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8TH GLOBAL MERGER CONTROL CONFERENCE Joint interview with Isabelle de Silva

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Joint interview with Isabelle de Silva, at the 8th Global Merger Control Conference organised by Concurrences in partnership with Dechert and CRA.

Mélanie Thill-Tayara

Mélanie Thill-Tayara interviewed Isabelle de Silva on recent developments in merger control proceedings. The first important issue relates to the upcoming change of approach in the referral mechanism provided for in Article 22 of the European Merger Control Regulation (“EUMR”). For this referral mechanism, the European Commission will no longer require transactions to meet national merger control thresholds. It is presented as an effective solution to address the alleged “enforcement gap” that exists when a transaction does not meet the national notification thresholds while being a concern for competition authorities. However, this new approach raises some issues. In particular, it remains unsure to what extent competition authorities will have the ability to refer transactions that have already been implemented. This may be an additional cause of apprehension for companies and their counsels. Similarly, the Covid-19 economic turmoil

may shrink companies’ turnovers so that their transactions may no longer be reportable under EUMR or national law. In that troubled context, clarification from the Autorité de la concurrence (the “Autorité”) would be welcomed to avoid gun-jumping proceedings for failure to notify.

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MÉLANIE THILL-TAYARA



In addition to this, Mélanie Thill-Tayara asked Isabelle de Silva about the Digital Markets Act and the New Competition Tool within the context of the upcoming *ex-ante* regulation of online platforms. Most importantly, these new regulatory procedures should not shield competition authorities from the requirements of due process and respect towards the rights of defence. This new framework calls into question what the role of the Autorité will be for its implementation.

Finally, Mélanie Thill-Tayara raised the issue of remedies. Structural remedies have long been the cornerstone of enforcement. However, we recently witnessed a renewed interest in behavioural remedies.

Laurent Flochel

Laurent Flochel asked Isabelle de Silva whether she agreed on the need or stricter enforcement of competition law regarding merger control and whether the Autorité would target the digital sector specifically. Some competition authorities are thinking of imposing mandatory notification requirements on strategic undertakings to control their acquisitions, especially in the digital sector.

“COMPANIES AND THEIR COUNSELS REMAIN CAUTIOUS ABOUT THE IMPLEMENTATION OF THESE NEW RULES AND THE INTERPLAY WITH EXISTING COMPETITION LAW REGIMES.”

LAURENT FLOCHEL



In the US, the recent House of Representatives report on digital markets also advocates for stricter control of transactions involving structural platforms. Against that background, one may wonder whether digital markets require

a dedicated framework of analysis, distinct from the standard assessment. It seems that merger control review will turn toward a very prospective analysis of relevant sectors with new concepts dedicated to the digital industry. This is all the more relevant since retrospective analysis has sometimes failed to predict accurately developments of innovative markets, as in *Google / Doubleclick* (Case COMP/M.4731).

In that respect, another important development in antitrust law is the future adoption of *ex-ante* regulation for the digital sector. Companies and their counsels remain cautious about the implementation of these new rules and the interplay with existing competition law regimes. Many practitioners still wonder how these new tools will fit in the regulatory framework and, in particular, what their interaction with merger control will be.

Isabelle de Silva

Isabelle de Silva first addressed the issue of Article 22 referrals. Since 2017, the Autorité has identified several transactions likely to have a strong impact on competitive dynamics of various markets, which failed to meet the national merger control thresholds. Most importantly, these transactions were not limited to the digital sector as they also related to other activities such as the pharmaceutical industry, the broadcasting sector, or even the pet health insurance sector.

Given what has been referred to as an “enforcement gap”, the Autorité made several proposals to adapt national and EU rules on merger control. First, the Autorité advocated for a complementary merger control regime that could be implemented as soon as a transaction under the thresholds was identified by the Autorité, which could request a filing for a limited period. Second, the Autorité has repeatedly called for a new approach to Article 22 of the EUMR, that was initially drafted to catch transactions in Member States that did not have any merger control regime.

On this second proposal, the Autorité will now be discussing with the European Commission on how article 22 should be implemented and whether guidance can be provided to companies. According to Isabelle de Silva, the new implementation of Article 22 referrals should target highly concentrated markets where a dominant undertaking, or any undertaking with significant market power, acquires one of its competitors, as well as “niche” markets. It may also be useful to prevent dominance in emerging markets, for instance in the digital sector, or innovative markets like the pharmaceutical or biotech industry.

For the enforcement of Article 22 of the EUMR to transactions that have already been implemented, this is one of the issues that will be discussed within the European Competition Network (the “ECN”), but it seems unlikely that the European Commission or a National Competition Authority (“NCA”) would launch proceedings regarding transactions that have been implemented for several months or years. It would appear more logical to apply this mechanism to future transactions.

In addition to this, the Autorité has recently proposed to impose on strategic or dominant players a reporting obligation of all their future transactions. This would allow the Autorité to monitor their acquisition policy, which is sometimes significant.

Regarding the factors taken into account for the merger control analysis, Isabelle de Silva indicated that traditional instruments have shown their limits when it comes to assessing new ecosystems. Concepts like market definition or dominance may be difficult to apply to the new economy. Against this

“AS FAR AS THE NEW COMPETITION TOOL IS CONCERNED, THE AUTORITE CONSIDERS THAT NCAS SHOULD BE GIVEN THE POSSIBILITY TO IMPLEMENT IT ALONG WITH THE EUROPEAN COMMISSION.”
ISABELLE DE SILVA



background, the Autorité will work on new tools and concepts such as the use of data and communities of users across markets, that may strengthen the analysis of conglomerate effects. Some even call for a presumption that any acquisition by an ultra-dominant or strategic operator would impede competition. The review of the European Commission’s Notice on market definition will already include some of these new issues.

Also, competition authorities need to refine their predictive analysis of the markets using more qualitative data. This is what the Autorité did in *Se Loger / Logic Immo* (Case 18-DCC-18). Over reliance on retrospective analysis should be viewed with caution. In that respect, enforcers shall pay attention to past cases like *Facebook / Whatsapp* (Case COMP/M.7217) or *Facebook / Instagram* (Case ME/5525/12) to understand whether and how they would assess these types of cases differently today. From that perspective, it is worth noting that some competition authorities, like the CMA, have decided to conduct an assessment of their prior decisions to adapt their practice to future challenges.

This refined perspective on merger control analysis translates into remedies. Broadly speaking, structural commitments are generally preferred for horizontal competition problems, while behavioural commitments are relevant for vertical or conglomerate issues, or to address specific or new issues raised by the merger.

Another important issue will be, within the coming months, the adoption in the EU of the new *ex-ante* regulatory framework for online platforms. In this context, merger control will remain an essential tool of competition law and even more so in the future, while the Digital Markets Act (the “DMA”) will provide complimentary tools for enforcers. This is not an unknown territory for competition authorities since the CMA has enjoyed similar tools for some years and we can see the benefits of such tools and the possible remedies associated.

In particular, the DMA will provide a two-level response with a flexible system. First, some conducts will be prohibited. Second, other behaviours will trigger a market inquiry likely to result in injunctions for companies. This has been referred to as the New Competition Tool. The companies concerned will benefit from an adversarial procedure with appropriate guarantees and will have the opportunity to challenge the decisions before review courts.

As far as the new competition tool is concerned, the Autorité considers that NCAs should be given the possibility to implement it along with the European Commission, as it is already the case for traditional competition law tools. In this respect, the ECN would ensure coordination and consistency in the enforcement of this tool throughout the EU.

Finally, Isabelle de Silva guided the calculation of turnover in light of the Covid-19 economic crisis. She acknowledged that existing rules and guidelines do not provide for a clear-cut response in such circumstances. The Autorité will take a pragmatic approach and the company’s good faith may not be questioned where the thresholds for 2020 are not met. However, the question remains open for discussion if a company has faced a total collapse of its turnover in 2020. This will probably be the case in tourism or the catering industry. In this case, 2020 revenues will not be an indication of the target’s true value and market position. The Autorité will consider this problem, which could be discussed within the ECN. The Autorité already knows how to deal with this kind of issue in the context of antitrust proceedings. When an infringing company’s turnover for a certain year does not accurately reflect its strengths on the market, the Autorité takes another year of reference to calculate the fine. ■