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“Vertical” Merger Concerns: Forgotten Hurdle in Antitrust Clearance Timelines?

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On 10 January 2020, the US Department of Justice (“DoJ”) and the US Federal Trade Commission (“FTC”) announced the publication of draft vertical merger guidelines that describe how the agencies currently review “vertical” mergers between companies at different levels of the supply chain to determine whether a deal gives rise to competition concerns (“Draft US Vertical Merger Guidelines”). While the Draft US Vertical Merger Guidelines propose a market share “safe harbour” of 20% (below which the agencies are unlikely to challenge the merger) that is lower than the “safe harbour” of 30% in the EU, the analytical principles laid down in the guidelines broadly mirror the similar provisions set out in the Irish Competition and Consumer Protection Commission’s (“CCPC”) Merger Guidelines and the European Commission’s (“Commission”) Non-Horizontal Merger Guidelines that those authorities use to assess “vertical” mergers in the Irish and EU contexts. While the publication of the US Vertical Guidelines does not necessarily signal any increased enforcement activity in relation to “vertical” mergers, it does serve as a timely reminder that competition authorities remain vigilant in assessing the possibility of competition concerns in “vertical” mergers – in particular in the Irish and EU context where the practice of assessing vertical mergers is now well-established and the authorities subject vertical mergers to increasingly rigorous reviews.

When it comes to deal planning for strategic M&A transactions, the assessment of potential antitrust concerns typically (and rightly – given the higher likelihood of concerns arising) focuses on “horizontal” overlaps in the parties’ activities – ie, overlaps in the supply of similar (or substitutable) products or services in the same geographic areas – and whether this would lead to increased market power resulting in higher prices, lower service offerings or reduced innovation.

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hat bring about vertical integration of parties’ activities at different levels of the supply essential, however, to consider whether the “vertical” overlaps in the parties’ activities rise to competition concerns in either the “upstream” manufacturing or wholesale market or the “downstream” distribution or retail market. While the pro-competitive effects and efficiencies of transactions leading to vertical integration are well recognised by competition authorities across the globe, such transactions can primarily give rise to competition concerns where they result in the potential foreclosure of, or increased costs for, competitors at the upstream or downstream level of the supply chain or give the merged entity access to competitively sensitive information about their competitors.

US – Renewed focus on vertical mergers

While the US agencies have traditionally taken a more favourable view of vertical mergers (with no interventions over the last 40 years up until 2017), the US agencies’ approach to two recent transactions marked a step change from its decisional practice. First, the DoJ’s challenge to the acquisition by AT&T (one of the largest pay TV providers in the US) of Time Warner (one of the largest content producers in the US) before the US District Court in 2017 – due to concerns that AT&T would gain leverage in negotiating distribution deals with Time Warner’s rival content distributors and stifle innovative and next-generation distributors – demonstrated the US agencies’ renewed interest in reviewing and potentially challenging vertical mergers (irrespective of the fact that the DoJ’s challenge was ultimately unsuccessful both at first instance and on appeal). Similarly, the concerns raised by the FTC in relation to the acquisition of Essendant (the largest wholesale distributor of office products in the US) by Staples (the largest retailer of office products in the world) in 2018 – namely, that Staples could potentially exploit access to competitively sensitive pricing information about its competitors (which were also Essendant’s customers), as a result of which Staples was required to offer a firewall remedy to limit its access to competitor information – suggested that these cases marked a growing trend amongst the US agencies of assessing the potentially anticompetitive effects of vertical mergers more closely.

Given the renewed focus on vertical mergers, there were calls on the US agencies to issue updated guidance on when a vertical merger might raise concerns (noting that the DoJ’s 1984 Non-Horizontal Merger Guidelines were long considered out of date) leading to the publication of the US Draft Vertical Merger Guidelines earlier this month. The guidelines only deal with the principles that the US agencies will follow in relation to vertical mergers and do not extend to “conglomerate” mergers (ie, mergers between companies that are active in related markets), which continue to be viewed as highly unlikely to give rise to potential competition issues, in contrast to the position in the EU (where authorities regularly review conglomerate, as well as vertical, mergers for potential competition concerns, as explained below).

Notably, the guidelines propose a market share “safe harbour” whereby the agencies state that they are unlikely to challenge a merger where the parties’ share in the relevant market is below 20% and the “related” product (ie, an upstream input or downstream product or service) is used in less than 20% of the relevant market. The guidelines also focus on the following topics as specific areas of focus:

- The approach to defining the “relevant market” (which is stated to broadly follow the approach in the agencies’ Horizontal Merger Guidelines from 2010);
- The analysis of potential anti-competitive effects resulting from vertical mergers;
- The agencies’ use of economic models to evaluate the potential effects of vertical mergers; and

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analysis of potential pro-competitive effects and efficiencies of vertical mergers.

draft guidelines are pitched at a relatively high-level, they provide helpful insights into how the US agencies are likely to structure their analysis of vertical mergers in the future. The guidelines are open for public comment for 30 days after publication and may well be amended to reflect any comments received before final publication.

Ireland / EU – Ever-increasing focus on vertical mergers

While vertical mergers are still generally believed to be less likely to give rise to competition concerns than horizontal mergers, in contrast with the traditional stance adopted by the US agencies, the practice in relation to vertical mergers (as well as conglomerate mergers) is now well-established in Europe, both at the EU level and the national level, including in Ireland.

At the EU level, while there was a lack of clarity about the Commission’s practice in relation to “non-horizontal” mergers (ie, both vertical and conglomerate mergers) for a number of years after its findings in Tetra Laval/Sidel and in GE/Honeywell were reversed on appeal before the EU courts in the early 2000’s, since the publication of its Non-Horizontal Merger Guidelines in 2007 (which set out the principles to be followed in assessing non-horizontal mergers), the Commission has increased its focus on analysing the potential competition concerns arising out of both vertical and conglomerate mergers.

The Commission’s guidelines themselves contain a market share “safe harbour” whereby the Commission is unlikely to have concerns (save in special circumstances) where the parties’ market share is below 30% in each of the relevant markets post-transaction and, consistent with the general concerns described above, set out in detail the Commission’s approach to assessing the potentially anticompetitive concerns arising from vertical and conglomerate mergers.

As regards vertical mergers, applying the principles set out in its guidelines, the Commission has found concerns to arise in a number of transactions in recent years and required the parties to offer remedies – both structural divestiture remedies as well as behavioural “access” remedies to ensure competitors have continued interoperability to a downstream product or service, eg extended licensing arrangements, access to APIs / data etc – in order to obtain approval for their transactions. Some of the decisions taken in more recent years included the following:

- In Mars / AniCura (decision of 29 October 2018), following its review of the acquisition by Mars (the global consumer products manufacturer, including of dietetic pet food) of AniCura (a veterinary clinic chain in several EU Member States, which also owned a purchasing organisation for independent veterinary clinics, VetFamily), the Commission found that the transaction could enable Mars to exclude competing manufacturers of dietetic pet food in Sweden and Denmark from the downstream retail chains of the AniCura veterinary clinics and the VetFamily member clinics which hold significant positions in those jurisdictions. In order to address the Commission’s concerns, Mars offered to divest the VetFamily business in its entirety throughout Europe.
- In Telia / Bonnier Broadcasting (decision of 12 November 2019), following its review of the acquisition by Telia (a telecoms operator that provides mobile and fixed telecoms services and broadband and TV services in the Nordic and Baltic regions) of Bonnier Broadcasting (a TV broadcasting company in the Nordic region which also owns a Finnish production company that produces news content), the Commission found that the transaction could allow the merged entity to deny Telia’s competitors in Finland and Sweden access to the

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ed entity’s services (ie, TV channels, streaming services and TV advertising space). In r to address the Commission’s concerns, Telia offered a package of behavioural dies that included obligations to license on FRAND terms, to enable access to specific services, not to discriminate against competitors accessing its downstream services and to protect competitors’ confidential business information.

In Ireland, the CCPC’s practice of closely scrutinising vertical mergers in accordance with both its own merger guidelines as well as the EU guidelines is also well-established. In 2019 alone, three of the four transactions – which the CCPC ultimately found to give rise to competition concerns and for which it required behavourial or otherwise novel commitments before issuing its clearance decision – involved vertical links between the parties’ activities:

- In *Pandagreen / Knockharley Landfill and Natureford* (decision of 6 February 2019) which was cleared subject to commitments after an extended Phase 1 investigation, the CCPC found that the proposed acquisition of the Knockharley landfill (an “upstream” provider of waste disposal and recovery services) by Pandagreen (a “downstream” provider of waste collection and processing services to domestic and commercial customers) may give rise to vertical competition concerns. This was on the basis that Pandagreen could potentially have the ability and incentive to deny its competitors access to the upstream waste disposal and recovery services market post-transaction, given the merged entity’s high shares and the likely capacity constraints in the upstream market. In order to address the CCPC’s concerns, Pandagreen was required to reserve a certain proportion of the disposal and recovery capacity at the Knockharley landfill and another landfill (Ballynagran) with which it has a long-term supply agreement for third party use and not to acquire the Ballynagran landfill without notifying the CCPC of the acquisition (ie, irrespective of whether the CCPC would have jurisdiction to review the transaction under its usual legislative powers).
- In *LN-Gaiety / MCD* (decision of 5 July 2019) which was cleared subject to commitments after a Phase 2 investigation, the CCPC found that the acquisition by LN-Gaiety (a joint venture between Live Nation and Gaiety that runs the Electric Picnic music festival in Ireland, with Live Nation separately owning Ticketmaster and owning and operating a number of other music and theatre venues in Ireland) of MCD (a promoter of live music events in Ireland, including two music festivals, Longitude and Vital) gave rise to potential vertical competition concerns (although these are not detailed in the CCPC’s public statements). The CCPC required the parties to offer wide-ranging commitments to secure clearance, including requirements that LN-GAIETY implement information barriers between it and the acquired business, abide by non-discrimination obligations vis-à-vis other venues and maintain hold-separate obligations with Live Nation’s Ticketmaster and voluntarily notify the CCPC of any below-threshold acquisitions of music festival businesses in Ireland for a period of five years. (See here for a full note on the CCPC’s decision.)
- In *Formpress Publishing (Iconic) / Assets of Midland Tribune* (decision of 9 October 2019) which was cleared subject to commitments after an extended Phase 1 investigation, the CCPC found that the acquisition by Mediaforce (a conduit for advertising agencies to channel national advertising spend to local and regional newspapers and digital newspapers in Ireland) through its subsidiary, Formpress (which owns a number of local/regional newspaper and digital newspapers in Ireland), of Midland Tribune (which owns two local/regional newspapers and their digital newspaper titles) gave rise to potential vertical competition concerns. This was on the basis that Mediaforce could potentially discriminate against competing newspaper titles by channelling advertising spend allocated to local/regional newspapers to its own group newspapers and that competitively sensitive

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mation about competing local/regional newspapers could potentially be exchanged n the merged entity. In order to address these concerns, Mediaforce was required to into a non-discrimination commitment and a commitment to limit the exchange of competitively sensitive information.

Concluding remarks

The well-established practice in Ireland and the EU as well as the (re-)emerging practice in the US regarding the scrutiny of vertical mergers make clear that, along with the analysis of potential horizontal overlaps, parties and their advisors increasingly need to focus their advocacy on potential vertical overlaps in their activities in the context of deal planning for strategic M&A transactions to avoid any delays or other surprises in the period between signing and closing before mandatory antitrust approvals have been obtained. While the renewed focus on vertical mergers in the US is still in its early stages and the direction of travel will only become clear once the US agencies publish their final guidelines, the practice in Ireland and the EU is well-entrenched, with the level of scrutiny of vertical overlaps in the parties’ activities continually increasing, meaning that the scope for delays in clearance timeframes due to protracted review periods is ever greater. Significant vertical overlaps between the parties’ activities should therefore be overlooked or downplayed at one’s peril!

This article was co-authored by Helen Kelly, Kate McKenna and Calum Warren of the EU, Competition and Regulatory Group at Matheson.

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