Editorial

What Will Be the Size of the EU Competition Policy Reform: XS, M or XXL?

With the new Commission now in place, we keep witnessing more and more political claims and statements about the need for a reform of the competition rules to meet industrial policy goals. These voices first came from national governments, but are now also being echoed by political leaders in the EU institutions. What seemed to be a short term reaction by French and German ministers on the Commission's ban of the Siemens/Alstom merger in early 2019 is turning out to be a more and more robust policy trend with increasing support.

In early February, the Polish and the Italian governments vehemently joined France and Germany's push for an overhaul of the EU competition rules in order to promote 'European Champions' and to protect them better against rivals from other parts of the world, mainly the US and Asia. In a way, such protection has always been the objective of EU policy, with its special mix of internal market legislation, financial support and competition law enforcement, but now we are getting a new spin on it.

While these policies and rules have worked well for many years, the context in which they are applied has changed dramatically in the recent past. As long as globalisation was the common goal, at least among the industrialised countries of this world, the established EU policy mix seemed to strike the right balance and helped European companies grow and expand outside the EU, while foreign rivals entered Europe. However, in the present times of increasing protectionism, global markets are rather being perceived as a threat than an opportunity, and this can be seen as the main trigger of the call for reforms.

It is fair to concede, at least, that Europe did not start this trend. Many of the Asian markets for instance have for a long time been shielded from foreign market entry. Both Donald Trump's 'America First' initiative and Brexit will also have contributed to the global move towards more protection. But in Europe too, we have witnessed a rise of nationalism in several Member States, starting with migration and climate change, and this has now reached the industrial policy battlefield. Whether we like this trend or not, it is here, and it triggers essentially two questions. What changes to the existing EU rules and regulations might be needed or helpful in order to better promote European businesses than before? And how could these changes be achieved under the existing system of competences, checks and balances?

Substantive changes could be made either with specific tools or in general competition law. Within the former, we have already seen the adoption of the foreign direct

investment (FDI) screening instrument which will apply as from October 2020. In the energy sector, there is a specific screening of non-EU investments into transmission infrastructure within the EU. Stricter platform regulations, currently under debate, can also be viewed as primarily targeting non-EU companies. Such policy objectives can be pursued with secondary EU legislation, following a well-established process, and it can be expected that the new Commission will present more such targeted proposals in the coming months. They will follow the ordinary legislative process and are usually adopted with significant changes introduced by the other EU institutions.

The more challenging objective for the Commission will be to satisfy the Member States' expectations for an overhaul of the competition rules, while at the same time keeping up its own role and track record in the long standing enforcement practice. To better protect 'European Champions' or even 'National Champions', the proposals vary from broader market definitions in antitrust and merger control, to more innovative theories of harm permitting certain mergers based on strategic considerations ahead, all the way to more (or easier) access to State aid.

It does not seem very likely that the reforms would involve a change of the Treaty rules on competition. Opening them up to include a balancing test between harm to competition on the one hand and industrial policy considerations on the other would trigger political considerations, and interventions, which risk putting the effective implementation and deterrence effect of these rules at risk. More limited changes may not require legislative changes, but rather a review of soft law tools. Market definitions, for instance, or theories of harm, are essential elements for every individual case, but they do not lend themselves to being set out in binding legal provisions.

The Commission has immediately reacted to the recent initiative by the four Member States. First by pointing out the flexible nature of competition law, but then generally acknowledging the idea of adapting them, or at least their application, to match current and future needs. In this regard, the Commission explicitly mentioned the ongoing review of the block exemption regulation for vertical agreements, of the guidelines on horizontal agreements, and of the notice on the definition of relevant markets, as well as the current fitness check in the field of State aid. Any amendments made within these instruments could however only lead to incremental changes in the future enforcement practice in individual cases, rather than to major new policy orientations addressing the core of the Member States' claims.

It will therefore be highly interesting to observe the next steps in this process, and CoRe will continue to be an excellent forum for debate and exchange of views. This present first volume of 2020 is once again packed with a great variety of contributions, starting with *Marek Krzysztof Kolasiński's* assessment of the *Google Shopping* decision with special attention to the remedy ordered by the Commission, which can have a material impact on the development of vertical search engine markets. The second article, by *Lynn Vanhaverbeke and Caroline Buts*, examines the efficiency of the EU's leniency policy from 1985 until 2017 from a quantitative perspective, using re-

gression and variance analyses, which has so far not been done to a significant extent.

Our country correspondents cover the following topics with their reports: *Anastasios A. Antoniou* addresses the increasing abuse of dominance practice in Cyprus, *Satu-Anneli Kauranen* reviews the fines imposed in a Finnish bus cartel case, *Ronan Dunne* presents an update of the Irish merger control practice with a focus on simplifications and gun jumping prosecutions, and last but not least, *Michele Giannino* examines the symbolic fine imposed on the Italian incumbent railway operator. Three case notes, by *Niccolò Colombo* on the *HSBC Holdings* case, *Martin Gassler* on the *Otis* ruling, and *Yves Bottemann and Daniel Barrio* on the *AKKA/LAA* matter, as well as two book reviews, by *Oles Andrichuk* and *Justin Lindeboom*, almost complete this issue of CoRe.

Finally, we are happy to present three contributions to a recent conference in Brussels, on 'Dynamic Competition in Dynamic Markets', which was co-organised by CoRe in October 2019. In the form of short summaries, *Pedro Gonzaga*, *Bill Batchelor* and *Caroline Janssens*, as well as myself, shed light from different angles on possible ways to deal with mergers and big data in digital markets. This nicely closes the loop, as this topic will also be high on the agenda for the competition law reform, whatever its scope will be.

Robert Klotz
Managing Editor