

CorporateLiveWire

COMPETITION & ANTITRUST LAW 2020 EXPERT GUIDE

www.corporatelivewire.com



ABOGADOS
ARAOZ & RUEDA

CRA Charles River
Associates

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

K&L GATES

The interplay between EU Competition Law and Industrial Policy: The Grounds for a Reform

By Melanie Bruneau, Antoine De Rohan Chabot & Antonia Rountou

On 10 March 2020, the European Commission (“EC”) presented “A New Industrial Strategy for Europe” which outlines a comprehensive package of initiatives aiming towards a competitive, climate-neutral and digitalised industry. This industrial strategy is an important part of the EC’s priorities for the 2019-2024 Strategic Agenda.

The EU’s new industrial strategy proposes a range of actions in three pillars, including renewing existing approaches in innovation, investment and standards, enhancing the single market and levelling the playing field at a global scale.

Fair competition and competitiveness in global markets: what role for industrial policy?

The interest towards an integrated industrial policy at EU level was foreseen in the EC agenda. Since 2005, the EC has been regularly launching communications and action plans with the objective of promoting European industrial competitiveness and fostering sustainable growth. At the same time, both the EC and the EU Member States have called for further integration of the single market over the years where the objectives would be to develop a globally competitive and world-leading industry and a deeper and more digital single market.

On the competition law front, the prohibition of certain contemplated mergers in 2019 fuelled a vivid debate regarding the interplay between industrial and competition policy. The EC’s prohibition of the *Alstom/Siemens* merger has raised questions about the effectiveness of the existing mechanisms and the relationship between competition law and other public policy objectives. The French and German governments were the first ones tackling the issue of competition law preventing the creation of so-called “European Champions”. In their joint manifesto published in February 2019, France and Germany proposed a set of measures deemed necessary in order to render competition rules “fit for purpose” for pursuing a global competitive playing field. Joined by Poland in July 2019 and Italy in February 2020, the four EU Member States called for reforms of the EU Merger Regulation highlighting the need for flexibility given strong competition from foreign companies benefiting from substantial state support and protected domestic markets.

Alongside the issue of the anticipated EU merger control reform, EU competition law needs to respond to the challenges posed by the digital economy and to ensure effective competition in the digital markets. The stakes are high as not all countries outside of the EU are subject to the same competition rules and standards,



and states often have the possibility to allow for the implementation of industrial projects likely to circumvent competition rules.

The debate around the effectiveness of traditional antitrust enforcement has revived the discussion on the respective objectives of EU competition and industrial policy. One of the main questions concerns the appropriate standard for antitrust analysis and whether such standard should evolve to include non-antitrust aspects.

On the one hand, the objective of EU competition policy is to promote general consumer welfare, rather than to protect market competition. Restriction of competition is, in some instances, seen as the appropriate instrument to achieve a free and dynamic internal market, in which the trade between Member States is not adversely affected.

On the other hand, industrial policy is designed as horizontal in nature and aims to ensure framework conditions favourable to industrial competitiveness where the efficiency of industrial policies will depend on the level of competition on the market. In that regard, it should be noted that according to Article 173 of the Treaty on the Functioning of the European Union (“TFEU”) the aim of EU industrial policy is to speed up the adjustment of industry to structural changes and foster better exploitation of the industrial potential in the fields of innovation, research and technological development while avoiding any distortion of competition.

The single market and Europe’s industrial policy: What’s next?

The EC’s 2020 industrial strategy sets the goal of a dual-transition towards climate neutrality and digital leadership. In this context, Europe’s sovereignty is put at the centre of interest where Europe’s industry should enable and accelerate change and innovation. For these goals to become a reality, the EC’s industrial policy shall focus on the impact of international trade and geopolitical factors on the nature of competition.

By contrast, the EC insists on its position that there can be no competitiveness without fair competition. In a speech delivered on 2 March 2020, Margrethe Vestager, EU Commissioner for Competition, referred to the challenges being set for competition law, including global competition, protectionism, market distortions, trade tensions and challenges to the rules-based system. While Ms Vestager did not rule out the importance of competition as a key component of any industrial strategy, she stressed that competition rules are the appropriate instrument to preserve the benefits of the single market. In other words, competition policy should apply without discrimination to all market participants, regardless of the size of the company, its sector of activity or country of origin.

However, the EC recognises the importance of international cooperation in the competition field. The EC has already put in place mechanisms of consultation, cooperation and transparency between China and the EU in the field of state aid control since June 2017. In its industrial strategy, the EC supports the idea of promoting an open market, where a series of trade defence mechanisms will nevertheless be implemented in order to secure reciprocal access for European companies to the home country markets of foreign state-owned companies. Particular emphasis is put on the strengthening of the EC’s anti-subsidies toolbox and on the issue of foreign state-owned companies access to EU public procurement markets and EU funding. In this regard, a White Paper on an Instrument on Foreign Subsidies is expected to be published in mid-2020, to be followed by a proposal for a legal instrument in 2021.

The direction of the discussions surrounding the implementation of an active industrial policy at European and national level and its interaction with competition enforcement remains to be seen. In response to the Member States’ positions, Ms Vestager stressed that “the champions we need are not just the biggest companies; what we need are businesses, big or small, that are the best in the world at what they do”. The EC is exploring ways to reinforce and update its existing toolbox in view of global competition, but is reaffirming its stance that EU competition policy should remain independent of any other policy considerations.