Expansive Jurisdiction in Merger Control

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Introduction – Local Nexus

- Proliferation of merger control regimes in the last 20 years means that now over 146 jurisdictions practise some form of antitrust merger review

- International Competition Network (ICN) established in 2001
  - Virtual network of 132 member states that seeks to facilitate cooperation between competition law authorities
  - Mission to advocate for "the adoption of superior standards and procedures in competition policy around the world, formulate **proposals for procedural and substantive convergence**"

- Recommended Practices issued by ICN provide:

  "Jurisdictions should ensure that their thresholds conform to the Practices, including that their thresholds (i) use revenue and assets based tests instead of market share-based tests, and (ii) **reflect domestic activities and not merely worldwide activities**."

- The jurisdictional thresholds in most merger control regimes are underpinned by some form of local nexus / domestic effects requirement (some notable exceptions…)

- Limiting factor designed to ensure no regulatory overreach / long-arm jurisdiction

Introduction – Killer Acquisitions

- Antitrust regulators increasingly concerned by 'killer acquisitions'
  - Phenomenon refers to situations where the acquirer's strategy is "to discontinue the development of the target's innovation projects and pre-empt future competition"
  - Also extends to situations where acquirer's strategy is to acquire the newcomer/challenger to grow and nurture the business…having removed it as a competitive threat
  - Killer acquisition concerns primarily centred on life sciences and technology sectors
- US Federal Trade Commission study found that Google, Amazon, Apple, Facebook and Microsoft completed over 600 transactions that fell below US filing thresholds
- Covid has amplified the problem - opportunistic takeovers of struggling businesses
- **Concern to catch small deals / acquisition of start-ups has led antitrust regulators to taking an increasingly expansive view of their jurisdiction**

UK – Widening Interpretation of "Share of Supply" Test

- Merger qualifies for review under Enterprise Act 2002 where:
  - Share of at least **25%** of the supply/purchase of goods or services **in the UK or a substantial part of it** will be created or enhanced (**share of supply test**); or
  - Value of the turnover **in the UK** of the target exceeds GBP 70 million (**turnover test**)
- Competition and Markets Authority used to require a **% increment** but now takes a broader view of the share of supply test:
  - ***Roche/Spark Therapeutics.*** Spark had no commercialised haemophilia treatments (still in the pipeline), but UK/EU patents and employees undertaking R&D in UK sufficient to establish UK nexus. Deal cleared.
  - ***Sabre/Farelogix.*** CMA found that Farelogix had supply in the UK due to arrangement allowing British Airways to use certain services provided by Farelogix to American Airlines (with which British Airways had an interlining arrangement). The merger was **blocked** and the CMA's decision was upheld on appeal.
  - ***Mastercard/Nets.*** Although Nets had no UK assets or business activities, the CMA asserted that the share of supply test was met because both parties registered to make their services available to prime bidders for part of a procurement project. The European Commission cleared the merger following a referral by the CMA.
  - ***Facebook/GIPHY.*** CMA considered that parties overlap in the supply of GIF databases or GIF search capabilities, even though GIPHY did not generate any UK turnover and Facebook does not have a GIF database (GIPHY's products are vertically integrated into Facebook). The merger was **blocked** and Facebook has been ordered to divest GIPHY.

EU – Article 22 EU Merger Regulation

- Article 22 – the so-called Dutch clause – was originally conceived as a tool to enable Member States with no merger control rules to pass cases to the Commission for review
- Adoption of merger control regimes by Member States (all bar Luxembourg) meant that Article 22 was to some extent gradually rendered redundant
- The Commission adopted the position that it would discourage referrals for deals which fell below national merger control thresholds
  - Practice was based on its experience that “such transactions were not generally likely to have a significant impact on the internal market.”
- Concerns over killer acquisitions have fed into debate over perceived enforcement gap in EUMR
  - Turnover-based thresholds may not capture all competitively significant transactions
  - No complementary share-based threshold (cf. UK, Portugal, Spain)
  - Some cases caught via referral system (e.g. *Facebook/WhatsApp*, *Apple/Shazam*), but coverage is not systematic
  - Unlike the US, the Commission is unable to investigate transactions which do not qualify for referral or otherwise meet the jurisdictional thresholds
- Article 22 repurposed to address perceived gap - without the need for fresh legislation!

EU – Article 22 EU Merger Regulation

- Commission issued new Article 22 Guidance stated it would welcome referrals by Member State National Competition Authorities (NCAs) of transactions **not meeting** national filing thresholds but likely affecting competition in Europe

- Policy rethink triggered by recognition that “market developments have resulted in a gradual **increase of concentrations involving companies with low turnover, but high competitive potential** in the internal market”

- Guidance is primarily targeted at R&D-driven industries such as digital and life sciences

- Examples of candidate cases include, *inter alia*, where target is:
  - A start-up or recent entrant with low turnover but significant competitive potential
  - An important innovator or a company conducting potentially important research,
  - An entity/business with access to competitively significant assets

EUROPEAN COMMISSION

Brussels, 26.3.2021
C(2021) 1959 final

COMMUNICATION FROM THE COMMISSION

Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases

EU – Article 22 EU Merger Regulation

- Article 22 Guidance provides request for referral will be admissible where concentration:
  - affects trade between Member States; and
  - threatens to significantly affect competition within territory of Member State(s) making the request
- Legal test creates uncertainty as to the extent of the risk/threat to competition which warrants a referral
- Critics of the new Article 22 policy consider that it represents a backdoor extension of jurisdiction
- Article 22 Guidance increases procedural uncertainty and timing risks for M&A transactions
  - Does not establish process for parties to seek Commission guidance
  - No obligation on Commission to provide parties comfort it will not accept referral
  - Deadline of 15 working days to request referral from date transaction notified or “made known” to NCA
    - “made known” is a half-truth: **NCAs must have enough information** to form a view (contrast. CMA)
    - uncertainty as to when clock starts running
  - Possibility of calling in **closed transactions** with no clear time limits (Guidance indicates referral unlikely if more than six months have passed…but this will be decided on a case-by-case basis)
  - Difficult to reflect and allocate Article 22 referral risk in transaction documentation

EU – Article 22 EU Merger Regulation

Article 22 Timeline

NCA makes Article 22 referral request

Clock starts from date transaction notified or “made known” to NCA

15 working days

Other NCAs may join referral request

Commission will inform NCAs and parties of referral request without delay*

15 working days

Decision on referral request

If Commission has not taken decision within deadline, it will be deemed to have accepted referral

10 working days

*** suspensory obligation applies to uncompleted transactions**

EU – Article 22 EU Merger Regulation

- French Autorité de la concurrence referred *Illumina/GRAIL* to the Commission (later joined by other NCAs)
  - Illumina (acquirer) is a leading supplier of next generation sequencing (NGS) systems for genetic and genomic analysis
  - GRAIL (target) is a start-up developing advanced blood tests relying on NGS systems (which it sources from Illumina), **with no EU revenues**
- Commission found that the merger affects trade in the single market and significantly threatens effective competition within the territory of the Member States that made the referral request
- Phase II investigation ongoing and Commission imposed interim measures to prevent integration of the parties
- Competive concerns centred on ability of merged entity to foreclose access to NGS systems which "could have an **adverse impact on GRAIL's rivals and European patients**, in particular by hampering innovation, reducing the choice, innovative features and performance of products available to patients, doctors and health systems, and increasing barriers to enter the NGS-based cancer detection tests space"
- Appeal currently pending before EU General Court (hearing took place in December 2021)

US – Investigation of Non-Reportable Mergers

- US antitrust agencies (i.e. Department of Justice and Federal Trade Commission) have the power to investigate mergers that are not reportable under the Hart-Scott Rodino Act where they potentially violate anti-trust rules
  - Cases investigated involved competitors with high combined market shares
  - Remedies may include divestiture, behavioural relief or disgorgement (repayment of profits earned post-acquisition)
  - No *de minimis* exemption
  - No statute of limitations
- Multiple investigations in the life sciences sector:
  - *Össur/College Park*
  - *Mallinckrodt/Questcor/Novartis*
  - *Valeant/Paragaon*
- FTC has undertaken studies into non-reportable deals by hospitals/healthcare providers and the “biggest technology companies” (i.e. Google, Amazon, Apple, Facebook and Microsoft)

Not just Competition, also *National Security*

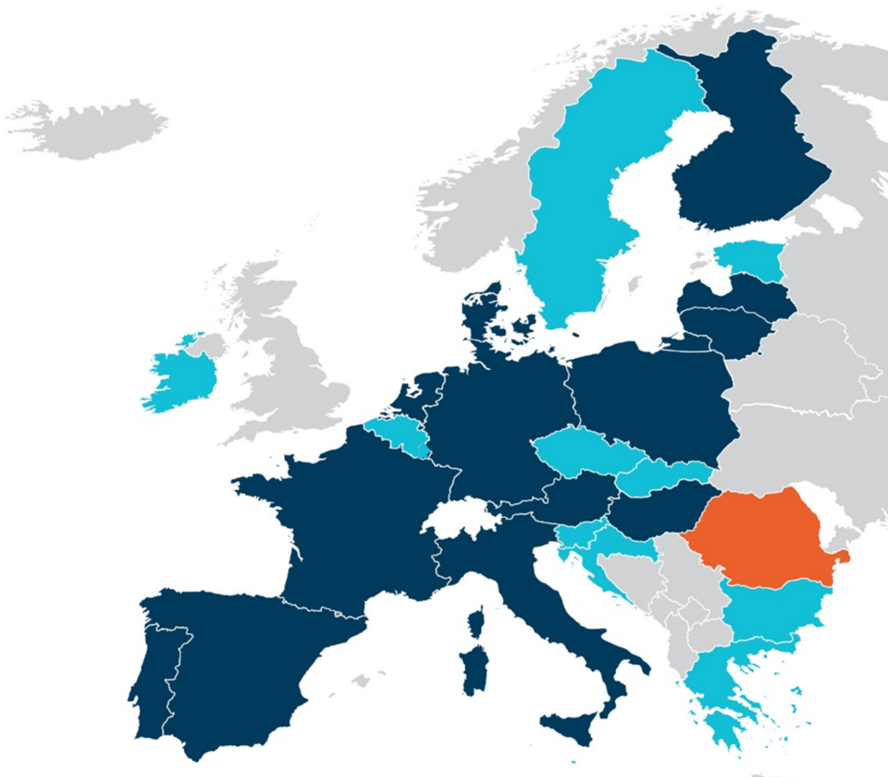
- Merger control focuses on threats to competition, but increasing trend to screen for security concerns: “Foreign Direct Investment”(FDI), comparable to CFIUS (Committee on Foreign Investments in the US)

- Heightened concerns around Chinese outbound investment and then also COVID have accelerated proliferation of FDI screening regimes
  - EU adopted FDI Regulation in March 2019, in force October 2020
  - UK’s National Security and Investment Act 2020, in force January 2022
  - Dozens of countries have introduced / expanded screening

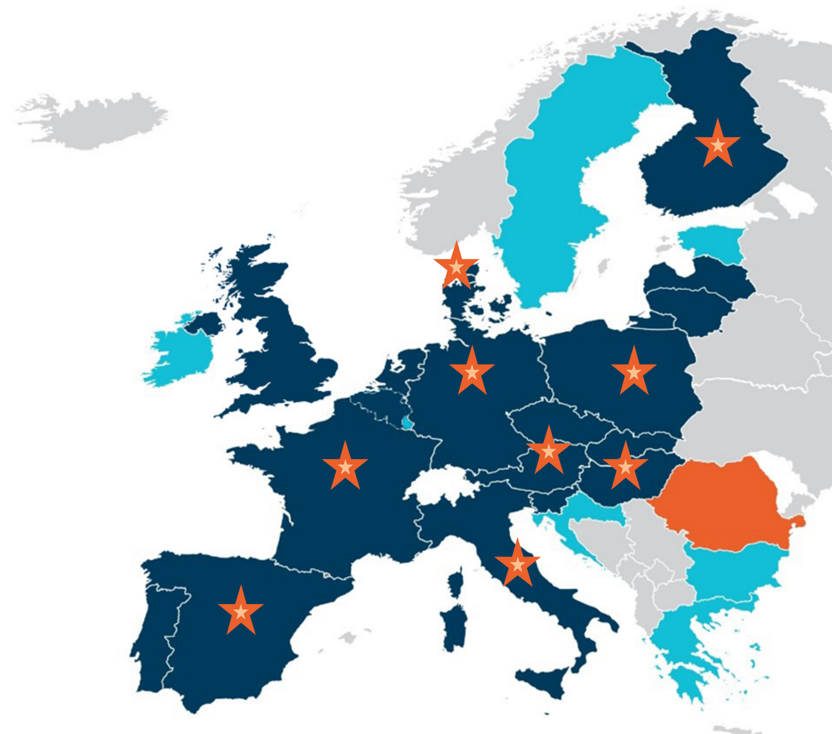
- **FDI screening regimes operate in addition to merger control, leaving businesses to navigate an increasingly complex regulatory landscape**

Proliferation of FDI screening regimes in Europe

April 2020



January 2022



FDI screening | FDI screening within merger control | No FDI screening | Extended regimes

Selected References

- *Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc.*, CMA decision of 16 December 2019
- *Anticipated acquisition by Sabre Corporation of Farelogix Inc.* Final Report, CMA decision of 9 April 2020
- Case COMP/M.9744 *Mastercard/Nets*
- *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc.* Final Report, CMA decision of 30 November 2021
- Commission, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases' (Communication) C (2021) 1959 final (Article 22 Guidance)
- Case COMP/M.10188 *Illumina/GRAIL*
- Regulation (EU) 2019/452 of the European Parliament and the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (EU FDI Regulation)

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Alec Burnside practices in the field of EU and UK competition law, working on cartels, dominance, mergers and State aid, as well as the control of foreign direct investment and EU law more generally.

Mr. Burnside has played key roles for leading corporations, global industries and governments on issues arising across many industries, including consumer products, energy and natural resources, financial services, manufacturing, military, pharmaceuticals, technology, telecoms, and transport and logistics.

He appears before the European Commission and the UK's Competition and Markets Authority, and in court appeals from their decisions, and is admitted to practice in both England and Belgium.

Awards/Recognitions

Clients noted Mr. Burnside as *"one of the icons of the competition Bar in Brussels"* because of his "*strong analytical skills and intellectual curiosity*." *(Chambers Global)*

Mr. Burnside has been recognized and recommended over many years as a leading lawyer for competition law in publications such as *Chambers Global, Chambers Europe, Legal 500 EMEA, Global Competition Review, International Financial Law Review,* and *Best Lawyers in Belgium.* He is named a "*thought leader*" in competition by *Who's Who Legal.*

Education

University of Cambridge, Downing College, 1982

College of Law, London, 1983

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Bar Admissions/Qualifications

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Languages

English

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