most recently, the document production requirements were expanded in 2013, to go beyond documents prepared to assess the transaction, and now also cover 'analyses, reports, studies, surveys and any comparable documents from the last two years for the purpose of assessing any of the affected markets with respect to market shares, competitive conditions, competitors (actual and potential) and/or potential for sales growth or expansion into other product or geographic markets'.

23 The Commission has suggested a worrying lack of interest in these issues: 'for the purpose of a competition law assessment it is not decisive whether a document is authored by junior employees, sales staff or external consultants, for example, as long as it provides evidence of a conduct that a given company adopted - or is likely to adopt - in the market'. *Ineos/Solvay/JV* (Case M.6905) [2014] C 407/06, para 59.

In short, while internal documents can provide valuable insights into the relevant markets and the impact of the transaction on the prospective behaviour of the merged firm, the process of properly understanding a body of these materials is far from straightforward. These issues should not be glossed over by identifying 'smoking gun' instances of commentary on a particular issue, combined with an insistence that the Commission cannot address every piece of evidence. The task must be to properly understand the evidence on the Commission's file as a whole.

Using statistics to assess responses to market tests

In parallel with its increased reliance on internal documents, in complex cases the Commission now tends to contact more stakeholders and ask more questions than before. As a result of the corresponding increase in responses, Commission decisions show a largely statistical approach to feedback from market tests. Observations like the following are commonplace: 'a clear majority of customers responding to the Commission's Market Test…',[24] 'the vast majority of the respondents to the phase I and phase II market investigations consider that…'[25] and 'a clear majority of both distributors and industrial customers indicated that…'.[26]

This enables the views of a large number of market participants to be summarised succinctly. In this way, a decision-maker can be informed by the apparent views of the market without having to read hundreds or thousands of pages of underlying responses. In turn, it allows the Commission to summarise the responses in its public decision, without jeopardising stakeholder confidentiality.

However, this approach may not correctly capture feedback that is complex, nuanced or unclear, especially where it is provided in response to qualitative questions. Experienced officials may be able to assess such material but, where large volumes of responses are reviewed only briefly (or even compiled in an automated manner), the relevant issues need to be considered in advance.

AVOIDING QUESTION BIAS

It should be uncontroversial to insist that the questions in Commission market tests do not reflect an unintended bias – this is particularly important where responses are later summarised in statistical form without repeating the actual question asked. However, some issues that should be easy to avoid (eg, ensuring symmetry in multiple choice options) do crop up in market tests issued by the Commission. Other issues are less obvious (eg, avoiding leading language in question formation), yet are equally important and occur more frequently.

24 *Deutsche Börse/London Stock Exchange Group* (Case M.7995) [2017] OJ C 240/05, para 955.
25 *Qualcomm/NXP Semiconductors* (Case M.8306) [2018] OJ C 113/08, para 730.
26 *ArcelorMittal/Ilva* (Case M.8444) [2018] OJ C 351/9, para 234.

Understanding the meaning of the response rate

The Commission routinely ignores nil responses to its market tests and focuses only on answers that have been submitted (referring to the views expressed by 'the respondents'). This implicitly assumes an even distribution of nil responses between third parties that support the transaction, and those that oppose it. That seems questionable – stakeholders who are not concerned about a given transaction are less likely to invest the requisite time and effort in responding to a detailed questionnaire. It seems misleading to ignore such nil responses, where an alternative explanation (eg, most stakeholders were insufficiently concerned about the transaction to respond) might be more plausible.

Understanding respondents' knowledge

The Commission sends questionnaires to a wide range of stakeholders. There may be wide variation in the level of factual knowledge about the issues under investigation within the firms that receive them. Yet Commission market tests rarely ask respondents to confirm their knowledge about a set of issues, and a statistical approach treats all responses as equal.

Understanding the economic awareness of respondents

Stakeholders have a varied degree of understanding of economics and antitrust principles. At one end of the spectrum, well-resourced firms may have internal competition counsel and/or be prepared to retain external counsel and economists. At the other end, some stakeholders have little understanding of the context in which questions are being asked. This may be less problematic for questions that ask about basic industry facts. But it is questionable whether many stakeholders can provide meaningful testimony on complex questions looking at the prospective effects of a given transaction.

In short, while increasing engagement with stakeholders helps the Commission to verify submissions made by the merging parties and build up the fact base for its substantive review, the underlying data must be constructed impartially, and consideration needs to be given to whether a statistical summary of responses can reflect a meaningful overview of the feedback received.

As with the issues noted regarding internal documents, the trends towards building cases with significantly larger datasets may be well intentioned, but the steps needed to digest the resulting information create real difficulties for accurate decision-making.

Conclusion

Many of the issues raised in this article are easier to raise than to address. This article seeks to foster public debate, as a starting point towards progress. Meanwhile, some modest suggestions are proposed below:

Engage with authorities in other jurisdictions

The US Department of Justice and Federal Trade Commission, in particular, has considerable experience in handling large volumes of internal material. That includes considerably greater experience in first-instance trials, where evidence is subject to immediate cross-examination and counter-argument by the merging firms.

Reflect on market test design

Commission case teams perform an admirable job in preparing bespoke questionnaires for complex cases, routinely running to 100 questions or more. While the more obvious pitfalls are often avoided, the process of questionnaire design and response interpretation would benefit from more intense scrutiny within case teams, and from peer review within the broader DG Competition community. More broadly, increased focus from DG Competition's policy unit would be welcome, ideally drawing on the myriad academic work in this area.

Develop public guidance

The Commission's proposed guidelines on internal document productions are a welcome first step, but include little material on how the Commission should review internal document productions. Neither is there any public guidance on the Commission's approach to market tests. Canvassing feedback on draft guidelines has been invaluable to a wide range of issues on which the Commission has worked over the past 30 years, and there is no reason why these areas should prove an exception.

Encourage case teams to search for information that runs counter to a theory of harm

As noted above, it is (or should be) as easy for a case team to identify material that undermines a theory of harm as it is to identify supportive material. There may be time/resource-based reasons why this is not undertaken to the extent that would be desirable, but increasing the role of the peer review panel, including through earlier involvement in contentious cases, would be beneficial.

Ensure the merging parties' procedural rights are respected

The Commission's increased reliance on extensive internal document productions raises significant procedural issues, including the time and costs needed for adequate privilege review, a restrictive approach to legal professional privilege by the Commission, and the legitimacy of requests for documents located outside of the EU. While this article focuses on substance, it is equally important that the Commission ensure fair treatment for merging parties under investigation.

Competition authorities should aspire to assess available evidence as rigorously, objectively and fairly as possible. That task is made more difficult (not less) by expanding the scope of the information collated. Developments in machine learning may mitigate some of these issues in time. But, for now, the Commission should push itself to understand the available evidence as accurately as possible, and the European competition community should hold the Commission to a high standard in this respect. In short, the Commission should seek to undertake that this aspect of its work is performed even better, and not necessarily with a pool of information that is bigger.

About the author

Richard Pepper is a counsel in the Brussels office of Cleary Gottlieb Steen & Hamilton. He advises on all aspects of European and United Kingdom competition law, including merger control, cartel investigations, behavioural matters and litigation. His practice focuses on complex merger and cartel cases, where he has extensive experience in a wide variety of sectors, including the transportation, mining, manufacturing, healthcare, technology, agrochemicals, automotive and music industries. He also teaches behavioural competition law at the Université Catholique de Lille.