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**Level-playing field and innovation in technology markets**

**Alexander ITALIANER  
Director General  
Directorate General for Competition  
European Commission**

Ladies and Gentlemen,

It is a pleasure to be here today to discuss the enforcement of antitrust rules in technology markets.

I think we can all agree that vibrant competition is a pre-requisite for enduring economic success. It is through competition that innovative firms, products and ideas reach the market.

The role of antitrust rules is to safeguard the level playing field so that consumers reap the benefits of productivity and innovation. This is a belief that we share on both sides of the Atlantic. You will have heard President Obama refer to it in last week's inauguration address when he said that "*a free market only thrives when there are rules to ensure competition and fair play*".

Under EU law, we apply the same antitrust principles to all companies doing business in Europe, across all sectors, and irrespective where the headquarters of these companies may be.

Let me give you a couple of examples. Only last month we imposed our highest fine ever in a cartel of producers of computer and monitor tubes. The companies involved included European and Asian companies such as Philips and Samsung. We have also added another case to the string of antitrust decisions tackling the anticompetitive practices of some European telecom operators. Last week, we fined the Spanish telecom operator Telefónica and the Portuguese one, Portugal Telecom, for having agreed not to compete with each other in Spain and Portugal. We have also fined about a year ago the Polish telecom operator Telekom Polska for abusing its dominant position in the Polish broadband market and, we have in the past prohibited anticompetitive moves by companies such as Deutsche Telekom and France Telecom. These cases highlight our commitment to safeguard fair-play in the EU Single Market and I will come to this topic later today in more detail.

The core principle of our action as European competition authority is to preserve consumer welfare in terms of price, quality, choice and innovation. Contrary to what is sometimes said, it is not our job to protect inefficient competitors.

## **1. The high-tech sector and its challenges for competition enforcement**

### **A. Characteristics of high-tech markets**

High-tech markets are broadly characterised by rapid innovation with the creation of new products, platforms, or services, and by the reduction of production costs as a result of competitive pressure. These industries heavily rely on intellectual property, and access to standards and interoperability are crucial. High-tech industries also frequently build on network effects by virtue of which the more users a platform or network has, the greater its

commercial value. Network effects are enhanced by more applications being created for successful platforms, attracting in turn more users, thus more value.

Head to head competition is a catalyst for innovation in this sector. Preserving competition is thus all the more important in high-tech markets because they are most conducive to innovation when they are open and accessible to all.

Despite this, we sometimes hear that there is no need for antitrust intervention in high-tech markets. Allegedly, the constant and rapid pace of technological innovation would make entrenched positions of market power impossible to maintain.

Well, if there are such characteristics present in a market, we will fully acknowledge them in our cases, like we did in a recent merger case involving mobile payments<sup>1</sup>. But we do not think that "high-tech" markets - however their boundaries may be defined - should be generally immune from antitrust intervention.

In reality, these markets may often have characteristics which actually increase the likelihood of entrenched market power over time. These could for instance be network effects, sunk costs, tipping, lock-in and so on. Entrenched market positions can thus be used anti-competitively, to exclude existing competitors or to prevent other potential ones from entering the market.

- For example, network effects may act as barriers to entry. A well-known example in this regard is the "applications barrier to entry" which was referred to in the Microsoft cases in both the US and the EU. Basically, the more applications are written for Windows, the more attractive Windows becomes. This entails that even more applications will be written for it, so it is increasingly difficult for a new entrant in the operating system market to get a critical mass of applications.
- Network effects can also lead to the tipping of the market in favour of one player or technology which has reached a critical mass. Take for example the format war that took place in 2002 - 2008 between the Blu-ray Disc and HD DVD format. In the meantime the market has tipped in favour of Blu-ray because it has reached the critical mass of users quicker, and HD DVD has essentially been phased out.

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<sup>1</sup> In Telefónica, Vodafone and Everything Everywhere, after an in-depth investigation, the Commission unconditionally approved the creation of a joint venture between 3 out of 4 of the mobile telephony operators in the UK that plans to offer mobile wallet and advertising services in the UK. The Commission was initially concerned that the JV and its parent companies would have the technical and commercial ability and incentive to block future competitors from offering mobile wallets by foreclosing access to the secure element of the handset. However, the Commission approved the proposed transaction because a number of alternative technologies already exist or are likely to emerge in the near future. The three parent companies would not be able to block or degrade the access to these alternative technologies.

- Sunk costs can be another very important entry barrier in IT markets. Once a company has spent millions on developing a certain application for a specific platform (such as a mainframe), the cost of moving these applications to another platform might be prohibitive.
- User lock-in can also be problematic. Because of legacy issues such as for example the vast amount of documents a company has written in a specific file format, it can be very difficult to switch to alternative technologies.

Furthermore, history tells us that competition *for* the market, as exemplified by disruptive innovations which introduce totally new business models in high tech markets, may happen slower than predicted. Take mainframes or PC operating systems as examples: they have had stable market presence for decades. There is therefore a need to foster competition not only for the market but also *in* such markets. This is a shared belief on both sides of the Atlantic. Recent research shows that increasing competition in concentrated markets stimulates innovation; monopolies and tight oligopolies are less conducive to innovation than somewhat less concentrated markets<sup>2</sup>.

That being said, the question is what is the right way to enforce our antitrust rules in high-tech markets? In particular, how do we maintain incentives to innovate while pursuing possible anticompetitive practices?

## **B. Striking the balance between enforcement and maintaining incentives to innovate**

In Europe, we are particularly wary of situations in which dominant positions by players in the high-tech sector are used to gain leverage in neighbouring markets and can impair effective competition.

In a similar way as our US colleagues, our concern is not about the lawful creation of market power as such<sup>3</sup>. Our concern focuses instead on the abuse of that power to exclude competitors or new entrants that come forward with innovative ideas that could be disruptive for the dominant player.

Both US and EU authorities generally acknowledge that when intervening in high-tech markets, it is important to strike a careful balance so as not to undermine incentives to invest and innovate. Evidently, getting the balance right between (a) allowing the market to develop, and (b) ensuring that positions of market power are not abused, can be difficult. It requires careful and cautious analysis of the facts and the market developments.

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<sup>2</sup> Philippe Aghion, Nick Bloom, Richard Blundell, Rachel Griffith and Peter Howitt, "Competition and Innovation: An Inverted-U Relationship", *Quarterly Journal of Economics*, vol. 120, No. 2, pp. 701-728, 2005.

<sup>3</sup> The European Court of Justice recalled this key principle in a recent ruling when it said that: "...it is settled case-law that a finding that an undertaking has (...) a dominant position is not in itself a ground of criticism of the undertaking concerned. It is in no way the purpose of Article 102 (then 82 EC) to prevent an undertaking from acquiring, on its own merits, the dominant position on a market". Case C-209/10, Judgment of the Court (Grand Chamber) of 27 March 2012. *Post Danmark A/S v Konkurrencerådet*.

I believe that our European case experience – to speak about what I know best - shows that a balance between the dominant companies' incentives to innovate and enabling competition on the merits can be adequately struck. It also shows that our intervention does not have chilling effects on innovation and I will mention a few examples later on.

I also think that antitrust rules can have a role to play in ensuring that intellectual property is not misused for anti-competitive purposes. The Commission believes that IP should serve its main *raison d'être*, that is to encourage innovation. Of course, it is not the aim of any intervention by competition enforcers to meddle into disputes that are purely of an intellectual property nature. However, whenever necessary, we do intervene to ensure that markets remain open enough for innovation to be able to flourish, and that we protect consumers down the line.

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I have just sketched some of the main features of high-tech industries and some of the main issues we look at in Europe. I would like to briefly refer now to the different legal frameworks that apply in the EU and the US, in particular in unilateral conduct cases.

## **2. Applicable legal framework on unilateral conduct**

Unilateral conduct of dominant companies is a topic that has been long debated in the EU<sup>4</sup> and the US. Some of the most interesting antitrust cases have arisen in this area in both jurisdictions and we largely share the same objectives. On both sides we believe that antitrust intervention is warranted where unilateral conduct is likely to have a detrimental effect on consumers. In addition, the economic methods applied by our US counterparts and our own teams are to a large extent similar<sup>5</sup>.

There are however a number of differences between in our approaches to unilateral conduct. These differences derive from our different historical developments, legal orders and institutional contexts. To a certain extent, they are inevitable and this may lead to different results in some cases.

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<sup>4</sup> In the EU, we adopted a Guidance Paper on the Commission's enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings. It provides a modern framework for an effects-based analysis of exclusionary behaviour of dominant firms and focuses on those types of exclusionary conduct that are most harmful to consumers.

<sup>5</sup> For instance "dominance" under Article 102 TFEU and "monopoly power" in Section 2 of the Sherman Act are similar in content. They both relate to a degree of market power which allows the company in question to behave to an appreciable extent independently of its competitors and to price above the competitive level for a significant period of time without attracting entry or expansion. The agencies also consider similar factors in the assessment of market power: market shares, barriers to entry, buyer power are all relevant considerations in the two jurisdictions.

## **A. Different institutional set-ups**

In the EU, the task of enforcing the competition rules belongs to an independent European institution – the Commission. As an administrative body, the Commission is tasked with investigating and, if warranted, sanctioning anti-competitive behaviour. Very often such an investigation is triggered by a complaint - including from US companies like recently Google and Microsoft. When the investigation reveals anticompetitive conduct, the Commission may settle the case by accepting commitments and making them legally binding. It can also take a decision finding an infringement, ordering the company to cease its practices, and imposing a fine.

If the Commission finds that the complaint is without merit, it must take a formal and fully motivated decision to reject it. The Commission is therefore not in the position to simply "drop" a case following a complaint. We have a legal obligation to reason both interventions and non-interventions, which is not the case in the US. Whatever decision we ultimately take, it is subject to appeal before two levels of European courts. The Commission acts therefore as the body of first instance.

In the US, antitrust enforcement takes place in a different institutional and legal set-up. This could partly be the reason why more caution is applied with regard to intervening against unilateral conduct, in particular where it requires public enforcers to prosecute a case before a court. For example, the fact that private actions are a prominent means of antitrust enforcement in the US may play a role. The prospect of private treble damage litigation against successful monopolists has probably been one of the reasons behind US caution to expand unilateral conduct case practice. Furthermore, the *Trinko* jurisprudence of the US Supreme Court has also set strict limits for antitrust enforcement against certain forms of unilateral conduct, notably refusals to deal.

## **B. Different market realities**

Like in the US, the aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anticompetitive way. We are not concerned about protecting competitors as such. We are only concerned about "anticompetitive foreclosure" that is likely to lead to an adverse impact on consumer welfare, in the form of higher prices or by limiting quality, innovation and consumer choice. In our analysis of anti-competitive foreclosure by dominant companies we attempt to strike a balance between short term and longer term effects of intervention.

Our EU rules and policy provide for more scope to intervene, although we will only do so under specific circumstances in order not to undermine dominant companies' incentives to invest and to innovate.

In Europe, the importance of preserving competition as a pre-condition for the success of the EU Single Market has been recognised from the start. This is why the Commission has been entrusted with a key mission of safeguarding competition in the Single Market. This mission also explains why the Commission has not shied away from a robust enforcement against abuses of dominance in regulated or recently liberalised sectors. Through such enforcement, the Commission has ensured that the advantages brought by an EU-wide Single Market are not endangered by anticompetitive abuse.

For example, when you look more closely at our abuse of dominance practice, you will see that we have typically intervened in regulated sectors in Europe, dealing with mammoth incumbents in fragmented markets, like in the energy sector. Antitrust decisions such as E.ON, RWE or Distrigaz to mention only a few have contributed to opening up the German or Belgian energy markets and consolidated the Single Market for energy.

This type of intervention goes to the core of our mission of protecting the EU Single Market against fragmentation and anticompetitive partitioning.

The history of the US being different, market fragmentation and national monopolies are of a lesser concern to you. The US economy is more integrated. What we aspire to in Europe – a true single market – already exists in the US, with all the benefits it entails. Competition forces in the US may therefore be better able to rectify competition problems that occur, whereas in the EU the self-healing force of competition may not yet be as fully developed.

I also have to recall that EU intervention on abuse of dominance in high-tech markets is less frequent than in regulated markets. Broadly speaking, antitrust intervention in this field is, and should always be, exceptional<sup>6</sup>. Indeed, out of the many abuse of dominance cases which the Commission investigates every year, only a couple lead to formal decisions and even fewer concern high-tech industries. When our concerns are not confirmed, we close cases – and we have done so for example in cases regarding IBM mainframes or Qualcomm.

### **C. Convergence of approaches and cooperation**

Despite the differences I have just sketched, competition authorities in the EU and US share the same objectives when applying competition rules to high-tech markets. We carry out a vigilant monitoring of these markets in order to preserve competition and stimulate

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<sup>6</sup> Any undertaking - dominant or not - should generally have the right to choose its trading partners and to dispose of its property freely. For example an **obligation to supply** - even against fair remuneration - may undermine incentives to innovate. There is also the risk of free riding by competitors on investments made by the dominant undertaking. Neither of these consequences would, in the long run, be in the interest of consumers. There is thus a balance to be drawn: An obligation to supply may be justified in exceptional circumstances (Microsoft interoperability case). We may also have to look at the terms and conditions of supply (Microsoft compliance case). You may recall that the Commission closed an investigation into IBM mainframes two years ago because an obligation to supply could not be established.

innovation. We also search for practical and quick remedies that achieve a positive impact in a timely manner, before the markets have moved on.

Let me briefly refer now to some of the EU case practice in recent years and to similarities with the outcomes of the cases of US agencies.

### **3. Examples of EU enforcement action in high-tech markets**

#### **A. Microsoft**

As you will recall, the Commission ordered Microsoft to make interoperability information available to its competitors in the server market so that they could interoperate with the dominant Microsoft PC operating system. The DOJ agreed on a similar remedy with Microsoft by means of a consent order. The emphasis in designing both sets of remedies lay on ensuring that follow-on innovation and competition on product features would be enabled without allowing competitors to "clone" the Microsoft products.

#### **B. Intel**

In the Intel case, the Commission took action to restore competition in the market for computer chips. We found that Intel, as the dominant manufacturer, had engaged in a series of anticompetitive practices aimed at foreclosing its only significant competitor in the market, AMD. Intel has been the object of several similar findings by competition authorities around the world such as in Japan or Korea. And of course, after a US investigation on similar issues, Intel also entered a consent decree with the FTC where it committed in particular not to have recourse to retroactive rebates. This was yet another case where we enjoyed excellent co-operation with the FTC and our approaches were similar. (Intel has challenged the Commission Decision in Court, and proceedings before the EU General Court are ongoing.)

Then there are the standard-essential patent cases:

#### **C. Samsung statement of objections**

Last month, we formally notified Samsung of our concerns regarding its recourse to injunctive relief in various EU countries on the basis of standard-essential patents which it committed to license on fair reasonable and non-discriminatory (FRAND) terms. In line with the position which we already expressed in the Google/Motorola merger decision, we take the preliminary view that recourse to injunction on the basis of FRAND standard essential patents against a willing licensee can be anti-competitive.

Our approach in this regard is cautious; we do not want to get involved in patent infringement disputes as I said earlier. There is however a convergent opinion among competition regulators across the Atlantic. A FRAND commitment given in the standardisation context entails that a SEP holder can no longer have recourse to injunctive

relief so long as the potential licensee is willing to negotiate a FRAND licence or to submit any dispute to a court or binding arbitration. This general position seems to be shared by the FTC<sup>7</sup> and the DOJ<sup>8</sup>.

Separately, we have also opened proceedings against Motorola in two cases.

#### **D. Google**

I will not comment on the Google case other than to say the case is under review and that we are currently discussing potential commitments in four areas: 1. Vertical search, 2. Scraping, 3. Exclusivity, 4. Portability.

#### **E. Merger control**

Merger control has also played a key role in ensuring that competition is encouraged in high-tech markets, in particular by devising adequate remedies that keep market structures competitive while allowing innovation to thrive.

In the **Intel and McAfee** merger, Intel could have leveraged its strong market power in the x86 processor market to degrade the interoperability of its products with the security solutions of rival vendors. The commitments offered by Intel ensure that competitors have access to the necessary information to use Intel's products.

In the mobile security joint-venture between **ARM, Giesecke & Devrient and Gemalto** of 2012, we dealt with a joint venture focusing on the nascent technology of trusted execution environments for consumer electronics (smartphones and tablets). Our concerns related to ARM's very strong position upstream as a supplier of intellectual property for processors widely used in consumer electronics devices. Similar to Intel/McAfee, the commitments in this case strike a balance between, on the one hand, allowing the innovation to happen and, on the other hand, preventing the possibility of lock-in and anti-competitive market capture.

In **Cisco/Tandberg**, the Commission identified horizontal competition concerns arising due to the strong position of the merged entity and high barriers to entry in video-conferencing solutions. To address these concerns, Cisco agreed to transfer intellectual property rights to an independent body and to open-source an IT protocol.

In the case of **Western Digital's acquisition of Hitachi's** storage business, we concluded that the proposed transaction would have resulted in a duopoly or quasi-duopoly on important hard disk drive markets. In order to address these competition concerns, the parties subscribed to far-reaching divestments and other commitments.

On mergers, we work with our US counterparts as a matter of routine. This is further helped by the EU/ US Merger Best Practice Guidelines that we revised about a year ago.

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<sup>7</sup> See Bosch and Google consent orders.

<sup>8</sup> See statement to ITC.

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For all the cases I have just mentioned we have worked together as much as we could with the US authorities, and we will continue to do so. There is an excellent working relationship between EU and US authorities as Sharis Pozen and Commissioner Julie Brill who are here today can testify. Companies should always keep this in mind and be aware that strategies that seek to play one authority against the other are not productive.

## **Close**

To conclude, I have tried to demonstrate that our case practice in both the EU and the US shows the determination of our competition agencies to intervene with antitrust enforcement in high-tech markets whenever this is justified.

High-tech industries are more fast-paced than others, but this does not mean that they should be immune from antitrust intervention.

However, our intervention will remain cautious and balanced, so that the firms in this prosperous sector maintain their incentives to innovate, especially in these difficult economic times.

In enforcing our rules, we will continue to base our action on the same objective criteria for intervention as in all other sectors, irrespective of where these companies are from.

Fair play also applies to competition agencies, and I can assure you that on both sides of the Atlantic we cooperate closely to stimulate competition in such a way as to foster innovation by all possible competitors.

Thank you.