European Commission

Competition *merger brief*

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Competition *merger brief*

Adobe/Figma: Much Ado(be) About Nothing?

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Introduction

On 30 June 2023, the Commission received notification of the proposed acquisition of Figma by Adobe for approximately USD 20 billion (the 'Transaction'). The Transaction was referred to the Commission by 16 countries[1] in accordance with Article 22 of the EU Merger Regulation.

Adobe is a US-based global software company offering products that enable the creation and delivery of digital content, including Photoshop, Illustrator and Acrobat. Adobe also offers a desktop-based interactive product design tool (Adobe XD). Figma is a US-based software company founded in 2012 which offers web-based software tools for interactive product design (Figma Design) and online whiteboarding (FigJam).

Following its Phase I market investigation, the Commission opened an in-depth investigation into the Transaction on 7 August 2023 and adopted a Statement of Objections ('SO') on 17 November 2023.[2] An SO informs companies of the preliminary competition concerns of the Commission in relation to their transaction – it is neither a formal decision, nor does it prejudge the outcome of the investigation.

On 18 December 2023, Adobe and Figma (the 'Parties') decided to abandon the Transaction. The abandonment caused the end of the Commission's in-depth investigation without a formal decision.

This article is therefore not based on any final decision in this case, but it provides some lessons learnt from this (aborted) investigation which was already at an advanced stage. In particular, this brief provides an overview of some considerations with regards to (i) the relevant markets affected by the Transaction as well as (ii) the theories of harm concerning the Parties' relationship as actual and potential competitors considered by the Commission. All information used in this article is publicly available and relies on the Parties' public statements, the Commission's referral decisions, its press releases, and documents made public by other competition authorities.

This case raised several interesting legal questions related to the boundaries of the competitive relationship between the Parties (i.e., actual and/or potential competition). The Commission investigated concerns related to a possible strengthening of a dominant position in the main markets of a multi-product ecosystem, through the elimination of a potential new entrant that risks eating into this position from the fringes.[3] This was analysed within the framework of the potential competition test.

In a nutshell

Where does competition between companies begin and where does it end? In *Adobe/Figma*, the Commission investigated whether the proposed combination of the Parties would have (i) terminated current competition in the market for interactive product design, despite Adobe having put its competing product into 'maintenance mode', and (ii) prevented future competition by Figma in the markets for vector and raster editing tools.

Competitive interactions with a rival's ecosystem can take many forms and may be well captured within the legal framework for potential competition in specific cases.

[1] Including EU and EFTA Member States.

[2] https://ec.europa.eu/commission/presscorner/detail/en/IP_23_5778.

[3] Ecosystem-related concerns can arise in different forms. In case M.10615 - *Booking/eTraveli*, the Commission based its decision on the strengthening of Booking's dominant position in its ecosystem's core market (hotel online travel services) caused by the attempted expansion of its ecosystem of travel services through the acquisition of a company active in a neighbouring market (flight online travel services). In case M.11033 – *Adobe/Figma*, the Commission's competition concerns were caused by the elimination of (actual or potential) competition in markets where the (current or future) activities of the parties overlap. Both cases are examples of how the

Scope of the relevant markets

Today, Adobe and Figma both compete in the supply of interactive product design tools, *i.e.*, software tools used to design websites, mobile applications, and other digital products with a user interface or user experience elements. The Parties' products in this market are Adobe XD and Figma Design.

Furthermore, Adobe is a leading player in vector and raster editing tools. Vector editing tools (such as Adobe's Illustrator) are products used to create and edit vector-based graphic illustrations. Raster editing tools (such as Adobe's Photoshop) are used to create and edit pixel-based raster images (typically photos). Figma is not currently offering standalone vector or raster editing software products, though its flagship software Figma Design incorporates certain vector editing functionalities.

Regarding the supply of interactive product design tools, the Commission investigated the substitutability between the Parties' respective products, Adobe XD and Figma Design, and other tools that may be used to design interactive digital products. Adobe XD and Figma Design are 'end-to-end' tools that integrate all the steps of the interactive product design workflow, which typically involves sketching, wireframing, mock-up, prototyping and handoff.

There are also specialized tools or 'point tools' which can only be used for discrete parts of the interactive product design workflow. A combination of different point tools may constitute an alternative to a single end-to-end tool.

Other tools with some interactive product design functions, such as whiteboarding tools, prosumer applications and no-code/low-code website builders, may constitute an alternative to end-to-end tools for more specialized or less complex use cases.

The Commission investigated whether all such tools are part of an overall market for interactive product design or whether a narrower market should be considered, comprising either only end-to-end tools or both end-to-end and point tools.

Regarding the supply of vector editing tools and raster editing tools, the Commission investigated whether they belong to two separate markets on the basis that they serve different customer needs, or whether they form part of a broader digital asset creation tools space and therefore belong to the same market.

Actual competition in interactive product design – a potential reverse killer acquisition

'Killer acquisitions' are typically defined as transactions whereby a company acquires an innovative target solely to discontinue (kill) the target's product or its innovation projects, with the aim to eliminate the direct competitive pressure that the target exerts on the acquiring company. A 'reverse killer acquisition' occurs where the acquiring company decides to discontinue its own product or innovation projects (rather than the target's) post-closing. Both killer and reverse killer acquisitions can curb actual competition by removing one of two directly competing players, leading to less competition and less innovation in the market to the detriment of consumers.

The Commission investigated whether the Transaction would either create a dominant position or eliminate Adobe as an important competitive force as a result of a discontinuation of Adobe's own interactive product design tool Adobe XD (as well as any potential successor product of Adobe in this space). For both assessments, the Commission needed to determine the market shares of Adobe XD in the market for interactive product design tools.

Market share methodology – How to allocate revenue from a bundle to an individual product in the bundle?

Adobe XD was sold both as a standalone product and as part of Adobe's widely used subscription bundle called 'Creative Cloud'. This bundle contains more than 20 apps, including Adobe XD, Illustrator, and Photoshop (amongst several other apps). To analyse Adobe XD's market share, the Commission considered possible methodologies that adequately reflect Adobe XD's market position by allocating an appropriate proportion of the Creative Cloud bundle revenue to Adobe XD. Since the majority of Adobe's revenue is generated by the Creative Cloud bundle, such allocation is particularly important.

Creative Cloud users can use any app inside the bundle once the subscription price is paid. Therefore, allocating these revenues – and, hence, market share – to individual software products is not straightforward.

The Commission considered that one way of allocating revenues can be based on a measure of usage, such as monthly active usage or repeated monthly active usage,[4] in which case revenue can be attributed to individual software products based on their usage share. This methodology gives equal weight to each software product for each monthly active user independently of the standalone price of each software product. This approach could be modified to reflect the respective standalone prices of each software product, if such standalone prices differ a lot across software products.

While there can be a debate about factors relevant for the allocation, it is important that any employed methodology needs to ensure that all revenues from the bundle plan are allocated to specific products, even if some of these relate to markets outside the scope of the transaction.

Commission may take into account the competitive impact of an acquisition within an overall ecosystem of products or services.

[4] Monthly active usage meaning the number of users that open the software product at least once a month; repeated monthly active usage meaning the number of users that open the software product in two consecutive months.

As a large share of Adobe's sales are based on its bundles, the Commission considered that these bundles need to be taken into account when assessing Adobe's position in individual markets. Not allocating some part of these revenues to the individual products included in the bundle would significantly underestimate Adobe's position in such markets. Indeed, breaking down revenues on a product level ensures that market power in a larger ecosystem is not overlooked when assessing individual markets.

Creation of a dominant player. In the relevant market for interactive product design tools (whether comprising only end-to-end tools or both end-to-end and point tools), Figma Design was perceived as best-in-class and has enjoyed exponential growth in the last few years.

Adobe XD was considered by many market participants as Figma Design's main competitor. Together with the longstanding brand recognition of Adobe in the broader creative space, Adobe XD enjoys unique advantages through its integration in the 'Creative Cloud' bundle.

Against this background, the Commission investigated whether the combination of the Parties' products and their respective strengths could lead to the creation of a dominant position.

Elimination of significant competitive constraints. Adobe had decided to put its interactive product design tool, Adobe XD, into a so-called 'maintenance mode'. As explained on Adobe's website, this meant that Adobe would not further develop the Adobe XD software – instead Adobe would only continue to provide technical support and bug fixes to its users.[5] Adobe XD continued to be available as a standalone app, until June 2023, and remains to the date of this Brief a part of the Creative Cloud subscription.

The Commission investigated whether Adobe's decision to place Adobe XD into maintenance mode was likely motivated by the anticipated acquisition of Figma's competing interactive product design tool, Figma Design.

In principle, Adobe would have a strong incentive to continue investing in the market for interactive product design tools and to address existing competition, in order to protect its market position against the threat posed by competing products (such as Figma Design), as well as in order to increase the sales of its Creative Cloud product bundle (consisting of Adobe XD, but also several other core Adobe products whose utilisation could increase via the inclusion of a strong and well-developed Adobe XD in the Creative Cloud bundle). In light of this, the Commission's investigation focused on understanding whether, absent the Transaction, Adobe would have continued to offer an interactive product design tool (either Adobe XD or a successor product). If the evidence showed that this would have been the case, the Transaction would have constituted a 'reverse killer acquisition', potentially leading to less customer choice and innovation.

Elimination of potential competition by Figma in vector and raster editing tools

Software firms with a wide ecosystem of products are often protected by strong network effects, economies of scale and commercial bundling. In such cases, one of the main competitive risks they face is the emergence of nascent competitors active not at the core but rather at the boundaries of their ecosystem. Rather than entering into head-on competition with the incumbent on its core market(s), offering complementary services could allow a new entrant to build up scale and unlock own network effects at the fringes of the incumbent's ecosystem that it could later leverage to enter the core market(s).

Addressing a dynamic competitive threat to an ecosystem within the framework of potential competition. Given the nature of Figma's products and Figma's specific characteristics, the Commission investigated to what extent Figma would be particularly well-placed to use its position at the boundaries of Adobe's large product portfolio to innovate and expand its own portfolio in due time. In other words, the Commission investigated whether what may have started as entry in an adjacent market could turn into direct competition in areas where Adobe is dominant.

Those concerns were assessed – at least to some extent - by looking at Figma's potential to enter two of Adobe's core digital asset creation markets (vector and raster editing tools) and thus analysing the Transaction as an acquisition of a potential competitor.

Put differently, the Commission investigated whether the Transaction could have led to the strengthening of Adobe's significant position in the supply of vector editing tools and raster editing tools by eliminating Figma as a potential competitor in these markets.

The Commission's Horizontal Merger Guidelines provide for a two-step legal test to assess possible anti-competitive effects of a merger with a potential competitor:[6]

- First, the potential competitor must already exert a significant constraining influence; or there must be a significant likelihood that it would grow into an effective competitive force.
- Second, there must not be a sufficient number of other potential competitors which could maintain sufficient competitive pressure after the merger.

[5] This information had been made available by Adobe on its website following the Commission's decision to open an in-depth review of the Transaction. Cfr. Adobe XD Learn & Support.

[6] See point 60 of the Horizontal Merger Guidelines.

The first condition can be met in two alternative ways: either the potential competitor, albeit not yet active in the market, already constrains the competitive behaviour of the incumbent firm(s); or it is significantly likely to grow into an effective competitor to the incumbent firm(s) in case it would enter the market in the future.

The 'First Alternative' – did Figma already exert a significant constraining influence? The constraining influence exerted by potential competitors is typically weaker than the competitive constraints exerted by – effective – actual competitors. Therefore, the loss of potential competition would normally not lead to competition concerns in markets where actual competition is working well. However, in highly concentrated or dominated markets, actual competition is largely ineffective and, therefore, even the elimination of attenuated competitive constraints such as those exerted by potential competitors can lead to a significant impediment of effective competition.

The Commission investigated whether Adobe viewed Figma as a potential risk and a growing competitive threat to Illustrator and Photoshop, two of its core products in the digital asset creation space. In addition, the Commission investigated whether the threat of Figma's entry may have influenced Adobe's product development priorities and innovation efforts, such that it may have actually triggered a competitive reaction by Adobe in the markets for the supply of vector and raster editing tools. In these circumstances, Figma could already be exerting a significant competitive constraint upon Adobe's vector and raster editing tools. By removing such constraining influence, the Transaction could have led to the strengthening of Adobe's significant position in these markets.

The 'Second Alternative' – would Figma likely grow into an effective competitive force? The Commission bases its assessment on the competitive conditions existing at the time of the merger and, where necessary, takes into account future changes to the market that can reasonably be predicted.[7]

The Commission's assessment of potential competition must be based on objective evidence rather than mere theoretical possibilities. The Commission considers that, depending on the characteristics of the industry and the specific circumstances of a case, any of the following non-exhaustive circumstances, separately or combined, can constitute such objective evidence: (i) the potential competitor has sufficient relevant resources to enter the market in a timely manner; (ii) the potential competitor has the ability to expand or add to its capabilities, whether organically or through acquisition; (iii) the potential competitor has advantages that would make it well-situated to enter; (iv) the potential competitor has successfully expanded into other markets in the past or already participates in adjacent markets; and (v) industry participants recognise the potential competitor as a potential entrant.

Furthermore, the Commission considers that the finding of potential entry does not require the existence of concrete or extensively developed entry plans (for example in the form of a detailed business plan or investment project) or a firm decision by the company to enter. While such steps constitute factual elements that the Commission will take into account in its assessment of potential entry, they do not constitute necessary evidentiary requirements for such a finding. This is particularly relevant in dynamic and fast-moving technology markets, where (unlike in more traditional industries) investment decisions are often made quickly and rather informally in line with the start-up culture of many young technology companies. In addition, unlike in some more traditional industries, new product development in such markets does not typically require long lead times (such as, for instance, additional plants or other tangible production assets, building stock, or the application for regulatory permits and licences).

In this case, the Commission investigated Figma's previous innovation and product expansions as well as its specific characteristics and potential competitive advantages to assess whether it would have the ability and incentive to enter the markets for the supply of vector and raster editing tools and be significantly likely to grow into an effective competitive force in these markets following such entry.

The requirement to "*grow into an 'effective' competitive force*" should not be interpreted as Figma competing head-to-head with Adobe in vector and raster editing tools or displacing Illustrator and Photoshop from day one. Rather, the Commission investigated whether Figma would be significantly likely to grow gradually but steadily, whether through the addition of new products or functionalities or the improvement of the existing features of its software, into a player able to effectively compete against existing players including Adobe over time.

International cooperation

Parallel to the Commission, the UK Competition and Markets Authority ('CMA') and the US Department of Justice ('DOJ') also examined the Transaction. The CMA issued its Provisional Findings on 28 November 2023, setting out concerns similar to those included in the Commission's SO.[8] The DOJ welcomed the abandonment of the Transaction in a press release stating that this 'ensures that designers, creators, and consumers continue to get the benefit of the rivalry between the two companies going forward'.[9]

[7] See point 9 of the Horizontal Merger Guidelines.

[8] Available in the CMA's public case file, at https://www.gov.uk/cma-cases/adobe-slash-figma-merger-inquiry.

[9] https://www.justice.gov/opa/pr/antitrust-aag-kanter-statement-after-adobe-and-figma-abandon-merger.

Conclusion

While there is no final decision on this case, the Commission's investigation and the preliminary competition concerns laid out in the SO, together with the position of other authorities, caused the Parties to abandon the Transaction.[10]

This case illustrates the Commission's approach to dynamic competition concerns in digital ecosystems. In this case, the Commission assessed these concerns under its framework for actual and potential horizontal competition as Adobe and Figma were in a horizontal relationship with each other – as actual competitors in interactive product design and as potential competitors in vector and raster editing. The Commission also aimed at capturing the 'ecosystem' dynamics. These dynamics were considered within the framework of the 'traditional' horizontal theories of harm, i.e., loss of actual or potential competition between the Parties.

10 https://ec.europa.eu/commission/presscorner/detail/en/statement_23_6715.

Competition Merger Brief 2/2024 – Article 2

Competition *Merger Brief*

Amazon/iRobot: Keeping competition in robot vacuum cleaners spotless

Rosa Aldonza Rubio, Liam Biser, Pilar Córdoba Fernández

Introduction

On 1 June 2023, the Commission's Directorate-General for Competition ('DG COMP') received notification of the proposed acquisition of iRobot by Amazon (the 'Parties') for approximately EUR 1.45 billion (the 'Transaction').

iRobot, headquartered in the US, is a global manufacturer of robot vacuum cleaners ('RVCs'), notably through its flagship brand, Roomba. Amazon, also headquartered in the US, provides online intermediation services to third party sellers through its online Amazon marketplaces ('Amazon Stores' such as Amazon.de and Amazon.fr) which allow third party sellers (Original Equipment Manufacturers and other retailers) to advertise and sell products to customers. Amazon is also active as a retailer of various products on its Amazon Stores (including RVCs) through its retail division ('Amazon Retail'). Amazon also manufactures and sells its own products, such as the Ring smart doorbells, the Blink home security cameras, or the Alexa virtual assistant, among other smart home devices.

Following its Phase I market investigation, DG COMP opened an in-depth investigation into the Transaction on 6 July 2023[1] and adopted a Statement of Objections ('SO') on 27 November 2023.[2] An SO informs the companies concerned of the Commission's preliminary competition concerns in relation to their transaction – it is neither a formal decision, nor does it prejudge the outcome of the investigation.

On 29 January 2024, Amazon abandoned its proposed acquisition of sole control over iRobot. The abandonment took place twelve working days before the statutory deadline for the Commission to decide on the deal and prompted the end of DG COMP's in-depth investigation without a formal decision.

This article therefore does not reflect a final decision adopted in this case. It provides some lessons learnt from this (discontinued) in-depth investigation. In particular, this brief provides an overview of some considerations with regards to the relevant markets impacted by the Transaction, as well as DG COMP's potential theory of harm, concerning the Parties' vertical relationship: on the one hand, iRobot as a supplier of RVCs and, on the other hand, Amazon as a sales channel for RVCs.

The case raised several interesting legal questions related to market definition, how to measure market power beyond sales data, the complexity of foreclosure theories of harm in a setting where the merged entity could engage in a wide variety of foreclosure mechanisms and the difficulty in quantifying incentives and effects in complex algorithmic and/or digital markets. Moreover, this was one of the first merger cases involving a "gatekeeper" after the

In a nutshell

In *Amazon/iRobot*, DG COMP investigated whether Amazon would have the ability and incentive to foreclose rival robot vacuum cleaners by reducing their visibility in the Amazon Stores, as well as the effects of any such strategy.

While the merger was abandoned shortly before the deadline to adopt a decision, interesting lessons can be drawn, including (i) taking into account Amazon's dual role as platform provider and retailer when defining the relevant market; (ii) measuring market power beyond sales data; (iii) the complexity of assessing foreclosure theories of harm when the merged entity could engage in a wide variety of foreclosure mechanisms; and (iv) the difficulty of quantifying incentives and effects in complex algorithmic markets.

This case also shows how EU merger control can work hand in hand with other applicable regulatory instruments, in this case the DMA, that pursue complementary but different objectives.

[1] https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3702.
[2] https://ec.europa.eu/commission/presscorner/detail/en/IP_23_5990.

adoption of the first designation decisions under the Digital Markets Act ('DMA') but before its entry into application.

In Phase II, the Commission investigated concerns related to the potential foreclosure of RVC suppliers on the Amazon Stores in France, Germany, Italy, and Spain.

In the SO, the Commission assessed whether, post-Transaction, Amazon could have restricted competition in the RVC market in the EEA and/or in France, Germany, Italy and Spain, by hampering rival RVC suppliers' ability to effectively compete, which could have led to higher sales and advertising costs for competing RVC suppliers and, in turn, increased prices, lowered the quality or reduced the choice for RVC customers.

One-sided or two-sided market?

While DG COMP took note of its previous decisional practice, it took into account the specific perspective which was relevant for this Transaction (the acquisition of a retail product by another large online retail supplier) in order to determine the most appropriate market definition.

iRobot's RVCs are sold through a variety of online and offline sales channels in the EEA, including through Amazon and other online marketplaces.

With regard to **Amazon**, its activities as an online intermediation service provider have been previously assessed in the context of various antitrust investigations. Most recently in case AT.40703 - *Amazon - Buy Box,* DG COMP found that there were separate product markets on a two-sided e-commerce platform, namely, the market for the provision of online marketplace services to third-party sellers and the market for the provision of online marketplace services to consumers. In that case, the Commission preliminarily concluded that the relevant market was that for marketplace services for retailers to reach consumers located in individual Member States.[3]

In the present merger case, the Commission acknowledged Amazon's role as a marketplace and the two-sided nature of Amazon's platform. However, RVC suppliers can sell their RVCs in different ways on Amazon, including through Amazon Retail, in which case the RVC supplier would not need intermediation services. As a result, to assess the competitive interactions between Amazon and the supply of RVCs, the Commission's preliminary investigation did not focus separately on the consumer and seller side of the Amazon platforms. Rather, the Commission's preliminary investigation focused on the role of Amazon as an online retail supplier of RVCs, irrespective of any intermediation activities, where Amazon competes with all other online retail channels for RVCs (whether intermediation platforms or not). The competitive pressure exerted by offline sales channels for RVCs was taken into account in the Commission's preliminary effects assessment, as explained below. The scope of the geographic market investigated was EEA-wide or national.

Market power – beyond sales indicators

The vertical link between the Parties' activities arose from the fact that the Amazon Stores are an online sales channel for providers of RVCs in several EEA countries. The Commission investigated whether, in countries where Amazon has a dedicated Store, in particular, in France, Germany, Italy and Spain,[4] Amazon's online marketplace is the main channel to sell RVCs online, i.e., if most online sales of RVCs take place through Amazon in these countries.

While sales volumes could already be a good indicator of Amazon's market power as an online sales channel for RVCs, market shares may not fully capture Amazon's importance as a sales channel for RVCs. Most notably, the Commission assessed whether Amazon is the main **discovery channel** for customers searching for RVCs (i.e., customers looking for an RVC may do their research on Amazon even if they ultimately buy on another platform). The importance of Amazon as a discovery channel would mean that it is not enough for an RVC supplier or their RVCs to be listed on Amazon to achieve sales, they also need to be visible on the platform (e.g., rank high on the search results).[5] The Commission also investigated if gaining visibility (and consequently sales) requires significant investment in advertising on Amazon. The Commission focused its investigation on RVCs, assessing whether RVC suppliers in the EEA and the four countries where Amazon has a dedicated Store predominantly focus their online advertising activity on Amazon or elsewhere. The Commission also looked into potential additional unique characteristics of Amazon as a sales channel for RVCs, namely, its large customer base, powerful marketing tools, very successful loyalty programme (Amazon Prime) involving widely followed sales campaigns (e.g., Prime Day) and efficient fulfilment services.[6]

The theory of harm – integrating the main RVC manufacturer into the main sales channel for RVCs

In its competitive assessment, the Commission's investigation took into account the dual role of Amazon as platform operator and as retailer on its platform. It also considered the implications of Amazon merging with the owner of a very successful product, iRobot's RVCs, for which Amazon is already an important route to market. Hence, the Commission's theory of harm assessed Amazon's ability and incentives to engage in total or partial foreclosure of rival RVC suppliers on the Amazon Stores, as well as the effects of any such foreclosure.

[3] Cases AT.40462 - *Amazon Marketplace* and AT.40703 – *Amazon Buy Box*, Article 9 decision, paragraph 80.

[4] In the EEA, Amazon also has dedicated Stores in Belgium, the Netherlands, Poland, and Sweden.

[5] CMA's Decision, paragraph 162.

[6] See also CMA's Decision, paragraph 186.

The **total foreclosure** scenario envisaged the full delisting of competing products from the Amazon Stores, either generally (i.e. all RVC models, all rivals, or all year long) or in a targeted manner (i.e. only delisting some RVC models, some rivals, in some countries or during specific sales periods). The **partial foreclosure** scenario assessed a potential reduction in visibility and/or increase in fees charged to rival RVCs on the Amazon Stores.

In terms of **ability**, the Commission investigated whether Amazon has the ability to engage in a variety of conducts that could totally or partially foreclose competitors. Short of outright delisting products, Amazon could potentially: (i) raise the commissions it charges to sellers for every sale they achieve on the Amazon Stores; (ii) increase rivals' advertising costs either directly or indirectly by reducing the number of paid search results displayed when a customer searches for RVC-related keywords on Amazon (given that paid results on Amazon are subject to an aggressive bidding process, reducing the number of paid slots available would render the bidding process even more competitive and, hence, increase the advertising spend of successful bidders); (iii) reduce visibility of rival RVCs in both non-paid (i.e., organic) and paid search results (i.e., advertisements) displayed in Amazon's marketplace; (iv) favour iRobot's RVCs in paid and non-paid search results; or (v) limit access to certain widgets (e.g., 'other products you may like') or certain commercially-attractive product labels (e.g., 'Amazon's choice' or 'Works With Alexa').

The existence of numerous total and partial foreclosure conducts that could be used in isolation or in combination, in a targeted or market-wide manner, and that may mutually reinforce each other, added complexity to the assessment of Amazon's **economic incentives** to foreclose post-Transaction. The Commission assessed whether the merged entity would gain more from additional sales of iRobot RVCs than it would lose from fewer sales of iRobot's rivals and other related products on Amazon, both in total and partial foreclosure scenarios, as well as both in market-wide and targeted foreclosure scenarios. If so, the Transaction could create an economic incentive for Amazon to totally or partially foreclose RVC rivals post-Transaction. The Commission's investigation into that strategy's potential gains and losses was as comprehensive as possible and covered a wide range of potential gains, including indirect gains from outside the markets being foreclosed (for example, aftersales, additional sales on Amazon of Amazon's own products linked to iRobot's RVC and customer data gained through the Transaction), as well as all possible losses, including complex concepts such as reputational harm to Amazon. In this case, as typically happens in cases involving digital ecosystems, mutually reinforcing foreclosure conducts and/or algorithmic tools, the quantification of incentives (notably the determination of post-foreclosure switching rates), can be rather complex. The Commission therefore also relied on qualitative evidence (i.e., from internal documents, the market investigation, third-party studies, and past acquisitions). This also allowed the Commission to better account for the different (and complex) foreclosure strategies, and in particular the partial foreclosure strategies, where an entirely quantitative assessment is not possible.

The Commission's investigation of incentives took into account the applicable **regulatory framework and the antitrust rules** (in this case, particularly the GDPR, the DMA, and Article 102 TFEU), their impact on the lawfulness of Amazon's potential foreclosure conduct, and, hence, on Amazon's economic incentives to foreclose. This was one of the first transactions involving a gatekeeper designated under the DMA, i.e., Amazon, and its Core Platform Services ('CPS') Amazon marketplace and Amazon advertising services. In particular, the Commission investigated whether Article 6(5) of the DMA, prohibiting self-preferencing by gatekeepers in their CPSs, would likely be applicable to some of the identified potential foreclosing conducts. In line with paragraph 46 of the Non-Horizontal Merger Guidelines, without prejudice to any detailed assessment to be undertaken in a proceeding under the DMA itself, the Commission carried out a summary assessment of: (i) the lawfulness of the identified conducts; (ii) the likelihood of detection of those conducts under the DMA; and (iii) the potential fines that could be imposed by the DMA. It also took into consideration the early stages of the DMA.

In terms of **effects**, DG COMP investigated a potential increase in selling and advertising costs on the Amazon Stores for RVC suppliers, who could also lose or see their access to an important online sales and discovery channel degraded in France, Germany, Italy, and Spain. This in turn could have resulted in higher prices, lower quality, and less innovation to the detriment of RVC consumers. The quantitative assessment of the Transaction's competitive effects was particularly challenging in view of the various foreclosure mechanisms considered (some of which relied on complex and fast changing algorithms), the possibility to combine and target them, and their mutually reinforcing nature. For this reason, the Commission's investigation relied mainly on qualitative evidence, including internal documents provided by the Parties, on evidence from past Amazon acquisitions (for instance, the acquisition of smart doorbell company Ring in 2018), in markets presenting similar dynamics to the RVC market (e.g., in terms of market maturity), and on the views and evidence from market participants such as suppliers of RVCs and other smart home devices, as well as providers of online sales channels. Further, the Commission investigated the different partial foreclosure conducts jointly (as opposed to assessing the effects of individual conducts separately).

Conclusion

As announced by Amazon[7], the Commission's in-depth investigation into Amazon's proposed acquisition of iRobot and the preliminary concerns detailed in the SO effectively led to the

[7] Statement on announcement by Amazon (europa.eu).

abandonment of the Transaction before the Commission could adopt a final decision.

In this case, the Commission assessed the intention by Amazon, the main online RVC sales channel in the EEA, France, Italy, Germany, and Spain, to acquire the main RVC supplier in the EEA, iRobot. This case shows the importance of reviewing transactions by which large, established online sales channels acquire sellers that may be heavily dependent on the acquirer's infrastructure and customer reach to be successful in the EEA. This, however, does not mean that the Commission would find competition concerns in every acquisition by a major selling platform of a product sold through its platform. The Commission assesses, on a case-by-case basis, whether the online sales channel in question is an important route to market for the target product at stake, whether the sales channel has market power beyond sales volumes (e.g., if it is an important discovery channel for the target product at stake) and whether the merged entity would have the economic incentives to foreclose, which is more likely when the target product has high sales margins and/or is a flagship product in the product category. This case illustrates how the EUMR's framework of review is well suited to tackle structural changes in the market and to prevent incentives to foreclose rivals from arising in the first place, hand in hand with other applicable regulatory instruments, such as the DMA.

Competition Merger Brief 2/2024 – Article 3

Competition *Merger Brief*

Orange/MásMóvil/JV: 'O-range' of concerns resolved thanks to spectrum divestment to fast-growing MVNO Digi

Dominik Erharter, Julie Eve, Sean Mernagh, Naemi Reiss, Ana Soria Rebollo, Katarzyna Marita Szreder

In a nutshell

The Commission conditionally approved the combination of the retail telecom businesses of the second and fourth largest operators in Spain, Orange and MásMóvil. They committed to divest mobile spectrum assets to Digi, a small but fast-growing mobile virtual network operator, sufficient to allow Digi to deploy a mobile network comparable to that of MásMóvil.

The commitments also include an optional national roaming agreement allowing Digi to use the JV's mobile network to complement its own future mobile network if needed.

Given the experience and resources of Digi, this package fully addressed the Commission's concerns, preserving competition on price and quality, as well as in terms of 5G network investment, to the benefit of all Spanish consumers.

Introduction

On 20 February 2024, following an in-depth investigation, the Commission conditionally approved the proposed creation of the joint venture ('JV') by Orange and MásMóvil which combined their mobile and fixed telecommunication businesses in Spain (the 'Transaction').

The case is the first 'gap case' involving mobile network operators after the *CK Telecoms* judgment and required a thorough assessment of efficiencies and a targeted spectrum remedy to reinforce Digi in the Spanish market. The case was also assessed in a context of calls to allow telecom operators to gain scale through consolidation in order to invest in next generation networks such as 5G and fibre-to-the-home ('FTTH').

Overview of main operators and particularities of the Spanish telecoms market

Pre-Transaction, there were four mobile network operators ('MNO's) present on the Spanish market. In order of magnitude, these are:

Telefónica, the incumbent Spanish network operator and the largest provider of both fixed and mobile retail, as well as wholesale services. It operates under two brands, Movistar and O2.

Orange, a French global telecommunications company operating both as fixed and mobile operator in Spain under three brands, Orange, Jazztel, and Simyo.

Vodafone, active in Spain through its Lowi and Vodafone brands. Vodafone faces a challenging situation, in part due to its reliance on a coaxial network to provide broadband and fixed-mobile bundles, for which Spanish consumers used to have a strong preference. But this technology is becoming obsolete and is underperforming relative to fibre, in which Vodafone has invested only to a limited extent. Vodafone Spain was acquired during the investigation by UK-based private equity firm Zegona.

MásMóvil, a hybrid MNO operating in Spain through a wide variety of brands, including Yoigo, MásMóvil, Pepephone and Euskaltel. MásMóvil has grown both organically and through acquisitions, notably as the remedy taker of fixed network assets following the *Orange/Jazztel* merger and through the acquisition of Yoigo which enabled it to become a mobile network operator. Unlike Telefónica, Orange and Vodafone, MásMóvil operated as a hybrid MNO, relying partly on its own mobile network deployed mainly in more densely populated parts of Spain, and partly on a national roaming agreement with Orange to provide retail telecoms services nationally to Spanish consumers.

Pre-Transaction, Orange and MásMóvil were direct competitors in the Spanish retail markets for the supply of mobile and fixed internet services. The Transaction would have created the largest operator by customer numbers in Spain, with a significant market

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share increment of up to 20% across all relevant retail markets (or even above 20% in some cases).

Other than the four MNOs, several mobile virtual network operators, or ‘MVNOs’, that rely entirely on wholesale access to the infrastructure of network operators to offer mobile and fixed services to their consumers, are active in the Spanish market.

Digi was the largest of the MVNOs active in Spain pre-Transaction and has been growing dynamically in recent years, surpassing by far other MVNOs in size, although still being several times smaller than the four mobile network operators. To provide mobile services, Digi relies on Telefónica’s mobile network while, for fixed services, Digi has been building its own FTTH network since 2017, while still partly relying on Telefonica’s network.

One of the distinguishing characteristics of the Spanish telecommunications market is the popularity of multiple-play bundles and, especially, fixed-mobile convergent (‘FMC’) bundles. Spanish customers buy these services together in bundles much more than in other Member States, mainly because such bundles tend to be cheaper than purchasing the services separately.

Another particularity of the Spanish telecom market is that, compared to other European countries, Spain is one of the leading countries both in terms of coverage and penetration of FTTH fibre connections (with a penetration rate of around 70% in 2021). However, in terms of 5G coverage, the Spanish telecommunication market ranks 9th in the EU in terms of population coverage of 5G in 2022, behind Italy, Germany, and France.

First telecom gap case after *CK Telecoms*

This case was the first telecom consolidation case to be decided after the Court of Justice’s ruling in the *CK Telecoms* case,[1] which confirmed the Commission’s approach to so-called ‘gap’ cases, involving mergers in oligopolistic markets that do not create or strengthen a dominant player.

As this case raised competition concerns of a horizontal nature and concerned four retail markets with an oligopolistic structure, the findings of the Court were directly applicable to it, not least with regard to the correct standard of proof to be applied (balance of probabilities), but also with respect to key concepts referred to in the Horizontal Merger Guidelines, namely closeness of competition and the notion of an important competitive force (’ICF’).

With the four network operators being present on the Spanish telecom markets pre-Transaction, each holding roughly similar market positions, the Commission concluded, on the basis of evidence from internal documents and diversion ratios, that Orange and MásMóvil were competing closely with each other. As confirmed by the Court of Justice in *CK Telecoms*, it was not necessary to go beyond that and show that they competed particularly closely or were one another’s closest competitors before making a finding of significant impediment of effective competition.

The Commission also took a particularly close look at the role played by MásMóvil on the market, especially to understand its competitive position as a hybrid player that was only partially relying on its own mobile network. The Court indicated that eliminating an important competitive force may be one of the factors which may influence whether significant non-coordinated effects are likely to result from a merger.[2]

The Commission concluded that MásMóvil exerted significant competitive pressure on other mobile operators, even if there might have been more aggressive players present on the market. The Court clarified that, in an oligopolistic market, not standing out from competitors by being ‘particularly aggressive’ in terms of price does not mean that a concentration could not alter the competitive dynamics to a significant and detrimental extent. The Commission considered MásMóvil’s market shares and steady growth an indication of its market position and relative strength as a mature player on the market. Moreover, the market investigation and review of internal documents indicated that its mobile spectrum assets and own partial mobile network gave MásMóvil flexibility and bargaining power to obtain more attractive wholesale conditions than any other access seeker. These elements allowed it to grow beyond a certain size to achieve scale, which distinguished it from pure MVNOs which are, by definition, wholly reliant on the networks of their host operators.

The Commission also noted that the existence or the growing position of other players, such as Digi, did not undermine MásMóvil’s role as an important competitive force or as an important competitive constraint on the market. Indeed, the Court in *CK Telecoms* confirmed that on a given oligopolistic market a number of undertakings may be classified an important competitive force.[3] Consequently, the Commission concluded that the Transaction may result in the elimination of an important competitive force and in any event reduce competitive pressure by eliminating an important competitive constraint from the Spanish retail mobile services, fixed internet access services, multiple-play bundles and mobile-fixed convergent bundles markets.

Estimated price increases well above 10%

The Commission’s decision included an assessment of potential price effects, concluding that the Transaction would likely lead to

[1] Case-376/20 P Commission v CK Telecoms UK Investments, ECLI:EU:C:2023:561.

[2] Case-376/20 P Commission v CK Telecoms UK Investments, ECLI:EU:C:2023:561, para 163.

[3] Case-376/20 P Commission v CK Telecoms UK Investments, ECLI:EU:C:2023:561, para 163.

significant price increases of well above 10% across Spain. In its assessment, the Commission used data submitted by the Parties on prices, contribution margins and customer switching behaviour. The data on past switching events, derived from Mobile Portability data, enabled the calculation of the relative switching rate, or so called “Diversion ratios”, between the notifying Parties. The Commission then calculated the Gross Upward Pricing Pressure Index (’GUPPI’) and the Compensation Marginal Cost Reduction (’CRMC’), which were similarly relied on in past Commission merger decisions in the telecoms sector to quantify possible price effects following mergers.[4]

The Commission’s assessment indicated that the Transaction would result in substantial upward pricing pressure across the markets covered in the competitive assessment, namely retail mobile services, fixed internet access services, the retail market for the supply of FMC and multiple-play bundles. Additionally, the analysis revealed that the marginal cost reduction required to counteract this upward pricing pressure would be substantial for the merged entity. Under both measures, price effects were typically in the range of 10-20%, or even higher in some instances.[5] The Commission also concluded that these substantial price effects could not be shown to be outweighed by efficiencies. This would mean that Orange’s and MásMóvil’s customers across the country would suffer substantial price increases post Transaction.

A thorough assessment of efficiencies

Efficiencies have been assessed in previous telecom mergers,[6] though in this case the Parties submitted an efficiency defense of unprecedented scope related to cost efficiencies and improved network coverage.

As regards **cost efficiencies**, the Parties submitted projections for 84 cost synergy and integration cost items, over a 10-year period. The claimed cost savings concerned both the Parties’ network business (fixed network, mobile network, and transmission) and non-network business (sales & marketing, customer care, general expenses, HR, and IT). Additional cost synergies were submitted in relation to the elimination of double marginalization (EDM) in wholesale contracts.

The Commission concluded that the 10-year timeframe considered by the Parties was too long and that only efficiencies realized within a timeframe of 4 years after closing can be considered as timely. This was the case because the harm from the merger and the benefits to consumers should be balanced within the same timeframe and because the harm arising from the Transaction would impact consumers immediately following the Transaction, and notably in the initial four years.

The Commission’s assessment concluded that within that time period, a part of the claimed net cost savings would meet the cumulative test of verifiability, merger-specificity and benefit to consumers. Some claims were however rejected because (i) the Parties’ projections were in some cases not backed up by data or contradictory, and therefore not verifiable, (ii) the Commission had identified a number of less-anticompetitive alternatives to the Transaction, which meant certain efficiencies could not be regarded as merger-specific and (iii) in some instances the Parties failed to show that the relevant cost savings were variable in nature, which are typically the only cost savings that are passed on to consumers.

As regards **network coverage**, the Parties claimed that the Transaction would allow them to increase their roll-out of fibre-to the-home (‘FTTH’) and 5G networks, over and above their respective standalone roll-out plans absent the Transaction.

The Commission assessed this claim in detail but concluded that the alleged efficiencies related to incremental FTTH and 5G roll-out, were not verifiable, lacked merger-specificity and would not benefit consumers sufficiently, in particular for the reasons set out below.

First, with regard to verifiability, the Commission concluded that the Parties’ joint and standalone FTTH plans were not binding and that detailed network deployment plans would only be decided by technical and operational teams. Indeed, there was evidence from internal documents that the Parties had, after the Transaction announcement, already changed the budget allocated for their combined FTTH roll-out plan due to higher cost estimates which in the Commission’s view shows how easily roll-out plans and associated CAPEX budgets can be changed at a later stage.

Second, with regard to merger-specificity, the Commission concluded that the Transaction did not increase the Parties’ ability or incentive for incremental FTTH and 5G network roll-out.[7]

[4] See for example Commission decision of 27 November 2018 in case M.8792 – *T-Mobile NL/Tele 2 NL*, Annex A, paragraph 20 et seq.

[5] See Orange/MasMovil/JV, Tables 35, 40 and 46, which respectively show CMCR ranges of 20-30% in the market for fixed internet services and the potential markets for all multiple play bundles, and for FMC bundles.

[6] For example, in *Orange/Jazztel*, *T-Mobile NL / Tele 2 NL*, and *Orange/MásMóvil/JV* the Commission accepted that these transactions would lower the wholesale costs of one or two of the merging parties for network access and concluded that the elimination of wholesale costs between the merging parties for network access was verifiable and that these cost savings could not be achieved by less anti-competitive means.

[7] As regards the ability to invest, the Commission concluded that the Parties are financially sound undertakings with access to capital. As regard the incentive to invest, the Commission noted that the Parties' FTTH/5G roll-out is largely limited to areas where other network operators are already present. Therefore, the Parties roll-out incentives would largely come from wholesale cost savings from moving subscribers from other operators’ networks to the Parties' own network which would not be affected by the Transaction. On the other hand, the incentive with regard to wholesale costs between the Parties would be lost. Therefore the Parties' roll-out incentives would not increase and might even decrease following the Transaction (see *Orange/MásMóvil/JV,* paras 1687, 1695(b), 1715 and 1723).

In addition, the Commission identified less anti-competitive means such as network co-deployment and financial lease agreements to achieve the planned incremental network roll-out absent the Transaction.

Third, with regard to benefits to consumers, the Commission noted that only a small sub-set of consumers would be expected to benefit from the claimed roll-out efficiencies, e.g., the limited number of customers in areas where additional FTTH deployment may take place, while the vast majority of customers would not benefit but suffer from significant price increases.

Following the assessment of the Parties' efficiency claims, the Commission examined whether those efficiencies that the Parties credibly demonstrated would be sufficient to outweigh the anti-competitive price effects expected from the merger.[8] The Commission concluded that these efficiencies were however insufficient, and that appreciable anti-competitive harm could be expected also when taking account of efficiencies.

Remedy: spectrum divestment, optional national roaming agreement, and a credible remedy taker

In order to address the significant competition concerns that the Commission identified, the Parties submitted remedies involving, first, the divestment of mobile spectrum enabling the remedy taker to build its own mobile network, and second, an optional national roaming agreement that allows the remedy taker to use the JV's mobile network as an alternative to that from other mobile operators, to complement its own future mobile network, similarly to the business model of MásMóvil. The Parties offered the package as a fix-it-first remedy, with Digi – the largest MVNO in Spain – as the buyer.

It is important to recall that where a merger results in a structural change in the market, the Commission's Remedies Notice clearly provides that structural remedies are preferable to behavioural remedies, and notes in particular that "*divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps*".[9] Indeed, the competition concerns in this case resulted precisely from the large horizontal overlaps between the activities of Orange and MásMóvil in the relevant retail markets.

The Commission followed this approach in the Italian telecom market, in 2016, where it approved the joint venture between Hutchison and Wind in Italy subject to a remedy involving the divestment of mobile spectrum to a pre-approved remedy taker, Iliad. This structural remedy ensured that a new mobile network operator would enter the Italian mobile market, thereby preserving effective competition, while also maintaining incentives to invest.[10]

In this case, for background, following the Transaction, the JV's overall spectrum holdings would exceed the applicable regulatory caps in Spain, with the result that the Parties would in any event be required to divest 90 MHz of mobile spectrum.

First, the remedies package accepted by the Commission in the present case includes the divestment of 60 MHz of MásMóvil's spectrum, across 3 frequency spectrum bands (20 MHz of 1800 MHz, 20 MHz of 2100 MHz, and 20 MHz 3.5 GHz band spectrum).

In assessing the amount of spectrum offered, the Commission took into account MásMóvil's own mobile network assets and associated national roaming agreements. In particular, the Commission assessed the amount of spectrum that MásMóvil was using pre-Transaction and would be using in a standalone situation going forward, as well as on which frequency spectrum bands MásMóvil had spectrum. MásMóvil notably did not have any 'low-band' spectrum (below 1 GHz), which is important for rural and indoor coverage, which meant it needed to rely on access to a third-party mobile network at least to some extent.

Second, the Parties gave a binding commitment to enter into an optional national roaming agreement with Digi, allowing it to use the JV's mobile network, as an alternative to that from other mobile operators, to complement its own future mobile network. The aim of this element of the remedy is to replicate the hybrid position of MásMóvil, who also supplemented its spectrum with a national roaming agreement, in this case with Orange. Therefore, the Commission considered that the optional national roaming agreement would offer Digi a greater number of roaming alternatives and allow it to partly rely on another operator's network to complement its own mobile network in a similar manner to MásMóvil pre-Transaction.

An important aspect of the national roaming agreement included in the remedy is its optional nature vis-à-vis Digi. Digi may decide not to exercise the option, and therefore remains free to choose the operator with which to enter into a national roaming agreement, including its current mobile wholesale provider, Telefónica, or Vodafone Spain, which was recently acquired by Zegona. As a result, the remedies will also not disrupt competition in the wholesale mobile market, where the Commission considered that the Transaction would not raise competition concerns.

[8] As outlined above, this concerned net cost savings related to FTTH consolidation, the consolidation of mobile sites and EDM in wholesale contracts. If qualitative efficiencies related to network coverage would have been found to be acceptable, these efficiencies could have been added to the trade-off as well (expressed in terms of consumers' willingness to pay).

[9] Remedies notice, para. 17.

[10] See https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2932.

Third, with regard to the suitability of Digi as the remedy taker, the Commission noted that Digi is currently active in the mobile telecommunications sector in Spain as the largest MVNO and has already rolled-out a relatively large fixed (FTTH) network, which it continues to build. Furthermore, Digi already has experience rolling out and operating mobile networks in other EU Member State (i.e., Romania, Belgium, and Portugal), and the financial resources to roll-out its own mobile network in Spain. On this basis, together with Digi's credible business plan, the results of the market test, as well as the report of the Independent Advisor, the Commission concluded that Digi is a suitable purchaser of the remedy package offered by the Parties.

Fourth, this Commission did not consider it necessary for the remedy to include additional assets, such as mobile sites or FTTH assets. This is because of the highly convergent nature of retail telecom markets in Spain described above, the extensive FTTH network of Digi which it continues to roll-out, and the existence of a competitive wholesale market for the use and rental of mobile sites and passive equipment.

The Commission retained some doubts as to whether 60 MHz of spectrum would, of itself, remove the competition concerns on a lasting basis. Ultimately however, the Commission concluded that the commitments package as a whole, including the spectrum divestment across three frequency bands, the capacity-based optional national roaming agreement, and the fact that the agreed buyer, Digi, was already fast-growing and had a substantial FTTH network, would entirely remove the competition concerns found in this case. They will preserve a competitive telecom market in Spain with the emergence of a new hybrid mobile network operator, Digi, that will compete in a similar way to MásMóvil pre-Transaction.

In this context, the Commission also took note of the fact that there may be further mobile spectrum auctions organised in Spain in the coming years. If additional spectrum were to be necessary or appropriate for ensuring competition in the long term, the Spanish Ministry could thus decide to organise such auctions to guarantee a certain portion of spectrum for the fourth and smallest MNO, as indeed was done recently in a number of other EU Member States.[11]

Conclusion

Following an in-depth investigation, the Commission found that this Transaction would eliminate an important competitor and would likely have resulted in substantial price increases for consumers in Spain. The Commission also considered that the efficiency claims of the Parties were largely not sufficiently proven and, in any event, would not outweigh the significant competitive harm that would follow from the elimination of competition between Orange and MásMóvil.

However, thanks to a comprehensive commitment package involving the divestment of spectrum and the suitability of Digi as the remedy taker, the Commission was able to conclude in this case that effective competition in the Spanish retail markets would be preserved as the competitive constraint, and that MásMóvil had been exerting as a hybrid mobile network operator would be replicated by Digi, in particular through the roll-out of its own mobile network. This will not only guarantee continued competition on price and quality in these markets but also investment in 5G networks by different players. At the same time the decision enables the Parties to proceed with combining their businesses to achieve scale.

This is important in the context of the debate as to whether the necessary scale of investments in new technologies (for example 5G or 6G) may require consolidation within national markets.[12] DG Competition's report titled 'Protecting Competition in a Changing World', suggests that higher concentration levels in mobile telecoms markets appear to be associated with higher prices, while positive effects on investment in networks relevant to user experience or 4G roll-out could not be reliably discerned.[13] This is supported by recent economic research concluding that a reduction in the number of mobile network operators would negatively impact consumers in terms of prices and investment in network quality.[14]

Looking forward, the ECJ judgment in *CK Telecoms* provides a solid framework for the assessment of national telecom consolidation cases in the future. The decision in this case demonstrates how this framework has been applied to the *Orange/MásMóvil* joint venture.

[11] While not impacting the amount of spectrum to be divested to Digi as part of the remedy, or the spectrum holdings of the other MNOs, the spectrum licences of all MNOs in Spain were recently prolonged by 10 years, meaning they will not need to be re-auctioned until around 2040. See www.telecompaper.com/news/spain-confirms-extension-of-mno-spectrum-licences-by-10-years--1504237?utm_source=headlines_-_english&utm_medium=email&utm_campaign=24-06-2024&utm_content=textlink.

[12] See, e.g., Enrico Letta's report – Much more than a market. See: https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf (e.g. pages 55-56) while also emphasising that competition in telecom markets has to be preserved, and encouraging the creation of a Telecom Single Market through cross-border consolidations.

[13] Protecting Competition in a Changing World - Evidence on the evolution of competition in the EU during the past 25 years. See competition-policy.ec.europa.eu/system/files/2024-06/KD0924494enn_Protecting_competition_in_a_changing_world_staff_report_2024.pdf. This conclusion was based on empirical evidence from 29 countries over a 10 year period.

[14] See 'Market Structure, Investment, and Technical Efficiencies in Mobile Telecommunications' with Jonathan Elliott, Georges-Vivien Houngbonon, and Marc Ivaldi (June 2024), Accepted, Journal of Political Economy, available at www.ptscott.com/papers/telecom_infrastructure.pdf.

Competition *Merger Brief*

CMA CGM/Bolloré Logistics: One-way trade to structural remedies in vertical shipping mergers?

Anne Jussiaux, Mariana Romano Colaço, Catherine Ellwanger, João Barreiros

Introduction

On 23 February 2024, following a Phase I investigation, the Commission conditionally approved CMA CGM's acquisition of Bolloré Logistics (the 'Transaction').

CMA CGM is a French-based global container shipping carrier that also provides freight forwarding services through its subsidiary, CEVA. Bolloré Logistics, also based in France, is active in the provision of freight forwarding services. The Transaction is CMA CGM's largest acquisition ever, valued at almost EUR 5 billion.

A bit of context…

Freight forwarders organise the transportation of items on behalf of their customers, possibly taking care of customs clearance and warehousing services. Acting as intermediaries, sea freight forwarders are the main revenue source of shipping carriers.

The Transaction leads to the further vertical integration of shipping carrier CMA CGM with a sea freight forwarder. It is illustrative of the significant structural changes that the shipping and logistics sectors have undergone (including consolidation and vertical integration),[1] which, among other reasons, led the Commission to not extend the legal framework[2] exempting shipping consortia from EU antitrust rules.[3]

The Commission had serious doubts that, post-Transaction, the merged entity would have the ability and incentives to deny or limit the access of competing freight forwarders to CMA CGM's container liner shipping services in legs of trade to certain French overseas territories.

In this brief, we focus on some of the salient features of this case, notably the Commission's refined approach to geographic market definition, the input foreclosure concerns involving trades to/from Martinique, Guadeloupe, and French Guiana, as well as the divestiture package offered by the parties.

In a nutshell

This case involved the acquisition by CMA CGM, a global container shipping carrier (upstream), of Bolloré Logistics, a French-based freight forwarder (downstream).

The Commission found a risk that, post-Transaction, the merged entity would deny or limit the access of competing freight forwarders to some of CMA CGM's liner shipping services for which limited alternatives exist, reducing competition in the territories of Martinique, Guadeloupe, and French Guiana.

The Commission approved the Transaction in view of the comprehensive structural remedy package offered by CMA CGM.

Geographic specificities of 'niche' trades to Overseas France

Upstream markets. In previous decisions, the Commission segmented the upstream market for the provision of container liner shipping services in one-way legs of trade connecting different world regions, due to the degree of substitutability that exists between ports in the same region. It distinguished, by way of example, between a leg of trade from North Europe to Central America & The Caribbean and a leg of trade from Central America & The Caribbean to North Europe. However, the Commission's market investigation in this case revealed that a refined analysis taking into account the characteristics of trades to/from overseas France was necessary.

[1] *E.g.*, Commission's decisions in concentration cases M.8594 – *COSCO SHIPPING / OOIL*, M.9016 – *CMA CGM / CONTAINER FINANCE*, M.9221 – *CMA CGM / CEVA*, M.10216 – *DFDS / HSF LOGISTICS GROUP*, and M.10733 – *CMA CGM / GEFCO*.

[2] Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article [101] (3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ L 256 29.9.2009, p. 31.

[3] Commission's press release of 10.10.2023 '*Commission decides not to extend antitrust block exemption for liner shipping consortia.*'

Territories isolated from mainland France

Martinique, Guadeloupe, and French Guiana are French overseas territories in the Central America & Caribbean region.

They are small territories, both in terms of size and population, isolated from a geographic point of view from mainland France. They are particularly dependent on sea imports, which represent 90% of the total trade flows.

These territories are not well integrated with their neighbouring territories or countries, having instead strong commercial links with mainland France (from where 55% of all imports originate).

The market investigation results indicated a lack of substitutability between, on the one hand, each of the ports in Martinique, Guadeloupe, and French Guiana and, on the other hand, other ports in the Central America & Caribbean region. Using alternative ports in the region to ship goods to each of these three territories is not commercially viable. This is evidenced by the limited transhipment that occurs between these three territories' ports and other ports in the same region. As a result, the Commission considered, in this case, narrower legs of trade between each of the North Europe and Mediterranean regions to each of Martinique, Guadeloupe, and French Guiana (*i.e.*, six different legs of trade).

Downstream markets. In light of the particular characteristics of the relevant French overseas territories, the Commission also conducted a refined assessment of the geographic dimension of the downstream sea freight forwarding markets.

Several reasons justified departing from the Commission's previous decisional practice and distinguishing different sea freight forwarding markets in (i) mainland France and (ii) in each of Martinique, Guadeloupe, and French Guiana. Among others, these territories have a different structure of supply than the rest of the French territory: the main sea freight forwarders active in the overall French territory are large global freight forwarders that, except for Bolloré Logistics, do not feature as top competitors in the French overseas territories. This may be explained by the fact that trades to these territories are not sufficiently large to attract global operators, but also by the existence of specificities favouring French-based and locally present freight forwarders, such as Bolloré Logistics, SIFA, and Léon Vincent. Moreover, the market investigation revealed that being present in these niche trades requires in-depth knowledge (technical, but also in terms of cultural and commercial behaviour). By way of example, local operators are required to have the necessary logistics, staff, and expertise to consolidate in the same container, goods from different clients at origin (as the volumes dispatched to these territories are quite small) and split them at destination.

Conclusion. The Commission examined the Transaction's effects in all the relevant possible markets, including (i) upstream, one-way legs of trade to/from each of North Europe and the Mediterranean from/to each of Martinique, Guadeloupe, and French Guiana, and (ii) downstream, sea freight forwarding markets in each of mainland France, Martinique, Guadeloupe, and French Guiana. The exact market definition was left open, as the parties' commitments remedied all serious concerns identified.

From CMA CGM's quasi-monopoly to foreclosure concerns

The Transaction generated several vertical relationships between CMA CGM's provision of container shipping services and Bolloré Logistics' provision of sea freight forwarding services. Despite CMA CGM's high market shares upstream (above 30% or even 50%, either individually or in the context of alliances), the Commission was able to exclude concerns in most of them, based on the following considerations: (i) CMA CGM faces competition from several shipping carriers in these legs of trade, to whom sea freight forwarders could easily switch in response to a hypothetical foreclosure strategy, and (ii) the sector is generally not characterised by high barriers to entry or capacity constraints.

The Commission's investigation, however, revealed a very different competitive scenario in the legs of trade to/from each of Martinique, Guadeloupe, and French Guiana, where CMA CGM is the historical shipping carrier.

Unassailable market power upstream

CMA CGM has high market shares in legs of trade involving Martinique, Guadeloupe, and French Guiana, of at least 70% (individually) or of approximately 90-100% (through its alliance with the smaller carrier Marfret). In these segments, CMA CGM operates most of the vessels and controls most of the capacity.

In practice, CMA CGM only faces competition from one carrier (its alliance partner, Marfret) or, in a minority of legs of trade, from a maximum of two carriers (Marfret and Seatrade). The Commission found that these players do not represent significant competitive constraints on CMA CGM's activities:

- Marfret has a limited presence and is not independent from CMA CGM in the majority of the relevant legs of trade, providing its services under an alliance where CMA CGM operates most of the vessels;
- Seatrade is only active in two legs of trade (from North Europe to Martinique and Guadeloupe), operates much smaller vessels, and specializes in refrigerated containers.

As a result, freight forwarders active in Martinique, Guadeloupe, and French Guiana depend heavily on CMA CGM's services (usually at more than 80% of the goods shipped).

In addition, the Commission considered that barriers to entry and expansion are high because of the limited size and economic attractiveness of these trades. Maersk, one of the top global carriers, exited the markets in 2023 because unbalanced trade flows made them unprofitable. In fact, CMA CGM might be the only carrier capable of filling containers shipped from Martinique and Guadeloupe to Europe (thanks to contracts with local banana suppliers) and, consequently, profiting in these trades.

A clear change in incentives

The Commission considered that, post-Transaction, CMA CGM would have the incentive to favour its own subsidiary, Bolloré Logistics, to the detriment of competitors. Competing freight forwarders raised numerous partial and total foreclosure concerns (*e.g.*, higher prices and lower quality) capable of leaving them vulnerable with (almost) no alternative.

Importantly, the Commission assessed whether competing freight forwarders would have the possibility to retaliate against a hypothetical CMA CGM foreclosure strategy. Retaliation did not seem to represent a credible threat, as most freight forwarders are local players, without significant flows in other legs of trade that they could leverage to retaliate.

In addition, the Commission found that CMA CGM was not already, prior to the Transaction, extracting all available profits from its position in the upstream markets.[4] Pre-Transaction, freight forwarding margins in these territories were still positive. In addition, price-setting mechanisms in the upstream markets do not allow CMA CGM to maximize its profit extraction, in view of, notably, the (i) highly cyclical nature of the shipping activity, (ii) high fixed costs, and (iii) existence of various surcharges.

A detrimental effect in fragile territories

The Commission found that the Transaction would have a negative impact in the markets for the provision of sea freight forwarding services in Martinique, Guadeloupe, and French Guiana. This impact could take the form of price increases and/or lower service quality, negatively impacting the daily lives of consumers in these territories, which are heavily dependent on imports from mainland Europe.

Competing freight forwarders would have been unable to avoid cost increases, as they are not vertically integrated or capable of switching to alternative providers.

As a result, the Commission concluded that the Transaction, as initially notified, would raise competition issues.

Remedies: full removal of the vertical link

To address the competition issues raised by the Commission, the parties offered to divest Bolloré Logistics' freight forwarding activities in Martinique, Guadeloupe, and French Guiana. The remedy fully removes the vertical link between CMA CGM's container liner shipping and Bolloré Logistics' freight forwarding activities in the relevant territories.

More precisely, the Divestment Business is a standalone business composed of Bolloré Logistics' entities established in Martinique, Guadeloupe, and French Guiana, including assets, staff members, and local customers. In addition, it includes:

- relationships with customers with activities in Martinique, Guadeloupe, and French Guiana commercially managed by Bolloré Logistics' division in mainland France;[5] and
- in view of the nature of the business, which requires staff on both ends of trade to prepare the shipment of goods, several employees located in mainland France.

Beyond the usual requirements set out in the Commission's Notice on Remedies,[6] the commitments require the purchaser to be a freight forwarder with significant preexisting activities in mainland France, given the trade specificities in these territories and the fact that mainland France is their main trading partner.

The Commission's market investigation confirmed that the Divestment Business constitutes a stand-alone and viable business, sufficient to fully remove the Commission's concerns in Phase I.

The commitments are unprecedented: it is the first time that the Commission clears a vertical transaction subject to commitments in the container shipping sector, confirming that divestitures may be suitable remedies in problematic vertical mergers.[7]

In line with the commitments, the parties signed an agreement to sell the Divestment Business to Balguerie, a French company active in the provision of sea, air, and land freight forwarding services with significant activities in mainland France and experience in French overseas territories. In July 2024, the Commission approved Balguerie as a suitable purchaser of the Divestment Business.

Tropical international cooperation

In this case, the Commission closely cooperated with the competition authorities of French Polynesia and New Caledonia. Both authorities expressed similar vertical concerns regarding the

4 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.2008, p. 7), paragraph 44.

5 Apart from a narrowly defined number of global customers with multi-destination commercial relationships with Bolloré Logistics France, as well as customers carrying out only a limited part of their business in these territories. The market investigation confirmed that the exclusion of these global customers from the scope of the Divestment Business does not impair its viability.

6 Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/C 267/01), paragraph 48.

7 For previous structural remedies in vertical cases, see, *e.g.*, M.9569 – *EssilorLuxottica/Grandvision*, M.9019 – *Mars/Anicura*, and M.5406 – *IPIC/MAN Ferrostaal AG.*

Transaction's effects in their respective territories. While the New Caledonian competition authority accepted behavioural remedies, the Polynesian competition authority followed an approach similar to the Commission's in accepting a structural remedy.

The Commission's cooperation with the Polynesian competition authority extended to the approval of the Divestment Business' purchaser, as CMA CGM selected Balguerie as the purchaser of both divestiture packages.

The Commission also liaised closely with the French national competition authority all along the merger review process.

Conclusion

This case demonstrates the Commission's ability to carry out complex assessments requiring a refinement of its previous decisional practice, as well as to solve potential competition concerns, still in Phase I, as long as the parties are ready to submit comprehensive and clear-cut remedies packages. It also shows that the Commission, in close cooperation with its counterparts, has the tools to properly investigate and understand the functioning of local markets, even if distant from mainland Europe.