EU/UK Competition Alert

Akin Gump
STRAUSS HAUER & FELD LLP

Joint UK, German and Australian Statement on Merger Control: A Paradigm Shift Towards Skepticism and Divestments to Restore Lost Competition

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The U.K. Competition and Markets Authority (CMA), German Bundeskartellamt (BKA) and Australian Competition and Consumer Commission (ACCC) issued a joint statement (the "Statement") on April 20, 2021, highlighting to businesses, advisors, courts and governments the need for more rigorous and effective merger enforcement. The heads of the three competition authorities—Dr. Andrea Coscelli (CMA), Rod Sims (ACCC) and Dr. Andreas Mundt (BKA)—also met at a virtual conference to discuss the Statement and the challenges for effective merger control such as the economic impact of COVID-19 and the dynamic nature of digital markets.

Key Takeaways from the Statement and Conference:

- The economy must emerge from the pandemic with competitive markets, and merger control is the most powerful tool to ensure this. "Merger control is the way out!" (Mundt) and "COVID-19 should not be used as a reason to relax merger control enforcement" (Coscelli).
- Many markets (particularly in the digital economy) have been allowed to become very concentrated. Robust merger control should be used to prevent companies from gaining market power and higher margins through acquisitions. Once competition is eliminated between the merging firms, it is very difficult to restore competition with other competition enforcement tools.
- The three authorities will approach every merger with skepticism and will subject all merging parties' arguments to close scrutiny. Competition agencies (and courts and tribunals) should challenge the presumption promoted by merging firms and their advisors that mergers are generally efficiency-enhancing and should only be restrained where there is certainty that serious detriment will result: "We need to break the bias towards clearing deals" (Sims).
- If in doubt, agencies should "focus on the competition that is lost by the merger, and not on predicting the future" (Sims). More weight should also be given to evidence provided by third parties, who are increasingly concerned about retaliation from the

Contact Information

If you have any questions concerning this alert, please contact:

Davina Garrod
Partner
davina.garrod@akingump.com
London
+44 20.7661.5480

Alaric Green
Counsel
alaric.green@akingump.com
London
+44 20.7012.9737

Scott Pettifor
Counsel
scott.pettifor@akingump.com
London
+44 20.7012.9637

Sebastian Casselbrant-Multala
Associate
Sebastian.Casselbrant-Multala@akingump.com
London
+44 20.7012.9697

Andrzej O'Leary
Associate
andrzej.oleary@akingump.com
London
+44 20.7661.5392

Victoria Yuan
Counsel
victoria.yuan@akingump.com
London
+44 20.7661.5426

merging firms. Type Two errors (accidentally clearing anticompetitive deals) cannot continue.

- "Behavioural remedies very often do not deliver" (Coscelli). The increasing complexity of dynamic markets and the need to undertake forward-looking assessments require competition agencies to strongly favor structural remedies. Structural remedies—whether prohibition or divestment of a standalone business—are much more likely to permanently safeguard the competitive framework.

Motivation Behind the Statement

Competitive markets are essential as economies re-boot. Too many deals in dynamic markets have been waved through. The three authorities express their alignment on merger control being the most effective tool to keep markets competitive and prevent harm to consumers before it has been caused. They note that economic evidence has consistently shown that competition improves the functioning of market economies and helps to ensure low prices, choice, quality and innovation. Companies that face healthy competition are more successful at home and abroad.[1]

The Statement is made in the wake of studies showing high levels of concentration across various markets in the United Kingdom, Australia and Germany and many more merger reviews involving dynamic and fast-paced digital markets. This level of concentration can lead to market power, which companies are incentivized to exploit. As noted by Rod Sims: "Companies have a clear incentive to merge with or acquire their competitors to increase their market power and raise prices. This is why effective merger control is so important, and why some mergers must be blocked by competition authorities."

The Statement notes that once market power is gained from a merger, it is very difficult to restore competition with other competition enforcement tools, making it crucial to use merger control more effectively. Andrea Coscelli named the mergers leading up to the formation of the Big Four accounting firms, and Google's acquisition of DoubleClick, as examples of mergers where stricter enforcement might have been warranted.

The three authorities emphasized that the need for effective merger control is even more acute when economies are weakened, meaning that it would be wrong to relax competition enforcement during the pandemic, as some government officials and companies have advocated. In that context, Andrea Coscelli (CMA) mentioned that in *Amazon/Deliveroo*, while the failing firm defense was made out initially, Deliveroo's fortunes swiftly began to change, and the CMA adapted its assessment, ultimately clearing the transaction on the merits. The Statement notes that while in some circumstances it may be necessary to factor in the short-term impact of the pandemic, assessments must remain evidenced-based and focused on the long-term consequences of a merger.

Substantive Analysis: A Paradigm Shift Towards Skepticism

The Statement acknowledges that the forward-looking nature of merger reviews means that competition agencies will always face some level of uncertainty. However, such uncertainty should not result in potentially anticompetitive mergers being cleared, as even a small transaction can cause a market to tip in an anticompetitive direction

(e.g. the acquisition of a small start-up could be a “killer acquisition,” shielding an incumbent from future competition). In this context, Andreas Mundt noted that of 400+ acquisitions made by GAFAM from 2008-2019, very few were blocked or made subject to any conditions, and that some of these deals likely contributed to tipping in digital markets (creating ecosystems which are almost incontestable for competitors).

The authorities noted that merging firms and their advisors have developed a large body of arguments in favor of 4-3, 3-2 and even 2-1 mergers, claiming that they are pro-competitive (e.g. by generating synergies or other efficiencies). However, retrospective studies show that very often the opposite is true. Competition agencies need to test such advocacy and forensically scrutinize the evidence before deciding whether such claims are supported. Rod Sims commented that a fundamental shift in posture is required: authorities need to break the bias of clearing mergers, and approach merging parties’ claims with more skepticism, remembering that they have a profit incentive to merge.

For the same reason, competition agencies need to be aware of the risk of accepting the merging firms’ views over those of competitors, customers (who are often underrepresented in the review) and consumers (rarely represented) simply because the merging firms are more engaged in the merger review process. Many firms (whether suppliers, competitors or customers) may be reluctant to provide information that may jeopardize their commercial relationship with the merged firm, particularly if the merging firms are powerful customers or suppliers.

The Statement also notes the role of courts and tribunals in challenging the presumption promoted by merging firms and their advisors that mergers are generally efficiency-enhancing. In the conference, the point was made that when authorities face regular challenges in courts, this can have a chilling effect on robust enforcement. In that regard, Andrea Coscelli commented that the U.K. CMA is in a relatively good position with its independent inquiry panel at Phase II and the specialized Competition Appeal Tribunal deciding appeals. The CMA has a strong record of prevailing in judicial challenges. However, he admitted disappointment at the General Court’s annulment of the European Commission’s decision to block the proposed Three/O2 merger (on which the CMA had worked closely with the European Commission), and hoped that the decision would be reversed on appeal.

Strong Preference for Structural Remedies

The Statement makes it clear that the three authorities will favor structural over behavioral remedies, particularly in light of the complexity of dynamic markets and the need to undertake forward-looking assessments.

The authorities noted that complex behavioral remedies are less likely to recreate the pre-merger competitive intensity of the market, can raise significant circumvention risks, are often open to interpretation (especially since merging parties may have an incentive to interpret them in a particular way) and can become outdated as market conditions change. Behavioral remedies also place a burden on competition agencies and businesses by necessitating extensive post-merger monitoring of companies and their conduct. In that regard, Andreas Mundt commented that “*structural remedies are clearly preferable since they permanently safeguard the competitive framework. There*

are good reasons why, under German merger control, it is not possible to impose conditions that subject the behavior of the undertakings involved to continued control."[2]

Importantly, the Statement also emphasizes that the burden of proof required to prohibit a merger is not higher when no divestment would be effective in restoring the lost competition; protecting competition and consumer welfare can sometimes only be achieved by blocking a merger outright.

Brave New World

With this Statement the three authorities have made it clear that they intend to apply merger control more robustly and treat all claims by merging parties and their advisors with greater skepticism.[3] They hope that closer merger control scrutiny, particularly in the digital sector, will help to avoid Type II errors (i.e. approving mergers that later turn out to be anticompetitive). This way future competition issues can be avoided altogether, rather than trying to rely on ex post enforcement. As noted by Andreas Mundt: "Abuse proceedings are difficult, lengthy, involve many economic and legal issues when it comes to Big Tech, and are merely aimed at a company's specific conduct. If we do not rigorously apply merger control and prohibit anti-competitive mergers, the post-merger road that we subsequently have to take is a very difficult one."

It is also clear that there will be an even stronger preference for structural remedies (or outright vetoes). Not only will this bolster the already very strong presumption at Phase I for structural remedies, but also expand it to Phase IIs, where we have seen a material use of behavioral remedies in the United Kingdom.

[1] In the conference, Andreas Mundt commented that even before the COVID-19 pandemic there was a debate on European champions. In his view these should be fostered by making sure there is healthy competition, and not by weakening competition law in Europe. Competition authorities can still help to establish a level playing field by taking account of the fact that certain companies (e.g. Chinese state-owned enterprises (SOEs)) have access to subsidies and resources not available to other firms, as done for example in the BKA's review of the acquisition of Vossloh by the Chinese SOE CRRC.

[2] It was emphasized in the conference that any remedies should also address potential competition, and not just look to remedying static overlaps.

[3] In that regard it was pointed out in the conference that the CMA has already become well known globally for its robust merger control enforcement, and that there is already a 70 percent deal mortality rate in CMA Phase II investigations (possibly deterring investment). In response, Andrea Coscelli commented that the CMA considers about 500 deals per year, 50-60 of which are the subject of a more in-depth investigation (about 10 percent), and only 10 are blocked or abandoned (about two percent of the total). The CMA has also recently updated its Merger Assessment Guidelines, thereby making its approach clear.