Editorial

Taking Competition Policy into the Future

This was the title of a ‘Young Experts Conference’ hosted by DG Competition on 3 February 2022. In her opening remarks at this remarkable event, focusing on a fresh look at competition policy by next generation practitioners from very different horizons, Margrethe Vestager stressed once again that the challenges of digitising our societies and fighting climate change are ‘at the very heart of competition policy’. For many years, competition rules were focused mainly on the goal of securing consumer benefits by addressing behavioural, structural and financial distortions of competition, using the existing tools under primary and secondary EU law. To address the more complex societal problems of today, the current competition rules can certainly contribute, but we also quickly realise the limits of what they can really achieve.

The conference’s first panel therefore addressed possible extensions of existing competition policy (and laws) to tackle broader social and economic issues beyond consumer welfare. The suggestions made by the speakers included both substantive amendments, eg innovative theories of harm in abuse of dominance cases to sanction unfair conduct in the field of data privacy or environmental standards, as well as procedural changes seeking to provide more guidance and transparency to market players involved in innovation activities. Most of this could already be achieved on the basis of the current rules and does not require major legislative reforms.

The overall impact of such changes should however not be overestimated, at least not in the short run. New theories of harm can take a long time to develop and implement in practice, and they remain legally uncertain until the end of highly complex and time-consuming judicial reviews. Procedural changes, eg of Regulation 1/2003, that would achieve more predictability for market players developing innovative technologies are not really in sight. Comfort letters generally do not adequately achieve this objective and the notification/individual exemption system that was applicable until 2004 is not expected to make a comeback either.

The more decisive changes to competition policy can rather be found outside the three traditional pillars of antitrust, merger control and State aid. Increasingly, competition policy is being sidelined by other policy instruments forming part of a broader industrial policy approach than before. DG Competition’s ‘2021 at a Glance’ overview, published on its website on 22 December 2021, already shows the importance of such ‘Policy Files’ within its overall track record. Several of them, eg Foreign Subsidies and the Digital Markets Act (DMA), do not belong to the traditional pillars and are genuine extensions of competition policy into new grounds. They introduce new legal

concepts, intervention criteria and procedural tools, and will require new teams to be set up within DG Competition and new forms of cooperation with other authorities. Both tools shall essentially protect EU players against unfair competition from outside the EU. The Foreign Direct Investment Regulation of 2019 is another example for this gradual shift of competition policy towards EU industrial policy.

But this new trend goes even further, with more and more direct and active promotion of the EU economy in areas that were traditionally left to market forces and only subject to intervention by competition authorities in cases of market failure. A recent example is the 'Chips Act', an EU Regulation establishing a framework of measures for strengthening Europe's semiconductor ecosystem, which was proposed by the Commission on 8 February 2022. The chip industry is generally underdeveloped in the EU compared to the US and Asia, and the competition tools are not suited to improve this situation. The Chips Act therefore introduces instruments to ensure security of supply by attracting investments and enhanced production capacities in the EU, and a mechanism to facilitate access to finance for start-ups. The closest connection with EU competition policy can be found with the State aid rules. The Chips Act shall pool resources from the Union, Member States, associated third countries, as well as the private sector, through the enhanced 'Chips Joint Undertaking'. An amount of €11 billion shall be made available to strengthen existing research, development and innovation, and to ensure the deployment of advanced semi-conductor tools, among other goals. In its Communication 'A competition policy fit for new challenges' of 18 November 2021, the Commission already signalled that it will be open to approving national support measures to fill funding gaps in the semiconductor ecosystem.

Another example of the growing importance of EU industrial policy to address market failures, this time in the field of broadband connectivity and infrastructure, is the proposed 'Regulation establishing the Union Secure Connectivity Programme' of 15 February 2022. It contains an ambitious plan, presented by Thierry Breton, for an EU space-based communication system, meant to ensure long-term availability of worldwide uninterrupted access to secure and cost-effective satellite communication services. This new infrastructure shall allow private operators to provide commercial services based on advanced, reliable and fast connections across Europe. The total cost is estimated at €6 billion, of which the EU will contribute €2.4 billion. Member States, the European Space Agency and the private sector shall also contribute.

These initiatives, if adopted and implemented, must be seen as strong public interventions into markets at EU and national level, both with policy instruments and financial support. The objectives pursued are certainly in the general interest of the EU, its economy and its citizens. However, they also express a certain distrust in market forces, private initiative, and competition policy as a last resort remedy to address any market failures. In this regard, they certainly reflect the classic French approach to economic and industrial policy, which has always been tainted by a strong degree of State intervention. Both proposals were promulgated during the French presidency of the Council.

We at CoRe will keep an open eye on these developments and cover them as they come along. The new issue of our journal already addresses some of these ‘future’ topics of competition law, such as Foreign Subsidies and the DMA, but also deals with more traditional, though highly relevant issues. In our articles section, Heike Schweitzer analyses whether railway undertakings can recover excessive infrastructure charges under Article 102 TFEU against the background of a pending preliminary ruling before the CJEU. Salomé Cissal de Ugarte, Mélanie Perez and Ivan Pico share their views on an ‘increasingly fragmented and uncertain regulatory landscape’ due to ongoing reforms of merger control regimes, notably in digital markets. Regarding abusive practices of airport operators, Matthias Nordmann and Caglagül Koz engage in a ‘fresh appraisal’ of whether Article 102 TFEU is still relevant in light of the EU Groundhandling Directive of 1996. Joseph Antel, Ciara Barbu-O’Connor, John Carroll, Katie Daw, and ‘Yours Truly’ compare the current legislative and enforcement trends to ensure effective competition in digital platform markets, mirroring the EU’s pending DMA proposal with proposed antitrust reforms in the US. Last but not least, Jakub Kociubiński assesses the proposed EU Regulation on foreign subsidies distorting the internal market and its perspectives for making a real difference.

The country report section features contributions by Heinrich Kühnert on discriminatory rebates in the postal sector in Austria; by Bogdan Marius Chirițoiu and Vlad Dan Roman on the new digital paradigm and a more comprehensive approach to market resilience in Romania; by Helene Andersson on the start of foreign direct investment screening in Sweden; by Philipp Zurkinden and Bernhard Lauterburg on the expanded scope for the control of abusive conduct and a reform proposal for antitrust enforcement in Switzerland; as well as by Kiran Desai on the *Facebook/GIPHY* merger in the UK.

Finally, our case note section includes reports by Justin Lindeboom on the CJEU judgment of 14 January 2021 in case C-450/19 *Kilpailu- ja kuluttajavirasto*, determining the end of an infringement of Article 101(1) TFEU in bid-rigging cases, and by Catarina Vieira Peres de Fraipont and Ines Neves on the judgment of the CJEU of 6 October 2021 in case C-882/19 *Sumal/Mercedes Benz Trucks Espana* regarding the theory of economic unit and the ‘downward’ liability of subsidiaries for competition law infringement of their parents.

We hope that this fully packed issue will grab your attention, no matter if you are more interested in the past, present or future of competition and regulatory law in the EU and beyond.

Robert Klotz
Managing Editor