Concurrences
Antitrust Publications & Events

UCL

COMPASS LEXECON

ELİG GÜRKAYNAK Attorneys at Law

Joel Bamford
Senior Director of Mergers
UK Competition & Market Authority
London

Tembinkosi Bonakele
Commissioner
South African Competition Commission
Pretoria

Etienne Chantrel
Head of Mergers Unit
Autorité de la concurrence
Paris

Kirsten Edwards-Warren
Executive Vice President
Compass Lexecon
London

Ulla Schwager
Deputy Head of Unit - Mergers
Markets and cases III:
Financial services
DG COMP
Brussels

Moderator

Gönenç Gürkaynak
Partner
ELIG Gürkaynak Attorneys-at-Law
Istanbul

2nd International Mergers Conference

#3 Remedies: Design, implementation & revision of remedies

Webinar - 19 May 2021*

> "Merger control should remain thorough in a time of economic crisis, and perhaps even more so."
>
> Etienne Chantrel

Etienne Chantrel

Etienne Chantrel indicated that most of his intervention was going to rely on the recent study by the French Competition Authority ("FCA") which focused on behavioural remedies in antitrust and mergers, already available online. He indicated that from 2009 to 2018, 3,5 per cent of the FCA's decisions involved remedies -putting it second to the CMA in terms of numbers of remedies decisions. By way of comparison, Germany does not use remedies while the European Commission reaches a "remedy rate" of around six per cent. Forty-five per cent of the FCA's remedies over this period were structural, thirty-six per cent were behavioural, and nineteen per cent were mixed. France is more inclined to accept behavioural remedies than other jurisdictions are – the Commission's behavioural remedies only account for twenty per cent of its total, this number is sixteen per cent for the CMA and almost zero for Germany.

One should note, however, that telling a structural remedy from a behavioural one is not easy: in a case involving an agricultural cooperative, the same remedy was said to be structural if it had no monitoring period and behavioural if it had one. As a rule, behavioural remedies are more flexible. They can also be much more complex, and in a few of the FCA's cases, this complexity has reached a high degree. They also come with a duration problem. In some cases, it is

> Third panel of the 2021 « International Mergers » Conference. See synthesis of the other panels on the Conferences section of concurrences.com.

* Tanguy Laurioz drafted the following synthesis for Concurrences. The views expressed in this presentation are those of the speakers and do not necessarily represent those of the institutions to which they are affiliated.

easy to devise a proper duration. For example, remedies can last for the duration of a given contract. In an airport case, the remedy simply stood for the duration of the public contract. Even though this duration was thirty-eight years, it had a clear and defined time limit that made sense. Monitoring behavioural remedies can indeed be complex and costly – this is why enforcers typically favour structural ones-, but infringements are not that common. In France, five infringement cases were instructed and ended up in sanctions. Four of these involved behavioural remedies and one of them related to structural remedies (*Fnac/Darty* -resulting in a €20 million fine).

On public interest objectives, they are entrusted in France, not to the FCA but the Minister for the Economy. He retains the power to revoke a case on public interest grounds (that could in theory be applied also to Covid-induced or health concerns). On Covid-induced change, more parties have been asking for exemption from the suspensive effect of merger control. In terms of remedies, there may be a tendency to ask for a longer period for structural remedies. Depending on the sectors (with retail being particularly struck), finding an acquirer for divested businesses in the context of structural remedies may prove more difficult. In conclusion, merger control should remain thorough in a time of economic crisis, and perhaps even more so.

“

The need to address likely consumer harm from problematic mergers is at the forefront of decisions on merger remedies.”

Joel Bamford

Joel Bamford

Joel Bamford reflected on the CMA’s practice of ex post review and merger remedies -which was the topic of a 2019 report. Assessing the impact of such interventions is particularly important both in terms of antitrust and public policies. Evaluations help policymakers and agencies understand what worked well and what has been less successful. They provide the basis for continuous improvement and can drive legislative reform and policy development, as well as inform future interventions. In the CMA’s experience, there were successful and problematic cases. Among the key lessons of this experience are the following: first, the need to address likely consumer harm from problematic mergers is at the forefront of decisions on merger remedies. Second, experience has consecrated the general superiority of structural over behavioural remedies in merger control in terms of their effectiveness, risk profile, and durability of that remedy. Third, given the voluntary nature of the U.K. regime and the ability of firms to complete their merger during the review, case studies have confirmed the fundamental role played by interim measures or initial enforcement orders in enabling the CMA to implement effective remedies in already-completed mergers. This process was further confirmed by the recent Court of Appeal judgment in the *Facebook/Giphy* case. Finally, previous cases prove the importance of implementation and the need to give parties strong incentives to implement remedies effectively and in line with applicable timetables. A new report of case studies will shortly be published and will very likely bring more lessons – especially from cases where remedies have not delivered all expected outputs.

In the public interest, the United Kingdom has a long experience in minding non-competition issues such as national security or media plurality in its merger control scheme. During the Covid-19 pandemic, the government has introduced a public-health emer¬gency consideration that has not been used so far but has the potential to either prohibit or allow a merger despite competition concerns. On remedies, the framework remains the same: remedies have to ensure continued competitiveness on the market after the merger. There shouldn’t be a tradeoff between the cost of the remedy versus how effective it will be. Instead, it is necessary to pass a certain bar to ensure that competition is protected.

Ulla Schwager

Ulla Schwager mentioned that, from the Commission’s perspective, structural remedies, in particular divestiture remedies, are very clearly the preferred solution for competition problems. This is set out in the Remedy Notice and reflected in the decision practice. For example in the year 2020, the Commission intervened in 18 cases that fell in its jurisdiction – eighty per cent of them being structural. Structural remedies are indeed a logical solution to a structural problem brought about by the merger. They are more efficient and effective from the perspective of implementation. That being said, there is an opening in the Commission’ Guidance accepting that there are certain cases where non-structural remedies might be suitable. Specific reference is made to access remedies. These can secure granting access

> Third panel of the 2021 « International Mergers » Conference. See synthesis of the other panels on the Conferences section of concurrences.com.

to key infrastructure or networks or ensure that the remedy taker can offer products that are interoperable with the merged entity.

The ICN 2016 Paper on remedies mentioned that behavioural remedies can prove particularly relevant in vertical cases. Even though the Commission considers that structural remedies such as divestitures can be appropriate to address vertical theories of harm (as in *Mars/AriCura*), it accepted non-structural ones in *London Stock Exchange/Refinitiv* and Google/Fitbit. Looking at the type of cases, non-horizontal conglomerates seem to be the case category where the Commission is more open to non-structural remedies, in particular when theories of harm relate to potential degradation of interoperability. An example is provided by the *Siemens/Varian* merger. Monitoring is key in such remedies, and its burden should not be borne only by enforcers, this is why the Commission insists on appointing a monitoring trustee, as well as a fast solution for conflict resolution should they arise. In any case, non-structural remedies involve a lot of monitoring and workload up to their implementation phase. That has to be taken into account when deciding to go the route of a non-structural divestiture remedy.

On Covid-induced evolutions, the shocks to the economy have been considered in all aspects of competitive assessment. The impact of the pandemic has been felt differently depending on regions and industries. However, overall, the standard in terms of remedies is still effective – with a priority given to divesture remedies in case of horizontal overlap. Remedies must be tailored to the current context, with particular care be given to obligations in the interim period. During this period, the divested business must be getting appropriate support from the merged entity so that it can be sold as a viable business.

> “Non-horizontal conglomerates seem to be the case category where the Commission is more open to non-structural remedies, in particular when theories of harm relate to potential degradation of interoperability.”
>
> Ulla Schwager

Kirsten Edwards-Warren

Kirsten Edwards-Warren concurred with the numbers put forward by previous speakers. She noted that the percentage of cases resulting in remedies is consistent over time. It is under 10 per cent every year from 1990 to 2019. This stability challenges the commonly-held idea that DG COMP is getting more and more interventionist. It is also interesting to see that the prevalence of behavioural remedies has increased over time. From 2013 to 2021, 20 per cent of cases are behavioural. Behavioural remedies are involved in eight cases in that later period as compared to one in a similar earlier period (2005-2012). In that same period, of all the non-horizontal Phase II remedy cases over the last fifteen years, close to 80 per cent involved a behavioural remedy and just over 20 per cent involved a structural remedy, showing that there are still structural remedies in non-horizontal cases. Many of the behavioural remedies (eight out of nine) have an access component to them, *ASL/Arianespace* being an exception to this trend. Access remedies have been implemented in *Google/Fitbit* for instance – ensuring that competing firms could access Fitbit data to engage Fitbit users. Remedies, in this case, were controversial, with dominance and privacy concerns being brought up by commentators that thought the Commission did not go far enough. Other commentators pointed that the Commission was right not to exceed its remit in term of remedies.

The geographical reach of remedies sometimes extends outside of the EEA. Of all seventy Phase II cases since 1990, fourteen per cent involved remedies that touched other countries. They were almost all cases where the Commission had found that the market was global, and they had accepted divestment of an asset outside of the European Economic Area. Not very surprisingly, the United Kingdom, Norway, and Switzerland get lots of mentions in the remedy discussions, but also the U.S., China and Australia... Remedies can be decided based on different types of evidence: in Phase, I cases, market investigations are the main source of evidence cited in decisions, followed by market shares, with economic evidence and internal documents seeming secondary sources. In Phase II remedies decisions, the evidence base is much more balanced across these four types of evidence.

> “The percentage of cases resulting in remedies is consistent over time. It is under 10 per cent every year from 1990 to 2019.”
>
> Kirsten Edwards-Warren

Tembinkosi Bonakele

Tembinkosi Bonakele wished to bring the focus back to prime objectives of competition law, which have now evolved to embrace social ideals beyond the traditional objectives of consumer welfare or market efficiency. It has taken different roads depending on jurisdictions: South Africa chose competition law as one avenue, amongst many, to correct the effects of the racial imbalances of the

> Third panel of the 2021 « International Mergers » Conference. See synthesis of the other panels on the Conferences section of concurrences.com.

“

Following the pandemic, many planned on a wave of mergers and consolidation. That remains to be seen.”

Tembinkosi Bonakele

past, as it was well documented that racial imbalance translated into economic imbalances. Although competition law did exist during apartheid, it did not open the economy to fair and inclusive participation. This is the reason why its current regime includes public interest factors such as employment in its merger control framework. More recently, competition law was used to tackle excessive pricing during Covid-induced market perturbations.

Black economic empowerment is also one of the dimensions of competition law in South Africa. Notably, because of an exclusionary phenomenon in the economy, it is a policy of the South African government that competition law must address the issue of participation of small and medium-sized enterprises. As an example, when Walmart entered the South African market, there was a concern that local suppliers (most of them small and medium-sized enterprises), would be displaced by the global value chain of Walmart. Therefore, a condition was imposed that Walmart would assist -through various schemes that were ordered as merger remedies- these local suppliers to benefit from the Walmart value chain. This proves how dependent on context competition law is, and how mature market economies experiences may not be perfect standards for all jurisdictions worldwide.

Following the pandemic, many planned on a wave of mergers and consolidation. That remains to be seen. On the contrary, calls for cooperation and joint ventures increased in health and banking notably. These could be examined from the perspective of block exemptions rather than mergers – and adapting the solutions over time could therefore be made easier, as exemptions can be lifted if circumstances change. ■

> Third panel of the 2021 « International Mergers » Conference. See synthesis of the other panels on the Conferences section of concurrences.com.