



BRUSSELS À JOUR

Towards a Digital Fortress Europe?

SOTEU 2021's Digital Highlights Mean More Stumbling Blocks for Tech Giants

Markus Röhrig and Laura Stoicescu report on the latest developments from the European capital of competition law.

Ursula von der Leyen's State of the EU ("**SOTEU**") speech on 15 September showed that the bloc is emerging from the shadows of the pandemic stronger and with bold moves on its mind. One of them is – what some might call "protectionist" but the European Commission ("**EC**") chose to name "tech sovereignty" – building a digital fortress Europe, which would support the European economic recovery. The EC's approach is based on the draft Digital Markets Act ("**DMA**"), innovating with a new industrial policy plan, all while the speech refrained from mentioning any competition developments.

Works in progress

The idea is not exactly new: in December 2020, the EC unveiled the draft DMA, setting out 18 bans and duties for businesses deemed to be gatekeeper platforms. They would for example be banned from combining data collected by their different services, and would have to allow business users to access data they generate in their use of the gatekeeper's platform. Currently, according to the EU's law-making procedure, national representatives in the Council of the EU and members of the European Parliament are separately scrutinizing the draft DMA to produce their own drafts that they will then negotiate with each other and the EC to arrive at a final version of the document.

The current draft is not without controversy. Consistency regarding what exactly the new powers to curb the market power of tech giants should be seems problematic. So is the discussion regarding where enforcement should reside: primarily with the EC, as with most major antitrust cases; with national authorities, as with the GDPR; or perhaps a combination of the two.



Members States frontrunners such as Germany already amended their competition legislation by anticipating the DMA with innovations such as singling out “gatekeepers” for in-depth scrutiny. Moreover, in January 2021, Germany even initiated investigations against all of Google, Apple, Facebook and Amazon based on the new “significance for competition across markets” rules that are tailored to address the digital space (Section 91a of the German Act against Restraints of Competition). In addition, the Federal Cartel Office is looking into Oculus-Facebook’s “tying arrangement” which requires Oculus users to have a Facebook account. Against this background, the SOTEU’s take on gatekeepers signals that the EC has not yet said its last word in the DMA debate.

Of semi-conductors and other things

One of the SOTEU’s “aha” moments was von der Leyen’s announcement regarding the launch of the European Chips Act, in reply to the global shortage of microchips.

In the EC’s view, while global demand has exploded, Europe’s share across the entire value chain – from design to manufacturing capacity – shrunk, resulting in heavily relying on state-of-the-art chips manufactured in Asia. The solution? Linking together the bloc’s world-class research, design and testing capacities by coordinating EU and national investments along the value chain. The result would be a state-of-the-art European chip “ecosystem” (including production) which would ensure the EU’s security of supply and will develop new markets for ground-breaking European tech. In von der Leyen’s words, a project as big and bold as Galileo, 20 years ago.

More details on the European Chips Act are kept under wraps for the moment, but judging by the fact sheet the EC published on the SOTEU day, it will build on the steps the EU has taken to contain the gatekeeper power of big tech, amongst others.

The EC’s announcement follows the US’s initiative, which last year proposed the Chips for America Act which would see billions of dollars poured into the sector. Other countries are also investing in the technology.

You say it best when you say nothing at all

Von der Leyen’s speech spoke volumes about what it did not say – competition, including foreign state ownership and subsidies in the internal market. Was it an elephant in the room situation or is competition taking a backseat? Although security, defense, and the ongoing pandemic are burning issues, the 60 minutes speech did not provide any insights into the EC’s current work in the field of competition, to the disappointment of the Brussels legal community.

What about strengthening competition enforcement, the review of Europe’s competition rules, or any of the other competition priorities? Although notably absent from the speech, they were addressed in von der Leyen’s SOTEU letter to the president of the European Parliament. In a nutshell, the competition policy review is due to take stock of policy initiatives across antitrust, mergers and state aid, and ensure they fit with the EC’s wider digital and green agenda. According to the EC’s planning documents, Margrethe Vestager is scheduled to discuss a policy review with the other commissioners on 27 October.



Concerning foreign state ownership, the omission is difficult to explain, particularly in light of the latest global developments. More precisely, since the early 2000s, when the “Going Out” policy was launched, China has shown itself to be an aggressive investor abroad, prompting the EC to put forward in December 2020 its proposal for tackling the distortions created by such investment on the single market. The proposal is currently being reviewed by the Council and the Parliament, so very much work in progress. Most importantly, the EC proposal came out at the same time as the centenary of the Chinese Communist Party and the 50th anniversary of the restoration of China’s seat in the UN – two milestones susceptible to redefine (or at least tweak) current Chinese policy. And indeed, president Xi Jinping’s speech at the 2021 UN General Assembly on 21 September might be seen as a step in this direction. Among other surprising announcements – mainly related to global warming – the Chinese president made it clear that China is not a global threat and is not seeking hegemony. It remains to be seen how the foreign state ownership issue will shape up, especially in view of the EC’s new Indo-Pacific strategy, formulated expressly as an olive branch extended to China.

A simpler explanation for the omission would be that competition is not one of the key priorities of von der Leyen’s mandate. It does not appear on the list of the 6 pillars of the 2019-2024 EC and it was mentioned only marginally in the 2020 SOTEU. Over time, Margrethe Vestager benefitted from the tacit support of von der Leyen in her unabated crusade against antitrust infringements.

SOTEU 2022 will show whether the pandemic really was the necessary wake-up call to the bloc’s digital transformation and whether competition will become one of von der Leyen’s priorities, or it will remain only a means to an end. Until then, follow us on LinkedIn for the latest EU antitrust updates and insights.

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Markus Röhrig
Partner

T +32 2 7885 525
markus.roehrig@hengeler.com



Laura Stoicescu
Associate/Int. Lawyer

T +32 2 7885 528
laura.stoicescu@hengeler.com

➤ www.hengeler.com