



EUROPEAN COMMISSION

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## **Enforcing EU competition law in a time of change**

"Is Disruptive Competition Disrupting Competition Enforcement?"

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

W@competition Conference  
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Good morning,

Many thanks to Evelina Kurgonaiti and Fiona Carlin for inviting me to discuss with you whether disruptive competition disrupts competition enforcement.

It is an honour and a pleasure to debate such a fundamental topic with such a distinguished audience of professionals and experts.

A fundamental point indeed. So, let me make a few remarks that are more fundamental than technical in nature.

Stating that the technological, economic and social landscape around us changes fast, or that it is developing in a disruptive way, is stating a truism.

But how does the speed of change and its depth affect competition policy and competition enforcement?

To answer this question, we must look beyond the truism.

Change is undeniable. In our practice at DG Competition, we can see it every day.

Scientific and technological innovation sparks new business models and makes others increasingly obsolete.

But does this call the mandate, the remit of competition policy and enforcement into question? After two and a half years in the job as Director-General for the Directorate-General for Competition at the European Commission, I am convinced that the rationale of our mandate, or our remit, has not changed. And that it should not change.

We must make sure today – as our predecessors had to make sure 60 years ago, when the EU competition rules were first enacted in the EU Treaties – that markets remain open and contestable; that consumers are not harmed by distortions of the competitive process; by anti-competitive agreements, by exclusionary practices, or by exploitative practices.

This mandate, this remit, is a beacon that guides us through disruptive change. And this is so because it is in itself a lesson distilled out of disruptive change – as are the ground rules that are the cornerstones of competition policy and enforcement on the other side

of the Atlantic, namely Canada's Competition Act and the Sherman Antitrust Act in the U.S.

This is why EU competition law has been historically resilient. Business, the economy and society have changed beyond recognition since EU competition rules came into effect 60 years ago. But our basic principles have stood the test of time. They are what a Portuguese poet called "Um saber de experiência feito". Wisdom made out of experience.

Yet, I cannot stop here. Because whilst the principles remain stable, this does not mean that what we have to *do* to implement these principles does not have to change at all.

The Treaties' competition rules have remained unchanged, relevant and effective over time because they were designed to be applicable to a wide range of developments.

They are not a static implementation programme. When business is unusual, competition policy and enforcement cannot remain business as usual – so to speak.

Our ground rules were designed to be future-proof – in the EEC at first and later in the EU – precisely so that they can accompany an economy in flux.

The system we have inherited continues to serve European consumers and businesses well and continues to inspire sister competition authorities around the world. In large part because of this combination of stability and flexibility. Which, crucially, is also a combination of checks and balances that comes with the unlimited jurisdiction of the EU Courts over it.

It is a dynamic system, made of durable principles that enable precise diagnostics and remedies amid changing factual circumstances.

We have a responsibility to protect this dynamic system and preserve it for the future.

In fact, I believe this is a responsibility not only for policymakers and enforcers, and for the courts that scrutinise our actions. But also for practitioners in law-firms and in-house legal counsels, as well as for economists and consultants.

For us enforcers, this means monitoring technology, business, and markets closely at all times and adjusting the course when the need arises.

As we do so, we follow three main beacons at DG Competition:

- We keep our action fact-based, fair-handed and independent;
- We set high standards for ourselves in pursuit of relevance, quality and speed; and, above all,
- We don't believe that enforcing competition rules is all about trade-offs.

Let me explain this last point.

I often hear that there is an unavoidable trade-off between rigorous and vigorous enforcement; or that a thorough investigation can only come at the cost of lengthy proceedings.

Of course, resources are limited and choices must be made.

But it is altogether possible to reconcile swift proceedings and thorough assessment. It is possible to aim for both accuracy and administrability. And we will continue to grant the companies and public administrations involved in our proceedings procedural rights of the highest standard.

Now, how do these principles translate into our day-to-day work in *our* disruptive times?

Let me share with you some remarks on a few recent cases to make my point.

## **1 Merger review**

I will start with a couple of merger cases in industries marked by technological innovation.

The first is the Dow/Dupont deal the Commission approved with remedies last year.

Innovation played a part in our assessment. We looked at innovation because of the facts that our analysis found in the industry, the markets that would be affected by the proposed deal, and the deal itself.

Our investigation revealed that competition is a crucial driver of innovation in the agro-chemical industry. Innovation happens when industry players have to race against each other to discover new molecules in order to acquire market shares from rivals and protect their own business.

The market was already oligopolistic when we received the notification, with only five integrated R&D players worldwide

It is also a market characterised by high entry barriers, such as regulatory barriers, scale, and costs of development.

Our assessment of the roles of the two companies as innovators was based on comprehensive evidence and large amounts of data, including on the companies' track records, products in the pipeline, targets and R&D capabilities.

In addition, the team of economists at DG Competition conducted a detailed analysis of the companies' patent portfolios.

That part of the review showed that both firms owned some of the best-quality patents and accounted for a significant patent share for the discovery of new molecules.

We also saw that in many innovation areas the companies competed head-to-head and that both pursued overlapping innovation efforts.

Those efforts were unlikely to be continued in the same manner after the merger, when they would be wrapped in a single entity.

Indeed, we discovered direct evidence that the parties were planning to cut back their innovation efforts compared to pre-merger levels, for instance in terms of R&D output targets and inputs.

Finally, we requested substantial data from the parties' rivals to assess how likely it would be that they would compensate for the lost innovation.

Only after carefully weighing all these detailed pieces of evidence – sometimes technically sophisticated – did we arrive at our conclusions.

in this case, we could reach sound conclusions grounded on all relevant facts and evidence only thanks to the companies' own documents.

In general, internal documents are important, because they can help us understand the plans that companies have for the future and make better decisions.

We are preparing a set of best practices, to be published in the coming months, to clarify the Commission's approach and give practical guidance to companies on how to reply to our requests for internal documents in merger cases.

A well-defined scope will make our requests more transparent and predictable. Also, early cooperation with companies will make requests simpler and better targeted. We may also allow for flexible submission of documents on a rolling basis.

By publishing guidance on our practice we can help businesses handle requests for internal documents more efficiently without compromising on our responsibility to protect consumers.

At the end of the day, the system will be more business-friendly, saving companies time and money as they cooperate in our reviews.

If Dow/Dupont illustrates the flexibility of our rules and how we use them to stay abreast of change, the next example will show how this flexibility extends to procedures.

Earlier this month the Commission accepted a request from the Austrian competition authority to review Apple's plans to acquire Shazam, a company that develops and distributes music-recognition technology. Six more national authorities<sup>1</sup> later joined this referral under Art. 22(1) of the EU Merger Regulation.

The proposed deal did not meet the turnover thresholds for mergers that must be notified to the European Commission. However, looking at the referral request, we agreed that possible adverse effects on competition in the EEA could not be ruled out from the outset. So, we are asking Apple to notify the transaction to us.

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<sup>1</sup> Iceland, Italy, France, Norway, Spain and Sweden.

This is not unprecedented for proposed mergers in the digital economy. We have already seen companies with low turnovers being bought by technology giants for vast sums of money.

One notable example is Facebook's acquisition of WhatsApp in 2014, which did not meet the thresholds and was nevertheless referred to us.

We have been discussing the question of whether there is a surge in this type of situations and whether this calls for an adaptation of the EU Merger Regulation. The reflection is ongoing.

But in the meantime mergers continue to be assessed by the best placed authority thanks to seamless cooperation within the European Competition Network.

These examples show in some detail how we keep merger review both stable and flexible.

On the one hand, industry receives good and consistent guidance, including from the Commission's decisions.

On the other hand, our enforcement stays ahead of the curve.

When we see even more complex deals these days, more aspects have to be considered more deeply in our assessment.

When companies move the competition battleground from price to other levels, we cannot ignore these shifts. We must take them into account and adjust.

Apple's plans to buy Shazam is also indicative of another trend that can help us understand how innovation plays out in digital industries.

According to data from Bloomberg it seems that Alphabet, Amazon, Apple, Facebook and Microsoft alone made over 400 acquisitions worth more than \$130 billion over the last decade.

These figures are consistent with the many stories and comments we see in the media of industry giants picking up smaller rivals to secure their patents and technologies. It is

legitimate to wonder whether the competitive pressure of start-ups is still strong enough to push incumbents to innovate.

## **2 Antitrust**

I would keep these considerations as background as I move to my next examples of how our tried and trusted competition rules can be applied so as to effectively protect our interests in these times of change.

In April 2016 we sent a Statement of Objections to Google in relation to its conduct in the mobile space.

Our objections concern a number of restrictions on mobile network operators and on manufacturers of Android- based mobile devices.

Among these, there is the requirement that manufacturers pre-install Google Search and Google Chrome on their devices as a condition to license the Google Play Store.

Another restriction concerns the ability of manufacturers to sell smart mobile devices running on competing operating systems based on the Android open-source code, known as "forks".

We are concerned that the practices may illegitimately protect Google Search's dominant position and that they may hinder the development of Android forks, thus limiting the opportunities to develop new apps and services.

This is an ongoing case, so I cannot today prejudge its outcome. But I want to stress that contrary to what I sometimes hear said, our case is not about the open source nature of Android. We have no objection to open source – how could we!

Our case is rather about whether certain contractual restrictions have hindered consumer choice and innovation; whether initial openness is being turned into future foreclosure.



Another example is especially illustrative. In May last year, we accepted the commitments offered by Amazon in relation to a number of clauses in its distribution agreements with e-book publishers in Europe.

Because of these clauses – sometimes dubbed "most favoured customer" or "most favoured nation" clauses – publishers had to offer Amazon similar or better terms and conditions as those offered to its competitors. They also had to keep Amazon informed about them.

The clauses covered not only price but many other aspects, such as new distribution models, innovative e-books, and promotions.

Our concern was that these clauses would reduce the ability and incentives of publishers and competitors to develop innovative e-books and alternative distribution services.

For readers, this may have led to less choice, less innovation and higher prices.

Amazon's pledge not to use such clauses for any e-book it distributes in the EEA for five years addressed our concerns.

And let me turn to yet another example. Earlier this year the Commission fined Qualcomm for abusing its market dominance in LTE baseband chipsets.

The decision sanctioned the large payments Qualcomm made to a key customer on the condition that it would not buy from rivals.

This conduct also denied consumers choice and harmed innovation in a sector with huge potential for innovative technologies.

This decision is also an excellent example of our deference towards the Court of Justice of the European Union and its rulings.

In its Intel judgment of September 2017, the Court confirmed but qualified the jurisprudence according to which exclusivity rebates and payments by a dominant company can be presumed to be illegal.

By turning the non-rebuttable presumption under the Hoffmann-La Roche jurisprudence into a rebuttable one, the Court emphasised that a dominant firm can seek to rebut the

presumption of unlawfulness by showing that its rebate scheme cannot produce anti-competitive effects.

If the dominant company puts forward good enough arguments, the Commission needs to address them and show that the conduct can indeed foreclose competition.

In this regard, the Intel ruling confirmed that the capability of foreclosure can be shown through different qualitative and quantitative means, depending on the facts and circumstances of each specific case.

We could conclude the Qualcomm case in full compliance with the guidance given by the Court – and within the reasonable timeframe of two and half years – combining the starting presumption that such payments are anti-competitive with extensive evidence showing that they had harmful effects in the circumstances of the case.

Such evidence included:

- Internal documents from Apple showing that Apple was seriously considering switching to Intel for at least part of its LTE chipset requirements;
- Data showing that Apple represented a large portion of demand for LTE chipsets – on average, one third during the whole period of infringement; and
- Statements from other LTE chipset customers confirming that Apple is a leading smartphone and tablet manufacturer, which can influence these customers' procurement and design choices.

In the same judgment, the Court also stressed the need to keep records of contacts with companies and other parties involved in our investigations.

Again, the Commission takes this judgment very seriously. This follows not in the least from our emphasis on fairness, which includes the respect for companies' rights of defence.

The crucial role played by the Court through this and other judgments relates to my initial point: we have a system grounded in firm principles, dynamic, and with very effective checks and balances.

Some of the companies I have mentioned today are household names around the world. Let me point out that they have built their global success also thanks to the open and level conditions they found in the single market when they were still maverick innovators and disruptors.

But would it be fair if we moved the goalposts today? Certainly not. This is why Europe's competition enforcers are determined to grant today's innovators and disruptors the same conditions and opportunities they enjoyed back then.

### **3 Fairness**

I have just made reference to fairness. The debate around the notion of fairness rages on in competition circles, including later today in one of the panel discussions.

I think that this is a good sign. It means that our community is ready to discuss the foundations of our work, the broader implications, and the ultimate objectives.

This, in my opinion, is what the debate around fairness is all about.

The implications of competition policy and enforcement include the response that we must give – as a public policy with tangible and direct impact on people's lives – to widespread popular concerns that the game is rigged; that the market does not work for everyone but for the lucky or privileged few.

A legitimate point can be made that competition policy and enforcement contributes to economic and social fairness.

This does not mean that 'fairness' is a legal or economic standard that overrides the tools crafted over time by the patient and collective work of enforcers, judges, academics, experts and practitioners – each in their own roles. It is the rationale behind these tools and their painstaking, meticulous application.

I mentioned earlier the amount of work that goes into assessing the impact of a merger on innovation. Something similar applies here. Philosophers would call 'fairness' an emergent property of the complex system that makes competition policy and enforcement happen.

As Commissioner Vestager put it in a recent speech: "In our work on competition, we have a pattern to follow. We have principles, rules, ways of analysing the data that lawyers and economists have been working on for decades. And that's the way we make Europe a fairer place".

Let me close on this note: making Europe a fairer place. I believe that this may also have been and still is one of the motivations of having this conference.

We cannot ignore the discontent and loss of trust I've just mentioned – in fact, we must address it through all available means. In policy, in conferences – and in the way we organise and conduct our workplaces.

This is why it's more important than ever that we explain to the people that – thanks to our accurate rules and exacting standards – we are enacting a public policy that protects the interests of everyone, especially in disruptive moments and times of change.

Competition policy and enforcement has always been about strengthening or restoring people's trust in the fair conduct of companies and in markets that work for everyone.

This is a historical *acquis* that we should all be determined to bring into the future and to improve, hone and develop it further.

Thank you very much for inviting me today and for your time and interest in this discussion.