

Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world

A number of studies have been published in the last few months about the specific challenges that the digital economy raises for competition authorities.¹ These reports, while taking different angles, share a number of findings about the key characteristics of the digital economy. In the words of Crémer et al. (2019) the digital economy is characterized by extreme returns to scale, network externalities, and data is a crucial ingredient. Although they do not propose to change the basic competition rules in the Treaty, they contributed to a lively debate in the Union and many Member States on competition and industrial policy, the role of competition authorities and the instruments and resources required to deliver what stakeholders are entitled to expect.

The ACM, BCA and Conseil de la concurrence wish to contribute to these discussions and actively participate with their ECN colleagues in the further development of European competition policy during the mandate of the next European Commission.

This memorandum cannot address all the challenges faced by competition authorities. It focusses rather 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

1. Mergers in a digital environment

One of the main points of discussion (and sometimes disagreement), concerns the appropriate policy actions in relation to merger control—as shown not only by the policy actions proposed by the reports, but also by subsequent commentaries. The questions raised focus primarily on the ability to control the growth of platforms in a winner-takes-all environment and the current jurisdictional thresholds

¹ Crémer, J., de Montjoye, Y.-A. and 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).

and assessment criteria (theories of harm), on the issue of killer acquisitions², and on the balance between *ex ante* and *ex post* assessments. This paper does not address issues related to joint ownership and national champions because they are less specific to the digital economy.

More specifically, a number of authors and commentators fear that dominant platforms can purchase small start-ups with a quickly growing user base, before competition authorities can properly review their competitive impact in a merger control assessment.

There are two underlying questions (see Crémer et al., 2019). First, the jurisdictional thresholds, as some of the potentially competition harming acquisitions may not be required to pass through (or escape) the screening of the Commission (or the national competition authorities), because they take place at a time “the start-ups do not yet generate sufficient turnover to meet the thresholds set out in the EUMR. This is because many digital startups attempt first to build a successful product and attract a large user base while sacrificing short-term profits; therefore, the competitive potential of such start-ups may not be reflected in their turnover”.³

Secondly, on substance, discussions have focused on cases “where a dominant platform and/or ecosystem which benefits from strong positive network effects and data access, which act as a significant barrier to entry, acquires a target with a currently low turnover but a large and/or fast growing user base and a high future market potential”.⁴

A first policy question on substance concerns the so-called “balance of harms,” whereby competition authorities instead of considering, as is currently the case, only the *likelihood* of harm in a specific merger, would also take into account the *scale* of potential competition harm of the transaction. That is, merger control would be stricter in cases where dominant platforms that enjoy significant network effects and barriers to entry, acquire (potential) competitors. Furman et al. (2019) propose for instance that change should be made to the UK legislation to allow the CMA to use a “balance of harms” approach. Similarly, Stigler center (2019) argues that “[u]nderenforcement is likely to be costlier than previously thought because, among other things, market power of large technology platforms is more enduring,” and Crémer et al. (2019) explain that “competition law should try to translate general insights about error costs into legal tests. The specific characteristics of many digital markets have arguably changed the balance of error cost and implementation costs, such that some modifications of the established tests, including allocation of the [...] definition of the standard of proof”

A second, related question, is whether in these specific circumstances, the burden of proof should be reverted. Some suggest that instead of imposing, as is usually the case in competition investigations, that competition authorities show that the merger will have a negative impact on the market before they block the acquisition (or impose remedies), one would impose on the acquirer to show the pro-competitiveness of its acquisition, or the lack of competitive harm.

² 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.

³ Crémer et al. (2019), op. cit.

⁴ Crémer et al. (2019), op. cit.

Learlab (2019) reviewed acquisitions of Amazon, Google and Facebook in the last decade. Their study shows that horizontal mergers seem to be a minority.

The authors explain that Amazon, Google and Facebook acquire young targets,⁵ which may be problematic for competition investigations, “to the extent that there are considerable difficulties in understanding the competitive implications of acquiring a young firm, as at that stage in their life cycle their evolution is still uncertain and it is therefore very difficult to determine if the target will grow to become a significant competitive force.” In merger control, this comes along with significant difficulties, because competition authorities need to predict the evolution of the target in the absence of the merger, i.e. the counterfactual. “This is especially challenging when, as is often the case, targets are young firms at the early stage of their development. In markets as dynamic as digital markets, evolution may be the result of the target’s independent decision to change its business model and/or investments made by venture capitalists and/or the decision of other entities in the industry to purchase the target and integrate it in their own operations. In other words, when defining the counterfactual to a merger, [competition authorities] may need to consider the ability of the target to develop, on its own or attracting outside resources, as well as the likelihood of an alternative buyer coming along”.

Therefore, and in view of the doubt or the issues left open or raised in the available studies⁶, **it would be most useful for the DG COMP to commission an economic study on merger control in the digital sector.** Building on previous studies, most notably Learlab (2019), the authors would analyze past acquisitions undertaken by the main platforms in the past decade, and review past merger decisions taken by competition authorities. They would also study which type of mergers are caught under the jurisdictional thresholds that are not based on turnover, such as transaction-value based thresholds. For the acquisitions that were not subject to review by competition authorities (e.g. because the turnover threshold was not exceeded), the authors would study whether plausible theories of harm, such as the ones proposed by Crémer et al. (2019), or efficiencies have developed. For the acquisitions that were reviewed by competition authorities, they would seek to find out if competition authorities had access to sufficient information to investigate the relevant theories of harm and efficiencies. Based on their analysis, the authors would discuss policy options designed to address an alleged 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;

⁵ The age of the target 6.5 years for Amazon, 2.5 years for Facebook and 4 years for Google.

⁶ 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 Minister of the economy to Parliament of 20 May 2019 (brief van Minister mr. drs. M.C.G. Keijzer to the Voorzitter van de Tweede Kamer, accessible via <https://globalcompetitionreview.com/article/1193142/>).

- whether there would be options for competition authorities to revise their assessment when young targets have further developed (eventually, by imposing that acquirers keep assets and teams separate for a given period of time).
- how information-gathering power of competition authorities could be broadened for the review of acquisitions of start-ups by digital platforms.

2. 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 behaviour within a time period that meets the legitimate expectations of stakeholders.

When infringement cases concern novel issues we need e.g.:

- an early identification and case allocation and fast track cooperation 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,
- a further optimization of accelerated procedures such as single or multiple Member State competition authority settlements and commitments,
- an optimization of interim measures procedures,
- and more generally a use of any technique that may bring forward the useful effect of such procedures, e.g. by communicating on dawn raids⁷.

But this will not be sufficient:

1. Guidance papers

Competition authorities must develop the ability and willingness to offer *ex ante* guidance on specific issues⁸, also before they (and the courts) developed 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 can and do also take the initiative. In this case, they should exchange drafts and experience *ex post* within the ECN in order to facilitate the development of a coherent policy within the EU.

2. 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 individualised opinions on the compatibility with

⁷ 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.

⁸ Crémer et al. (2019), op. cit. p. 126. See also the conclusions in the above mentioned letter of Minister Keijser, pp. 10-11.

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)*⁹. 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*'¹⁰.

We propose to examine the possibility of developing an approach that would allow the European Commission and Member State competition authorities to sidestep the infringement route in a much less formal and 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 to examine e.g. the following issues:

- The scope of application of such practice: 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 review¹¹?

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 to establish 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.

3. The introduction of an ex ante instrument providing for imposed 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 characterised 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 ACM and the BCA support 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 behaviour by dominant companies acting as gatekeeper to the relevant online ecosystem.

Ex-ante tool to prevent competition problems

We envisage 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. These

⁹ OJ 2004 C 101/78.

¹⁰ See the annual reports of the two authorities.

¹¹ We can indicate that also in formal settlement procedures Belgian competition law excludes judicial review.

remedies will be behavioural in nature. Examples are platform access, data portability, data-sharing and non-discriminatory ranking. Rather than broad-stroked regulation, these remedies should be proportionate and tailored to specific situations.

It should be noted that the strategies and economic dynamics that lead companies to become dominant do 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 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, it increases 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 behaviour and network effects should be taken into account are desirable. This will also enhance a uniform approach by the European Commission and the Member State competition authorities.

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 the voluntary acceptance of reasonable commitments at an earlier stage, avoiding long drawn-out legal battles with a strong emphasis on procedural defence that come with punitive sanctions.

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.

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 with the imposed remedies.

Comparison with existing tools in EU competition law

This new ex-ante tool differs from the powers granted to the Commission on the basis of Article 7, 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.

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.

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