



EUROPEAN COMMISSION

Johannes Laitenberger

Director-General for Competition, European Commission

Enforcing EU competition law: Principles, strategy and objectives

*Check Against Delivery
Seul le texte prononcé fait foi
Es gilt das gesprochene Wort*

Fordham University, 44th Annual Conference on International Antitrust Law and Policy

New York City, 15 September 2017

1 Introduction

Ladies and Gentlemen:

It is a real pleasure for me to return to Fordham University's Conference on International Antitrust Law and Policy for the second year in a row. I thank James Keyte for his invitation and for the opportunity he offered me to share the stage with Maureen Ohlhausen.

Last year, I discussed the challenges that trailblazing digital players can pose to competition enforcers with a focus on the work we have done to better understand the competition landscape in the European Union's e-commerce sector.

This morning I will broaden the scope. This year marks the 60th anniversary of the Treaties of Rome that created EU competition law – what are today Articles 101 and 102 of the Treaty on the Functioning of the European Union have in substance remained unchanged over six decades.

I will talk about some of the beacons that guide the enforcement of EU competition rules in the single market using as illustrations decisions taken and new cases formally opened over the past twelve months.

But first, let me make a comment on the State of the European Union speech that President Juncker delivered the other day in Strasbourg before the European Parliament. Every year in September, the Commission President gives a comprehensive picture of the Union and its most pressing challenges, unveiling the main initiatives that the EU's executive arm will take to address them.

The EU – like many other regions of the world – has gone through a rough patch in the last few years, facing political, economic and societal challenges.

This year, the mood in Strasbourg was decidedly more upbeat; the citizens and leaders of the EU are more optimistic about the future.

More daunting challenges still await the EU of course – and indeed the world – but there are many positive signs on the EU's economic, political and social fronts. Once again, the European Union is showing its mettle.

One of President Juncker's main announcements was a broad strategy for the EU's international trade that is fit for today's global business environment.

The strategy traces a path towards harnessing the forces of globalisation; it reaffirms the EU's commitment towards multilateral approaches and institutions; and it puts on the international table the issue of government subsidies and other interventions in the economy.

In this context, the President's proposals include the formal start of free-trade agreement negotiations with Australia and New Zealand building on recent successful negotiations with Japan and Canada and adding to the fast progress made with partners such as Mexico.

They also include the setting up of a multilateral court to settle disputes that may arise between business investors and government authorities.

Finally, the President proposed new rules on the screening of Foreign Direct Investments on grounds of security and public order by Member States, not unlike the review of Foreign Direct Investments by the Committee on Foreign Investment in the US or under the Investment Canada Act

This instrument will be separate from the assessment by the European Commission of certain Foreign Direct Investments on competition grounds under the EU Merger Regulation.

The design of the new rules does not clash with the open and level single market we advocate. EU openness to foreign investment is not going to change.

Instead, it will be accompanied by appropriate policies to protect assets in the EU against takeovers that could harm the essential interests of the EU or its Member States. It is part and parcel of a rules-based, transparent and predictable approach to business regulation, one that is proportionate and open to that established in multilateral

approaches. This openness to international cooperation is one of the beacons of our action. Let me briefly review others before coming back to international cooperation at the end.

2 Beacons for our action

Commissioner Vestager has often spoken about the underpinnings of competition policy and enforcement, especially the need to instil a sense of openness, fairness and trust in the markets and in society at large.

This translates into specific priorities and objectives, which we – together with the competition authorities in EU countries – follow as beacons for our action.

The beacons that have guided us more specifically in the last 12 months include

- equal treatment;
- helping to build the EU single market;
- keeping markets open and contestable;
- promoting consumer welfare; and
- a commitment to international cooperation.

Let me say a few words on each.

2.1 Equal treatment: A level playing field

The bedrock of robust and consistent enforcement is granting equal business conditions to all companies with operations in Europe's single market.

This is a constant in all our decisions, but is perhaps clearer in cartel cases because everyone has an intuitive grasp of secret cartels as unfair cabals set up to produce unequal conditions.

The fight against cartels has been, is and will remain one of our top priorities. Our record over the past 12 months bears that out.

Apart from a couple of decisions involving older cases – we call them re-adoption decisions – the European Commission has taken five cartel decisions since we last met. Two were taken in December last year against three large banks in the Euro Interest Rate Derivatives case and against three household brands in consumer electronics in the Rechargeable Batteries case.

This year, we have taken three decisions, all in automotive markets. The first in the recycling of car batteries; the second involved a group of suppliers of air conditioning and engine cooling systems; and the latest, last June, involved three producers of lighting systems.

As you can see, the phrase 'equal business conditions for *all* companies' should be taken quite literally.

The companies involved in the cases I just recalled range from large international banks to smaller car-part suppliers.

Even the fines we imposed over the past 12 months fall into a broad range: from €27 million to almost half a billion euros – not to speak of the €2.9 billion fine imposed on a group of truck manufacturers in July 2016.

We go after cartels large and small because they are all bad for the economy and all have a disheartening effect on rivals and unsuspecting consumers. We are refining our tools for detecting them. One element in this effort is the new whistleblower tool, which allows two-way communication with informants who wish to remain anonymous.

2.2 Helping to build the single market

The second beacon for our action I would like to illustrate is our contribution to the creation of the single market.

This task comes straight from the competition articles in our Treaties, which prohibit business practices that are, I quote, "incompatible with the internal market".

Our founding fathers knew that the integration of national markets would bring economic peace in Europe and turn the Union into a lasting success. The first six decades have proven them right.

There's a parallel here with developments in the United States in the 19th and early 20th century. Rail transport had expanded trade between states at the time and the Interstate Commerce Act was passed in 1887 to regulate the industry at federal level. Shortly afterwards, the Sherman Antitrust Act included a ban on business practices which restrained "trade or commerce among the several States".

So, the introduction of competition rules is linked to market integration on both sides of the Atlantic. However, the US is a federation and has integrated its economy over a much longer time. The EU is still young, only 60 years old, and remains a union of sovereign countries, and one that strives to establish a fully integrated market between them.

This means that Europe's single market will likely remain a work in progress for a while still. This being said, it also means that EU competition policy and enforcement address the single market in its entirety and should not stop before its internal borders.

The e-commerce sector inquiry that I spoke about last year is a good example of what we can do to bring the goal of a fully integrated market closer. Let me give you an update.

The final report of the inquiry was issued last May. We found that increased online price transparency and price competition of digital distribution channels may lead to protective measures in distribution contracts.

Protective moves include pricing restrictions such as resale price maintenance, platform bans, and restrictions on the use of price comparison tools. We also found that geo-blocking is quite prevalent, especially in the case of digital content.

Geo-blocking means that European consumers cannot buy goods or services online across national borders within the EU – which undermines one of the tenets of the single market.

Not all these defensive moves are in breach of competition rules. But those that are create unjustified barriers and restrictions that need to be addressed.

We have already opened a few antitrust cases since the final report was published involving allegations of:

- resale price maintenance of consumer electronics manufacturers, which we consider a practice that restricts intra-brand competition and affects prices;
- geo-blocking of video game publishers and distribution platforms;
- discrimination based on nationality by hotel and tour operators; and
- territorial restrictions in selective distribution systems.

We will see where these investigations lead. For the moment, the good news is that many companies – on their own initiative – have torn down the digital barriers they had erected since we launched the inquiry.

For example, we are aware that companies, such as Mango, Pull & Bear and Dorothy Perkins in the clothing industry, coffee machine producer De Longhi, and photo equipment manufacturer Manfrotto, have done that.

I am particularly happy of this news.

First, because the single market works a bit more as intended now that these digital barriers have been removed.

Second, because it shows the impact that a robust and authoritative competition-control system can have on the behaviour of companies.

It is very important that market players see competition enforcers as independent, even-handed and predictable public authorities. When our action is consistent and our priorities clear, companies find it easier to comply with the law.

A level, open and well-functioning single market is hugely important to sustaining Europe's current recovery, also because it can attract businesses from outside Europe.

Suggestions are often made about an enforcement bias against non-EU companies, a discussion that has flared up after recent decisions involving US internet giants.

I respectfully but firmly disagree with these views.

Let's look at the facts. It is a fact that companies based in the US lead the digital economy, therefore our investigations tend to involve them when the complaints we receive – often by rivals from the US – have merit.

The picture is different in other industries. European banks are often involved when we look into the financial sector and European companies in the pharma or chemical sectors.

Another fact is that this is the age of globalisation. Many of the cartel cases in automotive markets that I referred to earlier are truly global. As a consequence, the companies involved hailed from Asia, Europe and the Americas.

In sum, the facts show that we are indifferent to where the companies involved in our investigations happen to be headquartered. Our only bias is towards an open and competitive single market – nothing else.

2.3 Keeping markets open and contestable

Europe's competition authorities operate on the assumption that all entrepreneurs – domestic or international – are welcome as long as they play by the rules.

Keeping the single market open and contestable is the next beacon for competition control in Europe which I will cover today – and I will use our action in merger review and antitrust to make my point.

We have consistently accepted clear-cut structural remedies to make sure that the company resulting from a merger is not too large for comfort.

Between 2011 and 2016, the Commission approved 95 merger cases with remedies, and, in almost three quarters of them, the remedies were divestitures.

Two recent decisions on large agro-chemical mergers are consistent with our longstanding policy.

Last March, the Commission approved the merger between Dow and DuPont only after both companies pledged to sell certain manufacturing facilities and almost all of DuPont's pesticide business, including its Research and Development organisation.

The following month, ChemChina's planned acquisition of Syngenta was approved on condition that the two companies divest all the businesses that would create problematic overlaps.

In both cases, especially the former, we also made sure that the deals would not reduce the competitive pressure that fuels research and innovation.

Last month, we opened an in-depth investigation into another large agricultural merger that was notified to us – the proposed acquisition of Monsanto by Bayer.

More evidence of the importance we attach to contestable markets comes from the digital industry. The Google Shopping antitrust decision, which the Commission took before the summer, is just one example.

I will not add to the countless comments that the decision has generated. I would just like to recall a simple fact that sits at its core. Commissioner Vestager put it in plain language: the company was sanctioned for abusing its dominant position by, I quote

"promoting its own comparison shopping service in its search results, and demoting those of competitors".

In other words, we found that Google used its dominance in general internet search to give an illegal advantage to its own product in an adjacent market, comparison shopping, with an exclusionary impact on rivals and the consequent harm for consumers.

Another decision in digital markets is equally worth mentioning. I'm referring to the commitments we accepted from Amazon in May.

The company had included certain most-favoured-nation clauses in its distribution agreements with e-book publishers that made it too difficult for rival platforms to compete.

The pledges we made legally binding will now encourage other platforms to offer new features, promotions and business models to European e-book readers.

This is to show how 'open and contestable markets' translates into actual enforcement action.

Breaking news comes from the European Court of Justice, not the European Commission.

Last week, the Court issued its ruling on the Intel case that the Commission decided a few years ago, referring the case back for further examination to the General Court.

First, we welcome the fact that the Court confirmed the Commission did not breach Intel's rights of defence, which are paramount for us.

We also welcome the Court's clarification that practices conducted outside Europe fall under the jurisdiction of EU antitrust rules if they have substantial effects on European markets.

For the rest, we are examining the ruling in detail and look forward to the General Court's fresh review of the decision.

2.4 Above all, protecting consumers

I will now turn to the ultimate beacon of our action – European consumers – whose interests, choice and overall welfare will always guide us as we set our priorities and work on our cases.

I can hardly think of a decision where this is not the major consideration. A recent example comes from the antitrust case we opened formally in May involving the South African pharmaceutical company Aspen.

The investigation, which follows a similar one by the Italian competition authority, is the first about excessive pricing in the pharmaceutical industry. We are looking at information suggesting that the company spiked the prices of a number of medicines used for treating cancer.

Still in the pharmaceutical sector, in July, the Commission sent a Statement of Objections to Teva and its subsidiary Cephalon for a 'pay-for-delay' agreement the two companies struck back in 2005 when they were independent companies.

Cases like these translate a general orientation.

I said earlier that companies find it easier to comply with competition rules when they see that enforcers are authoritative and even-handed. The same goes for consumers. In an ideal scenario, they would see competition enforcers as public authorities that protect their rights.

There is a sense in which these are the twin constituencies of a competition agency; towards economic players and towards the people.

I believe that a crucial element for achieving these goals is what I would call 'enforcement balance'. Let me explain.

It is vital that competition enforcers operate within a well-defined remit, according to clear legal and procedural limits, and that their action have effective checks and balances.

It is never good news for an economy and a society when enforcers – even beyond competition control – are simply given free rein. Conversely, enforcers that do not look at their responsibilities in full are not good news either. If this occurred, law-abiding business and consumers would feel they have been let down.

In a word, it's all about striking the right balance.

I often describe the job of competition enforcers as complex and delicate. Striking the right enforcement balance is perhaps the most delicate aspect of it.

The debate on the scope and level of enforcement has always kept competition circles busy – and will probably never end.

Over the last decades, we have often debated the perils of over-enforcement – quite regularly, in fact. Not in the least, this has brought with it considerable refinement of our methods and priorities – including a more economic approach that avoids overly formalistic enforcement.

If we are serious about protecting consumers, we should of course also be wary of under-enforcement.

There are too many people out there who feel that the turn the economy has taken in the last few decades has left them behind.

And this is not only about income inequality. It spills into the social and political. It is about a perception of social divisions, low levels of trust in the economic and political spheres, and sometimes a general feeling of helplessness vis-à-vis developments in general.

It is about a sense that the economy is bifurcating. That it serves the interests of few; not of the many.

I hasten to add that these trends vastly exceed competition control. But when it comes to our limited, well-defined and proper sphere of activity, I am convinced we should spare no effort.

This is especially urgent in those parts of the world where the people feel that today they are more disenfranchised. That they no longer have a sufficient say on their personal and collective future.

Avoiding 'false negatives' in competition control requires as much rigour, analysis and – yes – humility as avoiding 'false positives'. Only if we take both sides of our job seriously can we carry it out in full.

2.5 A committed international player

As promised, I will conclude with international cooperation, which is a beacon for us, as it should be for the entirety of the international enforcement community.

We have been establishing formal links with our sister agencies around the world for over 25 years. The first was the EU/US Competition Cooperation Agreement signed in 1991.

We can see the need to cooperate with sister agencies every day, as a growing number of the cases that we handle have a global scope.

Look at the Dow/Dupont deal I mentioned earlier. In its review, we talked with the US Department of Justice and the competition authorities of Australia, Brazil, Canada, Chile, China and South Africa.

The Commission supports both multilateral and bilateral cooperation. The International Competition Network is the natural venue for the former, together with the work done in other international organisations, such as the OECD and the UN Conference on Trade and Development.

The latest major advance is the Memorandum of Understanding signed by Commissioner Vestager and Mr He Lifeng, Chairman of China's National Development and Reform Commission, to start a dialogue on state aid control and fair competition review.

This sort of cooperation brings benefits all around. Companies can count on a more uniform and predictable landscape for their global operations. Above all, consumer interests are protected more effectively. As to enforcers, good cooperation with sister agencies has now become a decisive factor in our effectiveness. How could any of us win the respect of companies with global operations if we could not count on a global network of partners?

3 Close

The principles, strategy and objectives that I have covered in my presentation are reflected in practically every case we investigate and decide. We make sure every economic player has the same opportunities to succeed; we help build an open and contestable single market; we always look at consumer welfare; and we are committed to international cooperation. I would like to stress in closing the impact that keeping markets fair, level and well-functioning can have in our economies and societies. A young entrepreneur that sees her efforts thwarted by the abusive behaviour of a dominant and more established rival may feel discouraged and drop her plans altogether. A consumer that is made to pay too much for the goods he wants to buy because of a cartel may feel he is the helpless victim of a conspiracy. When these things happen too often, people end up feeling excluded. They may lose trust in the system altogether. So, this is my parting thought. The robust, independent and even-handed enforcement of competition rules is one of the public policies that contribute to making our society more sustainable, more inclusive and hence more future-proof. Thank you.