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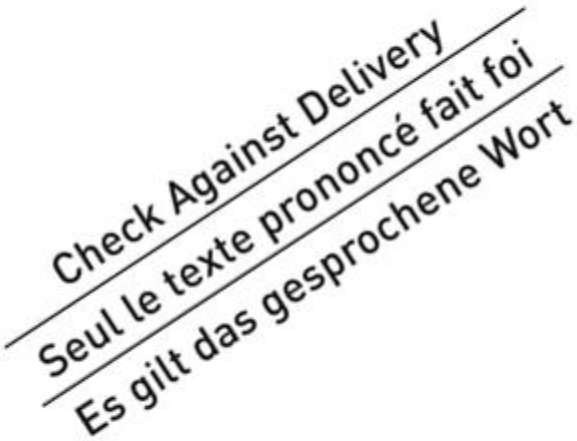
The many dividends of keeping markets open, fair and contestable



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Competition

Ladies and Gentlemen:
I wish to thank Carl Baudenbacher for his kind invitation to open the Competition Law Forum. It is truly an honour for me to address – again – the audience of one of the landmark events in our community of practice, knowledge and expertise.
In the presentation I gave last year here in St. Gallen I spoke about our work in State aid, notably in the area of corporate tax, which keeps attracting much attention.
Today, I would like to step back a little from the details you will cover in extenso in a number of very interesting sessions over the next two days. Allow me to take a look at the broader role of competition enforcement for Europe's economy and society in this delicate stage of transition out of the financial and economic crisis.
A transition towards new patterns of production, employment and consumption.
A transition that raises fundamental societal questions.
Right now, too many people feel they are left behind and disempowered. With societies running the risk of fragmentation – real or perceived.
The title speaks of 'many dividends' of keeping markets open, fair and contestable. Why many? And – can we take them for granted?

Three obvious and lasting dividends

If I asked you point blank what is the main benefit of keeping the playing field level in the Single Market, the most likely answer would surely be that it creates the conditions for keeping prices low for consumers, for offering them a broader choice of quality goods and services and for maintaining good incentives for business to innovate.
These are what I would call the core objectives of competition control. But although attaining these goals already requires sustained, delicate and complex work, this is only the first step.
Contributing to a good environment for sustainable economic development would probably come next.
There is a broad consensus that – in general – robust competition is a factor, among many others, of economic expansion and job creation, although there's a lively debate on the exact role of competition policy and enforcement in this respect.
Last but not least, many in Europe would certainly point out the unique institutional arrangement and features of EU competition law.
The EU celebrated the 60th birthday of the Treaties of Rome just over a month ago. There is a good reason to honour here the vision and courage our founding fathers showed when they imagined the original competition articles.

The success of the European project has always been predicated on the progressive integration of the economies of member countries into the Common – now Single – Market.
Our internal market and its four freedoms have given us 60 years of economic peace, creating at the same time the conditions for sustained prosperity.
In all likelihood the internal market wouldn't have survived and prospered without Europe's system of competition policy and enforcement.
EU competition law has always been instrumental in bringing together the countries and peoples of Europe – and I would say that it has carried out its task quite well.

More dividends

So, we reviewed three obvious, lasting and – I should hope – broadly, consensual dividends of effective competition policy and enforcement in the EU. But now I would like to take a step further. Is there not another dividend at least as important as the ones I have just recalled?
What I would like to explore now is how competition enforcement can contribute to tackle a challenge for our economies and societies in the past decade, which – let me add – has also affected other world regions and jurisdictions.
I am referring to the widespread loss of trust in government, institutions, specialists – i.e. "the establishment" – that has been attested by studies, opinion polls and elections in Europe and elsewhere in the world.
Of course, enforcing competition law is a clearly circumscribed and highly specialised public-policy. In any event, in the EU. In contrast, the problems posed by the financial and economic crisis, by new socio-economic patterns, by digitisation, automatisation, robotisation and globalisation are many and diverse. But I believe that fair, even and effective competition enforcement can help us address this challenge.
In the 1980s and 1990s, competition policy and enforcement helped to unshackle a European economy stifled by barriers and strictures. At the time, that was the right thing to do in full respect of the character of our policy instrument.
While this task is by no means exhausted today, I can see no reason why competition policy and enforcement cannot be used to tackle today's additional and newer issues.
I said there are of course several reasons for the erosion of trust. But it seems to me that one important reason is a feeling that, somehow, "the game is rigged". A perception that has spread in particular with a view to the causes of the "Great Recession".
Let me reprise a theme from last year to show you what I have in mind. Just as many European consumers and businesses were asked to tighten

their belts, a few large corporations were paying improbably low tax rates on their corporate profits.
Many have remarked this aspect of our tax State aid cases. I am recalling those comments because they show that the action of an effective competition authority has ramifications on several levels – and it can pay dividends on each.
On the core level, our action aims to restore equal competitive conditions in the Single Market. Let me stress here once again that our decisions implement just what our State aid rules provide – nothing more, nothing less.
Our action does not stray from this principle. EU competition law is not about tax policies or tax harmonisation - that is an issue for national and EU lawmakers.
But on another, both collateral and overarching level it sends the message that the EU is a community of law and that the law applies to all in the same fashion.
Every decision we take – on mergers, antitrust or State aid – says that everyone is welcome to do business in Europe's open and competitive markets, as long as they play by the book.
Therefore, Europe's competition authorities can - indeed, must - send a positive message to the fellow Europeans who feel they don't share the opportunities and whose confidence in the 'system' is waning.
A message about fairness.

Fairness

Commissioner Vestager often makes reference to fairness in her public statements.
For instance, in a speech she gave at Georgetown University last year, she said "competition enforcement also sends a message of fairness. That public authorities are here to defend the interests of individuals, not just to take care of big corporations".
And she went on to quote President Juncker's phrase about the "social side of competition law", used in his latest State of the Union address before the European Parliament.
But I have come to note that finding a place for the notion of 'fairness' – current in political philosophy – is not uncontroversial in the competition-enforcement discourse. I find this a bit surprising. The word 'fair' has four letters. But it's not a "four-letter word".
Just as John Rawls, to name a leading political philosopher of our time, used the notion of fairness as the cornerstone of the rigorous and articulated arguments he set out in *A Theory of Justice*, fairness is not a fuzzy notion for us either.

Fairness is indeed a rationale that sits right at the core of the rules we apply. The rules are the same for everyone and must be applied without fear or favour – as I said last year. This requires rigour and accuracy. The high standards we set for our own work also serve the principle of fairness. We must be scrupulous and thorough in fact-checking, research and analysis. We must carefully balance the different interests and points of view.
Above all, we must be acutely aware of the rights of all the parties involved in our cases and of the broader implications of our actions – or inaction, for that matter.

A two-way street

Fairness is a two-way street. For economic players – large and small – it ultimately means that they should play by the rules. For competition authorities, it means that we also must obey these rules as we enforce them.
Saying that all economic players are under the law doesn't mean they are subject to stifling rules that are applied mechanically. Far from it!
It's like in sports, rather. Clear rules and referees with the authority and the means to enforce them even-handedly are a *condition* for the players to show their skills and make for a worthwhile game.

Fairness in due process

As to competition enforcers, fairness for us means above all due process and the principled respect of the rights of defence.
We have been reminded of this by the General Court last month when it annulled the Commission's 2013 decision to prohibit the acquisition of TNT by UPS on procedural grounds.
We are carefully examining the Court's ruling and will decide whether to introduce an appeal. One way or another, we will step up our regular monitoring of our procedures. Granting all the companies involved in our investigations their full procedural rights is our legal obligation and the pre-condition of our credibility
In addition, it is also the best course of action we can take – the only one, in fact – if we are serious about asking the companies involved in our investigations and reviews to strictly follow the rules of the game.
In most cases, they do. Occasionally, the parties fail to respect the procedures – and when this happens, we don't hesitate to take action.
For example, in December last year, Facebook received a Statement of Objections which alleged that back in 2014 it had provided incorrect or misleading information on its acquisition of WhatsApp.
We are looking at other potential procedural violations in merger review. In an interview last month, Commissioner Vestager said that they are – and I quote – "less than five but more than one".

Procedural compliance is important. It promotes a competition system built on mutual trust and helps the Commission adopt accurate and fair decisions.

Fairness and even enforcement

Fairness also means even enforcement, whenever and wherever anti-competitive practices arise across the Single Market.
It is well known that the 28 national competition authorities deal with the vast majority of competition cases in the EU. So it is vital that they do their job as effectively and consistently as possible.
But not all of them have the tools they need. For example, some cannot impose fines, or only very small ones. The result is that the penalty for the same offence can be as much as 25 times higher in one country than another.
Just over a month ago the Commission sent to the European Parliament and the Council a draft Directive that includes a minimum set of rules and standards to close these and other gaps.
The draft Directive, presented "to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market" – as its formal title reads – is fondly nicknamed ECN+.
The Commission adopted the proposal on 22 March 2017. Its main goals include

- giving all national competition authorities in the EU sufficient guarantees of independence and resources;
- ensuring that they have an effective enforcement toolbox and can impose deterrent fines;
- maintaining incentives for companies to apply for leniency throughout the EU and
- making sure that the necessary mutual-assistance mechanisms are in place.

The goal, when the Directive becomes law in all EU countries, is to reinforce the evenness of competition enforcement throughout the Union in the respect of the rights of defence that are also part of the proposal.

Staying abreast of change

Fair and even enforcement also depends on keeping the pace with technological change. For DG Competition, this means adopting new technologies to carry out our work and closely monitoring those that can be used to gain illegal advantage out there in the markets.

Whistleblower

Last month we introduced a clever new tool – a simple web application – that opens a two-way channel that whistleblowers can use to talk with our staff without revealing their identity.
We want individuals with knowledge of anti-competitive practices to approach us without fear of retribution, to report on practices typically shrouded in secrecy, especially cartels.
As to developments in the markets, we are currently looking at the issues that may arise as companies amass large amounts of data and introduce algorithms to make sense of them – which often translates into commercial success.

Big data

In merger review, for instance, one way to integrate big-data into our analysis is to regard data protection as an element of quality.
In December last year, we approved the Microsoft/LinkedIn deal with commitments that made sure the merged company would not shut out competitors in the market for professional social networks.
These commitments indirectly also preserve consumers' choices in terms of data protection. They make sure that the acquisition does not deprive consumers who value privacy of more privacy-friendly services.
We also check that proposed mergers do not allow the companies to accumulate amounts of data so large as to gain an insurmountable advantage.
We looked at this concern in several cases, for example in the Facebook/WhatsApp deal of 2014 – the case I mentioned earlier. But we have not found any problem so far because in each case enough data would continue to be available on the market.

Algorithms

We are also on the watch out for algorithms, which are widely used by companies in several industries today. Can they be used to pursue anticompetitive ends?
In principle, illegal behaviour – for instance, setting up a cartel or sending price signals – is just as illegal if the practice is left to software. Companies should program it not to take an anticompetitive way in the first place.
Algorithms open several possible implications for competition. One was examined by the Court of Justice in its Eturas preliminary ruling.
There, competing travel agents in Lithuania used a common IT booking platform. The platform operator used it to inform them individually that the platform would automatically cap discounts for bookings made through the platform itself.

The Court said the situation may be considered anticompetitive in specific circumstances. We follow these issues closely. And are ready to deal with them when they land on our desk.

False negatives, false positives

Steering the right course between over-enforcement and under-enforcement is another crucial ingredient in a fair and even application of competition rules.

The debate over these veritable Scylla and Charybdis of competition control is not new. Around the time when Prof Mario Monti – now Senator Monti – was Commissioner for Competition in the early 2000s, there were concerns that the Commission had been over-enforcing.

Looking back at those years, one can say there were sensible reasons to ask the Commission to be more careful to avoid false positives and call for a reset. However, this has never meant forgetting the need to avoid false negatives as well.

This unrelenting search for balanced enforcement has produced good results for EU consumers over the years.

Last week, to give you but one example, *The Economist* reported that air travellers enjoy lower fares and better service in Europe than in the Unites States. The simple explanation, the newspaper noted, is competition.

The concern expressed by *The Economist* is not limited to the aviation industry. Last year, the then White House Council of Economic Advisers reported a decline in competition in many industries within the U.S. economy.

In Europe the pattern is less clear. We should not be alarmist, but neither can we be complacent. We will keep following these trends with open eyes and remain alert. We don't wait for competitive conditions to irrevocably deteriorate to carry out our statutory duties and enforce the law.

The consequences of this approach

Now, how do these principles translate into enforcement and case-work?

Antitrust

It is reflected for example in the fact that reining in companies that are tempted to abuse their dominance in their respective markets remains one of the priorities of competition-law enforcement in the European Union.

In recent years, we have focussed on recently liberalised sectors, such as telecoms, media, energy and transport.

Currently, as you all know, digital markets are keeping us quite busy.

You are well aware of the range of exclusionary practices we have tackled . We have seen rebates in the Intel case, tying and bundling practices involving Microsoft, or Telefónica's margin squeeze, to quote just a few examples. Our ongoing cases include, of course, the three investigations involving Google, but are not limited to these.
In addition, we have seen less conventional forms of exclusionary abusive behaviour: take the SEPs cases involving Samsung and Motorola. One ongoing case involves Amazon and the Most Favoured Nation clauses in its contracts to distribute e-books.
We often focus on exclusionary practices because we try to intervene before competitors are excluded from the market.
But we also pursue exploitative abuses.
In the ongoing Gazprom case, for instance, one of our concerns is that Gazprom's prices were excessive in a number of Central and Eastern European countries compared to competitive, Western European prices. This goes to show that the Commission is ready to intervene, when needed, also against exploitative practices.

Mergers

Moving on to mergers, we review proposed deals for concerns that may arise from horizontal overlaps, such as many transactions among mobile telephone operators and the Deutsche Börse/London Stock exchange merger we had to prohibit last month.
But we also look at vertical overlaps. These are generally less likely to harm competition. That does however not mean they are all benign.
We have not prohibited a merger based on vertical concerns alone since our non-horizontal merger guidelines of 2008, but there have been several cases with remedies.
For instance, Liberty Global/De Vijver Media raised concerns regarding Belgian TV and was cleared with an access remedy to TV channels.
Our review is not limited to the potential effects on prices, notably in the short term.
We have also assessed the impact of mergers on innovation in a string of recent cases.
The Commission found that certain pharmaceutical and medical devices mergers could harm innovation. For example, we approved the acquisition of GSK's oncology business by Novartis with remedies that would address this problem.
The same goes for industrial mergers. Examples are GE/ Alstom concerning gas turbines and the recently approved agro-chemical merger between Dow and DuPont.
Of course, the vast majority of mergers we review are unproblematic. In 2016 we received over 360 merger notifications and as many as 250 of them where in simplified procedure. Of 26 intervention cases (with interventions both in Phase 1 and Phase 2) there was only 1 prohibition.

This being said, we can see a clear trend that more cases, often transactions in already highly concentrated markets, require in-depth scrutiny and complex and far-reaching remedies before we can approve them.

The holy triad of relevance, quality and speed – especially speed

Above all, we must make sure that our action stays relevant, that it is of the highest quality standards and that proceedings move forward without undue delay, because – as the phrase goes – justice delayed is justice denied.
We pursue our quest for swift procedures on different levels.
One has to do with the way we give company access to the information we possess.

Access to file

Access to file is a vital component of a company's rights of defence but it is also time consuming for everyone.
To make access to file more efficient we've introduced a range of measures. We published Best Practices on data rooms. We have amended the Access to File Notice to allow for the return of documents unrelated to the case.
We have also used voluntary confidentiality rings in several cases and I am happy to report a growing interest among the parties.
So we are constantly reflecting on refinements that can be added to our toolbox.
But in the long run we should probably reflect with the competition community on a more fundamental development of our access to file system in the interest of all parties concerned.

Incentives for cooperation

Offering companies the right incentives while preserving deterrence is another promising way to speed up antitrust proceedings.
The settlement option is open to companies involved in our cartel investigations for a long time.
Now we are reviving cooperation procedures also in other antitrust cases.
We took this path in our recent ARA decision, where we fined the Austrian company for abuse of dominance.
However, we reduced the fine by 30% because the company acknowledged the infringement and its liability and offered a structural remedy.
We look forward to reward this sort of cooperation in future antitrust cases because it makes proceedings shorter and – above all – brings immediate benefits to consumers.

Prioritisation

Our quest for relevance and speed also means that we have to be selective with respect to the 40 to 45 antitrust complaints we receive every year.

Also the Court of Justice noted that administrative authorities need to set their priorities and that we need to use our resources wisely.

To do this, we can assess whether a complaint concerns a large enough market – in the same way we only review large mergers.

We can decline to investigate a complaint if we conclude it does not point to a substantial likelihood of infringement. When this happens, complainants get in all cases a chance to discuss the reasons with us. And they can appeal the decision before the Union courts.

This being said, let me be very clear. Complaints are extremely important for us – about 35% of our antitrust cases start this way – and we strongly encourage complainants to come forward.

By object, by effect

I will quickly touch upon one last level were we pursue our quest for relevant, quality and fast decisions.

In which conditions antitrust violations should be regarded as infringements by object or by effect?

First, let me clarify that this is not a comment on the Intel case now pending before the court. My only remark on that case is that we are waiting for the judgement.

Let me further recall the recent judgement of the Court of Justice in the Cartes Bancaires case where the Court told us that the concept of restriction "by object" must be interpreted restrictively.

But that only means that it must be interpreted correctly, namely, when the practice presents "by its very nature […] a sufficient degree of harm".

A similar logic applies to hardcore restrictions defined in block exemption regulations.

We use the "hardcore" label only when it is clearly appropriate.

But in those cases we should not shy away from using it.

Recently in the Coty case the Commission argued before the Court of Justice that the hardcore list should be limited to those restrictions which generally have severe anticompetitive effects regardless of the market conditions in the individual cases.

Of course, this prudent attitude means that when we see novel behaviour, we don't spare time or resources to analyse the facts of the case, as the Google investigations show.

But we have no general bias towards classifying infringements as "by object" or "by effect". "By object" is not a taboo phrase. Where it can be applied, it should.

When – by nature or on the strength of our experience – a practice is clearly anti-competitive, I cannot see why the by-object category should not apply.
After all, it is Article 101 itself that states that business practices which "have as their object or effect the prevention, restriction or distortion of competition within the internal market" are prohibited.
For example, in the ISU case, we are investigating whether the International Skating Union effectively prevents skaters from participating in other events the federation does not control.
A sports federation that misused its powers to fend off rival, commercial event organisers would potentially violate EU competition rules.
In such situations, a by-object qualification seems to be justified, as is our preliminary view in the Statement of Objections we sent to ISU in September 2016.
Finally, let us turn to our sector inquiry into e-commerce, where we have found that vertical restraints are back with some vengeance: 42% of retailers report price related restrictions and nearly 12% report cross-border sales restrictions.
Every company should be aware that Retail Price Maintenance passive sales restrictions are likely illegal by now.
As a follow-up, we have recently opened a number of investigations concerning the distribution of video games, consumer electronics and hotel accommodation.
Not using the by-object category where it applies and moving to an all-by-effect approach – as some advocate – would jeopardise legal certainty, put smaller players with less resources at a disadvantage and lead to investigations and litigation for their own sake.
In certain situations, our past practice gives precious guidance here.
As Leonardo da Vinci once said *la sapienza è figliola dell'esperienza*, "knowledge is the daughter of experience".

Efficiency claims

Let me add that a by-object case does not prevent companies from pleading an efficiency defence under Article 101(3).
The main point here is where the burden of proof lies: with the enforcers or with the companies under investigation.
It would not be right and thus not be fair to exclude logic and experience in the allocation of the burden of proof.
Legally speaking, a company can use efficiency claims in both by-object or by-effect cases. However, there is an important difference in practice. By-object violations are generally unlikely to have pro-competitive effects.
The expected lack of efficiencies also explains why defining an infringement as "by object" where applicable is an expedient way to ensure that our rules work in the interest of consumers.

As a matter of fact, Article 101 requires us to prohibit agreements that harm consumers and to only allow agreements that are to the benefit of consumers: that allow "consumers a fair share of the resulting benefit". So, we have a legal requirement to take the perspective of consumer welfare.

Close

In my opinion, this is one of the main reasons why competition policy and enforcement is a success story. 60 years after the adoption of the Treaties of Rome.

When Europe's enforcers assess the behaviour of a company or study what a market would look like after two or more companies join forces, we have the statutory obligation to take care of the other side of the market – the side of consumers.

I have already referred to cheaper fares and better service for air travellers. But think of our reviews of mergers among mobile network operators. According to our estimates, last year key merger decisions in the telecoms sector have saved Europeans between 7 and 11 billion euro.

It is more important than ever – at a time when the people's trust in public institutions is so low – that we continue to care for consumers.

Of the many dividends brought by robust enforcement of EU competition law, this is perhaps the most important. We won't reap the other dividends – or not on a sustainable basis – if the people are not confident that the economy works for everyone. In other words, if they don't see that the system is fair, works for the many and does not just benefit the few.

This is of vital importance, because competition policy and enforcement is predicated on open and free markets – in fact it is designed to make them work as intended. If this crucial function is enfeebled or disregarded, then we risk opening the door to protectionism, barriers between national economies, and increased tensions among conflicting interests. A recipe that has proven disastrous many times in our past.

The White Paper on the future of Europe just published by the European Commission identifies "harnessing globalisation" as a key task for the Union in years to come.

We will not succeed to do this without effective, even and fair competition policy and enforcement.

Thank you.