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CONCURRENCES LAW & ECONOMICS WEBINARS

EU NEW COMPETITION TOOL: A paradigm shift in competition rules for the digital economy and beyond ?

Webinar - 29 September 2020*

Webinar organised in partnership with Freshfields and Compass Lexecon, as part of the Concurrences Law & Economics Webinar Series.

Alastair Chapman

Alastair Chapman opened the webinar by giving the participants to the webinar some background information on the EU's new competition tool and introducing the panellists. The European Commission's consultation on a new competition tool closed earlier in October. Many preliminary questions remain unanswered, including first, is there an enforcement gap which justifies that the adoption of a new tool, or are existing instruments sufficient to address the issues identified by the Commission? And second, what should be the legal standard be to determine that an issue has arisen and conducted an investigation?

Mr Chapman also stressed that businesses have been keen to be given clarity on the scope of application of the new competition tool, especially whether it would be limited to digital markets or whether it would be of more general application. Furthermore, it remains unclear whether the new competition tool would be used as a last resort, or whether it could be used instead of existing enforcement mechanisms, such as those available under Articles 101 and 102. The impact assessment suggested that the European Commission might be able to use the new competition tool when it deems that other tools would be less effective. However, given that the new competition tool allows the imposition of remedies without a finding of illegality, the Commission might, in fact, resort to the new competition tool rather frequently, and perhaps to the detriment of existing, more tightly constrained powers. Finally, Mr Chapman emphasised the call for reassurance on the length and cost of investigations, as well as the applicable checks and balances to safeguard the rights of those affected, including their recourse to judicial (or another kind of) oversight.

> **"GIVEN THAT THE NEW COMPETITION TOOL ALLOWS THE IMPOSITION OF REMEDIES WITHOUT A FINDING OF ILLEGALITY, THE COMMISSION MIGHT, IN FACT, RESORT TO THE NEW COMPETITION TOOL RATHER FREQUENTLY."**
> ALASTAIR CHAPMAN

> SEE SPEAKERS' PRESENTATIONS, VIDEO AND TRANSCRIPT ON CONCURRENCES.COM WEBSITE (CONFERENCES > 29 SEPTEMBER 2020)

* Concurrences drafted the present synthesis. The views and opinions expressed in this Document do not necessarily represent those of the speakers' institution or clients.

Marieke Scholz

Marieke Scholz gave an overview of the state of play of the ongoing impact assessment for a possible New Competition Tool, which was launched on 2 June 2020. The inception impact assessment published on that day aimed at determining whether there is a need for an additional instrument complementing the existing competition rules and exploring its possible design.

The Commission also launched a public consultation to gather more detailed stakeholder feedback on these issues. In parallel, discussions have taken place with the national competition authorities, which have the parallel competence to apply Articles 101 and 102 TFEU in their respective jurisdictions and therefore valuable experience with structural competition problems that cannot be tackled or addressed most effectively under these provisions. The Commission also commissioned expert advice by renowned academics to further explore important elements of such a new instrument, including its institutional and procedural design, possible intervention triggers and underlying theories of harm, as well as the interplay with sector-specific regulation.

Ms Scholz then commented on the feedback received during the public consultation, which closed on 8 September 2020. Two-thirds of the submissions came from businesses and business associations located in Europe, many of which are providers of digital goods or services. Other participants were academics and research institutions, consumer organisations, citizens, NGOs, and public authorities. In their replies to the online questionnaire, stakeholders identified market features that they considered to give rise or contribute to structural competition problems (e.g. access to inputs and assets which are essential to compete, network effects, high market concentration and vertical integration). The consultation also showed that the scenarios identified as giving rise to structural competition problems (e.g. repeated leveraging, anti-competitive monopolisation, gatekeeper scenarios and tipping markets) were considered by many stakeholders as not being covered by the existing competition rules. Ms Scholz explained that there is more support for a market structure-based tool considering that some problematic situations involve non-dominant players.

“BROAD INVESTIGATIVER POWER MUST BE COUNTERBALANCED BY DUE PROCESS AND PROCEDURAL SAFEGUARDS.”
MARIEKE SCHOLZ

She stressed in this context that the identified market features, such as network effects, are not problematic as such since they can often have pro-competitive effects.

However, in specific circumstances, they can prevent markets from self-correcting, as a strong incumbency advantage may hinder innovative rivals with better products from getting access to a sufficient user base (e.g. in markets characterised by high switching costs and a lack of multi-homing). As regards the design of such a new instrument, stakeholders emphasised that there is a need for sufficient predictability and legal certainty as to which situations would trigger an investigation, but also for flexibility in respect to possible follow-up actions and remedies. Many stakeholders argued in favour of broad investigative power allowing the Commission to gather all relevant information, which must be counterbalanced by due process and procedural safeguards. Stakeholders also pointed to the need for binding deadlines, including for the businesses under investigation when requested to provide relevant information, to ensure the timeliness of intervention under such a new instrument.

Timothy Lamb

Timothy Lamb stressed that, over the last few years, there has been considerable concern over the competition in digital markets, which has resulted in numerous theoretical papers and reports identifying new ways in which competition can be harmed in digital markets. However, he noted that looking at the claims, there is no evidence supporting such assertion and the idea of an enforcement gap by reference to Articles 101 and 102 TFEU. The existing EU framework has proved itself remarkably adept at treating novel or complex issues relating to the digital sectors such as multi-sided markets, zero price features, innovation theories of harm.

In recent years, the European Commission has demonstrated that Articles 101 and 102 are flexible enough to deal with those issues. And so, when we talk of an enforcement gap, the question must be raised as to whether - through the NCT / DSA combination - we are witnessing the introduction of a sweeping efficiency offence? That question can be elaborated upon by reference to how the current debate is discussing self-preferencing where there are very few limiting principles being discussed and yet it is business conduct which lies at the heart of our economy and is key to

the efficiencies generated for the benefit of consumers. Regarding safeguards, Timothy Lamb stressed the difficulty of identifying what safeguard would be relevant. He queries the distinction as to what can be captured under Articles 101 and 102 TFEU and what might be captured by the new competition tool, and therefore the interaction between the different regimes. For example, if the European Commission is considering an investigation under Article 102 on refusal to supply, but indispensability criteria are not satisfied, can it then flip to the new tool?

Finally, Mr Lamb commented on the UK framework and the existence of elaborate safeguards and due process. Detailed guidelines apply to the conduct of market investigations in the UK, including precise timescales that envisage site visits, the publication of working papers and annotated issues statements, a series of hearings with concerned parties, and consultation on any recommended remedies. Then, there is a strong judicial review by the Competition Appeal Tribunal ("CAT"), which reviews the merits of the CMA's decisions.

"THE EXISTING EU FRAMEWORK HAS PROVED ITSELF REMARKABLY ADEPT AT TREATING NOVEL OR COMPLEX ISSUES RELATING TO THE DIGITAL SECTORS."
TIMOTHY LAMB

Although the EU Courts will certainly review the Commission's actions, the standard of that review is not as high as in the UK. It is unclear whether all those safeguards; which are critical for the legitimacy of the process and expected by companies, can be replicated within the European Commission's current architecture.

The legal standard for intervention and evidentiary burden need to be lowered, and strong checks and balances must be put in place. Finally, Timothy Lamb noted that the Commission's proposals, if enacted, would then mark a significant shift in legal and regulatory enforcement. Reforms of such significance should only be introduced following a meaningful cost/benefit assessment as there are clear trade-offs here and those trade-offs should be spelt out clearly. But beyond that, such a shift in focus would also raise some important questions such as: (i) does the current direction of travel lead to regulatory proposals/enforcement (e.g. self-preferencing, data silos) that significantly harm the efficiencies that are generated from the current integrations? (ii) are these approaches severing feedback loops and network effects that result in value creation for users and the economy more broadly? (iii) is there an alternative path through which we could explore options which would seek not to remove the efficiencies, but which aim at a re-distribution of those efficiencies and value preservation?

John Davies

John Davies has been broadly supportive of the new competition tool, noting that market tipping is not covered by existing tools effectively. Asked about tipping, Mr Davies gave the examples of VHS vs Betamax, and Blu-ray vs HD-DVD, stressing the initial war between competing businesses in relation to technology standards. Tipping also happened in the market for word processing software, with Word being now virtually the only word processor on the market.

"THE FOCUS SHOULD NOT BE ON THE FIRMS' CONDUCT BUT ON THE MARKET'S STRUCTURE AND PROMOTING COMPETITION."
JOHN DAVIES

However, there is potentially a difference between standard tipping to a given technology and the market tipping to a monopoly provider – competing word processors are now compatible with Word. Markets tip largely because of direct and indirect network effects between users on the same side or different sides of the market, through technology, standards and compatibility, particularly when there are barriers to entry. The new competition tool would not be useful in trying to stop companies tipping in the first place, as one would not be able to identify what companies are likely to tip successfully.

Mr Davies also objected to the relevance of prohibiting companies that are not in a dominant position from adopting conduct that would consist of abuse if they were in a dominant position. Targeted interventions that actually promote competition should be encouraged: making standards available more widely, promoting interoperability, restricting monopoly power that comes from a market that has tipped so that any monopoly is strictly limited to the asset that has become the standard rather than leveraging into other markets, etc. Articles 101 and 102 are not useful here. The focus should not be on the firms' conduct but on the market's structure and promoting competition. Regarding remedies, John Davies noted that a new instrument can provide for remedies affecting the market in itself, rather than an individual company or a small group of companies.

Questions & Answers

In response to a question about the possibility to impose interim measures and accept commitments under the new competition tool, Marieke Scholz explained that both possibilities should also be explored under such a new instrument. While both could help to ensure the effectiveness of the intervention, commitments could also increase the timeliness by resulting in a swifter termination of the investigation. Given that Regulation 1/2003 is only applicable to investigations under the existing competition rules, a new procedural framework would be required for that purpose.

A panellist asked whether such a market investigation instrument should be limited to tipped markets only, or also include tipping markets. He stressed that, if applied to the tipping markets, intervention may result in type one errors. Marieke Scholz emphasised the importance of conducting a very careful case-by-case analysis in such cases, including an assessment of the costs and benefits of any such intervention. The results of this assessment would depend on the specificities of the market concerned. John Davies added that type one errors and type two errors are made whatsoever; they cannot be avoided completely. He noted that the European Commission's impact assessment appeared to be based on the idea that the Commission would not make mistakes. This assumption distorts the cost-benefit analysis, which would necessarily be positive if all decisions are assumed to be correct. The risk of errors, including any asymmetric consequences of Type 1 and Type 2 errors - should be accounted for in impact assessments for designing policy and instruments.

Linda Martin, from Baker and McKenzie, asked Marieke Scholz whether DG COMP anticipates that national competition authorities be given new competition powers, given the risk of adverse effects from early intervention, which could be multiplied? Ms Scholz explained that the problem definition in the inception impact assessment focused on structural competition issues with an EU dimension. The need for such a new competition tool at the national level was, however, being discussed with national competition authorities, some of which have expressed an interest in having a similar tool. Alastair Chapman added that the question also goes to the legal underpinning for the new competition tool and the determination of whether it is proper to rely on Articles 103 and 114 of the Treaty. ■