Editorial

‘Wouldn’t It Be Nice?’

... asked the Beach Boys so charmingly in the 1960s, around the time when the first surfers were seen in Europe, on the French Basque coast, in Biarritz. This summer, the very same city hosted the G7 meetings, and one of the hot topics addressed within this high level forum very much reflects this beautiful song. Yes, it would indeed be nice to have globally consistent competition enforcement keeping up with the rapid evolution of the digital economy.

Under the French presidency’s initiative, the G7 countries’ competition authorities, together with the European Commission, kicked off a joint reflection about the future of competition law and policy for the digital markets, driven by big data and platform-based business models. In July 2019, they shared with the G7 Finance ministers their ‘Common Understanding’ on key principles to address the upcoming challenges triggered by the transformation of our economies in the digital age.

One of the main drivers of this joint initiative is the increasing globalisation of markets with more and more global players, global services and global users. Individual national authorities often lack the powers to address competition law problems effectively when the facts at stake are not confined to national territories. The Common Understanding therefore outlines the G7 competition authorities’ joint views on whether competition rules are well suited for the digital economy, and how they should be adapted and more harmonised going forward. This debate started a while ago and has been in the spotlight of CoRe from the beginning, both in our publications and in our regular conferences. So obviously we had to take a closer look at this G7 initiative.

There is little doubt that this is an interesting and important process, but it appears that the high level conclusions in the Common Understanding do not present many genuine novelties. To start with, the authorities are in agreement that they all play an important role in the digital economy. Rather unsurprisingly, competitive markets are seen as the key to well-functioning economies, and the benefits of the digital economy can best be achieved if this remains so. The authorities also agree that competition law enforcement will continue to play an important role in safeguarding trust in digital markets, ensuring economic dynamism, incentives to innovate, and consumer benefits. This is not really new either, but it is always good to share common ground in order to have a meaningful discussion about what works well and what needs to be improved.

In this regard, we find ourselves in the middle of a passionate debate about the need, or not, for more upfront regulation to address certain challenges posed by digital mar-

kets. Those advocating stricter rules, typically smaller rivals of big tech companies, as well as consumer groups, take the view that competition rules may not always be suited to effectively prevent and address distortions of competition by the leading global players. In this respect, the G7 initiative indeed identifies certain substantial challenges, eg due to multi-sided platform models, as well as procedural hurdles for effective enforcement, eg data gathering and duration of proceedings. However, the main conclusion is that existing competition laws are flexible enough and generally fit for purpose, also in the digital era.

The recent enforcement practice indeed shows that competition authorities have strict tools and considerable flexibility for applying them in order to tackle anticompetitive conduct in the digital economy. However, the system also has its shortcomings, and proposals have already been made to sharpen the tools. For instance, the French-German Manifesto, published earlier this year, advocated for stricter rules on abusive conduct by dominant (data-driven) players. It will be interesting to see if any such proposals will still be tabled, and how the new Commission under the leadership of Ursula von der Leyen will view them.

These reforms, or any other need to amend the existing competition rules, are however not addressed by the group at all, although this would be in its own best interest. The EU's recent ECN+ initiative would have provided a good basis for spreading certain procedural best practices. But all this is not mentioned in the Common Understanding. Instead it is considered important that competition authorities have tools and means to deepen their knowledge of new business models and their impact on competition, eg through market studies, sector inquiries and the like. One would guess that they have these already, and it would have been nice to hear from the group what new tools could be added going forward.

Reform proposals about additional sector-specific rules to prevent certain forms of anti-competitive conduct are not really considered either by the G7. While consumer protection and data privacy laws are recognised as complementary to the competition rules, there seems to be a certain form of distrust by competition authorities about ex ante rules addressing more genuine competition law issues, such as third party access for instance. Such rules may not be very popular for competition authorities, for not leaving enough scope for facts-based, case-by-case decisions with drastic sanctions. This might explain why they are not covered in the Common Understanding.

Instead, the group rather states that regulations can harm competition by increasing the cost of entry and entrenching incumbents. This certainly depends on how these rules are shaped and applied, but they have proved to be very useful in other network industries, where competition law and ex ante regulation have co-existed for many years. Here they are generally deemed - and praised - to strengthen each other and achieve better results than each of them alone. It would indeed be interesting to check more thoroughly in how far some form of unbundling, third party access obligations and cost-based access prices might be more effective than the existing competition

rules alone in digital markets. Maybe such a broader exercise could be part of the next steps for the joint G7 process. The competition authorities have already agreed to share their knowledge to promote a competitive digital marketplace. Wouldn't that be nice?

Finally, in their joint statement, the Seven recognize the importance of promoting greater international cooperation and convergence in the application of competition laws. Given the borderless nature of the digital economy, this seems to be yet another rather obvious claim. CoRe, both with our journal and our events, will seek to contribute to this debate in the years to come. In October, we will co-host our next conference on these topics and would be glad to welcome many of our readers in Brussels.

Meanwhile, we hope that you find this brand new issue interesting and thought-provoking once again. In the articles section, *Ana Cacho Lacarra* analyses recent case law on the rejection of competition law complaints, a very relevant procedural issue, both in digital markets and in other sectors, well presented from her perspective as an EU official dealing with such matters. *Jasper Sluijs* takes a close look into the way in which EU competition law applies to commercial divisions of public entities under Article 106 TFEU, a more rarely used provision, which has not really been at the forefront of the EU enforcement practice in the past few years. *Mateusz Brzeziński* addresses the interesting issue of how to overcome obstacles for cross-border mergers, especially in high-tech markets, in light of EU merger control and secondary EU legislation in the field of company law.

The issue also contains several highly topical country reports on recent developments in Belgium by *Jeroen Dewispelaere* and *Chloé Binet*, in Germany by *Julius Rumpf*, in Greece by *Andriani Ferti*, in Malta by *Clement Mifsud-Bonnici*, in Poland by *Tomasz Feliszewski*, and in Romania by *Bogdan Marius Chiritoiu* and *Vlad Dan Roman*. In the case notes section, you will find contributions about recent rulings of the Court of Justice of the EU and the General Court by *Thomas de Meese* and *Karl Stas*, *Vasiliki Fasoula*, *David van Wamel*, and *Agustin Reyna*. Finally, please get inspired by our book reviews, this time presented by *Eda Sahin* and *Miroslava Marinova*.

If you like this special mix, please spread the word and be welcomed to contribute to CoRe!

Robert Klotz
Managing Editor