WHAT AGENDA FOR THE SECOND TERM OF COMMISSIONER VESTAGER?

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I. INTRODUCTION

In an unprecedented move in the history of the European Commission, Margrethe Vestager has been nominated Competition Commissioner for a second consecutive term. Commissioner Vestager's renomination for one of the most coveted and, arguably, most demanding, Commission positions, is undoubtedly a testament to her achievements. In addition to an extension of her competition mandate, Commissioner Vestager has also been entrusted with the title of Executive Vice-President for a "Europe fit for the Digital Age."

The purpose of this article is to discuss the challenges that Commissioner Vestager will likely encounter, as well as the objectives that she should prioritize in her new powerful role within the Commission.

In particular, we argue that the two biggest challenges she will have to face in her new role are: (i) finding the right balance between enforcement and regulation in the high-tech industry; and (ii) resisting political pressure to introduce potentially disruptive changes to the EU merger control regime.

From a substantive standpoint, we advocate that Commissioner Vestager should pursue relatively minor reforms to refine, at the margins, the current enforcement system, such as (i) a reform of the merger control rules to tackle so-called "killer acquisitions"; (ii) new sectoral guidance concerning digital markets; and (iii) a review of the Commission's Notice on market definition to better reflect modern-day competitive dynamics.

From a procedural standpoint, we argue, first, that the Commission's increasingly heavy reliance on internal documents in merger control should be tempered. Next, we argue that once procedural convergence has been achieved with the ECN+ Directive, the Commission should prioritize substantive convergence, i.e. ensure that national competition authorities ("NCAs") consistently apply Articles 101 and 102 TFEU across the EU. Finally, we argue that, at a time when changes in the economy occur at a very fast pace, it is key for an effective enforcement agency to secure timely interventions, an objective that could be better reached by introducing deadlines to shorten the average duration of antitrust investigations, rather than by systematically resorting to interim measures.

II. COMMISSIONER VESTAGER'S FIRST TERM – THE LEGACY

Within the antitrust community, there is general agreement that the EU Commission's accomplishments during Margrethe Vestager's first term as Competition Commissioner are significant.

In merger control, new substantive standards have materialized: innovation has become a key competition parameter for the assessment of mergers, at the same level as price and output; the removal of a "close" competitor, rather than the closest competitor, is now sufficient for a merger to be blocked; and "gap" cases are no longer the exception.[2]

In antitrust, enforcement priorities have changed: effects-based analysis has been strengthened, also thanks to its endorsement by the Court of Justice ("ECJ") in the recent *Intel* ruling; and while cartel investigations have diminished in number, in tune with modern developments, emphasis is now on vertical restraints impacting e-commerce on the web, with algorithms, artificial intelligence ("AI"), and big data becoming the bread and butter of DG Comp. Reverse settlement deals in the pharma sector have also ended up on the radar screen.

In State Aids, the campaign against allegedly preferential fiscal regimes enjoyed by large multinationals is proving for the time being successful, in light of the recent judgments of the General Court.[3]

In the meantime, the EU enforcement toolkit has also been refined: procedural convergence is being achieved following the adoption of the ECN+ Directive, and now all NCAs are equipped with similar investigative and enforcement powers. New investigative techniques have been developed both in mergers (with more emphasis on requests for information, and internal documents, as well as prosecution of gun jumping and misleading information), and in antitrust (where DG Comp is using dedicated software to detect online cartels, and has set up a whistleblower desk).

Importantly, while, on the other side of the Atlantic, a vocal debate has unfolded on how to address perceived problems related to the development of the digital economy (spurred on by adherents of the so-called "hipster antitrust" and "neo-Brandesianism" movements), in Europe, Commissioner Vestager has taken significant enforcement action in a string of landmark cases against a number of high-tech players.

But, above all, Commissioner Vestager has been praised for enforcing competition rules impartially and with no deference, against businesses and Member States alike.

Finally, her accomplishments have been cloaked in a catchy narrative (based on the notion of "fair competition"), which has proved popular with the public.

Against this background, what are the challenges, and what should be the priorities of the newly re-nominated Commissioner? The impression is that she has more to lose than to win from a second term given the challenges ahead.

III. COMMISSIONER VESTAGER'S ROLE WITHIN THE VON DER LEYEN COMMISSION – THE POLITICAL CHALLENGES

A. Reconciling Enforcement with Regulation

The first significant challenge that Commissioner Vestager will face stems from the dual role she has been assigned: Executive Vice-President for a Europe Fit for the Digital Age, and head of antitrust enforcement.

Von der Leyen's mission letter, as addressed to Commissioner Vestager, articulates in some length the responsibilities that come with the digital role, namely overseeing digital taxation, coordinating work on AI, and upgrading liability and safety rules for digital platforms as part of a new Digital Services Act.

2 I.e. transactions giving rise to anticompetitive unilateral effects, despite the absence of the creation or strengthening of a dominant position as a result of the merger.

3 Cases T-755/15, *Luxembourg v. Commission*, and T-760/15, *Netherlands v. Commission.*

Although Sylvie Goulard had initially been designated by von der Leyen to oversee (among others) DG CONNECT, the recent rejection by the European Parliament of her nomination means that DG CONNECT may well ultimately fall under Commissioner Vestager's portfolio. Previously, on the other hand, some had considered that Commissioner Vestager's actual powers in digital affairs were likely to be limited to the realm of competition enforcement.[4] In any event, regardless of the scope of her mission in the digital area, there remains tension between these two potentially conflicting competences.

Enforcement, on the one hand, requires independence and impartiality when applying the competition rules, with consumer welfare as the sole and ultimate objective. An independent competition enforcer must take a quasi-judicial stance, and the less interference and influence from (possibly politicized) stakeholders, the better. On the other hand, the role of a regulator is to listen to all stakeholders and factor in all views, considerations, and vested interests prior to proposing a regulatory framework. Consequently, this dual mission entails, in and of itself, a potential clash between the role of unbiased enforcer, and industry-involved regulator.

Against this background, the question arises as to what Commissioner Vestager's real role should be in influencing any new regulatory framework for the digital industry. In other words, should Commissioner Vestager strive towards implementing new, pro-competitive regulation in order to tackle the "digital problem," if ever one exists, or should she continue to rely on the competition law toolbox, as she has done for the past five years?

On the regulation side, one example of a proposed *ex ante* regulatory "quick fix" is structural unbundling, similar to what was implemented in the energy and transport sectors. This solution is primarily envisaged for vertically integrated platforms which show or might show a propensity for "self-preferencing."[5]

One might query the actual merits of such measures in the first place, in terms of whether they would actually solve any supposed competition deficiencies in digital markets, given their characteristic network effects.[6] Other *ex ante* instruments, such as behavioral tools that would strong-arm large digital platforms with "gatekeeper" roles into sharing data from the outset, even before any alleged abuse has occurred, have also been proposed.[7]

We would recommend caution in embracing either of these regulatory stances. The digital industry is still young and the extent of the perceived problems is too uncertain to call for radical, and irreversible, *ex ante* regulatory changes, at least at this early stage. In-depth sector inquiries and consultations with industry stakeholders and experts are needed as a first step to conclude that real market failures exist, and, only then, to lay the groundwork for potential regulatory intervention. Failing this, the risks of elimination of potential or existing efficiencies and ensuing chilling effects in an industry that is still highly innovation-driven are too great to justify taking the regulatory plunge.

In the meantime, the existing antitrust rules should continue to act as the primary tool to address any competition issues identified in the digital sector, and it would be sensible for the Commission to devote most of its energy to this task. This is all the more so given that, as the past five years have shown, the competition law toolbox as it currently stands may be in need of some fine-tuning in order to better tackle the digital industry.

In this respect, in our view, priority should be given to either updating existing guidelines, or devising entirely new guidelines, in order to address the specificities of the Commission's practice in the digital sector and provide consistent guidance beneficial to all stakeholders: businesses and enforcers alike.

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4 Stolton, S. (2019), "Vestager the digital chief in name, but Goulard in practice," Euractiv, September 11, 2019, available at https://www.euractiv.com/section/digital/news/vestager-the-digital-chief-in-name-but-goulard-in-practice/.

5 Crémer et al (2019), "Competition Policy for the digital era," *European Commission*, p. 67.

6 These networks effects give these markets a "*winner-takes-all quality*" and, consequently, a not unlikely fallout is that one of the divested entities eventually surpasses its peers, and a new giant ultimately forms. See SMITH E. (2018), "The techlash against Amazon, Facebook and Google – and what they can do," *The Economist*, January 20, 2019.

7 The Dutch government, for example, has urged the Commission to consider implementing such measures. See "Regulate tech giants and create European champions, says Dutch government," *Stibbe*, June 6, 2019, available at https://www.stibbe.com/en/news/2019/june/regulate-tech-giants-and-create-european-champions-says-dutch-government.

In this context, issues deserving clarification are plentiful, ranging from the complexities of defining multi-sided markets, to the role of data in competition law.[8]

One issue that should be handled with particular care is the interplay between personal data issues, on the one hand, and competition law issues, on the other. Competition enforcers should refrain from developing theories of harm based on the rather alien (to competition law) concept of misuse of data. Such developments would risk venturing into a battleground which has been, and should remain, reserved for data protection enforcers.[9] This is why the Commission should act with extreme caution when dealing with investigations bringing together elements from both worlds. Claims touching on the subject of data protection should, in our view, be promptly diverted to the relevant authorities, and DG Comp should resist the temptation of blurring the lines between these two legal worlds, as the German Bundeskartellamt did in its recently overturned *Facebook* decision.[10]

Finally, clear guidance about the suitability of behavioral remedies, such as mandatory data sharing and access, including data portability and platform interoperability, would also be of great value.[11] Such behavioral remedies remain, for the time being, arguably the better and more appropriate tool to address the intricacies of data-intensive markets.

B. Resisting Interference from Member States – European Champions

The second very delicate issue is how to handle the Franco-German push for a reform of the EU Merger Regulation ("EUMR").

Commissioner Vestager's prohibition, despite political pressure, of the attempted *Siemens/Alstom* merger,[12] triggered a strong reaction from certain politicians, and prompted some EU Member States to advocate for new rules aimed at creating "European champions," including a joint proposal by Germany and France to give the Council a veto over Commission merger decisions. These proposals find their justification in what has been labelled "the Chinese threat." European companies, so the argument goes, over time will not be able to compete against ever-larger Chinese giants, which benefit from generous state subsidies and lax antitrust enforcement in their home country.

A similar concern also resonates in von der Leyen's mission letter to Commissioner Vestager, where the President-Elect explicitly makes a link between competition rules and industrial policy.[13]

In our view, Commissioner Vestager should resist any such attempt. In particular, the solution that France and Germany are proposing risks undermining the integrity of the internal market. Granting the Council the power to overrule a Commission prohibition decision on grounds other than competition concerns could in fact pave the way for the approval of deals harmful to consumers, based only on vocal political spon-

8 The question of whether data concentration might pose a risk ex-post as the result of a merger was cursorily addressed in the context of the *Facebook/WhatsApp* and *Microsoft/Linkedin* merger clearance decisions, although the Commission ultimately found that no such risk existed. Commentators have speculated that the Commission may have refrained, in those decisions, from venturing into abstract assessments of an "innovation offence" in data markets given that there would always be Article 102 TFEU left as a fallback tool to regulate anticompetitive behavior based on (mis)use of data *ex post*. See Kinsella, S. (2016), "The innovation offence," Chilling Competition, November 14, 2016, available at https://chillingcompetition.com/2016/11/14/the-innovation-offence-by-stephen-kinsella/.

9 As we know from well-established case law, competition law and data protection law need to be kept at an arm's length from one another (see e.g. Case C-238/05, *Asnef/Equifax*, at para. 63: "*any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resulted on the basis of the relevant provisions governing data protection*"). Partitioning these two areas makes sense from a purely procedural perspective: while the competence for competition enforcement lies with the Commission, the competence with respect to data protection in turn lies with the relevant data protection supervisory authorities. Consequently, if conduct pertaining to personal data were to be subjected to scrutiny from both angles, the ensuing risk of dual proceedings and fines would run counter to the rule of law and the principle of *ne bis in idem*. See Volmar, M. N. & Heldmach, K.O. (2018), "Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation," European Competition Journal, October 17, 2018.

10 Case no B6-22/16, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, Bundaeskartellamt, February 15, 2019. Commissioner Vestager has, for now, publicly distanced herself from this decision. See WHITE A., PONIKELSKA L. (2019), "Germany's Facebook Order Will Be Studied by EU, Vestager Says," *Bloomberg,* February 8, 2019.

11 See Heim, M. (2019), "Modernising European Competition Policy: A Brief Review of Member States' Proposals," *Bruegel*, July 24, 2019, available at https://bruegel.org/2019/07/modernising-european-competition-policy-a-brief-review-of-member-states-proposals/.

12 Case M.8677, *Siemens/Alstom*.

13 "*[C]ompetition will have an important role in our industrial strategy. The competitiveness of our industry depends on a level playing field that provides business with the incentive to invest, innovate and grow."* In that regard, Vestager is expected to continue to *"work with the Member States to make the most of Important Projects of Common European Interest."* See Ursula von der Leyen's Mission Letter to Margrethe Vestager, dated September 10, 2019:

sorship. And while Europe might well end up with larger companies, European consumers would in all likelihood over time pay higher prices in the absence of sufficiently significant competitive constraints.

This is why in our view, admittedly legitimate industrial policy concerns about the competitiveness of our industry should be addressed from a different angle: the focus of any EU initiative to protect/strengthen European industry should be on maintaining a level playing field here at home, in particular between European companies and third country businesses not subject to stringent EU State Aid and competition rules. In this respect, stepping up the level of scrutiny and screening of public subsidies received by third country companies operating in Europe should be the priority in order to ensure that any such subsidies are properly factored into the Commission's assessment of a merger impacting the EEA market (up to the point of becoming a legitimate ground for blocking a deal).[14] In fact, in her mission letter, von der Leyen also refers to this task.[15]

A second, relatively simple, adjustment to the Commission's current merger analytical framework would be the revamping of the Notice on market definition, in order to better reflect economic reality. In that context, for example, in order to better take into account the competitive pressure coming from credible newcomers (including Chinese players), the issue of when potential competition is likely to turn into a significant competitive constraint deserves to be wholly reconsidered; all the more that the Commission is applying a dangerous double standard in assessing potential competition, depending on whether it is used as a sword (by the Commission) or as a shield (by the parties). Indeed, in many recent merger decisions impacting innovation and the merging parties' pipeline products, the Commission has applied a stretched time frame of several years over which the potential for success of the merging parties' pipeline products is to be evaluated, while it continues to use a shorter timeframe (two years) to determine whether third-party potential competitors should be treated as credible future entrants capable of exerting a significant competitive constraint.[16] This discrepancy has no place in the EU merger control system, which is governed by a general principle of symmetry, including in the assessment of the "counterfactual" scenario.

IV. WHAT SHOULD COMMISSIONER VESTAGER'S ENFORCEMENT PRIORITIES BE?

Aside from these challenges, in terms of priorities, we would recommend a limited number of reforms that would be relatively simple to implement.

A. Merger Control

In merger control, the most sensitive topics that deserve to be discussed are: (i) killer acquisitions; (ii) common ownership; and (iii) the new test of harm to innovation.

1. Killer Acquisitions

So-called "killer acquisitions" (whereby an incumbent acquires a smaller company with significant potential to undermine its market position) are becoming increasingly widespread in some industries.[17]

For the time being, absent a referral from a Member State, these acquisitions typically escape the purely turnover-based notification requirement under the EUMR.[18] This deficiency has arguably resulted in several potentially problematic transactions slipping through the cracks.

14 In fact, the horizontal guidelines (36) and the case law of the EU courts (see, e.g. Case T-156/98, *RJB Mining*) state already that in assessing a transaction the Commission takes into account the financial strength of the merged entity relative to its rivals.

15 *"As part of the industrial strategy, you should develop tools and policies to better tackle the distortive effects of foreign state ownership and subsidies in the internal market."*

16 In Case M.7275, *Novartis/GSK*, the Commission assessed innovations that may or may not enter the market in five to seven years' time. In Case M.7932, *Dow/DuPont*, the Commission assessed innovations that may or may not successfully enter the market in ten years' time.

17 According to some commentators these acquisitions are recurrent in the pharmaceutical industry and now also in the digital industry. See e.g. Cunningham, Ederer & Ma (2018), "Killer Acquisitions," available at http://faculty.som.yale.edu/songma/files/cem_killeracquisitions.pdf.

18 Tech start-ups do not typically profit from and monetize their user base until a relatively late stage, although their value and overall potential (usually based on their popularity) are more easily discerned from the outset. For example, Facebook did not make a profit for the first five years of its existence.

In order to address this issue, which, based on recent trends, is not expected to dissipate any time soon, the Commission could introduce transaction value-based thresholds, to operate in tandem with the existing turnover-based regime. Inspiration for such a reform can be taken from the model which has run in Germany and Austria since the second half of 2017.[19]

As to the merits of a regime targeting incumbents with a pre-defined "strategic market status" (as proposed by certain commentators),[20] in our view such an approach would be too radical, at least at this initial stage where regulatory caution is warranted and the risk of over-enforcement could have negative effects on the economy.

2. Common Ownership

In recent years, "common ownership" (i.e. simultaneous ownership of shares in competing firms, typically by institutional investors) has also appeared on DG Comp's radar.[21]

Dow/Dupont made EU merger control history as the first time common ownership formed part of DG Comp's substantive analysis, although as an "element of context" in the Commission's overall assessment of the transaction. [22] Since then, Commissioner Vestager has publicly stated that a problem might exist in this regard. However, no concrete measures have as yet been taken to address these situations, as the Commission is still assessing the extent of the problem, if one exists at all.[23]

On balance, given the lack of consensus in the economic literature on this topic, in our view a total reform of the merger control system in order to address upfront these (still relatively isolated) instances is not yet warranted.

3. Harm to Innovation

A topic which has caused heated debate within the antitrust community at large is the way the Commission is currently approaching the problem of mergers potentially harming innovation.

As already discussed, under Commissioner Vestager, DG Comp has profoundly revised its traditional analysis of innovation and, ultimately, introduced what some authors have labeled "a novel theory of harm in EU merger policy."[24] Under this theory, the Commission does not look at harm to innovation in a specific product market where the merging parties are developing similar pipeline products, but adopts a general assessment of "harm to innovation," unrelated to a specific product market, and without considering potential anticompetitive effects on this basis.

In a new industrial era driven by technological progress, it is legitimate that protection of innovation should be a priority in the Commission's merger enforcement activities. But this should not occur to the detriment of legal certainty, which is a fundamental principle of the EU legal order. The problem with an open-ended theory of harm based on generic "harm to innovation" is that the Commission is left with a significant margin of discretion, while businesses struggle to predict the implications of their commercial choices. Not to mention that overly aggressive enforcement also has the potential to stifle innovation. This is why, at the very least, the Commission's recent practice in point needs to be streamlined, and set out in structured guidance delimiting the boundaries of this theory of harm.

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19 DG Comp is currently assessing the merits of these regimes in order to address the problem of killer acquisitions. See in this regard the speech by Commissioner Vestager: "Merger Control: The Road Ahead," June 19, 2019.

20 Perez de Lamo, D. (2019), "Preserving Innovation Competition in the Digital Era: 'Killer Acquisitions'," *Competition Policy International*, available at https://www.competitionpolicyinternational.com/student-challenge-quadriptych-shaping-competition-policy-in-the-era-of-digitisation/.

21 I.e. situations where investors hold minority stakes in several companies active within the same industry.

22 Case M. 7932, *Dow/DuPont*.

23 The purported danger here is that investors with shareholdings in competing companies might be able to influence the decisions of those companies, particular in concentrated sectors such as airlines and pharma, which could in turn lead to higher prices. See Elhague E., "The Growing Problem of Horizontal Shareholding," (June 15, 2017). Antitrust Chronicle, Vol. 3, June 2017, Competition Policy International; Harvard Public Law Working Paper No. 17-36.

24 Petit, N. (2017), "Significant Impediment to Industry Innovation: A Novel Theory of Harm in EU Merger Control?," February 4, 2017, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911597.

B. Antitrust Enforcement

In antitrust, DG Comp's current course of action seems relatively steady, and does not require significant adjustments.

In recent years, abuse of dominance case law had been riddled with inconsistency as a result of clashes between the form- and effect-based approaches.

The ECJ's *Intel* ruling,[25] however, marks a definitive shift towards the effects-based approach, thereby harmonizing the analytical framework across rebates cases. Recent rulings by the ECJ have moreover upheld the *Intel* effects-based approach in non-rebate cases as well.[26] This is a welcome development in that it offers greater clarity in relation to the appropriate legal test and standard of proof, which will not only serve to guide DG Comp but, more importantly, NCAs across the EU.

And while the *Intel* analytical framework already reflects, by and large, DG Comp's own established practice in antitrust investigations dealing with unilateral conduct,[27] the coming five years will hopefully show a definitive shift towards an ever-more rigorous application of the effects-based analysis across the board, with support from the Chief Economist's Team.

Concerning cartels, as noted above, the past few years have shown a marked slowdown in enforcement at the EU level, concomitant with a boost in activity in some of the larger individual Member States, including France, Germany, Italy, and Spain.

This is likely not a reflection of a loss of interest in cartels on DG Comp's part. The recent development of new investigative techniques and tools, such as the eLeniency online tool, which allows whistleblowers to report cartel behavior directly online, is an indication that cartels will continue to be high on the Commission's agenda (as, in our view, they should).

Finally, with the e-commerce sector inquiry having revealed the prevalence of vertical restraints in the form of selective distribution systems, pricing restrictions and recommendations, and platform bans, DG Comp will likely continue to closely scrutinize this sector in the coming years. DG Comp is also likely to provide more guidance in its new guidelines on vertical agreements, due in 2022.[28]

C. State Aid

In the State Aid area, an issue deserving urgent reconsideration is the Commission's approach to voluntary support interventions put in place by statutory deposit guarantee schemes ("DGS") to banks in distress.[29]

After having cleared multiple massive bail-outs in favor of distressed banks in Germany, France, and the UK during the so-called credit crunch – on the ground that there was a systemic risk for the EU economy – from 2013 onwards, the Commission has radically changed its policy, and imposed a strict "burden-sharing" principle, i.e. distressed banks should no longer be rescued with taxpayer money (no bail-outs). It is rather for the banks' "owners" (shareholders and junior debt holders) to bear the losses first ("bail-ins").[30]

While this principle has theoretical appeal, its radical interpretation by the Commission has created significant disruption, especially in those EU countries where the banking system was imperiled following the credit crunch (leading to crises in both sovereign debt and the "real" economy). The Commission has in particular prohibited as illegal State Aid any voluntary support taken by mandatory DGS to avert failures of

25 Case C-413/14, *Intel Corporation Inc v. Commission*.

26 See C-525/16, *MEO v. Autoridade da Concorrência*, para. 31.

27 For example, Commissioner Vestager has publicly claimed that the Intel judgment will not fundamentally change how the Commission currently analyses exclusivity rebates. See Aranze, J. (2018), "Vestager: No fundamental change from Intel judgment," *Global Competition Review*, January 25, 2018, available at https://globalcompetitionreview.com/article/1153099/vestager-no-fundamental-change-from-intel-judgment.

28 See Staff Working Document, "EU competition rules on vertical agreements – evaluation," *European Commission*.

29 DGS are statutory funds which have been set up in every MS as a result of an EU Directive (Directive 2014/49/UE), having as primary mission the reimbursement of depositors in case of failure of a credit institution. However, DGS can also voluntarily provide alternative support measures in favor of a bank in distress to avert failure of the latter, to the extent there is a good prospect of restructuring the bank and the cost of the intervention for the banks feeding the DGS is lower than the cost of reimbursement of depositors.

30 The bail-in principle is also the inspiring principle of the Banking Recovery and Resolution Directive (Directive 2014/59/EU, "BRRD").

distressed banks, on the ground that such schemes act in the name of a public policy mandate and their interventions are approved by Central Banks, hence imputable to the State.

In its recent *Banca Tercas* ruling,[31] the General Court has entirely rejected this reasoning: when taking voluntary alternative support measures, DGS are rather trying to minimize in the first place the financial burden that affiliated banks of the DGS would bear should the bank go bankrupt and all depositors be entitled to reimbursement. And by approving these measures, the Central Bank is merely exercising its statutory mission to ensure the stability of the financial system, which has nothing to do with the State imputability of the measure. In light of the above, it would now be sensible for the Commission to review its intransigent position in relation to voluntary support interventions of DGS. At a time when the economy within the EU is showing signs of weakness, the stability of banks is paramount for the purpose of sustaining the real economy.

Still in the area of State Aid, an issue that has for the time being been off the radar screen, but could soon emerge, is the ever-increasing panoply of aid approved by the Commission. The State Aid rules have become so intricate and diverse that there is apparently the possibility, with very few exceptions, for Member States to grant lawful aid for any given industry or business, and not necessarily only the most meritorious ones. The question that may soon come up is *cui prodest*? Is there a risk of a competitive distortion in view of the fact that some EU countries have budgetary constraints while very few have significant resources to subsidize their industry? The Commission had better push for increasing the EU budget and boosting EU funded projects of Community interest.

D. Procedural Reforms

1. Tempering Reliance on Internal Documents in Merger Control

In the past five years DG Comp's merger clearance decisions have increasingly relied on internal documents in its assessment of the compatibility of a merger under the EUMR.

While use of internal documents can, and usually does, serve to guide DG Comp to a sound and fully-informed decision, the pitfalls of a too-heavy reliance on such documents, on the other hand, are numerous, ranging from abnormally prolonged merger reviews,[32] increasing cost to business, to the risk of potentially biased decisions colored by cherry-picked documents.[33]

In our view, DG Comp should therefore, in the coming term, act with caution when dealing with internal documents, in order to safeguard merger control enforcement transparency and impartiality.

2. Procedural vs. Substantive Convergence

Procedural convergence is one of Commissioner Vestager's primary achievements during her first term. Following the adoption of the ECN+ Directive,[34] as it is colloquially known, NCAs across the EU are heading towards a common antitrust enforcement model, i.e. they will act as independent agencies endowed with adequate resources and powerful investigative and fining powers.

There are, however, areas of procedural competition law where harmonization is far from achieved. For instance, the ECN+ Directive fails to introduce a long-overdue one-stop shop regime for leniency applications, which would eliminate the fragmentation and risks resulting from

31 Joined Cases T-98/16, *Italy v. Commission*, T-196/16, *Banca Popolare di Bari SCpA v. Commission*, and T-198/16 *Fondo interbancario di tutela dei depositi v. Commission*.

32 "Stop-the-clock" decisions after making requests for internal documents are a not an uncommon occurrence, and unnecessarily prolong the duration of merger reviews. See in this regard Kuhn, T. (2019), "EC focus on internal documents: Time to rethink the architecture of the EU merger control process?"

33 To the extent that DG Comp is bound by the EUMR to make an overall informed assessment based on the evidence as a whole, information overflow from internal documents runs the risk of blurring DG Comp's vision in the context of this mission and inhibiting its ability to make a balanced assessment. In the same vein, a too-heavy reliance on internal documents might lead DG Comp down a path of cherry-picking those documents which best corroborate its thesis. See in this regard Kuhn, T. (2019), "EC focus on internal documents: Time to rethink the architecture of the EU merger control process?"

34 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

the co-existence of multiple national leniency programs working in parallel.[35] Nor does the ECN+ Directive deal with the critical topic of interim measures.

In her mission letter, and perhaps in tacit recognition that procedural convergence has not yet been satisfactorily achieved, von der Leyen has tasked Vestager with the mission of facilitating cooperation with and between NCAs, as part of the overall objective of strengthening competition enforcement.[36] On that basis, the next Commission will hopefully push harder to close those remaining gaps in relation to harmonization of procedural competition rules.

More importantly, procedural convergence should go hand in hand with substantive convergence, i.e. uniformity of substantive standards when assessing similar conduct under EU competition rules across the EU.

In a world where every NCA applies the same substantive rules and imposes the same (hefty) fines, it is no longer acceptable that the same conduct can be treated (and fined) in a very different manner. Yet, there are clear signs that significant discrepancies persist in applying supposedly common substantive standards among NCAs across the EU. In the context of an investigation of a rebate scheme by a dominant firm, for example, is the as-efficient competitor test a necessary step to establish an abuse? Can a pure exchange of information with no evidence of an alteration of the commercial conduct taken by the market actors, be treated and fined like the most egregious cartel? And in the investigation of an alleged refusal to deal, should objective justifications such as well-documented technical constraints, be considered sufficient to rule out an infringement of Article 102 TFEU?

Apart from the general guidance provided through its notices and guidelines, the Commission has at the moment limited powers to oversee the investigations run by NCAs under Articles 101 and 102 TFEU. Regulation 1/2003 provides the Commission with two tools to oversee the consistent application of EU competition law, namely the consultation procedure on draft final decisions of NCAs (Article 11(4)), and the possibility to take over a case from NCAs (Article 11(6)).

However, while the Commission hardly ever exercises its authority to take over an NCA's investigation, and typically only when a case has an EU-wide interest, its supervisory role under Article 11(4) of Regulation 1/2003 appears to be largely ineffective in overruling flawed NCAs' decisions. According to Article 11(4), EU NCAs have a duty to inform the Commission of any imminent decision applying Articles 101 and 102 TFEU, with the latter being entitled only to advise the NCAs as to the direction to take in enforcing EU competition rules. However, under this procedure, the Commission does not have binding powers, and, even worse, the consultation process starts at the very end of the decision-making process, when the findings of the investigations have crystallized and there is little appetite to change the course of an investigation.

Accordingly, a solution would be to provide the Commission with the power to intervene at an earlier stage (e.g. when the Statement of Objections is issued), and provide binding opinions, although the latter amendment would require a legislative reform, something that admittedly may not be easy to achieve.

3. Shortening the Duration of Antitrust Investigations or Resorting to Interim Measures?

Finally, the timeliness of antitrust investigations is another area where we still see room for improvement. The past five years have, unfortunately, not shown meaningful progress in this area. The Commission still struggles to conclude cartel or abuse of dominance investigations in a timely manner, no doubt as a result of the increasingly complex nature of the markets under scrutiny.

This is particularly problematic in industries that are characteristically fast-paced and prone to "tipping" quickly, and where speedy intervention therefore becomes crucial in order to restore competitive conditions before harm to competition, and consequently to consumers, becomes irreversible. For example, in the digital industry, some commentators have argued that the combination of the inherently fast-moving

35 See in this regard Case C-428/14, *DHL Express (Italy) v. Autorità Garante della Concorrenza e del Mercato*. In this case, the CJEU affirmed the independence of the EU and national leniency programs from one another in the context of a company having applied for leniency both at the EU and national level at different points in time, resulting in diverging decisions on the granting of immunity.

36 See Ursula von der Leyen's Mission Letter to Margrethe Vestager, dated September 10, 2019: "*You should focus on improving* […] *speeding up investigations and facilitating cooperation with and between national competition authorities.*"

features of digital markets[37] with sometimes decade-long investigations,[38] has resulted in many of the big tech cases brought by the Commission to have been for naught, as the decisions have come too late to have any real impact on the competitive landscape.[39]

To address this problem, some commentators propose the use of interim measures[40] as a tool to swiftly correct market deficiencies resulting from anti-competitive behavior before they take on a more permanent form.[41] This solution is increasingly relied on by several NCAs,[42] many of which have urged DG Comp to make more use of this instrument in order to speed up the antitrust process.[43]

While interim measures can help in some instances, they are not a permanent, structural solution to the problem. First, there is an issue of effectiveness that should not be underestimated. The EU's interim measures procedure is time consuming in itself. The many procedural hurdles underlying their successful implementation significantly affect their ultimate timeliness, the result of which is that it can sometimes take several months, if not more, before interim measures are effectively in force. Second, and perhaps more importantly, an inflationary use of interim measures would inevitably entail lowering the standard of proof required to grant such measures and compress the right of defense of the parties in the administrative proceeding before the Commission.

Instead, a more balanced solution would, in our view, be to introduce (non-mandatory) deadlines in order to shorten the length of antitrust investigations. This is probably also more in line with what von der Leyen had in mind when she tasked Commissioner Vestager, in her mission letter, with speeding up investigations in order to strengthen competition enforcement.[44]

Such mechanisms are already in place in several Member States,[45] and have to date shown very few downsides. In fact, in our view, a deadline instrument would not only be conducive to more timely intervention in order to address competitive harm in dynamic industries without simultaneously running the risk of encroaching on fundamental rights, but would also significantly increase the transparency of investigations. In addition, because they would be non-mandatory, DG Comp would not be *per se* legally accountable for respecting these deadlines, and its activities would therefore not be significantly impeded by their existence. Instead, DG Comp would be encouraged to meet them, in a best efforts type of commitment.

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37 See Gerardin, D. (2019), "What should EU competition policy do to address the concerns raised by the Digital Platforms' Market Power?," available at https://www.competitionpolicyinternational.com/what-should-eu-competition-policy-do-to-address-the-concerns-raised-by-the-digital-platforms-market-power/.

38 The *Google Shopping* case, for example, lasted almost ten years from the date the first complaint was submitted to the Commission by Foundem, to the date the fine was imposed. See "TIMELINE - Google's decade-long antitrust battle in Europe," *Reuters*, March 20, 2019, available at https://www.reuters.com/article/eu-google/timeline-googles-decade-long-antitrust-battle-in-europe-idUSL8N2166ZH.

39 Toplensky, R. (2019), "Vestager revives dormant antitrust weapon against tech groups," *Financial Times*, June 27, 2019.

40 DG Comp has historically been reluctant to use interim measures in antitrust investigations; for a recent (pending) case, see June 26, 2019, *Broadcom*. The difficulty with imposing interim measures stems from the inordinately heavy burden of proof underlying this tool, whereby the Commission is required to prove a *prima facie* infringement. In more novel cases, such as those in the tech industry where the anti-competitive effects of the conduct are not as black-and-white as in other more clear-cut abuse cases, this has proven to be a quasi-impossible task.

41 See Gerardin, D. (2019), "What should EU competition policy do to address the concerns raised by the Digital Platforms' market power?," available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257967.

42 France, for example, adopted interim measures in a total of 15 cases between 2007 and 2017. See Burnside A.J., Kidane, A. (2018), "Interim Measures: An overview of EU and national case law," *Concurrences,* available at https://www.concurrences.com/en/bulletin/special-issues/interim-measures-en/dominance/interim-measures-an-overview-of-eu-and-national-case-law.

43 Guniganti, P. (2019), "Interim measures help to keep antitrust relevant, says DG Comp official," *Global Competition Review*, 1 July.

44 See Ursula von der Leyen's Mission Letter to Margrethe Vestager, dated September 10, 2019: "*You should focus on improving* […] *speeding up investigations.*"

45 For example, the Italian, and to some degree the Spanish, antitrust systems use a deadline mechanism.

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