Kluwer Competition Law Blog

European Court of Auditors encourages European Commission to tighten the screws on 'Big Tech'

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The Court of Auditors believes that the introduction of new instruments should go hand in hand with stricter enforcement of existing instruments

In a Special Report published on 19 November 2020, the European Court of Auditors (the 'Court') makes a plea for more stringent enforcement of EU competition policy. The Special Report comes at a time when Europe is awaiting the publication of the Digital Services Act (DSA) on 15 December 2020, which may incorporate a Digital Markets Act (see our last post; we will follow up with an update as soon as possible after the publication). In addition, on 25 November 2020, the European Commission (the 'Commission') published its proposed Data Governance Regulation (DGR), which will create a new legal framework to encourage the development of a European single market for data (see this post for an in-depth description).

Whereas the Digital Services Act aims to introduce, among other instruments, new enforcement powers for the European Commission (the 'Commission') to impose ex-ante measures on digital platforms with significant market power (which in many cases will amount to a dominant position) even in the absence of (demonstrated) abusive conduct, the Special Report focuses on more effective enforcement of the existing instruments of merger control and antitrust.

Court: 'Commission must make massive investments in market knowledge'

The Court believes that in general, the Commission's enforcement could become more efficient if the Commission would invest more in actively monitoring markets. If such investments are lacking, the Commission risks becoming too dependent on complaints to pick its cases. This touches on an issue we have also described in our book *Digital Competition Law in Europe: A Concise Guide* (Kluwer 2019). We identified a lack of knowledge of digital markets as a major bottleneck for European competition authorities. Competition authorities will always be lagging behind tech companies in terms of knowledge, but they should nevertheless invest in the necessary resources in order to minimise – if not completely close – this knowledge gap. We suggested that in order to achieve this, competition authorities should also share knowledge and learn from each other, as well as from academics and other experts.

The Court recognises that whilst the Commission has put incentives in place to encourage self-

reporting of cases, the numbers of such self-reporting cases have fallen since 2015. The Court further observes that by prioritising cases, the Commission has allocated resources to relevant investigations, but this was not based on a clear weighting of criteria ensuring the selection of cases with the highest risk. In particular, that Court believes that the Commission failed to formulate clear objective criteria on the basis of which a selection of cases with the highest risk to competition or consumer welfare in the internal market and across all relevant economic sectors.

Merger Control: 'Commission is doing well, but the process would benefit from further efficiencies and value-based thresholds'

The Court observes that the number of merger cases that come under the Commission's jurisdiction has increased during the past years and it believes that this tendency will continue in the years to come. The Court fears that this will put further pressure on the Commission's capacity to actively and properly monitor markets. The Court, therefore, proposes to consider introducing filing fees in order to recover at least partly the costs incurred for reviewing a concentration (see the recent Kluwer Competition blog on this topic). In addition, the Court believes that the Commission should further streamline its proceedings and (further) increase the number of cases that are dealt with under the simplified procedure, in order to be able to devote its resources to those merger cases that entail the greatest risk from a competition perspective.

On the other hand, the Court fears that some high-profile cases may escape the Commission's attention. In particular, in the pharmaceutical industry, in new technology markets or in the digital sector, high-value acquisitions of companies with a turnover that is still relatively low can be a risk to effective competition. In such cases, the acquisition may allow the buyer to quickly achieve a dominant position in a new but still small market or the buyer may decide to discontinue the development of new products or services to protect its own portfolio (so-called *killer acquisitions*). In both Germany and Austria, a value-based threshold was introduced alongside the existing turnover thresholds in order to subject such (potential) *killer acquisitions* to the jurisdiction of the local competition authorities. Without explicitly saying so, the Court appears to favour the introduction of similar value-based thresholds at the EU level.

Antitrust: 'more efforts are necessary'

First of all, where it comes to antitrust, the Court believes that the Commission should attempt to speed up its proceedings. Especially investigations in the tech sector proved to be complex and therefore took a considerable amount of time. Traditional assumptions of effective competition needed to be adapted and the effectiveness of the existing legal tools for intervention had to be evaluated. The Court believes that if takes too long for the Commission to adopt a decision, that may negatively affect that decision's effectiveness. One could for example imagine rivals of an already dominant platform weakening or even being driven off the market pending a lengthy investigation, thus causing that market to 'tip'. Restoring effective competition in such a market may prove difficult or even impossible.

Whereas the Court acknowledges that the Commission has taken a number of case decisions tackling challenges resulting from the digital economy, significant challenges remain to be resolved. For example, the Court believes that the Commission should strive to find better

remedies to address consumer harm caused by infringements in digital and other types of innovative markets (such as energy, telecommunications, financial services and transport). The Court also recommends that the Commission revise its guidelines and notices so that companies know whether a certain type of conduct is allowed or not. The Court observes more in particular, that the Commission's Notice on the definition of the relevant market dates back to 1997 when the digital world was still in its infancy. Similarly, the Commission's 2009 guidance on enforcement priorities regarding abusive exclusionary conduct by dominant undertakings or the block exemption regulation on categories of vertical agreements and concerted practices do not mention any of the features specific to the digital age. In this respect, it must be however be observed in the Commission's defence that it is currently in the process of revising its rules on vertical agreements as well as the Notice on the Relevant Market.

Furthermore, the Court believes that "*Effective enforcement requires deterrent fines*". The Court does admit that the fines imposed by the Commission are among the highest in the world. Nonetheless, the Court fears that they nonetheless may not always sufficiently deter very large companies. This effect may be aggravated by a (perceived) low chance of detection among infringing companies.

Finally, the Court concludes that the cooperation between the Commission and national authorities in the European Competition Network (ECN) is generally going well. However, the allocation of cases between the Commission and national authorities could be improved according to the Court, as well as the knowledge of each other's enforcement priorities. The Court also finds that it should be avoided that many competition authorities are looking at similar behaviour by the same company. We note that in the tech sector, exactly that is however very much the reality right now. For example, both the Commission and the Dutch ACM are currently investigating Apple's AppStore (albeit allegedly from slightly different angles) and Amazon is currently under parallel investigations by the Commission, the German Bundeskartellamt and the Italian AGCM.

Recommendations

The Court concludes its report with four concrete recommendations to the Commission:

- *Recommendation 1* – Increase the probability of detecting infringements. The Commission should follow a more proactive approach by gathering and processing market-relevant information in a consistent and cost-efficient manner and select cases based on clearly weighted criteria, for example by using a scoring system. This should be implemented by the end of 2022

- *Recommendation 2* – Increase the effectiveness of competition enforcement. In particular, the Commission should (by mid-2024 or upon the expiry of the relevant block exemptions):
    - further optimise merger procedures and case management with a view at covering all transactions relevant for the internal market and conduct a detailed analysis of the costs and benefits of charging merger filing fees;
    - strengthen its antitrust intervention tools and update notices and guidelines as well as block exemption regulations upon their expiry to take into account new market realities (mainly those resulting from the digital markets);
    - perform a study of the deterrent effect of its fines and update its fine-setting methodology

as appropriate.

- *Recommendation 3* – Better use the potential of the European Competition Network. The Commission should better coordinate market monitoring with the NCAs and enhance sharing information on priorities within the ECN to increase transparency and strive for complementarity, and promote (i) better use of its early warning mechanism as well as (ii) an allocation of cases (in particular in complex digital markets). This should be implemented by 2022.

- *Recommendation 4* – Improve performance reporting. The Court recommends that the Commission should:
  - by 2023 regularly carry out ex-post evaluations of the performance of its enforcement decisions, including of their impact;
  - by 2024 together with NCAs, develop an approach for regular independent assessments of the achievement of strategic enforcement objectives, such as in the form of peer reviews.

It will be interesting to see whether the Commission will indeed be successful in implementing some or all of these recommendations and what they in practice will entail. It will also be interesting to see to what extent the DSA and/or the New Competition Tool may help to solve some of the bottlenecks that the Court has identified.

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