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EU competition law in innovation and digital markets: fairness and the consumer welfare perspective

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

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Competition

Ladies and Gentlemen:

First of all, many thanks to the organisers and in particular Lewis Crofts and Gianni de Stefano for inviting me. And many thanks to Edith Ramirez for the kind introduction. It is a special honour and pleasure to be introduced by her. The remarkable tenure that she has had at the FTC has left a strong, positive mark on the EU-U.S. cooperation in antitrust and mergers, for which we are grateful.

Regarding today's speech and discussions, I have to say Lewis and Gianni sent me an extensive shopping list of topics that I might want to discuss today. It's so extensive that it will allow me to concentrate on some topics for this talk and leave others for the questions and answers or for future debates.

"Baltic Rail" and remedies

Today's focus is on innovation and on the digital sector. But let me start with a case from the "old economy" – actually in a sector which was central to the first industrial revolution, almost two centuries ago: the railway sector. Just to show that while many things change, others stay the same, or almost.

Last week the Commission imposed a fine of almost 28 million euros on Lithuanian Railways for abuse of dominance. The Commission was acting on a complaint by the Polish oil conglomerate Orlen.

This decision forms part of a broader pattern of Commission enforcement in both Central and Eastern European countries – and indeed more widely in the Single Market – to ensure that consumers enjoy the full benefits of market liberalisation. Prominent cases concerning Central and Eastern European countries include BEH Electricity, OPCOM, and Slovak Telekom in recent years, not to mention pending cases. At the same time, we have taken action in many cases covering the EU as a whole, including Servier, Container Shipping – and the Trucks case, in which after last year's 2.9 billion euros settlement with most parties, just two weeks ago we imposed a fine of 880 million euros on Scania, the only non-settling party.

Let's recall what "Baltic Rail" was about: for a key customer of Lithuanian Railways wishing to ship oil to neighbouring Latvia, there were two routes: a short track or a long detour within Lithuania.

Lithuanian Railways removed the short track. So customers had to use Lithuanian Railways for a longer stretch of their rail shipping routes.

There may be good reasons to close a track, of course. But here the track was dismantled. Not just closed.

And Lithuanian Railways did not show any objective justification for this.

The Commission concluded that Lithuanian Railways dismantled public rail infrastructure to protect itself from competition.

As usual, the decision included an order to end the infringement. The decision does not spell out a specific remedy. It is now for Lithuanian Railways to restore the situation absent the infringement in every respect.

This duty to return to legal behaviour is drawn directly from Article 102. The decision merely states the obvious: under the Treaty, every undertaking has a directly effective duty to comply with the competition rules.

The corollary of directly effective competition rules is that firms have the burden of self-assessment.

Certainly, companies are entitled to legal certainty. And indeed the Commission helps to create legal certainty through decisions and guidelines.

So firms can consult several sources in order to shape their behaviour, including case-law, and, if needed, their legal advisers [T-34/92 Fiatagri §39; T-167/08 Microsoft §84; C-189/02 P Dansk Rørindustri §219; C-194/14 P AC-Treuhand §42-43].

Another corollary of this system is that "where several remedies exist for bringing an infringement to an end", the Commission cannot impose a particular remedy [T-24/90 Automec ("Automec II") §52; T-69/89 Radio Telefis Eireann ("Magill" at first instance), §98; C-241/91 P Magill §91].

To sum up, one could say that the Commission may order the firm to comply, but, usually, it may not dictate how to comply.

A good way to apply this principle is to require the undertaking to propose remedies by a certain deadline.

Of course, if the Commission considers that there is only one way to remedy the infringement, it will not shy away from imposing it.

But where there may be several ways, then it is preferable to let the company assess options and propose one of them – and we are ready to listen then.

Fairness

We are willing to listen, because we give companies a fair hearing.

That is part of our attachment to fairness in general and procedural fairness in particular.

Procedural fairness has several dimensions. From the rights of defence, to impartiality in decision-making, to objective communications with the public.

Procedural fairness ensures a rigorous process.

Ultimately, fairness is important to maintain confidence in the system. If a competition authority wants to maintain credibility and trustworthiness – in the eyes of courts, counterparts, businesses and consumers – it must help ensure fairness and above all guarantee procedural fairness.

The notion of fairness and the debate around it in the markets and in our societies of course extends beyond procedure in a narrow, formalistic sense.

"Fairness" is as old as competition law itself. Standing on the floor of the U.S. Senate in 1890, Senator Sherman explained that his bill was about ensuring "free and fair competition".

Likewise, the Spaak Report of 1956 – when the EU competition rules were first discussed – stressed the importance of "fair" competition.

Crucially, it also addressed the different notions of "fair" competition floating around at the time.

Some thought that "fair competition" meant treating competitors according to certain standards. They understood the term to mean the observation of "equitable" rules of behaviour among economic actors.

That idea was ultimately recognised as something different from "competition law" as it was laid down in the treaties of Rome.

Essentially, the discussion was resolved through the distinction between competition law, on one side, and "unfair trading" laws, on the other. In this sense, the German language distinguishes between "Kartellrecht" and "Lauterkeitsrecht" which is why German competition law as we understand it today is the subject of the "Gesetz gegen Wettbewerbsbeschränkungen", the law on practices that restrict competition, as distinct from the "Gesetz gegen den unlauteren Wettbewerb", the German law on unfair trading practices.

Unfair trading laws focus on unequitable behaviour among competitors, such as misleading comparative advertising. Competition law focuses primarily on restrictions to competition.

That does not mean, however, that within the sphere of competition law, the notion of fairness becomes irrelevant.

Quite to the contrary. The term "fair" appears in Article 101(3) TFEU. The term "unfair" appears in Article 102 TFEU. The preamble of the TFEU calls for concerted action in order to guarantee "fair" competition. It is a rationale that underpins the EU competition rules.

One obvious example is the idea of not gaining an "unfair advantage", such as State aid or special rights from the State.

Let me take as example the Amazon State aid case, where the Commission took a final negative decision just last week. Following an in-depth investigation launched in October 2014, the Commission has concluded that a tax ruling issued by Luxembourg in 2003, and prolonged in 2011, lowered the tax paid by Amazon in Luxembourg without a valid justification.

The tax ruling enabled Amazon to shift the vast majority of its operating profits from an Amazon group company that is subject to tax in Luxembourg (Amazon EU) to a company which is not subject to tax in Luxembourg (Amazon Europe Holding Technologies). In particular, the tax ruling endorsed the payment of a royalty from Amazon EU to Amazon Europe Holding Technologies, which significantly reduced Amazon EU's taxable profits.

The Commission's investigation showed that the level of the royalty payments, endorsed by the tax ruling, was inflated and did not reflect economic reality. On this basis, the Commission concluded that the tax ruling granted a selective economic advantage to Amazon by allowing the group to pay less tax than other companies subject to the same national tax rules. In fact, the ruling enabled Amazon to avoid taxation on three quarters of the profits it made from all Amazon sales in the EU.

This is where EU State aid rules kick in. They help to ensure that companies compete on the merits within the Single Market. Those rules prevent Member States from giving advantages only to selected companies without an objective justification. For example, tax rulings cannot endorse a transfer pricing between two companies belonging to the same group that does not reflect economic reality. Doing so would disadvantage all the stand-alone companies. They are after all taxed on their actual profits determined as a difference between the market prices for the goods or services they buy and sell.

No selective advantage without objective justification: this is a specific translation of the broader fairness rationale that I have just mentioned. And let there be no mistake: of course the rationale needs to be translated into specific, clear rules to be applicable. But the fact that it is in need of being translated into very specific rules does not mean that it is no longer there.

It is the same with the idea of treating consumers fairly: no overcharging through cartels, collusion or abuses of dominance. Today, fairness is firmly anchored in the notion of "competition on the merits", which is so central to the case-law on abuse of dominance.

As Commissioner Vestager said in a recent TED talk [NYC, 20 September 2017], "when markets work fairly, businesses compete on the merits". And vice versa.

Firms may win market power lawfully through their own efforts. Competition law must make sure that markets remain open and contestable for others as well.

Where "fairness" is directly used in our legal provisions, there is case-law giving practical content to the notion.

As I said, Article 101(3) TFEU refers to a "fair share" of efficiencies accruing to consumers. Our cases on standard-essential patents enforce "fair, reasonable and non-discriminatory" prices.

Article 102 TFEU mentions "unfair prices" – a notion that the Court of Justice has clarified in detail in the recent judgment on the Latvian collecting societies [AKKA/LAA judgment of 14 September 2017, case C-177/16], which gives us guidance, e.g. for the Aspen case that we opened last May.

Competition helps consumers get a fair deal and gives firms a fair chance to compete. When consumers feel that the game is rigged, some may feel excluded and left behind. When entrepreneurs are victim of rogue rivals, they may lose heart and drop their plans altogether.

So, far from being a "weasel word", used to justify voluntaristically desired outcomes, fairness only rings true if it is understood as a call to rigour, coherence and consistency.

Such call obviously also extends to our merger procedures. Procedural fairness is a key element in our merger investigations. The Commission has always endeavoured to give all parties involved in merger cases ample opportunity for open and frank discussions and to make their points of view known throughout the procedure and has strived to ensure a high degree of transparency and predictability of the review process. In particular, the Commission is committed to fully respect the parties' rights of defence, such as their right to be heard. Our decisional and enforcement practice reflects these objectives. That is why we take the concerns underlying the UPS/ TNT judgement very seriously. After careful analysis of the judgment, we decided to appeal it: we seek that the Court of Justice re-examines the ruling of the General Court and, if appropriate, develops and/or clarifies its legal doctrine.

But I would also like to stress that procedural fairness needs to be implemented both ways. To reach decisions within the strict timetable of merger procedures, we have to ensure that companies do their part. Companies mustn't put a merger into effect before our approval. Otherwise, competition might already be harmed. Also, companies have to give us full and accurate information. Otherwise, we are not in a position to fully assess the merger. For this reason, the Commission has recently fined Facebook 110 million euros for providing misleading information about the WhatsApp takeover. And for this reason the Commission is also looking at other cases.

Digital markets and innovation markets

Today, concerns about fair competition are especially salient in digital markets and innovation markets.

To state the obvious, the main parameters of competition are price, quantity, quality, choice and innovation [C-413/06 P Bertelsmann §121, T-168/01 Glaxo §106, and many others judgments, including C-413/14 Intel §134].

Now in many digital markets, price – as we used to understand it – plays no decisive role since the services are not monetised on the consumer side, or at least there is no price expressed in monetary terms.

Quantity often plays no decisive role either, since marginal costs can be almost zero; services are scalable; and delivery is instantaneous.

So there is a stronger focus on the last three parameters of competition: quality, choice and innovation.

Our Google Shopping decision of last June focuses precisely on them. Google's own internal documents said that its price-comparison service was of bad quality.

So, to give it a boost, Google chose to take out its price-comparison service from its search results and display it at the top of its search pages.

Google Shopping results were not based on quality, they were based on Google's own interests.

By doing so – and here I quote Commissioner Vestager – Google "denied European consumers a genuine choice of services and the full benefits of innovation".

The relevance of innovation is also on display in our merger cases.

The Commission's analysis of the impact of mergers on innovation is not new. We have regularly looked at how innovation is likely to evolve post-merger in a variety of recent and past cases: for instance, GE/Alstom, Deutsche Börse/Euronext, Intel/McAfee, ARM/Gemalto JV, Telefonica UK/Vodafone UK/Everything Everywhere JV, Intel/Altera, as well as a number of pharmaceutical mergers.

Not always did we find negative effects. For example in TomTom/TeleAtlas, the Commission recognised innovation efficiencies that were merger-specific – at least in part – and beneficial to consumers. Although, in the end, the proposed transaction did not bring about anti-competitive effects irrespective of efficiencies.

Recently, the Commission's assessment of innovation competition in the Dow/Dupont case has given rise to some debate.

Let me sketch the main lines of the Commission's assessment in this case.

As a starting point, innovation in the agro-chemical industry is crucial to discover and develop new products that are less toxic or more efficient.

Moreover, innovation is spurred by the fact that pests adapt and may become resistant to existing products over time.

Getting new and innovative products to market is a complex and costly process.

At the time of notification, there were only five companies that could do this from start to finish on a global scale.

Two of those were Dow and DuPont. Against this background, it was the Commission's duty to carefully assess the impact of the proposed merger also on innovation aspects.

The Commission's innovation concerns in Dow/DuPont are based on various elements based on a cogent and consistent body of evidence. These include:

- A competitive landscape with only five integrated R&D players at industry level and even fewer players at the level of individual innovation spaces (e.g insecticides for a given crop and pest);
- Very high barriers to entry, due – for instance – to the need for global field stations and registration capabilities;

- Direct evidence of the suppression of R&D efforts post-merger;
- The strength and closeness of the merging parties in innovation areas;
- Overlaps within the R&D activities of the parties; and
- Past evidence on the relationship between concentration and innovation efforts.

In addition, we looked at broader elements that affected the likelihood that a merger between rival innovators would lead to a reduction in innovation, including the effectiveness of intellectual property rights.

Once the public version of the decision is published, the legal community will be able to have a close look at our reasoning and the strong evidence that we have collected.

I am sure there will be comments on some of the individual considerations I just outlined. We will be happy to reflect upon any constructive comments which will allow us to further refine our review of similar cases in the future.

Inevitably, cases that hinge on quality, choice and innovation are bound to be somewhat different from cases focused on price and quantity, although the classic labels still apply: collusion, exclusion, "Significant Impediment to Effective Competition" (SIEC).

Inevitably, some critics argue that enforcement in innovation-driven markets is misplaced because today's dominant firms – especially in digital industries – will soon be replaced by a startup in a garage.

I hope there are many start-ups in a garage out there as we speak. But it seems to me that it takes a lot more to start a successful digital business nowadays. Access to talent, venture capital, and links to research universities appear crucially important [David Gann & Mark Dodgson, "Forget the start-up garage myth. We need golden triangles and super clusters", World Economic Forum, 3 November 2016].

Moreover, it seems that many of today's startup owners want to be acquired instead of growing to challenge the incumbents [James Fontanella-Khan, Anna Nicolaou & Anne-Sylvaine Chassany, "Retailers to Amazon: pick me, pick me", Financial Times, 5 September 2017]. The Financial Times recently outlined the situation of such startup owners, who are faced with a stark choice: struggling to survive or pitching their business to the online giants. Data compiled by Bloomberg shows that, in the last decade, Google, Amazon, Facebook, Apple, and Microsoft made 436 acquisitions worth a total of 131 billion dollars [Paula Dwyer, "Should America's Tech Giants Be Broken Up?", Bloomberg, 20 July 2017]. A separate report noted that since 2012, "over 250" private companies focusing on artificial intelligence have been acquired by the online giants as well as IBM, Salesforce, and some hardware and industrial firms (e.g. Samsung, GE, Ford) ["The Race For AI: Google, Baidu, Intel, Apple In A Rush To Grab Artificial Intelligence Startups", cbinsights.com, 21 July 2017].

In the meantime, if there is competition harm in the market, we need competition enforcement to fix it and keep it in check.

EU competition law is fit for purpose

Today's cases are different from previous cases because the reality on the ground is different. The technology is different. Business methods are different. Marketing channels are different. And businesspeople become more imaginative.

To take a recent example, just 10 days ago, *The Economist* called for more enforcement in maintenance aftermarkets of digital products ["How digital devices challenge the nature of ownership", The Economist, 30 September 2017].

The article noted that digital products may not only affect our privacy rights but also our property rights, as we are increasingly unable to repair products, lend them, or sell them on.

That's why we need to keep our ear to the ground – to identify the factors that we will need to assess in the competition analysis.

Ten years ago it was network effects, the lock-in effect, the gatekeeper effect, switching costs, and multi-sided markets.

Now it's open-source software, online ecosystems, scale effects, feedback loops, data, and algorithms.

Does this mean that we need to reinvent antitrust?

I do not think so, at least not at this stage.

The rules that we have and the principles on which they are based apply also in the new environment.

Indeed EU competition law has been remarkably adaptable, precisely because it is drafted in terms that allow us to address new phenomena.

Take the example of data. Let's look first at Microsoft's acquisition of LinkedIn, a conditional clearance decision adopted in 2016.

We were concerned that, after the merger, Microsoft could use its strong market position in operating systems and productivity software to strengthen LinkedIn's position.

As a consequence, it would have been harder to start a new business providing professional social network services.

But we also found that data protection was an important parameter of competition on quality between professional social networks.

So, it was only possible to clear the deal subject to remedies aiming to do three things.

First, ensuring that manufacturers and distributors of personal computers would be free not to install LinkedIn on Windows and allowing users to remove LinkedIn from Windows, if pre-installed.

Second, allowing competing professional social network service providers to maintain current levels of interoperability with Microsoft's Office suite of products.

Third, granting competing professional social network service providers access to "Microsoft Graph", a gateway for software developers.

This and other cases show how data fits within competition-law reasoning.

When we see data as output – like financial data or supermarket scanner data being sold as such – we treat it like any other output.

When we see data as an input being purchased or as an asset being generated within the firm, we may raise concerns that data accumulation may prevent competitors from accessing sufficient data, to the detriment of consumers.

When we see data protection as an element of the quality of a product, we may raise concerns that a merger or cartel or unilateral behaviour may degrade competition on data protection.

And when we see that data accumulation leads to efficiencies, we are ready to recognise them provided all the conditions are met. So, we have a new phenomenon, but general competition-law reasoning applies.

Now, as you know, data cases are often associated with markets in which there is no "price" – as in, no price expressed in money. Consumers do not pay money though they may "pay" with their data. So let's call them "non-monetary-price markets". But of course, online service providers have to monetise their services somewhere – usually on the other side of the market, the advertising side. Or there is no explicit price because the firm wants to gain scale first, and charge users later. Or the aim is to broaden the use of a standard, and monetise services using this standard later.

These markets are sometimes presented as a challenge for competition law.

In reality, the Commission has tackled these kind of markets in many cases, from Microsoft I and Microsoft II to Google, Oracle/Sun, Facebook/WhatsApp, Microsoft/Skype, and Microsoft/LinkedIn, to name a few.

Non-monetary-price markets can fit within the competition analysis.

Since there is no monetary price, one focus will inevitably be competition on quality.

In such markets, we need to recognise that there is probably another side of the market. We need to compute market shares based on shares of volume, rather than shares of sales. We need to be mindful of multi-homing users.

And we need to define the relevant market in view of product functionalities, instead of comparing products' price movements in relation to each other.

Perhaps former Commissioner – now Senator – Monti expressed this best at a recent conference in Oxford on 22 May 2017.

In his view, "When faced by shockingly new phenomena, it is probably appropriate to be relatively unimpressed. Because it is unlikely that the new phenomenon may not need competition enforcement. And it is very likely that the instruments that you have in your hands can be adapted, with appropriate reflection, to the new phenomena".

Close

The critics urge caution. Caution is often a sound principle – but it cuts both ways: One must be cautious not to over-enforce, but equally one must be cautious not to under-enforce.

What I see from the research is that arguably not all cartel cases are caught, at least not immediately. What I see from Eurobarometer surveys is that many consumers are – in some ways – unhappy with the online services that they get, particularly when it comes to geoblocking and privacy. Indeed geoblocking was a main finding of the E-Commerce Sector Inquiry Report, released last May.

There is no single conclusion from caution.

So let me conclude with this enforcement-minded message.

EU competition law combines fairness and rigour. It combines a well-defined framework and adaptability. These are our tools.

We intend to use them to ensure that markets deliver for the many, not the few.

Importantly, we are not just looking for short-term price effects – we are also interested in competition in the longer term, and not only on price.

A merely static, short-term, price-centric perspective will fail to deliver the benefits of competition. The consumer welfare standard to which we are bound also includes a dynamic perspective, looking also at longer-term effects, potential effects, and counterfactual effects.

Sometimes an anti-competitive effect is not statically observable because it is simply an R&D budget not increased, a product launch delayed, a more efficient production line cancelled.

From this perspective, the best way to preserve competition is to maintain what the European Court of Justice calls "competition as a process", "competition as such", or the benefits of competitive "pressure" [C-501/06 P Glaxo §63, C-8/08 T-Mobile §38, T-342/07 Ryanair §224, and T-472/13 Lundbeck §425, among many others].

This is what the Commission tried to capture in its guidelines on Article 101(3) TFEU: "Article 101 recognises the fact that rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation. In other words, the ultimate aim of Article 101 is to protect the competitive process."

I will close with a historical analogy.

This event is called "EU Competition Law Enforcement 2.0". Many things are now called 2.0 or 3.0, including the web itself. German industry likes to say that it is already working on "Industry 4.0"!

The web 1.0 was about passive viewing of content by internet users. When the Web 2.0 appeared around 2005, it was about user-generated content and sharing platforms – a more social, interactive, participatory web.

The latest Web – 3.0 – is driven by artificial intelligence and things like natural-language search, automated translation, digital assistants, and so on.

There is a parallel with EU competition law here.

EU competition law 1.0, before 2003, was about formal rules, applied centrally by the Commission, helping to overcome the fragmentation of national markets and to level the Single Market. EU competition law 2.0, as launched with modernisation, could build on that acquis and thus become more interactive and more participatory: EU competition law became a network involving the national competition authorities and the national courts, integrating economics more dynamically.

Whether EU competition law 3.0 will be based on artificial intelligence, like the Web 3.0, I cannot yet say.

But I can tell you that EU competition law will account for new phenomena and new technologies while maintaining the level of enforcement that is needed for the Single Market to serve society as a whole.

Thank you.