

## INTERNATIONAL COMPETITION NETWORK

### EUROPEAN REGIONAL WEBINAR “MERGER CONTROL IN TIMES OF CRISIS”

**ON 24 NOVEMBER 2020**

#### **Introduction**

A panel of speakers chaired by the Spanish Competition Authority (**CNMC**) presented their experiences related to the ongoing COVID-19 crisis in merger review and how it has affected the daily work and whether it will impact future work and merger analyses of the Competition Authorities. Pilar Canedo, Member of the Spanish Competition Board moderated the discussion. The CMA, Irish and German Competition Authority provided the views of the National Competition Authorities. A Non-Governmental Advisor of the French Competition Authority as well as the OECD enriched the discussion with their different perspectives. The specific list of speakers that participated on the webinar is the following:

Organization	Speaker
Spanish Competition Authority (CNMC)	Pilar Canedo Arrillaga Member of the CNMC Board (Moderator)
Germany Competition Authority (BKA)	Fabian Pape Head of Merger Control Department
Non-Governmental Advisor (NGA) of the French Competition Authority (Adc)	Adrian Giraud Partner, Latham & Watkins
United Kingdom Competition Authority (CMA)	Eleni Gouliou Director, Mergers
Irish Competition Authority (CCPC)	Ibrahim Bah Director, Competition Enforcement & Mergers Division
OECD	Renato Ferrandi Senior Competition Expert

#### **1. Practical aspects and effective tools in times of crisis**

In this first part of the webinar, CCPC and BKA provided the view of the Competition Authorities while the NGA focused on the “user” perspective of the French Competition Authority and the European Commission. All the speakers agreed on the increasing use of electronic filings, the capacity of the competition authorities to adapt quickly to the crisis, and the resilience of the merger control systems against the COVID-19 crisis.

To face the COVID-19 crisis, the CCPC took a flexible approach in order to work effectively while adapting to the COVID-19 restrictions and bearing in mind the serious disruptions to business activities.

Initially CCPC published a statement asking the parties to delay filings, or if not possible, to file electronically. As for the timing of merger review there was little impact. In any case, CCPC introduced longer deadlines to receive responses to information requests and chose to be more flexible regarding the possibility of extending deadlines.

As for oral submissions, which were done in person before the crisis, it implemented a procedure to conduct them remotely. Regarding site visits CCPC managed to do them by reducing the number of staff making the site visits. Also, they have explored the possibility of video-recording facilities. Lastly, CCPC highlighted that it continues to conduct market enquires and market testing of remedies, and that the level of engagement and response has been encouragingly high.

The BKA, similarly to CCPC, expressed that the number of e-filings, a voluntary system that was already in place, has increased. BKA does not conduct oral submissions and hardly ever does site visits. However, BKA conducts meetings with merging parties which have been done remotely since the COVID-19 crisis started.

Regarding deadlines, BKA referred to a special law that was passed and that allowed BKA to extend its time limits in merger review for those cases notified between March and May 2020. Hence, the law allowed for one extra month for Phase I case and for two extra months for Phase II cases. However, for the majority of the cases, BKA did not use this extra time.

BKA also highlighted that the number of notifications, compared to the previous year, fell considerably between March and June (around 30-40% less). Since the first COVID-19 wave, the number has been more similar to previous years, amounting to 23% fewer notifications received so far.

Lastly, the French NGA described how the situation was for those notifying mergers before the French Competition Authority and the European Commission. In the case of France, at the beginning of the first lockdown there was a general suspension approved by an executive order. Although this suspension was open ended, after a few weeks the French Competition Authority resumed contacts with the notifying parties and implemented special proceedings, such as the possibility to file entirely electronically.

Hence, despite the general suspension, the French Competition Authority approved filings in 22 business days on average, which is lower than the normal statutory deadline. Furthermore, and likewise for the BKA, the number of decisions of the French Competition Authority dropped by around 25% between March and October.

In the case of the European Commission, no general suspension was applied, although it asked parties to delay filings. However, the EC quickly resumed

its activity, using e-filing procedures and, in contrast to most of the National Competition Authorities, the number of notifications, and thus the number of decisions issued, did not drop during the first wave of COVID-19.

## **2. Failing firm defence**

In this section of the webinar the speakers shared their views on the possibility of the failing firm defence being used more frequently as a result of the COVID-19 crisis. CNMC pointed out that since the pandemic started it has only received one case where the failing firm defence could have been addressed, although there was no need to analyse it as there were no overlaps. Likewise, CPCC has not received any failing firm claims yet.

The intervention of the CMA focused on providing a general view on how it has been dealing with the failing firm defence. In this regard, at the beginning of the pandemic, the CMA published guidelines specific to the COVID-19 crisis, including an Annex on the failing firm defence in the context of COVID-19. In this Annex, the CMA recognises that the COVID-19 crisis might increase the likelihood of failing firm claims, but also that the criteria and tests used to analyse this scenario have not changed. The COVID-19 crisis has not relaxed the CMA's standards, and therefore, the assessment has to be based on evidence rather on speculation. In terms of practical aspects of failing firm defences, the guidelines suggest early engagements with the case team in order to assess the situation properly.

The CMA also provided an example to illustrate how the COVID-19 crisis is being taken into account, and how evidence is being analysed in relation to dynamic situations. At the beginning of the pandemic the CMA was dealing with the Amazon/Deliveroo case, which was already in Phase II. The CMA considered very carefully the impact that COVID-19 would have on the merger. In this regard, in April 2020, the CMA published provisional findings that Deliveroo would likely have exited the market without Amazon's investment because of the negative impact that COVID-19 had on its business. Following these provisional findings, the CMA continued to gather and analyse evidence from Amazon and Deliveroo, and conducted consumer surveys. As a result, in June 2020, revised provisional findings on the case were published. The CMA found that Deliveroo was no longer likely to exit the market in the absence of the transaction and there was no longer a failing firm situation. Finally, the transaction was cleared in August 2020 on the basis of a competitive assessment without a failing firm situation.

CCPC focused its intervention on some concerns that were raised in Ireland, where there is a mandatory merger regime whose threshold is based on the turnover in the most recent financial year. As the revenues dropped in 2020 due to the COVID-19 crisis, there was a concern that some mergers may not have to be notified in 2021 as they would no longer meet the threshold for notification. Therefore, CCPC is internally exploring possibilities to avoid a potential situation where mergers are not notified because of the impact the COVID-19 crisis had

on 2020 revenues.

### **3. Impact of the crisis in the essence of the merger control assessment**

This section of the webinar began with the intervention of the OECD, which focused on the joint reflection the OECD has promoted on various hot issues brought by the pandemic, including merger control.

The OECD provided some preliminary thoughts on whether Competition Authorities should experiment with new ways of assessing mergers. The assessment of mergers is based on the comparison between the competitive conditions post-merger and the future conditions without the merger, the so-called contrafactual. This assessment may however be very hard to conduct in those markets disrupted by the COVID-19 crisis. Therefore, at least in some sectors heavily affected by the crisis a change of focus is needed. Typically, merger reviews rely on past data, internal documents, etc. However, for heavily disrupted markets the probative value may be limited while a thorough understanding of the markets involved and of the latest developments may be of much more importance.

The second reflection provided by the OECD focused on whether the standard of review for mergers should change because of the pandemic. In this regard, several Competition Authorities, like the CMA, have clarified that they will not relax the standard of review for mergers. However, the opinion of the OECD expert is that the economic and psychological impact of the crisis cannot be neglected. In this regard, it is expected that in the next months in some big cases, Competition Authorities may come to the conclusion that a transaction would seriously reduce competition and should therefore be prohibited. However, this may have repercussions on jobs and even on the national economy. Governments and the media are expected to put pressure on the Competition Authorities as a result. The OECD expert considers that, therefore, it is important that Competition Authorities make efforts to explain their role and clarify that clearing a deal might appear beneficial but in the long term will result in a loss of competition which will hinder post-pandemic recovery.

During its intervention, the French NGA highlighted that from a substantive point of view, the COVID-19 crisis has not changed the essence of the assessment carried by the French Competition Authority and the European Commission. However, this doesn't mean the crisis has no impact. There has generally been a more turbulent M&A process with renegotiations linked to the COVID-19 crisis.

Furthermore, there are sectors where the analysis and the data and the tools are going to be of limited value. The French NGA provided some examples regarding airlines, hotel business or restaurants, among others. In these cases, the former market share will no longer be useful as the number of competitors that will remain in the market after the crisis is unknown as well as whether the demand will stay the same after the recovery.

According to the French NGA, the phenomenon is very much starting and, therefore, in the years to come Competition Authorities and parties would have to find common grounds on what is indeed a sound contrafactual scenario.

Lastly, the CMA provided its view on the challenges that the assessment poses in times of crisis. So far, the CMA's approach appears on its guidelines (published in April 2020) regarding the substantive assessment of mergers during the pandemic. The starting point is that the overall approach remains unchanged. COVID-19 has not changed legal investigation standards. However, the CMA recognises that the assessment needs to consider the impact of the pandemic when appropriate. In this regard, the CMA provided three recent examples relating to the digital advertisement industry, private hospitals and blinds where the impact of COVID-19 has been taken into account.

#### **4. Remedies**

The last topic of the webinar focused on remedies and whether the COVID-19 crisis will affect how they are designed and implemented.

The OECD began this section providing the following general considerations: It is likely that Competition Authorities will be faced with mergers in highly concentrated markets and in this context merger remedies may become even more important than usual. There is a general consensus that structural remedies should be preferred. As an example, the US recently said that there is no reason to be more open to behavioural remedies with this crisis. However, the COVID-19 crisis could make structural remedies very challenging both in terms of designing and implementation. On the one hand, certain assets may be subject to fast depreciation. On the other hand, the search for a suitable buyer could take more time than usual. Furthermore, structural remedies are irreversible and are not able to adapt to market circumstances, so they may quickly become ineffective or disproportionate.

Lastly, the BKA intervention focused on one recent example of a case with remedies involving a market severely affected by the pandemic. The case relates to the acquisition of cinemas that would lead to overlaps in some cities. The procedure was long and took almost a year. The BKA finally issued a decision subject to structural remedies (i.e. a divestiture) in early March 2020. The parties were confident of finding a buyer but then the first wave of the pandemic began, and cinemas were closed. The parties asked for an extension of the divestiture period to have more time for negotiations, which BKA granted. Then the second wave of the pandemic arrived and therefore cinemas were closed again. Despite being a very affected market by COVID-19, BKA has not received from the parties any submission arguing that the remedies are no longer necessary. However, the case is still ongoing and it is uncertain how it will end.

## **Final remarks**

Before ending the webinar, the speakers provided some final remarks regarding the difficulties that lie ahead in the months to come and whether Competition Authorities can anticipate some of these difficulties and therefore to face them more effectively.

In this regard, the speakers agreed on the fact that there are still many challenges ahead. Among others, defining adequate contrafactual scenarios where the impact on the market of COVID-19, of which we are not fully aware of yet, is well assessed. Another challenge that was mentioned related to the effort that Competition Authorities may also need to make in terms of advocacy regarding merger risks.

The OECD also raised a concern regarding the role of governments in this crisis and whether this may overrule decisions of competitions authorities. In this was the case, Competition Authorities can still play a role, together with the policy makers, by complementing merger control with advocacy and explaining the risks of undermining competition in the market.