



EUROPEAN COMMISSION

Johannes Laitenberger

Director-General for Competition, European Commission

The Antitrust Journey

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

The Antitrust Enforcement Symposium 2019
Pembroke College, University of Oxford
Oxford, 29 June 2019

Dear Prof. Ezechia, dear Prof. Kovacic,

Distinguished guests,

- It is a genuine honour to be with you tonight and to have the privilege of sharing some thoughts with such an expert audience. We are in the last moments of the mandate of the Juncker Commission and at the eve of a new mandate for a new Commission. I cannot – and should not – try to pre-empt what is to come. But now is a time at which we can consolidate lessons from the past five years and set a starting point for the next five years. Such a reflection comes against the background of an economy that is ever more disrupted. It comes against ever more intense debates about what directions our societies should take. And it comes against far-reaching soul-searching on the right international order for times to come. It is only against this background that the growing debate on whether antitrust policy and law are fit for purpose, be it in terms of the goals they pursue, be it in terms of the concepts they use, be it in terms of their tools, can be properly understood.
- It sure is an exciting time to be engaged in antitrust policy and law. Today's and tomorrow's learned contributions that I cannot hope to match and that I will therefore not try to match tellingly attest to that. It is the most exciting time for a long time. One could liken it to a voyage of discovery on a stormy sea. At its end, there is the promise of renewed treasures. Most importantly among such treasures is inclusive prosperity. But to get there, with the requisite speed, we need the right charts to navigate.
- My thesis is that for the journey on this strong sea, EU competition policy and law still hold the charts for a successful course. They have notably not been restricted to navigating only in the comparatively safe waters of price and output, i.e. the waters of comparatively easy measurable quantitative analysis: EU Competition policy and law have never lost track of all five parameters of competition, looking also at innovation, quality and choice – the admittedly more perilous waters where measuring is also needed, but where it might be less easily quantifiable. As Professor Fiona Scott Morton has put it in her recent report, today's challenge is to recalibrate existing antitrust laws in order to be able to “recognize [familiar anticompetitive tactics] in the new [digital] setting”. I submit that EU competition policy and law are sufficiently structured to allow to move on in this direction. Also because they have not been restricted to not making one single nautical mile without drawing a detailed map before setting sail. So let me for tonight take a broader perspective and not speak about specific cases or theories of harm. I would rather like to look at the

bigger picture, and more specifically argue the question policymakers will and must ask themselves right now: **I**s EU competition policy and law still fit for purpose?

- In fact, EU competition policy and law have not suffered from certain limitations that some national legal systems and debates seem to be confronted with. I consider that there is enough margin to treat novel or complex issues without each time having to amend the underlying legal texts in considerable detail. EU competition policy and law have been able to deal with two-sided markets or zero-price factors, as well as myriad of other issues on the basis of rigorous legal standards and economic analysis, but without restrictions that would constrain the remit of antitrust law to a point where it risks becoming inoperable, absent a detailed redefinition whenever a new wave of technologies or business models rolls in.
- Examples of issues that have been addressed in recent years include:
 - New leveraging strategies (i.e. better positioning and display) [Google Shopping, 2017];
 - Pre-installation through e.g. tying [Google Android, 2018, and Microsoft/LinkedIn, 2016];
 - Innovation [Dow/DuPont, 2017; Bayer/Monsanto 2018];
 - Exclusivity requirements (including on placement) [Google Android, 2018; Google AdSense, 2019];
 - Concerns about collusion on business models [E-books, 2012 and 2013];
 - Standard-essential patents [Motorola and Samsung, 2014];
 - Most-favoured-nation clauses, not only with regard to price MFNs, but also with regard to business model MFNs [Amazon E-books, 2017];
 - Restrictions on using brand names and trademarks for the purposes of online search advertising [Guess, 2018]; and
 - Consumer electronics case, involving algorithms [2018].
- This is quite a track record. It has already had some impact and we will see how it will impact further, including how it fares in the courts. But one should not have any illusions. Whilst it might be exaggerated to roar that “we ain’t seen nothing yet”, it is certain that things “don’t stop”, to refer to two great hits from the 1970s, another time when antitrust underwent a paradigm shift.
- Add to that the fact that antitrust policy and law have gained prominence, because regulation in the digital sphere has so far not yet played the same role as in the

analogue world. At the onset of digitalization, there was the expectation that much of the “traditional” regulation would not be needed in the “new age”. As we have learned in the meantime, that proved far too optimistic. But in the meantime, a gap has opened. Due to their general nature, antitrust policy and law have been drawn to fill some of it. Antitrust has succeeded in dealing with novel issues quite comprehensively. Not because enforcers stretched its remit. Rather because it produced “collateral benefits”.

- But in order to get ship-shape for the journey ahead, taking in the lessons learned so far, the Commission does not just rely on the insight and experience of its own experienced navigators and sailors.
- Indeed, the Commission is part of the world-wide exchanges that go on bilaterally and multilaterally, most notably in the OECD and the ICN. A lot can be learned from peers elsewhere – from the work of Japan’s FTC to the reflections of the Australian CCC to the hearings of the US FTC. The prospective debate within the ECN is evolving ever stronger.
- Crucially, the Commission has also been listening and talking to the various stakeholders and their often diverging views on possible over- or under-enforcement of competition rules in our times. It is in this context of what one could term a Popperian exercise of verification and falsification with a view to testing and trying our knowledge that Commissioner Margrethe Vestager has asked three Special Advisers to produce a report on competition in the digital world: the lawyer, Prof. Heike Schweitzer; the economist, Prof. Jacques Crémer; and the internet expert, Yves-Alexandre de Montjoye. It is important to stress that the report outlines the Special Advisers’ own views. Over the past year, there have been very interesting and enriching exchanges – including a public consultation and a broad consultation – that gave them an overview of the issues and challenges we face and on which they reflected and concluded. The report is thus another important step in the ongoing deepening of our understanding of the digitisation of the economy and the role of competition policy and law in it. The report assigns a crucial role to competition policy and law in promoting pro-consumer innovation in the digital age. At the same time, it points out that it will be all the more effective if it is complemented by well-calibrated regulation.
- Let me just point to two ideas that come of this very rich and multi-faceted report.

- A key point, by the way also made in the already mentioned report by Prof. Fiona Scott Morton, is the discussion of the re-adjustment of the so-called error cost framework. Competition policy and law should try to translate general insights about error costs into legal tests. After decades of development of more sophisticated econometric tools, false positives might today be less common than previously feared. Minimizing the risk of over-enforcement may not be the core issue today in the same way as it appeared decades ago. Network effects, lock-in, consumer inertia all underscore that there is also a clear and present risk from under-enforcement. This being said, such an affirmation raises in many quarters an immediate concern: Does this mean that antitrust will become of necessity once again more formalistic and/or even speculative?
- I believe that the balance between over- and under-enforcement does not lead us away from a thorough effects analysis. The task at hand is to do this type of analysis whilst avoiding an infinity loop of reasonings, which ultimately would carry the risk of justice being denied because it is delayed. This is by the way the reason why enforcers must use all instruments at their disposal where and when appropriate. Contrary to what has been suggested earlier today, using tools like interim measures is therefore not a fashion, it is a necessary part of the rule of law and that is why just this week, the Commission indeed has issued a statement of objections in an interim measures case.
- One way out of such an infinity loop might be the use of rebuttable presumptions based on empirical evidence. Rather than advocating – at this stage – legislative changes, the Special Advisers thus suggest modifications of established tests, including allocation of the burden of proof and definition of the standard of proof. In particular, in the context of highly concentrated markets characterised by strong network effects and high barriers to entry (i.e. markets that do not easily self-correct), the Special Advisers put forward that one may want to shift to the side of disallowing potentially anti-competitive conducts and impose on the incumbent the burden of proof for showing the pro-competitiveness of its conduct.
- The other element I want to touch upon is the relationship between competition law and regulation that is also raised by the report.
- This relationship has two dimensions.

- First, there is an “intra-competition” dimension: in fact, when speaking about ex-post and ex-ante regulation, we often speak about competition policy and law itself. The question here is whether and to what part we can be pro-active and offer ex-ante-guidance – and namely (rebuttable?) ex-ante-guidance that is not just a mere compilation derived from existing case laws: It would seem that there is quite some demand for this, especially from sectors that are facing disruptions.
- In many aspects, ex-ante-guidance is indeed of the essence to provide legal certainty to businesses and consumers alike in dynamic situations. It should therefore be considered in particular in situations where:
 - a) There is a clearly defined issue,
 - b) which is recurrent,
 - c) which shows a pattern, i.e. which does not require a case-by-case assessment,
 - d) which therefore can be more effectively addressed through a general rule than a tailor-made prohibition or exemption, and
 - e) where there is an authority empowered and equipped to implement that general rule.
- Second, there is the “Competition vs other regulatory disciplines” dimension. The question here is one of complementarity between competition policy and law (which is the general discipline that addresses market failures) and other disciplines that are sector-specific and / or pursue distinct public policy objectives.
- Competition policy and law cannot do everything. This is true for reasons of expertise, of democracy and of the rule of law. As I said, it has so far been able to address implicitly also certain issues in the digital world, which in the analogue world would have been possible fields for other regulatory disciplines. In that sense, its action addressed also “collateral” issues. But one should not hold illusions as to what competition law can and cannot do in the longer term. If a certain topic concerns larger public policy objectives, these objectives can only be realized to their full extent via regulation. The benefit for competition enforcement will then be that it can focus on effective and timely action where it is actually most needed. For example, with a functioning GDPR or P2B regulation, many an uncertainty for the competitive process will be solved. Competition enforcers will then be able to focus on where they can be most useful.

- Matters in which those two dimensions come together and will be considered are at the heart of the Special Advisers’ report: Namely the role of platforms as ecosystems and marketplace rule-setters and the role of data access and inter-operability.
- These and other issues will undoubtedly be part of the work to be carried forward.
- Without pre-empting case work and other future action, I can point out that the Commission is already engaging in a review of the arsenal of legal tools in the field of horizontals and verticals. This will provide the opportunity to check the ability of these tools to sufficiently reflect today’s realities. It will also be the opportunity to provide, if need be, guidance needed to unlock the potential that the digital transformation can offer and to address the risk of anti-competitive restrictions that it may carry.
- Let me conclude. There is reason to believe that on the basis of the fundamental rules that the EU treaties provide for competition law, on the basis of the learnings so far, on the basis of a balanced error-cost framework, on the basis of exemplary enforcement, and on the basis of well-calibrated complementarity between competition law and other regulatory disciplines, a human-centric framework for digitisation can and will be designed. It is not a given, though. It will continue to require resources and efforts to find and assess evidence, to develop facts-based theories of harm and to produce timely investigations and decisions. But it is only through a truly evidence-based approach to antitrust – without a bias in one or the other direction – that the strong sea can be navigated successfully.
- As some of you know, I will from this autumn onwards – at least temporarily – step back from the antitrust vessel. I would like to pay tribute to the fellow navigators and sailors for our common voyage so far. We have together raced against waves and winds, like today at this conference, and I am grateful for the distance we have travelled together.
- They say that it is better to travel hopefully than to arrive. I do think that there is a lot of hope in the travel ahead. Having already mentioned two inspirational songs from that other age of hopeful antitrust travel, the 1970s, let me bid you farewell with a third and final one: “Come Sail Away”!