1. INTRODUCTORY REMARKS

Séverine Schrameck opened the discussion by stressing that ex-post merger control is a very hot topic in several countries, among which Germany and France. The French competition authority has communicated several times on that question, especially on the fact that it is in favour of the development of ex-post control in France. Ex-post merger control regimes exist in a number of other countries such as the UK, the main difference being that in the latter the ex-post control is due to the absence of mandatory ex-ante control. In some countries there are both ex-ante and ex-post proceedings.

2. UK PERSPECTIVE

Joel Bamford explained that merger notification in the UK is voluntary: parties to a transaction are within their legal rights to complete the transaction without clearance from the CMA, even if the merger qualifies for being reviewed by the CMA by meeting its jurisdictional thresholds. These thresholds are based on turnover and shares of supply of goods and services. Due to the voluntary nature of the UK regime it is the parties’ responsibility to determine whether the jurisdictional thresholds are met or not, and assess, on this basis, whether to notify the transaction to the CMA. Transactions not notified by the parties may still be called in should the CMA become aware of the transaction as a result of its own market intelligence function. Outside this formal notification process, parties may send the CMA a short briefing note explaining why they believe the CMA should not open an investigation. If the CMA decides not to open an investigation immediately, it will contact the parties and indicate that it has no further questions at this stage. However, this does not preclude further questions at a later stage nor an investigation being opened, if further information comes to light (e.g. where the CMA received further evidence from customers, competitors or general members of the public, requiring further investigation).

With regard to non-notified transactions, the CMA has a formal four-month window to open and complete its Phase I investigation and make a reference for a Phase II investigation, if required. This four-month clock runs from completion of the transaction or, if later, when the transaction is made public (i.e. when the CMA could...
reasonably be aware of it). There have been debates before the CMA and UK Courts as to what that notion of “made public” encompasses. As per the CMA’s guidance this involves material facts about the transaction being publicly disclosed including, for example, in a press release on the companies’ website and in the national press etc.

Once the transaction has been made public, the CMA has four months to investigate. However, in some cases, from the transaction being completed to the CMA concluding its Phase I investigation, several years have passed due to the transaction not being made public. From the parties’ perspective, this may create some uncertainty with respect to the outcome and length of the investigation.

As a result of this voluntary regime, the CMA looks at a lower number of transactions by comparison to other European regulators. Thus, while mandatory regimes may provide more certainty, the UK system allows the CMA and business alike to concentrate their efforts on transactions with a significant impact.

Finally, the CMA has another tool at its disposal, the so-called “salami slicing” provision. Where two companies carry out a series of transactions within a single two-year period, the CMA can treat these successive transactions as having occurred simultaneously. The last transaction will be used as the basis to determine when the four-month investigation window will end.

3. FRENCH PERSPECTIVE

Etienne Chantrel addressed the question from the view of France’s practice of merger control. The current tools may be slow or difficult to use. This is also true regarding certain EU tools. Article 22 of the EU Merger Regulation provides the possibility for national competition authorities to refer a case to the Commission, but it contains no mention of a case being not viable in the original country. However, it is an explicit policy of the Commission that they will never accept an Article 22 referral if the case was not notifiable in the country of origin. Thus, there is a safety net in theory but not necessarily in practice.

Regarding potential reforms, there has been a debate about thresholds on the value of transactions. It was proposed in the Commission’s White Paper in 2016 and adopted by Germany and Austria in 2017. All other European countries have chosen different methods. In 2017 Hungary, which already had an accepted threshold based on turnover, decided to add an ex-post review regime. To sum up, all countries that have an ex-ante regime experience a debate about changing the merger notification thresholds.

What is the rationale behind that? It is true that some transactions that are important for the markets cannot be caught by the authorities, but no system is perfect and this is not a sufficient reason to reform merger control.

In addition, it is uncertain that a new threshold based on the value of transactions would catch transactions such as those occurring on smaller markets. An example of that are the bus companies that merged 4 years ago in France: the entrance of numerous new incomers on the market led to a consolidation phase where companies such as Flixbus bought several competitors. The market was globally narrowed down to 2 players. The transactions concerned were under the turnover thresholds, but they would have also been under the transaction value thresholds. If tomorrow a 2 to 1 merger occurs in that sector, it is still likely to fall below the thresholds.

The speaker concluded that an ex-post regime is the perfect balance between not catching too many uninteresting transactions and catching all those that are interesting by design. Of course, such a perfect balance goes at the expense of legal certainty.
4. THE DEBATE

DAVID SEVY

The debate on ex-post merger reviews started from at least two angles. The first one was a recognition of increasing concentration and mark ups in several sectors of advanced economies, raising the issue of market power and its exercise by e.g. star firms at the upper tail of firm distribution. The digital sector epitomized those concerns, as its characteristics (economies of scale, network effects...) would lead naturally to concentrated market structures.

The second one is a growing concern with antitrust and merger control under-enforcement. The European experience would fare rather well in that regard, while there is a vivid debate in the US as to whether ex-ante merger control has been properly enforced. Thus, the introduction of an additional tool must be carefully thought, in particular given the resource constraints emphasized by competition agencies. The second one is a growing concern with antitrust and merger control under-enforcement. The European experience would fare rather well in that regard, while there is a vivid debate in the US as to whether ex-ante merger control has been properly enforced. Thus, the introduction of an additional tool must be carefully thought, in particular given the resource constraints emphasized by competition agencies.

Amongst places where ex-post merger control is implemented, the US is an interesting case. There, ex-post interventions take place within a strong checks and balances system, in particular with demanding judicial review. This is an important counterpart to an ex-post merger review system that leaves significant scope to Government’s discretion.

If there is ever an ex-post regime in the French case, clarity on the scope and timing of intervention will be needed, with trade-offs to achieve. A long enough period after a merger is consummated obviously creates legal uncertainty, but certainly gives authorities an opportunity to look at what happened on the market. This is a luxury, insofar as ex-ante merger control is essentially about predicting the future, which is difficult for authorities and advisors alike. Yet, a robust ex-post merger assessment will need to take into consideration a host of factors that might explain what has happened in the market (demand and supply factors, technological changes, evolution of the market regulation,...). This is quite an amount of work and authorities will have to accept that results might not allow to conclude that the merger was harmful – as shown in post-mortem merger studies – hence exercise some self-restraints.

Another important aspect that can be tackled with an ex-post assessment would be non-price dimensions of competition, such as product quality, variety. This is an area where standard predictive tools used in merger control are not as effective as UPPs, GUPPIs or merger simulation can be in the case of price competition. With non-horizontal mergers, analytical tools used in ex-ante reviews allow to look at potential changes brought by the merger, for instance in the ability and incentives to supply inputs and provide access to some facilities. An ex-post assessment could exploit natural experiments: authorities could see if, after a merger, a vertically-integrated company is changing the manner and conditions of access to its input or facilities.

ETIENNE CHANTREL

The debate on whether to adopt a new tool or update the existing ones should not entail a dilemma: both can be done, and in any case the current tools will need to be improved. However, the introduction of quantitative criteria would need to be clearly thought of, and for now uncertainties prevail.

SHOULDN’T WE FOCUS ON IMPROVING EX-ANTE MERGER REVIEW IMPLEMENTATION, RATHER THAN ADDING THE BURDEN OF EX-POST MERGER CONTROL? “

DAVID SEVY

> SEE SPEAKERS’ VIDEO INTERVIEWS AND PHOTOS ON CONCURRENCES.COM WEBSITE (CONFERENCES > 16 OCTOBER 2019)
Regarding the idea that particular undertakings could be monitored, there could be a list of companies required to inform the agencies of their activities and acquisitions. Norway has created such a list of companies in addition to an ex-post and ex-ante regime. The legal basis is simple: the Norwegian authority considers that the list is only an extension of the fact-finding powers. This system is not burdensome for the agencies, nor for the firms: it is a part of their ex-post regime, by putting on them the responsibility to inform on their activities. It could be an interesting thing to implement within the EU, although the national authorities do not have lists of sectors with particular companies in mind.

Etienne Chantrel agrees that a longer time period after the merger would allow for a real ex-post assessment, which would allow to catch killer acquisitions and non-price effects. However, with a longer period there would be no longer an ex-post control but more a discretionary aggregation power. The legislator will have to make the balance between efficiency and legal certainty, and to decide on the creation of a new tool. So far, the French government has taken no formal position on that matter, apart from the Minister of the Economy stating that they have in mind a longer time frame.

**5. QUESTIONS & ANSWERS**

The biggest issue of ex-post control is that firms can wait an important amount of time after the ex-post time frame to implement anti-competitive effects. For example, Whatsapp waited 2 years to share the data with Facebook. How to address these challenges?

Etienne Chantrel stressed that Articles 101 and 102 TFEU allow to address these challenges. There is also a specific tool in France: Article L. 430-9 of the code de commerce (a specific ex-post regime for abuses of dominant positions). However, this provision is not often used: the burden of proof of the abuse is high, and the length of the related investigations is incompatible with the pace of business in certain sectors (especially the digital one).

David Sevy recalled that merger control is also meant to account for efficiencies, which are expected to materialize rather quickly when they flow from the companies’ new organisation. In case of an ex-post control, the verification of those efficiencies should be easier.

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**JOEL BAMFORD**

The UK has already undertaken a programme of ex-post remedy reviews, which has shown a clear preference for structural remedies. Even in highly regulated economic sectors, with long-term assets and high entry barriers, the burden on the enforcing agency and the parties is high.

The Enterprise Act 2002 enables the CMA to take steps to prevent or unwind pre-emptive action in completed mergers i.e. an action that might prejudice the outcome of a reference or impeded the taking of any appropriate remedial action. Those more stringent powers were, inter alia, introduced to enable the CMA to hold the main parties separate even where the transaction has already taken place i.e. for completed transactions. Through issuing such initial enforcement orders and interim measures, the CMA ensures the parties continue to compete while the investigation is on going and aids the development of any divestment remedy that is required.

Finally, while parties can take the initiative to offer remedies to the CMA, the latter also has the power to impose these.

Finally, the UK Government commissioned a recent review looking at competition and the digital world (The Furman report). One of the report’s recommendations is to designate certain companies as having “strategic market status”. The report recommends that these companies would have to inform the CMA of all transactions.