LIDC

INTERNATIONAL LEAGUE OF COMPETITION LAW

Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

## LIDC Conference 8 November 2024

**Closing Panel - What is Coming Next?**

***Antitrust, intellectual property and regulatory themes for the next five years***

**Panel:** Cintia Aguilar-Flores (Shell)
Jessica Radke (Deputy General Counsel, CMA)
Mr Justice Roth (High Court of England & Wales & UK Competition Appeal Tribunal)
Grant Saggers (NERA)
Professor Okeoghene Odudu (Emmunuel College, University of Cambridge)
Dr Christopher Stothers (Freshfields)
Chaired by Lord Justice Green (England & Wales Court of Appeal)

**SUMMARY OF SESSION**

**Key themes**

- The session traversed a series of issues on what the next five years may bring from the points of view of the different decision-makers and practitioners on the panel.

- We are now seeing the advent of ex ante controls (e.g. via the EU's Digital Markets Act (DMA), and the UK's DMCC) in an increasingly polarised world. This also has significant private law implications. In addition, data are becoming highly valuable property and large companies in the information sectors are increasingly arguing that copyright is moribund.

- In light of the new US administration, the panel explored potential implications for the enforcement and administration of antitrust (e.g. looser enforcement and increased politicisation) and what that could mean for global companies looking for legal certainty. One might envisage more rigorous enforcement in Europe to counterbalance greater US political intervention (reversing the historic position), which may lead to unpredictability.

- Courts are also considering the nature of future litigation, with a potentially more refined role for economic evidence given the types of technologies and issues in play.

**The Competition and Market Authority's (CMA's) Digital Markets Unit (DMU)**

- The Digital Markets, Competition and Consumers Act 2024 (DMCC), the UK's version of the DMA) establishes a new digital markets competition regime for powerful technology firms, to promote greater competition and innovation in digital markets, and to protect consumers and businesses from unfair and unsustainable practices. The DMU, created by the DMCC, will additional significant resources, to investigate firms with strategic market status and to address wide-ranging issues such as the AI marketplace.

- The panel debated whether the CMA, which is not democratically accountable in a meaningful way, could overreach its role by providing a *quasi*-legislative function, given concerns it is introducing and enforcing an economically and politically powerful regime. Yet, the CMA has parliamentary authority for the actions it is taking, and it intends to exercise stakeholder engagement and proceed in an evidence-led manner such that any concerns are considered.

- A new co-operation agreement between the CMA and EC will facilitate closer international co-operation on competition matters. This is intended to increase sharing and understanding between the UK and EU and ensure consumers / businesses are protected (although co-operation does not equate to convergence of approaches).

**Impact of *ex ante* regulation**

- A general perception exists that aside from the valid pursuit of addressing consumer welfare issues, antitrust has become more politicised globally. Regardless of the merits, the impact is less legal certainty which affects the ability of companies to self-assess. One presupposes that *ex ante* regulation will benefit consumers but, in the US, where focus has been on non-competes, labour issues and wage fixing, we may see less enforcement which may be good for companies but morally questionable. Businesses are also mindful that such regulation may not achieve the correct balance.

- Lower US intervention could leave a void for the EU to fill, so that the EU sets the minimum compliance standard across the world. These changes would take place in parallel with the new Commission, which will start its work in December 2024, under Teresa Ribera who might have different views on key policy objectives. This divergence could be disadvantageous to companies operating across both the US and the EU (as opposed to the US only), which will most likely have to conservatively comply with the most stringent regime globally.

- It might be easy to criticise the new EU and UK legislation (DMA / DMCC), but it is widely acknowledged that *ex post* regulatory enforcement of digital giants comes too late, and the pre-existing regime was not working. The recent developments are therefore positive, but the devil will be in the detail. The UK appears to provide more flexibility to the regulator than the corresponding EU regime, but the impact is difficult to predict at this stage.

- CMA decisions under the new UK regime can be challenged in the courts. Except for the quantum of fines, this will only be possible by judicial review (JR), rather than on a merits' basis. JR is more about decision-making processes rather than the decision itself.

**Role of economic analysis**

- Recent (draft) guidelines suggest that economic analysis and the role of economic evidence may be less important under the new regime – the draft DMCC guidance, for example, suggest that traditional approaches to market definition and dominance may need to evolve. One expects to see economic profitability analysis as an important tool to evaluate how markets are performing (and whether an Adverse Effect on Competition, AEC, exists), but practitioners argue that this tool is often difficult to apply in large complicated, digital businesses. Final guidelines from the CMA with regard to the digital markets competition regime guidance (a legislative requirement under the DMCC) is anticipated in December, at which point the role of economic evidence may become clearer. Even if the rules are set out carefully, there will be a debate about how to build the evidence base by which the CMA imposes a rule that a company must take action. This will be a hard process (particularly given the type of companies caught by the rules).

**Interplay between competition and IP**

- There are lessons for some of these new issues around data from past developments on the competition/IP interface. Competition policy frequently comes into how FRAND issues are resolved (incentivising improvements in better technology through IP while ensuring these are justly paid for). We are also seeing regulatory involvement with pharmaceutical companies, exemplified by a recent significant fine for TEVA. In the context of data, there is a need to understand why IP rights exist and their role in encouraging innovation, while also addressing justifiable concerns regarding delays and uncertain outcomes associated with the use of data. There is a need to find a balance and to address the market failure around licensing.

**Assessing the success of the new *ex ante* regime**

- In five years, how will we assess the success of the new model of competition regulation. We will need to consider whether innovation and investment is occurring in the jurisdictions in which *ex ante* regulation is in force, or whether it in fact occurs in jurisdictions subject to a different regulatory regime.