Concurrences
Antitrust Publications & Events

20 YEARS ANNIVERSARY

BAKER BOTTS

GLOBAL ANTITRUST HOT TOPICS: EU, US & GLOBAL PERSPECTIVES

KEY TAKEAWAYS BRUSSELS, SEPTEMBER 26TH, 2024

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Catriona HATTON | Partner, Baker Botts, Brussels

Daniel GORE | Partner, RBB Economics, London

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Stacy L. TURNER | Partner, Baker Botts, Washington D.C.

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CORNERSTONE RESEARCH

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ATTENDEES

INSTITUTIONS / AGENCIES

- DG COMP
- DG TRADE
- European Commission
- Netherlands Authority for Consumers & Markets
- The Mission of Japan to EU

ECONOMISTS / CONSULTANTS

- APCO Worldwide
- Berkeley Research Group
- Biontino Europe
- BRG
- Brunswick Group
- Compass Lexecon
- Davidson Kempner
- Decagon Asset Management
- Forefront Advisers
- FTI Consulting
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CORPORATIONS

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- Decathlon
- EBA Clearing
- Google
- ING Bank
- Market Securities
- Microsoft
- Samsung
- Tencent
- Thyssenkrupp
- Unilever
- ZF Group

PROGRAM

12:00 REGISTRATION & LUNCH

12:45 FIRESIDE CHAT:
WHAT CAN WE EXPECT FROM THE NEXT EU COMMISSION'S MANDATE AND THE NEW US ADMINISTRATION?

Mathew HEIM | Senior fellow, George Washington Competition & Innovation Lab, Madrid

Natalie McNELIS | Senior Correspondent, MLex Market Insight, Brussels

Presenter: Catriona HATTON | Partner, Baker Botts, Brussels

13:30 #1 MERGERS: EU, UK & US PERSPECTIVES

Daniel GORE | Partner, RBB Economics, London

Annemiek WILPSHAAR | Head of Unit, Mergers, DG COMP, Brussels

Jody BOUDREAULT | Partner, Baker Botts, Washington D.C

Tero LOUKO | European Competition Counsel, Google, Stockholm

Moderator: David CARDWELL | Partner, Baker Botts, Brussels/London

14:30 COFFEE BREAK

15:00 #2 FDI & FSR

Damien LEVIE | Head of Unit - Technology and Security, FDI Screening, DG TRADE, Brussels

Fernando ISCAR RULAND | Senior Legal Counsel, Thyssenkrupp, Düsseldorf

Vincent MUSSCHE | Partner, Liedekerke, Belgium

Nicole ROBINS | Partner, Oxera, Brussels

Moderator: Matthew LEVITT | Partner, Baker Botts, Brussels/London

16:00 #3 NEW THEORIES OF BEHAVIOURAL HARM: NO POACH, AI, PRODUCT DENIGRATION, PURCHASING CARTELS

Remko BOS | Director, Netherlands Authority for Consumers & Markets, The Hague

Elisa MARISCAL | Principal, Cornerstone Research, London

Dirk MIDDELSCHULTE | VP Global General Counsel Competition, Unilever, Brussels

Stacy L. TURNER | Partner, Baker Botts, Washington D.C.

Moderator: Paul LUGARD | Partner, Baker Botts, Brussels

17:15 RECEPTION

FIRESIDE CHAT

Catriona HATTON (Partner, Baker Botts, Brussels) moderated the discussion. Some of the current main issues in the EU are related to industrial policy, growth and competitiveness. The Draghi report that came out in September addresses challenges such as the acceleration of innovation, how to bring down energy prices in Europe and how to react to a less stable geopolitics world and reduce interdependence on other regions of the world. It highlights that competition policy could be an obstacle to industrial growth in the EU.

Natalie McNelis

Senior Correspondent, MLex Market Insight, Brussels

Draghi report influence on competition policy

- Draghi's recommendations influenced Ursula von der Leyen's mission letters to the commissioner Ribera, particularly in supporting European companies' growth and innovation.
- A controversial focus on preventing foreign companies from making «killer acquisitions» sparked concerns about inconsistent treatment based on company nationality raising questions about the rule of law.
- Vestager cautioned Ribera about the potential long-term consequences of this policy direction, indicating possible conflicts within competition enforcement.
- The potential Qualcomm-Intel merger highlights concerns about the consistency of competition policy, especially when considering non-European companies, suggesting a bias towards European firms. There is also the issue of determining which company is "European enough" in today's globalised context.
- There is uncertainty about whether Draghi's pro-European industrial policy focused on competitiveness aligns with traditional European competition objectives focused on consumer protection and market structure.

Innovation and European champions

- There is a concern whether the Commission's new policy is to permit a loss of innovation in favour of creating European champions. The Commission said in Bayer/Monsanto and Dow/Dupont that the competition between the two R&D departments would feed innovation, which was an important point.
- A key point is that European champions are not created by shielding them from competition.
- This view applies broadly, and innovation should continue to be central to merger control.
- The European Commission's study showed that European industry competitiveness thrives on fierce competition within its local markets.
- Weakening competition could lead to unintended negative outcomes for the industry.
- On Siemens/Alstom, we saw that not all countries supported the approval of the merger.

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.

Long term investment in the European telecom sector

- Belgian consumers only have access to national telecom operators, and the market is defined by national spectrum allocation, not a European one.
- There is a challenge in how mergers are evaluated when the market is artificially defined as "European."
- Draghi has proposed considering longer-term investment perspectives, recognising that network investments take time to yield results.
- The Commission faces a dilemma: whether to prioritise consumer interests, such as affordable telephony, or focus on the long-term health of companies.
- Prioritising companies solely based on their European identity does not make sense, especially for vital sectors like telecom and energy, which are critical for all industries.
- Sacrificing consumer interests to create European champions in essential industries like telecom and energy could undermine the foundation of other industries reliant on these services.

FSR and FDI

- The FSR is seen as less conflicted and aligns with DG COMP's goals of addressing unfair competition.
- In contrast, FDI is viewed more as a national security issue rather than purely a competition concern.
- The Commission may emphasise the FSR as a consistent and effective tool to combat unfair competition.

International cooperation

- The Commission often emphasises that cooperation with other authorities is improving, suggesting a trend towards more collaborative regulatory practices.
- The Illumina-Grail case raises questions about extraterritorial actions and why Europe felt the need to intervene instead of relying on U.S. regulators.
- The case reflects a shift in U.S. enforcement, with courts now more aligned with blocking mergers, marking a change from previous "business-friendly" stance.

Mathew Heim

Senior fellow, George Washington Competition & Innovation Lab, Madrid

Draghi's report influence on competition policy

- In the Draghi report, the analysis of Europe's economy is sound, but the impact of competition policy report's proposals on productivity and growth remains uncertain.
- In Von der Leyen's mission letter, there is a clear focus on modernisation and updating competition policy, though not all Draghi's recommendations are included (e.g., enhanced sector inquiry powers with remedies).
- The Ribera mission letter hints at potential inquiries, particularly in the food sector, which will require collaboration between relevant sectoral and competition commissioners.
- It is desirable to ensure the independence of DG COMP in competition enforcement.
- The report advocates for faster and greater enforcement which raising due process concerns.

- Europe's key challenge is competitiveness, particularly in enabling small companies to scale across borders, which is hindered by regulatory burdens and lack of access to capital.
- Another issue related to the Draghi report and post-Siemens/Alstom discussions is the lack of definition of a 'champion'. There is no agreed academic or legal definition of an industrial champion. Size does not necessarily reflect innovation intensity or any other socio-political priority identified by the EU.
- A controversial sector-specific approach to competition policy is taken in the Draghi report, which could undermine consistency and legal certainty.

Regulatory barriers and their impact on startup exit strategies and investment

- Regulatory requirements such as FDI, FSR, and DMA, as well as the new resiliency proposal by Draghi, add complexity beyond traditional merger control.
- These regulations can create significant obstacles for mergers and acquisitions.
- Political motives may push for consolidation in specific sectors or companies based on nationality or region.
- However, creating such regulatory hurdles to acquisitions may hinder the exit strategies of startups and scale-ups, deterring investors.
- The lack of alternative exit strategies is a frustration and is closely linked to capital markets' willingness to invest.
- Develop new exit opportunities takes time and requires careful consideration.
- The European Commission, particularly DG COMP, must navigate these issues cautiously to foster growth and investment.

Impact of the competition policy on the emergence of a stronger defence industry

- National governments protect their defence capabilities, making centralised procurement politically challenging; it is not a merger issue.
- Dual-use technologies, like drones or semiconductors, increasingly blur the lines between civilian and military usage, complicating regulation.
- The European Commission may be persuaded to prioritise defence over competition concerns in these cases.

Cooperation between the Commission and international enforcers

- The mission letter emphasises increasing coordination between the European Commission and international enforcers.
- However, it may be challenging if the European Commission is perceived as favouring European industries for geopolitical reasons.
- The «Brussels effect» shows that competition authorities worldwide observe and learn from each other, adapting practices to their own jurisdictions.
- Greater cooperation, a level playing field, and alignment on rule of law and approaches are viewed positively.
- Different jurisdictions vary in their aggressiveness, adherence to the rule of law, and government ties, which should be carefully considered.
- The goal is to avoid creating regulatory practices that could disadvantage European companies in international markets.

PANEL 1

MERGERS: EU, UK & US PERSPECTIVES

David CARDWELL (Partner, Baker Botts, Brussels) moderated the discussion. This debate focused on the key merger control developments that occurred over the past year and featured a discussion of recent developments in the AI sector, the consequences of the ECJ's Illumina judgment, non-horizontal mergers and the rise of state-level merger control regimes in the US.

Annemiek Wilpshaar

Head of Unit, Mergers, DG COMP, Brussels

Recent developments in the AI sector

- The Commission is closely monitoring the AI sector and its evolving deal structures, such as partnerships and acqui-hires.
- In partnerships, the key question is whether investments in GenAI companies result in a change of control on a lasting basis. For example, on the basis of internal documents, the Commission concluded that – as the relationship stands – the Microsoft/OpenAI partnership does not amount to a concentration.
- In acqui-hires, the focus is on whether the acquisition of parts of a company, such as the founder, employees, engineers or IP, results in a change in market structure and therefore amount to a concentration. The Commission will look at what remains with the target post-merger in terms, for example, of know-how and market activities. The Commission recently found that Microsoft/Inflection amounted to a concentration.

Article 22 and merger control challenges

- The Commission is disappointed by the ECJ's ruling, which overturned the General Court's support of our Article 22 policy.
- The Commission is still carefully studying the implications of the judgment, and will reflect on how best to ensure that sub-threshold deals with a significant competitive impact in Europe can be reviewed.
- While not necessarily problematic, some transactions where an innovative target has limited to no turnover merit investigation because they might significantly impact competition.
- Potential options to address this enforcement gap include targeted revisions of the EUMR – such as adjustments to Article 22 itself or to the notification thresholds – and will have to be discussed with the newly appointed Commissioner.
- In the meantime, the Commission will consider how to close the enforcement gap through cooperation with Member States with jurisdiction under their national merger control rules based on alternative jurisdictional tests or call-in provisions.

Non-horizontal merger case law

- The divergence in outcomes between UK and EU decisions can be due to different legal systems, enforcement traditions and priorities, market realities.In cases like Amazon/iRobot and Broadcom/VMware, the Commission and the CMA were aligned in terms of focusing the assessment on foreclosure of rivals, but the CMA eventually dropped concerns concluding that despite the ability to foreclose rivals, there would not be an incentive to do so.
- That type of incentive assessment is difficult and depends on the gains and losses that are considered to be relevant, and that can also include benefits in neighbouring markets.
- It also depends on whether you only consider market-wide foreclosure or also more targeted foreclosure strategies whereby only a certain type of competitors are foreclosed.
- It depends on the evidence you gather to assess whether customers would switch in reaction to a foreclosure strategy.Non-horizontal mergers may also raise concerns about the elimination of potential competition (e.g., in Adobe/Figma, the Commission investigated whether Figma was a competitive threat to Adobe's core markets) or about a strengthening of dominance (e.g., in Booking/eTraveli, eTraveli could have brought additional traffic of customers at early stages of the booking process).
- In Adobe/Figma and Booking/eTraveli, the Commission analysed conglomerate relationships through a horizontal lens. At first glance, the activities seem complementary and we examine whether the deal may hamper access or interoperability, but the key concern may well be that there is a risk ofentrenchment of the acquirer's position. That is only the case where the acquirer already has a very significant market position, stable market shares, high margins and barriers to entry or expansion are high.
- The Commission will look at the whole body of quantitative and qualitative evidence and consider whether it points in the same direction.

Upcoming developments in merger policy enforcement

- The Draghi Report emphasises that competition stimulates productivity, investment and innovation and that any attempts to undermine competition principles or competition instruments would go directly against these drivers of competition.
- Merger control is not about scale but about market power.
- Our rules are the same across sectors and regardless of where the parties are from, and I personally hope that will continue to be the case.

Tero Louko

European Competition Counsel, Google, Stockholm

Merger transactions and challenges of acqui-hires

- Acqui-hires, where a company hires individuals or teams from another firm, are becoming more common and raise unique regulatory challenges.
- Companies like Google proactively engage with regulators to explain why such transactions may not constitute notifiable concentrations.
- The Commission should absolutely have the right to scrutinise whether such moves may attempt to circumvent merger control or DMA filings.
- Key questions include whether the transaction involves acquiring more than just people, such as IP or assets as well as whether the original company can continue operating independently after losing key staff or whether it will pivot to a different activity.
- Another point to consider is how permanent the change in market structure is, considering that, unlike assets or IP, people may choose to move on to work for another company in six months' or a year's time.

Generative AI investments/partnerships

- Recent investments by Google and Amazon in generative AI startup Anthropic have triggered investigations, including in the U.S.
- These investments are driven by the need for generative AI startups to access costly cloud capacity to run AI workloads, which is provided by large cloud providers like Google, Amazon, and Microsoft.
- The arrangement is mutually beneficial: startups receive the necessary cloud capacity, and cloud providers gain customers for their platforms.
- The key issue is determining when such investments translate into acquisitions of control, which must be analysed based on traditional factors like the size of equity stakes, board observer seats, veto rights over key strategic decisions.

Notification requirements under the DMA

- Under Article 14 DMA, gatekeepers must notify the Commission of every acquisition, even for small targets without a presence in Europe. The deal must be notified before closing but there is no bar on closing.
- Even if the deal is legally closed without merger filings, an analysis must be conducted to assess potential concerns in any EU Member State that could lead to a referral under Article 22 EUMR.
- The DMA notification process uses a form similar to the Merger form CO, though slightly lighter, and the process has been manageable so far.
- This has an impact on deal-making for core platform services, as the various hurdles may mean that they are not necessarily the most attractive buyer.

Non-horizontal merger cases

- At the end of last year, Google acquired Photomath, a European tech company allowing users to take pictures of mathematical formulas and providing step-by-step solutions. The rationale of the transaction was to allow Google to increase the quality of results to a tiny portion of search queries.
- The transaction was cleared in Phase I. Was the clearance linked to product quality improvement as an efficiency or to the very limited number of queries improved with the new tool? What if the transaction had allowed Google to improve a greater portion of its search queries?
- One may hope for more legal certainty on where to draw the line in acquisitions aimed at improving product quality versus those intended for cross-selling.

Upcoming developments in merger policy enforcement

- The mission letter to newly appointed Commissioner Teresa Ribera states that her role will be to modernise competition policy to ensure that it supports European companies to innovate, compete and lead worldwide.
- What does this mean in practice for merger control? Potentially, it could translate into allowing European companies to do deals that might not have been allowed before or into blocking deals by non-European companies that would strengthen their position in Europe.
- Whilst authorities may not treat companies differently under the law, they have a wide margin of discretion in complex economic assessment.

Daniel Gore

Partner, RBB Economics, London

Non-horizontal mergers

- There has been a marked shift towards increased scepticism in the Commission's policy on non-horizontal mergers compared to the last two decades, leading to uncertainty on how these deals should be assessed in the future.
- In Amazon/iRobot, the Commission examined customer foreclosure issues under a traditional approach that was to be expected under the non-horizontal merger guidelines. In hindsight, post-Booking/eTraveli, it is perhaps surprising the Commission did not seek to develop an ecosystem theory of harm in this case.
- In Broadcom/VMware, the Commission's theory of harm examined whether integrating server software and hardware products to improve their performance could extend to degrading interoperability to weaken competitors. The Commission addressed this theory as a question of partial foreclosure within the realms of a standard analysis under the non-horizontal merger guidelines.
- In contrast, Booking/eTraveli was investigated at its core under an ecosystem theory of harm rather than under the non-horizontal merger guidelines. That is a novel approach and it remains unclear what that concepts precisely covers. Initially, there would have been an expectation of the deal being unproblematic, and it is difficult to see how the facts could have led to a prohibition decision.
- It is worth recalling the costs versus benefits of over-intervention in non-horizontal mergers. In contrast to horizontal mergers, there is no unilateral effect whereby there could be an economic rationale to increase prices post-merger, all else constant. Rather, in non-horizontal mergers concerning complementary products, standard economics tells us that there is an incentive to decrease prices post-merger. The risk of moving away from an effects analysis and of being more sceptical of non-horizontal mergers is losing those efficiencies and re-introducing the efficiency offence.

The use of ecosystem theory in the Booking/eTraveli case

- The Booking/eTraveli case questions the use of the «ecosystem theory of harm» over the traditional «ability-incentives-effects» framework.
- In Booking/eTraveli, the traditional theory of harm – whereby Booking would have leveraged its market power in accommodation to favour eTraveli in flights –was dismissed due to consumers' preference to purchase flights some time before accommodation.
- Instead, the Commission relied on the reverse theory, using flights to protect accommodation. However, Booking's increased sales from cross-selling would have been minor, raising doubts as to the existence of actual effects and therefore of a SIEC.
- The decision refers to this as an ecosystem theory of harm. There is no clear definition of an ecosystem in this context however. In antitrust, ecosystem issues can be conceived in terms of barriers to switching for consumers due to the combination of interoperable products. But travel services do not rely on technical interoperability, casting doubt on the relevance of the "ecosystem" concept as justification for setting aside the non-horizontal merger guidelines.
- Because of consumer habits and preferences, which mean the potential impact of flights on the accommodation market would have been minimal, the ecosystem theory of harm used in Booking/eTraveli would likely have failed the anti-competitive effects limb of the standard non-horizontal merger guidelines framework.
- This raises concerns that an ecosystem theory of harm may be used to sidestep effects-based analysis in non-horizontal mergers.
- It will be interesting to see how General Court defines the concept of ecosystem and how it establishes a limiting principle for intervention in this type of cases.

Upcoming developments in merger policy enforcement

- The mission letter and the Draghi Report plead for boosting European competitiveness.
- Former Commissioner Vestager has stated that competitive European firms cannot be generated by protecting them from competition at home. That makes sense from as a horizontal merger argument.
- This could re-open the debate on non-horizontal mergers, where intervention may carry a risk of foregoing efficiency benefits through over-enforcement.

Jody Boudreault

Partner, Baker Botts, Washington D.C.

State-level merger control in the U.S.

- Over the past year there have been about 1,500 deals in the healthcare industry, and regulators are concerned that consolidation in the industry may be exacerbating existing issues in terms of cost, quality, access and equity.
- The past year has therefore seen a corresponding rise in state-level merger control laws affecting the healthcare industry. Approximately 10 states have instituted notification regimes capturing joint ventures, mergers, and regular commercial transactions involving healthcare entities, and others have legislation pending. The notion of healthcare entities is very broad and can mean something different depending on the state.
- Companies must notify relevant state authorities of their deals 30 to 90 days prior to closing, depending on the state's law. Provisions allow some states to toll the notification period, extending the review time.
- State-level merger control changes the bargaining dynamic at federal level. Federal agencies know that you are filing at the state-level and that could delay the federal procedure.
- State agencies could impose post-closing reporting requirements and penalties if expected benefits of the deal are not met.
- The proliferation of state merger control laws increases the time and risk related to deal making, which must be taken into account in negotiations, particularly around the outside date and regulatory clauses.

Vertical aspects of the new US merger guidelines

- There is no presumption of illegality for vertical mergers, but agencies may now infer monopoly power when a firm's share of the input market is 50% or more.
- The new guidelines extensively cite the Fifth Circuit's Illumina/Grail decision, which affirmed that prima facie foreclosure cases can be built by showing market concentration in the input market, as well as a few other factors. The Fifth Circuit also accepted the FTC's view that an entity could foreclose competitors through «quiet foreclosure» (e.g., delaying deliveries).
- A section of the new guidelines allows agencies to investigate a trend toward vertical integration.
- In practice, agencies are increasingly focused on the impact of vertical mergers on rivals who are smaller, non-vertically integrated competitors and their ability to continue to compete post-closing.
- In addition to the historical raising rivals' costs and input foreclosure questions, agencies are also asking customer foreclosure questions in vertical merger investigations, focusing on whether rivals will be blocked from accessing customers.
- In exploring vertical concerns, agencies are looking at geographies where the parties hold 40% or more market share, and may investigate even lower thresholds, like 30%.

Upcoming developments in merger policy enforcement

- The big question is how the US presidential elections will affect merger enforcement policy.
- There is no reason why a new Trump administration would reduce current levels of enforcement activity, with intense enforcement during the first Trump administration and J.D. Vance praising Lina Khan.
- Harris has the support of part of Silicon Valley, which may suggest some lessening of the burden of the merger enforcement process and perhaps tweaking of the more aggressive theories of harm, but companies are not speaking with a unitary voice and her campaign rhetoric suggests that a Harris administration may bring cases on price-gouging theories of harm.

PANEL 2

FDI & FSR

Matthew LEVITT (Partner, Baker Botts, Brussels/London) moderated the discussion.

Fernando Iscar Ruland

Senior Legal Counsel, Thyssenkrupp, Düsseldorf

FDI filing process

- Managing regulatory filings has become a burden to companies; a massive amount of resources go into assessing and preparing filings, and it has become increasingly complicated to work out where filings are needed.
- It is difficult to explain to commercial teams that "Foreign Direct Investment" screening does not need to be related to foreign direct investment. It can be indirect, it can be domestic, and does not need to be an investment as such.
- There are big differences between FDI and merger control. In easy merger control cases, timing plays an important role. Clearance could be obtained in one to three months. However, if FDI filings are triggered, it takes longer. Even easy cases take a substantial amount of time. In relation to minority acquisitions and internal corporate restructurings, these can often be done without M&A groups getting involved, but we will still need to look at FDI filings. Especially in sensitive sectors like defence, even internal restructurings often require FDI filings in multiple jurisdictions, as do preparatory steps for a deal such as a carve-out.
- Compared to the merger control regime, risk allocation is difficult to assess in FDI filing. 'Hell or high water' clauses are increasingly coming up in SPAs, because foreseeing the risk is much harder. From an internal counsel perspective, if you are selling then you know the target and what they do, but it is not realistic to carry out that assessment for, say, 35 bidders. You won't get the data you need at an early stage. As regards FSR, a monitoring system must be in place in the company because potential acquirers looking into the European industries may come from foreign countries, and the resources required for that are mind-blowing.
- There is a strong need for harmonisation of FDI regulations to reduce the burden and complexity of filing across different countries. It would make filings less burdensome and mean that we can allocate risk effectively.

FDI screening and dynamic investment

- A balance of interests should be found to allow investor companies to do business and invest in Europe, to reinforce the struggling economy. FSR and FDI tools must not become an impediment to investments within the economic union.
- It is important to keep an eye on the adaptation of foreign regimes - particularly in Asia - to the strengthening of European FDI and FSR regimes. If we do not allow them to invest in Europe because they have had a state subsidy, should we also expect Asian countries not to allow us to invest if we have received subsidy from Germany? The risk of this needs to be talked about openly.
- It is also important to ensure that the remedies implemented are effective and have a clear nexus to the concerns identified.

Damien Levie

Head of Unit - Technology and Security, FDI Screening, DG TRADE, Brussels

Rationale for the FSR

- FSR is a complement to the existing trade defence tools. A number of third country companies operating in the EU market are relying on significant subsidies received from their countries of origin. These activities are not covered by trade defence tools.
- The FSR is about ensuring that there is effective competition in the EU, maximising openness while taking care of unfair practices not addressed by the existing instruments. The EU is not moving into a protectionist dirigiste way but is adapting to behaviours to maintain the level playing field.
- Over the past year we have had, on average, eight FSR notifications per month. DG COMP have done some on the spot investigations. The EU Commission adopted its first decision under the FSR mid-September, clearing a Phase II merger with remedies.
- FSR needs to be enforced. It is important not to read too much into the new Commissioner's mission letter; they will have been creative in these, but DG COMP colleagues will continue to take the regime forward in the same professional way they have so far. The EU Commission will keep releasing and developing guidance when there is sufficient case practice on the FSR.

Overview of FDI screening

- The EU Commission's level of intervention is extremely low as regards FDI. We have screened 1500 cases in 4 years. There is a mechanism of cooperation among national authorities and the EU Commission which does not really delay cases.
- When I created the new team in DG Trade 4 years ago, we wanted to have all Member States screening foreign direct investments within 3 to 5 years. Almost all Member States have now implemented a screening mechanism except for Cyprus, Greece and Croatia. Implementing FDI screening requires a delicate balance, because it is important to make sure that the investment climate is not undermined. Deals have to be made as easy as possible but it is important to take care of security concerns.
- It is difficult to say what is the right level of harmonisation needed between national laws on FDI screening to ensure you can screen properly but you do not undermine—and hopefully improve—the climate of open investment we need for prosperity.

FDI filing obligation

- Concerns on FDI's harmonisation proposal expressed in Council do not echo many views of the business community. It is up to businesses to make sure their national authorities hear their concerns.
- With th eproposal the Commission is not seeking to take power away from national authorities; it maintains the decentralised system of protection of security within Member States. As regards the legislative proposal, national authorities have the obligation and no longer the right to screen.

- There is no reason from a security perspective not to screen intra-EU investments when the EU investor is controlled by a third country's entity. That comes with clear conditions, however, because you are exercising your rights under exceptions of the Treaty on the right of free movement of capital.
- We have made a conscious choice not to regulate certain sectors. The proposal contains a hardcore of sectors where all Member States should screen if the target is active on an EU Programme – that is Annex 1. Annex 2 contains a fairly long list of sectors to be screened. The proposal calls for harmonisation and suggests that cases should only be sent to the cooperation framework of 27 authorities and the Commission if there is a risk concerning the foreign investor: sanctions, third state control or influence.
- The proposal indirectly establishes a 60-day period for Phase 1 in all Member States, which is longer than in most Member States. The Commission proposes due process with caveats for national security, and implementing the EU charter for fundamental rights, to increase the predictability of the screening process.
- Because of the sensitive sectors of transactions screened by FDI regimes, and the fact that intelligence services feed into the review process, it is normal that you will not have a high degree of transparency on the theory of harm developed by national screening authorities. However, we have proposed harmonisation of substantive grounds for reaching a decision on FDI. Finally, we are not hearing calls from Member States for us to go further on harmonisation.
- The Commission invites companies to relay their concerns to national authorities. It will be important to improve cooperation mechanisms and to regularly update national FDI regimes. Member States may not like to update their legislation, but FDI regimes are like security software for IT systems – they need to be regularly updated.

Vincent Mussche

Partner, Liedekerke, Brussels

Belgian perspective on FDI

- The Belgian FDI regime was adopted one year ago. The regime reflects Belgium's complex institutional structure; it is governed by a cooperation agreement between the federal State and federated entities. The reviewing authority is the Inter Federal Screening Commission composed of twelve representatives, coming from regional and federal authorities. These authorities will all have their say on the investment in the case of a territorial nexus or a material impact on their competence.
- The Belgian regime is a balance between openness of economy and FDI screening because Belgium is traditionally a small country, open to investment. The Belgian FDI regime only looks at investment from outside the European Union, but has fairly low thresholds, e.g., acquisition of a 10% interest in certain very strategic sectors such as defence, energy, etc. The scope is broadly described, and you come across the usual questions on what is "essential" and "critical" or what are "personal data". There is a long list of sectors affected, and the only guidance as for now is that the sectorial scope should be interpreted in light of safeguarding national security, public order and strategic interests in Belgium.
- The other guidance we have is: when in doubt, please file. As lawyers, we are going through the learning curve together with the Belgian authority. As the authority wants to rapidly gain further experience to define a better demarcation of the scope of the application of the regime, the authority seems rather eager to take up cases at this point time. In addition, a nascent authority as the Belgian one wants to keep a bit of freedom to potentially call in deals.
- What is reassuring is that we are not the only ones with questions. The Belgian authority tells us they are facing the same questions as we are. That makes it all pretty exciting – the Belgian authority is a very dynamic, young authority, which always responds swiftly and is eager to engage in dialogue. The Belgian FDI regime is clarified by two sets of guidelines and the new version of the notification form, and questions we ask to the authority are often reflected in the next version of the guidelines.

- There are some interesting figures available: From 30 June there have been 65 notifications, the average duration of the FDI procedure was 36 calendar days (1-2 days to declare notification complete, then 30 calendar days for clearance), 80% of filings were in Dutch and 20% were in French. It is important to file in the correct language, as if you file in the wrong language the filing is void.
- FDI filings so far intervene mostly in health, digital, infrastructure, transport and electronic communication' sectors. Investors come mostly from the USA, UK, Switzerland, India and Canada.

FDI screening and dynamic investment

- FDI screening was the right thing to do in the current geopolitical situation.
- Further harmonisation developments from the Commission are more than welcome, especially harmonisation on timing to avoid delays. However, if you harmonise on sectors this should come with sufficient central guidelines, because nascent authorities like Belgium will otherwise need a few years to get enough experience to refine their guidance. You cannot rely on other jurisdictions' guidelines, as their regime may be different.

Nicole Robins

Partner, Oxera, Brussels

Issues raised by the FSR from an economic perspective

- Certain aspects of the existence of a foreign subsidy (i.e. whether a foreign financial contribution confers a benefit) and the impact of foreign subsidies on competition could be analysed using similar economic tools to those used in the state aid and merger control context – we may be able to draw on those same tools for application to the FSR.
- However, in terms of the assessment of whether a foreign financial contribution confers a benefit, while economic tools that are standard in the state aid context could be used in the FSR context, specific challenges arise in the FSR context.
  - As an example, benchmarks that you would use to determine whether a loan granted by a state-backed entity is on market terms in certain jurisdictions, such as China, may not be accepted by the European Commission under the FSR control.
  - The sheer number of foreign financial contributions is another challenge. In the state aid context, there may just be one relevant measure or scheme, but in the context of FSR there may be hundreds to consider.
- In terms of how to assess the distortions that might arise from foreign subsidies, a staff working paper published by the Commission in July 2024 highlights that the appropriate concept in the FSR context is that of a level playing field, or competition on the merits. Two steps are highlighted by the Commission:
  - Firstly, whether the foreign subsidy improves the competitive position of the undertaking on the EU market.
  - Secondly, whether the foreign subsidy does actually or potentially negatively affect competition in the EU market.

- Some foreign subsidies that seem to directly facilitate a concentration are presumed by the Commission to be distortive unless contrary evidence is provided by the parties. But the question then is: what kind of evidence? It may be relevant to consider whether the acquirer could carry out the transaction without the foreign subsidies, and whether the foreign subsidy may have affected the valuation of the target.
- The final step of the assessment is to look at the overall balancing of the positive effects and negative ones. Can the positive effects outweigh the negatives?
- Remedies should be proportionate to the negative effects, and should fully and effectively remedy the distortion. From an economics perspective, the notion of full and effective remedying of distortions is key as it will affect the type and extent of remedies that are likely to be imposed or accepted by the Commission.

Balance between protecting the industry affected by a foreign subsidy and the broader interests

- The FSR fills a gap in terms of ensuring the level playing field, as the state aid mechanism controls spending by EU Member States but there was no regime to tackle distortions in the internal market caused by subsidies provided by third countries.
- On the public procurement side, there have been some high-profile examples of companies abandoning their bids as a result of investigations under the FSR.
- It is too early to know whether the FSR will have an adverse impact on investment in the EU. The fact that some companies withdrew their bids on the public procurement side cannot be used to infer the likely impact of the FSR on the M&A side. It is going to be a careful balancing exercise to make sure that deals contributing positively to the EU internal market go through. It is difficult to balance short term interests and harms versus benefits over the long term. Further case guidance will be important in clarifying how the balancing assessment is undertaken under the FSR.

PANEL 3

NEW THEORIES OF BEHAVIOURAL HARM: NO POACH, AI, PRODUCT DENIGRATION, PURCHASING CARTELS

Paul LUGARD (Partner, Baker Botts, Brussels) moderated the discussion. Mr. Lugard introduced the discussion by explaining that agencies are looking to expand their toolsets by extending the interpretation of existing rules and by seeking to expand rules and investigative means. Mr. Lugard explained that this first aspect could be illustrated by the judgment of the Court of Justice in Illumina/Grail, or by the use of novel theories of harm such as the denigration of a competitor's product as an abuse of a dominant position in the pharmaceutical sector. This second aspect could according to Mr. Lugard be illustrated by the DMA, and the continued interest that agencies have shown in adapting market inquiry tools, which allow the latter to study markets and impose remedies without needing to prove infringements, as also most recently proposed by the Draghi report. After questioning panellists on their thoughts on the above, Mr. Lugard went on to seek their views on the tension between more effective enforcement and predictability/legal certainty, as well as current challenges faced by agencies.

Dirk Middelschulte

VP Global General Counsel Competition, Unilever, Brussels

Trends evolution of the competition tools from an in-house perspective

- In relation to 101 TFEU cases, enforcement trends have shifted significantly from 10-15 years ago, moving away from hardcore cartels to novel types of cartel behaviour.
- New areas of focus include HR-related practices like wage fixing, no-poaching agreements and HR benchmarking, which previously were much less on everyone's compliance radars.
- There are also cartel behaviour investigations in the sustainability space (e.g. car manufacturers AdBlue cartel case), which raise difficult compliance questions as rules are difficult to apply in the context of technical standardization.
- Marketing restrictions and claims have emerged as another area of concern (e.g. Commission investigation into car manufacturers and recycled vehicles, there has also been a similar case in France in relation to Bisphenol A).
- Information exchange and benchmarking indices of information service providers are under investigation, with new forms of potential collusion being scrutinised by the Commission.
- A significant case involving Mondelēz relating to restrictions of parallel trade also illustrates how the Commission is expanding the boundaries of competition enforcement.
- The new draft guidelines of Article 102 TFEU offer broad leeway for presumptions but limited opportunities for companies to defend against them, which contrasts with past court rulings emphasising the importance of considering defendant evidence (e.g. Unilever Italia ruling by the Court of Justice from 2023, where it was made clear that evidence produced by defendants has to be thoroughly considered).

Tension between more effective enforcement and predictability

- Vigorous competition enforcement is critical for businesses, both as defendants and plaintiffs, as illustrated by the fact that companies may well have more of an active than passive role in damage cases.
- Therefore, the European Commission and national authorities should of course be able to adapt to changing business environments and develop new theories of harm.
- Authorities are creative in identifying new investigative areas as classical cartels become less common, and courts should say how far they can go.
- The approach in the 102 TFEU space is concerning especially concerning the respect for the rights of defence of companies, as a point could be reached in which any behaviour from a dominant company incentivising customers to buy its products could be considered abusive, which does not appear warranted or supported by the case law.
- In US, Federal Agencies also seem to be stretching the limits.
- There is a growing and urgent need for revisiting the issue of legal privilege for in-house lawyers within the meaning of the Akzo ruling, especially as their role in ensuring compliance has evolved significantly over the last 15 years.
- Legal privilege should provide in-house lawyers with the security to communicate freely and effectively within narrowly defined parameters without fear of discovery.
- The operational enforcement of competition law largely relies on in-house lawyers, as they ensure day-to-day compliance (which competition authorities are of course not able) to, they are there to facilitate compliance not conceal things.
- The revision of Regulation 1/2003 offers an opportunity to formalise legal privilege for in-house lawyers, which would reflect changes in both national and EU-level legal practices.

New theories of harm and the challenges for the agencies of the business community

- Compliance training has evolved, requiring a focus on areas like HR and R&D, where competition concerns were historically less familiar. In terms of marketing claims, marketing teams need to take into account consumer law and competition law.
- Authorities are also looking at aggregated data that could have forward-looking implications, whereas it was previously understood that use of aggregated data was largely unproblematic.
- AI presents new compliance challenges, with risks ranging from using AI to police cartels, companies agreeing on using certain algorithms to ensure price harmonisation, or the use of a algorithms which sensitive sources information from/about competitors.

Elisa Mariscal

Principal, Cornerstone Research, London

Economic insights in the current changing landscape

- Novel theories of harm, ecosystems and information exchanges, require revisiting established economic theories.
- Ecosystems theory shares similarities with related market theories, yet they differ. Ecosystems for instance seem to take the concepts of intra-brand versus inter-brand competition, which we've previously seen in the context of vertical chains and manufacturing firms into this new world of digital knowledge and dynamic markets.
- Economists can apply traditional economic theories and data to new industries to ensure regulatory actions remain relevant and balanced.
- New theories of harm often focus on anti-competitive effects, but it's essential to also consider pro-competitive elements.

- Market investigations, recommended in the Draghi report, are powerful tools seen in countries like the UK, Iceland, and Mexico but to be effective require clear market participant collaboration with regulators and a well-defined counterfactual to ensure proposed remedies are beneficial, otherwise intervention can be problematic.

New theories of harm and the challenges for the agencies of the business community

- Hub-and-spoke cartels require monitoring, enforcing, and punishment of deviations, which are all factual elements that need to be checked.
- Facts are crucial when analysing cartels and information exchanges, especially when dealing with presumptions.
- Information exchanges such as those related to standardisation, should be evaluated for both anti- and pro-competitive effects, rather than automatically be presumed harmful.
- Emerging areas of concern where new theories of harm have been put forward include AI, pricing algorithms, and recommendation algorithms, e.g. in the context of decision-making for pricing and HR. It should nonetheless be remembered that there are pro-competitive aspects in relation to to recommendation algorithms.
- The concern is less about individual AI tools and more about the integration of AI into systems (e.g., smartphones, messaging apps). Key issues include the potential difficulties of unbundling AI from systems and the impact on consumer switching.
- To balance competitive effects and avoid purely subjective debates, factual analysis is necessary, especially in assessing the impact of AI on markets and consumers.

Remko Bos

Director, Netherlands Authority for Consumers & Markets, The Hague

Evolution of competition tools in the current landscape from a national agency perspective

- The ACM is a multi-function authority, combining competition and antitrust enforcement with consumer protection and sector-specific regulation, allowing a multifaceted approach to problem-solving, which is relevant especially in the digital domain (e.g. in relation to the DMA, DSA, and Data Act).
- The Draghi's report emphasises the importance of competition policy for Europe's competitiveness, highlighting the evolving nature of competition law due to changing market behaviour.
- The ACM believes public interests should be taken into account in competition assessments. The ACM has a guidance practice for companies seeking to promote sustainability through cooperation; they can come to the ACM and seek guidance, which works well in practice. The ACM is also looking at press plurality aspects in the context of DPG's proposed acquisition of RTL, with the media regulator also being involved.
- The ACM sees the need for new instruments, particularly to address mergers below turnover thresholds and tackle local market competition issues. The judgement of the Court of Justice in Illumina/Grail underlines that such powers are needed.
- The ACM also sees the need for a New Competition Tool in the Netherlands to address the risk of tacit collusion in oligopolistic markets, where there are no clear breaches of competition law but competitive issues could still arise (e.g. in the market for savings by households).
- Strategic priorities include promoting a fair and open digital economy, investigating platforms for potential anti-competitive practices. The ACM has an ongoing investigation into Bol.com, and is also closing an investigation into Ticketmaster.

- The ACM closely works with the the European Commission (DG Competition) as European enforcement authority. For example, in the field of the DMA, ACM at the moment seconds staff member to participate in the joint investigation teams of the Commission (regarding the non compliance investigations into designated digital gatekeepers). Relevant signals in the Netherlands are transferred to the Commission. Next to this the ACM expects the national implementation law for DMA to be effective in 2025, which means that ACM can also autonomously investigate signals/complaints by market parties stating that a digital gatekeeper does not comply. The results of such investigations will be shared with the Commission which eventually can impose penalties or apply other instruments where appropriate and proportionate.

Tension between more effective enforcement and predictability

- Absolute predictability doesn't exist, and full clarity is achieved only when a case is closed. It is important that regulators and competition authorities should adhere to specific rules to ensure legal certainty.
- In relation to call-in powers, NCAs should have a limited timeframe to announce the assessment of a merger case and also a fixed period to assess mergers, ensuring legal certainty and preventing prolonged uncertainty. Call-in powers are important. For example, there are issues with local/regional veterinarian markets and private equity acquisitions. The Court of Justice ruling in Ilumina/Grail means that a case such Microsoft/Inflection which could have harmful effects in the Netherlands cannot be requested to be referred to the European Commission.
- A New Competition Tool could also include maximum investigation periods (e.g., one or two years) to avoid long-term uncertainty for companies.
- Guidelines are also instruments in specific areas to clarify how rules are applied in practice, e.g. in relation to what types of sustainability cooperation is acceptable.
- In the Netherlands, courts also thoroughly assess decisions made by the ACM, which encourages regulators to have strong cases and make a thorough analysis for an accurate reasoning of a decision.

New theories of harm and the challenges for the agencies of the business community

- Certain sector organisations have called for no-poach agreements, especially where there is a scarcity of highly skilled personnel. The ACM has warned that these agreements violate competition rules and have negative effects on the market.
- Mergers can create monopsony power or buying power. There is increasing attention on the impact of mergers on hiring markets, e.g. for journalists, both employed and freelance.
- Product denigration could become a more significant issue. This could include situations where products are labelled as unsustainable..
- A dedicated data analysis task force has been developed to improve detection, oversight, and understanding of the application of AI by companies.
- There is a growing concern about algorithms autonomously setting prices without human intervention, potentially leading to higher prices. This situation may not currently be prohibited but could result in consumer harm, so this goes back to the relevance of a New Competition Tool.

Stacy Turner

Partner, Baker Botts, Washington D.C.

U.S perspective on the current competition landscape in the U.S. and in Europe

- Agencies perform a critical role in relation to consumer protection.
- Competition law is not supposed to be static, and addressing new threats in digital markets and algorithm/AI-based collusion is crucial for consumer protection.
- That being said, it is important for agencies to operate within legal boundaries, yet sometimes agencies extend their authority beyond what is legally allowed.
- U.S. agencies are moving closer to European approaches, such as considering a 30% market share as potential market power, which is unfamiliar in U.S. legal precedent. There is also a lack of clear legal authority to do so.
- Findings of market power should be supported by facts, and not be based on presumptions.

Tension between more effective enforcement and predictability

- Legally privileged communication with in-house counsel is crucial, especially for creating written plans that internal business teams can rely on.
- Concerns arise over presumptions used by U.S. antitrust agencies in enforcement tools, as presumptions are generally disfavored under U.S. antitrust law, with the exception of naked restraints (such as price fixing or bid rigging) and a few narrow safe harbor exceptions.
- U.S. courts, including the Supreme Court, have consistently rejected presumptions in antitrust cases, favouring case-by-case evaluations based on specific market facts.
- General assumptions, such as market power based on thresholds are not enough; courts require close examination of the economic realities of each market, as illustrated by the California Dental case concerning advertisement restrictions amongst competitors and the Illinois Tool Works case (where the Supreme Court declined to adopt a presumption that owning a patent is tantamount to possessing market power).
- Agencies must meet the burden of proof in demonstrating anti-competitive conduct; it is not the defendant's responsibility to disprove it.In terms of predictability, we do not know how courts will rule on new agency efforts which go far astray from case law.

New theories of harm and the challenges for the agencies of the business community

- In terms of pricing algorithms, the DOJ has moved from theoretical concerns to active enforcement, bringing a civil case against RealPage for alleged Section 1 violations involving pricing software for landlords. It is unclear how this will pan out.
- There is an increased focus on labour markets, including the FTC's near-fullban on non-competes, despite the fact that most states have effective laws protecting against the concerns cited by the FTC, though this rule faces legal challenges questioning the FTC's authority.
- While the FTC chair remains confident in their authority, any long-term solution may require action from Congress, though legislative agreement remains unlikely.