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Merger control: the road ahead

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EU commissioner for competition Margrethe Vestager delivered a speech entitled 'Merger control: the road ahead' in Brussels on 18 June 2019. As she will reach the end of her five-year mandate on 31 October 2019, it is a good time to evaluate how the competition policy in merger control has been applied in recent years and look ahead to what the future will bring.

Ms Vestager stressed the importance of European competition policymaking being prepared for the challenges and obstacles ahead. The rules applied by the European Commission (EC) should continue to promote innovation and protect consumers, while ensuring the development of a successful, diverse ecosystem in the European Union (EU).

Lessons learned from the report on 'Competition policy in the digital era'

The role of EU competition law policy and enforcement is particularly relevant in the context of market digitalisation and the digital economy. In order to ascertain how competition policy should evolve in this regard, Ms Vestager commissioned a special report – 'Competition policy in the digital era' – which was published on 4 April 2019.

The report underlines how digitalised markets have different dynamics compared to other markets normally studied and scrutinised by the EC. The focus of competition enforcement and policy should not solely focus on the price paid by consumers for those goods and services, but should also take into account digitalised markets specificities.

In general, the digital economy presents certain characteristics, including a significant competitive advantage for incumbents. Data acquired as technology has made it possible for companies to collect, store and use data in large quantities, creating new forms of power which make it more difficult for market entrants to compete. The report underlines that these factors raise the reasonable concern under EU competition policy that dominant digital firms are incentivised to engage in anticompetitive conduct and require "vigorous competition policy enforcement".

These key characteristics of the digital economy also prompt a rethink of certain accepted concepts, doctrines and methodologies of EU competition law. According to the report, the timeframe and standard of proof of consumer welfare should be re-evaluated due to error costs and the difficulty of computing the impact from an economic perspective. The boundaries of market definitions are not as clear as they have been in more traditional markets, therefore there should be more emphasis on theories of harm and identifying anticompetitive strategies. Furthermore, measuring market power should be case-specific and should take into account behavioral economics. Whether these challenges should be addressed by competition law, by a regulatory regime or by non-market power-related rules is unclear. However, competition law spirit and design is to react to changing markets. As a result, competition and regulation are not substitutes but can reinforce each other.

In light of the foregoing, what should be the approach toward mergers in the digitalised market?

In her speech, Ms Vestager emphasised how some are arguing that markets are getting more concentrated, with fewer companies making the profits, and therefore the rules on mergers should be tougher, while others are focusing on whether the current merger rules may underestimate how competitive some markets are. In practice, mergers in the digital sector in recent years involved companies that were not clear and direct competitors.

The issue to be tackled by the EC is how these different markets interact and require a different, broader range of solutions, including behavioural remedies (for example Qualcomm and NXP, where the competition concerns were solved by a commitment from Qualcomm not to undermine the interoperability of chips). In addition, if this is required, the EC can also review new types of remedies to address certain concerns, including data sharing remedies. As Ms Vestager noted, mergers can be positive when they make competition more efficient and better serve consumers.

The report includes a chapter on mergers, focusing on whether the EU Merger Regulation needs to be adjusted to address the concerns illustrated above. First of all, the report underlines how small start-ups' value and competitive potential may not be reflected in their turnover. This means that a merger might not be caught under the EU merger thresholds. In order to address this issue, Germany and Austria have added additional thresholds linked to the value of the merger.

The report, however, concludes that it is too early to change the EU jurisdictional thresholds and that it will be useful to follow the implementation of the new thresholds in those Member States. Then, the report argues that changes should be made to the EU substantive assessment of "significant impediment to effective competition", especially in cases concerning dominant platforms acquiring targets with a low turnover and a large or fast-growing user base. This potentially reduces rivals' access to inputs and strengthens the dominance of the platform. In order to avoid these systemic distortions, the report suggests adding "horizontal" elements into theories of harm analysis by asking questions such as: does the acquirer benefit from barriers to entry linked to network effects or the use of data? Is the target a potential or actual competitive constraint within the technological/users' space or ecosystem?

The EC will continue to review the issue raised by so-called 'killer acquisitions', where tech giants buy start-ups, and investigate whether adding thresholds would be the right way forward.

Principles recently followed by merger control

In practice, Ms Vestager highlighted the use of an effects-based approach to potential mergers, which also takes into account 'efficiencies' resulting from a merged entity using its dominant position in the market and economies of scale to reduce prices, increase innovation and increase consumer welfare.

She added that the EC does not prejudge a proposed merger. Indeed, only a detailed analysis will provide a better understanding of its potential effects. As such, she insisted that mergers can have a positive effect on the economy and be beneficial to consumers, notably by helping competition work more efficiently and serve customers better, by keeping prices down and by fostering investment in innovation. In that regard, the EC carefully considers all evidence that a proposed merger would make the companies more efficient, provided that the companies demonstrate that such efficiencies will be passed on to customers.

Using that approach, the EC has approved over 3000 mergers in the past 10 years, while only prohibiting 10. As a general rule, the purpose of the EU Merger Regulation is to block mergers that would "significantly impede effective competition,

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in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position".

In that regard, two recent transactions, which were blocked by the EC, illustrate its approach to merger control.

The *Tata Steel/ThyssenKrupp* case involved the creation of a joint venture, which would have combined ThyssenKrupp's and Tata Steel's flat carbon steel and electrical steel activities in the European Economic Area (EEA). During the investigation, the EC received feedback from a large number of customers active in the packaging and automotive industries – industries which depend on competitive steel prices to offer their products to customers at competitive prices – many of which were worried that the transaction would result in higher prices. In the end, despite the remedies proposed by the companies involved, the EC considered that these customers would face a reduced choice in suppliers, as well as higher prices, and that competitive pressure from remaining players and from imports from third countries would not have been sufficient to ensure effective competition, and therefore decided to block the transaction.

In the *Siemens/Alstom* case, Siemens' proposed acquisition of Alstom would have combined Siemens' and Alstom's transport equipment and service activities in a new company fully controlled by Siemens, bringing together the two largest suppliers of various types of railway and metro signalling systems, as well as of rolling stock in Europe. During its in-depth investigation, the EC received several complaints from customers, competitors, industry associations and trade unions, and ultimately considered that the merger would have created an undisputed market leader in some signalling markets and a dominant player in the high-speed train market, significantly reducing competition in these markets. It was highlighted that this could significantly harm competition and reduce innovation, leading to the foreclosure of smaller competitors, higher prices and less choice for customers.

The EC argued that, in all of the markets where Siemens and Alstom are active, the competitive pressure from remaining competitors would not have been sufficient to ensure effective competition, even at a worldwide level. Notably, it was pointed out that Chinese suppliers are not currently active in the EEA and it would take a long time for them to become credible suppliers to European infrastructure managers. In the high-speed train market, the EC considered it highly unlikely that new entrants from China would represent a competitive constraint on the merging parties in the foreseeable future.

This recent prohibition has raised a recent debate on the role of industrial policy in EU Merger Regulation following the proposal made by France and Germany to review these rules in order to allow for the creation of new champions.

The question of 'European champions'

Ms Vestager defended the need for the EU to see 'champions' succeeding in global markets. However, she insisted that such champions cannot be the result of mergers that harm competition and cannot be built by putting aside EU competition rules. European companies can and should compete on their merits, without facing excessive prices for their essential inputs because of anticompetitive mergers, cartels or unfair trading terms imposed by monopolies, and without being undercut by subsidised rivals.

In response to the argument that, since global competition is not taking place on a level playing field, the EU should respond by limiting competition in Europe, Ms Vestager replied that the EU wants fair competition globally and that a level playing field requires more than competition enforcement in the EU. For this reason, the EU is working to strengthen World Trade Organization (WTO) rules on subsidies and has started a dialogue with China about subsidies and fair competition rules. Other tools to secure this level playing field include the new EU regulatory framework for screening foreign direct investments, and trade defence instruments to maintain fair competition worldwide. ■

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