Key Takeaways

EU Merger Control and Digital Markets

Bill Batchelor
Partner / Brussels
32.2.639.0312
bill.batchelor@skadden.com

Frederic Depoortere
Partner / Brussels
32.2.639.0334
frederic.depoortere@skadden.com

Giorgio Motta
Partner / Brussels
32.2.639.0314
giorgio.motta@skadden.com

Ingrid Vandenborre
Partner / Brussels
32.2.639.0336
ingrid.vandenborre@skadden.com

One Manhattan West
New York, NY 10001
212.735.3000

Avenue Louise 480
1050 Brussels, Belgium
32.2.639.0300

40 Bank Street, Canary Wharf
London, E14 5DS, UK
44.20.7519.7000

On 31 May 2022, Skadden, Compass Lexecon and *Concurrences* convened for a fireside chat to discuss developments in merger control and digital markets, followed by a panel discussion on a range of issues, including the increasingly blurred lines of EU jurisdiction, the standard of proof, the role of economic analysis, the changing approach to merger remedies and the changing landscape for agency coordination.

Speakers

Fireside Chat:

- Moderator: Ingrid Vandenborre, Partner, Skadden
- Frédéric Jenny, Chairman, Organisation for Economic Co-operation and Development (OECD) Competition Committee
- Guillaume Loriot, Deputy Director-General, Directorate-General for Competition (DG Competition), European Commission (Commission)

Panel Discussion:

- Moderator: Bill Batchelor, Partner, Skadden
- Frederic Depoortere, Partner, Skadden
- Jorge Padilla, Senior Managing Director and Head of EMEA, Compass Lexecon
- Chris Prevett, Senior Legal Director, U.K. Competition and Markets Authority (CMA)
- María Luisa Tierno Centella, Competition Director, Spanish Competition Authority (CNMC)

Closing Remarks:

- Giorgio Motta, Partner, Skadden

Jurisdiction

Guillaume Loriot said that the big topic at the moment is how to make sure to have the best system to review transactions that do not come under normal scrutiny based on the turnover thresholds but still merit a review. Mr. Loriot indicated that this includes "killer acquisitions" that have a horizontal dimension, as well as "early acquisitions," where one company buys another that is still nascent with no turnover and not necessarily active in the same market but potentially upstream or downstream and there may be some scope for foreclosure. As an example, he referred to the Illumina/Grail case in the pharmaceutical sector but noted this can also take place in the digital sector.

Mr. Loriot said that the Commission believes that giving full effect to article 22 is the most efficient system to tackle this issue. He said that the General Court judgment, set for 13 July 2022, will give a position as to whether the principles of article 22 indeed allow the Commission to review cases referred by European member states because of the rights conferred by and the primacy of European Union (EU) law.

María Luisa Tierno Centella indicated that the current interpretation of Spanish law is that the CNMC can only refer cases to the Commission if the transaction meets the notification thresholds in Spain. Ms. Tierno said that they are waiting for the General Court ruling and if the General Court rules on the side of the Commission, they may need to change their interpretation of Spanish law in view of EU law primacy.

Frédéric Jenny cautioned against the presuming that a significant transaction value means there is a competition issue looming in the background. Mr. Jenny said that such high value could also be explained by, for instance, the perfect complementarity of the merging parties' services. According to Mr. Jenny, it is not obvious that any of the changes have brought to the fore more transactions; conversely, this has created legal uncertainty for merging firms.

Turning to jurisdiction in the U.K, **Chris Prevett** has found that establishing whether the CMA has jurisdiction has in some cases occupied a significant amount of the organization's and the parties' time. According to Mr. Prevett, that is taking resources away from looking at the real substance of cases, which he thinks should be the CMA's focus. Mr. Prevett also briefly discussed the recently announced reforms of competition law by the U.K. government. The share-of-supply test will no longer need an overlap where the buyer has a share of more than a third of the relevant goods and services, and its turnover is more than £350 million in the U.K.. According to Mr. Prevett, that will increase certainty about the CMA's jurisdiction. He added that the government's intention is to also build in a U.K. nexus test, but it is still undecided what that will look like.

Substantive Standard

Mr. Loriot underscored the relevance of the judgment of the General Court in Hutchison in 2020, and that raising the standard of proof in this way is not compliant with the spirit of the EU merger regulation or case law. Mr. Loriot advises against it and noted that otherwise a double standard would be created regarding the standard the Commission follows when accepting remedies, which are not required to be effective beyond reasonable doubt.

Mr. Jenny welcomed the discussion on the standard of proof, and said that this issue is still a moving target at national level. Mr. Jenny noted that blocking a merger is a severe infringement on the freedom of establishment and should be justified by a finding of high probability that it will limit competition. Second, Mr. Jenny said that merging parties as well as enforcers need to have a better understanding of the threshold for efficiencies.

Mr. Prevett indicated that in the U.K. the standard of proof is the same irrespective of the theory of harm: whether the merger is more likely than not to give rise to a substantial lessening of competition. Mr. Prevett said the CMA has become more effective at gathering evidence to help inform how the market is likely to evolve and the acquirer's intentions, emphasizing that both deal valuation elements as well as internal documents are hugely informative in this regard. Mr. Prevett cautioned, however, against taking "smoking guns" out of context and noted that understanding where internal documents fit into the company, who created them, and why they were created, as well as triangulating these factors with other forms of evidence such as market participants' feedback, is critical to reach a conclusion.

Theories of Harm in Digital Markets

Mr. Jenny said that analyzing mergers, or indeed antitrust investigations, in the digital sector using traditional competition analysis does not work very well and we need to retool our instruments. Mr. Jenny said that, in cases involving a killer acquisition theory of harm, it is important, when considering whether the target is a potential competitor, to assess the target's innovative services and whether it would be able to develop a network, which requires a significant economic investment, and whether it has or it is developing a profitable business model.

Jorge Padilla emphasized that the economic literature on the effect of mergers in digital markets is in a state of flux and is continuously evolving through new theories and countervailing arguments. Mr. Padilla explained that, on the basis of the existing economic literature, competition authorities are not capable of establishing a presumption that acquisitions by large digital platforms are anticompetitive. Mr. Padilla indicated that a large proportion of economic literature explains why digital mergers may be procompetitive, why more cautious merger control policy may be more adequate where investment and innovation is important and in economies that are populated by zombie firms, where barriers to exit are high. He argued that it would be incorrect to interpret the new theories of harm being developed (*i.e.*, killer acquisition, reverse-killer acquisition and platform envelopment theories of harm) as establishing a presumption of anticompetitiveness. Mr. Padilla emphasized that these theories need to be further refined, assumptions need to be clarified and complex acquisitions must be analyzed on a case-by-case basis.

On efficiencies, Mr. Padilla discredited the presumption that mergers all result from empire building as unsubstantiated by existing economic evidence. He explained that a very

significant and important source of efficiencies, which is normally neglected in merger control debates but plays a major role for macroeconomics and policy makers, is the reallocation of scarce resources from companies that have failed to companies that are successful.

Mr. Prevett noted that, when looking at mergers in dynamic markets that involve nascent competition, a certain degree of prospective analysis is required, as there is uncertainty about how that market will evolve. Similar to Mr. Jenny, Mr. Prevett indicated there are two key components to potential competition: (i) whether the target company will likely enter the market in the future, and (ii) whether the innovative efforts of the target today are likely to be important to competition.

Role of Economic Analysis

Mr. Jenny believes economic analysis plays a role in merger control, but enforcers rely too much on internal documents, which can easily be incriminatory and taken out of context. Mr. Jenny explained, in relation to digital mergers, that economists are not clear on the relationship between competition, concentration and innovation and there is no well-established competition economic analysis, so economic principles should be applied with caution.

As an example, he said that the Commission decision in Dow/DuPont was a disaster since the decision relied on recently developed economic analysis that was toned down by other economists in the weeks following the decision. Conversely, Mr. Jenny said business economic literature is very well-established and helpful to understand business models, how they develop and how innovation interplays with competition. He advised the Commission, now that it is expanding its staff and resources, to recruit business people with experience in the digital sector who understand the different business structures and strategies from the point of view of the companies.

Mr. Loriot explained that internal documents are not decisive, as economic evidence is also relevant. Mr. Loriot noted, however, that economic evidence should be embedded in qualitative evidence and should not rely on assumptions that are so complex that it becomes not credible; sometimes the simpler the better. He indicated that no piece of evidence is decisive in and of itself; economic evidence is complimentary to internal documents and market feedback.

Mr. Padilla indicated that economic evidence in killer acquisition analysis is required to analyze whether the acquirer has the incentive to shelve or reposition the target's products and the impact on consumer welfare. Mr. Padilla said that shelving products from the target will likely be anticompetitive, but if the buyer plans to reposition the products, the authority must consider whether consumers will benefit from this, as it will diminish duplication (less price competition) but increase differentiation (more innovation). He noted that internal documents will provide insight into the company's plans, but advised that the authority does a forward-looking analysis to see whether the plans are reasonable.

Remedies

In relation to remedies, **Mr. Loriot** considered that it is the Commission's role and task to make sure that if solutions are proposed by parties, they conduct a rigorous assessment, test the remedy with the market and see whether these solutions (and divestitures in particular) can effectively solve the problems identified. Mr. Loriot said that the standard is to go for structural remedies, but in a limited number of cases access remedies are considered, notably in non-horizontal cases. He added that the burden is on the Commission to prove that the remedy is effective. The Commission does not have a wide margin of discretion over the approval of remedies as these have to be approved by the market. In terms of standard of proof, Mr. Loriot said that the test is one of balance of probabilities: are the remedies more likely than not to remove the concerns? This test is based on operational, practical input, not on assumptions.

Mr. Jenny considered that the position of the Commission makes much more sense than some of the debate he sees in the OECD on the issue, which he thinks is very ideological and self-serving on the part of competition authorities. Leaving aside what the competition authority would like to have in order to minimize its work, and leaving aside ideology, Mr. Jenny thinks the Commission has adopted a very practical approach: If a structural remedy can be found, it can be used, but, if not, the merger should not necessarily be blocked if behavioral or access remedies can address the concerns. With respect to behavioral remedies, he thinks that competition authorities overestimate the cost of monitoring and that current mechanisms, such as the appointment of a trustee, unburden the authority and reduce the risk that the remedy will not be correctly applied.

As for the CMA, **Mr. Prevett** said that the application of behavioral remedies can be challenging because there is a blurred line in practice between the nature of the theory of harm and whether it is horizontal or vertical. Mr. Prevett considered that, aside from a monitoring and enforcement perspective, considerable challenges arise when looking at the effectiveness of behavioral remedies in markets which rapidly evolve. While there may be a higher degree of certainty about their effectiveness in the early years, questions remain about how confident we can be that they will continue to be effective in dynamic, rapidly evolving markets.

Coordination

In relation to Cargotec-Konecranes, **Mr. Depoortere** said that the CMA and the Commission missed an opportunity to reach consistent outcomes in the first post-Brexit case where both authorities were dealing with a Phase 2 investigation in parallel. Mr. Depoortere observed that, in that case, the same remedy offered to address the same substantive issues based on the same facts in the same geographic market was accepted by the Commission but rejected by the CMA. While there is a lot of coordination and exchange of information between authorities, Mr. Depoortere is concerned that there is a much lower preparedness and desire to also come to consistent outcomes where appropriate. According to Mr. Depoortere, this is an evolution that goes against the efforts in the past 20 years since the GE-Honeywell judgment, which slowly evolved in a system of international merger control with consistent outcomes.

Mr. Prevett indicated that inter-agency coordination is an area that the CMA invested in significantly in anticipation of the U.K.'s exit from the EU, but also since then. He said that coordination can help achieve consistent approaches and outcomes across different jurisdictions, and help to fully understand the factual differences. He added, however, that achieving consistency is not an end in itself. According to Mr. Prevett, it is important to understand that each regime is different, each has its own legal framework and independent decision makers, and authorities may have different evidence to consider.

Mr. Prevett said that in Cargotec-Konecranes, while the CMA pursued theories of harm similar to those considered by other competition authorities, it reached a different outcome, reflecting that decisions are made by independent decision makers and are supported by different evidence bases. According to Mr. Prevett, one can take a view about the rigorousness of the different processes, but ultimately the consideration of the CMA is whether there is a high degree of certainty that the remedy is going to be effective.