

ENFORCER HUB

European Union

Claus Kastberg Nielsen, Norbert Maier and
Maximilian Langer
Copenhagen Economics

JANUARY 2021

GCR INSIGHT

For the first edition of the GCR Enforcer Hub and this year's overview of the European Union's competition scene, we again consulted European law firms about relevant topics, their experience with economists over the past year as well as the expected impact of the ongoing developments on the European competition stage.

We found out that merger filings continue to account for a large share of all matters in which expert economic analysis is called for. Most lawyers had only few collaborations with economists on antitrust and state aid cases. They noted, however, that state aid cases have become more prevalent, in part due to the covid-19 crisis, although they tended not to raise the need for expert economic input. Brussels lawyers were also active in the private enforcement of competition law across the EU, with EU-level cases attracting an ever-increasing number of third-party damages claims in most EU member states.

As was the case last year, competition in digital markets remains a hot topic. The Commission's initiative to ex ante regulate gatekeeper digital platforms triggered high interest. At the same time, lawyers are sceptical regarding the European Commission's adaption of a new investigative tool (the New Competition Tool).

Next, we discussed the upcoming reviews of the European Commission's block exemption regulations on vertical restraints and horizontal cooperation agreements and the Notice on the definition of relevant markets as well as the increased presence of industrial policy concerns. Lawyers generally welcomed an update of the rather old guidelines but raised concerns about the possible interference of industrial policy with competition policy.

Finally, we asked lawyers about their views on two important cases: while many lawyers regard the General Court's judgment in *Hutchison/O2* as a potentially seminal judgment raising the standard for economic evidence in merger cases, there seems to be more uncertainty on whether the European Commission's use of interim measures in *Broadcom* signals a trend towards a more frequent use of an old tool on the European stage.

This article is based on interviews with leading representatives of a number of law practices based in Brussels and London (but working on European Commission cases): Allen & Overy, Bird & Bird, CMS, DaldeWolf, DLA Piper, Hausfeld, Jones Day, Kirkland & Ellis, Norton Rose Fulbright, Reed Smith, Sidley Austin, Van Bael & Bellis, as well as with representatives of DG Competition's Chief Economist Team.

The involvement of economists in competition remains focused on data-related work and merger cases

Most law firms continue to use economists in their large competition cases. Economists typically contribute with data-related work quantifying competitive effects in these cases. While they also advise lawyers on the formulation and assessment of theories of harm, data-related work remains the economists' core area of expertise.

Yet, some lawyers explained that even more qualitative economic input can be very useful for them, especially in complicated cases, often involving digital markets. Here, economic thinking can contribute to an understanding of the market dynamics and competitive constraints. In contrast, other lawyers maintained that legal arguments are still at the core of their cases and most important to their outcomes.

Merger cases with the Commission remain the key area where competition economics is most relevant. Lawyers agreed that antitrust enforcement has been relatively quiet in the past year, at least on the European stage. Nonetheless, Brussels lawyers have been active in antitrust on the national level.

In part due to the covid-19 crisis, many lawyers were also busy with state aid cases in the past couple of months. Lawyers have helped their clients secure aid where necessary. While expert economic analyses could have contributed to these cases, lawyers have mostly abstained from economic support, given the short deadlines. The urgency of the situation has further led to a record amount of state aid being approved, but the long-term repercussions of this are unclear. Several lawyers noted that they would not be surprised if the remarkable amount of state aid from the spring will be followed by a wave of litigation.

Furthermore, several lawyers reported a continuous cooperation with economists in private enforcement cases (eg, follow-on litigation from cartels). Here, lawyers and economists often cooperate from the outset, with economists helping to assess the plausibility of harm and quantify claims and possibly providing expert reports at court. Economists' contributions are often key given the courts' interest in the likelihood and magnitude of competitive effects.

Digital competition remains a hot topic

The debate about competition policy for digital players and markets remains a key topic for the competition community. Arguably, competition policy for digital markets has become even more focal with Margrethe Vestager

combining Europe's competition policy and digital strategy in her dual role as Executive Vice President for a "Europe fit for the Digital Age" and Competition Commissioner.

At the core of the debate is the question whether large digital players need to be regulated ex ante. In light of this question the European Commission's forthcoming Digital Services Act and focus on gatekeepers are especially relevant.

For the lawyers we interviewed, many questions are still open and require clarification in this regard. For example, they wonder what the formal definition of "gatekeepers" will be. Furthermore, they point out that any regulation must be clear on what a gatekeeper is and what kind of market power causes concern to the European Commission.

Lawyers also noted that the gatekeeper discussion may see competition policy integrate into a broader interdisciplinary spectrum (eg, including discussions around data protection and privacy). As such, competition economics has to find its place next to other disciplines in what will likely be large and complex analyses.

To deal with competition in the digital space, the European Commission also considers a "New Competition Tool". The first outline of this tool resembles the UK's Competition and Markets Authority (CMA) Sectoral Investigation Tool, which permits the CMA to initiate a sector inquiry and impose remedies even absent any evidence of an antitrust infringement.

Many lawyers were sceptical about the benefits of such a tool, also based on their UK experience. The tool is seen as potentially disruptive, rendering the European Commission excessively powerful and private companies at its mercy. Furthermore, the lawyers to whom we talked have identified a host of challenges that the adoption of a new tool would face: What would be the standard of intervention? What would be the rights of the subjects of the inquiry? And would the tool be specifically restricted to digital markets, or would non-digital markets also be concerned? It seems that it was motivated by concerns regarding ecosystems in digital markets, but the same concern is also at the focus of the forthcoming ex ante regulation of digital gatekeepers, raising further questions on the scope of the new tool.

In sum, many lawyers viewed the introduction of such a tool as a risk for legal certainty and business certainty. They also expect resistance from the private sector to the adoption of such a tool, with companies fearing the potentially large impact on their already strained resources in cases of investigations.

If implemented, however, such a tool would likely imply a larger role for economics. Larger investigations would require a greater need for economists to support with the collection and assessment of evidence.

Guideline revisions may increase role of economics in competition cases

The European Commission is currently reviewing the Vertical Block Exemption Regulation. Again, lawyers welcomed the initiative to improve the framework for competition law enforcement. At the same time, there is little certainty on the changes that the European Commission envisions. The findings of the latest academic literature (eg, concerning most-favoured-nation clauses and retail price maintenance) may be reflected in the revised regulation, but the European Commission may also review topics such as territorial restrictions.

Vertical agreements have been an area with a limited role for economics so far, but new guidelines could put a greater focus on identifying and quantifying the effects of such agreements. For example, economists could be asked to contribute more in identifying the resulting pro-competitive effects in the future.

The European Commission is also revising the Horizontal Block Exemption Regulation. Lawyers mostly agreed that sustainability concerns, especially environmental concerns, should and will play a role in the revised regulation. Sustainability is not a new topic; lawyers have raised the need for environmental impacts to play a role in competition issues in previous years. Going forward, it is more likely that sustainability will find recognition in the future. In addition, some lawyers also raised the possibility that the covid-19 crisis may turn the focus to secure supply chains within the Single Market.

Furthermore, the European Commission is also reviewing its Notice on the definition of relevant market, which dates back to 1997. Lawyers generally welcomed a possible update given the Notice's age. They noted, for example, that the Notice does not reflect some of the features specific to digital markets such as two-sidedness, zero prices, competition between online and offline agents and many more. If an updated Notice better incorporates the specificities of digital markets, the implementation in practical cases may also imply a greater involvement of economists.

Despite the hope for an updated Notice, some lawyers also expressed scepticism whether an updated Notice will have an impact on the European Commission's enforcement policy, especially in mergers where

precedent cases play a large role. Here the lawyers remarked that the European Commission is already looking beyond the borders of the formal market definition for competitive pressure.

Some lawyers also noted that the geographic dimension of the market may play a role in the assessment of the Notice: stakeholders from the industry have long argued for including global competition in the European assessments.

Finally, in light of the European Commission's dense policy agenda for 2020, we also discussed with lawyers the role and potential impact of industrial policy in competition economics. Several lawyers felt that a general belief in the need for a "level playing field" has become a trend in society, with the political pressure mounting on the European Commission to take industrial policy into consideration in its cases. Whether this is beneficial – a holistic view with competition policy at the centre – or detrimental – political intervention in competition law enforcement – remains to be seen. The devil may be in the detail too, as one may conclude after having read the Commission's white paper on foreign subsidies. At this stage, it is difficult to predict a definite trend. Details may also decide the evolution of the role of economics in these issues. Economists may find new tasks if industrial policy considerations enter competition economics (eg, in the assessment of the economic impact of foreign subsidies).

Use for economics may increase following important cases

In May 2020, the EU's General Court upheld the appeal against the European Commission's prohibition of the merger between Three, owned by CK Hutchison, and O2, owned by Telefónica UK, which would have seen two of the UK's four mobile network operators merge. Several lawyers viewed this as a potentially seminal judgment, which may universally increase the standard for submissions in competition cases, assuming that the judgment is not overturned by the Court of Justice.

Generally, most lawyers agreed that the General Court sent a sharp message that legal and economic evidence in a merger case must be clear and robust. Any sophisticated analysis has to be thorough and reliable. In a way, this can be seen as helpful guidance, but at the same time it will also require greater resources from the European Commission and from merging parties. In that regard, several lawyers stressed that the burden on companies is already high and that a higher standard of evidence will not be welcomed by the industry.

If the General Court's judgment will indeed turn out to become as influential as it may seem today, this would likely mean a greater role for economics. The General Court's emphasis on clear and robust evidence raises the bar for economists too but could pave the way for more extended economic analyses in merger cases.

Yet, some lawyers also warned that an appeal is not unlikely and that some of the General Court's strong language may still be reversed (following the interviews it has been confirmed that the European Commission will appeal the General Court's judgment).

Next to the Hutchison/O2 judgment, the European Commission's use of interim measures in its investigation of Broadcom was another case with potentially far-reaching consequences. While interim measures are common in national cases, the European Commission has only rarely used them in the past.

Several lawyers voiced their understanding for the European Commission's use of interim measures in light of often long durations of investigations, while business cycles turn much faster, especially in markets where technology is central and where companies develop and enhance new products constantly. Investigation durations of several years diminish the value of the European Commission's interventions. Given a dynamic environment, the use of interim measures may not be an isolated action but become a more frequently used tool for the European Commission.

However, some lawyers also noted that the use of interim measures is inherently risky and warned that a potential appeal may discourage the European Commission. Applying interim measures mounts pressure on the European Commission, and any mistake will bring an undesired spotlight. With this angle, some lawyers even wondered whether the use of interim measures is not the wrong response to the problem of long investigation periods: should the goal rather be to shorten investigation periods themselves? At the same time, interim measures can add value in the way they were intended to: by preventing irreparable damage to competition.

In conclusion, competition policy is facing developments on several fronts, spanning from crucial judgments in merger cases to the European Commission's adaption to deal with increased digitalisation through new approaches. It is likely that these developments will lead to an expanded role for economists, providing novel analyses in new cases.



**Claus Kastberg
Nielsen**

Copenhagen Economics

Dr Claus Kastberg Nielsen is the founder of Copenhagen Economics and managing director for our Brussels office. He helps private and public sector clients reaching favourable outcomes in cases of antitrust, mergers, state aid, damage claims and cases concerning regulatory design and management.

He has international experience from all the Nordic countries, Germany, United Kingdom and the European Union and his industry experience spans energy, transport, mechanical industries, food and beverage industries, financial services, construction and retail and professional services. Claus has acted as an expert before all Nordic, the German and European competition authorities and has wide experience as an expert witness in European courts.

Claus's breadth of experience and expertise, built up during more than 15 years, has helped clients in a wide variety of situations. The Global Competition Review's 'Who's Who Legal 2020' features Claus as one of the world's leading competition economists.



Norbert Maier

Copenhagen Economics

Dr Norbert Maier has more than twelve years of experience within the field of competition economics across various sectors and industries. He excels in conducting economic analysis on mergers, antitrust and state aid cases within the public and private sector.

He particularly excels at formulating theories of harm and developing supporting economic analysis consistent with the European Commission competition policy decision-making. Over the years, he has developed a sound understanding of the competition aspects of big data and machine learning.

Norbert has great experience in mergers and antitrust cases, involving digital markets, energy markets as well as other regulated and non-regulated industries.

Before joining Copenhagen Economics, Norbert spent six years as member of the Chief Economist Team of DG Competition at the European Commission. Prior to that, he worked as a senior competition economics consultant for six years at a London-based economic consultancy.

Most recently, Norbert wrote a paper on the closeness of substitution between big data datasets in merger control.



Maximilian Langer

Copenhagen Economics

Maximilian Langer is an economist based in Copenhagen Economics' Brussels office. He helps clients understand the economics behind competition issues by applying industrial organisation and econometric tools. He provides economic expertise and precise recommendations in cases involving the quantification of damages, horizontal mergers and vertical restraints.

Maximilian uses his expertise in economics to critically assess the robustness of damage estimates by others, covering a wide range of industries including automotive, beverages and electricity markets. Maximilian has broad experience in regulatory design analyses along with competition and dispute cases.

Prior to joining Copenhagen Economics, Maximilian worked for economics consultancies in Brussels and Berlin, where he performed damage estimations and regulation reviews. His work also included the creation of regulatory models in the energy sector.

**Copenhagen
Economics**

CE

Copenhagen Economics is one of the leading economic consultancies in Europe. Founded in 2000, we currently employ more than 90 people operating from our offices in Copenhagen, Stockholm, Helsinki and Brussels. Based on established research methods and in-depth sector knowledge, we help our clients make better choices in their political and commercial reality. Our senior team provides pragmatic solutions founded in economics to law firms, private companies, regulators, and policy makers all over the world. We are particularly dedicated to 12 service areas, including competition, dispute support, digital economy, intellectual property valuation and transfer pricing and postal and delivery. *Global Competition Review (GCR)* lists Copenhagen Economics among the Top-20 economic consultancies in the world and has done so since 2006.

Langebrogade Place Eugène Flagey 18
BE-1050 Brussels
Belgium

Tel: +32 4 9332 3334

www.copenhageneconomics.com

Claus Kastberg Nielsen
ck@copenhageneconomics.com

Norbert Maier
nom@copenhageneconomics.com

Maximilian Langer
mlla@copenhageneconomics.com