

# Kluwer Competition Law Blog

## **‘Open strategic autonomy’: towards the geopoliticisation of EU competition law?**

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### **Spotlight on Europe’s ‘strategic autonomy’**

The calls for Europe’s ‘strategic autonomy’ or ‘strategic sovereignty’ have been gaining increasing traction in Brussels policy circles over the past few years. With its origins in the fields of defence and security, the idea of Europe’s autonomy has started to resonate beyond these areas, extending to foreign and economic policies and squaring with the promise of European Commission President von der Leyen to lead a ‘geopolitical’ Commission.[1]

As such, the ultimate logic and scope of the ambition to bolster the EU’s strategic autonomy remain vaguely stated. What is known is that it has to do with geopolitical shifts, in particular the rise of China’s economic power that is affecting global competition, with new challenges to the open liberal international order (e.g. U.S. isolationism), with the growing realisation that the European industry lags behind in some key sectors, and, as a result, with the need for the EU to assume greater responsibility for its own interests[2] and ‘fight for a level playing field’.[3] There is a particularly growing impetus to prioritise Europe’s ‘digital sovereignty’: ensuring the continent’s digital, technological and infrastructural transformation and leadership while reducing its external dependencies in this sector.[4] At the heart of this, as the Commission’s ‘New Industrial Strategy for Europe’ underlines, is the ability of Europe to lead the twin green and digital transition and drive its competitiveness.[5]

### **An empty catchphrase or a policy direction?**

Amidst new global power shifts, many of the EU’s policies – and its economic one in particular – are arguably in need of a rethink. As regards trade, investment or public procurement, the EU has already announced or implemented a number of initiatives aiming to render the block more autonomous. These policy actions range from adopting a “White Paper on levelling the playing field as regards foreign subsidies”[6] to introduce the EU framework for screening of foreign direct investment (FDI) to establishing Important Projects of Common European Interest (IPCEI) and the European Cloud Initiative.

Similarly to trade or investment, EU competition policy might be seen as a field that is not insulated from the Union’s geopolitical concerns and that could play a more active role in

addressing them. As suggested by scholars, ‘competition law is inherently political’ and forms ‘part and parcel of other public policies’.[7] Hence, as further argued, it would be short-sighted to ‘believe that the independence of competition authorities from the broader governmental marketplace of ideas – or that the independence of competition from political choices – is a precondition for the effective functioning of the competitive process’, particularly in unstable and unpredictable political and economic contexts.[8]

Executive Vice-President Margrethe Vestager has expressed readiness to embrace the objective of a strategic autonomy – more precisely, as she frames it, an ‘*open* strategic autonomy’ – as a principle that could inform competition policy going forward.[9] Offering no details on the exact meaning of this principle, she has pointed towards heavily subsidised Chinese firms as well as competitive distortions in digital markets as sources of concern when it comes to Europe’s autonomy and the ability of domestic companies to succeed. The Executive Vice-President’s references to the concept of autonomy have come, however, with a warning label that there are ‘strict limits on how competition policy as such can be a tool when it comes to geopolitics’.[10] In particular, she has invoked Europe’s rule of law, equal treatment, and non-discrimination as principles that might put a hold on attempts to use competition policy in pursuing geopolitical ambitions and selectively enforce it to the benefit of European stakeholders and detriment of their foreign counterparts.

How should one understand this pledge to contribute to Europe’s open autonomy? Towards which direction, if any, could the pressures to strengthen its strategic autonomy steer competition enforcement?

Thus far, there are some known (or at least partially known) knowns. The most relevant one is that autonomy is unlikely to find its manifestations in traditional economic protectionism – at least not in the field of competition law. As regards merger control, for example, the EU competition enforcers have shown no appetite to adopt the flawed industrial policy logic that assumes relaxing merger rules in order to create ‘European champions’, with the prohibition of the Alstom-Siemens merger serving as a poster child for their approach.[11] This is consistent with the EU’s past enforcement strategy: a study by Bradford et al. that looked at all mergers decided by the Commission between 1990 and 2014 showed that the EU did not deploy its merger control powers to systematically advance protectionist industrial policy and protect European businesses.[12] A radical change of heart seems unlikely in the near future.

Similarly, the Commission has always forcefully rebutted accusations of geographically-targeted interventions in the tech sector, in particular in its cases against the U.S.-based internet giants such as Google, Apple or Amazon.[13] Given these rebuttals, it would be illogical to associate the openly stated aim of ensuring Europe’s strategic autonomy with traditional forms of protectionism and bias against foreign tech companies.

### **The concept of an open strategic autonomy applied strategically**

Based on the current discourse around open strategic autonomy and the role of competition, it seems reasonable to infer that pursuing autonomy is unlikely to bring about any imminent ideological or policy shift under EU competition law in the near future. On the contrary, the concept of autonomy seems to be expressly invoked to justify the current competition policy and

enforcement strategy on the EU level: as the argument goes, more vigilant competition enforcement creates better conditions for market players, including for domestic companies.

When understood in this way, open strategic autonomy could also be equated with Europe's ambitions to independently set and subsequently export its values and norms, inspiring regulatory and enforcement actions in other jurisdictions. Europe has demonstrated its aspirations to be a first-mover on a number of occasions, ranging from vigorous law enforcement against tech platforms to the regulatory proposals put forward in the forthcoming Digital Services Act package (DSA). In fact, creating and exporting such rules can be presented as a form of 'soft geopolitics' that bolsters the EU's autonomy – its ability to act independently and according to its own values – without compromising its openness.

Another strategy to show that competition law contributes to the Union's objective of autonomy is to perform minor surgeries on competition law while sticking to its established logic. For example, under specific circumstances, the Commission could more carefully consider companies' complaints about potential competitive threats posed by future market entrants – including foreign rivals – placing a greater emphasis on the concept of 'potential competition'.

Openly embracing the objective of autonomy by the EU competition enforcer comes across as a strategic choice. On the one hand, it demonstrates that competition law does its part in strengthening Europe's autonomy and fits with other Union policies. On the other hand, this tactic seems to serve as an effective defence mechanism against those who would like to see competition policy taking a more protectionist turn.<sup>[14]</sup>

While this strategy can be applauded, it is unavoidable that the EU and national competition authorities will be increasingly confronted with geopolitical dilemmas, in particular given the unprecedented presence of Chinese and other foreign rivals on the EU market. Going forward, competition enforcers need to remain vigilant in answering the calls for more open strategic autonomy, particularly where doing so would result in greater geopoliticisation. At the same time, they need to acknowledge impacts that their decisions might have on highly sensitive areas, for example, security or independence of strategic value chains, and further reflect on developing a systematic and consistent approach towards addressing them.

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[1] See, for example, European Commission President von der Leyen, 'Speech in the European Parliament Plenary' (2019): [https://ec.europa.eu/commission/presscorner/detail/es/speech\\_19\\_6408](https://ec.europa.eu/commission/presscorner/detail/es/speech_19_6408); European Commission President Juncker, State of the Union 2018, 'The Hour of European Sovereignty': [https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech\\_en\\_0.pdf](https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech_en_0.pdf); European Parliamentary Research Service, 'On the path to 'strategic autonomy'' (2020): [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652096/EPRS\\_STU\(2020\)652096\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652096/EPRS_STU(2020)652096_EN.pdf).

[2] See European Council President Michel, 'Strategic autonomy for Europe – the aim of our generation' (2020): <https://www.consilium.europa.eu/en/press/press-releases/2020/09/28/1-autonomie-strategique-euro>

peen-est-l-objectif-de-notre-generation-discours-du-president-charles-michel-au-groupe-de-reflexion-bruegel/. As President Michel expressed, Europe’s strategic independence is ‘our new common project of the century’ that entails objectives of creating stability, disseminating Union’s standards, and promoting its values.

[3] European Commission, ‘New Industrial Strategy for Europe’ COM(2020), 102 final, at 1.

[4] European Commission President von der Leyen, State of the Union 2020, ‘Building the World We Want to Live In: A Union of Vitality in a World of Fragility’: [https://ec.europa.eu/info/sites/info/files/soteu\\_2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/soteu_2020_en.pdf). See also, European Commission, ‘Inception Impact Assessment’ of the Digital Services Act package (2020), at 2. In the Impact Assessment the Commission noted that ‘Europe’s estimated 10 000 online platforms are potentially hampered in scaling broadly and thereby contributing to the EU’s technological sovereignty, as they are increasingly faced with incontestable online platform ecosystems’.

[5] European Commission, ‘New Industrial Strategy for Europe’, COM(2020) 102 final.

[6] European Commission, ‘White Paper on levelling the playing field as regards foreign subsidies’, COM(2020) 253 final: [https://ec.europa.eu/competition/international/overview/foreign\\_subsidies\\_white\\_paper.pdf](https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf). When it comes to the interaction between EU competition rules and the new instrument on foreign subsidies, the White Paper highlights that the latter will have a complementary function.

[7] Oles Andriychuk, ‘On the Political Nature of Competition Law’, *Competition Forum* (2020): <https://competition-forum.com/on-the-political-nature-of-competition-law-interview-with-oles-and-riychuk/>.

[8] Ibid.

[9] European Commission Executive Vice-President Margrethe Vestager, ‘Transatlantic relations in the digital age’ (2020): <https://www.youtube.com/watch?v=QjrZwYZbo28&feature=youtu.be>. As she suggested, ‘autonomous’ means to have choices as to what kind of society one wants to shape, and Europe has been able to make choices because of its prosperity, which in turn comes from openness. Hence, the idea of strengthening autonomy has to go hand in hand with staying open as the biggest trading block.

[10] Ibid.

[11] European Commission, Case M.8677 – *Siemens/Alstom*. In that case, the Commission rejected pressures to allow more consolidation in the Europe’s rail industry – allegedly serving the purpose of standing a chance in a fight against Chinese competitors – by relying on a well-established competition reasoning focused on prices, choice, and innovation.

[12] Anu Bradford, Robert J. Jackson, and Jonathon Zytznick, ‘Is E.U. Merger Control Used for Protectionism? An Empirical Analysis’, 15 *Journal of Empirical Legal Studies* (2018).

[13] See, for example, European Commission, Case AT.39740 – *Google Search (Shopping)*; European Commission, Case COMP/SA.38373 *Aid to Apple*; European Commission, ‘Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices’, Press Release (2020).

[14] Commissioner for Internal Market Thierry Breton has suggested on several occasions that competition should refocus and protect not only consumers, but also European businesses.

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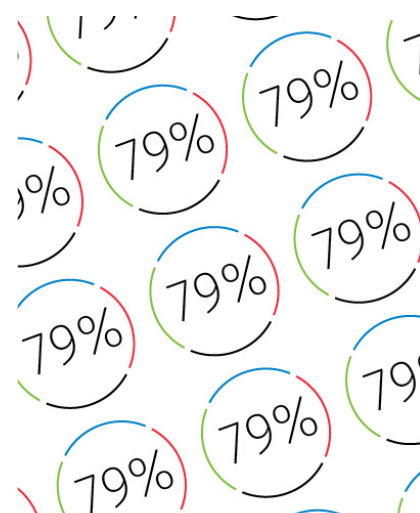
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