Key Takeaways

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Antitrust Law and Policies
From Brussels to Washington, DC: The Atlantic Divide?

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On October 21, 2016, Skadden presented a seminar titled "Antitrust Law and Policies From Brussels to Washington, D.C.: The Atlantic Divide?" in Brussels. Former DG Competition Director General Sir Philip Lowe gave the keynote speech, which was followed by panel discussions titled "Recent Developments in Merger Control Review," "Geoblocking and the Boundaries of Competition Law," and "Brexit — Challenges and Opportunities." Skadden participants included Ingrid Vandenborre (Brussels), Frederic Depoortere (Brussels), James Keyte (New York), Michal Berkner (London) and Tara Reinhart (Washington, D.C.). Panellists included Ludovic Bernardeau (General Court of the EU), Cristina Caffarra (Charles River Associates), Ronan Flanagan (Competition and Markets Authority), Thomas Kramler (DG Competition), Maya Lester QC (Brick Court Chambers), Michele Piergiovanni (European Commission), Patrick Rey (University of Toulouse) and Patrick Schriber (DuPont de Nemours International S.A.).

Frederic Depoortere introduces the merger control panel.

Former DG Competition Director General Sir Philip Lowe's Keynote Address

Sir Philip's keynote address examined the implications of Brexit for both the U.K. and the EU's remaining member states (EU 27). He noted that the negotiating process for the secession of such a large country will divert resources from other EU initiatives, and he explained that the ongoing debate surrounding the U.K.'s negotiating stance centers on the themes of openness and competitiveness versus protectionism and interventionism. He said a framework deal may be reached by the 2019 European Parliament and 2020 U.K. general elections, noting that the agreement likely will provide a timetable for the conclusion of sectoral agreements and define transitional arrangements until such conclusions.

Sir Philip touched on the tone of the pre-referendum debate in the U.K., including the issue of migration control. He also said that the U.K. likely will push for the freest possible access to the European Union's single market, even if it must pay into the EU budget. However, Sir Philip noted that the EU 27 probably will be reluctant to budge on the current rules governing the free movement of workers and single-market access.

Sir Philip speculated on Brexit's possible consequences for EU competition law, including that the EU's "one-stop shop" may become two stops for companies conducting business in both the U.K. and the EU, and that the U.K. might become a less attractive destination jurisdiction for private actions. He discussed how the loss of U.K. influence over EU competition law might lead the EU to focus more on object-based analysis (*i.e.*, undertakings might violate Article 101 if their purpose was anti-competitive, regardless of their effect).

Geoblocking and the Boundaries of Competition Law

Geoblocking impedes trade over the internet by limiting the countries from which purchases can be made, the platforms through which certain products or types of products can be purchased, or the price levels that can apply to purchases. Mr. Kramler noted that European institutions, in pursuance of a single-market objective, have sought since the '60s to end territorial restrictions such as geoblocking. He pointed to what he called a clear "Atlantic divide" regarding vertical restraints, noting the European Court of Justice's (EJC) decision in the *Grundig* case, which stressed the importance of intrabrand competition among the member states. The European Commission's block exemption regulation on vertical agreements seeks to promote market integration. However, the U.S. Supreme Court's decision in *Grundig* put more emphasis on *interbrand* competition concerns.

Mr. Kramler also discussed the European Commission's proposed regulation addressing geoblocking. If adopted by the European Parliament and the Council of the European Union, the regulation will apply to activities outside the scope of competition laws, including to unilateral behaviors by nondominant companies. Most significantly, Article 4 of the proposed regulation prohibits discriminatory general conditions of access to goods and services (offline or online) based on the customer's nationality, place of residence or place of establishment, whereas Article 6 extends the definition of discriminatory behavior to include restrictions on passive sales.

Mr. Rey noted that a ban on geoblocking could prevent companies from adjusting prices for certain customer segments based on demand elasticity, forcing companies to rely instead on aggregate or average demand elasticity, which may negatively impact poorer customers. He went on to say that by increasing intrabrand competition, geoblocking restrictions could curb companies' market power and benefit customers. However, increased intrabrand competition raises the possibility of freeriding (a problem that occurs when those who benefit from resources, goods or services do not pay for them, which results in an under-provision of those goods or services). Limits to intrabrand competition can also negatively affect interbrand competition, Mr. Rey noted. He concluded that it is not economically advisable to foster parallel trading in regulated markets, because doing so can negatively affect governments and businesses whose long-term orientation requires them to invest more in research and development and therefore set higher prices, putting them at a disadvantage to public administrations and companies with more short-term, price-oriented policies.

Patrick Rey speaks on the geoblocking panel.

Brexit — Challenges and Opportunities

Ms. Berkner called the June 2016 referendum result a "revolt" against the establishment and noted the high likelihood that U.K. Prime Minister Theresa May will trigger Article 50 of the Lisbon Treaty in 2017. Ms. Berkner said that, at best, the U.K. and the EU 27 will agree to a negotiations framework by 2019 — after which the real work will begin. She suggested that mutually beneficial business interests may influence sector agreements more heavily than they will the overall framework agreement.

Ms. Lester discussed Brexit's potential impact on European competition law. She noted that if the U.K. does not remain in the European Economic Area, the EC Merger Regulation will no longer be effective in the U.K. and the country's Competition and Markets Authority (CMA) will have to deal with merger notifications, leading to dual London and Brussels filings. She said that, in such a case, the CMA might have to focus on larger mergers or otherwise prioritise. She also considered whether the U.K.'s influence on European competition law will decline if it leaves the EU and the European Competition Network, noting that the U.K. has had a significant influence in the EU on, among other areas, leniency towards cartels, guidelines in cases of abuse of dominance and vertical guidelines on mergers.

Furthermore, Ms. Lester discussed whether Articles 101 and 102 of the Treaty on the Functioning of the European Union will no longer have direct effect in the U.K., leading to the potential for dual investigations in the U.K. and the EC. Brexit could also cause Commission decisions to no longer be legally binding in just the U.K. While Germany and the Netherlands — where Commission decisions will still be binding — may say that they will become more attractive jurisdictions for follow-on litigation, there are significant attractions of the U.K. as a seat of private litigation, and Commission decisions will no doubt still be treated as highly relevant in the English courts — in any event, there are a number of ways in which parties can bring damages actions in the U.K.

Furthermore, although the U.K. courts have been receptive to anchor defendants under the Brussels Regulation, the common law and pre-*Lugano* rules will likely still mean that the relevant parties are joined to an action. Ms. Lester said that the U.K.'s disclosure regime also will likely remain an attraction.

Ludovic Bernardeau speaks during the Brexit discussion.

Mr. Bernardeau discussed how the U.K.'s becoming a "third country" outside of the EU will change the relevance of ECJ jurisprudence relating to Turkey and Switzerland. He noted that the 1963 Ankara agreement between the European Economic Community and Turkey provides for free movement of goods and services and freedom of establishment between the EC and Turkey. However, in the *Demirkan* case, an advocate general of the ECJ successfully argued against extending free movement case law to the Ankara agreement. Mr. Bernardeau noted that, depending on the nature of any agreement or trade deal reached with the EU, the U.K. also may have difficulty relying on the free movement of services in practice. He gave the example demonstrated by the *Fidium Finanz* case, where the free movement of capital was relied on by third-country beneficiaries only within certain limits. In this case, the provision of loans by Swiss banks in Germany was not deemed to constitute free movement of capital.

Recent Developments in Merger Control Review

The panel discussed the European Commission's launch on October 7, 2016, of a public consultation on the functioning of procedural and jurisdictional aspects of EU merger control. The consultation focuses partially on whether current turnover thresholds are sufficient to catch all relevant cases or whether additional criteria should be put in place. Mr. Piergiovanni noted that the debate mainly concerns the information technology sector, in which startup revenues are usually too small to meet the current thresholds, and the biotech industry, in which pipeline products are sometimes not adequately reviewed due to low or absent revenues. Panellists suggested different thresholds that could be implemented, such as a "size of the transaction" test.

Mr. Flanagan provided a U.K. perspective on the issue, indicating that over 60 percent of the cases reviewed by the CMA satisfy the 25 percent "share of supply test" (*i.e.*, the CMA has jurisdiction to investigate a merger whereby the combined enterprise will supply or acquire 25 percent or more of any goods or services in the United Kingdom). Mr. Flanagan gave as examples Facebook's acquisition of Instagram and Google's acquisition of Waze, both of which targets generated no turnover in the U.K. In addition, the CMA imposed remedies in a recent transaction involving the acquisition of an energy derivatives trading software that generated little turnover in the U.K.

Ms. Reinhart observed that the U.S. "size of the transaction" thresholds were never intended as cutoffs; the Federal Trade Commission (FTC) and Department of Justice (DOJ) can review transactions that fall below these thresholds. In a recent transaction involving New York tour bus operators, the Hart-Scott-Rodino Act thresholds had not been met but the parties were still required to commit to certain divestitures. Ms. Reinhart added that 20 percent of "second requests" by the FTC and DOJ for additional information regarding mergers and acquisitions concern below-threshold cases.

Mr. Schriber raised the issue of whether new thresholds in the U.K. would take into account fast-moving high-tech markets, and he asked the broader question of whether competition authorities have the necessary expertise to review these types of cases. Ms. Caffarra referenced the Facebook/Whatsapp transaction as a recent case in which the European Commission analyzed potential data concentration appropriately in terms of effects on the online advertising market (where data is monetized). However, while the EC is seeking to change the thresholds because it worries it has "missed out" on mergers like *Facebook/Instagram*, concerns remain regarding the standard that is to be used to evaluate anticompetitive effects in these cases. There is at present very little understanding of how to evaluate concentration of data as "assets," and there needs to be a lot more thinking on the substantive assessment standard rather than thresholds.

Mr. Depoortere's final question dealt with the European Commission's increased reliance on the merging parties' internal documents, sometimes referred to as Section 5.4 documents, rather than on its market investigations. Mr. Schriber queried whether drafting a full standard merger notification is still useful in complex cases in which the European Commission follows up with a substantial document production request. Mr. Piergiovanni answered that the number of these complex cases is limited and that EU document production requests are usually much smaller in scope than what is required in the United States. Ms. Reinhart added that in the U.S. more than 97 percent of merger cases close after 30 days and that the process is very transparent. In that sense, parties can usually anticipate second requests and prepare for document collection requests in advance.

Closing Remarks

Mr. Keyte's comments focused on international regulatory convergence, which would provide businesses with greater predictability in multijurisdictional reviews. He highlighted areas where progress has been made through forums such as the International Competition Network (ICN), including on the substantive aspects of merger review. He noted a lack of convergence on issues of monopolization and dominance, citing the divergent approaches and outcomes between the FTC and the EU with respect to certain of Google's practices. He viewed this as reflective of a fundamental EU/U.S. legal divide, whereby U.S. courts generally don't condemn so-called monopoly pricing or aggressive competition, even if it disadvantages particular competitors or even new entrants. He noted another fundamental distinction in the way that competitors can influence review processes in the EU, whereas in the U.S. agencies distrust complaints by competitors. Mr. Keyte suggested that the path forward may be to use the ICN to build further consensus on fundamental approaches to competition enforcement, such as by establishing a standard for what constitutes exclusionary conduct and by promoting a focus on harm to consumers as opposed to harm to rivals. However, he expressed a fear that further divergence is possible in the future, especially with regard to the U.S. and European regulators' fundamentally different approaches to transactions involving the "big data" industry.