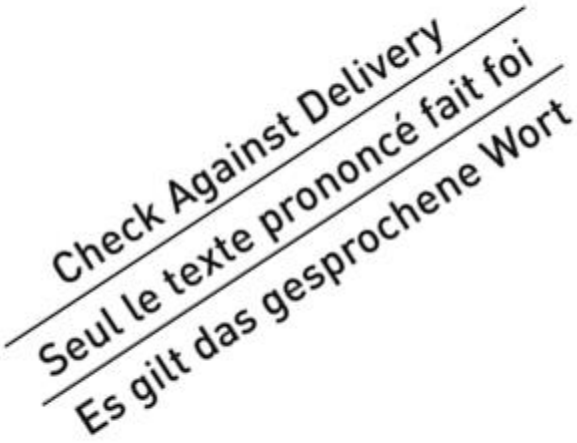
EUROPEAN COMMISSION

Johannes Laitenberger
Director-General for Competition, European Commission

Competition at the digital frontier



Consumer and Competition Day
Malta, 24 April 2017

Competition

Honourable Minister for Social Dialogue, Consumer Affairs and Civil Liberties,

Honourable Chairperson of the Malta Competition and Consumer Affairs Authority,

Ladies and Gentlemen:

It is a privilege and a pleasure for me to represent Commissioner Margrethe Vestager at today's Consumer and Competition Day organised by the Maltese Presidency.
I would like to thank Godwin Mangion of Malta's Competition and Consumer Affairs Authority for inviting me.
It is fitting that today's event is devoted to the digital markets, which pose significant challenges to both competition and consumer authorities.
The ongoing digital revolution is affecting consumers as much as businesses. Citizens wonder how the new goods and services it makes possible will change our lives even beyond the changes that have already happened.
Topics of concern voiced in the public debate range from the use of our personal data to the impact that automation will have on our workplace.
And we can add to that the concerns over cybersecurity, security in general, but also the impact on public spheres and debates.
Not to speak of the practical but increasingly difficult task we all face of talking to teenagers and – let's be honest about this – people of all ages over dinner or at social occasions, when everyone is glued to small, hand-held screens even between bites.
It is necessary that we become aware of the risks. It is of the essence that we do so faster than the pace of technological change.
But I am convinced that we should not let ourselves get overwhelmed by risks real or perceived. We should be ready to seize the opportunities that are offered by digitisation.
First and foremost, digital technologies open new horizons. They are at the heart of breakthroughs in fields as diverse as health and mobility – and despite the difficulties at the dinner table I just mentioned, they allow us to keep families and friends together in ways we couldn't have imagined only a few years ago.
In line with my sphere of competence, let me focus focus on the impact that the rise of digital industries has on competition policy and enforcement.
What does it mean to keep digital markets open, level and contestable? How is our work going to change as the whole economy – as it seems – embraces the new technologies in unprecedented width and depth?
The first consideration touches on our action directly. It comes from Margrethe Vestager, an avid technophile herself.

In her speeches and interviews, Commissioner Vestager often remarks that new technologies are a sea change, but the motives that push people to break rules and among them competition rules have not changed a bit. At the end of the day, it's not the newly invented gadget that decides to – say – set up a cartel. It's always going to be people who take those decisions and – let me add – who may live to regret them.

I am not sure whether the secret meetings that set up cartels were ever held in the proverbial smoked-filled backroom – there were and there are many ways to set up cartels. This being said, today the cyber-sphere definitely adds itself to them – the backroom being replaced by the chatroom.

Now chatrooms may be a new thing. But the temptation that leads people to use a chatroom to gain unfair and illegal advantage over their competitors is old hat to competition enforcers.

The second consideration follows quite naturally, although it is broader in scope. Some observers worry that EU competition law will soon be inadequate for digital markets – and that high-tech infringers will simply outwit enforcement agencies.

The European Commission and its Competition Directorate-General take these worries seriously. But we are not without means.

Let me illustrate how we address the digital challenges in and through competition law. I would like to start with three systemic considerations.

First, we must keep our skills and devices up to date. For instance, the Commission has recently launched a simple and clever tool that allows whistle-blowers to reveal cartels and other infringements without having to reveal themselves.

People with knowledge of illegal practices can use this two-way communication channel and remain anonymous if they so wish. Other, more sophisticated tools are being implemented to detect infringements and carry out our investigations.

Second, the European Union's fundamental competition rules are both robust and flexible. They have been so for 60 years, since they were first introduced in Treaties of Rome that we celebrated just a few weeks ago. They have allowed to the Commission to take landmark decisions which have helped make digital markets work better. Their rationale remains sound.

They are implemented through secondary law that is regularly checked against fitness for purpose. Let me give you an example.

We noticed that some companies are willing to pay very large sums to acquire rivals with no profits and very little sales. Three years ago, for instance, Facebook paid 19 billion dollars to buy WhatsApp.

At the time WhatsApp had more users than there are people in the EU – 600 million users, to be precise. However, its turnover was so low that the deal didn't have to be notified to the Commission

The case was referred to the Commission by a national authority. The Commission eventually gave the green light – but the case showed us that since the rules say that we must review planned mergers that are above certain turnover thresholds, transactions aimed at assets such as client-base, patents, or even datasets that have not yet translated into sizeable turnover may escape us.
That is potentially bad news for consumers if such transactions raise competition concerns but remain unscrutinised. So what to do?
Commissioner Vestager decided to look at the facts to see whether there is a need to adapt the rules. As the Commission always does, we opened a consultation to learn what industry players and ordinary citizens would think.
The consultation closed in January. We are currently analysing the replies, without rushing to conclusions.
This careful scrutiny is something of a tradition for the Commission. Our Union's competition system has been evolving constantly over the past 60 years and – thanks to this – it has remained relevant and has delivered in times of change.
Third, our Union's competition authorities play as a team.
The European Commission and the national competition authorities in all our Member States work closely together in the European Competition Network, the ECN. We apply the same rules in antitrust and share our work in merger review.
Last year we set up an early warning system to signal novel cases to each other and discuss them at the earliest possible stage.
In addition, the ECN set up a Working Group on the Digitalization of the Economy, and we are planning to hold our first meeting later this year.
Finally, we are striving to make the system work even better. Last month the Commission proposed a directive with new rules and standards designed to empower all national authorities to be even more effective enforcers. We call this policy initiative ECN+.
It covers a wider range of topics where more common standards will be of benefit. A good example of where we can make progress is providing all national authorities with the investigative tools needed in the digital age.
By honing our enforcement capabilities, we can ensure that our enforcement remains relevant in the digital environment.
I would like to thank the Maltese Presidency for its commitment to advance the discussion of this proposal.

Contributing to the Commission's digital agenda

Let me now turn to the substance of competition enforcement at the present stage of digital markets.
The digital economy is one of the key areas that the Commission under President Jean-Claude Juncker has been looking at to help Europe

overcome the long aftermath of the financial and economic crisis and take the path of sustainable growth and employment.
Since it took office in late 2014, the Juncker Commission has been pushing in ten priority areas for investment, growth and jobs , from the Energy Union, a deeper Single Market to the creation of a true Digital Single Market.
Competition policy and enforcement has brought its contribution to many of these priorities, while preserving its absolute independence when it comes to applying the rules in individual cases.
Let's look at the Digital Single Market. For instance, two years ago Commissioner Vestager launched an inquiry into the e-commerce sector. The analysis of the results and of the responses to our public consultation is well advanced and will be published later this spring.
Also, last February we formally opened three antitrust investigations into suspected anticompetitive practices in e-commerce. They involve companies in the consumer electronics, video games and hotel accommodation sectors.
The ultimate goal of this work is making sure that practices such as retail price restrictions, discrimination on the basis of location and geo-blocking do not hamper the potential of e-commerce, which is designed to give consumers a wider choice of goods and services, as well as the opportunity to make purchases across borders.
These cases stress our renewed focus on restrictions to competition in distribution agreements – 'vertical restraints' in the jargon – in relation to e-commerce.
E-commerce makes it easier for consumers to shop cross-borders within the EU; so, it has large market integration potential.
That is why we are stepping up enforcement in this area. We want to make sure that the benefits of e-commerce in terms of more cross-border competition are not undermined by certain business practices.
For example, some manufacturers set retail prices or restrict the territories into which their distributors can sell.
The work carried out over the past two years on the e-commerce sector inquiry and its findings clearly support this renewed focus on vertical restraints in e-commerce.

Notable digital cases

Other ongoing antitrust cases involve Google – and I am sure everyone in the room will have heard of it – the chipset producer Qualcomm, and Amazon, the latter for the use of 'most-favoured-nation' clauses in its contracts with e-books publishers.
Google is involved in three ongoing cases.

In the "shopping case", we are concerned that the company treats its own comparison shopping service more favourably than those of rivals in its general search results.
As a consequence, consumers may not see the most relevant results in response to their shopping-related queries. We are also concerned that Google has harmed competition and reduced incentives for innovation.
In the "Android case", we suspect that Google – through contractual restrictions imposed on smartphone manufacturers and mobile network operators – has artificially restricted competition in a range of mobile apps and services with the aim of preserving and strengthening its dominance in general internet search.
Finally, in the "AdSense case" we are concerned that Google limited the ability of certain third-party websites to display search advertisements from its competitors.
If this is confirmed, Google may have prevented existing and potential competitors, including other search providers and online advertising platforms, from entering and growing in the market.
The next cases I will quickly cover involve Qualcomm, the world's largest supplier of baseband chipsets, which are key components of mobile devices such as smartphones and tablets.
In December 2015, the Commission formally informed the company that it was the object of two separate investigations. Our suspicion is that it has abused its dominant position in the worldwide markets for (3G and 4G) baseband chipsets.
The first case concerns alleged exclusivity payments by Qualcomm to a major customer for using only Qualcomm chipsets. The second case alleges that Qualcomm sold its chipsets below cost to two of its main customers with the aim of forcing a competitor out of the market.
Our ongoing case involving Amazon alleges that the company imposed a number of parity and similar provisions on e-book publishers, thereby abusing its dominant position.
To allay our concerns, Amazon has proposed not to enforce or put in place any new non-price and price parity clauses in the European Economic Area for a period of five years.
We are currently finalising our assessment of the comments received in the formal market test with the aim of moving this case forward as soon as possible.
But our action in digital markets cuts across all our instruments. To go back to mergers, late last year we approved the acquisition of LinkedIn by Microsoft with conditions.
In essence, we made sure that the deal would not narrow Europeans' choice of professional social networks.
To clear the transaction, we accepted a set of pledges offered by Microsoft. For instance, that PC manufacturers and distributors would be

free not to install LinkedIn on Windows and that users would be free to remove it if it was pre-installed.
The company also committed to interoperability; a long word which means that other services competing with LinkedIn would continue to work with Microsoft Office.
Let me also mention two proposed deals we reviewed last year among mobile network operators in the UK and in Italy.
In the former, Hutchison's Three intended to buy Telefónica's O2 in the UK. We blocked the acquisition because it would likely have resulted in less choice for British consumers and higher prices for mobile services.
The Italian transaction was a joint venture between Wind and H3G, respective subsidiaries of VimpelCom and Hutchison. We cleared the proposed deal when the companies offered remedies that would allow a new mobile operator to enter the Italian market.
Decisions like these bring tangible benefits to customers. In 2016, for instance, key merger decisions in the telecoms sector have been estimated to save customer between 7 and 11 billion euro. This is about one third of the total customers savings from our merger interventions last year.
Finally, in State aid, let me recall the Broadband guidelines which, for the past five years or so, have helped EU countries invest in a key infrastructure of the digital age.
A study carried out for DG Competition which will appear soon includes an interesting finding. It shows that State aid schemes approved by the Commission increased broadband coverage by 18 to 28% in rural areas of Germany's Bavaria and Lower Saxony.
Finally, let me make a passing reference to a related technology – vectoring – which can deliver broadband speeds over copper cables, thus eliminating the need for the roll-out of fibre cables.
We have an ongoing vectoring case in Germany. The country's regulator allowed Deutsche Telekom to deploy the technology, but we want to make sure that it does not unduly restrict access to competitors.

The shape of things to come

But the key to keeping markets level in the digital age is staying ahead of the curve – not merely adapting to change. This is why we are looking at potential issues that may arise from things like big data and algorithms.
There's no doubt that big data can do a lot of good as a technology. Think of the opportunities it offers to make self-driving cars commonplace or our energy networks more efficient.
At the same time, people need to be reassured that these advances will not be used to snoop into their private affairs and that the companies that sit on huge mountains of data will not crush their competitors.

Our review of mergers started looking into issues related to the combination of big data a few years ago. One case was Google's acquisition of Doubleclick in 2008, where we found the combination of data posed no threat to competition.
Then, when Microsoft bought Yahoo's search business in 2010, our analysis actually showed that the market would become more competitive thanks to the data Microsoft would receive with the deal.
More recently, in 2016, we also looked at the combination of the data held by the companies in the Verizon/Yahoo merger.
So, we looked at this potential concern but have not found data used for anti-competitive purposes yet. All cases were cleared because we found that competitors would have access to comparable sets of data from other sources.
However, our practice confirms that this is a time when data is an asset, so we will continue to keep a keen eye on how companies use it. And this means making sure that the accumulation of data does not give a firm an advantage its rivals cannot possibly match.
Let me stress that this is always done on a case-by-case basis. Because of the many different types of data and market circumstances, it is difficult to draw general conclusions.
Having said this, there are a few questions our reviews often ask. How much of the attractiveness of a product depend on data? How easily does data translate into product improvements? Is data exclusive to a particular firm or can it be collected again?
The same goes for algorithms, which turn data into information you can actually use. It's all about the way they are employed.
To go back to e-commerce, our study found that the use of algorithms that trawl online shops to monitor and adjust prices is quite common.
Now, this is not necessarily a problem for competition enforcers. But it may become a problem if the technology is used to bring anti-competitive practices into the digital age. And, again, rest assured that we are on the watch-out and we know where to look.
We follow a simple principle. If a conduct is illegal in our brick-and-mortar world – for instance, a price-fixing cartel – it is equally illegal when it is carried out through software. A company can never hide behind an algorithm.
Imagine that a firm lets a piece of software monitor the prices of rivals and set its own. Let us also imagine that the software works all by itself, taking over the kind of coordination, bargaining and mutual commitment that are necessary to run a cartel.
Well, even in this case the firm would still be liable for its actions. To stay on the safe side of the law, it should have programmed the software to prevent collusion in the first place.

Looking farther into the future, one can only speculate at what it will take to keep competitive conditions fair and make open and free markets work for us all.
As I said, the whole economy is going digital. Value in almost every industry will increasingly depend on data, intellectual content, and business models not yet imagined. We will probably see a total overhaul of our infrastructures and modes of production.
The way our societies are held together are likely to change, too. We don't know how yet – at least, I don't.
But one thing I am sure of. Whatever shape the things to come will take, we need to make sure that nobody is left behind.
This is a view that comes naturally to competition enforcers, because we're there to protect the interests of all, none excluded.
Even in this futuristic scenario, I can see a place for the public authorities that enforce competition rules.
They will probably develop algorithms that will outwit the companies they have to monitor and keep in check. And they will put them to work to make sure that markets remain open, contestable and fair.
Thank you.