



EUROPEAN COMMISSION

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Enforcing EU competition law – recent developments and a glance to the future

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

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1 Introduction: competition enforcement and the recovery

Ladies and Gentlemen:

It is a pleasure to share my thoughts on recent developments in EU competition law with you this afternoon. I would like to thank Dr. Michael Bauer for his kind invitation, Dr. Harald Kahlenberg for his introduction, Professors Kersting and Podszun for their work as event co-organisers, and Dr. Petranyi for co-chairing this session with the latter.

I particularly appreciate the forward-looking perspective that you have given to our exchange of views today.

It is precisely in this forward-looking spirit that I will start with a look at the past, because – as Confucius once said – "study the past if you would divine the future".

I believe EU competition enforcement has continued to build a solid *acquis* in the past few years as the EU had to grapple with many serious challenges.

As President Juncker stated in this year's State of the Union address, Europe's economy is finally bouncing back, ten years after the crisis struck. It is fair to say that competition policy and enforcement have contributed to the turnaround.

There are several reasons to support this claim. There is a growing body of research on the positive economic impact of competition policy and enforcement.

For instance, the Commission's cartel decisions in 2015 brought benefits to consumers estimated at between €1 billion and €1.5 billion. Customer savings from merger decisions in the same year were between €1 billion and €2.7 billion.

But these estimated figures don't tell the whole story. Beyond direct savings, competition enforcement can also improve overall consumer welfare in other ways and over time.

For instance, preserving a healthy competitive pressure in the markets promotes innovation and improves economic efficiency overall.

These direct and indirect benefits of competition control hold true in general. However, looking at the EU over the past ten years one can see one particular aspect.

Competition enforcement has managed to keep a steady course as Europe was buffeted by the crisis – which was just as much an economic and financial crisis as it was a crisis of confidence.

I believe that competition control has indeed helped on both fronts.

Robust, consistent and predictable enforcement sends a clear message that the Commission *will* make sure that every company – none excluded – is granted equal conditions to operate and equal chances to succeed in the single market.

At the same time, it sends a message to citizens that it *will* protect the interests of all European consumers – none excluded. The people can look at competition control as a European public policy that works and delivers.

This applies to all instruments, including State aid. Let me just recall that the instrument was instrumental and indispensable to swiftly stabilise the banking sector when the financial crisis reached the EU after the collapse of Lehman Brothers and in the following years.

So, I believe that the steady hand of competition enforcers is one factor – among many others, of course – that explains why Europe's economy is rebounding and public opinion is again looking at the EU in a more positive light.

According to the latest Eurobarometer survey, 56% of respondents are optimistic for the future of the EU – that's a 6 percentage point increase since autumn 2016.

2 Recent activity

As to the current economic recovery, we can see it reflected in our work on mergers, which is often a good gauge of economic trends.

Four years ago, 277 deals were notified to us. Last year, we received 362 notifications. The trend continues this year, with 259 notifications received up to the month of August. As many transactions involve European companies, this economic dynamics indicate that the wind is indeed back in our sails, as President Juncker said in his State of the European Union speech.

As we did in the crisis years, we will continue to do our bit to support the recovery. One way to do this is by swiftly assessing and clearing non-harmful deals. In 2016, 70% of all notified transactions were reviewed under the simplified procedure.

Another way is by preventing the emergence of market structures that would impede effective competition.

From January to August this year, we raised concerns in 20 cases.

Plans initially notified to us were changed to protect competition.

For example, in the automotive sector, the French company Valeo pledged to divest almost all of its gear-components business as a condition to acquire FTE of Germany. In the same sector, the brakes manufacturer Knorr Bremse called off its plans to acquire its competitor Haldex two months after the Commission formally opened an in-depth investigation.

Very significant divestitures were required in the agro-chemical sector, both in the Dow/Dupont and Chemchina/Syngenta cases.

Finally, in the Maersk line/HSDG case, we responded to the wave of consolidation in the container shipping industry by requiring that links between competing consortia be removed.

But suitable remedies are not always put forward. In Deutsche Börse/LSE, the Commission had to prohibit the deal due to the expected negative impact on financial markets.

In these and other cases, the business rationale we can observe is increasingly the emergence of a champion with the size needed to operate in global markets.

When the deals that are notified to us pose no threat to effective competition in the single market, competition enforcement will not stand in the way.

One example is in the recent acquisition of the wind turbine manufacturer Gamesa by Siemens, which was cleared unconditionally.

This allowed a European company to grow internationally in a market where Europe is currently world leader.

When a proposed deal raises concerns, we will continue to make sure that European businesses and consumers are not harmed by consolidation that will significantly impede effective competition.

This is why we remain attentive to discussing both global circumstances and the effects a deal can have on consumer welfare in the single market.

I am convinced that an integrated and contestable single market is the ideal environment where companies can grow stronger, more efficient and prepare to challenge international rivals. This belief underpins our review of mergers as well as our work in antitrust.

The Commission has been quite busy on this front. Since January 2016, the Commission has adopted 18 antitrust decisions – the latest being the "Baltic Rail case".

At the start of the month, the Commission imposed a fine of almost €28 million on Lithuanian Railways for abuse of dominance and required the company to end the infringement.

An unusual feature of this case is that the company physically removed 19 km of existing rail track to shield itself from competition.

In other cases, where appropriate, we have opted for remedy solutions that can bring structural changes to the market.

The Commission has taken four commitment decisions over the past twelve months – Container Shipping, CDS, Pay TV, and Amazon e-books.

The ARA case was a cooperation case. In its decision the Commission reduced the fine by one third because the company acknowledged the infringement and proposed a good structural remedy.

This decision paves the way for future cases where the Commission may reward a cooperative approach during antitrust investigations even beyond cartels.

3 Beyond the figures

Again, I think these figures don't tell the whole story. I can think of at least two important aspects that should be stressed in order to grasp the full impact of competition policy and enforcement.

First, that our work across all instruments – antitrust, mergers and State aid – contributes directly to the completion of the single market, which is one of the ultimate goals of the European Union.

Second, that competition control can support the Commission's overall efforts to realise the full potential of the single market in strategic, growth-promising, and job-creating domains.

One such domain is the digital industries.

Building a genuine **Digital Single Market** is high on the list of priorities of the Juncker Commission. Removing barriers in the digital economy means – among other things – ensuring that consumers can buy products and services online independent of their location in the EU.

We looked into these restrictions with our inquiry in the e-commerce sector and the final report was published this year in May.

The report provides a comprehensive look at the evolution, dynamics and challenges of e-commerce and of the barriers to the cross-border sale of goods and digital content erected by private companies, especially in distribution contracts.

In parallel, we are investigating individual cases for suspected anticompetitive practices in e-commerce.

Some involve companies in consumer electronics, video games and hotel accommodation. The goal here is to make sure that practices such as retail-price restrictions, discrimination on the basis of location and geo-blocking do not hamper the potential of e-commerce.

We also launched investigations into distribution agreements and licensing practices to make sure they didn't illegally restrict cross-border sales within the EU.

I am particularly heartened by the fact that a number of businesses have updated their practices when we launched the inquiry and removed the barriers they had erected in e-commerce on their own initiative.

Once again, our action in this domain has both economic and social implications.

Extending the benefits of the single market to the digital world can give a boost to our economy. A fully functional Digital Single Market could add an estimated €415 billion a year to our economy.

And it is clear that we are also meeting the demands of our fellow European citizens. The Eurobarometer survey I mentioned earlier shows that 59% of respondents are in favour of a digital single market within the EU.

Another priority of the Juncker Commission – establishing a genuine **Energy Union** – enjoys even more support. As many as 72% of respondents are in favour of a common energy policy among EU countries.

The Commission is pushing for energy that is economically sustainable, environmentally friendly, and affordable for consumers and businesses. To achieve all this, better integration of gas and electricity markets is vital.

A good illustration of how competition control can contribute to this overall objective is our Gazprom investigation.

As you know, we suspect that the territorial restrictions Gazprom imposes on its customers effectively partition the single market.

Earlier this year, the company proposed commitments to address our concerns. As we always do, we published the proposed pledges to collect the views of market participants.

At this stage, we are reviewing their replies and will soon decide on the next steps.

4 Competition control reaches all Europeans

We have seen that by contributing to the integration of digital and energy markets, we contribute to the overall goals of the Commission and meet the expectations of most Europeans.

If we asked the people what they think of the core goals of competition control – low prices, choice and innovation – I believe we would get even higher ratings.

Let's take the Google Shopping decision, for example. Our investigation found that Google's comparison-shopping product had been promoted in Google searches irrespective of how good it was, while those of rivals were demoted.

Precisely at a time when more and more people shop on the web, through this conduct vis-à-vis rival comparison shopping services, millions of Europeans have been denied a genuine choice of comparison-shopping services, which may have offered them lower prices, different products and perhaps better ways to look for them.

Let me say in passing that this case also shows what it takes to bring our tried-and-trusted methodology and thorough analysis into the digital age. I will mention just one detail: during our investigation, we reviewed 5.2 terabyte of data – which is a lot of data indeed.

Keeping prices low for consumers remains a top priority across the board. Staying with our action in antitrust, this is a prime concern in a number of recent investigations. I can recall the case involving Cephalon, where our preliminary view is that the company paid Teva to keep out of the market a cheaper generic version of its blockbuster drug Modafinil.

If the conduct is confirmed, it may have caused considerable harm to patients and health systems in Europe.

Another pharmaceutical company we suspect is not offering patients a fair deal is Aspen, headquartered in South Africa.

Our preliminary concerns here are that the company imposed unjustified price increases of up to several hundred percent for certain medicines used for treating cancer.

Cases like these strike a chord among European citizens.

We all expect to see the most relevant results when we do a web search; and we all feel that striking pay-for-delay deals and overcharging cancer patients are decidedly unfair practices – if they are confirmed, of course.

But perhaps the most intuitive form of unfair business practice is secret cartels.

Fighting cartels has been one of our core tasks for the past 17 years at least; that is, since Commissioner van Miert set up the first team of enforcers entirely devoted to cartels, the first leniency programme, and the first guidelines on fines.

Our enforcement action in the automotive sector is a good example of our continued focus on cartels. All in all, the Commission has adopted seven decisions since 2013.

Cartels have been uncovered in many components of a car, including the foam used for padding seats, bearings, alternators, the thermal systems used in engines, and lighting systems.

In the latest cartel decision, taken exactly a month ago, the truck manufacturer Scania received an € 880 million fine. Scania had decided not to settle in the decision the Commission took in July last year against five other truck manufacturers. At the time, the fines for the settling parties totalled almost €3 billion – the highest ever combined fine in a cartel case. Recently we have been busy refining our tools for detecting cartels. Part of this effort is the whistle-blower tool launched in March, which allows two-way communication with informants who wish to remain anonymous. The innovation was well received. The page on our website that includes it has received about 9,000 visits last month.

5 Innovation

The whistle-blower tool is a simple and effective innovation we have introduced in our practice. It fits well with our commitment to protect innovation in Europe's markets, especially in digital and other high-tech and research-heavy industries.

I could cite several examples, such as the Commission decision last May that rendered legally binding a set of commitments offered by Amazon to increase competition in e-book distribution.

Previous to the Commission's intervention, the contracts that e-book publishers signed with Amazon specified that they had to tell Amazon when they would offer a better deal to other sellers – or even just a different deal. Publishers were also obliged to offer Amazon terms that were at least as good.

That discouraged other e-book sellers from coming up with innovative business models that could compete with Amazon, because they knew that any deal they would strike with publishers would immediately be offered to Amazon as well.

Other examples of innovation concerns in our cases are the ongoing Qualcomm and Google Android investigations, but our efforts to protect innovation go beyond the digital sector.

I will recall again the Dow/DuPont merger decision, for instance, where we looked at innovation in the agro-chemical industry.

Farmers value new products that are less toxic and more efficient against pests, which – over time – may become resistant to existing active ingredients.

When the deal was notified, there were only five companies that could effectively develop and launch new active ingredients on a global scale – including both Dow and DuPont.

The Commission had concerns that the merger – as originally proposed – would likely result in less innovation in these markets.

Eventually, we could clear the deal when the companies proposed good remedies to allay our concerns, including the sale of DuPont's Research and Development organisation and certain pipeline products.

6 Big data, algorithms

These stories from our work in e-commerce, with digital giants and involving agricultural technologies, point at what competition control will probably be like in the future.

Speaking of the future, I simply must mention the implications of big data and algorithms for competition policy and enforcement, because it seems likely that the companies that will collect, process, and make sense of huge amounts of data will be the big players in future markets.

So far, we have not investigated an antitrust case in which the collection or use of data was at the core of the theory of harm. However, we do see data becoming more and more relevant in our investigations.

This is especially the case in mergers in digital markets, such as Google/DoubleClick, Facebook/WhatsApp and Microsoft/LinkedIn.

The first two deals were cleared unconditionally; instead, remedies were needed in the latter case precisely to address our concerns regarding data.

We were concerned that, after the deal, LinkedIn's and Microsoft's users would find themselves pooled in a single, giant database.

If this had come to pass, it would have been really hard for anyone to start a new business in the market for professional social network services. So, the remedies are designed to prevent this from happening.

We are also monitoring potential antitrust issues related to algorithms.

The principle here is that companies cannot hide behind algorithms. Practices that are illegal offline will likely be just as illegal when implemented through algorithms.

Commissioner Vestager had a simple piece of advice for the companies that want to stay on the safe side of the law: "What businesses can – and must – do is to ensure antitrust compliance by design" she said earlier this year.

This means that respect for competition rules must be baked into the algorithms as they are implemented.

To think of it, it's the ultimate compliance programme. When you instruct a piece of software not to collude with your rivals, it will follow your instructions without question or hesitation.

In sum, algorithms are configured and used by companies, and these can be held liable when illegal behaviour takes place through algorithms.

7 Working with our partners

Another thing that I can see in the future of competition control is ever closer cooperation between the Commission and national competition authorities in EU countries.

National authorities are vital elements in Europe's competition control system. They account for over 85% of all antitrust and merger decisions taken across the European Union and the European Competition Network is perhaps the EU's most advanced form of cooperation.

But we should never rest on our laurels. We can do even more.

Last March, the Commission proposed the ECN+ Directive, which is designed to strengthen the independence of national authorities; guarantee their resources; and fill in any gaps in their enforcement toolbox.

More specifically:

- The independence of National Competition Authorities will be better protected and they will have a legal hook to intervene when they don't have the human, technical and financial resources that they need to do their work;
- Companies will no longer be able to escape fines by simply restructuring and will have better incentives to come forward and reveal cartels; and
- Safeguards will be in place to ensure that National Competition Authorities exercise their powers in line with the EU Charter of Fundamental Rights when implementing EU competition law.

Overall, the proposal has been received very well by both the Council and the Parliament, where it is currently debated. We can realistically expect that the proposal will be adopted before the end of the current Commission and Parliament mandate. National Competition Authorities are not the only bodies applying competition law in each country of the EU; national courts are part of the system, too. This is particularly true for damages actions.

As of today, 23 Member States have communicated full implementation of the damages directive.

National courts now have greater responsibility in the area of private enforcement of competition law, and the Damages Directive ensures that they are empowered to use effective tools to deal with such claims.

It is up to the courts to ensure that victims of competition-law violations can effectively exercise their right to full compensation under Union law – one of the two main goals of the directive.

The binding effects of an infringement decision, the presumption of cartel harm and the power to estimate harm are only a few features I would like to highlight.

Another core concept of the Damages Directive concerns the rules on disclosure of evidence.

Especially in this context, national courts play an important role because they will have to balance the different interests in accordance with the new legal tests.

They are called upon to protect confidential information when ordering disclosure and making sure that certain documents may never be disclosed, namely leniency statements and settlement submissions.

In this role, national courts contribute to the second main goal of the Damages Directive, which is to fine-tune the interplay between public and private enforcement.

8 Close

Ladies and Gentlemen:

In a recent interview with a British newspaper, Commissioner Vestager stated: "In Europe you can't tell people the detail of what you do. You have to tell them the bigger story."

Because you're an expert audience, I have given you many details about our action today and some educated guesses at what competition control will be focussed in the future.

But perhaps the predictions we ought to make are about the bigger story.

In my opinion, the story of Europe's competition-enforcement system is that of a closely-knit network of dedicated public bodies that:

- defend the interests of all European consumers;
- make sure that all companies with operations in the EU find equal businesses conditions and opportunities; and
- contribute to the success of the overarching policies of the European Union, starting with the statutory goal of integrating the single market and keeping it open, level and contestable.

In all of this, we should be aware of the economic and social implications of a public policy that ultimately makes sure the single market works for everyone and leaves nobody behind.

Competition policy is inclusive. It stands by the side of the people and of law-abiding businesses.

This is why we spare no efforts in applying the rules even-handedly and to the best of our abilities. This is why we closely monitor changes in the markets and never stop adapting our intellectual and technical resources.

Because, when all is said and done, we are building the future of competition policy and enforcement in the EU with our everyday action.

As Italo Calvino wrote shortly before he died in an essay exploring the shape of things to come after the turn of the century: "We shall face the new millennium, without hoping to find anything more in it than what we ourselves are able to bring to it"¹.
Thank you.

¹ Italo Calvino. *Six Memos for the Next Millennium*. Harvard University Press, Cambridge (Mass.), 1988: 29.