

Broadcom Acquisition of VMware Increasingly Unlikely to Close

Article By:

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Following its Phase 1 investigation, the UK Competition and Markets Authority (CMA) determined Broadcom Inc.'s acquisition of VMware, Inc., could substantially lessen competition in several server hardware markets and, therefore, warranted an in-depth Phase 2 investigation. This comes on the heels of news that the Federal Trade Commission's (FTC) investigation of the merger remained ongoing and that the European Commission (EC) would also conduct an in-depth investigation of the transaction. Based on these facts, it seems likely Broadcom will face challenges from major antitrust agencies concerning the merger.

Background of the Merger and Reactions by Federal Antitrust Agencies

On May 26, 2022, Broadcom, a leading supplier of certain hardware components used in servers, announced it would acquire VMware, the dominant supplier of virtualization software for servers, for \$61 billion. When announced, this was the third largest tech merger in decades and quickly drew the attention of antitrust agencies worldwide.

On July 11, 2022, the FTC sent a second request for information to the parties. According to a February report, the FTC's review continues and is focused on "conglomerate effects" of the merger, i.e., whether the combined company could use its range of products to harm competition. On Dec. 20, 2022, the EC announced it, too, would conduct an in-depth investigation of the merger.

On Nov. 21, 2022, the CMA invited public comment regarding whether the merger would "result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services." Then, on Jan. 25, 2023, the CMA launched a Phase 1 merger inquiry. Based on this initial inquiry, the CMA concluded the merger could substantially lessen competition in several server hardware markets and, therefore, would proceed to an in-depth Phase 2 inquiry.

Phase 1 Inquiry Indicates Merger Could Harm Competition

According to the CMA, VMware is dominant in the market for server virtualization software and compatibility with its software, which VMware dictates, is critical for the server hardware components sold by Broadcom and its rivals. Therefore, if VMware is acquired, then Broadcom "would be able to leverage VMware's market power in server virtualization software to weaken ("foreclose")

Broadcom's hardware competitors." This would reduce competition and consumer choice in those hardware markets.

In addition, because hardware manufacturers must provide commercially sensitive information to VMware to obtain interoperability, the merger would give Broadcom direct access to its rivals' sensitive information. The CMA determined this could reduce innovation since rivals would lose their incentive to innovate if forced to pass sensitive information to Broadcom.

Good Sign: Agencies Focusing on Market Realities

Given the lack of horizontal overlap or increase in market share, this is the type of merger that would have received little pushback from antitrust agencies during the 2000s and 2010s, particularly from those in the US. However, in a refreshing pivot, major antitrust agencies are focusing more on market realities than bright line rules when analyzing potential anticompetitive effects of mergers. This is significant because large companies are increasingly using product breadth, often obtained through acquisitions that flew under agency radars, to control markets through tactics like discount bundling.

Here, if Broadcom acquires VMware, then it will have the ability and incentive to stifle its server hardware rivals. And, as we have written previously (see below), Broadcom is a serial antitrust offender, having paid multiple fines and been subject to several antitrust investigations for abuse of market power in both Europe and the US. Based on these circumstances, it is not implausible for antitrust enforcers to conclude the effect of the merger "*may be substantially to lessen competition, or tend to create a monopoly,*" i.e., that the merger violates Section 7 of the Clayton Act.

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