

A primer on Antitrust laws: stories of successes and failures in M&A deals - Part II

Introduction

As already discussed at length in the part I of this series of articles, antitrust authorities and their applicable laws have a huge impact in determining the success or failure of an M&A deal. Nowadays, this is particularly important, given a toughened regulatory environment worldwide. From the progressive stance on antitrust of the Biden administration to enhanced EU merger control laws, passing through a more interventionist CMA in the UK, companies are all facing greater scrutiny when intent in carrying out a merger transaction. Within this new article, there will be a dissertation regarding three remarkable transactions that happened in the last couple of years, which hopefully will provide the reader with valuable insights into the typical competition concerns raised by regulators and how some corporations managed to bypass them by adopting deal-specific remedies.

The article will start by first exploring two derailed deals and its implications: Nvidia - Arm and UnitedHealth Group's - Change Healthcare; then conversely, it will be time to dive deep in the details underlying an important transaction which managed to get the regulatory approval: Intesa Sanpaolo - UBI Banca. Ultimately, some final takeaways and points of reflections will be provided.

Biggest-ever semiconductor deal falls apart: Nvidia - Arm

What was meant to be the biggest-ever deal in the semiconductor industry collapsed in early February of this year. Nvidia, the American multinational technology company which invented the GPU, announced in September of 2020 its planned takeover of the UK-based chip designer Arm. Since the announcement, the deal has been embroiled in an overwhelming sea of regulatory issues, leading Nvidia to abandon its cash-and-stock takeover of Arm valued at over USD 60B. The US Federal Trade Commission (FTC), the UK Competition and Markets Authority (CMA), and the European Commission had all launched separate investigations into the deal, however working closely together to carefully assess the impact of the acquisition.

In a lawsuit conducted in December of 2020, the FTC stated that Arm's position as the "Switzerland" of the semiconductor industry is the key reason for why it believes the deal demonstrated anti-competitive behavior. Arm Ltd., owned by conglomerate SoftBank group, produces processors which are used in most mobile devices, creating a significant market dominance. Arm estimates that 70% of the world's population uses technology made with its products or intellectual property. Many of the largest tech companies such as Apple, Microsoft, and Google license Arm's technology to build semiconductor chips and related products. Numerous rival tech companies and customers expressed concern about the deal, stating that it would give Nvidia excessive market power. Arm's neutral business model, characterized by the open licensing of their technology, would be at threat by Nvidia. If the acquisition had materialized, regulators claimed that this would give Nvidia the power to cut off rivals completely from Arm's technology. This would increase prices for consumers across the tech industry, in addition to reducing product quality, choice and innovation.

As explained in Part 1 of this article series, a firm may come up with potential remedies to solve competition issues. Nvidia did this by claiming that it would keep Arm's open licensing model and expand the Arm ecosystem through strong investments in research and development. However, this was not enough to mollify the doubts of

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the FTC or European and British regulators. These behavioral remedies proposed by Nvidia are promises to act in a certain way in the future, requiring regulators to monitor and report on the firm in the long run. These promises have little value to regulators as they can not be certain that Nvidia will not engage in anti-competitive activity by cutting off rival firms.

The CMA launched its investigation after expressing serious concerns about anti-competitive behavior in addition to UK national security. UK officials stated that the deal would affect competition in markets for the automotive sector, Internet of Things, and data centers. British politicians and regulators view Arm as a strategic national asset due to its crucial role in the global technology supply chain. The recent crunch in the global chip industry, caused by a combination of the snowball effect from the COVID-19 crisis and the US-China trade war, has further fueled Arm's international importance. Therefore, the UK government and the CMA were opposed to Arm being snatched up by a major US firm.

Furthermore, watchdogs argued that the deal would impede on the UK's ability to develop and employ national defense and security systems that use Arm technology and intellectual property. Since 2018, due to implemented reforms, the UK government has acquired more power to investigate and scrutinize deals involving tech businesses linked to national defense and security. The National Security and Investment (NSI) act is a recent reform that forces firms and investors to notify the UK government of any M&A deals related to any of the 17 sectors of the economy deemed "sensitive". These include, for example, defense, artificial intelligence, travel and civil nuclear. According to the UK government, this act is aimed at protecting national security, while at the same time ensuring transparency, free trade and innovation. There are several other recent examples of deals that have received intense regulatory pressure from the CMA and UK government due to national security concerns. In August of 2021, Cobham, an aerospace manufacturing company owned by American private equity firm Advent International, announced the acquisition of British defense firm, Ultra Electronics, for USD 3.6B. Once again, even with Cobham stating that they would increase investments, keep UK headquarters, make more jobs available and overall, not put the UK's national security at risk, this deal was met with intense investigations by regulators, which are still ongoing.

US government blocks UnitedHealth Group deal: a fight against corporate consolidation

The Department of Justice filed a lawsuit on the 24th of February to stop a UnitedHealth Group affiliate from buying a health technology business for USD 13B. This represents the latest action made by the Biden administration in order to limit corporate concentration. The government argued that UnitedHealth's acquisition of health tech firm Change Healthcare would provide the company with sensitive data that it could use against its insurance competitors.

The lawsuit was filed in the District of Columbia's United States District Court. The lawsuit was also joined by New York and Minnesota. The Department of Justice's "seriously flawed position is based on highly speculative notions that do not reflect the realities of the health care system," according to a spokesperson for Optum, a UnitedHealth affiliate, who added that the company would "vigorously defend our case." Change Healthcare said it was "working towards concluding the merger as we comply with our commitments under the merger agreement," according to a spokesman. The deal is the latest transaction to run into opposition from the Biden administration, which has made countering corporate consolidation a central part of its economic agenda. Last year, President Biden signed an executive order to encourage competition in many businesses. He also named

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Lina Khan, a vocal opponent of the tech giants, to chair the Federal Trade Commission, and Jonathan Kanter, a lawyer who has represented huge corporations, to manage the DOJ's antitrust investigations.

Last year, Optum announced that it would acquire Change Healthcare, a provider of technology services to insurers. With USD 287.6B in revenue in 2021, UnitedHealth is one of the country's top healthcare companies. Its Optum unit has medical offices, a significant chain of surgery centers, and one of the nation's largest pharmacy benefit managers, in addition to its health care information technology business. The data that Change Healthcare collects when it assists in the processing of insurance claims is at the heart of the DOJ's case. UnitedHealth would be able to examine the guidelines that its competitors used to process claims and undercut them, according to the agency. The company might use data from other insurers' patients to gain a competitive advantage. According to the lawsuit, more than half of all American medical insurance claims "flow-through (or touch)" Change Healthcare's systems, according to a UnitedHealth estimate. According to the report, UnitedHealth's former CEO saw the tech company's data as the "basis" of the deal's justification. UnitedHealth could potentially withhold Change Healthcare's products (which other insurers utilize) from competitors or keep some of its new developments for itself, according to the lawsuit. The purchase would also give UnitedHealth a monopoly over a type of service that was used to screen insurance claims for inaccuracies and speeds up processing, according to the DOJ. According to the corporations, the deal would boost industry efficiency.

Legislators and regulators are becoming increasingly concerned that large corporations may utilize vast amounts of data to harm their competitors. A congressional committee has investigated whether Amazon, for example, utilizes data from third-party merchants on its platform to produce competing items. Critics of Facebook have also said that the company's years of user data makes it tough for an upstart business to compete. In the future, as mentioned by Biden, all the actions decided by Congress will have the aim of preserving fair competition in all markets, continuing the line of these years.

Intesa Sanpaolo - UBI Banca: a success story

It is being proposed here an analysis of one of the most significant operations in recent years: the merger between Intesa Sanpaolo and UBI Banca. It was a corporate integration which significantly changed the Italian banking market, bringing the group Intesa to assume a prominent position not only in Italy, but also in Europe.

To understand the European economic situation at the beginning of 2020 it is important to take a step back and look at the last semester of 2019, the last months in which Mario Draghi sits at the presidency of the European Central Bank (ECB). The last six months of Mario Draghi have seen the interruption of the monetary policy normalization process undertaken in 2018 and the reactivation of quantitative easing. Despite being a previously used policy, the economic conditions appeared to be more complex than in the past: years of significant expansion of the ECB's balance sheet they had not in fact led to the hoped-for growth in GDP and investment, but they had fueled an excess of liquidity that had spread from the nations of northern and central Europe (France and Germany) towards the more fragile and indebted ones in the south (Italy and Spain). In a system that was therefore subject to excess liquidity, with strong GDP deceleration, the renewed adoption of expansionary monetary policies had produced a further increase in competition on loans and a considerable reduction in expected returns on financial investments, especially as regards government bonds, with the spreads applied by Italian banks for new loans to customers at very low levels. Therefore, the Italian banking system remained in a very difficult situation. In particular, the financial results of the institutes were strongly influenced by a weak macroeconomic context, which led to a sharp deterioration of the credit quality and a decrease in volumes

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compared to the pre-crisis amount, and again the profound change in the regulatory framework (launch of single supervision at European level and new directives) resulting in organizational impacts and compliance costs. Another element to consider is the technological disruption, which has led banking institutions to consider the competition in the financial services sector of fintech operators and digital champions.

It is therefore in a complex and uncertain context that Intesa Sanpaolo announces on 17 February 2020 a takeover bid on UBI Banca for a total consideration of roughly EUR 4.86B. The form of payment is a 100% stock deal on the basis of an exchange of 17 new Intesa Sanpaolo shares for every 10 Ubi Banca, with a premium of 28% on the market price of the session prior to the announcement. There are many reasons that led Intesa Sanpaolo to undertake this bidding operation, first of all the desire to be an even bigger player both at Italian and European level. In addition, revenue synergies, complementarity in some business sectors with potential for up-selling and cross-selling of the product catalog, and improved ability to attract new talents were among the other motives.

Of particular interest are the choices made by Intesa to avoid the blocking of the transaction by the authorities due to competition concerns. As it is well known, the European banking sector is highly regulated by both the central bank in Frankfurt and by the national competent authorities. In this case, the ECB had given its green light on the transaction whereas the Italian authorities were causing concerns to the top management of Intesa regarding the likelihood of success of the transaction. To prevent the emergence of situations potentially relevant for antitrust purposes, Intesa Sanpaolo the February 17, 2020, on the same day of the announcement of the transaction, declares to have stipulated an agreement with BPER Banca S.p.A ("BPER Agreement"), which would have undertaken to purchase by December 2020 a business unit consisting of a set of branches (estimated between 400 and 500) of the new combined entity. In fact, the union of two banks of such size as Intesa Sanpaolo and UBI Banca could have led to critical issues in terms of competition on the market, as it might have created a presence throughout the national territory capable of preventing other banking institutions from operating. To remedy this situation, the BPER agreement was born.

The AGCM (*Autorità Garante della Concorrenza e del Mercato*), the Italian competition authority, after studying the offer, the agreement stipulated for antitrust purposes and the potential new group in the banking sector, recognized the possibility that the union could have led to the strengthening of a position dominant in different banking services in certain regional areas of Italy, hindering competition in the market. For this reason, on 5 June 2020, the AGCM notified Intesa Sanpaolo that the operation communicated was likely to fall within the prohibition referred to in Article 6 of Law no. 287/90 ("*Divieto delle operazioni di concentrazione restrittive della libertà di concorrenza*"). On June 15, 2020, a supplementary agreement to the binding agreement is then concluded, as a result of the notification of the investigation by the AGCM, in this amendment the business branch of the object is consistently outlined. The number of branches to be sold, initially estimated at 400/500 branches, was increased to 532, a number composed not only of UBI branches but also of branches of ISP, with precise definition of the addresses of these latter. As of June 19, 2020, the consideration for the sale of these branches to BPER was estimated at approximately EUR 660M. On July 16, the AGCM authorized the operation of acquisition of control of UBI Banca subject to the execution of structural transfers in line with the provisions of the BPER Agreements. This pushed the UBI Banca shareholders to reconsider the offer, after the first two rejections emerged from the shareholders meetings.

And so it was that, after a series of further negotiations with UBI shareholders, where in addition to shares also a consideration in cash was included for them, Intesa was able to overcome the last few resistances and to

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complete a deal that has ever since then redefined the Italian banking landscape and characterized an important success story of a corporate securing regulatory approval in a very complicated scenario.

Conclusion

In recent years, due to an overall increase in the concentration of market power there has been a growing intensity of antitrust action. This has influenced mergers and acquisitions around the world and specifically in the US, UK and EU as outlined by the examples in the article. Furthermore, competition concerns have not been the only reasons for heightened regulatory pressure, as worries regarding national security have also come into play, as demonstrated by Nvidia's failed acquisition of Arm. Despite investigations and obstacles raised by watchdogs, firms can present potential remedies to solve competition issues to receive clearance from regulators, shown by the example of Intesa Sanpaolo's "BPER Agreement". In the coming years, the trend of increased transaction scrutiny will probably stick if not escalate further. This will have an impact on future M&A deals, meaning buyers and sellers will have to put forward strong proposals to prevent their own anti-competitive behavior.

TAGS: antitrust, DOJ, FCA, CMA, regulatory risk, competition law, cartel, monopoly, commission, big data

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