EUROPEAN COMMISSION

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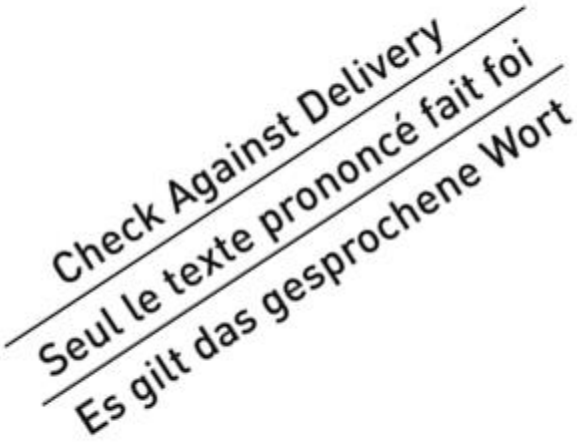
Accuracy and administrability go hand in hand



CRA Conference
Brussels, 12 December 2017

Competition

Ladies and gentlemen,

Good morning.

Dear Cristina, I would like to thank you for the invitation, and to congratulate you for assembling – once again – a great programme today.

From the innovation theory of harm to consumer welfare to the effects-based approach to algorithms, I think you have managed to capture very significant topics.

And you have managed to do that in a way that brings together enforcers and advisers to businesses, not only from both sides of the Atlantic, but also from other parts of the world.

It is a privilege and a pleasure to be with you all today.

1 A changing economy and society

The topics chosen for this conference reflect broader trends in our economy and indeed in our society.

Ten years ago, in the autumn of 2007, we saw the bank run on Northern Rock. It was a sign of the subprime mortgage crisis, which, after the demise of Lehman Brothers, became a global financial crisis and then a full-blown recession. The sovereign debt crisis followed suit.

Soon there were calls to relax the application of EU competition law during the recession.

Instead, the Commission continued to apply EU competition law, because that is the best foundation for the restoration of growth, employment, and innovation.

The EU is now recovering from the recession. We have experienced four years of uninterrupted growth. Growth is now reaching all Member States. More than 8 million jobs were created in the EU since 2013.

But whilst this puts "wind in our sails", it must not tempt us into complacency. To make the recovery lasting and sustainable, more work is needed. And the foundation for this work is vigilance.

Let me take just one example where vigilance is needed: The new jobs created are often either high-wage jobs or low-wage jobs. There is less and less in between. This, together with business concentration tendencies, has fuelled concerns about growing economic inequality. In a moment, Tommaso Valletti, the Chief Economist of DG COMP, will share with us his findings in this respect, and their potential consequences for competition policy.

Without further work and vigilance, the economic recovery will remain precarious. This could easily add to a sense of uncertainty among citizens – among the same citizens who are not yet convinced that our society and economy has found a new balance after the crisis. Many people feel that they are subject to economic forces that are still not fully controlled or not even fully understood. They rightly ask us to take a closer look at possible root causes of present and potential future problems.

Indeed the economic crisis has led many economists and regulators to re-assess some of their prior beliefs and certainties. Clearly, there is less of a conviction today that markets, if only left to their own devices, will over time necessarily produce the most efficient outcomes or that advantages to an undertaking or an industry will automatically translate into welfare for the economy and society as a whole.

Yet, at the same time, an ever larger proportion of our daily life is governed by the market today than before the crisis. That is largely because of the many digital products and services that we use. Of course many of these new digital products and services serve us. But they also mean more complexity and, often, a loss of control – not only, but largely, of privacy.

The digital devices that we used to employ for relatively trivial tasks like consuming music and videos are now managing more important aspects of our lives, like our houses, our cars, even our health.

So while many Europeans appreciate the benefits of digital technologies, concerns are never far behind.

2 The role of EU competition law

Consequently, I often hear that "this" or "that" is a new "challenge" for EU competition law. But I am not sure that the word "challenge" is the right term. I prefer to see the changes in the economy and in the society as a reminder of the rationale proper of competition policy and enforcement: To stay alert at all times, to analyse issues comprehensively, and to take decisive action where appropriate.

Some new phenomena will produce tremendous benefits to consumers. Some new phenomena (indeed sometimes the same phenomena) may also harm consumers.

All too often, the debate is cast in simplifications.

Almost every day, I read about "techno-optimists" focusing mainly on the benefits, and "techno-pessimists" mainly emphasising the risks.

We have to go beyond that simplicity.

The point of policy-making and of enforcement is to optimise the risk/benefit ratio.

For example, the fact that a particular new phenomenon may produce benefits to consumers does not mean that there could not be *even more* benefits if there was more competition. Because innovation does not stop, we should never stop demanding a better deal.

Conversely, innovation is not necessarily good, or at least, it is not always good *in every respect*. A product is typically a bundle of attributes, like price, features, longevity, brand image, after-sale service, and even its broader consequences for society. Sometimes we have good innovation in one respect, together with bad innovation in other respects.

- For example, some medicines cure diseases but cause side effects like addiction.
- Cars brought us better mobility, but at the same time repair and maintenance becomes ever more complex.
- Or look at "financial innovation": The recession was triggered partly because of financial products that were poorly understood or poorly designed and irresponsibly sold.

That is why the Commission now promotes "responsible innovation": Innovation which is aligned with the needs and values of society – innovation that aims at building in all-around positive outcomes from the outset.

There is good and bad innovation in the digital world as well. We have experienced good innovation, like productivity gains and better information. We've also experienced bad innovation, like computer viruses and "clickbait".

Indeed, if there's anything that we've learned in the last year, it is that digital tools can have a large impact not only on markets, but, more broadly, on society – indeed on the state of our democracy.

The most obvious manifestation is the rise of hate speech and fake news. Just a month ago, on 13 November, the European Commission launched a public consultation and expert group on fake news. The purpose is to assess the effectiveness of measures already taken by platforms and news media; and to consider potential new measures to improve the reliability of information. One of the panels today will discuss fake news.

The Commission's public consultation on fake news is not a competition policy and enforcement exercise, though DG COMP is associated with it. We will of course follow it, as we will follow the even more far-reaching exercise just launched in this respect by our Australian colleagues of the ACCC.

And there is even a more subtle effect on our consumption of information: it is the rise of the "filter bubble" or "echo chamber". As personalisation algorithms learn what we like – and what similar people like – we are shown more of the same. In that sense, algorithms perpetuate our prior tastes. We are less exposed to new and varied opinions. That is not positive innovation. It is limitation through innovation.

And when we experience increased polarisation, we do not understand each other's opinions any more. Sometimes we do not even understand *facts* in the same way.

So where does this leave EU competition law? Does EU competition law need to change?

What strikes me is that while the economy and the society change so much, the ground rules of EU competition law remain so stable. They were designed to apply to a wide range of scenarios.

They have proven capable of navigating the last 60 years. I should think that they will be able to navigate the next 60 years.

This is so because the nautical charts – the fine print – which underpin the direction are continuously refined and adjusted.

3 Reconciling accuracy and administrability

3.1 A realistic view of error costs

Now there are many navigators using these charts. They are public and private, legal and economic, and so on.

To provide direction to all of them, there has to be a degree of consensus on the charts.

I just mentioned the polarisation of views. To some extent I see some polarisation in the competition community as well.

My thesis today is that we can work to move away from the more extreme interpretations of the charts. We can – and should – focus on building a more common understanding.

One view, for example, advocates for less competition enforcement, as a matter of principle. In this view, false convictions are more of a problem than false acquittals.

The argument is that false convictions are particularly harmful because they "chill" pro-competitive behaviour – even if false acquittals allow an anti-competitive behaviour to continue for a while. But that is seen as not so serious, because competitive forces are supposed to somehow erode market power over time.

I think we need to look at these claims with a critical eye.

- First, in some markets with strong network effects or lock-in effects, the leading firms can become entrenched. Such entrenched positions sometimes create a reputation effect: Potential entrants will not even attempt to enter the market. And if they do want to enter the market,

they will not get financing. *That* is one chilling effect that we should also talk about. So I think it's clear that the market will not necessarily correct itself.

- Second, the largest part of false acquittals is not cases where a competition authority wrongly clears illegal behaviour – they are the group of cases that are never even detected or investigated for lack of resources, or that are punished too late.

If we take *these* cases into account, then false acquittals – false negatives – become a much more serious issue. And then one must be as concerned about under-enforcement as about over-enforcement.

To some extent, this debate is related to the contrast between accuracy and administrability.

In the one view, accurate antitrust decision-making requires as much information as possible, and for this reason, it must necessarily be time-consuming and resource-intensive. But this risks the untimeliness and hence the non-effectivity of enforcement (or at least that is the counter-argument). In a way, this is antitrust to the measured Louis Armstrong tune: "We have all the time in the world".

By contrast, another view holds that broad-brush rules are more administrable: They save time and resources, and they improve legal certainty. But they are also more prone to errors (or at least that is the counter-argument here). So this is antitrust to the nervous beat of Queen's "Don’t stop me now".

Traditionally, this debate is cast as an inevitable trade-off between accuracy and administrability.

But, as my musical examples, this trade-off is a bit dated.

Perhaps we should move beyond this idea of a trade-off. We should focus on ways to *reconcile* accuracy and administrability.

And that's where *presumptions* and their possible rebuttal can play a role.

Let me illustrate how presumption and rebuttal work in two recent cases: the ISU decision of last Friday, and the Intel judgment of last September.

3.2 The ISU case

The case originated from a complaint filed by two Dutch speed skaters against the International Skating Union, the ISU.

The ISU rules provide that if speed skaters participate in events not authorised by the ISU, they may face severe penalties – up to a lifetime ban from all ISU competitions, such as the Olympic Games and the World Championships.

Because top-level skaters cannot afford to lose the chance to participate in the Olympic Games and World Championships, and because athletes are at the top of their game for only a few years, they were not signing up to unauthorised events. The ISU rules prevent skaters from supplementing their revenues by participating in unauthorised events. This also deprived the public of the emergence of such events.

In the Commission's view, this behaviour is anti-competitive by its nature. So it is a so-called "restriction by object". In the presence of a "restriction by object", a deeper analysis of effects is not necessary.

But even if a behaviour restricts competition, the firm under investigation can still show countervailing efficiencies. One can say that under Article 101 TFEU, if a restriction of competition is established by the enforcing authority, the absence of a justification by efficiencies is presumed. But this can be rebutted by the business investigated.

In other words, in such a situation, the presumption and the possible rebuttal are set at the level of harm versus efficiencies.

In the ISU case, no countervailing efficiencies were shown by the ISU.

3.3 The Intel judgment

Now, unsurprisingly for you, the discussion of "object" and "effect" leads me to the Intel judgment of the Court of Justice of 6 September of this year.

As you know, with the Intel judgment, the Court of Justice has recently ruled on exclusivity rebates. The Court has reiterated the Hoffmann-La Roche case-law that saw such rebates by a dominant company as anti-competitive under Article 102 TFEU because of the risk of foreclosure that they convey. But the Court clarified that case-law: The dominant firm can

submit in the administrative procedure that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.

Again, in other words: Here the presumption and the possible rebuttal are set already at the level of the likelihood or not of anti-competitive effects. Of course, if such is found, the next level of rebuttal through the efficiencies defence still remains open as well.

Obviously, the required standard for rebutting the presumption would be meaningless if the dominant firm was able to put forward general theories and abstract arguments. To rebut, the dominant firm must present case-specific arguments based on concrete evidence, and this must be done during the administrative procedure. Placing the burden of rebuttal on the dominant firm encourages it to put forward its best evidence early in the process. Indeed that is in the firm's interest if it has a good case.

If the dominant firm puts forward sufficiently serious and substantiated arguments and evidence to that effect during the administrative procedure, the Commission must undertake an analysis showing the capacity of the conduct to foreclose "as efficient" competitors.

With this, both accuracy and administrability are addressed: When in doubt, the analysis has to be deepened, but the procedure is a two-way street.

In practice, this has a limited impact on the Commission's investigations because (a) the Commission was anyway engaging with dominant firms' arguments and (b) the Commission's Article 102 cases over the last ten to fifteen years always showed anti-competitive capabilities.

The Intel judgment thus clarifies when we need to show this, and what we need to show. It does not exhaustively prescribe how this should be done. The evidence, methods and tools we should rely on will depend on the circumstances of each case, taking into account the criteria specified by the Court of Justice:

- the extent of the undertaking’s dominant position on the relevant market;
- the share of the market covered by the challenged practice;

- the conditions and arrangements for granting the rebates in question;
- the duration and amount of the rebates;
- and the possible existence of a strategy aiming to exclude as efficient competitors.

In recent years, there has been quite a debate about the use of the so-called "as efficient competitor test", or price-cost test. This test tries to measure if a competitor that would have the same costs as the dominant company would be unable to compete against the exclusivity rebates.

The Intel judgment referred the case back to the General Court, requesting it to examine the arguments of Intel concerning the "as efficient competitor test" as set out in the Commission's decision, because the Court of Justice held that the test played an important role in the Commission's assessment. The judgement did however not exclude that the Commission can rely on other criteria or factors as well, without necessarily undertaking such an "as efficient competitor test".

This means that quantitative or qualitative evidence can be used to show an abuse of dominance, as appropriate.

Ultimately, it is not the type of evidence that is decisive.

It is the solidity of the evidence that counts.

On this basis, the Commission will apply the most suitable tools to assess the specific case – including, where appropriate, analysing the "as efficient competitor test" when the dominant company provides the necessary information during the administrative procedure. We are confident that this will allow us to continue to focus on the most harmful cases, while concluding them within a reasonable time.

3.4 A shared responsibility to make the system work

Let me zoom out from this specific case to the bigger picture.

In any legal system where gathering information is costly and litigants' resources are limited, it makes sense to use presumptions. This is particularly true in competition law, which is fact-intensive and often investigates secret behaviour, like cartels, or uncertain events, like the likelihood of foreclosure, or the post-merger situation.

In EU competition law, almost all presumptions are rebuttable. So presumptions are only a starting point or a working hypothesis. Until there is evidence to the contrary.

Presumptions are not a shortcut. Presumptions are not about ignoring evidence. They are based on general knowledge and experience.

So, presumptions are a way to allocate the burden of marshalling evidence at different stages of the analysis.

I sometimes hear that presumptions are a convenient device allowing authorities to enforce more, just for the sake of enforcing. In this view, *vigorous* enforcement is suspect, because it allegedly means less *rigorous* enforcement.

I disagree.

Our decisions are as rigorous as they need to be. And considering the close scrutiny of our decisions by the courts – among other factors – we are going in the direction of more rigour, not less.

Often, that means comprehensive fact-finding. A few months ago, I told the Commissioner about an antitrust case file containing 600,000 pages. I added that we would probably soon see a case file of more than a million pages.

And this doesn’t fully capture the nature of today's evidence: in the Google Shopping case, for example, we received and analysed about 5 terabytes of data.

We take great care to go through the evidence presented in a case to ensure that we have an objective result.

EU competition enforcement is committed to maintaining high standards: swift and efficient proceedings, thorough and accurate decisions, and procedural rights.

I don't think it is a surprise if I tell you that this creates pressure on the system.

But that is where companies' advisers – lawyers and economists – can play their part: through early engagement, sincere engagement, and focusing on the key issues. Ultimately, we can all deal with cases better –

for the benefit of consumers and companies – if we have the right information, and the right amount of information, at the right time.

In exchange, I can offer this, for both antitrust and mergers, in line with our Best Practices: DG COMP case teams are ready to discuss draft document requests with the parties and their lawyers, so that our requests for information are well-targeted. We aim to refine the scope, the custodians, and the keywords that are subject to requests for information.

In merger control specifically, I know that some of you have concerns about internal document requests becoming too broad and too time-consuming. But I think the Commission generally strikes the right balance.

- On one hand, the Commission is determined to impose as little administrative burden as possible. That was the rationale behind extending the scope of the simplified procedure in 2014. This led to a significant increase in simplified cases, reducing the overall burden on companies and on the Commission.

- On the other hand, internal documents are important to the solidity of our assessment. That is why extensive document requests are usually issued in complex, potentially problematic cases. In cases where we consider that there is a good chance that intervention may be necessary and that our decisions might be appealed, we would not do our job properly if we were not to use all available sources of evidence.

So the Commission will thoroughly analyse potentially problematic mergers, while trying to cut red tape for unproblematic mergers. In order to do so, we are counting on everyone's cooperation in providing us with the limited information necessary in unproblematic mergers and the relevant information in problematic mergers.

4 Conclusion

I want to conclude with a nod to the second panel this morning, on "hipster antitrust".

I can tell you from personal experience that there are not many hipsters in DG COMP. Last year, at a DG COMP social event, there was a competition to find one. Not even the winner was close to perfect and most were quite far off the mark.

But it is not because of this that I think the U.S. debate about "hipster antitrust" does not transpose very well to the EU. I think that it reflects a more U.S.-specific discussion about the cycles in the interpretation of the remit of antitrust that have not reflected in the same way in the EU. Ultimately, with all its refinements and adjustments, the interpretation of the antitrust remit has been more stable on this side of the Atlantic than in the U.S.

But I will make a couple of general comments anyway regarding one aspect of the discussion that may be of relevance also in the EU: The role of competition law vis-à-vis broader societal concerns.

No one claims that competition law can solve all issues in our society.

But competition law has always contributed and will continue to contribute to solutions beyond the mere enhancement of "efficiencies". It is possible to have big-picture concerns – about fairness, or inequality, or innovation, for example – while applying rigorous competition enforcement at the same time. And it is possible that rigorous competition enforcement has beneficial effects on these big picture concerns – sometimes inevitably so.

It would be wrong to criticise rigorous decisions merely on the grounds that they connect to big-picture concerns in some ways and that this connection is made explicit. Solid cases do not turn into knee-jerk reactions to vague concerns if they have societal impact. There is no reason to be shy about the overall impact of competition law – and even less reason to pretend that positive effects on big picture concerns are in themselves a sign of over-enforcement.

Once again, I think this comes down to the perceived tension between *vigorous* and *rigorous* competition enforcement. I think we should move beyond a way of thinking in terms of inevitable tension, polarisation, dichotomies, and trade-offs.

Let's be ambitious instead.

I will conclude with this: Let us work with the presumption that accuracy and administrability go hand in hand.

Accuracy without administrability is meaningless. Administrability without accuracy is pointless.

So let us reconcile vigorous and rigorous antitrust. Let us reconcile speed and thoroughness.

Because if we do not succeed in this, antitrust enforcement will become irrelevant.

The first step towards building common ground, towards asserting relevance, is to talk to each other sincerely, in conferences such as this one.

So thank you so much for your attention.

I wish you fruitful discussions throughout the conference.

See you soon again.