Concurrences
Antitrust Publications & Events

20 YEARS ANNIVERSARY

UCL

International Mergers conference

KEY TAKEAWAYS | LONDON - 21 MAY 2024

Carolina ABATE | Competition Expert, OECD, Paris

Micaela ARIAS DOMECQ | Special Advisor, Spanish National Markets and Competition Commission, Madrid

Joel BAMFORD | Executive Director of Mergers, UK Competition and Markets Authority, London

Kristina BARBOV | UK Director of Competition & Regulatory Law, Microsoft, London

Ioannis LIANOS | Member of the UK Competition Appeal Tribunal | Professor of Global Competition Law and Policy at UCL Faculty of Laws

Sir Nicholas FORWOOD KC | Counsel, Judge, White & Case Brussels, and Brick Court Chambers, London

Davina GARROD | Partner & Head of International Competition, Akin Gump Strauss Hauer & Feld, London

Emma GRIFFITHS | Lead Counsel, Rolls-Royce, London

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

Grania HOLZWARTH | Legal Counsel, Deutsche Telekom, Brussels

Jenine HULSMANN | Partner, Weil, Gotshal & Manges, London

Nicholas KHAN KC | Legal Adviser, European Commission, Brussels

Ioannis KOKKORIS | Professor, Queen Mary University, Member, UK Competition Appeal Tribunal, London

Oliver LATHAM | Vice President, Charles River Associates, London

Guillaume LORIOT | Deputy Director General, DG COMP, Brussels

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

Anna MARCOULLI | Judge, General Court of the European Union, Luxembourg

Okeoghene ODUDU | Professor, University of Cambridge, Cambridge

Marco RAMONDINO | Deputy Head of Unit, Mergers: Transport, Post, and other services, DG COMP, Brussels

Paul REEVE | Partner, RBB Economics, London

Nick ROOT | Lead Competition Counsel, Vodafone, London

Sir Marcus SMITH | President, Competition Appeal Tribunal, London

Vanessa TURNER | Senior Advisor for Competition, The European Consumer Organisation (BEUC), Brussels

Joshua WHITE | Vice President, Analysis Group, Brussels, London

Tina ZHUO | Partner, Slaughter and May, London

Akin | ANALYSIS GROUP | CRA Charles River Associates | ELIG Gürkaynak Attorneys at Law | GA_P Gómez-Acebo & Pombo | RBB Economics | SLAUGHTER AND MAY | Weil | WHITE & CASE

ATTENDEES

INSTITUTIONS / AGENCIES

- CNMC
- Competition Appeal Tribunal
- DG COMP
- EU Delegation to UK
- European Commission
- General Court of the European Union
- OECD
- UK Competition and Markets Authority

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- Charles River Associates
- CIBRA Capital
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- Microsoft
- Renewalink
- Rolls-Royce
- VKR Holding A/S
- Vodafone

PROGRAM

08:30 REGISTRATION & WELCOME

09:00 INTRODUCTORY REMARKS

Ioannis LIANOS | Member of the UK Competition Appeal Tribunal | Professor of Global Competition Law and Policy at UCL Faculty of Laws

09:15 OPENING SPEECH

Sir Nicholas FORWOOD KC | Counsel, Judge, White & Case Brussels, and Brick Court Chambers, London

09:45 POLICY DISCUSSION - RECENT DEVELOPMENTS IN EU MERGER CONTROL AND INTERNATIONAL COOPERATION

Joel BAMFORD | Executive Director of Mergers, UK Competition and Markets Authority, London

Guillaume LORIOT | Deputy Director General, DG COMP, Brussels

Moderator: Ioannis LIANOS | Member of the UK Competition Appeal Tribunal | Professor of Global Competition Law and Policy at UCL Faculty of Laws

10:25 #1 EXPANDING THE SCOPE OF MERGER CONTROL TO DIGITAL MARKETS

Carolina ABATE | Competition Expert, OECD, Paris

Micaela ARIAS DOMECQ | Special Advisor, Spanish National Markets and Competition Commission, Madrid

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

Oliver LATHAM | Vice President, Charles River Associates, London

Moderator: Ioannis LIANOS | Member of the UK Competition Appeal Tribunal | Professor of Global Competition Law and Policy at UCL Faculty of Laws

11:45 COFFEE BREAK

12:00 #2 REMEDIES IN EU, UK AND US TRANSACTIONS

Davina GARROD | Partner & Head of International Competition, Akin Gump Strauss Hauer & Feld, London

Marco RAMONDINO | Deputy Head of Unit, Mergers: Transport, Post, and other services, DG COMP, Brussels

Vanessa TURNER | Senior Advisor for Competition, The European Consumer Organisation (BEUC), Brussels

Joshua WHITE | Vice President, Analysis Group, Brussels, London

Moderator: Ioannis KOKKORIS | Professor, Queen Mary University, Member, UK Competition Appeal Tribunal, London

13:10 LUNCH

14:00 KEYNOTE SPEECH - THE INTENSITY OF THE REVIEW OF DIGITAL MERGER OR MERGERS AFFECTING INNOVATION BETWEEN POLICY DISCRETION AND PROTECTION OF THE RULE OF LAW

Sir Marcus SMITH | President, Competition Appeal Tribunal, London

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

14:30 #3 REGULATORY DEVELOPMENTS IN THE UK, EU AND US: WHAT'S NEW FOR MERGER CONTROL?

Nicholas KHAN KC | Legal Adviser, European Commission, Brussels

Anna MARCOULLI | Judge, General Court of the European Union, Luxembourg

Paul REEVE | Partner, RBB Economics, London

Tina ZHUO | Partner, Slaughter and May, London

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

16:00 COFFEE BREAK

16:15 #4 HOT TOPICS ROUNDTABLE: WHAT CHALLENGES LIE AHEAD?

Kristina BARBOV | UK Director of Competition & Regulatory Law, Microsoft, London

Emma GRIFFITHS | Lead Counsel, Rolls-Royce, London

Grania HOLZWARTH | Legal Counsel, Deutsche Telekom, Brussels

Jenine HULSMANN | Partner, Weil, Gotshal & Manges, London

Nick ROOT | Lead Competition Counsel, Vodafone, London

Moderator: Okeoghene ODUDU | Professor, University of Cambridge, Cambridge

17:45 CLOSING REMARKS

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

17:50 COCKTAIL & RECEPTION

OPENING SPEECH

THE SCOPE OF EU MERGER CONTROL AND ARTICLE 22

Nicholas Forwood

Queen's Counsel, Brick Court Chambers, London

Ability to catch below-threshold mergers with Article 22

- In the Illumina/Grail case, concerns were raised that the merger could lead to dominance in the EEA markets for early cancer detection tests.
- The Commission, after consulting several NCA) and the UK's CMA, invited Member States to refer the case under Article 22 EUMR.
- France submitted a referral request, supported by five other Member States, despite the merger not meeting French review criteria.
- The Commission accepted the referral, implementing the standstill obligation of Article 7.
- Despite the standstill obligation, Illumina completed the transaction. This led to gun-jumping proceedings and a fine of €432 million.
- Illumina and Grail challenged the referral's validity and the Commission's acceptance.
- The General Court rejected their challenge.
- Advocate General (AG) Emiliou proposed allowing their appeal, arguing Article 22 was not intended for requests by Member States with national merger laws where the merger fell outside those laws' criteria.
- The key issue is whether Article 22 allows requests by Member States with national merger laws where the merger falls outside their jurisdictional criteria.
- AG Emiliou argues this was not the Council's intention, suggesting the Court may annul the Commission's decision.
- Observers and merger practitioners expect and hope the Court will follow AG Emiliou's Opinion.
- The Court's judgement is anticipated by the first week of October.

Extraterritoriality in merger control

- The Commission's prohibition of the Illumina-Grail transaction under EUMR is based on potential global vertical foreclosure effects.
- Illumina's appeal argues that the transaction wouldn't stifle innovation or reduce market choice and questions the Commission's jurisdiction based on speculative effects.
- It is generally accepted if certain conditions are met.
- Over-extensive jurisdictional claims can lead to conflicts.
- The regulatory environment has evolved and merger transactions face longer reviews and uncertain outcomes.
- Previously, there was a trend towards international convergence and faster global deal reviews.

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.

- There are several new challenges such as an increased focus on internal documents, mandatory pre-notification, extensive forms, and massive information requests, as well as new theories of harm and higher intervention rates (EU and US).
- Since Brexit, the CMA has become an aggressive merger regulator.
- The UK Competition Appeal Tribunal warned the CMA about interfering in global mergers (Facebook/GIPHY case).
- This led to potential changer and industry impact such as regulatory uncertainty that deters deal negotiations, especially in tech and pharma/life sciences.
- There seems to be a global consensus among antitrust agencies to discourage M&A.
- Following the *Towercast* judgement, NCAs can conduct ex-post reviews of below-threshold transactions based on Article 102 TFEU.
- Strengthening a dominant position is not enough for abuse under Article 102; the merger must substantially impede competition both quantitatively and qualitatively.

International divergence on remedies

- More and more often, the world's leading authorities are achieving different results for the same operation:
  - Cargotec/Konecranes merger cleared by the Commission but blocked by CMA despite identical remedy offers.
  - *Microsoft/Activision* Blizzard deal: the Commission cleared it with licensing commitments, CMA blocked it despite the same remedies.
  - Meta/Kustomer: CMA cleared it, while the Commission required commitments, showing subjective views in digital markets.
  - Booking/eTraveli: FTC and CMA cleared it, but the Commission blocked it.
- There is a growing focus on vertical and conglomerate «ecosystem» theories of harm.
- There is an increased scepticism towards behavioural remedies in non-horizontal concerns.
- In the Illumina/Grail case, the Commission blocked a purely vertical merger, rejecting behavioural remedies.
- Regulatory uncertainty discourages M&A negotiations.
- Concerns over potential chilling impact on innovation efforts and third-party incentives are difficult to measure.
- The perception of global consensus to discourage M&A, contrasted with subsidy programs aimed at strengthening industries.
- Overall, the increasingly varied landscape of international merger control creates challenges for global deal navigation and impacts innovation and market dynamics.

POLICY DISCUSSION

RECENT DEVELOPMENTS IN EU MERGER CONTROL AND INTERNATIONAL COOPERATION

Ioannis LIANOS (Founding Director, Center of Law Economic and Society / Member, University College London, London) moderated the discussion, which focused on four points: ecosystems and new theories of harm related to them, innovation in competition law, sustainability and privacy issues in mergers, and the interplay between the competition authorities and the judges at the judicial review stage.

The notion of ecosystems

- The concept of ecosystem is very much part of the current competition's discussions, and it was first mentioned in a number of reports commissioned by competition authorities in the digital space and in academic work integrating business studies' literature in competition law, as well in some processes of reform of national competition laws.
- This notion is now mentioned in the DMA and was subject to discussions during the negotiations.
- Previously, the Court used the notion of ecosystem in the *Google Android* case.
- A number of recent merger cases referred to this concept (e.g., *Booking / eTraveli* case, *Amazon / iRobot* case).

Guillaume Loriot

Deputy Director General, DG COMP, Brussels

The notion of ecosystems from an EU perspective

- At the moment, the notion of ecosystems is not perceived as a competition tool but rather as a market reality, particularly in digital markets, which is taken into account by competition authorities.
- This notion refers to interconnections and complementarities in some markets, that justify a holistic approach to the assessment (e.g., *Google Android* case).
- The interconnections of markets require competition authorities to take a multi-directional examination to assess the overall strategy of a company and the likely effects of a merger.
- There are not necessarily distinct theories of harm relating to ecosystems.
- This concept has gained increased prominence because of the trend towards consolidation in digital markets. Moreover, the Commission has taken what it learned from previous antitrust investigations (Google Android, *Google Shopping* cases), which

underscored the impact of very close interconnections between services and products, and their impact on the markets.

- In EU practice, this notion is often seen as recent, whereas it was previously used in several decisions to look at the potential impact of mergers (e.g., the cases of *Meta / Kustomer, Amazon / MGM, Microsoft / Activision Blizzard, and Google / Photomath*).
- The *Booking / eTraveli* case is important because:
  - It is the Commission's first merger prohibition decision based on concerns relating to a digital ecosystem.
  - It shows the links between the various services that are offered on that type of platform.
  - It is not about specific conduct that Booking would have adopted but about the fact that, by acquiring eTraveli (which is a leader in the OTA market), it would strengthen its dominant position by acquiring traffic.
- Issues that are raised in the context of merger control for non-horizontal mergers do not always concern vertical foreclosure cases. Sometimes, the concerns are more horizontal in nature, for example, restriction of potential competition (e.g., the *Adobe / Figma* case).

Innovation effects and EU merger control

- Over the last 10 years, it has been accepted and underlined that competitive markets promote innovation. This latter is an important driver of growth and employment and thus brings benefits to society.
- EU merger control rules underscore the importance of innovation as they assess the competitive impact of mergers based on both price and non-price considerations.
- Innovation does not only occur in tech markets but also to pharma or agrochemicals markets (e.g., *Novozymes / Chr. Hansen* bioscience case). Innovation competition can also be a driver of greater sustainability in traditional industries.
- Some nascent markets are based on novel technologies and are disrupting the established *modus operandi*, including non-horizontal mergers. Here, the role of competition authorities is to preserve the innovation race and ensure that these markets remain contestable in the future (e.g., *Illumina / Grail, NVIDIA / ARM* cases).

The approach of the Commission and the EU jurisdictions

- The standard of proof is the same for all merger cases and irrespective of the complexity of the theory of harm (*CK Telecoms* judgment).
- Even though it is not always easy, especially in innovation cases, this confirmation buttresses the Commission's ability to be bold in formulating theories of harm when necessary, in the face of novel market realities and dynamic markets.
- Competition authorities do not invent theories of harm according to a top-down approach. They only look at the facts and the internal documents — without speculating — and sometimes, they are confronted with new issues (e.g., *Booking / eTraveli, Illumina / Grail cases*).

Joel Bamford

Executive Director of Mergers, UK Competition and Markets Authority, London

The UK perspective on ecosystems

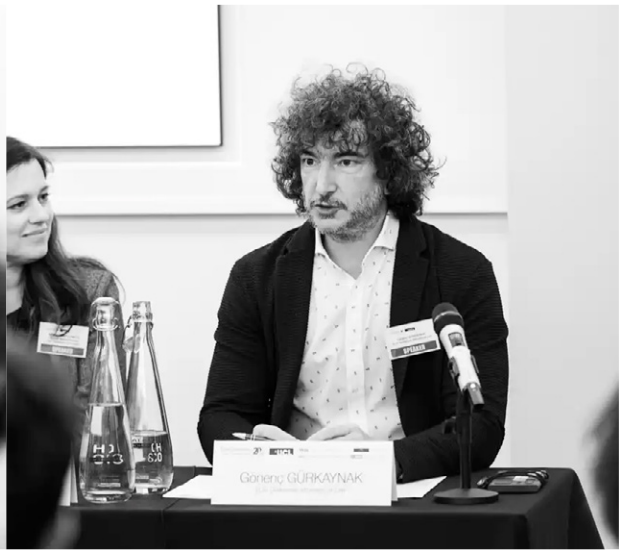
- Over the last year, the CMA has frequently considered ecosystems, which is not a completely new notion.
- Generally, it is about following the business strategy undertaken by the company to understand how it thinks about what it is doing and what the merger will do for it.
- The *Booking / eTraveli* case is a good example of a combination in some markets. It is not similarly apprehended and resolved by the CMA and the Commission because UK customers' behaviours were different.
- The theory of ecosystems does not always lead to a concern, and it is necessary to follow the evidence (e.g., *Booking / eTraveli, Amazon / iRobot* cases).

Innovation effects and UK merger control

- Innovation effects are central to analysing horizontal mergers.
- When observing companies, competition authorities apprehend innovation from an outside perspective to understand how they are innovating, what their next steps will be, and how their competitors respond to this innovation. That competitive response is a full part of merger control.
- Consequently, in particular cases, thinking about the interpretation of documents could be key to understanding companies' strategies over time (e.g., *Adobe / Figma* case).
- In accordance with the 2021 Merger Assessment Guidelines, some cases reflect the companies' logic in thinking about and putting forward various innovations in dynamic competition (*Illumina / PacBio, Sabre / Farelogix* cases).
- Uncertainty about end results is less important than the competition driving product development.
- The CMA takes into account the loss of dynamic competition within its analysis (*Meta / Giphy* case) to identify a theory of harm around dynamic competition between products (*Adobe / Figma* case).

The interplay between the CMA and the CAT

- It is vitally important that the CMA faces robust and effective judicial scrutiny of all its decisions.
- The Competition Appeal Tribunal (CAT) has an important role to play in terms of evidence (e.g., *Cérélia* judgement).



PANEL 1

EXPANDING THE SCOPE OF MERGER CONTROL TO DIGITAL MARKETS

Ioannis LIANOS (Chair of Global Competition Law and Public Policy, Member, University College London, UK Competition Appeal Tribunal) moderated the panel.

Gönenç Gürkaynak

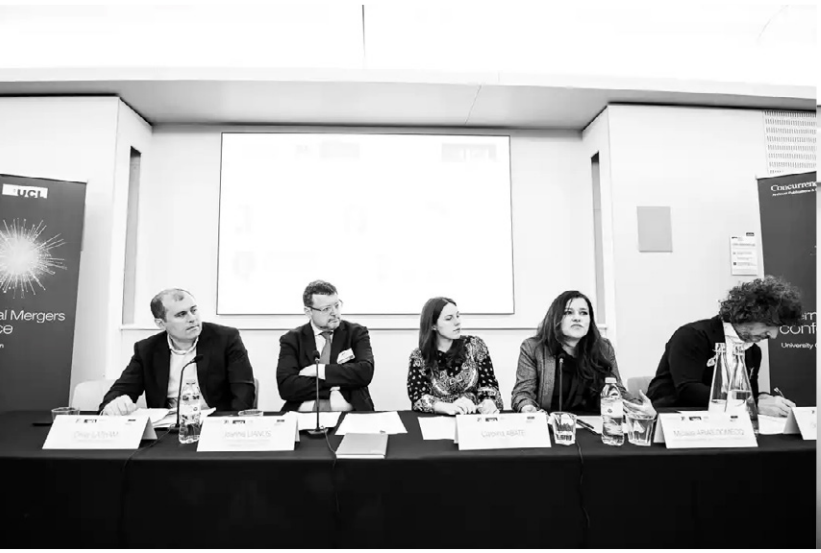
Founding Partner, ELIG Gürkaynak Attorneys-at-Law, Istanbul

The use of general economic theory by the antitrust agencies

- There is a need for clear criteria and transparency in innovation-related merger cases, especially regarding the shifting burden of proof.
- Innovation theories of harm often carry implicit presumptions, particularly in digital markets, which courts may avoid explicitly naming.
- Innovation is elusive, challenging to protect and articulate, yet vital for economic growth and welfare maximisation.
- Innovation's importance for long-term economic growth surpasses allocative efficiencies.
- Speculation is inherent in innovation harm theories, complicating merger control analysis and requiring transparency about standards of proof for predictability.
- Companies often lack comprehensive market data, making it hard to address agency concerns, especially in digital markets with novel theories of harm.
- Authorities should conduct detailed, market-specific analyses considering innovation incentives and capacities, using proxies where possible.
- Agencies sometimes rely on general economic theory and unspoken presumptions, shifting the burden of proof without clear communication.
- New horizontal merger guidelines in the US make it difficult for parties to meet proof standards, often due to the handling of proof standards rather than the transaction's competitive risk.

Impact of AI on merger control issues

- Discussions often revolve around data set synergies, increased analytical capabilities, and their effects on virtual control or foreclosure of access to essential data sets or algorithms.
- In cases where AI capabilities enable exclusionary conduct or market abuse, a deeper dive by antitrust agencies is warranted.
- The analysis of AI-related mergers is challenging due to the dynamic nature of digital markets and the potential for abuse of dominant positions.
- There's a growing trend of «acqui-hiring» in the UK, where acquisitions primarily focus on acquiring talent rather than assets, leading to concerns about concentration and control in the AI sphere.



- This trend may prompt other agencies to scrutinise such acquisitions more closely, as seen in the recent investigation launched by the CMA into Microsoft's acquisition of certain employees of Inflection AI.

Issues related to the integration of the US Merger Guidelines approach in the EU practice

- European guidelines on presumptions in merger analysis are critiqued for being too quick to assume anti-competitive effects.
- Partial integration may be preferred by parties due to regulatory ease, but it risks overlooking competitive concerns and efficiency gains.
- The U.S. and Canada are adopting guidelines with rebuttable presumptions of illegality, lowering thresholds for anti-competitive presumptions.
- Mergers exceeding 30% market share may be presumed anti-competitive, with the burden of proof on the merging parties.
- Concerns include killer acquisitions, leveraging, and the purpose of guidelines in providing legal certainty versus wielding authority.

Role of market definition in merger control

- Ongoing debate on relevant market definition exists on both sides of the Atlantic.
- Some view relevant market definition as outdated, while others stress its importance.
- Agencies may feel constrained by principles, making it difficult to articulate problems.
- The analogy of a referee unable to define fouls but recognizing them illustrates the challenge.
- Lack of clarity in market definition poses challenges for engaging with the market effectively.

Carolina Abate

Competition Expert, OECD, Paris

New theories of harm from the OECD perspective

- No entirely new theories are applied, particularly in big tech cases.
- Theories are adapted to reflect a better understanding of market realities in big tech.
- Theories now better internalise elements related to innovation and ecosystem dynamics.
- Classic input foreclosure theories remain, but the type of input has evolved to include virtual inputs such as APIs, operating systems, and data.

Data, a key point for theories of harm in digital mergers

- Data is a key point for theories of harm in digital mergers.
- Recently, focus has shifted to risks from combining data sets post-merger, highlighting the overall advantage and value derived from the combined data.
- Even ubiquitous, non-rivalrous data can create competition concerns when combined with existing data, potentially entrenching the acquirer's position.
- The impact of combined data sets can extend to related markets and entirely new markets, making it imperative to look beyond the immediate market for the transaction.
- Traditional categorizations of horizontal, vertical, and conglomerate effects are blurred in data-related cases, complicating the analysis.
- The interplay between competition enforcement and privacy enforcement is increasingly relevant, as data concentration by few platforms impacts market power and privacy considerations.

Issues related to AI

- New technologies like AI pose challenges for competition authorities.
- Debate exists on whether lack of early intervention in these markets would lead to risks of market tipping, amongst others
- Assessing mergers in innovative markets might require more complex theories while aligning with legal standards.
- Evaluation of current legal frameworks is needed to address emerging market complexities.
- Ex-post evaluations suggest room for improvement in adapting theories to market realities.
- Legal reform may be considered in the future, pending further analysis of past cases.

Parallels between sustainability and privacy considerations

- Privacy is increasingly relevant in competition within big tech markets.
- Competition may revolve around privacy as a quality element.
- Theories of harm are evolving to include privacy degradation.
- Cooperation between privacy regulators and competition authorities is complex but feasible.
- Privacy regulators generally view privacy as a human right with less flexibility.
- Synergies and tensions exist between privacy and competition law, especially in data-intensive mergers.
- Authorities are beginning to address these interplays but are still in the early stages.

Oliver Latham

Vice President, Charles River Associates, London

Assessing whether an ecosystem merger raises concerns

- The easier question is whether there is an ecosystem in the first place. In Amazon/iRobot term “smarthome ecosystem” was widely used, but the economic features weren’t there.
- Unlike smartphones, there was no central hub product committing users to a set of complementary devices. There was no strong complementarity between products, and users didn’t desire interconnected appliances.
- The harder question is assessing whether adding an extra component to an existing ecosystem is beneficial or, as the Commission found in Booking/eTraveli, detrimental.
- The trade-off involves short-term benefits versus potential dynamic harm, such as raising barriers to entry for competitors.
- Both benefits and harms stem from the same mechanism of adding value by connecting complements to the main platform.
- A case-specific approach is necessary, considering factors like strong interactive network effects and the sharing of efficiency gains with counterparties.
- A potential limiting principle should be whether the efficiency generated by the transaction is extracted by the platform or shared with counterparties.

Relevance of analogies from the last wave of innovation for thinking about new innovation in AI

- Care is needed when applying experiences from the Web 2.0 era to emerging technologies like AI. Past concerns stemmed from factors like zero prices and marginal costs, network effects, and data feedback loops that may not apply.

- Unlike consumer software markets, AI products often have positive prices due to high computational requirements and significant marginal costs.
- AI markets allow for a price-quality trade-off, with smaller, specialised models competing against larger, higher-quality and more costly ones.
- Data feedback loops in AI markets are less pronounced compared to past markets like search, where click and query data was the predominant source of data.
- All this implies AI markets are likely to be less prone to winner-takes-all outcomes, impacting how merger control should be approached. In particular, there may be more time to assess competition dynamics, reducing the need for preemptive measures.

AI partnerships

- AI partnerships are often seen as a regulatory workaround, but need to evaluate other economic explanations for their existence.
- The economic literature (e.g. the work of Florian Ederer) shows how minority investments across a supply chain can internalise knowledge spillovers and boost innovation.
- Collaboration between firms with different expertise can enhance efficiency through shared learning.
- Also understandable why compute providers could be attractive investors vs. purely financial players: a compute provider can provide compute at marginal cost.
- Incentive effects of partnerships and investments differ from full mergers and this needs to be considered carefully when analysing theories of harm.

Micaela Arias Domecq

Special Advisor, Spanish National Markets and Competition Commission, Madrid

Impact of innovation on digital mergers

- In Spain, in digital mergers a their impact on innovation is systematically analized, with a focus on both quantitative and qualitative evidence.
- Market share thresholds, in addition to turnover thresholds, determine which mergers are analysed, leading to a high percentage of digital mergers being assessed.
- The importance of innovation in competition varies across different markets, as seen in cases like wedding planning platforms versus cybersecurity.
- Assessing the impact on innovation in digital mergers is challenging due to their dynamic nature and uncertainty.
- The burden of proof remains the same as in any other merger, requiring robust and coherent evidence.
- Methods used in practice include analysing R&D intensity, patents, human resource allocation to innovation, internal documents, market tests, and sector reports.
- International cooperation is increasing to ensure consistent and thorough analysis of digital mergers on a global scale.

Sustainability in merger control

- Sustainability can factor into merger assessments if it impacts competition.
- Consumer preferences for sustainability are increasing.
- Authorities lack a mandate to intervene solely for environmental reasons.
- Intervening may be justified if a merger harms competition in sustainability.
- Efficiency gains related to sustainability can be considered but must align with existing legal frameworks.
- The burden of proof for claiming merger-specific efficiencies lies with the parties involved.
- Competition authorities may not be best suited to address purely environmental concerns that do not affect competition within mergers.

PANEL 2

REMEDIES IN EU, UK AND US TRANSACTIONS

Ioannis KOKKORIS (Professor, Queen Mary University, London) moderated the discussion.

Davina Garrod

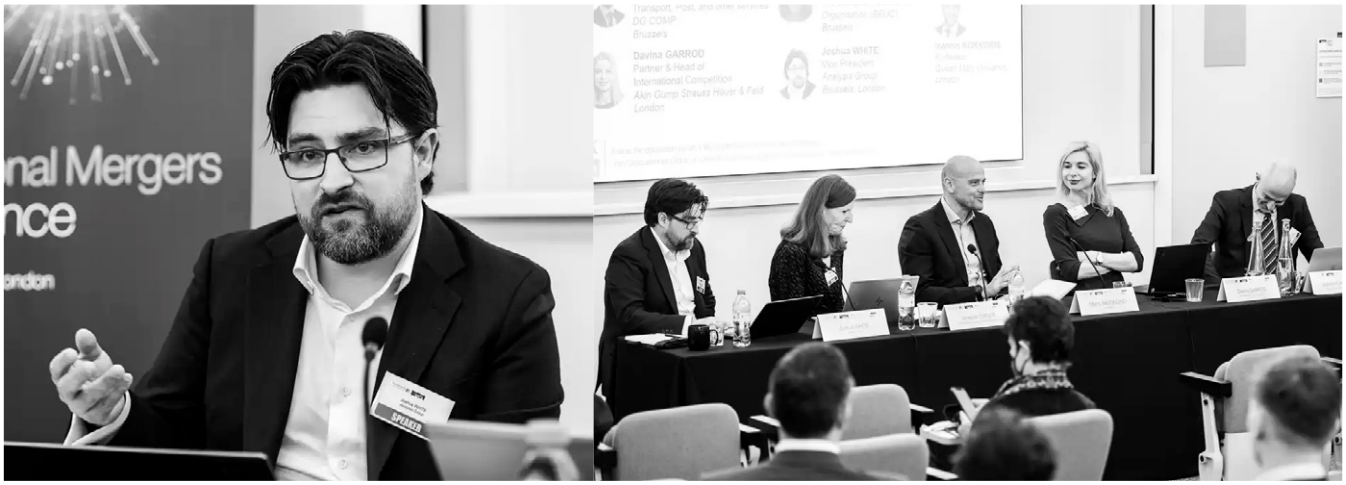
Partner & Head of International Competition, Akin Gump, London

Varying appetites for behavioural remedies

- Jurisdictions vary in their openness to behavioural remedies in merger cases.
- Authorities like the European Commission, China's SAMR, and the French Competition Authority are more receptive to behavioural remedies in the right cases.
- The US agencies, the Australian agency (ACCC), and the German Bundeskartellamt are more sceptical and distrustful of behavioural remedies.
- Some cases, like Brookfield/Origin in Australia, have involved agency acceptance of behavioural remedies in highly regulated industries like energy, where the existing sectoral regulation does not cover some of the more nuanced forms of discrimination.
- Certain sectors seem to be more conducive to behavioural remedies, such as where interoperability or access concerns may arise in the tech platform context, as well as in highly regulated sectors such as energy, water, and telecommunications.
- That said, more recently the EC has taken an increasingly tough line in one highly regulated sector – aviation – where generous slot divestments and other structural remedies have become the norm.

Convergence and divergence in the choice of remedy

- Certain types of non-horizontal transactions can be good candidates for a behavioural remedy at EU level. .
- Clients may resist divestitures, necessitating a focus on behavioural solutions, at least in the first instance.
- That said, when a client is acquiring a nascent competitor in the technology sector, the CMA has strongly resisted behavioural remedies for various reasons, including lack of effectiveness, and the monitoring and enforcement burden.
- The EC's non-structural remedies in *Microsoft/Activision* appear to be a good example of how behavioural remedies can be the best choice for consumers in appropriate cases, in terms of helping drive an extremely nascent market (cloud gaming) to greater consumer take-up.
- Jurisdictions vary in their approach and risk tolerance towards different types of remedies, requiring tailored strategies.
- Remedies negotiations tend to be iterative, involving multiple rounds of incrementally improved remedies (in response to market-tests).
- Coordination with different regulators tends to involve constant adjustments to remedy packages.
- There is a clear need for standardised effectiveness and monitoring criteria among competition authorities
- A holistic and coordinated international approach to remedies would improve efficiency.
- Third parties can heavily influence regulators as part of the market-testing of remedies, particularly those regulators with very high standards for accepting remedies.
- Some authorities reduce monitoring burdens by working closely with monitoring trustees, while others can expend significant resources on it.
- Greater global alignment and trust among agencies are needed for effective remedy implementation.



Joshua White

Vice President, Analysis Group, Brussels/London

Issues in assessing choice of remedies in complex transactions

- A key consideration in merger review is ensuring that any anti-competitive impacts are dealt with while avoiding prohibiting potentially pro-competitive effects.
- This is particularly important in vertical transactions where there are a number of pro-competitive impacts (e.g., removal of double marginalization) that can arise from deals.
- For horizontal transactions, structural remedies are the starting point. These tend to be clearer and easier to specify and implement.
- However, in vertical transactions, structural remedies risk preventing pro-competitive effects and therefore behavioural remedies may be preferable. Structuring these can, however, be more complicated.
- Behavioural remedies can lead to pro-competitive outcomes by facilitating investment and open access to technologies.
- Prohibiting behavioural remedies could lead to blocking more transactions, and losing efficiencies from potentially pro-competitive transactions.
- Behavioural and structural remedies often complement each other rather than being mutually exclusive.
- In some jurisdictions, behavioral remedies can be adjusted over time if found ineffective, as seen in Ticketmaster Live Nation case.
- Remedies should be rooted in industry economics and structure.
- Quasi-structural remedies may be more attractive to regulators.
- Designing and enforcing vertical remedies can involve considering specification risks, such as information asymmetry and companies finding loopholes.
- Remedies that establish an ongoing relationship between regulators and companies may be more complex to monitor and enforce.
- Existing regulation can facilitate monitoring, with existing sectoral regulators playing a role, while lack of a market regulator can increase the monitoring burden on authorities.
- In the Vodafone case in South Africa, the competition authority is arguing that accepting behavioural remedies would amount to as quasi-market regulation.

Use of behavioural insights in remedy design

- Behavioural testing and consumer insight research are well-established fields, with companies already possessing valuable data.
- Collaboration and targeted surveys can expedite the design and implementation of effective remedies.
- The focus is on providing evidence that remedies will be effective, monitorable, enforceable, and not overly burdensome for regulatory authorities.

Authorities' approach on the choice and implementation of remedies

- International coordination is crucial, as different authorities prioritise different concerns.
- Some authorities may require extensive divestitures to eliminate risks, while others focus on cost and productivity impacts.
- Ongoing conversation is needed to find the optimal path through varying regulatory demands.
- Early awareness of differing evidence and market testing in different jurisdictions is important.
- Companies should gather and process local market information early to anticipate and address potential regulatory concerns.

Marco Ramondino

Deputy Head of Unit, Mergers: Transport, Post, and other services, DG COMP, Brussels

Issues related to behavioural remedies

- Horizontal settings typically warrant full divestiture as the primary option.
- The Commission's guidance favours structural remedies in such cases.
- Behavioural remedies may be considered in non-horizontal, conglomerate cases with discrete issues.
- Broad concerns like bundling products pose challenges for behavioural solutions.
- The *Microsoft/Activision* case is an example of the type of issues that can be addressed with behavioural remedies.
- Behavioural remedies need to be effective and easy to implement and monitor. Moreover, they have to be aligned with market dynamics.
- The foreseeable duration of the competition issue may make it less likely that a behavioural remedy can be accepted.

How to choose the right remedy

- Key questions include identifying competition problems and determining suitable fixes.
- The Commission considers both structural and behavioural solutions.
- Behavioural remedies are a last resort, chosen only if they adequately address concerns.
- Sectoral considerations may narrow down the potential remedies that are available but do not determine what remedies would eventually be acceptable.
- Structural solutions are in any event the preferred option.
- Some sectors may not permit traditional structural remedies due to the nature of industry or of the type of transactions that take place in the sector.
- Lack of production assets to be divested implies that alternative solutions may have to be considered.

Consumer behaviour

- Assessment of consumer behaviour may be part of the evaluation of competition issues and potential remedies.
- Consumer behaviour indicators discovered during investigations may inform remedy assessments.
- Understanding how consumers behave may inform the design of effective remedies.

Importance of convergence in the implementation of remedies

- Convergence is beneficial but challenging to achieve due to the involvement of multiple parties and agencies.
- Early collaboration between parties and agencies is crucial, including sharing submissions and granting waivers for inter-agency communication.
- To achieve converging outcomes agencies must communicate, listen, and consider each other's perspectives despite different legal systems and internal dynamics.
- Convergence should not be the sole objective; the priority is identifying and addressing the right problems with appropriate solutions.
- Many cases have demonstrated successful convergence with shared remedies and trustees.
- Harmonisation of rules and approaches enhances the likelihood of convergence.

Vanessa Turner

Senior Advisor for Competition, The European Consumer Organisation (BEUC), Brussels

Importance of the effectiveness of a remedy

- Effectiveness is the primary concern for remedies and must be assessed on a case-by-case basis.
- Theory of harm guides assessment of remedy effectiveness.
- Three aspects considered for effectiveness: choice between behavioural and structural remedies, specifics of consumer-facing markets, and ensuring ongoing effectiveness.
- Structural remedies are generally preferred due to their permanence and avoidance of long-term monitoring.
- There is uncertainty about the effectiveness of behavioural remedies over time.
- Behavioural remedies may not address unforeseen structural changes resulting from mergers.
- Preference for structural remedies does not mean exclusion of behavioural remedies, as both have their place in regulatory options.
- Ongoing effectiveness of remedies, especially concerning monitoring, is crucial.
- Structural remedies' effectiveness depends on the package and the remedy-taker.
- Uncertainty about remedy effectiveness should warrant caution in clearing transactions to avoid negative market impacts.

Consumer facing markets

- Consumer-facing market behavioural remedies rely on understanding consumer behaviour for effectiveness.
- Case examples, like Booking/eTraveli show the importance of considering consumer behaviour and the *Google Android* antitrust case highlights the importance of ensuring the effects of an remedy are as intended.
- Testing of behavioural remedies based on consumer behaviour is essential.

International consistency of remedy

- Consistent theory of harm and analysis of facts are essential for consistent remedies.
- Achieving absolute international consistency is challenging due to varying local requirements, such as those in South Africa.
- Organisations like ICN and OECD have worked towards aligning merger control but need more focus on remedies.
- *Ex post* or comparative reviews of remedies across jurisdictions could provide valuable insights into what works.
- Parties should avoid telling different things to different regulators to prevent inconsistent approaches.
- Some controlled divergence in approaches across jurisdictions might be beneficial for testing ideas and learning.

KEYNOTE SPEECH

THE INTENSITY OF THE REVIEW OF DIGITAL MERGER OR MERGERS AFFECTING INNOVATION BETWEEN POLICY DISCRETION AND PROTECTION OF THE RULE OF LAW

Deni MANTZARI (Associate Professor - Competition Law and Policy, Co-Director - Centre for Law, Economics and Society, Faculty of Laws, University College London, London) moderated the discussion.

Sir Marcus Smith

President, Competition Appeal Tribunal (CAT), London

Digital markets' specificities

- Digital markets clearly wield significant power, not just economic, but social and psychological. They contributed to the increasing and enormous change of the world in terms of how to interact with one another, both commercially and non commercially.
- First, even though this is not proper to them, these markets are international. Thus, many mergers have to be cleared across regulators the world over whereas each authority can have different views on the same transaction (e.g., Microsoft / Activision).
- This potential for conflicting views and approaches is a danger to efficient and competitive markets because such differences can result in either beneficial mergers not proceeding or in market fragmentation.
- Secondly, these markets are fast moving and largely intangible. That means that disruptors are able to enter the market quickly, but also that they can be bought equally quickly by incumbents. This novel and difficult feature arise 2 problems:
  - Enforcement, particularly if it is *ex ante*, needs to be fast.
  - If regulation is embodied in legislation with excessive granularity or specificity, then it is likely to date. Moreover, if it is out of date, it could become a threat form of discretion and an affront to the rule of law in itself, which puts predictability and certainty of outcome at centre stage.
- Thirdly, these markets' intangibility renders them hard to control as they are both complex and untransparent. The reason for that is that algorithms and software are the product of massive investment and innovation, which is deserving of protection, not just through patents.
- Fourthly, these markets involve the creation of platforms out of which many markets operate. The notion of a two sided market is ubiquitous and reflects the importance of network effects.

Ex ante regulation versus *ex post* regulation

- The first issue is the choice between an *ex ante* and an *ex post* regulation:
  - An *ex ante* merger regime is convenient as it is better to stop the transaction before it happens, than to deal with the fallout after

it has taken place. Similar thinking underlies the digital market controls (e.g., DMCC Bill).

- Conversly, an *ex post* control allows to see the harm that is done, delineate its effects, and specify with precision what has gone wrong, and state how this should be rectified.

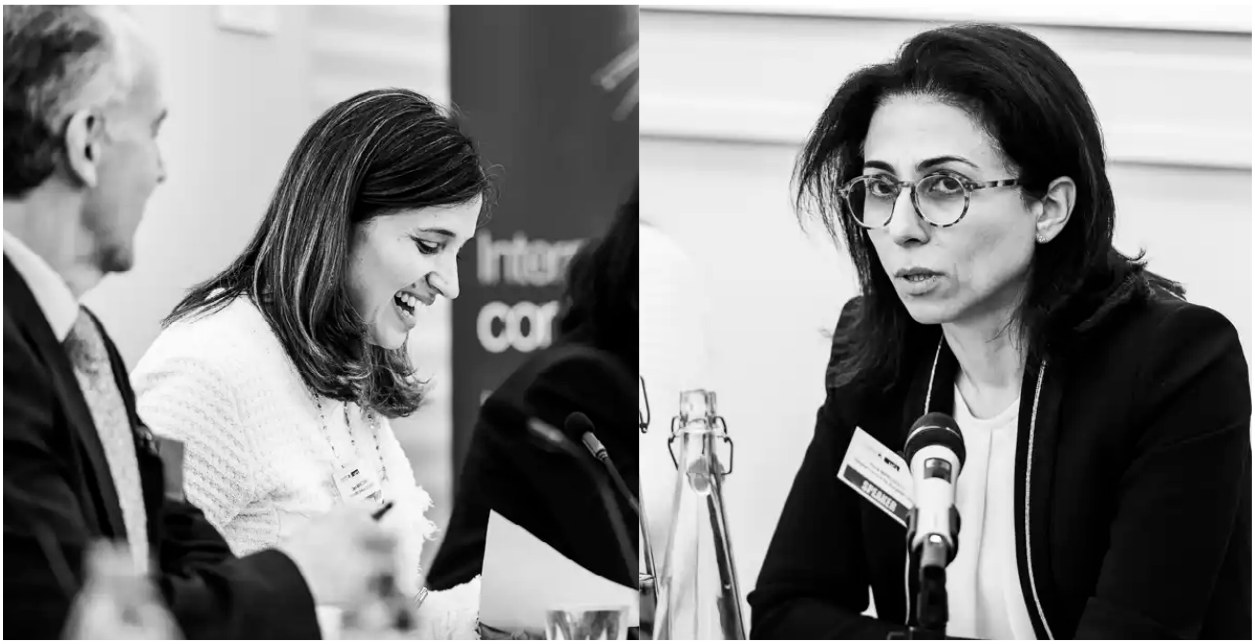
- *Ex ante* control only allows to improve the potential adverse effects, by 3 different ways:
  - It is crucial to monitor outcomes and be appropriately self critical.
  - It is important to identify precisely how the actors in these markets operate, what the competitive constraints are, and where and how market power is exercised.
  - It is necessary to be clear about how the review of administrative action operates in this context (e.g., *Meta / CMA*).
- The consequences of getting *ex ante* regimes wrong in significant markets is really rather dangerous and less easy to detect than in the case of *ex post* regulation and enforcement.

Artificial intelligence: concept, opportunities and issues

- It is both linked with and separated from digital markets.
- The AI definition has to be conceptual and distinguish between technology as a tool and technology that is autonomous. Making this distinction resolves many problems.
- Autonomous AI is the only that deserves the label "AI", as "intelligence" implies autonomy. Thus, defining AI through this way is the key.
- AI immediately raises the issue of liability and leads to wonder whether the machines will really run free.
- Autonomous Artificial Intelligence (AAI) presents new challenges and opportunities, particularly in the form of new corporations or legal persons able to harness the potentiality of AAI.
- AAI is almost certainly going to be providing networked products, and networks trend to the singular.
- Standardisation is imperative, even if there is competition. The nexus between standards and an absence of competition is accepted, even if it is not inevitable. Thus, it could be a good idea to define a new form of corporation, with a proper return for the providers of capital.
- Even though this new form of corporation must ultimately be controlled by human actors, AI could be autonomous to deal with day-to-day control of the undertaking.
- There is a need to apprehend AAI's future implications rather than simply treating the astonishing developments that are being created as simply another technical advantage.

Suggestions for the unpredictable future of merger control regime

- It is necessary to avoid thinking that the future is predictable, and that predictive questions are questions of fact.
- Because of the fluidity of some markets, market share is much less of a guide than in other markets. The CMA dealt with this topic and took into account that these are dynamic future questions, and not static present questions.
- One may wonder whether the law of persons is going to become of increasing significance. As competition is the only thing that protects consumers, if that is absent — as it is often the case on these markets — corporations will create value for shareholders, and not for consumers.
- Consequently, it may be timely to think more about how such values can be embedded in the undertakings that hold market power that we are concerned with.
- Regarding the similarities between AI and the new digital markets regime, and because it is human beings who determine what those structures are, a proactive *ex ante* approach to the internal structure of undertakings should be considered. This approach would be transparent, clearly articulated, and well-thought.
- Allowing AAI to manage pricing and operations to control market power could provide benefits. Nevertheless, human agents might still handle long-term business development and liability issues.



PANEL 3

REGULATORY DEVELOPMENTS IN THE UK, EU AND US: WHAT'S NEW FOR MERGER CONTROL?

Deni MANTZARI (Associate Professor - Competition Law and Policy, Co-Director - Centre for Law, Economics and Society, Faculty of Laws, University College London, London) moderated the discussion.

Regulatory developments in the field of merger control

- In December 2023, the US Department of Justice (DOJ) published a review of the US merger guidelines.
- The EU Commission is seeking to streamline merger reviews.
- In addition, the Commission has revised its Article 102 guidelines, which has had an impact on the field of merger control.
- Recent EU case law developments also emphasise an evolution of merger control:
  - The long-awaited European Court of Justice's judgement in *Towercast* confirmed that national competition authorities (and national courts) can apply abuse of dominance rules to mergers that did not trigger EU and national merger control thresholds, and were not referred to the European Commission under Article 22 of the EU Merger Regulation. However, uncertainties still remain.
  - AG Emiliou proposes to set aside the General Court judgement and annul Commission decisions on referral request.

Anna Marcoulli

Judge, General Court of the European Union, Luxembourg

The *Towercast* judgement (CJEU, 16 March 2023)

- In this case, the CJEU confirmed that a merger that does not meet the national or EU thresholds could be examined *ex post* and be deemed contrary to Article 102 of the TFEU under certain circumstances, thus confirming that its *Continental Can* judgement (21 February 1973) is still applicable even after the introduction of a merger control regime.
- Indeed, it is necessary that :
  - First, the acquisition is made by an undertaking that already holds a dominant position in the market.
  - Second, this acquisition has strengthened the position of the dominant undertaking in such a way that the degree of dominance reached, substantially fetters competition.
- It is interesting to note that, even if this case seems only to refer to horizontal mergers giving rise to anticompetitive concerns, the interpretation of the reference of the Court, in the second condition, to "only undertakings whose behaviour depends on the dominant

undertaking would remain on the market" could suggest a vertical relationship (in fact links between the dominant undertaking and other competitors on the market were there in *Continental Can* and *Towercast*.)

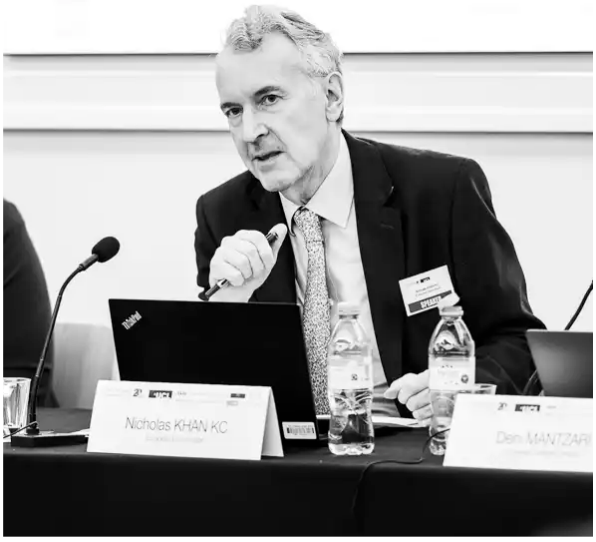
- It is therefore not excluded that these 2 conditions could be further clarified by the Court.
- After this judgement was given, the Belgian Competition Authority opened an investigation of the *Proximus / EDPnet* merger under Article 102 of the TFEU, which was closed by the divestment of EDPnet.
- The French Competition Authority also examined practices under Article 101 of the TFEU in the meat-cutting sector through a series of mergers, but dismissed that case.

The Illumina / Grail case (C-611/22 P pending case)

- The Commission accepted a referral under Article 22 of the EUMR introduced by five Member States to examine the acquisition of Grail by Illumina despite the fact that the transaction did not meet the national thresholds. The General Court confirmed this approach and Illumina and Grail submitted an appeal against this judgement before the Court of Justice, which is still pending.
- Advocate General N. Emiliou recently gave his opinion in this case:
  - He dismisses the interpretation of Article 22 of the EUMR as interpreted by the Commission and endorsed by the General Court. He proposes an alternative approach to the Commission's interpretation of this article by suggesting the possibility of reviewing mergers under Article 102 following the *Towercast* judgement.
  - According to him, such an *ex post* control would not be ineffective, time-consuming, or complex since it could rely on *ex post* merger evidence.
  - He makes a reference to killer acquisitions and says that they could fall under the description of "by object" abuses (cf. *Superleague* judgement).
- The two judgements were delivered amid discussions around the sufficiency of merger thresholds to capture certain problematic mergers from a competition point of view (eg. killer acquisitions).
- It is interesting to note that some Member States have carried out legislative reforms in order to capture such transactions, which are below existing thresholds (Germany, Austria, Italy, Ireland). Regulators indicate that lowering thresholds cannot be a solution since it could provoke appreciable augmentation of administrative workload (lower thresholds catching non-problematic lower value transactions).

The standard of proof in merger control regarding Article 102

- The Court of Justice brought clarification regarding the standard of proof in its *CK Telecoms* judgement. The standard of proof is a test of probability to examine whether a concentration is more likely than not to significantly impede effective competition. In this respect, the Court recognized a prospective analysis.
- However, such *ex ante* control applies to merger control and is therefore not applicable in a case examined under Article 102 TFEU, in which authorities proceed to an *ex post* control, i.e. after the merger has been concluded (it remains to be seen how this standard of control is applied in cases in which the authorities intervene immediately after the merger, e.g., *Proximus / EDPnet case*).



Nicholas Khan

Legal Adviser, European Commission, Legal Service, Brussels

Different merger control trends and the difficulty of choosing one of them

- Some trends go in the direction of a lighter touch.
- Some others go in the direction of putting mergers under greater scrutiny and seek to introduce wider criteria for doing so.
- It is quite difficult to know whether it is wise to go in one direction or another.
- To solve the insoluble problem adverted to by Sir Marcus Smith, the Commission has a group within DG Comp that is in charge of retrospectively studying the outcome of intervention and non-intervention in mergers, notably regarding the commitments adopted.
- Of course, studying this question also has implications for this new stream, potentially looking at mergers of Article 102.

The review of the simplified procedure

- In 2021 — during the COVID period — the Commission registered more than 400 merger notifications, which is unprecedented, even though 75% of them could be done under the simplified procedure.
- Before COVID, the Commission was already thinking about how to simplify the simplified procedure.
- The simplified procedure started around 2000. It shortened the formalities, notably the approval decision offered by the Commission, but did not absolutely guarantee a shortening of the burden on the parties.
- Over time, the Commission became more receptive to what could qualify for the simplified treatment of mergers, expanding the scope in 2013.
- The package that entered into force on 23 September 2023 considerably alleviated the burden on the parties. This is a much more far-reaching reform than earlier iterations of the simplified procedure.
- This revised procedure contains a flexibility clause that encourages people to notify a merger without the usual preliminaries of pre-notification - a "super-simplified" procedure — in the words of the Commission.
- Even though it is in its early days of application, it seems to be working without major problems and should free up Commission resources to deal with tricky cases that seem to come along in greater numbers.

The increasing scrutiny in merger control

- Article 14 of the DMA provides that gatekeepers have to inform the Commission of any merger they plan to enter into. This provision emphasises that certain categories of mergers are likely to be of particular interest to the Commission.
- The present position, after the *Towercast* judgement and before the Illumina / Grail judgement reflect an uncertain juncture. Until recently, Article 22 existed in uncontroversial obscurity. The Commission had a practice of discouraging referrals under this provision.
- This trend changed in 2020 with the Commissioner Vestager's speech who announced that henceforth Article 22 would be used to capture mergers that did not necessarily have to be notified in Member States, and the Commission would be open to accepting referrals from them, even if they did not have jurisdiction over the merger under their own merger control (e.g., *Illumina / Grail, Qualcomm / Autotalks*).
- Article 22 started applying in this way, but if the Commission's interpretation is not upheld, then it leads to uncharted territory. Enforcers have already proved they are prepared to pick up the alternative stream of Article 102.
- If Member States were to lower their thresholds across the board, they would be engulfed with many more notifications, most of which would be of no interest.
- If they adjust their merger control regimes on a subjective basis, they will shift the uncertainty of that primary question under Article 22.

- This tendency is also reflected in the US draft guidelines, which move towards an EU-style system of transparency prior to notifications.
- Regarding the French Competition Authority's merger control in the meat rendering sector (Article 101), there is no conceptual or institutional problem with using Article 101 rather than Article 102.

Reflexions about efficiencies

- It is quite incorrect to say that the Commission has been unreceptive to efficiencies.
- In the *UPS / TNT* case, the damages action was essentially based on the net present value of efficiencies that would have been gained if the merger had been authorised.
- In the less familiar environment of damages action judgement, there is a lot of discussion in the General Court's judgment about efficiencies by reference to the Commission's guidelines, which provides some guidance on the approach to efficiencies.

The opportunity to change merger rules

- This question is not under discussion in Brussels.
- There would not be much utility in expanding the notion of a concentration for the purpose of the merger regulation because it would expand the degree of uncertainty rather than resolve the uncertainty that is observed in other areas.
- With the DMA, the Commission has gone for very specific *ex ante* regulation.
- With the DMA, the Commission may use this information received to inform member states about it with a view to a referral request under Article 22. Now, the utility of that whole mechanism will depend quite substantially on the outcome of the Illumina jurisdiction case.

Tina Zhuo

Partner, Slaughter and May, London

Recent developments in the UK

- In the UK, as in Europe, it is becoming harder to be able to predict when the Competition and Markets Authority (CMA) will try to claim jurisdiction over a transaction.
- This is due to the flexible nature of one of the UK merger control thresholds, the "share of supply" test. «Share of supply" does not equate to market share – the CMA has considerable discretion to identify a specific category of goods or services for the purposes of applying the share of supply test, and has applied the concept very flexibly in order to assert jurisdiction over deals it wants to review.
- The Digital Markets, Competition, and Consumers Bill (DMCC Bill), [which at the time of speaking was still in the final stages of the legislative process], also brings new developments:
  - The target UK turnover threshold will be increased to £100 million.
  - A new threshold will be introduced alongside the existing thresholds.
  - This new threshold will make it easier for the CMA to assert jurisdiction over vertical, conglomerate and potential competition cases.
  - The Bill also provides a new safe harbour for small mergers.
- There will probably also be developments around the concept of « material influence », notably in the context of AI partnerships.

Post-Brexit transition

- Post-Brexit we are seeing some UK-EU divergence.
- The first category of divergent cases is those in which the apparent divergence can be explained by different local fact patterns. Here, the divergence was not unexpected, given the market dynamics might be different in each jurisdiction.
- The second category concerns those cases where the CMA and the European Commission pursued different theories of harm, even when analysing effectively the same global market dynamics (e.g., *S&P / IHS Markit* case).

- The third category concerns cases in which the authorities looked at the same theory of harm but nevertheless came to different conclusions (e.g., *Meta / Kustomer, Broadcom / VMware, Amazon / iRobot, Booking / eTraveli* cases).
- A fourth category of divergent cases can be explained by the different positions of the CMA and European Commission regarding remedies. Whereas the CMA has a strong preference for structural remedies, the Commission has shown more tolerance for behavioural remedies.
- For practitioners, this divergence means more complexity at each stage of the merger control process. Several elements can vary and have to be taken into account when developing a strategy for global transactions. Above all, this strategy has to be revisited when the different regulators share their points of view as the case progresses.
- Moreover, the authorities' merger control timelines differ.

Paul Reeve

Partner, RBB Economics, London

The divergent outcomes in key buckets

- This divergence can be observed in some decisions that look like test cases with a low bar. This is not the ideal for competition authorities.
- Some cases underscore the implicit strengthening of dominance concerns rather than looking at it entirely on its merits as to how much drivers would be affected (e.g., Meta / Giphy, Broadcom / VMware, *Booking / eTraveli, Amazon / iRobot* cases).
- To some extent, competition authorities are competing with each other in terms of their reputation and how they look at cases.

The *Booking / eTraveli* case

- Contrary to what the authorities could say, the fact patterns are not so different from one country to another.
- In this case, the bar is incredibly low, and any increase in Booking's sales would be an issue.
- From an economic point of view, it is somewhat frustrating to observe two competition authorities look at the same theory of harm in two different ways:
  - The CMA opted for a standard approach (ability/incentive/effect), which is well established because it gives a lot of rigour to the economic thinking that is brought to it and to the evidence that you apply to it.
  - The Commission adopted a different approach based on ecosystems, perhaps due to the different ways the organisations have run (e.g. the greater role for economists at the CMA).
- The comparison of this case with the Farfetch joint-venture case is interesting; both raise similar issues of two-sided markets and network effect, and the question of whether Farfetch can become an unavoidable trading partner was relevant. In the Farfetch case, network effects are, in reality, a lot weaker because consumers and brands multi-home in this market to a large extent. Moreover, the brands have a good direct-to-market reach, so they are not reliant on these platforms. This case was cleared, which shows that the Commission is not always going to raise ecosystem concerns for this type of market.

The *ex post* review of merger control

- The CMA's experience with *ex post* review of merger control shows that this review was difficult, notably regarding the counterfactual (e.g. Facebook / Instagram case, which is widely regarded as a bad decision, but the review found that it was highly uncertain how Instagram would have developed if Facebook had not acquired it).
- It's good that these elements are being looked at and learning is happening.

PANEL 4

HOT TOPICS ROUNDTABLE: WHAT CHALLENGES LIE AHEAD?

Okeoghene ODUDU (Professor, University of Cambridge, Cambridge) moderated the discussion.

Jenine Hulsmann

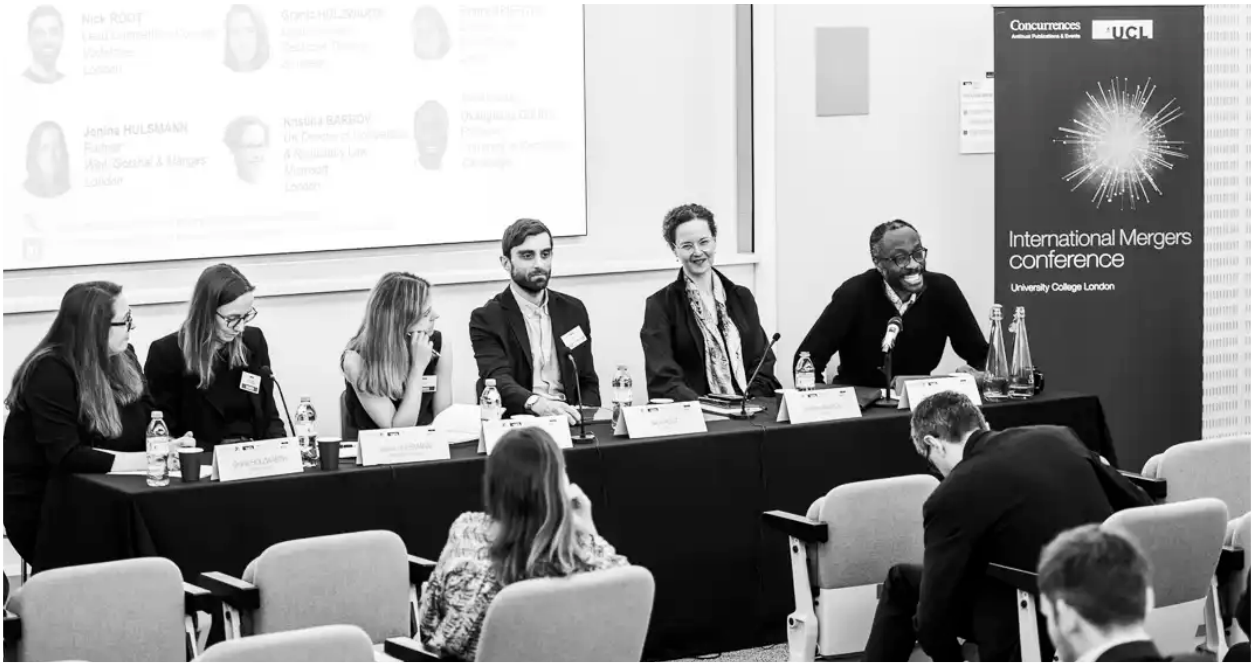
Partner, Weil, Gotshal & Manges, London

Hot topics in relation to procedural issues

- Procedural issues are a hot topic in the way they are uncertain. The UK regime is characterised by a significant amount of uncertainty, even in terms of questions about what constitutes a relevant merger situation (e.g., *Microsoft / Mistral AI* case before the CMA).
- The *Microsoft / Mistral AI* case is quite clear, but it does raise a huge amount of uncertainty as to what will constitute material influence going forward.
  - This interesting CMA's decision mentioned the concept of economic dependence and thus raises 2 questions:
  - At what point does a contract that is not a shareholding give rise to economic dependence and become a relevant merger situation?
  - How can this decision be reconciled with the Competition Appeal Tribunal (CAT)'s decision *Eurotunnel*, in which the jurisdiction made an *obiter dictum* saying that economic dependence is not material influence?
- A final question would be why the CMA made this decision, as normally, these decisions of "non-qualification" are very short; contrary to this decision, it is much longer and gives clear guidance as to what constitutes material influence.
- When we consider expanding the merger control regime, it is important to remember that the EU merger control regime is based on a prohibition on mergers unless cleared, even though most mergers are pro-competitive.
- Even though this approach has worked in the EU, it is essential to wonder if every single merger needs to be reviewed and if it is crucial to fill every gap. Or should we use other competition tools where merger control rules do not apply.

Uncertainties, linkages between markets, and theories of harm

- The first uncertainty relates to the notion of ecosystem. Technology companies are present in a number of different markets, but that does not create something that is bigger than the sum of the parts, and that is what a merger theory of ham needs to do.
- Ecosystems are interesting if they are examined in the context of market linkages.
- These linkages are of different kinds:
  - Bundles that are offered to consumers (e.g., in telecoms) can be looked at in the context of conglomerate theories of harm.
  - Interoperability is one of these linkages, and it should be looked at as potentially positive and not necessarily as the basis for a theory of harm.
- Understanding these linkages is important, but it is not in and not of itself a theory of harm. The analysis has to dig much deeper.



Specificities of artificial intelligence markets

- For fundamental reasons, markets where AI is deployed cannot be compared to previous technology markets.
- First, AI foundation models have a very significant marginal cost, even if the service is offered free-of-charge.
- Those marginal costs also mean that people are shopping around and looking at all different models, and there is a really broad range of them. In the last 6 months, more than one hundred thousand open-source models were released. That represents a 50% increase in the number of open-source models.
- When trying to apply nascent theories of harm to AI markets, it is crucial to take into account this incredible dynamism.

The entrenchment of dominance in merger control

- That entrenchment is the basis of the Commission's decision in the *Booking / eTraveli* case. Here, the theory of harm is that Booking was looking to try and protect its existing dominant position as a hotel OTA by acquiring a company that it was already in a commercial relationship with and that did travel bookings. The idea is that people tend to book their flights first, which would somehow allow Booking to entrench its dominant position in hotels.
- This entrenchment is also mentioned in the new US guidelines and it is a topic treated by the US doctrine. Thus, there is going to be a lot coming out of the US around entrenchment theory.
- Raising barriers to entry has also been tackled in the UK (e.g., *Meta / Kustomer*).
- This is a hot and uncertain debate around what constitutes a substantial or a significant impediment to competition (e.g., in the Booking case, the increment in market share was tiny).

Challenges raised by efficiencies

- One of the big challenges is not just showing that merger efficiencies are possible. Quantifying them is also a big step.
- The other big issue for parties is that they have to make commitments in relation to efficiencies. Thus, they have to integrate this element into their business plan to create cost efficiencies.
- In the UK, the CMA is sceptical of contracts because they are concluded between private parties and can be changed.
- Regarding the different regimes that are currently applied, depending on the nature of the company to whom it can give those commitments and whether they will be taken into account, there is also the issue of whether a company can negotiate remedies with one regulator, will those be taken into account by another?

Effective strategies for addressing theories of harm in mergers

- Many theories of harm require speculative predictions, acknowledging the uncertainty of future outcomes. Some potential issues may never materialise, and this uncertainty must be honestly considered.
- The Commission addressed concerns in the *Microsoft / Activision* case with a smart and adapted remedy.
- Remedies are complex and must be developed in parallel with the Commission's investigations.
- Effective remedies require early and ongoing discussions as the theory of harm is refined.
- In this respect, early discussions, even before Phase II, are crucial to align on potential harms and commitments to mitigate them. For instance, the CMA's revised Phase II process facilitates earlier and more productive discussions.

Grania Holzwarth

Legal Counsel, Deutsche Telekom, Brussels

Uncertainties related to merger control

- The Article 22 solution is full of uncertainty and thus constitutes an ill-suited solution to find a way to look into these mergers.
- The Advocate General's opinion underscores the existence of a huge legal uncertainty and precises that it is at the discretion of the Commission to determine which cases it wants to take or not.
- Moreover, it is not really in the spirit of the EU merger regulation (EUMR), in the sense that it does not follow a subsidiary proportionality, and also not really a one-stop shop (cf. Meta / Kustomer case, which led to fragmentation over the EU market).
- The use of Article 102 in *Continental Can* and *Towercast* cases is neither a good solution because it is limited to dominance cases. As it is an *ex post* assessment, it is difficult to implement remedies.
- A clear solution with a new threshold could lie in a reform merger regulation, which could then also be matched with the DMA reporting obligations. A review should be conducted, given that this regulation has been around for 20 years.

Efficiencies and remedies

- Efficiencies are a crucial part that needs to be reformed in the substantial analysis of competition.
- Harm, Efficiencies and remedies need to have the same analytical framework. It cannot be that for the standard of proof for the harm, it is more likely than not, while For efficiencies, the standard of proof is almost certainty. They need to be balanced.
- Efficiencies and remedies also have to be tackled in the same timeframe. In this respect, it is necessary to consider the long-term issues and long-term effects of a merger that will also affect European competitiveness overall.
- Remedies should be proportionate and effective in the sense that they should meet the harm of the transaction.
- Regarding this statement, the *Microsoft / Activision* case is quite concerning, as the goal of a merger should not be to make the market more competitive than before.
- In tech markets, there are very different outcomes on investment on the remedies (e.g., *Orange / MásMóvil* case *versus T-Mobile / Tele2 NL* case).
- Consequently, there needs to be a lot of attention paid to how to put effective remedies that create value in the long term.
- The standard of proof is very different for the parties and for the Commission. It is very important because, often, the party can try and prove the counterfactual, but the Commission just points to potential network sharing that basically destroys all the merger specificity of the efficiencies.
- In digital markets, when looking at vertical mergers, behaviour remedies become much more important than structural remedies.
- Even though it is more difficult to adapt and it requires early discussions, it may also need an exposed fine-tuning and monitoring. In this respect, the DMA seems to go in the right direction.

Kristina Barbov

UK Director of Competition & Regulatory Law, Microsoft, London

Uncertain times in the process

- The degree of uncertainty could also be there because of the new processes that the CMA itself is either revising or thinking about, but that makes things a bit more complex to anticipate.
- This could also be due to the unusual way in which the CMA uses current processes.
- In the UK, the creation of the Digital Markets Unit by the DMCC Bill offers interesting thoughts around new thresholds and mergers, as well as new potential ways in which the rafts will operate.
- The Phase II review by the CMA is a useful process.

Political approach to merger control

- Regulation is probably more political than competition.
- Here, there is an important difference between the UK and Europe, as in the UK, everything has been done to make competition more and merger control, in particular non-political, by putting it into an independent regulator that does not have a lot of political oversight.
- The CMA takes its independence very seriously, and its non-political approach allows it to focus on economic analysis.
- However, as merger control becomes more political, the issues become much more regulatory in nature, and thus, more and more people consider that merger control has to be used to protect democracy.
- Consequently, it leads to wonder whether decisions should be taken by a body that is not subject to political oversight and that is not democratically elected.

AI partnerships

- As these partnerships are not simply joint ventures, it is quite difficult to find a certain degree of certainty to advise companies.
- By advising these partnerships, practitioners are creating the AI sector. Thus, the efficiency that creates is definitely not very specific, as it is about growing an entire economy.
- Early engagement with regulators is essential, especially if potential issues are identified.
- Continuous interaction with regulators helps them understand relationships and technology, enabling them to address problems effectively.

Emma Griffiths

Legal Counsel, Rolls-Royce, London

Uncertainties generated by a proliferation of regimes

- In recent years, as well as merger control, there has been a proliferation of other regimes. That raises the issue of convergence and divergence.
- It is now necessary to manage the balance of merger control and the other regimes that are moving in parallel (e.g., foreign direct investments).
- Foreign investment screenings are a hot topic, especially because, regarding the international geopolitical instability, there is a real focus on economic security (e.g., the Commission's new economic security package, January 2024, UK's reform on the FDI regime announced on last April).
- The latest concept that seems to have come out of this focus on economic security is linked to FDI: outbound investment screening.

- This new outbound investment screening regime is being considered in the US, the UK, and the EU.
- The other big uncertainty topic is how the EU foreign subsidies regime will play out in the M&A world.
- Consequently, these new regimes are a source of uncertainties for practitioners, and if they are just notifying everyone, it is quite difficult to know where the concern will come from.
- Despite new theories of harm in merger control, merger control remains to some extent more predictable. In contrast, practitioners are in an uncomfortable position with some of the other regimes as they cannot easily predict the political approach that will be adopted next (regarding FDI, for instance).

Nick Root

Lead Counsel - Competition, Vodafone, London

Difficulties raised by the FDI regime

- With FDI, the regime's timelines and substance are so different, and it is hard to manage.
- Moreover, practitioners who work in multinationals have to deal with different regimes worldwide.

How to deal with efficiencies

- Merger control rules should not be enforced in a vacuum. For example, in the digital sector, authorities should bear in mind the need for more investment in digital infrastructure.
- Authorities should maintain an open-minded approach to efficiency discussions, giving proper consideration to the parties' explanations as to how the transaction will have positive effects in terms of investment and innovation.
- The efficiency arguments should be given due prominence in the substantive assessment of deals – not left to be assessed very late in the process as a topic of secondary importance.
- When assessing efficiencies, it is crucial to consider long-term benefits. The investment cycle often spans several years, so evaluations should reflect this timeframe.
- Merging parties need to do their part by clearly explaining the efficiency benefits of the transaction and how they are transaction-specific.