Collective Intelligence

The Future of Remedies in Global Merger Control

Five Takeaways for Business

Brunswick Global Antitrust and Competition Practice Group

February 2023

BRUNSWICK

The Future of Remedies in Global Merger Control

*On January 25, Brunswick hosted a panel discussion to deliberate the future of merger remedies and how business can best navigate a more challenging global regulatory environment for dealmaking. Panelists were **Nicole Kar**, global head of antitrust & foreign investment at Linklaters; **Colin Raftery**, senior director of mergers at CMA; **Carles Esteva Mosso**, former deputy director-general for state aids and merger control at the European Commission DG COMP and partner at Latham & Watkins; and **Andrea Gomes da Silva**, former executive director of markets and mergers at CMA and senior advisor at Brunswick Group. The panel was chaired by **John Davies**, senior advisor at Brunswick Group.*

The views of the panelists were varied, and not all the findings below should be attributed to all four panelists. The below five key takeaways below have been compiled and edited for clarity.

1. Parties need to think global, act local

As has been witnessed over the past decade, in complex multi-jurisdictional cases, it is increasingly challenging for merging parties to receive clearance from key competition authorities, even after proposing what would previously have been considered credible remedies packages. Some of the panel noted that the European Commission (EC) remains more pragmatic than others in its acceptance of remedies. However, it is the European Commission's greater openness and willingness to engage in constructive dialogue with merging parties during the inquiry process that is most welcomed by business and their advisors.

The panel agreed that advisors need to appreciate that in global markets, procedural issues, substantive legal tests and competitive dynamics can differ significantly across jurisdictions. As such, a one-size-fits-all approach to global authorities is not a feasible option. It is fundamental that practitioners focus on the policy position and respective legal frameworks of authorities and approach each jurisdiction with a different strategy for engagement on remedies. Some panelists noted that certain authorities now require merging parties to put forward country-specific remedies in addition to global ones already accepted elsewhere. In addition, merger inquiry procedures can be difficult to align between jurisdictions meaning advisors must think more strategically about their engagement timelines.

2. Tolerance of complex remedies has changed

The panel underlined that a 'clean divestiture'—of a standalone businesses—remains the most common means by which competition concerns are resolved. While such divestitures can still be seen as viable and sustainable in the longer term, in practice, they can still be difficult as companies do not tend to organize themselves in the same way that competition authorities define markets.

The idea that overly complex remedies should not be accepted is nothing new. What *has* changed is competition authorities' tolerance for complexity, with some having almost zero tolerance for complexity given increasing skepticism of remedy effectiveness.

To help competition authorities feel more comfortable with complex remedy proposals, panelists suggested that merging parties should submit evidence of similar approaches in a business-as-usual context (i.e., comparable commercial benchmarks). They argued that competition authorities could be more receptive to a remedy if the merging parties can show that the solution being proposed is commonplace in the commercial world or demonstrate that they are in a sector where it is common to have supply agreements with competitors, such as in the telecommunications or chemical industry.

A "mortality meter" carried out by Linklaters has indicated that about 65% to 70% of Phase II cases in the UK and EC in the last year have been abandoned or blocked, or the remedies are so significant that it is effectively a total unwind.

© BRUNSWICK GROUP 2023

Upon request by the chair for a show of hands amongst the audience, some 40% felt that the more negative approach to remedies by regulators has had a chilling effect on dealmaking.

3. Access vs. pure behavioral remedies

Members of the panel see greater skepticism among major global competition authorities toward vertical mergers, reducing optionality. Merging parties are now no longer able to bank on a primary behavioral remedy as a silver bullet for clearance. However, it was noted that behavioral remedies do remain a useful component of a broader remedies package.

While practitioners have noted the increasing move away from behavioral remedies in both the Competition and Markets Authority (CMA) and the EC, speakers distinguished that on the one hand, pure behavioral remedies have a short lifespan, while on the other hand, access remedies still have the potential to counter regulators' skepticism on remedies given their structural impact on the market. In the European Union, the panelists noted that access remedies have worked well in both vertical and horizontal settings. They cautioned that the Commission is still sending mixed signals regarding its appetite towards access remedies, pointing to the executive body accepting interoperability remedies in Meta/Kustomer while opposing the wide access remedies in Illumina/Grail.

4. Digital legislation may facilitate acceptance of behavioral remedies

Speakers argued that while the EU's Digital Markets Act (DMA) sets the mandatory pre-closing obligation on "gatekeepers" to inform the European Commission (EC) about any deal in the EU, they noted that the EU already has a system of merger control that is able to catch most of the significant deals, either through market share-thresholds or the new thresholds in Germany and Austria.

The EC's new interpretation of Article 22, in which it changed its policy on investigating below-threshold mergers and exercising jurisdiction, in the right circumstances, over deals that do not fall within the scope of any member states' national regimes, is expected to surprise M&A practitioners in sectors such as pharmaceuticals and medical (as seen with Illumina/Grail), but not necessarily in digital. The argument here is that the EC already has the tools to investigate deals in the sector that it wants to. However, the question was raised whether the DMA will lead to a more assertive EC, arguing that if a merger could lead to one of the behaviors that are prohibited under the DMA, it should be blocked.

With the EC's increasing assertiveness, empowered by the Digital Markets Act and novel theories of harm, panelists asked whether now may be the time to bring the "Tetra defense" [in Tetra Laval/Sidel] back to the table. [The thrust of the Tetra defense is that if a particular behavior/course of action is prohibited, e.g. under article 101, this could be a defense by a merging party to a finding by the competition authority that post-merger it would behave in this way, because it is unlawful.]

Separately, speakers added that it is arguable that in the future that the DMA and the UK's proposed Digital Markets Unit (DMU) will have the potential to positively impact the acceptability of behavioral remedies in digital markets. Once the new legal framework is in place, the UK's proposed DMU may help address some of the concerns around monitoring and will help to develop a greater understanding of how digital markets operate, potentially making regulators more susceptible to accepting behavioral remedies in such markets.

5. The role of competitor activism

In response to a question from the audience about the relevance of competitor intervention, some panelists acknowledged that in some merger cases today, the competitors of merging parties are increasingly taking prominent public positions and adopting sophisticated campaigns to demonstrate their opposition to a proposed deal. Some felt that this was nothing new and argued it had little impact

© BRUNSWICK GROUP 2023

in practice given the formal procedures, such as market testing, in place to probe in detail the evidence behind opposition arguments.

To continue the conversation:

John Davies, Senior Advisor, Global Antitrust and Competition Co-Lead, London
jdavies@brunswickgroup.com

© BRUNSWICK GROUP 2023