EUI Florence Annual Competition Law and Policy Workshop
10-11 March 2022

Competition Law and Industrial Policy

Conclusions

1. In its first session, the Workshop addressed the overall theme of the interaction and possible tensions between competition policy and industrial policy. Competition authorities and governments had for a long time held the view that policies to promote the competitiveness of industrial sectors and of the economy as a whole need not come into conflict with competition and state aid rules. Support could be given for example to infrastructures, training and research without causing undue market distortions. The very objective of competition policy – to preserve and promote free and fair competition – created an environment in which the strongest firms would gain competitive advantage and provide the basis for sustainable economic growth and prosperity for society a whole. In this sense, competition policy has been seen as part and parcel of industrial policy. In the European Union, the creation of a single market provided European firms with a large home market. If they became competitive within this single market, they would be sufficiently strong to be competitive at an international level.
2. It was also acknowledged that an active competition policy could enhance the efficiency and effectiveness of sensitive sectors such as defence and security which were difficult to open up completely to competition. Reliance in public procurement on a sole supplier and as a single supply chain could expose these sectors to risks which could be avoided by the development of alternative supply chains, by encouraging new entrants and innovation. These measures to promote competition increased the resilience of strictly national policies.

3. This traditional and positive view of the relationship between competition and industrial policies had for some time now been called into question a political level.
4. In the first place, there was increasing scepticism, first as to whether competition policy really did guarantee free and fair competition – particularly if it prohibited the creation of strong national champions - and secondly as to whether the commitment to free and fair competition was sufficient to safeguard the competitiveness of firms and countries at an international level. Firms often had to compete with very large foreign firms who received substantial state support. Controls on foreign subsidies to inward investment and trading within the EU offered some response to the problem but it was difficult for the EU or any national government to take decisions on the legitimacy of support provided by foreign governments. Some decisions may in the end have limited competitive impact. Current deglobalisation trends had also exacerbated the difficulties of pursuing a free-market approach.
5. Secondly, it was recognised that competition policy could no longer be pursued without taking account of other policies which had a significant impact on markets and on competitiveness. There was a growing body of ex-ante regulation and an increasing amount of state support designed to achieve sustainability goals and to respond to crisis situations, recently in the financial and health sectors and more immediately in the energy sector. In addition, regulation was also preferred to competition law in order to deal with some competition problem such as excessive mobile roaming charges and bank interchange fees.
6. Thirdly, in the context of deglobalisation, there was a widespread move to reinject greater strategic autonomy and sovereignty into the governance of economies, and a greater willingness of governments – in a spirit of *dirigisme* – to regulate or provide financial support to, specific sectors with

the declared aim of bolstering their competitiveness. The EU itself was no exception in this respect. Its Projects of Common Interest, for example for batteries and microelectronics, followed this dirigiste logic.

7. Against this background, together with the challenges of decarbonisation and digitalisation, it was felt that a focus of competition policy on short-term price impacts, and on the pursuit of the ill-defined consumer welfare standard, risked being regarded as narrow and irrelevant. Analysing consumer impacts is necessary but not sufficient for robust results. Preserving and promoting competition for the benefit, not just of consumers but for business and for society as a whole, was an objective which had better political appeal.
8. In European administrative competition regimes, the inevitable lag between Court judgements on cases, as well as the heavy reliance of courts on the assessments made by competition authorities, had now led ironically to a situation in which a detailed effects-based approach now appeared to be mandatory in all cases. It had always been possible, and should continue to be possible, to identify practices and agreements, which can be prosecuted as anti-competitive by object, but this should be based on a substantial body of historical evidence as to their harm to competition.
9. The Workshop also discussed the extent to which competition investigations of mergers, restrictions and unilateral conduct were sufficiently comprehensive in their analysis of different categories of consumers (especially in two-sided markets) and of the impact on innovation in the short and long term.
10. Given that competition concerns on particular conducts and transactions were also being crowded out by attention to such issues as ESG, security and privacy, there was also the danger that competition authorities would be asked to undertake investigations on problems which they were not competent to handle and where the intervention of other

government departments and agencies would be more appropriate.

11. The second session of the workshop was focused on digital policies and the scope for divergence or convergence in the approach of different jurisdictions to the digital sector. Digital policies had a clear impact on comparative advantage and on competitiveness.

12. Considerable experience had gained in Europe through cases pursued against high tech companies and platforms. Several expert groups (Scott-Morton/Stigler, Furman and Ms. Vestager's advisers…) had also made a substantial contribution to the search for the best approach to the digital sector. However, it was agreed within the Workshop that there was still insufficient knowledge of, and expertise on, digital markets for competition authorities to develop effective enforcement strategies towards them.

13. Most participants expressed some preference for the more pragmatic changes made to German law and those proposed in the UK, rather than the wholesale ex-ante regulation approach of the European Commission's proposed Digital Markets Act(DMA). The *per se* prohibitions and negative presumptions envisaged in the DMA were too prescriptive and would lead to overenforcement. Implementation of the Act, alongside pursuit of cases under EU and national competition rules and private action, could well lead to chaos and confusion. The interplay between the activities of national competition authorities, acting in accordance with national competition law on the one hand and those of the Commission and national regulators who were applying the DMA, was not likely to result in coherent policies towards companies and platforms which were operating worldwide.

14. In addition, the changes in digital policies which were envisaged so far, whether in application of the DMA, or through amendments to national competition law, did not hold out the prospect of more rapid action by competition

authorities in response to problems on fast-moving digital markets. On the contrary, more thorough investigations, combined with the necessary dialogue with gatekeepers, with companies of paramount importance or special status on digital markets, would more likely lead to further delay and continuing legal uncertainty. Under the DMA, some designated gatekeepers could potentially obtain some protection from public and private action by reaching rapid agreement with the Commission on Codes of Conduct, but it remained to be seen whether those agreements would benefit either consumers or competitors.

15. It was also underlined by a number of participants that new digital policy proposals had concentrated so far on intra-platform problems rather than issues relating to inter-platform competition. The positive and negative aspects of inter-platform competition had therefore been largely ignored.

16. The Workshop acknowledged the potential advantages of regulatory competition between jurisdictions, each of which was trying to be the first to solve the problems in the digital sector. However, it regretted the lack of willingness of a number of authorities to work together in various fora to establish some common principles underlying digital policies.

17. More broadly, the Workshop pointed to the apparent contradiction in public opinion surveys between on the one hand, widespread satisfaction with the current provision of digital services and on the other hand outright hostility to the firms and platforms which supplied them. In terms of enforcement priorities, sectors such as telecoms and energy had a continuing track record of consumer harm which was arguably of more significance than that found in the digital sector.

18. The Workshop also called for more research and analysis on the enabling conditions for firms to be successful in digital markets. This would help European countries, as well as the EU as a whole, to devise policies which would encourage more

contestability to existing companies in the sector and increase Europe's overall digital competitiveness.

19. There was finally a consensus that the DMA was a train that had left the station. The Commission, national competition authorities and courts would now have to deal with its enforcement. They would learn from this inevitable period of experimentation, and as a result make the necessary changes to regulation and to competition law enforcement priorities.

20. In the Workshop's third and last session, the discussion turned to merger policies in the context of concerns about higher levels of concentration and a consequent increase in market power of incumbents and profit levels. In the light in addition of sustained allegations at political level of low value-added from competition policies, the European Commission and other competition authorities appeared to be prepared for change. However most participants in the Workshop shared the Commission's view that there was no justification for any significant amendment to the EU Merger Regulation. In conjunction with national merger control rules, it had so far served its purpose well. Transatlantically, there was also a distinction to be made between the debate on the need for change in the United States, where the emphasis was on weak enforcement, and that in Europe, where there were sometimes accusations of overenforcement (cf. the Siemens/Alstom prohibition).

21. With respect to market definition, the Commission had embarked on a full-scale review of its 1997 Notice. Some revision was necessary to reflect market developments and there would be further attention to the time dimension of market definition. It was planned to adopt a revised Notice in early 2023 after a period of wide consultation among all stakeholders.

22. In parallel, a considerable effort was being made to simplify procedures under the regulation for implementation of the EU Merger Regulation. The current high level of

notifications, combined with the increasing complexity of investigations into a limited number of more complex mergers, was putting considerable pressure on staff resources.

23. With respect to Article 22 referrals from national competition authorities, there was arguably an enforcement gap for problematic mergers which were not caught either by EU or by national thresholds. There was a need to close this gap.

24. On the international front, it was suggested that there was increasing convergence in the competition assessment of mergers but potentially more divergence in remedies.

25. As far as the European courts were concerned, it was emphasised that it was their task to examine merger cases, not overall merger policy. There were two recurring themes their assessment:-

- the control of the Commission's independent powers to vet mergers;
- the extent of the discretion exercised by the Commission and the scope of the judicial review by the courts.

26. It was emphasised that the EU system of merger control remained neutral and impartial as to the benefits of a merger, providing it had been assessed for its potentially negative effects on competition by the Commission, prior to its implementation. However, remedies policy reflected industrial policy considerations (for example in the energy and pharmaceuticals sectors) which were more difficult to assess under judicial review.

27. As to mergers in complex and fast-moving digital markets, there was a growing trend towards very lengthy Commission investigations and very lengthy decisions. This weighed down the work of the Commission and the courts. It called in to question the effectiveness and enforceability of EU merger control law and left considerable scope for further simplification. More detailed discussions between the

Commission, the courts and legal practitioners could help to achieve this.

28. Some proposals had been made to reverse the burden of proof for mergers involving dominant firms with high market shares in digital markets. This would clearly nuance the EUMR's existing neutrality on merger control with unintended consequences, including overenforcement. However, it was emphasised that additional attention to anti-competitive effects was necessary in very concentrated markets. Further options in this respect were, for example, lowering the burden of proof for very dominant companies and/or establishing lower notification thresholds for specific markets.

29. The attention of the Workshop was drawn to the situation of companies which were faced with the decision to invest heavily in expensive new infrastructure (eg 5G) or production facilities and which needed some assurance that if market demand was in the end insufficient to provide sufficient profitability, they could exit the market. Merger control could well prevent exit with detrimental effect on competition if the companies concerned were forced to maintain a presence on the market even though they did not exert any competitive pressure on other market players. In these circumstances, it was important that competition authorities investigated the dynamic and strength of actual and potential competition more closely and took account of the entry and exit conditions.

30. Finally the Workshop stressed the importance of ex-post evaluation of merger cases which provided valuable guidance for the conduct of future investigations and for remedies policy.

PL/150322