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Amazon / Deliveroo *Case Study Internal Documents as the Key Tool of Regulators in Merger Control Procedures: a Pandora's Box of Risks (and Opportunities?)*

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In recent years, there has been a proliferation of merger control rules throughout the world as well as policy changes in the field. As shown by Amazon's experience in its recent 16% minority shareholding acquisition of the online restaurant delivery operator Deliveroo, this has led to new risks and challenges for merging companies, as well as significant timing issues (in big, worldwide transactions, it can now take as long as 18 months or more to get through all of the regulatory minefields). At least 130 jurisdictions in the world (of about 200) have rules which concern, directly or indirectly, merger control procedures or filing requirements, from the most experienced (U.S., European Union, and some of the Member States of the EU) to the most recent (Guatemala). The U.K. has a unique approach to merger control, and the recent *Amazon / Deliveroo* case, cleared in August 2020 by the U.K. Competition and Markets Authority (CMA) after about a year of procedure, provides a telling example of how review of internal documents may arise and even benefit the notifying party on the merits.

In multinational transactions, the parties and their advisors are required to analyze the business footprint of the parties against this mosaic of rules in order to evaluate where the potential transactions may have to be notified and in what conditions. In mega-transactions, it is not unusual, today, for the parties to have to file before some 10-30 competition authorities on a worldwide basis, depending on characteristics of the combining parties in terms of geographic revenues and assets breakdown, transaction value and, in cases where there is market overlap, combined market shares.

The most sophisticated amongst the lot (in particular EU, U.S.) have rules which require the parties to submit internal documents prepared in connection with the proposed merger as a required appendix of the notifications. Under the U.S. Hart-Scott-Rodino merger control procedure ("HSR"), this is a standard part of any notification, known as "4(c) documents" and "4(d) documents". Under the EU Merger Regulation ("EUMR"), the requirement is referred to as "Section 5.4 documents" and arises only in cases where the proposed transaction involves "reportable markets": that is to say cases where the parties have sufficiently significant market "overlaps" by being either direct competitors in a relevant market or by having a relationship in vertical markets (upstream or downstream) which could lead to vertical integration between them once completion takes place. In recent years, there has been considerable development of the means and use of internal documents in merger control procedures, in such way that companies which make acquisitions should contemplate an in-house "protocol" concerning the preparation and contents of such documents.

The rules of the internal documents "game" are fast-changing. In a recent EU procedure, the European Commission requested for a substantial number of *additional* internal documents (in the thousands) as the case team needed to "*know the company from the inside, and have the same vision of its workings as company management*". A top official at the U.K. Competition and Markets Authority (CMA), recently commented at a conference in London, that internal documents may be a valid tool to compensate the lack of traditional data in the review of digital sector deals. *Caveat emptor*—may the purchaser beware! Whether multinational business interests agree to the regulators' approach is not the point: the most advanced competition authorities in the world are becoming tech savy: they invest in IT forensic tools that allow for the screening of many thousands of internal documents, and thus get access to the "DNA" of the merging parties.

The recently concluded (by a Phase II clearance decision) *Amazon / Deliveroo* matter provided an instructive case in point. When Amazon was contemplating taking a 16% minority shareholding in Deliveroo, the U.K.-based online restaurant delivery company, on a logical basis, it likely did not envision that, in the absence of traditional means of control which are at the essence of notification requirements, the transaction would be the subject of a merger control procedure and, indeed, that thousands of pages of internal documents and email communications would have to be produced before the competition regulator in such a procedure. And yet, this is what happened before the U.K.'s Competition and Markets Authority (CMA), in a drawn-out, highly-publicized procedure, lasting for at least a year, including a Phase II in-depth review period, at the end of which, on August 4, 2020, Amazon finally obtained unconditional CMA clearance. The entire case file from start to finish, including the non-confidential public version of last month's clearance decision, is available on the CMA's specific *Amazon/Deliveroo* case page (www.gov.uk/cma-cases/amazon-deliveroo-merger-inquiry).

In the U.K., where the merger control thresholds are met, notification is optional. This does not mean that unnotified mergers remain unknown. The CMA has a Merger Intelligence Service which actively interacts with businesses concerning transactions, sending out hundreds of requests for information to acquiring companies every year. Under most merger control approaches, Amazon's 16% minority shareholding giving it one Board seat out of seven and no veto rights over strategic commercial decisions would not be considered a "merger" for purposes of merger control. However, under the U.K.'s broad approach, the issue of whether the minority shareholding could be characterized as a merger hinged on whether Amazon, as purchaser of the minority shareholding, would acquire "*material influence*" over Deliveroo, as target. In this particular transaction, at first view, the level of shareholding, and the limited Board rights (one Board seat out of seven, no strategic veto rights) would not give to Amazon a "*realistic prospect*" to acquire material influence and this was stated by the CMA in its Phase II reference decision of December 11, 2019. Despite this, the CMA found that Amazon's "*particular industry knowledge and expertise*" would allow it, nevertheless, to exercise "*material influence*" both at shareholders meetings and through its Board seat. The view is purely subjective and contestable. On this basis, in the absence of a voluntary Amazon notification, the CMA asserted jurisdiction on its own initiative. On the merits of the case, the fundamental issue for the CMA was whether Amazon's minority shareholding in Deliveroo would constitute an obstacle to its potential re-entry into the supply of online food platforms in the U.K. (and thus restrict competition from Amazon as a potential direct market re-entrant) (Amazon had closed its Amazon Restaurants business in the U.K. in 2018 before embarking on the Deliveroo investment round in May 2019). On the merits, the CMA method is to establish a "counterfactual" (competitive situation in the absence of merger). In the counterfactual, Amazon was free to re-enter the market, but would the same be true after investment in another market operator? To that end, the CMA reviewed large volumes of internal documents relevant to whether Amazon could / would re-enter the market after making the 16% minority investment in Deliveroo. At the end of the day, in its clearance decision of August 4, 2020, the CMA came around to the conclusion that the minority investment in Deliveroo would not alter any re-entry decision that Amazon could be led to make and

thus the minority investment could not be considered to significantly limit competition. The important point here is that Amazon, as it went through its internal decision-making process with regard to the Deliveroo investment, manifestly did not expect a competition regulator to examine its thousands of pages of internal documents on the minority investment and the U.K. market in general. And yet it seems, from the terms of the CMA decision, that the internal Amazon documents reviewed by the CMA had a significant role in the final determination that the Deliveroo minority investment would not constitute an obstacle to potential future Amazon market re-entry.

There are actually two ways that parties may be required to supply internal documents concerning a proposed transaction to the enforcement authority vetting the proposed transaction.

The *first* one is through a requirement set out in the merger control form itself. Except for simplified procedures, the standard EU Form CO notification lists at Section 5.4 internal documents concerning the transaction which must be submitted to the European Commission. It is very broad in scope and requests *(i) minutes of the meetings of the board of management, board of directors, supervisory board and shareholders' meeting at which the transaction has been discussed;* (ii) analyses, reports, studies, surveys, presentations and any comparable documents for the purpose of assessing or analysing the concentration with respect to its rationale (including documents where the transaction is discussed in relation to potential alternative acquisitions), market shares, competitive conditions, competitors (actual and potential), potential for sales growth or expansion into other product or geographic markets, and/or general market conditions; and (iii) analyses, reports, studies, surveys and any comparable documents from the last two years for the purpose of assessing any of the affected markets with respect to market shares, competitive conditions, competitors (actual and potential), and/or potential for sales growth or expansion into other product or geographic markets".

The *second* occurs where a competition authority feels that it simply does not have enough information concerning the market and thus makes an information request to the parties, embracing a swath of internal documents which can involve *all* documents (emails) within a company involved in the transaction (for the purchaser, the entire group), on a given subject (such as a market segment regardless of whether the documents concerned the target specifically) within a given time period (such as the previous three years), and with "custodians" of documents clearly identified. It can involve document search forays and lead to the production of hundreds of thousands of emails and documents. Regulators sometimes issue RFIs several times for the same deal, where distinct market overlap issues arise. This places considerable burden on the parties (who are often constrained to hire IT forensic specialists), and can add months to the procedure. Basically, in today's merger control environment, where the parties are significant competitors in a market, the regulators intend to go to the heart of their businesses via such RFIs.

The French Competition Authority (*Autorité de la concurrence*) practices this second approach. In late July 2020, it published an updated version of its merger control guidelines (in French, "*Lignes directrices de l'Autorité de la Concurrence relatives au contrôle des concentrations*"), which included a new annex on "Requests for Internal Documents". Unlike various other merger control systems (U.S. HSR, EU Form CO, U.K. CMA), under French law, the supply of internal documents by the notifying party is not part of the formal notification file itself but derives from a specific request of the French Competition Authority, in "pre-notification" or at any time during the formal review procedure. In the new, updated version of the guidelines, the French Competition Authority explains its method. The decisive principle which will lead the Authority to request internal documents is lack of sufficient information, in its view, to make a determination, either with regard to (i) market definition, (ii) the "proximity" of the parties as competitors, (iii) identification of third-party competitors for purposes of determination of competition pressures on the parties, and (iv) business motives of the transaction, such as reorganization plans, with a view to determination of the effects of business choices on competition. As for media, the Authority states that it can request any type of documents (slide presentations, internal analyses and notes, spreadsheets and data compilations

of any kind, internal and external studies, and emails). The Authority states that it attempts to reduce the volume of documents by pinpointing requests to specific subjects and time periods only. It also sets out a modus operandi allowing for respect of legal privilege in the parties' exchanges with outside legal counsel.

What we have described, with a particular look to the French Competition Authority and the U.K.'s CMA, is an increasing tendency in today's merger control proceedings for competition regulators to rely on the review of internal company documents to orient its views on the transaction. In this new context, companies going through these proceedings must take note of the role that internal document production requirements can have on regulatory review of a transaction and act accordingly. As shown by the *Amazon / Deliveroo* decision, the analysis of internal documents can be the key to a regulator's decision, in one direction or the other. Regulators such as the European Commission, the U.K.'s Competition and Markets Authority, France's *Autorité de la Concurrence* and Germany's *Bundeskartellamt* now use advanced digital tools which allow them to review many thousands of internal documents.

In this regard, companies should put in place internal protocols for the drafting and presentation of internal documents relating to M&A projects, designate custodians of the documents, in order to take into account the production of documents before a merger control authority. The most basic rule would be to consider, from the outset of exchanges concerning a proposed transaction that one or several merger control authorities will be reviewing the documents which reference the transaction, including emails (perhaps many thousands of them).

In this spirit, we have drawn up a list of "best practices" which companies should follow:

- Establish protocols which set out internal practices of communication (group-wide) concerning potential transactions.
- Protocols should cover, at minimum internal procedures and content (avoid sensitive / ambiguous declarations).
- Management training sessions should be undertaken to ensure understanding and compliance with protocols.
- Designate a custodian of all internal communications to be copied on all exchanges. This allows for internal monitoring of exchanges and greatly simplifies internal document collection and production procedures, which often take place under pressure.
- Key internal documents (Board minutes, Information Memorandums, and slide presentations submitted to the decision-making process) should be reviewed by outside competition counsel at draft stage.

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If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings Paris/Brussels lawyers:

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