

Kluwer Competition Law Blog

A Competition Lawyer's Digest of the Letta Report – What You Need to Know

Sam MacMahon Baldwin (Szecskay Attorneys-at-Law, Hungary) · Thursday, May 23rd, 2024

As it marked the 30-year anniversary of the Single Market, the European Council asked former Italian Prime Minister, Enrico Letta, to set out his vision for the future of the Single Market including specific proposals for its development. Letta published his report last month which, he writes, is based on 400 stakeholders' meetings in 65 European cities. His work product: [a lengthy 150-page report](#).

'Why is this relevant for me as a competition lawyer?', I hear you ask. Well, firstly, the European Commission is increasingly making clear that competition policy is Single Market policy and *vice versa*. As we look into a new Commission mandate following EP elections in June, we are likely to see a new economic policy agenda in which Single Market & competition policy are interlinked & aligned – both serving to foster deeper market integration and consumer welfare across the Union. Secondly, Letta has quite a few specific observations that may impact competition enforcement for the next decade. In the following, I have summarised the touch-points from the Report that are relevant for competition lawyers.

Curbing vertical territorial restraints

Letta calls for more enforcement against what he labels 'Territorial Supply Constraints (TSC's)'. He lists branded consumer goods & agri-food as relevant sectors while emphasizing all levels of the supply chain: manufacturing, processing, wholesale, and retail. He proposes strengthening the capability of enforcers to tackle suspected TSC's in cross-border cases; referring not only to DG COMP enforcing across multiple jurisdictions but also local NCA's doing so in alignment through the ECN:

„The EU should strengthen the capacity of national authorities to tackle suspected TSCs thanks to a formal procedure common to all for cross-border cases.”

As a specific example, Letta stresses the challenges that large wholesalers and retailers face when, as he puts it, „*invoking their right to source products where they wish*”. He continues:

„Concretely, they say that retailers wishing to buy branded consumer packaged goods face compulsory referral to the national branch of their manufacturers. They also face deliberate hindrances to parallel trade (the possibility to import products from low-price Member States towards a high-price Member States through channels other than those established by the brand owner). They underline that such TSC prevent them from getting the best deal for consumers.”

It is therefore clear that Letta envisages more enforcement against (vertical) practices – be it under Article 101 or 102 TFEU – that partition the EU into national or regional markets. We are therefore likely to see more cases similar to the [AB InBev beer imports case](#) both under Art. 101 & 102 TFEU.

While stressing the importance of ramping up competition law enforcement to tackle geographical market partitioning, he, conversely, calls for restraint when it comes to adopting further rules seeking to curb market power:

„[T]he EU needs to ask itself whether it should intervene when a market malfunctions for other reasons than those covered by competition law.”

Geo-blocking

As with TSC's, the Letta Report devotes a separate section to geo-blocking and its adverse effects on consumers. He states rather sweepingly that:

„[T]he wider phenomenon of geo-blocking clearly runs counter to the spirit of the Single Market[.]”

More specifically, Letta advocates expanding the 2018 Geo-blocking Regulation, concluding that:

„Remaining obstacles for consumers to buy and consume services at distance from another Member State should be tackled as a matter of urgency, chiefly the “cannot deliver the product to that destination”.”

This call for expanding anti-‘geo-blocking’ rules seems somewhat contradictory to the declared need for the EU to exercise caution when it comes to adopting further rules beyond classic competition law enforcement.

Price discrimination & ‘dark patterns’

Letta takes aim at businesses who want to tailor their pricing to capture consumers’ individual

willingness to pay for a given good or service as well as at other opaque pricing tricks adversely affecting consumers. While leaving the exact enforcement tool open – e.g. classic antitrust or UCP – Letta concludes that enforcers must act against such pricing practices:

“Unfair practices go beyond false or misleading information. They also include, inter alia, price discrimination based on information collected on the web and ‘dark patterns’ (subscription traps, fake countdown timers, pre-selecting options by default, drip pricing – presenting a low price incrementally increased with additional charges). NCAs may coordinate their action to bring these unfair practices to an end through a dialogue with the concerned companies.”

With this in mind, we are likely to see a ramping of enforcement against certain pricing behaviour and perhaps introduction of additional tools for the NCAs to deploy.

Sectors in focus

Letta singles out four industries that he considers fall well short of their Single Market potential. These are:

- Telecoms
- Energy
- Financial services
- Transport

The first three sectors, Letta explains, were intentionally excluded from the scope of the Single Market at its establishment 30 years’ ago – deemed back then to be too domestically strategic for EU-wide integration. It is time to remedy this, he says, as the *“once prioritized domestic control is now proving to be a barrier to the growth and competitiveness of these sectors at the European level and globally.”*

The end-goal according to Letta is to achieve full market integration in these sectors or, to put it in competition law terms, for the ‘relevant geographic market’ in these industries to be truly EU-wide. For example, with respect to financial services, Letta calls for the creation and completion of a Savings & Investments Union as well as the Capital Markets Union:

“In this context, this Report calls for a significant transformation: the creation of a Savings and Investments Union, developed from the incomplete Capital Markets Union. By fully integrating financial services within the Single Market, the Savings and Investments Union aims to not only keep European private savings within the EU but also attract additional resources from abroad.”

Letta’s vision is that when consumers choose their bank, insurance or pension provider, they

should be shopping around in all Member States and not just within their domestic (oligopolistic) markets. The same goes for businesses who should be looking more cross-border when it comes to corporate finance incl. bond issuance, private equity, and public listing:

“The markets in question must evolve towards a European dimension, surpassing the national confines that currently hinder any substantial competition with American, Chinese, or Indian conglomerates. By identifying the European one as the relevant market, we can finally enable market forces to drive consolidation and growth in scale, in full respect of the European principles, objectives and rules.”

(Underlining added)

Big business is good business

A re-occurring message throughout the Report is the need to allow businesses to get bigger:

“Allowing EU companies to scale up within the Single Market is not just an economic imperative but also a strategic one.”

Letta drives this point home in the section covering the telecoms industry by comparing the average size of European operators to those in China and the US:

“The scale of disparity is stark: an average European operator serves only 5 million subscribers compared to 107 million in the United States and a staggering 467 million in China.”

He then has a very interesting observation that – some would say – is hard to square with current antitrust policy when it comes to merger control in telecoms. He talks of markets suffering from “excessive entry” resulting in telecoms operators not being able to achieve the scale and profitability levels to finance innovation & further investment. He concludes:

“Today, in a European market with more than 100 operators, keeping the focus only on pro-entrant regulation, would be detrimental for a technology switch towards advanced networks that require massive investments.”

While he does add that “*competition law must be respected*”, it would seem at first glance that Letta is calling for laxer merger control enforcement when it comes to telecoms consolidation, so to allow for the scale and investment levels of China and the US. A more nuanced interpretation would be that he would like to see mergers of telecoms operators on an *inter*-‘Member State’ basis rather than *intra*-‘Member State’ consolidation. If so, this aligns with [Commissioner Vestager’s comment](#) of late on exactly this point.

Strong FDI regimes

As keen as the Report is on promoting market integration within the Union, equally important is the matter of preventing third-countries from taking over strategic infrastructure in Member States. Letta emphasises the importance of strong FDI regimes:

“The EU should also ensure an effective implementation of the rules on the control of foreign direct investment in strategic sectors, to ensure that third countries’ investment in key energy infrastructure or assets may not pose risk to public security or public order in the future.”

Taking a page from the DG COMP playbook

At the end of the Report, a section titled *‘Strengthening enforcement to uphold market integrity’* champions the importance of more & quicker Single Market enforcement. This is good news for those of us representing clients with grievances under Freedom of establishment in Art. 49 TFEU and Freedom to conduct a business in Art. 16 of the EU Charter of Fundamental Rights.

One of the means to achieve this, Letta suggests, is by taking a page from the DG COMP playbook:

“One viable approach could involve adopting a model similar to that used in EU Competition law enforcement for handling cases of significant legal, economic, or social impact. This model would streamline the process introducing more transparency and codified procedural steps starting from the initial steps until the final decision of referral to the Court of Justice that might lead to the imposition of fines.”

This makes a lot of sense. Governments can – and regularly do – distort competition just like businesses. However, while businesses face massive financial exposure for distorting markets in breach of the Treaty, Member States pay no penalty whatsoever for their wrong-doing causing the same effects. Therefore, it would certainly be welcome to have more robust sanctioning in place serving to deter Member States from infringing Single Market rules to the detriment of businesses and consumers.

Letta even goes as far as proposing the establishment of a Chief Enforcement Officer which is no doubt inspired by the prominent role of the Commission’s competition Commissioner when enforcing antitrust rules:

„To underscore the paramount importance of enforcement while these changes are being implemented, it is proposed that the next European Commission appoint an

Executive Vice-President, responsible for Single Market and specifically tasked with serving as the Chief Enforcement Officer.”

Final thoughts – If you’re holding a hammer, everything you see is a nail

As the saying goes, *‘If you’re holding a hammer, everything you see is a nail’*. The Report reads a bit like that. Letta’s solution to all policy challenges – be it economy, health, defense, or climate change – is giving the EU more powers at the expense of Member State sovereignty. To illustrate this principle of the EU deciding more and Member States less, you can look at how Letta strongly advocates the use of the ‘Regulation’ over the ‘Directive’ as a means for the EU to legislate:

“This method underscores the paramount importance of Regulations as the cornerstone for achieving such harmonisation across the Single Market. It posits that EU Institutions should unequivocally prioritise the use of Regulations in the formulation of Single Market binding rules.”

Further centralization of power at EU level may well be effective, but it is unlikely to go down well with Member States who feel strongly that ‘Brussels’ is already making far too many decisions in matters impacting domestic policy. These Member States may well criticize the Report for not placing much value in the EU principle of subsidiarity enshrined in Art. 5(3) TEU. This principle seeks to ensure that policy decisions are taken at the closest possible level to the citizen.

For the same reason, while the Report is truly full of vision as well as good & specific proposals on how to further develop the Single Market, it remains to be seen how much of it will in fact be executed.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe [here](#).

Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

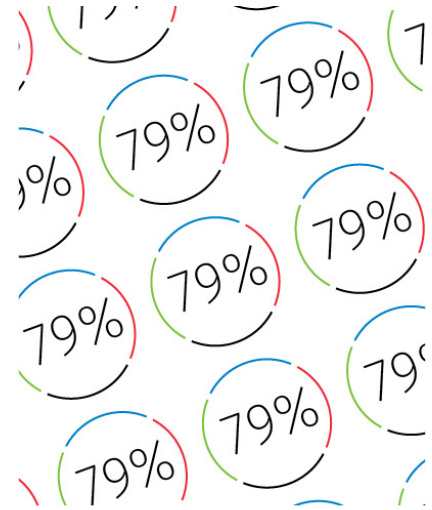
Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change



This entry was posted on Thursday, May 23rd, 2024 at 9:00 am and is filed under [Competition policy](#), [European Union](#), [Internal Market](#), [Policy](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.