EU Antitrust Reforms and Lessons from the Pandemic

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“Never let a good crisis go to waste.”
—Winston Churchill

Before EU policy discussions were overwhelmed by the COVID-19 outbreak in March 2020, the European Commission (EC) had embarked on the most far-reaching European Union (EU) antitrust reform program since at least 2003. At that time, Regulation 1/2003\(^1\) introduced the current regime of “self-assessment” and eliminated previous procedures for seeking EC comfort on individual agreements containing potentially restrictive covenants. The COVID-19 outbreak required the EC, including its Directorate-General for Competition (DG COMP), to suddenly redirect much of its energy to the crisis. The EC quickly adopted new frameworks for the assessment of cooperative arrangements between competitors, in particular in the health care sector, and State aid granted by EU Member States. The Commission also temporarily adapted its merger review processes. At the same time, however, DG COMP continued pushing ahead with its antitrust reform agenda, with four major consultations launched in June 2020 and legislative proposals expected in the second half of 2020 and 2021.

What can we expect from the EC’s antitrust reforms in the coming years? How will DG COMP’s reform agenda be influenced by its experience adjusting EU competition policy enforcement during the COVID-19 crisis?

The EU Antitrust Reform Agendas

EU antitrust reform involves multiple workstreams reflecting two main (and sometimes conflicting) policy agendas. These agendas are not limited to the EU but are generating pressure for antitrust reforms in many jurisdictions around the world.

The first, which I will call the Digital Agenda, reflects the view that more vigorous EU antitrust enforcement is required, in particular to curb the expansion of digital giants. These concerns are expressed most fully and authoritatively in a 2019 report entitled *Competition Policy for the Digital Era* (Digital Era Report).\(^2\) This report, echoed in a number of speeches by Executive Vice President Margrethe Vestager,\(^3\) proposed new analytical frameworks and enforcement schemes targeting

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The hot issues in antitrust today include: (1) the application of EU antitrust rules to online platforms; (2) circumstances under which companies are allowed—or can be forced—to share data; and (3) how best to review large companies’ acquisitions of small players, even when the target’s activities do not directly overlap with the buyer’s (and where notification thresholds may not be reached).

The second policy agenda, which I call the Sovereignty Agenda, reflects the view that EU antitrust enforcement sometimes goes too far and impedes the ability of “European champions” to develop and compete on the global stage. This view was forcefully expressed by the French and German governments in a February 2019 manifesto calling for a “European industrial policy fit for the 21st Century.” This manifesto, followed by other proposals and reactions from a number of antitrust authorities and business groups, called for, among other things, three potential changes to EU merger control review: (1) introducing the possibility for EU Member States to override Commission decisions in “well-defined cases” and “subject to strict conditions”; (2) revising the EU Merger Regulation (EU MR) and the Commission’s current merger guidelines to take greater account of competition at the global level, potential future competition, and the timeframes the Commission considers when assessing the effect of notified transactions to “enable a more dynamic and long-term approach to competition, at the global scale”; and (3) taking into greater consideration the State control of and subsidies for undertakings in substantive merger control analysis.

On March 2, 2020, Vice President Vestager outlined the EC’s antitrust reform program in a major speech at the College of Europe entitled “Keeping the EU competitive in a green and digital world.” Unsurprisingly—given Vestager’s dual appointment as Competition Commissioner and Commissioner for making Europe fit for the digital age (Digital Commissioner)—many of these workstreams reflect the Digital Agenda. But elements of the work program also seem to be inspired by the Sovereignty Agenda.

**Cooperation.** The EC’s antitrust reform workstreams include review of a number of expiring legal instruments under Article 101 of the Treaty on the Functioning of the European Union (TFEU), including the Vertical Block Exemption Regulation; Horizontal Block Exemption Regulation

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7 Bundesministerium für Wirtschaft und Energie and Ministère de l’Economie et des Finances, supra note 4.

8 Id.


(HER); and Motor Vehicle Block Exemption Regulation. Although these reviews are legally required and in some cases started several years ago, successor measures are likely to reflect current policy concerns, especially those of the Digital Agenda.

In her College of Europe speech, Vestager noted that the EC is “reviewing our rules on horizontal cooperation, to make sure that businesses have clear rules about how they can cooperate.” This includes, for instance, how they can “pool data, so they can compete to develop advanced artificial intelligence” and other “new, innovative ideas.” The EC, she said, will “soon launch a study . . . on how the existing rules are working [and] . . . consult on the main options for change” in mid-2021. Vestager also raised the possibility of “making use of our power to decide formally that the antitrust rules don’t apply to an agreement . . . [s]o that, by replacing doubt with certainty, we can unlock new possibilities for cooperation.” These comments echo the Digital Era Report, which noted the lack of clarity in the antitrust treatment of data sharing and pooling arrangements. The report recommended that the EC enhance guidance to companies via the HBER review process, as well as guidance letters and “no infringement” decisions (previously eliminated by Regulation 1/2003). Indeed, the Report noted that a separate block exemption regulation on data sharing and pooling may be called for.

Abuses of Dominant Positions. Notably, the EC’s antitrust reform agenda does not include any workstreams specifically targeting the application of Article 102 TFEU, which prohibits abuses of dominant positions, even though concerns relating to market power in the technology sector are at the heart of the Digital Agenda. Indeed, in her College of Europe address, Vestager noted that some digital platforms have become so dominant that they’re effectively private regulators, with the power to set the rules for markets that depend on those platforms. That doesn’t have to cause any more harm to competition, if they use that de facto regulatory power in a way that lets fair competition thrive. But we know from experience . . . that these big platforms don’t always do that. In fact, our competition enforcement has taught us a lot, about the sort of behaviour by dominant platforms that can stop the markets which they regulate from working well.

The Digital Era Report advocated adapting competition policy tools rather than “regulations organising the whole sector—akin to the type of regulation used for traditional utilities.” Nonetheless, Vestager suggested drawing on the EC’s enforcement experience “to design regulations that clearly set out what those platforms can do with their power—and what they can’t.” On June 2, 2020, the EC invited public comments through consultations on two potential regulatory measures:

13 Vestager, supra note 10.
14 Id.
15 Id.
16 Id.
17 Digital Era Report, supra note 2.
18 Vestager, supra note 10.
19 Digital Era Report, supra note 2.
20 Vestager, supra note 10.
In the first (the Ex Ante Tool Consultation), the EC requested comments on a proposed new tool to allow the EC to intervene in markets to enhance competition without the need to find an infringement of EU competition rules or the ability to impose fines. This proposal reflects Vestager’s desire to learn from the experience of “competition authorities [which] have the power to step in, even when businesses haven’t broken the competition rules . . . to head off looming threats to competition.”

In the second (the DSA Consultation), the EC is consulting on a proposed Digital Services Act that would, among other things, create “ex ante rules to ensure that markets characterised by large platforms with significant network effects acting as gatekeepers, remain fair and contestable for innovators, businesses, and new market entrants.” The DSA Consultation reflects concerns about big data and online platforms highlighted in the Digital Era Report, but in some ways it goes beyond those concerns. For example, the DSA Consultation addresses the application of competition law to collective bargaining in the gig economy. In her College of Europe speech, Vestager noted that “competition rules are not there to stop workers forming a union. So we need to make clear that those who need to can negotiate collectively, without fear of breaking the competition rules.”

Merger Review. The EC has not launched any new reform workstreams in relation to merger review. In the second half of 2020, however, the EC plans to publish the “evaluation results” of work that started in 2016 with a consultation on procedural and jurisdictional aspects of EU merger control.

A major aspect concerns transactions that cannot now be reviewed under the EUMR because the target does not meet the relevant turnover thresholds. Although the 2016 consultation did not produce strong support for change, and the Digital Era Report did not advocate changes to EUMR thresholds, capturing acquisitions of start-ups by large technology companies has remained a concern in the Digital Agenda. Vestager noted that the EUMR relies on “the turnover of the companies involved, to decide whether mergers should be notified to us. But in the digital world, turnover isn’t always a reliable guide to a company’s importance.” The EC is considering those “thresholds, along with some considerations on whether we could rely more on the system of referring mergers from national competition authorities to the Commission, to make sure that important mergers don’t escape our notice.”

The EC’s merger review reforms are notable not only for what they include, but also for what they do not include. For example, the EC does not appear to be considering proposals to introduce special presumptions or other requirements for acquirers in so-called killer acquisitions, in

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22 Vestager appears to be referring especially to the UK Competition and Markets Authority.

23 Vestager, supra note 10.


25 Vestager, supra note 10.

26 Id.


28 Vestager, supra note 10.

29 Id. Indeed, two EU Member States (Germany and Austria) adopted transaction thresholds to capture high-value transactions involving targets with low turnover.
which large companies allegedly stifle innovation by acquiring start-ups. Digital Agenda proponents commonly call for such tools, although they were not endorsed by the Digital Era Report.

The EC is also not pursuing key elements of the Sovereignty Agenda, as set out by the French and German governments in February 2019. In particular, calls to create a mechanism for political review of EUMR decisions have not gained traction. Instead, the EC seems to be responding to Sovereignty Agenda concerns about EU merger control through two workstreams not directly related to the EUMR: First, on June 17, 2020, the EC published a white paper proposing (as Vestager put it) “new powers to . . . allow us to deal, for example, with the harm that foreign subsidies and state ownership can do to competition in Europe.” Among other things, the white paper proposes to give the EC powers to remedy competitive distortions in EU markets due to subsidies outside the EU and to potentially prohibit acquisitions of EU businesses that are facilitated by such subsidies. These proposals address the Sovereignty Agenda concern about competitive distortions from non-EU State controlled companies and subsidies without revising EU merger control.

Second, the EC launched a consultation on revision of the EC’s 1997 Market Definition Notice, arguably inspired by the Sovereignty Agenda’s push to “take greater account of competition at the global level.” It remains to be seen, however, whether the results of this exercise will satisfy Sovereignty Agenda proponents. A 2016 study on geographic market definition commissioned by the EC concluded that no major changes were required to favor the definition of broader geographic markets. Indeed, the Digital Era Report, focusing more on product than on geographic market definition, recommended “less emphasis on analysis of market definition, and more emphasis on theories of harm and identification . . . [i]n the digital world, [because] market boundaries might not be as clear as in the ‘old economy’. They may change very quickly.”

As a result, changes to the current market definition notice may in fact reflect Digital Agenda objectives more than Sovereignty Agenda objectives.

EU Competition Policy Responses to the COVID-19 Outbreak

Between mid-March and June of this year (when the EC launched the four consultations discussed above), much of DG COMP’s energies understandably concentrated on the COVID-19 pandemic. DG COMP’s response to the COVID-19 outbreak relates to three main areas: cooperation, market abuses and “crisis cartels,” and merger review.

**Cooperation.** On April 8, DG COMP published a Communication on a temporary framework for assessing antitrust issues related to business cooperation stemming from the COVID-19 cri-
sis (the Cooperation Framework). The EC has also created a dedicated COVID-19 webpage discussing the application of EU antitrust rules in the crisis.

The Cooperation Framework acknowledges the potential need for companies to cooperate to overcome or mitigate the effects of the crisis, especially—but not only—with respect to medicines and medical equipment used to test and treat COVID-19 patients or to mitigate and possibly overcome the outbreak. The Cooperation Framework covers both arrangements involving companies already active in the relevant sector and those active in other sectors (e.g., companies converting part of their production lines to start producing scarce products).

The EC also considers that companies may be able to address shortages of essential products and services during the COVID-19 outbreak more efficiently by cooperating, but they may need guidance on proposed cooperation initiatives and/or ad hoc feedback or comfort to implement these initiatives rapidly. Based on requests from companies and trade associations, notably in the health sector, the Cooperation Framework recognizes that companies might need to quickly increase production for some products, while reducing production of others, and to reallocate stocks. These steps could require companies to share information on sales and stocks and to coordinate the use of production lines. For example, output could be increased more efficiently if only one medicine was produced at a particular site (as opposed to switching production between different products, which requires time-consuming cleaning of machinery, etc.), balancing economies of scale with the need to avoid excessive reliance on any particular production site.

The Cooperation Framework notes that some forms of cooperation in the health sector would not be considered to raise any antitrust issues if implemented in accordance with standard EC guidelines on horizontal cooperation. This includes entrusting a trade association (or an independent advisor, independent service provider, or public body) to, e.g., (1) coordinate joint transport for input materials; identify essential medicines for which there are risks of shortages; (2) aggregate production and capacity information, without exchanging individual company information; (3) work on models to predict demand and identify supply gaps; and (3) share aggregate supply gap information, and request participants, without sharing that information with competitors, to indicate whether they can fill the supply gap through existing stocks or increased production.

The EC acknowledges that other forms of cooperation to overcome critical supply shortages in the health sector might go beyond existing guidance. These could include coordinating production, such as which sites produce which medicines, stock management and, potentially, distribution with a view to increasing and optimizing output so that not all firms focus on one or a few medicines while other medicines remain in under-production. This coordination could also require exchanges of commercially sensitive information.

The Cooperation Framework notes that such measures would not be problematic under EU competition law or at least not give rise to an enforcement priority, subject to a number of conditions. Such measures should be designed and objectively necessary to actually increase output in the most efficient way to address or avoid a shortage of supply of essential products or services, such as those that are used to treat COVID-19 patients. These measures should also be tem-

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porary in nature (i.e., applied only as long there is a risk of shortage or in any event during the COVID-19 outbreak) and not exceed what is strictly necessary to achieve the objective of addressing or avoiding the shortage of supply.

In parallel with the Cooperation Framework, the EC announced the creation of a dedicated mailbox for companies seeking informal guidance on specific initiatives to respond to the crisis. Companies seeking guidance are asked to provide as much detail as possible, including: (1) the firm(s), product(s) or service(s) concerned; (2) the scope and set-up of the cooperation; (3) the aspects that may raise concerns under EU antitrust law; and (4) the benefits that the cooperation seeks to achieve, as well as an explanation of why the cooperation is necessary and proportionate to achieve those benefits in the current circumstances.

DG COMP also announced the issuance of the first comfort letter under its new procedure to Medicines for Europe, formerly the European Generics Medicines Association, with respect to a cooperation project among pharmaceutical producers targeting the risk of shortage of critical hospital medicines for the treatment of coronavirus patients.³⁸ DG COMP noted that this temporary cooperation appeared justifiable in view of the urgent need for large volumes of critical hospital medicines. The comfort letter describes extensive record-keeping and monitoring requirements applicable to participating pharmaceutical companies.³⁹

At the time of writing, DG COMP has not announced the issuance of any other comfort letters or guidance in response to the COVID-19 crisis. Two additional measures in the food and agriculture sector have been adopted under another legal framework, the EU’s Common Agricultural Policy.⁴⁰ Indeed, an EU official reportedly expressed concerns in a conference that businesses have made little use of EU resources intended to help them avoid antitrust violations when cooperating during the crisis.⁴¹ Some other European and global authorities have been much more proactive.⁴²

**Abuses and “Crisis Cartels.”** While mainly focused on the conditions for allowed cooperation in the crisis, the Cooperation Framework underlined that it remains more important than ever in the crisis that competition law protect companies and consumers. The EC warned particularly against companies engaging in anticompetitive agreements or abusing their dominant positions (including dominant positions resulting from the crisis) by exploiting customers and consumers (e.g., by charging prices above normal competitive levels) or limiting production to the ultimate prejudice of consumers (e.g., by obstructing attempts to scale up production to face shortages of supply).

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The EC’s warning about excessive pricing reflects an unusual focus on so-called exploitative abuses. Unlike some European authorities, the EC has in recent years shied away from excessive pricing cases, with one exception in the pharmaceutical sector.\textsuperscript{43} At the time of writing, however, the EC has not announced any investigations into COVID-19-related complaints. Again, this contrasts with the experience of some other authorities, which have reported a spike in enforcement activity relating to the COVID-19 outbreak.\textsuperscript{44}

\textbf{Merger Review.} On April 7, 2020, DG COMP published information on special measures due to Coronavirus/COVID-19 regarding merger notifications.\textsuperscript{45} DG COMP noted that it faced “difficulties in some cases in collecting information from the notifying parties and third parties, such as their customers, competitors and suppliers, given the disturbances caused by coronavirus outbreak.”\textsuperscript{46} and consequently encouraged “parties to discuss the timing of notifications of transactions with the relevant case team and to use electronic means to notify their transactions.”\textsuperscript{47} DG COMP reiterated its commitment “to helping and supporting business at this difficult time. It will deal with notifications to the best of its ability,”\textsuperscript{48} and noted that it stood “ready to deal with cases where firms can show very compelling reasons to proceed with a merger notification without delay.”\textsuperscript{49} Indeed, DG COMP adapted to remote working and quickly began processing merger notifications, including in complex cases, at approximately normal levels.

Although DG COMP adapted its merger review processes smoothly to COVID-19 conditions, without the need for regulatory changes, anecdotal reports reveal interesting changes in day-to-day practices. DG COMP merger review processes have always relied heavily on lengthy questionnaires, often in English only, sent electronically to dozens if not hundreds of customers and competitors of the notifying parties. In response to the COVID-19 outbreak, DG COMP has reportedly experimented with shorter questionnaires sent in multiple languages.\textsuperscript{50} DG COMP has also reportedly responded to pandemic-related market uncertainties by asking respondents to assess the effects of notified mergers under different scenarios, with and without taking account of the pandemic’s effects.\textsuperscript{51}


\textsuperscript{44} For example, the Spanish antitrust authority (CNMC) has received more than 500 complaints and inquiries, leading to investigations in the financial services, funeral services, sick leave insurance, and health product manufacturing markets. See CNMC, Press Release, La CNMC Recibe Más de 500 Quejas y Consultas a Traves del Buzón Habilitado Durante la Crisis del Covid-19 (Jun. 2, 2020), https://www.cnmc.es/novedades/2020-06-02-la-cnmc-recibe-mas-de-500-quejas-y-consultas-traves-del-buzon-habilitado. In the UK, the CMA has received thousands of complaints leading to four investigations for excessive and unfair practices. https://www.gov.uk/cma-cases/hand-sanitiser-products-suspected-excessive-and-unfair-pricing.


\textsuperscript{46} Id.

\textsuperscript{47} Id.

\textsuperscript{48} Id.

\textsuperscript{49} Id.


DG COMP and other EU representatives have also floated more dramatic suggestions for COVID-19-related changes to EU merger review. DG COMP’s Chief Economist reportedly suggested that a temporary ban on “sufficiently significant mergers” or extra vigilance about specific types of deals may be required to help manage DG COMP’s constrained resources.

Quo Vadis?—The Direction of EU Antitrust Reform and Lessons from the Pandemic

The COVID-19 outbreak has turned lives and economies in Europe and globally inside out. Before the pandemic, the EC had mapped out its most extensive antitrust reform agenda in decades. To its credit, the EC is forging ahead with this agenda, with little if any delay. But DG COMP’s experiences during the pandemic also have lessons to offer. Hopefully, the EC will take the time to share best practices with other authorities and adapt its reform agenda accordingly. A crisis is a terrible thing to waste.

The Digital Agenda will likely drive most changes to EU antitrust law in the coming years. These should offer more clarity and flexibility in the application of EU competition rules in the digital economy. The Digital Agenda is also the driver behind proposals to empower the EC to intervene without the need to find a violation of EU antitrust rules and regulate “gatekeeper” platforms. The Sovereignty Agenda is driving proposals for new legislation on foreign subsidies but will likely not drive significant changes to EU antitrust law.

In merger control, Digital Agenda concerns may prompt renewed calls to review more transactions in which large companies acquire start-ups. Again, Sovereignty Agenda proposals, such as the controversial proposal to allow political review of EUMR decisions, have not gained much traction. The EC is reviewing its approach to market definition, but any changes are more likely to affect the definition of markets in digital ecosystems than to broaden geographic market definitions, as sought by Sovereignty Agenda proponents.

As the EC’s ambitious agenda was gathering speed, the EC—together with the rest of the world—was overtaken by the COVID-19 outbreak. DG COMP quickly adopted new guidance on the assessment of cooperative arrangements and created a new mechanism to offer specific guidance. Compared to a number of European and global authorities, however, the EC’s pandemic-related output has been limited. The only comfort letter issued by the EC so far imposed such extensive restrictions and monitoring and reporting obligations that it is hard to imagine how DG COMP could monitor more than two or three such arrangements at any given time. Similarly, the EC’s invitation for whistle blowers to make pandemic-related complaints has apparently not generated a significant response.

How will—or should—DG COMP’s antitrust reforms be affected by experience during the COVID-19 outbreak? The pandemic now seems likely to have lasting implications for European and global markets, rather than the sharp but short disruption many expected at first. Thus, the Commission may need to review its guidance on cooperation on production, allocation of raw materials and distribution, and information sharing, assuming that pandemic-related disruptions will last for years, not months. It should also expand its guidance to cover markets outside the health care sector.

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More generally, DG COMP’s approach to individual guidance should be more practical and flexible to encourage greater use. Hopefully, DG COMP and other authorities will share the lessons they have learned so far and develop more harmonized approaches. This process will also benefit the EC’s ongoing review of the HBER and other guidance on cooperative arrangements.

In relation to abuse of dominance, the EC’s agenda focuses on new tools rather than reforming existing enforcement. But the pandemic has focused attention on exploitative abuses, like excessive pricing. The pandemic should prompt the EC to update its thinking and potentially to issue new guidance on the analysis of exploitative abuses. Again, DG COMP should share experiences with other competition authorities that have been more active in such cases.

In relation to merger control, the EC’s next reform proposal could be a revision of EUMR thresholds. However, experience during the pandemic suggests other areas for possible improvement. Initiatives such as shortening requests for information, issuing requests in the language of the addressee, and inviting respondents to comment on transactions’ effects under different hypothetical market scenarios would be welcome even when more normal conditions return. These reforms could improve response rates, generating more information for DG COMP case teams while reducing the burden on respondents.