

Not the dawn of a new age: the EU Commission's competition policy review

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Introduction

Modesty does not seem to be a characteristic trait of the European Commission (the 'Commission') under the Presidency of Ursula von der Leyen. Since the beginning of this administration's mandate, it has produced an unprecedented amount of extensive general policy papers on a wide range of topics. Most of these documents have ambitious titles, such as the European Green Deal, Digital Strategy, Digital Decade, New Industrial Strategy for Europe and so on. They cover almost the whole spectrum of European Union policy areas, including of course competition policy. It is difficult not to lose track in this paper jungle.

On 18 November 2021, the Commission adopted a paper on competition law with a promising title: 'A competition policy fit for new challenges.'¹ In its introduction, the 20-page paper heralds major changes: 'a review of competition policy tools with

1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A competition policy fit for new challenges*, COM(2021) 713 final (the 'Communication on a competition policy fit for new challenges').

unprecedented scope and ambition.² It refers to all three pillars of competition enforcement: antitrust law (including unilateral conduct), merger control and state aid law. It also addresses new issues, such as the Digital Markets Act (DMA) and the fight against third-country subsidies.

Although the paper follows a comprehensive approach and concerns all areas of competition policy, the response in the community has been restrained. It seems to have gone largely unnoticed and has hardly been commented on so far – either positively or negatively. This is not surprising, given the lack of new policies contained in the document. The very limited resonance also illustrates the problem of the current flood of general policy papers, namely the inflationary effect.

The annex to the document contains a list of tools that are due for examination and revision in the next few years – a routine procedure that has already been in place for many decades, but certainly not a radical reorientation.

Antitrust

Practitioners looking for a revolution in the field of antitrust will be disappointed. In this respect, the document does not set any new priorities. For long stretches, the paper sounds more like business as usual.

It explains in some detail that the 1997 Notice on Market Definition,³ which is certainly outdated, is to be revised.⁴ This has already been promised several times and such a reform is long overdue.

The Commission also announces that it will update the Horizontal Block Exemption Regulations and the Horizontal Guidelines.⁵ According to the Commission, the antitrust rules should ‘allow businesses in the EU to join forces to advance their research and development efforts, to design, produce and commercialise products, or to jointly purchase products or services they may need for their operations.’⁶ This regular revision process, which is repeated every 10–12 years, had already kicked off some time ago. The new set of rules are also to contain guidelines for cooperation in the development of more sustainable products. Since March 2022, a draft of the new Horizontal Guidelines has been available and up for consultation.

Furthermore, the Commission has adopted new guidelines on collective bargaining for self-employed persons. This is to ensure that antitrust law does not stand in the way of collective agreements for solo self-employed persons who are in a weak position (collective bargaining between employers and employees falls

² *Ibid*, s 1.

³ OJ 1997 C 372/5.

⁴ See n 1, s 3.

⁵ See n 1, s 3.1 and 3.2.

⁶ Commission press release (18 November 2021), IP/21/6101.

outside the scope of competition law, but self-employed persons are considered 'undertakings' and thus potentially within the remit of Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Finally, the Commission will review the block exemption regulations on shipping consortia and motor vehicles.⁷ In the category 'unfinished business', the Commission plans to complete the long-running revision of the Vertical Block Exemption Regulation and the Vertical Guidelines.⁸

Merger control

In the field of merger control, none of the measures mentioned in the paper can qualify as a radical shift in policy.

The Commission once again refers to its previously published guidelines on the application of Article 22 of the EU Merger Regulation,⁹ in which the national competition authorities are encouraged to make use of the referral system. The aim of this (controversial) paper is to 'strengthen control of potentially problematic acquisitions in the digital sector'. According to the Commission, this will 'encourage Member States to refer potentially problematic transactions for its review, even if they do not meet national notification thresholds, and allows the Commission to review acquisitions of innovative companies having competitive potential beyond what their turnover would indicate, in particular in the digital sector.'¹⁰

The fact that the Commission can have jurisdiction to decide on cases that are not even subject to a notification obligation at the national level is puzzling and has upset many competition lawyers as well as their M&A colleagues. However, this is not exactly a new development – the guidelines date from March 2021.

On a more technical point, the Commission plans to adopt a new Notice on the simplified procedure for treatment of certain mergers and a revised Implementing Regulation by the end of 2022. The goal of this initiative is to 'improve the EU merger control procedures in order to (i) better target the merger review process, allowing the Commission to focus its investigations on the cases that merit a more detailed review and (ii) reduce the administrative costs and burdens of the merger review process for companies'.

The Commission previously attempted to streamline the system,¹¹ but EU merger filings are still burdensome compared to merger filings at the national level.

7 For details, see the table in the Annex of the *Communication on a competition policy fit for new challenges*.

8 See n 1, s 3.1 and 3.2.

9 *Communication from the Commission: Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases*, OJ 2021 C 113/1.

10 See n 6.

11 Commission Notice of 5 December 2013 on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ 2013 C 366/5.

State aid

In the field of state aid, the paper does contain a relatively large amount of substantive information, although it only announces a few real novelties.

Temporary framework

First and unsurprisingly, the Temporary Framework for COVID aid¹² is to be phased out as soon as possible.¹³ It was, by definition, only a ‘temporary’ measure from the outset, so the Commission wants to ‘set the path for a progressive phase-out of crisis measures, while avoiding cliff-edge effects, and accompanies the recovery with new tools to kick-start and crowd-in private investment in the recovery phase.’¹⁴

CEEAG and Green Deal

The Commission announces the new version of the Guidelines for climate, energy and environmental aid (CEEAG), which has been adopted in the meantime.¹⁵ This set of rules is mainly aimed at supporting industry’s efforts towards decarbonisation.¹⁶ The CEEAG are probably the most important part of the ongoing state aid reform.¹⁷

Although the rules far exceed the scope of the previous regulation, the Commission announced them with the slogan ‘streamlining the existing rules’. The reform includes an extension of the scope of the guidelines into new areas (eg, clean mobility, energy efficiency of buildings, circular economy and biodiversity), as well as new aid instruments, such as CCfDs (Carbon Contracts for Difference).

In addition, familiar topics, such as aid for energy-intensive companies in the form of reductions in environmental charges, are addressed. In this respect, the rules will be more precise, more detailed and stricter – not only to the financial advantage of the aid recipients.

The new rules are more complex, especially in terms of procedure. In principle, the Commission made the implementation of an elaborate ‘public consultation’ by the Member States a prerequisite for the approval of state aid. Above all,

12 The Temporary Framework has been amended six times. For the latest version, see *Communication from the Commission: Sixth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak* and amendment to the Annex to the *Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance*, OJ 2021 C 473/1.

13 See n 1, s 2.

14 See n 6.

15 *Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022*, OJ 2022 C 80/1.

16 See n 1, s 3.1.

17 Environmental and energy subsidies now account for more than 50 per cent of all state aid in the EU.

the requirement of a bidding procedure was introduced as a basic principle. This means that in future one will have to apply for funding in an open, transparent and non-discriminatory procedure, in competition with other companies.

The strict thresholds for individual notifications to the Commission are largely eliminated, which contributes to a certain streamlining of the process. However, it does not appear certain that the Commission will ultimately receive fewer cases as a result of this change, as the CEEAG contains a general reservation that the Commission may demand individual notification in certain cases.

The question of whether the (narrow) exceptions to the requirement of prior consultation and bidding procedures apply is likely to continue to provide much material for discussion and dispute between the Member States and the Commission. Lawyers should be prepared for increased complexity.

Digital transition, innovation and semiconductors

Another brick of the state aid chapter is the revision of the Broadband State aid Guidelines,¹⁸ which is supposed to contribute to the digital transition, particularly to digital infrastructure development by facilitating the deployment and take-up of broadband networks that respond to fast-evolving user needs.¹⁹

The importance of state support for pan-European 'Important Projects of Common European Interest' (IPCEI) is stressed several times in the paper,²⁰ although the new IPCEI Communication (issued shortly afterwards)²¹ actually contains only minor changes compared to the previous communication.

The Commission aims to support the Member States' efforts to set up IPCEIs that jointly overcome market failures by enabling breakthrough innovation and infrastructure investments in key green and digital priorities, namely hydrogen, cloud, health and microelectronics.

While all of these rules have been in the revision process for several years, there is some exciting change in terms of state aid law concerning microelectronics. The Commission intends to approve aid for the construction of new chip factories in view of the exceptional situation in the field of semiconductors, their relevance and the dependency on supply from a limited number of companies in a challenging geopolitical context. Such aid can be approved in order to fill

18 *Communication from the Commission - EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks*, OJ 2013 C 25/1.

19 See n 1, s 3.2.

20 *Ibid*, s 3 and 3.1.

21 *Communication from the Commission - Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest*, OJ 2021 C 528/10.

potential funding gaps for the establishment, in particular, of European first-of-a-kind facilities in the semiconductor ecosystem.²²

This is indeed eye-catching news for the sector and probably a point that – according to those in the know in Brussels – was pushed through, above all, by Internal Market Commissioner Breton and only grudgingly accepted by Competition Commissioner Vestager. In the meantime, the Commission has, in the context of the proposed ‘Chips Act,’ adopted additional guidelines on state aid for the semiconductor industry.²³

The introduction of sector-specific rules for the semiconductor industry may remind older readers of the days when the Commission regularly adopted numerous guidelines for certain industries (automotive, steel, airlines, synthetic fibres, shipbuilding, etc). This school of thought was abandoned some 20 years ago, but it is possible that such an approach is now experiencing a renaissance.

DMA

Although, strictly speaking, it is not only a competition law issue, the Commission refers extensively²⁴ to the DMA proposal,²⁵ which is currently in the legislative process. Unsurprisingly, the idea of ‘keeping the market power of dominant platforms in check’ seems like it is becoming a *leitmotif* of the Commission future competition policy.

The DMA proposal is intended to ensure ‘contestable and fair markets in the digital sector’. It will establish a set of narrowly defined objective criteria for qualifying a large online platform as a ‘gatekeeper’ and set up specific obligations, ‘dos’ and ‘don’ts’. The DMA will ‘complement competition enforcement in keeping digital markets well-functioning,’ that is, the DMA and antitrust enforcement ‘will work in tandem: the DMA will set *ex ante* rules applicable to designated gatekeepers to ensure contestable and fair digital markets, while competition rules will continue to be enforceable *ex post* on a case-by-case basis’ [emphasis added].

Foreign subsidies

With its proposed regulation on foreign subsidies,²⁶ the Commission aims to tackle state support from third countries.²⁷ Again, this is not really pure competition law

22 See n 1, s 3.3.

23 *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Chips Act for Europe*, COM(2022) 45 final, sect. 3.3.3.

24 See n 1, s 3.2, and Annex.

25 COM(2020) 842 final.

26 COM(2021) 223 final.

27 See n 1, s. 1, 3.3, and Annex.

in the traditional sense, but rather a mix of different elements from state aid rules, abuse and merger control, public procurement law, trade law and investment control.

The proposed new system, which has been on the table since June 2020, is meant to fill a legal vacuum: the strict state aid rules in Article 107 *et seq* of the TFEU are only geared towards aid granted by EU Member States. Although the European anti-subsidy rules permit – based on the World Trade Organization rules – the imposition of countervailing duties, in practice, these have over the last 25 years not proved to be a particularly powerful weapon in the fight against unfair subsidisation by third countries.

The issue is not new but it has taken on a new dynamic, particularly during the Covid-19 crisis. One of the concerns is that weakened EU undertakings could become easy prey for takeovers by heavily subsidised state-owned groups. Alternatively, that they may face competition from foreign competitors with the financial support to underbid players from the European Union – including for prestigious public contracts.

The Commission intends to combat subsidies from non-EU-countries that cause distortions and undermine the level playing field in the EU. Under the proposed Regulation, the Commission will have the power to investigate financial contributions granted by non-EU governments to companies active in the EU. If the Commission finds that such financial contributions constitute distortive subsidies, it can impose measures to redress their distortive effects. The proposal involves three tools:

1. a notification-based system to investigate larger transactions involving a financial contribution by a non-EU government, comparable to the EU merger control system;
2. a tool to investigate bids in public procurements involving a financial contribution by a non-EU government, with an option for contracting authorities to exclude bidders; and
3. a general tool to investigate all other market situations, which the Commission can start on its own initiative (*ex officio*), and it may request ad hoc notifications.

The proposal, which was adopted on 5 May 2021, is currently being discussed by the co-legislators. If the Commission's plans are adopted, the new system will lead to more red tape.

The proposed notification thresholds are low, meaning that a large number of matters could be caught by these. The notification procedure for planned acquisitions will be very time-consuming and expensive. The new system is to run in parallel to the already existing competition instruments at EU and national level, such as the (numerous) merger control filings. The national rules of foreign trade law and

investment control will obviously also have to be checked. This means an increase in complexity.

Although it does appear conceivable for state aid control and merger control, as well as other regulatory systems, to coexist in principle, this may however lead to efficiency losses and conflicts between the systems – for example, if the different decision-makers issue different orders or demand conflicting commitments. Coordinating the various review and approval processes will most likely pose a challenge for M&A practitioners.

Another obvious concern is how third countries affected by the new system will receive the new plans. The possibility that they will retaliate by resorting to protectionist measures cannot be ruled out.

Much ado about nothing?

In summary, the Commission's key message in the document is that it has done a great job in the field of competition law and that the rules work perfectly. In this context, the victory over Google before the EU General Court in November 2021 is proudly recalled in great detail.²⁸ This is not exactly what you would expect from a forward-looking document, but such self-praise from the Berlaymont building in Brussels is familiar.

Most outside observers seem to wonder whether it was necessary to announce the paper with great fanfare if everything will in essence remain the same. The Commission's competition policy over the past 60 years has certainly been a success. However, it would have been possible to formulate all of this a bit more modestly. The Commission's general tone was certainly different in the past, with communications containing fewer 'soundbites' and not so much grandeur. The titles sounded less ambitious, but the plans were more concrete, more tangible and often included more substance.

There is another interpretation of the paper circulating in Brussels that sounds more like a conspiracy theory. This version says that the Commission is actually planning much more, but has deliberately left out the sensitive issues or has formulated them in such a way that they are only recognisable between the lines. In terms of transparency, that would of course be deplorable. But it is also merely speculation, which in turn is fuelled by the fact that the paper contains so little worthy of being called real news.

The most interesting message is that the Commission is (once again) very clear about the benefits of free competition. According to Commissioner Vestager, strong competition:

²⁸ See n 1, s 3.2.

*'gives businesses of all sizes a fair chance to compete. It makes sure businesses are challenged to deliver the best, most innovative solutions for consumers. And it gives customers a choice of products and services, contributing to reliable and diverse supply chains. That's why effective competition policy is needed now, more than ever, to give the European economy the agility and drive to overcome the challenges it faces.'*²⁹

This implies a clear rejection of all those voices, especially from Germany and France, who in recent years have called for a fundamental reform of competition law in order to create European champions.

Author biography

Ulrich Soltész has been a partner at Gleiss Lutz in Brussels since 2002, focusing on competition and state aid. During the past 25 years he has represented clients before the EU Commission, the EU Courts, the German Federal Cartel Office (FCO), and in national court proceedings. He is the co-editor of the *European Journal of Business Law* (EuZW) as well as of the *New Journal of Antitrust Law* (NZKart) (both in German). Ulrich is a non-governmental advisor to the International Competition Network (ICN) and a member of various associations, including the Berlin State Aid Forum, the International Bar Association, the American Bar Association and the Association for the Study of Antitrust Law.

²⁹ See n 6.

