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Webinar Part II: Merger Control Regulation Hot Topics 'merger control in a digital environment'

Speakers: Michael Cousin ("**MC**"), Ashurst LLP

Colin Raftery ("**CR**"), Competition Markets Authority ("**CMA**")

Simon Genevaz ("**SG**"), European Commission

Date: 8 February 2018 at 12 pm

The purpose of the webinar was to discuss merger control in a digital environment, covering recent case law in the EU, the UK and France. The webinar was divided into two sections: (a) the online constraint in retail mergers, in particular the extent to which online sales are taken into account in competitive assessment; and (b) jurisdictional criteria and other challenges facing authorities in the context of digital merger control. This note will summarise each of the two sections with reference to each speaker's commentary.

1. The online constraint of retail mergers

SG: SG introduced the *FNAC/Darty* case and highlighted its significance in expanding the market definition to include both online and offline retail in the same distribution market. SG explained the two types of evidence used by the French Competition Authority ("**FCA**"):

- Convergence between online and offline distribution e.g. the change in retailers' business models to a mixed online/offline model ('click and mortar') and increased price transparency/price matching.
- Survey evidence and inter-channel diversion ratios.

SG then explained how the FCA measured the competitive constraint posed by online retailers on offline ones. The FCA considered if online and offline sales were part of the same distribution market and if the geographic market should be national in scope. The FCA concluded that extending the geographic market would ignore significant local parameters of competition.

SG explained how the FCA instead focused on quantifying the local constraint exercised by online retailers on local store using methods such as the weighted competitors approach. SG concluded that the FCA overhauled their assessment to take online constraint into account but that the amount of evidence required to do so was extensive.

CR: CR opened the presentation noting that similar to the FCA, the CMA's traditional approach was to consider online and offline retailers as separate relevant markets. CR explained that looking at the CMA's recent case load, a recurring theme is distinguishing

online diversion from migration. He explained that evidence of migration is not by itself sufficient so as to consider the online channel as part of the same product market as the offline channel. Therefore the key challenge for the CMA was how to assess and characterise evidence of online constraint. He mentioned four recent cases where this was an issue.

CR then examined the case of *JD Sports/Go Outdoors*. He explained in detail how the four types of evidence available (commercial strategy, internal documents, third party views and customer surveys) each provided evidence for and against the impact of online constraint. CR explained the CMA's conclusion that the evidence didn't support a single relevant market for online and offline sales so their analysis continued in the usual way for a local merger i.e. assessing local competition, initial filtering (mainly based on a fascia count) to filter unproblematic areas. CR noted that the online channel nevertheless played an important part in the case, as it was taken into account as an out-of-market constraint that, considered along with other constraints, enabled the CMA to dismiss competition concerns in areas in which there was significant head-to-head competition between the merging parties' stores and few other bricks-and-mortar competitors.

MC: MC opened his presentation with an overview of the FCA's recent merger control activity in the digital sector. He also highlighted the *FNAC/Darty* case where online and offline sales were considered part of the same market but noted that this approach is not applicable to all sectors. MC noted the geographical scope of digital markets, namely that they are national in size. MC then explained four areas of competitive assessment in detail:

- Market power analysis (taking into account the fact digital markets are often two or multi-sided).
- The importance of conglomerate effects.
- Data as a key element of market power in the digital economy.
- Whether or not privacy rules should be taken into consideration in merger control.

Note: MC spoke from detailed slides which can be used for further analysis of his presentation

2. Jurisdictional issues

CR: CR focused on one of the limbs of the UK jurisdictional test- the share of supply test. He explained the test, namely that a merger has to bring about an increment in share before UK jurisdiction is triggered and the threshold is set at 25%.

CR spoke about how the test gives wide discretion to the CMA as it is not determined by the usual economic principles that apply to market definition. The CMA also has flexibility in how to measure the segment of supply, provided the criterion is reasonable. CR provided examples of the range of criterion used in previous. He noted how in practice it enables the CMA to assert jurisdiction over digital mergers which might not have qualified via a pure turnover based system.

CR explained how this applied in *Google/Waze*. He concluded that the flexibility of the test works well in the context of the UK voluntary regime but noted that in mandatory regimes, the need for certainty may be more important.

SG: SG gave two examples of how 'old tools' are adequate to analyse the specific issues that digital mergers pose. The first example was big data. SG explained why a merger between large companies involving large data sets can give rise to horizontal issues:

- A merged entity with access to a larger data set can enhance its market power.

- The merger can create higher barriers to entry for companies that don't have the same scale to compete effectively with the merged entity.
- The merger can lead to loss of competition if pre-merger the parties' competition was based on the data they control.

SG explained how the above applied in *Microsoft/LinkedIn* where the Commission analysed whether the combination of parties' data re online advertising could give rise to concerns. SG then introduced *Facebook/Whatsapp*. He explained how the lack of a value-based metric meant the Commission mainly relied on qualitative assessment of competition. SG explained in detail how the Commission used 'old tools' such as closeness of competition, consumers' ability to switch supplier, barriers to entry and network effects. SG concluded that these were adequate to analyse specific issues in digital mergers.

MC: MC focused on the issue of merger control thresholds in the digital sector. He noted the debate around a possible 'merger enforcement gap' and highlighted the approach taken by Germany, the EU and the FCA. MC explained that the value of transaction thresholds are relevant for two reasons:

- Turnover may not be an optimal indicator of market power (especially in the digital economy).
- Buying start-ups with disruptive models can be a way for incumbent players to secure market power and raise barriers to entry.

MC considered whether the above issues justified a new threshold i.e. if there is an actual enforcement gap in France, whether the new threshold would really filter problematic mergers and if the additional burden posed on undertakings would outweigh the advantages of catching more concentrations in the digital sector. He concluded by considering if a new threshold would impair the predictability of French merger control.