22 October 2019

On 10 October 2019, the competition authorities of Belgium, the Netherlands and Luxembourg (the "Authorities") issued a "Joint Memorandum" which adds further (BeNeLux) perspective to the on-going debate regarding "competition law for the digital economy". The document shares the views of the Authorities in respect of the interplay of the "digital world" and (i) merger control, (ii) informal antitrust guidance by the Authorities, and (iii) the right antitrust enforcement tools (including the suggestion of a new ex-ante instrument allowing for the imposition of binding commitments on companies without the finding of an infringement).

Digitalization is increasingly playing a crucial role in all kinds of industries. Therefore, this Joint Memorandum is of importance to all companies active in the BeNeLux and the EU.

Merger control in the digital economy – a clear focus on killer acquisitions

The Joint Memorandum hints at the fact that merger control policy in the digital economy is of utmost importance and should be a focus area of the European Commission.

In that regard, companies active in the BeNeLux should take careful note of the fact that the Authorities are highlighting the challenges of assessing the competitive implications of acquisitions of "small targets" by (dominant) platforms. They suggest in the first place that these "killer acquisitions" might be escaping antitrust scrutiny entirely as start-ups typically do not generate revenues that exceed the current jurisdictional thresholds.

Three further points need to be noted from the Joint Memorandum in the context of merger control:

- The Authorities suggest that in concentrations involving dominant platforms more focus should be given to barriers to entry that might be created by such platforms' access to data and strong network effects; the Authorities consider that merger control should be stricter when reviewing the acquisition by a dominant platform enjoying strong network effects of a potential competitor;

- The Authorities also suggest reversing the burden of proof in some cases, obliging the parties to prove the transaction's pro-competitive nature (or absence of competitive harm), rather than the competition authority having to prove its anti-competitive effects;
Informal guidance provided by the Authorities in fast-moving digital markets

According to the Authorities, relying on existing case law will not be sufficient to deal with competition issues that arise out of the digital economy. The Authorities are urging competition authorities (in the first place, the European Commission) to issue ex-ante guidance papers on specific issues raised by the digital economy (and do so before the adoption of infringement decisions in order for such guidelines to have an impact on new developments).

The Authorities also propose that competition authorities introduce fast-track procedures to issue case-by-case guidance letters to individual companies. Such procedures would not require changes in EU law but would in some cases require competition authorities to depart from the infringement route and give priority to a faster outcome that provides specific guidance, not only to the parties involved, but also to others.

Companies active in Belgium should note that the Belgian Competition Authority has a procedure for obtaining informal advice from the Authority's president. This tool is very frequently used in Belgium and the proposals of the Joint Memorandum seem to make this option more attractive and likely more frequent in the future.

Towards ex-ante remedies without the establishment of an infringement

One of the Authorities' most ambitious proposals is that competition authorities should be able to remedy alleged harm to competition (arising out of conduct in the digital economy) before any formal finding of an infringement. Competition authorities' current ex-post enforcement tools are sometimes said to be too slow to deal with competition concerns in the digital economy. According to the Authorities, there is a need for more ex-ante tools and capabilities (both at EU and at national level).

As a result, the Joint Memorandum suggests an ex-ante mechanism to prevent anti-competitive behaviour by dominant companies in the digital world. Such mechanism should allow competition authorities to impose remedies on dominant companies in order to prevent competition concerns, without the establishment of an infringement.

The Authorities are of the opinion that the non-punitive nature of the ex-ante tool could facilitate a constructive dialogue between competition authorities and dominant companies and that it may lead to voluntary acceptance of reasonable commitments at an earlier stage, avoiding long proceedings. Lastly, the Authorities envisage a punitive mechanism for companies not complying with such remedies.

Lastly, the Authorities urge the European Commission to commission an economic study on merger control in the digital economy, in particular to get a clearer picture on the prevalence of "killer acquisitions".

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Conclusion

Whether these proposals will be taken on board by the European Commission or national competition authorities remains to be seen. However, companies should note this very visible step taken by the BeNeLux authorities in focussing on the challenges perceived by these authorities and on the companies involved in the digital economy.

You can read the Joint Memorandum in full here. We would be happy to provide guidance on this topic and assist you with any questions/clarifications in this regard.

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