Merger review of creeping private equity consolidation: a new use for Article 22 EUMR and beyond?

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Abstract: Gone are the days when merger control risk assessments were only rarely a feature of private equity deal planning. Competition authorities around the world have recently turned their attention to creeping consolidation in particular sectors, including across private equity portfolios, and are finding new ways of using their existing toolkits to review so-called ‘roll-up’ strategies pursuant to which a private equity investor acquires multiple small companies in the same sector. This article considers the mechanisms through which private equity ‘roll-up’ transactions may be subject to merger review in the EU and the UK and the potentially far-reaching implications for PE firms and those advising them.

Keywords: private equity, merger control, Article 22, European Merger Regulation, European Commission, roll-up acquisitions

1. Introduction

Historically, private equity (PE) firms’ investment strategies have not attracted significant antitrust scrutiny, largely because they have generally involved the acquisition of relatively small players and/or non-controlling minority stakes, or not focused on multiple acquisitions in the same industry.1 In the EU, such transactions were, even if they satisfied the jurisdictional turnover thresholds under the EU Merger Regulation (EUMR),2 often reviewed by the European Commission (Commission) under the simplified procedure.3 However, against the backdrop of an ever more aggressive approach to competition enforcement around the world, this is unlikely to remain the case for long.

Over the last year or so, competition authorities have turned their attention to ‘roll-up’ strategies pursuant to which PE firms acquire a significant share of a sector through a series of small transactions which would not require review on an individual basis. Following calls for more thorough scrutiny of such strategies by the U.S. Department of Justice and Federal Trade Commission (FTC) in summer 2022,4 there have recently been suggestions that such transactions could be candidates for review by the Commission under Article 22 of the EUMR.5 Other competition authorities are also weighing in: the Competition and Markets Authority (CMA) has taken particular interest in creeping consolidation in the veterinary services sector6 (and has even required a

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1 There are, of course, exceptions and some PE deals have raised significant antitrust issues, e.g. the acquisitions of veterinary practices recently reviewed by the CMA, which are considered in further detail in section 4 of this article. At the EU level, in March 2018, Blackstone and Celanese abandoned their proposed joint venture after it was referred to Phase 2 and the Commission rejected remedies proposed by the parties: see Case M.8457 Celanese/Blackstone/JV (17 December 2017). The Commission has also prohibited PE deals at the end of Phase 2, e.g. Case COMP/M.2187 CVC/Lenzing (17 October 2001).
2 Regulation 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24/1, Article 1.
4 See e.g. S. Palma, M. Vandevelde and J. Fontanella-Khan, ‘Lina Khan vows “muscular” US antitrust approach on private equity deals’, Financial Times (9 June 2022).
number of completed transactions to be unwound), while the chair of the Australian Competition and Consumer Commission (ACCC) has expressed concern about acquisitions by PE firms of minority shareholdings in competing companies. This does not necessarily mean that PE investors are being singled out – but rather that their deal making should come under the same level of scrutiny as other acquirers.

This article focuses on the mechanisms through which PE ‘roll-up’ strategies might be subject to merger review in the EU and the UK and the implications for PE firms and those advising them. The upshot is that, as in many other areas, PE investment strategies which focus on a particular sector will need to factor in the risk of merger review at an early stage of the deal planning process. A careful balancing act will need to be undertaken between the commercial upside associated with a particular investment opportunity and the potential delays, costs and negative outcomes that may result from antitrust scrutiny.

2. What is PE ‘roll-up’?

‘Roll-up’ refers to the process of acquiring multiple small companies in the same sector and sometimes subsequently consolidating them into one larger company. Investors hope that the resulting economies of scale will lead to reduced costs and improved profitability, in part because of operational efficiencies and in part because of the enhanced competitive strength of the consolidated portfolio. As each individual transaction tends to be small, the chances of triggering the revenue, asset, market share or transaction value-based thresholds which delineate the jurisdictional reach of most merger control regimes around the world are low. But as part of the rationale for pursuing these transactions is often linked to increasing the profitability of the portfolio as a whole, it is perhaps not surprising that PE ‘roll-up’ has caught the eye of antitrust authorities, including in the EU and the UK.

3. EUMR review even below EU and national turnover thresholds?

The application of the EU merger control regime to a particular transaction has historically been determined by applying bright-line tests based on the parties’ turnover in the EU as a whole and/or in its constituent Member States. If the parties’ turnover was not sufficient to trigger either the EUMR or any national thresholds, it was usually safe to assume that a transaction would not be reviewed by the Commission. The Commission’s new approach to the transactions it is willing to review pursuant to a referral request under Article 22 EUMR means that this is no longer the case: this can capture mergers that are not notifiable under either EU or national merger control legislation.

Article 22 allows a Member State to refer a transaction to the Commission for review by it under the EUMR if it: (i) affects trade between Member States and (ii) threatens to significantly affect competition within the territory of the Member State(s) making the request. The transaction does not need to meet national or EU jurisdictional thresholds although, historically, the Commission discouraged referrals from Member States which did not have jurisdiction under their own national legislation.

However, in revised guidance published on 31 March 2021, the Commission reversed this approach for transactions in which the turnover of at least one of the companies concerned does not reflect its ‘actual or future competitive potential’: the Commission will now accept (and in certain circumstances even encourage) referral requests by national competition authorities under Article 22 in relation to such transactions, even if they do not meet any other jurisdictional thresholds. This change has been driven in part by concerns around ‘killer acquisitions’ in the digital, pharmaceutical and life sciences sectors – the only below-threshold transaction the Commission has reviewed under this revised approach to date is Illumina/GRAIL, a deal between two US-based biotech companies – but the Article 22 Guidance is can be easily handled by the companies involved in a merger in order to determine if their transaction has a Community dimension and is therefore notifiable: see Commission Consolidated Jurisdictional Notice under EU Merger Regulation [2008] OJ C 95/31, para 127. In considering the concept of turnover under the EUMR, the General Court has also stated that ‘the requirements of legal certainty and speed which apply in the context of control of concentrations mean that both undertakings and competition authorities can in principle rely on a foreseeable criterion and immediate access’: Case T-417/05 Endesa SA v. Commission EU: T:2006:219, para 209.

11 Commission, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases [2021] OJ C 113/1, para 8 (Article 22 Guidance).

12 Article 22 Guidance (fn 11), paras 11 and 19.

13 The General Court rejected Illumina’s challenge to the Commission’s use of Article 22 EUMR to review this transaction: Case T-227/21, Illumina,
not limited to these areas. The possible consequences for any transaction that may potentially give rise to competition concerns are therefore far reaching.

In the PE space, Martijn Snoep, the head of the Autoriteit Consument en Markt, the Dutch competition authority, has recently suggested that Article 22 could be used to ensure merger control review of PE ‘roll-up’ acquisition strategies.14 Although such transactions may not meet the national (or EU) jurisdictional thresholds for review and may not individually pose competition concerns, as explained above, many competition authorities consider that there should be a mechanism through which their collective impact on competition can be assessed in the round.

The Commission has not, to our knowledge, considered the use of Article 22 in such circumstances, though this requirement is interpreted broadly and can be satisfied through which their collective impact on competition can be assessed in the round. The transaction value is particularly high compared to the target’s current turnover.

Whether or not any of these factors will apply to a particular ‘roll-up’ acquisition strategy will of course be fact-specific, although, importantly, there is no need to shoe-horn a transaction or set of transactions into the ‘illustrative’ list above, which the Commission explains ‘cannot be deemed in any way comprehensive’.17 Provided that an effect on trade between Member States and a credible competition issue within the requesting Member State can be demonstrated, the Commission can accept a request to review a transaction.

It is therefore important that PE firms making multiple acquisitions in a sector that may have some impact on cross-border trade within the EU consider the potential impact of those transactions on competition in the round rather than individually, as they may have been used to doing. This will likely represent a significant step change, in particular in the initial stages of deal planning, but early consideration of the following two issues should assist in identifying those transactions which may warrant closer inspection from a competition perspective:

• The transaction rationale and associated deal value, i.e. is the deal valuation vulnerable to challenge on the basis that it suggests that the PE firm is willing to pay a premium for the target business because it will strengthen its position in a particular market and enable it to charge supra-competitive prices?
• The likely market reaction, i.e. the possibility and strength of complaints from third parties, such as competitors, customers and suppliers. The Article 22 Guidance explicitly provides that third parties can inform the Commission or any national competition authority of transactions which should, in their opinion, be subject to a referral under Article 22.18

4. Recent CMA scrutiny of creeping consolidation in the veterinary services sector: a cautionary tale

PE firms active outside the EU (including through existing or potential portfolio companies) should ask themselves the same questions in relation to other jurisdictions in

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Inc. v. Commission EU:T:2022:447. The General Court confirmed that a Member State is entitled to refer to the Commission any concentration that satisfies the cumulative conditions set out therein, irrespective of the existence of scope of national merger control rules: ibid paras 94, 116, 139, 148 and 183. A further appeal to the Court of Justice is pending: see Case C-611/22 P Illumina v. Commission and Case C-625/22 P Grail LLC v. Commission. The Commission has, subsequently, prohibited the Illumina/Grail transaction: Case M.10188 Illumina/Grail (art. 85) (6 September 2022) and Commission press release, Mergers: Commission prohibits acquisition of GRAIL by Illumina (IP/22/5364, 6 September 2022). Illumina has appealed the prohibition decision to the General Court: Case T-709/22 Illumina, Inc. v. Commission. As Illumina had already completed the acquisition of Grail, the Commission has proposed requiring Illumina to unwind the transaction by divesting Grail as an independent, viable and competitive business: see Commission press release, Mergers: The Commission adopts a Statement of Objections outlining measures to unwind Illumina’s blocked acquisition of GRAIL (IP/22/7403, 5 December 2022).

14 See Parry (fn 5).
15 Article 22 Guidance (fn 11), para 14.
16 Article 22 Guidance (fn 11), para 19.
17 Article 22 Guidance (fn 11), para 20.
18 Article 22 Guidance (fn 11), para 25.
which they are present, in particular those in which competition authorities have been public about their concerns with creeping consolidation. The UK CMA’s recent scrutiny of the veterinary services sector provides a cautionary tale.

Since September 2021, against ‘a backdrop of a small number of corporate groups … buying up large numbers of independent practices and local chains of vets across the UK’,19 the CMA has probed four sets of transactions involving veterinary practices, CVS Group/The Vet,20 Vet Partners/Goddard,21 Independent Vetcare/multiple independent vet businesses,22 and Medivet/multiple independent vet businesses.23 None of these transactions (or sets of transactions) was notified to the CMA voluntarily and all had completed before the CMA became aware of them under its ‘mergers intelligence’ function24 and commenced merger investigations on its own initiative. As explained in further detail below, under section 24 of the Enterprise Act 2002 (the Act), the CMA has the power to investigate non-notified mergers and there is no time limit for it to do so where details of the transaction(s) have not been made public.

In each of the reviews the CMA has completed (Medivet remains ongoing at the time of writing), it has found significant competition concerns,25 which the parties have addressed through the divestment, at the end of Phase 1, of the acquired practices in those local areas in which the CMA identified possible competition concerns,26 rather than fighting the CMA’s findings in an in-depth Phase 2 review. In CVS/The Vet and Independent Vetcare, the divestments equate to the entirety of the businesses acquired by the relevant purchaser.

The CMA has flexed its investigatory toolkit in a number of interesting ways to achieve these results:

- First, wrapping up a number of completely independent transactions over a certain time period in to one substantive assessment, as it has done in Independent Vetcare (relating to eight separate transactions between September 2021 and March 2022) and Medivet (relating to 17 separate deals between September 2021 and September 2022).28 While the CMA has technically launched separate, parallel merger reviews into each transaction, when it comes to the competition analysis, it has – at least in Independent Vetcare – assessed the cumulative impact of all of the transactions on competition in each local area in which there were competitive overlaps.29 It is assumed that the CMA will adopt the same approach in Medivet.30

- Second, linked to this, based on the authors’ recent experience, the CMA’s mergers intelligence unit (the role of which is to proactively monitor the market for potentially problematic transactions that have not been notified voluntarily to the CMA31) has started requesting information about all transactions a particular company has undertaken over a set period, rather than specific individual transactions that have been identified by the unit (as has historically been common practice) in circumstances in which the CMA has concerns about consolidation in a particular sector.

- Third, taking a broad approach to its statutory time limit for reviewing completed transactions. Under substantial lessening of competition (5 April 2023) and CMA press release, Takeover of eight vet businesses could increase costs for animal owners (17 February 2023), identifying competition concerns in 23 local areas; Case ME/6967/21 Completed acquisition by CVS Group plc of Quality Pet Care Ltd (trading as The Vet), Decision on acceptance of undertakings in lieu (27 June 2022); and Case ME/6967/21 Completed Acquisition by VetPartners Limited of Goddard Holdco Limited, Decision on acceptance of undertakings in lieu (2 September 2022) (fn 7). In Independent Vetcare, IVC has offered to divest all eight of the veterinary businesses acquired by it, which the CMA is presently considering: see the CMA case homepage, at: https://www.gov.uk/cma-cases/independent-vetcare-limited-ivc-slash-multiple-independent-veterinary-businesses-merger-inquiries (accessed 4 April 2023).

26 Case ME/6967/21 Completed acquisition by CVS Group plc of Quality Pet Care Ltd (trading as The Vet), Decision on acceptance of undertakings in lieu (27 June 2022); and Case ME/6967/21 Completed Acquisition by VetPartners Limited of Goddard Holdco Limited, Decision on acceptance of undertakings in lieu (2 September 2022) (fn 7). In Independent Vetcare, IVC has offered to divest all eight of the veterinary businesses acquired by it, which the CMA is presently considering: see the CMA case homepage, at: https://www.gov.uk/cma-cases/independent-vetcare-limited-ivc-slash-multiple-independent-veterinary-businesses-merger-inquiries (accessed 4 April 2023).

27 Independent Vetcare/multiple independent veterinary businesses (fn 25).

28 Medivet/multiple independent veterinary businesses (fn 23). On 6 April 2023, the CMA announced that it had decided that two of the 17 completed acquisitions (Monument Vets Ltd and Stanhope Park Veterinary Hospital Limited) did not qualify for investigation under the merger provisions of the Enterprise Act 2002 because neither the turnover test nor the share of supply test set out in section 23 of the Act was met: see Case ME/7052/23 Completed Acquisition by Medivet Group Limited of Stanhope Park Veterinary Hospital Limited, Decision on relevant merger situation (12 April 2023) and Case ME/7054/23 Completed acquisition by Medivet Group Limited of Monument Vets Ltd, Decision on relevant merger situation (12 April 2023).

29 Independent Vetcare/multiple independent veterinary businesses (fn 25).

30 At the time of writing, the deadline for the CMA’s Phase 1 decisions was 18 May 2023.

31 CMA56revised (fn 24), para 1.2.
section 24 of the Act, the CMA has four months from the transaction closing to complete its Phase 1 review, but if completion took place without having been made public and without the CMA being informed of it, the four month period starts from the earlier of the time that material facts are made public or the time the CMA is told of those facts. The CMA adopted its Phase 1 decision, the CMA has taken the view that they had not been made sufficiently public at the time of completion and the four month period started from the point in time at which material facts were made available to the CMA: the CMA considered this to be when it received responses to questions it sent to Independent Vetcare in August 2022, nearly one year after the first transaction closed. Given that the first of the Medivet transactions also closed in September 2021, it is assumed that the CMA has taken a similar approach in that investigation. The CMA’s guidance on jurisdiction and procedure explains that the ‘made public’ requirement would generally be satisfied on the basis of publication of all relevant information in the national or relevant trade press in the UK and where the purchaser has taken steps to publicize the transaction at large, normally by publishing and prominently displaying on its own website a press release about the transaction. In Independent Vetcare, the CMA took a strict approach to this requirement and rejected IVC’s arguments that publication on (i) its own and the targets’ websites, (ii) the ‘Veterinary Industry News’ section of VetClick.com, (iii) local/regional newspapers and (iv) the targets’ practices (by way of a written notice) was sufficient including because (i) some of the language used was vague and non-specific (referring to practices ‘joining IVC’ rather than being acquired by it), (ii) the available evidence relating to the nature, profile and reach of VetClick.com did not support the position that it should be considered as trade press for these purposes, (iii) the relevant statements on IVC’s website were not on the homepage or the site’s news section (IVC did not publish press releases about any of these transactions) and (iv) publicity on individual target websites/practices and local/regional newspapers was too ‘local’ to be deemed ‘generally known or readily ascertainable’. The CMA noted that it was ‘entirely within IVC’s control’ to start the four month period, either by publicising the transactions in accordance with the CMA’s ‘extensive’ guidance or by informing the CMA directly by contacting the mergers intelligence team (as IVC had done in the past). Short of contacting the CMA proactively about a particular transaction, the safest option to ensure that the clock starts ticking therefore seems to be to issue a press release and ensure that this is picked up by national or trade press, though this may itself increase the likelihood that a transaction comes to the CMA’s attention: this will need to be balanced against the overall risk of CMA review.

- Fourth, the CMA has taken an expansive approach to the ‘share of supply’ test under section 23(2) – (4) of the Act. In each of the reviews it has completed to date, the UK turnover of each of the relevant target businesses was below the £70m threshold under the ‘turnover’ test, so the CMA had to rely on the share of supply test to assert jurisdiction. In the majority of cases, it found that the 25% share of supply threshold was exceeded based on the parties’ combined share of full-time equivalent vets or vet ‘shops’ (practices) in various local areas in the UK. The CMA rejected CVS’s arguments that using full-time equivalent vets as a criterion for applying the share of supply test was inappropriate because merging parties would not have access to this data for their competitors and this would have adverse consequences for both future transacting parties (who would find it impossible to determine by themselves whether a transaction would qualify for CMA review under the share of supply test) and the CMA’s mergers intelligence function (because it would need to request data from third parties as well as the transacting parties). This is not surprising as the CMA’s use of a wider set of criteria than traditional value and volume measures to assert jurisdiction under the share of supply test has become increasingly common and the CMA considers it has wide discretion in this area, which has been confirmed by the Competition Appeal

32 The CMA interprets ‘material facts’ as the identity of the merging parties and whether the transaction remains anticipated (including the status of any conditions precedent) or has completed: see CMA, Mergers: Guidance on the CMA’s jurisdiction and procedure (CMA2, revised January 2021), paras 4.48 and 4.49. See also Lebedev Holdings Limited v. Secretary of State for Digital, Culture, Media and Sport (2019) CAT 21, paras 53-68: sufficient facts for the CMA to be able to determine that two enterprises have or may have ceased to be distinct, such that there is or may be a relevant merger situation, must be published. See further, M. O’Regan, ‘Merger litigation: recent developments in the Competition Appeal Tribunal’ (2020) 19(4) CLJ 167, 173-174.

33 Independent Vetcare/multiple independent veterinary businesses, Decision on relevant merger situation and substantial lessening of competition (fn 25), para 9.

34 CMA2 (fn 32), para 4.49(b).

35 Independent Vetcare/multiple independent veterinary businesses, Decision on relevant merger situation and substantial lessening of competition (fn 25), paras 76-83.

36 Independent Vetcare/multiple independent veterinary businesses, Decision on relevant merger situation and substantial lessening of competition (fn 25), para 85.

37 Enterprise Act 2002, s 23(1).

38 See CVS/Quality Pet Care (fn 25), paras 29 and 30; Independent Vetcare/multiple independent veterinary businesses, Decision on relevant merger situation and substantial lessening of competition (fn 25), paras 7 and 8; and VetPartners Limited/ Goddard Holdco Limited (fn 25), para 6.

39 CVS/Quality Pet Care (fn 25), para 33.

40 CMA2 (fn 32), para 4.59; see also M. Jephcott and V. Karadakova, ‘The CMA’s increasingly expansionist approach to the share of supply test in UK merger control: a threshold issue’ (2020) 41(9) ECLR 466 and
This does not, however, mean that the CMA will always be capable of finding a basis on which the share of supply test is satisfied: on 6 April 2023, half way through Phase 1, the CMA announced that it had decided that two of the 17 Medivet acquisitions it was investigating did not qualify for review because neither the turnover nor the share of supply test was met.\(^{42}\) Although the CMA’s decisions do not provide further details, given the local nature of the relevant vet markets, it may well be that the share of supply threshold was not exceeded in any particular locality. ‘Roll-up’ strategies in sectors characterised by local competition may therefore escape scrutiny to the extent that they involve the acquisition of businesses in different local areas.

Perhaps for the reasons set out above, none of these transactions was notified to the CMA proactively and all had closed by the time the CMA opened its investigation.\(^\text{43}\) This meant that the parties had to deal not only with the stress and burden of an unexpected and difficult merger review but with the expansive initial enforcement orders (IEOs) the CMA routinely imposes in completed transactions that it subsequently investigates.\(^\text{44}\) An IEO requires the purchaser to hold each of the purchased businesses separate from its existing businesses and ensure their independent and viable operation pending the conclusion of the CMA’s review. As well as preventing further business integration, the CMA can also require existing integration steps to be unwound. The Tribunal and the Court of Appeal have confirmed the CMA’s broad discretion in imposing an IEO in the case of a completed acquisition.\(^\text{45}\) Compliance with IEOs is notoriously onerous and costly, including because they apply to the entirety of the purchaser’s group as well as the target; thus, for example, as a result of the majority stake it purchased in Medivet in September 2021, CVC Capital Partners is subject to the 17 IEOs imposed in the Medivet reviews.\(^\text{46}\)

Interestingly, the US FTC has also identified similar concerns in the veterinary services sector: in its 2022 settlement relating to JAB Consumer Partners’ acquisition of SAGE Veterinary Partners, JAB was required both to sell clinics and to agree to seek prior approval from, or give notice to, the FTC in respect of certain future clinic acquisitions, whether or not they met the HSR thresholds.\(^\text{47}\) Of course, that is not to say that these concerns are limited to the veterinary sector and that the CMA and other agencies would not adopt a similar approach to consolidation in other sectors. Indeed, the prior approval requirement imposed on JAB now reflects general FTC policy in merger settlements.\(^\text{48}\) Further, the CMA press releases accompanying the Phase 1 decisions in the veterinary services cases it has issued to date refer to the fact that it had received complaints about higher prices or lower quality services as a result of consolidation and the need to act in light of the cost of living crisis.\(^\text{49}\) Companies should expect consolidation in any area with a direct impact on household budgets to attract significant scrutiny in the coming months.

5. Conclusion

Over the past five years, competition authorities around the world have taken a much more active and aggressive approach to reviewing transactions, including, as in the EU and UK, by flexing their existing regimes to allow them to scrutinize a wider range of deals.

The message for PE ‘roll-up’ strategies is clear: they can raise serious competition issues if they relate to sectors in which the purchaser (or its portfolio companies) has, or will acquire, a well-established position, as well as where such a position will be created as a result of multiple, consecutive transactions. This needs to be assessed at both a local and national level: a series of seemingly independent acquisitions in different geographic regions would not qualify for review (fn 28).

47 See FTC press release, FTC Approves Final Order against JAB Consumer Partners to Protect Pet Owners from Private Equity Firm’s Rollup of Veterinary Services Clinics (14 October 2022).


can pique regulator interest if the purchaser has, or indeed two targets have, overlapping activities in any of the relevant areas. If a competition authority decides to investigate, the consequences for deal timing, outcomes and costs can be very significant indeed.

While many transactions will remain unproblematic, if the transaction relates to a market, including a local one, in which a PE firm already has a relatively strong position (considering its portfolio in the round), a more detailed analysis of the potential competition issues and how these might affect deal planning is advisable. That is by no means to say that these deals should be ‘off the table’ but rather that everyone should go into them aware of the possible risks and their implications for timing, outcomes and cost.