Memo to the commissioner responsible for competition

You face challenges of filling gaps in competition enforcement (including small mergers of innovative firms, for example), applying state aid to advance competition and enable European firms to grow, and enforcing new rules for digital gatekeepers embodied in the Digital Markets Act (DMA). Your priorities should be continued vigorous competition enforcement to maintain existing competitive markets, redesigning state aid to serve as a procompetitive industrial policy that creates new markets and fixes broken ones, and regulation of monopolised markets to deliver competitive outcomes to society (not least through the DMA).

Coordinating with other jurisdictions on regulation of digital platforms will also be crucial. In this context you must resist platforms' divide

State of play

Competition enforcement

Under your predecessor, European competition enforcement was osiTu/GS09J0 -1.364 Td[(w)4 5oe(h)tioa r and m harm[2]. Over the last five years the Commission has continued strong enforcement of ‘standard’ cases in areas including telecoms, pharma and banking, supported by court opinions.

Digital enforcement has increased significantly. The Commission has brought (and in some instances concluded) a number of important digital platform antitrust cases, including against Apple, Amazon, Google and Meta. The Commission has also become stricter on digital mergers, with several acquisitions blocked or abandoned. An unusually large amount of state aid was disbursed over the last five years because of COVID-19, the energy crisis and the green transition.

The courts were not entirely friendly to competition enforcement in Europe during the previous mandate. The Commission lost state aid tax cases and suffered significant setbacks in antitrust. In Qualcomm, the court rejected the Commission’s analysis of anticompetitive effects and criticised its procedures, demonstrating the supremacy of process over substance that hinders the Commission’s ability to protect consumers from market power[3].

The Intel case showed that judicial outcomes can turn on details of how and whether particular economic analyses were carried out, making enforcement more expensive and risky for the Commission[4].

Regulation of digital markets

Though the Commission obtained commitments and remedies in several big-tech competition cases, these did not lead to more competition. Rather the monopolists maintained their market positions. The DMA was passed after it became clear that competition law was not a strong enough tool to deliver competition in digital markets. The Commission moved swiftly along an analytical path from opening investigations, bringing

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2 E[illegible] C[illegible] 16 [illegible] 2019, ‘A[illegible]: C[illegible] B[illegible]’, https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6109.

3 [illegible] B[illegible], ‘E[illegible] C[illegible]’ 1 [illegible]’, *Euractiv*, 15 [illegible] 2022, https://www.euractiv.com/section/digital/news/eu-court-dismisses-commissions-e1-billion-antitrust-fine-against-qualcomm/.

4 G[illegible] C[illegible] E[illegible] 26 [illegible] 2022, ‘[illegible] G[illegible] C[illegible] C[illegible] 1.06 [illegible]’, https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-01/cp220016en.pdf.

cases, launching a debate on digital policy (eg Crémer *et al*, 2019), drafting the DMA, passing the law despite lobbying from big tech and then beginning enforcement in March 2024.

Challenges

Gaps in competition enforcement

Gaps exist in competition enforcement that cannot be filled with existing tools. Tacit collusion, for example, may be easier to create in the high inflation environment of recent years, but there is no good EU-level tool that can be used to tackle the practice. Consumers with behavioral biases such as excess inertia or responsiveness to defaults may not be able to discipline competition because they do not choose the most competitive product. Again, there is no obvious tool for a competition enforcer to use to reform these markets so that consumers are not exploited.

Controlling mergers between innovative or disruptive startups and dominant incumbents has become critical because often a dominant firm has an incentive to end the innovation competition between the merging parties. When these innovative firms could be competitively significant at EU level, it is crucial that the Commission has an accepted and settled way to obtain jurisdiction over them. Advance notice allows the regulator to keep up with a dominant firm that can quickly identify disruptive competitors and buy them.

More competition, to the benefit of European consumers, European firms to succeed, they must be able to get bigger within a functioning single market for inputs, outputs, labour and capital. When the necessary firm scale is large relative to the EU market, there can appear to be a conflict between sustaining competition between multiple European firms and achieving full economies of scale that similar firms located in bigger markets may achieve.

Merger control is perceived by some as being inconsistent with development of European 'national champions.' The argument is that, for example, perhaps a combination of two medium-sized European firms can create a large European firm that will then compete with a large Chinese or American firm on a global scale, and this will bring benefits to Europe that the two medium-sized firms could not.

because they anticipate this problem. If the regulator has evidence that entry by foreign firms with scale advantages is happening or is imminent, this may render an EU merger harmless. If the foreign entrant is 'competitive' because it is receiving illegal subsidies, this is a serious problem, but not one that merger control is set up to solve. Rather, implementation of the Foreign Subsidies Regulation and procedures to block or impose countervailing tariffs need to be fast and effective.

Adapt competition enforcement to reflect new concerns

The Commission must vigorously protect competition on the basis of innovation, not only price and quality, which requires explaining that risks to competition in future innovation are inevitably uncertain. For example, we cannot know for sure what innovation might occur in the but-for world and it is difficult to identify harmful transactions ex ante. The Commission must ensure there is a strategy to review small acquisitions that nonetheless have a large impact on innovation and competition must be created

You should advocate for the creation of a new tool that allows you to protect competition more effectively in several weak areas. One of these areas is tacit collusion, which usually is not a violation of existing laws. A tool that allows the authority to investigate and disrupt tacit collusion would restore competition. Another problematic area is (the many) markets that do not work well because of consumers' behavioural biases. A tool permitting you to identify and propose procompetitive solutions where consumers are being exploited would improve competition in those markets. European enforcers may be able to learn about successful solutions from competition authorities in the process of obtaining these capabilities such as those in Iceland, Germany and the Netherlands.

Lost resilience is a possible harm from a merger

For example, a pandemic that causes Europeans to lose access to certain kinds of chips or medications could be costly. If, for example, merging parties become efficient by consolidating their supply chains on one supplier of a raw ingredient, this may lead to a shortage of the product when there is a pandemic, flood or war. Consumers may be harmed by the merger over time as these adverse shocks manifest themselves, even if costs are lower initially. e Commission could consider using existing merger deepening of the single market. And to this end the subsidies should be EU funds. These funds can subsidise a member state's firms' investments, infrastructure or coordination, on the condition that that country has harmonised its regulations and made the required reforms. You must carefully review such a policy because cooperation between firms in an industry can quickly devolve into a mechanism to shut out innovation and disruptive entrants. If DG COMP concludes the project is procompetitive, it is more likely to increase output, innovation and competition.

Better studies

There are many externalities in Europe and it is unlikely that DG COMP has the information or resources to identify and fix them all. A programme might allow for a member state, one of its regulatory bodies or an EU agency to carry out the study that identifies the externality causing the problem and determine the policy necessary to mitigate it. You should then review the plan to ensure that it improves the functioning of one or more markets and strengthens competition.

An example is the harmonisation of spectrum management across member states. With such harmonisation, telecom firms could operate in many member states and achieve large economies of scale (today it is a problem that they cannot, as described by Letta, 2024). Scale for many European industries can be achieved, and therefore competition intensified, with a programme that induces national regulators to change rules to permit efficient cross-border operations. Critically, this is a solution that does not involve mergers within member states – which creates countervailing problems of market power, higher prices, lower quality and less innovation – but rather makes it easy and productive to merge across member state lines.

The externality may be mitigated through the use of existing law or it may require the application of new tools. You can advocate a solution to these externalities that creates a longer-lived entity in that case, one with its own programme, a source of EU funds and ongoing oversight (in addition to DG COMP). Such a structure would allow approved programmes to access EU funds and expand the single market. However, any subsidies to firms must be conditional on the member states that are home to those firms carrying out the reforms the project requires (eg a change in regulation, adoption of a standard or opening of a market). A similar programme exists already in the form of Important Projects of Common European Interest (IPCEI), which could be expanded to include simpler and non-frontier projects.

DMA enforcement is critical

Regulation limits harms from already monopolised markets. The DMA is now fully in force. If core platform services comply with its rules, then business users in the EU will have many more opportunities for innovation. Entry into app stores, digital wallets, messaging, gaming, entertainment content and more will be technically easier, while business users will be protected from discrimination and expropriation.

However, enforcement of the law must be vigorous and swift. Big tech can be expected to deploy substantial legal, economic and lobbying resources, so you will need to have backbone in this process or the regulation will be ineffective. The Commission has already begun noncompliance proceedings against Apple, Google and Meta. The DMA unit will need to spend enforcement resources on this stage of the law which is expected to last through the bulk of your mandate because of the slow speed of the courts. In some cases, you have two tools to achieve improvements within one market – an Article 102 investigation and the relevant portions of the DMA. You have the possibility to coordinate enforcement to achieve maximum contestability at maximum speed and minimum resource cost.

Coordinate with other jurisdictions concerning regulation of digital platforms

This may be the most delicate and important topic of your mandate. Many other jurisdictions are also interested in, or are in the process of, adopting regulations that seek to create more competition in digital markets. Because the platforms themselves are global, one can expect those that are most threatened by regulation to have global strategies of playing one jurisdiction off against another. Governments need to play this same game, advance their interests in a coordinated fashion and work together to resist corporate lobbying. Because Europe has moved first, it has the ability to provide advice and leadership to others. There are opportunities for regulatory progress given that many other states share Europe's goals, even if their legal systems and timings are different. The stakes are high and the game will be tricky.

References:

Crémer, J., Y.-A. de Montjoye and H. Schweitzer (2019) *Competition policy for the digital era, Directorate-General for Competition*, European Commission

Letta, E. (2024) *Much More Than a Market*, report to the European Council