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Third Annual Conference: Innovation Economics for Antitrust Lawyers. London, 1 March 2019

3rd annual conference entitled **'Innovation Economics for Antitrust Lawyers'**, organized by Concurrences Review in partnership with King's College London was held at King's College London on the 1st of March 2019. The conference brought together antitrust lawyers, legal counsel, regulators, competition agencies and economists to discuss the latest thinking on the link between competition policy and innovation.

Professor Gillian Douglas (Executive Dean, King's College London) delivered the welcoming speech and opened the conference by referring to the long history of law teaching at King's College London, one of the oldest law schools in the United Kingdom.

The first panel discussion focused on banking and Big Data and, more specifically, the question whether incumbents should get access to FinTechs' data. **Ms Ingrid Vandenborre** from Skadden stated that there is a risk that technology and innovation can develop too quickly at the disadvantage of consumers. When it comes to data sets, the reasoning focuses on indispensability and market barriers. However, if a given data set can be replicated, then it will not be identified as indispensable. It raises the question of the relevance of competition regulation. She also considered what the specificities of the financial sector in relation to data access issues are, and is competition law the right tool to address these issues.

Mr Adam Land from the Competition and Markets Authority (hereinafter: CMA) explained that the CMA had the opportunity to look at some of those markets holistically, to assess competitive structures and practices, and to intervene using a broad range of options. The issues which were identified by the CMA related to high concentration levels, barriers to entry and expansion, demand-side characteristics, for example low levels of customer switching and pricing complexity. There was a clear need for change. The CMA now created a new body, the Open Banking Implementation Entity (OBIE), to drive forward these changes, with the CMA providing strategic direction and enforcement action, if necessary, to support the work of the OBIE. The CMA is focusing on the quality of the consumers' experience with open banking services in prioritizing its interventions.

Mr Sheldon Mills from the Financial Conduct Authority (hereinafter: FCA) reminded that competition was added by the FCA to other objectives (market integrity and consumer protection), to enable the FCA to consider how the process of rivalry works in financial services as consumers can benefit from the promotion of effective competition in financial services markets.

Mr Matthew Readings from Shearman & Sterling stated that the key features of financial services, which can result in entry barriers and other competition law problems, are the need to have access to data to compete with incumbents, platform technologies and interoperability. However, access to data could result in over transparency, which, linked with artificial intelligence, can cause a wide range of problems. A solution to interoperability issues (that is, companies need to use a specific technology to compete) is standardization, although it can result in chilling the innovation incentives of incumbents.

Ms Natalia Przystasz from Auka noticed that Directive 2015/2366 of 25 November 2015 on payment services did not change the mobile payment business model, but it made it easier. It took out one of the constraints that related to API (application programming interface). In fast-paced moving sectors, it is important to be proactive rather than reactive. Regulators involved with FinTech actors should initiate discussions across countries.

Dr Stefano Trento from Compass Lexecon explained that big tech companies are likely to enter the markets for consumer lending and small business lending. For example, Amazon has started lending money to merchants who sell products through Amazon. He suggested that data will be the key asset for competition between large tech companies and traditional banks. The data advantage of traditional banks is bank accounts information, which can be used to screen out borrowers who are likely to face repayment difficulties and default.

Mr Peter Freeman QC, Chairman of the United Kingdom Competition Appeal Tribunal (hereinafter: CAT), delivered the keynote speech. He noticed that the conference's topics are drawn from the array of challenges that the digital economy has brought to competition law at the age of fast-moving innovation, big data and the growth of IT-based companies. He addressed some of the concerns that the appeal system for competition infringement cases is not fit for purpose and should be in some way curtailed, or lightened, or reduced. It has been said that the system imposes an unnecessary second tier, substantive assessment, that it allows the CAT to conduct a complete re-hearing of an authority's decision, using evidence not available to the authority, and that the CAT substitutes its own decisions, thus thwarting the effectiveness of the enforcement system. According to Peter Freeman, these criticisms are greatly overstated and do not accord with the facts. The CAT is required to determine the appeal on the merits by reference to the grounds of appeal. It is not able to roam freely over the subject matter of the decision; appeals are often on quite narrow and specific points and even on those specific issues. The process is adversarial and not inquisitorial. The CAT's approach is conditioned by the case that is being made to it. Also, the CAT will also give due weight to the authority's findings that are properly and reliably arrived at. The CAT is merely holding the decision-maker to account.

The second panel was focused on 'Post-Mortem' analysis of cleared mergers in the context of innovation. **Dr Maria Ioannidou** from Queen Mary University of London started with stating that there is no consensus on the appropriate role of innovation in merger control. Trying to decipher the impact of merger control on innovation is very topical, especially in the light of recent criticisms against competition authorities and competition policy, both in the UK and internationally, that there has been a perceived increase in concentration and lessening of competition in many markets in recent years. Retrospective analyses of completed mergers are very useful in that regard.

Mr Colin Raftery from the CMA noticed that not only businesses, but also authorities, have to challenge themselves to innovate. There is an ongoing debate about merger control in fast moving industries, in the context of a broader debate about how competition law should be enforced. Competition analysis in digital sectors raises a number of specific challenges. First, the M&A activity is very intense. Second, prospective analysis is particularly important, as markets are fast moving, but also difficult, given the rapid development of technology. Different theories of harm and substantive questions have been applied and raised in previous cases.

Mr James Aitken from Freshfields Bruckhaus Deringer suggested that mergers should be assessed considering the markets' conditions at the time of the transaction, rather than assessed in light of how markets have developed. All antitrust cases in digital sectors are about evidence. Documentary evidence is critical and the authorities have huge powers to gather it. A key concern seems to be whether the authorities have been careful enough regarding the potential for entrants to become competitors.

Professor Richard Whish QC from King's College London considered that although the issues raised by antitrust in digital markets seem new, they take place in a fairly well-established legal order. In the Dow/Dupont case, the European Commission came up with apparently new theories of harm, seemingly in a context of legal uncertainty. However, the approach taken was not innovative. Another example is the Siemens/Alstom case. Regardless of the excitement surrounding this case, it raised concerns and debates similar to those related to the Aerospatiale/Alenia case back in 1991. Also, in a number of cases dated from the early 1990s, the question was raised as to the existence of a technology market. It was debated for several years. The European Commission first defined a technology market in the Shell/Montecatini case in 1994. A remedy – a non-exclusive worldwide license of intellectual property – was already deemed necessary to address related competition issues.

Mr Justin Coombs from Compass Lexecon agreed that focusing on innovation does not necessarily mean that a new theory of harm or paradigm is adopted. Focusing on innovation can be required while conducting conventional analyses within the well-known framework of horizontal merger control: companies do not only compete on prices. Innovation is just another dimension of competition.

Mr Alvaro Ramos from Qualcomm also agreed that the substance of the analysis is not new. However, from a procedural perspective, three aspects should be noted. Competition authorities need to assess whether the current filing threshold based on the parties' volume of sales allows them to review large deals (deal value) where the target has limited sales. There should be no presumption of illegality on deals where there is a reduction in the number of innovators. The scope of discretion of authorities in merger control is quite wide, notably outside of the European Union and the United States.

Professor Richard Whish responded that the standard of proof and the burden of proof are established by the General Court, not by the Commission. Nothing can be concluded from the Dow/Dupont case in that regard, especially as it resulted in commitments and thus the decision was not appealed. A related question is how to apply the innovation theory of harm in practice when it requires assessing theoretical research and development. It would be reasonable to require that specific evidence is found to support the case.

The last panel was focused on killer acquisitions and the question whether they can be prevented. **Dr Colleen Cunningham** from London Business School explained that killer acquisitions occur when incumbents acquire nascent startups solely to shut down their technology and pre-empt potential future competition. According to his research, approximately 6% of all acquisitions in the pharmaceutical industry are pure killer acquisitions. Such acquisitions occur disproportionately just below the thresholds for antitrust scrutiny. There are discussions about lowering thresholds, but other policy options should also be considered, as killer acquisitions can be of companies without any turnover. Because of the potential for negative innovation-related effects, killer acquisitions raise important concerns.

Ms Jacquelyn MacLennan from White & Case said that killer acquisitions can be prevented either by using existing tools, or by changing the tools, but the core of the debate is whether killer acquisitions should be prevented. Does the situation require changing the law? One change suggested is to revise the thresholds in some jurisdictions, for example to move away from revenue-based thresholds to adopt value-based thresholds. But is this necessary? In Germany, where the thresholds according to which transactions are or are not subject to filing requirements have been modified in 2017, one third of the filed deals were in the tech sector, one third in the pharmaceutical sector and one third in other sectors. None of these cases raised substantive concerns. Therefore, lowering the thresholds and increasing the filing burdens on companies and work for competition authorities may not be justified. The other legal test which has been focused on for change is the burden of proof. At the moment, it is considered that companies should be allowed to merge or acquire other companies unless a regulatory authority has proved that this results in anticompetitive effects. Should it be assumed that in some defined circumstances mergers should not happen unless the parties prove that their transaction is not anticompetitive? The case for such a radical move has not yet been made.

Ms Sarah Harper from Visa noticed that the real value of an acquisition is unknown until it is materialized. It cannot be evaluated at the outset as consumer needs are constantly and very quickly changing and developing. Fast-paced moving markets are characterized by high levels of uncertainty. A lot of assumptions have to be made to assess the impact of killer acquisitions, given that markets are not static.

Dr Lorenzo Coppi from Compass Lexecon added that the burden of proof regarding effects on competition should not be reversed. From a policy perspective, the burden of proof should not be reversed unless the standard of proof on efficiencies is lowered, or it would result in a large number of prohibitions.

Dr Giulio Federico from the DG COMP reminded that in some digital markets, large platforms benefit from network, winner-takes-all effects. Protecting competition in these markets can be difficult. Merger control is an instrument to make sure that at least some threats to competition are mitigated.

Professor Renato Nazzini from King's College London closed the conference sharing his final thoughts on the issue of the burden of proof. In his view it goes much broader than just competition policy. The reality that we should recognize is that competition law and the competition infrastructure, competition authorities and specialist tribunals and so on and so forth, is part of a wider legal and political environment, and certain things will inevitably happen whatever the merits or otherwise of the competition regime are. He said he would be happy with a system where things like reversing the burden of proof or other reforms were just based on whether the competition regime works well or not, the fear is that actually they may happen for other reasons. But that doesn't mean that we shouldn't listen to concerns including political concerns, or concerns from the public opinion more generally.

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