Merger remedies fit for purpose

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Whether the digital economy requires a competition policy different from that developed in an era of coal and steel is a keenly debated issue. In legal systems dominated by precedent, three responses are possible. No - the existing rules are robust enough to deal with new problems; yes - with suitable adaptations of the case law; yes - with a major paradigm change requiring legislation or new precedents set by the jurisdiction's supreme court.

One recent focus of this wider debate has been on remedies in merger cases. A merger should be allowed to go ahead if the competition problem it creates can be solved by remedial action. A traditional distinction made by competition authorities in this respect is between behavioural and structural remedies.

Behavioural remedies consist of promises to do something or not to do something in an attempt to mitigate the problems created by a merger. Structural remedies prevent the emergence of the problems in the first place.

Several problems arise. How should behavioural remedies be monitored and enforced? What is the most appropriate remedy for horizontal, vertical and conglomerate mergers? How predictable should the potential competition problem be to justify a remedy? Should the degree to which the problem is foreseeable determine how stringent the remedy should be?

There is a tendency to exaggerate the difficulties encountered by authorities in enforcing behavioural remedies. In dialogue with the companies concerned, they should be able to build on well-known mechanisms like licences, dispute resolution and related contractual arrangements to devise sensible solutions which do not call upon excessive use of public officials' time.

Divestiture will usually be most appropriate when the competition problem stems from a horizontal "concentration", to use EU jargon, i.e. the combination of two direct competitors' businesses, assets and resources. In its most radical form, this entails sale of all or part of one of the merging parties' business units to an independent third party.

More surgical, sophisticated and proportionate structural access remedies are appropriate to respond to specific competition problems identified in the complex combination of products and services prevalent in today's high tech industries. This could entail a sale to a third party of one or more particular elements, together with relevant intellectual property and know-how. A useful rule of thumb is that problematic horizontal mergers call for divestiture, vertical mergers less so and conglomerate mergers hardly ever. Structural change in the tech sector can come in various guises. Access and interoperability issues in particular can be dealt with by targeted remedies without any need for divestiture.

A structural access remedy, providing reliable interaction between proprietary and third party technologies or components, can solve a competition problem more effectively and less intrusively than a simple promise to behave well in the future or lopping off part of a company and hoping it will compete with its erstwhile owner.

In all these considerations, it is important to bear in mind that structural remediation is not limited to divestiture in the sense of outright sale of one or more business units. Forensic analysis of the point at which competition problems arise can lead to bespoke transfer of control and/or ownership of a specific feature of a digital product while leaving the wider merger intact, without any need for divestiture of a business unit. Interoperability, for example a commitment not to bundle certain products and/or services, can also provide a structural remedy preventing the emergence of competition problems.

Mergers in digital or high tech sectors cause concern because today's champion may nip tomorrow's rival in the bud before it has had time to bring products and services to the market, thwarting innovation and potential competition. Short of prohibiting mergers between big companies and promising start-ups altogether, which would punish the former for their

success while denying the latter the investment and know-how they need to grow, the remedies issue must be faced.

In the last few years, we have seen innovative approaches to theories of harm taken by competition authorities. In particular, they have sought to identify harm that will arise only in the future. More recently, and in relation to the digital or high tech sectors, competition authorities started looking into digital ecosystems. This approach responds to the need to address the ever increasing variety of business models and the challenges they pose.

As they adapt to the challenges of analysing mergers in digital or high tech sectors, including competition concerns relevant for markets that may not even exist yet, but are expected to arise in the future, competition authorities should be equally open-minded about remedies to address such challenges. A forward-looking approach to theories of harm coupled with a narrow-minded approach to remedies risks creating an adverse merger control environment lacking proportionality and legal certainty.

Accordingly, theories of harm should be accompanied by openness to innovative remedies. Depending on the nature of the merger and the relationship between the parties, now or in the foreseeable future, combinations of remedies will have to be considered.

There is constructive dialogue between competition authorities in relation to theories of harm in merger control cases. We see competition authorities mirroring each other on the approach in such cases. In the same vein, dialogue between competition authorities and market participants is needed to devise effective and proportionate remedies. Otherwise, blunt instruments will produce poor outcomes and deter much needed investment and innovation. The importance of getting this right cannot be overstated: failure will lead either to monopoly or inefficiency, the former leading inexorably to the latter anyway. Competition authorities should encourage open debate and weigh up their responsibilities carefully.

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