Competition law in the EU: consistency, strategic industrial vision and workers' involvement are badly needed! - DRAFT

The neo-liberal agenda must be revised – and reverted

Competition law in the European Union addresses two important needs: (1) control the power of dominant players in the Internal Market and (2) prevent destructive "subsidy wars" between Member States. It has been however distorted to serve a neo-liberal agenda and needs to be revised and made more consistent, along the following lines: (1) workers must be consulted in all mergers, acquisitions and privatisations; (2) the prohibition of State aid should extend to tax rulings; (3) the control of mergers and acquisitions should allow the build-up of European "champions"; (4) the liberalisation of former public networks should be reconsidered; and (5) all private monopolies should be considered as harmful, even in the absence of "abuse".

When does the Commission act on dominant industrial players?

In general, EU policy tends to be horizontal, and to define general rules applicable equally to all economic players. There are however some circumstances where the Commission acts specifically on some industrial players, when they are dominant. This happens in case of:

- State aid;
- large mergers and acquisitions;
- the liberalisation of former public monopolies in network industries (rail, electricity, gas, telecommunications, …); and
- abuse of dominant power.

In all these cases, the Commission has important discretionary powers to **prohibit** companies and Member States from performing actions that they intended, or to **force** companies to perform actions that they would otherwise not have undertaken. The justification of these powers lies in the fact that the Commission has the mandate to protect and enforce the good functioning of the **Internal Market**, and specifically a fair **competition**.

IndustriAll European trade union has important **concerns** regarding the current implementation of these powers. By focusing exclusively on a fair competition in the Internal Market only, the Commission misses:

- important **strategic goals** of an industrial policy at **global** scale;
- **consistency** between policy fields; and
- the interests of the **workers** involved in these operations.

Workers must be consulted in all actions related to competition regulation

Workers are **the first impacted** by any action resulting from competition regulation:

- they are subject to the redundancies, divestments and transfers of activities related to mergers and acquisitions;
- their rights are attacked and reduced when their company, a public operator, is privatised in the framework of a liberalisation agenda of their sector.

Despite this, workers are, more often than not, not informed of the upcoming changes – and even less consulted. This deprivation of Information and Consultation rights is performed by management under the fallacy that these operations are confidential, and that workers' representatives in the (European) Works Councils would jeopardise this confidentiality (despite their obligation to uphold it).

IndustriAll Europe considers these practices as inacceptable. Workers' representatives, just as Board Members, can keep confidential information to themselves. They must be provided with complete and timely information regarding the consequences of a merger or acquisition, or of a privatisation plan, so as to provide relevant feedback in the framework of a thorough consultation process. ## TO BE COMPLETED / AMENDED ##

The general prohibition of State aid should be explicitly extended to tax rulings

The Treaty on the Functioning of the European Union (TFEU), explicitly prohibits State aid (Art. 107(1)[1]). This makes good sense, as it prevents Member States from entering a downward and mutually harmful spiral to attract economic activities on their territory, in a "subsidy war" destructive of public budgets and to the sole benefit of company shareholders.

There are however some exceptions, such as State aid to support **innovation**[2], provided the fraction of public funds remains under a threshold (dependent upon the size of the company and the maturity of the technology).

When companies compete on a global scale, they may obtain State aid beyond these strict limits provided that they set up an **Important Project of Common European Interest (IPCEI)**, uniting at least two Member States[3]. Thereby, large and ambitious industrial and technological projects such as Airbus or Ariane remain legally possible.

Until recently, **tax rulings**, i.e. the specific (and often very favourable) tax treatment offered to some companies by Member States, were not considered as State aid – even though they indeed distort the Internal Market and encourage Member States to enter into "tax wars" which are at least as destructive as "subsidy wars". Recent moves by Commissioner Vestager (e.g. regarding Amazon in Luxembourg or Apple in Ireland) have started to move in the direction of placing tax rulings on an equal legal footing with explicit subsidies. IndustriAll Europe **supports** this move, and encourages the Commission to strengthen its legal position by adopting a decision that **explicitly** prohibits unjustifiably favourable and discriminatory tax treatment of companies by Member States, and considers them as strictly equivalent to cash subsidies.

The control of mergers and acquisitions should enable the build-up of European "champions"

Under the current Regulation on mergers and acquisitions[4], a concentration of companies is forbidden when it results in a "*dominant position*", "*in the common market or in a substantial part of it*" (Art. 2(3)). This means that, in the control of mergers and acquisitions:

- a dominant position is considered as harmful in itself, and should be acted upon preventively, even in the absence of any abuse of this dominant position
- the size of the "relevant market" being considered to assess the dominant

[1] "*Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.*"

[2] Framework for State aid for research and development and innovation

[3] Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (2014)

[4] Regulation on the control of concentrations between undertakings (2004)

position is the Internal Market of EU at most – not the global market.

In many cases however, and specifically for industrial products that are intensively traded world-wide, the "relevant market" where the competition takes place[5] is the global market, not the Internal Market of the EU.

Because of this regulation, the build-up of **European industrial "champions"**, who would have a locally dominant position in the EU Internal Market, but remain modest in the global competition, is **strongly restricted**. As a result, EU-based companies are forced to remain small and fragmented, while being confronted to much larger competitors based in other jurisdictions. Another potential outcome is that, in order for the company resulting from the merger not to acquire a potentially harmful "dominant position" in the Internal Market, the Commission forces the sale of some assets to competitors, thereby breaking down the internal synergies and economies of scope that made the companies efficient and competitive.

The ultimate result is that EU-based firms (or parts thereof) are **acquired by foreign-based companies**, either because they were prevented from building a "European champion" and are thus too weak to defend themselves against a hostile takeover, or because they are divested as part of the deal to avoid this "dominant position". These acquisitions by foreign-based companies are to the detriment of EU strategic autonomy in industry, and of the welfare of the involved workers. It is no secret that industrial locations that are remote from corporate headquarters are the first victims of any corporate restructuration plan, so that the fate of European industrial workers in Multi-National Corporations based elsewhere can often be bleak.

This sad story has happened several times already: the prevention by the Commission of the Pechiney (FR) – Alusuisse (CH) – Alcan (CA) merger of 1999 led to these two European firms being finally acquired by the mining multinational RioTinto in 2007; the divestments required to allow the merger between ArcelorMittal (LU) and ILVA (IT) in 2018 will result either in the closure of the divested sites or to damaging interruptions in internal supply chains. ## TO BE COMPLETED / AMENDED ##

IndustriAll Europe supports the views that the "**relevant market**" to be considered when assessing a potential "dominant position" should explicitly have the possibility of being **global**, beyond the EU Internal Market.

The liberalisation of former public networks should be reconsidered

The European institutions, led by a neo-liberal agenda since the 1990s, have imposed the break-up of public networks in the rail, electricity, gas and telecommunication sectors. These public, monopolistic networks had been established during the 20th century after the failure of private, competing operators, because they are **natural monopolies**: the operation of a single monopolistic network is more efficient than the juxtaposition of un-coordinated private ventures. These public monopolies were generally operated under a simple obligation: provide universal service at a price mimicking that of a "perfect market" (the marginal cost). Because they were strongly integrated, with high visibility on their markets, they were able to invest massively in new technology and infrastructure, and to be efficient.

Despite this historical experience, the European institutions have forced the introduction of competition in these natural monopolies:

[5] Defined in the Notice on the definition of relevant market for the purposes of Community competition law (1997)

- in the telecommunications sector, starting in 2002;
- in the sectors of electricity and natural gas, starting in 2009;
- in the railway sector, starting in 2012.

In all these sectors, the pattern is the same. The market is open to the competition by private operators. In order to force competition of these new entrants against the dominant position of the incumbent public monopoly, this public monopoly is submitted to the following obligations. It is:

- privatised in whole or in part;
- broken down into functional units that provide services to each other under commercial contracts (this break-up is called "unbundling"), so that competitors can provide only the lucrative part of the service. This unbundling thereby destroys the economies of scope and the coordinated nature of the integrated network;
- obliged to provide "universal service" to the less profitable segments of the market, so that private operators can choose their customers among the profitable ones;
- forced to sell its products wholesale to its competitors at a regulated, low price for them to re-sell with a profit;
- forced to give access to essential assets to its competitors, at a regulated, low price, for them to use for their own operations.

The promise of this opening up of former public monopolies to competition was to achieve lower prices, better quality and more innovation to the consumer. This promise has proven to be false. In the telecommunications sector, prices have indeed fallen, because of the technical progress in the underlying equipment. In all other sectors, the liberalisation of the market has led to high price, inconsistent interconnections and low quality – as exemplified in the forerunner of this process, the British rail system.

IndustriAll Europe demands that this liberalisation policy of natural monopolies in network activities (rail, electricity, gas, telecommunications) be subject to a **neutral re-evaluation** according to actual outcomes. Consequences regarding the regulation of the market and the status of operators should be drawn accordingly.

All private monopolies should be considered as harmful, even in the absence of "abuse"

In all cases other than those mentioned above (mergers and acquisitions, State Aid), the current European legislation does not act on private monopolies. It lets them operate freely, cash in obscene profits from their overbearing bargaining position towards business and consumers alike, and exert an unprecedented influence on democracy, without intervening. The most obvious examples of this situation are the **digital monopolists** regrouped under the GAFAM acronym: Google, Amazon, Facebook, Apple, Microsoft. The only situation when intervention occurs is in case of "abuse" of dominant position[6], and then only if the Commission can prove it. Considering the immense means at the disposal of these private monopolies, this burden of proof is extremely difficult, long and uncertain to support.

IndustriAll Europe considers that **private monopolies** are **harmful** in themselves, even in the absence of any demonstrated abuse of their dominant position, because of the disproportionate influence they have on our economies, societies and democracies. This position is also coherent with the competition rules governing mergers and acquisitions. Therefore, we demand that any private monopoly be subject to:

[6] Article 102 TFEU: "*Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited […].*"

- either the extensive obligations that former public monopolies follow when forced to open their markets to private competition (unbundling, universal service, forced access of competitors to essential assets at regulated prices, forced wholesale of products to competitors at regulated prices); or
- if this proves ineffective to achieve true competition, the direct control of its operations by public, democratic authorities.

Thereby, **consistency** would be restored between all forms of regulation of dominant market players in the European Single Market.