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K&L GATES

陽明國際律師事務所
YANGMING PARTNERS



Melanie Bruneau

Belgium

melanie.bruneau@klgates.com

+32 2 336 1940

www.klgates.com

K&L GATES



Antoine De Rohan Chabot

Belgium

Antoine.DeRohanChabot@klgates.com

+32 2 336 1941

www.klgates.com

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A Path for EU Merger Control Reform: What's next with the new European Commission?

By Melanie Bruneau, Antoine De Rohan Chabot & Antonia Rountou

In the Political Guidelines for the Next European Commission 2019-2024, President Ursula von der Leyen stated, "I see the next five years as an opportunity for Europe – to strive for more at home in order to lead in the world." This marks the start of a five-year policy and regulatory cycle for the new College of European Commissioners, which took office on 1 December 2019. The main guidelines and proposed agenda reflect a strong emphasis on three key priorities which includes climate change, digital transformation and economic policy.

In this context, Ms Margrethe Vestager, appointed as the European Union (EU)'s Competition Commissioner for a second term, will run the extended portfolio under the title "A Europe fit for the digital age". As the European Commission (EC)'s Executive Vice-President, Ms Vestager is called upon to assume additional responsibility for the term of her new mandate by leading on EU digital policy issues and introducing regulatory and legislative proposals on the digital economy.

The Future of Merger Control in the Digital Era

Merger control reform in the digital era ranks high on the political agenda of the EU. A draft document setting forth the EU's build-

ing blocks for a new industrial strategy, which shall announce an evaluation and review of EU competition rules to ensure enhanced contribution to a strong European industry is expected to be published in March 2020.

Ms Vestager has identified as priority to explore the ways in which competition policy should evolve to promote innovation in the digital sector. In particular, the April 2019 report ("*Competition policy for the digital era*") prepared by three special advisers, appointed by Ms Vestager, advocated significant changes to EU merger control. The report focuses on instances where a dominant platform, which benefits from strong positive network effects and data access, acquires a target with a currently low turnover but a large user base and a high future market potential. The advisers, each coming from a different legal, economic and technology background, considered the existing framework and underlined that the focus should shift to theories of harm and the identification of anti-competitive strategies.

Calls for reform come from the European Commission but also from a selected number of EU Member States, industry actors and other stakeholders. Nevertheless, the key players have highlighted objectives pulling in different directions.



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By contrast, following the EC's prohibition of the Siemens/Alstom merger in February 2019, the French and German governments called for more flexibility in the EU merger review, taking into greater consideration the potential global competition constraints and the future growth of non-EU competitors, with China as the strongest among them. Joined by Poland, the French, German and Polish governments issued in July 2019 a proposal with the title "Modernising EU Competition Policy". Among others, the proposal focuses on endorsing the Council's input into policy and decision-making process at both political and technical level.

More recently, in October 2019, the Competition Authorities of Belgium, the Netherlands and Luxembourg ("BeNeLux") contributed to the on-going dialogue in respect of the specific challenges that the digital economy raises for competition authorities. The BeNeLux Authorities highlighted in their "Joint Memorandum" that the existing case law can provide limited guidance in tackling the specific competition issues arising in fast moving digital markets. It was also underlined that, as the intervention mechanisms are currently designed, ex-post enforcement can prove too slow in the digital era. To that end, the BeNeLux Authorities urged the EC to issue ex-ante guidance papers and envisage the development of ex-ante enforcement tools, providing for binding commitments without the establishment of an infringement. Such mechanisms would provide for behavioural remedies on dominant companies in the absence of any finding of an infringement of Article 102 Treaty on the Functioning of the European Union ("TFEU").

The issue of tackling "killer acquisitions"

Whether and how competition rules should be adapted for the digital age is one of the most rigorous debates at the moment when it comes to competition policy and enforcement. In this context, the question surrounding the so-called "killer acquisitions", whereby incumbents acquire potential future rivals or rival products to neutralise their competitive threat, remains a recurring subject. This perception is particularly prominent within the digital sector as giant tech firms seek to acquire start-ups with promising and innovative products.

The question of "killer acquisitions" has been in the centre of some of the EU Member States' concerns. The BeNeLux Authorities hint to the fact that this sort of transactions might be escaping regulatory scrutiny altogether, since start-ups do not generate revenues that would exceed the current jurisdictional thresholds. The adjustment of merger control thresholds for some companies, the success of which cannot be measured by turnover, but rather by their ability to build their network or to collect data, and the reversal of the burden of proof are gaining increasing attention within the competition law circles.

In light of the foregoing, Commissioner Vestager has touched upon the issue of "killer acquisitions". Echoing the April 2019 Report, she highlighted that it is not the momentum to change the existing EU Merger Regulation's ("EUMR") thresholds and that the experience of Germany and Austria, which introduced transaction value-based thresholds, should be monitored. As regards



data, the EC has progressively developed a fine-tune approach to assess their role in merger cases. As shown by recent precedents - namely Apple's acquisition of Shazam and Facebook's acquisition of WhatsApp - the EC used the so-called "4 Vs" for comparing one set of data against another set of data, namely Variety, Velocity, Volume and Value. Nevertheless, such acquisitions raise complex questions that require further in-depth review.

National initiatives have been launched provided that, ultimately, the issue of "killer acquisitions" can only be effectively addressed at the European level. At this stage, there is limited indication on how the European Commission shall react to and deal with such concentrations. A French proposal is being reviewed to establish a list of "systemic companies" which would have to notify to the competition authority every acquisition before concluding the deal. The EC does not seem convinced that this is the way to go as this would significantly increase the number of notifications and subsequent workload.

Further challenges in merger control – from market definition to non-EU subsidies

As one of her very first initiatives, Ms Vestager has announced her intention to proceed to an extended review and amendment on how relevant product and geographic markets are defined. The three prohibitions in 2019 – in Wieland/Aurubis, Siemens/Alstom and in Tata Steel/ThyssenKrupp/ JV – fuelled a public debate about merger control that touches upon further aspects. Keywords that surfaced frequently include "geographic market

definition", "European champions" or "potential competition". In a speech delivered in Brussels in December 2019, "Defining markets in a new age", Ms Vestager confirmed the upcoming review of the 1997 Market Definition Notice to adapt it to the age of globalisation and digitisation and the evolution of markets, in terms of their scope and nature. That comes at the utmost importance since, in the digital world, the interdependence of the "multi-sided platforms" has become a crucial part of the regulatory analysis. Ms Vestager noted that the guidance provided by the European Commission should be accurate and up-to-date, whilst ensuring a consistent approach to merger cases across different industries in a way that is readable and accessible.

As a last point, the vivid debate between the French and German national governments and the Directorate-General for Competition brought to light some tensions in respect of matters relating to foreign investment. Ms Vestager has highlighted the importance of fair competition not only with competition enforcement but also with reciprocity. A range of tools, other than mergers, could serve as a solution to the growing strength of Chinese companies. A "White Paper on an Instrument on Foreign Subsidies" is expected soon to tackle the distorting effect of non-EU state subsidies in the internal market benefiting non-EU state-supported companies. In addition, trade defence, antidumping policies and investment screening, including the new EU regulatory framework on foreign direct investment, which shall apply within the EU as of October 2020, could serve as means to restore the level playing field and fair competition at a global scale.

