

Digital mergers : a French perspective

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Substantive issues

Are there specificities in the competition law assessment of digital mergers ?

FCA's merger control activity in the digital sector

- 2015 to date : **19 non-simplified merger decisions** dealing with digital-related markets :
 - 12 decisions on e-commerce.
 - 4 decision on online services (banking, travel, etc.)
 - 2 decision on online advertising
 - 1 decision on editorial websites
- Authorised in **phase 1 without commitments save** :
 - *Fnac/Darty* (16-DCC-111) : Phase 2 with commitments
 - *Logic-immo.com/SeLogger.com* (01/02/2018) : Phase 2 without commitments (first decision involving the merger of two digital platforms)

Market definition in a digital environment

DO ONLINE AND OFF-LINE SALES BELONG TO DIFFERENT MARKETS ?

- *Fnac/Darty* (16-DCC-111) : online and offline sales of electronic goods part of the same market albeit substitutability is not perfect
- That solution may not be extended to all sectors
 - Wholesale distribution of physical vs. digital recorded music : separate markets due e.g. to differences in organisation of sales, distribution costs, technical and commercial conditions of sale (16-DCC-97, *Deezer/The Access Industries*).
 - Same for retail distribution of digital vs. physical music where prices and distribution mechanisms differ to a great extent (16-DCC-97, *Deezer/The Access Industries*).

Market definition in a digital environment

WHAT IS THE GEOGRAPHICAL SCOPE OF DIGITAL MARKETS ?

- In the FCA's decisional practice, markets are essentially **national in size** due to a number of factors :
 - Language/cultural differences
 - Differences of habits
 - Delivery costs/time
 - Geographical scope of licenses negotiated with distribution platforms

Competitive assessment

MARKET POWER ANALYSIS ON MULTI-SIDED MARKETS

- Markets in the digital sector are often **two- or multi-sided** markets.
 - Organised around an intermediary (e.g. a digital platform) with interdependencies between agents obtaining services on various sides of the platform.
 - One side is often free (e.g. editorial content, search engine) but the other side(s), connected to the later, generate a revenue (e.g. online advertising).
- **Indirect network externalities** : the benefit one side of the market derives from being on the platform depends on the number of customers on the other side of the market, and vice versa.

Competitive assessment

MARKET POWER ANALYSIS ON MULTI-SIDED MARKETS

- So far very few merger cases where multi-sided markets were concerned in France and even less problematic cases.
- At this stage FCA tends to analyse market power of merging firms **separately on each side of the platform**
- Specific criteria are used to assess the undertaking's market power on the « free » side of the market (e.g. for editorial websites : number of pages viewed and/or single website visitor (17-DCC-76, *SFR/News Participations*, 2017))
- FCA is aware of the need to use **complementary tools** to measure market power in multi-sided markets (*Opinion n°10-A-29 on online advertising*) and the analysis will probably evolve with the development of online platforms and decisional practice in that field
- NB : OECD's hearings held in June 2017 : discussion on how to complement classical tools on multi-sided markets (single-homing vs. multi-homing, profitability, etc.)

Competitive assessment

IMPORTANCE OF CONGLOMERAL EFFECTS

- Digital channels/services enable undertakings to **diversify** themselves more easily than in the « old » economy ; they can do it through JV's or acquisition of existing digital players
- Analysis of **conglomerational effects** become key in these non-horizontal mergers especially when they involve incumbent operators enjoying a large customer base on a connex market
- Example of *Orange Bank*, a joint venture between Orange, the French incumbent telephone operator and Groupama Bank, an insurance company also active in retail banking (16-DCC-36)
 - Orange bank only accessible via smartphones and call centers
 - A few Orange shops dedicated to the subscription of services
 - No horizontal effects but analysis of (i) conglomerational effects as Orange could use its numerous shops in order to also sell bank services, and (ii) vertical effects as Orange bank's insurance services were those of Groupama

Competitive assessment

DATA AS A KEY ELEMENT OF MARKET POWER IN THE DIGITAL ECONOMY

- The merger of vast amounts of data through concentration may lead to the creation or reinforcement of market power and generate **foreclosure effects** if the merging parties constitute, through the merger, data sets which competitors are not able to match
- The EU Commission has assessed that kind of risk in merger control in *Google/DoubleClick* (M.4731, 2008), *Telefonica UK/Vodafone UK/Everything Everywhere UK* (M.6314, 2012), *Facebook/Whatsapp* (M.7217, 2014), *Microsoft/Linkedin* (M.8124, 2016)
- In their joint study on big data and competition (May 2016), FCA and BKA recall that there is no possible anti-competitive use of data if these data do not confer market power to their owner, i.e. if there is no competitive advantage conferred by data -> Need to assess the **actual advantage** conferred by data

Competitive assessment

DATA AS A KEY ELEMENT OF MARKET POWER IN THE DIGITAL ECONOMY

- Three factors are considered as being key in this regard : scarcity of data, availability, volume/variety
- Main factor liable to increase market power in relation to big data : **network effects**
- Main factors liable to mitigate market power : (i) **Multi-homing** (need to assess how easy/practical it is to use multiple and competing platforms) and (ii) **market dynamics** : new « disruptive » models can replace existing ones very quickly
- FCA and BKA point out that the efficiency gains brought about by concentrations involving big data (e.g. improvement of service quality) must also be taken into account and may counterbalance possible competitive risks

Competitive assessment

SHOULD PRIVACY RULES BE TAKEN INTO CONSIDERATION IN MERGER CONTROL ?

- No precedent but FCA's doctrine was summarized in its joint study with BKA on big data and competition
- If privacy issues are a **differentiating factor** between two firms, their merger may result in lowering the overall level of privacy protection :

« firms that gain a powerful position through a merger may be able to gain further market power through the collection of more consumer data and privacy degradation. If two horizontal competitors compete on privacy as an aspect of product quality, their merger could be expected to reduce quality. »

- In the FCA's view, merger control seems to be the most relevant tool to correct/regulate *ex ante* possible misuse of data by Internet giants (esp. when privacy is at stake)

Jurisdictional issues

Should merger control thresholds be adapted to the digital sector ?

A recurring debate and some precedents

- There is a recurring debate among enforcers on a possible “**merger enforcement gap**” in (*inter alia*) the digital sector.
- **Germany** came first with new thresholds intended to fill this gap : a new threshold based on the value of the transaction (EUR 400 million) was introduced in June 2017 ; Austria followed in November 2017 with a EUR 200 million threshold,
- **EU Commission’s Evaluation Roadmap** of procedural and jurisdictional aspects of EU merger control (August 2016) : turnover-based thresholds may not be effective to capture transaction that can have an impact on competition, especially in the digital economy.
- **FCA’s public consultation of November 2017** on merger control addresses the possibility to introduce new transaction value threshold.

Why would a value of transaction threshold be relevant ?

- **First** : turnover may not be an optimal indicator of market power (esp. in the digital economy)
 - EU Commission's evaluation roadmap : *"services are regularly launched to build up a significant user base before a business model is determined that would result in significant revenues"*.
 - This can result in operators having considerable market power (due e.g. to the ownership of strategic data sets) with little turnover
- **Second** : buying start ups with disruptive models can be a way for incumbent players to secure market power and raise barriers to entry
 - FCA/BKA's joint study on big data : *"(...) dynamic competition may be stifled if established undertakings have a proven ability to buy out competitively significant new entrants with a turnover, asset-base or market share too low to trigger merger control."*

Do these issues really justify a new threshold ?

- Query whether there is **an actual enforcement** gap in France
 - In its reply to the EU Commission's public consultation of 2016, the FCA advised that it had not encountered specific cases where an enforcement gap would have arisen
- Query whether the new threshold **would really filter** problematic mergers :
 - A few concentrations in the digital sector gave rise to competition concerns so far
 - How to substantiate a theory of harm in mergers involving the acquisition of companies which market power has not materialised yet : isn't there a risk that the analysis will be **too forward-looking** ?
- Query whether the additional burden imposed on undertakings on markets which are not on the FCA's radar will not outweigh the advantage of catching more concentrations in the digital (or e.g. the pharma) sector

A risk for the predictability of French merger control ?

- There is a consensus that a new threshold should: (i) not impair the predictability of EU merger control, (ii) ensure a sufficient nexus with the EEE territory and (iii) be easy to assess and implement (*FCA's contribution to the Commission's 2016 public consultation*).
- A notification threshold based on the value of sales raises a number of issues in this regard :
 - **Difficulty to objectively define the "value" of a transaction** : at what time should the value be calculated (signing ? Closing ?) ? What about earn out clauses ? Milestone payments ? The value of the debt ?
 - **Difficulty to set a value** that would be relevant in different economic sectors.
 - How to ensure that the transaction which value triggers merger control has a **sufficient nexus** with the French territory ? That implies to define a number of criteria intended to determine whether the target has a "significant" activity in France.
- The German precedent shows that the value of transaction threshold relies on a number of criteria which are far from being as clear-cut as the concept of turnover ; this is to the detriment of predictability

THANK YOU



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