

ACM: Extension of enforcement toolkit to increase effectiveness in dealing with competition problems in the digital economy

Introduction

The basic framework of competition law, as embedded in Articles 101 and 102 of the TFEU, is generally adequate to address the most pertinent competition problems in the digital economy. One drawback, however, is that *ex-post* application can be too slow in these highly dynamic and innovation driven markets. When such markets are characterised by winner-takes-most dynamics, driven by strong network effects, high barriers to entry due to data collection and consumer lock-in, there is a risk that *ex-post* enforcement comes too late to keep them competitive and contestable.

ACM supports the Netherlands' Secretary of State's proposal¹ for the introduction of an *ex ante* intervention mechanism to prevent anti-competitive behaviour by dominant companies acting as gatekeeper to the relevant online ecosystem. We think introducing the mechanism by way of adding an extra tool to Regulation 1/2003, to be applied by the European Commission and the member states' competition authorities, could be explored.

Ex-ante tool to prevent competition problems

We envisage a tool that allows competition authorities to impose proportionate remedies upon dominant companies aimed at preventing competition problems, rather than relying on after-the-fact enforcement. The power to impose these remedies is not unlike the powers the CMA has to impose remedies following market studies and the powers of the member states' telecom authorities to impose remedies on companies with significant market power. These remedies will be behavioural in nature. Examples are platform access, data portability, data sharing and non-discriminatory ranking. Rather than broad-stroked regulation, these remedies will always be proportionate and tailored to specific situations. The principle of proportionality requires that, when choosing between two equally effective remedies, the remedy imposed is least burdensome for the undertaking.

It should be noted that the strategies and economic dynamics that lead companies to become dominant do not necessarily create competition problems. Strong growth, innovation and new services benefit consumers and other companies. The risk, however, is that once a company becomes dominant its incentives may shift to protecting its market position by foreclosing actual and potential competitors or deliberately raising switching costs. The *ex-ante* tool therefore should be designed to prevent this, closely following the interpretation of dominance and abuse in the context of Article 102 TFEU. In fact, the remedies should prevent a dominant company from abusing that position. Staying close to well established terminology and case law of EU competition law reduces the risk of lengthy legal procedures that the introduction of new

¹ <https://www.government.nl/ministries/ministry-of-economic-affairs-and-climate-policy/news/2019/05/27/dutch-government-change-competition-policy-and-merger-thresholds-for-better-digital-economy>

concepts will involve. Additionally, it increases legal certainty and predictability. Since market definition in dynamic multisided markets can be complex, updated guidelines clarifying how e.g. the role of data, consumer behaviour and network effects should be taken into account are desirable. This will also enhance a uniform approach by NCA's.

Non-punitive in nature

The non-punitive nature of the tool could facilitate acceptance of the dominant company as they are not accused of any wrong doing and will not face fines and damage claims. For the same reason, it may also lead to commitments at an earlier stage,

EU and national level

ACM is of the opinion that such a tool should ideally be available at both the EU and national level. Obviously, the Commission is best placed to impose remedies on EU wide dominant companies controlling a bottleneck so as not to impair the single market. However, given the heterogeneous nature of both platforms and markets, enforcement at national level may be in line with subsidiarity principles. Some companies might after all be dominant only in one member state.

Procedural considerations

The ACM is of the opinion that rebuttable presumptions on the legality of imposing certain remedies are appropriate for effective and efficient enforcement, particularly in light of the non-punitive character of the *ex-ante* instrument. Obviously, an effective punitive mechanism should be in place if companies do not abide with the imposed the remedies.

Comparison to existing tools in EU competition law

This new *ex-ante* tool differs from the powers granted to the Commission on the basis of Article 7 Regulation 1/2003, as no finding of an infringement of Article 102 TFEU is required. Also, for an Article 8 Regulation 1/2003 interim decision a prima facie finding of an infringement is required. Even an Article 9 Regulation 1/2003 commitment decision requires an intention by the Commission to adopt a decision requiring an infringement to be brought to an end. The powers to be granted to the member states' authorities on the basis of Directive 2019/1 require similar findings before remedies can be imposed. Therefore, the *ex-ante* tool fills a gap.