Editorial

The Untapped Potential of the Old Competition Tool

Following a 2-year long (and still ongoing) reflection process on the fitness of the EU competition law framework to tackle the challenges raised by the digital economy, the European Commission expressed its view that there is a need ‘for a holistic and comprehensive policy response’. This would encompass three mutually reinforcing pillars. In addition to continued vigorous antitrust enforcement (pillar 1), the Commission considers introducing two complementary instruments: a specific *ex ante* regulatory regime for large digital platforms acting as gatekeepers (pillar 2) and a New Competition Tool to address structural competition problems (pillar 3).

The anticipated New Competition Tool would enable the Commission to identify and remedy structural competition problems that cannot (effectively) be tackled on the basis of the current antitrust rules. In particular, the Commission targets two very different scenarios.

Firstly, a scenario where markets are not delivering competition outcomes due to structural market failures, for instance oligopolistic markets exhibiting an increased risk for (algorithmic) tacit collusion. Here, the existence of a blind spot is evident. Similar to the UK market investigation regime, a New Competition Tool would generate real added value. It would allow the Commission to launch market investigations and subsequently address inherent structural issues that may go beyond the conduct of particular market participants.

Secondly, a scenario where competition concerns arise from unilateral conduct particularly in markets prone to tipping. Here, the perceived enforcement gap is far less apparent. Monopoly leveraging in the context of digital markets features quite prominently on the Commission’s antitrust enforcement agenda. And while it is true that our antitrust rules do not tackle attempted monopolisation, it is unclear why markets with winner-takes-most dynamics would suddenly call for placing a ‘special responsibility’ on non-dominant undertakings.

So, what could a New Competition Tool offer for the second scenario?

A close reading of the inception impact assessment suggests that the main concern here not so much relates to an alleged enforcement gap, but rather to the inefficiency of slow-paced antitrust enforcement. The New Competition Tool should allow for swifter and more effective remedial action in fast-moving digital markets. Yet speedy intervention can hardly be expected. While the procedural design of the tool is sub-

ject to the ongoing consultation, the combination of a detailed market investigation with requirements of due process are unlikely to guarantee a quick fix. It is also telling that the UK Competition and Markets Authority, in its final report of the market study into online platforms and digital advertising, stressed how the need for a swift resolution of the identified competition concerns called *against* making a market investigation reference.¹

As a legal sandbox for the design of effective remedies, the New Competition Tool offers more potential. This was one of the core elements of the *ex ante* instrument initially put forward by the Dutch government and subsequently endorsed by the Benelux competition authorities.² As previously discussed on these pages,³ it is a worthwhile idea to promote and co-design preventive compliance measures for dominant undertakings. The non-punitive and participatory nature of the new tool would allow for behavioural remedies to be tested and fine-tuned with a view to possible commitments or imposed remedies – if it comes to that.

To ensure that antitrust remedies are more effective, however, we do not need to introduce any new tool.

In more recent years, the European Commission has largely refrained from imposing prescriptive remedies in its antitrust prohibition decisions. Instead, it orders the undertaking(s) concerned to bring the infringement to an end – orders which Commissioner Vestager now considers to be insufficient.⁴ The current framework, however, does allow for a more outcome-oriented conception of remedies that goes beyond cease-and-desist orders, requiring also the elimination of the consequences of the infringement.⁵ This would be particularly warranted in markets prone to tipping, where the infringing undertaking might have obtained an enduring advantage.

If there is more than one way to bring an infringement to an end, the principle of proportionality commands that it is for the infringing undertaking to choose how to comply. The Commission should not be in the business of designing products or services – a takeaway from the first Microsoft tying case. Yet to ensure their effectiveness, the remedy proposals could be scrutinised far more carefully, for instance by launching an open market test. The current practice is to only invite the parties involved in the proceeding to submit their views on the proposed remedies. The remainder of the

1 Competition and Markets Authority, *Online platforms and digital advertising market study: final report* (1 July 2020) <https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf> accessed 31 July 2020.

2 Joint Memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world (2 October 2019) <<https://www.belgiancompetition.be/en/about-us/publications/joint-memorandum-belgian-dutch-and-luxembourg-competition-authorities>> accessed 31 July 2020.

3 B Van Rompuy, 'Editorial: Faster, Higher, Stronger' (2019) 3(4) CoRe 351-353.

4 See eg Statement by Margrethe Vestager to the U.S House of Representatives, Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law (29 July 2020) <<https://docs.house.gov/meetings/JU/JU05/20200729/110883/HHRG-116-JU05-20200729-SD007.pdf>> accessed 31 July 2020.

5 For a useful discussion, see I Lianos, 'Competition law remedies: in search of a theory' in I Lianos and D Sokol (eds), *The Global Limits of Competition Law* (Stanford University Press 2012); C Ritter, 'How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?' (2016) 7 Journal of Competition Law & Practice 587.

process is a black box, opaque to outside scrutiny. And since the Commission does not formally 'endorse' remedies as being compliant with its prohibition decision, there is no legal certainty for the undertaking(s) concerned and, apart from an action against the Commission for failure to act, interested third parties cannot effectively challenge an inappropriate remedy. Alignment with the more transparent commitment decision procedure could already take us a long way in the quest for remedies that truly pass the compliance test.

In short, we should only consider augmenting the antitrust toolbox for the right reasons. Unlocking the full potential of the existing tools is not one of them.

The challenges faced by competition authorities in a digital world are also at the heart of the first contribution in this issue. In 'Estimating Reasonable Prices for Access to Digital Platforms' Data', Jordi Casanova Tormo discusses the difficulties in using the standard framework of utility regulation to determine reasonable prices for access to online platform data. Instead, he proposes to explore using a framework similar to that used for patents. Nicole Roosenboom examines the implications of the growing number of civil damages actions in the Netherlands on the effectiveness of the Dutch leniency programme in 'The Dutch Leniency Programme Turns 18'. And in 'TMT-related Measures during the COVID-19 Pandemic in Italy', Raffaele Giarda and Jacopo Liotta critically review the temporary regulatory measures that the Italian government and communications regulator has imposed on the electronic communications and media sectors.

The reports section of this issue offers an update of the latest competition and regulatory law developments at the national level (Ireland, Lithuania, and the United Kingdom). In the case note section you will find commentaries on various recent rulings of the Court of Justice of the EU (C-454/18 *Baltic Cable*; C-228/18 *Budapest Bank*; C-10/18 *P Mowi ASA v Commission*; and C-617/17 *PZU Życie*). Finally, this issue includes book reviews of the latest edition of *Electronic Communications, Audiovisual Services and the Internet – EU Competition Law & Regulation* (Laurant Garzanti et al) and of *Fidelity Rebates in Competition Law* (Miroslava Marinova) as well as a recent highlight from the CoRe Blog: Alice Rinaldi's proposal for the introduction of an abuse of economic dependence provision at the EU level.

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