Concurrences
Antitrust Publications & Events

STATION F

Cercle Montesquieu

digital antitrust

HOW TO REGULATE ?

KEY TAKEAWAYS

PARIS - TUESDAY 13 MAY 2025

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PROGRAM

08:30 REGISTRATION & BREAKFAST

09:00 OPENING FIRESIDE CHAT

Benoît CŒURÉ | President, Autorité de la concurrence, Paris

Olivier GUERSENT | Director-General, DG COMP, Brussels

Xavier NIEL | Founder and President, Illiad / Free, Paris

In discussion with:

Emmanuel COMBE | Professor, Université Paris I Panthéon-Sorbonne, Paris

Frédéric de BURE | Partner, Cleary Gottlieb, Paris

Laurence BARY | Partner, Dechert, Paris

10:15 #1 DIGITAL REGULATIONS AROUND EUROPE: THE CURRENT STATE OF PLAY

Lucia BONOVA | Head of Unit, Digital Platforms I, DG COMP, Brussels

Clare KELLY | Competition Counsel, Google, London

Avery GARDINER | Global Competition Policy Director, Spotify, Washington D.C.

Mikaël HERVE | Vice President, Charles River Associates, London/ Paris

Stéphanie YON-COURTIN | Member, European Parliament, Brussels/Strasbourg

Moderator: Anouk CLAMENS | Partner, White & Case, Paris

11:15 COFFEE BREAK

11:45 #2 MERGERS AND ACQUISITIONS: A LUXURY THAT TECH GIANTS CAN NO LONGER AFFORD?

Guillaume DUQUESNE | Senior Vice President, Compass Lexecon, Paris

Geoff MANNE | President & Founder, International Center for Law and Economics, Portland

Jérôme VIDAL | Deputy General Rapporteur, Head of the Mergers Unit, French Competition Authority, Paris

Moderator : Mathilde SALTIEL | Partner, Latham & Watkins, Paris

13:00 LUNCH BREAK

14:00 #3 PARTNERSHIPS, "ACQUI-HIRES" & OTHER AI HOT TOPICS

Andrea APPELLA | Associate General Counsel, Open AI, London

Leonor BETTENCOURT NUNES | Case Handler, DG COMP, Brussels

Vincent CHAMPAIN | SEVP, Chief IT & Digital Officer and member of the Executive Committee, Framatome Group, Paris

Michel PFLIEGER | Competition Counsel EMEA, Microsoft, Paris

Blanche SAVARY DE BEAUREGARD | General Counsel and Secretary of the Board, Mistral AI, Paris

Moderator: Franck AUDRAN | Partner, Gide Loyrette Nouel, Paris

15:30 COFFEE BREAK

16:00 #4 REGULATION OF THE DIGITAL SECTOR: SHOULD MERGER OR DOMINANCE CONTROL BE PREFERRED?

Eshien CHONG | Chief Economist, Autorité de la concurrence, Paris

Pascale DÉCHAMPS | Partner, Accuracy, Paris

Olivier FRÉGET | Partner, Fréget Glaser & Associés, Paris

Luca PRETE | Legal Secretary, European Court of Justice, Luxembourg

Moderator: David BOSCO | Professor of Law, University of Aix-Marseille

17:30 COCKTAIL

OPENING FIRESIDE CHAT

Emmanuel COMBE (Professeur, Université Paris I Panthéon-Sorbonne, Paris), Frédéric de BURE (Avocat Associé, Cleary Gottlieb Steen & Hamilton, Paris) et Laurence BARY (Avocate Associée, Dechert, Paris) ont modéré cette discussion.

Xavier Niel

Founder and President, Iliad / Free, Paris

Talents but few entrepreneurs: The European paradox

- Europe must foster a culture of bold entrepreneurship to bring ambitious tech projects to life, particularly by leveraging its AI talent trained in top-tier institutions.
- A shortage of entrepreneurs capable of turning ideas into strong businesses hinders innovation, highlighting the importance of initiatives like Station F.
- With access to affordable, decarbonized energy, Europe holds strong advantages, and projects like Mistral show that funding can indeed follow.
- However, overly strict or premature regulation harms Europe's attractiveness and pushes investors away.
- The internal European market remains too fragmented (due to taxation, languages, etc.), although AI has the potential to reduce these barriers.
- To retain researchers, Europe must offer salaries and career prospects comparable to those in the U.S. or China.

Small-scale innovation: A disruptive model against tech giants

- Major corporations like Google or Meta often struggle to innovate in a tangible way. Major disruptions typically come from small companies (e.g., iAgility) that overturn established models.
- These large groups usually respond by heavily investing in such innovations, often with limited effectiveness.
- This innovation model—originating from small, AI-focused structures—is not only a smart marketing strategy but also excellent news for the sector.
- This ability to innovate on a small scale is healthy and proves that innovation can emerge anywhere, even outside major tech powers like the U.S.

Creating a European AI: Retaining talent and building on open source models

- Kyutai is a €300 million fund launched to retain AI talent in France and Europe. Free from foreign surveillance or bias concerns, it aims to develop AI rooted in European values while offering researchers conditions similar to those in the U.S.
- Two initial models have been created, published open source, and trained directly on voice: one for instant voice-based chat, the other for real-time translation.
- The open-source approach allows others to adopt, enhance, and use these models as the foundation for entrepreneurial projects.
- By creating locally, Kyutai stimulates an ecosystem that naturally attracts entrepreneurs focused on practical applications.
- The ultimate goal: transform research into real products, driven by European entrepreneurs, while maintaining technological and ethical control.

Nina Trninic drafted the following synthesis for Concurrences. The views expressed in this presentation are those of the speakers and do not necessarily represent those of the institutions to which they are affiliated.
The original contributions were delivered in French and have been voluntarily translated into English to ensure greater coherence and accessibility across the entire conference.

The growth challenge for European startups amid Big Tech's appetite

- The digital space is dominated by a few American and Chinese giants who capture most of our attention. However, entering these markets is now easier, allowing innovative individuals to challenge incumbents.
- In response, large companies acquire promising startups, creating a dynamic of absorption that threatens European innovation and local ecosystems.
- Europe struggles to develop large-scale social networks, often bought out or copied by American giants before they have a chance to grow.
- The funding of Mistral shows that creating European tech leaders is possible, and underscores the importance of building long-lasting companies that support new startup emergence.

Financing innovation: Challenges and opportunities for European startups

- In France, some initiatives like BPI (Banque Publique d'Investissement) effectively turn public funds (targeted support) into private investment with a profitability mindset.
- The main obstacle remains access to subsidies, which are often captured by large corporations, to the detriment of startups discouraged by complex bureaucracy.
- Financing digital innovation is relatively inexpensive, but the real need is to encourage more entrepreneurs by removing certain barriers—following the U.S. model—such as high app store commissions (from Apple and Google).
- Europe needs to catch up by introducing appropriate regulation in this area.

Benoît Cœuré

Président, Autorité de la concurrence, Paris

Ensuring an Open AI Market: Regulation in service of Competition

- The challenge is to build an open and dynamic AI market by acting upstream to prevent concentration risks tied to economies of scale in access to data, GPUs, capital, and talent, which currently benefit major existing players.
- The best response to competitive risks remains technological: models like DeepSeek show that innovation is possible with fewer resources, fostering competition.
- Opening the market depends not only on competition policy but also on appropriate regulation, especially in the face of opaque contractual practices, unequal energy access, and intellectual property issues (even though the decision by the French Competition Authority on Google and neighboring rights shows that competition law can sometimes provide answers).
- The Authority is preparing an opinion on online video content (YouTube, TikTok, etc.) and is monitoring the effects of generative AI in music, journalism, and advertising.
- Maintaining a dynamic ecosystem thus relies on innovation, regulatory vigilance, and genuine optimism.

Better oversight of «under-the-radar» acquisitions to preserve an innovative ecosystem

- Currently, the Competition Authority can only review deals exceeding certain turnover thresholds, allowing potentially anti-competitive acquisitions to go unchecked.
- Antitrust law can sometimes be used (e.g., abuse of dominant position), but it only covers specific cases and comes with legal uncertainty.
- A European attempt to use Article 22 of the Merger Regulation (Illumina/Grail) was stopped by the Court of Justice, and reforming the regulation remains uncertain due to the requirement for unanimous approval from all Member States.
- In France, a public consultation has been launched, and the Authority will propose by the end of 2025 a system of power to review deals below thresholds—strictly regulated by deadlines and clear guidelines to ensure predictability and legal certainty.
- The goal: prevent anti-competitive takeovers of emerging players, preserve innovation, and ensure an open market where startups can grow without being automatically absorbed.

Why a targeted review power is the best response to problematic acquisitions

- Some acquisitions of small companies by tech giants, while below notification thresholds, can harm competition (e.g., "killer acquisitions"), already known in the pharma sector and now present in digital markets.
- Lowering notification thresholds would be counterproductive, disproportionately increasing the administrative burden on businesses.
- The current trend is the opposite: raising general thresholds to simplify procedures (a measure under discussion in Parliament).
- Use of Article 22 is very rare, with only one or two cases referred per year.
- Ex-post handling of problematic concentrations (under Articles 101 or 102 TFEU) only applies in specific cases, often comes too late, and creates uncertainty—whereas a targeted review power is a preventive, proportionate solution already in use in 10 European countries.
- Its effectiveness, however, depends on a clear framework to ensure legal certainty and predictability.

Ongoing evaluation of partnerships and their impact on competition

- The Microsoft/OpenAI partnership did not initially raise competition concerns, but such structures require regular reassessment due to their evolving nature.
- The notion of "concentration" is broad and includes any form of effective control, whether through equity, access to critical resources (GPUs, data), or human capital.
- Partnerships can benefit startups (access to customers, economies of scale) but may also be problematic when involving exclusivity clauses or reinforcing dominant players, hence the need for competition authorities to remain vigilant.

The importance of an ecosystem to foster European tech champions

- Europe's ability to create global tech champions depends on having an ecosystem that allows startups to grow and scale.
- Unlike the U.S. or China, Europe has yet to provide such an environment conducive to the rise of global companies.
- Public policies (especially in France) often wrongly assume champions must come from mergers of existing firms, whereas examples like Netflix show that champions are born from innovation and a favorable ecosystem.

Building a pro-competition industrial policy at the European level

- Our companies won't survive in global markets if they've been shielded from competition. Industrial policy must be pro-competitive and avoid capture by vested interests, such as public subsidies benefiting established giants.
- An effective industrial policy must be designed at the European level by eliminating single market barriers and fully leveraging the potential of that market.
- Rather than pre-selecting winners, support should be given to several promising projects within a sector—similar to the U.S. BARDA model used during the COVID crisis.
- This European approach—based on cross-border, open projects—is the only realistic path for an industrial policy that fosters innovation and leverages the comparative advantage of Europe's single market.

Olivier Guersent

Director-General, DG COMP, Brussels

Diagnosis and levers for a competitive AI in Europe

- Europe has talent and innovation, but the conditions for scaling up are insufficient: the cost of failure is too high, and the lack of a unified internal market (due to fragmentation in tax systems, legal frameworks, and language diversity) hinders expansion. A simplified "28th regime" for startups could improve this situation.
- European regulations, such as the Digital Markets Act (DMA) and state aid control, while essential, are sometimes perceived as obstacles to innovation—especially when portrayed that way by certain actors (like Apple) seeking to delay enforcement—despite the fact that these rules actually protect innovation.
- Critical AI inputs (capital, data, computing power, talent) are becoming barriers to entry, as are closed distribution channels (like app stores) that lock out newcomers. This trend is under close scrutiny by competition authorities.
- Competition authorities, increasingly working in cooperation (DOJ, FTC, CMA, European Commission), are monitoring indirect acquisition strategies (acqui-hires, partnerships, targeted buyouts), as seen in the Microsoft/OpenAI and NVIDIA/RunAI cases.
- Although the DMA does not directly target AI, its effects on major players are being closely monitored. Furthermore, strict control of state aid remains a key lever for efficiently allocating resources without falling into a logic of automatic subsidization.

Why National Review Powers Are Currently the Most Realistic Option

- At the European level, Article 22 of the Merger Regulation was initially used to review certain acquisitions of companies below the turnover thresholds, upon referral from Member States—even when national thresholds were also not met. This approach was validated at first instance but was later overturned by the Court of Justice, which now requires a clear legislative basis for such referrals. Any reform of the regulation would be complex due to the unanimity requirement.
- In the meantime, national "review powers" offer a pragmatic solution for addressing rare but critical cases—such as the acquisition of revenue-less startups by dominant players.
- This mechanism, already in place in several countries, is limited and targeted, creating risk only in highly specific cases. To mitigate uncertainty, companies can self-assess and engage in dialogue with authorities.
- Conversely, systematic control of all mergers—through lowered or adjusted thresholds—would be counterproductive, particularly for SMEs, as it would require notification of numerous deals that raise no competitive concerns.
- The French initiative to establish such review powers has strong support from the EU Directorate-General for Competition.

No legal revolution, but a concrete application of existing law

- The adoption of national review powers would not create a new legal framework—it would simply allow the existing competition law to be applied to new economic configurations (like the acquisition of low-revenue but high-potential startups), especially in tech.
- A partnership between a startup and a large firm can be pro-, neutral, or anti-competitive depending on its terms. The approach must remain practical and case-by-case.
- Competition law is highly adaptable and evolves with new acquisition forms. For example, for over 40 years, it has not been necessary to acquire more than 50% of a company's capital for a merger to be deemed effective (e.g., Coca-Cola). What changes are the contractual formats, not the legal principles.
- Therefore, current competition law tools remain fully adequate to address contemporary challenges—there is no need to reinvent the law.

No change in sanctions policy under the DMA

- The DMA is a distinct regulatory instrument from antitrust law: its penalties cannot be compared to antitrust fines, which aim both to compensate economic harm and to deter repeat offenses. The DMA is an ex-ante regulation tool that complements antitrust policy without replacing it.
- Automatically replacing fines with corrective measures would be counterproductive—especially in the digital world, where deterrence is crucial.
- So far, fines under the DMA have been relatively modest because the regulation is new, infractions are still recent, and companies are in a learning phase. These sanctions follow the DMA's own logic and scope and do not indicate any lasting leniency.
- The EU is already applying the DMA to oversee Apple's practices: a recent decision penalized Apple for circumventing the ban on abusive commissions (replacing the 30% fee with equivalent charges), imposing a fine, a cease-and-desist order, and daily penalties. In this regard, Europe is a step ahead of the United States, where legal proceedings are only just beginning.

PANEL 1

DIGITAL REGULATIONS AROUND EUROPE: THE CURRENT STATE OF PLAY

Anouk CLAMENS (Partner, White & Case, Paris) moderated this discussion.

Avery Gardiner

Global Competition Policy Director, Spotify, Washington D.C.

Apple, the Courts, and the new momentum for platform regulation

- A U.S. Court found Apple in contempt for violating an App Store order, citing false testimony and anti-competitive behavior — with potential criminal referrals.
- Within 48 hours, Spotify enabled direct purchases in the U.S., bypassing Apple's 30% commission and prompting rapid consumer uptake.
- Apple is appealing, but others are following Spotify's lead; audiobook price display is next, including in Europe.
- A U.S. Congresswoman introduced the App Store Freedom Act, signaling bipartisan regulatory momentum.
- Lesson: platform claims, even under oath, must be rigorously scrutinized.

Balancing legal strategy and business realities in DMA enforcement

- The tech community broadly agrees on avoiding a fragmented internet and ensuring it remains open and accessible.
- The EU merger control model shows different jurisdictions can apply diverse rules while still reaching coherent enforcement.
- The Commission pursues narrow investigations (e.g., Apple's anti-steering, core tech fee) to maintain legal prudence.
- Businesses assess enforcement holistically — considering the full cost and impact, not isolated issues.
- Narrow enforcement can lead to fees or restrictions resurfacing under new terms, complicating conditions for startups.
- Startups need regulatory clarity and predictability to secure funding — a key objective of the DMA.
- It's essential to monitor whether these focused probes, when combined, actually improve market conditions and startup support in Europe.

Stéphanie Yon-Courtin

MEP, European Parliament, Brussels/Strasbourg

The Digital Markets Act: A global leadership moment with implementation challenges

- The DMA marks a strategic shift from case-by-case antitrust to systemic, *ex ante* digital regulation, positioning the EU as a global leader.
- The U.S. is beginning to follow Europe's lead on platform regulation.
- In its first year, the DMA has led to gatekeeper designations, compliance probes, and sanctions (e.g., Apple, Meta).
- A small EU team faces the challenge of enforcing rules against powerful tech firms with vast resources.
- Enforcement is slower than hoped, while U.S. actions are picking up speed.
- Both platforms and smaller players are increasingly seeking regulatory clarity.
- Overlaps between EU, national, and antitrust laws risk creating confusion.
- Timely, clear enforcement is essential to maintain the DMA's credibility and effectiveness.

Ensuring effective DMA enforcement amidst AI and resource challenges

- The DMA must stay flexible and well-resourced to address AI-driven gatekeeping and ensure effective enforcement.
- The Commission urgently needs more and better resources to enforce the DMA.
- Gatekeeper fees, as under the DSA, could help fund enforcement and rebalance the massive resource gap — e.g., Google has 250+ staff on DMA, while the Commission has only ~80.
- Messaging around modest fines risks weakening compliance incentives; penalties should reflect DMA's seriousness.
- Gatekeeper fees could shift costs from litigation to early compliance.
- Despite deregulation pressure, gatekeepers often rely on the DMA — showing its relevance and value.
- Future revisions must be guided by collaboration but prioritize enforcement capacity.
- Staffing shortages hinder case coverage (e.g., Criteo case dropped), showing enforcement limits.
- The resource gap between Commission and gatekeepers makes reinforced support critical.

Lucia Bonova

Head of Unit, Digital Platforms I, DG COMP, Brussels

DMA enforcement: Progress, challenges, and the focus on implementation

- Enforcement under the DMA is advancing: Apple was fined €500 million for non-compliance on pricing communication and has 60 days to comply or face further penalties.
- Europe's leadership is driving global regulatory momentum, as seen with the U.S. App Store Freedom Act.
- Two cases have concluded—Meta's and Apple's anti-steering—while investigations continue into Google and Apple's practices.
- An Apple probe on default settings was closed after meaningful compliance and positive market feedback.
- Despite limited resources, progress has been substantial.
- The focus remains on effective implementation through cooperation and regulatory dialogue, with much work happening behind the scenes.

The DMA's role in opening ecosystems, managing disruption, and coordinating enforcement

- The DMA aims to open digital ecosystems by challenging gatekeeper dominance and enabling real user choice and innovation.
- Its success depends on startups, developers, and civil society actively using this space to bring new products to market.
- User frustration is expected due to habits shaped by dominant platforms, but short-term disruption is key to long-term innovation and diversity.
- Positive early results include a rise in alternative browser usage via DMA-compliant choice screens.
- The DMA complements competition law and supports private enforcement, with mechanisms for coordination through national courts.
- National laws like Germany's Section 19a may apply only where the DMA does not, helping close enforcement gaps without duplication.
- AI and emerging digital issues may still fall under antitrust, reflecting a flexible regulatory system.
- Close collaboration between the Commission and national authorities ensures coherent, effective enforcement.

Clare Kelly

Competition Counsel, Google, London

Understanding DMA enforcement beyond fines: Compliance and continuous dialogue

- The DMA is an *ex ante* regulation requiring proactive company compliance, minimizing frequent investigations.
- Google actively engages with the Commission to align on practical DMA implementation.
- Adjustments like updated choice screen designs reflect Commission and market feedback.
- Most enforcement occurs behind the scenes through continuous cooperation, beyond visible fines and investigations.
- Focusing only on penalties overlooks the DMA's ongoing impact.
- The DMA influences Google's daily operations and product development.

Balancing evidence, compliance, and user impact under the DMA

- Solid evidence is crucial, but «effective compliance» must be clearly defined for each obligation.
- For consent and choice screens, the focus is on ensuring users have free, informed choice, verified through behavioral economics to preserve user agency.
- Outcomes-based evidence like A/B testing suits contexts with measurable trade-offs, such as search page changes.
- Some changes may negatively impact certain businesses and users, reflecting complex trade-offs.
- The DMA should prioritize genuine benefits for all users and businesses, not just the loudest or best-funded.
- User perspectives are often underrepresented despite being central to the DMA's purpose.
- Ongoing assessment of consumer impact is essential to ensure the regulation serves its intended audience.

Challenges and the need for clear guidance on DMA enforcement across Member States

- The DMA promotes cooperation between the European Commission and national authorities, as seen in Italy's data processing investigation under consumer protection law, highlighting legal overlaps.
- Litigation in national courts is rising, raising concerns about DMA enforcement authority division.
- Harmonization under Article 114 TFEU aims to prevent regulatory fragmentation and ensure DMA supremacy.
- Member States cannot impose rules covered by the DMA or pursue overlapping objectives.
- Coherence between Article 102 and the DMA is best maintained at the European level to avoid conflicting rulings and misuse of the DMA as a "backdoor" to bypass Commission enforcement.
- The Commission must provide clearer guidance to national authorities and courts on DMA roles and limits.
- While some cooperation exists, national litigation often lacks coordination with the Commission.
- Uninformed national rulings risk disrupting Commission-gatekeeper negotiations and weakening regulatory dialogue.
- Stronger Commission leadership is needed to maintain its sole DMA enforcement role and prevent circumvention through national procedures.

Mikaël Hervé

Vice President, Charles River Associates, London/Paris

The role of economics and evidence-based compliance in DMA enforcement

- The DMA is conduct-based, but assessing real-world effects is essential for effective compliance, as shown by the Meta decision's focus on actual outcomes over formal adherence.
- Behavioral economics aids understanding of how design and defaults influence user behavior and regulation.
- Outcome-focused enforcement can be pragmatic and streamlined using A/B testing and before-and-after analyses.
- Ongoing evaluation is necessary to measure the impact of regulations like the DMA and Data Act.
- Regulatory resources should target efforts with measurable impact, avoiding waste.
- Solid economic, business, and factual evidence is crucial, especially with emerging technologies like AI.
- The DMA builds on past enforcement to directly address known harmful practices and avoid repeating failures.
- Rapid innovation requires careful evidence gathering to prevent regulating hypothetical issues and maintain predictability.
- Delays in addressing known problems, such as in ad tech, emphasize the need for timely enforcement.
- Balancing innovation and regulation is vital to support growth without stifling emerging markets.

Balancing contestability and user experience in the DMA

- The core goal of the DMA is ensuring market contestability, allowing rivals to compete fairly.
- There is an inherent tension between maximizing contestability and optimizing user experience.
- Presenting competing services randomly enhances fairness but may confuse users, while ordering by popularity aids intuition yet risks entrenching dominant players.
- The DMA prioritizes short-term contestability, accepting possible short-term user experience costs.
- The expectation is that increased competition will eventually lead to better user outcomes through innovation and choice.
- This trade-off reflects a policy decision to favor long-term benefits over immediate user convenience.

Tailoring regulation to the unique dynamics of digital markets

- Digital markets are diverse—search, social media, cloud, and AI each have distinct characteristics.
- Urgency to intervene should be based on specific economic features of each market, not a one-size-fits-all approach.
- Market tipping is typically driven by strong economies of scale and network effects, which were evident in search but are less clear or more complex in AI and cloud markets.
- Market studies (e.g., the French market study) highlight the absence or heterogeneity of these effects in AI, suggesting less risk of tipping.
- This implies regulators may not need to rush interventions in all digital sectors.
- If there is any trade-off between regulation and innovation, timing interventions carefully is crucial.
- Ultimately, intervention decisions should be grounded in concrete evidence of market dynamics, not assumptions.

PANEL 2

MERGERS AND ACQUISITIONS: A LUXURY THAT TECH GIANTS CAN NO LONGER AFFORD?

Mathilde SALTIEL (Partner, Latham & Watkins, Paris) moderated this discussion.

Jérôme Vidal

Deputy General Rapporteur, Head of the Mergers Unit,
French Competition Authority, Paris

Towards a french mechanism for reviewing acquisitions below revenue thresholds

- The debate on below-threshold acquisitions dates back to 2018, when the French Competition Authority launched a first public consultation.
- Article 22 of the European regulation served as a temporary solution to refer certain cases to the European Commission.
- In early 2024, the Authority launched a new consultation to create a national mechanism inspired by the Italian model, based on qualitative criteria and a minimum revenue threshold.
- Three principles guide this system: targeting problematic concentrations, allowing intervention from the letter of intent, and ensuring smooth integration into the European framework.
- A combined revenue threshold would exclude SMEs to avoid excessive administrative burden.
- The goal is to better control acquisitions of intangible assets or companies with no immediate revenue.
- A draft text is expected by the end of 2024, with a proposed bill in 2025, requiring amendments to the Commercial Code.

Priority on ex-ante measures and simplifying merger control

- France already has a post-closing safeguard mechanism (Article L.430-9 of the Commercial Code), which is rarely used.
- Pre-closing (ex-ante) intervention with suspensive effect is deemed essential to reduce legal uncertainty and allow full assessment.
- The Authority has shortened review times by a third, notably by eliminating the pre-notification phase in 90% of cases.
- 92% of cases are now handled quickly and without issue, supporting the idea of a simple and targeted ex-ante system.

Coordination between merger control and DMA obligations

- Acquisitions by gatekeepers would likely fall under the European Commission's purview, via referral by a Member State—pending clarification from the Court of Justice.
- The DMA will be considered in the analysis due to its practical benefits: its obligations apply continuously, unlike French behavioral commitments, which are time-limited.
- Merger control remains complementary: it helps anticipate specific future risks not covered by the DMA.
- This approach is especially useful in emerging sectors like AI, while awaiting a possible revision of the DMA to include such concerns.

Economic assessment in merger control – A rarely decisive tool

- The Competition Authority has never approved a problematic transaction solely on the basis of an economic efficiency assessment, which is only considered in Phase 2 and only when no viable remedies exist.
- Criteria set by the Council of State are very strict: efficiencies must be quantifiable, verifiable, directly linked to the merger, and partially passed on to consumers.
- In practice, such arguments are often submitted late in Phase 2, limiting the scope for a genuine adversarial debate with the services.
- Companies rarely raise efficiency arguments early, as doing so would imply acknowledging competitive issues; in the tech sector, such efficiencies are only accepted if they clearly offset the risks—especially those concerning innovation.

The original contributions were delivered in French and have been voluntarily translated into English to ensure greater coherence and accessibility across the entire conference.

Guillaume Duquesne

Senior Vice President, Compass Lexecon, Paris

Merger control challenges and evolving approaches in digital markets

- Competition in digital markets often involves potential or nascent rivals, making killer acquisitions a key concern.
- A major issue is whether below-threshold mergers escape review and how authorities assess competition in fast-moving markets.
- The Illumina/Grail judgment increases national authority involvement but adds complexity for businesses.
- Forward-looking analysis is essential but difficult due to limited reliable data.
- To reduce uncertainty, authorities need clearer merger guidelines, defined harm thresholds, and stronger international coordination.
- Positive trends include sharper investigations and decisions like CMA's Adobe/Figma, as well as ongoing updates to merger guidelines that better address dynamic competition.
- The DMA may inform merger assessments, but it's not a reliable backstop—it's based on past concerns, doesn't capture emerging risks, lacks clear compliance standards, and is subject to change. Authorities must still conduct full, independent reviews, especially as global firms face differing rules across jurisdictions.

Ex ante vs. *ex post* merger review: Practical and strategic trade-offs

- *Ex ante* review offers greater legal certainty and allows harm prevention, but its predictive nature creates inherent uncertainty—especially in fast-moving markets.
- *Ex post* review may seem attractive for assessing actual market outcomes, yet is rarely practical:
  - Proving causality years later is extremely difficult.
  - Reconstructing a credible counterfactual and restoring competition post-merger is often infeasible, especially with deeply integrated businesses.
- The error-cost framework must also consider the impact on business behavior:
  - Chilling effect: fear of future scrutiny may deter beneficial mergers.
  - Under-investment: firms may avoid full integration or innovation to minimize risk of reversal.
  - Over-integration: others may rush to merge operations quickly to render breakups impractical, possibly leading to inefficiencies.
- Overall, while *ex post* enforcement has limited, specific utility (e.g., some vertical mergers), a systematic reliance on it introduces serious legal and economic risks that challenge consistent application.

Efficiencies and ecosystem theory of harm in digital mergers

- Digital mergers often face a presumption of harm, making efficiency arguments difficult.
- Uncertainty affects both proving efficiencies and establishing harm, yet the burden is one-sided.
- Efficiency arguments can be turned against merging parties under ecosystem theories of harm.
- This risks ignoring real benefits for businesses and consumers.
- Parties often rely on a pro-competitive narrative to justify the merger despite limited formal proof.

Geoff Manne

President & Founder, International Center for Law and Economics, Portland

Distinctions and challenges in assessing vertical and nascent mergers

- The Illumina/Grail case highlights the need to distinguish vertical from horizontal mergers, as they carry different presumptions of harm.
- Vertical mergers often create efficiencies, such as the elimination of double marginalization, unlike horizontal mergers that more readily reduce competition.
- Illumina/Grail was not a killer acquisition; the concern was exclusionary leverage, not the elimination of a nascent rival.
- Expanding review powers for under-threshold mergers, especially horizontal or nascent/killer acquisitions, is challenging due to limited strong evidence.
- Studies show that only a very small fraction of such transactions may raise competition concerns—highlighting the need for better case selection criteria.
- Current approaches often resemble presumptions without reliable triggers, unlike traditional per se rules.
- For vertical mergers, economic and legal reasoning typically weigh against a presumption of harm.
- While enforcement bodies seek broader powers in dynamic markets, current evidence does not justify expanding presumptions of harm.

Ex post merger review and the limits of retroactive enforcement

- In the Meta case, only merger-related claims (Instagram and WhatsApp) remain after the foreclosure claim was dismissed—making this effectively an *ex post* review.
- FTC clearance letters allow later investigation, supporting the idea that some false negatives are tolerable.
- *Ex post* enforcement feasibility depends on the merger type:
  - Vertical mergers (e.g., Illumina/Grail) are easier to monitor and remedy.
  - Horizontal or nascent mergers (e.g., Meta/Instagram) may be harder to unwind due to entrenched dominance.
- Even a breakup may not restore competition when network effects persist.
- The Google AdTech case also shows the difficulty of addressing past mergers long after integration (e.g., DoubleClick).
- While predicting future harm is difficult, post-merger evidence (e.g., Instagram's massive growth) complicates harm arguments.
- The Meta/Instagram merger drove scale and user benefits—unlike a "killer acquisition."
- Key takeaway: past mergers can be reviewed, but remedies must match the merger type and realistic impact.

The DMA as a post-merger compliance mechanism

- Hypothetically, if Illumina were a DMA-designated gatekeeper, a commitment not to self-preference Grail would fall under DMA rules and likely be enforceable.
- The existence of the DMA can strengthen confidence in post-merger commitments due to its continuous oversight and enforcement mechanisms.
- The General Court (Deutsche Telekom case) has recognized that antitrust can serve as an *ex post* corrective tool—DMA should logically play a similar role.
- Arguments claiming that the DMA and competition law must remain separate often seem more strategic than substantive.
- In practice, the DMA and antitrust law should be viewed as complementary—working together to constrain anti-competitive conduct, including post-merger behavior.
- The presence of the DMA could, in some cases, justify allowing a merger to proceed, assuming effective post-merger oversight is in place.

On Ecosystem Theories of Harm

- Ecosystem theories of harm remain underdeveloped and are mostly theoretical at this point.
- Being part of an ecosystem can generate efficiencies outside the specific market under review, since companies optimize across the entire ecosystem, not just within individual markets.
- Ignoring cross-market or ecosystem-wide effects can lead to flawed analysis, as addressed in the American Express case.
- Ecosystems are often used to highlight competitive concerns, but they can also create efficiencies that might justify a merger.
- The ecosystem concept should be applied symmetrically—recognizing both potential harms and efficiencies.

PANEL 3

PARTNERSHIPS, "ACQUI-HIRES" & OTHER AI HOT TOPICS

Franck AUDRAN (Partner, Gide Loyrette Nouel, Paris) moderated this discussion.

Leonor Bettencourt Nunes

Case Handler, DG COMP, Brussels

EU merger control and AI: Adapting tools to a changing market

- Close monitoring of AI markets is a priority, as large digital players can rapidly shape developments; preserving competition requires both *ex ante* and *ex post* enforcement.
- The Commission is adapting its existing tools and assessment to address AI-specific challenges, especially in partnerships and acqui-hires.
- In the partnership Microsoft/OpenAI, the Commission found no decisive influence from Microsoft; but such arrangements will continue to be monitored.
- Acqui-hires, targeted at talent and IP transfers, may be subject to merger control, when they amount to a structural change in the market (e.g. Microsoft/Inflection).
- After the Illumina judgment, Article 22 referrals are more limited; the Commission will continue to rely on Member State competence to capture below-threshold deals but is assessing this enforcement gap and the potential need for EUMR reform.
- Member States competence is expanding via national "call-in" powers allowing review and Article 22 referrals of below-threshold but strategically important deals (e.g., NVIDIA/RunAI).
- The EU is updating its merger guidelines to better address innovation harms, with public consultation ongoing, as the Commission adapts its tools to effectively oversee fast-moving AI markets.

Commission's *ex post* enforcement and insights on AI market competition

- The Commission is using Articles 101 and 102 to investigate AI-related partnerships and behaviors, issuing RFIs to monitor market dynamics.
- A broad market study led to a competition policy brief on AI, supported by public consultations and mapping of key digital agreements.
- Several national authorities (e.g., France, CMA, Portugal) are also monitoring AI markets and have been identifying risks for competition and innovation.
- Foreseeable anticompetitive practices include refusal to supply, bundling, lock-in, and exclusivity clauses, limiting choice for consumers and/or access to key inputs
- Partnerships may be pro-competitive, but "gray zone" cases, like those involving big tech and fast innovators, require careful scrutiny.
- The Commission, CMA, DOJ, and FTC are closely aligned to maintain open and competitive AI markets.

Andrea Appella

Associate General Counsel, Open AI, London

UK approach to AI, merger control, and regulation: evolving with innovation

- The UK aims to balance innovation, investment, and business confidence—especially in AI where regulatory signals shape the ecosystem and business confidence.
- The CMA's enforcement in dynamic markets is now guided by the "4 Ps": pace, predictability, proportionality, and process.
- The CMA has reviewed five major AI-related deals (e.g., Microsoft/OpenAI, Amazon/Anthropic, Alphabet/Anthropic, Microsoft/Inflection, Microsoft/Mistral) and clarified which transactions may trigger scrutiny and how reviews proceed.
- The CMA is currently refining its approach via a remedies review and a new Merger Charter to promote early and transparent business engagement.
- Legal certainty is key in the UK's voluntary regime, especially regarding the material influence threshold; we are waiting for updated guidance, which should be due this summer.
- In addition to the merger tools, the new UK DMCC introduces an *ex ante* framework with Strategic Market Status and flexible, tailored obligations—more adaptable than the EU DMA.
- The UK views merger control, antitrust, and *ex ante* tools as complementary, each addressing different concerns.
- As AI evolves rapidly, the CMA must act quickly to prevent lasting harm and support a competitive digital economy.

Broader regulatory context for AI in Europe

- Competition law is part of a wider legal regulatory framework for AI, including the upcoming AI Act and the Code of Practice, which will introduce new compliance obligations for AI companies.
- Ongoing efforts for regulatory simplification aim to reduce overlapping rules affecting tech companies, with initiatives like the Draghi report and the Digital Omnibus package. OpenAI has published a blueprint with some recommendations in this area.
- Competition concerns extend beyond partnerships to include vertically integrated dominant firms' unilateral actions, requiring vigilant, forward-looking enforcement to maintain open and fair AI markets as the technology rapidly evolves.
- Complex rules affect Europe's ability to attract investment, talent, and innovation, delaying some product launches, which influences startup choices, major player rollouts, and overall competitiveness—highlighting the need for a holistic, simplified, innovation-friendly framework.
- It's vital to consider competition enforcement within this broader ecosystem to support innovation and investment amid evolving regulations and the fast pace of development of the AI technology.

Blanche Savary de Beauregard

General Counsel and Secretary of the Board, Mistral AI, Paris

Navigating AI growth and regulatory scrutiny: A startup perspective

- Mistral AI's early partnership with Microsoft triggered a surprising CMA investigation, under the merger control grounds, despite the characteristics of the partnership (minority convertible bonds investment, no influence from Microsoft in Mistral AI's governance, access to a Microsoft's compute envelope and cloud).
- Partnerships are vital for access to compute, markets, and talent but can still raise regulatory concerns—even at early stages.
- In AI markets, firms like Mistral can be both partners and competitors (e.g., Le Chat vs. Microsoft Copilot), complicating oversight.
- Regulatory unpredictability—such as unclear merger qualifications—makes *ex ante* review feel like *ex post* enforcement.
- This uncertainty risks deterring partnerships and slowing innovation.
- Authorities must balance oversight with not discouraging vital collaboration in dynamic sectors.
- Cross-border rule fragmentation adds complexity, with investigations in jurisdictions where companies may have no revenue.
- As Mistral grows, it still must navigate regulatory pressure while staying fast, innovative, and compliant.
- The need is for legal certainty and smarter enforcement that enables rather than hinders startup growth in AI.

Making AI partnerships work: openness, leverage, and clear guidance

- Competing in AI requires assembling layered inputs—data, compute, talent, and capital—at large scale.
- Access to key downstream markets is controlled by a few hyperscalers, limiting distribution options for smaller players.
- Vertical integration by dominant firms may harm innovation; partnerships are essential for ecosystem diversity.
- An open, interoperable AI stack—with deployment flexibility—is critical for user choice and market health.
- A "partnership playbook" could help smaller firms navigate deals, highlighting risks and pro-competitive practices.
- Access to end-user data is vital for product improvement but remains difficult to obtain.
- Authorities could aid competition by offering clear guidance on red flags, influence thresholds, and protective contract terms.
- Empowering emerging players with legal clarity and better negotiation tools supports a fair, innovative AI ecosystem.
- Regulatory simplification should consider that in AI, the traditional criteria distinguishing "small" firms from more important ones no longer make sense —caution is needed.
- Customers face uncertainty due to unclear AI rules (e.g., FLOPS reporting), and lack of clarity on how the regulatory burden is split between supplier, deployer, client, which slows adoption and risks widening Europe's AI gap.

Michel Pflieger

Competition Counsel EMEA, Microsoft, Paris

Industry view: Balancing regulation and innovation in AI partnerships

- Microsoft affirms its commitment to EU competition law and the DMA, noting its data center investments are locally anchored and regulated.
- The company routinely provides data to regulators as part of its obligations in a heavily scrutinized market.
- Manifestation of this intense scrutiny : the CMA alone just reviewed five of AI-related partnerships in a bit more than a year.
- Clarity and predictability in regulation are important for planning, investment, and innovation.
- Unpredictable tools like call-in powers increase complexity and may deter partnerships and transactions in general, especially if used in an inconsistent way across jurisdictions.
- Treating AI talent recruitment like mergers risks overreach and may chill normal hiring in a competitive field.
- Microsoft supports rigorous enforcement but calls for a balanced approach—ensuring rules are proportionate and promote innovation and investment.

Assessing AI partnerships: innovation, structure, and regulatory clarity

- The tech sector—and especially AI—relies on layered, interdependent partnerships across the full technology stack (infrastructure, model, and application layers).
- AI partnerships are essential for Europe's ambition to build a competitive AI ecosystem, enabling innovation, productivity, and tech diffusion.
- Not all partnerships are alike; their structure (commercial vs. structural) should guide whether merger or antitrust tools apply—case-by-case assessment is key.
- Regulators should account for AI's dynamic evolution and the often pro-competitive role of partnerships in early-stage innovation.
- Example 1: Partnerships like the Microsoft–OpenAI partnership results in more innovation and choice. They supports startup independence while expanding competition and market choice.
- Example 2: Microsoft acts as an open computing platform, hosting ~1,800 models (many open-source), giving developers flexibility and promoting competition.
- A predictable legal framework is vital to encourage such partnerships by ensuring pro-competitive intentions are recognized and fairly evaluated.

Vincent Champain

SEVP, Chief IT & Digital Officer and member of the Executive Committee, Framatome Group, Paris

Interoperability as a competition driver in AI

- Users want to have a real choice for business users depends technical features such as easy integration, voiding lock-in across the AI stack or the existence of open standard to integrate components from different vendors.
- Dominant players gain unfair advantage when integration with a platform with a strong market position (ex: Windows, Office…) is made difficult—seen in past bundling (e.g., Windows + Office, Office + Teams).
- Relevant market is also important – for example the relevant market for AI sovereign models in Europe is much smaller (and Mistral is a large player there) than the larger market
- Even in strategic areas like sovereign AI, modularity and interoperability remain essential, beyond cloud environments.
- Modern IT is "Lego-like," where value comes from combining best-in-class tools across layers—OS, models, apps—while forced bundling inflates costs and limits flexibility.
- Regulatory timing is challenging—non-problematic deals (e.g., Skype: authorized in 2014 when Microsoft was a small player in the visio market, disappearing in 2025 while Teams, which was built using Skype technology bricks, is now a key player) can later raise concerns (e.g., Teams bundling with Office) as independent services become inseparable.
- Innovation often drives disruption (e.g., AI challengers to Google), but poor regulation can entrench incumbents and hinder new entrants: regulators should ensure that some regulation (ex: proposals to complexify entry in the AI market) will reduce innovation and there reduce competition, benefiting existing players
- Open standards (e.g., APIs, Agent-to-Agent Protocols) reduce switching costs and may promote competition more effectively than regulation.
- Complex AI rules—that might be well-intentioned or created by existing players to increase barriers to entry—create high administrative burdens, internal uncertainty, compliance fears, and slower innovation.
- Regulators should promote open, technical standards and smart, proportionate enforcement to sustain dynamic, competitive AI markets. Creating an open technical standard (ex: open standard for word or excel documents, Agent to Agent AI protocols….) might not look like a competition tools, but it can be much more powerful than regulating complex and quickly moving technologies.

PANEL 4

REGULATION OF THE DIGITAL SECTOR: SHOULD MERGER OR DOMINANCE CONTROL BE PREFERRED?

David BOSCO (Professor of Law, University of Aix-Marseille) moderated this discussion.

Luca Prete

Legal Secretary, European Court of Justice, Luxembourg

The complementary role of *ex ante* and *ex post* competition enforcement

- The question concerning the distinction between *ex ante* and *ex post* enforcement is rhetorical — both are complementary and necessary. The DMA exemplifies this hybrid approach, combining preventive and corrective tools.
- Articles 101 and 102 TFEU remain foundational to competition law, enabling *ex post* intervention based on actual market outcomes — particularly where *ex ante* tools fall short (confirmed – in merger cases – by the Towercast judgment, though enforcement questions remain).
- Merger control has inherent limits: only a fraction of deals are reviewed, and predicting long-term market evolution is speculative and uncertain.
- Advocate General Emiliou's Illumina opinion calls for extending the "by object and effect" framework to Article 102, particularly for "killer acquisitions," which he sees as potentially inherently anticompetitive.
- Introducing experience-based presumptions of harm could streamline *ex post* enforcement, challenging the idea that it must necessarily be slow or overly complex.

Reflections on the evolving state of Article 102 case law and the Commission's new Guidelines

- EU competition law is in transition, with a surge in litigation and the Court itself re-considering some of foundational principles (e.g., Intel).
- The Commission's new Guidelines shift from setting enforcement priorities to codifying an evolving and unsettled body of law.
- While intended to aid companies, courts, and NCAs, this quasi-judicial role risks overlapping with the Court's interpretive function.
- Critics highlight selective case use and the risk of the Guidelines quickly becoming outdated or legally ambiguous.
- Reconciling landmark cases (United Brands, Booking.com, Google, Intel, Qualcomm) reveals an evolving, sometimes inconsistent jurisprudence.
- The conceptual uncertainty surrounding the Guidelines raises doubts about their clarity, authority, and long-term practical utility.

Exploitation under competition law: challenges and current developments

- Case law on exploitation by the CJEU is scarce and outdated, mainly from the 1970s–1980s, leaving the concept underdeveloped.
- In a pending case on football agents challenging FIFA's rules the issue of exploitative abuses has been raised, although very much in passing. The AG opinion is expected soon.
- The Commission rarely uses the exploitation theory, while national authorities, especially on excessive pricing, have been somewhat more active.
- Defining "excessive" pricing remains legally and economically complex, as illustrated in AKKA/LAA.
- Terms like "unreasonable" or "disproportionate" help shape the concept, but remain vague and subjective.
- Exploitation involves dominant firms imposing conditions that customers would not accept in a competitive market, though no clear legal test exists yet.

Olivier Fréget

Partner, Fréget Glaser & Associés, Paris

Ex ante vs. *ex post*: A choice of economic and legal model

- The choice between *ex post* and *ex ante* interventions defines the role attributed to competition. An *ex post* approach reflects trust in competition's ability to regulate itself, intervening only when clear and non-speculative market failures occur. Choosing *ex ante* means viewing the market as so flawed that one no longer believes competition can fulfill its role. *Ex ante* regulation reflects a will to administer the market, and like all economic administration, faces the same pitfalls — particularly the public authority's limited ability to speculate on what is desirable or how innovation should evolve.
- The trauma caused by the rise of digital giants has fueled a logic of preventive regulation, marking a shift toward a new form of managed economy and a devaluation of competition law, accused of being allegedly incapable of preventing monopolies that have been politically branded as necessarily irreversible. Every day, whether one agrees or not with specific decisions, competition law proves its ability to address the challenges posed by digital markets, disproving the claimed necessity of the DMA.
- The DMA rejects, while claiming to pursue, the same goals as classical antitrust by imposing *ex ante* obligations — thereby avoiding any concrete factual analysis or competitive testing.
- «Competitive regulation» is thus an oxymoron that merely signals the return of individualized state intervention, albeit in modernized form.
- Putting *ex ante* and *ex post* interventions on the same level — as if the former were not meant to be an exception — reflects a normalization of state intervention, with the major risk of relegating antitrust to a subsidiary role.
- The speculative nature of *ex ante* — based on uncertain scenarios, particularly in sectors like AI — threatens both innovation and the rule of law, since a fluid and unpredictable legal framework loses its core function as a guarantor. It promotes uncertain projections rather than reasoning from established facts. *Ex post* retains strong appeal as it is based on tangible evidence and a more limited counterfactual, unlike the speculative foundation of *ex ante*.
- *Ex ante* must therefore remain the exception, justified only by demonstrated failures; in the absence of solid evidence, a rigorous use of Article 102 may be sufficient to handle problematic cases.

Limits and nuances of *ex ante* and *ex post* in competition regulation

- It is misleading to argue that *ex ante* helps prevent irreversible changes. Legal sanctions — even *ex ante* — always come *after the fact*: restoring a competitive balance *ex post* remains difficult, both in abuse of dominance and in merger control.
- In merger control, unless mergers are systematically prohibited — which is difficult — the resulting remedies often fail to preserve the market and instead steer it. The real effectiveness of these remedies, especially structural *ex ante*concessions, remains uncertain.
- In uncertain sectors like AI, *ex ante* regulation can create legal instability by anticipating developments that are still largely unknown.
- It is essential to preserve the rigor of competition law, avoid prescriptive approaches, and favor solutions grounded in established facts.

The *Android Auto* ruling: A turning point in the concept of abuse of dominance and interoperability

- The *Android Auto* ruling marks a shift in competition law by abandoning the indispensability requirement from *Oscar Bronner* to qualify as an abuse of the refusal to allow a third-party application to appear on one's screen, while avoiding any assessment of the practice's market effects.
- The Court now accepts that a refusal of access can be abusive if there is a «legitimate expectation» based on partial openness of the infrastructure — even if the infrastructure is not essential.
- The Court's reasoning — that designing an infrastructure to host applications implies, for dominant firms, a surrender of development control — should not have been addressed via a preliminary ruling. Agreeing to answer this way reveals a worrying simplicity in the Court's ability to assess the broader economic and legal consequences of its decisions.
- This enshrines a logic of generalized and asymmetric interoperability, undermining the principle of technological neutrality. It is not up to public authorities — except in rare, tightly regulated cases like telecoms — to dictate interoperability choices to market players, even dominant ones, unless it is shown that on the relevant market, a lack of interoperability exacerbates a market failure.
- Abandoning the established *Oscar Bronner* approach — imperfect and outdated as it may be — disrupts the delicate balance between antitrust and fundamental freedoms. This was done through a clumsy and imprecise decision delivered via a preliminary ruling, short-circuiting any opportunity for legislative debate. It functions as a sort of cross-sector DMA, without deliberation.
- The case highlights a normative drift by the Court, which is increasingly codifying or legislating indirectly — at the risk of blurring the separation of powers.
- The implications of this ruling go beyond the digital sector: it raises a structural question about the appropriate balance between innovation, private property, and forced access.

Exploitation abuse: Challenges and limits in the digital sphere

- Exploitation abuse is listed under Article 102 but has been largely abandoned by the Commission, seen as too complex to enforce.
- It has traditionally been handled through sector-specific regulation aimed at lowering entry barriers.
- The rise of digital markets and GAFAM has revived the use of this tool in response to lock-in effects.
- In the Apple/ATT decision, the Competition Authority intervened on an issue falling under the GDPR, blurring jurisdictional boundaries.
- The concept of «unreasonable behavior» lacks clarity and does not constitute a solid economic standard.
- There is a risk of excessive regulation and a loss of legal clarity in competition law.

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Eshien Chong

Chief Economist, Autorité de la concurrence, Paris

The growing blurring between ex ante and ex post in competition regulation

- Ex ante intervention should ideally be based on demonstrated market failure, but new presumptive tools—such as the DMA and the gatekeeper concept—are increasingly blurring the line between ex ante and ex post approaches.
- These mechanisms, based on presumptions (e.g., restrictions «by object»), create a legal grey area that challenges traditional distinctions.
- Predatory acquisitions highlight the limits of ex post enforcement: once a concentration is completed, restoring competition is often impossible.
- Structural remedies post-acquisition are difficult to implement, due to issues such as the viability of the divested entity, network effects, and efficiency losses.
- This supports the case for upstream intervention powers (e.g., a call-in mechanism), allowing authorities to prevent irreversible effects.
- A well-framed ex ante control enhances legal certainty by providing businesses with greater clarity and predictability regarding the legality of their operations.

Apple ATT: Key competition concerns

- Dominant digital firms like Apple act as private regulators and bear particular responsibility not to distort competition.
- The implementation of ATT (App Tracking Transparency) does not provide genuine informed consent in line with the GDPR: it requires a double consent in case of acceptance and adds friction for the user.
- This complexity lowers consent rates, disproportionately harming smaller publishers reliant on advertising, compared to larger players with proprietary data. This imbalance constitutes an exploitative abuse under Article 102 TFEU.
- Apple narrows the definition of “advertising tracking” to third-party tracking only, which makes the ATT prompt less effective in ensuring meaningful user consent.
- The decision penalizes this asymmetry and underscores the need for fair treatment between Apple and third parties.

Pascale Déchamps

Partner, Accuracy, Paris

Ex ante, ex post: Effectiveness, limits, and complementarity of competition tools

- The real issue is not which tool to choose, but how effective they are at restoring competition. Ex post enforcement works well for cartels but faces significant limitations in abuse of dominance cases, especially in the digital sector.
- In markets shaped by network effects and tipping dynamics, ex ante tools become crucial to prevent irreversible situations where ex post remedies are no longer viable.
- Ex post remedies can sometimes be too complex or too late to be effective, as seen in the Google Shopping case, where injunctions became necessary.
- UK-style market investigation tools—allowing structural interventions without a formal infringement—could be reintroduced in the EU for greater flexibility.
- Striking a balance between Type I and Type II errors is key: premature intervention can stifle innovation, while delayed action may render enforcement ineffective.
- Rather than seeking a single “best” tool, it is essential to view existing instruments as complementary, ensuring that functional tools are not undermined.

Exploitative abuse and private regulation: The case of Apple ATT

- Exploitative abuse is a relevant lens to analyze Apple's rules, as the company acts as a private regulator shaping the market.
- The issue was not exclusion of a rival, but the imbalance created by Apple's management of user consent, which disadvantaged third-party publishers.
- The author participated in the investigation at the French Competition Authority, and the views expressed here are personal.
- The decision imposed a €150 million fine without any injunction or mandatory corrective measure, meaning Apple was not required to modify ATT—a point that raises concerns about the sanction's effectiveness.
- A more structural remedy (e.g., aligning ATT with GDPR requirements) could have been pursued, but it raises questions about Apple's responsibility in managing user consent.
- The implicit message: the company is left to solve the problem on its own, relying on its technical capability and willingness—an uncertain outcome.

The evolution of exploitative abuse: From pricing to non-price conduct

- Today, exploitative abuse mainly reemerges through non-price practices, since the evidentiary standard for excessive pricing remains too high.
- In digital markets, competition is increasingly shaped by access conditions, technical restrictions, and product design rather than price.
- The European Commission favors structural solutions (e.g., opening platforms to alternative app stores) rather than price setting, aiming to restore a competitive environment.
- The DMA seeks to remove non-price barriers, with an indirect effect on pricing, without replacing traditional antitrust.
- Exploitative abuse remains a sanctioning tool—not a means of price or sectoral regulation.
- Cases like Apple ATT highlight the significance of anti-competitive non-price imbalances, even when no specific injunctions are issued, leaving corrective actions in the hands of the firm.