Developments in EU competition control in the global and digital age

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Introduction

Ladies and Gentlemen:

First of all, I want to thank James Keyte for his invitation the 2018 Fordham Antitrust Law and Policy Conference. I believe this is the longest running conference in the competition circuit. It is an honour to be here again. I would like to pay tribute to James and Barry and extend my warmest congratulations to Fordham's Competition Law Institute for 45 years of excellence.

It is indeed an extraordinary and humbling occasion to converse with eminent personalities such as Professor Mario Monti, who has done so much for EU competition law and remains a source of inspiration for many generations of EU civil servants active in the field; with members of the judiciary such as Judge Ginsburg and Advocate-General Wahl; with Fred and Andreas, who keep the global competition community together at the OECD and the ICN; with our colleagues from the FTC, such as Maureen, and the team of the DoJ here; with so many heads of authorities, lawyers, economists, academics and journalists.

Today I would like to talk about the enforcement of competition rules in the EU with a focus on the globalised economy in the digital age.

I will do so using two lines of argument. First, I will make a broad case for convergence and cooperation in our globalised economy. Then, I will move to a more detailed analysis of the approaches taken by EU enforcement in digital markets.

I can see from the programme that the first panel in the afternoon also has convergence – and divergence! – in its title. I can assure you we have not exchanged notes. It is just an instance of unplanned convergence.

Unplanned but unsurprising. For decades, EU authorities have been part of an increasingly vigorous group advocating for international cooperation and convergence in competition enforcement.

Convergence is predicated upon open markets with compatible standards. The past decades have seen strong developments in this sense.

Now, amid fresh tensions in global trade, serious reflections are in order on how to keep momentum.

If one needs proof of the benefits of open markets, one needs look no further than the exchanges between Europe and the U.S.

I trust the *genius loci* will allow me to take this as an example.

In 2017 merchandise exports from Europe to the U.S. were worth $430 billion while the U.S. exported merchandise to Europe for a record $284 billion, pushing the peak imbalance of 2015 down 6%.

As to services, in 2016 Europe's exports to the U.S. amounted to $212 billion; while the U.S. had a $67 billion trade surplus in services with export to Europe reaching $279 billion.

But these figures are dwarfed by Foreign Direct Investments.

In 2017, total U.S. investment in Europe exceeded €2 trillion and the corresponding flow from Europe to the U.S. was $168 billion – over half of all FDI inflows into the U.S.

In addition, in 2016 U.S.-controlled companies in Europe recorded $720 billion in output while that of European affiliates in the U.S. was $584 billion. The combined output is staggering – larger than the GDP of many countries.

Given this level of integration between Europe and the U.S., we can accurately speak of a transatlantic economy. As many as 15 million jobs depend on it on both sides of the Atlantic[1].

Similar developments can be shown for other regions of the planet.

This is not a zero-sum game where the gains of some are necessarily offset by the losses of others. As EU Competition Commissioner Margrethe Vestager said in a memorable speech this week, "the world has changed vastly for the better. And most of that change happened in the last few generations".

At the same time, this development is not a Deus Ex Machina. In her speech, Margrethe Vestager reminded us, for example, of the collapse of Lehman Brothers ten years ago almost to the day and the financial and economic crisis that followed.

There is a need for public policies to make sure that the opportunities are for the many, not just for the few and that those who cannot avail themselves of those opportunities are not left behind.

As Margrethe Vestager put it: "we still have work to do, to make sure that trade is fair as well as free". She went on to stress that also competition policy and enforcement can "keep the market working fairly for consumers" [2]. In a global and digital world, this is more than ever a shared challenge and task.

Enforcement across jurisdictions

On the strength of these arguments, I am thus convinced that competition enforcers need to continue working with each other and multiply multilateral and bilateral efforts to make sure our respective rules are compatible and convergent.

I believe this is more urgent than ever in a globally integrated business environment shaken by protectionist shivers.

[1] All data from Daniel S. Hamilton and Joseph P. Quinlan. *The Transatlantic Economy 2018* (source)
[2] Bruegel Annual Meeting, Brussels, 3 September 2018 (source)

According to the latest WTO annual report issued in the spring[3], growth in global trade in 2017 was the strongest since 2011. But trade tensions have escalated in 2018 and, as WTO Director-General Azevêdo remarked, “we can take nothing for granted”.

Competition enforcers are among the actors who can defend the open, rule-based system that have created the conditions for the positive global economic performance of the past years and decades.

As far as the European Commission is concerned, this is not merely talking the talk. We now cooperate with sister agencies in *all* cases with significant implications beyond our jurisdiction.

Between 2010 and 2017 – to give you some figures – we cooperated with competition agencies outside of the EU in 65% of all cartel cases and in 54% of complex merger cases. There is no doubt that we also walk the walk.

Beyond our daily practice, we have also been very active in multilateral fora, such as the ICN – whose members include more than 100 competition authorities – the OECD’s Competition Committee, and UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy.

As to bilateral agreements, I am happy to report continued momentum.

In early June Margrethe Vestager and Alejandra Palacios, Chairwoman of the Federal Economic Competition Commission of Mexico, signed an Administrative Agreement on Cooperation.

The agreement provides for a framework for dialogue on competition policy issues and for sharing views and non-confidential information on individual cases.

This is just the latest example of bilateral initiatives tailor-made for competition policy and enforcement.

The first fully-fledged cooperation agreement was signed in 1991 with the U.S. Canada, Japan, the Republic of Korea and Switzerland followed over the years.

The cooperation agreement with Switzerland is a so-called "second generation agreement", allowing, under certain conditions, to exchange confidential information between the competition authorities also in the absence of a written consent by the parties.

Second generation agreements are also in preparation with Canada and Japan.

In addition, Memoranda of Understanding are now in place with Brazil (2009), Russia (2011), India (2013), South Africa (2016) and China (2004, 2012 and 2017).

Finally, since 2006 the Commission has started trade negotiations with 36 non-EU countries. 14 of these have been concluded and all include competition provisions. The latest big news in this context is – of course – the Economic Partnership Agreement signed between the EU and Japan on July 17 of this year.

[3] WTO Annual Report 2018 (source).

Another move that aims to seek a common ground for competition enforcers is the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement (MFP) initiative recently launched by the U.S. Department of Justice.

Given our shared impetus to promote and strengthen due process, the European Commission – in coordination with the other EU competition authorities – has engaged in talks with the DoJ to better understand the objective of the MFP initiative and how it could fit in with the decades-long, ongoing and successful multilateral efforts to promote global procedural convergence.

Global procedural convergence plays an important role to make sure competition authorities can work together effectively on competition issues that affect consumers and markets globally, and ensure due process and legal certainty for companies.

The Commission fully supports and continues to actively contribute to the important work on this issue in the ICN and the OECD's Competition Committee – which have proven to be reliable and effective forces for progress in this area.

Let me recall just two examples of the progress made this year.

In March, the ICN adopted Guiding Principles for Procedural Fairness in Competition Agency Enforcement and in June the OECD's Competition Committee launched a new project to advance its work on transparency and procedural fairness.

The common goal here is to make sure that any new initiative – including the MFP – strengthens multilateralism and extends its reach, effectiveness and consistency.

A few cases in point: Global mergers in the agro-chemical industry

All of this looks at the necessary framework for cooperation among competition authorities. Now I would like to give you a tangible example of how cooperation works on the ground.

I will look at the merger between Bayer and Monsanto approved with matching remedies by the European Commission last March and by the U.S. DoJ in May.

This was a large deal involving companies with global operations. The transaction was notified to at least 17 enforcement agencies[4].

In situations of this complexity, it is crucial for the companies that enforcers coordinate the process and the substance of their reviews as they protect consumer welfare in their respective jurisdictions.

And this case was cooperation at its best.

It was not a lucky outcome, but the result of hard work. To conclude the case, the Commission has actively cooperated with as many as ten authorities[5].

The most intense exchanges – as Makan knows well – were with his agency.

[4] To our knowledge: Argentina, Australia, Brazil, Canada, Chile, China, Costa Rica, India, Japan, Mexico, Serbia, South Africa, South Korea, Turkey, Ukraine and the U.S.

[5] U.S., Canada, Australia, Brazil, China, India, South Africa, Russia, Argentina and Chile.

- Our team travelled to Washington D.C. for a dedicated workshop;
- We exchanged the evidence found in our respective reviews; and
- We made sure that the remedies were fully compatible – I would say, essentially the same – and the timing aligned. For instance, BASF was approved as remedy purchaser in the EU on the same day as the consent decree was filed in the U.S.

In sum, we are looking at a success cooperation story – and it is not the only one.

We have worked closely with the FTC – as well as with China's Mofcom – in our review of ChemChina's acquisition of Syngenta. Both the Commission and the FTC cleared the acquisition with remedies which – although they addressed concerns that were unique to each market – were mutually compatible.

We also had teams travelling between Washington D.C. and Brussels when we were reviewing the Dow/DuPont merger, to stick to the agro-chemical industry.

While the outcome of the substantive assessment was partially different – after all, market circumstances are different in the EU and the U.S. – the remedies, i.e. selling parts of DuPont's business to FMC, were largely the same and in any event mutually compatible.

Besides the DoJ, the Commission's Dow/DuPont team was also in regular contact with the authorities of China, Canada, Australia, Brazil, Chile and South Africa – which greatly improved the consistency of the remedies in the different jurisdictions.

Of course, not all international cases require the same degree of cooperation. In spite of globalisation, many markets still show significant differences.

Take AT&T's acquisition of Time Warner.

AT&T does have some business in Europe, but nothing compared to its position in the U.S. This explains why the case made waves in the U.S. but was swiftly approved in Europe.

Conversely, there are cases that raised serious concerns in the EU but not in the U.S.

Deutsche Börse's merger with NYSE Euronext, for instance, was settled by the DoJ with remedies.

It was prohibited by the European Commission because it would have resulted in a quasi-monopoly in European financial derivatives traded on exchanges.

Digital and innovation markets

These are some of the reasons why I am convinced that convergence and cooperation among competition enforcers are simply a must in our global age.

But our times are marked by the digital revolution as much as by global economic integration.

I will therefore turn to my second line of argument: The enforcement approaches taken in the EU in digital markets.

I will first make a few general remarks and then I will move to notable antitrust decisions in digital markets taken by the European Commission this summer.

Before I do, let me clarify that, although I am focussing on digital markets today, competition policy and enforcement continues to take care of the interests of law-abiding firms and the welfare of consumers across all industries and markets in Europe's single market.

For example, since the start of 2017 the European Commission took nine new cartel decisions imposing fines for a total of €2.75 bn. Most of these decisions were related to the automotive sector.[6]

Also, last year the Commission took 380 merger decisions. Apart from information and communication technologies, the main sectors we worked on included renewable energy, media, airlines and the agro-chemical industry.

The point I am making here is that, while we follow digital markets in their evolution and anticipate the possible implications for competition control, we keep looking at the economy as a whole.

We look into proposed mergers or conducts whenever they raise competition concerns regardless of whether they take place in the digital sector or in other industries.

And we always closely analyse markets to tailor EU competition policy and enforcement to their specific features.

In digital markets, we often observe that innovation plays a crucial role. We also frequently see network effects with the associated high switching costs, multi-sided markets, and strong links between adjacent markets. Finally – but this is a common observation – digital markets are places where companies can grow very fast, which is of course not a competition concern in itself.

I hasten to add that these observations should not lead us to generalise. Each market shows its own features.

However, when a digital market does show these structural features, it can become tempting for a company to entrench its market position; take advantage of winner-takes-all effects; and leverage its dominance from one market to another.

And these are behaviours that may give rise to competition concerns and call for the intervention of competition enforcers.

Indeed, there is great continuity between the approach we follow in digital and other markets. EU competition law's principles are general and apply across all sectors.

We assess every case we look into on its own merit. We look at the factual findings of our painstaking investigations and we assess them against our principles and rules.

This has been the bedrock of our enforcement practice in the EU for over six decades and we will keep true to this orientation.

[6] 2017: car battery recycling, thermal systems, lighting systems, trucks, occupant safety systems. 2018: braking systems, spark plugs, maritime car carriers and capacitors.

When it comes to digital companies, there is no doubt they have produced great benefits for consumers and society over the past few years and will likely continue to do so.

EU competition enforcers recognise these benefits and potential and regard them as all the more reason to keep the digital single market open so that technology firms can continue to give consumers more and more value.

Notable recent decisions

Google Android

We have just seen some of the features that competition enforcers find in digital markets. Now I would like to show the role some of them had in a few notable antitrust decisions taken by the Commission this summer.

On July 18, the Commission found that Google had engaged in conduct aimed at protecting and strengthening its dominant position in general internet search through various restrictions in relation to its Android mobile operating system.

The case is essentially about three types of restrictions that Google imposed on mobile-device manufacturers and network operators.

First, Google made sure that its search engine would be pre-installed on practically all Android devices. It did so by tying both the Google Search app and the Chrome browser to the Play Store, which smartphone and tablet manufacturers see as a must-have app.

Second, Google paid mobile-device manufacturers and network operators to make sure that its search engine would be the only one pre-installed on many Android devices.

Third, Google obstructed the development of so-called Android forks, which are modified versions of Android. These forks could have provided a launchpad for rival search engines and other app developers.

In this way, Google prevented competing search engines from acquiring traffic and valuable data, which could have allowed them to improve their products.

Beyond its own merits, the case is important as it sets out a framework for the assessment of anti-competitive conduct in the mobile sphere, in particular with regard to the assessment of conduct resulting in the pre-installation of mobile software applications, which are often referred to as apps.

The pre-installation and default setting of apps can of course have beneficial effects for consumers, who can enjoy fully functioning devices immediately after purchase – some refer to this as the ‘out-of-the-box experience’.

However, pre-installation can also lead to anti-competitive effects.

This can be particularly the case when pre-installation of a tied app is imposed as a condition to obtain another app which is in a dominant position.

In these circumstances, the pre-installation of the tied app can reduce customers' incentives to download competing apps and lead to the foreclosure of credible competitors.

Whether the effects of pre-installation are on balance positive or negative for competition and consumers will ultimately depend on empirical analysis.

Competition agencies are not new to this type of assessment. Both the DoJ and the Commission looked at whether the pre-installation of Microsoft's Internet Explorer browser restricted competition, in the context of their respective antitrust investigations.

The Commission also ran a similar analysis in the context of the recent Microsoft/LinkedIn merger case.

But this is the first time the Commission has comprehensively assessed the effects on competition of pre-installation in a mobile internet environment.

This assessment is strongly grounded on the merits of the case and the evidence gathered. For example, we have found that on Android devices where Google Search is pre-installed, more than 95% of all search queries were made via Google Search.

On the other hand, on Windows Mobile devices, where Google Search is not pre-installed, less than 25% of all search queries were made via Google Search. This shows that pre-installation of Google Search had a clear impact on the choice of consumers – a choice that is influenced by the mere fact that a product is made available in a convenient and easy-to-use way rather than by the actual merits and quality of that product.

Let me also mention another aspect of the case which is important from a policy perspective.

As part of its Decision, the Commission sanctioned Google's so-called 'antifragmentation agreements', which in essence prevented device manufacturers from shipping devices based on Android forks.

We have investigated in detail this aspect of Google's conduct and concluded that it affected competition as it deprived competing operating system developers from the opportunity of finding partners that would distribute devices based on their own implementations of Android.

As part of this analysis, we reviewed internal documents showing that a number of device manufacturers had an interest in shipping devices based on Amazon's version of Android, called Fire OS, but were prevented from doing so due to Google's conduct.

Thus, we are firmly convinced that our analysis is fully in line with an effect-based assessment and consistent with the case law of the European Courts, which for example have already confirmed in the Microsoft case that pre-installation by means of tying is capable of foreclosing effective competition.

It is also consistent with our other recent infringement actions, also based on an effects-based approach.

In this respect, let me stress that when looking at how to prove anti-competitive effects, there is no case for formalism. There is not a single method or tool to prove effects. Different ways may be more or less suitable depending on the circumstances of the case.

In the Google Shopping case, for example, we looked at 5.2 terabytes of Google search data to show that Google's illegal advantage granted to its own comparison shopping service was restricting competition.

In the Qualcomm (exclusivity payments) case, we relied on a number of qualitative sources of evidence, including Apple's internal strategy documents, which confirmed that Qualcomm's exclusivity payments influenced Apple's sourcing decisions.

As elsewhere in law enforcement, what matters is that effects are established convincingly.

Decisions involving consumer electronics manufacturers

Other notable decisions the Commission took this summer – certainly very important for the point of view of consumers – involved consumer electronics manufacturers Asus, Pioneer, Philips, and the Denon and Marantz group.

In July the Commission imposed fines of more than €100 million on these companies the for resale price maintenance in online markets.

A prominent feature in these cases was the use of pricing algorithms.

Many online retailers use pricing software that automatically adjusts their own retail prices to those of competitors by way of an algorithm.

These cases show that resale price maintenance practices – when applied to low-pricing online retailers – had a broader impact on the overall prices for the consumer-electronics products involved.

This is because the price increases were picked up automatically by retail competitors using pricing algorithms – including very big online players.

In addition, the growing use of automated monitoring tools allowed the manufacturers to closely track their retailers' prices and swiftly intervene when prices went down.

Another prominent feature of these four cases is the development of the new 'cooperation procedure' outside the area of cartels inaugurated with the ARA case two years ago.

Under the procedure, companies may receive reduced fines if they expressly acknowledge the infringement and provide evidence that adds significant value to the evidence the Commission has already gathered.

This allows the Commission to speed up investigations – which may greatly increase the relevance and impact of its decisions, especially in digital industries.

The decisions involving consumer electronics manufacturers followed a systematic inquiry of the e-commerce sector that DG Competition conducted between 2015 and 2017.

The study is a contribution – one of many – that competition policy and enforcement gives to the Commission's overall objective of bringing Europe's single market online.

Building the single market – online *and* offline – means tearing down internal barriers to trade.

We are now following up the inquiry with actual decisions.

But things began to improve even before that.

When we launched the inquiry, many companies started to remove on their own initiative the online barriers they had erected.

Continuing the reflection, continuing the dialogue

These cases are illustrations of some of the challenges that we find in digital markets in the EU, the U.S. and elsewhere in the world.

The features I have briefly reviewed were not all present in the same way the 'old economy' – or even five years ago.

While this will not force an overhaul of the legal frameworks in our respective jurisdictions, we need to seriously reflect about how our policy and enforcement should evolve to stay ahead of the curve.

Recent initiatives taken in Washington D.C. and in Brussels go in this direction.

On this side of the Atlantic, the FTC launched a series of hearings and a process for written contributions.

On the other shore, Commissioner Vestager appointed in March a panel of special advisers on the competition implications of digitisation.

The Commissioner also announced a conference on data, privacy, platforms and innovation to be held in Brussels in January 2019 and we have launched a call for public contributions on these topics.

I take this opportunity to invite you to send us your written contributions by the end of September.

Initiatives such as these will help us deepen the reflection to find common approaches in this and other industries.

This is a goal we all share. Even we do not overlook the fact that our respective jurisdictions have different economic structures and that there is not a perfect overlap between our legal and enforcement traditions in every detail.

For example, some may be tempted to draw analogies between EU competition law and the Supreme Court's recent American Express judgment – and I am not sure that would be helpful or even advisable.

Both EU and U.S. competition laws take the two-sided nature of a market into account, but they do so in different ways.

First, the anti-steering provisions at issue in American Express are prohibited by law in the EU. In a sense, EU views about anti-steering provisions were so strong that we preferred to make them illegal through regulation.

Second, under EU competition law the burden of showing efficiencies falls on the defendant, not the claimant. In this respect, the law leaves little scope to offset harm in one market citing efficiencies in another market.

Third, no part of the EU competition law assessment hinges on a precise definition of two-sided platforms – which is a matter of debate judging from the American Express majority and dissenting opinions.

We know that the overlap is not 100% in our approaches to some unilateral conduct scenarios.

U.S. colleagues have underlined gaps in this area between EU competition law and U.S. antitrust law, showing that there are differences in outcomes, but also in objectives. I think that is a correct reflection.

Conclusion

This is part of the respectful and fruitful debate among sister agencies I advocated in the first part of my remarks today.

The debate is possible in the first place because, on both sides of the Atlantic, we share much more than separates us, building on an underlying notion of competition policy and enforcement that takes an evidence-based approach and focusses on consumer welfare.

Consensus around these and other broad principles is strong, but not we may still struggle with the fine points.

And then there may even be a bit of the problem St. Augustine had with the concept of time. “What then is time?” – he wrote – “If no one asks me, I know what it is. If I wish to explain it to him who asks, I do not know”.

Broad principles in competition control can mask factual complexities and value judgements in specific instances – let alone material differences in our respective markets.

We all should seek convergence. While we need to proceed with caution and mutual respect, we cannot give up on it. The inherent difficulty of the task did not deter St. Augustine from seeking an explanation. Neither should we – the legal standards we are held to require it.

I want to thank Fordham for giving us a forum to pursue this noble exercise and to you for being part of it.

Makan started out with a revised quote from the Eagles’ *Hotel California*. Let me end with one that – give or take a few years – is almost as old and yet as fresh as the Fordham conference: Fleetwood Mac’s *Don’t Stop*. Indeed: Let’s not stop, let’s not stop thinking about tomorrow.

Thanks you