



**EUROPEAN COMMISSION**

**Johannes Laitenberger**

Director-General for Competition, European Commission

## Striking the right balance in the enforcement of competition rules

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

Consumer and Competition Day  
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## **A world in flux**

Dear Minister, dear Colleagues, Directors General of the Estonian Competition Authority and Consumers Protection Board,

Ladies and Gentlemen:

Consumer and Competition Days are landmarks in the programmes of Council Presidencies. Focussing today on the sweeping changes we observe in the business environment and in consumer behaviour chimes with the overall priorities of the Estonian presidency, and indeed the European Commission.

DG Competition is pleased to contribute to the forward-looking themes of today's debate.

Let me start by looking back. Technological acceleration since the 1980s has contributed to the integration of world markets, growth and prosperity, and the rise of new business models, undertakings and economic forces on the global stage.

European integration has deepened and broadened in parallel, with the "1992 single market project" – and EU enlargement as major driving forces.

Crucially, the fall of the iron curtain in 1989, thanks to the courage and determination of millions of peaceful but determined citizens in Central and Eastern Europe, has given all Europeans a new perspective of freedom, peace and opportunity. The restoration of Estonia's independence in 1991 was a milestone in this respect as much as the EU accession in 2004.

Back then, there was a sense of unlimited opportunity.

In the meantime, there have been daunting challenges for the EU: from the global financial and economic crisis to an unstable neighbourhood and increased migration, as well as last year's Brexit.

Yet today, at the moment when Estonia celebrates the century of its independence, the outlook is once again more optimistic.

As President Juncker stated in his State of the European Union speech last week, "the wind is back in Europe's sails".

Once again, Europe is showing economic and political resilience.

This is the time for the EU to be bolder, fight for itself and take a stand.

The opportunity is unmissable.

## **Competition enforcement in the digital age**

Now, competition enforcers as everybody else look at momentous changes. In the digital age, new business models are emerging. Consumer habits are being revolutionised.

The two discussions later today will explore these issues in depth. I look forward to the insights on the sharing economy, paradigm shifts in technology and consumer behaviour and what they can mean for future policy-making and enforcement of rules.

As competition enforcers, we look at the whole stream, from inventors and disruptors to producers and consumers. And from that vantage point, we see even more change in the making.

We can see not only merchant platforms serving end users, but also platforms that companies use to design, build and assemble products digitally before they even reach the shop floor.

We can see the line that divides the production of goods and services becoming blurred, and hybrid products emerging as goods manufacturers become service providers, too.

And while we are still absorbing yesterday's news, the future may be shaped by technologies such as blockchain or augmented reality, and applications for these technologies yet to be imagined.

Of course, we will embrace these changes only if traffic in the digital infrastructure is at least as safe as on our roads and railways so far. Here lies the responsibility of public authorities.

### **EU competition control is fit for the digital age**

Europe's competition agencies are here to help Europeans reap the opportunities of digital transformation.

I often hear that competition law and its enforcement must be rejigged to stay ahead of change in digital markets.

That depends on what the future brings, of course - nobody has a crystal ball.

But I do believe that we have the rules, expertise and resources to protect consumer interests for the foreseeable future. Our tools are up-to-date. We deploy them as necessary.

At the same time, we are constantly refining our analysis.

That's why, just yesterday, Commissioner Vestager announced her plan to set up a panel of experts from outside the Commission, to advise us on how change will affect consumers, and how competition enforcement should respond.

Clearly, we need to be more forward-looking and more vigilant, for example, in markets with high entry barriers, in markets characterised by network effects, switching costs for consumers and the corresponding propensity for lock-in.

The challenge therefore is to strike the right balance between preserving the incentives for innovators and detecting the "tipping point" when today's disruptors become tomorrow's dominators. I can follow Schumpeter when it comes to rewarding market power acquired on the merits. But we must just make sure that markets remain open and contestable.

### **EU Competition Control is challenged in the digital age**

In responding to the challenge, we must stay away from simplifications that obfuscate the matter more than clarify it.

In the digital age, we are neither at competition's "death door" nor are we in a brand new world where competition control becomes superfluous because "competition is always just a click away".

Let me use an illustration to elucidate further why and when we should be vigilant.

As I said earlier, competition enforcers should be particularly vigilant in industries that show certain structural features.

One such feature in many digital markets is a trend towards concentration. Looking at the 43 members of the Internet Association – a trade association of leading global internet companies – one can see that the ten largest members by revenue account for over 90 per cent of the combined annual turnover of all members.

By comparison, sales of the top ten companies in the *Fortune 500* list account for less than 8 per cent of the sales of the 500 companies taken together.

In other words, by this - admittedly imperfect - measure, the internet economy is over ten times more concentrated than the offline economy.

Of course, there are more sophisticated ways to measure concentration in an industry - our Chief Economist is carefully looking at them in great detail. But these rough-and-ready figures are a good enough indicator that there is something to be looked at - without jumping to facile conclusions.

So how have we reached this point?

Historically, many nascent industries saw an initial burst of innovation - with many competitors and a lot of churn in the early years. With time, a few players would gain a decisive competitive advantage over the rest of the field.

Experts call this pattern a "shakeout". It happened in the car industry, in the TV industry, and in the mobile-phone industry, to take just a few examples.

Examples of this pattern in digital markets are Google's displacement of Altavista in 2002 and Facebook's displacement of Myspace in 2008.

If historical patterns are any guidance for the future, I wonder what level of churn we can expect in digital sectors going forward.

The next question is the effect that these "shakeouts" will have on innovation and consumer choice.

I will again use the Internet Association's members as a gauge. Together, its members acquired about 900 potential competitors in recent years. For instance, Facebook bought Instagram, WhatsApp and Oculus; Google bought YouTube and DoubleClick; and Android bought Waze and ITA.

Or, to use a different gauge, data compiled by Bloomberg show that Alphabet, Amazon, Apple, Facebook and Microsoft alone made 436 acquisitions worth \$131 billion over the last decade.

These figures raise interesting questions. Which market structures are more likely to promote innovation? Where exactly is innovation happening? Is the pressure of maverick start-ups strong enough to motivate incumbents to improve their own products or create new ones?

I believe we should keep these issues in mind as we debate the effects of competition enforcement on innovation and consumers choice in digital markets.

Yesterday's disruptors have become today's giants thanks to their brilliant ideas, hard work, and commercial savvy. But another key factor of their success was that they found open and level market conditions in the EU as they grew into global companies.

Europe's competition enforcers should spare no effort in granting today's disruptors the same conditions and opportunities.

This is the reason why Commissioner Vestager has consulted widely on the adequacy of the current jurisdictional thresholds in the EU Merger Regulation and why we continue to analyse this issue.

## Casework

In addressing these issues through casework, we are guided not by generalisations nor anecdotal evidence, but by painstaking case-by-case analysis on the basis of detailed rules, in-depth research of facts and sound economic analysis.

This – and only this – is the way to ensure that the single market remain open and contestable.

The e-commerce sector inquiry is a good example. Let me give you an update.

The final report of the inquiry was issued last May. We found that the increase of online price transparency and of price competition of digital distribution channels, may lead to protective measures in distribution contracts.

These protective measures may include pricing restrictions, such as resale price maintenance, platform bans, and restrictions on the use of price comparison tools. We also found that geo-blocking is quite prevalent, especially in the case of digital content. Geo-blocking means that European consumers cannot buy goods or services online across national borders within the EU – which undermines one of the tenets of the single market.

Not all of these defensive moves are in breach of competition rules. But those that are create unjustified barriers and restrictions that need to be addressed.

We have already opened a few cases since the final report was published involving allegations of:

- resale price maintenance of consumer electronics by manufacturers – a practice, which we consider restricts intra-brand competition and affects prices;

- geo-blocking of video game publishers and distribution platforms;
- discrimination based on nationality by hotel and tour operators; and
- territorial restrictions in selective distribution systems.

We will see where these investigations lead. For the moment, the good news is that, since we launched the inquiry, many companies – on their own initiative – have torn down the digital barriers they had erected.

For example, we are aware that companies, such as Mango, Pull & Bear and Dorothy Perkins in the clothing industry, coffee machine producer De Longhi, and photo equipment manufacturer Manfrotto, have done just that.

I am particularly happy at these developments.

The Google Shopping antitrust decision before the summer is another example. I will not add to the countless comments that the decision has generated. I would just like to recall a simple fact that sits at its core. Commissioner Vestager put it in plain language: the company was sanctioned for abusing its dominant position by, I quote, "promoting its own comparison shopping service in its search results, and demoting those of competitors".

In other words, when a consumer enters a query into the Google search engine in relation to which Google's comparison shopping service wants to show results, we found that Google has done two things:

1. It has systematically given prominent placement to its own comparison shopping service in its search results; and
2. It has demoted rival comparison shopping services in its search results.

Evidence shows that even the most highly ranked rival service appears on average only on page four of Google's search results - others appear even further down.

This action by a dominant firm in the market for general search has denied other companies the chance to compete on a level playing field and to innovate in the adjacent market of comparison shopping. And it has denied European consumers genuine choice and the full benefits of innovation.

Another decision in digital markets is equally worth mentioning. I am referring to the commitments we accepted from Amazon in May addressing our competition concerns over clauses in Amazon's e-books distribution agreements.

These clauses required publishers to offer Amazon similar - or better - terms and conditions as those offered to its competitors and/or to inform Amazon about more favourable or alternative terms given to its competitors. The clauses covered not only price but also issues such as an alternative business (distribution) model, an innovative e-book or a promotion.

The Commission considered that such clauses could make it more difficult for other e-book platforms to compete with Amazon. The clauses may have led to less choice, less innovation and higher prices for consumers due to reduced competition.

With our May decision, Amazon will no longer enforce or introduce these clauses in agreements with publishers.

DG Competition also pays attention to the interaction of data and competition policy.

Data protection issues "as such" are not a matter for competition policy, as the European Court of Justice has ruled in the ASNEF judgment. But, as Commissioner Vestager said in January last year – I quote – "that doesn't mean [we] will ignore genuine competition issues just because they have a link to data".

Let us look at the Commission's December 2016 decision on the acquisition of LinkedIn by Microsoft. In its investigation, the Commission found that data protection was an important parameter of competition between professional social networks on the market. This parameter could have been negatively affected by the transaction – for example, if it led to the foreclosure and marginalisation of existing professional social networks

which offer a greater degree of data protection to users than LinkedIn. Hence, the Commission found that the transaction may have restricted consumer choice.

Therefore, in its decision approving the acquisition, the Commission accepted commitments aimed to address such foreclosure risks, preserving consumer choice, in particular in relation to different levels of data protection. Those customers who value more privacy will not be harmed by the merger.

Another way to integrate data into competition analysis is to check that a proposed merger does not allow the merging parties to accumulate large amounts of big data and thereby gain an insurmountable advantage. We have investigated this concern in several cases, including Google/DoubleClick, Facebook/WhatsApp and other cases, such as, more recently, Verizon/Yahoo.

In this last case, the Commission found that both parties had user data that could be used for advertising purposes. The Commission also analysed potential data concentration as a result of the acquisition with regard to its potential impact on competition in the EU. In line with its findings in previous cases, the Commission's Verizon/Yahoo decision excluded any competition concerns deriving from the combination of the merging parties' data sets because a large amount of such user data is, and will continue to be, available on the market after the transaction.

Now let me come back briefly to the e-commerce sector inquiry. The final report flagged potential competition concerns with regard to the use of data. It noted that "The exchange of competitively sensitive data, such as on prices or quantities sold, between marketplaces and third-party sellers or manufacturers with their own shops and retailers, may lead to competition concerns where the same players are in direct competition for the sale of certain products or services."

Marketplace operators sometimes act as an online retailer on their platform in direct competition with third-party sellers. Data that is sensitive in terms of potential effects on competition, provided by third-party sellers to marketplaces or generated on marketplaces in relation to third-party transactions (for example, bestsellers, transactional prices and pricing plans, inventory levels, supplier data) could – without safeguards in place – be used to give an artificial advantage to the retail activities of the marketplace operators at the expense of third party sellers.

Similarly, manufacturers that directly sell online may request their authorised distributors to provide them with sensitive data which could potentially be used to compete unfairly with those distributors.

These are just a few illustrations of our work and of our analysis on issues linked to rapidly developing markets. They are part of a broader context which includes our wider preoccupation with encouraging innovation and facilitating consumer choice.

Two recent Commission decisions on large agro-chemical mergers are good examples of consistency in this approach beyond the digital sphere.

In regard to the merger of Dow and DuPont, the Commission had concerns that the transaction would have not only raised prices, but also *reduced innovation* in the pest control industry, where only five players are globally active throughout the entire research & development process.

Therefore, last March, the Commission approved the merger only after both companies pledged to sell [large parts](#) of DuPont's pesticide business, including its [global](#) Research and Development organisation.

The following month, ChemChina's planned acquisition of Syngenta was approved on condition that the two companies divest all the businesses that would create problematic overlaps. However, unlike the Dow-Dupont case, the Commission did not find that competition for innovation in pesticides would be impacted by the transaction since ChemChina [is a 'generic' pesticide producer and therefore](#) does not compete with Syngenta for the development of new and innovative [active ingredients](#) for pesticides.

I mention this to show that there is a coherent and thought-through effort across the board, taking into account the specificities of each and every case.

## ECN and ECN+

In all of this, the European Commission does not work alone.

Europe's 'competition enforcers' comprise the European Commission and the authorities in all EU countries working together in the European Competition Network - or ECN - of which the Estonian Competition Authority is an active and esteemed member. Can I use this occasion to congratulate our colleague Märt Orts on his reappointment as its Director General.

The strength of the ECN lies in mutual trust and a division of labour: the Commission is particularly well placed to take care of cross-border cases with effects in more than three Member States whereas national authorities mostly look into cases with national implications only. This is no mean feat: national authorities account for over 85% of all competition decisions taken in the EU. Here – as in other fields – the caricature of an all-absorbing Brussels machinery is just that: a caricature.

Novel challenges can arise in cases with national or trans-national implications alike and the ECN is the place where the Commission and national authorities can exchange notes when they do. But when the effects are felt beyond national borders, it is the Commission's duty to look into them.

The ECN has specific tools, including an early warning system, to make sure we all read from the same hymn sheet.

The ECN is probably the EU's most advanced international network - a paragon of 'unity and balance', to reprise the Estonian Presidency motto. But there's no such thing as too much unity and balance.

We can do even better.

Last March, the Commission proposed a Directive to: strengthen the independence of national authorities; guarantee they have enough resources; and fill any gaps in their enforcement toolbox.

When the proposed standards are in effect, we will have a more effective system to enforce competition rules for all Europeans.

At present, the proposed Directive is being examined by the Council and the European Parliament. The feedback is good, so we can realistically expect that it will be adopted during this mandate. I would like to thank the Estonian presidency and the Minister present here for the support and the work on this.

The good news is that we count on the support of all stakeholders - above all national authorities. Many are part of the delegations their respective countries sent to the Council to discuss the proposal. I am happy to note this level of engagement.

I look forward to the ECN+ discussion that my colleague Kris Dekeyser will moderate this afternoon: independence, resources and the powers to investigate and take decisions are crucial for a more effective system.

## A future with great hope

In its own way, ECN+ is another European project that looks to the future with optimism. I will lift a phrase from the Estonian Presidency manifesto. It is true that "we have reason to view the European Union and its future with great hope".

EU competition enforcers can help spread this view and this hope among the people. I have tried to show that our work hinges on a delicate balance. But enforcers and the people we serve need not be intimidated by it.

Robust enforcement can contribute to consumer welfare and greater equality of opportunities. This is important at a time when perceived inequality grows and many people feel they have been left behind.

Europeans expect public institutions to serve the broader purpose of a fairer and more inclusive society. I am convinced that the effective and level-handed enforcement of competition rules can do a great deal to pursue this public-policy goal.

So that hope becomes reality and that the many, not just a few, can reap the opportunities of the digital age.  
Thank you.