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Competition Policy Outlook in 2021

How companies should prepare to be part of the EU's agenda

Introduction

As national restrictions across the world in relation to the COVID-19 pandemic are being enforced, societies and business have to adapt to the new reality. At the same time, and while the unfolding of the global COVID-19 vaccination strategy is ongoing, companies need to anticipate and adapt to a myriad of regulatory, economic and political challenges. In this context, the need to boost Europe's economic recovery and resilience, in light of geopolitical tensions and Europe's need for a level-playing field vis-à-vis its global trading partners, puts competition and antitrust at the forefront of the debate in Europe.

Our Trade, Competition and Investment Team explores the main challenges and trends that are likely to affect business in 2021. We offer some advice on how to



communicate and engage with stakeholders regarding the EU’s evolving competition regime.

Geopolitical dynamics and competition

The health crisis has caused demand and supply shocks which in turn triggered a global recession. Having said that, the disruption of global value chains in conjunction with pre-existing changes in global trade patterns has revealed EU Member States’ weaknesses to protect essential assets which are targeted by foreign investors. In response, governments have initiated stricter takeover rules in order to defend strategic interests, and blocked investments that pose security risks. In the EU, separately to the Foreign Direct Investment Screening Regulation, the European Commission (Commission) recently put in place a legislative initiative that aims to address the possible distortive effects of foreign subsidies in the Single Market. The initiative is the EU’s response to Chinese and other third countries state-financed investments. It is expected to introduce a number of transparency conditions, including disclosure of financial sources for those companies that benefit from foreign subsidies and operate or aim to launch their activities in the EU.

Foreign companies can prepare to engage with the Commission and national competition authorities on the sources of their financing, in order to limit delays to their commercial plans caused by unforeseen administrative requirements. EU companies will obtain the level playing field that they have campaigned for. In any case, any policy change at the EU level will seek to avoid disincentivizing desirable third-country investors from investing in European SMEs and start-ups. This will be especially important in the aftermath of the COVID 19-crisis. A productive dialogue between industry and institutional stakeholders will be essential in order to avoid an excessive prolongation of incoming investments and transactions screening.



Increased level of merger control enforcement

Following a period of economic uncertainty and volatility, we might see the number of mergers and acquisitions increase in 2021. At the same time, competition authorities in Europe are expected to scrutinise closely transactions, especially related to health, pharmaceutical, data and digital markets, amidst increased political and media pressure to strengthen European industry. Recent policy developments in the EU, such as the referral system under Article 22 of the EU Merger Regulation, as well as Brexit will lead to a higher number of transactions being reviewed by the Commission. In addition, preventing mergers where big tech companies acquire European start-ups to prevent them from innovating in the market in which they operate, known as “killer acquisitions”, will remain a key priority for the Commission and Member States’ competition regulators. Moreover, the ongoing review of the market definition notice, which is due in 2021, will update the Commission’s methodological guidance on defining relevant markets to capture all technological and global market developments, industrial policy, climate objectives, social policy and sustainable development, for the purpose of competition law.

Companies will wish to develop a clear understanding of new forms of legal and regulatory scrutiny they will have to face in the year ahead. Potential bidders will also face political and media scrutiny, especially when it comes to transactions in strategic sectors. They will need to carefully design their communication strategies to demonstrate benefits to the market and society from the transaction. At the same time, they will seek to strengthen their reputation, as well as the standing of the acquisition.

Green transformation

Competition rules play a key role in the achievement of the ambitious EU Green agenda, and in particular the goal of achieving a climate neutral economy by 2050. Competition legislation is a powerful tool as it drives technological innovation in the energy sector,



facilitates tax and financial policies in the context of the transition to a cleaner energy and sets the criteria for companies to engage in “green cooperation”. Taking these elements into consideration, in October 2020, the Commission published a call for contributions on how competition rules (state aid, antitrust and merger control) and sustainability policies can work together. While some Member States’ competition regulators (the Netherlands, Greece and Germany) have already looked into this issue, the Commission’s initiative can be seen as an attempt to harmonise the EU’s approach. The European Commission has scheduled a conference on sustainability and competition on in February 2021, to present the gathered feedback and discuss next steps.

In the area of state aid, the Commission is currently reviewing the guidelines on energy and environment as well as the Communication on Projects of Common European Interest, and it has already adopted the revised guidelines on EU Emission Trading System. The Commission considers adjusting the rules in order to incentivise green investments and the transition to decarbonisation, while determining which economic activities can qualify as environmentally sustainable, under the EU's Taxonomy. The way the Commission looks at cooperation between competing firms or at the organisation of supply chains would also be influenced by the need to attain the European Green Deal’s objectives. Finally, the extent to which sustainability issues should be taken into account when evaluating mergers and acquisitions has come onto the Commission’s radar. Companies can therefore expect competition authorities to assess the environmental impact of a deal.

Financial support by the governments and cooperation between companies to address climate change and promote sustainable projects, becomes increasingly favourable especially in the post-COVID era. It is thus essential for businesses to engage with relevant stakeholders both at national and European level in order to exchange views on how competition law and policy need to adapt to to support green industrial strategies and drive change.



Fair and open digital markets

The increasing role that online platforms play in shaping economies and societies has long been the subject of debate. Regulators and governments have stressed the need to enforce competition in digital markets. They aim to ensure that businesses will use the data they possess fairly, and they wish to stimulate innovation and drive market entry through positive enforcement of competition rules.

Just before the end of 2020, the Commission published its proposal for a Digital Markets Act (DMA). The proposal aims to address the negative consequences arising from certain behaviours by platforms acting as digital “gatekeepers” to the Single Market. These are platforms that have a significant impact on the internal market. They are gateways for business-users to reach their customers, and they enjoy entrenched, durable and dominant positions in multiple marketplaces. If approved by the European Parliament and the Council, the DMA will prevent gatekeepers from treating their own services and products more favourably in rankings and algorithms than similar services or products offered by third parties on their platform. Under the new rules, it will also be prohibited for gatekeeper-platforms to combine personal data sourced from their core services with personal data from any other services offered by these gatekeepers or with personal data from third-party services.

Ensuring digital sovereignty is another ambitious target on the European agenda. The Commission plans to promote interoperability to strengthen Europe’s capabilities and infrastructures for hosting, processing and using data. Projects on European data pools, data spaces and cloud infrastructure will facilitate access for the private and public sectors to new innovative services, and they will ensure resilience and empower EU’s presence in the global digital arena. However, companies collaborating with each other will need to do so in line with the antitrust rulebook and they should seek to facilitate data pooling and access to third parties. The ongoing review of the Horizontal Cooperation Guidelines expected in Q1 2021 will provide more clarity in this regard.



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The digital community is preparing itself for a heated debate on the DMA. Companies will use a wide variety of strategies to shape the debate. The Commission aims to create a new environment for companies to cooperate in the digital space in order to opens up opportunities for business. However, companies have to be aware of the challenges and respect the boundaries being set in an evolving competition framework. Clear and precise communication with regulators and decision makers will be essential. And as always, transparency will be expected and demanded.

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