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International Mergers conference

19 May 2022 - University College London

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Program

09.00 Welcome & Breakfast

09.30 INTRODUCTORY REMARKS

Despoina MANTZARI | Associate Professor - Competition Law and Policy, Co-Director - Centre for Law, Economics and Society Faculty of Laws, University College London

09.45 #1 LATEST DEVELOPMENTS IN MERGERS ASSESSMENT: WHAT CONSEQUENCES ON SUBSTANCE AND PROCEDURE?

Marc ISRAEL | Partner, White & Case, London

Rameet SANGHA | Senior Vice President Compass Lexecon, London

Marie-Claire STRAWBRIDGE | Partner, Morrison & Foerster, London

Björn VROOMEN | Deputy Director for Competition - Mergers Netherlands Authority for Consumers and Markets (ACM) The Hague

Moderator: Ioannis LIANOS | President, Hellenic Competition Commission | Professor of Global Competition Law and Public Policy, Faculty of Laws, University College London (on leave)

11.00 COFFEE BREAK

11.15 #2 CONGLOMERATE MERGERS: STILL WATERS RUN DEEP?

Andy PARKINSON | Senior Vice President, Compass Lexecon, London

Colin RAFTERY | Senior Director of Mergers UK Competition and Markets Authority, London

Caroline HOBSON | Partner, Cooley, London

Moderator: Nicholas LEVY | Partner Cleary Gottlieb Steen & Hamilton, London

12.45 Lunch

14.30 #3 BREXIT: THE DAY AFTER

Sorcha O'CARROLL | Senior Director - Mergers, UK Competition and Markets Authority, London

Tim LAMB | Director & Associate General Counsel Competition & Regulatory, Meta, London

Matthew LEVITT | Partner, Baker Botts, London

David READER | Lecturer in Competition and EU Law Newcastle University | Senior Fellow, Melbourne Law School

Joshua WHITE | Vice President, Analysis Group, London

Moderator: Ioannis KOKKORIS | Professor, Queen Mary University London

16.00 Coffee break

16.15 #4 ARTICLE 22 EUMR: NO MORE SAFE HARBOURS?

Antoine CHAPSAL | Managing Principal, Analysis Group Paris/Brussels/London

Étienne CHANTREL | Head of Mergers Unit Autorité de la concurrence, Paris

Catriona HATTON | Partner, Baker Botts, Brussels

James WEBBER | Partner, Shearman & Sterling, London

Moderator: Despoina MANTZARI | Associate Professor Competition Law and Policy, Co-Director - Centre for Law Economics and Society, Faculty of Laws, University College London

17.45 Reception

Panel 1

Latest Developments in Mergers Assessment: What Consequences on Substance and Procedure?

Ioannis Lianos

President
Hellenic Competition Commission
Professor of Global Competition Law and Public Policy
Faculty of Laws, University College London (on leave)

One of the questions that have been discussed a lot in recent years is whether merger control has failed to some extent and whether it has not been strict enough. In particular, it is possible to identify several developments. For example, the U.S. Department of Justice and the Federal Trade Commission are revising their merger guidelines. Thus, many questions are being asked about whether merger control is becoming stricter, about the standard of proof, theories of harm, the development of presumptions that are linked to the larger size of the company, etc.

According to him, the UK's Revised Merger Assessment Guidelines, which introduced the concept of loss of future competition, and dynamic loss of competition, were specifically aimed at capturing the various strategies by which firms innovate to enter existing future markets.

Rameet Sangha

Senior Vice President
Compass Lexecon
London

As to whether merger control is stricter in some sectors than in others or between different jurisdictions, it can be seen that in non-technology cases the majority are approved in Phase I either without conditions or with conditions. Only 6% of cases are in Phase II. On the contrary, tech cases are less numerous. A smaller proportion of cases are approved in Phase I and a much higher proportion, about 24%, move to Phase II. It is, therefore, possible to see a real sectoral difference here. As in the EU, we see that in the technology sector in the UK there are relatively few cases compared to non-technology, but again, the most striking thing is that we have a much higher proportion going to phase II than for non-technology for the EC, and a significant proportion of these have been banned; there is a big dark red bar here. These findings raise questions about the reasons for these differences.

In the UK, when thinking about mergers, the focus has been on how companies compete, how competition works, and then how the merger will affect it.

As far as the type of evidence is concerned, if one looks at all of the European Commission's merger decisions over time, the market share is quite explicit. This type of evidence is referenced in each of the decisions. Economic evidence may also be mentioned. This includes bidding studies, consumer surveys, the gross upward price pressure index, etc. Internal company documents are also explicitly used as evidence. A peak in 2016 can be seen, which reflects the Dow/Du Pont case, where there was a lot of reliance on this document, and it is a very long decision, which distorts the data. Within the types of evidence that the European Commission relies on, there are also the previous cases, the market investigations, which are increasingly used.

As far as the CMA's practice is concerned, it is almost equivalent to that of the Commission. Indeed, there is the use of economic evidence, market shares are also mentioned, internal documents, and third-party evidence, which are similar to the European Commission's market investigations.

Björn Vroomen

Deputy Director for Competition – Mergers,
Netherlands Authority for Consumers and Markets (ACM)
The Hague

According to Björn the Dutch agency is not becoming stricter, but simply more cautious in certain sectors. Stricter could mean more bans but also more thorough investigations, which is not necessarily the case. Before 2019, in the Netherlands, it was really quiet in the merger area. From 2019 onwards, something happened because three cases were brought, the authority intervened with remedies in several cases, and the number of notifications rose sharply. So there is much more intervention by the Dutch authority. One of the reasons why the authority is

Marie de Monjour 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.

more cautious is because they are trying to get a better understanding of how markets work and how they develop.

He underlined that as far as the definition of the market is concerned, the objective today is to ensure more flexibility away from a formal definition of the market. A pure market definition is useful in a certain sense, it remains at a high level for us, but we need to go further. That is why we are moving away from it. We still use it, but only as a step and not as a formal step. Flexibility is really necessary, especially for very dynamic markets.

Björn points out that ACM's practice is very similar to that of CMA. In Phase I cases, the thresholds are quite low, so the ACM is limited to a market survey, market shares, and some information provided by the parties. Phase II, on the other hand, is more interesting because the Authority uses internal documents to build the case, to understand what the parties were planning, what their objectives were, and also how the market works. Now the Authority is also interested in the internal documents of third parties. However, where they differ from the CMA is in the use of economic evidence. On the issue of privacy, the CMA considers this but has not yet developed a real framework for this, how to assess it, or how to take it into account. Björn points out that the first cases where this will be relevant will be Commission cases.

In the ACM, once you are in the context of a merger, the teams are asked to think about sustainability and to broaden it a little to the labour market. The difficulty, they say, is that there are more practical issues. A sustainability study takes a lot of time, so it would be very difficult to see if it could fit into the timetable of a merger assessment.

Marc Israel

Partner
White & Case
London

He said that from the CMA's point of view, from a practitioner's point of view, the impression is that it is becoming stricter in merger control. However, in the UK there is a voluntary merger regime, so the CMA does not decide which mergers to review. If you look at the situation in the US, the FTC is expected to be much stricter. If you look at the statistics in the UK, there are more cases in recent years from Phase I that have moved to Phase II; but again, the number of cases that have been notified has gone down, and that could be because they are not called. So, to answer the basic question asked, yes, he considers that the CMA is becoming stricter in merger control. The fact that there are recent decisions in the UK, even in Phase I, is a very good

discipline because it forces detailed thought and analysis, which has to be put in writing. However, it must be emphasised that the level of scrutiny in the UK is very high: the transaction has to be irrational, and unreasonable.

The way the CMA approached the question on the structure of the assessment was very much focused on the frame of reference concerning competition, on the fact that market definition is not a means in itself, and then you have to go back to the economic evidence. In addition, the new Merger Assessment Guidelines are much clearer on the point of dynamic and potential competition.

The type of evidence relied upon by the CMA is very case-specific. However, according to him, for newer and more dynamic markets, you have to rely more on internal documents because there is no data that you can use to do a very robust economic and econometric analysis because you don't know how the market will develop. So you have to rely both on what the parties say in their internal documents, and also on what the third parties say.

In addition, Marc emphasised the importance of taking sustainability into account when assessing mergers. Indeed, the merging parties may be competing on sustainability issues and this is addressed somewhat in the new CMA guidelines on merger assessment. However, in his view, the challenge will be to persuade the CMA or another authority that there is sufficient evidence and so the evidence falls very much on internal documents.s

Marie-Claire Strawbridge

Partner
Morrisson & Foerster
London

First, in terms of divergent outcomes, one of the things we're seeing in the more difficult enforcement climate is more divergent outcomes on the merits of cases, which is becoming increasingly difficult for the parties. For example, the CMA in the Cargotec/Konecranes merger blocked that transaction because it was not convinced that the remedy would be sufficient. Several elements lead to these different outcomes. One is the high standard that the CMA sets for itself for being willing to accept remedies, which is a much higher standard than that for establishing a substantial lessening of competition.

According to her, one of the biggest challenges facing parties today, in this more aggressive enforcement climate, is assessing the risks when transactions involve potential and dynamic competition. There has been a significant change, in the UK at least, in the way the CMA looks at these theories of harm. One example that illustrates the kind of mismatch it believes parties face is the way the CMA looks at potential entry by one of the merging parties. One of the key differences that determine the outcome is this point about exposure to judicial review and the standards that must be met.

As regards the issues of market definition, she does not consider that introducing more discipline into market definition would necessarily be useful to do in the types of markets that regulators are now having to analyse. However, it must be underlined that traditional market definition tools do not work a priori in the context of digital markets, not least because they are so fluid, and we do not know where things are developing.

From a privacy perspective, if we look at the traditional types of consumer harm and the parameters of competition one could analyse whether these parties are competing to provide consumers with better protection of their data and whether this merger will harm them. This is an issue that could be examined and could easily fit into the existing framework.

Thus, on the UK side, the more difficult implementation environment simply leads to more complex and burdensome investigations. The prevalence of internal documents is becoming increasingly burdensome. ■

Panel 2

Conglomerate Mergers: Still Waters Run Deep?

Nicholas Levy

Partner
Cleary Gottlieb Steen & Hamilton
London

Conglomerates are mergers between companies that are not horizontal competitors and do not have vertical relationships with each other. Their products are often complementary or compete in adjacent markets. Several issues have historically been raised concerning the effects of conglomerate mergers, including concerns around post-transaction bundling and restrictions on interoperability. Both theories of harm involve speculation about future behaviour and the effects of that behaviour.

Perhaps the most controversial case involving a conglomerate effects theory of harm was the General Electric/Honeywell deal, where the European Commission was concerned that General Electric would be able to use its aircraft leasing company, GECAS, to incentivize airlines to order aircraft that included General Electric engines and Honeywell's avionics, thereby foreclosing rival suppliers of avionics. The deal was blocked in Brussels and drew criticism from the Federal Trade Commission and Department of Justice. Following this transaction, in Tetra Laval/Sidel, the Court stated that the more speculative the theory of injury, the stronger the empirical evidence must be to meet that standard. This principle was enshrined in the non-horizontal Merger Guidelines that the Commission adopted in 2007.

In the ten years since then, no conglomerate merger has been prohibited by the European Commission. There has, however, been a revival of conglomerate effects theories with eight conglomerate mergers being conditionally approved on the basis of largely behavioural remedies in recent years. By contrast, the CMA, while generally being more interventionist than the European Commission in recent years, has not challenged mergers on the basis of conglomerate effects theories of harm.

This panel will explore the reasons for the renaissance of conglomerate effects cases in Brussels and the CMA's reticence to pursue such theories.

Andy Parkinson

Senior Vice President
Compass Lexecon
London

Data collected since 1990 show that in Phase I decisions there has been a steady increase in the number of decisions per year that mention co-location. However, in Phase II, the number of investigations is much lower, but the number of cases mentioning bundling has increased since around 2010 to a slightly higher level, although it does not show the kind of steady growth that Phase I decisions show.

Concerning the mention of bundling in Commission decisions, the average mention will depend on whether a decision mentioned bundling at least once. In the context of Phase 1 decisions, a steady increase in the number of cases with many mentions of bundling can be observed. This indicates a more intensive examination of conglomerate effects in Phase I decisions, especially since 2015. As for Phase II decisions, there have been fewer. Thus, for example, in the General Electric/Honeywell decision there were 100 mentions, and then only in 2015 was there a more significant peak in the number of cases with mentions of hard selling and thus a very detailed examination of conglomerate effects in these cases.

The main concern from an economic point of view is that after the merger, a company can exercise market power from one market to an adjacent market, often by tying or bundling products together, and this can take various forms, including interoperability. In analysing such a merger, one must consider ability, incentive, and effect. First, concerning the ability to capture, a

key question is whether the firm has significant market power. In particular, the product must be seen as sufficiently important by customers who therefore have few relevant alternatives. Secondly, concerning the type of bundling strategy that companies might adopt, one can broadly speak of mixed bundling, pure bundling or contractual tying, and technical tying. In this context, the economic literature points out that one should be less concerned about mixed bundling and more concerned about technical tying, pure bundling, and contractual tying. This requires very detailed work to examine how a company can effectively bundle or link its activities in practice. In a third step, the next key piece of information examined is the degree of common customers. This means that if two products are always used together, it will be possible to impose a flat rate on all sales. Finally, the effects are also examined. It is very important to note that a loss of sales from rivals is not a concern in itself. The concern is whether there are exclusionary effects, a reduction in the incentive, or the ability of rivals to compete. Thus, all of these points show that the assessment of conglomerate effects is complex and fact-based, and because there is little direct evidence, it is necessary to infer, based on market characteristics and counterfactual evidence, whether the market is compatible with conglomerate effects likely to occur.

Caroline Hobson

Partner
Cooley
London

In the light of some of the criticisms of the Tetra Laval/Sidel case where it was found that the Commission had not looked at that case carefully enough, had not looked at the evidence carefully enough, and had not taken into account the remedies that were offered, there was then a reluctance to go back into the fray on some of these transactions shortly afterward.

There are several reasons why we may be seeing something of a resurgence in conglomerate mergers. In particular, the Commission has published research that indicates increased concentration in certain sectors. In addition, the business environment has changed and we are looking at everything digital and technological. Markets have changed and therefore transactions have changed and the nature of the interactions between the merging parties is much more complex.

If you look at the individual cases, they can fall into two different categories. The first is where one of the parties has particularly high market shares. The second is where we have seen several mergers in the technology sector, which are looking at these wider ecosystems.

One of the challenges is therefore how to advise companies involved in conglomerate mergers on what they should do and what kind of evidence they should gather. Moreover, this challenge is also faced by the competition authorities who examine the evidence. It is a challenge to analyse, feel comfortable with, or identify remedies to deploy. The other issue that practitioners and competition authorities face is that nothing is certain or predictable. It is therefore necessary to look more closely at the rationale for the transaction, or certainly the whole planning and analysis of the transaction and the synergies and efficiencies it will bring. Finally, it is possible to ask to what extent corrective measures would be necessary and how to identify them.

Caroline points out that while having divergence can be a good thing, it is still a real point of concern and a real worry for clients as to whether they are going to get the deal done and how to get around it. The current turbulent economic times make it all the more important that some deals do go ahead and that they don't necessarily run into a lot of regulatory problems and that companies have some certainty, or at least a good indication, of the approaches that the competition authorities will take.

Colin Raftery

Senior Director of Mergers
Competition and Markets Authority (CMA)
London

There are three factors to consider when looking at changes over time. The first factor is the economy in general, i.e. you have to look at how markets change. The second factor is how enforcers change. Finally, the third factor is the evolution of fashion and business decisions. So, these three factors are important to consider when looking at enforcement trends. When you look at Phase II mergers, you are looking at a relatively small sample. Over the last five years, 70% of mergers were prohibited or abandoned in 2020 and 2021, but if you go back a few years, you will see that no mergers were prohibited or abandoned in 2017-2018. So there is a degree of fluctuation in the intervention rate over time.

In the context of a merger, it is important to consider the nature of the concerns that are identified and addressed. The new Merger Assessment Guidelines, therefore, place greater emphasis on dynamic competition, potential competition, and, to some extent, non-horizontal effects. Looking at the increase in agency intervention and the trend in the US under the previous administration, there has been a significant increase in merger challenges in the last two years of the Trump administration.

When we talk about stricter enforcement, in his view, it means that enforcement is not enough and that more enforcement should be allowed. However, this is not a goal that a regulator should focus on. Indeed, he considers that it is more appropriate for a regulator to focus on what is seen in the markets and how the process should reflect that. Today we see a lot of problems developing in the markets, particularly in markets where the structure has changed quite recurrently in the past. For example, merger control did not seem to be rigorous enough in the past. In his view, one of the main trends in recent years is that many cases that have resulted in Phase II interventions have gone through the merger intelligence process rather than being notified to the CMA.

Concerning conglomerate effects, it should be noted that the Commission's new guidelines have abandoned the previous characterisation of non-horizontal mergers as generally benign. Colin points out that the need to revise the guidelines is essentially a factor outside the control of the CMA, so it is difficult to predict with any reliability, as an authority, the type of agreements that will be reached over time. Moreover, the academic literature has shown that non-horizontal agreements were presumed to be unproblematic. He added that in the Tetra Laval and Intercontinental Exchange decisions, the Competition Appeal Tribunal indicated that there is no special high burden for non-horizontal theories of harm and those vertical mergers in this case can and do raise competition concerns. In practice, we very rarely encounter conglomerate effects as such. They tend to be considered in cases that raise other concerns under other theories of harm, and I think inevitably in those cases a degree of pragmatism is brought to bear.

As far as behavioural remedies are concerned, Colin points out that there are several common risks. Firstly, if one thinks about measures that might address the clustering or interoperability issues that clustering has raised, the first fundamental problem is that they often do not address the underlying competition issues. Then, another problem that can be identified is how these remedies can be specified. Finally, the third problem is how these remedies can be monitored. The second issue relating to the remedy concerns divergence. From the point of view of the CMA, there is a divergence which is established by three points. The first is that there are different assessment rules, and no system is uniform. The second is that different processes are used to carry out these assessments. Finally, each authority has different decision-makers. ■

Panel 3

Brexit: The Day After

Ioannis Kokkoris

Professor
Queen Mary University
London

The panel will focus on topics related to remedies, in particular on digital markets. Topics concerning national security investment and foreign direct investment will also be discussed. Ioannis added that there is a lot of convergence and divergence on these topics that can be raised.

Tim Lamb

Director & Associate General Counsel – Competition & Regulatory
Meta
London

In the run-up to Brexit, there was considerable debate about the potential for increased divergent outcomes between the EU and the UK. Indeed, the CMA has emphasised that divergent outcomes are indeed possible but should be rare as competition authorities rely on the same economic tools, the same analytical approaches, and similar legal tests to intervene in mergers. At the same time, the CMA noted that there is a caveat that in some rare cases different commercial requirements could be imposed on a given merger and that divergent results could lead to a merger being abandoned. This caveat is accompanied by a statement that the CMA will seek to coordinate as much as possible with the European authorities post-Brexit.

From the outset, there is a risk of non-alignment or lack of coordination in terms of timing concerning the statutory deadlines in the EU and UK merger notification processes. There are also different review times both in Phase I and Phase II, and different procedural aspects to each merger regime. Brexit will therefore create challenges on these issues. To ensure better harmonisation between the two regimes, it would be necessary for the CMA to accelerate the Phase II scrutiny. However, this assumes that such a Phase II in-depth review is necessary and that the parties are prepared to accept that the merger reaches the relevant threshold for a Phase II review with the CMA. Finally, it also assumes that the Commission's process will be sufficiently advanced for this to be a real option for the merging parties concerned. Several issues, therefore, need to be aligned before such alignment can begin to be considered. The current merger review processes and regimes cannot treat all types of transactions in the same way, both in terms of the intensity of review and the timeframe for review. Thus, in this context, it supports the Commission's merger proposals as they allow for the examination of ways to deal more quickly with vertical transactions. What more can be done by the parties to ensure speedy recourse to the jurisdiction? This question arises in particular with Article 12 of the DMA which could be a tool to provide greater certainty on timing for some of the parties involved in the merger. In his view, there is a real potential for harmonisation and coordination of these issues between the CMA and the Commission. It is even a high priority.

Finally, concerning the review of documents, the question arises whether we could not all work from the same universe of documents.

On the substance, the CMA found different results in its last two merger reviews (Giphy transaction and Kustomer). In his view, this type of divergence is inevitable, not least because each agency has its legal standards and its responses to different stakeholders. It might therefore be productive for agencies that reach different results in such cases to meet and carefully determine what led to the different conclusions.

Matthew Levitt

Partner
Baker Botts
Brussels

One of the problems is that some countries in Europe and the UK have competence criteria that are not purely turnover based. According to Matthew Levitt, turnover is the clearest line an authority can take. However, Germany and Austria have adopted transaction value tests as an alternative jurisdictional criterion. Other Member States have also set market share thresholds. This is a tool that is, in his view, at least as uncertain as a jurisdictional test. Finally, in the UK there is the supply side which is another alternative jurisdictional basis. It is these differences that may contribute to some of the uncertainties and delays in merger control procedures. In addition, it should be noted that within the European Union there is no formal coordination structure, either in terms of process or outcome in merger review. Finally, it would be much easier to create some alignment around the procedure and process than around the outcome, as the outcome depends fundamentally on the legal tests.

According to Matthew, merger remedies are probably the most distinct area of divergence seen post-Brexit, due to the parallel competence of the CMA to review transactions that, pre-Brexit, would have been reviewed solely by the European Commission. Although Andrea Coscelli says that behavioural remedies should be 100% effective, Matthew says that in reality, they are usually only 50-60% effective. In this context, the question arises: what would be the implications for the acceptability of behavioural remedies if a company that has been designated as having a strategic market share (SMS) were to engage in some sort of merger where behavioural remedies might be an effective solution

due to the regulatory framework that will exist once the UK Digital Markets Unit regime comes into force?

As for structural remedies, these comments are illustrated by the divergence between the CMA and the European Commission in the Cargotec/Konescranes case. Andrea Coscelli stated that structural remedies should be easy, simple, and clear, that they should not be fundamental, that they should be limited to a single product line or clearly defined geographic market, and that they should be 100% effective in ensuring that 100% competition is maintained and that their application should not be uncertain, complex or risky. What is interesting in this case is that, despite this clear divergence between the CMA and the European Commission, the comments made by the US Department of Justice after the deal failed due to the CMA's opposition were much closer to the CMA's position than to that of the European Commission.

Joshua White

Vice President
Analysis Group
London

Joshua points out that from an economist's point of view there is not so much divergence in the way theories of harm are currently employed. For example, in the Meta/Kustomer case, the same theory of harm is addressed by both authorities but different weight is given to different evidence. If we take this case as a benchmark case on misuse, it can be seen that although the competition authorities arrive at different results, there is no difference in the general approach to the way the merger is assessed.

However, again from an economic point of view, the divergence is somewhat greater at the global level. Over the past thirty-four years, there has been a general global consensus on the consumer welfare standard. Recently, however, there is evidence that many jurisdictions around the world are considering whether the consumer welfare standard should be expanded to include concerns about sustainability, labour markets, and other diverse areas that some authorities are incorporating.

Finally, there is a knock-on effect of much of this divergence, which is uncertainty. There is a lot of evidence that uncertainty can be detrimental to innovation, to growth. The aim is therefore to ensure that there is less uncertainty. This would provide greater clarity for companies about whether they can do a deal, and greater clarity for investors and start-ups when they are assessing options for future growth.

If you look at the issue of behavioural remedies from the CMA's perspective, having a comprehensive regulatory infrastructure and a regulator that monitors certain companies identified as having strategic status in the market on an ongoing basis allows the infrastructure to monitor these remedies more effectively on an ongoing basis, as opposed to a bespoke set of remedies in cases such as Google/Fitbit. So, there is an interesting question as to whether the CMA will become more comfortable with behavioural remedies in digital. As an economist, if we think about

behavioural remedies, they are more difficult. The US courts are quite concerned about their implementation because they are difficult to control at times, especially in fast-moving technology markets.

Sorcha O'Carroll

Senior Director – Mergers
UK Competition and Markets Authority (CMA)
London

On the substance, the CMA has spent a lot of time thinking about what could be improved. Like Joshua, Sorcha points out that in practice the differences are not huge. There are similarities in the legal tests applied by the CMA, as well as the European Commission and other agencies, but they are not identical tests. In terms of process, the fast-track procedure that exists in the UK is a mechanism that merging parties can consider where deadlines are not perfectly aligned. The operation of that procedure is also something that the government has been thinking about in the context of the amendments that are being proposed, and there has been some thought given the kind of concessions that are needed to move quickly to Phase II.

In the universe of similar documents and similar issues, it is not always possible to apply an efficient process and match all these elements, as agencies work to slightly different timetables. Although there may be slightly different issues there is a degree of alignment. This coordination aims to put in place the most effective and efficient processes possible as agencies.

As already mentioned, in some cases there is a degree of difference in the tests used by the CMA and two used by the European Commission with the European Commission's Significant Impediment to Effective Competition (SIEC) test versus the Substantial Lessening of Competition (SLC) test here in the UK. What can also be interesting is to think about the evidence base. We often look at similar documents. Each agency always conducts an independent investigation. It relies on its evidence, not on the evidence or conclusions that someone else has reached. There are different models of how authorities deal with third parties. For example, in the US there is extensive use of deposition-type evidence gathering. In the UK, the CMA tends to use a combination of written questionnaires and calls with third parties, or hearings with third parties in Phase II. The European Commission also uses a combination of questionnaires and calls, but the balance between the two differs slightly from the CMA's practice. In the recent Cargotec/Konescranes decision, there was a debate about the extent to which the CMA should rely on the findings or evidence of the European Commission or try to obtain such evidence. Sorcha recalled that the CMA relies on its evidence base. However, she points out that if the CMA finds that in the same decision where they talk to similar people about similar markets and they get very different answers, then that would raise a question about their degree of confidence in the evidence they are relying on.

According to her, a behavioural remedy, by its nature, does not address the change in the market that leads to potential harm; it tries to manage the harm that might result. So this raises challenges and questions.

David Reader

Lecturer in Competition and EU Law
Newcastle University
Senior Fellow
Melbourne Law School

David considers that a default position in the face of many changes in regulation and market policy has been to prioritise procedural and substantive standards, and thus to look for simple resource-saving solutions to provide short-term fixes. The CMA's joint statement with the ACCC and the Bundeskartellamt indicates that competition authorities should seek to clarify acquisitions and transactions that require a longer-term view.

The FDI was the first real substantive reform project to come out of the Brexit in competition policy. Now the National Security and Investment Act, which came into force this year, repeals the national security element exception to the Enterprise Act regarding the public interest regime and replaces it with something much broader than covers mergers but also smaller transactions and assesses them on whether or not they pose a risk to national security. They are all subject to mandatory notification now. The government has chosen not to formally put in place a definition of what national security encompasses. Therefore, this regime is potentially broader in its definition than the Enterprise Act was. The reason was given by the Government for not having a definition of national security was that it wanted to ensure sufficient flexibility for unforeseen national security concerns. ■

Panel 4

Article 22 EUMR: No More Safe Harbors?

Deni Mantzari

Associate Professor
Competition Law and Policy
Co-Director – Centre for Law, Economics and Society, Faculty of Laws
University College London

The European Commission has changed its approach to the referral mechanism under Article 22 of the EU Merger Regulation (EUMR) and now encourages referrals from the Member States even when their filing thresholds are not met. This new approach is intended to remedy the lack of enforcement against killer acquisitions that fall below all concentration thresholds in the EU. The question, therefore, arises as to whether these new guidelines will extend and strengthen the scope of the merger control regime or whether they will lead to frequent and insufficiently justified control of companies' transactions.

Étienne Chantrel

Head of Mergers Unit
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The basic principle is that merger control is a balancing act. Not all operations can be controlled as this would be too cumbersome. The right limit must therefore be found. In 2016, the Commission established in a paper on thresholds that many transactions fall under the EU's radar. This was particularly the case for killer acquisitions in the digital sector, where large digital companies have been buying up more and more small companies, which shows that they expect a lot of return on their investments. It is clear that there is a gap, but it is also clear that there are already different theories about why companies do this. This is not only an issue in the digital sector and the pharmaceutical industry but also in traditional sectors. For the Competition Authority, it is clear that there is a gap that is a problem, and that merger control is therefore at least part of the solution. Several tools have therefore been introduced in recent years to try to remedy this problem. For example, in 2017, the introduction of thresholds based on transaction values in Germany and Austria was one way to tackle this problem. Also in this toolbox is the introduction of an appeal option that exists in Slovakia, Lithuania, Sweden, Norway, and Hungary, among others. In France, a public consultation was opened on this subject, following which the Authority concluded that it would be desirable to include a call option as well. Moreover, for the French Authority, Article 22 is also a good solution to introduce a partial solution to this problem at the European level. This is a point that the Authority had stressed even before the Commission announced this new policy.

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Catriona said that to fill this gap in merger control, it might be useful to look briefly at where we were and where we are. We need to try to understand why we have arrived at the point where Article 22 is going to be used for referrals to the European Commission, so that the Commission can have jurisdiction over any transaction, whether it meets thresholds or not. We have gone from the bright-line test to unlimited jurisdiction. In this context, the Commission has gone through a fairly lengthy review of the procedural and jurisdictional aspects of merger control and has recognised that it has these corrective mechanisms to have jurisdiction over certain transactions below certain thresholds. In the context of this review, the Commission has indicated that between 2014 and 2020 it has reviewed over 130 mergers below the thresholds based on Article 4(5) and the traditional references to Article 22. This is therefore not insignificant in terms of the

Commission's ability to push transactions it wishes to see below the thresholds.

In particular, concerning Article 22, the basic criterion is that a Member State can request Commission review if two criteria are met. Firstly, the agreement must affect trade between the Member States, and secondly, it must threaten to significantly affect competition in the territory of the Member States. When it was adopted in 1989, Article 22 was nicknamed «the Dutch Clause». Merger control was new to the many Member States so the idea was to introduce a clause in the EUMR so if a Member State doesn't have merger control and it's worried about a transaction, it can ask the Commission to review it. Until this policy change, the Commission discouraged the Member States from submitting an agreement to the Commission for review if the Member State did not have the competence to review the agreement itself. When the Commission decided to change its policy, consideration was given to amending the Merger Regulation, which might have been difficult, to introduce a new jurisdictional test or other mechanisms to attract smaller deals. However, in the end, it seemed simpler to go through Article 22 and adopt new guidelines that allow the Member States that do not have any competence to review a transaction to refer transactions to the Commission if it believes that the transaction is competitively attractive. Under this new policy, the Commission is not constrained by thresholds. It has given guidance.

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The main point of the new Article 22 guidelines is that the Commission is happy to encourage the Member States to submit certain transactions below the national thresholds to the Commission. The main objective is indeed to fight against abuses of dominant positions, which seem to be widespread in the digital sector and the pharmaceutical industry. From an economic point of view, this new strategy can be seen in certain circumstances as a specific monopolisation strategy.

The first question is how to better detect these potentially anti-competitive mergers. First, according to Antoine, one should look at the target which is a revenue threshold or a transaction value threshold. The main objective of this net is to capture as many potentially anti-competitive mergers as possible. This requires an effective filtering device. Then, it should be noted that there is also a constraint to this main objective as competition agencies have limited resources, so it will not be optimal as it is far too costly to review all mergers.

Having determined the objective and the constraint, however, other criteria must be added to try to assess what might be an effective system. The first criterion must be clarity and legal certainty. The second criterion is information, and this is a very important point. The third criterion is that we could try to design or analyse what could be an efficient screening device related to firms' incentives. So, section 22 seems to be quite an efficient screening device because it will probably allow you to catch more potentially anti-competitive mergers. After all, the referral decision is made by a competition agency that knows the potential anti-competitive risk of a given merger. The second point is what we call the targeted approach, which is exactly like section 12 of the DMA. This approach brings more clarity, but according to Antoine, it will not be a very effective filtering mechanism. The risk with this mechanism is that you end up with a very large number of transactions to review. We then need to discuss the type of threshold that we can choose. There is the transaction value threshold and the revenue threshold. The former is clear but does not seem to be a sufficiently effective screening device for these mergers and may capture many non-problematic transactions.

The second issue is how to assess the competitive impact of these mergers. In such killer acquisitions, the counterfactual is very difficult to define. Moreover, theories of harm are often quite complex. There are already some instruments that can be applied in this context. The first theory is that of internal documents which are used by competition authorities to assess the impact of such a merger. In addition, the analysis of the financial data of a merger can also be useful. Finally, it is possible to have a theoretical and empirical analysis.

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James points out that there is no analytical reason why an anti-competitive transaction should escape scrutiny simply because it does not meet an arbitrary revenue threshold. Moreover, there is a European obsession with notification determining jurisdiction. The European Commission and most Member States have merger notification thresholds and consider them jurisdictional, so you either have jurisdiction (and notification obligation) or you don't. The Americans don't bind the jurisdictional thresholds to the merger notification thresholds. The US system is also extremely responsive to consumer complaints. The US system thus provides incentives for parties not to engage in a transaction that may have anti-competitive effects – regardless of whether there is an HSR filing. Thus, the net to catch potentially problematic transactions a range of techniques that do not depend on a clear notification test or at least at to complement a clear notification test.

Given the current situation and the tool that the European Commission has chosen to use, the challenge is whether this undermines legal certainty. For James, it does, because you cannot design a transaction anymore using the EUMR (or member state) notification thresholds to rule out a competition review. But that's not necessarily a bad thing. He points out that you just have to think more deeply now about the substance of the transaction, regardless of the jurisdiction. When we say that this reduces legal certainty, what we really mean is it erodes the privilege mergers have in the system. We have been thinking about substance (and not jurisdictional answers) forever in respect of Art 101 cases – also in respect of US and (increasingly) UK mergers. So, this isn't so new. The Commission is trying to fix the rigidities of the system as it exists and using the tools that were available to it.

The Illumina/GRAIL case may clarify some points if the Court of First Instance pick up the ball in respect of the new guidelines. For instance, the question of the 15 working day deadline on member states to make an Article 22 request or the six months 'long stop' period do not make much sense if the Commission can easily override both. The substantive test is also meaningless since we know that we can ignore the 'effect' in the Member State. So, it will always be possible from now on to have a EUMR review in any merger – regardless of its size or nexus. Discussions on strategy and risk should therefore focus on substance and much less on jurisdiction. ■