

TO THE COMMISSIONER RESPONSIBLE FOR COMPETITION

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* Market regulation is increasingly political and, for good or ill, competition intervention is seen as offering solutions to deeper socio-political challenges. You will face the challenge of the growing overlap between competition and trade policy. Nevertheless, your commitment should be to your core responsibilities: promoting the competitive process and guarding against anti-competitive practices, in order to maximise economic efficiency. You must continue to demonstrate that protectionist rule changes will undermine EU competitiveness in the medium- to long-term.

Your overarching task is to maintain the independence of competition enforcement and to ensure the efficient allocation of resources, applying sound economic theory to provable facts. Competition policy also needs to increase its flexibility to address the challenges posed by digital markets. On the international stage, you must more forcefully advocate a uniform understanding of the dynamic goals of competition regimes.

- * DIGITAL TECHNOLOGIES
- * INDUSTRIAL POLICY
- * INDEPENDENCE

1 STATE OF AFFAIRS

You take over the European Union's competition portfolio at a challenging time for competition policy. First, there is the rise of nationalism and significant scepticism about the European project; second, growing wealth disparity is causing scepticism about globalisation; third, concern that the European economy is losing ground to the United States and Chinese models is resulting in calls for economic populism; and fourth, there is concern about the influence of technology on the democratic process, firm concentration and systemic shocks that can be expected from technology development, notably artificial intelligence and the internet of things. European competition policy finds itself at the epicentre of these interlinking issues, putting pressure on the integrity of the competition system

*POLITICISATION

Market regulation is increasingly political and, for good or ill, competition intervention is seen as offering solutions to some of these deeper socio-political challenges. As you set out your priorities, one of your more important tasks will be to consider how far competition law can be a response to some of these issues, while ensuring competition enforcement does not become politicised. However, underlying your reflections must be a commitment to maintain the *acquis* of European competition law and the competition directorate-general's (DG Competition's) core function, as set out in the Treaty: promoting the competitive process and guarding against anti-competitive practices, in order to maximise economic efficiency.

2 CHALLENGES

Challenge 1: competition policy and industrial policy

The unravelling of multilateralism has spurred protectionist tendencies in a number of important economies, threatening the ability of European companies to compete equally. The overlap between competition policy and trade policy is therefore becoming starker. Competition policy can no longer be seen in isolation from these trends. Nowhere is this more evident than in relation to concerns about state-driven Chinese mercantilist policies that

*PROTECTIONISM

use state-controlled enterprises to further geopolitical goals. There have been calls from national European capitals for competition policy to support attempts to create European champions, to foster European economic autonomy or even to be used as blunt tool of industrial policy. While European competition policy is not able to address measures taken by third countries, it may have a role in addressing the effects of such distortions, once empirically measured.

*INDUSTRIAL;
POLICY

One of your challenges will also be to know where to draw the line between industrial policy and competition policy. The new Commission will be expected to help drive the digitalisation of European industry, and competition policy will have a role in this. Are industrial policy and competition policy merely complements? To what extent should competition policy actively support European industrial policy, for example by ensuring effective competition in particular sectors identified as key to European competitiveness? For example, should competition policy assist in fulfilling the goals of the Treaty on the Functioning of the European Union that, under Article 3, include economic growth, price stability, a highly competitive social market economy and the promotion of scientific and technological advancement? Or should competition policy be limited to executing the competition objectives outlined in the Treaty (while not undermining the other elements of the Union's objectives)?

*DIGITAL
PLATFORMS

Another challenge you will face is how to revise competition policy tools to effectively address the market power of digital platforms, where distortion has occurred. The debate is not limited to the competition community but is occurring at the highest political levels. Europe has an important role to play and should be at the forefront of these developments in competition. You will need to decide whether the arguments put forward for intervention have merit and, if so, whether these are indeed competition law issues. You should look strictly at the evidence and avoid following simplistic political argumentation and vested interests. There are clearly competition law challenges in the digital space, as there are in any other, but in addressing these challenges you should consider whether competition policy should primarily be focused on the

consumer-welfare interests of users in Europe, or on competitive dynamics. The distinction might be subtle but the impact on industry dynamics and long-run consumer welfare could be significant.

You will therefore need to consider what competition policy can bring, within the scope of the law, to the European industrial policy debate while not threatening the integrity of the competition system in Europe or the international competition system. In fact, in the international context European competition law is recognised as a gold standard globally and so your policies and acts can have major implications for global competition policy for both good and ill. As a result, you will always need to consider the impact of what you do on other jurisdictions and how the measures you take might be interpreted in third countries.

Challenge 2: competition policy and technology

Competition authorities and policymakers around the globe have been seeking the right analytical framework to assess digital technology markets, notably digital platforms, and what appropriate remedies to apply when evidence of harm is established. Despite many years of debate on whether traditional competition analysis or competition tools are sufficient, there is no consensus or whether new approaches or new tools are needed. We have seen calls (including from US presidential candidates) for the structural break-up of dominant digital platforms, for the application of essential-facilities doctrine to data, and for more nuanced measures, such as requirements to share non-replicable data.

It is likely that a consensus will form during the period of your mandate on what the role of competition policy may be. The European Commission should be at the head of policy developments on these matters. The discourse is often framed in terms of dominant digital platforms and the treatment of data harvesting, ownership and analysis (as highlighted by Crémer *et al*, 2019). Given the importance of digital technology development and dissemination, Europe should consider an approach appropriate to its market, based on accepted tenets of empirically sound competition policy.

It goes without saying that digital technologies affect all areas of the European economy. Sectors critical to European economic growth, such as financial services and the automotive sector, will see digital technologies fundamentally change their market structures. While competition from digital players, which are nimbler and less constrained by fixed costs, can bring significant short-term consumer welfare, disruption can create longer-term industrial policy challenges, such as the shift of value creation from the consumer product (such as a vehicle) to the application (such as on-board digital services). Disruption can also result in higher systemic risk (such as in financial services), or can result in a long-term shift of production of high value components from Europe to third countries. If competition enforcement occurs in such sectors, you might therefore have a significant influence over the evolution of entire value chains, critical to European interests.

Competition policies affect digital technologies across the board. For example, the Commission faces challenges related to selective corporate tax benefits for digital companies, state subsidies supporting emerging technologies that fall under Important Projects of Common European Interest (IPCEI), consolidation in innovation markets or of 'killer acquisitions', collusion cases arising from artificial intelligence, and standardisation efforts and dissemination. DG Competition will need to offer a coherent response across these different areas of law and policy.

Challenge 3: international antitrust comity principles

The European Commission will also face significant international challenges. There is a need for leadership in the international competition community to defend the basic precepts of modern competition law from undue political influence, while also ensuring that mechanisms exist to prevent competition authorities from using competition proceedings for protectionist measures. But it is imperative, notably in the context of digital platforms and data markets, that different jurisdictions do not take divergent approaches that would create uncertainty and costs for business, while potentially resulting in a 'race to the bottom'.

In pursuing long-run consumer welfare, you must not lose



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sight of the fact that competition policy should also have the effect of incentivising investment in Europe and lead to the development of innovative solutions and services and their take-up by the market and consumers. And as your priorities in these areas take shape, actions taken by DG Competition must be based on objective criteria and the rule of law, in order to inoculate itself from political interference.

3 RECOMMENDATIONS

Recommendation 1: competition policy and industrial policy

There is as yet no agreement on what role competition policy should play in addressing concerns expressed by certain EU governments, notably France and Germany, about how Europe can remain a global manufacturing and industrial power . This might be because Europe's global competitiveness challenges still need to be clearly defined (Leonard *et al*, 2019). In the first instance, DG Competition must engage more confidently with member-state governments in order to set out what European competition law seeks to achieve and how it does so. This would be relevant where proposed industrial policy intervention occurs at one particular level in a value chain but will have effect the whole ecosystem.

DG Competition's strength in its analytical abilities can assist governments to identify what the underlying problems of industrial policy might be and to tailor-make appropriate solutions, whether involving a regulatory or enforcement approach. In this context it would be important to ensure that there is a clear

*COMPETITIVENESS
CHALLENGE

(structural) separation between competition policy formulation and competition enforcement function.

*SINGLE MARKET

In this debate, DG Competition must continue to demonstrate that protectionist rule changes will undermine EU competitiveness in the medium- to long-term (and indeed affect international competition comity). Rather, DG Competition should continue to support the creation of a truly single European market. Therefore, DG Competition should create a mechanism enabling a regular dialogue with member states outside individual cases (where the established mechanism remains the Member States Advisory Committee on Concentrations and on Restrictive Practices and Monopolies).

*INDEPENDENCE

Notwithstanding these challenges, your overarching task is to maintain the independence of competition enforcement and to apply your considerable powers to ensure the efficient allocation of resources, applying sound economic theory to provable facts. Competition pushes companies to enhance their productivity and output, reduce marginal costs and lower their prices or improve their products and services, thereby promoting the selection of the most efficient firms. This stimulates investment and the development of new services and products, helping to close the gap between the European Union and other leading economies on innovation performance. Therefore, you should continue to promote the use of effect-based analysis in competition assessments, based on sound empirical data. To assist you, you should continue to support the role of the Chief Economist's Office within your services, to act as a check and balance and fresh pair of eyes, in order to advise you and your senior team in case there are deficiencies in preliminary assessments.

*EFFICIENCY GAINS

There should also be a greater acceptance of the benefits of long-term efficiency gains over static losses, notably if there are sufficient guarantees that gains will materialise as a trade-off against short-term losses. This is particularly important in markets where businesses need to make significant up-front investments that need to be recouped to incentivise further investment, or where technology creation and dissemination need time to reach a pricing equilibrium reflecting economies of scale.



Competition policy should not be seen as punishing the most successful firms without clear evidence of harm to consumers

If the competition dynamic is to reward successful firms, it is critical that competition policy should not be seen as punishing the most successful firms (whether through the chilling effect of scrutiny or through sanctions), without clear evidence of harm to consumer welfare. Otherwise, the message to the market is that ‘too much’ success in Europe is a liability and this can have a significant effect on the attractiveness of Europe as a market for investment, whether for fundamental research or for new products or services.

*VALUE CHAINS

Finally, given how impactful competition proceedings are, DG Competition should be mindful of how intervention at one level of a value chain could affect the entire value chain. Standardised technologies are a good example, as standardisation can be the foundation of entire ecosystems. Competition intervention at a particular point in the value chain will affect incentives for companies to engage in technology research and development and have an impact on standardisation of key enabling technologies, components and devices. This, in turn, will affect competition between operating systems that build on standardised technologies, as well as the plurality of services that are provided on top (European Commission, 2017). These considerations are particularly important given the geopolitical characteristics of key enabling technologies, of global value chains, and European long-term competitiveness at each level of these value chains. In the automotive sector, for instance, the long-term objective should be to ensure the plurality of players at each level and not to, in effect, create a gatekeeper at any one level of the value chain. This will require DG Competition to have a broad overview of sectoral dynamics, and it is recommended that DG Competition should regularly pull in expertise from other relevant Commission services or external sector experts in order to understand value chains

*SECTORAL
DYNAMICS

and, where needed, to set out remedies that avoid unintended consequences.

*STATE AID

Critical European sectors face pressure from international competition and from disruption brought by digitalisation. During times of economic pressure, member states might be tempted to prop up selected businesses or sectors and will call for protectionist or special interest measures. But supporting inefficient businesses often results in long-term costs. It will therefore be critical to maintain the core of the state-aid system. Guidance on European state aid rules should therefore be updated, notably to speed up approvals. Competition authorities should therefore increase their interaction with national authorities to clarify how state aid can be legally applied. The EU is already looking to state-aid measures, including Important Projects of Common European Interest¹, which can be used to increase European competitive capacity without distorting competition.

*CREATING CHAMPIONS

The European Commission has committed to “*appropriately deal with the distortive effects of foreign state ownership and state financing of foreign companies on the EU internal market*” (European Commission/High Representative, 2019). What the role of DG Competition should be in ensuring a level playing field remains controversial, with some member states calling for the relaxation of competition rules to permit the creation of European champions. It is strongly recommended that accurate data is gathered to assess the actual market impact of distortions created by third-country governments. This should be undertaken by a taskforce drawn from across the Commission services. The understanding of markets and analytical skills that DG Competition possesses will be an important addition to such a taskforce. Once a source of distortion is identified, a horizontal taskforce should coordinate the range of possible solutions including trade defence, procurement rules, competition rules or proactive investment and growth policy. Such taskforces can be set up for any significant threat to European economic autonomy, and be structured around a country, sector or even a technology. Competition enforcement decisions would stand outside this process.

European competition policy might have a role where there is *prima-facie* evidence of market distortion caused by

*STATE-OWNED ENTERPRISES

state-controlled enterprises (SOEs), directed by third-country governments. It is strongly recommended that DG Competition sets out clear policy guidance on how it addresses competition abuse by SOEs, covering notions of control and coordination; of market power (given that SOEs might not be profit maximising and can therefore behave independently of competitive constraints); theories of harm to the competitive process, such as buyer power, predatory pricing or discrimination; and touching on pragmatic matters including sanctions for lack of cooperation with the European Commission. Such guidance will also assist DG Competition in taking a coherent approach to SOEs and in its enforcement prioritisation.

*MERGERS

In the merger field, DG Competition can also issue guidance on its practice of reviewing SOE transactions and take a more consistent approach. Such guidance will notably be important for national competition authorities (NCAs) when they scrutinise transactions involving SOEs, given the divergent approaches taken to date. Indeed, DG Competition could consider amending the European merger control rules to give it jurisdiction over notifiable SOE transactions in order to ensure coherence in approach (or at the very least, to require NCAs to notify to DG Competition of the existence of such a transaction). On a more technical point, there is some logic to more flexible analyses of market contestability and market entry, if the threat of market entry can be established in fact (eg where industry players are actively seeking to mitigate threat of entry over that period, even in the long term). If it cannot be established, then the European Commission or member states should have the time to institute pro-competitive industrial policies to address any threat, rather than relying on competition enforcement.

Recommendation 2: competition policy and digital technologies

Competition policy needs to increase its flexibility to address the challenges posed by digital markets because digital markets might – although not always – challenge received wisdom born from ‘brick-and-mortar’ competition-policy solutions. For example, notions of ‘classic’ competition enforcement are being challenged

*DIGITAL MARKETS

by new business models relating to zero-price markets, competing for the market, multi-sided markets, reliance on economies of scale and data-heavy markets. As a result, the simple application of traditional analytical tools might not be appropriate. Market shares might not be a relevant proxy for market power where a dominant platform ‘envelops’ a new market, and classic price increase methodologies (eg the small but significant and non-transitory increase in price – SNNIP – test) might not be relevant in non-price markets. However, we do not believe that notions of market power, market definition and contestability require a revolution in themselves. Rather it should be possible to rely on triangulation of multiple scientific measurement systems in order to establish critical elements in competition cases, whether related to market definition or power, because the notions of contestability, lock-in and distortion of the competitive process remain core to the competition analysis of digital platforms.

DG Competition has a critical role to play in setting what could become a globally-recognised framework for analysis of digital and technology markets. This is particularly important in relation to data-centric markets. Technology markets are increasingly complex, raising additional challenges given their rapid evolution and as technology becomes implemented across more ‘traditional’ sectors of the economy. Importantly, the debate could be further clarified by breaking down definitions. We see the policy debate focused on ‘dominant digital platforms’ and ‘data’ whereas, by their very nature dominant digital platforms are heterogeneous (especially where the competition is for the market, rather than on the market), depending what data they gather, and how and what it is used for (eg data gathered by supermarkets, search engines, credit-card companies, machine-to-machine or cars). DG Competition should seek to promote a common understanding to address verifiable competition distortions. This is in particular relevant when considering potential remedies to ensure contestability and to maintain the competitive processes. For this reason, a more appropriate filter through which to view competition issues might be harmful to the competitive process, as it encompasses dynamic consumer welfare and establishes contestability criteria.

*DIGITAL
DOMINANCE



You should engage in proactive market monitoring, as a standard practice in markets that are key to European economic competitiveness, including financial services, automotive and internet of things

You should ensure that DG Competition engages in proactive market monitoring, as a standard practice in markets that are key to European economic competitiveness, including financial services, automotive and internet of things. We further recommend that DG Competition should hire more software and technology engineers to better understand market dynamics and ensure relevant enforcement action. This is important in order to correctly assess dynamic or innovative markets and issues linked to them, such as the debates on innovation mergers, efficiency defences and killer acquisitions. We further recommend that DG Competition should identify future topics on which it could launch a dialogue with the competition community in order to reach common understandings and provide preliminary guidance to markets. For example, DG Competition could engage with companies, legal advisers, engineers and others on understanding how artificial intelligence and deep-learning algorithms could potentially result in market distortion, and how this could be avoided, for example through instructions to avoid price parallelism.

The greater the focus on industrial value chains by policymakers, the more important it will be for DG Competition to understand market trends and how market intervention might affect the competitive balance throughout value chains. In order to continuously refine DG Competition's understanding of digital markets, we recommend, in addition to *ex-ante* monitoring, proportionate *ex-post* assessment of decisions as standard practice in order to assess the effect of intervention on long-run consumer welfare and on non-competition effects including data protection, network security and financial stability.

*EMERGING TOPICS

Recommendation 3: international antitrust comity principles

On the international stage, DG Competition should more forcefully advocate a uniform understanding of the dynamic goals of competition regimes, including through the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN). In particular, DG Competition should work more closely with other Commission services, notably your trade colleagues, to promote a hard-edged and effective international comity regime (giving effect, where appropriate, through competition chapters in trade agreements), so that DG Competition can assist in ensuring that Europe's *important interests* under comity principles – in both competition and industrial policy respects – are protected, when third-country jurisdictions apply competition rules to such interests. This will be important if authorities around the world diverge in their analyses and competition enforcement in the digital sector. Given that sometimes Europe's important interests will not relate to competition matters but broader industrial policy interests, or that third-country jurisdictions might act on direction from ministries, other services in the Commission will need to be informed, engaged and if need be, enabled to act towards their natural third-country interlocutors, as needed.

In addition, DG Competition must continue to play a full role in the work of international organisations, such as the OECD and ICN, to foster fundamental due process norms that will help prevent antitrust protectionism by avoiding enforcement with a predetermined outcome, and also to improve the quality of competition law around the world. European competition law principles must continue to be influential in competition jurisdictions across the world, to avoid an 'race to the bottom' or undermining of the entire system.

NOTES

- 1 See https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1517560605813&uri=OJ:-JOC_2018_039_R_0003.

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