BENELUX COMPETITION AUTHORITIES ON CHALLENGES IN A DIGITAL WORLD

BY JACQUES STEENBERGEN, MARTIJN SNOEP & PIERRE BARTHELMÉ[1]

1 Presidents of the Belgian Competition Authority ("BCA"), the Dutch Authority for Consumers and Markets ("ACM" and the Luxembourg Conseil de la Concurrence ("LCdlC," or "Conseil de la concurrence")

CPI ANTITRUST CHRONICLE DECEMBER 2019

Australia's Digital Platform Inquiry: We've Only Just Begun…
By Julie Clarke

Competition Policy for the Digital Era
By Heike Schweitzer & Robert Welker

Digital Competition Reports and Merger Enforcement
By Alexis J. Gilman, Akhil Sheth, Angel Prado & Eric Fanchiang

A New Competition Framework for the Digital Economy – Report by the Commission "Competition Law 4.0"
By Martin Schallbruch, Heike Schweitzer & Achim Wambach

Modernizing the Law on Abuse of Market Power in the Digital Age: A Summary of the Report for the German Ministry for Economic Affairs and Energy
By Justus Haucap, Wolfgang Kerber, Heike Schweitzer & Robert Welker

Digital Avant-Garde: Germany's Proposed "Digital Antitrust Law"
By Christian Ritz & Falk Schöning

Benelux Competition Authorities on Challenges in a Digital World
By Jacques Steenbergen, Martijn Snoep & Pierre Barthelmé

Competition Policy in a Globalized, Digitalized Economy
By Pinar Akman

The First Report of the BRICS Competition Authorities Working Group on the Digital Economy
By Alexandre Barreto, Patrícia A. Morita Sakowski & Christine Park

Visit www.competitionpolicyinternational.com for access to these articles and more!

CPI Antitrust Chronicle December 2019

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2019© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

I. INTRODUCTION

In October, the Belgian, Dutch, and Luxembourg competition authorities published a joint memorandum on challenges faced by competition authorities in a digital world. The memorandum is a first joint product of the authorities of the Benelux countries. It refers to a number of recent studies,[2] and suggests some responses. The authors do not claim to address all the challenges faced by competition authorities. The memorandum focusses on issues in merger control, the need for guidance in fast moving digital markets, and the debate on an *ex ante* instrument providing for binding commitments without the establishment of an infringement

II. MERGERS IN A DIGITAL ENVIRONMENT

The questions raised in recent studies focus primarily on the ability to control the growth of platforms in a winner-takes-all environment and the current jurisdictional thresholds and assessment criteria (theories of harm), on the issue of so-called "killer acquisitions,"[3] and on the balance between *ex ante* and *ex post* assessments. The memorandum does not discuss issues related to joint ownership and national champions because they are less specific to the digital economy.

In view of the doubts and issues raised in the available studies,[4] the memorandum considers it most useful for the DG COMP to commission an economic study on merger control in the digital sector.

Building on previous studies, such a study could analyze past acquisitions by the main platforms in the past decade, and review past merger decisions taken by competition authorities.

For the acquisitions that were not subject to review by competition authorities (e.g. because the turnover threshold was not exceeded), the study could examine whether plausible theories of harm, such as the ones proposed by Crémer et al. (2019), or, by contrast, whether efficiencies have developed.

2 Crémer, J., de Montjoye, Y.-A. & H. Schweitzer (2019), "Competition policy for the digital era," European Commission, Brussels; Furman, J. et al. (2019), "Unlocking digital competition, Report of the Digital Competition Expert Panel: An independent report on the state of competition in digital markets, with proposals to boost competition and innovation for the benefit of consumers and businesses"; Stigler Center (2019), "Digital Platforms, Markets and Democracy: A Path Forward." Stigler Center for the Study of the Economy and the State at the University of Chicago Booth School of Business, Chicago; Lear (2019), "Ex-post Assessment of Merger Control Decisions in Digital Markets," document prepared for the Competition and Markets Authority. See also the recent *Common Understanding of G7 Competition Authorities on "Competition and the Digital Economy"* http://www.autoritedelaconcurrence.fr/doc/g7_common_understanding.pdf.

3 The term killer acquisition is used, because it is often used in policy comments even if, as explained by Crémer et al. (2019) on page 117, there are in their opinion no "killer acquisitions" in the tech sector.

4 See on the introduction of alternative thresholds for merger control Crémer et al. (2019), op. cit, p. 115 advise to wait but see also the letter of the Dutch Secretary of State for Economic Affairs and Climate Policy to Parliament of May 20, 2019 (brief van Staatssecretaris mr. drs. M.C.G. Keijzer to the Voorzitter van de Tweede Kamer, accessible via https://globalcompetitionreview.com/article/1193142/).

For the acquisitions that were reviewed by competition authorities, the study can seek to find out if competition authorities had access to sufficient information to investigate the relevant theories of harm and efficiencies.

Based on the analysis, the study would need to discuss policy options designed to address any possible under enforcement of competition rules in the digital sector, such as:

- how competition authorities should assess the competitive potential of start-up companies and whether more guidance should be given to allow for self-assessment prior to notification;
- a change in the jurisdictional thresholds, e.g. by introducing an additional threshold based on the market power of the acquirer and/or the value of the transaction;
- whether and how a balance of harms could or already can be implemented, and whether it would improve merger review;
- whether the burden of proof could be reversed, under which circumstances, and whether it would have led to a more competitive outcome;
- whether there would be options for competition authorities to revise their assessment when young targets have further developed (possibly by requiring that acquirers keep assets and teams separate for a given period of time).
- how the information-gathering power of competition authorities could be broadened for the review of acquisitions of start-ups by digital platforms.

III. *EX ANTE* GUIDANCE FOR DIGITAL AND OTHER FAST-MOVING MARKETS

The digital economy and other fast-moving markets confront us with the challenge of having a real impact on market behavior within a time period that meets the legitimate expectations of stakeholders.

When infringement cases concern novel issues, according to the memorandum we need, e.g.:

- early identification, case allocation, and fast track cooperation mechanisms in related cases as envisaged in the ECN "early warning" procedure;
- complemented by enhanced up-front information exchange within the ECN at the earliest possible stage concerning investigations that may lead to broader media attention;
- further optimization of accelerated procedures such as single or multiple Member State competition authority settlements and commitments;
- optimization of interim measures procedures; and
- more generally the use of any technique(s) that may bring forward the useful effect of such procedures, e.g. by communicating on dawn raids.[5]

But this will not be sufficient.

5 While the BCA considered in the past that it could only communicate by not denying that a dawn raid took place, it changed this policy at the suggestion of the Belgian association of competition lawyers now issues a press release in order to create a level playing field for leniency applicants indicating the sector. See e.g. press release 21/2018.

Competition Policy International, Inc. 2019© Copying, reprinting, or distributing
this article is forbidden by anyone other than the publisher or author.

A. Guidance Papers

Competition authorities must, according to the memorandum, develop the ability and willingness to offer *ex ante* guidance on specific issues,[6] also before they (and the courts) develop the relevant case law. Guidance papers cannot be expected to have an impact on new developments if they come after the market has waited for years for infringement decisions and their confirmation or annulment in court.

Guidance is expected in the first place from the European Commission. But when the European Commission does not think guidance is relevant, or that particular issues are country-specific, Member State competition authorities could and should also take the initiative. In this case, they should, according to the memorandum, exchange drafts and experience *ex post* within the ECN in order to facilitate the development of a coherent policy within the EU.

B. Case-by-case Guidance Letters

The European Commission and Member State competition authorities have, since the entry into force of Regulation 1/2003, been reluctant to give individualized opinions on the compatibility with competition law of envisaged multilateral or unilateral practices as they want to avoid re-introducing individual exemptions "by the back door." This explains also the lack of use of article 10 of Regulation 1/2003 and the limited practice under the *Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)*.[7] The ACM, the BCA, and the Conseil de la concurrence share this concern. They have nevertheless developed a limited practice of "*informele zienswijzen*" if not "*comfort letters*."[8]

The memorandum proposes to examine, in specific circumstances, the possibility of developing a less formal fast track commitment procedure, e.g. as a development of the practice under article 10 of Regulation 1/2003 or in line with the Notice on informal guidance.

We suggest examining the following issues, for example:

- The scope of application of any such practice: should it be only for specific sectors, specific operators (only in case of dominance on the relevant markets or not), or specific issues?
- Information exchange within the ECN in case of a Commission "case" / opportunity for concertation in case of a "case" before a Member State competition authority.
- The level of transparency and the publication of guidance letters.
- The rights of third parties?
- The possibility of judicial review?[9]

The introduction of such a procedure may not require a legislative change. But it might require a change of culture and the willingness to abandon in some cases the possibility or even probability of establishing an infringement in order to give priority to a faster outcome that will not only provide specific guidance to the parties involved but also to others.

6 Crémer et al. (2019), op. cit. p. 126. See also the conclusions in the above-mentioned letter of Minister Keijser, pp. 10-11.

7 *OJ* 2004 C 101/78.

8 See the annual reports of the two authorities.

9 We can indicate that also in formal settlement procedures Belgian competition law excludes judicial review.

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2019© Copying, reprinting, or distributing
this article is forbidden by anyone other than the publisher or author.

IV. THE INTRODUCTION OF AN *EX ANTE* INSTRUMENT PROVIDING FOR REMEDIES WITHOUT THE ESTABLISHMENT OF AN INFRINGEMENT

One drawback of the current enforcement toolkit is that *ex post* enforcement can be too slow in digital and other fast-moving markets. When such markets are characterized by winner-takes-most dynamics, strong network effects, high barriers to entry due to data collection and consumer lock-in, there is a risk that *ex post* enforcement comes too late to keep markets competitive and contestable. Therefore, the memorandum supports the proposal of the Netherlands' Secretary of State for Economic Affairs and Climate Policy to introduce an *ex ante* intervention mechanism to prevent anti-competitive behavior by dominant companies acting as gatekeeper to the relevant online ecosystem.

A. Ex Ante Tool to Prevent Competition Problems

The proposal envisages a tool that allows the European Commission and Member State competition authorities to impose proportionate remedies on dominant companies in order to prevent competition problems, rather than relying on after-the-fact enforcement. The ability to impose these remedies resembles the powers that the CMA has to impose remedies following market studies and the powers of the Member States' telecom authorities to impose remedies on companies with significant market power. But, unlike the CMA powers, the memorandum only envisages behavioral remedies. Examples are platform access, data portability, data-sharing, and non-discriminatory ranking. Rather than broad-stroke regulation, these remedies should be proportionate and tailored to specific situations.

Strategies and economic dynamics that lead companies to become dominant do according to the memorandum not necessarily create competition problems. Strong growth, innovation, and new services benefit consumers and other companies. The risk, however, is that, once a company becomes dominant, its incentives may shift to protecting its market position by foreclosing actual and potential competitors or deliberately raising switching costs. The *ex ante* tool therefore should be designed to prevent this, closely following the interpretation of dominance and abuse in the context of Article 102 TFEU, and the remedies should seek to prevent a dominant company from abusing that position. Staying close to the well-established terminology and case law of EU competition law reduces the risk of lengthy legal procedures that the introduction of new concepts will involve. Additionally, such an approach would increase legal certainty and predictability. Since market definition in dynamic multisided markets can be complex, updated guidelines clarifying how e.g. the role of data, consumer behavior, and network effects should be taken into account are also considered desirable. This will also enhance uniformity in the approaches adopted by the European Commission and the Member State competition authorities.

B. Non-punitive in Nature

The non-punitive nature of the tool could facilitate a constructive dialogue with the dominant company as it is not accused of any wrongdoing, and will not face fines and damage claims if it accepts the findings of the competition authorities' assessment. For the same reason, it may also lead to agreed commitments at an earlier stage, avoiding long drawn-out legal battles with a strong emphasis on procedural defense that come with punitive sanctions.

C. EU and National Levels

The ACM, BCA, and Conseil de la concurrence are of the opinion that such a tool should ideally be available at both the EU and national levels. The Commission is best placed to impose remedies on EU-wide dominant companies so as not to impair the functioning of the single market. However, given the heterogeneous nature of both platforms and markets, enforcement at the national level may be in line with subsidiarity principles. Some companies might be dominant only in one Member State.

D. Procedural Considerations

The ACM, the BCA, and the Conseil de la concurrence are of the opinion that rebuttable presumptions on the proportionality of certain remedies are appropriate for effective and efficient enforcement, particularly in light of the non-punitive character of the *ex ante* instrument. An effective punitive mechanism should be in place if companies do not abide by the imposed remedies. Also, private enforcement of the remedies should be made possible.

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2019© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

E. Comparison with Existing Tools in EU Competition Law

This new *ex ante* tool will differ from the powers granted to the Commission on the basis of Article 7 of Regulation 1/2003, as it is not required to establish an infringement. Also, for an Article 8, Regulation 1/2003 interim decision a *prima facie* finding of an infringement is required. Even an Article 9, Regulation 1/2003 commitment decision requires an intention by the Commission to adopt a decision requiring an infringement to be brought to an end. The powers to be granted to the Member States' authorities on the basis of Directive 2019/1 require similar findings before remedies can be imposed. Therefore, the proposed *ex ante* tool fills a gap.

F. Examples of Issues and Potential Remedies

Although the *ex ante* tool is envisaged to create tailor made solutions to specific market problems in individual cases, a number of recurring competition concerns can be distilled from reports on the digital economy and online platforms. We think that the *ex ante* add-on to the toolbox could address these concerns.

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2019© Copying, reprinting, or distributing
this article is forbidden by anyone other than the publisher or author.

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.