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Editorial

by Bertold Bär-Bouyssièrè

Dear Readers,

Welcome to our new edition of Antitrust Matters, featuring country reports from Russia and various African States, a piece on industrial policy and merger control and a piece on the recent Belgian law on the abuse of economic dependence.

We also use this opportunity to emphasize the importance of “Vestager II”, the return of Margrethe Vestager, the most impactful Competition Commissioner in recent years, for a second term in which she will look after competition and digital health in the European Union. For more details, please see our alert.

Last but not least, we are proud to have read the first independent and very positive review of our Global Merger Control Handbook in the September issue of Business Law Magazine.

The book is available for purchase in hard copy or in electronic format here.

Please enjoy this issue of Antitrust Matters.

Best wishes,

Bertold Bär-Bouyssièrè
Tackling UTPs through Belgian competition law

By Martijn van Wanroij and Moustapha Assahraoui

I. Introduction

Belgium's Law of April 4, 2019 published in May 2019 in the Belgian Official Journal (Belgisch Staatsblad/Moniteur Belge), introduces several significant changes to the Belgian Code of Economic Law (CEL) by regulating three unfair trading practices (UTPs) in a business to business (B2B) relationship: (i) abuse of economic dependency (enters into force in June 2020); (ii) abusive clauses (enters into force in December 2020); and (iii) unfair market practices (recently entered into force as per September 1, 2019).

The objective of the legislation is to widen the scope of Belgian competition law by broadening the notion of “abuse of dominance,” which now also entails abusive conduct performed by undertakings who are considered as indispensable commercial partners to other undertakings. This means the Belgian Competition Authority (BCA) to establish market dominance – ie, when there is a situation of economic dependency in a commercial relationship between undertakings.

Because the legislative changes are aimed at protecting smaller trading partners, these new rules are mainly relevant in vertical relationships.

II. Substantive changes

A. ABUSE OF ECONOMIC DEPENDENCY

Whereas under article 102 TFEU, abusive behavior can only be sanctioned when the undertaking subject of the investigation is dominant in the market(s) concerned, the Belgian provision now relaxes that obligation by prohibiting non-dominant undertakings from abusing their market position in their relation with smaller trading partners (on the condition that there is economic dependency in their commercial relationship).

Indeed, the aforementioned practice would fall within the scope of Article IV.2/1 CEL if the following cumulative conditions are fulfilled:

- established economic dependency in a commercial relationship between the undertakings concerned
- abusive conduct and
- effect on competition on the Belgian market or a substantial part of it.

The Belgian Law of April 4, 2019 defines economic dependency as “a position of subordination of an undertaking in relation to one or more other undertakings defined by the absence of a reasonable equivalent alternative, available within a reasonable period of time, on reasonable conditions and at a reasonable costs, allowing the latter undertaking(s) to impose terms and conditions that they would not be able to obtain under normal market conditions”.

The CEL does not prevent the creation of commercial relationships between undertakings where there is a degree of economic dependency. It does however prohibit the abuse of such position. Article IV.2/1 CEL provides a non-exhaustive list of abusive practices, ie:

- Refusal to deal
- Imposition of unfair prices or trading terms
- Output limitation
- Discrimination between trading parties and
- Abusive tying.

Acting on its own initiative or following a complaint, the BCA is able to instigate an investigation against abuse of economic dependency, which can be sanctioned with a fine of up to 2 percent of the undertaking’s global annual turnover.

1 Similar legislation preventing abuse of economic dependence has already been introduced in several EU member states, among them France, Germany and Italy.
This resonates in two ways. First, a similar and quite old provision can be found in Germany. In particular, Article 20 of the Act against Restraints of Competition (GWB) imposes an obligation of non-discriminatory treatment on suppliers with relative market power (below the level of dominance) in relation to smaller buyers that are economically dependent on the supplier. This provision can be used to force access. An illustrative example is a toy store in the city of Nürnberg that is refused supplies of Märklin miniature train sets, a “must-have” brand, in the pre-Christmas period. The obligation presupposes discriminatory treatment – i.e., the toy store in our example can only force supplies if Märklin has a policy of selling its products via toy stores. Where Märklin does not engage in trade at the toy store level, our toy store cannot force an exception.

There is, however, another way in which this provision could be used. In the digital economy, there is a lot of policy talk on platforms that operate as competitive gateways and block competing suppliers from access to the platform. A provision that works with the concept of economic dependency would allow to force access to marketplaces without having to prove dominance. The Belgian legislative debates highlighted that the main reasons for adopting such provisions are (i) aligning Belgian law with other European countries – i.e., prior to the adoption of the law, Belgian law offered less protection than other European countries such as France; (ii) tackling the challenges small and medium-sized enterprises (SMEs) and farmers encounter in an economic dependent relationship by increasing their protection; and (iii) enabling the BCA to investigate abuses of economic dependency.

However, regardless of the legislative debates, it cannot be excluded that this provision turns into a powerful access tool.

B. ABUSIVE CLAUSES
The Belgian Law of April 4, 2019 moreover prohibits abusive clauses in commercial contracts between undertakings, which occurs when the clause creates, alone or in combination with other clauses, a clear imbalance between the rights and obligations of the parties.

Article IV.91.4 CEL provides for a black list of clauses which are abusive in all circumstances such as (i) potestative clauses (i.e., clauses that depend solely on the will of one party); (ii) clauses giving an undertaking in a commercial relationship the unilateral right to interpret any clauses; (iii) clauses requiring one party to waive any means of recourse in the event of a dispute; and (iv) clauses which irrefutably establish one party’s acceptance to clauses of which it has not had the possibility to become aware before the conclusion of the contract. Similarly, Article IV.91/5 CEL establishes a graylist of clauses which are presumed to be unfair unless proven otherwise, e.g., among others, clauses that (i) commit the parties without specifying a reasonable period of termination; or (ii) tacitly extend or renew a fixed term contract without specifying a reasonable period of notice.

The abusive clauses included in the blacklist are null and void and therefore enforceable. The remainder of the contract however remains in place.

The graylist clauses can be challenged by the undertaking(s) involved in a civil court procedure. When establishing the abusive nature of a clause, a holistic approach would be desired. In particular, the overall context would need to be taken into account such as the intention of the parties as well as the nature of the products covered by the product.

The new rules apply to contracts in B2B relations entered into, amended or renewed after December 1, 2019.

C. UNFAIR MARKET PRACTICES
Finally, the Belgian Law of April 4, 2019 also introduces a prohibition of certain unfair market practices between undertakings, including misleading and aggressive market practices. The aforementioned practices were before the introduction of this law, already criminally sanctioned but only in a business to consumer (B2C) context. Unfair market practices can be challenged by the undertaking(s) involved in a civil court procedure.

A market practice is considered misleading if it misleads or is likely to mislead an undertaking with respect to a number of elements with the result that the undertaking is lead to take a decision on a transaction that it would not have taken otherwise. Misleading market practices may also entail providing misleading or erroneous information or hiding essential information.

A market practice of an enterprise is deemed aggressive when it limits the freedom of choice of an undertaking by (for example) harassment, coercion or inappropriate influence over such undertaking.

The assessment of whether a market practice is aggressive or misleading should be done on a case-by-case basis, taking into account all relevant circumstances.
Stirring the competition pots: recent developments in competition law in Africa

By Janine Simpson, Caleb Kipa and Jeanne-Mari McDonald

Most African countries recognize that competition regulation is an important policy tool to assist in the realisation of inclusive growth and sustainable development despite economic challenges. As a result, the number of countries with competition regimes has grown rapidly in recent years in Africa, from just over 10 in 2000 to more than 30 in 2018. A number of supranational, regional African competition regimes have also been formed.

Various African countries, among them Nigeria, Angola and South Africa, the three largest economies in the Sub-Saharan region, have had significant competition developments in the past year.

In the last year, both Angola and Nigeria adopted new competition legislation which provides for the establishment of new competition regulators. The regional competition authorities for ECOWAS and East African Community (EAC) were also established. In South Africa an amendment act, which introduces significant and far-reaching changes to the existing Competition Act (which has been in force since the late 1990s) was promulgated and has partially come into effect. Changes to the existing competition regimes in Botswana and Mauritius also seem to be on the cards in the near future.

New competition regimes in Angola and Nigeria

Angola has in recent times implemented various policy reforms aimed at making Angola's economy more competitive and dynamic, including the introduction of competition legislation. In late 2018, the Competition Act of Angola entered into force followed, shortly thereafter, by the establishment of the Angolan Competition Regulatory Authority (CRA).

The CRA has administrative, financial and regulatory autonomy and is empowered to investigate, regulate, supervise and sanction. It has the power to request documents and carry out searches and seizures.

The Angolan Competition Act introduces a mandatory merger control regime if the following thresholds are met:

- The acquisition, creation or reinforcement of a market share of 50 percent or more in the Angolan market or a substantial part of it or
- The combined turnover in Angola of all undertakings participating in the merger exceeded AOA450 million (US$1.3 million or €1.15 million) in the last financial year or
- The combined turnover in Angola of all undertakings participating in the merger exceeded AOA3.5 billion (US$10 million or €9 million) in the last financial year.

Prior implementation and failure to notify are prohibited. The Angolan Competition Act also prohibits certain anti-competitive horizontal and vertical agreements as well as the abuse of a dominant position. Undertakings that contravene the provisions of the Competition Act face potential penalties of up to 10 percent of annual turnover.

Shortly after the Angolan Competition Act came into force, the Nigerian Federal Competition and Consumer Protection Act (FCCPA) was also signed into law, at the beginning of 2019. The FCCPA establishes a comprehensive, consolidated legal framework for the regulation of competition matters in Nigeria. The FCCPA is now the primary competition legislation in Nigeria. Previously the regulation of competition in Nigeria was provided for in various sector-specific pieces of legislation and the Securities and Exchange Commission (SEC) had regulatory oversight over mergers.

Nigeria's FCCPA, like many of its African counterparts, includes public interest considerations in its competition regime. Other countries which consider public interest effects (other than the effects on competition) in their competition regimes, albeit with different nuances, are South Africa, Zambia, Zimbabwe, Botswana, Namibia, Cameroon and Kenya. Some of the other notable provisions of the FCCPA include those dealing with merger control, restrictive agreements, abuses of dominance and price regulation:

Merger control – The Federal Competition and Consumer Protection Commission (FCCPC) replaces the SEC as the primary regulator of mergers in Nigeria. The thresholds notification have not as yet been published. In May 2019, the SEC and FCCPC issued a joint advisory notice providing guidance on how mergers should be dealt with during a transaction period (which commenced on May 3, 2019 and remains in force until
Further notice). During this transaction period, notifications are to be submitted to the FCCPC and will be jointly reviewed by the SEC and FCCPC (under the SEC rules). The filing fees (determined under the SEC filing fees rules) are payable to the FCCPC and the FCCPC will convey any decision made regarding a notification.

Restrictive agreements – The FCCPA prohibits and voids agreements if their purpose or effect is the preventing, or lessening, or distorting of competition. Price-fixing, market allocation, restricting production or distribution, collusive tendering, tying and resale price maintenance are specifically listed as types of restrictive arrangements which are likely to prevent, restrict or distort competition.

Price regulation – The FCCPA empowers the President of Nigeria to regulate, by order, the price of goods or services specified in the order. Before making such order the FCCPC is required to furnish the President with a report assessing the state of competition in a relevant market and providing recommendations of the desirability and likely effect of regulating prices in such market.

Abuse of dominance – The abuse of a dominant position is prohibited. Examples of such an abuse are specifically listed in the FCCPA and include excessive pricing, predatory pricing, requiring or inducing a supplier or customer not to deal with a competitor, selling good or service on condition that the buyer purchases unrelated good or services, buying up scarce supply of intermediate goods or resources, and refusing access to an essential facility.

Extensive changes made to the South African Competition Act

Certain provisions of the South African Competition Amendment Act 18 of 2018 came into effect on July 12, 2019. The amendments have a strong public interest focus and are expected to have a significant impact on market participants and the regulation of competition in South Africa.

Various provisions of the amendment act have not yet commenced but are expected to come into effect towards the end of this year. These include those relating to (i) the proposed dual notification process for mergers involving foreign acquiring firms; (ii) buyer power; (iii) price discrimination; (iv) the powers of the Minister to make regulations regarding restrictive horizontal and vertical practices; and (v) the protection and disclosure of confidential information.

Some of the most notable amendments that have come into force relate to merger control, abuse of dominance, market inquiries, administrative penalties and exemptions:

Exemptions from the application of the prohibited practices provisions – New grounds, including (i) the promotion of market participation, entry or expansion by small and medium businesses, or firms controlled or owned by historically disadvantaged persons; (ii) changes in productive capacity; (iii) economic development, growth, transformation or stability of designated industries; and (iv) competitiveness and efficiency gains that promote employment or industrial expansion are introduced on which a firm may apply to the Commission to be exempt from the application of the prohibited practices provisions of the Competition Act.

Merger control – Additional grounds are introduced for the Commission and Tribunal to consider when analysing mergers, namely:

- the extent of ownership of merger parties in, or the extent to which merger parties are related to other firms in related markets, including through common members or directors
- other merger engaged in by merger parties for a period to be situated by the Commission
- the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market
- the ability of national industries to compete in international markets and
- the promotion of a greater spread of ownership, in particular to increase levels of ownership by historically disadvantaged persons and workers in firms in the market.

Abuse of dominance – The amendments to the abuse of dominance provisions include changing the test for predatory pricing, introducing margin squeeze as a specific exclusionary act and significant changes the excessive pricing provisions.

Market inquiries – Market inquiries in respect of the general state of competition, levels of concentration and structure of a market, without referring to any specific conduct by market participants may now be initiated by the Commission or the Minister responsible for the administration of the Competition Act. The Commission must decide, having regard to the impact on competition on small and medium businesses, or firms controlled or owned by historically disadvantaged persons, whether any feature of a market impedes, restricts or distorts competition within that market. If so, an adverse effect on competition is deemed to exist which empowers the Commission to take any remedial actions that it considers to be reasonable and practicable, with the exception of divestiture, which can only be imposed by the Tribunal.

Administrative penalties – Previously, certain contraventions of the Competition Act did not attract a penalty for a first time offence. Now all contraventions carry a potential first offence penalty of up to 10 percent of turnover and a penalty of up to 25 percent is introduced for repeat offences. These penalties
may now also be increased to include the turnover of firms that control a contravening firm, if the controlling firms knew, or should reasonably have known that the contravening firm was engaging in prohibited conduct.

**Establishment of regional competition authorities**

Economic Community of West African States (ECOWAS) constitutes a regional economic block of 15 West African member states, namely Benin, Burkina Faso, Cape Verde, Cote d’Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. On May 31, 2019 ECOWAS launched its regional competition authority (ERCA) in Banjul, Gambia. The ERCA has been established to implement the regional competition rules adopted by ECOWAS in 2008.

Similarly, the competition authority (EACCA) of the East African Community (EAC) commenced operations in March 2018. Its activities are currently limited to industry investigation and analyses. The EACCA is mandated to promote and protect fair trade and to ensure consumer welfare in the community and includes five partner states comprising of Burundi, Kenya, Rwanda, Tanzania and Uganda.

**Likely imminent changes to the existing competition regimes in Botswana and Mauritius**

The President of Botswana assented to a new Competition Act last year. The new act (which is not yet in force) will repeal the current competition legislation and will introduce various changes, including the introduction of criminal liability, changes to the merger control regime and abuse of dominance provisions:

**Merger control** – The current competition legislation makes no provision for financial penalties for failing to notify a merger. The new act will introduce financial penalties for failing to notify a merger or for prior implementation of a merger. A penalty of up to 10 percent of the consideration or the combined turnover of the parties involved in the merger (whichever is greater) may be imposed. The new act also provides for the Minister of Investment, Trade and Industry to provide comments to the competition authority where a merger “raises paramount issues of public interest”.

**Abuse of dominance** – The current competition act only provides a general prohibition against the abuse of dominance, without specifying types of conduct that are regarded as abusive. The new act identifies specific conduct which constitutes abuses of dominance, namely, predatory conduct, tying and bundling, loyalty rebates, margin squeeze, refusal to supply or deal with other enterprises including refusal of access to an essential facility, requiring or inducing any customer to not deal with other competitors, discriminating in price or other trading conditions; and exclusive dealing.

**Criminal liability and sanctions for engaging in restrictive practices** – The new act introduces criminal sanction, applicable to any officer or director of an enterprise who contravenes the horizontal restrictive practice provisions of the new act. An officer or director may be liable for a fine of up to BWP100,000 (US$10 000) or imprisonment for up to five years, or both. Personal liability may also apply to any director or officer contravening the resale price maintenance provisions of the new act. A fine of up to BWP50,000 (US$5,000) may be imposed. The competition authority will be required to report the investigation of criminal matters under the new act to the Botswana Police Service.

Last year, the Competition Commission of Mauritius announced in its newsletter that it was looking to review its current competition legislation (the Competition Act of 2007) in order to “adequately cater for emerging competition issues as well as to be in line with international good practices and other regional commitments.”

Of particular interest is the proposed change to the existing merger control regime in Mauritius. At present, unlike most other African jurisdictions, which have a mandatory and suspensory merger control regime, in Mauritius merger notification is voluntary. Indications are that it is probable that Mauritius will transition to a mandatory merger notification system in the near future. Despite the fact that notifications are not mandatory, the Competition Commission of Mauritius may, under the current regime, review any merger if it is of the view that the parties meet a market share threshold of 30 percent (either together or individually) and the merger situation results or is likely to result in a “substantial lessening of competition within any market for goods or services.”

**Final notes**

It is clear that the competition pots of Africa are simmering with change. The competition landscape on the African continent is evolving and developing. This is, in part, due the fact that many African competition regimes are relatively young and are continuously being tested and improved. Public interest factors are playing an increasingly prominent role in the competition regimes of African countries and further changes to competition regimes, aimed at creating more inclusive economies can be expected. The levels of enforcement are also increasing as the competition regulators become more experienced. Keeping a finger on the pulse of these developments and understanding the legal requirements is therefore crucial as a lack of knowledge and understanding could bring about significant legal and reputational consequences.
Russian competition law and enforcement priorities

By Azamat Abdulmenov

Russian competition law was first introduced in 1991 and has significantly evolved since then. The current legal framework is based on the 2006 Federal Law No. 135-FZ On Protection of Competition. Generally, Russian competition law tends to follow European competition regulations, but there are still considerable differences.

The Russian competition authority, the Federal Antimonopoly Service of the Russian Federation (FAS), has broad executive powers, including reviewing merger control; investigating the observation of competition law; and regulating public procurement, unfair competition, advertisements, and natural monopolies' tariffs.

In recent years, FAS has been increasingly active in the digital markets sector, with its senior executives repeatedly emphasizing the importance of considering digital economy markets and elaborating on the application of traditional competition law tools to regulate them.

FAS has paid particular attention to competition law violations resulting from the use of artificial intelligence, big data, online platforms, aggregators and pricing algorithms. On March 18, 2019, FAS published recommendations on using pricing algorithms (see our legal update for more information).

Merger control regime

The Russian merger control regime broadly resembles that of other major jurisdictions. Subject to financial thresholds being met, merger transactions that trigger a merger filing include:

- statutory mergers;
- the acquisition of company shares;
- the acquisition of production or intangible assets;
- the acquisition of rights to determine the terms of business activities of a company; and
- the execution of a joint venture agreement between competitors.

The financial thresholds that trigger a merger filing are rather low. They are met if:

- the book value of assets of the acquiring company's group and the target company's group exceeds approximately US$100 million or the total annual turnover of the acquiring company's group, and the target company's group exceeds approximately US$150 million; and
- the target company's group book value of assets exceeds approximately US$6 million.

Foreign-to-foreign transactions trigger merger filings in Russia if they involve foreign target companies with Russian subsidiaries (even if they are dormant) or foreign target companies with an annual turnover from sales to Russia over around US$15 million. Because of the low thresholds, the acquisition of a foreign target company with a Russian subsidiary will most likely require a merger filing in Russia.

In 2018, FAS reviewed 1,086 merger clearance applications. One recent high-profile cross-border case was the Bayer/Monsanto transaction, which was cleared in 2018. In this matter, FAS tested new methods for analyzing the economic effects of the transaction on the market, and imposed particularly heavy behavioral remedies.

Despite the relatively low market shares of the parties in Russia, FAS argued that the Bayer/Monsanto transaction would result in a significant growth of market power and the restriction of competition, because of the use of big data, algorithms, and other digital technologies in the agricultural market in which the parties operate.

FAS conditionally cleared the transaction by imposing behavioral remedies. For the first time, these remedies included:

- an obligation to transfer techniques for the molecular selection of seeds to selected Russian organizations;
- an obligation to provide Russian companies with access to the digital platforms for precision agriculture; and
- the appointment of a monitoring trustee for ensuring compliance with the remedies.

The Bayer/Monsanto case shows that FAS closely reviews and regulates cross-border transactions involving digital markets.
Competition law investigations

FAS is active in enforcing competition law. In 2018, it investigated 685 abuse of dominance cases, and 437 cases on anticompetitive agreements and concerted actions, which included 332 cartel cases, 46 other anticompetitive agreements cases, and one vertical agreement case. The same year, authorities initiated 14 criminal cases against officials of organizations that committed cartel violations. Historically the majority – over 85% – of cartel cases in Russia relate to bid rigging cases.

Recent high-profile investigations include those against multinationals. For example, in 2018, FAS investigated why various consumer electronics retailers used the same resale prices for LG smartphones. It transpired that the authorized importer of LG smartphones to Russia published recommended resale prices on its website, and monitored and enforced the compliance of retailers with those prices. Managers of the authorized importer monitored the resale prices not only by regularly collecting price data from the resellers, but also by using special software containing a price analysis algorithm. The use of this algorithm differentiates the case from the 2019 resale price maintenance investigation regarding Samsung.

FAS sanctioned the authorized importer for violating Russian competition law. In its decision, FAS noted that the use of price algorithms is not a violation as such, but that they may be used as a means of violating competition law.

Amendment of Russian competition law

The most actively debated proposed amendments of Russian competition law are set out in a draft law named the Fifth Antimonopoly Package (which represents the fifth package of substantial amendments to the competition law).

The aim of the draft law is to regulate digital market by introducing a digital platform and network effects doctrine. It is proposed that the companies that have digital platforms with network effects could be considered dominant entities in the markets where they operate.

The draft law also proposes amending the merger control regime by introducing, among others, the following provisions:

- If FAS considers that a transaction results, or may result, in the restriction of competition, FAS should issue a report containing its position on the merits of a transaction and invite an applicant and other relevant parties to discuss such concerns.

The draft law is expected to be enacted in 2020.

Another long-expected reform of competition law is the introduction of a system of antimonopoly compliance. Under the draft law for the measure, antimonopoly compliance is defined as a set of internal acts and organizational measures aimed at preventing antimonopoly violations. The draft law provides that if a company implements an effectively functioning antimonopoly compliance system, it may qualify for a reduced fine for an accidental violation of competition law. This amendment of the competition law could also be enacted in 2020.

Eurasian Economic Union

Russia is a member of the Eurasian Economic Union (EAEU), which has supranational competition law regulations. The member states of the EAEU are Armenia, Belarus, Kazakhstan and Kyrgyzstan. This means that companies doing business in Russia must comply with not only Russian competition law, but also – where applicable – the EAEU competition regulations.

EAEU competition law does not provide for a merger control regime. Certain vertical and horizontal cooperation may, however, be assessed under the provisions prohibiting the abuse of dominance and anticompetitive agreements. If the competition authority of the EAEU initiates a case, FAS would lose jurisdiction over the same matter.

The competition authority of the EAEU may investigate competition law violations and impose sanctions if the criteria for assuming EAEU jurisdiction are met. Under the general rule, the competition authority has jurisdiction over infringements on cross-border markets that adversely affect competition in two or more member states. A cross-border market is deemed to be a market whose geographic boundaries cover two or more member states (e.g. Russia and Belarus).

Some EAEU antimonopoly investigations have led to companies being held liable for the violation of EAEU competition law (e.g. the Caterpillar case and the NMLK case), and some of them are still ongoing (e.g. the Farmexpress case).

Historically, the EAEU competition authority has not been particularly active in enforcing EAEU competition rules. For example, in 2018, the competition authority of the EAEU conducted five investigations in total, and the same number of investigations in the first half of 2019. This may, however, change in future.
EU Industrial policy and merger control: Advancement or pitfall?

By Bertold Bär-Bouyssiére, Daniel Wojtczak and Moustapha Assahraoui

In February 2019, the European Commission prohibited the proposed acquisition of Alstom by Siemens, reigniting the discussion on the need of including wider public interest considerations in merger control. That ongoing debate restarts whenever a high-profile transaction is prohibited, and the discussion's main focus is whether in merger review the Commission should have the discretion to take into account other objectives than protecting competition and allow the creation of "European champions" that are better placed to face global competition.

A recurrent theme in the European media is that in today's rapidly developing globalized economy, in a landscape of rising competition and international trade wars, the competitive position of Europe is under threat. A prominent sub-theme is the looming entry of powerful Chinese giants into the European theatre, sponsored by government subsidies, support and coordination, all of which are lawful thanks to China's outdated "developing economy" status under the WTO rules. The argument is that these and other factors favor Chinese companies over their European competitors. This then raises a burning question: should Europe stick to the old faiths of free trade and competition law orthodoxy or become more protectionist and pursue a more coordinated industrial policy? Such a policy would be supported by more and better state aid, revised public procurement rules insisting on reciprocal market access, effective trade defence instruments (TDIs), a thorough monitoring of foreign direct investment and – last but not least – a more lenient merger review system capable of closing an eye to competitive harm for the greater good of Europe's industry and welfare. This particular aspect of industrial policy would imply that the merger rules may be bent to let industrial policy considerations override competition policy orthodoxy.

In recent years, the EU has already adopted a set of rules to cope with the changing global environment, ie by modernizing its TDIs which strengthens the protection of EU companies against harmful imports (2018) and adopting an EU FDI screening allowing the exchange of information between the Commission and EU member states and raise concerns related to specific investments (2019). "In a colourful paper titled EU Industrial Policy After Siemens-Alstom – finding a new balance between openness and protection released in March 2019, the Commission's European Political Strategy Centre rolls out the different dimensions of such an industrial policy: (i) making the WTO fit for purpose; (ii) growing the EU's arsenal of TDIs; (iii) protect critical technologies and assets through an increased monitoring of foreign direct investment; and (iv) leveraging power to have more reciprocal market access.

The report rightly states that "industrial leadership starts at home." And given the institutional framework, the member states are in the driving seat to achieve these goals. This means (i) re-boosting the Single Market; (ii) funding innovation and important projects of common European interest; (iii) developing standards for a brand Europe; (iv) and building partnerships including through more "economic diplomacy." The report does not list merger control as a means to make European companies fit for the global stage. In one of the sub-chapters, it does call for a "rethinking of 'European champions," but the example referred to is the teaming up of Ericsson, Telia and another international car manufacturer for 5G testing, not a concentration within the meaning of merger control. This deliberate silence clearly suggests that opening up merger control to industrial policy considerations is not on the Commission's table, at least not today. Which is not surprising.

Although several EU countries have shown some sympathy to the idea of modifying the merger control regime in one way or the other, it should be recalled that it has taken the antitrust community in the US and the EU many decades since the adoption of the Sherman Antitrust Act in 1890 to develop our current rationalistic competition law framework, which forces regulators in merger reviews to clearly identify a harm to competition, and that restrictive measures (ie, veto, conditions) can only be imposed where and to the extent that this is necessary to prevent the harm from occurring (principle of proportionality). The current orthodoxy aims at guaranteeing the optimal allocation of resources through the competitive play of market forces, at generating consumer welfare and

1 EU Commissioner's Decision of 6 February 2019, Siemens/Alstom, Case M.8677.
3 https://g8fip1kplyr33r3krz5d97d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/03/EPSC_Industrial-Policy.pdf
efficiencies. This being said, according to established EU case law, the competition rules laid down in the European Treaty aim to “protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such” – whatever “competition as such” may be.4

To the extent that the EU beefs up its industrial policy along the frontlines sketched out above and that EU competition rules continue to safeguard the interests of both competing suppliers, their input providers, buyers and final consumers, thereby incentivizing European companies to reach their full potential and leveling the playing field on the European and global market places, there should arguably not be any need to discard orthodoxy and dabble with protectionism. But let us take a closer look at the proposed modifications of merger control discussed over the last months.

I. European champions
A. SIEMENS/ALSTOM

As previously stated, the recent decision of the Commission to block the proposed Siemens-Alstom merger has fuelled EU competition policy critics to voice their concerns. Critics were in support of the merger as it would allow for the creation of an EU champion and level out the playing field against foreign companies enjoying subsidies (eg, Chinese companies). Given the significant interest in the decision and the heated debate, the Commission rushed to publish a provisional non-confidential “summary” of the decision on 5 September – a “summary” of 400 pages. The published sections include those of relevance “summary” of the decision on 5 September – a “summary” of 400 pages. The published sections include those of relevance for the debate, notably those on the potential entry of Chinese competitors.5

The Commission based its negative decision on the ground that the proposed transaction would have harmed competition in markets for railway signalling systems and very high-speed trains. During the lengthy investigation, there was much political pressure on the Commission to allow the transaction – a pressure that was resisted, as the outcome shows. However, the decision as such is not political – rather, it refuses to be, claiming that the negative outcome of the review is entirely based on the decision as such is not political – rather, it refuses to be, claiming that the outcome shows. However, the decision as such is not political – rather, it refuses to be, claiming that the negative outcome of the review is entirely based on the Commission’s use of wholly orthodox legal and economic tools.6

The parties had argued that Chinese train manufacturers, such as CRRC and Huyndai Rotem, should be considered potential competitors, because they satisfy the technological standard required to bid in European tenders if they want to. The time window for potential entry should be 5 to 10 years given the dynamics of the market, surmountable barriers to entry and the fact that tenders are infrequent.

The Commission objected that it had sufficiently considered potential entry in its analysis of the global competitive landscape. It found that Chinese suppliers were not yet present in the EEA markets for very high-speed trains and have not yet tried to participate in any tenders. Moreover, the Commission believes that it will take a long time before Chinese suppliers can become credible suppliers for European infrastructure managers. Regarding very high-speed trains, the Commission indicated that it will be highly unlikely that new Chinese entry will represent a competitive constraint on the merging parties in the foreseeable future.6 However, the time frame when assessing competitive constraints should be done on a holistic basis (ie, how long would it take for Chinese competitors to enter the market?). In relation to the timeframe taken for the analysis, it should be noted that the Commission would prefer not to have a long period of unconstrained competition and forward-looking assessments are complicated in fast-changing markets without a sufficient volume of information. The Commission also pointed out (quite maliciously) that Alstom had already forecast Chinese entry at the time of Alstom/Areva,7 ie, almost a decade ago.

B. THE GERMAN-FRANCO MANIFESTO

Not surprisingly given the strong support of Germany and France to the merger, less than two weeks after the prohibition of Siemens/Alstom, the German and French Ministers of Economy published a short manifesto outlining 3 pillars and 14 working points envisaging an EU industrial policy fit for the 21st century.8 The manifesto’s key section is the second pillar, the call for an adaptation of the regulatory framework, and notably the competition rules. The manifesto bluntly alleges that the current rules are outdated as they disadvantage European companies in the global playing field, where competitors are heavily subsidized. The merger rules, says the manifesto, prevent European companies from growing and competing.

4 Judgment of the Court of 6 October 2009, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P GlaxoSmithKline Services and others v Commission and others, paragraph 63; and Judgment of the Court of 4 June 2009, T-Mobile Netherlands and Others, Case C-8/08 paragraph 38-39. It seems noteworthy that some seem to view the recent trend of Commission decisions annulled on appeal as a sign that the European courts might move more towards a US-style effects-based “consumer welfare” standard.

5 https://ec.europa.eu/competition/mergers/cases/decisions/m8677_9376_3.pdf


7 EU Commission’s Decision of 26 March 2010, Alstom Holdings/Areva, Case M.5754, paragraph 125.

This translates into two proposals:

• Merger control should “take greater account of competition at the global level, potential future competition and the timeframe when it comes to looking ahead to the development of competition to give the European Commission more flexibility when assessing relevant markets. This would enable a more dynamic and long-term approach to competition, at the global scale.”

• There could be “a right of appeal of the Council which could ultimately override Commission decisions could be appropriate in well-defined cases, subject to strict conditions.”

The manifesto further suggests to take more account of third-country subsidies in merger reviews, and it welcomes the recent developments in European state-aid rules enabling EU member states to finance major research and innovation projects including the first industrial deployment in Europe.9

While a subsequent initiative, the Polish-Franco-German manifesto of June 2019 toned the proposed veto right down to a Council involvement, it still opens the door to a broader political influence.

Shortly after the manifesto, the European Council called upon the Commission on May 27, 2019 to present “a long-term vision for the EU’s industrial future, with concrete measures” by the end of 2019,10 with a demand that action at the EU level should be taken in order to prevent a fragmented and thus ineffective approach to the economic challenges that lie ahead.

II. Advancement or pitfall?

A. ADVANCEMENT

While the Commission’s Directorate-General for Competition insists on the importance of having an impartial review according to orthodox competition law standards and free of political pressure, several merger control regimes in Europe and around the world openly allow for public interest considerations to be taken into account, be it in the initial process or at the appeal level. The following countries among others indicated to including public interest considerations in their assessment:

i. Germany

Under the German merger rules, public interest considerations can be taken into account (arguably even allowing mergers that can cause competitive harm) in exceptional circumstances. Indeed, if the Bundeskartellamt (BKarT) prohibits a merger, the parties can appeal to the German Federal Ministry for Economic Affairs and Energy for a “ministerial authorization.”

The German Ministry for Economic Affairs and Energy is allowed to approve an anti-competitive merger on non-competition grounds, in exceptional cases, provided this is in the “overriding public interest,” the macroeconomic benefits outweigh the restriction of competition and the authorization does not put a threat to the German system of market economy. Introduced in 1973 at time of Keynesian interventionism, the exception was applied for less than 25 times and granted not more than 9 times. The exercise of that exceptional authority, which requires to overcome significant self-constraint due to the ordo-liberal competition culture prevailing in Germany, is usually accompanied by a lot of drama and systematically criticised by numerous representatives of the German antitrust community. Such public interest grounds have included, among others:

• Securing technological progress (Thyssens/Hüller)
• Securing energy supply (VEBA/Gelsenberg) and
• Supporting international competitiveness (MAN/Sulzer).

ii. Portugal

Although the substantive assessment of mergers carried out by the Portuguese Competition Authority (PCA) is based on competition law considerations, public interest may have an impact on the outcome of the decision. In particular that could manifest through the opinion of the Regulatory Authority for Media and the potential extraordinary appeal to the Portuguese government.

Therefore parties concerned are able to submit an extraordinary appeal against a prohibition decision of the PCA, however the decision by the Council of Ministers must be grounded on fundamental strategic interests of the national economy, outweighing the impact of competition that will likely be distorted stemming from the merger.

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iii. South Africa

South African legal framework allows for competition and public interest considerations. In particular, the South African Competition Authority can, in accordance to section 12A(3) of the Competition Act, consider the following public interest-related factors:

- Particular industrial sector or region
- Employment
- The ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive and
- The ability of national industries to compete in international markets.

Admittedly, there are a few examples of respectable jurisdictions that do allow merger review to take into account other than purely competition considerations. It is therefore not heresy to think that industrial policy considerations can have some weight in merger reviews.

B. PITFALL

Although EU competition policy critics might argue to the contrary, EU competition enforcement does not as such prevent the creation of EU champions while focusing on sustaining robust competition in EU markets. A well-established competition law enforcement keeps markets fair and competitive and creates conditions for better, more efficient and innovative industries to emerge.11 Previous Competition Commissioner Joaquin Almunia stated that “competition policy is not about preventing the rise of vibrant and competitive European champions – far from it. On the contrary, enforcement of competition rules – including merger control – is a vital tool for public authorities to create the best possible conditions for firms to do business and to help the economy grow.”12

Looking at the broader picture, the Commission has since its inception cleared the vast majority of the more than 7,400 notified merger transactions. Some of them allowed for the creation of EU champions (eg, Peugeot/Opel,13 AB InBev/SABMiller14). The Commission has currently only blocked 30 mergers. Even when adding clearances with conditions and some withdrawals to avoid a negative decision, the statistics do not indicate an inflexible regime.

The incremental development of rationalistic antitrust standards on both sides of the Atlantic has taken almost a century – before that, competition regulators in the US would – depending on the prevailing policy – sometimes block mergers for the most ridiculous reasons. Even if the system is never perfect, we should also be careful to throw the baby out with the water. Relaxing EU competition rules by including public interest considerations in the Commission’s assessment carries significant risks, as it may open the door to many other considerations that we do not currently think about. Further, relaxing merger control rules may result in economic inefficiency on the EU market and political arbitrariness. Moreover, including public interest consideration in merger control may arguably give larger EU member states the tool to impose their will on smaller EU member states, fuel distrust in the Single Market and trigger more internal divisions within the EU itself. The Commission’s credibility and expertise could also be affected if it would have to directly consider member states’ public interest in the decision making process. Last but not least, some would argue that there are many other hurdles, including in the regulation of labor law and taxation at national level that may adversely affect the expansion of companies established in Europe.

III. Conclusion

It is good to have a clearly defined EU competition regime that mainly focuses on ensuring that market practices do no reduce consumer welfare by creating inefficiencies, rather than inviting a vague and undefinable array of industrial policy considerations to blur the process. To arrive at a regime that only sanctions conduct that is genuinely anticompetitive has been an undeniable achievement of US and EU competition law, and it took many decades to get there (counting from the adoption of the Sherman Act in 1890).

14  EU Commission’s Decision of 24 May 2016, AB Inbev/SabMiller, Case M.7881.
Industrial policy should concentrate on securing conditions for optimal industrial competitiveness, but outside merger reviews, “Public interest” can vary from one year to the next, so trying to intertwine competition policy with wider public interest may lead to unpredictable results. Competition policy should preserve competition, removing market-entry barriers and incentivize innovation. Any remaining market imperfections should be targeted by other industrial policies and specific sectorial regulations, which take into account other public interest considerations, such as public safety and consumer health.

At the same time, industrial policies should not interfere with the objective of the EU competition rules to optimize the allocation of efficiencies. Public interest policies constructed to choose a specific firm as the champion of the sector, instead of being the result of the competitive market process, are also argued as potentially ineffective because (i) the selection process may be arbitrary (especially when the process is not transparent) and (ii) it may lead to unexpected results (governments usually are not well suited to estimate the likely commercial success of a company).

At an independent panel discussion in Brussels organized by DLA Piper in June, panel members from different economic consultancies, the antitrust press and a leading national transport company converged in thinking that the EU merger review process does have the ability to deal with competition from foreign firms benefiting from domestic industrial policies allow them to distort competition. The consensus extended to being cautious with far-reaching proposals to remedy the current rules. Letting public interest be a factor in merger control decisions, if allowed at all, would need to be accompanied with transparent and well-aligned guidelines, in order to preserve legal certainty. Such rules may not be easy to create.

Looking at the proposals of the Franco-German Manifesto, the proposal to allow an appeal against a negative Commission decision that can be overcome by a political decision at Council level would probably qualify for “industrial policy,” as this decision would have to be based on other than competition grounds. It would of course also raise many practical questions, such as the grounds for appeal and the majority required to override a Commission decision. It would introduce an extraneous element in the (quite) cohesive body of EU competition law doctrine.

On the other hand, adjusting the parameters for taking into account potential competition in merger review to better reflect the realities of global markets, is in our view within the scope of competition policy orthodoxy, and does not amount to opening the doors to industrial policies of all sorts. We are convinced that the regulators at EU and national level could develop a modified standard in the context of future merger reviews. And it is standard practice to do so. The Commission itself, each time it modifies its guidelines, proceeds with such adjustments, and while some of these adjustments have been criticized by some, to the best of our knowledge no one has ever alleged that DG Comp ventured beyond the scope of its jurisdiction to introduce extraneous considerations into the realm of competition policy. According to the principle of proportionality, which is one of the fundamental principles of EU law, preference should be given to the least disruptive adjustment that is equally suitable to achieve a desired objective. In lay words: why use a sledgehammer to crack a nut? We therefore advocate more flexibility in applying and adapting the existing assessment guidelines, rather than opening up the door to wider public interest considerations.

Global Merger Control Handbook

Why?
With an increasing number of cross-border mergers and strategic corporate reorganizations in today’s fast-changing global environment, an understanding of – and compliance with – the applicable regulations and requirements is of vital importance.

Merger control regulation has greatly evolved and expanded in recent years:

- In many jurisdictions, the substantive merger test has evolved beyond a straightforward dominance assessment based on market shares, to a more comprehensive and inclusive assessment of the transaction’s impact on the requirements of dynamic competition
- The nature and the number of variables taken into account by competition authorities have increased, making it more complex to assess the likely outcome of a merger review
- In some jurisdictions, the rules of merger procedure have evolved into a substantial risk for the parties to a notifiable transaction, and
- Even fairly straightforward mergers and acquisitions may require numerous clearances around the world today, with each filing being subject to different procedural requirements and substantive tests in different countries including, in some cases, assessment on factors other than purely their impact on competition

What it is?
The Global Merger Control Handbook is a comprehensive three-volume handbook, which is available in hardcopy and in digital formats (e.g. pdf and ebook), and is designed to serve as a helpful reference guide for in-house counsel and other individuals involved in mergers and corporate reorganizations, when analyzing merger control requirements and navigating the merger clearance process in the 55 jurisdictions covered in the book.

The handbook’s key features include:

- A detailed overview of relevant local rules, methodology, process and timing requirements in more than 50 jurisdictions across Europe, North and South America, Africa, the Middle East and Asia Pacific
- Authored by competition and antitrust lawyers in local offices at DLA Piper and a number of its relationship firms, providing on-the-ground guidance on the regulatory issues involved in merger control
- A supporting dedicated Global Merger Control Handbook webpage with regular updates on the latest relevant developments in each of the jurisdictions covered in the handbook

For our clients
Additional information on this publication can be found at https://www.dlapiper.com/en/us/insights/publications/2019/02/global-merger-control-handbook/

Should you have any questions in relation to the handbook, please reach out to your regular DLA Piper lawyer or the authors of the respective chapters.