DIGITAL AND COMPETITION
SHOULD THE RULES BE CHANGED?

Monday 7 October 2019  |  Paris
55 Corporations
ACT - The App Association
Airbnb
Airbus
Amazon
Apple
Association of Commercial Television
Association of In-house Competition Lawyers (ICLA)
Atos
Booking.com
BPCE
Boston Scientific
Caisse des Dépôts
Chanel
Clarins
Computer & Communications Industry Association
Confederation of Danish Industry
EDF
ENGIE
Eissilor International
European Broadcasting Union
Facebook
Fédération du Commerce et de la Distribution (FCD)
Geodis
Google
HP
IATA
Ingersoll Rand
International Rail Transport Committee
Intesa Sanpaolo
ITM Entreprises
Johnson & Johnson
Keolis
La Poste
LVMH
Michelin
Netflix
Orange
Panasonic
Premier Foods
Radio France
Reckitt Benckiser
Saint Gobain
Showroomprivé.com
SNCF
SNCF Mobilités
Suez
Tetra Pak
TFI
The Walt Disney Company
Total
Total Marketing Services
Uber
UiPath
United Telecommunications Services
Vivendi
Western Union
Whirlpool

45 Law firms
ADSTO
Allen & Overy
Ashurst
Baker McKenzie
Bird & Bird
Borrel Avocats
Bredin Prat
Bryan Cave Leighton Paisner
Cabinet Goyer Avocats
Carbonnier Lamaze Rasle
Claude & Sarkozy
Covington & Burling
Dango
Darrois
De Gaulle Fleurance & Associés
Dechert
ELIG Gürkaynak
Attorneys-at-Law
Euclid Law
Fidal
Fieldfisher
Franklin
Freshfields Bruckhaus Deringer
Friejac Associates
Hausfeld
Herald
Kuckenburg Bureth Boineau
Linklaters
Mairie de Bois Colombes
Mapp
Markó & Udrea Attorneys-at-law
Massimiliano di Gangemi
McDermott Will & Emery
Norton Rose Fulbright
Oréal
Orck
Paul Hastings
Reed Smith
Samman Avocats
Satis Avocats
Sidley Austin
Simmons & Simmons
Solon Avocats
Spy Avocat
Tanfield Chambers
Tsianounis & Partners
Van Bael & Bellis
White & Case
Willkie Farr & Gallagher
Zhong Lun

35 Courts & Enforcement Agencies
ARCEP
Autorité de la concurrence
CCI Paris
CGefi
CNIL
Cour de cassation
Danish Competition and Consumer Authority
Danish Permanent Representation to the EU
Department of Communications of the Republic of South Africa
DG COMP
DG Research and Innovation
DGCCRF
Egyptian Competition Authority
Eurojust
European Data Protection Supervisor
French General Secretariat for European Affairs
French Ministry for armed forces
French Parliament
French Prudential Supervision and Resolution Authority (ACPR)
French Treasury
Higher Audiovisual Council (CSA)
Italian Competition Authority
Mairie de Bois Colombes
OECD
Papua New Guinea Department of Treasury
Payment Systems Regulator
Salvadorian Competition Superintendence
Secrétariat général des affaires européennes (SGAE)
Tribunal de Commerce de Paris
Turkish National Telecommunications Authority
The Netherlands Administrative High Court of Trade and Industry
UK Competition and Markets Authority
UK Competition Appeal Tribunal
PROGRAM

13.30 REGISTRATION

14.00 OPENING KEYNOTE

Daniel FASQUELLE | Member of Parliament & Vice-President of the Economics Affairs Commission, Assemblée Nationale | Professeur, University of Littoral-Côte-d’Opale

14.15 BUSINESS AND PERSONAL DATA: SHOULD ACCESS SHARING BE MANDATORY?

Christian D’CUNHA | Head of the Private Office of EDPS Supervisor, EDPS, Brussels
Daniel KANTER | Chief antitrust counsel, IATA, Montreal
Timothy LAMB | Associate General Counsel - Competition and Regulatory, Facebook, London
Jacques MOSCIANESE | Executive Director & Group Head of Institutional Affairs, Intesa Sanpaolo, Milan
Moderator: Miranda COLE | Partner, Covington & Burling, Brussels

15.30 COFFEE BREAK

16.00 COMPETITION POLICY: SHOULD NEW TOOLS BE DEVELOPED?

Nicholas BANASEVIC | Head of Unit - Antitrust: IT, Internet and Consumer electronics, DG COMP, Brussels
Oliver BETHELL | Director - EMEA Competition, Google, London
Andrea GOMES DA SILVA | Executive Director - Markets and Mergers, Competition and Markets Authority, London
Michael KEFI | Lead Competition EMEA, Uber, Paris
Thibault SCHREPEL | Assistant Professor, Utrecht University
Moderator: James AITKEN | Partner, Freshfields, London

17.15 ENFORCERS ROUNDTABLE

Marie-Laure DENIS | President, French data protection authority (CNIL), Paris
Isabelle DE SILVA | President, Autorité de la concurrence, Paris
Gabriella MUSCOLO | Commissioner, Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato, AGCM), Rome
Moderator: Cristina CAFFARRA | Head of European Competition Practice, CRA International, Brussels/London

18.30 COCKTAIL RECEPTION
Daniel Fasquelle opened the conference by stressing that the topic of competition in digital markets is of interest not only to jurists and economists, academic and practitioners, but also to the Legislature. He expects that initiatives be undertaken within the Economics Affairs Commission of the Assemblée Nationale.

To begin with, Mr Fasquelle reminded the title of the conference: ‘Should the rules be changed?’ He explained that difficulties have arisen from the fact that digital markets are characterized by specific features that are different from traditional markets, including network effects and market barriers due to data accumulation. Therefore, the analytical framework has changed. Various initiatives have been undertaken, both at the national levels and at the European and international levels. The on-going discussions are building on an already large set of materials.

Then, Mr Fasquelle elaborated on a few introductory remarks. First, he noted that competition law appears to be threatened (in competition with other disciplines, or a sui generis sector-specific regulatory regime) as a tool to preserve and promote fair competition in digital markets; competition law must and will adapt. Under French law, the prohibition on unfair trading practices and that of practices, which restrict competition, remain useful tools, among others, which provide with material solutions. The law has proved to be flexible. Mr Fasquelle also highlighted the collaborative approach adopted by the national competition authorities but also by other relevant actors. He mentioned the European Digital Media Observatory. However, further changes must be made. Mr Fasquelle noted that the Furman report and the Crémer reports coincides in that they endorse further action since the existing tools are not suitable to address the issues raised by the conduct and market shares of the biggest tech companies. He outlined the most recent initiatives, before suggesting that, when revising competition law and enforcement, the emphasis should be placed on market definition, theories of harm, predation, and merger control.
Miranda Cole opened the discussion on whether access to data should be made mandatory and introduced the panellists, emphasizing on the diversity of their backgrounds. She started by explaining that the use of the word ‘data’, regardless of the association with the adjective ‘big’, refers to a broad thing: consumption-related data, data coming off sophisticated equipment, and financial services data. Ms Cole raised specific questions, including: how and where is the data used and how and where will it be used? Where is the harm that might warrant access from being granted? Does the nature of data in issue matter and does it have an impact on replicability? Should data be treated differently depending on how it has been collected? Should competitive advantage be considered? Ms Cole outlined the topics to be discussed by the speakers, such as portability and access rights.

Later on, Ms Cole focused on the question of who owns the data to be shared, and whether it matters in the assessment of the harm justifying the data sharing measure. The question she thus raised is whether the challenge is only that of the conditions of the sharing. Another issue relates to the determination of the authority granting the right to data access, as well as the relevance of considering the market in which the data to be shared will be used, as opposed to the market in which it has been collected.

Timothy Lamb started by framing the discussion in the context of the use of data in the advertising industry. He explained that a wide variety of companies around a wide range of industries, including airlines, pharmaceutical, financial services have been collecting data for some time, noting that, although it is not a new phenomenon, the velocity, variety, volume, and veracity of data obtained through the different channels has dramatically increased. Mr Lamb stressed that recent changes in the use of electronic devices signal that individuals will have an increasing number of data relationships within an increasing number of organisations. It raises questions as to how data should be treated. Mr Lamb explained that, although a number of organisations make data available for sale or licence, there are a number of other options for acquiring data. He suggested that, even if it were not possible to acquire exactly the same set of data than another company, this is not the right question. He explained that an underlying assumption is that data is homogenous. Evidence suggests that this might not be the case, together with the fact that data from the outset might not be necessary for market entry. The rapid entry and growth of some market players suggest that ideas and ability to execute might matter more than data for market entry. Data is valuable, but not essential. It does not drive entry. Timothy Lamb then focused of whether data confers long-term competitive advantage. According to him, regardless of the criteria used in assessing data-based competitive advantages, the latter does not justify intervention under European law. He argued that this is nothing more than competition on the merits.

Furthermore, Timothy Lamb focused on data portability. He explained that Facebook supports the principle of data portability for digital platforms as it provides users with the ability to have control over their data. It thus provides a “download your information” tool, in accordance with the GDPR. Mr Lamb emphasized that further efforts could be made, to enhance control over data. He pointed out that Facebook, Google, Microsoft and Twitter have partnered in the context of an open-source collaboration to enhance data portability. Also, Mr Lamb highlighted issues of privacy and security and listed the main questions raised by data portability, including those related to platform-to-app portability.

Finally, Timothy Lamb highlighted some issues associated with tying data with ownership rights. He stressed discrepancies between the persons who have control over the data and the persons who have interest in the data being shared or not, such as exemplified by the right to delete a picture posted on a digital platform.

After providing the audience with general data on the airline industry and emphasizing the enormous costs associated with aircraft maintenance, Daniel Kanter noted that an Airbus A350 produces 2.5 terabytes of data where an Airbus 777 only produces a couple of gigabytes. Mr Kanter explained that this data, which includes all parameters related to the aircraft, could be used to reduce maintenance costs drastically. It can also be used for innovation leading to cost reduction. He mentioned the development of two products driven by the use of data: prognostics and predictive maintenance. Data is also processed for product improvement and commercial purposes, as well as to prevent reverse engineering in the primary market. Mr Kanter also elaborated on interoperability. Finally, he stressed that, since the data coming off aircrafts is encrypted, operators who own the data cannot use it; therefore, data ownership has not been raised as a prominent issue in the industry.

Jacques Moscianese reminded that antitrust law prohibits the exchanges of some information between competitors. However, he stated that, in many cases, data exchanges between market players may improve the conditions of competition on markets. According to him, the right approach is to look at the market into which the data could be an input, even though it may not be used as such yet, considering whether it could be a facilitator for a new service. Mr Moscianese argued that information exchanges should not be limited to intra-sector data but extend to inter-sector data, and that they should not be limited to information exchanges from banks to
third parties in the financial services industry. In other words, information exchanges should not be unilateral such as provided by the PSD2 Regulation. He explained that it is easy for big tech companies to adapt their structure and organisation to address current challenges. These companies, flush with money and data, benefit from network effects and efficiencies that allow them to enter secondary markets. On the contrary, banks and many other industries face difficulties in adapting.

Mr Moscianese contended that a right to data access should be granted under certain circumstances. When determining whether a right to data access should be granted, antitrust tools could be used, for example, to assess asymmetries. Law makers should act as facilitators of the digital economy by reducing barriers to data sharing when such measure would be procompetitive. He expressed confidence in the relevance of data portability such as enshrined in the GDPR.

Furthermore, Moscianese stated that, although recent initiatives are going in the right direction, however, they are not enough. A regulatory initiative should be undertaken at the European Union level building a cross-sectoral free data portability area.

To finish, Jacques Moscianese pointed out the difference between data portability in a B2B context (business-to-business) and data portability in a B2C context (business-to-consumer). He stressed the importance of having a level playing field in the B2B context, contrary to what the PSD2 Regulation effects.

**Christian D’Cunha** started by reminding that access to data is at the core of the agenda in Brussels. He explained that data sharing empowers operators and that it should be considered in a public interest perspective. Data may provide information, knowledge and wisdom. The question remains whether companies and governments that control the most data are the most knowledgeable and the wisest.

Mr D’Cunha elaborated upon the regulatory framework for data portability. The GDPR provides with a broad definition of personal data and requires that the processing of data be justified and to have a legal basis. He explained that an assumption underlying the GDPR is that the free flow of data is beneficial. It introduces privacy by design. Also, new rights have been granted, such as data portability. Christian D’Cunha mentioned initiatives with respect to the challenge of anonymizing data, i.e. turning personal data into non-personal data. He explained that if a data set contains personal data, sharing the data set requires finding a legal basis, which could be a decision by a competition authority. Another legal basis on which the EDPS is working towards is public interest.

Furthermore, Mr D’Cunha emphasized that current phenomena, such as the decrease investment in artificial intelligence, signals that the hype around AI could be a bubble. He mentioned other reasons for taking initiatives and acting at the European Union level, such as the general sense that the monopolization of data has broken the incentive structure of markets. Last but not least, democracy itself seems to be threatened by uncontrolled data practices when data is weaponized by actors with political motives. Finally, Christian D’Cunha mentioned another policy concern, namely the impact of the digital economy on the environment.
James Aitken introduced the panellists and briefly mentioned their backgrounds. Mr Aitken emphasized the proactivity of competition authorities in regard to digital markets, in which active enforcement is being undertaken. He also noted that a greater number of transactions have been reviewed under the merger control regime. Mr Aitken suggested that the issue of competition for the market and competition in the market reveals that action should be taken against the status quo.

With respect to merger control, Mr Aitken pointed out two issues. First, are competition authorities reviewing enough acquisition activity in the digital sectors? Second, when competition authorities are reviewing deals, are they applying the right theories of harm? Interestingly, and unusually, the UK regime is voluntary, coupled with wide and flexible jurisdiction test. The Furman report recommended that certain firms be designated as having strategic market significance, required to notify all of their deals. Some argued that it would be a rather bureaucratic mechanism.

Furthermore, Mr Aitken reminded that although competition authorities in Western Europe have broad powers to gather evidence to carry out the competition analysis, it is said that this analysis is not properly carried out ex ante.

Nicholas Banasevic understands the question as that of whether there is a systemic issue signalling that transactions that currently do not fall under the radar of competition authorities should be reviewed. He stated that the DG COMP, together with other authorities, is vigilant in that regard. With respect to the relevance of ex post review, Mr Banasevic reminded that ex ante merger control is a predictive discipline based on a prospective analysis; an objective decision must be reached based on the evidence available.

Also, Mr Banasevic insisted on the fact that competition and regulation should not be regarded as a trade-off but rather complementary disciplines. According to him, common sense, on the basis of evidence, should drive enforcement. He reminded that the European Commission adopted seven decisions of prohibition under Article 102 of the Treaty on the Functioning of the European Union over the last five years. In other cases, the European Union also agreed commitments with parties. While some consider that enforcement is insufficient, others criticise over-enforcement. Mr Banasevic stressed the importance of being vigilant when characterizing phenomena. He stressed that the Commission’s recent abuse of dominance Decisions had a detailed analysis of effects and harm.

Andrea Gomes da Silva reminded the audience of the proposals put forward in the Furman report in relation to possible changes to the UK merger control regime. In relation to a specific question in relation to one of the proposals, namely that those companies designated as having SMS should be required to alert the CMA of proposed acquisitions, Ms Gomes da Silva explained that an internal CMA body, the Mergers Intelligence Committee (the “MIC”), review over 600 mergers a year that have not been notified to the CMA, and that the CMA has the power to “call in” non-notified mergers for review. She expressed satisfaction with the activity of the MIC. However, she highlighted that there may be a time lag before a merger is picked up by MIC and, as the regime is not suspensory, transactions may have been completed before the CMA as started conducting its review. If the CMA eventually concludes that the transaction has a harmful impact on competition, this can make it more difficult for the CMA to take action to address concerns about an adverse effect on competition. The Furman proposal would thus address this time lag and relieve the burden on the MIC. She stressed that the proposal cannot be seen as a substitute but an improvement of the regime at its margin.

Ms Gomes da Silva stated that it is almost certain that there has been underenforcement in relation to mergers in the digital space, but emphasized the difficulty of identifying which cases were handled (or not) wrongly. She agreed with the Furman report that different theories of harm should be considered, and said that the CMA had already been doing this for some time. However, although the CMA has
1 Panel

2 James Aitken  
Partner, Freshfields

3 Nicholas Banasevic  
Head of Unit - Antitrust: IT, Internet and Consumer electronics, DG COMP

4 Andrea Gomes da Silva  
Executive Director - Markets and Mergers, Competition and Markets Authority

5 Oliver Bethell  
Director - EMEA Competition, Google

6 Michael Kefi  
Lead Counsel Competition EMEA, Uber

7 Thibault Schrepel  
Assistant Professor, Utrecht University
been supportive of the Furman report in various regards, it disagrees with the ‘balance of harm’ approach. Ms Gomes da Silva explained that the ‘balance of harm’ test made intuitive sense, but would likely be incredibly difficult to operationalize in practice, especially because its degree of false precision. Reducing a competition assessment (which is currently taken on the basis of all the evidence in the round) to a probabilistic outcome, particularly in markets in which competition authorities are not dealing with price effects, runs the risk of perverse outcomes.

Finally, Ms Gomes da Silva explained that the Furman report recommends the adoption of a code of conduct for companies designated as having strategic market significance; it can be regarded as a way to set some ex ante rules. Furthermore, a category of procompetitive regulation could be applied more broadly, for example with respect to interoperability and access on fair terms.

Asked whether there is an enforcement gap, Oliver Bethell pointed out the importance of looking at market entry. He stressed that Google’s experience with venture capital funding does not reveal a decrease in market entry. Also, following entry, acquisitions do not appear to have a chilling effect on innovation. Mr Bethell then focused on other specific questions to be answered, beyond that of the existence of an enforcement gap, including the impact of greater scrutiny on investment incentives and the predication of high-risk investment in technology on the exit strategy, as well as the valuation of deals in digital markets by companies.

Regarding the notion of competition on the merits, Mr Bethell suggested that guidance on how it is to be applied in specific cases, for example depending on the type of integration and/or technology. He elaborated upon the Google Shopping case, suggesting that it informs about how competition authorities will deal with similar cases. Another aspect that requires more specificity is the metrics to be used for the purposes of the assessment.

Michael Kefi reminded that the debates revolving around killer acquisitions have been raised in reaction to the increase in the level of concentration and the associated need for tools to mitigate the effects ex ante and ex post. According to Mr Kefi, the question is that of a trade-off between, on the one hand, innovation and related efficiencies and, on the other hand, killer acquisitions—in other words, restriction to competition and restriction to innovation. Three perspectives must be taken: that of the targeted company, that of the buying company and that of the competition authority. The innovative company produces a good or service that big tech companies are not able to produce. For the point of view of the buyer, it may be organic investment or inorganic investment, but the investment will not be driven by the attempt to kill the technology underlying the product or service. Mr Kefi suggested that a combination of ex ante and ex post control is key, as well as rethinking the burden and standards of proof.

Mr Kefi insisted on the fact that competition on the merits and business success on markets should not be regarded as an issue. Competition authorities need to be equipped with innovative tools, such as the notion of level playing field and fairness, to deal with the issues they face. Also, competition authorities should take into account the fact that big tech players are huge investors. Finally, Michael Mefi argued that competition authorities’ activity should prevail over regulation.

Thibault Schrepel was asked by Mr Aitken to address his views on how to increase certainty in ex ante merger control and whether new tools should be used in conjunction or as an alternative to the counterfactual approach. Mr Schrepel started to explain that disruptive innovation is, initially, of worse quality than existing technology, the difficulty being to identify which of these lower-quality innovations will become a leading technology in the future. For that reason, he argued, ex ante rules are incomplete by nature. That being said, Dr. Schrepel argued that implementing ex post review mechanisms would threaten companies in disproportionate terms, as they could be required to divest at any point in time. It would also make competition agencies a de facto regulator. An alternative would be to institutionalize retrospectives on past mergers to improve how merger control is carried out ex ante. For that, competition authorities need to raise their understanding of technologies by diving into the coding of digital platforms and software, for example to identify potential network effects. He noted that the French competition authority is very active in that regard and that it requires dialogue between jurists and economists, but also, computer scientists and developers.

Regarding the burden of proof, Dr. Schrepel expressed scepticism towards the proposal that companies could be required to provide competitive analysis for all their conducts because they are not, and should not be, equipped to perform such analysis. According to Mr Schrepel, competition authorities should adopt a clear definition of harm and bear the burden of conducting proper empirical study, especially when they are not relying on the categories of practices already known (tying, predatory pricing…) but are rather sanctioning a “new type” of practice. Dr. Schrepel explained that, for instance, the Google Shopping case could have been dealt with under Article 102(c) of the Treaty of the Functioning of the European Union, that is, the rules applicable to discrimination. Considering the fact that the European Commission preferred to characterize Google’s conduct as a new type of practice, it should have required to set a clear legal test. By doing so, indeed, the European Commission forced a new practice into the realm of the rule of law, and for that reason, would have been well inspired to specify the legal test being applied.

Finally, Dr. Schrepel argued that competition issues raised by the use of algorithms—detectability and liability— are nothing new and that it could be wise to wait for the technology to develop before taking any action. On the contrary, he highlighted the need to deal with the issues associated with the development of blockchain without further ado as an ex-post application of competition law may prove to be extremely difficult, if not impossible in most cases.
PANEL 3

ENFORCERS’ ROUNDTABLE

Cristina Caffarra introduced the discussion on the relevance and adequacy of the tools available to competition law enforcers, the need to move beyond antitrust and the complementarity of regulation, especially when it comes to privacy.

Marie-Laure Denis started by noting the increasing overlap between data protection and competition. Not only the companies whose business model is based on collecting, processing and monetizing data are one of the most significant market players, but also individuals are increasingly concerned about their rights relating to data.

According to Ms Denis, data protection and antitrust must be regarded as complementary to address the specificities of digital platforms. She mentioned the Facebook decision of the German competition authority as an example. Ms Denis identified the question as to whether, under competition, users are granted control over their personal data as one of the most significant challenges. At the European level, the European Data Protection Board is considering holding an exchange of views with the Commissioner for Competition or the DG COMP. Recent discussions and initiatives signal awareness regarding the need for a more collaborative approach shared by regulators and enforcers.

Furthermore, Ms Denis elaborated upon the GDPR. She mentioned that the Regulation does not aim at promoting competition but protecting privacy. However, it may foster competition and innovation. Ms Denis took the example of the right to portability, enshrined in the GDPR. The implementation of the GDPR should not be regarded as a constraint on business but rather as an opportunity since it supports the development of the digital economy.

Finally, Marie-Laure Denis opposed the idea of a 'super-regulator' that would be tasked by enforcing competition law and privacy law in digital markets, noting that the two disciplines are governed by different underlying rationales.

Gabriella Muscolo explained that the process that aims at extracting knowledge from big data involves collecting (generating, acquiring and storing data), processing and interpreting data. Ms Muscolo stressed the importance of distinguishing among data. While raw data produced by machines are usually not protected by intellectual property rights since they do not result from an intellectual activity, the data obtained by processing raw data is subject to different regimes, which may grant ownership and intellectual property. Ms Muscolo mentioned the sui generis right related to data sets and patent law and explained that the theory underlying intellectual property rights is based on utilitarianism.

The Court of Justice has not produced relevant case law yet in that regard. Nevertheless, the Italian competition authority is aware that intellectual property rights can have a significant role in the development of market power.
Some tools are already available to protect competition in the digital sector. According to Ms Muscolo, it is not necessary to develop new tools, but to adapt the existing tools. For example, the Italian competition authority has hired a data scientist tasked with dealing with the technology-related aspects of the issues raised by the development of the digital economy. The authority also benefits from advocacy powers. By applying the proportionality test, competition authorities can have a balancing role between competition and other legitimate public interests, acting towards ensuring fair competition between existing market players and new entrants.

Isabelle de Silva started by stressing the importance and urgency of engaging with the Legislature on the adaptation of competition law in view of the challenges raised by the digital economy, and that of furthering the current discussion within the Parliament. She stated that, although a lot can be done within the scope of competition law, it cannot address all the issues and challenges raised by the digital economy and should consequently be strengthened.

First, Ms de Silva emphasized the importance of using all the tools currently available to competition authorities. For example, the French competition authority can conduct in-depth sector investigations and specific studies. Also, merger control enables the authority to avoid competition disruption. Isabelle de Silva pointed out that the authority would benefit from another tool, which would allow it to review acquisitions that fall below the current thresholds. Furthermore, she suggested that these acquisitions should be reviewed differently. Market definition raises other challenges. However, Ms de Silva explained that relevant markets can be defined without using the SSNIP test, which is said to be irrelevant in the case of digital markets in which price is absent. Finally, the President insisted on the importance of resorting to precautionary measures and to react in relevant time to avoid anticompetitive effect to materialize.

Second, Ms de Silva argued that these tools must be complemented. She wishes that the French competition authority be granted the right to grant precautionary measures upon its own initiative and be equipped with a mechanism to compensate whistle-blowers. In regard to merger control, Ms de Silva explained that proposals have been put forward to review acquisitions that do not fall under the thresholds, based on other criteria. The proposal endorsed by the French competition authority consists in enabling it to review acquisitions that could disrupt competition significantly on the relevant markets (which cannot be translated into a transaction value criteria). Another tool, already used by the Norwegian competition authority, is to have the power to require from big market players that they notify all of their deals; the competition authority will review a particular deal if it considers that it may raise competition issues.

To conclude, Ms de Silva asserted that the collaborative approach adopted by the different, relevant agencies has been fruitful, given the overlap between the issues that these agencies have to deal with. According to her, regardless of the institutional structure, it only matters that the relevant powers are granted to well-equipped authorities and that these authorities exercise their powers successfully and efficiently.

Ms Caffarra firmly endorsed the initiatives of the French competition authority aimed at preserving and promoting competition in digital markets.
SPEAKERS & VIPS DINNER
MP’S PRIVATE RESTAURANT

Dinner hosted by Covington & Burling and Freshfields Bruckhaus Deringer at the restaurant of the French Parliament

COVINGTON  Freshfields

ATTENDEES

ADSTO
Amazon
Assemblée nationale
Autorité de la concurrence
Bredin Prat
Carbonnier Lamaze Rasle
Competition and Markets Authority
Covington & Burling
Dargo
Ecole Polytechnique
Extent Economics
EE&MG
ELIG Gürkaynak
Attorneys-at-Law
Eurojust
Facebook
Fidal
Freshfields Bruckhaus Deringer
Frieh Associés
Frontier Economics
Google
Harvard University

HP
IATA
International Rail Transport Committee
Intesa Sanpaolo
Italian Competition Authority
Kuckenburg Bureth Boinneau
Markó&Udrea
Attorneys-at-law
Orange
Positive Competition
SNCF
Tanfield Chambers
Total Marketing Services
Tribunal de Commerce de Paris
Uber
University of Paris II Panthéon-Assas
Vivendi
Willkie Farr & Gallagher
Zhong Lun

1 Daniel Kanter
   Chief Antitrust Counsel, IATA
2 Irene de Angelis
   Head of Antitrust Affairs, Intesa Sanpaolo
3 Gabriel Lluch
   General Counsel competition and regulation, Orange
4 Michael Kefi
   Lead Counsel Competition EMEA, Uber
5 Timothy Lamb
   Associate General Counsel Competition and Regulatory, Facebook

DIGITAL AND COMPETITION  |  Monday 7 October 2019  |  Paris 13
NO NEED FOR DEDICATED FRENCH REGULATOR FOR BIG TECH, SAYS COMPETITION HEAD DE SILVA

by Arezki Yaïche, MLex, October 8, 2019

Greater cooperation between French regulators will be more effective to curb Big Tech companies’ dominance than setting up a new digital task force, French competition head Isabelle de Silva has said. “The collaborative approach between regulators, with regular meetings, is already efficient without merging and creating a common service,” De Silva told a conference in Paris yesterday. “Digital is everywhere so . . . do we need to create a digital authority?” de Silva asked during the conference, adding that the complementarity between the French telecom regulator, the data-protection agency, the audio-visual watchdog and the competition authority should be enough, because it’s “well-functioning.” Her comments echoed the ones made by Marie-Laure Denis, head of the data-protection agency CNIL, who told MLex that monitoring Big Tech’s collection and monetization of personal data requires stronger cooperation between EU antitrust and data-protection regulators. However, De Silva’s comments contradict calls earlier this year to create a digital taskforce in France. In July, the seven French regulators said they would share information to boost their ability to act, specifically when it comes to their monitoring and auditing powers. The CNIL, the Autorité de la Concurrence, financial markets authority AMF, rail watchdog Arafer, telecom regulator Arcep, energy watchdog CRE and audio-visual regulator CSA pledged to boost cooperation and to meet twice a year.

FRENCH AGENCY PROPOSES NORWAY-STYLE RULES ON KILLER ACQUISITIONS

by Jacob Parry, PaRR, October 8, 2019

The French competition authority has proposed a system which would oblige dominant companies to file any acquisition plan for merger control, the agency’s head Isabelle de Silva said at a conference in Paris on Monday (7 October).

At a conference last month, de Silva had anticipated that the Autorité de la concurrence had put forward proposals to the government to review “killer acquisitions” in a way that would be more effective than threshold changes operated by Austrian and German authorities.

Speaking at Concurrences’ Digital and Competition event, the agency head specified that the French proposals are modelled upon Norwegian competition authority rules. The Norwegian Competition Authority can order an undertaking to notify a concentration that falls below the turnover thresholds if it has reason to assume that competition will be affected by the transaction or if other particular considerations indicate that the authority should examine the case in more detail.

The French authority has opted not to propose a measure based on transaction value like in Austria and Germany, said de Silva. She said that German and Austrian regulators have dealt with a large volume of cases “with not much competition impact,” and that this was a result the French agency was seeking to avoid.

The current regime in France does not allow the agency to register acquisitions by Facebook and Google, said de Silva citing the two companies as an example. The new system will allow the Autorité to be aware of any such transaction, she said.

De Silva also said that the authority had expanded the toolkit that it uses to investigate mergers, mentioning a closer focus on data. The authority is adopting “a broader approach” to evidence in merger review, to include polls, survey, and email, she said. “We are going above and beyond internal documents”, the agency head said, to assess the impact of deals on users of digital platforms, for example.
CMA OFFICIAL POSITS CODE OF CONDUCT, NEW REGULATION POST FURMAN

by Jacob Parry, PaRR, October 8, 2019

The regulatory tools proposed in the Furman report have a “clear place in a competition authority’s armoury”, said Andrea Gomes da Silva, executive director, markets and mergers at the CMA, speaking (7 October) at Concurrences Digital and Competition event.

In March, the five-member panel led by Jason Furman presented 20 key recommendations, and said that anticompetitive behaviour in platforms’ acquisition strategies as well as business models demands a new ‘code of conduct’ to enable competition and innovation.

In the recommendations, the panel said that a new digital markets unit should be set up with expertise in technology, economics and behavioural science, and the appropriate legal powers. The unit should give people more control over their data by enabling them to switch between platforms more easily, according to the release.

The proposed unit could also develop a code of conduct “so the largest digital companies know the competitive rules of the game”, the item said.

The recommendations from the Furman report can be categorised into “two buckets”, said Da Silva.

The first bucket contains the proposed code of conduct and other ex ante tools. These could be the “rules of the game that will give clarity to businesses” said Da Silva, adding that these tools would have to be introduced in a “smart” and “dynamic” way as these are fast-moving markets.

The second bucket contains pro-competitive regulation such as tools to ensure interoperability, access on fair terms and data portability. Da Silva said that these three elements can be seen as a package.

CMA OFFICIAL SAYS FURMAN ‘BALANCE OF HARMS’ TEST DIFFICULT TO APPLY

by Jacob Parry, PaRR, October 8, 2019

A ‘balance of harms’ test for digital mergers as described in the Furman report would be difficult to apply in the UK’s merger control regime, said an official from the Competition and Markets Authority (CMA).

A recent report compiled by professor Jason Furman and four other competition experts for the CMA recommends “a more economic approach” to assessing digital mergers. This approach, defined as “balance of harms”, would consist of weighing up both the likelihood and the magnitude of the impact of the merger.

But this recommendation would be difficult to put into practice, said Andrea Gomes da Silva, CMA executive director of mergers, speaking on Monday (7 October) at Concurrences Digital and Competition event in Paris.

With this approach “you would be asking CMA to decide about the the likelihood, in a probabilistic sense, that a particular form of harm is emerging and whether that was relatively larger and more probable than another form”, the official explained. “If you start to boil down to probabilistic outcome, particularly in an area where you are not dealing with price effects, which would often be case in digital, I think it would be very tough, and run risk of quite perverse outcomes”, she concluded.

The report mentions the example of Instagram/Facebook. In that case the test would have considered the potential harm of losing a rival to Facebook and whether it would lead to higher costs of digital advertising being passed to consumers, as well as lower privacy protection. These potential impacts would be factored into the decision to a greater extent than is possible under the current test, the report suggests.

When reviewing mergers between online platforms, authorities should ask whether a deal would lead to strengthened control of an ecosystem relative to the range of needs that a consumer has, Da Silva said.

In the context of killer acquisitions, authorities should consider whether a target could be potential horizontal competitor in the future and whether they have the tools to capture these developments, said the official.

In terms of evidence in such mergers, the items that the CMA seeks are “not necessarily the board documents of 10 to 15 years ago, the CMA official said. “Specifically, the agency looks to valuation reports to look at the acquisition value relative to assets, she said and added that “if you find a “big delta between scenarios then you want to know what’s driving those figures”.”

DIGITAL AND COMPETITION | Monday 7 October 2019 | Paris 15
TESTIMONIALS

By bringing together influential competition law enforcers, lawyers and economists on this extremely dynamic subject of competition law, this conference allowed us to take a realistic and multi-dimensional snapshot of competition law in digital markets at that point in time. I am looking forward to the next year’s event.”

GÖNENÇ GÜRKAYNAK
ELIG Gürkaynak Attorneys-at-Law

Timely and well thought through panels with lots of clear insights and different perspectives.”

BRONA HEENAN
Bird & Bird

Quality of the topics covered by dedicated speakers who are ready to share makes Concurrences’ conferences a must-attend event. This first conference on digital and competition met all my expectations.”

ALBAN CURRAL
Carbonnier Lamaze Rasle
VIDEOS

During the conference, some of the speakers summarised their speeches in short videos. These can be watched at concurrences.com (Conferences > 7 October 2019).

James AITKEN
Freshfields

Nicholas BANASEVIC
DG COMP

Christian D’CUNHA
EDPS

Isabelle DE SILVA
Autorité de la concurrence

Marie-Laure DENIS
French Data Protection Authority

Daniel FASQUELLE
Assemblée Nationale

Andrea GOMES DA SILVA
Competition and Markets Authority

Daniel KANTER
IATA

Michael KEFI
Uber

Jacques MOSCIANESE
Intesa Sanpaolo

Gabriella MUSCOLO
Italian Competition Authority

Thibault SCHREPEL
Utrecht University
Concurrences+  
THE NEW CONCURRENCES GLOBAL OFFER

4 databases, 15 years of archives

- Concurrences Review  
  14 000 articles

- e-Competitions Bulletin  
  11 000 articles

- Conferences  
  400 presentations and syntheses

- Books  
  30 eBooks

www.concurrences.com
Concurrences Review: 14,000 articles since 2004. EU and French competition law

e-Competitions Bulletin: 11,000 case comments since 1911 until today. 55 countries

Conferences: 400 ppt presentations, syntheses, videos and transcripts

Books: 30 eBooks available

Unlimited multi-user access by office

IP address recognition access

PRICES: Quotation on request to webmaster@concurrences.com

Concurrences Review print 595,00 € w/o tax
1 year - 4 issues