EUROPEAN COMMISSION

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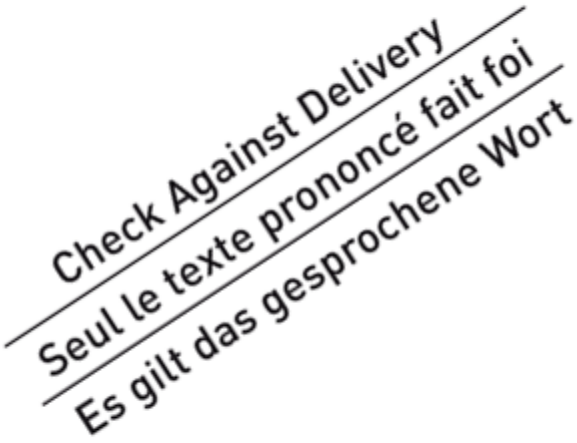
Antitrust in times of upheaval



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Competition

1 Introduction

Ladies and gentlemen,

It's a pleasure to be with you here today. Many thanks for this opportunity to introduce this highly relevant and timely programme with so distinguished speakers and an agenda discussing some of the most difficult and important questions facing competition enforcers and practitioners nowadays. It is difficult to recall, looking over my by now long career in DG COMP, whether there has ever been a time in which so many of our fundamental assumptions, our ways of doing things, and our way of looking at the European and global economy, have been called so much into question all at the same time. It is now very fashionable to have opinions and heated debates about industrial policy, the competition rules, international trade rules and the future of the Western alliance along with many other fields. It is therefore hardly an exaggeration to say that we are entering a time of upheaval.

We are therefore fortunate to be meeting in this forum still during the very early days of the Von der Leyen Commission, which has unveiled an ambitious agenda for the coming five years, with three pillars led by its Executive Vice Presidents. First, the Commission will soon present its European Green Deal to respond to the climate crisis. Second, the new College has appointed Margrethe Vestager to head the push to make Europe Fit for the Digital Age. Last but not least, and not unrelated to the first two, the Commission has committed itself to ensuring An Economy that Works for People.

2 Global reflection on digitalisation

We are in the midst of the ongoing debate concerning whether competition policy is still fit for purpose in the age of digitalisation and the related questions of what to regulate in the digital economy and how.

In recent years, the world (in particular the EU) has become increasingly aware that with the new technologies and products widely available in our digital world come new dangers, not only to our markets but also to our democracies and our personal lives.

From a competition point of view, many of today's digital markets are hence dominated by strong incumbents facing competition (if any) from only a few other players. The presence of a dominant player may not be a competition concern as such, as long as markets remain contestable and dominant players are under continuous pressure to compete and innovate for the ultimate benefit of consumers and not only of their revenues and shareholders.

Experience has however shown that large incumbent players in digital markets are rather difficult to challenge. This is partly due to certain characteristics of these markets such as extreme returns to scale and strong network effects.

These developments have led to a broader reflection about the extent to which competition law is able to ensure effective competition in this new environment. It seems that whenever technological developments take a leap forward, there is the legitimate question of whether we are well equipped to deal with them – as just one example, an early foreshadowing of the current debate occurred at the beginning of the century, when some questioned whether enforcers were able to deal with conduct by rising IT firms like Microsoft.

What is new and exciting about the ongoing reflection is that it is for the first time a genuine global debate, since enforcers around the world are faced with the same challenges due to the ubiquity of the big digital players. This has resulted in a rich debate with an immense variety of contributions from the Commission's Special Advisers, the Furman Report, the ACCC report and many others, as well as other related initiatives such as the FTC hearings and the states' Attorney General investigations.

So what do we see when we look at all of this now extensive literature? Is there some measure of agreement, at least on the problems if not the solutions? The main areas of reflection do seem to be similar around the globe: the conduct of platforms with market power, the role of data and the dramatically named concept of 'killer acquisitions'. So when some ask, as will today's first panel, "Do regulators really understand what's going on in tech?," at least we can reply with some confidence that most of us broadly agree on what the issues are, even if the debate on solutions will inevitably become complex and sometimes contentious.

Of course, we learn not only from published reports, but also from our experience in actual cases and in our observations of markets and sectors. In this regard, we are witnessing a rise in enforcement action against digital players around the globe, addressing a broad range of conduct by incumbents that was found to be harmful in the specific circumstances of each case. As examples from right here in Europe, I can point, among others, to three infringement decisions in relation to Google with *Shopping* in 2017, *Android* in 2018 and *AdSense* earlier this year; two decisions involving Qualcomm and the important chipset markets in 2018 (*exclusivity*) and 2019 (*predation*); and the first imposition of interim measures by the Commission in 18 years, earlier this year involving *Broadcom*.

3 Where is the digital debate taking us?

The last word on all EU cases will of course be for the Union Courts. Judicial scrutiny is an essential element of the rule of law and of checks and balances. If we are confirmed on appeal, this will lend support to our view that the competition rules, are flexible enough to address novel conduct. Many practices which at first glance look novel may really be old wine in new bottles, and hence they can be addressed under established theories of harm.

In some cases, established concepts developed to address a particular set of circumstances may have to be nuanced or adjusted to be able to tackle comparable issues in today's economy. Here I am thinking of, for example, concepts like the essential facilities doctrine, which may inform our thinking in relation to how to deal with certain behaviour in digital markets, for example questions concerning when to grant (or restrict) data access, even if we may not apply the test in exactly the same way as it was originally designed.

As announced by Vice-President Vestager yesterday, even our market definition notice, which still sets out the basic relevant framework, will benefit from some updates during this mandate to reflect the experience that we have gathered over time in our antitrust and merger enforcement practice in relation to both geographic and product markets. Today's digital markets in particular often present issues that we have analysed in practice but not set out in an updated notice, such as how to deal with zero-price products/services and the consideration of digital ecosystems in our analysis.

So perhaps the question is not really whether we have the right tools to intervene, but how to ensure that intervention is timely enough to prevent irreparable harm in fast-moving markets. Because there is always room to improve, we need to explore ways to be quicker without compromising on due process, which is a cornerstone of our system.

While we are aware that the *burden* of proof of an infringement rests on us, there must be a reasonable limit to the *standard* of proof needed in a given case, to maintain our ability to conclude investigations within a reasonable and business-relevant, consumers-relevant, timeframe and strike the right balance between accuracy and administrability.

We should not forget, for example, that the possibility of relying on rebuttable presumptions in certain cases is part of the legal framework and endorsed by the case law to the extent those presumptions are based on solid previous experience, e.g. in the area of exclusivity rebates. Therefore, there is in principle no reason we cannot test new rebuttable presumptions once we can safely assume that anti-competitive effects are likely to follow from a given conduct.

A lot of attention has recently focused on our first use of interim measures in 18 years in the *Broadcom* case. In appropriate cases, interim measures are a means to prevent irreparable harm until the main proceedings are decided. While this is not a way of speeding up the process in terms of the main proceedings, it can help safeguard the effectiveness of our intervention, provided the rights of defence are respected and the high threshold for interim measures is met.

In many cases, once we have identified the harm to competition we face a further challenge to design remedies appropriate to remove it. The traditional cease-and-desist approach, involving detailed discussions on the remedy but ultimately leaving it to the undertaking to choose among all available options that are deemed to remove the competition concerns, has generally worked well, but in fast-moving markets there is a risk that this would take too long to implement and would be too difficult to monitor. Therefore, in particular in these markets, we recognise that we may need to design more prescriptive, and possibly restorative, remedies in order to ensure that the conditions for effective competition can be fully restored.

Finally with regard to the digital debate, we should not forget that competition law cannot and should not tackle all conduct with negative consequences on the market. Certain other tools, including vigorous enforcement in other fields such as data protection, or legislation where there is a clearly defined and recurring issue that leads to systemic market failure, may be appropriate.

4 The future of merger enforcement

The European Commission's competition policy has been subject to political demands continuously throughout its history. The current transition to the new Commission has been a focal point for such demands, which makes working in competition policy particularly exciting at this time. In fact, it has always been exciting to work in DG COMP.

We all remember the still fresh calls for reform of the EU merger control rules following the Commission's decision to prohibit the Siemens/Alstom merger in February. The debate is complex and involves different actors with partly diverging and partly converging positions.

On the one hand, there are calls for relaxed merger enforcement to ease the creation of so-called European champions to compensate for the lack of a level global playing field, but also to take into account other, non-competition-related public interests.

On the other hand, there are those that argue in favour of increased enforcement in view of higher levels of concentration, margins and inequality visible in the economy. There are also those who point to potential enforcement gaps in digital markets where current jurisdictional thresholds may not capture all important cases. And there are calls for tougher enforcement to correct the distortive effects of foreign subsidies and state support.

The claims of increased concentration are of particular interest for enforcers. A significant body of empirical research has documented a structural increase in market power (as measured by firms' profit margins) across a wide range of industries and countries. Possible explanations include technological change and globalisation, to be sure, but also, according to some, a weakening of competition. Irrespective of the origin of increased pricing power, these developments suggest competition policy has to stay vigilant to prevent a further dampening of competition in many sectors.

And we have remained vigilant in practice. It has been quite a year for the Commission's merger network. The stats confirm it. The Commission came at or near the top of most enforcement metrics, including three prohibition decisions (*Siemens/Alstom*, *Tata Steel/ThyssenKrupp* and *Wieland/Aurubis*) as well as two fining decisions for procedural infringements (*GE/LM Wind* and *Canon/Toshiba Medical Systems*).

5 Conclusion

Effective EU competition enforcement, based on facts, available evidence and sound economic reasoning, is as important now as it ever was. While Europe certainly needs a sound industrial policy to remain competitive globally, we must also respect the values of fairness, non-discrimination, the rule of law and due process.

We should continue to uphold these values, even as we are fully aware of the fact that not all global actors are currently doing the same. Most importantly, we must also ensure that as we roll out tools such as artificial intelligence, algorithms, the Internet of Things and other disruptive technologies, the citizen (and the consumer) remains the beneficiary of these developments and not the victim.

The challenges we face today are considerable. I am certain, however, that as we have adapted to changing realities in earlier moments, we can do so now, by preserving what has worked so well in the past but by not shying away from updating and sharpening both the investigative tools to detect potential anticompetitive conduct and the analytical tools we use to identify and describe it.