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COMPETITION POLICY IN THE DIGITAL ERA: THE EUROPEAN COMMISSION PUBLISHES ITS REPORT

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On 4 April 2019, the European Commission (hereinafter referred to as "the Commission") published a report prepared by a panel of three special advisers on “Competition policy for the digital era” (hereinafter referred to as "the Report"). The aim of this Report is to analyse possible adaptations of Competition Law in the digital era in order to ensure innovation in favour of consumers.

On the day of the Report, Margrethe Vestager, European Commissioner for Competition, said: *"Competition can therefore be fragile in this digital era. Opportunities to challenge powerful companies may be rare. Competition authorities must be particularly vigilant to ensure that these companies do not abuse their power to close opportunities to innovators at the expense of consumers". **[1]***

The Report is structured around five themes:

- the main ways in which markets function in the digital era (I);

- the objectives of EU Competition Law in the digital era and the methodologies to be used (II);

- the application of Competition Law rules to platforms (III);

- the application of Competition Law rules to data (IV); and

- the question of an update of merger control in Europe (V).

I. The main ways in which markets function in the digital era

The panel focused on analysing the main characteristics of the digital economy:

1. extreme returns to scale: the panel highlights the cost of production of digital services as proportionally lower compared to the number of customers ;
2. network externalities: the panel members noted that offering a better service is not enough for new market entrants, it is necessary to encourage users to migrate to their new platform ;
3. the role of data: technology has enabled companies to collect, store and use a very large amount of data. According to the panel, data is not only an essential ingredient in artificial intelligence but also an essential contribution to many online services, manufacturing processes and logistics.

The consequence of these characteristics makes it difficult to dislodge so-called "incumbent" operators, since the savings provided by these characteristics enable the operators to support their strong market position.

II. The objectives of EU Competition Law in the digital era and the methodologies to be used

To meet the digital challenge, the Report does not advocate a complete reform of Competition Law. Articles 101 and 102 of TFEU are sufficient to address anticompetitive practices and are also flexible enough to adapt to the challenges of the digital economy.

However, the Report makes several recommendations for rethinking the application of these principles in the digital economy:

- consumer welfare: in the age of platforms, harm to users, professional or private, cannot be accurately measured. For this reason, the strategies of dominant platforms to reduce the competitive pressure they face should be prohibited in the absence of clearly established consumer benefits ;

- rethinking market definition: the Report proposes to reduce the emphasis placed by "traditional" competition policy on defining the relevant market. The definition of the relevant market usually allows (i) to identify the scope within which competition between companies takes place and (ii) to establish the framework within which the Commission applies competition policy. This criterion is no longer fully adapted to the digital economy. The Report therefore suggests that more attention should be paid on theories of harm and anticompetitive strategies rather than to market definition.

III. The application of Competition Law rules to platforms

The Report examines the strategies used by platforms to limit attempts to enter the market where they are active or strategies to expand to neighboring markets and how competition authorities should react. In other words, how platforms act as regulators and how this is likely to hinder competition. The Report stresses that it is particularly important to examine the rules relating to platforms when it comes to dominant platforms that could be encouraged to limit competition between platform sellers/users and that could take advantage of their power to promote their own services.

The Report considers that dominant platforms should be subject to specific obligations to ensure that their rules are pro-competitive and to allow providers of complementary services to operate by sharing data with them.

Spotify's current complaint against Apple before the Commission is interesting in this respect. Spotify claims that Apple has put in place the rules of the App Store (the only application marketplace for iPhone users) to promote Apple Music at the expense of Spotify, because Apple Music does not need to comply with certain App Store rules as Spotify does. Spotify claims that these rules make Spotify less attractive to consumers.

In addition, in the Report, particular attention is paid to the "most favoured nation" clauses (hereinafter referred to as "MFN clauses"). These clauses guarantee the best price or conditions among those available on the market, which in most cases leads to a situation where the service provider on a platform cannot (i) offer lower prices on its own site or (ii) offer lower prices to competitors of the platform on which it already sells its services.[2]

Due to the very high externalities of the network, the incumbent's advantage over its competitors is significant and the risk of distortion of competition is acknowledged. The Report proposes to prohibit so-called "too broad" MFN clauses - clauses that limit the resale of goods or services at a lower price (i) on other competing platforms **and** (ii) directly on the seller's site. “More restricted” MFN clauses (which prohibit the reseller from selling goods or services at a lower price only on its own site) would only be allowed if competition between the different platforms is sufficiently strong (if there is no dominant company in the market in question).

Interoperability between platforms is also analysed in the Report.

IV. The application of Competition Law rules to data

Access to a large volume of data is now essential for young innovative companies to compete with digital giants. However, most of these data volumes are controlled by the dominant companies on the market. If dominant companies restrict access to data, this can be a barrier to entry for potential new competitors. This issue has been the subject of particular attention by national competition authorities. In 2016, the French Competition Authority and the Bundeskartellamt (German Competition Authority) published a study entitled "Competition Law and Data" in which they assessed restrictions on access to data from the perspective of abuse of a dominant position.

However, the Report considers that Competition Law should address data access issues outside the scope of Article 102 TFEU[3]. In the authors' view, Article 102 TFEU is not the most appropriate tool to deal with these anti-competitive practices, especially when competing companies need the data for uses that are not related to the market served by the dominant company (e.g. the creation of an artificial intelligence algorithm). The Report suggests that in these specific cases, courts/authorities should specify the conditions of access, or even specific sectoral regulation.

The Report also suggests that in these specific cases, the courts as well as national competition authorities should determine whether access to data is really necessary (essential facility theory) and specify, as the case may be, the conditions for access to data. It also advocates the establishment of specific sectoral regulation and launches the idea of a future block exemption regulation in this field.

Finally, the Report points out that Competition Law raises legitimate questions for competitors seeking to share their data or enter a data pool, and that regulation should provide more guidance on when data sharing and data pools can be considered pro-competitive.

V. The question of an update of merger control in Europe

Today, merger control is based on the turnover criterion, which may have the effect of excluding certain transactions from the control of competition authorities when they do not meet the thresholds set by national laws or by Regulation 139/2004.

The recent acquisition of Shazam by Apple is a perfect example: the transaction was only examined by the Commission through requests from several European countries requesting that the Commission examine whether the acquisition of large volumes of data (whereas the transaction was only controllable in Austria), including potentially commercially sensitive data, was not likely to restrict competition in the European Economic Area.[4]

The Report warns against updating existing EU merger control rules to include criteria based on the value of the transaction (as this is the case in Germany and Austria). It advises the Commission to first assess the functioning of these schemes before amending its own criteria. It should be noted that the French Competition Authority has also opposed the introduction of a threshold based on the value of the transaction[5] because it would introduce a strong administrative constraint without necessarily allowing all potentially problematic transactions that are not currently controlled to be processed.

The Report also examines "killer acquisitions", i.e. those where innovative companies are bought by a major market player, which has the effect of "killing" the competitive potential of this young company.

It proposes an evaluation grid for these operations:

(i) does the acquirer benefit from entry barriers related to network effects or data use? ;

(ii) is the target a potential or actual competitor? ;

(iii) does its elimination increase market power, in particular through increased barriers to entry? ;

(iv) if so, is the merger justified by efficiency gains?.

In practice, it may be difficult to demonstrate the absence of negative effects of an acquisition, given the rapid evolution of digital markets and the inability to predict the likely impact of the target company on the market. For example, Google has acquired in the last ten years more than 200 companies: how to know which ones could have prospered and which ones would have failed?

At this stage, the Commission has not commented on the implementation of the Report's recommendations. When she was handed over, Commissioner Vestager said that it will first have to be discussed and debated. This will probably be on the agenda of the next Commission.

[1] Margrete Vestager's speech, « *Defending competition in a digitised world* » European Consumer and Competition Day, Bucharest, 4 April 2019

[2] See in this respect the many booking.com cases of recent years

[3] Article 102 TFUE *"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."*

[4] European Commission - Press release Mergers: "*Commission clears Apple's acquisition of Shazam*" Brussels 6 September 2018

[5] French Competition Authority - Press releases 2018: "*Modernization and simplification of merger control"* 07 June 2018