

Competition Policy for the Digital Era

Advisers to the European Commission Recommend Vigorous Enforcement and Adjustments to Established Concepts

Skadden

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On April 4, 2019, the European Commission published a report¹ prepared by three special advisers (the Advisers) appointed by EU Competition Commissioner Margrethe Vestager to explore how EU competition policy should evolve in the digital age. In the report, the three authors, all academics, share their views on the application of competition rules to platforms, data, and digital and tech “killer” acquisitions. While confirming that the fundamental goals of competition law remain the same in relation to the digital economy, the Advisers advocate “vigorous” enforcement and certain adjustments to the way competition law is currently applied, including:

- Tougher treatment of a dominant platform’s alleged “self-preferencing” of its own products and services;
- Potential data-sharing or interoperability remedies for dominant technology companies if required to ensure effective competition by breaking down network effects and data-related entry barriers;
- No change to the EU merger control thresholds to capture so-called “killer” acquisitions (where a supposedly dominant incumbent buys out a nascent technology that might have emerged as a competitive threat), but suggesting that if these types of deals are identified, it should be for the companies to prove no anti-competitive effects or offsetting efficiencies.

Background

On March 28, 2018, Commissioner Vestager appointed the academics — Heike Schweitzer, professor of law at the Humboldt University of Berlin; Jacques Crémer, professor of economics at the Toulouse School of Economics; and Yves-Alexandre de Montjoye, assistant professor of data science at Imperial College London — as special advisers for a period of one year (mandate ended on March 31, 2019) to help explore how competition policy should evolve to continue to promote innovation in the digital age. In their much-awaited final report, the three experts describe what they see as the main characteristics and challenges of the digital economy and they make general suggestions on the application of EU competition rules to platforms, data, and digital and tech “killer” acquisitions.

The Advisers identify strong economies of scope across the digital economy, which favors the development of ecosystems, giving incumbents a strong competitive advantage that makes them “very difficult to dislodge.” The Advisers also identify a “reasonable concern that dominant digital companies have strong incentives to engage in anti-competitive behaviour” that require “vigorous” competition enforcement and adjustments to the way competition law is currently applied. Current under-enforcement in the digital sphere is a concern and thus strategies by dominant companies to reduce competition “should be forbidden” unless the company can clearly demonstrate benefits for consumers.

While the Advisers consider that the existing basic framework of EU competition law remains relevant and sufficiently flexible to protect competition in the digital age, they advocate a departure from certain established concepts, doctrines and methodologies — such as consumer welfare, market definition and market power — and more empha-

¹ “Competition Policy for the Digital Era,” a report by Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, 2019 — <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

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sis on theories of harm and identification of anti-competitive strategies.

Platforms

In markets where network effects and returns to scale are strong, the Advisers consider “there might be room in the market for only a limited number of platforms.” In such context it is essential to both protect competition “for” the market and protect competition “in” the market (*i.e.*, on the platform itself). The Advisers argue that large platforms have a quasi-regulatory role as they determine the rules according to which their users interact. The fact that they determine rules is not an issue *per se*, but when acting as regulators, they have a responsibility to use their power in a pro-competitive manner and should “take this role seriously.”

The Advisers further advocate that actions by a dominant platform to impede market entry without competing on the merits (*e.g.*, through the use of “most favored nation” clauses, best price clauses, restrictions on multi-homing and switching) “should be suspect under competition law” and that the dominant platform should bear the burden of demonstrating the efficiency of such measures as defense.

The Advisers note that self-preferencing by a dominant platform (*i.e.*, giving preferential treatment to the platform’s own products or services when they are in competition with products and services of other entities using the platform) is not abusive *per se* but should be subject to an “effects test.” Self-preferencing by a vertically integrated dominant digital platform can be abusive when it is not justified by a pro-competitive rationale. The Advisers propose that, to the extent that the platform performs a regulatory function, it should bear the burden of demonstrating that self-preferencing has no long-term exclusionary effects on product markets. Where self-preferencing has significantly benefited a platform’s subsidiary by improving its market position vis-à-vis competitors, remedies might need to include a restorative element.

Data

The Advisers note that timely access to relevant data is increasingly becoming a parameter for competitiveness. However, a broad dissemination of data must be balanced against the need to ensure sufficient investment incentives for firms to collect and process data, as well as the need to protect privacy and business secrets. Commenting on the report, Commissioner Vestager stated “as data becomes the key to success, the huge quantities of information that some big businesses have can give them an edge that smaller rivals can’t match. And the importance of network effects can mean that it’s hard for smaller firms to compete, even

with a better product, if they don’t have a critical mass of users,”² but also that “collecting data also takes effort and time. So if we insist that companies share it with others, without proper compensation, we could discourage others from putting in those efforts in the future.”³

Data sharing and data pooling arrangements are not fully developed. While a legal framework is yet to be clearly defined, the Advisers consider that a block exemption regulation on data sharing and data pooling may be appropriate. In a number of cases, data access will not be indispensable to competition and if so, public authorities should refrain from intervention. However, there are cases where an obligation to ensure data access — and possibly data interoperability — “may need to be imposed.” This would be the case for data needed to serve complementary markets or aftermarkets, *i.e.*, markets that are part of the broader ecosystem served by the data controller. The Advisers consider that data access/interoperability can be a remedy against anti-competitive leveraging of market into markets for complementary services and add that “[w]here vertical and conglomerate integration and the rise of powerful ecosystems may raise concerns, requiring dominant players to ensure data interoperability may be an attractive and efficient alternative to calling for the break-up of firms — a way that allows us to continue to benefit from the efficiencies of integration.”

Digital and Tech ‘Killer Acquisitions’

The Advisers examine whether the current EU merger control rules need to be revised to address concerns relating to early elimination of potential rivals by dominant firms, through acquisitions of small startups with a quickly growing user base and significant competitive potential, commonly called “killer acquisitions.” Many of these acquisitions may escape the European Commission’s jurisdiction because they take place when the targets do not yet generate sufficient revenue to meet the conditions of the EU Merger Regulation. The Advisers consider it too early to contemplate any changes to the rules. They consider it more appropriate, for the time being, to monitor the performance of new thresholds linked to transaction value that were recently introduced in certain member states, such as Germany and Austria. Amendments to the EU rules may become justified in the future.

The Advisers consider however that there is a need to revisit the substantive theories of harm to properly assess acquisitions in the digital sector. The report states that competition law should

² “Defending Competition in a Digitised World,” a speech by Margrethe Vestager at the European Consumer and Competition Day, Bucharest, April 4, 2019 — https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/defending-competition-digitised-world_en.

³ *Ibidem*.

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be particularly concerned about protecting the ability of competitors to enter markets. This would imply a heightened degree of control of acquisitions of small startups by dominant platforms and/or ecosystems, to analyze whether they are used as a possible strategy against partial user desertion from the ecosystem. The report adds that where an acquisition is plausibly part of such a strategy, the notifying parties should bear the burden of showing that the adverse effects on competition are offset by merger-specific efficiencies. The report specifies that this theory of harm does not create a presumption against the legality of such mergers but that it takes due account of new business strategies and the competitive risks they raise.

Similar UK initiative

On March 13, 2019, the Digital Competition Expert Panel appointed by the U.K. chancellor and chaired by professor Jason Furman, former chief economist to President Obama, issued a similar report making strategic recommendations for changes to the U.K.'s competition framework to face the opportunities and challenges of the digital economy.⁴ The report recommends updating the rules governing merger and antitrust enforcement. In particular, the report advocates the need for the U.K. Competition and Markets Authority (CMA) to take more frequent and firmer action to examine digital and tech acquisitions and calls for a review of the CMA merger assessment guidelines based on the latest economic understanding and an update of the legislation clarifying the standards for blocking or conditioning a merger.

The report also stresses the need to prioritize and fast-track enforcement in digital markets, placing less reliance on large fines and enabling action that targets and remedies issues more directly. The report also proposes a set of pro-competition measures to open up digital markets, such as the establishment of a pro-competition digital markets unit tasked with securing competition, innovation and beneficial outcomes for consumers and businesses.

Conclusion

The Advisers' report makes general suggestions on the application of the EU competition rules to the digital sphere. While it does not suggest a complete overhaul of existing competition policy, it proposes adjustments to established concepts and assessment tools. In some areas, the report suggests that regulatory changes

⁴ "Unlocking Digital Competition: Report of the Digital Competition Expert Panel," March 2019 — https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

may be needed in the longer run. However, the Advisers do not envision a new type of "public utility regulation" to emerge for the digital economy: "[T]he risks associated with such a regime — rigidity, lack of flexibility, and risk of capture — are too high." At the same time, the report advocates that competition agencies can contribute to the better functioning of the digital economy by providing more guidance, thereby creating more legal certainty for companies. For instance, guidance may be needed on the definition of dominance in the digital environment, the duties of dominant platforms as regulators, data sharing and data pooling, data access and interoperability requirements.

Rather than offering a final word on how the EU rules on competition should adapt to the fast-moving and fast-growing digital economy, the report provides a significant contribution to the ongoing debate between competition authorities, academics and other stakeholders on both sides of the Atlantic as to whether existing competition rules are fit to address the many challenges and opportunities of the digital economy. The report offers a clear contrast to recent proposals promoted by U.S. Sen. Elizabeth Warren to "break up" big tech companies and impose "big, structural changes" to the sector. Commissioner Vestager has recently stated that in the EU, structural changes in the tech industry are met with great skepticism and breaking up big tech companies would be "the last resort," as EU enforcers are focused on using existing antitrust rules to address issues in the market.⁵ The report suggests that access to data and data interoperability may be an efficient alternative to breaking up big tech companies.

Commenting on the publication of the report, Commissioner Vestager said that the European Commission will "need to take some time to think about those ideas and to discuss and debate before conclusions are reached."⁶ It might be some time before we see drastic proposals for change. It also remains to be seen how the new commission will implement the proposals offered by the report after the elections this fall.

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Skadden senior professional support lawyer Caroline Janssens contributed to this article.

⁵ "Warren Says She'll Break Up Amazon, Facebook, Google if Elected President in 2020," MLex, March 8, 2019; "Warren Proposal to Break Up Big Tech Is 'Very Far-Reaching,'" Vestager Says," MLex, March 11, 2019.

⁶ "Defending Competition in a Digitised World," a speech by Margrethe Vestager, *op. cit.*

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