

concerns. In some cases, ESG considerations are actually catalyzing new deals, such as by causing companies in the oil and gas industries to accelerate their efforts to acquire assets in the renewables sector.

I'm Thinking of Ending Things: Political and Regulatory Changes

There were also profound political and regulatory changes in 2020, changes which will undoubtedly continue to have an effect on M&A activity in the new year. Early in 2020, new regulations issued by the Committee on Foreign Investment in the United States (“CFIUS”) came into effect. CFIUS is an inter-agency committee of the U.S. federal government authorized to review certain transactions involving foreign investment in U.S. companies. The new CFIUS regulations greatly expanded CFIUS’ power, allowing it to modify or even unwind transactions based on national security concerns. More recently, the UK published a new National Security and Investment Bill, which, like the new CFIUS regulations, proposes to strengthen the UK government’s power to oversee and intervene in acquisitions of UK assets. 2020 also saw an increase in antitrust enforcement in the United States and Europe, with government agencies taking particular interest in the technology sector. Looking ahead, we can generally expect to see a continued increase in antitrust and foreign investment regulatory enforcement.

In one of the lowest points in our *annus horribilis*, we also saw the passing of Justice Ruth Bader Ginsburg. The passing of Justice Ginsburg had significant political implications, resulting in the third vacant United States Supreme Court seat that President Trump was able to fill over the course of his presidency. The resulting Supreme

Court bench is now divided 6-3 in terms of Republican to Democratic appointees.

Lastly, three-and-a-half years after the results of the Brexit general election vote were announced, the UK and EU have finally agreed to a post-Brexit trade deal.

Queen’s Gambit: Looking Ahead

Before the COVID-19 pandemic hit, significant portions of dealmaking activity were already becoming virtual. In 2020, we saw dealmaking become almost entirely virtual, with key negotiations, board meetings, and advisor sidebars now almost entirely taking place on virtual platforms. The resurgence of M&A activity in the second half of 2020, and the effectiveness of remote dealmaking in the midst of such resurgence, may have long-term impacts on how we approach dealmaking in the years ahead. The recent positive news on the race to develop an effective COVID-19 vaccine provides some hope that in-person meetings, at least to a certain extent, may be able to resume at some point in 2021. In the end, although the impacts of the pandemic, trade wars and continued geopolitical shifts will certainly persist as we enter 2021, such factors as promising COVID-19 vaccines, increased connectivity, and work-from-home flexibility as deal work rebounds provide a sense of hope and optimism as we embark on the new year.

BREXIT AND M&A: ONWARD!

On December 18, 2020, The M&A Lawyer spoke to Matt Evans, a partner in Jones Day’s London office, on M&A and antitrust implications for the post-Brexit United Kingdom in 2021. We had last spoken on the topic in March 2019.¹ A

few days after this conversation, the UK and the EU announced they had come to terms on a deal, which includes some state aid provisions. As of press time, the deal had yet to be approved by the European Parliament but had been approved by the British Parliament.

M&A Lawyer: For a company considering a UK or UK-connected acquisition in 2021, what is the best strategy to employ, given that things still seem a bit unclear as to post-Brexit Britain?

Matt Evans: The UK has been in a transition period in which it is still subject to the EU merger regulation. But it's already been the case that if you have a transaction that qualifies for review by the European Commission on behalf of all of the EU plus the UK, if this transaction impacts the UK, many companies now have been proactively reaching out to the Competition and Markets Authority ("CMA"), telling them about the deal, and getting the CMA comfortable that there isn't any UK angle that can't be dealt with by the EC. And the CMA has been actively contacting merging companies and saying that 'we've read about this deal, we'd like to hear more about it.' If those companies say 'well, it qualifies for EC review, you should speak with them if you really want to know more about it,' the CMA may reply with, 'we will want to speak directly with you.'

So it's already the case that the CMA is actively monitoring deals that are being notified in Brussels and are reaching out to deal parties, even when they don't have jurisdiction, and making it clear that they want engagement. We're going to see more of that and it seems likely that the number of deals that are considered by the CMA is going to increase. They've kind of started a parallel process already.

MAL: When did that begin?

Evans: It seems to have become more systematic when the UK formally left the EU at the end of January 2020. Since the [past] autumn, the CMA has been more vocal in encouraging parties to think of them. Since the end of summer, if you've started pre-notification discussions around a deal with the European Commission, you may not know if the clock in Brussels is going to start before January 1. If it doesn't start before then, the CMA will say they've got the right to launch a parallel investigation.

MAL: Have they done anything else to indicate their future priorities?

Evans: The CMA is currently consulting on some draft guidance on merger control procedure and jurisdiction and merger assessment guidelines. They're taking into account a bunch of recent cases involving UK-to-U.S. mergers and they've raised controversial points in relation to jurisdiction and substantive analysis. There's been quite a lot of engagement by practitioners and other bar associations, including the ABA, on the content of those draft guidelines. The guidelines have to be changed because a lot refer to the EU merger regulation, which no longer has anything to do with the UK, and vice versa. The CMA has updated quite a few things already. And they are also dealing with topical issues, such as so-called killer acquisitions and mergers involving two-sided platforms, bringing users and suppliers together in one place.

MAL: How do you think CMA analysis will change going forward?

Evans: I suspect the CMA wouldn't say their analysis is changing but they would say they are now bringing everything into one place and consolidating their current practice. Among the

things they're clarifying is the UK concept of control when ascertaining whether there's a notifiable merger—whether “two enterprises cease to be distinct.” One tweak the CMA is making is worth flagging, concerning how they assess jurisdiction. The current guidance suggests if you're taking a 15% or higher stake in a company, the CMA will look quite closely at whether if you have material influence, a form of control. The draft new guidance removes the reference to 15%.

So the clear message is now: no shareholding is too small for us to assert jurisdiction. If there are factors that demonstrate you have material influence, companies should think about the UK. This can be an obvious one, common to many jurisdictions, such as veto rights over a business plan or annual budget but only with a 5% stake. That's still sufficient to give you joint control. But maybe you're buying a minority stake in a competitor, maybe you're thinking you might increase that stake over years. Well, the CMA will be very interested in learning that, and they'll look at internal documents to see what your future plans are and what discussions you have had with the target and whether it appears that by having a small stake now plus a seat on the board will mean your influence will be magnified and the target will do everything it thinks you want it to. If so, that could confer material influence and bring UK merger control into play.

MAL: What about the issue of state aid? When we last spoke about Brexit, that was one of the major sticking points in negotiations.

Evans: One of the two most important sticking points in the negotiations has been the question of state aid: what aid can be given, will the UK essentially have a version of the EU rules, will it have its own regime, and, if so, could that distort

competition if the UK still has access to the single market in terms of supply of goods? So we've all been still a bit in the dark on state aid. The expectation is that the UK rules will mirror the EU rules, but there's been remarkably little obvious progress in developing a UK state aid regime. That may be because the Brexit negotiations were going down to the wire.

MAL: Was there anything unexpected that happened over the past year, in relation to Brexit negotiations or the role of the CMA?

Evans: The CMA has been very active in merger control this year and has blocked or caused the abandonment of a much higher proportion of deals than has traditionally been the case. Some commentators have questioned whether the CMA has been deliberately more muscular and interventionist to demonstrate to the world that it intends to be taken seriously and treated with respect: that it's been a run-up to the full Brexit when the CMA will have a seat at the table with the biggest competition authorities and be involved in the world's biggest deals.

The CMA takes the view that it just so happens that several riskier, more difficult deals have come across its desk than is usually the case. Some CMA officials have reportedly said they think some companies have been taking a less risk-averse approach to deals and assuming they can buy their closest competitors and force the deal through. I haven't seen evidence to suggest that's right. My perception is that the CMA has become a more unpredictable agency and thus a more difficult one for deals that raise particular issues.

Another thing is that the CMA has been cooperating ever more closely with other competition

authorities. It has indicated in draft procedural guidance that it will be cooperating at an earlier stage than traditionally has been the case, with authorities like the FTC and DOJ, and the European and Chinese authorities. The intention is to get more information from the parties in pre-notification about the status of filings over jurisdictions to allow closer, earlier coordination with other agencies. And that may be a good thing because companies want consistency in analyses and consistency in outcome from authorities around the world. Anything that improves the chances of that on balance is likely to be a good thing.

MAL: *Have there been any indications the CMA might pursue antitrust cases similar to the recent ones in the U.S. against digital platforms such as Facebook?*

Evans: There's been quite a lot of development this year in relation to digital markets. The UK is introducing a new unit within the CMA called the Digital Markets Unit. There have been recommendations in some reports drawn up by the government that certain major digital platforms need to be looked at quite closely, that they could have a market power that's harming consumers. But I think the CMA will need to tread carefully there.

So yes, more focus on digital platforms, there will be a dedicated unit, maybe a new code, maybe new legal obligations for certain platform operators. For a lot of digital companies and platform providers, they're often operating cross-border, they're already typically global players. I don't think one single agency is going to be able effectively to regulate them on their own. That said, they can have a go and compartmentalize jurisdictions to some degree. But I anticipate a lot

of cooperation between UK, the Americans, the EU and so forth to swap notes and see if there's some sort of common approach they want to take towards on-line companies.

MAL: *Will there be a sense of relief for companies that are considering deals in the UK in 2021, given that Brexit has been a source of uncertainty for so long, for several years now?*

Evans: The uncertainty of Brexit has weighed on companies doing business in the UK in relation to things like GDPR, trying to answer questions like: what do you do with data, what are the new rules about transferring data from the EU and UK and vice versa? There are real, pragmatic challenges and questions about the movement of goods. Will there be tariffs on them or not? How quickly can you get goods into the UK and out of it, will there be border checks where there weren't before, more paperwork to fill out? How easily can I recruit from outside the UK, how easily can I move employees from subsidiaries in the EU to branches in the UK? Those are all important questions that incur costs, and they are questions that some two weeks before the end of the transitional period we still didn't know the answers to.

In terms of antitrust enforcement, obviously merger control is going to change because more deals will need to be notified to the UK authority than today, a lot of deals where you will have to notify to both the EU and UK, whereas in the past it was just the EU. That's a practical increase in costs and red tape, but we've known that for quite some time.

The same with antitrust investigations: there may be parallel investigations in the EU and the UK. In terms of antitrust laws, the UK has transposed into UK law various EU principles and had

done so years ago, so I wouldn't expect any big changes overnight. There's possibly one exception. In the EU single market, there are competition laws that relate to how easily a consumer can obtain goods or services from a supplier in another member state and how easily that supplier must make it such cross-border sales available. There are rules on whether a supplier can impose restrictions on selling across borders. It's possible that UK law will now enable manufacturers and brand owners to impose some restrictions on their resellers, so the UK can be ring-fenced. Depending on the facts of each case, they may be able to tell their UK reseller they can't under any circumstances resell the goods in the EU. That could become quite useful for brand owners, as it will become easier to stop gray imports in the rest of the EU and it may mean that we'll see higher prices in the UK than we do at the moment. But companies should take care before imposing new restrictions on their UK distributor selling into Europe.

MAL: *Have Brexit concerns been a drag on new deal volume, or given the COVID crisis, is it hard to determine how it affected volume in 2020?*

Evans: There has been a reduction in deal volume. We've seen a last-quarter push as we do every year, and the hit taken by some sectors due to the pandemic has meant there are companies that are now quite attractive targets, whose share price has taken a hit—those companies have become attractive targets for cash-rich buyers in particular. But while there has been a reduction in M&A, I don't think it's been that catastrophic.

MAL: *Is there anything else to keep our eyes on during the next six months or so?*

Evans: If you're a company doing a deal that

requires merger clearances, the most important thing to remember is not that you may have to do an extra filing and get CMA clearance. It's more that UK merger control has been quite slow for deals that are relatively straightforward. If they're difficult deals, UK merger control takes about as long as the other regimes. But for deals for which you might get early termination in the States and clearance in less than a month in Germany, if you do notify in the UK, you need to be aware there isn't a quick phase one. Pre-notification can take two months and the phase one review could take up to two months as well—it's a three-to-four month process, which means the UK could become a bit of an outlier going forward. This can impact on your deal timetable and you'll need to factor it in.

ENDNOTES:

¹"Brexit & M&A: The Final Round," *The M&A Lawyer*, April 2019, Vol. 23, Issue 4.

DELAWARE COURT OF CHANCERY PERMITS BUYER TO TERMINATE MERGER DUE TO TARGET'S FAILURE TO OPERATE IN THE ORDINARY COURSE; BUT FINDS NO MAE DUE TO COVID-19

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