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UCL

International Mergers conference

KEY TAKEAWAYS | 23 May 2023 - London

ANALYSIS GROUP · CLIFFORD CHANCE · CRA Charles River Associates · ELİG Gürkaynak Attorneys at Law · frontier economics · Linklaters · RBB Economics · SHEARMAN & STERLING

ATTENDEES

INSTITUTIONS / AGENCIES

- DG COMP
- Hellenic Competition Commission
- Italian Competition Authority
- New Caledonia Competition Authority
- Spanish National Markets and Competition Commission
- UK Competition & Markets Authority

CORPORATIONS

- AbbVie
- American Express
- Haleon
- JD Sports
- Santander UK

ECONOMISTS / CONSULTANTS

- Analysis Group
- Brattle
- Capstone
- Charles River Associates
- Compass Lexecon
- Consilio
- Evelyn Partners
- Flint Global
- Frontier Economics
- Globesight
- GMT Economics
- HBK Capital Management
- RBB Economics
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LAW FIRM

- ACTECON
- Akin Gump
- Allen & Overy
- Alston & Bird
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- Debevoise & Plimpton
- Dentons
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- Herbert Smith Freehills
- King & Spalding
- Kirkland & Ellis
- KPMG
- Latham & Watkins
- Linklaters
- Mayer Brown
- Milbank
- Morgan Lewis & Bockius
- Proskauer Rose
- Shearman & Sterling
- Sidley Austin
- Skadden
- Taylor Wessing
- Weil, Gotshal & Manges
- White & Case

PROGRAM

09.00 Registration & Welcome

09.30 INTRODUCTORY REMARKS

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

09.45 #1 DEVELOPMENTS OF NEW THEORIES OF HARM IN MERGER REVIEWS

Verity EGERTON-DOYLE | Counsel, Linklaters, London

Gönenç GÜRKAYNAK | Partner, ELIG Gürkaynak Attorneys-at-Law, Istanbul

Pedro HINOJO | Head of Information Society, Competition Directorate, Spanish National Markets and Competition Commission, Madrid

Adrian MAJUMDAR | Partner, RBB Economics, London

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

11.15 COFFEE BREAK

11.30 #2 SUSTAINABILITY IN MERGER CONTROL

David FOSTER | Director, Frontier Economics, London

Julian NOWAG | Associate Professor in EU Law, Lund University

Teresa VECCHI | Deputy Head of Unit Merger DG COMP, Brussels

James WEBBER | Partner, Shearman & Sterling, Brussels

Moderator: Simon HOLMES | Visiting Professor, University of Oxford, Member, UK Competition Appeal Tribunal, London

13.00 Lunch

14.00 #3 MERGERS IN THE PHARMACEUTICAL INDUSTRY

Ioannis KOKKORIS | Director of the Centre for Commercial Law Studies, Queen Mary University, London

Elisabetta LANZA | Investigative Officer, Italian Competition Authority, Rome

Alexandru POTLOG | Legal Director, AbbVie, London

Joshua WHITE | Vice president, Analysis Group, London/Brussels

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

15.30 Coffee break

15.45 #4 MERGER CONTROL AND PRIVATE EQUITY

Timothy GEER | Director, Mergers, CMA, London

Muath MASRI | Principal, Charles River Associates, London

Jennifer STOREY | Partner, Clifford Chance, London

Anna TZANAKI | Lecturer in Law, University of Leeds

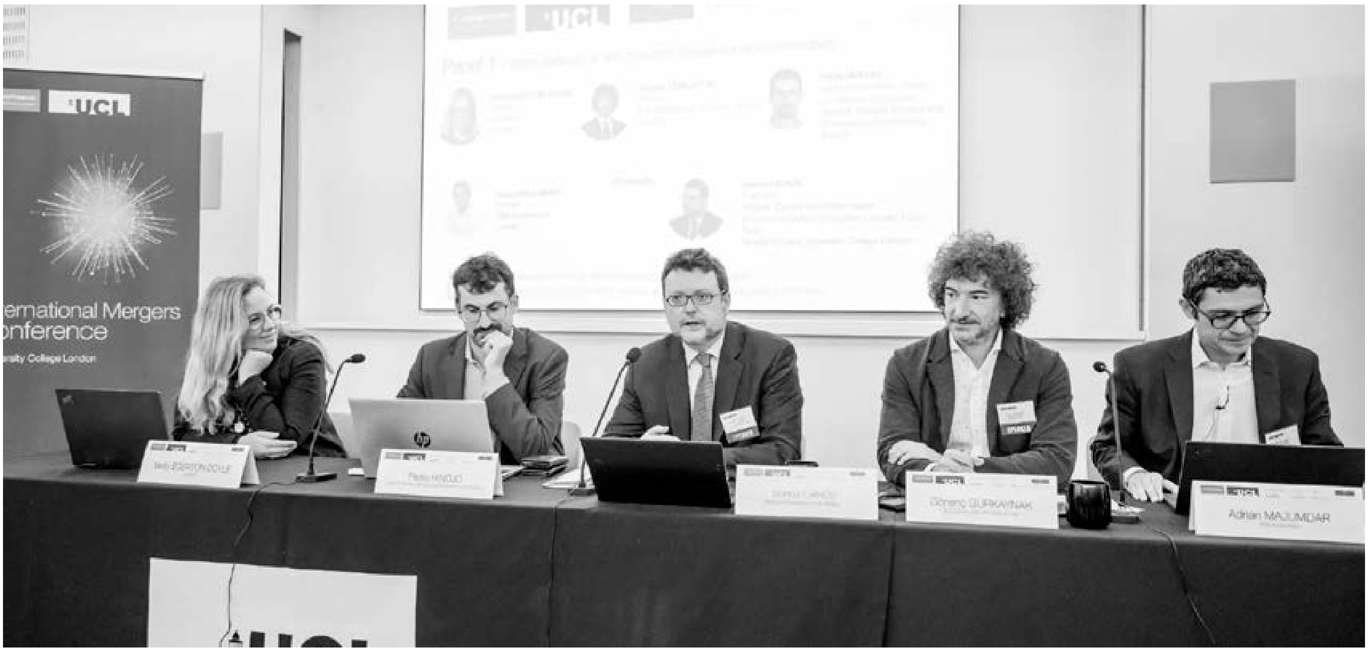
Moderator: Florence THEPOT | Lecturer in Law, University of Strasbourg

17.15 CLOSING REMARKS

Ioannis LIANOS | President, Hellenic Competition Commission | Professor of Global Competition Law and Public Policy, Faculty of Laws, University College London

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

17.30 Cocktail Reception



PANEL 1

DEVELOPMENTS OF NEW THEORIES OF HARM IN MERGER REVIEWS

Ioannis Lianos (President, Hellenic Competition Commission, Athens) moderated the discussion. The panel will focus on five major topics: conglomerate ecosystemic theories of harm, innovation theories of harm, potential competition and killer acquisitions, privacy theories of harm and access to sensitive data, and legal standards, standards of proof, and judicial review.

Different instances where innovation theories of hardware come in

- The first one is how to define the field of competition, what is the competitive space where things are happening. It is important to focus on different dimensions of performance to determine what is the space where the competition is actually held (market, ecosystem, innovation space…).
- Secondly, the theory of harm, what type of effect on innovation are we talking about.
- Thirdly, outcome metrics which could be the level of innovation and observable performance indicators that are required as a result of these R&D investments. It could help to not only focus on internal documents but also move to more effects-based analysis.

Innovation theories of harm

- Innovation theories of harm define competition based on performance and other quality dimensions, not just price. For instance, privacy bundling etc.
- Innovation includes capital investment, patents, and observable new competencies (capabilities) from R&D.
- Consider efficiencies related to innovation when addressing unilateral price increases but there should be emphasis on the pass on requirement – as these efficiencies need to be compensated in terms of quality, innovation etc. unilateral price increases.
- Recent research suggests a shift from IPOs to acquisitions, impacting market dynamics and favouring dominant corporations, which raises innovation concerns.

Adrian Majumdar

Partner, RBB Economics, London

On conglomerate ecosystemic use of harm

- In conglomerate mergers you have suppliers of two products. They sell their products to the same consumers, but they are not substitute products.
- In the past, these mergers were considered benign or pro-competitive if the merging parties had no market power.
- Concerns arise when firms have market power, as mergers can lead to anti-competitive outcomes.
- Anti-competitive effects can occur through deliberate degradation of interoperability.
- Pro- and anti-competitive effects may arise at the same time, e.g., where the merging parties improve their own interoperability more quickly but, as a result, improve interoperability less quickly with rivals.
- The assessment of conglomerate mergers should consider both pro-competitive and anti-competitive effects together, using the same evidentiary standard.

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.

- A recent trend has been the re-emergence of the "efficiency offence". For example, in *Booking/eTraveli*, the CMA theory of harm was that by bringing more consumers into the Booking ecosystem via offering them the benefits of an integrated accommodation and flight online travel agency (OTA), it would become harder for other accommodation OTAs to compete.
- The CMA's consideration of this theory of harm reflects a concern about large platforms using complementary products to protect their core services.
- Efficiencies should be recognized as positive aspects of conglomerate mergers. It is important to approach "newer" theories of harm, particularly efficiency offences, with caution and treat efficiencies as beneficial aspects.

Scope for lost innovation and the Meta-Giphy merger

- Outside of a merger to monopoly, there should be no presumption that mergers are inherently bad for innovation – that should be a matter for a case-by-case assessment.
- In the Meta-Giphy merger, the CMA did not properly evaluate whether Giphy would be a significant competitor in display advertising, despite its prominence in gifs. Giphy's importance should have been assessed relative to the number and strength of competitors already competing in display advertising, as well as other potential entrants to that market.
- If the CMA considers speculative harm, it should also consider low probability positive events such as efficiencies or potential competition. A balanced approach is necessary.

Pedro Hinojo

Head of Information Society Services, Spanish Competition Authority, Madrid

Merger between Telefónica and DTS

- It was a conglomerate merger. Commitments were implemented to address the ecosystem theories of harm arising from the merger.
- This was a very particular operation where it was necessary to devise specific remedies to address this ecosystem theory of harm. The remedies focused on preventing restrictions to competition, such as clauses limiting mobility of pay TV clients and leveraging market power in pay TV to the telecom market.
- The remedies included measures to safeguard replicability of retail offers, ensuring non-discriminatory wholesale channel offers, and regulating costs for premium sport content.
- The remedies were initially implemented in 2015 and were extended in 2020 for three more years.
- The changing market dynamics, including the rise of OTT players, was analysed in the decision to extend most of the commitments.

Killer acquisitions

- Merger control requires a prospective analysis, especially in the digital sector where killer acquisitions are more prevalent (also in pharma).
- The market share threshold is believed to capture potential killer acquisitions.
- No evidence of any killer acquisition has been found in the sector in Spain.
- Mergers in online food delivery, cybersecurity, anti-plagiarism software, and legal databases have been analysed without identifying any innovation-related risks.
- Factors such as innovation, parties' symmetry, and market pressure have been thoroughly examined.

Privacy theories of harm

- The CMNC published a market study on online advertising, providing an overview of the debate.
- Synergies between privacy and competition exist, but not always.

- Privacy is not a standalone factor in competition analysis but can influence competition as a parameter.
- Privacy policies can act as barriers to entry.
- No purely data-driven mergers have been analysed, but data-related theories of harm have been considered. Data exclusivity, multi-homing, and network externalities are factors considered in harm analysis.
- Remedies can be implemented to prevent exclusivity contracts that hinder entry.

Gönenç Gürkaynak

Founding Partner, ELIG Gürkaynak Attorneys-at-Law, Istanbul

On innovation theories of harm

- Innovation is the establishment of a new production function leading to the creation or improvement of products, services, or industries.
- If competition law is so directly linked to the protection of innovation, then competition law should prioritize the protection of innovation and base its analysis on solid facts and case law.
- A lot of previous cases in merger control have involved commitments related to innovation (e.g., *Western Digital DVT, Medtronic Covidien, Pfizer, Dow DuPont*, etc).
- Since *Medtronic Covidien* in 2014, there has been a significant reliance on internal documents as evidence has emerged in recent years.
- Innovation theories of harm have gained significance, focusing on discovery stages, cannibalization (e.g., *Monsanto* case), and innovation spaces. Innovation theories of harm are going to become the next big thing in providing uncertainty for legal counsel.
- Remedy proposals in innovation-related cases have been deemed challenging and complex to monitor.
- The privilege of mergers in the innovation sphere is a policy preference, and the burden and standard of proof should be carefully considered.
- The way to distinguish between speculative scaremongering and actual articulation of a theory of harm is by making sure that there's a holistic analysis taking into account all parameters.
- Economic and legal presumptions about the reduction of innovation should be discarded, and case-specific proof is necessary.
- Asymmetries in proof, exclusion of cost efficiencies, and reliance on general economic theory should be addressed.
- Agencies should conduct a neutral starting point analysis and not rely solely on general economic literature or internal company correspondences.
- Parties should not be burdened too quickly with proving market-wide issues without access to comprehensive market information.

Microsoft Activision

- Endogenous growth is important in addressing innovation issues and should not be disregarded.
- The timing and reasons behind Activision's potential moves need further examination. The antitrust agency's ability to make accurate business predictions is questioned.
- The analysis lacks sufficient justification for certain aspects.
- The decision regarding consoles in the merger is not seen as problematic due to obvious financial implications.
- The cloud market is dynamic and complex, requiring careful consideration of potential harm and ramifications.
- Cost efficiencies resulting from innovation and process innovation are currently undervalued in comparison to product innovation.

Verity Egerton-Doyle

Counsel, Linklaters, London

Ownership structure in merger reviews

- Ownership structure of merging companies and others in the market can be important in assessing dynamic theories of harm in merger reviews.
- The ability of new entrants and/or incumbents to invest is an important consideration that should be taken into account in industries with high capital investment costs (e.g., *Viasat/Inmarsat*).
- Shareholder identity and holding structure can be important for this and should be considered when assessing a company's ability to continue investing in innovation (e.g. difference between publicly-listed companies and privately held companies with no reporting/accounts obligaitons).

Importance of internal documents

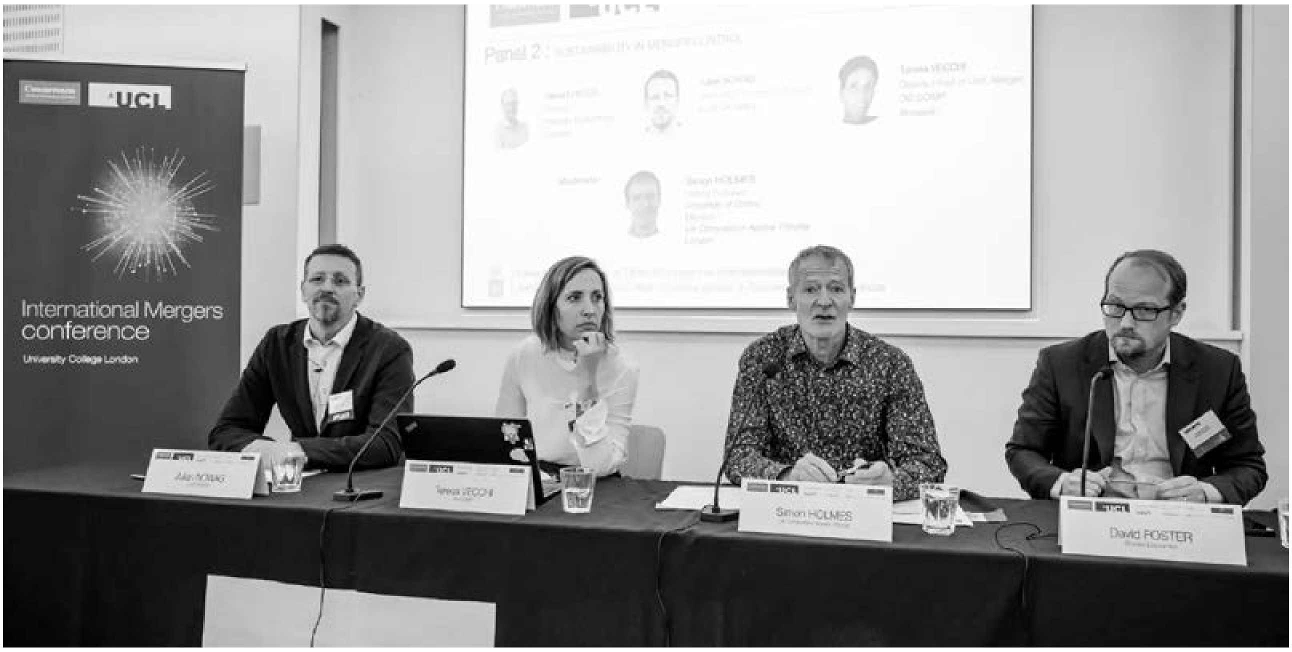
- Information asymmetry exists where authorities have better access to documents of merging parties compared with third parties and this presents a challenge in evaluating innovation-based theories of harm.
- Authorities should find ways to access critical third-party documents in cases that turn on future investment plans / incentives to ensure a comprehensive and accurate evaluation of the market.
- CMA Merger Assessment Guidelines set a higher threshold for establishing entry and expansion as countervailing factors than entry or expansion by merging parties.
- Information asymmetry can have implications for the evaluation of complex future scenarios and should be a focal point in assessment.

Privacy theories of harm

- Privacy is an important parameter of competition. E.g. non-compliance with privacy regulations, such as GDPR, can be a relevant factor in assessing abuse .
- Privacy considerations have been used as a defence in mergers, protecting the competitiveness of certain entities.
- Privacy settings and policies have been deemed critical for maintaining competitiveness in certain cases. Cases involving specific and valuable datasets may potentially lead to intervention based on privacy concerns.
- Privacy can both enhance and degrade competition depending on its importance in the market. Privacy-related theories of harm in abuse cases may provide inspiration for merger assessments.
- Exploitation in the context of privacy can involve inadequate compensation for data and price discrimination.

Legal standards and perspectives

- Two legal questions on merger effects: (1) Does it significantly impede effective competition or lessen competition? (2) Is the effect a lessening of competition or something else? If something else – merger control cannot address.
- Giphy case guides CMA on assessing dynamic harm theories and gives extremely broad latitude. CAT judgement urges CMA to explicitly outline disbenefits when assessing dynamic competition and intervention in similar cases.
- ECJ's Hutchinson judgement expected to set a higher standard for the European Commission compared to CAT's standard.
- Both CAT and ECJ likely to agree that no need to apply stricter legal test where theory of harm is novel.



PANEL 2

SUSTAINABILITY IN MERGER CONTROL

Simon Holmes (Visiting Professor, University of Oxford, Member of the UK Competition Appeal Tribunal, London) acted as both moderator and speaker on the panel. The panel focused on a number of topics, including: incorporating considerations of sustainability into merger control, the relative place of sustainability policy in relation to competition policy, the EU Commission's tools, the role of merger remedies for sustainable transition and green theories of harm.

The paper «A Sustainable Future: how can control of monopoly power play a part» (Simon Holmes and Michelle Meagher)*

- The paper highlights the urgency of addressing climate change and growing market concentration, stressing the responsibility of competition law to utilise all tools available (and up-date them where necessary).
- Three key points are presented: (1) gaining perspective by considering the scale of the problem, the limited benefits of mergers, and the issue of under-enforcement; (2) examining the current law, primarily EU law but applicable to national laws as well; (3) proposing updates to the law, including the consideration of sustainability factors and the possibility of changing the burden and standard of proof.

A holistic approach to competition policy

- Advocates for a more holistic approach seeking greater coherence between competition policy and other policies such as the "Green Deal".
- There should be explicit inclusion of sustainability and climate change in the assessment-eg an updated version of Article 21(4) EUMR to allow (or require) the Commission to take "all appropriate measures to ensure the concentration has no adverse effects on climate change or environmental sustainability".
- The European Commission should lead the analysis, involving experts beyond antitrust lawyers and economists.
- Competition law cannot stand aside hoping other policies/tools will conveniently resolve the issues of climate change and excess market power. Competition law can only do so much-but where it can it has a moral (and often legal) duty to do so.

David Foster

Director, Frontier Economics, London

Prioritising competition policy and addressing external factors

- The first best solution is to prioritise competition policy and disregard other factors such as climate crisis and sustainability.
- The second best solution suggests that if achieving the first best outcome is not feasible, it is economically incorrect to aim for an outcome that is close to it.
- Merely adhering to a purist approach of competition analysis may not be the right course of action if policy fails to address the problems effectively.
- There is a need to consider how to incorporate various factors into daily work and understand the underlying problem that requires fixing.

Examining capitalism and alternative perspectives

- Some view the problem as capitalism itself, attributing it to the destruction of the world through power concentration and environmental degradation.

*Simon Holmes and Michelle Meagher, A Sustainable Future: how can control of monopoly power play a part?, May 2022, https://uk.westlaw.com/SharedLink/24c27854d6dc4e1cb6427f67d9e6292c?VR=3.0&RS=cblt1.0

- The fundamental problem to solve is the absence of markets, as people have free access to environmental resources, leading to their excessive use.

Sustainability integration in merger control

- Creating markets for ecosystem services and implementing emissions trading schemes are steps toward addressing sustainability issues.
- Decarbonization process extends to manufacturing and heavy industry, requiring significant investments and careful management. Challenges include dealing with stranded assets and overcoming financial viability issues in legacy industries.
- Mergers may consolidate stranded assets but face obstacles due to potential price increases caused by low asset prices.
- Carbon leakage can result in offshoring dirty production and undermine sustainability efforts.
- Environmental and energy economists play a crucial role in quantifying sustainability effects in merger control. Incorporating sustainability analysis faces two hurdles: determining unique sustainability benefits and assessing competition concerns.
- An orderly transition to sustainability must consider overall economic benefits and drawbacks of old technologies. Incorporating sustainability benefits becomes complex without emissions trading and with costlier greener technologies.
- Competitive markets should reflect true production costs, even if prices increase post-merger. Aligning economic incentives accounts for high costs and ensures true competition post-merger.
- **The crucial role of merger remedies for sustainable transition**
- The merger facilitates the acquisition of necessary investments for the transition and combines the benefits of coherence and scale.
- The remedies stage is crucial in addressing concerns and demonstrating the merger's effectiveness.
- The argument for the merger emphasises the need for scale to afford costly technology and achieve efficiency and environmental sustainability.
- Private firms may be sceptical about making non-economic investments for the greater good.
- A potential solution lies in reaching a deal at the remedy stage, with broad behavioural commitments that ensure the necessary investments are made.
- The *Tetra Laval* case demonstrates the importance of commitment effectiveness over its structural or behavioural nature.
- A coherent policy approach allows for an agreement where the merging parties commit to making analysed investments for the economy and the environment using their synergies.
- Accepting certain commitments can overcome concerns about the likelihood of fulfilling investments without remedies.
- Flexibility at the remedy stage can greatly facilitate a fast and expensive transition toward Net Zero in Europe by 2050.

Julian Nowag

Associate Professor in EU Law, Lund University

Creation of markets and competition

- Creation of markets by private parties can lead to necessary restrictions in competition cases (e.g., the DSD recycling case).
- The presumption that higher prices equate to a restriction of competition should be examined further, as it may not always be the case.
- Overlap between sustainability and competition raises the possibility of pursuing green theories of harm in competition cases. International cooperation is crucial, given the potential discrepancies in leniency or standards across jurisdictions.

Balancing sustainability and competition regulation

- Consideration should be given to the significant investments required for a transition and their relation to efficiency defences in merger contexts.
- While regulation is often seen as the answer, the absence of a sustainability regulator necessitates careful consideration of how sustainability and competition can be effectively regulated.
- Enforcement priorities should be evaluated, particularly in areas related to the environment and energy, to ensure sufficient resources are allocated.
- The tension between output efficiency and overall environmental impact in mergers should be explored, as increased production may undermine the benefits of greener products.

Enhancing merger procedures

- Enhancing participation in the merger procedure by training NGOs and improving the quality of their submissions could be beneficial.
- Under-enforcement and the capacity of the merger department should be considered in relation to the number of cases being handled.

Article 21(4) and its implications for Merger Regulation

- Article 21(4) concerning national interests and public defence is distinct from competition law and focuses on the relationship between EU and national law, specifically regarding the free movement of capital.
- The European Commission's assessment provides additional protections under free movement, which may differ from usual court proceedings for challenging national rules restricting mergers in national courts.
- Including environmental protection in Article 21(4) would have no significant impact on the merger regulation debate as it is already considered a mandatory requirement under free-movement law and thus a reason that can justify a restriction of the free-movement of capital.
- Currently, companies can approach the Commission and claim that national authorities have failed to provide prior notification of a decision blocking a merger on non-privileged public interest grounds.
- Certain areas enjoy privileged treatment exempt from the notification requirement, here sustainability might be added. But it would only change the procedural rules. It would mean national authorities would not have to make a notification before they want to block a merger on public interest grounds.

Teresa Vecchi

Deputy Head of Unit Merger DG COMP, Brussels

The Commission's role in addressing the environmental aspects of competition matters

- The European Commission's mandate is limited to the competencies conferred in the Treaties and the EU merger regulation transposes the goals of Articles 101 and 102 TFEU.
- Competition policy encourages competitive markets, fostering innovation and efficient resource utilisation, thereby supporting environmental sustainability.
- Specific sustainable products might have separate market definitions due to consumer preference.

- Consumer preference for sustainable products might also affect geographic market definitions.
- The Commission considers consumer preference for sustainable products as a parameter of competition and includes it in assessments.

The role of merger control in a sustainable economic model

- Merger control plays a role in supporting a new economic model based on sustainability .
- Sustainability is a factor in the analysis of differentiated products, closeness of competition and innovation.
- When competition concerns relate to sustainability, remedies must consider sustainability and may involve divesting R&D facilities or setting purchase criteria that incentivize continued innovation.

The Commission's approach and tools for considering sustainability

- Efficiencies resulting from mergers, including green efficiencies, can be taken into account if they meet the efficiency criteria and benefit consumers.
- Out-of-market efficiencies may be considered, but they must substantially cover the harmed consumers, be merger-specific, and verifiable.
- The Commission's new guidance paper also covers the risk of green killer acquisitions, addressing concerns raised in the context of sustainability.
- While Member States may have different legislation, the Commission's role is to assess mergers based on competition law, and it does not have the power to intervene politically in blocking or allowing a merger after it has been assessed by a competition authority.
- Through the tools and steps outlined, the Commission can effectively consider sustainability and support the transition towards a more sustainable economic model.

Green theories of harm

- The Commission cannot consider green theories of harm that are solely focused on environmental concerns.
- Sustainability becoming a parameter for competition plays an increasingly important role in merger assessments.
- Merger control's tools can identify market trends, including consumers' preference for sustainable products and services.
- Environmental policies are better achieved through other means, such as regulation.
- International cooperation extends beyond sustainability and is a separate matter.
- Some member states, like Germany, can intervene in mergers for political assessments prioritising environmental benefits.

PANEL 3

MERGERS IN THE PHARMACEUTICAL INDUSTRY

Deni Mantzari (Associate Professor - Competition Law and Policy, Co-Director - Centre for Law, Economics and Society, Faculty of Laws, University College London) moderated the panel. The panel focused on a number of topics, including the pharmaceutical market structure and players, the challenges arising from its regulation, innovation theories of harm, recent key cases and global enforcement trends.

Joshua White

Vice president, Analysis Group, London/Brussels

Pharmaceutical market structure

- The pharmaceutical market comprises diverse players, including multi-product firms (e.g., Pfizer, AbbVie), large generic companies (e.g., Teva), brand companies with generic arms, and pure-play entities specialising in specific therapeutic areas.
- Other entities in the pharmaceutical ecosystem include contract manufacturing organisations (CMOs), contract development and manufacturing organisations (CDMOs), and contract research organisations (CROs).
- Merger and divestiture activity is common in this market as firms seek to optimise constraints, diversify risks, and manage therapeutic lines.
- Despite perceived rampant consolidation in the pharmaceutical industry, there's considerable divestment with firms frequently shifting in and out of markets.
- Although some companies are reducing their number of assets, others are selling significant parts of their portfolios to meet different needs (e.g., Novartis).

Market trends and competition

- Market definition in pharma, particularly for horizontal mergers, can be complex, especially considering the separation between the payer and the prescriber.
- Substantial buyer power exists in pharmaceutical markets, particularly in Europe, while pricing is somewhat dependent on regulatory structures.
- Theories of harm include horizontal effects, vertical effects, conglomerate effects, and dynamic competition. Specific instances depend on the details of each merger.
- Dynamic competition considerations require serious analysis, considering the high rate of drug development failure.
- Innovation theories of harm require qualitative analyses, examining competition and market capacity.

Regulations and their impact

- Regulatory leeway exists, particularly in Europe, allowing authorities to enforce with considerable latitude. This raises the question of over-enforcement and its possible detrimental effects on the dynamic, high-risk pharmaceutical industry.
- Over-enforcement can have public impact, as pharmaceutical advancements play a significant role in public health, extending life and addressing critical diseases.
- Investment in pharmaceutical ventures needs significant returns to offset the high risk, suggesting a need for regulatory caution in order not to deter potential investment.

UK pricing regulations and drug pricing considerations

- UK pricing regulations permit certain firms to recover their investment, assessed at a firm level, not a specific drug level.

- A portfolio perspective on competition aligns better with market realities of pricing decisions and captures relevant aspects of industry dynamics.
- Despite perceived rampant consolidation in the pharmaceutical industry, there's considerable divestment with firms frequently shifting in and out of markets.
- Although some companies are reducing their number of assets, others are selling significant parts of their portfolios to meet different needs (e.g., Novartis).
- Concerns regarding high drug prices, particularly in the context of personalised medicine and gene therapy, should be balanced by considering the clinical value these treatments provide.
- The UK's health technology assessment, which evaluates clinical benefits post-marketing authorization, exemplifies an aspect of the pharmaceutical industry's deal-making process not fully accounted for by competition authorities.

Ioannis Kokkoris

Director of the Centre for Commercial Law Studies, Queen Mary University, London

Pharmaceutical sector challenges and complexities

- Merger control approaches in the pharmaceutical sector, until two years ago, had converged among the US, UK, and EU authorities.
- The pharmaceutical sector presents a unique set of challenges, including innovation requirements, sensitive customers, high drug prices, and reduced choice in medications.
- There are many cases in progress, such as Amgen and Pfizer.
- Market definitions, particularly in relation to pharmaceutical drugs and their applications, and the overlap between traditional prescription and over-the-counter drugs present complexities for competition authorities.
- Authorities may assess the entire development process of a drug, potentially going back to trial phases, due to concerns about the research for a drug being discontinued after a merger.

Regulatory approaches and changes

- Remedies in this sector, compared to others, are generally more cautious and, as the speaker describes, intrusive.
- The CMA has shown creativity in jurisdiction determination based on share of supply.
- Recent legislative changes in the EU have made jurisdictional thresholds clearer.
- The pharmaceutical sector has been heavily monitored and intervened in by competition authorities due to the number and frequency of arising issues.

Elisabetta Lanza

Investigative Officer, Italian Competition Authority, Rome

Innovation competition in the pharmaceutical sector

- Innovation competition pertains to all R&D activities targeted at improving current production processes, including the discovery and development of new products.
- Merger assessments should consider potential discontinuation or delay of innovation efforts and possible price increase of innovative products post-merger.
- Innovation competition arises in mergers that consolidate entities developing new products or technologies.
- The consequences of such mergers often involve reduced competition and innovation, fewer new products in the same product market, potential increase in prices for patients and healthcare systems, and reduced variety for physicians and patients.
- The key elements in assessing innovation harm include the merging parties' roles as innovators, concentration in research, combined patents, and competition between the parties in terms of innovation efforts.
- Innovation competition assessments consider potential product and price competition, ongoing pipeline overlaps, and the companies' ability and probability to innovate.

- Remedies in such cases necessitate the merging parties to demonstrate that the acquiring company can act as a global integrated R&D competitor.
- In the Illumina Grail merger, the primary concerns were the lack of long-term perspective within the remedies and potential foreclosure strategies by Illumina.
- The Italian Competition Authority now assesses acquisitions of control over small, innovative companies, even if these transactions do not meet the national threshold.

The role of small companies in innovation

- Innovation is an essential parameter of competition, requiring dynamic market analysis and consideration of both potential and future competition.
- Small companies are significant contributors to innovation, as seen in the US market where approximately 70% of new compounds approved by the FDA in 2022 were from such entities.
- The advent of mRNA-based products highlights the critical role of small but innovative companies, as witnessed during the COVID-19 pandemic.

Risk assessment in the pharmaceutical industry

- The pharmaceutical industry is characterised by substantial investment risk, particularly with a high rate of unsuccessful research ventures.
- Competition assessments consider the aforementioned risk, especially during merger evaluations and potential abuses investigations (e.g., the Aspen case in Italy)
- Risk assessment is inherent to managerial assessments across all industries; the pharmaceutical sector, being more sensitive, merits particular attention.
- Appreciation and careful evaluation of early-stage pipelines is necessary.
- Regulatory courses and negotiations account for industry-specific challenges and authorities incorporate these into their assessments.
- It is vital that merging parties disclose pertinent information regarding their activities, both during and prior to the merger.

Alexandru Potlog

Legal Director, AbbVie, London

Innovation and market definitions in merger decisions

- AbbVie, initially a spin-off of Abbott in 2013, has transitioned within 10 years from a company focused on one product to a top five global pharmaceutical company. Its portfolio has expanded into various therapy areas and acquisitions such as Allergan in 2020.
- Competition authorities, particularly in Europe, often view pharmaceutical innovation in a similar light to other industries, overlooking the unique aspects and complexities of drug development.
- Competition authorities tend to stop their analysis at the moment a product obtains marketing authorization, whereas there are other regulatory hurdles before a drug can effectively compete on the market.
- Market definitions in merger decisions do not always adequately represent actual market dynamics and they don't extensively factor in clinical decisions, treatment pathways etc. (e.g., well established medicines can still command a significant market share despite the availability of more innovative and effective molecules).
- Health authorities are demonstrating a push for affordable medicines and those addressing areas of unmet need so higher choice is not an absolute priority for many health regulators.

The AbbVie and Allergan merger

- The merger between AbbVie and Allergan demonstrated minimal business overlap from a European perspective.
- To mitigate this overlap, the European Commission accepted the divestment of Allergan's version of this therapy.
- The divested therapy returned to AstraZeneca, its original licensor, as per public information.
- Ultimately the success of the merger was shaped by the ability of the two businesses to come together and integrate synergistically, which comes down to culture and people, two key aspects which are often overlooked when discussing mergers, but which have a very strong impact on efficiencies and outcomes.

PANEL 4

MERGER CONTROL AND PRIVATE EQUITY

Florence Thepot (Lecturer in Law, University of Strasbourg) moderated the panel. The discussion covered a wide range of topics focusing on Private Equity, including: the economic impact of private equity, cross-ownership concerns, the CMA's approach to private equity firms merger assessment, the competitive impacts of private equity, policy differences between the EU and the U.S., concerns about consolidation strategies, societal concerns about private equity, and industry-specific consolidation trends.

Muath Masri

Principal, Charles River Associates, London

Private equity overview and structure

- Private equity is under critical scrutiny, with US antitrust leadership expressing concerns about its impacts.
- Private equity comprises institutional investors and high net worth individuals collectively investing money, with limited liabilities and limited roles in managing investments.
- These investors are known as limited partners who entrust their capital to a private equity fund or general partner.
- The general partner actively manages the investments, aiming to exit the investment and return the profits to investors within a 10-year horizon.
- Investments typically involve high levels of debt, using generated revenue to service this debt, while seeking to enhance the business value for eventual profitable sale.
- Investments are meticulously analysed with a clear exit strategy focusing on adding value and improving operational performance.
- High-powered incentives form a key feature of the private equity model, linking managers' compensation to performance.

Economic impact of private equity

- Private equity constitutes around 40% of M&A deals, a significant proportion of which are in technology and healthcare sectors.
- Literature regarding the economic impact of private equity reveals mixed findings depending on the chosen evaluation metric, as discussed below. Studies show:
  - Private equity often results in management changes in the acquired firms, with management practices generally improving.
  - Employment effects are nuanced; taking public companies private may result in job cuts, while private-to-private deals tend to increase employment.
  - Evidence concerning wage effects and productivity is mixed, with varying impacts across different studies and time periods.
  - Impacts of private equity deals on consumers depend on market competitiveness prior to the deal.
  - There is no clear negative impact on innovation as measured by the number of patents post-acquisition.

Antitrust concerns in private equity

- Concerns raised about private equity deals such as the aggregate impact of numerous small acquisitions and issues related to common ownership and cross ownership are not exclusive to private equity.
- As such, and given mixed evidence on impact of private equity deals, antitrust implications require case-by-case examination of whether a deal involves a theory of harm, backed by evidence.

Common and cross-ownership concerns

- Common and cross-ownership concerns necessitate evaluating incentives of management and owners to address potential misalignment.
- Managers whose compensation is based on the performance of their own company only may lack incentive to benefit competitors even if their investors own a stake in these competitors.
- However, board seats could serve as a mechanism to influence managers' actions towards competitors.


Timothy Geer

Director, Mergers, CMA, London

The CMA and private equity mergers

- The CMA operates a voluntary notification regime concerning mergers; it can initiate its own investigations but lacks a short-form process.
- The regime is non-suspensory, allowing parties to complete their deals before or during the merger review.
- Private equity deals historically often do not raise competition concerns and hence are not always notified to the CMA.
- The CMA treats private equity mergers similarly to any other merger, conducting owner-agnostic reviews.
- The CMA scrutinises private equity parties the same as any other parties in a merger review, examining their commercial incentives and the potential overlaps or vertical relationships.

Concerns and considerations in private equity mergers

- The CMA may impose 'hold separate' obligations, or initial enforcement orders, on the major parties in a merger. This may affect a private equity investor's other activities although the CMA will try to target these obligations as best it can.
- The CMA's concern about a private equity involved merger aligns with concerns about any merger that reduces competition due to horizontal overlaps or likelihood of foreclosure because of vertical or conglomerate relationships.
- Industry-specific M&A activity by private equity firms might warrant closer examination by the CMA, especially if there's an increase in industry consolidation due to private equity M&A activity.
- The CMA has observed industry-specific consolidation trends in the vet, dental, and petrol retail sectors in the UK. The CMA will continue to monitor private equity activity in these.
- Arguments about efficiencies created by private equity deals are considered within the context of enhancing competition, benefiting customers, and being merger-specific.

Industry-specific consolidation trends

- When it comes to merger remedies, in a structural divestment scenario, the CMA evaluates the prospective purchaser's commitment to the market, their business plan, and their financial capability. Our guidance says that a highly-leveraged acquisition of the divestiture package which left little scope for competitive levels of capital expenditure or product development is unlikely to satisfy the CMA. [TG2]
- Private equity firms' portfolio approach to investment and potential shareholdings in other businesses in the same industry could affect the firm's incentives to compete and thus influence the CMA's decisions in a divestment purchase scenario.

Case-based learning

- Learning primarily occurs through cases, including major cases, market studies, and antitrust cases. If private equity managers express frustration over agencies' limited understanding of their business there is some responsibility on them and their advisers to make representations on these to the CMA.
- Collaboration with specialist regulators, such as the FCA, allows for knowledge exchange with other agencies.

Jennifer Storey

Partner, Clifford Chance, London

U.S. concerns about consolidation strategies

- Clients perceive a fundamental misunderstanding of private equity firms' operations, strategies, and incentives, especially in the US.
- US concerns about consolidation strategies may influence other jurisdictions.

- Competition authorities may worry that private equity acquisitions lead to market consolidation and reduced competition.
- Limited action has actually been taken in the US, with the example of the FTC's action against JAB Consumer Partners, where the FTC required divestment including to private equity houses, raising the question about whether this case reflects skepticism towards private equity or traditional market consolidation concerns.
- US regulators' concerns may stem from specific limitations in merger control notification requirements in the US for private equity.

Emerging concerns in the UK

- Similar sentiment may be emerging in the UK.
- While the CMA expressed concerns about quiet deal-making and veterinary practices, only some of these cases involve companies with private equity backers.
- Private equity may not be the issue; local consolidation is the common concern.
- Small roll-up deals may be subject to CMA scrutiny due to the flexibility of the UK jurisdictional thresholds.
- Higher scrutiny and controls on private equity firms may not be justified as similar issues affect all acquirers and investors.

Benefits and competitive impacts of private equity

- Private equity provides necessary capital and expertise for business growth and profitability.
- Private equity firms do not intentionally seek deals below notification thresholds to avoid antitrust scrutiny.
- Private equity aims to efficiently grow portfolio companies for profitable exits and investors' benefit.
- Competition authorities analyze private equity investors' overlaps across all funds ultimately managed by a common owner.
- Private equity firms face challenges in coordinating competitive strategies among different funds and portfolio companies due to fiduciary duties to investors, exit strategies and investment timelines.
- Availability of remedies in private equity transactions is limited due to the need to protect existing investments.
- Private equity firms should be considered suitable remedy takers in divestment scenarios like any other investor.
- Private equity investment can be beneficial and pro-competitive.
- Concerns raised are not specific to private equity and should be assessed in a balanced and fair manner.

Common Board Appointments in Private Equity

- Private Equity firms acquiring control may have common board appointments across their controlled portfolio companies, subject to merger control clearance.
- Interlocking directorate is restricted by the Clayton Act in the US and similar restrictions exist in other countries.
- In Europe and the UK, although there are no specific restrictions, Article 101 prohibits information sharing and anti-competitive coordination.
- Establishing common board seats between competing portfolio companies would be challenging due to the need for firewalls and preventing sharing of competitively sensitive information.

Managing merger control risk efficiently

- Transactions can trigger multiple merger control filings based on various definitions of control.
- When discussing control thresholds, there are differences between the EU, the UK and other jurisdictions.
- Structuring around merger control notifications is, therefore, difficult. It's better to focus on doing the desired deal and manage merger control risk accordingly.

Anna Tzanaki

Lecturer in Law, University of Leeds

Increased scrutiny on private equity policies

- There is increasing recent attention on financial investors, particularly private equity, that has resulted in new policy debates in both the EU and the U.S. and has broader root causes.
- Financial investors, including private equity but also large asset managers like BlackRock and Vanguard, have attracted unprecedented attention from U.S. antitrust agencies, necessitating an understanding of why and why now.
- The business model of private equity is now viewed as potentially incompatible with competition laws, with theories of harm being put forward such as common ownership and roll-up acquisitions.
- The U.S. is considering expanding reporting rules to capture more activities under merger control, focusing on companies under common investment management fearing that potentially problematic M&A deals relating to financial investors may go unnoticed.
- The U.S. antitrust officials' speeches suggest a shift in preference from financial buyers, notably private equity, to strategic buyers impacting traditional merger remedies.

Policy Differences between the EU and the U.S.

- The EU and U.S. approaches to private equity, particularly minority investments, are diverging due to inherent legal limitations in their respective competition laws.
- The U.S. policy shift signifies an interest in not just industry-level competitive overlaps but also overlaps at the investor level.
- There are contrasting legal approaches in the EU and the U.S. to majority and minority shareholdings, with the EU applying liability under Article 101 based on the parental liability doctrine, and the U.S. using a flexible merger control system under Section 7 of the Clayton Act.
- Both EU and U.S. authorities share concerns about circumvention of laws, by companies gaining de facto control and later legal control unnoticed.

The need for balanced regulation

- The 'politics of private equity' can be understood through three scenarios: the 'pragmatic', regulation as a response to emerging economic reality reflecting changing ownership structures; the 'populist', focusing on more on rhetoric than science appealing to consumers and groups sensitive to change; and the 'anarchist', cautioning against unlimited expansion of antitrust scope into finance without clear principles.
- The evidence regarding private equity's impact on competition is mixed, suggesting a need for industry-specific considerations and balancing efficiency gains with potential theories of harm.
- Private equity's role in the market for corporate control, an area traditionally outside of antitrust scope, has brought new complexities to the antitrust discussion.
- There's a risk of antitrust intervention inadvertently disrupting the market for corporate control, potentially insulating managers from market discipline.
- A balance is required to modernize antitrust policy without overstepping its traditional boundaries with corporate law.

Interlocking directorates

- In the US, interlocking directorates are prohibited and enforcement action is being taken against them.
- Recent studies show extensive interlocks in the US, particularly in the pharmaceutical and healthcare industries.
- Some individuals in the industry and investors opt for board observer seats instead of board seats for tax purposes primarily rather than antitrust reasons.
- Investors, including financial investors, can intelligently adapt to changing rules but what is key for them is legal certainty regarding any new rules.