

Challenges and continuities in competition policy and enforcement

Competition Law 2018 – Helsinki, 11 October 2018

Introduction

Ladies and Gentlemen:

It is an honour and a pleasure to be here with you today. Many thanks to Mr Leppihalme for inviting me to be part of Competition Law 2018. I understand that this is a real flagship conference devoted to competition policy and enforcement in Finland which, in the past few years, has also been gathering experts from neighbouring countries.

So I would first of all like to congratulate you for your continuous success in offering such a forum for debate to enforcers, judges and experts.

If I may add a personal note, I would also like to congratulate you for the choice of venue.

When I walked into Finlandia Hall this morning, it became immediately clear to me why this magnificent complex is regarded as one of Alvar Aalto's masterpieces. It is a true "Gesamtkunstwerk". Its functionality stems from the clarity of its structures that in turn are impressed on us intuitively by its seamless beauty. If only public policy, regulation and enforcement could be conceived and implemented in the same way!

Alvar Aalto was an architect who developed solutions to challenges out of continuities. He was also an architect who brought together Nordic and Southern inspirations in his work which makes him a European reference to this day. By pure serendipity, this building is the perfect location for the topic I would like to discuss with you today: Challenges and continuities in competition policy and enforcement in the European Union's Single Market.

I thought to share a few thoughts on this topic because there has been much talk of late about the developments that competition enforcers face in the digital industries – and just as well.

Indeed, in this country, you have sampled significant experience with the fast moving developments in digital markets.

To add another personal note: My own early professional exposure to digital developments in the European Commission owes quite a bit to discussions launched and had with eminent Finnish members of the European Commission, namely Erkki Liikanen and Olli Rehn – and these days, one of those who have the digital developments firmly in their sights is Vice-President Jyrki Katainen.

There is hardly any sphere of our lives – and therefore of public policy, regulation and enforcement – that is immune from the digital revolution.

And what I find more and more interesting is the fact that there is no longer a clear separation between what was once termed the "old" and the "new" economy.

Virtual and physical, traditional and innovative, analogue and digital products and businesses come together in an ever more complementary and hybrid – albeit often disruptive – way.

"Old" economy operators and their products and services continue to account for a large part of GDP and – even more importantly – a large part of household expenditure.

The "new" economy operators may in a number of instances have monopolised hopes and expectations, even or maybe especially of the stock markets – but they do not have a monopoly on innovation.

"Traditional" operators innovate as well. Sometimes they digitalise, to increase their efficiency and user-friendliness. And sometimes traditional sectors innovate with even more far-reaching consequences, for example when it comes to environmentally-friendly mobility and energy sources.

Indeed the "greening of the economy" is probably a more important trend than a distinction between an "old" and a "new economy".

It is therefore with good reasons that our starting point is the application of the same fundamental rules across the board of the economy. Firms need to feel the constant spur of competition to keep innovating: that applies in all sectors. And therefore the European Union treaty rules on competition apply to all sectors – from search-engine platforms to environmentally-friendly cars.

Bird's eye view of digital markets

But it is of course undeniable that digital markets present certain specificities.

A much-debated feature is the presence of a very few, very large firms in their respective markets. Can they act as gatekeepers for these markets? Can they from such positions cement their dominance and acquire an almost unassailable advantage that they can also extend to other markets? Is this an unavoidable development that – so to say – is in the nature of these markets? Or may a lack of competition both in and for the market still have to do with collusive or abusive behaviour?

Many analysts explain the rise of digital giants by pointing to technological breakthroughs providing first-mover advantages and consolidation opportunities thanks to network effects associated with high switching costs and strong lock-in effects.

These features are characteristic of many digital markets, but not unique to them. We can see scale and network effects also in telecoms markets – for instance, when it comes to transmission networks – and in financial services – for instance, in stock and derivative exchanges.

So, competition enforcers are not looking at totally new phenomena. It is true, however, that network effects are stronger in digital markets and winner-takes-all effects can be much more pronounced.

In this scenario, more and more commentators have been wondering whether EU competition enforcers – or indeed competition enforcers world-wide – still have the appropriate tools to safeguard effective competition in digital markets.

This interrogation is of course predicated on the assumption that winner-takes-all effects induced by very strong network effects are a problem competition enforcers should worry about.

When assessing the competition concerns which prompt these developments, we come back to a controversy that has emerged in economics and competition law history time and again when faced with new developments, namely the question of what creates and preserves innovation-based competition. Which level of market power should companies expect to be able to achieve so as to create sufficient incentives to innovate? To what extent does market power need to be restrained in order to allow innovations to have a fair and effective chance for market entry?

This controversy is described traditionally with the views of Schumpeter on one hand and Arrow on the other. Both views are not incompatible: the debate is rather about achieving time and again a sensible equilibrium. Precisely because of this is it important to underline that the aforementioned competitive concerns are far from any demonization of data, algorithms and platforms. Without those elements, it is difficult to conceive how the economic and social challenges of the coming years and decades - take the example of the creation of a resource-saving circular economy - can be addressed. Digitization and data usage, algorithms and platforms can promote competition. They can also hinder it. They can, under certain circumstances, create grounds for quick and strongly entrenched market dominance by big companies. On the other hand, they also create opportunities for SMEs to develop specific business models that maintain a diversity of offers and operators that would otherwise not exist.

Our topic can therefore not be fitted into a black-or-white scheme: the variety of different shades of grey calls for a differentiated and differentiating perspective.

When looking at the topic from this perspective, it appears necessary to me not to lose oneself in hasty and abstract debates about the adequacy or inadequacy of current laws.

I would rather advance the view that the primary challenge of competition law in the era of digitisation is to capture the relevant facts, in a precise but timely manner in order to allow for a precise and timely resolution of the relevant legal questions.

This is all the more important in EU competition law since a substantial - or rather decisive - part of the applicable legal principles is not laid down in the relevant legislation (in secondary law), but rather stems from the judicial interpretation of Articles 101 and 102 TFEU (which are part of the primary law).

And this is exactly why I would like to expand on this thesis to underline that the challenges related to capturing the relevant issues in a precise and yet timely manner are not necessarily linked to the setting of new judicial or legal principles. A lot speaks actually in favour of sharpening our analysis so that we apply the principles that have already been recognised or implied by the jurisprudence of the Union courts to the developing realities and the ensuing competition concerns in a more precise fashion.

This is, in fact, in the nature of dealing with jurisprudence. Precedents and differences, analogy and qualification must - and also can! - be equally applied, depending on the relevant circumstances.

So far, our constant rules have proven to be generally well-suited to deal with new markets and business models and with novel conduct.

Enforcement in individual cases sometimes presents analytical challenges.

But I am confident that the Commission has taken robust digital decisions so far.

The decisions involving Microsoft and Intel are examples from the past. The two Google decisions – Shopping and Android – are more recent examples which show that competition *in* the market is crucial if consumers are to benefit from the highest possible quality, choice, and follow-on innovation.

Android

To make this point I will briefly review the Google Android decision that the Commission took in the summer, which is a good illustration of how the tendency of dominant digital companies to cement their dominance plays out on the ground.

The case shows how the undisputed leader in the EU market for desktop search did not rely solely on competition on the merits in its efforts to extend its position to a related market – mobile search.

Let me give you a bit of context first.

The vast majority of Google's revenues come via its search engine, which allows the company to amass large amounts of data. Google has over 90% of the internet search market in most EU countries. Until a few years ago, much of the traffic on the internet would be generated by desktop computers. Now mobile devices account for well over half of all internet traffic worldwide.

At the core of the decision that the Commission took on 18 July 2018 are Google's practices designed to make sure that the company would keep its data advantage in the mobile sphere. Google could deploy this strategy thanks to the fact that the Android operating system it develops runs on 80% of the world's mobile phones.

The company's illegal restrictions as spelled out in the decision are well known by now.

We found that Google tied its Google Search app and Chrome browser to the Play Store. The Play Store is the place where users can download the apps that run on Android. Manufacturers of mobile devices cannot do without it: so they accepted to pre-install the Search app and Chrome browser on their devices to keep it.

Google also made payments to manufacturers and network operators on condition they would pre-install only its search engine on their devices. If the search product of a rival was found on a single Android device, the manufacturer would lose the revenue share from Google on all its devices.

So, we are looking at a two-step strategy thus far. The tying effectively forced manufacturers to pre-install Google's search app and browser. This second restriction made pre-installation exclusive to Google products.

Our investigation found evidence that very few users switch to rival search solutions in practice. Google Search accounts for over 95% of search queries on Android devices where the Google app

and browser come pre-installed. In contrast, it accounts for less than 25% of all search queries on Windows Mobile devices, where Google Search is not pre-installed. Therefore, the pre-installation of the tied app and browser can effectively foreclose credible competitors.

Finally, Google hindered the development of versions of Android – called forks – other than the one developed by Google itself. Now, Android is open-source – which means that the code is public and anyone can develop new and improved versions of Android. This last restriction undermined the very logic of open-source software, which is all about innovation. It effectively prevented the marketing of alternative forks and greatly reduced the incentive to innovate.

Consequently, the Commission took the decision that Google has to bring its illegal conduct to an end by 29 October 2018 and imposed a fine of €4.34 billion.

RPM cases

For another example of what it takes to enforce EU competition rules in digital sectors, I will turn to recent resale price maintenance decisions taken by the Commission also in July of this year, the first ones taken by the Commission in the wake of the e-commerce sector inquiry concluded in May of last year.

Last July, consumer-electronics manufacturers Asus, Pioneer, Philips, and the Denon and Marantz group were fined over €100 million for resale price maintenance in online markets. Pioneer was also found responsible for erecting illegal barriers within the single market since it blocked cross-border sales of e-commerce retailers of some of its products in twelve countries.

Resale price maintenance is not a new infringement. The European courts established a long time ago that RPM practices constitute a restriction of competition by object. However, e-commerce has changed the dynamics and incentives of RPM since the Commission's last RPM Decision over 15 years ago¹.

On the one hand, e-commerce has significantly increased price competition. On the other hand, it has allowed manufacturers to easily monitor the price-setting behaviour of retailers and intervene.

This can be seen clearly in the July Decisions.

The four manufacturers used dedicated software to spot the online retailers that would sell their products at a discount. When the software alerted them of the markdowns, they would quickly demand that these retailers bring the price back up to their own recommended level – sometimes using vigorous arguments.

These Decisions show that resale price maintenance can be much more effective in online markets than in traditional markets, because the pricing algorithms can pick up discounts very quickly.

They also show that the impact of RPM can be a lot larger. Our investigations found that price monitoring software is also in common use among e-commerce retailers. As a result, when the retailers of the four manufacturers yielded to pressure and re-instated the recommended price, the move would spread quickly across the web, potentially to the entire digital market for those same products.

¹ Case 37.975 Yamaha of 16.7.2003.

It is precisely because of that speed that it is significant that the Commission intervened in a speedy manner. The July decisions were concluded under the so-called "cooperation procedure". This is a novel approach in antitrust that complements the already well established settlement procedure for cartels (of which more later). In exchange for cooperating and thus accelerating the procedure, the parties can benefit from a fine reduction. This is a good example on how things can be done more effectively in the framework of the law that exists.

Vertical restraints beyond RPM cases

Finally, these RPM decisions indicate that new facts lead the Commission to giving new prominence and priority to vertical restraints.

Over the last few years, vertical restraints cases have largely been dealt with by national competition authorities.

But now the huge growth of e-commerce has changed the competitive landscape. According to recent Eurostat data, 57% of consumers in the EU – and a whopping 71% of Finnish consumers – made online purchases in 2017². And this is – of course – one of the reasons why we conducted the e-commerce sector inquiry in the first place.

Apart from the four cases I have just mentioned, we have more vertical cases in the pipeline which we hope to conclude in the near future. When the Commission takes those decisions, even more clarity will be provided to business on the application of EU competition rules to online markets.

I hope that what I have just said is a good illustration of the fact that a focussed application of our legal and analytical tools to adequately captured dynamic developments in digital markets continues to ensure the relevance, quality and speed of competition law enforcement.

This being said, there is of course yet another question on which I will only touch. This is the question of how far the efforts of competition enforcers have to be complemented by other regulatory disciplines – and by entrepreneurial dynamics at that.

Competition law can keep markets open and contestable and thus create opportunities for entrepreneurs and innovation. But competition enforcers cannot make sure that these opportunities are effectively used.

Competition law – at the least, EU competition law – has shown (as I have hopefully demonstrated) a remarkable consistency in its application to markets analogue and digital like. The same cannot be said of all regulatory disciplines: In many fields, there is still a regulatory asymmetry between analogue and digital that competition law cannot remedy.

It is not because it is a nimble and resilient instrument that we can overstretch it. So maybe, to a point, the question of whether instruments and tools are still up-to-date is not just a question for competition law alone, or not even primarily a question for competition law.

But I will leave the examination of the role of other regulatory disciplines for another day and to maybe more competent speakers.

² Eurostat data available at <https://ec.europa.eu/eurostat/web/digital-economy-and-society/data/main-tables>.

In any event, the debate about all the issues I just mentioned needs to be taken further. The fact that Commissioner Vestager has asked three special advisers to prepare a report to her attests to that. Before, there will be a conference in Brussels in January that she will host – you are of course invited to contribute.

Cartels in the automotive industry

After having spoken for so long on a challenge for our enforcement, I will now move to a very different industry – the Commission's anti-cartel enforcement action in the automotive sector – to illustrate a continuity of our enforcement.

I have deliberately picked an area of our work that is in many respects not immediately associated with the digital economy, first and foremost in terms of age.

Most of us in this room can still remember what life was like before the personal computer. But I dare say that personal experience of life before the age of the automobile is not around. Mr Daimler and Mr Benz each produced the first automobiles around 130 years ago.

Or, from another viewpoint, in 2014 Facebook acquired WhatsApp for US \$19 billion. At the time, WhatsApp had a very small turnover, about 60 employees, but 600 million users – which have now grown to more than 2 billion. The world's largest messaging app is the epitome of a digital firm with "scale without mass".

In contrast, Toyota – the world's largest carmaker – sells a bit over 10 million units per year and employs close to 400,000 people.

In sum, looking at the European Commission's antitrust action in the automotive industry can show the span of our work and give a true sense of how our stable principles can be applied in very different areas.

Car parts cartels

In recent years, the Commission has taken a number of cartel decisions in the automotive sector covering a wide range of car parts.

These include bearings, cables and wires, the foam used in car seats and other paddings, parking heaters, alternators and starters, air conditioning and engine cooling systems, lighting systems, occupant safety systems, braking systems and spark plugs.

A couple of other decisions also extended to adjacent markets.

In 2016, we broke a cartel among truck manufacturers which had colluded for 14 years on pricing and on passing on to consumers the costs of compliance with emission rules.

In February this year, the Commission sanctioned maritime car carriers that transport cars and other types of vehicles from production to customers on deep-sea, inter-continental routes.

I will focus on the decisions involving car part suppliers because interesting lessons can be learned following their evolution. I will then move to a new case we formally opened last month involving a group of car manufacturers, as opposed to suppliers.

Back in 2008, the Commission imposed what was at the time a record fine of more than €1 billion on European glass producers for cartelising the sale of car glass. We can regard this as an antecedent of the story I am about to tell you.

Then, between 2013 and 2018 the Commission took eleven decisions involving car part suppliers.

The earlier cases were triggered by Japanese leniency applicants. However, because of the global nature of the automotive industry, it was immediately clear that the conducts these applicants were revealing would also affect the EU Single Market.

When these Japanese suppliers decided to come clean, they had to report the collusive behaviour they had developed in their home market but also the conduct that affected Europe, where they had operations.

Car parts are manufactured all over the world and – once produced – they are sold on global markets. In addition, many car part producers and most car manufactures are active on a world wide scale and are capable of penetrating markets abroad.

Therefore it is no surprise that many competition authorities around the world investigated and fined car part cartels, including the authorities in Japan, the U.S., Canada, Korea, China and the European Commission in the EU.

Each of these car part cases involved players from different parts of the world, different products, and a variety of collusive conducts from price coordination, to market sharing and customer allocation, to coordination of general business conditions and commercial terms.

The Japanese applicants disclosed allegedly collusive conduct on a wide range of automotive products, which led to a flow of cases also involving European and U.S. suppliers. More recently, we have come across cases involving only or mainly large European suppliers.

It goes without saying that the Commission has conducted these investigations with the same mind-set and ambition regardless of the flag that flies on the headquarters of the companies concerned. If you operate on the European market, you need to comply with EU competition rules – it is as simple as that.

Among other things, these rules prohibit price coordination and market sharing.

So, if car part suppliers that sell their products within the European Economic Area decide to coordinate their bids in tenders issued by car manufacturers or share customers or territories; our rules apply and we will look into the firms' conduct.

The same applies if they arrange with their competitors *not* to enter the European market and *not* to sell their products within the EEA – we will still look into these other firms' conduct.

Some Japanese companies found it surprising that they should be fined for not selling in Europe. But some of the Commission's decisions gave us the opportunity to recall the rules on worldwide market sharing – which are in fact crystal clear.

Beyond car part suppliers, the Commission's recent maritime car carriers case shows that exactly the same rules apply in the service sectors adjacent to the automotive industry. The anti-competitive

practices of carrier companies transporting vehicles inbound and outbound the EEA harmed European consumers and had to be sanctioned.

The string of cases involving car part suppliers is interesting for another aspect as well. Only the antecedent Car Glass decision of 2008, which was adopted following the standard procedure, was appealed before the EU Courts. The outcome of the appeals was overall positive. The Court modified the Commission decision only to a very limited extent.

All other car part cartel cases and the maritime car carriers case were settled and no settling party appealed. Therefore, these decisions did not need to be reviewed in Court.

One of the advantages of the cartel settlement procedure is that, since the companies involved have to acknowledge their liability for their wrongdoings in order to settle, lengthy proceedings can usually be avoided.

Settling cases also leads to much quicker final decisions which impose fines and include a clear finding of the infringement. This means that competitive conditions in the markets can be restored more rapidly and the harm to consumers contained.

We have had to become intimately familiar with the specificities of these markets to apply the constant principles and rules of EU competition law to the facts that we would find in each case.

In some cases, car part suppliers coordinated in order to resist the pressure from car manufacturers to reduce the price in ongoing contracts through annual price negotiations. In others they tried to protect customers or territories that they had traditionally supplied over many years or decades. And the list can go on.

Let me stress that in all these cases we have always treated the business conditions of the manufacturers involved in our investigations for what they were: conditions, not justifications for anti-competitive behaviour.

Latest formal opening: Car emissions

The latest formal opening of an in-depth antitrust investigation in the automotive industry is a bit different because it does not involve car part suppliers, but car manufacturers.

Last month we opened formal proceedings against BMW, Daimler and the VW-group – which includes Volkswagen, Audi and Porsche. The concern is that these companies engaged in collusive conduct in the framework of their so-called ‘circle of five’ contacts.

These contacts concerned, among other things, emission-cleaning technologies for their new diesel and petrol passenger cars. We are investigating whether these contacts among competitor were in breach of Article 101 TFEU.

This investigation is not about price fixing, market sharing or customer allocation – as has been so often the case in the past. The alleged conduct here is about hampering innovation and keeping effective cleaning technologies from coming to the market or delaying them without justification.

This is what our investigation is assessing. Let me emphasise that the five carmakers involved are presumed innocent unless and until our assessment of the evidence confirms the alleged collusion.

In detail, for petrol passenger cars, the Commission is investigating whether the companies agreed not to introduce filters that reduce harmful particulate matter from their new cars' exhaust gases.

For diesel passenger cars, the Commission is investigating whether the carmakers involved colluded to limit the development and roll-out of SCR technology in their new car models.

SCR is the best available emission cleaning technology to date for reducing toxic nitrogen oxides emissions from exhaust gases. The technology uses AdBlue, a liquid that is injected into the catalyst. A direct correlation exists between the amount of AdBlue injected and the effectiveness of the cleaning process.

The Commission is investigating whether the car manufacturers coordinated their dosing strategies with the aim of limiting the amount of AdBlue injected and whether they agreed to limit the size of AdBlue tanks.

Beyond the technical details of the case we have just formally opened, what is at stake here is the kind of cooperation among rivals that the parties engaged in.

There is an important distinction to make, because not all cooperation is bad.

EU antitrust rules leave ample room for technical cooperation aimed at improving product quality or fostering innovation. This is also clarified in the Commission's Horizontal Guidelines on this issue.

For example, the issues discussed by BMW, Daimler, Volkswagen, Audi and Porsche during regular contacts also included common quality requirements for car parts, common quality testing procedures or exchanges of data about cars that were already on the market, and joint testing of competitors' cars. None of that would harm competition.

Our in-depth investigation instead is looking into the possibility that the rival carmakers colluded on the development and roll-out of technology with the aim of holding back or delaying the most effective cleaning technologies.

In other words, we are talking about coordination that – rather than improving product quality – could harm competition and innovation and limit technological development.

The investigation also concerns car quality.

The effectiveness of the technology used to clean emissions is seen as part of a car's quality and can be used for advertising purposes. Less effective cleaning technologies therefore have a negative impact on the quality of the product.

Finally, the investigation concerns consumer choice. If our allegations are confirmed, consumers were prevented from opting for cars with the best cleaning technology available. But let me stress again that we do not jump to conclusions and that the presumption of innocence must – and is – fully respected. I have explained what we investigate. We will see the conclusions only once the investigation is over.

Conclusions

I have come to the end of my presentation.

I have summarily reviewed and discussed parts of our antitrust enforcement work in two distinct areas: digital and automotive markets.

I have done so to try and re-balance the conversation in competition circles in Europe and around the world, which may be focussing too exclusively on the challenges of digital markets. As described, also our traditional areas of cartel and antitrust enforcement pose continued challenges.

I have also tried to show the resilience of EU competition law whose constant and robust rules apply across the board.

It is then our task to analyse the conduct of companies against these rules in whichever market they may operate. And this is what gives competition policy and enforcement at the European Commission its character of continuity.

Our analysis is always thorough, often complex, and sometimes demanding.

Regardless of whether we look into traditional or non-traditional industries, we will always study the market, look for compelling evidence, conduct a sound economic analysis, and consider the arguments brought by the parties until we can present a rock solid, exact application of the law to the case.

This is what European consumers expect of us and this is what it takes to meet their expectations. They can rely on our determination not to leave a single stone unturned to protect their interests.

We are in this together, the European Union and its Member States, the European Commission and the National Competition Authorities (NCAs). The creation of the European Competition Network (ECN) and the decentralisation of the enforcement of the Union's competition law through Regulation 1/2003 has been a real success story. This does not mean that there is no room for improvements. The rationale of the "ECN+ initiative" supported and promoted by the Finnish NCA and all other sister authorities in the ECN is to further empower competition authorities in all EU countries to become even more effective enforcers. This will strengthen us all as part of the ECN network and make sure that the interests of our consumers will be better protected.

Thank you very much for your attention. It was a privilege to be able to speak with you. I only regret that my agenda does not allow me to stay for the whole conference and the presentations by my eminent co-speakers.

All good wishes for successful conference proceedings!